

*Data Protection and Search Engines on the Internet:
Google –DoubleClick and other case Studies*

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**European Parliament,
LIBE Committee
Brussels, Belgium
January 21, 2008**

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Overview

EPIC: The Electronic Privacy Information Center (“EPIC”) is an American non-partisan research organization incorporated in Washington, D.C. EPIC’s activities include reviewing government and private sector policies and practices to determine their possible impact on the privacy interests and civil liberties of the American public. Among its other activities, EPIC first brought the American Federal Trade Commission’s attention to the privacy risks of online advertising in 2000.¹ Through its work on the DoubleClick-Abacus merger, the Google-DoubleClick merger, and its current investigation into Ask.com’s privacy protection features, EPIC has developed extensive expertise on the data privacy implications of online advertisers.²

Online Advertising: The creation of “Web 2.0” has enhanced the internet’s ability to operate as a virtual marketplace for ideas, information and products. Advertisers have capitalized on the Internet’s ability to reach billions of people, globally engaging in sharing a plethora of personal information. Online advertising is now considered to be a \$27 billion market which is expected to double within the next four years. Advertisers online employ cookies³ stored on the user’s computer to determine what sort of ads they might be interested in seeing based on their viewing habits.⁴ In the course of recording online behavior, advertisers collect information about users’ interests and tastes, including purchase information, websites visited, and stories read. In the interest of enriching these profiles of individual online behavior, some online advertisers have merged with offline marketing information companies and Internet search engines such as those offered by Google, Yahoo, and Microsoft.

Online Search Engines: Internet search engines are the primary means by which individuals access Internet content. In 2005, over 60 million American adults used search engines on a typical day. The number is no doubt much higher today. Typically, search engines (1) display advertising (either targeted or not) to the Internet user or consumer, and (2) collect detailed information that is personally identifiable or can be made personally identifiable for marketing and consumer profiling.⁵

Behavioral Marketing: The emergence of targeted Internet advertising has led to “behavioral marketing.” In the course of recording users’ viewing habits and monitoring their search terms, companies collect information about user interests and tastes, including the things they buy, the stories they read, and the websites they visit, in addition to very sensitive personal information. Search terms entered into the main

¹ EPIC, CDD, U.S. PIRG., Complaint to the FTC Concerning DoubleClick, Feb. 10, 2000, http://www.epic.org/privacy/internet/ftc/DCLK_complaint.pdf. See also EPIC, DoubleTrouble, (Jan. 16, 2008), <http://epic.org/privacy/doubletrouble/>.

² For more information, visit epic.org. See also *Id.* EPIC, Privacy? Proposed Google/DoubleClick Deal, (Jan. 4, 2008), <http://epic.org/privacy/ftc/google/>.

³ EPIC, Cookies, (Jan. 4, 2008), <http://epic.org/privacy/internet/cookies/>.

⁴ For information on how cookies track user behavior, see EPIC, DoubleTrouble: How Track User’s, (Jan. 4, 2008), <http://epic.org/privacy/doubletrouble/#whoabacus>.

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. The expansion of the behavioral marketing industry, its ability and incentive to monitor online search behavior, has produced significant privacy problems and substantial risks to Internet users. Opaque industry practices result in consumers remaining largely unaware of the monitoring of their online behavior, the security of this information and the extent to which this information is kept confidential. Industry practices, in the absence of strong privacy principles, also prevent users from exercising any meaningful control over their personal data that is obtained.

Mergers: The desire to control this rapidly developing advertising market sector and to obtain more detailed information about consumer behavior on the Internet has also encouraged mergers between such E-companies as DoubleClick- Abacus Direct Corp., Google- DoubleClick;⁶ Yahoo-Right Media,⁷ and AOL -ADTECH AG.⁸ These mergers present unique privacy problems and substantial risks to Internet users that are not adequately addressed by traditional competition analysis. The “consumers” for Internet advertisers are web-based publishers. Assuming there is healthy competition, they make choices among competitors for advertising services. But for the actual consumer, the “user” of the Internet service whose data is gathered, there is no choice. The market relationship exists between the advertiser and the publisher. It does not include the user as consumer. These mergers within the behavioral marketing industry also pose substantial and far-reaching privacy problems. Given that E-companies target individual users based on their interests, their activities, and even their personal behaviors, such mergers have led to the consolidation and matching of this preference and personally identifiable information.

