GOOGLE & INVESTIGATIONS INTO INTERNET COMPETITION

I. INTRODUCTION

The time to preserve competition, investment, and innovation on the Internet is now and the stakes are unprecedented. Economic growth, consumer welfare, and the future of the Internet all hang in the balance. We have become an Internet-dependent society. About 240 million people in the United States regularly use the Internet[i] and last year their activity generated nearly $170 billion in commerce, including online advertising and online transactions.[ii]

While offering extraordinary opportunities, the scope of the Internet also is daunting – both for users and for website developers. There are currently more than 312 million websites and more appear every day.[iii] Internet users navigate this vast array of information through search engines – principally through a single, dominant search engine: Google. Indeed, Americans "Google" so frequently and ubiquitously that the company's name has virtually become a generic verb that means to search the Internet.

As a result, Google has obtained unprecedented economic power over what users find, who is found, and what businesses must pay to be found on the Internet. More troubling, Google has used and continues to use this power to reinforce and expand its dominance through a pattern of exclusionary acts.

As explained below, competition enforcement officials need to investigate and take all appropriate action to protect innovation, economic growth, and consumers by preventing Google from stifling competition on the Internet. If they fail to do so, consumers will suffer in two primary ways. First, Google will continue to thwart competition and will dominate more and more of the Internet, to the detriment of consumers. Second, government regulatory officials in the U.S. and abroad could become frustrated with the lack of antitrust enforcement and impose a rigid government regulatory structure on the Internet that also could stifle innovation and growth.

The better approach for consumers and for economic growth is for antitrust enforcement officials to enforce applicable competition laws now and ensure that Google stops engaging in conduct that breaks those laws.

II. GOOGLE AS KINGMAKER

Users are the lifeblood of any website, so the primary struggle for any website is to be found – and then revisited – by users. On the crowded Internet, websites are increasingly found by consumers through search engines, so a website's ability to compete depends largely on whether it appears on search results pages in response to users' queries and, more importantly, on where it appears within those results.

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Thus, fair search is crucial to the health of the Internet. Without it, websites will not have the opportunity to attract users and to succeed, as a result of which innovation, consumer welfare, and economic growth on the Internet will be harmed.

**FairSearch.org is a group of businesses and organizations united to promote a healthy Internet future, where economic growth is driven by competition, transparency and innovation in search verticals and online services. Members are Expedia Inc., and its brands Expedia.com, Hotwire and TripAdvisor; Farelogix Inc.; Foundem; KAYAK, and its brand SideStep; Level...com; Microsoft; and Sabre Holdings, and its brands Travelocity and ZUJI.*

Today, fairness in search depends on a single company: Google. Google controls over 70% of search in the U.S.[iv] (and over 94% in Europe[v]). Studies confirm that approximately 88% of users' clicks are on links that appear in the top three results on those pages.[vi] This means that if a website does not appear near the top of the Google results, it might as well not be on the Internet at all. A senior Google executive has acknowledged this: "Search is critical. If you are not found, the rest cannot follow."[vii]

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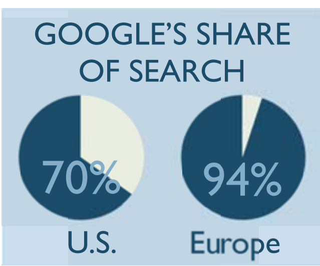
Google's search dominance has led to it also dominating paid search advertising. With a share of 80% in the U.S.,[viii] Google generated revenues of more than $29.3 billion in 2010, the vast majority of which was likely attributable to its dominant paid search platform.[ix] Paid search offers a uniquely valuable opportunity for advertisers. They can target users based on the interests they express in their search queries at a time when they are likely seeking to engage in commercial activity.



As a result of its dominance in search and search advertising, Google can control where users go and what sites they find. Its power to rank sites in search results and to determine how those results are displayed gives it unprecedented power over a site's ability to reach users. Similarly, Google dictates who can advertise on its search page – and at what price. In its own words, Google is "the biggest kingmaker on this Earth"[x] – it can crown, or unseat, kings at will.

Google harms competition and consumers in multiple ways:

1. **CONSUMERS:**
   As described more fully below, consumers are misled by Google's manipulated search rankings and by its deceptive and preferential display of its own sites in response to users' queries. More broadly, consumers pay more for goods and services because advertisers are paying more to Google and because of diminished competition among websites. Further, Google's exclusionary conduct denies revenue and traffic to sites that compete with Google, hindering the ability of those sites to bring more innovative online content and better services to consumers.

