1 November 2006

Complaint and Request)
for Inquiry and Injunctive Relief)
Concerning Unfair)
and Deceptive)
Online Marketing Practices)

Deborah Platt Majoras, Chairman
Room 440
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

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Dear Chairman Majoras:

The online marketplace, which now accounts for over $100 billion in U.S. e-commerce

sales annually, has evolved rapidly over the past decade.[1] The policies governing consumer privacy on the Internet have failed to keep pace with the developments that continue to re-shape the online world, however. Privacy policies designed for a largely static, text-based World Wide Web offer little protection in the dynamic Web of the present, in which both rich-media content, and the array of sophisticated marketing technologies designed to support that content, are assembled and re-assembled on the fly, customized and targeted for the user. Many of these data collection techniques, automated and operating in real time, are based on sophisticated algorithms that analyze user behavior online—down to the level of "micro-actions"—and shape content and advertising accordingly. For example, as Touch Clarity (a developer of consumer profiling software tools) explains, its Behavioral Targeting technology "is essentially … an automated process of intelligent listening and responding, working with each individual visitor, based upon everything they have expressed through their click-stream interactions … to-date. The result is significantly measured improvements in visitor engagement levels, conversion rates and most importantly, revenues."[2]

Indeed, as the FTC must recognize, we have reached a pivotal moment in the history of the U.S. broadband marketplace: the emergence of a ubiquitous "always-on" and "connected" interactive system, from PCs to Internet protocol television (IPTV) and digital television to cell and mobile networks. The data collection and interactive marketing system that is shaping the entire U.S. electronic marketplace is being built to

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[1] U.S. Census Bureau, "Quarterly Retail E-Commerce Sales: 2nd Quarter 2006," 17 Aug. 2006, http://www.census.gov/mrts/www/data/html/06Q2.html (viewed 27 Sept. 2006). In 2005, Internet advertising revenues in the U. S. totaled over $12.5 billion. PricewaterhouseCoopers, "IAB Internet Advertising Revenue Report," 2005 Full-Year Results, Apr. 2006, http://www.ameinfo.com/pdf/iab/IAB_PwC_2005full.pdf (viewed 24 Oct. 2006). According to the Interactive Advertising Bureau and PricewaterhouseCoopers, Internet advertising revenues reached a new record of $3.9 billion for the first quarter of 2006. Roger Park, "IAB: Q1 2006 Internet Ad Rev. $4 Bil." iMedia Connection, 31 May 2006, http://www.imediaconnection.com/news/9801.ASP (viewed 24 Oct. 2006). Parks Associates expects "digital media to grab 10 percent of overall ad spending, or $23.5 billion, by 2010. Last year, the company said, digital media captured just 5 percent of ad spending, or $9.45 billion." Enid Burns, "Digital Ads Expected to Hit $23B by 2010," ClickZ Network, 21 Feb. 2006, http://www.clickz.com/showPage.html?page=3586216 (viewed 24 Oct. 2006). Mobile data revenues, meanwhile, including marketing, are expected to rise to $37.5 billion in U.S. by 2010. James Belcher, "Mobile Spending: US Non-Voice Services," Sept. 2006, http://www.emarketer.com/Reports/All/Em_mobile_spend_sep06.aspx (viewed 24 Oct. 2006).
[2] Touch Clarity, "The Rise of On-Site Behavioral Targeting," http://www.touchclarity.com/downloads/index.php?fileid=106 (viewed 4 Oct. 2006, registration required).

aggressively track us wherever we go, creating data profiles to be used in ever-more sophisticated and personalized "one-to-one" targeting schemes. Unfortunately, over the last several years the FTC has largely ignored the critical developments of the electronic marketplace that have placed the privacy of every American at risk.[3] The FTC should long ago have sounded a very public alarm—and called for action—concerning the data collection practices stemming from such fields as Web analytics, online advertising networks, behavioral targeting, and rich "virtual reality" media, all of which threaten the privacy of the U.S. public.[4]

Consumers entering this new online world are neither informed of nor prepared for these technologies and techniques—including data gathering and mining, audience targeting and tracking—that render users all but defenseless before the sophisticated assault of new-media marketing. It is evident that attempts at self-regulation by the industry, such as the Network Advertising Initiative "principles," have failed to protect the public.[5] Current privacy disclosure policies are totally inadequate, failing to effectively inform users how and what data are being collected and used. While many companies claim they collect only "non-personally identifiable" information, they fail to acknowledge the tremendous amounts of data compiled and associated with each unique visitor who visits their website. Thus even if these companies don't know our names, through online tracking and analysis they literally know every move we make. The upcoming Tech-ade

[3] See, for example, the 14 August 2006 request of the Electronic Frontier Foundation (EFF) for the FTC "to investigate America Online (AOL) and require changes in its privacy practices, after the company recently released search history logs that exposed the private lives of more than a half-million of its customers." Electronic Frontier Foundation, "EFF Demands FTC Investigation and Privacy Reform After AOL Data Release," 14 Aug. 2006, http://www.eff.org/news/archives/2006_08.php#004876 (viewed 29 Oct. 2006).

[4] As an example of the kind of rich-media engagement that marketers are using to persuade website visitors to surrender more information, Web advertiser Oddcast (whose animated "talking avatar" products "are proven to help acquire new customers, increase conversion and click-through rates, page views, user interaction time and retention rates") cites Stanford University research: "According to a study conducted by the Center for the Study of Language and Information, Stanford University, 'characters can express social roles, emotions, and organized personalities that match learning goals, company brands, and transaction needs. Characters can increase the trust that users place in online experiences, in part because they make online experiences easier.'" Oddcast, "Case Studies," http://www.oddcast.com/home/casestudies (viewed 30 Oct. 2006). See also Byron Reeves, "The Benefitsof Interactive Online Characters," Center for the Study of Languages and Information, Stanford University, n.d., http://www.oddcast.com/home/cases/research/CSLI_Stanford_Study.pdf (viewed 30 Oct. 2006).

[5] Network Advertising Initiative, "The NAI Principles: How They Help Protect Your Privacy," http://www.networkadvertising.org/consumer/principles.asp (viewed 25 Oct. 2006).

hearing scheduled for next week, along with the "exhibit" area, is insufficient to protect the American public. It is therefore incumbent on the Federal Trade Commission to protect consumers from unfair and deceptive practices by using its authority under Section 5 of the FTC Act to address this issue on a variety of fronts:

- launching an immediate investigation into the online marketplace in light of this new environment
- exposing practices that compromise user privacy
- issuing the necessary injunctions to halt current practices that abuse consumers
- crafting policies—and recommending federal legislation—to prevent such abuses.

As a first step in this direction, the FTC should look closely at Microsoft's new set of adCenter services. As we shall describe in this complaint, Microsoft has embarked on a wide-ranging data collection and targeting scheme that is deceptive and unfair to millions of users.

The Center for Digital Democracy and the U.S. Public Interest Research Group, two of the leading public-interest advocacy groups working on behalf of a more diverse, open, and competitive online environment, call on the FTC to undertake an immediate, formal investigation of online advertising practices, focusing on five areas of concern:

- User Tracking/Web Analytics
- Behavioral Targeting
- Audience Segmentation
- Data Gathering/Mining
- Industry Consolidation

Collectively, these five areas represent the foundations of an entirely new online environment, one in which engagement gives way to entrapment, in which personalization impinges on privacy. It is an online environment, in short, that threatens to turn the traditional media equation on its head—a media that consumes us.

No other company displays these unfortunate traits more aggressively than Microsoft, and thus we respectfully request the commission to examine closely all facets of Microsoft's new approach to data collection via its Digital Advertising

Solutions/adCenter marketing apparatus: the MSN Web portal, Windows Live search engine, Hotmail e-mail service, Messenger instant messaging network, Xbox 360 gaming system, Office Online productivity suite, Windows Mobile software platform, Microsoft TV online video service, Spaces blogging service, and Soapbox videos. Especially disturbing is Microsoft's use of data gleaned from its Hotmail service (which attracts over 30 million users every month) to sharpen its ad-targeting efforts, and those of its adCenter clients. Like Google and Yahoo, then, Microsoft is actively rewriting the rules that govern the online marketplace. It is the FTC's job to make certain that these rules reflect more than corporate self-interest. The *public* interest matters, too, and it is the FTC's responsibility to protect and promote that vital perspective, by issuing an injunction against the most egregious of Microsoft's and other companies' new invasive advertising practices, which are discussed below.

A. User Tracking/Web Analytics

Online advertising today is built on an elaborate system of surveillance that tracks, compiles, and analyzes the movements of Internet users. As Atlas Solutions' promotional material reveals, "We've developed our technology to capture actual user behavior on a web site, such as which fields users interact with, how far down a page they scroll, or how engaged are they with the web page. Our experts analyze the data and deliver a compelling story about what users are doing, why, and provide action steps that you can implement to drive top line revenue and contribution to your bottom line."[6] The tracking

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[6] Atlas Solutions, "Analysis Services," http://www.atlassolutions.com/enterprise/usability/trueusability/ (viewed 28 Sept. 2006). Atlas works with such companies as Viacom/MTV and Microsoft (MSN). See http://www.atlassolutions.com/news/releases/20060906 (viewed 17 Oct. 2006). According to Atlas, "The Atlas Digital Marketing Suite gives you an unobstructed view of everything your customer does and the power to fully manage all of your campaigns-using one unified, integrated set of tools. It allows you to stay connected with your customer from the first click all the way to the sale, and even beyond.... You want to plan your buy based on customer behavior and create detailed reports on reach and frequency? You got it.... With integrated tracking across all your media, as well as over 30 of the world's leading search engines, Atlas tracks results by keyword, position, search engine, and dollar value. It follows every conversion, and assures you pay only once per conversion.... But unlike other web metrics tools, Site Optimization gives you more than just data. Our technology digs deep, tracking precisely how customers move through your site. Our team of analysts reveals hot and cold spots, levels of interactivity and which links motivate the highest conversions. We analyze your site's touch-points holistically and make recommendations toward achieving the lowest cost per action. Building a better site experience? It's a media thing. We identify every road block, isolate every imperfect traffic pattern and pinpoint exactly where your visitors make their exits. Then, we turn this data into a comprehensive report, full of specific, actionable recommendations to improve your site's performance." Atlas Solutions, "The Atlas Digital

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technology that enables such digital eavesdropping is completely invisible to website visitors, however, who never know they are being followed. "Once a JavaScript tag is placed on selected pages," explains Atlas (a provider of technology and services for "fully integrated online marketing campaigns"), "tracking begins. We record events such as clicks, scrolling, mouse-overs, screen resizing, page views, sessions, and time on page, just to name a few."[7] And users who actually complete an online transaction are accorded special treatment. "Visitors who make a purchase are a special breed, indeed," notes the website of ClickTracks, a Web analytics software provider.[8] "And knowing more about them gives you insights on how to turn more visitors into buyers. ClickTracks lets you see buyers from many different aspects, allowing you to see their entry points, the paths they take and things they do on the way to the checkout—giving you valuable knowledge that you can put into action."[9]

Even after visitors leave a particular site, a trail of digital bread crumbs follows them. Casale Media's InterestPoint retargeting component of its AdGlobal campaign delivery platform, for example, "involves positioning an invisible pixel on heavily trafficked areas of your website, and/or at various stages along the purchase process (e.g. homepage, checkout). With the pixels in place, InterestPoint is able to anonymously observe consumers' actions while they are browsing your website. Targeted messages are delivered to consumers after they leave the site, based on how far through the purchase process they got and whether they completed the desired response."[10] Nor are mobile users immune from this digital dragnet: JumpTap, for example, "offers a robust Recommendation Engine tailored specifically to mobile subscribers. By monitoring search, transaction and browsing history, JumpTap enables wireless operators to provide

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Marketing Suite Pulls Great Campaigns Together,"
http://www.atlassolutions.com/pdf/AtlasDigitalMarketingSuite.pdf (viewed 29 Oct. 2006).
[7] Atlas Solutions, "How We Work with You,"
http://www.atlassolutions.com/enterprise/usability/how_we_work/ (viewed 28 Sept. 2006).
[8] ClickTracks' clients include Coca Cola, Pfizer and Comcast. See
http://www.clicktracks.com/customer.php (viewed 17 Oct. 2006).
[9] ClickTracks, "20/20 Web Metrics," http://www.clicktracks.com/visitor_behavior.php (viewed 4 Oct. 2006).
[10] Casale Media, "Convert Browsers into Buyers with Retargeting Optimization." Casale Media, which describes itself as "an online media and technology company serving the needs of marketers and advertisers," has 5,500 websites in its advertising network, delivering 79 million unique U.S. visitors each

recommendations to subscribers for cross-sell and up-sell opportunities. The
Recommendation Engine determines trends and likelihoods of browsing and purchasing
behavior such as:

- People who purchase Oops, I Did it Again by Britney Spears tend to purchase Toxic by Britney
- People who browse Green Day tend to browse Weezer
- People who browse Golf games tend to purchase Bowling games
- Most people who searched for the phrase "TV Themes" eventually went on to buy the Dukes of Hazzard ringtone.[11]

Timing is everything in this new, hyper-commercial environment, and the JumpTap
Advertising Suite promises to present "… targeted ads and content to mobile users at the
precise moment those users express an interest in specific goods and services. The
mechanism for connecting to this audience is a sponsored link."[12]