DoubleClick-Abacus Merger (2000-2001)

Before the current focus on the proposed Google-Doubleclick merger, EPIC obtained significant expertise about the online advertising when we filed our objection to the original merger of Doubleclick and Abacus. Originally, we were impressed by Doubleclick’s efforts to develop online advertising that did not requires the collection of personally identifiable information. We said that this would allow targeted services and respect online privacy. But once Doubleclick proposed to acquire Abacus, our assessment changed dramatically.

⁶ 13 April 2007 – Google acquires DoubleClick; a provider of publisher-side and advertiser-side display ad service technology, for \$3.1 b, *see supra* .

⁷ 30 April 2007 – Yahoo acquires Right Media, owner of the leading online advertising exchange Direct Media Exchange, for \$680m. *See also* TACD, Statement on AOL-Time Warner Merger, (Feb. 2000), http://www.tacd.org/db_files/files/files-93-filetag.pdf. This source discusses privacy issues involved in a merger between a large Internet Service Provider and a large media company.

⁸ 16 May 2007- AOL agrees to acquire ADTECH AG, provider of publisher-side and advertiser-side display ad service technology. Ann Bentley, *AOL Enters Into Agreement to Acquire Behavioral Targeting Firm TACODA*, TimeWarner, July 24, 2007, <http://www.timewarner.com/corp/newsroom/pr/0,20812,1646264,00.html>.

The DoubleClick-Abacus merger provides a good example of the privacy problems flowing from such mergers. DoubleClick is an Internet advertising company. Abacus is a company that collects information about consumers' purchasing habits, collected through a database that tracks such information using sources like catalog subscriptions and purchases. The merger created controversy in 1999 when it enabled DoubleClick to personally identify individuals, linking up individual profiles of viewing habits with name and address information.

These privacy problems were first to the attention of the Federal Trade Commission's (FTC) on February 10, 2000, when EPIC filed a complaint. The complaint concerned the information collection practices of DoubleClick, alleging they had violated section 5 of the Federal Trade Commission Act.⁹ 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 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."¹⁰ The FTC's investigation into the company's privacy practices continued until 22 January 2001, when the FTC announced that DoubleClick had made a number of commitments, including a commitment to abide by the Network Advertising Initiative Privacy Principles.

Proposed Google-DoubleClick Merger

The FTC examined similar privacy concerns when it reviewed the implications of the Google-DoubleClick merger. The FTC's review was conducted after a complaint filed by EPIC, the Center for Digital Democracy (CDD)¹¹, and the U.S. Public Research Group (U.S. PIRG)¹² on the 20th April, 2007.

Google-DoubleClick Complaint to the FTC: The three groups based their complaint on the FTC's statutory obligation to investigate and prosecute violations of Section 5 of the Federal Trade Commission Act¹³ where privacy interests of Internet users are at issue. The complaint, and its subsequent amendments submitted in June,¹⁴ requested that the

⁹ EPIC DoubleClick Complaint to the FTC, *supra*.

¹⁰ DoubleClick, Press Archives, (March 2, 2000), <http://www.doubleclick.com/about/press.aspx>.

¹¹ See Center for Digital Democracy (CDD), <http://democraticmedia.org/>.

¹² U.S. Public Research Group (U.S. PIRG), <http://www.uspirg.org/>. 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.

¹³ Federal Trade Commission Act, 15 U.S.C. §§ 41-58, as amended.

¹⁴ EPIC, CDD, U.S. PIRG., Second Supplement to Original Complaint to the FTC Concerning Google/DoubleClick Merger, (September 17, 2007), http://epic.org/privacy/ftc/google/supp2_091707.pdf.

