COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

to

THE FEDERAL TRADE COMMISSION

In the Matter of Google, Inc.

"FTC File No. File No. 121 0120"

February 22, 2013

By notice published on January 3, 2013 the Federal Trade Commission ("FTC") has proposed two agreements with Google, Inc. concerning two of its business practices.[1] In the first agreement, Google agreed to meet its prior commitments to allow competitors fair, reasonable, and non-discriminatory access to patents on critical standardized technologies needed to make popular devices such as smart phones, laptop and tablet computers, and gaming consoles.[2] In a second, separate, and non-binding letter of commitment, Google agreed "to give online advertisers more flexibility to simultaneously manage ad campaigns on Google's AdWords platform and on rival ad platforms; and to refrain from misappropriating online content from so-called 'vertical' websites that focus on specific categories such as shopping or travel for use in its own vertical offerings."[3] Pursuant to the January 3 notice that the FTC issued requesting comments from the public on the proposed agreements, the Electronic Privacy Information Center ("EPIC") submits these comments and recommendations.

EPIC supports the continued monitoring of Google's business practices. However, EPIC

[1] 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), http://ftc.gov/opa/2013/01/google.shtm

[2] In the Matter of Motorola Mobility LLC and Google Inc., Analysis of Proposed Consent Order to Aid Public Comment, 78 Fed. Reg. 2398-2406 (proposed January 3, 2013), http://ftc.gov/os/caselist/1210120/130103googlemotorolaanalysis.pdf.

[3] Letter from David Drummond, Senior Vice President of Corporate Development, Google, Inc., to Jon Leibowitz (December 27, 2012 8, 2011), *available at* http://ftc.gov/os/2013/01/130103googleletterchairmanleibowitz.pdf.

believes that the agreements should be modified so as to create binding settlements that protect the interests of users regarding Internet search. Google's consolidation of its Internet privacy policies as well as its requirement that users create Google accounts for an increasing range of Internet services are monopolistic practices. One practical consequence is the increasing problem of consumer "lock-in" which makes it difficult for users to readily switch search engines. Furthermore, as the dominant collector of consumer data, the Federal Trade Commission should require Google to follow Fair Information Practices as part of the "comprehensive privacy program," earlier mandated by the FTC, for all of the company's data gathering activities. Finally, the Commission should require Google to increase transparency surrounding its search algorithm and make public the techniques that are used to order search results.

I. EPIC's Interest

EPIC is a public interest research center located in Washington, D.C. EPIC focuses on emerging privacy and civil liberties issues and is a leading consumer advocate before the FTC. EPIC has a particular interest in protecting consumer privacy, and has played a leading role in encouraging the FTC to monitor the emerging privacy issues presented by web companies such as Google that have near-universal access to Internet user data.[4] EPIC has a longstanding interest in the online advertising practices of Internet firms. In 2000, long before the current investigation involving Google, EPIC and several other privacy organizations filed a complaint with the Commission, alleging that the Abacus merger with Internet advertising firm DoubleClick posed

[4] *See, e.g.*, Comments of the Elec. Privacy Info. Ctr., FTC Project No P114506 (Jul. 11, 2012), *available at* https://epic.org/privacy/ftc/FTC-In-Short-Cmts-7-11-12-FINAL.pdf; Comments of the Elec. Privacy Info. Ctr., FTC Docket No. 102 3058 (Jun. 8, 2012), *available at* https://epic.org/privacy/socialnet/EPIC-Myspace-comments-FINAL.pdf; Comments of the Elec. Privacy Info. Ctr., FTC Project No P114506 (May 11, 2012), *available at* https://epic.org/privacy/ftc/EPIC-FTC-Ad-Disclosures-FINAL.pdf; Comments of the Elec. Privacy Info. Ctr., FTC Docket No. 092 3184 (Dec. 17, 2011), *available at* https://epic.org/privacy/facebook/Facebook-FTC-Settlement-Comments-FINAL.pdf; Comments of the Elec. Privacy Info. Ctr., FTC Docket No. 102 3136 (May 2, 2011), *available at* https://epic.org/privacy/ftc/googlebuzz/EPIC_Comments_to_FTC_Google_Buzz.pdf.

a substantial threat to the privacy interests of users around the world.[5] The EPIC complaint further alleged that the two companies would be under no legal obligation to protect the privacy and security of the information they collect, and that consumers would have no effective means to safeguard their privacy interests because of the lack of transparency in the companies' data practices.

