Impact of OTA Bias and Consolidation on Consumers

Benjamin Edelman – July 12, 2017*

Enjoying a once-a-year vacation to a summer hotspot, a family could easily spend $2000 on two weeks of hotel accommodations. Unbeknownst to them, when they choose that hotel via an online travel agency ("OTA", such as Expedia or Priceline), the hotel pays OTA fees that can reach 25% or even more. In an instant, $500 or more of the family's "hotel" expense could be paid over to the online search tool that facilitated the transaction. Of course many consumers would prefer to spend that money on something else, perhaps vacation activities or simply extending the trip, even if that meant a bit more difficulty choosing a hotel or a few more clicks to book. And the level of fee is remarkable, comparable to eight years of Pandora subscriptions or two and a half years of NYtimes.com. But OTA market structure offers the family no such choice.

One might reasonably ask why hotels agree to pay such high fees. A portion of the answer surely comes from hotel worries about the risk of empty rooms—and conversely, the benefit a hotel sees from incremental customers, even if obtained at high fees. That much, at least, reflects the genuine market fundamentals—that OTAs have something that hotels need. But OTAs have also adjusted their pricing and rules to extract higher payments from hotels. Historically, OTAs removed listings for hotels that did not pay—a powerful threat but one that was also costly for OTAs, as consumers would rightly distrust a travel site that omitted key properties. More recently, OTAs have found new ways to charge hotels—notably, effectively auctioning off the top positions in search results. Under this approach, the most prominent and (often) explicitly "recommended" positions go to the properties that paid the most rather than those that are in some objective sense the best fits for a customer's needs. When many hotels compete for high positions, the auction-like process can yield sharply higher fees to hotels, even if the OTA does not expand the market or increase the total number of room-nights customers require.

In this paper, I report key methods whereby OTAs modify and reorder search results, then assess their implications for both travelers and hotel operators. I present the explanations offered by hotel booking services, and I assess the persuasiveness of their reasoning. I explore possible responses that might dull the harm of search bias, including users adjusting display settings to remove bias or complaining about any bias they discover, but I find these possibilities unlikely to constrain OTA behavior. I also consider the impact of OTA consolidation, culminating in just two large OTAs, which increases the likelihood of bias and broadens the circumstances in which OTAs find it profitable to impose bias. My bottom line is that bias increases the power OTAs hold over hotels—correspondingly increasing the fees hotels end up paying to OTAs, fees which are necessarily passed through to consumers. Informed by that assessment, I conclude with principles to assure fair competition in hotel booking, and I offer a set of remedies to right the market.

Hotel Distribution and Consumer Booking Behavior

Advances in information technology have transformed hotel distribution. Two decades ago, a traveler needing a room might ask a travel agent for help, or perhaps consult a travel book or local expert. The information available to the traveler would be necessarily limited. Moreover, confirming price and

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availability usually required making phone calls, impeding comparison shopping and further limiting the traveler's effective options.

These days, the Internet allows travelers to see scores of options via a quick search. At leading OTAs, myriad hotels are arranged with information about price, availability, amenities, and more. Furthermore, most hotels and hotel chains offer their own sites, letting interested travelers book directly, circumventing online travel agencies.

Despite the feasibility of direct booking, most online shoppers consult intermediaries, most often the "big two" OTAs, namely Expedia and Priceline. Indeed, through a series of transactions, those two firms now own numerous sites that had previously been key competitors:

Expedia, Inc.	Priceline Group
Expedia.com	priceline.com
Carrentals.com	agoda.com
Classic Vacations	booking.com
eLong.com	cheapflights.com
HomeAway	ctrip.com
Hotels.com	KAYAK
Hotwire	Momondo.com
Orbitz Worldwide	Opentable.com
Travelocity	rentalcars.com
Traveldoo	Rocketmiles
Trivago	
Venere	
Wotif Group	

Consumers choose these OTA sites in part because they are household names, the result of billions of dollars spent on advertising including television, radio, print, and of course abundant online campaigns. (Indeed, advertising trade press Ad Age reports that Expedia is the 31st-largest advertiser in the United States, one position behind Pepsi, spending an estimated $1.3 billion in calendar year 2015.[1]) Furthermore, travelers perceive no cost to booking through OTAs. Historically, booking through a given OTA almost always carried the same bottom-line price to the traveler as booking direct with the property or, for that matter, booking through some other OTA. Indeed, if some OTAs charged hotels less than others, travelers wouldn't know about the difference and wouldn't care, as any savings accrues, at least in a short-term sense, to hotels and not to travelers. Travelers thus have had little reason to seek out the "cheapest OTA" or to think about OTA fees at all.