Commission open an investigation into the proposed acquisition as it created unique risks to privacy and violated previously agreed standards for the conduct of online advertising. In its complaint, EPIC argued the merger gave Google the ability 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.¹⁵ EPIC noted the merger could impact the privacy interests of 233 million Internet users in North America, 314 million Internet users in Europe, and more than 1.1 billion Internet users around the world.¹⁶ 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.

Privacy Objections to Google-DoubleClick Merger

In the complaint to the FTC, EPIC alleged that the following activities constituted deceptive and unfair trade practices:

General Privacy Problems

- Google claims that it uses all log information, including search queries, IP address information, browser type, traffic information, browsing information, and date and time of usage, in order to facilitate “quality control” and deliver “personalized user experiences.”¹⁷
- Google does not explain what “quality control” it is performing, nor does it explain the ways in which it delivers a “personalized experience” beyond scanning content of

EPIC, CDD, U.S. PIRG., Supplement to Original Complaint to the FTC Concerning Google/DoubleClick Merger, (June 6, 2007), http://epic.org/privacy/ftc/google/supp_060607.pdf.

¹⁵ EPIC, CDD, U.S. PIRG., Complaint to the FTC Concerning Google/DoubleClick Merger, (April 20, 2007), http://epic.org/privacy/ftc/google/epic_complaint.pdf.

¹⁶ Internet World Stats, Internet Usage Statistics as of Mar. 19, 2007, <http://www.internetworldstats.com/stats.htm>.

¹⁷ See e.g., Posting of Peter Fleischer and Nicole Wong to Google Blog, (Mar. 14, 2007), <http://googleblog.blogspot.com/2007/03/taking-steps-to-further-improve-our.html>. Elinor Mills, *Official Google Blog: Taking Steps to further improve our privacy practices*, Mar. 14, 2007 [“CNet News Story on Google Blog”], http://news.com.com/Google+adding+search+privacy+protections/2100-1038_3-6167333.html. Google Web History, *Privacy Notice: Your choices* (June 1, 2007), <http://www.google.com/history/whprivacy.html>; Google Maps, *Help: Google Maps User Guide* (May 31, 2007), <http://maps.google.com/support/bin/answer.py?answer=68259>; Google Maps, *Help: How do I save the addresses I search for on Google Maps?* (May 31, 2007), <http://maps.google.com/support/bin/answer.py?answer=45446&topic=10786>; Google Maps, *Help: What’s the difference between public maps and unlisted maps?* (May 31, 2007), <http://maps.google.com/support/bin/answer.py?answer=62845&topic=11305>; Google Maps, *Privacy Policy* (Nov. 1, 2006).

searches and communications in order to generate targeted advertisements¹⁸ and personalized links using AutoLink in *Google Toolbar*.¹⁹

- Although Google states that it does not sell user information, Google does share user information with other companies. Google shares non-personal aggregated information collected by *Google Video*,²² *Google Talk*, *Gmail*,²³ *Google Desktop*,²⁰ and *Google Checkout*.²¹ At least in connection with *Google Checkout*, Google maintains separate policies about sharing information with Google subsidiaries than with other companies and requires users to separately “opt-out” of information sharing between Google and third parties and Google and its subsidiaries.²²
- Google’s current policy of not selling the personal information that it collects is voluntary and could be changed at any future time, particularly when new opportunities arise as a result of a significant merger.
- There is no legal standard, binding order, or technological means that prevents Google from selling the user information that Google collected from consumers with the assurance that the data would only be distributed in non personalized and aggregated form.
- Google logs search queries in a manner that makes them personally identifiable but fails to provide users with the ability to edit or otherwise expunge records of their previous searches.²³
- Although Google has announced that it will begin limiting the retention period of log information,²⁴ Google currently fails to expunge a user’s search log information and retains the data for as long as it chooses.²⁵

¹⁸ Google Help Ctr., *Will Google share my information?* (May 31, 2007), <http://www.google.com/support/calendar/bin/answer.py?answer=37054&ctx=sibling>; Google Help Ctr., *Is Google reading my calendar information?* (May 31, 2007), <http://www.google.com/support/calendar/bin/answer.py?answer=37055&ctx=sibling>.

