# Federal Trade Commission

**Online Advertising: A Look back at Google - DoubleClick**

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The Internet is arguably the most important mediums of information and communication in the world today. It has transformed the way we do business, learn about the world, communicate with one another, and even the way politicians run for office. One reason for its popularity is that the vast majority of the content is free to anyone with an Internet connection. How is this possible? In a word, advertising. Advertisers collectively spend billions of dollars on online ad campaigns each year and those numbers are only projected to grow in coming years. Advertisers are not simply interested in access to the online audience. Online advertising is particularly appealing because online ads allow advertisers to not only target potential customers with greater accuracy than traditional media but it can also lead to *immediate* sales.

There have been some big changes in the competitive landscape as Google, Microsoft, Yahoo! and AOL sought to strengthen their positions through acquisitions in the last 18 months. It all started with a bidding war for DoubleClick in early 2007 – a war won by Google in April 2007. Within a month of that announcement, Microsoft, Yahoo! and AOL all announced their own transactions to respond to the Google deal. These early deals were largely non-horizontal –

[1] The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisors Holly Vedova and Kyle Andeer for their invaluable assistance in preparing this paper.

that is the firms did not compete head-to-head in the same market.

Yet the deal-making was only just getting started. Microsoft took its long-rumored interest in Yahoo! public in early 2008 when it announced an unsolicited $45 billion offer for Yahoo! Yahoo! successfully rebuffed Microsoft's advances and it subsequently announced an advertising agreement with Google. The terms of that agreement are currently being reviewed by the Justice Department and the European Commission. And as recently as last month, the press reported that Yahoo! was talking with AOL about a possible acquisition – which in turn led to speculation about Microsoft renewing its efforts to acquire a combined Yahoo-AOL. In short, the last eighteen months have been a whirlwind and the dust has yet to settle.

What I would like to do is take a step back and focus on the Google/DoubleClick merger. The FTC reviewed the deal for nearly eight months and I spent a great deal of my own time analyzing the transaction. I had some concerns about that transaction but I ultimately voted to close the investigation. However, it was a very close call for me. It was an interesting investigation in a number of ways and I thought I would share my thoughts on some of the competition and consumer protection issues raised by the acquisition.

## I. Background

Google and DoubleClick were not significant head-to-head competitors at the time of their transaction, and Google publicly argued the acquisition would allow it to access new markets and new technology. Google's core strength is in its popular search engine, a strength it has monetized through advertising. So for example, say I typed in Athens and hotel into Google, Google would not only provide me with results that met those search terms but it may also serve advertisements for hotels in Athens and other ads that are keyed off those search terms. Athenian hotels and other advertisers interested in potential travelers to Athens would buy

advertising space on Google's homepage to market their products. These advertisements are often referred to as "sponsored search" ads. Microsoft, Yahoo! and other search engines sell advertising space on their search pages. However, advertisers value Google's search engine because the size of its audience is so much larger than its competitors. So while its search engine share is large, Google's share of "sponsored search" advertising dollars is even larger.

But advertising on search engines like Google, Microsoft, and Yahoo! is only one piece of the online advertising market. The other piece is the advertising opportunities presented by the hundreds of thousands of other websites. For example, in addition to advertising on Google's home page, an Athenian hotel may also be interested in advertising on an online travel magazine or other publishers that cover travel to Greece. The look and feel of these ads is very different from the advertising you see on the search engines. The ads on most websites are generally referred to as "display" ads and may include colorful graphics, video and interactive features. (as opposed to the "text" ads on search engines). In many ways, these ads are more similar to those you see in traditional print and television media.

The Commission concluded that these non-search, or "display ads" were highly differentiated from "sponsored search" ads (i.e., the ads sold on search engines like Google). Advertisers use the two types of advertising differently – generally speaking, sponsored search ads are used in direct response advertising campaigns and the "display" advertising on non-search sites are used in brand ad campaigns. Furthermore, the evidence suggested that the two types of ads were sold differently and it did not appear that the ads constrained each other's pricing.

