July 31, 2015

Chairwoman Edith Ramirez
Commissioner Julie Brill
Commissioner Maureen Ohlhausen
Commissioner Joshua Wright
Commissioner Terrell McSweeny
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Chairwoman Ramirez and Commissioners Brill, Ohlhausen, Wright, and McSweeny:

I am writing on behalf of the Association of National Advertisers (ANA) regarding the July 7, 2015 complaint by Consumer Watchdog (CW) concerning the Right to Be Forgotten. ANA strongly urges the Commission to dismiss this complaint.

As I am sure you are aware, ANA provides leadership that advances marketing excellence and shapes the future of the advertising industry. Founded in 1910, the ANA's membership includes 670 companies with 10,000 brands that collectively spend over $250 billion in marketing and advertising. The ANA also includes the Business Marketing Association (BMA) and the Brand Activation Association (BAA) which operate as divisions of the ANA. The ANA advances the interests of marketers and promotes and protects the well-being of the marketing community.

The CW complaint, if accepted, would force the FTC to require Google "to honor" consideration of removal requests to links to information that its users believe are "inadequate, irrelevant, no longer relevant, or excessive." CW claims that Google's refusal to do so "…while holding itself out to be concerned about users' privacy is both unfair and deceptive, violating Section 5 of the Federal Trade Commission Act." ANA believes this view is legally baseless.

At the outset, it is clear that the rationale underlying CW's claims are sweeping in nature, and would not apply solely to Google. If upheld, they would create broad precedents adversely impacting numerous other U.S. companies. Also, the terms suggested by CW are extraordinarily broad, vague, and elusive. A determination that information somehow is "inadequate, irrelevant, no longer relevant, or excessive," clearly requires a highly subjective analysis. Google's expertise is in facilitating search capacities of its system; it does not possess a Solomonic ability to determine whether information about particular individuals is relevant, excessive or inadequate. Google, of course, could determine on its own to decide on the meaning of these terms and carry out this type of self-censorship, but there is absolutely no basis that allows the United States government to force it to do so.

Consumer Watchdog claims that, because the so-called Right to Be Forgotten is mandated in Europe, it therefore should be imposed in the United States. In this regard, CW asserts that, "describing yourself as championing users' privacy while not offering a key privacy tool – indeed one offered all across Europe – is deceptive behavior." This is clearly baseless. The FTC has held companies accountable under the law when they promise certain specific privacy practices but then fail to adhere to them (*e.g.*, terms of service that agree not to release consumers' personally identifiable information). *See*, *e.g.*, *In the Matter of Snapchat, Inc*., Docket No. C-4501 (FTC, Dec. 23, 2014). But there is no precedent for compelling companies to import expansive privacy policies that are not already part of their terms of service. The fact that a company generally has privacy protections does not provide *carte blanche* to impose regulations on CW's wish list. This has nothing to do with Section 5.

Moreover, if CW's claims and underlying rationale were accepted, then a myriad of broad privacy protections imposed in Europe would have to be imposed automatically in the U.S. by any company asserting to be protective of privacy interests. Clearly this view is unprecedented, counterintuitive, illogical, and dangerous to free expression in a free society. While European law provides some level of speech protection, these limitations are far less robust and stringent than those required of the United

protections imposed in Europe would have to be imposed automatically in the U.S. by any company asserting to be protective of privacy interests. Clearly this view is unprecedented, counterintuitive, illogical, and dangerous to free expression in a free society. While European law provides some level of speech protection, these limitations are far less robust and stringent than those required of the United States government under the First Amendment. Article 10 of the European Convention on Human Rights expressly limits freedom of expression by balancing it against other values such as "the reputation and rights of others." As a consequence, protections for freedom of expression are not nearly as robust in Europe as in the United States. Put simply, certain regulations acceptable under European law would be plainly unconstitutional if applied in the United States. The so-called "Right to Be Forgotten" is one such policy.

Consumer Watchdog attempts to avoid or ignore this reality by simply claiming that its suggestions "would not raise any First Amendment issues in the United States." This view is clearly inaccurate. The First Amendment states that, "Congress shall make no law… abridging the freedom of speech or of the press." CW is demanding government imposition of a pervasive regulatory regime that will impose major costs and threaten to impede the public's right to know, while threatening to erect high hurdles to the access of information in the press and elsewhere.

