

Using Antitrust Enforcement Prudently in High Tech Markets

By David A. Balto

The debate over the effective use of antitrust enforcement in high technology markets is at the core of our understanding of how competition functions in these markets. Where competition is restrained by artificial barriers to entry or improper aggregations of power antitrust enforcement can be a vital tool for eliminating those barriers. But competition in high tech markets can be dramatically different than traditional markets, and consumers may have far alternatives and can exercise these alternatives more readily. Moreover, before antitrust enforcers act they must determine that enforcement will actually improve the alternatives for consumers and make the market work more effectively. And they have to find that government intervention will be effective.

No matter presents these issues as readily as the complaints that Google is engaging in unlawful conduct. To buttress the allegations of competitive harm the critics attempt to compare the dispute to the Justice Department case against Microsoft and suggest that the precedent in that case can be easily followed to condemn Google's conduct. In support of their claims that Google violates federal antitrust laws, members of the so-called "FairSearch coalition" compare Google's practices of today to that of Microsoft in the late 1990s.¹ They claim that since Google, like Microsoft, is a large and successful company in the technology sector with a dominant market share, surely it is a monopoly.² They go on to draw comparisons between the tactics Microsoft used to protect its dominant position in the operating system market to Google's

1Standard Oil, US Steel, AT&T, Microsoft and . . . Google?, Fairsearch.org (Oct. 26, 2011, 9:41 AM), <http://www.fairsearch.org/acquisitions/standard-oil-us-steel-att-microsoft-and%E2%80%A6google/>.

2 Is Google Cooking It? Former DOJ Counsel Weighs In, Fairsearch.org (Oct. 27, 2011, 2:34 PM), <http://www.fairsearch.org/search-manipulation/is-google-cooking-it-former-doj-counsel-weighs-in/>.

practices of “cooking it” (i.e. purportedly manipulating its search results in favor of its own content).³ However, a more careful analysis reveals that the circumstances underlying the DOJ’s case against Microsoft for monopolization of the operating systems market are drastically different than the nature of the internet search market and Google’s practices in particular.

As recognized by the U.S. District Court for the District of Columbia and affirmed on appeal, and the DOJ’s case against Microsoft had all the necessary elements of a monopolization violation. Microsoft had monopoly power in the operating systems market and Microsoft unlawfully maintained that monopoly power through, *inter alia*, licensing restrictions Microsoft imposed on original equipment manufacturers (“OEMs”).

Unlike the case against Microsoft, a potential antitrust case against Google based on its search practices will not survive scrutiny. Google competes on the most level playing field imaginable: the internet. All competitors must continuously adapt and innovate to remain viable, including Google. This ultimately leads to consumer welfare, and distinguishes Google from Microsoft. This paper analyzes the potential antitrust case against Google against the backdrop of the DOJ’s case in Microsoft and explains why the two cases are vastly different. In the DOJ’s case against Microsoft was appropriate and necessary to stabilize competition in the PC operating systems market. These concerns do not exist in the internet search market.

Part I provides a very basic overview of federal law bans on monopolization and the *Microsoft* decision. Part II explains the monopolization claims made against Google today. The analysis that follows in Part III explains how the facts and circumstances of Google today are dramatically different than those of Microsoft in the 1990s. Part IV completes the analysis by, notwithstanding the distinctions noted in Part III, examining the issue of administrability of any potential remedy.

³ *Id.*

I. Monopolization Claims in the High tech Industry

Since its founding in the 1970s and entry into the computer operating system business in 1980, Microsoft has enjoyed significant commercial growth.⁴ Microsoft first faced federal antitrust scrutiny in 1990 when the FTC investigated potential collusion between Microsoft and IBM.⁵ In 1994, the Department of Justice filed suit against Microsoft for allegedly unlawfully maintaining its monopoly through anticompetitive terms in licensing and software developer agreements.⁶ Microsoft settled the 1994 investigation with a consent decree.⁷ In 1998, the DOJ initiated an action for a preliminary injunction alleging that Microsoft had violated the consent decree based on Microsoft's bundling of its web-browser, Internet Explorer, with its operating system, Windows 95.⁸ On appeal, the DC Circuit determined that conduct was not in violation of the consent decree; however, specifically reserved the issue of whether or not that conduct constituted a violation of §§ 1 or 2 of the Sherman Act.⁹

Before the DC Circuit had issued its decision in that case, the DOJ and several states initiated a separate action against Microsoft, alleging a wide range of anticompetitive conduct, including both Section 1 and Section 2 violations.¹⁰ The DOJ's primary Section 2 allegation was that Microsoft maintained its monopoly of operating systems through a panoply of

4 Much of this background is developed using Daniel L. Rubinfeld, *Maintenance of Monopoly: U.S. v. Microsoft (2001)*, in The Antitrust Revolution: Economics Competition and Policy, Fourth (John E. Kwoka, Jr. & Lawrence J. White, eds.) [hereinafter *Maintenance of Monopoly*].

5 IBM, Microsoft Admit FTC Probe, LA TIMES, Mar. 13, 1999, available at http://articles.latimes.com/1991-03-13/business/fi-179_1_system-software.

6 United States v. Microsoft, 253 F.3d 34, 47 (DC Cir. 2001).

7 United States v. Microsoft, 253 F.3d 34, 47 (DC Cir. 2001).

8 United States v. Microsoft, 253 F.3d 34, 47 (DC Cir. 2001).

9 United States v. Microsoft, 253 F.3d 34, 47 (DC Cir. 2001).

10 *U.S. v. Microsoft*, DOJ Civil Action No. 98-1232, Complaint, available at <http://www.justice.gov/atr/cases/f1700/1763.htm>.

anticompetitive conduct, including Microsoft's licensing practices with OEMs and its integration of IE and Windows.¹¹

Monopolization is a violation of Section 2 of the Sherman Act,¹² which governs unilateral activity. To prevail on in a monopolization claim, the plaintiff or government carries the burden of demonstrating that the defendant (1) possesses monopoly power in a relevant market; and (2) has acquired, enhanced, or maintained this power by use of exclusionary conduct.¹³ The standards governing each element and the DC Circuit's analysis in *Microsoft* follows below.

A. Monopoly Power

With respect to the first element of a Section 2 claim, market power and monopoly power are not synonymous. Monopoly power is “the power to control prices or exclude competition;”¹⁴ whereas, market power is “the ability to raise prices above those that would be charged in a competitive market.”¹⁵ The difference between the two is subtle but important. Typically, market power and monopoly power are both established only by circumstantial evidence since direct proof is rarely available.¹⁶ Market share is a key piece of circumstantial evidence to establish both market power and monopoly power. When assessing market power, a firm with large market share is more likely to possess market power than a firm with small market share.¹⁷ But, when assessing monopoly power, a competitor's market share must be considered in light of the market in which it competes, particularly the likelihood and ease of entry into that market by new competitors, and the durability of that large market share.¹⁸

11 United States v. Microsoft, 253 F.3d 34, 59-67 (DC Cir. 2001).

12 15 U.S.C.A. § 2.

