



June 7, 2010

ANALYSIS OF THE FTC'S DECISION NOT TO BLOCK GOOGLE'S ACQUISITION OF ADMOB

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Introduction

On May 21, 2010, after months of investigation, the Federal Trade Commission (FTC) announced that it would not challenge Google's \$750 million acquisition of AdMob, a mobile advertising network and mobile ad solutions and services provider.¹ In this white paper, we present AAI's analysis of the FTC's decision.

The FTC found that, but for recent developments concerning Apple, the acquisition "appeared likely to lead to a substantial lessening of competition in violation of Section 7 of the Clayton Act." According to the FTC, Google and AdMob "currently are the two leading mobile advertising networks, and the Commission was concerned about the loss of head-to-head competition between them." The companies "generate the most revenue among mobile advertising networks, and both companies are particularly strong in ... performance ad networks," i.e. those networks that sell advertising by auction on a "per click" or other direct response basis. Without necessarily defining a relevant market, the Commission apparently saw a likelihood of unilateral anticompetitive effects, as it found "each of the merging parties viewed the other as its primary competitor, and that each firm made business decisions in direct response to this perceived competitive threat."

Yet, Apple's acquisition of the third largest mobile ad network, Quattro Wireless, in December 2009, and its introduction of its own mobile advertising network, iAd, as part of its iPhone applications package, convinced the FTC that the anticompetitive effects of the acquisition "should [be] mitigate[d]." The Commission "ha[d] reason to believe that Apple

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¹ *See* Statement of the Commission Concerning Google/AdMob, FTC File No. 101-0031 (May 21, 2010) ("FTC Statement"), <http://ftc.gov/os/closings/100521google-admobstmt.pdf>. The Commission's statement is quoted throughout the white paper, but generally is not separately cited.

quickly will become a strong mobile advertising network competitor” because of its relationships with applications developers and users, and ability to offer targeted ads “by leveraging proprietary user data gleaned from users of Apple mobile devices.” Indeed, the FTC concluded that “Apple’s ownership of the iPhone software development tools, and its control over the developers’ license agreement, gives Apple the unique ability to define how competition among ad networks on the iPhone will occur and evolve.” As result, AdMob’s current market share, which is derived largely from the iPhone platform,² was “unlikely to be an accurate predictor of [its] competitive significance going forward.”

The FTC’s decision not to challenge Google’s acquisition of AdMob is understandable given the nascent and changing nature of the mobile advertising market and Apple’s emergence as a likely formidable competitor in this market. The FTC’s conclusion is well taken that, particularly as a result of Apple’s recent actions, current market shares are unlikely to be an accurate predictor of future market shares or whether the Google/AdMob combination will be able to exercise market power.

However, it is not clear that Apple’s emergence will mitigate competitive concerns with respect to advertising on mobile web sites, as opposed to advertising on mobile applications, which is iAd’s exclusive focus. Moreover, a market dominated by two mobile advertising networks – Google and Apple – is unlikely to provide adequate competition to protect application developers and advertisers, particularly insofar as those networks hold mutually exclusive “inventory.” The Commission apparently believes that other advertising networks may emerge, including self-supplied networks created by other mobile platform providers. We hope the Commission is correct, but there are reasons to be skeptical. Certainly, smaller mobile advertising networks do exist, some of which are controlled by well-established companies. But, if application inventory on the iPhone platform cannot be sold using non-Apple ad networks, then other ad networks may be deterred from entering the market or expanding.

It is not clear how deeply the FTC investigated the possibility that Apple’s license agreements with developers may unreasonably foreclose rival ad networks. Presumably, Apple will be a formidable competitor with or without such restrictions. But Apple should not be permitted to dominate advertising on the iPhone through exclusionary means, and nothing in the FTC’s Google/AdMob decision precludes a review by the FTC (or DOJ) of Apple’s conduct.

² AdMob reported that, for the month of January, iPhone devices alone accounted for 47% of its ad impressions. See Jack Marshall, *AdMob Data Suggests Divisions in Mobile Ad Market*, ClickZ, April 30, 2010, <http://www.clickz.com/3640210>. The 47% figure represents only impression from the iPhone, and excludes impression from the Ipod Touch, on which AdMob also sold and served ads during the same month. *Id.* Thus, a substantial percentage of AdMob’s impressions, and in turn its revenues, were attributable to Apple devices.

Background

The structure of mobile and online advertising. While online advertising involves the placement of advertisements on desktop and laptop computers, the mobile advertising industry concerns the placement of advertisements on non-PC devices, primarily cell phones and smartphones. The two industries have evolved to operate within distinct but similar frameworks. Advertisers in both industries face the challenge of delivering ads created in non-traditional, electronic formats for viewership in non-traditional, electronic mediums. Online, the sellers of ad space are roughly divisible into search engine providers and content providers. Search engine providers sell search engine ad space, or “search inventory,” on their search sites; content providers, or website “publishers,” sell “publisher inventory” on their websites. The mobile sellers include search engine providers and publishers, but also applications (“apps”) developers. Applications developers create smartphone-downloadable software widgets that serve an array of user purposes, from entertainment and social networking to business and vehicle navigation, and afford advertisers a distinct channel for accessing viewers. The buyers, both online and in mobile, are the putative advertisers, or perhaps advertising agencies looking to buy on behalf of the putative advertisers.

