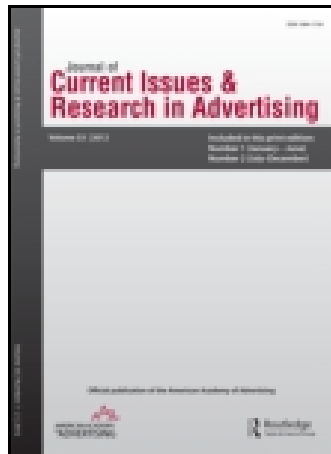


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Legal and Ethical Challenges of Online Behavioral Targeting in Advertising

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Online behavioral targeting (OBT), the tracking of a consumer's online activities in order to develop a behavioral profile of the consumer, is a rapidly growing technique that enables advertisers to deliver relevant messages. While OBT provides many advantages to shoppers and advertisers alike, the practice has the technological potential to violate consumers' privacy rights to a dangerous and unprecedented degree. Still, OBT is poorly understood by most consumers, is often nontransparent and deceptive, and in many cases does not even provide a reasonable chance to opt out. Due to OBT's relative newness, few laws, regulations, and policies, as well as in-depth ethical analyses of the practice, exist. Actions by the Federal Trade Commission (FTC), however, provide a notable exception. In a series of reports, in particular since 2009, the agency has engaged in dialogs with various stakeholders about OBT and the dangers it poses to consumers. Its efforts have also included legal enforcement activities. Within the context of these developments our article presents the evolution of the broader legal environment, including an ethical analysis of the FTC's efforts. Our objective is to shed light on the issue from a normative perspective and to assist online advertisers as well as regulators searching for guidelines and policies on how to use OBT in a responsible manner.

THE RISE OF ONLINE ADVERTISING

Advancements in modern communication technologies have ushered in an era of creative opportunities for advertisers. While traditional media remain primarily restricted to a one-way communication between the advertiser and the customer, modern technology allows for truly customized messages and interactive communication. Since the early 1990s, advertisers have reaped the rewards of unprecedented growth due to the Internet, a medium exceptionally adept

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at delivering information to customers (Zinkhan 2002). While the number of global websites increased from less than 10 million in 2000 to almost 600 million in 2012, the number of Facebook accounts exploded from almost none in 2005 to more than 800 million in 2012 (Zakon 2012). In line with the staggering growth of new media, U.S. retail E-commerce sales, as a percent of total retail sales, have gained continuously from less than 1% in 2000 to almost 5% in 2011 (CBCD 2012), an increase five times as fast as traditional retail sales.

Over the last decade, Internet advertising revenue increased from \$8 billion to close to \$32 billion in 2011 according to the IAB Interactive Advertising Revenue Report (IAB 2012). With 47% of total advertising revenue on the Internet, search-related advertising leads the field, followed by display and banner ads, which generated 22% of revenue.

Despite these impressive numbers, there is a general dearth of research publications in the marketing literature dealing with the specific legal and ethical challenges of online advertising (Nill and Schibrowsky 2007; Schibrowsky, Peltier, and Nill 2007). In fact, online advertising did not generally start to attract major interest in academia before the mid-1990s (Ha 2008; Culnan 2000; Sheehan and Gleason 2001). Earlier research is concerned with privacy issues and the use of public records data for marketing purposes (Bunker, Splichal, Chamberlin, and Perry 1993; Nowak and Phelps 1995; Hoefges 1998; Sheinkopf 1998; Phelps, Nowak, and Ferrell 2000; Phelps and Bunker 2001). In the legal literature, the topic has been gaining an increasing amount of attention in recent years. (Fuelleman 2011; Roethlisberger 2011; Serwin 2011).

The purposes of this article are (1) to shed light on the character and significance of online behavioral targeting (OBT), (2) to explain the important and ongoing role of the Federal Trade Commission (FTC) in fashioning policies and regulatory actions for addressing OBT, (3) to offer an ethical analysis of OBT vis-à-vis the FTC's policies, and finally (4) to provide some ethically based recommendations for online advertisers to comport with the current but evolving legal environment.

Online Behavioral Targeting

Online behavioral targeting, or OBT,¹ is a direct spinoff of direct marketing. More specifically, it is a technique for delivering relevant messages to consumers by basing the messages on an analysis of the consumers' online behavior. To accomplish this, advertisers or their agents collect information about an individual consumer's Internet activities to gain a broad consumer profile. The collected data include which websites the consumers visited, what search terms they used, and whether goods or services were purchased. This information is at times combined with demographic and geographic data that can also be retrieved from the Web. Once analyzed, the collected information enables advertisers to deliver pertinent and targeted messages. For example, if a consumer is searching for flight information to Las Vegas for a specific weekend, it is a reasonable assumption that this person might be interested in hotel fares as well. Accordingly, a banner ad about hotels in Las Vegas might be relevant for this consumer. As Pippa Leary, the managing director of Fairfax, explains: "Behavioral targeting gives the banner an effectiveness that it never had and creates a much more targeted effect for advertisers" (Howarth 2010, 26).

¹Some sources, most notably the FTC, also refer to online behavioral targeting (OBT) as online behavioral advertising (OBA). The terms are essentially interchangeable. This article generally uses the abbreviated OBT except when the source of the discussion refers to it as OBA.

As the Network Advertising Initiative in 2009 noted in a study, behaviorally targeted advertising is more than twice as effective at converting users who click on the ads into buyers, compared with traditional advertising (6.8% conversion vs. 2.8% for traditional ads). Further, behaviorally targeted advertising has secured an average of 2.68 times more revenue per ad than nontargeted advertising. Online behavioral targeting accounted for approximately 18% of advertising revenue in 2009 (Network Advertising Initiative 2012). A report by eMarketer, a U.S. research group, predicts that behaviorally targeted ad dollars will rise as a proportion of online display spending from 14.2% in 2010 to nearly 20% in 2014 (Howarth 2010). In Europe, it is estimated that more than a quarter of online advertisers use some form of behavioral targeting (Bearne 2009).

There are also potential rewards for consumers. First, consumers are much more likely to receive information about the products and services that are both relevant and interesting to them. Moreover, online advertising and the revenue it creates allow consumers to have access to a vast amount of information and services for free.