¹⁹ Google Checkout, *Tour: Find it with Google. Buy it with Google Checkout* (May 31, 2007), <https://checkout.google.com/buyer/tour.html>; Google Checkout Tour, *Keep your credit card number and email address confidential* (May 31, 2007), <https://checkout.google.com/buyer/tour.html>; Google Checkout: *Tour: Track all of your orders and shipping in one place* (May 31, 2007), <https://checkout.google.com/buyer/tour.html>; Google Checkout, *Privacy Policy: Information we collect and how we use it: Registration information* (May 31, 2007), <https://checkout.google.com/files/privacy.html>; Google Checkout, *Privacy Policy: Information we collect and how we use it: Transaction information* (May 31, 2007), <https://checkout.google.com/files/privacy.html>; Google Checkout, *Privacy Policy: Information we collect and how we use it: Information about your use of the service* (May 31, 2007), <https://checkout.google.com/files/privacy.html>; Google Checkout, *Privacy Policy: Information we collect and how we use it: Google Cookies* (May 31, 2007), <https://checkout.google.com/files/privacy.html>; Google Checkout, *Privacy Policy: Information we collect and how we use it: Log Information* (May 31, 2007), <https://checkout.google.com/files/privacy.html>; Google Checkout, *Privacy Policy: Information we collect and how we use it: Links* (May 31, 2007), <https://checkout.google.com/files/privacy.html>.

²⁰ Google Desktop, *Privacy Policy: Information we collect* (May 31, 2007), <http://desktop.google.com/privacypolicy.html> (indicating the Google retains file indexes for the “search across computers” function on their servers); Google Desktop, *Privacy Policy: Uses* (May 31, 2007), <http://desktop.google.com/privacypolicy.html>; Google Desktop, *Privacy Policy: Your choices* (May 31, 2007) <http://desktop.google.com/privacypolicy.html>.

²¹ *See supra*.

²² *Id.*

²³ Google Privacy Ctr., *Privacy Policy Highlights*, <http://www.google.com/intl/en/privacy.html>.

²⁴ Peter Fleischer and Nicole Wong, *supra*.

- Google's announced, but as of yet unimplemented "anonymization" protocol fails to render log information untraceable to identifiable Internet users.²⁶

Google's Activities Constitute Deceptive Trade Practices:

- The Google user is not informed of Google's data collection upon arriving at the Google homepage. In order to find information on Google's data collection practices the user click through four links. Most users will not reach this page.
- The user is not given adequate notice that Google collects the user's search terms in connection with his or her IP address. This makes Google's representations concerning its data retention practices deceptive.

Google's Activities Constitute Unfair Trade Practices:

- Google's collection of users' information, through search term retention in connection with users' IP addresses, is performed without the knowledge or consent of Google users. In the United States, self-regulatory principles set forth by the Network Advertising Initiative ("NAI") in July 2000 stated, "[c]onsumers will receive notice of network advertisers' profiling activities on host Web sites and have the ability to choose not to participate in profiling." As a result of Google's failure to detail its data retention policies until four levels down within its website, its users are unaware that their activities are being monitored. Furthermore, Google does not provide any "opt-out" option to its users who do not want Google to store their search terms.
- Google's collection of information about its users is not in compliance with Fair Information Practices, such as the OECD Privacy Guidelines. This lack of compliance is likely to cause substantial injury to consumers. This injury is not reasonably avoidable by consumers and not outweighed by countervailing benefits to consumers or competition. According to American law, Google's information collection therefore constitutes an unfair practice.

Consumer Injury:

- Google's and DoubleClick's conduct, as set forth above, has injured consumers throughout the United States by invading their privacy; storing information obtained through the retention of users' search terms in ways and for purposes other than those consented to or relied upon by such consumers; causing them to believe, falsely, that their online activities would remain anonymous; and undermining their ability to avail themselves of the privacy protections promised by online companies.
- Google will leave Internet users vulnerable to surveillance by law enforcement agents and intelligence officers, both in United States and in other countries, that could occur without any legal basis to permit the disclosure of personal information.

