

# Search, Advertising, and Online Distribution: Practical Guidance and Open Questions Under FTC Standards

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**S** EARCH ENGINES AND ONLINE distribution platforms have transformed how consumers shop as well as how companies advertise and deliver their products. While these technologies greatly expand consumers' choices in the commercial arena and afford businesses access to new markets and customers, an intense debate is swirling around the hidden algorithms that businesses use to generate search results and place advertisements. This debate is likely to continue for a long time, but the Federal Trade Commission has recently taken some modest but significant steps illustrating the importance of squaring the use of search advertising with existing consumer protection standards.

Two sides of search-driven marketing warrant close attention: (1) the contents of search ads, which are typically provided by advertisers themselves, and (2) search engines' decisions about what results to display and how to display them. Companies that use search ads to compete for online traffic should be aware that the small amount of text in a typical search engine ad can be misleading on its own and can open the door to a more thoroughly deceptive online presence—as demonstrated by the FTC's recent enforcement action against *Reservation Counter*.<sup>1</sup>

Similarly, where the provision of search capabilities is concerned, the FTC's recent case against *Victory Media*<sup>2</sup> has breathed life into its long-standing guidance on search advertising by making the alleged failure to disclose payment for inclusion in search results part of the grounds for an enforcement action. These actions demonstrate that, while current and recent members of the FTC have expressed different views about how extensively the FTC should wade into companies' use of data and algorithms to advertise to consumers,

there should be no doubt that the FTC will take action against search-related practices that, in its view, deceive consumers.

The disparate industries at issue in these two actions—travel in *Reservation Counter*, and post-secondary education in *Victory Media*—also show that companies across the economy should pay attention to the FTC's search-related standards.

This article begins with overviews of the economic significance of online distribution platforms and search engines, how they relate to one another, and the FTC's guidance on search advertising. It then discusses the FTC's actions against *Reservation Counter* and *Victory Media*, and how those actions point to the need for companies to take a holistic look at their use of search in connection with online distribution. Although the enforcement actions discussed in this article address specific companies' alleged practices, they also highlight more general questions that companies should consider in connection with any search capabilities they offer and their overall online distribution operations. The article concludes by identifying issues that the FTC's guidance and enforcement actions leave unaddressed and provides guidance on what companies should ask themselves in connection with purchasing search ads and providing search capabilities.

## Understanding the Close Connection Between Search and Online Distribution

To appreciate the broader significance of the FTC's actions against *Reservation Counter* and *Victory Media*, it is helpful to keep two general online distribution models in mind. One model is direct distribution, in which the provider of the good or service sells directly to consumers through a website or app. To take an example from the hotel industry, which is at the center of the *Reservation Counter* action, many hotel brands maintain websites and apps through which they allow consumers to search for and book rooms with a specific location.

A second general model of online distribution uses dedicated distribution platforms that offer products or services from different providers. To refer again to the hotel industry, online travel agencies (OTAs), such as Expedia and Priceline, allow consumers to search among different hotels and book rooms through the OTA platform. There are variations on this model. Of particular relevance to the *Reservation Counter* case is the OTA affiliate model, in which independent third parties contract with OTAs for inventory and conduct their own marketing campaigns in an effort to get consumers to book rooms through their services. *Reservation Counter* itself is an OTA affiliate, and its use of search advertising was a central element of the FTC's action against the company.

These distribution models differ significantly in how consumers use them and how payments flow among the various participants. However, they share a dependence on search results and search advertising. Consider a consumer who searches for "Milwaukee hotels" on a general search engine.

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Depending on a variety of factors, the consumer may see, among other things, search results from specific hotels in Milwaukee, results from an OTA like Expedia, results from an OTA affiliate, and search ads for any of the same. The consumer's first click from this point can make the difference between booking directly, through an OTA, or through an OTA affiliate. Unsurprisingly, search ads—which are often displayed prominently above “organic” or “natural” search results, that is, results determined through relevance to a search query—are an important force in affecting the paths that consumers take. Their importance is evident in the amount of money spent on search advertising—approximately \$35 billion,<sup>3</sup> which is sizable in comparison with the total amount of nationwide retail electronic commerce (\$294 billion in 2015<sup>4</sup>).

