Conversations With...

WLF Washington Legal Foundation
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WINTER 2012

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The Issue: Competition In Online Search: What Role For Antitrust?

In this edition of Washington Legal Foundation's CONVERSATIONS WITH, former Attorney General of the United States and Pennsylvania Governor Dick Thornburgh leads a discussion with Cadwalader Wickersham & Taft LLP partner Jonathan Kanter and Hogan Lovells partner Robert Robertson on whether there is a need and a role for antitrust enforcement to address alleged competitive concerns arising from Internet search engines. Our participants discuss and debate that broad question, and delve into how basic competition law principles such as market definition, consumer harm, unfair or deceptive practices, and remedy identification apply in the context of online search.

Governor Thornburgh: Our initial question here is the same first question that American antitrust enforcers must address when embarking on an investigation or an action: What is the relevant market? What type of business activity should the Federal Trade Commission (FTC) consider when looking at Google?

Robert Robertson: Under established principles, any properly defined market would have to include all methods of search, whether horizontal, vertical, general, mobile applications, and other applications (for example, on smartphones and tablets) that bypass browsers altogether. The contrary view appears to be that the FTC can just ignore an analysis of a market definition or limit it to one aspect of search engines, such as horizontal search. Obviously, if the FTC alleges a fictional market that is far too narrow, any findings it might make of market or even monopoly power would be fictional, too.

I have tried many antitrust cases, many of them for the FTC, and I have to say that the market definition issue is what drives the outcome in most cases. The government has lost only four merger cases in the last twenty years when it proved the alleged market, and conversely, when it failed to prove the market, it lost all of them. Non-merger antitrust cases involving unilateral conduct are no different.

In cases in which the FTC lost the market definition issue, it was almost always because the FTC's counsel failed to prove the alleged market using principles that have been well-established since the late 1950s and early 1960s. For example, in *Brown Shoe*, Chief Justice Warren explained that a product market must be "determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." Simply put, "cross-elasticity of demand" is a measure of what choices customers will switch to if they are unhappy with the quality or price of the product at issue. If an alternative product is a reasonable substitute for Google's search function – in other words, if there is a high cross-elasticity of demand between them – then that alternative must be included in the relevant market.

It is easy to say, "Oh, that's from 1962

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and can't possibly be the law today," but *Brown Shoe* (or the very similar *Philadelphia National Bank* from 1963) actually is still the case most often cited by federal courts for this principle. There are many mathematical tests to measure this cross-elasticity or substitutability, but the essence of the problem is to see where customers switch to when attempting to achieve their goals – for example, whether that is buying a computer or using various methods of search to find the same computer. If customers stop using Google to search for a computer but switch to apple.com, amazon.com or walmart.com to find the same computer, especially if the customer believes it takes less time (a function of cost) or is better in terms of the quality of the search, price of the product, or terms of delivery or payment, all of these various types of search should likely be in the same market.

Jonathan Kanter: Through their prior investigations of Google, the FTC and the Department of Justice (DOJ) have already identified the market for *paid search advertising* as the relevant market for antitrust analysis. The FTC identified the search advertising market during its investigation of Google's DoubleClick acquisition, and the DOJ twice confirmed the FTC's analysis during its investigation of the failed Google/Yahoo! search transactions and in its commentary on the latest settlement proposal in the Google Books copyright litigation. The DOJ concluded that "Google is by far the largest provider of such services, with shares of more than 70 percent."

The agencies' focus on search advertising makes sense because other forms of advertising cannot substitute for it. Paid search advertising is uniquely valuable because when an Internet user enters a keyword into a search engine, the user – a potential customer – is making a unique real-time expression of interest. This makes a potential sale more likely. No other form of advertising, either online or off, allows advertisers to reach a potential customer at the precise moment that she is expressing interest in a product. The evidence will show that there is a significant portion of advertisers that would not switch to another form of advertising in response to a "small but substantial non-transitory increase" in the price of paid search advertising, which is the typical metric the FTC uses in defining a relevant market.

Within the sphere of online search generally, Google operates in the market for "general" search advertising. General search engines scour all corners of the Internet to return results to users on any topic. Advertising through general search is uniquely valuable to advertisers, and is distinguishable from other types of search advertising, such as that offered on "vertical" search engines. Vertical search engines focus on discrete subjects to return specialized results to users. But advertisers do not view verticals as substitutes for general search advertising because verticals' narrow focus means that they have far less exposure to users. Currently, advertising through verticals is at best a compliment to general search advertising, and not yet a substitute.

