

June 11, 2019

The Honorable David Cicilline, Chair
The Honorable F. James Sensenbrenner, Ranking Member
House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Cicilline and Ranking Member Sensenbrenner:

We write to you regarding the hearing on “Online Platforms and Market Power, Part 1: The Free and Diverse Press.”¹ We appreciate your interest in this important issue. EPIC was also the first organization to examine the structure of internet-based advertising.

Over the past two decades, an absence of privacy regulation has led to a growing concentration of internet services. Privacy rules could help level the playing field. And the states must continue to have the freedom to respond to new privacy challenges as they emerge.

There are many problems today caused by a lack of regulation – increasing concentration of providers (Google and Facebook), profiling and tracking of Internet users, the loss of support for editorial content, and preferencing the advertiser’s products over competitor’s. All of these issues require careful examination by this Committee. The threats to innovation and competition are real.

It didn’t have to be this way. More active regulation by the government could have sustained online platforms and digital advertising models that were good advertisers and businesses, big and small, and good also for consumers.

In the early days of the commercial Internet, EPIC favored the development of digital advertising techniques and explained that online advertising could both safeguard privacy and promote new forms of revenue.² We expressed support for the digital advertising firm DoubleClick when it first announced that it would develop an advertising model that did not require the collection of personal information.³ Among the first privacy policies on the Internet were those developed by

¹ *Online Platforms and Market Power, Part 1: The Free and Diverse Press*, 116th Cong. (2019), H. Comm. on the Judiciary, Subcomm. on Antitrust, Commercial, and Administrative Law, <https://judiciary.house.gov/legislation/hearings/online-platforms-and-market-power-part-1-free-and-diverse-press> (June 11, 2019).

² Marc Rotenberg, EPIC Executive Director, Testimony before the Senate Commerce Committee, *On Internet Privacy and Profiling* (June 13, 2000), <https://epic.org/privacy/internet/senate-testimony.html>.

³ Marc Rotenberg, EPIC Executive Director, Testimony before the Senate Commerce Committee, Subcomm. on Communications, *Hearing on S. 809, The Online Privacy Protection Act of 1999* (July 27, 1999), https://www.epic.org/privacy/internet/EPIC_testimony_799.pdf.

websites that partnered with DoubleClick. They assured users that no personal data would be collected.⁴ As DoubleClick explained in 1997:

DoubleClick does not know the name, email address, phone number, or home address of anybody who visits a site in the DoubleClick Network. All users who receive an ad targeted by DoubleClick's technology remain completely anonymous. Since we do not have any information concerning names or addresses, we do not sell or rent any such information to third parties. Because of our efforts to keep users anonymous, the information DoubleClick has is useful only across the DoubleClick Network, and only in the context of ad selection.⁵

But then, in 1999, DoubleClick proposed to merge with Abacus, a large customer database firm that collected detailed information of Internet users' offline purchases. EPIC immediately objected and launched a national campaign to block the Abacus-DoubleClick merger.⁶ We filed one of the first privacy complaints with the FTC.⁷ Many agreed that the proposed merger was unlawful and deceptive, and the case also provided one of the first opportunities for the FTC to address new challenges to consumer privacy.⁸

Eventually, DoubleClick backed off the deal, stating that it had made a “mistake by planning to merge names with anonymous user activity across Web sites in the absence of government and industry privacy standards.”⁹ But the message was clear: Internet advertisers, even those who began with good business models, would seek to expand their reach and build their profiles of Internet users.

And when a Google later proposed to acquire DoubleClick, EPIC went to the FTC with an extensive complaint and warned of the danger to online privacy, competition, and innovation if the leading search engine also became the Internet's primary advertiser.¹⁰ Much of what we predicted happened. Google broke many of the agreements to protect privacy that DoubleClick had established.¹¹ And then in 2009, Google took a dramatic step with online advertising that has diminished journalism and contributed to the growth of fake news. Google moved from contextual

⁴ *Id.*

⁵ In the Matter of DoubleClick, Inc., EPIC Complaint, Request for Investigation, Injunction, and Other Relief (Feb. 10, 2000) at 4, https://epic.org/privacy/internet/ftc/DCLK_complaint.pdf [hereinafter “EPIC DoubleClick Complaint”].

