

**Questions for the Record from Senator Lindsey O. Graham
To Mr. Brian O’Kelley
U.S. Senate Committee on the Judiciary
Understanding the Digital Advertising Ecosystem and the
Impact of Data Privacy and Competition Policy
Submitted on May 28, 2019**

1. How is the current digital advertising marketplace impacting publishers like the Wall Street Journal and New York Times? How will privacy legislation change that?

Most major newspapers, including the Wall Street Journal and the New York Times, have seen significant declines in advertising revenue over the past decade as print gives way to digital. The current digital advertising marketplace does not place a premium on high-quality editorial content, making it necessary for newspapers to look to other revenue streams like subscriptions and events (both of which risk making independent journalism inaccessible for low-income citizens).

Privacy legislation could go either way in terms of its impact on newspapers. If privacy legislation puts more power in the hands of Google, Amazon, and Facebook – for instance by allowing data acquired on their consumer-facing properties to be used for third-party advertising purposes – then newspapers will continue to have to rely on crumbs left over from the walled gardens’ feasts. If privacy legislation protects consumers without penalizing independent technology companies that can partner with newspapers to create valuable advertising products, it could be very good for newspapers by shifting budgets back to quality and away from audience buying.

2. As a result of GDPR, we understand that Google limited third-party ad serving on YouTube and also restricted the data received by publishers through AdSense. Do you agree with Google’s interpretation of GDPR? Could the law be clearer?

As ad tech industry leaders like AppNexus collaborated with leading European publishers, marketers, industry groups and regulators to implement GDPR in 2017 and 2018, Google pursued their own path. I think they had to take extreme measures in some cases to protect consumer data, and I also think those measures were commercially convenient, like shutting down third-party ad serving or restricting access to IDs. In effect, GDPR gave Google to take anti-competitive actions on the basis of privacy that made it almost impossible for competitors to operate. I am not sure it is an issue of the law being clearer; I think part of the challenge is that the law is slow and static and can’t keep up with the nuance and dynamism of the internet. This is why I suggested a FINRA for privacy: a public-private partnership with cooperation from government, large enterprises, privacy advocates, and small companies to develop and evolve the

standards and enforcement practices that can keep up with the steady pace of technological innovation.

**Written Questions for Mr. Brian O’Kelley
Submitted by Senator Patrick Leahy (D-Vt.)
May 28, 2019**

- 1. Your written testimony describes how many customers do not know how much they pay for a given service, since they are unaware of how that service collects and monetizes their data. How does this impact a new start-up that perhaps doesn’t intend to compete by monetizing user data? Is there an impact on competition?**

I think the point I was trying to make in my testimony was that just because a consumer doesn’t explicitly pay for ad-supported content doesn’t mean it’s free. The competitive issue is that we’ve created an anti-trust exception for ad-supported companies since their business model means sticker price to the consumer doesn’t go up. For instance, imagine if Google bought Netflix and lowered the price by \$1.00 a month in return for putting 6 minutes of ads in every TV show. Win for consumers, right? Look at it from the advertising perspective. Now one company owns 80% of all video content consumed on the internet, with the ability to bundle it into their ad tech, search, cloud, browser, analytics, and operating system assets. It’s hard enough for a startup to compete with Netflix on its own. GoogleTubeFlix is impossible to compete with – and yet it seems like the anti-trust approach of the past thirty years would see this as accretive to consumers on the basis of prices.

- 2. If we had data portability- if consumers retained possession of their data and could move it from one platform to another - how would that impact a startup’s ability to compete?**

Data portability is especially important in social media, where the consumer’s data is literally the product. If Facebook can prevent me from easily copying my profile to a competitive service, it creates a massive barrier to entry to new social networks. Consumers have years of history in pictures, posts, emotes, messages – not to mention hundreds of friends – that would be impossible to recreate without data portability. If there were a “import from Facebook” button, it would give a startup a fighting chance to compete with Facebook. In essence, this is the button that Instagram has been using to build and scale under the Facebook umbrella. We need that button to exist for anyone who wants to build a social network so that consumers can have real choice.

- 3. Any data privacy regulation we undertake must include appropriate enforcement mechanisms to ensure that companies appropriately understand the stakes and consumers may hold companies accountable for data breaches and other privacy failures.**

- a. What sort of enforcement mechanisms should we include in a federal data privacy law?**

I like the idea of allowing an independent agency like FINRA to set the standards and enforcement practices, largely because I think it will be more agile and responsive than have a federal agency attempt to keep up with the pace of change in the internet economy. I think there

are some preventative measures that could be interesting, like the securities exams that financial services professionals must pass before working as brokers. It would be good to hold individuals accountable for ethical actions and not just companies, especially given the immense opacity and complexity of large internet companies. In terms of enforcement, I think companies should be at risk of losing their license to operate with sensitive data if they do not follow best practices around privacy and data security. Ideally, the agency would start taking action before security breaches or privacy violations by issuing fines and warnings for smaller issues, forcing companies and their boards to take privacy seriously.

