

The Real Reason Foundem Foundered

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A pair of recent, longform articles in the *New York Times Magazine*¹ and *Wired UK*² – the latest in a long string of such articles – chronicle the downfall of British price comparison site, Foundem, and attribute its demise to anticompetitive behavior on the part of Google.

Unfortunately, the media’s hagiographies of Foundem and its founders, Shivaun and Adam Raff, approach the antitrust question as if it were imbued with the simple morality of a David vs. Goliath tale. The reality is far more complicated. In fact, these articles misunderstand and misstate the critical economic, business, and legal realities of Google Search, of Foundem’s claims of harm, and of the relationship between the two.

The “gatekeeper” epithet

At one point in the *New York Times* piece, its author, Charles Duhigg, writes that

lawmakers from both political parties have started questioning how these tech giants grew so powerful so fast.... When does a megacompany’s behavior become so brazen that it violates the law?³

Duhigg’s implication is clear: in his view, at least, “megacompanies” like Google became “so powerful so fast” because of bad behavior. And to the question, when does their conduct (finally) become actionable?, Duhigg suggests, “[w]hen a company

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¹ Charles Duhigg, *The Case Against Google*, NEW YORK TIMES MAGAZINE (Feb. 20, 2018), <https://www.nytimes.com/2018/02/20/magazine/the-case-against-google.html>.

² Rowland Manthorpe, *Google’s nemesis: meet the British couple who took on a giant, won... and cost it £2.1 billion*, WIRED UK (Feb. 14, 2018), <http://www.wired.co.uk/article/fine-google-competition-eu-shivaun-adam-raff>.

³ Duhigg, *The Case Against Google*, *supra* note 1.

grows so powerful that it becomes a gatekeeper, and uses that might to undermine competitors.”⁴

This “gatekeeper” notion has become fashionable of late — at least in the media and among a growing cadre of proponents of populist antitrust; it is the basis of many complaints about Google and about the tech industry in general. And many of these criticisms end the same way: with calls for antitrust or other regulation to mandate some form of “neutrality,” or even the outright break up of large, American tech companies.⁵

In fact, a virtual journalistic cottage industry consists of articles lauding Margrethe Vestager, the EU’s competition commissioner, who concluded the EU’s seven-year antitrust investigation into Google’s treatment of comparison shopping sites like Foundem.⁶ Vestager’s case was the only one among a multitude of antitrust investigations of Google’s search practices around the world (including several in the US) to culminate in a finding of liability.⁷ (India’s investigation subsequently resulted in a ruling against Google, as well, although in a far more measured and limited fashion).⁸ The EU’s decision was built, in key respects, on the basis of the Foundem story.

⁴ *Id.*

⁵ See, e.g., Jonathan Taplin, *Is It Time to Break Up Google?*, NEW YORK TIMES (Apr. 22, 2017), <https://www.nytimes.com/2017/04/22/opinion/sunday/is-it-time-to-break-up-google.html>; Scott Galloway, *Silicon Valley’s Tax-Avoiding, Job-Killing, Soul-Sucking Machine*, ESQUIRE (Feb. 8, 2018), <https://www.esquire.com/news-politics/a15895746/bust-big-tech-silicon-valley/>; Tucker Carlson, Segment: “Google should be regulated like the public utility it is,” TUCKER CARLSON TONIGHT (Fox News television broadcast Aug. 14, 2017), available at <https://www.youtube.com/watch?v=dUeqjPd560>.

⁶ See, e.g., Sam Schechner and Natalia Drozdiak, *The Woman Who Is Reining In America’s Technology Giants*, WALL STREET JOURNAL (Apr. 4, 2018), <https://www.wsj.com/articles/the-woman-who-is-reining-in-americas-technology-giants-1522856428>; Rowland Manthorpe, *Europe vs Silicon Valley: behind enemy lines with the woman deciding Google’s fate*, WIRED UK (Jun. 27, 2017), <http://www.wired.co.uk/article/who-is-margrethe-vestager>.

⁷ See *Press Release: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service*, EUROPEAN COMMISSION (Jun. 27, 2017), available at http://europa.eu/rapid/press-release_IP-17-1784_en.htm.

⁸ See Geoffrey Manne, *Google’s India case and a return to consumer-focused antitrust*, TRUTH ON THE MARKET (Feb. 8, 2018), <https://truthonthemarket.com/2018/02/08/return-to-consumer-focused-antitrust-in-india/> (“The CCI [Competition Commission of India] rejected many more claims than it adopted, and it carefully tailored its remedy to the welfare of consumers, not the lamentations of competitors. Unlike the EU, the CCI’s finding of a violation is tempered by its concern for avoiding harmful constraints on innovation and product design, and its remedy makes this clear. Whatever the defects of India’s decision, it offers a welcome return to consumer-centric antitrust.”).

But the gatekeeper/neutrality motif is overly simplistic and at odds with the economic realities of the markets it purports to describe. In the modern technological age, the cutting-edge antitrust questions must account for the complex relationships among multi-sided platforms and their users, in fast-evolving and uncertain markets. This interdependency and fluidity seriously complicates efforts even to meaningfully *define* markets, let alone to ascribe lasting power to any players within them.

In fact, high-tech markets are frequently characterized by “big-bang disruption,”⁹ and entire business models can be (and have been) wiped out practically overnight – not by anticompetitive foreclosure, but by the natural course of competition itself.

