

COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER, CENTER FOR
DIGITAL DEMOCRACY, CONSUMER FEDERATION OF AMERICA, AND U.S. PUBLIC
INTEREST RESEARCH GROUP

to the

FEDERAL TRADE COMMISSION

Competition and Consumer Protection in the 21st Century Hearings,

Project No. P181201

Topic 4: “The intersection between privacy, big data, and competition.”

August 20, 2018

By notice published on August 6, 2018, the Federal Trade Commission (“FTC”) seeks comment in advance of public hearings that will examine “whether broad-based changes in the economy, evolving business practices, new technologies, or international developments might require adjustments to competition and consumer protection enforcement law, enforcement priorities, and policy.”¹ Pursuant to this notice, the Electronic Privacy Information Center (“EPIC”), Center for Digital Democracy (“CDD”), Consumer Federation of America (“CFA”), and U.S. Public Interest Research Group (“U.S. PIRG”) submits these comments on the following topic: “*the intersection between privacy, big data, and competition.*” In these comments, EPIC will explain why privacy is critical to the FTC’s mission of promoting competition.

¹ Fed. Trade Comm’n., *Hearings On Competition and Consumer Protection in the 21st Century*, File No. P181201, 83 Fed. Reg. 3807, (Aug. 6, 2018), https://www.ftc.gov/system/files/documents/federal_register_notices/2018/07/p181201_fr_notice_announcing_competition_and_consumer_protection_hearings.pdf; *see also*, Fed. Trade Comm’n., *FTC Announces Hearings On Competition and Consumer Protection in the 21st Century*, Press Release (Jun. 20, 2018), <https://www.ftc.gov/news-events/press-releases/2018/06/ftc-announces-hearings-competition-consumer-protection-21st>.

Over the past twenty years, the growing concentration among the dominant technology firms in the United States has eroded consumer privacy and stifled innovation. Unlike traditional mergers and acquisitions, where companies combine their products and services, companies today are merging for the explicit purpose of amassing vast troves of consumer data. This dramatic shift has not only enabled the invasive tracking and profiling of consumers, but has threatened the free flow of ideas on the web. The FTC’s failure to protect privacy in its merger review process has contributed greatly to the decline in competition among the digital platforms in the US. The dominant digital platforms regularly abuse their access to consumer data to undermine competitors and hinder the development of innovative, privacy-enhancing technologies. The past twenty years have demonstrated that protecting consumer privacy is paramount to promoting competition and innovation.

As Chairman Simons stated during his nomination hearing, “the FTC needs to devote substantial resources to determine whether its merger enforcement has been too lax, and if that is the case, the agency needs to determine the reason for such failure and to fix it.”² The FTC’s failure to consider privacy in its review of mergers and anticompetitive conduct has had enormous and wide-ranging consequences for the American economy. Simply put, the FTC can no longer promote competition while ignoring privacy.

Consumer groups have called attention to the link between privacy and competition for nearly two decades. In 1999, EPIC first pointed to the specific consumer privacy risks that would result from the Internet advertising firm DoubleClick’s proposed acquisition of the catalog

² *Nomination Hearing*, 115th Cong. (2018), S. Comm. on Science, Commerce and Transportation, (Feb. 14, 2018) (Joseph Simons, Chairman, Fed. Trade Comm’n. at 59:40), <https://www.commerce.senate.gov/public/index.cfm/hearings?ID=EECF6964-F8DC-469E-AEB2-D7C16182A0E8>.

database firm Abacus.³ The TransAtlantic Consumer Dialogue (“TACD”) also warned the FTC of the consumer privacy risks of the proposed merger of Time Warner and AOL in 2000.⁴

EPIC, the Center for Digital Democracy, and US PIRG warned the FTC of the devastating consequences for consumer privacy that would result from Google’s acquisition of DoubleClick in 2007 and of Facebook’s acquisition of WhatsApp in 2014.⁵ The Commission’s failure to block these two mergers or impose privacy safeguards has drastically reduced privacy for Internet users around the world, stifled innovation, and accelerated industry consolidation.

The comments of Consumer Privacy Organizations are divided into three sections. Part I will discuss the FTC’s history of inaction on significant mergers and anticompetitive conduct that harmed consumer privacy and innovation. Part II will address the consequences of this inaction, including the unprecedented threats to privacy, innovation, and free speech posed by the dominant digital platforms. Finally, Part III will propose what steps the FTC can take to remedy this failure. In short, the FTC should: 1) unwind the Facebook-WhatsApp deal; 2) require Facebook and Google to spin off their advertising units into independent companies; 3) block all future acquisitions by Facebook and Google that would enable the companies to increase their monopoly over consumer data; 4) impose privacy safeguards for all future mergers that implicate data privacy concerns; and 5) perform audits of algorithmic tools for companies under consent order as a way to guard against anticompetitive conduct.

³ In the Matter of DoubleClick Inc. (2000) (EPIC Complaint, Request for Injunction, Investigation and Other Relief), https://epic.org/privacy/internet/ftc/DCLK_complaint.pdf.

⁴ TACD, Statement on AOL-Time Warner Merger (Feb. 2000), <https://www.ftc.gov/news-events/press-releases/2000/12/ftc-approves-aoltime-warner-merger-conditions>.

⁵ In the Matter of Google, Inc. and DoubleClick, Inc. (2007) (EPIC Complaint, Request for Injunction, Investigation and Other Relief), https://epic.org/privacy/ftc/google/epic_complaint.pdf; In the Matter of WhatsApp, Inc. (2014) (EPIC and Center for Digital Democracy Complaint, Request for Injunction, Investigation and Other Relief), <https://epic.org/privacy/ftc/whatsapp/WhatsApp-Complaint.pdf>.

I. The FTC’s failure over the past two decades to protect privacy in its merger review process has reduced competition and stifled innovation

A. The DoubleClick-Abacus Merger

In the early days of the Internet, many favored the development of online advertising models that could protect privacy.⁶ DoubleClick, then the Internet’s largest advertising firm, had developed an advertising model that was critical for the protection of privacy. DoubleClick’s business model did not rely on the collection of personal information.⁷ The company assured users that “DoubleClick does not know the name, email address, phone number, or home address of anybody who visits a site in the DoubleClick Network.”⁸ DoubleClick further stated in its Privacy Policy that, “all users who receive an ad targeted by DoubleClick’s technology remain completely anonymous. We do not sell or rent any information to third parties.”⁹

But in 1999, DoubleClick proposed to acquire Abacus, the largest catalog database firm in the United States.¹⁰ Abacus collected detailed information about consumers’ offline purchases. At the end of 1998, the Abacus database contained over 88 million detailed buyer profiles compiled from records of over 2 billion catalog purchasing transactions.¹¹ Abacus included over 75% of the largest consumer merchandise catalogs in the United States.¹²

⁶*On Internet Privacy and Profiling: Hearing before the S. Committee on Commerce, Science and Transportation*, (statement of Marc Rotenberg, Exec. Dir., EPIC), 106th Cong., (Jun. 13, 2000), <https://epic.org/privacy/internet/senate-testimony.html>.

⁷ *S. 809, The Online Privacy Protection Act of 1999: Hearing before the S. Comm. on Commerce, Science and Transportation, Subcomm. on Communications*, (statement of Marc Rotenberg, Exec. Dir. EPIC) 106th Cong., (Jul. 27, 1999), https://www.epic.org/privacy/internet/EPIC_testimony_799.pdf.

⁸ *In the Matter of DoubleClick Inc.* (2000) (EPIC Complaint, Request for Injunction, Investigation and Other Relief), https://epic.org/privacy/internet/ftc/DCLK_complaint.pdf [hereinafter “DoubleClick complaint”].

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

We immediately objected to the proposed DoubleClick-Abacus merger and launched a national campaign to block the deal.¹³ EPIC filed one of the first privacy complaints with the FTC, warning of the consequences of combining anonymous online browsing data with offline, identified purchase information.¹⁴ We also pointed to the representation that DoubleClick had made to Internet users that it would not gather user-identified data.¹⁵ It was the first time that the FTC had been asked to use its Section 5 authority to investigate a privacy complaint.