13 Verizon Communs. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).

14 United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 391 (1956).

15 NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 109 n.38 (1984).

16 United States v. Microsoft, 253 F.3d 34, 51 (D.C. Cir. 2001).

17 TK Footnote Needed.

18 United States v. Microsoft, 253 F.3d 34, 51, 54-55 (D.C. Cir. 2001).

In *Microsoft*, the district court below defined the relevant market as “licensing of all Intel-compatible PC operating systems worldwide.”¹⁹ Microsoft challenged this market definition on the grounds it improperly excluded Apple’s operating system, operating systems for non-PC devices, and middleware products.²⁰ The DC Circuit, however, rejected Microsoft’s arguments on market definition because Microsoft had failed to challenge the district court’s factual findings and therefore Microsoft’s conclusory statements on appeal were insufficient to show that the district court’s findings as clearly erroneous.²¹

With the market defined, the district court concluded that “Windows account[ed] for a greater than 95% share” (the court also noted that even if Apple’s operating system had been included in the relevant market, Microsoft’s market share would have still exceeded 80%).²²

Having examined market share, the district court completed its analysis of monopoly power by examining barriers to entry.²³ The court concluded that there were substantial barriers to entry for any competitors to challenge Microsoft’s monopoly,²⁴ many of which Microsoft exacerbated through its anticompetitive tactics. The DC Circuit summarized the district court’s findings on entry barriers as follows:

[T]he “applications barrier to entry”-stems from two characteristics of the software market: (1) most consumers prefer operating systems for which a large number of applications have already been written; and (2) most developers prefer to write for operating systems that already have a substantial consumer base. . . . This “chicken-and-egg” situation ensures that applicants will continue to be written for the already dominant Windows, which in turn ensures that consumers will continue to prefer it over other operating systems.²⁵

This description acknowledges the simultaneous features of the software market that consumers could not easily switch from Windows to other operating systems and there was a certain “critical mass” in order to attract software developers for a particular operating system. The

19 United States v. Microsoft, 253 F.3d 34, 51, 52 (D.C. Cir. 2001).

20 United States v. Microsoft, 253 F.3d 34, 51, 52 (D.C. Cir. 2001).

21 United States v. Microsoft, 253 F.3d 34, 51, 52 (D.C. Cir. 2001).

22 United States v. Microsoft Corp., 253 F.3d 34, 54 (DC Cir. 2001).

23 United States v. Microsoft Corp., 253 F.3d 34, 55 (DC Cir. 2001).

24 United States v. Microsoft Corp., 253 F.3d 34, 55 (DC Cir. 2001).

25 United States v. Microsoft Corp., 253 F.3d 34, 55 (DC Cir. 2001).

functionality of a computer is grounded in the applications and programs available to be run on it.²⁶ A consumer would have to forego a large selection of available applications if he were to avoid Microsoft.²⁷ As one commentator explained, “disconnecting from the Microsoft ecosystem was costly, time intensive and complicated, requiring companies to overhaul systems and retrain personnel.”²⁸ The switching costs were simply too high for any consumer to ever consider moving to a different operating system, leaving Microsoft in its dominant position.

Microsoft challenged the existence of barriers to entry on three grounds. First, Microsoft argued the fact that software developers do in fact write programs for other operating systems necessarily refutes this “chicken-and-egg” problem.²⁹ Second, Microsoft argued that the applications barrier is not a cause of Microsoft’s success but merely “a reflection of Windows’ popularity.”³⁰ Lastly, Microsoft argued that consideration of the applications barrier to entry was improper because, before Microsoft had risen to dominance, it too had to overcome barriers to entry and therefore costs borne by all entrants should not be considered a true entry barrier.³¹

The DC Circuit court rejected Microsoft’s claims. First, the court dismissed the first argument based on the district court’s finding that a consumer prefers an operating system that runs not only the applications that the consumer uses but also the applications she thinks she may develop an interest in later, and thus, the limited success of Microsoft’s rivals does not disprove that Microsoft does not benefit from the applications barrier.³² Thus, to compete with Microsoft, any “operating system entrant must not only have a good operating system, but also one that

26 United States v. Microsoft Corp., 84 F.Supp.2d 9, 19-20, ¶ 37 (D.D.C. Nov. 5, 1999).

27 United States v. Microsoft Corp., 84 F.Supp.2d 9, 20, ¶ 40 (D.D.C. Nov. 5, 1999).

28 Bianca Bosker, *Google Antitrust Inquiry: Microsoft’s History Looms Large*, Huffington Post, June 23, 2011.

29 United States v. Microsoft Corp., 253 F.3d 34, 55 (DC Cir. 2001).

30 United States v. Microsoft Corp., 253 F.3d 34, 56 (DC Cir. 2001).

31 United States v. Microsoft Corp., 253 F.3d 34, 56 (DC Cir. 2001).

32 United States v. Microsoft Corp., 253 F.3d 34, 55 (DC Cir. 2001).

either runs existing applications or has close versions of existing applications written for it.”³³

Second, the DC Circuit acknowledged that Windows’ initial popularity surely was the result of superior quality; however, how Microsoft acquired its dominant position was not the issue.³⁴

Instead, the analysis of barriers to entry is an assessment of the market, operating systems in this case, and is not linked to any particular firm.³⁵ Finally, the DC Circuit rejected Microsoft’s final

argument on the facts:

When Microsoft entered the operating system market with MS-DOS and the first version of Windows, it did not confront a dominant rival operating system with as massive an installed base as a vast an existing array of applications as the Windows operating systems have since enjoyed.³⁶

Having found no error in the lower court’s findings of fact and conclusions of law, the DC Circuit affirmed that Microsoft had monopoly power. As a result of these positive network effects, many more applications were written for Windows, and any competitor would have struggled to obtain critical mass to compete with Windows. Even if Microsoft significantly increased the cost of its operating system, OEMs would have no alternative but to capitulate to the higher price.³⁷ In fact, the district court found that IBM had given up on competing with Windows as evidenced by the fact that the price of IBM’s operating system was about 250% higher than Windows 98.³⁸

B.Exclusionary Conduct and Consumer Harm

Section 2 outlaws monopolization, not monopolies.³⁹ Therefore, even a finding of monopoly power does not condemn the defendant. Furthermore, a monopolist is not prohibited

33 Timothy J. Brennan, *Do Easy Cases Make Bad Law? Antitrust Innovations or Missed Opportunities in United States v. Microsoft*, 69 GEO. WASH. L. REV. 1042, 1060 (2001).

34 *United States v. Microsoft Corp.*, 253 F.3d 34, 55 (DC Cir. 2001).

35 *United States v. Microsoft Corp.*, 253 F.3d 34, 55 (DC Cir. 2001).

36 *United States v. Microsoft Corp.*, 253 F.3d 34, 56 (DC Cir. 2001).

37 *United States v. Microsoft Corp.*, 84 F.Supp.2d 9, 24, ¶ 54 (D.D.C. Nov. 5, 1999).

38 *United States v. Microsoft Corp.*, 84 F.Supp.2d 9, 22, ¶ 46 (D.D.C. Nov. 5, 1999).

39 *See United States v. Griffith*, 334 U.S. 100, 106 (1948); *United States v. Microsoft*, 253 F.3d 34, 51 (DC Cir. 2001) (“[M]erely possessing monopoly power is not itself an antitrust violation . . .”).

from extracting monopoly rents in the form of supra-competitive prices.⁴⁰ Instead, the gravamen of the offense occurs when a monopolist maintains its monopoly power through some other means than the continued superiority in product design or creation of efficiencies that ultimately benefit the end consumer.⁴¹ The Supreme Court articulated that the second element of a Section 2 violation is “the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”⁴² Monopoly maintenance can take many different forms but the common factor is exclusionary conduct.

