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Future Imperfect: Googling for Principles in Online Behavioral Advertising

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Future Imperfect: Googling for Principles in Online Behavioral Advertising

Brian Stallworth*

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I. INTRODUCTION

In a remarkably short time, Google, Inc. has grown from two people working in a rented garage to a pervasive Internet force and an

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unprecedented economic powerhouse.¹ Although in its infancy, Google's nascent successes already measure in billions of dollars and in thousands of employees.² The influence and legacy of this phenomenal growth remain impossible to estimate, as do the risks it may represent to this and subsequent generations.

Google has become far more than a successful corporation. Bundling a user-friendly system for searching an ever-expanding catalogue of Web pages with Google's lucrative use of consumer information itself as a commodity, Google is now a ubiquitous cultural icon perhaps capable of leading legislators, businesses, and consumers alike. Today, Google satellite imagery is capable of peeking into every backyard in the nation and then posting detailed, zoom-ready photos on the Internet.³ Roving Google vehicles map our streets and front doors with increasing regularity and resolution.⁴ Advertisers worldwide depend on Google to efficiently reach targeted consumers, just as consumers themselves rely on the Internet to identify and locate any information, any business, or any product they desire.⁵ Americans swarm to Google services, like YouTube, Google Docs, Google Groups, and many more, apparently unaware of the expanding risks to privacy and security to which they expose themselves every day.⁶

Consumers adore Google—after all, Google's pantheon of products are offered free of charge to Internet users worldwide.⁷ Rather than being

1. Corporate Information – Google Milestones, <http://www.google.com/intl/en/corporate/history.html> (last visited Feb. 23, 2010) (Google founders Sergey Brin and Larry Page moved their fledgling operation to a rented garage in Menlo Park, California, in September 1998.).

2. Tom Krazit, *Google's Quarterly Revenue, Profits Increase*, CNET, Oct. 15, 2009, available at http://news.cnet.com/8301-30684_3-10376046-265.html (Google earned \$5.94 billion in the third quarter of 2009 and employed 19,655 people worldwide.).

3. See Google Maps, <http://maps.google.com/> (last visited Feb. 23, 2010); see also Google Earth, <http://earth.google.com/> (last visited Feb. 23, 2010).

4. See Google Maps, <http://maps.google.com/> (last visited Feb. 23, 2010); see also Google Earth, <http://earth.google.com/> (last visited Feb. 23, 2010); Google Maps with Street View, <http://maps.google.com/help/maps/streetview/> (last visited Feb. 23, 2010).

5. Posting of Miguel Helft to New York Times Bits Blog, <http://bits.blogs.nytimes.com/2009/01/08/google-1-million-advertisers-in-2007-more-now/> (Jan. 8, 2009, 17:43 EST) (“The number of advertisers on Google has grown at a steady clip, from 89,000 in 2003, to 201,000 in 2004, 360,000 in 2005, and 600,000 in 2006 [and 1,000,000 in 2007].”).

6. FTC STAFF REPORT, SELF-REGULATORY PRINCIPLES FOR ONLINE BEHAVIORAL ADVERTISING 2 (Feb. 2009), available at <http://ftc.gov/os/2009/02/P085400behavadreport.pdf> [hereinafter FTC STAFF REPORT 2009] (describing the practice of behavioral advertising as typically invisible to consumers).

7. *Potential Privacy Implications of Behavioral Advertising Before the H. Comm. on Energy and Commerce, Subcomm. on Commc'ns, Tech., and the Internet and Subcomm. on Commerce, Trade, and Consumer Prot.*, 111th Cong., 4 (2009) (testimony of Nicole Wong, Deputy General Counsel, Google, Inc.), available at http://energycommerce.house.gov/Press_111/20090618/testimony_wong.pdf (“We make privacy a priority because

eyed with suspicion as the Big Brother of the Internet, Google's popular success has continued, even in the face of challenging economic times.⁸ Consumers trust Google because of its innovative disclosure and consumer education techniques that have allowed Google to present itself as a champion of the people and a specimen for new businesses to emulate.⁹ Though all of its amazing freebies are subsidized by online advertising sales—Google's primary source of income—few consumers appreciate the extent to which their information is actually being gathered, much less the degree to which it is used to reap enormous profit.¹⁰

our business depends on it. If our users are uncomfortable with Google's approach to privacy, they are only one click away from switching to a competitor's services.") [hereinafter Testimony of Nicole Wong]; see also, *Privacy Implications of Online Advertising Before the Senate Comm. on Commerce, Science, and Transp.*, 110th Cong., 2 (2008) (testimony of Jane Horvath, Senior Privacy Counsel, Google, Inc.), available at http://commerce.senate.gov/public/_files/JaneHorvathGoogleOnlinePrivacyTestimony.pdf ("The revenue that we generate from online advertising makes it possible for Google to offer dozens of free products to our users.") [hereinafter Testimony of Jane Horvath].

8. *Google Reports Stronger Profits*, BBC NEWS, Apr. 16, 2009, <http://news.bbc.co.uk/2/hi/business/8002712.stm> (last visited Feb. 23, 2010) (Google's revenues for the first three months of 2009 were up six percent compared to the same period last year, which was "better than many analysts had expected bearing in mind the recession in the US and the general downturn in advertising spending.").

9. Testimony of Nicole Wong, *supra* note 7, at 8:

At Google, for example, we take great pride in our effort to provide our users with a better understanding of how we collect, use, and protect their data through a series of short videos available at Google.com and on YouTube, as well as through blog posts. Too often, companies view their online privacy policy—which is often impenetrable to the average user—as the beginning and end of their privacy obligations.

Id. at 4 ("We believe user trust is essential to building the best possible products."); see also *The Blind Eye to Privacy Law Arbitrage by Google -- Broadly Threatens Respect for Privacy, Before the House Energy and Commerce Subcomm. on Telecomms. and the Internet*, 110th Cong., 10 (2008) (written testimony of Scott Cleland, President, Precursor LLC), available at <http://energycommerce.house.gov/images/stories/Documents/Hearings/PDF/Testimony/TI/110-ti-hrg.071708.Cleland-testimony.pdf> ("Google's rhetoric and public relations intimate that Google works for users—they don't. Google is not paid by users—Google is paid by advertisers and websites.") [hereinafter Written Testimony of Scott Cleland].

10. *Hearing on Privacy Implications of Online Advertising, Before the Senate Comm. on Commerce, Science, and Transp.*, 110th Cong., 4 (2008) (prepared statement of the FTC on behavioral advertising), available at http://commerce.senate.gov/public/?a=Files.Serve&File_id=4c0f22aa-d93b-4d17-8483-e333b18bc3eb ("behavioral advertising may help subsidize and support a diverse range of free online content and services that otherwise might not be available.") [hereinafter Prepared Statement of the FTC on Behavioral Advertising]; *Interactive Advertising Bureau Public Comment to the Federal Trade Commission*, 1 (Apr. 11, 2008), available at <http://ftc.gov/os/comments/behavioraladprinciples/080411interactiveadbureau.pdf> ("IAB members include Yahoo!, AOL, MSN, Google, Forbes.com, New York Times Digital, CNET Networks, and others. Collectively, our members are responsible for selling over 86% of online advertising in the United States, a \$21.7 billion dollar industry, which is expected to grow to \$50.3 billion by 2011."); FTC STAFF REPORT 2009, *supra* note 6, at 2 ("Online behavioral advertising involves the tracking

Although consumer groups, online advertisers, and the Federal Trade Commission (FTC) have asked Congress to enact federal legislation to provide basic protection for online consumer privacy, Congress has thus far chosen not to act.¹¹ Rather, the FTC has incorporated Internet commerce under its mantle of regulating trade in the protection of consumers.¹² In the online privacy arena, the FTC has investigated fairness violations, brought law enforcement actions, required some Web sites to post privacy policies, and overseen an ongoing dialog with industry and consumer groups.¹³ However, the FTC's effort to establish enforceable regulatory privacy standards has been limited by concern for stifling the freedom and prosperity of online commerce.¹⁴

After more than a dozen years of considered reflection into online behavioral advertising, the FTC's conciliatory approach has yet to establish those protections, even in principle.¹⁵ In the same span that saw Google's inception and explosive online dominance, the FTC has struggled to define not only the privacy issues involved in online behavioral advertising, but also the practice of behavioral advertising itself.¹⁶ Freed from the restraints of comprehensive federal laws and restrictive federal regulations, Google and its ilk have thrived while taking innovative liberties with the collection and use of consumer information.¹⁷

of consumers' online activities in order to deliver tailored advertising. The practice, which is typically invisible to consumers, allows businesses to align their ads more closely to the inferred interests of their audience.”).

11. FTC STAFF REPORT 2009, *supra* note 6, at 7 (“[A] majority of the Commission recommended that Congress enact ‘backstop legislation’ to address online profiling. Ultimately, Congress did not enact legislation to address online profiling.”); Testimony of Jane Horvath, *supra* note 7, at 6 (“Google supports the passage of a comprehensive federal privacy law.”); Written Testimony of Scott Cleland, *supra* note 9, at 12 (“In short, the lack of a holistic, comprehensive and balanced approach to privacy is a serious threat to American’s [sic] privacy.” (emphasis omitted)); *see* Personal Data Privacy and Security Act, S. 1490, 111th Cong. (2009) (proposing federal legislation to protect privacy online).