Meanwhile, online travel agencies have become significantly more concentrated. Since 2012, Expedia acquired Orbitz, Travelocity, and Trivago, which joined other Expedia brands including Hotels.com and Hotwire. Priceline has similarly grown through acquisitions, most notably the 2013 purchase of Kayak. As of 2013, four OTAs each served more than 5% of the US OTA market.[2] But with the many acquisitions, consumers seeking an OTA are increasingly likely to end up at either an Expedia site or a Priceline site. Indeed, no other OTA controls more than 1% of the OTA market, so hotels are correspondingly dependent on Expedia and Priceline.

Consolidation predictably allows OTAs to increase their prices to hotels. As a thought experiment, consider a hotel's options if the OTA market instead consisted of numerous small providers. Facing a high price from one of (say) ten small OTAs, a hotel might choose to do business only with the nine others—still reaching 90% of the travelers who prefer to use OTAs, and avoiding high fees from the tenth. Indeed, the savings from foregoing that final OTA would let the hotel offer a slightly lower price throughout, increasing demand to make up for the customers "lost" through absence from the tenth. This strategy is far less promising when there are only a few OTAs. For one, the customers "lost" are more numerous and correspondingly more difficult to replace. Furthermore, with limited competition, each OTA can anticipate the others' pricing and responses, letting the OTAs increase their fees to hotels with greater confidence that the others will match.

At the same time, the hotel industry remains strikingly decentralized, with no single firm controlling more than 20% of capacity. Smaller hotels, especially, lack the market power to forcefully oppose OTA fees.

By all indications, and consistent with economic theory and experience in other markets, OTAs' charges to hotels have increased as OTAs have merged and gained in market power. Hotels' contracts with OTAs are confidential, and most hotels understandably hesitate to publicly criticize crucial suppliers. But a range of media reports convey hotels' dissatisfaction with growing fees,[3] and my telephone interviews of industry sources reveal similar concerns.

The Rise of OTA Search Bias

Search bias is well-known—and amply litigated—in other information systems, indeed in other reservation systems for travel booking. Broadly, search bias entails an information system granting favored treatment to results from its own service or its favored partners, rather than presenting results according to the objective criteria that users reasonably expect. For example, when travel agents in the 1980s searched for flights through Apollo, a computerized reservation system then owned by United Airlines, United flights disproportionately came up first—even if other carriers offered lower prices or nonstop service. Only regulatory intervention brought an end to this practice.[4]

Today's OTAs are not owned by hotels, nor do they own hotels—avoiding one incentive for the bias that arose when United (airline) owned Apollo (reservation system). Yet OTAs nonetheless have incentives to bias results, including to bias results towards the hotels that pay them greatest commissions—and to demote the hotels that insist on lower commissions.

Hotels and OTAs have long bickered about appropriate commissions and fees. In some instances, discussions reached impasse, occasionally culminating in some chains disappearing from OTAs during the period of a dispute. More often, the parties would eventually reach a compromise. In many instances, an OTA would accept a reduced commission rate, below what it sought from other hotels. Such reductions were most likely when large hotel chains insisted on lower fees. When a small property requested a lower fee, the OTA had every reason to decline, knowing that customers would be unlikely to miss that property. In contrast, the absence of a large chain of properties could reduce an OTA's credibility, making OTAs more likely to lower fees to big chains.

