

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Comments Sought on Privacy Issues)	GN Docket Nos. 09-47, 09-51, 09-137
Raised by the Center for Democracy)	NBP Public Notice # 29
and Technology)	

**COMMENTS OF BERIN SZOKA, SENIOR FELLOW
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In the “American Recovery and Reinvestment Act of 2009,” Congress required the Federal Communications Commission (FCC) to formulate “a detailed strategy for achieving affordability of such service and maximum utilization of broadband infrastructure and service by the public,” and to present that strategy to Congress.¹ Thus, the FCC may recommend only those policies that it concludes will, on net, help achieve “affordability” and “maximum utilization” of broadband. For such a strategy to be useful to Congress in considering legislation, its recommendations must also be prioritized according to their ability to achieve these goals.

The FCC has, no doubt, been lobbied heavily to use its National Broadband Plan (“the Broadband Plan”) to “help protect consumer privacy.” Some of these recommendations are quite sound. As the Center for Democracy and Technology (“CDT”) put it in their comments on the Broadband Plan last year: “Consumers will not embrace broadband if they have a sense that everything they do online will be watched by government officials.”² CDT has led the way in explaining the need to reform the Electronic Communications Privacy Act of 1986 (“ECPA”). Unfortunately, CDT has it exactly backwards when they say: “Consumer privacy concerns encompass not only what companies do with their data, but also the extent to which the government accesses it.”³

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¹ Recovery Act § 6001(k)(2)(B), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1enr.pdf.

² Comments of the Center for Democracy & Technology in the Matter of A National Broadband Plan for Our Future, GN Docket No. 09-51, June 8, 2009, <http://fjallfoss.fcc.gov/ecfs/document/view?id=6520220149>, at 13-14 (“CDT Comments”).

³ *Id.*

The Real “Big Brother” is Government

The harm caused by government access to users’ data (and data *about* users) is more demonstrable and serious than the harms alleged to result from the use and collection of that data by private companies. Governments have the power of life, death, and imprisonment over their citizens, and powers no less dire over their citizens’ property, livelihood, and intimate relations. Even in the “Land of the Free,” the most banal (and respected) of bureaucracies can do serious harm to individual rights—from local family courts to national law enforcement. For this reason, the framers of our Bill of Rights adopted the Fourth Amendment to protect the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,” and set exacting requirements for judicial warrants.

There is indeed a trade-off between privacy from government intrusion and security. But, as Ramon “Mike” Vargas (the embattled Mexican policeman played by Charlton Heston in Orson Welles’s 1958 film *Touch of Evil*) put it: “A policeman’s job is only easy in a police state.”⁴ Properly understood, the Fourth Amendment provides a clear rule that spares courts and lawmakers from having to constantly weigh privacy and security on a rolling, ad hoc basis. Congress has only to update the laws that implement the Fourth Amendment’s guarantees to bring the Bill of Rights into the Digital Age. The FCC should include the strongest possible endorsement of such vital reform in the Broadband Plan because a higher “Wall of Separation between Web and State” will certainly encourage broadband adoption.⁵

Regulating Private Data Will Impose Real Costs on Internet Users

Like all too many “privacy advocates” CDT fails to recognize the essential distinction between restricting government access to data and restricting the private collection and use of data—or, more pointedly, why concerns about government must come first in any discussion of online privacy:

- While the harm caused by governments through data access is quite real, the harms alleged to result from the private use and collection of data are largely conjectural, amorphous, or based on efforts to redefine harm in terms of vague notions of “dignity interests.”⁶
- While users cannot opt-out of giving governments access to their data, they *can* opt-out of sharing information with private companies—if not by exercising an explicit data sharing opt-out, then by using “technologies of evasion” to conceal their online activity from data collection,⁷ or simply by deciding not to use a particular service whose privacy

⁴ www.imdb.com/title/tt0052311/quotes.

⁵ Comments of Berin Szoka to FTC Exploring Privacy Roundtable, *Privacy Trade-Offs: How Further Regulation Could Diminish Consumer Choice, Raise Prices, Quash Digital Innovation & Curtail Free Speech*, Nov. 2009, at 2 www.pff.org/issues-pubs/filings/2009/111009-FTC-privacy-workshop-filing.pdf.

⁶ See e.g., Adam Thierer & Berin Szoka, *Chairman Leibowitz’s Disconnect on Privacy Regulation & the Future of News*, Progress Snapshot 6.1, January 13, 2010, <http://pff.org/issues-pubs/ps/2010/ps6.1-Leibowitz-disconnect-on-privacy-and-advertising.html>.

