

Testimony of

Marc Rotenberg

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Testimony and Statement for the Record of
Marc Rotenberg
President, EPIC
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Industry: What are the Risks for Competition and Privacy?"
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Chairman Kohl, Senator Hatch, and Members of the Subcommittee, thank you for the opportunity to testify today on the proposed Google-DoubleClick Merger. My name is Marc Rotenberg and I am Executive Director of the Electronic Privacy Information Center. EPIC is a non-partisan research organization based in Washington, D.C. Founded in 1994 to focus public attention on emerging privacy and civil liberties issues. 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.¹

Today, I will provide a brief background on the FTC's previous actions concerning Internet privacy, the complaint that EPIC filed earlier this year to block the merger of Google and Doubleclick, and the developments since the filing of our initial complaint. It is our view that unless the Commission establishes substantial privacy safeguards by means of a consent decree, Google's proposed acquisition of Doubleclick should be blocked.

Attached to my statement is a comprehensive overview of the matter now pending before the FTC.² I ask that it be included in the hearing record.

The EPIC Complaint Regarding the Proposed 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 merger of the Internet's largest search company and the Internet's largest advertising complaint posed a unique and substantial threat to the privacy interests of Internet users around the globe.³ 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 and that consumers would have no effective means to safeguard their privacy interests because of the lack of

transparency in the companies data practices. We urged the Commission to either block the deal or impose substantial conditions that would safeguard privacy.

Our 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. 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.

EPIC and the Original Doubleclick Complaint

EPIC's interest in the advertising practices of the online industry began in the late 1990s when a company called Doubleclick first began to sell targeted ads that could be displayed on Internet sites based on the editorial content of the site. Doubleclick made a point of saying that the company did not need to collect the personal information of Internet users; it was simply interested in mapping relevant advertising to interested users.

At the time, we expressed support for Doubleclick and its advertising model. We said it was the type of innovative service made possible by the Internet. We praised the company for its stand on privacy issues, and we specifically acknowledged its effort to make anonymity work for online commerce.

At the time, Doubleclick also included a description of its business practices and its regard for privacy and anonymity on its Web site and the Web sites of more than a thousand of its business partners. A person who was interested in the company's privacy practices could read the statement and act upon the data provided by the company.

So, when Doubleclick announced that it would acquire a large consumer database company called Abacus and merge the profiles of anonymous Internet users with the detailed profiles of identified users, we were surprised and disappointed. The company had collected personal information and built relationships of trust based on one set of privacy policies and then decided to change the rules. We filed a complaint at the Federal Trade Commission, alleging that the company had engaged in false and deceptive trade practices, and that the FTC had authority to act based on Section 5 of the Federal Trade Commission Act.⁴ It was the first time that the FTC had been asked to use its Section 5 authority to investigate a privacy complaint.

Doubleclick backed off the merger of Abacus. The CEO of Doubleclick said that 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."⁵ The Federal Trade Commission, in response to EPIC's complaint, required Doubleclick to adopt privacy standards for online advertising and also required Doubleclick to create an "opt-out" cookie that would note users who did not want to receive Doubleclick advertising.⁶

The FTC's involvement in the Doubleclick-Abacus case was significant and demonstrated that the Commission had authority under Section 5 to pursue privacy complaints in the context of a merger. However, the NAI Guidelines that were adopted were simply too weak and in the absence of meaningful enforcement have had little impact on the practices of the online advertising industry. We said at the time that the Commission should have established stronger safeguards.⁷

We also said that the technical measure recommended by the Commission - the opt-out cookie - made little sense because it required Internet users who did not want to

be tracked by Doubleclick to maintain a Doubleclick cookie on their computer that would tell the company not to target ads at the user. This was a nutty approach since Internet users who did not want to be targeted by Doubleclick would naturally want to remove the Doubleclick cookie. Doubleclick was saying in effect, "you need to keep reminding us that you don't want us to track you and if you remove our cookie, we'll start tracking you."

