CAN SEARCH DISCRIMINATION BY A MONOPOLIST VIOLATE U.S. ANTITRUST LAWS?

Antitrust enforcers across the world recently have launched broad antitrust investigations against Google. In November 2010, the European Commission announced a sweeping investigation into claims that Google has abused a dominant position in online search and search advertising. The U.S. Federal Trade Commission recently launched its own investigation, following on a similar investigation by the State Attorney General in Texas. Argentina also is investigating Google on competition grounds, and two South Korean search firms have urged antitrust authorities there to launch their own investigation.

A common claim in several of these investigations is that Google forecloses competition by manipulating search results--both organic and paid results--on its dominant search engine to afford preferential placement to its own services and depress the rankings of competitors.[i] These competitors include "vertical" search services--specialized search engines that let users search in specific areas such as travel, shopping, and video--and sites that offer specific types of content (e.g., maps, information on local attractions, etc.). These sites pose competitive threats to Google because they provide users with a potentially more focused and useful means of finding relevant information than Google.

That Google has the necessary market power to violate the antitrust laws is hard to deny. Google controls over 90% of searches and over 95% of search advertising revenues in Europe and roughly 70% and 80%, respectively, in the United States. Antitrust enforcers and courts that have studied the issue have repeatedly concluded that search advertising and related areas are relevant antitrust markets and that Google has market power in them.[ii] Given Google's monopoly grip on search and search advertising, Google's customers and competitors increasingly worry that Google has both the incentive and ability to manipulate its search results in ways that steer users to its own (possibly inferior) services and away from competitors--and thus deprive these competitors of the customers they need to survive.

In a Google-sponsored paper, *If Search Neutrality is the Answer, What's the Question?*, Geoffrey Manne and Joshua Wright seek to respond to these claims.[iii] In doing so, they quite possibly offer a glimpse into the primary defenses that Google intends to assert in these investigations.

The authors do not seek to marshal evidence that Google does not manipulate search results to harm competition. Instead, they argue that, even if Google does so, this should be immune from antitrust enforcement due to the difficulty of identifying "bias" and the risks of regulating benign conduct. The authors also seek to excuse Google's conduct by analogizing to a hypothetical of Coke and Pepsi competing for priority placement on supermarket shelves. Their discussion of this analogy, however, reveals their deep misunderstanding of Google's role in search and the importance of scale to competition in search. The authors' failure to grapple with the fundamental concerns around Google's tactics also trivializes the seriousness of the issues under investigation--issues that have profound implications for the thousands of businesses that rely on Google and for the broader economy.

- ***The authors' claim that search discrimination by a monopolist should not be subject to antitrust enforcement exaggerates the enforcement challenges and trivializes the competitive harms.***

Numerous companies and experts have come forth with data suggesting that Google manipulates its organic and paid search results to give preferential placement to its own services and to depress the rankings of rivals. Vertical search sites in the United States and Europe claim that Google imposed severe search penalties on them, for both their organic and unpaid search results, that were unrelated to any change in the content or quality of their sites.[iv] Research has also demonstrated that Google often places its own sites or services at or very near the top of Google's organic search results for a large number of common search terms, without any apparent relationship to the quality of these Google sites as compared to competing sites.[v]

These are important claims. If true, they raise serious questions about whether Google is abusing its market power in search and search advertising in a manner that harms competition and/or consumers—and is breaching the numerous representations it has made to consumers, advertisers, and the Internet ecosystem about the unbiased nature of its search results.[vi]

Manne and Wright, however, question whether search discrimination can or should ever be subject to antitrust enforcement, due in large part to the difficulty, in their view, of being able to distinguish anticompetitive manipulation from benign conduct:

> [T]he very concept of bias in this context…is deeply problematic. Alleged bias occurs not only from direct manipulation of algorithmic results, but may be built into the algorithm itself and thus nearly impossible to recognize... …Relevance is a slippery and subjective concept . . . and there is no *a priori* way to define it; *as with pro- and anti-competitive conduct, it can be nearly impossible to differentiate between "relevant" and "manipulated" search results.*[vii]

The final clause in this passage is indicative of the authors' broader views. Differentiating between "relevant" and "manipulated" search results is as difficult, in the authors' view, as differentiating pro- from anti-competitive conduct--a challenge so great that antitrust enforcers, apparently, are better off not seeking to enforce the laws against such conduct at all. The authors further argue that because *improving the relevance* of search results benefits consumers--hardly a controversial statement--any effort to prevent search engines from *manipulating* search results runs too great a risk of preventing search engines from providing users with relevant results.

