

BEFORE THE
SUBCOMMITTEE ON COMMERCE, TRADE, AND CONSUMER PROTECTION
OF THE
HOUSE ENERGY AND COMMERCE COMMITTEE

HEARING ON

**H.R. 5777, THE BEST PRACTICES ACT, AND A DISCUSSION DRAFT OF
REPS. BOUCHER AND STEARNS TO REQUIRE NOTICE TO AND CONSENT
OF AN INDIVIDUAL PRIOR TO THE COLLECTION AND DISCLOSURE OF
CERTAIN PERSONAL INFORMATION RELATING TO THAT INDIVIDUAL**

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TESTIMONY OF

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I. Introduction

Thank you for the opportunity to testify at this hearing of the House Energy and Commerce Committee's Subcommittee on Commerce, Trade, and Consumer Protection. I'd like to thank Chairman Rush and Ranking Member Whitfield for holding this important hearing.

My name is Michael Zaneis and I am the Vice President of Public Policy for the Interactive Advertising Bureau (IAB). The IAB is the trade association for ad-supported interactive media in the United States. IAB's 460 member companies account for 86 percent of the interactive advertising sold in the United States. Our members include the great names of the online and offline media world – AOL, CBS, Google, MSN, The New York Times, Time Inc., Walt Disney, and Yahoo! among them – as well as scores of smaller publishers, advertising networks, and specialists in such areas as digital video advertising and mobile advertising.

IAB and our member companies vigorously support strong protections for consumer privacy rights and expectations in all media, online and offline. Delivering advertising relevant to users' interests and needs enhances their online media experiences and productivity, and helps businesses to grow. Those goals are not only complementary, but necessarily conjoined: Providing consumers with control over their online experiences has been a core principle of interactive media, commerce, and advertising from the birth of the medium. Moreover, reinforcing consumer trust in the medium is necessary for our continued viability. These principles – consumer control and trust – have fueled the Internet's growth into the most popular entertainment and information medium in the United States, and our emergence as the fastest-growing advertising medium in the World.

II. Self Regulation Is Robust and Effective

IAB strongly supports industry self-regulation and leading business practices as the most effective framework to provide transparency and choice to consumers. Such a framework will nurture the continued development of innovative offerings online. To this end, we believe that self-regulation inherently possesses features that make such an approach more effective than any legislation that might seek to govern the online ecosystem. Entities and their associations are best situated on the frontlines to interface with consumers and evaluate their experiences online. In response to any harm that consumers may experience, industry is uniquely positioned to respond swiftly to rapidly evolving online technological advances and consumer expectations with self-regulatory programs and best practices that carefully balance restrictions on the use of information with the significant benefits that such uses provide to consumers. Unlike self-regulation, legislation runs the risk of codifying outdated practices for decades to come whereas best business practices and self-regulatory programs can quickly evolve to address the dynamic online environment.

Industry has ample experience and a strong track record of navigating and promoting best practices online that provide for a variety of effective choices to consumers. These practices have been embodied in numerous self-regulatory frameworks in both the advertising and online privacy arenas. Among the most successful examples of effective self-regulation are guidelines and standards of organizations including the Council of Better Business Bureaus' National Advertising Review Council, the Direct Marketing Association, the Network Advertising Initiative, TRUSTe, the AICPA's WebTrust, and BBBOonline. These organizations and programs have many years of experience in developing flexible and effective best practices and standards that protect consumers' privacy online.

As a recent and very important example, in July 2009 IAB partnered with the American Association of Advertising Agencies, the Association of National Advertisers, the Direct Marketing Association, and the Council of Better Business Bureaus to develop robust self-regulatory principles that provide enhanced transparency and consumer control in online behavioral advertising.¹ We provided the Subcommittee with a copy of the Self-Regulatory Principles for Online Behavioral Advertising upon its release. Since that time, the associations have been working to implement these principles, placing a significant focus on providing enhanced notice to consumers in the form of an industry-developed icon and wording that will be used to demonstrate adherence to the industry principles for online behavioral advertising.² There have been tremendous developments in this area and any legislation should encourage such efforts, and not limit their development.

