

Statement of Marc Rotenberg (EPIC)
Regarding the Majority Opinion of the Federal Trade Commission
in Proposed Acquisition of Doubleclick

December 20, 2007

The issue before the Federal Trade Commission was whether to permit the merger of Google and Doubleclick, or whether to take action, such as to seek a consent order, or to block the merger outright. A majority of Commissioners has concluded that this merger may go forward without condition. EPIC believes that the Commission has failed to fulfill its obligations to the public.

It is clear that this review is unlike previous mergers that the Commission has considered. The FTC sought to understand the impact on competition of two innovative firms in a rapidly transforming market sector. As several commentators have noted, in such markets it may be best for the Commission to take no action because innovation will lead to the emergence of new competitors and the risks of monopoly control and anti-competitive practices will be effectively addressed.

But the competition at issue here is not simply the development of a product or a service, it concerns the techniques that are used to collect information on American consumers in the Internet advertising industry, whether by text-based advertising, display-based advertising or some combination of the two.

Further, unlike typical merger reviews where the Commission may assume that the market analysis of suppliers and consumers captures all of the relevant parties, the market for Internet-based advertising is different. These companies target individual consumers based on their interests, their activities, even their personal behaviors. 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 consumer whose data is gathered, there is no choice. The market relationship exists between the advertiser and the publisher. It does not include the consumer.

In such circumstances, the market failure is evident and the Commission has a responsibility to address the problem. Moreover, it is not only advocates for consumers and Internet users, such as EPIC and CDD, which have raised these concerns. Leading Senators of both parties urged the Commission to address the privacy implications of the merger, as did senior Members in the House of Representatives, the New York Consumer Protection Board, and others.

But a 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.

Such a narrow view of the Commission's authority fails to recognize both the origins of the Federal Trade Commission as well as the recent work by the Commission to address the specific threats to American consumers that result from the growing computerization and commodification of personal data.

The Federal Trade Commission Act sought to address the growing concentration of private power that shaped the American economy. The antitrust law that resulted was intended to encourage vigorous competition for the larger purpose of protecting the public interest. Competition was the means, not the goal. As Senator Kohl said recently, "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."

Moreover, in the last several years, the Commission has become increasingly aware of the new risks to American consumers. The FTC's annual surveys repeatedly find that identity theft is the number one concern of American consumers. But consumers have little understanding of how their personal information is collected, how it is used, or what they might do when problems arise. The reality is that the gap between the risks to consumer privacy and the protections for consumer privacy is growing.

The FTC has taken some innovative steps in the past to address this challenge. In 2002, the Commission imposed conditions on Microsoft when it proposed to establish a single sign-on service for the Internet that had implications not only for privacy and security, but also for competition. Although the Microsoft Passport was not a merger review it was undertaken pursuant to the Commission's Section 5 authority, which EPIC and CDD repeatedly argued could be applied here.

So, there is no reason, with the long history of the FTC Act and the authority of Section 5, when the privacy issue is squarely before the Commission, and the parties to this review have both stated publicly their support for consumer protection, that the Commission could not make privacy protection, in some form, a condition of this merger.

Simply stated, the Commission had reason to act and authority to act, and failed to do so.

EPIC is surprised by the outcome, particularly following the Second Request that occurred earlier in this merger review. The Chairman herself had said that in "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 a transaction would violate the antitrust laws." What happened between the time of that decision to pursue a Second Request and the decision reached today that produced a merger outcome without any conditions?

We remain troubled by the role of the Jones Day law firm in this proceeding. The ties between the Federal Trade Commission and the Washington office of Jones Day are everywhere apparent, even leading up to the recent hiring by Jones Day of key Commission staff while the merger review was taking place. This should be investigated.

EPIC has submitted a series of expedited Freedom of Information Act requests to the FTC regarding the Commission's review of the merger and we plan to pursue these requests vigorously. We will also bring this matter to the appropriate Congressional oversight committees that are responsible for the agency's funding and statutory authority.

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.

The Federal Trade Commission is a public agency funded by taxpayer dollars. Its sole purpose is to protect the public interest. It failed to do so today in a case that will have far-reaching implications for the Internet economy and the privacy rights of American consumers.