S. HRG. 110–194

# AN EXAMINATION OF THE GOOGLE-DOUBLECLICK MERGER AND THE ONLINE ADVERTISING INDUSTRY: WHAT ARE THE RISKS FOR COMPETITION AND PRIVACY?

## HEARING

BEFORE THE

SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

SEPTEMBER 27, 2007

**Serial No. J–110–25**

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

39–015 PDF WASHINGTON : 2007

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

# CONTENTS

## STATEMENTS OF COMMITTEE MEMBERS



## WITNESSES



## QUESTIONS AND ANSWERS



## SUBMISSIONS FOR THE RECORD

# AN EXAMINATION OF THE GOOGLE-DOUBLECLICK MERGER AND THE ONLINE ADVERTISING INDUSTRY: WHAT ARE THE RISKS FOR COMPETITION AND PRIVACY?

---

**THURSDAY, SEPTEMBER 27, 2007**

U.S. SENATE,
SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS, COMMITTEE ON THE JUDICIARY,
*Washington, DC.*

The Subcommittee met, pursuant to notice, at 2:30 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Herb Kohl, Chairman of the Subcommittee, presiding.

Present: Senators Kohl, Schumer, and Hatch.

## OPENING STATEMENT OF HON. HERB KOHL, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Chairman KOHL. Good afternoon to you all. Our hearing today will examine the consolidation currently underway in the Internet advertising industry, including the planned acquisition of DoubleClick by the Internet giant Google. Advertising on the Internet is $17 billion business annually and is growing by about 30 percent a year, an amount which will only continue to increase dramatically as more news and entertainment content is delivered over the Internet. With similar acquisitions announced by Microsoft, Yahoo, and AOL, the total value of merger activity in this industry does exceed $30 billion already this year.

But much more than Internet advertising is at stake. This consolidation has profound consequences for all those who use the Internet and for all of those who sell products and services on the Internet. The Internet offers consumers an amazing array of information and entertainment choices. Best of all, beyond the fee consumers pay to access the Internet, this incredible wealth of information is available for free. But the companies that bring this content to consumers, recognizable names such as Google, Microsoft, and AOL, are not charitable organizations.

Advertising is the fuel that drives the Internet. Search companies like Google sell advertisers the right to place advertising on their search result pages—advertising which is highly targeted based on the words used in the consumer's search. And content companies like CNN.com or washingtonpost.com make money by selling graphics which display ads on their websites. These display ads are closely related to the content of the Web page and the demographics of the audience that views the Web page.

The leading company placing Internet display ads on behalf of advertisers and on behalf of website owners is DoubleClick. Currently under review at the FTC is Google's planned acquisition of DoubleClick. For literally hundreds of millions of Americans and consumers around the world, the name Google is synonymous with a quick, easy, and reliable way to access a wealth of information and entertainment choices. Not even in existence a decade ago, Google has become universally known as the best and the fastest way to search the Internet. In harnessing the power of Internet advertising, Google has developed into one of the wealthiest and most profitable corporations in the world, with a current market capitalization of $170 billion in its very short corporate life.

Google now seeks to acquire DoubleClick. The acquisition of the leading server of display ads—DoubleClick-by the dominant seller of search-based text ads—Google—obviously warrants close examination by the antitrust regulators at the FTC. Well, advertisers and Internet publishers have no choice but to deal with Google, giving Google a stranglehold over Internet advertising and the power to raise ad rates. Once these two companies have joined forces and combined their gigantic information resources, will the barriers to entry for a new entrant into the marketplace simply be too high? On the other hand, will the likely benefits to the advertising market and consumers by improving the targeting and precision of Internet advertising outweigh the potential damage to competition arising from this merger?

But this merger and the ongoing consolidation in the Internet advertising industry as a whole raises equally important issues of consumer privacy. Google collects an enormous amount of information on computer users' search history and Internet preferences. DoubleClick also collects a vast amount of information regarding consumers' Internet preferences. While DoubleClick assures us today that this information is shared with no one other than the advertiser or the website carrying the advertising, what will happen to this treasure trove of consumer data once Google gains control of DoubleClick? Do consumers need to worry about the security and use of their privacy personal information as Google continues to grow more powerful?

Some commentators believe that antitrust policymakers should not be concerned with these fundamental issues of privacy and merely be content to limit their review to traditional questions of effects on advertising rates. Respectfully, we disagree. The antitrust laws were written more than a century ago out of a concern with the effects of undue concentrations of economic power for our society as a whole and not just merely their effects on consumers' pocketbooks. No one concerned with antitrust policy should stand idly by if industry consolidation jeopardizes the vital privacy interests of our citizens so essential to our democracy.

So we express that we have not reached a conclusion with respect to any of the vital questions that we will be exploring today. We have an open mind, and we have a need to examine these issues closely as the stakes for our society and the increasingly Internet-based economy are very high. We look forward to the testimony of our distinguished witnesses here today, and before we call on you for your statements, we turn to the Ranking Member on this Committee, the very distinguished Senator Orrin Hatch.

## STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Well, thank you, Mr. Chairman. We welcome all of you to the Committee. I want to thank you for scheduling this important hearing. Let me see. Do I have this on? As always, it is a pleasure to be with you.

I would also like to thank our distinguished panel of—for some reason, this is not working very well, is it?

I want to thank our distinguished panel of witnesses today and thank them for agreeing to testify. And I especially want to welcome to the Committee and thank David Drummond and Brad Smith for appearing before us today. I appreciate all of you doing it. I realize being the general counsel and chief legal officer of a large corporation is a demanding job, and I am grateful to you both for taking the time to come and testify.

The purpose of this hearing, as with all previous mergers under Senator Kohl's chairmanship, is to properly define the market in question and then discuss how the law applies. In the case of this specific hearing, we will also explore the legitimate questions of privacy. My goal for that portion of the hearing will be to have a frank discussion of the facts so that consumers are informed about the products offered by the corporations involved in this merger, because I believe many consumers do not fully understand the amount of data being collected about them and how it is used by these businesses.

Accordingly, I anticipate that we will touch on a number of topics during this hearing, but the fundamental question remains: Does the Google-DoubleClick merger violate our Nation's antitrust laws?

The first question to be asked then is: What type of merger is proposed? Now, I ask this question because Google argues in information provided to the Committee that they are not a competitor of DoubleClick. Now, is this then a conglomerate merger where we will explore the legal concepts of reciprocity and entrenchment? Is it a vertical merger? Or is this a merger between two competitors competing for a portion of the Internet advertising market? If this is the case, then the question of market power has to be addressed. Market power has been defined as "the ability to profitably maintain prices above competitive levels for a set price without a resulting decrease in consumer demand." Google competitors have argued that if the transaction is finalized, then in addition to the 70 percent of the text-based advertising that Google currently controls, the combined firm will account for nearly 80 percent of display ads. This poses the question: Can any firm, even one with the resources of Microsoft, overcome such a market position?

Then there is the question of privacy. I believe that Google's intent is to act in a responsible manner with the information that it collects. However, I also believe the American consumer must be made fully aware of the fact that when they use search engines or click on an advertisement, whether it is a text or display ad, there is a strong possibility that personal information is being collected and stores. It is then up to the consumer to decide if that consumer wishes to use the services offered by these companies.

Now, Mr. Chairman, these are important questions. I look forward to learning the thoughts and conclusions of this august panel of witnesses that you have invited to be with us today. And, again, I welcome all of you here, and I am going to be extremely interested in this particular hearing.

Thank you, Mr. Chairman.

Chairman KOHL. Thank you very much, Senator Hatch.

We would now like to introduce our distinguished panel of witnesses. The first witness today will be David Drummond. Mr. Drummond is the Senior Vice President for Corporate Development and Chief Legal Officer at Google. In this role, Mr. Drummond works with the management teams at Google to evaluate new business opportunities, including alliances and mergers.

Our next witness will be Brad Smith. Mr. Smith is the Senior Vice President and General Counsel for Microsoft. While at Microsoft, Mr. Smith has played a leading role in the company's intellectual property, competition, and other public policy issues. He is also serving as Microsoft's Chief Compliance Officer.

Following him we will have Dr. Thomas Lenard. Dr. Lenard is currently a Senior Fellow at the Progress and Freedom Foundation. He will be leaving that organization at the end of the week to join a new think tank specializing in high-tech issues. Dr. Lenard has also served as the Office of Management and Budget, the Federal Trade Commission, and the Council on Wage and Price Stability.

Following him we will have Scott Cleland. Mr. Cleland is the founder and President of Precursor, a consulting firm specializing the technology and telecommunications industries. Before founding Precursor, Mr. Cleland was Senior Policy Adviser for the Secretary of State in the first Bush administration, as well as Director of Legislative Affairs for the Department of Treasury.

Finally, we will have Marc Rotenberg. Mr. Rotenberg is Executive Director of Electronic Privacy Information Center, a public interest research center focusing on protecting privacy and civil liberties. Mr. Rotenberg chairs the ABA Committee on Privacy and Information Protection, and he teaches privacy law at Georgetown University Law Center.

We thank you all for appearing at this Subcommittee hearing today, and now I would ask you all to stand and take the oath and raise your right hand. Do you affirm that the them you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. DRUMMOND. I do.

Mr. SMITH. I do.

Mr. LENARD. I do.

Mr. CLELAND. I do.

Mr. ROTENBERG. I do.

Chairman KOHL. Thank you.

Mr. Drummond, we will take your statement.

## STATEMENT OF DAVID DRUMMOND, SENIOR VICE PRESIDENT OF CORPORATE DEVELOPMENT AND CHIEF LEGAL OFFICER, GOOGLE, MOUNTAIN VIEW, CALIFORNIA

Mr. DRUMMOND. Chairman Kohl, Ranking Member Hatch, members of the Subcommittee, it is my pleasure to appear before you this afternoon to discuss recent developments in the online advertising world. Thanks for inviting me to testify here.

Chairman KOHL. Is your button on?

Mr. DRUMMOND. Sorry. The online advertising business is complex, but my message to you today is simple: Online advertising benefits consumers, promotes free speech, and helps small businesses succeed. Google's acquisition of DoubleClick will help advance these goals while protecting consumer privacy and enabling greater innovation and greater competition.

Now, in our experience, users value our ads because, like our search results, they connect them to the information, the products, and the services that they seek. Our online advertising promotes freer, more vigorous, and more diverse speech. We know that many bloggers and many website owners actually can afford to dedicate themselves full-time to that endeavor because of online advertising. In fact, last year, we paid $3.3 billion in advertising revenue to our website partners, and it is a great satisfaction to us that we are able to help this proliferation of online speech and activity.

Now, our advertising network also helps small businesses connect with consumers that they otherwise would not be able to reach and to do so affordably, efficiently, and effectively. Let me give you an example. Allen-Edmonds, the shoemaker in Wisconsin, is a great example of how this works. Allen-Edmonds has frequently appeared as a sponsored link or ad to people searching for terms like "men's dress shoes." Now, according to Allen-Edmonds' marketing director, the company's online sales rose 40 percent in 2005 because of the type of advertising that Google does. Mr. Chairman, there are thousands of other companies throughout America—most of them very small businesses—that also advertise with us.

Now, we believe our acquisition of DoubleClick will help us provide even more benefits to consumers, support even more free speech, and help drive the success of even more small businesses throughout the country.

By combining our advertising network with DoubleClick's display ad serving products and technology and by investing the resources in the display ad business, we think we will be able to provide better and more relevant advertising to consumers and to help publishers and advertisers generate more revenue. All of this new economic activity will fuel the creation of more rich, more diverse content on the Internet, which, of course, benefits consumers and society at large.

Now, let me address the issue of competition. We are confident that our purchase of DoubleClick does not raise antitrust issues because of one simple fact: Google and DoubleClick do not compete with each other, despite what some might be saying. DoubleClick does not buy ads, does not sell ads, does not buy or sell advertising space. What it does do is provide technology tools that enable advertisers and publishers to deliver and manage ads once they have come to terms, and there are many, many others who do these sorts of things.

The simplest way to look at this is by using an analogy. Google is to DoubleClick what, say, Amazon is to FedEx. Amazon sells books; FedEx delivers them. And, by analogy, we sell ads; DoubleClick delivers ads. Two different businesses.

Our acquisition of DoubleClick does not foreclose other companies from competing in the online advertising space. Recent acquisitions in the space by Microsoft, $6 billion acquisition of aQuantive, which was a competitor of DoubleClick, acquisitions by Yahoo, AOL, and others are strong signals that the market believes this space has a lot of room for growth and a lot of room for competition. Beyond the recent acquisitions, there are thousands of companies that are competing in selling online ad space.

Now, despite what they are saying here today, Microsoft actually appears to agree with this. Brian McAndrews, who is Microsoft's Senior Vice President of the Advertiser and Publisher Solutions Group, and before that the CEO of aQuantive, recently commented that the online advertising space is, and I quote, "in the first or second inning of a long game here." He goes on to say that, "There's no monopoly on innovation. I don't think you're going to see two or three big players and then game over. There will continue to be a broad range of companies."

We certainly agree with that, and if it were one stray comment in an unguarded sort of moment by a Microsoft executive, it would be one thing. But we have compiled a lengthy list of similar statements from Microsoft senior executives all made after the announcement of the DoubleClick transaction and after the aQuantive transaction, and they completely contradict what Microsoft is saying here today.

Really, it seems like the only place that Microsoft is making these arguments about fear of declining competition in the online spaces here in Washington. I would be happy to discuss this list of quotes during Q&A or to submit it following the hearing, with your permission.

Now, my final point today is that Google will continue to protect its users' privacy. For us, privacy does not begin or end with our purchase of DoubleClick. Privacy is a user interest that we have been protecting since our inception, and we will continue to innovate in this area. We spend a lot of time designing our products on the principles of transparency and choice—transparency about what information we collect and how we use it, and user choice about whether to provide us with any personal information at all. We were the first leading Internet company to decide to anonymize IP addresses and cookies in our server logs after 18 months. Most of our products allow people to use them anonymously and do not use any personally identifiable data unless we fully disclose that use in our privacy policy. We support Federal privacy legislation and the development of global privacy standards that can help build consumer trust and confidence in the Internet. We will also participate in the FTC's upcoming Town Hall on privacy in online advertising, which we think is a great vehicle for further examination of this subject.

In looking to innovate in this area, looking ahead, we are approaching our entry into the ad serving business with a fresh eye. Here are some examples of the privacy protections and innovations we are working on in third-party or this ad serving business.

We will be included an opt-out mechanism so that people can choose not to have an advertising cookie place on their computer, and our industry-leading decision to anonymize logs data after 18 months will also cover any log data generated in our ad serving programs that we are testing now.

We are exploring the use of what we are calling "crumbled cookies" so that user data is not stored just in one cookie, which I know concerns some people.

And we are working on better forms of notice within as so that users can better understand who is behind the ads that they see.

Now, some of these ideas are experiments, and like all experiments, they may or they may not work out. But we are excited to start innovating in this area for our advertising customers and for our users to deliver better ads for them.

Now, as I conclude my testimony, I will note that a lot of this activity—it seems like a lot of activity, and you may wonder why we focus on it. For one reason, protecting privacy is really part of the Google culture, and it is also a priority because our business simply depends on it. If our users do not trust us with the way we manage their information, they simply will not use us, and they are one click away from switching to any other competing product.

I appreciate the opportunity to discuss these issues with you in the question session, and thank you for allowing me to testify.

[The prepared statement of Mr. Drummond appears as a submission for the record.]

Chairman KOHL. Thank you, Mr. Drummond.

Mr. Smith?

**STATEMENT OF BRADFORD L. SMITH, SENIOR VICE PRESIDENT, GENERAL COUNSEL, AND CORPORATE SECRETARY, MICROSOFT CORPORATION, REDMOND, WASHINGTON**

Mr. SMITH. Well, thank you, Mr. Chairman, for the opportunity to provide Microsoft's perspective on these important issues this afternoon.

We believe that the future of the Internet will be decided by developments in online advertising. As you noted, Mr. Chairman, online advertising is rapidly emerging as the fuel that powers the Internet and drives the digital economy. We estimate that online advertising spending is already a $27 billion business, and it is projected to double to $54 billion in the next 4 years alone. To put that in perspective, that will be roughly the same size as the television and radio industries in this country today combined.

These changes, as you noted, Mr. Chairman, are not only of tremendous economic importance, they have serious societal implications as well. Online ads increasingly provide the economic foundation for a free press and for political life more broadly.

Now, I will be the first to admit that Microsoft is not disinterested when it comes to this issue. Competitors never are. But I do think we are in a good position to help identify the right questions. We know this market well, and it is absolutely clear to us that this merger raise serious questions that deserve serious answers. I would like to address two questions myself very briefly.

The first one is this: What are the economic implications of allowing the largest Internet company in online advertising to acquire its most significant competitor? While there are millions of websites on the Internet and many, many advertisers, as David notes, there are actually a very small and declining number of intermediaries—intermediaries that provide the tools and services that connect advertise and website publishers together. These intermediaries play a gateway or a middleman role, if you will, much like the natural gas pipelines that connect refineries to distributors and ultimately to consumers in their homes.

If you are a website operator and you want to sell ad space on your site, or if you are an advertiser and you want to display your ads, you have to work with and through one of these intermediaries.

Now, already Google is the dominant company for one of the two main types of online advertising: search online ads. Roughly 70 percent of global spending on search-based advertising today flows through Google's ad words service. If Google is allowed to proceed with this merger, it will obtain a dominant gateway position over the other main type of online advertising: non-search ads—the non-search ads that are displayed on websites that we visit.

Today, Google and DoubleClick are the two largest competitors in this area, and as I hope we will discuss more, they are competitors in this area. And yet, combined, Google will account for nearly 80 percent of all spending on non-search ads served to third-party websites. In short, if Google and DoubleClick are allowed to merge, Google will become the overwhelmingly dominant pipeline for all forms of online advertising.

Now, this merger will undoubtedly result in higher profits for the operator of the dominant advertising pipeline, but we believe it will be bad for everyone else. It will be bad for publishers, it will be bad for advertisers, and, most importantly, it will be bad for consumers.

This leads to the second question I would like to address. What are the antitrust and privacy implications of giving a single company sole control over the largest data base of user information the world has ever known? Online ads are typically served based on user information, user data. As consumers, we give up this data, often without knowing it, in exchange for access to free content and services.

Today, it is generally believed that Google and DoubleClick have amassed the two largest data bases of online user data in the world. This country does not permit the phone company to listen to what we say and use that information to target ads. The computer industry does not permit a software company to record everything we type and use that information to target ads. Yet with this merger, Google seeks to record nearly everything you see and do on the Internet and use that information to target ads. Indeed, one question is whether this merger will create a whole new meaning to the term "being Googled."

These privacy issues, in fact, have antitrust consequences. Given the nature and economics of online advertising, this concentration of user information means that no other company will be able to serve ads as profitably. In short, it will substantially reduce the ability of other companies to compete.

I appreciate that the technology and business models are new and dynamic, and I fully agree that the Internet is continuing to change very rapidly. Yet, amidst constant change, it is worth bearing in mind that one rule of the road has remained constant in the 117 years since the Sherman Act was adopted: We are all encouraged to work hard; we are all encouraged to earn our way to success. But no one is permitted to buy a dominant position by acquiring its single largest competitor.

That principle has served this country well through generations of new industries and technologies. The question for this Congress and, indeed, for the Federal Trade Commission and this country is whether we want to abandon that principle now.

Thank you very much, Mr. Chairman. I look forward to answering your questions.

[The prepared statement of Mr. Smith appears as a submission for the record.]

Chairman KOHL. Thank you very much, Mr. Smith.

Mr. Lenard?

**STATEMENT OF THOMAS M. LENARD, SENIOR FELLOW, PROGRESS AND FREEDOM FOUNDATION, WASHINGTON, D.C.**

Mr. LENARD. Thank you, Mr. Chairman. Thank you very much for the opportunity to present my views on the important competition and privacy issues raised by the Google-DoubleClick merger. Although I haven't done the detailed economic analysis that is often part of a merger review, from what I do know I do not believe that this acquisition threatens to be anticompetitive or harmful to consumers' privacy. I do think, however, that Government interference with this evolving market, which is still very much in its infancy, could be quite harmful to consumers.

Google's purchase of DoubleClick is part of a spate of recent acquisitions in online advertising where companies are adding new capabilities in order to better serve their customers and better compete with each other.

The FTC is doing a careful review of the Google deal, as it should, but these reviews are much more difficult when the markets are changing rapidly, as they clearly are here.

In many ways, Google epitomizes the digital revolution. As you indicated in your opening remarks, Google's business model was difficult to envision just a few years ago—an illustration of the fact that the digital revolution is not just a technological revolution, but it is also very much a revolution in the design of business models and in the evolution of markets. When technologies and markets are changing rapidly, it is much more difficult to avoid policy mistakes.

Policymaker should do everything possible to create an environment in which both the Googles and the DoubleClicks of the future can emerge and thrive. For many entrepreneurial ventures, acquisition by another company is a major way to generate capital and pay off early investors. The most likely acquirers are larger firms in the same or related sectors. And it would not go unnoticed by early investors if antitrust enforcement were to make it more difficult for the ventures in which they invest to be acquired. Such a policy would raise the hurdle for investment in these firms, with potentially adverse effects on innovation in this critically important sector of our economy.

Opposition to the Google acquisition has focused on two arguments, both of which I think are flawed. The first argument is the standard antitrust claim—that both Google and DoubleClick have a large share of the activities that they undertake, so a merger would create market power problems. But I believe these firms are engaged in different activities, and so that even if we believed that Internet advertising was a market in antitrust terms, which is debatable since it still comprises only about 5 percent of all advertising, the firms will not gain market power from this merger because they don't have business in common.

Google sells text ads mainly on their own websites and search result screens. DoubleClick sells the technology that delivers display ads from advertisers to websites and evaluates the effectiveness of the ads. DoubleClick does not sell advertising space or control any websites. Thus, even if we believe that Internet advertising is a market (which itself is highly debatable, since even with its growth it still comprises only about 5 percent of all advertising) the firms will not gain any market power from this merger since they do not have any business in common.

The second argument concerns privacy where privacy advocates allege that Google's and DoubleClick's conduct "has injured consumers by invading their privacy." But there is no evidence to support any assertions that consumers have been harmed or would be harmed.

The great appeal of the Internet as an advertising medium is the ability to target ads to consumers much more precisely than can be done through other media. Using information from a variety of sources, including sometimes the past history of Internet browsing, Internet advertisers can develop an understanding of consumers' interests, deliver ads that are most useful to them, and avoid delivering those that are of less interest. More information can facilitate more precise targeting, and all of this serves consumers well.

In addition, the revenues from online advertising support a variety of valuable services provided to consumers at no charge by the companies represented here as well as many others, such as search services, free e-mail, and content that is customized to the individual. Internet advertising firms also provide customized advertising to smaller websites that use the revenues to support themselves.

In my view, antitrust and privacy are really separate issues, but some people have tried to connect the issues by arguing that the aggregation of data serves as a barrier to entry. The argument seems to be that the aggregation of data would enable Google to provide a better service and do so more efficiently and, therefore, it would be more difficult to compete against the company. Whether or not that is true, we need to approach such arguments with great caution because they go the heart of what we want our competitive economy to do, which is provide consumers with better goods and services at lower cost.

The worst thing antitrust enforcers or any other policymakers could do is to implement policies that prevent companies from getting too good at what they do because it makes it harder to compete against them. That might be helpful to some competitors, but the goal of the antitrust laws is to help consumers and not competitors.

Thank you.

[The prepared statement of Mr. Lenard appears as a submission for the record.]

Chairman KOHL. Thank you, Mr. Lenard.

Mr. Cleland?

**STATEMENT OF SCOTT CLELAND, PRESIDENT, PRECURSOR LLC, MCLEAN, VIRGINIA**

Mr. CLELAND. Mr. Chairman, thank you for the opportunity and the honor to testify. I am Scott Cleland, President of Precursor LLC. The views expressed by me in this testimony are mine alone and not the views of any of my clients.

The online advertising market is rapidly consolidating and becoming highly concentrated. Yahoo has bought Right Media, Microsoft bought aQuantive, Google has bought YouTube, Ad Scape Media, DoubleClick, Feed Burner, and others.

Now, I have done the in-depth work on this and on the facts of the case, and of all the recent mergers, I believe Google-DoubleClick is uniquely anticompetitive and really represents a watershed moment for Internet competition. I think it is clearly one of the most far-reaching, least understood, and most important mergers this Subcommittee will ever review.

The biggest challenge here, Mr. Chairman, is to see the forest for the trees. Online advertising is the only proven business model for monetizing Internet content. Also, the Internet is the ultimate network of networks, so in antitrust terms, it also creates the ultimate network effect of network effects. Essentially, network effect is the positive feedback loop where the looter extends one's lead.

Now, in a nutshell, this merger creates an exponential network effect in that the merger expand Google's network of viewers, advertisers, website publishers, and data.

Now, the biggest risk for Congress and the FTC is missing the critical importance of the essence of online advertising, and that essence is the exceptional interconnectedness and interrelated segments—networks, people, products, services, and technology. They are all webbed together.

Now, the traditional concept in antitrust wants to have separate markets, and I would argue be careful here because, arguably, separate markets are the least applicable and most artificial and contrived when they are applied to an Internet business. Now, listen. I know others have said we are separate markets, we do not compete. Be very wary when they say they are separate when they are heavily interrelated by the same viewers, the same advertisers, the same websites, and the same core data.

Now, the analogy I would like to use is to argue that search and display are separate markets and do not compete is like saying your eyes and your ears do not compete for the brain's attention. It makes no sense. Of course they compete.

This merger should also concern you, Mr. Chairman, because every politician understands that information is power, and Google openly aspires to be the world's most powerful information broker. Listen to Google's on uniquely monopolistic public vision in its well-known mission statement: to organize the world's information and make it universally accessible and useful. No other entity in the world currently has such a naked ambition to control and effectively corner any world commodity, let alone the world's information, both public and private, and have the wherewithal—infrastructure, technology, capacity, expertise, and acquisitions—to actually pull it off.

What I ask you is: What checks and balances would exist to Google-DoubleClick's web of market power over the world's information? The combined Google-DoubleClick merger would have little accountability to consumers, to competition, to regulators, or even third-party oversight.

So what is my recommendation? Oppose the merger. This is not a hard antitrust call, in my view. In my 15 years of relevant experience, I have never seen a merger that facilitates such extreme global concentration, both horizontally and vertically simultaneously, generates more powerful and cumulative network effects or increasing barriers to entry, tips so many sub-segments to substantially less competition. Let's talk search, text ad serving, contextual ad serving, graphic display ad serving, rich media video ad serving, consumer behavior data, ad publishing analytical tools, cross-market performance analytics, ad brokering, and ad exchanges. I have never seen anything like this. I have never seen anything that accelerates a dominating platform effect so quickly and so completely where dominance in one segment can be cross-leveraged to dominate related segments. And, finally, I have never seen anything that forecloses more actual and potential competition.

Another thing. Conditions will not work here. They would prove futile and they would prove counterproductive, and I actually think it would result in the worst of all scenarios, which would be a slippery slope toward Internet regulation.

So why should you oppose this merger? Very simply, bottom line, if a business wants its content to succeed on the Internet, it would have no choice but to use the Google-DoubleClick-YouTube online advertising platform. No real competitive choice.

Now, I have said a lot of things in my short remarks here. I do have six charts that, if it pleases the Chairman, in Q&A I can go into in depth and explain the Internet choice paradox, the extreme concentration, the extreme media concentration, the tipping point that this creates, the bottleneck this creates, and then, last, the extreme market power it creates.

Thank you.

[The prepared statement of Mr. Cleland appears as a submission for the record.]

Chairman KOHL. Thank you, Mr. Cleland.

Mr. Rotenberg?

**STATEMENT OF MARC ROTENBERG, EXECUTIVE DIRECTOR, ELECTRONIC PRIVACY INFORMATION CENTER, WASHINGTON, D.C.**

Mr. ROTENBERG. Mr. Chairman, thank you very much for the opportunity to testify today, in particular for considering the privacy implications of the Google-DoubleClick Merger. There is no question that the merger has enormous economic consequences for the two companies and its partners, but I think the greatest consequences will be felt by Internet users around the world whose privacy interests will be clearly implicated by whatever outcome we see.

EPIC, my organization, has played a significant role at the Federal Trade Commission over many years trying to establish strong privacy safeguards for consumers and for Internet users, and what I would like to do this afternoon is briefly summarize some of the key cases that we have been involved with as the basis for the reason that we challenged the Google-DoubleClick merger. I think it will help explain the significance of the merger, the privacy interests at stake, and also the FTC's authority to act.

I would like to begin by describing for you the fact that we challenged a similar merger in the late 1990's when DoubleClick sought to acquire a company called Abacus. At that time DoubleClick was the Internet's leading advertiser, and we were very impressed by the company. They made a point of saying that they did not collect user-identified information, that it was not necessary to make online advertising work, and they represented in their privacy policy, as well as in the privacy policies of all their partners, that there was no collection of personal information taking place. It was on this basis that many people accepted the DoubleClick business model.

It, therefore, came as a surprise to us when we learned that DoubleClick proposed to acquire a data base marketing firm called Abacus, which had large profiles on American consumers, and DoubleClick proposed to merge the anonymous Internet profiles with the detailed customer profiles contained in the Abacus data base.

We filed a complaint to the Federal Trade Commission. We alleged that the company had engaged in an unfair deceptive trade practice. It was the first time, in fact, that the Section 5 authority of the Commission had been invoked in the context of consumer privacy.

The Commission undertook an investigation. There was a modest settlement reached. DoubleClick agreed to abide by certain privacy principles. Frankly, we were not very happy at the time, but it was significant that it demonstrated that the Commission could act on privacy matters.

Now, the second case which I will tell you about, which I think is in some respects even more interesting, involves a complaint we brought to the Commission in 2001 regarding Microsoft. Microsoft's identity management system, Passport, proposed a single sign-on for the Internet that would essentially become the gateway for access to Internet content. And we said that the privacy and security issues implicit in the Passport proposal were substantial and implicated the privacy rights of Internet users.

The Commission undertook an investigation and ultimately issued a consent order, which Microsoft agreed to, and Microsoft, since the time of that case has been bound by significant privacy obligations because of the concerns about the Passport system, even though it was not necessary for the Commission to find in that case actual harm.

I will mention briefly we also brought the ChoicePoint case to the Commission. That involved a large data broker. It engage in lax business practices. The Commission found in our favor and ultimately issued a $15 million judgment, the largest judgment in the Commission's history.

So when we decided earlier this year to file our complaint at the Federal Trade Commission, along with the Center for Digital Democracy and the U.S Public Interest Research Group, it was based on our familiarity with the FTC's authority to act under Section 5. It was based on our concern about the privacy interests that would be implicated in this merger. And it was based on the information that we were able to obtain about Google and DoubleClick's business practices.

Since the filing of our complaint, nothing has happened that has led us to a different conclusion. In fact, all of the information that has been revealed since April indicates that there are greater data collection practices planned than were originally proposed, and that our instinct about the privacy interests implicated in the deal is something that others who look at these matters also share.

For example, after the filing of our complaint, the Consumer Protection Board in New York State wrote to the Federal Trade Commission and expressed support for what EPIC said, said the deal should be blocked. We learned that the FTC itself had issued a second request in this merger review, which we know from the Chairman's own analysis indicates a strong presumption that the deal will either be blocked or modified. And now we are seeing regulatory authorities around the world—the European Commission, Australia, and Canada—moving to undertake investigations of the privacy implications of this deal.

Simply stated, it is our view that unless the Federal Trade Commission imposes substantial privacy safeguards by means of a consent order, this merger should not go forward. The privacy interests are simply too great. The safeguards are not there. This is going to be a real problem for the Internet if it is allowed to stand.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Rotenberg appears as a submission for the record.]

Chairman KOHL. Thank you very much.

Mr. Cleland, Google argues that DoubleClick does not really compete with Google with respect to Internet advertising. Google further argues that while Google actually sells the ads appearing on its search results pages, DoubleClick does not sell any advertising. It just provides the technology to place ads for advertisers on websites.

Doesn't Google have a point, Mr. Cleland? And if so, how could this merger harm competition or lead to higher rates?

Mr. CLELAND. They certainly do compete, and basically what we are talking about is how ads get served to a screen. And Google serves those screens as text ads in a search bar and as contextual ads. DoubleClick serves them in display, which is a banner ad, or in video.

Now, those are the exact same function and technology that is going that serves 1's and 0's from different companies through a network and has them appear in different formats on the screen that you see. They are doing exactly the same thing, and they compete for the same ad dollars.

As I said before, they have the same audience, they have the same set of advertisers they work with, they have the same websites they work with, and they have basically similar data.

The analogy is a very powerful one. What I am trying to say here is these are interrelated markets. It is like trying to say that since my eye and my ear are separate body parts, they do not have any interaction with my brain and they do not compete with my brain for information. Of course, I may hear something, I may see something, and we both know that you can see and hear completely different things, and the brain must sort out which is superior.

It is classic. What we are talking about is Google is going to create a brain where it controls all the major networks. Let's look at each one of these segments that I keep repeating. It would take the Internet viewer audience from 65 percent to about 90 percent. It would take the 90 percent of Google's share, according to William Blair, of the advertiser community and add 1,500 of the top global customers that DoubleClick has, hundreds that Google does not have.

Then if we talk about websites, Google has about a million websites, and it would add 17 of the top 50 from DoubleClick. And as other witnesses have described, the two biggest online data bases of consumer behavior would be added to, by far, what would be the world's largest.

And so what I see here is to argue that they are separate markets is preposterous. It is artificial, superficial, and basically arbitrary distinctions, because also, let's look at it here, this whole time Google explains and represents themselves as working for consumers. Consumers do not pay Google a dime. Now, generally we would think that the people who pay you are the ones you work for. Google says they are just one click away of losing a customer. That is not a customer. It is a user, and the user pays their privacy in order to use search.

So I do not buy Google's argument. They are competitors.

Chairman KOHL. Mr. Drummond, in a minute I am going to give you, and perhaps you, Mr. Lenard, a chance to respond. But just to add on a little bit, Brad Smith, you said that DoubleClick is the most significant and the largest competitor to Google.

Mr. SMITH. Yes, absolutely, and we believe that.

Chairman KOHL. Do you want to amplify that a little bit?

Mr. SMITH. Sure.

Chairman KOHL. Because Mr. Drummond does not think that is true at all and Mr. Lenard does not think that is true at all.

Mr. SMITH. I disagree with the premise in the first instance that Google is only in the business of selling ads and not in the business of delivering them or serving them. I just went to Google's website myself at lunchtime today, and this is all about their AdSense network. And if you go to google.com/adsense, the first thing you are going to see is this. It says, “AdSense for content automatically crawls the content of your pages and delivers ads. You can choose both text or image ads.”

And you can see this not only on Google’s site. You can see it on a number of other sites. I will show you a chart of a website that we took a snapshot of the day before yesterday. It is a popular social networking site called friendster.com, and you can see on this page on the right two ads. The top ad is delivered by DoubleClick, and the ad directly below it is delivered by Google’s AdSense Network.

To the best of our knowledge, if you buy an ad through AdSense, it may sometimes be delivered by DoubleClick, but it is also sometimes delivered by Google AdSense directly itself. And what is more, if you look at what DoubleClick was doing before this merger and what Google was doing before this merger, they were each building out all of the pieces in the pipeline, the piece that connects with publishers, the piece that connects with advertisers, and this electronic exchange in the middle.

So I am not persuaded myself by Google’s analogy. I think a better analogy is this: Google is already Amazon and is already FedEx. Now they are proposing to buy the post office. I think if that happened, not only Barnes & Noble but every book buyer in the country would have a real problem.

Chairman KOHL. Mr. Drummond, would you like to take those two arguments and rip them into shreds, please?

[Laughter.]

Mr. DRUMMOND. Sure. I will give it my best shot, but first I guess I have to express a little bewilderment. I keep hearing that DoubleClick is our single largest competitor over and over again, and when I heard single—I showed up at a hearing about a DoubleClick transaction, and it appears to be a hearing about our acquisition of Microsoft.

There is a lot of rhetoric being thrown around here, but we have got to be clear, and I can even use Brad’s prop here to make the point.

We are very different than DoubleClick. We have never sat around the boardroom and talked about our competition with DoubleClick. It is a very different business.

We sell ads—we sell largely search ads. We do not actually participate in this display ad segment very much. We very much would like to, and that is part of the reason we purchased DoubleClick because of their tools.

DoubleClick does not sell any ads. When you see an ad from DoubleClick, all they do is deliver it. The buyer of the ad, the seller of the ad have already gotten together and done the deal together. DoubleClick has nothing to do with that, and all they do is deliver the ad.

Conversely, we do not sell any ad serving products. Yes, we have our own fleet of trucks, but we don’t operate any truck delivery services to anyone else. So these comparisons are quite specious. They are very different markets, and they simply do not overlap.

This notion that DoubleClick is our biggest competitor seems strange in light of the total revenues that DoubleClick generated in their ad serving tools business—about $143 million in revenue last year in North America. That hardly seems like the kind of business compared to Google and compared to Microsoft and others that would serve as our biggest competitor.

I think you need to think about it a little differently. What seems to be being said here is that because the DoubleClick tools are used by some sellers of ads and some buyers of ads, that, therefore, DoubleClick controls and dominates this market, that is not true. It is no more true than a delivery—a company that delivers trucks from, say, the dock to the dealer, or cars, you know, controls the car or the truck market. It does not. It is an enabler, and that is all. So I think we need to be a little bit more precise with what we are talking about here.

I also want to address this data base notion that is being tossed about. The information that DoubleClick has is standard Web information. It is not personally identifiable information, that all Web companies, including Microsoft, and others, have and collect. It is a very standard thing. DoubleClick cannot use that data for anything else, and this data is not—this is not a unique situation that gives Google some leg up. Obviously, lots of companies are in this space. They are competing in this space. Microsoft just acquired aQuantive, which does all of the same things. They are now saying that aQuantive is the leading ad serving company, bigger than DoubleClick, so it is somewhat surprising to hear them say now that DoubleClick has this vast trove that is greater than any other data that anyone else has. And DoubleClick cannot do, by contract with its customers, it cannot do all these things with this data. And so it is just not something that we need to worry about.

And I do need to say that, you know—I am not saying this to say that this is not something that we should be looking at in terms of, you know, the data that ad companies have, and we are going to participate in the FTC Town Hall on this issue, and we believe that that is the right way to go rather than attempting to make this a single-company issue, which it clearly is not.

I mean, when you look at the information—let's just unpack this notion of Google having, you know, the biggest data base or having this treasure trove of information. Microsoft already has what it claims is the biggest ad serving company. It is, with the acquisition of a Quantive, in addition the largest purchaser of online ads. It has a destination site with hundreds of millions of users, e-mail with 280 million or so users, $1 billion or so in revenue from display advertising compared to Google's very small amount. And this is not even talking about any of the other products that Microsoft has.

I think they are pretty well poised—they have a lot more information than Google has and, quite frankly, have announced many, many new initiatives with behavioral targeting and the like.

So I think what we need to do here is put things a little bit more in perspective and look at the facts. Thanks.

Chairman KOHL. Senator Schumer from New York has joined us, and I would like to call on him for remarks and questions.

## STATEMENT OF CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. Thank you, Mr. Chairman.

First, I want to thank you for holding these hearings. You are always right there when there are issues that are of importance in antitrust and other related areas. So I thank you for holding the hearing, because given the high stakes and important issues on all sides, it is appropriate to look at the antitrust and other implications of mergers in this sector.

I am concerned about consumer privacy as these companies which hold vast amounts of information do consider merging. And, of course, Mr. Chairman, it has been amazing to watch computer technology develop. It was not long ago when nobody had personal computers. I remember in college I learned about computers, and we had all these punch cards, and it took about days to write a program and more days to punch in the cards, and then it did not work. These big, huge machines like you used to see in the movies in the 1960s, and now, of course, we can hold them almost in the palm of our hand.

Of course, each of these new innovations brings new challenges. They are all to the good. But there are challenges. One of these is the complicated by interesting issue of online advertising that brings us here today.

We cannot ignore the fact that an increasing portion of the advertising dollar around the world is going to online advertising, text or picture ads that show up every time we do a search or go onto an ISP like AOL or Google. The companies at issue here are some of the largest and most profitable in America. It is my sincere hope that as they continue to grow, they will use their expansions for the good of consumers.

But I want to make sure three things are addressed in the online advertising deals, particularly this one, which has relevance to New York: first, antitrust laws, as you are carefully watching over, Mr. Chairman; second, privacy; and, third, jobs in New York.

On the antitrust side, there are certainly questions about what impact a merger such as this will have on the advertising market. Those questions should be answered by this Committee, Justice Department, and the FTC as they review this merger.

In addition, I have some concerns on the privacy side. As the Internet expands, the amount collected about our personal life grows. Some of it is collected to better target ads to each of us.

So because of my concerns, I met with the Google CEO, Dr. Eric Schmidt. I asked for a specific commitment from Google that it will protect privacy following the merger given the increased abilities and power that they have. And at this time, Mr. Chairman, I would like to place into the record a copy of a letter from Dr. Schmidt to me that lists some of the steps Google tells me that it will take to protect privacy.

Chairman KOHL. Without objection.

Senator SCHUMER. Thank you, Mr. Chairman.

Google is looking for ways to provide users with better forms of notice to help users understand what is behind the ads they see. Google is looking into "an opt-out mechanism" in the future so that individuals can choose not to have cookies placed on their computers. And it is also experimenting with new privacy protection features. For instance, they are looking into the idea of using crumbled cookies so that the user data is not stored in any one single cookie, one single place.

Mr. Chairman, these steps I think are important measures toward addressing my privacy concerns, and I thank Google and Dr. Schmidt for doing them. I am hopeful that Google will take these steps as part of this merger and part of an ongoing effort to protect privacy, because that is going to make customers happy, so it is in your interest and everyone's interests.

Google has also talked to me, Dr. Schmidt has, about commitments of jobs in New York. Obviously, DoubleClick is a New York company. Google has hundreds and hundreds of their top researchers in New York, a lot of them at, I think it is, 111 Eighth Avenue, which is one of our high-tech buildings, and we are very interested in growing a high-tech industry in New York as best we can. And Dr. Schmidt has assured me that as a net effect of the merger, the number of jobs is going to grow in New York, which matters a great deal to me as well.

These commitments I think are significant and meaningful. I thank Google for responding to my requests in this way. And, Mr. Chairman, I thank you for having the hearing and thank the witnesses for coming.

Chairman KOHL. Thank you very much, Senator Schumer.

Mr. Cleland, most analysts agree that as a result of all these Internet advertising deals and the Google-DoubleClick merger in particular, advertising will becoming more targeted to a customer's interests and, therefore, more efficient. Customers will get ads for products that they are more interested in; advertisers will get access to people more interested in their products; and websites will be able to sell their ad space at the best possible prices.

Now, wouldn't you say that this is a good result for consumers and for the economy as a whole?

Mr. CLELAND. I think what this does is it brings to mind the Internet content paradox, and if you can put up the first slide here, what I really want to do here is I think there is a lot of misdirection that is going on of trying to get—you know, have people talk about—oops, not that one. I am sorry. The first one. It would be the one on the other—the other side. It's called the "Internet Choice Paradox."

The point I am making here is that Google represents itself as working for consumers and gets everybody to focus on the consumer side. You know, and that is a smart thing for it to do. But it is not in the business, it is not being paid by consumers not one dime. It serves advertisers.

And so what I would like to do is get people to understand that the consumer side has many choices—free access to reach any content. But on the business side, there is very little choice, and there is, you know, a bottleneck for that access.

And so how I would answer your question is that when you talk about consumers, that is where they would like to take this. But this is an antitrust hearing. This is competition. This is talking about where is the competition. They say they are one click away from somebody using another search engine. They did not get paid dime one by that user that is leaving them.

Now, on the other side, you know, they would be worried about losing a big competitor, and what is going on with Facebook right now, there is a fight between Google and Microsoft over who will get access to that traffic, that large website. That is where the action is. It is on the business side. And all this talk about the consumer side in an online advertising model where consumers do not pay for the service I consider a huge misdirection. And that is why I put together this slide to focus people: Competition issues are on the right side on the bottleneck access to online advertising.

Did that answer your question?

Chairman KOHL. Somewhat.

[Laughter.]

Chairman KOHL. Mr. Drummond, after Google's deal to acquire DoubleClick was announced, Google Deputy Counsel Nicole Wong stated that Google hopes to "integrate the two companies' non-personally identifiable data" in order to provide "better and more relevant ads for consumers." This makes perfect sense. As you gain more and more information about consumers, you will be able to do a better job of targeting ads. Both Google and DoubleClick collect a huge amount of information on consumer preferences, including what websites they search and what advertising they view online. How could any new entrant without such access to consumer information possibly be able to compete with the combined Google-DoubleClick? Doesn't the tremendous amount of information that will be held by the combined Google-DoubleClick after the merger constitute a barrier to entry to any new rival entering this market, a huge barrier to entry? And isn't, in fact, that one of the goals that you wish to achieve?

Mr. DRUMMOND. Let me address. No, that is not true. We do not have a unique—or a stranglehold on all of the information out on the Internet for purposes of—for online advertising purposes. There are many—there are other competitors in this space; aQuantive is a big competitor to DoubleClick, has the same kind of data. There is simply no way for us to—there are ample ways for others to come into this market.

Again, if you look at the data that Microsoft has—

Chairman KOHL. But I just want to be sure we—isn't it true that one of the offshoots of this merger is that it will make you a much stronger player in the whole field?

Mr. DRUMMOND. Well, we hope that it will help make us stronger in a field that we have actually been fairly weak in, and that is in display advertising. You know, one of the things we hear from customers is that they would like all of us to offer more integrated solutions that have an ad serving component, that have the ad placement components, as well as selling and placing—selling the ads.

Now, Microsoft and Yahoo and AOL are all going down the same path, and it is really in response to a customer demand, and that is why you are seeing a lot of these transactions in the marketplace.

So, yes, we definitely want to be a stronger competitor in display advertising where there is enormous, enormous competition. There are some incumbent larger players, such as MSN, such as AOL, such as Yahoo. We are not one of them. But there is a lot of competition in that space, thousands of sites that are selling advertising space. So we think it is a great space. And all of the companies are moving forward with ideas about better targeting to create better ads. And, yes, that uses some of the data that is created in the process.

But I have to tell you that when people come here and say that DoubleClick is the only place that has this data, it is just not true: aQuantive has this data; lots of other folks involved in ad serving have this data as well. So this is not a barrier-to-entry issue.

Chairman KOHL. Mr. Cleland?

Mr. CLELAND. Could I reply to that? Could you pull up the chart that says "A Tipping Point"? Let's look at the world from a competitor's standpoint, and look at what this does.

What do people want when they buy advertising? They want an audience, and they will pay for a larger amount if they have a larger audience. So in this instance, Google's—you know, 65 percent of Internet viewer share would be—they would get 25 percent of the share that they do not have, up to about 90 percent, according to my estimates. And if you are a website, what do you want? You want to have access to lots of advertisers, and you are willing to pay for that, and that is what you seek.

Well, they have got 90-percent share of the advertisers, and this is going to give them hundreds of the ones they do not have. So once again, if you are a website, who are you going to turn to? You are going to turn to Google because they are the only game in town that can give you access to all of the world's advertisers. If you are an advertiser globally and you want to reach all of the consumers, you have got to go to Google because they have gone from 65 to 90 percent. And Microsoft, Yahoo, and the others? Baby stuff relative to those numbers.

Then if you look at the consumer data that they combine, remember, these are network effects upon network effects. And it is acquisition. If you deconstructed this and asked Mr. Drummond how long would it take them to replicate organically what DoubleClick has, it would take them years. And ask them if DoubleClick could ever catch Google. They would say no, you know, it is ridiculous.

So when you realize that what Google will get through buying it instantly, they will own this market. They will control it via acquisition.

Now, that is what the law—at least the way I understand it, it says you cannot via acquisition substantially lessen competition. And there is a tipping point here, and then in the next slide—I will not talk about it, but what I would do is explain very clearly that it facilitates a bottleneck, and it talks about many of the same points I just made, but in a different dimension.

Chairman KOHL. Yes, Mr. Smith?

Mr. SMITH. Yes, if I could address that. I would not be here if we did not believe that this merger does create two very important barriers to entry. And I go back and say think of this as a pipeline and think about it as something that, in fact, is not all that different from other kinds of delivery channels, even like the passive shipping issues that you have been addressing, Mr. Chairman, in other contexts.

This pipeline has advertisers on the one end and website publishers on the other. And the pipeline itself principally has three broad components: there is a component that serves the publishers, there is an exchange that is electronic that is in the middle, and there is a component that serves the advertisers.

Now, David keeps talking about aQuantive, but what is important to keep in mind is aQuantive's business was principally on the side of addressing the needs of the advertisers. When you go to serving the publishers, the third-party publishers on the Internet, aQuantive had a business that was in single digits, DoubleClick has a business that was at about a 50-percent share, and Google had a business that was about a 30-percent share.

And keep in mind, yesterday Google was saying that they were not in the delivery business at all. Today they have a fleet of trucks. Yesterday they were saying they did not do delivery of ads, and today when David answered your question, he said they do not delivery very much.

The fact is they are in not only the business of selling advertisements to publishers but delivering those ads. They have in this business, this pipeline business, they have a million customers who advertise. Microsoft has 85,000 or thereabouts. The businesses are really not comparable today.

And so there is, on the one hand, this barrier to entry that consists of what you might think about as the advertising inventory barrier to entry. There are all of these ads. There is also a barrier to entry that consists of this massive accumulation of user information. And it all comes together not only on these two ends, but in the middle.

In a lot of ways, this merger is like the—it would be like combining the New York Stock Exchange and the Nasdaq. You know, if the New York Stock Exchange and the Nasdaq were to combine, somebody could build an alternative exchange, but would anybody go there to take their company public? It is hard to believe that would be the case. That is the kind of thing that will result here.

Chairman KOHL. As I understand it, Mr. Drummond is suggesting that these businesses are dissimilar and that there really is not much synergy between one and the other. Are you suggesting that he is being somewhat disingenuous here today?

Mr. SMITH. I am not going to second-guess his motives. Off the basketball court, we can be friendly. But I do respectfully disagree with what he is saying.

Chairman KOHL. Are you a basketball player?

Mr. DRUMMOND. I am not. I do not know where that came from.

Mr. SMITH. Only when they are playing in Wisconsin.

[Laughter.]

Chairman KOHL. Mr. Drummond, go ahead.

Mr. DRUMMOND. I am not sure where that came from, but I have to say, I did not say that these were completely dissimilar. They are certainly complementary businesses. We would like to have an integrated offering that includes the kinds of things and the kinds of ad serving tools for display advertising, which Google does not have, and we would like to add that to our product suite. The same reason why Microsoft wanted to add aQuantive, that product to their product suite.

But it still is the case that we are not in the ad—we have not been in the ad serving business to date, and just to say that we deliver our own ads is not saying that we are in the ad serving business. Every website—many websites have ways to place ads independent of DoubleClick, of Atlas, aQuantive, or anything else. So the fact that we happen to deliver ads does not put us in the business.

No advertiser, no publisher, in evaluating their choices for these ad serving tools, will sit down and think, Well, should I purchase from DoubleClick, from Atlas, or from Google? Google is not into the conversation because Google does not have a product. So when you talk about competitors, you need to talk about firms that are choices for a consumer. And there is no choice here. They operate in completely different markets. And the same goes on the advertising sales side. If you are an advertiser and you are looking to sell ads on websites, you do not come to DoubleClick to do that, because DoubleClick does not sell any space. You go to websites. Many websites have their own direct sales forces. You can go to advertising networks such as Microsoft's ad center, Yahoo, to Google, and lots of places like that. But the place that you would not go is to DoubleClick or to an ad serving company. You would use an ad-serving company perhaps, but you would not—and you have many choices there, but you would not use Google. And I think that is being lost over here, but it is clearly the case that these are very different, complementary but very distinct businesses.

Chairman KOHL. Senator Hatch?

Senator HATCH. Thank you, Senator.

Mr. Drummond, with respect to the broadband service market, Google seems to contend that consolidation harms consumers and "downstream" application service providers. At least that is the way I have interpreted it. Yet the Google-DoubleClick merger represents a much more significant concentration of Internet advertising market share.

Now, why are there too few players in the broadband service market, but why won't the Google-DoubleClick transaction create too few players in the Internet advertising market?

Mr. DRUMMOND. Well, Senator, I would be happy to address that. These are very different businesses, very different markets. I think in the broadband sector, it is apparent to all of us that we have very few choices for our broadband service. In many markets, you have two choices, and in many, many markets you have just one.

That is simply not the case in online advertising. In the markets that—in the sale of ads, which is what Google does, there are many, many choices. There are display ads; there are search-based ads; there are many, many outlets to get those ads. And so we simply do not have that same dynamic.

This acquisition changes that not at all. As I said, by acquiring DoubleClick it does not reduce the choices of anyone who is looking for ad serving technology products. It does not reduce the choices of anyone who is looking to buy or sell ads because DoubleClick simply does not do that. So these are very different markets. You are talking about one market where there are few players that the customers, the consumers can touch, and one in which there are multiple players. And they are only growing, not shrinking in many ways.

Senator HATCH. OK. Mr. Smith, for as long as I can remember, Microsoft has stated that an entrepreneur operating from a garage could put your company out of business, astounding as that sounds. But I understand what you are saying.

Whether or not that is true, it strikes me that a similar statement could be made of Google. If someone writes a better search algorithm, Internet users will merely jump to the entrepreneur's site and perform their searches there. Simply put, if Google does not have Internet users using its search engine, then it does not have anyone to advertise to. In addition, DoubleClick's percentage of the overall Internet advertising market is much smaller by comparison.

So I think we have to ask: What is the concern? If Microsoft or another company comes along and creates a better search engine, Google might not be as dominant a player in the market as it is today. Now, if that is true, again, where is the this problem? Why not just build a better product? Have you not just purchased a DoubleClick competitor? This is a lot of questions and I—

Mr. SMITH. That is a very good question, Senator, and if we believed that this was a market where better technology or better value by itself could carry the day, I would not have come here today. But that is not the market that we are dealing with.

Indeed, if that were this market, Microsoft would not have paid an 83-percent multi-billion-dollar premium to acquire a Quantive, and I do not think that DoubleClick would have sold for the premium that it sold for. This market is consolidating. And we certainly believe that when this consolidation is finished—and it is going to be finished very quickly—we are either going to have one company that provides the pipeline for online advertising, or we will have two, or maybe we will have three. I cannot imagine more than three. I am skeptical that we will even have as many as three.

And once we reach that point, I do not think that better technology or better value can make a difference. The barriers to entry created by the accumulation of all of the inventory in the ads and all of the user information is too great. It really is, as I was saying before, Senator, it is like the combination of the New York Stock Exchange and Nasdaq. Somebody could offer a better stock exchange, but if that one exchange were to come into existence and had all of the brokerage relationships and all of the purchasers in the country, why would anybody take their company public anywhere else? That very much, I believe, is analogous to this situation.

Mr. CLELAND. Senator, could I also answer that question?

Senator HATCH. Sure.

Mr. CLELAND. One of the most preposterous notions I have heard is Google saying that, you know, any day a new search engine could come and knock them out. Let's break that down.

What Google has is the world's largest infrastructure and a parallel processing grid. It is a supercomputer. There are a million customized servers that Google has bought and dispersed around the country, and those million servers copy every single page, at least reported by the New York Times, every single page of the Internet every day and keep it stored and recovered. That is how you can get, you know, a very quick response.

They also have a million advertisers, or a million websites they deal with. They have 90 percent of the advertisers. They have 650 million users and 80 percent of the data on consumers' usage patterns in order to do targeted advertising.

Now, I would say the accumulated aspect of two guys or one guy in a garage, it would require, you know, tens of billions of dollars and years and years for them to replicate something that could compete with Google. It is not just what search engine you have. If that was true, ask.com would be really—you know, they made some tweaks to their engine, and they would be improving. Or Yahoo, when it tweaked and improved its search engine, which it used to outsource to Google, it would be better. But the cost, the barriers to entry, are just enormous about what Google does.

Hopefully that was helpful.

Senator HATCH. It was.

Mr. Smith, much has been made about how Google and DoubleClick maintain information to their users. With your acquisition of—is it a Quantive?

Mr. SMITH. Yes. That is right, a Quantive.

Senator HATCH. What other types of information will you store, for how long, and what are Microsoft policies to maintaining the privacy of Microsoft's users?

