



**Before the
Competition and Market Authority
United Kingdom**

July 30, 2019

In the Matter of:

Online platforms and digital advertising market study

COMMENTS OF DIGITAL CONTENT NEXT

We are pleased to comment on the study you have launched into online platforms and the digital advertising market in the UK.

Digital Content Next is the only association exclusively focused on paving the future for high-quality digital publishers. Our members include some of the most trusted brands on the web – big and small, legacy brands and digital natives – including The New York Times, The Wall Street Journal, WarnerMedia, NBC, Fox, Vox Media, Financial Times and The Insider.

As the Competition and Markets Authority considers the complex public policy issues related to the digital ecosystem, we support the CMA's decision to consider the market in the context of consumer detriment. However, in doing so, the CMA should also have regard for how publishers are also adversely impacted by the behavior of the platforms, and in so doing how this in turn impacts their ability to invest in content. The long-term sustainability of content creators should be a key focus of the scope of any market investigation, given that a) it provides evidence of where markets are not properly functioning and b) where publishers are impacted and have to scale back or wind up their activities, consumers will face a detriment from a decrease in choice.

Consumer Expectations

Consumers have a wide variety of places where they can find quality investigative reporting, breaking news, sports, entertainment or comedy. When consumers visit a site or app, they expect their data may be collected to ensure the service works properly. This may include combatting fraud, authorization of subscriptions, personalizing content or advertising, and that the site recognizes a returning visitor

among other things. These data collection and use cases tend to meet consumer expectations because there is a direct benefit to the consumer experience and because the consumer's data is collected and used transparently within the same context. If the consumer does not like how their data is being used, the consumer can communicate their dissatisfaction or they can choose to visit a competing publisher's site or app. Given the plethora of choices for consumers, publishers are acutely aware that preserving consumer trust is key to building a relationship with the consumer. By comparison, the major consumer-facing platforms operate in such a way that it is almost impossible for consumers to exercise a choice not to use the service or impart their data to the platform. This is because the platforms operate at such a wide scope and scale.

We do not believe that consumers are fully aware of how their data is being used by the platforms. In April 2018, we conducted a survey¹ of US consumers to better understand their expectations with regard to how Facebook collects and uses consumer data. The survey found that consumers expect Facebook to track consumers while they are using Facebook-owned apps. However:

- Sixty-one percent of consumers do not expect Facebook to track a person's usage of apps that Facebook does not own in order to make ads more targeted.
- Sixty-nine percent of consumers do not expect Facebook to collect location data when a person is not using Facebook.
- Seventy-one percent of consumers do not expect Facebook to collect data about a person's online activities on a non-Facebook webpage if a person does NOT click on the "like" button.

In April 2019, we conducted a similar survey² to measure consumer expectations with regard to Google's data collection and use practices.

- Sixty-six percent of consumers do not expect Google to collect location data about consumers when they are not using a Google platform or app.
- Sixty-four percent of consumers do not expect Google to track a person's usage of non-Google apps in order to make ads more targeted.

Consumers clearly do not expect companies to collect data about them outside of the context of their relationship with the company. For example, consumers expect Google to collect location data in order to provide directions in Google maps. Yet, they are not likely to expect or even know that Google continues tracking consumers long after they have stopped using Google maps.

Consumer trust can be eroded when their data is collected in one context but used in another without transparency or an opportunity for the consumer to exercise choice. The ongoing scandal involving Facebook and Cambridge Analytica is a good example. In this case, Facebook allowed an outside company to collect data about Facebook users for what consumers expected was a benign purpose and solely within the confines of the Facebook service. However, the consumer and their friends' data was ultimately shared with multiple parties and used for unexpected purposes. Also, it is important to note that the data collection provided no benefit to the consumer.

