Senate Judiciary Committee
Subcommittee on Antitrust, Competition Policy and Consumer Rights
Hearing on "The Power of Google: Serving Consumers or Threatening Competition"
September 21, 2011

Sen. Grassley's Questions for the Record for Susan Creighton

1. **You are familiar with the Microsoft case brought by the Justice Department in the late 1990s – early 2000s. Could you explain the difference between Internet Explorer and its interdependency on Windows in 1998 and Google Places' interdependency on Android today?**

There are at least three important differences between Internet Explorer's relationship to Windows and Google Places' relationship to Android.

First, Microsoft used various exclusive dealing, tying, commingling of code, and other anticompetitive conduct to foreclose distribution and use of competing browsers and ensure that Internet Explorer remained the primary web browser used on Windows systems. Google does not condition access to or use of Android on pre-installation of any Google application, including Google Places, or on making Google the default search engine. Handset makers who wish to pre-install Google applications are required to meet certain minimum compatibility standards to ensure that applications written for Android will function properly on those phones. However, Google does not condition Android compatibility determinations on pre-installation of Google applications or on making Google the default search engine.

Second, Windows had approximately 90% market share among operating systems used on PCs, and so any competing browser, such as Netscape, that attempted to penetrate the PC market had to overcome Microsoft's tactics in order to gain access to users. Android does not have comparable market share and so competitors that seek access to smartphone users are able to distribute their applications on the iPhone, on RIM (BlackBerry), on Windows Mobile, and, of course, also on Android. Users of Android, the iPhone, and other smartphones can quickly and freely download and use apps much more easily than users in 1998 could download software to be used on Windows.

Finally, Microsoft never successfully demonstrated any benefits to users from commingling the code for Internet Explorer and Windows and tying the use of Internet Explorer to Windows. In contrast, Google does not condition use of Android on the installation of Google Places, and 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. For these reasons, I believe that there are fundamental differences between the anticompetitive conduct Microsoft undertook to require Windows users to use Internet Explorer, versus the free and open mobile environment created by Android with the flexibility that mobile users have to customize their mobile devices with apps from Google's competitors.

2. **Google often states that "Competition is just one click away." Do you agree with this statement? Why or why not? Does this claim hold true in a smartphone environment, where pre-installed Android applications create a high barrier for competition?**

I agree whole-heartedly with Google that "competition is just one click away." The statement also holds true for the smartphone environment, where users can easily navigate to different web pages on mobile web browsers and download applications from Google's competitors.

With respect to Internet search, it is virtually costless, both in time and money, for consumers to try different search engines. Because using another search engine is free and costs a consumer only a few seconds of time (*e.g.*, the amount of time it takes to type "www.blekko.com"), an innovative search engine that delivers better results than its rivals can expect to attract and keep users. Google cannot prevent users from switching to Bing, Yahoo!, Blekko, or any specialized search engine such as Amazon, Yelp, or NexTag.

Just as the Internet provides a level playing field for websites, on the Android platform there are no obstacles for rival application developers looking to reach their audiences and achieve success. The Android platform was designed to allow users to fully "personalize" their mobile devices – including the applications. Because Android is customizable by the user, if a user does not like a particular application (including a pre-installed one), they can easily download, install and use a competing application, typically in just a minute or two. This applies even to native applications like the email client, calendar, and browser.

Thus, pre-installation of an application on an Android device does not serve as a barrier for competing applications. For example, Yelp's mobile apps appear to be doing quite well. Yelp boasts that "over 40% of all Yelp searches were done on one of [Yelp's] mobile apps."[1] Yelp's experience shows that users download and use mobile apps no matter what other apps may come pre-installed. Yelp's website shows that it has mobile apps for the iPhone, iPod Touch, Android, BlackBerry, Windows Phone 7, Palm Pre, and a mobile site (m.yelp.com) for mobile browsers.[2] Therefore, I also agree that "competition is only one click away," and that equally applies to the mobile environment where competition is only "one tap" or "one download" away.

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[1] *Yelp, Siri Says*, YELP WEB LOG (Oct. 17, 2011, 1:15 PM), http://officialblog.yelp.com/2011/10/yelp-siri-says.html.

[2] *See* YELP FOR MOBILE, http://www.yelp.com/yelpmobile (last visited Nov. 3, 2011).

3. **One of my constituents praised Google's services and indicated that it gives him "the tools to help my business grow, supporting business across [Iowa], and fueling our national economy." He urged that "Government should not be picking winners and losers – it should allow successful companies like Google to continue to empower small business and promote entrepreneurial growth across our country." What is your opinion on this?**

I agree with your constituent. The antitrust laws are founded on the bedrock principle that the government should not be in the business of picking winners and losers, but should let consumers pick winners and losers through our free-market system. Only where conduct has been found to harm competition itself – not just a specific competitor or competitors – should the government take action.

