

November 12, 2007

Chairman Deborah Platt Majoras
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, D.C. 20580

Dear Chairman Majoras:

The attached "Supplemental Statement in Support of Complaint and Request for Inquiry and Injunctive Relief Concerning Unfair and Deceptive Online Marketing Practices," submitted in the "eHavioral Targeting" Town Hall docket on behalf of the Center for Digital Democracy (CDD) and the US Public Interest Research Group (USPIRG), reflects our concern that many of the issues that we raised in November 2006 ("Complaint and Request for Inquiry and Injunctive Relief Concerning Unfair and Deceptive Online Marketing Practices") remain unaddressed. The past year, moreover, has seen the continued growth of marketing technologies that have sharpened the precision with which Internet users are tracked and targeted, and these techniques are now being deployed in entirely new settings, including social networking sites.

Nor, unfortunately, did the discussions at the Town Hall itself suggest that the advertising industry is prepared to offer any more meaningful response to this issue than the vague promises of self-regulation that have proved insufficient in the past. On the contrary, in the few days since the Town Hall ended, a number of announcements have been made, including ambitious new targeted advertising schemes on the part of both Facebook and MySpace, that make clear the advertising industry's intentions to move full-speed ahead without regard to ensuring consumers are protected.

In reviewing the supplementary material that we are submitting (and also filed formally with the Secretary last week), we trust that the commission will pay particular attention to the impact of these new advertising practices on youth. Since both Facebook and MySpace are working with fast-food clients, for example (Coca-Cola on Facebook and Taco Bell on MySpace), the connection between targeted advertising and the commission's ongoing and statutorily required study of youth and unhealthy products needs to be explored. So, too, does the possibility that behavioral targeting firms are violating the terms of the Children's Online Privacy Protection Act, by including users under the age of 13 in their tracking/segmenting/targeting sweeps, warrant investigation.

As our supplemental filing makes clear, there are a number of other issues that warrant the immediate attention of the FTC--including the role behavioral targeting played in the current national tragedy involving sub-prime mortgage loans.

We await with interest the commission's response to this matter, and will be happy to furnish any additional information that the commission may need.

Respectfully submitted,

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Ed Mierswinski
USPIRG

cc: Commissioner Pamela Jones Harbour
Commissioner Jon Leibowitz
Commissioner William E. Kovacic
Commissioner J. Thomas Rosch

1 November 2007

Supplemental Statement)
In Support of)
Complaint and Request)
for Inquiry and Injunctive Relief)
Concerning Unfair)
and Deceptive)
Online Marketing Practices)

Exactly one year ago, on 1 November 2006, the Center for Digital Democracy (CDD) and the US Public Interest Research Group (USPIRG) filed a "Complaint and Request for Inquiry and Injunctive Relief Concerning Unfair and Deceptive Online Marketing Practices." As we asserted at that time, "The policies governing consumer privacy on the Internet have failed to keep pace with the developments that continue to re-shape the online world... Privacy policies designed for a largely static, text-based World Wide Web offer little protection in the dynamic Web of the present, in which both rich-media content, and the array of sophisticated marketing technologies designed to support that content, are assembled and re-assembled on the fly, customized and targeted for the user."¹

Unfortunately, nothing has changed over the past 12 months to alter that assessment, and thus we respectfully submit this supplemental filing in support of our original complaint. Neither the deliberations of the Federal Trade Commission, nor the PR efforts of industry (including the Interactive Advertising Bureau's recently opened lobbying office in Washington, DC) has contributed meaningfully to the promotion and preservation of online privacy. On the contrary, another year of industry consolidation, coupled with continued advances in tracking and targeting technologies, has left Internet users even

¹ Center for Digital Democracy and the US Public Interest Research Group, "Complaint and Request for Inquiry and Injunctive Relief Concerning Unfair and Deceptive Online Marketing Practices," 1 Nov. 2006, <http://www.democraticmedia.org/files/pdf/FTCadprivacy.pdf> (viewed 18 Oct. 2007), 2.

more vulnerable to the incursions of invasive online marketing. Again, as we stated last year, "The data collection and interactive marketing system that is shaping the entire U.S. electronic marketplace is being built to aggressively track us wherever we go, creating data profiles to be used in ever-more sophisticated and personalized "one-to-one" targeting schemes."²

That unfortunate status quo, sad to say, still prevails. The right hand of online marketing continues to hide behind the myth of anonymity, even while the left hand of Web analytics constructs remarkably detailed mosaics out of innumerable shards of purportedly "non-personally identifiable" information. Seven years after the National Advertising Initiative members promised that users would soon have access to the personal profiles that marketers had compiled (in order to correct or delete those dossiers), that data remains as guarded as the secret algorithms and targeting formulas of the industry giants.³ And seven years after the FTC, by a four-to-one vote, called for privacy legislation—"... backstop legislation addressing online profiling is still required to fully ensure that consumers' privacy is protected online"—Internet users remain at the mercy of industry privacy policies that are far more self-serving than self-regulatory.⁴

As detailed below, CDD and USPIRG remain concerned that the online advertising industry continues to run roughshod over basic privacy rights in five key areas:

- User Tracking/Web Analytics: an elaborate system of surveillance that tracks, compiles, and analyzes the movements of Internet users.
- Behavioral Targeting and retargeting: a system of personalized, one-to-one marketing designed to deliver, through investigation and inference, "relevant" advertising to "in-market" Internet users.

² CDD and USPIRG, "Complaint and Request for Inquiry and Injunctive Relief Concerning Unfair and Deceptive Online Marketing Practices," 2-3.

³ According to Section IVB1(f) of the NAI principles, "Network advertisers shall provide consumers with reasonable access to PII and other information that is associated with PII retained by the network advertiser for OPM uses." Network Advertising Initiative, "Self-Regulatory Principles for Online Preference Marketing by Network Advertisers," 2000, 8, <http://www.ftc.gov/os/2000/07/NAI%207-10%20Final.pdf> (viewed 15 Oct. 2007).

⁴ Federal Trade Commission, "Online Profiling: A Report to Congress. Part 2, Recommendations," July 2000, 10.

- Audience Segmentation: the classification of individuals into narrowly drawn categories, whose often-flippant taxonomy, from "Shopaholics" and "Penny Pinchers" to "Lonely Hearts" and "Hardcore Gamers," masks the crass, manipulative nature of such digital stereotyping.
- Data Gathering/Mining: the "moving target" of online marketing, whose algorithms grow more powerful as the databases they adumbrate and assess—literally billions of search terms, "cookie crumbs," and assorted transactions—grow more extensive.
- Industry Consolidation: with more and more data falling into fewer and fewer hands—reflected in the multi-billion-dollar acquisitions of Google, Microsoft, and AOL in recent months—the opportunities for abuse of that power only increase.

To these five areas of concern we now add two additional issues that warrant the FTC's immediate attention, for they speak to the future of the Internet—indeed, to the future of our democracy—in a manner that cannot await the deliberate pace with which the commission has approached privacy in the past. First, the cavalier attitude with which industry markets to youth online is nothing short of scandalous. The Children's Online Privacy Protection Act of 1998 may protect the privacy of users under the age of 13, but as this amended complaint documents, it appears they are increasingly being subjected to behavioral targeting techniques. Teens remain completely unprotected from an increasingly intrusive set of data mining and targeted marketing practices.

Second, online marketers have recently set their sites on social networks, the Web 2.0 communities whose staggering popularity—over 140 million users between MySpace and Facebook alone—is outstripped only by their potential "monetization," in the language of Behavioral Targeting 2.0. Privacy considerations aside, the sheer betrayal of trust, as youth-driven communities are effectively sold to the highest advertising bidders, threaten to undermine the shared culture of the Internet.

A. User Tracking/Web Analytics

The online system of surveillance and tracking that we described in our complaint last year continues unabated. As the commission itself noted in its June 2000 "Online Profiling" report,

The information gathered by network advertisers is often, but not always, anonymous, *i.e.*, the profiles are frequently linked to the identification number of the advertising network's cookie on the consumer's computer rather than the name of a specific person.... In some circumstances, however, the profiles derived from tracking consumers' activities on the Web are linked or merged with personally identifiable information ("PII"). This generally occurs in one of two ways when consumers identify themselves to a Web site on which the network advertiser places banner ads. First, the Web site to whom personal information is provided may, in turn, provide that information to the network advertiser. Second, depending upon how the personal information is retrieved and processed by the Web site, the personally identifying information may be incorporated into a URL string that is automatically transmitted to the network advertiser through its cookie.⁵

More than merely a sweep of data into various digital repositories, however, the user-tracking system (as we shall discuss more fully below) also includes a range of analytical processes designed to refine the data in preparation for various ad-targeting schemes.

Again, quoting the FTC's own 2000 study,

Once collected, consumer data can be analyzed and combined with demographic and "psychographic" data from third-party sources, data on the consumer's offline purchases, or information collected directly from consumers through surveys and registration forms. This enhanced data allows the advertising networks to make a variety of inferences about each consumer's interests and preferences. The result is a detailed profile that attempts to predict the individual consumer's tastes, needs, and purchasing habits and enables the advertising companies' computers to make split-second decisions about how to deliver ads directly targeted to the consumer's specific interests.⁶

Today, more than seven years after the commission's study, the power and precision of these tracking and analytical techniques have increased several-fold, particularly as data from diverse sources—online and off—are combined and processed. Data mining is a "great example of a disruptive technology that dramatically changes marketing and enables individual targeting," says Dave Morgan, CEO of Tacoda. "It changes how you have to approach your markets."⁷ Morgan was speaking as a participant in the recent Marketing & Media Ecosystem 2010 study, conducted earlier this year by Booz Allen Hamilton in conjunction with the Association of National Advertisers, the Interactive

⁵ Federal Trade Commission, "Online Profiling: A Report to Congress," June 2000, 4-5.

⁶ "Online Profiling: A Report to Congress," 5.

⁷ Quoted in Andrea Rasmussen, Carolyn Ude, and Edward Landry, "HD Marketing 2010: Sharpening the Conversation," n.d. [2007], 6.

Advertising Bureau, and the American Association of Advertising Agencies. Over 250 marketers were consulted on a number of topics related to the kind of disruptive technologies to which Morgan referred. The project report bears repeated witness to the growing importance of tracking and analytics:

Every web page's individual views, every word typed in a search query box (also known as the "database of consumer intentions"), every video download, and every word in an email may create one more data point that a marketer can leverage and use to more precisely target the audience with customized media placement and messaging. Tacoda (recently purchased by AOL), the largest advertising network, has more than 4,500 sites, collects over 135 million individual behaviors fifty times each month, and has segmented the online audience into behavioral buckets.⁸

The 2010 marketing study participants referred also to the dialogs, both intentional and inferential, that exist between marketers and consumers: "Now, marketers can have real-time conversations with consumers. They can identify and draft high consumer-influencers as brand advocates, gather ideas to improve their products or services, and change their marketing messages and media mix instantaneously, depending on what is working now. And they can do all of the above immediately."⁹

Many of those conversations, to be sure, are of the "overheard" variety, as marketers "listen in" on user interactions online. The data, it seems, are everywhere. "By virtue of their use, digital channels generate lots of additional data on consumers," explains marketing consultant Nick Earnshaw.

But this online data can be even more powerful when combined with traditional offline datasets, using real-time decisioning.... Real-time decisioning involves using all available data on a customer (whether stored or instantly generated), and then developing rules to identify which individual offers or treatments are most appropriate, regardless of which channel they happen to be using. Consider this simple example. An existing customer goes onto the brand's website and begins browsing a number of products. Consulting offline data (i.e., their transaction history) shows that the customer in question hasn't made a purchase for a while. Combining online and offline data in real time could trigger a personalised offer

⁸ Rasmussen, *et al*, "HD Marketing 2010: Sharpening the Conversation," 6. Among the six key trends identified by the study was one, "Marketing + Math," that underscored the importance of quantitative analysis: "Data quality, quantity, and accessibility have brought math to marketing. New digital tools, predictive models, and behavioral targeting will turn insight into foresight."

⁹ Rasmussen, *et al*, "HD Marketing 2010: Sharpening the Conversation," 2.

to the customer, offering them a discount on the products they've been looking at as an incentive to encourage their next purchase.¹⁰

Microsoft, for example, draws on third-party sources to create a "wealth index," which allows advertisers to target consumers based on their income, among other demographic variables.¹¹ Touch Clarity facilitates the internal processing of user data—"By passing compact Web site visitor behavioral profiles back to CRM systems that track other channels, and passing CRM data from other channels to the On-site Behavioral Targeting system, truly consistent multi-channel customer views become practical and possible"—while technology from Visual Site enables the exchange of data with other marketing firms: "Visual Site's openness and flexibility allows the rapid integration of data from advertising vendors or other sources of visitor profile and campaign information. The same openness allows *any of the analytics that Visual Site provides, for instance an individual visitor's lifetime value, to be output on an ongoing basis so such information can be used by external vendors for further targeting purposes.*"¹²

WhitePages.com, meanwhile, has called on Revenue Science to add behavioral targeting capabilities, exploiting offline as well as online data:

Expanding further from its phone directory roots, WhitePages.com has added third-party results from Web search, public records, and professional profiles, and a fledgling e-mail search product. The Web search data will come from Microsoft's Live Search index, with queries formulated by WhitePages.com to return the most relevant people-based or location-based results. Public records data, including criminal record and background checks, will come from a U.S. Search data feed. Professional profiles for people and companies will come from ZoomInfo. Additional providers in related fields will likely be added later this year.¹³

¹⁰ Nick Earnshaw, "Developing Positive Interactions through Real-time Decisioning," *iMedia Connection*, 23 Oct. 2007 (viewed 24 Oct. 2007).

¹¹ Greg Brooks, "Microsoft to Bring 'Wealth Index' Ad Targeting to the UK," *NMA*, 10 Apr. 2007, <http://www.nma.co.uk/Articles/35201/Microsoft+to+bring+wealth+index'+ad+targeting+to+the.html> (viewed 22 Oct. 2007).

¹² Touch Clarity, "The Rise of On-Site Behavioral Targeting." "Visual Site Delivers Comprehensive Online Ad Campaign Analytics and Optimization Solution," press release, 16 May 2007, emphasis added, <http://www.websidestory.com/press/20070516/1/> (viewed 21 Oct. 2007).

¹³ Kevin Newcomb, "WhitePages.com Expands People Search," *ClickZ*, 24 Jan. 2007, <http://www.clickz.com/showPage.html?page=3624662> (viewed 24 Oct. 2007).

Even more dramatically, Acxiom, long a consumer-information broker in direct- and tele-marketing campaigns, is now moving its operation online. "Acxiom Corp. knows a lot about you," write Kevin J. Delaney and Emily Steel in the *Wall Street Journal*,

It has scoured public records for how many cars you own and what your house is worth. It has accumulated surveys that show if you are married and how many children you have. And for years Acxiom sold that information to marketers eager to use it to send mailings and make telephone pitches to consumers most likely to buy. Now, the Little Rock, Ark., company is putting those hundreds of millions of bits of data in the service of customizing which display ads to show people browsing the Web—a development that has raised red flags with some privacy advocates....

Acxiom's new service, Relevance-X, goes further, drawing on the company's database of 133 million households to determine which ads to show. Acxiom's consumer database includes information gleaned from sources such as public real-estate and motor-vehicle records, surveys and warrantee cards consumers fill out. Estimates of annual income, marital status, average ages of kids, home ownership and property value, educational level and travel histories are also available.¹⁴

As LookSmart Vice President Ari Kaufman has observed, speaking of the potential of cookies to aid in the aggregation and exchange of data, "Advertisers have thrown various behavioral targeting techniques together into the kitchen sink in an attempt to make the most out of everything available. These techniques need to integrate, talk to each other and take multi-channel, offline initiatives into consideration, as well.... A first-party cookie can serve as a common translator with which each technology can communicate. It can break the silo walls and enable an advertiser to integrate various techniques and leverage the knowledge from one technology to benefit the other."¹⁵

Another way user tracking will expand is through mobile networks. "Mobile devices are likely to play as large a role in marketing in the future as fixed television and broadband computer-based internet applications do today," observes Rishad Tobassowaala, CEO of Denuo. "Mobile offers the combination of persistent use, mobility, targeting, interaction

¹⁴ "Acxiom contracts with Web sites that collect consumer addresses, such as online retailers and those offering sweepstakes and surveys," the *Journal* reports. "In a blink, Acxiom looks up the people who provide their addresses in its database, matches them with their demographic and lifestyle clusters and places "cookies," or small pieces of tracking data, on their computer hard drives." Kevin J. Delaney and Emily Steel, "Firm Mines Offline Data to Target Online Ads," *Wall Street Journal*, 17 Oct. 2007, B1.

¹⁵ Ari Kaufman, "The Targeting Solution You've Been Waiting For," *iMedia Connection*, 6 June 2007, <http://www.imediaconnection.com/content/15223.asp> (viewed 24 Oct. 2007).

and data richness."¹⁶ As the UK-based Internet Advertising Bureau suggests, "... [T]he internet knows where you are—especially when using your mobile phone. While a user's location could always be discerned roughly using an IP address, it is now entirely possible to pin-point a consumer's location very accurately. In 2007/2008 geo-targeted internet advertising will begin to be based on a user's actual location...."¹⁷

Already, with the full implications of Web 2.0 still to be determined, the Web analytics community has its sites set on Web 3.0, which "will be about mobile computing," according to Eric Nelson, author of *Web Analytics Demystified*:

- ... Web 3.0 will create unique opportunities
 - Every request for information could be tied to a good unique ID
 - Every request for information could be coupled with a *geographic location*...
- Just think about the new questions you'll be able to ask with Web Analytics 3.0!
 - Which of our stores was the visitor in or near when they came to our site?
 - What offers do we have in the visitor's neighborhood at work or at home?
 - Can the visitors' location or demographic profile be used to disambiguate search?
 - Which ads work best based on the visitors' phone browsing platform and time of day?
 - What message would be most appropriate given time of day, geographic location, and observed visitor behavior?
- Web 3.0 will bring advertisers and marketers closer than ever to their customers¹⁸

Despite these advances in tracking and analysis, some things haven't changed at all. Marketers still claim, for example, that their data collection activities are done anonymously. "The vast majority of behaviors we collect are done on an anonymous basis," declared Yahoo Senior Director of Product Marketing Richard Frankel last year, sentiments that have become something of a mantra among the marketing companies. Frankel, at least, was a little more forthright than most. "We know identity only on those

¹⁶ "Sprint Mobile Media Network," Sprint, <http://www.sprintmedianetwork.com/about.php> (viewed 22 Oct. 2007).

¹⁷ "Targeting," Internet Advertising Bureau, <http://www.iabuk.net/en/1/internetadvertisingtargeting.html> (viewed 22 Oct. 2007).

¹⁸ Eric Nelson, "Web Analytics Demystified," PowerPoint presentation, n.d. [2007], 33-34.

occasions when the user has chosen to log in," he admitted, "which gives them the full benefits of personalization, which include more relevant content and ads."¹⁹ Sites such as Yahoo, of course, regularly entreat visitors to register and log in, and *require* such self-identification in order to participate in some activities online (such as checking one's Yahoo email account, for example).

"Exhibit A" in the tracking/analysis sweepstakes, though, would have to be the proposed Google/DoubleClick merger (discussed in greater detail below). As Mark Ward, a software engineer for RevCube (itself a provider of multi-channel online ad campaigns) explains, without DoubleClick Google's online tracking ends once the user leaves the search results page. But with DoubleClick in its fold, Ward points out, "...if a user stays on major sites [assuming DoubleClick is on the site the user browses] and uses Google to search, it's conceivable Google/DC would know what page the users was on, when the user was on it, where the user was coming from, etc., for every page the user ever browses."²⁰ From log-on to sign-off, in other words, the combined Google/DoubleClick will be able to track users throughout their online travels, gathering data every step of the way, and then mining that data for the valuable profiling information therein.

As we concluded in our complaint last November, nowhere are users warned that their movements are being digitally shadowed in this manner, nor that such information, coupled with behavioral targeting technologies, can be used to lure site visitors into seemingly irresistible commercial transactions. "On-site Behavioral Targeting," notes Touch Clarity, "recognizes all visitors each time they return, remembers everything about their previous visits, and can leverage that previous behavior to deliver even more relevant and targeted content and promotions which increases their likelihood to purchase substantially."²¹ By the time that the average user even *finds* the opt-out procedure

¹⁹ Quoted in Anna Papadopoulos, "Yahoo's New Behavior," *ClickZ*, 19 July 2006, <http://www.clickz.com/showPage.html?page=3620586> (viewed 10 Oct. 2007).

²⁰ Quoted in Alexandra Wharton, "Look Out," *revenue*, July/Aug. 2007, 54.

²¹ Touch Clarity, "The Rise of On-Site Behavioral Targeting," <http://www.touchclarity.com/downloads/index.php?fileid=106> (viewed 4 Oct. 2006, registration required). Nor does the common practice of prevarication in the face of inquisitive websites promise any real protection, thanks to new software being developed by Microsoft in its research facility in China: "If you thought you could protect your privacy on the web by lying about your personal details," cautions *New*

buried in the fine print of privacy statements that raise more questions than they answer, the damage has already been done.