Despite OBT's potential benefits, the practice raises legal and ethical concerns about consumer privacy and control (Cases et al. 2010). Further, unlike with traditional information collection methods that afford a payment or other incentive to divulge information, consumers usually do not receive any direct compensation when exposed to OBT. It is additionally worrisome that this is occurring in an environment in which consumers are often unaware of the advertisers' targeting practices (Manny 2010; Stallworth 2010).

There is a wide range of technological possibilities to the collection and use of data for targeted messages, and not all of them raise the same kinds of concerns. Therefore, it is necessary to distinguish between different forms of OBT. These are discussed next.

Contextual Advertisements

Contextual advertisements are thematically related to the webpage a consumer visits at a current online session. As shown in the earlier example, a consumer looking at a travel webpage such as expedia.com for flights to Las Vegas might be shown ads of Las Vegas hotels on the same webpage. While these complementary context-based ads have been shown to be three times as effective as regular online ads (Hayashi 2010), they are fairly innocuous from a privacy perspective. Little information about the consumer is collected and used. Virtually no information is stored past the visit of this webpage and the consumer can readily see the connection. In other words, the consumer is usually aware of how the advertiser is using his or her information.

The use of search engines and free e-mail constitutes a potentially more troublesome form of contextual advertisements. Starting in March 2012, Google has put together all the information it holds about its consumers from such disparate products as cell phones, search engines, e-mail, YouTube, and so on. Thus, as Chris Gaither, a spokesman for Google, notes, if someone writes a friend on Gmail about a new puppy, Google will be able to recommend dog training videos on YouTube (Weise 2012). Similarly, a consumer writing an e-mail using Google's free service is likely to get an ad that contextually corresponds to the e-mail on his Google-operated cell phone. Google strives "to make ads that appear next to search results just as useful to users as the search results themselves" (Wong 2009, 1). "As Google users browse the Internet, Google simultaneously compiles data about that user, the viewer becomes the viewed" (Stallworth 2010, 470).

Browser-Based Tracking

Browser-based tracking allows the collection of data across several webpages and over multiple online sessions. For instance, if a consumer visits a commercial webpage such as Bloomberg.com, a cookie is installed on the consumer's browser. The cookie marks this particular browser so that it will be recognized if the consumer moves on to other websites. This enables the advertiser to assemble a profile of the individual consumer by combining many pieces of information collected in different contexts and at various times (Manny 2010). Most commercial websites use some form of browser-based tracking. The use of cookies is also used by not-for-profit organizations. For instance, in an analysis of 102 church websites, 36% either placed a cookie or had third-party cookie placement (Hoy and Phelps 2003). Consumers who do not wish to divulge information about their Web browsing activities might opt out and block the installation of cookies. This, however, may cause the consumer other difficulties since many websites don't allow access without cookies. For example, Bloomberg.com's privacy policy declares: "However, it is possible that some parts of this Web site will not function properly if you disable cookies" (Bloomberg.com 2012). Alternatively, consumers might delete cookies after each online session in an attempt to avoid allowing data to be collected over a series of times.

Stealth Browser-Based Tracking

Many consumers are unaware that some new targeting technologies cannot be defeated by the simple means already described (Howarth 2010). For example, tracking information can be installed in the software code of local shared objects (LSOs) such as Adobe's Flash multimedia software. But, unbeknownst to those consumers who then delete all their cookies in order to protect their privacy, all of their historical behavioral data is still available to advertisers. As discussed in the following with the Sears and K-Mart case, consumers' computers can be infiltrated with tracking software that cannot be detected by common anti-spy software. Further, consumers often have no way of knowing that the private information about them on the Internet is being secretly collected, analyzed, and used. In other words, even quite computer-savvy consumers can fall prey to this behavioral targeting scheme.

Internet Service Provider-Based Tracking

Possibly the most egregious and abusive form of online behavioral targeting is based on Internet service provider (ISP) tracking (Center for Democracy & Technology 2008). Every computer connected to the Internet has an Internet Protocol (IP) address. This address is provided by the consumer's Internet service provider (ISP), which keeps log files that record every single move on the Internet. These log data provide information about who—the unique IP address—visited which pages at what time (Drost 2009). Since the means of connection such as cable or DSL require a fixed registered connection node, usually associated with a physical address, the ISP is also in a position to determine the physical location of each IP address. That is, the ISP knows the actual physical location of each customer logging on to the Internet.

As occurred in two relatively recent cases, for example, *Valentine v. NebuAd* (2008) and *Kirch v. Embarq Management* (2010), an ISP allowed an advertising network company to access these log data. The advertising network company analyzes the data in order to create a profile of each individual consumer based on the consumer's past online behavior, interests, purchases, address, and possibly income. This information is used by placing targeted ads on the websites the consumer visits. In comparison to browser-based targeting, ISP targeting is or can be based on virtually all Web transactions, including visits to noncommercial sites, such as political or religious sites, that usually do not use cookies. Further, the consumer cannot defeat this system by simply switching browsers or even switching computers (Topolski 2008). This enables the advertising network company to assemble an even more precise picture of the individual consumer, who is neither aware of being profiled, nor in a position to do anything about it.

LEGAL CHALLENGES TO ONLINE BEHAVIORAL TARGETING

While laws protecting Internet consumers were created in the earliest days of its inception, this article focuses on the Federal Trade Commission guidelines regarding OBT and its potential consequences for online advertisers and consumers.

Federal Trade Commission: Policies and Principles on Online Behavioral Targeting

The Federal Trade Commission (FTC) has been actively engaged since 1995 in exploring the legal and policy parameters of what it refers to as “understand[ing] the online market and the privacy issues it raises for consumers” (Federal Trade Commission 2009, i). Beginning in 1999 the commission launched an investigation of online profiling practices, and in a 2000 report it recommended to Congress that Congress enact “backstop legislation,” warning that self-regulation was not working (Federal Trade Commission 2009, 7). In the wake of the dot-com bubble, however, many of the worst offenses declined as a result of a precipitous fall in advertising after many wrongdoers simply ceased doing business (Federal Trade Commission 2009).