Such sponsored links, and the data collection techniques they hide, routinely invade our
everyday leisure pursuits as well. Fox/News Corp's IGN Entertainment, for example,
offers a variety of video games, which attract more than 31 million unique monthly users
worldwide. Few of these users are aware, however, how closely their "play" is being
monitored. IGN's "GamerMetrics" offers "not just a reporting tool that provides page
view data, [but also] ... robust capabilities [that] allow you to track actual gamer behavior
according to individual wish lists, requested email alerts, game ownership, and more.
You'll be able to see what's working to create a buzz—and use that information to keep
your multimedia communications campaigns on the right track for a successful release."[13]
IGN created GamerMetrics, we're told,

> to help you develop and maintain ongoing analyses of the online gaming
> community, its members, and its subsections. Using GamerMetrics, you'll be able
> to track the online activity, preferred gaming environments, and demonstrated
> interests of the gaming audience—even as it develops and changes.… Simply
> put, IGN and GamerMetrics give you the power to know your audience: to track,
> analyze, and forecast its behaviors—and to take action accordingly.… In addition

month. See http://www.imediaconnection.com/content/7929.asp (viewed 17 Oct. 2006).
[11] JumpTap, "Solutions for Mobile Operators: Recommendation Engine,"
http://www.jumptap.com/solutions_mob_re.aspx (viewed 4 Oct. 2006).
[12] JumpTap, "Solutions for Mobile Operators: Advertising Suite,"
http://www.jumptap.com/solutions_mob_adinv.aspx (viewed 4 Oct. 2006).
[13] IGN, "IGN GamerMetrics Overview," http://www.gamermetrics.com/pages/about_out.jsp (viewed 4 Oct.
2006).

to tracking the online behavior of our general audience, IGN also obtains data on the interests of individual users provided voluntarily on IGN.com User Pages. This Gamer Panel is now over 400,000 members strong and growing. Gamer Panel data includes over 7 million games in gamers' collections, and over 1.6 million games in gamers' wishlists.[14]

Online video represents the next frontier of invasive advertising practices, with multimedia Web content used to attract new visitors to a site, who are then subjected to data collection and user profiling technologies. "While video is a terrific hook that brings online audiences to the brand," notes the online advertising firm PointRoll, "there is an opportunity to create a longer dialogue with the user by adding interactive features to the ad unit. Interactive features encompass additional ad functionality such as viral mechanisms (send to a friend), data collection, gaming, polling, dynamically generated content and even interactivity within the video itself."[15] According to Erwin Castellanos and Chris Houtzer, online video is an ideal means of capturing data on users: "no other medium provides the in-depth reporting of online. Know how viewers interacted with the video—from play and replay rates, pause, mute, video duration and more."[16]

The extent of online monitoring of user movement is illustrated by the sophisticated techniques employed by a company such as 24/7 Real Media (an interactive marketing and technology firm that "targets and delivers audiences for publishers and marketers").[17] That company's Pixel Tracking technology "determines the precise impetus for a particular user action," while its Page Path Analysis "allows you to find specific path fragments inside your visitor's unique full paths," and its Next Page Flow Reports "analyze how your visitors flow from one page or item to the next."[18] AdPath technology, similarly, developed by the interactive advertising and targeting network

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[14] IGN, "IGN GamerMetrics Overview."

[15] PointRoll, "Lights Camera Video!" http://www.pointroll.com/video/overview.asp (viewed 27 Oct. 2007).

[16] Erwin Castellanos and Chris Houtzer, "Leveraging Integrated Solutions for Interactive Video Online and In Games," PowerPoint presentation, n.d. [Sept. 2006].

[17] 24/7 Real Media, "About Us," http://www.247realmedia.com/about/?navSource=TopNav (viewed 25 Oct. 2006). 24/7's clients include Court TV, Playboy Magazine, Ford, and Verizon. See http://www.247realmedia.com/products/OASdemo.html?544441169 and http://www.247realmedia.com/about/press.html (viewed 25 Oct. 2006).

[18] 24/7 Real Media, "Targeting Capabilities," http://www.247realmedia.com/products/targeting.html; 24/7 Real Media, "Analytics," http://www.247realmedia.com/products/analytics.html (viewed 27 Sept. 2006). 24/7 works with such sites as Neopets, Wedding Channel.com, and Wired News. See

BlueLithium, allows advertisers to "follow prospects across the 1,000+ site BlueLithium network and serve them messages that bring them back, either to complete a transaction or up sell them on a service or additional product."[19]

Nowhere are users warned, however, that their movements are being digitally shadowed in this manner, nor that such information, coupled with behavioral targeting technologies, can be used to lure site visitors into seemingly irresistible commercial transactions. "On-site Behavioral Targeting," notes Touch Clarity, "recognizes all visitors each time they return, remembers everything about their previous visits, and can leverage that previous behavior to deliver even more relevant and targeted content and promotions which increases their likelihood to purchase substantially."[20]

Missing in this new system of scrutiny, then, is the ability simply to browse anonymously, to window-shop, as it were, replicating online the right we've long enjoyed in real-world stores ("Just looking, thanks")—the right to be left alone.

B. Behavioral Targeting

As BlueLithium founder Gurbaksh Chahal declared in reference to the power of Web analysis and personalized advertising, "The more we see you, the more we know about you."[21] And the more they know about us, the more finely targeted are the ads that literally surround us online. Judging from ValueClick Media's website, advertisers already know quite a lot about us, using personal data collection and Web analytics to craft highly personalized marketing campaigns:

> ValueClick Media's behavioral targeting solutions give you the ability to identify and communicate with specific users based exclusively on their past web browsing behavior. With User Re-targeting, ValueClick Media can identify and serve customized messaging to consumers who have demonstrated an active interest in your product or service by having visited your site.

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http://www.247realmedia.com/products/web_alliance/index.htm (viewed 17 Oct. 2006).
[19] BlueLithium, "AdPath: Behavioral Targeting for Advertisers."
[20] Touch Clarity, "The Rise of On-Site Behavioral Targeting."
[21] Quoted in Erick Schonfeld and Jeanette Borzo, "Google Gets a New Ad-versary," *Business 2.0 Magazine*, 20 Sept. 2006, http://money.cnn.com/2006/09/15/technology/disruptors_bluelithium.biz2/index.htm (viewed 27 Sept. 2006).

Additional Targeting Options

By using data provided by comScore Media Metrix, the following key demographics are available for targeting:

- Age
- Gender
- Household income
- Children in household
- Household size
- Education level
- Race

Additional targeting filters include:

- User geography / country, state, DMA, city and zip code
- Daypart / hour of day, day of week
- User bandwidth
- User ISP[22]

Online ad agency Zedo, similarly, offers its clients "… precise targeting and delivery. You can target by attributes including detailed geographic area, content area, time of day and day of week. ZEDO supports surround sessions where users can see just one advertisers' ad for a day. ZEDO also offers state of the art opt-in targeting that increases the value of your inventory."[23] The goal of campaigns such as these is the development of a well-defined, compliant, and hopefully spendthrift audience eager to take advantage of whatever commercial offers come their way, as Future Now's so-called "Persuasion Architecture" suggests:

> Persuasion Architecture provides a detailed process for persuading your visitors to take the actions you want them to take. Nothing is left to chance. You design persuasive paths based on personas to provide visitors with the information they want, when they want it, in language that speaks to their individual needs.

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[22] ValueClick Media, "Targeting," http://www.valueclickmedia.com/adv_da_targeting.shtml (viewed 4 Oct. 2006). According to a company press release, "ValueClick Media advertisers can purchase advertising on these sites individually or as part of a larger media plan, which is typically comprised of a select group of high-profile single site opportunities as well as any of ValueClick Media's 18 content channels. ValueClick Media reaches more than 68 percent of the U.S. Internet audience via over 13,500 Internet sites." ValueClick Media, "Publishers Select ValueClick Media as Ad Network of Choice; Live365, Parade.com and ScienceDaily Sign Representation Agreements," press release, 26 Apr. 2006, http://phx.corporate-ir.net/phoenix.zhtml?c=84375&p=irol-newsArticle&ID=847756 (viewed 27 Oct. 2006).

[23] Zedo,"Third Generation Ad Serving for Publishers," http://www.zedo.com/product/forpublishers.htm (viewed 25 Oct. 2006).

Persuasion Architecture makes it possible for you to:

- Create business-specific personas that reflect the demographic, psychologic and topologic dimensions of your audience
- Develop persuasion scenarios that meet the needs of your audience's buying decision processes and your sales process
- Identify the necessary language that will help you create persuasive copy and rank well in search engine results
- Integrate your multi-channel marketing efforts, based on the personas you have created, through Persuasion Entities (on- or offline).[24]

An example of the range of personalized targeting approaches is offered by ad network Specific Media, which touts itself as "…the only ad network that offers a comprehensive suite of targeting capabilities that enable advertisers to reach specific audiences across a network wholly comprised of name brand sites….

> Behavioral targeting from Specific Media gives advertisers access to users who are not just searching for information about their product, but searching on sites that mean they are looking to perform a transaction. With our Behavioral Targeting Index we score each user as they traverse the web and assign a score as to the likelihood of a purchase in over 3300 categories. Behavioral Targeting from Specific Media turns online behaviors into actionable data for our advertisers…. Specific Media scans every URL that we see our users on and classifies the web page into related categories. Contextual Targeting from Specific Media gives advertisers not just the ability to deliver top level categories (Level 1: Automotive) but getting into more granular sub-categories (Level 2: Trucks, Level 3: Ford).   Specific Media can automatically detect a user's location by their IP address and give advertisers the ability to target all the way down to the zip code.[25]

The Claria Corporation, creator of a "proprietary behavioral marketing platform," offers insight into the kind of invasive practices that permit such fine-grain targeting, boasting of "the ability to ride along with consumers as they surf the Web. That allows us to display targeted ads based on actual behavior and deliver incredible insights.

- Fully understand consumer behavior across millions of Web sites
- Conduct detailed Web analytics and quantitative research across the Web
- Deliver precision targeted ads and information to Claria's tens of millions of consumers.[26]

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[24] Future Now, "Persuasion Architecture: A Strategy to MAP the Selling Process to the Buying Process," 2004.

[25] Specific Media, "Targeting Technology," http://www.specificmedia.com/targeting-technology.php (viewed 25 Oct. 2006).

[26] http://www.claria.com/advertise/qtr/page_2.html?pub=clickz_gen1_360 (viewed 4 Oct. 2006). iMedia

Web analytics are the power behind behavioral targeting, and they are the main reason for the prevalence of this rapidly evolving approach to online advertising, especially in the field of search engine marketing (SEM). "The big thing about search is the ability to target consistently, and second is the ability to track them," observes Tim Cadogan, VP of search at Yahoo Search Marketing. "There's a lot of potential in harnessing consumer intent."[27]

If search engines provide a form of "instant gratification" for marketers seeking qualified leads, data-rich sites like MySpace promise even greater rewards. Thus Susquehanna Financial Group analyst Marianne Wolk refers to "...the recent Google deal with MySpace and other transaction that are occurring for sites that have a lot of personal information.... I think initially you will see more partnerships among the major sites with high quality data and the ad networks that want to do the targeting," Wolk explains. "So you have seen eBay sign deals with Google and Yahoo. You've seen Google sign a deal with MySpace. I wouldn't be surprised to see other major Internet sites like classmates and Amazon think about how best to use their data, and do more than they are already doing."[28] As Stefanie Olsen reported on CNET News. com,

New technologies are on the horizon now to help social networks appeal

Connection describes behavioral ad network as follows: "In contrast to traditional advertising selectivity, normally focused on demographics, geography and/or context, Behavioral Networks use online technology to analyze the actions and choices made by individuals—searching, clicking, pausing on specific pages and so forth—across a relatively wide range of websites. Complex algorithms then seek to infer from these behaviors the current interests of the individual working the keyboard, and to serve ads that conform to those interests. Given the gigabytes of available data on specific consumer behaviors, the real value here is the ability to understand what each consumer is trying to accomplish and conceive a strategy to get advertisers favorably involved. Meaningful responses to issues of brand awareness and loyalty, purchase cycles and other behavioral angles can yield significant lifts over 'run-of-site' advertising." Robert Moskowitz, "What Kind of Ad Network is Right for You?" iMedia Connection, 18 Oct. 2006, http://www.imediaconnection.com/content/11777.asp (viewed 25 Oct. 2006). Clearly, the FTC should be focusing on the role of digital ad networks in undermining the privacy of Americans. A "crib sheet" is available to help the commission become more familiar with this interactive data collection and targeting infrastructure. See Jim Meskauskas, "Ad Networks Crib Sheet," iMedia Connection, 23 Jan. 2006, http://www.imediaconnection.com/content/7911.asp (viewed 26 Oct. 2006).
[27] Quoted in "SES Panel: SEMs, as 'Metrics Marketers,' Have the Advantage," MarketingVOX, 2 Mar. 2006, http://www.marketingvox.com/archives/2006/03/02/ses_panel_sems_as_metrics_marketers_have_the_advantage/index.php (viewed 4 Oct. 2006).
[28] Quoted in Steve Smith, "Following the Money Into BT," Media Post's Behavioral Insider, 29 Sept. 2006, http://mediapst.adbureau.net/adclick/acc_random=092929968/SITE=EMAIL/AREA=BEHAVIORALINSIDER/AAMSZ=TOWER/GUID=092929968 (viewed 4 Oct. 2006).

to...discerning advertisers. RelevanceNow, for example, is an Australian start-up with a technology it calls "social intelligence," an analytics tool that can size up members of a community via their so-called psychographics, which classify people's attitudes and values, likes and dislikes. With the technology, a social network could segment groups of people based on details they've divulged in member profiles or blogs. The network then could target an advertisement appropriate for a specific group. The technology also could help identify people in the network with certain needs--vulnerable teenagers, for example--and then be used to invite those teens to a group on building confidence.[29]

