Senate Judiciary Subcommittee on
Antitrust, Competition Policy and Consumer Rights

Hearing on "The Power of Google: Serving Consumers or Threatening Competition?"

Responses of Thomas O. Barnett (Covington & Burling LLP)
to Follow-Up Questions for the Record Received from Chairman Kohl

Question 1(a): In considering the competition to Google as a general search engine, is the competition offered by the Microsoft/Yahoo partnership Bing, which has a market share of about 30%, sufficient? Should the fact that Bing loses about $ 2 billion dollars a year matter in thinking of Bing as a competitive alternative?

Answer 1(a): The evidence confirms that Google wields monopoly power in general search and paid search advertising in the U.S. Google's Executive Chairman Eric Schmidt has admitted as much. He acknowledged in 2003 the major barriers to entry to general search.[1] In addition, in response to your question at the hearing about whether Google's very high market shares indicate that it has monopoly power, Mr. Schmidt said, "I would agree, Senator, that we're in that area."

Bing has not challenged Google's dominance of the general search and search advertising markets. Bing has not, for example, taken any significant share of searches away from Google since its launch in 2009; most of the market share that it has gained in that time has come from its search partner Yahoo! and from other, smaller search providers, like Ask.com.[2] Further, the large losses suffered by Bing each year raise the distinct possibility that Bing will exit the market, leaving Google as the only general search engine in the U.S.

Question 1(b): Are there high barriers to entry to anyone starting a new search engine? What are they?

Answer 1(b): There are high barriers to entry that someone starting a new general search engine would have to surmount. First, there are significant technological obstacles that any entrant must overcome. Providing high-quality search results in a fraction of a second presents an exceptionally complicated and dynamic computer science problem. To solve this problem and deliver quality search results to its users, an entrant must develop complex search algorithms, manage and store enormous quantities of data, and build a huge network of computers and servers to do so. Besides the technological challenges this presents, it also costs a great deal of money. Google, for example, runs nearly one million servers in data centers around the world[3]

[1] John Markoff and G. Pascal Zachary, *In Searching the Web, Google Finds Riches* (April 13, 2003), http://www.nytimes.com/2003/04/13/business/in-searching-the-web-google-finds-riches.html?src=pm.

[2] David Goldman, *Microsoft's Plan to Stop Bing's $1 Billion Bleeding* (Sept. 20, 2011), http://money.cnn.com/2011/09/20/technology/microsoft_bing/index.htm.

[3] Jonathan G. Koomey, Ph.D., *Growth in Data Center Electricity Use 2005 to 2010*, at 23 (Aug. 1, 2011), http://www.analyticspress.com/datacenters.html.

and invested $890 million in its data center infrastructure in the first three months of 2011 alone.[4]

Even if an entrant could meet these technological and financial challenges, it would also have to achieve sufficient and significant "scale" in order to compete against Google. Search engines "learn by doing." As more users enter more queries into the search engine, it gains access to more data that can be used to improve the search algorithms. Over time, this makes it more likely that the search engine will be able to return results that users find relevant, which in turn leads to even more users entering more search queries, and so on. Without sufficient scale, a search engine is less able to improve and innovate, less able to attract users, and therefore less able to compete. The self-reinforcing loop of scale also enables a dominant search provider like Google to maintain and even expand its dominance over time. As Mr. Schmidt has acknowledged, "Managing search at our scale is a very serious barrier to entry."[5]

Question 2: Google sometimes argues that it competes with social networking sites such as Facebook. Should Facebook be considered in the same market as the Google search engine? Why or why not?

Facebook does not provide general search functionality that is comparable to the general search engine available on Google.com. Indeed, my understanding is that, to the extent that a user seeks to perform a general web search on Facebook, the search is powered by Bing, not Facebook.

Question 3: Senior Google executives such as Marissa Meyer have openly acknowledged that Google lists its products and services first, ahead of organic search results. Do you believe there is an antitrust problem with Google favoring its own services in light of Google's dominant market share?

Answer: When a dominant firm like Google engages in exclusionary conduct to maintain or extend its dominance, rather than compete on the merits, its conduct raises significant antitrust issues. Google's dominance in search provides it with enormous power to steer users to particular websites. Unfortunately for consumers, Google appears to be abusing that power by using deceptive practices to induce users to click on links to Google pages in which Google has an economic interest.

Google has led users to understand that the search results displayed at the top of the page are links to those sites that Google's algorithm has indicated are most likely to be responsive to the user's query, unless the links are labeled as paid advertisements. Recently, however, Google began inserting links to Google pages at or near the top of the search results that are not the result of the normal algorithmic process. Because of this artificially prominent placement, consumers can be misled into clicking on the Google links in the mistaken belief that they are

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[4] Google Investor Relations, *Google Announces First Quarter 2011 Results* (Apr. 14, 2011), http://investor.google.com/earnings/2011/Q1_google_earnings.html.

[5] John Markoff and G. Pascal Zachary, *In Searching the Web, Google Finds Riches* (April 13, 2003), http://www.nytimes.com/2003/04/13/business/in-searching-the-web-google-finds-riches.html?src=pm.

natural, algorithmic search results. Google can thereby steer users to its own pages and foreclose the ability of competing sites to gain visibility. For example, when a user searches for information on the stock of a given company, the Google Finance link is displayed before any algorithmic results, with no clear label that the link has been placed there artificially by Google and that it is not a natural, algorithmic result to the consumer's query. This tactic also pushes competing services, such as Yahoo! Finance, further down the search results page, regardless of whether they are better or more popular than the Google site.

