

December 10, 2018

The Honorable Bob Goodlatte
Chairman
U.S. House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable Jerrold Nadler
Ranking Member
U.S. House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Goodlatte and Ranking Member Nadler:

The Electronic Privacy Information Center (EPIC) writes to you before your hearing, “Transparency & Accountability: Examining Google and its Data Collection, Use, and Filtering Practices.”¹ EPIC appreciates your timely attention to the key issues of algorithmic decision-making, filtering, and the use of personal data.

EPIC is a public-interest research center established in 1994 to focus public attention on emerging privacy and civil liberties issues.² More than a decade ago, explained to the Senate Judiciary Committee that Google was manipulating search results to favor its own content.³ More recently, EPIC has promoted “Algorithmic Transparency” to ensure accountability.⁴ This is a core principle in the field of data protection as it helps ensure that automated decisions about individuals are fair, transparent, and accountable. Algorithmic transparency could also help establish fairness, transparency, and accountability for dominant Internet firms that determine much of what users see online.

Universal Guidelines for Artificial Intelligence

As the committee examines the business practices of the major Internet firms, EPIC recommends legislative solutions based on the Universal Guidelines for Artificial Intelligence (UGAI). Over 200 experts (including former world chess champion Garry Kasparov) and 50 NGOs (including the American Association for the Advancement of Science, the world’s leading scientific association) have endorsed the UGAI.⁵

¹ U.S. House of Reps., Judiciary Committee, *Transparency & Accountability: Examining Google and its Data Collection, Use and Filtering Practices* (Dec. 11, 2018), <https://judiciary.house.gov/hearing/transparency-accountability-examining-google-and-its-data-collection-use-and-filtering-practices>.

² EPIC, *About EPIC*, <https://epic.org/epic/about.html>.

³ *An Examination of the Google-DoubleClick Merger and the Online Advertising Industry: What are the Risks for Competition and Privacy?: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Marc Rotenberg, Exec. Dir. EPIC), https://www.epic.org/privacy/ftc/google/epic_test_092707.pdf.

⁴ EPIC, *Algorithmic Transparency*, <https://epic.org/algorithmic-transparency/>.

⁵ A full list of endorsers is available at The Public Voice, *Universal Guidelines for Artificial Intelligence: Endorsement*, <https://thepublicvoice.org/AI-universal-guidelines/endorsement>.

The Universal Guidelines “are intended to maximize the benefits of AI, to minimize the risk, and to ensure the protection of human rights.”⁶ The “Guidelines should be incorporated into ethical standards, adopted in national law and international agreements, and built into the design of systems.” The Guidelines set forth twelve principles to guide the design, development, and deployment of AI. 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 establish accountability for firms such as Google.

The Right to Access Information

Users and regulators must have the ability to scrutinize search and ranking indexes, including those relied upon by Google. These algorithms control the flow of information on the Internet, and by extension curate many individuals’ primary access to news and educational resources. Despite striking levels of secrecy, private companies have nonetheless enjoyed incredible leeway to develop unique algorithms to control how information is fetched and displayed from search queries.⁷ There are many dangers with these proprietary information-mediating techniques:

- Filtering algorithms can prevent individuals from using the Internet to exchange information on topics that may be controversial or unpopular;
- Content may be labelled and categorized according to a rating system designed by governments to enable censorship and block access to political opposition or specific keywords;
- ISPs may block access to content on entire domains or selectively filter out web content available at any domain or page which contains a specific keyword or character string in the URL;
- Self-rating schemes by private entities will turn the Internet into a homogenized medium dominated by commercial speakers;
- Self-rating schemes will embolden and encourage government regulation on access to information on the Internet; and
- The majority of users are unaware of how algorithmic filtering restricts their access to information and have no option to disable filters.

EPIC knows of the harms caused by opaque algorithms deployed by a dominant platform. Several years ago, EPIC provided the videos among the top-ranked search results on YouTube for a search on “privacy.” At the time, YouTube’s search results were organized by the objective criteria of “hits” and “viewer rankings.” Both objective criteria are easy to verify. However, after Google acquired YouTube, EPIC’s search rankings fell. Google had substituted its own subjective, “relevance” ranking in place of objective search criteria. Google’s ranking algorithm was opaque and proprietary. Google’s subjective algorithm gave preference to Google’s video content on

⁶ The Public Voice, *Universal Guidelines for Artificial Intelligence*, <https://thepublicvoice.org/AI-universal-guidelines>.

⁷ See Jaap-Henk Hoepman, *Summary of the CPDP Panel on Algorithmic Transparency* (Jan. 26, 2017) (summarizing remarks of Marc Rotenberg, EPIC President), <https://blog.xot.nl/2017/01/26/summary-of-thecpdp-panel-on-algorithmic-transparency>.

YouTube about “privacy” over that of EPIC and others. The Google videos rose in the rankings while others fell.

EPIC prepared a detailed report for the FTC when it undertook its investigation of anti-competitive behavior of Internet companies, based on EPIC’s specific experience with Google’s decision to change the search algorithm on YouTube to favor its own content.⁸ The FTC took no action on EPIC’s complaint. But last year, after a seven-year investigation, the European Commission found that Google had abused its dominance as a search engine by rigging its search results to prefer its own shopping service.⁹ The Commission required Google to change its algorithm to rank its own shopping comparison as it ranks its competitors.

The committee should press Google to make public the factors used by its search and ranking algorithms to prioritize content. Facebook’s recent release of its community guidelines is a good example of what transparency can look like.¹⁰ It is a step in the right direction, but more must be done. For example, if a platform chooses to preference its own products above a competitors, that could be difficult to detect and remediate without a requirement that a platform make clear the basis of its search ranking.

