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May 21, 2010

VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Written *Ex Parte* Communication
Examination of the Future of Media and Information Needs of Communities in a Digital Age
GN Docket No. 10-25

Dear Ms. Dortch:

Pursuant to Section 1.1204(b) of the Commission's rules and the Commission's Public Notice concerning the Future of Media and Information Needs of Communities in a Digital Age,[1] Microsoft Corporation ("Microsoft") submits this letter to address issues integral to the distribution of news and information on the Internet that the Commission raised in its Notice.

The American political system and economy stand or fall on the public's access to a wide range of diverse ideas. The media in all its forms delivers myriad competing messages to the public, and the theory goes that, if consumers have unimpeded access to a multitude of ideas, the most compelling among them will prevail—until the next, more compelling idea comes along. Thus, our political and economic systems—a "marketplace of ideas" and "creative destruction"—are fueled by a media that is diverse and competitive.

Over the past half century, policymakers have responded to concerns about entities that became gatekeepers with the ability and incentive to dilute the melting pot of diverse viewpoints. In the 1970s and 1980s, the Commission worked to increase diversity and break down the gatekeeper role in the dominant media at the time, television, by limiting the influence of television networks on the programming of their affiliates. In the 1990s, Congress and the Commission sought to rein in cable operators by creating competition from

[1] Public Notice, "FCC Launches Examination of the Future of Media and Information Needs of Communities in a Digital Age," DA 10-100, GN Docket No. 10-25, at 10 (rel. Jan. 21, 2010) [hereinafter *NOI*].

direct broadcast satellite and by imposing carriage requirements, program access rules, and channel ownership limitations in order to promote diversity.

Today, the Internet, with its vast array of video and text content, is fast becoming the principal means of finding information and ideas and, as was the case with preceding forms of communication, it is of paramount importance that diversity thrive there. The Commission's Public Notice concerning the Future of Media and Information Needs of Communities in a Digital Age appropriately recognized this imperative, and it expressed concern that "all Americans [should] have access to vibrant, diverse sources of news and information" as they use the Internet and other forms of digital media.[2]

This concern is well-founded: Consumers historically have turned to traditional media, such as local radio and television broadcasters, for news and information, but, as the National Association of Broadcasters observed, "the traditional bases of broadcasters' revenue streams are under threat" as consumers increasingly turn to "online media" and other outlets as alternatives to traditional news sources.[3] Given this transition, Internet-based sources of news and information have become more important than ever before, and promoting diversity in the online environment has become especially critical.

Today's Internet features a nearly endless supply of information sources, and so most consumers use search engines to help identify the content that is most important to them. In this way, search engines have taken on the role of the news editor, making judgments about whether and how to present particular information to consumers. In recognition of the increasingly important role of search providers, the Commission has sought comment about whether "there [are] search engine practices that might positively or negatively affect web-based efforts to provide news and information."[4]

Likewise, just as the traditional media depend on advertisers for financial support,[5] Internet-based information sources fund their operations in whole or in part through ads, which are typically sold through third-party advertising providers known as "advertising networks." Acknowledging the essential role of advertising networks and the funding they supply to the provision of news and information on the Internet, the Commission has

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[2] *NOI* at 1.

[3] Nat'l Ass'n of Broadcasters, Comments, *Examination of the Future of Media and Information Needs of Communities in a Digital Age*, GN Docket No. 10-25, at 37-38 (May 7, 2010) [hereinafter NAB Comments].

[4] *NOI* at 8.

[5] NAB Comments at 35 ("The most significant threats [to broadcasters' revenues] include . . . [t]he fragmentation of the advertising market and strength of competitors for advertising dollars, including the rise of new media such as the Internet.").

inquired about "the trends for online advertising in general and specifically advertising supporting news and information."[6]

Although the Commission has very limited authority to *regulate* in the area of IP-based services, the Commission nevertheless can, and should, take steps to *evaluate* trends that may limit diversity of media. Microsoft agrees that any evaluation of the future of media turns on the ecosystem that the media rely on to distribute content and reach audiences over the Internet, including the two central components of that ecosystem—search and online advertising. To assist the Commission in making that evaluation, Microsoft offers this submission, which explores how the development of these components will influence virtually all media, information, and content upon which communities depend.