While search inventory and “premium inventory” sold by content providers is often sold directly to advertisers, most publishers and applications developers sell ad space through “ad intermediaries,” i.e., ad networks or ad exchanges, which facilitate sales transactions by providing an aggregation mechanism. Ad networks purchase or hold rights to aggregated inventory for sale to multiple advertisers; ad exchanges provide platforms of aggregated inventory where sellers and advertisers can list and bid for inventory. Ad networks may sell direct-response advertising on a cost-per-click (CPC) basis, or may sell brand advertising on a cost-per-impression (CPM) basis.³ Ad intermediaries also typically “serve” (deliver) ads into websites and applications, and provide sellers and/or advertisers with all manner of analytics to help track, manage, plan and analyze sales and campaign performance. Advertisers and sellers may also use third-party “ad servers” to deliver ads and provide analytics.

Mobile advertising has yet to mature into a robust industry comparable to online advertising largely because of impediments that have prevented publishers and developers from offering mobile inventory of a similar quality to online inventory. These impediments are found in various aspects of the mobile web experience, which has been hampered by small device screens, inferior browsers, carrier subscription fees that accompany data service, and slow connection speeds. In addition, none of the existing mobile platforms currently features a built-

³ As the FTC explained, in “performance” ad networks, “advertisers often buy ad space through auction rather than through sales relationships, and pay for the advertising on a ‘per click’ or other direct response basis. Brand advertising, conversely, is typically paid for on a ‘per impression’ basis, as the goal in brand advertising is to put the advertisement in front of the user, not necessarily to generate a click or other immediate action.” FTC Statement at 1 n.1.

in browser that supports Adobe Flash, a software program employed by a large number of websites. Thus, a mobile user who clicked on a mobile ad and was taken to an advertiser website might find that the site, or certain of its features, was inaccessible. As a consequence, publishers and developers have had less-appealing ad space to sell, ad networks and ad exchanges have had more difficulty aggregating quality inventory, advertisers have seen a lower value proposition, and users have yet to realize the full benefits of being exposed to richer mobile ads. However, this is changing.

The emergence of mobile advertising. Propelled by a tremendous increase in smartphone usage, improved smartphone features and advancements in mobile operating systems, the mobile Web and mobile data usage are now primed for explosive growth in the United States. Experts agree that advertising will eventually do for mobile what it did for the Internet, spurring such growth and powering the emergence of a new mobile ecosystem.⁴ While eMarketer reports that mobile ad spending reached only \$416 million in the U.S. in 2009, compared to over \$22 billion for online advertising,⁵ Sanford C. Bernstein & Co. reports that U.S. mobile ad spending could reach \$3 billion by 2013.⁶

Consumers, advertisers and mobile web publishers and application developers all stand to benefit substantially from this trend, and the concomitant investment in the mobile industry. With advancements in mobile advertising, consumers may gain access to more free or low-cost ad-supported content and a richer user experience, while being exposed to more relevant advertisements. New mobile revenue streams might also lead to lower prices on device hardware and software, and could encourage further development of open operating systems that run on multiple devices, creating more consumer choice. Advertisers can expect improved performance from their mobile ads, innovative new products and services, better data collection and analysis, and unique new opportunities like location-based advertising on GPS-enabled smartphones. Mobile web publishers and app developers, meanwhile, can explore new business plans and look toward monetizing their content more efficiently, helping to get it into the hands of more consumers at a minimal price or for free.

Whether and how these putative benefits develop will be impacted by the competitiveness of the mobile advertising landscape. Several large and successful companies have lined up to enter the mobile ad market, including AOL, which acquired Third Screen Media, a mobile ad network, in 2007; Microsoft, which acquired ScreenTonic, a mobile ad server and manager, in 2007; Yahoo, which acquired Actionality, a mobile ad server, in 2007; Nokia, which acquired Enpocket, a mobile ad solutions provider, in 2007; and Apple, which

⁴ See Federico Pisani Massamormile, *The Promise of Mobile is a Reality*, Media Post, Feb. 3, 2010, http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=121742.

⁵ See Scott Morrison, *FTC Focus of Google Ad Deal Too Narrow, Say Sources*, Wall St. J., May 4, 2010, available at http://online.wsj.com/article/BT-CO-20100504-721450.html?mod=WSJ_latestheadlines.

⁶ See Ari Levi et. al, *Google's Challenges Go Beyond China*, The Macomb Daily, April 5, 2010, <http://www.macombdaily.com/articles/2010/04/05/news/srv0000007966242.txt>.

acquired Quattro Wireless, a mobile ad network, in January of this year, and which unveiled a new personalized, mobile advertising system called “iAd” on April 7th.⁷ In AdMob, Google has now acquired one of the largest and most successful mobile ad networks in the U.S. Some M&A experts believe the recent interest shown by Google and Apple could spark a merger wave, with other mobile ad network startups such as Amobee, Millennial Media, Jumtap, Greystrip and Tapjoy as potential targets.⁸

