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ACCOUNTABILITY IN A SMOKE-FILLED ROOM: THE INADEQUACY OF SELF REGULATION WITHIN THE INTERNET BEHAVIORAL ADVERTISING INDUSTRY

INTRODUCTION

The online behavioral advertising industry has grown steadily in the past twelve years as online advertisers continuously track the movements of internet users.¹ According to the Federal Trade Commission (FTC or the Commission), online behavioral advertising is “the practice of tracking consumers’ activities online to target advertising.”² Despite the FTC’s recommendation in 2000 for the enactment of privacy legislation to supplement self regulation,³ the industry continues to operate under self-created principles authored by the Network Advertising Initiative (NAI) and the Digital Advertising Alliance (DAA).⁴ In light of increasing privacy concerns, the FTC stands on the cusp of a new horizon in online privacy regulation.⁵

It is this note’s position that the self regulation implemented by the online behavioral advertising industry must be supplemented with a multi-prong system of FTC regulation and federal legislation in order to actively protect consumer online privacy. The quickly expanding Internet behavioral industry can no longer be allowed to self regulate if consumer interests are to be effectively protected. Instead, external regulation and uniform methods of evaluation are necessary to allow the industry to continue growing in a controlled but productive manner. Ultimately, this note will suggest possible solutions to existing approaches in order to create a cohesive system of regulation and oversight.

1. See Saranga Komanduri, Richard Shay, Greg Norcie, Blase Ur & Lorrie Faith Cranor, *AdChoices? Compliance with Online Behavioral Advertising Notice and Choice Requirements*, CARNEGIE MELLON U. CYLAB (Mar. 30, 2011), <http://repository.cmu.edu/cgi/viewcontent.cgi?article=1081&context=cylab>.

2. FTC, *Online Behavioral Advertising Moving the Discussion Forward to Possible Self-Regulatory Principles* (2007), <http://www.ftc.gov/os/2007/12/P859900stmt.pdf>.

3. In its report, the FTC stated that “backstop legislation addressing online profiling is still required to fully ensure that consumers’ privacy is protected online.” See FTC, *ONLINE PROFILING: A REPORT TO CONGRESS: PART 2 RECOMMENDATIONS* at 10 (2000), <http://www.ftc.gov/os/2000/07/onlineprofiling.pdf>.

4. See DIGITAL ADVER. ALLIANCE, *SELF-REGULATORY PRINCIPLES FOR ONLINE BEHAVIORAL ADVERTISING* (2009), <http://www.aboutads.info/resource/download/seven-principles-07-01-09.pdf>. A number of companies engaged in online behavioral advertising formed the NAI in 1999 as a self-regulatory organization for the industry. See Komanduri et al., *supra* note 1, at 2. The NAI proposed a set of self-regulatory principles to the FTC, which it later published in 2001 and revised in 2008. *Id.* at 2–3. As of 2011, the NAI has seventy-four member companies. *Id.* at 3. The DAA was formed in 2009 as the FTC began to examine online behavioral advertising again. *Id.* One member of the DAA is the Interactive Advertising Bureau (IAB). *Id.* One of the core objectives of the IAB is to “[f]end off adverse legislation and regulation.” *About the IAB*, IAB, http://www.iab.net/about_the_iab (last visited Nov. 27, 2012).

5. See Komanduri et al., *supra* note 1.

Part I of this note explores the nature of online advertising and its methods, along with the various players that participate in and shape the industry. Part II examines the recent Google-DoubleClick merger⁶ by exploring the functions of each company, as well as their synthesis through the merger. It also delves into the response published by the FTC regarding the proposed merger between the two companies, along with a dissent from within the Commission. Part III discusses the inadequacy of self regulation within the behavioral advertising industry. It also examines the downfalls of the FTC's method of policing behavioral advertising. Finally, Part IV explores a multi-prong approach for a more effective method of monitoring online advertising through a consolidation of oversight programs, a reassessment of the technology markets, increased consumer transparency, and stricter federal legislation.

I. THE NATURE OF THE ONLINE BEHAVIORAL ADVERTISING INDUSTRY

Advertisers successfully utilize the Internet to target consumers with pinpoint precision on a level that is unattainable for advertising in other media.⁷ Behavioral advertising carries a built-in incentive for the advertiser to continue to use various tracking techniques.⁸ Increased surveillance and information gathering ultimately leads to larger revenues for advertisers.⁹ Active advertising networks are able to construct profiles of users as they navigate between different websites.¹⁰ The result of this tracking is that each user is presented with advertisements that are calculated to relate to his or her interests based on the different websites the user visits.¹¹

6. See Elinor Mills, *Google Buys Ad Firm DoubleClick for \$3.1 Billion*, CNET (Apr. 13, 2007, 5:00 PM), http://news.cnet.com/Google-buys-ad-firm-DoubleClick-for-3.1-billion/2100-1024_3-6176079.html.

7. See Google/DoubleClick, No. 071-0170, 2007 WL 4624893, at *2 (F.T.C. Dec. 20, 2007), available at <http://www.ftc.gov/os/caselist/0710170/071220statement.pdf>.

8. See Christopher Calabrese, *Yes, They Really Know It's You*, AM. CIV. LIBERTIES UNION BLOG (Oct. 11, 2011, 10:39 AM), <http://www.aclu.org/blog/technology-and-liberty/yes-they-really-know-its-you>.

9. *Id.*

10. Complaint and Request for Injunction, Request for Investigation and for Other Relief at 10, Google/DoubleClick, No. 071-0170, 2007 WL 4624893 (F.T.C. Dec. 20, 2007), available at http://epic.org/privacy/ftc/google/epic_complaint.pdf. Internet users primarily access Internet content through search engines provided by companies like Google, Yahoo, and Microsoft. *Id.* at 3. Search engine usage impacts both online decisions and offline consumer behavior. *Id.* The search terms entered into a search engine may reveal "a plethora of personal information such as an individual's medical issues, associations, religious beliefs, political preferences, sexual orientation, and investments monitored." See also Komanduri et al., *supra* note 1.

11. J. Thomas Rosch, Chairman, FTC, *Looking Backward and Forward: Some Thoughts on Consumer Protection* 13 (Mar. 11, 2009), available at <http://www.ftc.gov/speeches/rosch/090311backwardforward.pdf>. Behavioral advertising encompasses all tracking of a consumer's online activities over time, including searches the consumer has conducted, the web pages visited, and the content viewed, in order to provide tailored consumer advertising. *Id.* However, behavioral advertising encompasses situations where a website allows a third party to collect data

According to results from a study conducted by the NAI,¹² behaviorally targeted advertising in 2009 yielded 2.68 times the revenue per ad as did non-targeted advertising.¹³ Based on the results, the NAI has defended behaviorally-targeted advertising as a strong foundation and a “critical component of ad network, publisher, and advertiser success.”¹⁴ On average, behaviorally targeted ads are twice the price of regular advertising and tout twice the effectiveness of normal advertising, garnering increased revenues and spurring general Internet growth.¹⁵

A. TRANSACTIONS WITHIN THE BEHAVIORAL ADVERTISING MARKET

Online publishers use two methods to sell space to advertisers: direct and indirect sales.¹⁶ Direct sales are executed by the publisher’s sales force and guarantee a specific placement and time frame during which the advertisement will be displayed.¹⁷ Direct sales usually involve premium advertising space, typically considered to be at the top or upper-half of the computer screen, of websites with large numbers of online visitors.¹⁸ Indirect sales are completed through ad intermediation firms, which collect an inexpensive inventory of advertising space along a network of websites for targeting users.¹⁹ Indirect sales usually involve advertising space on the bottom half of the website or on websites with low user traffic.²⁰

and serve advertisements to consumers, a distinction that is increasingly redundant. *Id.* Notably, the FTC uses a separate definition for *online behavioral advertising*, which does not include contextual advertising or first party advertising. Komanduri et al., *supra* note 1.