There is in my view no evidence that the competitive process has been harmed. To the contrary, in the more than twenty years in which I have been an attorney representing high-technology companies in Silicon Valley, I have never seen competition flourish in the high-tech sector as it is today. As Thomas Friedman wrote a few weeks after the Senate hearing:

> While Wall Street is being rattled by a social revolution, Silicon Valley is being by transformed by another technology revolution—one that is taking the world from connected to hyperconnected and individuals from empowered to superempowered. It is the biggest leap forward in the I.T. revolution since the mainframe computer was replaced by desktops and the Web. It is going to change everything about how companies and societies operate.
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> The latest phase in the I.T. revolution is being driven by the convergence of social media—Facebook, Twitter, LinkedIn, Groupon, Zynga—with the proliferation of cheap wireless connectivity and Web-enabled smartphones and "the cloud". . . .
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> The emergence of the cloud, explained Alan Cohen, a vice president of Nicira, a new networking company, "means than anyone can have the computing resources of Google and rent it by the hour." This is speeding up everything—innovation, product cycles and competition. . . .
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> The great thing about the new I.T. revolution, says Jeff Weiner, the C.E.O. of LinkedIn, is that "it makes it easier and cheaper than ever for anyone anywhere to be an entrepreneur" and to have access to all the best infrastructure of innovation. "And despite all of our challenges," he adds, "it is happening here in America."[3]

In my view, antitrust law should follow the principle of medical ethics "first do no harm." As your constituent noted, companies like Google "continue to empower small business and

[3] Thomas Friedman, *One Country, Two Revolutions*, N.Y. TIMES, Oct. 23, 2011, at SR11, *available at* http://www.nytimes.com/2011/10/23/opinion/sunday/friedman-one-country-two-revolutions.html.

promote entrepreneurial growth across our country." Replacing this vibrant, competitive marketplace with government regulation aimed at determining the utility of billions of different results to millions of different users is, I believe, the antitrust equivalent of performing surgery on a healthy patient. Despite all the challenges we face in other economic sectors, in high technology, as Mr. Friedman observed, an extraordinary revolution is taking place, and "it is happening here in America." Government intervention in this thriving marketplace can only threaten the market's healthy vibrancy; it cannot improve it.

4. **The online search market is a dynamic, constantly evolving market. Do you believe that search is an essential facility that should be regulated? Are you concerned with what would happen to innovation in search if the government were to regulate it?**

I do not believe that search is an essential facility. I am, however, very concerned regarding the harm that consumers would suffer if search were subject to government regulation, either by an agency or by the courts.

The "essential facilities" doctrine has been the subject of frequent criticism by leading antitrust scholars,[4] and has never been endorsed by the Supreme Court.[5] Some lower courts have recognized the doctrine in very limited circumstances, typically involving physical infrastructure such as stadiums or electric transmission lines that cannot be readily duplicated. To be an essential facility, courts that have recognized the doctrine have stressed that control of the asset must "carr[y] with it the power to *eliminate* competition in the downstream market."[6] A facility "is not essential even if it is widely preferred by consumers and producers in the market, as long as there is an alternative (albeit inferior) [option available]."[7] In other words, to be truly essential, "the #1 monopoly facility also establishes a #2 monopoly."[8]

Neither Google nor any other search competitor has anything remotely resembling the ability to "eliminate" competition in adjacent markets. Google cannot prevent consumers from navigating directly to other websites, going to competing search engines or social networks that provide links to other web sites, clicking on advertisements displayed on any of the thousands of other websites on the Internet, or downloading mobile apps.

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[4] *See* Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841 (1989); *see also* 3 PHILLIP E. AREEDA, DONALD F. TURNER & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 771, at 195-96 (1978) (describing essential facility doctrine as "inconsistent with antitrust's purpose"); *id.* at 196 ("Lest there be any doubt, we state our belief that the essential facility doctrine is both harmful and unnecessary and should be abandoned.").

[5] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 410-11 (2004) (stating that the Court "never recognized such a doctrine").

[6] City of Anaheim v. S. Cal. Edison Co., 955 F.2d 1373, 1380 n.5 (9th Cir. 1992) (quoting Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 544 (9th Cir. 1991)); *see also* Twin Labs., Inc. v. Weider Health & Fitness Corp., 900 F.2d 566, 570 (2d Cir. 1990).

[7] JamSports & Entm't v. Paradama Prods., 336 F. Supp. 2d 824, 839 (N.D. Ill. 2004).

[8] AREEDA ET AL., *supra* note 41, ¶ 771, at 193.

Regarding your second question, I am extremely concerned about what would happen to innovation in search if government were to regulate it, whether through an agency or the courts. Google ranks content based on complex, rapidly evolving, and nonpublic algorithms designed to determine which results users will find most useful. Relief that requires Google to rank third-party sites in a particular way would require the courts or a regulatory agency to override Google's algorithms and, in effect, impose government-crafted ones. The regulator would need to determine how to rank literally hundreds of millions of websites as well as how to rank the results of specialized algorithms (*e.g.*, thematic search results such as video, news, etc.) against the results produced by other algorithms – an apples-to-oranges comparison that has presented an ongoing technical design challenge to general search engines since at least the late 1990s. Moreover, these metrics would necessarily need to adjust in real time, because the relevance of web pages to users is constantly changing, and webmasters continually create more sophisticated means of trying to trick Google into ranking lower-quality sites higher.

There is, in short, neither (i) an "objective" benchmark against which to rank websites, nor (ii) a feasible remedial mechanism for determining either the placement of thematic search results or where to rank websites unhappy with the ranking Google's algorithms give them. What is certain, however, is that compelling access to Google on terms regulated by an agency or a consent decree would chill the very innovation that the Sherman Act is designed to protect. In effect, Google would become a regulated utility administered by regulators (whether an agency or a court) who are not experts in Google's business and who would sit in judgment of Google's decisions how to provide service to every customer. Central planning would substitute for the market. In my opinion, a result more antithetical to the welfare of consumers or the purposes of the Sherman Act is hard to envision.