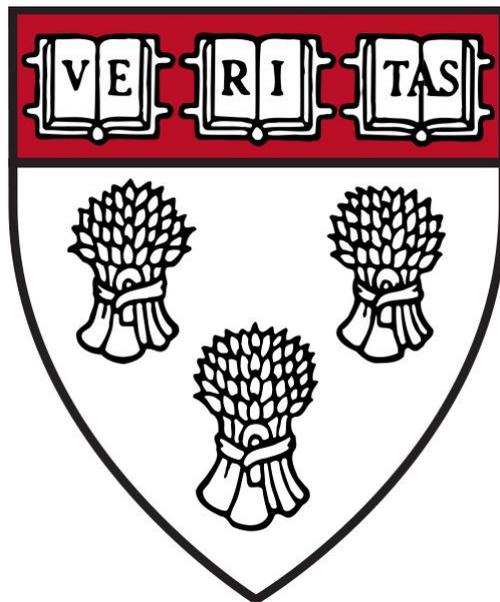


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The Market Realities that Undermined the FTC's Antitrust Case Against Google

By Geoffrey A. Manne and William Rinehart



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I. INTRODUCTION

The FTC completed its antitrust investigation of Google early this year and, finding no evidence of antitrust violations, decided not to bring an enforcement action against the company.¹ Although the FTC has concluded its investigation, Google’s competitors and critics, unhappy with the outcome, continue to raise issues and criticize the FTC’s decision.² In this brief article we discuss the FTC’s decision and assess the merits of the claims still being raised. The critics’ case against Google rests on certain assumptions about how the markets in which it operates function. But these are technology markets, constantly evolving and complex; most assumptions, and even “conclusions” based on data, are imperfect at best. The market realities in which Google operates, while not dispositive, strongly challenge the logic and thus the relevance of many of the contentions still being maintained by Google’s critics.

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1. See FEDERAL TRADE COMM’N, STATEMENT REGARDING GOOGLE’S SEARCH PRACTICES, IN THE MATTER OF GOOGLE INC. 3 (Jan. 3, 2013), available at <http://www.ftc.gov/os/2013/01/130103googlesearchstmtofcomm.pdf>.

2. *FTC Settlement Not the Last Word, Premature*, FAIRSEARCH (Jan. 3, 2013), <http://www.fairsearch.org/general/fairsearch-ftc-settlement-not-the-last-word-premature/>.

The public claims by Google's critics and the best information we have on the thinking of the regulators investigating the company reflect an over-simplified and inaccurate conception of the competitive conditions facing Google and its competitors. The reality is far more complex and, if properly understood, paints a picture that undermines the basic, essential elements of an antitrust case against the company.

Competitors continue to claim that their problems competing with Google are cognizable antitrust problems rather than the consequences of vigorous competition, shifting consumer demand, and their own business decisions. However, there is significant evidence indicating that these claims are unfounded, and the FTC, which undertook the most thorough examination of the issues to date, found unanimously that no antitrust action based on such claims was viable.

II. THE LEGAL STANDARD FOR ANTICOMPETITIVE FORECLOSURE AND ITS APPLICATION TO GOOGLE

The core claim at issue in the FTC's case was that Google's vertical integration of its own content (e.g., maps, shopping comparisons, flight search results) into its organic search results — “search bias” — foreclosed competitors from access to Internet users, resulting in anti-competitive harm.³ The focus of the FTC's inquiry, as it always must be, was the effect on consumers and the market as a whole, not the effect on individual competitors. The fact that Google's actions may have negatively affected some of its competitors is not determinative. For the FTC to have brought a case, it would have needed to show actionable harm — that is, to show conduct with an anticompetitive effect on consumers in the relevant market — not merely the existence of market conditions detrimental to some of Google's competitors. The Commission's statement indicates that it was unable to find evidence sufficient to support the elements of such a claim.

It is crucial to emphasize that antitrust law doesn't require that Google or any other large firm make life easier for competitors or others seeking to access resources controlled by these firms: “Businesses are generally free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing.”⁴

3. See, e.g., *Can Search Discrimination by a Monopolist Violate U.S. Antitrust Laws?*, FAIRSEARCH available at <http://www.fairsearch.org/wp-content/uploads/2011/07/Can-Search-Discrimination-by-a-Monopolist-Violate-U.S.-Antitrust-Laws1.pdf> (“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.”).