²⁵ *Id.*

²⁶ CNet News Story on Google Blog.

- The continuance of Google’s privacy invasive business practices will encourage other companies to collect large volumes of information from consumers in an unfair, disproportionate, and deceptive manner.
- If such business practices are permitted to continue, the privacy interests of consumers engaging in online commerce and other Internet activities will be significantly diminished.

EPIC Recommendations for Internet Privacy

Simply stated, EPIC states that privacy safeguards must be established as a condition of the Google-Double Click Merger. Specifically, EPIC asked the FTC to grant the following relief in our April 20, 2007 complaint:

- Order Google to give a user the right to obtain knowledge, in a reasonable and timely manner, of whether or not the data relating to the user is processed and if it is processed, information to the purpose of the processing.
- Order Google to provide, in a reasonable and timely manner, the logic involved in any automatic processing of data concerning that user.
- Order Google not to retain user data in a form that permits the identification of data subjects for longer than necessary for the purposes for which the data were collected.
- Order Google to institute an “opt-in” approach to collecting user information. If Google allows a user to “opt-in” before collecting personal data in order to personalize the search experience, Google should implement the same system with regards to a user’s privacy options.
- Order Google to allow individuals reasonable access to their personal information, along with the ability to edit and delete that information.
- Order Google to stipulate to never engage in behavioral tracking.
- Further order Google not to sell personally identifiable information.
- Order Google to implement a functional and secure system of anonymizing stored user data. Anonymized data remains traceable to the individual user, as demonstrated when America Online inadvertently leaked the search records of 658,000 Americans. Google must implement a technique that truly anonymizes this data, either by erasing more the last octet of the IP address, erasing the IP address completely, assigning randomized numbers to the data, or developing an alternative technique that will render tracing the data back to the individual source impossible.
- Order Google to cease storage of IP addresses. The search engine functionality would not be impaired if a search engine did not store any user information at all. Condition the merger on Google and DoubleClick maintaining separate databases of user information.
- Order Google to craft, disclose, and implement a security plan that will maintain, protect, or enhance the privacy, confidentiality, or security of all personally identifiable information.
- Order Google to implement remedies and a system of accountability in the event of a breach, and to disclose to the public the extent to which it cannot or will not protect the privacy, confidentiality, and security of all personally identifiable information.

Wide Support for EPIC Approach

The privacy implications of this merger were clear. Bipartisan support for an investigation into the matter was forthcoming as numerous leading congressmen, senators, and republican members of the House Subcommittee on Commerce, Trade and Consumer Protection²⁷ urged the Federal Trade Commission to use its authority to investigate the privacy implications of the proposed merger of Google and Doubleclick.

Senator Herb Kohl, the Chairman of the key committee responsible for antitrust law in the United States, stated that while “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.”²⁸ He further highlighted that antitrust laws, “written more than a century ago,” sought to prevent the “undue concentrations of economic power for our society as a whole, and not just merely their effects on consumers’ pocketbooks.”²⁹ He emphasized the need to examine this issue as “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.”³⁰

Senators Orrin Hatch, the leading member of the opposing party on the same antitrust committee, and Senator Herb Kohl, urged the FTC to critically analyze the privacy and competition effects of the merger. In the letter, the senators stated, “[t]his deal raises fundamental consumer privacy concerns worthy of serious scrutiny.”³¹

Leading Republican Congressman Joe Barton pushed for a detailed review of Google’s privacy practices. Representative Barton sent a letter to Google raising 24 questions about the company's proposed \$3.1 billion merger with Doubleclick.³² Representative Barton, co-founder of the House Privacy Caucus, asked Google to detail definitions of “anonymization” of consumer data, “behavioral targeting,” among other things. He also asked Google to explain “the need to retain collected information for the length of time [Google retains consumer data]” and “how and why information is combined or shared across platforms.”³³

Congress members Ed Whitefield, Dennis Hastert, Charles W. Pickering, and Cliff Stearns, stated that “given the enormous significance this merger has in these areas, we believe a rigorous examination before the subcommittee is warranted.”³⁴ Furthermore,

²⁸ United States Senate Committee on the Judiciary, An Examination of the Google-DoubleClick Merger and the Online Advertising Industry: What Are the Risks for Competition and Privacy?, (Sept. 27, 2007), <http://judiciary.senate.gov/hearing.cfm?id=2955>.