12. FTC STAFF REPORT 2009, *supra* note 6, at 4 (Since the mid-1990’s, “the Commission has sought to understand the marketplace, to evaluate the costs and benefits of various practices affecting consumers, and to stop unfair or deceptive practices.”).

13. *Id.* at 4-5.

14. *Id.* at 4 (“[T]he Commission has consistently sought to avoid stifling innovation so that responsible business practices could develop and flourish.”).

15. *Id.* at 47 (“The revised Principles set forth in this Report constitute the next step in an ongoing process.”). Center for Democracy & Technology, Public Comment to the Federal Trade Commission, 3 (Apr. 11, 2008), *available at* <http://ftc.gov/os/comments/behavioraladprinciples/080411cdtetotal.pdf> (“[T]he FTC’s proposed principles are a solid first step towards protecting consumer privacy online, but much more work is needed.”).

16. *See* FTC STAFF REPORT 2009, *supra* note 6.

17. *Hearing on Privacy Implications of Online Advertising Before the Senate Comm. on Commerce, Science, and Transp.*, 110th Cong. 1 (2008) (written statement of Leslie Harris, President/CEO, Ctr. for Democracy & Tech.), *available at*

This Note will detail the meteoric rise of Google in Part II, and explore the FTC's adoption of permissive self-regulation in Part III. Part IV will reveal the inadequacies of current consumer protections, while Part V will argue for the establishment of baseline privacy protections for online behavioral advertising.

II. THE RISE OF GOOGLE

A. *Obscurity*

There was a time, not so long ago, when "Google" was not even a word in the English language.¹⁸ As recently as the mid-1990s, there were only a few close entries: an adjective to describe staring eyes, a cricket term¹⁹ nearly unknown to Americans, and a numerical term²⁰ useful only to mathematicians and Scrabble players. The word "Google," as we know it, was first coined in 1997 by two ambitious students.²¹ Amused by the sound of the word, and drawing comparisons between the lofty number and immeasurable mountains of information lying inaccessible around the globe, the founders of Google turned their college data-searching exercise into what would become one of the world's most profitable and fast-growing businesses.²²

Their goal was to organize the world's information and make it available to the public in an easy-to-use, understandable form.²³ Integral to

http://commerce.senate.gov/public/?a=Files.Serve&File_id=5b391bee-f7ca-47df-b49d-602d1d002003, ("[E]xisting privacy protections have been far outpaced by technological innovation.") [hereinafter Statement of Leslie Harris]. Spending on behavioral advertising is expected to reach \$1 billion in 2008. *Id.*

18. Merriam-Webster Online, <http://www.merriam-webster.com/dictionary/Google> (last visited Feb. 23, 2010) (indicating the term Google was added to the dictionary in 2001).

19. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 979 (1993), (defining googly as bulging or staring); *id.* (defining googly as an offbreak in cricket with a leg-break action).

20. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 979 (1993), (defining "googol" as a 1 with 100 zeroes, or 10 to the 100th power).

21. Corporate Information – Google Milestones, *supra* note 1.

22. Google, Inc., Registration Statement (Amendment No. 9 to Form S-1), at 30 (Aug. 18, 2004), available at http://www.sec.gov/Archives/edgar/data/1288776/000119312504142742/ds1a.htm#toc59330_1 [hereinafter Registration Statement].

When Sergey and I founded Google, we hoped, but did not expect, it would reach its current size and influence. Our intense and enduring interest was to objectively help people find information efficiently. We also believed that searching and organizing all the world's information was an unusually important task that should be carried out by a company that is trustworthy and interested in the public good. We believe a well functioning society should have abundant, free and unbiased access to high quality information. Google therefore has a responsibility to the world.

Id. See also Corporate Information – Google Milestones, *supra* note 1.

23. Registration Statement, *supra* note 22, at 27 ("Sergey and I founded Google because we believed we could provide an important service to the world—instantly

the achievement of this goal, and to the founders' phenomenal success, was to consider the viewer of information as a potential gold mine of information.²⁴ As Google users browse the Internet, Google simultaneously compiles data about that user; the viewer becomes the viewed.²⁵ Google's enormous data-crunching machine is able to make calculated assumptions about consumers based on their searches or based on information consumers reveal when registering for any of the free services.²⁶

After gleaning a sense of a user's interests, Google is able to instantaneously direct both search results and advertising targeted to that specific user.²⁷ These calculations may be based on a single query or could incorporate quantities of data previously gathered about that user.²⁸ By correlating larger amounts of data, for example, information disclosed in product registration forms, the process becomes more accurate, generating more relevant behavioral advertising.²⁹ One of Google's many goals is to make online advertising every bit as relevant as search results.³⁰ Statistically, consumers are far more likely to enjoy—or at least to express

delivering relevant information on virtually any topic. Serving our end users is at the heart of what we do and remains our number one priority.”). Testimony of Jane Horvath, *supra* note 7, at 1 (“Google’s mission is to organize the world’s information and make it universally accessible and useful.”).

24. *Id.* at 1 (explaining that Google’s success is linked to its ability to make advertising relevant to the consumer, and that, by collecting information about the consumer, searches are more relevant); Prepared Statement of the FTC on Behavioral Advertising, *supra* note 10, at 2 (“Many businesses use online behavioral advertising in an attempt to increase the effectiveness of their advertising by targeting advertisements more closely to the interests of their audience.”).

25. Prepared Statement of the FTC on Behavioral Advertising, *supra* note 10, at 2-4 (offering a functional example of behavioral advertising, illustrating that behavioral advertising increases relevance and may decrease the number of unwanted online advertisements).

26. *Id.* at 2-4; Written Testimony of Scott Cleland, *supra* note 9, at 6 (“Google’s business edge is that it collects, stores and uses more private information than any other entity in existence, which enables it to ‘target’ ‘relevant’ advertising better than anyone else.”).

27. FTC STAFF REPORT 2009, *supra* note 6, at 2 (“Online behavioral advertising involves the tracking of consumers’ online activities in order to deliver tailored advertising.”).

28. *Id.* at 3 (demonstrating more sophisticated methods of combining data about consumers’ behavior).

29. Letter from Alan Davidson, Senior Policy Counsel and Head of U.S. Public Policy, Google, Inc., to Jessica Rich, Secretary of the FTC at 2 (Apr. 4, 2008), available at <http://ftc.gov/os/comments/behavioraladprinciples/080404google.pdf> (“[B]oth our own experience and third-party research demonstrate that consumers value relevant advertising.”); Testimony of Jane Horvath, *supra* note 7, at 1 (Google’s “online advertising business has succeeded because our most important advertising goal is to deliver ads that benefit our users.”).

30. Testimony of Nicole Wong, *supra* note 7, at 1 (“[W]e endeavor to make ads that appear next to search results just as useful to Google’s users as the search results themselves.”).

interest in—the behavioral advertising Google directs at them.³¹ Google's advertising scheme costs less money to reach a more narrowly targeted audience than nonbehavioral advertising, connecting advertisers with an audience statistically more likely to buy those products and services.³² This, in turn, makes Google all the more attractive to businesses, both large and small.³³

B. Omnipresence

After quickly becoming the nation's dominant Internet search engine,³⁴ Google's extensive offerings have continued to evolve: e-mail, mapping technology, social networking, news searches and archives, Web browsers and browser toolbars, desktop tools, photo-editing software, video sharing, instant messaging, online shopping, blogs, sharable document formats, online entertainment, mobile phone compatible services and software, language translation tools, and more.³⁵ Most of these services and products are instantly available free of charge to anyone with Internet access—almost anywhere in the world.³⁶ In 2009, Google's bold advances included the debut of the DoubleClick Ad Exchange and the announcement of a potential challenger to Microsoft's global operating system dominance, the Google Chrome Operating System.³⁷ Google is worth billions of dollars, and its searchable database includes over one trillion Web Pages.³⁸

31. Letter from Alan Davidson, *supra* note 29, at 2 (citing a thirty-five percent increase in consumer click-throughs for targeted advertisements); Testimony of Nicole Wong, *supra* note 7, at 1 (attributing Google's success to relevant advertisements).

32. Testimony of Nicole Wong, *supra* note 7, at 3 ("Our advertising network also helps small businesses connect with consumers that they otherwise would not reach, and do so affordably, efficiently, and effectively.").

33. Letter from Alan Davidson, *supra* note 29, at 2 ("[S]mall businesses are able to connect in an affordable and effective manner with otherwise unreachable consumers, including consumers in small, remote, or niche markets.").

34. *Google Creeps Toward 73% of U.S. Searches in April*, MARKETING CHARTS, <http://www.marketingcharts.com/interactive/google-creeps-toward-73-of-us-searches-in-april-9018/> (last visited Feb. 4, 2010); see also *September Search Share: Google Grows, Yahoo and Bing Decline*, MARKETING CHARTS, <http://www.marketingcharts.com/interactive/september-search-share-google-grows-yahoo-bing-decline-10699/> (last visited Feb. 4, 2010).

35. See *More Google Products*, <http://www.google.com/intl/en/options/> (for a menu of Google's many offerings) (last visited Feb. 23, 2010).

