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CookieConsumer: Tracking online behavioural advertising in Australia

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A B S T R A C T

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Online behavioural advertising (OBA) comes to consumers at a price. Often unknowingly, people deliver up commercially-valuable personal information as a condition of online user experience, functionality and access. Websites are increasingly tracking user behaviours for commercial purposes and social media derives its income largely from data collection and advertising targeted to the personal disclosures and behavioural attributes which are its data-production mainstay. In this context, consumers face a plethora of information collection practices, all designed to generate data analytics including inferential and predictive profiling to create a 'digital identity' for OBA purposes. In this subterranean exchange, consumers are economically redefined as data subjects and advertising targets; a reframing which is perhaps why the OBA industry faces a crisis in consumer concern, both as to privacy and trust.

This paper proposes that the regulatory control of OBA in Australia is in disarray. Consumer ignorance of online privacy management and OBA practices is demonstrable. Industry transparency, disclosure, consent processes and compliance practices are questionable. Regulator interest is minimal, industry self-regulation is weak and consumer technical ability and personal responsibility is a last fragile line of defence. Data breaches are ubiquitous in a crowded and poorly-audited supply chain, and entail significant adverse consumer consequences. Yet despite these serious concerns, Australian regulators are failing to respond to OBA issues, either through mandating greater industry disclosure or through regulatory action. The author seeks to expose these weaknesses in calling for consumer and privacy regulators to take more meaningful action to better protect consumers' interests online.

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Reader Note: This paper is a 'lawyer's look' at online behavioural advertising from a consumer perspective; it does not purport to offer a technical, industry-based or practical analysis of online advertising and the data analytics industries or any inherent privacy and consumer law issues. These technical issues are better dealt with by experts in these fields and the author does not pretend to have any computing expertise beyond that of an average Australian consumer. As such, technical or industry-related errors are intended to be avoided, but may be inevitable.

Acronyms pepper the advertising industry; please see **Appendix** for assistance in this regard. Please note that the Bibliography is available online as "supplementary material" on ScienceDirect.

Consistent with leading journalistic style guides and modern practice, the terms 'data' and 'social media' are generally used in the singular (e.g. data is. . .), rather than the arguably more correct Latin plural context (i.e. data are).

The phrase 'online behavioural advertising' is referred to in long form or as 'OBA' throughout for syntax reasons. Note also that 'consumer' is used in a colloquial sense to mean any Internet user, unless the context indicates otherwise, but does have a legal definition under the Australian Consumer Law which is cited in part 4.

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1. Introduction

*Online behavioural advertising is safe and transparent. Advertisers don't know who you are. . .*¹

*. . . underscoring all the debates about online privacy, behavioural targeting and internet advertising is a hard, cold reality: content costs money. . .*²

*You can make money without being evil. . .*³

Big data, digital advertising⁴ and consumer trust⁵ are about to collide. And online behavioural advertising – the use of tracking technologies, profiling and interest-based analytics to target online advertisements to consumers – may well be the point of intersect. In today's "quicksilver technological environment"⁶, the online horizon seems ever-expanding and of limitless potential. Digital data is the new "currency"⁷ of the digital economy,⁸ and online advertising holds the keys to both expanding data collection and monetising its targeted use in

advertising.⁹ OBA is hailed as enabling a "continuing dialogue"¹⁰; it is a "social utility"¹¹ which in its personalisation, is "respectful to. . . cultural norms"¹² while creating a connected universe where ". . . ads work around people. . ."¹³ Even regulators declare "no interest"¹⁴ in jeopardising the OBA business model, asserting that it benefits consumers with on-time purchase opportunities and supports diverse unpaid¹⁵ online content and services.¹⁶ But for others, OBA is "fraught with ethical and reputational risk"¹⁷ and constantly walks a fine line to avoid illegal or unethical privacy intrusions and consumer law breach. Advertisers fear targeted consumers being "creeped out"¹⁸ given online tracking is akin to being shadowed all day every day by someone you don't know, who notes down your every move and then markets products of inferred interest back at you. As one OBA advertiser admits, for that reason, ". . . a lot of what we do is behind the scenes. . ."¹⁹

While consumers have flocked to the Internet and social media, and clearly enjoy fast and sophisticated access to almost infinite information and social networking environments, OBA comes to them with a price. Often unknowingly,²⁰ consumers

¹ Australian Digital Advertising Alliance, 'Five Top Tips' (undated, accessed 2 Apr 2015) <<http://www.youonlinechoices.com.au/five-top-tips>>.

² Louise Story, 'Bits' *The New York Times* (5 Nov 2007) cited in Joseph Turow, Jennifer King and Chris Jay Hoofnagle et al., 'Americans Reject Tailored Advertising and Three Activities that Enable It' (September 29, 2009, accessed 10 Apr 2015) [8] <<http://ssrn.com/abstract=1478214>> or <<http://dx.doi.org/10.2139/ssrn.1478214>>.

³ Google, 'Ten things we know to be true' (undated, accessed 20 Apr 2015) <<http://www.google.com/about/company/philosophy/>>.