4. *Pac. Bell Tel. Co. v. Linkline Commc'n, Inc.*, 552 U.S. 438, 439 (2009); see also *Verizon Commc'n Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 411 (2004) (“[W]e do

Rather, vertical integration of the sort practiced by Google and complained of by its competitors tends to be procompetitive, and antitrust law does not mandate forced access to vertically integrated resources:

Over a century of antitrust jurisprudence, economic study, and enforcement agency practice have produced a well-understood economic analysis of the competitive effects of a vertically integrated firm's "discrimination" in favor of its own products or services, including widespread recognition that such arrangements generally produce significant benefits for consumers.⁵

While the agency properly refrained from bringing a case, its closing statement was nevertheless weak in an important respect: Rather than focusing solely on Google's *conduct* and its anticompetitive *effect*, the FTC's statement also paid particular attention to Google's *intent*. Critics have contended that Google has engaged in exclusionary conduct in search. But in the Commission's final ruling, there was no discussion of whether search bias, demoting a competitor in organic search results, actually constitutes a refusal to deal or really any sort of exclusionary conduct at all. Rather, the discussion focused (appropriately) on effects and procompetitive justification, and (inappropriately) on Google's intent, but not on the nature of the conduct itself.⁶

Where typical potential exclusionary acts like tying, predatory pricing and exclusive dealing may operate to "exclude" (in the dictionary-definition, not antitrust-term-of-art, sense) rivals, search bias as alleged by many of Google's competitors does not. Whether a competitor's results appear in the second or the first place in a search result page, they still appear, and only one result can ever appear first. There is natural scarcity and the vast majority of websites will be "foreclosed" from the first (or second, or third) place even in the complete absence of bias. Thus evidence of search bias, without more, is not evidence of exclusion, regardless of its actual effect.

While there might be a case to be made that a pervasive program of biasing results that systematically demoted search results off the first page is functionally equivalent to exclusion, the claims in the

not believe that traditional antitrust principles justify adding the present case to the few existing exceptions from the proposition that there is no duty to aid competitors.").

5. Joshua Wright, *Defining and Measuring Search Bias: Some Preliminary Evidence*, GEO. MASON L. & ECON. RES. PAPER, No. 12-14 at 5 (2011), available at http://www.law.gmu.edu/assets/files/publications/working_papers/1214DefiningandMeasuringSearchBias.pdf.

6. On the inappropriateness of intent evidence in antitrust cases, see Geoffrey A. Manne & E. Marcellus Williamson, *Hot Docs vs. Cold Economics: The Use and Misuse of Business Documents in Antitrust Enforcement and Adjudication*, 47 ARIZ. L. REV. 609 (2005).

Google case turned primarily on the interpolation of Google's own "Universal Search" results, in a single box or search result, ahead of results from some competitors. It is difficult to see how such conduct could exclude rivals whether it was intended to do so or not.

The problem with the approach to Google's conduct advocated by its critics (and, for that matter, adopted by the FTC, as far as we know from the limited insight into its analysis offered by its short Statement) is that it is, in Joshua Wright's words, "naive foreclosure analysis."⁷ In this analysis, acts that have the effect of excluding rivals are deemed anticompetitive, subject only to balancing against procompetitive justification. But, as Wright points out, if rivals would have been only marginally less foreclosed *absent* such conduct, the case is not actionable. Anticompetitive foreclosure requires not merely *any* foreclosure effect, but *substantial* foreclosure sufficient to prevent rivals from achieving minimum viable scale.⁸ Here that is not the case:

The observed own-content bias appears neither to be extensive enough to prevent rivals from gaining access to distribution nor does it appear to target Google's rivals; rather, it seems to be a natural result of intense competition between search engines and of significant benefit to consumers.⁹

This is not the same thing as saying the conduct has procompetitive justification, although the two will tend to go together. Rather, an appropriate (in Wright's term, "but-for foreclosure") analysis will first ask whether there is in fact substantial exclusion from the complained of conduct judged against a but-for world without such conduct, and, even if the answer is "yes," subsequently ask whether the conduct's procompetitive justifications outweigh its *net* anticompetitive effect, properly measured.¹⁰

One way of addressing this threshold question is to ask whether search results in other search engines that are not subject to the alleged biasing demonstrate the same or similar ordering of results. As Wright shows, on this basis there is no evidence of exclusion resulting

7. Joshua D. Wright, *Moving Beyond Naive Foreclosure Analysis*, 19 GEO. MASON L. REV. 1163 (2012).

8. *Id.* at 1167 ("A consensus has emerged that a necessary condition for anticompetitive harm arising from allegedly exclusionary agreements is that the contracts foreclose rivals from a share of distribution sufficient to achieve minimum efficient scale.").

9. Joshua Wright, *Is Google Search Bias Consistent With Anticompetitive Foreclosure?*, TRUTH ON THE MARKET (Dec. 9, 2011), <http://truthonthemarket.com/2011/12/09/is-google-search-bias-consistent-with-anticompetitive-foreclosure/>.

10. See also Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209, 259 (1986) (noting that whether foreclosure is sufficiently large to be actionable depends critically on the "net foreclosure rate").

from Google's conduct and, indeed, Google's search results demonstrate, if anything, *less* exclusionary effect than its competitors'.¹¹ But the question might also be asked in a different, perhaps more direct fashion: Relative to hypothetical search results pages on Google itself that simply excluded Google's own content results, were competitors foreclosed? The nature of online search and organic search results suggests the answer to this question is likely "no."

As noted, the primary complaint before the FTC and alleged by Google's critics was that Google's insertion of its own content results (rather than simply links to other sites) in preferred positions in results pages yielded anticompetitive exclusion. In this case we are looking primarily at the net effect of the insertion of a single search result — Google's Universal Search Box¹² — into results that otherwise would have looked identical or substantially similar.

