

**Before the
FEDERAL TRADE COMMISSION
Washington, D.C.**

In the Matter of)
Proposed Online Behavioral Advertising)
Privacy Principles)

COMMENTS OF THE NEWSPAPER ASSOCIATION OF AMERICA

The Newspaper Association of America (“NAA”)¹ respectfully submits these comments in response to the proposed guidelines for behavioral online targeting published by the Commission on December 20, 2007.²

NAA member newspapers publish many of the nation’s most popular “free” websites focusing on news and information regarding their local communities. NAA urges the Commission to affirm the indispensable role of advertising in supporting free content. The Commission should also avoid endorsing principles that would impair newspapers’ ability to attract advertising or manage the operations of their websites. Finally, the Commission should recognize that the First Amendment severely limits governmental efforts to regulate the editorial judgment of newspaper publishers, editors, reporters, and advertisers.

¹ NAA is a non-profit organization representing more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily U.S. newspapers. NAA members typically publish both print and online newspapers, and use their websites to conduct a variety of transactions with their advertisers and subscribers.

² See “FTC Staff Proposes Online Behavioral Advertising Privacy Principles,” <http://www.ftc.gov/opa/2007/12/principles.shtm> (Dec. 20, 2007) (“*FTC Release*”).

I. NEWSPAPERS ARE LEADING PROVIDERS OF LOCAL CONTENT

Newspapers have long served as the preeminent providers of news and information content to their local communities. This remains as true in today's digital environment as it was in pre-Internet times. Newspapers publish the news of events of local, state and national importance, community news and sports, features of community interest, reviews and opinion, legal notices, and many other types of community-focused content.

Newspapers also serve as leading distributors of advertising in a community. Newspaper retail advertising is vital to local businesses and the local real estate market, while newspaper classified advertising offers an important service to both individuals and businesses in a community. In the traditional business model, a newspaper's editorial content has been supported primarily by advertising revenue, with the subscription charge covering little more than the cost of distribution.

Until recently, of course, newspapers were published only in newsprint and delivered to subscribers' residences and places of business or sold at convenient locations. Today, newspapers also have become leading providers of local online content. According to recent figures, newspapers own the number one local websites in 24 of the top 25 markets.³ Eighty percent of adults cite local or regional news as their top reason for visiting a newspaper website, and nearly an equal number cite local advertising.⁴ Responding to this demand, newspapers have begun publishing more localized "community" sections on their websites, including blogs and social networks,

³ comScore data Age 2+, Nov. 2006.

⁴ NAA's 2006 Consumer Usage of Newspaper Advertising.

as well as devoting reporting and editorial resources to providing even more focused local news and information.⁵

While newspapers use their Internet websites in many different ways, an online edition of a newspaper often contains most if not all of the content in the print newspaper, and in many cases supplements the print edition with updated information during the course of a day.⁶ Regardless of whether the content is delivered on newsprint or online, in each case newspapers provide news and editorial content that are unique to their communities, covering far more topics within the community than any other outlet, including broadcasters and cable companies. Moreover, newspapers do so primarily by generating original content through their reporting, editorial, and advertising staffs, unlike some other websites that merely aggregate content written by others.

II. ADVERTISING IS ESSENTIAL TO THE AVAILABILITY OF “FREE” LOCAL NEWSPAPER WEBSITES

Just as advertising provides the financial support for the editorial content in print newspapers, advertising likewise provides financial support for online newspapers. Indeed, newspaper websites today are the direct descendants of the advertiser-supported colonial press that the First Amendment was ratified to protect. The first successful newspaper, the *Boston Newsletter*, hit the streets with an inaugural issue on April 24, 1704, promising to publish the news regularly as long as the publisher could attract advertising to fund the paper’s operations.⁷ Colonial newspapers, like their modern

⁵ The *New York Times* has launched some 50 blogs in the past year alone. Seth Sutel, “New York Times CEO: Focused on Online Growth” (news.wired.com) (viewed March 12, 2008).