B. Behavioral Targeting

"The fundamentals of behavioral targeting are simple," writes Phil Leggiere in *Behavioral Insider*: "getting the right message to the right person at the right place at the right time."²² Unfortunately, in the absence of the legal implementation of Fair Information Practices the BT process can be all wrong, too.²³ Even a BT practitioner like Rob Graham, author of *Fishing From a Barrel: Using Behavioral Targeting to Reach the Right People With the Right Ads at the Right Time*, recognizes the technology's darker side. "For the first time in the history of marketing," he declares, "the ability to reach individuals based on their needs, interests, desires and sudden urges is within reach of advertisers." But such power, Graham admits, also raises the specter of surveillance. "There's no way to sugar coat this," Graham writes. "In order to learn more about individual consumers, marketers have to resort to 'spying.'"²⁴ The results of that spying, moreover, can be a little *too* personal: As Facebook and MySpace "continue to collect data from their millions of users," writes the Internet Advertising Bureau (UK), "patterns

Scientist magazine, "think again. In online communities at least, entering fake details such as a bogus name or age may no longer prevent others from working out exactly who you are. That is the spectre raised by new research conducted by Microsoft. The computing giant is developing software that could accurately guess your name, age, gender and potentially even your location, by analysing telltale patterns in your web browsing history. But experts say the idea is a clear threat to privacy—and may be illegal in some places.... [T]he software could get its raw information from a number of sources, including a new type of "cookie" program that records the pages visited. Alternatively, it could use your PC's own cache of web pages, or proxy servers could maintain records of sites visited. So far it can only guess gender and age with any accuracy, but the team say they expect to be able to "refine the profiles which contain bogus demographic information", and one day predict your occupation, level of qualifications, and perhaps your location. Paul Marks, "New Software Can Identify You from Your Online Habits," *New Scientist*, 16 May 2007, http://technology.newscientist.com/article.ns?id=mg19426046.400&feedId=being-human_rss20 (viewed 21 Oct. 2007).

²² Phil Leggiere, "Targeting Multi-Modally," *Behavioral Insider*, 26 Sept. 2007, http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticle&art_aid=68158 (viewed 24 Oct. 2007).

²³ See, for example, "OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data," http://www.oecd.org/document/18/0,2340,en_2649_34255_1815186_1_1_1_1,00.html (viewed 23 Oct. 2007).

²⁴ Quoted in Michael Estrin, "Getting Ads to the Right Eyeballs," *iMedia Connection*, 20 Apr. 2007, <http://www.imediaconnection.com/content/14559.asp> (viewed 21 Oct. 2007).

and trends will start to emerge allowing marketers *to know more about the consumer than the consumer will ever know about their own subconscious buying patterns.*"²⁵

"Including actual physical location in behavioral targeting is next," suggests Marla R. Schimke, vice president of marketing at Revenue Science. "What's going to happen once GPS-chip handsets are out is that an advertiser can target a consumer based on where they are with their mobile device. So you can reach a consumer when you know they are approaching, say, a Starbucks or a clothing store at the mall with an ad customized to them, like a free cookie with your laté or 10 percent off on a new pair of boots."²⁶

And while the BT companies speak at length about the anonymous, aggregate nature of the data they collect, their product information is replete with references to the technology's ultimate goal: to reach specific individuals.²⁷ "Behavioral targeting goes one step beyond search," Revenue Science CEO Bill Gossman points out, "because, rather than engagement with page editorial, it provides engagement with an individual human—an actual carbon-based life form.... You can see how search and behavioral targeting are complementary advertising strategies: Search knows pages or words and their engagement with other words, while behavioral targeting knows people and their engagement with topics."²⁸ As users reveal more of themselves through Web 2.0

²⁵ "Targeting," Internet Advertising Bureau, emphasis added,

<http://www.iabuk.net/en/1/internetadvertisingtargeting.html> (viewed 22 Oct. 2007).

²⁶ Quoted in Papadopoulos, "Chatting With Behavioral Targeting's Darlings, Part 1," *ClickZ*, 10 Oct. 2007, <http://www.clickz.com/3627139> (viewed 23 Oct. 2007).

²⁷ In measuring website traffic or advertising reach, advertisers often speak of "unique individuals." According to the Interactive Advertising Bureau, for example, a unique user is a "unique individual or browser which has either accessed a site (see unique visitor) or which has been served unique content and/or ads such as e-mail, newsletters, interstitials and pop-under ads. Unique users can be identified by user registration or cookies. Reported unique users should filter out robots." "Glossary of Interactive Advertising Terms," Interactive Advertising Bureau, <http://www.iab.net/resources/glossary.asp#u> (viewed 23 Oct. 2007). comScore, similarly, says that "Unique visitors is a measure of how many unique (i.e. different) individuals visit a site over some period of time. This is an appropriate metric to quantify the size of the unduplicated audience a site reaches. Combining the unique visitor metric with the frequency of visits, you have a measure of both reach and loyalty." "The Challenges of Reconciling Panel-Based and Server-Based Unique Visitor Counts," comScore, <http://www.comscore.com/mt/mt-search.cgi?IncludeBlogs=2&search=unique> (viewed 25 Oct. 2007).

²⁸ Bill Gossman, "BT Engages with People, Not Pages," *iMedia Connection*, 9 Mar. 2006, <http://www.imediaconnection.com/content/8583.asp> (viewed 23 Oct. 2007). Such targeting, adds Marla Schimke, vice president of marketing at Revenue Science, is particularly useful in the Web 2.0 context of blogs, video, and other user-generated programming. "This type of content is a gold mine for behavioral

activities, moreover, the targeting becomes even more sharply focused on specific individuals:

Web 2.0 marks a shift in how you interact with consumers, with increased focus on longer term relationships. Of course, immediate conversions—such as sales—are still critical to measure. But understanding your visitors and customers over time is an increasingly important aspect of this new paradigm. To understand your customers' behaviors and preferences over time, you need a complete record of every interaction, and you need that interaction associated to a unique individual. In other words, you need a Lifetime Individual Visitor Experience (LIVE) Profile™. With a complete picture of an individual's online visitor behavior, you are able to personalize site experiences, enable one-to-one marketing, understand behavior across channels, and accurately assess the value both customers and your marketing activities....²⁹

According to Coremetrics,

...[I]t will become increasingly important to know your visitors and customers at an individual level, and to build long-term, deep relationships with them. Personalization and relationship marketing are becoming more of a reality. To be successful, marketers need a robust behavioral analytics solution and a complete record of all visitor behavior—not a sampling of data, and certainly not simple statistics about click throughs and page hits. Only with a customer-centric data asset will marketers be able to harness the power of the Internet and provide their visitors with a truly personal experience that optimizes their business goals."³⁰

There's plenty of data, certainly, to create such personalized, one-to-one experiences—even data that otherwise might be discarded, as Tacoda's Dave Morgan explains: "[W]hat we did is basically built a platform that takes all the data that's normally thrown away, and we extract it from the systems that serve the content, that serve the ads, that serve the email, that personalize the commerce experience—we pull it together from all of these disparate systems, and we unify it around a set of consumer profiles, which represent specific individuals who have interacted with the web publisher."³¹ Still other sites use more readily available data. Yahoo's new customized, dynamically generated SmartAds,

targeting because by and large it does not carry the depth of context needed for a traditional advertising buy," she observes. "At Revenue Science, we call it the 'contextual desert,' and it makes up the vast majority of the Web today. This fragmented, personal, and unplannable content requires advertising relevant to the person viewing it, rather than the content itself." Quoted in Anna Papadopoulos, "Chatting With Behavioral Targeting's Darlings, Part 1."

²⁹ Coremetrics, "Winning in a Web 2.0 World: Metrics-Driven Success," n.d., [2007], 7-8.

³⁰ Coremetrics, "Winning in a Web 2.0 World: Metrics-Driven Success," 10.

³¹ Quoted in Jeff Bercovici, "Mining the Real Value of Web User Data," *Media Life Magazine*, 5 June 2003, http://www.medialifemagazine.com/news2003/jun03/jun02/4_thurs/news4thursday.html (viewed 24 Oct. 2007).

for example, introduced last July, draw on a variety of user data that Yahoo collects. "SmartAds makes heavy use of 'customer insights' extracted from data Yahoo keeps on visitors, including their shopping, searching and Web surfing behaviors, as well as registration information and location data."³²

According to Bob Walczak, CEO of mobile ad network MoPhap, "The challenge with behavioral targeting lies in reaching the same customer across different media. With MoPhap's mobile server-side cookie, we're able to target by creating a comprehensive profile based upon a user's browsing history over time. The technology derives contextual meaning from each page that the user visits. This combines to create a psychographic user profile.... From the very beginning, we've attempted to build out a platform that brings online functionality to a mobile environment."³³ Joining MoPhap in this effort is MeMedia, a "multimodal advertising solutions provider" with which it recently signed an agreement. "MeMedia will utilize MoPhap's SparkMobile technology to deliver its multimodal targeting technologies to mobile users," reports *Wireless News*. "Together, MoPhap and MeMedia demonstrate how online networks can extend their reach into mobile—and maximize revenue potential for advertisers and publishers.... 'MoPhap's technology enables the expansion of our multimodal targeting capabilities into the mobile space,' says Chirag Patel, president and CEO of MeMedia. 'Together, our combined technology platforms will provide advertisers the unique opportunity to seamlessly deliver highly targeted and cohesive advertising campaigns inside the browser, within desktop software applications, and on mobile devices.'"³⁴

Another mobile targeter, Third Screen Media (now controlled by Time Warner/AOL), touts its TSM|TargetProfile system, which "captures key demographic data to enable more targeted and relevant media plans and recommendations.

- Gender, age & ethnicity
- HHI (Household income)

³² Kevin Newcomb, " *SearchEngineWatch*, 2 July 2007, <http://blog.searchenginewatch.com/blog/070702-103231> (viewed 22 Oct. 2007).

³³ Quoted in Leggiere, "Targeting Multi-Modally."

³⁴ "MoPhap and MeMedia Join Forces to Expand Reach of Mobile Advertising Industry," *Wireless News*, 13 Sept. 2007.

- Purchase intent
- Martial status & number of children
- Home/auto ownership
- Interests & hobbies
- Job description
- Mobile Internet usage; & more³⁵

BT often takes the form of *re-targeting*, in which individuals' prior decisions *not* to complete a given transaction, ironically, become grounds for persistent, highly focused marketing efforts. "Ninety-eight percent of Internet shoppers leave ecommerce sites without buying," notes Troy Janisch of the Icon Interactive Group, "which is why Internet-savvy marketers are starting to use re-targeting technology to pursue customers who have left their website, and to recapture lost sales."³⁶ Retargeting.com specializes in such strategies, which it unleashes on non-customers and former customers alike:

With the placement of 1 simple code on each page of your website that receives incoming visitors (similar to web analytics codes you probably already have in place), Retargeting.com's powerful technology begins identifying your visitors for you the instant it's live on your page.... Retargeting.com will start locating your past visitors among the 75,000,000 consumers we serve ads to within minutes of when they left your site and will begin "Retargeting" them for you within 24 hours! ...The consumer returns to your site to complete the sale. Now you have the ability to send visitors directly to your "here is where we close the sale" page.... Once a consumer has made a purchase with you and had an impeccable experience, don't be shy to keep in contact with them again. The trust is already there, they are familiar with your brand and service, and more than likely they have an interest in another one of your products... Up-Sell, Cross-Sell, and just plain old make your website Sell, Sell, Sell!³⁷

³⁵ "TSM|TargetProfile," Third Screen Media, <http://www.thirdscreenmedia.com/products/target-profile/> (viewed 23 Oct.2007). The profile system is a survey in which "[t]o capture the cleanest data possible, surveys are fielded entirely via mobile phone. Your audience is invited to take the survey from the TSM-enabled banner spaces within your content.... No personal data is collected about your audience without permission. We do not release our survey respondents' phone numbers or phone data. All surveys are entirely opt-in. We take our audience's privacy very seriously. All responses are captured on secure servers, and no data is ever sold or shared with a third party." Users are unaware, however, of how such information will be used in the expansion of target marketing over mobile communications services.

³⁶ Troy Janisch, "Clicks that Stick: Re-targeting Users that Leave Your Website," Wisconsin Technology Network, 7 Aug. 2007, <http://wistechnology.com/article.php?id=4107> (viewed 23 Oct. 2007).

³⁷ "What is Retargeting?" Retargeting.com, http://www.retargeting.com/about-what_is_retargeting.htm (viewed 25 Oct. 2007).

Earlier this year, in direct response to the threat posed by a combined Google-DoubleClick, the Electronic Privacy Information Center (EPIC, along with CDD and USPIRG) filed a complaint with the FTC concerning the proposed merger. "The massive quantity of user information collected by Google coupled with DoubleClick's business model of consumer profiling," concluded a June 2007 supplement to EPIC's original April 2007 complaint, "could enable the two companies to construct extremely intimate portraits of its users' behavior. Google's wide variety of services provides ample opportunities for DoubleClick to target users with its DART advertising technology."³⁸ The DART system, in turn, provides Google with a complete set of applications—and data access—to allow it to extend its more linear search advertising business into the third-party and rich-media advertising market. "Without a doubt, DoubleClick's historical data is very valuable," says Jupiter Research analyst Emily Riley. "Every time you're online, every page visit, and every ad you see comes with the possibility that a cookie is placed on your machine. DoubleClick has all the data."³⁹ Rich Tehrani, editor of TMC.net, notes that "with the acquisition of DoubleClick, Google now has access to the cookies and subsequently browsing history of vast numbers of web users. It would be fair to say that greater than 85% of Internet users frequently come into contact with ads served by DoubleClick. In addition there are a vast number of sites serving up Google's ads and running Google Analytics. Google perhaps now has access to the behavioral information of over 90% of web users. One can expect Google to start mining DoubleClick's databases immediately and in the process, cross reference this data with its own vast databases of search history and perhaps even Gmail content."⁴⁰

While they pose the biggest threat to user privacy, Google and DoubleClick are by no means alone in the deployment of aggressive behavioral targeting technology.

"Targeting customers based on their behavior has long been a part of the marketing conversation," observed Carol Krol in the journal *B to B*. "But thanks to the wealth of

³⁸ Electronic Privacy Information Center, "In the Matter of Google, Inc. and DoubleClick, Supplemental Materials in Support of Pending Complaint and Request for Injunction, Request for Investigation and for Other Relief," Federal Trade Commission filing, 6 June 2007, 19.

³⁹ Quoted in Sean Wolfe, "Crunching the Cookie," *Red Herring*, 19 Apr. 2007, <http://www.redherring.com/Article.aspx?a=22051&hed=Crunching+the+Cookie> (viewed 24 Apr. 2007).

⁴⁰ Rich Tehrani, "Google Achieves Behavioral Targeting Nirvana," TMC.net, 16 Apr. 2007, <http://www.tmcnet.com/news/2007/04/16/2510402.htm> (viewed 25 Apr. 2007).

behavioral information they can glean from their Web site traffic and analytic applications that make these data, once the sole domain of technology specialists and statisticians, more accessible and comprehensible, growing numbers of marketers are starting to embrace the technique."⁴¹

Those "growing numbers" are expanding rapidly, moreover. eMarketer predicts that BT ad spending will reach \$1 billion in 2008 (up from \$350 million in 2006 and \$575 million in 2007). While that figure represents only 11 percent of the U.S. display, rich media, and video market, "with greater attention being paid to ad targeting overall and an increased focus on brand marketing online, this level of spending will nearly quadruple by 2011."⁴² And since only a third of all ad-supported sites currently support behavioral targeting, eMarketer points out, "many more publishers will be joining behavioral targeting ad networks over the next few years."⁴³

A Forrester Research survey of 253 marketers in December 2005 found a similar upward trend for BT, from 38 percent who said they were already using the technique to another 36 percent who said they planned to pilot BT campaigns in 2006.⁴⁴ Within five years, predicts Revenue Science CEO Bill Gossman, "very large publishers will be selling 30% to 50% of their ad inventory using this [behavior targeting] technique."⁴⁵

Many of these publishers will be attracted by the "precise targeting" that companies such as 24/7 Real Media promise. "Who would you like to reach and how and when would you like to reach them?" asks the 24/7 website. "We can get as precise as you want. Would you like to reach single women who own cars and are sports-enthusiasts in

⁴¹ Carol Krol, "Behavioral Targeting Grows; Sophisticated Analytics Tools Enable Marketers to Customize their Messages," *B to B*, vol. 92, no. 10 (13 Aug. 2007), <http://www.btobonline.com/apps/pbcs.dll/article?AID=/20070813/FREE/70813006/1109/FREE> (viewed 25 Sept. 2007).

⁴² David Hallerman, "Behavioral Targeting: Advertising Gets Personal," eMarketer, June 2007, 1.

⁴³ Hallerman, 3.

⁴⁴ Hallerman, 10.

⁴⁵ "Behavioral Advertising on Target... to Explode Online," eMarketer, 11 June 2007, <http://www.emarketer.com/Article.aspx?id=1004989> (viewed 9 Oct. 2007).

Chicago, or maybe Japanese teens that live in the city and buy DVDs? Whoever you want to reach, we have targeting down to a science.

- Behavioral. Serve ads based on your customers' browsing behavior.
- Demographic. Target campaigns based on a number of demographic criteria such as race, age, income, sex, employment, education, and home ownership.
- Technographic. Target based on web browser, browser version, bandwidth or operating system.
- Retargeting. Flag visitors to a site based on what they did on their last visit, and then "retarget them" when they return.
- Geo-dem. Overlay geographic data such as country, state or zip code with demographic information.
- Daypart. Tell us what hour of the day or day of the week that you'd like an ad to be viewed.
- Content. Choose specific sites, sections or positions on a page for ad placement.
- Keyword/search. Serve ads based on specific keywords that are entered into a search engine.
- Custom. Develop a specific targeting strategy that is customized for whatever your marketing goal may be.⁴⁶

Living up to its name, Specific Media promises equally precise results through its "Behavioral Targeting Index":

Specific Media's Behavioral Targeting Index scores each user relative to the likelihood of a purchase in over 3,300 categories

Behavioral targeting gives advertisers the ability to target users whose previous web-surfing patterns and behaviors indicate an interest in a particular product, category or service.

Specific Media's Behavioral Targeting Index advances current behavioral targeting methods by assigning a quantifiable score to each user on our network, predicting his or her probability to complete a transaction in 3,300+ categories. This advanced technology enables Specific Media advertisers to do more than

⁴⁶ "Precision Targeting," 24/7 Real Media, <http://www.247realmedia.com/EN-US/you/precision-targeting.html> (viewed 17 Oct. 2007).

simply target users who previously visited a website - they target users who are 3 times more likely than the average person to purchase their product.

Behavioral targeting with Specific Media offers advertisers the opportunity to expand the reach and frequency of their online campaigns and engage their target audience throughout our network of 450+ name brand publishers. Our advanced behavioral targeting gives advertisers the ability to find users who are actively seeking information about their products or services throughout the purchase cycle: awareness, information search, alternative evaluation, purchase decision and post-purchase behavior. Advertisers can target these audience segments with specific messaging tailored for each stage in order to maximize relevance and strengthen brand awareness.⁴⁷

Before long, BT will move into entirely new areas, including social networks (discussed in section G below) and online video sites. "Coming this fall from YouTube," proclaimed *Advertising Age* last spring: "richer demographic information."

"We'll never have had that much data about that much content," said Suzie Reider, chief marketing officer at YouTube. She was speaking to a group of advertising research executives in New York at the Advertising Research Foundation's Rethink conference. "By Q3 we'll have a tremendous amount of metrics and data around every video," she said. "There's lots you can glean from looking at who's looking at what. It's a real-time focus group that happens all day, every day."⁴⁸

"Focus groups" imply full disclosure on the part of those companies seeking consumer input, however, with prospects fully cognizant of the views they are disclosing. The advertising industry's behavioral marksmen, in contrast, "have the capability to put together a really very complete profile of a person," as Jodie Bernstein, former director of consumer protection at the FTC, explained in 2000. "The most serious concern is that that (the data collection activity) is largely invisible to consumers."⁴⁹

Our Behaviors for Sale

The emergence of online marketing and behavioral targeting auction or exchange services poses new threats to consumer privacy. While hiding behind promotional

⁴⁷ "Behavioral Targeting," Specific Media, <http://www.specificmedia.com/behavioral-targeting.php> (viewed 29 Oct. 2007).

⁴⁸ Abbey Klaassen, "At ARF: YouTube to Get Richer Demo Data," *Advertising Age*, 17 Apr. 2007, http://adage.com/digital/article?article_id=116133 (viewed 9 Oct. 2007, subscription required).

⁴⁹ David McGuire, "Senators Grill Regulators, Advertisers On Net Profiling," Newsbytes News Network, 13 June 2000.

rhetoric claiming that such automated services help make the online targeted advertising system more efficient by bringing buyers and sellers of online advertising together (or, as DoubleClick euphemistically puts it "increasing overall yield"), in truth it's a behavioral targeting marketplace in which our profiles are bought and sold. As we illustrate below, these markets—now operated as a result of further interactive media and marketing industry consolidation by such major online advertising companies as Yahoo!, Microsoft and (pending FTC approval) Google—require an immediate investigation by the commission. None of the trading of profiles and targeting is done with the understanding and consent of individual consumers. It is part of the growing dissemination of our user data and information without meaningful consumer privacy protection. One area that the FTC must address in connection with these ad exchanges is whether sites serving children and teens are also being "traded" through this process.