In 2007 the FTC hosted a series of workshops to engage stakeholders to better understand the problems associated with online advertising. In February 2009, as a result of a two-day “Town Hall” meeting, a report titled “Self-Regulatory Principles for Online Behavioral Advertising” was issued (Federal Trade Commission 2009). The FTC defined OBT in the report (which the agency calls online behavioral advertising, or OBA) as “the tracking of a consumer’s activities online—including the searches the consumer has conducted, the webpages visited, and the content viewed—in order to deliver advertising targeted to the individual consumer’s interest” (Stallworth 2010, 481).

The FTC’s 2009 report and principles encompassed value-based and ethically based reasoning. The report acknowledged that consumers reap benefits from online advertising by providing them with access to free, personalized online content. Still, the report warned that these benefits should be balanced against often inadequate disclosures to consumers as well as the potentially harmful effect of important and private personal data which might be stored for destructive uses (Federal Trade Commission 2009). In light of these concerns, the report issued four governing principles

based on an overarching policy of advancing transparency, consumer control, and reasonable security for consumer data.

The four principles the FTC promulgated were:

1. “Transparency and consumer control,” suggesting that clear disclosures be made to consumers about what OBT is and what it can do, and to provide consumers with the ability to choose whether they wish to have the information collected for the purposes stated in the disclosure.
2. “Reasonable security and limited data retention for consumer data,” which espoused a policy recommendation that data ought to be retained for at least as long as it is necessary to fulfill possible business or legal enforcement.
3. “Affirmative express consent for material changes to existing privacy promises,” which proposed that all promises made to consumers in the manner in which data is collected and used must continue even if the policies change. More specifically, the agency stated that “before a company can use previously collected data in a manner materially different from promises the company made when it collected the data, it should obtain affirmative express consent from affected consumers” (Federal Trade Commission 2009, 47).
4. “Affirmative express consent (or prohibition against) using sensitive data for behavioral advertising,” which encompassed a plan for advertisers to obtain consent from stakeholders in particular for “financial data, data about children, health information, precise geographic location and Social Security numbers” (Federal Trade Commission 2009, 44).

Interestingly, the FTC exempted both contextual advertising and first-party advertising from its purview. The commission explained that “For purposes of the principles, online behavioral advertising means the tracking of a consumer’s online activities over time . . . This definition is not intended to include first party advertising . . . or contextual advertising” (Federal Trade Commission 2009, 46). Therefore, contextual advertisements even with the new technological possibilities of combining different product categories, as it is suggested by Google’s new privacy policy, is exempted from FTC purview.

In 2010, the FTC issued a new preliminary staff report addressing ongoing concerns about OBT. In the report, titled “Protecting Consumer Privacy in an Era of Rapid Change” (Federal Trade Commission 2010), the FTC conceded that its long-advocated “notice and choice” approach, a policy that animates the four principles presented in the 2009 report, may not be sufficient due to its “placing too high a burden on consumers to read, understand, and then exercise meaningful choices on them” (Federal Trade Commission 2010, 26–27). Despite these reservations, the 2010 report did in fact leave intact much of the substance contained in the 2009 report (Federal Trade Commission 2009), while proposing a new and stronger component, called “Do Not Track.” The agency contended that a “Do Not Track” system might be devised through legislation or “robust self-regulation” by “placing a setting similar to a persistent cookie on a consumer’s browser and conveying [by] settings to sites that the browser visits.” These cookies would then be deployed “to signal whether or not the consumer wants to be tracked or receive targeted advertisements” (Federal Trade Commission 2010, 66).

As the FTC’s policies are evolving, its “Do Not Track” idea continues to gain traction. The agency testified to Congress in 2011 on the merits of its proposal, as well as noting that many private stakeholders are already implementing the idea voluntarily (Federal Trade Commission 2011).

Paralleling the FTC efforts, some members of Congress pressed forward their own proposals. Rep. Jackie Speier introduced legislation dubbed the “Do Not Track Me Online Act of 2011.” Her bill allows computer users to block out data taken for most forms of online behavioral targeting or advertising and empowers the FTC to enforce it (Congresswomen Jackie Speier 2011). Senator John Kerry also introduced federal legislation in 2010 (Privacy Lives 2010) to address OBT. Neither bill has been codified yet.

In March 2012, the FTC issued yet another important report, titled “Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers” (Federal Trade Commission 2012a). The agency recommended that private companies should regulate themselves by promoting five goals, some of which were not new. These goals were:

1. *Do not track.* Under this goal, the FTC noted that in response to its 2011 proposal that two private groups, the Digital Advertising Alliance (DAA) and the World Wide Web Consortium (WWWC), were developing standards and an icon-based system to promote “Do Not Track.” In the report the FTC commended their progress and emphasized that it “will work with these groups to complete implementation of an easy-to-use, persistent, and effective Do Not Track system” (Federal Trade Commission 2012a, v).
2. *Mobile.* The FTC urged “companies offering mobile services to work toward improved privacy protections, including disclosures” (Federal Trade Commission 2012a, v).
3. *Data brokers.* The FTC also pressed data brokers to make their operations more transparent by “creating a centralized website” to identify who they were and to disclose how they collect and use consumer data. In addition, their websites should detail the choices that data brokers provide consumers about their own information (Federal Trade Commission 2012a, v).
4. *Large platform providers.* The FTC voiced a concern about ISPs, and encouraged them to act regarding ongoing privacy problems in their “operating systems, browsers and social media companies, [which] seek to comprehensively track consumers’ online activities” (Federal Trade Commission 2012a, v).
5. *Promoting enforceable self-regulatory codes.* Finally, the agency stated that it planned to coordinate its activities with those of the Department of Commerce and nongovernment stakeholders “to develop industry-specific codes of conduct” warning that once codes are enacted, if “companies do not honor the codes they sign up for, they could be subject to FTC enforcement actions” (Federal Trade Commission 2012a, v).

Enforcement of FTC Policies

In addition to sponsoring and interacting with stakeholders through workshops and Town Meetings in order to develop policies, the FTC has also pursued a policy to enforce and deter what it deemed improper practices. For example, from 2001 to 2009, the agency “brought twenty-three actions against companies that allegedly failed to provide reasonable protections for sensitive consumer information in both online and offline settings” (Federal Trade Commission 2009, 5). Specifically the agency is empowered to conduct these actions under the Federal Trade Commission Act (FTCA) Section 5(a). This law provides that the commission has authority to “prevent unfair methods of competition, and unfair and deceptive acts or practices in or affecting interstate commerce” (Federal Trade Commission Act 2009).

