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 Senator Lee

Question 1: In your written testimony, you make a statement that I find compelling: "Google already possesses unprecedented power to steer users and to stifle competition. If, for some reason, antitrust enforcement is not able to address these concerns, there will be pressure to reign in Google's power through more direct government regulation that is likely to be more rigid and burdensome and that itself would pose a threat to innovation and economic growth on the Internet." What are the specific aspects of the threat that (in the absence of antitrust enforcement) you believe may cause significant elements of the Internet to be subject to intrusive government regulation?

Answer: Google already wields enormous economic power through its dominance of search and paid search advertising, earning $29 billion in revenues last year.[1] Further, Google is expanding its dominance into other, search-dependent services, such as maps, finance, product search, and user-generated video. If antitrust enforcers fail to take appropriate action, government regulatory officials and consumers in the U.S. and abroad could become increasingly concerned by Google's growing power over Internet commerce and frustrated with the lack of sufficient enforcement. The result could well be louder calls for government regulatory bodies that would have the authority to dictate what companies can and cannot do under a broad, nebulous standard. For example, there have been suggestions that the government should create a "Federal Search Commission" to investigate and regulate Internet search providers.[2] The best response to Google's dominance and exclusionary conduct, I believe, is effective enforcement of our nation's existing antitrust laws to ensure that all participants in the market, not just Google, are able to innovate and compete on the merits.

Question 2: We learned from Robert Bork that the animating principle of antitrust justice ought to be consumer welfare. My principal concern with Google's current practices is that they harm consumers. What specific ways do you believe Google's actions work to harm consumers?

Answer 2: Although the growth of the Internet represents a major opportunity for American consumers, Google's conduct threatens to derail that progress in various ways. For example, Google deceives consumers as it ensures that its own products appear more prominently than those of its competitors on its search results pages, which denies consumers the opportunity to make an informed choice among alternatives. It also deprives competing sites of traffic and

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[1] Google Investor Relations, *2011 Financial Tables*, http://investor.google.com/financial/tables.html.

[2] Frank Pasquale, *Internet Nondiscrimination Principles for Competition Policy Online: Testimony Before the Task Force on Competition Policy and Antitrust Laws of the House Committee on the Judiciary*, at 1 (July 15, 2008), http://judiciary.house.gov/hearings/pdf/Pasquale080715.pdf.

advertising revenue, which reduces their ability to invest in further development and raises their costs, in part because they are forced to spend more on paid search ads to make up some of the lost traffic. Those higher costs are inevitably passed on to consumers in the form of higher prices.

Finally, and perhaps most importantly, if Google continues to foreclose the ability of sites to be seen by users, established vertical sites will have less reason to continue to invest in innovation and new sites will be less willing to take the substantial risks and incur the significant investments necessary to enter the market. This is not just a theoretical concern. Jeffrey Katz and Jeremy Stoppleman -- the CEOs of Nextag and Yelp, respectively -- both testified at the Subcommittee hearing that they would not attempt to launch their companies in today's market given Google's exclusionary conduct. Over the long run, absent effective antitrust enforcement, Google may come to dominate more and more of Internet commerce – with consumers and businesses suffering from higher prices and less innovation.

Question 3: Google has often said that competition is just "one click away." In what respects do you believe this is true and in what respects do you think this is misleading?

Answer 3: The fallacy in this slogan frequently invoked by Google is that the opportunity to click to another site does not help the user if there is no other site providing a comparable service. Because of the network effects that benefit Google from its massive scale, other general search engines simply cannot provide the same level of search service. Search engines "learn by doing." As more users enter more queries into the search engine, it gains access to more data, and it is better able to develop and improve its 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. Even Mr. Schmidt has acknowledged that "[m]anaging search at our scale is a very serious barrier to entry."[3]

Because of those hurdles, Google is unlikely to face significant competition in search for the foreseeable future. As a result, the ability of users to click to other sites does not impose significant competitive constraints on Google.

Question 4(a). We have been reminded many times over the last few months of the FTC's investigation into Microsoft in 1998. In what ways is the Google of 2011 similar to the Microsoft of 1998?

Answer 4(a). At its core, the antitrust case against Microsoft involved a company with a dominant position in one market -- the operating system market -- using its monopoly power to foreclose competition in related markets (e.g., internet browsers). The result was not only to

[3] 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.

threaten competition in the related markets, but also to stifle nascent threats to Microsoft's dominant operating system in order to maintain Microsoft's dominance.

The similarities with Google today are striking. Like Microsoft, Google has monopoly power, albeit in at least two markets -- general search and paid search advertising. Also like Microsoft, Google is alleged to be abusing its monopoly power to foreclose competition in related markets (*e.g.*, search dependent markets, such as maps, finance, product shopping, and user-generated video). And, like Microsoft, in doing so, Google not only threatens competition in these other markets, but also quashes nascent competitive threats (such as vertical search engines) to its general search dominance.