⁷ See, e.g., Multiple authors, *Privacy Solutions*, Ongoing Series, PFF Blog, <http://pff.org/privacy-solutions>.

policy they find objectionable. Advocacy groups like CDT play an invaluable role here in helping to inform consumers about sites with questionable privacy practices.

- Speech and privacy are but two sides of the same coin. After all, what is your “right to privacy” but a right to stop me from observing you and speaking about you? “Protecting privacy,” therefore, typically means restricting speech rights in the process.⁸ Advocates of privacy regulation often insist that the use, processing and collection of information are “conduct” unprotected by the First Amendment, but in fact, the First Amendment broadly protects the gathering and distribution of information as part of the process of communication (“speech”).⁹

Whatever one thinks of these distinctions, for purposes of the Broadband Plan inquiry, one further difference between government access to data and private use/collection of data is crucial: The quality and quantity of online services depends on the ability of service providers to collect and use data about web browsing habits to analyze site use, personalize content, tailor advertising, and measure its effectiveness. Government “privacy” regulations imposed on the private sector will, to varying degrees, reduce:

1. The relevance of advertising and thereby potentially increase its annoyingness;
2. Funding for online content, services and applications that are dependent on advertising revenues to support “free” content;
3. The flow of useful information in the economy, thus reducing competitiveness of all products for consumer goods and services;
4. The competitiveness of the online content, services and advertising markets; and
5. The ability of not-for-profit speakers to reach their audiences.¹⁰

Thus, as PFF warned in the title of our comments to the Federal Trade Commission’s first “Exploring Privacy” workshop, “Further Regulation Could Diminish Consumer Choice, Raise Prices, Quash Digital Innovation & Curtail Free Speech.”¹¹ If the Internet ecosystem is impoverished by government intervention, however well-intentioned it may be, users will have that much less reason to adopt and “utilize broadband.”

⁸ See Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People From Speaking About You*, 52 Stanford L. Rev. 1049 (2000), available at www.pff.org/issues-pubs/pops/pop7.15freedomofspeech.pdf.

⁹ See Amicus Brief for Association of National Advertisers, Cato Institute, Coalition for Healthcare Communication, Pacific Legal Foundation and The Progress & Freedom Foundation In Support Of Appellants, *IMS Health v. Sorrell*, No. 09-1913-cv(L), 09-2056-cv(CON) (2nd Cir. 2009), available at [www.pff.org/issues-pubs/filings/2009/071309-Brief-Amici-Curiae-ANA-et-al-Second-Circuit-\(09-1913-cv\).pdf](http://www.pff.org/issues-pubs/filings/2009/071309-Brief-Amici-Curiae-ANA-et-al-Second-Circuit-(09-1913-cv).pdf); see also Adam Thierer & Berin Szoka, *What Unites Advocates of Speech Controls & Privacy Regulation?*, Progress on Point 16.19, Aug. 2009, at 4, www.pff.org/issues-pubs/pops/2009/pop16.19-unites-speech-and-privacy-reg-advocates.pdf.

¹⁰ See Berin Szoka & Mark Adams, *The Benefits of Online Advertising & Costs of Privacy Regulation*, PFF Working Paper, Nov. 8, 2009, at 4 *et seq.*, www.pff.org/issues-pubs/filings/2009/111009-FTC-privacy-workshop-filing.pdf#page=33.

¹¹ *Supra* note 5.

Indeed, in a world of increased regulation of private data use/collection, broadband access could also be less “affordable” if Internet Service Providers (ISPs) are barred (or discouraged through further extralegal intimidation) from experimenting with online behavioral advertising (OBA) systems that could allow the delivery of highly relevant ads to users based on inspection of the packets sent to and from a user through their ISP.¹² Even if OBA revenue amounted to only a small fraction of monthly broadband service costs, smarter advertising could at least keep prices in check, potentially lower them significantly going forward, and/or provide additional revenue for infrastructure investments.¹³

Thus, the Commission should not accept at face value the assertions of those who suggest that increased data use/collection regulation of the private sector would somehow magically promote broadband adoption or reduce its cost. Indeed, to the contrary, the Commission should recognize that such regulations will impose significant burdens on the services and applications available online and could thereby undermine, rather than advance, broadband adoption. Simply put, *there is no free lunch*: We cannot escape the trade-off between locking down information and the many benefits for consumers of the free flow of information. Any recommendation in the Broadband Plan regarding increased regulation of private data collection must be based on a careful consideration of this trade-off because Congress has not given the agency *carte blanche* to lobby for increased online privacy regulation or any other policy change *except insofar as the FCC deems them to be “the most effective and efficient mechanisms for ensuring broadband access by all people of the United States.”*¹⁴

