UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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| In re DOUBLECLICK INC. PRIVACY | : | Case No. 00-CIV-0641 (NRB) |
| LITIGATION | : | |
| | : | |
| This Document Relates to: | : | |
| ALL ACTIONS | : | |
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# OBJECTION BY SETTLEMENT CLASS MEMBERS

Electronic Privacy Information Center

Junkbusters

## INTEREST OF SETTLEMENT CLASS MEMBERS

The Electronic Privacy Information ("EPIC") is a non-profit research organization incorporated in the District of Columbia. EPIC was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other constitutional values.

As a result of EPIC's expertise in online privacy, consumer protection, the development of technical standards for the Internet, its ongoing work in consultation with a wide range of consumer and privacy organizations, and its specific participation in a series of legislative and regulatory matters concerning the practices of Doubleclick, EPIC is uniquely qualified to assess whether the proposed settlement is fair, reasonable, and adequate.

Junkbusters is a privacy advocacy and consulting company based in New Jersey and incorporated in Delaware.

## SUMMARY OF ARGUMENT

The proposed settlement does not provide any significant benefit to class members that was not previously agreed to by Doubleclick as part of its earlier agreement with the Federal Trade Commission under the terms of the Network Advertising Initiative ("NAI"). By agreeing to the proposed settlement, Doubleclick has not made any significant change to its practices or its policies nor has it provided the type of meaningful privacy protection sought by consumer and privacy organizations that brought the Section 5 complaint to the Federal Trade Commission in the first instance. Moreover, the monetary reward will be provided only to the attorneys for the private litigants; no funds from the settlement will be distributed to any members of the class or

any of the organizations involved in either the original consumer complaint against the practices of Doubleclick or the ongoing defense of consumer privacy in the United States.

We urge the Court to consider a series of specific, practicable changes that are proposed below.

**ARGUMENT**

EPIC has been actively involved in the controversy surrounding Doubleclick's online profiling and data collection practices since the very beginning. EPIC first brought public attention to the looming privacy concerns with Doubleclick's proposed business practices in testimony before the United States Senate Commerce Committee in July 1999.[1] On February 10, 2000, EPIC and Junkbusters filed an extensive complaint with the Federal Trade Commission alleging that Doubleclick's decision to engage in user-identified profiling after representing to more than 1,000,000 users of the Internet and by means of an explicit privacy policy at more than 1,000 web sites that it would engage in only anonymous profiling was an unfair and deceptive trade practice in violation of the Federal Trade Commission Act. Subsequent to the filing of the EPIC complaint at the FTC, the Commission undertook an extensive investigation and settlement proceeding. The outcome of that proceeding was the Network Advertisers Initiatives ("NAI"), a set of guidelines that businesses engaged in the practice of Internet advertising by means of user profiling, including most importantly Doubleclick, agreed to adopt in return for the decision of the FTC to drop all further investigations.[2]

[1] Hearing on the Online Privacy Protection Act, S. 809, Before the Subcommittee on Communications, Committee on Commerce, Science, and Transportation, United States Senate, 106th Cong. (1999) (statement of EPIC Executive Director Marc Rotenberg).

[2] FTC Report on Online Profiling, dated July 27, 2000, incorporating as appendix the "NAI Agreement," hereinafter referred to as "NAI Agreement" (attached)(http:// http://www.ftc.gov/opa/2000/07/onlineprofiling.htm, last visited May 4, 2002).

In objection to that proposed settlement, on August 9, 2000, fourteen leading organizations, including EPIC, Consumers Union, the Consumer Federation of America, and the National Consumers League wrote to the United States Commerce Committee to express their view that, even though they believed it was important for the FTC to act in this matter to safeguard the interests of consumers, the NAI arrangement did not provide adequate protection for consumers.[3] They said that the "NAI Principles recently endorsed by the Federal Trade Commission fail to provide an adequate level of privacy protection." They went on to say that polling data indicated strong public support for the regulation of these business practices.

Under the terms of the proposed settlement now before this court, the Doubleclick "concessions" do not even rise to the low level of consumer protection provided by the Federal Trade Commission's Network Advertising Initiative (NAI), implemented almost two years ago. While it is not appropriate to debate the adequacy or inadequacy of the NAI agreement in this forum, it is important to make clear that (1) the proposed settlement fails to match those commitments to which Doubleclick is already bound, and (2) a broad range of leading organizations, representing the interests of consumers across the United States, believed that stronger obligations should be imposed on a company, such as Doubleclick, that routinely engages in the practice of monitoring and profiling individuals who use the Internet.

