

USING ANTITRUST ENFORCEMENT PRUDENTLY IN HIGH-TECH MARKETS

The Flaws of a Potential Antitrust Case Against Google

By David A. Balto* & Brendan J. Coffman**

INTRODUCTION

An analogy can be a powerful device in both public policy debates and legal disputes. It can illustrate how certain disputes should be resolved and how issues should be analyzed. It can bring together strong analysis, and help illuminate the solution to difficult problems.

Currently there is a tremendous amount of attention given to arguments that is harming competition with its search business practices. Its conduct is the subject of investigations before the European Union and the Federal Trade Commission (“FTC”). Many opponents of Google’s business practices have trotted out the *United States v. Microsoft*¹ decision and declared with beguiling simplicity that Google is the next Microsoft. To these critics, all you have to do to find an antitrust violation is calculate a few market shares, assemble a chorus of complaints from rivals, pull out the D.C. Circuit’s *Microsoft* decision and declare victory. They suggest the case provides a simple roadmap to finding antitrust liability.

This paper seeks to dispel that overly simple notion of the law and the facts. After carefully analyzing the underlying *Microsoft* decisions we point out the significant real world differences between Microsoft and Google and explain why that analogy simply falls short.

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¹ 253 F.3d 34 (D.C. Cir. 2001).

We begin with an observation about the challenges of antitrust enforcement in high technology markets. For over a decade, there has been a healthy debate over whether or not high technology markets require unique antitrust analysis.² Antitrust doctrine, after all, developed long before anyone ever “got mail” via AOL or “friended” somebody on Facebook. The principle concern over applying traditional antitrust doctrine in high technology markets is not derived from the novelty of the products. Instead, the question is whether the dynamic, innovation-driven nature of high-technology markets threatens to render traditional antitrust doctrine on monopoly power and exclusionary conduct obsolete.³ Judge Richard Posner weighed in on the matter, declaring:

[T]here is indeed a problem with the application of antitrust law to the new economy, but that it is not a doctrinal problem; antitrust doctrine is supple enough, and its commitment to economic rationality strong enough, to take in stride the competitive issues presented by the new economy. The real problem lies on the institutional side: the enforcement agencies and the courts do not have adequate technical resources, and do not move fast enough, to cope effectively with a very complex business sector that changes very rapidly.⁴

The suppleness of antitrust doctrine was put to the test in *United States v. Microsoft*,⁵ which at least one commentator has called “the defining antitrust case of our era.”⁶ In *Microsoft*, the D.C. Circuit Court of Appeals recognized the debate over traditional antitrust doctrines’ applicability to high tech markets:

We decide this case against a backdrop of significant debate amongst academics and practitioners over the extent to which “old economy” §2 monopolization doctrines should apply to firms competing in dynamic technological markets characterized by network effects. . . . we note that there is no consensus among commentators on the on the question of whether, and to what extent, current monopolization doctrine should be amended to account for competition in technologically dynamic markets characterized by network effects.⁷

² Compare Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to High Technology Competition*, 44 WM. & MARY L. REV. 65, 97 (2002) (proposing that courts should focus on the purpose of the defendant’s conduct rather than the market structure); with Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 925 (2001) (arguing that existing antitrust doctrine is applicable to “new economy” markets).

³ See, e.g. Timothy Muris, *Antitrust in a High-Tech World*, WALL STREET JOURNAL, Aug. 12, 2010.

⁴ Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 925 (2001).

⁵ 253 F.3d 34 (D.C. Cir. 2001).

⁶ John E. Lopatka, *Assessing Microsoft from a Distance*, 75 ANTITRUST L.J. 811, 813 (2009) [hereinafter Lopatka].

⁷ *United States v. Microsoft*, 253 F.3d 34, 49 (D.C. Cir. 2001) [hereinafter *Microsoft* Appellate Decision].

The court however, refused to deviate from established methods of assessing allegedly anticompetitive conduct.⁸ It followed the traditional path of defining a market, assessing market power and barriers to entry, assessing exclusionary conduct, and considering procompetitive justifications in a method called “straightforward” by one set of commentators.⁹

Perhaps symptomatic of the court’s refusal to vary its approach to assessing antitrust liability, the D.C. Circuit’s *Microsoft* opinion and the subsequent consent decree has been assailed from all sides. For example, some commentators have criticized the U.S. Department of Justice (“DOJ”) and the D.C Circuit Court of Appeals for finding liability based mostly on intent and theory and not demonstrable anticompetitive effects.¹⁰ Others have agreed with the liability finding but dubbed the resulting consent decree a “remedial failure.”¹¹ Still others have concluded that the entire case had an effect opposite its intention, and “left competition hobbled and significant violations of antitrust law largely uncorrected.”¹² Still others ardently defend the finding of liability and the final remedy.¹³ Carl Shapiro, who served as an expert in the remedy phase of the Microsoft case, later wrote that “[e]ach era has its landmark antitrust case . . . [a]nd each such case is a creature of the competitive context in which it arose.”¹⁴ *Microsoft* was representative of the turbulence when the “Internet Tidal Wave” crashed down on the budding software industry.¹⁵

⁸ *Id.* at 50. The court did however consider Microsoft’s arguments that monopoly power should be assessed in light of the unique nature of technologically dynamic markets. *Id.*

⁹ Harry First & Andrew I. Gavil, *Reframing Windows: The Durable Meaning of the Microsoft Antitrust Litigation*, 2006 UTAH L. REV. 641, 679 [hereinafter First & Gavil].

¹⁰ Lopatka, *supra* note 6, at 812-13.

¹¹ Carl Shapiro, *Microsoft: A Remedial Failure*, 75 ANTITRUST L.J. 739 (2009) [hereinafter Shapiro].

¹² First & Gavil, *supra* note 9, at 644.

¹³ *See, e.g.*, David S. Evans, Albert L. Nichols & Richard Schmalensee, *United States v. Microsoft: Did Consumers Win?*, 1 J. COMPETITION L. & ECON. 497 (2005).

¹⁴ Shapiro, *supra* note 11.

¹⁵ Shapiro, *supra* note 11 (citations and internal quotation marks omitted).

Last June, nearly ten years to the day from the *Microsoft* holding, Google Inc. (“Google”) announced that the U.S. Federal Trade Commission (“FTC”) is conducting a formal review of Google’s business practices.¹⁶ A few months later, Google Chairman Eric Schmidt and representatives from other players in the online search market were called to testified before the Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights in a hearing entitled: *The Power of Google: Serving Consumers or Threatening Competition*.¹⁷ These events have prompted speculation about the FTC bringing an antitrust case against Google and creating the next defining antitrust case of our era.

As this paper will demonstrate, antitrust enforcers should proceed very cautiously in considering potential enforcement action against Google. Many opponents of Google’s business practices have trotted out the *Microsoft* decision and declared with beguiling simplicity that Google is the next Microsoft. To these critics, all you have to do to find an antitrust violation is calculate a few market shares, assemble a chorus of complaints from rivals, pull out the D.C. Circuit’s *Microsoft* decision and declare victory. This paper seeks to dispel that overly simple notion of the law and the facts. After carefully analyzing the underlying Microsoft decisions we point out the significant real world differences between Microsoft and Google and explain why that analogy simply falls short.

Any similarities to *Microsoft* are superficial, and prevailing antitrust doctrine and sound enforcement policy firmly support Google’s business practices in online search. The DOJ’s investigation of Microsoft unveiled a company with insurmountable market power in a readily definable market, an industry with prohibitive barriers to entry and network effects, a business

¹⁶ *Supporting choice, ensuring economic opportunity*, THE OFFICIAL GOOGLE BLOG (June 24, 2011, 9:01 AM), <http://googleblog.blogspot.com/2011/06/supporting-choice-ensuring-economic.html>.

¹⁷ *The Power of Google: Serving Consumers or Threatening Competition? Before S. Subcomm. On Antitrust, Competition Policy, and Consumer Rights*, September 21 2011, available at <http://www.senate.gov/fplayers/jw57/commMP4Player.cfm?fn=judiciary092111p&st=1500> (webcast of hearing).

practice of targeted exclusion of any viable competitor through aggressive means, and an absence any procompetitive justifications for the exclusionary conduct. The same is not true with Google. Google is a leader in traditional search, but this position is perpetually in jeopardy and competition is just a click away. Furthermore, it is far from clear that the search market is definable, as change occurs rapidly, and is unlikely to stagnate soon. Google's conduct is not exclusionary and – in the off chance one were persuaded Google's practices have exclusionary effects – the procompetitive justifications are resounding.

This paper explores the potential monopolization claims against Google for its search and search advertising practices in light of the underlying facts and corresponding analysis in *Microsoft*. Part I recounts *Microsoft*, including the Department of Justice's claims, the district court's factual findings, and the D.C. Circuit's decision on liability. Part II explains the alleged complaints about Google's conduct today.¹⁸ Part III examines the similarities and distinctions between the nature of the markets and the conduct of the corresponding parties, and concludes that an enforcement action against Google's search business practices would be an error in enforcement policy.