Parties to the Transaction

Google. Google is an online search engine provider and, through its AdSense program which offers contextual and display advertising on third-party websites, an online ad intermediary. It is likewise a mobile search engine provider and, through its AdSense for Mobile program, a mobile ad intermediary offering display and text ads on mobile web sites and applications. Google is the leading seller of online advertising in the U.S. and worldwide, with total advertising revenues of approximately \$22.9 billion in 2009, which included approximately \$15.8 billion in advertising revenue from its own websites, and approximately \$7.1 billion from ads on third-party websites that are part of its AdSense content network.⁹ It is the overwhelming leader in organic and paid (or “sponsored”) search¹⁰ in the U.S. and worldwide. As of March 2010, its U.S. organic market share was approximately 65.2%¹¹ and its U.S. paid search market share was approximately 70%.¹² Google reported that it “currently makes a very small amount from mobile ads relative to [its] overall revenue.”¹³

⁷ See Google, Inc., *Facts about Google’s Acquisition of AdMob*, Competition, www.google.com/press/admob; see Joe Mandese, *Apple Poised To Unveil ‘iAd,’ New Mobile Ad Platform Is Jobs’ “Next Big Thing,”* Media Post, March 26, 2010, http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=125076.

⁸ See Olga Kharif, *Mobile-Ad M&A Frenzy May Continue*, Business Week, Jan. 26, 2010, available at http://www.businessweek.com/technology/content/jan2010/tc20100126_622940.htm.

⁹ Google Inc., Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 (Form 10-K) for the Fiscal year Ended December 31, 2009, at 65. Most of the revenue Google earns from advertising on third party web sites under its AdSense program is paid to the web publishers. The payments, referred to as “traffic acquisition costs,” amounted to approximately \$5.3 billion in 2009. *Id.* at 44. Google also pays certain amounts of revenue it earns through distribution arrangements for its toolbar, and through distribution and licensing arrangements for video and other content, sharing fees generated with its partner content providers. Its traffic acquisition costs related to distribution arrangements in 2009 were approximately \$904 million. *Id.*

¹⁰ “Organic search” refers to searches where results are tied to the search engine’s neutral criteria, such as keyword relevance, and are listed accordingly, not in exchange for any payment to the search provider. Organic search market share is measured in terms of the percentage of all search queries. “Paid search” refers to searches where results are tied to a keyword and listed in exchange for a fee paid to the search provider. Paid search market share is measured in terms of search advertising revenue.

¹¹ See Eric Savitz, *Yahoo Search Market Share Stabilizes in March, ComScore Says* (citing comScore, Inc.), Barrons.com, April 8, 2010, <http://blogs.barrons.com/techtraderdaily/2010/04/08/yahoo-search-market-share-stabilizes-in-march-comscore-says/>. Yahoo had 16.9% market share, Microsoft 11.7%, AOL 2.5% and Ask.com 3.8%. *Id.*

¹² See Stoney deGeyter, *Hitwise March 2010 Search Engine Market Share*, Pole Position Marketing, April 20, 2010, <http://www.polepositionmarketing.com/emp/hitwise-march-2010/>.

¹³ Google, Inc., *Facts About Google’s Acquisition of AdMob*, Frequently Asked Questions. One analyst estimated Google’s worldwide mobile advertising revenue at about \$75 million in 2009. See Marianne Wolk & Dalindi

AdMob. AdMob, like Google in its AdSense for Mobile capacity, is a mobile ad intermediary. It offers one of the world's largest mobile ad networks, assisting in the sale and serving of mobile website display ads and in-app display ads for over 15,000 mobile publishers or developers. AdMob did not disclose its annual revenues, but J.P. Morgan estimated they were between \$45 million and \$60 million.¹⁴ Research firm IDC estimated AdMob earned \$31 million in 2009.¹⁵ AdMob's network, services, tools and data help publishers monetize their mobile traffic and help advertisers target mobile customers, providing scale, mobile analytics solutions and mobile metrics reports. AdMob is not involved in mobile search.

Prior to the acquisition, Google and AdMob competed directly in the acquisition and sale of mobile advertising space on mobile web sites and applications. They were both involved in all three phases of mobile ad intermediation: facilitating ad sales through their respective ad networks, serving ads, and providing analytics.¹⁶

What Are the Relevant Product Markets?

Although the FTC stated that "Google and AdMob focus their businesses on performance mobile ad networks," the FTC did not expressly define a relevant product market, which is consistent with the agencies' proposed revisions to the Horizontal Merger Guidelines deemphasizing the importance of market definition, particularly in cases involving unilateral anticompetitive effects.¹⁷ Rather, the FTC found that "each of the merging parties viewed the other as its primary competitor, and that each firm made business decisions in direct response to this perceived competitive threat." Accordingly, the FTC "was concerned about the loss of head-to-head competition between them," i.e. unilateral anticompetitive effects.¹⁸ Implicitly, however, such unilateral effects, if sufficient in magnitude, imply a relevant market comprised of mobile

Davies, *Nexus One: Another Step Closer to a \$1 + bln Mobile Advertising Business; Raising Price Target*, SIG Research Report, Jan. 6, 2010, at 2.

¹⁴ Jessica E. Vascellaro, *Google Wagers on Cellphone Ads*, Wall St. J., Nov. 9, 2009, available at <http://online.wsj.com/article/SB10001424052748704402404574525651367011402.html>.

¹⁵ See Sam Gustin, *Why Apple's Mobile Ad Push Could Help Google's AdMob Deal*, DailyFinance.com, <http://www.dailyfinance.com/story/media/why-apples-mobile-ad-push-could-help-googles-admob-deal/19436642/>.

¹⁶ Google, through its DoubleClick acquisition, also acts as a third-party ad server and analytics provider in mobile and online, independent of its AdSense ad network. AdMob apparently only served ads through its ad network, and did not act as an independent third-party ad server.