But as vertical search engines evolve, they have the potential to return more relevant results to users and better targeting for advertisers, allowing them to lure advertisers away from general search. Google recognizes this risk, which explains its use of search manipulation to stymie vertical search engines. But despite this potential, verticals cannot yet be said to provide a legitimate alternative to general search advertising. DOJ and the U.S. Court of Appeals for the D.C. Circuit made the same distinction between computer operating systems and Internet web browsers during the DOJ's antitrust case against Microsoft in the late 1990s/early 2000s. Although web browsers and other so-called "middleware"

– Netscape Navigator was the primary example at the time – were not yet full-fledged competitors to Microsoft Windows, the DOJ and the court viewed Microsoft as having sought to prevent them from actually materializing into a competitive threat. Today, Google is moving down the same path by attempting to destroy the "nascent competitive threat" of vertical search engines, or at least limit their growth, to prevent them from competing for search advertising dollars currently reserved for general search.

As for business activity the FTC should investigate, the conduct at issue is the ways by which Google prevents actual and would-be rivals from being able to compete in search advertising. Google tries to prevent rivals from achieving the scale of users and advertisers that would be necessary for them to compete with Google. Scale is important in search advertising. Running more queries allows you to return better results to users, and having more advertisers allows you to display more relevant ads and generate revenue. And it is important to remember that *relative* scale is what matters, because both users and advertisers flock to platforms with the greatest scale.

Google takes numerous steps to deprive rivals of the scale that would be necessary for them to threaten Google's search advertising dominance. For instance, Google imposes restrictions on advertisers that effectively prevent them from being able to coordinate ad campaigns across multiple platforms. Google also enters into exclusive syndication and distribution agreements with websites, browsers, and mobile device makers and carriers. These exclusive agreements ensure that search traffic originating on those sites, browsers, and devices is directed to Google alone. And Google manipulates its search algorithms to favor its own products in order to squelch nascent rivals who might otherwise grow into a threat. These are just a few examples of Google's exclusionary conduct that the Commission should examine.

Governor Thornburgh: Why is definition of the relevant market especially critical in this case?

Mr. Kanter: Market definition is a factual question that is critical in all areas of antitrust law, especially in monopolization cases under Section 2 of the Sherman Act. In bringing a Section 2 case, the FTC will have to prove that Google has monopoly power in the relevant market. To avoid this conclusion, Google will argue for the widest possible market definition to make it seem like it does not actually have monopoly power. For instance, Google could argue that the relevant market includes all forms of advertising, such as television, newspaper, or radio. But as I already mentioned, the agencies have rejected such a broad definition in their prior decisions addressing Google's conduct, focusing instead on the search advertising market. As I also already discussed, there is no basis to conclude general search and vertical search operate in the same relevant market.

After defining the relevant market, the FTC will have to prove that Google has monopoly power within that market. This should not be too difficult. As FTC Chairman Jon Leibowitz said during the Commission's investigation of Google's acquisition of DoubleClick in 2007, it is "well known" that Google is dominant in the search advertising market.

Further, the search marketplace is characterized by strong network and cross-platform effects, meaning that advertisers value a search platform with a high number of users and a platform acquiring more users makes the platform more attractive to advertisers. Conversely, a platform's inability to acquire users prevents it from attracting advertisers.

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The network effects and positive feedback loops inherent to a market focused on scale, such as search advertising, make it susceptible to potentially anticompetitive domination by a large firm such as Google. Google's own chief economist, Hal Varian, recognized this risk when he wrote in 1999 that markets based on scale economies risk "tipping" to a dominant firm. Varian also explained that positive feedback allows "the strong [to] get stronger," even while making "the weak get weaker." The FTC must recognize these positive feedback and scale barriers to entry that are unique to search advertising.

Mr. Robertson: In any analysis of Google's business, as is the case in almost every antitrust investigation or litigation, the first step is to define the relevant market. Courts often call this a threshold question in monopoly cases. This is because monopolization cases typically involve unilateral conduct that is very hard to distinguish from vigorous competition – which is precisely what the antitrust laws are intended to protect. Such competition should be encouraged, not attacked, unless through independently wrongful conduct the company creates or maintains a monopoly position in a relevant antitrust market.

Why is market definition so critical in antitrust analysis? Let me give you a few examples. First, if the allegation is that Google is a monopolist, then what exactly has it monopolized? Most courts say that having at least 70% share of a relevant market is a threshold for even an inference of monopoly power. So, the first issue is the percentage share of what market. Without this step, the "monopolization" claim is simply nonsensical. The market analysis also helps identify whether there is harm or threatened harm to competition – a necessary predicate in any antitrust case brought under the federal antitrust laws or the FTC Act. The various types of conduct that may support a monopolization claim, such as refusing to deal with competitors, are often the same conduct that we want to encourage in companies that do not have market power. If the analysis skips over the market definition step, and then focuses purely on the conduct, the FTC or even private plaintiffs could sue any business for an antitrust violation, even if the business had almost no market share and therefore the alleged conduct posed no threat to consumers. Including or excluding competitors in this analysis is also often the same exercise as defining either the product or geographic market.

For Google, if one skips over the analysis of how customers use the product (i.e., the cross-elasticity of demand or substitutability of products), one is simply ignoring basic maxims in antitrust economics. But if the FTC were to define the market too narrowly, by including only horizontal search, for example, it will necessarily ignore all of the other players in the market that have made and will continue to make Internet search a dynamic market. Google has far too small a market share in a properly defined market to even begin to make out a case for monopoly, attempted monopoly, or even a Section 5 case.