Furthermore, while Consumer Watchdog believes that expanding and importing the Right to Be Forgotten to the United States "can be managed in a way that is fair and not burdensome for Google," CW clearly ignores that this program would be extremely extensive and costly. The complaint, for example, notes that, "Since Google began considering Right to Be Forgotten requests last May, Google has received 274,462 removal requests. The Internet giant evaluated 997,008 URLs for removal from its search results, and has dropped 348,794 or 41.3%. It declined to remove 495,673 or 58.7% of the links." These figures clearly show that expanding this type of program to the United States would be time-consuming, expensive, burdensome, and difficult for Google or any other company tasked with this requirement. Furthermore, there is no doubt that, if the Right to Be Forgotten were imposed and Google refused to accede to the wish of some individual for removal of links to allegedly "excessive, irrelevant or inadequate" material, Google could face expensive legal liability potentially enforced by the government.

It is important to note that CW is not asking Google to cut links to false, deceptive, or defamatory information, but to information that is likely accurate but potentially "embarrassing." CW argues that "youthful indiscretions and embarrassments and other matters no longer relevant" should be made (as a matter of law) extremely difficult to be retrieved by forcing Google constantly to consider removal of numerous search links. CW, however, is conflating the right to privacy with the right not to be embarrassed.

Consumer Watchdog seeks to freeze privacy rights at a point in time where information can only be found by someone "highly motivated" to "dig into paper files and folders." However, time and technology must move on. Neither CW nor any other group can be allowed to impose a static model of privacy on the rest of society.

Furthermore, it is important to emphasize that the benefits of the free exchange of information online are immense. The democratization of information is one of the hallmarks of the Internet and is a keystone of a free society. With a few keystrokes, anyone has access to the same information as everyone else, whether they be a scientist, student, politician or someone who delivers pizza. Anyone can find the same information, from the latest national political news of the day and local crime rates to reviews of the newest restaurant around the corner, or to an ever-expanding store of knowledge. Imposing the Right to Be Forgotten would impede information access in the United States; it would be anti-consumer, not pro-consumer.

The First Amendment protects the broad dissemination of information based on the understanding that the vast range of published matter "exposes persons to public view," including "both private citizens and public officials." *Time Inc. v Hill,* 385 U.S.374, 388 (1967). We do not permit anyone to utilize the power of government to force corporations to spend multi-millions of dollars to edit the facts about individuals unless the information about them is false, deceptive and defamatory. In *New York Times Co. v. Sullivan, 314 376 U.S 254 (1967), Time Inc. v Hill, 385 U.S.374 (1967*) and numerous subsequent cases, the Court has made clear that there are significant First Amendment limitations against restricting the dissemination of even false or potentially defamatory statements, let alone truthful but allegedly embarrassing material. These constitutional protections are in no way diminished by the fact that the Internet allows information to be accessed more easily and disseminated more widely. Quite to the contrary, the Supreme Court has held that "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

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If the FTC forced Google to require the Right to Be Forgotten to be imposed in the U.S., this action would be a content-based restriction on speech. It would seriously threaten limiting information about particular topics, and if challenged in court, would be subject to review utilizing the most stringent "strict scrutiny" standard. Strict scrutiny would require the regulation to be found necessary to achieve a compelling governmental interest and by the least restrictive means. The United States Supreme Court has invalidated regulations that "suppress, disadvantage, or impose differential burdens on speech because of its content" (*Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622 (1994)). Clearly the imposition of the Right to Be Forgotten would impose these forbidden differential burdens.

CW appears to believe that, because it considers information involved in regard to the Right to Be Forgotten to be trivial or no longer relevant, that there would be wide latitude for government to require the constant time-consuming, expensive and forced consideration of the excision of a broad range of search links. In *Time Inc. v. Hill*, however, the Court emphasized, citing *Bridges v. California, 314 U.S. 252,269* that, "No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas being expressed." In fact, the Court in *Time Inc. v Hill* went further to emphasize that, "Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of the press."

Allowing the Right to Be Forgotten in the United States would cause serious and undue harm to the public's right to determine for itself what is important and relevant information. It would force search companies to edit the past under the supervision of federal regulators. This runs contrary to consumers' interests. As protecting consumers is a core responsibility of the FTC's mission, ANA therefore requests that the Commission quickly and forcefully reject CW's misguided complaint.

Sincerely,

Daniel L. Jaffe
Group Executive Vice President, Government Relations