But over time, we became a little better at privacy complaints to the FTC and the Commission did a better job responding on matters concerning consumer privacy.

The Passport Case

In 2001, EPIC and 12 organizations submitted a complaint to the FTC, detailing serious privacy implications of Microsoft Windows XP and Microsoft Passport.⁸ The Passport complaint concerned an issue that is a hot topic in the online world today and that is identity management.

In our 2001 complaint we alleged that Microsoft, through its Passport sign-on system, "has engaged, and is engaging, in unfair and deceptive trade practices intended to profile, track, and monitor millions of Internet users," and that the company's collection and use of personal information violated Section 5 of the Federal Trade Commission Act.⁹ We expressed particular concern that Microsoft would become the sole gatekeeper for Internet access and we recommended that the development of multiple identity management systems that would respect privacy and promote innovation. Although the Passport case was not explicitly about a merger, the antitrust and competition implications were obvious.

In August 2002, the FTC announced a settlement requiring that Microsoft establish a comprehensive information security program for Passport, and prohibited any misrepresentation of its practices regarding information collection and usage.¹⁰

The FTC order in the Passport case was significant because the FTC did not uncover any security breaches, but acted nonetheless based on the potential for a security problem and privacy harms. This action demonstrated that the FTC has the authority to protect online privacy prospectively, and that the Commission will hold companies to a very high standard in their representations to consumers about privacy policies.

Since the FTC settlement of the EPIC complaint against Passport, industry groups have moved toward decentralized identity systems that are more robust, provide more security, and are better for privacy. Both Microsoft and the open source community now appear to agree that meta-identity systems are a better approach for identity management.¹¹ The Passport case demonstrates that effective action by the Commission will produce benefits for consumers and businesses and help spur innovation.

The Choicepoint Case

The third case concerned the specific privacy risks associated with the enormous aggregation of personal information held by one firm.

In December 2004, EPIC filed a complaint with the Federal Trade Commission against databroker Choicepoint, urging the Commission to investigate the compilation and sale of personal dossiers by data brokers such as Choicepoint.¹² Based on the EPIC complaint, in 2005, the FTC charged that Choicepoint did not have reasonable procedures to screen and verify prospective businesses for lawful purposes and as a result compromised the personal financial records of more than 163,000 customers in its

database.¹³

In January 2006, the FTC announced a settlement with Choicepoint, requiring the company to pay \$10 million in civil penalties and provide \$5 millions for consumer redress.¹⁴ It is the largest civil penalty in FTC history. The FTC also required Choicepoint to establish, implement, and maintain, "a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of the personal information it collects from or about consumers."¹⁵

My only regret about the Choicepoint case is that we did not act sooner. Identity theft and security breaches have become enormous problems in the United States, as the FTC has documented.¹⁶ Earlier action by the Commission might have significantly reduced the privacy risks American consumers now face.

The EPIC/CDD/PIRG Complaint Regarding the Google Acquisition

EPIC, the Center for Digital Democracy, and US PIRG have made a series of filings at the FTC regarding proposed Google-DoubleClick merger. In our original April 2007 complaint, we urged the Commission to investigate the ability of Google and Doubleclick to record, analyze, track, and profile the activities of Internet users and detailed significant privacy and antitrust problems in proposed merger.¹⁷ In our June supplement, we explained the need for the Commission to consider consumer privacy interests in the context of this merger review.¹⁸ The complaint provided additional evidence about Google and Doubleclick's business practices that fail to comply with generally accepted privacy safeguards.

In our most recent filing, we specifically addressed the proposal that Google made regarding a global privacy standard, based on the APEC Privacy Framework, the weakest international framework for privacy protection.¹⁹ APEC's framework focuses on the need to show harm to the consumer, but these guidelines were created prior to research into the cost to consumers of identity theft and security breaches. We also addressed Google approach to online privacy in a letter that appeared this week in the Financial Times.²⁰

The complaint and the supplemental filings are described in more detail in the attachment and are also available online.²¹

In the materials, we set out the case against the merger and propose 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. 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, 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. 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."²²

We also 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 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."²³

Also, the leading privacy officials in Europe, known as the "Article 29 Data Protection Working Party," launched an investigation into Google's privacy practices, specifically its lengthy data retention scheme.²⁴ Although Google said they were keeping search records to comply with European law, in fact, Europeans officials objected to the lengthy retention period.