2. **WEBSITES AND CONTENT CREATORS:**
   Websites lose critical traffic when Google steers users to its own or preferred partners' sites and forecloses the visibility of rival sites. They have to increase their advertising spend on Google to try to make up for some of that lost traffic. They also pay Google an ever-higher percentage of the advertising revenues that their sites generate for non-search (*i.e.*, content and display) ads served by Google.

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3. **ADVERTISERS:**
   Advertisers pay ever-higher fees to Google and have little choice but to accept Google's terms, such as its restrictive policies that prohibit advertisers from using their data freely on other ad platforms. Those fees are passed on to consumers in the form of higher prices.

4. **ECONOMIC DEVELOPMENT:** Google's control over access to information on the Internet threatens both existing and new Internet businesses. Simply put, Google's market power and anticompetitive practices inhibit other Internet businesses from competing by denying those companies the user traffic and revenue they need to develop new products, support innovation, create jobs, and foster economic growth. For those who are in Google's favor or able to pay for its support, Google provides critical Internet traffic and sales growth. For those who are unable to win Google's favor or those seeking to enter Internet commerce, Google's practices present a barrier to entry and an obstacle to competing on the merits.

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III. GOOGLE'S THREAT TO FAIR SEARCH

Unfortunately, Google has begun to use its power to maintain and increase its own profits at the expense of competition and consumers. The problem has emerged as Google has moved into two distinct areas: (i) vertical search sites, and (ii) web pages with substantive content that compete with non-search sites.

A. GOOGLE'S EXPANSION INTO VERTICAL SEARCH AND INFORMATION SERVICES

A "vertical" search provider specializes in serving results from a particular category of content, such as travel, shopping, financial, local attractions, or video content. Examples include brands like Kayak, Shopping.com, and Yelp. Because vertical search sites are focused on a particular vertical context, they can compete effectively with Google without having to match Google's enormous scale in general search. These innovative and specialized search engines are among the few remaining competitive threats to Google's general search dominance and, if allowed to develop free of unreasonable competitive restraints, they could provide certain users and advertisers with an alternative to Google's search engine. Accordingly, Google has an incentive to protect and expand its search dominance by undermining the development of competing vertical search sites.

In order to keep users on Google Web properties, Google has begun to provide more than search services, moving aggressively into providing content and information services. Google thus seeks to keep (and further monetize) users on its websites by steering them to Google pages that provide users substantive content. Examples include Google Maps and Google Places pages. Google offers these pages in competition with other websites; however, in most instances, Google's "substantive" content is not really Google's content at all. Rather, Google typically scrapes this content from other websites, often without permission or by coercing the websites into acquiescing to appropriation of their content by threatening to penalize them in Google's search results if they do not. Because it now frequently competes with the very websites that also depend upon it for traffic, Google now has both the incentive and the ability to use its search dominance to undermine competition from other sites.

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B. GOOGLE'S EXCLUSIONARY TACTICS

Google is now using its enormous power in search and search advertising to undermine competition and artificially direct users to its own sites in a variety of ways. These tactics include the following:

1. ***Deceptive Search Display and Search Manipulation.*** Google has conditioned users to expect that its search results are presented in the order of their likely relevance to the user's query. Google now deviates from this expectation in at least two important respects.

   a. *Deceptive Display*. Google now displays non-algorithmic results at the top or in the middle of the results page in a manner that does not clearly flag for consumers that these results are placed there artificially by Google – frequently with links to Google's own pages. Two prominent examples are Google "Places" links and Google's "universal" or "local" search. The result is to induce users to click on the artificially placed links regardless of whether those links are the most relevant to the user's query.

   b. *Search Manipulation*. Search rankings are determined by algorithms developed by the search provider that are supposed to identify the sites most likely to be relevant to the user's query. These algorithms can be programmed, however, to exclude, penalize, or promote specific sites or whole categories of sites. While the complexity of search algorithms make it difficult to know which variables have been set, any changes make a huge difference to a website's opportunity for success. Studies show, for example, that the top three results attract approximately 88% of the clicks, and results that do not appear within the first three pages of search results are almost never clicked.[xi] Given Google's *de facto* status as the gateway to the Internet for most consumers, these tactics starve competing sites of user traffic, thereby diminishing their visibility on the Web.

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2. ***Acquisitions***. Google has purchased a series of companies that eliminated nascent threats to its search dominance. For example, in October 2006, **YouTube** attracted more search traffic than anyone other than Google itself. By buying YouTube at that time, Google took control over this threat to its search dominance. Similarly, the Department of Justice recently challenged Google's acquisition of **ITA Software** and obtained a consent decree limiting Google's ability to abuse its control over this key technology for travel search.