In 2011, EPIC wrote to the Commission to call attention to Google's practice of ranking YouTube search results so that Google's proprietary content ranked artificially higher than non-Google material.[6] EPIC's letter explained that Google had substituted its own subjective "relevance" ranking in place of objective, transparent search criteria - such as "Hits" or "Views" - and had relocated the alternative ranking options so that they were harder for a user to locate. As a result, EPIC contended, Google's own videos ranked higher in search results. EPIC's letter included several detailed examples of this outcome, using the search term "privacy."

II. The Commission's Investigation

In the current investigation, the Commission investigated three of Google's business practices. The first had to do with anticompetitive practices conducted by Motorola prior to its acquisition by Google in June 2012.[7] The initial complaint alleged that Motorola had reneged on its commitment to license its essential patents to other technology developers in a way that was fair, reasonable, and pro-competitive. Following its acquisition, Google continued to ignore those commitments made to the standard-setting bodies in the patent field. As a result of this investigation, Google signed a Consent Agreement with the FTC that prohibits it from blocking the use of standard-setting patents.

[5] DoubleClick, Inc., *FTC* File No. 071-0170 (2000) (Complaint and Request for Injunction, Request for Investigation and for Other Relief), http://epic.org/privacy/internet/ftc/DCLK_complaint.pdf
[6] Letter from Marc Rotenberg, Executive Director, EPIC, to Jon Leibowitz et. al. (September. 8, 2011), *available at* http://epic.org/privacy/ftc/google/Google_FTC_Ltr_09_08_11.pdf.
[7] *See supra* note 2.

Under a separate commitment, Google agreed to modify two separate but related business practices related to its vertical search functions.[8] The first of these practices was to restrict advertisers' management of their ad campaigns across competing advertising platforms. An advertisement platform interface, or API, is the programming platform that Internet advertisers use in order to automate the process of bidding, buying, and adjusting offers for ad space. Google's API is called AdWords. During the time of the investigation, Google had some restrictions in place making it difficult for advertisers to negotiate transactions on AdWords and on other search engines' APIs at the same time.[9] While the FTC found that Google had not violated Section 5 of the FTC Act, Google nevertheless agreed to make its API terms more transparent and to remove those terms that threaten to harm competition. In its statement, the Commission noted, "Some FTC Commissioners were concerned that Google's contractual conditions governing the use of its API made it more difficult for an advertiser to simultaneously manage a campaign on AdWords and on competing ad platforms, and that these restrictions might impair competition in search advertising."[10]

The second of these practices involved Google's manipulation of search algorithms such that proprietary content would be displayed over competitor's content in vertical searches. In general, a horizontal search is a general search, displaying all categories of content. The websites that are displayed as a result of a horizontal search are sometimes called "organic" search results. A vertical search, on the other hand, restricts displayed content to certain categories – for instance, shopping, news, or academic articles. Certain search engines are created as vertical search tools – for example, sites that restrict their searches to film descriptions and movie theater schedules. Other search engines, such as Google, provide both horizontal and vertical search

[8] *See supra* note 3.
[9] *See supra* note 1.
[10] *Id.*

functions. For instance, Google permits both a general and a YouTube search for a video. In the horizontal search, the organic results might display links to the video as well as websites discussing the video or the videomaker's blog. The YouTube search would only display links to the video.

Prior to the FTC commitment, Google's vertical search tools, such as YouTube, could crawl organic search results for content and list the results under the google.com domain name.[11] The Complaint alleged that this possible "content scraping" constituted misappropriation of information, and was an unfair business practice under Section 5 of the FTC Act.[12] Along with the content scraping allegations, the FTC investigated whether Google's "Universal Search" tool unfairly advantaged Google's proprietary vertical search content in horizontal search result displays. Universal Search has two significant characteristics. First, it performs a search for Google-controlled content that would ordinarily appear in a vertical search query (for example, videos or news stories) and displays those results on the first display page for horizontal searches (which would ordinarily only display webpage results). Second, it promotes the vertical search results to the top, or near to the top of the first display page. That means that a user who performs a horizontal search in Google will be shown the webpages that best match the search term according to Google's normal search algorithm, but only after the "Universal Results" listings, including Google-sponsored videos, shopping, etc.

