FROM: ACSBLOG

DEBATE ON ANTITRUST SCRUTINY OF GOOGLE

Benjamin G. Edelman[†] *vs. Joshua D. Wright*[*]

GOOGLE'S DOMINANCE – AND WHAT TO DO ABOUT IT

Benjamin G. Edelman

The Senate Antitrust Subcommittee recently held a hearing[1] to investigate persistent allegations of Google abusing its market power. Witnesses Jeff Katz (CEO of Nextag) and Jeremy Stoppelman (CEO of Yelp) demonstrated Google giving its own services an advantage other sites cannot match. For example, when a user searches for products for possible purchase, Google presents the user with Google Product Search links front-and-center, a premium placement no other product search service can obtain. Furthermore, Google Product Search shows prices and images, where competitors get just text links. Meanwhile, a user

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> *Editor's Note: This is the first* [or second or third or final] *post in an ACSblog debate on antitrust scrutiny of Google between Harvard Business School Professor Benjamin G. Edelman and George Mason University School of Law Professor Joshua D. Wright. This online debate follows a recent U.S. Senate hearing* [www.acslaw.org/acsblog/senate-antitrust-hearing-to-examine-google-practices] *on whether Google's business practices "serve consumers" or "threaten competition."*

Comments on a post are reproduced after the end of that post.

1 www.judiciary.senate.gov/hearings/hearing.cfm?id=3d9031b47812de2592c3baeba64d93cb.

searching for restaurants, hotels, or other local merchants sees Google Places results with similar prominence, pushing other information services to locations users are unlikely to notice. In antitrust parlance, this is tying: A user who wants only Google Search, but not Google's other services, will be disappointed. Instead, any user who wants Google Search is forced to receive Google's other services too. Google's approach also forecloses competition: Other sites cannot compete on their merits for a substantial portion of the market – consumers who use Google to find information – because Google has kept those consumers for itself.

But Google's antitrust problems extend beyond tying Google's ancillary services. Consider advertisers buying placements from Google. Google controls 75% of U.S. PC search traffic and more than 90% in many countries. As a result, advertisers are compelled[2] to accept whatever terms Google chooses to impose. For example, an advertiser seeking placement through Google's premium Search Network partners (like AOL and The New York Times) must also accept placement through the entire Google Search Network which includes all manner of typosquatting sites,[3] adware,[4] and pop-up ads,[5] among other undesirable placements. While these bogus ad placements defraud and overcharge advertisers, Google's U.S. Advertising Program Terms[6] offer remarkable defenses: these terms purport to let Google place ads "on any content or property provided by Google . . . or . . . provided by a third party upon which Google places ads" (clause 2.(y)-(z)) – a circular "definition" that sounds more like a Dr. Seuss tale than an official contract. Even Google's dispute resolution provisions are one-sided: An unsatisfied advertiser must complain to Google by "first class mail or air mail or overnight courier" with a copy by "confirmed facsimile." (Despite my best efforts, I still don't know how a "confirmed" facsimile differs from a regular fax.) Meanwhile, Google may send messages to

[2] www.benedelman.org/news/092011-1.html.
[3] www.benedelman.org/presentations/inta-2009.pdf#page=47.
[4] www.benedelman.org/news/051309-1.html#whenu.
[5] www.benedelman.org/news/011210-1.html.
[6] www.google.com/intl/en_us/adwords/select/TCUSbilling0806.html.

an advertiser merely by "sending an email to the email address specified in [the advertiser's] account" (clause 9). This hardly looks like a contract fairly negotiated among equals. Quite the contrary, Google has all the power and is using it to the utmost.

Google likes to claim[7] that "competition is one click away." I disagree. Google CFO Patrick Pichette recently defended Google's large investments in Chrome by arguing[8] that "everybody that uses Chrome is a guaranteed locked-in user for us." He's right about Chrome's effective lock-in, and the lock-in is bigger than Chrome: Google also buys premium placement in Firefox, and Google's Android platform also offers preferred placement for Google Search. Even on non-Google mobile platforms, Google serves fully 95% of searches thanks to defaults that systematically direct users to Google. (Indeed, when Google then-CEO Schmidt was also on Apple's board, Google sealed a sweetheart deal for iPhone search traffic. Competitors never even had the chance to bid for this traffic.) In addition, Google's web syndication contracts assure exclusive long-term placement on most top web sites. Google has spent billions of dollars to establish these relationships, with the necessary consequence that users systematically and predictably run their searches on Google.