¹⁷ See U.S. DEPT. OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES FOR PUBLIC COMMENT: RELEASED ON APRIL 20, 2010 ["DRAFT MERGER GUIDELINES"] § 4 ("Some of the analytical tools used by the Agencies to assess competitive effects do not rely on market definition"), § 6.1 ("Diagnosing unilateral price effects based on the value of diverted sales need not rely on market definition or the calculation of market shares and concentration."). "Unilateral" anticompetitive effects are those that result from the elimination of competition between the two firms alone, in contrast to "coordinated" effects which arise when a merger encourages coordinated interaction among the remaining firms in the relevant market. *Compare id.* § 6 ("Unilateral Effects") *with id.* § 7 ("Coordinated Effects").

¹⁸ See *id.*, § 2.1.4 ("The Agencies consider whether the merging firms have been . . . substantial head-to-head competitors. Such evidence is especially relevant for evaluating adverse unilateral effects, which result directly from the loss of that competition.").

web display and app advertising networks that offer performance-based pricing.¹⁹ Such a relevant market is also supported by an analysis of the public record and traditional market definition tools.

The new and old merger guidelines provide that a relevant product market is defined by delineating a product or group of products in which a hypothetical monopolist likely would impose at least a small but significant and non-transitory increase in price.²⁰ There may be multiple, overlapping relevant markets, but the agencies will apply the “smallest market principle,” meaning they will evaluate the merger in the smallest relevant market satisfying the hypothetical monopolist test.²¹

Non-Internet advertising. Implicitly, the FTC rejected the notion that the relevant market for analyzing this transaction included all forms of advertising, which is plainly correct. In *DoubleClick*, the FTC had already determined that online advertising is sufficiently distinct from other forms of advertising, such as television, radio, print, or billboards, to form a relevant product market, and indeed it found narrower relevant product markets within the online advertising market.²² Because mobile advertising offers the same features – targeting, performance-based pricing, and measurability – that allowed the FTC to distinguish online advertising from other forms of advertising, the related question of whether mobile advertising is likewise distinct from non-Internet forms of advertising was likely answered by the FTC’s prior analysis.

Internet and mobile advertising. If the relevant market for analyzing the acquisition included all mobile and Internet advertising, then the acquisition would likely not have been viewed as problematic because mobile advertising comprises only a minute fraction (less than 2%) of a combined mobile-and-online advertising market, which means that the change in Google’s market share would have been slight. However, the available evidence suggests that mobile advertising is sufficiently distinct from online advertising such that a hypothetical monopolist in the sale of mobile advertising would be able to increase prices a small but significant and non-transitory amount without losing so many sales to online sources to make the price increase unprofitable, especially as mobile advertising matures. Indeed, relevant advertising markets would seem to follow secular shifts in the amount of time consumers spend using a particular advertising medium: from print and broadcast to online; from online to mobile.

Industry participants view mobile and online advertising as offering different value propositions. First, the mobile phone is a uniquely personal device, frequently in close proximity

¹⁹ See *id.*, § 2.14 (evidence of adverse unilateral effects “can also inform market definition”); § 4 (same).

²⁰ See *id.*, § 4.1.1; U. S. DEPT. OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES. [“CURRENT GUIDELINES”] § 1.11 (1992), available at http://www.justice.gov/atr/public/guidelines/horiz_book/hmg1.html.

²¹ See DRAFT MERGER GUIDELINES, § 4.1.1; CURRENT GUIDELINES, § 1.21.

²² See Statement of Federal Trade Commission Concerning Google/DoubleClick, FTC File No. 071-0170 (Dec. 7, 2007), <http://www.ftc.gov/os/caselist/0710170/071220statement.pdf>.

to its lone user, which provides better opportunities for more precise targeting and interaction. Second, the presence of apps on mobile phones affords better prospects for behavioral targeting, demographic targeting and location-based targeting through GPS. Google has said its mobile ad rates have increased “dramatically” in recent years and that it believes it could eventually charge higher click-through-rates for mobile ads than for desktop ads because of these unique features.²³

Still other factors further distinguish mobile and online advertising. For example, mobile and online Web users reportedly use the two mediums for different purposes, with mobile users less likely to be researching, watching video or reading lengthy material and more likely to be locating stores and trying to obtain information quickly.²⁴ Advertisements also perform differently in mobile than they do online, with publishers sometimes charging different click-through-rates for each.²⁵ Given all of the above, the sale of online advertising likely does not (and will not) sufficiently constrain the pricing of mobile advertising to preclude the existence of a mobile advertising relevant market.²⁶

All mobile advertising. Yet even if mobile advertising is a relevant product market, the acquisition would not have raised significant competitive concerns if the relevant market included all types of mobile advertising. There are roughly five types of mobile ads: (1) mobile “text” message ads, which include SMS (Short Messaging Service) ads that allow text to be delivered to a user’s phone, and MMS (Multimedia Messaging Service) ads that allow rich media, including graphics, photos, audio and video, to be delivered to a user’s phone; (2) mobile search ads, which allow primarily text or banners to appear on mobile search sites; (3) mobile web “display” ads, which allow text, as well as graphics, images or other content to appear on mobile websites; (4) mobile app ads, which allow display ads to appear within developer applications; and (5) mobile video ads, which allow audio and video ad content to appear on smartphone media players.