Self-regulation in the online behavioral advertising arena has been recognized by the Federal Trade Commission ("FTC" or "Commission") as the correct approach in this area. The Commission reached this conclusion after several years of focused study in the area. In the Commission's February 2009 Staff Report on Self-Regulatory Principles for Online Behavioral Advertising, the Commission indicated that "[s]taff supported self-regulation because it provides the necessary flexibility to address evolving online business models."³ To this end, the report continued on to note that "in issuing the proposed Principles, staff intended to guide industry in developing more meaningful and effective self-regulatory models...."⁴ The principles that IAB and the associations have set forth in the Self-Regulatory Principles for Online Behavioral Advertising are consistent with the framework espoused by the Commission and the timeliness of their release demonstrates industry's commitment to serving as a responsible actor online.

¹ American Association of Advertising Agencies, Association of National Advertisers, Direct Marketing Association, Interactive Advertising Bureau, and Council of Better Business Bureaus, Self-Regulatory Principles for Online Behavioral Advertising (July 2009), available at <http://www.iab.net/media/file/ven-principles-07-01-09.pdf>.

² Press Release, IAB and NAI Release Technical Specifications for Enhanced Notice to Consumers for Online Behavioral Advertising: Critical Step in Interactive Industry's Ongoing Self-Regulatory Efforts (Apr. 14, 2010), available at http://www.iab.net/about_the_iab/recent_press_releases/press_release_archive/press_release/pr-041410.

³ FTC Staff Report: Self-Regulatory Principles For Online Behavioral Advertising, at 11 (February 2009) (hereinafter Staff Report), available at <http://www.ftc.gov/os/2009/02/P085400behavadreport.pdf>.

⁴ *Id.*

III. Interactive Advertising Is Important to the U.S. Economy

As the FTC stated in its Staff Report, “Consumers have genuine and legitimate concerns about how their data is collected, stored, and used online. They may also benefit, however, from the free content that online advertising generally supports, as well as the personalization of advertising that many consumers appear to value.”⁵ Indeed, the scope of that value is breathtaking.

Interactive advertising is responsible for \$300 billion of economic activity in the United States, or roughly 2% of Gross Domestic Product, according to a study released last year by the IAB and undertaken by Harvard Business School Professors John Deighton and John Quelch, along with Cambridge, MA-based Hamilton Consultants. The study was designed to provide an impartial and comprehensive review of the entire Internet economy and answer questions about its size, what comprises it, and the economic and social benefits Americans derive from it.

Professors Deighton and Quelch found that the advertising-supported Internet employs 1.2 million people directly in jobs that build or maintain the infrastructure, facilitate its use, or conduct advertising and commerce on that infrastructure. Under the reasonable assumption that each Internet job supports an additional 1.54 jobs elsewhere in the economy, then 3.05 million, or roughly 2 percent, of employed Americans owe their employment to the advertising-supported Internet.

Internet jobs are widely dispersed across the United States. Every one of the 435 U. S. Congressional districts contains at least 17 Internet employees. Some districts support as many as 6,500, and twenty-four districts have at least 1,000 identified Internet employees.

For the 19 states represented on the Subcommittee, our industry contributes over \$218 billion in revenue annually and is responsible for the employment of over 2.6 million people.

Some 20,000 small businesses operate on the Internet. The online auction site eBay alone is the primary source of income for 120,000 individuals who earn their living as sellers; another 500,000 men and women have part-time businesses on eBay. A 2009 *Wall Street Journal* report estimates that nearly half a million individuals may make their living as “bloggers,” or small publishers of online content.

At work and at leisure, about 190 million people in the United States spend, on average, 68 hours a month on the Internet. This is unsurprising, for the Internet is a vast treasury of quality content, such as news, business information, entertainment, maps, and self-help resources. Education and information-gathering tools, including search engines, have undoubtedly democratized the availability and accessibility of educational content. The

⁵ *Id.* at 7.

Web is a communications lifeline for an enormous number of people. There are an estimated 1 billion users of free email services worldwide. Some 100 million Americans keep in touch with family and friends through social networking sites. Last November, 124 million Americans viewed 9.5 billion videos online that were uploaded by others.

All of these services, information, and entertainment are free. Although, as you and I know, they are not really free: They are supported by advertising.

This is not surprising. From the early 19th Century, advertising has been at the center of a vital value exchange between businesses and consumers. We provide quality news, information, entertainment, and other services, in return for which consumers give us their time and attention. That time and attention, in turn, allows businesses to communicate the availability of goods and services to consumers and customers. Advertising is the heart of the U.S. consumer economy.