I. THE INTERNET IS INCREASINGLY THE PLATFORM OF CHOICE FOR MEDIA AND INFORMATION.

A recent episode of the public affairs program *Frontline* aptly summarized the impact of the digital era: "Within a single generation, digital media and the World Wide Web have transformed virtually every aspect of modern culture, from the way we learn and work to the ways in which we socialize and even conduct war."[7] The media is no exception to this transformation. In 2008, the Internet surpassed all other media except television as an outlet for national and international news, with 40 percent of consumers then obtaining their news from the Internet.[8] More recent figures show that six in ten Americans get some news online in a typical day.[9] Sources of news online include both sites associated with traditional news outlets as well as newer forms of media such as blogs, Facebook, Twitter, and other social applications. As the Pew Project for Excellence in Journalism explained in its *State of the News Media* 2010 report, "Citizen journalism at the local level is expanding rapidly and brimming with innovation."[10]

At the same time, consumers are relying less frequently on offline media for news and information.[11] The Commission is well aware of these trends,[12] and media

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[6] *NOI* at 8.

[7] Public Broadcasting Service, Press Release, "Frontline Explores What It Means to Be Human in a World Immersed in Technology," http://www.pbs.org/wgbh/pages/frontline/digitalnation/press/#press (Feb. 2, 2010).

[8] Pew Center for the People & the Press, "Internet Overtakes Newspapers As News Outlet," http://people-press.org/report/479/internet-overtakes-newspapers-as-news-source (Dec. 23, 2008).

[9] Pew Project for Excellence in Journalism, *Online*, "The State of the News Media, An Annual Report on American Journalism," http://www.stateofthemedia.org/2010/online_summary_essay.php (Mar. 15, 2010) [hereinafter *State of the Media Report*].

[10] *Id.*, *Overview*, http://www.stateofthemedia.org/2010/overview_intro.php.

[11] *Id.*

professionals, investors and innovators, policymakers, academics, nonprofit organizations, citizens, and others are working actively to develop sustainable models for serving the information needs of communities. Regardless of which models emerge in this process, it is clear that they will depend greatly on the Internet and other IP-based platforms and, like the traditional media, on advertising.

As consumers' reliance on the Internet for news and information grows, it will be essential to preserve the "marketplace of ideas" online by protecting against developments that would restrict competition and diversity or create bottlenecks that could stand between consumers and the news and information they seek. Microsoft agrees with the Commission that the Internet "offers the same *potential* audience to a blogger on her couch and to a major newspaper columnist."[13] But that potential could be snuffed out if consumers do not have realistic opportunities to find both the blogger and the columnist—which is a particular risk if there exists a gatekeeper with the incentive to deny or limit access to some of those sources.

Competition in all media is essential to ensure a diversity of views, as well as a diversity of avenues through which consumers can access those views. Where competition does not exist, there is the risk that diversity may suffer, or that a gatekeeper may arise that could impede consumers' access to a diversity of views. In this regard, the point is not whether a gatekeeper is acting with malevolent intent. When a single entity achieves dominance and thereby becomes a gatekeeper, there is an inherent risk that it may have both the incentive and ability to place its own interests above consumers' interests in access to a broad and diverse range of content, services and viewpoints.

In its *Open Internet* proceeding, the Commission is working to prevent a bottleneck in broadband Internet access service, which serves as the initial "on ramp" to the Internet for many consumers.[14] Microsoft agrees that an open Internet is important, and it recently submitted a proposal for preserving the openness of broadband Internet access service.[15] But Internet access service is only one potential bottleneck on the Internet, and it means little for network operators to operate "openly" if the Internet itself is not open or competitive. The vast array of content on the Internet, a hard-to-imagine 24 to 64 billion web pages at one recent count,[16] means that once consumers have used the "on ramp" to access

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[12] *See, e.g.*, *Annual Assessment of the Status of Competition in the Market for Video Programming*, Supplemental Notice of Inquiry, 24 FCC Rcd 4401, 4405 & n.17 (2009).