Mr. SMITH. I think there are two things to think about, Senator, in the context that you raise. They are both quite important.

First, I would say that we need to think about this in the context of this merger. This merger, in our opinion, is about creating a single pipeline that has virtually all of the user information on the Internet. And if things go in this direction, we will no longer as consumers live in a world where our user information is divided and held by a variety of different companies. It will all be in the hands of a single company. And so I think you are quite right to ask, OK, well, what are the policies and practices of us when it comes to protecting user information?

We announced new privacy principles in July. We built on privacy principles that we have had in the past, and I believe that they are—I would have to say I believe they are the best principles that you can find in this industry. We said, for example, that we will anonymize all user information, for example, all of the IP addresses, after 18 months. Now, Google likes to say that they were the first to anonymize information. In fact, I do not believe that Google is anonymizing anything, and I say that with respect, because, you know, all of our computers basically have the equivalent of a phone number. It is the IP address. It is basically nine digits.

What we announced at Microsoft is that after 18 months we would delete that IP address, that phone number, in its entirety. What Google announced was that they would take that IP address after 18 months, and they would delete the last few digits.

This very much reminds me of when I moved to Paris in 1993. I quickly found that when you get a phone bill in France, you get the list of phone numbers that were called from your house, but the last four digits have been deleted. Apparently it was considered socially awkward for spouses to be able to know who was being called from their house. And yet any good divorce lawyer in France can tell you that they can still figure out quite a bit. It may make it harder, but it does not make this information anonymous.

Mr. ROTENBERG. Senator, may I speak to this issue?

Senator HATCH. Yes, sir.

Mr. ROTENBERG. I did not raise earlier some of the privacy concerns that we identified in Google's practices, but I think it is appropriate now, and I think it is particularly important because Google has made a number of representations to this Committee, and I sense that as well in Senator Schumer's remarks, regarding what it will do to safeguard privacy. But it uses these terms such as "anonymize" very loosely.

Mr. Smith is correct. When Google says that it is anonymizing the Internet protocol address, it is much like taking the last two digits off a telephone number. In context, it is very easy to re-create the identity of the computer tied to the Internet. It is very similar with a cookie as well, and we have actually put together an analysis, and our simple conclusion is that what Google describes as non-personally identifiable information, which is the information that it retains on every single search query—and that is the Internet protocol address, the cookie information, the date and time of the query, the query search term. They describe all of that as non-personally identifiable. That is actually a remarkable claim because in so many different respects, that information is uniquely tied to the Internet user who made the search query. In fact, it is the reason that the Department of Justice, for example, goes to search companies and requests those files precisely to identify Internet users.

And I will say further I have recently had an exchange with Dr. Schmidt, the CEO of Google. In the pages of the Financial Times, he described his proposal to safeguard privacy for Internet users. I published a response and explained that many of the safeguards that Google is recommending will not adequately safeguard the privacy interests of Internet users. And this is precisely the reason that the pending complaint of the Federal Trade Commission is so important. We need a much clearer description of what the business practices will be of this merged entity to ensure that the privacy interests of Internet users will be protected.

Senator HATCH. Thank you.

Dr. Lenard, as you well know, one of the major concerns about antitrust law is the creation of or enhancement of market power. In the context of sellers of goods or services, market power may be defined as "the ability to profitably maintain prices above the competitive levels for a significant period of time."

Now, market power may be exercised, however, not only by raising price but also by reducing quality or slowing innovation. Therefore, how can one argue that a standard antitrust claim cannot be made if Google already controls 70 percent of the search advertising and if the merger is permitted, Google-DoubleClick will account for nearly—well, I guess nearly 80 percent of the non-search ads or display ads.

So I would like your opinion, and then I would like to give other members of the panel an opportunity to respond as well.

Mr. LENARD. Thank you, Senator. There are several responses to that. The first one, I think, is the one we have been talking about a lot, that these really are not—this is really not a merger between direct competitors, really for the reasons that Mr. Drummond said. I mean, you do not—if the price of the ad space that Google is selling goes up, you cannot substitute for that by going to DoubleClick and buying, you know, ad serving capabilities. They are just not direct substitutes for each other. Obviously, what DoubleClick provides is an input into the Internet advertising market, but it is not by any means a direct substitute for what Google is supplying.

You know, the second thing gets to this—and this has not been talked about that much. I mentioned it a little bit in my statement. What we really are talking about here is providing better quality for consumers. All of these companies are integrating with other firms in an effort to provide a better product for consumers. And the notion that—there is this notion that maybe if Google acquires DoubleClick, the product will be too good and it is going to be hard to compete against. Well, as I said, I think that is really a risky proposition to go down that road because we do not want to—you know, we do not want to hold—you know, grab onto the belt of somebody who is in the race and say, well, everybody, let's make them run a little bit slower so everybody can catch up a little bit. That would just provide all sorts of bad incentives to the system.

The other thing I think that has not been mentioned in this so far is the customers, the people who buy—the firms who buy advertising services. A lot of them are very big companies. They are very sophisticated. They are very price-sensitive. They buy from multiple suppliers. And if somebody starts raising the price on them, they are going to go someplace else very quickly, and that is going to discipline the market.

Senator HATCH. Anybody else?

Mr. DRUMMOND. If I may, this notion of 80 percent of all advertising keeps getting tossed around here as if it is some kind of a fact. It is a made-up number. We have not seen any support for it. I do not think there is any. And it relies on this premise, which is utterly false, that DoubleClick somehow controls some major sector of spending on display ads. It does not control it. It does not get any—no one pays DoubleClick to place an ad.

So to say that somehow there is this control or domination of the display advertising business because as part of our products we now have ad serving technology is just—is crazy. Again, Brad talks about a $27 billion market potentially this year in online advertising. Of course, a big chunk of that is display advertising. And the entire market for ad serving companies is about $300-some million. Those are the revenues of the companies, you know, Atlas, DoubleClick, and everyone combined.

How can it be that one participant in a $300 million market controls and dominates a multi-multi-billion-dollar market? It is impossible.

So, you know, I urge you not to be misled by some of these numbers that are being tossed around today.

Mr. CLELAND. I have to reply to that. If Google is representing that this is the online advertising market, they are going to have a very hard time making that case, because as you know, the Congress for years has media ownership limits that it restricts how much you can control a certain media, and online is clearly a separate media. And Google—and there are just reams and mountains of evidence of how Google has explained how online advertising is better, because it is targeted, it is relevant, and it is measurable; and that, therefore, people should move ads off of TV, radio, and newspaper, and move it online.

Now, if that is not different markets, I do not know what is, because where the other advertising is just kind of general, this is stuff that you can target to an individual user, you can measure it, and they can argue that the consumer might save more. That is relevant.

Now, the other point you made about extreme market power, if you could put up that slide, what you have here is extraordinary. You cannot just say these guys do not compete. What we are talking about is an ecosystem, OK? They are going to corner this market. Now, let's look—remember, online advertising is an indirect market. Consumers do not pay a dime to Google. There is a three-way transaction here. So you have to understand it as a three-way-sided market. You have got users, content providers' websites, and advertisers. Once again, this merger adds the No. 1 and No. 2 Internet viewer audiences, the No. 1 and No. 2 best Internet content website networks, and the No. 1 and two best advertiser networks. And what it does, because this is the brains of the Internet and the brains of online advertising, what it will allow them to do over time is on this platform cross-leverage, and as ads to more to ad brokering and as ads go more to ad exchanges, whether it is a pipeline, whether it is a bottleneck, whatever we call it, they are almost all going to have to go through Google-DoubleClick-YouTube.

And so this notion that there is lots of choice, a big advertiser, if it wants to reach the world audience, it has got to go to Google-DoubleClick. If a website wants to reach all the advertisers out there, it has one choice. It has got to go to Google-DoubleClick.

Thank you.

Senator HATCH. Brad?

Mr. SMITH. If I could just make two points, Senator. I do think it is helpful to be clear about what we are not talking about and what we are talking about. We are not talking about, in my opinion, whether Google should continue to have the opportunity to innovate and develop a better product and service. And I say hats off to Google. They have done a lot of good innovation, and we have all benefited from that this decade.

What we are talking about is not that but, rather, whether Google can buy its way to what we regard as a dominant market position. And also, we should be clear we are not talking about buying up this entire $300 billion market for all of the advertising in the world or even all of the $27 billion online advertising business. We are talking about this pipeline. And there are a lot of markets that are characterized by these concerns about passive shipping or pipelines, for example.

The very first antitrust case ever brought against Standard Oil was brought at a time when there were lots of different oil wells owned by different people in the country. There were lots of different people that were distributing oil to customers. But what Standard Oil was accused of doing was basically solidifying and monopolizing the railroad network and, thereby, the pipeline for effectively moving oil downstream in the economy. That is analogous to what we are talking about here.

I do believe that when you look at this pipeline, it is absolutely fair and it is absolutely accurate to say that if this merger is approved, Google will account for 80 percent of the ads that are served to publishers.

Mr. DRUMMOND. We will not account for that. The 80 percent—simply because some portion of online, of display advertising is delivered using a tool from DoubleClick when there are many other tools available does not mean that Google accounts for. Again, no control over the advertising, no ownership of the data that comes with that that is collected in the process of the advertising. That data is owned by the customers, publishers and advertisers, and DoubleClick or Google cannot do anything with it.

It is simply not true that by doing an acquisition like this there is some control of this display advertising market.

Senator HATCH. Well, this has been a very interesting hearing. I am sorry I have been in and out, but I have been on the floor all day and had to go back and forth. I have a lot of other questions, but I think I will submit them, Mr. Chairman, so that we do not keep these folks too long. But a very interesting set of questions. You have very interesting two companies here, and other companies involved, and I am absolutely fascinated by your industry. We will just have to see where we go from here.

Chairman KOHL. Thank you very much. I quite agree, Senator Hatch.

One more question, Mr. Rotenberg, to you. Should there be Federal laws to ensure that customer information from searches and that from advertising information be kept separate? Should we put conditions on this deal to ensure that information be kept separate? What other conditions would you propose in terms of this merger?

Mr. ROTENBERG. Thank you, Senator, for asking that question. One of the things that we have done in the various filings that we have made to the Commission regarding this merger is to propose a number of different remedies that the Commission, we believe, could enforce through a consent order. I think the most simple and most direct one is to say that there should be enforceable privacy standards that safeguard the information that is being collected, ensure that it is not being misused.

Google has in various ways said that it shares that goal; it is prepared to do that. Our view is that if that is the company's position, this is the perfect opportunity, perhaps even a unique opportunity, to get that in writing through a consent order at the Commission and we would like to see it happen.

There are, in fact, I think in our three different filings, between 20 and 25 different recommendations we have made. One of the recommendations concerns this very interesting issue of data retention, and as you may be aware, there is a lot of controversy today, particularly among users of the Internet, about the amount of information that is being collected and retained by these companies.

Now, to be fair to Google, it is very much a reflection of the Internet architecture that some information needs to be accessed by any Internet advertiser, generally speaking, to respond to a query. That is basically—because of the stateless nature of the Internet, if the Internet user was, in effect, a new entity every time they went to a website, it would be almost impossible to interact. Now, there are ways to get around that, but, generally speaking, we understand why Internet advertisers collect a little bit of information. The question is: Why do they keep it for so long? Why is it necessary, after they have answered the search request, after they have provided the advertising links that their business partners provide so that there is a successful business model, why do they need to keep the information as long as they do?

So with respect to that issue, we actually think there is a very good opportunity here as well for the Commission to enforce much more sensible limits on the duration of information that is kept by the search companies to protect the privacy interests of Internet users. And we actually believe that over the long term—the companies may not admit this publicly, but I will be willing to bet they would say so privately—they will protect themselves against some downstream risks if they were not sitting on so much data, because I can tell you several scenarios under which both Microsoft and Google are genuinely concerned about the amount of information they keep: one, a security breach. These are companies that have brilliant people; the top computer security experts in the world work for these companies. And, nonetheless, you know, before this hearing, we happened to do a little search because I thought you might ask me a question about Google's security flaws, so I did a Google search. There are over 2,200,000 Web pages on the topic of Google security flaws. The top ten all describe very serious breaches that that company has experienced. That is one reason, I suspect, they are genuinely concerned about the information they keep.

The other, of course, is in the legal context. They can always be compelled to produce information to someone else under circumstances that they might otherwise choose not to disclose that information. Now, we applauded Google last year when they opposed a broad subpoena that the Department of Justice sent to that company. We thought it was unnecessary, we thought it was excessive. Google did the right thing by opposing it. But we also said at the time that there was an ongoing risk, as long as this company kept so much information on Internet users, that the Department of Justice or anyone else with legal process could come back in the future.

And so, you know, in answer to your question, Senator, we think this is the ideal moment, the unique moment to enforce meaningful privacy standards to limit the collection of information on Internet users to make these business models work, but also to ensure trust and confidence in our new economy.

Chairman KOHL. A last comment, Mr. Smith? Or second to last comment, then Mr. Drummond.

Mr. SMITH. I would second Mr. Rotenberg's call for Federal privacy legislation. We have been endorsing that for some time. I have come here a number of times myself to encourage Members of Congress to adopt Federal privacy legislation.

But I also think it is a mistake to think that as consumers our personal information can be protected by law and regulation alone. And in that context, I think one of the fundamental issues in this merger is whether the marketplace and competition will continue to play a role as well.

I think it is very disconcerting to think about a future where all of our user information flows through only one data pipeline, because if that pipeline is breached, the consequences are enormous. If you look at the information that is now flowing, it includes not only the simple things like where we live and our date of birth, but it includes increasingly medical health records, it includes our financial records, it includes everything we are interested in on the Internet, what we are looking for, what we are thinking. The amount of information truly is quite substantial. We should not have to rely on a single pipeline. Not only is there the danger of what happens if there is such a breach, but we would lose the role that competition plays.

One of the reasons we are having this dialog is because Google and Microsoft and Yahoo and AOL and many others have an incentive today to compete to offer consumers better privacy. Competition is, in effect, the guardian of consumer privacy needs today. And yet if this merger is approved, the ability of that guardian to play this role in the future will be dissipated quite substantially.

Chairman KOHL. Mr. Drummond?

Mr. DRUMMOND. Thank you. Let me just say that I agree with Brad's call for Federal privacy legislation. We are on the record on that. We also believe there should be some global standards so that there is not a patchwork of privacy laws around the world that are very difficult to work with and make it very confusing for consumers. So we are all for that.

We do not think that there should be conditions placed here. This is an industry issue, and we think it should be addressed, and we should be thinking about ways in which we can make sure that there is continued confidence in protecting user data while at the same time allowing the companies to innovate and to deliver better services to users, which is what—you know, users want those and users benefit from them, as do advertisers and websites. That is why we think the upcoming FTC Town Hall is so important, because it provides a great forum for us to sit down and really work these issues out. That is how these issues should be worked through, not in the context of one deal in a big industry with many, many players, where there are many other deals going on. We ought to look at this in a more holistic manner.

And let me just close by saying one thing. There is no pipe. You keep hearing about this pipeline, this single pipeline with all of the data. Please do not be misled. There is no such thing. When it comes to search, there are a number of options for users. We all know that. We have been successful because we have delivered a great service. There are other good search engines, and they have been pretty successful, too. And it is absolutely true that any user can, at a moment's notice, go use another one, and they do all the time.

On the advertising side, whether it is ad serving or whether it is display ads, there are all kinds of choices. And any data that is collected through advertising, whether it is from a technology maker or from a website itself, that is going to be broadly distributed around the thousands of participants in this market, the many, many participants in this ad serving technology market, of which the No. 1, according to Microsoft, is owned by Microsoft.

So I just want to be clear. This pipe that is being talked about is very much a fiction.

Chairman KOHL. Well, gentlemen, we want to thank you so much for coming today. The Internet is enormously powerful in our world today and will become even more so in the years to come, and this deal obviously will have an impact on that, as well as other deals, and the rules and regulations that will govern the Internet. These are very important questions in our society, and I think we are privileged to have had such strong, well-informed both advocates and objectors here today. It has added a lot to the dialog, and I am sure there will be additional rounds before this heavyweight fight is settled.

So we thank you all for coming, and this hearing is adjourned.

[Whereupon, at 4:16 p.m., the Subcommittee was adjourned.]

[Questions and answers and submissions for the record follow.]

# QUESTIONS AND ANSWERS

**Responses of David Drummond to Senate Follow-Up Questions**

1. **A study by the AEI Joint Center for Regulatory Studies found that search based advertising and display advertising are interchangeable. When the price of one type of advertising is raised 10%, advertisers switch to use the other type of advertising. Does this suggest that there are horizontal merger issues to consider here and that the merging companies are competing at some level?**

No. DoubleClick does not sell either text or display ads, so interchangeability of the two does not suggest that this is a horizontal merger. In fact, the AEI article prepared by Robert Hahn and Hal Singer and funded by Microsoft and AT&T (the "Hahn-Singer article") explicitly acknowledges that Google and DoubleClick are not competitors. The article observes at the outset that advertising space (offered by Google) and display ad serving tools (offered by DoubleClick) "cannot be in the same product market" because they are not demand or supply substitutes.[1]

The Hahn-Singer article then proceeds to spin out a novel theory of potential harm premised on a poorly crafted survey. The theory is that Google might have an incentive to impose a small increase in the price of DoubleClick's advertiser-side display ad serving technology because some advertisers would supposedly react by switching from display ads to Google alternatives in response to what is effectively a *microscopic* increase in the overall price of display advertising. This is a highly implausible theory. Professor Ravi Dhar of the Yale School of Management, an expert in consumer behavior and survey techniques, reviewed the Hahn-Singer article and found serious flaws in the survey design and interpretation that led to this novel and implausible conclusion. Professor Dhar concluded that the Hahn-Singer article strayed so far from basic principles of good survey research that its conclusions are not credible. Professor Dhar's report is attached as **Exhibit 1**.

Although the Hahn-Singer article is unreliable, Google agrees that text and display ads compete with one another, as well as with other forms of advertising. One need look no further than the 10-K reports of any major newspaper publisher in recent years to see that one of their leading forms of competition is online advertising. The sale

[1] Robert Hahn and Hal Singer, "An Antitrust Analysis of Google's Proposed Acquisition of DoubleClick," *AEI Joint Center Related Publication No. 07-24,* 2007 at 4-5.

of advertising is an extremely competitive and dynamic space, and Google is excited to be a part of this growth and competition.

**2. That same study found that the combined Google-DoubleClick will have an incentive to increase their prices. Some studies suggest that Google can already charge a 20% premium over its competitors. Will Google be able to charge an even greater premium over other on-line advertising firms? How will consumers be impacted by this?**

The transaction will not give Google any ability to raise ad prices because it will not eliminate any competition in the sale of ads. The Hahn-Singer article does not suggest any increase in the price of ads. Rather, the Hahn-Singer article addresses a theoretical price increase in DoubleClick's advertiser-side display ad serving technology. For many reasons, including those set forth in detail in Professor Dhar's report, the Hahn-Singer article is invalid. All of the direct evidence on display ad serving technology demonstrates robust competition and plummeting prices.[2]

With respect to prices for ad space, we are not aware of any study suggesting that Google charges a premium over its many competitors. In fact, Google does not set prices for ad space at all: Google uses auction pricing. Advertisers who choose to use Google's AdWords system bid on keywords that will trigger their ads. Advertisers bid the amount they are willing to pay per click for certain keywords to which their advertisements will relate. Winning bidders do not pay the price they bid; instead, their price is automatically lowered to one cent more than the next closest bid.[3] In addition, by bidding on a cost-per-click basis, advertisers pay for ads only when users click on their ads.

The Google-DoubleClick transaction will have no impact on this auction pricing process, and indeed, customers and consumers alike will undoubtedly benefit from Google's acquisition of DoubleClick's display ad serving technology. Google will expand the supply of advertising space by offering advertisers the ability to place display ads in the Google network while at the same time supporting the sophisticated reporting

---

[2] *See, e.g.*, Ad Serving Solutions – A Buyer's Guide, E-consultancy (January 2006) at 6 ("Trends within this market include: Commoditisation of technologies forces prices down and reduces cost of core ad serving as proportion of overall online media spend.").

[3] For a further description of AdWords, please see https://adwords.google.com/select/comparison.html.

metrics that advertisers demand in connection with display ads. This increased supply will be good for advertisers and will place downward pressure on prices. Google will also be able to help website owners ("publishers") place relevant display ads on portions of their websites that go unsold and are filled with "house" ads today. Having this additional option is good for publishers. And consumers will benefit from faster loading web pages, more relevant advertising, and enhanced privacy protections.

We note that Microsoft has invested a great deal of money in an attempt to generate opposition to this transaction, including by using a third-party public relations firm that sought to encourage advertiser opposition without disclosing Microsoft's involvement.[4] Despite Microsoft's tactics, a number of very prominent advertisers, including General Motors, Delta Airlines, Travelocity, and Buy.com, have expressed strong support for the transaction precisely because it will increase competition.

3. **In a market with vibrant competition, the entrants will compete to offer the consumer the best price, the best quality or the best service. When it comes to major Internet companies, one of the ways a company may distinguish itself is by offering the best privacy policy to consumers. The major Internet search engines -- Google, Microsoft and Yahoo -- have different policies on what they do with consumer information and how long they retain search histories. Does the consolidation we have seen in this industry in the last few months decrease the likelihood that these companies will compete to offer the best privacy policy?**

The transaction will not change Google's incentives to compete on any front. The online industry is experiencing very rapid growth and expansion. The many recent transactions and new product introductions are a sign of healthy competition in the sale of advertising. Further, these developments demonstrate that very large and well financed companies such as Microsoft (and its "mega" advertising agency Avenue A | Razorfish), Yahoo!, AOL/Time Warner, ad agency holding company WPP, and others agree with

---

[4] *See, e.g.,* Robert A. Guth & Charles Forelle, *Microsoft Goes Behind the Scenes*, Wall St. J., Sept. 24, 2007, at A4, *available at* http://online.wsj.com/article/SB119059784609936938.html?mod=hps_us_whats_news; Nick Mathiason, *Microsoft in row over lobby tactics*, The Observer, Sept. 23, 2007, *available at* http://observer.guardian.co.uk/business/story/0,,2174717,00.html.

Microsoft's Steve Berkowitz that "the internet is just an amazing kind of sea of opportunity at this point."[5]

All of these companies and others have recently expanded their offerings to include display ad serving technology, either through acquisitions or internal development. All are seeking to build the most attractive and complete offerings possible to attract advertisers, publishers, and consumers. This is an extremely positive development. One of Microsoft's executives put it well when he said, "We're in the first or second inning of a long game here. There's no monopoly on innovation. I don't think you're going to see two or three big players and then game over. There will continue to be a broad range of companies."[6]

With respect to privacy, Google's very first principle is "Focus on the user and all else will follow."[7] Google does and will continue to do everything possible to provide the highest quality search experience to its users, including offering privacy features and policies that emphasize transparency and user choice. Google is very much aware that its users are one click away from another search provider, and we will continue to be at the forefront of efforts to enhance user privacy. For example, as discussed at the hearing on September 27, we are experimenting with new privacy features and policies as we begin to engage in the third party display ad serving business, and we are excited to bring these and other privacy innovations to our users.

4. **Mr. Drummond, you argue that Google does not directly compete with DoubleClick, since Google is not in the business of serving display ads for advertisers or web site owners. But isn't it true that prior to this acquisition Google was developing an ad serving product to compete with DoubleClick? Won't your acquisition cause us to lose the competition in the ad serving market that would have otherwise existed between DoubleClick and your ad serving product?**

---

5 Steve Berkowitz, Senior Vice President, Online Services Group at J.P. Morgan, Speech at J.P. Morgan 35th Annual Technology Conference (May 22, 2007).

6 Brian McAndrews, quoted in Laurie Petersen, aQuantive's McAndrews Holds Forth on Microsoft Deal, MediaPost Online Media Daily, June 15, 2007, http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticle&art_aid=62431.

7 http://www.google.com/corporate/tenthings.html.

Google recently began developing display ad serving technology. This technology is neither ready for commercial distribution nor likely to be so for some time. As discussed above, display ad serving is already highly competitive, and prices have been dropping dramatically over the last few years.[8] There are many strong competitors including Atlas (Microsoft), Yahoo!, ADTECH (AOL/TimeWarner), 24/7 RealMedia (WPP), Mediaplex (ValueClick), BlueStreak (Aegis), and many others, all of which are competing aggressively for customers.[9] Google is by no means a uniquely positioned potential entrant into this space.

Furthermore, we note that Google's acquisition of other technology companies has consistently led to increased competition and consumer welfare. Google has an established track record of acquiring technology companies, improving their products, and then making those products available to users at little or no charge. For example, in 2004, Google acquired Keyhole, a company that had been charging users for digital mapping products, and used its technology to create Google Earth, a free and highly popular product that allows users to explore a three-dimensional model of our planet. Similarly, in 2005, Google acquired Urchin Software Corporation, which had been selling Internet traffic analysis products to web publishers and marketers. Once again, Google invested resources in improving this technology and then began offering it to users for free, in the form of the popular Google Analytics service. And just last year, Google acquired @Last Software, which had been selling a three-dimensional modeling application called SketchUp, and began making that technology available to users free of charge as well. In short, Google's history demonstrates our commitment to making quality products and services available as broadly as possible and for the lowest possible cost—often for no cost at all.

---

[8] *See, e.g.*, Ad Serving Solutions – A Buyer's Guide, E-consultancy (January 2006) at 6 ("Trends within this market include: Commoditisation of technologies forces prices down and reduces cost of core ad serving as proportion of overall online media spend."); http://www.startup-review.com/blog/advertisingcom-case-study.php ("[A]d serving … has trended towards a commodity business with prices falling from $0.25 per thousand impressions served down to below $0.04.").

[9] For example, Microsoft announced that it has already won 20 new publisher clients just since acquiring aQuantive/Atlas. *See* Press Release, Atlas Solutions, Microsoft's Atlas Publisher Suite Adds More Than 20 New Clients Since aQuantive Acquisition (Sept. 24, 2007) *available at* http://www.atlassolutions.com/news-20070924NC.aspx

By acquiring DoubleClick, Google can significantly accelerate its entry into display ad serving and continue its pattern of improving what is available to customers and consumers. Google will take the best of its development efforts to date and combine them with the best of DoubleClick's current technology. Customers will benefit greatly from this combined and enhanced offering. Google looks forward to driving further innovation in the highly competitive display ad serving space.

**Senator Kohl's Follow-Up Questions for Hearing on**
**"An Examination of the Google-DoubleClick Merger and the Online Advertising Industry: What Are the Risks for Competition and Privacy?"**

**For Thomas Lenard**

**1.** A study by the AEI Joint Center for Regulatory Studies found that search based advertising and display advertising are interchangeable. When the price of one type of advertising is raised 10%, advertisers switch to use the other type of advertising. Does this suggest that there are horizontal merger issues to consider here and that the merging companies are competing at some level?

Answer:

The Hahn-Singer study referred to in the question did not find that search-based and display advertising are interchangeable. The study did find that various forms of online advertising are substitutes, which is not surprising. However, the study did not provide any information on the degree of substitutability (even putting aside questions about the survey methodology). The study found (p.7) that "66 percent [of survey respondents] indicated they would increase their purchases of search ads in response to a 10 percent increase in the price of graphic ads, indicating they view the two types of online ads to be substitutes." But the survey respondents were not asked and did not indicate how much of their expenditures would shift between the two types of ads. It could be a very small amount.

The study does not alter my view, expressed in my testimony, that this is not a merger between direct competitors. The cost of ad serving for display ads, which DoubleClick sells, is an extremely small portion—reportedly, about 1-2 percent—of the total costs of a display ad. Thus, an increase in the ad serving price would yield an extremely small increase in the total cost of the ad. For example, if ad serving is 1 percent of the total cost of the ad, a 10-percent increase in the ad serving price would result in a $1/10^{th}$ of a percent increase in the price of the ad. It is not plausible that this would cause many (or any) customers to shift to a different type of advertising. The Hahn-Singer study's finding is likely a reflection of flaws in their survey instrument and methodology.

It is plausible that a 10-percent increase in the price of ad serving might cause customers to shift to a different ad serving provider. This would constrain DoubleClick's pricing and is what we want from a competitive market.

All this suggests that the horizontal merger issues involved here are trivial to non-existent, as I indicated in my testimony.

**2.** That same study found that the combined Google-DoubleClick will have an incentive to increase their prices. Some studies suggest that Google can already charge a 20% premium over its competitors. Will Google be able to charge an even greater premium over other on-line advertising firms? How will consumers be impacted by this?

Answer:

The study did not conclude that a combined Google-DoubleClick will have an incentive to increase their prices. The authors explicitly state (p. 9): "Pursuant to its merger review, the FTC will likely conduct analyses to determine whether Google could profitably increase the price of DoubleClick's inputs as a result of the proposed transaction. <u>We do not perform that analysis here</u> (underlining added)."

For the reasons discussed in the answer to question 1—namely, that ad serving is such a trivial portion of the total ad cost—it is not plausible that the combined Google-DoubleClick will have the incentive or ability to raise prices.

**3.** In your testimony you argue that the vitality and changing nature of the Internet is a reason not to be very concerned about the concentration in this market. It is certainly true that almost daily we are seeing more and more content – whether it is music, television shows, movies or radio broadcasts -- available to consumers on the Internet. Does the fact that more and more people are getting their entertainment from the Internet and, as a result, more and more money is being spent on Internet advertising, make these mergers more important?

Answer:

It indicates that this is a market very much in its infancy, which makes intervention very risky. There is always the risk that antitrust enforcement, rather than deterring anticompetitive activities, will stifle activities that are procompetitive. That risk is much higher in markets that are subject to a lot of technological change and rapid growth, such as the ones we are dealing with here.

October 26, 2007

Senator Herb Kohl
United States Senate
Antitrust, Competition Policy, and
Consumer Rights Subcommittee
Washington, DC 20510

Dear Senator Kohl,

Thank you for the opportunity to provide further comments for the hearing that was held before the Senate Judiciary Committee regarding "An Examination of the Google-Doubleclick Merger and the Online Advertising Industry: What are the Risks for Competition and Privacy?"

As you indicated, there are critical consumer privacy issues that must be considered by the Federal Trade Commission as it reviews the proposed merger of Google and Doubleclick. The Commission should not approve the merger without imposing substantial privacy safeguards as condition of the deal.

My answers to your questions are attached. Thank you for your continued interest in this issue.

Sincerely,

Marc Rotenberg
EPIC Executive Director

Enclosures

"1) In a market with vibrant competition, the entrants will compete to offer the consumer the best price, the best quality, or the best service. When it comes to major Internet companies, one of the ways a company may distinguish itself is by offering the best privacy policy to consumers. The major Internet search engines -- Google, Microsoft, and Yahoo – have different policies in what they do with consumer information and how long they retain search histories. Mr. Rotenberg, does the consolidation we have seen in this industry in the last few months decrease the likelihood that these companies will compete to offer the best privacy policy?"

Yes, Senator, it is my belief that the diminished competition in this sector will reduce any prospects for market-based privacy protections, though I am skeptical that any meaningful privacy safeguards currently exist. This is true for several reasons. First, there is no evidence that self-regulation currently protects consumer privacy. The reason are clear: consumers cannot make informed decisions about competing providers because (1) they do not know in fact how their information will be used, (2) companies reserve the right to change the terms of the privacy policy, and (3) there is no easy metric that allows consumers to make meaningful decisions.

By way of contrast, consider the purchase of an automobile by a consumer who is concerned about fuel economy or the purchase of a pint of ice cream by a second consumer who is on a diet. In the first example, the consumer will be able to look at the reported Miles Per Gallon for vehicles and make a reasonably informed decision about the various trade-offs concerning fuel economy. The consumer will no doubt consider other factors, such as price, safety, and brand reputation. Still, for two comparable vehicles, a consumer can make a meaningful choice based on fuel economy because the MPG figure provides an easily understood measure.

The second example is similar. The consumer looking at ice cream might consider flavor and brand. When it comes to counting calories, there is a simple metric, displayed on the food label, that might lead the consumer to the frozen yogurt or perhaps the low-fat ice cream. Again, the consumer can make an informed decision based on easily factual information that does not change.

There is simply no way for consumers today to make similar decisions when it comes to privacy protection. The general problem of privacy protection through self-regulation is well understood and has been described in detail in many books and articles. But there are particular problems with self-regulation in the online advertising sector that argues even more strongly for government intervention.

Consumers whose personal data are gathered are not the actual customers of the companies that sell advertising. In other words, it is the web publisher who makes the decision about which advertiser to do business with. A consumer who goes to a web site and clicks on an ad is unlikely to know the source of the ad, and therefore almost certainly has no idea what privacy rights, if any, might exist. In the absence of "privity," the contractual obligations that exist between the online advertiser and the web publisher, the consumer is left without any legal recourse or market-based alternative. That is why the online advertising sector, now that it involves the collection of consumer-identified data, is a textbook example of market failure that requires government intervention.

Add to all of this the recent news of consolidation in the online advertising industry coupled with the rise of more invasive marketing techniques, such as behavioral targeting, and it should be clear that the Internet is headed toward a genuine privacy meltdown. These advertising companies will build vast secret profiles on consumers. They will be under no legal obligation to limit the use of the data or the harms to the consumers. The business practices will remain opaque. Consumers will be unable to exercise meaningful choice in the marketplace. And the increasingly competitive nature of the industry will lead to more invasive practices with less accountability. Some might describe as simply "a loss of privacy" but the outcomes will be far more serious – discriminatory practices based on user profiles, exploitation of personal data for commercial gain, extraction of consumer "rents," the loss of control over the assertion of identity in the digital environment.

For all of these reasons, we believe it is clear that the Federal Trade Commission must impose privacy safeguards if the Google-Doubleclick merger is approved.

"2) We've heard your concerns about the dangers to consumer privacy posed by the transactions in Internet advertising. We wonder, however, don't the companies who have access to this information have an incentive to protect it as much as possible? In other words, will consumers switch to other search engines if they think that one is not very good at protecting their search histories and other information private?"

Again, the essential problem is that there is no meaningful way for consumers to evaluate and compare how well companies' safeguard the personal information they collect. Every incentive is for the companies to conceal their data collection practices as well as any risks that consumers may face. This is why privacy policies typically include vague assurances rather than detailed information, such as the information that is collected, who has access to it, and how it will be used.

It is also obvious that all of the incentives are for companies to conceal problems when they occur. That is why there is an effort underway in virtually all of the states to establish obligations for companies to provide notification when breaches occur. Companies are understandably reluctant to call attention to problems, particularly when liability might result.

When questions do arise about certain practices, companies will invariably explain that their practices are for "the benefit of the consumer." This is precisely how Google justifies its lengthy data retention period even though it is the lengthy retention that places at consumers at risk of government surveillance and commercial exploitation.

All of the factors point toward the need for regulatory intervention to help ensure that consumers can in fact make meaningful choices. Greater obligations for transparency, for example, can provide information for Internet users can make informed decisions among competing providers, much as MPG and the food labels help consumers make informed decisions about cars and nutrition.

"3) In his testimony, Dr. Leonard suggests that EPIC does not provide evidence for the assertion that an increased collection of personal information by internet advertisers poses far reaching privacy threats and this conduct has already injured consumer by invading their privacy. What evidence do you have that such harm has and will continue to occur?"

We have provided in our filings to the Federal Trade Commission regarding the merger detailed information about privacy risks and security flaws for both Google and Doubleclick.

As I indicated during the hearing, it is not very difficult to find evidence of substantial evidence of harm to consumers with even savvy Internet advertising companies, such as Google. A quick "Google search" for the phrase "Google security flaws" returned 2,210,000 entries. (Please see attached). Among the listings on the first page (as ranked by Google):

- "Google fixes security flaw – Security experts had also given warning of security flaws found on Google's and Yahoo's web-based e-mail services in the past . . ."
- "Jibbering Musings >> More Google security failures – Like the gmail security flaw google appears to have a complete silence approach to security, I guess they think what the public don't know can't worry them . . ."
- "Google Huge Gmail Security Flaw; Fixed Now But Are There Others? – Whenever you hand over your sensitive daily tasks – such as email, word, spreadsheets—to an online provider, you'll always have that nagging . . . "
- "Major Security Flaw With Google Sitemaps Stats [SearchEngineWatch] – David Naylor points out, as does this WebmasterWorld thread spotted via Threadwatch, a pretty surprising security oversight with Google's new Sitemaps stats . . ."

The top entry (again, according to Google) stated:

- "Google Closes Presentations Security Flaw After 15-Hour Breach – You're looking at a small selection of the email addresses I harvested from innocent readers of this blog and others, thanks to a security flaw in Google's . . .

Mr. Leonard may be correct that it would be difficult for a particular consumer to link the security flaw that caused a specific harm to her, such as the increased risk of identity theft. This is understandable. Google is in possession of the personal data and has far more information about the subsequent use of the data than does the individual.

Economists describe this as an "information asymmetry." The efficient solution to this problem, again according to the economists, is to place the legal burden on the "least cost avoider," that is to say the party that has better information and is better placed to reduce the risk of harm.

This is the reason that meaningful privacy frameworks appropriately place the responsibility for data privacy and data security on the data holder and not the data subject. These frameworks are typically described as "Fair Information Practices." Virtually all privacy laws in the United States make these Fair Information Practices statutory obligations.

By contrast, "notice and choice" models, favored by Internet advertisers, place the burden on individuals to monitor the practices of the businesses that possess their data. This is, of course, impossible when companies are under no obligation to be transparent about their practices. In other words, these models are less efficient, and allow companies to extract from consumers enormous value that, if a real market existed, would never be transferred without some compensation.

Mr. Leonard's point also explains our objection to Google's proposal to follow the APEC (Asia Pacific Economic Cooperation) Privacy Framework for Internet privacy. The APEC Privacy Framework incorporated the concept of consumer harm to make it more difficult to establish liability for companies that do not follow best practices for privacy protection.

I recently exchanged views with Mr. Schmidt, CEO of Google, in the Financial Times on this point. My commentary is attached.

Thank you, again, for the opportunity to participate in the hearing and to submit answers to your additional questions.

**Senator Kohl's Follow-Up Questions for Hearing on**
**"An Examination of the Google-DoubleClick Merger and the Online Advertising Industry: What Are the Risks for Competition and Privacy?"**

**For Brad Smith**

**1.** Mr. Smith, your company recently purchased a competitor to DoubleClick, a company called aQuantive, for $6 billion. Yet, you argue that a combined Google-DoubleClick is anticompetitive and others will be shut out of this burgeoning market as a result of their deal. Are you suggesting that a company that wants to advertise on the Internet will have no choice but to use a combined Google-DoubleClick to reach potential customers? And, if so, doesn't your large purchase of aQuantive disprove that argument?

Microsoft's Response:

It is of course true that Google's acquisition of DoubleClick has spurred consolidation in online advertising. This does not change the fact, however, that with this merger Google would buy its way into a dominant position, making it substantially less likely that any other competitor could achieve the scope and scale necessary to compete with Google effectively. Even if this elimination of competition were not to result in Google effectively being the "only" choice, it will substantially lessen the competition Google would face in the marketplace. It is only logical that smaller competitors like aQuantive recognized that they must team up for survival. Facing a competitor with the size and advantages of a combined Google-DoubleClick, even companies as large as Microsoft recognize that internal growth alone will not be enough to give them a fighting chance to compete in this space. Microsoft paid a substantial premium for aQuantive because the acquisition was the only way for Microsoft to retain a foothold, however small, in the online advertising space. For instance, even with the purchase of aQuantive, Microsoft will have a roughly 5% share of the supply of publisher ad-serving tools, as compared to Google/DoubleClick's combined share of nearly 80% of that market, based on ad revenues.

Microsoft's acquisition of aQuantive is by no means a guarantee of success, particularly if Google is allowed to buy its way into dominance. In fact, it is a huge bet by Microsoft and an acquisition we had to make. In short, we paid $6 billion for aQuantive to have a *chance to compete* on the merits. Google wants to pay $3 billion for DoubleClick to *avoid having to compete on the merits* and effectively buy its way to dominance over advertising on websites across the Internet.

Thus, Microsoft's acquisition of aQuantive does not change the fact that Google's acquisition of DoubleClick would substantially lessen competition in the supply of technologies that websites and advertisers use to serve online ads and to mediate transactions between them. It would enable Google to acquire DoubleClick's unparalleled scope of contracts and relationships with websites and the critical online advertising space that these websites control. The acquisition would also enable Google to exploit both economies to scale and returns to scale in order to erect barriers to competition. I describe these effects in more detail on pages 9-14 of my written testimony.

The acquisition would thereby place Google in the position of a pervasive gateway between websites' online advertising space and advertisers who seek to display their ads in that space. Other companies and new entrants are likely to be unable to compete effectively against the combined company, as a substantial portion of the online advertising space to which advertisers seek access will be under Google's exclusive control. Moreover, Google's acquisition of DoubleClick will give the combined entity an overwhelmingly dominant position and unfair advantage, one that will enable them to succeed even over companies that offer consumers higher-quality products and services for better value. This, to us, is a substantial lessening of competition.

**2.** In a market with vibrant competition, the entrants will compete to offer the consumer the best price, the best quality or the best service. When it comes to major Internet companies, one of the ways a company may distinguish itself is by offering the best privacy policy to consumers. The major Internet search engines -- Google, Microsoft and Yahoo -- have different policies on what they do with consumer information and how long they retain search histories. Does the consolidation we have seen in this industry in the last few months decrease the likelihood that these companies will compete to offer the best privacy policy?

Microsoft's Response:

Recently completed acquisitions in the online advertising space have not decreased the likelihood that companies active in this area will compete in the quality of their privacy practices, simply because none of these acquisitions has yet enabled the combined company to achieve a dominant market position. Google's proposed acquisition of DoubleClick, by contrast, would give the combined company dominant market share and market power in online advertising. As a result, Google would be in a stronger position, one that would enable it to ignore the market pressures and competitive constraints that exist in a competitive market – including market pressure to compete on the quality of its privacy practices.

While this would be a significant concern in *any* transaction involving consumer privacy, these concerns are much greater in this case given the massive amount of online consumer data that the combined company would acquire and be able to collect in the future. This acquisition would give a single firm control over the largest database of information on individual online behavior the world has ever known. Going forward, Google could combine data collected about users' behavior across the entire google.com domain, the network of websites that participate in Google AdSense network, and network of websites that use DoubleClick to serve ads. This would allow Google to track a wide variety of user activity — including the websites and specific web pages they visit, how long they stay there, what advertisements or other links they click, etc. — across a large share of the world's most popular websites and services, and combine that data with the search queries users enter on Google.com, which holds a dominant and growing share of Internet search. Google would also be able to associate this information with users' personal information and other data it collects, such as information about their online purchases, and would have virtually no limits on its ability to use the data. This would enable Google to engage in behavioral profiling and online ad targeting that Google's competitors – with their significantly lower search query shares and less extensive online ad networks – simply could not compete against effectively.

In short, by purchasing DoubleClick, Google would gain an information advantage that would substantially lessen competition in online advertising. Both advertisers and websites would increasingly perceive Google as a "must buy." Lacking the depth or breadth of a combined Google-DoubleClick's data collection and user profiling capabilities, other firms would be would be unable to compete effectively for advertising revenues or websites' advertising space. As a result, Google would be largely impervious to consumer demand or other market pressure to strengthen, or even maintain, the quality of its privacy practices.

SUBMISSIONS FOR THE RECORD

JOINT CENTER

AEI-BROOKINGS JOINT CENTER FOR REGULATORY STUDIES

# An Antitrust Analysis of Google's Proposed Acquisition of DoubleClick

**Robert W. Hahn and Hal J. Singer**

**Related Publication 07-24**

**September 2007**

# An Antitrust Analysis of Google's Proposed Acquisition of DoubleClick

**Robert W. Hahn†**
**Hal J. Singer††**

*By serving as a key revenue source for online content providers, online advertising has been instrumental in the development of innovative websites. Continued innovation among content providers, however, depends critically on the competitive provision of online advertising Suppliers of online advertising provide three primary inputs—(1) advertiser tools, (2) intermediation services, and (3) publisher tools. Certain suppliers such as Google provide a platform that combines the inputs into one integrated service. In this paper, we focus on the overlapping products sold to advertisers by Google and DoubleClick—namely, the supply of advertiser tools. Because the supply of advertiser tools is highly concentrated, Google's proposed acquisition of DoubleClick raises important questions for antitrust authorities. Proponents of this acquisition argue that Google and DoubleClick do not compete—that is, buyers of search-based or contextual-based advertising (the two advertising channels in which Google participates) do not perceive graphic-based advertising (the advertising channel in which DoubleClick participates) to be substitutes. Thus, they conclude that the proposed acquisition would not lead to higher prices*

*In this paper, we examine economic evidence and legal precedent to help identify the relevant antitrust product market for Google's proposed acquisition of DoubleClick. According to the Federal Trade Commission and Department of Justice Horizontal Merger Guidelines, product markets are defined by the response of buyers to relative changes in prices. To inform how buyers—in this case, online advertisers—would respond to relative changes in price across the three online advertising channels (search, contextual, and display), we analyze the results of a survey of online retailers. The survey suggests that (1) a significant share of online advertisers would substitute among the three channels in response to relative changes in prices, and (2) a significant share of DoubleClick customers would turn to Google before any other supplier in response to an increase in the price of DoubleClick's advertiser tools. In particular, the survey indicates that a combined Google-DoubleClick would likely have a greater incentive to increase the price of DoubleClick's advertiser tools relative to a stand-alone DoubleClick offering.*



† Director, AEI-Brookings Joint Center for Regulatory Studies.
†† President, Criterion Economics, L.L.C. We would like to thank Robert Crandall and Robert Litan for their insightful comments. We would like to thank Keith Klovers and Molly Wells for excellent research assistance. AT&T and Microsoft provided support for this research. The views in this paper represent those of the authors and do not necessarily represent the views of the institutions with which they are affiliated. 

## I. INTRODUCTION

Online advertising has played a key role in the emergence of a vast amount of Internet content. In 2007, U.S. advertisers were expected for the first time to spend more on online advertising than on radio advertising.[1] Without the revenue that websites generate from posting advertising on their pages, countless applications and social networks such as WashingtonPost.com, Engadget, and MySpace would not likely have been economically viable. Advertisers bear the cost of webpage development through advertising fees; the alternative—charging consumers subscription fees—would result in a smaller online environment. This result follows from the fact that end users are generally more price-sensitive than advertisers.

Considering the rapid pace of consolidation among online advertising firms, Google's planned acquisition of DoubleClick presents antitrust authorities with a much-needed opportunity to define the relevant antitrust product market for merger review. According to the U.S. Department of Justice and Federal Trade Commission *Horizontal Merger Guidelines* ("*Merger Guidelines*"), product markets are defined as the smallest group of services such that a hypothetical monopoly provider of those services could profitably raise prices above

1. Ben Macklin, *Radio Trends. On Air and Online*, EMARKETER, Aug. 2007, abstract *available at* http://www.emarketer.com/Reports/All/Emarketer_2000409.aspx?src=report_head_info_sitesearch ("By 2008, online advertising in the US is expected to surpass radio advertising spending."). For 2007, eMarketer projects $21.7 billion in spending on online advertising, versus $20.4 billion for radio advertising.

competitive rates.[2] Fortunately, past efforts by the courts and other antitrust authorities provide boundaries within which the Federal Trade Commission (FTC) can define a relevant product market for the purpose of analyzing the competitive effects of the proposed acquisition. In the absence of data on how buyers have responded to relative changes in prices, survey data—such as the European Commission's pending survey of Google's customers—can be used to help define the relevant product market.[3]

The proposed acquisition has received much attention from the press and analysts. For example, Stiefel Nicolaus analysts have identified several antitrust concerns that they feel will have to be addressed before Google's proposed acquisition of DoubleClick can move forward. The first concern is that Google may accumulate so much consumer data—which can be used to more effectively target advertising—that it may reach a tipping point that limits new entrants into the online advertising market.[4] This concern suggests that new entrants would not have comparable consumer information, and thus would begin at a significant competitive disadvantage to Google. The acquisition could also put existing rivals at a permanent competitive disadvantage, which could impair their ability to compete effectively. The analysts also note that consumer privacy may also be harmed by this acquisition. They point to the 2000 purchase of Abacus by DoubleClick, an event that sparked a privacy battle and, ultimately, a consent decree maintaining the separation between their consumer databases. We do not address the consumer privacy issues raised by the proposed acquisition here, which is not meant to suggest that the matter is trivial.

In this paper, we use economic analysis to help identify the relevant antitrust product market for Google's proposed acquisition of DoubleClick. Specifically, we examine the procompetitive hypothesis, offered by proponents of the acquisition, that Google and DoubleClick compete in distinct, separate product markets, as posited by Thomas M. Lenard and Paul H. Rubin in their August 21,

---

2. *See* Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 1.1 (1997). ("Absent price discrimination, the Agency will delineate the product market to be a product or group of products such that a hypothetical profit-maximizing firm that was the only present and future seller of those products ('monopolist') likely would impose at least a 'small but significant and nontransitory' increase in price.") [hereinafter *Merger Guidelines*].

3. *EU Questions Google Customers over DoubleClick*, REUTERS, Sept. 6, 2007, *available at* http://today.reuters.com/news/articlenews.aspx?type=technologyNews&storyid=2007-09-06T124843Z_01_BRU005921_RTRUKOC_0_US-GOOGLE-DOUBLECLICK-EU.xml ("The European Commission has taken the unusual step of sending questionnaires to Google customers before the company officially seeks permission to take over a rival, two business sources familiar with the situation said on Thursday.").

4. Blair Levin, Rebecca Arbogast & David Kaut, *Google-DoubleClick Merger Review – A Big Battle in a Bigger War*, STIEFEL NICOLAUS, Apr. 23, 2007, at 3 ("In the context of the competition analysis, opponents are concerned that the Google-DoubleClick combination will have access to so much consumer data...that there will effectively be a tipping point for targeting ads such that the current (and growing) market-share gap between Google and its competitors will become irreversible.").

2007 article in the *Wall Street Journal*.[5] Lenard and Rubin contend that Google places ads "mainly" on its own search websites ("search-based ads"), whereas DoubleClick-supported ads use third-party websites such as CNN.com or NYTimes.com ("publisher-based ads"). As a result, they argue that "the two companies undertake activities that don't overlap."[6] To test that hypothesis, we analyze new survey data, which reveals the degree to which buyers of online advertising perceive the three online ad channels—(1) search, (2) publisher-based contextual, and (3) publisher-based graphic—to be substitutes. As an alternative defense of the merger, Lenard and Rubin argue that online advertising competes with other forms of advertising, such as print and television.[7] To assess the hypothesis that a hypothetical monopoly provider of online advertising would need to control the supply of other forms of media to raise prices above competitive rates, we examine regulatory precedent, empirical research, and court decisions relating to inter-media substitution.

Our analysis of market definition proceeds in two steps. We begin by analyzing which products should be included in the relevant market *within a given channel*. Suppliers of online advertising offer three inputs: (1) advertiser ad management tools ("advertiser tools"); (2) advertiser-publisher intermediation ("intermediation services"); and (3) publisher ad management tools ("publisher tools"). Advertiser tools and publisher tools are software packages that allow advertisers and publishers, respectively, to track, manage, and serve ads, and are provided by specialized software firms. Ad intermediation refers to the process of matching advertisers (buyers) to publishers (sellers) in an advertising marketplace, which can be done by publishers' direct sales forces, specialized "ad networks" that resell publisher ad space, or "ad exchanges" that provide an online marketplace for advertisers and publishers. Intermediation provides access to publishers' ad space, which may be provided by either search engines (Google.com or Yahoo!.com) or by third-party content web sites (for example, CNN.com). Google provides a platform that integrates each element into one offering for search and (third-party) contextual ads, whereas DoubleClick provides advertiser tools and publisher tools for firms using graphic (also known as "banner" or "display") ads. Because our analysis focuses on the competitive effects on online *advertisers*, we do not include the supply of *publisher* tools in the product market.[8] Because the two inputs sold to online advertisers—advertiser tools and intermediation service—are complements,[9] basic economic

5. Thomas M. Lenard and Paul H. Rubin, *Googling "Monopoly"*, WALL ST. J., Aug. 21, 2007, at A14, *available at* http://online.wsj.com/article/SB118765934437503661.html.

6. *Id.*

7. Lenard & Rubin, *supra* note 5.

8. Our analysis focuses on the likely merger effects from the perspective of online advertisers. A similar analysis could be performed from the perspective of publishers, who serve as buyers on the other side of this market.

9. *See* DoubleClick Inc., DoubleClick Advertising Exchange, http://www.doubleclick.com/us/products/adx (last visited Sept. 19, 2007) ("Usage of the DART Suite of products is optional; you may use the DoubleClick Advertising Exchange service with other ad-serving products as well."). This advertisement demonstrates that DoubleClick's intermediation service (the DoubleClick Advertising Exchange) is complementary to DoubleClick's advertiser tool products (the "DART Suite" generally and DART for

reasoning dictates that advertiser tools and intermediation services cannot be in the same product market. A product market consists of demand substitutes or supply substitutes.[10] Applying the *Merger Guidelines*, a hypothetical monopoly provider of advertiser tools would not need to control 100 percent of the supply of intermediation services in order to profitably raise the price of advertiser tools above competitive rates.[11]

Having determined that advertiser tools are distinct from intermediation services sold to advertisers, we next consider whether advertiser tools (or intermediation services) used in one channel (for example, contextual) belong in the same product market as advertiser tools used in another channel (for example, graphic). We address the issue of buyer substitution across channels by analyzing a survey of 200 online retailers, an important component of all online advertisers. According to Section 1.11 of the *Merger Guidelines*, product markets shall be defined based on, among other items, "evidence that buyers have shifted or *have considered shifting* purchases between products in response to relative changes in price or other competitive variables."[12] In the absence of evidence that online advertisers have actually shifted purchases between search, contextual, and graphic segments in response to relative changes in price, the survey can inform whether buyers *have considered shifting*—at least when prompted by a survey—purchases between those segments in response to changes in relative prices. As a result, our survey (and surveys like it) represents a legitimate method by which antitrust authorities can define the product markets implicated by Google's proposed acquisition of DoubleClick. Our survey indicates that online advertisers do in fact perceive the three channels of online advertising to be substitutes.

Having defined advertiser tools sold to support ads in search, contextual, and display channels as a relevant antitrust market, we next examine how concentrated that market is, and how much more concentrated the market will become if the parties are allowed to consummate the proposed transaction. We find that (1) the advertiser tools market is highly concentrated, and (2) the proposed acquisition would significantly increase concentration. A similar (static) analysis of the competitive effects in the market for intermediation services sold to advertisers would likely generate smaller competitive effects given the fact that DoubleClick only recently began to provide intermediation services. The two analyses presented here—market definition and market

---

Advertisers in particular) and to rival advertiser tools (such as ValueClick's Mediaplex or aQuantive's Atlas).

10. The definitive industrial organization textbook states that a "proper definition of the product market dimension of a market should include all those products that are close demand or supply substitutes." *See* DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 612 (3d ed. 2000). The authors explain that "Product B is a demand substitute for product A if an increase in the price of A causes consumers to use more B instead." *Id.*

11. Market definition is primarily informed by demand-side evidence. *Merger Guidelines, supra* note 2, at §1.0 ("Market definition focuses solely on demand substitution factors—i.e., possible consumer responses. Supply substitution factors—i.e., possible production responses—are considered elsewhere in the Guidelines in the identification of firms that participate in the relevant market and the analysis of entry.").

12. *Id.* at §1.11 (emphasis added). Buyer-side substitution is one of four considerations enumerated in this section.

concentration—track Section 1 of the *Merger Guidelines*. The FTC will also have to consider the potential adverse competitive effects of mergers (Section II of the *Merger Guidelines*), entry analysis (Section III), and merger-related efficiencies (Section IV). Analyses of Sections II, III and IV of the *Merger Guidelines* are beyond the scope of this paper. The remainder of this paper is organized as follows.

Part II examines the online advertising industry. We provide a way to categorize different segments of the industry, and we identify the largest suppliers within each segment. We demonstrate that Google currently operates in the search-based and contextual publisher-based ad segments. According to a 2007 analysis by Alan Rimm-Kaufman, a marketing consultant, Google accounted for 73 percent of the budgets of companies that advertise on search engines (versus 21 percent and 6 percent, respectively, for Yahoo! and Microsoft).[13] The study also revealed that Google charged more for each click, owing to Google's "bigger network of advertisers and more competitive online auctions."[14] In addition to search advertising, Google sells contextual advertising through an ad network by purchasing ad space from third parties such as Washingtonpost.com and then reselling that space to advertisers. Similarly, it sells search advertising on its own site, Google.com, directly to advertisers. In contrast, DoubleClick is the leading participant in the graphic publisher-based ad segment. DoubleClick distinguishes itself from Google or graphic ad firms (such as ValueClick and aQuantive) in the sense that DoubleClick does not purchase or resell advertising space. Instead, DoubleClick—at least until very recently (April 2007)—focused its activities on the sale of advertiser tools and publisher tools.