Despite the seismic shifts that the entry of online distribution channels have brought to the ways that consumers shop, one thing has remained the same when they purchase tangible goods: the goods that ultimately reach the consumer are the same as they would purchase in a physical store. That is, a pair of a particular type of sneakers purchased at Foot Locker, at the Adidas store, or from Zappos would be exactly the same.

Matters are somewhat less clear where the “product” for sale is actually a service. For some services, the very process of acquiring the service is part of the experience of using the service itself. This is especially true in the lodging industry, where there are strongly established expectations that the hotel (or other service provider) is in control of the service from beginning to end. However, an entity that is involved in distributing but not delivering a service may have the opportunity to rewrite some aspects of the experience in ways that clash with consumers' expectations. At worst, distributors can use search engines and style their online presence in a way that misleads consumers to believe that they are dealing directly with the company that ultimately provides a good or service, degrading the search and sale experience as well as the ultimate service itself. This was the case in the FTC action against Reservation Counter, as discussed below.

### **Search Advertising: Broad Guidance but Little Enforcement Against Search Engines**

Because search advertising and search results occupy a central position in *Reservation Counter* and *Victory Media*, it is helpful to begin by taking stock of relevant search guidance from the FTC. The nexus between search and advertising has long been of concern to the FTC, and the agency's guidance on search advertising provides some durable and fundamental principles. The existing guidance is directed to search engines, rather than advertisers. Though limited in that way, the FTC's search advertising guidance applies across the many different contexts in which companies offer search capabilities, including general-purpose search engines, vertical search engines, and online distribution platforms that incorporate search functionality.

**2002 Search Engine Guidance.** In response to a non-governmental group's complaint and request for investigation of several search engines, the FTC in 2002 issued staff guidance on search engine advertising (2002 Search Engine Guidance).<sup>5</sup> The 2002 Search Engine Guidance asks and answers a basic question about search: what do consumers take away from the content and ordering of search results? The FTC staff's answer to this question is simple. Based on standard industry practice at the time, consumers reasonably expect that search results are “based on relevancy to the search query, as determined by algorithms or other objective criteria” that are “based on a set of impartial factors.”<sup>6</sup>

With this broad principle in the background, the FTC focused its initial guidance on two general search engine practices.

*Paid placement* practices include the still widespread practice of displaying ads above or next to organic search results. By 2002, the FTC understood that advertisers' and search engines' financial incentives could blur the line between organic results and ads. The 2002 Search Engine Guidance recommends clearly and conspicuously labeling ads to distinguish them from results chosen based on “objective criteria,” including any results from sites that “have paid to be ranked higher than they would be ranked by relevancy, or other objective criteria.”<sup>7</sup>

*Paid inclusion* practices include the listing of sites that have paid a search engine to appear in the results and also may involve the intermingling of paid with non-paid sites.<sup>8</sup> FTC staff advised that search engines should make clear and conspicuous disclosures about the presence of such advertising. The starkest example of paid inclusion is a service in which *all* sites pay to be included—a practice upon which FTC staff commented: “[C]ertainly, if all Web sites included in a search guide or a search engine's database have paid to be included, so that the search engine is essentially an advertising medium, that fact should be disclosed adequately to avoid deception.”<sup>9</sup> As discussed further below, paid inclusion was an issue in *Victory Media*. Specifically, the company allegedly represented that its search tool searched “military friendly” schools, while the tool was limited to schools that paid to be included.