I. SUMMARIZING THE *MICROSOFT* CASE¹⁹

By the time the Department of Justice's antitrust case against Microsoft had been filed, the two parties were already familiar with each other. The DOJ established the foundation of what ultimately became the Microsoft antitrust case in a 1994 complaint alleging a violation of Section 2 of the Sherman Act for illegal maintenance of monopoly power. The crux of the complaint focused on Microsoft's use of exclusive contracts with original equipment

¹⁸ Google has been subject to a variety of antitrust and consumer protection related claims in the past, all of which cannot be addressed in this Paper. Instead, this Paper will focus exclusively on Google's allegedly anticompetitive conduct in search and search advertising.

¹⁹ The summary in this section is taken heavily from WILLIAM H. PAGE & JOHN E. LOPATKA, *THE MICROSOFT CASE: ANTITRUST, HIGH TECHNOLOGY, AND CONSUMER WELFARE* (2007) and Maureen Olhausen, Editor's Note, *Symposium: The End of the Microsoft Antitrust Case?* 75 *ANTITRUST L.J.* 691 (2009).

manufacturers (“OEMs”), particularly with respect to processors. The DOJ and Microsoft entered into a consent decree,²⁰ which faced difficulty in district court, primarily because the judge did not believe the agreement opened the market up to competition sufficiently to satisfy the “public interest” standard of the Tunney Act. The parties ultimately prevailed in Circuit Court, and entered into an agreement through which Microsoft agreed to refrain from certain contractual and licensing practices that further embedded its monopoly power, including imposing Internet Explorer on purchasers of the Windows operating system and requiring a licensee of Windows to install IE. In 1997 the DOJ alleged that Microsoft had violated the terms of its consent decree, but Microsoft won on appeal.

In 1998, the Department of Justice and several States filed suit against Microsoft alleging four violations of the Sherman Act.²¹ First, the complaint alleged that Microsoft had entered into a variety of exclusive dealing arrangements, which in themselves were in violation of Section 1. Second, the complaint alleged that Microsoft unlawfully maintained its monopoly in the operating systems market in violation of Section 2 by integrating Internet Explorer with the Windows operating system. Third, the complaint alleged that Microsoft had attempted to monopolize the Internet browser market in violation of Section 2. Finally, the complaint alleged that Microsoft had unlawfully tied its web browser (Internet Explorer) to its operating systems (Windows 95 and Windows 98) in violation of Section 1.

All the claims eventually dropped away except for the monopoly maintenance violation. The District Court rejected the Section 1 exclusive dealing claim, finding the evidence insufficient.²² The government did not appeal this decision. The court did, however, find Microsoft liable for tying its web browser to its operating system, as a per se violation of Section

²⁰ United States v. Microsoft, Civil Action No. 94-1564, Final Judgment.

²¹ 15 U.S.C. §1 et seq.

²² United States v. Microsoft, 87 F. Supp. 2d 30, 51-52 (D.D.C. 2000) [hereinafter *Microsoft Conclusions of Law*].

1,²³ and for attempting to monopolize the browser market in violation of Section 2.²⁴ Both those holdings, however, were subsequently overturned by the D.C. Circuit on appeal. The D.C. Circuit held that the government had failed to establish a relevant browser market, which was fatal to the attempted monopolization claim. The D.C. Circuit denied the government a chance to cure the deficiencies in its case. As to the tying claim, the D.C. Circuit held that *per se* treatment of the tying claim was inappropriate given the possibility that:

Jefferson Parish's consumer demand test would “chill innovation to the detriment of consumers by preventing firms from integrating into their products new functionality previously provided by stand alone products-and hence, by definition, subject to a separate consumer demand.” . . . [and] that the separate-product element of the *per se* rule may not give newly integrated products a fair shake.²⁵

The D.C. Circuit remanded for further proceedings but the government decided to abandon the tying claim under the rule of reason.

Having disposed of all the other claims, *Microsoft* boiled down to a Section 2 monopolization claim. And, as the DOJ did not allege that Microsoft engaged in any unlawful conduct to gain its purported monopoly share in the operating system market, the claim was monopoly maintenance in the market for the licensing of all Intel-compatible PC operating systems worldwide – extremely similar to the allegations contained in the DOJ’s original 1994 complaint.

A. *Microsoft’s Monopoly Power*

In *Microsoft*, the district court defined the relevant market as “licensing of all Intel-compatible PC operating systems worldwide.”²⁶ Microsoft challenged this market definition on the grounds that it improperly excluded Apple’s operating system, operating systems for non-PC

²³ *Id.* at 49-50.

²⁴ *Id.* at 45-46.

²⁵ *Microsoft* Appellate Decision, *supra* note 7, at 89.

²⁶ *Id.* at 51, 52.

devices, and middleware products.²⁷ The D.C. Circuit, however, rejected Microsoft’s arguments concerning Apple’s OS because Microsoft had failed to challenge the district court’s factual findings and therefore Microsoft’s conclusory statements on appeal were insufficient to show that the district court’s findings as clearly erroneous.²⁸ The D.C. Circuit also rejected Microsoft’s argument that middleware, or programs that expose their own application programming interfaces, should have been included in the relevant market.²⁹

With the market defined, the district court concluded that “Windows account[ed] for a greater than 95% share” (the court also noted that even if Apple’s operating system had been included in the relevant market, Microsoft’s market share would have still exceeded 80%).³⁰ Having examined market share, the district court completed its analysis of monopoly power by examining barriers to entry.³¹ The court concluded that there were substantial barriers to entry for any competitors to challenge Microsoft’s monopoly,³² many of which Microsoft allegedly exacerbated through its anticompetitive tactics. The D.C. Circuit summarized the district court’s findings on entry barriers as follows:

[T]he “applications barrier to entry”-stems from two characteristics of the software market: (1) most consumers prefer operating systems for which a large number of applications have already been written; and (2) most developers prefer to write for operating systems that already have a substantial consumer base. . . . This “chicken-and-egg” situation ensures that applicants will continue to be written for the already dominant Windows, which in turn ensures that consumers will continue to prefer it over other operating systems.³³

This description acknowledges two features of the case that proved pivotal: consumers could not easily switch from Windows to other operating systems; and operating system manufacturers need to attain a certain “critical mass” in order to attract software developers for a particular

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 53-54.

³⁰ *Id.* at 54.

³¹ *Microsoft* Appellate Decision, *supra* note 7, at 55.

³² *Id.*

³³ *Id.*

operating system. The functionality of a computer is grounded in the applications and programs available to be run on it.³⁴ A consumer would have to forego a large selection of available applications if he were to avoid Microsoft.³⁵ As one commentator explained, “disconnecting from the Microsoft ecosystem was costly, time intensive and complicated, requiring companies to overhaul systems and retrain personnel.”³⁶ Switching costs were too high for any consumer to consider moving to a different operating system, leaving consumers locked in to Microsoft.

Microsoft challenged the existence of barriers to entry on three grounds. First, Microsoft argued the fact that software developers do in fact write programs for other operating systems necessarily refutes this “chicken-and-egg” problem.³⁷ Second, Microsoft argued that the applications barrier is not a cause of Microsoft’s success but merely “a reflection of Windows’ popularity.”³⁸ Finally, Microsoft argued that consideration of the applications barrier to entry was improper because before Microsoft had risen to dominance, it too had to overcome barriers to entry and therefore costs borne by all entrants should not be considered a true entry barrier.³⁹

The D.C. Circuit rejected Microsoft’s assertions. The court dismissed the first argument based on the district court’s finding of fact that a consumer prefers an operating system that has the potential to run future applications, meaning Microsoft does benefit from the applications barrier.⁴⁰ To compete with Microsoft any “operating system entrant must not only have a good operating system, but also one that either runs existing applications or has close versions of

³⁴ United States v. Microsoft Corp., 84 F.Supp.2d 9, 19-20, ¶ 37 (D.D.C. Nov. 5, 1999) [hereinafter *Microsoft Findings of Fact*].

³⁵ *Id.* at ¶ 40.

³⁶ Bianca Bosker, *Google Antitrust Inquiry: Microsoft’s History Looms Large*, HUFFINGTON POST, June 23, 2011.

³⁷ *Microsoft* Appellate Decision, *supra* note 7, at 55.

³⁸ *Id.* at 56.