In Part III, we examine previous antitrust decisions to determine what regulatory authorities and courts have defined as the outer limits of a relevant product market relating to online advertising. Previous U.S. antitrust proceedings relating to online advertising—including *KinderStart.com LLC v. Google, Inc.*, *Prometheus Radio Project, et al v. F.C.C.*, and the FCC's *2002 Biennial Regulatory Review*—have a direct bearing on the product market implicated by Google's proposed acquisition of DoubleClick. We supplement this legal and regulatory review with a review of the economic literature. A highly relevant article by Reid, King, Martin and Soh demonstrates based on empirical evidence that advertisers do not find online advertising to be a substitute for traditional advertising media, such as television, radio, and outdoor advertising.[15] The legal and economic review suggests that search-based advertising is too narrow and all advertising is too broad.

In Part IV, we examine buyer substitution patterns using both anecdotal evidence and a survey of online advertisers. In particular, the survey provides evidence of how buyers—in this case, online advertisers—would react to a relative change in the price of the three major channels for online advertising. The survey offers many insights on market definition that should prove helpful to antitrust agencies:

13. *Google. Inside the Googleplex*, ECONOMIST, Aug. 30, 2007.

14. *Id*

15. *See* Leonard N. Reid, Karen Whitehill King, Hugh J. Martin & Hyeonjin Soh, *Local Advertising Decision Makers' Perceptions of Media Effectiveness and Substitutability*, 18 J. MEDIA ECON. 1, 35-53 (2005).

- 67 percent (weighted by expenditures, 65 percent) of respondents indicated that they would increase their purchases of *contextual ads* in response to a hypothetical 10 percent increase in the price of *graphic ads*, indicating they view the two products as substitutes.
- 66 percent (weighted, 69 percent) indicated that they would increase their purchases of *search ads* in response to a 10 percent increase in the price of *graphic ads*, indicating they view the two types of online ads to be substitutes
- 69 percent of respondents (weighted, 70 percent) would decrease (but not necessarily eliminate) their use of DoubleClick's advertiser tools if the price of DoubleClick's advertiser tools increased by 10 percent; 41 percent (weighted, 26 percent) indicated that they would increase their purchases from a rival graphic ad firm; 19 percent (weighted, 24 percent) would increase their purchases from a contextual advertising firm; 9 percent (weighted, 19 percent) would increase their purchases from search advertisers.
  - Respondents who indicated they would purchase more contextual advertising were asked which firm they would first consider. A majority (62 percent unweighted, 52 percent weighted) indicated that they would use Google AdSense, compared to 19 percent each for Microsoft AdCenter (weighted, 13 percent) and the Yahoo! Publisher Network (weighted, 35 percent).
  - Respondents who indicated they would shift some expenditures to search-based advertising were asked which search-based provider they would first consider. Google.com was the most popular, with 67 percent of the relevant respondents (weighted, 58 percent). Yahoo.com and MSN.com each garnered 17 percent (weighted, 1 and 40 percent, respectively).
  - Thus, Google would retain almost 18 percent (equal to 0.62* 0.19+0.67*0.09) of the "marginal" DoubleClick customers—that is, DoubleClick's customers who substitute some portion of their spending to a rival supplier of advertiser tools.

Based on the evidence presented in Parts III and IV, we conclude that the relevant product market to analyze the competitive effects of Google's acquisition of DoubleClick is online advertiser tools, consisting of tools used to support both search-based and publisher-based advertisements. The implication of this result is that providers of search and contextual-based advertising compete with providers of graphic-based advertising. Stated differently, search and contextual-based advertising likely constrain the price of graphic advertising.

In Part V, we attempt to construct a meaningful measure of market concentration in the market for advertiser tools used in all three channels. Using the *Merger Guidelines* in combination with the survey results, one can make some inferences on the likely competitive effects of the acquisition. We estimate that the post-merger Herfindahl-Hirschman Index (HHI) using revenue shares would vastly exceed 1,800 and the change in HHI would vastly exceed 100—the threshold established by the *Merger Guidelines* for creating a presumption that the transaction would likely create or enhance market power or facilitate its exercise. Our general findings about market concentration are not sensitive to changes in the way we treat advertiser expenditures that ultimately flow to the publishers. Based on the survey evidence of marginal DoubleClick customers who would substitute to Google, one can reasonably infer that a combined Google-DoubleClick would have greater incentive to increase the price of DoubleClick's advertiser tools relative to a standalone DoubleClick. Part VI concludes.

## II. THE ONLINE ADVERTISING INDUSTRY

There are two basic types of online advertisements: (1) search-based advertisements generated by search engine results ("search ads"), and (2) publisher-based ads placed alongside content on third-party websites ("publisher-based ads").[16] Search ads appear alongside search engine results, and are often labeled as "sponsored results." Publisher-based ads, which are also called "affiliate ads," are advertisements placed alongside content on third-party websites; examples include advertisements found on ESPN.com, NYTimes.com, and web journals ("blogs"). Publisher-based ads can be text-based ("contextual ads") or graphic display ("graphic ads"). These three segments together provide a reasonably complete representation of the online advertising industry. Table I displays the segments graphically. For each advertising segment, we list the leading providers.

16. Email and online classified advertising—a third potential segment—is distinct from search and publisher ads because email and classified ads are used primarily by individuals (and some small businesses), and are not effective for online advertisers who use search and publisher ads. For example, *see* Thomas Eisenmann, Presentation at the AEI-Brookings Joint Center: The Economics of Internet Advertising (July 18, 2007) [hereinafter *Eisenmann Presentation*]; David S. Evans, Presentation at the AEI-Brookings Joint Center: The Economic Structure of the Online Advertising Industry (July 18, 2007), at 2; Lorin Hitt, Presentation at the AEI-Brookings Joint Center: The Proposed Google-DoubleClick Acquisition (July 18, 2007) [hereinafter *Hitt Presentation*]; . The exclusion of email and online classified ads is implicit in Eisenmann's and Hitt's discussions, and explicit in Evans's diagram.

TABLE 1: SEGMENTS OF THE ONLINE ADVERTISING INDUSTRY AND THE MAJOR PROVIDERS BY SEGMENT

| Online Advertising | | |
|---|---|---|
| Search-Based | Publisher-Based | |
| | Contextual | Graphic |
| •Google.com<br>•Yahoo.com<br>•MSN.com<br>•AOL.com<br>•Ask.com | •Google AdSense<br>•Yahoo Publisher Network<br>•Quigo | •DoubleClick<br>•ValueClick<br>•aQuantive<br>•24/7 Real Media |

*Note*: AOL.com and Ask.com use Google software to supply search-based advertisements.

As Table 1 shows, Google currently operates in the search and contextual publisher-based ad channels. Google sells contextual advertising through an ad network by purchasing ad space from third parties (such as Washingtonpost.com)[17] and then reselling that space to advertisers. Similarly, Google sells search advertising on its own site, Google.com, directly to advertisers.

DoubleClick, a leading provider in the graphic publisher-based ad segment, is distinguishable from Google and other graphic ad firms (such as ValueClick and aQuantive) because it does not purchase or resell advertising space to any significant degree as of yet.[18] Instead, DoubleClick provides an input—one type of software for advertisers (advertiser tools) and another type of software for publishers (publisher tools)—that allows advertisers and publishers to manage their advertising inventory and produce ads. Although other graphic ad firms provide competing software, such as aQuantive's Atlas and ValueClick's Mediaplex platforms, these competitors also offer ad space directly through their own ad networks. Although DoubleClick is not involved in the direct sale of ad space, it is still a significant participant in the graphic publisher-based ad segment. Unlike contextual and search ads, no one firm in the graphic segment provides all necessary inputs. Figure 1 illustrates the fragmented nature of the graphic ad market.

---

17. WashingtonPost.com has recently agreed to an extension of its contextual and search advertising agreement with Google. *See* Press Release, Google, Washingtonpost.Newsweek Interactive and Google Renew Multi-Year Advertising Agreement (July 18, 2007), *available at* http://www.google.com/intl/en/press/pressrel/20070718_adsense.html [hereinafter *WashingtonPost com-Google Contract Extension*].

18. DoubleClick has entered the businesses of buying and selling online ad space with its April 2007 launch of a beta version of the DoubleClick Ad Exchange.

FIGURE 1: CONTEXTUAL AND GRAPHIC AD INPUT PROVIDERS

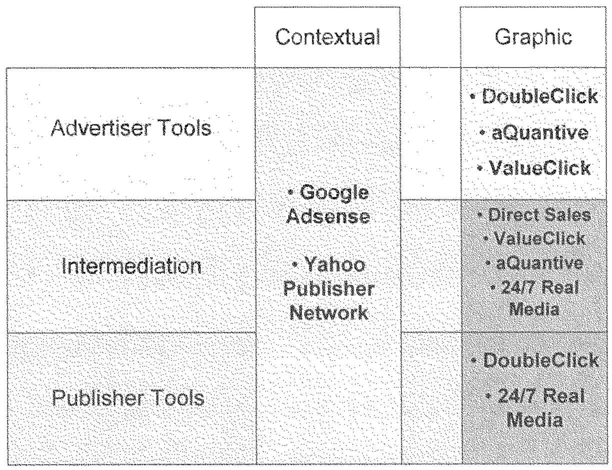



Figure 1 shows that Google and Yahoo! provide integrated contextual platforms, whereas the fragmented nature of the graphic ad market requires more than one firm to provide inputs. However, DoubleClick has announced plans for its own intermediation service (the DoubleClick Advertising Exchange), which will allow it to offer end-to-end service for graphic ads.[19]

Online advertising revenues are increasing quickly, both in the United States and abroad. A May 2007 Interactive Advertising Bureau (IAB) report estimated U.S. online advertising revenues to be $16.9 billion, an increase of 35 percent over 2005 revenues.[20] Of this amount, IAB estimated search and contextual ad spending to be $6.8 billion, and "display-related" (graphic) ad spending to be $5.4 billion.[21] Internet advertising has grown abroad, as well. In Australia, for example, online advertising is poised to overtake radio in terms of advertising dollars, an increase from 88 percent of radio advertising revenue last year.[22] In

19. DoubleClick Inc., DoubleClick Advertising Exchange, http://www.doubleclick.com/us/products/adx/ (last visited Sept. 19, 2007)..

20. Interactive Advertising Bureau & PriceWaterhouseCoopers, *IAB Internet Advertising Revenue Report, 2006 Full Year Results*, May 2007, *available at* http://www.iab.net/resources/adrevenue/pdf/IAB_PwC_2006_Final.pdf, at 3 [hereinafter *IAB Internet Advertising Revenue Report*] ("Internet advertising revenues in the United States totaled $16.9 billion for the full year 2006…").

21. *Id.*, at 8 ("Search advertising revenues total $6.8 billion for the full year 2006…Display-related advertising totaled $5.4 billion…"). Note that their definition of search advertising includes contextual ads. *Id.* ("Search categories include:…Contextual search—paid links appear in an article based on the context of the content, instead of a user-submitted keyword.").

22. Andrew Anagnostellis and Tim Plumbe, *Ad Market Overview*, DEUTSCHE BANK, Sept. 14, 2006, at 4. For Fiscal Year 2006 online advertising is listed at AUD 778 million

what follows, we describe the segments of the online advertising marketplace in more detail, and we present market shares for each segment. It bears emphasis that calculation of market shares for a given segment of the online advertising industry does not imply that that segment constitutes a relevant product market.

### A. *The Search Segment*

Search advertising, the largest and fastest growing of the three online advertising segments, is a common search engine feature. In this system, advertisers bid for search terms; when a particular term is used in a search engine query, a given advertiser's paid (or "sponsored") search result appears above or alongside the non-paid (or "natural") search results. Search engines may receive their commissions in different ways, such as on a per-view, per-click, or per-sale basis.

Evidence from industry observers suggests that advertising revenue accrues disproportionately to the high-volume firms. For example, although research firm comScore estimates Google's share of search engine *traffic* to be 49.7 percent,[23] eMarketer projects Google to collect 76 percent of search ad *revenue* (a ratio of 0.66).[24] Second-place Yahoo! serviced 26.8 percent of total search engine *traffic*,[25] but realized only 16 percent of search ad *revenue* (a ratio of 1.64).[26] Yahoo!'s relatively high ratio of traffic-to-revenue is shared by the other major search engines—Microsoft's MSN, Ask.com, and Time Warner's AOL—which together account for most of the remaining 25 percent of search engine volume but less than 10 percent of search ad revenue.[27] Furthermore, a June 2007 analysis by DoubleClick's Performics division indicates that Google's dominant share of search revenue has been widening.[28]

In contrast to eMarketer and IAB, which estimate search revenues in the United Stated only, we estimate worldwide search revenue shares. Because local advertisers could easily substitute advertiser tools produced in one country for

---

versus radio revenues of AUD 888 million. The Deutsche Bank forecast for FY 2007 projects online revenues of AUD 1.1 billion versus projected radio ad revenues of AUD 914 million.

23. *comScore Releases April U.S. Search Engine Rankings*, COMSCORE, May 25, 2007, *available at* http://www.comscore.com/press/release.asp?press=1447 [hereinafter *comScore Search Engine Rankings*]

24. David Hallerman, *Search Marketing: Counting Dollars and Clicks*, EMARKETER, April 2007, *available at* http://www.emarketer.com/Reports/All/Emarketer_2000384.aspx [hereinafter *eMarketer Advertising Report*]

25. *comScore Search Engine Rankings*, *supra* note 23.

26. *eMarketer Advertising Report*, *supra* note 24. Based on a revenue share of 16.3 percent (rounded above for simplicity).

27. *Id.*; *comScore Search Engine Rankings*, *supra* note 23. comScore reports a 10.3 percent search volume share for Microsoft's MSN, a 5.1 percent share for Ask.com, and a 5.0 percent share for Time Warner's AOL. EMarketer reports that Google and Yahoo! together collect 91.9 percent of search advertising revenue (or "paid search"), leaving just 8.1 percent for MSN, Ask.com, AOL, and other lesser competitors.

28. *Q1 2007 Search Trend Report*, DOUBLECLICK PERFORMICS (2007), at 3-4 ("...search spend[ing] on Yahoo! campaigns was up only 33 percent in the first quarter of 2007 versus the same time period last year (compared to an increase of 124 percent year-over-year on Google).").

tools produced in another, the relevant geographic market for analyzing the merger is likely worldwide. To the extent that the U.S. revenue shares reported by eMarketer and IAB are not significantly different from the worldwide revenues that we calculate below, the choice of geographic market is not critical.

Our estimate of Google's revenue share is lower than some industry estimates.[29] For example, a widely reported analysis by Alan Rimm-Kaufman estimated Google's share of search revenue at about 70 percent.[30] There are three possible explanations for this difference. First, "Google Network" websites generate search revenue. For simplicity, we allocated all "Google Network" revenue to Google's contextual revenues. Thus, our estimate of Google's search revenues is likely understated. Second, Google provides some inputs for AOL and Ask.com search ads.[31] To be conservative, we treated AOL and Ask.com as separate entities, which had the effect of decreasing Google's share. Third, Google's search-based revenues are growing faster than its competitors, which would result in higher revenue shares for 2007 (our shares are for 2006).[32] Table 2 presents the reported search ad revenue shares for Google and Yahoo!, along with estimates for Microsoft's MSN, Time Warner's AOL, and Ask.com.

29. We understand that Google generates primarily, if not exclusively, search-based revenue from its "Google web sites." Yahoo!, MSN, and AOL provide content as well as search engine functions on their proprietary web sites, and accompany the content with non-search (primarily graphic) ads. Although we recognize this distinction, data were not available to disaggregate search and non-search revenues on proprietary websites. As a result, we chose to use all proprietary web site (for example, "Google web site" or "Yahoo! web site") revenues as a measure of search revenues. Similarly, despite the possible presence of search revenues in Google, Yahoo!, and Microsoft's "affiliate" revenues, we elected to allocate all "affiliate" revenues as contextual revenues. These distinctions do not affect our HHI analysis, which aggregates firm search, contextual, and graphic revenues into a top-line revenue number.

30. *See Inside the Googleplex*, *supra* note 13.

31. Google provides its AdWords search advertising platform for both AOL and Ask.com, and also provides the content (search engine results from Google.com) for AOL. Ask.com provides its own search engine. To ensure that Google's Ask.com and AOL revenues are not double-counted in our analysis, we remove the Ask.com and AOL revenues from Google's "affiliate" revenues in the contextual segment. Google reported $4.16 billion in "affiliate" (contextual) revenues for 2006, but in Table 3 we report that number less Ask.com and AOL search revenues ($3.052 billion).

32. For example, its "Google web site" revenues for the second quarter of 2007 accounted for 59 percent of search revenue for the top five search engines, as opposed to 49 percent for all of 2006. *See* Google Inc., Quarterly Report (Form 10-Q), at 20 (Aug. 8, 2007). *See also* Yahoo Inc., Microsoft Corp., Time Warner, and InterActive Corp. Quarterly Reports (Forms 10-Q).

TABLE 2: WORLDWIDE PROPRIETARY SITE (SEARCH) SEGMENT REVENUE SHARES, 2006

| Provider | Revenue (M) | Share |
|---|---|---|
| Google | 6,333 | 49% |
| Yahoo! | 3,245 | 25% |
| Microsoft | 2,227 | 17% |
| AOL | 564 | 4% |
| Ask.com | 544 | 4% |
| TOTAL | 12,913 | 100% |

*Sources*: Company SEC filings.

As Table 2 shows, Yahoo! was the second largest provider with 25 percent of search revenue. Yahoo! and Microsoft's MSN.com also receive revenues from graphic and contextual ads placed on their own websites that are unrelated to search, such as Yahoo! Finance. Because we do not have an accurate way to distinguish those revenues, we treat all revenue derived from their websites as search revenues. Thus, search revenue for both Microsoft and Yahoo! may be overstated, which also has the effect of understating Google's actual share.

Table 2 revenues include "traffic acquisition costs" (TAC), which are payments made to content publishers in exchange for contextual ad space or the inclusion of a given firm's search tool on the publisher's web site. We included these revenues in Table 2 because we cannot properly apportion TAC charges between the search and contextual channels. In our HHI analysis, we remove TAC from the aggregated search and contextual revenues to be consistent with methods used by eMarketer[33] and IAB.[34]

Network effects are a driving force behind Google's commanding dominance in the paid search segment. Google's search algorithm, like those of its competitors, relies heavily on consumer search and purchasing information to prioritize its search results and accompanying advertisements.[35] As a result, it has developed a reputation for highly relevant search terms and advertisements, which increases its ability to attract users and advertisers alike. In addition to generating highly relevant results, Google's status as the largest search engine gives it a size and reach not available to advertisers on competing search

33. *See, e.g.* , Press Release, eMarketer, Google Expected to Pocket 25% of Online Ad Revenue in 2006 (Oct. 17, 2006), *available at* http://www.emarketer.com/Article.aspx?id=1004217.

34. *See IAB Internet Advertising Revenue Report, supra* note 20. We infer that IAB/PwC also removes TAC, since their 2006 full-year revenue estimate ($16.9 billion) is consistent with eMarketer's 2006 full-year revenue estimate ($16.879), which removes TAC. *See* Press Release, eMarketer, Yahoo! Languishes, While Google Keeps Pulling Ahead (July 17, 2007), *available at* http://www.emarketer.com/Article.aspx?id=1005162.

35. For example, Google founders Sergey Brin and Lawrence Page discuss how Google's Page Rank delivers the most relevant search results by tracking consumer page choices. As a result, Google's process is highly data-intensive. *See* Sergey Brin and Lawrence Page, *The Anatomy of a Large-Scale Hypertextual Web Search Engine*, PROCEEDINGS OF THE SEVENTH INTERNATIONAL CONFERENCE ON WORLD WIDE WEB 7 (1998), 107-117.

platforms. This increased size of the online audience is particularly important in an industry where much of the advertising space is devoted to audiences too small for conventional advertising. For example, Google's vast audience allows it to reach more members of a targeted audience (for example, water ski enthusiasts) at a lower cost than their search competitors or traditional outlets such as print, television, or radio advertisements.

The search ad segment is particularly favored by online retailers. For example, retailing giant eBay is the largest user of online search advertising, accounting for 4.1 percent of all "impressions" or advertisements, viewed in March 2007.[36] comScore notes that, "[t]he top ten paid search advertisers, generating 16 percent of all sponsored links, were all retail or comparison shopping sites."[37] Considering that 280,000 advertisers used Google services alone in 2004, and more than 600,000 are expected to use Google by 2008,[38] it is remarkable that the top ten advertisers managed 16 percent of all impressions.

### B. *The Publisher-Based Segment*

Publisher-based ads represent a second major segment of the online advertising industry. These ads are generally distinguished by their visual presentation, and are often classified as either contextual ads or graphic ads. These ads are also differentiated by the use of audience targeting mechanisms, which advertisers use to limit the scope (and thus cost) of advertising campaigns to those consumers most likely to purchase their products. These differences are largely superficial, however, as both types of publisher-based ads appear above or alongside third-party content. Because they compete for publisher space and for advertising customers, contextual and graphic publisher-based ads are likely perceived as substitutes.

Publisher-based ads are ubiquitous on the Internet. These ads may appear next to online articles, journals ("blogs"), or various other forms of online content. For example, the advertisements that appear alongside NYTimes.com or ESPN.com articles would be considered publisher-based ads. Although some web properties can command significantly higher rates than others, publisher-based ads are commonplace throughout the universe of third-party content.

The distinction between contextual and graphic publisher-based ads is increasingly blurry. For example, Google notes that its contextual advertising tool AdSense, which scans a page's content and selects an appropriate (usually text-based) ad, can now deliver "text or image ads."[39] Similarly, Microsoft portrays its "content modules" as including "...text-only, text and graphic, or scrolling behavior."[40] These innovations have increasingly brought contextual

36. *E-Commerce Sites Dominate Paid Search Advertising*, COMSCORE, June 5, 2007, *available at* http://www.comscore.com/press/release.asp?press=1461.

37. *Id*

38. Verne Kopytoff, *Google Forecasts Growth*, SAN FRANCISCO CHRON., Oct. 20, 2004, *available at* http://sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2004/10/20/BUG269CI1P1.DTL&type=business. More recent figures were unavailable.

39. Google, Inc., Learn About AdSense, https://www.google.com/adsense/login/en_US/ (last visited July 6, 2007).

40. Microsoft Corp., Microsoft Digital Advertising Solutions, Content Module, http://advertising.microsoft.com/Content-Module (last visited July 6, 2007).

and graphic advertisers into direct competition, as well as making these products closer from the perspective of online advertisers.

*1. Contextual Ads*

Contextual advertising is very similar to search advertising; unsurprisingly, the major search engines also dominate this advertising segment. As the name suggests, this ad type appears as a set of "sponsored" or "featured" ad links. It is known as "contextual" advertising because the particular ad to be served is chosen to match the context of the content against which it is displayed. To do so, contextual publisher ad servers scan the webpage for keywords that identify what kind of content, and thus what demographic, the webpage or article relates to. The web server then matches the appropriate ad for that demographic. This process is similar to how search engines find pertinent query results.

Consider the example of a young men's clothing retailer. This firm might wish to advertise alongside sports content, under the assumption that such content is disproportionately used by young men. This retailer would bid on a particular keyword—such as "sports"—and supply a text ad to a contextual ad server, such as Google's AdSense. Google's bidding platform performs the intermediation function, whereas the retailer would generate the text ad using Google's advertiser tool. To target the desired demographic, a contextual advertisement would scan the content of a given webpage for keywords that indicate the site contains sports information (for example, "baseball", "batting average" and other words might be used as indicators). If a site is identified as a sports website and assigned the keyword "sports", the clothier's ad would be displayed by Google; if it is not, Google would display a different advertisement from a different client. Content information and ad serving would be provided by Google's publisher tools.

The largest participants in this market are Google's AdSense, Yahoo!'s Yahoo! Publisher Network, and Quigo Technologies' AdSonar. One estimate suggests that about 60 percent of the $2 billion a year industry was claimed by Google's AdSense alone.[41] Yahoo! is the second-most used of the major services by revenue. Table 3 presents estimated market shares as apportioned among these three segment leaders. As discussed in Section II. A., these revenues are based on a firm's reported "affiliate revenues," and thus may include contextual revenue *and* search-based affiliate revenue. In addition, they include TAC payments as revenues, although these revenues are removed in the subsequent HHI analysis when search and contextual revenues are combined. To the extent that Yahoo!'s reported affiliate revenues contain more search revenue (as a percentage of total affiliate revenue) than Google's, our estimate may understate Google's contextual revenue share.

41. As estimated by eMarketer analyst David Hallerman. *See* Louise Story, *An Ad Upstart Challenges Google*, N.Y. TIMES, Feb. 26, 2007, *available at* http://www.nytimes.com/2007/02/26/business/media/26adco.html.

TABLE 3: WORLDWIDE "AFFILIATE" (CONTEXTUAL) SEGMENT REVENUE SHARES, 2006

| Provider | Revenue (M) | Share |
|---|---|---|
| Google | 3,052 | 56% |
| Yahoo! | 2,382 | 43% |
| Quigo* | 60 | 1% |
| TOTAL | 5,494 | 100% |

*Sources*: Company SEC filings; * Brett Tabke, *Interview with Michael Yavonditte*, June 21, 2007.

In 2006, Google accounted for the majority (56 percent) of worldwide contextual advertising revenue.[42] As was the case for the search segment, Yahoo! is the second-largest provider with 43 percent. Several recent start-ups have entered the contextual ad segment, of which Quigo is the largest.

### 2. *Graphic Ads*

In contrast to contextual ads, graphic (also called "non-contextual" or "display") ads can take many forms. These advertisements include traditional banner graphic ads, video ads, and even some rudimentary text-based ads. Graphic ads are also the oldest of the three kinds of online advertising discussed here, with their origins dating back to the first technology boom of the mid- to late-1990s. As such, they enjoy prominent placement on many of the more established online properties, including the online outlets of major media concerns in television, radio, and newspaper.

Graphic publisher-based ads are also distinguished from contextual ads by audience targeting mechanisms, which are important to ensure that advertisers reach their intended audience. Advertisers often want to limit their exposure to those most willing to buy their product, as a way to limit costs and maximize potential revenues. To continue with the previous example, a young men's clothing retailer might prefer to target only men aged 18 to 30; to do so, it might again decide that consumers of sports information are likely to be interested in their products. In contrast to contextual ads, graphic ads use electronic tags, or "cookies", to track which sites an Internet user visits. If an Internet user often visits sports pages, a graphic ad server might select the clothier's ad even if the user is currently viewing a soap opera website, under the assumption that the

42. 56 percent as in Table 3 above. Based on 2006 full-year contextual advertising revenue for each provider. *See*, Google Inc., Annual Report (Form 10-K), at 42 (Mar. 1, 2007). Revenues for Yahoo! are based on 2006 annual revenue as reported in Yahoo! Inc., Annual Report (Form 10-K), at 37 (Feb. 23, 2007); split between Yahoo! own site/affiliate site (contextual/search) revenues based on ratio of 58 percent "owned and operated sites" (search) and 42 percent "affiliate site" (contextual) revenue for the first six months of 2007 (comparable 2006 information was not available). *See* Yahoo! Inc., Quarterly Report (Form 10-Q), at 20 (Aug. 8, 2007). Quigo figures based on conservative estimate of $60 million in 2006 annual revenue, based on CEO Michael Yavonditte's statement that "traditional media" accounts for "a few" million dollars in annual revenue and represents about 5 percent of Quigo's annual revenue. *See* Brett Tabke, *Interview with Michael Yavonditte*, June 21, 2007, *available at* http://www.webmasterworld.com/advertising/3378548.htm.

viewer is of the desired demographic despite his (or her) current viewing choice. Reflecting this focus, some advanced graphics servers are considered "behavioral" servers because they track individual viewing behavior rather than the content of the current webpage.[43]

Although the contextual ad segment is dominated by the large search advertising firms, the graphic ad segment has until now been contested by firms focused primarily or exclusively on this market segment. DoubleClick, ValueClick, aQuantive, and 24/7 Real Media, along with many other independent firms, compete as input or final service providers for graphic advertising, whereas Google's AdSense and Yahoo!'s Yahoo Publisher Network serve the bulk of the contextual segment. Graphic ad intermediation is often provided by publishers' direct sales forces or through ad agencies. ValueClick, aQuantive, and 24/7 Real Media also provide affiliate networks that resell ad space provided by their affiliates. The current industry—characterized by separation between graphic ad firms and firms providing search and contextual ads—is likely to change dramatically with the proposed acquisition of DoubleClick by Google and aQuantive by Microsoft.[44]

The revenues reported here have been assembled from company financial statements or, in the case of DoubleClick, as reported by the *Wall Street Journal* in April 2007.[45] Because some firms, such as ValueClick and aQuantive, combine graphic ad services and other advertising services such as advertising agencies or search advertising, we extracted the graphic ad revenue streams for each company. For example, we reported aQuantive's advertiser tools and publisher tools revenues from its "Digital Marketing Technologies" (which contains its Atlas software tool) division, but not from its "Digital Marketing Services" division (which includes its Avenue A | Razorfish advertising agency). We made similar adjustments for ValueClick (counting revenue from its "Technology" division) and for 24/7 Real Media (counting its tools-based "Technology" revenues). Given DoubleClick's exclusive focus on graphic ads, however, we retained all DoubleClick revenues.

For a given supplier, we compute the share of total expenditures on graphic ads as the sum of direct revenues (from advertiser and publisher tools) plus intermediation revenues plus "indirect revenues"—that is, revenues that were spent on graphic ads but not booked as revenues by suppliers in the graphic channel. We derived indirect revenues by apportioning worldwide 2006 graphic ad revenues based on each firm's share of direct graphic ad revenues (equal to

43. For example, some of Yahoo!'s graphic affiliate ads are served using "behavioral" models. *See* Brian Morrissey, *Yahoo Tests Behavior-Based Content Ads*, ADWEEK, June 22, 2005, *available at* http://www.adweek.com/aw/iq_interactive/article_display.jsp?vnu_content_id=1000966760.

44. 24/7 Real Media is also being purchased (by the WPP Group). Because WPP does not have a presence in this area, we do not examine the impact of this purchase in our discussion. We similarly do not cover Yahoo!'s acquisition of Right Media because of its small size. Yahoo!'s acquisition of Adtech AG is similarly omitted because it is primarily focused on the European market and thus is outside of the relevant geographic market examined here.

45. James B. Stewart, *Common Sense: Google's DoubleClick Play Still Makes It a Good Bet*, WALL ST. J., Apr. 18, 2007, at D3 ("DoubleClick had just $300 million in revenue and $50 million in profit last year.").

the sum of revenues from advertiser tools and publisher tools). Intermediation revenues are not used to apportion indirect revenues.[46] DoubleClick's share of direct revenues (63 percent) is consistent with estimates reported in the *Financial Times*.[47]

TABLE 4: WORLDWIDE GRAPHIC AD SEGMENT EXPENDITURE SHARES, BY INPUT, 2006

| Provider | Direct Revenues* ($M) | Share | Intermediation ($M) | Share | Share of Total Expenditures** |
|---|---|---|---|---|---|
| DoubleClick[1] | 300 | 63% | 0 | 0% | 58% |
| aQuantive[2] | 122 | 26% | 52 | 8% | 24% |
| 24/7 Real Media[2] | 29 | 6% | 85 | 13% | 7% |
| ValueClick[2] | 26 | 5% | 495 | 78% | 11% |
| TOTAL | 477 | 100% | 632 | 100% | 100% |

*Sources:* [1] James B. Stewart, *Common Sense: Google's DoubleClick Play Still Makes It a Good Bet*, WALL ST. J., Apr. 18, 2007, at D3. [2] Company SEC Filings.
*Notes*: * Revenues from advertiser tools and publisher tools. ** Equal to share of direct revenues plus intermediation revenues plus indirect revenues.

As Table 4 shows, DoubleClick controls the largest share of direct revenues. aQuantive is the next largest firm, with 26 percent of direct graphic ad expenditures.[48] According to our estimates, DoubleClick services are used to support roughly $4.5 billion in worldwide graphic ad spending (58 percent). If one includes intermediation revenues as direct revenues for the purpose of

46. Intermediation revenues include payments ultimately made to publishers, while advertiser tools and publisher tools revenues do not. Thus, intermediation revenues account for the full amount of advertising expenditures associated with the use of those inputs, whereas advertiser tools and publisher tools revenues account *only* for that small percentage of an ad's total value that flows to the tool provider.

47. 24/7 Real Media CEO David Moore estimates that DoubleClick has a 75-80 percent share of the advertiser tools market, and 55-60 percent of publisher tools. We do not have the requisite information to apportion DoubleClick revenues across advertiser tools and publisher tools, but our reported 63 percent share is firmly within the range of 55 to 80 percent. *See* Abigail Roberts and Paulina Roguska, *Google-DoubleClick. The FTC Takes on the Deal.* FIN. TIMES, May 29, 2007, *available at* http://www.ft.com/cms/s/2/a6e96666-0df3-11dc-8219-000b5df10621,dwp_uuid=e8477cc4-c820-11db-b0dc-000b5df10621.html [hereinafter *FT Online Advertising Article*] ("[24/7 Real Media's Moore] estimated that DoubleClick had a 75 to 80% market share in the advertising market, and a 55 to 60% market share in the publishing market. In advertising, aQuantive's Atlas and ValueClick's Mediaplex were DoubleClick's two largest competitors. 24/7 Real Media, with a 30% market share, was DoubleClick's largest competitor in the publishing arena.") Since Atlas and Mediaplex are advertiser tools software, these shares appear to be specific to that input. Similarly, we interpret the publisher shares as referring to publisher tools revenue shares.

48. We understand that a significant portion of aQuantive's revenue comes from Microsoft. As a result of Microsoft's pending acquisition of aQuantive, these revenues will become internal transfers. Thus, our estimate may overstate aQuantive's future revenue share.

allocating indirect revenues, DoubleClick services support roughly $2.1 billion in worldwide graphic spending (27 percent).

## III. PREVIOUS ATTEMPTS TO DEFINE THE RELEVANT PRODUCT MARKET FOR ADVERTISING INDUSTRIES

Although the Federal Trade Commission (FTC) review of Google's proposed acquisition of DoubleClick represents the first comprehensive attempt by an antitrust agency to examine online advertising, other antitrust proceedings provide boundaries within which a meaningful definition of an online advertising product market can be inferred. *KinderStart.com LLC v. Google, Inc.* (KinderStart.com"),[49] *Prometheus Radio Project, et al v. F.C.C.* ("Prometheus"),[50] and the FCC's *2002 Biennial Regulatory Review*[51] provide valuable information by discussing what should *not* constitute the appropriate product market for online advertising. Thus, by understanding the boundaries beyond which a definition is too broad or too narrow, a range of options can be constructed that is consistent with the findings in past proceedings. In the following section, we review these past proceedings and develop a range of appropriate market definitions.

Previous antitrust proceedings relating to online advertising have a direct bearing on Google's proposed acquisition of DoubleClick. In their determination of the appropriate size of media market definitions, antitrust authorities have considered the consumer experience and audience type to be key metrics differentiating one type of media from another. Similarly, advertisers consider the consumer experience and audience when they formulate their ad campaigns and allocate funding among the potential media outlets. As such, definitions of what is—and is not—a distinct media product market similarly define the limits of the online advertising product market.

Regulatory precedent, empirical research, and court decisions suggest that a hypothetical monopoly provider of online advertising would not need to control other forms of media, such as television or print, to raise advertising prices above competitive levels. In the *2002 Biennial Regulatory Review*, the Commission recognized the Internet as a unique media market.[52] Recent empirical findings support that view. Reid, King, Martin, and Soh find that Internet advertising is considered a very poor local advertising substitute for traditional media.[53] This delineation among media has also been upheld in subsequent court decisions, particularly in *Prometheus*.

---

49. KinderStart.com LLC v. Google, Inc., Slip Copy, 2007 WL 831806 (N.D.Cal. 2007), 2007-1 Trade Cases 75643.

50. Prometheus Radio Project, et al. v. F.C.C., 373 F.3d 372 (3d Cir. 2004).

51. *See* 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Report and Order and Notice of Proposed Rulemaking, MB Dkt. No. 02-277, 18 FCC Rcd. 13,620, 2003 WL21511823 [hereinafter *2002 Biennial Review Order*].

52. This recognition was granted in its examination of how consumers get local news. *See* NEILSEN MEDIA RESEARCH, CONSUMER SURVEY ON MEDIA USAGE (MOWG STUDY NO. 8) (2002).

53. Reid, King, Martin & Soh, *supra* note 15.

### *A. The FCC's 2002 Biennial Regulatory Review*

In its *2002 Biennial Regulatory Review*, the FCC attempted to alter—and to a large extent reduce—its extant media ownership rules. These rules, which provide limitations on the common ownership of any combination of more than one radio station, television channel, or newspaper in the same media market,[54] have been enacted over the previous decades to ensure a dispersion of media ownership and points of view. The availability of several independent local news sources is especially prominent within these regulations.[55] To justify its proposed relaxation of these restrictions, the FCC introduced a measure of media concentration patterned on the traditional Herfindahl-Hirschman Index (HHI).[56] The HHI is used by the FTC and Department of Justice (DOJ) to measure market concentration.[57] To construct its index, the FCC relied on a definition of the news media market that included radio, television, newspapers, and the Internet;[58] the Internet, it noted, is "an entirely new medium."[59] The FCC suggested that product markets that are narrower than the Internet as a whole would continue to be defined for "competitive purposes."[60]

### *B. Prometheus Radio Project, et al. v. F.C.C.*

The FCC's proposed rule changes in the *2002 Biennial Regulatory Review* were quickly contested in court, with *Prometheus Radio Project, et al. v. F.C.C.* an important test case. In *Prometheus*, the plaintiffs argued that the proposed rule changes relied on a faulty methodology, especially the construction of the FCC's media concentration index. At issue was the FCC's inclusion—and relatively large weight given to—the Internet as a local news source.[61]

The *Prometheus* proceedings examined and ultimately upheld the FCC's characterization of the Internet as a distinct media market. Because media and advertising markets overlap, the *Prometheus* decision also affirms the Internet as the largest possible definition of the relevant media market for competition analysis. Although the court took issue with the "independence" of the Internet as a news source,[62] it continued to recognize the Internet as a distinct form of media. Furthermore, it did not challenge the FCC's more general concept that the media

54. *See* 47 C.F.R §73.3555 (2005).

55. *See 2002 Biennial Regulatory Review, supra* note 51, at 13,643-45, ¶¶ 73-79.

56. The FCC referred to their measure as the media "Diversity Index".

57. For a discussion of HHI, *see* DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 247 (3d ed. 2000).

58. *See Neilsen Media Research, supra* note 55, at 1.

59. *2002 Biennial Review Order, supra* note 51, at 13629 ¶ 111 ("The Internet, as an entirely new medium, composed of an amalgam of all the technologies that preceded it, completely transformed the way in which we communicate in unimaginable ways.").

60. *Id.* at 13634 ¶ 129 ("...markets defined for competition purposes (*i.e.*, defined in terms of which entities compete with each other in economic terms) are generally more narrow than markets defined for diversity purposes (*i.e.*, defined in terms of which entities compete in the dissemination of ideas)...").

61. *See Nielsen Media Research, supra* note 55, at 1 ("What sources, if any, have you used in the past 7 days for local news and current affairs?:...Internet, 18.8%...").

62. *Id* at 408 ("On remand the Commission must either exclude the Internet from the media selected for inclusion in the Diversity Index or provide a better explanation for why it is included in light of the exclusion of cable.").

market used to examine cross-media mergers is comprised of several distinct media product markets, or that the Internet is one of these product markets.

This concept has been supported empirically by evidence that advertisers do not find Internet advertising to be a substitute for traditional advertising media, such as television, radio, and outdoor advertising. Reid, King, Martin, and Soh find that local advertisers consider Internet advertising to be a very poor substitute for traditional media.[63] For example, survey respondents did not identify the Internet to be a top substitute for any of the five "most effective" media.[64] Indeed, the Internet was chosen as the seventh-most acceptable substitute for daily newspaper advertising (behind radio, cable television, the Yellow Pages, direct mail, magazines, and weekly newspapers).[65] Similarly, the Internet was not found to be among the top five substitutes for daily newspapers for any of the authors' four types of businesses.[66] Thus, they conclude that advertisers do not perceive online advertising to be an acceptable substitute for local advertising in other media.[67] Based on previous research of national advertisers,[68] they conclude that advertising buyers "put media options in specific perceptual boxes when it comes to planning media schedules."[69]

Together, regulatory precedent, empirical research, and the *Prometheus* court decision provide a plausible upper bound—no larger than the Internet as a whole—regarding the scope of the product market that would encompass online advertising. This reading of online advertising is a reasonable extension of their definition of the Internet as a whole as the largest appropriate definition of the online media market. Because advertising is differentiated in the same way—by audience—as media has been, the appropriate online advertising product market definition may similarly be no larger than Internet advertising as a whole.

### *C. KinderStart.com LLC v. Google, Inc.*

In *KinderStart.com LLC v. Google, Inc.*, the United States District Court for the Northern District of California sought a meaningful definition of the online advertising market. In an antitrust complaint regarding alleged search result

63. Reid, King, Martin & Soh, *supra* note 15, at 35-53.

64. *Id.* at 46, Table 2.

65. *Id.* at 46 ("Radio, the medium ranked the second most effective local advertising medium, was perceived as the most acceptable substitute (87%; 113) for daily newspapers. Cable TV was judged the second most acceptable substitute (68%; 88), although it was ranked the fifth most effective local medium. Yellow pages (47%; 61), the medium ranked fourth most effective, and direct mail (37%; 48), the medium ranked third most effective, were perceived as the third and fourth most acceptable substitutes, respectively. Magazines (33%; 43), weekly newspapers (27%; 35), and the Internet (23%; 30) followed as the fifth, sixth, and seventh most acceptable substitutes...").

66. *Id.* at 48, Table 4.

67. *Id.* at 50 ("Of the 14 media options [which include Internet], only 5 other media [other than daily newspapers and radio] were considered first- or second-order substitutes for local advertising: cable TV, magazines, weekly newspapers, broadcast TV, and direct mail.").

68. Leonard N. Reid & Karen Whitehill King, *A Demand-Side View of Media Substitutability in National Advertising. A Study of Advertiser Opinions about Traditional Media Options*, 77 JOURNALISM & MASS COMM. Q. 292-307 (2000).

69. Reid, King, Martin & Soh, *supra* note 15, at 51.

ranking abuses, the plaintiff argued that search advertising constituted the proper product market—that is, the relevant "grouping of sales whose sellers, if unified by a monopolist or a hypothetical cartel, would have market power in dealing with any group of buyers."[70] However, the court found *KinderStart.com*'s definition to be too narrow, stating that, "there is no logical basis for distinguishing the Search Ad Market from the larger market for Internet advertising."[71] The court continued that, "[b]ecause a website may choose to advertise via search-based advertising or by posting advertisements independently of any search, search-based advertising is reasonably interchangeable with other forms of Internet advertising."[72] The court provided the same interpretation—of a product market larger than just search advertising—in a subsequent case, *Person v. Google Inc.*[73]

The *KinderStart.com* court thus implied three things: (1) that the proper product market would be Internet advertising used by websites and other firms; (2) that the relevant customer base is advertisers, rather than viewers, and (3) that by selecting publisher-based ads—in spirit if not name—as an example of an "independent" online advertisement, that publisher-based ads would be in the same product market as search ads. The court subscribed to the product market test of product interchangeability, in this case contending that search ads and publisher-based ads were reasonably interchangeable. This reading suggests that the court, had they had occasion to uphold a definition of the online advertising market, would have affirmed a definition of the product market that includes, at the very least, both search ads and publisher-based ads.

Considering these boundaries together, the relevant product market for an antitrust review of the Google-DoubleClick merger would be somewhere inside a range of possible definitions that include search ads, but that are not larger than Internet advertising as a whole. As the *KinderStart.com* decision illustrates, antitrust authorities are unlikely to approve of a product market definition that is so narrow as to include only one type of online advertising, such as search ads. Furthermore, the *2002 Biennial Regulatory Review* and *Prometheus* court have established that the Internet is one of several competitively distinct media—and by implication advertising—markets; as such the relevant online advertising product market definition cannot be larger than Internet advertising as a whole. Figure 2 visually presents this range.

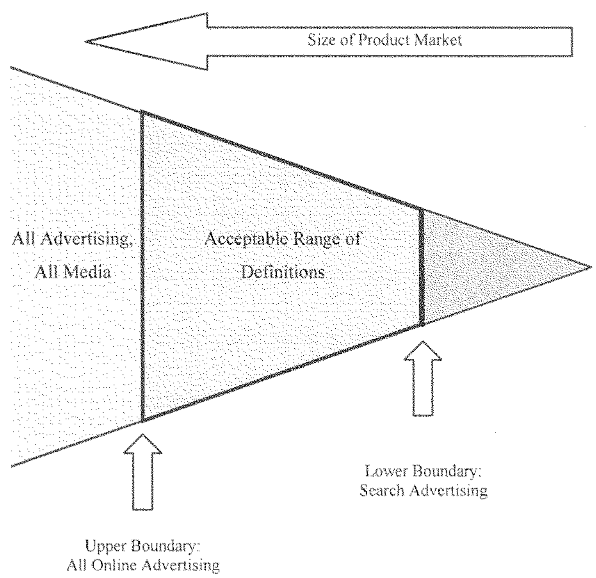
70. Rebel Oil Co. v. Atlantic Richfield Co , 51 F.3d 1421, 1434 (9th Cir.1995). The *KinderStart com* court referred in particular to the definition of the appropriate product market as defined in the *Rebel Oil Co.* decision.

71. KinderStart.com, *supra* note 52, at 75649.

72. *Id* at 75649.

73. Carl E. Person v. Google Inc., Slip Copy, 2007 WL1831111 (N.D.Cal. 2007), 2007-1 Trade Cases P 75,759.

FIGURE 2: RANGE OF POSSIBLE PRODUCT MARKET DEFINITIONS




## IV. THE RELEVANT PRODUCT MARKET FOR ANALYZING THE COMPETITIVE EFFECTS OF GOOGLE'S PROPOSED ACQUISITION OF DOUBLECLICK

By evaluating economic information, and in particular the extent to which advertisers view different types of advertising as substitutes, we can select an appropriate product market definition from the range of possibilities established in Part III. We begin by providing anecdotal evidence and industry observers' impressions of the degree to which consumers can—and do—substitute between various forms of advertising. To perform a more thorough analysis, we also present evidence from a survey of online retailers demonstrating the degree of substitutability between search ads and publisher-based ads, and between graphic and contextual publisher-based ads. We find compelling evidence that advertisers view search ads and publisher-based ads as substitutes, a definition that fits neatly within the range established in Figure 2.

### *A. Market-Based Evidence of Substitution Patterns*

In this section, we review evidence of buyer and seller substitution across the three online advertising channels

#### *1. Demand-Side Evidence*

Increasingly, contextual and graphic ads have competed directly on the same publisher website and for the same clientele. For example, a July 3, 2007 visit to the Business section of the *Washington Post's* website encountered a contextual advertisement, served by Google, for condominiums in the Washington, D.C. area.[74] A colorful graphic advertisement on a subsequent Post article's webpage, served by DoubleClick, promoted an apartment leasing website.[75]

This example is illustrative of how contextual and graphic ads can serve as substitutes. One content publisher, the *Washington Post*, hosts both contextual and graphic ads from two different (for now) companies—Google and DoubleClick—advertising for the same type of client (in this case, real estate companies). This suggests that, at present, if a condominium developer found that Google's AdWords network had become prohibitively expensive, he could reasonably switch to a DoubleClick-served graphic ad. If Google and DoubleClick were to merge, however, they would potentially provide ad spaces or key inputs for all publisher-based ads on the Washington Post website. As a result, all advertisers currently using the Post would require Google services, and in the event of a Google service price increase would be forced to choose between the Post and a different website altogether. The recent extension of Google's contract with WashingtonPost.com suggests that Google may have pricing power for WashingtonPost.com ads for years to come.[76]

*2 Supply-Side Evidence*

In limited circumstances, one can look to actions of sellers to inform market definition. Such "supply-side evidence" may be used as a proxy for the preferences of buyers, but only to the extent that "sellers base business decisions on the prospect of buyer substitution between products in response to relative changes in price or other competitive variables."[77] DoubleClick appears to be aware of the close interoperability among the various forms of online advertising. In particular, Dave Fall, Vice-President of Product Management, Search Technology at DoubleClick, noted at a May 2007 conference that one of DoubleClick's advertiser-oriented services, DART Search, now "[d]e-duplicates transactions across search and display."[78] The implication, is that DART Search users are likely to use both search and display advertising, and to want to view their expenditures on these types of ads side-by-side so as to compare—and

74. *Business News from The Washington Post*, WASH. POST, http://www.washingtonpost.com/wp-dyn/content/business/index.html. For example, the "Ads by Google" text box promoted "Stunning New DC Condos" (www.thebeauregard.com) and "Washington Dc Homes" (www.wcicommunities.com).

75. Alex Veiga, *KB Homes Swings to 2Q Loss on Charges*, WASH. POST, June 27, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/06/28/AR2007062800606.html. The ad promotes Apartments.com.

76. *See WashingtonPost.com-Google Contract Extension, supra* note 17.

77. *See Merger Guidelines, supra* note 2, at §1.0

78. Dave Fall, Presentation at 2007 DoubleClick EMEA Insight Conference: Paid Placements vs. Organic Search (May 16, 2007), at 21. Mr. Fall further emphasizes this point by noting that the improvement "[d]e-duplicated transactions across display, paid search, and organic search traffic" (at 23), and again "de-duplicated transaction information across display, paid placement, organic search, and paid inclusion programs." (at 25).

adjust—their allocation between them. The new DART service apparently streamlines this effort. Such service suggests that, at the very least, DoubleClick views search ads and publisher-based ads as closely related, if not substitutes.

*B. Survey Data*

According to the *Merger Guidelines*, product markets shall be defined based on, among other items, "evidence that buyers have shifted or *have considered shifting* purchases between products in response to relative changes in price or other competitive variables."[79] In the absence of evidence that online advertisers have actually shifted purchases between search, contextual, and graphic segments in response to relative changes in price, a survey can inform whether buyers *have considered shifting* purchases between those segments in response to changes in relative prices.

To analyze the potential buyer response to relative changes in prices for graphic ads, contextual ads, and search ads, we commissioned a survey of online retailers conducted by Shaw and Company Research ("Shaw"). Retailers represent the largest consumers of online advertisements; thus, our survey encompasses many of the most important consumers that would be affected by the proposed transaction. It would exclude, however, traditional firms that advertise online but do not sell their products directly online; this may exclude some food or services firms, such as McDonald's, Coca-Cola, or Johnson & Johnson. We do not know how large this effect is, but we expect that online retailers purchase a significant share of online advertising.

Conducting a series of Internet interviews over the days August 7-8, 2007, Shaw polled 200 retail advertisement managers who had purchased publisher-based advertising within the last year. Shaw selected these respondents with the help of the GMI MR database, one of the largest panel dataset providers in the world. Prospective respondents received a notice by email, and from this selection Shaw received its 200 "opt-in" respondents.[80] Respondents answered as many as 21 questions related to their usage of online advertising, their substitution preferences, and their firm characteristics. According to Shaw, the poll had a margin of error of plus or minus 7 percent.[81]

The respondents provided substantial data on firm characteristic. Based on the simple averages for our sample, we estimate that the "representative" (that is, average) firm in the survey spent roughly $2.4 million on online advertising in the last twelve months. We also estimate that the "representative" retailer surveyed had been in business for roughly 6.5 years, and had about 550 employees.[82] Unfortunately, we do not know of any particular census of online

79. *Merger Guidelines, supra* note 2, at §1.11 (emphasis added).

80. The initial email notice thus constituted an effort to reach a representative subset of the universe of interest. Those who responded were akin to people agreeing to do a phone interview in a random-digit-dial design. The margin of error is calculated in the same manner as for traditional probability samples.

81. As reported by Shaw and Company for a sample size of 200.

82. This was more difficult to estimate than online ad expenditures, however, because our firm age ranges only went as high as a "more than 20 years" response. This loses much of the distinction between 21-year-old firms and 100-year-old firms. Estimates were generated by assigning the midpoint of each range to a given respondent,

retailers with which to compare these respondent characteristics. The respondents represented a wide range of industries, from the automotive industry to social networking. Nearly 15 percent of respondents cited "Financial services or insurance" as their industry sector. "Clothing apparel or shoes" and "Computer services, hardware, software" were the next most popular industry sectors. Each sector garnered 9 percent of all respondents.

In the absence of an industry census with which Shaw's sample characteristics could be compared, Shaw took certain steps to provide as unbiased a sample as possible. Specifically, Shaw examined firm characteristic data for obvious under- or over-sampling. Geographically, Shaw found a reasonably even distribution of respondents.[83] Similarly, a review of firm age and industry sector revealed no particular sample bias.[84] Because variation between industries, firm sizes, firm geographic base, or firm ages were generally small, any firm segment under- or over-representation would have limited effects. In any event, Shaw's target demographic—marketing personnel with knowledge of firm advertising spending—was unlikely to suffer from common "opt-in" survey selection biases. For example, although "opt-in" surveys may under-represent low-income and senior populations, our survey specifically targets marketing personnel (a group that is unlikely to be low-income or elderly). The survey data indicate that online advertisers view graphic ads as substitutes for both contextual and search ads. The responses also suggest that, if Google were to acquire DoubleClick, Google could be assured that many advertisers that use DoubleClick for ad management would switch to a Google search ad or a Google contextual ad in response to a price increase. For example, the results suggest that for a 10 percent increase in the price of DoubleClick's advertiser tools, Google would retain almost 18 percent of the "marginal" DoubleClick customers—that is, DoubleClick's customers who substitute some portion of their spending to a rival supplier of advertiser tools.

### *1. Do Advertisers View Graphic Ads as Substitutes for Contextual or Search Ads?*

To measure the amount by which a change in the price of one form of advertising would affect the consumption of that good and other related goods, we asked all respondents how they would react to a 10 percent increase in the price of different forms of online advertising. Respondents could answer in such a way as to indicate that two forms of advertising were complements (a corresponding *decrease* in their purchase of other ad products), substitutes (a corresponding *increase* in their purchase of other ad products), or that

---

and the minimum number (for example, 21 years) to a firm in the highest range. This produces conservative estimates of spending, firm age, and firm size.

83. Midwesterns, however, represented only 16 percent of our survey sample, compared with 28.5, 28.5, and 27 for the Northeast, South, and West, respectively.

84. Of the 16 possible industry sectors, the top two ("financial services/insurance" and "other") garnered a modest 14 percent each. Firm age similarly suggested that those firms that have been in operation from 5 to 10, 10 to 20, and more than 20 years were about equally represented (29.5, 30, and 29.5 percent, respectively), while firms in operation less than 5 years represented 10.5 percent of the survey sample. A variety of factors, such as limited funding or the end of the technology bubble, may explain why firms less than 5 years old are less prevalent.

consumption decisions were unrelated (no change in the purchase of other ad products). In addition, we asked respondents who suggested they would decrease their purchases of other products why they chose to do so. Thus, we were able to distinguish between advertisers who would decrease other ads because they faced a budget constraint and wished to maintain their existing level of one form of advertising (those who actually view the ads as substitutes) from those who considered the value of an ad type to fall as the price of other ad types rose (those who view the ads as complements). This process was conducted to measure the relationship between graphic advertising and both search and contextual advertising.

The majority of respondents surveyed indicated that they viewed graphic and contextual advertisements as substitutes. For example, respondents were asked how their purchases of contextual ads would change "in response to a 10 percent increase in the price of *graphic* ads placed on *all* publishers' websites," to which they could respond with "not at all"; increases of less than 5, 5 to 10, and more than 10 percent; decreases of less than 5, 5 to 10, or more than 10 percent; or "don't know/refused/NA."[85] Based on their responses, a full 68 percent of respondents indicated that they would increase their purchases of *contextual ads* in response to a hypothetical increase in the price of *graphic ads*—that is, they view the two products as substitutes.[86] This compares to 13 percent that indicated they would decrease purchases of *contextual ads* in response to a hypothetical increase in the price of *graphic ads*, implying that those customers perceive graphic and contextual ads to be complements. 56 percent of all respondents (83 percent of those who indicated an increase in contextual ad purchases) indicated they would increase their purchases of contextual ads by at least 5 percent.[87] This suggests a relatively high sensitivity to graphic ad price changes—that is, a relatively high cross-price elasticity of demand. Table 5 presents these results.

