



**Revised Testimony on Internet Privacy
US House Committee on Energy and Commerce
Subcommittee on Commerce, Trade &
Consumer Protection**

1995 Broadway, 17th Floor
New York, NY 10023-5882

tel +1-212-580-0800
fax +1-212-580-0898

www.softwarefreedom.org

Thank you, Chairman Rush, Ranking Member Whitfield, Mr. Space, other members of the Subcommittee. I very much appreciate the invitation to testify, and I would like to express my particular gratitude for the committee's strong respect for free speech in the legislative process.¹

I think it would be useful to begin with a technical clarification. The receipt of advertising on the Web is already completely optional. I receive no advertisements in my browser, on my laptop, or on my mobile devices. Any member of the committee or any member of the listening audience on C-SPAN who is using the Firefox browser could search briefly for Ad-Block Plus, and discover that advertising is already optional to receive, whether it is targeted advertising or non-targeted advertising.²

The apparent connection made in the course of this discussion between the economics of the advertising business and whether surveillance ought to be authorized or acceptable on the web, therefore, escapes me. It is already possible for anyone wishing to receive no advertising, to do so. Yet civilization has not collapsed. Distinguished businesses represented here are still in business. I believe therefore there is no justification for the conclusion that legitimate control of surveillance on

¹I am Professor of Law at Columbia Law School, where I have taught since 1987. I am the Founding President and Executive Director of the Software Freedom Law Center in New York, a non-profit corporation organized under New York law and granted federal tax exemption under section 501(c)(3) of the Internal Revenue Code. SFLC provides free legal advice to non-profit makers and distributors of free and open source software. Because of the nature of my work, I hold no stock in any information technology companies. I have no financial interest in the affairs of any of my clients.

²Since this testimony was delivered, Microsoft has announced changes in version 9 of the Internet Explorer that will implement the equivalent of AdBlock Plus in the default configuration of its browser. See the analysis of the privacy specialist Christopher Soghoian in response to the Microsoft announcement, <http://paranoia.dubfire.net/2010/12/initial-thoughts-on-microsofts-ie9.html> Once IE9 is available, advertising of all kinds will no longer be received by users of almost all the major browsers on the market who do not want to receive them.

the web in the public interest would have any adverse effect on the economics of the web, because a blanket opt-out on receipt of advertising by individual consumers is already fully implemented and available at no charge.

I also believe that the concept of “tracking” is perhaps part of the general mystification in which consumers find themselves. We should, I think, be more clear with consumers, who do not have our level of interest or expertise in these questions. We would be clearer with them if we simply pointed out that the Internet has become a very highly surveilled locale, much more highly surveilled than all previous social environments in their experience.

As Mr. Markey pointed out earlier this afternoon in his questioning, already half a billion people live all of their social lives online inside a single service provider’s structure, which puts everything they do, everything they say to one another, every photograph they post, every piece of information they distribute about their social lives in one great big database, owned by the single, for-profit business that Mr. Markey named.

Facebook and similar centralized social networking services like to talk about their “privacy settings.” This is mere deception, a simple act of deliberate confusion.³ These “privacy settings” merely determine what one user can see of another user’s private data. The grave, indeed fatal, design error in social networking services like Facebook isn’t that Johnny can see Billy’s data. It’s that the service operator has uncontrolled access to *everybody’s* data, regardless of the so-called “privacy settings.”⁴

I think we ought, therefore, to conclude that the idea of Do-

³A research study in submission for publication by the distinguished computer scientist Steven Bellovin and his group at Columbia University, generously shared with me by the author, surveyed a sample of Facebook users to determine their intentions with respect to privacy, and compared those intentions against their “privacy settings.” One hundred percent of the sample were actually achieving something other than their intended privacy goals, with more than 90% of the sample sharing material they intended to keep private. A system that produces unintended, potentially harmful results for 100% of its users is deceptive and misleading in the technical meaning of those terms. FTC requires no new legislative power to deal with such business practices by affirmative regulation.

⁴Facebook’s published privacy policy, as of the date of filing this testimony, confirms that it has unrestricted access to all “information you provide to us,” as well as “all information we collect when you interact with Facebook.” See <http://facebook.com/policy.php> (section 2).