The FTC, after initially advancing its 2009 principles, pursued both Sears and K-Mart for violations of the Federal Trade Commission Act (FTCA) for their OBT practices. In the case, an affiliate company of Sears and K-Mart managed a pop-up advertisement on both companies' websites that employed a type of stealth browser-based Web tracking system. The ad invited consumers to join its interactive online group labeled "My SHC Community." The ad stated:

"Ever wish you could talk directly to a retailer? Tell them about the products, services and offers that could really be right for you? If you're interested in becoming something new, something different, we'd like to invite you to become a member of My SHC Community. My SHC Community, sponsored by Sears Holdings Corporation, is a dynamic and highly interactive online community. It's a place where your voice is heard and opinions matter, and what you want and need counts." (*In the Matter of Sears Holdings Management Corp. I* 2009, 2)

Despite the enticing and ostensibly harmless-sounding language, the consumers who did join in the program were not informed in advance that tracking software would be loaded onto their computers. The software, in fact, had the ability to send data to the retailers of most of the consumers' online activities. This included online purchases, applications, and banking transactions, as well as browsing, and even had the ability to acquire the names of senders and receivers of Web-based e-mail and instant messaging. Sears and K-Mart's only efforts to inform consumers of how the system worked consisted of a written explanation of its software and its operations, yet this was only available if requested. None of this adequately conveyed the actual impact on consumers.

Sears and K-Mart subsequently settled with the FTC. The companies agreed that they would end their practices, give notice to their consumers on how to take out the tracking software, and destroy the data already collected. Regarding their future practices, Sears and K-Mart agreed they would never again install tracking software unless users were told of the kind of information that was being collected, the manner in which it would be used, and the parties, other than the two companies, that might use it. Moreover, consent could only be given by a non-preselected button or link (*In the Matter of Sears Holdings Management II* 2009).

Possibly encouraged by the FTC's early policies of pursuing online advertisers who overstepped the boundaries of privacy, a series of class action suits was filed beginning in 2008. The suits, also initiated to thwart OBT, involved the application of various federal and state statutes, as well as common law actions (*Valentine v. NebuAd, Inc.* [2008]; *Kirch v. Embarq Management* [2010]; *Mortensen v. Bresnan Communication* [2010]; *Deering v. CenturyTel* [2011]). These cases, a detailed discussion and analyses of which are beyond the scope of this article, add to the growing legal challenges to OBT and may also help to shape future policies in forging a more moral environment for both consumers and advertisers.

However, it is noteworthy that some arguments made in the recent cases brought against OBT practices were arguably counter to ethically based standards. For example, some legal assertions were dismissed on the basis of consent, particularly due to the courts' application of the Electronic Communication Protection Act or ECPA (ECPA 2010). In those cases, the courts contended—in line with the FTC's pre-2010 advocated approach of "notice and choice"—that the information about the companies' OBT practices was presented to the consumer, who agreed to the terms but did not actually read them. Thus, the plaintiffs had legal notice, and therefore consented, at least

impliedly, to those provisions that stated that their private information might be intercepted and used (*Kirch v. Embarq Management* [2010]; *Mortensen v. Bresnan Communication* [2010]).

Due to the FTC's actions as well as the lawsuits just cited, the legal environment surrounding OBT is becoming more discernible in its shape and direction. The FTC has, particularly since the issuance of its 2010 report, demonstrated an abiding desire to thwart abusive OBT practices with its influence and resources if the industry does not self-regulate. Congress is also revealing some, albeit not yet successful, interest in passing statutes to create more protections.

Online activity in general and OBT in particular are, of course, truly global phenomena that lawmakers and regulators in different countries have not responded to uniformly. This may possibly impede the goal of more consumer privacy due to the Internet's global nature. More specifically, while there is agreement on general privacy principles between the United States and the European Union, there is considerable variation in how these principles are interpreted, implemented, and enforced (Manny 2010; Gellman 2011).

ETHICAL CHALLENGES TO BEHAVIORAL TARGETING

While the legal challenges can be daunting, companies involved in online behavioral targeting also have to grapple with ethical issues. Interestingly, according to a study on decision making in advertising, the majority of advertising professionals were influenced only by legal considerations; ethics exerted only a minor role (Davis 1994). Advertising ethics is often given little or no attention until the company is forced to make a reactive response when challenged by consumers or the law (Snyder 2008).

While it suffices to say that the legal system is not and cannot be a substitute for responsibility (Nill 2003) in the first place, the laws and regulations governing OBT are evolving too quickly and are too elusive to provide clear guidance for advertisers (Stallworth 2010). Further, without an explicit ethical dialogue involving all stakeholders, the market left to its own devices might not lead to ethical outcomes. Even if consumers were aware of OBT, it is folly to assume that they are in a position to shy away from those companies that engage in practices that they perceive as improper or unethical. While consumers can certainly choose between different products and services advertised on the Internet, there is only one Internet. That is to say, at the present moment, consumers who do not want to risk being tracked by online advertisers have no choice but to stay away from the Internet altogether. This is certainly not an appealing or even realistic choice for most consumers.

Further, while the majority of consumers are aware of the fact that online advertisers collect data and use these data to deliver targeted advertisements (Alreck and Settle 2007), they are oblivious of the breadth and depth of OBT (Milne et al. 2008; Turow, Hennessy, and Bleakley 2008). Most consumers do not realize that behavioral advertising already takes place, are confused about tracking technology, and do not know how to limit advertisers' ability to track their online behavior (via deletion of cookies, selecting safe websites, etc.) (McDonald and Cranor 2009). Indeed, a national survey revealed "that consumers' failure to protect their privacy online as well as offline can also be attributed to limited consumers' knowledge" (Turow et al. 2008, 412). For example, 75% of consumers in this survey incorrectly assumed that when a website has a privacy policy, it means the site will not share the consumer's personal information with other websites

or companies. Clearly, it would be a far cry to assume that the typical online consumer is capable of making an informed choice about OBT.

An explicit consideration of ethical aspects concerning OBT seems warranted since neither the legal system nor consumer choice provides a sufficient guideline for online advertisers.