The Commission (as well as two states) launched an investigation into DoubleClick's business practices following EPIC's complaint. DoubleClick ultimately backed off the deal, stating 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."¹⁶ But the message was clear: Internet advertisers, even those who began with good business models, would seek to expand their reach and build profiles of Internet users.

B. The AOL-Time Warner Merger

In 2000, AOL and Time Warner announced their intent to merge into a combined multimedia company to produce what would be, at the time, "the most detailed records on consumers ever assembled."¹⁷ AOL's instant messaging service had over 20 million Internet subscribers by the year 2000.¹⁸ As the Wall Street Journal reported, "AOL already has the names, addresses, and credit card numbers of its 22 million members. It also has tons of tidbits

¹³ EPIC, *DoubleTrouble*, <https://epic.org/privacy/doubletrouble/>.

¹⁴ DoubleClick complaint.

¹⁵ *Id.*

¹⁶ *Statement of DoubleClick CEO Kevin O'Connor re: Online Privacy Practices* (Mar. 2, 2000), available at <http://techlawjournal.com/privacy/20000302.htm>.

¹⁷ TACD, *Statement on AOL-Time Warner Merger* (Feb. 2000), <https://www.ftc.gov/news-events/press-releases/2000/12/ftc-approves-aoltime-warner-merger-conditions>. [hereinafter "TACD statement"]

¹⁸ Andrea Petersen & Matthew Rose, *Database of a Merged AOL Brings Cheers and Chills*, Wall Street Journal (Jan. 14, 2000), <http://www.wsj.com/articles/SB947807131223295584>.

on ages, interests, and musical tastes of the people who fill out member profile pages or register with AOL's ICQ chat or its Spinner online radio divisions."¹⁹ Furthermore, the company recorded and collected the browser history of its users.²⁰

The Trans Atlantic Consumer Dialogue ("TACD"), in conjunction with 64 consumer organizations—including EPIC—warned the FTC of the privacy implications of the TimeWarner-AOL merger.²¹ TACD stated that, "companies other than AOL-Time Warner who seek to operate under a higher privacy standard will be at a competitive disadvantage as they will be unable to compete against a larger entity that is able to make unrestricted use of the personal information it obtains." TACD recommended that the FTC not approve the merger unless enforceable practices to safeguard consumer privacy were adopted.²² In hearings before Congress regarding the proposed merger, many Senators also voiced privacy as one of their chief concerns.²³

Furthermore, as TACD described in its letter to the Commission, AOL and Time Warner both had a history of noncompliance with privacy laws.²⁴ At the time of the FTC's merger review, Time Warner was defending itself in federal court against allegations that it failed to comply with privacy subscriber provisions of the Cable Act of 1984.²⁵ And AOL, TACD wrote, "has been the subject of numerous privacy complaints. At one point, AOL sold member profile information to telemarketers until this practice was disclosed to the public."²⁶

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² TACD statement.

²³ Transcript of hearing before the S. Comm. on Commerce, Science, and Transportation (Mar. 2, 2000), *available at* <http://www.gpo.gov/fdsys/pkg/CHRG-106shrg78185/html/CHRG-106shrg78185.htm>.

²⁴ TACD statement.

²⁵ *Id.*

²⁶ *Id.*

The FTC approved the merger with conditions, but without addressing any of the consumer privacy or data security risks, despite both companies' records of non-compliance with privacy laws.²⁷ The warnings of EPIC and TACD proved prophetic. In 2007 AOL changed its business model, transitioning to behavioral advertising and digital media.²⁸ By the end of 2009, after AOL spun off from Time Warner as an independent company, AOL had amassed over 80 content websites, its own search engine, and its own behavioral targeting software company.²⁹

C. The Google-DoubleClick Merger

In 2007, EPIC warned the FTC that Google's acquisition of DoubleClick would accelerate its dominance of the web.³⁰ At the time, Google not only dominated the search market in Europe and the United States, but it also tracked its users' search activity in connection with their IP addresses and stored users' search activity indefinitely. Thus, in 2007, Google maintained permanent records of over 1.1 billion Internet users' web activity.³¹

EPIC, along with the Center for Digital Democracy and U.S. PIRG, filed a complaint with the FTC warning of the dire consequences for consumer privacy if the Commission approved the Google-DoubleClick merger:

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. At this time, there is simply no consumer privacy issue more pressing for the

²⁷ Press Release, *FTC Approves AOL/Time Warner Merger with Conditions*, Federal Trade Commission (Dec. 14, 2000), <https://www.ftc.gov/news-events/press-releases/2000/12/ftc-approves-aoltime-warner-merger-conditions>.

²⁸ Louise Story, *AOL Moving Headquarters to New York*, N.Y. Times (Sept. 17, 2007), <https://www.nytimes.com/2007/09/17/technology/17cnd-adco.html>.

²⁹ Press Release, *AOL Celebrates Day One as an Independent Company*, AOL (Dec. 10, 2009), <http://corp.aol.com/2009/12/10/aol-celebrates-day-one-as-an-independent-company/>.

³⁰ In the Matter of Google, Inc. and DoubleClick, Inc. (2007) (EPIC Complaint, Request for Injunction, Investigation and Other Relief), https://epic.org/privacy/ftc/google/epic_complaint.pdf [hereinafter "Google-DoubleClick complaint"].

³¹ Internet World Statistics, *Internet Growth Statistics*, <http://www.internetworldstats.com/stats.htm>.

Commission to consider than Google's plan to combine the search histories and web site visit records of Internet users..³²

Congress held hearings on the proposed merger, at which EPIC testified that, "it is our view that unless the Commission establishes substantial privacy safeguards by means of a consent decree, Google's proposed acquisition of DoubleClick should be blocked."³³ At the time, it was becoming increasingly clear to lawmakers that privacy should play a critical role in merger analysis. Senator Herb Kohl, then-Chairman of the Senate Judiciary Committee, Subcommittee on Antitrust, stated that:

Some commentators believe that antitrust policymakers should not be concerned with these fundamental issues of privacy, and merely be content to limit their review to traditional questions of effects on advertising rates. We disagree. The antitrust laws were written more than a century ago out of a concern with the effects of undue concentrations of economic power for our society as a whole, and not just merely their effects on consumers' pocketbooks. No one concerned with antitrust policy should stand idly by if industry consolidation jeopardizes the vital privacy interests of our citizens so essential to our democracy.³⁴

A bipartisan group of Senators also wrote to FTC Chairman Deborah Platt Majoras, urging that, "antitrust regulators need to be wary to guard against the creation of a powerful Internet conglomerate able to extend its market power in one market into adjacent markets, to the detriment of competition and consumers."³⁵

³² *Id.*

³³ *An Examination of the Google-DoubleClick Merger and the Online Advertising Industry: Hearing Before the S. Comm on the Judiciary, Subcomm. on Antitrust, Competition Policy & Consumer Rights*, 110th Cong. (Sep. 27, 2007), (statement of Marc Rotenberg, Exec. Dir., EPIC), https://epic.org/privacy/ftc/google/epic_test_092707.pdf.

³⁴ *Opening Statement of Sen. Herb Kohl at a hearing on An Examination of the Google-DoubleClick Merger and the Online Advertising Industry: What Are the Risks for Competition and Privacy?*, (Sept. 27, 2007), available at https://epic.org/privacy/ftc/google/kohl_092707.pdf.

³⁵ Letter from Sens. Herb Kohl and Orrin Hatch to Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, (Nov. 19, 2007), https://epic.org/privacy/ftc/google/sen_anti_111907.pdf.