So, if a firm has monopoly power in a relevant market – the plaintiff or government must show that this monopoly power was acquired, enhanced, or maintained through exclusionary conduct. Exclusionary conduct does not mean competing vigorously, continuing to innovate, or out-performing rivals. Instead, exclusionary conduct is confined to a list of outlawed activities, such as limiting competitors’ access to markets or suppliers, price predation, tying, and refusals to deal by essential facilities, among others. All of these practices involve blocking an actual or potential competitor from actually competing even though the competitor offers a superior product is more efficient. Thus, the analysis of the second element is a fact-intensive inquiry which explains why the difficulty of distinguishing between rigorous competition and anticompetitive conduct persists.

Finally, and perhaps most importantly in Google’s case, demonstrating exclusionary conduct is not simply identifying “harm to a competitor.” As articulated by Thomas O. Barnett,

⁴⁰ See *Verizon Comm’n’s., Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (explaining that “The opportunity to charge monopoly prices—at least for a short period—is what attracts ‘business acumen’ in the first place; it induces risk taking that produces innovation and economic growth.”).

⁴¹ *Id.*

⁴² *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

then-Assistant Attorney General for the DOJ's Antitrust Division, "injury to competitors does not demonstrate competitive harm."⁴³ This sentiment is echoed by the DC Circuit court in *Microsoft*:

[T]o be condemned as exclusionary, a monopolist's act must have an "anticompetitive effect." That is, it must harm the competitive *process* and thereby harm consumers. In contrast, harm to one or more *competitors* will not suffice.⁴⁴

Antitrust law is concerned with ensuring open competition, not with protecting competitors or picking winners or losers.

For Microsoft in the late 1990s, the internet was "both an opportunity and a threat."⁴⁵ The internet provided more customers, and more opportunities for applications.⁴⁶ This offered vertical opportunities to create new integration products, and horizontal opportunities to increase sales.⁴⁷ However, the internet also provided competitors the opportunity and means to dethrone Microsoft's dominant Windows OS.⁴⁸ The district court found that Netscape Navigator, the primary competitor to IE in the browser market at the time, possessed three attributes that could eventually overcome the applications barrier to entry in the operating systems market:

First, in contrast to non-Microsoft, Intel-compatible PC operating systems, which few users would want to use on the same PC systems that carry their copies of Windows, a browser can gain widespread use based on its value as a component to Windows. Second, because Navigator exposes a set (albeit a limited one) of APIs, it can serve as a platform for other software used by consumers. A browser product is particularly well positioned to serve as a platform for network-centric applications that run in association with Web pages. Finally, Navigator has been ported to more than fifteen different operating systems. Thus, if a developer writes an application that relies solely on the APIs exposed by Navigator, that application will, without any porting, run on many different operating systems.⁴⁹

For these reasons, it was theoretically possible for a browser such as Navigator to attract developers to create programs that would be run on the browsers regardless of the host operating

43 Sherman Act Section 2: Joint Hearing Before the U.S. Fed. Trade Comm'n & U.S. Dep't of Justice at 36 (2006) (statement of Thomas O. Barnett, Asst Attorney Gen., U.S. Dep't of Justice) *available at* <http://www.ftc.gov/os/sectiontwohearings/docs/60620FTC.pdf>.

44 *United States v. Microsoft*, 253 F.3d 34, 58 (DC Cir. 2001).

45 *Maintenance of Monopoly* at 492.

46 TK Footnote Needed. Id.???

47 TK Footnote Needed. Id.???

48 *United States v. Microsoft*, 84 F.Supp.2d 9, 46, ¶ 143.

49 *United States v. Microsoft*, 84 F.Supp.2d 9, 28, ¶ 69.

system. The reliance on Microsoft would be replaced with an option between running programs on Microsoft's operating system, or Navigator's browser. To combat this threat, Microsoft purportedly engaged in a suite of anticompetitive conduct, including market allocation (offering to Netscape the server market while Microsoft would seize the PC market), predatory pricing (distributing its IE browser at a colossal loss despite the lack of a penetration strategy), bundling (requiring the purchaser of Windows OS to also purchase IE), and OEM restrictions (forbidding OEM manufacturers from distributing other browsers).

In *Microsoft*, the DOJ made several allegations of exclusionary conduct; however, the focus of the case was licensing restrictions that Microsoft imposed on OEMs. There were three specific licensing restrictions on OEMs at issue: (1) prohibition of the removal of desktop icons, folders and start-up menu entries; (2) prohibition on modifying the initial boot sequence; and (3) prohibition on removal of icons or other alterations to the desktop.⁵⁰ The DOJ went two for three, with the DC Circuit only finding merit in the restriction preventing OEMs from modifying the initial boot sequence.⁵¹

In the end, this panoply of anticompetitive conduct led to very real consumer harm.⁵² The price that consumers pay for computers is directly affected by the input cost of the operating system.⁵³ Once the consumer purchases the computer from the OEM, he is not likely to change the operating system comes with the computer.⁵⁴ By maintaining and enhancing its monopoly, Microsoft was able to ensure that it had the ability to dictate prices, and therefore continue to charge monopoly rents from OEMs.⁵⁵ These OEMs, in turn, had no alternative but to pass the cost on to the consumer.⁵⁶

50 United States v. Microsoft, 253 F.3d 34, 60-64 (DC Cir. 2001).

51 United States v. Microsoft, 253 F.3d 34, 63-64 (DC Cir. 2001).

52 United States v. Microsoft Corp., 84 F.Supp.2d 9, 22, ¶ 46 (D.D.C. Nov. 5, 1999).

53 United States v. Microsoft Corp., 84 F.Supp.2d 9, 110-11, ¶¶ 409-412 (D.D.C. Nov. 5, 1999).

54 United States v. Microsoft Corp., 84 F.Supp.2d 9, 25, ¶ 57 (D.D.C. Nov. 5, 1999).

55 United States v. Microsoft Corp., 84 F.Supp.2d 9, 110-11, ¶¶ 409-412 (D.D.C. Nov. 5, 1999).

56 United States v. Microsoft Corp., 84 F.Supp.2d 9, 13, ¶¶ 10 (D.D.C. Nov. 5, 1999).

C. A Note on Error Costs

A well documented concern when assessing a Section 2 violation is the risk of a false positive is extremely harmful because of the chilling effect on innovation.⁵⁷ Technology markets are especially prone to false conclusions of monopoly power based on high market share.⁵⁸ The innovation-driven nature of technology markets, particularly internet-based markets, distinguishes these markets from the more static markets examined in the seminal antitrust cases and that distinction explains the temporary monopolies or short durations of dominance in particular products characteristic of internet-based markets.⁵⁹

In *Microsoft*, the DC Circuit prefaced its decision by “reflect[ing]” on this “theoretical” issue.⁶⁰

We decide this case against a backdrop of significant debate amongst academics and practitioners over the extent to which “old economy” §2 monopolization doctrines should apply to firms competing in dynamic technological markets characterized by network effects. . . . we note that there is no consensus among commentators on the on the question of whether, and to what extent, current monopolization doctrine should be amended to account for competition in technologically dynamic markets characterized by network effects.⁶¹

Although acknowledging the debate, the DC Circuit immediately noted that Microsoft made no claim that anticompetitive conduct should be assessed differently in technologically dynamic markets; and instead, merely argued that the assessment of monopoly power should differ.⁶²

Presumably, the DC Circuit intended to not weigh in on that issue, but, it may have inadvertently done so later in the opinion.

57 See generally, Joshua D. Wright & Geoffrey A. Manne, *Google and the Limits of Antitrust: The Case Against the Case Against Google*, 34 HARV. J. L. & PUB. POL’Y 171 (2011).

58 *Id.* at 244.

59 TK Footnote needed

60 *United States v. Microsoft*, 253 F.3d 34, 48 (DC Cir. 2001).

