

**GOOGLE'S NEW PRIVACY POLICY:
EUROPEAN PRIVACY AND COMPETITION CONCERNS**

Google recently announced that it will impose a new privacy policy on users that will allow Google to combine nearly all of the personal data it collects across dozens of different products and use that data to sell targeted adverts. Critically, users will be given **no choice** in the matter: after 1 March, anyone who signs in to use any of more than 60 Google products covered by the new policy will be deemed to have accepted its terms, **without any opportunity to choose otherwise**. Google has been typically obscure on whether it will apply this new policy to data collected before it announced this change,¹ but given its track record there seems little doubt that it intends to apply the policy to as much data as technically feasible and commercially profitable. As one consumer protection watchdog put it: "**Google has eliminated its last pretence that it protects consumer privacy - the walls are torn down.**"²

Google's new policy has prompted an outpouring of concerns from those who believe it will further weaken Google's already weak privacy practices and might well violate EU data protection and competition rules. Indeed, the EU's Article 29 Working Party (a formal body representing data protection authorities in the EU) recently launched an investigation into the new policy and has asked Google to suspend its introduction until the investigation is completed.³ **Google, however, brushed these concerns aside and has refused to suspend implementation of its new policy.** Although the company professes to respect user privacy and choice, its new policy in fact leaves consumers who sign in to use Google's products **with no choice but to accept Google's weaker privacy practices.**⁴

Google's actions reflect a pattern of Google executives acting as if they are **above the law**-- particularly when it comes to laws affecting consumer welfare and competition. Google's actions must be seen in light of the fact that it generates over 95 percent of revenues from online advertising and that the new privacy policy will allow Google to exploit user data more effectively in selling online ads. **European enforcement agencies should stand firm in insisting that Google suspend implementation of its new privacy policy in Europe**--and if it does not, those agencies should apply the very severest sanctions at their disposal if Google's actions are found to violate EU law.

¹ See, <http://www.zdnet.com/blog/btl/googles-new-privacy-policy-the-good-bad-scary/67893>.

² Statement by the Privacy Project Director at Consumer Watchdog, John M. Simpson, see, <http://www.marketwatch.com/story/consumer-watchdog-says-sweeping-online-data-protection-in-europe-could-benefit-us-consumers-googles-new-arrogant-data-consolidation-policy-underscores-need-for-strong-protections-2012-01-25>.

³ Letter from Jacob Kohnstamm, Chairman, Article 29 Working Party to Larry Page, CEO, Google, Inc. (2 Feb. 2012), available at: http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2012/20120202_letter_google_privacy_policy_en.pdf.

⁴ Letter from Peter Fleischer, Global Privacy Counsel, Google, Inc. to Jacob Kohnstamm, Chairman of the Article 29 Working Party (3 Feb. 2012), available at <http://articles.law360.s3.amazonaws.com/0306000/306219/Google%20Response.pdf>

Google believes it is above the law

As Google has grown ever more dominant in online search and advertising, it has become increasingly defiant in the face of concerns about its business practices. Google's refusal to delay implementation of its new privacy policy, despite the unequivocal request of EU data protection authorities, is but the latest example in a pattern of conduct demonstrating that **Google considers itself above the law**:

- **For years, Google knowingly sold and profited from advertisements by foreign pharmacies seeking to sell illegal prescription drugs to US consumers.** According to press reports, knowledge of this illegal conduct reached to top Google executives, including current CEO Larry Page.⁵ Google recently paid a \$500 million fine to avoid criminal prosecution in the U.S.⁶
- A recent investigation by the BBC revealed that **Google profits from adverts for illegal products targeted at UK users**, ranging from cannabis, fake ID cards and passports to illegal tickets to the upcoming Olympic games in London. In response to inquiries from BBC investigators, Google admitted that it knowingly retains the profits from these advertising sales.⁷
- **Google is being investigated and may face a substantial fine for obstructing an investigation by the Korean Fair Trade Commission (KFTC) into unfair methods of competition.** When the KFTC recently raided Google's Korean offices to investigate charges of anti-competitive conduct in relation to mobile search, Google employees reportedly deleted files from PCs and took other steps designed to undermine the investigation.⁸
- Google Chairman Eric Schmidt, when asked recently about pending anti-piracy legislation in the United States, responded: **"If there is a law** that requires [domain name systems] to do X and it's passed by both Houses of Congress and signed by the President of the United States **and we disagree with it, then we would still fight it.** If it's a request, **the answer is we wouldn't do it,** if it's a discussion we wouldn't do it."⁹