There are also widespread concerns about certain Google business practices that impact the privacy rights of Internet users.

Google’s Location Tracking

Recent reporting showed that Google tracks users’ locations even when users opt out of that collection and use.¹¹ Following that report, EPIC wrote to the Federal Trade Commission (FTC) explaining why Google’s actions violate the Commission’s 2011 consent order with Google.¹² Google’s disregard for its users’ preferences follows an institutional pattern. The original 2011 consent order stemmed from Google ignoring its users’ privacy preferences and opting users into the now-defunct Google Buzz social network.¹³ More recently, Google engaged in “deception by design,” when it tricked users into choosing the most privacy-invasive settings online.¹⁴

The FTC acknowledged that it would investigate Google’s violation of the consent order but has taken no other action.¹⁵

⁸ Letter from EPIC to Commissioners of the Federal Trade Commission (Sept. 8, 2011), https://epic.org/privacy/ftc/google/Google_FTC_Ltr_09_08_11.pdf.

⁹ Press Release, European Commission, Antitrust: Commission fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison-Shopping Service (June 27, 2017), http://europa.eu/rapid/press-release_IP-17-1784_en.htm.

¹⁰ Facebook, *Publishing Our Internal Enforcement Guidelines and Expanding Our Appeals Process* (Apr. 24, 2018), <https://newsroom.fb.com/news/2018/04/comprehensive-community-standards/>.

¹¹ Ryan Nakashima, *Google Tracks Your Movements, Like It or Not*, AP (Aug. 13, 2018), (<https://www.apnews.com/828aefab64d4411bac257a07c1af0ecb>).

¹² Letter from EPIC to Commissioners of the Federal Trade Commission (Aug. 17, 2018), <https://epic.org/privacy/google/tracking/EPIC-to-FTC-GoogleTracking-August2018.pdf>.

¹³ EPIC, *In re Google Buzz*, <https://epic.org/privacy/ftc/googlebuzz/#complaint>

¹⁴ EPIC, et al., Letter to Commissioners of the Federal Trade Commission (June 27, 2018), <https://thepublicvoice.org/wp-content/uploads/2018/06/FTC-letter-Deceived-by-Design.pdf>

¹⁵ Letter from James A. Kohm, Director of Enforcement, Federal Trade Commission to EPIC (Aug. 21, 2018), <https://epic.org/privacy/ftc/2018-08-20-FTC-EPIC-Ltr-re-Google.pdf>.

Google's Purchase Tracking

In 2017, Google announced a tracking program that allows the company to match online advertising with in-store purchases.¹⁶ Google did this by acquiring virtually all of the credit card purchase records of American consumers. Google said that privacy would be protected because the company claimed it would not obtain personally identifiable information, but Google refused to provide information about how the match would be conducted or to be subject to third-party audits.¹⁷

In July 2017, EPIC filed a complaint with the FTC alleging that the Store Sales Measurement program was unfair and deceptive because of the use of secret algorithms, the failure to reveal the identities of third parties, and because of misleading claims Google made about the ability to opt out of the program.¹⁸ Following nearly a year of inaction, EPIC sent an additional correspondence to the Commission, urging it to take swift action to discontinue Google's program.¹⁹

The Stores Sales Measurement program is perhaps the largest collection of personal data ever gathered on American consumers, yet neither the FTC nor Congress have taken any steps to investigate Google's foray in the credit purchase data-mining industry.

Google's Email Data Mining

Google's disregard for the privacy of email is well-established. The original Google business model relied on examining the contents of private message for key words that could have value to advertisers. Google established the practice of routinely scanning email for the company's benefit and frustrated attempts to establish end-to-end encryption, which would have dramatically improved the privacy and security of email users. In 2016, EPIC filed a brief as amicus curiae to the Supreme Judicial Court of Massachusetts in a case concerning Google's practices of intercepting and scanning the email messages of email users who were not even Gmail users.²⁰ As a result, Google gained access to the private mails of Internet users simply because they communicated with a Gmail user.²¹

¹⁶ EPIC, *Google Purchase Tracking*, <https://epic.org/privacy/google/purchase-tracking>.

¹⁷ Elizabeth Dwoskin and Craig Timberg, *Google now knows when its users go to the store and buy stuff*, Washington Post (May 23, 2017), <https://www.washingtonpost.com/news/the-switch/wp/2017/05/23/google-now-knows-when-you-are-at-a-cash-register-and-how-much-you-are-spending/>.

¹⁸ EPIC, Complaint, Request for Investigation, Injunction, and Other Relief (July 31, 2017), <https://epic.org/privacy/ftc/google/EPIC-FTC-Google-Purchase-Tracking-Complaint.pdf>.

¹⁹ Letter from EPIC to Commissioners of the Federal Trade Commission (May 7, 2018), <https://epic.org/privacy/google/purchase-tracking/EPIC-FTC-Google-Tracking-05-2018.pdf>.

²⁰ EPIC, *Marquis v. Google*, <https://epic.org/amicus/massachusetts/google/>.

²¹ *Id.*

Conclusion

As Google and other dominant firms should be held to account for their business practices by public officials. In the committee's hearing, Google should be questioned about its practice of ranking its own services above those of competitors, its use of secretive algorithms, and its failure to protect the privacy of Internet users.

We ask that this letter be entered in the hearing record. EPIC appreciates your attention to this timely issue and look forward to working with the committee as it continues its work.

Sincerely,

/s/ Marc Rotenberg

Marc Rotenberg
EPIC President

/s/ Caitriona Fitzgerald

Caitriona Fitzgerald
EPIC Policy Director

/s/ Christine Bannan

Christine Bannan
EPIC Consumer Protection Counsel

/s/ Jeff Gary

Jeff Gary
EPIC Legislative Fellow