The DoubleClick Advertising Exchange, for example, is integrated into the DART for Advertiser (DFA) platform, which allows buyers to "[s]hare creatives, user lists, Spotlight tags...." Through the use of DoubleClick's behavioral retargeting product, the Exchange promotes "Boomerang-User List remarketing: Raise browsing-to-buying conversion rates by delivering relevant ads based on your *audience's past behavior on your website*."⁵⁰ In a question-and-answer interview with iMedia Connection, DoubleClick explained its exchange in the following manner:

8. How can advertisers target their ads?

The DoubleClick Advertising Exchange service has one of the most sophisticated and broad set of targeting options available. The exchange supports standard online targeting elements including time of day, day of week, user location, et cetera. In addition, buyers can target using DoubleClick's proprietary solutions including a three-tier content categorization, site genre and site maturity. Buyers can target participating sites by name or, alternately by using IDs, target sites that are participating anonymously. The exchange also allows buyers to leverage their own data by targeting based on their own user information.

9. What differentiates your ad exchange from other ad exchanges?

⁵⁰ "Benefits for Buyers," DoubleClick, http://www.DoubleClick.com/products/advertisingexchange/benefits_for_buyers.aspx (viewed 29 Oct. 2007).

Seamless integration: DoubleClick Advertising Exchange is tightly integrated with DoubleClick's existing DART ad management platform, enabling yield maximization across sales channels for sellers, as well as shared creatives, advertisers, Spotlight Tags and audience targeting for buyers...

12. Can your ad exchange service be integrated with other ad management platforms?

DoubleClick Advertising Exchange is tightly integrated with DoubleClick's existing solutions. Integration with DoubleClick's ad management platforms—including DART® for Publishers and DART® Enterprise—enables it to deliver unique benefits such as dynamic allocation, which helps publishers automatically determine how to generate the highest return for every impression. In addition, DoubleClick Advertising Exchange is integrated with DART® for Advertisers, allowing for shared campaign management elements including creative, advertisers, user-lists and spotlight tracking tags."⁵¹

DoubleClick tracks user behavior through cookies and what it calls its "Spotlight" tags and Boomerang products. Spotlight tags are "transparent GIF files embedded in the website, to help manage and track the effectiveness of online advertising.... The spotlight tags enable DoubleClick to recognize a unique cookie on your web browser, which in turn enables us [a publisher] to learn through DoubleClick which advertisements bring users to the Website. The cookie was placed by us, or by another advertiser who works with DoubleClick."⁵² DoubleClick has expanded its use of the tags to the rich media and interactive video environment through Motif Spotlight, which enables customers to turn "data into meaningful information...."⁵³ Rich media advertising, DoubleClick explains to prospective clients, has several advantages over static media: "Rich Media offers unprecedented capabilities for measuring consumer interactions with the ad, such as rate and time of interactions, video plays and custom events. The advanced levels of brand interactions that rich media offers to advertisers deliver results in terms of brand impact: rich media performs better than GIF/JPG ads, particularly for ad awareness and message

⁵¹ Nanette Marcus, "Ad Exchanges at a Glance," *iMedia Connection*, 18 July 2007, <http://www.imediaconnection.com/content/15818.asp> (viewed 29 Oct. 2007).

⁵² See, for example, "MassHousing Privacy Policy," https://www.masshousing.com/portal/server.pt?open=514&objID=242&parentname=Gateway&parentid=None&mode=2&in_hi_userid=2&cached=true (viewed 31 Oct. 2007).

⁵³ "DART Ad-Serving Features," DoubleClick, http://www.dartmotif.com/about/about_adserving.asp#pt1 (viewed 29 Oct. 2007).

association. When interactivity and especially video are added to the mix, the impact on brand metrics can be tremendous."⁵⁴

In April 2007, Yahoo! acquired Right Media, which bills itself as the "Largest Emerging Online Advertising Exchange." Yahoo!'s expansion into the buying and selling of user behaviors for online advertisers must also be viewed in the context of its new "smart" ads behavioral targeting techniques and acquisition in September 2007 of BlueLithium.⁵⁵ Clearly, the scale of these networks indicate their growing use, but also underscore why privacy concerns must be addressed. Right Media "has more than 60 networks and a half-dozen different behavioral targeting providers all compete openly across three to four billion impressions per day."⁵⁶ Indeed, in the guise of efficiency and "open" standards, networks such as Right Media permit the widespread targeting of consumer behaviors: "Open APIs (application programming interface) make it possible for any provider of behavioral targeting technology to hook into the platform to offer its own flavor to member networks, advertisers and publishers. Instead of being limited to one network's inventory, segmentology and technology, an exchange advertiser can choose among an array of competing networks and technology partners, greatly increasing access to targetable inventory as well as the best targeting tool for the job at hand."⁵⁷

⁵⁴ DoubleClick, "The Evolution of Rich Media Advertising" Sept. 2005, http://www.doubleclick.com/insight/pdfs/dc_mediawp_0509.pdf (viewed 31 Oct. 2007).

⁵⁵ "Yahoo! Announces Agreement to Acquire Right Media, Largest Emerging Online Advertising Exchange," press release, 30 Apr. 2007, http://www.rightmedia.com/content/news-events/press-releases/5_703; "Yahoo!'s New 'SmartAds' Meld Brand and Direct Response Advertising," press release, 2 July 2007, <http://yhoo.client.shareholder.com/press/releasedetail.cfm?ReleaseID=252034>; "Yahoo! Announces Agreement to Acquire BlueLithium," press release, 4 Sept. 2007, http://home.businesswire.com/portal/site/google/index.jsp?ndmViewId=news_view&newsId=20070904006334&newsLang=en (all viewed 30 Oct. 2007).

⁵⁶ Bennett Zucker, "Three Steps to Targeting Nirvana" (page 4 of 6), *iMedia Connection*, 1 Mar. 2007, <http://www.imediaconnection.com/content/13845.asp> (viewed 29 Oct. 2007).

⁵⁷ Bennett Zucker, "Three Steps to Targeting Nirvana" (page 5 of 6), *iMedia Connection*, 1 Mar. 2007, <http://www.imediaconnection.com/content/13847.asp> (viewed 29 Oct. 2007). Right Media also notes that "With open access to all buyers and sellers on a common platform, you no longer have to look elsewhere to increase scale. If, at a given moment, you lack needed inventory, you naturally acquire more in the exchange. Likewise, if you run out of paying ads, buyers are available in the exchange." Ramsey McGrory, "Ad Networks: Driving Efficiency on the Right Media Exchange," Right Media, <http://www.rightmedia.com/content/right-media-exchange/ad-networks/1.4> (viewed 31 Oct. 2007).

Microsoft's acquisition of AdECN Exchange in July 2007 should also be viewed in the context of its \$6 billion plus buyout of aQuantive in May 2007.⁵⁸ Online ads and targets are literally auctioned off in "less than 12 milliseconds, for every single ad impression." Pricing for the bidding based on "the visitor's profile, or the visitor's past behavior, or the page content...."⁵⁹ In addition, AdECN informs advertisers that its "Extreme Targeting includes over a dozen ways to match ads to viewers, including contextual, behavioral, and profile based methods.... Conversion Tracking to assure that the ads are really paying off.... Metering to deliver the budget when and where it is needed."⁶⁰

In its FAQ for "Targeting" AdECN provides additional details:

What sort of targeting is available in the AdECN Exchange?

We built the targeting engine to be an open platform. We offer more than a dozen ways to match ads to viewers now, and can plug in new ones as they pop up.

Aside from the basic run of exchange with geo-targeting, day parting, and the other staples, we offer three levels of live contextual, in which we read the web pages on the fly for relevant content. This works extremely well with blogs and news sites, whose content is changing constantly. We also offer behavioral, including a viewer's recent search queries, and profile-based targeting: age, gender, income, and that sort of thing.

Where do you get your profile data?

We cull it through relationships with our partners. Here's how it works: when a viewer lands on a webpage in the exchange, we can tell if that viewer is known by one of our partners. If so, we query the partner, who tells us about that person, but obviously never their name or other data, which identifies the visitor. We have a strict privacy policy and adhere to those already adopted throughout the industry. Our partners, in turn, get paid for each profile. What this means is that the AdECN Exchange is not only a market for advertisers and publishers, it is also a market for data providers.

Can an ad network that already has its own targeting apply it to traffic from the exchange?

⁵⁸ "Microsoft Acquires aQuantive," press release, 18 May 2007, <http://advertising.microsoft.com/uk/microsoft-aquantive-announcement> (viewed 30 Oct. 2007).

⁵⁹ "The AdECN Exchange," AdECN, http://www.adecn.com/adeqn_description.html (viewed 31 Oct. 2007).

⁶⁰ "Advertisers in the AdECN Exchange," AdECN, http://www.adecn.com/adeqn_advertisers.html (viewed 31 Oct. 2007).

Yes. A member may have excellent targeting from its private publisher relationships and want to use it to identify those viewers on other sites. The member can keep this targeting wholly to itself, or elect to make it available to other members—for a price. In any event, the targeting data remains with the member.

The actual integration process will require a conversation with our engineering team, but we have several such projects underway...

What do you mean by "performance history?" Is that just the spot's click-through ratio?

The CTR is important, but we also take into account conversion history and other factors that I am not at liberty to disclose."⁶¹

AdECN boasts that with its advanced targeting system there is no longer any real online ad "remnant inventory." It explains that "the AdECN targeting dramatically increases the value of those impressions by adding the viewers' age, gender, income, search histories, or the contextual details of the page."⁶² In its "Whitepaper: A True Exchange for Online Advertising," AdECN makes clear that it is using consumer data for targeting purposes: "An exchange must also trade in the most discrete units possible. In our world this means individual ad impressions, matched specifically to the viewer or situation. AdECN provides extraordinary contextual, behavioral and profile based targeting, and auctions off each targeted impression individually. This means that advertisers know what they are buying and pay only what it is worth to them."⁶³

Even the most ardent proponents of behavioral targeting concede that the technology is problematic—undeniably effective in zeroing in on users' needs and interests, but equally adept at uncovering their weaknesses and vulnerabilities, too. Or, as Gokul Rajaram, the product management director for Google's AdSense, told *Business 2.0* magazine, "People are most often not aware that cookies are collecting data on their surfing behavior. It's

⁶¹ "FAQ: Targeting," AdECN, http://www.adecn.com/faq_4.html. See also "FAQ: The Auction," AdECN, http://www.adecn.com/faq_3.html (both viewed 31 Oct. 2007).

⁶² "FAQ: Trading," AdECN, http://www.adecn.com/faq_5.html (viewed 31 Oct. 2007).

⁶³ William Urschel, "Whitepaper: A True Exchange for Online Advertising," n.d. [2007], 1, <http://www.adecn.com/resources/A%20True%20Exchange%20for%20Online%20Advertising.pdf> (viewed 19 Oct. 2007).

murky in terms of privacy."⁶⁴ Usama Fayyad, similarly, chief data officer at Yahoo, admitted that

Internet companies were walking a fine line. "If you get bombarded by ads for minivans on Yahoo, even if you are interested in minivans, it becomes creepy," Mr. Fayyad said. "If you want to do this responsibly, you have to restrain yourself." For example, he said, Yahoo's new system is based on monitoring for 300 types of behavior—some as detailed as having shopped for flowers in the last two days—but it does not keep records on more sensitive topics, like specific medical conditions.⁶⁵

Yahoo may allegedly refrain from chronicling users' health concerns and sexual preferences, but there are plenty of other companies (discussed below) for whom such issues represent viable audience segments, which are targeted accordingly. Other companies target racial and ethnic minorities, with all of the attendant risks of stereotyping and redlining. AOL targets African Americans, for example, through "AOL Black Voices, the leading African American portal, reaching more than 2.8 million users each month. This site offers timely, relevant and engaging content in the categories of greatest interest to our audiences focusing in the areas of news, entertainment, lifestyle and sports."⁶⁶ While that kind of targeted programming might seem plausible, given the size of the African-American audience, other forms of racial targeting—where "a user who visits a Hispanic website (either Hispanic themed content or Spanish language) is flagged as exhibiting 'Hispanic' behavior," for example—are either insensitive or opportunistic.⁶⁷ And when such racial profiling is combined with predatory lending practices (as discussed in section C, below), the negative consequences are all too real.

There's a more subtle, manipulative aspect of behavioral targeting, too, that shouldn't go unnoticed. DoubleClick's Boomerang is typical of this approach. "With Boomerang," DoubleClick promises, "you can now engage that audience in a dialogue, providing timely and relevant messages triggered by their online actions...."

⁶⁴ Quoted in Hallerman, 20.

⁶⁵ Quoted in Saul Hansell, "Advertisers Crave Web-use Profiles," *Pittsburgh Post-Gazette*, 20 Aug. 2006.

⁶⁶ "Targeted Audiences: African-American," AOL, [http://www.aolmedianetworks.com/index.php?id=1839&no_cache=1&tx_ttnews\[tt_news\]=8301](http://www.aolmedianetworks.com/index.php?id=1839&no_cache=1&tx_ttnews[tt_news]=8301) (viewed 22 Oct. 2007).

⁶⁷ Lee Vann, "Hispanic Online Best Practices: Hispanic Online Marketing," Captura Group, <http://capturagroup.com/hispanic-best-practices-hispanic-online-marketing.html> (viewed 22 Oct. 2007).

Retain and Increase Spend with Existing Customers —

Increase order size and brand loyalty. Identify and up-sell visitors that purchase with offers based on what they've previously carted or bought....

Re-target site visitors who have "dropped off" the purchase cycle with a related message to drive them back to the site.

Up-sell and cross-sell customers that have already purchased core products....

Test different offers and price points to determine the most effective methods for converting browsers into buyers.⁶⁸

In DoubleClick's hands, users who once were part of involuntary focus groups are now unwitting lab rats, forced to navigate an all-too-familiar maze of sales pitches for products in which they once may have expressed curiosity in the past.

Jason Burby and Shane Atchison, authors of *Actionable Web Analytics*, describe another manipulative aspect of BT, as targeting gives way to more or less subtle forms of incitement:

The easiest way to think about user behavior is to ask yourself what you want people to do on your site. In web analytics, we refer to these actions as *desired behaviors*. They include such things as the paths you want users to take, the marketing initiatives you want them to come in contact with, and the products you want them to buy. Desired behaviors may be as simple as the movement of customers from your home page to a specific initiative. Or, they may be complex. For example, a content site may want its users to explore particular site areas that have higher-ad conversion rates than others. There are as many possible desired behaviors as there are business objectives; the important thing is to isolate what you want users to do. The second step is to monetize these desired behaviors.⁶⁹

Or consider the case of one Gord Hotchkiss, who, as president of a search engine marketing firm, is no stranger to the wiles and ways of his field. "I was forcefully fit into the proverbial 'other shoes' last week," wrote Hotchkiss in April 2007, "and it was a disconcerting experience.

I was behaviorally targeted in an unmistakable way, and I had to come to personal terms with the new reality of marketing....

⁶⁸ DoubleClick, "Boomerang for Advertisers, Marketers and Agencies," 2006.

⁶⁹ Jason Burby and Shane Atchison, *Actionable Web Analytics* (Hoboken, NJ: Wiley Publishing, 2007), 66.

I've written about behavioral targeting a number of times in the past, but always from a marketer's perspective. From that viewpoint, there's a lot I like about behavioral targeting. But last week, the crosshairs drew a bead on my forehead and I became the hunted, not the hunter.

I'm not naïve. I know I've been targeted before, but this was the first time that it was obvious enough to register on my consciousness. And I have to tell you, I'm having mixed feelings about it....

I don't consider myself a neophyte when it comes to online marketing. I obviously knew what was going on. I understood the mechanics behind it. But this was the first time that it was obvious that I was being targeted, and I've got to tell you, it creeped me out a little....

I'm not sure, but I know that losing my BT virginity has left me feeling a little queasy....

I admire Orbitz' marketing prowess, but I do feel a little violated. Maybe it will just take some getting used to. Until then, I'm sniffing the wind when I frequent my online watering holes and being a little more cautious about the trail I'm leaving behind. After all, you can't be too careful nowadays. The trees have eyes and ears.⁷⁰

Since it revolved around his travel plans for a Search Engine Strategies conference in China, some might find Hotchkiss's cautionary tale more amusing than alarming. But the experience of millions of other Internet users, similarly targeted in the course of their search for solutions to personal problems, or for the source of an affordable mortgage, cannot be dismissed so easily. Perhaps Tacoda CEO Dave Morgan put it best: "What makes behavioral targeting special is the data, what makes behavioral targeting dangerous is the data."⁷¹

⁷⁰ Gord Hotchkiss, "Hello, My Name Is Gord, And I've Been Behaviorally Targeted," *Search Insider*, 12 Apr. 2007, http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticle&art_aid=58602 (viewed 9 Oct. 2007).

⁷¹ Quoted in Hallerman, 18. While our focus here is on advertising and user privacy, the use of BT in other settings, including political campaigns (in which candidates might adjust their message for particular demographic and behavioral targets) should not be overlooked. See, for example, the BlueLithium Voter Network, which "...is powered by the same advanced technologies that are widely used by brand marketers to influence consumer buying behavior. Political and issue-oriented campaigns now have the ability to leverage behavioral, demographic and geographic targeting to reach the most receptive and persuadable voters as they visit hundreds of top sites across the Web.... The BlueLithium Voter Network reaches 119 million U.S. Internet users, or 65 percent of the US Internet population, making it larger than Google Search, AOL, MSN or MySpace. The network includes most of the 250 top household-name Web sites. Real-time reporting capabilities, and the ability to modify campaigns on the fly, deliver high levels of control and flexibility, important factors in the world of politics where tides can turn in a matter of hours."

C. Audience Segmentation

One of the dangers of behavioral targeting, as we noted in our complaint last year, is that it often shuttles Internet users—without their permission or even their knowledge—into pre-defined groups that conform to some marketer's idea of a "receptive audience."

Tacoda Systems, for example, divides its online targets into 31 "behavioral segments," including such categories as Family Planners ("Newly engaged couples research and plan weddings; expecting parent explore information about pregnancy; and parent's [sic] investigate preschools, parenting techniques and childcare"); Family MDs ("People who are concerned about family health well-being and research medicines; plan fitness programs and search for information about specific health conditions"); and Shopaholics ("Obsessive shoppers who indulge in reading shopping reviews, consult price comparison Web sites, monitor auctions and online classifieds Web site keeping an eye out for that 'must have' item").⁷² Acxiom, which is moving aggressively into online marketing, "classifies each U.S. household into 70 clusters based, it says, 'on that household's specific consumer and demographic characteristics, including shopping, media, lifestyle and attitudinal information.' Clusters range from 'Married Sophisticates' to 'Penny Pinchers.'"⁷³ 24/7 Real Media has its own version of such marketing niches (including

"BlueLithium Launches First Ever Online Voter Network," press release, 13 Aug. 2007, <http://www.bluelithium.fr/press/2007081303.html> (viewed 14 Oct. 2007).

⁷² Tacoda Systems, <http://www.tacoda.com/> (viewed 21 Sept. 2006). Tacoda, whose clients include the Associated Press, Chicago Tribune and NBC, describes the operation of its networks as follows: "TACODA leverages its proprietary, behavioral targeting technology on participating partner Web sites to collect anonymous, non-identifying information and group visitors into valuable behavioral segments. These visitors then receive advertising most relevant to their interests whenever they visit a participating inventory Web site on TACODA Audience Networks. For example, if a consumer visits a participating TACODA Web site and viewed golf-related content, the next time they access a partner Web site, they might be shown advertisements from a golf equipment company or golf resort, rather than simply a generic ad that is not relevant to them." "FAQ," Tacoda, <http://www.tacoda.com/> (viewed 27 Oct. 2006).

⁷³ Delaney and Steel, "Firm Mines Offline Data to Target Online Ads." Acxiom was the target of hackers in 2004, who succeeded in compromising the company's database of individual profiles. But the company still maintains vast consumer holdings, including, according to *Fortune* magazine, a 13-digit code for every person. The ID codes allow the company to "identify you wherever you go," says Acxiom's demographics guru, Bruce Carroll. "Each person is placed into one of 70 lifestyle clusters, ranging from 'Rolling Stones' and 'Single City Struggles' to 'Timeless Elders.' Nearly one-third of Americans change their clusters annually as a result of a 'lifestyle trigger event,' Carroll says. Acxiom's catalog also offers hundreds of lists, including a 'pre-movers file,' updated daily, of people preparing to change residences, as well as lists of people sorted by the frequency with which they use credit cards, the square footage of their homes, and their interest in the 'strange and unusual.' Says Carroll: 'We're pushing a new paradigm.' ... Yet it was only in the wake of the hacker intrusions that Acxiom created the post of chief security officer, with full-time

Money Makers, Big Spenders, African American, Globetrotters, and Health Specific), offering as well the promise that "our specialists will also develop custom behavioral targeting segments based on your specific objectives."⁷⁴ AOL boasts "over 500 behavioral segments available across 22 categories."⁷⁵

Many of these artificially created segments, to be sure, seem harmless enough, even frivolous, including Yahoo's "Female Fashion Freaks," "Seeking Out the Silver Screen," and "Nutrition Nuts."⁷⁶ In other instances, however, particularly among firms that offer customized segmentation, categories arise that by their very nature raise privacy concerns. According to Blue Lithium, for example, "We identify a set of behaviors that meet the needs of a specific marketer or campaign, then we create a segment targeting just those who fit the profile. For example, 'online poker players,' or 'lonely hearts.'"⁷⁷ With categories such as these, can new groupings of "problem gamblers" or "manic depressives" be far behind? ValueClick Media, meanwhile, includes several segments specifically targeting youth among its 21 "channels," including Careers & Education, Dating & Social Networking, and Gaming, with website coverage that features such youth magnets as www.student.com, www.ratemyprofessors.com, www.top10virals.com, www.neopets.com, www.pokemoncrater.com, and www.killermovies.com.⁷⁸

Raising another set of issues is Microsoft's approach to audience segmentation, which draws on Passport and Hotmail data to fashion such audience segments as Gamers, Personal Investors, Credit Card Shoppers, and Home Refinancing and Home Equity Loan

responsibility for preventing cybercrime and mandating encryption." Richard Behar, "Never Heard Of Acxiom? Chances Are It's Heard Of You. How a little-known Little Rock company--the world's largest processor of consumer data--found itself at the center of a very big national security debate," *Fortune*, 23 Feb. 2004, http://money.cnn.com/magazines/fortune/fortune_archive/2004/02/23/362182/index.htm (viewed 22 Oct. 2007)

⁷⁴ 24/7 OnTarget, http://www.247realmedia.com/products/on_target/page0001.htm (viewed 28 Sept. 2006).