European consumer organizations, including BEUC, the leading European consumer association, echoed the warnings of US lawmakers and consumer groups.³⁶ In an open letter to the European Commission, BEUC wrote:

The monopoly power that Google will acquire through this acquisition will further weaken its incentives to compete on the non-price aspects of its services, including such quality factors as the privacy protections it offers consumers. Indeed, Google's own stated ambitions are to establish integrated on-line profiles of internet users, to enable it to provide customized content, highly targeted advertising, and individualized recommendations for new services and content. This will vastly diminish a user's ability to selectively limit their consent to use certain pieces of personal information to specific purposes or at least control access to this information.³⁷

The New York State Consumer Protection Board likewise warned about the competitive and privacy risks posed by the merger. The Chairperson and Executive Director of the Board wrote in a letter to the FTC:

The combination of DoubleClick's Internet surfing history generated through consumers' pattern of clicking on specific advertisements, coupled with Google's database of consumers' past searches, will result in the creation of 'super-profiles,' which will make up the world's single largest repository of both personally and non-personally identifiable information. . . . In the best interest of consumers, we call for a halt to the merger until the Federal Trade Commission has fully investigated Google's planned use of the data post-merger.³⁸

EPIC proposed several possible remedies, based on past FTC actions. For example, EPIC suggested that the Commission could require the merged companies to license a set of data to a commission-approved buyer, which would then act as an independent competitor.³⁹ EPIC also suggested that the Commission require the acquiring company to divest a division that threatened

³⁶ Letter from BEUC and Others to Commissioner Neelie Kroes on Proposed Acquisition of DoubleClick by Google (June 27, 2007), available at https://www.epic.org/privacy/ftc/google/beuc_062707.pdf.

³⁷ *Id.*

³⁸ Letter from Mindy Bockstein, Chairperson and Exec. Dir., N.Y. State Consumer Prot. Bd., to Chairperson Deborah Platt Majoras, Fed. Trade Comm'n. (May 1, 2007), available at <https://epic.org/privacy/ftc/google/cpb.pdf>.

³⁹ See Fed. Trade Comm'n, *Decision and Order, In Re Softsearch Holdings, Inc.*, FTC Docket No. C-3759 (Aug. 1997).

to block competition in the market,⁴⁰ create an information security and reporting program,⁴¹ or grant the FTC access to its databases for post-merger audits.⁴²

The Commission did not adopt any of these recommendations, however, and instead approved the merger without conditions. The sole dissenter was Commissioner Pamela Jones Harbour, who accurately forecasted the numerous data and privacy-related harms that would arise from the merger. Finding that the combination of Google's and DoubleClick's vast troves of data could lead to network effects that might "tip" the market irrevocably in Google's favor, Commissioner Harbour concluded that, "I do not doubt that this merger has the potential to create some efficiencies, especially from the perspective of advertisers and publishers. But it has greater potential to harm competition, and it also threatens privacy."⁴³ She posed a set of questions that foreshadowed the wide-ranging anticompetitive effects of the merger:

- In a post-merger online advertising market driven by the value of behavioral targeting, will Google/DoubleClick face meaningful competition?
- Will any other firm be able to amass a data set of the same scope and size?
- Will any other company be able to overcome the network effects and offer an equally focused level of behavioral targeting?
- If advertisers and publishers have to channel their online advertising through Google/DoubleClick in order to access the best dataset that supports targeted advertising, will any other firms have the ability or incentive to compete meaningfully in these markets?⁴⁴

⁴⁰ See Fed. Trade Comm'n, *Agreement Containing Consent Orders, In Re VNU N.V.*, FTC Docket No. C-3900, File No. 991-0319 (Oct. 22, 1999), available at <http://www.ftc.gov/os/1999/10/vnunconsent.pdf>.

⁴¹ See generally, Fed. Trade Comm'n, *Agreement, In Re Microsoft Corporation*, FTC Docket No. C-4069 (Aug. 8, 2002).

⁴² See Fed. Trade Comm'n, *Decision and Order, In Re Automatic Data Processing, Inc.*, FTC Docket No. 9282 (Oct. 20, 1997), available at <http://www.ftc.gov/os/1997/10/autoinfo.htm>.

⁴³ P Jones Harbour, *Dissenting Statement In the Matter of Google/DoubleClick*, FTC File No 071-0170 (2007), https://www.ftc.gov/sites/default/files/documents/public_statements/statement-matter-google/doubleclick/071220harbour_0.pdf.

⁴⁴ *Id.*

We now know that the answer to all of these questions is conclusively ‘no.’ In the years since, the warnings by members of Congress, Commissioner Harbour, EPIC and the entire US and international consumer protection community have proven only modest. For instance, at the time of the merger, Google did not engage in behavioral advertising. But in 2009, two years after the merger, 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.⁴⁵

Then in 2011, Google attempted to launch Buzz, a social networking service linked to Gmail, Google's email service.⁴⁶ EPIC filed a complaint with the FTC, highlighting several aspects of the Google Buzz service that threatened Gmail users' privacy.⁴⁷ The Commission agreed with EPIC, and entered into a Consent Order with Google.⁴⁸ But Google soon violated that Consent Decree by tracking Internet users in violation of their browsers' privacy settings, resulting in what was at the time the largest FTC fine ever.⁴⁹

EPIC also wrote a letter to the FTC in 2011 following Google acquisition of YouTube, detailing how Google had begun to preference its own videos on privacy over EPIC's videos.⁵⁰ Google had replaced YouTube's objective search rankings with the company's own opaque,

⁴⁵ 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), available at <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.”)

⁴⁶ See, EPIC, *In the Matter of Google*, (Complaint, Request for Investigation, Injunction, and Other Relief), before the Fed. Trade Comm'n. (Feb. 16, 2010), https://epic.org/privacy/ftc/googlebuzz/GoogleBuzz_Complaint.pdf.

⁴⁷ *Id.*

⁴⁸ Fed. Trade Comm'n, *FTC Charges Deceptive Privacy Practices in Google's Rollout of Its Buzz Social Network*, Press Release, (Mar. 30, 2011), <http://ftc.gov/opa/2011/03/google.shtm> (“Google's data practices in connection with its launch of Google Buzz were the subject of a complaint filed with the FTC by the Electronic Privacy Information Center shortly after the service was launched.”).

⁴⁹ Fed. Trade Comm'n, *Google Will Pay \$22.5 Million to Settle FTC Charges it Misrepresented Privacy Assurances to Users of Apple's Safari Internet Browser*, Press Release, (Aug. 9, 2012), <https://www.ftc.gov/news-events/press-releases/2012/08/google-will-pay-225-million-settle-ftc-charges-it-misrepresented>.

⁵⁰ Letter from EPIC to Jon Leibowitz, Chairman, Fed. Trade Comm'n., (Sep. 8, 2011), https://epic.org/privacy/ftc/google/Google_FTC_Ltr_09_08_11.pdf (on Google/Youtube search rankings).

subjective algorithms, resulting in the disappearance of EPIC’s videos from the top of the search rankings.⁵¹

In 2012, the FTC failed to act on a 160-page report compiled by staff of the Bureau of Competition concerning Google’s anticompetitive practices. The report recommended initiating an enforcement action against Google for anticompetitive conduct under Section 2 and Section 5 of the FTC Act, concluding that, “the natural and probable effect of Google’s conduct is to diminish the incentives of vertical websites to invest in, and to develop, new and innovative conduct.”⁵² The staff report detailed numerous anticompetitive practices by Google, including entering into exclusive contractual restrictions with publishers to preference its search and advertising businesses, favoring Google’s own content over that of its competitors, and “scraping content from rival vertical websites in order to improve its own product offerings.”⁵³ Despite the extensive report, the Commission voted 5-0 to close its investigation into Google in 2013. In 2017, Google’s rampant anticompetitive conduct produced a \$3 billion fine by the European Commission.⁵⁴ To date, however, the FTC has taken no action.

D. The Facebook-WhatsApp Merger

Facebook’s acquisition of WhatsApp is a prime example of how innovative business models that protect user privacy have been destroyed by companies that rely on privacy-invasive business models. Facebook announced its acquisition of WhatsApp, a mobile messaging application, in 2014. WhatsApp’s business model reflected a strong commitment to user privacy.

