

U.S. Senate Committee on Commerce, Science & Transportation

“A Status Update on Voluntary Do-Not-Track Standards”

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Chairman Rockefeller, Ranking Member Thune, and other members of the Committee, thank you for the opportunity to testify on the need for privacy protections, the status of self-regulation and Do Not Track (DNT).

I am Harvey Anderson, I lead the business, legal, and public policy teams for Mozilla. In addition to commercial and legal responsibilities, this role also captures the intersection of product and policy initiatives such as DNT, leadership on open Internet issues, net neutrality, copyright reform, and Internet governance. I have practiced in the technology sector for the past 20 years, and have worked in the Internet domain since I first joined Netscape in the mid '90s.

Mozilla is the maker of the Firefox browser used by 450 million people worldwide. We developed Firefox to bring competition to the browser market, and to promote openness, innovation, and opportunity online. We do not own or operate a search or advertising business, yet like most online ventures, our revenues are based on advertising and commerce. We view ourselves as “an agent of the user” whose role is to help users navigate their digital lives in ways that make sense to them. Mozilla was voted the Most Trusted Internet Company for Privacy in 2012 by the Ponemon Institute, as well as a top 20 overall trusted brand for privacy.¹

When we testified here last time on this topic, we told you that:

- Industry self-regulation can work when it is a multi-stakeholder process that reflects the

¹ *2012 Most Trusted Companies for Privacy*, Ponemon Institute, January 28, 2013; <http://www.ponemon.org/local/upload/file/2012%20MTC%20Report%20FINAL.pdf>

views of all of the relevant parties involved in data transactions.

- Regulatory measures can introduce unintended consequences that can be harmful to a fragile Web ecosystem.
- Enabling economic ecosystems on the Web is essential to a robust and healthy Internet; however, commercial imperatives and user choice/control are not mutually exclusive. They can and must coexist through a combination of technical capabilities and user-centric business and data practices.
- The multi-stakeholder process occurring at the W3C will result in a consensus on both the meaning of DNT and how websites should respond.

Those statements stand true today and are still timely for your consideration. Our goal today is to provide further context, an update on recent market developments, and insights that can assist your evaluation of whether current self-regulatory efforts are adequate. To achieve this, I will touch on the following topics:

- The Internet environment;
- What has happened since the June 2012 hearing by this committee on DNT; and
- Expectations of the W3C standards process for online tracking.

My testimony today will not cover Mozilla's current evaluation of a new third-party cookie policy in Firefox. That work is ongoing as we engage with the full spectrum of stakeholders, including our users, developers, advocates and business leaders. We would be pleased to come back at a later date to update members of this Committee on browser product features that give more options to manage cookies.

Internet Environment

The Internet is the most significant social and technological development of our time. However, the Internet is young, very young – maybe 9,000 days since the evolution of the World Wide Web. As a result, we are all still finding our way in this evolving environment. This means that mainstream users do not necessarily have a historical set of norms or expectations to guide their digital choices, they do not always understand the consequences of their online actions and the trade-offs implicit in getting services for “free,” or what happens “behind the scenes” with their data.

The Web ecosystem has also created new and unparalleled opportunities online that produce unimaginable amounts of data and possibility for new products, services and relationships. Google’s Eric Schmidt observed in 2010 that “we create as much information in two days now as we did from the dawn of man through 2003.”² At the same time, there are no clear parameters or boundaries other than those that are codified by legislative and regulatory bodies or by industry practices. So acceptable collection and use norms are still evolving. Notwithstanding the current entropy in the market, this is a natural form of evolution which should temper both expectations and desires to intervene prematurely.

Commercial models are also evolving on top of this ever-changing technological landscape. We often cannot predict what models the current technology will enable. Consider the models based on the cookie. Lou Montulli and John Giannandria, colleagues of mine at Netscape, developed the cookie to solve a very real technical problem - to store state and invent the notion of a “session” over several HTTP requests. It is safe to say they would have never imagined a whole industry built upon a technical construct like the cookie and the data practices it enables.

During this same period, the digital advertising business has grown, reaching a record-breaking \$36.6 billion in 2012³ – so there is real money at stake. This means any change will be met with resistance by inherent incumbent interests. We have seen these arguments in

² Techonomy Conference, Lake Tahoe, California, August 4, 2010; <http://techonomy.com/>

³ *IAB Internet Advertising Revenue Report*, Interactive Advertising Bureau and PricewaterhouseCoopers, April 2013; http://www.iab.net/media/file/IAB_Internet_Advertising_Revenue_Report_FY_2012.pdf

this debate expressed as change is bad for competition or will decrease revenue. We should question whether protecting business models that lack transparency is “protecting or promoting competition” – particularly models that use data in ways that people do not understand or expect. Historically, there have been many profitable models that have challenged our norms, but the fact that they were profitable neither sanctioned them nor justified their preservation. It is worth pointing out that the widespread adoption of pop-up blocking by browsers, which Mozilla led many years ago and was initially labeled "bad for advertising," has clearly done nothing to hinder the success or innovation of online marketers or the operation of websites.