But if the import of the Foundem story has been misconstrued by journalists and EU regulators, it is useful in illuminating what may *actually* be the fundamental question regarding the antitrust fortunes of the platform economy:

What, if anything, does a successful platform like Google “owe” to the companies that make themselves dependent upon it?

The Foundem fairytale

In early 2006, Shivaun and Adam Raff launched Foundem (Foundem.co.uk), a shopping directory that could compare prices for products listed on other ecommerce sites. Foundem’s core (and sole) feature was a “vertical search” algorithm that, at least according to its founders, outperformed other such algorithms.

Vertical search refers to searching not just for sites that contain certain content but for specific content within a specific category of website. Instead of directing users to websites that happen to mention grey overcoats, for instance, a vertical search might direct users specifically to sites that *sell* grey overcoats, and identify, and sort its results by, the price or other attribute of the coats on offer.

Like any commercial website among the hundreds of millions of sites on the Web, a comparison shopping engine like Foundem must attract users in order to remain viable – in the case of comparison shopping sites, by generating product listing fees and/or advertising revenue, which are generally paid on a per-click basis.

⁹ LARRY DOWNES AND PAUL NUNES, BIG-BANG DISRUPTION: STRATEGY IN THE AGE OF DEVASTATING INNOVATION (2014).

Enter Google. According to Foundem, it would be extremely difficult for it to succeed without Google:

[T]here is no substitute for [general search engine] traffic: web sites can supplement search engine traffic by traditional forms of advertising, but they cannot replace it.¹⁰

Unfortunately, following a significant update to Google's search algorithm in March 2006, Foundem dropped in Google's search results. Claiming that their site had been improperly "demoted," the Raffs spent what sounds like a frustrating three-year period trying to find someone at Google to re-list them:

"It just felt so unfair," Shivaun told me. "We had great technology."¹¹

But to the Raffs' apparent surprise, great technology wasn't enough. *With a single algorithm update* Foundem was virtually derailed – and the Raffs couldn't find anyone at Google to return their site to its previous status.

Finally, in 2009, and at the suggestion of a Microsoft-backed PR firm,¹² the couple filed a complaint with the European Commission (EC) accusing Google of violating EU competition law. In 2010 the Commission began a formal investigation based on the Raffs' complaint, along with a few others like it that were similarly prodded, funded, or brought directly by Microsoft, which was then waging a regulatory war against Google.¹³

In 2011, more than a year into the EC investigation, Google implemented another algorithm change targeting "low quality" sites, nicknamed "Panda."¹⁴ According to the Raffs, "Panda had [] a devastating impact on Google's price comparison competitors (including Foundem)."¹⁵ Notably, Google's own comparison shopping service, which had been improved dramatically since its unsuccessful "Froogle" days,

¹⁰ Adam Raff & Shivaun Raff, *The European Commission's Google Search Case: A Timeline of Significant Events* (Jan. 21, 2018) at note 8, available at http://www.foundem.co.uk/Foundem_Google_Timeline.pdf.

¹¹ Duhigg, *The Case Against Google*, *supra* note 1.

¹² See Richard Waters & Nikki Tait, *Microsoft in spotlight over Google case*, FINANCIAL TIMES (Mar. 4, 2010), <https://www.ft.com/content/ad1c2094-27bf-11df-863d-00144feabdc0>.

¹³ See Danny Hakim, *Microsoft, Once an Antitrust Target, Is Now Google's Regulatory Scold*, NEW YORK TIMES (Apr. 15, 2015), <https://www.nytimes.com/2015/04/16/technology/microsoft-once-an-antitrust-target-is-now-googles-regulatory-scold.html>.

¹⁴ Amit Singhal and Matt Cutts, *Finding more high-quality sites in search*, GOOGLE BLOG (Feb. 24, 2011), <https://googleblog.blogspot.com/2011/02/finding-more-high-quality-sites-in.html>.

¹⁵ *Foundem Timeline*, *supra* note 10 at 21.

“is not subject to the same ranking mechanisms as its competitors, including adjustment algorithms such as... Panda,” as the EC’s Google Shopping decision points out.¹⁶ Panda became the centerpiece of the Commission’s case.

In 2017 – after similar investigations were closed in the U.S.¹⁷ and Canada¹⁸ with no finding of anticompetitive conduct – Vestager finally concluded the European Commission’s investigation, finding that “Google has abused its market dominance as a search engine by giving an illegal advantage to another Google product, its comparison shopping service.”¹⁹

But was Foundem’s failure really the result of anticompetitive “gatekeeping” on Google’s part? Or could it simply be a pedestrian tale of yet another tech start-up that failed because its founders didn’t appreciate that a successful business is built on more than just a good idea?

Foundem’s real enemy: the “asset specificity” problem

A content provider that makes itself dependent upon another company for distribution (or vice versa, of course) takes a significant risk. Although it may benefit from greater access to users, it places itself at the mercy of the other – or at least faces great difficulty (and great cost) adapting to unanticipated, crucial changes in distribution over which it has no control.

This is a species of what economists call the “asset specificity” problem.²⁰

Of course, the risk may be a calculated one: Firms occupy specialized positions in supply chains throughout the economy, and they make risky, asset-specific investments all the time. In most circumstances, firms use contracts to allocate both

¹⁶ Case AT.39740 *Google Search (Shopping)*, Commission Decision of 27 June 2017, ¶ 379, available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf.

¹⁷ Statement of the Federal Trade Commission Regarding Google’s Search Practices, *In the Matter of Google Inc.*, FTC File No. 111-0163 (Jan. 3, 2013), available at https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commission-regarding-googles-search-practices/130103brillgooglesearchstmt.pdf.