Governor Thornburgh: Those who support government action point to a number of activities they consider anti-competitive or otherwise unlawful. Let's focus on two of them here, both of which relate to Google allegedly favoring its own services. Jonathan, can you talk about the allegation that the company engages in search manipulation?

Mr. Kanter: Google's search manipulation is an especially insidious example of its exclusionary conduct. Back in 1998 when they were just starting out with Google, Larry Page and Sergey Brin published a paper, *The Anatomy of a Large-Scale Hypertextual Web Search Engine*, in which

they acknowledged that a search engine that monetizes through advertising revenue could manipulate search results to increase ad revenue: "[S]ince it is very difficult even for experts to evaluate search engines, search engine bias is particularly insidious. . . . [L]ess blatant bias [is] likely to be tolerated by the market. For example, a search engine could add a small factor to search results from 'friendly' companies, and subtract a factor from results from competitors. This type of bias is very difficult to detect but could still have a significant effect on the market." They concluded that *competition* in search is necessary to cure the problem of bias: "We believe the issue of advertising causes enough mixed incentives that it is crucial to have a competitive search engine that is transparent . . . ." In a competitive market with a number of viable alternatives to Google, if Google was to fail to fulfill its role as a technology platform to match users, advertisers, and publishers, then users would go to another platform and advertisers would follow. But, because of its monopoly in search, Google knows that most users will not click away even when Google offers up an inferior experience and degrades its results.

Numerous websites, including Yelp, Nextag, Foundem, and others were once favored by Google, with their content appearing at the top of its search results and receiving favorable "quality scores" for valuable ad placement. Google was able to use search manipulation to divert users away from these sites and toward Google's own content. This is similar to a case brought by the New York Jets in 2005 in which the team alleged that Cablevision, which owns stadiums in the New York area as well as a cable television platform, unlawfully refused to sell advertising to the Jets "in order to prevent the Jets from encroaching on Cablevision's stadium monopoly." When a monopoly platform manipulates its dealings with a rival that results in the rival's exclusion from the market without justification, the monopolist violates the law.

Governor Thornburgh: The other allegation is that Google is deceiving consumers by not providing "unbiased" search results. Can you explain that?

Mr. Kanter: Users rely on a search engine to provide the most relevant results first. There is evidence that users almost always click on top-ranked results and ads because they believe that search engines operate as unbiased mechanisms matching users to websites and ads based on their search query, the sites' content, and the ads' relevance. Yet there is significant evidence that Google's search results are not "unbiased." In fact, evidence shows Google changing the way it displays search results and ads if its algorithms return results and ads of companies viewed as potential rivals.

Specifically, Google is worried about the threat posed by websites called "vertical" search sites. As I mentioned earlier, verticals provide users with specialized results, such as results focusing on finance, shopping, or local commerce. The advantage of verticals lies in their ability to focus on a specific field and return more relevant and specialized results. As they grow in size, verticals can individually or collectively develop their own keyword advertising platforms to compete with Google's. Although no verticals have yet attained the critical mass necessary to compete with Google in the search advertising market, Google fears that these potential rivals might someday grow large enough to pose a threat. Its biasing of search results is meant to nip that threat in the bud.

Verticals pay to advertise their specialized search services to general search users on Google, and they rely on the resulting traffic to "introduce" users to their sites. Google assigns quality scores to ads reflecting their relevance to a user's search. But there have

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been numerous examples of Google using its algorithms artificially to handicap a rival vertical's quality score so that its ad receives a lower billing, making it difficult for the vertical to gain user clicks and build scale. Google then manipulates its results to favor its own vertical sites, placing them among the top search results. Evidence shows that users overwhelmingly choose top results. This is because Google designs its search results pages to steer users to certain portions of the page and away from others, and because users generally assume that the most relevant results will be displayed first. Google's exclusionary manipulation of those results is therefore highly effective in denying rivals new traffic and keeping them from developing into full-fledged threats to Google's search dominance.

Governor Thornburgh: Would evidence that Google is affirmatively favoring its own services or those of its advertisers alone be enough to subject it to antitrust liability, Robby?

Mr. Robertson: I do not see how Google's favoring its own services (if it actually did that) could possibly violate the antitrust laws or even Section 5. There are two significant problems with this kind of theory. First, all search – by its very nature – is subjective in some way; otherwise, we would still be using web crawlers. Many consumers like the way that Google's search is structured; others may like the way Microsoft, Amazon, Kayak or others structure or display their results. Indeed, Google's specialized search results, with maps, images, news, products, etc., are beneficial for consumers. Competing to benefit consumers is the essence of competition.

It is not anticompetitive for Google to favor any search result or product. That's what all competitors do. BP doesn't have to have a few extra dispensers of Marathon gas on its property, just to give a bit more choice. Neither does a department store have to display Ralph Lauren next to the front door, instead of the store's private label brand, unless it chooses to do so. A company's choices of which products to display and how to display them are essential to what is so innovative about legacy stores and the virtual store of the Internet.