This kind of "social intelligence," added RelevanceNow CEO John Zakos, "understands users' interests even if they don't explicitly say (what they are)."[30] Portals such as Yahoo and MSN, concluded Olsen, "appear to be best positioned to sell targeted advertising in their social networks with technology that helps them analyze hundreds of millions of users based on demographics, psychographics and even time of day. What's more, they have the advantage of being able to analyze the habits of people across Yahoo and MSN's multiple properties, such as those devoted to finance and to sports, to garner more ad-targeting data."[31]

Offering a glimpse under the hood of behavioral targeting, Touch Clarity reveals the complex, real-time analysis that drives the new movement:

> On-site Behavioral Targeting leverages highly automated technology that takes advantage of the same web analytics data you are most likely already collecting, such as referring site, referring search engine and keyword phrase, time and day of visit, machine properties such as IP address and browser settings, along with complete individual visitor click-stream data. The system efficiently organizes the anonymous data to build individual visitor profiles containing the hundreds of data variables that occur during a visitor's visit to a web site, each with some small amount of predictive value. Highly sophisticated mathematical models then interpret these variables in real-time and assemble together their collective predictive value to determine exactly which piece of content or promotion is most likely to engage each visitor, and then serves that content while the visitor is still on the site, keeping track of the entire context of each piece of served content. The On-site Behavioral Targeting system then measures if the visitor responded to the served content in the manner predicted. By efficiently learning in real time from any differences between the predicted response behavior and actual response

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[29] Stefanie Olsen, "Turning Social Network Traffic into Dollars," CNET News.com, 18 Oct. 2006, http://news.com.com/Turning+social+network+traffic+into+dollars/2100-1024_3-6127268.html (viewed 25 Oct. 2006).
[30] Quoted in Olsen, "Turning Social Network Traffic into Dollars."
[31] Olsen, "Turning Social Network Traffic into Dollars."

behavior, the system continuously makes itself smarter for the next decision. The best On-site Behavioral Targeting systems are fully accountable, and directly report back their decision effectiveness in real-time, as a measured lift delivered versus a control group.[32]

The most recent incarnation of behavioral targeting involves re-targeting, zeroing in, that is, on previous visitors to a website who left without completing a transaction. DoubleClick's Boomerang, for example, "… allows you to re-target to the most desirable audience of all: browsers who have already shown an interest in your product or service. With Boomerang, you can now engage that audience in a dialogue, providing timely and relevant messages triggered by their online actions. Boomerang delivers true behavior-driven advertising, so you can reach pre-qualified prospects and customers quickly and easily."[33]

"Retargeting works by anonymously observing consumers' behaviors while they are visiting your website," notes Advertising.com's Nada Stirratt. "Targeted messages are delivered to those consumers after they leave—based on whether or not they completed a desired action. While behavioral marketing in general uses online actions to identify, reach and convert good prospects, retargeting focuses on consumers who have actually been to your site.… Ad networks make retargeting especially potent, because they enable you to retarget your site visitors as they visit hundreds of sites, whether they are simply surfing or actively researching before making a purchase. By reaching them with a custom message based on specific site interaction—such as cart abandonment—you can convince that consumer to come back and complete your desired action."[34] As BlueLithium explains to its clients, "you can target your streaming ads to people who've already visited your website as they visit other sites across the BlueLithium network. AdRoll is the first and only streaming video network that allows you to do behavioral retargeting, which has been shown to improve click through and conversion rates by

[32] Touch Clarity, "The Rise of On-Site Behavioral Targeting."
[33] DoubleClick, "Boomerang for Advertisers and Agencies," 2004, http://www.doubleclick.com/us/knowledge_central/documents/misc/overview_boomerang_dfa_0405.pdf?c=0406_smr&id_lead=newsletter&id_source=newsletter_0406 (viewed 25 Oct. 2006).
[34] Nada Stirratt, "Retargeting Saves Money," iMedia Connection, 3 May 2006, http://www.imediaconnection.com/content/9434.asp (viewed 4 Oct. 2006).

>300%."[35] BlueLithium's AdPath Remarketing, similarly, "targets visitors to an advertiser's site when they are seen on the BlueLithium network and drives them back to the advertiser's site for immediate up-sell and cross-sell opportunities, or to complete an unfinished purchase. Additionally, only AdPath Remarketing offers: multi-dimensional targeting by combining remarketing with other forms of targeting including geographical and contextual; multiple conditioning, which allows an advertiser to segment their visitors for targeting purposes; and Insight Reports, which provide a unique analysis of the composition of the visitors to an advertiser's site."[36]

These behavioral re-targeting techniques extend, moreover, to e-mail campaigns and even to location-based mobile advertising. "Imagine," suggests Coremetrics, "possessing the capability to know exactly what your customers are interested in, and reaching them with an offer, creative, and message that is designed specifically to capitalize on those intentions and initiate transactions on your web site. Coremetrics delivers this capability through LIVEmail, a closed loop email marketing system that seamlessly links online profiles of visitor and customer activity with your email vendor, giving you the direct marketing tools necessary to capitalize on customer behavioral trends and product affinities."[37]

And once those trends and affinities are determined, a company like Google will know just where and when to reach prospective customers. In September 2004, Google applied for a patent for "a method by which an end user accessing the Internet via a wireless access point (WAP) would be served advertisements based on factors such as the geographic location of the WAP, a behavioral profile of users of the WAP, the vertical market served by the WAP's owner, or other predetermined criteria."[38] More recently, according to Digital Micro-Markets' Donna Bogatin, Google CEO Eric Schmidt has

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[35] BlueLithium, "Advertisers and Agencies, Branding Solutions," http://bluelithium.com/branding-solutions.html (viewed 4 Oct. 2006).

[36] BlueLithium, "BlueLithium Introduces the Industry's First Behavioral Targeting Suite for Interactive Advertisers, Agencies and Publishers," 26 Apr. 2006, http://www.bluelithium.com/press/2006042601.html (viewed 4 Oct. 2006).

[37] http://www.coremetrics.com/solutions/behavioral_email_marketing.html (viewed 4 Oct. 2006).

[38] Kevin Newcomb, "Google Seeks Patent for Targeting Ads on Wi-Fi Hotspots," ClickZ Network, 24 Mar. 2006, http://www.clickz.com/showPage.html?page=3593971 (viewed 4 Oct. 2006).

shared his vision for a system of "GPS location-based delivery of highly targeted and personalized advertising via in-car radios," yet another way in which the company will track and target its users.[39] In the future, we can expect such invasive technologies to find their way into our living rooms as well, as Google rolls out interactive television (ITV) applications. A recent Google research paper, for example, describes "Social and Interactive Television Applications Based on Real-Time Ambient Audio Identification," which is

> focused on using broadcast viewing to automatically present relevant information on a web browser… [and on] how to sample the ambient sound emitted from a TV and automatically determine what is being watched from a small signature of the sound…. The system could keep up with users while they channel surf, presenting them with a real-time forum about a live political debate one minute and an ad-hoc chat room for a sporting event in the next. And, all of this would be done without users ever having to type or to even know the name of the program or channel being viewed.[40]

The next generation of sophisticated set-top boxes will also prove to be prime targets for personalized advertising. While "the internet reigns as the hypertargeting leader since site registration data, behavioral targeting and database matching are available across a critical population mass," explains MEC Interaction's July 2006 Hypertargeting newsletter, "… the medium's true hypertargeting potential will be realized when different messages can be routed to individually addressable cable set top boxes, estimated to be between three and five million homes by 2008."[41] "We are now at an inflexion point in TV targeting," concludes MEC Interaction, "driven by the rapidly-growing home base of digital set top boxes and the emergence of software to handle complex instructions for serving up the right commercials to the right people. Looking beyond TV, other digital channels like mobile phones and satellite radio show promise for location-based and content-driven targeting."[42]

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[39] Donna Bogatin, "Google Targets GPS-based In-car Personalized Advertising," Digital Micro-Markets, 16 June 2006, http://blogs.zdnet.com/micro-markets/?p=131 (viewed 19 Oct. 2006).
[40] Donna Bogatin, "Google Developing Social and Interactive Television Applications for 'Mass Personalization,'" Digital Micro-Markets, 8 June 2006, http://blogs.zdnet.com/micro-markets/?p=97 (viewed 19 Oct. 2006).
[41] MEC Interaction, "Targeting TV Audiences with Emerging Digital Platforms," Digital Media and the Emergence of Hypertargeting, Jul. 2006,
http://www.mecinteraction.com/files/pdf/Hypertargeting_newsletter_July06.pdf (viewed 24 Oct. 2006).
[42] MEC Interaction, "Targeting TV Audiences with Emerging Digital Platforms." According to MEC

The reigning myth surrounding behavioral targeting, of course, is that it's all done anonymously. No one really knows who you are, or so the argument runs, as your online travels are tracked, as profiles of your tastes and preferences are compiled, and as content designed to meet those predilections is delivered. But common practice in the online marketplace suggests otherwise. "Behavioral targeting uses cookies to anonymously monitor and track users as they surf online," explains an overview of the field by Media Contacts, an interactive media ad division of Havas.[43] "This information is then fused with publisher registration or survey data such as age/gender or zip/postcode. Users are then grouped or classified by content viewed, sites visited, search subjects, as well as the time, length and frequency of visits."[44] According to MEC Interactive, "The web currently provides more critical opportunity for hypertargeting than any other medium. Focusing on the major portals, well over 100 million people visiting Yahoo!, AOL and MSN have registered on those sites and provided some kind of information about themselves that can be selectively used for targeting purposes. By far, this is the highest critical mass within the realm of precision targeting."[45] Thus while there might not be a name or physical address attached to the extensive online dossiers on individual users that marketers are actively compiling and analyzing, unique identification numbers *are* assigned to each visitor, which serve the same purpose: marketers know who you are, where you've gone, and what you've done online. And, increasingly, by segmenting visitors into targeted groups, they're also determining where you're headed online.

C. Audience Segmentation

The media in general, and online media in particular, have long been defined as open

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Interaction, whose clients include Campbells, Canon, and Lincoln Mercury, "We are a full service digital and direct services company offering strategy consulting, planning and implementation, advanced analytics and creative production.... Driving productivity in communications through engagement, response and measurement, we get consumers actively engaged with our clients' brands, leading to relevant awareness, deeper relationships and stronger sales." MEC Interaction, "Who We Are," http://www.mecinteraction.com/output/Page12.asp (viewed 29 Oct. 2006).

[43] Media Contacts' clients include Air France, Expedia, Nike, ING Direct, and VW. See http://www.mediacontacts.com/en/our-company/(viewed 26 Oct. 2006).

[44] Media Contacts, "Behavioral Targeting," Dec. 2004, www.mediacontacts.com.br/mcinsight/behavioral.pdf (viewed 4 Oct. 2006).

[45] MEC Interaction, "Targeting TV Audiences with Emerging Digital Platforms."

systems, in which users are free to select from a vast array of content choices. Within any given medium choice might be constrained (by the finite number of pages in a magazine or the channels in a cable system, for example), but there are always other sources from which to choose (such as a different magazine or a rental DVD). Nowhere is this freedom of choice more evident than on the Internet, whose clickable, hyperlinked structure invites exploration.

Today's online marketers, however, have a different vision in mind for the World Wide Web, one that may give us the *illusion* of free choice, but whose options are actually pre-configured according to segmented demographic profiles. Tacoda Systems, for example, divides its online targets into 31 "behavioral segments," including such categories as Family Planners ("Newly engaged couples research and plan weddings; expecting parent explore information about pregnancy; and parent's [sic] investigate preschools, parenting techniques and childcare"); Family MDs ("People who are concerned about family health well-being and research medicines; plan fitness programs and search for information about specific health conditions"); and Shopaholics ("Obsessive shoppers who indulge in reading shopping reviews, consult price comparison Web sites, monitor auctions and online classifieds Web site keeping an eye out for that 'must have' item").[46] 24/7 Real Media has its own version of such marketing niches (including Money Makers, Big Spenders, African American, Globetrotters, and Health Specific), offering as well the promise that "our specialists will also develop custom behavioral targeting segments based on your specific objectives."[47]

Omniture, similarly, offers its clients Advanced Segment Insight, "a technology that allows our customers to visually construct segments using behavior-based and

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[46] Tacoda Systems, http://www.tacoda.com/ (viewed 21 Sept. 2006). Tacoda, whose clients include the Associated Press, Chicago Tribune and NBC, describes the operation of its networks as follows: "TACODA leverages its proprietary, behavioral targeting technology on participating partner Web sites to collect anonymous, non-identifying information and group visitors into valuable behavioral segments. These visitors then receive advertising most relevant to their interests whenever they visit a participating inventory Web site on TACODA Audience Networks. For example, if a consumer visits a participating TACODA Web site and viewed golf-related content, the next time they access a partner Web site, they might be shown advertisements from a golf equipment company or golf resort, rather than simply a generic ad that is not relevant to them." Tacoda, "FAQ," http://www.tacoda.com/ (viewed 27 Oct. 2006).
[47] 24/7 OnTarget, http://www.247realmedia.com/products/on_target/page0001.htm (viewed 28 Sept. 2006).

demographic segment criteria and then build out reports reflecting just the activity of users meeting all the segment criteria. Using this technology, our customers can identify where their most valuable website visitors originate, enabling them to allocate more advertising dollars to that source. Our customers are also able to identify visitors who abandon the conversion process and to launch remarketing efforts to bring them back to the website."[48] The goal, according to Omniture, is a simple one: "Understand exactly how different types of visitors behave on a site. Leverage every click and event to create visitor segments based on any criteria."[49]

The key to such tracking and targeting, analysis and segmentation, is digital surveillance, as marketers peer over our shoulders while we surf the Web. Thus for ClickTracks, Visitor Segmentation allows marketers to "[g]roup visitors who share certain criteria, then see how they behave similarly (and differently) from other visitors. From campaign to clickthrough to checkout, you'll see what they're up to."[50]

Nowhere are users informed of this unprecedented level of scrutiny—not even a boilerplate warning akin to the alert that tele-marketers are obliged to provide ("This call may be recorded for the purposes of quality control"). Nor, unfortunately, are there any policies limiting the ability of online marketers to see, from campaign to click-through to checkout, "what we're up to," even with those products and services, such as health care and personal finance, that raise very serious privacy concerns. As the boundaries between advertising and editorial content online continue to blur, and especially as news and civic information are delivered in a commercial context, we must be concerned by the specter of a segmented civil society, one whose news and information are tailored not to the needs of our democracy, but rather to the presumed tastes of some mega-marketer's notion of behavioral segments.