³⁹ *Id.*

⁴⁰ *Id.* at 55.

existing applications written for it.”⁴¹ As to Microsoft’s second argument, the D.C. Circuit acknowledged that Windows’ initial popularity surely was the result of superior quality; however, how Microsoft acquired its dominant position was not the issue.⁴² Instead, the analysis of barriers to entry assesses the market, not a particular firm.⁴³ Finally, the D.C. Circuit rejected Microsoft’s final argument on the facts:

When Microsoft entered the operating system market with MS-DOS and the first version of Windows, it did not confront a dominant rival operating system with as massive an installed base as a vast an existing array of applications as the Windows operating systems have since enjoyed.⁴⁴

Having found no error in the lower court’s findings of fact and conclusions of law, the D.C. Circuit affirmed that Microsoft had monopoly power. Even when Microsoft increased the cost of its operating system, OEMs had no alternative but to capitulate.⁴⁵ For instance, IBM stopped competing with Windows, as evidenced by the fact that the price of IBM’s operating system was about 250% higher than Windows 98.⁴⁶

B. *Microsoft’s Exclusionary Conduct*

The monopoly maintenance claim was premised on (1) Microsoft’s exclusive dealing arrangements with various players in the software ecosystem; (2) Microsoft’s integration of its web browser, Internet Explorer, with its operating system; and (3) Microsoft’s conduct with respect to Java, a middleware technology developed by Sun Microsystems. As will be discussed in more detail below, the D.C. District Court and the D.C. Circuit “agreed that Microsoft had

⁴¹ Timothy J. Brennan, *Do Easy Cases Make Bad Law? Antitrust Innovations or Missed Opportunities in United States v. Microsoft*, 69 GEO. WASH. L. REV. 1042, 1060 (2001).

⁴² *Microsoft* Appellate Decision, *supra* note 7, at 55.

⁴³ *Id.*

⁴⁴ *Id.* at 56.

⁴⁵ *Microsoft* Findings of Fact, *supra* note 34, at 24, ¶ 54.

⁴⁶ *Id.* at ¶ 46.

little or no justification for much of its conduct, which compromised its ‘hard competitor’ narrative.”⁴⁷

The district court overwhelmingly ruled in favor of the government on the allegations of exclusionary conduct. On appeal, the D.C. Circuit reviewed the exclusionary conduct by asking four questions:

- (1) Was the conduct alleged to have harmed the competitive process and thereby consumers, not just harmed one or more competitors?
- (2) Has the plaintiff sufficiently demonstrated that the conduct has in fact had the requisite anticompetitive effect?
- (3) Has the monopolist asserted a non-pretextual, pro-competitive justification for the challenged conduct?
- (4) If the monopolist has asserted a non-pretextual, pro-competitive justification for the challenged conduct, has the plaintiff demonstrated that the anticompetitive harm outweighs the procompetitive benefits?⁴⁸

With this framework in mind, a brief overview of the alleged exclusionary conduct and the courts’ rulings is described below.

1. Exclusive Dealing Arrangements

Microsoft foreclosed Netscape Navigator from the PC market in a variety of ways which had the effect of unlawfully maintaining Microsoft’s operating system monopoly. Microsoft targeted the two most effective forms of browser distribution: (1) OEMs that preinstall browsers on PCs; and (2) Internet access providers (“IAPs”) that bundle browsers with their Internet software. Microsoft reinforced this foreclosure of the most efficient means of distribution through market foreclosing arrangements with various other players in the Internet ecosystem, including independent software vendors (ISVs) and Apple Computer.

OEMs, like IBM, manufacture personal computers and often preinstall Microsoft’s operating system.⁴⁹ Microsoft’s licensing agreements with OEMs prevented OEMs from: (1)

⁴⁷ First & Gavil, *supra* note 9, at 665.

⁴⁸ *Microsoft* Appellate Decision, *supra* note 7, at 58-59.

removing any desktop icons, folders, or “Start” menu entries; (2) otherwise altering the Windows desktop; and (3) modifying of the initial boot sequence. These restrictions perpetuated the chicken-and-egg barrier to entry in the operating system market and further curtailed competing browser use.⁵⁰ The district court held that each of the three restrictions on OEMs imparted antitrust liability on Microsoft. The D.C. Circuit largely upheld the district court, but did determine that Microsoft’s restriction on modification to the initial boot sequence had a valid procompetitive justification because without such a restriction, OEMs could create

[A] shell that automatically prevents the Windows desktop from ever being seen by the user [which] is a drastic alteration of Microsoft’s copyrighted work, and outweighs the marginal anticompetitive effect of prohibiting the OEMs from substituting a different interface automatically upon completion of the initial boot process.⁵¹

In fact, several large OEMs had in fact developed programs that launched immediately after the initial boot sequence and replaced the Windows desktop with an interface designed by the OEMs or with Netscape Navigator’s interface.⁵²

IAPs offer Internet access and a varying array of services and proprietary content.⁵³ Microsoft licensed IAPs its browser free of charge and extended valuable promotional treatment to the ten most prominent IAPs in exchange for commitments to use Internet Explorer as their default browsing software for the IAPs services.⁵⁴ This allegedly had the effect of excluding competing browsers from the IAP distribution channel. The district court concluded that this conduct helped Microsoft unlawfully maintain its operating system monopoly, and the D.C. Circuit upheld this ruling, commenting “[Microsoft’s deals] help keep usage of Navigator below critical level necessary for Navigator or any other rival to pose a real threat to Microsoft’s

⁴⁹ *Microsoft Findings of Fact*, *supra* note 34, at ¶ 10.

⁵⁰ Maureen Olhausen, Editor’s Note, *Symposium: The End of the Microsoft Antitrust Case?* 75 ANTITRUST L.J. 691, 695 (2009).

⁵¹ *Id.* at 63.

⁵² *Microsoft Findings of Fact*, *supra* note 34, at ¶ 211.

⁵³ *Id.* at ¶ 15.

⁵⁴ *Id.* at ¶¶ 248, 255.

monopoly.”⁵⁵ The D.C. Circuit echoed its rationale with respect to independent software vendors and Apple, pointing out in all three instances that Microsoft failed to provide any plausible procompetitive justification.

2. Integration of Internet Explorer and Windows

Microsoft bound its browser to its operating system with “technological shackles” by (1) making it difficult to remove by excluding Internet Explorer from the “Add/Remove Programs” utility; (2) overriding a user’s default browser choice in certain instances; and (3) commingling browser code with the operating system code.⁵⁶

The district court condemned each of these practices. On appeal, Microsoft challenged the district court’s finding that Microsoft commingled code as clearly erroneous; but the appeals court noted that the contradictory evidence and testimony did not render the district courts finding clearly erroneous.⁵⁷ Microsoft did not offer any procompetitive justifications for excluding Internet Explore from the “Add/Remove Programs” utility or commingling browser code with operating system code and accordingly, the D.C. Circuit affirmed liability for that conduct.⁵⁸ Microsoft did assert that overriding a user’s default browser in certain circumstances for “technical reasons” was in the user’s best interest. For example, the Windows Update feature depended on programming not supported by Netscape’s Navigator.⁵⁹ The government offered no argument against this procompetitive justification, and the D.C. Circuit reversed.⁶⁰

3. Java

Much like with Netscape, Microsoft perceived Java as a threat to its monopoly power because Java offered a means for developers to transfer applications from Microsoft to other

⁵⁵ *Id.* at 71.

⁵⁶ *Id.* at 64.

⁵⁷ *Microsoft* Appellate Decision, *supra* note 7, at 66.

⁵⁸ *Id.*

⁵⁹ *Id.* at 67.

⁶⁰ *Id.* at 67.

platforms, and vice versa. Remember that the captive application market was a key to Microsoft's monopoly maintenance – if application developers could simultaneously create applications that worked for Windows and other operating systems, the market reliance on Windows would dwindle, and Microsoft's monopoly would suffer.

The district court held, and the D.C. Circuit affirmed, that Microsoft engaged in a wide array of anticompetitive conduct with respect to Java, including contractually requiring Internet Service Providers to promote exclusively Microsoft's Java Virtual Machine ("JVM"), deceiving Java developers, and coercing Intel to stop helping Sun Microsystems improve its technology. Notably, the appellate court reversed the finding of liability with respect to Microsoft's development of a competitor JVM, even though it was incompatible with rivals' JVMs.

Most important when evaluating the Java claims against Microsoft was its' inability to provide a procompetitive justification of these practices. In fact, throughout the appellate opinion, the court repeatedly concludes that Microsoft has failed to justify the practices, could not show how the company was benefitting consumers, and decisions were not a result of competition on the merits. For instance, in reviewing Microsoft's exclusionary practices with ICPs, ISVs, and Apple, the court wistfully concluded, "Thus, once again, Microsoft is unable to justify the full extent of its restrictive behavior."⁶¹

In fact, before moving on to the next section, it is worthwhile to step back and assess Microsoft's lack of procompetitive justifications. The Microsoft court defined procompetitive justification as "a nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal."⁶² The court set the stage upon delving into the numerous allegations, commenting that it will "consider

⁶¹ *Id.* at 43.

⁶² *Id.* at 59 (citing *Eastman Kodak Co. v. Image Technical Servs., Inc.* 504 U.S. 451, 483 (1992)).

