

The FTC Should Update Search Engine Transparency Guidelines

By: David Balto, June 28, 2012

If the government could protect consumers through issuing guidelines instead of pursuing costly litigation, shouldn't it?

Guidance from the federal government regarding acceptable commercial practices is important, especially in dynamic industries. Standards and practices change constantly, and companies frequently face uncertainty when evaluating whether their business practices are acceptable. Antitrust agencies are aware of this uncertainty, and often create -- and modernize -- public guidelines. In the past several years, the antitrust agencies have revamped and clarified their guidance concerning [Horizontal Mergers, Testimonials in Advertising](#), [Accountable Care Organizations](#), [Antitrust Enforcement and Intellectual Property Rights](#), and a [comprehensive list of specific industries](#) and practices.

Guidelines can be one of the most effective means of clarifying when conduct may raise competitive or consumer protection problems. Guidelines are superior to case-by-case litigation in several respects: guidelines can be more expeditious, focused and informative. The process of developing guidelines can help develop an educated industry consensus. A single enforcement action can only affect the defendant in the matter rather than the entire industry. And then there is simply the cost and snails pace of litigation -- as Senator Richard Blumenthal, a former state antitrust enforcer explained "[antitrust] enforcement actions... are costly, time consuming, cumbersome, blunt and inexact instruments of protecting competition."

The Federal Trade Commission learned this lesson in a painful and costly fashion. In 2003, it challenged the alleged abuse of a standard setting process by Rambus, an important high tech firm. When it was brought, some consumer advocates, myself included, suggested that the FTC should approach the problems by issuing guidelines rather than litigating. The litigation was a Himalayan effort that lasted over seven years with hundreds of filings and hearings. At the end the D.C. Circuit rejected the FTC decision finding a violation, in part because the Commission failed to establish a coherent theory of violation. Now, years later, the FTC has started to hold hearings on standard setting issues, a course that would have been a far more sound approach to these issues.

Guidelines are often a vastly more refined and efficient approach than litigation. Take search issues for example. In 2002, the FTC believed that consumers could be better informed by search engines if they clearly labeled and differentiated paid results from organic, unpaid search results, and encouraged search companies to proactively alter their business methods while following the spirit of the guidelines. This was a helpful result for consumers and competitors alike. The guidelines also achieved the FTC's goal of improving consumer welfare without resorting to the expense, uncertainty, and unnecessary singling-out of litigation.

Unfortunately, [as other commentators have explained](#), the search engine guidelines have become antiquated. This is not a blemish for the FTC. This is merely the result of ten years of fierce competition in

an industry and the resulting redefinition of the status quo. In fact, the outdatedness of the guidelines probably speaks to their success.

To reiterate: the 2002 search engine guidelines were a success. They were more successful than any enforcement action would have been, especially considering the behavior was an industry-wide problem, and not the unilateral activity of one competitor. It is this past success that should compel the FTC to embrace a similar approach to dealing with the 2012 version of these questions. The 2002 guidelines ought to be updated to respond to modern questions confronting the search industry. Topics such as content created or hosted by search engines, precise answers to factual questions, and the legitimacy of vertical search silos as distinct products confound regulators and competitors alike. Other questions - such as social search, are so daunting that only a few competitors have really tried to tackle them.

Despite the FTC's guidance, today the lines of proper conduct are blurry at best. While prominent search engines openly comply with the guidelines, smaller competitors like Nextag who offer nothing but pay-for-play search results fail to disclose this fact anywhere. The FTC is silent about the harm to consumers resulting from the very same practices deemed harmful ten years ago.

Of course, these questions are being raised in a different fashion this time around. Rather than seeking an industry wide solution with input from all interested parties, the FTC is spending its vast resources in a massive investigation of a single company, Google. I have elsewhere expressed my fear that the FTC might be poised to experiment with its Section 5 authority in an effort to circumvent the pitfalls of a traditional antitrust case. The issues surrounding search are fundamentally a consumer protection rather than a competition issue.

There is no sense in solely targeting Google in an investigation of an industry-wide business practice. Google's competitors cry foul concerning the search engine's algorithms and ranking practices, but fail to take even basic steps to comply with the transparency guidelines that are in play. Larger competitors -- primarily Bing -- denounce Google's use of Google-curated or -hosted content in its search results, while Bing does the exact same thing.

That's why we need a different approach: open a dialogue on search engine transparency with industry stakeholders, hold programs in which these parties can discuss the questions with each other, issue guidelines containing the findings from these programs, and implement a series of workshops to teach the industry how to conform with the new standards. Collaboration will let the industry set the rules of the road with the oversight of appropriate regulators. This is much more prudent than struggling to find an antitrust violation where there really isn't one.

The effort will be larger in size and scope than the previous guidelines. Search engines are more numerous and ubiquitous today, and they impact many lines of commerce. This complexity should not intimidate the FTC. Indeed, this complexity and importance counsels against closed-door litigation with one market participant, and in favor of openness. The zeal for litigation and excitement of such a complex market can be distracting. It is most important to remain focused on the end goal: maximizing consumer welfare. The best way to achieve this goal is through the creation of universally applicable standards and an improved commitment to educating the industry.