¹⁸ *Competition Bureau statement regarding its investigation into alleged anti-competitive conduct by Google*, CANADA COMPETITION BUREAU (Apr. 19, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04066.html>.

¹⁹ *Press Release: Commission fines Google €2.42 billion*, *supra* note 7.

²⁰ See, e.g., Benjamin Klein, *Asset Specificity and Holdups* in *THE ELGAR COMPANION TO TRANSACTION COST ECONOMICS* 120-26 (Peter G. Klein & Michael Sykuta, eds., 2010), available at http://www.masonlec.org/site/files/2012/05/WrightBaye_klein-b-asset-specificity-and-holdups.pdf.

risk and responsibility in a way that makes the relationship viable.²¹ When it is too costly or too difficult to manage risk by contract, firms may vertically integrate (thus aligning their incentives) or simply go their separate ways.²²

But Google and the sites linked in its organic results don't have a commercial relationship. There is *no agreement* specifying what Google's obligations are; *no money* changes hands between the companies; and each company bears its own risk and is *not constrained* by any contract terms to act in the other's interest.

The fact that Google creates an opportunity for companies to rely upon it doesn't mean that a company's decision to do so – and to do so without a viable contingency plan – makes good business sense.

It was entirely predictable, and should have been expected, that Google's algorithm would evolve. It was also entirely predictable that it would evolve in ways that could diminish or even tank Foundem's traffic. As one online marketing/SEO expert puts it:

On average, Google makes about 500 algorithm changes per year. 500!

And each and every one of them threatens to wipe your website from the face of Google search results, very much like Panda update did to so many different sites.

... [C]ounting on search engine traffic as your primary traffic source is a bit foolish to say the least.... [N]o more than 40% of your referred traffic should come from Google because any significant change is bound to have a negative impact on your bottom line.²³

In the fast-moving, constantly evolving digital marketplace, “pure” players of any stripe are in a vulnerable position: “pure” platforms, “pure” content providers, even “pure” advertisers often find themselves disadvantaged and outcompeted by more-integrated services with the flexibility and scope to capture and hold fickle user attention.

²¹ *Id.* at 121 (“These costs, however, are reduced because transactors, aware of the risks associated with specific investments, design contractual arrangements that avoid the likelihood of holdups.”).

²² *Id.* at 123-24.

²³ Ana Hoffman, *Where Does Website Traffic Come From: Search Engine and Referral Traffic*, TRAFFIC GENERATION CAFÉ (Mar. 12, 2018), available at <https://trafficgenerationcafe.com/website-traffic-source-search-engine-referral/> (emphasis added).

The recently deceased Yahoo is a stark example. Yahoo didn't invest in operating systems, devices, browsers, or any of the other new, mobile technologies springing up through the early 2000s. When the mobile revolution hit, Yahoo was caught flat-footed:

[Yahoo's] mobile troubles stemmed largely from one problem: unlike Google and Apple, Yahoo had neither a mobile operating system nor a widely used browser of its own.... Yahoo lacked a "front door" through which smartphone users might access – and, more to the point, be led to – the company's own services and apps. Google, by contrast, had its Android operating system, which it had begun work on in the mid-two-thousands.²⁴

Certainly Yahoo's failure wasn't solely a function of its dependence upon others for distribution. But just as certainly that dependence made things more difficult for Yahoo as the market evolved toward mobile and its previous business and investment decisions left it in a precarious – and eventually fatal – position.

All of which again raises that fundamental question: In the absence of an explicit agreement, should Google be required to make decisions that protect a dependent company's "asset-specific" investments, thus encouraging others to take the same, excessive risk?

Evolve or die

The articles about Foundem paint Shivaun and Adam Raff as a talented and committed development team. But the accounts of their struggle are also littered with obvious signs of their unsophisticated business sensibilities (and often outright naïveté) – even as they stepped into the fiercely competitive market of online search.

As suggested, the Ruffs' most critical miscalculation, by far, was to build their business on the assumption that Google's search algorithm would forever stay *exactly the same* as the day Foundem launched and to depend almost entirely on referrals from Google for traffic.

The couple knew that they weren't the only ones racing to develop an effective vertical search tool; indeed, by the time Foundem launched, comparison shopping

²⁴ Vauhini Vara, *Why Yahoo Couldn't Adapt to the Smartphone Era*, THE NEW YORKER (Feb. 9, 2016), <https://www.newyorker.com/business/currency/why-yahoo-couldnt-adapt-to-the-iphone-era>.

was already a burgeoning enterprise, and even Google already had a rudimentary (and, ultimately, unsuccessful) comparison shopping service of its own.

It must also be noted that by 2011 (the year the Panda update was implemented) Google was regularly confronted with articles bearing headlines like “Google's Search Algorithm Has Been Ruined, Time To Move Back To Curation.”²⁵ Content farms and, yes, an unmanageable, spam-riddled swamp of alleged product comparison sites had dramatically reduced the value of Google Search.²⁶

In part to stave off situations like this, Google changes its algorithm all the time to adapt to changing market conditions. It's generally accepted that the company annually adopts some 500-600 minor updates²⁷ (according to at least one Google insider, it's actually three changes *every day*)²⁸ and, currently, as many as a dozen major adjustments every year.²⁹

By contrast, Foundem's entire approach to addressing the challenges the site faced was rooted in *resisting* change, not adapting to it.