Particularly if “text” message ads (SMS and MMS) were in the relevant market, then the combined market share of Google and AdMob would not have been substantial because neither Google nor AdMob is apparently involved in this business, which comprised 55% of mobile advertising revenue in 2009 (compared to 20% for search and 25% for apps and mobile

²³ See Alexei Oreskovic, *Google Sees Mobile Ad Rates Passing PC Rates*, Reuters, March 15, 2010, <http://www.reuters.com/article/idUSTRE62E5FD20100315?type=technologyNews>.

²⁴ See Mobile Marketing Association, *Mobile Advertising Overview January 2009*, <http://www.mmaglobal.com/mobileadoverview.pdf>.

²⁵ In a study conducted by digital marketing research firm InsightExpress measuring mobile norms against online norms for unaided awareness, aided awareness, ad awareness, message association, brand favorability, and purchase intent, mobile advertising was found to be 4.5 - 5.0 times better at delivering ROI than online advertising. See InsightExpress LLC, *New InsightExpress Research Reveals Impact of Mobile Advertising*, Press Release, February 4, 2010, <http://www.insightexpress.com/release.asp?aid=445>.

²⁶ The above also suggests that insofar as the mobile ad market can be broken into narrower segments (e.g., mobile display), online advertising of the same type (e.g., online display) would not be part of the relevant market.

websites).²⁷ Indeed, the acquisition would seem to be relatively benign in an “all mobile” advertising product market.

Text message ads. For mobile web publishers and applications developers, text message ad networks are not substitutes for display and app ad networks in facilitating the monetization of their content. Likewise, SMS and MMS ads are likely not good alternatives to mobile display and app ads for many advertisers. To be sure, SMS messaging ads are uniquely valuable for their extensive reach, in that virtually every available cell phone supports SMS-message receipt. Furthermore, a significantly higher percentage of mobile subscribers use SMS messaging than use web browsers, apps, games, or social-networking sites or blogs.²⁸ In addition, once delivered, both SMS and MMS messaging ads continue to reside on the user’s phone unless or until they are actively removed, and oftentimes users will sign up to receive text message content, so text message ads embedded in text message content can reach an opted-in customer base and afford some level of targeting. However, text-messaging ads are not good substitutes for mobile display or app ads because SMS ads are limited to 160 characters of text and do not support rich media. MMS messages, which do offer the prospect of richer ad content similar to display and app ads, are not supported by many phones and carriers, and they do not enjoy the same high rates of customer usage. In addition, the precision of the available targeting, while perhaps comparable to web display ad targeting, is likely inferior to app ad targeting. 4INFO, the largest SMS publishing platform and SMS ad network in the U.S., publicly disclosed a letter it wrote to the FTC suggesting it had no concerns about Google and AdMob potentially dominating mobile advertising.²⁹ But that could be because it does not believe display or applications ads compete with SMS ads, or that they compete but the acquisition is likely to raise prices.

Search ads. In *DoubleClick*, the FTC concluded that online search ads were not sufficient substitutes to be in the same relevant market as online display or contextual ads.³⁰ In *AdMob*, the FTC apparently concluded that this distinction also holds true for mobile advertising, and we see no reasons to question it. A relevant market that included mobile search ads probably would have been somewhat more concentrated post-merger than a market limited to mobile display and/or app ads because of Google’s dominance of mobile search,³¹ although because AdMob did not

²⁷ See Google, Inc., *Acquisition Facts – Google/admob*, slide presentation.

²⁸ According to comScore, in the month of February 2010, 64% of mobile users used text messaging, while 29.4% used a browser, 27.5% used downloaded apps, 21.9% played games, and 18% accessed social networking sites or blogs. See comScore, Inc., *comScore Reports February 2010 U.S. Mobile Subscriber Market Share*, Press Release, April 5, 2010, http://files.shareholder.com/downloads/SCOR/890215602x0x363430/26cb7c09-47e8-4599-a563-2d4aa9e21e40/SCOR_News_2010_4_5_General_Releases.pdf.

²⁹ See Michael Arrington, *4INFO Tells FTC: Approve the Google/AdMob Deal*, TechCrunch, April 2, 2010, <http://techcrunch.com/2010/04/02/4info-tells-ftc-approve-the-googleadmob-deal/>.

³⁰ Statement of Federal Trade Commission Concerning Google/DoubleClick at 3. The Commission also found that directly sold publisher inventory and publisher inventory sold through ad networks were not good substitutes, *see id.* at 4, and the same appears to be the case with mobile ads.

³¹ According to Opera’s “State of the Mobile” report, which is based on data culled from phones running Opera’s web browser (approximately 100 million phones were shipped with the Opera browser pre-installed), Google

offer search, the inclusion of search in the relevant market would not have made unilateral anticompetitive effects any more likely.