¹ <https://www.niemanlab.org/2018/04/jason-kint-here-are-5-ways-facebook-violates-consumer-expectations-to-maximize-its-profits/>

² <https://www.niemanlab.org/2019/04/does-google-meet-its-users-expectations-around-consumer-privacy-this-news-industry-research-says-no/>

Our concern is that ubiquitous web-wide tracking of consumers by Google and Facebook runs counter to consumer expectations and, thus, undermines consumer trust in the internet at large. There are many ways that the lack of consumer trust manifests itself. Consumers are less willing to share data about themselves with any company. Consumers delete all cookies, which degrades the consumer experience. More recently, consumers are increasingly downloading ad blocking software³, which block the opportunity for any ads to be shown – which impacts the publisher’s ability to monetize their content. According to a 2015 survey⁴ we conducted, concerns about ads tracking consumers are a key reason that people download ad blockers. In addition, as digital advertising industry leaders, Google and Facebook help set the expectations for advertisers that troves of behavioral consumer data will be available for the personalization of ads. While many companies would prefer to limit their collection of consumer data, the market is skewed to reward companies to ever-increasing amounts of personal data about consumers.

Competition

DCN is concerned that the current digital marketplace is unfairly tilted in favor of two companies – Google and Facebook. Combined, these two companies account for 73%⁵ of digital advertising dollars and 90%⁶ of all growth in the market. This revenue is generated by selling advertising on their platforms but also taking a cut of the growing advertising technology services used by publishers to sell advertising on their own websites. The revenue gained from their dominant advertising businesses allows them to offer “free” services. What makes these two companies so dominant is their ability to collect data about consumers at an unmatched scale and to use that data to sell targeted advertising against publishers’ content without paying a fair share.

While they offer “free” consumer-facing services such as Facebook, Instagram, Gmail, Google Maps and Android devices, the scale of their data collection is broadened by their ability to collect data as the provider of non-consumer facing, third party services such as social media widgets (e.g. the “like” button) and ad serving technologies. Princeton released research⁷ in 2016 showing that Google and Facebook together account for *all of the top ten* third-party data collectors across the web. *As a result, it is impossible for consumers or publishers to avoid interacting with Facebook and Google.*

Facebook recently disclosed to UK Parliament, it can track consumers across an estimated 8.4 million websites. Most consumers are not aware that the Facebook “like” button allows Facebook to collect data about where and when consumers go online and what they are reading.

Similarly, Google collects data about consumers across the web at a massive scale through a combination of popular services and advertising technologies.

- Google Search controls approximately 90%⁸ of the search market.
- Google Chrome is responsible for more than 60%⁹ of web traffic.

³ <https://digiday.com/media/ad-blocking-still-substantial-threat-publisher-revenue-streams/>

⁴ <https://digitalcontentnext.org/blog/2016/01/05/2015-dcn-consumer-ad-block-report/>

⁵ <https://www.cnbc.com/2017/12/20/google-facebook-digital-ad-marketshare-growth-pivotal.html>

⁶ <https://adage.com/article/digital/iab-digital-ad-revenue-catapulted-88-billion-2017/313464>

⁷ http://randomwalker.info/publications/OpenWPM_1_million_site_tracking_measurement.pdf

⁸ <https://www.statista.com/statistics/216573/worldwide-market-share-of-search-engines/>

⁹ <https://www.statista.com/statistics/544400/market-share-of-internet-browsers-desktop/>

- Google Android is the most popular mobile operating system.
- Google has cornered nearly the entire advertising server market. On the supply side, advertising teams are optimizing for Google's Ad Server and the often-opaque business rules and measurements Google establishes.
- And on the demand side, because Google oversees more advertising demand than any of the top five advertising agencies, Google is able to, in effect, set the rules of data usage in the open-auction market. Google determines these rules with full knowledge whether they will help Google or help publishers.

The aforementioned Princeton research also showed that Google owns all of the top five third-party domains across the top one million websites. In the words of Harvard Business School Association Professor Ben Edelman, "No other firm engages in even a fraction of this tracking."