The second fundamental issue with such a claim is that a company with large market share has no obligation to aid a competitor. The U.S. Supreme Court for years, and recently in *Trinko*, has said that even a monopolist has no duty to aid a competitor. Justice Scalia even reminded us that the antitrust laws do "not give judges carte blanche to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition."

Governor Thornburgh: Google's competitors suggest that it has an obligation to send traffic to other websites, do you believe this claim has a legal basis?

Mr. Robertson: No. Generally, companies – even monopolists (which Google does not appear to be) – do not have to help their competitors at all. The case law on this point goes back to at least 1919 (in the *Colgate* case) and was recently reaffirmed by the U.S. Supreme Court just a few years ago in *Trinko*, where Justice Scalia said that "as a general matter, the Sherman Act 'does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.'"

The only very narrow exception, as explained by the Court, was in *Aspen Skiing*, when a supposed monopolist had been cooperatively selling a product with another competitor and then cutting off the competitor for no justifiable reason. I have not seen or heard any claim that comes remotely close to

that in this case. First, Google does not appear to have a monopoly; it has never extended a right to competitors to have all of their traffic routed by Google to their sites; and, second, no company has a "right" to any particular place in Google's search rankings – especially when Google is trying to display answers, not rankings.

Governor Thornburgh: Google offers its search services to consumers for free. Can consumers be harmed if they are not paying for the service? Are there precedents where market leaders were found to have violated antitrust laws where its products or services were free?

Mr. Kanter: It is important to recognize that Google operates a technology platform that is designed to match Internet users, publishers, and advertisers. Only if one ignores the fact that Google monetizes its search results pages with ads would it be accurate to say that Google offers its search services for "free." Google, like other matching platforms, subsidizes its customers on one side of the platform by charging a high price to its customers on the other side of the platform (advertisers). This is similar to a credit card company inducing consumers to choose one type of card over another while simultaneously charging a fee to merchants when the cardholder uses that card in a store. In a sense, the cardholder is paying a "negative" price to use the card because she benefits from a generous credit card rewards program. The fact that consumers in many instances receive access to credit cards free of charge has not stopped the Department of Justice from bringing *multiple* antitrust actions against Visa, MasterCard, and American Express. Nor did the fact that Microsoft and Netscape both offered their web browsers for free stop the DOJ from bringing a significant Section 2 case against Microsoft, the crux of which related to Microsoft's efforts to eliminate Netscape as a potential threat to its Windows operating system.

It is important also to recognize that "price" is only one feature of every product. Unless the FTC acts to restore competition in search and search advertising, Google will have little incentive to compete on other aspects of its services that affect consumers, such as data retention and consumer privacy. Absent competition, Google could even move toward a paid inclusion model, which would hurt users. In a paid inclusion model, websites would actually be allowed or required to pay for placement in algorithmic listings. Search engine rankings based on payments, rather than on relevance, would hurt consumers, but recent reports indicate that Google has been moving in that direction, particularly with regard to its vertical search services.

In addition to concerns about consumer welfare, Google's anticompetitive behavior raises concerns in the context of online privacy. Google admittedly collects an enormous amount of data about users. Indeed, Google was fined by the FCC in relation to the "wispy" scandal in which Google unlawfully captured consumer data through unsecured wi-fi networks. Unless Google faces legitimate competition, it can ignore Internet users' demand for more online privacy protection.

Finally, even if it was relevant to the antitrust analysis of Google's conduct that consumers do not pay a monetary price for Google's search services, it is clear that advertisers pay enormous sums of money to advertise on Google's search results pages. Because Google is able to charge advertisers monopoly-level prices to place ads on its search results pages, the price consumers must pay for the goods that are advertised increases. Even though users are supposedly using Google's search services free of charge, they are effectively paying for Google's monopoly every time they make a purchase from a

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company that advertises online with Google, just like consumers who use a credit card that offers generous rewards end up paying for the credit card companies' anticompetitive conduct every time they make a purchase with a credit card.

Governor Thornburgh: Robby, what are your thoughts on that first question?

Mr. Robertson: Customers are typically not harmed by a free product. The reason is that the "freemium" model is the format that most benefits competition and hence consumers. Amazon doesn't charge to use its search service, and neither does Microsoft. It is the way business is more often done, and it is becoming a common method of innovative competition in the Internet and software industries.

Generally, products given away for free raise antitrust concerns only in two circumstances: First, there might be an antitrust claim if a company gives away a product below cost, and that leads to the company's ability at some later date, to charge monopoly prices for the formerly "free" product to recoup the lost profits. The company's later recoupment by charging a monopoly price for the product is essential to such a claim. The reason is that, if other competitors can also offer the product for free, the company that is being accused of an antitrust violation can never achieve a real monopoly and recoup the losses from offering a free product. In a freemium market, which is what one typically sees in search products, such a claim could never work. Others would always offer a free search to prevent Facebook, Google, Microsoft, Amazon, or others from successfully charging a monopoly price for Internet searches. If anyone really thinks monopoly pricing is going to replace free search, they don't use the Internet.

