

MASSACHUSETTS  
40 main st, suite 301  
florence, ma 01062  
tel 413.585.1533  
fax 413.585.8904

WASHINGTON  
1025 connecticut ave. nw, suite 1110  
washington, dc 20036  
tel 202.265.1490  
fax 202.265.1489



October 7, 2016

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 Twelfth Street SW  
Washington, DC 20554

**RE: *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106**

Dear Ms. Dortch:

Free Press writes in response to Google's October 3rd letter in this docket.<sup>1</sup> Google has now joined the chorus of industry associations and ISPs calling for complicated rules, based on an unworkable sensitive/non-sensitive data distinction regarding broadband users' proprietary and private information. We were heartened to learn, from the preliminary information in the Fact Sheet circulated by the Commission this week,<sup>2</sup> that the current proposal does not seem to adopt the approach Google and other companies demand. We write nonetheless to emphasize that, whatever the contours of the final rules' resort to some kind of sensitive/non-sensitive distinction, the Commission cannot and must not adopt the unworkable approach set forth in the Google Letter.

We have consistently explained how the type of distinction Google now posits is contrary to the clear statutory mandate in Section 222, and how such a scheme would be impracticable.<sup>3</sup> Yet, Google's entry into the fray lays bare the infeasibility of this approach, and puts to bed the argument that the FCC's strong privacy rules proposal favors one set of actors in the "internet ecosystem" over another.

The Google Letter calls the FCC's proposal to require a consumer's opt-in consent before ISPs share any of their customers' web browsing history "unjustified," claiming that customers shouldn't receive "special protection" for their browsing history when they shop or get a weather forecast online. Google suggests instead that "the FCC's

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<sup>1</sup> Google Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 16-106 (filed Oct. 3, 2016) ("Google Letter").

<sup>2</sup> Federal Communications Commission, "Fact Sheet: Chairman Wheeler's Proposal to Give Broadband Consumers Increased Choice Over Their Personal Information," Doc 341633 (rel. Oct. 6, 2016) ("Fact Sheet").

<sup>3</sup> Federal Communications Commission, "Fact Sheet: Chairman Wheeler's Proposal to Give Broadband Consumers Increased Choice Over Their Personal Information," Doc 341633 (rel. Oct. 6, 2016) ("Fact Sheet").

<sup>3</sup> Free Press *et al.* Letter to Chairman Wheeler, GN Docket No. 16-106 (Sept. 28, 2016).

framework should allow [ ] differentiation based on the nature of web browsing information.” That suggestion misses the point here, in several ways.

First, the FCC has recognized that broadband users deserve the dignity of choosing for themselves how their private information can be shared with third parties and used to market back to them. Google wishes to substitute the broadband provider’s judgment about what information should be private for its customers’ judgments – robbing them of that choice.

The Google Letter then suggests that the FCC might require opt-in consent for broadband customers’ web-browsing information that pertains to “healthcare or financial transactions” but not for web-browsing and content that Google deems non-sensitive on broadband users’ behalf. Google, like other ISPs, is suggesting the FCC promulgate a rule allowing ISPs to retain all of their customers’ web-browsing history then comb through it to determine what the ISP considers sensitive. Customers would need to opt in before the ISP could share what it considers sensitive, but would only be afforded the chance to opt out before the ISP shares their so-called non-sensitive information by default.

As Free Press has explained on many occasions, this is nothing less than allowing the carrier to read its customers’ messages first, before deciding whether that message was really too private to be read. Contrary to the Orwellian accusations in USTelecom’s press statement on the Fact Sheet,<sup>4</sup> the Commission is in no way attempting to determine the types of content that internet users consider private. Instead, the rules would prevent ISPs from engaging in that very same behavior by protecting the content of all messages.

Google’s preferred scheme is unwieldy, intrusive, and unjustified. The idea that sharing a list of all the websites a broadband ISP customer visits raises plausible privacy concerns was at least recognized even by Google VP Vinton Cerf.<sup>5</sup> A bright-line rule requiring a customer’s affirmative consent before sharing their browsing history gives customers the dignity of choosing how to share their information, and won’t burden companies by forcing them to maintain ever-changing black or white lists of sites they deem more sensitive than their customer’s shopping habits.

Finally, Google’s opposition to the FCC’s privacy proposal shows the absurdity of the claim that the FCC is pitting broadband against the edge. When it comes to the FCC fulfilling its statutory duties under Section 222, edge providers and broadband ISPs have locked arms in opposition and in favor of weaker “FTC-style” rules. Far from a reflecting a “time tested” approach to privacy, the FTC’s approach simply reflects the different authorities and regulatory tools the FTC can exercise absent a comprehensive consumer

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<sup>4</sup> USTelecom, “Statement on the FCC’s Proposed Broadband Privacy Regulations,” Oct. 6, 2016, <https://www.ustelecom.org/news/press-release/statement-fcc%E2%80%99s-proposed-broadband-privacy-regulations>.

<sup>5</sup> Vinton G. Cerf email to Chairman Tom Wheeler, *FW: IP addresses, domain names and CPNI* (Apr. 12, 2016), <https://epic.org/privacy/cpni/Pages-from-EPIC-16-06-14-FCC-FOIA-20160926-Production-Pt2.pdf> (“I can see that binding any such list to a particular subscriber seems like a privacy issue.”).

privacy statute. We hope the FCC's Section 222 rulemaking will represent a floor not a ceiling on kinds of privacy protections consumers should begin to expect.

Sincerely,

Gaurav Laroia  
Policy Counsel, Free Press