

STATEMENT OF COMMISSIONER THOMAS B. LEARY CONCURRING IN PART AND
DISSENTING IN PART

July 27, 2000

Online Profiling: A Report to Congress (Part 2): Recommendations

I agree with the Report's recommendations relating to Online Profiling insofar as they endorse the NAI self-regulatory principles, advocate safe-harbor protections for these principles and others of a similar kind, and recommend some "backstop legislation." However, for the reasons expressed in my separate statement relating to online privacy generally,⁽³⁴⁾ I believe that legislation should focus on adequate "Notice" and not mandate across-the-board standards for other elements of the so-called "fair information practices."

There is a need for clear and concise disclosure of individual privacy policies in both the online and offline worlds, and this need is particularly compelling in the area of online profiling.⁽³⁵⁾ The technological capabilities for profiling are unfamiliar to many people and the practice may be perceived as particularly intrusive. However, if people are adequately informed about profiling, as well as other practices that raise privacy concerns, the marketplace should provide the appropriate mix of substantive privacy protections.

An appropriate marketplace response obviously depends on communication of consumer choices, which might initially suggest that some legislative attention to the element of "Choice" is also appropriate. However, I have been reluctant to endorse this legislative option because, up to now, there has not been sufficient attention to what "Choice" means.

If mandated "Choice" simply refers to some mechanism whereby a consumer can either grant or refuse permission for online profiling, I would have no problem with it. A consumer should have the ability to exit the site before the fact of the visit becomes part of a profile. If, however, "Choice" means that a consumer can exercise this choice (either by opting out or failing to opt in) and still obtain the same benefits as a consumer less solicitous of privacy, it could be unfair. Consumers who object should not have a legally guaranteed right to "free-ride" on possible value and corresponding benefits made possible by the cooperation of those who do not object. Put another way, it should not be illegal to reward consumers who are willing to be profiled. The question of appropriate rewards or penalties attendant upon the exercise of various options can be extremely complicated.

Because there does not seem to be adequate discussion of this issue in the Report's recommendations or in any of the numerous privacy bills thus far introduced, - - and because the "free-riding" issue may or may not be significant, depending on the individual business - - I am reluctant to endorse a legislative mandate for "Choice," at this time. Similar concerns about unaddressed complexities apply to proposals for mandated "Access" and "Security." It is not appropriate to defer all the tough issues for future rule-making.

Notwithstanding these reservations, I have voted for this Report. Unlike the earlier, more general Commission Report on Privacy Online, this Report contains more points with which I concur than points from which I dissent. This Report focuses on a particularly serious issue that applies

uniquely to the online world and it gives appropriate recognition to a comprehensive self-regulatory scheme. In these circumstances, the particular legislative proposals that I consider overbroad have a relatively limited impact. I am optimistic that further dialogue will continue to narrow our remaining points of disagreement.

Appendix: NAI Principles

34. Federal Trade Commission, "Privacy Online: Fair Information Practices in the Electronic Marketplace: A Report to Congress" (Statement of Commissioner Thomas B. Leary, Concurring in Part and Dissenting in Part) (May 2000).

35. My previous Statement emphasized that the practice was "uniquely invasive" and that it is necessary to "ensure that consumers are adequately informed about these Internet capabilities." *Id.* at 8.