In fact, there is no indication (even in their own, detailed “timeline” of events) that the Raffs ever applied their coding skills to updating the site's user interface, adjusting the site's business model, or enhancing or expanding its functionality in

²⁵ Paul Kedrosky, *Google's Search Algorithm Has Been Ruined, Time To Move Back To Curation*, BUSINESS INSIDER (Jan. 12, 2011), <http://www.businessinsider.com/googles-search-algorithm-is-spinning-out-of-control-2011-1>. See also Matt Cutts, *Google search and search engine spam*, GOOGLE BLOG (Jan. 21, 2011), <https://googleblog.blogspot.com/2011/01/google-search-and-search-engine-spam.html>.

²⁶ Vivek Wadwha, *Why We Desperately Need a New (and Better) Google*, TECHCRUNCH (Jan. 1, 2011), <https://techcrunch.com/2011/01/01/why-we-desperately-need-a-new-and-better-google-2/>:

The problem is that content on the internet is growing exponentially and the vast majority of this content is spam. This is created by unscrupulous companies that know how to manipulate Google's page-ranking systems to get their websites listed at the top of your search results. When you visit these sites, they take you to the websites of other companies that want to sell you their goods. (The spammers get paid for every click.) ... [As] Paul [Kedrosky] concluded... “the entire web is spam when it comes to major appliance reviews.” Unfortunately, it isn't just appliance reviews that are the problem. Almost any popular search term will take you into seedy neighborhoods.

²⁷ See, e.g., Ryan Shelley, *3 things to do after a major Google algorithm update*, SEARCH ENGINE LAND (Oct. 18, 2016), <https://searchengineland.com/3-things-major-google-algorithm-update-260828>.

²⁸ Gary Illyes (@methode), TWITTER (Mar. 9, 2017 4:31 AM), <https://twitter.com/methode/status/839815982369636353>.

²⁹ See *Google Algorithm Change History*, MOZ (last visited Apr. 30, 2018), <https://moz.com/google-algorithm-change>.

response to changing market conditions³⁰ – even as consumers were consistently demanding more and sleeker services tailored to advanced browsers, mobile phones, digital assistants, and smart home devices.

It's also not evident that the Raffs ever did much to market their site, nor even that they experimented seriously with Google's paid search when it seemed organic search was becoming insufficient to drive traffic.

Prime real estate on a search results page is scarce; it's surprisingly expensive to capture the top "free" results. Companies have been projected to spend \$70 billion in the U.S. alone on search engine optimization (SEO) in 2018.³¹ Yet the Raffs refused venture capital investment, foregoing critical partnerships with seasoned advisors who might have offered an infusion of money and expertise when the fledgling business faced inevitable challenges.

Instead, like many optimistic entrepreneurs, the Raffs hoped that their creation would prevail over the competition entirely on its intrinsic, technological merits:

Adam and Shivaun weren't sure their company would succeed – there were already a couple of other big price-comparison search engines, like PriceGrabber, NexTag and, of course, Google itself – but they figured this was how the internet was supposed to work: Two people with a new idea can take on giants and, if their technology is good enough, grow into colossi themselves.³²

But it's never been the case that "good enough" technology is all it takes to succeed in consumer-facing technology markets. San Francisco Bay is littered with the rotting carcasses of good ideas that weren't successful – not because they were the victims of anticompetitive markets, but because being "good" when everyone else vying for the same prize is *also* good isn't enough to guarantee success.

For the Raffs, a Ferrari engine under the hood should have been all that was required to sell their rusting Yugo, even as the market was turning to SUVs and Teslas.

³⁰ It does appear that the Raffs sought to raise revenue by licensing and applying their technology to internal search on a few publisher websites. See *Foundem Timeline*, *supra* note 10 at 5, 8. But that effort didn't affect Foundem's consumer-facing site.

³¹ See Jason DeMers, *The SEO industry is worth \$65 billion; will it ever stop growing?*, SEARCH ENGINE LAND (May 9, 2016), <https://searchengineland.com/seo-industry-worth-65-billion-will-ever-stop-growing-248559>.

³² Duhigg, *The Case Against Google*, *supra* note 1.

But as a terse article in *The Economist*, titled “Evolve or die” (and published the same year that Foundem launched to the public), pointedly notes:

Companies that start off with a wildly successful product often fail to stay the course, explains Jim Collins, the author of “Built to Last”. “**If you have a great idea, it creates a false sense that you are stronger and more successful than you actually are,**” he says. **Failure to evolve can then lead to extinction.**³³

The Facebook analogy

This same dynamic is playing out right now in the relationship between Facebook and media companies that depend upon Facebook referrals.

Confronted with relentless criticism from users, politicians, policy advocates, and the media, Facebook recently altered its algorithm to prioritize posts from friends and family over content provided by news outlets, retailers, and brands.³⁴ The stated purpose behind the change was to ameliorate the “crowding out [of] personal moments that lead us to connect more with each other.”³⁵ In reality, of course, the purpose was to diminish the prevalence of fake news (and thus stave off criticisms that Facebook was perpetuating and exacerbating the problem).³⁶ But the specific intent hardly matters: Either way, we can be sure that the change is ultimately intended to benefit Facebook, whether by helping it retain users, increase revenue from post-promotion fees, or forestall regulation.

The effects of the change will not be felt by all sites equally, however.³⁷ Some sites will (and have already) shut down because they will receive less traffic from

³³ *Evolve or die*, THE ECONOMIST (Jul. 27, 2006), <https://www.economist.com/node/7226018> (emphasis added).