3. ***Unauthorized or Coerced Scraping of Content***. As noted above, most of the "content' that Google provides in its sites such as Places or local or universal search is not generated by Google through its own investment. Rather, Google scrapes the content developed by other websites and displays it on a Google page. This enables Google to earn advertising revenues and to deprive the other website of user traffic. The recent dispute between TripAdvisor and Google illustrates this practice. TripAdvisor spent years and many millions of dollars developing a collection of user reviews that

provide a valuable resource to users selecting hotels and restaurants. Google scrapes these reviews from TripAdvisor and displays them on Google Places pages despite TripAdvisor's objection to the practice. Google is now seeking to coerce TripAdvisor into acquiescing to this use by tying the removal of TripAdvisor content from Google Places pages to the exclusion of all TripAdvisor links from appearing in Google's dominant algorithmic search engine results.

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4. ***Quality Score Manipulation***. Google's domination of the search advertising market gives Google a further tool for undermining competition. "Advertisers aim to have ads placed in the best possible positions on the search engine results pages to obtain the greatest visibility and therefore the highest number of clicks."[xii] The placement of ads on Google is determined through an auction in which advertisers submit bids for keywords associated with search queries. The bid is the amount that the advertiser is willing to pay each time a user clicks on its ad. But Google handicaps each bidder with a "quality score." The lower a quality score, the higher a price the advertiser has to bid to win the auction. Given the opaque and subjective – and advertiser-specific – process, Google has the ability to manipulate paid search to limit competition. Numerous companies have complained about Google raising minimum bids to prohibitively high levels, without warning and with little or no justification.

5. ***Exclusive dealing***. Google also has maintained and expanded its dominance in search and search advertising by imposing exclusivity restrictions in its "syndication" and "distribution" agreements. These are arrangements where Google provides search functionality for another website (such as by placing a graphical "search box," "search bar," or "toolbar" on a website, such as AOL.com or CNN.com) or software product (such as Adobe's offerings). Google has locked up as much as 90% of search syndication through its network of exclusive deals with websites. Similarly, through exclusive distribution deals, Google search appears as the default search option on the products of a large number of browser companies (*e.g.*, Mozilla Firefox, Opera's desktop and mobile browsers, and Safari), software developers, and device manufacturers, among others. These exclusive deals help ensure that Google controls these searches and make it more difficult for Google's current and potential competitors to achieve the "scale" that could enable them to compete more effectively with Google.[xiii]

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6. ***Advertising Platform Restrictions.*** With Google's dominant share of user queries and the user "eyeballs" that advertisers want to access, Google's paid search advertising platform, AdWords, is a "must buy" for businesses that advertise online. Google uses this power to deprive other online advertising platforms of business. For example, Google adopts policies that prevent the development of software that would enable advertisers – and small advertisers, in particular – to use and compare Google's prices and returns on investment with those

of Google's competitors. Google prevents advertisers from synchronizing updates or other changes to their ad campaign data across multiple platforms. Google also imposes limits on advertisers' ability to port their Google AdWords data to any other ad platform using third party tools that would make the process simple or even automatic. As a Harvard Business School professor has stated with respect to Google's restrictions on advertising data portability, the "net effect . . . is to reinforce the tendency of small to medium-sized advertisers to 'single-home' – to use only Google AdWords to the exclusion of competing platforms."[xiv] He adds that "[w]ere it not for Google's restriction, more advertisers would sign up to use competing ad platforms."[xv]

IV. INCREASED ANTITRUST SCRUTINY OF GOOGLE

Antitrust enforcers in the U.S. and Europe have become increasingly concerned about Google and its potential violations of the antitrust laws. For example:

- Google was forced to abandon its proposed agreement with Yahoo! in 2008 in the face of an expected challenge by the Department of Justice;
- The DOJ expressed serious concerns with Google's proposed Book Search settlement. In its recent opinion rejecting that settlement, the court agreed with the DOJ and found that the deal "would further entrench Google's market power in the online search market" if allowed to go forward;
- The DOJ recently challenged Google's acquisition of ITA Software, concluding that, as proposed, it would have violated antitrust law;
- Members of Congress from both parties and in both Chambers also expressed concern regarding the Google-ITA deal. Some, including Sens. Herb Kohl and Mike Lee—the Chairman and Ranking Member of the Senate Antitrust Subcommittee, respectively—have also called for hearings into competition in online search and Google's conduct;
- Google eliminated its board of director overlaps with competitors in response to a Federal Trade Commission investigation;
- The Attorney General of Texas is investigating whether Google uses its dominant positions to harm rivals by manipulating its search results and paid search advertisements; and
- In November 2010, the European Commission announced a wide-ranging antitrust investigation into allegations that Google is abusing its dominant position in online search.[xvi]

In addition to government investigations, several private cases have been filed against Google under both under Federal and State law.[xvii]

Continued antitrust scrutiny of Google's conduct is critical, and agencies need to pursue all appropriate enforcement action where warranted. If Google is not required to obey the antitrust laws, consumers, advertisers, website creators, and economic growth will suffer.