The Google of 2004 promised[9] to help users "leave its website as quickly as possible" while showing, initially, zero ads. But times have changed. Google has modified its site design to encourage users to linger on other Google properties, even when competing services have more or better information. And Google now shows as many fourteen ads on a page;[10] users with mid-sized screens often must scroll to see the second algorithmic result. By adding bias and filling its site with advertising, Google has effectively raised prices to consumers – a price paid not in dollars but in attention, yet with consequences equally real. Meanwhile, prices charged to advertisers – set

[7] blogs.pcworld.com/techlog/archives/004530.html.

[8] www.zdnet.com/blog/btl/why-is-chrome-so-important-to-google-its-a-locked-in-user/47295.

[9] web.archive.org/web/20040603020634/http:/www.google.com/corporate/tenthings.html.

[10] www.benedelman.org/images/google-sep11/acuvue-14ads-091611.png.

through a secretive process with details known only to Google – climbed sharply as Google grew. Finally, as Yelp and Nextag leaders told the Senate last month, Google's current practices make it infeasible to launch businesses like theirs – presaging a world where myriad sectors are off-limits to competition because Google effectively blocks every service but its own.

Search and search advertising are the foundation of online commerce – crucial to users and sites alike. With Google increasingly dominant, exceptionally opaque, and continuously invoking its power in search to expand into ever-more sectors, it's time for antitrust authorities to take a closer look.

RETROGRADE ANTITRUST ANALYSIS IS NO FIT FOR GOOGLE

Joshua D. Wright

The theoretical antitrust case against Google reflects a troubling disconnect between the state of our technology and the state of our antitrust economics. Google's is a 2011 high tech market being condemned by 1960s economics. Of primary concern (although there are a lot of things to be concerned about, and my paper with Geoffrey Manne, "If Search Neutrality Is the Answer, What's the Question?,"[11] canvasses the problems in much more detail) is the treatment of so-called search bias (whereby Google's ownership and alleged preference for its own content relative to rivals' is claimed to be anticompetitive) and the outsized importance given to complaints by competitors and individual web pages rather than consumer welfare in condemning this bias.

The recent political theater in the Senate's hearings on Google[12] displayed these problems prominently, with the first half of the hearing dedicated to Senators questioning Google's Eric Schmidt about search bias and the second half dedicated to testimony from and about competitors and individual websites allegedly harmed by Google. Very little, if any, attention was paid to the underlying

[11] papers.ssrn.com/sol3/papers.cfm?abstract_id=1807951.

[12] www.judiciary.senate.gov/hearings/hearing.cfm?id=3d9031b47812de2592c3baeba64d93cb.

economics of search technology, consumer preferences, and the ultimate impact of differentiation in search rankings upon consumers.

So what is the alleged problem? Well, in the first place, the claim is that *there is* bias. Proving that bias exists – that Google favors its own maps over MapQuest's, for example – would be a necessary precondition for proving that the conduct causes anticompetitive harm, but let us be clear that the existence of bias alone is not sufficient to show competitive harm, nor is it even particularly interesting, at least viewed through the lens of modern antitrust economics.

In fact, economists have known for a very long time that favoring one's own content – a form of "vertical" arrangement whereby the firm produces (and favors) both a product and one of its inputs – is generally procompetitive. Vertically integrated firms may "bias" their own content in ways that increase output, just as other firms may do so by arrangement with others. Economists since Nobel Laureate Ronald Coase[13] have known – and have been reminded by Klein, Crawford & Alchian,[14] as well as Nobel Laureate Oliver Williamson[15] and many others – that firms may achieve by contract anything they could do within the boundaries of the firm. The point is that, in the economics literature, it is well known that self-promotion in a vertical relationship can be either efficient or anticompetitive depending on the circumstances of the situation. It is never presumptively problematic. In fact, the empirical literature[16] suggests that such relationships are almost always procompetitive and that restrictions imposed upon the abilities of firms to enter them generally *reduce* consumer welfare. Procompetitive vertical integration is the rule; the rare exception (and the exception relevant to antitrust analysis) is the use of vertical arrangements to harm not just individual competitors, but competition, thus reducing consumer welfare.

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[13] en.wikipedia.org/wiki/The_Nature_of_the_Firm.