Variation in hotel commission rates created a new problem: When hotels varied in their commission rates, an OTA had a natural incentive to favor listings accordingly. In particular, if two hotels were broadly similar, with equal prices and equal appeal to consumers, the OTA would want to favor the hotel with a higher commission rate. Having negotiated for lower fees, chain hotels often found themselves with lower positions, while the top of OTA search results more often featured smaller properties paying full price for OTA service.

otaAn OTA might characterize its favored placement of independent hotels as “helping the little guy,” but evidence for that characterization is at best mixed. For one, independent hotels pay dearly for the favored placement they receive, by all indications reaching 25% or even 30%, more than what they spend on physical plant, maintenance, or cleaning. Such high fees are in tension with standard notions of “help.” Moreover, an independent hotel that sought to change to a large chain’s OTA fee schedule—lower OTA fees, albeit with reduced prominence—would almost always find OTAs unwilling to accede to that request. OTA “help” thus appears effectively compulsory, at odds with the vision of a special benefit voluntarily accepted by a grateful recipient.

Despite the risk of OTA bias, including in favoring independent versus chain hotels, several factors historically combined to limit OTA bias. First, the hotel chains that negotiate lower rates tend to be the same hotels that many consumers favor—trusted brands where consumers are familiar with quality standards. If an OTA instead featured a lesser-known independent hotel, it might get a higher commission when a booking is made—yet the consumer might also be dissatisfied with the options shown, and proceed to a different OTA. Conversely, featuring the chain hotel might yield a lower percentage commission, but if the chain hotel’s conversion rate was sufficiently high, a prominent placement for that property might nonetheless increase OTA revenue.

Second, the historic pricing structure—standard OTA commission rates with discounts for the chains that pushed hardest—somewhat dulled the incentive to bias results because there was a clear notion of “normal” sort order that would naturally drive standard OTA behavior. In contrast, as discussed below, recent changes create a heightened incentive and opportunity for OTAs to bias results towards certain properties.

Modern Search Bias: Paid Boosts and Penalizing Hotels that Discount Elsewhere

After recent consolidation, OTAs have become more aggressive in their approach to search bias. Two key developments have accelerated this practice.

First, OTAs now allow interested hotels to increase their prominence in search results. Booking.com’s Preferred Property Program has long offered top listings in exchange for an extra commission fee.[5] Expedia coined the term Accelerator for its version of preferred listings.[6] With a top-bidding Accelerator request, a hotel might end up paying as much as 25% or even 30% to an OTA—a combination of base commissions plus a surcharge for top placement. This large payment might nonetheless increase the hotel’s short-run profit, as it might yield guests whose revenue was more than the hotel’s marginal cost to serve them, thereby increasing profit compared with empty rooms. But at the same time, high surcharges payments correspondingly increase an OTA’s incentive to favor participating properties.

Second, OTAs increasingly face the prospect of hotels offering lower prices on their own web sites. Based on regulatory interventions that began in Germany and the UK,[7] OTAs now face pressure about—and in some countries, prohibitions against—insisting that hotels charge the same price to a consumer whether the consumer books direct versus via an OTA. With regulators’ assistance, some hotels have responded by offering lower “members only” rates on their own sites,[8] an effort intended to encourage customers to book directly. OTAs responded in part through threats to some hotels[9] and most notably through demoting the listings for hotels that offer lower prices elsewhere.[10] These demotions include changing the sequence of search results (placing the demoted hotels lower among results, including on subsequent pages of results) as well as changing color schemes to deemphasize these hotels (e.g. using the color grey), withholding standard promotional text provided for other properties similarly situated (e.g. highlighting a property offering a "lower than usual price"), and even removing photos these hotels previously uploaded to the OTA.[11]

