May 20, 2019

The Honorable Lindsey Graham, Chairman
The Honorable Dianne Feinstein, Ranking Member
U.S. Senate Committee on the Judiciary
 Dirksen Senate Office Building 224
Washington, DC 20510

Dear Chairman Graham and Ranking Member Feinstein:

We write to you regarding the hearing on "Understanding the Digital Advertising Ecosystem and the Impact of Data Privacy and Competition Policy."[1] We appreciate your interest in this important issue. EPIC was also the first organization to examine the structure of internet-based advertising.

Today's digital advertising techniques are very different from traditional advertising models. In the analog world, consumers could readily identify the placement of an ad, the source and its purpose. There was little need for advertisers to gather personal data from users. Perhaps most critically, advertising supported editorial content. Advertising made possible the publication of daily news. Traditional advertising sustained a healthy ecosystem that also made possible the production of news without government subsidy. Much of that has changed.

There are many problems today with the Digital Advertising Ecosystems – profiling and tracking of Internet users, increasing concentration of providers (Google and Facebook), the loss of support for editorial content, discriminatory practices and redlining, preferencing the advertiser's products over competitor's, and political ads purchased by foreign advertisers intended undermine democratic elections in the United States. All of these issues require careful examination by this Committee. The threats to innovation, competition, and democracy are real.

But 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, and good also for consumers, journalism, and democracy.

In the early days of the commercial Internet, EPIC favored the development of digital advertising techniques and explained that online advertising could both safeguard privacy and promote new forms of revenue.[2] We expressed support for the digital advertising firm DoubleClick when it first announced that it would develop an advertising model that did not require the collection

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[1] *Understanding the Digital Advertising Ecosystem and the Impact of Data Privacy and Competition Policy*, 116th Cong. (2019), S. Comm. on the Judiciary, https://www.judiciary.senate.gov/meetings/understanding-the-digital-advertising-ecosystem-and-the-impact-of-data-privacy-and-competition-policy (May 21, 2019).
[2] Marc Rotenberg, EPIC Executive Director, Testimony before the Senate Commerce Committee, *On Internet Privacy and Profiling* (June 13, 2000), https://epic.org/privacy/internet/senate-testimony.html.

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of personal information.[3] 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.[4] As DoubleClick explained in 1997:

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

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

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

And when a Google later proposed to acquire DoubleClick, EPIC went to the FTC with an extensive complaint and warned of the danger to online privacy, competition, and innovation if the leading search engine also became the Internet's primary advertiser.[10] EPIC said at the time, "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."[11] On December 21, 2007, the FTC approved the proposed merger

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[3] Marc Rotenberg, EPIC Executive Director, Testimony before the S. Comm. on Commerce, Sci., and Trans., 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.
[4] *Id.*
[5] In the Matter of DoubleClick, Inc., EPIC Complaint, Request for Investigation, Injunction, and Other Relief (Feb. 10, 2000) at 4, https://epic.org/privacy/internet/ftc/DCLK_complaint.pdf.
[6] EPIC, *DoubleTrouble*, https://epic.org/privacy/doubletrouble/.
[7] EPIC DoubleClick Complaint, *supra* note 6.
[8] *Privacy advocates rally against DoubleClick-Abacus merger*, CNET (Jan. 2. 2002), https://www.cnet.com/news/privacy-advocates-rally-against-doubleclick-abacus-merger/.
[9] *Statement of DoubleClick CEO Kevin O'Connor re: Online Privacy Practices* (Mar. 2, 2000), *available at* http://techlawjournal.com/privacy/20000302.htm.
[10] *In the Matter of Google, Inc. and DoubleClick, Inc.*, EPIC, Center for Digital Democracy, and U.S. Public Interest Research Group Complaint, Request for Investigation, Injunction, and Other Relief (April 20, 2007), https://epic.org/privacy/ftc/google/epic_complaint.pdf.
[11] *Id.* at 10.

without conditions in a 4-1 opinion, saying that the proposed acquisition is "[u]nlikely to lessen competition."[12]

Much of what we predicted happened. Google broke many of the agreements to protect privacy that DoubleClick had established.[13]

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.[14] 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 and it is effective. 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.

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 ads with a level of granularity that has not been possible before. Political actors are able to target users with such precision that they can sow discord and undermine our democracy. During the 2016 election, Russian operatives bought ads from Facebook targeted at "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.'"[15]

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[12] 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/418081/071220googledc-commstmt.pdf.

[13] 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.

[14] 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.")

[15] Craig Timberg, Elizabeth Dwoskin, Adam Entous and Karoun Demirjian, *Russian ads, now publicly released, show sophistication of influence campaign,* Washington Post (Nov. 1, 2017),

Greater accountability for this advertising technique can be achieved with "Algorithmic Transparency." Advertisers should disclose how they targeted specific individuals, including the precise data collected and the targeting techniques deployed. EPIC recommends legislative solutions based on the Universal Guidelines for Artificial Intelligence (UGAI).[16] The UGAI "are intended to maximize the benefits of AI, to minimize the risk, and to ensure the protection of human rights."[17] These principles can provide the framework for any successful legislative efforts. Broadly, the guidelines address the rights and obligations of AI systems to ensure 1) fairness, accountability, and transparency; 2) autonomy and human determination; 3) data accuracy and quality; 4) safety and security; and 5) minimization of scope. Congress should enact legislation, based on the Universal Guidelines for AI, to address concerns about bias and establish accountability for companies who collect personal data.

Conclusion

The "Digital Advertising Ecosystem" today is not healthy. Two companies dominate the market. 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. Journalism, sustained by traditional advertising, is dying. Democracy is under attack from fake news. Secrecy and complexity are increasing as accountability is diminished. It would be foolish to imagine that the current model is sustainable.

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

Sincerely,

/s/ *Marc Rotenberg*

Marc Rotenberg
EPIC President

/s/ *Caitriona Fitzgerald*

Caitriona Fitzgerald
EPIC Policy Director

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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.

[16] The Public Voice, *Universal Guidelines for Artificial Intelligence*, https://thepublicvoice.org/AI-universal-guidelines.

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