Ultimately, these arguments are unpersuasive--and seem primarily to reveal the authors' skepticism that antitrust enforcers or courts can even tell the difference between pro- and anti-competitive conduct. First, although the authors make strong assertions that the consumer benefits of search discrimination outweigh any potential harms to competition, they rely primarily on anecdotal evidence and by uncritically accepting Google's claim that any web site that fell victim to Google's discrimination must have been of low quality. But whether discriminatory manipulation of search results by Google really does benefit users (or advertisers, who are not only the victims of this manipulation but also the true customers of Google's search business and whose interests as "consumers" therefore matter), and whether any such benefits outweigh harms to competition, is *the* critical question from an antitrust perspective. This question can be answered only with actual data, robust economic analysis, and a review of Google's own internal communications and documents. Manne and Wright fail to provide either data or true economic analyses, and their views, if adopted, would foreclose what could be a revealing review of Google's documents.

The ongoing investigations in the United States and Europe are therefore critical avenues for uncovering this crucial information.

Second, the authors posit the choice confronting antitrust agencies as either: (1) intrusive, ex ante regulation of Google's algorithms and quality scores in ways that would throttling innovation and make search results "uniform"; or (ii) allowing Google free rein to discriminate against competitors. This, however, is a false choice. There are many antitrust remedies that could prevent Google from engaging in anti-competitive discrimination while preserving its ability to innovate. For instance, it is not at all uncommon for antitrust enforcers to impose non-retaliation, non-discrimination, or similar requirements on parties, often linked to an oversight mechanism or a path for parties to alert enforcers about violations. One can easily imagine imposing similar requirements on Google, and there is no reason to think that the ranking of search results is unique in any way that would make such a requirement unworkable.

One thing is certain, however. The authors' approach would allow Google free rein to discriminate against competitors and exclude them from its search results. Because the authors are dubious that Google has market power, they are unconcerned with this outcome. However, Google's market power has been apparent to antitrust enforcers who have studied these markets and is even more evident to those advertisers and websites that today feel compelled to do business with Google on Google's terms.

- ***The authors rely on a flawed analogy that ignores Google's market power and its incentive and ability to abuse that power to foreclose competition.***

In seeking to explain why Google should be free to discriminate in its search rankings, Manne and Wright rely extensively on an analogy to a hypothetical involving whether Coke should be permitted to pay supermarkets for preferential placement over Pepsi on their shelves.[viii] This analogy fails on multiple levels, and the differences between it and search discrimination by Google only serve to highlight the significant antitrust concerns raised by the latter:

- ***No supermarket controls 70-90% of the market.*** There are thousands of supermarkets and many non-supermarket outlets for soft drinks. Accordingly, no single deal by Coke--even with the largest supermarket--could foreclose Pepsi from reaching consumers. Google, by contrast, controls over 90% of search in several European markets and nearly 70% in the United States. And search is far and away the leading avenue through which users find online content. Thus, when Google manipulates search results to drive down the ranking of a competing website, it can and does have a dramatic impact on the site's access to users and ability to compete.
- ***Pepsi does not compete with supermarkets.*** A key reason why we are unlikely to worry about supermarkets placing Pepsi on non-premium shelf space is that they don't compete with Pepsi (they sell groceries; they don't produce cola). Thus, it is not unreasonable to assume that supermarkets, when allocating shelf space, are motivated by pro- rather than anti-competitive goals and that their actions will not harm consumers or competition. Google, by contrast, *does* compete with the vertical search firms and other specialized services that claim to have been victims of Google discrimination: the fact that Google places its own services at the top of the page when users search for these competitors' offerings confirms that they compete. These vertical search firms and specialized services present a competitive threat to Google because users who navigate to these sites will spend less time on Google--meaning that Google will have fewer opportunities to show them ads.

- ***Supermarkets aren't removing Pepsi from their shelves.*** In the authors' hypothetical, the effect of Coke's actions is to place Pepsi products on less desirable shelf space--meaning that a person searching for Pepsi at most has to glance down (or up) to find the Pepsi product. Thus, the case for foreclosure is relatively weak. The available data, however, suggest that even a relatively small change in a site's organic or paid search ranking on Google can dramatically impact its ability to compete. Studies show that the top five results on the first page of results attract 88 percent of the clicks. Indeed, even Google has acknowledged that a prominent placement on its search engine is "critical" to web sites because "[i]f you are not found, the rest cannot follow."[ix] Victims of Google's practices often found that they were demoted dozens or even hundreds of places, rendering them effectively invisible to users.