In summary, the FTC's apparent or at least implied conclusion that a narrow mobile advertising market exists comprised of mobile display and app advertising networks that offer performance-based pricing seems quite plausible and supported by the public record. And within this market, the FTC suggested that Google/AdMob had a significant market share, observing, "Google and AdMob today are *the* leading competitors among mobile ad networks."³²

The Relevance of Apple's iAd Network to the Analysis

The Commission's conclusion that "Apple quickly will become a strong mobile advertising network competitor" is well taken. Indeed, Apple may be a greater threat to dominate in-app mobile advertising through its new iAd platform than a combined Google/AdMob mobile ad network. However, it is worth noting that iAd is only an app ad platform.³³ It does not cater to mobile web display ads. And although Quattro Wireless is the third largest mobile ad network, and it may continue to offer web display ads, Apple does not appear to be particularly interested in that segment of the mobile advertising market. Thus, insofar as mobile web display ads constitute a separate relevant market, and Google/AdMob has the ability to exercise market power in that market, the emergence of Apple would not mitigate those anticompetitive effects.³⁴

Apple's iAd platform allows developers to easily start placing ads in their paid or free apps available from Apple's App Store. The reach of Apple's App Store is significant, with approximately 185,000 apps and a very large target base of more than 85 million iPhone, iPod Touch and iPad devices.³⁵ By comparison, Google's reach through its Android operating system

searches accounted for "more than 9% of all page views on the mobile web," more than double the next closest competitor, Yahoo, which had 4.3% of page views. William Hobson, *Google Nets Biggest Share of Mobile Search Engine Market*, VerticalLeap, Feb. 26, 2010, <http://www.vertical-leap.co.uk/news/google-nets-biggest-share-of-mobile-search-engine-market/>.

³² FTC Statement at 1 (emphasis added).

³³ See Apple, Inc., Get a Sneak Peak Into the Future of iPhone OS, <http://www.apple.com/iphone/preview-iphone-os/>.

³⁴ The FTC did not address this issue in its Statement. It seems quite plausible that in-app advertising constitutes a separate relevant market because mobile app ads have unique benefits, in that (1) they offer advanced demographic targeting, specifically because apps tend to be more content-specific than websites; (2) app users tend to skew younger demographically; (3) they have good prospects for syndication; (4) they have higher click-through rates than web ads; and (5) they may be most effective for potentially lucrative location-based targeting, because users often use apps for purposes like navigation. But the fact that mobile display ads may not be good substitutes for app ads does not necessarily mean the converse is true. See, e.g., Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 Antitrust L. J. 129, 153 (2007) (noting "the common possibility that sellers of product A constrain the exercise of market power among sellers of product B, but not vice versa").

³⁵ See Jeanine Poggi, *Will Apple's iAd Hurt Google?*, The Street, April 12, 2010, <http://www.thestreet.com/story/10722164/2/will-apples-iad-hurt-google.html>

is limited to 25,000 apps through a target base of only 8 million Android phone users,³⁶ although Android's market share is growing sharply.³⁷ In terms of paid apps, Apple's App Store was responsible for 99.4% of U.S. app sales in 2009 according to research firm Gartner.³⁸ The significance of ads sold on iPhone apps may be reflected in the fact that nearly half of AdMob's ad impressions were delivered on iPhone devices, and click-through rates on the iPhone are significantly higher than on other smartphones.³⁹

Apple's iAd inventory offers a number of important features, including the ability to run in-app video ads without requiring the user to navigate to a smartphone media player, the ability to execute advertiser-based, in-app mini-apps, and the ability to offer in-app product sales and downloads without redirecting the user to a mobile web page, all while allowing the user to exit the advertisement and return to the original app at the user's precise departure point.⁴⁰ Moreover, Apple has reportedly offered app developers who use iPhone ads to self-advertise and drive downloads of their own apps the ability to tie their ads directly into iTunes purchasing data, affording app advertisers a unique metric for monitoring their conversion rates of ad impressions to downloads.⁴¹ Also, app inventory sold through the iAd platform is priced differently from app inventory sold through other ad networks, with advertisers incurring both a cost per thousand impressions charge and a cost per click charge, as compared to one or the other, which is common to most mobile ad networks.⁴²

More ominously, Apple has taken steps that may limit the development of apps for other mobile operating systems, and possibly make iAd the exclusive ad network for its app developers. Apple's iPhone OS 4.0, which is scheduled for release to consumers later in the summer but is currently accessible to developers in beta form, is a closed system. It runs exclusively on Apple mobile devices, including the iPhone, iPod Touch and iPad, and, according to Apple's iPhone Developer Program License Agreement for iPhone OS 4.0, developers may

³⁶ *Id.*

³⁷ See NPD Group, *Android Shakes Up U.S. Smartphone Market*, May 10, 2010, http://www.npd.com/press/releases/press_100510.html (reporting that Android moved into second position at 28 percent behind RIM's OS at 36 percent and ahead of Apple's OS at 21 percent).

³⁸ *Id.*

³⁹ See Mark Walsh, *Study Examines Mobile Click-Through Rates Across Categories*, Media Post News, Oct. 28, 2009, http://www.mediapost.com/publications/index.cfm?fa=Articles.showArticle&art_aid=116312.

⁴⁰ See Chris Maxcer, *iAd for the Win as iPhone 4's Biggest Blockbuster*, MacNewsWorld, April 13, 2010, <http://www.macnewsworld.com/story/69757.html?wlc=1274142444> (citing presentation to reporters by Apple CEO Steve Jobs).

⁴¹ See Erick Schonfeld, *Scoop: Apple is Pushing a Secret "VIP" Ad Program for iPhone Apps*, TechCrunch, May 5, 2010, <http://techcrunch.com/2010/05/05/apple-vip-ad/>.