61 *United States v. Microsoft*, 253 F.3d 34, 49 (DC Cir. 2001).

62 *United States v. Microsoft*, 253 F.3d 34, 49 (DC Cir. 2001).

In addition to the monopolization claim based on the OEM licensing restrictions, the DOJ had also alleged that Microsoft unlawfully maintained its monopoly by tying its web browser, Internet Explorer, with its Operating System.⁶³ The district court had found Microsoft's conduct per se illegal under the tying analysis set forth in *Jefferson Parish*.⁶⁴ The DC Circuit reversed and remanded, finding that per se treatment was inappropriate for this case.⁶⁵ That decision was based in part on the dynamic, innovation-driven nature of high technology markets:

In fact there is merit to Microsoft's broader argument that *Jefferson Parish*'s consumer demand test would "chill innovation to the detriment of consumers by preventing firms from integrating into their products new functionality previously provided by stand alone products-and hence, by definition, subject to separate to consumer demand." . . . We heed Microsoft's warning that the separate-product element of the per se rule may not give newly integrated products a fair shake.⁶⁶

Given the importance of innovation to high technology markets, the antitrust community must be especially careful when assessing the competitive effects of successful, even dominant, firms. The need to tread lightly, however, does not necessarily preclude a finding of monopolization. As middle ground, any claim of monopoly power the technology markets should thoroughly analyze the existence and impact lock-in and network effects; and the resulting impact on innovation in the market over a considerable period of time.⁶⁷

II. Monopolization Claims Against Google Today

The case against Microsoft's monopolization of the operating system market was strong, and the harm was apparent. Consumers paid supracompetitive prices, innovation in the relevant product markets stagnated, and competition was nearly non-existent. In the complaints against Google, consumer harm is less apparent. In fact, consumers widely support Google. A recent

63 United States v. Microsoft, 253 F.3d 34, 47 (DC Cir. 2001).

64 United States v. Microsoft, 253 F.3d 34, 84 (DC Cir. 2001).

65 United States v. Microsoft, 253 F.3d 34, 84- (DC Cir. 2001).

66 United States v. Microsoft, 253 F.3d 34, 89 (DC Cir. 2001).

67 TK Footnote needed

survey by Rasmussen Reports reinforces the argument against regulation, as 77 percent of those surveyed said they did not believe that there is a need for search regulation.⁶⁸

At the recent hearing before the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, members of the so-called “FairSearch coalition” presented the antitrust complaints against Google. On a superficial level, some of these complaints appear similar to those levied against Microsoft thirteen years ago.

A. Google’s Alleged Monopoly Power

Critics and competitors allege that Google is a monopolist, or rather, that Google has monopoly power. This allegation spans both the internet search market and the search advertising market. At the subcommittee hearing last month, and almost as vehement as the members of Fairsearch, Senator Michael Lee pointed out that (1) between 60%-70% of the searches performed in the United States use Google; (2) Google controls 75% of search page advertising; (3) Google is a very big, profitable company, earning approximately \$28 billion in advertising revenues alone in 2010; (4) that “google” has come to be an accepted verb in the United States, synonymous with searching the Internet.⁶⁹ Surely these facts qualify Google as a monopolist, complete with the power to raise prices or lower output, and undermine competition in an industry?

Google’s critics couple that purported evidence of monopoly power with claims of network effects, and correspondingly, barriers to entry.⁷⁰ According to the Fairsearch coalition,

68 Most Say No to Government Regulation of Search providers, *available at* http://www.rasmussenreports.com/public_content/lifestyle/general_lifestyle/january_2011/most_say_no_to_government_regulation_of_search_engines.

69 *The Power of Google: Serving Consumers or Threatening Competition? Before S. Subcomm. On Antitrust, Competition Policy and Consumer Rights*, September 21, 2011 (statement of Sen. Michael Lee).

70 Can Search Discrimination by a Monopolist Violate U.S. Antitrust Laws?, at 4, *available at* <http://www.fairsearch.org/wp-content/uploads/2011/07/Can-Search-Discrimination-by-a-Monopolist-Violate-U.S.-Antitrust-Laws1.pdf>.

since search requires critical mass in order to function, it is therefore a network effect and inherently favors those competitors that already have users.⁷¹ Critics also assert that Google lures in users by offering a bevy of services, free of charge that makes users unable to migrate to other search providers.

B. Google's Alleged Exclusionary Conduct and the Corresponding Consumer Harm

Critics further complain that Google engages in “search bias” and often changes its search algorithm, sometimes to the detriment of content providers who had previously enjoyed higher rankings in Google’s search results.⁷² Critics also argue that there is an inherent conflict of interest when a search provider also serves as a content provider and that it is anticompetitive when Google competes horizontally as a content provider, and favors its own content in search results.⁷³ This argument often extends to the point of arguing that Google is the equivalent of an essential facility, without access to which content providers have no real hope of competing, at least on the internet. This complaint is particular popular with owners of “vertical search” or specialized search sites that purport to compete with Google while simultaneously relying on Google for traffic. How can a shopping website hope to compete if Google provides shopping results in its search results?

To complete the story, critics paint a picture of consumer harm. First, they argue that “real customers” are the advertisers. Advertisers purportedly “have little or no choice but to use Google to reach the vast majority of Internet users, and they pay a higher price for ads than they would in a truly competitive market otherwise.”⁷⁴ Second, they tie it all back to individual search

⁷¹ *Id.*

⁷² See, e.g., Thomas Barnett, *Google's Search Tactics Warrant Antitrust Scrutiny*, BLOOMBERG, May 16, 2011, available at <http://www.bloomberg.com/news/2011-05-16/google-s-search-tactics-warrant-antitrust-scrutiny-tom-barnett.html>.

⁷³ See *id.*

⁷⁴ *Don't Believe Everything You Hear: A Guide to the Google Speak*, FAIRSEARCH.ORG, Sept 20, 2011, available at <http://www.fairsearch.org/general/dont-believe-everything-you-hear-a-guide->

users by claiming that the thousands of small, medium, and large businesses that pay those supra-competitive advertising costs pass those costs along to consumers in the form of higher prices for their products.⁷⁵ The so-called “Google tax” that everyone pays, even those who do not use Google’s products.⁷⁶

III. **Is Google Like Microsoft?**

That which posed the greatest threat to Microsoft in 1998 is what most distinguishes the *Microsoft* case from any case against Google today: the nature of the internet. This section will show that, despite some commentators’ claims to the contrary, there are differences between the internet search market and the operating system market as well as differences between Google’s conduct of today and Microsoft’s conduct of the 1990s. Those differences demonstrate why the government successfully showed monopoly power, anticompetitive conduct or exclusionary practices, and consumer harm in the *Microsoft* case but cannot make a similar showing in a potential case against Google.

A. Preliminary Note on Market Definition and Error Costs

Before there can be any meaningful analysis of monopoly power, one first needs to establish the relevant market. Recall that the DC Circuit rejected Microsoft’s challenge to the district court’s definition of the relevant market on procedural—not substantive—grounds.⁷⁷ Because Microsoft’s “general, conclusory statement[s]” were insufficient to overturn the district court’s factual findings, the DC Circuit was able to defer to the district court’s conclusions regarding the relevant market without having to conduct its own thorough analysis.⁷⁸ By resting on the procedural standard of review, the DC Circuit thus avoided having to deal with two

to-the-google-speak/.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See *supra* note 21 and accompanying text.

⁷⁸ See *supra* note 21 and accompanying text.

complicated issues: the scope of the relevant market and the two-sided nature of the relevant market.

