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Google Acquisition of DoubleClick: Antitrust Implications

Publicly available information suggests that Google's acquisition of DoubleClick, which is presently being considered by the Federal Trade Commission and European Commission, raises serious competitive issues under several different antitrust theories. In this white paper, we present some background and brief analysis of the principal competitive considerations under U.S. antitrust law.

Background

Online advertising is a critically important industry to the U.S. consumer and economy, as it funds the troves of free content on the Internet: from news and entertainment to reference and other useful tools, social networking and blogs. As traditional sources of media advertising revenue decline, online advertising has become increasingly important to the vibrancy, if not survival, of newspapers and magazines. Online advertising revenue has surged in tandem with the use of the Internet. Sales of online advertising in the U.S. were approximately \$17 billion in 2006, and are predicted to exceed \$20 billion in 2007.¹ By 2010, online advertising is expected to grow to about 10% of total advertising spending in the U.S., up from 6% in 2006.²

Google. Google is the leading seller of online advertising in the world, with advertising sales of approximately \$10.5 billion in 2006,³ which included approximately \$6.3 billion in search-based advertising on its own websites, and \$4.2 billion in sales of

¹ See INTERACTIVE ADVERTISING BUREAU & PRICEWATERHOUSECOOPERS, IAB INTERNET ADVERTISING REVENUE REPORT: 2007 SECOND-QUARTER AND FIRST SIX-MONTH RESULTS 6 (October 2007), www.iab.net/pwc_half_year_2007. Online advertising revenue has nearly tripled in four years since 2003. *See id.*

² See Youssef H. Squali et al., *Technology: The Case for Digital Marketing: The \$60B "Emerging" Opportunity*, Jeffries & Co., Inc. Report, Feb. 28, 2007, at 3 (estimating that by 2010, online advertising revenues will grow to \$33 billion in the U.S. and \$61 billion worldwide). In contrast, newspaper advertising revenue was about \$47.7 billion in 2006, and is expected to continue to decline. *See* Robert S. Peck et al., *Google: Adjusting & Expanding Model; New \$700 Price Target*, Bear, Stearns & Co. – U.S. Equity Research Report, Oct. 5, 2007, at 11.

³ Google Inc., Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 (Form 10-K) for the Fiscal Year Ended December 31, 2006, at 42 [hereinafter "Google 2006 10-K"]. Google earned 43% of its revenue from advertisers located outside the U.S. *See id.* at 44. Google's ad revenues were up 57% in the first three quarters of 2007 and are expected to exceed \$16 billion in 2007. *See* Press Release, Google Inc., Google Announces Third Quarter 2007 Results (Oct. 18, 2007), <http://investor.google.com/releases/2007Q3.html>; Peck et al., *supra* note 2, at 6.

ads on third-party websites that are part of its AdSense content network.⁴ It is by far the dominant search engine, accounting for about 57% of searches in the U.S. in August 2007, with Yahoo at 25%, MSN at 11%, AOL Search at 4%, and Ask at 2%, and its dominance in search is growing.⁵

Google's advertising on third-party web sites involves mostly "contextual" ads, which are ads targeted to web sites based on keywords selected by the advertiser and on the content of the web site as analyzed by Google.⁶ Contextual ads may be either text ads or display (graphical) ads, although most of the ads sold through its content network to date have been text ads similar to the text ads that appear on the Google search results pages. Contextual ads are sold on a cost-per-click basis using an auction process similar to that used for search ads. Advertisers can also use the content network to place text or display ads targeted to specific sites in the network selected by the advertiser on the basis of user demographic and other information about the sites provided by Google's Site Tool. Google is the leading provider of contextual ads;⁷ other companies with search engines, such as Yahoo and Microsoft, also offer contextual ads in connection with their search advertising businesses.

DoubleClick. DoubleClick is the leading provider of ad serving services or "tools" for display ads for Internet publishers, advertisers, and advertising agencies.⁸

⁴ Most of the revenue Google earns from advertising on third-party websites is paid to the web publishers. See Google 2006 10-K at 45 (traffic acquisition costs were \$3.3 billion in 2006).