It is difficult to argue that the insertion of a single additional search result foreclosed competitors from access to Google's users — regardless of any procompetitive justification or Google's intent. As Wright's analysis shows, competitors may have been in precisely the same relative position absent the alleged exclusionary conduct (as evidenced by analogous search results on non-Google search engines). But more, even compared to a world where Google's own content wasn't available at all — where, in other words, other results were simply moved up one place in the search results — the net foreclosure effect of the addition of Google's Universal Search results would seem to be marginal. As Wright points out:

Search rankings therefore are only a rough proxy; merely because a search engine ranks its own content highly does not indicate that users are more likely to consume that content — in fact, a ranking does not necessarily speak to the rate of consumption at all. Moreover, search rankings are notoriously short-lived — Google's critics complain their rankings are constantly changing. The dynamic nature of search results, combined with the fact that users are not committed to clicking on any given search result — or even to using any given search engine — for any period of time at all, means that "competition is one click away." Accordingly, even this more accurate

11. Joshua D. Wright, *Defining and Measuring Search Bias: Some Preliminary Evidence*, *supra* note 5, at 2.

12. See Danny Sullivan, *Google 2.0: Google Universal Search*, SEARCH ENGINE LAND, (May 16, 2007), <http://searchengineland.com/google-20-google-universal-search-11232>.

measure of foreclosure likely overstates the extent to which rivals are in fact excluded from competing.¹³

The point is entwined with the analysis of procompetitive justification on which the Commission did, appropriately, focus, and it may seem like semantics to differentiate between conduct that “sufficiently” excludes and conduct that has exclusionary effect that outweighs its procompetitive benefits. But a simple balancing of the procompetitive and anticompetitive effects of particular conduct without any sort of threshold filter and without a proper measure of the net foreclosure effect at issue would sweep in far too much desirable conduct and deter competition. Aggressive competition—say, investment in building and successfully marketing a better product—may result in “exclusion” of competitors from a market and may even cause them to exit a market entirely. But no one would argue that such conduct should be investigated or prohibited by antitrust enforcers. Reliance solely on a balancing of effects from allegedly exclusionary conduct makes potentially illegal all business conduct and risks false positives and the over-deterrence of consumer welfare-enhancing conduct.

And as it happens, the evidence strongly suggests that, indeed, Google’s complaining competitors have not been prevented from obtaining scale. For example, as of September 2012, Google ranks 7th in visits among meta-search travel sites, with a mere 1.4% of such visits, while Kayak, a founding member of the anti-search-bias group FairSearch, sits in first with a whopping 61% – and this figure is up from 53% six months after Google entered the travel search business.¹⁴ Kayak also receives 75% of its traffic through direct navigation; a mere 10% of its traffic in the first half of 2012 was directed through search.¹⁵ Expedia, another FairSearch founder and vocal Google critic, is the largest travel company in the world, and it has continued to grow since Google’s entry into travel search.¹⁶

13. Wright, *supra* note 7, at 1197 (citing Benjamin Edelman & Benjamin Lockwood, *Measuring Bias in “Organic” Web Search* (Jan. 19, 2011), <http://www.benedelman.org/searchbias> (“The strongest example for Google is the term ‘email.’ Gmail, the first result, receives 29% of users’ clicks, while Yahoo mail, the second result, receives 54%.”)).

14. Kevin May, *Google Flight Search One Year On - No Wonder Rivals Can Safely in Their Beds at Night*, TNOOZ (Oct. 9, 2012), <http://www.tnooz.com/2012/10/09/news/google-flight-search-one-year-on-no-wonder-rivals-can-sleep-safely-in-their-beds-at-night/>.

15. Josh Peterson, *Google’s Victims Thriving, Despite Telling Regulators Otherwise*, DAILY CALLER (Sept. 20, 2012), <http://dailycaller.com/2012/09/20/googles-victims-thriving-despite-telling-regulators-otherwise/>.

16. Drew DeSilver, *Expedia.com Dominates Online Travel Bookings*, THE SEATTLE TIMES (June 12, 2012), http://seattletimes.com/html/business/technology/2018416421_bestexpedia13.html; Andy Batts, *Expedia Growing Rapidly: Stock to Scale New Highs*, SEEKING ALPHA (Aug. 6, 2012), <http://seekingalpha.com/article/784471-expedia-growing-rapidly-stock-to-scale-new-highs>.

Perhaps more interestingly, Nextag.com, another vocal Google critic, complains that Google's conduct has forced it to shift its strategy from attracting traffic through Google's organic search results to other sources, including paid ads on Google.com. Rather than kill the company, however, this change in strategy helped it parlay its experience with new data sources into a successful new business model.¹⁷

Meanwhile, Bing touts its advantages over Google and new entrants in the general search game including, DuckDuckGo and Blekko, have seen triple digit growth and attract fervent followers.¹⁸

Whether Google's conduct had anticompetitive effect or not, antitrust law does not bar a company from making life a little harder for its rivals, but only from impairing competition by engaging in exclusionary conduct that prevents competitors from reaching efficient scale. As we discuss in more detail below, the evidence before the FTC (insofar as the publicly available evidence relentlessly put forth by competitors and other critics during the pendency of the case represents the evidence before the agency) was dramatically insufficient to demonstrate this.