³⁴ See, e.g., Jonathan Vanian, *Everything to Know About Facebook’s Big News Feed Change*, FORTUNE (Jan. 12, 2018), <http://fortune.com/2018/01/12/facebook-news-feed-change/>.

³⁵ Mark Zuckerberg, FACEBOOK (Jan. 11, 2018), <https://www.facebook.com/zuck/posts/10104413015393571>.

³⁶ See, e.g., Jonathan Vanian, *Facebook’s Relationship with Artificial Intelligence and Fake News: It’s Complicated*, FORTUNE (Dec. 1, 2016), <http://fortune.com/2016/12/01/facebook-artificial-intelligence-news/>.

³⁷ See Kathleen Chaykowski, *Facebook’s Latest Algorithm Change: Here Are The News Sites That Stand To Lose The Most*, FORBES (Mar. 6, 2018), <https://www.forbes.com/sites/kathleenchaykowski/2018/03/06/facebooks-latest-algorithm-change-here-are-the-news-sites-that-stand-to-lose-the-most/#44e541de34ec>.

Facebook.³⁸ While Facebook expects the change to decrease referrals to news sources across the board, “some publisher sites stand to lose more than others.”³⁹

In particular, and just like the Google algorithm changes denounced by Foundem, the Facebook change hits relatively “unoriginal” sources the hardest:

For publishers that have become too reliant on a business model that relied on amassing big audiences with viral but undifferentiated content, this newest news feed change is a reckoning. A lot of publishers have audience scale but little else to differentiate themselves.⁴⁰

An article in *Forbes* aptly sums up the unsurprisingly familiar problem:

The best positioned sites will be those that diversify their traffic sources so that specific algorithm or platform changes won't have an overwhelming impact, said SimilarWeb's Greenberg. **Sites put themselves at risk when they invest too much in the whims of platforms**, such as Facebook's infamous “pivot to video” in 2015, which spurred many publishers to scramble to make news feed-friendly video content. Now, Facebook says there will be less video in news feed.

* * *

“A lot of publications made a big miscalculation building a business on someone else's platform,” Vogel added. **“Any publisher that felt like Facebook owed them something was making a big mistake.”**⁴¹

Search is inherently non-neutral

Even if it's true that consumers happily visited Foundem's site when it was higher ranked, and that its traffic plummeted when Google updated its algorithm, the *fact* of that drop in traffic does not amount to evidence of misconduct. To hold otherwise would be to grant Foundem – and every other site that can claim it competes with Google and happened to make it to the top of Google's search results at some

³⁸ Anthony Ha, *LittleThings blames its shutdown on Facebook algorithm change*, TECHCRUNCH (Feb. 28, 2018), <https://techcrunch.com/2018/02/28/littlethings-shutdown/>.

³⁹ Chaykowski, *Facebook's Latest Algorithm Change*, *supra* note 37.

⁴⁰ Lucia Moses, *'A watershed moment': Publishers find hope in a more rational post-Facebook media landscape*, DIGIDAY (Jan. 15, 2018), <https://digiday.com/media/watershed-moment-publishers-find-hope-rational-post-facebook-media-landscape/>.

⁴¹ Chaykowski, *Facebook's Latest Algorithm Change*, *supra* note 37 (emphasis added).

arbitrarily determined point in history – a virtual entitlement to that idiosyncratic state of affairs.⁴²

Such an entitlement would not only halt the continued improvement of Google's search engine, prevent it from adapting to changing technology and consumer preferences, and decimate innovation by competitors hoping to unseat the incumbent, *it would be an unprecedented legal anomaly.*⁴³

Of course, the Raffs say they just want “equal” or “neutral” treatment:

[The Raffs] see it simply: Google, or any other search engine, should present only impartial results that do not benefit it financially. It sounds idealistic, but why should it?... This is the end the Raffs keep in sight: an internet in which search is neutral.⁴⁴

But there is no principled way to impose neutrality (nor to measure it) that doesn't ultimately negate the benefits of a search engine in the first place.

[T]he case for search neutrality is a muddle. There is a fundamental misfit between its avowed policy goal of protecting users and most of the tests it proposes to protect them. **Scratch beneath the surface of search neutrality and you will find that it would protect not search users, but websites. In the search space, however, websites are as often users' enemies as not; the whole point of search is to help users avoid the sites they don't want to see.**⁴⁵

Indeed, online search is inherently non-neutral. Users are wildly different; search intent is ambiguous and varies enormously; preferences change over time; and the whole point of search is to *prioritize* certain information. Everyone (even the Raffs, in

⁴² See James Grimmelmann, *Some Skepticism About Search Neutrality*, in THE NEXT DIGITAL DECADE 435, 439 (Berin Szoka & Adam Marcus, eds., 2010), available at http://nextdigitaldecade.com/ndd_book.pdf#page=436.

⁴³ See *id.* at 440-41, 448. Grimmelmann notes that the free speech interest that some legal scholars and advocates have adapted to try to conjure up a legal right for users (or websites) to access search engines as they see fit is “basically a dead letter as far as First Amendment doctrine goes.” Its application to search engines is *entirely* a dead letter under the law.

⁴⁴ Manthorpe, *Google's nemesis*, *supra* note 2.

⁴⁵ Grimmelmann, *Some Skepticism About Search Neutrality*, *supra* note 43 at 437-38 (emphasis added).

their less sensationalist moments⁴⁶) recognizes that the touchstone for “good” online search is *relevance*, not “neutrality.”