1.Scope of the Relevant Market

In *Microsoft*, the DC Circuit did not have to independently consider whether or not Apple OS, operating systems for non-PC devices, and “middleware” products such as Navigator and Java should have been included in the relevant market.⁷⁹ While the court rested solely on this reason for Apple OS and operating systems for non-PC devices, it did however go on to explain that, for middleware, the district court was consistent with the common standard to assess reasonable interchangeability based on the reasonably foreseeable future.⁸⁰ Because middleware such as Java and Navigator exposed some APIs but not nearly enough for software developers to develop programs capable of running exclusively on the middleware platform and independent from the operating system, there is no basis for showing that middleware was a viable alternative for consumers to switch away from Windows if Microsoft charged sustained supra-competitive prices.

Members of the Fairsearch coalition frame the relevant market as online search/online advertising. Even accepting that online advertising is not constrained by offline advertising, the government and the courts must answer the question of whether search-based advertising constitutes a relevant market. As noted by Professors Geoffrey Manne and Joshua Wright, the meaningful aspect of online advertising is “eyeball time.” Internet users do not use the internet solely to perform searches. They have a bevy of choices when spending time online, including social media sites Twitter and Facebook. As testament to that competition for “eyeball time,” more than 50% of Facebook’s 800 million users log on to their account every day. Therefore, it shouldn’t be surprising that Facebook is now the top display-ad publisher in the United States.⁸¹

79 *United States v. Microsoft*, 253 F.3d 34, 52-54 (DC Cir. 2001).

80 *United States v. Microsoft*, 253 F.3d 34, 54 (DC Cir. 2001).

81 U.S. Online Display Advertising Market Delivers 1.1 Trillion Impressions in Q1 2011, comScore.com, May 4, 2011, *available at*

Given the stakes, it is hard to imagine Google not fighting tooth-and-nail on the scope of the relevant market. Therefore the government-plaintiff, as well as the court to hear the case, will have to analyze the complicated nature of online advertising.

2. Two-Sided Market

The *Microsoft* decision represents a missed opportunity to provide the antitrust community with guidance on a critical issue: how to define the relevant market in two-sided markets.⁸² A two-sided market exists when a product has two distinct groups of customers and the value obtained by one group increases with the size of the other.⁸³ Classic examples of two-sided markets are newspapers (subscribers and advertisers) and credit cards (cardholders and merchants).⁸⁴ Search engines like Google operate in a two-sided market because the value to advertisers increases as the number of searchers increases.⁸⁵ Concededly, search, like newspapers, is not a bilateral two-sided market. For example, my estimation is that the number of advertisements in a newspaper or on a search page does not increase the value to search users, in fact, they probably decrease the value. In this way, search differs from bilateral two-sided markets such as credit cards, where the number of merchants that accept a particular brand of credit card are value enhancing to cardholders and the number of cardholders is value enhancing to the merchants. That distinction, however, is merely my conjecture. It could in fact be that the number of relevant ads on a search results page is value enhancing to search users. Whatever the case, the point is that before imparting antitrust liability, there would need to be a thorough

http://www.comscore.com/Press_Events/Press_Releases/2011/5/U.S._Online_Display_Advertising_Market_Delivers_1.1_Trillion_Impressions_in_Q1_2011.

82 Peter T. Barbur, Kyle W. Mach & Jonathan J. Clarke, *Market Definition in Complex Internet Markets*, 12 SEDONA CON. J. 285, 297 (2011).

83 Timothy Muris, *Payment Card Regulation and the (Mis)Application of the Economics of Two-Sided Markets*, 2005 COLUM. BUS. L. REV. 515, 516 (2005).

84 Steven Semeraro, *Credit Card Interchange Fees: Three Decades of Antitrust Uncertainty*, 14 GEO. MAS. L. REV. 941, 952 (2007).

85 Peter T. Barbur, Kyle W. Mach & Jonathan J. Clarke, *Market Definition in Complex Internet Markets*, 12 SEDONA CON. J. 285, 289 (2011).

understanding of the two-sided nature of the market, which merely lends credence to how complicated the analysis of two-sided markets can be.

Google's critics would likely draw a comparison between the two-sided nature of search and the applications barrier to entry (the "chicken-and-egg" situation) from *Microsoft*. Yet, to do so without a thorough, fact-intensive analysis of the market is merely a conclusory comparison, and a bad one at that.

First, as discussed above, search is probably not a bilateral two-sided market since the number of advertisements does not increase value to search users. In *Microsoft*, there was a pure two-sided market: the software developers benefited from an increasing number of consumers with Windows and the consumers benefited from an increasing number of applications available for the Windows operating system. The self-perpetuating nature of the bilateral two-sided market in *Microsoft* is therefore different from the unilateral two-sided market likely to exist in search.

Second, Microsoft extracted the value from the consumer side of the market, not the software developer side of the market. Google on the other hand offers a majority of its services to consumers for free and instead derives its profits nearly exclusively from advertisers. It is commonly understood that, in two-sided markets, the firm will apportion the price of the product based on the relative demand elasticities of the two groups of consumers.⁸⁶ But, whether or not that pricing scheme bears on antitrust liability in a two-sided market—and furthermore, whether or not the fact that consumers are or are not directly bearing the costs—remain unanswered questions.

In any action against Google, it's unlikely that Google will make the same mistake and therefore the government-plaintiff, as well as the court to hear the case, will have to grapple with the two-sided market issue. Commentators have noted that the antitrust enforcers and the courts may not have the analytical tools necessary to assess and define complicated, two-sided markets

⁸⁶ Benjamin Klein, et al., *Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees*, 73 Antitrust L.J. 571, 577-80 (2006).

such as search.⁸⁷ Given the relative uncertainty in this area of antitrust law, error costs, such as the risk of chilling innovation, must also factor into the government's and the court's analysis.

B. Google Does Not Have Monopoly Power

Notwithstanding the comments in Section III.A above, even if the relevant market is online search, those concluding that Google is dominant and a monopolist are half right. Google is dominant, in that it currently commands more than 50% of the relevant market for online search. However, as discussed previously in the primer on monopolization claims, market power and monopoly power are not the same. The threat from monopoly power is that the monopolist will be able to raise the prices with impunity, decrease output, or diminish quality.

For Google to be able to raise prices, it would have to charge a price to the consumer in the first place. As has been well-documented, Google provides its search service (as well as its e-mail, social networking site, maps, travel search, and reader, to name a few) for free. Furthermore, this list of services demonstrates Google's, and other search engines', incentive to innovate. And, often to the chagrin of competitors whose position changes as a result, Google continues to modify its algorithm to ensure that the most relevant results continue to be displayed prominently, while irrelevant, spamming, or harmful sites stay marginalized.

A popular counterattack is to say that it is advertisers, and not users, that respond to price in Google. There is an element of truth to this, as advertisers do in fact pay Google. But the reason Google has garnered success is not by exploiting advertisers, or catering to advertisers. Instead, Google, like all successful search engines, remains committed to providing the best results possible. Good results attract more users, and having more users attracts more traffic, leading to a higher return on investment for advertisers. Public policy wonks could not design a

⁸⁷ Peter T. Barbur, Kyle W. Mach & Jonathan J. Clarke, *Market Definition in Complex Internet Markets*, 12 SEDONA CON. J. 285, 299 (2011).

better system – search engines remain incentivized to compete vigorously to provide a service to the public for free. Moreover, in the hypothetical world in which Google actually is a monopolist seeking to abuse its dominance, Google’s search advertising system prevents the company from doing so. Google employs a bidding system in which the advertisers tell Google how much it is willing to pay. This bid is part of an algorithm that also includes relevance and click through popularity for determining advertisement space. This model actually puts the pricing power in the hands of the advertisers.