⁷⁵ "AOL behavioral Targeting Overview," AOL, <http://www.aolmedianetworks.com/?id=2371> (viewed 14 Oct. 2007).

⁷⁶ "Behavioral Targeting," Yahoo! <http://advertising.yahoo.com/marketing/bt/> (viewed 15 Oct. 2007).

⁷⁷ "We apply additional audience identifiers," Blue Lithium explains, "such as publisher site analytics, registration data or search query data to create high-performance behavioral segments." AdPath Behavioral Targeting," Blue Lithium, http://www.bluelithium.com/adpath_behavioral_targeting.html (viewed 15 Oct. 2007).

⁷⁸ "Valueclick Media Channels and Sample Sites," n.d., <http://www.valueclickmedia.com/onesheets/grid.pdf> (viewed 14 Oct. 2007).

Researchers. "If you're aiming at an audience with specific attributes," Microsoft promises, "you can add any combination of demographic targets, such as gender, age, and household income, geography, day of the week, and even day part."⁷⁹

A year ago, Microsoft's approach might have struck many as business-as-usual in the no-data-barred world of behavioral targeting. But viewed against the dark stain on our economy of the sub-prime lending crisis, Microsoft's targeting of credit card shoppers and home financiers seems far less benign. And the problem extends well beyond Microsoft, to include a broad range of online marketers involved in targeting and segmenting prospective home buyers and mortgage seekers.

Behavioral Targeting and the Subprime Mortgage Meltdown

According to data from Nielsen/NetRatings, mortgage lenders Countrywide and Low Rate Source were two of the 10 biggest online advertisers in the US in July 2007. Experian Group and Privacy Matters, which advertise to consumers who are concerned about their personal credit scores, also numbered among the top 10.⁸⁰ Google and Yahoo were among the primary beneficiaries of the wildcat sub-prime market, according to Faisal Laljee, having "cashed in big time from the mortgage boom. Direct lenders, conventional banks and lead aggregators like Lending Tree, Nextag and LowerMyBills.com have all paid top dollar to drive online traffic to their site. Keywords like 'mortgage' and 'refinance' have gone for as high as \$20 to \$30 per click during peak times."⁸¹ The online ad industry trade publication *ClickZ* noted the involvement of major online advertisers in the sub-prime arena. "Google search for 'home loans' turns up at least a dozen sponsored or paid results. Among them, one for LendingTree, that read '\$200,000 for \$938/Month! When Banks Compete, You Win.'"⁸²

⁷⁹ "Targeting from Microsoft," Microsoft Digital Advertising Solutions, 2007, <http://advertising.microsoft.com/ad-programs/microsoft-targeting> (viewed 13 Oct. 2007).

⁸⁰ "Google, Microsoft Top Nielsen/NetRatings Web Site Lists," Website Zoom, 19 Sept. 2007, <http://www.websitezoom.com/news-articles/cat/index/4/Search-Engines> (viewed 21 Oct. 2007).

⁸¹ Faisal Laljee, "Subprime Mortgage Bust Could Create Ad Trouble for Google," Seeking Alpha, 22 Feb. 2007, <http://seekingalpha.com/article/27736-subprime-mortgage-bust-could-create-ad-trouble-for-google> (viewed 16 Oct. 2007).

⁸² Anna Maria Virzi, "What Does the Mortgage Meltdown Mean for Online Advertising?" *ClickZ*, 31 Aug. 2007, <http://www.clickz.com/3626907> (viewed 16 Oct. 2007).

Bankrate.com, which bills itself as "the Web's leading aggregator of financial rate information," sells access to its audience with a variety of online marketing products, including contextual advertising and behavioral targeting.⁸³ As Bankrate explains in its online media kit, "Behavioral targeting allows marketers to reach users that have been identified on the Bankrate Network of sites as consumers of specific in-market content and to deliver timely messaging to these same consumers when they leave the Bankrate Network." Bankrate's ad clients who use the BT product can "follow users with your message as they visit other sites," as behavioral targeting is implemented in the following manner:

To qualify a user as an in-market shopper in any of Bankrate's segments (using mortgage example):

A cookie is placed in the Bankrate user's browser, which will then track the pages visited by that user.

A Bankrate consumer who visits a mortgage story, rate table, or calculator within the last 120 days will be tagged and placed in the Mortgage Behavioral Targeting Bucket/Segment.

When that consumer visits one of the sites within the Behavioral Targeting Network they will receive a mortgage advertisement.⁸⁴

In a FAQ section, Bankrate answers such questions as "What benefits will I gain from a Behavioral Targeting campaign?"

The benefit comes from simply reaching the right user at the right time.

All consumers are in-market for financial products for a limited amount of time. A consumer might shop for a mortgage for several months, but might make a decision about opening a new CD account in less than a month (or do so each and every month). Bankrate users are in-market consumers either actively conducting research or getting ready to transact. These highly in-market consumers are a finite target... Behavioral Targeting now provides the ability to expand upon this finite target and allows you to follow these users with your message once they've left the Bankrate site, but while they are still very much in-market....

⁸³ "Ad Products," Bankrate.com, <http://www.bankrate.com/mediakit/ad-products.asp> (viewed 16 Oct. 2007).

⁸⁴ "Ad Products: Behavioral Targeting," Bankrate.com, <http://www.bankrate.com/mediakit/ad-behavioral.asp>; "Ad Products: Behavioral Targeting—How Does It Work?" Bankrate.com, <http://www.bankrate.com/mediakit/ad-behavioral-how.asp> (both viewed 16 Oct. 2007).

What sites will my ads be running on?

Through the combined reach of our two partners Revenue Science and 24/7 Real Media, Bankrate's Behavioral Targeting network encompasses hundreds of the most recognized publishers on the Web, with a reach exceeding 90% of the U.S. Internet audience. But remember—the beauty of Behavioral Targeting is that you're targeting highly in-market consumers, regardless of context.

Consumers looking for the following financial products or services can be behaviorally targeted:

- Mortgages
- Home Equity
- Credit Cards
- Deposits (CDs/Investment/Checking/Savings)⁸⁵

It is doubtful, however, that users of Bankrate knows that the company is working with two behavioral targeting firms, 24/7 Real Media and Revenue Science, or that as a result of their online travels, they may soon be besieged with offers from sub-prime lenders.

In addition to search engines such as Google and Yahoo, financial websites such as Bankrate.com and Mortgage War, and behavioral targeting firms such as 24/7 Real Media and Revenue Science, another, less-heralded part of the sub-prime marketing equation is the field of online lead generation. In this instance, people who are identified as likely prospects for a mortgage are then "sold" to various parties offering financial services. Search engines, including Google, Yahoo, and MSN have sold search terms to such lead generators, effectively creating a new "audience segment" of those who enter terms such "mortgage" or "home refinancing" in a search engine.

"Lead generation is a discrete wing of interactive marketing, and so the ways in which it uses behavioral targeting are a bit different as well," explains Steve Smith in *Behavioral Insider*. "Active Response Group uses behavioral tracking to enhance its ability to gather qualified leads from its banner network."⁸⁶ Active Response CEO Brad Powers openly

⁸⁵ "Ad Products: Behavioral Targeting—FAQs" Bankrate.com, <http://www.bankrate.com/mediakit/ad-behavioral-faq.asp> (viewed 16 Oct. 2007).

⁸⁶ Steve Smith, "Where Behavior Leads," *Behavioral Insider*, 24 Aug. 2007, http://blogs.mediapost.com/behavioral_insider/?p=185 (viewed 29 Oct. 2007).

discussed his company's use of targeting in a variety of campaigns, including the sub-prime market:

We're able to use BT and retargeting, so when someone registers for a particular form or takes an offer or clicks on a banner, or doesn't click on a banner - we record all of that, and then, based on the vertical they are clicking on, we will use that to retarget additional offers.... One of the most powerful things that you can do is offer either a free trial to begin the dialogue or as a carrot, or some sort of information that's relevant to that consumer... We consider credit cards a lead because there is no transaction involved other than signing up. We find people will sign up for multiple credit cards at the same time.... And one of the interesting things about that is, behavior is the same in the prime market as in the sub-prime market, although we have stayed away from the sub-prime of late.⁸⁷

One such lead generator is ZipSearch ("Leads that Close"), which is typical of a field that generates an estimated \$1.3 billion a year in revenues. As its CEO explained on the ZipSearch website,

Mortgages are something that just about everyone needs at some point, regardless of their race, background or location. However, people only need a mortgage when they are about to buy a home. How do you figure out when someone is about to buy a house? ...Enter behavioral targeting. This form of targeting doesn't care who a potential customer is—instead, it focuses directly on what a customer is doing at a particular time. The internet is ideal for this sort of targeted advertising and marketing, since online users can be tracked "on the fly." Using cookies and other technology, you can see that a customer has checked out four mortgage calculators in the past week. If you are selling mortgages, that can be a great indication that the customer may be in need of your product soon and is therefore ripe for a marketing message from you. Search activity, pathway data, click streams, submission activity and conversion studies have been used for some time to track user behavior in order to provide better options for advertisers.⁸⁸

ZipSearch, in turn, works with such companies as Targusinfo, a database firm offering "On-Demand Lead Verification [that] enables you to verify and enhance names, addresses and phone numbers the instant they are submitted."⁸⁹ The company provides a database service that it describes as

⁸⁷ Quoted in Smith, "Where Behavior Leads."

⁸⁸ David Schneider, "The Future Of Behavioral Targeting Online," ZipSearch, 18 Sept. 2007, <http://www.zipsearch.com/articles/internet-advertising/the-future-of-behavioral-targeting-online.html> (viewed 15 Oct. 2007). ZipSearch runs a number of mortgage-related websites, including Mortgage War, <http://www.mortgagewar.com/>.

⁸⁹ "Online Lead Generators," Targusinfo, <http://www.targusinfo.com/solutions/solution.aspx?id=918> (viewed 16 Oct. 2007).

not a traditional single-source data supplier, as are White Pages compilers and Directory Assistance providers. These databases have inherent weaknesses in accuracy, completeness and coverage.

We have relationships with over 90 proprietary sources, including a unique membership in the US Telecommunications Network (USTN).

The USTN is the ultimate platform for up-to-date information on all phone numbers, including nonpublic and wireless numbers. By becoming a trusted member of the USTN, TARGUSinfo has built a foundation for data that is exceptionally precise, relevant and actionable.

Our data sources allow you to take advantage of data that isn't found anywhere else. And it's all delivered to you in sub-second speed.⁹⁰

Despite the current home financing crisis, with the rate of foreclosures skyrocketing across the country, Internet lead generation in the subprime market continues. As one website explains, "Because sub prime customers can not depend on their local financial institutions for mortgages, they will turn to the internet in search of a loan officer such as yourself who works with wholesale lenders in the hope of getting a mortgage or their current home refinanced.... As far as the lead companies you decide to invest with are concerned, look for the ones that obtain and sell their leads in real time. With this type of lead you will be dealing with customers who are anxiously awaiting your phone call."⁹¹

Offline studies have shown, however, that the customers "anxiously awaiting" those calls from sub-prime lenders are predominantly low-income, black, and Hispanic. "Home

⁹⁰ "Online Lead Generation: Frequently Asked Questions," Targusinfo, <http://www.targusinfo.com/industries/faqs.aspx?id=388> (viewed 16 Oct. 2007).

The company also says it can

- Capture and verify information including names, addresses and phone numbers for every person contacting you—ensuring you have precise, actionable data for your CRM efforts
- Increase your sales by automatically sending personalized direct mail to prospects who contact you but don't make a purchase—and get your offer mailed within 48 hours
- Improve your service for your best prospects by using profiles to move them ahead in your call queue and drive your automated use of offers and scripts
- Enhance system-wide decision-making by ensuring that you gather accurate, in-depth information every time a prospect or customer calls or visits your locations
- Improve your segmentation for your marketing efforts by gathering profiles, demographics and buying propensity scores at the start of every interaction with consumers and customers.

"CRM & Marketing," Targusinfo, <http://www.targusinfo.com/solutions/solution.aspx?id=356> (viewed 16 Oct. 2007).

⁹¹ "Sub Prime in Real Time," PR-GB.com, 11 Oct. 2007, http://pr-gb.com/index.php?option=com_content&task=view&id=29772&Itemid=9 (viewed 16 Oct. 2007).

buyers in predominantly black and Hispanic neighborhoods in New York City," reported the *New York Times* in October 2007, "were more likely to get their mortgages last year from a subprime lender than home buyers in white neighborhoods with similar income levels, according to a new analysis of home loan data by researchers at New York University.... The 10 neighborhoods with the highest rates of mortgages from subprime lenders had black and Hispanic majorities, and the 10 areas with the lowest rates were mainly non-Hispanic white."⁹² A national study of some 50,000 sub-prime loans conducted by the Center for Responsible Lending found similar results: "... blacks and Hispanics were 30 percent more likely than whites to be charged higher interest rates, even among borrowers with similar credit ratings."⁹³

"It's almost as if subprime lenders put a circle around neighborhoods of color and say, 'This is where we're going to do our thing,'" said Robert Stroup, a lawyer and the director of the economic justice program at the NAACP Legal Defense and Educational Fund Inc.⁹⁴ It remains to be seen what role behavioral targeting and audience segmenting might have played in drawing those circles around neighborhoods of color, but it behooves the FTC to investigate the impact of online technologies on this ongoing crisis.⁹⁵

It is unlikely, however, that the Interactive Advertising Bureau will provide much meaningful assistance to the FTC in this effort. While the IAB belatedly turned its attention to the lead-generation field in September 2007, in an all-too-typical fashion its Lead Generation Committee is conspicuously *silent* on the issue of user privacy, on the

⁹² Manny Fernandez, "Study Finds Disparities in Mortgages by Race," *New York Times*, 15 Oct. 2007, http://www.nytimes.com/2007/10/15/nyregion/15subprime.html?_r=1&ref=realestate&oref=slogin (viewed 17 Oct. 2007).

⁹³ Fernandez, "Study Finds Disparities in Mortgages by Race."

⁹⁴ Quoted in Fernandez, "Study Finds Disparities in Mortgages by Race." See also Ford Fessenden, "The American Dream Foreclosed," *New York Times*, 14 Oct. 2007, <http://www.nytimes.com/2007/10/14/nyregion/nyregionspecial2/14Rprimemap.html> (viewed 17 Oct. 2007).

⁹⁵ In addition to ValueClick, which is reportedly under investigation by the FTC, there are a number of other lead-generation companies that warrant scrutiny and action on the part of the commission. Matthew G. Nelson, "ValueClick Under Federal Trade Commission Investigation," *ClickZ*, 21 May 2007, <http://www.clickz.com/3625921>. See also Kate Kaye, "ValueClick Not Only Company in Lead Gen Scrutiny," *ClickZ*, 25 Sept. 2007, <http://www.clickz.com/3627118> (both viewed 23 Oct. 2007).

right of individuals to avoid the lead-generation dragnet in the first place, and on the need to treat mortgage seekers and credit card debtors—or any of a dozen other inherently *personal* transactions—differently than the aforementioned "fashion freaks" and "nutrition nuts."⁹⁶ At least one member of the lead-generation community has publicly decried the IAB's feeble efforts. "Due to the misconduct of some online lead generation providers that has been brought to light in the past six months or so," writes Jere Doyle, president and CEO of Prospectiv,

I believe the IAB's best practices merely skim the surface of what the industry really needs. In fact, I wouldn't even go so far as to call what the IAB has released "best practices." What the IAB has put out are standards for data transfer. While I think these data transfer standards are very good, let's not call them industry best practices, as they barely skim the tip of the iceberg in addressing the big issues the lead generation industry faces. Although these guidelines are useful in helping the process work more smoothly for online lead generation providers and their clients, they do nothing to address the abuses (including the selling of consumer data to third parties, misleading promotions, disrespectful use of email and forced registration) that are hurting the industry and consumers.... Issues such as transparency, data sharing, and misleading promotions need to be tackled head-on. When we talk about consumer data, isn't the bigger issue the reselling of this personal data over and over again without the consumer's knowledge or consent? Best practices that deal with these types of issues are what the industry lacks.⁹⁷

Clearly, generating leads for buyers of household appliances or ski vacations is one thing. Trolling for prospects involved in life-altering decisions like home purchases and retirement planning is quite another, a distinction that is apparently lost on the IAB and its all-deals-are-created-equal mentality.

D. Data Gathering/Mining

Neither user tracking nor behavioral targeting—nor even the audience segments into which the tracked and the targeted are ultimately herded—would be possible without

⁹⁶ Gavin O'Malley, "IAB To Lead Gen Industry: Shape Up By April 1," *Online Media Daily*, 12 Oct. 2007, http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticleHomePage&art_aid=69050 (viewed 17 Oct. 2007).

⁹⁷ Jere Doyle, "IAB Lead Generation 'Best Practices': Helpful, But Not Exactly The Best of Practices," *Performance Insider*, 25 Oct. 2007, http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticleHomePage&art_aid=69783 (viewed 27 Oct. 2007).

sophisticated data-gathering and -mining techniques. CDD and USPIRG continue to be alarmed by practices in this area. As we stated in our original complaint,

The data collection infrastructure effectively automates the process by which we are tracked and profiled—our behaviors digitally "x-rayed" by sophisticated mathematical algorithms fueled by artificial intelligence technologies. Touch Clarity's TCT visitor profiles, for example, "typically contain over 100 variables about each individual...."⁹⁸

... What makes these profiles so useful to marketers, and so invasive of consumer privacy, are the connections that are made between online and offline data. As Web analytics provider Unica tells its clients, "... you will want to learn as much as possible about individual visitors, including their names, companies, email addresses, telephone numbers, and geographic location so you can leverage this information for targeted content and marketing activities. You will also want to see what each of these individuals did on your web site, such as whether they filled out online forms, made purchases, or if they fall into any other visitor behavior segments that have been defined for your web site."⁹⁹

... Our online travels are increasingly becoming part of vast databases that comprise the source material for sophisticated analytical engines designed solely to make us more susceptible to online marketing.¹⁰⁰

Twelve months later, we have seen nothing to suggest that online marketers are any less assiduous in their efforts to capture and analyze user data, or any more willing to create digital pathways that are free of such surveillance. As a recent Touch Clarity white paper reveals, "On-site Behavioral Targeting immediately gets to know visitors as soon as they land on your site. On-site Behavioral Targeting is essentially installing an automated

⁹⁸ Touch Clarity, "Visitor Profiling," <http://www.touchclarity.com/technology/detail.php?id=77> (viewed 26 Oct. 2006). "TCT deploys highly sophisticated unique statistical algorithms which continually update visitor profiles and rebuild targeting models in real-time, taking account of changes in visitor and buyer behavior as it happens. Because TCT is a self-learning system, not only does it provide more accurate targeting and the highest available uplift, it requires no targeting modeling maintenance from the e-commerce team, analysts or consultants. Because TCT learns in real-time visitors are treated as individuals rather than being put into buckets. This means that rifle shot accuracy is achieved, rather than traditional approaches which target broad consumer segments. Together, these advances are a quantum leap forward in performance and usability compared with rules-based personalization and segmentation-based approaches." "Targeting Engine," Touch Clarity, <http://www.touchclarity.com/technology/detail.php?id=76> (viewed 26 Oct. 2006).

⁹⁹ Unica, "Web Analytics," 2006. Unica, whose clients include Best Buy, Honda, Goldman Sachs, Turner Broadcasting, and Tribune, describes itself as "a leading global provider of Enterprise Marketing Management (EMM) software. We focus exclusively on the needs of marketing organizations. Our Affinium software addresses the principal functions of EMM including marketing and customer analytics, demand generation, and marketing resource management." Unica Corporation, "About Unica," <http://www.unica.com/about/about.cfm> (viewed 29 Oct. 2006).