⁶ EPIC, *DoubleTrouble*, <https://epic.org/privacy/doubletrouble/>.

⁷ EPIC DoubleClick Complaint, *supra* note 5.

⁸ *Privacy advocates rally against DoubleClick-Abacus merger*, CNET (Jan. 2, 2002), <https://www.cnet.com/news/privacy-advocates-rally-against-doubleclick-abacus-merger/>.

⁹ *Statement of DoubleClick CEO Kevin O'Connor re: Online Privacy Practices* (Mar. 2, 2000), available at <http://techlawjournal.com/privacy/20000302.htm>.

¹⁰ *In the Matter of Google, Inc. and DoubleClick, Inc.*, EPIC, Center for Digital Democracy, and U.S. Public Interest Research Group Complaint, Request for Investigation, Injunction, and Other Relief (April 20, 2007), https://epic.org/privacy/ftc/google/epic_complaint.pdf.

¹¹ Press Release, Federal Trade Comm'n, Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns In the Markets for Devices Like Smart Phones, Games and Tablets, and in Online Search (Jan. 3, 2013), <https://www.ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc>.

advertising to behavioral advertising, a change it said it would not make and which its founders knew could bring great damage to the Internet.¹² And it has.

In most simple terms, contextual advertising is the advertising that is placed in the newspaper or magazine or the TV show. It is the ad in the radio show. It is the ad on a website that reflects the content of the site. It is tied to content and it is targeted toward individuals not because of data about them, but rather because of their interest in a particular magazine, tv show, or web site. Contextual advertising allows the advertiser to reach the customer without the deep intrusion into private life. It is effective. And a new, small business can offer it without the troves of customer data currently consolidated into a handful of tech giants.

The original DoubleClick model relied on contextual advertising to provide revenue to support websites. And it was a good model. The behavioral model is entirely different. It targets the consumer directly. It relies on deep profiles. It provides no benefit to content providers, such as news organizations. In fact, the behavioral models attack the revenue model that has sustained news organizations in the United States since the early days.

The internet advertising system today is not healthy. Advertising should provide consumers with information about products. Instead the big Internet firms – Google and Facebook -- are providing advertisers information about consumers who have become the product. The problems are growing worse. As *The Boston Globe* recently explained:

Along with Facebook, Google owns sites and services that, by some estimates, influence 70 percent of all Internet traffic. Not coincidentally, the two companies also form a duopoly that gets 73 percent of all digital advertising in the United States, and virtually all the growth in ad spending, on the Internet. Once the lifeblood of a vital free press, and later of a vast array of independent sites serving every possible interest, ad dollars increasingly flow to two tech giants that organize information produced at other people's expense.¹³

The Right to Access Information

Algorithms that rank and index search results must be scrutinized for distorting web users' access to information with limited transparency and accountability. Virtually every search engine, social media company, and web operator develops its own unique algorithm to curate content for individual users to control how information is fetched and displayed from search queries.¹⁴

¹² Scott Gilbertson, *Google's New Ad Network Knows Where You've Been, What You Do*, WIRED (Mar. 11, 2009), <https://www.wired.com/2009/03/googles-new-ad/>; Letter from the Founders, N.Y. Times, Apr. 29, 2004, <https://www.nytimes.com/2004/04/29/business/letter-from-the-founders.html> (“founders Larry Page and Sergey Brin. The letter is located in Google's registration statement filed with the Securities and Exchange Commission.”)

¹³ Editorial, *Break Up Google*, Boston Globe (June 14, 2018), <https://apps.bostonglobe.com/opinion/graphics/2018/06/break-google/>.

¹⁴ See, Jaap-Henk Hoepman, *Summary of the CPDP Panel on Algorithmic Transparency* (Jan. 26, 2017) (summarizing remarks of Marc Rotenberg, EPIC President), <https://blog.xot.nl/2017/01/26/summary-of-the-cpdp-panel-on-algorithmic-transparency/>.