12. NETWORK ADVER. INITIATIVE, <http://www.networkadvertising.org> (last visited Dec. 19, 2011).

13. *See* Press Release, Network Adver. Initiative, Study Finds Behaviorally-Targeted Ads More Than Twice as Valuable, Twice as Effective as Non-Targeted Online Ads (Mar. 24, 2010), available at http://www.networkadvertising.org/pdfs/NAI_Beales_Release.pdf. The NAI commissioned and conducted a study measuring the pricing and effectiveness of behaviorally targeted online advertising based on data from twelve major advertising networks. *Id.* The study was conducted by economist Howard Beales, the former Director of the Bureau of Consumer Protection at the FTC. *Id.*

14. *Id.*

15. *Id.* According to the NAI study, the average relative cost of behaviorally targeted ads in 2009 was 2.68 times greater than normal advertising. *Id.* at 1. The weighted average cost per thousand ad impressions for behaviorally targeted ads was \$4.12, while the cost for normal advertising was \$1.98. *Id.* at 2. According to the data, behaviorally targeted ads accounted for 17.9 percent of respondents’ advertising revenue, with an increase of 3.2 percent within the year. *Id.* A smaller subset of the data suggested that users who clicked on a targeted ad were more than twice as likely (6.8 percent) to complete a transaction on the site in comparison to users who clicked on a normal ad (2.8 percent). *Id.*

16. *See* Google/DoubleClick, No. 071-0170, 2007 WL 4624893, at *3 (F.T.C. Dec. 20, 2007), available at <http://www.ftc.gov/os/caselist/0710170/071220statement.pdf>.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

The ad intermediation market is split into ad networks and ad exchanges.²¹ While both aggregate advertising inventory, ad networks purchase advertising inventory from multiple websites and sell this inventory to advertisers, keeping a percentage of the revenue.²² Meanwhile, ad exchanges create a platform where advertisers list and bid on advertising inventory.²³ Ad intermediaries use a type of targeting technology called contextual advertising, utilizing ads consisting primarily of text that are delivered onto a webpage through the process of scanning the site's text for key words.²⁴

B. THE SELF REGULATION LANDSCAPE

The online behavioral advertising industry is part of the greater digital advertising industry, which operates under a self-regulatory regime based on guidance from the statements of the FTC.²⁵ In response to the recent increase in the scrutiny of Internet behavioral advertising and various company practices, the DAA²⁶ issued "Principles for Multi-Site Data," which were designed to "expand the scope of self regulation of online data collection."²⁷ The Principles issued by the DAA are intended to build on the industry's existing self-regulatory standards²⁸:

The new Principles establish comprehensive self-regulatory standards governing the collection and use of Multi-Site Data, data collected from a particular computer or device regarding Web viewing over time and across non-affiliated Websites. Building on and adopting the recommendations

21. *Id.* at *4.

22. *Id.*

23. *Id.*

24. *Id.* at *3-4. Contextual advertising provides advertising based on the online content the reader is viewing in an attempt to elicit a specific consumer response, such as the purchase of a product or service. *Id.* at *5. In its investigation of the merger between Google and DoubleClick, the FTC stated that collected evidence indicated that ad intermediation did not function as a substitute for direct sales by publishers. *Id.* at *4.

25. See *DAA Announces Comprehensive Principles for Online Collection of Web Data*, PR NEWSWIRE (Nov. 7, 2011, 2:10 PM), http://www.prnewswire.com/news-releases/daa-announces-comprehensive-principles-for-online-collection-of-web-data-133375378.html?utm_expnid=43414375-18&utm_referrer=http%3A%2F%2Fwww.google.com%2Furl%3Fsa%3Dt%26rct%3Dj%26q%3D%26esrc%3Ds%26source%3Dweb%26cd%3D1%26ved%3D0CCIQFjAA%26url%3Dhttp%253A%252F%252Fwww.prnewswire.com%252Fnews-releases%252Fdaa-announces-comprehensive-principles-for-online-collection-of-web-data-133375378.html%26ei%3DY0Q6UIvAFujw0gH82oGIBA%26usg%3DAFQjCNGkcjzMwtCAMRCvdDTwIDD-vKrRGg.

26. The Digital Advertising Alliance operates as a coalition of the nation's largest media and marketing associations. *Id.* It includes the American Association of Advertising Agencies (AAAA), the American Advertising Federation (AAF), the Association of National Advertisers (ANA), the Direct Marketing Association (DMA), the Interactive Advertising Bureau (IAB), and the Network Advertising Initiative (NAI). *Id.* As a cooperative effort, the DAA is designed to develop "effective self-regulatory solutions to consumer choice in online behavioral advertising (OBA)." *Id.*

27. See *id.*

28. See NETWORK ADVER. INITIATIVE, 2008 NAI PRINCIPLES: THE NETWORK ADVERTISING INITIATIVE'S SELF-REGULATORY CODE OF CONDUCT 4 (2008), <http://www.networkadvertising.org/sites/default/files/imce/principles.pdf>.

by the FTC . . . the new Principles establish a clear framework governing the collection of online Multi-Site Data that also provides consumer choice for the collection of such data. They also prohibit the collection or use of Multi-Site Data for the purpose of any adverse determination concerning employment, credit, health treatment or insurance eligibility. The Principles also codify existing industry practices prohibiting the collection or use of Multi-Site Data for the purpose of any adverse determination concerning employment, credit, health treatment or insurance eligibility. Additionally, like the OBA Principles, the Multi-Site Data Principles provide specific protections for sensitive data concerning children, health and financial data.²⁹

The DAA has announced that its Principles, as published in 2012, are applicable to the entire Internet.³⁰ This echoes the general industry sentiment that online behavioral advertising should be explained more persuasively and effectively to consumers, rather than modified or altered in any way.³¹ Instead of focusing on consumer opinions expressing discontent with the use of targeted ads based on personal browsing behavior, the industry points to the statistical effectiveness of consumer response to targeted advertising.³² The industry suggests a dual approach for the survival of its self regulation.³³ Aside from continuing to develop and announce self-regulating principles of conduct, the industry aims to focus its efforts on widely advertising the work and scope of the DAA self-regulatory program by striving to “explain the benefits of a targeted, tailored online experience to consumers.”³⁴

29. See DAA Announces Comprehensive Principles for Online Collection of Web Data, *supra* note 25.

30. See *id.* The Principles are designed to increase consumer choice and control by tackling specific protections in problem areas such as information regarding children, consumer finance, and health records. *Id.* Peter Kosmala, managing director of the DAA, states that the addition of the new Principles is directly related to recent concerns being voiced about the collection and use of online consumer information. *Id.*

31. See Abbey Klaassen, *Behavioral Targeting Might Scare Consumers Less if We Did Better Job Explaining It*, AD AGE BLOGS (Oct. 17, 2011), <http://adage.com/article/abbey-klaassen/behavioral-targeting-scare-consumers-job-explaining/230431/>; e.g., John Gamble, *The Case for Behavioral Advertising Compliance*, TRUSTE BLOG (Sept. 8, 2011), <http://www.truste.com/blog/2011/09/08/the-case-for-behavioral-advertising-compliance/>; J.H. Snider, *Could Federal Government Privacy Policy Kill Online News?*, HUFFINGTON POST (Oct. 17, 2011, 6:54 PM), http://www.huffingtonpost.com/jh-snider/behavioral-targeting_b_1013510.html.

32. The industry ironically discusses consumers’ negative associations with various Internet terms, perpetuated by “fear-mongering terminology.” Klaassen, *supra* note 31. As an example of this terminology, words like “tracking” and “cookie” now carry negative connotations in the minds of consumers due to the smear campaign against online behavioral advertising. *Id.*; see also Press Release, Network Adver. Initiative, *supra* note 13.

33. See Klaassen, *supra* note 31.

34. See *id.* In her article, Ms. Klaassen suggests some helpful ways to educate consumers about the benefits of self-regulation. *Id.* One of her suggestions is an idea for a “funny campaign about being stalked by awful ads you don’t want to see as opposed to ads you *do* want to see,” in order to alleviate consumer fears. *Id.*

The online advertising community stands firmly in favor of self regulation as the best framework for the industry.³⁵ For example, TRUSTe, a leader in the development of privacy applications and a privacy services vendor, is a significant supporter as it is one of the main players converting the self-regulation principles into tangible programs, an important product for the industry.³⁶ The general industry sentiment is that a self-regulatory program administered through a collaborative effort, such as the DAA, is a superior strategy which provides better protection “against over-reaching legislation.”³⁷

II. THE GOOGLE-DOUBLECLICK MERGER

In April 2007, Google made its largest acquisition to date by purchasing online ad company DoubleClick for \$3.1 billion in cash.³⁸ The acquisition accelerated Google’s display advertising business by providing a large network of advertisers and web publishers and boosting its banner advertising business in comparison to rivals like Yahoo.³⁹ The merger also allowed media agencies and advertisers to manage integrated search and display ad campaigns through a single centralized console, boosting system speeds and increasing the amount of targeted advertising.⁴⁰ In addition to strengthening its competitive edge over Yahoo, Google’s purchase of DoubleClick would also bolster its challenge against Microsoft, which had recently launched its own search advertising system.⁴¹ Amidst reports of the merger, it was noted that DoubleClick had been involved in a consumer privacy scandal in the late 1990s when it attempted to combine consumer

35. Forrester recently released its report, *Online Advertising Data Compliance Matters*, which was aimed at marketers and squarely advocates self regulation “for the benefit of their brand as well as the overall industry.” Gamble, *supra* note 31.

36. See Press Release, TRUSTe, TRUSTe Extends Leadership Role in Mobile Privacy with Introduction of Free Privacy Policies for Mobile Applications (Nov. 2, 2011, 9:00 AM), available at http://www.truste.com/about-TRUSTe/press-room/news_truste_free_privacy_policies_for_mobile_applications.