I should note that this is a distinction that bears directly on the antitrust merits of the agreement between Google and Yahoo! that is under review at the Department of Justice. Both

Google and Yahoo! sell sponsored search ads, and they have entered into an agreement under which Google will supply Yahoo! with Google search advertising for the next ten years. The Google/Yahoo! agreement is that it is non-exclusive, meaning Yahoo! can still act on its own. As I understand it, one question is whether Yahoo! will still have incentive to compete after the agreement, or whether it will result in Yahoo! essentially exiting the sponsored search market.

The large online publishers – be they TimeWarner or Disney – sell advertising space directly to advertisers. However, direct sales represents only a small percentage of the total available inventory on the internet. Even the largest publishers cannot sell all of their inventory through their own salespeople. And the tens of thousands of smaller online publishers cannot afford to employ their own sales teams. In the hands of the individual publisher the inventory is practically worthless, but it is worth more if packaged with the excess inventory of other publishers. A number of firms have developed businesses that aggregate unused advertising inventory and then sell that inventory in bundles to advertisers.[2] These firms are middleman and generally charge a percentage or commission off each sale.

Google, and to a much lesser extent DoubleClick, both participated in this "ad intermediation" market. At the time of the transaction, Google had developed a leading position in this market with its AdSense business. Google's strength was in partnering with smaller online publishers. The ads themselves would have similar look and feel to Google's search ads –

[2] This aggregation and wholesaling of unsold online advertising inventory is often referred to as "ad intermediation." Some simply repackage the inventory and sell it in general bundles. Other firms will take the inventory and bundle into specific categories – so for example, they will buy unused inventory from a number of different online publishers focused on professional football and then turnaround and sell that bundle of space to advertisers interested in marketing to football enthusiasts.

they were generally text ads.[3] Google had not been very successful in wooing large online publishers for a variety of reasons. Indeed, DoubleClick's relationships with many of these large online publishers appeared to be a driver behind the transaction. On the other hand, DoubleClick was at the very early stages of developing its own intermediation business in 2007 to take advantage of this opportunity. However, the buying and selling of advertising was not at the core of DoubleClick's business.

DoubleClick's strength was in its software tools that are used by online publishers (content providers) and advertisers alike to accurately and reliably serve ads. It had also developed complementary software products – for example software that allowed customers to track the success of particular ad campaigns. We referred to this as the "ad server" market. DoubleClick was the undisputed market leader. Its tools and services were widely used and its relationships were long-lasting, particularly with the larger publishers. At the time of the transaction, Google was beta testing its own "ad server" technology and was poised to enter this "market." There were a number of other independent "ad server" firms in the market as well. However, the transactions of the last year transformed this market as Google, Microsoft, Yahoo! and AOL all acquired "ad server" technology and the impact of these transactions is still shaking itself out.

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[3] AdSense serves text "Ads by Google" into unused web space (typically at the bottom of a web page). Those ads are related to the content of the page pulled up via Google's search technology that determines which ads would be relevant. The ads are delivered to a web page using technology that scans the text of a web page for key words and delivers ads to the page. These ads are sometimes referred to as "contextual" ads. They are usually visually less appealing than display ads placed by a publisher's direct sales force that have a lot of graphics, color, and video; as a result, contextual ads are usually placed in what is considered non-premium ad inventory, usually at the bottom of a web page. Like sponsored search ads, contextual ads are paid for on a cost-per-click basis.

## II. Competition Issues: Focus on the Non-Horizontal Theories of Harm

My presentation of the facts, by necessity, is over-simplified and I have glossed over a number of nuances. But the gist is that at the time of the transaction Google was a buyer and seller of online advertising and DoubleClick was a service provider to online publishers and advertisers alike. Yes, there was some competition at the margins – DoubleClick was weighing entry into the "ad intermediation" market and Google's entry into the ad server market would have had an impact. I, for one, however concluded that these horizontal issues did not support a challenge.[4] For me, the competition issues were in the non-horizontal aspects of this deal. It essentially boiled down to whether Google would be able to leverage DoubleClick's position in the ad-server market to foreclose its competitors in the ad intermediation market through a variety of different strategies.