85. See text of Question 6.

86. This statistic actually understates substitution. 73.2 percent of "valid" responses, which are those that did not answer "Don't Know"/Refused/NA, suggested that they would increase their purchases of contextual ads in response to an increase in graphic ad prices. In weighted terms—which account for differences in advertiser spending power—respondents representing 65 percent of all respondents' Internet ad spending indicated that they would increase their purchases of *contextual ads* in response to a hypothetical 10 percent increase in the price of *graphic ads*.

87. As above, this actually understates substitution. Removing "Don't Know/Refused/NA," 60.7 percent indicated an increase of at least 5 percent.

TABLE 5: ADVERTISER CHANGE IN CONTEXTUAL AD PURCHASES IN RESPONSE TO 10 PERCENT INCREASE IN GRAPHIC AD PRICES

| | *Amount* | *Percent* |
|---|---|---|
| | Not At All | 12% |
| Increase | < 5% | 12% |
| | 5-10% | 31% |
| | > 10% | 25% |
| Subtotal | | 68% |
| Decrease | < 5% | 5% |
| | 5-10% | 6% |
| | > 10% | 2% |
| Subtotal | | 13% |
| Don't Know/Refused/NA | | 9% |

*Source*: Shaw and Company Research, *U.S. National Survey of Online Advertisers*, Question 6 in Appendix B.
*Note*: Numbers may not sum to 100 percent due to rounding.

We also found significant evidence that substitution between graphic and contextual ads was understated. As Table 6 shows, of those who answered that they would decrease their purchases of contextual ads, we found that the majority (56 percent) did so "[b]ecause of budget constraints and the higher cost of graphic ads."[88] The remainder (44 percent) answered that they "perceived the value of text-based ads to fall."[89] Given the choice between the two, we expect that respondents will choose the effect that predominates in this particular instance—that is, even if respondents may find both to be true, we expect that their response will accurately reflect the *net* effect (either contextual is a net substitute or it is a net complement). Thus, these respondents (who said they would decrease expenditures on contextual ads due to budget constraints) do not likely decrease their purchases of contextual ads because they view them as less valuable given an increase in graphic ad prices; instead, they try to maintain their presence in graphic ads by reducing their expenditures elsewhere. This explanation is more consistent with a perception of substitutes rather than complements,[90] as the advertiser is willing to *decrease* expenditures on one good while *increasing* expenditures on the substitute.

This willingness to reduce contextual ad expenditures and increase graphic ad expenditures suggests that an additional 14 respondents (7 percent of all respondents, and 56 percent of 13 percent who said they would decrease purchases of contextual ads) actually view graphic and contextual ads as substitutes. Thus, overall, 74 percent of all respondents consider graphic and contextual ads to be substitutes.[91]

88. See text of question 7.

89. *See id.*

90. This explanation is consistent with Hicks-compensated demand, which isolates the substitution effect from income effects related to the change in a given product's price.

91. Excluding non-responses, 80.9 percent indicated substitution between graphic and contextual ads. In weighted terms, respondents representing 73 percent of all ad spending view graphic and contextual ads as substitutes.

TABLE 6: ADVERTISER REASON FOR DECREASING PURCHASES OF CONTEXTUAL ADS

| | *Percent* |
|---|---|
| Budget constraints and higher cost of graphic ads would force a decrease in the purchases of text-based ads | 56% |
| Because of increased cost of graphic ads, perceive the value of text-based ads to fall | 44% |
| Confused by logic of question – not sure how the two are linked | 0% |
| Total | 100% |

*Source*: Shaw and Company Research, *U.S. National Survey of Online Advertisers*, Question 7 in Appendix B.

Examining the relationship between graphic ads and search ads in a similar fashion, we found that graphic and search ads are also usually seen as substitutes. The majority of respondents (68 percent) indicated that they would increase their purchases of *search ads* in response to a 10 percent increase in the price of *graphic ads*—as above, indicating those customers perceive the two types of online ads to be substitutes. Furthermore, this option was much preferred to the option of *decreasing* search ads, as more than ten times as many respondents preferred increasing search-based expenditures to decreasing them. 54 percent indicated that they would increase search ads by more than 5 percent; this again suggests a high level of sensitivity to price changes of graphic ads, or a relatively high cross-price elasticity of demand.[92] Table 7 presents these results.

TABLE 7: ADVERTISER CHANGE IN SEARCH-BASED AD PURCHASES IN RESPONSE TO 10 PERCENT INCREASE IN GRAPHIC AD PRICES

| | *Amount* | *Percent* |
|---|---|---|
| | Not At All | 18% |
| Increase | < 5% | 14% |
| | 5-10% | 28% |
| | > 10% | 26% |
| Subtotal | | 68% |
| Decrease | < 5% | 4% |
| | 5-10% | 2% |
| | > 10% | 1% |
| Subtotal | | 7% |
| Don't Know/Refused/NA | | 10% |

*Source*: Shaw and Company Research, *U.S. National Survey of Online Advertisers*, Question 8 in Appendix B.
*Note*: Numbers may not sum to 100 percent due to rounding.

92. In weighted terms, respondents representing 69 percent of all respondents' Internet ad spending indicated that they would increase their purchases of *search ads* in response to a hypothetical 10 percent increase in the price of *graphic ads*.

As was the case with contextual ads, the number of respondents who view graphic and search-based ads as complements—although small—appears to be overstated. As Table 8 indicates, of those who indicated they would decrease search-based ads in response to a graphic ad price increase, two-thirds suggested that "[b]ecause of budget constraints and the higher cost of graphic ads, I would be forced to decrease my purchases of search-based ads."[93] Again considering the *net* effect, it appears that many respondents who initially indicated that they viewed the graphic and search-based ads as complements did so because they faced budget constraints. As with contextual ads, this budget-constraint rationale suggests that these respondents actually view graphic and search ads as substitutes. As such, it is more reasonable to say that roughly 71 percent of all respondents view graphic and search ads as substitutes.[94]

TABLE 8: ADVERTISER REASON FOR DECREASING PURCHASES OF TEXT-BASED ADS

| | *Percent* |
|---|---|
| Budget constraints and higher cost of graphic ads would force a decrease in the purchases of search-based ads | 67% |
| Because of increased cost of graphic ads, perceive the value of search-based ads to fall | 33% |
| Confused by logic of question – not sure how the two are linked | 0% |
| Total | 100% |

*Source*: Shaw and Company Research, *U.S. National Survey of Online Advertisers*, Question 9 in Appendix B.

### 2. *How Would Current DoubleClick Customers React to a Price Increase?*

To fully examine the effects of the proposed Google-DoubleClick acquisition, however, it is necessary to move beyond market share analysis and towards a more elaborate examination that accounts for customer substitution preferences. Specifically, it is important to examine how customers would react to an increase in service prices as a result of the acquisition, and how the proposed acquisition would affect advertisers' abilities to substitute between competing advertising services. To evaluate the impact of the proposed acquisition, we analyze two scenarios: (1) the DoubleClick offering as a stand-alone entity; and (2) the DoubleClick offering as part of a combined Google-DoubleClick.

Pursuant to its merger review, the FTC will likely conduct analyses to determine whether Google could profitably increase the price of DoubleClick's inputs as a result of the proposed transaction. We do not perform that analysis here. For example, we do not have data on the pre-merger margins of Google and

93. See text of question 9.

94. 78.3 percent of "valid" responses. In weighted terms, respondents representing 83 percent of all ad spending view graphic ads and search ads as substitutes. Table 9 summarizes their (unweighted) responses.

DoubleClick. Our analysis is meant instead as an exploratory step to determine the necessity of a more comprehensive FTC review.

In response to an increase in the price of DoubleClick's advertiser tools, Google could capture a significant share of the "marginal" customers that use DoubleClick inputs for graphic ads. With the coming deployment of the DoubleClick Advertising Exchange, DoubleClick will also be able to offer a platform of all input services similar to current Google and Yahoo! services. Google will thus also be able to capture "marginal" customers from DoubleClick's integrated graphic service. Thus, the proposed acquisition could allow Google to internalize this substitution by, in effect, moving customers from one Google-DoubleClick product to another (for example, from graphic ads that use DoubleClick advertiser tools, DoubleClick's forthcoming "DoubleClick Advertising Exchange" intermediation service, and DoubleClick's publisher tools to contextual ads using Google AdSense). The effect of this internalization would likely be to increase the price of DoubleClick's advertiser tools.

First, consider the situation of a stand-alone DoubleClick (the status quo). Our survey results indicate that, given a 10 percent increase in the price of DoubleClick's inputs, DoubleClick would lose a significant number of clients to other graphic ad firms, contextual firms, and search ad firms. As the results presented in Table 9 below indicate, 69 percent of respondents[95] would decrease their use of DoubleClick's advertiser tools if prices increased by 10 percent. (This is not to say that DoubleClick's revenues would fall by 67 percent in response to a 10 percent price increase.) 41 percent of all respondents indicated that they would increase their input purchases from a rival graphic ad firm. An additional 19 percent would increase their ad purchases from a contextual advertising firm, perhaps in part to maintain a presence on the same publisher sites, whereas 9 percent of respondents would increase their ad purchases from search advertisers.[96]

95. Including the 41.2 percent that would "Purchase Same Amount of Graphics Ads Through a Rival," 19.1 percent that would "Purchase Fewer DoubleClick Graphic Ads and More Contextual Ads," and 8.8 percent that would "Purchase Fewer DoubleClick Graphic Ads and More Search-Based Ads." If the one "don't know" response is excluded, 69.6 percent of valid respondents would decrease their use of DoubleClick services.

96. In weighted terms, respondents representing 70 percent of total DoubleClick ad spending would substitute some portion of their DoubleClick ad spending on a competing graphic, contextual, or search-based ad provider.

TABLE 9: IDENTIFYING DOUBLECLICK'S MARGINAL CUSTOMERS (BUYER RESPONSES TO A 10 PERCENT PRICE INCREASE)

| | Percent |
|---|---|
| Purchase Same Amount of Graphics Ads Through DoubleClick | 30% |
| Purchase Same Amount of Graphics Ads Through Rival Firm | 41% |
| Purchase Fewer DoubleClick Graphic Ads and More Contextual Ads | 19% |
| Purchase Fewer DoubleClick Graphic Ads and More Search-Based Ads | 9% |
| Don't Know/Refused/NA | 1% |

*Source*: Shaw and Company Research, *U.S. National Survey of Online Advertisers*, Question 10 in Appendix B.
*Note*: Marginal customers are highlighted.

Respondents representing 26 percent of DoubleClick ad spending would purchase ad inputs through a rival graphic ad firm, respondents representing 24 percent of DoubleClick ad spending would substitute contextual ads, and respondents representing 19 percent of DoubleClick ad spending would substitute search-based ads.

Next, we asked those respondents who indicated they would switch to another ad product which firm they would likely use. In this way, we sought to measure the number of current DoubleClick customers who would reallocate some portion of their current spending to Google products. These customers represent the "marginal" customers who would be lost by a stand-alone DoubleClick but would be retained (and thus contribute to firm revenue and profit) by a combined Google-DoubleClick.

We first examined those DoubleClick customers that would substitute contextual ad spending for some portion of their current DoubleClick graphic ad spending. There were 26 respondents who indicated they would substitute with contextual spending, representing 19 percent of all surveyed DoubleClick customers. Of the group that would substitute contextual ad services, a majority (62 percent) indicated that they would use Google AdSense, compared to 19 percent each for Microsoft AdCenter and the Yahoo! Publisher Network.[97] These results are reproduced in Table 10 below.

97. In weighted terms, we also found that Google AdSense would be the substitute of choice for a majority of those respondents who indicated that they would increase contextual ad spending in response to an increase in DoubleClick prices. Google was the first choice for respondents representing 52 percent of ad spending, followed by Yahoo (35 percent) and Microsoft (13 percent).

TABLE 10: TOP CHOICE OF CONTEXTUAL PROVIDER FOR MARGINAL DOUBLECLICK CUSTOMERS

| | *Percent* |
|---|---|
| Google Adsense | 62% |
| Microsoft AdCenter | 19% |
| Yahoo! Publishers' Network | 19% |
| Total | 100% |

Source: Shaw and Company Research, *U.S. National Survey of Online Advertisers*, Question 11 in Appendix B.

We asked DoubleClick customers who indicated they would reallocate some portion of their spending to the search channel which search provider they would first consider. As Table 9 indicates, there were 12 DoubleClick customers in our survey (9 percent of total DoubleClick customers) who indicated they would substitute some portion of their DoubleClick graphic ad spending for search ad spending. We found that Google.com was the most popular potential search ad provider, with 67 percent of the relevant respondents. Yahoo.com and MSN.com each garnered 17 percent.[98] Table 11 reports these results.

TABLE 11: TOP CHOICE OF SEARCH-BASED PROVIDER FOR MARGINAL DOUBLECLICK CUSTOMERS

| | *Percent* |
|---|---|
| Google.com | 67% |
| MSN.com | 17% |
| Yahoo.com | 16% |
| Total | 100% |

*Source*: Shaw and Company Research, *U.S. National Survey of Online Advertisers*, Question 12 in Appendix B.

Together, Tables 10 and 11 suggest that, for a 10 percent increase in the price of DoubleClick's advertiser tools, a combined Google-DoubleClick would retain almost 18 percent (equal to 0.62*0.19 + 0.67*0.09) of DoubleClick's marginal customers. Although this analysis does not measure the *amount* (in dollar terms) of substitution away from DoubleClick, it does measure the number of additional *customers* that a combined Google-DoubleClick would be able to retain in full (and thus more potential ad revenue) than a stand-alone DoubleClick.

98. Examining these responses in terms of their importance to DoubleClick (that is, in DoubleClick ad spending-weighted terms), we find that Google's service is again the most popular search-based substitute to graphic ads that use DoubleClick services. Google.com was the top choice for respondents representing 58 percent of DoubleClick ad spending (among those that answered that they would substitute search ads for some DoubleClick ads; that is, for the 9% of respondents in Table 10). One large DoubleClick customer preferred MSN.com, which garnered a spending-weighted 40 percent. Yahoo.com was the top choice for respondents representing just 1 percent of the sub-sample's DoubleClick ad spending.

### C. *Advertiser Tools Used in the Production of Search Ads and Publisher-Based Ads Constitute a Relevant Product Market*

Our market definition proceeds in two steps. We begin by determining which inputs should be included in a product market within a given advertising channel. Because input services are *not* demand substitutes (for example, an advertiser could not substitute intermediation services for advertiser tools software), it is reasonable to consider each input to be a separate product market. This is consistent with the *Merger Guidelines* approach, which explains that the proper product market definition includes the *narrowest* group of products such that a hypothetical monopolist could profitably impose "at least a 'small but significant and nontransitory' increase in price."[99] Because intermediation services and advertiser tools are not demand substitutes, a hypothetical monopoly provider of advertiser tools could profitably raise the price of advertiser tools above competitive levels without having to control 100 percent of the supply of intermediation services. Thus, there are likely three relevant product markets that would be affected by Google's proposed acquisition of DoubleClick: (1) advertiser tools, (2) intermediation, and (3) publisher tools.

Having determined that advertiser tools are distinct from intermediation services sold to advertisers, we next consider whether advertiser tools (or intermediation services) used in one channel (for example, contextual) belong in the same product market as advertiser tools used in another channel (for example, graphic). According to our survey, a large majority of advertisers view search-based, contextual (text-based publisher), and graphic ads to be close substitutes. Thus, to the extent that other forms of media advertising do not significantly constrain the price of online advertising, advertiser tools used in the production of search ads and publisher-based ads constitute a relevant product market ("advertiser tools market"). In the following section, we focus on the competitive effects of Google's proposed acquisition of DoubleClick in the advertiser tools market.

## V. IMPLICATIONS FOR GOOGLE'S PROPOSED ACQUISITION OF DOUBLECLICK

Because we have no way to disaggregate search and contextual revenues across the three relevant product markets—advertiser tools, publisher tools, and intermediation services—we rely on shares of all online advertising expenditures to serve as a proxy for the shares within advertiser tools. We estimate that a combined entity would provide services for just over 50 percent of worldwide online ad expenditures (equal to Google's 30 percent share plus DoubleClick's 22 percent share). This estimate is consistent with an analysis in the *Financial Times*, which concluded that a combined Google-DoubleClick would "control"

99. *Merger Guidelines, supra* note 2, at § 1.11 ("...the Agency will begin with each product (narrowly defined) produced or sold by each merging firm and ask what would happen if a hypothetical monopolist of that product imposed at least a 'small but significant and nontransitory' increase in price, but the terms of sale of all other products remained constant.").

between 40 and 50 percent of all online advertising expenditures.[100] After presenting our HHI analysis, we provide a preliminary analysis of the likely competitive effects of the transaction.

### *A. Concentration Analysis*

To assist the interpretation of market share data, the *Merger Guidelines* advocate the use of the Herfindahl-Hirschman Index ("HHI") of market concentration.[101] In "highly concentrated" industries (post-merger HHI above 1800), mergers that result in large changes in the HHI (over 100) are presumed to "create or enhance market power or facilitate its exercise."[102] Put another way, mergers in a concentrated industry that generate a significant change in HHI are presumed to have anticompetitive effects. Following our product market definition developed in Part IV, we seek to calculate the pre- and post-acquisition market concentration levels in the markets for advertiser tools and publisher tools. We compute shares for *all* online advertising expenditures—including advertiser tools, publisher tools, and intermediation services—used to produce search, contextual and graphic ads.

Table 12 presents pre- and post-acquisition shares of online advertising expenditures. The *Merger Guidelines* counsel the use of the "best indicator of firms' *future* competitive significance" when calculating market shares.[103] We used shares of expenditures reported in Tables 2, 3, and 4. Consistent with the approach used by IAB and eMarketer, we removed TAC from the revenues of Google, Yahoo!, and Microsoft. For graphic firms, we use share of total expenditures rather than direct revenues. The graphic channel is currently highly fragmented. As providers in that channel become more vertically integrated over time—as search and contextual suppliers currently are—they will likely control a larger share of the total expenditure in the graphic channel. Moreover, to the extent that advertiser and publisher tools (the two sources of direct revenues) constitute essential inputs in the production process for a graphic ad, the share of total expenditures represents the best indicator of the competitive significance of graphic ad firms.

---

100. *FT Online Advertising Article*, *supra* note 47. ("If Google was to acquire DoubleClick, Google would then control 40 to 50% of online advertising dollars, one industry analyst estimated.")

101. *Merger Guidelines*, *supra* note 2, at § 1.5. The HHI is calculated by summing the squares of the individual market shares of all the participants.

102. *Id.* at § 1.51(c).

103. *Id* at § 1.41 (emphasis added).

TABLE 12: SHARE OF ONLINE ADVERTISING EXPENDITURES (GOOGLE-DOUBLECLICK ACQUISITION ONLY), 2006

| | Pre-Acquisition | | | Post-Acquisition | | |
|---|---|---|---|---|---|---|
| Provider | Expenditures ($M) | Share | HHI | Expenditures ($M) | Share | HHI |
| Google* | 6,085 | 30% | | 10,603 | 52% | |
| DoubleClick | 4,517 | 22% | | | | |
| Yahoo!* | 3,761 | 19% | | 3,761 | 19% | |
| aQuantive | 1,895 | 9% | | 1,895 | 9% | |
| Microsoft* | 1,488 | 7% | | 1,488 | 7% | |
| ValueClick | 882 | 4% | | 882 | 4% | |
| AOL | 564 | 3% | | 564 | 3% | |
| Ask.com | 544 | 3% | | 544 | 3% | |
| 24/7 Real Media | 524 | 3% | | 524 | 3% | |
| Quigo | 60 | 0% | | 60 | 0% | |
| Total | 20,321 | 100% | 1,914 | 20,321 | 100% | 3,246 |
| Change in HHI | | | 1,331 | | | |

*Sources*: Tables 2, 3, and 4.
*Note*: * Revenues less TAC.

As Table 12 shows, the post-acquisition HHI would be 3,246 and the change in HHI is 1,331.

An alternative approach is to examine the effects of the Google-DoubleClick acquisition within the broader context of changes in other participants' market shares. In practice, this requires the consolidation of aQuantive into Microsoft. Table 13 presents the relevant data for this scenario.

TABLE 13: SHARE OF ONLINE ADVERTISING EXPENDITURES (ALL PROPOSED ACQUISITIONS)

| | Pre-Acquisition | | | Post-Acquisition | | |
|---|---|---|---|---|---|---|
| Provider | Expenditures ($M) | Share | HHI | Expenditures ($M) | Share | HHI |
| Google* | 6,085 | 30% | | 10,603 | 52% | |
| DoubleClick | 4,517 | 22% | | | | |
| Yahoo!* | 3,761 | 19% | | 3,761 | 19% | |
| Microsoft* aQuantive | 3,384 | 17% | | 3,384 | 17% | |
| ValueClick | 882 | 4% | | 882 | 4% | |
| AOL | 564 | 3% | | 564 | 3% | |
| Ask.com | 544 | 3% | | 544 | 3% | |
| 24/7 Real Media | 524 | 3% | | 524 | 3% | |
| Quigo | 60 | 0% | | 60 | 0% | |
| Total | 20,321 | 100% | 2,051 | 20,321 | 100% | 3,382 |
| Change in HHI | | | 1,331 | | | |

*Sources*: Tables 2, 3, and 4.
*Note*: * Revenues less TAC.

As Table 13 shows, Google's proposed acquisition of DoubleClick represents a significant increase in the concentration of this particular product market. In fact, this combination of the top two firms—Google and DoubleClick—increases the HHI by roughly 1,300. The post-merger HHI, including the Microsoft-aQuantive transaction, is 3,382.

Given these post-merger market shares and the change in HHI, the proposed Google-DoubleClick acquisition would likely "create or enhance market power or facilitate its exercise" in the advertiser tool market according to Section 1.5 of the *Merger Guidelines*.[104] The post-merger HHI would exceed the "highly concentrated" benchmark of 1,800, and the change in HHI would exceed 100. Our results are robust to inclusion of TAC in the revenues of search and contextual providers. As demonstrated in Appendix A, the post-merger HHI and the change in HHI using this approach are not significantly different than those reported in Tables 12 and 13. Moreover, the presumption of an increase in market power is not affected by how we allocate indirect graphic revenues to graphic providers. In particular, when intermediation revenues are counted as direct revenues for the purposes of allocating indirect revenues in the graphic channel (which has the effect of decreasing DoubleClick's expenditure share to 10 percent), the post-merger HHI is 2,418 and the change in HHI is 623. Finally, if indirect revenues are excluded from graphic suppliers' expenditure shares (which has the effect of decreasing DoubleClick's expenditure share to 2

104. *Merger Guidelines, supra* note 2, at §1.51 ("Where the post-merger HHI exceeds 1800, it will be presumed that mergers producing an increase in the HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise.").

percent), the post-merger HHI is 3,133 and the change in HHI is 197. See Appendix A for complete results.

To be sure, direct evidence of market power, such as the ability to raise price significantly above competitive levels or the ability to exclude rivals, is preferable to indirect evidence based on an HHI analysis. In the absence of direct evidence, however, the HHI analysis creates a presumption that the combined firm would possess market power. Although our HHI analysis is only a starting point for a more comprehensive analysis—data on ease and timeliness of entry or merger-specific efficiencies could mitigate the predicted adverse effects—our analysis suggests that the proposed Google-DoubleClick acquisition should be carefully and comprehensively reviewed for potential anticompetitive behavior.

### *B. Potential Harm to Advertisers*

In what follows, we suggest a roadmap for the FTC when implementing Sections 2, 3, and 4 of the *Merger Guidelines*. Our discussion is *not* intended to serve as a substitute for a more detailed analysis.

In the market for advertiser tools used to support search ads and publisher-based ads, Google's proposed acquisition of DoubleClick threatens to lessen competition through "unilateral effects" of the merged firm. As our survey results indicate, online advertisers primarily view search ads and publisher-based ads as substitutes, thus affirming regulators' prior notions. As such, horizontal consolidation of advertiser tools—particularly in such a concentrated market—could have an immediate impact on the competitive environment. In particular, the acquisition would likely induce Google to increase the price of DoubleClick's advertiser tools or its forthcoming integrated platform, recognizing that a significant portion of DoubleClick's marginal customers would select a Google offering, either in the search segment or in the contextual ad segment.

#### *1. Higher Prices for Advertiser Tools*

Following the transaction, if Google were to raise the price of DoubleClick's advertiser tools, Google would retain *both* those clients that maintain their expenditures at DoubleClick (the infra-marginal customers) *and* the departing customers that would increase their expenditures of Google-provided contextual or search ads (the marginal customers). Our survey indicates Google would capture roughly 18 percent of DoubleClick's marginal customers. Depending on the relative margins earned by Google and DoubleClick, this increase in customer (and revenue) retention implies that a combined Google-DoubleClick would have a greater incentive to increase the price of DoubleClick's advertising tools. Stated differently, the profit-maximizing price of DoubleClick's advertiser tools for a combined firm (that chooses two prices to maximize the sum of profits from DoubleClick's and Google's offerings) would likely exceed the profit-maximizing price for DoubleClick alone.[105] A similar unilateral effects analysis

105. The merged firm maximizes the profit function $(p_i - c_i)\, Q_i(p) + (p_j - c_j)\, Q_j(p)$ with respect to the price for each product, where $p$ is the price of each product, $c$ is the marginal cost of each product, and $Q(p)$ is the quantity demand for each product. Under Bertrand differentiated product competition, the pricing rule for product $i$ is $p_i = \dfrac{c_i \varepsilon_{ii}}{\varepsilon_{ii} - 1}$,

(using different data than that presented here) could be performed in the market for intermediation services or publisher tools.

### 2. *Other Potential Harms to Advertisers*

Google's acquisition of DoubleClick would provide Google with access to vast consumer behavior data, which it would likely use to further bolster its dominance vis-à-vis other suppliers of online advertising. As several industry observers have noted, data is a key input in the online advertising industry,[106] providing information on consumers that can be used to better target consumers that might be interested in a given product. As targeting improves, so does the likelihood of a sale; this makes advertising more lucrative to both advertiser (in the form of higher sales) and to the ad server (in the form of more revenue per ad). The end result, of course, is that Google would continue to extend its lead in revenue per ad and revenue per search. If consumer data generates increasing returns to scale, as some academics have asserted,[107] Google would extend their lead in search ads and possibly also their new position in graphic ads. Google's acquisition of more data would also increase the barrier to entry faced by new entrants, as well as putting current competitors at an even greater competitive disadvantage. To the extent that Google's rivals are impaired in their ability to compete effectively, the price of online advertising could increase further.

In addition, an extension of Google's third-party access policies to the vast network of websites that rely on DoubleClick's tools could curtail an advertiser's ability to substitute a combined Google-DoubleClick's services for a rival's. Google Group Product Manager Alex Kinnier has noted on the company's official blog, when explaining its purchase of DoubleClick, that, "[h]istorically, we've not allowed third parties to serve into Google's AdSense network, which has made it hard for advertisers to get performance metrics."[108] Google would likely extend this prohibition to current DoubleClick members because DoubleClick Performics—DoubleClick's performance metrics unit—would become a Google-DoubleClick service. A combined firm's control over

---

where $\varepsilon_{ii}$ is the own-price elasticity of demand for firm i. For the merged firm, the post-merger pricing rule for product *i* is $\frac{p_i - c_i}{p_i} = \frac{1}{\varepsilon_{ii}}\left[-s_i(p) - s_j(p)\varepsilon_{ji}\frac{p_j - c_j}{p_j}\right]\frac{1}{s_i}$,

where $\varepsilon_{ji}$ is the cross-price elasticity of demand for product *j* with respect to the price of product *i*, and $s_i$ is the revenue share of firm *i*.

106 *See, e g* , Hitt Presentation, *supra* note 16, at 5.

107. Eisenmann Presentation, *supra* note 16, at 4, 9. Eisenmann presents evidence of increasing returns to scale for the RPS curve (at 4).. At 9, he suggests that more data will increase the slope of the Revenue Per Search ("RPS") curve for search advertisers (thus further increasing Google's competitive advantage), and may increase the slope of the Revenue Per Eyeball ("RPE") curve for graphical (in his words, "display") advertisers.

108. Alex Kinnier, *Why We're Buying DoubleClick*, THE OFFICIAL GOOGLE BLOG, June 26, 2007, *available at* http://googleblog.blogspot.com/2007/06/why-were-buying-doubleclick.html.

performance information would leave advertisers without the information necessary to judge the effectiveness of Google products vis-à-vis possible substitutes, and would create another barrier to substituting away from Google or DoubleClick products.

## VI. CONCLUSION

This paper represents the first attempt to empirically estimate the degree to which buyers of online advertisements perceive the three primary channels over which they can reach online users—search, contextual, and graphic ads—to be substitutes. Proponents of Google's proposed acquisition of DoubleClick argue that Google does not compete with DoubleClick. Our survey data appears to undermine that hypothesis. In particular, the data show that a large percentage of search and contextual advertising customers would substitute to graphic ads in response to a relative change in prices, indicating that consumers perceive those alternative online advertising channels to be substitutes.

Google's proposed acquisition of DoubleClick would enhance Google's market power in the market for search and publisher-based advertising tools. Our initial estimate suggests that the post-merger HHI would significantly exceed 1,800 and the change in HHI would significantly exceed 100. Furthermore, our HHI estimates affirm a presumption that the acquisition will enhance Google's market power. This presumption is also bolstered by survey evidence that DoubleClick customers perceive Google's offerings to be the next-best alternative. The implication of such a finding is that a combined Google-DoubleClick would likely have an incentive to increase the price of DoubleClick's offering relative to a stand-alone DoubleClick, thereby harming online advertisers.

## APPENDIX A: ALTERNATIVE HHI ANALYSES

We also performed the HHI analysis by (1) maintaining traffic acquisition costs in search-based and contextual advertising revenues (Tables A.1 and A.2), (2) allocating indirect graphic revenue on the basis of combined direct and intermediation revenues (Tables A.3 and A.4), and (3) using only reported direct publisher tools, advertiser tools, and intermediation revenue for graphic ad firms (A.5 and A.6).

TABLE A.1: SHARE OF ONLINE ADVERTISING EXPENDITURES (GOOGLE-DOUBLECLICK ACQUISITION ONLY), 2006

| | Pre-Acquisition | | | Post-Acquisition | | |
|---|---|---|---|---|---|---|
| Provider | Expenditures ($M) | Share | HHI | Expenditures ($M) | Share | HHI |
| Google[1*] | 9,385 | 36% | | 13,903 | 53% | |
| DoubleClick[2] | 4,517 | 17% | | | | |
| Yahoo![1*] | 5,627 | 21% | | 5,627 | 21% | |
| Microsoft[1*] | 2,227 | 8% | | 2,227 | 8% | |
| aQuantive[2] | 1,895 | 7% | | 1,895 | 7% | |
| ValueClick[2] | 882 | 3% | | 882 | 3% | |
| AOL[1] | 564 | 2% | | 564 | 2% | |
| Ask.com[1] | 544 | 2% | | 544 | 2% | |
| 24/7 Real Media[2] | 524 | 2% | | 524 | 2% | |
| Quigo[2] | 60 | 0% | | 60 | 0% | |
| Total | 26,226 | 100% | 2,186 | 26,226 | 100% | 3,419 |
| Change in HHI | | | 1,233 | | | |

*Sources:* [1] Company financial statements. [2] Tables 3 and 4.
*Note*: Includes traffic acquisition costs.

TABLE A.2: SHARE OF ONLINE ADVERTISING EXPENDITURES (ALL PROPOSED ACQUISITIONS)

| | Pre-Acquisition | | | Post-Acquisition | | |
|---|---|---|---|---|---|---|
| Provider | Expenditures ($M) | Share | HHI | Expenditures ($M) | Share | HHI |
| Google[1*] | 9,385 | 36% | | 13,903 | 53% | |
| DoubleClick[2] | 4,517 | 17% | | | | |
| Yahoo! [1*] | 5,627 | 21% | | 5,627 | 21% | |
| Microsoft[1*] | 4,122 | 16% | | 4,122 | 16% | |
| aQuantive[2] | | | | | | |
| ValueClick[2] | 882 | 3% | | 882 | 3% | |
| AOL[1] | 564 | 2% | | 564 | 2% | |
| Ask.com[1] | 544 | 2% | | 544 | 2% | |
| 24/7 Real Media[2] | 524 | 2% | | 524 | 2% | |
| Quigo[2] | 60 | 0% | | 60 | 0% | |
| Total | 26,226 | 100% | 2,309 | 26,226 | 100% | 3,542 |
| Change in HHI | | | 1,233 | | | |

*Sources*: [1] Company financial statements. [2] Tables 3 and 4.
*Note*: Includes traffic acquisition costs.

TABLE A.3: SHARE OF ONLINE ADVERTISING EXPENDITURES (GOOGLE-DOUBLECLICK ACQUISITION ONLY), 2006

| | Pre-Acquisition | | | Post-Acquisition | | |
|---|---|---|---|---|---|---|
| Provider | Expenditures ($M) | Share | HHI | Expenditures ($M) | Share | HHI |
| Google[1] | 6,085 | 30% | | 8,200 | 40% | |
| DoubleClick[2] | 2,115 | 10% | | | | |
| Yahoo![1] | 3,761 | 19% | | 3,761 | 19% | |
| Microsoft[1] | 1,227 | 6% | | 1,227 | 6% | |
| aQuantive[2] | 1,488 | 7% | | 1,488 | 7% | |
| ValueClick[2] | 3,673 | 18% | | 3,673 | 18% | |
| AOL[1] | 564 | 3% | | 564 | 3% | |
| Ask.com[1] | 544 | 3% | | 544 | 3% | |
| 24/7 Real Media[2] | 803 | 4% | | 803 | 4% | |
| Quigo[2] | 60 | 0% | | 60 | 0% | |
| Total | 20,320 | 100% | 1,795 | 20,320 | 100% | 2,418 |
| Change in HHI | | | 623 | | | |

*Sources:* [1] Company financial statements. [2] Tables 3 and 4.

TABLE A.4: SHARE OF ONLINE ADVERTISING EXPENDITURES (ALL PROPOSED ACQUISITIONS)

| | Pre-Acquisition | | | Post-Acquisition | | |
|---|---|---|---|---|---|---|
| Provider | Expenditures ($M) | Share | HHI | Expenditures ($M) | Share | HHI |
| Google[1] | 6,085 | 30% | | 8,200 | 40% | |
| DoubleClick[2] | 2,115 | 10% | | | | |
| Yahoo![1] | 3,761 | 19% | | 3,761 | 19% | |
| Microsoft[1] | 2,715 | 13% | | 2,715 | 13% | |
| aQuantive[2] | | | | | | |
| ValueClick[2] | 3,673 | 18% | | 3,673 | 18% | |
| AOL[1] | 564 | 3% | | 564 | 3% | |
| Ask.com[1] | 544 | 3% | | 544 | 3% | |
| 24/7 Real Media[2] | 803 | 4% | | 803 | 4% | |
| Quigo[2] | 60 | 0% | | 60 | 0% | |
| Total | 20,320 | 100% | 1,883 | 20,320 | 100% | 2,507 |
| Change in HHI | | | 623 | | | |

*Sources:* [1] Company financial statements. [2] Tables 3 and 4.

TABLE A.5: SHARE OF ONLINE ADVERTISING EXPENDITURES (GOOGLE-DOUBLECLICK ACQUISITION ONLY), 2006

| | Pre-Acquisition | | | Post-Acquisition | | |
|---|---|---|---|---|---|---|
| Provider | Expenditures ($M) | Share | HHI | Expenditures ($M) | Share | HHI |
| Google[1] | 6,085 | 45% | | 6,385 | 47% | |
| DoubleClick[2] | 300 | 2% | | | | |
| Yahoo![1] | 3,761 | 28% | | 3,761 | 28% | |
| Microsoft[1] | 1,488 | 11% | | 1,488 | 11% | |
| aQuantive[2] | 174 | | | 174 | | |
| ValueClick[2] | 521 | 4% | | 521 | 4% | |
| AOL[1] | 564 | 4% | | 564 | 4% | |
| Ask.com[1] | 544 | 4% | | 544 | 4% | |
| 24/7 Real Media[2] | 114 | 1% | | 114 | 1% | |
| Quigo[2] | 60 | 0% | | 60 | 0% | |
| Total | 13,611 | 100% | 2,935 | 13,611 | 100% | 3,132 |
| Change in HHI | | | 197 | | | |

*Sources:* [1] Company financial statements. [2] Tables 3 and 4.

TABLE A.6: SHARE OF ONLINE ADVERTISING EXPENDITURES (ALL PROPOSED ACQUISITIONS)

| | Pre-Acquisition | | | Post-Acquisition | | |
|---|---|---|---|---|---|---|
| Provider | Expenditures ($M) | Share | HHI | Expenditures ($M) | Share | HHI |
| Google[1] | 6,085 | 45% | | 6,385 | 47% | |
| DoubleClick[2] | 300 | 2% | | | | |
| Yahoo![1] | 3,761 | 28% | | 3,761 | 28% | |
| Microsoft[1] | 1,662 | 12% | | 1,662 | 12% | |
| aQuantive[2] | | | | | | |
| ValueClick[2] | 521 | 4% | | 521 | 4% | |
| AOL[1] | 564 | 4% | | 564 | 4% | |
| Ask.com[1] | 544 | 4% | | 544 | 4% | |
| 24/7 Real Media[2] | 114 | 1% | | 114 | 1% | |
| Quigo[2] | 60 | 0% | | 60 | 0% | |
| Total | 13,611 | 100% | 2,965 | 13,611 | 100% | 3,162 |
| Change in HHI | | | | 197 | | |

*Sources:* [1] Company financial statements. [2] Tables 3 and 4.

APPENDIX B: SURVEY QUESTIONNAIRE

**U.S. National Survey of Online Advertisers**

August 2, 2007

N=200 ONLINE RETAILERS

*This survey is being conducted on behalf of Shaw and Company Research. We would like to include your responses to this survey, which will be kept confidential, with the responses of several hundred other people like yourself.*

*First, may I ask:*

*QA Do you work for a company that purchases Internet advertising?*

1. *Yes [CONTINUE].*
2. *No [THANK AND TERMINATE].*

*QB. Do you purchase or have knowledge about these advertising purchases?*

1 *Yes [CONTINUE]*
2 *No [THANK AND TERMINATE].*

*QC. Has your company purchased Internet advertising that ran on a publisher's website, such as NYTIMES.COM or ESPN.COM?*

1. *Yes [CONTINUE].*
2. *No [THANK AND TERMINATE]*

Q1. How much did you spend on advertising across all media outlets – including print, radio, television, and Internet – over the past year?

1. Less than $5000
2. $5,000 to $25,000
3. $25,000 to $100,000
4. $100,000 to $500,000
5. $500,000 to $1 million
6. $1 million to $5 million
7. $5 million to $10 million
8. $10 million to $50 million
9. Greater than $50 million
10. Unsure

    99. Don't Know / Refused / NA.

Q2. Now, how much did you spend on Internet advertising in the past year?

1. Less than $5000
2. $5,000 to $25,000
3. $25,000 to $100,000
4. $100,000 to $500,000
5. $500,000 to $1 million
6. $1 million to $5 million
7. $5 million to $10 million
8. $10 million to $50 million
9. Greater than $50 million
10. Unsure
99. Don't Know / Refused / NA.

Q3. In thinking about ads placed on a publisher's website such as NYTIMES.COM or ESPN.COM, were those ads graphic ads or text-based ads, or both?

1. Graphic.
2. Text-based. [GO TO Q15].
3. Both.
4. Don't Know / Refused / NA. [THANK AND TERMINATE].

Q4. Were the graphic ads that you placed on publishers' websites purchased as part of an advertising portfolio through an agency or broker?

1. Yes.
2. No.
99. Don't Know / Refused / NA.

Q5. In the past year, have you used DoubleClick services – including ad management or DART exchange software – to produce a graphic ad?

1. Yes.
2. No. [CONTINUE TO Q6 through Q9, THEN SKIP TO Q13].
3. Don't Know / Refused / NA. [CONTINUE TO Q6 through Q9, THEN SKIP TO Q13].

Q6. Suppose the price of **graphic ads** placed on all publishers' websites increased by 10 percent. How would your purchases of **text-based ads** placed on publishers' websites change?

1. Not at all. [GO TO Q8].
2. Increase by 5 percent or less. [GO TO Q8].
3. Increase between 5 and 10 percent. [GO TO Q8].
4. Increase by 10 percent or more. [GO TO Q8].
5. Decrease by 5 percent or less. [GO TO Q7].
6. Decrease between 5 and 10 percent. [GO TO 7].
7. Decrease by 10 percent or more. [GO TO Q7].
99. Don't Know / Refused / NA. [GO TO Q8].

Q7. Why would you choose to decrease your purchases of **text-based ads**?

1. Because of budget constraints and the higher cost of **graphic ads**, I would be forced to decrease my purchases of **text-based ads**.
2. Because of an increase in the cost of **graphic ads**, I would perceive the value of **text-based ads** to fall.
3. I'm confused by the logic of this question – I'm not sure how the costs of **graphic ads** and **text-based ads** are linked.

Q8. Suppose the price of **graphic ads** placed on all publishers' websites increased by 10 percent. How would your purchases of **search-based ads** placed on publishers' websites change?

1. Not at all. [GO TO Q10].
2. Increase by 5 percent or less. [GO TO Q10].
3. Increase between 5 and 10 percent. [GO TO Q10].
4. Increase by 10 percent or more. [GO TO Q10].
5. Decrease by 5 percent or less. [GO TO Q9].
6. Decrease between 5 and 10 percent. [GO TO Q9].
7. Decrease by 10 percent or more. [GO TO Q9].
99. Don't Know / Refused / NA. [GO TO Q10].

Q9. Why would you choose to decrease your purchases of **search-based ads**?

1. Because of budget constraints and the higher cost of **graphic ads**, I would be forced to decrease my purchases of **search-based ads**.
2. Because of an increase in the cost of **graphic ads**, I would perceive the value of **search-based ads** to fall.
3. I'm confused by the logic of this question – I'm not sure how the costs of **graphic ads** and **search-based ads** are linked.

Q10. [ASK FOR ONLY THOSE WHO ANSWER '1. YES' TO Q5] Now suppose that the price of DoubleClick's graphic ads services – including ad management or exchange software – increases by 10 percent. Would you:

1. Purchase the same amount of graphic ads through DoubleClick. [GO TO Q13].
2. Purchase the same amount of graphic ads through another firm (such as ValueClick, aQuantive, or 24/7 Real Media). [GO TO Q13].
3. Purchase fewer graphic ads through DoubleClick and increase the amount of text-based ads you purchase on the publisher's website. [GO TO Q11]

4. Purchase fewer graphic ads through DoubleClick and increase the amount of search-based ads you purchase. [GO TO Q12].
5. Keep everything the same. [GO TO Q13].
99. Don't Know / Refused / NA. [GO TO Q13].

Q11. To which supplier of text-based ads – such as those found on ESPN.COM or NYTIMES.COM – would you first turn?

1. Microsoft AdCenter. [GO TO Q13].
2. Yahoo Publishers' Network. [GO TO Q13].
3. Google AdSense. [GO TO Q13].
4. Quigo. [GO TO Q13].
5. other. [GO TO Q13].
99. Don't Know / Refused / NA. [GO TO Q13].

Q12. To which supplier of search-based ads would you first turn?

1. Google.com
2. Yahoo.com
3. MSN.com
4. Ask.com
5. AOL.com
6. other
99. Don't Know / Refused / NA.

Q13. For every $1,000 you spend on online ads, please allocate your expenditures across the following three groups:

| | |
|---|---|
| 1. Search-based ads | {text box} |
| 2. Text-based ads on publisher site | {text box} |
| 3. Graphic ads on publisher site | {text box} |

Q14. [ASK ONLY IF VALUE FOR Q13, OPTION 3 IS GREATER THAN $0] For every $1,000 you spend on graphic ads on publisher sites, please allocate your expenditures across the following providers:

| | |
|---|---|
| 1. DoubleClick | {text box} |
| 2. ValueClick | {text box} |
| 3. aQuantive | {text box} |
| 4. 24/7 Real Media | {text box} |
| 5. other | {text box} |

Q15. [ASK IF VALUE FOR Q13, OPTION 2 IS GREATER THAN $0, OR IF REDIRECTED FROM Q3, ANSWER 2] For every $1,000 you spend on text-based ads on publisher sites, please allocate your expenditures across the following providers:

| | |
|---|---|
| 1. Google AdSense | {text box} |
| 2. Yahoo Publisher' Network | {text box} |
| 3. Microsoft AdCenter | {text box} |
| 4. Quigo | {text box} |
| 5. other | {text box} |

Q16. For every $1,000 you spend on search ads, please allocate your expenditures across the following providers:

| | | |
|---|---|---|
| 1. | Google.com | {text box} |
| 2. | Yahoo.com | {text box} |
| 3. | MSN.com | {text box} |
| 4. | Ask.com | {text box} |
| 5. | AOL.com | {text box} |
| 6. | other | {text box} |
| 7. | Not Applicable – I do not purchase search ads | {check box} |

Q17. How many employees does your firm have?

1. Less than 50.
2. 50 to 100.
3. 100 to 200.
4. 200 to 500.
5. 500 to 1,000.
6. 1,000 to 2,500
7. 2,500 to 5,000
8. Greater than 5,000
9. Unsure

99. Don't Know / Refused / NA.

Q18. What state is your business located in?

{drop down menu with 50 states + DC listed}

Q19. What is your firm's retail sector?

1. Arts, entertainment, recreation
2. Automotive
3. Clothing, apparel, shoes
4. Computer services, hardware, software
5. Consumer electronics (including household appliances)
6. Education
7. Financial services / insurance
8. Food / beverage
9. Healthcare and pharmaceuticals
10. Office equipment, supplies
11. Real Estate
12. Social networking (dating, people searches, employment)
13. Travel / tourism
14. Video services / telecommunications (including wireline and wireless)
15. Combination of above
16. other

99. Don't Know / Refused / NA.

Q20. What was the value of your sales, shipments, or receipts for the calendar year 2006? Please place a dollar amount in the text box.

{text box}

Q21. For how many years has your business been in existence?

1. Fewer than 5 years
2. 5 to 10 years
3. 10 to 20 years

4. More than 20 years
5. Unsure
99. Don't Know / Refused / NA.

Thank you very much for your cooperation and patience. Have a good day.

**Statement of**
**The Center for Democracy & Technology**
**before**
**The Antitrust, Competition Policy and Consumer Rights Subcommittee**
**of the Senate Committee on the Judiciary**
**on**
**"An Examination of the Google-DoubleClick Merger and the Online Advertising Industry: What Are the Risks for Competition and Privacy?"**

**September 27, 2007**

Chairman Kohl and Ranking Member Hatch, the Center for Democracy & Technology (CDT) is pleased to have the opportunity to provide a statement for the record on the risks to competition and privacy of the Google-DoubleClick merger.

Although the Google-DoubleClick merger has drawn fresh attention to the privacy issues raised by online advertising and behavioral targeting, this is by no means a new debate. In 1999, concerns about consumer profiling led the Federal Trade Commission (FTC) to hold a workshop on the issue. At that workshop, a group of online advertising companies announced the formation of the Network Advertising Initiative (NAI), an organization aimed at developing a self-regulatory framework for online advertising networks engaged in consumer profiling. After reviewing the NAI's work, the FTC submitted a report to Congress that was approved 4-1 by the FTC commissioners.[1]

In its report, the FTC commended the NAI for developing an innovative self-regulatory framework, but noted that "backstop legislation addressing online profiling is nonetheless required to fully ensure that consumers' privacy online is protected."[2] Indeed, if such legislation had been passed in the years since the publication of the report, perhaps privacy would not be a subject of today's hearing. Unfortunately, even though the Internet has become increasingly intertwined with consumers' daily lives, no baseline legal protections have been implemented to safeguard privacy.

In its report to Congress, the FTC recognized that the NAI guidelines would not apply to all companies engaged in online profiling. The FTC observed "unavoidable gaps" in the ability of NAI members to require their partners to comply with the self-regulatory principles.[3] Over the past seven years, these gaps have widened substantially, greatly reducing the NAI's effectiveness.

A CDT study conducted last year illuminated one facet of this deficiency in the NAI framework.[4] Over a two-week period in May 2006, CDT collected advertisements

---

[1] *Online Profiling: A Report to Congress (Part 2)*, Federal Trade Commission, Jul. 2000, http://www.ftc.gov/os/2000/07/onlineprofiling.pdf. ("Profiling Report").
[2] Profiling Report at 10.
[3] Profiling Report at 10.
[4] *Following the Money II: The Role of Intermediaries in Adware Advertising*, Center for Democracy & Technology, Aug. 2006, http://www.cdt.org/privacy/20060809adware.pdf.

displayed by two deceptively installed "adware" programs – software applications that deliver pop-up ads while users browse the Web. The results of the study showed that rather than delivering ads directly from advertisers' servers to users' desktops, these ads pass through a Byzantine network of intermediaries: online advertising networks, affiliate networks, and ad-serving platforms. Although each of these arrangements may work differently, it is possible for these intermediaries to compile the same kinds of behavioral profiles that sparked such controversy and led to the creation of the NAI in 1999. Out of the 73 intermediaries CDT identified, however, only four were members of the NAI. In 2000 the FTC estimated that 90 percent of the network advertising industry was covered by the NAI principles, but CDT's numbers indicate that this percentage has greatly diminished as the industry has evolved.[5]

Adware intermediaries are just a small slice of this problem. Including the Google-DoubleClick merger, no less than five major mergers and acquisitions of behavioral targeting firms have been announced this year, bringing a new wave of Internet giants into the space.[6] This means that the same companies that provide search services, store emails, support online personal calendars, and run chat applications may begin to engage in behavioral targeting, dramatically increasing the amount and types of data that can be brought together to create consumer profiles and the ease with which such information can be shared. These kinds of business models were not taken into account when the NAI framework was developed. With so little of the industry subscribing to the NAI privacy framework -- and no baseline national law to protect users' rights -- consumers are not being sufficiently protected.

The fact that the NAI applies to only a portion of the online advertising industry and only a subset of business models in the marketplace is by no means its only deficiency. The FTC's upcoming workshop on this issue will showcase how changes in technology, policy, and business practice have rendered the current online privacy framework inadequate.

CDT is pleased that this Committee has taken an interest in the Google-DoubleClick merger, as it exemplifies the industry-wide privacy concerns that behavioral targeting raises. We look forward to working with you as you look further into privacy issues in this industry.

---

[5] Profiling Report at 10.
[6] For a list of the mergers, see *Privacy Initiatives Key to Addressing Behavioral Targeting Concerns*, Center for Democracy & Technology, Aug. 2007, http://cdt.org/publications/policyposts/2007/11.

**Written Testimony of**
**Scott Cleland**
**President, Precursor LLC**

**Before the**
**Senate Judiciary Subcommittee**
**On Antitrust, Competition Policy, and Consumer Rights**

**Hearing on:**
***"An Examination of the Google-DoubleClick Merger***
***and the Online Advertising Industry:***
***What are the Risks for Competition and Privacy?"***

**September 27, 2007**

## Table of Contents

## I. Introduction

Mr. Chairman and Members of the Subcommittee, thank you for the honor of testifying on the extremely important subject of the risks to competition from the proposed Google-DoubleClick merger. I am Scott Cleland, President of Precursor LLC, an industry research and consulting firm, specializing in anticipating the future of the converging techcom industry. As was the case in my previous appearances before this Subcommittee, the **views expressed by me in this testimony are my own personal views and not the views of any of my clients**. In the interest of full disclosure, I am also Chairman of NetCompetition.org, an e-forum opposed to regulation of the Internet, which is funded by broadband companies.

- Attached to this testimony is my July 17, 2007, 35-page white paper: "Googleopoly: The Google-DoubleClick Anti-competitive Case" which can also be found at www.googleopoly.net. I produced this analysis on my own volition, and not for any clients, in order to help Congress and this subcommittee better understand the anti-competitive nature of this merger, and to accelerate and improve the FTC's investigation of anti-competitive effects of this merger. **It is my professional view, as a leading expert on the future of communications and the Internet, that Google will eventually supplant Microsoft as the company facing the most antitrust scrutiny globally in the years ahead.**

## II. Relevant Online Advertising Trends

- Online advertising revenues eclipsed radio advertising revenues this year (per eMarketer), and they are projected to surpass TV revenues, the number one advertising medium, in 2011, per Veronis Suhler estimates. This migration will continue to occur because online advertising is so much more targeted, relevant and measurable than offline advertising.

- Most all content, news, books, audio, video, research, databases, etc. are rapidly being digitized and migrating to the Internet, because of the extraordinary scale and scope distribution efficiencies of the Internet.

- Google's search share has grown steadily to about 65% of all searches per Hitwise and ~65% of all video sessions per compete.com.

- Internet users increasingly use the search bar for a browser as their cursor increasingly defaults to the search bar and not the browser bar.

- More downloaded software, like Adobe and RealNetworks, increasingly comes bundled with a default to set a default search engine, which is predominantly Google's.

- Customers are increasingly demanding search and display to be offered together and coordinated per Yahoo.

- Most people don't look beyond the first page of search results, and very few look beyond the first two pages of search results.

- Online audiences increasingly depend on online intermediaries or aggregators, like Google and Yahoo, for news per Jupiter Research; 60% of users aged 18-24 cite news aggregators as their main source of news.

- Content is replacing communications as the Web's primary use according to the Online Publishers Association as users spend almost half of their time online visiting content; time online visiting content is up 37% over four years ago.

- Students increasingly don't question Google's search ranking system according to a new study in the Journal of Computer Mediated Communication.

- **The online advertising market is rapidly consolidating and becoming highly concentrated as Yahoo has bought Right Media, Microsoft has bought aQuantive, WPP bought 24-7 Real Media, and Google has bought YouTube, Adscape Media, DoubleClick, and FeedBurner.**

## III. This Merger in Perspective

**This merger review is a watershed moment for Internet competition.** I believe Google-DoubleClick is clearly the most far-reaching and least-understood merger this Subcommittee has ever reviewed, and it may arguably turn out to be one of this Subcommittee's most important merger reviews as well.

- **Most Far-Reaching Merger:** It is most far-reaching because of the *global* scale and scope of the adolescent twelve-year-old commercial Internet, and because it involves arguably two of the most dominant Internet businesses: Google and DoubleClick. Google has 75% of the *global* search market revenue share per Hitwise and DoubleClick serves ads to an estimated 85% of websites globally per EPIC. To put these *global* market shares in the context of another "big" global FTC merger review, Exxon Mobil in 1999, Exxon then had 2% global market share of oil production and Mobil 1% because of widespread state ownership of oil production.

- **Least-Understood Merger:** It is also among the least understood mergers the committee has ever reviewed for a variety of reasons. First, since DoubleClick is a privately-held company without the normal publicly-traded company disclosure requirements; there is less public information available than normal, and consequently much less media and trade press scrutiny. Second, Google, the world's leading brand, paradoxically is among the least transparent companies I have covered in my fifteen years tracking publicly-traded companies. Google is basically a "black box" company that is extremely secretive of their internal operations and shares very little information with investors or the public. Third, in listening to the Google-DoubleClick merger announcement call in April, I was flabbergasted at how little information Google disclosed to investors and how many pertinent questions the company refused to answer. It was substantially less transparent than any of the dozen or so conference calls on major mergers that I have participated in and analyzed in the last fifteen years. I came away from that conference call deeply troubled and determined to discover what they were so intent about hiding. (Much of what I have learned since then is included in this testimony and attachments.)

- **Arguably One of the Most Important Mergers:** This is a watershed moment for antitrust. The Internet is the most global and efficient distribution platform ever invented for distributing content of any type. The only proven business model for monetizing Internet content is online advertising. Given the surge of content being driven to the Internet, as well as the trend of traditional offline advertising dollars migrating to online advertising, **this merger really is ultimately about the long-term competitive trajectory of the world content business.** Given that Google and DoubleClick each dominate different formats of the same ad-serving market, their combination could represent an irreversible "tipping point" to domination of the Internet as a means of monetizing content. The long-term implications of this merger are arguably greater than most any other merger before it due to the unique speed and extreme concentration of the Internet and because this merger has the potential to greatly set the competitive trajectory for the content business going forward. This is about whether an online advertising bottleneck will be allowed to form to effectively pick content "winners and losers" on the Internet.