**Closing Statement on Google's Search Practices.** In January 2013, the FTC announced that it was closing its antitrust-focused investigation of Google's alleged “search bias,” that is to say, the accusation that Google “unfairly promoted its own vertical properties through changes in its search results page,” with the effect of pushing organic results “farther down the search results page.”<sup>10</sup> Although the closing statement focuses on the antitrust issues that were the subject of the FTC's investigation, it also affirms the 2002 Search Engine Guidance's notion that the main purpose of organic search results is to provide information that is relevant to the search query.<sup>11</sup>

**2013 Search Engine Guidance.** Later in 2013, the FTC returned to the consumer protection side of search and adver-

tising. Noting a “decline in compliance” with the 2002 Search Engine Guidance, FTC staff sent letters to several general purpose search engines and 17 vertical search engines.<sup>12</sup> Like the 2002 Guidance, the 2013 Search Engine Guidance asserts that “consumers ordinarily expect that natural search results are included and ranked based on relevance to a search query, not based on payment from a third party.”<sup>13</sup> The FTC sought to future-proof this view, asserting that “[r]egardless of the precise form search may take in the future, the long-standing principle of making advertising distinguishable from natural search results will remain applicable.”<sup>14</sup> As an example, the 2013 Guidance describes a social network’s recommendations for restaurants based on a user’s contacts and states that any such recommendations “included or prioritized based in whole or in part on payments from a third party” should be clearly distinguished as advertising.<sup>15</sup> This principle holds irrespective of whether a search engine is general or vertical.<sup>16</sup>

The FTC’s search engine guidance is sweeping. Read literally, the 2013 Search Engine Guidance advises that any search result placement or inclusion based “in whole or in part” on a third-party payment qualifies as advertising. There is no qualitative or quantitative threshold, nor does the 2013 Search Engine Guidance offer any distinction based on the nature of the payment from a third party. In particular, the 2013 Search Engine Guidance does not require the payment to be for the purpose of advertising. This is important because it is common in online distribution arrangements for money to flow in the form of commissions or fees from the seller to the distribution platform, and there is some evidence that some companies use revenue earned from partners as a factor in determining the order of search results.

### Case Study: Search and Online Distribution in the Travel Industry

As sweeping as the FTC’s guidance is, its scope is not infinite. In particular, the guidance does not address advertisers’ use of search engines’ capabilities. If there was any doubt that the small amount of text available to advertisers in typical search ads can be part of a deceptive practice, the *Reservation Counter* action should remove that doubt. *Reservation Counter* makes clear that advertisers should ensure that their search ads are not deceptive, either on their own or as part of the broader impression that their advertising campaigns create.

In recent years, OTAs, such as Expedia and Priceline, have become a fixture in the marketplace and account for a significant portion of hotel bookings to non-business travelers. In many instances, it is clear to consumers that they are using an intermediary—like an OTA—to conduct a transaction. Still, when a room is booked through the OTA, the OTA handles only the booking while delivery of the service is up to a hotel. OTAs typically receive a commission for each booking they facilitate, creating an incentive to vie for as many bookings as possible.<sup>17</sup>

This arrangement can create risks for hotels and consumers when the presence or role of a third party is unclear.

In addition to handling bookings themselves, OTAs contract with “affiliates” that sell hotel room inventory. Hotels do not enter into direct relationships with affiliates, and affiliates can be as small as a single person operating from her laptop computer in a college dorm room. Like many companies across the economy, some OTA affiliates reach consumers through search advertising. However, when search ads obscure the role that the OTA affiliate plays or if the OTA affiliate purports to be the hotel itself, rather than a third party, there is a problem—for the hotel and consumers. The FTC’s recent action against Reservation Counter<sup>18</sup> and its corporate parents tackled exactly this issue.