In the fall of 2018, we helped distribute research from Vanderbilt Professor Douglas Schmidt, which sought to catalogue the various ways that Google collects data about consumers. While the research yielded a number of relevant data points, a key highlight is that two-thirds of the data collected about consumers by Google is collected in the background when consumers are unaware they are using Google services and often unable to do anything about it.

Legal Strong Arm Tactics

Because the ability to collect massive amounts of data about consumers is key to capturing an increasing share of the digital advertising marketplace, Google and Facebook often leverage their size to employ legal and regulatory strategies to protect their dominant positions. The companies are able to operate in this manner at odds with consumer expectations not despite but because of their dominance.

In order for any website to include a Facebook "like" button on their site, the publisher must agree to Facebook's terms of use, which allow Facebook unfettered access to collect data about a consumer's activity on the internet. There is no opportunity for the publisher to limit Facebook's ability to collect and use data about consumers. Worse, those terms of use are frequently modified.

Similarly, legal teams at publishers are forced to accept Google's rules or choose not to do business with Google. After years of the industry preparing to comply with the EU's General Data Protection Regulation (GDPR), Google announced¹⁰ new terms of service for its products and services just a few weeks before the roll-out of GDPR. In a nutshell, Google asserted itself as co-controller over all data it collected from publisher websites with independent rights to use the data as it sees fit, refused to tell any company how it would use that data, required the publisher to gain consent from the consumer for Google's data collection and use (even though consent cannot be valid without information from Google); and assigned all liability to the publisher for any violations of GDPR. While other companies in the ecosystem deployed similar terms, it is notable that only Google has refused to negotiate or even engage in a meaningful conversation.

¹⁰ <https://digitalcontentnext.org/blog/2018/04/12/google-to-publishers-on-gdpr-take-it-or->

Intersection of Competition and Data Policy

As noted above, Google and Facebook offer very popular services to consumers for “free,” yet they extract a cost from consumers in the form of personal data. That personal data is used to offset the cost and enhance the effectiveness of their advertising products. Unfortunately, the legal tools available today for regulators do not always appropriately account for “free products.” As such, we would also encourage you to explore further law professor Maurice Stucke’s arguments¹¹ that competition could be more balanced by shifting away from price-centric tools in evaluating free products which exploit consumer data. We would also call attention to a research paper published in September 2018 by Dina Srinivasan titled, “The Antitrust Case Against Facebook”¹² in which Ms. Srinivasan documents this “bait and switch” by Facebook in its early years using privacy protection as a “paramount” differentiator in a competitive set of free social networks forced to compete on quality. Ms. Srinivasan reasons this enabled Facebook’s growth until it reached a point of dominance allowing it to slowly lower its quality and privacy protections in order to accelerate revenues and profits.

Google similarly offers “free” services for search, maps, browsing and mobile operating systems. The revenue gained from those services enabled Google to purchase ad tech companies, which now make up the technology in their advertising stack. It is important to point out that none of Google’s advertising technology was developed in-house. Now, Google benefits from a virtuous cycle of having the ability to collect about consumers across their “free” services and across their advertising technologies, which in turn enhances their ability to target consumers with advertising.

Conclusion

We appreciate the opportunity to comment on this proceeding. Please let us know if you have additional questions or if we can be of assistance in any way. We look forward to working with you to ensuring a healthy and competitive digital advertising marketplace that respects consumers and properly allows for content creators to invest in the content and experiences that consumers love.

Sincerely,

Jason Kint
CEO
Digital Content Next

¹¹ See ETHI, *Democracy Under Threat: Risks and Solutions in the era of Disinformation and Data Monopoly*, Chapter 6: Relevant Evidence of Maurice Stucke, Dec 2018, <http://www.ourcommons.ca/DocumentViewer/en/42-1/ETHI/report-17/page-129#33>.

¹² https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3247362