Ethical Analysis of Online Behavioral Targeting and the FTC Principles and Guidelines

Advertising ethics is “concerned with questions of what ought to be done, not just what legally must be done” (Cunningham 1999, 500). Most theories of normative ethics can be separated in deontological and teleological approaches, both of which are often used in moral philosophy (Murphy and Laczniak 1981; Whysall 2000; Hunt and Vitell 2006).

Basing an ethical assessment of OBT on deontological as well as teleological considerations seems relevant since the ethical decision-making process of most individuals is influenced by both of these moral philosophies (Ferrell and Gresham 1985; Hunt and Vitell 1986; Ferrell, Gresham, and Fraedrich 1989; Jones 1991; Forsyth 1992; Barnett, Bass, Brown, and Hebert 1998). Empirical research suggests that while marketing practitioners (Mayo and Marks 1990; Hunt and Vasquez-Parraga 1993) as well as consumers (Vitell, Singhapakdi, and Thomas 2001) typically use both types of evaluations, they tend to rely more on deontological principles than on teleological calculations (Cherry and Fraedrich 2002).

Deontological and Teleological Approaches

Deontological approaches to ethics judge the value of actions only from the perspective of their inherent wrongness or rightness (Nill and Schibrowsky 2007). Being ethical is having ethical intentions without considering the consequences, because any result of any action is influenced by uncontrollable variables. The philosopher Immanuel Kant stated that “A good intention is the only thing which can be seen as truly ethical” (Kant 1965, 10). Thus, deontological approaches are duty based and follow absolute principles. Kant’s categorical imperative “Act according to that maxim only, which you can wish, at the same time to become a universal law” (Kant 1965, 42) and the Golden Rule of Christianity, “Do unto others as you would have them do unto you,” are prominent examples of these approaches. Deontological approaches have mainly been criticized for being too abstract or elusive to provide practical guidance and for ignoring potential consequences of duty-guided actions (Nill and Schibrowsky 2007). Further, decisions based on moral duties do not always offer a clear mechanism for resolving conflicting duties (Murphy et al. 2005).

Teleological approaches judge the value of actions by assessing their moral consequences. Utilitarianism, as it was introduced by John Stuart Mill (1806–1873) and Jeremy Bentham (1748–1832), constitutes a prominent example for teleological theories. Accordingly, one should choose the alternative that leads to the greatest happiness for the greatest number of people. Mill (1979, 7) suggested, “Pleasure and freedom from pain are the only things desirable as ends; and . . . all desirable things . . . are desirable either for pleasure inherent in themselves or as means to the promotion of pleasure and the prevention of pain.” Due to its similarity to a cost–benefit

analysis—a concept most marketers are familiar with—and its flexibility, utilitarianism is a popular method of ethical reasoning that is explicitly, or implicitly, used by many managers (Laczniak and Murphy 1993). Utilitarianism has mainly been criticized for its “massive measurement problems” (Hunt and Vitell 1986, 7) and for its denial of any absolute, categorical values. In the following discussion, using this broad ethical framework, normative criteria are developed in order to analyze the different OBT practices. Further, these normative criteria are compared to the FTC guidelines and are synthesized with the goal of developing potential ethical guidelines and policies for online advertisers.

Ethical Guidelines Vis-à-Vis FTC Policies

As already described, the FTC exempted contextual advertisements from its purview. Given the new technological possibilities of connecting different media, this exemption seems increasingly problematic from an ethical perspective. For example, as in the case of Google-operated media, a consumer who writes an e-mail is likely to have the content of his/her e-mail analyzed. The consumer might consequently receive a targeted ad, which contextually corresponds to his/her e-mail, on his/her cell phone. From a privacy perspective this scenario is quite different from the more innocuous traditional contextual ads. While most consumers are not even aware of their e-mails being subject to analysis by the provider, by using different media this OBT technique is a lot more intrusive than the contextual ads the FTC had in mind when issuing its exemption. This is an example of how difficult and cumbersome it is to regulate a rapidly moving technology that constantly creates new realities. It becomes apparent that in the face of those difficulties and, as in the case of contextual ads, in the absence of FTC oversight, ethical guidelines might be a valuable tool for online advertisers engaged in OBT.

Following a deontological perspective, lying and its antidote, honesty, constitute moral duties. Since Kant developed the categorical imperative out of the concept of the unlimited good—or what he called the practical law—lying, even when it might ultimately serve a good purpose, is always wrong (Hoffe 1995). Dishonesty cannot be a maxim for action that should be adopted universally. Similarly, dishonesty is wrong according to Aristotelian virtue ethics, which focuses on the person and his/her character traits (Murphy 1999). Further, following a teleological perspective, it is difficult to see how in the case of OBT systematic dishonesty could lead to the greatest happiness. Indeed, deception, the intentional act of misleading people, is morally questionable by almost all moral philosophies and religions (Martin and Smith 2008). Thus, we posit the first moral guideline for online advertisers (see Table 1):

1. *Free of deception: OBT practices should not mislead consumers.*

With regard to the ethics of OBT, the inherent moral duty of not being deceitful is often violated. As in the foregoing cases of stealth browser-based and ISP-based targeting, some of the companies, such as Sears/K-Mart, acted deceitfully when they purposefully hid their tracking devices and ultimately, their intentions. Judicial practices as well as the FTC follow the moral duty of not being deceitful.

Arguably, Expedia's contextual advertisements, as well as Bloomberg's traditional browser-based tracking, discussed earlier, are not deceitful since they provide information about their practices.

TABLE 1
Potential Guidelines for Online Advertisers

Synthesizing the criteria that have been for the analysis of OBT from the broad framework of deontological and teleological ethics, six potential guidelines can be postulated:

1. Free of deception:
OBT practices should not mislead consumers.
2. Active transparency:
Active transparency requires companies to take reasonable action to ensure that consumers understand the information provided.
3. Control over information:
Consumers should be afforded the opportunity to take comprehensive control over their data. That is, consumers should be able to determine which data are being collected and how the data are being used. At the very least, consumers should have a reasonable choice to opt out.
4. Data security:
Online advertisers should meet reasonable precautions to prevent sensitive data being stolen and/or misused.
5. Consideration of stakeholder interests:
Online advertisers should try to balance the interests of their stakeholders. Ideally, online advertisers should enter into a dialogue with all stakeholders with the goal of devising OBT practices that are acceptable to all parties involved. At the very least, all stakeholders should be provided with an opportunity to voice their concerns.
6. Fairness:
Online advertisers should treat all parties that are affected by their actions fairly.