⁶ LaShell Stratton, “Web Sites Experiment With Noontime Videos,” at 46 *Presstime* (March 2008).

⁷ *Boston Newsletter*, Apr. 24, 1704, reprinted in James P. Wood, *The Story of Advertising*, at 45 (1958). The publisher announced that “[t]his Newsletter is to be continued Weekly, and all Persons who

counterparts, filled many of their column inches with advertising that subsidized, in whole or in part, the publisher's newsgathering and dissemination efforts.⁸

That same economic structure remains intact today—and is fundamental to newspapers' current efforts to transition into digital media. It is advertising revenue that pays the costs that newspapers incur for the reporters, the editors, the bloggers, and the many other inputs that go into publishing original editorial content in print and online. For newspapers—unlike other websites that simply repackage content reported, researched, and written by others—these costs are substantial.

Although newspaper websites are as varied as the newspaper industry itself, all but a few dozen offer content for free online.⁹ Whether to publish content for free is a market-specific decision. However, newspapers' experience to date shows that the for-pay model generally has not had marketplace success. For example, the *New York Times* recently stopped its TimesSelect program, which had charged readers for access to columns and other content. Even the *Wall Street Journal*, long one of the most successful for-pay newspaper websites, recently made available a portion of its content for free, although much of its content remains accessible only on a subscription basis. Many newspaper sites that have converted from paid-access to free content have found

have Houses, Lands, Tenements, Farms, Ships, Vessels, Goods, Wares or Merchandise, &c., to be Sold or Let; or Servants Run-Away; may have the same inserted at a Reasonable Rate." *Id.* The following week's issue included paid ads seeking the return of two lost anvils and offering a "a very good Fulling Mill to be Let or Sold" in Oyster Bay, N.Y. *Id.*

⁸ James P. Wood, *The Story of Advertising*, at 85 (1958). Newspapers of the colonial and Revolutionary eras "were not only supported by advertising but they were, even primarily, vehicles for the dissemination of advertising." See also Lawrence C. Wroth, *The Colonial Printer*, at 234 (1938) (more than half of standard colonial newspaper devoted to ads). Modern newspapers typically aim for a ratio of roughly 70% advertising to 30% editorial content in their print editions. C. Fink, *Strategic Newspaper Management*, at 43 (1988).

⁹ A.S. Berman, "Revisiting the Paid vs. Fee Debate," at 6 *Presstime* (February 2008).

that the increased advertising revenue, attributable to the larger audience attracted by the free content, more than offsets the loss of the paid access revenue.¹⁰

Newspaper websites contain many types of advertising. Like their print versions, online newspapers publish their advertising sold by their sales staff, sometimes in combination with a print advertising campaign. Newspaper sites publish contextual advertisements. In addition, online newspapers may rely on other sources of advertising, including search-based advertising through arrangements with companies such as Yahoo! and Google, and through network advertising. Each of these types of advertising, in fact, may present advertising based on some form of behavioral tracking, broadly defined.

For the advertising-supported model to succeed, however, advertisers want results. The marketplace for online advertising is growing¹¹ and evolving rapidly. It is also highly competitive. Newspaper sites face competition from both online and offline sources. Their classified ads compete with services such as eBay and Craigslist; their national ads compete with national media, including national audience websites and broadcast and cable networks; and their local retail advertising competes with mail, print directories, local websites, and online coupon firms.

Relevant to this proceeding, behavioral targeting is used today by newspapers and network advertisers that contract with newspapers as a means of improving the effectiveness and value of the advertising presented to readers while reducing what website users uninterested in some ads would call “clutter.” This benefits both the publisher and the public. The publisher benefits from potentially greater revenue (and the

¹⁰ *Id.* at 7, citing example of the *Columbus (Ohio) Dispatch*, which earns today from advertising several multiples of its revenues in 2005 when it operated under the paid model.