1. Up to this point, a number of states have lived up to their "laboratories of democracy" moniker and led the way in regulating data privacy. One of the biggest issues surrounding a potential federal consumer data privacy law is preemption.
 - a. **Do you believe that Congress should write “one national standard” that wipes out state legislation like California's Consumer Privacy Act (CCPA), Illinois' Biometric Privacy Act, and Vermont's Data Broker Act, or should the federal bill create a minimum standard that allows states to include additional protections on top of it?**

Having run a global company, I can say that trying to comply with all of the local laws and regulations was extremely difficult and expensive. This wasn't just privacy law; we had to address issues like online gambling, data collection from children, different mores around nudity, recreational drugs, political ads, and more. When these laws were different across jurisdictions, it formed a barrier to entry for the larger firms that could afford to build the process and technology to handle them. At AppNexus, when didn't have the resources to properly implement a regulation, we would be forced to exit certain lines of business globally or nationally.

I worry that any patchwork privacy regulations in the US will have various challenges: first, that states will inadvertently break the internet by banning practices that seem problematic but are actually critical to everyday functioning, like integrating third-parties services into web sites. Second, that states won't see the anti-competitive risk inherent to privacy policy, and will differentiate between first parties and third parties, effectively giving Google and Amazon a free pass on privacy and penalizing startups and service providers. Third, the overhead of having to address all of these different privacy regulations may be so expensive that many companies cease to do business or fail to properly implement them.

In sum, I think it wise for the federal government to invest the time and energy in a comprehensive privacy standard, and consider creating an adjacent agency (Consumer Privacy Bureau) that can incorporate new technologies, collaborate with industry to establish best practices, and provide an agile enforcement approach that will help smaller companies succeed and mitigate the need for individual states to have their own privacy regimes.

“Understanding The Digital Advertising Ecosystem And The Impact Of Data Privacy And Competition Policy”

Questions for the Record

Submitted May 28, 2019

QUESTIONS FROM SENATOR WHITEHOUSE

Questions for All Witnesses:

- 1. As we consider federal legislation regulating online data collection, data privacy, and data security, what are the most exploitative practices used to coerce consumers into granting consent that federal law should prohibit?**

I disagree with the idea that consumers grant consent for data collection. Consumers do not read privacy policies or EULAs. I personally do not consent to have my data used against me, and yet I click the “accept cookies” button and continue to be oppressed and exploited. There is a power asymmetry between a consumer and a technology company that makes a truly consensual relationship impossible.

- 2. Are there best practices with respect to customer consent that we use should to model federal legislation?**

I believe there are three key principles that should be applied:

- 1) Consent must be given in context of a specific service. Giving Google access to my email address for Gmail does not give them the right to use it for advertising on YouTube.
- 2) Third parties that are used to provide a service should be disclosed but not discriminated against. The internet has always been a composition of many different technologies, and restricting this would be like saying that Ford has to make all of the parts in the car instead of leveraging a diverse supply chain.
- 3) The act of browsing should be anonymous and not require consent. Web sites, apps, and advertising companies should not be allowed to collect data on browsing behavior. If the consumer chooses to actively share information by registering for a service, she should be given a clear choice about whether she wants to receive targeted advertising or not, just as she is given the choice to opt-into email marketing.

Brian O’Kelley
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Questions for the Record
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QUESTIONS FROM SENATOR BOOKER

1. The German Bundeskartellamt now prohibits Facebook from combining data gathered from WhatsApp or Instagram and assigning those data to a Facebook user account without a user’s voluntary consent.

a. Is this the most effective remedy available to address consolidation in the advertising technology market?

I don’t think this decision has any direct impact on the advertising technology market as Facebook is a publisher, not an ad tech company. In terms of the overall digital advertising market, the issue is really that Facebook has massive share of consumer attention across its various assets. I don’t think this decision changes that.

b. Does this one decision in Europe open opportunities for new entrants into the market? Or are the major platforms still too large to compete with?

The Facebook monopoly prevents new entrants in the social space. My sense is that this decision only addresses a very small part of their unfair competitive advantage here.

2. The Microsoft, IBM, and AT&T antitrust cases each took the better part of a decade and were prohibitively expensive. However, Professor Tim Wu of Columbia Law School has argued that the IBM case was worth bringing because—despite the costs and delays—the litigation immediately caused IBM to change some of its anticompetitive conduct.¹ Others have made similar claims about Microsoft.²

Do you believe that society and industry can benefit from enforcement agencies simply commencing antitrust litigation?