The Commission looked at the possibility that Google could bundle DoubleClick's ad serving technology with its ad intermediation product, AdSense, to force publishers to use AdSense. The Commission also examined whether Google could manipulate the DoubleClick software to steer publishers to AdSense. Finally, the Commission looked at whether Google could gain access to competitively sensitive information that it could use to its advantage in the ad intermediation market.

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[4] The Commission did analyze whether Google was a potential competitor in the ad-server market. It concluded that Google's entry was unlikely to have a significant pro-competitive effect because the third-party ad serving markets were competitive. The recent acquisitions by large firms of existing third-party ad servers is likely to make the market even more competitive. There was also no evidence that Google's product was uniquely positioned to have a substantial effect on the third-party ad serving markets. As for DoubleClick's development of an "ad intermediation" business, we concluded that it was unlikely that DoubleClick's entry would have a significant effect. DoubleClick was not uniquely positioned to significantly enhance competition in the market.

The Commission ultimately concluded that a leveraging theory could not support a challenge in this case largely because DoubleClick lacked market power despite its high market share. An attempt by Google to steer DoubleClick's customers to AdSense would most likely be defeated by customers switching to one of the other third-party ad serving products.[5] Some argued that it might be difficult for online publishers and advertisers to switch away from DoubleClick because of high switching costs. However, the evidence did not support this argument. For example, there was evidence that some customers who for whatever reason didn't want to do business with Google had already switched away from DoubleClick's ad server to a competing ad server.

The Commission also closely analyzed whether the ad intermediation market would "tip" to Google as a result of the merger. As I mentioned earlier, Google enjoyed a leading position in that market. It also appeared that the acquisition of DoubleClick would also enhance Google's relationships with the larger online publishers. While it was unlikely that Google would be able to steer those publishers to AdSense, it was arguable that some of those publishers might begin to use Google to sell their excess advertising. Arguably, Google would look more attractive to those publishers with the DoubleClick technology and the ability to reliably and accurately serve

[5] The evidence showed that publishers placed an extremely high value on DoubleClick's neutrality and would reject a product that compelled them to use AdSense exclusively. Furthermore, the evidence revealed that it was the publishers who set the ad server parameters by which remnant inventory is filled, and publishers pay close attention to that control. Publishers continuously review those parameters to ensure that they are monetizing their inventory appropriately. The evidence showed that publishers would be able to detect any manipulation of their third-party ad server. Google would also stand to lose a lot of customer goodwill if it were caught biasing DoubleClick's neutral DFP software, and that negative exposure could spill over into its core search engine product. DoubleClick's lack of market power here was also relevant, and most publishers were not concerned about Google manipulating the DoubleClick's software.

display ads. The question in my mind was whether Google's acquisition would drive enough additional inventory to Google so that the market would "tip" to it and publishers would have no choice but to work with Google.

The underlying assumption was that the ad intermediation market was characterized by network effects. The theory would be that Google would have the largest amount of remnant advertising space post-merger, and therefore the greatest ability to target that space for advertisers. Google would then be more attractive to advertisers, and in turn more attractive to publishers. In the end, I think the theory was sound but the facts simply did not support it in my opinion. There was insufficient evidence that the ad intermediation market was likely to "tip" to Google.

Another factor in my decision to close the investigation was the fact that Microsoft, Yahoo!, and AOL had all moved aggressively to respond to Google's acquisition of DoubleClick. I believed it was likely that these firms were in a good position to compete with Google – or at least I couldn't ignore that possibility.

