September 8, 2011

Honorable Jon Leibowitz, Chairman
Honorable William E. Kovacic, Commissioner
Honorable J. Thomas Rosch, Commissioner
Honorable Edith Ramirez, Commissioner
Honorable Julie Brill, Commissioner
The Federal Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Dear Mr. Chairman and Members of the Commission:

We understand that the Federal Trade Commission (FTC) is currently investigating Google for possible antitrust violations.¹ We also understand that the investigation is focusing on Google’s search practices, and whether it preferences its own content in its search results.² We would like to bring a relevant matter to your attention -- Google’s use of its dominance in the search engine market to discriminate against non-Google content concerning “privacy.”

Specifically, the subjective, secretive ranking criteria that Google uses on YouTube, the video sharing site the company acquired in 2006, unfairly preferences Google’s own material on “privacy” over non-Google material that would be ranked higher with the use of objective, transparent criteria. Following the acquisition, Google revised the YouTube search criteria such that Google’s subjective “relevance” rankings became the default for returning search results. As a consequence, Google’s own online videos on “privacy” are more likely to be ranked highly, and therefore viewed by Internet users, than if the original search criteria had remained as the default. Over time, it has also become increasingly difficult to organize search results on YouTube using objective criteria.

This problem came to our attention as a result of EPIC’s (the “Electronic Privacy Information Center”) efforts to promote access to online videos on privacy-related topics. Beginning in 2006, EPIC created a web page to make available privacy-related videos of interest to the general public.³ The videos for the EPIC archive were gathered from news

sources, documentaries, TV programs, interviews with political leaders, and privacy experts. Initially, many of these videos were highly ranked on YouTube, which was often where we looked to find useful content.

For example, the first post on the EPIC Video Archive, a very disturbing cell phone recording of a student being tased has, as of today, 1,711,845 hits and 4,378 likes. Yet this video, prominently featured at the EPIC site, will not be found on YouTube using the current Google default ranking system and the search term “privacy.” However, Google’s own video content occupies positions #4, #5, #9 and #10 for a search today on YouTube with the search term “privacy.”

As part of the FTC's investigation into Google for potential antitrust violations, we recommend that the Commission investigate the extent to which Google's rankings preference its own content and disfavor the content of others. Our concern is not primarily about anti-competitive market practices; it is about public access to information made available on the Internet.

**Factual Background**

Google’s video service business practices impact large numbers of consumers, as YouTube is the third most popular site on the Internet, with over 2 billion hits per day. More than 13 million hours of video were uploaded to YouTube in 2010 and 35 hours of video are uploaded. Even YouTube's mobile site gets over 100 million views a day.

The specific reason to address this concern now in the context of the current review is the fact that Google now controls the search rankings on YouTube and therefore exercises enormous influence over the availability and popularity of videos made available over the Internet. On October 9, 2006, Google announced it had bought

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4 We note that similar practices, i.e. the preferencing of the search provider’s content, may occur with other search services and other search companies. For example, using Google search and the search string “privacy” produced a ranking for the “Google Privacy Center” at #3 while using “Bing” finds “Microsoft Online Privacy Notice Highlights” at #2, a listing that does not appear on the first screen of Google search. Both companies appear to be favoring their own content over the content in the search rankings they provide. We believe that the Commission could also look more broadly at search rankings across the industry. But the focus of this letter is specifically on the impact that Google’s acquisition of YouTube had on the ranking of privacy-related video content on the Internet, and therefore on the public’s ability to get access to this information.


8 Id.
YouTube for $1.65 billion dollars in stock.9 With regard to the acquisition, Eric Schmidt, Google CEO, stated: "The YouTube team has built an exciting and powerful media platform that complements Google’s mission to organize the world’s information and make it universally accessible and useful. . . "10 At the time Google bought YouTube, it had been in operation for less than a year but already had 50 million users around the world.11

At the time Google acquired YouTube, 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. “Hits,” for example, is simply the number of times a particular video was viewed, at least in part, and an ordering by “hits” would place those videos that had been viewed a lot above those videos that had been viewed fewer times. “Viewer rankings” reflect the five-to-one user star rating that users assign to the videos. Searches ordered by “viewer rankings,” for example, would place a video that received four stars on average above a video that received three stars on average.