Through this deceptive and exclusionary conduct, Google harms competition in specialized, or "vertical," search markets (such as finance, maps, or shopping). By artificially promoting its own products, Google deprives competing sites of traffic and advertising revenue, raises their costs as they are forced to spend more on paid search ads to make up for part of the lost traffic, and reduces their incentives and ability to innovate. This stifles the development of nascent competitors and enables Google both to maintain its dominance in general search and search advertising and to extend that dominance into vertical areas. The final result is less innovation and higher prices for consumers and businesses.

Question 4: Do you believe that the "search penalties" Nextag has been subject to in Europe – that is, placement on the search results being deliberately downgraded by Google because it, among other things has search functionality on its site and links to other sites – is an example of Google attempting to maintain its dominant market position in search? What are the antitrust implications of this conduct?

Answer: Because Google so dominates search and because search is the gateway to the Internet, Google has the power to steer enormous volumes of user traffic to -- or away -- from a given website. The tactic described in the question -- downgrading the search rankings of sites because they compete with Google -- is one means by which Google can exercise its power. Thus, such activity by Google can pose a serious threat to competition. Further, in the same manner described above, such manipulation of search result rankings would constitute a deceptive practice in that consumers have been led by Google to believe that sites ranked higher on the search results have been identified by Google's search algorithm as more likely to be relevant to a user query.

The opaque nature of Google's algorithm makes it difficult to determine from the outside whether and, if so, to what extent Google may be engaging in such conduct. Thus, it is important for the FTC and other antitrust enforcement agencies to conduct a thorough investigation that includes examination of such practices by Google.

Question 5: Mr. Barnett, do you believe that there are enough safeguards inside Google to guard against search bias – that is, favoring the websites and services it owns in search results? Should there be some outside supervision of Google's conduct to ensure against this?

Answer: Google is a for profit corporation that seeks to earn money for its shareholders. Accordingly, Google has the economic incentive to engage in conduct that can increase its profits. As discussed during the hearing, Google's incentives have changed dramatically in recent years. At one time, Google's incentive was to direct users to the most relevant sites as efficiently as possible. Now, Google has an economic incentive to keep users within the "Google universe," where it can continue to monetize their activity. Google therefore has an incentive to steer users to its own products, such as Google Places (hotels, restaurants and destinations), Google Product Search (product information and price comparisons), Google Finance (investment and other financial issues), Google Maps (location and direction information), and YouTube (video content). Because Google now competes with the very websites that depend on its dominant search engine and search advertising platform to reach consumers, it has both the incentive and the ability to foreclose the visibility of rival sites.

If consumers are to benefit from the full potential of the Internet, antitrust enforcers need to provide independent outside scrutiny of Google's actions to ensure that Google obeys the antitrust laws. Indeed, antitrust enforcement already has helped to preserve competition. In 2008, Google and Yahoo! abandoned their proposed partnership in the face of threatened litigation by the Antitrust Division of the Department of Justice. Earlier this year, a federal court in New York rejected the Google Books settlement on the grounds that it "would further entrench Google's market power in the online search market."[6] Also this year, the Department of Justice obtained an antitrust consent decree that imposed conditions on Google's takeover of ITA Software, the leading provider of online flight search technology.[7] Most recently, the antitrust scrutiny of ongoing investigations by the FTC and numerous state attorneys general forced Google to take an initial step back from its unauthorized use of content that it has scraped from other sites. In short, enforcement of existing antitrust laws can help preserve the benefits of competition for consumers.

Question 6: The Federal Trade Commission and several state attorneys general are currently pursuing an antitrust investigation against Google. Should they conclude the law has been violated, are there any specific remedies you believe they should pursue?

Answer: The FTC and the state attorneys general need to conduct a thorough investigation and to make enforcement decisions based on the facts discovered in that process. At this point, based on the evidence available today, it appears that Google's exclusionary and anticompetitive conduct might well have crossed the line in several respects, raising serious concerns about the possibility of a violation of Section 2 of the Sherman Act and/or Section 5 of the FTC Act: (i) Google has a dominant share of the search and search advertising markets; (ii) Google is maintaining that dominance and expanding its dominance into other markets; and (iii) Google has been doing so through a pattern of exclusionary conduct rather than by competing on the merits.

If, after a full investigation, the FTC and the state attorneys general determine that Google has violated the antitrust laws, they should pursue concrete, administrable remedies that can help preserve the benefits of competition for consumers. While any remedy should be crafted based on the violations found, the information already available points to examples of relief that an antitrust enforcement action could seek that would help consumers. For example, an order could

[6] *Authors Guild v. Google, Inc.*, No. 1:05-cv-8136, Order at 37 (S.D.N.Y. Mar. 22, 2011).

[7] *United States v. Google*, No. 11-cv-00688 (D.D.C. Oct. 5, 2011).

prohibit Google's deceptive display of its own links, Google's practice of scraping and using content from other sites without their permission, and the reduction of a site's rankings in its search results based on whether the site competes with Google.

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