36. See *id.*

37. See Posting of Neil Mohan to Official Google Blog, <http://googleblog.blogspot.com/2009/09/doubleclick-ad-exchange-growing-display.html> (Sept. 17, 2009 21:01 PST); see also Posting of Sundar Pichai to Official Google Blog, <http://googleblog.blogspot.com/2009/07/introducing-google-chrome-os.html> (July 7, 2009 21:37:00 PM).

38. See Google Inc. (GOOG) Company Financials – NASDAQ.com, <http://www.nasdaq.com/asp/ExtendFund.asp?symbol=GOOG&selected=GOOG> (last visited Feb. 23, 2010) (showing Google's 2008 revenue in excess of \$21 billion); Corporate Information –

Google employs thousands of workers,³⁹ its founders are among the wealthiest people on the planet,⁴⁰ and it has thrived financially in one of the most challenging economic environments in decades.⁴¹ The list of Google's achievements grows each day as more Internet users come to rely on Google's many products and services and as more businesses of all sizes come to see the ease and cost-effectiveness of using Google's advertising products to reach prospective customers.

Google has introduced into common vernacular such terms as Google Books, Google Docs, Google Earth, Google Voice, Google Maps, Google Calendar, and Goog-411.⁴² Today, the term "google" is not only a standard colloquial term for searching the Internet using Google or even a competitor's search engine, it has also been accepted among major dictionaries as proper English.⁴³ Google has officially become a noun fit for conversion to a verb, in past and future tenses,⁴⁴ and has so infiltrated our language it is even being incorporated into neo-Latin scientific terms.⁴⁵

Google Milestones, *supra* note 1 (Google's indexing system reached 1 trillion unique URL's in July of 2008).

39. Krazit, *supra* note 2 (Google employs 19,655 people worldwide).

40. *The World's Billionaires*, FORBES, March 5, 2008, available at http://www.forbes.com/lists/2008/10/billionaires08_The-Worlds-Billionaires_Rank_2.html (showing Brin and Page as the thirty-second and thirty-third richest people in the world, respectively).

41. See *Google Reports Stronger Profits*, *supra* note 8. (Google's revenues for the first three months of 2009 were up six percent compared to the same period last year, which was "better than many analysts had expected bearing in mind the recession in the US and the general downturn in advertising spending."). See also Press Release, Interactive Adver. Bureau, Internet Ad Revenues at \$10.9 Billion for First Half of '09 (Oct. 5, 2009), available at http://www.iab.net/about_the_iab/recent_press_releases/press_release_archive/press_release/pr-100509 ("We are in one of the most difficult economic slumps in decades. Interactive is one of the advertising sectors that has been least affected," said Randal Rothenberg, President and CEO of the IAB."). Google is a member of the IAB. IAB General Members, http://www.iab.net/member_center/1521/1534 (last visited Feb. 23, 2010). See also Krazit, *supra* note 2 (showing a seven percent increase in Google's overall revenue compared to the same period in 2008).

42. See More Google Products, <http://www.google.com/options/> (last visited Feb. 23, 2009).

43. See, e.g., Corporate Information, <http://www.google.com/corporate/history.html> (last visited Feb. 23, 2010) (stating that 'Google' was added to the Oxford English Dictionary in June, 2006); Brin, Page See 'Google' Take Its Place In Dictionary, http://www.forbes.com/2006/07/06/page-brin-google-cx_cn_0706autofacescan01.html; Geoffery Lewis, 'Google', the Word, Makes Official Transition from Slang to Proper English, EARTH TIMES, July 7, 2006, available at <http://www.earthtimes.org/articles/show/7498.html>; Glen Chivers, *Google Enters the Dictionary*, BIT-TECH.NET, Jul. 8, 2006, http://www.bit-tech.net/news/bits/2006/07/08/google_enters_the_dictionary/1.

44. See, e.g., Google Definition, <http://dictionary.reference.com/browse/google> (last visited Feb. 4, 2010) (citing sources offering as sample sentences, "Why don't you just go to your computer and google it for yourself?" and "We googled the definition of the new word.").

45. See Press Release, California Academy of Sciences, Academy Scientist Maps World's Ants With Google Earth, (Sept. 22, 2005), available at

Senior citizens may struggle to use it in a sentence, but today's youth and tomorrow's consumers show few qualms about accepting google into their language, their businesses, and their homes.

C. *Overexposure*

Although millions of Americans appear willing to sacrifice a significant measure of their private information to gain access to Google's ever-increasing armament of products and services, these people may not fully appreciate the risks they are taking.⁴⁶ In unknown hands, even the legal use of private information may be surprising and unnerving.⁴⁷ In the wrong hands, this information could facilitate identity theft, credit card fraud, cyber-stalking, damaged credit, and more.⁴⁸ The digital nature of this data means that it can be distributed across the globe in seconds without leaving a traditional paper trail for investigators or victims to follow.⁴⁹ Given the exponential growth of inexpensive data storage, private information could be retained indefinitely—thereby prolonging the risks.⁵⁰

<http://www.calacademy.org/newsroom/releases/2005/Fisher%20Google.html> (“Fisher has been so impressed with the support he has received from the Google Earth team that he is naming a new species of ant in their honor. The ant, *Proceratium google*, which he discovered during a recent trip to Madagascar, feeds exclusively on spider eggs.”); see also Jonah Fisher, *Exploring the ‘Google Forest,’* BBC NEWS, June 11, 2009, <http://news.bbc.co.uk/2/hi/science/nature/8094862.stm> (last visited Feb. 23, 2010) (Google Earth credited with aiding in the discovery of a pristine rainforest populated with species previously unknown to man.).

46. See FTC STAFF REPORT 2009, *supra* note 6, at 2 (behavioral advertising “is typically invisible to consumers”); see also Statement of Leslie Harris, *supra* note 17, at 7 (Consumers “have no expectation that their browsing information may be tracked and sold, and they are rarely provided sufficient information . . . to gauge the privacy risks.”).

47. FTC STAFF REPORT 2009, *supra* note 6, at 26 (“[S]taff agrees that ‘first party’ behavioral advertising practices are more likely to be consistent with consumer expectations, and less likely to lead to consumer harm, than practices involving the sharing of data with third parties or across multiple websites.”); Statement of Leslie Harris, *supra* note 17, at 7 (“[C]onsumers are largely unaware of the practice and are thus ill equipped to take protective action.”).

48. FTC STAFF REPORT 2009, *supra* note 6, at ii (citing public concern about “the risk that data collected for behavioral advertising—including sensitive data regarding health, finances, or children—could fall into the wrong hands or be used for unanticipated purposes”); see also Prepared Statement of the FTC on Behavioral Advertising, *supra* note 10, at 4 (privacy concerns are “exacerbated when the tracking involves sensitive information about, for example, children, health, or a consumer’s finances.”); see also Maggie Shiels, *Call to Rally Against Cybercrime*, BBC NEWS, Apr. 21, 2009, available at <http://news.bbc.co.uk/2/hi/technology/8011160.stm> (“RSA President Art Coviello said the online fraudsters ‘are not bound by any rules of law’ and ‘control massive armies of zombie computers.’”).

49. See FRED H. CATE, *PRIVACY IN THE INFORMATION AGE 14-16* (1997) (detailing the advantages of electronic storage and distribution of information compared to traditional paper methods).

50. FRED H. CATE, *PRIVACY IN PERSPECTIVE 7* (2001) (explaining that infinite retention may prevent consumers from moving beyond past mistakes); see also FTC, *Online*

While the ultimate costs to consumers may be difficult to quantify, experts agree that the stakes are high and only getting higher.⁵¹

Others worry more about the privacy implications of Google's vast infiltration of U.S. society.⁵² The combination of Google Maps, Google Earth, and Google Street View allows any would-be stalker to conveniently absorb a wealth of information about a person's home or office.⁵³ Google Street View, offering 360-degree photographs taken from an increasing number of city streets around the nation, displays the exact facade of many homes and captures many people going about their seemingly random business.⁵⁴ These silent patrols of Google vehicles have also memorialized some of life's less-flattering moments: images of auto wrecks, fires, laws being broken, people being arrested, and, of course, people in various states of undress.⁵⁵

One activist group, Stop Internet Predators, has launched a campaign to spur community and legislative action against Street View, citing the

Behavioral Advertising, Moving the Discussion Forward to Possible Self-Regulatory Principles, at 4 (Dec. 20, 2007), available at <http://www.ftc.gov/os/2007/12/P859900stmt.pdf> (expressing concerns that "[t]he longer that data is stored . . . the greater the risks") [hereinafter FTC Statement 2007].

51. Tim Weber, *Cybercrime Threat Rising Sharply*, BBC NEWS, Jan. 31, 2009, <http://news.bbc.co.uk/2/hi/business/davos/7862549.stm> (last visited Feb. 23, 2010).

Online theft costs \$1 trillion a year [globally, and] the number of attacks is rising sharply. . . . attacks could threaten whole economies.

The past year had seen 'more vulnerabilities, more cybercrime, more malicious software than ever before,' more than had been seen in the past five years combined.

Id. See also Shiels, *supra* note 48 ("Symantec, one of the biggest security software firms in the world, said it had blocked 245 million attacks per month in 2008—roughly 200,000 attacks every half hour. 'Information is the most valuable thing we protect,' said Symantec CEO Enrique Salem."); see also Testimony of Nicole Wong, *supra* note 7, at 9 (estimating the economic impact of the Internet on the United States at \$300 billion a year).