⁵ See Peck et al., *supra* note 2, at 4 (data from comScore); see also Press Release, Net Ratings, Inc., Nielsen/NetRatings Announces August U.S. Search Share Rankings (Sept. 19, 2007), www.nielsen-netratings.com (showing 53.6% share for Google and 19.9% share for Yahoo in August 2007). Google's share of search queries jumped by about 4 percentage points from January 2007, while Yahoo's declined by about the same amount. See Peck, *supra* note 2, at 4. Google's dominance even greater on a worldwide basis. See *id.* (65% of global queries in August 2007). It is estimated that Google has more than 500,000 advertisers worldwide, and that only about 10% of search advertisers do not participate in Google's marketplaces. See Troy Mastin et al., *Google Inc./Yahoo! Inc.*, William Blair & Co. Research Note, Aug. 21, 2007, at 2 (estimating that half of Yahoo's and MSN's search advertisers also advertise on Google). Google's share of U.S. search advertising spending is higher than its share of queries, and is predicted to exceed 75% in 2007. See eMarketer, *Search Marketing: Counting Dollars and Clicks* (April 2007), http://www.emarketer.com/Reports/All/Emarketer_2000384.aspx?src=report_head_info_reports.

⁶ According to Google, "Our system analyzes the content and theme of the site [in its content network], considering factors such as text, language, link structure, and page structure. From these factors, Google determines the central themes of the webpage and targets AdWords ads to the page using keyword selections created by the advertiser." Google Inc., AdWords Learning Center, <http://www.google.com/adwords/learningcenter/text/18990.html>.

⁷ See Google Inc., AdWords Help Center, Google's Content Network, <https://adwords.google.com/select/afc.html> ("There is no larger network for contextual advertising in the world. . . . The Google AdWords content network reaches a remarkable 64% of unique Internet users around the world.").

⁸ According to DoubleClick, "all 10 of the world's top 10 brands, 8 of the top 10 global agencies and 8 of the top 10 U.S. and European Web sites choose DoubleClick to help meet their digital

DoubleClick’s revenues were reportedly approximately \$300 million in 2006,⁹ divided equally between its advertiser and publisher clients.¹⁰ For its publisher clients, its DART for Publishers (DFP) provides an “operating system” of software and hosted servers to enable publishers to insert display ads on their web pages and manage the process of serving ads to Internet users.¹¹

DoubleClick’s advertising platform allows advertisers to target their ads to users based on cookies placed on the users’ computers by web sites using DART (referred to as “profiling”). For its advertiser clients, DoubleClick’s DART for Advertisers (DFA) provides software and other tools to permit advertisers (or agencies) to deliver, manage and report on ad campaigns. In addition, DoubleClick has recently started an advertising exchange that allows publishers and advertisers to buy and sell inventory on an automated basis, with DoubleClick charging a commission for each impression sold. Table 1 lists the three principal types of online advertising sold or served by Google and DoubleClick.

Table 1: Principal Types of Online Ads

<i>Search</i> (keywords)	<i>Contextual</i> (keywords)	<i>Profiling</i> (cookies)
<input type="checkbox"/> text	<input type="checkbox"/> text <input checked="" type="radio"/> display	<input checked="" type="radio"/> display

Analysis

Is online advertising a relevant antitrust market? An initial question is whether online advertising is sufficiently distinct from other forms of advertising, such as television, radio, print, or billboards, to be a relevant antitrust market. If not, then because online advertising comprises only a small fraction of the overall advertising market, the merger would be unlikely to be problematic. In other words, in a sufficiently

marketing needs.” Press Release, DoubleClick Inc., DoubleClick Names Charlie Dickson Chief Financial Officer (April 12, 2007), http://www.doubleclick.com/about/news_details.aspx?id=536.

⁹ See Louise Story & Miguel Helft, *Google Buys an Online Ad Firm for \$3.1 Billion*, N.Y. TIMES, April 14, 2007, at C2.

¹⁰ See *Google to Acquire DoubleClick – FINAL (FD) DISCLOSURE WIRE*, April 13, 2007 (statement of David Rosenblatt, DoubleClick CEO).

¹¹ “DFP is a hosted, enterprise class solution with extensive functionality enabling publishers to manage, serve, and report on ads through our central servers to reduce infrastructure costs and increase revenues. It offers detailed inventory forecasting, an efficient trafficking workflow, advanced targeting capabilities, a superior query tool for comprehensive reporting, unrivaled rich media automation, and unsurpassed reliability and scalability.” DoubleClick Inc., DART for Publishers, <http://www.doubleclick.com/us/products/dfp/>.

large relevant market, even a “monopolist” of online advertising would not be able to raise prices.¹² The available evidence suggests that online advertising is sufficiently distinct that a monopolist in the sale of online advertising would be able to increase prices a small but significant amount without losing so many sales to offline sources to make the price increase unprofitable. Online advertising offers features – particularly targeting, performance-based pricing, and measurability – that other types of advertising cannot match. The fact that a secular shift in advertising is occurring from traditional media to online media, as consumers spend more and more time using the Internet,¹³ underscores that advertisers place a significant value on the unique attributes of online advertising.¹⁴ Certainly, if radio and newspaper advertising are each relevant markets because advertisers find value in their unique attributes, as the Justice Department has contended,¹⁵ then there can be little question that online advertising is a separate relevant market.