Given the centrality of the Internet to Americans' lives, it's natural that advertising has grown to become the medium's primary financial support. In 2002, advertising contributed 7 percent of the \$78 billion paid for Internet services to the U.S. economy. In just seven years, while the value of the Internet has doubled, advertising has increased fourfold and its contribution to the pool of funding for the Internet has grown to 11 percent. Advertising is the only Internet funding source that has shouldered more of the burden than seven years ago. Online interactive advertising has substantially reduced what consumers have had to pay for e-commerce products and services.

IV. Regulation Presents Risks

The interactive advertising industry continues to grow and provide greater benefits to consumers. In the first quarter of 2010 alone, interactive advertising revenues in the United States hit nearly \$6 billion. This shows a 7.5% revenue growth over the first quarter of 2009, despite a difficult economy, and at a time when overall advertising spending was decreasing.⁶ You might think that a medium so wildly popular and so useful for so many people would be strong enough to withstand any and all challenges. But the interactive advertising ecosystem is fragile. In their report, Professors Deighton and Quelch caution against inappropriate "restrictions on advertising or use of individual-user data [which] could undermine the effectiveness of major elements of the Internet."⁷ The components of the ecosystem that they believe could be compromised include:

- The ad-supported search engines and many content sites that provide information, entertainment, news, and social networking;

⁶ Q1 '10 Internet Advertising Revenue Press Release, IAB Internet Advertising Revenue Report conducted by PricewaterhouseCoopers (May 13, 2010), available at http://www.iab.net/about_the_iab/recent_press_releases/press_release_archive/press_release/pr-051310.

⁷ Hamilton Consultants, Inc., with Dr. John Deighton, Harvard Business School, and Dr. John Quelch, Harvard Business School. Economic Value of the Advertising-Supported Internet Ecosystem, at 9 (June 10, 2009), available at <http://www.iab.net/media/file/Economic-Value-Report.pdf>.

- The enterprise websites created by companies and other institutions that increasingly are able to individualize the messages; and
- The e-commerce companies that use data to personalize offers to current customers.

As a representative of the interactive advertising industry, I too share their concerns. Some of the proposals we have seen from advocacy groups and the legislative proposals being considered today could unintentionally cause material harm to the existing interactive advertising industry, and impede our industry's growth and constrain the services and content that are currently provided to consumers, largely free of charge.

V. H.R. 5777 Represents Significant Progress in the Privacy Debate

A. Industry Self-Regulation Remains the Most Effective Framework for Protecting Consumers

I'd like to commend the Chairman for recognizing the value and importance of a strong self-regulatory program. As mentioned earlier in my testimony, industry has been working diligently these past twelve months to set-up a self-regulatory regime that encompasses the entire online ecosystem, from publishers to service providers. I'm pleased to see that some of the Principles first proposed by the FTC and subsequently adopted by the self-regulatory program are incorporated here in Title IV of H.R. 5777.⁸ However, this is a complicated process and I believe that further refinements to the language can be made to make it compatible with the FTC's and industry's existing work.

I believe that the incorporation of Title IV in this legislation is truly a testament to the hard work and progress industry has made in this area. While I applaud the Chairman's inclusion of Title IV, I would like to briefly note some of the incredible complexities and unintended consequences that can arise when attempting to legislatively proscribe practices that do not conform to existing business models, and limit flexibility to develop new models.

As the online advertising business model currently exists, most advertisements being served on publisher websites are in fact being served by third party companies, such as ad networks. Third party ad-serving platforms, such as Doubleclick and Atlas, deliver almost 90% of the display advertisements seen online. Virtually all small publishers – the ad-supported sites and blogs too specialized to afford their own sales staffs – sell and place ads via online advertising networks like Burst Media and Advertising.com. Since these ad networks are largely responsible for the serving of ads that appear on publisher websites, and data collection, they are best situated to provide consumers with options

⁸ Two key Principles of the Self-Regulatory Principles for Online Behavioral Advertising include Consumer Control and Accountability, which are both addressed under Title IV; §403, 1A references a "clear and conspicuous opt-out mechanism" (i.e. Consumer Control) and §403 2C acknowledges the realization that "accountability and compliance testing is important."

regarding notices of data collection as well as choices as to how that data is being used. However, as currently drafted, H.R. 5777 does not fully consider the role that these types of third parties play in the online advertising space, and instead focuses on data collection being done by a first party, i.e. a publisher.⁹ This type of requirement does not reflect the true nature of how data is collected and used in the online marketplace. Given the incredible technological intricacies of the online advertising marketplace, it can be very easy to miss such seemingly trivial, but critical nuances.