[13] *Preserving the Open Internet*, Notice of Proposed Rulemaking, GN Docket No. 09-191, FCC 09-93, ¶ 4 (rel. Oct. 22, 2009) (emphasis added) [hereinafter *Open Internet NPRM*].

[14] *Id.*

[15] Microsoft Corp., *Preserving the Open Internet*, Reply Comments, GN Docket No. 09-191 (Apr. 26, 2010).

[16] *ACLU v. Mukasey*, 534 F.3d 181, 184 (3d Cir. 2008).

the Internet, they are nearly totally dependent on online service providers to locate content. And today, the online service consumers most often use to locate content is search.

II. SEARCH IS THE ONLINE GATEWAY TO MEDIA, CONTENT, AND INFORMATION.

As more Americans find their video and text content online, search engines play a crucial and valuable role because they allow users quickly to find the information they seek in the vast sea of online content. According to the Pew Internet and Life Project, 88 percent of adult Internet users today reported using a search engine to find information—about the same as the number of people who use the Internet to send and receive email.[17] Given the vast amount of content available on the Internet, search engines thus play a critical role in determining what content users will or will not see. But they also are the vehicle through which publishers of online content connect with consumers. In a very real sense, search engines are the means by which consumers find content *and* content finds consumers.

In part because of this central role—that is, because search engines inevitably guide users to certain sources of online information over others based on the way in which they select and rank results—search engines can have a significant impact on the fate of online publishers, including both publishers of news and providers of other, non-news, content. This happens inherently because of the search algorithm's judgments about "relevance" and about where to place a given website in search results.

A. Competition in Search Helps Promote The Diversity of Voices on the Internet.

Search service providers typically return two kinds of results at the same time: *natural* results, which are selected and ranked in part by complex formulas, or algorithms, that are designed to identify the websites that are the most "relevant" to the user's search query, and *paid* results, which are selected and ranked by criteria such as the amount an advertiser is willing to pay and the perceived likelihood that a consumer will click on the result. Consumers commonly understand that paid search results reflect a degree of bias because they would appear to favor those advertisements that generate the highest return for the search provider.[18] In fact, given space limitations and other considerations, certain

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[17] Pew Internet & American Life Project, "Usage Over Time," http://www.pewinternet.org/Static-Pages/Trend-Data/~/media/Infographics/Trend%20Data/July%202009/UsageOverTime%2007%2015%2009.zip (Apr. 2009).

[18] Some networks weigh paid search results by other factors in addition to the amount paid, so it is possible that a favored advertiser could receive better placement independent of whether it paid the most for its advertisements.

companies may have no ability to appear in the paid search results of a given search engine no matter how much they are willing to pay for placement.

What is less clear is whether users understand that even natural search results invariably reflect value judgments by the search provider.[19] These judgments—such as what factors influence determinations regarding which results are more relevant than others, whether to promote popular views or websites over unpopular ones, whether to exclude adult or hateful speech, and many others—are reflected in the search results that the provider generates from queries.

A search engine could promote the content of publishers that it favors by placing it high in the search results it returns.[20] It also can demote content from disfavored publishers by placing it low in the rankings it returns—or even by eliminating such content from the results entirely. Thus, search engines by necessity play a certain editorial function in the online experience of most consumers, and they therefore inherently and inevitably influence what most consumers experience on the Internet.

In general, of course, the fact that search engines select and rank results in response to perceived relevance is of tremendous benefit to consumers. Indeed, without search engines, most consumers would find it extremely difficult to locate the grain of sand they seek in the vast ocean of the Internet, and without sophisticated algorithms search engines generally would do a much poorer job of returning the most relevant results.

This kind of editorial discretion has existed for as long as there has been media, and it is plainly both valuable and essential to a robust marketplace of ideas. In the traditional media, editorial decisions exist in an environment that features a diversity of voices and that fosters transparency in the views that the editors espouse.[21] In that

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[19] *See, e.g.*, Google Inc., Reply Mem. in Support of Motion to Dismiss the First Amended Complaint, *Kinderstart.com, LLC v. Google Inc.*, No C-06-2057-JF, at 5 (N.D. Cal. Jun. 16, 2006) (explaining that it is "nonsense" to suggest that "Google does not express its . . . opinion through its search results").