But the foregoing is just a starting point for the analysis. For advertisers, there may be narrower relevant markets within the online advertising market based on the type of ads (e.g., search, contextual, profiling) or based on services used by advertisers in connection with buying ads. Likewise, for online publishers selling ads, there may be distinct markets based on the type of ads sold by the publishers and the services used by publishers in selling (or “monetizing”) their ad space.

Horizontal Competitive Concerns

Google claims “Google and DoubleClick are not competitors. Google generates most of its revenue from selling space to place text ads on its own website and on small

¹² See Google Inc., Google-DoubleClick Acquisition: Background Information (April 2007), http://services.google.com/blog_resources/google_doubleclick_background.pdf. (asserting that “[t]he advertising market is highly competitive and dynamic, and online advertising faces stiff competition from TV, radio, outdoor, newspaper, and magazine advertising as well as direct marketing.”).

¹³ See, e.g., Stuart Elliott, *As Customers Flock to the Web, Intel Gives Chase With Its Ad Budget*, N.Y. TIMES, Oct. 10, 2007, at C9 (noting that Intel was shifting its \$300 million annual advertising budget to more than 50% online in another two years, compared to 15% two years ago).

¹⁴ See Squali et al., *supra* note 2, at 8 (noting that advertisers follow audiences). Indeed, the shift has occurred even as the prices for online advertising apparently have increased. See *id.* at 9 (noting increases in online prices over the last three years); Rick E. Bruner, *The Decade in Online Advertising 1994-2004*, at 2 (DoubleClick Report April 2005), http://www.doubleclick.com/insight/downloadResearch.aspx?fileName=dc_decaderinonline_0504.pdf (noting that seller’s market was emerging).

¹⁵ See, e.g., *United States v. Daily Gazette Co.*, C.A. No. 2:070329 (D. S.D.W.Va. May 22, 2007) (complaint contending that sale of advertising in newspapers in Charleston, West Virginia is relevant market); *United States v. Clear Channel Communications, Inc.*, C.A. No. 1:00CV02063 (D. D.C. 2000) (complaint and consent decree based on allegation that radio advertising in various local markets is a relevant market).

portions of partners' websites. DoubleClick does not sell ad space. Its core products offer support technology for storing, serving and tracking display ads."¹⁶ Google has analogized its relationship with DoubleClick to the relationship between Amazon.com and Fed Ex or UPS. "Our current business involves primarily the selling of text-based ads – books in our analogy. By contrast, DoubleClick's business at its core is to deliver and report on display ads."¹⁷

In fact, however, Google and DoubleClick have recently introduced products that make the companies direct competitors in the markets for distributing third-party websites' online advertising space (or "inventory") and for ad serving services provided to web publishers, and their traditional products compete (albeit somewhat indirectly) in the online advertising distribution market.

Elimination of Indirect Competition

From a publisher perspective, Google's AdSense and DoubleClick's DART for Publishers offer alternative solutions for publishers to monetize their "white space." Google's contextual-based text ads and DoubleClick's profiling-based display ads are different techniques for targeting ads to consumers, which many advertisers apparently see as substitutes.¹⁸ Moreover, Google's AdSense network serves display ads in addition to text ads, and allows advertisers to place ads using site targeting in addition to contextual targeting.¹⁹ Of course, DoubleClick's ad server, DART for Publishers, is only an input into selling ad space, while Google offers an integrated, "turnkey" solution, marketing its content partners' advertising space as well as serving ads for that space. But that does not mean that Google and DoubleClick do not compete for publishers, any more than full-service real estate agents using multiple listing services do not compete for homeowners with self-service web sites like "isoldmyhouse.com." A publisher must supply or obtain additional inputs when using DoubleClick (i.e. market the ads itself or through an advertising network), but the cost of the ad serving component may well be a relevant consideration in the publisher's determination of whether it will sell its "inventory" using DFP (or another ad server) versus AdSense (or comparable integrated ad network).

¹⁶ Google Inc., *supra* note 12.

¹⁷ Prepared testimony of David Drummond, Senior Vice President of Corporate Development and Chief Legal Officer, Google Inc., before the United States Senate Judiciary Committee Subcommittee on Antitrust, Competition Policy and Consumer Rights (Sept. 27, 2007), http://judiciary.senate.gov/testimony.cfm?id=2955&wit_id=6685.