²⁹ *Id.*

³⁰ *Id.*

³¹ Letter from Orrin Hatch to Honorable Deborah Platt Majoras, Chairman of the FTC (Nov. 19th, 2007), http://epic.org/privacy/ftc/google/sen_anti_111907.pdf.

³² *Supra.*

³³ *Id.*

³⁴ *Supra.*

they called for a hearing is needed to understand how consumers' information is used and what can be done to better protect consumer privacy.³⁵

As Congressman Ed Towns stated,

Section 5 of the FTC Act gives the Commission broad authority to address potential consumer harms, and I trust the Commission will use this authority to ensure that consumer privacy interests are protected in connection with Google's proposed acquisition of Doubleclick.³⁶

Similar privacy concerns were voiced in Canada. In a complaint filed on 2 August 2007, the Canadian Internet Policy and Public Interest Clinic at the University of Ottawa requested 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."³⁷ 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.³⁸

CIPPIC cited the FTC complaint and supplement from EPIC, CDD and US PIRG, as well as the ongoing European investigations into the merger.

Conflict of Interest at the Federal Trade Commission

Before FTC released its opinion on the Google-DoubleClick case, EPIC and the Center for Digital Democracy ("CDD") filed several statements seeking the disqualification of FTC Chairman, Deborah Platt Majoras, from the review of the proposed Google-DoubleClick merger. Statements were filed after learning that the FTC Chairman's husband has taken on Doubleclick as a client for his Washington, D.C. law firm, Jones Day, for which he is partner. Despite this conflict of interest, the FTC Chairman issued a statement refusing to step down in the Commission's review of the Google-DoubleClick merger.³⁹ EPIC also submitted a detailed Freedom of Information Act request seeking the expedited release of all documents concerning the participation of

³⁵ *Id.*

³⁶ Letter from Edolphus "Ed" Towns to Honorable Deborah Platt Majoras, Oct. 26, 2007.

³⁷ Letter from Canadian Internet Policy and Public Interest Clinic to Commissioner Sheridan Scott, Commissioner of Competition Regarding Section 9 Application for an Inquiry into the Proposed Merger of Google, Inc. and DoubleClick Inc., (2 August 2007), http://www.cippic.ca/uploads/Google-DC_s9_CompAct_complaint_FINAL.pdf. See also CIPPIC, CIPPIC calls on Competition Commissioner to review Google-DoubleClick merger, (2 August 2007), http://www.cippic.ca/uploads/file/CIPPIC_Media_Release_-_Google-DoubleClick_-_Competition_Filing_-_02August2007.pdf.

³⁸ *Id.*

³⁹ Federal Trade Commission, FTC Chairman Statement, <http://ftc.gov/opa/2007/12/google.shtm>.

Jones Day in the Commission's review of Doubleclick as well as other matters involving consumer privacy.⁴⁰

Surprising Decision of the Federal Trade Commission

Before arriving at their decision regarding the Google-DoubleClick merger, the FTC made a "second request" in its review of Google's merger with DoubleClick.⁴¹ According to FTC Chair Majoras's statement on the merger review process, the majority of investigations in which the FTC issues a second request results in a merger challenge, consent order, or modification to the transaction.⁴² This statement suggested 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.

Surprisingly, the FTC ultimately approved the proposed Google-DoubleClick merger without condition in a 4-1 opinion released on December 21, 2007.⁴³ However, the concurring and dissenting opinions addressed the "substantial privacy issues" in significant detail.⁴⁴ In a strong dissent, Commissioner Harbour stated,

If the Commission closes its investigation at this time, without imposing any conditions on the merger, neither the competition nor the privacy interests of consumers will have been adequately addressed.⁴⁵

Commissioner Harbour went further stating that "the merger creates a firm with vast knowledge of consumer preferences, subject to very little accountability."⁴⁶ Dealing with the "undeniable"⁴⁷ privacy questions, Commissioner Harbour found that "traditional competition analysis of Google's acquisition of DoubleClick fails to capture the interests of all the relevant parties."⁴⁸

Commissioner Leibowitz indicated in a concurring decision that,

⁴⁰ EPIC, Freedom of Information Request, (14 Dec. 2007), http://www.democraticmedia.org/files/EPIC_FTC_FOIA.pdf.