To make the analogy to Google's search discrimination even remotely apt, Coke would need to own 70%-90% of all soft drink outlets (not just supermarkets) and remove all Pepsi products from its shelves. Obviously, the risk of competitive foreclosure and consumer harm in that scenario would be high. Also, any argument in that hypothetical that Coke was merely giving consumers what they wanted, or that its conduct was justified because Coke was superior to Pepsi, would properly be met with skepticism.[x]

- ***The authors fail to acknowledge the importance of scale to competition in search and search advertising--and how Google's search discrimination and related practices deprive rivals of scale.***

It is increasingly clear that one of the primary factors to success in search and search advertising is scale. The more users a search engine has, and the longer it can keep users on its site, the more opportunities it has to show ads. This attracts advertisers who, in selecting among competing ad platforms, place a premium on the platform with the largest number of ad opportunities (also known as the largest "ad inventory"), since access to a larger ad inventory, all else being equal, increases advertisers' efficiency and return on investment. More advertisers competing for inventory also drives up ad prices, which allows Google to generate higher revenues and profits.

Antitrust enforcers have recognized this "unusual relationship" between scale and competitive performance in search and search advertising.[xi] Google is well aware of the importance of scale too, which explains why it would be willing to discriminate against some of its advertising customers (*i.e.*, those that compete with Google's own services) and prefer its own services, despite the risk of short-term profit loss by doing so.

Google's desire to gain scale and, more importantly, to deprive actual and potential rivals of scale, is also the critical thread that connects Google's search discrimination to a broad range of other antitrust claims that have been leveled against the company. These claims include that it has entered into exclusive deals to deprive competitors of scale, that it imposes restrictions on its advertiser customers that make it more difficult for them to use competing ad services in addition to Google, and that it aggressively acquires companies to deprive competitors of scale. These claims are even more compelling in light of evidence that the benefits of additional scale level off significantly once a search engine reaches a certain level--meaning that the anti-competitive harms caused by Google depriving its competitors of additional scale are likely to outweigh any pro-competitive benefits to Google.[xii]

Manne and Wright fail to acknowledge the importance of scale in search and search advertising and therefore overlook one of the main competitive harms flowing from Google's search discrimination. As a result, the authors misjudge the application of existing case law to Google's conduct. In fact, these cases make clear that a firm with market power may not take steps to deprive rivals of commercial opportunities where the harms to competition from such acts outweigh pro-competitive benefits.[xiii]

Whether the anticompetitive impact of Google's search discrimination outweighs any possible consumer benefits is the subject to multiple investigations and remains to be seen. What is clear, however, is that Manne's and Wright's failure to grapple with the critical nexus between scale and competitiveness in search--or even to acknowledge this as a key issue--renders their analysis of limited use.

- ***The authors mistakenly assert that conduct that is lawful when undertaken by a firm without market power must therefore be lawful if undertaken by a firm with market power.***

It is a truism of antitrust law that conduct undertaken by a firm with market power may foreclose competition or harm consumers, and therefore violate the antitrust laws, even if the same conduct undertaken by a firm without market power would be lawful. Manne and Wright, however, argue that Google's manipulation of search results and related practices should be presumed lawful because smaller search engines engage in similar practices. Thus, they assert that "[t]he fact that search engines such as Yahoo . . . exhibit similar bias [in the ranking of search results] suggests that the practice is not anticompetitive."[xiv]

While the adoption of a challenged practice by companies without market power may be relevant in evaluating whether the practice is pro-competitive, it is not dispositive. Indeed, nearly every business practice that has ever been held to violate Section 2 of the Sherman Act is also commonly engaged in by companies without market power (*e.g.*, pricing below cost, imposing exclusive dealing requirements, refusing to deal with rivals, etc.). Thus, whether companies without market power engage in a certain practice reveals very little about whether practice is illegal when done by a monopolist.