[14] faculty.fuqua.duke.edu/%7Echarlesw/s591/Bocconi-Duke/Papers/new_C09/Vertical%20Integration,%20Appropriable%20Rents%20and%20the%20Competitive%20Contracting%20Process.pdf.

[15] pages.stern.nyu.edu/%7Ewgreene/entertainmentandmedia/Williamsonvertint.pdf.

[16] www.aeaweb.org/articles.php?doi=10.1257/jel.45.3.629.

One has to go back to the antitrust economics of the 1960s to find a literature – and a jurisprudence – espousing the notion that "bias" alone is *inherently* an antitrust problem. This is why it is so disconcerting to find academics, politicians, and policy wags promoting such theories today on the basis that this favoritism harms competitors. *The relevant antitrust question is not whether there is bias but whether that bias is efficient.* Evidence that other search engines with much smaller market shares, and certainly without any market power, exhibit similar bias suggests that the practice certainly has some efficiency justifications. Ignoring that possibility ignores nearly a half century of economic theory and empirical evidence.

It adds insult to injury to point to harm borne by competitors as justification for antitrust enforcement already built upon outdated, discredited economic notions. The standard in antitrust jurisprudence (and antitrust economics) is harm to *consumers*. When a monopolist restricts output and prices go up, harming consumers, it is a harm potentially cognizable by antitrust; but when Safeway brands, sells, and promotes its own products and the only identifiable harm is that Kraft sells less macaroni and cheese, it is not.

Understanding the competitive economics of vertical integration and vertical contractual arrangements is difficult because there are generally both anticompetitive and procompetitive theories of the conduct. One must be very careful with the facts in these cases to avoid conflating harm to rivals arising from competition on the merits with harm to competition arising out of exclusionary conduct. Misapplication of even this nuanced approach can generate significant consumer harm by prohibiting efficient, pro-consumer conduct that is wrongly determined to be the opposite and by reducing incentives for other firms to take risks and innovate for fear that they, too, will be wrongly condemned.

Professor Edelman has been prominent among Google's critics calling for antitrust intervention. Yet, unfortunately, he too has demonstrated a surprising inattention to this complexity and its very real anti-consumer consequences. In an interview in Politico[17] (login

[17] www.politicopro.com/login/.

required), he suggests that we should simply prevent Google from vertically integrating:

> I don't think it's out of the question given the complexity of what Google has built and its persistence in entering adjacent, ancillary markets. A much simpler approach, if you like things that are simple, would be to disallow Google from entering these adjacent markets. OK, you want to be dominant in search? Stay out of the vertical business, stay out of content.

This sort of thinking implies that the harm suffered by competing content providers justifies preventing Google from adopting an entire class of common business relationships on the implicit assumption that competitor harm is relevant to antitrust economics and the ban on vertical integration is essentially costless. Neither is true. U.S. antitrust law requires a demonstration that consumers – not just rivals – will be harmed by a challenged practice. But consumers' interests are absent from this assessment on both sides – on the one hand by adopting harm to competitors rather than harm to consumers as a relevant antitrust standard and on the other by ignoring the hidden harm to consumers from blithely constraining potentially efficient business conduct.

Actual, measurable competitive effects are what matters for modern antitrust analysis, not presumptions about competitive consequences derived from the structure of a firm or harm to its competitors. Unfortunately for its critics, in Google's world, prices to consumers are zero, there is a remarkable amount of investment and innovation (not only from Google but also from competitors like Bing, Blekko, Expedia, and others), consumers are happy, and, significantly, Google is far less dominant than critics and senators suggest. Facebook is now the most visited page on the Internet. Many online marketers no longer view[18] Google as the standard, but are instead increasingly looking to social media (like Facebook) as the key to advertisers' success in attracting eyeballs on the Internet. And at the end of the day, competition really is "just a click away" (OK, a few letters away) as Google has no control over users' ability

[18] www.fantatikole.com/social-media-marketing-more-important-than-seo/.

to employ other search engines, use other sources of information, or simply directly access content, all by typing a different URL into a browser.

Finally, even if there is a concern, there is the problem of what to do about it. Even if Google's critics were to demonstrate that bias is anticompetitive, it is relevant to any analysis that bias is hard to identify, that there is considerable disagreement among users over whether it is problematic in any given instance, that a remedy would be difficult to design and harder to enforce, and that the costs of being wrong are significant.