⁴¹United States Securities and Exchange Commission, FORM 8-K: Current Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 regarding Google, (25 May 2007), <http://www.sec.gov/Archives/edgar/data/1288776/000119312507124889/d8k.htm>.

⁴² Deborah Platt Majoras, Chairman, Federal Trade Commission, *Reforms to the Merger Review Process*, (February 16, 2006), <http://www.ftc.gov/os/2006/02/mergerreviewprocess.pdf>.

⁴³ Federal Trade Commission, 4-1 Opinion Approving the Google-DoubleClick Proposed Merger, December 21, 2007, <http://ftc.gov/os/caselist/0710170/071220statement.pdf>.

⁴⁴ Federal Trade Commission, Concurring Statement of Commissioner Jon Leibowitz: Google/DoubleClick, December 21, 2007, pps. 1- 2, <http://ftc.gov/os/caselist/0710170/071220leib.pdf>. Commissioner Pamela Jones Harbour, Dissent from FTC Opinion Approving the Google-DoubleClick Proposed Merger, December 21, 2007, <http://ftc.gov/os/caselist/0710170/071220harbour.pdf>.

⁴⁵ *Id.*

⁴⁶ *Id.* at 1.

⁴⁷ *Id.* at 9.

⁴⁸ *Id.* at 10.

this rampant tracking of our online conduct, as well as the resulting consumer profiling and targeting, raises critical issues about the sufficiency of companies' disclosures, the depth of consumers' understanding and control of their personal information, and the security and confidentiality of the massive collection of sensitive personal data. Moreover, behavioral marketing directed at vulnerable individuals, such as young people and teens, clearly warrants heightened privacy protection.⁴⁹

Commissioner Leibowitz warned that "industry participants must stop being coy and start being more forthcoming about their practices, the consumer information they collect, and how they use it,"⁵⁰

Flawed Self Regulatory Privacy Principles

Following the FTC approval of the Google-DoubleClick merger, the FTC released a discussion paper containing proposed "self-regulatory" principles for online advertisers who target user behavior and habits.⁵¹ These principles were developed to identify common themes and possible norms to govern behavioral advertising and also to try to address any consumer concerns regarding online privacy protection. These principles include 1) transparency and consumer control, 2) reasonable security and limited retention of user data, and 3) obtaining "affirmative" user consent before making material changes to privacy policies and before using "sensitive" data to target ads. In response to these proposed principles, the FTC is seeking comments and discussions on the appropriateness and feasibility of these principles for both consumers and businesses, including the costs and benefits of offering choice for behavioral advertising.

Because of the previous experiences in the United States with industry self-regulation and the specific failure of the Network Advertising Initiative, EPIC does not believe that this is an effective approach to the problems arising from online advertising. Invariably such principles operate as "waivers" or "disclaimers," essentially allowing companies to do whatever they wish with the personal data that they collect.

EPIC Response to Federal Trade Commission Decision

In response to the Federal Trade Commission's failure to adequately address the privacy implication of the Google-DoubleClick merger,⁵² stated that "the Federal Trade Commission failed to address the privacy implications of the Google-DoubleClick Merger

⁴⁹ Federal Trade Commission, Concurring Statement of Commissioner Jon Leibowitz: Google/DoubleClick, December 21, 2007, ar 1- 2

⁵⁰ *Id.*

⁵¹ Federal Trade Commission, Online Behavioral Advertising Moving the Discussion Forward to Possible Self-Regulatory Principles, <http://www.ftc.gov/os/2007/12/P859900stmt.pdf>

⁵² Marc Rotenberg (EPIC), *Statement of Marc Rotenberg (EPIC) Regarding the Majority Opinion of the Federal Trade Commission in Proposed Acquisition of Doubleclick*, (December 20, 2007), http://epic.org/privacy/ftc/google/EPIC_statement122007.pdf.