In this case, the fact that manipulation of search results may deprive rivals of the ability to acquire critical scale suggests that Google's conduct might indeed be anticompetitive despite being benign if undertaken by others. If it is true, as the Department of Justice has recognized, that achieving scale is critical to competing in search and search advertising, and if it is also true that a firm with market power realizes fewer pro-competitive benefits from an increase in scale than a firm without market power would realize from an equivalent gain in scale, then it is entirely appropriate to prohibit search discrimination by a monopolist such as Google and not by its smaller rivals.

- ***The authors imply that Google does not have market power despite multiple competition regulators having reached the opposite conclusion.***

Although the authors at one point concede, for the sake of argument, that Google has monopoly power,[xv] they nonetheless devote a significant amount of text seeking to refute that claim. Thus, they write, "[E]vidence suggests that search engines compete with other distribution mechanisms for advertisement revenue. . . . It is accordingly challenging to accurately delineate a given search engine's market share -- a necessary pre-condition to determining market power and antitrust enforcement under Section 2 of the Sherman Act."[xvi]

Surprisingly, the authors fail to acknowledge that both courts and antitrust enforcement agencies have concluded that Google does have market power in search advertising and/or related markets. For instance, both the Department of Justice and the Federal Trade Commission have expressed the view that Google holds a dominant position in search advertising,[xvii] a view shared by France's national competition authority.[xviii] The Southern District of New York, in rejecting Google's proposed settlement of litigation against its Google Books service, likewise held that "Google's ability to deny competitors the ability to search orphan books would further entrench Google's market power in the online search market."[xix]

That courts and antitrust agencies have concluded in other contexts that search advertising and related sectors are relevant antitrust markets and that Google is dominant in them does not necessarily mean, of course, that they will reach the same conclusion in the ongoing investigations against Google. Yet the broad consensus on this issue among enforcers and courts does suggest that some skepticism is warranted to Manne's and Wright's assertion that Google is really just a small fish in a large pond.

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The Internet is the great economic engine and enabler of our time. It has opened opportunities for companies in every sector of the economy and across the world. For many, Google today is the gateway to all that the Internet has to offer.

Whether Google manipulates search results in order to afford preferential placement to its own services and depress the rankings of competitors is not a trivial matter. It has profound economic implications, not only for search engines but for every Internet user and every company that uses search advertising. While Manne and Wright seek to downplay the competitive impact of Google's actions and suggest that antitrust enforcers are wasting their time investigating them, their arguments do not stand up to scrutiny. Antitrust enforcers should seize the opportunity to investigate Google's practices closely and take the necessary steps to restore the conditions for competition in search.

[i] *See, e.g.*, European Commission Press Release, *Antitrust: Commission probes allegations of antitrust violations by Google* (IP/10/1624) (Nov. 30, 2010) ("The Commission will investigate whether Google has abused a dominant market position in online search by allegedly lowering the ranking of unpaid search results of competing services which are specialised in providing users with specific online content such as price comparisons (so-called vertical search services) and by according preferential placement to the results of its own vertical search services in
order to shut out competing services. The Commission will also look into allegations that Google lowered the 'Quality Score' for sponsored links of competing vertical search services.")

[ii] *See, e.g.*, Autorite de la concurrence (France) Press Release (Dec. 14, 2010) ("The Autorite de la concurrence considers that Google holds a dominant position on the advertising market linked to search engines."); *Authors Guild, Inc. v. Google, Inc.*, at 15 (No. 05 Civ. 8136, 2011 WL 986049) (S.D.N.Y. Mar. 22, 2011) ("Google's ability to deny competitors the ability to search orphan books would further entrench Google's market power in the online search market"); Department of Justice Press Release, *Yahoo! Inc. and Google Inc. Abandon Their Advertising Agreement* (Nov. 5, 2008) (noting that investigation revealed "that Internet search advertising and Internet search syndication are each relevant antitrust markets and that Google is by far the largest provider of such services, with shares of more than 70 percent in both markets").

[iii] *See* http://www.laweconcenter.org/images/articles/search_neutrality_manne_wright_final.pdf. Geoffrey Manne is a lecturer in law and Lewis & Clark Law School; Joshua Wright is an associate professor at George Mason University School of Law.

[iv] *See, e.g.*, *Foundem's Google Story* (Aug. 18, 2009), at http://www.searchneutrality.org/foundem-google-story; Complaint in *TradeComet v. Google*, (S.D.N.Y. Feb. 17, 2009) (09-cv-1400).

[v] *See, e.g.*, Benjamin Edelman and Benjamin Lockwood, *Measuring Bias in "Organic" Web Search* (Jan . 19, 2011), at http://www.benedelman.org/searchbias/.