III. GOOGLE'S RELEVANT MARKET

One crucial aspect of any antitrust action is the determination of the relevant market in which to analyze complained-of conduct. Although market definition has a complicated place in exclusion cases, a proper unilateral effects analysis will incorporate, whether explicitly or not, identification of potentially foreclosed competitors and an assessment of market dynamics in order to assess whether and how much consumers may be affected by the alleged exclusion.¹⁹ Without properly defining the market, any judgment of competitive effects will be flawed.²⁰

In the first place, the determination that a defendant is a monopolist (and thus subject to antitrust-based legal limitations on its business

17. Steve Lohr & Claire Cain Miller, *Google Casts a Big Shadow on Smaller Web Sites*, N. Y. TIMES at B1 (Nov. 3, 2012), available at <http://www.nytimes.com/2012/11/04/technology/google-casts-a-big-shadow-on-smaller-web-sites.html>.

18. Matt McGee, *Blekkos Traffic is Up Almost 400 Percent*, SEARCH ENGINE LAND (Apr. 17, 2012) <http://searchengineland.com/blekkos-traffic-spiking-2012-118728>; DUCKDUCKGO, <http://duckduckgo.com/traffic.html>.

19. See, e.g., Steven C. Salop, *The First Principles Approach to Antitrust, Kodak, and Antitrust at the Millennium*, 68 ANTITRUST L.J. 187, 188 (2000) ("Although market power and market definition have a role in antitrust analysis, their proper roles are as parts of and in reference to the primary evaluation of the alleged anticompetitive conduct and its likely market effects. They are not valued for their own sake, but rather for the roles they play in an evaluation of market effects.")

20. FTC, SINGLE FIRM CONDUCT: MONOPOLIZATION DEFINED, available at http://www.ftc.gov/bc/antitrust/monopolization_defined.shtm ("Judging the conduct of an alleged monopolist requires an in-depth analysis of the market and the means used to achieve or maintain the monopoly.")

practices), requires an assessment of the firm's power to restrict its own output or that of competing firms — an analysis that requires identifying which firms are, in fact, competitors. But more importantly, for purposes of the foreclosure analysis at issue in the Google case, it also requires identifying the range of mechanisms — sources of input or channels of distribution — available to competitors that serve to mitigate an alleged monopolist's ability to constrain competitors' output (by raising rivals' costs).

For casual purposes, Google is said to operate in the “online search” and/or “online search advertising” markets. But for purposes of antitrust analysis, this causal definition is insufficient, and both of these are too narrow.

To say that Google dominates “search” or “search advertising” misses the mark precisely because there is nothing especially anti-trust-relevant about either search or search advertising. Because of their own unique products, innovations, data sources, business models, entrepreneurship and organizations, many companies that do not fall into either category have challenged and will continue to challenge the dominant company — and the dominant paradigm — in a shifting and evolving range of markets.

A more accurate market definition would perhaps include the range of firms that participate in the market for “targeted eyeballs” — that offer any of a range of products attractive to consumers (general search, product search, social networking, emailing, online retailing, etc.), the use of which generate data, context, or secondary actions that enable the firm to target advertising to specific, likely consumers. While undeniably significant in this market, Google is not likely dominant. And Amazon — not Bing or any other search engine — may be its most significant competitor:

In 2009, nearly a quarter of shoppers started research for an online purchase on a search engine like Google and 18 percent started on Amazon, according to a Forrester Research study. By last year, almost a third started on Amazon and just 13 percent on a search engine. Product searches on Amazon have grown 73 percent over the last year while searches on Google Shopping have been flat, according to comScore.²¹

21. Claire Cain Miller & Stephanie Clifford, *Google Struggles to Unseat Amazon as the Web's Most Popular Mall*, N.Y. TIMES AT B1 (Sept. 9, 2012), available at <http://www.nytimes.com/2012/09/10/technology/google-shopping-competition-amazon-charging-retailers.html>.

To the extent that consumers use Google, they do so largely to find information on the web. But this is in no way confined to search. Facebook, Twitter, Amazon and even iTunes, among many others, all act as functional equivalents in various contexts.

And there is another sense in which Google may not be as dominant as it looks — it depends on what the meaning of “search” is. Data is not readily available, but common sense tells us that consumers “search” for music more often on iTunes than on Google (and certainly they actually purchase music there significantly more often). Likewise for books (and all manner of retail goods) on Amazon (and here we do have some data, as noted above).