¹⁸ See Robert W. Hahn & Hal J. Singer, An Antitrust Analysis of Google's Proposed Acquisition of DoubleClick, AEI-Brookings Joint Center for Regulatory Studies, Pub. No. 07-24, at 27 (Sept. 2007) (68% of advertisers surveyed indicated that they would increase their purchases of contextual ads in response to 10% across the board price increase in graphic ads).

¹⁹ See *Google to Acquire DoubleClick*, FINAL FD (FAIR DISCLOSURE WIRE), April 13, 2007 ("[S]oft display advertising has been important for several years, and in fact we've done a lot of work and have a lot of products in display advertising. And in fact, for example, we have our site-targeted ads, we have our image ads, and so forth.") (Sergey Brin).

It has been suggested that the cost of ad serving is too small relative to other factors to affect publishers' decisions to allocate their inventory among various online advertising channels, but the *degree* of substitutability between AdSense and DFP cannot be determined in the abstract (or on the basis of publicly available information). The Federal Trade Commission will have to consider carefully the testimony of publishers on this issue. The fact that some publishers use both DFP (for serving display ads sold directly or through other networks) and AdSense (for serving text-based ads) may suggest that at least some publishers see them as complements rather than as substitutes. However, since DFP charges by the number of advertising impressions served, it is possible that AdSense and DFP compete to serve "remnant" ads within those publishers' web sites.²⁰

Elimination of Direct Competition

Online advertising distribution. DoubleClick recently introduced its Advertising Exchange, which competes directly with Google's AdSense network in distributing online advertising inventory of third-party (non-search) web sites. That "intermediation" market includes integrated ad networks such as AdSense (which combine ad serving services with distribution), unintegrated ad networks such as Advertising.com, and other exchanges such as Yahoo's recently acquired Right Media exchange and Microsoft's recently acquired AdECN exchange.²¹

While there are numerous online advertising networks, AdSense is by far the largest in terms of revenue. In 2006, Google's revenue from ads sold on its network exceeded \$4 billion.²² In contrast, Advertising.com, the largest ad network in terms of the number of unique visitors to its partners' web sites, had revenues of only \$455

²⁰ For larger publishers, "remnant" ad space is space that is not sold directly by the publisher to a particular advertiser, but rather is space leftover after a publisher has disposed of its "reserve" or "premium" inventory directly to advertisers (typically at higher prices).

²¹ To be sure, there is some differentiation between the business models of ad networks and advertising exchanges, and advertising networks may be customers or suppliers of advertising exchanges as well as competitors. Moreover, there is some differentiation between the Google network and DoubleClick's advertising exchange in that the former has focused more on text ads than display, while the latter focuses on display ads. DoubleClick has described the difference between an advertising network and an exchange as follows: An exchange "is a transaction platform designed to match buyers and sellers of online advertising. Networks typically act on behalf of a buyer or seller to get the highest return or revenue respectively, using information proprietary to the network to increase yield." DoubleClick Inc., DoubleClick Advertising Exchange: Questions and Answers, http://www.doubleclick.com/insight/downloadResearch.aspx?fileName=dc_adxoverview_0704.pdf.

²² See Google 2006 10-K, at 42. This amount includes revenue from Google search ads placed on partner websites, which should not be included in its market share. Google's revenue for its non-search advertising from the AdSense network is not publicly available, but is no doubt a significant proportion of its network revenues.

million.²³ These data suggest that the distribution market for publishers is probably concentrated.²⁴

DoubleClick's advertising exchange is a recent innovation and its current market share is probably negligible. However, given its leading position in providing ad-serving services to advertisers and publishers, it is arguably poised to capture significant market share in the near future.²⁵ Under the Department of Justice/Federal Trade Commission *Horizontal Merger Guidelines*, it is critical that the agencies look at likely future market shares, not merely current shares,²⁶ particularly given that the transaction appears premised on DoubleClick's future market potential.²⁷ DoubleClick's anticipated growth, if it comes partially at the expense of AdSense, would reduce the current level of concentration in the market. In contrast, the combination with Google would increase concentration compared to what it otherwise would be. The result may be higher intermediation costs for publishers.

Entry is not likely to resolve the competitive concerns. On the contrary, network effects are likely to be important in brokering online advertising on third-party web sites, which would restrict entry to firms like DoubleClick that have relationships with very large numbers of publishers and advertisers. All else equal, the more advertisers that participate in a network, the more valuable the network will be for publishers, and the

²³ See Time Warner Inc., Annual Report 2006, at 60. The number of unique visitors for September 2007 is reported by comScore at <http://www.comscore.com/press/release.asp?press=1808>. The second largest ad network by number of unique visitors, ValueClick, reported revenues from its network of no more than \$383 million in 2006. See ValueClick, Inc., Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 (Form 10-K) For the Fiscal Year Ended December 31, 2006, at 34 (revenue from media segment).