⁴² See Kunur Patel & Michael Learmonth, *Is it Worth \$1M in Media to Be a First Adopter with Apple's iAd?*, Advertising Age, May 3, 2010, available at http://adage.com/digital/article?article_id=143640 ("Apple is reinventing mobile ad pricing ... by simultaneously charging a rate for 1,000 impressions (CPM) and rate for click-through's (CPC) [Advertisers will] pay not only a \$10 cost per thousand, but also a \$2 fee every time a person interacts with the ad That's different from other mobile ad networks that usually charge one or the other, not both.").

write applications for it exclusively using Apple’s native software development kit (“SDK”).⁴³ The license agreement also contains language that, if construed literally, prevents non-Apple ad networks from collecting data that is essential for analyzing, serving and selling app inventory on apps written for iPhone OS 4.0.⁴⁴ Thus non-Apple ad networks, including AdMob, may not have the ability to compete for Apple app inventory once iPhone OS 4.0 is fully operational.

The FTC or DOJ should investigate whether Apple’s license agreements with developers will indeed have the effect of foreclosing rival ad networks, and if so, whether the data limitation has a legitimate justification that could be satisfied by less restrictive means. Arguably, advertising on iPhone apps is a separate relevant market, and Apple’s ownership and control over the iPhone platform does not give it the right to monopolize that advertising market through exclusionary means.⁴⁵

Competition between two “circumscribed” advertising networks – iAd for iPhone applications, and Google/AdMob for applications running on Android and other operating systems – is not likely to be sufficient to prevent the exercise of market power. The differentiation between the inventory available on the two systems risks the exercise of unilateral market power against applications developers and advertisers, while the duopoly structure risks the exercise of coordinated interaction and pricing rigidity. The Commission suggested, “Google has a strong incentive to encourage the development of applications on Android to maintain the competitiveness of Android against the iPhone.” No doubt this incentive exists, and it also encourages Google to keep its ad intermediation charges on Android applications low (the same incentive explains why Google gives away Android free), but Google also has an offsetting incentive to increase net revenue from advertising sales, which is after all the core of its business model. Moreover, Google does not capture the full “platform benefit” of low advertising intermediation charges because Google/AdMob serves ads on all platforms (or at least has done so until now).

Apple too has some incentive not to gouge advertisers or applications developers, as it seeks to drive iPhone applications. But Apple already has a commanding lead in iPhone

⁴³ As a result, developers may not write programs for the iPhone using Adobe’s Flash-to-iPhone converter, a “cross platform” language that allows applications developers to write their applications to work with any smartphone operating system. Given the expense of porting an application for multiple operating systems, this restriction seems likely to diminish the number of applications written for non-iPhone devices. See Stan Schroeder, *Adobe Gives Up on iPhone App Development*, CNN.com, <http://edition.cnn.com/2010/TECH/04/21/adobe.iphone.app.mashable/>.

⁴⁴ See Peter Kafka, *MediaMemo: Is Apple Closing Off the iPhone to Rival Ad Networks*, April 12, 2010, <http://mediamemo.allthingsd.com/20100412/is-apple-closing-off-the-iphone-to-rival-ad-networks/>; Peter Farago, *Flurry Product Updates: About iPhone Developer Program License Agreement (3.3.9)*, Flurry, April 14, 2010, <http://blog.flurry.com/updates/bid/32115/About-iPhone-Developer-Program-License-Agreement-3-3-9> (“Notwithstanding anything else in this Agreement, Device Data may not be provided or disclosed to a third party without Apple’s prior written consent. Accordingly, the use of third party software in Your Application to collect and send Device Data to a third party for processing or analysis is expressly prohibited.”) (quoting iPhone Developer Program License Agreement for iPhone OS 4.0 § 3.3.9).

⁴⁵ See *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 480-85 (1992) (holding that Kodak was not entitled to extend its monopoly in Kodak parts to service of Kodak machines).

applications, and it can use advertising revenue to support lower prices on hardware and software, which is the core of its business model. In short, platform competition between Google and Apple seems unlikely to mitigate the expected anticompetitive effects of a duopoly in mobile advertising networks.

The Commission suggested that other firms are “developing or acquiring smartphone platforms to better compete against Apple’s iPhone and Google’s Android,” and that “[b]ecause of the importance of advertising-supported content to the success of smartphone platforms, these firms would have a strong incentive to facilitate competition among mobile advertising networks, including through self-supply.” While the incentives may be there, the ability to develop a successful mobile advertising network is not so clear, particularly given the potential significance of network effects (in operating systems and advertising networks) and other barriers to entry.⁴⁶

What Are the Implications of the Fact That the Mobile Ad Market Is Nascent?

The FTC recognized that the mobile advertising market is a nascent market, but that fact in itself was not a reason for its decision to permit the transaction. The Commission noted,

In any nascent market there will be uncertainty about the path of competition and the durability of early leads in market share. In order to fully protect consumers, however, the Commission must subject mergers in nascent markets to the same level of antitrust scrutiny as mergers in other markets, taking into account all relevant information that becomes available during the course of an investigation. Had the facts supported a challenge here, the Commission would not have hesitated to act to preserve competition in the mobile ad network market.