Second, if the "free" product is simply a marketing tool to sell something else, it is still not illegal, but one could look at the effect on prices in the market for the products that are being marketed to see if the company giving away the free product is causing prices to go up in the entire market. For example, recently, in the *H&R Block* merger case, the District Court thought that free software products were part of the market but that the proper analysis had to be placed on the quality of those products and the prices of the related products that customers had to pay for that were being marketed by the initial "free" offering. The government's theory of the case was that if other companies also use the "free" model, that is good for consumers. The Department of Justice claimed that "free" was a pro-competitive model and that the merger was going to limit customers' access to "free" products or that the products would be "less free." The defendants, of course, had to agree. They just disagreed that the "free" offering was going to be inhibited in any way.

So, in short, I cannot understand how customers can be harmed by the offering of a free product. Generally, case law and recent literature on the subject indicate that it is a pro-competitive kind of product that benefits customers.

Governor Thornburgh: Some antitrust scholars argue that when examining harm to consumer welfare, the reduction of consumer *choices* should be enough to demonstrate harm. Will that play into the FTC's determination, and should it?

Mr. Robertson: The reduction of consumer choices cannot be enough to demonstrate antitrust harm. The theory, known as "consumer choice" theory, is an extraordinarily dangerous one. It simply has no place in antitrust policy.

First, it goes against our entire free-market theory and very few antitrust scholars have

embraced it. All of the history of the antitrust laws and the FTC Act are focused on harm to competition that in turn harms consumers. Absent harm or dangerously threatened harm to competition, there is no basis for an antitrust or even a Section 5 unfair or deceptive act claim. Imagine what our economic system would be like if the government said that a company had to display all airlines' offerings, just so it would improve consumers' choice, or if the government attempted to force a green-stamp company to have an offering for its competitor's brown-stamp business. Oddly, these are examples of real cases that the FTC lost on a solely, consumer-choice theory, which the FTC last tried to use in the 1970s and early 1980s, and abandoned shortly thereafter.

One might suppose thirty years later that the FTC might want to take another crack at the theory. But far too much water has passed under the bridge since the early 1980s. First, there was significant Congressional backlash to the FTC's attempt to broaden Section 5 with this consumer-choice theory. Then, as a result, in 1984, the FTC had to assure Congress that it would not pursue cases without analyzing harm to competition. In several subsequent cases, and in particular, the *Times-Mirror* case, the FTC confirmed that anticompetitive conduct (or, at least, threatened anticompetitive conduct) was a prerequisite to a Section 5 competition case. Recently, the FTC confirmed this principle in *Intel* and in numerous statements by Commissioners, including Chairman Leibowitz in his concurring opinion in *Rambus*. Even more recently, in *Brantley v. NBC Universal* (2012), the Ninth Circuit rejected an antitrust claim based on "reducing consumer choice" to pick channels on cable TV and held that the claim was "insufficient to allege an injury to competition." I cannot see how the FTC would or could successfully bring a claim based solely on a consumer-choice theory.

Governor Thornburgh: Should FTC give any weight to the fact that generally, search engines no longer offer simply the basic "ten blue links" and instead provide search users with specific answers and tailored information?

Mr. Kanter: In deciding whether to bring a case against Google, the Commission will undoubtedly consider how the industry has evolved, and it cannot ignore the fact that search results pages now include content beyond the "ten blue links" that were prevalent in the early stages of the search industry. To my knowledge, most companies are not arguing that Google should be prohibited from providing search users with specific answers and tailored information. Rather, Google's problematic conduct involves *biasing* its search results and *manipulating* its advertising platform artificially to prevent competitors' content from appearing in the top results. This case is about Google abusing its *dominant market position* by *retaliating* against competitive threats.

Google's decision to enter a particular area of vertical search, such as "finance" for example, is not a competition problem. Nor is it a problem for Google to display vertical results on its general search pages. What is problematic is when Google manipulates its search algorithms such that links to Google's own finance content appears on the top of the page and links to incumbent finance search pages are moved lower down the page or off the first page entirely, regardless of relevance or quality. When Google first enters a vertical space, this behavior necessarily reduces the quality of Google's search results pages because the most relevant results are returned by non-Google sources, such as incumbent verticals that have used time and experience to hone their algorithms. Because of Google's monopoly position, however, Google's hardwiring of Google-provided vertical content to the top of its page creates an unbalanced playing

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field where Google is *always* the winner. Google officers have even admitted that Google does this, justifying biasing results in favor of their own verticals by saying things like "we do all the work for the search page . . . so we do put it first."

If there was viable competition in search, users could respond to Google's quality sacrifice by switching to a competitor. But without action by the FTC, Google will continue to squash the nascent competitive threats posed by vertical search sites in their infancy by biasing and manipulating its search results.