Assertions that Google qualifies as an “essential facility” also fail. One does not need Google to use the internet, and a merchant or service provider does not need a high search ranking from Google to succeed. Internet users increasingly are spending less time on Google, and more time on other websites, such as Facebook.com. In fact, several popular websites report that they get a majority of their traffic from sources other than Google.⁸⁸

It is true that search needs a critical mass to operate; however, this minimum scale is actually very obtainable.⁸⁹ After achieving this minimum scale, the added benefit of other users is fairly negligible with respect to the functionality of the product,⁹⁰ undermining network effects as a barrier to entry.⁹¹ All of this is against the backdrop that there are two other large search providers, Bing and Yahoo, competing with Google, and striving to take away users. Bing’s market share has actually been increasing while Google has been slowly losing search volume.⁹² Google’s success has not conferred upon it any significant advantage in query scale. Bing/Yahoo

88 Compete.com, August 2011.

89 TK Footnote Needed (if all else fails, use Wright & Manne article at 211-213).

90 Manne & Wright, *supra* note 8.

91 This does not mean that there are not benefits to more users. In fact the economic returns may increase with the scale, thereby encouraging search engines to have more users. But this is not the same as an entry barrier.

92 Compete.com, *available at* <http://blog.compete.com/2011/09/27/august-2011-us-search-market-share-report/> (last accessed October 18, 2011).

have about 50% of Google's current query volume, and the same query volume that Google had in February 2008. Indeed, Bing acknowledges that there's no meaningful difference in the query results produced by Bing and Google. At the recent Web 2.0 conference, Steve Ballmer said: "[T]ake any search you want, and try it out on Bing, try it out on Google.... According to our internal stats, 70 percent of the time you probably won't care, 15 percent of the time you'll probably like us better, and 15 percent of the time you'll like the other guy better."⁹³

And this does not account for the influx of new entrants always striving to compete with Google by offering a superior product. For instance, blekko.com launched just a year ago. While blekko has yet to win any significant market share, the fact remains that Google competes against a bevy of firms, and does not have monopoly power.

1.Barriers to Entry in Internet Search Market are Not as Stark as in the Operating System Market

Barriers to entry are not the same as difficulties to entry. Barriers to entry are "either a cost that would have to be borne by an entrant that was not and is not borne by the incumbent or any condition that is likely to inhibit other firms from entering the market on a substantial scale in response to an increase in the incumbent's prices."⁹⁴ The fact that an incoming firm has to expend resources or compete with an incumbent's popularity does not support a finding that a particular market has barriers to entry sufficient to support antitrust review. Instead, courts will look to factors such as switching costs, intellectual property restraints, and network effects.

The *Microsoft* case exemplified all three of these barriers. Switching costs for either OEMs or end-user customers is extremely difficult. For an OEM to switch and provide a marketable computer without Windows that could compete with computers loaded with Microsoft products, the developer would have to find a way to substitute not only the operating

93 TK Footnote Needed

94 Jonathan Jacobson, ed. ANTITRUST LAW DEVELOPMENTS (SIXTH) 233.

system, but all of the applications written to run on Windows. When combined with intellectual property restraints – Microsoft’s refusal to license its products to OEMs who chose not to use Windows – there was no way for an OEM to offer a competing product at a comparable price. Similarly, customers are locked-in to Microsoft. As explained above, a computer is only as useful as the applications it will run. Customers had no choice but to purchase the entire portfolio of Microsoft products, and pay the fees OEMs needed to charge. And customers certainly were not willing to take on the added expense and effort to replace or modify the operating system that came installed on their machine.

Google, as all search providers, has no lock-in. If a user does not like Google, an alternative is – say it with me – one click away. It is really that simple. You can simultaneously use Google, Bing, Yahoo, blekko, and whatever other search engine you might choose, and compare results, if you feel that is most efficient. A recent Microsoft report highlights this fact, concluding “The barrier to switching Web search engines is low and multiple engine usage is common. Indeed, prior work in this area suggests that 70% of Web searchers use multiple search engines.”⁹⁵ Even Google’s main competitor, who denounces the one-click-away defense, concludes that it is in fact this simple.

Without of lock-in, search providers must strive to attract their customers through loyalty. This means, earn users’ business, and continue to earn this business. Given the nature of search, and the flexibility of the internet, if Google (or Bing or Yahoo) tried to lock-in its users, the revolt would be astounding. Instead, Google takes a multitude of steps aiming to improve the user experience, and earn their loyalty, including:

- Improving the algorithm up to 500 times per year

95 Qi Guo, et al. *Why Searchers Switch: Understanding and Predicting Engine Switching Rationales*, available at <http://research.microsoft.com/en-us/um/people/ryenw/papers/guosigir2011.pdf>.

- Continuing to improve the intelligence of search (a recent example includes deducing what a user intends to search after a misspelling or homophone mistake)
- Devising new methods to display search results so that the user can obtain a comprehensive profile of possible results
- Increasing the speed of search results
- Providing tools that allow a user to use search simultaneously with other activities
- Staying ahead of the game by proactively identifying spammers and black hat SEOs

Another example of low switching costs occurred in January, 2009. Because of a coding error, every Google result returned with a malware warning.⁹⁶ During the duration of coding error (about a half hour) Yahoo's search engine traffic doubled.

Nor are network effects in the search market comparable to what they were in the OS market in 1998. Network effects compelled users to stay with Microsoft and made switching to another OS nearly impossible, and Microsoft's licensing stranglehold on most of its applications ensured that no new entrant could offer similar applications. Application developers would respond to the OEM decisions regarding operating systems, and develop applications for the systems that were being sold. OEM would then be forced to use Windows, because all the applications were written for Microsoft. Furthermore, each person that already owned a computer with Windows benefitted when more people purchased Windows, because this ensured more applications would be developed.

A common misconception is that Google (and other search engines) rely on network effects to succeed. This is usually because people understand that search improves with each query, and they assume this is a network effect. While it is true that search benefits from more users, this is a diminishing marginal return after a certain attainable threshold. It is not clear that this is a network effect as understood under the antitrust laws. The difficulty arises in identifying

⁹⁶ Google Operating System blog, <http://googlesystem.blogspot.com/2009/01/google-flags-all-search-results-as.html> (last visited October 19, 2011).

where the network effects occur, and how these relate to competitors entering the marketplace. While users themselves increase the value of a search engine through searches, their ability to use various search engines negates the impact of any network effect. Furthermore, the valuation or commercialization of search does not occur on the user side of search. Instead, advertisers commercialize the users' search results for search engines.

What occurs on the advertising side of the Google model is not a network effect. Any increase in users correlates to a change in pricing, and ultimately valuation. One commentator explains why the network effect is not clear:

The problem for those who would point to indirect network effects as a barrier to entry for Google's competitors is that advertisers pay only when a user clicks through its paid search result to the advertiser's landing page. The consequence is that the full value of Google's advertising platform is internalized by the system, with advertisers paying a price that reflects the full value of their use of Google's platform--there are no externalities, and, as mentioned, network size may not be relevant to advertisers. If having more users makes a click more likely to lead to a conversion, advertisers will pay more per click, internalizing the effect. If having more users makes a click more likely in the first place, advertisers also pay more because they pay for each click. In either case, the effect is fully internalized.⁹⁷

It is a facile argument to say that network effects serve as a barrier to entry in search. It boils down to saying that, because Google is big, it must be bad. It is important to step back and analyze how this size actually impacts a competitors' ability to enter the market and compete for space. In *Microsoft* the network effects resulted in no applications being made for competing operating systems. This made competition a non-starter, as applications were necessary for the marketing of operating systems. To equate, one would need to show that Google's size prevents users from using other search engines. Bing's increasing market share and the entry of new competitors such as *blekko.com* shows that this is not true. In this case, there is no evidence that Google's size is in any way a barrier to entry.