**The Notice Obligation**

Under the provisions of the NAI agreement, Doubleclick agreed to notify users, through a "clear and conspicuous" privacy policy, about online profiling activity.[4] If personally identifiable information was to be collected, Doubleclick represented that it would give users

[3] Letter attached.

clear and conspicuous "robust" notice, appearing at the time and place of information collection.[5] Doubleclick further agreed that it would contractually require websites using Doubleclick technology to provide similar disclosures. Doubleclick also provided assurances that it would make reasonable efforts to enforce these contractual requirements.[6]

In contrast, under the Proposed Settlement terms, Doubleclick is only obligated, for a mere two years, to have an understandable privacy policy that explains its ad serving service, cookies, and pixel tags (without any detailed explanation of its online profiling systems).[7] Similarly, Doubleclick is required to develop a privacy policy that provides only representative examples of interest categories that Doubleclick includes and excludes from its online profiling.[8] As part of the proposed settlement, Doubleclick will require some, but not all, websites using Doubleclick technology to give clear, conspicuous, and robust notice that information submitted by the user may be shared with Doubleclick, may be linked to other information about the user, and may mean that some of the user's future Web activity will not be anonymous.[9]

Not only do these proposed terms fail to satisfy the NAI threshold, they also fail to provide meaningful notice for consumers. First, the notice obligation, in whatever form it takes, must continue as long as Doubleclick engages in the practice of collecting and using personally identifiable information. Second, Doubleclick must clearly be obligated to require its business partners, who are both the agents for collecting personal information and the means by which personal information is disclosed to others, to adopt a clear, consistent privacy policy. Third, the

(continued)
[4] NAI Agreement, Section IV (B)(1)(a).
[5] Id., Section IV(C)(2).
[6] Id., Section IV(A)(4).
[7] Proposed Settlement, Sections IV(A)(1)(A) and (B).
[8] Id., Sections IV(A)(1)(C) and (D).
[9] Id., Section IV(A)(4)(B)(4)(b).

notice must be meaningful in that it must make consumers specifically aware of the type of information that is collected and how it would be used.

**The Choice Obligation**

Under the terms of the NAI Agreement, Doubleclick was required to give users a choice over whether or not to participate in Doubleclick's information collection practices. Doubleclick said it would not link any previously collected non-personally identifiable data to personally identifiable data unless the user affirmatively consented ("opt-in").[10] Doubleclick further agreed to use "robust" notice and opt-out choice for prospective uses of personally identifiable information.[11]

In contrast, under the Proposed Settlement terms, Doubleclick simply agrees to not link any previously collected non-personally identifiable data to personally identifiable data unless the user affirmatively consents ("opt-in").[12] The settlement does not give users any meaningful choice, whether opt-in or opt-out, about whether Doubleclick is permitted to link user data collected now or in the future.[13] This settlement could effectively sever a commitment made by Doubleclick to the Federal Trade Commission regarding future data collection practices. In any event, it does not provide the type of effective choice that should be required in a circumstance where the consumer does not stand in privity with the business, i.e. Doubleclick, by virtue of the fact that its customer for networking advertising services is actually the company to whom it sells the data it collects and the banner ads it projects, has a particularly strong obligation to subjects of the data to ensure effective notice and choice.

[10] NAI Agreement, Section IV(C)(1).
[11] Id., Section (IV)(C)(2).
[12] Proposed Settlement, Section (IV)(A)(4)(B)(1-3).

**The Access Obligation**

Under the terms of NAI Agreement, Doubleclick agreed to give users reasonable access to personally identifiable information that Doubleclick retains for profiling.[14] Yet, under the Proposed Settlement, a user who is actually the subject of a Doubleclick profile is not permitted to review that profile or correct any inaccuracies contained in it. Moreover, Doubleclick merely agrees to limit internal access to user profile data to (a) those employees who need the data for "analysis, technical and customer support, compliance with internal policies, procedures and customer contracts, and any governing laws;" (b) any third party with merely a good faith reason for the data who agrees to abide by Doubleclick's policies.[15] Given the weak and amorphous "good faith" test, almost any third party will be able to obtain user profiles created by Doubleclick. Practically, this defeats the purpose of privacy rules, which are to maximize the opportunities for the data subject to understand the information that is collected and how it is used, and to minimize the likelihood that such information will be improperly disclosed to third parties.[16]

(continued)
[13] Id., Section (IV)(A)(4)(B).
[14] NAI Agreement, Section IV(C)(1)(f).
[15] Proposed Settlement, Section IV(A)(2)(A)(1) and (2).
[16] 15 USC 1681 (Fair Credit Reporting Act); 47 USC 551 (Cable Communications Policy Act); 18 USC 2710 (Video Privacy Protection Act); 42 USC 1302a et seq. (Health Insurance Portability Protection Act).