Microsoft's proffered justifications for the restrictions and, for the most part, hold those justifications insufficient.”⁶³ These unjustified practices included:

1. Exercise of valid copyright rights – “borders upon the frivolous.”⁶⁴
2. License restrictions on OEMs prohibiting them from removing desktop icons or changing boot sequence serves to stop OEMs from reducing value of Microsoft product – Microsoft “never substantiates this claim,” and the protection of market power “is not a permissible justification for the license restrictions.”⁶⁵
3. Excluding IE from the Add/Remove Programs utility – Microsoft offered no procompetitive justification.
4. Commingling IE and OS source code – Microsoft offered no procompetitive justification.
5. Requiring exclusive dealing contracts with Internet Access Providers – Microsoft’s attempted rationale was not a procompetitive justification.
6. Requiring exclusive dealings contracts with Independent Software Vendors – Microsoft offered no procompetitive justification.
7. Exclusive dealing arrangement with Apple – Microsoft offered no procompetitive justification.
8. Exclusive contracts with Java – Microsoft offered no procompetitive justification.
9. Deception of Java developers – Microsoft offered no procompetitive justification.
10. Threatening Intel to stop assisting Java developers – Microsoft offered no procompetitive justification.
11. Tying – Microsoft offered no justifications for the tying and bundling practices, though was not held liable because the government failed to show competitive harm, and declined the opportunity to do so.

II. MONOPOLIZATION CLAIMS AGAINST GOOGLE’S SEARCH PRACTICES

Drawing an analogy between Google’s and Microsoft’s conduct and positing that Google’s conduct must also be an antitrust violation is beguilingly simple. At the recent Senate Subcommittee hearing Thomas Barnett, former Assistant Attorney General at the Justice Department’s Antitrust Division and current counsel for TripAdvisor (one of the principle critics of Google and member of the so-called FairSearch coalition),⁶⁶ presented the antitrust complaints

⁶³ *Microsoft* Appellate Decision, *supra* note 7, at 60.

⁶⁴ *Id.* at 63.

⁶⁵ *Id.* at 63-64.

⁶⁶ *About Fairsearch.org*, FAIRSEARCH.ORG (Mar. 12, 2012), <http://www.fairsearch.org/about-fairsearch/>.

against Google.⁶⁷ Yelp⁶⁸ and Nextag⁶⁹ echoed these complaints— two nominal competitors to Google that, ironically, owe much of their success to Google search.

On a superficial level, these allegations appear similar to those levied against Microsoft thirteen years ago. Google is big. Google competes in more than one market, and is vertically integrated between these markets. Competitors feel threatened by competition from Google. However, there are three absolutely fundamental differences between the Microsoft case and the theoretical case against Google, and it is important to keep these differences in mind. First, the structures of the markets are extremely different – especially with respect to barriers to entry and the ability to extract monopoly rents and maintain monopoly power. Second, the nature of the alleged exclusionary conduct – a prerequisite for Section 2 liability – is drastically different when comparing Microsoft’s foreclosure strategies to Google’s search relevance determinations. Third, and most importantly, the procompetitive justifications for Google’s decisions are many and compelling. Remember, Microsoft failed to offer any plausible procompetitive justification for eleven of the anticompetitive practices. These three differences matter immensely in Section 2 review, and tip the scale in Google’s favor.

A. *Google’s Alleged Monopoly Power*

Critics and competitors allege that Google is a monopolist, or rather, that Google has monopoly power in the relevant market of search and search advertising.⁷⁰ In Mr. Barnett’s

⁶⁷ *The Power of Google: Serving Consumers or Threatening Competition? Before S. Subcomm. On Antitrust, Competition Policy and Consumer Rights*, Sept. 21, 2011 (statement of Thomas Barnett) available at <http://www.judiciary.senate.gov/pdf/11-9-21BarnettTestimony.pdf> [hereinafter Barnett testimony].

⁶⁸ *The Power of Google: Serving Consumers or Threatening Competition? Before S. Subcomm. On Antitrust, Competition Policy and Consumer Rights*, September 21, 2011 (statement of Jeremy Stoppelman) available at <http://www.judiciary.senate.gov/pdf/11-9-21StoppelmanTestimony.pdf>.

⁶⁹ *The Power of Google: Serving Consumers or Threatening Competition? Before S. Subcomm. On Antitrust, Competition Policy and Consumer Rights*, September 21, 2011 (statement of Jeffrey Katz) available at <http://www.judiciary.senate.gov/pdf/11-9-21KatzTestimony.pdf>.

⁷⁰ Before any assessment of monopoly power, one first defines a relevant market. Much ink has already been spilt exploring the contours of the relevant market in search which will not be rehashed in this Paper. See e.g. Geoffrey

testimony before the Senate subcommittee, he pointed to recent search query data showing that in the United States, search users recently conducted 79% of searches using Google and 80% of paid search advertising was through Google.⁷¹ Senator Michael Lee, among the most skeptical of the Committee’s members, had slightly different figures—claiming Google controls between 65%-70% of the searches and 75% of search page advertising—and also noted that Google is a very big, profitable company, earning nearly \$30 billion in advertising revenues alone in 2010 and that “google” has come to be a recognized verb, synonymous with searching the Internet.⁷²

Google’s critics couple market share and profit data with claims of significant barriers to entry in the search industry. Competitors insist that Google’s market share is exacerbated by network effects that make entry and expansion difficult.⁷³ According to the FairSearch coalition, search requires critical mass in order to function; it is therefore a network effect and inherently favors those competitors that already have a significant user base.⁷⁴ Critics also assert that Google lures in users by offering a bevy of services, free of charge, which has a lock-in effect that makes it difficult for users to migrate to other search providers and consequently constitutes an artificially high switching cost.

B. *Google’s Alleged Exclusionary Conduct*

Critics claim that Google engages in “search bias.” This term lacks precise meaning,⁷⁵ and is often difficult to describe in any useful way, given that the entire value proposition of

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

⁷¹ Barnett testimony, *supra* note 67.

⁷² *The Power of Google: Serving Consumers or Threatening Competition? Before S. Subcomm. On Antitrust, Competition Policy and Consumer Rights*, September 21, 2011 (statement of Sen. Michael Lee).

⁷³ Can Search Discrimination by a Monopolist Violate U.S. Antitrust Laws?, at 4, *available at* <http://www.fairsearch.org/wp-content/uploads/2011/07/Can-Search-Discrimination-by-a-Monopolist-Violate-U.S.-Antitrust-Laws1.pdf>.

⁷⁴ *Id.*

⁷⁵ Joshua D. Wright, *Defining and Measuring Search Bias: Some Preliminary Evidence*, International Center for Law and Economics, Nov. 3, 2011 *available at* <http://www.laweconcenter.org/images/articles/definingmeasuring.pdf>.

search engines is to engage in bias on behalf of the consumer, thereby filtering irrelevant information. The best understanding of the theoretical antitrust allegations is that Google favors its own content in its search results, thereby depriving rival content creators from the opportunity to feature prominently in Google search results.⁷⁶ The term “search bias” insinuates that there is an inherent conflict of interest when a search provider also serves as a content provider, and further suggests that vertical integration in the search market is undesirable.⁷⁷ This argument often extends to the point of arguing that Google is the equivalent of an essential facility, without access to which content providers have no real hope of competing, at least on the Internet.⁷⁸ Suggesting that Google is an essential facility is particularly popular with owners of “vertical search” or specialized search sites that purport to compete with Google while simultaneously relying on Google for traffic. As the argument goes, how can a shopping website hope to compete if Google provides its own shopping results in its search results?

Google’s critics argue that this conduct is not competition on the merits and goes beyond mere harm to competitors, but actually harms competition and thereby the consumers. They argue that “real customers” are the advertisers. Advertisers purportedly “have little or no choice but to use Google to reach the vast majority of Internet users, and they pay a higher price for ads than they would in a truly competitive market otherwise.”⁷⁹ Critics tie it all back to individual search users by claiming that the thousands of small, medium, and large businesses that pay those supra-competitive advertising costs pass those costs along to consumers in the form of

⁷⁶ See, e.g., Thomas Barnett, *Google’s Search Tactics Warrant Antitrust Scrutiny*, BLOOMBERG, May 16, 2011, available at <http://www.bloomberg.com/news/2011-05-16/google-s-search-tactics-warrant-antitrust-scrutiny-tom-barnett.html>.

⁷⁷ *Id.*

⁷⁸ For a comprehensive analysis of the difficulties in considering a search engine an “essential facility” see Geoffrey A. Manne, *The Problem of Search Engines as Essential Facilities: An Economic & Legal Assessment*, in THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET 419 (Berin Szoka & Adam Marcus, eds.).

