STATEMENT OF JOAN GILLMAN

before the

Subcommittee on Commerce, Trade, and Consumer Protection

of the

Committee on Energy and Commerce

on

"Do Not Track" Legislation: Is Now the Right Time?

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Thank you, Chairman Rush and Ranking Member Whitfield. My name is Joan Gillman. I am Executive Vice President and President, Media Sales, at Time Warner Cable. In that capacity I lead Time Warner Cable's advertising sales initiatives. I appreciate the opportunity to appear before the Subcommittee today to discuss consumer privacy, including the potential for "do-not-track" legislation.

Do-not-track proposals cannot be considered in a vacuum. Rather, the advisability of do-not-track must be part of a larger conversation about the appropriate role for government in ensuring consumer privacy as interactive technologies continue to evolve and mature. One part of this conversation is recognition of the important role that advertising has played and will continue to play in providing essential financial support for online and other media content that in many instances simply would not be available without such support. Any measures considered must also take account of the risk that new regulations imposed on online businesses could inhibit innovation and growth of the Internet economy, and thwart the development of new technologies and new services.

Time Warner Cable appreciates this Subcommittee's diligent and balanced efforts to grapple with the complex and still-evolving interactive advertising marketplace and to assess its impact on consumer privacy. Protecting privacy is not only important as a matter of public policy, it is also central to the success of our business.

The bedrock foundation of our business is our relationship with our subscribers. We operate in a highly competitive marketplace, and our ability to succeed depends upon winning and retaining the trust of our customers. Our customers rely upon us to serve as a trusted medium for accessing and delivering content and services that reflect consumer tastes and

preferences. It is our job to preserve and strengthen that trust, while continuing to innovate and introduce the benefits of new network technologies and capabilities.

Presently, Time Warner Cable does not engage in targeted online advertising, as an ISP, based on our subscribers' web surfing activities or target ads based on consumers' search queries, web surfing, or related aspects of their usage.[1/] As we examine new advertising business models, Time Warner Cable is committed to ensuring the protection of our customers' privacy.

While industry must proceed with care as it explores new advertising initiatives, so, too, should the debate about privacy policy recognize the benefits of these initiatives. In particular, advertising has emerged as a key driver of the incredible array of online content, services and applications available to users at little or no cost. Because of advertising revenue, these websites and Internet content are available either without a separate subscription fee or at a subsidized price. Websites without offline outlets for their content are often wholly dependent on a robust advertising revenue stream in order to continue to offer their content without charge. Likewise, niche websites with small, albeit loyal, followings also benefit from the desire and ability of companies to tailor ads for specialized demographics and online user segments that may be particularly interested in their products.

The more effective the advertising, the greater the advertising revenues available to these websites. Tailoring ads to viewers is one way to make the advertising more effective – and more valuable to both the advertiser and the consumer. Such tailored advertising is by no means novel or unique to the online world. Advertisers using traditional media and marketers undertaking offline promotional campaigns have employed targeting techniques – based upon geography, demographics, interests and preferences, and purchasing patterns – for decades. In the online

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1/ We do rely on cookies and IP addresses to avoid repeating a single display ad too frequently and to prevent consumers from seeing out-of-market ads.

world, targeted advertising both responds to, and helps to preserve and promote, the rich diversity of the Internet. The FCC's National Broadband Plan expressly acknowledged the link between online advertising and the Internet features and capabilities that are most popular with consumers:

> Whole new categories of Internet applications and services, including search, social networks, blogs, and user-generated content sites, have emerged and continue to operate in part because of the potential value of targeted online advertising.[2/]

The appropriate framework for policy discussions, therefore, is not how do we impose the most stringent privacy regime, but rather how do we establish the policy that encourages innovation while protecting privacy. In the first instance, policymakers should rely on industry best practices to achieve this result. Consumers have a keen and important interest in safeguarding their privacy, but they also want information about products and services and they want access to content at a reasonable price that is possible only with advertiser support. Privacy policy should reflect both of these objectives. As FTC Chairman Jon Leibowitz has observed, targeted online ads are typically "good for consumers, who don't have to waste their time slogging through pitches for products they would never buy; good for advertisers, who efficiently reach their customers; and good for the Internet, where online advertising helps support the free content everyone enjoys and expects."[3/]

It is in this context that policymakers should review the appropriateness of a do-not-track requirement. Do-not-track remains largely a concept – "do not call" was successful, so let's extend that model to the collection of data about online activities. Depending on how do-not-

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2/ *Connecting America: The National Broadband Plan*, Federal Communications Commission, at 53.

3/ "Leibowitz: FTC Not Interested in Regulating Behavioral Ads," *Multichannel News*, May 12, 2010.

track is implemented, however, it could be a blunt instrument that upsets consumer expectations and negatively affects advertiser-supported content businesses (such as newspapers, magazines, and video – TV and movies) – even as these industries try to figure out how to create viable online business models. Do-not-track could hinder job creation within the advertising industry and by websites that rely on advertising revenues. It may also deter the provision of free online advertiser-supported content and inhibit innovation and the development of new services.