⁵¹ *Id.*

⁵² Fed. Trade Comm’n, *In re Google, Inc.* (Memorandum), FTC File No. 111-0163, (Aug. 8, 2012), available at <https://graphics.wsj.com/google-ftc-report/img/ftc-ocr-watermark.pdf>.

⁵³ *Id.*

⁵⁴ European Comm’n., *Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service*, Press Release, (Jun. 27, 2017), http://europa.eu/rapid/press-release_IP-17-1784_en.htm.

The company charged a nominal fee, and in exchange, its users relied on the company's promises to protect their privacy. The founder of the company proclaimed to his users in 2012 that, "we have not, we do not and we will not ever sell your personal information to anyone. Period. End of story."⁵⁵ WhatsApp was wildly popular because of its privacy commitments. At the time of the proposed acquisition, WhatsApp processed 50 billion messages per day from 450 million monthly users.⁵⁶

Prior to the deal, Facebook was regularly collecting user data from companies it acquired, even if those companies originally protected user privacy. When Facebook purchased Instagram in 2012, Instagram users were not subjected to targeted advertisements based on the content they uploaded to the site.⁵⁷ Like WhatsApp, Instagram's Terms of Service included a provision that in the event of acquisition, users' "information such as name and email address, User Content and any other information collected through the Service may be among the items sold or transferred."⁵⁸ After the acquisition, though, Facebook did in fact begin collecting Instagram users' data, changing the Instagram Terms of Service to reflect this change.⁵⁹

That is why when Facebook proposed buying WhatsApp in 2014, industry experts warned that the merger would have disastrous consequences for consumer privacy.⁶⁰ EPIC and the Center for Digital Democracy filed a complaint with the FTC requesting that the Commission

⁵⁵ WHATSAPP, *Why We Don't Sell Ads*, WhatsApp Blog, (Jun. 18, 2012), <https://blog.whatsapp.com/245/Why-we-dont-sell-ads>.

⁵⁶ Kristin Burnham, *Facebook's WhatsApp Buy: 10 Staggering Stats*, InformationWeek (Feb. 21, 2014), <http://www.informationweek.com/software/social/facebooks-whatsapp-buy-10-staggering-stats-/d/d-id/1113927>.

⁵⁷ Craig Timberg, *Instagram outrage reveals a powerful but unaware Web community*, Washington Post, (Dec. 21, 2012), http://www.washingtonpost.com/business/technology/instagram-outrage-reveals-a-powerful-but-unaware-web-community/2012/12/21/b387e828-4b7a-11e2-b709-667035ff9029_story.html.

⁵⁸ *Id.*

⁵⁹ Hayley Tsukayama, *Instagram reminds users of privacy policy change*, Washington Post, (Jan. 16, 2013), http://www.washingtonpost.com/business/technology/instagram-reminds-users-of-privacy-policy-change/2013/01/16/124a8712-5fee-11e2-9940-6fc488f3fecdd_story.html.

⁶⁰ Elizabeth Dwoskin, *WhatsApp Founder Plans to Leave After Broad Clashes with Parent Facebook*, Washington Post (Apr. 30, 2018), https://www.washingtonpost.com/business/economy/whatsapp-founder-plans-to-leave-after-broad-clashes-with-parent-facebook/2018/04/30/49448dd2-4ca9-11e8-84a0-458a1aa9ac0a_story.html.

block the merger until adequate privacy safeguards could be established to protect WhatsApp users' data.⁶¹ As we explained in the complaint:

WhatsApp built a user base based on its commitment not to collect user data for advertising revenue. Acting in reliance on WhatsApp representations, Internet users provided detailed personal information to the company including private text to close friends. Facebook routinely makes use of user information for advertising purposes and has made clear that it intends to incorporate the data of WhatsApp users into the user profiling business model.⁶²

In response to EPIC and CDD's complaints, the director of the FTC Bureau of Consumer Protection sent a letter to Facebook and WhatsApp notifying the companies of their obligations to honor their privacy promises.⁶³ The letter stated, "if the acquisition is completed and WhatsApp fails to honor these promises, both companies could be in violation of Section 5 of the FTC Act and potentially the FTC's order against Facebook."⁶⁴ The FTC cautioned that, "hundreds of millions of users have entrusted their personal information to WhatsApp. The FTC staff continue to monitor the companies' practices to ensure that Facebook and WhatsApp honor the promises they have made to those users."⁶⁵

Immediately following the announcement of the Facebook deal, the founder of WhatsApp, Jan Koum, publicly reasserted his commitment to protecting his users' privacy. Koum wrote on the WhatsApp Blog, "Here's what will change for you, our users: nothing. WhatsApp will remain autonomous and operate independently." At the time, European antitrust regulators were skeptical of the merger, serving Facebook with a questionnaire of more than 70

⁶¹ *In the Matter of WhatsApp, Inc.*, (2014) (EPIC Complaint, Request for Investigation, Injunction, and Other Relief), <https://epic.org/privacy/ftc/whatsapp/EPIC-CDD-FTC-WhatsApp-Complaint-2016.pdf> [hereinafter "WhatsApp complaint"].

⁶² *Id.*

⁶³ Letter From Jessica L. Rich, Director of the Federal Trade Commission Bureau of Consumer Protection, to Erin Egan, Chief Privacy Officer, Facebook, and to Anne Hoge, General Counsel, WhatsApp Inc., at 1 (Apr. 10, 2014), available at http://www.ftc.gov/system/files/documents/public_statements/297701/140410facebookwhatapltr.pdf.

⁶⁴ *Id.*

⁶⁵ *Id.*

pages to determine if the merger violated Europe's antitrust laws.⁶⁶ The FTC, however, approved the merger without conditions based on the assurances by both companies to protect WhatsApp users' privacy.

Then in 2016, WhatsApp announced that it would begin disclosing users' personal information to Facebook, including their phone numbers, for targeted advertising.⁶⁷ The announcement stated, "by connecting your phone numbers with Facebook's systems, Facebook can offer better friend suggestions and show you more relevant ads."⁶⁸ WhatsApp users were not even given the opportunity to affirmatively consent to this change in business practice, despite the fact that it directly contradicted years of WhatsApp assurances. Rather, users were required to opt-out within 30 days.⁶⁹

EPIC and the Center for Digital Democracy immediately filed a second complaint with the FTC in response to this proposed data transfer, arguing that WhatsApp's policy change violated Section 5 of the FTC Act.⁷⁰ EPIC and CDD urged the FTC to investigate and enjoin the proposed transfer of WhatsApp users' data to Facebook.⁷¹ The FTC responded that it would "carefully review" the complaint, but took no further action.⁷²

In Europe, however, the response was starkly different. In March of 2018, the UK Information Commissioner's Office blocked WhatsApp's proposed transfer of data to Facebook,

⁶⁶ Frances Robinson & Tom Fairless, *EU Sends Questionnaire to Rivals over Facebook Deal with WhatsApp*, Wall St. J., (Sept. 1, 2014), <https://www.wsj.com/articles/eu-sends-questionnaire-to-rivals-over-facebook-deal-with-whatsapp-1409577419>.

⁶⁷ WHATSAPP, *Looking Ahead for WhatsApp*, WhatsApp Blog, (Aug. 25, 2016), <https://blog.whatsapp.com/10000627/Looking-ahead-for-WhatsApp>.

⁶⁸ *Id.*

⁶⁹ WHATSAPP, *Frequently Asked Questions*, <https://faq.whatsapp.com/> (last visited Aug. 9, 2018).

⁷⁰ WhatsApp complaint (*supra* note 61).