There are many dangers with these information-mediating techniques:

- Filtering algorithms can prevent individuals from using the Internet to exchange information on topics that may be controversial or unpopular;
- Content may be labelled and categorized according to a rating system designed by governments to enable censorship and block access to political opposition or specific keywords;
- ISPs may block access to content on entire domains or selectively filter out web content available at any domain or page which contains a specific keyword or character string in the URL;
- Self-rating schemes by private entities will turn the Internet into a homogenized medium dominated by commercial speakers;
- Self-rating schemes will embolden and encourage government regulation on access to information on the Internet; and
- The majority of users are unaware of how algorithmic filtering restricts their access to information and do not have an option to disable filters.

Several years ago, EPIC encountered the problem of opaque algorithms deployed by a dominant platform. At the time, EPIC, an organization whose mission is to educate the public about emerging privacy issues, provided several videos that were among the top-ranked search results on YouTube for a search on “privacy. At the time, YouTube’s search results were organized by the objective criteria of “hits” and “viewer rankings.” Both of these are objective criteria and easy to verify.

But after Google acquired YouTube, EPIC’s search rankings fell. Google had substituted its own subjective, “relevance” ranking in place of objective search criteria. Google’s ranking algorithm was opaque and proprietary. And significantly, Google’s subjective algorithm preferred Google’s video content on YouTube concerning “privacy” over that of EPIC and others. Suddenly, the Google videos rose in the rankings.

At the time, we prepared a detailed report for the FTC when it undertook its investigation of anti-competitive behavior of Internet companies.¹⁵ The FTC took no action on EPIC’s complaint. But last year, after a seven year investigation, the European Commission found that Google had abused its dominance as a search engine by rigging its search results to give preference to its own shopping service.¹⁶ The Commission required Google to change its algorithm to rank its own shopping comparison the same way it ranks its competitors.

¹⁵ Letter from EPIC to Commissioners of the Federal Trade Commission (Sept. 8, 2011), https://epic.org/privacy/ftc/google/Google_FTC_Ltr_09_08_11.pdf.

¹⁶ Press Release, European Commission, *Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service* (June 27, 2017), http://europa.eu/rapid/press-release_IP-17-1784_en.htm.

Facebook’s recent release of its community guidelines is a good example of what transparency can look like.¹⁷ It is a step in the right direction, but more must be done. For example, Twitter could make public its search algorithm to make clear that it is not preferencing accounts affiliated with certain views.

EPIC recommends legislative solutions based on the Universal Guidelines for Artificial Intelligence (UGAI).¹⁸ The UGAI “are intended to maximize the benefits of AI, to minimize the risk, and to ensure the protection of human rights.”¹⁹ These principles can provide the framework for any successful legislative efforts. Broadly, the guidelines address the rights and obligations of AI systems to ensure 1) fairness, accountability, and transparency; 2) autonomy and human determination; 3) data accuracy and quality; 4) safety and security; and 5) minimization of scope. Congress should enact legislation, based on the Universal Guidelines for AI, to address concerns about bias and establish accountability for companies who collect personal data.

Conclusion

The consolidated market power of online platforms today is not healthy. Two companies dominate the market. The privacy of Internet users is under assault. The revenue model that sustained journalism and allowed small businesses to break into the market is broken. The current model is not sustainable. Privacy rules can help level the playing field.

We ask that this letter be entered in the hearing record. EPIC looks forward to working with the Committee on these issues of vital importance to the American public.

Sincerely,

/s/ Marc Rotenberg

Marc Rotenberg
EPIC President

/s/ Caitriona Fitzgerald

Caitriona Fitzgerald
EPIC Policy Director

¹⁷ Facebook, *Publishing Our Internal Enforcement Guidelines and Expanding Our Appeals Process* (Apr. 24, 2018), <https://newsroom.fb.com/news/2018/04/comprehensive-community-standards/>.

¹⁸ The Public Voice, *Universal Guidelines for Artificial Intelligence*, <https://thepublicvoice.org/AI-universal-guidelines>.

¹⁹ A full list of endorsers is available at The Public Voice, *Universal Guidelines for Artificial Intelligence: Endorsement*, <https://thepublicvoice.org/AI-universal-guidelines/endorsement>.