As an OTA affiliate, Reservation Counter “obtain[s] hotel room inventory primarily through affiliate network programs sponsored by first-tier online travel agencies . . . such as Expedia, Priceline, and Orbitz, but they advertise and market the available hotel rooms through their own advertisements, websites, and call centers.”<sup>19</sup> The FTC alleged, however, that Reservation Counter’s search ad text, landing page representations, and call center practices “create[d] the impression that consumers [were] booking hotel rooms directly through the advertised hotel, and thus, that reservations made through Defendants [were] subject to the same terms and policies as those applicable to consumers who book hotel rooms directly with the hotel.”<sup>20</sup>

**Search Ad Text.** According to the FTC’s complaint, the company’s deceptive online presence began with search ads. For instance, a search for “Hilton Birmingham Atlanta” on Yahoo’s search engine would return text-based ads with the headlines “Hilton Birmingham Alabama—Hilton Reservation Counter.com” and “Hilton Birmingham Al—8 Perimeter Park South, Birmingham” in “large bold lettering.”<sup>21</sup> The effect of this ad text on consumers, in the FTC’s view, was to “convey[] the impression that clicking on the advertisement will take consumers to websites owned and operated by or directly for the advertised Hilton hotel located in the Birmingham, Alabama area.”<sup>22</sup>

Furthermore, the complaint highlighted that the second line of Reservation Counter’s ads displayed website links (“URLs”) that included the name of the hotel in the search query alongside Reservation Counter’s (or its affiliate, Reservation Desk’s) domain name, e.g., Reservation Counter.com/Hilton. This juxtaposition, according to the FTC, “convey[ed] the impression that the reference to “Reservation Counter” or “Reservation-Desk” refers to the centralized booking center operated by or for the Hilton hotel chain.”<sup>23</sup>

**Landing Page Representations.** The FTC further alleged that the links in Reservation Counter’s search ads led to web pages “dedicated specifically and exclusively to the advertised property,” i.e., the hotel name and location that were in the search query.<sup>24</sup> These pages prominently displayed the name and images of the hotel, as well as facilities to search for and reserve a room, and to obtain rate information.<sup>25</sup> Although the defendant-operated sites displayed the name “Reservation Counter,” the FTC alleged that the

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size, placement, and other aspects of this display was “insufficient to dispel the net impression” conveyed by its search ads and landing pages, namely that the site was operated by the hotel named in the search.<sup>26</sup>

**Call Center Practices.** In addition, the defendant’s landing pages allegedly displayed a phone number for “Reservations” below the name and address of the hotel, which in the FTC’s view, created the impression that calling the number would put the consumer into contact with the hotel itself.<sup>27</sup> Instead, the number was staffed by call centers operated by Reservation Counter, whose agents allegedly were instructed to answer calls with phrases such as “Thank you for calling Reservation Counter” and were not trained or instructed to tell consumers that they were not affiliated with the hotel.<sup>28</sup> The complaint also asserts that, although Reservation Counter’s training materials instructed call center staff not to affirmatively represent that they worked for the hotel, the materials’ instructions led to “vague and ambiguous” disclosures that did not “dispel the net misimpression that the caller has reached the reservation center at the advertised hotel or acting on behalf of that hotel.”<sup>29</sup>

Why did any of these representations matter to the FTC? After all, the FTC’s complaint does not allege that Reservation Counter failed to reserve the rooms that consumers booked through its site.<sup>30</sup> The complaint alleges that Reservation Counter’s involvement changed the terms of hotel room reservations in some important ways, without adequately disclosing those changes. Some of the common terms and policies that typically apply to direct booking apparently did not apply to reservations made through the defendants’ service. For example, consumers were charged in full at the time they reserved their rooms (rather than after their stays), were subject to more restrictive change and cancellation policies, did not earn rewards or loyalty points, and may have missed special rates that otherwise would have been available to them (e.g., discount rates for weddings or conferences).<sup>31</sup>