Mr. Robertson: Isn't the way that Google does it called innovation? Google, Bing, Facebook, Yelp and others offer different specialized search formats all the time to persuade consumers to use their sites. If the design doesn't work, customers can easily go elsewhere and search.

It is necessarily true that all Internet search services must make difficult decisions regarding how to present and rank search results. These decisions are a zero-sum game – under any Internet search service's algorithm, when one company's ranking goes up, another company's ranking necessarily goes down. There is no alternative to making these decisions. Any FTC-mandated changes to such an algorithm may create different winners and losers, but there would still be winners and losers. Moreover, Google's business decision to place direct answers to users' queries at the top of the search results is partly a response to competition from a new generation of information technology, such as Facebook and Apple's Siri, that do not require the user to sift through links to other websites to get the information they are searching for. It is not within the scope of the FTC's authority – or expertise – to substitute its business choices for those of Google or any other company.

The other problem with this kind of theory is that once the FTC were to decide how many links should be on the page and how they should be displayed on a Google site, would that same rule apply to all companies? Absent some other antitrust theory that I haven't heard yet, this is the kind of solution that the FTC has stayed away from. The *Times-Mirror* case is a great example. It was decided by the FTC just after the backlash from Congress in the early 1980s. The complaint alleged that the newspaper didn't treat all advertisers fairly and charged them different prices. After considering the evidence – and the intervening Section 5 cases that the FTC had lost – the FTC dismissed the case because it did not think it was fair to impose a different standard on just one newspaper. Likewise, it does not make sense for the FTC to do something like that here.

Governor Thornburgh: The press has focused on whether Google has a monopoly and whether it has abused its monopoly status. But FTC also has the authority to bring a case under the Federal Trade Commission Act, and namely Section 5 of that law. Robby, what does that section prohibit?

Mr. Robertson: In competition cases, the FTC Act "was designed to supplement and bolster the Sherman Act and the Clayton Act ... to stop in their incipiency acts and practices which, when full blown, would violate those Acts ... as well as to condemn as 'unfair methods of competition' existing violations" of those acts and practices. The *S&H Green Stamps* case explained that the FTC, "like a court of equity," can consider other forms of anticompetitive harm that go beyond the antitrust laws. Classic examples of conduct that fall within the scope of Section 5 include deceptive, collusive, coercive, predatory, unethical, or exclusionary conduct that causes actual or incipient harm to competition. Although not yet tested in court, the FTC has moved beyond the specific conduct that the courts have accepted as

violations of Sherman Act Section 2 (prohibiting monopoly) to a monopolist's "course of conduct" that tends to cripple rivals or prevent would-be rivals from constraining its exercise of that power. All of these types of claims may be defended by proof of offsetting procompetitive effects, and that engaging in that course of conduct was reasonably necessary to achieve those offsetting procompetitive effects.

This description, which is paraphrased from the *Intel* complaint, seems rather broad. But it must be put into the context of the case law and the accepted purpose of the FTC Act. At the outset, it is a mistake to talk about Section 5 claims and Sherman Act claims in conduct cases. The FTC sues only under Section 5. In most cases, however, the FTC complaint uses an accepted Sherman Act theory of liability. This has been the practice in most cases since the FTC lost all of its attempts to expand the scope of Section 5 in the 1970s and 80s. There are some recognized exceptions to the rule. For example, it is not a violation of the Sherman Act to attempt to violate Section 1; thus, one cannot be found guilty of an attempt to fix prices. However, the FTC, which has authority to seek an injunction to stop violations in their incipiency, has brought claims for "invitations to collude." Another recent type of claim, raised in *Intel*, was to allege that a course of conduct (*i.e.*, several acts, each of which might not be illegal) could be used as a predicate for a monopoly or Section 5 claim. Other types of so-called "pure" Section 5 claims have been discussed for years but never clarified.

Harm to competition is the threshold for any Section 5 claim. In the Google investigation, the main complainants have stayed away from these basics and, instead, focused on "consumer choice" or arguments that Google should use its own innovations to help competitors. Neither of these theories works under existing law.

Governor Thornburgh: What behavior of Google's might FTC be able to demonstrate as unlawful under FTC Act Section 5? Is the burden of proof under that law lower for FTC than it would be under the Sherman Act?

Mr. Kanter: To demonstrate that Google's conduct violates Section 5, the FTC need only point to Google's exclusionary conduct. The licensing restrictions, exclusive deals, and search result manipulation I have mentioned are all violations of Section 2 of the Sherman Act, and by extension violations of Section 5. As I pointed out earlier, Section 5 encompasses each of the practices also prohibited by Section 2. Case law and the text of the FTC Act also indicate that Section 5 likely covers conduct that would not otherwise be prohibited by the Sherman Act.

It is difficult, however, to make a prediction as to what that broader coverage might entail or what burden of proof the FTC would have to meet in order to prove a violation of Section 5 alone. This is because courts have so far been reluctant to use Section 5 to condemn practices that are not already prohibited elsewhere in the law.