37. See Gamble, *supra* note 31. Companies that openly participate in the self-regulatory system and claim to follow published industry principles also qualify for a safe-harbor provision for their goodwill. *Id.*

38. See Mills, *supra* note 6.

39. *Id.*

40. *Id.*

41. *Id.* In 2001, DoubleClick was forced to shut down its “intelligent” targeting service which anonymously tracked people online and then served ads based on personal preferences by allowing marketers to target advertising using a database of 100 million user profiles. *Id.* In 2005, DoubleClick settled state and federal lawsuits for violating the privacy of Internet users. *Id.* As part of the settlement, the company was required to provide consumers with an “easy-to-read” privacy policy, purge personally identifiable consumer information, obtain opt-in agreement from future users, and conduct a public information campaign using 300 million banner ads. Gwendolyn Mariano, *DoubleClick Able to Settle Privacy Suits*, CNET (May 21, 2002, 5:10 PM), <http://news.cnet.com/2100-1023-919895.html>.

online and offline data, track consumer activity, and target ads based on user profiles.⁴²

On April 20, 2007, the Electronic Privacy Information Center (EPIC), the Center for Digital Democracy (CDD), and the U.S. Public Interest Research Group (U.S. PIRG) filed a complaint with the FTC, requesting that the FTC open an investigation into the merger and halt the acquisition.⁴³ The joint complaint argued that Google's activities constituted deceptive and unfair trade practices that would injure consumers throughout the United States.⁴⁴ The complaint alleged that allowing the merger would enable Google to operate with "virtually no legal obligation to ensure the privacy, security and accuracy of the personal data that it collects."⁴⁵

A. GOOGLE AND ITS FUNCTIONS

Google operates the largest Internet search engine in the United States and also dominates the search market in Europe.⁴⁶ The Google search engine is linked to the servers which store users' search terms in connection with their individual Internet Protocols (IP).⁴⁷ The IP identifies each individual computer connected to the Internet.⁴⁸ Prior to the merger with DoubleClick, Google itself did not directly engage in behavioral advertising.⁴⁹

42. See Mills, *supra* note 6.

43. Complaint and Request for Injunction, Request for Investigation and for Other Relief, *supra* note 10, at 11.

44. *Id.* The complaint argued that this constituted deceptive trade practices because the Google homepage did not directly inform users about Google's data collection practices; rather, the user had to click through four links to reach the information. *Id.* at 9. The complaint stated that a user was unlikely to take the time to look for this information. *Id.* In addition, the complaint argued that Google's activities constituted unfair trade practices through retention of users' search terms in connection with their IP address because such retention was performed without their knowledge or consent. *Id.* At this time, there was no "opt-out" option for users who did not want Google to store their search terms. *Id.*

45. *Id.* at 10.

46. *Id.* In March 2007 alone, approximately 3.5 billion searches were performed through the Google search engine, a number believed to be much greater now. *Id.* at 6. Google sites are visited by 75 percent of Internet users in Europe, in comparison to 60 percent of users in the United States. *Id.* at 6-7.

47. *Id.* at 7.

48. *Id.* This information is stored indefinitely by Google in connection with each unique IP address. *Id.* at 7. A January 2006 poll found that 89 percent of Google users believed that search terms were kept private while 77 percent believed that Google searches do not reveal their personal identities, including the storing of information by unique IP addresses. *Id.* When a user enters a search term, the Google server automatically records "the user's web request, IP address, browser type, browser language, the date and time of the request and one or more cookies that may uniquely identify the user's browser." *Id.* This means the search terms are linked with the user's personally-identifiable IP address. *Id.* at 7.

49. *Id.*

Previously, Google functioned as an ad intermediary in the advertising market space.⁵⁰ The company would sell online advertising to customers in its capacity as a search engine provider.⁵¹ For example, when a user enters a search term using Google, the search engine returns results along with advertisements, which have been triggered to appear by the user's search term.⁵² Google generates "most of its online advertising revenue . . . [from] sale[s] of advertising space on its search engine results pages."⁵³ In terms of ad intermediation, Google offers its customers the AdWords⁵⁴ and AdSense⁵⁵ programs, which can be individualized according to the particular customer.⁵⁶

Google allows customers to use AdWords in order to shape the service according to their individual business needs.⁵⁷ Using the service, the customer creates an advertisement and assigns key words thought to be relevant to their businesses.⁵⁸ When the assigned keywords are entered by a consumer, the advertisement appears next to the search engine's generated results, allowing a consumer to click on the ad in order to be redirected to that website.⁵⁹ According to Google, this allows AdWords customers to advertise "to an audience that's already interested in you," targeting consumers based on the content of their online searches.⁶⁰ The AdWords payment plan devised by Google further appeals to advertisers because they are only charged when an online consumer clicks on the displayed ad and is redirected to the advertiser's website.⁶¹ Finally, the service also provides advertisers with tools and reports that break down exactly how the money spent on advertising is being used, in order to allow advertisers to target consumers more effectively and improve ad campaigns.⁶²

The Google AdSense program allows website clients to earn revenue by displaying Google advertisements on their site.⁶³ This service is free for the participating website, since advertisers and ad networks are billed for using the service.⁶⁴ Offering the "most robust targeting of any network," AdSense

50. Google/DoubleClick, No. 071-0170, 2007 WL 4624893, at *4 (F.T.C. Dec. 20, 2007).

51. *Id.* at *2. Search engine providers such as Google are distinct from content providers, or publishers, because content providers also sell online advertising space either directly or indirectly. *Id.* at *3.

52. *Id.*

53. *Id.*

54. See GOOGLE ADS, <http://www.google.com/AdWords> (last visited Dec. 19, 2011).

55. See GOOGLE ADSENSE PRODUCT TOUR, https://www.google.com/adsense/www/en_US/tour/ (last visited October 20, 2012).

56. *Id.*; see also GOOGLE ADS, *supra* note 54.

57. See GOOGLE ADS, *supra* note 54.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. See GOOGLE ADSENSE PRODUCT TOUR, *supra* note 55.

64. *Id.*

targets its audience through three types of advertising: contextual, placement, and Internet-based.⁶⁵ The website participates in the service by choosing advertising space on their site and selecting types of acceptable content.⁶⁶ Advertisers subsequently bid to advertise in the available space.⁶⁷

B. DOUBLECLICK AND ITS FUNCTIONS

Prior to the merger, DoubleClick was a leading provider of Internet-based advertising that operated primarily by placing advertising messages on Internet websites.⁶⁸ DoubleClick was able to track individual Internet users who received ads served by the company through a system of stored unique identifications.⁶⁹ DoubleClick's product "'DART' (Dynamic, Advertising, Reporting and Targeting) . . . enabled advertisers to [utilize user information recorded and stored by DoubleClick in order to] target and deliver ads based on pre-selected criteria."⁷⁰ These criteria stemmed from the large amount of consumer demographic information stored by DoubleClick, which was used to execute behavioral targeting of advertisements.⁷¹ In addition to DART, DoubleClick also operated an advertising exchange and Performics, a search-engine marketing business.⁷²

65. *Id.* Contextual advertising allows the service to display ads "related to the content of your page." *Id.* Placement targeting allows an advertiser to "target your site based on demographics, vertical, geographic location, or URL." *Id.* Internet-based advertising allows an advertiser to display ads determined by "users' interests and previous interactions with that advertiser." *Id.*

66. *Id.*

67. *Id.*

68. *See* Complaint and Request for Injunction, Request for Investigation and for Other Relief, *supra* note 10, at 8. Its advertising is estimated to reach approximately 80–85 percent of Internet users. *Id.* Its advertising customers include AOL (a Time Warner company) and MTV Networks (a Viacom company). *Id.*

69. *Id.* at 9.

When a user is first "served" an ad, DoubleClick assigns the user a unique number and records that number in a "cookie" file stored on the user's computer. As that user subsequently visits other Web sites on which DoubleClick serves ads, he or she is identified and recorded as having viewed each ad. DoubleClick stores a user's history for two years.

Id.

70. *See id.* DoubleClick offered a product called DART, which placed banner advertisements on websites. *Id.* DoubleClick marketed this product to publishers, advertisers, and corporate customers. *Id.*; *see also* Dawn Kawamoto & Anne Broache, *FTC Allows Google-DoubleClick Merger to Proceed*, CNET (Dec. 20, 2007, 1:30 PM), http://news.cnet.com/FTC-allows-Google-DoubleClick-merger-to-proceed/2100-1024_3-6223631.html.

71. Complaint and Request for Injunction, Request for Investigation and for Other Relief, *supra* note 10, at 9. Consumer information stored includes a range of data including "web surfing, shopping cart behavior, and use of broadband video." *Id.*

72. *See* Kawamoto & Broache, *supra* note 70. The advertising exchange operated by DoubleClick functioned to match advertisers looking for advertising space with advertising networks who owned websites that are selling advertising space, in order to efficiently generate online advertising revenue for clients. *Id.*

Unlike Google, DoubleClick did not sell sponsored search advertising space to advertisers.⁷³ Instead, it was the leading company in the third-party ad serving market, which functions in the delivery and tracking of online advertisements.⁷⁴ Ad server products allow publishers to manage online advertising by tracking advertisements that generate the largest amount of revenue—satisfying the publisher’s contractual obligations—as well as performing various sales analyses.⁷⁵ Its products also allow advertisers to check that advertisements are sent and served by publisher sites.⁷⁶ Finally, ad server products analyze various online advertising campaigns among different publishers.⁷⁷

C. FTC INVESTIGATION OF THE GOOGLE-DOUBLECLICK MERGER

According to its official statement,⁷⁸ the FTC paid particular attention to Internet advertising activity due to a rise in customer use and the degree of effectiveness that its communication capabilities offered.⁷⁹ Google consolidated and developed its Internet advertising to create what the company called the “Google Display Network,”⁸⁰ which included “text, image, rich media, and video advertising on Google properties, YouTube, and millions of web, domain, video, gaming, and mobile partner sites.”⁸¹ The Commission’s investigation in regards to the merger between Google and DoubleClick aimed at considering its impact on competition within the realm of online advertising.⁸² The Commission noted that Google “is the dominant provider of sponsored search advertising.”⁸³ The company proclaimed itself to be the number one global advertising network, reaching more than 80 percent of Internet users across the world, delivering in excess of six billion ad impressions across hundreds of thousands of websites daily, and touting thousands of advertisers as Google Advertising Network users.⁸⁴

73. See *Google/DoubleClick*, No. 071-0170, 2007 WL 4624893, at *3 (F.T.C. Dec. 20, 2007).

74. *Id.* at *5–6.