D. Data Gathering/Mining

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[48] Omniture, Inc., S-1/A filing, Securities and Exchange Commission, 23 May 2006, http://www.secinfo.com/dr643.v4b.htm (viewed 4 Oct. 2006).
[49] Omniture, "SiteCatalyst 13: Real-Time, High-Performance Analytics & Reporting," Sept. 2006.
[50] "ClickTracks Web Analytics Features and Benefits," http://www.clicktracks.com/features.php (viewed 4

As a revealing article from Touch Clarity explains, "The way Internet technology works inherently means that every interaction is now part of a recordable conversation."[51] Such "conversations" are not simply being recorded, moreover. They are also being compiled, analyzed, and combined with other data, online and off. Few online travelers realize that their communications are now routinely monitored and analyzed for marketing purposes, however, including covert efforts to determine the "buzz" about products. As the president of Nielsen BuzzMetrics wrote last year, "the study of online consumer buzz already has proved itself a killer application. It all starts by employing sophisticated search software and linguistic algorithms to passively monitor the billions of naturally occurring conversations that occur in blogs, online message boards, public email groups and consumer-ratings Web sites.... There are three aspects that make this research so powerful and like no other. First, it is completely unaided and therefore devoid of many traditional research biases; people are talking precisely because they're engaged! Second, the methodology has an uncanny ability to zero in on groups of affinity, and pinpoint audiences by lifestage and psychographics. Finally, this research opens a clear window into the minds of early adopters and trendsetters, thereby providing amazing predictive power."[52]

In the words of Coremetrics, a provider of on-demand Web analytics and precision marketing services, "The web today represents the single richest source of customer behavior data for multichannel marketers.…"[53] As a means of capturing, analyzing, and organizing this new repository of personal data, Coremetrics developed a product known as "Lifetime Individual Visitor Experience Profiles, or LIVE Profiles.

> Coremetrics LIVE Profiles are the single most accurate and comprehensive source
> of online data available today, representing a complete record of all individual
> visitor interactions with client web sites. With LIVE Profiles, organizations can

Oct. 2006).
[51] Touch Clarity, "The Rise of On-Site Behavioral Targeting." Touch Clarity's partners include Omniture, WebSideStory, WebTrends, and Fair Isaac. See http://www.touchclarity.com/partners/ (viewed 23 Oct. 2006).
[52] Jonathan Carson, "Consumer Buzz: The Ultimate Metric of Engagement," BuzzMetrics MouthPiece, Dec. 2005, http://www.nielsenbuzzmetrics.com/nwslttr_mouthpiece200512.asp (viewed 27 Oct. 2006).
[53] Coremetrics, "LIVE Profiles Overview," http://www.coremetrics.com/technology/index.html (viewed 4 Oct. 2006). Coremetrics' clients include Bank of America, Coca Cola, and Staples. See http://www.coremetrics.com/clients/index.html (viewed 17 Oct. 2006).

find the data they require to meet their most complex analytical needs while also building a valuable customer data asset. Marketers can also extend their analysis beyond the web, augmenting LIVE Profiles to understand the behaviors of cross-channel visitors as they traverse the web, call center, and the offline channels. Finally, LIVE Profiles provide a critical foundation for one-to-one marketing, enabling online brands to manage intelligent interactions with visitors via email, paid search, and online promotions and recommendations, driving increased customer satisfaction, retention, and lifetime value.[54]

The data collection infrastructure effectively automates the process by which we are tracked and profiled—our behaviors digitally "x-rayed" by sophisticated mathematical algorithms fueled by artificial intelligence technologies. Touch Clarity's TCT visitor profiles, for example, "typically contain over 100 variables about each individual…. Even on the first visit, we learn the time of day, day of week, which referring site the visitor came from, which creative they clicked on, or the search term they entered, their IP address and corresponding company information. Technographic factors such as the browser type, operating system and screen size are also observed. When the customer returns, we add to the profile data on which parts of the website they have viewed in the past, what they are looking at now, which tools they have used, Zip or postal code where available…."[55]

What makes these profiles so useful to marketers, and so invasive of consumer privacy, are the connections that are made between online and offline data. As Web analytics provider Unica tells its clients, "… you will want to learn as much as possible about individual visitors, including their names, companies, email addresses, telephone

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[54] Coremetrics, "LIVE Profiles Overview." Coremetrics data collection technology, which has captured 6.4 *billion* LIVE Profiles, is based on JavaScript page tags. Called SmartTags by Coremetrics, these tags "dynamically respond to online visitor activity by collecting the complete and accurate information required to build LIVE Profiles." Coremetrics, "LIVE Profiles Overview."

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

numbers, and geographic location so you can leverage this information for targeted content and marketing activities. You will also want to see what each of these individuals did on your web site, such as whether they filled out online forms, made purchases, or if they fall into any other visitor behavior segments that have been defined for your web site."[56]

"…Since more and more customer interactions are happening online, with every click delivering valuable insight," notes Touch Clarity, "it is essential that businesses start to harness this insight and use it as a bridge between the on-site experience and other customer channels. By passing compact web site visitor behavioral profiles back to CRM [customer relationship management] systems that track other channels, and passing CRM data from other channels to the On-site Behavioral Targeting system, truly consistent multi-channel customer views become practical and possible."[57] Or, as Jerry Moyer, manager of analytics at interactive marketer Refinery, more bluntly puts it, "you can glean information about your visitor's state of mind."[58]

Our online travels are increasingly becoming part of vast databases that comprise the source material for sophisticated analytical engines designed solely to make us more susceptible to online marketing. Omniture's SiteCatalyst 13 Visitor Interaction Profiling, for example, compiles a broad range of data, over time ("Lifetime Visitor Profiling") and across distances ("Nomadic Profiling"), as extensive databases of millions of users online are monitored and analyzed.[59] According to Omniture, a provider of online business optimization software, the following data types are collected:
- Atomic level data. Provides complete and accurate data at the granular level

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[56] Unica, "Web Analytics," 2006. Unica, whose clients include Best Buy, Honda, Goldman Sachs, Turner Broadcasting, and Tribune, describes itself as "a leading global provider of Enterprise Marketing Management (EMM) software. We focus exclusively on the needs of marketing organizations. Our Affinium software addresses the principal functions of EMM including marketing and customer analytics, demand generation, and marketing resource management." Unica Corporation, "About Unica," http://www.unica.com/about/about.cfm (viewed 29 Oct. 2006).
[57] Touch Clarity, "The Rise of On-Site Behavioral Targeting."
[58] Jerry Moyer, "The When and How of Targeting," iMedia Connection, 14 Sept. 2006, http://www.imediaconnection.com/content/11210.asp (viewed 27 Sept. 2006). Refinery's clients include Campbells, Sony Pictures, and Suburu. See http://www.refinery.com/work.aspx (viewed 17 Oct. 2006).
[59] Omniture's partners include Doubleclick, Google, Yahoo! and Ask.com. See http://www.omniture.com/partners/showcase (viewed 17 Oct. 2006).

that has eluded marketers relying on older macro profiling tools.

- Lifetime Visitor Profiling. Since behaviors can change from visit to visit, the ability to capture, organize and classify behaviors and patterns over the lifetime of an interaction versus a single visit snapshot provides a truer picture of the motivations, attitudes, and potential value of each visitor.
- Xographic Profiling. Most profiles rely on a limited number of data sets. However, with Xographic Profiling, any combination of available data types can be used to pinpoint specific profiles and actions. Use behavioral, attitudinal, sociographic, demographic, technographic, and psychographic attributes.
- Historical Profiling. Examine the multi-session behavior of visitors, including all activity prior to the visitor being known, to yield profile patterns and trends.
- Corporate Profiling. Associate a visitor with a company to gain a more macro understanding of their business motivations.
- Nomadic Profiling. In today's world, visitors utilize a variety of devices, locations, and sessions to access information. VIP allows you to pool behaviors from all of those sessions to create one overall profile.
- Behavioral Targeting Integration. Profiles can be automatically published to behavioral targeting technologies for remarketing efforts or enhanced in-session interaction."[60]

The key to Omniture's data mining lies in its collection of so-called "xographic" data, a scientific-sounding neologism that masks the serious breach of privacy that results when online and offline data are combined. The Omniture blog provides ample evidence of such practices, as the following two entries suggest:

Where to find xographic customer profile information?
Typically the best place to locate customer profile information is your own internal data warehouse. This information is often captured at the unique customer level, and can source from any number of channels. For example, a member registration process, a call center, in-store sales, conference attendances, newsletter subscriptions, etc—these are all good sources of customer profile information.

Enhancing web analytics with xographic customer profile data
To begin with, ensure you are measuring unique people and capturing a customer IDwith your web analytics platform. Once you have your customer ID, there are actually several ways to build a richer profile with Omniture SiteCatalyst. I won't

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[60] Omniture, "SiteCatalyst 13: Visitor Interaction Profiling." Omniture's data collection is based on "over fifty different cookie types or variables. As a marketer, you can specify when each of these variables should expire.… [T]hey can expire in the same session, only after purchase, after a period of time (like 7 or 30 days), or after a user sees a specific page. You have a great deal of flexibility, and this is critical because consumer behavior can differ dramatically from campaign to campaign." Omniture, "Search Engine Marketing: Maximizing Profit with Web Analytics," 2005.

go into all the methods here, but one of the easiest methods is to use Omniture's SAINT import tool. SAINT is incredibly flexible and you can use it to add attributes to almost any record in SiteCatalyst.[61]

So let's consider this for a moment. This simple checkout process has just yielded an individual ID that in most circumstances, can be used to identify a unique customer. And importantly it does not suffer from the same inaccuracies of Unique Visitors. In most cases, the ID will not change if visitors delete cookies; it will not change if multiple visitors use the same computer; it will not change if one visitor uses multiple computers; it will not change if visitors reject cookies; it will not be impacted by IP pooling nor will it be impacted by dedicated corporate IP addresses.

This individual ID also does not suffer from the same limitations of Visits; namely, the lack of uniqueness. Rather, each Unique Customer is truly unique— connected to one person, irrespective of time, place, or technology.

In short, this approach is among the best you'll find for identifying truly unique people and prospects that visit your website. Furthermore, this methodology lends itself to much more robust marketing analysis, customer segmentation, and lifetime value analysis because it is connected to an individual. And perhaps most importantly, since remarketing to individuals is a primary strategy after you've completed marketing analysis or customer segmentation, this unique identifier is critical to executing those campaigns.[62]

While Omniture takes a typically hands-off view of the privacy implications of its products—"It is very important that you review the respective privacy policy of each website that you visit, because such privacy policies govern the use of information on those websites, including our customer's use of Omniture products and services where applicable"—it was at least more forthright in its recent SEC filings.[63] "On behalf of our customers," Omniture admits, "we collect and use anonymous and personal information and information derived from the activities of website visitors. This enables us to provide our customers with anonymous or personally identifiable information from and about the users of their websites."[64]

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[61] Omniture, "Xographic Customer Profiles: the Easy Way!" 29 June 2006, http://www.omniture.com/blog/node/21 (viewed 4 Oct. 2006).
[62] Omniture, "Measuring Unique People with Web Analytics...," 11 May 2006, http://www.omniture.com/blog/node/18 (viewed 4 Oct. 2006).
[63] Omniture, "Omniture Product Privacy Policy,"http://www.omniture.com/privacy/product (viewed 4 Oct. 2006).
[64] Omniture, 10-Q filing, Securities and Exchange Commission, 30 June 2006, http://www.secinfo.com/dsvR3.v4B1.htm (viewed 4 Oct. 2006).

In that same 10-Q filing, Omniture also acknowledged the possibility of new government privacy policies that would sharply reduce the efficacy of the company's surveillance and analytical products, with a corresponding impact on Omniture's bottom line:

> Domestic and foreign governments are also considering restricting the collection and use of Internet usage data generally. Some privacy advocates argue that even anonymous data, individually or when aggregated, may reveal too much information about website visitors. If governmental authorities were to follow privacy advocates' recommendations and enact laws that limit data collection practices, our customers would likely have to obtain the express consent of a user of our customers' websites before we could collect, share or use any of that user's information regardless of whether the collection is done on behalf of our customers. Any requirement that we obtain consent from the users of our customers' websites would reduce the amount and value of the information that we provide to customers, which might cause some existing customers to discontinue using our services. We would also need to expend considerable effort and resources to develop new information collection procedures to comply with an express consent requirement. Even if our customers succeeded in developing new procedures, they might be unable to convince Internet users to agree to the collection and use of the users' information. This would negatively impact our revenues, growth and potential for expanding our business and could cause our stock price to decline.[65]

Omniture's corporate self-interest notwithstanding, the kind of privacy environment it fears—one in which consumers must give their permission before surrendering personal data online—is one that FTC policy should mandate. For as Revenue Science (the self-proclaimed "world leader in behavioral targeting for brand and search advertisers") makes clear in its privacy policy, and despite claims for the anonymity of their sources, online marketers routinely commingle and correlate personal and non-personal data in an effort to zero in on the most likely targets for a particular message:[66] "Our Clients," explains the Revenue Science privacy statement, "collect information about their customer interactions using cookies, action tags, and other methods."[67] "...A Client may

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[65] Omniture, 10-Q filing.

