Privacy Issues Associated with Tracking of Consumers’ Online Behavior
Current Federal Standards

- **FTC Act**
  - Deception Policy Statement
  - Unfairness Policy Statement
  - Commission’s Privacy Agenda:
    - Preventing misuse of consumers’ personal information, especially their sensitive personal information
    - Prevent deception that results in harm to consumers

- **FTC Actions**
  - **Geocities** line of cases
  - **Lilly** line of cases
  - The unintended consequence: “Privacy Paradox” – No incentive to have a privacy policy at all, but if you do, the incentive is to make it as broad as possible to avoid perceived misrepresentations.
Should Privacy be Treated as a Consumer Protection Issue?

- Clear and Conspicuous standard
- FTC “Dot Com Disclosures” document
  - Very little enforcement
- FTC enforcement in privacy cases
- FTC regulation of online advertising industry
- The rub: Differing opinions on the utility of the EULA as a disclosure document in consumer transactions.
Congress, Recent FTC Activity: Yes

- HR 29, S 687 – Congress looking to raise the notice and consent standard for software that tracks consumers and uses the information for advertising purposes.
  - How? Layered notice works well in this context.
- Recent FTC speeches – Discuss adequacy of disclosures
- Recent FTC enforcement activity – D-Squared, Seismic Entertainment, Max Theater, Inc. make clear that the FTC is on the beat in the context of spyware.
- Implications could be much broader, and that’s why Congressional activity is getting so much attention.
“Spyware” and “Adware”

- Claria’s definitions --
  - Spyware: Without notice and consent
    - Collects behavioral information
    - Uses it for an unrelated purpose (malicious, commercial)
  - Adware: With notice, consent, control
    - Advertising-supported software
The Future of Ad-Supported Software

- **Keys –**
  - Market Demands:
    - Enhanced value of ad inventory
    - Advertisers looking for more and more effective campaigns
    - More certainty in the market on regulatory framework
  - Consumer Demands: Value and control
    - Accept as a good value exchange – high benefit, low burden
    - “Bipolar consumer control”
    - Consistent with expectations of a positive online experience
Questions?