⁵ Thomas Catan, *Con Artist Starred in Sting That Cost Google Millions*, Wall St. Journal (25 Jan. 2012), <http://online.wsj.com/article/SB10001424052970204624204577176964003660658.html>.

⁶ Shan Li & Tiffany Hsu, *Google to Pay \$500-million Fine for Running Canadian Pharmacy Ads*, Los Angeles Times (25 Aug. 2011), <http://articles.latimes.com/2011/aug/25/business/la-fi-google-settlement-20110825>

⁷ Adrian Goldberg, *Google Admits Profiting from Illegal Olympic Ticket Ads*, BBC News (9 Jan. 2012), <http://www.bbc.co.uk/news/mobile/business-16468846>. Inexplicably, Google continues to deny this in the face of overwhelming evidence: "[Schmidt] denied that Google made money from advertising against links to illegal sites. 'We have been accused of making money, but we don't,' he said." <http://www.telegraph.co.uk/finance/financetopics/davos/9045192/Davos-2012-Googles-Eric-Schmidt-defends-company-against-piracy-accusation.html>.

⁸ Jay Greene, *Google Reportedly Faces Maximum Fine From Korean Trust Buster*, Cnet.com (Jan. 6, 2012), http://news.cnet.com/8301-1023_3-57354092-93/google-reportedly-faces-maximum-fine-from-korean-trustbuster/

⁹ Josh Halliday, *Google boss: anti-piracy laws would be disaster for free speech*, The Guardian (18 May 2011), at <http://www.guardian.co.uk/technology/2011/may/18/google-eric-schmidt-piracy>.

Google's actions reflect a pattern of disregard for consumer privacy

While Google claims its new privacy policy adds simplicity, it in fact **makes it more difficult for users who sign in to use Google's products to protect their personal data**. This is not the first time that regulators and consumers have noticed a stark contrast between Google's privacy claims and the reality of its actions:

- Although Google consistently denies that it “sells, trades or rents” personal information,¹⁰ this technical formulation misleads consumers by masking the fact that **Google exploits users' personal information for its own commercial ends**--namely, to sell more adverts. For example, Google recently teamed up with BBVA, Spain's second largest bank, to provide BBVA with advanced forecast data based on users' search behaviour. In short, Google will sell information based on users' private searches to BBVA. According to one estimate, Google sold over \$30 billion of targeted adverts in 2011.¹¹
- In 2010, Google launched its Buzz social networking service by automatically enrolling users of its Gmail service and preventing enrolled users from easily disabling Buzz. This resulted in **millions of users' email contacts, online photos and Web browsing history being disclosed without authorisation**. In March 2011, the U.S. Federal Trade Commission announced that Google had accepted a wide-ranging consent decree to bring an end to charges that it had used deceptive tactics and violated its own privacy policy when it launched Buzz.¹²
- From 2007 to 2010, Google's Street View vehicles surreptitiously collected the private WiFi communications of consumers. Although Google initially disputed the facts, after a German regulator pressed it for information, **Google admitted that the vehicles collected unsecured WiFi Internet transmissions, including complete names, e-mail addresses, telephone numbers, usernames, passwords, and e-mail messages**. These activities prompted investigations from regulators around the world, with numerous regulators concluding that Google had breached privacy and consumer protection laws.¹³ Despite the major outrage prompted by Google's actions, then-CEO Eric Schmidt was cavalier: just days after the scandal broke, Schmidt defended the company's actions by asking: “Who was harmed? Name the person.”¹⁴

¹⁰ See Letter from Pablo Chavez, Dir. Public Policy, Google Inc. to Members of U.S. House of Reps 2 (30 Jan. 2012), *available at*: https://docs.google.com/viewer?a=v&pid=explorer&chrome=true&srcid=0BwxyRPFduTN2NTZhNDIkZDgtMmM3MC00Yjc0LTg4YTMtYTM3NDkxZTE2OWRi&hl=en_US.