I do believe that commencing antitrust litigation will have a significant and positive impact on competition in the internet space. First, it forces these companies to assess their strategic plans in context of potential anti-competitive concerns. I think it’s likely that they will avoid taking actions that would provoke regulators. Second, companies may unilaterally change policies and behaviors to avoid anti-trust concerns. Third, as Tim Wu states in his book The Curse of Bigness, “Sometimes great size yields a short-term advantage, but creates ‘dynamic’ disadvantages: A larger firm may also become cumbersome, unable to adapt to changing market conditions.” Without their monopolistic practices, it’s unclear that these companies will be able to compete with their more nimble, innovative competitors.

3. Apple dominates podcast listening via its podcast app. However, because of Apple’s privacy policies, podcast advertisers complain that they receive almost no data from Apple beyond

anonymized user statistics. For example, a brand purchasing a web ad can tell how many people viewed it, how many people clicked on it, and, with cookies, possibly how many people visited the website without clicking through. However, generally speaking, when a brand purchases a podcast ad, they cannot even be certain about how many people listened to the ad.

Furthermore, a recent PricewaterhouseCoopers analysis of the media marketplace predicts that increased consolidation is a foregone conclusion in the podcast industry: “The podcast market is ripe for M&A activity, as potential targets in the space include content networks, hosting services, distribution platforms, and advertising and analytics services.”³ Indeed,

¹ Tim Wu, *Tech Dominance and the Policeman at the Elbow* (Columbia Pub. Law Research Paper No. 14-623, 2019), https://scholarship.law.columbia.edu/faculty_scholarship/2289.

² Matthew Yglesias, *The Justice Department Was Absolutely Right To Go After Microsoft in the 1990s*, SLATE (Aug. 26, 2013), <https://slate.com/business/2013/08/microsoft-antitrust-suit-the-vindication-of-the-justice-department.html>.³ Bart Spiegel, Ian Same & Silpa Velaga, *US Media and Telecommunications Deals insights Q1 '19*, PWC (2019), <https://www.pwc.com/us/en/industries/power-utilities/pdf/pwc-media-and-telecom-deals-insights-q1-2019.pdf>

Spotify recently purchased the podcasting firms Gimlet and Anchor for a combined \$340 million.

- a. **Do you believe that a wave of consolidation in the podcast market is inevitable?**
- b. **Why did this consolidation not take place earlier? Did Apple's focus on privacy change the way the podcast advertising market developed?**

I do not have domain expertise in the podcast market, so I don't have a strong perspective on consolidation. From an advertising perspective, it feels like there is no expectation in outdoor advertising that billboard companies provide individualized data on who drives by in their car, and one hopes that nobody is climbing up to click on the billboards. Yet outdoor advertising works perfectly well. The same case could be made for linear TV or radio. I am not sure that trading privacy for personalization is a good deal for the consumer, and Apple has the tools to provide privacy-safe targeting using techniques like geo-fencing without any privacy tradeoffs.

4. The major digital advertising markets essentially operate as black-box auctions. Each platform runs its own internal exchange and, in the milliseconds required to load a page, makes decisions about the ads you will be served. At the same time, advertising fraud is rampant, with computer programs (bots) either creating fake traffic on websites with embedded ads or automatically generating clicks on banners. One research firm estimated that ad fraud cost advertisers \$19 billion in 2018,⁴ the same year in which Facebook, for example, shut down 583 million fake accounts in the first quarter alone.⁵ Google recently agreed to refund advertisers for ads purchased on its ad marketplaces that ran on websites with fake traffic.⁶ In addition to the trackers meant to follow us from site to site and from device to device, there are also trackers set up simply for verifying ad fraud. Thus, in effect, the watchers themselves are being watched, as companies resist paying for the delivery of ads that never reach the intended audience.

Given the lack of transparency about this process, how confident are you that this is a functioning market? How do we know that it is competitive? How do we know whether it is efficiency enhancing?

The biggest issue with digital advertising marketplaces is that they place inordinate value on audience and quantitative metrics at the expense of everything else. For instance, you could run a programmatic campaign that targets "women 35-44 who have expressed interest in weight loss" and deliver 1 million impressions across thousands of sites. Alternatively, you could choose 10 sites that focus on the target audience and deliver 200,000 impressions. In the former case, you have no idea where those ads ran, whether the sites have any relevance, whether the ads are placed in proximity to the content or way off to the side where they are unlikely to be noticed. In the latter case, you could work with the sites to make sure the ads are in highly visible placements, adjacent to the right content. You could adjust the creative and ad copy to make sure it works well with the site layout. You could work with the sites to review results and get their help to improve outcomes. Unfortunately, while this is extremely effective, relatively efficient, and good for quality publishers, most marketers have fallen prey to the myth that buying audiences programmatically makes context irrelevant.