With regard to whether the burden of proof is lower under Section 5 than under Section 2, that question is purely academic in this case. Google's conduct falls squarely within the generally accepted principles of exclusionary conduct set forth in seminal government monopolization cases like *Lorain Journal*, *AT&T*, and *Microsoft*.

Mr. Robertson: I litigated this issue in the *Unocal* case at the FTC, and the general answer is that the standard of proof in an administrative hearing at the FTC is the preponderance of the evidence. That burden of proof is established by the Administrative Procedures Act, § 7(c). In most conduct cases, the FTC chooses to send the case to an administrative law judge at the FTC. That

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gives the Commission (rather than a district court) the ability to render an opinion explaining its rationale for the decision – something that would be especially important in non-traditional, Section 5 cases.

In this discussion, I should note that any good trial lawyer looking at a claim against Google would have to ask whether he or she had the preponderance of the evidence for market definition, market power, and anticompetitive effects to make out a basic case.

Governor Thornburgh: Robby, is such conduct "unfair" or "deceptive"? Are there precedents that FTC would invoke when making such arguments?

Mr. Robertson: There are many, but they are not applicable to Google. *Walker Process*, a fraud on the patent office case, is often cited for the proposition that any patent monopoly achieved through fraud should not be enforced. That simple formula raises lots of questions in light of several patent cases that are more recent. For example, what is a patent monopoly? The Supreme Court's *Independent Ink* case says that one will still have to do a market definition/market power analysis to prove such power. *Unocal* was a case that the FTC tried and later settled through consent. It was based on a deception count, as was *Rambus* and more recently, *Intel*. In federal court, *Microsoft* is also often cited for the proposition that a monopolist cannot use deception to exclude competition or maintain its monopoly.

All of these cases cite the simple proposition that deception cannot be used to achieve or maintain a monopoly. But there are lots of other elements to prove before one gets there. Deception with no monopoly, market power, or anticompetitive effects does not state an antitrust claim. Deception, which is a form of fraud, also requires that the hearer of the deception reasonably rely on the statement. In FTC parlance, it is required that the consumers cannot reasonably avoid the harm.

But nothing that the complaining competitors have said publicly about Google looks like these cases of intentional fraud. In *Unocal*, for example, the company was alleged to have persuaded the State of California and the automobile and gasoline companies to make gasoline the Unocal way, which they said was "non-proprietary." Yet, at the same time, the managers at Unocal had put together a Lottery symbol on a 4x8' board, with a pot of gold on it, promising the executives at Unocal that they would later make billions of dollars on royalties from undisclosed patents. There does not appear to be anything like that here. For example, as Bob Litan and Hal Singer have pointed out, Google's change to using more specialized results is hardly deceptive – any more than Amazon's shift to selling more than just books. Also, Google's not revealing its proprietary method of search is not a deception. It isn't reasonable for any customer to believe that Google is going to disclose this kind of information, and apparently, no other company does either.

Governor Thornburgh: What sort of remedies might be considered in a case like this, both under the Sherman Act and the FTC Act? More important, what remedies are feasible?

Mr. Kanter: The case law makes clear that the Commission has the full panoply of remedies available at its disposal regardless of whether it pursues its case under Section 2 or under Section 5. The available remedies include divestiture, disgorgement, and pure behavioral remedies, such as a set of injunctions designed to thwart Google's anticompetitive conduct. In choosing the best set of remedies to pursue, it is important that the Commission design a remedial scheme that is both tailored to address Google's misconduct and designed to foster competition in

search going forward. Google is able to engage in exclusionary conduct because competitors are unable to achieve the scale necessary to provide users, advertisers, and web publishers with a viable alternative. Accordingly, the Commission should focus on remedies that will result in competitors being able to build scale on all sides of the market.

Divestiture is one approach. Behavioral remedies are another. In choosing the most appropriate remedies, the FTC should be mindful of the distinction between regulations and enforcement. Regulation is costly because it requires near-constant oversight by the courts and agencies. But the Commission can ensure that future regulation of the search industry is unnecessary by seeking remedies designed to result in a more competitive marketplace.

The FTC could seek to address Google's conduct by implementing certain behavioral injunctions designed to ensure a competitive search marketplace. If the Commission pursues this approach to remedying Google's anticompetitive conduct, it must take care to ensure both that the mix of remedies it pursues is comprehensive enough to address all of Google's exclusionary conduct and that Google does not sidestep the purpose of a monopolization case by engaging in new ways to exclude competitors and maintain its dominance.

Governor Thornburgh: Robby, others have suggested that the proposed remedies would do more harm than good. What do you think about that?