## IV. The Problem

**The biggest challenge for antitrust authorities is to not miss the proverbial *"forest for the trees"* in this merger review.** Online advertising is the only proven business model for monetizing Internet content. The Internet is the ultimate network of networks and it creates the ultimate network effect of network effects.

The **biggest risk for Congress and the FTC here is missing the critical importance of the *essence* of online advertising**, which is the exceptional *inter-connectedness* of: *inter-related* segments, networks, people, products, services, and technologies -- by artificially assuming that they are *separate* and distinct not highly-interdependent markets. **The traditional antitrust concept of "separate" antitrust markets is arguably least applicable and most artificial and contrived when applied to Internet businesses.**

- Another analogy drives home the irrationality of "separate markets" analysis when dealing with highly integrated systems like Internet advertising. The human body's five physical senses: sight, hearing, taste, smell and touch -- are clearly driven by "separate" body parts, but none can function without the brain. To conclude that the Internet's "ears" of display ad-serving are "separate" and unrelated to the Internet's "eyes" of search ad-serving is to irrationally conclude that the "brains" of the Internet and all its knowledge of relationships, memories, information, and ability to learn -- are irrelevant to understanding what people "hear" or "see". Concluding that search and display ad-serving don't compete with each other is as irrational as concluding that the eyes and ears don't compete for the brain's attention or conclusions.

- The FTC has to guard against irrational conclusions arising from irrational and artificial market segmentation analysis. **The anti-competitive effects of this merger are a result of multiple and cumulative network effects and also the tipping effect of combining these two related dominant companies.** I explain in detail the four largest new anti-competitive network effects, which would result from this merger in the attached Googleopoly white paper analysis on pages 25-27.

**The Internet Choice Paradox:** The public relations challenge for antitrust authorities is the "*Internet choice paradox*." How can the Internet, which offers consumers so much choice, at the same time, present so little real choice for businesses to monetize their content on the Internet? Turns out that the same extraordinary global scale/scope efficiencies and minimal transactional friction costs that make the Internet so easy for any consumer to use, are also "winner-take-all" business efficiencies, which in the hands of the two most dominant global companies in online advertising, become a deadly chokehold on Internet competition.

- **See Exhibit 1** in the Appendix to view the paradox of the many choices of the consumer side of the Internet versus the little choice for monetizing their content on the business side of the Internet.

- The most difficult and costly task in the online content business is to build a large audience i.e. gain the attention of viewers. The most difficult task in the online advertising business is to build a large client network of advertisers and website publishers. This merger uniquely combines, via acquisition, the two most dominant companies who have been highly successful at achieving the most difficult business tasks of building the largest and most comprehensive audience and client base. **It would take years for Google to organically replicate DoubleClick's client and audience reach and I don't believe DoubleClick could ever hope to organically recreate Google's advertiser reach. Consequently, worse-positioned companies like Yahoo and Microsoft would have little chance of ever catching a combined Google-DoubleClick.**

**Extreme Concentration: Comparing Analogous Intermediary Markets**: One of the few things I am repeating in this testimony that was included in the attached white paper; "Googleopoly," is about comparing analogous intermediary markets.

- "Most observers do not appreciate how extraordinarily concentrated key parts of the Internet have become. To put in proper perspective this merger's market concentration in the *intermediary market* of online advertising, compare it to the analogous *intermediary market* of finance or capital markets. **To equal Google-DoubleClick's level of market concentration, one single financial services company would have to own:**

- The top ~15 Wall Street banks/asset managers;
- ~60% of the hedge fund and private equity industries;
- The New York and London Stock Exchanges;
- The two leading providers of financial analytic tools: Bloomberg and Factset;
- Two of the three national providers of credit profiles: Experian and Equifax; and
- ~60% of the Federal Reserve's and U.S. Census Bureau's raw market and consumer data." **See Exhibit 2.**

**Extreme Media Concentration**: This merger should give pause to any journalist who believes in the importance of an independent press, because of how much potential power over all media it concentrates increasingly in one entity's hands – an entity by the way, which has a proven track record of extraordinary secrecy and lack of transparency to the press and investors. The trajectory here is clear; more and more people are getting more and more of their news via search or news aggregators fueled by search engines. The trend is also clear that monetizing online journalism is increasingly being "powered by Google:" (New York Times, Washington Post, Chicago Tribune, AP, CNN, among others). Since the monetization of online journalism is driven by readership, and search algorithms are popularity-driven, the business of online journalism will increasingly skew towards more popular "soft" or celebrity news and away from more "hard," political, economic or international news.

- This merger also highlights the de facto "end run" Google is successfully achieving around the spirit of long time, bi-partisan limits on media ownership. To promote competition and localism, Congress and the FCC has long restricted the cross-ownership of newspapers and broadcasters in a local market, and restricted the national reach of radio and cable to roughly 30% of the nation, and TV broadcast to 39% of the nation. In contrast, Google is effectively aggregating and integrating a national (and even global) audience reach for newspapers, radio, TV, and cable all in one online medium – effectively creating a de facto "end-run" of media ownership limits. (**See Exhibit 3**.)

**Googleopoly Tipping Point?** The core question many ask to determine if this merger is anticompetitive is: what does this merger specifically do to "substantially lessen competition?" **See Exhibit 4** to see how the Google-DoubleClick merger accelerates network effects via acquisition. Simply, this merger will grow Google's Internet audience reach from 65% to close to 90% by buying the 25% of the Internet viewing audience that Google does not yet control. No other company would have an Internet audience remotely close to Google-DoubleClick's. Moreover, the merger would expand Google's existing overwhelming competitive advantage in building the world's largest network of advertisers, with 90% share of the advertiser market, by adding hundreds of the top 1500 global advertisers that Google does not have and which may be the hardest to break into. This merger would extend Google-DoubleClick's market lead to the extent that no other competitor could hope to catch them.

**Facilitating Bottleneck Control of Online Advertising: See Exhibit 5** to view how the tipping point also contributes to creating an effective business model bottleneck for online advertising. In addition to the tipping effect of the audience and advertiser network, the combined entity would also dominate the click data universe of what's known about consumers' Internet behavior and the software tools or "dashboard" to optimize online advertising campaigns. This merger would essentially give the combined Google-DoubleClick the keys to the Internet vault of private information. Over time there would be precious few users that Google-DoubleClick would not have a "private dossier" on.

- The advertiser tools segment is particularly important to building an online advertising "platform". These tools are effectively like a home page or operating system for advertisers who want comprehensive access to all their advertising performance across ad formats. This format will also have other software applications to further ensconce Google as the dominant and permanent home page and online advertising operating system for the Internet.

**Extreme Market Power:** The other analysis that I will repeat in this testimony that is also included in the attached Googleopoly white paper, is the summary chart – **See Exhibit 6**. The antitrust problem here explains the cumulative effect of all increases in Google-DoubleClick's "web-of-market-power." Essentially the Google-DoubleClick merger would combine the #1 and #2 networks of Internet viewers, advertisers and websites. Not only would Google-DoubleClick enjoy near perfect market intelligence and information relative to their competitors of viewer demand, advertiser supply, and website inventory, they would also enjoy near perfect market information on how to best segment/target these networks to optimize the monetization of this content. This network effect of network effects essentially would enable Google-DoubleClick to increasingly "corner" the online advertising market.

## V. The Stakes

**The Stakes of Lax Antitrust Enforcement:** Will lax antitrust enforcement enable Google to become via acquisition the:

- **"Online-advertising bottleneck provider"** picking Internet content business winners and losers?
- **"Ultimate Internet Gatekeeper"** deciding which Internet content gets viewed the most and which the least?
- **"Internet's de facto paymaster/boss"** determining which websites get paid how much?
- **"Internet market maker"** that has uniquely comprehensive market intelligence and information on advertisers, websites, ad-inventory, viewers, and Internet user behavior?

**The political stakes -- no checks and balances:** This merger **should also give pause because every politician understands that "*information is power*", and Google openly aspires to be**

**the world's most powerful information broker.** Listen to Google's own uniquely monopolistic public vision in its well-known mission statement: "*to organize the world's information and make it universally accessible and useful.*" No other entity currently has such a naked ambition to control or effectively corner the market for any of the world's commodities, let alone all "*the world's information*" (public and private), while also having the wherewithal (infrastructure, technology, capacity, expertise, and acquisitions) to accomplish the task.

As a nation founded and grounded on the principles of separation of powers, checks and balances, a free press, and free speech, it is troubling that one company is dedicated to, and well on path, to quickly achieving business model dominance over access to "*the world's information.*"

- Google's defense is that the accumulation of all "the world's information" is only for noble purposes and to "*do no evil*" as their well-known motto states. While it is certainly true that they are giving more people ready access to useful information than ever before in history, it is also true that the world knows virtually nothing about the real and inherent biases and value judgments that power Google's increasingly world dominant search algorithm and which "*organizes the world's information.*"
  - Google's search "algorithm" contains a series of ~400 "bias variables," which determine, via a ranking, what information practically gets found and what information gets practically "buried" from public view.
  - Simply, Google has automated the editorial placement function of newspaper, TV and radio editors. Just like different media outlets have well-known information biases, the Google algorithm has its own information biases, but they are totally secret and non-transparent.

- With virtually no transparency or accountability, who knows what Google's real and inherent algorithmic biases are?

- With this DoubleClick acquisition tipping Google to further online advertising dominance, by providing Google with instant access to the 25% of the Internet viewers it does not have, and to the hundreds of top global advertising clients that Google doesn't have, **the combined Google-DoubleClick will have little accountability to consumers, competition, regulators, or third-party oversight**. Given that the majority of Internet users do not look beyond the first page of search results and very few look beyond the second page, who would ever know if the algorithm had a subtle bias to keep certain types of information that Google did not agree with from ever surfacing to the first or second page of results? **What checks and balances would exist to Google-DoubleClick's "web of market power" over "the world's information?"**

- Adding to the troubling lack of checks and balances, Google has a well-established policy and culture of "innovation without permission" that internally resists the need for "corporate controls" or what is better known post Sarbanes-Oxley as "internal controls."

## VI. Recommendation

**Block This Merger:** As an ardent adherent to the free-market "Chicago School" of antitrust enforcement, and as a longtime leading analyst covering the Internet marketplace, the strong evidence that this merger "substantially lessens competition" compels me to **recommend that this Subcommittee oppose this merger and urge the FTC to seek an injunction to block it in Federal Court**.

In my fifteen years of relevant experience, **I have never seen another merger which**:

- Facilitates more extreme *global* concentration both horizontally and vertically simultaneously;
- Generates more powerful and cumulative "network effects" or increasing barriers to competitive entry;
- Tips so many market sub-segments to "substantially less competition" going forward: (Search, text ad-serving, contextual ad-serving, graphic display-ad-serving, rich-media/video ad-serving, consumer behavior data, ad-publishing analytical tools, cross-market performance analytics, ad-brokering, and ad-exchanges.)
- Accelerates a dominating "platform effect" so quickly and completely where dominance in one segment can be cross-leveraged to dominate related segments; and
- Forecloses more actual and potential competition by effectively "cutting off the supply of oxygen" to competitors.

**This should not be a hard antitrust call.**

- The superficial defense that Google and DoubleClick are not competitors withers upon scrutiny of the facts.
- The attempt to define the market more broadly as advertising overall ignores the law of the land that defines these markets and restricts both the ownership share and cross-ownership of radio, TV, cable and newspapers.
- The initial "screen" or measurement of potential market power, the Herfindahl-Hirschman Index, in almost any way the FTC chooses to slice it, shows that the online advertising sub-markets are highly concentrated and the presumption that the merger creates market power.
- Further investigation into whether there are sufficient competitive/market forces to naturally and quickly "cure" the presumption of increased market power show a market with extraordinary network effects and tipping towards effective bottleneck control of online advertising. (Please see my attached white paper for an in-depth, barriers-to-entry

analysis of why Yahoo and Microsoft will continue to fall behind competitively and how the merger creates multiple serious anti-competitive network effects.)

- **The threshold bar of this merger review is not proving a monopoly, but simply proving the merger "substantially lessens competition."**

**The Subcommittee should be deeply troubled that both web publishers and Yahoo are so reluctant to *publicly* testify before this subcommittee.**

- "The dirty little secret" is that web publishers who use Google and DoubleClick literally know better than to "*bite the hand that feeds them.*" Google "shares" over $3 billion a year in online ad revenues with website publishers. Behind-the-scenes and confidentially the FTC will learn how little real competitive choice these publishers have other than Google and DoubleClick. It will also become clear from these FTC interviews with web publishers that if the merger were approved and Google wanted to raise its "price," i.e. a better ad revenue split for Google, the **web publishers would not have a viable competitive alternative to earn a comparable amount of online advertising revenue for their content.**

- Even more troubling, is Yahoo not agreeing to testify before this Subcommittee. Yahoo is currently in a very difficult and vulnerable juncture with its investors. Investors have hammered Yahoo's stock because investors fear that Yahoo can't compete with Google in search. This investor disaffection led to the resignation of Yahoo's CEO and a current 100 day review of strategic options under co-founder Jerry Yang. Yahoo obviously believed that publicly discussing how the Google-DoubleClick merger would be anti-competitive would put even more intense investor spotlight on Yahoo's competitive weaknesses and drive their stock down even further. Yahoo also does not want to answer questions publicly on:
    - **Whether or not Yahoo is seriously considering exiting the search business** (as reported by both the New York Times and Wall Street Journal), which would eliminate Google's biggest and best-positioned competitor in search-text-advertising and Google's only real competitor in search-contextual-advertising. **The potential loss of Yahoo as a competitor to Google is extremely material to the review of this merger.**
    - The lack of progress and effectiveness of their much-touted new "Panama" project to improve the monetization of their search engine, which reportedly is not reversing Yahoo's competitive problems with Google.

All that said, I do sympathize with the FTC that the reluctance of these key potential witnesses to testify publicly could make this a harder case to prove in court. Moreover, this merger exploits the weak underbelly of antitrust law, which must heavily discount prospective effects. Simply, the FTC has to explain how the merger *today* is an antitrust problem, and it is limited by legal precedent in explaining how the merger will affect competition in the future.

**Conditions won't work.** It is my professional opinion that there is no remedy to "cure" or merger conditions that would "fix" the obvious and severe anti-competitive impacts of this merger. The anticompetitive effects of this merger are so deep, broad, intertwined, and long-lasting that they cannot be "fixed" with merger conditions or divestitures. Simply, there are a finite number of problems that can be anticipated and addressed in merger conditions, but there is an infinite capacity to evade them in the real world.

- Let's be practical here. Merger conditions would require ongoing price regulation or oversight of online advertising, business practice bans, and/or divestitures to attempt to address the "tipping effect" of this merger. I believe merger conditions would prove futile and counter-productive and **probably result in the worst of all possible outcomes – a slippery slope to regulating the Internet.** I most fear that lax merger enforcement of an obviously anti-competitive Internet merger would ultimately force individual countries or the EU to regulate the Internet in the absence of sufficient competition, therefore Balkan-izing and undermining the Internet's universal value. Thus in this instance, the risk of lax antitrust enforcement leading to regulation of the Internet would be the worst outcome. The best outcome is maintaining Internet competition and denying the merger to keep DoubleClick a viable competitor to Google.

- The core reason why conditions would not work in this instance is that Google is essentially buying from DoubleClick the client relationships and consumer click data that it doesn't yet have and not DoubleClick's infrastructure or technology, which is arguably a few years out-of-date relative to Google's technology. I believe Google would quickly transfer the DoubleClick software platform to a more integrated Google software application running on Google's massively larger infrastructure "cloud." Once this infrastructure transfer was complete the "eggs would be scrambled" and could not be separated again if more antitrust problems arose in the future. The DOJ learned the hard way through failure that relationships and market information are exceptionally difficult aspects of a merger to "condition," because they require exceptionally rigorous on-site regulation and oversight to ensure compliance – resources antitrust officials simply do not have.
    - The best evidence of the difficulty of "conditioning," or attempting to divest customer relationships/market information, was the disastrously ineffective MCI-Worldcom merger conditions/divestitures. MCI was directed to sell its Internet business to Cable and Wireless, which proved nearly impossible to implement or oversee because customers have their own free will, and much of the most important information was in people's "heads." Ensuring compliance would have required near-perfect "24-7" regulatory oversight. In the end, Cable and Wireless got very little of the business utility/value of the MCI-divested Internet business which it bought. This hard lesson contributed to the DOJ/FTC learning from experience that it is better to block a merger outright -- than to try and cure it with complicated conditions and oversight that can never fully anticipate all the natural unintended consequences of such market intervention.

## VII. Conclusion

**In sum, this merger should be opposed and ultimately blocked** because it would create extreme market concentration horizontally and vertically, and also tip the online advertising market to a bottleneck, a market which is one of the most strategically fundamental markets for the new economy going forward – the only proven monetization engine of Internet content. This is a watershed merger; the stakes of lax antitrust enforcement would be hard pressed to be greater.

**Bottom-line: if a business wants its content to succeed on the Internet, it would have no choice but to use the Google-DoubleClick-YouTube online advertising platform. No real competitive choice.**

## IX. Appendices:

A. Exhibits:

1. "The Internet Choice Paradox:" Advertisers not Consumers Pay for Internet Content
2. Extreme Concentration: Comparing Analogous Intermediary Markets
3. Extreme Media Concentration: A De Facto "End-run" Around Media Ownership Limits?
4. Googleopoly Tipping Point? Accelerating Network Effects Via Acquisition
5. Facilitating Bottleneck Control of Online Advertising?
6. Extreme Market Power: How Merger "Corners" the Online Advertising Market.

B. "*Googleopoly: The Google-DoubleClick Anti-Competitive Case*" White Paper by Scott Cleland, President, Precursor LLC. For the Federal Trade Commission and Congress, July 17, 2007; Bio of Scott Cleland included.

# "The Internet Choice Paradox"

## Advertisers not Consumers Pay for Internet Content

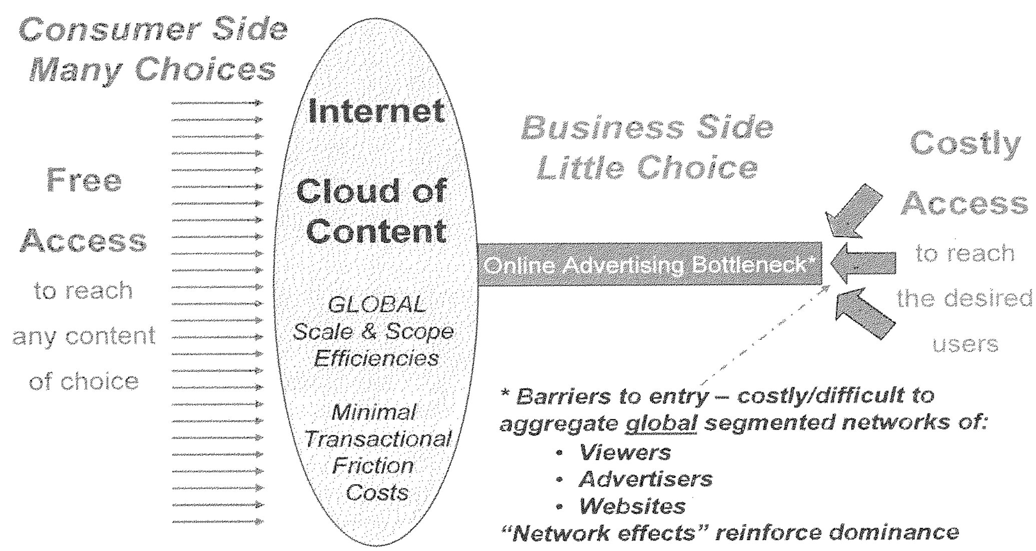



**EXHIBIT 1**

# Extreme Concentration

## Comparing Analogous Intermediary Markets

**Online Advertising Intermediaries** = **Capital Markets Intermediaries**

**Go gle**
**+**
**Do bleCl ck**

*A horizontal merger with vertical effects? Or a vertical merger with horizontal effects?*

=

+ **Top ~15 Financial Institutions:**
(Citicorp, Bank of America, HBSC, JP Morgan, Morgan Stanley, Merrill Lynch, UBS, Goldman Sachs, Credit Suisse. Wachovia, American Express, Société Général, Bear Stearns, Barclays, Prudential)
+ New York & London Stock Exchanges
+ Bloomberg & Factset (Analytic tools)
+ Experian & Equifax (Credit profiles)
+ 60% Fed Reserve & US Census data

**EXHIBIT 2**

# Extreme Media Concentration

## *A De Facto "End-run" Around Media Ownership Limits?*

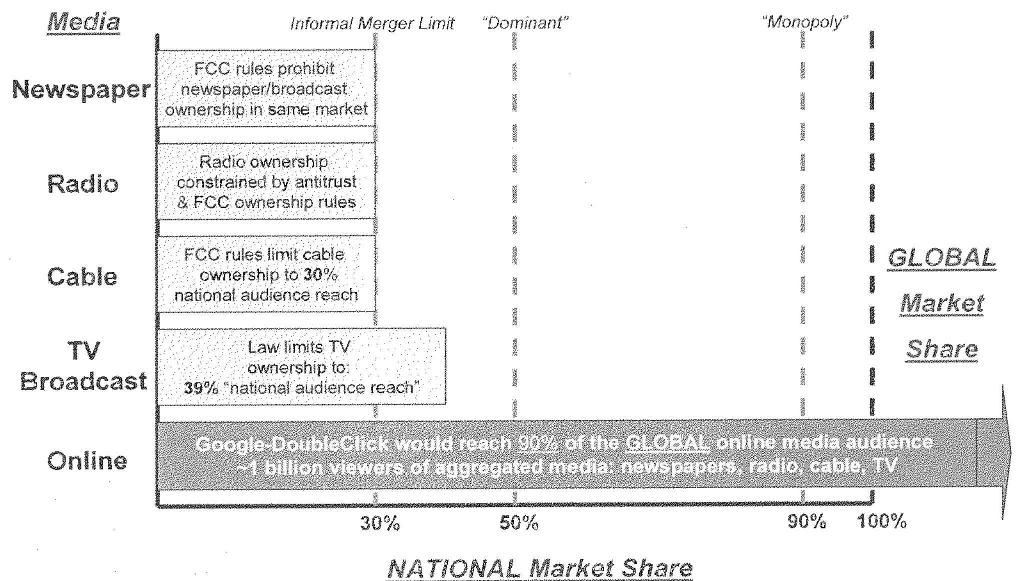



**EXHIBIT 3**

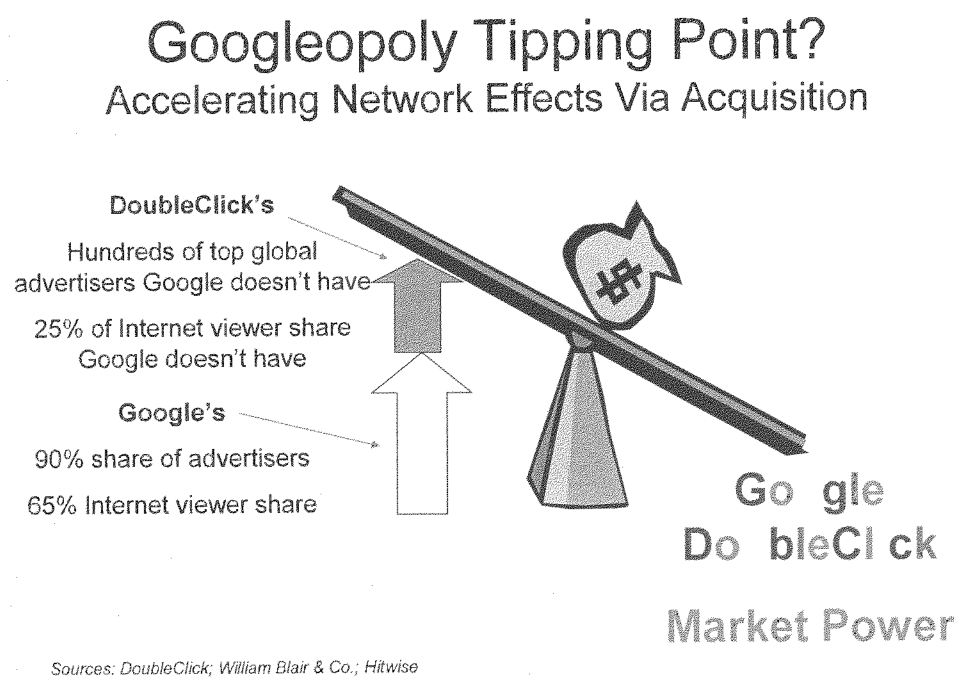
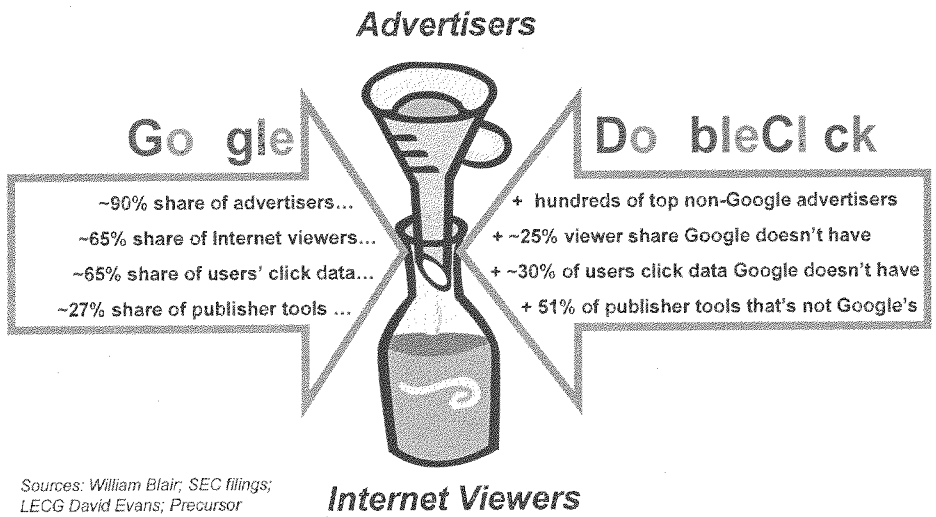

Googleopoly Tipping Point?
Accelerating Network Effects Via Acquisition
DoubleClick's
Hundreds of top global advertisers Google doesn't have
25% of Internet viewer share Google doesn't have
Google's
90% share of advertisers
65% Internet viewer share
Go gle
Do bleCl ck
Market Power
Sources: DoubleClick; William Blair & Co.; Hitwise

**EXHIBIT 4**

# Facilitating Bottleneck Control of Online Advertising?




*Sources: William Blair; SEC filings; LECG David Evans; Precursor*

**EXHIBIT 5**

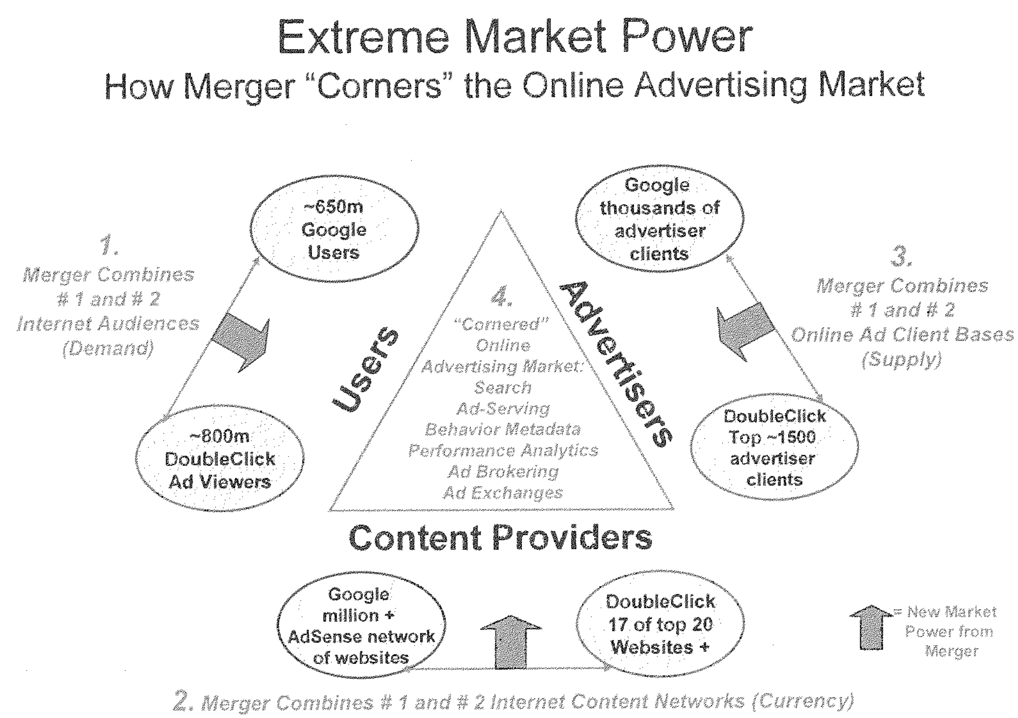

Extreme Market Power
How Merger "Corners" the Online Advertising Market
1.
Merger Combines
# 1 and # 2
Internet Audiences
(Demand)
~650m
Google
Users
~800m
DoubleClick
Ad Viewers
Users
4.
"Cornered"
Online
Advertising Market:
Search
Ad-Serving
Behavior Metadata
Performance Analytics
Ad Brokering
Ad Exchanges
Advertisers
Google
thousands of
advertiser
clients
DoubleClick
Top ~1500
advertiser
clients
3.
Merger Combines
# 1 and # 2
Online Ad Client Bases
(Supply)
Content Providers
Google
million +
AdSense network
of websites
DoubleClick
17 of top 20
Websites +
= New Market
Power from
Merger
2. Merger Combines # 1 and # 2 Internet Content Networks (Currency)

**EXHIBIT 6**

# Googleopoly:

# The Google-DoubleClick Anti-Competitive Case

www.Googleopoly.net

**Scott Cleland**

President, Precursor LLC
A Techcom Industry Research and Consulting Firm

July 17, 2007

### Theory of the Case:

- **Google and DoubleClick each dominate the two leading competitive technology platforms to deliver targeted online advertising,** i.e. the market of using technology to monetize the intermediation of the three core online advertising constituencies: users, advertisers, and content providers, and also the leading business model for providing access to Internet content.
  - **With ~60% share of each of their respective technology platforms, search and display,** technologies which are mutually-reinforcing, the combination would enable a horizontal merger to monopoly, which would harm users, advertisers and content providers with higher prices and less choice.

### Summary of Conclusions:

- The facts and evidence will **prove that the Google-DoubleClick merger will substantially lessen competition** in the appropriate defined-relevant market: *targeted online advertising* – **warranting the FTC to file an injunction in Federal court to block the transaction.**
- The facts and evidence will also **prove this to be a standard horizontal merger to monopoly** of competitive technology platforms in the targeted online advertising market, not a vertical merger of separate search and display markets, nor an inconsequential merger in the broader $300 billion advertising market including TV, radio, newspapers, etc.
- The market power created by the Google-DoubleClick merger **would lessen competition and harm consumers, advertisers, and content providers specifically** by:
  - Enabling Google-DoubleClick to effectively dominate:
    - Online ad-serving to websites;
    - The monetization model for accessing Internet content; and
  - Providing Google-DoubleClick greater opportunity to collude to manipulate the targeted online advertising market, raise prices, fix prices, and price predatorily.
- The facts and evidence will **prove consumer, advertiser, and content provider harm:**
  - Tens of millions of **consumers would be harmed** by facilitating an unregulated information access monopoly making consumers more vulnerable to: misrepresentation, conflicts, fraud, deceptive/unfair trade practices, and clandestine invasion of privacy.

- Thousands of **advertisers would be harmed** by higher online ad prices, less real choice, and impaired market forces to prevent, investigate and rectify click fraud.
- Hundreds of **content providers would be harmed** by higher prices (i.e. lower revenue ad splits) and less real choice for monetization of their digital content via the Internet.

**Table of Contents**

# I. Introduction

## A. What is the purpose of this paper?

The purpose of this paper is to present the case theory, structure and evidence of why this is a traditional horizontal merger to monopoly that will be blocked in court by the FTC.

More specifically, the goal of the paper is to provide sufficient evidence and argumentation to justify each of the major necessary points necessary for a successful case to block this merger:

- That the relevant market is targeted online advertising not advertising overall;
- That Google and DoubleClick each have enduring market power; and
- That combining the market power of both Google and DoubleClick is anti-competitive and would harm consumers, advertisers, and content providers.

In sum, the intent of this systematic, detailed and evidence-driven antitrust case against the Google-DoubleClick merger is:

- To make the complexities of antitrust more understandable for the interested layperson;
- To assist Congress in understanding the anti-competitive problems with the merger;
- To accelerate and improve the FTC's investigation into the anti-competitive effects of the Google DoubleClick merger; and
- To put in perspective the other related mergers in this industry: Google-Feedburner, Yahoo-Right Media, and Microsoft-aQuantive and WPP-24/7 Real Media.

## B. What analogy puts Google-DoubleClick's market power in perspective?

Most observers do not appreciate how extraordinarily concentrated key parts of the Internet have become. **To put in perspective the relative market concentration that a Google-DoubleClick merger would create in the *intermediary market* of Internet advertising**, it is instructive to look at what a comparable level of market concentration would be in the *intermediary market* of finance or *capital markets*.

- **To assemble a comparable level of market dominance to a Google-DoubleClick combination in capital markets, one single company would have to own:**
  - The top ~15 Wall Street banks/asset managers;
  - ~60% of the hedge fund and private equity industries;
  - The New York and London Stock Exchanges;
  - The two leading providers of financial analytic tools: Bloomberg and Factset;
  - Two of the three national providers of credit profiles: Experian and Equifax; and
  - ~60% of the Federal Reserve's and U.S. Census' raw market and consumer data.

Few would try to argue that this analogous level of overall market concentration in capital markets would not substantially lessen competition, raise prices and limit choice.

## C. Why has the anti-competitiveness of this merger been hard to discern?

There are a variety of strong reasons why the Government has not yet fully connected-the-dots of Google's breathtakingly fast accumulation of existing market power in targeted online advertising, let alone understand the anti-competitive implications of Google's rapid-fire acquisition strategy to extend its existing market power more broadly.

- The exceptional speed of the Internet's development, growth and flurry of new products, services, content and applications -- makes it a very difficult market to follow.

- Throughout the government and the private marketplace there is surprising and widespread ignorance and superficial understanding of how the Internet actually works in multiple dimensions: architecturally, technologically, economically, financially, competitively, legally, and internationally – and how these multiple dimensions of the Internet affect each other and inter-play.
    - While there are many experts with sophisticated understanding of their respective slivers of the Internet, there are precious few people outside of Google who see the Internet big picture clearly and understand the broader implications of Google's acquisition strategy and the Google-DoubleClick merger in particular.
    - In a word, ignorance is bliss.

- The derivative nature of the intermediary advertising market, where users do not pay for search in currency, they pay for search intangibly in terms of intrusion of ads and more importantly in terms of invasion of personal privacy.

- Old-line advertising agencies appear to be largely befuddled with many aspects of Internet technology, and are in a general state of denial over the competitive implications of online advertising technology for the advertising business in general.

- Google's tight corporate secrecy and its lack of transparency for investors, leaves most people with a very superficial or "brand level" understanding of Google.

- Google's extraordinary popularity as the world's number one brand after only a few short years as a public company creates wide popular awareness, but offers little real understanding about what the company does to make money.

- Finally, Google has been very effective in its public relations dismissals to date of the festering problems of Google's alleged: market dominance, invasion of privacy, click-fraud, and intellectual property theft.

The Google-DoubleClick merger, the FTC's investigation of the merger, and the likelihood that the FTC will eventually oppose the merger and block it, **will prove to be a watershed event for the business model of the Internet and the Internet monetization architecture, whatever the final outcome of the merger.**

## II. What is the relevant market? -- "Targeted online advertising"

### A. Why is online advertising a separate market from the advertising market?

#### 1. What is the online-offline dichotomy?

The advent of the Internet created the fundamental dichotomy of offline and online advertising. All advertising involves communications and since the Internet has radically changed communications, the Internet has radically changed advertising.

- **Architecture separates**: At its core, the Internet is well-known to have created a different communications architectural paradigm.
  - Internet architecture used for advertising, enables *many-way, many-to-many* communications, which differs fundamentally from:
    - Telecom/wireless telemarketing, which enables *two-way, one-to-one* telecommunications;
    - Advertising over-the-air broadcast, cable, and direct broadcast satellite, which enables *one-way, one-to-many* broadcast communications.

- **Interactivity separates**: One of the values of Internet architecture is that it enables formerly *one-way* broadcast communications to become *two-way* or *many-way* communications. Virtually every type of *non-interactive* offline communication can be made *interactive* communication when done online.
  - The value of interactivity to advertising is that it transforms "marketing" more into "selling" by enabling: greater engagement with potential buyers, "building a "relationship," more investment of buyers' time, more information/feedback from buyers, more ability to follow-up, and more ability to measure results, among other differences.

- **Separate audiences**:
  - The online advertising audiences are people who have either Internet access (~70% in U.S.) or who have broadband access (~50% in the U.S.), which is a substantially smaller and different subset than the 90+% of Americans who hear radio, watch TV and/or read newspapers/magazines.
  - The online audience is global; newspapers are local; radio is local or national; and TV is mostly regional or national.

- **Different drivers**: The Internet has empowered users with more freedom to drive the content that they see. The Internet, by its very nature, is a user-driven content medium where users tend to go online to find content they want. In contrast, radio, TV, and newspapers are supplier-driven mediums providing content that they hope users will value and seek out.

- **Different economics**: Internet leaders like Google, eBay, and Amazon are big proponents of the notion that the Internet has actually changed the laws of economics. Chris Anderson's seminal bestseller "*The Long Tail*" may be the best detailed explanation of the new theory of the "economics of abundance." According to the theory, the Internet creates a new "economics of abundance," because the incremental cost of storing content on servers and transmitting digital content on the Internet is near zero, in stark contrast to the high costs of storage and delivery of physical goods in the "bricks and mortar world." This new school of economic thought, which is still in its early stages of development, is a direct, intellectual assault on decades of economic thought based on the fundamental principle of economics, "scarcity," where prices are set by the relative "scarcity" of supply and demand. According to the "economics of abundance" theorists, the Internet creates a multitude of new niches, "the long tail" of the supply curve that would not exist except for the existence of an Internet with extremely low marginal cost characteristics.

- **Different consumer expectations**: The immediacy of clicking and reaching content on the Internet creates greater impatience of consumers' online vs. offline. While consumers have become accustomed to waiting through 1-3+ minutes to resume hearing or seeing their radio or TV content, the tolerance/attention span for Internet users waiting for their Internet content is a fraction of that -- say 5-15 seconds. There is also a large and vocal segment of the Internet audience that expects to get everything on the Internet (content and applications) for free, a la Napster, Skype, etc.

    ***Note**: Google finds itself in a real dilemma in defining the relevant market here. For the purposes of gaining approval of this merger, it is strongly in Google's interests to try and define the relevant market as the entire ~$300b U.S. advertising market and not the ~$17b online advertising market according to the Interactive Advertising Bureau, the market in which Google has substantial market share.*

    - *For Google to argue in the context of this merger that the online and offline markets for advertising are the same market, will require Google to repudiate years of public statements, by a multitude of Google representatives, in a multitude of forums.*

    - *The FTC staff will have no difficulty assembling a mountain of evidence in Google's own words about how different and better advertising can be online vs. offline. Google's official documents for investors before and since going public are rich sources for this evidence as will be the sales material that the FTC can subpoena, material which explains the value of online advertising in enabling better measurability and target-ability than offline advertising.*

    - *On their conference call announcing the Google-DoubleClick merger, Google officials explained the benefits were better tools, better measurement, better targeting. According to Google, online advertising is much more "relevant" than offline advertising.*

- *The dilemma that Google finds itself in will only get tougher if and when the FTC requires affidavits under oath on this market definition. Every Google representative asserting under oath that the online market is just part of the broader offline market of advertising, will have to consider if there is a record, recording, letter, memorandum, or public statement that another Google representative may have made that could directly impeach their sworn testimony.*
    - *It is ironic that Google's own search engine will be the easy source for "discovering" the many places where Google representatives publicly touted the value and benefits of Google's online advertising vs. offline advertising.*
    - *And being under investigation and subpoena power, Google's General Counsel would be well advised to supervise the team of engineers that constantly "tweak" the Google search engine. Any "tweaks" that make it more difficult for the FTC to "search", and "discover" Google-relevant records and statements could be interpreted as obstruction of justice.*

**2. What is the targeted-non-targeted market dichotomy?**

The advent of the ability to efficiently track, analyze and target certain consumer behaviors/interests with targeted online advertising has **created a growing business-model dichotomy** between traditional, *impression*-based online advertising and newer, *action/performance*-based online advertising. On the traditional, impression-based end of the online advertising business model continuum, advertisers shoulder more of the cost risk in reaching the desired audience, while on the newer, performance-based, opposite side of the online advertising business model continuum, ad-providers like Google shoulder the cost risk in actually reaching the desired 'target" audience.

- **Traditional impression-based online advertising (CPM)**: CPM is cost per thousand impressions or the cost for an online ad to be available to be seen by a thousand online viewers. This business model is similar to the traditional TV/radio advertising business model where you pay a lower bulk impression rate per viewer to reach a larger less defined audience.

- **Newer performance-based online advertising (CPA)**: CPA is cost per action, a results-driven payment model based on qualifying actions like sales of registrations. This business model is the opposite of the bulk CPM model because it is focused on causing a desired behavior, a sale, registration or some other selling step, and because the risk is shifted from the advertiser to the online ad publisher.

The Interactive Advertising Bureau (IAB), in its May 2007 Internet Advertising Revenue report, spotlights the trend that hybrid pricing, a mix between traditional CPM and newer CPA, is rapidly declining and being replaced with the growing CPM/CPA dichotomy. (In 2005 13% of Internet ad revenues were hybrid, but in 2006 fell to 5% of Internet ad revenues.) Moreover, in this industry transition away from hybrid pricing model to a dichotomy pricing model, performance or CPA pricing is gaining share at a greater rate than traditional CPM advertising. CPM increased from 46% to 48% from 2005 to 2006, while CPA grew from 41% to 47% from 2005 to 2006 in an online advertising market that grew 35% from 2005 to 2006 from $12.5b to $16.9b.

Google has pioneered and largely defined this transition towards more "targeted" online advertising. Google has long argued that targeted advertising helps users by reducing ad clutter, which means presenting fewer ads to better targeted audiences. Google argues that targeted advertising also benefits advertisers by reducing their risk in wasting ad dollars on users not interested in their message, and by giving advertisers better measurability of effectiveness. Better measurability enables advertisers to more fully understand the return on investment (ROI) of their ad spending and enables advertisers to better compare targeted online advertising to other advertising mediums.

The future of online advertising is more efficiently targeting the matching of buyers/consumers with sellers/advertisers. A big reason why ad dollars are shifting from TV, radio, and newspaper to the Internet is that targeted online advertising enables direct, customer-specific, feedback data on the impact and effectiveness of the advertising. Radio, TV and newspapers require indirect surveys and statistical extrapolation to discern their effectiveness in very general terms. Online advertising enables a more efficient advertising effort and more ROI effectiveness per ad dollar.

To excel in targeted advertising requires a great deal of historical and comprehensive click data, consumer interest information (searches), and Internet consumer behavior (Internet traffic metadata.) The Internet, combined with "cookie" web tracking technology, and the ability to store and process massive databases, has created the most sophisticated capacity to monitor, analyze, and predict consumer behavior ever assembled.

- Google, with 65% of the rapidly growing search market (according to HitWise), has more than three times the "relevant" consumer data of its next closest competitor, Yahoo with ~21% share, and over seven times the "relevant" consumer data of Microsoft with ~8% share.

- DoubleClick, with 60% of the ad-serving publisher market has more than twice the "relevant" consumer click data as its number two competitor, 24/7 Real Media with 25% share, and about twelve times the "relevant" consumer data of the number three competitor, Atlas (which has 5+% share and which is pending to be bought by Microsoft.)

### B. Why are Google/DoubleClick competitors in "targeted online advertising"?

Advertising is fundamentally an *intermediary* market where consumers/buyers are matched with suppliers/sellers. **Targeted online advertising is basically a technology market where different technology platforms, like search engines and ad-servers, compete to better intermediate and target consumers with advertisers' messages.**

**Both Google and DoubleClick offer the same targeted online advertising value proposition, to the same: corporate advertising clients, Internet users, and websites -- just employing different technology platforms.**

- DoubleClick CEO David Rosenblatt admitted that there is *"a very high overlap between the two in the value chain"* on their April 13th conference call announcing the merger.

- Google CEO Eric Schmidt also admitted on that call that the Google-DoubleClick merger was *"a way of solving, in an end-to-end way, the problems in search and display advertising."* While also noting the two companies' *"obvious alignment"* and *"strong alignment of goals."*
    - *"Solving, in an end to end way, the problems in search and advertising"* is another way of saying that merging mutually-reinforcing technology platforms together makes them both better in brokering their advertising clients with their advertising audience.

- These two CEOs also implicitly understand that their companies' *"obvious alignment"* comes from being "two sides of the same coin" or two sides of the same market – to monetize the online audience for advertisers.
    - Google uses *search* technology to monetize the online audience for advertisers.
    - DoubleClick uses *ad-serving* technology to monetize the online audience for advertisers.

**Both Google and DoubleClick work for the same advertising clients**: corporate marketers and their various advertising intermediaries.

- As the dominant search engine with ~65% share in the US and ~75% share in Europe, Google's AdWords and AdSense programs work for the lion's share of advertisers in the global corporate 1000.

- As the dominant ad-serving publisher company with 60% share of that segment, DoubleClick claims "the world's top marketers, marketers, publishers and agencies" as clients, or in other words, DoubleClick also works for the lion's share of advertisers in the global corporate 1000.

**Both Google and DoubleClick serve the same target audience**: the global market of Internet users.

- Google reaches ~65% of the global Internet audience of over a billion Internet users worldwide.

- DoubleClick's ads served through its network of top websites reach as much as 80-85% of the global Internet audience of over a billion Internet users worldwide, per EPIC estimates.

- Both Google and DoubleClick target the entire Internet audience while Yahoo/Microsoft/MSN, which both seek to primarily be leading proprietary brands and destinations on the web, do not target the entire Internet audience in the same way.

**Both Google and DoubleClick basically do the same core business function, i.e. "serving" ads**, albeit using different technology platforms and ad formats.

- Google leverages its market-leading search engine technology to attract users to look for information via its search bar. Once a user engages the search engine, Google presents the user with a results page. That page takes the form of a unique, original, customized website for that particular search query.
  - Google then "serves" ads by presenting text links on the right column, or by positioning some text links as sponsored links at the top of the search results.
  - **Google *chooses* to serve text ads on these unique customized web pages; they could just as easily serve banner ads or rich media on these web pages like DoubleClick routinely does for websites/publishers.**
  - Simply, Google constructs and controls a unique customized search web page for users and can use that page to serve the user ads in any form Google desires.

- DoubleClick serves ads a step or two later in "the value chain" by serving ads to Internet users that have already reached their desired Internet destination. Internet users could have reached that destination directly via a browser bar entry or indirectly via a search engine bar entry.
  - Once the user has reached its desired destination, DoubleClick then leverages its market-leading ad-serving technology by serving them a variety of ad formats: display, banner, or types of rich media, anywhere on the web page the user is looking at.

- One reason **why Google-DoubleClick are such powerful mutually-reinforcing technologies is that with the proposed merger, Google could continue to serve the consumer more targeted ads after the user left Google's customized search results pages and arrived at the desired third-party website.**
  - In the instance that the user visits a content provider in the Google AdSense network, Google would dramatically increase its advertising market share of user's "eyeballs" on that site. It is this big overlap that the FTC will want to quantify.
  - In the instance that the user visits a content provider un-affiliated with the Google network, it would enable Google to serve ads to that user that they do not reach without owning DoubleClick.

**Both Google and DoubleClick's technology platforms to serve ads could be easily adapted to enable the other's technology platform** to serve their respective specialty of ads to each other's ad-serving platform because text, banner, display, and rich media are essentially just interchangeable digital ones and zeros formats at their most basic level.

- In other words, DoubleClick could serve ads onto Google's search results pages and Google could serve its search-based ads by gaining access to content providers currently served by DoubleClick and Google's search *competitors.*

- **The easy technological interchangeability of Google and DoubleClick's ad-serving formats (text, display, rich-media) mean Google and DoubleClick are *direct competitors.***

Both Google and DoubleClick have pioneered CPA/Cost per Action or performance pricing models.

- Both have leveraged their dominant share position in their respective technology platforms to structure business models where they can exploit their vastly superior market information, which confers a potentially anti-competitive advantage in targeting online advertising. In other words, better and more information about consumer Internet behavior enables them both to better target consumers and create better advertising "relevancy."

- Both Google and DoubleClick serve advertisers seeking to use online technology to more effectively target their advertising for better sales results and better advertising ROI.

**While Google and DoubleClick compete in same market, they approach it from different technological directions.**

- Google entered the online advertising market through search technology and solving the technology problem for users of finding information, i.e. finding "needles in the haystack."
    - Meeting this unmet user need better than any other search engine, enabled Google to lead the global Internet market in aggregating Internet users into an audience for advertisers to reach and target.

- DoubleClick entered the online advertising market as the founder of ad-serving technology and solving the technology problem for advertisers of efficiently customizing the placement of ads on websites throughout the Internet.
    - Meeting this unmet need better than any other ad-serving technology, enabled DoubleClick to lead the global Internet market for aggregating Internet users via website traffic into an audience for advertisers to reach and target.

- Since Google and DoubleClick entered the targeted online advertising market from different directions, Google with technology focused on serving users, and DoubleClick with technology focused on serving advertisers, Google and DoubleClick's respective success and increasing dominance of their most immediate segment, **is increasingly making Google and DoubleClick direct competitors** in the targeted online advertising segment.

- **Now that Google and DoubleClick have each dominated their individual segments they see acquisitions as the most effective and fastest means to further dominate the broader targeted online advertising market including:**
  - **Video streaming through YouTube;**
  - **Blogging through Feedburner; and**
  - **Ad-serving, performance measurement/metrics, analytic tools, ad brokering and advertising exchanges through DoubleClick.**
- Google acquired these companies because they could not compete effectively with them straight up.

Lastly, and maybe most compelling, DoubleClick CEO Rosenblatt describes search as display as being in the same market in the transcript of his video interview on DoubleClick's website.

- *"...we're also excited about the ability to begin to bring together some of the different channels within online that previously had been managed separately – specifically search and display. And when you put those things together – new economic models delivered through new user interfaces and other things that impact our customers on a day-to-day basis – we believe that we have an opportunity to take advantage of our position to really reshape the way people think about the Internet media industry in ways both large and small."*

- Translation: the combination of Google and DoubleClick's will enable us to "take advantage of our position" (market power) to "reshape... the Internet media industry."

## III. What barriers make Google and DoubleClick's dominance enduring?

### A. What barriers to entry make Google's search dominance enduring?

While Google claims to be in a highly competitive search market, by pointing to over a hundred search engine competitors and the few-clicks-ease with which any user can switch to a different search engine, this competitive assessment is only superficially true.

#### 1. Why are start-ups not a legitimate competitive threat to Google?

It takes much more than a better algorithm to compete in search and targeted online advertising. There are **substantial economies of scale required to successfully compete** directly with Google.

- Google operates the world's largest parallel processing computer grid in the world comprised of over one million specially networked and customized servers in multiple data centers capable of:
    - Processing hundreds of millions of searches every day, with sub-second response time;
    - Indexing tens of billions of web pages daily;
    - Making an actual copy of the entire Internet regularly: (every word of every page to store in its data centers in order to speed search response time); and
    - Storing trillions of historical searches.

- Google is the top brand in the world. It would take a competitor billions of dollars and years of time to achieve Google's brand status, if it was even possible.

- Google has over a half a billion users worldwide and is growing much more than any of its competitors. Any start up would begin many years behind.

- Google's search algorithm is state-of-the-art and Google leads search R&D. *(Saul Hansel, "Inside the Black Box, Why Google can't stop tweaking its search engine" NYT 6-4-07)*
    - Google has a set of search methods, which are far ahead of the academic research.
    - Moreover, Google's algorithm is based on over 200 proprietary variables of relevancy called "signals" and formulas called "classifiers" which have been honed and refined with the real life feedback of over trillions of live searches and countless requests for improvement.
        - For example this experience has taught Google the desired answer for the myriad of ways people misspell or accidentally mischaracterize what they are looking for.
        - Google also has a market-leading team of engineers continually tweaking and improving their search engine to stay ahead of the competition.

- Google offers services in 112 languages in contrast to Yahoo, which is an older company than Google, which offers services in around 20 languages.

- Google, with its market leading search infrastructure, searches dramatically more raw amounts of information than any other search engine.
  - Google knows **a search engine is only as good as the amount and quality of info it searches**.
  - Google's breathtaking mission: "*to organize the world's information and make it universally accessible and useful*" is powerful evidence of its understanding of the importance of how much info is searched.
  - Google is leading the market in digitizing most all of the world's books and publications and has invented the world's fastest scanning technology to ensure it maintains its market lead in accumulating digital copies of the world's information.
  - A start up can't claim to search anywhere near the capacity of the world's information that Google can.

- In short, a start up search engine seeking to compete effectively with Google faces similar barriers to entry to what a single gas station would face in trying to compete with Exxon Corporation.
  - They may succeed in a small or local niche, but they are not going to be able to compete on a national or global scale on an ongoing basis.
  - **For a start up or small competitor to become a direct competitive threat to Google, they must have the resources to:**
    - **Construct and maintain a comparable database of all Internet content;**
    - **Construct and maintain a comparably responsive search processing grid and global network of data centers; and**
    - **Rapidly build a hundred-million-plus user search audience/customer base to warrant funding the previously mentioned infrastructure and manpower.**
  - So if start ups or small competitors can't realistically compete with Google what about Google's self-described primary competitors: Microsoft and Yahoo?

## 2. Why are Microsoft and Yahoo decreasingly competitive with Google?

The facts and evidence show that Google's leading competitors, Microsoft and Yahoo, are steadily decreasing in competitive viability vis-à-vis Google. The reasons for that decreasing competitive viability include the reasons discussed above, but more importantly involve additional "network effect" reasons that will be discussed below.

There is a **growing body of evidence that Google enjoys multiple enduring "network effects." That means Google has reached a "tipping point" in the Internet content search segment**, where its current market dominance is leading to an enduring monopoly.

- **Audience tipping point**: With over a half billion users worldwide, Google has created the largest consistent advertising audience in the history of media.
  - Why this matters is that Google's economics (and market power) directly derive from its overwhelming *relative audience size*. When Google/Yahoo/Microsoft approach a third party content provider to be the wholesale provider of search and ad-serving services for a high traffic website, they bid on how much revenue they will provide to the third party. Because Google has 2-3 times the size audience as Yahoo it can afford to bid a dollar amount 2-3 times more than Yahoo can. Because Google has 5-6 times the size audience as Microsoft, it can afford to bid 5-6 times higher than Microsoft to win that third-party search/ad-serving business.
  - Google's vastly bigger audience, combined with the Google's network effects and faster and broader international growth than Yahoo or Microsoft, **give Google the unmatched ability to guarantee minimum, multi-million-dollar, multi-year, revenue-sharing payments to third-party websites.** The clearest example was Google's willingness and ability to guarantee MySpace, the leading social networking service with minimal revenues, a $900m minimum guaranteed revenue-sharing arrangement over four years. **The assumption of that level of market risk without a blink from the marketplace is powerful evidence of Google's relative market power in providing advertising services/revenues to third-party websites.**

- **Content wholesale network tipping point**: Google's accumulation of the world's largest audience has contributed to another self-perpetuating network effect, Google's aggregation of the world's largest network of Internet content providers in the world. While Google does not disclose all of its Adsense content partners in the Google network, Google has assembled the "lion's share" the world's top third-party content providers:
  - *MySpace, AOL, Ask.com, about.com, AT&T.com, Earthlink, NYTimes.com, CNETSearch.com, Lycos.com, shopping.com, engadget.com, Digg.com, dogpile.com, business.com, HowStuffWorks.com, Techtarget.com, MyWebSearch.com, Information.com, Infospace.com, foodnetwork.com, blogthings.com, netscape.com, Compuserve, Luxist, US News and World Report, CBSSportsline.com, Carconnection.com, MarthaStewart.com, Morningstar, HotorNot.com, tripadvisor.com, Oingo.com, dealtime.com, PlentyofFish.com, among others.*
    - This is not an exhaustive list only an illustrative list.
  - Why are Yahoo and Microsoft unlikely to be able to develop competitive alternatives to Google's dominant third-party content network?
    - **Yahoo and MSN, as leading Internet traffic destinations are viewed as direct competitors to third-party websites for attracting Internet traffic.**
    - Many Internet content providers, especially those with similar offerings as Yahoo/MSN would be concerned that Yahoo and Microsoft/MSN have a competitive conflict of interest in being the wholesale search engine for their site. Would their search engines have a bias to skew traffic to its own proprietary sites?

