Digital Behavioral Advertising – Why Worry?

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Ryan Calo, *Digital Market Manipulation*, 82 **Geo. Wash. L. Rev.** 995 (2014).

Alongside the explosive growth of the internet, digital marketing is also growing aggressively. According to some projections, it might even surpass TV-based advertising in the coming decades. One of its most prominent and controversial features is commonly referred to as "behavioral advertising"; the tailoring of advertisements to specific users at a specific time, on the basis of previously collected personal information about those users' online activities.

Behavioral advertising is creating a substantial buzz in the press. It is therefore no surprise that this issue is also generating a vibrant discussion in the legal and policy realm. Addressing it properly is a serious intellectual challenge. Behavioral advertising generates an uneasy feeling (some might find it "creepy"). Yet it is not necessarily simple to figure out why. Consumers have dealt with marketers—some of them quite aggressive—since the dawn of time. Existing mechanisms, which incorporate a delicate mix of market forces, reputation concerns and in extreme cases regulatory action, have produced an acceptable status quo. Recently, this status quo has apparently been breached. The challenge academics and policy makers face is explaining why and how. In his recent Article, Ryan Calo tackles this challenge directly, and sets forth important answers. His insights will enhance the policy debates about the regulation of behavioral marketing, and push them in the right direction.

One popular way to view the policy concerns raised by behavioral marketing is through the conceptual lens of "information privacy." To some extent, this is the easy way out of the policy conundrum created by behavioral advertising, because the practice requires the collection of vast amounts of personal information regarding the traits and preferences of specific users. Prof. Calo notes this concern, but is wise not to rely upon it exclusively. While the privacy-based argument is simple and intuitive, it is also fragile. Marketers commonly argue that individuals' privacy is not compromised because the personal information collected is not "identified" or "identifiable" and cannot be easily linked back to a specific individual. While this latter claim could certainly be rebutted, let us set it aside for now while observing that supplementing this basic privacy argument with an additional analytical framework surely cannot hurt.

Another key conceptual framework to understanding the problematic aspects of these new forms of marketing, Calo explains, is to recognize that they are *manipulative*. These marketing measures are influencing consumers to make bad decisions (at least from the consumers' perspective), even though they do not, technically, include inaccurate information. Moving an argument based on the harms of manipulation from this colloquial level to a genuinely analytical one requires work—and this is where the Article's central substantial contribution can be found.

To explain why manipulation is relevant here, Calo describes how advances in technology and social sciences empower digital marketing firms and allow them to exert influence over consumers. They do so by identifying the points when the consumers are most vulnerable and when their consumption-related decisions will (most likely) prove irrational.

Arguing that online digital marketing is manipulative to the excessive degree which calls for regulatory intervention is an uphill battle. On its face (and when applying Marshall McLuhan's controversial paradigms for "understanding media"), this "cool" medium's ability to substantially impact the human psyche is quite limited. With the possible exception of games, the forms of engagements brought about by new media are no competition to TV's immersive force. TV engages our senses and draws us "in" entirely. It is an ideal platform for suggestive advertising. Yet even so, advertising flourishes on the screen, with the general understanding that it presents an acceptable price to pay for the so-called free content provided. How can digital media top this powerful set of effects, and create the unacceptable manipulative outcome noted?

The reason new media indeed generates these risks, according to Calo, is that it is both *digitized* and *mediated*. These two elements arguably provide marketers with an edge they did not have before. Technology provides the elasticity to shape and time every interaction with every specific user. Furthermore, it provides for the collection and analysis of personal data to optimize the firm's interaction with consumers.

Reviewing Calo's foundational claim calls for future empirical work, of course. Whether digital media indeed enable such extensive and successful manipulation is an open empirical question which social scientists must now explore. Providing a response should take time. While it is possible that at first users will be easily influenced by these marketing measures, they might prove resilient to them in the long run, or even develop countering measures as they adapt to new media.

Yet beyond establishing whether digital marketing can prove influential and effective, the policy argument to regulate behavioral marketing must also explain why the possible manipulative steps might prove problematic. Calo provides several analytical responses to this crucial question. I found the most interesting and promising argument to be one that focuses on "autonomy." Here, Calo defines autonomy as the absence of vulnerability or ability to act in one's self interest. With this definition in hand, it is relatively simple to explain what the firms engaged in behavioral advertising are doing wrong. These marketers identify the individual's vulnerabilities and act upon them. By doing so, they limit consumers' ability to exercise autonomy, thus leading to the unacceptable outcomes regulators must counter.

This argument, however, is trickier than it might seem. As with many other autonomy-based claims, it calls for properly explaining what it means to act in one's "self interest." In other words, how can we know for sure that the individual accepting the marketer's proposal is exhaustedly succumbing to the marketers' pitches, rather than acting within her own self interest? To complicate things, asking individuals after the fact whether they are happy with their purchases might not prove helpful. To bridge the cognitive dissonance they find themselves in after making the suggested purchase, consumers might successfully convince themselves that the purchase they made following the tailored digital pitch is the best thing they have done (or else, why did they carry it out?).

One way to explain what self-interest actually means in this context (and how it is linked to "autonomy") is to break this notion into two, by introducing the concepts of first- and second-order preferences. In fact, the individual's self interest is built up in several layers. The individual might have a set of long-term life goals, such as health, education and saving. These are her second-order preferences, which she strives to act upon and align her first-order preferences with—the current preferences according to which she operates daily. Digital advertising allows marketers to influence consumers to make decisions which coincide with their momentary first-order preference, but not necessarily their longer-term second-order one. Thus, the autonomy-based argument here can be further sharpened by noting that "self interest" actually means the ability to exercise second-order preferences. Or, the autonomy-based concern might promote the argument that the state must move to intervene when second-order preferences cannot be easily exercised.

Beyond unlocking the notion of autonomy, a discussion of manipulation calls for evaluating the ever-challenging "the market will fix it" argument. The marketing firms indeed act in their own interests, which are often misaligned with that of the consumer. But that is the nature of business. The reason the market nonetheless usually functions and does not necessarily move consumer surplus to the pockets of vendors is of course *competition*. Therefore, a convincing argument stating the problematic manipulative aspects of behavioral marketing must explain why market forces do not balance off the different manipulative ploys various firms strive to subject their users to. For instance, consider a firm trying to influence a consumer to abandon her second-order preference of health, and buy that extra cookie she really should not eat. Given the nature of technology, it is at least arguable that at the same exact time a firm promoting low-sugar cookies (or perhaps the consumers' own health insurance plan or employer) will intervene with a message of its own, prompting the consumer to reconsider and revert to her second-order preferences.

The manipulation-based argument therefore must also convincingly argue that competition will not essentially change things and therefore regulatory intervention is needed. This might be due to several reasons. The relevant market might lack competition, or perhaps there are instances in which those who are supposed to provide the countering response (strengthening the consumers' second-order preferences) are too weak and lack sophistication. In other instances, perhaps *all* the commercial firms share the problematic objective of influencing consumers in the same direction (for instance to engage in greater consumption) and therefore no countering voice will arise. The analysis will vary from one context to another and must therefore be further explored. For instance, Oren Bar-Gill explains convincingly why market forces will not mitigate firms' incentives to influence consumers to act irrationally in credit and cell-phone markets. It is not clear that this argument could be made with similar success for other retail markets.

In conclusion, readers worried about behavioral marketing should read Ryan Calo's article to better understand the analytical foundations of their hunch that these practices are problematic. Those who are not worried should probably read the article as well. It might change their mind.

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