⁷⁹ *Don’t Believe Everything You Hear: A Guide to the Google Speak*, FAIRSEARCH.ORG, Sept 20, 2011, available at <http://www.fairsearch.org/general/dont-believe-everything-you-hear-a-guide-to-the-google-speak/>.

higher prices for their products.⁸⁰ In theory, this leads to a so-called “Google tax” that everyone pays, even those who do not use Google’s products.⁸¹

Another line of allegations constitute what can best be described as allegations of tying, meaning that Google leverages its dominance in search to direct users to its other services. Tying requires a demonstration of monopoly power (not just market power) in a good, and an unlawful conditioning of the sale of the tying good on the customer’s agreement to also purchase the tied good. This conditioning must be coerced – merely encouraging or incentivizing the customer to purchase the tied good is not enough.⁸² Finally, tying falls under the rule of reason, requiring the court or regulatory body to rebut any procompetitive justifications offered for the tying arrangement.⁸³

III. ASSESSING GOOGLE’S CONDUCT IN LIGHT OF *MICROSOFT*

Before examining Google’s conduct in light of *Microsoft*, I must first include a point on error costs, and the difficulty of applying antitrust to high-tech markets. For decades, commentators have encouraged caution before imposing antitrust liability too readily for fear of chilling innovation.⁸⁴ Even the *Microsoft* court was cognizant of error costs when it rejected the lower court’s *per se* illegal treatment of the tying claim:

In fact there is merit to Microsoft’s broader argument that *Jefferson Parish*’s consumer demand test would “chill innovation to the detriment of consumers by preventing firms from

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1159-60 (9th Cir. 2003) (“Essential to . . . a tying claim is proof that the seller coerced a buyer to purchase the tied product.”).

⁸³ In his testimony before the Senate subcommittee, former Assistant Attorney General Tom Barnett proffered several other examples of Google’s purported exclusionary conduct which unlawfully foreclose competition instead of standing on the merits of its own products. First, Mr. Barnett claims that Google’s search display practices are deceptive because they do not adequately distinguish between paid placement and “natural” search results. Second, Mr. Barnett points to Google’s history of “scraping”—a practice whereby Google allegedly passes off content from third party websites as its own, such as using restaurant reviews from Yelp on Google’s competing service Google Places—and claims that this is hardly competition on the merits. See Barnett testimony, *supra* note 67. Both of these examples would be best analyzed under consumer protection law.

⁸⁴ See e.g., Geoffrey A. Manne & Joshua D. Wright, *Google and the Limits of Antitrust: The Case Against the Case Against Google*, 34 HARV. J. L. & PUB. POL’Y 171, 220-23 (2011).

integrating into their products new functionality previously provided by stand alone products- and hence, by definition, subject to separate to consumer demand.” . . . We heed Microsoft’s warning that the separate-product element of the per se rule may not give newly integrated products a fair shake.⁸⁵

In light of error costs, there is no guarantee a court today would strictly follow *Microsoft’s* analysis of the monopoly maintenance claim. The search market is even more technologically dynamic than the OS market was years ago. Market definition is more difficult with dynamic technologies; I will, however, assume that *Microsoft’s* strictures remain guiding principles for the antitrust scrutiny of Google’s practices. I will proceed with the analysis as if the FTC’s most recent attempt to offer guidance on the relevant market were determinative.⁸⁶

With these assumptions in mind, my analysis proceeds in three parts. First, I explore the potential claims of monopolization, including whether Google has monopoly power. Second I consider the claims of exclusionary conduct, and analyze whether Google’s conduct goes beyond harm to competitors, and constitutes harm to competition. Third, I explore the viability of Google’s potential procompetitive justifications. In each instance, I conclude that the facts and circumstances of the online search market and Google’s conduct, and procompetitive justifications are vastly different than the operating system market and Microsoft’s exclusionary conduct during the late 1990s.

A. *Claims of Monopolization or Monopoly Maintenance*

1. Defining a Relevant Market

To begin with, a plaintiff in a Section 2 complaint must define the relevant market.⁸⁷ This is no small feat in even the simplest antitrust analysis, and defining a relevant market in the high-tech industry is especially difficult. Recall that in *Microsoft* the government and defendant

⁸⁵ *Microsoft* Appellate Decision, *supra* note 7, at 89.

⁸⁶ Fed. Trade Comm’n, Statement of Federal Trade Commission Concerning Google/DoubleClick, FTC File No. 071-0170, at 3, 7 (Dec. 20, 2007) (citations omitted), *available at* <http://www.ftc.gov/os/caselist/0710170/071220statement.pdf>.

⁸⁷ *United States v. Grinnell Corp.*, 384 U.S. 563 (1966).

disagreed about the relevant market, and the D.C. Circuit largely declined to readdress the issue of relevant market on appeal due to procedural mistakes by Microsoft.⁸⁸ It is unclear exactly how a market would be defined in the search and Internet advertising industries, due in large part to the dynamic nature of the business. Factors that courts and regulators have considered when defining a relevant market include cross-elasticity of demand (asking whether customers who use one product would easily and quickly switch to another product after an increase in price), differences in price, and differences in quality.

Google is a classic two-sided market participant, meaning that it caters to two different sets of customers – the public search engine user, and the advertisers who pay for advertisement placement through AdWords. Each potential market is dynamic, and raises difficult questions about the definition of a relevant market for antitrust purposes. In a market of search queries, the cross-elasticity of demand would be enormous – if users had to pay for search, they would all migrate to another provider. In fact, there is evidence demonstrating that the average user employs several search engines simultaneously. A report funded by Microsoft itself proclaimed, “Indeed, prior work in this area suggests that 70% of Web searchers use multiple search engines.”⁸⁹ Furthermore, one has to ask, precisely what is the consumer purchasing? Search results are just links to information. There are numerous other ways for a consumer to gain this information, including other web sites, social media, navigating directly to the source they are looking for, or non-Internet sources. Any of these would become more attractive if the cost to the consumer were raised above zero.

⁸⁸ The D.C. Circuit concluded that Microsoft failed to challenge the district court’s finding of fact, or show how these findings of fact fail to support the district court’s conclusions of law. *Microsoft* Appellate Decision, *supra* note 7, at 52.

⁸⁹ Qi Guo, et al. *Why Searchers Switch: Understanding and Predicting Engine Switching Rationales*, available at <http://research.microsoft.com/en-us/um/people/ryenw/papers/guosigir2011.pdf>.

The same confusion abounds on the advertiser side of the Google business model. Advertisers compete with each other not for search result placement, but for “eyeballs,” that is, views by people on the web. Google search is just one way that Internet advertisers can look for these views – in fact, advertisers pay to be included on websites throughout the Internet, not just search engines. For example, earlier this year, Facebook became the top online display ad publisher in the United States.⁹⁰ If other forms of online advertising, such as display ads, were included within the relevant market, Google’s market share, and consequently any inference of monopoly power, would fall by the wayside.

Facebook is the elephant in the room when discussing Google. One might be tempted to not count Facebook as a competitor – it is not a general purpose search engine. However, such a conclusion would be folly. The two are stark competitors for all things Internet, including eyeballs and thus advertising revenue. Among other things, Facebook has an extraordinary presence in terms of consumer usage and advertising revenues. Facebook has more than 800 million regular users. More than 50% of active Facebook users log on every day. More than 500 million people use an app on Facebook or experience the Facebook platform on other websites. And according to comScore.com, Facebook is now the top display-ad publisher in the U.S. (ahead of Google, Bing and Yahoo), accounting for nearly one-third of all display-ad impressions. In fact, some argue that Facebook represents the next stage in the evolution of search, transforming from “links” to “likes.” Facebook is endeavoring to improve its search engine to connect users with content that is pre-approved by other Facebook users. This effectively eliminates the need to correlate page visits to query responsiveness, an assumption that traditional search engines such as Google still make. As one journalist explains “With a

⁹⁰ U.S. Online Display Advertising Market Delivers 1.1 Trillion Impressions in Q1 2011, comScore.com, May 4, 2011, *available at* http://www.comscore.com/Press_Events/Press_Releases/2011/5/U.S._Online_Display_Advertising_Market_Delivers_1.1_Trillion_Impressions_in_Q1_2011.

more potent search engine, Facebook's wine-loving users might be able to query the closest wineries that have been liked most often. That would give people one fewer reason to leave the site's walled garden."⁹¹

Facebook teaches us several important points: not only should we be careful in defining a relevant market for antitrust purposes, but we should also be hesitant to assume that technology markets will establish and maintain a status quo for any significant period of time. As Stafford Masie, former head of Google South Africa explained, the shift has already begun:

The pie of search query volumes in the world – that business is shrinking. Why? Because people are going and doing search queries – search query volumes are moving towards social containers. They're moving away from static pages being searched and they're moving more towards dynamic real-time stream content. Like Twitter. Like Tumblr. Like Facebook. Those things have a better result because the penetration, the personalization associated with it, and the constant freshness of the content. So I believe that Google's search volume – the business Google is in on the search side – that business is shrinking. And they've got to do something about it.⁹²

As policymakers and regulators spend their time assessing Google's alleged market power, the fact of the matter is that the market and its competitors are changing so quickly that such an analysis is rendered moot by the time it is completed.

As these points suggest, defining a relevant market will be extremely difficult – even more difficult than most market definition exercises. Alternative products and high responsiveness to price changes indicate that a market as narrowly construed as search engines or search advertising may not be adequate under the antitrust laws. It will not be as easy for the government to define a relevant market in a broad § 2 case against Google as it was, for example, during the review of Google's acquisition of airline travel information provider ITA, in which

⁹¹ Douglas MacMillan & Brad Stone, Facebook Delves Deeper into Search, BLOOMBERG BUSINESSWEEK, March 29, 2012, *available at* <http://www.businessweek.com/printer/articles/16340-facebook-delves-deeper-into-search>.