75. *Id.* at *5.

76. *Id.* at *5–6.

77. *Id.* at *6.

78. *Id.* at *1.

79. According to its statement, the FTC was responding to complaints and warnings that the merger would allow the companies to combine their databases of consumer information in a way that would infringe upon consumer privacy. *Id.*

80. See GOOGLE DISPLAY NETWORK, www.google.com/displaynetwork (last visited Dec. 19, 2011).

81. *Id.*; see *CPA Performance Trends on the Google Display Network*, GOOGLE, http://static.googleusercontent.com/external_content/untrusted_dlcp/www.google.com/en/us/adwords/displaynetwork/GDN_Whitepaper.pdf (last visited Dec. 19, 2011).

82. See *Google/DoubleClick*, 2007 WL 4624893, at *1.

83. *Id.* at *3.

84. See *CPA Performance Trends on the Google Display Network*, *supra* note 81.

The Commission conducted its investigation of the merger between Google and Double-Click under the authority of the Clayton Act, which grants the Commission authority to review mergers and acquisitions.⁸⁵ “The standard used by the FTC to review [the merger] is set forth in Section 7 of the Clayton Act.”⁸⁶ Codified at 15 U.S.C. § 18, it specifically states:

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.⁸⁷

In pursuing its investigation, the Commission specifically targeted transactions deemed harmful to consumers, either because sellers were able to maintain prices that were above competitive levels for extended periods of time or which resulted in the diminished quality of a product or service.⁸⁸

In deciding to close its investigation of Google’s acquisition of DoubleClick due to its unlikely reduction of competition, the Commission evaluated and rejected three possible theories of harm.⁸⁹ First, the Commission did not find evidence to support the theory that the merger would “eliminate direct and substantial competition” between the two companies.⁹⁰ Likewise, the Commission declined to accept the theory that a merger would eliminate any potential competition in the third-party ad server market.⁹¹ Finally, the Commission rejected the merger’s potential to cause non-horizontal harm by allowing Google to utilize DoubleClick’s dominance in the third-party ad server market in order to benefit its own position in the ad intermediation market.⁹² In concluding its statement, the

85. See *Google/DoubleClick*, 2007 WL 4624893, at *1.

86. *Id.*; Clayton Act, Pub. L. No. 62-213, § 7, 38 Stat. 730, 731–32 (1914) (codified at 15 U.S.C. § 18 (2006)).

87. See 15 U.S.C. § 18.

88. See *Google/DoubleClick*, 2007 WL 4624893, at *1.

89. *Id.* at *6.

90. *Id.*

91. *Id.* at *7.

92. *Id.* at *10. Google’s competitors had expressed concerns that the merger would allow the company to combine its own database of user information with data collected by DoubleClick, thereby creating an “overwhelming advantage” in the market. *Id.* The FTC dismissed this concern, basing its conclusion on the fact that information collected by DoubleClick regarding its customers and competitors technically lies in the possession of the various publishers. *Id.* DoubleClick is not the proprietor of this information. *Id.* DoubleClick has individual contracts with its customer publishers which contain restrictions on the disclosure of the information collected by DoubleClick. *Id.* In its statement, the FTC expressed that they believed statements made by Google that the company would continue to honor the disclosure restrictions in the contracts between DoubleClick and its customers. *Id.* Therefore, the FTC did not believe that the

Commission summarized competitors' qualms about the merger, attributing their concerns to a fear of a superior Google product that could potentially dominate the market.⁹³ This fear was dismissed in the face of the ever-changing nature of the online advertising market and its products.⁹⁴ Relying on a "snapshot of current, narrowly-drawn product categories,"⁹⁵ the Commission approved the merger in December 2007.⁹⁶

D. HARBOUR'S DISSENT IN THE FTC'S DECISION TO CLOSE INVESTIGATION

In her dissent accompanying the Commission's statement regarding ending its investigation, Commissioner Pamela Jones Harbour pinpointed lack of foresight as the Commission's downfall in its analysis of the relevant markets.⁹⁷ In particular, Harbour delineated three ways in which the activities of Google and DoubleClick horizontally overlap within the online advertising markets, potentially resulting in decreased competition due to the merger of the two companies.⁹⁸ First, Google was in the process of developing and beta-testing its own third-party ad serving tools, which would eventually enter the market in direct competition with DoubleClick's product.⁹⁹ Likewise, DoubleClick developed its own tool for ad intermediation, which placed it in direct horizontal competition with Google prior to the merger.¹⁰⁰ Finally, Google's recent implementation of "placement targeting," which allowed advertisers to select specific websites for their text or image advertisements, was merely a substitute product for DoubleClick's display advertisement tools. Therefore, Harbour considered the two companies to be in direct competition for customers.¹⁰¹ None of these elements were analyzed in the FTC's report regarding the markets which Google and DoubleClick products occupied.¹⁰²

E. SUBSEQUENT HISTORY AFTER THE FTC INVESTIGATION

The FTC ultimately announced that it would allow the \$3.1 billion merger proposal between Google and DoubleClick to proceed after eight months of review for possible antitrust violations following Google's

merger would allow Google to utilize DoubleClick's dominance in the third party ad server market to its own advantage in an unfair way. *Id.*

93. *Id.* at *11.

94. *Id.*

95. Pamela Jones Harbour & Tara Isa Koslov, *Section 2 in a Web 2.0 World: An Expanded Vision of Relevant Product Markets*, 76 ANTITRUST L.J. 769, 784 (2010).

96. *Id.* at 783-84.

97. *See Google/DoubleClick*, 2007 WL 4624893, at *12.

98. *Id.*

99. *Id.*

100. *Id.* at *13.

101. *Id.*

102. *Id.*

announcement of the merger.¹⁰³ Despite significant dissent by rivals such as Microsoft, as well as a strongly worded dissent by Commissioner Harbour, the Commission approved the merger in a four-to-one vote.¹⁰⁴ Although Google was waiting for the approval of the merger by European regulators, it announced that “the FTC’s strong support sends a clear message: this acquisition poses no risk to competition and will benefit consumers.”¹⁰⁵ In the wider scope of antitrust regulation, critics found that the FTC’s decision corresponded to the general trend regarding treatment of vertical mergers in the marketplace.¹⁰⁶ The Commission’s decision comes in the face of complaints by competitors like Microsoft that the merger would “give Google an unfair advantage in search and publisher-based advertising tools.”¹⁰⁷

Subsequently, the European Commission approved the \$3.1 billion merger between Google and DoubleClick and placed no conditions on the transaction.¹⁰⁸ Following the Commission’s decision, Google’s chief executive, Eric Schmidt, expressed his satisfaction:

We are thrilled that our acquisition of DoubleClick has closed With DoubleClick, Google now has the leading display ad platform, which will enable us to rapidly bring to market advances in technology and infrastructure that will dramatically improve the effectiveness, measurability, and performance of digital media for publishers, advertisers, and agencies.¹⁰⁹

Similar to the statement issued by the FTC, the European Commission determined that Google and DoubleClick could not be considered competitors in this transaction.¹¹⁰

III. THE INADEQUACY OF SELF REGULATION AND THE FTC APPROACH

As the leading agency in privacy policy and enforcement, the FTC has the task of observing and policing how technology affects American

103. See Kawamoto & Broache, *supra* note 70.

104. *Id.*

105. *Id.*

106. *Id.* For the past thirty years, vertical mergers which involve companies “in adjacent businesses and are designed to push the buyer into a new market” have been approved. *Id.* The FTC has taken a stricter approach to horizontal mergers between “two companies in exactly the same line of business,” which may function to remove a competitor. *Id.*

107. *Id.*

108. See Dawn Kawamoto, *With Europe’s OK, Google Closes DoubleClick Acquisition*, CNET (Mar. 11, 2008, 8:52 AM), http://news.cnet.com/8301-10784_3-9890858-7.html.

