

March 26, 2019

The Honorable Jerry Moran, Chairman
The Honorable Richard Blumenthal, Ranking Member
U.S. Senate Committee on Commerce, Science, and Transportation
Subcommittee on Manufacturing, Trade, and Consumer Protection
512 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Moran and Ranking Member Blumenthal:

We write to you regarding the hearing on “Small Business Perspectives on a Federal Data Privacy Framework.”¹ We appreciate your interest in this important issue. For many years, the Electronic Privacy Information Center (“EPIC”) has worked with the Senate Commerce Committee to help protect the privacy rights of Americans.²

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 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

¹ *Small Business Perspectives on a Federal Data Privacy Framework*, 116th Cong. (2019), S. Comm. on Commerce, Sci. & Trans., Subcomm. on Manufacturing, Trade, and Consumer Protection, <https://www.commerce.senate.gov/public/index.cfm/hearings?ID=F9F0116F-97F7-4EF3-BD87-1325C0730BFA> (Mar. 25, 2019).

² See, e.g., *An Examination of Children’s Privacy: New Technologies and the Children’s Online Privacy Protection Act (COPPA)*: Hearing Before the S. Comm. on Commerce, Sci., and Trans., 111th Cong. (2010) (statement of Marc Rotenberg, Exec. Dir. EPIC), https://epic.org/privacy/kids/EPIC_COPPA_Testimony_042910.pdf; *Impact and Policy Implications of Spyware on Consumers and Businesses*: Hearing Before the S. Comm. on Commerce, Sci., and Trans. 110th Cong. (2008) (statement of Marc Rotenberg, Exec. Dir. EPIC), https://www.epic.org/privacy/dv/Spyware_Test061108.pdf.

promote new forms of revenue.³ 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.⁴ Among the first privacy policies on the Internet were those developed by websites that partnered with DoubleClick. They assured users that no personal data would be collected.⁵ 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.⁶

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.⁷ We filed one of the first privacy complaints with the FTC.⁸ 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.⁹

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.”¹⁰ 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.¹¹ EPIC said at the time,

³ 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>.

⁴ 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.

⁵ *Id.*

⁶ 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”].

⁷ EPIC, *DoubleTrouble*, <https://epic.org/privacy/doubletrouble/>.

⁸ EPIC DoubleClick Complaint, *supra* note 6.

⁹ *Privacy advocates rally against DoubleClick-Abacus merger*, CNET (Jan. 2, 2002), <https://www.cnet.com/news/privacy-advocates-rally-against-doubleclick-abacus-merger/>.

¹⁰ *Statement of DoubleClick CEO Kevin O'Connor re: Online Privacy Practices* (Mar. 2, 2000), available at <http://techlawjournal.com/privacy/20000302.htm>.

¹¹ *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.

“Google’s proposed acquisition of DoubleClick will give one company access to more information about the Internet activities of consumers than any other company in the world. Moreover, Google will operate with virtually no legal obligation to ensure the privacy, security, and accuracy of the personal data that it collects.”¹² On December 21, 2007, the FTC approved the proposed merger without conditions in a 4-1 opinion, saying that the proposed acquisition is “[u]nlikely to lessen competition.”¹³

Much of what we predicted happened. Google broke many of the agreements to protect privacy that DoubleClick had established.¹⁴ 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 advertising to behavioral advertising, a change it said it would not make and which its founders knew could bring great damage to the Internet.¹⁵ 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

¹² *Id.* at 10.

¹³ Statement of the Federal Trade Commission Concerning Google/DoubleClick, FTC File No. 071-0170 (Dec. 20, 2007), https://www.ftc.gov/system/files/documents/public_statements/418081/071220googleddc-commstmt.pdf.

¹⁴ 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>.

¹⁵ 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.”)

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.¹⁶

The Problem of Preemption

We also recognize that many small businesses may prefer a single federal standard, but this approach is both short-sighted and contrary to American traditions. Privacy challenges are arising rapidly and it is the states who are on the front lines, defending both American consumers and American businesses. In the area of data breach legislation, for example, California recognized that the original bill it enacted to address the problem of breach of financial records would not help with the new problem of medical record breach. A federal law that preempted California's ability to respond to new threats would have placed consumers and businesses at risk, particularly over the last few years as cyber attacks from foreign adversaries increased.

Conclusion

The advertising system we have 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. It would be foolish to imagine that the current model is sustainable. Privacy rules can help level the playing field. And states must have the freedom to respond to new challenges as they emerge.

We ask that this letter be entered in the hearing record. EPIC looks forward to working with the Subcommittee 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

¹⁶ Editorial, *Break Up Google*, Boston Globe (June 14, 2018), <https://apps.bostonglobe.com/opinion/graphics/2018/06/break-google/>.