The *Reservation Counter* order directly addresses the practices that were alleged in the complaint. Specifically, Reservation Counter is prohibited from making any misrepresentation that consumers who book through its service are booking directly through the hotel or that the company is, or is working directly for, an advertised hotel.<sup>32</sup> This type of provision is typical in FTC advertising cases. However, the order

goes on to list specific elements that could lead to such misrepresentations, including the “actual or display URL” used in advertisements and placing a call center “in immediate proximity” to an advertised hotel photo or logo. The calling out of these specific elements aligns with the complaint, which details how, in the FTC’s view, individual elements of Reservation Counter’s ads, websites, and call center operations were misleading on their own and also worked together to create the misimpression that consumers interacted directly with hotels.<sup>33</sup>

Overall, the FTC’s complaint outlines a set of alleged practices that work together to create the impression that consumers were dealing directly with the hotel named in their search queries. This action demonstrates that the FTC will step in when an online distributor changes terms of a transaction in ways that consumers expect based on previous experience, even if the product or service that is ultimately delivered to consumers is the one that was advertised.

### **Case Study: The FTC’s Search Engine Guidance in Action**

The FTC’s action against Victory Media demonstrates that entities that offer search capabilities also need to pay attention to the potential for creating misrepresentations about consumers’ choices. In particular, the FTC’s action against Victory Media provides a look at how the paid inclusion elements of the FTC’s search engine guidance look in an enforcement action.

Victory Media focuses on helping “military transitioners and veterans explore different employment, education and entrepreneurship opportunities” through a variety of online and print publications.<sup>34</sup> The search-related aspects<sup>35</sup> of the FTC’s action concern an online search tool—Matchmaker—that Victory Media provided to allow consumers to search for post-secondary schools based on a variety of criteria, including name, location, and area of study.<sup>36</sup> According to the FTC, Victory Media created a “military-friendly” designation for schools based on publicly available data and the results of a survey that it sent to schools, which assessed how schools met military students’ interests and educational needs.

During the time period covered by the complaint, the FTC alleged, all schools listed in Matchmaker paid to be included.<sup>37</sup> Some of the included schools were “military-friendly”; others were not.<sup>38</sup> However, Victory Media ran a variety of ads in which it allegedly claimed that Matchmaker would allow consumers to search military-friendly schools.<sup>39</sup> In other words, “several schools not designated by the respondent as ‘military friendly’ [were] included in the Matchmaker search results.”<sup>40</sup>

The charging language in the FTC’s complaint combines two issues. First, the Matchmaker complaint charges that Victory Media included schools that it had not designated as military-friendly,<sup>41</sup> in apparent contrast with the claims in ads about Matchmaker. Second, the FTC charged Victory Media with failure to disclose that it was essentially a paid inclusion

search engine.<sup>42</sup> The second element of this charge fits squarely with the concept of “paid inclusion” that dates back to the FTC’s 2002 Search Engine Guidance.

The *Victory Media* order addresses the allegedly undisclosed paid inclusion practice by prohibiting the company from misrepresenting “in connection with paid promotional content regarding post-secondary schools . . . the scope of the search conducted by any search tool, including, but not limited to whether any such tool searches only through schools Respondent or others have designated as military friendly.”<sup>43</sup> In other words, the order does not prohibit a search tool that includes paid content, nor does it require a disclosure about the scope of a search in the absence of a paid promotion. It is the combination of those two conditions that falls within the scope of this order provision. Thus, the *Victory Media* order’s search provision is relatively clear-cut and reflects the underlying allegation that all schools listed in the search tool paid to be included.<sup>44</sup>

### Implications for Search Engines and Advertisers

**Advertisers.** The FTC’s action against Reservation Counter makes it clear that the agency may take action against companies that use search ads to grab the attention of consumers and create the misimpression that they are more than a middle man. When combined with other misrepresentations and practices that diminish the quality of the product or service—such as leaving consumers with unexpectedly inflexible room reservations—the risks (potentially including enforcement by state attorneys general) of such practices are obvious.