- **Targeting/personalization tipping point**: Given that much of the business model of targeted online advertising depends on the amount and quality of search history or search metadata (data on data), Google's largest audience of over a half billion users, and its superior search expertise provide Google with vastly more and better information to make their searches more relevant/personalized/targeted, is the key to maximizing the monetization of targeted online advertising.

- **Acquisition economics tipping point**: Google's willingness and ability to outbid everyone to acquire YouTube for over $2b despite no revenues, and its ability to reportedly bid twice what Microsoft bid for DoubleClick, despite Microsoft being a much bigger company in revenues and having a much bigger market cap, is additional evidence of Google's market power in this segment.
    - The acquisition of YouTube adds to the audience network effect because it instantly gave Google more than 60% of the video search market and enabled Google to provide a better integrated, text/video search experience than Microsoft or Yahoo. There is no other site that can match YouTube in that type of traffic so Microsoft of Yahoo are unlikely to be able to catch Google in video search through organic growth.
    - The acquisition of YouTube has catapulted Google to #1 in the world in video streaming users on the Internet per ComScore.

- **Tracking metadata tipping point**: Because Google serves more third-party content providers than any Yahoo or Microsoft, they have access to more Internet traffic tracking data than any other company. **The most traffic means the best tracking, the best tracking means the best measurement, the best measurement means the best targeting, the best targeting means the best advertising relevancy, ROI.** This is a classic antitrust definition of a network effect where more begets more.

Google's CEO Eric Schmidt recently spoke candidly about Google's self-reinforcing array of network effects in a USA Today CEO Interview May 16, 2007 "*Schmidt says he didn't grasp the power of Google at first*":

- Question: "*What's your take on why Google keeps growing, while your competitors have such a hard time catching up?*"
    - Answer: "*...We get more users, and that gets us more advertisers. More advertisers give us more cash, more cash gets us more data centers, more data centers means we can get engineers who want to build even bigger data centers and do more amazing computer science. Those engineers bring in their friends to build more amazing ad systems and also work on great search. That cycle is very real at Google.*"
        - That "very real" "cycle" Mr. Schmidt so candidly describes -- is also well understood to be "network effects" in antitrust terms.

- Question: "*What about the size issue? Critics say that Google has gotten too big.*"

- Answer: *"Our size is a function of our success with end users. Size isn't a problem. Size has some benefits – like getting more information, more execution and more global service."*

- Google's CEO Schmidt is obviously very well aware of Google powerful network effects and market power.
  - In a sense, **Google has "network effects on steroids;" their network effects spawn network effects of their own.**

### a. Why will Yahoo continue to fall behind Google competitively?

While Google and Yahoo consider each other one of their top two competitors, and Yahoo has the #2 search engine by market share, they are actually very different businesses. And those differences explain why Google is, and will continue to increasingly distance itself competitively from Yahoo.

- **Marketing vs. technology**: Yahoo describes itself as a *"leading global Internet brand and one of the most-trafficked Internet destinations worldwide."* In contrast, Google describes itself as *"a global technology leader focused on improving the way people connect with information."*
  - Yahoo's business is marketing-focused, Google's technology-focused.
  - **Yahoo originally used Google as its search service.** When Yahoo discovered how effective and lucrative search advertising was, Yahoo acquired Inktomi's search service and Overture Services' search ad selling business.
    - **The key takeaway here is that Yahoo historically has had to outsource its search capability; it has never been a core competency and mission for Yahoo like it is has been for Google.**
    - Moreover, the New York Times reported in *"Yang is Back, So Now What for Yahoo?"* (6-20-07) that **Yahoo's leadership has contemplated exiting the search business and outsourcing its search function to Google**, and may consider that option again in the future.

- **Content provider vs. content access**: Yahoo says it works for users and advertisers. In contrast, Google says it works for users, advertisers *and content providers.* **Herein is the huge business model difference between Yahoo and Google**:

  - **Proprietary vs. non-proprietary**: At its core, Yahoo is focused primarily on monetizing its *own* proprietary and affiliated content. Google is not a proprietary *content* provider, but a proprietary *application* provider, that is focused on enabling Yahoo's content provider competitors to monetize their own proprietary content.

  - **Part vs. whole**: Yahoo is focused primarily on serving *a subset* of the Internet audience, while Google is focused on serving *the entire* Internet audience, including Yahoo's audience. This is the structural reason Google is taking share from Yahoo. Moreover, Google has greater emphasis on international (112 languages vs. 20+) and greater international revenue mix (US/International for Google is 56/44 but for Yahoo is 68/32). Thus Google enjoys substantially more scale and scope than Yahoo by not being a proprietary content retailer.

- **Destination vs. virtual conduit**: Yahoo sees its business as creating a place/website where users want to go. Google sees its business as being the conduit to Google's private copy of every page on the Internet, including Yahoo's and Microsoft's.

- **Yahoo audience vs. Internet audience**: Yahoo's market ambitions are orders of magnitude smaller than Google's. Yahoo seeks to serve those who want a proprietary website, while Google seeks to serve all Internet users.

- **Retail vs. wholesale**: Yahoo is an Internet content *retailer*, hence the focus on brand and marketing. Google is a technology *wholesaler to* content providers. In other words, Google partners with and works for most all of Yahoo's largest content provider competitors. The fact that Yahoo directly competes with most major Internet content providers and Google does not means that Google has a powerful competitive advantage over Yahoo in the wholesale search market. **Given this competitive conflict, Yahoo faces an enduring structural impediment in competing with Google for Internet content.** Simply, Yahoo is a web content retailer while Google is a web content wholesaler.
    - This is also why Yahoo's touted search engine upgrade called "Panama" will continue to disappoint.

- **Partial ad monetization vs. pure ad monetization**: Given that Yahoo is focused on creating a "sticky" community destination of proprietary content and premium services, Yahoo is pursuing a mixed revenue model of advertising and subscription fees. (Yahoo's revenue mix is 87% ads and 13% fees.) Google on the other hand has the benefit of pursuing a pure ad based monetization model, the most successful Internet business model. The Internet subscription model has largely failed, e.g. AOL's transformation from subscription to ad-based. Google is purely focused on a monetization strategy that is proven to work, where Yahoo is split focused trying to make a flawed subscription model work against the market trends. **Another way of looking at this is that Yahoo is still figuring out how to sell *its own* content, while Google has mastered how to best sell *everyone else's* content.**

- **Yahoo's "Panama" Project**: Many in the market and the media have a superficial view of what is required to be truly competitive with Google and take search market share. They are looking to Yahoo's new search engine upgrade, "Panama," to transform all of Yahoo's relative weaknesses discussed above and out-monetize Google in the search market.
    - **The competitive impact of "Panama," which has been negligible to date, will be an excellent case study for antitrust authorities to gauge whether or not**

**Google truly has market power.** More Panama/competitive "proof points" will emerge in Google's second quarter earnings report in July and third quarter earnings report in October.

- Is it the search algorithm that determines success in search or is it economies of scale/scope and network effects, which determine competitive success in the search market segment? The evidence is overwhelming -- it is the latter.

### b. Why will Microsoft continue to fall behind Google competitively?

While Google considers Microsoft its number one competitor, Microsoft does not view Google as a primary competitor. For antitrust purposes, what matters more is what the competitor thinks and is doing -- not what the dominant player claims.

- In its annual 10K filing with the SEC, Microsoft does not mention Google as a competitor in five of its seven business segments, including the top two which comprise two thirds of Microsoft's revenues. Microsoft's primary competitors overall are: Apple, Hewlett-Packard, IBM, Sun Microsystems, and Linux.

- The business segment most directly competitive to Google, what it calls MSN or online, represents about 5% of Microsoft's revenues, and Microsoft lists AOL, Google, and Yahoo as its primary competitors in that segment.

- In its #3 business segment, called "Information Worker" which represents about one quarter of Microsoft's revenues, Microsoft lists Google among it's competitors in that segment: Apple, Corel, Google, IBM, Novell, Oracle, RedHat and Sun Microsystems.
    - It is important to note that this applications business segment that Google has invested heavily in order to compete with Microsoft, is generating negligible revenues for Google to date as ~99% of Google's revenues come from advertising. In other words, Google is currently more a potential competitor to Microsoft in this quarter segment of Microsoft's business than a current serious direct competitor.

What this means for this case is that Microsoft is overwhelmingly in a different business than Google and that **Microsoft is not primarily focused on competing in the search market**. Simply, Microsoft has bigger fish to fry.

- In terms of revenue priority, search falls in Microsoft's #5 revenue bucket and that segment is ~5% of Microsoft's global business.

- In describing in the general business summary how Microsoft generates revenues in its 10K SEC filing, Microsoft does not mention "search." "We generate revenue by developing, manufacturing, licensing and supporting a wide range of software products for many computing devices." After listing their software products; their provision of consulting and support services; their selling of Xbox, games and peripherals; Microsoft lists its online offerings, but does not mention search or online advertising in this overall summary of how Microsoft generates revenues.

Like the discussion above, about how Yahoo and Google are very different businesses, Microsoft and Yahoo are also very different businesses. This explains why Microsoft has heretofore failed to gain share and actually lost substantial search market share at precisely the time they have "developed their own algorithmic search engine." **The fundamental businesses differences and focuses discussed below argue that Microsoft is not going to be able to become a sufficient competitor to overcome Google's market power in the monetization of accessing Internet content.**

- **Search technology vs. software technology**: 99% of Google's business is focused on being the *"global technology leader focused on improving the ways people connect to information."* 95% of Microsoft's business has a very different focus: *"We develop and market software, services, and solutions that we believe deliver new opportunity, convenience, and value to people's lives."*
  - What this means is that the purposes of companies' core technologies are very different.
    - Google's technology is about *accessing other's* information.
    - Microsoft's technology is about *generating and processing your own information* through software applications.
  - More simply, Google's technology works from the outside-in, from the world to the individual, while Microsoft's technology works from the inside-out, from the individual/business to the world. This point becomes clearer when one contrasts Google and Microsoft's different missions:
    - Google: *"our mission is to organize the world's information and make it universally accessible and useful."*
    - Microsoft: *"our mission is to enable individuals and businesses throughout the world to reach their full potential."*

- **Web/network-centric vs. computing-centric**: Google uses the *Internet/web* and Google's network of servers in data centers as its operating platform. Microsoft uses *computers* as their operating platform.
  - What this means is that search and accessing content efficiently "goes with the natural flow" of a Web/Internet platform, where search and accessing content "goes against the natural flow of a computing platform. In other words, search looks for its computing power in a distributed manner, where Microsoft primarily looks for its computing power on the device where its software resides. Microsoft is currently scrambling to adapt to the more efficient web services platform of the web future, but it is being forced to adapt and play catch up, while Google is already there and rushing ahead with the flow.

- **Proprietary vs. non-proprietary**: Like Yahoo, Microsoft with its MSN proprietary content, is focused primarily focused on monetizing its *own* proprietary and affiliated content, not the vast market of third party Internet content. Google is not a proprietary *content* provider, but a proprietary *application* provider, that is focused on enabling Microsoft's content provider competitors to monetize their own proprietary content.

- **Ad based vs. subscription based**: Google and Microsoft have very different business models. Google has mastered and is the world leader in the advertising-based monetization of Internet services. Most all of Microsoft's revenues are for transaction purchases of their software or products or subscription fees for services. This legacy subscription business model, which generates over $16 billion in profits for Microsoft, is a powerful disincentive to aggressively learn, adapt and change Microsoft's business model to advertising monetization on the web. Advertising monetization is relatively new to Microsoft and it goes against the culture and organization. It is hard to see how Microsoft can quickly and sufficiently transform its ability to compete on the advertising-monetization competitive playing field.
  - Microsoft's purchase of aQuantive is strong evidence of Microsoft's lack of understanding of the advertising model. The most valuable part of aQuantive to Microsoft is the ad-serving segment, Atlas, which has only 5% share of ad-serving compared to DoubleClick's 60% share of ad serving and 24/7 real Media's 25%. Moreover, Microsoft has indicated it will keep Avenue A/Razorfish, aQuantive's large interactive advertising arm. The big problem with keeping Avenue A/Razorfish in the Microsoft orbit is that is generates a substantial conflict of interest for Microsoft. Microsoft is the 37th largest advertiser overall, and Avenue A/ Razorfish customers could legitimately worry that Microsoft would get preferential treatment for placement of prime advertising at their expense.

- **Retail vs. wholesale**: Microsoft/MSN is an Internet content retailer. Google is a technology wholesaler *to* content providers. In other words, Google partners with, and works for, most all of Microsoft/MSN's largest content provider competitors. The fact that Microsoft/MSN directly competes with most major Internet content providers, and Google does not, means that Google has a powerful competitive advantage over Microsoft in the wholesale search market. **Given this competitive conflict, Microsoft faces an enduring structural impediment in competing with Google for Internet content**. Simply, Microsoft/MSN is a web content retailer while Google is a web content wholesaler.

- **Unencumbered vs. antitrust encumbered**: It can't be overstated that Microsoft is an encumbered competitor in search. Under the ongoing antitrust supervision of a Department of Justice oversight committee, Microsoft cannot be a free-wheeling competitor in search. There is a litany of facts of Microsoft anti-competitive actions that were never overturned in court and under which Microsoft must live. It is the aggressive bundling tactics that the court found to be anti-competitive, that Microsoft would need to engage in, for Microsoft to have any chance in competing against Google's growing market power in the monetization of access Internet content. There is little reason to believe that these substantial antitrust restrictions on Microsoft are going away any time soon, or that antitrust authorities will proverbially allow "fire to be fought with fire."

  - In contrast, Google is currently unencumbered by antitrust authorities (outside of the current review of DoubleClick) and Google is not regulated.

### 3. What it means that market forces cannot cure Google's market power?

What does it mean that:

- New and entrants small competitors can't compete with Google's barriers to entry?

- Google's primary competitors, Microsoft and Yahoo face network effects that they cannot overcome?

- Yahoo is very different than Google and those differences put Yahoo at a competitive disadvantage relative to Google?

- Microsoft is very different than Google and those differences put Microsoft at a competitive disadvantage relative to Google?

It means that Google:

- Has growing and enduring market power in the search segment;

- Is on path to monopolize the monetization of access to Internet content; and

- Is becoming the world's de facto info utility for accessing Internet content because Google has accumulated the world's:
  - Largest Internet audience for content;
  - Largest network/concentration of Internet content providers; and
  - Largest search infrastructure of instantaneous grid computing and info retrieval.
- Has already acquired the market power to harm consumers, advertisers, and content providers.

## B. What barriers to entry make DoubleClick's ad-serving dominance enduring?

### 1. How does DoubleClick describe its own ad-serving leadership/dominance?

DoubleClick is a global market leader in digital technology and services for online advertising.

- DoubleClick has the dominant ad-serving platform with 60% share followed by 24/7 Real Media with 25% share and Atlas with 5% share, according to DoubleClick's competitors.

- "*With over 1500 clients, DoubleClick is the preferred partner of leading companies worldwide for a wide range of digital advertising solutions*" according to its website.

- Per EPIC's FTC filing, DoubleClick serves ads which reach an estimated 80-85% of all Internet users worldwide and serve ads to 17 of the top 20 most trafficked Internet websites.

DoubleClick is unabashed in touting its dominance in its market segment.

- The company recently re-branded as "*The nerve center of digital marketing.*"
  - On the merger announcement conference call, DoubleClick highlighted its centrality in this market by explaining it has two types of clients, buyside and sellside, and that their business was split about 50-50 between the two.

- Its website states: "*Today, the company's DART and Performics divisions power the online marketplace.*"

- DoubleClick marketing materials:
  - Estimate DART for advertisers is responsible for serving over 60 billion ads a month or over 720 billion targeted online ads a year.
  - Also claim that DART for Advertisers is the most advanced ad management platform in the world and the most used.
  - Tout that its search service can pull keyword performance data from all the top search engines: Google, Yahoo, Microsoft/MSN and Ask.com among others.
  - Tout that its customer profiling service, Boomerang, "*as the most effective form of targeting available. It allows you to target the most desirable audience of all: browsers who have already shown an interest in your product or service.*"

**2. Why is DoubleClick's ad-serving dominance enduring?**

DoubleClick has assembled a majority of the largest advertising clients in the world and has served them for years.

- This means that DoubleClick has deep and detailed account data histories with each of these clients.

- These large DoubleClick advertising clients are among the most sophisticated advertisers in the world in measuring targeted online advertising performance. They like to compare their current targeted campaigns with their previous ad campaign results to measure improvement and to further improve their targeted online advertising. They also like and need to compare different ad campaign histories and trends.

- **Switching costs**: Thus if you are a DoubleClick ad-serving client, you face a huge switching cost when switching to an ad-serving competitor like 24/7 Real Media or Atlas. If you leave DoubleClick, you don't have the ability to easily port and organize the performance and analytics of your ad campaign histories so you would basically have to start over partially blind to what you have learned in targeting efficiency in the past. In essence, **any large advertising client of DoubleClick's that values measurement is for all practical purposes "locked in" to DoubleClick because DoubleClick**

**effectively controls the ability to compare current campaign performance with past campaigns.**

### 3. What is DoubleClick currently doing which abuses its market power?

With a dominant 60% share of the ad-serving segment, competitors are already experiencing the anti-competitive effects of DoubleClick's exercise of market power. Because of the integrated nature of online ad campaigns and cross-platform performance and tracking, discrepancies can emerge over what advertising performance has been measured and thus what payment should be made. Competitors like 24/7 Real Media, Atlas and others will work together for a joint client to resolve payment measurement discrepancies which can happen naturally for a variety of legitimate reasons. DoubleClick refuses to cooperate to resolve measurement discrepancies and leverages these opportunities to tell customers the only way to get good industry data is to use DoubleClick's service since they have more than half of the data. In other words, DoubleClick is not so subtly saying that if a customer wants DART for Advertisers to work for the customer they also need to use DART for Publishers. This is a classic anti-competitive allegation of tying a dominant product to use of a non-dominant product or service.

## IV. What are the anti-competitive effects of the merger?

### A. Why does dominance of constituencies confer market power in ad functions?

The core of the anti-competitive effect of this merger is that it will combine the two dominant global leaders in all of Google's self-described "three primary constituencies" that make up the targeted online advertising market: users, advertisers, and content providers.

- For **users** (the Internet audience) the merger would combine:
  - Google's global ~650 million person audience of unique monthly visitors which Google claims is 77% of the Internet audience,
  - With DoubleClick's ~800 million viewers of served ads per EPIC's estimate that DoubleClick ads reach 80-85% of Internet users.
    - *Note:Per Nielsen/NetRatings, the leading proprietary websites: Yahoo, Microsoft/MSN, AOL and MySpace, each have only ~100 million unique user audiences, a small fraction of either Google or DoubleClick. 24/7 Real Media may reach a larger monthly audience than any of the proprietary sites, but less than half of DoubleClick's audience.*

- For **advertisers**, the merger would combine:
  - Google's estimated hundreds of major advertiser clients, and tens of thousands of "long tail small advertiser clients,
  - With DoubleClick's blue chip client base of 1500 of the largest global advertisers.
    - *Note: Google stated on the announcement call that the overlap of the two companies' advertising clients was "very high."*

- For **content providers** (websites) the merger would combine:
  - Google's million plus websites which comprise their global ad network,
  - With DoubleClick's hundreds of top websites, including 17 of the top 20.

Given that advertising is an intermediary market model where advertisers, not users, pay for the production of content, the **path to market power is through the "constituency troika" of users, advertisers and content providers**.

Dominance of all three primary intermediated constituencies confers market dominance in a variety of intermediary advertising functions:

- Search technology;
- Ad-serving technology;
- The business/monetization model for accessing Internet content;
- Advertising campaign performance measurement and analytic technologies;

- Consumer click behavior data and metadata collection and storage technologies; and
- Advertising exchange and ad brokering technologies.

**B. How do network effects further enhance Google-DoubleClick's dominance?**

Google's and DoubleClick's respective individual dominance would be further enhanced by the cross-network effect of each of the dominant intermediary functions discussed above. Specifically, the combination of Google and DoubleClick's individual market power creates a:

- **Search and ad-serving network effect**:
  - Google and DoubleClick could cross-leverage Google's knowledge of the search results that yield the highest click per action payments and DoubleClick's knowledge of which advertisers want to pay the most, and marry them to their potential self-dealing advantage as the market's intermediary without being subjected to market forces discipline.
  - These companies know *first* that display advertising is the best way increase brand awareness on the web, and *second* that increased brand awareness drives more cost-per-action clicks.
    - **By managing both the search and display ad algorithms, the merged companies would have the opportunity and incentive to collude to nearly perfectly target their display ads to optimize Google's click performance.**
  - The powerful network effect between the search performance model and display ads can create a **self-dealing "feedback loop" where they can secretly optimize the display algorithm to optimize Google's cost per action algorithm.**
    - This type of self-dealing arrangement would create a further disincentive to detect fraudulent clicks, an industry and Google problem that is far from being brought under control and that harms advertisers and users.
  - In effect, Google could preferentially target display ad inventory where Google knows it has the highest priced click per action rate, shortchanging both the advertiser with mis-targeted ads and the user with conflicted results that serve Google-DoubleClick more than the search user.

- **Monetization network effect**:
  - Since monetization is driven by both the volume and efficiency of matching advertisers with content and users, the combined volume of these two global leaders' user, advertiser and content provider bases, **creates a *monetization architecture* which no other targeted online advertiser could ever hope to match.**
  - With no realistic alternative monetization architecture, the merged companies could raise ad prices for advertisers and also increase prices for content providers by negotiating a better revenue sharing split from their Google ad network partners.

- **Click data & performance measurement network effect**:
    - By being able to combine the world's largest databases on consumer click behavior today and historically, **the merged company could bundle or tie the use of this consumer behavior metadata with the use of their performance measurement or analytics tools.**
    - **Google-DoubleClick could then deny competitors access to their dominant share of consumer behavior summary metadata necessary to manage large global online advertising campaigns,** thus ensuring that competitors have an inferior view of the overall market and inferior performance measurement because of the inferiority of available data.
    - Google-DoubleClick could also bundle or tie DoubleClick's ad-serving for publishers with its ad-serving for advertising further disadvantaging competitors like 24/7 Real Media or Atlas.
    - Advertisers and content providers would both be vulnerable to higher prices for performance measurement tools and metadata because they would have no viable alternative competitive choice of which to avail themselves.

- **Advertising exchange/brokering network effect:**
    - The combination of the two dominant players in counterpart market segments, Google on the consumer demand/buy side through search dominance, and DoubleClick on the advertiser supply/sell side through ad-serving dominance, would enable the combined company to see most of both sides of the market.
    - **Their dominant view of overall market information would give the combined entity the capability and the incentive to manipulate the market to their de facto market making advantage**, fix prices for long tail advertisers and content providers, raise prices where competitors are weak, and predatorily price serially where competitors are strongest to foreclose competition long term.

**The cumulative effect of all these network effects will be to create a de facto Internet monopoly or unregulated Internet utility -- for the monetization of access to Internet content.**

## V. What are the anti-competitive harms of the Google-DoubleClick merger?

### A. What are the consumer harms?

Ultimately many tens of millions of **American consumers would be harmed** by facilitating an unregulated information access monopoly -- making consumers more vulnerable to: misrepresentation, conflicts, fraud, deceptive/unfair trade practices, and undisclosed invasion of privacy.

Consumers would go from a marketplace naturally structured to redound to their benefit, to a marketplace where the benefits of new efficiencies would be increasingly captured by the market power of Google-DoubleClick.

Nothing in the marketplace is really "free." Google and DoubleClick users "pay" an intangible price for Internet content in the distraction and time delay of advertising interfering with the content they seek. The market power would enable the company to increase the amount of screen real estate devoted to ads at the expense of the content. It also could raise intangible prices in the form of increased time cost waiting for video ads to play before getting the desired content.

The intangible "price" of search could also go up when users search for information not available on other search engines. In those instances, the company would know there was no other option for quickly accessing that content and they could insert longer preview video ads before serving that content.

### B. What are the advertiser harms?

Thousands of **advertisers would be harmed** by higher online ad prices, less real choice, and impaired market discipline to prevent, investigate and rectify click fraud.

Advertisers, especially those at the ends of market, the largest and smallest, would be most vulnerable to price increases. Competitors wouldn't be able to offer smaller advertisers the same Internet audience reach enabling the company to raise prices. Competitors wouldn't be able to meet scale, scope and bundled tools that the company provides enabling the company to raise prices.

Advertisers also would be harmed by impaired market discipline to prevent self-dealing and front-running on their information.

### C. What are the content provider harms?

Hundreds of **content providers would be harmed** by higher prices (i.e. lower revenue ad splits) and less real choice for monetization of their digital content via the Internet.

The reality is that Google now has precious little competition in the middle and long tail markets; Google is really the only game in town. **This merger would foreclose a company from being able to enter this highly lucrative market in the future.**

## VI. Conclusion

The facts and evidence in this paper show Google understands what is necessary to lead and further dominate the Internet:

- Accumulating the most digital information to search;
- Building the best parallel processing grid for finding cached information instantaneously;
- Aggregating the largest:
  - Audience of users;
  - Client base of advertisers;
  - Network of content providers;
- Archiving the most consumer behavior (click) information;
- Creating the best performance measurement and analytic tools of consumer online information;
- Devising the optimal business model/algorithm for maximizing desired sales actions;
- Bundling its search engine with its consumer metadata, with its measurement/analytic tools with its text ad-serving, with the video streaming of YouTube -- to create network effects; and
- Acquiring major new first-mover formats like YouTube-video streaming, DoubleClick-ad-serving, and Feedburner-blogging to extend their market power to emerging formats to fuel growth and foreclose competition.

**Google has built the dominant global architecture for monetizing the access of Internet content** through search text ads, and it is seeking to extend that market power into the ad-serving technology platforms that it does not yet dominate, display, rich media, and blogging -- through the acquisitions of DoubleClick and Feedburner.

**The facts and evidence in this paper prove that the Google-DoubleClick merger:**

- **Will substantially lessen competition** in the appropriate defined-relevant market: *targeted online advertising* – **warranting the FTC to file an injunction in Federal court to block the transaction; and**
- **Is a standard horizontal merger to monopoly** of competitive technology platforms in the targeted online advertising market, not a vertical merger of separate search and display markets, nor an inconsequential merger in the broader $300 billion advertising market including TV, radio, newspapers, etc.

**The market power created by the Google-DoubleClick merger would lessen competition and harm consumers, advertisers, and content providers specifically by:**

- Enabling Google-DoubleClick to effectively dominate:
  - Online ad-serving to websites;
  - The monetization model for accessing Internet content; and

- Providing Google-DoubleClick greater opportunity to collude to manipulate the targeted online advertising market, raise prices, fix prices, and price predatorily.

**The facts and evidence prove consumer, advertiser, and content provider harm:**

- Tens of millions of **consumers would be harmed** by facilitating an unregulated information access monopoly, making consumers more vulnerable to: misrepresentation, conflicts, fraud, deceptive/unfair trade practices, and clandestine invasion of privacy.

- Thousands of **advertisers would be harmed** by higher online ad prices, less real choice, and impaired market forces to prevent, investigate and rectify click fraud.

- Hundreds of **content providers would be harmed** by higher prices (i.e. lower revenue ad splits) and less real choice for monetization of their digital content via the Internet.

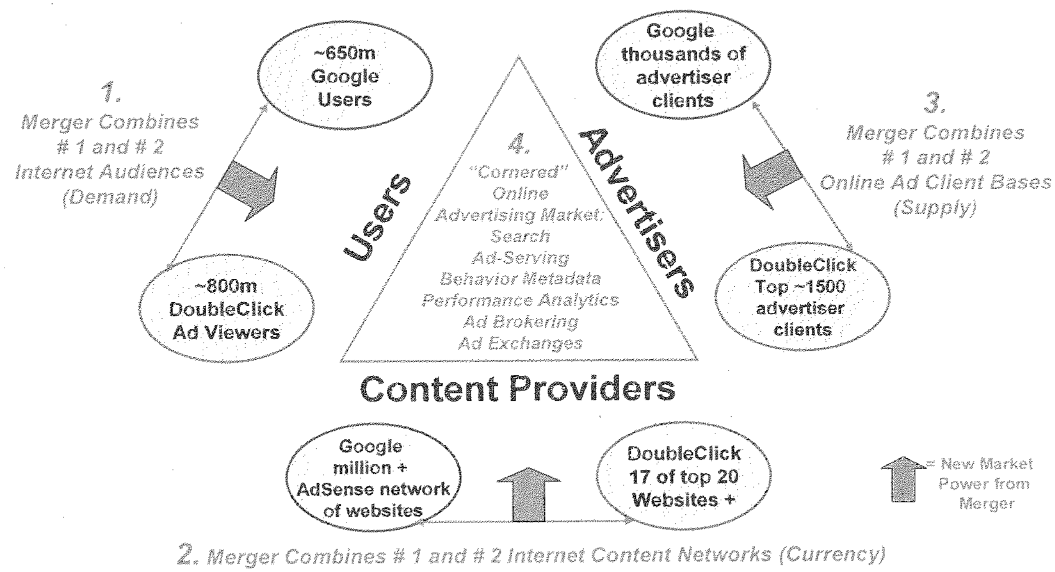
**Appendices:**

Chart: How Google-DoubleClick Merger "Corners" the Online Advertising Market

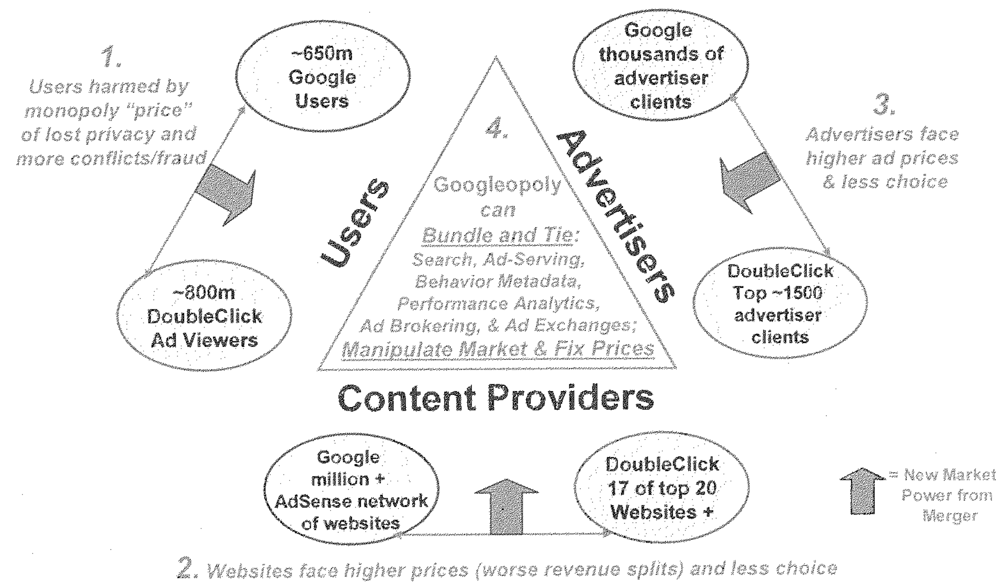
Chart Google-DoubleClick Anti-Competitive Harms & Effects

Bio Scott Cleland

# How a Google-DoubleClick Merger "Corners" the Online Advertising Market



# Google-DoubleClick
# Anti-Competitive Harms & Effects



Google

**Testimony of David Drummond**
**Senior Vice President of Corporate Development and Chief Legal Officer**
**Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights**

**Hearing on "An Examination of the Google-DoubleClick Merger and the Online Advertising Industry: What Are the Risks for Competition and Privacy?"**

**September 27, 2007**

Chairman Kohl, Ranking Member Hatch, members of the Subcommittee.

It's my pleasure to appear before you this afternoon to discuss recent developments in the world of online advertising. My name is David Drummond, and I am Google's Senior Vice President of Corporate Development and Chief Legal Officer.

The online advertising business is complex, but my message to you today is simple: Online advertising benefits consumers, promotes free speech, and helps small businesses succeed. Google's acquisition of DoubleClick will help advance these goals while protecting consumer privacy and enabling greater innovation, competition, and growth.

There are various types of online advertisements. For example, there is text-based advertising, which looks much like a classified ad in a newspaper. There is also display advertising – static or moving images that appear on a website you're visiting that are similar to billboards or TV commercials. In both cases, many competitors and thousands of individuals are engaged in creating online ads, purchasing and selling advertising space on websites, delivering ads, measuring performance, and creating new technologies to deliver better and more relevant advertising to consumers.

Though online advertising is relatively young and a very small piece of the advertising market, it is a robust business characterized by strong competition, significant innovation, and tremendous growth. In Google's case, the growth that we've seen has occurred because the innovations and investments that we've made, and the risks that we've taken as a company, have brought benefits to consumers, advertisers, and website publishers such as blogs and news sites.

**Benefiting Consumers, Supporting Free Speech, and Partnering with Small Business**

I'll start with consumers – our users – on whom our business depends. In our experience, our users value the advertisements that we deliver along with search results and other web content because the ads help connect them to the information, products, and services they seek. Simply put, advertising is information, and relevant advertising is information that is useful to consumers.

The advertising we deliver to our users complements the natural search results that we provide, because our users are often searching for products and services that our advertisers offer. Making this connection is critical. In fact, we strive to deliver the ads that are the most relevant to our users, not just the ones that generate the most revenue for us. We do this through our innovative ad auction system, which gives weight to the relevancy – the usefulness – of the ad to our users.

And our ads aren't always commercial. We run a program called Google Grants that provides free advertising to non-profit organizations engaged in community service in areas such as science and technology, education, global public health, the environment, youth advocacy, and the arts. Since April 2003, grantees have collectively received more than $155 million in free advertising.

We've also found that online advertising promotes freer, more robust, and more diverse speech. It's no coincidence that blogs have proliferated over the past few years. Our business model enables bloggers and others to generate revenue from sharing their views with the world. Without online advertising, the individuals who run these sites would not be able to dedicate as much time and attention to their publications as they do today.

In fact, we know that many website owners can afford to dedicate themselves to their sites full time because of online advertising, in part because a significant percentage of the revenue we earn from advertising ends up not in Google's hands, but in the hands of the bloggers and website operators who partner with us.

Last year we paid $3.3 billion in advertising revenue to our partners, and it's a great satisfaction to Google that we help enable this proliferation of online speech and activity. Our advertising programs help fund an incredible range of useful Internet websites, from AskTheBuilder.com, where home construction expert Tim Carter earns an average of $1400 a day through Google advertising, to SeatGuru.com, a website that allows consumers to review the pros and cons of every seat on every commercial airline.

Our advertising network also helps small businesses connect with consumers that they otherwise would not have reached, and to do so affordably, efficiently, and effectively. The advertiser decides the maximum amount of money it wishes to spend on advertising. And in the cost-per-click payment model, the advertiser only pays us when a user actually clicks on an ad.

Allen-Edmonds – the Port Washington, Wisconsin, shoemaker – is an example of how effective this type of advertising is. Allen-Edmonds has frequently appeared as a sponsored link to people searching for terms like "men's dress shoes." According to Allen-Edmonds' marketing director, the company's online sales rose 40 percent in 2005 because of the type of advertising that Google enables. Mr. Chairman, there are thousands of other Wisconsin-based companies – most of them small businesses – that also advertise with us.

It's no mistake that I've focused mainly on individual users, small publishers, and small advertisers. Google's business model has focused on what's known as the "long tail" of the Internet – the millions of individuals and small businesses that cater to niche interests and markets. We lower the barrier to entry for these small publishers and advertisers, and we match them up with users who are interested in what they have to say or sell.

We believe that our advertising business as it continues to grow and evolve will continue to encourage the development of the long tail. We also believe that the DoubleClick acquisition will help us broaden display advertising, in which we have very little experience, to the long tail of the Internet.

**The DoubleClick Acquisition Promotes Competition**

The display ad business has existed for over a decade, and it's led by three portals – the Microsoft Network, America Online, and Yahoo! Each has more than $1 billion in annual display ad revenue. Content sites such as CNET and ESPN.com also generate significant revenue from display advertising. Display ads, as I've noted before, are static or moving images similar to billboards or TV commercials, and in the chronology of internet advertising display ads came first.

In 2000, Google started to build its business by innovating in another segment of online advertising. Since that time, we have focused on text-based ads, which are generated in response to what an Internet user is searching for or the web content that the user is reading. To date, however, we have been a minor player in display advertising.

Today, display advertising is becoming more sophisticated and more popular with advertisers and publishers. Advertisers and publishers who work with us have asked us to complement our text-based advertising with display advertising capabilities offered by many others in the online advertising space. Part of our response to this was our decision to purchase DoubleClick, which delivers display ads and measures their effectiveness.

We believe that by combining our advertising network with DoubleClick's display ad serving products, and by investing resources in the display ad business, we will be able to help publishers and advertisers generate more revenue, which will fuel the creation of even more rich and diverse content on the Internet.

Some have asked whether this acquisition raises competition concerns. We are confident – and numerous independent analysts have agreed – that our purchase of DoubleClick does not raise antitrust issues because of one simple fact: Google and DoubleClick are complementary businesses, and do not compete with each other. DoubleClick does not buy ads, sell ads, or buy or sell advertising space. All it does is provide the technology to enable advertisers and publishers to deliver ads once they have come to terms, and provide advertisers and publishers statistics relating to the ads.

The simplest way to look at this is by way of analogy. DoubleClick is to Google what FedEx or UPS is to Amazon.com. Our current business involves primarily the selling of text-based ads – books in our analogy. By contrast, DoubleClick's business at its core is to deliver and report on display ads.

Our acquisition of DoubleClick does not foreclose other companies from competing in the online advertising space. Rather, the transaction is just one of several that underscore the strong competition in the online advertising space.

In the second quarter of this year, on the heels of our acquisition of DoubleClick, several major transactions in the online advertising space were announced: Yahoo's acquisition of the online advertising firm Right Media; AOL's acquisition of ADTECH AG, a leading international online ad-serving company, and of TACODA, an online behavioral targeting advertising network; WPP Group's acquisition of online advertising firm 24/7 Real Media; and Microsoft's $6 billion acquisition of online advertising firm aQuantive, as well as its acquisition of online advertising exchange AdECN Inc.

These acquisitions are strong signals that the market believes this space has a lot of room for growth and competition. In fact, just this week Microsoft announced that it had added 20 new advertising clients after closing its acquisition of aQuantive, a DoubleClick competitor – providing fresh evidence that numerous companies are finding it possible to compete in the online advertising space and the free market.

Each of the acquisitions following our purchase of DoubleClick demonstrates that there are many sophisticated, well-financed, and competitive companies that believe that the online advertising space merits more investment and remains open to strong competition.

Beyond the recent acquisitions, thousands of companies compete in selling online ad space. According to InternetAdSales.com, there are at least 36 online advertising management companies, 47 advertising sales networks, and thousands of websites that sell ad space directly.

More capital infusion into this space means that more entrepreneurs will enter it, too. Since the announcement of the DoubleClick transaction, venture capitalists have invested in startups in the ad serving business. We are seeing more entrepreneurs, more market participants, and more capital combining to create not only more competition but also more innovation in technologies and business models.

Brian McAndrews, Microsoft's Senior Vice President of the Advertiser and Publisher Solutions Group, recently commented that the online advertising space is "in the first or second inning of a long game here. There's no monopoly on innovation. I don't think you're going to see two or three big players and then game over. There will continue to be a broad range of companies."

We agree with this assessment, and we welcome this competition and innovation. The online advertising space is both critical to the continued growth of our economy, and beneficial to consumers.

**Google and DoubleClick Will Continue To Protect Online User Privacy**

As a result of the DoubleClick acquisition, consumers will benefit from more relevant and useful advertising, as well as from improvements that we plan to make to DoubleClick's ad serving technology to enhance the loading speed of websites. Another area where Google plans to continue innovating is in privacy.

Google's bottom line is this: We believe deeply in protecting online users' privacy, and we have a strong track record of doing so. We are constantly working to innovate in our privacy practices and policies. Some have asked questions about privacy protections in connection with the DoubleClick acquisition, but for us privacy does not begin or end with our purchase of DoubleClick. Privacy is a user interest that we've been protecting since our inception.

For example, just recently we announced a finite data retention policy that states in a clear and simple manner what we do with our server logs. We were the first leading Internet company to decide to anonymize IP addresses and cookies-- which are bits of data placed by nearly all websites on your computer -- in our server logs after 18 months. We are pleased that other search engines – including Microsoft, Yahoo and Ask.com – followed our lead in setting their own data retention policies.

We have also announced a new policy to reduce our cookie lifespan from 30 years to 24 months, which will be a much shorter lifespan than the cookies of many other companies.

We also spend a lot of time designing products on the principles of transparency and choice – transparency about what information we collect and how we use it, and user choice about whether to provide us with personal information at all. For example, to give users more control Google engineers built an "off the record" feature in Google Talk, our instant messaging product, so that users could decide whether their conversations are stored.

Google makes privacy a priority because it's deep-seated in our culture. Early in the product development process, our product teams and lawyers are thinking about user privacy by building privacy protections into our products from the ground up. We have designed most of our products to allow people to use them anonymously, and to ensure that none of our products use any personally identifiable data unless fully disclosed in our privacy policy.

We make privacy a priority because our business depends on it. If our users are uncomfortable with how we manage the information they provide to us, they are only one click away from switching to a competitor's services. If you don't believe me, recall that before Google, users clicked on an earlier generation of search engines like Excite, Altavista, Lycos, and Infoseek – each extremely popular in its time. User interests effectively regulate our behavior, and user trust is a critical component of our business model.

Our desire to protect consumer privacy is one reason why we are late to the display advertising space. For some time, Google's leadership has been concerned that third party cookies – a key component of the display ad-serving systems of Atlas (now owned by Microsoft), 24/7 Real Media (now owned by WPP), DoubleClick, and many other companies – might collect data in a way that might not be easily detected or understood by users. As a consequence, we traditionally have not accepted third party cookies in our advertising network.

I should note that DoubleClick is a founding member of the Network Advertising Initiative, a cooperative group of network advertisers that developed privacy principles that set the standard for privacy in the online advertising industry. These principles have been applauded by the Federal Trade Commission, and we are committed to continuing to follow the NAI's privacy guidelines following the acquisition. In fact, Google recently submitted its application to join the NAI, and we look forward to participating in its efforts to protect user privacy.

I should also note that DoubleClick is already extremely protective of privacy. In fact, it does not own and has very limited rights to use any of the data it processes on behalf of its publisher and advertiser clients.

Of course, given that innovating is what we do, we are also approaching our entry into third-party ad serving with a fresh eye, and evaluating whether changes can be made to innovate on user privacy in this space. As is the best practice in the ad serving industry, we will be including an opt-out mechanism so that people can choose not to have an advertising cookie placed on their computer. If users do accept the ad serving cookies, those cookies will expire after two years.

In addition, our industry leading decision to anonymize log data after 18 months will also cover our new test ad-serving logs. Beyond current practices, we also are experimenting with new online ad technologies and new approaches to privacy. For example, we're exploring the idea of using what we're calling "crumbled" cookies, so that user data isn't stored in association with a single cookie, and providing better forms of notice within ads to help users understand who is behind the ads they see.

Like all experiments, these ideas may or may not work out. And we believe that the entire industry must address the privacy issues raised by online advertising. As far as we are aware, we are the only company taking these steps. And we are excited to start innovating in this area for our advertising customers and for our users.

We have consulted with numerous privacy, consumer, and industry groups in developing these ideas, and have endeavored to be responsive to their concerns. We hope to be part of an ongoing conversation with these organizations after the acquisition is completed to ensure that we are listening to them, learning from them, and addressing their concerns. In addition, we have every intention of continuing to be transparent about our advertising practices and continuing to launch industry-leading privacy protections.

We are also exploring other ways to create more transparency in our privacy practices and policies. We have a lot of information about our privacy practices on our website, and we're making that information even more accessible to users by adding video-format "tutorials" to help users understand privacy issues online in plain English. The first of these video tutorials has been viewed about 43,500 times on YouTube, and the second video launched earlier this week and has already been viewed hundreds of times.

We also believe that government can and should play a key role in protecting the privacy of its citizens. The U.S. government could lead the effort to create broad-based privacy standards that protect consumers and give clear rules to business. We support federal privacy legislation, and we recently announced our support for the world community to develop global privacy standards that can help to build consumer trust and confidence in the Internet.

That's a long-term project, and in the meantime we'll continue protecting and respecting our users' privacy and we'll remain engaged with consumers, advocacy groups, and government agencies. For example, the Federal Trade Commission is planning a town hall meeting in November on the emerging privacy issues surrounding online advertising, and we're looking forward to participating in the important discussions there.

I appreciate the opportunity to discuss with you recent developments in our advertising business, and the efforts Google makes to protect user privacy. I would welcome any questions that the members of the subcommittee may have for me. Thank you.

# # #

news from

**HERB KOHL**

United States Senator
Democrat of Wisconsin

330 Hart Senate Office Building • Washington, D.C. 20510 • (202) 224-5653

**"An Examination of the Google-DoubleClick Merger and the Online Advertising Industry: What Are the Risks for Competition and Privacy?"**

September 27, 2007
Opening Statement of U.S. Senator Herb Kohl, Chairman
Senate Judiciary Committee Subcommittee on Antitrust, Competition Policy and Consumer Rights

Our hearing today will examine the consolidation currently underway in the Internet advertising industry, including the planned acquisition of DoubleClick by the Internet giant Google. Advertising on the Internet is a $ 17 billion dollar business annually and is growing by about 30% per year, an amount that will only continue to increase as more news and entertainment content is delivered over the Internet. With similar acquisitions announced by Microsoft, Yahoo, and AOL, the total value of merger activity in this industry exceeds $ 30 billion dollars so far this year. But much more than Internet advertising is at stake. This consolidation has profound consequences for all those who use the Internet, and for all of those who sell products and services on the Internet.

The Internet offers consumers an amazing array of information and entertainment choices. Best of all, beyond the fee consumers pay to access the Internet, this incredible wealth of information is available for free. But the companies that bring this content to consumers – recognizable names including Google, Microsoft and AOL -- are not charitable organizations. Advertising is the fuel that drives the Internet. Search companies like Google sell advertisers the right to place advertising on their search result pages, advertising which is highly targeted based on the words used in the consumer's search. And content companies like CNN.com or Washingtonpost.com make money by selling graphics rich "display ads" on their websites. These display ads are closely related to the content of the web page and the demographics of the audience that views the web page. The leading company placing Internet display ads on behalf of advertisers and on behalf of web site owners is DoubleClick.

Currently under review at the FTC is Google's planned acquisition of DoubleClick. For literally hundreds of millions of Americans – and consumers around the world – the name "Google" is synonymous with a quick, easy and reliable way to access a wealth of information and entertainment choices. Not even in existence a decade ago, Google has become universally known as the best and fastest way to search the Internet. And, harnessing the power of Internet advertising, Google has developed into one of the wealthiest and most profitable corporations in the world – with a current market capitalization of $ 170 billion dollars – in its short corporate life.

Google now seeks to acquire DoubleClick. The acquisition of the leading server of display ads – DoubleClick --- by the dominant seller of search based text ads – Google -- obviously warrants close examination by the antitrust regulators at the FTC. Will advertisers and Internet publishers have no choice but to deal with Google, giving Google a stranglehold over Internet advertising and the power to raise ad rates? Once these two companies have joined forces and combined their gigantic information resources, will the barriers to entry for a new entrant into the marketplace simply be too high? On the other hand, will the likely benefits to the advertising market and consumers by improving the targeting and precision of Internet advertising outweigh the potential damage to competition arising from this merger?

But this merger – and the ongoing consolidation in the Internet advertising industry as a whole – raises equally important issues of consumer privacy. Google collects an enormous amount of information on computer users' search history and Internet preferences. DoubleClick also collects a vast amount of information regarding consumers' Internet preferences. While DoubleClick assures us today that this information is shared with no one other than the advertiser or the web site carrying the advertising, what will happen to this treasure trove of consumer data once Google gains control of DoubleClick? Do consumers need to worry about the security and use of their private, personal information as Google continues to grow more powerful?

Some commentators believe that antitrust policymakers should not be concerned with these fundamental issues of privacy, and merely be content to limit their review to traditional questions of effects on advertising rates. We disagree. The antitrust laws were written more than a century ago out of a concern with the effects of undue concentrations of economic power for our society as a whole, and not just merely their effects on consumers' pocketbooks. No one concerned with antitrust policy should stand idly by if industry consolidation jeopardizes the vital privacy interests of our citizens so essential to our democracy.

In closing, let me stress that we have not reached a conclusion with respect to any of the vital questions we will explore today at our hearing. We have an open mind and need to examine these issues closely as the stakes for our society and the increasingly Internet based economy are very high. I look forward to the testimony of our distinguished panel of witness on this important topic.

**Statement of Senator Leahy**
**Chairman, Senate Judiciary Committee**
**Hearing on "An Examination of the Google-DoubleClick Merger and the Online Advertising Industry: What Are the Risks for Competition and Privacy?"**
**September 27, 2007**

Today, the Antitrust Subcommittee examines the competition and privacy issues implicated by Google's proposed acquisition of DoubleClick, and of the online advertising industry generally. I thank Senator Kohl and Senator Hatch for holding this important hearing.

The Internet has opened up new frontiers for promoting ideas – and for selling products and services. Advertisers are keenly aware of the potential the Internet poses as they target ads to consumers with particular interests. As a result, advertising on the Internet is exploding. In the first six months of 2007, Internet ad spending increased 25% over the same period last year, while ad spending dropped on network television, radio and in newspapers. Reportedly a $17 billion business last year, Internet advertising is still somewhat mysterious. This hearing provides an opportunity for the Subcommittee to examine this emerging marketplace and its competition and privacy implications.

From a competition perspective, we need to ensure that the market for Internet advertising remains competitive both for website publishers and advertisers. When a company such as Orvis or the Vermont Teddy Bear Company or Green Mountain Coffee looks to advertise online, it should not have to pay artificially high prices as a result of mergers; similarly, website publishers should have a competitive market in which to sell advertising space on their websites.

The spate of recent acquisitions in the online advertising marketplace, with a combined value of well over $10 billion, warrants scrutiny to ensure competition remains vibrant. In the absence of competition, consumers end up paying in the form of higher prices and fewer choices. But these mergers also raise the specter of a threat not just to wallets, but to privacy.

The potential for accumulation of vast amounts of personal viewing data by online advertising providers raises significant privacy concerns. Most online users are unaware of how and when information about their online activity is being used. Although data is often accumulated anonymously, tracking a user's actions on the web can build profiles that may be linked with personally identifiable information.

Americans consumers value privacy and want personal information protected. Companies that do collect and aggregate a significant amount of personal data about consumers' online behavior have an obligation to safeguard such data. And when there is no longer a legitimate use for it, personally identifiable information should be deleted.

The appropriate level of privacy protection is now in the spotlight with the potential Google acquisition of DoubleClick and the other recent acquisitions in the online advertising market.

I look forward to hearing from our distinguished panel of witnesses today.

#####

STATEMENT OF

THOMAS M. LENARD, PH.D.
SENIOR FELLOW, THE PROGRESS & FREEDOM FOUNDATION

AN EXAMINATION OF THE GOOGLE-DOUBLECLICK MERGER AND THE ONLINE ADVERTISING INDUSTRY:
WHAT ARE THE RISKS FOR COMPETITION AND PRIVACY

BEFORE THE
SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY
AND CONSUMER RIGHTS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

SEPTEMBER 27, 2007

Chairman Kohl, Ranking Member Hatch and members of the Subcommittee. Thank you for the opportunity to present my views on the important competition and privacy issues raised by the Google-DoubleClick merger. Although I haven't done the detailed economic analysis that is typically part of a merger review, I do not believe that this acquisition threatens to be anticompetitive or harmful to consumers' privacy. I do think, however, that government interference with this evolving market, which is still in its infancy, could be quite harmful to consumers.

Google's purchase of DoubleClick is part of a spate of recent activity in the online advertising world. In the last few months, the three most prominent players in Internet advertising have each announced major acquisitions: Google-DoubleClick, Microsoft-aQuantive, and Yahoo-Right Media. All of these companies are adding new capabilities in order to better serve their customers and compete with each other.

The Google deal has stirred the most controversy and is currently being scrutinized by the FTC. The FTC is doing a careful merger review, as it should, but these reviews are much more difficult when the markets are changing rapidly, as they clearly are here. The Microsoft and Yahoo acquisitions are signals, if any were needed, that these companies intend to compete vigorously. Internet advertising is growing rapidly—up 38 percent globally in the last year. New organized exchange markets for online ads are just starting to be developed. And, with the convergence of media (including television and the Internet), the online advertising market will expand further.

All this goes to illustrate a very important point: The digital revolution is not just a technological revolution. It is also a revolution in the design of business models and the evolution of markets. Firms in the IT sector are continuously experimenting, and markets are responding to the new economic imperatives. In general, we want markets, not the government, to determine winners and losers in the race to develop successful business models, and that obviously should also apply to online advertising.

In many ways, Google epitomizes the digital revolution, and the wealth of information it has brought to our fingertips was unimaginable to most of us just a few years ago. Google's business model was also difficult to envision just a few years ago. Policymaking in the face of this rapid change is extremely risky, because when technologies and markets are changing rapidly, it is much more difficult to avoid policy mistakes. We want to do everything possible to create an environment in which the Googles of the future can emerge and thrive.

We also want to create the right environment to foster the DoubleClicks of tomorrow. For many entrepreneurial ventures in the IT sector and elsewhere, acquisition by another company is a major way to generate capital and pay off early investors. The most likely acquirers are larger firms in the same or related sectors. It will not go unnoticed by early investors if antitrust enforcement makes it more difficult for the ventures in which they invest to be acquired. Such a policy would raise the hurdle for investment in these firms, with potentially adverse effects on innovation in this critical sector of our economy.

Those who have urged the FTC to investigate the Google acquisition make two arguments, both of which are flawed.

The first argument is a standard antitrust claim—that both Google and DoubleClick have a large share of the activities they undertake, so a merger would create problems. But the flaw in this argument is that these firms are engaged in different activities. Google sells text ads mainly on their own websites and search result screens. DoubleClick sells the technology that delivers display ads from advertisers to websites and evaluates the effectiveness of the ads. DoubleClick does not sell advertising space or control any websites. Thus, even if we believe that Internet advertising is a market (which itself is highly debatable, since even with its growth it still comprises only about 5 percent of all advertising) the firms will not gain any market power from this merger since they do not have any business in common. The notion that this is a merger between direct competitors because they are both involved in online advertising is just not correct.

The second argument concerns privacy. Privacy advocates led by the Electronic Privacy Information Center (EPIC) have filed a complaint with the FTC asking them to investigate how Google manages personal information and block the acquisition unless the parties adopt a number of new information practices. The complaint alleges that "the increasing collection of personal information of Internet users by Internet advertisers poses far-reaching privacy concerns," and that Google's and DoubleClick's conduct "has injured consumers throughout the United States by invading their privacy." The complaint does not provide any evidence for these assertions.

Data on individuals were used by marketers and advertisers long before the Internet. The great appeal of the Internet as an advertising medium is the ability to target ads to consumers much more precisely than can be done through other media. Targeted advertising on the Internet is based on developing an understanding of consumers' interests, and then matching and delivering relevant advertisements. Using information from a variety of sources, including sometimes the past history of Internet browsing, Internet advertisers can deliver ads to consumers that are most useful to them, and avoid delivering those that are of no interest. This reduces "spam" and other unwanted advertising messages. Both consumers and advertisers benefit from better targeting of advertising messages, which is made possible by the use of personal information. More information can facilitate more precise targeting. All of this serves consumers well.

Online advertising revenues provide additional benefits. They support a variety of valuable services that are provided to consumers at no charge by many companies, including the companies represented here, such as search services, free Internet access and e-mail, and content customized to contain information of interest to the particular individual. Internet advertising firms also provide customized advertising to smaller Websites that use the revenues to support themselves.