Tom Barnett[19] – who was formerly in charge of the Antitrust Division at the DOJ and who now represents Expedia and vociferously criticizes Google (including at the Senate hearings in September) – has himself made this point, observing that:[20]

> No institution that enforces the antitrust laws is omniscient or perfect. Among other things, antitrust enforcement agencies and courts lack perfect information about pertinent facts, including the impact of particular conduct on consumer welfare . . . . We face the risk of condemning conduct that is not harmful to competition . . . and the risk of failing to condemn conduct that does harm competition . . .

Condemning Google for developing Google Maps as a better form of search result than its original "ten blue links" reflects retrograde economics and a strange and costly preference for the status quo over innovation. Doing so because it harms a competitor turns conventional antitrust analysis on its head with consumers bearing the cost in terms of reduced innovation and satisfaction.

FINDING AND PREVENTING BIASED RESULTS

Benjamin G. Edelman

Professor Wright questions[21] whether Google biases results towards its own services, and asks whether consumers are harmed even if Google does bias its results. I don't find these questions so

[19] truthonthemarket.com/2011/05/10/barnett-v-barnett-on-antitrust/.
[20] www.justice.gov/atr/public/speeches/226537.htm.
[21] www.acslaw.org/acsblog/retrograde-antitrust-analysis-is-no-fit-for-google.

difficult, and while Professor Wright suggests we'd struggle to identify appropriate remedies, I see some straightforward solutions.

Let's start with the question of whether Google biases its results towards its own services. On a whim, I ran a search[22] for pop superstar Justin Bieber. Google's top-most link promoted Google News (in oversized bold type). Down a few inches came a "Videos" section where three thumbnails and three video titles all linked to YouTube clips. (Less prominent links identified other services showing these same videos – links added only after critics flagged the problem of Google always directing this traffic to its own video site.) Lower, Google presented a block of Google Images results. In the analogous context of extra-prominent links to Google Finance, Google's Marissa Mayer argued[23] that the company should be permitted to put its own links first. "It seems only fair right, we do all the work for the search page and all these other things, so we do put it first." Marissa doesn't dispute that Google favors its own links – and she couldn't, when Google's links widely appear in prominent ways no other service enjoys.

And what of the consequences of Google's bias? Professor Wright posits an "efficient bias" wherein Google usefully offers consumers its full suite of services. Certainly it's handy to have a single Google password providing access to personalized search, finance, videos, and more. But this misses the serious harms of Google's ever-broadening panoply of services.

Consider an advertiser, say a hotel, dissatisfied with high prices for Google's dominant AdWords advertising service. If Google prominently features links to Expedia and Tripadvisor, the hotel can strike deals with those sites to promote its property – a plausible alternative to high prices for ads from Google. But consider Google's recent changes to its search result format. Where Google used to link to Expedia, Google Hotel Finder now appears front-and-center – pushing Expedia links lower and less prominent. And where Google used to link to Tripadvisor, users now see Google Places – which requires hotels and booking services to pay Google

[22] www.google.com/search?q=justin+bieber.
[23] www.youtube.com/watch?v=LT1UFZSbcxE#t=44m50s.

to get direct booking links. (Adding insult to injury, Places also asks a hotel to bid against its competitors for ads on its own Google Place page. If the advertiser bids too low or refuses to participate, Google features competitors instead.) Sending less traffic to alternative advertising venues like Expedia and Tripadvisor, Google can raise prices with greater confidence, and advertisers have little means of escape. There's nothing "efficient" about that; Google raises price above marginal cost, restricts supply, and takes its pound of flesh from advertisers who have little alternative.

Wright suggests we should focus on harm to consumers. In the long run, consumers certainly suffer when innovators can't launch businesses or get financing for fear of Google blocking their opportunities. Who would launch a video sharing site, knowing that Google overwhelmingly sends video-related traffic to YouTube? And if savvy developers envisioned a new mapping site superior to Google Maps, perhaps with better printing or clearer instructions, that team would struggle to reach consumers since Google systematically features its own service whenever a search calls for a map. These foreclosures impede competition, slow innovation, and are a proper subject of antitrust inquiry.