¹⁰⁰ CDD and USPIRG, "Complaint and Request for Inquiry and Injunctive Relief Concerning Unfair and Deceptive Online Marketing Practices," 1 Nov. 2006, 21-22.

process of intelligent listening and responding; working with each individual visitor, based upon everything they have expressed through their click-stream interactions with you to-date.... Finally, a practical bridge to the 360-degree customer view. The way Internet technology works inherently means that every interaction is now part of a recordable conversation."¹⁰¹

The Canadian Internet Policy and Public Interest Clinic (CIPPIC) at the University of Ottawa has detailed the interlocking web of data collection that the ever-expanding Google empire has created, for example:

Google Web History retains user search queries and allows users to delete records that he or she can see, but fails to give users the option of deleting their search records from Google's servers.¹⁰² *Orkut* records user hobbies, employment, address, phone number, and records are maintained even after a user deletes their profile or removes information from the service.¹⁰³ Google also collects detailed personal information about users on *Google Checkout*. When registering, users must provide Google with their name, address, credit card number, card verification code, phone number, and desired shipping address. Google tracks user transaction history with *Checkout* and retains this information indefinitely in order to meet "reporting and auditing obligations," even after a user has canceled the service.¹⁰⁴

...It is our understanding that when a user registers for a Google account and uses a handful of Google services, Google combines the personal information collected from each service under that user's account. For example, Google collects a user's search queries through *Search*, a user's address search queries through *Google Maps*, the blogs and websites a user frequents through *Blogger* and *Google Reader*, which media the user watches on *YouTube*, copies of a user's emails and instant messages on *Gmail* and *Talk*, and the user's schedule as inputted into *Calendar*. In addition to this, *Orkut* collects the user's hobbies, employment, address, phone number, and *Checkout* collects the user's name, address, credit card information, card verification code, phone number, and shipping address. All of this personal information may be collected by Google and linked to the user account.¹⁰⁵

¹⁰¹ Touch Clarity, "The Rise of On-Site Behavioral Targeting."

¹⁰² "Web History Privacy Notice," Google, <http://www.google.com/history/whprivacy.html> (viewed 16 Oct. 2007).

¹⁰³ "About," Orkut, <http://www.orkut.com/About.aspx>; "Orkut Privacy Notice," <http://www.orkut.com/privacy.aspx> (both viewed 17 Oct. 2007).

¹⁰⁴ "Google Checkout Privacy Policy," <https://checkout.google.com/files/privacy.html> (viewed 18 Oct. 2007).

¹⁰⁵ Canadian Internet Policy and Public Interest Clinic, letter to Jennifer Stoddart, privacy commissioner of Canada, 17 Sept. 2007, 15-16, [http://www.cippic.ca/uploads/G-DC_%20Privacy_complaint_17Sept07\(1\).pdf](http://www.cippic.ca/uploads/G-DC_%20Privacy_complaint_17Sept07(1).pdf) (viewed 20 Oct. 2007).

As the *Economist* wrote this summer in a cover story on Google's history and business practices, "Google could soon, if it wanted, compile dossiers on specific individuals.... It could use a person's search history and advertising responses in combination with, say, his location and the itinerary in his calendar, to serve increasingly useful and welcome search results and ads. This would also allow Google to make money from its many new services. But it could scare users away."¹⁰⁶

No less frightening in this regard is Microsoft, which, according to an eMarketer report, is looking to combine user search data with demographic details gained from its Hotmail e-mail service to better target ads. "When people sign up to use Hotmail, they are asked for 13 pieces of personal information, including age, occupation and address—though providing all the data isn't obligatory," reported *The Wall Street Journal* in December 2006. "If they use Live Search, Microsoft's rival to Google's search, the company can keep a record of which words people searched for and the results they clicked on."¹⁰⁷

Even while the FTC drags its feet in seriously tackling this issue (and as the IAB attempts to skirt to altogether), millions of Americans have voted with their mouse: "According to a TRUSTe and TNS survey in September 2006," eMarketer reports, "71% of US consumers decided against registering or making a purchase online because those actions required them to provide information that they did not want to divulge, while 41% provided inaccurate information to Web sites that required personal information that respondents did not want to share."¹⁰⁸

E. Industry Consolidation

"The past few years," as we noted in our November 2006 complaint, "have witnessed an alarming degree of consolidation in the Web analysis, advertising, and Internet data collection industries. The result of these transactions is not only the concentration of power in fewer hands, but also an increased ability... for these companies to use their massive compilations of user data to violate consumer privacy in the U.S.... We believe

¹⁰⁶ "Inside the Googleplex," *Economist*, 30 Aug. 2007, http://www.economist.com/displaystory.cfm?story_id=9719610 (viewed 20 Oct. 2007).

¹⁰⁷ Hallerman, 21.

¹⁰⁸ Hallerman, 18.

that such consolidation is fueling new and expanded risks to consumer privacy, across all platforms—personal computer/broadband, interactive television, and cell/mobile communications."¹⁰⁹

Nor has the pace of mergers and acquisitions in the online advertising market slackened in recent months. This past spring, for example, saw a number of startling merger announcements:

- Google-DoubleClick (\$3.1 billion)
- Microsoft-aQuantive (\$6 billion)
- Microsoft-Screen Tonic (undisclosed terms)
- Yahoo-Right Media (\$680 million)
- WPP Group-24/7 Real Media (\$649 million)
- AOL-Third Screen Media (undisclosed terms)

More recently, AOL acquired the behavioral ad network Tacoda for \$275 million to form part of its new Platform A advertising network (comprising Advertising.com, the direct-resonse network AOL acquired in 2004; the video ad network Lightningcast; the mobile ad network Third Screen Media; AdTech AG, an international ad-serving company based in Germany; along with Tacoda).¹¹⁰ Other recent acquisitions include Zingku and Jaiku, by Google; AdECN, by Microsoft; and BlueLithium, by Yahoo.

These deals (totaling some \$11 billion in all) illustrate how the online advertising market is converging. Formerly discrete ad platforms and technologies, especially search and so-called display advertising (using video and other rich-media formats) are being integrated. Interactive advertising will work seamlessly on many levels (text and video) and across multiple platforms (mobile, social networks, broadband video, games, and IPTV).

¹⁰⁹ CDD and USPIRG, "Complaint and Request for Inquiry and Injunctive Relief Concerning Unfair and Deceptive Online Marketing Practices," 1 Nov. 2006, 27-28.

¹¹⁰ Catherine Holahan, "Behind AOL's Move to Manhattan: Ads," *BusinessWeek Online*, 19 Sept. 2007, http://www.businessweek.com/technology/content/sep2007/tc20070917_275608.htm?chan=top+news_top+news+index_technology (viewed 25 Sept. 2007); Gavin O'Malley, "Media Buyers Give Thumbs Up to New AOL Ad Network," *Online Media Daily*, 18 Sept. 2007, <http://publications.mediapost.com/index.cfm?fuseaction=Articles.san&s=67570&Nid=34418&p=403657> (viewed 10 Oct. 2007).

Further consolidation in the online ad market is likely, according to many observers. As Joe Doran, general manager of Microsoft's digital advertising solutions unit, recently told *Online Media Daily*, "As we look at how the market is evolving, we think there will only be two large-scale advertising platforms ... and we will be one of them" [the other being Google/DoubleClick].¹¹¹

The Google/DoubleClick and Microsoft/aQuantive mergers in particular raise both market competition and privacy concerns over their growing control of consumer data. As noted by *Search Insider*, "If Microsoft gains access to all the data, across all the engines, for aQuantive's entire client roster of search clients, it will be sitting on a treasure trove of information that it's never seen before—and which should have Google feeling very nervous. The same is true, of course, for the information that DoubleClick's Performics can provide to Google. To a network, an agency is a wealth of competitive data—a fact about which all of the networks are undoubtedly aware."¹¹² *Direct Marketing News* also explained that "this deal gives Google access to publishers outside of its current AdSense network and to behavioral data that will help them with ad targeting."¹¹³ And as one leading online ad technology executive explained,

DoubleClick serves more display ads for more advertisers and more agencies and more publishers than any other company in the world.... Plus, DoubleClick probably sets more cookies on more consumer browsers than any other company in the world as well. Just the analysis of this data could yield for Google the keys to dramatically improving the targeting of all of their ads.¹¹⁴

Another of DoubleClick's key technologies is its Motif product, used to track user interaction with video and so-called rich-media ads. As the search and online video

¹¹¹ Laurie Petersen, "Microsoft \$6B Deal Caps Watershed Month For Digital," *Online Media Daily*, 21 May 2007, http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticle&art_aid=60652 (viewed 14 Oct. 2007).

¹¹² Mark Simon, "Why Conglomeration Could Be Bad For Advertisers," *Search Insider*, 21 May 2007, http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticleHomePage&art_aid=60654 (viewed 14 Oct. 2007).

¹¹³ Giselle Abramovich, "FTC Probes Google's Planned Purchase of DoubleClick," *DMNews*, 30 May 2007, <http://www.dmnews.com/cms/dm-news/search-marketing/41265.html> (viewed 15 Oct. 2007).

¹¹⁴ Curt Viebranz, "Google/DoubleClick: It's About Display, Data And Defense," *Online Media Daily*, 16 Apr. 2006, http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticle&art_aid=58756 (viewed 13 Oct. 2007).

markets combine, the ability to identify user behavior with interactive media environments will be central to online advertising. Google's interest in DoubleClick in this regard was no doubt fueled by its 2006 acquisition of YouTube. Google is now in the process of data "tagging" all the videos on YouTube in order to make the video service more effective for advertisers.¹¹⁵

Economies of scale and improved ad targeting notwithstanding, Google's proposed takeover of DoubleClick (having already dominated the U.S. online search market with a 75.6 percent share of search ad revenues) raises profound anti-trust concerns. Precursor's Scott Cleland has aptly described the "competition foreclosure" that will surely result from Google's acquisition of DoubleClick:

Just as Microsoft vertically-leveraged (bundled/tied) its operating system dominance to dominate the office applications market via the Windows platform, Google apparently looks to vertically-leverage (bundle/tie) its keyword search dominance with DoubleClick's leadership in online banner/video display advertising, and with its Google-YouTube dominance in video search.... This vertical combination reportedly could give Google-DoubleClick upwards of 80% of the overall market for advertisements provided to third-party websites. Just like Microsoft became the default office applications platform for email, e-calendars, word processing, spreadsheets, and PowerPoint, for any user, Google has obvious designs on becoming the default Internet advertising broker/platform for: keywords, website display ads, and TV, radio, newspaper/magazine advertising for the average large advertiser.... If Google can gain the first-mover advantages of offering advertisers the super-efficiencies of cross-media-platform advertising optimization, i.e. a vertically-integrated/tied advertising platform, individual advertising mediums and companies will largely be at their (anti-)competitive mercy going forward. Game. Set. Match.... The DoubleClick acquisition, like Google's acquisition of YouTube, is really all about achieving competitive foreclosure long term. Google's "partnership" strategy is also all about competitive foreclosure...."¹¹⁶

The threat posed by the proposed Google-DoubleClick merger has not gone unnoticed, certainly, as a number of inquiries have been launched around the world.¹¹⁷

¹¹⁵ "Content of YouTube Videos Soon Verified: Marketers Can Target Audiences," 77 Lab News, 17 May 2007, http://www.77lab.com/Content_of_YouTube_videos_soon_verified.html (viewed 16 Oct. 2007).

¹¹⁶ Scott Cleland, "How Google-Double-Click is Exploiting Antitrust Law's Weak Underbelly to Dominate Internet Advertising Going Forward," The Precursor Blog, 16 Apr. 2007, <http://www.precursorblog.com/node/357> (viewed 17 Oct. 2007).

¹¹⁷ See, for example, "Privacy? Proposed Google/DoubleClick Deal," Electronic Privacy Information Center, <http://www.epic.org/privacy/ftc/google/> (viewed 28 Oct. 2007).

Perhaps the BEUC, in its letter to the European Commission, put the matter most succinctly: "Never before has one single company had the market and technological power to collect and exploit so much information about what a user does on the Internet.... The unprecedented and unmatched databases of user profiles will constitute significant and possibly insurmountable barriers to entry but they appear also to be in clear violation of users' privacy rights."¹¹⁸

F. Targeting Youth Online

In light of the alacrity with which young people have adopted the new media as their own, often leading their parents into the digital age, it is not surprising that youth are natural targets for online advertisers. Often among the early adopters of new technology, children and teens have eagerly embraced computers, cell phones, game consoles, MP3 players, and a host of other new digital tools and quickly assimilated them into their daily lives.

- Approximately 70 percent of children 8-11 go online from home. Of those, 37 percent use instant messaging and 35 percent play games.¹¹⁹
- Ninety-three percent of 12-to-17 year-olds use the Internet; more than half of online teens (55 percent) use social networks.¹²⁰
- Fifty-seven percent of online teenagers post their own "user-generated content" on the Web, including photos, stories, artwork, audio, and video.¹²¹
- Of the more than 25 million 12-17 year-olds in the US, 20 million are gamers.¹²²

Data such as these have not gone unnoticed in the advertising and marketing sector, which has conducted its own studies to plumb the depths of youth involvement in the

¹¹⁸ Jim Murray, BEUC director; Edda Müller, vzbv director; Andrea Doneda, Altroconsumo director; and Carlos Sanchez Reyes, OCU President, letter to Neelie Kroes, commissioner, European Commission, 27 June 2007, http://www.epic.org/privacy/ftc/google/beuc_062707.pdf (viewed 21 Oct. 2007).

¹¹⁹ Wendy Davis, "Seven in 10 Tweens Surf Web at Home," *Online Media Daily*, October 27, 2006. http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticleHomePage&art_aid=50280 (viewed 15 Apr. 2007).

¹²⁰ Amanda Lenhart and Mary Madden, "Teens, Privacy & Online Social Networks," Pew Internet & American Life, 18 Apr. 2007, http://www.pewinternet.org/PPF/r/211/report_display.asp (viewed 25 Apr. 2007).

¹²¹ Amanda Lenhart, "User-Generated Content," Pew Internet & American Life Project, 6 Nov. 2006, http://www.pewinternet.org/PPF/r/76/presentation_display.asp (viewed 21 Apr. 2007).

¹²² Gameasure, <http://www.gameasure.com/> (viewed 21 Apr. 2007).

new media. According to a recent study undertaken by Circuits of Cool/Digital Playground on behalf of Microsoft, MTV, and Nickelodeon, for example, "One in three US teens says they can't live without their games console. Out of 18,000 young people around the world, almost 70 percent said the first thing they did after turning on their computer was to check IM. With marketing research like this," Microsoft explains, "you can fine-tune your marketing approach to the elusive young audience."¹²³ As Chris Dobson, vice president of global advertising sales for Microsoft, explains, "We wanted to understand more deeply how young people interact with digital technologies and consequently what this means for our advertising partners focused on reaching this highly engaged and influential audience. Working with MTV Networks globally on this study enabled us to do so."¹²⁴ More to the point, as Caroline Vogt, head of international research for Microsoft, notes, "The amount of time young people are spending on instant messenger every day presents a very powerful opportunity for brands to connect with the youth audience. When on IM, teenagers are at their most engaged and interactive."¹²⁵

Given the spending power of U.S. children and teens, moreover—expenditures that doubled between the years 1960 and 1980, and *tripled* in the 1990s—the youth demographic is well-nigh irresistible to advertisers.¹²⁶ In 2002, children aged 4-12 were spending \$30 billion in direct purchases, nearly five times as much as they spent in 1989.¹²⁷ Between 1999 and 2004 alone, teenage spending increased nearly 40 percent,

¹²³ Microsoft, "Global Marketing Study Examines Kids, Teens, and Technology," 14 Sept. 2007, <http://advertising.microsoft.com/research/global-youth-study> (viewed 22 Oct. 2007).

¹²⁴ Microsoft, "Global Marketing Study Examines Kids, Teens, and Technology."

¹²⁵ Microsoft, "Global Marketing Study Examines Kids, Teens, and Technology."

¹²⁶ Experts point to a number of demographic and economic trends that have contributed to this dramatic increase, including rising divorce rates, more parents working outside of the home, and more and more children responsible for shopping decisions that used to be strictly the domain of parents. See Chapter 2, "Digital Kids," in Kathryn Montgomery, *Generation Digital: Politics, Commerce, and Childhood in the Age of the Internet*. According to Juliet Schor, "Unofficial estimates suggest that children four to twelve spent a reported \$6.1 billion in purchases from their own money in 1989, \$23.4 billion in 1997, and \$30 billion in 2002, for a total increase of four hundred percent. The largest product category is sweets, snacks, and beverages which account for a third of children's total expenditures." Juliet B. Schor and Margaret Ford, "From Tastes Great to Cool: Children's Food Marketing and the Rise of the Symbolic," *Journal of Law, Medicine & Ethics*, Spring 2007, <http://www.blackwell-synergy.com/doi/pdf/10.1111/j.1748-720X.2007.00110.x?cookieSet=1> (viewed 26 Mar. 2007).

¹²⁷ According to Juliet Schor, "Unofficial estimates suggest that children four to twelve spent a reported \$6.1 billion in purchases from their own money in 1989, \$23.4 billion in 1997, and \$30 billion in 2002, for a total increase of four hundred percent. The largest product category is sweets, snacks, and beverages

from \$122 billion to \$169 billion.¹²⁸ Children and teens do not just spend their own money, they also influence purchases by their parents, in many cases having significant sway over major items such as family vacations, household appliances, and automobiles. Known in the industry as "kidfluence," marketers have developed an entire set of strategies for encouraging such behavior.¹²⁹

The rapid expansion of digital media in children's lives has created a new "marketing ecosystem" that encompasses personal computers, cell phones, mobile music devices, instant messaging, videogames, and virtual, three-dimensional worlds.¹³⁰ This new ecosystem is not separate from television, but rather encompasses all media, including traditional over-the-air broadcasting, which will become completely digital in 2009. As a trade publication observed last year, the new media offer marketers the opportunity "to reach kids 24/7—or at least any hour before bedtime."¹³¹ Or, as a Burger King executive explained his company's major push into digital marketing, "The eyeballs have moved."¹³² There are any number of examples of the way marketers have turned to new media to capture those eyeballs, from website cross-promotion of popular TV shows to user-generated "viral marketing" campaigns.

Of greater interest to the present discussion, however, are the "eyeballs" of advertisers, who have fixed their gaze on young people in a manner that warrants much more attention than it has received. "Because the digital media emerged in the midst of a highly commercialized youth culture," notes a recent study of online food marketing to children, "a large infrastructure of market research firms and ad agencies was already

which account for a third of children's total expenditures." Schor and Ford, "From Tastes Great to Cool: Children's Food Marketing and the Rise of the Symbolic."

¹²⁸ "Teens Cash In," Fiscal Notes, Aug. 2005, <http://www.cpa.state.tx.us/comptrol/fnotes/fn0508/teens.html> (viewed 26 Mar. 2007).

¹²⁹ See Susan Linn, *Consuming Kids: The Hostile Takeover of Childhood* (New York: The New Press, 2004), and Juliet B. Schor, *Born to Buy: The Commercialized Child and the New Consumer Culture* (New York: Scribner, 2004) for discussions of these strategies.

¹³⁰ John G. Singer, "Marketing Ecosystems: Framing Brand Management for Business Ecosystems," Blue Spoon Consulting Group, 2005, <http://www.crm2day.com/library/50216.php> (viewed 12 Dec. 2007).

¹³¹ David Goetzl, "Television has Competition in Pursuit of Kids; Alternative Platforms Gaining Favor," *TV Currents*, 20 Feb. 2006.

¹³² "Burger King's Russ Klein: In an All-Out Gallop," *Advertising Age*, 9 Oct. 2006, http://adage.com/ana06/article?article_id=112404 (viewed 26 Mar. 2007).

studying how children and teens were engaging with media. With the growth of the Internet and other new technologies, a host of trend-analysis companies, consultants, and digital strategists has moved into place, making today's young people the most intensely analyzed demographic group in the history of marketing."¹³³ And the quest to expand and refine that analysis continues.

As noted in Section C above, online advertisers' audience segmentation techniques include sub-groups that pertain especially (if not exclusively) to youth, including behavioral targeting company Tacoda's Academic Minded ("Students who are looking for homework help, research online course opportunities, or use online references such like encyclopedias and dictionaries"); Active Gamer ("Teens and adults who look for online and console game strategies, track release dates, and purchase video games"); Digital Youth ("Teens and moms who research and buy computers, printers, and computer accessories..."); and Music Enthusiast ("Young music lovers who listen to and purchases a variety of music online").¹³⁴

In other instances, some ad firms include special youth channels among their advertising networks. Undertone Networks, for example, a behavioral targeting company, includes Gaming and Kids & Teens content channels among its 16 programming segments.¹³⁵ "We utilize pixel-tracking technology to monitor activity," the company explains to its clients. "By tracking impressions, clicks, click-through rates (CTRs) and post-click activity, we can identify performance trends and make strategic decisions that optimize your campaign."¹³⁶ Eyeblander, similarly, a rich-media company, works with sites aimed at both kids (more than 20 sites in all, including Disney.com, Neopets, Nick.com, and Yahoo!igans) and teens (15 sites, including Bolt.com, Cliffnotes.com, and Teen People). And among the niche sites in the Premium Sites network, for which the company offers

¹³³ Jeff Chester and Kathryn Montgomery, "Interactive Food and Beverage Marketing: Targeting Children and Youth in the Digital Age," Berkeley Media Studies Group, May 2007, 10-11, <http://www.digitalads.org/documents/digiMarketingFull.pdf> (viewed 21 Oct. 2007).

¹³⁴ "Audience Segments," Tacoda, <http://www.tacoda.com/advertisers/segments.php> (viewed 21 Oct. 2007).

¹³⁵ "Undertone Networks Launches ReDirect 2.0 Advanced Behavioral Targeting Solution," press release, 6 Nov. 2006, http://www.undertone-inc.com/aboutus/press_releases/article21.php (viewed 28 Oct. 2007).