At the same time, a new paradigm has developed that pits “what can be done” against “what should be done.” We face this challenge often at Mozilla. Although we employ privacy by design and use transparency, choice, and control as guiding principles, the application is not always easy. For example we internally debate whether the functionality and configuration for a new product or service provides enough informed choice, the right choices, which defaults make sense, and whether user experience is compromised. No doubt this body is no stranger to extended debate given the vast constituencies you represent. The point here is that the application of our values is still under development and that application changes based on context while the values do not. We all remain in search of that delicate balance that allows for aggressive innovation and competition, but that also respects user intent, expectations, and ultimately creates trust. This is part of the backdrop that should inform what we expect from business solutions, technical standards and self-regulatory programs.

Developments Since June 2012

It was nearly a year ago when Alex Fowler, my colleague and Chief Privacy Officer of Mozilla, sat at this table to report on the status of DNT. Since that time, the industry has not moved forward quickly enough, consumers have shown increased concern about online tracking and privacy, more users are sending DNT signals, and yet the efficacy of the Ad Choice program remains questionable.

Consumer concerns over online tracking persist and continue to grow. A study published by the prominent industry analyst group Ovum, found that 68 percent of the Internet users across 11 countries would select Do Not Track if easily available to them. The group also found

that only 14 percent of respondents believe Internet companies are honest about their use of consumers' personal data.⁴ Similarly, research at UC Berkeley's Center for Law and Technology found that over 60 percent of users want DNT to prevent the collection of information about their online activities.⁵

Our own data continues to show strong user support for and steady adoption of DNT. We see this in actual adoption and consumer sentiment. DNT adoption in the US Firefox user base is approximately 17 percent. Globally, the average is 11 percent. Statewide Firefox DNT adoption rates are outlined in the table below.⁶

⁴ *Ovum predicts turbulence for the Internet economy, as more than two-thirds of consumers say 'no' to Internet tracking*, February 6, 2013;
http://ovum.com/press_releases/ovum-predicts-turbulence-for-the-internet-economy-as-more-than-two-thirds-of-consumers-say-no-to-internet-tracking/

⁵ *Privacy and Modern Advertising: Most US Internet Users Want "Do Not Track" to Stop Collection of Data About their Online Activities*, Chris Jay Hoofnagle, Jennifer Urban and Su Li, Oct. 8, 2012;
<http://www.law.berkeley.edu/privacysurvey.htm>

⁶ Anyone with a website and access to a web server can start counting how many users are sending DNT:1, which is how the signal is expressed via HTTP requests.

Table: User Adoption Averages in the U.S. for Do Not Track in Firefox



Source: Mozilla, April 2013

Consumer concerns over online tracking and privacy are real. Surveys of our user base consistently show concern about online privacy. Only 13 percent of respondents believe their privacy is being respected online. More importantly, over 60 percent of those polled want DNT to cover both collection and use by companies online in either a first- or third-party context. At the same time, the prevalence of non-transparent online tracking continues to grow year over year. A recent Evidon study showed a 53 percent increase in trackers from the prior year.⁷ Even more alarming, only 45 percent of the tracking tags identified by Evidon were placed there by the publisher of the site.

The efficacy of the Digital Advertising Alliance (DAA) Ad Choices program, which is still

⁷ Evidon, a firm that administers the ad industries' Ad Choices program for more than \$2 billion of display media and e-commerce transactions annually, measured sites across the Internet and found 987 web-tracking tags from ad servers, analytics companies, audience-segmenting firms, social networks and sharing tools, which represented a 53% increase from the 645 unique trackers found in previous studies.

only in beta after several years of development, remains low. Many stakeholders view this as an indicator of the inadequacy of the industry-led, self-regulatory program. Last year, according to one study, the number of users who viewed the icon was low: 0.0035% of users clicked, and only 1 in 20 of those actually opted out.⁸ Last month, the industry reported that more than a trillion ads per month include the Ad Choices icon – a blue triangular icon that when clicked, takes consumers to a page where they can learn about the ad, and opt out of receiving it. Only five million users have accessed the choice tool, and 1 million of those have opted out of all interest-based advertising.⁹ The claims that this low opt-out rate prove that consumers are “OK” with the tracking and collection practices associated with cookies clearly do not square with the overwhelming research that consistently finds that the majority of consumers are concerned with being tracked across the Web. They also do not square with the 11 percent of Firefox users who have turned on Do Not Track.¹⁰