Unfortunately, assessing this trade-off in any rigorous way is a profoundly difficult task—because the harms are difficult to define, the benefits are disperse and difficult to quantify, and the precise effects of specific regulation are difficult to predict. (For example, if “behaviorally targeted” ads tailored to a user’s interest based on browsing across other sites produce several times more revenue for the publisher that displays the ad, but an opt-in mandate would result in several times fewer users opting-in to such data collection than would choose *not* to opt-out under an opt-out regime, the difference in revenue for the publisher could be significant—but still difficult to predict.¹⁵) The Progress & Freedom Foundation has undertaken our own modest effort to catalog the consumer benefits of online advertising, especially in supporting publishers of content and services,¹⁶ and we encourage the collection of more empirical data about the benefits of data use in promoting broadband adoption and potentially reducing its cost by improving the quantity, quality, and competitive diversity of content and services available to broadband users—particularly those supported by advertising.

¹² One company offering packet inspection technology for advertising purposes, NebuAd, shut down under intense pressure from lawmakers on its ISP partners. See Harlan Yu, *Lessons from the Fall of NebuAd*, Freedom to Tinker Blog, Oct. 8, 2008, www.freedom-to-tinker.com/blog/harlanyu/lessons-fall-nebuad.

¹³ See generally Berin Szoka & Adam Thierer, *Online Advertising & User Privacy: Principles to Guide the Debate*, Progress Snapshot 4.19. Sept. 2008, www.pff.org/issues-pubs/ps/2008/ps4.19onlinetargeting.html.

¹⁴ Recovery Act § 6001(k)(2)(A).

¹⁵ See *supra* note 10.

¹⁶ See, e.g., *id.*; see also Berin Szoka, Mark Adams, Howard Beales, Thomas Lenard & Jules Polonetsky, *Regulating Online Advertising: What Will it Mean for Consumers, Culture & Journalism?*, PFF Capitol Briefing, July 2009, www.pff.org/issues-pubs/pops/2009/pop16.22-benefits-of-online-advertising-transcript.pdf.

The FCC Should Be Particularly Wary of Claims Based on Opinion Polls or Surveys

The arguments made by CDT and other groups for data use regulation rest largely on opinion polls that purport to show that “consumers do not understand how their data is used under... diverse new business models predicated on the collection, analysis and retention of richly detailed data about consumers and their online activities...—and when they find out, it is cause for great concern.”¹⁷ A similar study was released in October 2009 concluding that, “Contrary to what many marketers claim, most adult Americans (66%) do not want marketers to tailor advertisements to their interest.”¹⁸

But such opinion surveys necessarily tell us more about the psychology of decision-making under the artificial uncertainty of polls than about the choices users would actually make in the real world. As such, they are inherently unreliable as indicators of real preferences.¹⁹ As Jim Harper and Solveig Singleton concluded in their 2001 paper *With a Grain of Salt: What Privacy Surveys Don't Tell Us*:

privacy surveys in particular... suffer from the “talk is cheap” problem. It costs a consumer nothing to express a desire for federal law to protect privacy. But if such law became a reality, it will cost the economy as a whole, and consumers in particular, significant amounts that surveys do not and cannot reveal.²⁰

Consumers may, indeed, express concern about practices they do not understand. But how do we know their ignorance is not “rational”—in the sense that these consumers would make much the same choices if fully informed about the costs and benefits at stake and choosing were costless? Truly, consumers’ actions speak louder than words: Experiments measuring real-world activity show that users clearly “vote with their clicks” for ads they find relevant—*i.e.*, they vote for “tailoring” despite what they tell pollsters.²¹ A true behavioral economics experiment that required consumers to make real trade-offs and clearly presented existing privacy management tools to them, could tell us more about how much consumers ultimately value their privacy—not just as a monolith in the abstract, but in various real-world situations.

But ultimately, the best experiment is the one being conducted in the real world every day. And in that ongoing “experiment,” online advertising continues to provide an indispensable source of revenue for publishers of content and services that lack the pricing power necessary to support their offerings through subscription fees or micropayments.²²

¹⁷ CDT Comments, *supra* note 2, at 12-13.

¹⁸ Joseph Turow, Jennifer King, Chris Jay Hoofnagle, Amy Bleakley & Michael Hennessy, *Americans Reject Tailored Advertising and Three Activities That Enable It*, Sept. 2009, http://graphics8.nytimes.com/packages/pdf/business/20090929-Tailored_Advertising.pdf.

¹⁹ See generally Berin Szoka, *Privacy Polls v. Real-World Trade-Offs*, Progress Snapshot 5.10, Oct. 2009 (discussing the Turow-Hoofnagle survey), www.pff.org/issues-pubs/ps/2009/ps5.10-privacy-polls-tradeoffs.html.