52. See FTC STAFF REPORT 2009, *supra* note 6, at 17 (recognizing continued public interest in privacy issues raised by behavioral advertising); see also Mark Morford, *I Can See Your Thong From Here*, SF GATE, June 6, 2007, <http://cdn.sfgate.com/cgi-bin/article.cgi?f=/g/a/2007/06/06/notes060607.DTL> ("How much is too much? . . . Do we let this sort of technology run free simply because the [d]raconian creepiness of it all is so easily offset by how damn fascinating and helpful and nifty is all so very obviously is?"); see also Miguel Helft, *Google Zooms in Too Close For Some*, N.Y. TIMES, June 1, 2007, available at http://www.nytimes.com/2007/06/01/technology/01private.html?_r=1 ("The next step might be seeing books on my shelf. If the government was doing this, people would be outraged.").

53. See Morford, *supra* note 52 (calling Google Street View a "stalker's paradise").

54. See generally Google Maps with Street View, <http://maps.google.com/help/maps/streetview/> (last visited Feb. 23, 2010).

55. See, e.g., Posting of Stan Schroeder to Mashable, <http://mashable.com/2007/05/31/top-15-google-street-view-sightings> (May 31, 2007); see also StreetViewFun: Funny Google Maps Street Views, <http://www.streetviewfun.com/> (last visited Feb. 23, 2010).

service's risk of enabling child predation, sexual assault, and stalking.⁵⁶ A small community in England went a step further when local residents stood in the road to prevent a Street View vehicle from intruding on their privacy and "facilitating crime" in their neighborhood.⁵⁷ In Pennsylvania, a suit for invasion of privacy against Google Street View was dismissed for failure to state a claim as the judge emphasized the presence of unutilized remedies provided by Google itself—the ability to blur or remove offending photos upon request at no cost to the plaintiff.⁵⁸

Google's innovative strategies have also stirred the eloquent ire of consumer and privacy groups seeking legislative or regulatory protection:

By turning a blind eye to what Google, the worst privacy offender on the Internet, is doing to systematically invade and abuse Americans' expectation of privacy, Congress is perversely encouraging copycat behavior. . . .

The inescapable conclusion from this pattern of behavior is that Google's culture exhibits a fundamental and sustained disdain for privacy.⁵⁹

Consumer groups worry that, if these privacy interests are not given basic protection today, tomorrow may prove too late to reclaim them.⁶⁰

And yet, surrendering privacy to Google is what consumers seem eager to do. Not only are people swayed by free access to indisputably amazing services, Google's public image may have quelled many doubts before they could take root at all. Google has long touted its slogan, "don't be evil," as a corporate mantra.⁶¹ As founders Brin and Page explained the concept to the Securities and Exchange Commission in the Initial Public Offering Registration Statement,

56. Stop Internet Predators, <http://www.stopinternetpredators.org/about/> (last visited Feb. 23, 2010) ("Stop Internet Predators has a special focus on new internet technologies that pose a risk to . . . children's safety, such as Google's Street View.").

57. *Residents Challenge Google Camera*, BBC NEWS, April 3, 2009, http://news.bbc.co.uk/2/hi/uk_news/7980737.stm ("Police were called to Broughton after residents staged the protest, accusing Google of invading their privacy and 'facilitating crime.' . . . 'Google have[sic] taken a tremendous liberty in the way they've gone about it.'").

58. Maggie Shiels, *Judge Dismisses Google Lawsuit*, BBC NEWS, Feb. 19, 2009, <http://news.bbc.co.uk/2/hi/technology/7898407.stm> ("The plaintiffs' failure to take readily available steps to protect their own privacy and mitigate their alleged pain suggests to the Court that the intrusion and that their suffering were less severe than they contend," wrote Judge Reynolds Hay.").

59. Written Testimony of Scott Cleland, *supra* note 9, at 4, 7.

60. See, e.g., Statement of Leslie Harris, *supra* note 17, at 3 ("[S]elf-regulation has not worked to date and, even if strengthened, will never by itself fully protect consumers' privacy interests.").

61. See, e.g., Registration Statement, *supra* note 23, at 32; see also Google Investor Relations: Google Code of Conduct, <http://investor.google.com/conduct.html> (last visited Feb. 4, 2010).

Don't be evil. We believe strongly that in the long term, we will be better served—as shareholders and in all other ways—by a company that does good things for the world even if we forgo some short term gains. This is an important aspect of our culture and is broadly shared within the company.

Google users trust our systems to help them with important decisions: medical, financial and many others. Our search results are the best we know how to produce. They are unbiased and objective, and we do not accept payment for them or for inclusion or more frequent updating. We also display advertising, which we work hard to make relevant, and we label it clearly. . . .⁶²

We will live up to our “don't be evil” principle by keeping user trust and not accepting payment for search results.⁶³

Google is so omniscient today that some have even suggested that it may be the closest contender to true divinity humankind has ever known.⁶⁴ Risking blasphemy and bad taste, the Church of Google takes a humorous defense of Google's divinity, offering as proof Google's omniscience and omnibenevolence, among other divine attributes.⁶⁵ Missing from the list, of course, is perfection, as even Google's greatest fans must recognize its fallibility. In 2009 alone, Google fell prey to several attacks, mishaps, and mistakes.⁶⁶ For example, an undisclosed number of Gmail usernames and

62. See Registration Statement, *supra* note 22, at 32.

63. *Id.* at 32 (emphasis omitted); see also Katie Hafner & Matt Richtel, *Google Resists U.S. Subpoena of Search Data*, N.Y. TIMES, Jan. 20, 2006, available at http://www.nytimes.com/2006/01/20/technology/20google.html?_r=2 (“In its brief history, Google has made ‘Don't be evil’ an operating principle, even as it has come to endure scrutiny and criticism over its increasing inroads into a variety of businesses beyond Web searches, from advertising to mapping.”).

64. See Proof Google Is God—Church of Google, http://www.thechurchofgoogle.org/Scripture/Proof_Google_Is_God.html (last visited Feb. 23, 2010) (offering multiple “proofs” that Google is God Herself, including omniscience, omnipresence, potential immortality, and omnibenevolence); but see Hate Mail—Church of Google, http://www.thechurchofgoogle.org/Scripture/hate_mail.html (last visited Feb. 23, 2010) (disapproving the Church's faith in Google).

65. Proof Google Is God—Church of Google, *supra* note 64.

66. See, e.g., Jonathan Fildes, *Google Targeted in E-mail Scam*, BBC NEWS, Oct. 6, 2009, <http://news.bbc.co.uk/2/hi/8292928.stm>; see also Posting of Ben Treyner to the Official Gmail Blog, <http://gmailblog.blogspot.com/> (Sept. 1, 2009, 18:59 PST) (explaining an all-too-human cause for a temporary outage of Gmail's Web interface); see also Posting of Karim Bardeesy to the Globe and Mail, *Gmail's Cloudburst*, <http://www.theglobeandmail.com/blogs/globe-on-technology/gmails-cloudburst/article1273395/> (Sept. 2, 2009, 13:32) (“If [Google] makes a mistake, or misaligns resources, larger questions have to be raised about its, or anyone else's, ability to offer cloud computing to clients . . . who need reliability.”); see also Matt Marrone, *Is Google Evil?*, N.Y. DAILY NEWS, Sept. 3, 2009, available at http://www.nydailynews.com/tech_guide/2009/03/13/2009-03-13_is_google_evil.html.

In January, for example, a single human error caused Google to red flag every single site on the Internet as malware. Though the mistake was quickly caught, for a time Google advised users to avoid each and every URL on the Web, warning that the sites may damage computers. It's not at all a stretch to wonder what else

passwords were recently compromised and posted on the Internet in a phishing attack that also targeted users of Yahoo!, AOL, and Hotmail.⁶⁷ Even if Google's benevolent intentions prove unimpeachable, consumers' expanding trust—willingness to divulge their information online—ultimately may prove misplaced.⁶⁸

III. ONLINE PRIVACY POLICE: THE FEDERAL TRADE COMMISSION (FTC)

A. *The FTC Takes Responsibility*

The Act that created the FTC gives it law enforcement authority over unfair and deceptive practices in national commerce, especially in fields not overseen by other regulatory agencies.⁶⁹ For example, the FTC has long

could happen, either because of human error or through something more nefarious.

Id.

67. Fildes, *supra* note 66 (Gmail was targeted in an industry wide phishing scheme, compromising hundreds of accounts).

68. For some examples of factors beyond the control of even Google, see Written Testimony of Scott Cleland Testimony, *supra* note 9, at 10, in which it is argued that, “[t]he scale and scope of Google’s unauthorized-web-surveillance is truly Orwellian ‘Big Brother.’ While Google is not the Government, all this private information that Google collects and stores is certainly available to the Government via subpoena.” See also Press Release, Indiana University, IU Cybersecurity Expert: Recent Cyberattacks A ‘Wake-Up Call’ (July 9, 2009), available at <http://newsinfo.iu.edu/tips/page/normal/11362.html> (referring to a wave of cyberattacks on U.S. and foreign Web sites: “‘These attacks demonstrate how vulnerable key computer systems remain,’ said Fred H. Cate, director of the Center for Applied Cybersecurity Research.”); see also Shishir Nagaraja & Ross Anderson, UNIVERSITY OF CAMBRIDGE COMPUTER LABORATORY, *Technical Report No. 746: The Snooping Dragon: Social-Malware Surveillance of the Tibetan Movement 3* (March 2009), available at <http://www.cl.cam.ac.uk/techreports/UCAM-CL-TR-746.pdf> (referring to targeted surveillance of political organizations as “devastatingly effective,” the authors state that “[f]ew organisations outside the defence and intelligence sector could withstand such an attack, and although this particular case involved the agents of a major power, the attack could in fact have been mounted by a capable motivated individual.”). For a discussion on re-identifying anonymous data, see Arvind Narayanan & Vitaly Shmatikov, *De-anonymizing Social Networks* (2009) (unpublished manuscript, available at http://www.cs.utexas.edu/~shmat/shmat_oak09.pdf), in which the authors developed a re-identification algorithm that allowed them to convert some anonymous data back into personally identifiable information.