¹¹ “Online ad revenue over \$21B in 2007,” *USA Today.com* (visited Feb. 25, 2008).

corresponding support for newsgathering and other editorial content) than might be received from untargeted ads. Targeted (both contextually and behaviorally) ads are likely to be more effective because they are more likely to be viewed, which depends both upon the interests of the reader and the placement of the ad. The readers benefit from (1) having free access to valuable editorial and informational content; and (2) not having their website experience suffer from being presented with ads that they find irrelevant.

To the extent behavioral targeting can improve the effectiveness of advertising on newspaper websites, the practice benefits the public more broadly by contributing to the financial support for free localized information content. In considering the proposed behavioral targeting principles, the Commission must not lose sight of the vital role advertising plays in providing the financial underpinning of free content websites desired by consumers.

III. THE COMMISSION SHOULD AVOID ADOPTING PRINCIPLES THAT WOULD IMPAIR THE ABILITY OF “FREE CONTENT” WEBSITES TO PUBLISH CONTENT OR DEGRADE THE SITE EXPERIENCE

As consumer-responsive media, newspapers understand the importance of consumer choice and offer their customers choices every day.¹² The Internet advances consumer choice by allowing consumers to find and select content and other information (including advertising) of interest to them. However, newspapers also understand that consumer choice must not be confused with allowing consumers to interfere with the

¹² Most if not all newspaper sites provide notice of their privacy practices (including targeting behavior) and provide consumers with choices. And, of course, the NAI opt-out mechanism is available for those newspaper sites that use NAI members' services.

operation of a website or its business operations, or to degrade website content and services.

For example, the first proposed principle states, in part, that “consumers can choose whether or not to have their information collected” for the purpose of providing advertising about products and services tailored to their interests.¹³ If, as suggested by commentary accompanying the proposed guidelines, the staff seems to contemplate consumer control in the form of an improved ability to block third-party network advertising cookies, then the proposed guideline reflects current policy reflected in the NAI Guidelines that have been in effect for about a decade. Such a mechanism, even if flawed, exists today, and NAA encourages voluntary efforts by network advertisers to address this concern and improve that process.

NAA is concerned, however, lest the proposed principle be intended to have a far more expansive interpretation. For example, the language could be read as suggesting that consumers should have, in effect, a veto over a website’s internal operations. Indeed, a broad reading of this proposed principle could, in practice, allow users to disrupt the normal operations of an online newspaper to such an extent as to impair its ability to provide desirable service and attract the financial support that pays for the “free” content. If this is the intent, the result would be to greatly complicate the operation of a website and would be poor policy.

¹³ *FTC Release* at 3.

For example, if consumers were to forbid the collection of “their”¹⁴ information (clickstream, search, areas of sites visited and frequency of visits, cached data), the likely result would be an inferior and even unsatisfactory experience on the website. Such users would likely find it more difficult to navigate a website and could experience time-consuming reloads of otherwise cacheable data, thus degrading the experience. Furthermore, each user would not be presented with content tailored to his or her interest, as the website—unlike other commercial businesses—would be prevented from learning about its customer’s interests and preferences. From the newspaper’s perspective, if its website or its advertisers are unable to collect information about their readers, the ability of the site to obtain necessary financial support will suffer, causing harm to the “free” content model.

The dangers become possibly even more dire when one considers the possible future evolutions of newspapers online. Newspaper websites increasingly are considering ways to tailor the content presented to a reader more closely to their interests, as shown both by what they voluntarily disclose and by their actions. The “customized” newspaper, long an objective in the print world but difficult to implement on anything less than a broad geographic basis, is far more possible online. It is easy to imagine a local newspaper website offering highly customized editions to different website users. Indeed, *The Washington Post* currently offers different versions of its washingtonpost.com website to local and out-of-town viewers, providing an early example of what may come in the future. Internet technology potentially enables

¹⁴ Even describing this information as belonging to the customer begs a fundamental question. In the ordinary business context, information about customers’ shopping histories and patterns is part of the trade property of the business. By analogy, whether a consumer subscribes not only to a newspaper but to a newspaper’s related offerings is a fact unquestionably within the trade property of the newspaper.

newspapers to publish highly customized editions tailored to readers based not merely on their geography, but on their interests as well.