Analysis by data aggregator OTA Insight reports that Expedia was dimming approximately 500 hotels in April-May 2016, but in June jumped to nearly 1000 and by August and September approximately 1500.[12] Notably Expedia suspended dimming in late September 2016, declaring that dimming "was not improving the overall consumer experience."[13] Expedia is surely correct that consumers benefit from seeing hotel listings as they were intended, including photos and other details. But despite Expedia's decision to suspend dimming, nothing prevents Expedia from resuming the practice any time. Expedia's decision to begin dimming surely reflected its assessment that the practice would bring Expedia benefits (penalizing hotels that offered lower prices elsewhere) that exceeded the losses (customers going elsewhere). With high OTA concentration, that assessment is entirely plausible. Moreover, even temporary dimming may suffice to penalize and deter the hotel strategies Expedia dislikes. In that context, Expedia's cessation of dimming need not indicate that the dimming was ineffective; temporary dimming may suffice. Finally, despite ending dimming, Expedia continues to use other methods to penalize hotels that use methods it dislikes. For example, hotels continue to report that when they offered lower prices on their own web site, Expedia threatened to move their listings to the bottom of search results, and did so, even if the hotel's actions were permitted under its contract with Expedia.

Harms from Search Bias

Search bias causes three key harms. First, it is inherently deceptive and indeed intentionally deceptive. Consumers reasonably expect that the properties featured on OTAs are those that best match their request, and consumers have no reason to expect properties to be sorted or prioritized based on payment. Indeed, affirmative statements by OTAs tend to deny that possibility. OTAs typically indicate that hotel sort order favors "Recommended" properties by default. When an OTA implements search bias, the featured properties are no longer those that are most responsive to the user's request in any objective sense. Nor is it plausible that consumers seek a "recommendation" that exactly coincides with which properties yield the highest commissions for an OTA. Meanwhile, some OTAs label certain listings as "ads"[14] or "sponsored listings."[15] When some listings are so labeled but most are not, and when the top of screen sort command specifies sorting by "Recommend" properties, consumers have every reason to think that only the "advertisements" and "sponsored listings" are sorted by payment, and the others are prioritized based on bona fide quality.

Tellingly, existing regulatory principles disallow undisclosed advertising for broadly these reasons. In 2002, the FTC reminded all search engines that they must provide "clear" disclosure of both of paid placement (favored treatment to certain listings) as well as "paid inclusion" (where listings are included only because they pay).[16] While the FTC sent copies of that letter to mainstream general-purpose search engines, the plain language of the letter also applies to specialized search tools including those for travel services. Indeed, in 2013 the FTC reminded both general-purpose search engines and specialized search engines of the obligation both to separate paid results from unpaid listings as well as to make it clear if search results are based at least in part on payment from a third party.[17] In 2012, I alerted the FTC to apparent violations by leading apartment search sites,[18] and the British Office of Communications (Ofcom) in April 2016 reported that half of adults still could not recognize search engine advertising.[19]

Second, search bias tends to perpetuate market norms in which many consumers book through OTAs despite the availability of less costly technologies. Some hotels offer special benefits to consumers who choose to book directly, including lower prices (often reduced by about 5%) and sometimes other benefits such as breakfast, Internet access, or points in a loyalty program. But search bias penalizes the hotels that use those methods, especially those that offer lower prices on their own sites, thereby perpetuating the expectation that prices are the same at OTAs and directly. In response, consumers conclude that if an OTA offers even a trivial convenience, they might as well book through the OTA (even if the OTA's small benefit to a consumer is far less than its substantial fee to the hotel). Meanwhile, those consumers who book directly end up, in an important sense, subsidizing those who book via OTAs.[20]

Indeed, Expedia Accelerator and similar programs threaten to *increase* OTA fees to hotels and thereby increase the market distortion created by OTAs. Even with a significant Accelerator fee, a hotel will likely find a customer booking preferable to an empty room. Hotels thus risk end up competing not to offer low prices to consumers, nor competing to offer high quality to consumers, but instead competing to offer the highest commission to OTAs. This distortion of competitive forces, away from what consumers care about and towards OTA interests, dulls market pressures that would otherwise benefit consumers.

Most of all, search bias drives up OTA fees to hotels. Rather than a hotel receiving top placement at no additional charge when it deserves that placement on the merits based on its offering and the user's request, Expedia Accelerator and similar "boost" services charge hotels for preferred placement. Moreover, by penalizing hotels that encourage consumers to book directly, search bias increases the proportion of consumers who book via OTAs, thereby causing additional fees to hotels.