The FTC surprisingly decided that none of these practices violated the FTC Act. Google agreed to sign a letter of commitment stating that the company would modify its business practices as to its API rules and its vertical search parameters. The letter pledges that Google will "make available a web-based notice form that provides website owners with the option to opt out

[11] *Id.*
[12] *Id.*

from display on Google's Covered Webpages of content from their website that has been crawled by Google."[13] When a website owner exercises this option, Google will cease displaying crawled content from the domain name designated by the website owner." The letter specifies that "[e]xercise of this option will not (1) prevent content from the website from appearing in conventional search results… or (2) be used as a signal in determining conventional search results." Furthermore, "Google will remove from its AdWords API Terms and Conditions the AdWords API Input and Copying Restrictions… for all AdWords API licensees with a primary billing address in the United States." Google promised not to treat AdWords API clients differently from "similarly situated licensees with respect to the provision or administration of the AdWords API as a result of their development or distribution of AdWords API clients that implement the functionality currently."[14]

Google also agreed to submit a compliance report to the Commission, and to update this report annually throughout the duration of its commitments. Additionally, if the FTC suspects that Google has violated the terms of its commitments, Google has agreed to make public those documents that pertain to their FTC commitments and to permit FTC staff to interview Google staff and directors.[15]

III. The FTC Ignored the Significance of Google's Dominance in the Consumer Data Collection Market

While EPIC appreciates Google's letter to the Commission, EPIC believes that the FTC has failed to examine Google's massive aggregation of user data. Instead of focusing on two of Google's individual practices, the Commission should instead have looked into the data collection policies that enable Google's other allegedly anticompetitive conduct.

[13] *See supra* note 3.
[14] *Id.*
[15] *Id.*

When the Commission approved the Google/DoubleClick merger without conditions in 2007, Commissioner Pamela Jones Harbour voted against the majority's decision and filed a dissenting opinion.[16] Her dissent highlighted Google's dominance as a data collection firm – an issue that EPIC believes is still unresolved in Google's business practices, and which could have been resolved through the current investigation. Additionally, EPIC would like to reiterate the significance of Commissioner Harbour's comments about the role played by network effects in keeping Google dominant, and the ongoing user privacy interests still at risk in Google's business methods.

As the FTC was concluding this investigation, former Commissioner Harbour published an article in the New York Times, reiterating one of her main concerns that remained after the DoubleClick merger.[17] Specifically, Harbour emphasized that "Google is not just a 'search engine company,' or an 'online services company,' or a publisher, or an advertising platform. At its core, it's a data collection company."[18] While Google asserts that there are sufficient alternate search engines to ensure a competitive marketplace, it fails to address the substantial market failures that prevent other search engines from offering users a fair choice. These market failures include the inability of alternate search engines to compete with Google due to the increasing cost of market entry, the increasing switching costs that users face the longer they continue to use Google as their primary search engine, and the information asymmetry that prevents users from being able to make an informed choice about their search engine preferences to begin with.

First, competing search engines face increasingly costly barriers to market entry. "Incumbent [search engines] with large numbers of users enjoy substantial advantages over

[16] DoubleClick, Inc., FTC File No. 071-0170 (2000) (Dissenting Statement of Commissioner Pamela Jones Harbour), http://www.ftc.gov/os/caselist/0710170/071220harbour.pdf
[17] Pamela Jones Harbour, *The Emperor of All Identities*, N.Y. Times, Dec. 18, 2012, at A35.
[18] *Id.*

smaller entrants."[19] Although alternate search engines may use an algorithm that could produce superior, more accurate search results, they do not have access to the roughly 2.5 exabytes of data that Google generates each day.[20] The more users Google is able to attract by virtue of its ability to refine its algorithm at increasingly lower cost, the more costly it becomes for competitors to enter the market.

Second, the trend toward personalized search raises users' switching costs. A larger volume of search history data helps search engines that feature personalized search options to refine results for individual consumers. With personalized search, artificial intelligence can "learn" a consumer's preferences and produce an array of search results that the consumer is more likely to want. As Commissioner Harbour explained in her DoubleClick dissent:

> Type the search term 'apple' into the Google search engine, and Google will 'know' whether the user is focusing on food (apple recipes) or technology products (Apple computers), depending on which websites the user recently visited (Cooking Light versus MacWorld) as well as what searches she recently conducted (Golden Delicious versus iPod). Subsequent search *and* display advertisements will be targeted to match these revealed preferences.[21]

This artificial intelligence cannot "learn," however, without receiving a stream of data from repeat users. Emerging search engines are therefore even further disadvantaged by the high cost of market entry; even if an emerging search engine had a vastly superior personalized search function, a user would have to decide that the value of "teaching" the new search engine was high enough to justify the cost of abandoning a search engine that has already learned his preferences.