69. 15 U.S.C. §§ 45(a)(1)-(2) (2006).

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful. (2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

Id. See also Federal Trade Commission – Privacy Initiatives, <http://www.ftc.gov/privacy/> (last visited Feb. 23, 2010) (“Under the FTC Act, the Commission guards against unfairness and deception by enforcing companies’ privacy promises about how they collect, use and

protected consumers by maintaining national standards for adequate labeling of products and for truth in advertising.⁷⁰ The FTC's scrutiny of online consumer privacy concerns surfaced with the emergence of Internet commerce in the mid-1990s.⁷¹ This step was rationalized as consistent with its regulation of consumer privacy offline.⁷² And while obeying its principal mandate to protect consumers, the FTC quickly shied from the risk of stifling innovation in a rapidly growing field.⁷³

By the late 1990s, the practice of tracking consumer behavior online to more accurately personalize advertising had emerged as a focal point of FTC concern.⁷⁴ What the FTC would later call behavioral advertising originally bore a name with a more powerful pejorative—online profiling.⁷⁵ While early FTC descriptions reflect the novelty of the technology involved, they also demonstrate a quick grasp of the privacy implications of collecting and retaining such data:

Once collected, consumer data is analyzed and can be 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

secure consumers' personal information.").

70. See 15 U.S.C. § 45a (2006) (governing product labels that advertise a product with a U.S. origin); 15 U.S.C. § 52 (2006) (criminalizing the dissemination of false advertisements).

71. FTC STAFF REPORT 2009, *supra* note 6, at 4 ("The Federal Trade Commission's involvement with online privacy issues, including behavioral advertising, dates back to the emergence of 'e-commerce.'").

72. FTC Statement 2007, *supra* note 50, at 1 ("The FTC's work in this area is part of its broader, longstanding program to address privacy concerns in both the inline and offline markets."); see also *Dot Com Disclosures: Information about Online Advertising*, FTC, May 2000 at 3, available at <http://www.ftc.gov/bcp/edu/pubs/business/ecommerce/bus41.pdf>.

The FTC Act's prohibition on unfair or deceptive acts or practices broadly covers advertising claims, marketing and promotional activities, and sales practices in general. The Act is not limited to any particular medium. Accordingly, the Commission's role in protecting consumers from unfair or deceptive acts or practices encompasses advertising, marketing, and sales online, as well as the same activities in print, television, telephone and radio.

73. FTC STAFF REPORT 2009, *supra* note 6, at 4 ("[G]iven the dynamic nature of this marketplace and the technologies that make it possible, the Commission has consistently sought to avoid stifling innovation.").

74. See *id.* at 6 ("[I]n November 1999 the FTC and the Department of Commerce jointly sponsored a public workshop to examine the privacy implications of 'online profiling'—essentially, an early form of online behavioral advertising.").

75. *Id.*

deliver ads directly targeted to the consumer's specific interests.⁷⁶

Chief among the privacy concerns raised by online profiling were its nearly invisible nature and the broad scope of data collected about individual consumers.⁷⁷

Although network advertisers and their profiling activities are nearly ubiquitous, they are most often invisible to consumers. . . . Unbeknownst to most consumers, advertising networks monitor individuals across a multitude of seemingly unrelated Web sites and over an indefinite period of time. The result is a profile far more comprehensive than any individual Web site could gather. Although much of the information that goes into a profile is fairly innocuous when viewed in isolation, the cumulation over time of vast numbers of seemingly minor details about an individual produces a portrait that is quite comprehensive and, to many, inherently intrusive.⁷⁸

The FTC, having recognized a potential threat to consumers, recommended the enactment of federal legislation to provide at least minimal protection to online consumer privacy.⁷⁹ Congress declined to act.⁸⁰

B. Privacy Policies Substitute for Protection

Without federal legislation or a confident grasp of the issues involved, the FTC turned to privacy policies as a principal tool for an enforceable measure of transparency in online profiling.⁸¹ Any business engaged in

76. *Online Profiling: Benefits and Concerns before the S. Comm. on Commerce, Science, and Transportation* (June 13, 2000) (prepared statement of the Federal Trade Commission), available at <http://www.ftc.gov/os/2000/06/onlineprofile.htm> [hereinafter Prepared Statement of the Federal Trade Commission on Online Profiling].

77. *Id.* at 4. ("Despite the benefits of targeted advertising, there is widespread concern about current profiling practices. The most consistent and significant concern expressed about profiling is that it is conducted without consumers' knowledge.").

78. *Id.*

79. *Privacy Online: Fair Information Practices In the Electronic Marketplace before the S. Comm. on Commerce, Science, and Transp.* (May 25, 2000) (prepared statement of the Federal Trade Commission), available at <http://www.ftc.gov/os/2000/05/testimonyprivacy.htm> [hereinafter Prepared Statement of the Federal Trade Commission on Privacy Online] ("While there will continue to be a major role for industry self-regulation in the future, a majority of the Commission recommends that Congress enact legislation that, in conjunction with continuing self-regulatory programs, will ensure adequate protection of consumer privacy online.").

80. FTC STAFF REPORT 2009, *supra* note 6, at 7 ("Ultimately, Congress did not enact legislation to address online profiling."); *but see* Personal Data Privacy and Security Act of 2009, S. 1490, 111th Cong. (2009) (proposing federal legislation to protect consumer privacy online).

81. FTC Statement 2007, *supra* note 50, at 3 n.6 ("Many FTC laws, rules, and policies require clear and conspicuous disclosures to prevent deception and possible consumer harm."). *See also* Privacy Initiatives <http://www.ftc.gov/privacy/privacyinitiatives/promises.html> (last visited Feb. 23, 2010) [hereinafter Privacy Initiatives] ("A key part of the Commission's privacy program is making sure companies keep the promises they make to consumers about privacy, including the precautions they take to secure consumers' personal information.").

online commercial activity must formulate a privacy policy that states the intended uses for information gathered about consumers, or risk becoming the subject of an FTC enforcement action.⁸² Failure to provide consumers with the means to make informed decisions constitutes an unfair trade practice, for which the FTC may exercise its investigative and law enforcement powers.⁸³

The FTC watches for deceptive trade practices by holding online businesses to their word, requiring them to keep the promises they have made to consumers.⁸⁴ For example, a business that claimed, in its privacy policy, that it would never sell or share consumer information with anyone, but that subsequently shared or sold that information as a result of a merger or bankruptcy proceeding, could find itself the subject of unwanted FTC scrutiny.⁸⁵ Few, if any, restrictions are actually placed on specific means or uses, provided that the business makes the effort to inform consumers.⁸⁶

C. *Proposed Principles Substitute for Action*

Another key coping strategy for the FTC has been the formulation of principles for self-regulation of behavioral advertising.⁸⁷ The idealistic goal of this initiative has been to generate baseline protections for consumer privacy without having to resort to federal standards promulgated through either statute or regulation.⁸⁸ If successful, this approach would obviate the need for Congress or the FTC to take more decisive action, thus placing the

82. FTC Statement 2007, *supra* note 50, at 3 n.6; *Dot Com Disclosure: Information about Online Advertising*, *supra* note 72 at 3.

For certain industries or subject areas, the Commission issues rules and guides. Rules prohibit specific acts or practices that the Commission has found to be unfair or deceptive. Guides help businesses in their efforts to comply with the law by providing examples or direction on how to avoid unfair or deceptive acts or practices.

Id.; *id.* at 19 n.6 (“Although the [FTC] guides do not have the force and effect of law, the Commission may bring an enforcement action if a person or company fails to comply with a guide and engages in an unfair or deceptive practice in violation of the FTC Act.”).

83. *See* 15 U.S.C. § 45 (2006).

84. FTC Statement 2007, *supra* note 50, at 5 (“[A] company must keep any promises that it makes with respect to how it will handle or protect consumer data.”); *see also* Privacy Initiatives, *supra* note 81 (“Using its authority under Section 5 of the FTC Act, which prohibits unfair or deceptive practices, the Commission has brought a number of cases to enforce the promises in privacy statements, including promises about the security of consumers’ personal information.”).

85. *See, e.g.*, *FTC v. Toysmart.com*, No. 00-CV-11341, 2000 WL 1523287, at *1 (D. Mass. Aug. 21, 2000).

86. *See* 15 U.S.C. § 45.

87. FTC Statement 2007, *supra* note 50, at 3 (“The purpose of this proposal is to encourage more meaningful and enforceable self-regulation to address the privacy concerns raised with respect to behavioral advertising.”).