⁷¹ *Id.*

⁷² Letter from Jah-Juin "Jared" Ho, Div. of Privacy and Identity Prot., Bureau of Consumer Prot., Fed. Trade Comm'n. to Marc Rotenberg, EPIC & Jeff Chester, CDD, (Aug. 31, 2016), <https://epic.org/privacy/ftc/whatsapp/FTC-Response-to-EPIC-CDD-WhatsApp-Complaint.pdf>.

finding that the companies deceived users and that they could not assert a lawful basis for the transfer.⁷³ In May 2017, the European Commission fined Facebook \$122 million for misleading European authorities about the data transfer.⁷⁴ And in September of 2016, Germany’s privacy regulator ordered Facebook to immediately stop collecting and storing user data from WhatsApp, and to delete all WhatsApp user data that has already been transferred.⁷⁵ German officials stated that WhatsApp’s new data transfer policy constitutes “an infringement of national data protection law.”⁷⁶

In April 2018, WhatsApp founder Jan Koum quit the board of Facebook because Facebook decided to cast aside the business model that had made his app successful.⁷⁷ Shortly after Koum’s departure, WhatsApp announced that it would formally shift away from a privacy-protective business model and begin selling targeted ads on its platform.⁷⁸

The Facebook-WhatsApp merger should serve as a powerful warning to the Commission of the consequences of its failure to safeguard privacy in its merger review process. As EPIC Executive Director Marc Rotenberg wrote in *Techonomy*:

If the FTC had stood behind its commitment to protect the data of WhatsApp users, there might still be an excellent messaging service, with end-to-end encryption, no advertising

⁷³ Information Commissioner’s Office, *WhatsApp, Inc.*, (Mar. 12, 2018), <https://ico.org.uk/media/action- weve-taken/undertakings/2258376/whatsapp-undertaking-20180312.pdf>.

⁷⁴ European Comm’n., *Mergers: Commission Fines Facebook €110 Million for Providing Misleading Information About WhatsApp Takeover*, Press Release, (May 18, 2017), http://europa.eu/rapid/press- release_IP-17-1369_en.htm.

⁷⁵ Samuel Gibbs, *Germany orders Facebook to stop collecting WhatsApp user data*, The Guardian (Sept. 27, 2016), <https://www.theguardian.com/technology/2016/sep/27/germany-orders-facebook-stop-collecting-whatsapp-phone-numbers-user-data>.

⁷⁶ *Id.*

⁷⁷ Elizabeth Dwoskin, *WhatsApp Founder Plans to Leave After Broad Clashes with Parent Facebook*, Washington Post (Apr. 30, 2018), https://www.washingtonpost.com/business/economy/whatsapp-founder-plans-to-leave-after-broad-clashes-with-parent-facebook/2018/04/30/49448dd2-4ca9-11e8-84a0-458a1aa9ac0a_story.html.

⁷⁸ Deepa Seetharaman, *Facebook’s New Message to WhatsApp: Make Money*, Wall Street Journal, (Aug. 1, 2018), <https://www.wsj.com/articles/facebooks-new-message-to-whatsapp-make-money-1533139325>.

and minimal cost, widely loved by internet users around the world. But the FTC failed to act and one of the great Internet innovations has essentially disappeared.⁷⁹

II. Protecting consumer privacy is pivotal to preserving competition, innovation and the free exchange of ideas on the web

It is well established that the consolidation among technology firms has diminished consumer privacy. But the lack of privacy protection is a key reason why these firms became monopolies to begin with. Commentators have remarked that, “big data is the new oil.”⁸⁰ Technology firms today merge for the purpose of combining their vast troves of consumer data. The dominant digital platforms leverage their “network effects” to obtain monopolies over data collection, preventing competitors from entering the market. The rise of the two most dominant digital platforms, Google and Facebook, has been facilitated by their constant abuse of consumer privacy. These firms employ algorithmic secrecy to thwart competitors and further entrench their dominance. As a consequence, there has been a dramatic shift away from contextual advertising and towards behavioral advertising, built on deep profiles of consumers. This shift has taken power away from traditional publishers and placed it in the hands of just two companies that now control the vast flow of information on the web. It is becoming clear that this concentration of power threatens our democratic institutions. Protecting consumer privacy is critical to restoring competition and trust in the digital economy.

A. The lack of privacy protection has contributed to the decline in competition among technology firms

⁷⁹ Marc Rotenberg, *The Facebook-WhatsApp Lesson: Privacy Protection Necessary for Innovation*, Techonomy, (May 4, 2018), <https://techonomy.com/2018/05/facebook-whatsapp-lesson-privacy-protection-necessary-innovation/>.

⁸⁰ *The World's Most Valuable Resource is No Longer Oil, but Data*, The Economist, (May 6, 2017), <https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data>.

A handful of technology companies now assert unprecedented control over the digital economy. Google accounts for 90 percent of all Internet searches in the United States.⁸¹ 66 percent of smartphone users rely on Google's Android operating system.⁸² Apple and Google together provide the software for 99 percent of all smartphones.⁸³ Meanwhile, Facebook controls 77 percent of mobile social networking traffic in the United States.⁸⁴ As the Boston Globe observed, "[a]long with Facebook, Google owns sites and services that, by some estimates, influence 70 percent of all Internet traffic."⁸⁵

Google and Facebook achieved their dominance through unrivaled access to consumer data. While these two companies may be known for offering search and social media services to Internet users, their real customers are advertisers, and the products they offer are the users. Over 80 percent of Google's revenue comes from advertising, while advertising accounts for nearly all of Facebook's revenue.⁸⁶

The more dominant these companies become, in turn, the greater their ability to collect consumer data and increase their share of the market. As of 2018, Google controls 88 percent of the online search advertising market.⁸⁷ Facebook and Google presently control 84 percent of the global digital advertising market, and together the two firms are capturing 99 percent of the growth.⁸⁸

⁸¹ The Editorial Board, *Break Up Google*, Boston Globe (Jun. 14, 2018), <http://apps.bostonglobe.com/opinion/graphics/2018/06/break-google/>.

⁸² Matt Phillips, *Apple's \$1 Trillion Milestone Reflects Rise of Powerful Megacompanies*, N.Y. Times, (Aug. 2, 2018), <https://www.nytimes.com/2018/08/02/business/apple-trillion.html>.

⁸³ *Id.*

⁸⁴ Shannon Bond, *Google and Facebook build digital ad duopoly*, Fin. Times, (Mar. 14, 2017), <http://on.ft.com/2npS0cv>.

⁸⁵ Boston Globe, n. 86, *supra*

⁸⁶ *Id.*

⁸⁷ Shannon Bond, *Google and Facebook build digital ad duopoly*, Fin. Times, (Mar. 14, 2017), <http://on.ft.com/2npS0cv>.

⁸⁸ Matthew Garrahan, *Google and Facebook dominance forecast to rise*, Fin. Times, (Dec. 3, 2017), <http://on.ft.com/2jKl913>.

This dominance is not simply a result of “network effects”—the phenomenon whereby each additional user of a network enhances the network’s value.⁸⁹ Privacy—or a lack thereof—is at the very heart of why the digital platforms have been able to entrench their dominance. Access to consumer data gives firms a competitive edge that did not exist prior to the age of big data.⁹⁰ The more dominant a company becomes, the greater its ability to surveil consumer activities. This in turn enables the company to extract more advanced information from its artificial intelligence techniques, making its behavioral advertising models infinitely more valuable than a rival firm’s.⁹¹ The Boston Globe commented that, “as Google’s vast data trove feeds ever more sophisticated algorithms, the search giant’s lead over its competitors will lengthen.”⁹²

Mergers are thus driven by the desire to combine vast troves of consumer data. It quickly became clear that Facebook acquired WhatsApp to obtain access to its users’ data. During the trial over AT&T’s proposed acquisition of Time Warner, AT&T testified that access to consumer data was a primary reason it wished to acquire Time Warner.⁹³ “Unlike Google and Facebook,” the companies wrote in a trial brief, “Time Warner has no access to meaningful data about its customers and their needs, interests and preferences.”⁹⁴

FTC Commissioner Pamela Jones Harbour first observed this phenomenon over ten years ago in her dissent over the Google-DoubleClick merger. She stated:

in many ways the acquisition of DoubleClick by Google is a case of first impression for the Commission. The transaction will combine not only the two firms’ products

⁸⁹ See Maurice Stucke & Allen Grunes, *BIG DATA AND COMPETITION* 163 (2016).