Meanwhile, advertisers continue to suffer a particularly clear-cut harm – and since advertisers' payments fuel Google's $30+ billion annual revenue, antitrust authorities absolutely must consider their plight. As I argued in my opening piece,[24] Google has been thug-like in its imposition of exceptionally harsh terms. Google offers no defense of its take-it-or-leave it terms; Google knows that even the largest advertisers have no viable alternative.

Professor Wright questions what remedy is appropriate for Google's ever-expanding scope. I recently suggested several remedies for search bias,[25] grounded in tried-and-true remedies antitrust authorities have applied in similar circumstances. For example, two decades ago, travel agents used reservation systems that were owned by airlines, and each airline's reservation system favored its own flights – making it hard for travel agents or passengers to find

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[24] www.acslaw.org/acsblog/google's-dominance-—-and-what-to-do-about-it.
[25] www.benedelman.org/news/022211-1.html.

the flight that actually best met their needs. Department of Justice litigation put a stop to this practice, disallowing reservation systems from sorting flights based on improper factors like carrier identity. The analogue here is that Google shouldn't favor its own services just because they come from Google; putting Google Finance first because it's most popular might be fine if it actually were most popular (it isn't), but Google ought not put its services first just because they come from Google.

More recently, the European Commission required Microsoft to offer a "browser ballot box" to let users easily choose their preferred web browser, even a browser that competes with Microsoft's own offering. Such a choice can also be provided within search results: When a user seeks information that matches a predefined vertical (like video, pictures, finance, or news), a drop-down box or other listing could let the user choose a preferred vendor. A user might choose Google for ordinary web search, but prefer Hulu's video index, Yahoo's stock quotes, Yelp's local results, and Amazon's product search. A bit of AJAX would let users switch their providers any time. Suddenly Google would be far less able to leverage its dominance in search to achieve dominance in other categories. That would be a major benefit to users, advertisers, and the entire online economy.

COMMENTS

Remedies for Search Bias Good for Consumers? CRS Wasn't

Submitted by Josh Wright on October 6, 2011

You describe the remedies as "tried and true" – but were they successful? There has been ample study of the effects of the travel agent CRS remedy you appeal to. Sure, imposing a remedy is easy. But is it any good at improving consumer welfare? Alexander and Lee examine the CRS remedy and find that "[T]he social value of prohibiting display . . . bias solely to improve the quality of information that consumers receive about travel options appears to be low and may be negative." It gets worse. CRS regulations appear to have caused serious harm to the competitive process and made consumers worse off. Smith (1999) concludes that "When "bias" was eliminated, United moved up on the American system and vice versa, while all other airlines moved down somewhat . . . The antitrust restriction on competitive use of the CRS, then, actually reduced competition." Further, as with Google search, the CRS was imposed despite evidence that it had improved consumer welfare. One study found that CRS usage increased travel agents' productivity by an average of 41% and that in the early 1990s over 95% of travel agents used a CRS – indicating that travel agents were able to assist consumers far more effectively once CRSs became available (Ellig, 1991). And in your discussion of the CRS model for regulation, you fail to mention that the DOT terminated the regulation in 2004 in light of its failure to improve competitive outcomes and a growing sense that they were making things worse, not better. Seems like an important fact to consider in the debate.

Two More Points to Consider

Submitted by Josh Wright on October 6, 2011

First, the "do they or do they not" bias results discussion is largely a distraction in modern antitrust analysis. The question is whether Google's search practices foreclose rivals sufficiently to raise barriers to entry and generate anticompetitive effects. Anecdotal evidence on these points is insufficient. But it is worth correcting the Mayer quote above; to save space, readers are referred to Danny Sullivan's correction here: http://searchengineland.com/survey-google-favors-itself-only-19-of-the-t....[26]

Second, Professor Edelman gives me far too much credit when he writes "Professor Wright posits an "efficient bias" wherein Google usefully offers consumers its full suite of services." The idea that vertical integration or discrimination in favor of one's own products can be efficient is not my own. Credit may properly be attributed to Coase, Klein, Alchian, Hart, Holmstrom, Williamson, and even back to Cournot. These are old ideas. And distinguishing between foreclosure and efficient bias is at the heart of any modern attempt to diagnosis potentially exclusionary conduct under the antitrust laws.

[26] searchengineland.com/survey-google-favors-itself-only-19-of-the-time-61675.