[66] Revenue Science, "About Us," http://www.revenuescience.com/site/about.asp (viewed 17 Oct. 2006). Revenue Science's clients include ABC News, Dow Jones, and USA Today. See http://www.revenuescience.com/site/partners/clients.asp (viewed 17 Oct. 2006).

[67] Revenue Science Privacy Policy, http://www.revenuescience.com/site/privacy.asp (viewed 27 Sept. 2006). According to Revenue Science's privacy statement, "Cookies are small text files that identify your computer. Web site owners use cookies to, among other things, monitor site usage, customize site features, identify a user's computer operating system and browser, and complete transactions. An action tag (also known as a "clear gif" or "Web beacon") is a small, graphic image on a Web page that is designed to allow

provide information that it collects," the statement continues, "*including personally identifiable information*, to Revenue Science. We also may collect data on behalf of a Client using tags. Information that we collect and compile directly from users includes 'clickstream' data such as behavioral data, IP addresses, log files, and other traffic data.... *A Client may correlate or merge information that we report to it with personal information* already collected or accessible by that Client. On behalf of a Client, *we may correlate or merge personal information provided by the Client with non-personal information* that we collect for that Client."[68]

Increasingly, moreover, personal data are woven into the very fabric of the Web, in the form of social networks that serve as vast repositories of user-created content. The ability to capture data about millions of users for marketing purposes is a key reason why major media companies are paying significant sums of money to acquire online properties. Rupert Murdoch's News Corp. (Fox TV) outbid Viacom's MTV and others to acquire MySpace last year for nearly $600 million. The popular social networking site boasted 100 million registered users as of August 2006. As Shankar Gupta reported in the *Online Media Daily*, "Although MySpace has brought significant traffic to the Fox Interactive family of sites, the biggest asset the network has received from the $580-million-dollar purchase is the information that the sites' millions upon millions of users provide, said Ross Levinsohn, President of Fox Interactive, at a conference in New York City Thursday. 'The digital gold inside of MySpace wasn't the number of users, but the information they're providing, structured and unstructured data,' Levinsohn said—both demographic and psychographic data that Fox Interactive can use to suss out the brand preferences of young people on the Web."[69]

But whether personal data is willingly—or unwittingly—served up by users of social

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the site owner or a third party to monitor who is visiting a site by collecting the IP address of the computer that the tag is sent to, the URL of the page the tag comes from, and the time it was viewed. Tags also may be associated with cookie information."

[68] Revenue Science Privacy Policy, http://www.revenuescience.com/site/privacy.asp (viewed 27 Sept. 2006), emphasis added.

[69] Shankar Gupta, "Fox Exec: User Info Most Valuable MySpace Asset," *Online Media Daily*, 9 June 2006, http://publications.mediapost.com/index.cfm?fuseaction=Articles.san&s=44303&Nid=20848&p=198625 (viewed 4 Oct. 2006).

networks, or surreptitiously gathered by enterprising marketers, one fact is clear: When it comes to collecting data, compiling profiles, and analyzing that information for marketing purposes, today's online environment is unrivaled. "As a marketing vehicle," notes Bryan Eisenberg, chairman of the Web Analytics Association, "the Internet is multitalented. A strong suit is collecting and comparing considerable amounts of visitor data. Compared to other ad media, the Internet delivers more data about who our customers are and what they actually do, and does so more specifically and quickly than we ever dreamed possible. Combine such data with the context of site content or a specific ad campaign, and you see accurate snapshots of customer behavior patterns that can be observed, tracked, and measured."[70] Among the data collected and analyzed, adds Eisenberg, are the following:

- Demographics. These are customer attributes, such as age, gender, income, and buying cycle.
- Pyschographics. What does the customer psychologically do in the buying process? Some data are determined by Web analytics, others information is extrapolated through customer interviews and product/service analysis.
- Topographics. Topographic information (the situation, the marketplace, and the market position) is a combination of demographics and pyschographics. It shows the relationship between them, and how they affect the buying process. It's a window into customers' divergent needs and motivations.[71]

"The end result," claims Eisenberg, "is a set of personas and persona groups that embody the entirety of the customer base."[72] Unfortunately, the end result is also an online environment that poses grave risks to consumers, who are simply unaware that their every move online is being monitored and assessed.

E. Industry Consolidation

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

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[70] Bryan Eisenberg, "Personalization and Behavioral Marketing," ClickZ Network, 5 Nov. 2004, http://www.clickz.com/showPage.html?page=3430871 (viewed 4 Oct. 2006).
[71] Eisenberg, "Personalization and Behavioral Marketing."

within the core of the online marketing infrastructure also requires the FTC to conduct an anti-trust analysis to determine whether there is undue market power in this sector. We believe that such consolidation is fueling new and expanded risks to consumer privacy, across all platforms—personal computer/broadband, interactive television, and cell/mobile communications. The commission must include in its analysis the impact of both the elimination of network neutrality and increased consolidation within the digital content marketplace (e.g., Microsoft/Massive, News Corp [Fox Digital]/MySpace, Google/YouTube, and Google's August 2006 ad sales service contract with Fox Digital) on privacy, advertising competition, and broadband content distribution.

Listed below are a number of such emblematic acquisitions, which illustrate the consolidation within these inter-related and inter-connected digital commerce markets:

Google acquisitions:

> YouTube, Inc., video-sharing website (10/2006)
> Transformic, Inc., a search engine company (9/2006)
> Neven Vision, a facial and object-recognition company (8/2006)
> Measuremap, statistics/analytics software developer (3/2006)
> dMarc Broadcasting, a radio advertising firm (3/2006)
> Android, a maker of software for mobile telephones (8/2005)
> Dodgeball, a developer of social-networking software for mobile devices (5/2005)
> Urchin Software, a developer of Web analytics applications (3/2005)
> Sprinks, an online advertising firm (10/2003)
> Kaltix, a personalized search firm (9/2003)
> Applied Semantics, a contextual advertising firm (4/2003)
> Outride, a data-mining and semantic analysis company (9/2001)

Yahoo acquisitions:

> AdInterax, a rich-media online advertising company (10/2006)
> Del.icio.us, a developer of Web 2.0 tagging software and services (12/2005)
> WhereOnEarth Unlimited, a UK-based developer of location-based advertising software (10/2005)
> Ludicorp Research & Development Ltd., the maker of the Flickr online photo storage and display system (3/2005)
> WUF Networks, a developer of software for the transfer of multi-media data onto mobile devices (11/2004)
> Stata Labs, an e-mail and e-mail search company (10/2004)
> Overture, a provider of commercial search services (7/2003)

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[72] Eisenberg, "Personalization and Behavioral Marketing."

Inktomi, a Web search provider (3/2003)

Microsoft acquisitions:

DeepMetrix, a Web analytics company (5/2006)

Time Warner/AOL acquisitions:

America Online acquired interactive marketing services firm Advertising.com, the largest third-party advertising network (6/2004).
AOL acquired broadband ad company Lightningcast (5/2006).

Other key acquisitions:

VeriSign, Inc., a provider of intelligent infrastructure services for Internet and telecommunications networks, acquired GeoTrust, a provider of identity verification and network security services (9/2006).

Fox/News Corp. partnered with Versign to obtain controlling interest in Jamba, a provider of wireless content (9/2006).

Accipiter Solutions, an ad-serving technology firm, acquired BidClix, which provides a self-service, bid-for-placement marketplace of text ads (9/2006).

DoubleClick Inc., an online advertising technology services firm, bought Klipmart Corp., a provider of online video advertising and management offerings for Web publishers, agencies and marketers (6/2006).

Coremetrics, a provider of hosted Web analytics and precision marketing services, acquired IBM's SurfAid Analytics business, an on-demand Web analysis service (4/2006).

Unica Corporation, a provider of enterprise marketing management (EMM) services, acquired Sane Solutions, LLC, a provider of Web analytics software (3/2006).

DoubleClick acquired ad management firm Falk eSolutions, its strongest rival in Europe (3/2006).

WebSideStory, Inc., a provider of on-demand digital marketing applications, acquired Visual Sciences, LLC, a provider of streaming-data analysis and visualization software and on-demand services (2/2006).

Livedoor, a large Japanese ISP and blog search service, acquired Innovation Interactive, a performance-marketing firm that owns search marketer 360i and search software firm SearchIgnite (11/2005).

SSA Global, an enterprise resource-planning vendor, acquired Ephiphany, a

provider of CRM software and services (8/2005).

The Gannett publishing empire bought rich-media technology firm PointRoll, bringing one of the top four rich-media companies under the roof of a major publishing house (6/2005).

E.W. Scripps Company acquired comparison shopping site Shopzilla (6/2005).

WebSideStory, a provider of on-demand digital marketing services, acquired Web search company Atomz (2/2005).

Viewpoint, an online advertising firm, acquired rich-media competitor Unicast (12/2004).

Atlas DMT, an operating unit of advertising technology provider aQuantive, Inc., acquired NetConversions, Inc., a provider of website usability technology and services (2/2004).

Atlas DMT acquired GO TOAST, a paid search management and optimization technology provider (12/2003).

Overture purchased AltaVista and AllTheWeb, providers of search services (4/2003).

F. Microsoft

The extent of Microsoft's software empire, led by its dominant operating system (nearly 95 percent of the global desktop market), office productivity suite (over 94 percent of U.S. retail sales), and Web browser (over 82 percent of the market), has been well chronicled.[73] Equally well chronicled, of course, have been the various anti-trust proceedings against Microsoft, in the U.S. and abroad. Less heralded, perhaps, but also warranting the attention of federal regulators, is Microsoft's new integrated approach to data collection and targeted advertising throughout its vast online holdings, via its adCenter and Digital Advertising Solutions initiatives. These holdings include the MSN Web portal, Windows Live search engine, Hotmail e-mail service, Messenger instant messaging network, Xbox 360 gaming system, Office Online productivity suite,

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[73] For operating system statistics, see Market Share, "Operating System Market Share for September, 2006," http://marketshare.hitslink.com/report.aspx?qprid=2 (viewed 26 Oct. 2006). For office productivity software statistics, see Ina Fried, "Apple's iWork Emerges as Rival to Microsoft Office," CNET News.com, 23 Jan. 2006, http://news.com/Apples+iWork+emerges+as+rival+to+Microsoft+Office/2100-1012_3-6030011.html (viewed 26 Oct. 2006). For Web browser statistics, see Market Share, "Browser Market

Windows Mobile software platform, Microsoft TV online video service, adCenter search advertising, Spaces blogging service, and Soapbox videos. All of these holdings have been molded, moreover, into a single-minded data collection and personalized digital marketing system, bringing Microsoft's near-monopoly software platform to bear on virtually all aspects of online communications, from Web content to streaming media to e-mail and instant messaging.

In light of this obvious threat to consumer privacy, we urge the FTC to examine closely Microsoft's advertising and marketing practices for violations of consumer privacy. While we are aware of the company's recent "Privacy Guidelines for Developing Software Products and Services," nowhere in that 49-page document is there even a single mention of Microsoft's own adCenter system, let alone a suggestion that Microsoft's targeting technologies and services should be subjected to the same level of scrutiny and compliance that the company is eager to apply to others.[74] Nor does the document (which, the company makes clear, "… should not be interpreted to be a commitment on the part of Microsoft…") cover the kinds of marketing campaigns that are at the heart of our complaint. In failing both to disclose the kinds of data it collects as part of its adCenter and related activities, and to reveal what it subsequently does with that data, we believe Microsoft is violating its own rules. Especially given the vast reach—and concomitant data-gathering powers—of Microsoft's extensive online properties, and the preferential on-site treatment it provides to its adCenter clients, we believe that the company's privacy policies are wholly inadequate. It is clear, in short, that we need national safeguards to protect consumers from such unfair and misleading practices, rather than the conflicted attempts at industry self-regulation that invariably promise more than they deliver.

As the commission well knows, this is not the first time that the FTC has been petitioned to protect consumers in a matter concerning Microsoft's misleading privacy protection

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Share for September, 2006," http://marketshare.hitslink.com/report.aspx?qprid=0 (viewed 26 Oct. 2006).
[74] Microsoft, "Privacy Guidelines for Developing Software Products and Services," version 2.1, 10 Oct. 2006, http://www.microsoft.com/downloads/details.aspx?FamilyID=c48cf80f-6e87-48f5-83ec-a18d1ad2fc1f&displaylang=en (viewed 19 Oct. 2006).

practices. In response to a 2001 petition filed by the Electronic Privacy Information

Center on behalf of itself and 12 other consumer advocacy organizations, the FTC issued

a ruling in August 2002 that included the following stipulation:

> IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, marketing, promotion, offering for sale, or sale of a covered online service, in or affecting commerce, shall not misrepresent in any manner, expressly or by implication, its information practices, including:
>   A. what personal information is collected from or about consumers;
>   B. the extent to which respondent's product or service will maintain, protect or enhance the privacy, confidentiality, or security of any personally identifiable information collected from or about consumers;
>   C. the steps respondent will take with respect to personal information it has collected in the event that it changes the terms of the privacy policy in effect at the time the information was collected;
>   D. the extent to which the service allows parents to control what information their children can provide to participating sites or the use of that information by such sites; and
>   E. any other matter regarding the collection, use, or disclosure of personally identifiable information.[75]

We now have reason to believe that Microsoft may be exploiting these same data,

collected via user and product registration and other online transactions, as a means of

delivering personalized and targeted advertising to millions of consumers, via its new

adCenter platform.