109. *Id.*

110. *Id.* Responding to the European approval to the merger, the CDD echoed Commissioner Harbour’s concern that “[a]n antiquated and piecemeal antitrust approach” is an inadequate method of assessment for the privacy concerns raised in the new digital market. *Id.*

businesses and consumers.¹¹¹ The FTC framework consists of encouraging companies to build privacy and security protections into new products, simplified privacy policies, and greater transparency around data collection, use, and retention.¹¹² The online behavioral advertising industry relies on self regulation, along with many other private sector industries, to establish industry standards, develop and apply codes of professional ethics, and secure consumer confidence.¹¹³ However, recent evaluations of the industry's self-regulatory efforts are garnering significant criticism.¹¹⁴

A. THE FAILURE OF SELF REGULATION

Contrary to the claims of the online advertising community, studies at the University of California Berkeley School of Law and the University of Pennsylvania have both found that the majority of U.S. residents are not interested in receiving targeted advertising content.¹¹⁵ While only 35 percent of respondents agreed with jail time for executives of companies using consumer information illegally, consumers demonstrated disinterest in targeted advertising, which contradicted the results of an earlier study conducted by TRUSTe, an Internet privacy services vendor.¹¹⁶ In addition, a comprehensive report by researchers at Carnegie Mellon University found

111. Julie Brill, Comm'r, FTC, Privacy Implications of Social Media, Address at the U.S.–China Internet Industry Forum (December 7, 2011) (transcript available at <http://insuranceneedsnet.com/article.aspx?id=311115>).

112. *Id.*

113. See Daniel Castro, Info. Tech. & Innovation Found., Benefits and Limitations of Industry Self-Regulation for Online Behavioral Advertising 1 (2011), <http://www.itif.org/publications/benefits-and-limitations-industry-self-regulation-online-behavioral-advertising>.

114. See Wendy Davis, *Consumers Don't Understand Opt-Out Tools*, MEDIA POST (Oct. 31, 2011, 6:55 PM), <http://www.mediapost.com/publications/article/161469/consumers-dont-understand-opt-out-tools.html>.

115. See Grant Gross, *Survey: US Residents Don't Want Targeted Ads*, IT WORLD (Oct. 1, 2009, 10:48 AM), <http://www.itworld.com/government/79438/survey-us-residents-dont-want-targeted-ads>. The Berkeley Center for Law and Technology and the Annenberg School for Communication found that 86 percent of respondents did not want online vendors to provide targeted ads by tracking consumer behavior across multiple websites. *Id.* In addition, 66 percent of participants responded that they were simply not interested in targeted online advertisements. *Id.*

116. *Id.* TRUSTe, whose poll focused on online users, found that, while two out of three consumers were aware that their Internet browsing information was potentially being collected by a third party for the purpose of behavioral advertising, consumer discomfort with behaviorally targeted advertising fell to 51 percent in 2009 from 57 percent a year earlier, "suggesting that although consumers worry about protecting their private information online, they are growing more accustomed to behavioral targeting, with some even preferring to be served targeted advertisements." Press Release, TRUSTe, Behavioral Targeting: Not that Bad?! TRUSTe Survey Shows Decline in Concern for Behavioral Targeting (March 4, 2009), available at http://www.truste.com/about-TRUSTe/press-room/news_truste_behavioral_targeting_survey. On the other hand, 86 percent of the Berkeley Center respondents stated that they do not think online advertisers should deliver targeted advertising through the use of tracking consumers across various websites. *Id.* While the significant difference in results from the TRUSTe survey may be attributed to its polling of online users, the results of the Berkeley/University of Pennsylvania phone survey convey a general attitude of distrust from consumers. *Id.*

that Internet users who wanted to actively protect their privacy and prevent companies from tracking their online activities had great difficulty opting out of the tracking.¹¹⁷ While the DAA requires ad companies to allow people to opt out of receiving targeting advertising and notify users about the proper process, consumer confusion is not necessarily resolved.¹¹⁸

As an alliance created to establish a common set of guidelines to promote industry self regulation, the DAA has not been empirically successful at increasing consumer transparency through easily understandable opt-out tools.¹¹⁹ DAA initiatives carry no consequences, such as fines or formal reprimands, for companies who receive a bad report for noncompliance.¹²⁰ As part of the self-regulation effort, the industry has set up the Online Interest-Based Advertising Accountability Program to determine whether businesses are complying with the Principles for Online Behavioral Advertising created by the National Advertising Review Council (NARC).¹²¹ However, NARC can only identify violators through a combination of self monitoring and consumer complaints, relying on the industry to police itself.¹²² It refers companies who fail to comply with the Principles to the FTC and publicizes their noncompliance through a news release.¹²³ Meanwhile, consumer groups in the U.S. and Europe continue to voice their dissatisfaction regarding potential data breaches as a result of online behavioral ads.¹²⁴

117. See *Carnegie Mellon Report Finds Internet Privacy Tools Are Confusing, Ineffective for Most People*, EUREKALERT! (Oct. 31, 2011), http://www.eurekalert.org/pub_releases/2011-10/cmu-cmr103111.php. The researchers at Carnegie Mellon tested nine opt-out tools, finding serious usability flaws in each one. *Id.* They found that average consumers were “confused by the instructions and had trouble installing or configuring the tools correctly.” *Id.* “Often, the settings they chose failed to protect their privacy as much as they expected, or to do anything at all.” *Id.*

118. See Davis, *supra* note 114. The DAA responded to the results of the study by stating that they were interested in transparency and meaningful choices for consumers operating in the real world. The DAA was not concerned since “it is easy to create consumer confusion in the laboratory.” *Id.*

119. *Id.* See Lucian Constantin, *Advertisers Can't Be Trusted to Self-Regulate on Data Collection, Says EFF*, IDG NEWS SERVICE (Nov. 16, 2011, 1:53 PM), http://www.cio.com.au/article/407483/advertisers_can_t_trusted_self-regulate_data_collection_says_eff/.

120. Constantin, *supra* note 119. The Electronic Frontier Foundation (EFF) believes that no self-regulatory program can replace proper legislation from the US Congress. *Id.*

121. Hayley Tsukayama, *Advertisers Release First Self-Regulation Results*, WASH. POST BLOGS (Nov. 8, 2011, 5:30 PM), http://www.washingtonpost.com/blogs/post-tech/post/advertisers-release-first-self-regulation-results/2011/11/08/gIQA26Cf2M_blog.html. The program was set up in August 2011, and is overseen by the Better Business Bureau. *Id.*

122. *Id.* In its first decisions, the council examined opt-out mechanisms and asked six companies to change their opt-out policies due to inadequacy. *Id.* It reported that the companies of Forbes Media Extension, Martini Media, PredictAd, QuinStreet, Reedge, and Veruta made the necessary changes within the mandatory two-week period. *Id.*

123. *Id.*

124. Claire Davenport, *Consumers Out in Force Against Targeted Online Ads*, EURACTIV (Sept. 14, 2011), <http://www.euractiv.com/infosociety/consumers-force-targeted-online-ads-news-507597>. Regulatory advisers and advertisers held meetings in the Hague to discuss the possible

B. THE DOWNFALLS OF THE FTC APPROACH

The Commission's approach to enforcement regarding consumer privacy protection is an uncertain combination of reactive techniques and suggested guidelines for companies.¹²⁵ For example, a company that fails to uphold its promises regarding consumer privacy may face charges of deception by the Commission.¹²⁶ In addition, the entity which results from a merger is encouraged to clearly state its goals regarding its use of consumer information, as well as to articulate the choices available to consumers regarding the gathering of online behavioral information.¹²⁷ Google has recently blundered in the area of consumer disclosure with its Google Buzz product,¹²⁸ a Twitter-like platform that allowed users to share information such as updates, photos, and videos with other users.¹²⁹ This dialogue between users was integrated into Gmail, Google's email platform.¹³⁰ The Commission alleged that although the company had "led Gmail users to believe that they could choose whether or not they wanted to join the network, the options for declining or leaving the social network were ineffective."¹³¹ In addition, the Commission alleged that "the controls for limiting the sharing of their personal information were confusing and difficult to find" for users who chose to join the social network.¹³² Google has discontinued the service.¹³³

Overall, the FTC proposes a multi-level approach consisting of enforcement of the FTC Act and other laws,¹³⁴ consumer and business

dangers of online behavioral ads to consumers, as part of increasing international scrutiny by data protection authorities on online information gathering in the form of advertising. *Id.*

125. See *Google/DoubleClick*, No. 071-0170, 2007 WL 4624893, at *18 (F.T.C. Dec. 20, 2007), available at <http://www.ftc.gov/os/caselist/0710170/071220statement.pdf>.

126. *Id.* According to its statement, the FTC continues to be concerned with privacy enforcement, which it carries out according to its powers under its traditional Section 5 authority in order to ensure consumer privacy. *Id.* Companies that make certain guarantees regarding consumer privacy and then fail to uphold these promises face the danger of deception charges brought against them by the FTC, as in the case of ChoicePoint. *Id.* The FTC brought an enforcement action against ChoicePoint for failing to uphold its own stated privacy policies. Press Release, FTC, ChoicePoint Settles Data Security Breach Charges; to Pay \$10 Million in Civil Penalties, \$5 Million for Consumer Redress (Jan. 26, 2012), available at <http://www.ftc.gov/opa/2006/01/choicepoint.shtm>. As a result, ChoicePoint settled the charges regarding data security breaches for \$10 million in civil penalties and \$5 million in consumer redress. *Id.*

127. See *Google/DoubleClick*, 2007 WL 4624893, at *18–19.

128. See Press Release, FTC, FTC Charges Deceptive Privacy Practices in Google's Rollout of Its Buzz Social Network (Mar. 30, 2011) [hereinafter FTC Charges Deceptive Privacy Practices], available at <http://www.ftc.gov/opa/2011/03/google.shtm>.