Currently, DNT signals are largely ignored by ad networks. We estimate that approximately 45 million Firefox users send more than 135 million DNT signals everyday – more than four trillion every month – that mostly go unanswered. As discussed at the last DNT hearing, Microsoft adopted DNT and made it a default setting in their latest versions of Internet Explorer (IE). The position from the ad industry’s trade groups, paraphrasing of course, is that their members can ignore DNT signals sent by users of IE.¹¹ This was followed by a similar statement by Yahoo! that it intended to disregard DNT signals coming from IE users.¹² The rationale: DNT signals from IE do not represent a real user choice because it is on by default. So, in the interim, both Firefox users sending DNT signals every day and those IE users for whom the DNT signal represents their real choice are ignored. It does not have to be this way. The industry could incrementally respond in parallel while the standard is being finalized, and could always prompt an IE user to confirm his/her choice.

⁸ Leon, P. et al. *What Do Online Behavioral Advertising Disclosures Communicate to Users?* April 13, 2012; http://www.cylab.cmu.edu/files/pdfs/tech_reports/CMUCyLab12008.pdf

⁹ “Opinion: Harnessing the power of digital advertising,” Lou Mastria, *Politico*, March 10, 2013; <http://www.politico.com/story/2013/03/harnessing-the-power-of-digital-advertising-88668.html#ixzz2QrUsIE1S>

¹⁰ A common practice would be to gather user data to test the impact of the program. The results of A/B testing and user group studies on the Ad Choices user experience may be helpful to this Committee as it seeks to understand the effectiveness of the current self-regulatory effort.

¹¹ *DAA Statement on DNT Browser Settings*, October 09, 2012; <http://www.businesswire.com/news/home/20121009005980/en/DAA-Statement-DNT-Browser-Settings>

¹² *In Support of a Personalized User Experience*, October 26th, 2012; <http://www.ypolicyblog.com/policyblog/2012/10/26/dnt/>

What to Expect from a Standards Process

Over the past year, we have been troubled by a trend to characterize the ongoing standardization work on DNT by the W3C as a part of industry self-regulation. First, the W3C is neither *the* industry, nor the proper vehicle on its own to establish a self-regulatory program. It is a technical standards group. The W3C's Tracking Protection Working Group¹³ is not an extension of the DAA's Ad Choices program. The W3C is a body that codifies technical standards for issues that are either well understood and agreed upon in advance, or problematic for a set of stakeholders who are motivated to find a common solution. The W3C, or any technical standards group for that matter, is not intended to develop mechanisms that replace regulation and enforcement. Most standards groups are intended to be voluntary with a focus on improving issues like interoperability, efficiency, performance and transparency. This drives competition toward quality of implementation (efficiency/performance) and away from fragmentation.

The group is currently in the drafting stage which is now co-chaired by Professor Peter Swire who testified at last year's DNT hearing. This will be followed by a period of testing at Internet scale. In fact, our discussions with members of the group reveal that we may be very close to signing off on the Tracking Preference Expression specification, which covers the client-server architecture for DNT.¹⁴ Stakeholders that are standing by, waiting for the W3C to "complete" its work are misguided. Technical standards are adopted only after drafting, testing, refining and finalizing. But nothing prohibits *de facto* adoption during this process. Thus, arguments that shift blame exclusively to the W3C are dubious. At the same time, regulatory groups in the US and abroad should not hold back enforcement of its local laws in deference to the work happening within the W3C.

Ultimately, the question here is not about the standards process, but about responding to the tens of millions of consumers every day who are sending a DNT signal expressing a concern about their privacy and online tracking. There are many examples of how other markets react to guidance from their consumers. For example, car owners expressed preferences about the

¹³ See <http://www.w3.org/2011/tracking-protection/>

¹⁴ See <http://www.w3.org/2011/tracking-protection/drafts/tracking-dnt.html>

need for better gas mileage from their cars. They might not have immediately perceived that this could have an impact on the oil industry, influenced manufacturing, or that the solution was electric or hybrid cars, but the market did not ignore the signals. Rather, the market provided basic education and responded to the demand. Here, in the DNT context users are saying, “do not track me.” They may not know *exactly* what it means in every detail or nuance, but they understand enough without the extensive explanation called for by some.