We think the FTC applied the appropriate standard to nascent information-technology markets. It is true that the difficulty of predicting the future course of events in a nascent market increases the risk of misplaced antitrust intervention. Current market shares may not be

⁴⁶ One such barrier may be Google’s recently awarded patent, titled “Determining and/or using location information in an ad system.” See Kim-Mai Cutler, *Google Wins Patent for Location-Based Advertising*, March 1, 2010, VentureBeat, SocialBeat, <http://social.venturebeat.com/2010/03/01/google-location-ads/>. While the true scope of the patent is not immediately clear, it reportedly covers “using location for targeting, setting a minimum price bid for an ad, offering performance analytics, and modifying the content of an ad.” *Id.* Google currently offers geographical location targeting to its online AdWords customers, which allows advertisers to limit viewership of their ads to online customers within a geographic radius, determining geographic location based on the user’s IP address or in some cases the search query. However, it also offers location-based mobile advertising as determined by the device-user’s location, which is the targeting technology that has most intrigued mobile advertisers. Google chooses the most accurate source of the user’s location from the following, which are in order from most accurate to least: (1) the user’s GPS location, if the user’s GPS is activated and the signal is sufficiently strong; (2) the location of the WiFi router the user is accessing, if the user is connected via WiFi; and (3) Google’s Cell ID (cell tower) location database, if the device supports Cell ID location. See Google, Inc., *How Does AdWords Know Where to Show My Keyword-Targeted Ads?*, AdWords Help Articles, Location Targeting Options, <http://adwords.google.com/support/aw/bin/answer.py?hl=en&answer=6401>. It is unclear whether Google’s patent reaches mobile location-based advertising, as opposed to just online location-based advertising.

particularly meaningful, and the merged company could face challenges from new and as yet unseen business models predicated on changes that may occur in hardware or software technology, consumer usage, market size and costs. Moreover, to the extent that entrepreneurs in mobile advertising and other IT-related sectors rely on the prospect of being acquired by incumbent firms to cash in on their investment, blocking a transaction in a nascent market may have an adverse effect on future investment incentives. On the other hand, the rewards of successful antitrust intervention in a nascent market are equally high because of network effects, which may allow the market leader to obtain and maintain market dominance due to its sheer size. Moreover, innovation could be deterred if new entrants perceive little chance of competing against the market leader. In short, “the antitrust enforcement stakes are raised.”⁴⁷

Network effects in mobile advertising networks. It is easy to see how mobile advertising in the ad intermediation context could be susceptible to network effects.⁴⁸ As a mobile ad network acquired more and more of the best mobile inventory, it would become incrementally more attractive to advertisers, who would turn to that network to see their ads served on more of the best websites or applications, and to benefit from the data gathered on those same websites or applications. Likewise, as publishers and developers saw advertisers steadily migrating to that network, they would become increasingly desirous of selling their inventory through that network, in order to market to the largest pool of the best advertisers.⁴⁹ Still, the prospect that network effects would result in the dominance of the mobile advertising market by one or a few advertising networks rests largely on the premise that network size is the primary feature that attracts advertisers, which in turn attracts publishers, fostering the chain reaction discussed above.

In *DoubleClick*, the FTC noted that the size of an ad network is only one of several factors that customers consider in the online advertising context. Online advertisers also consider the quality of inventory housed in a given ad network, as well as the type and quality of targeting technology employed by the network.⁵⁰ For example, the FTC noted that smaller ad networks with particularly high-quality inventory have enjoyed considerable success in online ad intermediation, and that ad intermediation products with a strength in behavioral targeting may offer superior results for brand advertising, while ad intermediation products that employ contextual targeting may perform better for direct response advertising. Furthermore, the FTC concluded that most publishers utilized multiple ad intermediation providers to most effectively market their non-premium inventory, and most advertisers rely on multiple ad intermediation providers to achieve the best possible targeting.

⁴⁷ Daniel L. Rubinfeld, *Antitrust Enforcement in Dynamic Network Industries*, 43 ANTITRUST BULL. 859, 860 (1998) (arguing that costs and benefits of antitrust intervention are higher in dynamic high technology industries).

⁴⁸ Dynamic, high-technology industries generally tend to be more susceptible to network effects and the risk of tipping. *See id.*

⁴⁹ Indeed, network effects may be particularly strong in a mobile applications advertising market because the many thousands of app developers tend to be very small operators, and they often cannot sustain business models selling app inventory directly to advertisers, without the assistance of a mobile ad network.

⁵⁰ Statement of Federal Trade Commission Concerning Google/DoubleClick at 11.

The FTC's *AdMob* Statement does not indicate how it evaluated network effects in the mobile advertising market, except that it apparently assumed that network effects were no barrier to Apple becoming a formidable competitor.

Conclusion

The Google-AdMob transaction was an exceedingly difficult challenge for the FTC given the nascent and fast-changing nature of the market. The FTC did a commendable job in forthrightly addressing the critical issues in its closing statement. But we are left with an uneasy feeling that the upshot of the transaction may be a duopoly of mobile ad networks that serve app ads, and less competition in networks that serve mobile web ads. The FTC concluded with the statement that it “will continue to monitor the mobile marketplace to ensure a competitive environment and to protect the interests of consumers.” We hope that this is not mere boilerplate, because this is a market that needs careful monitoring by a government entity that is continually advancing its understanding of the industry.⁵¹

⁵¹ Cf. American Antitrust Institute, *Network Access, Regulation and Antitrust* 262 (Diana L. Moss ed., 2005) (strategy of “active monitoring” may be best approach in cases where there may be strong network effects and markets are prone to tipping).