[20] *See, e.g.*, Stefanie Olsen, "Ask Jeeves denounces paid inclusion," *CNET News*, http://news.cnet.com/2100-1024_3-5168805.html (Mar. 2, 2004) (reporting "that after 18 months the Internet search company [discontinued] Index Connect, [a] program . . . allow[ing] advertisers to pay fees to have large numbers of Web addresses indexed more regularly in search engines" than the websites of publishers that did not pay). *See* also Letter from Heather Hippsley, Acting Assoc. Dir., Div. of Advertising Practices, Fed. Trade Comm'n, to Gary Rushkin, Exec. Dir., Commercial Alert (Jun. 27, 2002), available at http://www.ftc.gov/os/closings/staff/commercialalertletter.shtm (expressing concern about the practices of offering paid placement and paid inclusion in search results without disclosure to consumers).

[21] *See, e.g.*, *Mr. John Oldfield*, 22 FCC Rcd 18638, 18642 (2007) (observing that the FCC does not "review the manner in which [broadcast] licensees choose to air their coverage of newsworthy events"); *American Broad. Cos., Inc.*, 83 F.C.C.2d 302, ¶ 10 (1980) ("The choice of what is or is not to be covered in the presentation of broadcast news is a matter committed to the licensee's good faith discretion.").

environment, editorial discretion helps consumers find their way through the forest of information that is available.[22] And it is undisputedly valuable that consumers have choices in the sources to which they turn for news and information.

Moreover, the fact that the search results on any specific search engine invariably will reflect the judgments of the search engine provider is not in itself a threat to diversity. This is because, in a competitive environment, competition itself would promote a diversity of viewpoints and "correct" for any biases that might arise in the rankings of any particular search engine. Thus, if one search engine systematically returned results that favored a single viewpoint or interest in ways that consumers did not find appealing, economic forces would help "correct" this as consumers gravitated towards alternative search engines whose rankings were perceived as more objective or otherwise corresponded more closely with consumers' own judgments and values.

But when effective competition does not exist—that is, if a single search engine serves as the dominant gateway between consumers and content—there is a greater risk that economic forces will not exert sufficient discipline to prevent the dominant search engine from altering search results to favor its own interests or viewpoint. Also, because consumers will lack competitive options, it may be impossible for them as a practical matter to determine whether the results reflect hidden biases or whether there is other speech that is not being conveyed.

At some level, diversity of voices really means a diversity of channels to reach those voices. When one channel is dominant and thereby achieves the operational role of a gatekeeper, it is important that consumers know that the channel is espousing a viewpoint—and also know what factors are affecting the dominant channel's selection of viewpoints and information. In other words, when a dominant channel makes a value judgment about what content to display without disclosing that judgment to its users, the diversity of voices that is the centerpiece of the Commission's media policy may be at risk. In the world of competing ideas and information, a dominant search engine arguably has the power to pick winners and losers in a way that today's newspapers and broadcast stations, which face effective competition, do not. And if a dominant search provider is not sufficiently transparent about its practices and the factors that influence the results that it provides, consumers may be unaware of how the dominant provider is influencing their access to content.

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[22] In the D.C. market, for example, one can choose between *The Washington Post* and *The Washington Times*, or between Channel 7 and Channel 9. Consumers make that choice, in part, based on their sense of those outlets' editorial viewpoints and their trust in the information that they provide.

B. Competition and Its Impact on Diversity Are Longstanding Concerns of Communications Policy.

In this proceeding, the Commission is asking the right questions as it faces an evolving media scene where the existence of a new dominant provider could have the power to skew its operations to advantage itself and limit diversity.

In the context of search, an effort by a single dominant firm to advantage itself may limit diversity by foreclosing competition not only in search itself but in related areas such as vertical search, online video sharing, online books, news, email, health, finance, and local content. This is because a search engine, in the act of ranking either natural or paid search results, could direct users to its own services rather than those of competitors, even if a competitor's service is more popular or more relevant.