"Microsoft adCenter is designed to ultimately provide advertisers a one-stop-shop

experience, whether buying search, contextual, or display ads across a number of

Microsoft properties," reads a May 2006 company press release.[76] In announcing the

launch of adCenter in the U.S., Microsoft CEO Steve Ballmer emphasized "the

importance for advertisers of providing powerful tools and audience intelligence in an

easy-to-use, accessible way, and that Microsoft's network of online sites and services will

deliver to advertisers a range of audiences with very different demographics that

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[75] U.S. Federal Trade Commission, "In the Matter of Microsoft Corporation, a corporation, Agreement Containing Consent Order," File No. 0123240, [8 Aug. 2002], http://www.ftc.gov/os/2002/08/microsoftagree.pdf (viewed 9 Oct. 2006).
[76] Microsoft, "Seventh Annual MSN Strategic Account Summit Celebrates Advertisers' Role in Microsoft Media Network Vision," press release, 4 May 2006, http://www.microsoft.com/presspass/press/2006/may06/05-03SAS7PR.mspx (viewed 26 Oct. 2006).

advertisers will be able to reach in one consistent way."[77] According to Ballmer, adCenter promises "real audience intelligence and targeting capabilities," including "demographics, geographics, and dayparting pilot with behavioral targeting," along with the integration of DeepMetrix's LiveStat analytics.[78]

The scope of Microsoft's advertising-supported online operations is unprecedented. As Microsoft itself boasts, MSN attracts some 465 million unique users worldwide per month. "With localized versions available globally in 40 markets and 20 languages, MSN is a world leader in delivering Web services to consumers and online advertising opportunities to businesses worldwide."[79] In September 2006, Microsoft launched its new Digital Advertising Solutions initiative, "in a move that combines the company's broad set of global advertising products and services into a unified offering for advertisers."[80] Nor is the company content to rest on its laurels, having committed $6.2 billion to research and development for fiscal year 2007. Nearly 18 percent of that R&D budget—$1.1 billion—is devoted to developing online advertising technologies, a move that will surely have profound implications for consumer privacy.[81] For example, Microsoft has launched two data mining labs to develop new approaches to data collection and digital marketing, including one in Redmond, WA, and another Beijing.[82] As *Search Engine Journal's* Gene Sterling has observed, it is Microsoft's "…user data and reach" that are so "… appealing to marketers in an era of growing media fragmentation."[83] Those same elements—the millions of personal profiles associated

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[77] Microsoft, "Seventh Annual MSN Strategic Account Summit Celebrates Advertisers' Role in Microsoft Media Network Vision."

[78] Steve Ballmer, "Digital Marketing Outlook: The Future is Now," 2006 Strategic Account Summit, PowerPoint presentation.

[79] Microsoft, "Enhanced MSN Communication Services Deliver Compelling Opportunities for Advertisers," 7 Apr. 2005, http://www.microsoft.com/presspass/press/2005/apr05/04-07CompellingOpportunitiesAdsPR.mspx (viewed 6 Oct. 2006).

[80] Microsoft, "Microsoft to Unveil Global Advertising Brand Strategy at Advertising Week," press release, 24 Sept. 2006, http://www.microsoft.com/presspass/press/2006/sep06/09-24AdWeekPR.mspx (viewed 26 Oct. 2006).

[81] "Microsoft Boosts Ad Research," *Red Herring*, 5 May 2006, http://www.redherring.com/Article.aspx?a=16754&hed=Microsoft+Boosts+Ad+Research# (viewed 6 Oct. 2006).

[82] David Rittenhouse, "New Behavioral Targeting Ideas in MSN's AdLab," ClickZ Network, 25 Jan. 2006, http://www.clickz.com/showPage.html?page=3579286 (viewed 9 Oct. 2006).

[83] Gene Sterling, "Microsoft's Digital Advertising Solutions, *Search Engine Journal*, 25 Sept. 2006, http://www.searchenginejournal.com/?p=3824 (viewed 6 Oct. 2006).

with Microsoft's far-flung online properties—must now come under the scrutiny of the FTC. While the FTC must investigate Microsoft's new approaches to data collection, it should recognize that such changes are emblematic of practices occurring throughout the digital marketing landscape.

The gravity of the problem, and the attendant need for the FTC to take action, should be apparent from even a cursory review of the many areas in which Microsoft is insinuating data mining and user tracking:

- **adCenter**
  Microsoft's new advertising hub for marketers "… is designed to let advertisers take advantage of the audience information MSN gleans from its users across the network in order to better target keyword ads. Advertisers will be able to refine their keyword buys by geographic location, gender, age group, lifestyle segment and time of day, combining data from Microsoft's Passport registration and purchased demographic information from partners, including consumer data bureau Experian."[84]

- **Microsoft Digital Advertising Solutions**
  What adCenter does for search-based marketing, Microsoft Digital Advertising Solutions does for other online activities, permitting advertisers "… to connect with your consumers as they access different media at various points throughout their day—an audience that totals more than 112 million unique users per month in the U.S. alone…. And what happens at every one of these points? Your target consumers deeply engage with the experience— whether through MSN, Windows Live, Xbox, Office Online, or any of our major offerings to come. Imagine the many new opportunities you'll now have to connect with them."[85]

- **Windows Live**
  According to Chris Dobson, Microsoft's vice president for international media sales, "Windows Live will bring all the elements of the consumer's digital life seamlessly together in one place, that's accessible at any time, anywhere and from any device, extending Microsoft's online audience beyond search and MSN to the delivery of software and services over the web. This expansion of Microsoft's digital properties will give advertisers new opportunities to connect with consumers as never before. They will not only be able to reach an extended and highly engaged audience through the new Windows Live products, but they will also be able to take advantage of new and innovative

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[84] Susan Kuchinskas, "MSN Opens U.S. adCenter Pilot," *Internet News*, 7 Oct. 2005, http://www.internetnews.com/ec-news/article.php/3554816 (viewed 6 Oct. 2006).
[85] Microsoft, "Microsoft Digital Advertising Solutions," http://advertising.msn.com/advertising-solutions (viewed 9 Oct. 2006).

advertising opportunities to reach different audience groups across the wider Microsoft media network in the future, including MSN (MSN.com), Office Live, Xbox Live, Microsoft.com and Media Center."[86]

- **MSN Messenger**
"Every month," according to Microsoft, "more than 155 million active users log in to the MSN Messenger service. The new theme packs in MSN Messenger 7.0, which include backgrounds, emoticons, dynamic display pictures and Winks, provide marketers with more compelling opportunities to position their brands at the heart of the consumer's online experience in a tangible and viral way."[87]

- **MSN Spaces**
"MSN Spaces," Microsoft explains, "is a new service through which millions of consumers can share their stories with their friends and family or the entire world. The new campaign from Volvo taps into the storytelling power of the Internet in an entertaining manner that advertises the brand and also helps introduce consumers to new stories from the community."[88] As the company explains elsewhere, "Interaction with users on Windows Live Spaces means you can reach your target audience as they open and share their lives with their online community of friends."[89] Taken together, MSN Messenger and Spaces represent Microsoft's latest efforts to inject advertising and branding into everyday communications, undermining user privacy and underscoring consumerism in the process. "Deeper brand integration into MSN Messenger and MSN Spaces will enable our advertisers to connect with their target audiences in more creative, spontaneous and unobtrusive ways," notes Joanne Bradford, vice president and chief media revenue officer for MSN. "Integrating great advertising opportunities is core to our product development process, and as consumers connect through these new branded entertainment experiences in the MSN environment, the results for advertisers are higher brand awareness and favorability."[90]

- **Hotmail**
An estimated 100 million e-mails are sent every day with MSN Hotmail, the largest Web-based e-mail service that attracts over 31.6 million users each month. More than simply a communications platform, however, Hotmail has also become a key part of Microsoft's personalized advertising juggernaut:

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[86] Chris Dobson, "The Changing Advertising Landscape: The Evolution of Microsoft, Windows and MSN as the Media and Software Worlds Converge Online," May 2006.
[87] Microsoft, "Enhanced MSN Communication Services Deliver Compelling Opportunities for Advertisers."
[88] Microsoft, "Enhanced MSN Communication Services Deliver Compelling Opportunities for Advertisers."
[89] Microsoft, "Why Windows Live?" http://advertising.msn.com/why-windows-live?s_int=219 (viewed 6 Oct. 2006).
[90] Quoted in Microsoft, "Enhanced MSN Communication Services Deliver Compelling Opportunities for Advertisers."

"Hotmail technology allows you to target the audience most likely to respond to your advertising message. Whether you run a Rich Media ad placed on the login page or an inline text ad on the Inbox and Sent Mail pages, your message receives high visibility with an audience ready to interact."[91] Microsoft adds that "marketing on MSN Hotmail gives you the double impact of huge reach combined with precise targeting! You can connect with consumers on MSN, whether they are tech-savvy teens or affluent, globe-trotting baby boomers. MSN offers a variety of hotmail ad targeting, including ability to target via 'Age, Agent, Client, Connection Speed, DMA, Gender, Hotmail Occupation, State/Province, TimeZone, User Country/Region, User Language.'"[92]

- **Xbox**
  In an effort to reach younger users, Microsoft is exploiting its Xbox gaming platform as an advertising medium. "We can now deliver real-world timed and targeted ads into more than 75 million game sessions worldwide, providing monetary streams for game publishers and enhancing realism for players," notes Microsoft's Bradford.[93] Similarly, the Microsoft subsidiary Massive, Inc., an in-game advertising technology firm, along with Facebook.com, with whom Microsoft maintains an exclusive arrangement to sell search and display advertising, are devoted to the task of targeting younger users.

- **Soapbox**
  More recently, Microsoft has seized the growing popularity of user-generated video as a new advertising platform: "The Soapbox service will have the same types of connections to other Microsoft services. For example, when someone uploads a new video to the service, people on that person's instant-messenger buddy list will see a small 'gleam' next to the Soapbox user's icon, letting them click through to see the video."[94] That video, as with Microsoft's other online products, will also feature personalized advertising.

- **Windows Mobile**
  "Get your message across anywhere," Microsoft tells its advertising clients, offering new means to reach consumers via wireless devices. "The highly integrated Windows Mobile software platform provides a variety of options to help users connect with the people, information, and entertainment that matter most to them—anytime, anywhere. Let your target audience know about your hot new products by sending interactive image or text ads right to their wireless devices. Look for information about the wide range of future

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[91] Microsoft, "Hotmail," http://advertising.msn.com/hotmail?S_int=28 (viewed 6 Oct. 2006).
[92] Microsoft, "Hotmail."
[93] Quoted in Sharon Desker Shaw, "Microsoft Retools for New Role as Media Owner," *Media Magazine*, 27 July 2006, http://advertising.msn.com/services/bradford-interview?s_int=167 (viewed 6 Oct. 2006).
[94] Todd Bishop, "Microsoft Getting on its Video Soapbox," *Seattle Post-Intelligencer*, http://seattlepi.nwsource.com/business/285609_msftsoapbox19.html (viewed 6 Oct. 2006).

advertising options available through Windows Mobile."[95]

- **Microsoft TV**
  Microsoft is still working out the details of its newest advertising platform—the "next generation of television" known as IPTV (Internet protocol television)—but it promises to deliver the same targeted and monitored messaging as its other online products: "Microsoft TV IPTV Edition delivers broadcast-quality video and new, integrated TV services over broadband networks. IPTV is ideal for telecommunications carriers and for cable operators looking to deliver differentiated TV services and experiences—and for delivering the dynamic TV experiences consumers want. Stay tuned to hear about dynamic new advertising options on this innovative service."[96]

- **Office Online**
  With the extension of its dominant Word, Excel, and PowerPoint productivity applications to Web-based services, Microsoft is now targeting the workplace for interactive, personalized advertising: "As the world's largest corporate website, Office Online attracts millions of unique users in the U.S. each month. Be one of the first advertisers to target the highly engaged, well-educated, professional audience that relies on this web extension of the Microsoft Office suite of products."[97]

A patent that Microsoft was granted in May 2006 is indicative of the direction that its interactive advertising is taking, a system built around an invasive feedback loop that closely monitors user behavior and responds accordingly. According to the patent description, Microsoft is developing

> Systems and methods for selecting and inserting advertisements in an information document displayed to a user, wherein the selection is based at least in part on television programming viewed by the user. The systems and methods may be implemented using the Internet or another information retrieval system that

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[95] Microsoft, "Windows Mobile," http://advertising.msn.com/windows-mobile (viewed 6 Oct. 2006).

[96] Microsoft, "Microsoft TV," http://advertising.msn.com/microsoft-tv (viewed 6 Oct. 2006). A glimpse of Microsoft's ITV plans are available in France, where Deutsche Telekom Group's Club Internet has adopted Microsoft TV for its "triple play" service. According to Club Internet, this service "will provide a complete digital television service together with voice and data services that soon will be supported by a set-top box with integrated hard disk from Linksys. The offering is high-definition (HD)-ready and digital terrestrial television (DTT)-ready and will include a vast range of on-demand programming, broadcast channels and advanced digital video recording (DVR) functionality, enabling consumers to control when and how they watch live and recorded TV. The unique Microsoft TV-based solution can be tailored to suit the viewers' preferences, turning television into a more personalized entertainment experience for each individual." Quoted in Donna Bogatin, "Microsoft TV Enters IPTV Market in France with 'Next-generation Digital Television' Software Platform," Digital Micro-Markets, 9 June 2006, http://blogs.zdnet.com/micro-markets/?p=102 (viewed 19 Oct. 2006).