For these online editions to remain “free,” market segmentation and advertising customization will likely prove inevitable. It will likely prove a practical necessity for newspapers to target users for both editorial and advertising content to recover the costs of providing such customization and segmentation. The technology to do that potentially is at risk in this proceeding.

Allowing users to have what amounts to an operational veto over such emerging models would be poor policy, would impair the ability of publishers to defray the high costs of creating “free” content, and would deter business innovation. The consumer always has the right to avoid “unwanted” tracking by choosing not to use a website altogether. Correspondingly, a website (especially one dependent upon advertising revenue to support free content) has the legal right to refuse deeper access to users who do not wish to be “tracked,” just as many websites today condition deeper access on the user consenting to provide registration and other data. There is no precedent for giving a website visitor a right to dictate the terms on which he or she will use a website.

IV. THE PROPOSED PRINCIPLES NOWHERE ADDRESS, OR EVEN CONSIDER, THE ESSENTIAL CONSTITUTIONAL PROTECTION ACCORDED NEWSPAPERS PUBLISHING ONLINE

Moving from policy to legal issues, NAA respectfully submits that the Commission should avoid adopting or recommending proposals that threaten First Amendment freedoms. In this instance, however, the agency has ignored significant constitutional issues raised by the proposed behavioral targeting principles. The proposed principles—which concededly are intended to set a national standard, and which presumably the agency would in the future use as a

basis for consent decrees and other enforcement actions—would have profound constitutional implications if applied to online newspapers. Unfortunately, the Commission has failed even to mention, must less address, these vitally important Constitutional protections of speech and the press.

A. Online Newspapers Are Fully Protected By The First Amendment

Newspaper publishers do not forfeit their longstanding constitutional rights when they speak via electronic means rather than on paper. As newspapers today adapt their traditional journalistic news and information services to the Internet, reporters and editors continue to engage in the core press and speech functions of selecting and generating content that are fully protected by the First Amendment. *See Miami Herald Co. v. Tornillo*, 418 U.S. 241 (1974). Whether newspaper content is distributed using ink or bits makes no difference to its constitutional protection. *See Reno v. American Civil Liberties Union*, 521 U.S. 844, 864-68 (1997) (holding that the Internet receives full First Amendment protection); *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004). The great freedoms of the press and of speech enshrined in the Bill of Rights apply to newspaper websites just as they apply to print newspapers. Any effort by government regulators to restrict how content—whether editorial or advertising—is selected for delivery to readers online or on newsprint faces profound constitutional hurdles.¹⁵

Similarly, the ability of Americans to select what matter they choose to read, online or offline, also is constitutionally protected from government interference. *United States v.*

¹⁵ The proposed restrictive guidelines cannot properly be viewed as a “content-neutral” time, place and manner restriction. The guidelines are not neutral, but rather would regulate directly how editors and advertisers perform the core function of selecting what content to publish to particular readers. Nor are they defensible under *Pittsburgh Press Co. v. Human Relations Comm’n*, 413 U.S. 376 (1973), absent any allegation that the advertising itself proposes an illegal transaction.

Amazon.com, No. 3:07-gj-04-slc (W.D. Wis. 2007) (quashing grand jury subpoena to Internet bookseller requesting identities of used book buyers). Freedom of speech and of the press ensure that citizens have access to information with which they can educate themselves about political, scientific, social, or other issues of the day, expose government corruption, or make informed decisions concerning the products they purchase.¹⁶

Therefore, efforts to restrict or limit what newspaper websites publish, and the basis by which editors and advertisers make decisions regarding what to publish, run directly counter to core First Amendment rights, and can amount to a form of prior restraint. The Commission should ensure that the outcome of this proceeding is fully protective of the freedoms of the press and of speech.