²⁴ This market does not include advertising space that is sold directly by publishers to advertisers.

²⁵ See Louise Story, *DoubleClick to Set Up an Exchange for Buying and Selling Digital Ads*, NEW YORK TIMES, April 4, 2007, at C6 (“DoubleClick “views the exchange as the centerpiece of a growth plan and may derive the majority of revenue from the new service within five years,” according to its CEO; it is “relationships with Web publishers that industry executives see as vital to the success of the exchange”).

²⁶ See U.S. DEPT. OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES § 1.41 (1992), <http://www.usdoj.gov/atr/public/guidelines/hmg.htm> (“Market shares will be calculated using the best indicator of firms’ future competitive significance.”); *id.* § 1.521 (“[R]ecent or ongoing changes in the market may indicate that the current market share of a particular firm either understates or overstates the firm’s future competitive significance.”); see also *id.* § 1.32 (uncommitted entrants that will enter within one year are assigned market shares); U.S. DEPT. OF JUSTICE, NON-HORIZONTAL MERGER GUIDELINES § 4.133 (1984), <http://www.usdoj.gov/atr/public/guidelines/2614.htm> (in potential competition case, if the evidence of likely actual entry is particularly strong, Department will determine likely scale of entry and evaluate the merger “much as it would a horizontal merger between a firm the size of the likely scale of entry and the acquired firm”).

²⁷ Google is paying \$3.1 billion for DoubleClick, a business with earnings last year of \$50 million before interest, depreciation and taxes. See Story & Helft, *supra* note 9, at C2.

more publishers that participate in a network, the more valuable it will be to advertisers. Not only does larger scale mean more opportunities for publishers and advertisers,²⁸ but a larger network of publishers provides more data about consumers' browsing behavior and thus can make behavioral targeting more effective and hence more attractive to advertisers, and a larger network of advertisers can lead to more relevant (and hence valuable) ads for publishers.²⁹ Google's acquisition may make entry by others even more difficult because of Google's dominance of the search market and its intent to integrate its search and display advertising services, as discussed below. The fact that the other large players in online advertising – Yahoo, Microsoft, and AOL – are all in the distribution market with their own networks or exchanges does not obviate our competitive concerns because DoubleClick would be an additional significant player with unique capabilities and incentives to inject competition into a concentrated market.

Publisher ad serving. With Google's recent introduction of an ad serving product (apparently in beta form) similar to DoubleClick's DART for Publishers, Google and DoubleClick also compete directly in the market for publisher-side ad servers and related services. That market also appears to be relatively concentrated, with DART for Publishers the market leader, and 24/7 Real Media's Open AdStream and Microsoft's Atlas AdManager its principal competitors.³⁰ As with DoubleClick's advertising exchange, Google's ad server apparently has a negligible current market share, but may be poised to gain significant market share in the near future absent the merger. Google's vast resources, its relationships with publishers through its AdSense network, and its ability to bundle general ad serving services with distribution through AdSense may make "Google for Publishers" a formidable competitor in the near future.

On the other hand, Google's position in the distribution market could hinder its growth in the ad serving market insofar as publishers see AdSense (and to a lesser extent,

²⁸ Google has suggested that increasing scale was an important benefit of the merger for both publishers and advertisers. See Press Release, Google Inc., Google to Acquire DoubleClick (April 13, 2007), <http://www.google.com/intl/en/press/pressrel/doubleclick.html> ("For online publishers, the combination provides access to new advertisers, which creates a powerful opportunity to monetize their inventory more efficiently."); Google Inc., *supra* note 12 ("Google and DoubleClick will provide greater reach for advertisers' target audience, helping them achieve the best returns for their advertising budgets.").

²⁹ To be sure, if participation in multiple networks is not costly, or switching costs are not high, or the costs of using a smaller network reflect its smaller reach, then entry may be less difficult.

³⁰ Hahn and Singer estimate DoubleClick's market share in the combined sale of advertiser and publisher tools at 63%. See Hahn & Singer, *supra* note 18, at 18; see also Abigail Roberts & Paulina Roguska, *Google-DoubleClick: FTC takes on deal; client switching could address anti-trust concerns – analysis*, FT.com, May 29, 2007, available at <http://www.ft.com/home/us> (quoting Real Media's CEO estimating that DoubleClick had a 55-60% market share in the "publishing market" and 75-80% share in the "advertising market."). Among the other ad servers is a free, open source ad server called OpenAds. See Eric Auchard, *Ad software maker OpenAds girds to take on Google*, REUTERS, June 13, 2007, <http://www.reuters.com/article/internetNews/idUSN1231267320070613>. It is also worth noting that some large publishers have in-house ad servers.