88. *Id.*

burdens and the benefits on the businesses that engage in behavioral advertising.

Through a series of workshops, town hall meetings, public comments, Senate testimony, and FTC reports spanning nearly a decade, the FTC, in late 2007, produced a short list of possible self-regulatory principles.⁸⁹ Building on what had already become industry standards for behavioral advertising, the proposed principles tread delicately toward the elusive balance between protecting consumers and fostering industry growth.⁹⁰ The stated goal was not to indicate likely areas for intended regulation; rather, the whole purpose was to “encourage more meaningful and enforceable self-regulation.”⁹¹ Integral to these principles, and characteristic of previous FTC actions, online profiling was given a broad definition, intended to encompass current practices as well as provide the basis for analyzing innovations: “‘behavioral advertising’ means the tracking of a consumer’s activities online—including the searches the consumer has conducted, the web pages visited, and the content viewed—in order to deliver advertising targeted to the individual consumer’s interest.”⁹²

The principles identified four areas of concern: (1) transparency and consumer control, (2) data security and retention, (3) modification of posted privacy policies, and (4) the special treatment of sensitive data.⁹³ For the most part, the principles were unsurprising, proposing to require “reasonable security” and to limit retention of data “only as long as is necessary.”⁹⁴ The FTC also recognized that some information, like that not readily traceable to individual consumers, might pose less of a threat if compromised, and that some businesses might have legitimate reasons for retaining consumer information that would be consistent with

89. See, e.g., FTC Staff Report, *Public Workshop on Consumer Privacy on the Global Information Infrastructure* (Dec. 1996), available at <http://www.ftc.gov/reports/privacy/privacy.pdf>; see also FTC Statement 2007, *supra* note 50, at 1-2; Letter from Alan Davidson, *supra* note 29, at 7-12; FTC Staff Report 2009, *supra* note 6, at 4-11.

90. Prepared Statement of the FTC on Behavioral Advertising, *supra* note 10, at 12. The principles

build upon existing ‘best practices’ in the area of privacy, as well as (in some cases) previous FTC guidance and/or law enforcement actions. At the same time, the Principles reflect the FTC staff’s recognition of the potential benefits provided by online behavioral advertising and the need to maintain vigorous competition in this area.

Id.

91. FTC Statement 2007, *supra* note 50, at 3.

92. *Id.* at 2 (“The staff intentionally drafted the principles in general terms to encourage comment and discussion by all interested parties and further development of the principles based on the comments.” *Id.* at 3.).

93. *Id.* at 3-6.

94. *Id.* at 4.

expectations.⁹⁵

Similarly predictable, another principle addressed the potential need for a business to revise or alter the terms of its privacy policy.⁹⁶ While such a need may indeed be legitimate, the FTC emphasized its long-standing policy that a company must keep the promises it has made to consumers.⁹⁷ Under this principle, material changes to obligations under such promises would require prior informed consent of the consumer affected.⁹⁸

Furthermore, the principle proposing heightened protections for various types of “sensitive” data was nebulous but well intended.⁹⁹ Without defining the key term, the principle responded to particular concerns raised when certain data, including medical information and children’s online activities, are used in behavioral advertising.¹⁰⁰ The FTC proposed that the collection of such data should be obtained only by the consent of the consumer, but acknowledged the need for further study and clarification.¹⁰¹ The FTC even suggested the possibility of banning this type of behavioral advertising altogether.¹⁰²

Of the four principles, perhaps the least responsive, and most disappointing, was the restated requirement of a posted privacy policy as a cure for the invisible nature of behavioral advertising.¹⁰³ The FTC’s update proposed that every Web site engaged in behavioral advertising post a “clear, concise, consumer-friendly, and prominent statement” informing consumers that information is being gathered about them to facilitate personalized advertising, and also that consumers have a choice about

95. *Id.* at 4 (“[T]here may be good reasons for retaining data, such as maintaining and improving customer service or tracking criminal activities on the website.”).

96. *Id.* at 5.

97. *Id.* at 5 (“[A] company must keep any promises that it makes with respect to how it will handle or protect consumer data, even if it decides to change its policies at a later date.”); *see also* Prepared Statement of The Federal Trade Commission on Online Profiling, *supra* note 76 (“The Commission’s primary legislative mandate is to enforce the Federal Trade Commission Act (‘FTCA’), which prohibits unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.”).

98. FTC Statement 2007, *supra* note 50, at 5.

99. *Id.* at 5-6; *see also* Center for Democracy & Technology, Public Comment to the Federal Trade Commission, *supra* note 15, at 24 (offering a comprehensive definition of sensitive data).

100. FTC Statement 2007, *supra* note 50, at 5.

101. *Id.* at 6.

102. *Id.* (“FTC staff seeks specific input on . . . whether using sensitive data for behavioral targeting should not be permitted, rather than subject to consumer choice.”).

103. *Id.* at 3; *see also* Prepared Statement of The Federal Trade Commission on Online Profiling, *supra* note 76 (“The most consistent and significant concern expressed about profiling is that it is conducted without consumers’ knowledge.”); *see also* Center for Democracy & Technology, Public Comment to the Federal Trade Commission, *supra* note 15, at 8, 18 (arguing that the proposed transparency principle would alleviate many concerns if it were implemented and if the FTC enforced compliance).

whether or not to allow that collection.¹⁰⁴ Although the FTC identified invisibility as a major concern shortly after assuming the mantle of online privacy police, this ponderous principle simply reacknowledged a long-standing regulatory failure.¹⁰⁵

IV. SOUND AND FURY

A. *Privacy Policies Provide Inadequate Protection*

Some consumer groups complain that privacy policies do little to actually inform consumers.¹⁰⁶ Many posted policies hide behind obscure links near the margins of a Web page; some are written in legalese or are simply uninteresting to an average consumer.¹⁰⁷ The FTC admits that, even if privacy policies are easy to find and understand, many consumers simply do not read them and thus do not benefit from them.¹⁰⁸

As online network advertising relationships become more complex, and as multiple sources of consumer data interact, consumer expectations regarding data use may drift still farther from reality.¹⁰⁹ Falling back on a tried but untrue solution further delays the arrival of a real answer and perpetuates the exposure of consumers to real and growing risks.

Always at the forefront, Google has received praise for its experimental approach to privacy policies.¹¹⁰ Rather than obscuring their

104. FTC Statement 2007, *supra* note 50, at 3.

105. *Compare id.*, with Prepared Statement of The Federal Trade Commission on Online Profiling, *supra* note 76.

The most consistent and significant concern expressed about profiling is that it is conducted without consumers' knowledge. The presence and identity of a network advertiser on a particular site, the placement of a cookie on the consumer's computer, the tracking of the consumer's movements, and the targeting of ads are simply invisible in most cases.

Id.

106. Center for Democracy & Technology, Public Comment to the Federal Trade Commission, *supra* note 15, at 19 ("the Town Hall provided much evidence of the fact that consumers do not understand privacy-related disclosures."); *see also* FTC STAFF REPORT 2009, *supra* note 6, at 35 (The FTC acknowledges that "privacy policies have become long and difficult to understand, and may not be an effective way to communicate information to consumers.").

107. *Id.* ("Across the entire Web, there is largely only one standard privacy-related disclosure that consumers come across again and again: the words 'Privacy Policy' displayed along the edge of a Web page."); FTC Statement 2007, *supra* note 50, at 3 ("[M]any consumers do not read privacy policies.").

108. FTC Statement 2007, *supra* note 50, at 3 ("Many criticize existing disclosures as difficult to understand, inaccessible, and overly technical and long.").

109. *See* Center for Democracy & Technology, Public Comment to the Federal Trade Commission, *supra* note 15, at 6, 7; Letter from Alan Davidson, *supra* note 29, at 6 (technological developments may soon blur the line between first-party and third-party applications).

110. Testimony of Nicole Wong, *supra* note 7, at 7 ("[I]nnovation is a critical part of our

policy, Google has promoted it as yet another reason to trust and enjoy Google.¹¹¹ Google has an entire series of Web pages describing and explaining many of the legal aspects of online privacy.¹¹² In addition to detailed information, Google also offers privacy overviews, bullet points, and even YouTube audio/visual presentations.¹¹³ By making privacy policies more interesting, more understandable, and, seemingly, more open and honest, Google and others have reinvigorated the FTC's hopes of overcoming the transparency issue with better consumer education.¹¹⁴

When examined more closely, however, Google's privacy policies appear to be more formulaic than substantive. The Privacy Policy overview summarizes the information that Google gathers, the uses that Google intends for that information, and the choices available to consumers concerning how that information is gathered and used.¹¹⁵ Although the policy easily exceeds FTC requirements, it also provides few checks on specific behavioral advertising practices. Legal nuances are simplified into bullet points and presented in nonthreatening language:

- We may use personal information to provide the services you've requested, including services that display customized content and advertising.
- We may also use personal information for auditing, research and analysis to operate and improve Google technologies and services.
- We may share aggregated non-personal information with third parties outside of Google.
- When we use third parties to assist us in processing your personal information, we require that they comply with our Privacy Policy and any other appropriate confidentiality and security measures.
- We may also share information with third parties in limited circumstances, including when complying with legal process, preventing fraud or imminent harm, and ensuring the security of our network and services.
- Google processes personal information on our servers in the

approach to privacy."); FTC STAFF REPORT 2009, *supra* note 6, at 19 n.30 (discussing the privacy education programs created by AOL and Google).