[97] Microsoft, "Office Online," http://advertising.msn.com/office-online (viewed 6 Oct. 2006).

includes a client system and a remote server. The client system monitors television programming viewed by the user and compiles a user profile characterizing the television programming. When the user requests an Internet resource using the client system, the television programming information in the user profile is utilized to select an appropriate advertisement. The advertisement is then inserted in the information document and displayed to the user. Advertisement selection and insertion may be conducted at the remote server, the client system, or at the level of the Internet service provider. Such selection of advertisement increases the efficiency by which Internet advertisements are tailored to individuals.[98]

More generally, Microsoft has aggressively pursued the same techniques and technologies—data gathering and mining, user tracking, behavioral targeting, and audience segmentation—that pose the biggest threat to consumer privacy. In its investigation of these practices, the FTC should pay particular attention to Microsoft's activities in these four areas.

Data Gathering/Mining

With its 2006 acquisition of DeepMetrix, a leading provider of Web analytics and business intelligence tools for marketers, Microsoft gained the ability to offer its advertising clients access to real-time performance statistics on Web user behavior and tendencies.[99] As the DeepMetrix website explains, "With LiveSTATS.BIZ, you can view the clicks streams for every visitor segment that you profile. As a result, you can analyze the click streams for first-time visitors, loyal customers, visitors from effective or ineffective promotions, visitors from a specific country like the USA or Poland, and so on. By understanding how specific segments use and navigate your web site, you can optimize layout to improve conversion rates, sales revenue, visitor satisfaction and web site ROI. The ability to profile and segment your visitor data makes click stream analysis in LiveSTATS.BIZ more effective and powerful than in any other website analysis solution."[100] "Drill down to the session-level of any visit," DeepMetrix tells its clients.

[98] Donna Bogatin, "Google vs. Microsoft in Interactive TV Advertising Race," Digital Micro-Markets, 8 June 2006, http://blogs.zdnet.com/micro-markets/?p=100 (viewed 19 Oct. 2006).
[99] "Microsoft Search Goes Live," *Red Herring*, 12 Sept. 2006, http://www.redherring.com/Article.aspx?a=18482&hed=Microsoft+Search+Goes+Live (viewed 6 Oct. 2006).
[100] DeepMetrix, "Leverage Click Streams with Visitor Segmentation," http://www.deepmetrix.com/livestats/biz/key_features/learn_click_streams.aspx (viewed 6 Oct.

"See IP addresses and timestamped action sequences for each visit. View a complete history of visits by any visitor to analyze past purchases, current interests, and completed promotions. Zoom in on specific visitors and unusual visits that require your detailed attention."[101] Armed with DeepMetrix's data mining and analysis tools, Microsoft and its partners can subject users' online activities to unprecedented levels of scrutiny:

> **Zoom-in on Visitor Sessions**
> Visit Browsing allows you to "zoom-in" on any visit made to your web site. It lets you review complete visitor sessions from beginning to end. You see all actions in sequence including every page view, goal conversion and product purchase, complete with timestamps.
>
> **The Power of Profiling**
> Definition: Visitor Profiling allows you to define who you want to see in your reports. It lets you breakdown your visitor population into segments of people with similar attributes, behaviors and interests. Example segments include first-time visitors, people referred from Google, and Germans who bought 3 or more of your products.
>
> Visitor Profiling lets you isolate segments of visitors who meet specific criteria. For example, you could isolate the people who purchased a big-ticket item and then breakdown their individual purchase sessions for in-depth analysis.
>
> When a microanalysis of visitor behavior is required, Visit Browsing enables you to drilldown to the session-level of any visitor session for close examination.[102]

User Tracking

In an effort to track user movements across its various Web properties, Microsoft uses click-stream analysis to "uncover navigation patterns and common paths that lead to desired actions."[103] Those actions are further tracked through the Ad-ID system, which Microsoft began using in April 2006. Jointly developed and owned by the Association of National Advertisers, Inc. (ANA) and the American Association of Advertising Agencies (AAAA), "Ad-ID provides the foundation for advertising digital trafficking and tracking,

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2006).
[101] DeepMetrix, "LiveSTATS.BIZ: Key Features,"
http://www.deepmetrix.com/livestats/biz/key_features/ (viewed 9 Oct. 2006).
[102] DeepMetrix, "Zoom-in on Visitor Sessions,"
http://www.deepmetrix.com/livestats/biz/key_features/learn_visit_browse.aspx (viewed 6 Oct.
2006).
[103] DeepMetrix, "Leverage Click Streams with Visitor Segmentation."

as well as digital connectivity."[104]   According to Barbara Bacci Mirque, Ad-ID co-CEO
and ANA executive vice president, "Microsoft believes the future lies with identified,
targeted, customized advertisements, and the best way to effectively track and measure
results from advertising assets is by using Ad-ID—a universal code which provides end
to end system connectivity."[105]

Behavioral Targeting

At the heart of Microsoft's tracking and analysis efforts—and the key component in
industry's state-of-the-art surveillance techniques—is behavioral targeting. Microsoft is
actively integrating behavioral targeting into its vast portfolio of Web products and
services, including "… a technology that neither Google nor Yahoo can yet offer: the
ability for advertisers to filter the people exposed to their search ads by demographic
information. Marketers will be able to target one ad to men, another to women, and use
additional information such as age and location. Microsoft has been tracking this
information for years through its various sites, including MSN, Hotmail and others,
keeping a vast database on tens of millions of individuals, each assigned a user ID
Microsofties refer to as a GUID, or global user ID. Past internal Microsoft plans to use
the GUID have been shelved due to fears privacy advocates would set about
characterizing the technology as a dangerous and invasive use of personal
information."[106]

As *Internet News*' Sean Michael Kerner observed in April 2006, "The holy grail of search
marketing is to deliver the right ad to the right person at the right time. But is reaching
that goal worth the price of user privacy?" Apparently Microsoft thinks it is. "With
MSN adCenter," Kerner adds, "advertisers can find out from a demographic point of
view who the people are that are searching for a particular term. They can also find out

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[104] "Microsoft Selects Ad-Id as its Digital Advertising Code," 24 April 2006, https://www.ad-id.org/news/docs/AdIDMS.pdf#search=%22MICROSOFT%20SELECTS%20Ad-ID%20AS%20ITS%20DIGITAL%20ADVERTISING%20CODE%20%22 (viewed 6 Oct. 2006).
[105] Quoted in "Microsoft Selects Ad-Id as its Digital Advertising Code."
[106] "Microsoft Intros Search Ads with Demographic Filtering," Marketing Vox, 16 Mar. 2005, http://www.marketingvox.com/archives/2005/03/16/microsoft_intros_search_ads_with_demograp hic_filtering/index.php (viewed 6 Oct. 2006).

geographic, as well as time-based information about the searchers."[107]

Jason Bailey, Search Media Strategist at Microsoft, has explained that with adCenter, advertisers can target their ads by day of the week and also by specific time of day. "Targeting and audience-intelligence tools are powerful because they let you create very surgical search campaigns," Bailey says. "You can be very specific about the type of person you are looking for how and when you are reaching them and making sure that they are converting well."[108] As Kerner pointed out, however, "Bailey did not address where Microsoft was actually getting its demographic information from during his presentation. It was only in response to an audience question that the Microsoft spokesperson admitted that the information is actually pulled based on users' Microsoft Passport accounts. Microsoft Passport is a unified single sign-on solution that powers many Microsoft services, including Hotmail and MSN Messenger, and is part of their new Windows Live services."[109]

As Microsoft itself explains, "Targeting is an optional feature in Microsoft adCenter. This feature provides options to help you optimized [sic] your ad's exposure. You can use the variables listed below to increase the chance that particular parts of the MSN Search audience will see your ad:

- Geographical location.
- Day of the week.
- Time of day (morning, afternoon, or night).
- Age and gender.[110]

Praising Microsoft's new technology for the level of detail on user behavior it provides, Stuart Larkins, vice president of search for Performics Inc., a division of the digital advertising technology firm DoubleClick Inc., notes that "adCenter is helping us apply more flexibility and control in our paid-search advertising campaigns because it gives us

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[107] Sean Michael Kerner, "MSN adCenter a Demographic Profile," *Internet News*, 28 Apr. 2006, http://www.internetnews.com/xSP/article.php/3602271 (viewed 6 Oct. 2006).
[108] Quoted in Kerner, "MSN adCenter a Demographic Profile."
[109] Kerner, "MSN adCenter a Demographic Profile."
[110] Microsoft, "A. What is Targeting?" http://advertising.msn.com/Home/Article.aspx?pageid=707&articleid=3196 (viewed 6 Oct. 2006).

the tools to learn so much more about the kind of people who are searching on MSN."[111]
"Powerful campaign management tools and deep audience intelligence unique to MSN,"
a Microsoft press release explains,

> make it easy for advertisers to optimize and refine their campaigns to reach a specific audience. Some of those tools include the following:
>
> - **Keyword Selection** allows advertisers to indicate whom they want to reach based on geographic location, gender, age range, time of day and day of week, and suggests keywords based on the desired audience.
> - **Site Analyzer** assists advertisers by suggesting keywords based on the content of their Web site, rather than on another keyword.
> - **Audience Profiler** provides advertisers with an expected profile of those customers who are most likely to search for specific keywords....
> - **Post Sales Audience Intelligence & Reporting** provides advertisers with detailed reports on campaign performance and audiences reached including click-through rate, estimated position and spending levels....
>
> In addition, advertisers will be able to use advanced targeting tools and audience intelligence data to reach their desired audiences across the MSN network.[112]

Even where precise information on site visitors cannot be obtained, Microsoft technology allows marketers to *predict* demographic trends: "Customer profile data can provide important hints for targeted advertising. However, customers are often reluctant to provide such information. To resolve this issue, Microsoft adCenter is developing a technology to predict—rather than harvest—customer attributes that are based on page views, searches, and other online behaviors."[113] According to Microsoft, "You can use adCenter technology to predict a customer's age, gender, and other demographic information according to his or her online behavior—that is, from search queries and webpage views."[114] Microsoft's behavioral targeting facilitates the following types of projections:

- Demographics prediction:
  Predict a user's age, gender, and other demographic information, based on his

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[111] Microsoft, "MSN Launches Paid-Search Service in France and Singapore," 26 Sept. 2005, http://www.microsoft.com/presspass/press/2005/sep05/09-26PdSearchSvcPR.mspx (viewed 6 Oct. 2006).

[112] Microsoft, "MSN Launches Paid-Search Service in France and Singapore."

[113] Microsoft, "Behavioral Targeting," http://adlab.msn.com/research_techBT.aspx (viewed 6 Oct. 2006).

[114] Microsoft, "Demographics Prediction," http://adlab.msn.com/DPUI/DPUI.aspx (viewed 6 Oct. 2006).

or her online behavior.

- Detecting Online Commercial Intention
  Does your customer intend to buy, sell, or complete another kind of transaction? Predict such intention from his or her search queries or recently visited URLs
- Ads Delivery on Social Network Coming soon!
  Leverage social networks to create a new ad delivery channel.
- Behavioral Targeting System Coming soon!
  Create precise, flexible behavioral segments by taking advantage of various data sources, including clickstream, search query, and demographic information.[115]

Microsoft also is extending the role of data collection to advance advertising and marketing in video games. Speaking at a 2006 Games Developer Conference, Kevin Browne, Microsoft's general manager of Xbox new media and franchise development, who is "working to facilitate the flow of advertising to the Xbox platforms," noted that, "When you think about it, a fairly small shift in advertiser behavior could replace all the revenue that we generate today," Browne said. "We could be a totally ad-funded business if we could figure out how to do that. We could double the size of our industry by 2010 by finding the right mix."[116] The role that target marketing and user tracking play in online video games is one reason why Microsoft acquired Massive this year, the leading company in that sector. "Within the casual gaming space," the company explained, "Microsoft plans to implement Massive's solution to extend in-game advertising capabilities to games on MSN and within MSN Messenger, delivering advertising solutions for the casual gaming audience of females 35 years old and up."[117]

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[115] Microsoft adCenter Labs Presentations, http://adlab.msn.com/demo.aspx#Behavior_Targeting (viewed 6 Oct. 2006).

[116] Brendan Sinclair, "Spot On: Microsoft's in-game ad master plan," GameSpot, 9 June 2006, http://www.gamespot.com/news/6152593.html?print=1 (viewed 25 Oct. 2006).