It is also important to note that information used for Internet advertising generally is used anonymously. We tend to think that if something is "known," then it is known by a person, but most of the information used in Internet marketing is known only to computers. These computers do not start with a specific individual and try to find out what we know about that individual. Rather, they start by asking, for example, "Which IP numbers (Internet addresses) are likely to be associated with someone interested in a new car?," and then contract to put an ad on a million pages viewed by such consumers. No one knows or cares whose computer is targeted.

Proposals to regulate in the name of privacy, which typically involve limiting the collection or use of personal information for commercial purposes, should be subject to the same scrutiny as other regulatory proposals. Policy makers should ask:

- Are there failures in the market for personal information?
- If market failures exist, how do they adversely affect consumers?
- Can such failures be remedied by government action?
- Will the benefits of government regulation exceed the costs?

Contrary to the assertions in the EPIC complaint, there is no evidence of market failure or harm to consumers from the legal use of personal information in online advertising, or that restricting that use would be net beneficial for consumers. As I indicated, the evidence is that the use of personal information by online advertisers produces substantial consumer benefits.

Antitrust and privacy are separate issues and have become conflated partly because the FTC, the agency reviewing the merger, also has jurisdiction over privacy enforcement. Some people also have tried to connect the issues by arguing that the aggregation of data serves as a barrier to entry. Why? Apparently, because the aggregation of data would enable Google to provide a better service and do so more efficiently and, therefore, would be difficult to compete against. We need to approach such arguments with great caution, because they go the heart of what we want our competitive economy to do—provide consumers with better goods and services at lower cost.

Scott Cleland makes this type of argument in his paper in the section on barriers to entry. For example, at various points he notes that: "Google has a set of search methods, which are far ahead of the academic research"; that it "has a market-leading team of engineers continually tweaking and improving their search engine to stay ahead of the competition"; and that it has "superior search expertise [that] provide[s] vastly more and better information to make [ ] searches more relevant/personalized/targeted, [which] is the key to maximizing the monetization of targeted online advertising." But these are all good things for consumers, not things we want to discourage.

The worst thing antitrust enforcers or any other policymakers could do is implement policies that prevent companies from getting too good at what they do, because it makes it harder to compete against them. That might be helpful to some competitors, but the goal of the antitrust laws is to help consumers, not competitors.

epic.org

ELECTRONIC PRIVACY INFORMATION CENTER

Testimony and Statement for the Record of

Marc Rotenberg
President, EPIC

Hearing on

"An Examination of the Google-Doubleclick Merger and the Online Advertising Industry: What are the Risks for Competition and Privacy?"

Before the

Subcommittee on Antitrust, Competition Policy and Consumer Rights,
Committee on the Judiciary,
U.S. Senate

September 27, 2007
226 Dirksen Senate Office Building
Washington, DC

Chairman Kohl, Senator Hatch, and Members of the Subcommittee, thank you for the opportunity to testify today on the proposed Google-Doubleclick Merger. My name is Marc Rotenberg and I am Executive Director of the Electronic Privacy Information Center. EPIC is a non-partisan research organization based in Washington, D.C. Founded in 1994 to focus public attention on emerging privacy and civil liberties issues. EPIC has played a significant role in the development of the Federal Trade Commission's authority to protect the privacy rights of consumers and users of the Internet, and we have a particular interest in the outcome of the matter now pending before the Federal Trade Commission.[1]

Today, I will provide a brief background on the FTC's previous actions concerning Internet privacy, the complaint that EPIC filed earlier this year to block the merger of Google and Doubleclick, and the developments since the filing of our initial complaint. It is our view that unless the Commission establishes substantial privacy safeguards by means of a consent decree, Google's proposed acquisition of Doubleclick should be blocked.

Attached to my statement is a comprehensive overview of the matter now pending before the FTC.[2] I ask that it be included in the hearing record.

The EPIC Complaint Regarding the Proposed Google-Doubleclick Merger

On April 20, 2007, EPIC, the Center for Digital Democracy and U.S. PIRG filed a complaint with the Federal Trade Commission in which we alleged that the merger of the Internet's largest search company and the Internet's largest advertising complaint posed a unique and substantial threat to the privacy interests of Internet users around the globe.[3] We said that the two companies would be under virtually no legal obligation to protect the privacy and security of the information that they collect and that consumers would have no effective means to safeguard their privacy interests because of the lack of transparency in the companies data practices. We urged the Commission to either block the deal or impose substantial conditions that would safeguard privacy.

Our complaint in the Google merger follows in a line of cases in which EPIC has asked the Commission to intervene where we believed there were significant privacy interests and where the Commission has the authority to act. It is based on our experience in these cases that led us to file the complaint regarding the merger and also to the conclusion that only a consent decree will effectively safeguard privacy interests.

---

[1] Letter from Marc Rotenberg, Dir., EPIC, to Christine Varney, Comm'r, Fed. Trade Comm'n (Dec. 14, 1995) (on need to investigate children's privacy), *available at* http://www.epic.org/privacy/internet/ftc/ftc_letter.html.
[2] EPIC, "Privacy? Proposed Google/Doubleclick Deal," http://www.epic.org/privacy/ftc/google/.
[3] *See* EPIC, CDD, U.S. PIRG, *In the Matter of Google, Inc., and DoubleClick, Inc: Complaint and Request for Injunction, Request for Investigation and for Other Relief before the Federal Trade Commission* (Apr. 20, 2007), *available at* http://www.epic.org/privacy/ftc/google/epic_complaint.pdf.

EPIC and the Original Doubleclick Complaint

EPIC's interest in the advertising practices of the online industry began in the late 1990s when a company called Doubleclick first began to sell targeted ads that could be displayed on Internet sites based on the editorial content of the site. Doubleclick made a point of saying that the company did not need to collect the personal information of Internet users; it was simply interested in mapping relevant advertising to interested users.

At the time, we expressed support for Doubleclick and its advertising model. We said it was the type of innovative service made possible by the Internet. We praised the company for its stand on privacy issues, and we specifically acknowledged its effort to make anonymity work for online commerce.

At the time, Doubleclick also included a description of its business practices and its regard for privacy and anonymity on its Web site and the Web sites of more than a thousand of its business partners. A person who was interested in the company's privacy practices could read the statement and act upon the data provided by the company.

So, when Doubleclick announced that it would acquire a large consumer database company called Abacus and merge the profiles of anonymous Internet users with the detailed profiles of identified users, we were surprised and disappointed. The company had collected personal information and built relationships of trust based on one set of privacy policies and then decided to change the rules. We filed a complaint at the Federal Trade Commission, alleging that the company had engaged in false and deceptive trade practices, and that the FTC had authority to act based on Section 5 of the Federal Trade Commission Act.[4] It was the first time that the FTC had been asked to use its Section 5 authority to investigate a privacy complaint.

Doubleclick backed off the merger of Abacus. The CEO of Doubleclick said that company made a "mistake by planning to merge names with anonymous user activity across Web sites in the absence of government and industry privacy standards."[5] The Federal Trade Commission, in response to EPIC's complaint, required Doubleclick to adopt privacy standards for online advertising and also required Doubleclick to create an "opt-out" cookie that would note users who did not want to receive Doubleclick advertising.[6]

---

[4] EPIC, *In the Matter of DoubleClick, Inc.: Complaint and Request for Injunction, Request for Investigation and for Other Relief, before the Federal Trade Commission* (Feb. 10, 2000), *available at* http://www.epic.org/privacy/internet/ftc/DCLK_complaint.pdf.
[5] Press Release, Doubleclick Inc., Statement From Kevin O'Connor, CEO of Doubleclick (Mar. 2, 2000).
[6] Letter from Joel Winston, Acting Assoc. Dir., Div. of Fin. Practices, Fed. Trade Comm'n, Letter to Christine Varney, Esq. (Jan. 22, 2001), *available at* http://www.ftc.gov/os/closings/staff/doubleclick.pdf.

The FTCs involvement in the Doubleclick-Abacus case was significant and demonstrated that the Commission had authority under Section 5 to pursue privacy complaints in the context of a merger. However, the NAI Guidelines that were adopted were simply too weak and in the absence of meaningful enforcement have had little impact on the practices of the online advertising industry. We said at the time that the Commission should have established stronger safeguards.[7]

We also said that the technical measure recommended by the Commission – the opt-out cookie – made little sense because it required Internet users who did not want to be tracked by Doubleclick to maintain a Doubleclick cookie on their computer that would tell the company not to target ads at the user. This was a nutty approach since Internet users who did not want to be targeted by Doubleclick would naturally want to remove the Doubleclick cookie. Doubleclick was saying in effect, "you need to keep reminding us that you don't want us to track you and if you remove our cookie, we'll start tracking you."

But over time, we became a little better at privacy complaints to the FTC and the Commission did a better job responding on matters concerning consumer privacy.

The Passport Case

In 2001, EPIC and 12 organizations submitted a complaint to the FTC, detailing serious privacy implications of Microsoft Windows XP and Microsoft Passport.[8] The Passport complaint concerned an issue that is a hot topic in the online world today and that is identity management.

In our 2001 complaint we alleged that Microsoft, thought its Passport sign-on system, "has engaged, and is engaging, in unfair and deceptive trade practices intended to profile, track, and monitor millions of Internet users," and that the company's collection and use of personal information violated Section 5 of the Federal Trade Commission Act.[9] We expressed particular concern that Microsoft would become the sole gatekeeper for Internet access and we recommended that the development of multiple identity management systems that would respect privacy and promote innovation. Although the Passport case was not explicitly about a merger, the antitrust and competition implications were obvious.

---

[7] *See* OnlineNewsHour, Internet Privacy, May 26, 2000, *available at* http://www.pbs.org/newshour/bb/cyberspace/jan-june00/privacy_5-26.html.
[8] EPIC, et al., *In the Matter of Microsoft Corp.: Complaint and Request for Injunction, Request for Investigation and for Other Relief, before the Federal Trade Commission* (July 26, 2001), *available at* http://www.epic.org/privacy/consumer/MS_complaint.pdf.
[9] *Id.*

In August 2002, the FTC announced a settlement requiring that Microsoft establish a comprehensive information security program for Passport, and prohibited any misrepresentation of its practices regarding information collection and usage.[10]

The FTC order in the Passport case was significant because the FTC did not uncover any security breaches, but acted nonetheless based on the potential for a security problem and privacy harms. This action demonstrated that the FTC has the authority to protect online privacy prospectively, and that the Commission will hold companies to a very high standard in their representations to consumers about privacy policies.

Since the FTC settlement of the EPIC complaint against Passport, industry groups have moved toward decentralized identity systems that are more robust, provide more security, and are better for privacy. Both Microsoft and the open source community now appear to agree that meta-identity systems are a better approach for identity management.[11] The Passport case demonstrates that effective action by the Commission will produce benefits for consumers and businesses and help spur innovation.

<u>The Choicepoint Case</u>

The third case concerned the specific privacy risks associated with the enormous aggregation of personal information held by one firm.

In December 2004, EPIC filed a complaint with the Federal Trade Commission against databroker Choicepoint, urging the Commission to investigate the compilation and sale of personal dossiers by data brokers such as Choicepoint.[12] Based on the EPIC complaint, in 2005, the FTC charged that Choicepoint did not have reasonable procedures to screen and verify prospective businesses for lawful purposes and as a result compromised the personal financial records of more than 163,000 customers in its database.[13]

In January 2006, the FTC announced a settlement with Choicepoint, requiring the company to pay $10 million in civil penalties and provide $5 millions for consumer redress.[14] It is the largest civil penalty in FTC history. The FTC also required Choicepoint to establish, implement, and maintain, "a comprehensive information security program

[10] Fed. Trade Comm'n, *Microsoft Settles FTC Charges Alleging False Security and Privacy Promises* (Aug. 8, 2002), *available at* http://www.ftc.gov/opa/2002/08/microsoft.shtm.
[11] Kim Cameron, *The Laws of Identity*, Identity Weblog, Dec. 9, 2004, http://www.identityblog.com/stories/2004/12/09/thelaws.html; Windows CardSpace, http://cardspace.netfx3.com/; OpenCard, http://www.opencard.org/.
[12] Letter from Chris Jay Hoofnagle, Assoc. Dir. EPIC, to Fed. Trade Comm'n (Dec. 16, 2004), *available at* http://www.epic.org/privacy/choicepoint/fcraltr12.16.04.html.
[13] Fed. Trade Comm'n, *Complaint for Civil Penalties, Permanent Injunction, and Other Equitable Relief, US v. ChoicePoint Inc.*, FTC File No. 052-3069 (Jan. 30, 2006), *available at* http://www.ftc.gov/os/caselist/choicepoint/0523069complaint.pdf.
[14] Fed. Trade Comm'n, *Consent Order, US v. ChoicePoint Inc.*, FTC File No. 052-3069 (Feb. 10, 2006), *available at* http://www.ftc.gov/os/caselist/choicepoint/0523069stip.pdf.

that is reasonably designed to protect the security, confidentiality, and integrity of the personal information it collects from or about consumers."[15]

My only regret about the Choicepoint case is that we did not act sooner. Identity theft and security breaches have become enormous problems in the United States, as the FTC has documented.[16] Earlier action by the Commission might have significantly reduced the privacy risks American consumers now face.

The EPIC/CDD/PIRG Complaint Regarding the Google Acquisition

EPIC, the Center for Digital Democracy, and US PIRG have made a series of filings at the FTC regarding proposed Google-Doubleclick merger. In our original April 2007 complaint, we urged the Commission to investigate the ability of Google and Doubleclick to record, analyze, track, and profile the activities of Internet users and detailed significant privacy and antitrust problems in proposed merger.[17] In our June supplement, we explained the need for the Commission to consider consumer privacy interests in the context of this merger review.[18] The complaint provided additional evidence about Google and Doubleclick's business practices that fail to comply with generally accepted privacy safeguards.

In our most recent filing, we specifically addressed the proposal that Google made regarding a global privacy standard, based on the APEC Privacy Framework, the weakest international framework for privacy protection.[19] APEC's framework focuses on the need to show harm to the consumer, but these guidelines were created prior to research into the cost to consumers of identity theft and security breaches. We also addressed Google approach to online privacy in a letter that appeared this week in the *Financial Times*.[20]

The complaint and the supplemental filings are described in more detail in the attachment and are also available online.[21]

---

[15] *Id.*
[16] Fed. Trade Comm'n, *Consumer Fraud and Identity Theft Compliant Data: January – December 2006* (Feb. 7, 2007), *available at* http://www.consumer.gov/sentinel/pubs/Top10Fraud2006.pdf.
[17] EPIC, CDD, US PIRG, *In the Matter of Google, Inc., and DoubleClick, Inc, supra* note 3.
[18] EPIC, CDD, U.S. PIRG, *Supplemental Materials in Support of Pending Complaint and Request for Injunction, Request for Investigation and for Other Relief before the Federal Trade Commission* (June 6, 2007), *available at* http://www.epic.org/privacy/ftc/google/supp_060607.pdf.
[19] EPIC, CDD, U.S. PIRG, *Second Filing of Supplemental Materials in Support of Pending Complaint and Request for Injunction, Request for Investigation and for Other Relief before the Federal Trade Commission* (Sept. 17, 2007), *available at* http://www.epic.org/privacy/ftc/google/supp2_091707.pdf.
[20] Letter from Marc Rotenberg, President, EPIC, to Financial Times (Sept. 23, 2007) ("Google's proposals on internet privacy do not go far enough"), *available at* http://www.ft.com/cms/s/0/764c5338-6a32-11dc-a571-0000779fd2ac.html.
[21] EPIC, "Privacy? Proposed Google/Doubleclick Deal," http://www.epic.org/privacy/ftc/google/.

In the materials, we set out the case against the merger and propose to the FTC a wide range of remedies that could be established by a consent decree that would address the privacy interests we have identified. Based on the previous experience with the original Doubleclick case and the subsequent Passport and Choicepoint cases, we believe it is obvious at this point that a meaningful outcome will only be possible if the FTC conditions the proposed merger on the establishment of substantial privacy safeguards.

Subsequent Developments

Subsequent to the filing of our initial complaint, the New York State Consumer Protection Board sent a letter to the FTC endorsing EPIC's complaint regarding the privacy implications of the proposed Google-Doubleclick merger. The Board stated, "[t]he combination of Doubleclick's Internet surfing history generated through consumers' pattern of clicking on specific advertisements, coupled with Google's database of consumers' past searches, will result in the creation of 'super-profiles,' which will make up the world's single largest repository of both personally and non-personally identifiable information."[22]

We also learned the FTC initiated a Second Request regarding the merger. This creates a strong presumption that the Commission will move to block or modify the deal. As Chairman Majoras explained, "the majority of investigations in which the FTC issued a second request resulted in a merger challenge, consent order, or modification to the transaction, suggesting that the FTC generally issues second requests only when there is a strong possibility that some aspect of the investigation would violate the antitrust laws."[23]

Also, the leading privacy officials in Europe, known as the "Article 29 Data Protection Working Parking," launched an investigation into Google's privacy practices, specifically its lengthy data retention scheme.[24] Although Google said they were keeping search records to comply with European law, in fact, Europeans officials objected to the lengthy retention period.

Last week, European competition authorities opened an investigation into the Google-Doubleclick merger. According to the *Times of London*, "Google Inc.'s $3.1 billion acquisition of Doubleclick, the largest broker of online banner advertising, is likely to be delayed for months by the European Commission."[25]

---

[22] Letter from Mindy Bockstein, Chair and Exec. Dir., State of New York, State Consumer Prot. Bd., to Deborah Platt Majoras, Chair, Fed. Trade Comm'n (May 1, 2007) (regarding "DoubleClick Inc. and Google. Inc. Merger"), *available at* http://www.epic.org/privacy/ftc/google/CPB.pdf.

[23] Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, "Reforms to the Merger Review Process," Feb. 16, 2006, *available at* http://www.ftc.gov/os/2006/02/mergerreviewprocess.pdf.

[24] Letter to Peter Fleischer, Privacy Counsel, Google Inc., from Peter Schaar, Chairman, Article 29 Data Protection Working Party (May 1, 2007), *available at* http://www.epic.org/privacy/ftc/google/art29_0507.pdf.

[25] Rhys Blakely, *Europe puts brakes on Google deal*, Times of London, Sept. 25, 2007, *available at* http://business.timesonline.co.uk/tol/business/industry_sectors/technology/article2525217.ece.

At present, the US Federal Trade Commission, European privacy officials,[26] the Australian Competition and Consumer Commission,[27] the Canadian competition authorities,[28] and the European Commission Directorate on Competition are all investigating the proposed Google-Doubleclick merger and considering its possible effects on competition and consumer privacy.

Competition authorities around the world appear to be in agreement that there is no merger that poses a more significant threat to online privacy than Google's proposed acquisition of Doubleclick.

Conclusion

EPIC's complaint to the FTC regarding the Google-Doubleclick merger follows in a long line of similar complaints that EPIC has brought to the FTC regarding changes in business practices that raise substantial privacy interests for Internet users. We are not for or against Google. We are not for or against any of Google's competitors. We are simply working to safeguard the privacy interests of Internet users. We believe that we have set out a good case for the Commission. We believe that the Commission has the authority to act in this matter, and we believe that the Commission should act to block the deal or to impose substantial privacy safeguards as a condition of the deal's approval.

Thank you again for the opportunity to testify today. I would be pleased to answer your questions.

---

[26] In a letter to the European Commission, consumer organizations, including BEUC, urged an investigation into the proposed merger. The groups said this merger means "Google could monopolize the on-line advertising business, thereby restricting competition and raising privacy concerns over control of consumer data." Letter from European Consumer Groups to Neelie Kroes, Comm'r, European Comm'n, on Proposed Acquisition of DoubleClick by Google (June 27, 2007), *available at* http://www.epic.org/privacy/ftc/google/beuc_062707.pdf.
[27] Australian Competition & Consumer Comm'n, *Google Inc - proposed acquisition of DoubleClick Inc.*, Aug. 22, 2007, *available at* http://www.accc.gov.au/content/index.phtml/itemId/788097; Letter from Gabrielle Ford, Australian Competition & Consumer Comm'n, to Online Publishers, Digital Agencies and Other Internet Service Groups Asking for Opinions on the Effect Proposed Google-DoubleClick Merger Would Have in the Australian Market (Aug. 27, 2007), *available at* http://www.accc.gov.au/content/trimFile.phtml?trimFileName=D07+79501.pdf&trimFileTitle=D07+79501.pdf&trimFileFromVersionId=796864.
[28] Canadian Internet Policy & Public Interest Clinic, *Section 9 Application for an Inquiry into the Proposed Merger of Google, Inc. and DoubleClick Inc.*, Aug. 2, 2007, *available at* http://www.cippic.ca/uploads/Google-DC_s.9_CompAct_complaint_FINAL.pdf; Canadian Internet Policy & Public Interest Clinic, *Request for Audit of Google Inc. and DoubleClick Inc. before the Privacy Commissioner of Canada*, Sept. 17, 2007, *available at* http://www.cippic.ca/uploads/G-DC_%20Privacy_complaint_17Sept07(1).pdf.

ELECTRONIC PRIVACY INFORMATION CENTER

# Privacy? Proposed Google/DoubleClick Deal



On April 20, 2007, EPIC, CDD, and US PIRG filed a complaint (pdf) with the Federal Trade Commission, requesting that the Commission open an investigation into the proposed acquisition, specifically with regard to the ability of Google to record, analyze, track, and profile the activities of Internet users with data that is both personally identifiable and data that is not personally identifiable. EPIC further urged the FTC to require Google to publicly present a plan to comply with well-established government and industry privacy standards such as the OECD Privacy Guidelines. Pending the resolution of these and other issues, EPIC encouraged the FTC to halt the acquisition. The three groups filed a supplement (pdf) to the complaint with the Commission in June.

On September 17, 2007, at the National Press Club, EPIC, the Center for Digital Democracy, and US PIRG announced a second supplement (pdf) to the groups' original complaint (pdf) and subsequent supplement (pdf) with the FTC concerning the proposed Google-DoubleClick merger. The amended complaint detailed new facts supporting the conclusion that the FTC should block Google's proposed acquisition of DoubleClick.

The FTC has made a "second request" in its review of Google's merger with DoubleClick (the world's largest Internet advertising technology firm). According to FTC Chair Majoras's statement (pdf) on the merger review process, "the majority of investigations in which the FTC issued a second request resulted in a merger challenge, consent order, or modification to the transaction, suggesting that the FTC generally issues second requests only when there is a strong possibility that some aspect of the investigation would violate the antitrust laws."

## Top News

- **EPIC Sets Out Case Against Google-Doubleclick Merger.** In a letter to the editor of the Financial Times, EPIC Executive Director Marc Rotenberg eplained the basis for EPIC's opposition to the Google-Doubleclick merger, and noted EPIC's similar successful complaints against Microsoft Passport and databroker Choicepoint. The US Senate will hold a hearing this week on the proposed merger. (September 24)
- **US Senate to Hold Hearing on Google-Doubleclick Merger.** The United States Senate Judiciary Committee will hold a hearing entitled [illegible] on Thursday, September 27. Dave Drummond of Google, Brad Smith of Microsoft, Scott Cleland of Precursor, Tom Lenard of the Progress & Freedom Foundation, and Marc Rotenberg of EPIC are expected to testify. (September 19)
- **EPIC, CDD, US PIRG File Additional Papers with FTC in Google-DoubleClick Merger.** At the National Press Club today, EPIC, the Center for Digital Democracy, and US PIRG announced a second supplement (pdf) to the groups' original complaint (pdf) and subsequent supplement (pdf) with the Federal Trade Commission (FTC) concerning the proposed Google-DoubleClick merger. The amended complaint details new facts supporting the conclusion that the FTC should block Google's proposed acquisition of DoubleClick. Also today, the Canadian Internet

Policy and Public Interest Clinic filed a formal complaint (pdf) with the Privacy Commissioner of Canada urging an investigation into the proposed merger. (September 17)

- **Google, Under Investigation for Violating Global Privacy Standards, Calls for New Global Privacy Standards.** As Google faces opposition to the proposed acquisition of Doubleclick, Google's privacy counsel called for less restrictive global privacy standards. The company's current privacy practices are under investigation in many countries around the world, including the United States, Canada, Australia, and most of Europe. More information about international privacy standards is available in EPIC's Privacy Law Sourcebook. (September 14)

- **Australian Competition and Consumer Commission Investigates Google-DoubleClick Merger:** On August 27, the Australian Competition and Consumer Commission began a review of the proposed Google-DoubleClick merger. The ACCC sent a letter to online publishers, digital agencies and other Internet service groups asking for opinions on the effect the proposed merger would have in the Australian market. The ACCC detailed (pdf) 10 questions, including whether the deal would give Google-DoubleClick the "incentive and/or ability to foreclose: a. rival search engines; and/or b. other providers of advertising services to online advertisers and publishers." The proposed merger is also under review by the U.S. Federal Trade Commission and the [illegible]. (August 30)

- **Google Sells Ads on YouTube Videos:** Google has announced that it has begun selling overlay ads to select videos running on YouTube, which Google bought less than 10 months beforehand. According to the Wall Street Journal, "YouTube's new format is a semitransparent ad that appears on the bottom 20% of the video. The ad shows up after a video plays for 15 seconds, and disappears up to 10 seconds later if the viewer doesn't click on it. Viewers can either click to close the ad right away or to watch the commercial." YouTube is the most popular online video site (pdf), and Google is now its exclusive server of display rich media advertising. Google and DoubleClick now both serve display ads. (August 21)

- **Internet Expected to Become No. 1 Ad Medium by 2011:** A new report from equity firm Veronis Suhler Stevenson predicts that Internet advertising will overtake television, radio and newspapers to become the No. 1 advertising medium in four years. VSS predicts that online advertising will grow by more than 21 percent per year to reach $62 billion in 2011. (August 10)

- **Canadian Policy Group Urges Investigation into Proposed Google-DoubleClick Merger:** In a complaint (pdf) filed today, the Canadian Internet Policy and Public Interest Clinic at the University of Ottawa requested (pdf) that the Canadian Commissioner of Competition investigate the proposed Google/DoubleClick merger "on the grounds that it is likely to prevent or lessen competition substantially in the targeted online advertising industry." CIPPIC Director Philippa Lawson said, "Through the merger, Google-DoubleClick will gain unprecedented market power, with which they can manipulate online advertising prices. Advertisers and web publishers will have no real choice but to choose Google's advertisement platforms in order to remain visible in the e-commerce market." CIPPIC cited the FTC complaint (pdf) and supplement (pdf) from EPIC, CDD and US PIRG, as well as the ongoing European investigations into the merger. (August 2)

- **White Paper: Googleopoly: The Google-DoubleClick Anti-Competitive Case:** Scott Cleland, President of Precursor LLC (a telecom consulting firm), today released a white paper on the proposed Google/DoubleClick merger. In it, he explains how a merger between Google and DoubleClick would facilitate a de facto information access monopoly and substantially lessen competition. "With [about] 60% share of each of their respective technology platforms, search and display, technologies which are mutually-reinforcing, the combination would enable a horizontal merger to monopoly, which would harm users, advertisers and content providers with higher prices and less choice." (July 17)

- **Google Cookies Will Delete After Two Years If Consumer Doesn't Return to Company's**

**Sites:** Google has announced that its cookies (files that allow a Web site to record your comings and goings, usually without your knowledge or consent) will automatically delete after two years if a user doesn't return to a Google site. If a user does return within the two-year period, the cookie will "re-set" for another two years, and the "re-setting" could continue indefinitely, well past the year 2039, when the current Google cookie is set to expire. Google's data retention practices are facing scrutiny (pdf) in Europe, and the FTC is reviewing its merger with DoubleClick amid privacy and antitrust questions. (July 17)

- **Federal Trade Commission Approves Microsoft's Acquisition of aQuantive:** The Federal Trade Commission has approved Microsoft's $6 billion acquisition of Internet advertising firm aQuantive. When reviewing mergers and acquisitions, the FTC has a 30-day Hart-Scott-Rodino Act waiting period. This period elapsed without the FTC seeking a "second request" from the two companies, which means the FTC has approved the deal. FTC has made a "second request" in its review of Google's merger with DoubleClick (the world's largest Internet advertising technology firm). According to FTC Chair Majoras's statement (pdf) on the merger review process, "the majority of investigations in which the FTC issued a second request resulted in a merger challenge, consent order, or modification to the transaction, suggesting that the FTC generally issues second requests only when there is a strong possibility that some aspect of the investigation would violate the antitrust laws." (July 9)

- **European Commission Opens Inquiry into Google/DoubleClick Merger:** The [illegible] will review Google's $3.1 billion merger with internet advertising company DoubleClick. The news comes a few days after European consumer group BEUC sent a letter (pdf) urging Commission to investigate the merger. The Article 29 Data Protection Working Party recently expanded (pdf) an investigation of Google's data retention policies to include the policies of all search engines. The U.S. Federal Trade Commission also is reviewing the merger. (July 6)

- **European Consumer Groups Urge European Commission to Investigate Google:** In a letter (pdf) to the European Commission, consumer organizations, including BEUC, urged an investigation into the proposed merger of Google and DoubleClick. This merger means that "Google could monopolize the on-line advertising business, thereby restricting competition and raising privacy concerns over control of consumer data," the groups said. The situation is unique because, "Never before has one single company had the market and technological power to collect and exploit so much information about what a user does on the Internet." The merger's privacy and antitrust issues have been highlighted in an FTC complaint (pdf) by EPIC, CDD and U.S. PIRG, and a letter (pdf) from the New York State Consumer Protection Board. The Article 29 Data Protection Working Party has expanded (pdf) an investigation of Google to include the data retention policies of all search engines. (July 2)

- **FTC to Hold Town Hall Meetings on Behavioral Targeting**: In a response (pdf) to a complaint (pdf) filed by CDD and US PIRG in November, the Federal Trade Commission announced that it "will hold at least one Town Hall meeting to learn more about behavioral targeting and related consumer protection issues." CDD and US PIRG's complaint urged the FTC to immediately begin investigating online advertising practices. "The data collection and interactive marketing system that is shaping the entire U.S. electronic marketplace is being built to aggressively track Internet users wherever they go, creating data profiles used in ever-more sophisticated and personalized "one-to-one" targeting schemes," the groups said. (June 22)

- **European Privacy Agency Expands Probe to All Search Engines**: The Article 29 Data Protection Working Party has announced (pdf) that it will expand its initial investigation (pdf) into Google's privacy practices, specifically its retention of personal information. The Working Party will now review "search engines in general, and scrutinize their activities from a data protection point of view, because this issue affects an ever growing number of users." In response to the Working Party's investigation, earlier this month, Google announced (pdf) that it will soon retain user data for a maximum of 18 months. The company previously announced that it would begin retaining user data for a maximum of 18 to 24 months, but the company continues to operate under its policy of retaining the information indefinitely. (June 22)

- **Google Easily Tops List of U.S. Search Providers**: Nielsen/Netratings announced (pdf) its May U.S. Search Share Rankings and Google again tops the list, with a 56.3 percent share of U.S. searches. Yahoo was a distant second with 21.5 percent; MSN had 8.4 percent, AOL had 5.3 percent, and Ask.com had 2.0 percent. The other companies listed in the Top 10 (My Web, Comcast, EarthLink, BellSouth, and Dogpile.com) all had less than one percent share. EPIC, CDD and US PIRG have filed a complaint (pdf) and a supplement (pdf) with the Federal Trade Commission explaining the need for the Commission to consider consumer privacy interests in the context of a merger review involving the Internet's largest search profiling company and the Internet's largest targeted advertising company, DoubleClick. (June 21)

- **Microsoft and Yahoo Acquisitions Also Under FTC Review**: The FTC is reviewing two more large online-ad deals. Microsoft has bid $6 billion for digital maketing firm aQuantive, and Yahoo paid $680 million for the 80% of ad-exchange operator Right Media Inc. that Yahoo didn't already own. Microsoft and Yahoo are undergoing the initial FTC reviews under the Hart-Scott-Rodino antitrust law, but have not been asked to submit more information for a "second request." FTC is currently investigating Google's merger with DoubleClick (the world's largest Internet advertising technology firm) and has made a "second request" in that review. According to FTC Chair Majoras's statement (pdf) on the merger review process, "the majority of investigations in which the FTC issued a second request resulted in a merger challenge, consent order, or modification to the transaction, suggesting that the FTC generally issues second requests only when there is a strong possibility that some aspect of the investigation would violate the antitrust laws." (June 15)

- **Google Cuts Retention Time, But Privacy Problems Remain**: Google will cut the period that it retains user data from a maximum of 24 months to a maximum of 18 months, the company said in a letter (pdf) to the Article 29 Data Protection Working Party. Last month, the Working Party began to investigate (pdf) Google's privacy practices and asked whether the company has "fulfilled all the necessary requirements" to abide by EU privacy rules. In its letter, Google did not adequately explain why it needed to retain user data for 18 or 24 months, except to vaguely say that the data would help Google build new services, possibly help prevent fraud and abuse, and that the U.S. and EU member states might impose a 24-month retention requirement. Privacy International has ranked Google's privacy policies dead last among 23 top Internet companies, including AOL and Microsoft. For more information see EPIC's page on International Data Retention. (June 12)

- **Google Ranks Dead Last on Privacy Among Top Net Companies, Privacy International Reports**: In a report released Saturday, Privacy International assigned Google its lowest possible grade, finding the company's privacy practices are the worst among Internet service companies. Not one of the other 22 companies surveyed (including AOL, Microsoft and Yahoo) "comes close to achieving status as an endemic threat to privacy" as Google, said Privacy International. The group cited the privacy issues raised by the Google/DoubleClick merger, which have been highlighted by in an FTC complaint (pdf) by EPIC, CDD and US PIRG, and a letter (pdf) from the New York State Consumer Protection Board. The Article 29 Data Protection Working Party has launched an investigation (pdf) into Google's data retention policies. (June 11)

- **Privacy Groups File Amended Complaint with FTC Regarding Google/DoubleClick Merger**: EPIC, CDD, and US PIRG today filed a supplement (pdf) to the groups' original complaint (pdf) with the Federal Trade Commission (FTC) concerning the Google/DoubleClick merger. The new complaint explains the need for the FTC to consider consumer privacy interests in the context of a merger review involving the Internet's largest search profiling company and the Internet's largest targeted advertising company. The complaint provides additional evidence about Google and DoubleClick's business practices that fail to comply with generally accepted privacy safeguards, and proposes further steps that the Commission should take if the merger is to be approved. (June 6)

- **SEC Filing Reveals Google Subject to "Second Request" - Challenge, Order or Modification to Acquistion of Doubleclick Under Consideration**: A recent filing with the Security and Exchange Commission indicates that the FTC "has issued a request for additional information and documentary materials regarding the proposed acquisition of" Doubleclick. According to FTC Chair Majoras's statement (pdf) on the merger review process, "the majority of investigations in which the FTC issued a second request resulted in a merger challenge, consent order, or modification to the transaction, suggesting that the FTC generally issues second requests only when there is a strong possibility that some aspect of the investigation would violate the antitrust laws." On April 20, EPIC, CDD and U.S. PIRG filed a complaint (pdf) with the FTC, requesting that the Commission open an investigation into the proposed acquisition. (May 30)

- **European Privacy Agency Opens Investigation Into Google**: The Article 29 Data Protection Working Party has launched an investigation (pdf) into Google's privacy practices and specifically its retention of personal information. The Working Party has asked Google whether the company has "fulfilled all the necessary requirements" to abide by EU privacy rules. European Justice Commissioner Franco Frattini is backing the investigation. Last month EPIC filed a complaint (pdf) at the Federal Trade Commission recommending that that Commission block Google's proposed acquisition of online advertising company DoubleClick. EPIC said that Google has failed to establish basic privacy safeguards. The New York State Consumer Protection Board has also recommended (pdf) that that merger be blocked. (May 25)

- **New York State Consumer Protection Board endorses EPIC's Google/DoubleClick Complaint**: The New York State Consumer Protection Board has sent a letter (pdf) to the FTC endorsing EPIC's recent complaint (pdf) regarding the privacy implications of the Google/DoubleClick merger. The Board stated, "[t]he combination of DoubleClick's Internet surfing history generated through consumers' pattern of clicking on specific advertisements, coupled with Google's database of consumers' past searches, will result in the creation of "super-profiles," which will make up the world's single largest repository of both personally and non-personally identifable information." The Board expressed concern that these profiles expose consumers to the risk of disclosure of their data to third-parties, as well as public disclosure as evidence in litigation or through data breaches. The Board urged the FTC to halt the merger until it has fully investigated Google's planned use of DoubleClick's data post-merger. (May 9)

- **DoubleClick Statement Regarding Data Ownership**: On April 20, DoubleClick released a statement regarding data ownership in response to EPIC's complaint (pdf) with the FTC. DoubleClick stated that the data collected by its online display advertising technology (DART) could not be used by Google, or combined with information owned by Google. DoubleClick stated that such collected information belongs to DoubleClick's clients and not to DoubleClick. (April 20)

- **EPIC Files Complaint With FTC Regarding Google/DoubleClick Merger**: On April 20, EPIC filed a complaint (pdf) with the Federal Trade Commission (FTC), urging the Commission to open an investigation into the proposed acquisition, specifically with regard to the ability of Google to record, analyze, track, and profile the activities of Internet users with data that is both personally identifiable and data that is not personally identifiable. EPIC further urged the FTC to require Google to publicly present a plan to comply with well-established government and industry privacy standards such as the OECD Privacy Guidelines. Pending the resolution of these and other issues, EPIC encouraged the FTC to halt the acquisition. (April 20)

- **Google Announces Agreement to Acquire DoubleClick**: Google has announced an agreement to acquire online advertising giant DoubleClick, Inc. for $3.1 billion. See Google's Press Release on the agreement. Google has already expressed an intent to merge data from Google and DoubleClick to profile and target Internet users. (April 13, 2007)

## EPIC's Complaint

On April 20, 2007, EPIC, CDD, and US PIRG filed a complaint (pdf) with the Federal Trade Commission (FTC), urging the Commission to open an investigation into the proposed acquisition of DoubleClick by Google. The groups urged the FTC to assesses the ability of Google to record, analyze, track, and profile the activities of Internet users with data that is *both* personally identifiable and data that is not personally identifiable. The groups stressed that the increased collection of personal information of Internet users by Internet advertisers poses far-reaching privacy concerns that the FTC should address. The groups further noted that Google fails to follow previously agreed upon standards for online advertising conduct, and urged the FTC to to require Google to publicly present a plan to comply with these standards. Pending the resolution of these and other issues, EPIC encouraged the FTC to halt the acquisition.

### EPIC's June 2007 Supplement to the Original Complaint

On June 6, 2007, EPIC, CDD, and US PIRG filed a supplement (pdf) to the groups' original complaint (pdf) with the Federal Trade Commission (FTC) concerning the Google/DoubleClick merger. The new complaint explains the need for the FTC to consider consumer privacy interests in the context of a merger review involving the Internet's largest search profiling company and the Internet's largest targeted advertising company. The complaint provides additional evidence about Google and DoubleClick's business practices that fail to comply with generally accepted privacy safeguards, and proposes further steps that the Commission should take if the merger is to be approved.

### EPIC's September 2007 Supplement to the Original Complaint

On September 17, 2007, at the National Press Club, EPIC, the Center for Digital Democracy, and US PIRG announced a second supplement (pdf) to the groups' original complaint (pdf) and subsequent supplement (pdf) with the FTC concerning the proposed Google-DoubleClick merger. The amended complaint detailed new facts supporting the position that "Google and DoubleClick have engaged in unfair and deceptive trade practices in violation of Section 5 of the Federal Trade Commission Act [. . . and] Google and DoubleClick have failed to establish adequate privacy safeguards to protect the interests of Internet users." The groups said, "[P]ending the establishment in fact of such protection, the Commission should block the proposed merger."

### FTC Authority to Act

The FTC's primary enforcement authority with regards to privacy is derived from 15 U.S.C. § 45, commonly known as section 5 of the Federal Trade Commission Act (FTCA). Section 5 of the FTCA allows the FTC to investigate "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." Although this law does not grant the FTC specific authority to protect privacy, over the last number of years it has been used to bring public attention to significant privacy issues and to provide a legal basis so as to reform business activities that threaten consumer privacy.

### Antitrust Experts on Privacy Review by FTC

- "Albert A. Foer, president of the American Antitrust Institute, said the government has historically avoided taking non-competition issues into account when reviewing mergers. Still, he noted that the FTC is a consumer protection agency and may 'very well' be interested in hearing privacy concerns."Albert A. Foer, president of the American Antitrust Institute. Alexei Alexis, FTC Exam of Google-DoubleClick Deal Should Order Use of 'Opt-In' Data Policy, Groups Say, Electronic Commerce & Law, Vol. 12, No. 24, June 13, 2007 .
- "The issues [antitrust and privacy] are not unrelated, in that one of the claims of the opponents of the deal is that giving the combined entity access to the data gathered by both companies not only creates a privacy problem, but also creates a barrier to entry to others who want to compete in the Internet advertising business." Brokerage Stifel, Nicolaus & Company, Inc. Google-DoubleClick Goes to the FTC: Approval Still Looks Likely, But Potential for Privacy Conditions Rises, Washington Telecom, Media, & Tech Insider, June 1, 2007 (pdf).
- "The privacy concern is, 'Will one entity have so much control that the information is going to

be centralized?,' " said Andrew Klevorn, an antitrust attorney with Eimer Stahl in Chicago. "Will they have too much informational power?" Google comes under scrutiny, San Francisco Chronicle, May 30, 2007.

- "The privacy issue is also the competitive issue," said Blair Levin, an analyst at brokerage Stifel, Nicolaus. "The biggest barrier to entry is not money or engineers or the networks, but the information on the behavior of people on the Internet." FTC study of Google purchase may focus on privacy, Los Angeles Times, May 30, 2007.
- "The combination of DoubleClick's Internet surfing history generated through consumers' pattern of clicking on specific advertisements, coupled with Google's database of consumers' past searches, will result in the creation of 'super-profiles,' which will make up the world's single largest repository of both personally and non-personally identifiable information," Mindy Bockstein, executive director of the NY State Consumer Protection Board. "In the best interest of consumers, we call for a halt to the merger until the Federal Trade Commission ("FTC") has fully investigated Google's planned use of the data post-merger." Letter from NY State Consumer Protection Board to FTC Urging Delay of Google/Doubleclick Merger (PDF), May 1, 2007.
- "We think antitrust authorities should take a hard look at this deal and the implications," said Jim Cicconi, senior executive vice president for external affairs at AT&T. "If any one company gets a hammerlock on the online advertising space, as Google seems to be trying to do, that is worrisome." Microsoft Urges Review of Google-DoubleClick Deal, New York Times, April 16, 2007.
- "This proposed acquisition raises serious competition and privacy concerns in that it gives the Google-DoubleClick combination unprecedented control in the delivery of online advertising and access to a huge amount of consumer information by tracking what customers do online," Microsoft General Counsel Brad Smith said. "We think this merger deserves close scrutiny from regulatory authorities to ensure a competitive online-advertising market." Companies want scrutiny of Google-DoubleClick deal, CNet News.com, April 15, 2007.
- "Today, just a very few telecom giants have an enormous amount of personal information on virtually every American's phone calls. As the market concentrates, the threat to our privacy grows. These considerations should be paramount to all of us who have the responsibility to review these mergers," Sen. Herbert Kohl, Chairman of the Subcommittee on Antitrust, Competition Policy and Consumer Rights of the Senate Judiciary Committee. Statement of the Honorable Herbert Kohl at a Hearing on AT&T/BellSouth Merger, June 22, 2006.

### Impact of Search Engines

Internet search engines, such as those offered by Google, Yahoo, and Microsoft, are the primary means by which individuals access content on the Internet. Search terms entered into the main Google search engine alone may reveal a plethora of personal information such as an individual's medical issues, associations, religious beliefs, political preferences, sexual orientation, and investments monitored. In 2005, more than 60 million American adults used search engines on a typical day. The number is no doubt much higher today.

### FTC Review of EPIC DoubleClick Complaint (2000 - 2001)

The Federal Trade Commission has previously investigated DoubleClick Inc. for violations of the Federal Trade Commission Act. On February 10, 2000, EPIC filed a complaint with the FTC concerning the information collection practices of DoubleClick. EPIC alleged that DoubleClick was unlawfully tracking the online activities of Internet users and combining surfing records with detailed personal profiles contained in a national marketing database. EPIC asked the FTC to investigate the practices of the company, to destroy all records wrongfully obtained, to invoke civil penalties, and to enjoin the firm from violating the Federal Trade Commission Act. On February 14, 2000, DoubleClick revealed in a document filed with the Securities and Exchange Commission that the FTC was investigating the company's privacy practices.

On March 2, 2000, DoubleClick CEO Kevin O'Connor released a statement that said that the company made a "mistake by planning to merge names with anonymous user activity across Web sites in the absence of government and industry privacy standards."' The FTC investigation into the company's privacy practices continued.

On January 22, 2001, the FTC released a letter announcing that it had closed its investigation of DoubleClick. The letter listed a number of commitments DoubleClick agreed to make, including a commitment to abide by the NAI Privacy Principles.

### Google's Business Practices

Google operates the largest Internet search engine in the United States. According to a comScore press release, Google captured almost 50% of the U.S. search engine market in March 2007, with approximately 3.5 billion search queries were performed on Google web sites. Google's services include:

1. *Google search*: any search term a user enters into Google;
2. *Google Desktop*: an index of the user's computer files, e-mails, music, photos, chat, and web browser history;
3. *Google Talk*: instant-message chats between users;
4. *Google Maps*: address information requested, often including the user's home address for use in obtaining directions;
5. *Google Mail (Gmail)*: a user's e-mail history, with default settings set to retain e-mails "forever";
6. *Google Calendar*: a user's schedule as inputted by the user;
7. *Google Orkut*: social networking tool storing personal information such as name, location, relationship status, etc.;
8. *Google Reader*: which ATOM/RSS feeds a user reads;
9. *Google Video/YouTube*: videos watched by user;
10. *Google Checkout*: credit card/payment information for use on other sites.

Google stores its users' search terms in connection with their Internet Protocol (IP) address, a unique string of numbers that identifies each individual computer connected to the Internet. When a user enters a search term into Google's search engine, Google's servers automatically log the user's web request, IP address, browser type, browser language, the date and time of the request and one or more cookies that may uniquely identify the user's browser. As a user's Web request includes the requested search term, Google's logs link a user's personally-identifiable IP address with their search terms. A January 2006 poll of 1,000 Google users found that 89% of respondents think their search terms are kept private, and 77% believed that Google searches do not reveal their personal identities. These numbers indicate that Google's practices violate the public's expectation of privacy with respect to the collection and use of search history data. Though Google tracks its users' search activity in connection with their IP address, Google does not currently use this data to engage in behavioral targeting.

### DoubleClick's Business Practices

DoubleClick is a leading provider of Internet-based advertising. The company places advertising messages on Web sites. DoubleClick reaches an estimated 80 to 85 percent of the users of Internet. Its customers include Time Warner's AOL and Viacom's MTV Networks.

DoubleClick tracks the individual Internet users who receive ads served through DoubleClick. When a user is first "served" an ad, DoubleClick assigns the user a unique number and records that number in a "cookie" file stored on the user's computer. As that user subsequently visits other Web sites on which DoubleClick serves ads, he or she is identified and recorded as having viewed each ad. DoubleClick stores a user's history for two years. Using the unique numbers contained in cookies, DoubleClick's "DART" (Dynamic, Advertising, Reporting, and Targeting) technology enables advertisers to target and deliver ads to Web users based on pre-selected criteria.

### Google and Privacy

According to comScore, three out of every 10 (30.1 percent) of U.S. Internet users streamed video from YouTube.com, recently acquired by Google, in March 2007 alone. YouTube Chief Marketing Officer Suzie Reider recently revealed that YouTube will expand the amount of user demographic data it retains later this year. Reider stated, "We'll never have had [sic] that much data about that much content. [. . .] By Q3 we'll have a tremendous amount of metrics and data around every video. There's lots you can glean from looking at who's looking at what. It's a real-time focus group that happens all day, every day." (quote from AdAge).

### European Review of Google Merger

On May 16, 2007, the European Union's Article 29 Data Protection Working Party launched an investigation into Google's privacy practices. In a letter (pdf) to Google, chair of the Article 29 Working Party, Peter Schaar asked whether the company has "fulfilled all the necessary requirements" to abide by EU privacy rules. Mr. Schaar explained, "As you are aware, server logs are information that can be linked to an identified or identifiable natural person and can, therefore, be considered personal data in the meaning of Data Protection Directive 95/46/EC. For that reason, their collection and storage must respect data protection rules." EU Directive 95/46/EC states that individuals' personal information can only be collected for "specified, explicit and legitimate purposes." Information that is collected can only be kept in identifiable form for as long as is "necessary for the purposes for which the data were collected or for which they are further processed."

Earlier this year, Google announced that it was changing its privacy policy, and would maintain user-specific information from Web searches for a period of 18 to 24 months. Google previously stored this information for as long as it was useful. After the 18- to 24-month period, the company claims that it will obscure the data, making it more difficult to identify individuals. This change "does not seem to meet the requirements of the European legal data protection framework," Mr. Schaar wrote. The Working Party requested a detailed explanation from Google as to 1) "why this long storage period was chosen" for the server logs, 2) "the purposes for which server logs need to be kept," and 3) "Google's legal justification for the storage of server logs in general." Also, the Working Party questioned whether the 30-year lifetime of the "Google cookie," which tracks users, "goes beyond what seems to be 'strictly necessary' for the provision of the service."

Mr. Schaar pointed to the "Resolution on Privacy Protection and Search Engines," (pdf) which urged data minimization and addressed several issues with regard to server logs and the detailed profiling of users. "The Article 29 Working Party fully supports this Resolution and would appreciate the detailed views of Google on the steps which it has taken to fully implement its recommendations." The Working Party will discuss the investigation into Google's privacy practices at its meeting in June and requested that the company respond before then. European Justice Commissioner Franco Frattini is backing the investigation.

### FTC Review of EPIC Microsoft Passport Complaint (2001 - 2002)

On July 26, 2001, EPIC and twelve organizations submitted a complaint (pdf) to the FTC, detailing serious privacy implications of Microsoft Windows XP and Microsoft Passport. The complaint alleged that Microsoft "has engaged, and is engaging, in unfair and deceptive trade practices intended to profile, track, and monitor millions of Internet users," and that the company's collection and use of personal information violated Section 5 of the Federal Trade Commission Act.

After Microsoft announced a series of changes to Windows XP and Passport in response to the complaint, EPIC et al. submitted a supplement (pdf) to the FTC further detailing specific ways Microsoft XP and Passport would harm consumer interests.

The privacy and security risks outlined in the complaint were: facilitation of online profiling through a sign on requirement into Passport in order to view web content; covert sharing of consumer's personal information within the MSN network; an increase in the amount of unsolicited commercial e-mail from the sharing of e-mail addresses within the MSN network (with no option for the consumer to opt-out of such a system); and Microsoft's failure to establish adequate security standards to ensure that personal information held by Microsoft, such as credit card data, were protected from disclosure to a third party.

In August 2002, the FTC announced a [illegible] in its privacy enforcement action against Microsoft. The settlement required that Microsoft establish a comprehensive information security program for Passport, and prohibited any misrepresentation of its practices regarding information collection and usage.

The agreement was significant because the FTC did not uncover any security breaches, but acted nonetheless based on the potential for a security problem. This action demonstrated that the FTC has the authority to protect online privacy, and that the commission will hold companies to a very high standard in their representations to consumers about privacy policies. Since the FTC settlement of the EPIC complaint against Passport, industry groups have moved toward decentralized identity systems that are more robust, provide more security, and are better for privacy. For more information, see EPIC's page on Microsoft Passport Investigation Docket.

### FTC Review of EPIC ChoicePoint Complaint (2004-2006)

In December 2004, EPIC filed a [illegible] with the Federal Trade Commission against databroker ChoicePoint. EPIC urged the agency to investigate the compilation and sale of personal dossiers by data brokers such as ChoicePoint. EPIC argued that the dossiers may constitute "consumer reports" for purposes of the Fair Credit Reporting Act, thus subjecting both the information seller and the buyer to regulation under the Act. Furthermore, EPIC argued that it is incumbent upon the Commission to analyze whether the sale of these dossiers circumvents the Act, giving businesses, private investigators, and law enforcement access to data that previously had been subjected to Fair Information Practices.

In February 2005, EPIC supplemented the ChoicePoint complaint and raised three additional issues relevant to the rise of commercial databrokers. First, an article written by Robert O'Harrow Jr. of the Washington Post quoted ChoicePoint representatives saying that the company acts like an "intelligence agency" and that the data industry should be subject to new regulations because of how personal information is being used. O'Harrow's article demonstrated the reliance on commercial data brokers for decision-making, and the growing importance that the brokers' data be accurate and their practices accountable to the public. Second, the letter included a dialogue from Declan McCullagh's Politechbot.com mailing list concerning the December 2004 complaint. A list message from a private investigator who uses ChoicePoint noted that the company maintains an audit trail of clients who access personal information. The EPIC supplement points out that law enforcement users are not subject to the audit trails, and that EPIC is unaware of a single case where a commercial databroker has turned in a user for prosecution as a result of an audit showing prohibited use of the service. Last, the EPIC supplement included a transcript of a recent television broadcast, "Someone's Watching," that aired on Dec. 18, 2004, on the Discovery Times Channel. The broadcast shows two private investigators using a commercial databroker to access a stranger's Social Security Number, employment details, and other information without any legal justification.

In 2005, based on the EPIC complaint, the FTC alleged (pdf) that ChoicePoint did not have reasonable procedures to screen and verify prospective businesses for lawful purposes and as a result compromised the personal financial records of more than 163,000 customers in its database. Because of this breach, the FTC alleged that ChoicePoint violated the Fair Credit Reporting Act by furnishing the financial records to subscribers that did not have a permissible purpose to obtain them. The FTC additionally alleged that ChoicePoint engaged in unfair or deceptive practices in violation of Section 5 of the Federal Trade Commission Act.

In January 2006, the FTC announced a settlement (pdf) with ChoicePoint, requiring the company to pay $10 million in civil penalties and provide $5 millions for consumer redress. It is the largest civil penalty in FTC history. ChoicePoint was also required to verify, "(1) the business identity of the subscriber, and (2) that the subscriber is a legitimate business engaged in the business certified and has a permissible purpose for obtaining consumer reports." The FTC also required ChoicePoint to establish, implement, and maintain "a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of the personal information it collects from or about consumers."

## Additional Parties to the Complaint

**Center for Digital Democracy**
The Center for Digital Democracy (CDD) is a nonprofit organization working to ensure that the digital media systems serve the public interest. CDD is committed to preserving the openness and diversity of the Internet in the broadband era, and to realizing the full potential of digital communications through the development and encouragement of noncommercial, public interest programming. For more information on CDD's position on the Google/DoubleClick merger, visit CDD's Jeff Chester's blog entries on the subject.

**U.S. Public Interest Research Group**
The U.S. Public Research Group (U.S. PIRG) serves as both the federal advocacy office for and the federation of non-profit, non-partisan state Public Interest Research Groups, with over one million members nationwide. U.S. PIRG is a strong supporter of fair, competitive marketplace practices, including compliance with the OECD Guidelines for the Protection of Privacy.

