

## **ESOMAR AND CASRO SUBMISSION TO THE W3C TRACKING PROTECTION WORKING GROUP**

### **MARKET RESEARCH TECHNIQUES THAT USE COOKIES AND TRACKING TECHNOLOGY**

24 October 2011

ESOMAR and CASRO submitted a position paper and were represented at the April W3C Workshop on Web Tracking and User Privacy by Duane Berlin of Lev & Berlin, P.C., CASRO's General Counsel; Peter Milla of Peter Milla Consulting, CASRO's Technical Consultant; and David Stark of GfK, who is a member of ESOMAR's Legal Committee.

The position paper expressed concerns about the scope of DNT, and argued that regulations should be limited to tracking for online behavioral advertising purposes and not extend to legitimate research which is distinct from advertising and marketing. Legislators around the world saw fit to ensure that research was not included in many national Do Not Call registries and anti-spam laws because research is not commercial speech. Further, market, social and opinion research have an excellent track record in respecting individuals' privacy and de-identifying data. Researchers need access to the public to deliver high-quality data on which organizations in the private, public and not-for-profit sectors depend.

ESOMAR is the essential organization for encouraging, advancing and elevating market research worldwide. With more than 4,800 members from over 120 countries on both the provider and client side as well as in public bodies and academic institutions, ESOMAR's aim is to promote the value of market and opinion research in illuminating real issues and bringing about effective decision-making. ESOMAR represents the sector to the European Commission and the Council of Europe.

CASRO is the U.S. national trade association for research businesses, representing the interests and integrity of the U.S. research industry. CASRO's membership includes 350 research businesses, their executives and 30,000 employees, and reflects one-third of the global research industry. CASRO represents the U.S. research industry to the FTC, other regulatory agencies, and Federal and state government. Taking into account the need for a harmonised global perspective relating to online regulation, CASRO and ESOMAR are working closely together.

Both ESOMAR and CASRO actively advocate responsible and ethical conduct through self-regulation. The [ICC/ESOMAR International Code on Market and Social Research](#) and the [CASRO Code of Standards and Ethics for Survey Research](#) set forth principles that guide our professional activities, such as requiring researchers to respect and protect the privacy of individuals who participate, whether passively or actively, in social, opinion and marketing research. Core to such self-regulatory Codes is that personal data collected for research purposes must not be used for other purposes and consent must be obtained if further processing is intended at a later date.

### **Market, opinion and social research is distinct from marketing, selling and advertising**

Market, social and opinion research is distinct and separate from marketing, sales, and advertising activities and should not be subject to regulations aimed at those activities. While research is used by marketers to test their product or messages, *it is not a promotional communication*.

Market research, which includes social and opinion research, is the systematic gathering and interpretation of information about individuals or organizations using the statistical and analytical methods and techniques of the applied social sciences *to gain insight or support decision making*. Research elicits opinions and gathers information on behaviors, attitudes, characteristics, and possessions; it does not solicit money or invite purchases.

Research serves a critically-important function throughout our society to support decision making and to achieve that function, it must, and does, hold to the highest ethical standards of social science inquiry. It is utilized by universities, corporations, research institutes, litigants, politicians, and government agencies to develop behavioral and attitudinal data in support of technical, scientific, economic, health care,

pharmaceutical, and other social, commercial, scientific and public policy issues. No other tool permits these constituencies to obtain comparable data or insights capable of serving as a barometer of public sentiment, behaviors, needs and aspirations. Without research, many issues affecting both public and private interests could not be addressed as intelligently or resolved as effectively.

It is important to note that the point of research is not to collect identifiable information for direct action, but rather to measure the behavior of small samples of a defined population in order to ascertain the views or behaviors of the whole population from which the sample was drawn. The risk of harm or adverse consequences for respondents where research is conducted in accordance with professional practices and under the oversight and enforcement of industry codes is infinitesimal.

U.S. federal law has supported the distinction between opinion, social and market research and marketing, sales and advertising activities. The FTC acknowledged the importance of research throughout its recent report, *A Preliminary FTC Staff Report on Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers*. In addition, the FTC has previously written that research is “informational,” has “social utility,” and is “not commercial speech.” It has recognized that distinction by excluding research from regulations that are intended to cover sales, marketing, and advertising activities, such as the TCPA, the TSR, the National Do-Not-Call Registry, and the CAN-SPAM Act.

### **Our position on do not track**

We support do not track proposals to the extent that they allow consumers to opt-out of online behavioral advertising (OBA). The scope of do-not-track should be limited only to this activity. Website analytics and tracking activities conducted by research organizations for legitimate research purposes should be excluded.

We also support browser do-not-track tools that allow users to better manage their cookies, both browser cookies and local shared objects. Reputable advertising networks offer opt-out cookies to help recognize users who choose not to receive behaviorally targeted ads. When consumers use their browser privacy settings to remove all cookies, though, their desired opt-out cookies could also be deleted. Add-ons are available for browsers to permit users to persist opt-out cookies, which we support.