[117] Microsoft, "Microsoft to Acquire In-Game Advertising Pioneer Massive Inc.," press release, 4 May 2006, http://www.microsoft.com/presspass/press/2006/may06/05-04MassiveIncPR.mspx (viewed 25 Oct. 2006). "Microsoft also has begun exploring how to apply Massive technology to incorporate dynamic advertising into other online environments, such as Windows Live and MSN, and to make it available on the adCenter advertising platform. 'We are committed to building an advertiser network that serves a wide spectrum of needs,' said Kevin Johnson, co-president of the Platforms & Services Division at Microsoft. 'Our acquisition of Massive will expand opportunities for advertisers and enable connection to a broader audience of digital consumers.' 'Joining forces with Microsoft will allow Massive to deliver even greater benefits for advertisers, game developers and gamers through one of the world's largest, most comprehensive online networks,' said Mitchell Davis, CEO of Massive Inc. 'While our current business relationships will remain in place, with Microsoft we have the prospect of extending our technology into a vast array of new markets and online environments.'" Microsoft, "Microsoft to Acquire In-Game

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Audience Segmentation

Once the data collection and analysis, user tracking and targeting are complete, Microsoft and its marketing clients are fully prepared to interact directly with consumers, based on the audience segments in which site visitors are placed. Microsoft's adLab is actively pursuing this approach to personalized advertising. "Richer audience intelligence and more control over campaigns are important themes in the adLab's work," wrote ClickZ Network's David Rittenhouse in January 2006. "Within the next six months, MSN's adCenter will be expanded to allow advertisers to target ads to behavioral segments based on user interests inferred from browsing habits. Behavioral targeting of this sort is already quite available on the market. What's unique about adCenter's approach is it will allow advertisers to build custom segments, something that could allow more accurate targeting than the current approach, which is based on prebuilt and sometimes broad and inflexible segment definitions."[118]

"You can easily target customer segments by using adCenter to model their online behaviors," Microsoft promises. "Microsoft adCenter technologies provide an excellent way to classify adCenter customers' behaviors and then segment and cluster the customers in ways that help you to understand them more clearly."[119] As DeepMetrix explains,

> Profiles can range from simple (visitors from North America), to specific (visitors referred from Google using the AdWord "plush slippers"), to elaborate (visitors from the 2-for-1 e-mail campaign who have made 4+ repeat visits, examined the product "Bear Paw Slippers", but have not yet purchased).

> Visitor profiles are created using an intuitive plain-language wizard that lets you easily add, modify and remove powerful data filters.

> Some examples of data filters include:

> - Visitors from a specific country such as Mexico or Norway.
> - Visitors who have purchased between $_.__ and $_.__.

Advertising Pioneer Massive Inc."

[118] Rittenhouse, "New Behavioral Targeting Ideas in MSN's AdLab."

[119] Microsoft adCenter Labs Research, http://adlab.microsoft.com/research_techBT.aspx (viewed 6 Oct. 2006).

- Visitors who have viewed more than (or less than) ___ products.
- Visitors who have responded to a specific e-mail promotion.
- Visitors who have made ___ visits to your web site.[120]

Combined with customer relationship management (CRM) technologies, Microsoft's targeting and segmenting techniques can be used to break down the traditional barriers of anonymity and privacy:

> Imagine being able to contact the people who visit your web site. You could reach out to them while their interest-levels are peaking and send them targeted messages and promotions that could make the difference between losing a sale and gaining a loyal customer.
>
> This type of proactive marketing is possible with LiveSTATS.BIZ CRM. With CRM, you can link visitor contact information to valuable website statistics , enabling you to send web site visitors targeted communications that match their current needs and interests....
>
> When you combine Visitor Profiling with CRM, you can group visitors based on similar interests and behaviors, build custom mailing lists, and send targeted communications.[121]

All of these advertising-infused products and services, moreover, are offered in the context of a complex, often convoluted, 3,400-word privacy statement that few users can be expected to read, much less understand.[122] According to the fine print, there are plenty of opportunities for Microsoft to continue its questionable practices:

> **Microsoft Online Privacy Statement**
> ...At some Microsoft sites, we ask you to provide personal information, such as your e-mail address, name, home or work address or telephone number. We may also collect demographic information, such as your ZIP code, age, gender, preferences, interests and favorites. If you choose to make a purchase or sign up for a paid subscription service, we will ask for additional information, such as your credit card number and billing address, that is used to create a Microsoft billing account.

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[120] DeepMetrix, "Segment Your Visitors with Visitor Profiling," http://www.deepmetrix.com/livestats/biz/key_features/learn_click_and_mine.aspx (viewed 6 Oct. 2006).
[121] DeepMetrix, "Expertly Target Your Campaigns with CRM," http://www.deepmetrix.com/livestats/biz/key_features/learn_crm.aspx (viewed 6 Oct. 2006).
[122] Microsoft's "Supplemental Privacy Information" includes ten separate privacy statements. "In order to understand the data collection and use practices relevant for a particular site or service," Microsoft advises, "you should read both the Microsoft Online Privacy Statement and any applicable supplement."

We may collect information about your visit, including the pages you view, the links you click and other actions taken in connection with Microsoft sites and services. We also collect certain standard information that your browser sends to every website you visit, such as your IP address, browser type and language, access times and referring Web site addresses.

When you receive newsletters or promotional e-mail from Microsoft, we may use web beacons (described below), customized links or similar technologies to determine whether the e-mail has been opened and which links you click in order to provide you more focused e-mail communications or other information.

In order to offer you a more consistent and personalized experience in your interactions with Microsoft, information collected through one Microsoft service may be combined with information obtained through other Microsoft services. We may also supplement the information we collect with information obtained from other companies. For example, we may use services from other companies that enable us to derive a general geographic area based on your IP address in order to customize certain services to your geographic area....

Sharing of Your Personal Information
Except as described in this statement, we will not disclose your personal information outside of Microsoft and its controlled subsidiaries and affiliates without your consent. Some Microsoft sites allow you to choose to share your personal information with select Microsoft partners so that they can contact you about their products, services or offers. Other sites, such as MSN, do not share your contact information with third parties for marketing purposes, but instead may give you a choice as to whether you wish to receive communications from Microsoft on behalf of external business partners about a partner's particular offering (without transferring your personal information to the third party). See the Communication Preferences section below for more information.[123]

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[123] The "Communication Preferences" section of Microsoft Online Privacy Statement includes the following language:

You can stop the delivery of future promotional e-mail from Microsoft sites and services by following the specific instructions in the e-mail you receive.

You may also have the option of proactively making choices about the communications you receive from particular Microsoft sites or services by visiting and signing into the following pages:

- The Microsoft.com Profile Center allows you to choose whether you wish to receive marketing communications from Microsoft.com, to select whether Microsoft.com may share your contact information with selected third parties, and to subscribe or unsubscribe to newsletters about our products and services.
- The MSN & Windows Live Communications Preferences page allows you to choose whether you wish to receive marketing material from MSN or Windows Live. You may subscribe and unsubscribe to MSN Newsletters by going to the MSN Newsletters website.

Some Microsoft services may be co-branded and offered in conjunction with another company. If you register for or use such services, both Microsoft and the other company may receive information collected in conjunction with the co-branded services....

Use of Web Beacons
Microsoft Web pages may contain electronic images known as Web beacons - sometimes called single-pixel gifs - that may be used to assist in delivering cookies on our sites and allow us to count users who have visited those pages and to deliver co-branded services. We may include Web beacons in promotional e-mail messages or our newsletters in order to determine whether messages have been opened and acted upon....

Use of Third Party Ad Networks
The majority of the online banner advertisements you see on Microsoft Web pages are displayed by Microsoft. However, we allow other companies, called third-party ad servers or ad networks, to display advertisements on Microsoft Web pages. Some of these ad networks may place a persistent cookie on your computer in order to recognize your computer each time they send you an online advertisement. In this way, ad networks may compile information about where you, or others who are using your computer, saw their advertisements and determine which ads are clicked on. This information allows an ad network to deliver targeted advertisements that they believe will be of most interest to you. Microsoft does not have access to the cookies that may be placed by the third-party ad servers or ad networks.

Microsoft maintains relationships with a number of the third-party ad networks currently operating such as: Avenue A; BlueStreak; DoubleClick; Mediaplex; Pointroll; RealMedia; TangoZebra; and Unicast. Those ad networks that use persistent cookies may offer you a way to opt out of ad targeting. You may find more information at the Web site of either the individual ad network or the Network Advertising Initiative....[124]

- If you have an Xbox.com or Xbox Live account, you can set your contact preferences and choose whether to share your contact information with Xbox partners on the My Xbox page on Xbox.com or on your console by selecting Privacy Settings under Edit Gamer Profile on Xbox 360, or selecting the Info Sharing option in Account Management for the Original Xbox Live dashboard.
- If you are registered with Microsoft Partner Programs, you can set your contact preferences or choose to share your contact information with other Microsoft partners by clicking Manage Your Account on the Partner Program website.

These communication choices do not apply to mandatory service communications that are considered part of certain Microsoft services, which you may receive periodically unless you cancel the service.

[124] "Microsoft Online Privacy Statement," http://privacy.microsoft.com/en-

G. Conclusion

The U.S. digital media system is at a crossroads. Over the next few years, as the distinctions between online and "old" media blur still further, there will be a ubiquitous interactive environment. So, too, in this fluid, new environment, with all manner of data compiled and analyzed, will the distinction between anonymous and personally identifiable information disappear. For these reasons it is critical that the FTC act *now* to protect the interests of the public. The FTC must require notice of all information collected, and full disclosure of how that data will be used. The commission should ask Congress to pass federal legislation requiring affirmative consent for all data used—which must be regularly updated and re-approved by users. An all-embracing opt-in should be the minimum standard. All data collection and e-commerce marketing techniques must be unbundled, disclosed, and given affirmative consent by users. Indeed, the commission should also strive to have industry develop meaningful codes of conduct related to marketing that go beyond these basic principles.

As our complaint reveals, an extensive data collection and targeting infrastructure has emerged, one that poses significant threats to the privacy—and the personal autonomy—of hundreds of millions in the U.S. As the commission must be aware, digital marketing/data collections practices are also dramatically shaping the other key communications platforms beyond the personal computer. In the rapidly emerging market of interactive (digital) television, our television sets will be *watching us*, as new tools permit data collection, profiling, and targeting of viewers/users. Open TV's Spot-on technology, for example, "includes OpenTV Measure software which provides network operators and advertisers the ability to measure and track each addressable spot and receive valuable aggregate viewer data, enabling advertisers to build profiles, and help drive improved analysis and research for future marketing and planning."[125] "OpenTV Measure," the company explains,

> is an audience measurement solution for digital set-top boxes that automatically

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us/fullnotice.aspx#collection (viewed 6 Oct. 2006).
[125] OpenTV, "OpenTV SpotOn," http://www.opentv.com/products/advertising/spoton.html (viewed 17 Oct. 2006).

collects TV click stream data based on pre-set parameters, and pushes the information to a server for further processing. It collects audience television viewing data, including channel ID and associated event IDs and timestamps, and iTV application usage data (e.g.: EPG, weather, games) either for all subscribers or an operator-defined subset. iTV application developers can include measurement parameters in their applications to log the necessary audience information…. Learn From and React to Subscriber Usage Patterns—Network operators do not have to rely on data generated by other providers' viewers—audience and application usage can be measured for any specific subset of the operator's subscriber base to help drive better carriage negotiation with content providers.[126]

Similarly, the rapidly evolving cell phone/mobile device marketplace is now seen as a "mobile marketing ecosystem."[127] For example, mobile content provider JumpTap explains that its "Advertising Suite provides marketers with the unprecedented ability to reach the right mobile consumers with the right message at the right time and place. By combining search knowledge with mobile targeting abilities, JumpTap provides marketers with more targeted inventory for performance-based search and graphical advertisements. The JumpTap Advertising Suite presents pay-per-click, pay-per-call and cost per impression (CPM) based advertisements in both a mobile search and mobile portal experience."[128] Among the "benefits" JumpTap offers to marketers are the following:

- Access a wide audience—Leverage targeted mobile advertising to tap into an active consumer base.
- Influence purchase decisions—Interact with consumers at the time of purchase.
- Convert consumers into buyers—Drive consumers directly to mobile sites, or trained sales professionals.
- Measure ROI—View real-time ad performance data.[129]

The examples offered in this complaint are—to a great extent—the proverbial tip of the digital data collection iceberg. But the need to meaningfully protect the public should

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[126] OpenTV Measure, "OpenTV Measure," http://www.opentv.com/products/enterprise/ent_measure.html (viewed 17 Oct. 2006). See also, for example, Comcast Spotlight, "Addressable Advertising," http://www.comcastspotlight.com/sites/Default.aspx?pageid=7826&siteid=62&subnav=3 (viewed 17 Oct. 2006); SeaChange, "Advertising," http://www.schange.com/Products/Advertising/main.asp (viewed 17 Oct. 2006); and Visible World, "Advertisers," http://www.visibleworld.com/advertisers/ (viewed 17 Oct. 2006).
[127] Mobile Marketing Association, "Mobile Marketing Ecosystem," http://mmaglobal.com/modules/content/index.php?id=53 (viewed 17 Oct. 2006).
[128] JumpTap, "Solutions for Advertisers: Overview," http://www.jumptap.com/solutions_adv_overview.aspx (viewed 17 Oct. 2006).

galvanize the FTC into immediate action. Consumer privacy rights should not be lost—but rather expanded.

The techniques and infrastructure we have described here are emblematic of only part of the data collection system being deployed throughout our digital media environment. The marketing industry is currently exploring expanded approaches to securing data collection as part of its new focus on the development of "engagement" as a measurable branding and ad delivery "metric." For example, current efforts designed to better utilize "emotional responses to advertising" organized by the MI4 Initiative (Measure Initiative for Advertising Agencies, Media, and Researchers) are exploring brain behaviors involving both cognition and emotion.[130]

We stand ready to help the commission with this investigation.

Cordially,

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[129] JumpTap, "Solutions for Advertisers: Overview."
[130] The MI4 Task Force is coordinated by the Advertising Research Foundation, the American Association of Advertising Agencies and the Association of National Advertisers. The Advertising Research Foundation, "ARF, AAAA and ANA Are Getting Emotional about Engagement," PowerPoint presentation, Advertising Week, 27 Sept. 2005.