⁹² Emil Protalinski, Former Google Exec: Facebook, Twitter are Killing Search, ZDNet, Feb. 7, 2012, *available at* <http://www.zdnet.com/blog/facebook/former-google-exec-facebook-twitter-are-killing-search/8812>.

the transaction involved a certain type of relatively difficult-to-find information.⁹³ In ITA, the Department of Justice defined the relevant markets as the market for airline information aggregators (the software created and sold by ITA) and the market for “comparative flight search services,”⁹⁴ but also explained that the government’s trepidation with the transaction “revolve around Google’s ability and incentive to weaken its competitors in the comparative flight search market by denying or degrading their access to QPX.”⁹⁵ Unlike the contemplated harm to competition in search generally – where there is not a concern about access to underlying information but rather the display of this information to the consumer – the DOJ’s investigation of Google’s acquisition of ITA included a unique and difficult-to-replicate input. ITA is an outlier in this sense, and an appropriate behavioral remedy was implemented to ensure that Google's rivals will have access to this or similar information.

2. Assessing Google’s Monopoly Power

Assuming Internet search and search advertising are the relevant markets, does Google have monopoly power?

As noted by the D.C. Circuit in *Microsoft*, monopoly power is “the power to control prices or exclude competition.”⁹⁶ Direct proof of monopoly power is only rarely available, and courts typically rely on circumstantial evidence, typically an inference of monopoly power based on the dominant share in the relevant market combined with barriers to entry.⁹⁷

In Google’s case, a 60%-70% share of Internet searches and a commensurate share of search advertising do not rise to Microsoft’s 95% market share of the Intel-compatible operating

⁹³ United States v. Google, Inc. & ITA Software, Inc., Competitive Impact Statement, *available at* <http://www.justice.gov/atr/cases/f269600/269620.pdf>.

⁹⁴ *Id.* at 7-8.

⁹⁵ *Id.* at 9.

⁹⁶ *Microsoft* Appellate Decision, *supra* note 6, at 51 (quoting United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956)).

⁹⁷ *Id.* at 51.

systems market.⁹⁸ Even with sufficient market share, however, there also needs to be sufficient barriers to entry in order to support an inference of monopoly power, specifically, the power to control prices or exclude competition.

Recall that in *Microsoft* the barrier to entry in the operating systems market was the so-called “applications barrier to entry,” which was the derived Hobson’s choice facing the various players in the computer ecosystem: work with Microsoft and only Microsoft or be on the outside looking in. This Hobson’s choice was imposed by the economic realities and nature of the products in the computer ecosystem. For example, for ISVs, it was often economically unjustifiable to develop software for operating systems that did not have a substantial consumer base.⁹⁹ Similarly, a PC only needs one operating system, and consumers prefer operating systems with a large number of applications already written, compelling the OEMs to install Windows.¹⁰⁰ The result was a self-enforcing cycle that made it very difficult for competing operating systems to displace Microsoft’s dominance.

Google’s critics argue that there is a similar “chicken-and-egg” scenario playing out in the online search and search advertising markets. But on closer scrutiny, there are actually three fundamental differences between the operating systems market in *Microsoft* and the online search and search advertising markets in a potential case against Google. These differences undermine the inference of monopoly power and instead demonstrate that Google’s continued success is through competition on the merits in the form of continued innovation and constant efforts to deliver to both search users and search advertisers desirable products/services.

⁹⁸ Similar market shares have generally been sufficient to suggest the possession of monopoly power, provided there are other indicators as well. ANTITRUST LAW DEVELOPMENTS (6th) at 231.

⁹⁹ *Microsoft* Appellate Decision, *supra* note 6, at 55.

¹⁰⁰ *Id.*

First, the cycle is unlikely to be self-sustaining. Search advertisers are arguably similar to the ISVs in *Microsoft*: assuming Google is the leader in online search and advertisers only choose one search firm to purchase search advertising from, they will choose Google. However, search users do not prefer a search engine with the greatest number of advertisers and are therefore unlike PC consumers who prefer an operating system with the greatest number of applications. The “chicken-and-egg” paradigm does not apply.

Search users may prefer a search engine with the most *relevant* ads, but in Google’s case that is a function of the company’s quality score system, not the sheer number of advertisers who use Google.¹⁰¹ This is where the switching costs/lock-in arguments come in. By offering search users a bevy of other services for free, Google allegedly entrenches the dominance of Google search. But the realities do not support that claim.

Google takes great efforts to ensure the interoperability of its services with competitors. For instance, with the recently revamped YouTube, you have the ability to share your YouTube activity with not only your Google+ contacts, but also your Twitter feed and Facebook page. Furthermore, Google is also sensitive to portability of a users’ information. The Data Liberation Front is a group of Google engineers who make it easier for users to import and export their data to and from Google products.¹⁰²

This brings us to the second difference between the nature of the operating systems market and the Internet search market: a Google user is less likely to only use Google search than a PC user is to only use Windows. If a search user is unsatisfied with search results, she only need go to Bing and try her query there. If it is a specific type of query, say for a restaurant

¹⁰¹ A fuller explanation of Google’s quality score and how it works can be found on Google’s website. *What is AdWords “Quality Score and how is it calculated*, last visited Dec. 12, 2011, <http://support.google.com/adwords/bin/answer.py?hl=en&answer=10215>.

¹⁰² The Data Liberation Front, [dataliberation.org](http://www.dataliberation.org), available at <http://www.dataliberation.org/home>.

review, a user can go directly to her preferred review site. A recent report by Microsoft, who operates Bing, attests to that fact: “The barrier to switching search engines is low and multiple engine usage is common.”¹⁰³ Antitrust scholar Herbert Hovenkamp said “[t]here's no lock-in with a Google search engine. If you want to have six different search engines all on your desktop, you can do that. It's all free.”¹⁰⁴

This is a far cry from the switching costs facing PC users consider a switch to a new operating system. Not only would they be faced with fewer application choices after the switch, but they would be faced with the very significant costs of either purchasing and installing a new operating system on their current PC or purchasing a new PC with the other operating system preinstalled. Advertisers similarly have the option to multi-home. Unlike Microsoft’s practice of requiring ISVs to use Internet Explorer as the default browser before granting them access to Windows 98, Google does not condition search advertisers’ access or pricing based on levels of exclusivity.

With respect to any corresponding control of advertising pricing, Google’s methods show that Google has very little control over the pricing it charges its own advertisers, let alone the prevailing prices for the search advertising market as a whole. Classic search advertising was based on “cost per impression” basis, meaning that advertisers paid based on the number of times their ad was displayed. Google gives advertisers a choice to use “cost per impression” or an option to pay on a “cost per click” basis (which according to Google, most of its search advertisers use).¹⁰⁵ Under the “cost per click” method, advertisers pay Google only if a search

¹⁰³ Qi Guo, et al. *Why Searchers Switch: Understanding and Predicting Engine Switching Rationales*, available at <http://research.microsoft.com/en-us/um/people/ryenw/papers/guosigir2011.pdf>.

¹⁰⁴ Bianca Bosker, *Google Antitrust Inquiry: Microsoft’s History Looms Large*, HUFFINGTONPOST.COM, Jun. 23, 2011, available at http://www.huffingtonpost.com/2011/06/23/google-antitrust-inquiry-n_883389.html?ncid=edlinkusaolp00000008.

¹⁰⁵ Google, Inc., Form 10-K for the fiscal year ended December 31, 2010, at 4.

user actually clicks on the advertiser's link and advertisers also have power to set a cap for their advertising costs.¹⁰⁶

Google uses an auction-based system for establishing the cost per click and part of the auction-bidding process is Google's quality score system, which acts as a modifier to the bid price based on an advertiser's historical click through rates, the quality of the landing page the user goes to after clicking the link, and the relevance of the bid-upon keyword to the search query.¹⁰⁷ Cost-per-click charges advertisers with higher quality scores *lower* prices.¹⁰⁸ Thus, advertisers control the pricing because they control the inputs to the per click price: their bid price and the factors bearing on their quality score. With low switching costs and multi-homing possible, Google competes to maintain its market share of users by earning their loyalty through innovative product offerings and relevant search results.

A third difference between Google and Microsoft is the facts underlying one of Microsoft's arguments against finding of monopoly power. Recall that Microsoft argued that consideration of the applications barrier to entry was improper because, before Microsoft had risen to dominance, it too had to overcome barriers to entry and therefore costs borne by all entrants should not be considered a true entry barrier. The D.C. Circuit rejected that argument because it mischaracterized the facts: at the time Microsoft entered the operating systems market, there were no competitors with an entrenched application base.

Google did in fact face, and overcome, such an entry barrier. In March 1998, at least one industry observer had declared that Yahoo! had "won the search wars."¹⁰⁹ But it was not until

¹⁰⁶ Google AdWords, Advertise your business on Google, last visited Jan. 4, 2012, <http://www.google.com/ads/adwords2/>.