If robust competition existed among several search engines, this practice would not pose a threat to diversity because no provider would have the ability to divert consumers disproportionately to its non-search services, and consumers would choose among competing sources of content based on the quality of the content and features offered. In the absence of effective competition, however, a dominant provider has the ability to push consumers to content that competes with an existing offering from a competitor and then "shout over" the competitor simply by causing its search users to believe that its own content is the most popular or relevant. As a result, the market discipline that ordinarily would exist where there is competition in search cannot be relied upon to promote diversity.

Throughout the history of the media in this country, concerns have been raised when an entity gains the ability to limit competition and, thereby, to threaten the diversity of voices that is the centerpiece of communications policy in the United States. Thus, for example, the Commission responded to these concerns during the 1970s and 1980s by restricting the activities of television networks, which otherwise could have exerted undue influence on the programming of the affiliates to which they supplied content, and thereby suppressed diversity.[23] Likewise, because of concerns that cable operators' ability to control both content and distribution could make it more difficult for competitors to acquire cable operator-affiliated content[24] and to launch competing distribution services,[25] Congress

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[23] *See, e.g.*, 47 C.F.R. § 73.658 (banning requirements that stations affiliate with one network and that stations option their airtime to their networks, and preserving for affiliates a right to reject network programming). Indeed, much like the staff that the Commission has today dedicated to consider issues relating to the Internet and the future of media generally, the FCC in 1978 launched a Network Inquiry Special Staff to address comparable issues that were then raised about the dominant media entities at the time. Thomas G. Krattenmaker, *Telecommunications Law & Policy* 229 n.5 (1994).

[24] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, § 2 [hereinafter *1992 Cable Act*].

enacted cable program access and program carriage restrictions as part of the 1992 Cable Act.[26]

Affirmative restrictions like these are sometimes required, but they ordinarily should be used only after other, less-restrictive methods for ensuring diversity are determined to be inadequate.[27] Thus, the Commission has acknowledged that disclosure of information about a media entity's operations can "encourage[] [the public] to play a more active part in dialogue with" the organizations that provide them with news and information.[28] Specifically, the Commission has indicated that "affording the public readier access to" this kind of information "will foster a better understanding of" the content media entities provide and how they provide it.[29] Disclosure also could "produce notable benefits for the public," such an enhanced dialogue between consumers and content providers and an improvement in consumers' ability to evaluate the content that they are receiving.[30]

For Internet-based media, the existence of a dominant search provider raises the risk that consumers will be exposed disproportionately to the content and views of the dominant provider or its preferred partners. As the Commission focuses on the future of media and on how to preserve and promote diversity, it must take into account the status of competition in search, the concern that a lack of competition in search could lead to the

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[25] *Id.* § 2(a)(2).

[26] *Id.* § 2(a)(5) (expressing concern that "[t]he cable industry has become vertically integrated," giving "cable operators . . . the incentive and ability to favor" their affiliated services over entities that competed with them by offering alternative video distribution services); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 16 FCC Rcd 19074, 19074 (2002). *See also 1992 Cable Act* §§ 2(a)(4), 2(a)(6) (expressing concern about the impact of vertical integration on "the number of media voices available to consumers" and announcing Congress's intent to "promot[e] a diversity of views provided through multiple technology media"). Although not directly relevant here, the Commission and Congress also have addressed network effects in the telecommunications industry and have imposed certain obligations on incumbent carriers to reap the positive benefits of network effects for all users of the integrated U.S. telecommunications network. Telecommunications Act of 1996, P.L. No. 104-104, 110 Stat. 56.

[27] That is particularly true in this context because the FCC has limited authority to regulate IP-based services since many of these services fall outside of the Commission's authority and, where regulated, these services generally should be considered Title I services. However, the issues surrounding competition in search and online advertising are integral to an understanding of the future of media, and addressing them in the Commission's report will provide important context as industry and the relevant regulators consider the proper approach to ensuring diversity on the Internet in the years to come.