²⁰ Jim Harper & Solveig Singleton, *With A Grain of Salt: What Consumer Privacy Surveys Don't Tell Us*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=299930.

²¹ *Supra* note 19 at 3-4.

²² See *supra* note 19 at 4-5.

Conclusion

Given the complexity of these unavoidable trade-offs, and with the Broadband Plan due to Congress so soon,²³ the Commission should avoid weighing down this already-sprawling project with yet another contentious policy issue lest the entire Plan become an over-ornamented “Christmas Tree.”²⁴ The only prudent course would be for the Commission to limit its legislative recommendations on privacy to endorsing enhanced limitations on government access, as described above. At most, the Broadband Plan should recommend more study of the privacy/benefits trade-offs inherent in regulating the private sector—which the FTC is already doing.²⁵ Otherwise, the Commission should defer to the expertise of the Federal Trade Commission in this area, since it is the FTC, not the FCC, that is ultimately responsible for consumer protection online.

If the Commission wants to go further, it could follow the approach it has taken in the context of the Child Safe Viewing Act, where the agency has focused not on regulatory solutions but on how government can help promote user empowerment tools and methods, and educate Internet users about how to use them to protect their privacy online if they are concerned about the information gathered about them, their Internet use, and their likely interests.²⁶ Empowering and educating these privacy-sensitive users is the best way to advance the “affordability” and “maximum utilization” of broadband both because it focuses on those users most likely to be discouraged from adopting broadband due to privacy concerns and because such an approach avoids jeopardizing the cornucopia of content and services that makes broadband worth having in the first place.

²³ Cecilia Kang, *FCC asks Congress to extend deadline for broadband plan by one month*, Washington Post Tech blog, http://voices.washingtonpost.com/posttech/2010/01/the_federal_communications_com_1.html.

²⁴ This apt expression was coined in 1956:

For 18 days U.S. Senators had wrangled about the farm bill, introducing more than a hundred amendments, rejecting 31 and adopting 21. At the end of last week, with some 60 amendments to go, New Mexico's Democratic Senator Clinton P. Anderson looked at the result and said: “This bill gets more and more like a Christmas tree; there's something on it for nearly everyone.”

The Christmas Tree Bill, TIME MAGAZINE, Mar. 26, 1956, available at www.time.com/time/magazine/article/0,9171,824103,00.html

²⁵ See Exploring Privacy Roundtable Series, www.ftc.gov/bcp/workshops/privacyroundtables/.

²⁶ Adam Thierer, The Progress & Freedom Foundation, *Comments in the Matter of Implementation of the Child Safe Viewing Act; Examination of Parental Control Technologies for Video or Audio Programming*, MB Docket No. 09-26, April 15, 2009, www.pff.org/issues-pubs/filings/2009/041509-%5BFCC-FILING%5D-Adam-Thierer-PFF-re-FCC-Child-Safe-Viewing-Act-NOI-%28MB-09-26%29.pdf

Related PFF Publications

- *Online Advertising & User Privacy: Principles to Guide the Debate*, Berin Szoka & Adam Thierer, Progress Snapshot 4.19, Sept. 2008.
- *Privacy Trade-Offs: How Further Regulation Could Diminish Consumer Choice, Raise Prices, Quash Digital Innovation & Curtail Free Speech*, Comments of Berin Szoka to FTC Exploring Privacy Roundtable, Nov. 2009.
- *Targeted Online Advertising: What's the Harm & Where Are We Heading?*, Berin Szoka & Adam Thierer, Progress on Point 16.2, April 2009.
- *Regulating Online Advertising: What Will it Mean for Consumers, Culture & Journalism?*, Berin Szoka, Mark Adams, Howard Beales, Thomas Lenard & Jules Polonetsky, PFF Capitol Hill Briefing, July 2009.
- *Privacy Polls v. Real-World Trade-Offs*, Berin Szoka, Progress Snapshot 5.10, Oct. 2009.
- *The Benefits of Online Advertising & Costs of Privacy Regulation*, Berin Szoka & Mark Adams, PFF Working Paper, Nov. 8, 2009.
- *What Unites Advocates of Speech Controls & Privacy Regulation?*, Adam Thierer & Berin Szoka, Progress on Point 16.19, Aug. 2009.
- *Behavioral Advertising Industry Practices Hearing: Some Issues that Need to be Discussed*, Berin Szoka & Adam Thierer, PFF Blog, June 18, 2009.
- *Privacy Solutions*, Ongoing Series, PFF Blog.
- *Online Advertising, Behavioral Marketing & Privacy*, Berin Szoka, William Blumenthal, Dan Jaffe, Alan Raul, Greg Sivinski, Hal Varian & Mike Zaneis, PFF Aspen Summit Panel Discussion, August 18, 2008.

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