⁹⁷ Manne & Wright, *supra* note 8.

In the end, future search providers do not face barriers to entry in any way comparable to those that operating system manufacturers and OEMs faced when dealing with Microsoft in the late 1990's. This is due to the open nature of the internet, and the level playing field that it provides. Movement across the internet is so quickly, and technological advancement so rapid, that the only barrier is the inability to innovate as rigorously. As discussed below, internet innovation is still thriving.

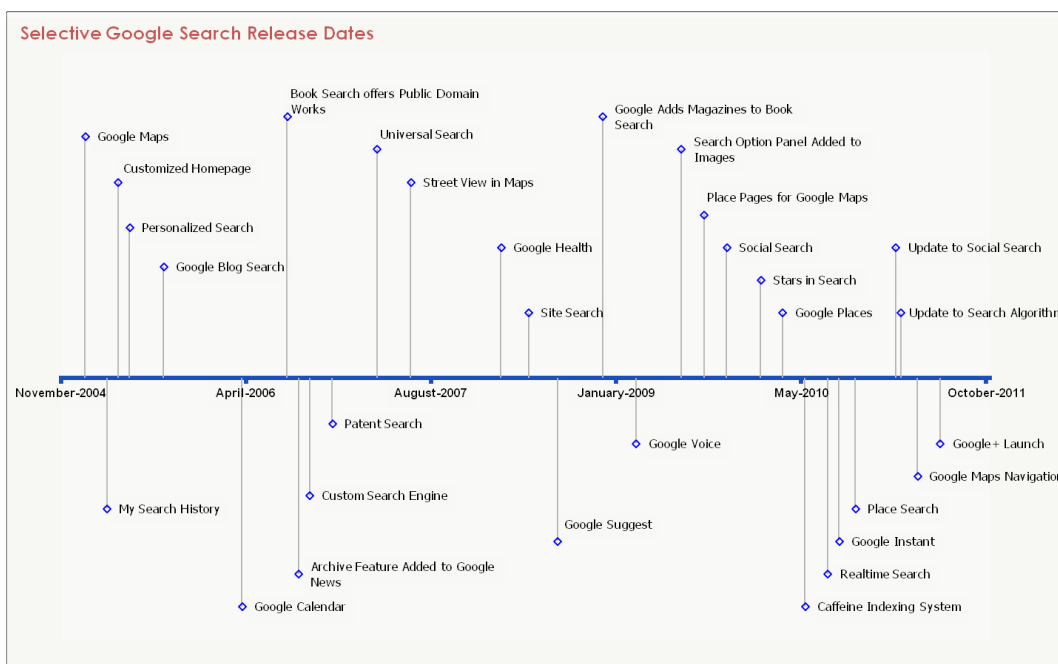
2. Innovation in Search Remains Vibrant

Because of the unique nature of the high tech industry, where competitors vie to develop the next best invention and earn a temporary monopoly when they succeed, antitrust enforcers should be looking for long-term innovation stagnation in the relevant product market when determining whether an antitrust violation may have occurred. This is a result of two factors. First, continued innovation suggests a thriving market, where competitors compete for the loyalty and business of consumers. Second, absent this evidence, antitrust regulators run a high risk of committing the Nirvana fallacy, and implementing a solution that is far more harmful than whatever problem they were seeking to redress because they falsely believe a perfect solution is possible.

In *Microsoft*, there was little doubt that the Microsoft's monopoly power had led to decreased innovation. OEMs had no economically-rational choice but to install Windows, and Microsoft's positioning allowed it to develop improvements for Windows at their own pace. The exclusionary tactics employed by Microsoft led to decreased innovation in the browser market as well. Following its successful crippling of Netscape, Microsoft failed to launch an improved IE for six years (IE 6 was released in August, 2001, and IE 7 was released in October, 2006).

Microsoft's market position led to complacency to the detriment of innovation, and consumer welfare.

Unlike the OS and browser markets, which experienced significant decrease in innovation throughout the 1990's and early 2000's, the search market has continued to innovate at a breath-taking pace. What was once "ten blue links" is now a dynamic product that transcends mere searches and includes elements such as GPS, social media, documents, real-time search, patent search, and voice search, to name a few. A complete timeline of innovations made



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by Google alone follows below:

Google is not the only innovator in search. Bing and Yahoo have continued to develop improvements for search as well. Yahoo Finance remains the premier source for such information, and Bing's image search blew competitors out of the water when it was released.

Again, it is not important to determine which is better, or to micro-analyze the differences between available search engines. What is important is that there are several competitors who are all striving to improve search and that the market, as a whole, has continued to improve.

Antitrust law does not concern itself with harm to competitors, so long as the market in which they compete is thriving. This is a fundamental difference between *Microsoft* and Google – Microsoft’s relevant markets suffered severe stagnation and decreased innovation, whereas search remains vibrant and on the cutting edge.

It is important to put this all in perspective. Google was not even relevant in 1996. In 1997, AltaVista reigned supreme, and in 1998, Yahoo dominated the search market, compelling one reporter to proclaim “This much is clear: Yahoo! has won the search-engine wars and is poised for much bigger things.”⁹⁸ Google evolved from a small, interesting alternative to dominant search engines into the world’s leading search engine by June of 2000.⁹⁹ The point is that this industry is dynamic, and change at the top can happen quickly. Any enforcement action would undermine the natural consequences of competition, and harm innovation in the process.

C. Google’s Conduct is Not Exclusionary

The above items stress that Google is not a monopolist, does not have monopoly power, and that the internet is fertile ground for open competition, eliminating the need for antitrust review of search. Even if we were to ignore these conclusions, and just analyze Google’s operation of its search engine, the result is clear: Google benefits consumers.

Take Universal Search. While competitors try to fabricate concerns over conflicts of interest, and bias results, they miss the point completely. First, search is bias. That is the whole point. When a user goes to Google and types in a query, they are relying on Google’s ability to perform bias and return relevant results. Second, the problem is that people are so conditioned to the ten blue links that they fail to understand that search results can be displayed in a better fashion. Universal search represents an attempt to package search results in a way that benefits

⁹⁸ Randall E. Stross, *How Yahoo! Won the Search Wars*, available at http://money.cnn.com/magazines/fortune/fortune_archive/1998/03/02/238576/index.htm.

⁹⁹ <http://www.google.com/press/pressrel/pressrelease26.html>

consumers by facilitating search, providing digestible information, and amplifying the scope of relevant results. As the internet continues to become an embedded tool in the American way of life, users demand a higher caliber of search. Google is not alone in recognizing this fact. Microsoft's own Director of Search, Stefan Weitz, stated as much at the unveiling of Bing, saying "there isn't another technology that is eight years old that you would be satisfied with"¹⁰⁰ while explaining that "as the Web moves away from being mostly just text to images, video, and rich pools of data . . . there are better ways to present that information in a way that reduces the work and effort required of the user."¹⁰¹

Those who complain that Google unfairly favors its own GoogleMaps to the detriment of MapQuest must never have used MapQuest. By today's standards it is primitive, and its decline in popularity is completely unsurprising. MapQuest tried to mimic Google's strategy by providing a street view, but its effort was extremely poor, and consumers never migrated back. More recently, complaints from local search companies such as TripAdvisor and Yelp have gained traction, culminating with Yelp CEO Jeremy Stoppelman's testimony before the Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights. Their complaint? That Google was "scraping" or including content from these sites as part of Google's search results. Of course Google does this. This is what search engines do, including Google's competitors. This snippet of information is what attracts a user to Yelp in the first place. Imagine if Google did not include these snippets, and Yelp lost traffic as a result. They would complain even louder.