111. See Google Privacy Center, <http://www.google.com/privacy.html> (last visited Feb. 23, 2010); see also Testimony of Jane Horvath, *supra* note 7, at 5-6.

112. See Google Privacy Center, *supra* note 111.

113. See *id.*

114. Prepared Statement of the FTC on Behavioral Advertising, *supra* note 10, at 14, 15 ("The FTC . . . believes that the self-regulatory process that has been initiated is a promising one."); see also FTC STAFF REPORT 2009, *supra* note 6, at 19 n.30; *id.* at 47 ("[s]taff is encouraged by recent steps by certain industry members, but believes that significant work remains.").

115. See Privacy Policy – Google Privacy Center, <http://www.google.com/intl/en/privacy/policy.html> (last visited Feb. 23, 2010).

United States of America and in other countries. In some cases, we process personal information on a server outside your own country.

- Read more in the full privacy policy.¹¹⁶

Notice that this policy overview provides Google with nearly unrestricted freedom to share consumer information within its many subsidiaries and even with attenuated or unrelated third parties. Those third parties are merely held to Google's already-generous policies. The overview further gives notice that consumer information may be distributed outside of the United States. While not expressly stated, this suggests that a given piece of information stored or processed beyond national borders might not be held to comply with already-minimalist U.S. consumer protections.¹¹⁷ The full-length version of the Privacy Policy provides slightly more clarity on what Google considers to be acceptable uses:

Google only processes personal information for the purposes described in this Privacy Policy and/or the supplementary privacy notices for specific services. In addition to the above, such purposes include:

- Providing our services to users, including the display of customized content and advertising;
- Auditing, research and analysis in order to maintain, protect and improve our services;
- Ensuring the technical functioning of our network;
- Protecting the rights or property of Google or our users; and
- Developing new services.¹¹⁸

Notice that the list of approved uses includes providing customized advertising, which the policy describes as a "service to users."¹¹⁹ Imagine if television advertising was likewise touted as programming; such a deliberate blurring of the lines could form the basis for a complaint of deceptive practices.¹²⁰ While Google currently distinguishes content by

116. *Id.*

117. See Lisa J. Sotto et al., *Privacy and Data Security Risks in Cloud Computing*, 15 ECLR 186, BNA NEWS (Feb. 3, 2010), available at http://news.bna.com/epln/EPLNWB/split_display.adp?fedfid=16263890&vname=eiplnotallissues&wsn=497983500&searchid=10505681&doctypeid=1&type=date&mode=doc&split=0&scm=EPLNWB&pg=0 ("Considering the complex regulatory issues surrounding data protection across various jurisdictions, the inability to know where one's data is located, or if and when the data may be moved to another state or country, implies a good deal of potential legal risk.").

118. Privacy Policy - Google Privacy Center, *supra* note 115.

119. *Id.*

120. 15 U.S.C. § 45 (2006); Prepared Remarks of Commissioner Roscoe B. Starek, III, FTC, Oct. 15, 1996, available at <http://www.ftc.gov/speeches/starek/nima96d4.shtm>.

Online advertising shares many characteristics with infomercials.... the technology may blur the lines between what is and is not an advertisement. . . . the FTC requires infomercials to disclose that they are paid advertisements. This raises the question whether online entertainment that is also advertising ought to contain similar disclosures.

Id.; see also Stipulated Order Modifying Final Order as to Defendants Great American

labeling advertisements as “sponsored links,” Google could conceivably alter or eliminate that practice and remain true to their posted policy. In spite of this preservation of an enormous potential for abuse, Google continues to appeal to consumers as a trusted source of free services and content, and to present itself to the FTC and to Congress as a model of responsibility.¹²¹ Part of that success may revolve around Google’s Privacy Policy’s language relating to choice. The overview provides:

- We offer you choices when we ask for personal information, whenever reasonably possible. You can find more information about your choices in the privacy notices or FAQs for specific services.
- You may decline to provide personal information to us and/or refuse cookies in your browser, although some of our features or services may not function properly as a result.
- We make good faith efforts to provide you access to your personal information upon request and to let you correct such data if it is inaccurate and delete it, when reasonably possible.
- Read more in the full privacy policy.¹²²

If a consumer chooses to inspect information that Google has stored on that individual, Google promises only to make “good faith efforts . . . when reasonably possible.”¹²³ Coming from the world’s largest search engine, that promise to retrieve data seems conspicuously lacking in confidence. Consumers are further informed that they may deny Google access to their personal information, but Google ominously hints that their products and services may not work correctly.¹²⁴ The full-length version provides only slightly more detail:

When you sign up for a particular service that requires registration, we ask you to provide personal information. If we use this information in a manner different than the purpose for which it was collected, then we will ask for your consent prior to such use.

If we propose to use personal information for any purposes other than those described in this Privacy Policy and/or in the specific service privacy notices, we will offer you an effective way to opt out of the use of personal information for those other purposes. We will not collect or use sensitive information for purposes other than those described in this Privacy Policy and/or in the supplementary service privacy

Products, Inc., available at <http://www.ftc.gov/os/caselist/0323247/080123greatamprodstipordmodify.pdf> (FTC required infomercial advertiser to prominently display paid programming disclosure).

121. *September Search Share*, *supra* note 34 (“Google accounted for 71.08% of all US searches conducted in the four weeks ending Oct. 3, 2009, while Yahoo Search, Bing and Ask.com received 16.38%, 8.96% and 2.56%, respectively.”); see Letter from Alan Davidson, *supra* note 29, at 1; FTC STAFF REPORT 2009, *supra* note 6, at 19 n.30.

122. Privacy Policy – Google Privacy Center, *supra* note 115.

123. *Id.*

124. *See id.*

notices, unless we have obtained your prior consent.

Most browsers are initially set up to accept cookies, but you can reset your browser to refuse all cookies or to indicate when a cookie is being sent. However, some Google features and services may not function properly if your cookies are disabled.

Google uses the DoubleClick advertising cookie on AdSense partner sites and certain Google services to help advertisers and publishers serve and manage ads across the web. You can view, edit, and manage your ads preferences associated with this cookie by accessing the Ads Preferences Manager. In addition, you may choose to opt out of the DoubleClick cookie at any time by using DoubleClick's opt-out cookie.

You can decline to submit personal information to any of our services, in which case Google may not be able to provide those services to you.¹²⁵

Consumers may decline to provide Google's lifeblood, personal information, but Google may then "not be able to" serve those consumers.¹²⁶ Such an arrangement provides little restraint on Google and no effective alternatives to individuals except to use some other service or product. But as Google continues to expand its presence online and its influence beyond the Internet, the prospect of being denied Google's services looms as an ever more serious threat. While appearing to offer choice and champion transparency, even the most lauded of privacy policies fail to actually provide consumers with the basic protections the FTC has long sought to require.

B. Further Revision Equals Further Procrastination

Nearly fifteen years after taking responsibility for online consumer privacy, the FTC, in 2009, released a revised version of its self-regulatory principles for behavioral advertising.¹²⁷ Like its 2007 predecessor, these principles are neither statute nor regulation, but are proposals for online privacy that the FTC would like the industry to adopt.¹²⁸ Much of the accomplishment in the 2009 revision is fine-tuning language that continues to reflect the issues identified in the 1990s that require federal protection and enforcement.¹²⁹

125. *Id.*

126. *Id.*

127. FTC STAFF REPORT 2009, *supra* note 6.

128. *Id.* at 47 ("Staff calls upon industry to redouble its efforts in developing self-regulatory programs, and also to ensure that any such programs include meaningful enforcement mechanisms."); *see also* FTC Statement 2007, *supra* note 50, at 3 ("The purpose of this proposal is to encourage more meaningful and enforceable self-regulation to address the privacy concerns raised with respect to behavioral advertising.")

129. FTC STAFF REPORT 2009, *supra* note 6, at 45-48; *see also* Prepared Statement of The Federal Trade Commission on Online Profiling, *supra* note 76.

Despite the ubiquitous presence of posted privacy statements, FTC staff acknowledged that many consumers simply do not understand how their online behavior pays for many free services.¹³⁰ This lack of clarity, in turn, interferes with consumers' ability to make informed decisions while online.¹³¹ Tacked onto the end of the previous transparency principle, the 2009 revision adds this nod to Google and other Web sites with creative statements: "Where the data collection occurs outside the traditional website context, companies should develop alternative methods of disclosure and consumer choice that meet the standards described above (i.e., clear, prominent, easy-to-use, etc.)."¹³²

Other amendments to the principles were dwarfed by the unprecedented limitation to the scope of the proposed guidelines in the revised definition of behavioral advertising itself.¹³³ The FTC, having previously defined targeted advertising practices broadly, redefined online behavioral advertising in the February 2009 report. The FTC chose to exempt both first-party and contextual advertising from the governance of the principles (with new language in bold italics):

For purposes of the principles, online behavioral advertising means the tracking of a consumer's online activities *over time*—including the searches the consumer has conducted, the web pages visited, and the content viewed—in order to deliver advertising targeted to the individual consumer's interests. ***This definition is not intended to include "first party" advertising, where no data is shared with third parties, or contextual advertising, where an ad is based on a single visit to a web page or single search query.***¹³⁴

The previous incarnation of proposed principles did not distinguish between advertising that collects and uses information entirely at a single Web site from advertising that uses information shared with third parties or across multiple Web sites.¹³⁵ Lacking that distinction, those principles did not provide corresponding degrees of consumer privacy protection.¹³⁶ The

130. Concurring Statement of Comm'r Pamela Jones Harbour Regarding Staff Report, "Self-Regulatory Principles for Online Behavioral Advertising," Feb. 2009, at 1, available at <http://www.ftc.gov/os/2009/02/P085400behavadharbour.pdf> (hereinafter Harbour Statement 2009) ("These technologies offer valuable benefits, but not all consumers understand how the business model works.").