B. First Amendment Jurisprudence Applies Well—Established Standards To Evaluating Governmentally—Imposed Or Endorsed Restrictions On Press And Speech

Well-established standards, rooted in a series of landmark Supreme Court decisions, govern the application of the First Amendment to restrictions on freedom of the press and of speech. In particular, “strict scrutiny” applies to governmental actions that affect the editorial choice of newspaper editors and reporters. *Miami Herald*, 418 U.S. 241. The Court has established a so—called “intermediate” level of scrutiny of regulations that affect “commercial speech”—that is, advertising. *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). Note, however, that

¹⁶ See *Pacific Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 8 (1986) (observing that First Amendment “protects the public’s interest in receiving information” (citations omitted)); *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) (“[I]t is now well established that the Constitution protects the right to receive information and ideas.” (quoting *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943))).

advertising that addresses matters of public concern receives higher protection. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

As a general conceptual matter, both the strict scrutiny and the *Central Hudson* analyses have similarities. Strict scrutiny review demands that the government prove that its actions further a compelling government interest and that there are no alternative means of advancing that interest that would restrict less speech.¹⁷ The lesser *Central Hudson* test, while phrased in language that demands slightly less from the government, similarly focuses on the substantiality of the government's interest, the degree to which the regulation effectively advances the government's interest, and the extent to which the regulation targets only the speech that is justifiably regulated. Both tests require considerably more factual support than the Commission has mustered to date.

NAA recognizes, of course, that the Commission has stated that the proposed principles are merely intended as guidelines for self-regulation and that the agency is not currently proposing regulations. Nonetheless, NAA is raising this concern now because today's voluntary principle has a tendency to become tomorrow's binding requirement, whether via the rulemaking process or a body of caselaw developed through enforcement actions.

The fully protected rights of news publishers are at stake. A limitation on behavioral targeting would directly affect the selection of content that is presented to

¹⁷ See, e.g., *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000). Indeed, while false statements may play no useful role in public debate, the First Amendment even tolerates some risk of falsehood to avoid spilling restrictions over into any protected speech. See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 270, 279-81 (1964) (protecting false statements not made with "actual malice" against libel plaintiff).

readers. “Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers,” *Miami Herald* at 418 U.S. at 256, citing *Grosjean v. American Press Co.*, 297 U. S. 233, 244-245 (1936). An endorsement of restrictions by a government regulator, even with the benign initial intent for voluntary self-regulation, would still raise constitutional concerns insofar as they would chill lawful communications.¹⁸ And constitutional standards of course would apply in any enforcement action initiated by the Commission.

Therefore, the Commission must be especially sensitive to the likelihood that its approach to behavioral targeting, however well-intentioned it may be, as applied to newspaper websites may be constitutionally infirm.

C. The Commission Must Avoid Endorsing Principles That Impair The Ability Of The Press To Deliver News And Information

Although the proposed principles seem to focus on advertising, the Commission also asks about uses of tracking data for purposes other than advertising. Today, editorial content increasingly is targeted, and newspapers are likely to use preference technologies, including information obtain from clickstream, search, and networks, to enhance their ability to tailor online editorial content to user’s interests. This trend will be accentuated as users seek an online version of a “personalized” newspaper.

It is hornbook law that the selection of editorial content receives the highest First Amendment protection. *Miami Herald Co. v. Tornillo*; *Associates & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133, 135 (9th Cir. 1971) (no “government agency—local, state, or federal—can tell a newspaper in advance what it can print and what it cannot”);

¹⁸ See *Bd. of Sch. Comm'rs v. Jacobs*, 420 U.S. 128, 134 (1975).

New York Times Co. v. United States, 403 U. S. 713 (1971) (holding that prior restraint of editorial judgment violates the First Amendment). What Internet users read also directly implicates core First Amendment protection. *United States v. Amazon.com* (W.D. Wis. 2007). The FTC has made no attempt to justify any application of these proposed principles on the targeting of editorial content.

Applying the proposed principles to online newspaper content would utterly fail to approach constitutional standards. Under strict scrutiny analysis, the Commission plainly has failed to identify, much less substantiate, any compelling governmental interest that could satisfy constitutional muster. It appears that the agency staff is relying on some putative “harm” from the tracking and targeting of editorial content, but neither the agency’s statement releasing the proposals nor the “Town Hall” from which they emerged provided any concrete examples of an actual (rather than speculative) harm. Still less has the agency made any attempt to show that such “harm” constitutes a compelling government interest. And the agency as certainly made no effort to satisfy the other elements of strict scrutiny analysis.