¹⁰⁷ WordStream, Inc., *How Does the AdWords Auction Work?*, Nov. 16, 2011, <http://www.wordstream.com/blog/ws/2011/11/16/how-adwords-works>.

¹⁰⁸ *Id.*

¹⁰⁹ Randall E. Stross, *How Yahoo! Won the Search Wars*, FORTUNE MAGAZINE, Mar. 2, 1998, *available at* http://money.cnn.com/magazines/fortune/fortune_archive/1998/03/02/238576/index.htm.

August 1998 that Google cofounders Larry Page and Sergey Brin obtained the \$100,000 investment from Andy Bechtolsheim.¹¹⁰ Therefore, if there is any user- or advertiser-embedded base barrier to entry, that barrier was present and overcome when Google officially became the world's largest search engine in June 2000 by indexing over one billion websites.¹¹¹ Bing currently has approximately 50% of Google's query volume, and about as much as Google had in 2008. There are no scale economies or other network effect that prohibits Bing from matching Google's efficacy in search results.

3. Assessing the Purported Exclusionary Effect of Google's Conduct and the Corresponding Consumer Harm

Looking back at Microsoft, there were three categories of allegedly exclusionary conduct: (1) integration of Internet Explorer with Windows; (2) exclusionary agreements; and (3) conduct with respect to Java.

The second and third categories are not on point with any analysis of Google's conduct. To be parallel with the second claim, Google would need to contractually prevent website developers from listing their pages with other search engines, or prevent advertisers from advertising elsewhere. Google employs no such contracts. Websites are widely indexed by search services around the world, and Google is just one of many websites performing this information aggregation service. Similarly, the third claim against Microsoft – that Microsoft took steps to exclude Java from developing a viable cross-platform threat - is not comparable to any conduct by Google. These two allegations are similar in that they allege Microsoft maintained its monopoly power through contracts and influence on third parties. To that end, to compare Google to Microsoft, one would need to establish third parties with whom Google does business, and identify contractual language that would prevent this third party from working

¹¹⁰ *Google History*, GOOGLE.COM, <http://www.google.com/about/corporate/company/history.html>.

¹¹¹ *Google History*, GOOGLE.COM, <http://www.google.com/about/corporate/company/history.html>.

with one of Google's competitors. Google does not contract with advertisers, content developers, or consumers in any such way.

A common misconception is that Google requires manufacturers of smartphones to install Google as the default search engine for mobile telephones. This is not the case. Android, Google's smartphone operating system, is open source. As Eric Schmidt explained in his written response to Senate Judiciary Committee, "Google does not demand that smartphone manufacturers make Google the default search engine as a condition of using the Android operating system."¹¹² In fact, Android is open source and is available to be used by any phone maker free of charge without entering into any license agreement with Google.¹¹³

Thus, the monopoly maintenance claims boil down to Google's use of its own content in its search results and, correspondingly, the limiting of competitors' access to users on Google search. There are two considerations complicating this analysis. First, competitors must show substantial foreclosure over a long period of time in order to justify legal action against a firm acting unilaterally. Second, even in the instances in which a competitor can show substantial foreclosure, the analysis then progresses to evaluating the anticompetitive effects against the procompetitive justifications. This traditional rule of reason review weighs all factors and attempts to determine, at the end of the day, whether competition and the final consumer are harmed by the dominant firm's unilateral conduct.

Generally speaking, antitrust law recognizes that a firm owes no duty to a competitor for access to inputs, including customers. In *Verizon Communications v. Law Offices of Curtis V. Trinko, LLP*¹¹⁴ the Supreme Court declared:¹¹⁵

¹¹² Eric Schmidt, Executive Chairman, Google, Inc., Response to Senate Judiciary Committee, September 21, 2011.

¹¹³ <http://source.android.com/faqs.html#what-is-the-android-open-source-project>.

¹¹⁴ 540 U.S. 398 (2004).

¹¹⁵ *Id.* at 407-08.

Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage . . . may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill-suited. . . Thus, as a general matter, the Sherman Act “does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.”

Thus, merely disfavoring the content from other nominal search engine competition is not sufficient, under the antitrust laws, to amount to liability for Google. There must be an anticompetitive effect – harm to competition – to spur further analysis.

The *Microsoft* court discussed foreclosure in great detail, particularly with respect to exclusive contracts.¹¹⁶ In fact, one of the key takeaways from the D.C. Circuit Court’s opinion was the legal conclusion that foreclosure under a successful Section 2 theory may be less in quantum than it might have to be under a Section 1 theory.¹¹⁷ The rationale behind this decision is important to the current Google debate – the *Microsoft* court reasoned that Microsoft “foreclosed a substantial portion of the field” from distribution and thereby maintained its monopoly power.¹¹⁸ Although contractual foreclosure is not the question in Google, the same logic would apply. Google’s competitors would need to demonstrate that they are sufficiently foreclosed from Internet users that they cannot attain minimum efficient scale.

Google’s competitors cannot claim substantial foreclosure. Failure to place prominently atop Google’s search results does not equate to being foreclosed from the market. In *Microsoft*, competitor operating system developers had three options to get their product to the consumer – it could be installed by an OEM and available at purchase, it could be installed by a computer owner as a program, or it could be downloaded and installed via the Internet. As the *Microsoft* court made clear, without access to one of these avenues, an operating system developer simply

¹¹⁶ *Microsoft* Appellate Decision, *supra* note 6, at 68-71.

¹¹⁷ ANTITRUST LAW DEVELOPMENTS (6th) at 250.

¹¹⁸ *Microsoft* Appellate Decision, *supra* note 6, at 76.

had no ability to bring his product to market. The same is simply not true for Internet content. This paper has numerous factors demonstrating that Google is not essential for either content developers or advertisers including: the abundance of search engine options; the numerous other means for advertisers to reach the market; comparatively easy entry into the market; lack of consumer lock-in; ability and propensity of consumers to utilize more than one search engine at a time; and the emergence of non-traditional search providers, such as Facebook and Twitter.

Microsoft proactively, and intentionally, took steps to limit consumers' options for operating systems and browsers. This affected not only consumer experience with Microsoft products, but with computers as a whole. Computers carrying Windows arrived with IE not only installed, but with code so commingled that it was impossible to remove. Even the most sophisticated computer user would not have been able to install a different browser without completely destroying the operating system. Google, on the other hand, retains users by continually improving upon the best mousetrap out there. Even if Google does place its content more prominently in its search results, this is not analogous to commingling operating system and browser code. A user can easily navigate away from Google, and an advertiser can seek other avenues to display his product. In fact, one study shows that even though Gmail appears more prominently than competitors' email options in Google search results, almost twice as many users click on the second listing (Yahoo Mail) than on Gmail – demonstrating that users know how to use search engines.¹¹⁹ It is hardly a case of antitrust foreclosure when a competitor appears right below a dominant firm and receives more traffic.

Most importantly, Microsoft offered absolutely no justification for these tactics. Commingling code was a naked, deliberate attempt to restrict competitors' access to the market.

¹¹⁹ See Benjamin Edelman & Benjamin Lockwood, *Measuring Bias in "Organic" Search*, available at <http://www.benedelman.org/searchbias/>.

When Google provides search results, the goal is not to render a competitor better or worse off – the goal is to provide the most relevant information, as quickly as possible, in the most digestible format possible. This is what consumers want. The very nature of the market requires this adherence to consumer demand. An inaccurate or slow search engine quickly becomes the next Lycos or Altavista.

In the final analysis, the case for demonstrating an antitrust violation is weak at best. Microsoft’s competitors were harmed by its conduct, but the Department of Justice successfully and convincingly demonstrated how this harm to competitors led directly to harm to competition. The monopoly maintenance of the dominant operating system developer through exclusionary contracts, code manipulation, and deceitful practices left the consumer with more expensive, lower quality products and no reliable alternative. With Google, the only potentially-aggrieved entities are Google’s competitors, but the adverse impact on consumers is clearly absent. Despite the many opportunities, Google’s critics have failed to demonstrate harm to consumers or competition, or explain why it is that these numerous competitors are incapable of attracting users in a market with zero switching costs and high mobility.

B. Considering Google’s Countervailing Procompetitive Justifications and Weighing them against the Purported Harm to Competition

The hypothetical case against Google does compare favorably to the case against Microsoft in one respect. The D.C. Circuit’s ruling on Microsoft’s integration of Internet Explorer into its operating system proclaimed that a full blown rule of reason analysis is necessary.¹²⁰ The court acknowledged that integration is often a good thing. It is essential that antitrust regulation not “chill” or “stifle” innovation.¹²¹ Integration under the guidance of Microsoft – perhaps the only part of the opinion to truly merit comparison to Google – makes at

¹²⁰ *Microsoft* Appellate Decision, *supra* note 6, at 94-95.