¹³⁶ "Advertisers and Agencies: Targeting and Optimization," Undertone Networks, <http://www.undertone-inc.com/advertisers/targeting.php> (viewed 15 Oct. 2007).

"site-specific marketing," are both Teens and PC Games sites (e.g., GameAmp.com) and Kids and Education sites (e.g., FactMonster.com).¹³⁷

More recently, social networking sites (discussed more fully in section G below) have become the primary online domain of young people—as well as a haven for advertisers who covet that particular demographic. Facebook (the second-largest social network with over 40 million registered users) "is a part of daily life for 18- to 34-year-olds. During the school year, 67 percent of four-year U.S. college students and 45 percent of alumni return to the site every day," reports Microsoft's advertising website.¹³⁸ "Young adults are the primary trend drivers in our society," Facebook tells potential advertisers. "Marketing to young adults on their own terms is critical for success. Facebook offers relevant and integrated advertising opportunities to engage the tech-savvy youth audience."¹³⁹ As Microsoft (now a minority partner in Facebook after its recent \$240 million investment), expresses it, "Facebook provides the ideal medium to advertise to a naturally viral environment of collegiate and high-school students...."¹⁴⁰ According to an article on the Facebook Flyers Pro targeted ad platform ("...targeting users based on gender, age, school, location, workplace, and interests), the population of the Facebook community is decidedly young:

Total U.S. Facebook population reachable: 20.7 million

- Currently in high school: 4.3 million

¹³⁷ "Premium Sites Lands a Dozen Niche Publishers Targeting Business, Tech, Health, Teens, PC Games, Education and Kids for Site-Specific Offerings," press release, 21 Nov. 2006, <http://www.premiumnetwork.com/news-11-21-06.shtml> (viewed 19 Oct. 2007). "With over 100 sites and Premium Network's core products of site-specific advertising, ad networks, and database targeting," the company explains, "advertisers can deliver their message to any one of a dozen targeted categories and audience segments. Products and services available also include Strategic Ad Banners, Contest Promotions, Content Integration, Rich Media, Targeted E-Mail, Opt-in Programs, and Web-to-Retail Merchandising POP Programs."

¹³⁸ "Partner Properties," Microsoft, <http://advertising.microsoft.com/partner-properties> (viewed 19 Oct. 2007).

¹³⁹ "Advertise," Facebook, <http://www.facebook.com/advertise.php> (viewed 21 Oct. 2007). See also Matt Marshall, "Facebook gets in MySpace's Face: Targets High Schools," *SiliconBeat*, 2 Sept. 2005, http://www.siliconbeat.com/entries/2005/09/02/facebook_gets_in_myspaces_face_targets_high_schools.html (viewed 30 Oct. 2007).

¹⁴⁰ Microsoft, "Reach the Net Generation by the Millions on Facebook," n.d. [2007], http://advertising.microsoft.com/wwdocs/user/en-us/advertise/partner%20properties/facebook/Facebook_Microsoft_OneSheet.pdf (viewed 22 Oct. 2007).

- Currently in college: 5.9 million
- Oldest age with at least one million Facebook users: 24 (1.1 million, which drops to 810,000 for 25-year-olds, 203,000 for 30-year-olds, and 44,000 for 40-year-olds)
- Youngest age with at least one million Facebook users: 16 (1.1 million)
- Age with most Facebook users: 19 (2.3 million)¹⁴¹

Another online targeter of youth is 360 Youth (part of Alloy Media + Marketing), which serves more than 1,800 clients every year, promising marketers a "powerful and efficient one-stop-shopping resource" and access to more than 31 million teens, tweens, and college students.¹⁴² Its arsenal of advertising and marketing weapons includes "e-mail marketing strategy and implementation," viral applications, interactive and multi-player games, and quizzes and polls.¹⁴³ The company operates a stable of websites that serve as online data collection and youth marketing research tools, with clients that include Coca-Cola, Domino's Pizza, Frito-Lay, General Mills, Hershey, Kellogg's, Kraft, MTV, Nabisco, Paramount Pictures, Verizon Wireless, and Procter & Gamble.¹⁴⁴

Exponential Interactive's Tribal Fusion ad network, meanwhile, bills itself as the "best way to reach active teens online."¹⁴⁵ Its "Teen channel" features ten high-traffic sites, including Student.com, uComics.com, Snowboard.com, and Tagged.com. "Visitors to our Teen sites," Tribal Fusion declares, making clear its true interests in serving the youth market, "are: 3.3x more likely than the average Internet user to have searched online for

¹⁴¹ David Berkowitz, "Searching Facebook by the Numbers," *Search Insider*, 30 Oct. 2007, http://blogs.mediapost.com/search_insider/?p=648 (viewed 31 Oct. 2007). According to Berkowitz, "Marketers can search Facebook's audience for ad targeting with its Flyers Pro ads, a self-service cost-per-click (CPC) ad format; advertisers can take part for as little as \$1 per day. As John Battelle summarizes the potential on his blog, it's like Google's 'AdSense driven not by search queries, but by personal profile. It could be a major, major new platform, if we, as a culture, take to it. It's not a given, but it's a very compelling vision."

¹⁴² "About 360 Youth," 360 Youth, <http://www.360youth.com/aboutus/index.html> (viewed 21 July 2005). Its 2005 form 10-K says the company has acquired a database of "31 million generation Y consumers."

¹⁴³ "About 360 Youth."

¹⁴⁴ "Clients," 360 Youth, <http://www.360youth.com/aboutus/clients.html> (viewed 21 July 2005); "Marketing Research," 360 Youth, http://www.360youth.com/marketing_tools/marketing_research/ (viewed 21 July 2005).

¹⁴⁵ Tribal Fusion now does behavioral targeting as well. See, for example, Kristen Nicole, "Exponential Launches Tribal Fusion Dynamic Ads," *Mashable.com*, 28 Aug. 2007, <http://mashable.com/2007/08/28/tribal-fusion-dynamic-ads/> (viewed 28 Oct. 2007).

information related to an educational loan in the last 6 months [and] 3x more likely than the average Internet user to have spent \$150 - \$199 on game consoles in the last 6 months."¹⁴⁶ Tribal Fusion employs EchoTopic contextual-advertising technology to insinuate its advertising messages into youth-centered discussions. "The EchoTopic proprietary technology scans and indexes each page and semantically analyzes it to determine the true topic of the page. It then determines which words on the page are related to the main topic and highlights them with ads that are contextually relevant. When a user moves the mouse over a highlighted word or phrase, the most contextually relevant and best performing message appears as a balloon ad."¹⁴⁷

As the commission knows, it has been mandated by Congress to examine and report on the relationship of food marketing and the growing problem of childhood obesity. CDD's report, "Interactive food and Beverage Marketing: Targeting Children and Youth in the Digital Age," which it filed with the commission last May, is replete with examples of questionable practices by online marketers—including technologies that undermine the health and compromise the privacy of young people.¹⁴⁸ Food and beverage manufacturers are heavily engaged in behavioral profiling. Executives from

¹⁴⁶ "Teen," Tribal Fusion, <http://www.tribalfusion.com/channels/teen/index.html> (viewed 14 Oct. 2007).

¹⁴⁷ "Exponential Announces Contextual Advertising Solution," press release, 26 Sept. 2007, <http://www.exponential.com/news-events/exponential-announces-contextual-advertising-solution.jsp> (viewed 21 Oct. 2007). Tribal Fusion also offers Dynamic Ads, which give "marketers what they covet from online advertising—the ability to deliver customized, one-to-one marketing messages to consumers on a large scale and in a safe environment. With Dynamic Ads, advertisers can instantly change the messaging based on the attributes of the user. Through a single creative unit, advertisements can be customized for different types of users based on their location, the type of content they have consumed, their demographic profile, or behaviors they have exhibited online." "Exponential Ad Network Tribal Fusion Introduces Dynamic Ads," press release, 29 Aug. 2007, <http://www.exponential.com/news-events/exponential-ad-network-tribalfusion-introduces-dynamic-ads.jsp> (viewed 22 Oct. 2007). "While targeting surfers based on their browsing habits, gender or location is not new, overlaying the ability to craft, deploy and test custom ads on the fly is Dynamic Ads' unique value proposition, according to Alistair Goodman, Exponential's vice president of strategic marketing. 'I'm not aware of others that are providing such robust targeting capabilities with this level of message customization,' said Goodman. 'Dynamic Ads enables advertisers to instantly create communication with much greater relevancy and efficiency.'" Tamika Kee, "Tribal Fusion's Dynamic Ads Offer Quick Customization and Targeting," *Online Media Daily*, 29 Aug. 2007, http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticle&art_aid=66531 (viewed 30 Oct. 2007).

¹⁴⁸ Chester and Montgomery, "Interactive Food and Beverage Marketing: Targeting Children and Youth in the Digital Age."

some of the largest companies frequently speak of its importance to the success of their efforts:

- Pepsi's director of digital media and marketing told *iMedia Connection* last year that the "growth and health of our database marketing efforts have been a secret weapon for us to jump-start programs and have a continuous dialogue with our best consumers." Using "real-time" tracking technologies, Pepsi is now "finally able to deliver high impact online advertising," he noted.¹⁴⁹
- General Mills routinely utilizes "behavioral targeting...along with...geographic, daypart [and] content-based targeting." As General Mills' director of interactive marketing explained, "our behavioral targeting has been based on surfing behavior and actual consumer purchase behavior."¹⁵⁰
- Addressing colleagues at an industry event in 2005, the director of relationship marketing at Masterfoods USA spoke of his company's valuable "registered user database," ensuring the ability to "precisely target" its customers and "engage uniquely" through a variety of different platforms, including satellite, set-top boxes, and online.¹⁵¹

"People are spending more time on digital devices and through digital media," explained Tim Gaudy, group manager, interactive marketing, for Coca-Cola. And because "a lot this behavior is trackable," the company is able to use its many online properties to answer key questions, such as "where are they spending their time... [and] are they doing what we set them up to do?"¹⁵²

Sadly, there is no evidence to suggest that advertising directed at youth online has become any less manipulative, or less invasive, in the five months since we submitted the report last May. On the contrary, we continue to track examples of questionable practices on the part of advertisers, including the following examples:

¹⁴⁹ Dawn Anfusio, "Pepsi's John Vail," *iMedia Connection*, 1 Sept. 2005, <http://www.imediaconnection.com/content/6631.asp> (viewed 28 Mar. 2007).

¹⁵⁰ Dawn Anfusio, "General Mills' Brad Smith," *iMedia Connection*, 27 Sept. 2005, <http://www.imediaconnection.com/content/6791.asp> (viewed 28 Mar. 2007).

¹⁵¹ Neil Perry, "Making the Triangle Offense Work (3 of 3)," *iMedia Connection*, 1 Feb. 2005, <http://www.imediaconnection.com/global/5728.asp?ref=http://www.imediaconnection.com/content/4994.asp> (viewed 28 Mar. 2007).

¹⁵² Tim Goudie, presentation at Emetrics Summit, Washington, DC, 18 Oct. 2006. Goudie explained that Coca-Cola relies on the technology company Fair Isaac for help with its database, WebTrends for "web metrics," Nielsen Netratings and Nielsen Buzzmetrics for "external benchmarks" related to the marketing campaign's effectiveness, and "Yesmail" and "ePrize."

Coca-Cola's Use of "Passion-based" Behavioral Targeting: "The objective of the My Coke Rewards online advertising campaign," explains Karna Crawford, senior interactive brand manager for the Coca-Cola Company, "was to drive mass participation in the program in the most cost-efficient means possible. The target audience included people who are loyal to The Coca-Cola Company portfolio of products and who also have a passion for entertainment, sports, gaming, sweepstakes, et cetera. The goal was to seek these people throughout their online experiences and entice them with relevant, passion-based offers to draw them to My Coke Rewards and thank them for drinking by delivering a simple, rewarding experience. Online acquisition for My Coke Rewards is truly about finding the right, interested consumers and cost-efficiently converting them into active members of the program. The critical importance is in who we reach—not where we find them—and then in clearly delivering the 'What's in it for Me?' or why they should join.... For example, we leveraged Tacoda's innovative Spectrum program to help define the My Coke Rewards customer experience. We cast a wide net to several dozen behavioral segments that relate to the My Coke Rewards related passions. Tacoda then auto-optimized the ad delivery to focus more impressions against those segments that drove the highest-qualified participants to the program."¹⁵³

MSN Reaches Out and Touches Young People: "Reach Out to Teens on Windows Live Messenger," proclaims the Microsoft Digital Advertising Solutions website. "Communications technology such as instant messaging can make teens feel closer to their friends and family. Windows Live Messenger helps you reach out to teens as they share and engage with the people they love."¹⁵⁴

"MSN Mobile makes it easier than ever for people to get the information they care about-any time, any place!" the Microsoft website explains. "This intuitive, reliable service opens up a world of new possibilities for users by providing instant access to information and e-mail from Internet-ready mobile telephones or personal digital assistants (PDA). Users can read breaking news stories, check their stocks, or confirm a flight-all without sacrificing their freedom of movement.

"Why Market on MSN Mobile?"

Reach affluent, on-the-go consumers. MSN Mobile attracts tech-savvy teens and high-income business professionals who travel often and work

¹⁵³ Karna Crawford, "How Coke was Rewarded for its BT Plan," iMedia Connection, 22 Aug. 2007, <http://www.imediaconnection.com/content/16346.asp> (viewed 18 Oct. 2007). "Coke does a good job with its My Coke Rewards program. If the company sees low activity among members it sends out a reminder that rewards such as ringtones and music downloads can be redeemed for a small amount of points to reengage that customer...." Amy Johannes and Patricia Odell, "Leveraging Your Database," *Promo Magazine*, 10 Sept. 2007, <http://promomagazine.com/lp/specialreports/icom/> (viewed 18 Oct. 2007).

¹⁵⁴ "Microsoft Digital Advertising Solutions: Enter the New Era," Microsoft, <http://advertising.microsoft.com/home/home> (viewed 19 Oct. 2007).

and play on the road. MSN Mobile is available on more Web-enabled phones in the United States and Canada than any other service, making it one of the most effective ways to reach these valuable consumers....

Deliver a call-to-action with MSN Mobile alerts. Notify users of sales, promotions, or hot new products by sending interactive image or text ads right to a user's wireless device! MSN Mobile consumers use their PDAs to buy movie tickets, book airline reservations, order flowers, and much more.¹⁵⁵

Microsoft Transforms Consumers into Marketers: "Windows Live Messenger is the largest instant messaging service in the world," Microsoft's advertising website declares. "Engage over 27 million people in the U.S. while they chat with friends, family, and co-workers. Deeply integrate your brand in fun, creative ways to help people customize their Messenger experience and express themselves. People use Messenger to make weekend plans, discuss purchases, and stay in touch with their social network. This is where your brand becomes a tool for self-expression, transforming your favorite consumer into your best marketer...."

"Consumer as Marketer

- Personal Expression integrates your creative elements straight into people's conversations. Design fun emoticons, winks, backgrounds, and display pictures for people to download and share.
- People can play a variety of games within Windows Live Messenger. Sponsor a game of Uno or create a custom game for your brand's audience.
- Customize and integrate your brand in fun Messenger's activities such as Mimic, Music Mix, and Movie Decisionator.

"Create a community. Combining Windows Live Spaces, Windows Live Messenger, and Windows Live Hotmail can create a powerfully, integrated campaign helping bring your consumers together and connect via your brand."¹⁵⁶

In-game advertising represents another new frontier for marketers seeking a more youthful demographic. "The ability to dynamically serve advertising into video games that are connected to the Internet will create a growing opportunity," according to ABI Research. "As gamers connect consoles to the Internet for online gaming and commerce,

¹⁵⁵ "Microsoft Digital Advertising Solutions: Mobile," Microsoft, <http://advertising.microsoft.com/Mobile> (viewed 19 Oct. 2007).

¹⁵⁶ "Microsoft Digital Advertising Solutions: Windows Live Messenger," Microsoft, http://advertising.microsoft.com/windows-live-messenger?s_int=us_20071015_hp_wl-messenger_003 (viewed 19 Oct. 2007).

publishers and their respective console partners increasingly will look to reach them through advertising—resulting in a market that will grow from \$80 million in 2007 to \$852 million by 2011."¹⁵⁷ In some instances, moreover, as a 2006 Kaiser Foundation report makes clear, the game itself is a nonstop advertisement for a particular brand or product.¹⁵⁸

The Interactive Advertising Bureau has just released a new report of its own on the topic—"Game Advertising Platform Status Report: Let the Games Begin"—which it describes as the "first in a series of papers that will lead the way to a vigorous and healthy industry with commonly adopted terminology, practices and standards."¹⁵⁹ Predictably, the issue of privacy is all-but-ignored by the IAB, with a lone reference to the topic buried in Appendix D, where the issue is delegated to the Entertainment Software Rating Board.

As CDD explained in its report last May, "... in-game advertising is not just a new form of product placement but rather a highly sophisticated interactive software system that closely monitors individual players, and directs personalized ad messages designed to trigger impulsive purchases. Viral marketing is not just an online extension of world-of-mouth brand promotion, but a calculated database strategy that relies on detailed profiles of key 'influentials,' along with surveillance of their social networks. And so-called 'brand-generated marketing,' rather than directing advertising messages *to* children, enlists kids to create the commercials themselves."¹⁶⁰

¹⁵⁷ ABI Research, "In-Game Advertising on Consoles to Reach \$850 Million by 2011," press release, 22 Aug. 2007 (viewed 13 Oct. 2007).

¹⁵⁸ Elizabeth S. Moore, *It's Child's Play: Advergaming and the Online Marketing of Food to Children* (Menlo Park, CA: The Henry J. Kaiser Family Foundation, 2006), <http://www.kff.org/entmedia/upload/7536.pdf> (viewed 26 Mar. 2007).

¹⁵⁹ Interactive Advertising Bureau, "Game Advertising Platform Status Report: Let the Games Begin," Oct. 2007, <http://www.iab.net/resources/pdf/games-reportv4.pdf> (viewed 17 Oct. 2007).

¹⁶⁰ Chester and Montgomery, "Interactive Food and Beverage Marketing: Targeting Children and Youth in the Digital Age," 52.

For all of these reasons and more, we feel compelled to reiterate the concerns we expressed in the food marketing report, and call once again for prompt FTC attention to this matter:

Many of the practices we have documented will need to be investigated further before we can fully understand their implications for children and youth. But the patterns and directions we have identified raise a number of troubling issues. For example, the influx of brands into social networking platforms—where they now have their own "profiles" and networks of "friends"—is emblematic of the many ways in which contemporary marketing has all but obliterated the boundaries between advertising and editorial content. The unprecedented ability of digital technologies to track and profile individuals across the media landscape, and engage in "micro" or "nano" targeting, raises the twin specters of manipulation and invasion of privacy. The growing use of neuropsychological research suggests that increasingly digital marketing will be designed to foster emotional and unconscious choices, rather than reasoned, thoughtful decision making. The prospect of armies of avatars, deployed as brand "salespersons," and programmed to react to the subtlest cues from other online inhabitants, suggests a disturbing move into uncharted territory for consumer-business relationships. On the face of it, a number of these practices are exploitive and unfair. Some may well be deceptive. For adults, they are problematic enough. For children and teens, they are even more serious.¹⁶¹

G. Monetizing Social Networks

For better or worse, social networks offer a quick reprise of the evolution of the World Wide Web itself. First comes the community, the sense of shared space online, and then comes the content—much of it created by the users themselves—to fill that space. And only then comes the commerce, various schemes to generate revenues from the community and the content. Admittedly, for every plan that manages to turn a profit, dozens of others fail, and the Information Highway is littered with bankruptcies and Chapter 11 reorganizations.

Whether the Web 2.0 phenomenon turns out to be just another Internet bubble remains to be seen, but this latest networking phenomenon—much of it based, like the original World Wide Web, on communal activities and user-generated content—has certainly breathed new life into venture capitalism. If there's a distinction between Web 2.0 and

¹⁶¹ Chester and Montgomery, "Interactive Food and Beverage Marketing: Targeting Children and Youth in the Digital Age," 52-53.

Bubble 1.0, it is in the acknowledgement today that ultimately someone has to foot the bill. Repeated infusions of venture capital and high-flying IPOs are the exception rather than the rule. And with the subscription model in full retreat (and micro-transactions still missing-in-action), advertisers are rushing in to balance Web 2.0's books—and to glean a lot of user data in the process.

The numbers speak for themselves: "Internet advertising revenues for the first half of 2007 hit \$10 billion," reports *Online Media Daily*, citing the IAB Internet Advertising Revenue Report, "an increase of nearly 27% over the same period last year.... Revenues for the second quarter of 2007 hit \$5.1 billion—a 25% increase over the second quarter of 2006 and the first time that revenue for a single quarter exceeded \$5 billion."¹⁶² While still lagging behind the traditional media in advertising revenues, the Internet is gradually catching up. "This year is a watershed," declares eMarketer. "For the first time, online advertising will surpass radio advertising spending in the US."¹⁶³ Even at the local level, where newspapers and Yellow Pages have long dominated the ad market, the Internet is enjoying a growth spurt. "As audiences continue migrating to the Web and away from traditional local media such as newspapers and radio, it's only a matter of time before online local ad spend catches up with today's reality," explains eMarketer's David Hallerman.¹⁶⁴ Through 2011, Hallerman predicts, spending for local online advertising will grow at a faster rate than either national advertising or total online advertising.