Scarcity necessarily and fundamentally constrains the output of any search engine; the technological borderline-omniscience of Google may only return so many “hits,” and basic logic and basic physics require that there is only one first search result, only one second search result, and so on. Observers generally acknowledge this phenomenon by conceding that search engines must somehow distinguish relevant results from irrelevant results.⁴⁷

But relevance cannot be objectively determined, and what is relevant will, absolutely, perpetually change over time and circumstances and between users. If there is any coherent touchstone for “impartiality” in search, it must turn on the effect on *users*: whether so-called “search bias” harms users or not.

It is thus problematic that advocates of search neutrality, even while sometimes acknowledging the need for discrimination, nevertheless point to a change in the relative position of certain websites (like Foundem) in Google’s search results as evidence that it is improperly “biasing” its results. Such a conclusion simply cannot be inferred from the *fact* of any particular prioritization absent evidence that a particular ordering gives users less, not more, of what they want.

This is true even if the prioritization mechanism adopted by Google happens to benefit Google itself at the expense of some of its competitors, especially if it *also* benefits users. Such a state of affairs is more commonly known as “competition,” and it is what antitrust laws are intended to promote, not punish.

⁴⁶ Adam Raff, *Search, but You May Not Find*, NEW YORK TIMES (Dec. 27, 2009), <http://www.nytimes.com/2009/12/28/opinion/28raff.html> (“[S]earch engines should have no editorial policies other than that their results be comprehensive, impartial *and based solely on relevance.*”) (emphasis added).

⁴⁷ Geoffrey A. Manne & Joshua D. Wright, *If Search Neutrality Is the Answer, What’s the Question?*, 2012 COLUM. BUS. L. REV. 151, 155. See also, e.g., Oren Bracha & Frank Pasquale, *Federal Search Commission? Fairness, Access, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149, 1167-68 (2008) (“[S]earch engines filter and rank websites and, as such, they must favor some entities and disfavor others.”).

And yet the EC's Google Shopping decision — the apotheosis of the Raffs' crusade against Google — rests entirely on the fact that

Google does not position and display in the same way results from Google's comparison shopping service and from competing comparison shopping services.⁴⁸

Google's impermissible "bias," in other words, is to favor its own results over those of its competitors. But so what? A scheme of "impartial results that do[es] not benefit [Google] financially"⁴⁹ (and thus benefits Foundem relatively more than the alternative) is inherently no better (or worse) for consumers than one that benefits Google at Foundem's expense.

But in a world with no objectively optimal set of results, neither alternative is actually "impartial," and each entails favoritism for one competitor or another. That Foundem prefers the alternative that favors itself is no surprise, but it shouldn't receive any deference.

And there is good reason to believe that Google's decision to favor its own content over that of other sites is procompetitive. Beyond determining and ensuring relevance, Google surely has the prerogative to vigorously compete and to decide how to design its products to keep up with a changing market. In this case, that means designing, developing, and offering its own content to partially displace the original "ten blue links" design of its search results page and offer its own answers to users' queries in its stead.

That doing so happens to cause difficulty for some websites "free riding" on the old model, as one court put it, does not undermine the benefits to consumers of Google's

⁴⁸ EC *Google Shopping Decision*, *supra* note 16 at ¶ 662. The EC's decision devotes nearly all of its 216 pages to describing the fact of Google's non-neutrality and its relative effect on traffic to other comparison shopping sites, with only conclusory statements asserting that this diversion of traffic will have anticompetitive effect. Rather, the decision simply asserts that Google's conduct makes competition more difficult for its rivals and generates more revenue for Google than would "impartial" conduct. But whether that *actually* results in harm to consumers is not assessed. See also *Is Margrethe Vestager championing consumers or her political career?*, THE ECONOMIST (Sep. 14, 2017), <https://www.economist.com/news/business/21728979-she-rich-worlds-most-powerful-trustbuster-margrethe-vestager-championing-consumers-or> ("The commission said Google abused its dominance of online search to promote its own comparison-shopping service and relegate those of rivals. Yet it did not show, for instance, that consumers were denied a superior service as a consequence.")

⁴⁹ Manthorpe, *Google's nemesis*, *supra* note 2.

adaptation.⁵⁰ As that court held in dismissing a similar case against Google relating to prioritization of its own weather results over links to external weather sites:

The prohibition of the abuse of a dominant position does not have as its object to preserve outdated business models that cannot withstand change. However, this is exactly what the injunction sought by the applicant would entail....

While the applicant seeks to maintain the status quo because its member companies have done well in the past with their traditional business model, [Google] is trying to position itself in the face of changing competition.... **[Google] is not required to limit itself to a neutral presentation of the results of its search algorithm.... Competition on the merits does not require [Google] to leave its offer unchanged and thus to accept being left behind by its competitors.**⁵¹

And just as surely, whatever one thinks the risks are of “allowing” Google the freedom to design its own products, no one is better positioned than Google itself to ensure that its products are designed to benefit its users.⁵² Saddling a sprawling, complex platform like Google’s with an externally determined design constraint aimed at preventing bias in favor of its own content would inevitably reduce, not enhance, its value to consumers:

[O]ver 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

⁵⁰ *Verband deutscher Wetterdienstleister v. Google*, Reference No. 408 HKO 36/13 (Apr. 4, 2013), Court of Hamburg, available at <http://deutschland.taylorwessing.com/documents/get/150/court-order-google-weatherinbox-english-unofficial-translation.pdf>, at page 4 (“[A]pplicant’s members have been participating and will continue to participate in Google Search as ‘free riders’. They demand favorable positioning without offering compensation.”).