Last week, European competition authorities opened an investigation into the Google-DoubleClick merger. According to the Times of London, "Google Inc.'s \$3.1 billion acquisition of Doubleclick, the largest broker of online banner advertising, is likely to be delayed for months by the European Commission."²⁵

At present, the US Federal Trade Commission, European privacy officials,²⁶ the Australian Competition and Consumer Commission,²⁷ the Canadian competition authorities,²⁸ and the European Commission Directorate on Competition are all investigating the proposed Google-DoubleClick merger and considering its possible effects on competition and consumer privacy.

Competition authorities around the world appear to be in agreement that there is no merger that poses a more significant threat to online privacy than Google's proposed acquisition of Doubleclick.

Conclusion

EPIC's complaint to the FTC regarding the Google-DoubleClick merger follows in a long line of similar complaints that EPIC has brought to the FTC regarding changes in business practices that raise substantial privacy interests for Internet users. We are not for or against Google. We are not for or against any of Google's competitors. We are simply working to safeguard the privacy interests of Internet users. We believe that we have set out a good case for the Commission. We believe that the Commission has the authority to act in this matter, and we believe that the Commission should act to block the deal or to impose substantial privacy safeguards as a condition of the deal's approval.

Thank you again for the opportunity to testify today. I would be pleased to answer your questions.

1 Letter from Marc Rotenberg, Dir., EPIC, to Christine Varney, Comm'r, Fed. Trade Comm'n (Dec. 14, 1995) (on need to investigate children's privacy), available at http://www.epic.org/privacy/internet/ftc/ftc_letter.html.

2 EPIC, "Privacy? Proposed Google/DoubleClick Deal," <http://www.epic.org/privacy/ftc/google/>.

3 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), available at http://www.epic.org/privacy/ftc/google/epic_complaint.pdf.

4 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.

5 Press Release, Doubleclick Inc., Statement From Kevin O'Connor, CEO of Doubleclick (Mar. 2, 2000).

6 Letter from Joel Winston, Acting Assoc. Dir., Div. of Fin. Practices, Fed. Trade Comm'n, Letter to Christine Varney, Esq. (Jan. 22, 2001), available at <http://www.ftc.gov/os/closings/staff/doubleclick.pdf>.

7 See OnlineNewsHour, Internet Privacy, May 26, 2000, available at

http://www.pbs.org/newshour/bb/cyberspace/jan-june00/privacy_5-26.html.

8 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.

9 Id.

10 Fed. Trade Comm'n, Microsoft Settles FTC Charges Alleging False Security and Privacy Promises (Aug. 8, 2002), available at <http://www.ftc.gov/opa/2002/08/microsoft.shtm>.

11 Kim Cameron, The Laws of Identity, Identity Weblog, Dec. 9, 2004, <http://www.identityblog.com/stories/2004/12/09/thelaws.html>; Windows CardSpace, <http://cardspace.netfx3.com/>; OpenCard, <http://www.opencard.org/>.

12 Letter from Chris Jay Hoofnagle, Assoc. Dir. EPIC, to Fed. Trade Comm'n (Dec. 16, 2004), available at <http://www.epic.org/privacy/choicepoint/fcraltr12.16.04.html>.

13 Fed. Trade Comm'n, Complaint for Civil Penalties, Permanent Injunction, and Other Equitable Relief, US v. ChoicePoint Inc., FTC File No. 052-3069 (Jan. 30, 2006), available at <http://www.ftc.gov/os/caselist/choicepoint/0523069complaint.pdf>.