Social networks are now also exploiting behavioral targeting and other advanced micro-marketing techniques. And the contrast between culture and commerce in this instance could hardly be more striking. "Members of the booming social network Web sites treat their individual profile pages as a creative canvas for personal expression," the *New York*

¹⁶² Douglas Quenqua, "IAB: First-Half Internet Ad Revenues of \$10B Up 27%," *Online Media Daily*, 5 Oct. 2007, http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticle&art_aid=68674 (viewed 9 Oct. 2007). According to the report, "Search (41%), banners/display (21%) and classifieds (17%) continued to account for the highest percentage of ad spending online.... Internet ad spending remained concentrated among the top 10 sellers online, which accounted for 70% of all money spent. Ninety-one percent of all ad dollars online were spent with publishers in the top 50."

¹⁶³ "Online Advertising Will Surpass Radio Spend by Year End," press release, eMarketer, 4 Sept. 2007, <http://www.emarketer.com/Article.aspx?id=1005337> (viewed 24 Oct. 2007).

¹⁶⁴ "Local Online Advertising to Nab \$7.8 Billion by 2011," press release, eMarketer, 10 Sept. 2007.

Times points out. In contrast, "[t]he social networking companies see those pages as a lush target for advertisers...."¹⁶⁵ MySpace, for example, has been experimenting with new technology to mine the profile pages of its 110 million active users to enable advertisers to target their ads with much greater precision. In the words of Peter Levinsohn, president of Fox Interactive Media (FIM, which oversees Rupert Murdoch's \$580 million purchase), "We are blessed with a phenomenal amount of information about the likes, dislikes and life's passions of our users. We have an opportunity to provide advertisers with a completely new paradigm."¹⁶⁶ A 100-employee team at FIM, aptly named the "monetization technology group,"

has designed computer algorithms to scour MySpace pages. In the first phase of the program, which the company calls "interest-based targeting," the algorithms assigned members to one of 10 categories that represents their primary interest, like sports, fashion, finance, video games, autos and health....

The system also looks at the groups members belong to, who their friends are, their age and gender, and what ads they have responded to in the past. "Our targeting is a balance of what users say, what they do and what they say they do," said Adam Bain, the chief technology officer at Fox Interactive.

... For the last two months, Fox Interactive has also experimented with the second phase of its targeting program, called "hyper targeting," in which it further divides the 10 enthusiast categories into hundreds of subcategories.¹⁶⁷

Eventually, News Corp. Interactive Chief Revenue Officer Mike Barrett adds, MySpace members will be divided into fine-grain audience segments, "[s]o you can target people who are not just interested in beauty, but makeup. Or people not just interested in travel, but safari travel. Being able to break down the segments even more finely will add more value to marketers."¹⁶⁸

Not to be outdone, MySpace's chief rival, Facebook (albeit much smaller at some 41 million users), is also exploring new advertising models. One such project is being carried out by Microsoft, "which signed with the up-and-coming social network last year

¹⁶⁵ Brad Stone, "MySpace to Discuss Latest Effort to Customize Ads for Members," *New York Times*, 18 Sept. 2007, <http://www.commercialexploitation.org/news/myspaceads.htm> (viewed 17 Oct. 2007).

¹⁶⁶ Stone, "MySpace to Discuss Latest Effort to Customize Ads for Members."

¹⁶⁷ Stone, "MySpace to Discuss Latest Effort to Customize Ads for Members."

¹⁶⁸ Quoted in Peter Kafka, "News Corp. Interactive Sales Chief Barrett: Targeted MySpace Ads Launch This Month," <http://www.alleyinsider.com/2007/08/news-corp-inter.html> (viewed 18 Oct. 2007).

to provide display ads on the service," and which recently invested \$240 million for a 1.6 percent stake in Facebook.¹⁶⁹ "To the consternation of privacy advocates, who say Internet users are unaware of such activity," the *New York Times* points out, "the social networks regard these detail-stocked profile pages as a kind of 'digital gold,' as one Fox executive put it last year."¹⁷⁰ Matt Sanchez of VideoEgg agrees:

Social network data is enormously rich. It starts with age, gender, zip code, the basic demographics, but can extend into everything from political leanings to educational background, hobbies, job information, friends, relationships, communities of interest. It's a deep well of data every marketer dreams of... In developing a segmentation by sensibility, the conventional behavioral data of search and browsing behavior are not unimportant. But they are less relevant than the information users themselves provide about their personal interests and how they actually pursue those by time spent in activities and communities.¹⁷¹

One basic data-mining approach on Facebook involves user surveys. "Facebook polls," the site tells prospective advertisers,

are an easy way to get quick answers to your questions. Facebook Polls allows you to ask detailed questions, target them to specific user segments and receive real-time responses. You can target Facebook users based on gender, age, school, location, or profile keyword....

Create a Poll

Want to instantly know what 30 million people are thinking?

For as little as \$26, Facebook Polls let you ask 18-24 year olds what's hip, ask people in New York who they're voting for, or even ask "Grey's Anatomy" fans if they'll actually watch the new spin-off....

Target your audience.

Get answers only from the people you want. Target your Polls by gender, age, or location. Or target by favorite music, movies, tv shows, books, or interests.

¹⁶⁹ Stone, "MySpace to Discuss Latest Effort to Customize Ads for Members." Michael Liedtke, "Microsoft Deal Values Facebook at \$15B," Associated Press, 25 Oct. 2007, <http://ap.google.com/article/ALeqM5hKn0T11Owng1NE5pvvZLewkJ5aVQ> (viewed 25 Oct. 2007). According to Microsoft's account of the Facebook investment, "under the expanded strategic alliance, Microsoft will be the exclusive third-party advertising platform partner for Facebook, and will begin to sell advertising for Facebook internationally in addition to the United States." Microsoft, "Facebook and Microsoft Expand Strategic Alliance," press release, 24 Oct. 2007, http://www.microsoft.com/Presspass/press/2007/oct07/10-24FacebookPR.aspx?rss_fdn=Press%20Releases (viewed 27 Oct. 2007).

¹⁷⁰ Stone, "MySpace to Discuss Latest Effort to Customize Ads for Members."

¹⁷¹ Phil Leggiere, "Toward User-Generated Targeting: From Intrusion To Invitation," *Behavioral Insider*, 24 Oct. 2007, http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticleHomePage&art_aid=69773 (viewed 27 Oct. 2007).

Bid for responses and immediately watch results stream in.
Get answers to your Polls in as little as 30 minutes.¹⁷²

Facebook's news feeds, personalized stories that are served up daily to each users home page, reflect the close scrutiny that members face from the company itself. Although the "news" is often trivial ("you'll know when Mark adds Britney Spears to his Favorites or when your crush is single again," claims the Facebook Blog), the secret algorithms that generate those stories leave no virtual stones unturned as they comb through user profiles.¹⁷³ "In fact," notes Justin Smith in the *Inside Facebook* blog, "Facebook considers nearly every available source of data it has on each user to help calibrate their weights and deliver the best stories:

- Whose profile pages you visit—and how frequently, how recently, and how often
- Who you message, and who messages you
- Whose walls you write on, and who writes on yours
- Who/what you search for
- What's on your profile
- Who you invite to events and groups, who accepts, and who invites you
- Who you tag in photos, and who tags you
- Which News Feed items you've clicked on before

"Facebook is able to choose the right 60 News Feed stories for you because, based on your behavior, Facebook knows who and what is important to you."¹⁷⁴

Outside ad companies have also zeroed in on Facebook's user base, taking advantage of arrangements in which Facebook gives third-party developers access to the profile data of users.¹⁷⁵ One such company is Lookery, which has developed a form of drive-by

¹⁷² "Advertise," Facebook, <http://www.facebook.com/advertise.php> (viewed 18 Oct. 2007).

¹⁷³ Ruchi Sanghvi, "Facebook Gets a Facelift," The Facebook Blog, 5 Sept. 2006, <http://blog.facebook.com/blog.php?post=2207967130> (viewed 26 Oct. 2007).

¹⁷⁴ Justin Smith, "Facebook's News Feed Knows What You Did Last Summer," *Inside Facebook*, 29 Oct. 2007, <http://www.insidefacebook.com/2007/10/29/facebook%e2%80%99s-news-feed-knows-what-you-did-last-summer/> (viewed 31 Oct. 2007).

¹⁷⁵ Facebook plans ultimately to automate this process. "Under the plan," according to *Advertising Age*, "Facebook would create an automated system that uses a member's profile information to direct relevant text advertising messages to the user's news feed.... Advertisers already are able to put messages into users' news feeds, the default news section that lets members know what their friends are up to. But these 'sponsored stories,' which can be text, graphical or click-to-play video ads, are expensive; the price tag limits them to mostly large brand marketers who have six-figure budgets to spend with Facebook's sales staff. An automated system could open up Facebook to smaller, more niche-targeted marketers, much as

surveillance that doesn't give users a chance to opt out of the data snapshots that Lookery captures on the fly. "Under Facebook's terms," writes Matt Marshall in *VentureBeat*, "Lookery, like other applications using its platform, can retain the demographic and profile information for no longer than 24 hours, after which it must relinquish the information and not retain any of the personally identifiable information. However, Lookery keeps a tab on aggregate data, building demographic profiles of the types of users who tend to use specific applications and their publishers."¹⁷⁶ Promising even faster results is Appfuel. "Without storing any user data, says co-founder Sundeep Ahuja, Appfuel can scan a user's profile and deliver a targeted ad in under a second."¹⁷⁷

Lookery, Appfuel, and their social networking peers (which include fbExchange, Cubics, and Social Media) might argue that that the Facebook data they are using are not personally identifiable, but none of them can deny that the "massive amounts of information people reveal about themselves," in the words of the *Wall Street Journal*, can be extremely *personal*, nevertheless. "Facebook's 32 million users," writes Marshall,

many of them college aged, provide a bounty of information about themselves in their profiles—from their age, to geographic location, hobbies and other interests, romantic to academic. Calvin Klein or Fendi for example, can use Lookery to target their ads to users of Facebook applications most heavily used by college aged woman aged 19 to 22, who are romantically involved and are likely to have high incomes because they attend Ivy League schools. Lookery, meanwhile, will be able to charge advertisers specific rates for targeting that demographic.¹⁷⁸

And as David Kaplan reported on paidContent.org, "MySpace has begun to leverage the data input by each MySpace user into their profile from a group of predefined menu choices (related to questions such as drinker, children, education, smoker, religion, college, employer, etc...). Within the next year, MySpace will be able to target ads based

Google's system has done." Abbey Klaassen, "Facebook Vs. Google's AdWords: Social Net's Automated System Appeals to Small, Niche-Serving Marketers," *Advertising Age*, 27 Aug. 2007.

¹⁷⁶ "... Lookery is significant," Marshall adds, "because it gets closer to what other behavioral companies such as Tacoda, 24/7 have promised but in reality have only been able to approximate. These networks can approximate a user's gender, location and income levels, but never guarantee it." Matt Marshall, "Lookery, the Facebook Advertising Network...with Lots of Data," *VentureBeat*, 26 July 2007, <http://venturebeat.com/2007/07/26/lookery-the-facebook-advertising-networkwith-lots-of-data/> (viewed 9 Oct. 2007).

¹⁷⁷ Julie Sloane, "Selling Ads on Facebook is a Tempting but Risky Business," *Wired*, 28 Sept. 2007, http://www.wired.com/techbiz/startups/news/2007/09/facebook_ads (viewed 17 Oct. 2007).

¹⁷⁸ Marshall, "Lookery, the Facebook Advertising Network...with Lots of Data."

on what users write and place on their Myspace page itself, such as what TV shows members like to watch or music they listen to."¹⁷⁹ As the list of MySpace "targeting opportunities" makes clear, the homesteads on the social networking frontier are all glass houses:

- Age
- Connection Type
- Day Part
- Education Level
- Ethnicity
- Gender
- Geographical
- Interest Groups
- Marital Status
- Parents
- Religion
- Sexual Orientation
- Smoker/Drinker¹⁸⁰

Another company trolling the social networking waters is the aptly named Seethroo, whose approach to behavioral targeting, notes CEO Jason Frankovitz,

is focused exclusively on the Web 2.0 arena. Specifically, Seethroo examines the content that individual users contribute to social websites and analyzes it to determine a profile for each person. In other words, we use Web 2.0 activity to learn what each person likes, how much they like it, and when that interest is strongest. Then we use that data to serve an ad that's the absolute best fit for that person's behavior....

We've zeroed in on user-generated content as our profiling vehicle; we feel it's got a lot of potential that hasn't been addressed by what's out there currently, and we can monetize it in a way that's ahead of the curve right now....

Seethroo is specifically tracking bookmark activity. We've built a bookmark-based behavioral analysis system (our patent is pending) that examines people's bookmarks, publicly stored on social bookmark sites, to accurately identify topics that are directly relevant to each person. Based on those topics, Seethroo targets an ad that's a good fit for that person. This all happens in real-time. We also combine all activity across our network to create a "clearinghouse" of bookmark data, which lets us find and quantify behavioral trends that may not be visible when you're looking only at individual bookmark sites....

¹⁷⁹ David Kaplan, "MySpace Ad Targeting Expected To Grow Over Next Year: Report," paidContent.org, 24 Aug. 2007, <http://www.paidcontent.org/entry/419-myspace-ad-targeting-expected-to-grow-over-next-year-report/> (viewed 13 Oct. 2007).

¹⁸⁰ MySpace Media Kit, n.d.

We examine what bookmarks a person has saved for themselves, as well as any bookmarks they've viewed that were found by other people.... Seethroo's detailed analysis translates both the contents of a person's bookmarks, and the activity associated with those bookmarks, into solid targeting information.¹⁸¹

In a similar fashion, Lotame's Crowd Control bases its behavioral targeting on user interactions with social networks. Most advertisers, Lotame CEO Andy Monfried explains, "are working with Web 1.0 tools and methods for a Web 2.0 world....

Most targeting, even targeting that bills itself as behavioral targeting, has a very outmoded notion of behavior. The implicit assumption is that behavior consists of passive consumption of "precooked" information or entertainment content. So you follow what Web site visitors browse and associate that by inference with some subjects they're likely interested in, segmenting accordingly....

You've got to look at entirely new sets of data that social media generates and, more importantly, learn how to cull from that relevant ways of tracking the kinds of engagement, participation, interaction and involvement in depth that are unique to social networks and how to segment audiences who are actually makers and creators....

We track over 34,000 individual behaviors ranging from uploads to sharing to posting to linking to commentary. It's not just about navigating existing content. It's about how individual members in a social network interact with content in specific communities. We provide publishers with those behaviors and a general taxonomy that includes 171 different segments. But we allow—more than allow, we encourage—publishers to code them any way they want to reach the customers they most need to.¹⁸²

Yet another means by which advertisers are tracking the tastes and interests of social networkers—and targeting ads accordingly—are through widgets (small applications containing external content, such as music or video, which users can embed in their home pages). According to *Wikipedia*, "Widgets are now commonplace and are used by bloggers, social network users, auction sites and owners of personal web sites. They exist

¹⁸¹ Robert Moskowitz, "Use Social Networks to Target Ads," *iMedia Connection*, 22 Mar. 2007, <http://www.imediaconnection.com/content/14061.asp> (viewed 13 Oct. 2007).

¹⁸² Quoted in Phil Leggiere, "Scaling Intensity: BT and Social Media," *Behavioral Insider*, 12 Sept. 2007, http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticle&art_aid=67329&art_type=31 (viewed 13 Oct. 2007). "As ads get richer," observes Monfried, "the duration of time spent with the ad becomes much more relevant than click-through. For so long click-through rate and conversion metrics have been the primary factors in determining the success of an online campaign. However, social media needs to be looked at through a different lens. I think engagement metrics are evolving into the next yardstick when you're talking about successful online advertising within social media."

on home page sites such as iGoogle, Netvibes, Pageflakes, SpringWidgets and yourminis. Widgets are used as a distribution method by ad networks such as Google's AdSense, by media sites such as Flickr, by video sites such as YouTube and by hundreds of other organizations."¹⁸³ A veritable cottage industry has sprung up in recent months in the development of widgets, nearly 200 million of which have been downloaded by users, according to comScore's new Widget Metrix Service.¹⁸⁴ "Because widgets are commonly uploaded onto a personal site," notes *Online Media Daily's* Chris Cunningham, "their mere presence connotes some sort of endorsement by the site's owner and publisher, lending a credible voice to the brand on the widget. That widget isn't there to pay the sales force; it's there because the person whose words or photos we're coming to see every day likes it."¹⁸⁵

Advertisers like it, too, as Tacoda Chairman Dave Morgan makes clear. "[W]idgets are the most recent embodiment of highly distributable Web media," he explains. "Widgets permit users to separate the content from the Web page, permitting users to implant them on all types of pages, from personalized portal home pages to blogs to personal pages on social sites like MySpace or Facebook. I believe that over the next three years, widgets will change online advertising as we know it today."¹⁸⁶ That's certainly the goal that Chirag Patel, CEO of MeMedia, has for his company, which intends to spread trackable widgets far and wide throughout the new-media landscape. "We've introduced a unified interface and a contextual and behavioral targeting platform that enables publishers to easily install an ad widget in any digital media type," Patel explains, "whether it's a downloadable desktop application like an IM tool, an online Web page, a mobile Web page or a video that describes the asset and exposes the information on that inventory necessary for advertisers to best engage that consumer.... With a targeting ad widget embedded within the IM software, an advertiser can target ads based on the surfing,

¹⁸³ "Widgets," *Wikipedia*, http://en.wikipedia.org/wiki/Web_widget (viewed 23 Oct. 2007).

¹⁸⁴ Chris Cunningham, "Widget Marketing Metrics That Matter," *Online Media Daily*, 10 Oct. 2007, http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticleHomePage&art_aid=68887 (viewed 22 Oct. 2007).

¹⁸⁵ Chris Cunningham, "Widget Marketing Metrics That Matter."

¹⁸⁶ Dave Morgan, "Widget Advertising: Coming Fast," *OnlineSpin*, 14 June 2007, http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticleHomePage&art_aid=62340 (viewed 18 Oct. 2007).

shopping and browsing of the user on the Web, creating a better performing campaign and increasing monetization for the publisher."¹⁸⁷

VideoEgg, "the leading video ad network for online communities," recently released its Eggnetwork Advertising Platform (EAP), which brings "interactive advertising overlays onto online video," another way social networks can be monetized. "By leveraging social network profile data," the company explains, "the Eggnetwork enables advertisers to target their video advertisements in [a] powerful new way. ... VideoEgg is the leading video solution for online communities, supported by the largest video ad network," comprising "more than 70 online communities including five of the top 20 social networks in the world such as AOL, Bebo, hi5, myYearbook.com and Tagged."¹⁸⁸

For all of their ingenuity in developing technologies to extract and exploit data from social networks, the individuals behind the Lookerys and Lotames, the MeMedias and Videoeggs of the ad-targeting community are curiously oblivious to the larger implications of their work, which will almost surely create a backlash among the very users whose data they covet. "Most users of Facebook," observes the *Wall Street Journal*, "treat it as a sort of online scrapbook for their lives—posting everything from basic information about themselves to photos to calendars of events they plan to attend. They create a social network by linking their own Web pages with the pages of other users they consider online 'friends.'"¹⁸⁹ More than a few of these users, surely, will grow increasingly skeptical of "friendships" based on corporate affiliations, and of "communities" that are little more than *ad hoc* promotional gatherings. The Facebook

¹⁸⁷ Phil Leggiere, "Crossing the Channel: BT's Next Iteration," *Behavioral Insider*, 10 Oct. 2007, http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticle&art_aid=68960&art_type=31 (viewed 22 Oct. 2007).

¹⁸⁸ "VideoEgg's Ad Network Powers 60 Online Video Campaigns in Three Months," press release, 24 Apr. 2007, http://home.businesswire.com/portal/site/google/index.jsp?ndmViewId=news_view&newsId=20070424005076&newsLang=en. Application developers such as Rock You, J. Squared Media, Graffiti, Renkoo and Flixster have incorporated EAP in their Facebook applications. "Facebook Developers Monetize Applications Through VideoEgg Ad Network," press release, 13 Aug. 2007, <http://www.marketwire.com/mw/release.do?id=760149> (both viewed 29 Oct. 2007).

¹⁸⁹ Vauhini Vara, "Facebook Gets Personal with Ad Targeting Plan," *Wall Street Journal*, 23 Aug. 2007, B1.

Sponsored Group, for example, is typical of the "integrated opportunities" that the social network offers advertisers:

The Facebook Sponsored Group is the most integrated advertising opportunity on Facebook. It combines the functional and personal features of a user-created group with a valuable branding opportunity.

It is a content-rich section of the site that enables students to unite within a branded environment.

The Sponsored Group provides brands with a direct link into the Facebook community as a **participant**, not just as an advertiser.¹⁹⁰

More to the point, the *Wall Street Journal* explains, "the new service would let advertisers visit a Web site to choose a much wider array of characteristics for the users who should see their ads—based not only on age, gender and location, but also on details such as favorite activities and preferred music, people familiar with the matter say."¹⁹¹ More than merely a breach of trust—nowhere are users apprised of such data mining and ad targeting—Facebook's new technology betrays a more sinister, manipulative aspect:

Next year, Facebook hopes to expand on the service, one person says, using algorithms to learn how receptive a person might be to an ad based on readily available information about activities and interests of not just a user but also his friends—even if the user hasn't explicitly expressed interest in a given topic. Facebook could then target ads accordingly....