More generally, companies must examine their own representations carefully to navigate this landscape. As the online commercial ecosystem becomes more complex, companies should start thinking about how practices that are now emerging will be viewed under fundamental consumer protection standards. It is not sufficient for advertisers to rely on search engines to clearly identify ads. Advertisers themselves need to ensure that the text of the ads that they submit does not create misleading impressions on their own or as part of a broader misrepresentation.

In addition, advertisers should look at their campaigns holistically. Multiple aspects of a company’s online presence can contribute to a broader claim or representation that a company ends up making. How do these elements tie together to make broader claims? Do a distribution platform’s terms differ from those of more established channels in ways that depart from consumers’ expectations? These questions are particularly critical in instances in which those terms are important to a service or overall experience, as the FTC’s action against Reservation Counter demonstrates.

**Search Engines.** The *Victory Media* action should also give pause to companies that use payments to influence the scope or ordering of their search results. Leading a consumer to believe that search results are organic and prioritized based on consumer preferences, if they in fact are based on some form of payment, may be deceptive to consumers and harm

the broader marketplace by punishing sellers who choose not to pay.

As more companies—even if they are not primarily search engines or distribution platforms—incorporate search features into their services, they will face challenges in determining when they must disclose relationships that affect search results and how to make those disclosures. The FTC’s search engine guidance provides a useful lens through which to view such issues. In particular, the two-part taxonomy of paid placement and paid inclusion has continuing applicability. However, applying the guidance’s principles to new issues that loom not too far ahead requires careful thought.

Some of the questions that arise implicate the paid placement dimension of the FTC’s search engine guidance. As discussed above, the straightforward scenario involves payments from an advertiser to a search engine to obtain a search ranking that is higher than it would be in organic search results. (At least one platform introduced such a model.<sup>45</sup>) But consider a more subtle example, such as a vertical search engine that uses commissions as a factor in determining the ranking of search results. Such payments are not for the express purpose of advertising. However, to the extent that payments to distribution platforms affect organic search results—long regarded by the FTC as based on objective criteria of “relevance”—they may conflict with consumers’ reasonable understanding of the results they see. More complex still is the question of when a search engine’s use of commissions—or, more generally, revenue earned from its business partners—moves from being a factor in the search engine’s determination of relevance to a form of advertising. And, if all results in a given search engine take this factor into account, what is an effective way to disclose this fact to consumers?

Other questions fall along the paid inclusion dimension of the FTC’s search engine guidance. The most detailed statement of paid inclusion guidance—from 2002—indicates that intermingling of paid and non-paid sites, payment for prioritized review of sites or links, and payment for deeper or more thorough review as a site relative to non-paid sites are all forms of paid inclusion. What does effective disclosure look like in these instances? Is it sufficient to state that payments may affect some search rankings? Or are more specific disclosures—perhaps indicating which results are affected by payments, or quantifying the effect of payments—necessary?

Of course, paid inclusion and paid placement models are not mutually exclusive, and companies that provide search capabilities may move between them or incorporate elements of both. The FTC’s existing guidance does not address the full range of business models or fact patterns that could arise in uses of search in connection with advertising. However, it is worth keeping in mind the FTC’s view that consumers expect default search results to reflect their relevance based on objective criteria (other than payments by the advertiser), its broad definition of what constitutes advertising in connection with search, and its consistent return to fundamental principles of clear and conspicuous disclosures to identify advertising.

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## Conclusion

Search engines and online distribution platforms have brought rapid changes in business models and a wide variety of benefits to the economy. But companies that offer these services—or use them for advertising—are subject to the same standards of deception as the FTC enforces across most of the economy, whether offering hotel reservations, job searches, or other services. While larger questions about transparency in algorithms and the economic power of online platforms are likely to persist, the FTC has sent a strong message that its consumer protection authority has a role to play now. ■

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<sup>1</sup> See *generally* Complaint, FTC v. Reservation Counter, LLC, 2:17-cv-01304 (D. Utah Dec. 21, 2017) [hereinafter Reservation Counter Complaint].