Google search)³¹ as a competitor and prefer to use a more independent ad server. There seem to be some network effects in this market (the more publishers that use an ad server, the more consumer browsing information and effective targeting the ad server will be able to provide), which may make new entry difficult, although the effects may not be as pronounced as they are with advertising networks and exchanges. If switching ad servers is difficult,³² then this may also make new entry difficult and the consequences of high concentration more severe.

Elimination of Potential Competition

Another way of looking at horizontal overlaps that are not presently substantial is through the lens of potential competition doctrine. Under the “actual potential competition” theory, even when the merging parties are not present competitors at all, a merger may be problematic when, but for the merger, one party would likely enter the market of the other either *de novo* or via a toehold acquisition of a small competitor.³³ Both horizontal and potential competition analysis are forward looking and attempt to compare the world as it would exist in the future with the merger and without the merger.

The potential competition theory is strong in this case because both Google and DoubleClick are not merely likely entrants; they are *actually* entering each other’s

³¹ See Hahn & Singer, *supra* note 18, at 29 (finding significant degree of cross elasticity between search and graphic ads from advertiser perspective).

³² The evidence on this issue is not clear. See Roberts & Roguska, *supra* note 30 (24/7 Real Media CEO David Moore, stating that Google and DoubleClick clients are free to switch to Real Media or other ad servers, and “[w]e’ve been getting a lot of those calls.”); see also *Time Warner Inc. at Sanford Bernstein 23rd Annual Strategic Decisions Conference*, FD (FAIR DISCLOSURE) WIRE, May 31, 2007 (Time Warner President stating that AOL, a client of DoubleClick, has alternatives to DoubleClick). But see Louise Story & Miguel Helft, *supra* note 9 (“Most of DoubleClick’s clients are locked into long-term contracts to keep using DoubleClick.”).

³³ When a merger eliminates a likely entrant, competition is harmed because absent the merger, the market would have been less concentrated and more dynamic. See NON-HORIZONTAL MERGER GUIDELINES, *supra* note 26, § 4.112 (theory of actual potential competition is that “[b]y eliminating the possibility of entry by the acquiring firm in a more procompetitive manner, the merger could result in a lost opportunity for improvement in market performance resulting from the addition of a significant competitor”); e.g., *Federal Trade Comm’n v. Staples, Inc.*, 970 F. Supp. 1066, 1082 (D.D.C. 1997) (noting that “allowing the defendants to merge would eliminate significant future competition. Absent the merger, the firms are likely, and in fact have planned, to enter more of each other’s markets, leading to a deconcentration of the market and, therefore, increased competition between the superstores.”). A merger of a potential entrant may also be problematic under the theory of “perceived potential competition” if the merger eliminates a firm whose presence on the edge of the market had been constraining the behavior of incumbent market actors. See NON-HORIZONTAL MERGER GUIDELINES, *supra* note 26, § 4.111 (theory of perceived potential competition is that “[b]y eliminating a significant present competitive threat that constrains the behavior of firms already in the market, the merger could result in an immediate deterioration in market performance”). We are not able to assess this latter theory on the available information.

markets. Indeed Google has made it clear that its interest in DoubleClick is to speed its growth in the display advertising business.³⁴ Hence the loss of a significant competitor to AdSense and to DART for Publishers is clear. Under the non-horizontal merger guidelines, such a merger should be challenged if the markets at issue are concentrated,³⁵ the firm already in the market has a significant market share,³⁶ entry is difficult,³⁷ and efficiencies are not likely to reverse the merger's potential to harm consumers. As discussed above, the markets at issue appear to be concentrated, Google and DoubleClick appear to have significant market shares in those markets, and entry by others is likely to be difficult.

Efficiencies. The merger does not appear likely to result in appreciable merger-specific efficiencies. Google has suggested that the acquisition will enable it to offer more display ad capabilities to advertisers and publishers, but acknowledges that acquiring DoubleClick largely speeds up offerings it intended to make in any event. Indeed, all of the benefits of the merger suggested by Google seemingly could be achieved by internal growth.³⁸ Moreover, the integration of search and display advertising, which Google has touted as an important benefit for advertisers,³⁹ could be

³⁴ See *Google to Acquire DoubleClick*, FINAL FD (FAIR DISCLOSURE WIRE), April 13, 2007 (“The first, and in many ways, the most compelling argument for this [acquisition] from a Google perspective is it is accelerating our display advertising business.”) (Eric Schmidt); *id.* (“[W]e feel the combination will accelerate the display advertising capabilities, and we’ll be able to give this better experience for end users and advertisers and publishers that many years sooner”) (Sergey Brin); see also Press Release, Google Inc., *supra* note 28 (“DoubleClick’s technology is widely adopted by leading advertisers, publishers, and agencies, and the combination of the two companies will accelerate the adoption of Google’s innovative advances in display advertising,” said Eric Schmidt . . .”).