It is in this light that the point that not only Google has evolved toward universal results and referral to its own content; but also Microsoft's Bing. Professor Edelman's own work demonstrates this; and subsequent analysis confirms it. But Google has market power one might object! In antitrust, the general conventional wisdom (for good economic reason) is that when firms with and without market power, i.e. when the industry, adopts a particular practice it is highly likely to be efficient. Such is the case here.

PUTTING CONSUMER WELFARE FIRST IN ANTITRUST ANALYSIS OF GOOGLE

Joshua D. Wright

Professor Edelman's opening post[27] does little to support his case. Instead, it reflects the same retrograde antitrust[28] I criticized in my first post.

Edelman's understanding of antitrust law and economics appears firmly rooted in the 1960s approach to antitrust in which enforcement agencies, courts, and economists vigorously attacked novel business arrangements without regard to their impact on consumers. Judge Learned Hand's infamous passage in the Alcoa decision comes to mind as an exemplar of antitrust's bad old days when the antitrust laws demanded that successful firms forego opportunities to satisfy consumer demand. Hand wrote:

> we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel.

Antitrust has come a long way since then. By way of contrast, today's antitrust analysis of alleged exclusionary conduct begins with (ironically enough) the *U.S. v. Microsoft* decision. *Microsoft* emphasizes the difficulty of distinguishing effective competition from exclusionary conduct; but it also firmly places "consumer welfare" as the

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[27] www.acslaw.org/acsblog/google's-dominance-—-and-what-to-do-about-it.

[28] www.acslaw.org/acsblog/retrograde-antitrust-analysis-is-no-fit-for-google.

lodestar of the modern approach to antitrust:

> Whether any particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition, can be difficult to discern: the means of illicit exclusion, like the means of legitimate competition, are myriad. The challenge for an antitrust court lies in stating a general rule for distinguishing between exclusionary acts, which reduce social welfare, and competitive acts, which increase it. From a century of case law on monopolization under § 2, however, several principles do emerge. First, to 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.

Nearly all antitrust commentators agree that the shift to consumer-welfare focused analysis has been a boon for consumers. Unfortunately, Edelman's analysis consists largely of complaints that would have satisfied courts and agencies in the 1960s but would not do so now that the focus has turned to consumer welfare rather than indirect complaints about market structure or the fortunes of individual rivals.

From the start, in laying out his basic case against Google, Edelman invokes antitrust concepts that are simply inapt for the facts and then goes on to apply them in a manner inconsistent with the modern consumer-welfare-oriented framework described above:

> In antitrust parlance, this is tying: A user who wants only Google Search, but not Google's other services, will be disappointed. Instead, any user who wants Google Search is forced to receive Google's other services too. Google's approach also forecloses competition: Other sites cannot compete on their merits for a substantial portion of the market – consumers who use Google to find information – because Google has kept those consumers for itself.

There are two significant errors here. First, Edelman claims to be interested in protecting users who want only Google Search but not its other services will be disappointed. I have no doubt such consumers exist. Some proof that they exist is that a service has already been developed to serve them. Professor Edelman, meet Googleminusgoogle.com.[29] Across the top the page reads: "Search with Google without getting results from Google sites such as Knol, Blogger and YouTube." In antitrust parlance, this is not tying after all. The critical point, however, is that user preferences are being satisfied as one would expect to arise from competition.

The second error, as I noted in my first post,[30] is to condemn vertical integration as inherently anticompetitive. It is here that the retrograde character of Professor Edelman's analysis (and other critics of Google, to be fair) shines brightest. It reflects a true disconnect between the 1960s approach to antitrust which focused exclusively upon market structure and impact upon rival websites; impact upon consumers was nowhere to be found. That Google not only produces search results but also owns some of the results that are searched is not a problem cognizable by modern antitrust. Edelman himself – appropriately – describes Google and its competitors as "information services." Google is not merely a URL finder. Consumers demand more than that and competition forces search engines to deliver. It offers value to users (and thus it can offer users to advertisers) by helping them find information in increasingly useful ways. Most users "want Google Search" to the exclusion of Google's "other services" (and, if they do, all they need do is navigate over to http://googleminusgoogle.com/[31] (even in a Chrome browser) and they can have exactly that). But the critical point is that Google's "other services" are methods of presenting information to consumers, just like search. As the web and its users have evolved, and as Google has innovated to keep up with the evolving demands of consumers, it has devised or employed other means than simply providing links to a set of URLs to provide the most relevant information to its users. The 1960s approach to antitrust condemns this as anticompetitive foreclosure; the modern version recognizes it as innovation, a form of competition that benefits consumers.