Mr. Robertson: In any antitrust case, equitable remedies that do something other than "restore competition" are beyond the scope of the antitrust laws, as the Supreme Court made very clear in the *Ford* case in 1972 – a case the FTC itself routinely relies upon today to fashion remedies in litigated cases. Yet, many of the proposed remedies appear that they would likely harm consumers and impair competition, rather than promote it. Let's look at a few examples. If one adopts the "consumer choice" theory, how many blue links would the FTC require Google to put on its site? To limit a successful search engine, just so other, not-so-successful search sites look better is not a free-market result and it actually harms consumers because it stifles innovation and prevents Google from offering what consumers may actually want. A free-market result would be for the FTC to regulate in a way that allows competitors to decide on their own how to innovate, as long as the companies do not threaten to or achieve a monopoly through the use of anticompetitive conduct.

Often, critics of Google throw out the term, "search neutrality," as a remedy. The first problem, of course, is that no one has been able to determine what this actually means. If it means that the FTC or some other agency is going to supervise on an ongoing basis what it thinks is "neutral," I cannot see that any court would allow that result. The purpose of antitrust enforcement is to allow the market to work. It isn't meant to make decisions for the market. For example, some critics would like the FTC to limit "universal search" (displaying different kinds of listings from news, video, images, local, book search engines and from results from crawling web pages), yet this is one of Google's innovative ways of competing. Placing limits on innovation has never been an acceptable method of antitrust enforcement. Instead, markets respond to innovation with more innovation. Which is undoubtedly why we see variants of universal search and other forms of search moving through Bing, Facebook, Yahoo!, and even to Siri. So, I cannot see "search neutrality" as a remedy.

Finally, some Google critics have insisted that the FTC stop Google from using

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excerpts from other sites, even though copyright and fair use laws allow Google and all of its competitors to do exactly the same thing. For the FTC to limit Google, and not others, from using a legal method of competition is not the kind of remedy that is typically used in antitrust laws, as the Court in *Trinko* made clear. On the other hand, for the FTC to limit any or all competitors from using information allowed under copyright and fair use laws would seem not only to implicate First Amendment rights but would appear to have nothing to do with promoting competition. If it were really true that any search site unfairly used any company's copyrighted material, there is a remedy available and a well-established body of law to deal with the issue. It does not make much sense for the FTC to change the law in this area, especially when current rules provide a level playing field for all competitors. Thus, all of these competition-restrictive remedies, and others like them, do not appear to be the kind of remedies that the FTC should pursue.

Governor Thornburgh: Critics of antitrust enforcement in the technology space argue that government regulation simply cannot keep pace with the speed of innovation and change, and that even since FTC started its investigation, competition in search has intensified. As a final question, I'd like each of your thoughts on that.

Mr. Robertson: I agree that search has become increasingly competitive over the last few years, and it is true that the antitrust agencies have often been slow to react to technological change. Unocal had been investigated for many years before a case was brought. Many mergers have seen large technological changes during the investigation. Yet, the FTC is getting better at moving faster. It changed its Rules of Practice in 2009 and brought several cases after short investigations, and then took them though quick litigation, as compared to many, but not all federal courts. The FTC can still move faster in its investigations, in my view. Deciding not to take action when the effects are uncertain is often the better option, especially when the Commission can still address any conduct later if the effects become more clear.

Thus, I applaud the FTC for trying to understand these high-tech industries and for becoming more flexible in how it addresses supposed harms to competition. Over the past several years, it has hired lawyers with engineering backgrounds and experts with deep knowledge in new industries, and it generally allows for a full discussion of the issues before it acts. However, I would advise caution before any agency intervenes in fast-moving technology markets in the absence of real, unavoidable harm to competition and to consumers.

Mr. Kanter: The antitrust laws are well suited to address all industries, including high-tech industries. The relevant antitrust statutes were all broadly written to be adaptable to new industries and to cover novel business practices. Indeed, many of the most significant Section 2 cases brought by the Government in the last half-century involved the technology space. The DOJ brought major Section 2 actions against AT&T, IBM, and Microsoft. A case against Google by the FTC therefore fits well within that broader trend of antitrust enforcement in technology industries.

Indeed, in my view antitrust plays a more important role in technology industries because of the tendency of such industries to be dominated by a single firm. Google's chief economist Mr. Varian confirmed this view in 1999, pointing out that "[n]etwork markets tend to tip toward the leading player." In my view, competition in search has remained unchanged since the FTC started its investigation. Barriers to entry in the space – indexing the web, developing a

search engine and ad platform with scale – remain enormous, and no credible threat to Google's monopoly has emerged for years.

Antitrust enforcement in the high-tech space is important to preserve the possibility of what the economist Joseph Schumpeter called "creative destruction." The truly transformative developments in high-tech tend to have meager beginnings. Larry Page and Sergey Brin started Google while they were in graduate school. Facebook's origin story begins in a dorm room. Robust antitrust enforcement ensures the next Google and the *next* Facebook don't have their business crushed in infancy by Google, the current dominant firm. Google's playbook is to squash all potential threats to its dominance and antitrust is necessary to prevent that.

Governor Thornburgh: Gentlemen, thank you for participating in this important discussion.

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