³⁵ See NON-HORIZONTAL MERGER GUIDELINES, *supra* note 26, § 4.131 (Department unlikely to challenge a merger where the HHI is below 1800, but “is increasingly likely to challenge a merger as this threshold is exceeded.”).

³⁶ See *id.* § 4.124 (“The Department is likely to challenge any merger satisfying the other conditions in which the [incumbent] firm has a market share of 20 percent or more.”).

³⁷ The guidelines suggest that “[i]f more than a few firms have the same or a comparable advantage in entering the [market at issue], the elimination of one firm is unlikely to have any adverse competitive effect.” *Id.* § 4.133. “If the evidence of likely actual entry by the acquiring firm is particularly strong, however, the Department may challenge a potential competition merger, notwithstanding the presence of three or more firms that are objectively similarly situated.” *Id.*

³⁸ See *Federal Trade Commission v. H.J. Heinz Co.*, 246 F.3d 708, 722 (D.C. Cir. 2001) (cognizable efficiencies “must be efficiencies that cannot be achieved by either company alone because, if they can, the merger's asserted benefits can be achieved without the concomitant loss of a competitor”); see also HORIZONTAL MERGER GUIDELINES, *supra* note 26, § 4 n.35 (“If a merger affects not whether but only when an efficiency would be achieved, only the timing advantage is a merger-specific efficiency.”).

³⁹ According to Google’s press release, the benefit of the merger for agencies and advertisers is that “Google and DoubleClick will provide an easy and efficient way to manage both search and

achieved even without internal growth. Apparently, the benefit is not so much that advertisers will be able to buy search and display ads from a single source,⁴⁰ but that advertisers will be able to measure the effectiveness of their search, contextual, and other display advertising using a single tool.⁴¹ Even assuming that this benefit is not offset by its exclusionary potential, as discussed below, a merger is not necessary to achieve it, as Google could open its platform to an independent DoubleClick (and other advertiser-side reporting tools).

Vertical Competitive Concerns

The integration of search, contextual, and display advertising, even if it offers efficiency benefits, may have exclusionary effects if advertisers using rival search engines or advertiser tools cannot replicate the benefits of such integration. For example, post-merger, advertisers using DART for Advertisers or other DART advertiser tools may be unable to get the same quality of access to data and reporting on their search or other campaigns with non-Google search engines or ad networks as they can with Google search or AdSense. Moreover, advertisers that use non-DART advertiser tools may be unable to get the same quality of access to data and reporting on their Google search or AdSense campaigns that is available to advertisers using DART's advertiser tools. In these cases, Google's dominant position in search (and contextual) advertising will be further entrenched, and DoubleClick's leading position in advertiser tools will be cemented. As a result, the lessening of competition in the search market and advertiser tools market may outweigh whatever efficiency benefit may result from integration.

Similarly, it has been suggested that Google might use its control over DART for Publishers to raise the costs of rival advertising networks that do not offer integrated ad serving services to publishers. If Google were to raise the price of DFP for publishers

display ads in one place. They will be able to optimize their ad spending across different online media using a common set of metrics." Press Release, Google Inc., *supra* note 28.

⁴⁰ *But see* Robert A. Guth et al., *Web Wars: With Big Buy, Microsoft Joins Online-Ad Flurry – Tech Firms Square Off With Madison Avenue Over Fast-Growing Field*, WALL ST. J., May 19, 2007, at A1 (consolidation rush is being driven in part "by advertisers' desire to reach broad swaths of Internet users through a single ad buy"); Press Release, Yahoo! Inc., Yahoo! to Combine Search and Display Advertising Sales Teams to Better Serve its Advertising Partners (June 24, 2007), <http://yhoo.client.shareholder.com/releasedetail.cfm?ReleaseID=250796> (maintaining that combining search and display can deliver significantly better results than when used independently).

