CONCURRING STATEMENT OF COMMISSIONER JON LEIBOWITZ

Google/DoubleClick

FTC File No. 071-0170

I join the Commission statement but write separately to note both the serious vertical competition issues raised by Google's proposed acquisition of DoubleClick as well as the substantial privacy issues that, though in part brought to light by the deal, clearly transcend it. Ultimately, reasonable people – and Commissioners – may disagree about whether to approve this merger, but most everyone should agree that consumer privacy needs to be better protected in the online behavioral marketing arena.

First, the majority's view of this transaction – that it does not threaten to substantially lessen competition – is based on a number of factual and legal determinations, some easy and some quite difficult. In particular, the merger presents complex questions about whether it facilitates potentially anticompetitive vertical behavior by Google. It is well known that Google is the dominant search engine today. But Google is also the leading firm in the ad intermediation market.[1] Further, the DoubleClick publisher's tool that Google is acquiring as part of this transaction is the largest competitor in the market for publisher's side ad serving. That product, DART for Publishers, is used by many of the foremost publishers on the web today to, among other things, help choose which ads will go on their websites. A number of Google's rivals in the marketplace have described potential strategies by which Google could, if it wanted, use its position as the owner of this tool to unfairly advantage Google's own AdSense product to the detriment of other ad intermediation firms. Some have complained that Google might use its ownership of DART to "rig" the competition between ad intermediation firms by secretly ensuring that its own AdSense ads are placed more often than they should be, or to tie its products in an anticompetitive manner. Each of these strategies, given Google's existing market power, presents serious competitive concerns.

Staff's investigation concludes that the danger of anticompetitive vertical behavior resulting from this merger is low. My staff and I independently spoke with publishers and advertisers potentially affected by this deal and, somewhat surprisingly, they raised few anticompetitive concerns. In fact, many seem unruffled by the alternatives in the post-merger market. This could be because publishers don't yet fully understand the still nascent Internet advertising market. It's at least as likely, though, that publishers believe that they will be able to switch to other ad serving firms if they need to or, perhaps, that they believe the merger will allow Google to provide greater value to its customers.[2]

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[1] Of course, as the majority statement notes, that market is highly competitive and Google's share in that market is low relative both to its share of search and to DoubleClick's DART for Publishers' share of its market.

[2] One common complaint from less well-versed opponents of this deal is that it would make Google such a formidable competitor that all the other firms in the industry would be unable to compete, which, of course, is not generally a valid reason to block a merger under our antitrust laws.

I am frankly reluctant to condition a merger (or to vote to block a deal) for conduct that *might* take place afterwards, especially without substantial anxiety from the parties potentially disadvantaged – that is, the Internet publishers and advertisers – and especially in such a dynamic industry where competitors would not be under the same impediments.

However, given the market share of DART for Publishers as well as the potential network effects in this industry, we do need to remain focused on this market. If it appears that a combined Google/DoubleClick abuses its position to dominate the market for ad intermediation, we certainly would have the authority – and, indeed, the obligation – to investigate and prohibit that conduct.

Second, notwithstanding the Commission's decision to approve the merger, we still need to address the fundamental issues of consumer privacy and data security raised by online behavioral advertising, which go well beyond the two companies involved in this acquisition. As the Internet has evolved, online tracking and ad targeting have become more sophisticated, more pervasive, and more granular. At the FTC Town Hall Meeting on behavioral marketing last month, much of the discussion focused on how the Internet, computerized data collection, and targeted advertising are creeping into nearly every aspect of our social and commercial transactions – our searching, browsing, networking, emailing, and telephoning. Most of us recognize that many of our online services, information, and entertainment are free due in large part to advertising (whether targeted or not) and that tailored marketing can bring a richer Internet experience to some consumers. Still, 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.

In my view, the Commission should consider how to address these privacy issues across industries and from multiple perspectives. The proposed Self-Regulatory Principles that FTC staff announced today are a very useful first step to move the discussion forward – but certainly not the last word. We surely need further information and comment to more fully develop an appropriate privacy protocol. More and better empirical data is vital to the effort to develop governing principles and best practices for behavioral marketing, as well as to learn which practices are so egregious as to be deemed "unfair or deceptive" and subject to enforcement action by the Commission. Simply put, industry participants must stop being coy and start being more forthcoming about their practices, the consumer information they collect, and how they use it.[3]

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[3] If we do not obtain the information we need to put some meat on the proposed self-regulatory framework, the Commission should consider using its subpoena authority under Section 6(b) of the FTC Act to compel companies to produce data about their online practices. At the FTC's November Town Hall meeting, for example, questions were raised about whether companies could, would, or actually do combine online data with offline data for marketing purposes. One panelist stated that she recently had

Agreement with the proposed basic behavioral advertising principles should be beyond dispute: (1) transparency and consumer control over tracking and targeting; (2) reasonable data security and limited data retention; (3) affirmative consent for material changes to existing privacy policies; and (4) affirmative consent to use certain sensitive data for ad targeting. But even the best principles will be empty promises unless coupled with effective implementation: Will industry be willing and able to develop short, conspicuous, and intelligible notices so that consumers can make informed choices about online tracking and targeted advertising? Will consumers be willing and able to effectively exercise their choices? And, other questions remain: Should consumers have the right to see and delete information collected online? Should they have the right to prohibit secondary transfers of data?

Perhaps the best solution for consumers is a change in the widespread opt-out default for ad-serving cookies and other tracking mechanisms to an opt-in default to allow consumers affirmatively to consent – especially when it comes to sharing consumer information with third parties and sharing it across various web-based services. Opt-in may not be the only answer, but in my view, it seems to strike the better balance between companies' marketing interests and consumers' privacy needs.[4]

Ultimately, if the online industry does not adequately address consumer privacy through self-regulatory approaches, it may well risk a far greater response from government. To be sure, the World Wide Web remains an awe-inspiring universe for experimentation and exploration and, certainly, advertising is integral to expanding the Internet frontier. We just need to ensure that consumer privacy isn't trampled in the race to mine data.

One final point: although many of us inside and outside the Commission have different views about the Google/DoubleClick merger, all of us should recognize Commission staff's excellent work in reviewing this complicated deal in a complex industry, and working through our proposed self-regulatory privacy principles. We thank them for their efforts.

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browsed a website (without providing any personal information) and, later that day, received a text message from that company on her mobile telephone. Yet despite a roomful of industry experts and marketers – apparently including a representative of the website in question (the website was not identified at the Town Hall) – there was no resolution as to how this "coincidence" could have occurred.

[4] Consumers often let inertia guide them and accept a "default" option. For instance, participation rates in 401(k) plans rise sharply when the default choice for the employee is switched to an opt-out from an opt-in. Eduardo Porter, *Choice is Good. Yes, No or Maybe?,* N.Y. Times, Mar. 27, 2005.