Economic theory predicts that increased OTA costs are split between consumers and hotels according to the relative elasticity of supply and demand. Hotels' share of the OTA fees means less money to reinvest in their businesses (i.e. through property upgrades) as well as less profit and hence less incentive for others to build new hotels that would increase consumer choice and drive prices downward. Consumers' share of OTA fees manifests itself in higher prices charged to consumers for hotel accommodations—hotel prices inflated due to the increased fees that hotels pay to OTAs. Even a modest reduction in OTA fees would yield large savings both to consumers and to hotels.

Limited Market Checks Preventing OTA Bias

One might hope that market forces would discourage or prevent OTA bias, but experience suggests not.

The Prospect of FTC Enforcement Action and Private Litigation

Given the likelihood that much OTA bias is unlawful, one might hope the FTC would investigate and pursue such conduct. Consistent with its wide mandate to assure competition and consumer protection, the FTC has the authority and power to prevent unfair and deceptive practices by OTAs. But the FTC to date has taken no action with respect to OTA bias. Among other limitations, deceptive online advertising is widespread, requiring the FTC to be selective in which deceptive advertising practices it pursues, particularly because its resources are notoriously limited.[21] OTAs seem to perceive a low likelihood of FTC enforcement action.

Nor does it seem promising for consumers to pursue such claims on their own. Among other things, OTAs impose compulsory arbitration,[22] disallowing lawsuits and furthermore requiring that any dissatisfied consumer proceed on an individual basis (not pooling resources to hire a single set of attorneys). It would not be economically viable for top-quality plaintiffs' attorneys to pursue even clear-cut unlawful practices when constrained by these procedural barriers.

The Risk of Public Outcry

One might hope that public concern would prevent OTA bias. Indeed, if consumers widely knew that Expedia's "Recommended" sort actually disfavored hotels that were objectively preferable, to the benefit of those that pay higher commissions, some consumers would probably choose other hotel booking tools.

A first impediment to public outcry, as a check on OTA bias, is that the public simply does not know. Perhaps this paper will be a first step in changing that. But in practice, the public has myriad other factors to worry about. With other subjects more likely to attract discussion, public outcry is not a promising mechanism to discipline OTAs.

Notably, OTAs have a plausible explanation for at least some of the search bias they implement. When asked why a hotel is demoted or otherwise penalized for offering lower prices on its own site, OTAs can style the demotions as serving consumers. Indeed, in an April 2016 whitepaper, Expedia explains that when a hotel does not offer its "most competitive rates on Expedia, [the hotel] likely will lose relative share on Expedia's marketplace."[23] To my eye the OTAs' explanation is unavailing. If an OTA notices that a lower price is available elsewhere, the OTA could better serve a consumer by telling the consumer "For the lowest price, click here to book directly at the hotel's web site"—perhaps collecting an affiliate marketing fee from the hotel, if the hotel operates an affiliate program. Such statements are routine in competitive sectors; for example, the Buy.com site also presents prices available from competing sellers, aiming to increase customer goodwill by showing that Buy.com's prices are in fact lowest.

Consumer outcry is further reduced because a concerned consumer can adjust search settings to remove at least some search bias and perhaps most of it. In particular, OTAs offer sort order customizations, allowing a consumer to replace "recommended" sort order with some other criterion. Thus, an unhappy consumer need not complain about search bias; a simple click will suffice. The problem, of course, is that consumers have little reason to change search defaults, and most do not. Indeed, Expedia's own research confirms that the most consumers retain the pre-sorted filter, and prominent listings thus get the most bookings.[24] (This finding matches longstanding research concluding that top search results receive an overwhelming share of clicks[25] and that most consumers retain default settings.[26]) Moreover, available information suggests that the consumers who rely on defaults may be less sophisticated, less wealthy, and for those and similar reasons more deserving of and in greater need of regulatory protection. For example, when I tested consumer understanding of advertisement labeling in 2010, I found that improved advertisement labels had the greatest benefit to vulnerable users with low education and little online experience.[27]