[28] *Report and Order in Docket No. 14864*, 4 R.R.2d 1664, 1667 (1965), *recon. granted in part and denied in part*, 6 R.R.2d 1527 (1965).

[29] *Standardized & Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, 23 FCC Rcd 1274, 1290 (2008).

[30] *Id.*

dominant search gateway becoming a near-monopoly gatekeeper, and the corrosive effect that such a lack of competition in search could have on diversity in the media.

III. LIKE THE TRADITIONAL MEDIA ECONOMY, THE INTERNET ECONOMY DEPENDS HEAVILY ON ADVERTISING.

A. Advertising Enables Online Content.

Though the online content world is in many ways radically different from the linear, space constrained offline content world, one common aspect is that content frequently is offered to consumers free or at limited cost, and so advertising pays some or all of the bills. And, like print newspapers and broadcasters, most online publishers devote a portion of the space on their web pages to advertising. Given advertising's integral role in ensuring the economic viability of online content, a Commission understanding of Internet advertising revenues is perhaps as important to understanding the health of online publishing as is an understanding of search. Online advertising is the lifeblood of online publishing; without it, the diversity of news and information available online would diminish precipitously.

It is the nature of Internet publishing that many content providers cannot afford their own advertising sales forces, so increasingly they rely on third-party advertising "networks" to sell ads. Just as search engines act as a gateway middleman between consumers and online publishers, these advertising networks—which are the most common source of advertising on the Internet today—act as an intermediary between publishers and their advertisers.

Ad networks sell a number of types of advertisements. Two of the most prominent and lucrative are those that appear on pages with natural search results, and those that are included as paid placements on third-party websites where the paid placement is contextually relevant to the balance of the content on the page.[31] For example, a website focused on election coverage might bid to have its advertisement appear as a sponsored link on a search engine's results page whenever a user searches for "2010 election"; the advertising network also could cause that advertisement to appear on the website of a larger

[31] Some advertising networks serve these ads not only based on the context in which they appear (for example, in a search or on a page about elections), but also on the specific characteristics known about the user visiting the site, for example based on their search and browsing histories. For example, if a user visits the sports section of a newspaper's website, she may receive sports-related advertisements in her next visit to the site. *See, e.g.*, Google, "Ads Preferences," http://www.google.com/ads/preferences/html/about.html (describing Google's use of "interest-based advertising technology" to target textual ads to consumers based on past browsing history).

news site that covers political candidates.[32] Likewise, the election site might generate revenue for itself by allowing an ad network to place other ads on its pages. Often, search results and paid placements on third-party sites serve distinct and complementary purposes for advertisers.

B. Concentration In Online Advertising Could Threaten Diversity.

In a competitive environment, ad networks provide an essential service that promotes content diversity by allowing small and under-funded publishers to continue operating. But if it obtains sufficient market power, an ad network might have the ability and incentive to use that power in ways that stifle competing voices in the marketplace of ideas as well as competition itself. This concern has caused policymakers to observe, in the context of the media that they regulated, that diversity could be harmed if one vertically-integrated company has the ability to constrain the revenues of the entities with which it competes.[33]

In the online advertising environment, this concern is particularly acute. Like a dominant search provider, a dominant ad network operator can increase or decrease the revenues of particular publishers that it favors or disfavors. With that dominance, an ad network can control the revenues of the media, creating the very real risk that it could suppress, or even eliminate, smaller speakers who cannot sustain themselves without advertising revenue, or simply return less advertising revenue to all of them in order to enrich its own position. Such a provider also could promote certain sites more broadly than others, bringing more users to its own or favored sites and further depriving those who are disfavored, particularly sites that the provider perceives as a competitive threat to primary or ancillary services that it might offer.

While competition among advertisers could be relied on to obviate these concerns in the offline world, the fact that online publishers increasingly can reach advertisers only through ad networks that control access to the advertisers means that, in

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[32] Relatedly, many online publishers enter into syndication arrangements, whereby a search engine places its search box on the publisher's website and pays the publisher a share of the revenue generated from searches operating from the publisher's site.