IV. MARKET DEFINITION FOR ADVERTISERS

Some critics have argued that Google’s conduct not only foreclosed its competitors from access to Internet users, but that, by doing so, Google also foreclosed advertisers from efficient access to online platforms other than Google.²² The claims are unsupported. For advertisers, the specific technology that supports their ads is not relevant; rather, advertisers care about effectiveness and the returns on an entire campaign. The sorts of targeting facilitated by social media, for example, may be as or even more effective than search, and, increasingly, there is evidence that advertisers are looking more and more to these other channels to reach potential customers.²³ As one commentator notes, “[t]he danger to Google . . . is that as social networking, smartphones and tablets increasingly come to dominate the Internet, Google’s chance to earn advertising revenues from searching will shrink along with its influence.”²⁴

Thus, for advertisers, the case for a search-specific market is especially weak. Advertisers don’t care whether consumers see their ads and navigate to their sites (or buy their wares) via a search page, a friend’s Facebook post, or a porn site; virtually any blank space on a web page (or in an app) will do. As long as advertisers are able to place ads that successfully reach those users who are most interested in buying what they’re selling, the specific mechanism by which the

22. See, e.g., *Google’s Transformation From Gateway To Gatekeeper: How Google’s Exclusionary And Anticompetitive Conduct Restricts Innovation And Deceives Consumers*, FAIRSEARCH at 39, <http://www.fairsearch.org/wp-content/uploads/2011/10/Googles-Transformation-from-Gateway-to-Gatekeeper.pdf>.

23. Samantha Felix, *Google, Again, Bested by a Rival in Terms of Ad Reach*, BUSINESS INSIDER (Oct. 26, 2012, 10:34 AM), <http://www.businessinsider.com/guess-who-the-top-ad-network-was-in-september-2012-10>; *Top 10 Ad Networks in U.S.*, COMSCORE DATAMINE (Oct. 11, 2010), <http://www.comscore.com/2010/10/top-10-ad-networks-in-u-s/>.

24. Keith Woolcock, *Is Google in Danger of Being Shut Out of the Changing Internet?*, TIME.COM (Feb. 1, 2012), <http://business.time.com/2012/02/01/are-we-seeing-the-beginning-of-the-end-for-google/>.

matching of users with advertisers is accomplished is of no competitive significance.

In other words, Google competes in the market for targeted eyeballs: a market aimed to offer up targeted ads to interested users. Search is important in this, but it is by no means alone, and there are myriad (and growing) other mechanisms to access consumers online.²⁵ The claim, then, that Google's conduct amounted to actionable foreclosure, even if it did make it more difficult for search competitors to access consumers (and thus attract advertisers) via Google's platform, is impossible to maintain. The advertising market — both in total and even if limited only to online advertising — is enormous and highly competitive, and Google represents a relatively small piece of it. The vast majority of competing advertising outlets, ranging from all offline platforms to online behemoths like Facebook, Amazon, and Twitter, are in no way affected, let alone foreclosed, by Google's alleged bias.

As noted above, despite critics' efforts to focus attention on the search market more narrowly, the broader online advertising market is significant and growing in importance. As one commenter put it talking about Amazon's move into display advertising:

Facebook knows who your friends are. Google knows what you're interested in finding on the [I]nternet. Amazon knows what you've bought, and has a pretty good idea of what you might want to buy next. If you were an advertiser, which company's data sounds most valuable to you? If you had a product you wanted to sell, which of those things would you most want to know?²⁶

It hardly matters that Amazon's matching mechanism results in display ads rather than search ads. As long as consumers are responsive to both types of ads, advertisers will substitute between them whenever the return on investment of one exceeds that of the other. And display advertising is increasingly important to advertisers. As Robert Hof notes:

Gartner's report has some interesting detail about the changing mix of mobile ad types and which parts of the world growth is coming from. Display ads will

25. Danny Sullivan, *Top Internet Activities? Search & Email, Once Again*, SEARCH ENGINE LAND (Aug. 9, 2011), <http://searchengineland.com/top-internet-activities-search-email-once-again-88964>.

26. Marcus Wohlsen, *Amazon's Next Big Business is Selling You*, WIRED (Oct. 16, 2012), <http://www.wired.com/business/2012/10/amazon-next-advertising-giant/>.

grow faster than search ads, overtaking them by 2016.

And where is all this mobile ad money coming from? Not surprisingly, print—especially newspapers—as well as radio.

Not only are advertisers increasingly paying attention to display advertising in lieu of search advertising — a dynamic particularly important in the mobile environment — but this focus (as well as the prior focus on search advertising itself) comes at the expense of offline advertising.²⁷

Claims that online search is a distinct, relevant market, separate from the broader advertising market, have long been suspect. As Avi Goldfarb and Catherine Tucker demonstrated empirically (in an article first distributed as a working paper in 2007), online and offline ads can be substitutes, and pricing of online display advertising, especially in niche markets, is sensitive to the availability of offline alternatives.²⁸ “[N]o doubt these interactions and cross-elasticities are complicated, nuanced, and difficult to detect, isolate, and identify with certainty,”²⁹ but that they are complicated does not mean they don’t exist or that they should be ignored in antitrust analysis.

