



June 6, 2024

Nathalie Marechal
Co-Director, Privacy & Data Project
Center for Democracy and Technology

Re: Defining Contextual Advertising: A CDT Working Draft

Dear Nathalie,

Consumer Reports sincerely thanks you for your work in developing a working definition for contextual advertising. As the introduction to the document notes, it is a particularly tumultuous time for digital advertising, with rapid developments in state privacy law, along with the active consideration of bipartisan federal privacy legislation, coinciding with a major rethinking of the broader strategies and technology underlying the digital advertising marketplace.

With such major changes afoot, it is critical to establish a consensus understanding of key terms and, especially for civil society groups, to not allow industry to control the narrative about the merits of possible alternatives to the currently dominant, and wildly harmful, model of behaviorally-targeted advertising. For example, Consumer Reports has observed some industry stakeholders advance a vision of “contextual advertising” that shares much of its DNA with behaviorally-targeted advertising, and as such, strays significantly from our own understanding of that term.¹ If a comparably invasive framework of contextual advertising is simply substituted for today’s behaviorally-targeted advertising, consumers may be no better off and could actually be worse off due to a false sense of security that the new, more anodyne terminology may engender.

While we largely agree with CDT’s definition, Consumer Reports proposes the following redline and explains our reasoning in further detail below:

ONLINE CONTEXTUAL ADVERTISING. – The term “online contextual advertising” means a message, for which delivery is paid or otherwise compensated, that promotes a product, service, or information that does not vary based on the identity of the individual

¹See, e.g., James Hercher, “Uber Declares Its Destination-Based Targeting Is ‘Contextual,’” AdExchanger, (October 19, 2022), <https://www.adexchanger.com/mobile/uber-declares-its-destination-based-targeting-is-contextual/>

recipient and that is selected or targeted without the use of personal data and solely on the basis of one or more of the following factors:

- *The immediate content of a webpage, app, video/audio programming, or online service on or within which the advertisement appears*
- *The immediate content of a search query or other request for information by the user if displayed in proximity to the results of such search query or other request for information*
- *The individual's immediate presence within a physical location no smaller than 10 square miles and non-personal information derived from that location*

EXCEPTION. - A controller may use the following types of personal data to display a contextual advertisement so long as the personal data is not used to make inferences about the consumer, profile the consumer, or for any other purpose.

- *Such technical specifications as are necessary for the ad to display properly on a given device*
 - *The individual's language preferences, as inferred from context, user settings, or geolocation*
- *Scope.* While the proposed definition understandably focuses on contextual advertising derived from online interactions, given that is essentially the nexus of the current debate, for purposes of proposing a working definition for lawmakers to use in current or forthcoming legislation it may be preferable to expand the scope to include *all* forms of contextual advertising (especially if the purpose of defining contextual advertising is to serve as a foil to the definition of targeted advertising). State and federal privacy efforts commonly ignore that some forms of targeted advertising can occur entirely outside of the online context in a way that still manages to violate consumers' reasonable expectation of privacy (e.g. having one's interactions in the physical world result in a mailed, called, texted, or in-person solicitation of some sort).

This sort of advertising may even increase in prominence with the proliferation of IoT or other smart sensors deployed in physical environments. Though perhaps difficult to accomplish, ideally, advertising definitions in privacy laws should cover all possible advertising permutations and provide a comprehensive framework of allowed and restricted practices. Alternatively, CDT should clarify for now that it is only attempting to define online contextual advertising.

- *Temporality.* Though CDT's definition seems to imply that contextual advertisements can only be presented on the basis of the specific content currently being viewed, it would help to clarify this point. Contextual advertising should not include the tracking of an

individuals' browsing of multiple pages on a website over a single visit or multiple visits to a website over time, which essentially mandates the creation of some sort of persistent identifier or profile (though such tracking could also be achieved through probabilistic methods). A key benefit of contextual advertising is that the advertisement does not need to rely on personal data (outside of a few narrowly scoped exceptions) but it is not clear to us that the word "solely" in the current definition would be enough to avoid an expansive interpretation which would consider most first-party behavioral ad targeting based on historical app or website usage as "contextual." We suggest clarifying language in our redline .

- Relatedly, we propose a clarification that controllers cannot use a combination of the permissible factors (e.g. technical specifications needed to present the advertisement, along with geolocation) to identify, create a persistent identifier, or profile the consumer. We do this through a slight restructuring to the definition that exempts certain limited categories of personal data that may be used for contextual ad delivery, subject to a strict purpose limitation provision. This would align with CDT's assertion that: "Using content negotiation information to re-identify a user or to target advertising based on that user's past activity is plainly not contextual advertising. Using explicitly-provided content negotiation information to make inferences about a user for ad targeting is also not contextual advertising, except for the specific categories noted below."
- *Context.* While CDT's definition limits targeting based on website or app data to the context of which that content appears, there is no comparable limit on the use of search data for targeting. As such, a bad faith interpretation could deem search retargeting on another site based on an earlier search engine query as "contextual" under CDT's text. CDT should clarify that to qualify as "contextual" the ad should appear in proximity to the search results.
- *Use of personal data.* As referenced above, we propose explicitly including a provision that bans the use of personal data for contextual advertising unless it is subject to an exception. While we agree in principle that acceptable contextual ads include those based on the context of a given webpage (i.e. an ad for fishing rods on a camping website), this analysis becomes more fraught in the case of social media, where most users' feeds (i.e. the content of the page) are inherently personalized by a combination of user-generated content (posts and likes), information directly provided to the social media company (age, location, interests, etc.), and the feed's underlying algorithm. Without stricter treatment, content-based contextual advertising on social media may effectively become personalized advertising. Banning the use of personal data for contextual advertising would ensure that contextual ads cannot be targeted using, for instance, sentiment analysis based on a user-generated content on a consumer's feed.

It would also help to rule out advertising based on content analysis within channels that most people would likely find highly objectionable, for example within their email or direct messaging apps. Under this framework, businesses could still advertise based on the content of a given page (for example, if you are in a Facebook group about the outdoors, receiving an ad about tents), but not on the basis of all of the possible content they can scrape from your profile, which is highly personalized.

- *Geolocation.* We are supportive of the idea that online ads can be fairly targeted to individuals within a 10 mile radius. This is roughly analogous to traditional advertising in print media (e.g. a small town's local newspaper), and is a wide enough berth that it should prevent the possibility of reidentification or microtargeting. It is debatable whether these sorts of ads are properly considered "contextual," but we agree that targeting based on rough geographic area presents relatively few privacy concerns. However, the language should clarify that targeting is limited to the consumer's present rough geolocation, not geographical data collected and maintained over time.
- *Sensitive Data.* CDT notes that there is some concern that contextual advertising could still cause harm where it appears in inappropriate places, such as an alcohol ad presented in a sobriety group on Reddit. CDT writes that it believes "it should be permissible to place contextual ads related to the specific topic on a health-related webpage or website, as long as no personal information is tracked or used," providing the example of an insulin pump ad on a diabetes website. We agree with this sentiment, and note that potential harms relating to the inappropriate placement of contextual ads might be better addressed through content moderation and platform governance measures rather than through the definition of contextual advertising itself.

Once again, we appreciate the work that has gone into crafting the proposed definition. Please feel free to reach out if we can be helpful in any way or if you would like to discuss our views in more detail.

Sincerely,

Matt Schwartz
Policy Analyst

Justin Brookman
Director, Technology Policy