Expedia's mid-2016 strategy of "dimming" hotels, including substituting inferior color schemes and removing photos, was probably at greatest risk of creating consumer outcry, as consumers could notice these changes and ultimately realize that it was Expedia, not the hotels, that was imposing them. Expedia's September 2016 decision to end "dimming"[28] blunts the prospect of consumer outcry in this area. Yet Expedia's change leaves open the possibility of more nuanced bias that consumers are less likely to detect. For example, consumers are less likely to notice changes to sort order, withholding of special logos or icons, or reduction (rather than elimination) of hotel photos. Moreover, travel booking intermediaries have a history of designing bias to evade detection, making it particularly plausible that OTAs might invoke similar methods. For example, in a 2010 scheme, distribution system SABRE designed "a sophisticated bias strategy that's hard for [the victim airline] to detect,"[29] including increasing bias on days and times when airline staff were less likely to notice.

OTAs' Economic Interests

By all indications, some OTA penalties to hotels are in fact costly to OTAs. For example, when an OTA demotes a hotel, converts its listing to an inferior color scheme, or removes its photos, some consumer demand will shift to other hotels that become more prominent in a relative sense, but another portion of consumer demand is likely to shift away from the OTA, i.e. booking elsewhere. Interviewing hotel marketing managers, I learned that they perceived that these effects somewhat dulled harm from search bias when they were penalized.

Nonetheless, from an OTA's perspective, search bias offers a valuable long-term benefit. In particular, bias is valuable in discouraging hotels from soliciting direct bookings; if consumers were to shift to direct bookings, OTAs would become less important and less able to charge substantial fees. Given the importance of norms, industry practice, and consumer instincts in shaping search behavior, OTAs have every reason to try to block a shift to direct bookings before the shift takes hold. Conversely, once consumers begin direct booking in earnest, the change might be virtually irreversible and in any event difficult to undo.

Notably, increased consolidation among OTAs makes it easier for OTAs to internalize the future benefits and thereby to justify the current costs. In a world of many OTAs, any OTA incurring short-term cost today would anticipate, correctly, that most of the benefit would flow to the many competing OTAs in the future. Only a complicated structure for coordination and enforcement would sustain the required short-term expenditures—and such a structure would leave records that exposed all participants to antitrust liability. In contrast, with most market share controlled by a few large firms, coordination is much easier.[30] For one, a large OTA like Expedia probably finds it advantageous to punish hotels that offer lower prices elsewhere, even if other OTAs do not do so, as Expedia itself will reap a large enough share of future benefits from deterring direct booking. Furthermore, with just two large OTAs, company leaders can better anticipate the decisions of their counterparts, increasing the likelihood that both large OTAs will choose a similar approach.

Limited Use of Direct Booking

If many or most customers booked directly with hotels, via hotels' web sites or other channels, OTA bias would have correspondingly reduced impact. But as discussed above, OTAs are a major channel for most hotels.

Moreover, OTAs have taken steps to impede hotels' efforts to become more self-reliant. Multiple hotel chain marketing managers told me that when a user runs a web search for their property names, they would prefer to reach the user via a paid ad promoting the hotel's own site. They indicated that they prefer to serve these customers directly because they seek to build direct relationships with customers, because they think they can buy this advertising at a cost below OTA fees, and because they wish to reduce the share of inventory they sell through OTAs. However, managers of even the largest hotel chains told me that OTAs rejected their requests for contract terms preventing OTAs from bidding on their hotel names. As a result, when a user searches for an affected hotel, the user sees OTA advertisements—pushing up advertising prices for both the hotel and for OTAs, and increasing and preserving OTA market share.

Principles and Remedies

With the OTA market already highly concentrated, including a Herfindahl Index above 5,000,[31] a first observation is that further consolidation in this market is undesirable and, indeed, contrary to well-established antitrust principles (including federal merger guidelines presumptively disallowing mergers in markets with HHIs of 2,500 or more[32]). That said, a prohibition on further OTA mergers and acquisitions would be unlikely to affirmatively restore competition in hotel booking.