⁹⁰ See Fed. Trade Comm’n, *BIG DATA: A TOOL FOR INCLUSION OR EXCLUSION?* (2016), <https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf>; see also, *The World’s Most Valuable Resource is No Longer Oil, but Data*, *The Economist*, (May 6, 2017), <https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data>.

⁹¹ *Id.*

⁹² Boston Globe, n. 86, *supra*.

⁹³ Mitchell Schnurman, *Here’s What The Facebook Crisis Means for AT&T and Time Warner*, *Dallas Morning News*, (Apr. 13, 2018), <https://www.dallasnews.com/opinion/commentary/2018/04/13/att-still-wanna-like-facebook>.

⁹⁴ *Id.*

and services, but also their vast troves of data about consumer behavior on the Internet. Thus, the transaction reflects an interplay between traditional competition and consumer protection issues.”⁹⁵

Specifically, Harbour predicted precisely how Google and DoubleClick would merge cookie-tracking data to develop a comprehensive map of all consumer activity across the web:

Post-merger, a user would visit one or more sites displaying DoubleClick ads, and also conduct one or more Google searches, during a time period when the IP address remained the same (a highly likely confluence of events, given each party’s reach on the Internet). The merged firm would be able to use the common IP address to link the Google and DoubleClick cookies on that machine, and thereby cross-index that user among both databases – without relying on any proprietary customer data. And once the cookies themselves were linked in the merged firm’s dataset, it would not matter if the user’s IP address changed in the future.⁹⁶

Companies today are looking to expand their access to consumer data at all costs, and for good reason. Targeted, or “behavioral” advertising is the fastest growing source of revenue for technology firms. Between 2012 and 2017, Google’s advertising revenue almost tripled, while Facebook’s advertising revenue shot from \$4 billion to \$40 billion.⁹⁷

Google and Facebook in turn leverage their dominance to further invade consumer privacy in anticompetitive ways. In 2017, German antitrust authorities investigated Facebook’s practice of entering into partnerships with third-party apps that require a Facebook account to login, as well as its practice of embedding the ‘like’ button on third-party websites.⁹⁸ The investigation found that Facebook had abused its dominant market position to accumulate information about users when they were not using the social network.⁹⁹ Google, meanwhile, is

⁹⁵ P Jones Harbour, *Dissenting Statement In the Matter of Google/DoubleClick*, FTC File No 071-0170 (2007), https://www.ftc.gov/sites/default/files/documents/public_statements/statement-matter-google/doubleclick/071220harbour_0.pdf.

⁹⁶ *Id.* fn 22.

⁹⁷ Rani Molla, *Google leads the world in digital and mobile ad revenue*, Recode, (Jul. 24, 2017), <https://www.recode.net/2017/7/24/16020330/google-digital-mobile-ad-revenue-world-leader-facebook-growth>.

⁹⁸ Douglas Busvine, *Facebook Abused Dominant Position, Says German Watchdog*, Reuters, (Dec. 19, 2017), <https://www.reuters.com/article/us-facebook-germany-dataprotection/facebook-abused-dominant-position-says-german-watchdog-idUSKBN1ED10J>.

⁹⁹ *Id.*

exploiting its dominance to merge the online and offline activities of consumers. EPIC filed a complaint with the FTC in July 2017 concerning Google’s “store sales measurement” technique, wherein Google correlates online advertising clicks with consumers’ offline, in-store purchases.¹⁰⁰ According to Google, it can now track up to 70% of the credit card transactions in the United States.¹⁰¹ These practices by Facebook and Google reflect a key theme: the more dominant a firm becomes, the more it will look to merge disparate sets of consumer information.

Studies show that consumers overwhelmingly care about privacy but lack choices. According to Pew Research Center, “[m]ost Americans hold strong views about the importance of privacy in their everyday lives.”¹⁰² As of 2015, 93 percent of adults believe it is important to have control over who can get information about them.¹⁰³ Conversely, 91 percent of adults believe that consumers have little to no control over how personal data is collected and used by companies.¹⁰⁴ This is a natural consequence of the fact that companies that protect privacy are at a competitive disadvantage to the companies that exploit vast amounts of consumer data.

Moreover, because Google’s and Facebook’s algorithms are a black box, consumers do not even have enough information to make meaningful choices.¹⁰⁵ And it would take consumers months to read every privacy policy they encounter even when companies do reveal their

¹⁰⁰ EPIC, *In the Matter of Google, Inc. (Purchase tracking) (Complaint, Request for Investigation, Injunction, and Other Relief)* before the Fed. Trade Comm’n., (Jul. 31, 2017), <https://epic.org/privacy/ftc/google/EPIC-FTC-Google-Purchase-Tracking-Complaint.pdf>.

¹⁰¹ *Id.*

¹⁰² Mary Madden & Lee Rainie, *Americans’ Attitudes About Privacy, Security and Surveillance*, Pew Res. Ctr. (May 20, 2015), <http://www.pewinternet.org/2015/05/20/americans-attitudes-about-privacy-security-and-surveillance/>; *see also*, EPIC, *Public Opinion on Privacy* (2018), <https://www.epic.org/privacy/survey/>.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Frank Pasquale, *Privacy, Antitrust, and Power*, 20 *Geo. Mason. L. Rev.* 1009 (2012).

practices.¹⁰⁶ In other words, consumers are not exercising any meaningful “choice” when Google or Facebook collects their data.

B. The dominant platforms deploy secretive algorithms and invasive profiling techniques to quash competition and stifle innovation

The tech giants leverage their dominance to hinder the development of new and innovative products and services. The secrecy of Google’s algorithms is critical to it maintaining its dominance over search. As Professor Frank Pasquale has explained, “Google’s secrecy is not only designed to keep spammers from manipulating its results; it can also prevent rival companies from copying its methods or building upon them.”¹⁰⁷ Innovation in search engine technology naturally depends on access to information—the more queries Google’s search engine gets, the more it is able to “train” its algorithms to sharpen and perfect the results.¹⁰⁸ Google’s chief scientist Peter Norvig explained this point simply: “We don’t have better algorithms than everyone else, we just have more data.”¹⁰⁹ Co-founder of Google Sergey Brin stated that the ideal search engine would be “like the mind of God.”¹¹⁰

Thus, algorithmic transparency is a critical aspect of competition. As Professor Pasquale explained, “unlike patents, which the patent holder must disclose and which eventually expire, it is possible for trade secrets never to be revealed, let alone enter the public domain.”¹¹¹

¹⁰⁶ Alexis C. Madrigal, *Reading the Privacy Policies You Encounter in a Year Would Take 76 Work Days*, The Atlantic (Mar. 1, 2012), <https://www.theatlantic.com/technology/archive/2012/03/reading-the-privacy-policies-you-encounter-in-a-year-would-take-76-work-days/253851/>.

¹⁰⁷ Frank Pasquale, *Paradoxes of Digital Antitrust: Why the FTC Failed to Explain Its Inaction on Search Bias*, Harv. J. L. & Tech. Occasional Paper Series, (Jul. 2013), available at, <https://jolt.law.harvard.edu/assets/misc/Pasquale.pdf>.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

Tech platforms also deploy invasive consumer tracking tools to track rival companies and quash competition. In 2013, Facebook acquired a startup called Onavo, a VPN-like app that touted its ability to protect user privacy by routing traffic through private servers.¹¹² When Facebook acquired Onavo, however, it used the app for a much different purpose—to track consumers when they used other apps on their smartphone to gain detailed insights into which rival apps consumers were using.¹¹³ According to the Wall Street Journal, “the tool shaped Facebook’s decision to buy WhatsApp.” The Washington Post referred to Facebook’s acquisition of Onavo as “a little-known weapon in Facebook’s massive expansion strategy—helping the social-networking giant determine what is gaining popularity among consumers.”¹¹⁴

Facebook’s and Google’s acquisitions are not about adding innovative products and services. They are about stifling privacy-enhancing innovations. Prior to Google’s acquisition of DoubleClick, DoubleClick had been developing an innovative online advertising model that preserved privacy. EPIC testified before Congress in 2007 that DoubleClick was “the type of innovative service made possible by the Internet. We praised the company for its stand on privacy issues, and we specifically acknowledged its effort to make anonymity work for online commerce.”¹¹⁵ Google’s acquisition of DoubleClick stifled that development. As Commissioner Harbour pointed out in her dissent, “[p]rior to the announcement of the deal, Google was developing and beta-testing its own third party ad serving solution, Google for Publishers and Google for Advertisers, which would have competed against DoubleClick’s DART for

¹¹² Elizabeth Dwoskin, *Facebook’s willingness to copy rivals’ apps seen as hurting innovation*, Washington Post, (Aug. 10, 2017), <http://wapo.st/2kt3E5B>.