129. See *Introducing Google Buzz*, <http://googleblog.blogspot.com/2010/02/introducing-google-buzz.html> (last visited Oct. 20, 2012).

130. *Id.*

131. FTC Charges Deceptive Privacy Practices, *supra* note 128.

132. *Id.*

133. See *Google Buzz*, GOOGLE, www.google.com/buzz (last visited Oct. 20, 2012).

134. See *Prepared Statement of the FTC on Privacy and Data Security: Protecting Consumers in the Modern World: Before the S. Comm. on Commerce, Sci., and Transp.*, 112th Cong. 16–17 (2011) (statement of Julie Brill, Comm'r, FTC).

education regarding consumer privacy,¹³⁵ and a combination of “public workshops, reports, and policy reviews” concerning new technology and business practices in the area of consumer privacy.¹³⁶ More recently, the Commission has focused its efforts on encouraging industry self regulation, issuing a staff report in February 2008 regarding online advertising which included another set of proposed principles for self regulation.¹³⁷ The Commission encourages companies to clearly inform consumers of their activities and offer an easy opt-out method, provide reasonable security for collected information and retain it only as long as necessary to fulfill a legitimate need, collect express consumer consent for using previously collected data for a different purpose, and obtain express consumer assent prior to collecting “sensitive” data.¹³⁸

The FTC insists that its only purpose in reviewing mergers and acquisitions, such as the Google-DoubleClick merger, is the targeting of transactions that harm competition and violate federal antitrust statutes.¹³⁹ It argues that its jurisdiction does not extend into public policy matters beyond federal antitrust violations, such as consumer privacy and behavioral advertising, and prefers not to set a dangerous precedent of regulating individual companies.¹⁴⁰ Nevertheless, the Commission evaluated the potential harm of the Google-DoubleClick merger from a public policy standpoint, rather than a violation of federal antitrust laws.¹⁴¹ The FTC frames a similar series of concerns about Google’s activities in the context of protecting consumers’ personal information within an ever-changing marketplace.¹⁴² However, in its decision to drop the investigation of the Google-DoubleClick merger, the Commission only highlights the dynamic nature of the new digital marketplace.¹⁴³

In her dissent, Commissioner Harbour offers a prediction for consumer privacy in the context of the convergence of Google and DoubleClick.¹⁴⁴

135. *Id.* at 18.

136. *Id.* at 19.

137. Rosch, *supra* note 11.

138. *Id.*

139. See Google/DoubleClick, No. 071-0170, 2007 WL 4624893, at *2 (F.T.C. Dec. 20, 2007).

140. *Id.*

141. *Id.*

142. See *Prepared Statement of the FTC on Privacy and Data Security: Protecting Consumers in the Modern World*, *supra* note 134, at 1.

143. See Google/DoubleClick, 2007 WL 4624893, at *18.

While the FTC’s competition and consumer protection missions focus on different types of conduct, they share the same overall goal: that consumers obtain truthful information about products and services that they can then use to make purchase decisions in a competitive marketplace in which their personal information is safeguarded. This purpose has assumed even greater importance in this dynamic, digital, and global marketplace.

Id.

144. *Id.* at *15.

Specifically, Harbour predicts the evolution of highly targeted advertising through the combination of search information gathered by Google and browsing information gathered by DoubleClick, resulting in both targeted search ads and targeted display ads.¹⁴⁵ This future combination of information seems inevitable, when considering Google's billion dollar efforts to obtain DoubleClick for itself rather than allowing it to function independently or risk its acquisition by another company.¹⁴⁶

IV. A MULTI-PRONG APPROACH TO EFFECTIVE INDUSTRY MONITORING

Effective behavioral advertising industry oversight can be implemented through a process of co-regulation.¹⁴⁷ Co-regulation would consist of a combination of government watchdogs, official enforcement agencies, and soft law for the purpose of providing a legal backstop for the enforcement of self-regulation principles from within the industry.¹⁴⁸

A. CONSOLIDATION OF REGULATORY PRINCIPLES AND OVERSIGHT PROGRAMS

The current self-regulatory landscape of online behavioral advertising is replete with a wide variety of proposed principles published by multiple sources.¹⁴⁹ This includes self-regulatory principles published and updated by the NAI,¹⁵⁰ as well as the proposed principles published by the DAA.¹⁵¹ In addition, the FTC has offered its own supplementing framework to promote the industry's self-regulation polices.¹⁵² The recent implementation of the Online Interest-Based Advertising Accountability Program¹⁵³ by

145. *Id.*

146. In effect, the merger between Google and DoubleClick creates a large compendium of consumer information and consumer preferences, likely increasing the targeting ability of products offered to advertisers by the combined entity. *Id.* at *16.

147. See generally CASTRO, *supra* note 113.

148. *Id.* at 2.

149. See, e.g., DIGITAL ADVERTISING ALLIANCE, *supra* note 4 (proposing seven "Self-Regulatory Principles for Online Behavioral Advertising" authored by "leading industry associations," including the American Association of Advertising Agencies, the Association of National Advertisers, the Council of Better Business Bureaus, the Direct Marketing Association, and the Interactive Advertising Bureau); see also Komanduri et al., *supra* note 1; DAA Announces Comprehensive Principles for Online Collection of Web Data, *supra* note 25.

150. See Brill, *supra* note 111.

151. See DIGITAL ADVERTISING ALLIANCE, *supra* note 4; see also DAA Announces Comprehensive Principles for Online Collection of Web Data, *supra* note 25.

152. See Brill, *supra* note 111. The FTC aims to encourage companies to build privacy and security protections into new products, simplify its privacy policies for increased consumer understanding, and create greater transparency regarding data collection, use, and retention. *Id.*

153. See BETTER BUS. BUREAU, ONLINE INTEREST-BASED ADVERTISING ACCOUNTABILITY PROGRAM (2011), http://www.bbb.org/us/storage/113/documents/online-behavioral-advertising/OAB_Procedures.pdf.

NARC marks yet another attempt at self monitoring with the additional involvement of the Better Business Bureau.¹⁵⁴ Each of these programs and manifestos relies on industry self monitoring and consumer complaints to ensure proper functioning.¹⁵⁵ Instead, the effort to improve implementation of consumer privacy protections must begin with reducing unnecessary regulations.¹⁵⁶ Federal legislation or government action is not always the proper or only solution.¹⁵⁷ However, the FTC must function in a way that informs both policymakers and the industry to create a cohesive regulatory framework.¹⁵⁸

B. REDEFINING NEW TECHNOLOGY MARKETS TO BOLSTER THE FTC ANALYSIS

Starting its analysis with market definition,¹⁵⁹ the FTC found that Google and DoubleClick occupied distinct product markets that had no overlap, which ended the investigation.¹⁶⁰ One solution may be to integrate consumer privacy issues within antitrust law by encouraging antitrust enforcement agencies to change their analysis of new technology markets.¹⁶¹ Enforcers developing the concept of a market definition as an organizing principle would shift the framing of product markets to center on privacy issues and consumer protection.¹⁶² Rather than perpetuating the split of enforcement efforts between antitrust issues and consumer privacy issues, privacy would be incorporated into the product market definition as an aspect of competition to enhance the antitrust analysis.¹⁶³

In re-examining market definitions implemented by regulatory agencies, another approach may entail creating a new category specifically

154. See Tsukayama, *supra* note 121.

155. DIGITAL ADVERTISING ALLIANCE, *supra* note 4, at 17–18; see also Komanduri et al., *supra* note 1; DAA Announces Comprehensive Principles for Online Collection of Web Data, *supra* note 25; Brill, *supra* note 111; Tsukayama, *supra* note 121.

156. See CASTRO, *supra* note 113, at 11.

157. *Id.* “In 2011, President Obama issued an Executive Order calling for a comprehensive review to improve the regulatory system. As noted in the Executive Order, policymakers should “identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends.” *Id.* (citation and internal quotation marks omitted).

158. Julie Brill, the FTC Commissioner, has recently stated that the FTC’s proposals are “intended to inform policymakers, including Congress, as they develop policies and legislation governing privacy. Our proposals are also intended to guide and motivate industry to develop best practices and improved self-regulatory guidelines.” Brill, *supra* note 111.

159. See Google/DoubleClick, No. 071-0170, 2007 WL 4624893, at *2–6 (F.T.C. Dec. 20, 2007), available at <http://www.ftc.gov/os/caselist/0710170/071220statement.pdf>.

160. See Michael R. Baye, Dir., Bureau of Economics, FTC, Is There a Doctor in the House? The Value of Economic Expertise in Antitrust, Remarks Consumer Protection, and Public Policy (Mar. 28, 2008). Without finding market overlap, the FTC was hard-pressed to find negative horizontal competitive effects, such as output restriction or price increase that would stem from the merger. *Id.*

161. See Harbour & Koslov, *supra* note 95, at 772–73.

162. *Id.* at 773.