## Resources

- EPIC, CDD, U.S. PIRG., Second Supplement to Original Complaint to the FTC Concerning Google/DoubleClick Merger (PDF), September 17, 2007.
- Canadian Internet Policy and Public Interest Clinic, Request for Audit of Google Inc. and DoubleClick Inc. (PDF), September 17, 2007.
- Jeff Chester, Center for Digital Democracy, Google's DoubleClick Takeover: Double Data-Dealing (DOC), Comments at the National Press Club, September 17, 2007.
- Google Posting, Call for global privacy standards, Official Google Public Policy Blog, September 14, 2007.
- Australian Competition and Consumer Commission, Letter to Online Publishers, Digital Agencies and Other Internet Service Groups Asking for Opinions on the Effect Proposed Google-DoubleClick Merger Would Have in the Australian Market (PDF), August 27, 2007.
- Canadian Internet Policy and Public Interest Clinic, Section 9 Application for an Inquiry into the Proposed Merger of Google, Inc. and DoubleClick Inc. (PDF), August 2, 2007.
- Canadian Internet Policy and Public Interest Clinic, Press Release (PDF), CIPPIC calls on Competition Commissioner to review Google-DoubleClick merger, August 2, 2007.
- Microsoft and Ask.com, Press Release, Microsoft and Ask.com Call on Industry to Join Together to Evolve Privacy Protections for Consumers, July 22, 2007.
- Googleopoly: The Google-DoubleClick Anti-Competitive Case, Scott Cleland, President, Precursor LLC -- A Techcom Industry Research and Consulting Firm, July 17, 2007.
- Letter from European Consumer Groups to the European Commission Urging an Investigation of Google/DoubleClick merger (PDF), June 27, 2007.
- Google Posting, Why we're buying DoubleClick, Official Google Blog, June 26, 2007.
- Letter from FTC to CDD and U.S. PIRG Announcing Town Hall Meeting on Behavioral Targeting (PDF), June 21, 2007.
- Press Release from Article 29 Data Protection Working Party Announcing Google Probe Will Expand to All Search Engines (PDF), June 21, 2007.
- Google, Posting to Google Blog by Peter Fleischer, Global Privacy Counsel, How long should Google remember searches?, June 11, 2007.
- Letter from Google to Article 29 Data Protection Working Party in Response to Working Party Investigation of Google's Privacy Practices (PDF), June 10, 2007.
- Privacy International, A Race to the Bottom: Privacy Ranking of Internet Service Companies, June 9, 2007 (ranking Google dead last on privacy among top Internet companies).
- EPIC, CDD, U.S. PIRG., Supplement to Original Complaint to the FTC Concerning Google/DoubleClick Merger (PDF), June 6, 2007.
- Letter from Article 29 Data Protection Working Party to Google Opening an Investigation Into the Company's Privacy Practices (PDF), May 16, 2007.

- Letter from NY State Consumer Protection Board to FTC Urging Delay of Google/Doubleclick Merger (PDF), May 1, 2007.
- EPIC, CDD, U.S. PIRG., Complaint to the FTC Concerning Google/DoubleClick Merger (PDF), April 20, 2007.
- Press Release, Google to Acquire DoubleClick, April 13, 2007.
- Google FAQ, FAQ: Google Acquires DoubleClick (PDF), April 13, 2007.
- TACD Statement on AOL-Time Warner Merger (PDF), February 2000 (discusses privacy issues involved in a merger between a large Internet Service Provider and a large media company).
- EPIC's Gmail Privacy Page
- Federal Trade Commission's page on Hart-Scott-Rodino Act pre-merger review .

### Editorials on Google

- Who's afraid of Google?, Economist, August 30, 2007.
- Googling 'Monopoly', Wall Street Journal, August 21, 2007.
- Is It OK that Google Owns Us?, eWeek.com, June 17, 2007.
- Google warrants an inquiry, FinancialTimes.com, June 13, 2007.
- Watching Your Every Move, New York Times, June 13, 2007.
- FTC obligated to set Internet standards, San Jose Mercury News, June 7, 2007.
- An unsafe search, San Francisco Chronicle, June 5, 2007.

### News Items

- [illegible], Inquirer, September 18, 2007.
- Privacy groups: Google's call for standard not enough, Computerworld, September 17, 2007.
- Google's Press for Global Privacy Fans Flames, MediaPost, September 17, 2007.
- Google Calls for International Standards on Internet Privacy, Washington Post, September 15, 2007.
- Google Posting, Call for global privacy standards, Official Google Public Policy Blog, September 14, 2007.
- Google proposes global privacy standard, CNet News.com, September 13, 2007.
- Watchdog examines Google bid, Sydney Morning Herald, September 6, 2007.
- EU questions Google customers over DoubleClick, Reuters, September 6, 2007.
- Internet Displaces Radio As Fourth Biggest Ad Medium, Media Daily News, August 31, 2007.
- Inside the Googleplex, Economist, August 30, 2007.
- Microsoft-Google Showdown Heats Up as Court Rule Ends, Bloomberg News, August 30, 2007.
- Keynote Conversation With Marissa Mayer, Vice President, Search Products & User Experience at Google, Search Engine Roundtable, August 22, 2007.
- Google's growth has come at a price, San Jose Mercury News, August 19, 2007.
- Online ads to overtake US newspapers, Financial Times, August 7, 2007.
- Antitrust now a battleground for Google and foes, Los Angeles Times, August 6, 2007.
- Google and Privacy, International Business Times, August 4, 2007.
- Canadian Policy Group Seeks Official Google/DoubleClick Review, MediaPost Publications, August 3, 2007.
- Canadian group opposes Google-DoubleClick deal, CNet News.com, August 2, 2007.
- Canadian Internet Policy and Public Interest Clinic, Press Release, CIPPIC calls on Competition Commissioner to review Google-DoubleClick merger, August 2, 2007 (pdf).
- Video, Cell, Display Ads Get More Google Focus, CNN Money.com, August 2, 2007.
- M&A volume surges on Google-Doubleclick transaction, 9:01 am, July 30, 2007.
- Search engines race to update privacy policies, ZDNet News, July 23, 2007.
- Web-Search Privacy Efforts Move to Forefront, Wall Street Journal, July 23, 2007.
- Microsoft curtails how long it stores Web searches, Reuters, July 22, 2007.
- Microsoft and Ask.com, Press Release, Microsoft and Ask.com Call on Industry to Join Together to Evolve Privacy Protections for Consumers, July 22, 2007.
- Google Plans Search Service for Mobile Content, Wall Street Journal, July 17, 2007.
- A Study in Contrasts: Yahoo and Google, New York Times, July 16, 2007.
- Google hotly denies deception over links, Telegraph, , July 16, 2007.

- Google cookie cut unlikely to satisfy privacy concerns, Platinax, July 16, 2007.
- Google vs Australia and the forgotten Facebook lawsuit, Guardian Unlimited, July 16, 2007.
- Google cookies will 'auto delete,' BBC News, July 16, 2007.
- Google takes swipe at Viacom, Australian IT, July 16, 2007.
- Google Knows All, Or Close Enough To Raise Concerns, Investor's Business Daily, July 16, 2007.
- Google Keeps Top Search Spot in June, Associated Press, July 16, 2007.
- Google Loses Search Share, Microsoft Gains, InformationWeek, July 16, 2007.
- Taking the temperature on Google Health, CNet News.com, July 16, 2007.
- ComScore: Google Sites Got 49.5% Of U.S. Searches In June, Dow Jones Newswires, July 16, 2007.
- On the Record with Deborah Majoras, FTC Chairwoman, San Francisco Chronicle, July 15, 2007.
- Google Web Search Is A Game-Changer In Advertising Field, Investor's Business Daily, July 13, 2007.
- Yahoo Closes Right Media Deal, Associated Press, July 12, 2007.
- Google buys e-mail security firm, International Herald Tribune, July 10, 2007.
- Google Buys Online Security Firm Postini In $625 Mil Deal, Investor's Business Daily, July 9, 2007.
- News Analysis: Marketers Eye Google In Web Privacy War, BrandWeek, July 9, 2007.
- FTC Clears Microsoft's $6 Billion Deal For aQuantive, InformationWeek, July 9, 2007.
- Google's Bid for DoubleClick to Be Reviewed by European Union, Bloomberg News, July 6, 2007.
- European Union to look into Google's $3.1B DoubleClick deal, San Jose Mercury News, July 6, 2007.
- Web search groups to yield on privacy, Financial Times, July 5, 2007.
- Your television will soon be watching what you're watching, Sydney Morning Herald, July 5, 2007.
- Yahoo's SmartAd Idea Raises Privacy Concerns, ABC News, July 4, 2007.
- Google-DoubleClick Deal Draws Criticism, Associated Press, July 4, 2007.
- BEUC calls for investigation into Google's DoubleClick bid, Marketing Week UK, July 3, 2007.
- Google's GrandCentral Buy Anticipates Web Voice Mail, PC Mag.com, July 3, 2007.
- Online Customized Ads Move a Step Closer, New York Times, July 2, 2007.
- Consumer group hits at Google $3bn move, Financial Times, July 2, 2007.
- Net growth prompts privacy update, BBC News, June 30, 2007.
- Google Explains Why It Bought DoubleClick, Internet Financial News, June 27, 2007.
- Why we're buying DoubleClick, Official Google Blog, June 26, 2007.
- Gov Regulators To Study, Not Regulate Online Marketing, Wired News, June 25, 2007.
- EU data privacy adviser widens Google probe to all Internet search engines, Associated Press, June 21, 2007.
- NetRatings Search Share: Google, Ask.com Up In May, MediaPost, June 21, 2007.
- EU delays Google decision, Bloomberg News, June 20, 2007.
- Is Google Too Big?, PC World, June 19, 2007.
- Google deputy general counsel addresses privacy fears, San Jose Mercury News, June 17, 2007.
- FTC Examines Web-Ad Deals Involving Microsoft, Yahoo, Wall Street Journal, June 14, 2007.
- Google in a pickle over data retention, Technology Law, June 14, 2007.
- Privacy Torments Google, Image and Data Manager, June 14, 2007.
- EU Official Welcomes Google Privacy Move, Associated Press, June 13, 2007.
- Google bows to privacy pressure from Europe, Times Online, June 12, 2007.
- Google limits data retention in EU compromise, Reuters, June 12, 2007.
- Google to limit data retention to 18 months, FinancialTimes.com, June 12, 2007.
- Poor Privacy Grade Reflects Google's Growing Power, Wired News, June 12, 2007.
- How long should Google remember searches?, Google Blog, Posted by Peter Fleischer, Global Privacy Counsel, June 11, 2007.
- Google's e-mail for universities, BBC News, June 11, 2007.
- Check Google Apps privacy, firms urged, ComputerWeekly.com, June 11, 2007.

- Google's privacy policies worst on Web: watchdog, Associated Press, June 11, 2007.
- Google's year-long shopping spree in review, Computerworld New Zealand, June 11, 2007.
- Privacy group demands apology from Google, Guardian Unlimited, June 11, 2007.
- Privacy Group Claims Google Has An "Entrenched Hostility to Privacy," Wired News, June 11, 2007.
- Watchdog Group Slams Google on Privacy, Associated Press, June 9, 2007.
- Groups want limits on Google, San Francisco Chronicle, June 7, 2007.
- Google/DoubleClick Deal Draws More Fire From Privacy Groups, MediaPost Publications, June 7, 2007.
- Watchdogs Oppose $3.1B DoubleClick, Google Merger Plan (PDF), Congress Daily AM, June 7, 2007.
- Getting Comfortable With Less Privacy, MediaPost Publications, June 4, 2007.
- Internet powerhouse Google bets on lots of small businesses and new applications as it looks for ways to extend its reach, Boston Globe, June 4, 2007.
- Driven by YouTube, Google Sites Account for 17 Percent of all Video Streams, comScore Press Release, June 4, 2007.
- Google-DoubleClick Goes to the FTC: Approval Still Looks Likely, But Potential for Privacy Conditions Rises, Washington Telecom, Media, & Tech Insider, June 1, 2007 (pdf).
- EU decision on Google data privacy months away, Reuters, May 31, 2007.
- Google comes under scrutiny, San Francisco Chronicle, May 30, 2007.
- FTC to Review Google Acquisition, Wall Street Journal, May 30, 2007.
- Google CEO hopes DoubleClick deal closes by yr-end, Reuters, May 30, 2007.
- Privacy concerns prompt inquiry into Google's £1.5bn purchase of DoubleClick, Guardian, May 30, 2007.
- Google deal to get antitrust review, Los Angeles Times, May 30, 2007.
- FTC does a DoubleClick double take, Bloomberg News, May 30, 2007.
- Google chairman says privacy concerns won't scuttle DoubleClick acquisition, Associated Press, May 30, 2007.
- Google Acquisition Probed, Washington Post, May 30, 2007.
- Google Deal Said to Bring U.S. Scrutiny, New York Times, May 29, 2007.
- FTC seeks more data on Google-DoubleClick deal, Reuters, May 29, 2007.
- Google-DoubleClick Deal Draws Attention, Associated Press, May 29, 2007.
- Why FTC review of GoogleDoubleClick is significant, Precursor Blog, May 29, 2007.
- EU data privacy officers launch investigation into Google's Internet search engine, Associated Press, May 25, 2007.
- Google defends data policy after EU warning, Reuters, May 25, 2007.
- Beware: Google is NOT your privacy friend, ZDNet Blog, May 25, 2007.
- Truth in advertising, Economist, May 24, 2007.
- Your Ad Goes Here, New York Times, May 16, 2007.
- Schmidt says he didn't grasp the power of Google at first, USA Today, May 15, 2007.
- The return of media merger madness, CNN Money.com, May 14, 2007.
- Agency urges delay of DoubleClick deal, Bloomberg News, May 10, 2007.
- Wheeling and dealing in tech land, with nary a bubble in sight, Globe and Mail (Canada), May 4, 2007.
- Privacy Activists Attempt Block of Google's Purchase of DoubleClick, Out-Law.com, April 24, 2007.
- Google and DoubleClick: Risky Business?, DMNews, April 24, 2007.
- Privacy Groups Challenge Google's DoubleClick Deal, Reuters, April 23, 2007.
- Google Promises to Tackle Fears Over Privacy, Financial Times (UK), April 22, 2007.
- Google's data-storing feature fuels privacy fears, Los Angeles Times, April 21, 2007.
- Privacy Group Aims at Google-DoubleClick, Associated Press, April 20, 2007.
- DoubleClick Says Google Can't Use Data from Software, Bloomberg.com, April 20, 2007.
- Privacy Groups Decry Google's Plans for DoubleClick, InformationWeek, April 20, 2007.
- FTC Asked to Block Google-DoubleClick Merger, PC World, April 20, 2007.
- Privacy Group Objects to DoubleClick Deal, Washington Post, April 20, 2007.
- Google Draws Privacy Complaint to FTC, CNET News.com, April 20, 2007.
- Light Ad Regulation is best - Even With Google, London Times, April 20, 2007.

- Google's Plan Raises Privacy Issues, Los Angeles Times, April 17, 2007.
- Google Achieves Behavioral Targeting Nirvana, TMCnet, April 16, 2007.
- Google-DoubleClick deal seen spurring Web ad Mergers & Acquisitions, Reuters, April 16, 2007.
- Google/DoubleClick, Financial Times (London), April 16, 2007.
- Companies Want Scrutiny of Google-DoubleClick deal, CNET News, April 15, 2007.
- Microsoft Urges Antitrust Officials to Scuttle DoubleClick Deal, New York Times, April 15, 2007.
- Google To Buy Online Ad Giant, Washington Post, April 14, 2007.
- Google-DoubleClick: Dangerous Monopoly?, InfoWorld Tech Watch, April 13, 2007.

---

EPIC Privacy Page |

Last Updated: September 25, 2007

Google™

September 25, 2007

The Honorable Charles E. Schumer
United States Senator
313 Hart Senate Office Building
Washington, D.C. 20510

VIA FACSIMILE AND FIRST CLASS MAIL

***RE: Google's Commitment to Protecting Our Users' Privacy***

Dear Senator Schumer:

Thank you very much for speaking with me recently. During our conversation you asked if Google would commit to continuing to protect user privacy after we close our acquisition of DoubleClick. At the time I answered that we would, and with this letter I wish to assure you that Google has protected, and will continue to protect, our users' personal information.

Protecting and respecting user privacy is critical to our business, and we are keenly aware of the trust that our users place in us and our responsibility to protect their privacy. We know well that our users are just one click away from using our competitors' services if they don't trust us.

The subject of online privacy has been raised recently by some in Washington in connection with our acquisition of DoubleClick. We understand those questions, but for us privacy does not begin or end with our purchase of DoubleClick. Privacy is a user interest that we've been protecting strongly since our inception.

We protect user privacy in many ways, including by building strong privacy safeguards into our products and by explaining to our users how we use data to provide and improve our products. To guard against the kind of data breaches that other companies have experienced, we have developed what we believe are industry-leading safeguards to protect unauthorized disclosure of data. We have also resisted excessive government requests to access users' data such as our successful opposition to a 2006 Department of Justice subpoena for millions of search queries.

We also have announced a number of new measures over the past several months to further safeguard our users' privacy and inform them about how we manage the data they provide to us.

Earlier this year we were the first leading search engine to announce that we would limit how we maintain user search logs – essentially, records of what has been searched for from a particular computer – by anonymizing the Internet Protocol address and the cookie associated with each search after 18 months. We believe that this is the type of privacy innovation that will enable Google to continue serving relevant and useful search results for our users in a way that protects their privacy.

We are also approaching our entry into third-party ad serving with a fresh eye, and evaluating whether we can implement other innovations and protections relating to user privacy in this space.

As is the best practice in the ad serving industry, we will be including an opt-out mechanism so that individuals can choose not to have an advertising cookie placed on their computer. If users do accept the ad serving cookies, those cookies will expire after two years. In addition, our industry leading decision to anonymize log data after 18 months will also cover our new test ad-serving logs.

Beyond current practices, we also are experimenting with new online ad technologies and new approaches to privacy. For example, we're exploring the idea of using what we're calling "crumbled" cookies so that user data is not stored in association with a single cookie, and we are working on providing better forms of notice within ads to help users understand who is behind the ads they see.

We have also launched a series of YouTube videos to help users better understand how, when, and why we collect and store their data. We have consulted with numerous privacy and consumer advocates in developing these ideas, and we look forward to keeping that dialogue going.

Finally, we look forward to participating in the Federal Trade Commission's upcoming Town Hall on privacy and online advertising. Although privacy is not part of the FTC's antitrust review of the DoubleClick transaction, Google believes that the Town Hall is an excellent forum for education about and discussion of the online advertising space.

Thank you for your continued interest in the issues that affect the Internet. I look forward to working with you to continue protecting the privacy of American consumers.

Sincerely,

Eric Schmidt
Chairman of the Executive Board and CEO
Google Inc.

**Written Testimony of**
**Bradford L. Smith**
**Senior Vice President, General Counsel and Corporate Secretary**
**Microsoft Corporation**

**Before the**
**Subcommittee on Antitrust, Competition Policy and Consumer Rights**
**Committee on the Judiciary**
**United States Senate**

September 27, 2007

Chairman Kohl, Ranking Member Hatch, honorable Members of this Subcommittee, my name is Brad Smith and I am Senior Vice President, General Counsel and Corporate Secretary of Microsoft Corporation. I want to thank the Subcommittee for inviting me to testify on one of the most important issues confronting businesses and consumers today: the state of competition in online advertising. The online advertising industry is currently undergoing rapid and fundamental changes that could alter irreversibly the structure of key markets. The decisions made today by companies, regulators, and policymakers will be felt for years to come.

Any discussion on the future of online advertising, in my view, is fundamentally a discussion about the future of the Internet. That is because online advertising has become the fuel that powers the Internet and drives the digital economy. Online advertising spending is set to reach $27 billion this year and double that amount – $54 billion – in 2011. Consumers today have free online access to an almost unimaginable variety of news, entertainment and other content, and increasingly to powerful online services as well. Most websites can offer this content and these services for free solely because of the income they receive from advertising. Online advertising is particularly critical for the thousands of smaller websites that have no off-line revenue sources. Online advertising also plays a crucial role in e-commerce, especially for the growing number of consumers who rely on Internet search engines to learn about products and locate suppliers.

As important as online advertising is today, it will become even more important in the future for one simple reason: convergence. Although convergence is not unique to online advertising, its effect in this sector is so striking because it is happening across so many dimensions at once – between content delivery channels, devices, and business models. The Internet is already becoming a content delivery tool for traditional media such as television and radio, which means that soon even more advertising will be delivered primarily through what we today think of as online advertising platforms.

In short, online advertising is not only an important industry in its own right, but is having an increasingly powerful influence on all types of publishing and media and on the broader digital economy. Given the central role of these industries in our social and civic life, it is not surprising that policymakers, regulators, consumers, and other stakeholders are beginning to raise questions about these market developments and to ask whether they are likely to enhance, or instead restrict, competition.

Today, the millions of websites and advertisers that purchase and sell online advertising rely on a small number of firms to make the process work – to match websites to advertisers, to select which ads to display to which consumers, and so on. This small number has gotten even smaller in recent months due to the significant consolidation that is taking place. Given the current state of the industry, however, it is fair to say that only one transaction poses an imminent risk of giving a single company the degree of market power that could foreclose competition.

Specifically, Google today already holds a dominant position over one of the two main types of online advertising – namely the advertising that we see when we use a search engine and paid ads appear in the margins of the search results page, known as search advertising. Google accounts for nearly 70 percent of search queries worldwide and a similar percentage of the amount advertisers spend on search ads. If Google is permitted to acquire DoubleClick, it will obtain a dominant position over the other main type of online advertising as well – namely, the ads that appear on other websites across the Internet, known as non-search advertising. A combined Google-DoubleClick would serve ads that account for nearly 80 percent of all advertisers' spending on non-search ads appearing on websites that use third party technology to serve those ads, giving the company tremendous power over every major form of online advertising.

Allowing Google to become the dominant gateway connecting advertisers and websites through its purchase of DoubleClick raises important questions for the entire online advertising ecosystem. Advertisers could face higher prices as the number of viable choices for reaching websites diminishes. Websites could see lower revenues, since a dominant provider with few competitive constraints will have the incentive and the ability to keep more of total online ad spending for itself. And online consumers could be left with poorer-quality content, since websites will have less revenue to spend on developing that content, and could also face higher prices for goods and services as advertisers seek to pass on their increased online advertising costs to their customers.

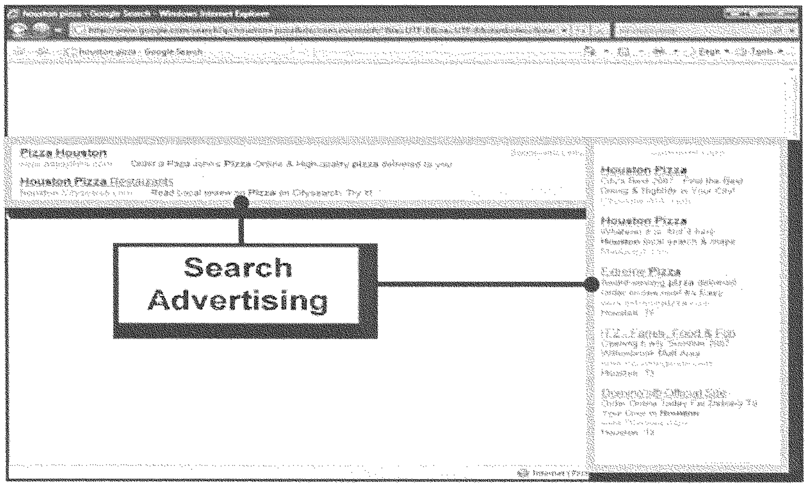
In addition, this acquisition would give a single firm exclusive control over the largest database of information on individual online behavior the world has ever known. Google would also have an unrivaled ability to collect even more user data and assemble an even more comprehensive data library in the future. The privacy implications of this are profound and, like the broader competitive issues raised by this proposed acquisition, raise serious questions that deserve close attention.

## I. An Overview of Online Advertising

To understand the state of competition in online advertising today, it is important to understand the two principal types of online advertising – namely, search and non-search ads – and their related business models.

- ***Search ads.*** Search ads are the ads users see, along with search results, when they enter a word or phrase into an Internet search engine. Search ads generally appear either at the top of the search results or along the right-hand side of the page. Search ads are selected based on the search term entered by the user, and sometimes also on data that has been collected about the user, such as the user's history of prior searches. Advertisers bid against each other for the right to have their ads appear when a specific search term is entered (also known as a "keyword"), and they typically pay only when a user "clicks" on their ad. The order in which ads appear, and the process of serving them on the page, are handled by the search engine operator using an "ad exchange" system.[1]

Here are examples of search ads on a Google search results page:




One of the great advantages of search ads is that they provide a cost-effective means of advertising even for small companies with niche, geographically dispersed customers. Consider, for example, a book dealer that specializes in selling rare, out-of-print books on history. This company probably could not afford to advertise through traditional channels such as television or newspapers, because the number of potential customers interested in this book dealer served by any particular TV channel or newspaper is likely to represent a small percentage of the outlet's viewers or readers. Search ads, by comparison, allow the company to target people who are most likely to be interested in what it has to sell – specifically, by displaying ads only to people who enter "rare history books" or a similar phrase into an Internet search engine. Search ads are effective because they are, by their very nature, targeted and interactive – users essentially tell advertisers what they are looking for.

- ***Non-search ads.*** Non-search ads are what users see when they visit virtually any site on the Internet other than a search engine site. A web publisher, much like a newspaper, typically

[1] I use the term "ad exchange" to refer to technologies for serving online ads that also handle various aspects of the transactions between online publishers and advertisers – *e.g.*, setting prices, determining which ad to display to which consumer, etc. Google's AdWords is the leading ad exchange for serving Internet search ads. Yahoo! and Microsoft also operate search ad exchanges in connection with their respective search engines.

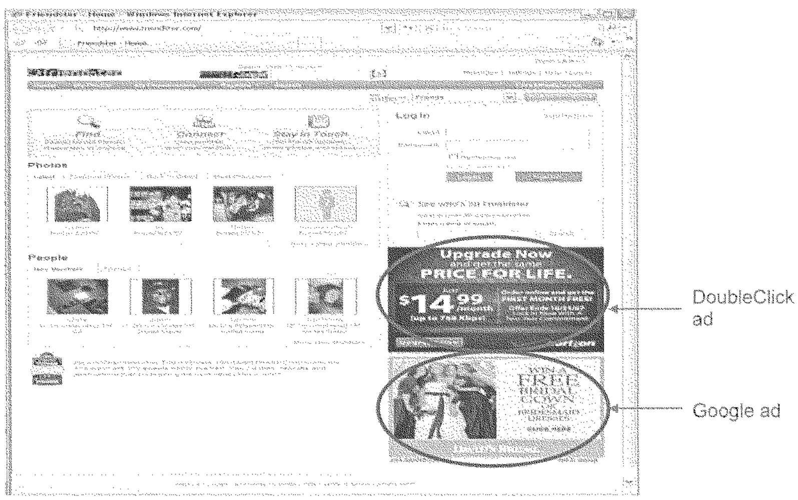
sets aside a portion of the space on its web pages to display ads. Websites normally have a choice to sell this ad space either directly to advertisers – in which case it will typically use specialized software (known as "publisher ad-serving tools") to manage which ad will be displayed when, etc. – or indirectly, typically through an ad network or an ad exchange. Smaller websites often choose to have one network sell all their ad space;[2] larger sites may contract to sell certain portions of their ad space to a network, or they may sell ad space to different networks using publisher ad-serving tools to serve the ads. When websites sell ad space directly to advertisers, these are sometimes referred to as "premium" (or "reserved") ads, while ads sold through an ad exchange or ad network are sometimes described as "discretionary" (or "remnant") ads.

Non-search ads are sold on the same price-per-click basis used to sell search ads or may use some other pricing model (*e.g.*, cost-per-thousand-impressions). Also, the choice of which ad to display may be made on the basis of the content of the web page on which the ad appears, or on the basis of information about the user (such as past browsing history, location, demographic information, etc.), which is often collected through the use of cookies, IP addresses, and related mechanisms.[3] Historically, premium ads used graphics and rich media and were displayed primarily on commercial websites that could afford to employ a direct sales force to sell their ad space to advertisers, while discretionary ads were more often text-based and were sold and served through ad networks and ad exchanges. However, ad networks and exchanges increasingly are used to serve all types of non-search ads, including rich graphical ads. Thus, distinctions between the different "flavors" of non-search ads (text-based vs. graphical, premium vs. discretionary) are quickly disappearing.

Here are examples of two non-search ads, the top one served by Google and the bottom one served by DoubleClick. Note how similar they are in appearance:

[2] Indeed, Google's AdSense reportedly has exclusive agreements to sell and serve ad space for a large portion of smaller websites that do not have direct sales forces.

[3] Thus, for instance, if I have visited several web sites on political history and clicked on ads for books at those sites, I am more likely to see an ad from the rare book dealer mentioned above than will a teenager who mainly visits the fan sites of pop music bands.




## II. Online Advertising and the Future of the Internet

There is a growing consensus among industry observers that online advertising will have a profound impact on the future development of the Internet. To understand why, it is worth taking a step back to consider online advertising's recent growth trajectory.

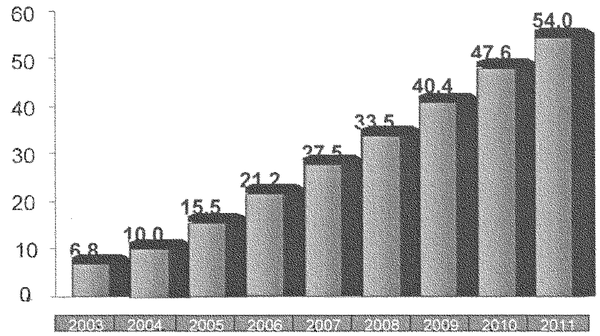
Starting from virtually nothing a decade ago, online advertising has exploded to become the fastest-growing segment of advertising. Advertisers last year spent more than $21 billion on online advertising and are widely expected to spend $27 billion or more this year.[4] Online ad spending grew at an astounding 45 percent annually between 2003 and 2006 and is expected to reach $54 billion or more in 2011. In the UK, online advertising spending already exceeds spending for advertising through radio and magazines,[5] and experts predict that within a few years it will exceed total spending for television advertising.[6] The following graph illustrates the remarkable growth trend of online advertising:

[4] The 2006 figure of $21 billion for online advertising includes paid search (including contextual text-links), rich media/video, display ads, sponsorships, and slotting fees and excludes online classified advertising, advertising associated with referrals / lead generation and email solicitations.

[5] *See* David Meyer, *Online advertising overtakes magazines*, ZDNet. co.uk (Aug. 11, 2006), at http://news.zdnet.co.uk/internet/0,1000000097,39280770,00.htm.

[6] Louise Story and Eric Pfanner, *The Future of Web Ads is in Britain*, The New York Times (Dec. 4, 2006) (citing media analyst predicting that online ad spending will exceed television ad spending in the UK by 2010), at

<u>Worldwide Online Advertising Spending</u>[7]
(in billions $)




A. <u>Online Content</u>

One reason for this rapid growth is the sheer quantity and diversity of content on the Internet. Consumers today enjoy free online access to an almost limitless variety of news, information, opinion, entertainment, and other high-value content, as well as access to a growing array of free online services. Websites can offer this content and these services for "free" only because of the income they receive from advertising.[8] Just as newspapers and TV news programs rely on offline advertising, online news sites and other commercial websites rely on advertising for their economic survival. Online advertising is particularly critical for the thousands of smaller websites – including the blogosphere that is proving to be so central to political and policy discourse in America – that do not publish through offline channels and thus depend entirely on online advertising revenue.

The reasons for the migration of advertising to the Internet are varied, but two reasons stand out. The first is the ability to target online ads to specific customers. Unlike traditional advertising channels such as print media or TV, the Internet is interactive. This interaction yields a wealth of data about user's activities and preferences that can be used to dynamically target ads "on the fly" toward those demographics, interest groups, or even individuals that are most likely to be interested in the advertised products or services.

---

http://www.nytimes.com/2006/12/04/technology/04adcol.html?ei=5088&en=05b0dcf2bba31217&ex=1322888400&adxnnl=1&partner=rssnyt&emc=rss&adxnnlx=1165256273-88PlrXEiXjT/dXO3/7VV4Q.

[7] Data from Piper Jaffrey Dec. 2006 and internal Microsoft estimates.

[8] For instance, NBC Universal recently announced that it will allow users to download copies of popular NBC programming, and that this service will generate revenue through embedded ads. *See* Bill Carter, *NBC to Offer Downloads of Its Shows*, The New York Times (Sept. 20, 2007).

This ability to target ads towards individuals and interests has led some companies to assemble or obtain access to massive amounts of online user data – about the websites users visit, the searches they run, etc. – data that consumers essentially barter away, often unwittingly, in exchange for access to free content on the web. Access to this data enables these companies to target online ads more effectively, but it also has raised important privacy concerns. Although some of these concerns relate to how such information is collected, many of these concerns relate to the unique risks that would arise if one company were to gain control over a large percentage of this data. I address these concerns in more detail below.

The second reason for the increasing importance of online advertising is the phenomenon of convergence that I mentioned in the introduction. Convergence, of course, is not unique to online advertising. Not long ago, a phone was a phone and email was something you did on your computer. Today, people use their phones to send email, surf the web, take pictures, play music – occasionally even to make a call.

The impact of convergence on online advertising is striking because it is taking place across so many dimensions at once. The convergence of content delivery channels means that people increasingly are watching TV, listening to the radio, reading print media, and enjoying their favorite movies and music on what are basically Internet pipes – and getting online ads along the way. The devices people use to access this content are likewise converging. Sit down with any video game aficionado whose gaming console also surfs the Internet, plays movies, and supports instant messaging, and you'll see this convergence in action.

Another important dimension of convergence in this space, however, is in business models. Companies that once provided either Internet search, or online advertising, or social networking services, or hosted email, or online music and video, are now pursuing all of these businesses, and more. Increasingly, companies are using each of these various businesses to serve online ads – and, critically, to target these ads more effectively by amassing all the information they've collected about you across all of these businesses. Further evidence of the impact of convergence on online advertising is the fact that ads accompanying "offline" content such as radio and print media are increasingly being sold over the Internet.

B. Online Commerce

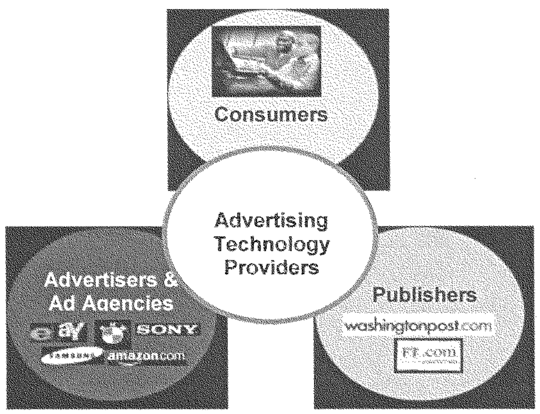
Online advertising is also a key driver of online commerce. Internet search engines and search advertising increasingly serve as a portal to online commerce for consumers, who use them as a launching pad for shopping online. Consumers use search engines not only to locate suppliers, but also to gather information about products and to engage in comparison shopping. Advertisers, for their part, have been quick to recognize the tremendous value of being able to reach only those consumers who have already expressed an interest in their product.

This close linkage between Internet search, online advertising and online commerce is reflected in the amount advertisers spend on search advertising in proportion to all forms of online advertising. Advertising on search results pages accounted for an astonishing 61 percent of global online advertising spending in 2006.[9] As one advertising analyst recently stated, on the Internet, "[w]e're all searchaholics."[10]

C. The Online Advertising Ecosystem

In sum, many thousands of advertisers, online publishers and e-commerce providers today rely on online advertising to survive. To view online advertising as simply another ad medium would be a mistake, for it fails to recognize the central role of online advertising in sustaining the vibrant ecosystem of e-commerce providers and websites the world over that collectively comprise the Internet.

If this is correct, then policymakers and consumers have a strong interest in ensuring that competition in online advertising remains vibrant. There are, of course, thousands of advertisers who use online advertising, and millions of websites that display online ads, making it unlikely that either of these segments is at risk of monopolization. However, these groups increasingly rely on a relatively small number of advertiser and publisher tools, ad exchanges, ad networks, and other intermediaries to make this ecosystem function. Moreover, the number of viable intermediaries has decreased significantly in recent months in light of recent consolidation in the industry.[11] Represented graphically, today's online advertising industry looks something like this:




[9] The figure for worldwide search share of 61% is derived by dividing the search page advertising market ($13.1 billion) by the total website advertising market ($21 billion).

[10] *See The Future of Web Ads is in Britain*, *supra* note [6].

[11] One example of this consolidation was Microsoft's acquisition of aQuantive. This acquisition, however, did not raise competition concerns, both because Microsoft and aQuantive do not compete, and because the acquisition did not pose any risk of foreclosing competition. The FTC allowed this acquisition to proceed without objection, and it was completed on August 13, 2007.

Given the central "gateway" role that advertising technology providers are increasingly playing in online advertising,[12] it is vital that competition between providers remains robust to ensure that those in the center of this ecosystem do not use their power to foreclose competition. It is to this issue that I now turn.

## III. Competition in Online Advertising

Like many industries, providers of online advertising technologies are subject to economies of scale. This means that, as more advertisers and publishers use a specific provider's advertising solution, the fixed costs of providing that solution can be spread across a larger number of customers, which results in lower costs. While economies of scale typically benefit the leading firm more than smaller players (who have fewer customers across which to spread their costs), they also generally benefit consumers in the form of lower prices or superior products.

### A. Online Advertising and Returns to Scale

The online advertising industry, however, also demonstrates positive feedback effects that are distinct in important ways from economies of scale, but which may have the effect of entrenching the position of the leading firm. Economists sometimes refer to these positive feedback effects as "returns to scale." In simplest terms, these effects mean that the leading advertising solution – *i.e.*, the solution with the largest amount of available ad space and therefore the largest number of participating advertisers – has an inherent advantage over its competitors and will be able to increase its lead over time as its market share grows.

To illustrate this point, consider the economics of search advertising. The search engine with the largest number of users will, by definition, be able to show a larger number and variety of ads than any of its competitors (who have fewer users and thus fewer opportunities to show ads). This allows the leading search engine to attract more advertisers than its competitors, since advertisers value having more opportunities to show their ads. The leading search engine will also be able to collect more user search history and related data than its smaller rivals, which it can use to serve more relevant ads and thus attract even more advertisers.

Similar economics apply to non-search online advertising. Specifically, the advertising solution with the most publishers can offer advertisers more opportunities to find more appropriate audience segments, which in turn attracts advertisers. The ability to display more ads also gives the leading firm more opportunities to watch where users go on the Internet, what issues interest them, and how they react (or not) to specific ads. The ability to collect more data about

[12] *See, e.g.*, Tobi Elkin, *Madison Avenue's Most Popular Boardroom Game*, MediaPost.com (July 2007) (quoting media analyst as saying that "[Google] has been telling the market that eventually it will be the gateway for all advertising dollars."), at http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticleHomePage&art_aid=63222.

individual Internet users enables the leader to target ads more effectively, which leads to more clicks for advertisers and higher rates of returns for publishers.[13]

These phenomena mean that the leading firm – whether in search or non-search advertising – will not only tend to be more powerful than its competitors, but also that the magnitude of its advantage will grow as its access to websites and their ad space (also known as "ad inventory") grows, making it increasingly difficult for competitors to exert discipline or compete effectively. Moreover, simply having better technology, without critical mass, may not allow competitors to overcome the leader's inventory advantage.

### B. Areas of Concern Arising from Google's Proposed Acquisition of DoubleClick

#### 1. Relevant markets

In simplest terms, the technologies used to bring advertisers and websites together to buy and sell ad space on the Internet effectively act as a "pipeline." The advertisers and websites are on opposite ends of the pipeline, while the middle of the pipeline provides the link for handling the financial and ad content exchange. The merger of Google and DoubleClick would affect this pipeline in at least three areas:

- ***Publisher Tools.*** Websites use publisher tools software to manage their ad space, find and then serve ads to their sites, and track the financial performance of their sites. Ads appearing on a website are actually stored offsite on an advertiser's or agency's server. They are served to the website each time a user views a particular web page. This means websites have a unique opportunity to determine which ads should be displayed each time a page is viewed. Publisher tools help websites capitalize on this opportunity by synthesizing the available information about a user or about the content of the page the user is viewing. The information is then matched to the advertisers willing to pay the most to get their ad in front of a particular kind of user, or paired with a particular kind of content. Chosen ads are then served to the website to be viewed by the user. Publisher tools also monitor the return a website earns on any given ad space to maximize the profitability of the site, *e.g.*, to ensure that the most relevant ads are shown to particular users and thus can earn the most revenue. Publisher tools are also used to serve ads based on other criteria, such as showing an ad a given number of times to a pre-agreed number of viewers.

- ***Advertiser Tools.*** Advertisers use advertiser tools software to receive requests for ads from a website and then to serve the requested ad. These tools also help advertisers manage and track the effectiveness of their online campaigns, *e.g.*, how often viewers click on an ad, and what return on investment the advertiser is earning by advertising on a particular website, or generally across multiple websites.

- ***Intermediaries.*** Ad networks and ad exchanges are two common types of intermediaries. These intermediaries act as "middlemen" to bring advertisers and websites together to buy

[13] Because publishers (and many advertisers) typically incur significant fixed costs in using any given ad-serving solution, and incur additional fixed costs for each additional solution they use, they generally prefer to use fewer solutions.

and sell online ad space. In the search world (as described earlier), advertisers use a search engine's ad exchange system to bid against each other for the right to have their ads appear on search results pages when a user searches a specific keyword. In the non-search advertising world, ad networks aggregate ad space from many websites and then resell access to this inventory to advertisers. Advertising exchanges provide a marketplace to pair willing buyers and sellers of ad space on websites on a real-time basis, in much the same way that a stock exchange pairs buyers with sellers of listed stocks. These networks and exchanges are proving increasingly effective and efficient as compared to traditional methods of direct selling between websites and advertisers.

2. Google and DoubleClick today

Google, at present, is active in all of these areas with respect to both search and non-search advertising via its AdWords and AdSense exchange system. DoubleClick is also active in all three areas, but only with respect to non-search advertising.

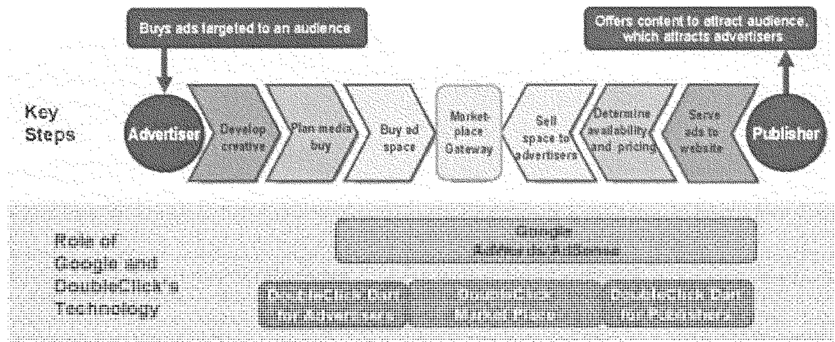
- ***Google.*** Google AdWords is the leading exchange system for search advertising, accounting for 68 percent of paid search advertising world-wide. Google's share of this market has been growing steadily for several years – due in large part to the returns-to-scale phenomenon described in the prior section.

  Google's AdSense is an exchange system for non-search advertising that is built upon the AdWords keyword bidding system. AdSense is the second-leading technology solution used to serve non-search ads,[14] accounting for roughly 27 percent of global advertiser spending on non-search ads. AdSense is an integrated solution that combines – within a closed, end-to-end network – all of the advertiser tool, publisher tool, and intermediary components of the non-search advertising pipeline.

- ***DoubleClick.*** As noted, DoubleClick competes in all three of the markets identified above with respect to non-search ads. Specifically, DoubleClick offers the "DART" family of publisher and advertiser tools, and it recently launched the "DoubleClick Advertising Exchange" (discussed further below) DoubleClick's "DART for Publishers" is a set of publisher ad serving tools that currently is used to serve roughly 51 percent by revenue of non-search ads to third-party websites. DoubleClick also has a very successful ad-serving product for advertisers, called "DART for Advertisers," which is used by an estimated 40 percent or more of advertisers.

Represented graphically, the stages of the online advertising pipeline in which Google and DoubleClick currently compete are as follows:

[14] Microsoft and Yahoo use their own custom-built software programs to serve ads on their own websites. These programs, with the exception of Yahoo's recently launched "Panama" ad platform, are not available to other websites except on a limited basis. Although Microsoft recently launched a version of such an ad exchange, called AdCenter, it is currently only in beta form.




3. Impact if Google and DoubleClick were to merge

If Google were permitted to acquire DoubleClick, this acquisition would lead to serious concentration in each of the areas identified above and would enable Google to exert market power over the online ad pipelines that today connect advertisers to websites.

a. Competitive effects on publisher and advertiser tools

Today, the publisher and advertiser ad-serving tools that Google hard-wires into AdSense are substitutes for DoubleClick's leading ad-serving tools. As such, each company imposes competitive constraints on the other. Advertisers and websites who are dissatisfied with Google's end-to-end solution can choose to use DoubleClick's neutral solution as the gateway to their non-search advertising needs, and vice versa. Although DoubleClick's software has historically been used primarily to serve ads to "premium" ad space, rather than the "remnant" ad space typically sold via ad networks, the lines between these two types of ad space are blurring. Also, many websites and advertisers increasingly view ads served by Google via AdSense as substitutable for ads they might buy or sell using DoubleClick.[15] Moreover, ad networks that aggregate and then resell website ad inventory also compete directly with AdSense, and they also use (or can use) DoubleClick technology to serve the ads they sell.

If Google were to acquire DoubleClick, this competition between the two firms would end. The transaction would combine the two largest suppliers of publisher ad serving tools used to serve non-search ads. The combined company's publisher tools would be responsible for serving roughly 78 percent of all such ads on a revenue basis.

[15] The amount of inventory sold via these channels will increase as networks and exchanges become a more efficient, profit-maximizing solution for more customers. Moreover, as the graphic of non-search ads above illustrates, these ads are, from the consumer's perspective, effectively indistinguishable.

The Google/DoubleClick merger also raises significant concerns because it would eliminate what is, by far, the most significant "neutral" gateway through which other non-search ad networks can today compete with Google. By seizing control of DoubleClick's previously unbiased but dominant gateways (for both publishers and advertisers), Google likely would be able to change trading conditions to entrench its position, foreclose others, and increase barriers to entry, including by: (i) obstructing the interoperability of competing products with its dominant search network; (ii) favoring its own tools and networks to the detriment of competitors to capture the best ad inventory and advertisers; and (iii) being able to observe confidential pricing and fulfillment information of competing networks obtained through DoubleClick.

b. Competitive effects on intermediation services

If Google were to merge with DoubleClick, it would also take control of DoubleClick assets that otherwise would constitute a direct rival to the intermediation services embedded in Google's AdWords/AdSense. DoubleClick recently launched "DoubleClick Advertising Exchange," an ad exchange that provides an automated alternative to Google's integrated offerings. DoubleClick was uniquely positioned to compete with AdSense because of its strong position in ad serving tools and its corresponding relationships with publishers and advertisers.[16]

Advertising exchanges are fast emerging as a leading channel for distribution of ads on the Internet. Like any exchange, a successful ad exchange must have a sufficient critical mass (or "liquidity") of advertisers looking to buy ad space on the one hand, and sufficient ad space or inventory available from websites on the other. Today, Google has the largest number of advertisers by far participating in its AdWords exchange system, more than Yahoo! and Microsoft Live Search combined. Similarly, DoubleClick's DART For Publishers is used by 8 of the 10 largest websites and nearly 70 percent of the top 100 sites. Thus, DoubleClick effectively controls access to a significant portion of the ad space on the Internet that could be traded via an exchange. If Google acquires control over this ad space, the resulting company would have an overwhelming lead over rival exchanges in both advertisers and access to ad space necessary to launch a successful ad exchange "out of the box."

In short, if Google and DoubleClick are allowed to merge, one company will become the overwhelming dominant gateway that connects the universe of online advertisers to the millions of websites that display ads. Given Google's existing dominant position in search advertising, the acquisition would make Google far and away the leading provider of the technologies used to serve *both* search and non-search ads. This would give Google market power over both major forms of online advertising and create considerable barriers to competition. Over time, this likely would accelerate the network effects resulting from Google's scale and information advantage, weaken competitors and thwart new entrants, permitting the combined firm to increase prices and capture more money for itself.

---

[16] Google apparently was also developing expanded ad serving tools and other technologies for publishers and advertisers aimed at competing even more aggressively with DoubleClick's DART For Publishers and DART For Advertisers technology. The proposed transaction would eliminate the prospect for this heightened competition – known generally in the industry as "Google For Publishers" – as well.

Allowing one company to purchase its way into a dominant position in this way is a bad result for the entire online advertising ecosystem – advertisers, online publishers, and consumers – and is likely to lead to:

- ***Advertisers*** having to pay higher prices, because they will have fewer alternatives for reaching large numbers of consumers or for reaching the consumers that are relevant to them.
- ***Websites*** receiving less compensation for making their content available online, because they will have fewer alternatives for obtaining advertising revenue for this content.
- ***Consumers*** facing poorer quality and less diversity of content over time because websites will have less revenue to invest in content creation and delivery, and facing higher prices from advertisers who seek to pass on the higher costs of online advertising.

4. Competition and Privacy

A related competitive concern arising from Google's proposed acquisition of DoubleClick involves the collection and aggregation of user data. As already noted, the ability to target online ads to interested users is a key benefit of online advertising. But such targeting often relies on the collection and use of online user data, which can raise important legal and policy concerns where this is accomplished through data collection and user profiling practices that are non-transparent or that do not give users meaningful choices.

Microsoft is committed to protecting consumer privacy, which is why we were one of the first Internet companies to support comprehensive consumer privacy legislation. Microsoft has long adhered to globally recognized privacy practices of notice, choice, access, security, enforcement, onward transfer, and data integrity. We have led the industry in adopting privacy notices that are clear, concise, and understandable, and enable users easily to locate more detailed information on our privacy policies if they are interested. We also recently released a set of privacy guidelines designed to help developers build meaningful privacy protections into their software programs.

We also recognize, however, that customers and those in the privacy community have expressed a growing interest in the privacy implications of online advertising. That is why, in July of this year, we announced an enhanced set of five fundamental privacy principles designed to help protect the privacy of Microsoft's Windows Live users, including users of our Live Search service.[17] Microsoft has also committed to join the Network Advertising Initiative (NAI), a cooperative of online marketing and advertising companies that addresses important privacy and consumer protection issues in emerging media. As a member of the NAI, Microsoft will follow applicable NAI Principles, including giving customers the ability to opt out of behavioral ad targeting by Microsoft's network-advertising service.

The privacy concerns around online advertising become particularly acute when the company engaging in such practices also holds a dominant position. Google holds this position today with respect to search advertising and may well achieve this position with respect to all online

[17] These principles include commitments to transparency, user controls, anonymization, security, and best practices. A detailed statement of these principles is set forth in Appendix A.

advertising if it were to acquire DoubleClick. Google and DoubleClick, between them, have already likely amassed the two largest databases of online user data in the world. Allowing these companies to merge would result in an unprecedented concentration of online user data and give a single company the unilateral power to exploit that data for its own ends. The merger would also give a single company an unrivalled ability to collect even more user data and assemble an even more comprehensive data library in the future. This would raise serious risks for user privacy and make it exceedingly difficult for other suppliers of online advertising to constrain Google's market power or practices.

Beyond the straightforward dangers that would arise from allowing one company to amass and exploit such vast amounts of online user data, Google's acquisition of DoubleClick raises additional competitive concerns respecting its data collection and privacy practices, including:

- ***Reduced Incentives to Compete on Quality of Privacy Practices.*** Acquiring a dominant position through its purchase of DoubleClick would weaken Google's incentive to compete on the quality of its privacy practices. Insulated from competitive pressure, Google would have little reason to heed consumer demand for stronger privacy protections and would face no significant competitive pressure from other firms offering superior practices. Indeed, to the extent Google could generate additional profits by diluting its privacy practices, there is a significant risk it would do so.

- ***Reduced Consumer Choice.*** A combined Google-DoubleClick would serve far more advertisements on more websites than any other company in the world. This would make it very difficult for consumers to avoid confronting Google-served ads and thus nearly impossible to avoid the data collection and profiling that these advertisements would facilitate. Even if competing online advertising networks offered superior consumer privacy practices, their limited presence on websites would mean that consumers would have little effective means to "choose" these practices.

Consumers are only now beginning to understand what data is being collected about them online and how companies are using this data. If Google – a company that quite probably holds the world's most extensive database of user search histories – is permitted to acquire DoubleClick – a company that quite possibly holds the most extensive online user data in the world – there is a significant risk that consumer privacy interests will be cast aside in the drive to maintain market share and increase profits.

## IV. Conclusion

Online advertising provides the primary source of revenue for most websites today, and in the future it will fund the online delivery of an even wider array of news, entertainment, and other content. Moreover, it is likely that a significantly greater proportion of *all* advertising will eventually be delivered online as traditional offline forms of content increasingly migrate to Internet-connected devices.

The online advertising industry is currently undergoing rapid, fundamental changes that could irreversibly alter the competitive landscape. Some of these changes raise important questions about the future of competition in online advertising and the implications of a single company controlling the largest database of information on individual behavior the world has ever known. These questions deserve careful consideration by all stakeholders. This hearing is an important step in this process.

*Appendix A:*

**Microsoft's Privacy Principles for Live Search and Online Ad Targeting**

Microsoft's Privacy Principles for Live Search and Online Ad Targeting represent the continuing evolution of Microsoft's long-standing commitment to privacy. They build on our existing policies and practices, as reflected in our privacy statements. They also complement our other privacy efforts, such as the public release of our Privacy Guidelines for Developing Software Products and Services and our work to advocate for comprehensive federal privacy legislation in the US and strong public policies worldwide to protect consumer privacy. Some parts of these principles reflect current practices, while other aspects describe new practices that will be implemented over the next 12 months.

In addition to guiding our own practices in the areas of Live Search and online ad targeting, we hope that these principles will be even more valuable in helping to advance an industry dialogue about the protection of privacy in these areas. We also recognize that these are dynamic technologies that are rapidly developing and changing. As such, we will continue to examine and update our privacy approach to ensure that we are striking the right balance for our customers.

**Principle I: User Notice**
We will be transparent about our policies and practices so that users can make informed choices. For example:

- Our current Microsoft Online Privacy Statement provides clear disclosures in an easy to navigate format that is readily accessible from every page of each major online service that we operate.
- We will regularly update the Microsoft Online Privacy Statement to maintain transparency as our services evolve or our practices change.
- In addition, we will shortly update our privacy statement to provide more detail on online advertising and search data collection and protection.

**Principle II: User Control**
We will implement new privacy features and practices as we continue to develop our online services. For example:

- We will continue to offer controls that help users to manage the types of communications they receive from Microsoft.
- Once we begin to offer advertising services to third party websites, we will offer users the ability to opt-out from behavioral ad targeting by Microsoft's network advertising service across those websites, in conformity with the Network Advertising Initiative (NAI) Principles.
- We will continue to develop new user controls that will enhance privacy. Such controls may include letting individuals use our search service and surf Microsoft sites without being associated with a personal and unique identifier used for behavioral ad targeting, or allowing signed-in users to control personalization of the services they receive.

**Principle III: Search Data Anonymization**

We will implement specific policies around search query data, be explicit with users about how long we retain search terms in an identifiable way, and inform users of when and how we may "anonymize" such data. Specifically:

- We will anonymize all Live Search query data after 18 months, unless we receive user consent for a longer time period. This policy will apply retroactively and worldwide, and will include irreversibly removing the entirety of the IP address and all other cross-session identifiers, such as cookie IDs or other machine identifiers, from the search terms.
- We will ensure that any personalized search services involving users choosing a longer retention period are offered in a transparent way with prominent notice and consent.
- We will follow high standards for protecting the privacy and security of the data as long as it is retained, as described in Part IV below.

**Principle IV: Minimizing Privacy Impact and Protecting Data**

We will design our systems and processes in ways that minimize the privacy impact of the data we collect, store, process and use to deliver our products and services. For example:

- We will store our Live Search service search terms separately from account information that personally and directly identifies the user, such as name, email address, or phone numbers ("individually identifying account information"). We will maintain and continually improve protections to prevent unauthorized correlation of this data. Moreover, we will ensure that any services requiring the connection of search terms to individually identifying account information are offered in a transparent way with prominent notice and user consent.
- We have also designed our online ad targeting platform to select appropriate ads based only on data that does not personally and directly identify individual users, and we will store clickstream and search query data used for ad targeting separately from any individually identifying account information, as described above.
- We will continue to implement technological and process protections to help guard the information we collect and maintain.

**Principle V: Legal Requirements and Industry Best Practices**

We will follow all applicable legal requirements as well as leading industry best practices in the markets where we operate. For example:

- We adhere to the standards set forth in the Organization for Economic Cooperation and Development (OECD) privacy guidelines.
- We follow the Online Privacy Alliance (OPA) guidelines.
- We are a member of the TRUSTe Privacy Program.
- We abide by the safe harbor framework regarding the collection, use, and retention of data from the European Union.
- As we begin to offer advertising services on third party websites, we plan to follow applicable Network Advertising Initiative (NAI) Principles, for example:
  - We will give users the opportunity to opt out of behavioral targeting on third party websites (including the delivery of behaviorally targeted ads on third party websites and the usage of data collected on third party websites for behavioral targeting).
  - We will not associate Personally Identifiable Information with clickstream data collected on third party websites without user notice and consent.