V. GOOGLE’S PRODUCT INNOVATION AND ANTITRUST

The ability to generate revenue from online matchmaking, whether the matching is built on search technology, social media or something else, turns on the quality of the match. All else equal, an advertiser interested in selling a product will be willing to pay more for an ad viewed by a user who can be reliably identified as being interested in buying its product. In other words, the most successful targeted advertising will match not only consumers’ interests with advertisers’ products, but also consumers *interested in making a purchase* with advertisers’ products.

Google’s primary mechanism for attracting users to match with advertisers, general search, is substantially about information and not commerce, and its original “ten blue links” search model is not partic-

27. Rob Hof, *Display Ads To Eclipse Search As Mobile Revenues Take Off*, ROB HOF’S BLOG (Jan. 17, 2013), <http://robhof.com/2013/01/17/display-ads-to-eclipse-search-as-mobile-revenues-take-off/>.

28. Avi Goldfarb & Catherine Tucker, *Search Engine Advertising: Channel Substitution When Pricing Ads to Context*, 57 MANAGEMENT SCIENCE 458 (2011).

29. Manne & Wright, *Google and the Limits of Antitrust: The Case Against the Antitrust Case Against Google*, 34 HARV. J. L. & PUB. POL’Y 171 (2011).

ularly well-suited to capturing these valuable product searchers. While Google has developed a remarkable technology for inferring consumers' likely interests from their search activity, its core technology is relatively ineffective at differentiating a user who searches for "Nikon camera" because she is interested in buying a camera from one who is researching the history of the Nikon camera or looking for a lost instruction manual. In fact, Google doesn't even bother to serve up ads for 70% of the searches run on its site precisely because these users are not (as far as Google knows) looking for anything monetizable.³⁰ And this creates a real vulnerability for Google, one it understandably tries to minimize by finding ways to attract and differentiate more monetizable searches.

In acknowledgement of this, Google has attempted to better identify more valuable searches with innovations like Google Shopping, Zagat restaurant ratings, and Flight Search. But its success in adapting has been rather meager. One study shows that the general search query breakdown for search engines is: 50 percent informational queries, 30 percent navigational queries, 10 percent product queries, and 10 percent services queries.³¹ It's these last two categories of search that attract advertisers, and while the vast majority of searches on Amazon, for example, are product queries, Google's share of these valuable searches is paltry by comparison.³²

Ironically, and important for understanding the competitive significance of Google's complained-of conduct, Google's relatively unsuccessful efforts to bolster its ability to offer (and differentiate) product and service searches are precisely the changes in Google's business model that have brought about the charges against it. But viewed from the point of view of the competitive dynamics of the broader market in which Google operates, these allegedly exclusionary acts look like sensible, even necessary, product design decisions. Although competitors might prefer that Google's products operate differently, those wishes are not a sound basis for antitrust liability, as the FTC realized.

Recent doctrine supports this argument and highlights the importance for antitrust jurisprudence of avoiding the costly error of over-deterring welfare-enhancing product innovations:

There is no room in this analysis for balancing the benefits or worth of a product improvement against

30. Mike Grehan, *Note to FTC: Google Satisfies Information Needs Way More than Shopping Needs*, SEARCH ENGINE WATCH (Sept. 25, 2012), <http://searchenginewatch.com/article/2207725/Note-to-FTC-Google-Satisfies-Information-Needs-Way-More-Than-Shopping-Needs>.

31. Jansen & Booth, *Classifying Web Queries by Topic and User Intent*, http://faculty.ist.psu.edu/jjansen/academic/jansen_user_intent.pdf.

32. See also Miller & Clifford, *supra* note 21, at 7.

its anticompetitive effects. If a monopolist's design change is an improvement, it is "necessarily tolerated by the antitrust laws.

* * *

To weigh the benefits of an improved product design against the resulting injuries to competitors is not just unwise, it is unadministrable. There are no criteria that courts can use to calculate the "right" amount of innovation, which would maximize social gains and minimize competitive injury. A seemingly minor technological improvement today can lead to much greater advances in the future. The balancing test proposed by plaintiffs would therefore require courts to weigh as-yet-unknown benefits against current competitive injuries.³³

As one of us has noted elsewhere, the factual and economic basis for claims of foreclosure based on product innovations in technology markets is extremely weak:

The problem with [foreclosure arguments based on product innovations] is that they assume, incorrectly, that there is no opportunity for meaningful competition with a strong incumbent in the face of innovation, or that the absence of competitors in these markets indicates inefficiency The traditional indicia of dominance are often easy to satisfy in the face of successful product innovation, especially in the New Economy. But it does not follow that dominance presents the same problems as it might in other facets of the economy.