Edelman (and other critics, including a number of senators at last

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[29] googleminusgoogle.com/.
[30] www.acslaw.org/acsblog/retrograde-antitrust-analysis-is-no-fit-for-google.
[31] googleminusgoogle.com/.

month's hearing) hearken back to the good old days and suggest that any deviation from Google's technology or business model of the past is an indication of anticompetitive conduct:

> The Google of 2004 promised to help users "leave its website as quickly as possible" while showing, initially, zero ads. But times have changed. Google has modified its site design to encourage users to linger on other Google properties, even when competing services have more or better information. And Google now shows as many fourteen ads on a page.

It is hard to take seriously an argument that turns on criticizing a company simply for looking different than it did seven years ago. Does anybody remember what search results looked like 7 years ago? A theory of antitrust liability that would condemn a firm for investing billions of dollars in research and product development, constantly evolving its product to meet consumer demand, taking advantage of new technology, and developing its business model to increase profitability should not be taken seriously. This is particularly true where, as here, every firm in the industry has followed a similar course, adopting the same or similar innovations. I encourage readers to try a few queries on http://www.bing-vs-google.com/[32] – where you can get side by side comparisons – in order to test whether the evolution of search results and innovation to meet consumer preferences is really a Google-specific thing or an industry wide phenomenon consistent with competition. Conventional antitrust analysis holds that when conduct is engaged in not only by allegedly dominant firms, but also by every other firm in an industry, that conduct is presumptively efficient, not anticompetitive.

The main thrust of my critique is that Edelman and other Google critics rely on an outdated antitrust framework in which consumers play little or no role. Rather than a consumer-welfare based economic critique consistent with the modern approach, these critics (as Edelman does in his opening statement) turn to a collection of anecdotes and "gotcha" statements from company executives. It is worth correcting a few of those items here, although when we've

[32] www.bing-vs-google.com.

reached the point where identifying a firm's alleged abuse is a function of defining what a "confirmed" fax is, we've probably reached the point of decreasing marginal returns. Rest assured that a series of (largely inaccurate) anecdotes about Google's treatment of particular websites or insignificant contract terms is wholly insufficient to meet the standard of proof required to make a case against the company under the Sherman Act or even the looser Federal Trade Commission Act.

- It appears to be completely inaccurate to say that "[a]n unsatisfied advertiser must complain to Google by 'first class mail or air mail or overnight courier' with a copy by 'confirmed facsimile.'" A quick search, even on Bing, leads one to this page,[33] indicating that complaints may be submitted via web form.
- It is likewise inaccurate to claim that "advertisers are compelled to accept whatever terms Google chooses to impose. For example, an advertiser seeking placement through Google's premium Search Network partners (like AOL and *The New York Times*) must also accept placement through the entire Google Search Network which includes all manner . . . undesirable placements." In actuality, Google offers a "Site and Category Exclusion Tool"[34] that seems to permit advertisers to tailor their placements to exclude exactly these "undesirable placements."
- "Meanwhile, a user searching for restaurants, hotels, or other local merchants sees Google Places results with similar prominence, pushing other information services to locations users are unlikely to notice." I have strived in vain to enter a search for a restaurant, hotel, or the like into Google that yielded results that effectively hid "other information services" from my notice, but for some of my searches, Google Places did come up first or second (and for others it showed up further down the page).
- Edelman has noted elsewhere[35] that, sometimes, for some of the

[33] support.google.com/adwords/bin/request.py?&contact_type=aw_complaint.
[34] support.google.com/adwords/bin/topic.py?hl=en&topic=1713963&from=15911&rd=1.
[35] www.benedelman.org/searchbias/.

> searches he has tested, the most popular result on Google (as well, I should add, on other, non-"dominant" sites) is not the first, Google-owned result, but instead the second. He cites this as evidence that Google is cooking the books, favoring its own properties when users actually prefer another option. It actually doesn't demonstrate that, but let's accept the claim for the sake of argument. Notice what his example also demonstrates: that users who prefer the second result to the first are perfectly capable of finding it and clicking on it. If this is foreclosure, Google is exceptionally bad at it.