**The Security Obligation**

Under the NAI terms, Doubleclick committed to making reasonable efforts to protect data that it collects for profiling from loss, misuse, alteration, or improper access.[17]

Under the Proposed Settlement terms, however, Doubleclick just agrees to maintain technology and procedures, in accordance with industry standards, designed to prevent unauthorized access to profiling data.[18] The settlement contemplates only hacking situations, and does not address employee abuse or other security risks.

**The Enforcement Obligation**

Under the NAI terms, Doubleclick agreed to work with an independent third party enforcement program to ensure compliance with NAI.[19] Doubleclick also agreed that, if such a program was not available, Doubleclick would submit to an independent compliance audit, the results of which would be made publicly available.[20]

But under the Proposed Settlement terms, Doubleclick merely agreed to have an accounting firm conduct a confidential audit for compliance with certain aspects of the settlement.[21] According to the settlement, if Doubleclick is not in compliance, neither the public nor Plaintiffs' counsel will be informed until Doubleclick has had the opportunity to remedy the violation(s).[22] It is only if Doubleclick refuses to avail itself of this opportunity that the auditors will inform Plaintiffs' counsel of Doubleclick's violation(s).[23] Even then, if Doubleclick is not in compliance with certain aspects of the settlement, as disclosed by the audit, the parties merely

[17] NAI Agreement, Section IV(A)(3).
[18] Proposed Settlement, Section IV(A)(2)(A)(3).
[19] NAI Agreement, Section VII.
[20] Id.
[21] Proposed Settlement, Section IV(C).
[22] Id., Section IV(C)(3-5).

agree to *discuss* the violation(s), and members of the affected class, whose privacy and security interests may be at risk, will remain in the dark.[24]

Public scrutiny of Doubleclick's compliance with settlement terms is particularly appropriate in a class action; yet, the class is prohibited from applying such scrutiny under these settlement terms. In any event, the enforcement mechanism is, as a practical matter, non-existent because Doubleclick violations are not made known to the public, or even reported to opposing counsel. In fact, Doubleclick is expressly permitted to hide violations. Moreover, even if opposing counsel become aware of such violations (because Doubleclick does not take advantage of its chance to cover them up when it first fails the audit), the only result is that the lawyers talk about the problem – if violations occur, stronger action than attorney discussion is appropriate.

**Further Problems With Proposed Settlement**

There are further problems with the proposed settlement.

*Deletion of obsolete log files (Proposed Settlement, Section IV(1)(B)).* Allowing business to retain customer transaction logs for up to three-years rather than deleting routinely, daily, or even annually is a far more generous time period than is found elsewhere. By way of contrast, federal agencies are routinely required to delete session cookies, under a directive issued by the Office of Management and Budget.[25] Moreover, compared to the one-year record destruction

(continued)
[23] Id.
[24] Proposed Settlement, Section IV(C)(1)(6).
[25] July 28, 2000 Letter from OMB to Office of Information and Regulatory Affairs (July 28, 2000)("Re: Memo on Privacy Policies and Data Collection on Federal Web Sites").

requirements in a federal statute, such as the Video Privacy Protection Act, 18 USC 27109(e), the proposed settlement's lengthy three-year timeframe is clearly overly generous. Because most consumers typically give away or trade their computers in less than three years, this provision provides no practical benefit for the majority of consumers who use the Internet and will confront the data collection practices of Doubleclick and its partners.

*Agreement that information collected under one version of a privacy policy will be governed by that privacy policy (as opposed to previous or subsequent privacy policies)(Proposed Settlement, Section IV(A)(2)(C)).* This proposition is a reflection of common sense and fair business practices. Indeed, Doubleclick is already bound by such a provision.[26] Moreover, the Federal Trade Commission has indicated that a subsequent change in privacy policies once data collection has occurred will subject a company to action under section 5 of the FTC Act for unfair and deceptive trade practices. Indeed, the original NAI settlement initiative arose precisely because Doubleclick, the party at interest here, had dramatically altered the terms of its privacy policy.[27]

[26] NAI Agreement, Section IV(A)(2)(C).
[27] See Letter from FTC Chairman Robert Pitofsky to DG XV Director for the European Commissioner John Mogg, dated July 14, 2000, reprinted in M. Rotenberg, The Privacy Law Sourcebook 2001, 505, 506.

*Agreement that a successor-in-interest who obtains user data from Doubleclick will be bound by the Doubleclick privacy policy under which that data was collected. (Proposed Settlement, Section IV(A)(2)(D)).* As a result of several high publicity bankruptcy cases and government investigations over the past few years, the prevailing legal wisdom is that this proposition is already in effect.[28]

*Expiration of obsolete cookies (i.e., more than five years old), but such expiration may be delayed if technical complications arise (Proposed Settlement, Section IV(A)(3)).*
In this era, it is unlikely that a user's computer will be useful in five years; a cookie even less so. This provision fails to provide any meaningful privacy protection.