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[i] Internet World Stats, *Usage and Population Statistics*, http://www.internetworldstats.com/am/us.htm (last accessed Apr. 12 2011).

[ii] ComScore, *ComScore Reports Record-Breaking $43.3 Billion in Q4 2010* (Feb. 4, 2011), http://comscore.com/index.php/Press_Events/Press_Releases/2011/2/comScore_Reports_Record-Breaking_43.4_Billion_in_Q4_2010_U.S._Retail_E-Commerce_Spending (providing retail e-commerce spending figures of approximately $142.5 billion in 2010); eMarketer, *State of the Day: Advertising Online Surpassed Newspapers In 2010* (Mar. 14, 2011), http://www.emarketer.com/blog/index.php/stat-day-online-advertising-surpasses-newspapers-2010/ (stating online advertising spend was $25.8 billion in 2010).

[iii] Netcraft, *April 2011 Web Server Survey*, http://news.netcraft.com/archives/2011/04/06/april-2011-web-server-survey.html.

[iv] ComScore, *Comscore Releases February 2011 U.S. Search Engine Rankings* (Mar. 11, 2011), http://www.comscore.com/Press_Events/Press_Releases/2011/3/comScore_Releases_February_2011_U.S._Search_Engine_Rankings (explicit core search including Ask and AOL).

[v] StatCounter Global Stats, *Top 5 Search Engines in Europe from Mar. 10 to Mar. 11*, http://gs.statcounter.com/#search_engine-eu-monthly-201003-201103-bar (last accessed Apr. 12, 2011).

[vi] SEO Scientist, *Google Ranking and CTR – How Clicks Distribute Over Different Rankings on Google* (July 12, 2009), http://www.seo-scientist.com/google-ranking-ctr-click-distribution-over-serps.html.

[vii] Kevin J. O'Brien & Eric Fanner, *European Opposition Mounts Against Google's Digitized Books*, N.Y. TIMES (Aug. 23, 2009) (quoting Santiago de la Mora, Google's head of printing partnerships in London), http://www.nytimes.com/2009/08/24/technology/internet/24books.html?_r=2&ref=business.

[viii] Google's share is 80% both by spend and clicks. Efficient Frontier, *Q1 2011 Global Digital Marketing Performance Report* at 4, http://www.efrontier.com/sites/default/files/EF_1Q11GlobalReport.pdf.

[ix] Google, Inc., Annual Report (Form 10-K) at 24 (Feb. 11, 2011).

[x] Matt Warner, *Google, Caffeine, and the Future of Search*, THE TELEGRAPH (June 17, 2010) (quoting Amit Singhal, who heads Google's search ranking team).

[xi] iProspect, *iProspect Search Engine Behavior* http://www.iprospect.com/premiumPDFs/WhitePaper_2006_SearchEngineUserBehavior.pdf; David A. Vise, THE GOOGLE STORY 118-19 (Bantam Dell 2005) (quoting Frederick Markini, CEO iProspect, as stating, "[a]ll research confirms that if you are not found on the first three pages of the search results, the top 30 matches, you have built a billboard in the woods. No one will find it.").

[xii] Case COMP/M.5727, European Commission, *Microsoft/Yahoo! Search Business* at 6 (Feb. 18, 2010), http://ec.europa.eu/competition/mergers/cases/decisions/M5727_20100218_20310_261202_EN.pdf.

[xiii] With more scale, a search engine is better able to conduct experiments to tune its search algorithm, to improve the relevancy of its search results, and ultimately to offer better and more features for users.

[xiv] Ben Edelman, *PPC Platform Competition and Google's "May Not Copy Restriction"* (June 27, 2008), http://www.benedelman.org/news/062708-1.html.

[xv] *Id.*

[xvi] *See, e.g., Google and Europe*, N.Y. TIMES (Dec. 1, 2010) (stating the European Commission "did the right thing" by opening an "investigation into allegations that Google abused its dominant position in online search to help its other businesses at the expense of rivals"), http://www.nytimes.com/2010/12/02/opinion/02thu3.html?scp=1&sq= google%20&%20europe&st=cse.

[xvii] In one private suit, Google has argued that it has immunity under state antitrust statutes because of the Federal Communications Decency Act. This position is being litigated in Ohio and is opposed by the Ohio Attorney General.