<sup>2</sup> See *generally* Complaint, Victory Media, FTC Docket No. C-4640 (Jan. 11, 2018) [hereinafter Victory Media Complaint].

<sup>3</sup> INTERACTIVE ADVERTISING BUREAU, IAB INTERNET ADVERTISING REVENUE REPORT 2, 11 (Apr. 2017), [https://www.iab.com/wp-content/uploads/2016/04/IAB\\_Internet\\_Advertising\\_Revenue\\_Report\\_FY\\_2016.pdf](https://www.iab.com/wp-content/uploads/2016/04/IAB_Internet_Advertising_Revenue_Report_FY_2016.pdf).

<sup>4</sup> DEPARTMENT OF COMMERCE, NEW INSIGHTS ON RETAIL E-COMMERCE 1 (July 2017), <http://www.esa.doc.gov/sites/default/files/new-insights-retail-e-commerce.pdf>.

<sup>5</sup> Letter to Gary Ruskin, FTC Staff Letter, at 1 (June 27, 2002) [hereinafter 2002 Search Engine Guidance]. As noted in the 2002 Search Engine Guidance, FTC staff declined to recommend action against the search engines named in the complaint but sent them warning letters “outlining the need for clear and conspicuous disclosures of paid placement, and in some instances paid inclusion.” *Id.* at 1.

<sup>6</sup> *Id.* at 2.

<sup>7</sup> *Id.* at 2.

<sup>8</sup> *Id.* at 3.

<sup>9</sup> *Id.*

<sup>10</sup> Statement of Federal Trade Commission at 1, Google Inc., FTC File No. 111-0163 (Jan. 3, 2013), [https://www.ftc.gov/system/files/documents/public\\_statements/295971/130103googlesearchstmttoftcomm.pdf](https://www.ftc.gov/system/files/documents/public_statements/295971/130103googlesearchstmttoftcomm.pdf).

<sup>11</sup> *Id.* (“These organic results—together with advertising, links to Google products, and other information judged to be relevant to the user’s query—are returned to the user as the Google search results page.”).

<sup>12</sup> Letter to Search Engines, FTC Staff Letter, at 1 (June 24, 2013) [hereinafter 2013 Search Engine Warning Letter]. See also Press Release, Fed. Trade Comm’n, FTC Consumer Protection Staff Updates Agency’s Guidance to Search Engine Industry on the Need to Distinguish Between Advertisements and Search Results (June 25, 2013), <https://www.ftc.gov/news-events/press-releases/2013/06/ftc-consumer-protection-staff-updates-agencys-guidance-search> (stating that the 2013 Search Engine Warning letter was sent to 17 recipients).

<sup>13</sup> Search Engine Warning Letter, *supra* note 12, at 1.

<sup>14</sup> *Id.* at 4.

<sup>15</sup> *Id.*

<sup>16</sup> See *id.* at 2 (“Sometimes the results returned as part of a specialized search are based at least in part on payments from a third party. If that is the case, it is also a form of advertising and should be identified as such to consumers.”).

<sup>17</sup> See Benjamin Edelman, Impact of OTA Bias and Consolidation on Consumers 4 (July 12, 2017), <http://www.benedelman.org/publications/ota-bias-12jul2017.pdf> (stating that hotels typically pay OTAs commission of approximately 25%).

<sup>18</sup> The complaint also names Reservation Counter’s corporate parents, Travelpass Group, LLC, and Partner Fusion, Inc. The stipulated final order that resolved the FTC’s allegations is binding on all three entities. For the

sake of simplicity in presentation, however, the discussion in this article refers only to Reservation Counter.

<sup>19</sup> Reservation Counter Complaint, *supra* note 1, ¶ 11. The FTC’s complaint contains no allegations concerning conduct by Expedia, Priceline, or other “first-tier” OTAs.

<sup>20</sup> *Id.* ¶ 20.