*Public relations campaign (banner ads) regarding online data collection (Proposed Settlement, Section IV(B)).* The uncontroverted experience of consumer organizations that have worked with consumers who have tried to make sense of such privacy notification campaigns is that unless consumers can quickly, easily, and effectively express choices and be assured that such choices will be honored until such time as the consumer chooses otherwise, the campaigns are absolutely worthless, other than to provide brand promotion and recognition for a company that should be taking actual steps to safeguard consumer privacy.[29]

[28] See majority commissioner statements in Stipulation and Order Establishing Conditions on Sale of Customer Information, FTC v. Toysmart.com, at http://www.ftc.gov/os/2000/07/toysmarttbankruptcy.1.htm (last visited May 1, 2002).
[29] See, e.g., Financial Privacy Notices: Do They Really Want You to Know What They're Saying? By Tena Friery and Beth Givens (Privacy Rights Clearinghouse June 2001)(http://www.privacyrights/org/ar/GLB-CodeOpEd, last visited May 3, 2002); How Consumers Responded to Financial Privacy Notices by Tena Friery (Privacy Rights Clearinghouse December 2001)(http:www.privacyrights.org/ar/f-glb-ftc.html, last visited May 3, 2002).

**CHANGES TO PROPOSED SETTLEMENT**

The proposed settlement fails to establish meaningful privacy safeguards for consumers, fails to meet the minimal standard set out by the Federal Trade Commission in the Network Advertising Initiative to which Doubleclick already agreed, and fails to ensure that Doubleclick will not engage in practices that jeopardize consumer privacy interests going forward. This Court should modify the proposed settlement to incorporate the following aspects:

1. Notice – Doubleclick should provide express notice to users of all material aspects of its data collection, use, retention, and aggregation for a minimum of five years. Doubleclick's use of collected information should be expressly limited to those uses specified in the disclosure.
2. Choice – Doubleclick's collection of both personally identifiable information and non-personally identifiable information should be exclusively opt-in. Consent for the latter category is necessary because consumers are not confident that non-personally identifiable information will not be linked to personally identifiable information.
3. Linking – Doubleclick should be prohibited from linking non-personally identifiable information with personally identifiable information unless the user is clearly informed of all information that is to be joined, and thereafter expressly consents to such linkage.
4. Access – Doubleclick should permit a user to view, correct, and delete at any time for any reason all of his information in Doubleclick's possession as a result of its data collection practices. Doubleclick should be prohibited from disclosing user information to third parties unless the user has granted his express consent to such disclosure.

5. Security – Doubleclick should ensure that all data is collected from reliable sources, take measures to maintain the quality and the accuracy of the information, and implement adequate protections against unauthorized access or use.
6. Enforcement – Doubleclick should comply with the substantive provisions of the settlement for at least five years. An independent company should audit this compliance every six months, and the results should be made public. Doubleclick should face serious monetary penalties for material violations.
7. Destruction – Doubleclick should destroy all records it created concerning users during any period of time in which Doubleclick or any of its business partners were assuring users about the anonymity of the information collected.
8. Claim Release – The release inappropriately encompasses both known and unknown claims.[30] Especially because this litigation concerns undisclosed surveillance and hidden electronic tags, any release should be limited to only known claims.
9. Cy Pres Fund – The Court should establish a Cy Pres Fund equal to the amount set aside for attorneys' fees and costs for distribution to consumer and privacy organizations in the United States. Such funds have been established in other privacy settlements and would be particularly appropriate in this case where a broad range of organizations participated in previous legislative and regulatory proceedings on behalf of the public interest.

[30] Proposed Settlement, Section V(B).

## CONCLUSION

For the reasons set out above, the proposed settlement is neither fair, reasonable, nor adequate. EPIC respectfully requests that the Court set aside the settlement and incorporate the recommendations described above.

## REQUEST TO PARTICIPATE IN SETTLEMENT HEARING

EPIC respectfully requests the opportunity to be heard before the Court in this matter during the settlement hearing on May 21 at the United States District Court, Southern District of New York.

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REQUEST FOR EXCLUSION FROM SETTLEMENT CLASS

If this Court approves the proposed settlement without adopting the revisions, EPIC and Junkbusters respectfully requests that their respective employees, all of whom are members of the Settlement Class, be excluded from the Class so they will not be bound by a settlement that they believe to be detrimental to their interests and contrary to public policy.

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Marc Rotenberg, Executive Director, for himself and
On behalf of the following:

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