Not-Track, which really ought to be described to the public whose interests we are protecting, as Do-Not-Surveil, is a problem more serious and more comprehensive than the problem of addressing behavioral advertising, which is merely one wrinkle in a rapidly changing technical environment, as others have noted.

The problem we really face is the problem of identifying the acceptable level of surveillance people are subject to in their daily activities, as they breathe the “online oxygen” that Mr. Markey referred to. At present, users of centralized social networking services like Facebook are comprehensively and exhaustively surveilled. Is this tolerable? If not, what should the limits of private activity against the public interest be?

The motive of surveillance doesn’t determine its acceptability. Whether it is for profit, or for the protection of people from wrongdoing of one kind or another, however valuable the surveillance may be to those conducting it, the public interest in the protection of privacy is never entirely overcome. How much are we prepared to abandon our traditional human understanding that what we do when we read, when we speak to our friends, when we go about our social lives, is nobody’s business except the business of the people with whom we choose to share?

The purpose of surveillance targeting advertising is to collect information concerning the capabilities and intentions of the potential buyer and to affect that buyer’s behavior. Oddly enough, those three points - collection of information about capabilities and intentions, for the purpose of affecting behavior is also the definition of what intelligence services do. There is, in fact, no practical distinction between the public activity we call collecting intelligence and the private activity we call targeting advertising. They are both spying. The purpose of spying has got to be one which the public would find to its advantage and not merely in the advantage of the institution performing the spying. We do that with respect to public intelligence services because they are under democratic control.

We don't do that with respect to advertising targeters: they are under nobody's control but their own, unless they are regulated.

Many technologies under present development—including technologies developed by my client base, the client base of non-profit entities, who make software for everyone to share, freely and at no cost—would allow us to achieve the enormous benefits of the web we know now, along with many other benefits of the web we will have later, with minimal levels of surveillance instead of the maximal levels from which we presently suffer.

That will undoubtedly bring significant economic change, as the web itself has brought economic change during the last eight thousand days, which is the total lifetime of the web so far.

In the next eight thousand days, we can decide whether what we want is the end of social networking and all of the benefits of online culture, with comprehensive spying going on all the time, or without comprehensive spying going on all the time.

As public servants, all of us, I think our role is to arrange to have as little spying as we can.

I do not think that is an obligation we can trade off against any other, because I think it reaches directly to the heart of what I think constitutional freedom is.

In my judgment, what we require is a comprehensive National Privacy Policy Act, in which Congress does what Congress does best - set large, general societal goals and empower all federal agencies in the conduct of their activities to achieve those goals.

The National Environmental Policy Act has within one generation done enormous amounts to clean our water, our air, and our environment because of Congress's wisdom in the declaration of broad general principles for the protection of the public interest.

Privacy maintenance in the face of over-surveillance is the

single largest environmental issue in the online world and it should be addressed with the same degree of seriousness and comprehensiveness with which the physical environment was addressed by Congress one generation ago.

Businesses will naturally regard such regulation as burdensome. That's not a reason to refrain from acting in the public interest, for example, by requiring businesses to disclose fully to any individual on request what information they have about him or her and what they have so far done with it.

Others have testified that without pervasive surveillance enabling targeted advertising, small websites would founder and diversity and access to knowledge and opportunities for under-served populations would be extinguished. I see no reason to believe that's true. I very much doubt that there is any person in this room whose life has not been altered by Wikipedia, which has provided the opportunities for under-served populations of the kinds that have been talked about: to conduct research and to learn at a level which is otherwise inaccessible. Wikipedia is unsupported by advertising and of the hundred most visited sites on the net studied by the Wall Street Journal in the series previously referred to, it was the only one of the one hundred not in any way surveilling or tracking its users. I think, once again, that the attempt to connect the advertising business model to the importance of vibrant content on the net, or life changing possibilities of expansion of access to under-served populations, is poppycock.

In conclusion, we must have a clean environment to live in and we must have a clean online environment that protects our freedom. Our principles acknowledged, there will be plenty of money for everybody to earn, but without our principles acknowledged, we will buy our convenience with our freedom and that is far too high a price to pay.

Thank you for your time. I am happy to answer your questions.