163. *Id.* at 773–74.

for data markets that would identify distinctions between isolated incidents of data collection in contrast to continuous use of consumer data over time.¹⁶⁴ For example, this new market definition would recognize differences between search information collected by Google¹⁶⁵ and browser information collected by DoubleClick,¹⁶⁶ and then analyze the effect of a merger through the lens of a data market, rather than an online advertising market.¹⁶⁷

C. STANDARDIZATION OF DISCLOSURE ABOUT DATA COLLECTION METHODS

An enduring principle of the FTC framework has centered on consumer transparency.¹⁶⁸ Consumers must be able to understand a company's privacy policy rather than be expected to both read and comprehend long, complicated privacy policies.¹⁶⁹ This is a principle also articulated by the DAA, which has stressed consumer choice in the collection of personal information.¹⁷⁰ One solution to foster widespread consumer transparency may be the adoption of a uniform privacy policy structure within the industry.¹⁷¹ Standardization in the appearance of notices and disclosures could significantly enhance the transparency of privacy policies and advertiser accountability for the average internet user.¹⁷² Standardized elements can help consumers understand the data collection process along with their individual choice regarding its collection.¹⁷³

164. *Id.* at 773.

165. *See* Complaint and Request for Injunction, Request for Investigation and for Other Relief, *supra* note 10, ¶ 55.

166. *Id.* ¶ 56.

167. *See* Harbour & Koslov, *supra* note 95, at 773.

168. *See* Brill, *supra* note 111.

169. *Id.* One suggestion to simplify notice for consumers is to exempt "commonly accepted" practices from the layers of notice. *Id.* This would allow consumers to pay attention to important practices which they may consider an invasion of their privacy, rather than force them to sift through an exhaustive list of company policies. *Id.*

170. *See* DAA Announces Comprehensive Principles for Online Collection of Web Data, *supra* note 25.

171. *See* CENTER FOR DEMOCRACY & TECH., ONLINE BEHAVIORAL ADVERTISING: INDUSTRY'S CURRENT SELF-REGULATORY FRAMEWORK IS NECESSARY, BUT STILL INSUFFICIENT ON ITS OWN TO PROTECT CONSUMERS 15 (2009), <http://www.cdt.org/files/pdfs/CDT%20Online%20Behavioral%20Advertising%20Report.pdf>.

172. The Center for Democracy and Technology (CDT) proposes scripting tags to identify who is serving each advertisement, or at least a standardized beacon of some kind. *Id.* at 6.

173. *Id.* The CDT recommends that each disclosure should clearly state "which company or companies are collecting and using personal data, including data provided by advertisers, third-party data suppliers, and any ad networks collecting or using relevant data along the delivery chain." *Id.*

D. CONCRETE LIMITS ON BEHAVIORAL ADVERTISING METHODS THROUGH FEDERAL LEGISLATION

A push in the direction of federal legislation has recently stemmed from the use of behavioral advertising principles by credit card companies.¹⁷⁴ Senator John D. (Jay) Rockefeller IV, chairman of the Senate Commerce, Science and Transportation Committee, has reportedly sent letters to the Visa and MasterCard companies regarding their plans to “use data on customer behavior to target people with online ads.”¹⁷⁵ The credit card companies are considering new ways to analyze and aggregate consumer data collected every time a person uses their debit or credit card to complete a purchase.¹⁷⁶ This data is gathered from a wide variety of places including social network websites, credit bureaus, search engines, insurance claims, and DNA databanks.¹⁷⁷ Chairman Rockefeller has recently introduced the Data Security and Breach Notification Act of 2011¹⁷⁸ and the Do-Not-Track

174. See Jared Hunt, *Plans Get Senator's Attention*, CHARLESTON DAILY MAIL (Oct. 28, 2011), <http://www.dailymail.com/News/201110270129>.

175. *Id.* The Senator decided to voice his concerns after the *Wall Street Journal* published an article regarding the credit companies' plans. *Id.* While expressing his concern about the need for any initiative which targets consumer behavior to be subjected to careful scrutiny, Senator Rockefeller voiced his opinion on the inadequacy of existing privacy protections.

The privacy protections afforded to the Americans in today's commercial marketplace are already inadequate. . . . Plans to combine customers' purchase data with other personal data, such as information from social network websites, credit bureaus, search engines, insurance claims and even DNA databanks for the purpose of targeted behavioral advertising are unprecedented and alarming.

Id. Chairman Rockefeller requested that the companies provide specific information on the types of information the credit cards currently gather, along with the consumer identity protections they currently provide. *Id.*

176. *Id.* Visa and MasterCard process approximately sixty-eight billion consumer transactions every year, which possess an enormous amount of information about consumer spending, including “online purchases, restaurant visits, grocery shopping and vacation purchases.” *Id.* As the *Wall Street Journal* reported, companies are looking at methods of utilizing consumer purchase information in order to increase the efficiency of targeting customers with advertisements. *Id.* While the credit card companies do not match customer names and personal information to lists of purchase data, Visa and MasterCard aim to create anonymous profiles based on the aggregate data. *Id.* In order to do this, the companies have recently sought several patents for technology that collect this type of aggregate data and create “specific customer behavior profiles that could be used in combination with online habits to target advertisements.” *Id.*

177. *Id.*

178. Data Security and Breach Notification Act of 2011, S. 1207, 112th Cong. This bill was ultimately not enacted. *S. 1207 (112th): Data Security and Breach Notification Act of 2011*, GOVTRAC.US, <http://www.govtrack.us/congress/bills/112/s1207> (last visited Feb. 13, 2013).

Online Act of 2011¹⁷⁹ as proposed methods for consumer privacy protection in the face of increasing online collection of personal information.¹⁸⁰

E. DATA SECURITY AND BREACH NOTIFICATION ACT OF 2011

The Data Security and Breach Notification Act addressed the growing incidence of online data collection by requiring businesses and nonprofit organizations to create strong safeguards for consumer data, alert consumers at the time of a breach, and guide affected individuals through the process of protecting their credit and finances.¹⁸¹ Had it been enacted, the Act would have been the first piece of legislation to create a federal standard for safeguarding a wide variety of consumer information.¹⁸² The Act outlined concrete requirements to be implemented within one year of enactment by all entities that own or possess data containing personal information or have contracts with third-party entities that maintain such data for them.¹⁸³ As a piece of proposed legislation, the Act did not clarify the various circumstances that would allow an entity to escape the notification requirement following the discovery of a breach. It is likely that the circumstances would have to be fact-specific, rather than the fulfillment of a blanket checklist of requirements.¹⁸⁴

The strength of the Data Security and Breach Notification Act stemmed from the specificity of its requirements on all entities which store personal information.¹⁸⁵ Nevertheless, the Data Security and Breach Notification Act

179. Do-Not-Track Online Act of 2011, S. 913, 112th Cong. This bill was ultimately not enacted. S. 913 (112th): *Do-Not-Track Online Act of 2011*, GOVTRAC.US, <http://www.govtrack.us/congress/bills/112/s913> (last visited Feb. 13, 2013).

180. See *Rockefeller Questions Alarming Plans by Visa, MasterCard to Use Consumers' Personal Information for Targeted Advertisements*, INSURANCENEWSNET.COM (Oct. 28, 2011), <http://insuranceneWSnet.com/article.aspx?id=292950>.

181. *Id.*

182. *Id.* Specifically, the company must: create a security policy regarding the personal information it possesses, designate an officer with responsibility for management and as a point of contact, create a process for identifying any reasonably foreseeable risks to the maintenance of the information, create a process for taking preventive and corrective action to mitigate any foreseeable risks, create a disposal process for personal information maintained in electronic form, and create a standard method of destruction for personal information maintained in non-electronic form. S. 1207 § 2(a)(2)(A)–(F). In addition to outlining strict requirements for all entities, the Act also laid out a detailed procedure for notification in the event of an information security breach, both of which affect the individual as well as the FTC. *Id.* § 3. The Act would require notification to occur within sixty days following discovery of the breach, unless the entity could demonstrate that such a time frame is not feasible due to various circumstances. *Id.* § 3(c). In addition, various types of notification methods are outlined along with the content which must be included in each effective notification. *Id.* § 3(d). As with the Do-Not-Track Online Act, the Data Security and Breach Notification Act of 2011 similarly allows enforcement by both the FTC, as well as the attorney general of a State. *Id.* § 4(b),(c).