The EC also investigated Google's DoubleClick acquisition and came to similar conclusions as the FTC. It looked to whether the two firms competed in the same market, and also examined the potential effects of any non-horizontal relationships. In March of this year, the EC closed its investigation, finding that "Google and DoubleClick were not exerting major competitive constraints on each other's activities and could, therefore, not be considered as competitors at the moment. Even if DoubleClick could become an effective competitor in online intermediation services, it is likely that other competitors would continue to exert sufficient

competitive pressure after the merger."[6]

## II. Privacy Concerns

In many ways the traditional competition theories were not the headliner in this case. Much of the public debate focused on the privacy concerns posed by the acquisition. The two companies' access to, and collection of, online consumer behavior prompted complaints and concerns about privacy.[7] Let me make one point at the outset. The Commission's Majority statement makes clear – and I personally feel very strongly – that the Commission's statutory mandate in merger reviews is confined solely to issues affecting competition.[8] As a result, we examined the privacy concerns only to the extent that they could adversely affect competition. I should note that the EC came to a similar conclusion when it stated that it did not have jurisdiction under its merger law to address privacy concerns.[9] That being said, I do think that the investigation highlighted some important policy questions.

The trend in online advertising is towards greater use of "behavioral advertising" – that is

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[6] EC Press Release dated 11/03/2008, Mergers: Commission Clears Proposed Acquisition of DoubleClick by Google, *available at:* <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/426>.

[7] See, e.g., Statement of The Honorable Herbert Kohl, United States Senator, Wisconsin, Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy, and Consumer Rights, An Examination of the Google-DoubleClick Merger and Online Advertising Industry: What are the Risks for Competition and Privacy, Washington, D.C., September 27, 2007, *available at:* <http://judiciary.senate.gov/member_statement.cfm?id=2955&wit_id=470>; Complaint and Request for Injunction, Request for Investigation and for Other Relief, in the Matter of Google, Inc. and DoubleClick, Inc., before the Federal Trade Commission (Apr. 20, 2007), *available at:* <http://www.democraticmedia.org/files/google_complaint.pdf>.

[8] Statement of the Federal Trade Commission concerning Google/DoubleClick, FTC File No. 071-0170 (Dec. 20, 2007), *available at:* <http://www.ftc.gov/os/caselist/0710170/071220statement.pdf>.

[9] *Id.*

the targeting of ads to consumers who are most likely to be interested in those ads. However, effective targeting means the advertiser needs to be able to know something about the audience on the web. This has led advertisers and publishers alike to develop technology that allows them to track consumer's activities online – such as through the search terms used, the web pages visited, and the content viewed. This information allows them to deliver ads targeted to the individual consumer's interests. Yet there is a trade-off. On the one hand, advertisers will pay more money to publishers for this sort of advertising which in turn creates the benefit of free online content. On the other hand, the tracking of consumers online could be viewed as an invasion of privacy. It was argued that Google and DoubleClick would have unmatched access to consumer data.

While I was not convinced that the merger posed a significant risk to consumer privacy, it did raise some important issues. That's why I supported the release of a set of proposed principles concurrently with the close of the Google investigation. It was our hope that those principles could serve as a model for industry-wide, self regulatory standards governing online behavioral advertising.[10] The proposed principles make four main points.

First, in order to increase transparency and enable consumer choice, "every Web site where data is collected for behavioral advertising should provide a clear, consumer-friendly, and prominent statement that data is being collected to provide ads targeted to the consumer and give consumers the ability to choose whether or not to have their information collected for such purpose."

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[10] FTC Staff Principles, Behavioral Advertising, Moving the Discussion Forward to Possible Self-Regulatory Principles, released December 20, 2007, *available at:* <http://www.ftc.gov/opa/2007/12/principles.shtm>.

Second, to address concerns that data collected for behavioral advertising may find its way into the wrong hands, web sites should take reasonable steps to secure the data, and the data should be retained only as long as is necessary for them to fulfill a legitimate business or law enforcement need.

Third, companies should obtain affirmative express consent from affected consumers before using data in a manner materially different from promises the company made when it collected the data.

Fourth, to address the concern that sensitive data – for example, information about health conditions – may be used in behavioral advertising, sensitive data should only be collected if companies obtain affirmative express consent from the consumer to receive such advertising.

