



# BerkeleyLaw

UNIVERSITY OF CALIFORNIA

## Samuelson Law, Technology & Public Policy Clinic

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# Objectives

- From the prospective of a lawyer
- Technology informed Policy
  - & Policy informed technology
- Highlight shortcomings in self-regulation programs that are relevant to *Do Not Track*
- Work thus far:
  - Comments to EASA

# Don’t let weasel words eat away privacy protection!

**Behavioral Targeting**

*must be*:

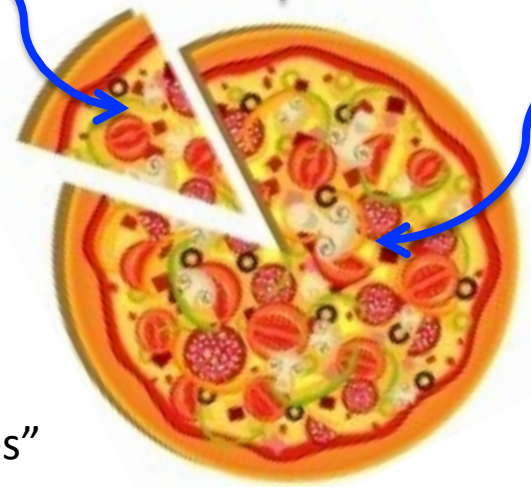
“Web viewing behaviors”

“from a particular computer”

“across non-Affiliate Web sites”

PII is “information about a specific individual…”

Sensitive Consumer Information is “Precise Information…about health or medical conditions…”



**Ad Delivery & Reporting + other uses not covered**

“Ad Delivery is the delivery of online advertisements…” basically almost everything else not “covered by the definition of Online Behavioral Advertising.”

What about non-OBA tracking?

# Questions for Technologists

- Can you think of  a creative solution that allow Ad Delivery and Reporting without tracking consumers?
- If Ad Delivery and Reporting falls outside the scope of *Do Not Track*, how can we use technology to verify that the data collected is used for Ad Delivery and Reporting only, but not for any other purposes?

# Limitations on Consent

- Consent is not binary
- What, if any, protections should be in place for those who consent?

Football: Players consent to certain types of physical violence – but not all physical violence.

Do Not Track: What scope of business activity is given a green light?

# Scope of Consent for Data Retention

- Data retention "only as long as necessary to fulfill a legitimate business need . . . "
  - DAA and NAI self-regulatory principles
- Probably diminishing returns and costs associated with retention
- Network operators: Usually say they need data for short periods of time (as opposed to OBA lobbyists)

# Anti-Circumvention of User Choice

- "[T]he practice of using technologies in order to circumvent the user's express choices (for example by deliberately "re-spawning" deleted cookies), is not regarded as compliant with data protection law and should not be used."
  - European Advertising Standards Alliance
- Why not in the NAI and DAA principles?
- Can DNT detect user circumvention?

# Conclusions

- Technology & policy necessary
- Self-regulatory gaps will be relevant for implementation of Do Not Track
  - How do we use technology to enforce that data collected for analytics is not used for other purposes?
  - Can DNT protect consumers after they've consented?
  - Can DNT detect/enforce retention policies?
  - Can DNT address circumvention problems?