

October 26, 2007

Representative José Serrano, Chair
Subcommittee on Financial Services and General Government
Committee on Appropriations
Room B-300 Rayburn House Office Building
Washington, DC 20515

Representative Ralph Regula, Ranking Member
Subcommittee on Financial Services and General Government
Committee on Appropriations
Room B-300 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Serrano and Ranking Member Regula,

We are writing to you regarding the investigation into the proposed Google-DoubleClick merger now pending at the Federal Trade Commission. Committee staff contacted us earlier this year regarding the ability of the Commission to address consumer privacy issues. At the time, the Subcommittee was considering the annual appropriation for the FTC.

We are writing to you now to provide a brief summary of the status of the merger review and to urge you and other Committee Members responsible for the funding of the Federal Trade Commission to pay close attention to how the FTC resolves the merger review. 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.

Unless the Commission establishes substantial privacy safeguards by means of a consent decree, Google's proposed acquisition of Doubleclick should be blocked.¹ Moreover, we believe that the case has been clearly made to the Commission, and that if the FTC fails to act it will place the privacy interests of American consumers at grave risk.

¹ 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) [hereinafter "April 20, 2007 Complaint to FTC"], available at http://www.epic.org/privacy/ftc/google/epic_complaint.pdf.

The Privacy Objection to the 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 proposed merger of the Internet's largest search company and the Internet's largest advertising company posed a unique and substantial threat to the privacy interests of Internet users around the globe. 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. We urged the Commission to either block the deal or impose substantial conditions that would safeguard privacy as condition of the merger. We wrote:

This complaint concerns the impact on consumer privacy of Internet advertising practices and the specific issues that arise in the proposed acquisition of DoubleClick, Inc. by Google, Inc. As set forth in detail below, the increasing collection of personal information of Internet users by Internet advertisers poses far-reaching privacy concerns that the Commission should address. Neither Google nor DoubleClick have taken adequate steps to safeguard the personal data that is collected.²

EPIC's 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.³ 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.

As we concluded in our initial complaint:

Google's proposed acquisition of DoubleClick will give one company access to more information about the Internet activities of consumers than any other company in the world. Moreover, Google will operate with virtually no legal obligation to ensure the privacy, security, and accuracy of the personal data that it collects. At this time, there is simply no consumer privacy issue more pressing for the Commission to consider than Google's plan to combine the search histories and web site visit records of Internet user.⁴

² *Id.* at 1.

³ See 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; 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; Letter from Chris Jay Hoofnagle, Assoc. Dir. EPIC, to Fed. Trade Comm'n (Dec. 16, 2004), available at <http://www.epic.org/privacy/choicepoint/fcaltr12.16.04.html>.

⁴ April 20, 2007 Complaint to FTC at 10, *supra* note 1.

In the initial complaint and subsequent filings, we set out the case against the merger and proposed 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.⁵

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, we 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 Deborah Platt 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.”⁶

Also, 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 and recommending that the merger be halted pending the establishment of meaningful privacy safeguards. 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.”⁷

Senate Hearing on the Google-Doubleclick Merger: “The Risks for Competition and Privacy”

The Senate recently held a hearing to examine the implication of the Google-Doubleclick merger. At the Senate hearing, Herbert Kohl, Chairman of the Judiciary Committee’s Subcommittee on Antitrust, Competition Policy & Consumer Rights, stated:

⁵ For the complaint, its supplements, and more detail about the proposed merger, *see* EPIC, Privacy? Proposed Google/DoubleClick Deal, <http://www.epic.org/privacy/ftc/google/>.

⁶ 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>.

⁷ 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>.

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. (emphasis added)⁸

At the same hearing, Ranking Member Senator Orrin Hatch also expressed concern about privacy. He said, "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 advertisements, whether it's a text or display ad, there's a strong possibility that personal information is being collected and stored."⁹

Senator Patrick Leahy, Chairman of the Judiciary Committee, stated:

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.¹⁰

⁸ The Honorable Herbert Kohl, Chairman, S. Subcomm. on Antitrust, Competition Policy & Consumer Rights, *Statement at a Hearing on "An Examination of the Google-DoubleClick Merger and the Online Advertising Industry: What Are the Risks for Competition and Privacy?" Before the Subcomm. on Antitrust, Competition Policy & Consumer Rights of the S. Comm. on the Judiciary*, 110th Cong. (Sept. 27, 2007), available at http://judiciary.senate.gov/member_statement.cfm?id=2955&wit_id=470.

⁹ The Honorable Orrin Hatch, Ranking Member, S. Subcomm. on Antitrust, Competition Policy & Consumer Rights, *Statement at a Hearing on "An Examination of the Google-DoubleClick Merger and the Online Advertising Industry: What Are the Risks for Competition and Privacy?" Before the Subcomm. on Antitrust, Competition Policy & Consumer Rights of the S. Comm. on the Judiciary*, 110th Cong. (Sept. 27, 2007), available at http://hatch.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=1915&Month=9&Year=2007.

¹⁰ The Honorable Patrick J. Leahy, Chairman, S. Judiciary Comm., *Statement at a Hearing on "An Examination of the Google-DoubleClick Merger and the Online Advertising Industry: What Are the Risks for Competition and Privacy?" Before the Subcomm. on Antitrust, Competition*

The Google-DoubleClick merger review is the single greatest test of the FTC's ability to safeguard consumer privacy in the Commission's history. While there may be a range of views as to which specific measures the Commission should require, there could not at this point be a debate as to whether the FTC has authority to act in this matter.¹¹

If the FTC fails to establish meaningful privacy safeguards as a condition of the merger, we believe there should be a comprehensive investigation of the factors that led to the FTC's decision. Of course, we hope that will not be necessary and that the Commission will be able to report to you favorably at the next appropriations hearing on the steps it took to safeguard consumer privacy in the context of the proposed Google-DoubleClick merger.

Thank you for your attention to this issue. We would be pleased to provide any other information the Committee may require.

Sincerely,

Marc Rotenberg
EPIC Executive Director

Melissa Ngo
EPIC Senior Counsel

CC: Chairman David Obey, House Committee on Appropriations
Ranking Member Jerry Lewis, House Committee on Appropriations

Chairman John D. Dingell, House Committee on Energy and Commerce
Ranking Member Joe Barton, House Committee on Energy and Commerce

Chairman Deborah Majoras, Federal Trade Commission
Commissioner Pamela Jones Harbour, Federal Trade Commission
Commissioner William E. Kovacic, Federal Trade Commission
Commissioner Jon Leibowitz, Federal Trade Commission
Commissioner J. Thomas Rosch, Federal Trade Commission

Policy & Consumer Rights of the S. Comm. on the Judiciary, 110th Cong. (Sept. 27, 2007), available at http://judiciary.senate.gov/member_statement.cfm?id=2955&wit_id=2629.

¹¹ See, e.g., Peter Swire, *Protecting Consumers: Privacy Matters in Antitrust Analysis*, Oct. 19, 2007, available at <http://www.americanprogress.org/issues/2007/10/privacy.html> (“Where mergers or dominant firm behavior create significant effects on customers, including in their use of customer data, then those effects should be considered under antitrust law.”).