The staff statement accompanying the set of principles also points out that any choice by consumers not to participate in behavioral advertising could reduce the availability of free web content and other benefits; accordingly, staff also sought comment on the costs and benefits of offering choice for behavioral advertising.[11] I think this is an important initiative, and at this point I think self-regulation is probably the way to go.[12]

Let me just briefly address a few points related to the these proposed principles. The first principle does not address how web sites that collect data for behavioral advertising should give

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[11] *See* <http://www.ftc.gov/os/comments/behavioraladprinciples/index.shtm>.

[12] I have elsewhere said that industry self-regulation plays a unique role by complementing federal law enforcement framework by providing consumers with more information and protection than the FTC might be able to offer under the same circumstances. Remarks by Commissioner J. Thomas Rosch, Self-Regulation and Consumer Protection: A Complement to Federal Law Enforcement, the NAD Annual Conference 2008, New York, NY, September 23, 2008, *available at:* <http://www.ftc.gov/speeches/rosch/080923Rosch-NADSpeech.pdf>.

consumers the ability to choose their preferences as to whether or not to have their information collected. There are at least two ways to give consumers this choice – consumers can be required to either "opt-in" or "opt-out" of data collection. Opt-in requirements can be very effective in achieving a desired level of protection for consumers, because the default provides consumers the maximum protection – they are not exposed if they do nothing. Opt-out requirements, on the other hand, may not be quite as effective in providing consumers a desired level of protection, because consumers have to affirmatively take action, and many may choose not to – either because they don't want to take the time to do so, they don't understand the request, or they don't even see it, or a combination of these and other factors. I think that opt-in requirements make sense when the consumer interest at stake is very high, but when the consumer interest at stake, while important, has other countervailing factors to be weighed, an opt-in requirement may be too stringent. An opt-out requirement may work better in those situations.

I question whether an opt-in requirement would ultimately provide benefit to consumers in the behavioral advertising context. The overall benefits of behavioral advertising arguably outweigh the potential harm to privacy that could result from behavioral advertising *provided* that web sites at least provide consumers the ability to opt-out. Consumers who feel strong enough about the privacy issues at stake would have the ability to opt-out. It is crucial that consumers be effectively educated on precisely what behavioral advertising is, and how it impacts their Internet use. That is one thing that the Commission can effectively do, and is what the Commission has been trying to do by holding various workshops and town hall meetings.[13]

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[13] AT&T and Verizon recently pledged to refrain from tracking customer Web behavior unless those customers "opt-in." *See* AT&T, Verizon to Refrain From Tracking Users

## III. Conclusion

Although the Google/DoubleClick merger review was a close one for me personally, in the end I felt that Google would, if anything, be able to improve its service offering through acquiring DoubleClick, and I didn't see that harming competition. There was also evidence that the other large vertically integrated firms in this industry were not willing to give up the industry to Google. In other words, the merger spurred on these other firms to compete even harder.

Let me also add, however, that in newly-evolving dynamic industries, especially those in the high-tech area, the risks of both false positives *and* false negatives are higher than usual. Overenforcement (false positives) could have a particularly strong chilling effect on innovation, and in an evolving high-tech industry, innovation is what it is all about. There is no way to replace innovation that has been snuffed out before it catches fire. High-tech industries need to be able to grow and evolve on their own terms, and competition among players is what spurs the development on. On the other hand, underenforcement (false negatives) may enable dynamic markets to "tip" irreversibly, impairing future competition.

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Online, Washingtonpost.com, September 26, 2008, *available at:* <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/25/AR2008092504135.html>. However, Google, Microsoft, and other Web companies have argued in favor of the "opt-out" model, stating that this will give consumers sufficient control over whether their activities are tracked. *Id.* Google, Microsoft and other Web companies have also argued that forcing users to "opt-in" could wreck the Internet economy because so much of it is supported by advertising, and if consumers are given a choice, they probably would not go to the trouble to opt-in to tracking. *Id.*