¹¹ FairSearch, *Good to Know Campaign*, http://www.fairsearch.org/wp-content/uploads/2012/01/FairSearchGoodToKnow_ThinkGooglesFree.pdf.

¹² Fed. Trade Comm'n, *FTC Charges Deceptive Privacy Practices in Google's Rollout of Its Buzz Social Network*, Ftc.gov (30 Mar. 2011), <http://ftc.gov/opa/2011/03/google.shtm>.

¹³ See Elec. Privacy Info. Ctr., *Investigations of Google Street View*, <http://epic.org/privacy/streetview/> (last visited 6 Feb. 2012).

¹⁴ Jonathan Fildes, *Google Chief Eric Schmidt Downplays Wi-Fi Privacy Row*, BBC News (18 May 2010), <http://www.bbc.co.uk/news/10122339>.

Google's mission: to amass and exploit user information

For Google, users are not customers but products to be served up to the company's true constituency: advertisers.¹⁵ As one Google executive noted, "**We don't monetise the thing we create We monetise the people that use it.** The more people use our products, the more opportunity we have to advertise to them."¹⁶ Google "monetises" its users by collecting massive amounts of data from them, which the company then uses to target adverts. As a member of the US Congress recently said, "Google is putting financial opportunity over customers' personal privacy."¹⁷

Leveraging these massive volumes of user data **has enabled Google to achieve near-complete domination in search and search advertising**, particularly in the mobile context, where the company controls nearly **97 percent** of the market.¹⁸ Google's handling of its new privacy policy changes are consistent with the behaviour of an unchecked monopolist:

- ***The fact that Google imposed this change unilaterally on users is evidence of its market power.*** To a significant degree, regulators have relied on market competition to provide the incentives for strong consumer privacy practices. Since consumers clearly value robust online privacy, market competition should lead providers of online services to compete in offering the best online privacy practices. The absence of consumer choice and effective competition means that Google can impose this privacy change on users unilaterally and in the face of mounting criticism. This amounts to powerful evidence that Google feels immune to the forces of market competition that apply to other online actors.
- ***Google's new privacy practices will support Google's goal to control all online information.*** Google's decision to aggregate user data across its services will further enhance Google's dominant position in search and online advertising and insulate it even further from market competition. It also goes to the heart of Google's strategy to control the world's information. As Google's Chairman Eric Schmidt has put it "**ultimately our goal at Google is to have the strongest advertising network and all the world's information, that's part of our mission.**"¹⁹
- ***Google's privacy policy change will further enhance Google's anti-competitive strategy to use its dominance in one area to drive out competition and achieve dominance in another.*** The aggregation of personal user data from across Google's various products and platforms will increase Google's monopoly power by allowing it to discriminate in favour of even more of its own products in its search results, while also enabling it to demand even higher monopoly

¹⁵ Nathan Newman, *You're Not Google's Customer--You're the Product: Antitrust in a Web 2.0 World*, The Huffington Post (29 March 2011), http://www.huffingtonpost.com/nathan-newman/youre-not-googles-customer_b_841599.html.

¹⁶ Steven Levy, *In the Plex: How Google Thinks, Works, and Shapes Our Lives* 229 (2011) (quoting Andy Rubin, Google's Senior Vice President of Mobile).

¹⁷ Tony Romm, *Google privacy inquiries mount in D.C. and the EU*, Politico Pro (6 Feb. 2012).

¹⁸ See Newman, *supra* note 15.

¹⁹ See Donna Bogatin, *Google Targeting All the World's Content and All Your Information*, ZDNet.com (5 Sept. 2006) <http://www.zdnet.com/blog/micro-markets/google-targeting-all-the-worlds-content-and-all-your-information/413>.

prices from advertisers. Google has already started down this path with its “Universal Search” preferences and its manipulated placement of Google+ results. This new privacy policy will enable the company to generate even greater profits from these abusive practices.