The programmatic approach to advertising asks us not just to trust the black box, but to trust publishers to design their sites to maximize advertiser outcomes and to avoid acquiring low-quality traffic. You also have to trust the data providers to validate that their segmentation is accurate and acquired legitimately. My experience after 15 years in the business of building advertising exchanges is that this trust is not warranted. Blatant fraud certainly exists, but not at the scale that some claim. The bigger issue is the huge economy built around crappy sites that acquire crappy traffic and are monetized using crappy data. Programmatic advertising directs a disproportional share of advertiser spend into crap, directing it away from high-quality publishers that employ journalists, designers, production staff, and creatives.

In sum, this is not a functioning market. It has massive privacy issues. It hurts quality publishers. It produces poor results for advertisers. It incentivizes crappy data collection, crappy traffic, crappy content. It enables Google, which doesn't produce content, to monopolize all aspects of the programmatic business and take a disproportionate tax for its trouble.

5. Last fall, at an FTC hearing on the economics of Big Data and personal information, Professor Alessandro Acquisti of Carnegie Mellon University previewed findings from his research indicating that targeted advertising increases revenue, but only by approximately 4 percent.⁷ Meanwhile, purchasing behaviorally targeted ads versus nontargeted ads is orders of magnitude more expensive.

If ultimately proven true, what should advertisers do with this information?

I would suggest that there are different kinds of targeting and that they will have different impact. For instance, if a business only operates in certain states, it seems reasonable to only advertise in those states. I have seen many instances in my career where targeting ads to certain sites has significantly improved performance. At the same time, I suspect that advertisers and their agencies spend a significant amount of money buying crappy sites using crappy data, as I discuss in my answer above. I have advised many large advertisers to simply stop buying sites that they're not familiar with, to stop buying third-party data, and to return to advertising fundamentals. This defies the current conventional wisdom, and yet as Professor Acquisti suggests, it doesn't seem reasonable to pay a huge premium for minimal benefit.

6. Earlier this year, rather than running the risk of incurring the large maximum fines set forth in the European Union's General Data Protection Regulation (GDPR), the *New York Times* decided it would simply block all open-exchange ad buying on its European pages. What this

⁴ *Ad Fraud To Cost Advertisers \$19 Billion in 2018, Representing 9% of Total Digital Advertising Spend*, JUNIPER RESEARCH (Sept. 26, 2017), [https://www.juniperresearch.com/press/press-releases/ad-fraud-to-cost-advertisers-\\$19-billion-in-2018](https://www.juniperresearch.com/press/press-releases/ad-fraud-to-cost-advertisers-$19-billion-in-2018).

⁵ Alex Hern & Olivia Solon, *Facebook Closed 583m Fake Accounts in First Three Months of 2018*, GUARDIAN (May 15, 2018), <https://www.theguardian.com/technology/2018/may/15/facebook-closed-583m-fake-accounts-in-first-three-months-of-2018>.

⁶ Patience Haggin, *Google To Refund Advertisers After Suit over Fraud Scheme*, WALL ST. J. (May 17, 2019), <https://www.wsj.com/articles/google-to-refund-advertisers-after-suit-over-fraud-scheme-11558113251>.

⁷ *FTC Hearing 6 – Nov. 6 Session 2 – The Economics of Big Data and Personal Information*, FED. TRADE COMM'N (Nov. 6, 2018), <https://www.ftc.gov/news-events/audio-video/video/ftc-hearing-6-nov-6-session-2-economics-big-data-personal-information>.

means is that the *Times* completely eliminated behavioral targeting on its European sites and focused entirely on contextual and geographical targeting. Surprisingly, the *Times* saw no ad revenue drop as a result; in fact, quite the opposite happened—it was able to increase its ad revenue even after cutting itself off from ad exchanges in Europe.

**Does this episode tell us anything at all about the efficacy of behavioral targeting?
Or can this outcome simply be attributed to the strength of certain brands?**

This episode aligns with my perspective on the digital ad market. I believe that major publishers should stop selling on the open exchange altogether. This would force advertisers to reconsider their reliance on audience at the expense of context; would eliminate a major source of data leakage; and would enable publishers to spend more time working directly with advertisers to create value and improve results. The only downside of this approach is that Google currently controls the entire ad stack outside of programmatic advertising, which is why anti-trust action is so important.