⁴¹ *See Google to Acquire DoubleClick*, FINAL FD (FAIR DISCLOSURE WIRE), April 13, 2007 (merger will allow integration of "search and display metrics . . . to be able to put those in a unified way, in a uniform reporting . . .") (Susan Wojcicki, Google VP Product Management); *see also* Alex Kinnier, Group Product Manager, Google Inc., Why we're buying DoubleClick, June 26, 2007, <http://googleblog.blogspot.com/2007/06/why-were-buying-doubleclick.html> ("Historically, we've not allowed third parties to serve into Google's AdSense network, which has made it hard for advertisers to get performance metrics. Together, Google and DoubleClick can deliver a more open platform for advertisers, and provide the metrics they need to manage marketing campaigns.").

that use rival ad networks, then those networks may be unable to compete with AdSense, and potentially could wither due to a lack of scale.⁴²

Finally, the merger raises the question of whether Google might use competitively sensitive information that DoubleClick obtains from publishers about their advertising programs or from advertisers about their advertising campaigns to gain a competitive advantage for Google's search or AdSense offerings.⁴³

Any of the foregoing foreclosure scenarios would have the effect of foreclosing rival online advertising competitors from the market, potentially raising prices for online advertisers and publishers. These foreclosure issues, like vertical foreclosure problems generally, might be remedied or mitigated by conditions that would bar discriminatory treatment. For example, Google might be required to maintain the operational independence of DoubleClick and ensure that its publisher and advertiser tools interoperate with rival search engines and advertising networks on the same terms as Google's own properties, and that Google's AdWords (search) program and AdSense network interoperate with rival advertiser tools on the same terms as DART for Advertisers.

Conclusion

Evaluating any proposed merger is difficult, especially for outside observers who lack both insider information and governmental powers to secure proprietary data and documents. It is particularly difficult to make predictions about online advertising, which is a dynamic new industry that is seeing rapid growth, new types of ads, and changes in the ways in which online publishers, advertisers, and intermediaries work together, not to mention significant recent consolidation. But merger analysis is necessarily forward looking and demands a judgment about what the world would look like with and without the merger. Moreover, given that the importance of network effects in this industry, the risks from not stopping an anticompetitive merger are high. The merging parties have predicated the merger on its future effects, and so must the antitrust analysis.

Based on the information presented here, AAI believes there is a good argument that Google and DoubleClick are horizontal competitors in two relevant markets. The

⁴² This theory would seem to depend on, among other things, the likelihood that publishers, faced with a price increase for DFP, would not switch ad servers, and the practical ability of DoubleClick to charge different prices to publishers for serving ads that are sold directly by the publishers and those that are sold through competing ad networks.

⁴³ For example, DoubleClick would know the details about the inventory that its DFP clients are selling to particular advertisers and ad networks, and Google could use that information to compete against those ad networks to acquire the inventory for AdSense or compete against the publisher in selling ad space to those advertisers. Concerns about Google's "conflicts of interest" have prompted some to suggest that publishers or advertisers may drop DoubleClick. *See* Story & Helft, *supra* note 9, at C2 ("If DoubleClick's existing clients start to feel that that Google is using DoubleClick's relationships to further its own ad network, some Web publishers or advertisers might jump ship.").

first is the market for distributing online advertising space of third party (non-search) web sites, where Google's AdSense is the market leader. The second is the market for publisher ad serving tools, where DoubleClick's DART for Publishers is the dominant product. While the competition between Google and DoubleClick in these markets may be more potential than actual,⁴⁴ the two companies are perhaps uniquely positioned to capture significant market share in each other's markets. If the evidence confirms that these markets are concentrated and that entry is otherwise difficult, as appears to be the case, then the merger presents a relatively straightforward case for challenge under the horizontal and non-horizontal merger guidelines. We see little in the way of merger-specific efficiencies that would offset the loss of competition. The upshot of the merger may be higher costs for web publishers to sell their advertising space, which ultimately may affect the diversity and richness of content available on the Internet and the vibrancy of the media. Given the potential adverse effect on web publishers, the FTC should be particularly sensitive to their views.

We also see a risk of significant foreclosure effects from Google's control over DoubleClick's publisher and advertiser tools and integration of those tools with Google's dominant search engine and contextual advertising network. If foreclosure were the only issue, it might be resolved by placing conditions on the merger, even though there are costs involved in enforcing a regulatory decree. But unless the horizontal concerns are rebutted, AAI believes that the prudent course is for the FTC to block the merger.⁴⁵

⁴⁴ We do not discount the present indirect competition between Google and DoubleClick; we simply have no way to evaluate its significance.

⁴⁵ We have not addressed the privacy concerns arising from the consolidation of control over the two firms' extensive databases. These concerns appear to be significant and may be independently cognizable under the FTC's jurisdiction over unfair business practices. Insofar as the merger may adversely affect competition over the terms of privacy protection, such a loss of competition would certainly be relevant to the analysis of the merger under Section 7, but we lack the evidence to evaluate this issue.