131. *Id.* at 1-2 ("Consumers cannot make informed choices, however, unless they have complete and accurate information about how their data may be collected and used."); FTC Statement 2007, *supra* note 50, at 3.

132. FTC STAFF REPORT 2009, *supra* note 6, at 46 (emphasis omitted).

133. Compare *id.*, with FTC Statement 2007, *supra* note 50.

134. FTC STAFF REPORT 2009, *supra* note 6, at 46.

135. FTC Statement 2007, *supra* note 50, at 2 ("[O]nline 'behavioral advertising' means the tracking of a consumer's activities online—including the searches the consumer has conducted, the web pages visited, and the content viewed—in order to deliver advertising targeted to the individual consumer's interests.").

136. Letter from Alan Davidson, *supra* note 29, at 6 ("The proposed principles do not

February 2009 version of the principles reconsidered that treatment, evidently moved by the comments of Google and other interested parties:

Staff believes that, given the direct relationship between the consumer and the website, the consumer is likely to understand why he has received the targeted recommendation or advertisement and indeed may expect it. The direct relationship also puts the consumer in a better position to raise any concerns he has about the collection and use of his data, exercise any choices offered by the website, or avoid the practice altogether by taking his business elsewhere. By contrast, when behavioral advertising involves the sharing of data with ad networks or other third parties, the consumer may not understand why he has received ads from unknown marketers based on his activities at an assortment of previously visited websites. Moreover, he may not know whom to contact to register his concerns or how to avoid the practice.

....

Based on these considerations, staff agrees that it is not necessary to include “first party” behavioral advertising practices within the scope of the Principles. If a website collects and then sells or shares data with third parties for purposes of behavioral advertising, or participates in a network that collects data at the site for purposes of behavioral advertising, however, such practices would remain within the scope of the Principles.¹³⁷

The FTC’s revised scope appears to include behavioral advertising applications within its third-party coverage.¹³⁸ Google’s comments to the FTC urged another definition of third-party advertising—one that would not include sites with common owners or operators.¹³⁹ Industry commentators have observed to the FTC that the first-party/third-party determination will be fact-specific, hinging on particular circumstances and the degree of consistency with consumer expectations, leaving open the possibility that Google’s global advertising network may yet fall predominantly outside of the purview of the FTC’s principles for self-

distinguish between data collection and use in what we will refer to in our comments as first-party advertising on the one hand and such activities performed in third-party advertising on the other.”).

137. FTC STAFF REPORT 2009, *supra* note 6, at 27-28.

138. *Id.*

139. Letter from Alan Davidson, *supra* note 30, at 6 (“[D]ata collection and use on one site involves different privacy and security considerations from data collection and use across multiple sites owned and operated by different parties.”); see also SELF-REGULATORY PRINCIPLES FOR ONLINE BEHAVIORAL ADVERTISING 23 (July 2009), available at <http://www.iab.net/media/file/ven-principles-07-01-09.pdf>.

The term Online Behavioral Advertising, as defined in the [Cross-Industry] Principles, does not include the activities of First Parties, Ad Delivery or Ad Reporting, or contextual advertising (i.e. advertising based on the content of the Web page being visited, a consumer’s current visit to a Web page, or a search query).

Id.

regulation.¹⁴⁰

Integral to Google's concept of self-regulation is to have contextual advertising, which it defines as "advertising that is provided in response to the current activities of a user," entirely exempted from the principles.¹⁴¹ For example, advertisements that are targeted to a particular user in response to search queries are contextual in nature, and Google's business model relies heavily on this type of advertising.¹⁴² Google and other interested parties had argued that contextual advertising is consistent with consumer expectations, and that consumers actually desire this type of relevancy in online advertising.¹⁴³ The FTC agreed:

[C]ontextual advertising provides greater transparency than other forms of behavioral advertising, is more likely to be consistent with consumer expectations, and presents minimal privacy intrusion when weighed against the potential benefits to consumers. As discussed above, these benefits may include free content—made possible by the revenue from the sale of the advertisements—and receipt of contextually relevant ads that consumers may value. Staff consequently does not believe that it is necessary for the Principles to cover this form of online advertising.¹⁴⁴

By redefining behavioral advertising to exclude both first-party and contextual advertising, the revised principles broaden the gap in consumer privacy protection; where Google leads, others will surely follow. When the sound and fury die down, the revised principles appear to cover a significantly lesser scope than the 2007 principles and far less than the range of concerns expressed by the FTC in the late 1990s.¹⁴⁵

V. MINIMUM STANDARDS FOR PRIVACY PROTECTION ARE LONG OVERDUE

Just a dozen years ago, Google was not a word, a company, or a cultural icon, and the FTC was preparing to protect privacy in the online marketplace. Twelve years later, millions of consumers surrender

140. FTC STAFF REPORT 2009, *supra* note 6, at 28-29 n.59.

141. Letter from Alan Davidson, *supra* note 29, at 5 ("We believe that this type of advertising [contextual advertising] should not be considered behavioral advertising."); Testimony of Jane Horvath, *supra* note 7, at 5 ("The online advertising products that we offer today are also privacy-friendly because they are primarily contextual in nature.").

142. Testimony of Jane Horvath, *supra* note 7, at 2, ("Google offers three main advertising products: AdWords, AdSense for Search, and AdSense for Content."); *see id.* at 5 ("The online advertising products that we offer . . . are primarily contextual in nature.").

143. FTC STAFF REPORT 2009, *supra* note 6, at 29; Letter from Alan Davidson, *supra* note 29, at 2 ("Many Town Hall participants, including Google, demonstrated that relevant online ads are useful to consumers. Our experience that relevant or targeted advertising is useful to our users is supported by industry research.").

144. FTC STAFF REPORT 2009, *supra* note 6, at 30.

145. *Compare id.*, with FTC Statement 2007, *supra* note 50; *see also* Prepared Statement of the Federal Trade Commission on Privacy Online, *supra* note 79.

information to Google every day, and the FTC is still preparing, still trying to define the terms and principles involved. Although it had once recommended potent federal legislation of online profiling tactics, the FTC maintains that its plodding progression toward conceptualizing behavioral advertising is cause for cautious optimism.¹⁴⁶

This optimism springs from the beneficence of influential online market players. The FTC expects businesses like Google to lead the honing process toward someday fostering growth in online commerce while also guaranteeing basic levels of protection for consumer privacy. After asserting market dominance over many aspects of consumers' daily online lives, Google appears poised to expand at-will into other online markets and to pioneer markets as yet unexploited.¹⁴⁷ While the FTC ponders the subtleties of revising proposed principles, mountains of data about consumers are being gathered and manipulated like never before, scarcely subject to legislative or regulatory privacy protections.

Although the short history of behavioral advertising is fraught with unknowing sacrifices by consumers and unprecedented profits by businesses, there is a near consensus that minimum consumer privacy protections are needed.¹⁴⁸ And while the innovation necessary for economic growth in an exploding field is easy to cast as too unpredictable to tame with national regulation, it is exactly that unpredictability that demands taming. Consumers' privacy interests, though facing new and different threats, remain a constant. Those interests require a consistent minimum level of protection from well-known and long-debated incursions. Without overdue action from the FTC establishing enforceable baseline privacy protections, the unwitting sacrifices made by today's consumers may prove to be tomorrow's status quo.

146. Prepared Statement of the Federal Trade Commission on Behavioral Advertising, *supra* note 10, at 1 ("At this time, the Commission is cautiously optimistic that the privacy concerns raised by behavioral advertising can be addressed effectively by industry self-regulation.").

147. *Search-Engine Rankings: Bing Grows 22% in August*, MARKETING CHARTS, Sept. 18, 2009, <http://www.marketingcharts.com/interactive/bing-search-grows-22-in-august-10434/> ("Though Google Search remained as the #1 search provider and grew 2.6% to 7.0 billion searches with a 64.6% share, the share of searches for Bing increased from 9.0% in July to 10.7% in August.").

148. Testimony of Nicole Wong, *supra* note 7, at 7 ("Google supports the passage of a comprehensive federal privacy law."); Prepared Statement of the Federal Trade Commission on Privacy Online, *supra* note 79 ("While there will continue to be a major role for industry self-regulation in the future, a majority of the Commission recommends that Congress enact legislation that, in conjunction with continuing self-regulatory programs, will ensure adequate protection of consumer privacy online."); Statement of Leslie Harris, *supra* note 17, at 3 (recommending the Senate enact baseline consumer privacy protections); Written Testimony of Scott Cleland, *supra* note 9, at 12 ("In short, the lack of a holistic, comprehensive and balanced approach to privacy is a serious threat to" the privacy of U.S. consumers. (emphasis omitted)).

