This is part one of a two part series of posts in which I'll address the problems associated with discerning an appropriate antitrust remedy to alleged search engine bias. The first problem – and part – is, of course, how we should conceptualize Google's allegedly anticompetitive conduct; in the next part, I will address how antitrust regulators should conceive of a potential remedy, assuming *arguendo* the existence of a problem at all. Despite some commentators' assumptions, I do not think the economics indicate any such problem exists.

The question of how to conceptualize Google's business practices – even its business model! – remains the indispensible starting point for antitrust analysis, including potential remedies; doubly so in the wake of the FTC's decision to formally investigate Google. While the next part will focus more directly upon potential remedies that have been proposed by various Google critics, there is a fundamental link between how we conceptualize Google's provision of search results for the purposes of antitrust analysis and the design of remedies. Indeed, antitrust enforcers and scholars have taught that thinking hard about remedies upfront can and frequently should influence how we think about the competitive nature of the conduct at issue. The question of how to conceptualize Google's organic search results has sparked serious debate, as some have claimed that "Google's behavior is harder to define" than traditional anticompetitive actions and represents "a new kind of competition." Some have also focused upon "search bias" itself as the relevant conduct for antitrust purposes. Of course, as I've pointed out, these statements are not in line with modern antitrust economics and usually precede calls to deviate from traditional consumer-welfare-focused antitrust analysis.

I see two useful conceptual constructs in evaluating "search bias" within the antitrust framework. Recall that "search bias" typically translates to allegations that Google favors its own affiliated content over that of rivals. For example, a search query on Google for "map of Arlington, VA" might turn up a map of Arlington from Google Maps in the top link. These allegations usually concede that we would expect Bing Maps if we ran the same search on Bing. The complaints from vertical search engines and travel services like Expedia particularly center around the notion that Google's "entry" into various spaces – such as travel services – supported by prominent search rankings disadvantages rivals and may lead to their exit.

Observant readers will note my use of scare quotes around "entry." This is not coincidental. It is not obvious to me that Google necessarily *enters* a new sector (much less a well-defined antitrust product market) when it directs a user to content in a new format– such as a map, video, or place page. Google's primary function is search; users rely on search engines to reduce search and information costs. I think it is at least as likely that Google's attempts to provide this content by *any* chosen metric is simply an attempt to do their cardinal job better: answering user queries with relevant information at a minimum of cost. Holding that threshold issue aside for a moment, in my mind, there are two ways to classify that conduct in the antitrust framework.

First, one might conceive of search bias allegations as "vertical integration" or vertical contractual activity. I've explored this conception at significant length both in blog posts (see, e.g. here and here) as well as a longer article with Geoff. The classic antitrust concern in this setting is that a monopolist might foreclose rivals from an input the rivals need to compete effectively. For example, Google owns YouTube; Google could prominently place YouTube results when users enter queries seeking video content. (Ignore for the moment that YouTube will necessarily rank highly on other search engines because it is the leading site for video content). Within this vertical integration framework, there is a standard analysis for understanding when competitive concerns might arise, the conditions that must be satisfied for those concerns to warrant scrutiny, a deeply embedded understanding that harm to rivals must be distinguished from demonstrable harm to competition, and an equally deeply held understanding that these vertical arrangements and relationships are often, even typically, pro-competitive (e.g., in the YouTube example vertical integration likely leads to reduced latency and faster provision of video content).

Second, one might conceptualize organic search results as the product of Google's algorithm and thus falling into the category of conduct analyzed as "product design" for antitrust purposes. This algorithm faces competition from other search algorithms and vertical search engines to deliver relevant results to consumers. It is the design of the algorithm that ranks Google-affiliated content, according to the complaints, preferentially and to the disadvantage of rivals. I explore both beneath the fold.

The two conceptions are not mutually exclusive. The antitrust implications of the two different conceptions of Google's organic search are significant. Courts and agencies generally give wide latitude to product design decisions, through with some prominent exceptions (Microsoft, FTC v. Intel). Courts are skeptical to intervene on the basis of complaints about product design by rivals because they concerned that such intervention will chill innovation. Concern for false positives play a central part in the analysis, as do concerns that any remedy will involve judicial oversight of product innovation. Plaintiffs can and do, from time to time, win these cases, but the product-design conception carries with it a heavy deference for design decisions.

The "vertical" (in the antitrust sense) conception of Google's search results requires us to think about the economics of algorithmic search ranking, placement choices, and the economics of vertical relationships between a content provider and a search engine. There are many economic reasons for vertical contractual relationships between such content or product providers and retailers. Coca-Cola pays retailers for promotional shelf space, manufacturers compensate retailers by granting them exclusive territories, and product manufacturers and distributors often enter into exclusive relationships in which the distributor does not simply feature or promote the manufacturer's product, but does so to the exclusion of all of the manufacturer's rivals.

The anticompetitive narrative of Google's conduct focuses heavily on that prominent placement within Google's rankings, e.g. the first link or one towards the top of the page, results in a substantial amount of traffic. This is no doubt true; it is not a sufficient condition for proving competitive harm. It is equally true that eye-level and other premium level shelf space in the supermarket generates more sales than other placements within the store. There is good economic reason for manufacturers to pay retailers for premium shelf space (see Klein and Wright, 2007); and evidence that these arrangements are good for consumers (Wright, 2008). Retailers' shelf space decisions, and decisions to promote one product over another, are often influenced by contractual incentives; and it is a good thing for consumers. Now consider the case when the retailer shelf space decision is influenced not by contractual incentive and compensation, but by ownership. This is really just a special case – as ownership aligns the incentives (like the contract would) of the manufacturer and retailer. For example, a supermarket might promote its own private label brand in eye-level shelf space. Alternatively, in a category management relationship, a retailer might delegate a specific manufacturer as "category captain" and allow it significant influence over product selection and shelf space placement decisions. Note that in the case of exclusive relationships, the presumption that such arrangements are pro-competitive applies to shelf placement that would entirely exclude a rival from the shelf, not just demote it.

In economics, the theoretical and empirical verdict is in about these sorts of vertical contractual relationships: while they can be anticompetitive under some circumstances, the appropriate presumption is that they are generally pro-competitive and a part of the normal competitive process until proven otherwise. How we conceptualize placement of search results, including those affiliated with the search engine (e.g. Google Maps on Google or Bing Maps on Bing), should influence how we think about the appropriate burden of production facing would-be antitrust plaintiffs, including the Federal Trade Commission.

Indeed, these two models offer important trade-offs for antitrust analysis. To wit, in my view, the vertical integration model provides a still difficult, but relatively easier case for potential rivals to make under existing case law, but it also integrates efficiencies directly into the analysis. For example, vertical integration and exclusive dealing cases accept as a starting point the notion that such arrangements are often efficient. On the other hand, while potential plaintiffs have a tougher initial burden in a product design case, the focus often turns to how the design impacts interoperability and whether the defendant can defend its technical design choices. Having explored the potential conceptual constructs for characterizing Google's conduct for the purpose of antitrust analysis, my next post will link those concepts to a discussion of potential remedies, exploring the proposed remedies for Google's conduct, a relevant historical parallel to today's "search bias" debate raised by some as a model of regulatory success, and a discussion of the economic non sequiturs surrounding the case against Google as juxtaposed against these proposed remedies.

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