B. A Flexible Notice Requirement Is Key for Keeping Consumers Informed and Engaged

It is no secret that it has become harder and harder to get consumers to pay attention to privacy policies. Privacy notices and policies seem to have proliferated in both the online and offline worlds over the past ten years, and industry has evolved to become increasingly more creative in catching consumers' attention. It would be fair to say at this point consumers are feeling inundated with potentially confusing privacy notices.¹⁰ The presence of Section 102 (F) – that the FTC should consider “the risk to consumers and commerce of over-notification” – demonstrates that the Chairman is aware that this practice may not in some instances serve consumers well. We commend the Chairman for this recognition and believe that Title I of H.R. 5777 takes a progressive and innovative approach in recognizing that when it comes to privacy notices, one size does not necessarily fit all.¹¹ The FTC Report urged industry to seek ways to provide consumer notice outside of the privacy policy. This provision has been fully embraced by the cross industry self-regulatory group and we have established new and innovative ways to deliver more easily identifiable and understandable notice to consumers. I applaud the Chairman's inclusion of language that would allow for innovation in this area, giving industry the opportunity to do what the advertising industry does best – get consumer attention – and hope that as this draft is considered that it will move even further towards this flexible, effective standard.

VI. H.R. 5777 and the Boucher Proposal Could Limit Critical Existing Business Models

A. H.R. 5777 and the Boucher Proposal Impact the Relationship Between First-Party Publishers and Their Customers

⁹ Title IV, §403 1A, as drafted, appears to only cover the transfer of data from a “first-party” (i.e. publisher) to a “third party” – it does not appear to cover scenarios where a third party (i.e. ad network) is collecting the data.

¹⁰ A bill currently in the Senate Committee on Banking, Housing and Urban Affairs entitled the “Eliminate Privacy Notice Confusion Act” (H.R. 3506) would amend the Gramm-Leach-Bliley Act to provide an exception from the continuing requirement for annual privacy notices for financial institutions in limited circumstances. One of the rationales behind the bill has been that consumers are becoming desensitized to privacy policy notices.

¹¹ §102 (b) of Title I, “Provision of Notice or Notices” allows for the FTC to promulgate regulations that would allow for variations in how notice could be delivered, i.e. variations based on type of media being employed, whether a short notice or limited disclosure would be more appropriate, etc.

H.R. 5777 and the Boucher proposal both envision imposing opt-out requirements on first parties that would impact the relationship between customers and publishers. Consumers are aware of, and significantly benefit from, use of information from first-party sites. Many consumers also enjoy personalized webpages when they return to a website with which they have had a previous interaction and perhaps an ongoing relationship (*e.g.*, personalized websites for consumers that frequent online retail ecommerce sites). People visit such sites with the expectation of exchanging information in order to benefit from the sites' online offerings.

When the FTC first began exploring the issue of how first parties should be treated in the online behavioral advertising context, it initially proposed a similar standard to the one set forth in H.R. 5777 and the Boucher proposal.¹² After reviewing feedback on the proposed principle, however, the Commission determined that the principles should exclude first parties and avoid getting in the middle of first parties and consumers.¹³ The FTC reasoned that “‘first party’ behavioral advertising practices are more likely to be consistent with consumer expectations, and less likely to lead to consumer harm”¹⁴ and that “given the direct relationship between the consumer and the website, the consumer is likely to understand why he has received the targeted recommendation or advertisement and indeed may expect it.”¹⁵

I encourage the bill sponsor to adopt language in this area that incorporates the FTC's findings and allows the first-party/consumer relationship to remain strong and vibrant. This principle could, for example also be included within the self-regulatory provisions of the bill.

B. We Support Applying an Opt-Out Standard to Sharing with Unaffiliated Third-Party Publishers

H.R. 5777 and the Boucher proposal would impact online information flow by restricting transfers of information to unaffiliated third-party publishers. IAB members have long adhered to the principle of providing choice to consumers through opt-outs for the transfer of data to third parties for advertising and marketing purposes. We believe that such a standard is critical any legislation in this area.