* * *

There is an unfortunate post hoc reasoning to these product innovation cases, where a technological standard or a dominant market share attributable to a product innovation is taken for granted, and arguments are made (and accepted) that competition is possible only with access to (or the ability to clone)

33. *Allied Orthopedic Appliances Inc. v. Tyco Health Care Group LP*, 592 F.3d 991, 1000 (9th Cir. 2010). See also Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. COMPETITION L. & ECON. 153, 170–178 (2010).

the dominant or standardized innovation. The problem with this sort of argument, as much of the network effects literature makes clear, is that competition on the merits is still possible even in the face of dominant products or standards.³⁴

To define the relevant market, or to look for competitive effects, in terms of the particular mechanism that accomplishes the matching of consumers and advertisers does not reflect the substitutability of other mechanisms that do the same thing but simply aren't called "search." Likewise, to identify Google's efforts to compete within this broader market that defines its competitive space through product innovations designed to benefit consumers and maintain its viability is similarly misguided.

VI. THE DIFFICULTIES OF ANTITRUST ON THE INTERNET

Internet monopolies are notoriously fleeting despite repeated (and eventually undermined) claims to the contrary. Competition is more rampant — and monopolies more fleeting — than is often assumed. In part this is because barriers to entry are low. For the same reason that Google and Facebook are competitors even though they operate in different "markets" using different technologies, online dominance is difficult to maintain: technological innovation inevitably serves to marginalize specific technological means of accomplishing desired functions online, rendering incumbents susceptible to decimating, and often unexpected, competition.³⁵

Low barriers to entry are a key reason for the extensive entrepreneurial activity on the web, further evidenced by the churn of the Internet ecosystem's largest players. In the two decades since the Internet's commercial viability, consumers have made and broken a number of these "unassailable" titans. AOL's merger with Time Warner, the biggest in history, was a colossal failure in part because new technology (particularly new content distribution technologies) undermined the firm's lock on Internet access and content delivery.³⁶ Yahoo! and AltaVista were early leaders in keyword search, only to be superseded by Google when they failed to keep up with spam and Google's technological acuity. MySpace, which ranks as one of Rupert Murdoch's biggest losses, was yet another "monopoly" that de-

34. Manne & Wright, *supra* note 33, at 175–76.

35. See generally LARRY DOWNES, *THE LAWS OF DISRUPTION: HARNESSING THE NEW FORCES THAT GOVERN LIFE AND BUSINESS IN THE DIGITAL AGE* (2009).

36. Tim Arango, *How the AOL-Time Warner Merger Went So Wrong*, N. Y. TIMES at B1 (Jan. 10, 2010), available at <http://www.nytimes.com/2010/01/11/business/media/11merger.html>.

manded antitrust scrutiny.³⁷ But the “market” that MySpace allegedly alone occupied turned out to be considerably bigger than its specific (music and entertainment) approach to social networking and the site quickly lost its dominance to innovative adaptations of its model like Facebook and Twitter.

Today Google is another behemoth whose particular attributes can’t, it is alleged, be duplicated without forced access to Google itself. One common refrain from Google’s critics is that Google’s access to immense amounts of data used to increase the quality of its targeting presents a barrier to competition that no one else can match, thus protecting Google’s “unassailable” monopoly.³⁸ But scale comes in many ways. In the first place, data can be bought; there’s plenty out there, and lots of it is for sale:

Data about consumer preferences and behavior — aggregated and (much to the annoyance of privacy advocates) individualized — is also a commodity in our modern economy. Whether credit and commercial transaction data . . . , product preference and consumer satisfaction data . . . or the emerging “big data” marketplace, data can easily be bought, in bulk, for cheap.³⁹

It may be the case that no other general search engine can match Google’s data primacy in general search. But that doesn’t mean either that Google’s model of search is inevitable and will be perpetual, or that its core functions — information retrieval and targeted advertising — can’t be accomplished through other technological means, using other sources of data.

Serendipitously, Facebook formally entered into the search space just a week after the Google investigation was closed.⁴⁰ It was not all that surprising. Google’s method of search is probably the most effective means for a user to garner information on the open web, whereas Facebook has a massive structured data set for the social web. Facebook’s Graph Search is still a form of keyword search, but its results come from indexing millions of individual social interactions in a web-based environment. It is rumored that the company will expand

37. Victor Keegan, *Will MySpace Ever Lose Its Monopoly?*, THE GUARDIAN (Feb. 7, 2007), <http://www.guardian.co.uk/technology/2007/feb/08/business.comment>.

38. See, e.g., Pamela Jones Harbour & Tara Koslov, *Section 2 in a Web 2.0 World: An Expanded Vision of Relevant Product Markets*, 76 ANTITRUST LAW JOURNAL 769, 777–78 (2010).

39. Glenn Manishin, *Why an FTC Case Against Google is a Really Bad Idea (Part III)*, PROJECT DISCO (Oct. 4, 2012), <http://www.project-disco.org/competition/why-an-ftc-case-against-google-is-a-really-bad-idea-part-iii/>

40. <https://www.facebook.com/about/graphsearch>.

its offering in the coming months to include Facebook posts and the extended ad network, a logical move given the potential in that data.⁴¹ If Facebook's search successfully catches on with consumers, it will have a search feature that makes an enormously valuable trove of information available to consumers and that reflects real time user interest — a viable consumer discovery tool to rival or exceed Google's.