The crux of Edelman's complaint seems to be that Google is competing in ways that respond to consumer preferences. This is precisely what antitrust seeks to encourage, and we would not want a set of standards that chilled competition because of a competitor's success. Having been remarkably successful in serving consumers' search demands in a quickly evolving market, it would be perverse for the antitrust laws to then turn upon Google without serious evidence that it had, in fact, actually harmed consumers.

Untethered from consumer welfare analysis, antitrust threatens to re-orient itself to the days when it was used primarily as a weapon against rivals and thus imposed a costly tax on consumers. It is perhaps telling that Microsoft, Expedia, and a few other Google competitors are the primary movers behind the effort to convict the company. But modern antitrust, shunning its inglorious past, requires actual evidence of anticompetitive effect before condemning conduct, particularly in fast-moving, innovative industries. Neither Edelman nor any of Google's other critics, offer any.

During the heady days of the Microsoft antitrust case, the big question was whether modern antitrust would be able to keep up with quickly evolving markets. The treatment of the proffered case against Google is an important test of the proposition (endorsed by the Antitrust Modernization Commission[36] and others) that today's antitrust is capable of consistent and coherent application in innovative, high-tech markets. An enormous amount is at stake. Faced

[36] govinfo.library.unt.edu/amc/report_recommendation/toc.htm.

with the high stakes and ever-evolving novelty of high-tech markets, antitrust will only meet this expectation if it remains grounded and focused on the core principle of competitive effects and consumer harm. Without it, antitrust will devolve back into the laughable and anti-consumer state of affairs of the 1960s – and we will all pay for it.

COMMENTS

Google's contracts are as I say they are

Submitted by Ben Edelman on October 6, 2011

Lots of interesting discussion here. But to set the record straight on a few key points where Professor Wright's factual errors are exceptionally clear-cut –

Professor Wright links to a Google complaints page where advertisers can send their complaints. Indeed. But for a complaint to be a valid notice within the meaning of advertisers' contracts with Google, Google's non-negotiable contract requires the advertiser to submit the complaint in the remarkable fashion I flagged in my first post. The form Joshua links will not suffice, under the plain language of Google's own contract.

Professor Wright links to a Google Site and Category Exclusion Tool. But that's a tool for the Display Network. (Check the breadcrumbs at the top of the page: "Display Network Placements.") That tool does nothing to address the key bundling problem I flagged, wherein Google requires advertisers to accept the entirety of its Search Network if they want any of its Search Network partners (whose search traffic Google has of course locked up through exclusive contracts such that advertisers can't access these placements any other way).

A few thoughts

Submitted by Josh Wright on October 7, 2011

As I said in the beginning, for the purposes of antitrust analysis I'm quite sure this is already descending into negative marginal product; but nonetheless:

First, Google's AdWords Terms and Conditions only require – according to standard legal practice – that legal papers be served in writing. As I understand it, North American legal notices are directed to Google's California headquarters, while non-U.S. legal notices are typically directed to the advertising legal support team in Ireland.

Second, and most importantly, Microsoft's AdCenter Terms and Conditions (section 10), as well as Yahoo's advertising Terms and Conditions (section 12), contain the same requirement that legal complaints be submitted in writing:

> o Microsoft: "All notices to Microsoft shall be sent via recognized overnight courier or certified mail, return receipt requested, to the Microsoft adCenter contract notice contacts."
>
> o Yahoo: "You will send all notices to us via recognized overnight courier or certified mail, return receipt requested, to: General Counsel, Yahoo! Inc., 701 First Avenue, Sunnyvale, California 94089."

Again, this is well outside the antitrust domain and Professor Edelman doesn't really make much of an effort to make the connection. But – I'd happily wager the FTC or any private plaintiff would not survive a motion to dismiss.

Third, the search syndication argument can be rejected quite easily. Professor Edelman contends that Google has "locked up through exclusive contracts" the search traffic of its network partners. But its just not the case that Google has locked up a majority of search syndication deals. Compare the Google deals with AOL and Ask.com (say, 5% of search queries) to Microsoft's deal with Yahoo – which runs about 16-20% of search queries! Of course, I've got no problem with vigorous competition between Microsoft and Google for these deals, no matter who wins them. They come up for renewal on a regular basis and Google wins some and loses some – but the idea that Google controls the non-Google and non-Bing search space doesn't square with the facts.

Bottom line: a consumer welfare focused antitrust analysis of Google's conduct just doesn't meet the bar set by the relevant legal precedents nor modern economic analysis. //