In one respect in particular, the analogy is directly on point. Google is rapidly gaining a dominant position in mobile operating systems through its "less than free" distribution of its Android operating system. Google's control over the mobile operating system in addition to its virtual absolute control over mobile search and mobile search advertising (with a share of each that exceeds 95%)[4] gives even more control over a user's experience on a mobile device than Microsoft had over the user experience on desktop computers. Google can, for example, use compatibility with its Android operating system as a "club" to exclude competitors.

Question 4(b). Some have suggested that Google seems to be innovating more than Microsoft was in 1998. Do you agree and, if so, does that change the approach?

Answer 4(b). The question for antitrust enforcers is whether Google today is engaging in exclusionary conduct that forecloses competition. If so, then Google has denied consumers the benefits of innovation by competitors that have been foreclosed while insulating itself from competitive pressures that would spur Google's own innovative efforts.

Question 4(c). Do Google's current activities call for similar antitrust action and remedies to those agreed to in the Microsoft case?

Answer 4(c). If, after a full investigation, the FTC or a state attorney general determines that Google has violated the antitrust laws, the FTC or state attorney general should pursue concrete, administrable remedies to protect the competitive process. 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 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.

Question 5: Attaining market dominance by providing the best product is not itself a violation of antitrust principles. Can you provide examples of how you believe Google is improperly

[4] *See* Greg Sterling, *Visualizing Google's Dominance of Mobile Advertising* (Feb. 16, 2011), http://searchengineland.com/picturing-googles-dominance-of-mobile-advertising-65114; *see also* Greg Sterling, *Google Controls 97 Percent Of Mobile Paid Search: Report* (Mar. 7, 2011), http://searchengineland.com/google-controls-97-percent-of-mobile-paid-search-report-66876.

leveraging and fortifying its market dominance by engaging in anticompetitive behavior as opposed to relying solely on the merits of its products?

Answer 5: As a result of its dominance in search and search advertising, Google wields enormous power to steers users to -- or away from -- particular websites. Unfortunately for consumers, Google is now abusing that power to undermine competition by steering users to its own sites and foreclosing the visibility of competing sites. For example, as you illustrated during your questioning of Mr. Schmidt, Google steers users toward its own products (like Google Places or Google Maps) by deceptively displaying them prominently and consistently at or near the top of the results page in ways that mislead consumers into believing that they are top-ranked natural, algorithmic search results. Google also scrapes content developed by other websites, like user reviews from TripAdvisor and Yelp, and uses it without permission to build its own competing sites. Further, Google coerces sites into accepting such scraping by tying access to its dominant search engine results to Google's use of such scraped content in other Google products, such as Google Places or Google Product Search. In each of these cases, Google is promoting its products not by competition on the merits, but instead through misleading users and coercing competitors.

Question 6(a): In 1998, some suggested that Microsoft would "take over the world." It is difficult to speculate what may have happened had the FTC not intervened, but few could have predicted the growth of Apple and Linux, which now offer meaningful alternatives for consumers. With respect to an innovative company in a rapidly evolving industry, what potential harm may come from early enforcement of antitrust laws?

Answer 6(a). The principles of effective antitrust enforcement apply across all industries. I am aware of the suggestions made by some that antitrust enforcement has no place in dynamic, rapidly-evolving markets like Internet search. A bipartisan, congressionally-chartered panel of experts -- the Antitrust Modernization Commission (AMC) -- recently studied and rejected this very argument. The AMC concluded that "[c]urrent antitrust analysis has a sufficient grounding in economics and is sufficiently flexible to reach appropriate conclusions in matters involving industries," like Internet search, "in which innovation, intellectual property, and technological change are central features."[5] Judge Richard A. Posner has taken a similar view: "[A]ntitrust doctrine is sufficiently supple, and sufficiently informed by economic theory, to cope effectively with the distinctive-seeming antitrust problems that the new economy presents."[6]

In short, antitrust laws ensure that companies -- even those in highly innovative, rapidly-evolving industries -- have the opportunity to compete and that those who win do so by competing on the merits. This competition drives companies in a free market to reduce costs, improve quality, and invent new products and services, which benefits consumers and spurs economic growth.

[5] Antitrust Modernization Commission, *Report and Recommendations* at 31 (Apr. 2007), http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

[6] Hon. Richard A. Posner, ANTITRUST LAW 256 (2d ed. 2001).

Question 6(b). Is it possible or even likely that the markets in which Google operates will experience some sort of disruptive technology that will allow for new entrants or the resurgence of current competitors?

Answer 6(b). The mere existence of a theoretical possibility of competition from a disruptive, new technology at some indefinite point in the future does not warrant abdication of antitrust enforcement, which is the implication presented by this argument. Rather, appropriate antitrust enforcement protects competition and consumer welfare during the period before any such disruptive new technology emerges, which could be many years. Further, antitrust enforcement can help maintain a fertile competitive environment in which new developments are more likely to emerge and take root rather than to be crushed in their incipiency by the incumbent dominant company.

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