¹²¹ *Berkey Photo v. Eastman Kodak Co.*, 603 F.2d 263, 282-83 (2d. Cir. 1979).

least one standard clear: when we evaluate the potential for competitive harm in innovation industries, we must weigh the benefit conferred by the practice in question against the harm it allegedly inflicts.

Showing monopoly power and exclusionary effect is not the end of the analysis. Recall that in *Microsoft*, the D.C. Circuit assessed whether Microsoft had asserted a non-pretextual procompetitive justification for the challenged practice.¹²² And, where Microsoft met that burden, it prevailed, causing one commentator to exclaim “in no instance did the court explicitly balance the anticompetitive harm and the procompetitive justification.”¹²³ A brief review of Google’s practices demonstrates a clear procompetitive justification.

At its core the critics are complaining about how Google adjusts its algorithm. There are two principal drivers for changes in algorithms. First, Google and all search providers face a continual onslaught from spammers and others who would prey on consumers through deception, fraud or other egregious conduct. Google’s careful control of the algorithm is the first line of defense for consumers. Changing the algorithm prevents spammers from inundating users with unwanted search results. Second, search is not perfect. There are always new ways to gather, index, interpret, and deliver information, and algorithmic changes are necessary to bring advances in search to the consumer.

In spite of the intense scrutiny there is little evidence that changes in the algorithm have been pretextual or targeted at harming rivals. Google makes hundreds of changes to its algorithm each month. To provide insight into the breadth and importance of these changes and to provide more transparency into the system, Google has begun publishing the changes.¹²⁴ In

¹²² *Microsoft* Appellate Decision, *supra* note 6, at 58-59.

¹²³ Spencer Weber Waller, *The Past, Present, and Future of Monopolization Remedies*, 76 ANTITRUST L.J. 11, 23 (2009).

¹²⁴ Inside Search: Google Search Blog, *available at* <http://insidesearch.blogspot.com/>.

February, 2012 alone Google made 40 changes to its algorithm.¹²⁵ Some of these could be described as mundane (such as adjusting the thumbnail size) but others are obviously important to improving the user search experience. Take a change in the ranking of YouTube videos to better reflect locally relevant information, or an improvement in detecting official pages. Both of these changes benefit the end user immensely, and have clear procompetitive justifications.

Others question the occasions where Google includes its own content in its search results. There are also consumer-friendly, procompetitive reasons for Google's inclusion of its own content in this fashion. Critics attempt to portray this as an expansion into vertical search categories, thereby posing a threat to competitors who focus narrowly in the search space. This has been a refrain echoed by the likes of Foundem and Nextag (against Google Shopping), Yelp and TripAdvisor (against Google Places) and Kayak (against Google Flight). However, the notion of vertical search is artificial – information is information. Google's job is to connect the user to the information, and may employ a variety of services to achieve this goal. Vertical search silos are just filtered displays of information that provides a lens to guide the search user. Critics of Google's expansion into vertical search silos often focus their ire on Universal Search, in which Google combines relevant information from a variety of different lens into one digestible result. Google Executive Chairman Eric Schmidt explains the disconnect in the discussion of vertical search:¹²⁶

What is crucial to understand is that universal search results are *not* separate “products and services” from Google. Rather, the incorporation of thematic and conventional results in universal search reflects Google's effort to connect users to the information that is most responsive to their queries. Because of this, the question of whether we “favor” our “products and services” is based on an inaccurate premise. These universal search results *are* our search service—they are not some separate “Google content” that can be “favored.”

¹²⁵ <http://insidesearch.blogspot.com/2012/02/search-quality-highlights-40-changes.html>.

¹²⁶ Response of Eric Schmidt, Executive Chairman of Google, Inc. before the Senate Judiciary Committee, response to Senator Kohl, Question no. 2, September 21, 2011.

This is a long way of saying that Google has a reason for organizing the information it displays in its search results. And this reason is not related to marginalizing competitors – instead, it is aimed at improving the user experience. Google’s goal is to connect people with information. This can be achieved in a variety of ways, including connecting a user to other sources that have the information (other websites) or providing the information directly. By providing its own content, Google can more quickly and directly provide the most relevant answers – precisely what all search engines strive to do. Take Google Maps, for example. Because it is integrated, Google can access the information more directly. In this case, integration actually enables a host of functions that would be hard or impossible with outside content.

Those looking for verification that the approach of compiling information in a more digestible manner need only look to Google's competitors. Bing and Yahoo! display search results in “one boxes” as well, showing their belief that the results are useful for consumers. This is not pretextual assertion, or a meaningless claim – Google, like other search engines, recognizes the need to continually refine its product.

Google Executive Chairman Eric Schmidt explained the challenge facing Google search engineers. There are times when Google is very confident that it knows precisely what a user wants, and can most accurately and quickly provide that information directly from Google source without requiring the user to click on another link. For instance, “for certain types of queries, such as stock quotes and weather forecasts, our studies show that users like direct answers.”¹²⁷ It would be antithetical to the purpose of search to require Google to complicate the process by directing a user to an unnecessary third party content provider’s link. Users do not want complicated or cumbersome search engines; they want information quickly. And if a user is

¹²⁷ Response of Eric Schmidt, Executive Chairman of Google, Inc. before the Senate Judiciary Committee, response to Senator Kohl, Question no. 1, September 21, 2011.

looking for a precise result, an easy adjustment to the search term (add “MapQuest” to the search, for example) makes it readily accessible, as does simply typing www.mapquest.com in the address bar before searching. Notably, Google is not alone in choosing to provide answers when it deems an answer most appropriate – Bing and Yahoo perform the same service.

Similarly, allegations that Google restricts use of its mobile Android operating system by requiring they run Google products or Google search are factually mistaken.¹²⁸ Google does not condition use of Android on use of any other Google product. The platform has some minimum compatibility requirements, as it must in order to ensure operability, but developers can easily adapt to these basic requirements. The pre-installation of an app (such as Google Places) on an Android device reflects a choice by the distributor. This is a feature – not a bug – as “users of the Google Places app benefit from functionality that comes with using the Google Places app on a mobile operating system because the app uses information about the user’s location to help the user find nearby local businesses.”¹²⁹

There are also those that assert that Google traps users by offering them a host of free products, and then integrating these products into search. For instance, Microsoft’s Vice President and Deputy General Counsel Dave Heiner opined that “Google’s business is helped along by significant network effects (just like the PC operating system business).”¹³⁰ Of course, Microsoft’s chief competition counsel followed up this allegation with the disclaimer that “Nor should firms be punished just because a particular business practice may harm a rival—

¹²⁸ See, e.g., Senator Grassley’s first question to Susan Creighton, Sen. Grassley’s Questions for the Record for Susan Creighton, Senate Judiciary Committee, September 21, 2011.

¹²⁹ Response of Susan Creighton, Wilson Sonsini Goodrich & Rosati, Sen. Grassley’s Questions for the Record for Susan Creighton, Senate Judiciary Committee, September 21, 2011.

¹³⁰ Dave Heiner, Competition Authorities and Search, Microsoft on the Issues, Feb. 26, 2010, *available at* http://blogs.technet.com/b/microsoft_on_the_issues/archive/2010/02/26/competition-authorities-and-search.aspx.

competition on the merits can do that, too. That is a position that Microsoft has long espoused, and we're sticking to it."¹³¹

The procompetitive justifications for this practice should be self-apparent. Google operates on the principal of loyalty, not lock-in. Consumers can come and go as they please, and Google strives to keep them on their content by providing the best content, not restricting their access to competitors. Not only does Google refrain from creating artificial barriers to customer migration as Microsoft did, but Google actually facilitates consumer ability to move freely about different products on the web.

CONCLUSION

Microsoft is a landmark case in antitrust law both for the § 2 roadmap it provides, and for the questions it raises. What is clear after *Microsoft* is that actions taken by a monopolist controlling over 90% of a relevant product market characterized by nearly insurmountable entry barriers to deter the possibility of new entrants will be deemed an illegal maintenance of monopoly power if there are no procompetitive justifications to offset the blatant harm to competition. What is not clear is precisely how much market power a dominant firm may have, how open the relevant product market can be to new entrants, how narrowly a market may be defined in a constantly changing industry, and how a court will struggle with the balance of legitimate procompetitive justifications for questionable conduct. *Microsoft* might have laid out the legal standard, the framework, and even some clear line-drawing regarding certain facts, but the relevant question in assessing Google is how this standard applies to the novel set of facts present in the search industry. It is not enough for Google's competitors – including Microsoft – to point to networks effects or perceived market dominance and presume that this mandates a

¹³¹ *Id.*

similar outcome. A case against Google must include a penetrating evaluation of the facts and an assessment of procompetitive justifications that the *Microsoft* court did not have to complete.

At the Senate Judiciary Committee hearing Senator Richard Blumenthal, a former state antitrust enforcer, explained “[antitrust] enforcement actions ... are costly, time-consuming, cumbersome, blunt and inexact instruments of protecting competition.” Antitrust enforcers should keep this in mind, especially when considering sailing forth on an overly simplified analogy to the *Microsoft* case.