[33] *See, e.g.*, 47 U.S.C. § 536 (prohibiting cable operators that own cable channels from discriminating against unaffiliated networks with which they compete—for example, by distributing them to fewer viewers, thereby curtailing their advertising revenues); 47 C.F.R. § 73.658(i) (prohibiting television networks from controlling the advertising inventory of their affiliates); *Amendment of § 73.658(i) of the Commission's Rules, Concerning Network Representation of TV Stations in National Spot Sales*, Report & Order, 5 FCC Rcd 7280, 7281 (1990) (observing that restricting networks' control over affiliates' advertising inventory was necessary to "protect[] broadcast affiliates from the networks exerting influence over affiliate programming decisions").

practice, publishers are left without options.[34] To put it another way, effective competition in ad networks is important to online publishers precisely because, if a dominant entity controls the majority of the supply of advertisers and the available audience on the Internet, the dominant entity has the ability to drive ad revenues towards or away from certain web sites, determining who wins and loses and, ultimately, what content consumers will obtain. Where there exists a dominant ad provider and a lack of competition, an online publisher's choice to use a non-dominant ad network will mean little if the publisher cannot make enough money through the non-dominant network to maintain its operations. In a very real sense, a dominant ad network has the ability to unilaterally assure—or destroy—an online publisher's financial viability.

The existence of a dominant entity in Internet advertising increases the premium on transparency in the way that entity operates. That is particularly true because, absent an ability to look inside the network's processes (or a meaningful ability to choose an effective competitor), a publisher may not even know until it is too late that it is being disadvantaged.[35] Given that opaque relationship, a publisher cannot even determine that it is being underpaid, let alone that the publisher across the street has a better deal.

As a consequence of a lack of transparency on the part of a dominant ad network, for example, an Internet journalist who wanted to attract visitors might face a steep advertising price if the dominant entity believed that her site would compete with its own service or if she reported news that was unfavorable to the dominant ad network. If it occurred, this practice would create a concern because the journalist might never know that she was paying a premium—or, if she did know, she might not have a choice if she wanted to attract users to her website.

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[34] *See* Section III(B)(1), *supra*. It may be tempting in this regard to argue that competition in online advertising or search is not a valid concern so long as there are any other ad networks or search engines available, regardless of size or market share. From this perspective, the argument goes, competition is always one click away. But this view ignores the fact that, for an online publisher or user, switching providers is like switching the side of the road we drive on. Changing lanes "only" requires a driver to adjust the position of her car by about 12 feet. But the reality is that changing lanes, like switching advertising or search providers, imposes substantial switching costs: running into opposing traffic, discontinuing relationships with longstanding advertisers that use the old ad network, or losing access to services associated with search (such as e-mail, photo sharing, investment monitoring, and many others).

[35] For instance, today's dominant advertising network provider, Google, does not disclose the formula that it uses to pay publishers for the advertising they publish. Google, "AdSense Help: Newbie Central - Earnings & Expectations," https://www.google.com/adsense/support/bin/answer.py?hl=en&answer=81567 ("One of the first things most publishers ask when they begin participating in AdSense is, 'How much will I earn?' Because lots of factors contribute to your earnings, we can't give you an exact answer. . . .").

Ultimately, a dominant ad network can adversely impact the financial viability of an online provider because of its power to promote or stifle speakers. This works to the detriment of consumers in a much more comprehensive manner than it would in the offline world today. That is because Congress and the Commission have worked, in the context of media regulated under the Communications Act, to ensure that each media market features a variety of traditional media voices, and no single entity can prevent a message from being heard. But in the Internet media world, which is not regulated under the Communications Act and in which a single entity controls the vast majority of paid speech, the risks are far greater. If the dominant ad network is the same as, or operates in concert with, the dominant search provider, that combination further compounds the risk to diversity because a single entity or group has the power to, first, prevent consumers from finding the content of a disfavored publisher and, second, deprive the publisher of the advertising revenues that it needs to survive.