¹¹³ Betsy Morris & Deepa Seetharaman, *The New Copycats: How Facebook Squashes Competition from Startups*, Wall St. J. (Aug. 9, 2017), <http://on.wsj.com/2vmw4TT>.

¹¹⁴ Dwoskin, n. 115, *supra*.

¹¹⁵ *An Examination of the Google-DoubleClick Merger and the Online Advertising Industry: Hearing Before the S. Comm on the Judiciary, Subcomm. on Antitrust, Competition Policy & Consumer Rights*, 110th Cong. (Sept. 27, 2007), (statement of Marc Rotenberg, Exec. Dir., EPIC), https://epic.org/privacy/ftc/google/epic_test_092707.pdf.

Publishers and DART for Advertisers. Development efforts ceased once the proposed acquisition of DoubleClick was announced.”¹¹⁶

The Economist clearly illustrated the problem of how data collection stifles competition and innovation:

This access to data also gives technology firms a competitive advantage that never existed prior to the age of big data. They are able to track what new products are entering the marketplace based on their surveillance of consumer activities.

They have a “God’s eye view” of activities in their own markets and beyond. They can see when a new product or service gains traction, allowing them to copy it or simply buy the upstart before it becomes too great a threat. Many think Facebook’s \$22bn purchase in 2014 of WhatsApp, a messaging app with fewer than 60 employees, falls into this category of “shoot-out acquisitions” that eliminate potential rivals. By providing barriers to entry and early-warning systems, data can stifle competition.¹¹⁷

In the coming years, this problem is only going to get worse. Companies that wish to develop business models that protect privacy will face barriers to entry that never existed before. The FTC must combat these anti-competitive forces by protecting consumer privacy and fostering the development of privacy-enhancing innovations.

C. The growing concentration among the digital platforms threatens the free exchange of ideas on the web

The FTC Act was written to address the growing concentration of private power that shaped the American economy over a century ago.¹¹⁸ Section 5 of the FTC Act and Section 7 of the Clayton Act were intended to encourage vigorous competition for the larger purpose of

¹¹⁶ Harbour dissent, n. 48, *supra*.

¹¹⁷ *The World’s Most Valuable Resource is No Longer Oil, but Data*, The Economist, (May 6, 2017), <https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data>.

¹¹⁸ *See*, Statement of Marc Rotenberg (EPIC), Regarding the Majority Opinion of the Federal Trade Commission in the Proposed Acquisition of DoubleClick, (Dec. 20, 2007), https://epic.org/privacy/ftc/google/EPIC_statement122007.pdf.

protecting the public interest.¹¹⁹ Today, Google and Facebook exercise enormous economic and political power.¹²⁰ They have effectively become the gatekeepers to the marketplace of ideas. This is antithetical to the First Amendment and to the core ideas on which our country was founded.

Google’s control of search—the portal to the web and to all information—has given it unprecedented control over the marketplace of ideas.¹²¹ Our democracy thus faces an unprecedented threat if Google abuses its role as gatekeeper. And it has. In June 2017, the European Commission fined Google \$2.7 billion for preferencing its own price comparison tools over those of competitors.¹²² A year later, the European Commission fined Google a record \$5.1 billion for abusing its Android operating system to preference its own services.¹²³ Shortly after the E.U. fine was announced, FTC Chairman Simons told Congress, “we’re going to read what the E.U. put out very closely. We’re very interested in what they’re doing.”¹²⁴

Unlike traditional services, consumers have no way of knowing if a search engine is hiding something from them.¹²⁵ If consumers are looking for competitors to Google among price

¹¹⁹ *Id.*

¹²⁰ See, e.g. *Google Spends Millions on Academic Research to Influence Opinion, Says Watchdog*, The Guardian (Jul. 13, 2017), <https://www.theguardian.com/technology/2017/jul/13/google-millions-academic-research-influence-opinion>; Ben Brody & Bill Allison, *Facebook Set Lobbying Record Amid Cambridge Analytica Furor*, Bloomberg, (Apr. 20, 2018), <https://www.bloomberg.com/news/articles/2018-04-20/facebook-set-lobbying-record-ahead-of-cambridge-analytica-furor>.

¹²¹ Frank Pasquale, *Paradoxes of Digital Antitrust: Why the FTC Failed to Explain Its Inaction on Search Bias*, Harv. J. L. & Tech. Occasional Paper Series, July 2013, <https://jolt.law.harvard.edu/assets/misc/Pasquale.pdf>.

¹²² European Comm’n., *Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service*, Press Release, (Jun. 27, 2017), http://europa.eu/rapid/press-release_IP-17-1784_en.htm.

¹²³ European Comm’n., *Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google’s search engine*, Press Release (Jul. 18, 2018), http://europa.eu/rapid/press-release_IP-18-4581_en.htm.

¹²⁴ *Oversight of the Federal Trade Commission: Hearing before the H. Comm. on Energy & Commerce, Subcomm. on Digital Commerce and Consumer Protection*, 115th Cong. (2018), (statement of Joseph Simons, Chairman, Fed. Trade Comm’n.) (Jul. 18, 2018) <https://energycommerce.house.gov/hearings/oversight-of-the-federal-trade-commission-2018/>.

¹²⁵ Pasquale, n. 123, *supra*

comparison shopping services, it is likely Google on which they will search for those services.¹²⁶ That is why algorithmic secrecy is so critical to Google's dominance.

In addition, the rise of behavioral advertising has undercut the traditional advertising model that once sustained journalism. As the Boston Globe observed, "billions of dollars have been reallocated from creators of content to owners of monopoly platforms."¹²⁷ The consequence has been a rapid decline in revenue for journalism, posing grave threats to free speech and democracy.

Not only does behavioral advertising rely on the personal data of the individual consumers, it also follows a series of rules that target some people—and exclude others—based on factors from zip code and age to race, religion, and nationality. Online platforms use algorithms to target users with a level of granularity that has not been possible before. Political actors are able to exploit these tools to sow discord and undermine democracy. During the 2016 election, Russian operatives bought ads from Facebook that targeted "professed gun lovers, fans of Martin Luther King Jr., supporters of Trump, supporters of Clinton, residents of specific states, and Southerners who Facebook's algorithms concluded were interested in 'Dixie,'" and many other groups.¹²⁸

The Facebook-Cambridge Analytica scandal revealed the power that digital platforms have to influence elections. A recent study suggests that Google "has likely been determining the outcomes of upwards of 25 percent of the national elections in the world for several years now,

¹²⁶ *Id.*

¹²⁷ Boston Globe, n. 86, *supra*.

¹²⁸ Craig Timberg, Elizabeth Dwoskin, Adam Entous and Karoun Demirjian, *Russian ads, now publicly released, show sophistication of influence campaign*, Washington Post (Nov. 1, 2017), https://www.washingtonpost.com/business/technology/russian-ads-now-publicly-released-show-sophistication-of-influence-campaign/2017/11/01/d26aead2-bf1b-11e7-8444-a0d4f04b89eb_story.html.

with increasing impact each year as Internet penetration has grown.”¹²⁹ Without meaningful competition enforcement against the digital platforms, the threats to privacy and democratic institutions like the Cambridge Analytica scandal will only increase.