⁵¹ *Id.* at page 3 (emphasis added).

⁵² As the FTC noted:

Reasonable minds may differ as to the best way to design a search results page and the best way to allocate space among organic links, paid advertisements, and other features. And reasonable search algorithms may differ as to how best to rank any given website. Challenging Google’s product design decisions in this case would require the Commission – or a court – to second-guess a firm’s product design decisions where plausible procompetitive justifications have been offered, and where those justifications are supported by ample evidence. Based on this evidence, we do not find Google’s business practices with respect to the claimed search bias to be, on balance, demonstrably anticompetitive....

FTC Google Search Statement, *supra* note 17 at 3.

“discrimination” in favor of its own products or services, **including widespread recognition that such arrangements generally produce significant benefits for consumers.**⁵³

So what is Google doing?

It’s true that, at one time, Google’s founders declared that

Google may be the only company in the world whose stated goal is to have users leave its website as quickly as possible.⁵⁴

That was in 1999, and things have changed since then. But while this line (or its most recent incarnation⁵⁵) is frequently cited – including by the Raffs⁵⁶ – the line that immediately preceded it is conveniently omitted:

Google believes in instant gratification. **You want answers and you want them right now.** Who are we to argue?⁵⁷

Google’s *purpose* is not to send traffic away from its site; it’s “to bring all the world’s information to users seeking answers.”⁵⁸ It just happens that sending users away from its site was the best and quickest way to provide answers on the Web in, say, 1999. But as Google’s technological abilities and resources grew, and as users sought even

⁵³ Joshua D. Wright, *Defining and Measuring Search Bias: Some Preliminary Evidence*, ICLE ANTITRUST & CONSUMER PROTECTION WHITE PAPER 2011-01 at 5 (Nov. 3, 2011), available at <https://laweconcenter.org/resource/defining-and-measuring-search-bias-some-preliminary-evidence/> (emphasis added).

⁵⁴ “Ten things Google has found to be true” in *Our Philosophy*, GOOGLE (1999) (archived Jun. 3, 2004), available at <http://web.archive.org/web/20040603020634/http://www.google.com/corporate/tenthings.html>.

⁵⁵ *Ten things we know to be true*, GOOGLE (last visited May 2, 2018), <https://www.google.com/about/philosophy.html> (“We may be the only people in the world who can say our goal is to have people leave our website as quickly as possible.”).

⁵⁶ Adam Raff & Shivaun Raff, *Penalties, Self-Preferencing, and Panda: Why Google’s Behaviour Makes Antitrust Sanctions Inevitable* at 2 (Aug. 31, 2011), available at http://www.foundem.co.uk/Google_Conflict_of_Interest.pdf.

⁵⁷ “Ten things Google has found to be true,” *supra* note 54. In its current iteration the line reads: “We know your time is valuable, so when you’re seeking an answer on the web you want it right away – and we aim to please.” *Ten things we know to be true*, *supra* note 55.

⁵⁸ *Id.*

quicker answers — especially ones provided by voice or on mobile devices — its mechanisms for serving its users evolved.⁵⁹

At the same time, it must be noted, other changes also made the practice of quickly shuttling users off Google’s site problematic. Most importantly, competition from other general search engines, social media sites, online merchants, and virtual assistants threatened to undermine Google’s advertising-based business model.

For all of Google’s success in search, most general Internet searches are of little value to advertisers: At least historically, 70% of searches on Google surfaced no ads at all,⁶⁰ and only a tiny fraction of searches resulted in an ad actually being clicked.⁶¹ The truly profitable searches are the ones that generate relevant ads, and searches properly identified as ones where the user is looking to actually *buy* something are far more likely to generate relevant ads than are informational searches. Had Google continued systematically giving those searches over to other sites, it would risk losing its most significant source of revenue.⁶²

Unsurprisingly, part of Google’s effort to identify and retain those more valuable searches — one that began for Google well before Foundem even came into existence — sensibly entailed creating a specialized, product-specific search engine and encouraging those users who were actually looking for products and their prices to use the site: giving consumers what they want, in other words.

Meanwhile, entirely new mechanisms for matching advertisers with consumers have the ability to siphon off the most valuable advertising.

⁵⁹ See Saul Hansell, *Google Keeps Tweaking Its Search Engine*, NEW YORK TIMES (Jun. 3, 2007), <https://www.nytimes.com/2007/06/03/business/yourmoney/03google.html> (“Search over the last few years has moved from “Give me what I typed” to “Give me what I want,” says Mr. Singhal;” and “Expectations are higher now,” said Udi Manber, who oversees Google’s entire search-quality group. “When search first started, if you searched for something and you found it, it was a miracle. Now, if you don’t get exactly what you want in the first three results, something is wrong.”).

⁶⁰ Mike Grehan, *Note to FTC: Google Satisfies Information Needs Way More Than Shopping Needs*, SEARCH ENGINE WATCH (Sep. 25, 2012), <https://searchenginewatch.com/sew/opinion/2207725/note-to-ftc-google-satisfies-information-needs-way-more-than-shopping-needs>.

⁶¹ David Towers, *PPC accounts for just 6% of total search clicks*, ECONSULTANCY (Aug. 23, 2012), <https://econsultancy.com/blog/10586-ppc-accounts-for-just-6-of-total-search-clicks-infographic>.