[vi] *See, e.g.*, NPR, All Things Considered, *CEO: Google Knows a Lot About You, Then Forgets* (October 2, 2009) (Eric Schmidt claiming that Google's "natural search answers [are] completely unbiased with respect to economics"), at http://www.npr.org/templates/story/story.php?storyId=113450803; Bloomberg Video, *Interview with Google Attorney Jon Jacobson* (quoting Google attorney saying "[t]here's simply no truth to the fact that Google is preferring its own services…. It's simply not true."), at http://www.bloomberg.com/video/67972770/ (quote at 2:25 in the video).

[vii] Manne & Wright, at 7 (emphasis added).

[viii] *Id.*, at 16 et seq.

[ix] Kevin J. O'Brien and Eric Pfanner, *Europe Divided on Google Book Deal*, NEW YORK TIMES (Aug. 23 2009), at http://www.nytimes.com/2009/08/24/technology/internet/24iht-books.html.

[x] In fact, in order to settle a five-year antitrust investigation into its practices by the European Commission, Coke agreed in 2004 to a number of commitments, including to cease offering rebates for certain premium shelf-space deals with retailers and to allow retailers to use up to 20% of the space in Coke coolers to stock competing products. *See* European Commission Press Release, *Commission close to settle antitrust probe into Coca-Cola practices in Europe* (IP/04/1247) (Oct. 19, 2004), at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/04/1247&format=HTML&aged=0&language=EN&guiLanguage=en.

[xi] *See* Department of Justice, *Statement of the Department of Justice Antitrust Division on its Decision to Close its Investigation of the Internet Search and Paid Search Advertising Agreement between Microsoft Corporation and Yahoo! Inc.* (Feb. 18. 2010) ("The search and paid search advertising industry is characterized by an unusual relationship between scale and competitive performance. The transaction will enhance Microsoft's competitive performance because it will have access to a larger set of queries, which should accelerate the automated learning of Microsoft's search and paid search algorithms and enhance Microsoft's ability to serve more relevant search results and paid search listings, particularly with respect to rare or 'tail' queries."), at http://www.justice.gov/atr/public/press_releases/2010/255377.htm.

[xii] Google's then-CEO Eric Schmidt acknowledged as much in a June 12, 2008 call with stock market analysts concerning Google's attempt to provide results for Yahoo queries, where he stated: "[i]f there is a benefit [from the proposed Yahoo! deal] it's a mild one, and the reason is that *most of our gains do not come from adding additional advertisers or additional inventory*." Eric Schmidt, *Google and Yahoo Advertising Agreement Conference Call* at 13:00 (June 12, 2008), http://investor.google.com/webcast/2008/index.html (emphasis added).

[xiii] Indeed, the authors at one point go so far as to imply that Google does not necessarily benefit from scale and might be better off with fewer users. *See* Manne and Wright, at 12. Although the authors make these statements in the context of a discussion about network effects, not scale effects, they reinforce the impression that the analysis fails to account for the competitive significance of Google's efforts to foreclose rivals of achieving scale.

[xiv] *Id.* at 15. The authors also state, "[t]hat [quality scores are] used by every general purpose search engine for the same purpose [to help price ads] suggests that its function is pro-competitive." *Id.* at 28. The authors' analysis, however, misses the point. The claim is not that Google's use of quality scores is per se anticompetitive. Rather, the claim is that Google *manipulates* its quality scores, and that it does so *not* in order to efficiently price ads, but instead to drive up the costs of advertising for rivals in order to deprive them of critical user traffic and scale and thereby to prevent them from competing effectively with Google.

[xv] *Id.* at 25.

[xvi] *Id.* at 11.

[xvii] *See DOJ Google Book Settlement Statement*, at 22 (stating that Google "already holds a relatively dominant share" in the Internet search advertising and Internet search syndication markets); *FTC Google/DoubleClick Statement* at 3 (stating that "Google, through its AdWords business, is the dominant provider of sponsored search advertising").

[xviii] Autorite de la concurrence Press Release (Dec. 14, 2010) (noting that "Google holds a dominant position on the advertising market linked to search engines.").

[xix] *Authors Guild, Inc. v. Google, Inc.*, at 15 (No. 05 Civ. 8136, 2011 WL 986049) (S.D.N.Y. Mar. 22, 2011).