Accordingly, the Commission should recognize that attempts to regulate the ability of online newspapers to tailor editorial content to the interests and preferences of their readers would violate the First Amendment.

D. The Proposed Guidelines Would Unjustifiably Restrict Commercial Speech

Even if behavioral targeting “guidelines” could be evaluated under the “intermediate scrutiny” analysis applied to commercial speech,¹⁹ the so-called *Central*

¹⁹ The newspaper is not (typically) the seller of the goods or services that may appear in advertisements adjacent to the editorial content and thus is not proposing a commercial transaction through

Hudson test has become increasingly difficult for government restraints implicating speech to survive.²⁰ At a minimum, agencies must muster concrete evidence to support their line-drawing efforts. Under that standard, the FTC would have to not only identify the legitimate government interest being served but also provide some tangible proof that the identified harm is “real”—as well as show that applying the regulations would directly advance that interest in a narrowly tailored fashion. No part of this test is satisfied.

In the normal commercial speech *Central Hudson* analysis, the threshold question under is whether the speech at issue is false or misleading. *Board of Trustees v. Fox*, 492 U.S. 469, 475 (1989) (iterating that protected commercial speech must not be misleading). While it is possible that an advertiser message accompanying the publisher’s fully protected speech might be deemed false or misleading,²¹ no connection between behavioral targeting and falsity or misleadingness has been demonstrated. Quite the reverse: the purported concern is that users may receive not only truthful advertising speech, but advertising speech that meets their interest. That is not fraud or deception—that is customer service.

its website. In addition, Section 230 of the Communications Act confers websites with substantial statutory immunity for content provided by third parties. 47 U.S.C. § 230.

²⁰ See, e.g., *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002).

²¹ Courts have been particularly loathe to credit unsupported claims that speech is “potentially” false or misleading, even when the communications are indisputably commercial in nature. See, e.g., *In re R.M.J.*, 455 U.S. 191, 203 (1982). The regulator must proffer some evidence to substantiate the claim of deception. See, e.g., *Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation*, 512 U.S. 136, 146 (1994) (“[W]e cannot allow rote invocation of the words ‘potentially misleading’ to supplant the [government’s] burden . . .”).

Furthermore, vague assertions of “harm” do not substitute for a showing of real harm under the *Central Hudson* analysis. Indeed, the Commission staff conceded at the November 2007 Town Hall that it has found no evidence of actual harm. It follows that the Commission has not shown that the proposed principles would “directly advance” that or any other legitimate government interest.

Additionally, the proposed principles cannot fairly be described as “narrowly tailored.” Quite the contrary, the definition of “behavioral targeting” in the proposed principles is very broad and vague. The proposed definition includes own-site clickstream data—including both content viewed and advertising viewed. It includes own site searches (regardless of whom “powered by”) as well as Internet search engine searches. It potentially even includes—due to the inclusion of the phrase “data collected at the site”—registration data. Perhaps the proposed principles are intended to refer only to clickstream data collected by network advertisers. But, as noted in Section III above, the actual language is far more broad. Under these circumstances, it is impossible to maintain that the proposed principles are “narrowly tailored” to address the alleged harm.

In sum, there appears to be no reason for the FTC to conclude that it could apply the proposed behavioral targeting principles on newspaper publishers’ advertising-supported websites in any manner that could withstand First Amendment review.

V. CONCLUSION

For the foregoing reasons, the Newspaper Association of America respectfully urges the Commission to recognize the necessity of advertising for “free” content newspaper websites and to affirm the utility of behavioral targeting as one technology that can help support such sites. NAA further urges the Commission to avoid any actions that would infringe upon the freedoms of speech and of the press and the selection of content that appears on newspaper websites.

Respectfully submitted,

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