Finally, information asymmetry prevents users from being able to make informed choices. The switching costs that prevent users from trusting new search engines to recognize

[19] Oren Bracha and Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 Cornell L. Rev., 1149, 1181 (2008).
[20] Harbour, *supra* note 16.
[21] *Id.*

their preferences are compounded by the fact that internet users suffer from a tremendous information asymmetry. To give consumers a meaningful choice between search engines, consumers would need to be able to consider not only the interface – the site's layout, color, and format – but more importantly, the search algorithm providing their results. However, public access to search algorithms is currently limited by intellectual property laws. Furthermore, "search consumers simply cannot reverse engineer the hundreds of factors that go into a ranking, and they have little incentive to compare dozens of search results to assess the relative efficacy of different search engines."[22]

Given the prevalence of consumer lock-in, it should have been clear to the Commission that Google is increasingly unlikely to face meaningful market pressures. Other search engines are not likely to offer real competition – not because of the quality of their search algorithms, but because consumer lock-in deprives users of both the incentive and the ability to switch search engines. Facing artificially low competition in the market, Google will have increasing amounts of consumer data at increasingly lower costs, and therefore greatly reduced incentives to compete based on privacy protections.

III. The Commission Should Require Google to Increase Transparency in Google Search

EPIC believes that the Commission should require Google to increase the transparency of the Google Search algorithm. Through its search engine, Google effectively determines how much of the world's information is accessed, with important implications for users, small businesses, and other entities that use or appear in search results. Society therefore has a strong interest in transparency and accountability regarding the power Google wields through its search function. The value of transparency has been recognized in a variety of contexts. The Freedom of

[22] Bracha and Pasquale, *supra* note 19, at 1183.

Information Act,[23] for example, has long proved a valuable tool in helping citizens learn "what the Government is up to."[24] Similarly, the EU Data Protection Directive grants data subjects a "right of access" to the logic involved in any automatic processing of personal data.[25] Both the Department of Commerce and the Commission have also cited transparency as an essential element of privacy protection.[26] Even Google has committed to transparency as part of its free and open Internet initiative.[27]

The Commission should apply these principles to Google's search practices. Users should have access to more information about the search algorithm, particularly regarding "personalized" searches that combine the processing of personal data with the display of search results. The principal objection to increased search transparency is that it will enable unsavory individuals to "game" the search rankings. This critique is less relevant, however, in cases involving highly personalized search results, as it would be exceedingly difficult to manufacture the prior search history necessary to generate a high search ranking. Furthermore, the Commission itself could review sensitive aspects of the algorithm confidentially[28] on a regular basis to check for competitive harms—a practice already in place as part of an earlier settlement with Google over privacy violations.[29]

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[23] 5 U.S.C. § 552 (2012).
[24] Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 171-72 (2004).
[25] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 1995 O.J. (L 281) art. 12(a) *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1995:281:0031:0050:EN:PDF.
[26] *See* WHITE HOUSE, CONSUMER DATA PRIVACY IN A NETWORKED WORLD: A FRAMEWORK FOR PROTECTING PRIVACY AND PROMOTING INNOVATION IN THE GLOBAL ECONOMY 2012, http://www.whitehouse.gov/sites/default/files/privacy-final.pdf; FED. TRADE COMM'N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE (2012), http://www.ftc.gov/os/2012/03/120326privacyreport.pdf.
[27] *See Google Transparency Report*, https://www.google.com/transparencyreport/ (last visited February 21, 2013).
[28] 15 U.S.C. § 46(f) allows the Commission to withhold "trade secret[s] or any commercial or financial information which is obtained from any person and which is privileged or confidential."
[29] *Google, Inc*., FTC File No. 102 3136, at IV (Agreement Containing Consent Order), *available at* http://www.ftc.gov/os/caselist/1023136/110330googlebuzzagreeorder.pdf.

IV. The Commission Should Require Google to Adopt Fair Information Practices for All Data Collection

Bearing in mind the threats to consumer privacy posed by the longer-term effects of Google's data collection market dominance, the Commission should have required Google to sign a consent order agreeing to a set of Fair Information Practices (FIPs).[30] By imposing an order, the FTC could have ensured Google's accountability to its commitments. While a letter of agreement is a gesture of good faith, it does not contain the more stringent kinds of conditions and safeguards that would hold Google accountable for its business decisions. In 2007, Commissioner Harbour applauded Google/DoubleClick's demonstration of its "willingness to be held accountable for its commitments." Nevertheless, she advised, the letter was not enough of a safeguard against potential privacy violations. She advised, "the combined firm is urged to state clearly and unambiguously what kind of information it intends to gather, how it will collect and use that information, and what choices consumers will be able to exercise."[31]