Do-not-track also raises technical and legal questions. Who would enable do-not-track – ISPs, browser makers, web servers, or some combination? What software or other technical changes would be required? Would a do-not-track election apply only with respect to identified websites? Another potential technical challenge is the fact that, unlike telephone numbers, IP addresses are dynamically assigned to users. While this may change with the assignment of IP addresses under IPv6, it will not change overnight. That means there is no stable one-to-one relationship between an IP address and a user's device, potentially undermining the permanence of a do-not-track election. Would websites be permitted to limit the content available to consumers who elect do-not-track? On the legal side, who would enforce a do-not-track rule? The Telephone Consumer Protection Act (the do not call law) includes both FCC and FTC jurisdiction. Would both agencies have a role in implementing do-not-track?

With do-not-track still at the conceptual stage, the next steps should be industry-led efforts to refine and test the concept rather than legislation or regulation. In contrast to the codification of a do-not-track requirement, which could quickly become moot in light of developing technologies, self-regulatory programs can quickly evolve to address the dynamic online environment. Do-not-track is a natural addition to the ongoing dialog with other industry and public stakeholders on privacy issues.

While it is premature for Congress to move forward with do-not-track legislation without further study, *any* do-not-track policy, whether adopted through industry best practice or government directive, should incorporate two principles. First, as I have just noted, the do-not-track mechanism should be focused on the kind of personally identifiable information that raises privacy concerns. Second – and this is a point the cable industry has made in connection with the broader privacy policy proposal embodied in Chairman Rush's "BEST PRACTICES Act," H.R. 5777 – any do-not-track requirement must be applied on a competitively neutral basis to so-called "edge" entities and network providers.

It makes no difference to an Internet user whether information is being collected from clickstream data or collected by an ad network, and there is no justification for imposing do-not-track on one participant in the ecosystem but not others. To the contrary, allowing some businesses to track individuals while effectively precluding others from doing so will lead to consumer confusion. An online user's privacy rights should not vary based upon the identity of the entity collecting data, analyzing the information, or delivering the advertisement. Consumers would be better served by a single standard applied uniformly based on the data being collected and how it will be used. Regulation that disfavors one technology or business model would also deter entry, thwart innovation, and limit competition and choice in the sale of online advertising. Fewer choices for online ad sales could exacerbate the already significant financial pressure on advertiser-supported media. It would be particularly self-defeating to exclude edge-based providers from any do-not-track requirement, given their currently overwhelming share of the online advertising marketplace.[4/]

[4/] By one estimate, Google and DoubleClick (which is owned by Google) account for "more than 65%" of the market share for ad servers. The next closest competitor is AOL, which serves approximately 7% of all ads. "Yahoo! Ad Server share Drops By Half; Google DoubleClick Dominate Market," Attributor, May 7, 2010, *at* http://attributor.com/blog/yahoo-ad-server-share-drops-by-half-

By contrast, a common set of rules will create relative certainty for consumers and allow all businesses seeking to offer the benefits of targeted advertising to compete and innovate on a level playing field. It will also preclude any company from attempting to compete by leveraging preferential access to personal information in a clandestine or inappropriate fashion.

Rather than starting with do-not-track, we would urge this Subcommittee to continue its work, which it began with H.R. 5777, on identifying a set of fair information practices for targeted advertising. We continue to believe that those practices are most appropriately implemented through self-regulation and the adoption of industry best practices. As I noted earlier, targeted advertising offers substantial benefits to consumers. Advertising remains a critical way to fund content and services online, often for free. Advertising that is more relevant is likely to be of more practical value to the consumer and essential to ensure the continued explosion of new content and services. And more entry into the advertising marketplace will bring more innovation and choice, as well as more content and services, to consumers.

Fair information practices should be imposed in the first instance through industry self-regulation, which is inherently more able to adapt to the dynamic online marketplace than regulation, but in any event should apply to all providers of online targeted advertising in a competitively neutral manner. In fact, the most egregious privacy breaches of the past year have originated not from ISPs, but rather from edge providers. There is no basis in fact for any presumption that network-based data collection poses a more serious threat to privacy than collection by edge providers.

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google-doubleclick-dominate-market-2/. A recent survey found that the "Google Ad Network led the October Ad Focus ranking with a reach of 93.4 percent of Americans online, followed by Yahoo! Network Plus with an 86.3-percent reach and AOL Advertising with 86.2 percent." Inside the Ratings (U.S. Edition) Oct. 2010, comScore Media Metrix (audience measurement services), *at* http://www.comscore.com/Press_Events/Press_Releases/2010/11/comScore_Media_Metrix_Ranks_Top_50_U.S._Web_Properties_for_October_2010.

Thank you again for the opportunity to appear before you today. As you continue to develop privacy policy, we respectfully urge you to consider issues concerning online privacy in their full context – framing requirements in a manner that permits the continued growth and innovation in advertiser-supported services and treating all participants in the ecosystem on a competitively neutral basis. We at Time Warner Cable look forward to working with you in this effort.

I'd be happy to answer any questions you have.