The DNT standard does not have to be final at the W3C before implementation begins. We would like to see more of the industry move forward and begin implementing DNT now. This is how Web standards are established – they must be iterative and user/developer-tested. It is how HTML5 was developed – some set of players adopt an approach that looks promising, they work out the kinks through use, and over time codify it. This practice is borne from the experience that if you wait to work out the perfect specification, you’ll never get anything done.

We are encouraged by some publishers, advertisers and other companies in the ecosystem who have put DNT into effect for their businesses. We applaud leading companies like Twitter, the Associated Press and Jumtap who have voluntarily implemented DNT and are trying to respond to the expression of user intent – all without waiting for a W3C pronouncement.¹⁵ We are also aware of many more companies across the advertising and publishing industries quietly supporting users who have enabled DNT, including DAA member companies. Apparently, it takes neither a law nor a finalized W3C specification to do the right thing.

* * *

What is at stake is not money, but trust. To date the debate has focused on the threat to those revenue models that are based on tracking. But, the loss of user trust is far more dangerous than potential lost revenues. Trust is the true currency that needs to be protected.

The lack of trust stems from users not understanding the value proposition of online tracking. Former IAB Chair, Jim Spanfeller, recently wrote in an op-ed, “[B]y doing unto others what we want done to us, we will enter into a more trusted ecosystem. Business, information exchange, spontaneous discovery and overall satisfaction will thrive in ways that have become increasingly difficult due to black hat activities perpetrated partly in the name of advertising

¹⁵ See <http://www.donottrack.us/implementations>

efficiencies.”¹⁶ This trust gives rise to increased participation and will foster new jobs. Similarly, Pam Horan, the Online Publishers Association’s President, wrote in an op-ed, “Ultimately this is about fostering a healthy environment where consumers feel safe online. It is hard to dispute that without this baseline acknowledgement of consumers' expectations, our entire ecosystem will be compromised.”¹⁷

This is where industry can really make a difference. If users do not understand what happens to their data, how it is used, or the trade-offs, they will inevitably seek more protective blocking options. Conversely, we may see the adoption of more invasive and even less transparent tracking methods. The impact is that efforts to protect the status quo further erode people’s trust in the ecosystem, thereby compromising future expansion of commerce and innovative growth of this ecosystem. Personalized content is good, however, the collective challenge we face is how to deliver that content transparently.

The future of a viable, innovative Web that continues to contribute jobs and drive social, educational and economic activity depends on consumer trust. To develop this trust, transparency, choice and control are essential. Real transparency of business and data sharing practices combined with meaningful user choice will engender the confidence users expect. With this as a baseline, I suspect survey results would be dramatically different and users may very well even opt-in to forms of tracking and data collection they understand and find valuable.

We saw a similar reaction in the early years of online commerce. People were afraid to use credit cards on the Internet until encryption was readily used and then users began to trust the practices that supported online electronic purchases. We believe it is in the industry’s own best interest to aggressively seek long-term, privacy-preserving and economically sound approaches to behavioral targeting and personalization that foster trust and greater participation and sharing of data. As the OPA’s Pam Horan observed, “Although change can be hard for any industry, it can also be a catalyst for better content services and privacy protections in the

¹⁶ "Firefox Cookie-Block Is The First Step Toward A Better Tomorrow," Jim Spanfeller, *AdExchanger*, March 18th, 2013;

<http://www.adexchanger.com/the-sell-sider/firefox-cookie-block-is-the-first-step-toward-a-better-tomorrow/>

¹⁷ "Relax, Mozilla's Move Will Not Break the Ad-Supported Internet," Pam Horan, *Ad Age*, April 02, 2013; <http://adage.com/article/guest-columnists/mozilla-move-break-ad-supported-internet/240663/>

Internet ecosystem...”¹⁸

We want to help the advertising and publishing industries create a paradigm of trust that both respects users and supports commerce. We recognize that the current opt-out system is in many ways a significant achievement – it is no small task to achieve comprehensive industry behavioral change. We also recognize that legislating technology is challenging and risky – but we can articulate clear values. Given the low participation rates of the current voluntary opt-out system, the increasing concern of consumers, and the increasing volume of DNT signals that remain unanswered from users across the United States, it is clear that more is required - including continued congressional oversight. As we and industry thought leaders have observed, there is a better way to gain the user’s trust – through choice, control and transparency, and meaningful engagement with the user on the benefits and trade-offs of the current tracking practices.

Thank you, again, Senator Rockefeller, Ranking Member Thune, and members of the Committee for the opportunity to join you today.

¹⁸ Ibid.