Furthermore, by requiring FIPs, the Commission could facilitate uniform, consistent policy enforcement. As Commissioner Harbour has noted, "Any final set of principles that emerges must respect the privacy regimes established in other jurisdictions, in order to foster international trust and facilitate global commerce."[32] FIPs appear in various laws and frameworks throughout the information privacy space, such as the Organization for Economic

[30] EPIC has made the same recommendation to the FTC in other similar settlement proceeding where the FTC has asked for public comment. *See, e.g.*, Comments of the Elec. Privacy Info. Ctr., FTC Project No P114506 (Jul. 11, 2012), *available at* https://epic.org/privacy/ftc/FTC-In-Short-Cmts-7-11-12-FINAL.pdf; Comments of the Elec. Privacy Info. Ctr., FTC Docket No. 102 3058 (Jun. 8, 2012), *available at* https://epic.org/privacy/socialnet/EPIC-Myspace-comments-FINAL.pdf; Comments of the Elec. Privacy Info. Ctr., FTC Project No P114506 (May 11, 2012), *available at* https://epic.org/privacy/ftc/EPIC-FTC-Ad-Disclosures-FINAL.pdf; Comments of the Elec. Privacy Info. Ctr., FTC Docket No. 092 3184 (Dec. 17, 2011), *available at* https://epic.org/privacy/facebook/Facebook-FTC-Settlement-Comments-FINAL.pdf; Comments of the Elec. Privacy Info. Ctr., FTC Docket No. 102 3136 (May 2, 2011), *available at* https://epic.org/privacy/ftc/googlebuzz/EPIC_Comments_to_FTC_Google_Buzz.pdf.

[31] Harbour, *supra* note 16.

[32] *Id.*

Cooperation and Development (OECD) Privacy Guidelines,[33] the Privacy Act of 1974,[34] and the European Commission's recent Data Protection Regulation.[35] Several of these principles are also highlighted in the Commission's recent report, such as privacy by design, user choice, and transparency.[36] One recent formulation of the FIPS is the White House's Consumer Privacy Bill of Rights (CPBR). [37] The CPBR is a comprehensive framework that lists seven substantive privacy protections for consumers: Individual Control, Transparency, Respect for Context, Security, Access and Accuracy, Focused Collection, Accountability.[38] By requiring that Google incorporate the FIPs, the Commission could establish a legal safeguard ensuring the same commitments that Google merely promised in its letter.

More importantly, the Commission can put in place the baseline privacy standards that are widely recognized around the world and necessary to protect the interests of Google's clients and users in an inherently transnational marketplace. This kind of commitment would address a number of the individual practices that the Commission sought to resolve in this investigation. For instance, in its letter of commitment, Google discusses its AdWords API terms and conditions, specifying that its modified practices will only be applicable to "licensees with a primary billing address in the United States." This means that Google, an international company, will be held to different standards regarding its API practices in the United States and elsewhere.

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[33] OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, *available at* http://www.oecd.org/document/18/0,3343,en_2649_34255_1815186_1_1_1_1,00.html.
[34] Privacy Act of 1974, 5 USC § 552a.
[35] Proposal for a Regulation of the European Parliament and the Council on the protection of individuals with regard to the processing of personal data and the free movement of such data (General Data Protection Regulation), E.C. COM (2012) final, (Jan. 25, 2012), available at http://ex.europa/eu/justice/data-protection/document/review2012/com_2012_11_en.pdf
[36] FED. TRADE COMM'N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE (2012), http://www.ftc.gov/os/2012/03/120326privacyreport.pdf.
[37] *See* WHITE HOUSE, CONSUMER DATA PRIVACY IN A NETWORKED WORLD: A FRAMEWORK FOR PROTECTING PRIVACY AND PROMOTING INNOVATION IN THE GLOBAL ECONOMY 2012, http://www.whitehouse.gov/sites/default/files/privacy-final.pdf.
[38] *Id.*

As a result, Google's responsibility will be to ensure that it is verifying its clients' mailing addresses before enforcing its terms and conditions. Instead, the Commission has the opportunity to ensure that Google's API practices align with those in other parts of the world. Instead of focusing its attention on verifying a client's mailing address, Google could look beyond that specific rule and into its data practices regarding AdWords clients more generally.

IV. Conclusion

Consumer privacy would be better protected by drafting orders to include FIPs and the other recommendations contained in these comments. Moreover, letter agreements have little ability to protect consumer interests. EPIC therefore urges the Commission to modify the agreements to address the concerns set out in these comments and to adopt binding settlements.

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