The most natural principle—already amply discussed in other contexts including web search and prior travel distribution disputes—is that sort order should be objective, grounded only in proper factors. In the context of general-purpose web search, the European Commission appears poised to require that Google not promote its own results simply because they are its own. In the context of air travel, the DOT and DOJ previously insisted that reservation systems must not favor flights based on carrier identity (i.e. favoring the flights of the carrier who owned a given GDS). Despite the lack of vertical integration between OTAs and hotels, the same principle can nonetheless be applied: Sort order should be based on objective factors.

Some care would be needed to apply this principle to OTAs. Most OTAs include only those hotels that pay to participate—a sharp contrast from, e.g., Google Search which includes sites without charge. If an OTA has a standard public price list for hotel participation, the OTA might reasonably apply that standard price list and of course exclude those hotels that refuse to pay; the principle of objective sort criteria would not rule out requiring payment of a standard fee. On the other hand, objective sort order would disallow favored placement designed to advance OTA strategic interests. For one, OTAs would no longer be able to retaliate against hotels that offer lower prices through their own sites or through other intermediaries. Moreover, “sweetheart deals” to favored hotels or hotel groups would probably violate objectivity, particularly if such agreements let certain hotels claim higher placement than they would receive on the merits.

In addition, disclosure is surely needed to alert consumers to the advertising they are seeing and the potential omissions. The FTC has long held that disclosure is required when consumers might not recognize that a given piece of information is advertising. Nor would a tiny label at the bottom of the page suffice; quite the contrary, the FTC demands “clear and conspicuous” disclosure.[33] Moreover, each OTA would probably need to assure that its overall marketing effort, product design, and statements to consumers provided a clear understanding of the OTA’s actual service. For example, if an OTA provides only an advertising listing of those hotels that pay to participate, it might need to revisit its marketing materials to make sure it does not create the impression of indexing and presenting all hotels in the area. The labels “best match” and similar might also be inapt for a sort order that is actually designed not to maximize consumer click-through or booking rate but to maximize OTA profit.

After nearly two decades of operation under practices that arguably fall short in disclosure and objectivity, OTAs have created a false impression among many consumers that their listings are comprehensive and presented evenhandedly. A heightened corrective disclosure is likely necessary to put consumers on notice of actual practice. This could take the form of a compulsory email to all registered users, a separate clarifying statement on OTA home pages, or additional disclosures within OTA search results for a period of time sufficient to reach most consumers. Such a corrective disclosure would need to be distinctive in format and impeccably clear in content, in order to effectively reach and inform affected consumers.

Finally, a reasonable inquiry should examine actual OTA practices. The analysis in this article is grounded in publicly-available sources including OTAs’ public statements and information available on

OTA web sites. Internal emails might reveal other practices intended to mislead consumers, penalize hotels that seek to reduce marketing costs, or otherwise fall short of applicable standards. The FTC or interested state attorneys general should demand internal records to check for such practices, and they should take appropriate further action as the documents and findings warrant.

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[23] Melissa Maher, "Understanding the Science Behind Expedia's Marketplace." https://www.tnooz.com/wp-content/uploads/2016/04/Expedia_Marketplace-White-Paper-April-2016.pdf.

[24] Id. at p.2.

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[28] Kevin May, note 13, above.

[29] *American Airlines, Inc. v. Sabre, Inc., et al.*, October 24, 2012 Trial Transcript, Tarrant County Texas, Cause No. 067-249214-10, p.61. Opening statement by plaintiff, quoting an email from SABRE CEO Sam Gilliland.

[30] Marc Ivaldi, Bruno Jullien, Patrick Rey, Paul Seabright, Jean Tirole, "The Economics of Tacit Collusion," March 2003, Final Report for DG Competition, European Commission. http://ec.europa.eu/competition/mergers/studies_reports/the_economics_of_tacit_collusion_en.pdf.

[31] Author's calculation of 2016 Herfindahl-Hirschman Index (HHI) for online travel agency booking of hotel room-nights: 5,069. Based on data from Kalibri Labs.

[32] Horizontal Merger Guidelines, US Department of Justice and the Federal Trade Commission, August 19, 2010, https://www.justice.gov/atr/horizontal-merger-guidelines-08192010.

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