These harms to diversity, of course, can be direct and occur immediately. For example, without effective competition, a dominant ad network could quietly distribute less revenue to sites that are critical of certain legislation and give those sites less prominent ad placements. But harms are equally possible in the long term because the cumulative effect of this behavior is that the landscape of diverse voices could be eroded so that only favored speakers, and those that were robust enough to have independent revenue streams, would remain.

IV. THE COMMISSION'S REPORT SHOULD REFLECT THE IMPORTANCE OF SEARCH AND SEARCH ADVERTISING TO THE FUTURE OF MEDIA.

As the Public Notice recognizes with reference to the bipartisan Knight Commission on Information Needs of Communities, "The digital age is creating an information and communications renaissance," but it remains to be seen whether it can "serv[e] democracy fully."[36] While there is no single variable that will determine the future of media, the ability of news and other information sources to be found and to sustain themselves financially online will be a precondition to serving the information needs of communities. In the future of media defined by our broadband era, *finding* online content, print or video news and information is and will be highly dependent on search. *Funding* online content, print or video news and information is and will be highly dependent on advertising. The Commission needs to focus on both of these elements to understand the future of media.

Today, there are growing concerns over the state of competition in both search and online advertising. Just as in other times in the history of media in which one actor was

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[36] *NOI* at 1.

in a position to decide who could or could not speak, this state of affairs raises significant risks to diversity.[37] The Commission's report on the Future of Media and Information Needs of Communities in a Digital Age should focus on the risk that, in 2010, diversity in the rich tapestry of information and ideas presently available on the Internet could be lost at the hands of a dominant gatekeeper.

Accordingly, in formulating its report, the Commission should look closely at trends in search and online advertising that may undermine media diversity in the digital era. Greater clarity on these trends will help the relevant stakeholders develop best practices to ameliorate threats to diversity caused by a single party's dominance in key online sectors such as search and online advertising.

As discussed above, transparency is one tool that, at least in part, can address concerns about the service provided to consumers by the media, and transparency has the potential to at least partially redress the lack of competition that threatens diversity in the online environment. Microsoft endorses the view that, while other steps likely are needed, "access to accurate information . . . encourages competition, innovation, low prices, and high-quality services,"[38] and transparency is an important component of efforts to address concerns surrounding a dominant search provider or ad network. In search, greater transparency would allow users and other actors in the online ecosystem to know whether a vertically-integrated, dominant search engine is favoring its own content or that of preferred partners in natural or paid search results over competing, unaffiliated content. And in advertising, transparency would enable publishers to better understand how the dominant advertising platform is calculating its share of revenue earned by sale of ad space on the publishers' sites.

Transparency in search and online advertising could take a number of forms, and it could be implemented without requiring public disclosure of the dominant provider's proprietary algorithms, which may create legitimate and significant business concerns. Whatever transparency process is adopted, however, the goal would be for users and the government to understand what factors are and are not influencing the dominant provider's search results and advertising placements and the extent to which the dominant provider makes judgments that could impede diversity in the future of media. This information is essential in detecting abuse of a dominant platform's control over its dealings with

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[37] *See, e.g.*, Steven Waldman, Sr. Advisor to Chmn. Genachowski, "Prepared Remarks before the Free State Institute at the Nat'l Press Club" (Apr. 16, 2010), available at http://reboot.fcc.gov/futureofmedia/blog?entryId=377886& sblog=y (explaining that a single party's dominance over a media outlet has been a concern of policymakers for more than 200 years, since the days when Benjamin Franklin encouraged postal subsidies for the *Pennsylvania Gazette* and other periodicals in order to promote diversity in the media).

[38] *Open Internet NPRM* ¶ 118 (citations omitted).

publishers. And it is essential to ensuring that the public can trust that they will find on the Internet information that is diverse, innovative, and worthy of their consideration.

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As the Commission takes stock of the issues and developments that will shape the future of media, Microsoft encourages it to consider the critical role that search and online advertising play in ensuring consumer access to a diversity of information and content as well as the financial viability and success of publishers and content providers. By encouraging Congress and the relevant regulators to promote competition in search and online advertising, the Commission will improve the ability of its Future of Media project to make meaningful recommendations for serving the information needs of communities in the digital era.

Respectfully submitted,

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