III. The FTC must use its competition authority to safeguard consumer privacy

The Commission has broad authority to consider privacy harms in its competition enforcement. Section 7 of the Clayton Act, 15 U.S.C. § 18, prohibits mergers if “in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.”¹³⁰ As the FTC states, “a merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, *diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives.*”¹³¹ Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), prohibits, *inter alia*, “unfair methods of competition.” Unfair methods of competition include any conduct that would violate the Sherman Antitrust Act.¹³²

Commissioner Pamela Jones Harbour explained in her Google-DoubleClick dissent why privacy falls squarely within the ambit of the Commission’s competition authority. “Section 7 is inherently forward-looking,” she wrote. “It requires the Commission to apply a dynamic analytical approach, based on predictions about how markets will evolve.” As she explained:

Google and DoubleClick’s customers are web-based publishers and advertisers who will profit from better-targeted advertising. From the perspective of these customers, the more data the combined firm is able to gather and mine, the better ... [u]nder the majority’s application of Section 7, there is no adequate proxy for

¹²⁹ Robert Epstein, *The Unprecedented Power of Digital Platforms to Control Opinions and Votes*, ProMarket, (Apr. 12, 2018), <https://promarket.org/unprecedented-power-digital-platforms-control-opinions-votes/>.

¹³⁰ U.S. Dep’t of Justice & Fed. Trade Comm’n, *Horizontal Merger Guidelines*, (Aug. 9, 2010), <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf>.

¹³¹ *Id.* (emphasis added).

¹³² *Id.*

the consumers whose privacy is at stake, because consumers have no business relationship with Google or DoubleClick.¹³³

International antitrust agencies recognize the need to make privacy a central component of competition analysis. EU Competition Commissioner Margrethe Vestager emphasized the connection between competition and privacy, calling data “the new currency of the Internet.”¹³⁴ Commissioner Vestager further stated, “Very few people realize that, if you tick the box, your information can be exchanged with others. Actually, you are paying a price, an extra price for the product that you are purchasing. You give away something that was valuable. I think that point is underestimated as a factor as to how competition works.” Former European Data Protection Supervisor Peter Hustinx has argued, “Power in the digital economy is partly driven by the degree to which a given undertaking can actually, potentially or hypothetically collect and diffuse personal information.”¹³⁵

Accordingly, the Commission should take these five steps to promote competition, innovation, and consumer privacy:

1) Reverse the approval of Facebook’s acquisition of WhatsApp

We now know that WhatsApp and Facebook lied to the FTC as part of the merger approval process. European authorities have come to the conclusion that WhatsApp cannot lawfully transfer data to Facebook. As EPIC told the FTC at the time, the merger would drastically reduce consumer privacy, and it has. The Commission erred in approving the deal, and it should correct its mistake and unwind the merger.

¹³³ Harbour dissent, n. 48, *supra*.

¹³⁴ Lewis Crofts & Robert McLeod, *Interview with Margrethe Vestager*, at 5, MLEX (Jan. 22, 2015), available at <https://www.yumpu.com/en/document/view/35665313/mlex-interview-vestager-22-01-15/2>.

¹³⁵ *Preliminary Opinion of the European Data Protection Supervisor on “Privacy and competitiveness in the age of big data,”* para. 4.1.2 (Mar. 2014), https://edps.europa.eu/sites/edp/files/publication/14-03-26_competition_law_big_data_en.pdf.

2) *Require Google and Facebook to spin off their advertising units into independent companies*

Requiring Google and Facebook to divest their advertising units would dramatically improve consumer privacy and competition, as it would eliminate most of the incentive for those companies to invasively track and profile consumers across the web.¹³⁶ Consumers use Google and Facebook to connect with friends and family, search the web, read the news, shop, and much more. In doing so, they disclose vast amounts of personal information to these companies. Google's and Facebook's ability to turn our private lives into advertising revenue has distorted the economy in profound ways. Separating their advertising units would go a long way towards preserving consumer privacy and restoring competition.

3) *Block all future acquisitions by Facebook and Google that would enable the companies to increase their access to consumer data*

As previously stated, these companies acquire competitors for the explicit purpose of increasing their monopolies over consumer data. Any future deal that would increase these companies' access to consumer data would have a de facto anticompetitive effect.

4) *Impose privacy safeguards for all future mergers that implicate data privacy concerns*

As EPIC has previously stated, the Commission need not outright block a merger to protect consumers. EPIC urged the Commission to impose privacy safeguards if it approved the Google-DoubleClick and Facebook-WhatsApp merger. These could include requiring companies to delete personal data from their servers and prohibiting the acquired entity from transferring the personal data of its customers to the parent company.

¹³⁶ See, Barry Lynn and Matt Stoller, *Facebook Must Be Restructured. The FTC Should Take These Nine Steps Now*, The Guardian, (Mar. 22, 2018), <https://www.theguardian.com/commentisfree/2018/mar/22/restructure-facebook-ftc-regulate-9-steps-now>.

5) Perform audits of algorithmic tools as well as human rights, social, economic and ethical impact assessments for companies under consent order to guard against anticompetitive conduct and other negative consequences

EPIC requested that the Commission order Google to provide “algorithmic transparency” for its processing of personal data as a condition of the Google-DoubleClick merger. We stated in our complaint that the Commission should, “order Google to provide, in a reasonable and timely manner, the logic involved in any automatic processing of data concerning that user.”¹³⁷ Algorithmic transparency is critical to identifying anticompetitive conduct. It would have exposed early on Google’s practices that led to record fines in Europe. Algorithmic transparency is also a key to protecting individual rights. By identifying potential biases, algorithmic transparency ensures a free and open web where ideas can be exchanged without the domination of one particular viewpoint or discrimination against certain groups.¹³⁸

Ultimately, however, we are concerned with the impact of secret profiling across broad categories of consumers and predictive algorithms. And so, we urge the FTC to develop, perhaps in cooperation with its European colleagues, methodologies to assess the human rights, social, economic and ethical impacts of the use of algorithms in modern data processing.¹³⁹ Such a broader view of the impact of algorithms would not only look at the effect on individual privacy, but also disparate impacts, as well as fairness, consumer protection, competition, accountability and innovation. These impact assessments should be required for companies under consent order

¹³⁷ EPIC, In the Matter of Google, Inc. and DoubleClick, Inc. (Complaint and Request for Injunction, Request for Investigation and for Other Relief), before the Fed. Trade Comm’n., (Jun. 6, 2007), https://www.epic.org/privacy/ftc/google/supp_060607.pdf.

¹³⁸ Comments of EPIC, *Developing UNESCO’s Internet Universality Indicators: Help UNESCO Assess and Improve the Internet*, United Nations Educational, Scientific and Cultural Organization (“UNESCO”) (Mar. 15, 2018), 5-6, [https://epic.org/internet-universality/EPIC_UNESCO_Internet_Universality_Comment%20\(3\).pdf](https://epic.org/internet-universality/EPIC_UNESCO_Internet_Universality_Comment%20(3).pdf).

¹³⁹ Alessandro Montelero, *AI and Big Data: A blueprint for human rights, social and ethical impact assessment*, Computer Law & Security Review, Volume 34, Issue 4, August 2018, Published by Elsevier Ltd., under the CCBY-NC-ND license, <https://www.sciencedirect.com/science/article/pii/S0267364918302012>

and could also be required of companies who come under special scrutiny for engaging in high risk data practices.

IV. Conclusion

It is simply wrong to suggest, as some have, that privacy and competition are at odds.¹⁴⁰ The reality is quite the opposite. Protecting consumer privacy is perhaps the most vital way to promote robust competition and innovation. Placing meaningful limits on the dominant firms' data collection practices can level the playing field and allow new, innovative products to enter the market, benefiting consumers and the American economy.

Respectfully submitted,

Electronic Privacy Information Center
Center for Digital Democracy
Consumer Federation of America
U.S. Public Interest Research Group

¹⁴⁰ See, *Keeping It: Maintaining Competition in the Privacy Debate*, Prepared remarks of Noah Joshua Phillips, Commissioner, Fed. Trade Comm'n, (Jul. 27, 2018), https://www.ftc.gov/system/files/documents/public_statements/1395934/phillips_-_internet_governance_forum_7-27-18.pdf.