... the majority of the Commissioners chose to ignore the privacy implications of the Google-DoubleClick merger and to propose instead the same self-regulatory approach to privacy protection that has repeatedly failed American consumers and could have been put forward whether or not a merger review was also underway.”⁵³

EPIC said that the unique circumstances of the online advertising industry required the FTC to impose privacy safeguards as a condition of the Google-DoubleClick merger. EPIC pointed out that the Commission ignored similar assessments from leaders in Congress and consumer protection agencies, noting that consumers around the world will be impacted by the business practices of the combined entity. EPIC concluded:

The decision today does not end the discussion about competition and privacy protection in the context of merger review. Consumers around the world will be impacted by the business practices of the combined entity, and the consequences will have to be addressed.

The Federal Trade Commission had an opportunity to establish the necessary safeguards for personal data and competition that could have allowed a global framework to emerge. Instead, the Commission’s failure to act leaves the question of how best to address the privacy and competition implications of this deal to others.

Recent Developments

AskEraser: Due to the privacy concerns raised by Google’s “opaque” business practices, Ask.com recently released AskEraser. Once enabled, AskEraser allows all search activities to be deleted from Ask.com servers “within hours”, opposed to the normal 18 months. Ask.com asserts that the new search tool “will offer its searchers unmatched control over their privacy.”⁵⁴

However, despite these reassuring statements and representations of increased privacy protection on Ask.com’s website, AskEraser comes with a number of significant flaws. These flaws go directly against the objectives of protecting Ask.com’s customers’ privacy. After a detailed study of the new search tool, EPIC found that Ask Eraser (1) requires a confusing and misleading opt-out cookie, where once deleted, the privacy setting is lost and Ask.com no longer honors the user’s privacy setting; (2) creates a quasi-unique identifier, where Ask.com inserts the exact time (down to the second) that the user enabled Ask Eraser; and (3) will be disabled without notice, in cases of abnormal operation or formal legal requests. All three of these attributes create substantial privacy risks for Internet users and therefore, must be addressed.

⁵³ *Id.*

⁵⁴ IAC Search and Media, Ask.com to Give People Unmatched Privacy Control, (July 2007) , http://www.irconnect.com/askj/pages/news_releases.html?d=123324

Facebook: The popular social networking site, Facebook, recently launched its Beacon feature.⁵⁵ Through the use of Beacons, Facebook users who shop at third party websites have their purchases broadcast to their friends via Facebook. Facebook then collects this third party information and subsequently shares it with other users, *unless* the user opts-out during a brief pop-up window at the third party site. In response to complaints from EPIC, the [Center for Digital Democracy](#), [Moveon.org](#), and thousands of users, Facebook modified its Beacon function and now asks that users *opt-in* before broadcasting their details. However, Facebook indicated that it will continue to collect information from third party sites and will continue to ask for opt-ins until the user consents. Facebook further specified that it will not keep or use this information on non-members and those who have opted out.⁵⁶

Conclusion

The massive quantity of user information collected by such companies as Google coupled with Doubleclick's business model of consumer profiling will enable such merged companies to construct extremely intimate portraits of its users' behavior. The detailed profiling of Internet users violates the fundamental rights of individuals, diminishes the accountability of large corporations, and threatens the operation of democratic governments.

The failure of the Federal Trade Commission to act in this matter could have profound consequences on the future of the Internet and the interests of American consumers. The Federal Trade Commission had an opportunity to establish the necessary safeguards for personal data and competition that could have allowed a global framework to emerge. Instead, the Commission's failure to act leave the question of how best to address the privacy and competition implications of this deal to others.

⁵⁵ Facebook Business Solutions, Beacon, <http://www.facebook.com/business/?beacon>.

⁵⁶ Mark Zuckerberg, The Facebook Blog, <http://blog.facebook.com/blog.php?post=7584397130>