<sup>21</sup> *Id.* ¶¶ 22–24.

<sup>22</sup> *Id.* ¶ 23.

<sup>23</sup> *Id.* ¶ 25.

<sup>24</sup> *Id.* ¶ 26.

<sup>25</sup> *Id.* ¶¶ 26–30.

<sup>26</sup> *Id.* ¶ 31.

<sup>27</sup> *Id.* ¶ 27.

<sup>28</sup> *Id.* ¶¶ 43–45.

<sup>29</sup> *Id.* ¶ 52.

<sup>30</sup> However, consumer and business education materials published by the FTC and a hotel industry trade group indicate that some third-party booking sites apparently do fail to make reservations. See FTC Consumer Blog, *Did You Book that Night at the Hotel’s Site?* (July 14, 2015), <https://www.consumer.ftc.gov/blog/2015/07/did-you-book-night-hotels-site>; FTC Business Blog, *Business Travelers: Check It Out Before You Check In* (July 14, 2015), <https://www.ftc.gov/news-events/blogs/business-blog/2015/07/business-travelers-check-it-out-you-check>; American Hotel & Lodging Ass’n, Stop Online Booking Scams, <https://www.ahla.com/stopping-online-booking-scams> (“They [the third-party site] took my money. The hotel had no record of my hotel reservation. I had to pay the hotel directly when I arrived because the third-party site never transmitted my reservation to the hotel.”) (quoting consumer complaint on unnamed consumer review site).

<sup>31</sup> Reservation Counter Complaint, *supra* note 1, ¶ 20.

<sup>32</sup> Stipulated Order for Permanent Injunction and Judgment § I, FTC v. Reservation Counter, LLC, 2:17-cv-01304 (D. Utah Dec. 21, 2017) [hereinafter Reservation Counter Order].

<sup>33</sup> The Reservation Counter Order also requires Reservation Counter to develop and implement written policies designed to prevent call center personnel from misrepresenting that they are a hotel or acting for a hotel. *Id.* § IV. In addition, the order bars the company from misrepresenting any material aspect of and “travel-related good or service” that it advertises or provides. *Id.* § III.

<sup>34</sup> Victory Media Complaint, *supra* note 2, ¶ 3 (quoting Victory Media’s website).

<sup>35</sup> The Victory Media Complaint contains two counts relating to misrepresentations about endorsements and recommendations, *id.* ¶¶ 22–26, which are not discussed in this article.

<sup>36</sup> *Id.* ¶¶ 8–9.

<sup>37</sup> *Id.* ¶ 11 (“Beginning in mid-2015, Respondent has included schools as possible search results for its Matchmaker tool only if the schools paid Respondent to be included, and regardless of whether Respondent has designated them as ‘military-friendly’ under Respondent’s criteria.”).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* ¶¶ 9–10.

<sup>40</sup> Analysis to Aid Public Comment, Victory Media, Inc., FTC Docket No. C-4640, 82 Fed. Reg. 50,129, 50,130 (Oct. 30, 2017).

<sup>41</sup> Victory Media Complaint, *supra* note 2, ¶¶ 20–21.

<sup>42</sup> *Id.* ¶¶ 24–25.

<sup>43</sup> Consent Order, Victory Media, Inc., at § I.A, FTC Docket No. C-4640 (Jan. 11, 2018).

<sup>44</sup> See Victory Media Complaint, *supra* note 2, ¶¶ 20–21.

<sup>45</sup> See Dennis Schaal, *First Look at Expedia Accelerator Program for Improving Hotel Placement*, SKIFT (Mar. 3, 2016), <https://skift.com/2016/03/03/first-look-at-expedias-hotel-accelerator-program-for-improving-hotel-placement/> (“Expedia’s new Accelerator program offers a way for hotel properties to move their way up from page three to the first page of listings on Expedia.com—all they might have to do is pay Expedia an additional 10 percent commission on top of their typical payments.”).