However, truth telling is more than avoiding outright deception. It also requires transparency. That is, consumers should receive full disclosure about how their personal data are being collected and used. The moral duty of truth telling is reflected in the American Marketing Association (AMA) code of ethics. The AMA states six ethical values: honesty, responsibility, fairness, respect, transparency, and citizenship. The value honesty—“to be forthright in dealings with customers and stakeholders”—corresponds directly with the moral duty of truth telling, while the value transparency—“to create a spirit of openness in marketing operations”—alludes to full disclosure.

Truth telling is also clearly expressed in the FTC’s first guideline, “Transparency and Consumer Control,” in its 2009 report (Federal Trade Commission 2009). However, considering the body of research that shows a general lack of understanding of the tracking technologies and practices (Milne et al. 2008; Turow et al. 2008; McDonald and Cranor 2009), it could be argued that the duty of truth telling also requires companies to make a reasonable effort to ascertain that consumers truly understand how their data are being collected and used. Full disclosure—that is, all the relevant information is provided and all information given is accurate—does not satisfy the moral duty of truth telling as long as companies, purposefully or not, present the information in a way that is unclear to most consumers.

In this respect the moral duty of truth telling goes beyond the current FTC guidelines. Specifically, the FTC advocated “notice and choice” approach is not sufficient from an ethical perspective. Put another way, can consumers really recognize the true parameters of the legal rights they are surrendering? Consumers’ inability to recognize the breadth and depth of OBT is nicely exemplified in what occurred in the case of *Kirch v. Embarq Management* (2010). In it, the plaintiff Kathleen Kirch stated “that she did not make a practice of reviewing privacy policies of any

Internet service she signed up for or websites that she visited. Instead, she just clicked ‘I agree,’ and continued on to the site” (*Kirch v. Embarq Management* 2011, 5). Her actions are likely repeated by Internet consumers a million-fold. Yet because she did agree to the disclaimer her legal claims were ultimately compromised. Kathleen Kirch’s testimony also adds credence to the FTC’s 2010 guidelines, which call for a “do not track” system, in which cookies are deployed to signal warnings to consumers so that they can opt for not being tracked by advertisers (Federal Trade Commission 2010). As discussed earlier, this was due to doubts about the effectiveness of the agency’s earlier “notice and choice” provision. Should a “do not track” system become commonplace, the act of placing the burden on the advertiser to cease its OBT activities once it is notified that it should not track the consumer, rather than on the consumer to agree to a long, largely incomprehensible consent form filled with legalese on how his or her private information may be used, might provide stronger consumer protection. Nonetheless, while the FTC is aware of the potential problem that consumers might not understand OBT practices even if the information is presented to them on the company’s website (Federal Trade Commission 2010), the call for companies to actively help consumers to become knowledgeable about OBT goes beyond the FTC guidelines.

A lack of transparency might also lead to unfair competition. So far, most websites that charge money but protect consumers’ privacy have not been very successful. This is because in most cases consumers are in a position to locate a site that offers similar information for free. However, unbeknownst to most consumers, the “free” website might not charge money but will collect information about the consumer. Therefore, the website really is not providing information for free since it requires the consumer to provide information in return for visiting the site. Consumers who are unaware that their information is being collected—most consumers are not aware of the breadth and depth of OBT (Milne et al. 2008; Turow et al. 2008; McDonald and Cranor 2009)—might base their preference for “free” websites over pay sites on wrong assumptions. In other words, “free” sites that do not properly inform consumers about their OBT practices might have an unfair competitive advantage over sites that charge money but don’t collect any information.

It is not unreasonable to assume that increased transparency coupled with more open and fair competition will lead to higher market efficiency. Therefore, the call for more transparency is also in line with a utilitarian framework. That is, it is likely that an increase in market efficiency as a result of more transparency will on balance produce more winners than losers.

We posit the second moral guideline for online advertisers (see Table 1):

2. *Active transparency: Active transparency requires companies to take reasonable action to ensure that consumers understand the information provided.*

Honoring a person’s basic rights is another common deontological moral duty (Dunfee, Smith, and Ross 1999). The AMA value respect—“to acknowledge the basic human dignity of all stakeholders”—directly reflects the moral duty of honoring people’s basic rights. It could be argued that respecting the right to privacy should involve consumers’ decisions about how much they will share about their lives, thoughts, and feelings, which then constitutes a moral duty (Murphy et al. 2005). In reference to the ethics of OBT, consumers should be able to decide if and how much of their personal information they want to divulge to online advertisers. In principle, this is in line with the first FTC guideline “Transparency and Consumer Control” (Federal Trade Commission 2009). The FTC suggests that consumers should have a choice

whether they want their personal data collected. While this sounds straightforward, the problem is whether consumers have a reasonable, practical choice.

As long as consumers are properly informed that their data will be collected, they always have—at least theoretically—the choice not to use the website. However, since most websites, including all Google services, use some sort of information collection, consumers would practically be cut out of the Internet altogether. Similarly, while most Web browsers provide consumers with the theoretical option to reject tracking cookies, once this option is exercised, the websites often cannot be visited anymore or are not fully functional. Interestingly, most initiatives to increase consumer control do not come from online marketers but from third parties such as companies that produce browsers or software programs that allow anonymous surfing.

Arguably, the moral duty of honoring a person's basic rights calls for a much more comprehensive consumer choice. Accordingly, we posit the third ethical guideline (see Table 1):

3. *Control over information: Consumers should be afforded the opportunity to take comprehensive control over their data. That is, consumers should be able to determine which data are being collected and how the data are being used. To the very least consumers should have a reasonable choice to opt out.*

While, at least at the present stage of OBT practices, the call for total consumer control over their data is utopian, establishing an open market for privacy would put consumers in a position to decide which of their information will be collected and how it will be used. Online marketers could buy consumers' private information and pay for it with either money or free access to websites. In essence, consumers would be selling their data. While consumer data have been a tradable commodity for a long time, this approach lets consumers participate directly. That is, consumers would be in a position to directly trade their personal information for money or other benefits. The advantage of this approach is that consumers would be more in control of which of their data are being collected and how these are being used. Perhaps this approach is also more honest and open, since consumers are being made aware that their private data are a tradable good.