It is also significant that either rating system could be easily verified by the user, i.e. the users could independently verify, by observing the hits and viewer rankings associated with each video entry, the accuracy of Google’s search ordering.

After Google acquired YouTube, Google transformed the search defaults for YouTube and adopted the subjective criteria of "relevance," which uses Google's proprietary search algorithm. While the original rankings were still available to users who went back to restore the defaults, this “nudge” in the settings caused a profound change in the search ordering and therefore the availability of video on the Internet.

For example, in 2007, after the acquisition, a search on YouTube for "privacy" (automatically sorted by "relevance") returned Google content (a PR video that described particular Google business practices) as the top result.12 See Appendix 1. This Google video only has a 3.5 star rating by users. However, when the search results are sorted instead by "rating," non-Google material (including a documentary video of freedom of speech, the right to privacy, and innocence from torture) is at the top of the list of results for a search for "privacy,"13 and the top result has a five star ranking by users. See Appendix 2.

Google continues to preference its own content on YouTube. As of today, a search on YouTube for "privacy" (automatically sorted by "relevance") returns five

10 Id.
13 Id.
Google videos in the top ten results. See Appendix 3. All of the videos are promotional videos developed by the company, describing its own services and business practices. When the search is sorted instead by "user rating," there is no Google content in the top ten search results. See Appendix 4. Instead, the videos include film documentaries, news reports, and music videos. And when the search is sorted by "view count," there is only one Google video in the top ten search results. See Appendix 5.

By way of further illustration, the top result in the "user rankings" search has 3,106 likes, 9 dislikes, and 108,546 views. See Appendix 6. The first result in the "view count" search has 12,430,424 views, 7,715 likes, and 6,196 dislikes. See Appendix 7. In contrast, the Google video ranked fourth on the default "relevance" search has 1,775,613 views, 546 likes, and 227 dislikes. See Appendix 8.

Therefore, Google's subjective "relevance" algorithm ranks the Google produced video higher than the other two videos, even though the Google video has 1/7 the number of views of the top viewed video, ¼ the number of likes, and 25 times as many dislikes as the top ranked video. The default rank ordering established by Google for YouTube clearly preferences Google's own content.

In order to sort search results by anything other than "relevance," the user has to choose from a drop down list, and can no longer see the other options listed at the top of the screen as they could in 2007. Google has also eliminated with the straightforward star rating system, replaced it with the number of likes and dislikes, making it easier still to manipulate search outcomes.

**Google's Practice of Preferencing its Own Content on YouTube Constitutes an Unfair and Anticompetitive Practice**

The FTC has the authority to review antitrust issues under Section 5 of the Federal Trade Commission Act (FTCA), which proscribes, "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce."20 According to FTC Commissioner Kovacic, "[c]ourts have

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interpreted Section 5 as enabling the FTC to prosecute conduct that violate the letter of the antitrust statutes . . . and to proscribe behavior that contradicts their spirit.\footnote{KOVACIC ET AL., ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 970 (Thomson West 2002).}

YouTube search results are organized using the subjective secret Google "relevance" algorithm by default. These search results preference Google content over non-Google content, even when this content has fewer views and lower ratings by objective standards. Other objective methods of organizing YouTube search results yield more results with non-Google content. It is not obvious to the user how to change the default subjective "relevance" setting to use the more objective criteria of "user rating" or "view count".

Therefore, Google has used its dominance in the search algorithm marketplace to preference its own content in search results. This business practice leads to Google's domination in the marketplace of content and ideas, as it gives Google the limitless ability to not only preference its own content but to disfavor the content of others, including groups or individuals that have differing views from Google on such topics as privacy.

**Request for Investigation**

EPIC respectfully requests that the Commission, as part of its investigation into Google for potential antitrust violations, investigate the extent to which Google's rankings preference its own content over information that is more newsworthy, more significant, and in fact of greater interest to Internet users. Google’s dominance of the search marketplace should not influence the marketplace of information and ideas to Google’s advantage.

Sincerely,

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Appendix 1:

Appendix 2

Search Results for “privacy”

Appendix 3

Appendix 4

Appendix 5

Appendix 6

Appendix 7

Appendix 8

Google Search Privacy: Plain and Simple