Facebook's plan, if it works, could be potentially powerful for advertisers. While Google's keyword-targeted ads aim at "demand fulfillment"—that is, they are triggered by Internet searches conducted by people who are actively looking for something that they want—*Facebook's new ad plan could help advertisers address an area called "demand generation."* This involves using available information—not just from a user but also the activities and interests of his

¹⁹⁰ Facebook, "Snapshot of Integrated Opportunities," n.d. [2007], emphasis in the original. For a minimum investment of \$150,000 over three months, the Sponsored Group package includes the following "promotional ad units, to drive traffic to the group:

Monthly Message Blast will reach registered group members via Facebook's internal e-mail program.

"Next Step" homepage link will appear on all members' log-in pages. This is one of our most effective traffic drivers on the site.

Sponsored Stories appear on the homepage, and drive users to the group.

Viral Promotion will occur organically as users see their friends have joined the Sponsored Group. We have seen a click-to-join increase of 5x via this viral promotion. Users can also "share" the group page with friends.

¹⁹¹ Vara, "Facebook Gets Personal with Ad Targeting Plan."

"friends" on the site—to figure out what people might want before they've specifically mentioned it.¹⁹²

It is little wonder, then, that even the *Wall Street Journal* has questioned the wisdom of Facebook's invasive practices. "While Facebook plans to protect its users' privacy and possibly give them an option to keep certain information completely private," the *Journal* notes, "some Facebook users might rebel against the use of their personal information for the company's gain."¹⁹³

Nor is Facebook's privacy statement very clear on this point. Even in the unlikely event that a Facebook user reads the entire statement, which runs to over 3,500 words, it's doubtful that he or she will grasp the slender thread on which one's privacy depends. But five key points (scattered, however, throughout the lengthy statement) should drive that point home. First, the company acknowledges, "When you visit Facebook you provide us with two types of information: personal information you knowingly choose to disclose that is collected by us and Web Site use information collected by us as you interact with our Web Site." Second, it warns, "You post User Content (as defined in the Facebook Terms of Use) on the Site at your own risk.... [W]e cannot and do not guarantee that User Content you post on the Site will not be viewed by unauthorized persons." Third, it admits, "Facebook may also collect information about you from other sources, such as newspapers, blogs, instant messaging services, and other users of the Facebook service through the operation of the service (e.g., photo tags) in order to provide you with more useful information and a more personalized experience." Fourth, moreover,

If you, your friends, or members of your network use any third-party applications developed using the Facebook Platform ("Platform Applications"), those Platform Applications may access and share certain information about you with others in accordance with your privacy settings.... [W]hile we have undertaken contractual and technical steps to restrict possible misuse of such information by such Platform Developers, we of course cannot and do not guarantee that all Platform Developers will abide by such agreements.... In addition, Platform Developers may require you to sign up to their own terms of service, privacy policies or other policies, which may give them additional rights or impose additional obligations on you, so please make sure to review these terms and policies carefully before using any Platform Application.

¹⁹² Vara, "Facebook Gets Personal with Ad Targeting Plan," emphasis added.

¹⁹³ Vara, "Facebook Gets Personal with Ad Targeting Plan."

Finally, the company declares (in perhaps the frankest admission of the sieve-like nature of its privacy standard), "When you use Facebook, certain information you post or share with third parties (e.g., a friend or someone in your network), such as personal information, comments, messages, photos, videos, Marketplace listings or other information, may be shared with other users in accordance with the privacy settings you select. All such sharing of information is done at your own risk. Please keep in mind that if you disclose personal information in your profile or when posting comments, messages, photos, videos, Marketplace listings or other items, this information may become publicly available."¹⁹⁴

If a chain is only as strong as its weakest link, Facebook's privacy policy is only as strong as those of its third-party collaborators—advertising networks, behavioral targeting firms, widget developers, and content delivery companies. Typical of such partners is RockYou!, the largest ad network on Facebook, whose privacy policy is nothing if not forthright. RockYou! admits to collecting both personally and non-personally identifiable information, through the media services it offers, the forums it hosts, the contests and surveys it runs, and the newsletters and mailing lists it operates. RockYou! also employs cookies, log files, Web beacons to collect data. "Any personal information or content that you voluntarily disclose online (on discussion boards, in messages and chat areas, within your public profile page, etc.)," the company admits, "becomes publicly available and can be collected and used by others." This information, moreover, is readily shared with other companies:

We provide personally identifiable information and non-personally-identifiable information to our subsidiaries, affiliated companies, or other businesses or persons for the purpose of processing such information on our behalf... RockYou! May share personally-identifiable information and/or non-personally-identifiable information with third party-affiliates and business partners for the purpose of offering greater functionality and enhanced services through RockYou! or other sites, and for the purpose of communicating these services to you.¹⁹⁵

¹⁹⁴ "Privacy Policy," Facebook, <http://www.facebook.com/policy.php> (viewed 26 Oct. 2007).

¹⁹⁵ "RockYou! Privacy Policy," <http://www.rockyou.com/privacypolicy.php> (viewed 13 Oct. 2007).

Understandably, several observers have expressed misgivings about Facebook's privacy standards and its emerging advertising practices. "Most people don't realize how targeting works; it becomes so good that even though it's anonymous, you feel like they know you," says Rishad Tobaccowala, CEO of Publicis Groupe-owned consulting firm Denuo Group. However, he says Facebook needs to be careful in implementing any targeted ad system, lest loyal users 'find it creepy.'"¹⁹⁶

More generally, other observers have expressed misgivings about the direction that social networks like Facebook and MySpace have taken. Instead of online communities supported by advertising, they are fast becoming marketing vehicles that host communications. And the level of such discourse, points out Wade Roush in *Technology Review*, is not very high. "...[T]here's good reason to be disturbed by the site," writes Roush in a withering critique of MySpace: "it is devolving from a friends' network into a marketing madhouse.

... To me, the popularity of MySpace and other social-networking sites signals a demand for new, more democratic ways to communicate—a demand that's likely to remake business, politics, and the arts as today's young Web users enter the adult world and bring their new communications preferences with them. The problem is that MySpace's choice of business strategy threatens to divert this populist energy and trap its users in the old, familiar world of big-media commercialism.

With friends like Burger King—and, as Roush points out, the fast-food chain cites over 130,000 friends on his MySpace profile—who needs advertisers? "There's nothing new, of course, about word-of-mouth marketing," Roush acknowledges. "What's sad about MySpace, though, is that the large supply of fake 'friends,' together with the cornucopia of ready-made songs, videos, and other marketing materials that can be directly embedded in profiles, encourages members to define themselves and their relationships almost solely in terms of media and consumption.... [I]f MySpace is to be the face of online social networking, it's fair to ask whether it's making our culture richer or poorer. To date, the only people who are profiting are Rupert Murdoch and his stockholders."¹⁹⁷

¹⁹⁶ Quoted in Vara, "Facebook Gets Personal with Ad Targeting Plan."

¹⁹⁷ Wade Roush, "Fakesters," *Technology Review*, 1 Nov. 2006, <http://www.technologyreview.com/Infotech/17713/page1/?a=f> (viewed 27 Oct. 2007).

H. The Failure of Industry Self-Regulation

Nearly ten years after the FTC released its 1998 report, "Privacy Online: A Report to Congress," the core privacy principles it espoused (and which actually date back to 1973)—Notice, Choice, Access, and Security—remain neglected afterthoughts in the advertising industry's headlong race to deploy tracking and targeting systems online:

Notice ("data collectors must disclose their information practices before collecting personal information from consumers," wrote the FTC in 1998), has been reduced to fleeting passages buried in complex, discursive "privacy statements" that are anything but user-friendly.

Choice ("consumers must be given options with respect to whether and how personal information collected from them may be used for purposes beyond those for which the information was provided"), has similarly been obscured, with well-hidden opt-out procedures that are often accompanied by warnings that service will be degraded (e.g., fewer customized features, less personalization) for those who reject the status quo of online surveillance.¹⁹⁸

Access ("consumers should be able to view and contest the accuracy and completeness of data collected about them"), would be implemented "soon," the NAI promised in 2000, but such access has never been delivered in any meaningful fashion.¹⁹⁹

Security ("data collectors must take reasonable steps to assure that information collected from consumers is accurate and secure from unauthorized use"), has been rendered fairly meaningless in the face of mergers and acquisitions that combine and commingle once-proprietary consumer databases.²⁰⁰

¹⁹⁸ MySpace, for example, advises users that "You may be able to configure your browser to accept or reject all or some cookies, or notify you when a cookie is set—each browser is different, so check the "Help" menu of your browser to learn how to change your cookie preferences—however, you must enable cookies from MySpace.com in order to use most functions on the site." "Privacy Policy," MySpace, <http://www.myspace.com/index.cfm?fuseaction=misc.privacy>. RockYou, similarly, cautions that "You can reset your web browser to refuse all cookies or to indicate when a cookie is being sent. However, some features of the RockYou! Sites may not function properly if the ability to accept cookies is disabled." "RockYou! Privacy Policy," <http://www.rockyou.com/privacypolicy.php> (both viewed 22 Oct. 2007).

¹⁹⁹ According to section IVB1(f) of the NAI principles, "Network advertisers shall provide consumers with reasonable access to PII and other information that is associated with PII retained by the network advertiser for OPM uses." Network Advertising Initiative, "Self-Regulatory Principles for Online Preference Marketing by Network Advertisers."

²⁰⁰ Nor have efforts to "anonymize" data proved to be reliable. In perhaps the most celebrated case, AOL released search log data on some 658,000 "unidentified" users, whose various search terms, as it turned out, were sufficient to identify many of those users. Dawn Kawamoto, "AOL Apologizes for Release of User Search Data," *C|Net News*, 7 Aug. 2006, http://www.news.com/2100-1030_3-6102793.html (viewed 22 Oct. 2007).

The simplicity of these principles is admirable, certainly, but the ease with which they have been neutralized by disingenuous and obfuscatory industry practices underscores the importance of the missing four principles from the 1980 OECD guidelines from which it is derived. Among these would be the fifth principle—Enforcement: "the use of a reliable mechanism to identify and impose sanctions for noncompliance with these fair information practices"—that the commission added in 1998. On this occasion, however, after nearly a decade of increasingly aggressive and sophisticated data collection practices on the part of the advertising industry—and a corresponding failure of the Network Advertising Initiative and the Interactive Advertising Bureau to update and enforce their principles accordingly—it is incumbent on the FTC to implement an enforcement system of its own.²⁰¹

The commission should know by now that it must adopt an approach to privacy for the interactive marketing era that truly protects consumers. It must embrace and implement the full OECD privacy guidelines, including ensuring the control of data by users, limiting collection and use, and providing transparency and accountability. It must expand upon these principles to state clearly that new media data gathering techniques, including IP addresses (such as search histories tied to an IP address), constitute the collection of personally identifiable information, as the 28th International Data Protection and Privacy Commissioners Conference stated last year:

Today, search engines have become the keys to cyberspace in order to be able to find requested information on the Internet, and thus an indispensable tool. The increasing importance of search engines for finding information on the Internet increasingly leads to considerable inroads into the privacy of users of search engines.

Providers of search engines have the capability to draw up a detailed profile of the interests of their users. Many IP-logs, especially when combined with respective data stored with access providers, allow for the identification of users. Given that the use of search engines is nowadays common practice among netizens, traffic data stored with providers of popular search engines allow for a detailed profile of interests, thoughts and activities across different sectors (for example work,

²⁰¹ As a supplement to the FTC's own "Fair Information Practice Principles," we would cite the "OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data," http://www.oecd.org/document/18/0,2340,en_2649_34255_1815186_1_1_1_1,00.html (viewed 23 Oct. 2007).

leisure, but also especially sensitive data about e.g. political opinions, religious beliefs, or even sexual preferences).²⁰²

Moreover, the commissioners reminded us of a chilling example of what can happen when such IP and search records are released, even inadvertently:

It is clear that this information is potentially personally identifiable. This not only makes it useful to the search engine providers but also to third parties. For example, a recent example highlighted the interest that law enforcement agencies take in this information: In spring [2006], AOL published a list of nearly 20 Million seemingly anonymised search queries about 650.000 AOL users had punched into AOL's search engine over a three-month-period. According to reports in the press, it was possible to identify single users on the basis of the content of their combined search queries. This list, although quickly withdrawn by AOL recognising that it was an error, had by the time of the withdrawal reportedly been downloaded and re-posted many times, and made available in searchable form on a number of websites.

It has to be noted that not only can traffic data constitute personal information, but so can the content of search queries.

These developments underline that search histories stored by providers of search engines now in many cases may constitute personally identifiable data. Specifically, in cases where operators of search engines are also offering other services leading to the identification of an individual (e.g. e-mail), traffic and content data from searches could be combined with other personally identifiable information derived from those other services during a single session (e.g. based on comparing IP-addresses). The percentage of search history data that can be linked to individuals is likely to further rise in the future due to the uptake of the use of fixed IP numbers in high-speed DSL or other broadband connections where user's computers are "always online." It will further rise once the introduction of IPv6 is completed.²⁰³

The FTC must immediately clarify for consumers that in today's interactive marketing era, the collection of bits of our personal behavior—whether perusing a travel site, viewing a video for a political candidate, searching for health information, or instant messaging our friends—constitutes personally identifiable information. The notion that only a narrow range of such data is PII (such as name, address, and social security number) is providing the online marketing industry with the commission's imprimatur

²⁰² "Resolution on Privacy Protection and Search Engines," 28th International Data Protection and Privacy Commissioners' Conference London, 2-3 Nov. 2006, http://ec.europa.eu/justice_home/fsj/privacy/news/docs/pr_google_annex_16_05_07_en.pdf (viewed 30 Oct. 2007).

²⁰³ "Resolution on Privacy Protection and Search Engines."

that our data is safe.²⁰⁴ Today, online marketers don't need to know *who* you are to know and understand (and target) you. Hence an immediate revision of the PII regime is required if the commission desires to provide consumer protection safeguards relevant to the twenty-first century.

As a very first step in this process, the commission needs to re-define the four basic privacy principles, as follows:

Notice: Disclosure of any and all data-collection practices should be clear and concise—indicating *what* data are being collected, *how* they are being used, and *whether* they will be shared with other parties (including a company's own affiliates). Websites that collect data, moreover, should include a special logo (e.g., ) at least as conspicuous as the TRUSTe badge  that emblazons many commercial websites today. Since the distinction between so-called personally identifiable information (PII) and non-PII is tenuous at best (as even non-PII can be aggregated and analyzed in a fashion that is *far more revealing* than one's name or address), adequate notice of *any* data-collection practices (including cookies and Web beacons) should be given.

Choice: The tracking, analysis, and targeting technologies that we have discussed in this complaint pose a sufficient threat to user privacy that they should be implemented only on an *opt-in* basis. Users, that is, must give their explicit permission before (1) their online activities can be monitored; (2) they are served behaviorally targeted ads or placed in specific audience segments for the purpose of receiving targeted advertising; or (3) any online data is combined with offline files for the purpose of tracking, targeting, or data-mining activities.

Access: Just as consumers now have access to their credit reports under the provisions of the Fair Credit Reporting Act, so should they be able to examine, correct, and/or delete any online data collected about them (including tracking, targeting, and segmenting profiles).

Security: A strict, limited data-retention policy for the storage of personal data collected online, stipulating that data may be retained only for the duration of a particular task or process—and in no case longer than 6 months without explicit consent from those to whom the data pertains—would go a long way toward eliminating concerns about the misuse and leakage of personal data.

²⁰⁴ For a more meaningful definition of PII, see "Consumer Rights and Protections in the Behavioral Advertising Sector," submitted in advance of the FTC Town Hall, "Behavioral Advertising: Tracking, Targeting, and Technology," 1-2 Nov. 2007, Washington, D.C.

Immediately following, the commission must take steps to address the other critical, missing, provisions of the OECD guidelines, by adding measures that will ensure the control of data by users, limit collection and use, and provide greater transparency and accountability.

Even *Business Week*, not usually counted among the staunchest proponents of consumer privacy, has acknowledged the shortcomings of industry behavior in the privacy realm. "To supporters of Internet self-regulation," the magazine wrote in a March 2000 editorial, "one of the saddest spectacles of late has been the inexorable drive to sacrifice consumer privacy in the name of targeted advertising. Postulating a false dichotomy between the economic well-being of Net enterprises and individual privacy, companies blindly proceeded to set the stage for a major backlash.... DoubleClick and other Net companies belonging to the Network Advertising Initiative promised to develop a privacy code some time ago and simply walked away from their responsibilities. Federal law is now necessary, if only to avoid the chaos that would surely come if pending state and local privacy bills were passed."²⁰⁵

In recent months, it is true, a number of companies, including Google, Microsoft, Tacoda, and the IAB itself have launched new privacy initiatives that purport to address the concerns that organizations such as the Electronic Privacy Information Center, the Electronic Frontier Foundation, as well as CDD and USPIRG have raised over the past

²⁰⁵ "Getting Serious About Net Privacy," *Business Week*, 20 March 2000. The magazine also came up with privacy policy recommendations of its own: "BUSINESS WEEK believes that a single minimum federal standard of online privacy would increase consumer trust and bolster the long-term health of e-commerce. Here are four principles for privacy legislation:—CLARITY. Web sites should explain clearly, in plain English, what they do with a person's information, how they aggregate it with other data bases, and with whom they share it. They and their business partners should follow the same set of privacy policies.—CHOICE. People must be given the choice of whether or not to reveal personal data on sensitive topics, such as health and finances. If they want to "opt in," they can. If not, no such data can be collected on them. Period. And under no circumstances should data be collected from children without their parents' consent. Consumers must also be given the opportunity to "opt out" of anything. Net companies are quick to say that anyone can opt out right now, but most mechanisms are obscure, difficult, and serve to dissuade people from using them. This must change.—DISCLOSURE. Consumers must be able to inspect all their online files and change them if they wish. Individuals can already demand to see their credit rating files and correct any errors. Allowing the same option for online files is a no-brainer.—ENFORCEMENT. If online sites invade consumer privacy, they must be penalized. The Federal Trade Commission should do this job. It already enforces the Fair Credit Reporting Act for credit agencies, the Truth in Lending Act, and the Children's Online Privacy Protection Act."

year.²⁰⁶ Based as these new initiatives are, however, on an illusory distinction between personally and non-personally identifiable information, and tied as they still are to obscure opt-out procedures that few users elect to follow, it must be said that these efforts on the part of the advertising industry have more to do with public relations than with sound public policy.

For all of these reasons, CDD and USPIRG feel compelled to reiterate the call we made in our original filing in November 2006:

... it is critical that the FTC act *now* to protect the interests of the public. The FTC must require notice of all information collected, and full disclosure of how that data will be used. The commission should ask Congress to pass federal legislation requiring affirmative consent for all data used—which must be regularly updated and re-approved by users. An all-embracing opt-in should be the minimum standard. All data collection and e-commerce marketing techniques must be unbundled, disclosed, and given affirmative consent by users. Indeed, the commission should also strive to have industry develop meaningful codes of conduct related to marketing that go beyond these basic principles.²⁰⁷

The advertising industry, as we have seen, continues to evolve, adopting new technologies and new techniques, and bringing their tracking and targeting systems onto entirely new platforms—moving from the Internet to mobile networks over the past year, for example, and doubtless "coming soon to a digital television near you."

In the face of such rapid developments, the FTC simply cannot afford to stand still. It should, instead, undertake the following items:

The Commission should immediately launch an investigation into the companies cited in this complaint, including the range of data collection practices described.

²⁰⁶ See, for example, "TACODA Builds on Consumer Choice Initiative With Privacy Practices Audit," press release, 1 Dec. 2006, http://www.ip97.com/tacoda_builds_on_consumer_choice_initiative_with_privacy_practices_fbcf.aspx; Peter Fleischer and Nicole Wong, "Taking Steps to Further Improve our Privacy Practices," The Official Google Blog, 14 Mar. 2007, http://www.Taking_steps_to_further_improve_our_privacy_practices.com/; "Microsoft Announces Enhanced Privacy Protections for Customers," press release, 22 July 2007, <http://www.microsoft.com/presspass/press/2007/jul07/07-22EnhancedPrivacyPrinciplesPR.msp>; and "IAB Supports Key Interactive Industry Executives Expected to Voice Strong Position on Consumer Privacy and Benefits of Ad-Supported Internet," press release, 27 Sept. 2007, http://www.iab.net/news/pr_2007_09_27.asp (all viewed 25 Oct. 2007).

²⁰⁷ CDD and USPIRG, "Complaint and Request for Inquiry and Injunctive Relief Concerning Unfair and Deceptive Online Marketing Practices," 1 Nov. 2006, 48.

The Commission should immediately create a special task force to examine new threats to children and teenagers, including the role of behavioral targeting and profiling. It should report to the Congress and the public concerning this topic with all due speed.

The Commission should open up an inquiry into the data collection and target marketing practices of social networks. It must especially examine how the current privacy policy of such well-known services as Facebook and MySpace protect users, especially youth.

The Commission must launch an investigation into the role of behavioral targeting and online advertising in the promotion and sales of subprime mortgages, bringing about swift enforcement action.

The Commission must also examine the role that racial profiling and ethnic identification play in the data collection and online market targeting of consumers.

The Commission must also update its own privacy principles to reinstate all provisions of the OECD Guidelines, which are needed more than ever in a connected, online world.

As always, we are prepared to assist the commission in addressing this vitally important issue.

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