Meanwhile, Google's chief competitor in traditional keyword search, Microsoft, is hardly hurting for data. In fact, Microsoft is even, quite creatively, culling data directly from Google itself,⁴² despite its claims to the contrary.⁴³ Furthermore, Microsoft has teamed up with Facebook to provide additional results for Facebook's Graph Search, tying Bing into the social search space and Facebook into the general Internet search space. Bing, Facebook, and other recent entrants in the general search business have enjoyed success precisely because they are able to obtain the inputs (in this case, data) necessary to develop competitive offerings and because they are able to develop innovative technologies capable of satisfying consumer and advertiser demand as well as, or better than, Google.

We've been here before in the relatively short history of high-tech antitrust. Microsoft's market position was unassailable...until it wasn't. Even at the time, many could have told you that its perceived dominance was fleeting, as many did.⁴⁴ Lawrence Lessig, one of those charged with assessing the claims against Microsoft, even apologized for "blowing it" by not anticipating potential competition in the desktop market—and he was talking about Linux, not Apple, which is now one of the world's most valuable companies.⁴⁵ Apple's success arose from an innovative and unexpected business model that deviated from its once-dominant rival's, and not on a business model that the DOJ's antitrust case against the company either facilitated or anticipated.⁴⁶

The notion of a durable monopoly in this evolving and uncertain environment is fanciful, and the claim of consumer harm difficult to support. Antitrust enforcers' imprecise predictions about the future in the Microsoft case point up a significant problem for antitrust: the risk

41. John Batelle, *Facebook Is No Longer Flat: On Graph Search*, JOHN BATELLE'S SEARCH BLOG (Jan. 15, 2013), <http://battellemedia.com/archives/2013/01/facebook-is-no-longer-flat.php>.

42. Danny Sullivan, *Google: Bing is Cheating, Copying Our Search Results*, SEARCH ENGINE LAND (Feb. 1, 2011), <http://searchengineland.com/google-bing-is-cheating-copying-our-search-results-62914>.

43. Harry Shum, *Thoughts on Search Quality*, BING (Feb. 1, 2011), http://www.bing.com/community/site_blogs/b/search/archive/2011/02/01/thoughts-on-search-quality.aspx.

44. *See, e.g.*, STAN J. LIEBOWITZ & STEPHEN F. MARGOLIS, *WINNERS, LOSERS & MICROSOFT* (1999).

45. Lawrence Lessig, *I Blew It on Microsoft*, WIRED (Jan. 2007), <http://www.wired.com/wired/archive/15.01/posts.html?pg=6>.

46. Fred Vogelstein, *The Untold Story: How the iPhone Blew Up the Wireless Industry*, WIRED (Jan. 9, 2008), http://www.wired.com/gadgets/wireless/magazine/16-02/ff_iphone.

and costs of antitrust “getting it wrong” and therefore impairing, rather than promoting, the competitive process. Courts are invariably beleaguered by Type 1 and Type 2 errors when trying to determine whether conduct is anticompetitive or procompetitive.⁴⁷ The first is an error of over-deterrence, the second is one of under-deterrence, but correcting for these errors has an unequal social cost. It is much easier in the case of a false negative, as markets have a tendency in the long run to correct these problems, whereas the issues from a regulatory fiat tend to linger. Jurisprudence is replete with examples, including several of the Warren Court’s long-ascendant horizontal merger decisions, such as *Von’s Grocery*,⁴⁸ and the Court’s long-held, but recently dismissed *per se* prohibition against resale price maintenance.⁴⁹ Meanwhile, Type 1 errors are more likely to occur, and “antitrust lawyers and economists have a long and storied history of systematically assigning anticompetitive explanations to conduct that is novel and not well understood.”⁵⁰

VII. CONCLUSION

There are two lessons to be drawn from this discussion. First, put into appropriate context, Google’s alleged search bias does not amount to anticompetitive foreclosure and the FTC was right to end its investigation without filing a complaint. Second, these are dynamic markets and it is a fool’s errand to identify the power or significance of any player in these markets based on data available today. Such data is already out of date between the time it is collected and the time it is analyzed. Competition with Google may not and need not look exactly like Google itself, and some of this competition will usher in innovations that Google itself won’t be able to replicate. But this doesn’t make it any less competitive. Competition need not look identical to be competitive; that’s what innovation is all about.

47. See generally Manne & Wright, *supra* note 33, at 11.

48. *U.S. v. Von’s Grocery Co.*, 384 U.S. 270 (1966)

49. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

50. Manne & Wright, *supra* note 33, at 195. See also Ronald Coase, *Industrial Organization: A Proposal for Research*, in 67 POLICY ISSUES AND RESEARCH OPPORTUNITIES IN INDUSTRIAL ORGANIZATION (Victor R. Fuchs ed., 1972) (“[I]f an economist finds something—a business practice of one sort or another—that he does not understand, he looks for a monopoly explanation. And as in this field we are very ignorant, the number of understandable practices tends to be very large, and the reliance on a monopoly explanation, frequent.”).