We are concerned, though, that another browser-based do-not-track approach, that of using filter lists to block content and tracking scripts, could extend beyond OBA to include legitimate website analytics and research activities. Filter lists that include research trackers could have unintended and undesirable consequences for online panel research firms that obtain explicit consent from individuals to monitor their online behaviors.

Our position paper commented on DNT solutions that are available in the latest versions of browsers including the header approach employed by Internet Explorer (IE), Firefox, as well as Tracking Protection Lists (TPLs) which allow anyone to create a list of domains whose cookies and tracking scripts are either blocked or allowed with four organizations that have prepared TPLs for IE users to download: Abine, Easy List, Privacy Choice and TRUSTe.

### **Blocking panel members**

Unfortunately, a few research domains appear on the Privacy Choice and Easy List TPLs and this means that panel members using the latest version of IE could download TPLs that block research domains' tracking scripts.

Our position paper pointed out that panel companies obtain explicit consent to track panel members' website visits or exposure to ads in return for small financial or other rewards. Given that TPLs can have upwards of 4,000 or more blocked domains, we cannot expect panel members to review their filter lists carefully to see if a particular research domain is included.

Panel members, whether unintentionally or deliberately, could thus block research firms from reading the optional cookies that the panel member already explicitly consented to. For their part, research firms would not always know that their scripts were being blocked and could pay rewards to panel members who do not allow research tracking to take place as a consequence of having activated third party blocking tools such as TPLs.

CASRO's and ESOMAR's concern about DNT mechanisms restricting research tracking cookies is that it could place an undue burden on the research company to communicate to and resolve the situation with their users when the research company has already obtained prior explicit consent for most types of cookies used (see below).

**Update on categories considered as tracking by the CDT**

Since the last conference, we note that W3C has been moving ahead fast to develop a draft working paper. We would like to contribute to this paper on behalf of the market research sector and in particular to add more perspective regarding the CDT matrix summarising what does and does not constitute tracking. This was generally accepted by many parties at the April 2011 workshop but this categorization could be misleading if it does not distinguish between marketing and research, noting that not all tracking is marketing.

We note the provisional definition of 'tracking' and the various categories.

**Source: CDT, April 2011**

Tracking	Not tracking
Third-party online behavioral advertising	Third-party ad and content delivery
Third party behavioral data collection for first party uses	Third-party analytics
Third party behavioral data for other uses	Third-party contextual advertising
Behavioral data collected by first parties and transferred to third parties in identifiable form	First party data collection and first-party use
Demographic information appended to the user's device	Federated identity transaction data
	Specifically excepted third-party ad reporting
	Data collection required by law and for legitimate fraud prevention purposes

According to this, market research could fall into several categories in the 'tracking' group but because of its purpose, it cannot be considered to present similar risks as the same practices with an advertising/sales purpose.

We would like to clarify some misconceptions about the techniques described on page 7 of the CDT paper for instance, which does not distinguish between cookies and similar technologies used for marketing and those used for market research purposes.

**Third party online behavioral advertising:** does not cover market research.

**Third-party behavioral data collection for first party uses:** is widely used by market research companies for legitimate market research purposes, e.g. audience measurement and ad-effectiveness metrics derived from a panel whose members have been informed of the purpose and positively consented to having their behavior tracked.

**Third party behavioral data for other uses:** this term is overly broad as presently defined and the techniques attributed to market research should be amended as there is no clear distinction made between market research and marketing purposes.

This type of data is used by market researchers to recruit respondents for samples and research panels. If an individual has visited websites that match the respondent type or profile that a research company requires for a sample, they will be invited to participate in survey research or join a research panel. This technique is used to recruit samples efficiently. The individual sees a pop up inviting them to complete a questionnaire. It could be argued that this approach has certain elements in common with behaviorally-targeted ads as the computer user is being tracked without consent but it should not be restricted as it does not significantly affect web users; the purpose is not to target, or to sell a product or service to the

web user, they are simply invited to participate in research or join a panel and whatever they decide, it will not produce any legal or commercial effects.

**Behavioral data collected by first parties and transferred to third parties in identifiable form:** this could refer to customer relationship management techniques as well as to research. This is only used by market researchers with users' explicit consent or the expressed wish from the respondent (except in certain markets, e.g. Germany where it is forbidden to pass on data to third parties, even if the respondent explicitly requests this).

**Demographic information appended to the user's device:** this is used in market research with the purpose of improving the quality of the sample in contrast to online behavioral advertising which has the purpose of targeting a particular individual with a promotional offer.

ESOMAR and CASRO recommend that any implementation of Do Not Track should take the above comments into account to avoid unintended but considerable harm, both to market, social and opinion research and to the quality of statistical information and insights that companies, not-for-profit organizations, governments and consumers depend on researchers to provide.

For more information or questions, please contact Diane Bowers at CASRO or Kathy Joe at ESOMAR.

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