183. See S. 1207.

184. *Id.*

185. See *Rockefeller Questions Alarming Plans by Visa, MasterCard to Use Consumers' Personal Information for Targeted Advertisements*, supra note 180.

was not directly applicable within the self-regulatory market of behavioral advertising because it increased consumer protection by targeting uninvited access to personal information.¹⁸⁶ It did not address an advertising company's own behavior and usage of the personal information which it maintains because this would not have constituted a security breach, as defined by the Act as an "unauthorized access to or acquisition of data in electronic form."¹⁸⁷

F. DO-NOT-TRACK ONLINE ACT OF 2011

The Do-Not-Track Online Act was simply designed to require the FTC to prescribe regulations about the collection and use of personal information obtained by tracking an individual's online activity to supplement the FTC's lack of enforcement.¹⁸⁸ The Act would have required the FTC to establish standards for a mechanism enabling a consumer to easily indicate his preference regarding the collection of his personal information through online sources.¹⁸⁹ Furthermore, it would have prohibited the collection of personal information once the consumer enacted the appropriate mechanism to express his preference for the information not to be collected.¹⁹⁰ The Act outlined a two-prong enforcement approach to implement the requirements.¹⁹¹

The concept of "do-not-track" has already been introduced by other entities in the industry, such as the Mozilla and Microsoft Internet browsers, which implemented do-not-track features in early 2011.¹⁹² Despite its hesitations, the FTC has recently called for a tougher, universal version of "do-not-track," notwithstanding fears of stunting Internet innovation.¹⁹³

186. Therefore, the Act does not directly address targeted advertising by advertisers and ad networks.

187. S. 1207 § 5(1).

188. See Do-Not-Track Online Act of 2011, S. 913, 112th Cong. (2011).

189. *Id.* § 2(a)(1).

190. *Id.* § 2(a)(2).

191. *Id.* § 3(a)(1), (b)(1), (b)(2)(A), (B). First, it allows the FTC to enforce the Act as a violation of a regulation under section 18(a)(1)(B) regarding unfair or deceptive acts or practice. *Id.* § 3(a)(1). In the alternative, it allows the Attorney General of a state to bring a civil action on behalf of the residents of that state if there is reason to believe that their interest has been or is threatened by a violation. *Id.* §§ 3(a)(1), (b)(1). The Act outlined the availability of civil penalties, to be determined by multiplying the number of days a person is not in compliance with the rule by an amount no greater than \$16,000, and capped at \$15,000,000 for all civil actions against an individual. *Id.* § 3(b)(2)(A)–(B).

192. Angeliqne Carson, *Lawmakers Discuss Behavioral Advertising, Consumer Choice*, IAPP DAILY DASHBOARD (Oct. 14, 2011), https://www.privacyassociation.org/publications/lawmakers_discuss_behavioral_advertising_consumer_choice. However, while the browsers allow users to indicate their preferences, there are no regulations which require operators like Mozilla and Microsoft to observe these preferences, which results in low levels of compliance within this self-regulatory scheme. See *id.*

193. See Karen Bleier, *Editorial: Time to Enact Do Not Track*, USA TODAY (Dec. 12, 2011, 8:30 PM), <http://www.usatoday.com/news/opinion/editorials/story/2011-12-11/Time-to-enact-Do-Not-Track/51816904/1>. The FTC scored a significant win against social media giant Facebook,

Chairman Rockefeller's Do-Not-Track Online Act attempted to act as a stepping stone towards effective behavioral advertising regulation, despite several dangerous ambiguities in its structure.¹⁹⁴ This included an exception to the prohibition on collecting consumer information,¹⁹⁵ which would allow a company to argue that despite the preference explicitly expressed by an individual consumer through an appropriate mechanism, the company is still entitled to collect personal information.¹⁹⁶ A company might state that it collected data in order to provide a service requested by the individual, as allowed by the statute.¹⁹⁷ In addition, the Act included a list of suggested factors for FTC consideration in future analyses.¹⁹⁸ This proliferation of factors to be considered likend the Act to the type of rhetoric that the Commission itself has published regarding the issues in the field of consumer privacy and regulation.¹⁹⁹ In particular, the addition of these factors threatened to create unnecessary space in which to maneuver by urging the FTC to consider the technical feasibility and costs of implementing mechanisms that would meet the Act's standards.

which was forced to enact certain FTC-approved privacy measures regarding its 800 million users in late November. *Id.* However, "the weakness in the FTC's agreement is that it didn't establish any guidelines about Internet tracking, the method by which Facebook collects data about its users even when they're not on the network itself." *Id.*

194. For example, the Act identified an exception to the prohibition on collecting consumer information after the consumer has expressed this preference where "necessary to provide a service requested by the individual, including with respect to such service, basic functionality and effectiveness," as long as the information retains anonymity or is deleted following the completion of the service. S. 913 § 2(b)(1). The requirement to maintain the anonymity of the information or otherwise delete it falls squarely within the plan outlined by the Visa and MasterCard companies. *See* Hunt, *supra* note 174. By compiling purchase information from the aggregate data of credit and debit card use, the companies hope to create anonymous profiles in order to efficiently hone in their online advertising and increase its effectiveness. *Id.* Another problematic aspect of the Do-Not-Track Online Act lay in its suggestion of factors for the FTC to consider in promulgating the desired rules and standards. *See* S. 913 § 2(c). The Act suggested that the FTC consider such factors as the appropriate scope of the standards and rules it promulgates, their technical feasibility and costs, possible mechanisms, how the mechanisms will meet the necessary standards, whether and how information can be collected and used anonymously, and possible standards for how this may be done. *Id.* The FTC already encourages companies to expressly inform consumers of their activities and offer an easy opt-out method, provide reasonable security for collected information and retain it only as long as necessary to fulfill a legitimate need, collect affirmative express consumer consent for using previously collected data for a different purpose, and obtain affirmative express assent prior to collecting "sensitive" data. Rosch, *supra* note 11. The addition of congressional factors for companies to consider simply acts as an added layer to a proliferation of layers and serves to create more leeway.

195. *See* S. 913 § 2(b).

196. *Id.*

197. *See id.*

198. *Id.* § 2(c).

199. *Id.*

G. THE CONSUMER PRIVACY BILL OF RIGHTS 2012

On February 23, 2012, the White House unveiled a new plan to “improve consumers’ privacy protections and ensure that the Internet remains an engine for innovation and economic growth.”²⁰⁰ The plan included a “Consumer Privacy Bill of Rights,” which is designed to foster consumer trust in the online advertising industry.²⁰¹ The Bill enumerates seven personal data “rights” afforded to consumers: individual control, transparency, respect for context, security, access and accuracy, focused collection, and accountability.²⁰² While the Bill is spelled out on two succinct pages, the White House discusses its reasoning for almost fifty pages in a well-organized, albeit repetitive, summary of consumer privacy issues.²⁰³

Regarding the need for strong enforcement, the White House looks to the past, citing that “the FTC has brought cases that effectively protect consumer data privacy within a flexible and evolving approach to changing technologies and markets.”²⁰⁴ Although it notes that the FTC may bring enforcement actions in connection with “companies’ failures to adhere to voluntary privacy commitments, such as those stated in privacy policies,” the White House touts the need to provide incentives to develop inter-industry voluntary codes of conduct.²⁰⁵ Similar tones of measured recommendation are expressed regarding the need for mutual recognition²⁰⁶ and enforcement cooperation.²⁰⁷ At the time of the release, “companies that represent the delivery of nearly 90 percent of online behavioral advertisements, including Google, Yahoo!, Microsoft, and AOL have agreed to comply when consumers choose to control online tracking.”²⁰⁸ One month later, the FTC asked Congress to enact privacy legislation, which would “give consumers access to information collected about them

200. Press Release, The White House, Office of the Press Sec’y, We Can’t Wait: Obama Administration Unveils Blueprint for a “Privacy Bill of Rights” to Protect Consumers Online (Feb. 23, 2012) [hereinafter Press Release, We Can’t Wait], available at <http://www.whitehouse.gov/the-press-office/2012/02/23/we-can-t-wait-obama-administration-unveils-blueprint-privacy-bill-rights>.

201. *Id.*; EXECUTIVE OFFICE OF THE PRESIDENT, CONSUMER DATA PRIVACY IN A NETWORKED WORLD: A FRAMEWORK FOR PROTECTING PRIVACY AND PROMOTING INNOVATION IN THE GLOBAL DIGITAL ECONOMY (2012) [hereinafter CONSUMER DATA PRIVACY IN A NETWORKED WORLD], available at <http://www.whitehouse.gov/sites/default/files/privacy-final.pdf>.

202. CONSUMER DATA PRIVACY IN A NETWORKED WORLD, *supra* note 201, at 47–48.

203. *Id.*

204. *Id.* at 29.

205. *Id.*

206. *Id.* at 31.

207. *Id.* at 33.

208. Press Release, We Can’t Wait, *supra* note 200.

and allow them to correct and update such data.”²⁰⁹ A response has not been forthcoming.

CONCLUSION

This note has attempted to establish that the current state of self regulation within the online behavioral advertising industry is an inadequate system for consumer privacy protection. Due to inadequate FTC regulation and ineffective oversight within the behavioral advertising industry, consumer privacy continues to be an afterthought in advertising power struggles like the Google-DoubleClick Merger. Ultimately, a system of co-regulation²¹⁰ must be implemented, consisting of the consolidation of oversight programs, a reassessment of the technology markets, standardization of consumer disclosure methods, and comprehensive federal legislation.

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209. Tanzina Vega & Edward Wyatt, *U.S. Agency Seeks Tougher Consumer Privacy Rules*, N.Y. TIMES, Mar. 26, 2012, http://www.nytimes.com/2012/03/27/business/ftc-seeks-privacy-legislation.html?pagewanted=all&_r=0.

210. See CASTRO, *supra* note 113.

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