⁶² See Geoffrey A. Manne & William Rinehart, *The Market Realities that Undermined the FTC’s Antitrust Case Against Google*, HARV. J. L. & TECH OCCASIONAL PAPERS SERIES 11-14 (July 2013), available at <https://jolt.law.harvard.edu/assets/misc/ManneRinehart.pdf>.

Most obviously, Facebook takes advantage of users' far more extended engagement with the platform to assess relevance, and it enables much richer, more-engaged advertising. It's an entirely different model than Google's, but one that has, of course, turned Facebook into an advertising juggernaut.⁶³ Twitter, Snapchat, Yelp, and Amazon (among many others) also compete for the same eyeballs and advertising revenue, all of them employing different models to connect users with the most relevant – and the most valuable – advertising.

Indeed, for all the claims that Google and Facebook constitute an unassailable online advertising duopoly, no such position has ever actually been truly “unassailable,” least of all in online and high-tech markets. Not only is there intense competition between the two, and not only do Facebook's current troubles highlight how rapidly their fortunes can shift, but “smaller” players are increasingly drawing advertising dollars away:

There's no one competitor snapping up the spending. Smaller players like Amazon and Snapchat are growing faster than expected, with Amazon singled out by industry leaders as the next big force in advertising.... Snapchat, which is expected to capture 82% more in ad spending than it did last year, is also projected to cross the \$1 billion mark in 2018.⁶⁴

Not surprisingly, more than half of product searches now start on Amazon⁶⁵ – and advertisers have noticed.⁶⁶

None of this intense competition was stifled by Google's vertical integration of product search results. If Google is a “gatekeeper,” intent on “us[ing] that might to undermine competitors,” as Charles Duhigg claims in the *New York Times* article,⁶⁷ it's a remarkably ineffective one.

⁶³ See Haley Tsukayama, *Why Facebook is delivering great earnings when other big tech companies are not*, THE WASHINGTON POST (Apr. 27, 2016), https://www.washingtonpost.com/news/the-switch/wp/2016/04/27/facebook-is-delivering-great-earnings-when-other-big-tech-companies-are-not/?utm_term=.c0774236cee5.

⁶⁴ Ashley Rodriguez, *Google and Facebook are losing their locks on digital advertising*, QUARTZ (Mar. 19, 2018), <https://qz.com/1232444/google-and-facebooks-digital-ad-lock-is-in-jeopardy/>.

⁶⁵ Jason Del Ray, *55 percent of online shoppers start their product searches on Amazon*, RECODE (Sep. 27, 2016), <https://www.recode.net/2016/9/27/13078526/amazon-online-shopping-product-search-engine>.

⁶⁶ Ashley Rodriguez, *Amazon is quietly building a digital advertising powerhouse*, QUARTZ (Aug. 31, 2017), <https://qz.com/1065717/amazons-ad-business-may-already-be-bigger-than-snapchats/>.

⁶⁷ Duhigg, *The Case Against Google*, *supra* note 1.

Conclusion

Duhigg concludes his article by asserting:

If you love Google, you should hope the government sues it for antitrust offenses – and you should hope it happens soon, because who knows what wondrous new creations are waiting patiently in the wings.⁶⁸

But the sad truth is that Foundem failed because, as smart and dedicated as its founders may be, it was decidedly not a “wondrous new creation;”⁶⁹ and contrary to Duhigg’s romantic notion, few entrepreneurs in the fast-moving tech sector succeed by “patiently waiting in the wings.”

It *could* be the case, of course, that if Foundem had maintained a strong revenue stream it would have had the resources, the skill, the knowledge, the will, and the luck to evolve into something even more valuable for consumers than Google’s non-neutral product search. But it chose to operate in a manner that traded off this uncertain (and unlikely) opportunity for easy and cheap access to users via Google.

Perhaps that was its only option, confronted with Google’s outsized presence in search. Then again, were it not for Google’s business model and massive size, it’s quite possible that Foundem never would have had sufficient traffic to get off the ground in the first place.

The one thing we do know is that it was the sum total of *previous* algorithm and design improvements between Google’s founding in 1998 and Foundem’s in 2005 that enabled Foundem to attract the amount of traffic from Google that it did until subsequent algorithm updates reduced it.

Of course, absent injury to consumers, there is no coherent antitrust principle that would properly endorse a company’s decisions when they happen to *benefit* a particular competitor, but condemn the same decisions when they happen to *harm* it. Conduct that leads to a decrease in traffic for Foundem *but improves Google for consumers* is not necessarily anticompetitive or otherwise problematic – any more than was the conduct that benefitted Foundem in the first place.

In fact, despite its decade-long, Microsoft-funded campaign against Google, neither Foundem’s hundreds of pages of anti-Google broadsides nor even the EU’s 200-plus

⁶⁸ *Id.*

⁶⁹ See, e.g., Chris Lake, *Foundem vs Google: A case study in SEO fail*, ECONSULTANCY (Aug. 18, 2009), <https://econsultancy.com/blog/4456-foundem-vs-google-a-case-study-in-seo-fail>.

page Google Shopping decision establishes that Google's conduct actually harmed *consumers* – only that it harmed *Foundem*. While this may be a problem for Adam and Shivaun Raff, for a cadre of sympathetic journalists, and even for the European Commission, the more ominous issue for the rest of us is what will happen to innovation, consumer welfare, and the economy writ large if antitrust law can be used to thwart technological evolution and enshrine mediocrity.