At the very minimum, honoring a person's basic rights requires providing consumers with a workable choice to opt out. That is to say, consumers should be provided with a reasonable choice to keep their private data private. This is in line with the FTC's "do not track" efforts discussed earlier (Federal Trade Commission 2010). It remains to be seen whether this cookie-based approach, which lets websites recognize "whether or not the consumer wants to be tracked or receive targeted advertisements" (Federal Trade Commission 2010, 66), will get adopted in a way such that consumers truly have a reasonable choice to opt out.

Stealth browser-based as well as ISP-based tracking applied in the FTC's *Sears/K-Mart*, with the *Valentine* (*Valentine v. NebuAd, Inc.* 2008) and *Kirch* (*Kirch v. Embarq Management* 2010) cases, clearly did not provide this option to consumers. In *Valentine*, for example, the ISP used a deep packet inspection technology designed by the defendant NebuAd, called an Ultra-Transparent Appliance (UTA). This technology has proven to be a particularly intrusive means of monitoring the online behavior of the ISPs' customers. The data were collected to purportedly target ads based on Internet users' Web-surfing habits (*Valentine v. NebuAd, Inc.* 2008). In *Kirch*, also involving NebuAd's technology, the defendants were primarily accused of using intercepted data "to inject advertisements into the web pages users visited, transmit code that caused undeletable tracking cookies to be installed on users' computers, and forge

the ‘return addresses’ of user communications so their tampering would escape the detection of Users’ privacy and security controls” (*Kirch v. Embarq Management* 2010, 2).

Even the more benign OBT practices by Expedia’s contextual advertisements and Bloomberg’s traditional browser based tracking do not make it particularly easy or even practical for consumers to keep their private information private if they wish to do so.

The foregoing discussion reveals situations in which consumers lack control over their private affairs. And although the FTC and the courts have attempted to address the more egregious forms, they generally have not risen to the standards necessary to advance the duty that businesses should assume of allowing consumers the control we argue they are morally entitled to. Still, changing the law is a slow and laborious task with many moneyed and competing interests jockeying for advantage. In the end, the FTC and the courts, as they continue to confront these issues, may be able to move their legal goals forward lead by morally based policies.

Another duty in most deontological approaches is the duty of nonmaleficence—to do no harm unto others. With respect to OBT, this alludes to online marketers’ duty to properly secure consumer data from potential misuse (Caudill and Murphy 2000). This duty corresponds to the second FTC guideline described earlier: “reasonable security and limited data for consumer data” (Federal Trade Commission 2009). Accordingly, we posit the fourth ethical guideline (see Table 1):

4. *Data security: Online advertisers should meet reasonable precautions to prevent sensitive data being stolen and/or misused.*

In the spirit of teleological approaches, the consequences of OBT practices should be assessed with the ultimate goal of creating more good than harm. This requires assessing the implications of OBT for consumers, advertisers, and all other stakeholders. Clearly, the consideration of stakeholder interests can also be justified using a deontological framework. For example, the Golden Rule, “Do unto others as you would have them do unto you,” indicates you should take into account the wants and needs of other stakeholders and not just yourself. Accordingly, we posit the fifth ethical guideline:

5. *Consideration of stakeholder interests: Online advertisers should try to balance the interests of their stakeholders. Ideally, online advertisers should enter into a dialogue with all stakeholders with the goal of devising OBT practices that are acceptable to all parties involved. At the very least, all stakeholders should be provided with an opportunity to voice their concerns.*

This ethical guideline relates to traditional stakeholder theory, which argues that those who have a stake in an organization—those who are affected by the actions of an organization—should be considered by the organization (Freeman 1984). Ideally, the online advertiser could enter into a dialogue with all its stakeholders with the goal of devising OBT practices that are acceptable to all parties involved (Nill 2003). An actual dialogue with all stakeholders is cumbersome, unpractical, and sometimes outright impossible. For example, an online advertiser could not possibly enter into a dialogue with all people visiting its website. It would be even more difficult to come to a communicative agreement with all those visitors. However, even if a true communicative agreement based on a dialogue is out of reach, at the very least, online advertisers could give all stakeholders a chance to voice their concerns and take those concerns seriously. The FTC’s overall approach in devising guidelines for OBT is not unlike this ethical principle. Indeed, the FTC regularly organizes workshops with the goal of seeking input from the main stakeholders.

Further, the FTC's 2009 principles calling for the "affirmative express consent (or prohibition against) using sensitive data for behavioral advertising" follows this moral principle. Accordingly, advertisers should obtain consent from all stakeholders in general, but provide proportion in protecting information that can be particularly harmful, such as "financial data, data about children, health information, precise geographic location, and Social Security numbers" (Federal Trade Commission 2009, 44). This FTC guideline relates—at least in part—to the deontological duty of nonmaleficence (to do no harm unto others) described earlier. That is, this rule restricts the use of data of which usage might cause harm to potentially vulnerable consumers. In regard to vulnerable consumers the FTC states that "All consumers need sufficient and accurate information to make an informed decision. Special care may be needed when dealing with disadvantaged or vulnerable consumers" (FTC 2012b). However, while the FTC rule "affirmative express consent (or prohibition against) using sensitive data for behavioral advertising" specifically protects children, it does not cover other vulnerable consumers such as consumers who are mentally impaired, old, or have poor reading and writing skills. Therefore, the deontological duty of nonmaleficence, which calls for the protection of all vulnerable stakeholders, goes beyond this particular FTC guideline.

Following a classic teleological framework, the outcome of OBT for all stakeholders should be measured in terms of "pleasure and freedom from pain" (Mill 1979, 7). Of course, it is literally impossible to measure which OBT practices will lead to the greatest happiness for the greatest number of people. Neither is it possible to recognize all people who are affected by OBT or to measure and compare all the different utility functions of stakeholders. Beyond these problems, the question of the desirability of a consequence, the greatest happiness, is basically a question of one's values and beliefs.