14 Fed. Trade Comm'n, Consent Order, US v. ChoicePoint Inc., FTC File No. 052-3069 (Feb. 10, 2006), available at <http://www.ftc.gov/os/caselist/choicepoint/0523069stip.pdf>.

15 Id.

16 Fed. Trade Comm'n, Consumer Fraud and Identity Theft Compliant Data: January - December 2006 (Feb. 7, 2007), available at <http://www.consumer.gov/sentinel/pubs/Top10Fraud2006.pdf>.

17 EPIC, CDD, US PIRG, In the Matter of Google, Inc., and DoubleClick, Inc, supra note 3.

18 EPIC, CDD, U.S. PIRG, Supplemental Materials in Support of Pending Complaint and Request for Injunction, Request for Investigation and for Other Relief before the Federal Trade Commission (June 6, 2007), available at http://www.epic.org/privacy/ftc/google/supp_060607.pdf.

19 EPIC, CDD, U.S. PIRG, Second Filing of Supplemental Materials in Support of Pending Complaint and Request for Injunction, Request for Investigation and for Other Relief before the Federal Trade Commission (Sept. 17, 2007), available at http://www.epic.org/privacy/ftc/google/supp2_091707.pdf.

20 Letter from Marc Rotenberg, President, EPIC, to Financial Times (Sept. 23, 2007) ("Google's proposals on internet privacy do not go far enough"), available at <http://www.ft.com/cms/s/0/764c5338-6a32-11dc-a571-0000779fd2ac.html>.

21 EPIC, "Privacy? Proposed Google/DoubleClick Deal," <http://www.epic.org/privacy/ftc/google/>.

22 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>.

23 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>.

24 Letter to Peter Fleischer, Privacy Counsel, Google Inc., from Peter Schaar, Chairman, Article 29 Data Protection Working Party (May 1, 2007), available at http://www.epic.org/privacy/ftc/google/art29_0507.pdf.

25 Rhys Blakely, Europe puts brakes on Google deal, Times of London, Sept. 25, 2007, available at http://business.timesonline.co.uk/tol/business/industry_sectors/technology/article2525217.ece.

26 In a letter to the European Commission, consumer organizations, including BEUC, urged an investigation into the proposed merger. The groups said this merger means "Google could monopolize the on-line advertising business, thereby restricting competition and raising privacy concerns over control of consumer data." Letter from European Consumer Groups to Neelie Kroes, Comm'r, European Comm'n, on Proposed Acquisition of DoubleClick by Google (June 27, 2007), available at http://www.epic.org/privacy/ftc/google/beuc_062707.pdf.

27 Australian Competition & Consumer Comm'n, Google Inc - proposed acquisition of DoubleClick Inc., Aug. 22, 2007, available at <http://www.accc.gov.au/content/index.php/ml/itemId/788097>; Letter from Gabrielle Ford, Australian Competition & Consumer Comm'n, to Online Publishers, Digital Agencies and Other Internet Service Groups Asking for Opinions on the Effect Proposed Google-DoubleClick Merger Would Have in the Australian Market (Aug. 27, 2007), available at <http://www.accc.gov.au/content/trimFile.php?trimFileName=D07+79501.pdf&trimFileTitle=D07+79501.pdf&trimFileFromVersionId=796864>.

28 Canadian Internet Policy & Public Interest Clinic, Section 9 Application for an Inquiry into the Proposed Merger of Google, Inc. and DoubleClick Inc., Aug. 2, 2007, available at [http://www.cippic.ca/uploads/Google DC_s.9_CompAct_complaint_FINAL.pdf](http://www.cippic.ca/uploads/Google_DC_s.9_CompAct_complaint_FINAL.pdf); Canadian Internet Policy & Public Interest Clinic, Request for Audit of Google Inc. and DoubleClick Inc. before the Privacy Commissioner of Canada, Sept. 17, 2007, available at [http://www.cippic.ca/uploads/G-DC_%20Privacy_complaint_17Sept07\(1\).pdf](http://www.cippic.ca/uploads/G-DC_%20Privacy_complaint_17Sept07(1).pdf).