Websites clearly do not have a right to any positioning on Google search results, including vis-à-vis Google-created content. Competitors owe no duty to other competitors to

100 Erick Schonfeld, *The New Bing Box, A Foursquare Map App, And Other Search Goodies*, TECHCRUNCH, March 25, 2010, available at <http://techcrunch.com/2010/03/25/bing-box/>.

101 *Id.*

facilitate their ability to compete.¹⁰² Many ask whether this is what Microsoft was accused of doing. The answer is no. Microsoft was not punished for favoring its own content (in fact, as emphasized above, Microsoft was victorious on the attempted monopolization claim because the court recognized that there could be vertical efficiencies associated with including IE with its operating system). Instead, Microsoft took steps to have third party OEMs and ISPs refrain from including Netscape on the desktop entirely; and it took steps to break Java on Windows, making sure it didn't work properly without telling anyone what it had done – all without justification. Even if Google is favoring its content over others in search results, this is like the ultimately unsuccessful attempted monopolization claim against Microsoft, and not the successful monopolization claims.

IV. **Comparing the Remedies: The Technical Committee Available in *Microsoft* Facilitated Regulation in a Way that a Technical Committee Could Not in *Google***

Even when antitrust regulators do uncover anticompetitive conduct, the remedies available are not always clear, and not always desirable. The threat of succumbing to the Nirvana fallacy – the comparison of the imperfect status quo to an ideal but unobtainable alternative – should serve as a deterrent to jumping into an enforcement action where there is no clear remedy. The FTC learned this lesson first hand in *Rambus*,¹⁰³ where the Commissioners divided on a proposed remedy as well as the future enforceability of the patents, ultimately contributing to the Commission's decision to abandon its case.

In *Microsoft* the Department of Justice considered the remedies closely, and crafted a novel solution that facilitated oversight of the terms of the consent decree: the Technical

102 *Verizon Comm'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) ; *Olympia Equip. Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 378 (7th Cir. 1986); *Bayou Bottling, Inc. v. Dr. Pepper Co.*, 725 F.2d 300, 304 (5th Cir.1984).

103 *Rambus, Inc. v. FTC*, 522 F. 3d 456, (Fed. Cir. 2008).

Committee. The Technical Committee served as an important enforcement mechanism, and included independent and impartial “experts in software design and programming” who would “monitor Microsoft’s compliance.”¹⁰⁴ The committee had the authority to “receive and investigate complaints, interview Microsoft’s staff and require them to produce information, and study Microsoft’s source code, subject to confidentiality requirements.”¹⁰⁵ All in all, the technical committee assisted the Department of Justice in monitoring compliance with a complicated consent decree, and provided a window of insight into Microsoft’s design of operating systems. Most notably the technical committee reviewed Microsoft’s design and coding for its 2009 product Windows 7.¹⁰⁶

While imperfect, the technical committee accomplished its purpose. Windows 7 complied with the committee’s review, and the product was brought to market with the DOJ’s blessing. There were some disagreements throughout the consent decree duration regarding the technical committee’s authority, as well as Microsoft’s document production responsibilities, but in the end it was more success than failure. The committee also costs Microsoft a considerable amount of money.

Given the gravity of the antitrust concerns, the stagnation in the market, and the complexity of the product, the technical committee made sense. Microsoft’s conduct needed intervention, and the technical committee provided the government the means to oversee Microsoft’s compliance with the consent decree while still allowing the company to

104 Final Judgment § IV.B.2, *United States v. Microsoft Corp.*, No. 98-1232(CKK), 2002 WL 31654530 (D.D.C. Nov. 12, 2002).

105 William H. Page & Seldon J. Childers, *Software Development As an Antitrust Remedy: Lessons from the Enforcement of the Microsoft Communications Protocol Licensing Requirement*, 14 MICH. TELECOMM. & TECH. L. REV. 77, 108 (2007)

106 Paul McDougall, *Windows 7 Eyed for Antitrust Violations*, InformationWeek, available at <http://www.informationweek.com/news/206902650>; Elizabeth Montalbano, *Microsoft Submits Windows 7 for Antitrust Review*, abcNews.com, available at, <http://abcnews.go.com/Technology/PCWorld/story?id=4439453>.

manufacturer its product. However, a similar committee would not work in the case of search or Google. Google's product is too dynamic for such a slow moving process to adequately oversee – Google makes as many as 500 tweaks to its search algorithm per year, and introduces new products constantly (see the chart above). Furthermore, it is unclear what such a committee would actually review. In *Microsoft*, the committee was constructed of software engineers who read code and ensured that Windows' code complied with the provisions of the consent decree. In the case of search, the mandate is not as clear. What would we tell the committee to look for? The maximum consumer welfare is for search to provide the most relevant search results, and to provide them quickly. How would the technical committee define relevance, and what standards would be applied? There is no answer short of a government-mandated relevancy standard. This would defeat the entire purpose of search.

The harm of imposing a technical committee is drastic. It would slow Google's ability to compete to a halt, and would threaten access to their proprietary intellectual property. When reviewing the potential for the Microsoft technical committee, the Computer Technology Industry Association offered a comment that rings more true now than it did then:

[We are] concerned that the precedent established by these disclosure provisions will be harmful to the technology sector in the long run. Innovation and growth in the IT industry are fostered by strong protection of intellectual property rights. If every antitrust violation is remedied by a wholesale forfeiture of valuable proprietary information by the defendant, intellectual property rights will suffer a significant blow.

The technical committee is an extreme solution that made sense in this single instance of enduring, irreversible anticompetitive conduct orchestrated by Microsoft. The same reservations that existed prior to implementing the committee in the *Microsoft* decree exist now with respect to Google's information. What has changed is the nature of the information being disclosed, the dynamism of the industry, and the complete lack of clear standards by which to analyze this information. Thus, even if, somehow, someone determined that Google was acting

anticompetitively, there is no plausible solution available. To impose such a solution on Google would be the quintessential Nirvana fallacy. All that would result would be a constrained pacesetter losing its ability to compete, resulting in an industry facing less competition, and therefore less incentive for any competitor to innovate. Microsoft's gain would be the consumer's harm, unlike fifteen years ago, when Microsoft's loss led to widespread innovation, the explosion of the internet age, and unimaginable gains in consumer welfare.

Conclusion

Google is not the next *Microsoft*. Microsoft was a genuine monopolist in an industry plagued by barriers to entry, including extreme lock-in and network effects, and Microsoft engaged in a laundry list of anticompetitive practices to protect this monopoly power. The internet is the ultimate level playing field, with virtually no barriers to entry, and Google's possession of a dominant share of search queries does not translate into monopoly power. Furthermore, Google does not engage in exclusionary practices to protect its success. Instead, Google continues to compete vigorously and improve its products and services, thereby winning the loyalty of its consumers. Finally, to the extent that one could identify a problem with Google's conduct, there is no practical solution available as there was in *Microsoft*. The optimal situation for the consumer is to maintain the status quo, and encourage these companies to abandon litigation and lobbying to re-commit themselves to innovation and production.