Balancing and prioritizing different stakeholder interests can be an intrinsically difficult and byzantine task. Therefore, this act of balancing stakeholder interests should rely on fairness (Caudill and Murphy 2000). The AMA value of fairness—"to balance justly the needs of the buyer with the interests of the seller"—alludes to this moral assessment. The duty of fairness—treating other stakeholders as you would have them treat you—can certainly also be justified using a deontological framework. Further, the Aristotelian virtue of justice is closely related to the concept of fairness.

Accordingly, we posit the sixth ethical guideline:

6. *Fairness: Online advertisers should treat all parties that are affected by their actions fairly.*

The principle of fairness is expressed in the FTC's attempt to balance the interests of consumers, marketers, and the society in general. While a classic utilitarian cost–benefit analysis is inherently difficult to make, online advertisers could still try to assess the consequences of their OBT practices and balance the differing interests of all stakeholders involved.

If consumers were in a position to directly sell their private information or trade for benefits provided by the site they are visiting, a cost–benefit analysis on the aggregate would no longer be as important. Instead, consumers could make this analysis on an individual basis. Some consumers might decide that the cost of providing personal information outweighs its benefits, while others might willingly sell their data. In this respect, a utilitarian cost–benefit analysis in conjunction with the moral guideline of fairness goes beyond the current FTC practice. That is, while the FTC tries to protect consumers' interests regarding OBT, the agency does not advocate enabling

consumers to be in charge of trading their own privacy information. In other words, consumers are not in a position to decide what information to sell and what to get in return.

Since there is no transparent market where consumers can trade their own information, one is left with the attempt of a utilitarian calculus in the aggregate. It is easy to see certain benefits for consumers such as receiving free services, information, entertainment, and more relevant advertisements. On the other hand, consumers provide a wealth of private data—knowingly or not—about their own personalities. Interestingly, when informed about OBT, most consumers do not like the practice. For example, Alreck and Settle (2007, 19) found that 81% of consumers felt that “online marketers should be prohibited by law from trading or selling information about visitors or buyers without their permission”; 69% argued that “there should be a law against online marketers collecting and saving information about visitors to their sites without the shopper’s permission.”

In their survey on respondents’ attitudes toward marketers’ use of public drunk driving, motor vehicle, and real estate records, Phelps and Bunker (2001) discovered that the respondents were likely to say that their public records should not be used by marketers. This is noteworthy since if consumers don’t even want public information to be collected by marketers, they are not likely to endorse OBT and its practice of analyzing private information.

According to a study commissioned by *New Media Age*, 81% of customers in Britain said they would be in favor of opting out from receiving online advertisements if the advertisers were to collect data about their online behavior (Bearne 2008). A more recent study suggests that consumers are less likely to purchase once they learn of online covert marketing practices (Milne, Rohm, and Bahl 2009). Similarly, consumers trusted a website less and held lower intentions of visiting this website once they detected that it was using cookies. This effect is attenuated by the use of a clear and a priori disclosure (Miyazaki 2008).

As discussed, it is difficult to assess whether there is a net benefit for consumers in the Expedia and Bloomberg cases. However, if consumers are outright deceived as in the *Sears/K-Mart*, *Valentine* (2008, 2009, 2011, 2012), and *Kirch* (2010, 2011), cases, it is reasonable to assume—based on existing surveys about consumer attitudes toward OBT (Alreck and Settle 2007; Bearne 2008; Milne et al. 2009)—that more harm was inflicted than pleasure was received. For example, on learning that they were deceived, consumers might experience feelings of anger, being duped, and distrust (Martin and Smith 2008).

While the advantages of OBT are quite obvious for advertisers, there might be also potentially negative consequences. As some studies have indicated (Miyazaki 2008; Milne et al. 2009), consumers who find out about OBT might be less inclined to purchase. Further, privacy and security concerns are negatively correlated with consumers’ trust toward the advertiser and the Internet in general (McCole, Ramsey, and Williams 2009). In the long run, all of this would be detrimental to the entire online industry and might encompass many other stakeholders as well (Martin and Smith 2008). Finally, the more advertisers use OBT in an offensive way, the more likely legislators and regulators are to devise strict laws regulating the whole industry.

CONCLUSION

Online behavioral targeting is a new and rapidly evolving practice that potentially offers vast benefits as well as harm to consumers and advertisers alike. Laws and regulations governing this

new and promising tool are currently in a state of flux. Yet it can be expected that the FTC, in light of its stated views and actions that continue to evolve, will become even more involved in regulating OBT in the future. The signals and proposals now coming from the FTC must be closely followed and heeded. Thus, to preempt adverse legal actions, advertisers should follow the spirit of the FTC guidelines. The few cases that have addressed OBT must also be taken seriously, as they provide a guide to how courts in the future may handle similar conflicts. The cases, however, like the FTC's directives, can change or be ignored by other courts. Thus, the moral standards that we have proposed are necessary for creating stable, unchanging, duty-based goals for lawmakers and regulators to pursue in an uncertain legal environment. This is important since even independent agencies like the FTC are constantly subject to politically motivated change, particularly in today's politically divisive atmosphere.

Therefore, an ethical analysis of OBT seems warranted since neither existing laws and regulations nor the forces of the market, Adam Smith's invisible hand, provide sufficient guidance for online advertisers. Using the broad framework of deontological and teleological ethics, some criteria for assessing current practices of OBT have been developed and juxtaposed to the FTC guidelines. The substantial overlap between the FTC and ethical guidelines shows—not surprisingly—that the overall FTC approach is based on ethical principles. Still, the ethical guidelines developed in this article for online advertisers go beyond FTC requirements.

Since it is inherently difficult to measure and assess the moral side of OBT, more research is needed in order to shed some light on the impact OBT has on consumers and their attitudes toward privacy issues and online advertising.

While advertisers and their stakeholders might not agree on what is ethical, "Disagreement is not the problem; avoidance of the topic and/or failure to engage in a collaborative dialogue is" (Drumwright and Murphy 2009, 103). Indeed, an open dialogue, which is characterized as "a sustained collective inquiry into the process, assumptions, and certainties that compose everyday experience" (Isaacs 1993, 25), between consumers, online advertisers, regulators and all other affected parties can help to devise mutually acceptable norms for regulating OBT.

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