⁴ The term 'marcomm' refers to marketing and advertising communication in the digital space. This reflects Australian Association of National Advertisers (AANA) guideline use: AANA, 'Best Practice Guideline: Responsible Advertising in the Digital Space' (26 Nov 2013, accessed 5 Dec 2014). <<http://aana.com.au/content/uploads/2014/05/AANA-Best-Practice-Guideline-Responsible-Marketing-Communications-in-the-Digital-Space.pdf>>.

⁵ John Still, "Blake Cahill of Philips: the Marketer needs to be Digital. It's part of the DNA" *The Guardian* (21 Jan 2015, accessed 27 Mar 2015) <<http://www.theguardian.com/media/2015/jan/21/blake-cahill-philips-digital-marketing>>.

⁶ Urs Gasser, 'Cloud Innovation and the Law: Issues, Approaches and Interplay' *Harvard University – Berkman Center for Internet and Society & University of St Gallen* (17 Mar 2014, accessed 20 June 2014) [2] Berkman Center Research Publication No. 2014-7 <<http://cyber.law.harvard.edu/research/cloudcomputing>>.

⁷ Maglena Kuneva, European Consumer Commissioner (March 2009) cited in ACMA, 'The cloud: services, computing and digital data – Emerging Issues in media and Communications' *Occasional Paper 3* (June 2013, accessed 11 July 2014) [1] <<http://www.acma.gov.au/~media/Regulatory%20Frameworks/pdf/The%20cloud%20services%20computing%20and%20digital%20data%20Emerging%20Issues%20in%20media%20and%20communications.pdf>>.

⁸ The term 'digital economy' means "the network of economic and social activity that is enabled by information and communication technologies, such as the internet, mobile and sensor networks." Department of Broadband, Communications & the Digital Economy, Australia's Digital Economy: *Future Directions* (July 2009, accessed 21 Feb 2014) <http://www.dbcde.gov.au/digital_economy/what_is_the_digital_economy/australias_digital_economy_future_directions/final_report/australias_digital_economy#digitaleconomy>.

⁹ Natasha Singer, "Wrangling Over 'Do Not Track'" *The New York Times* (15 July 2013, accessed 25 Mar 2015) <http://bits.blogs.nytimes.com/2013/07/15/wrangling-over-do-not-track/?_r=0>.

¹⁰ Brad Jakeman, President of PepsiCo Global Beverages Group, cited in Sydney Ember & Emily Steel, 'The Pepsi Challenge is Returning, but this Time for the Social Media Generation' *The New York Times* (11 March 2015, accessed 15 Mar 2015) <<http://www.nytimes.com/2015/03/11/business/media/the-pepsi-challenge-is-returning-but-this-time-for-the-social-media-generation.html>>.

¹¹ David Sze, a venture capitalist at Greylock Partners and a Nextdoor board member, cited in Mike Isaac, 'Nextdoor Social Network Digs Deep Into Neighborhoods' *The New York Times* (3 Mar 2015, accessed 15 Mar 2015) <<http://www.nytimes.com/2015/03/04/technology/nextdoor-a-start-up-social-network-digs-deep-into-neighborhoods.html>>.

¹² Carla Hassan, PepsiCo's chief marketing officer for the Middle East and Africa region: Above n 10.

¹³ AAMIA, "11th Annual The Future of Digital Advertising online flyer" 28 April 2015, accessed 30 Mar 2015 <<https://aimia.worldsecuresystems.com/BookingRetrieve.aspx?ID=312855>>.

¹⁴ Jessica L. Rich, 'Beyond Cookies: Privacy Lessons for Online Advertising' *AdExchanger Industry Preview* 2015 (21 January 2015, accessed 17 Mar 2015) <https://www.ftc.gov/system/files/documents/public_statements/620061/150121beyondcookies.pdf>.

¹⁵ See the discussion as to 'free' in Part 4.3 below.

¹⁶ At the same time, the FTC has prosecuted a range of OBA offenders and engaged in significant online privacy and related research: Above n 14.

¹⁷ Twitter data strategy chief Chris Moody cited in Garside, Juliette, 'Twitter puts trillions of tweets up for data miners' *The Guardian* (19 Mar 2015, accessed 22 Mar 2015) <<http://www.theguardian.com/technology/2015/mar/18/twitter-puts-trillions-tweets-for-sale-data-miners>>.

¹⁸ Romney campaign official cited in Charles Duhig, 'Campaigns mine personal lives to get out vote' *The New York Times* (14 Oct 2012, accessed 15 Mar 2014) [1] <http://www.nytimes.com/2012/10/14/us/politics/campaigns-mine-personal-lives-to-get-out-vote.html?_r=0>.

¹⁹ *Ibid*.

²⁰ That delivery may be voluntary – through website registration, user surveys, competitions and the like – or publicly disclosed through self-generated content such as LinkedIn profiles, tweets, Facebook posts or 'likes', but may also occur through potentially covert tracking technologies or analysis.

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