As recognized in the Executive Summary of the Boucher proposal, online advertising supports much of today's online commercial content, applications, and services that are available for free. In addition, Congressman Boucher has many times publically stated that consumers generally do not “opt-in” or “opt-out” of information sharing and advertising. In the experience of our members, only those few individuals, sometimes called the “privacy fundamentalists,” opt-out. Thus, requiring consumers to opt-in to

¹² See FTC Staff Report: Self-Regulatory Principles For Online Behavioral Advertising (February 2009) (hereinafter Staff Report), available at <http://www2.ftc.gov/os/2009/02/P085400behavadreport.pdf>.

¹³ *Id.* at 46.

¹⁴ *Id.* at 26.

¹⁵ *Id.* at 27.

transfers to third parties would drastically reduce the free flow of information that is the heart and soul of today's Internet offerings. Currently, information is collected in a seamless manner that does not interrupt a consumer's online experience. Changes to the system proposed in H.R. 5777 and the Boucher proposal would turn the Internet from a fast-moving information highway to a slow-moving toll-road. Such a move would hinder, not facilitate ecommerce. We stand ready to help craft a consumer choice standard that would preserve this important source of revenue upon which the Internet depends.

C. The Scope of "Sensitive Data" in H.R. 5777 and the Boucher Proposal Is Too Broad

We have reservations about the broad scope of the term "sensitive information" contained in these legislative proposals. The proposed definition extends beyond the data identified as sensitive by the FTC.¹⁶ We can all agree that subsets of the enumerated areas should be subject to heightened standards. However, this is a complicated area that should be studied and requires further refinement.

This provision would restrict multicultural marketing and media. The definition of "sensitive information" includes online communications to ethnic, racial, and religious minority audiences and places an opt in requirement for marketing to these audiences. Latino, African-American, and Asian-oriented Web sites would certainly be prevented from providing media kits to or delivering customized content or advertising on behalf of the agencies that place ads on their sites. While certainly not intended, we are concerned that these types of services provide great benefit to these audiences and the proposed restrictions would unintentionally harm the very groups of people they seek to protect.

D. H.R. 5777's Private Right of Action Is Unnecessary

We are very concerned with H.R. 5777's inclusion of a statutory private right of action in this area. I am not aware of any instances of a consumer being economically harmed by the collection or misuse of any data collected for online advertising purposes. The chilling effect on legitimate commerce in this area that could result from a private cause of action should not be overlooked.

Title VI of H.R. 5777 allows for multi-enforcement efforts by both the Federal Trade Commission as well as state attorneys general. Given their extensive expertise and experience in investigation and enforcement, the FTC and state attorneys general are well-positioned to handle any potential complaints. In particular, the thousands and thousands of small and medium-sized websites that don't have the capacity to deal with the uncertainty and expense of defending themselves against a barrage of lawsuits that may be meritless.

¹⁶ *Id.* at 43-44.

E. An Access and Correction Regime Is Unwarranted In This Environment

Given that online advertising data is largely anonymous in nature, a legislative standard calling for “access and correction” databases is both unnecessary and workable. Unlike information governed by the Fair Credit Reporting Act, data being used for online advertising purposes is generally information that involves clickstreams, cookies, dynamic IP addresses – essentially, pieces of information that amount to long streams of text or code that aren’t identifiable to an individual. They don’t include names, addresses, social security number, financial account numbers, balances owed, credit limits, etc. Most third parties in this ecosystem do not know what individual is associated with a certain cookie or clickstream – pragmatically speaking, if they cannot identify an individual, they cannot offer opportunities for access or correction to information about that individual. Thus, this provision would unintentionally create a perverse incentive for companies to collect more personally identifiable information than they currently do in order to comply.

Setting aside these pragmatic concerns for a moment, another question raised by the access and correction language in H.R. 5777 is the question of what harm is possible based on an online marketer, publisher, or network collecting clickstream data about the fact that a consumer likes blue shirts vs. red shirts. While the access and correction language included in Title II of H.R. 5777 may serve a demonstrable purpose in other regimes, where misuse of information could result in an individual may being denied employment or access to credit, we are concerned that it is an overly burdensome standard in the collection and use of data for online advertising. The use of information for making critical determinations such employment or credit are already strictly governed by other laws. If there are similar potential misuses of information that necessitate such a standard, these uses should be specifically enumerated and considered on their merits rather than such a general requirement that would impact so many millions of businesses of all sizes.

VII. Conclusion

Thank you for considering the views of the IAB on these issues. The success of the Internet has helped fuel this country’s economy and it is important to ensure that this medium can continue to grow and thrive. We look forward to working with members of the Subcommittee as they consider privacy proposals and the legislative process moves forward.