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. Kohl's Questions for the Record for Susan Creighton

1. **Would you argue that it is completely permissible under antitrust law for Google to favor its own products and services on its results page? Or, as a dominant firm, are there any restraints on Google's practices, and, if so, what are they?**

This question presupposes that Google is a "dominant" firm. "Dominance" is a term that, although used in some jurisdictions outside the United States, does not have any established legal significance in American antitrust law. The threshold question under American antitrust law is whether a firm has what is known as "monopoly power" in a properly defined antitrust market. If a firm does have monopoly power, then it is prohibited from engaging in what is referred to as "exclusionary" conduct – that is, conduct that amounts to "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[1]

The requirements of "monopoly power" and "exclusionary conduct" contained in Section 2 of the Sherman Act reflect two key principles that long have served as underpinnings for American antitrust law. First, when reviewing a company's unilateral, day-to-day decisions, government agencies and courts need to exercise extraordinary care not to chill innovation or other marketplace conduct that benefits consumers. Accordingly, the courts have long recognized that a company's unilateral conduct should be subject to antitrust review only if it threatens to create or sustain monopoly power:

> The conduct of a single firm is governed by § 2 alone and is unlawful only when it threatens actual monopolization. It is not enough that a single firm appears to "restrain trade" unreasonably, for even a vigorous competitor may leave that impression. . . . This is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster. In part because it is sometimes difficult to distinguish robust competition from conduct with long-run anticompetitive effects, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization.[2]

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[1] United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

[2] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767-68 (1984) (internal citations omitted).

Second, to "avoid constructions of § 2 [of the Sherman Act] which might chill competition, rather than foster it,"[3] the courts have consistently emphasized that "a monopolist, no less than any other competitor, is permitted and indeed encouraged to compete aggressively on the merits."[4] This is because "[s]ubjecting a single firm's every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote."[5] For that reason, the Sherman Act prohibits only "conduct which unfairly tends to destroy competition itself."[6]

Requirement of "Monopoly Power"

There are compelling reasons to conclude that Google does not have monopoly power in any relevant antitrust market. Monopoly power is "the power to control prices or exclude competition."[7] Because Google's search service is provided to consumers for free, and hence the power to raise price is not pertinent, the relevant question in showing monopoly power would be whether Google has the power to "exclude competitors" from the market. In *United States v. Microsoft*,[8] for example, Microsoft was able to use its ability to control access to its Windows operating system to exclude Netscape's browser from every major distribution channel, including PC manufacturers and Internet access providers (such as AOL).

Here, by comparison, Google has no ability to exclude a general search engine rival such as Microsoft from the market. Indeed, Microsoft has succeeded in having Bing installed as the default search engine on the vast majority of new desktop computers being shipped in the United States:

[3] Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459 (1993).

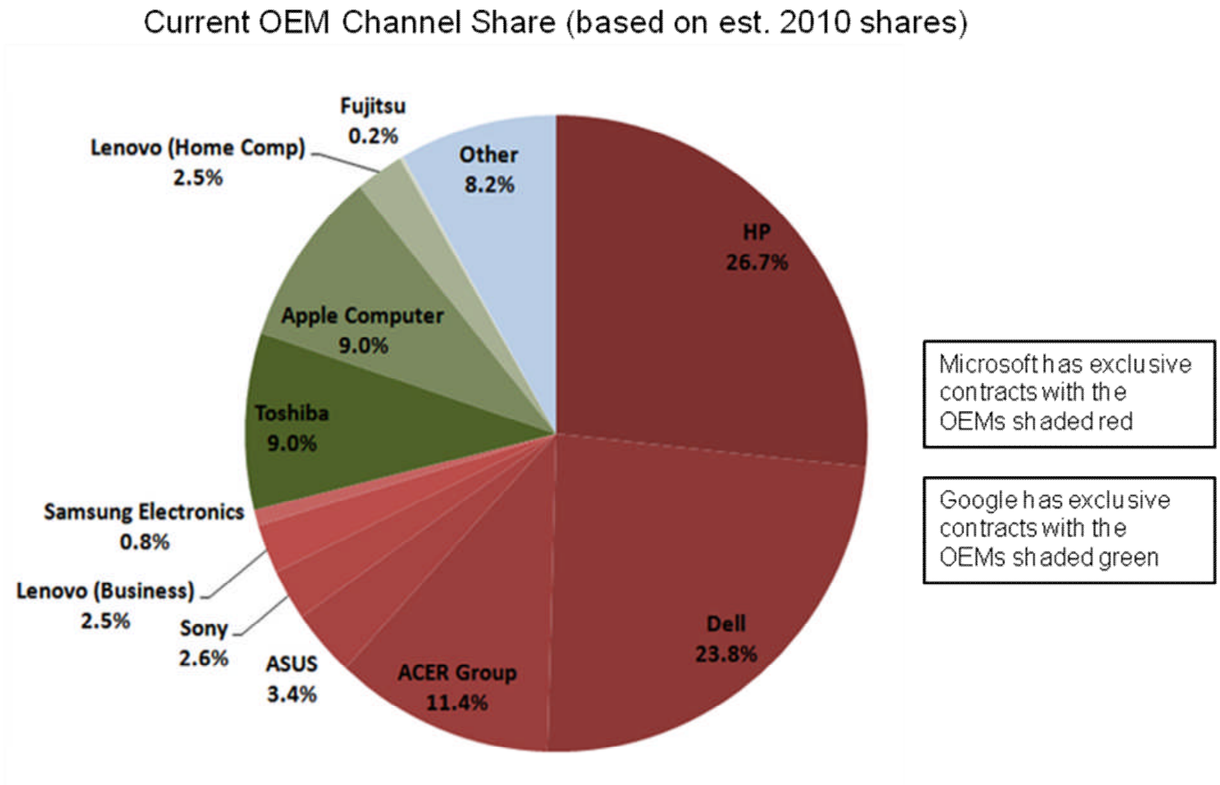
[4] Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 544-45 (9th Cir. 1983).

[5] *Copperweld*, 467 U.S. at 775.

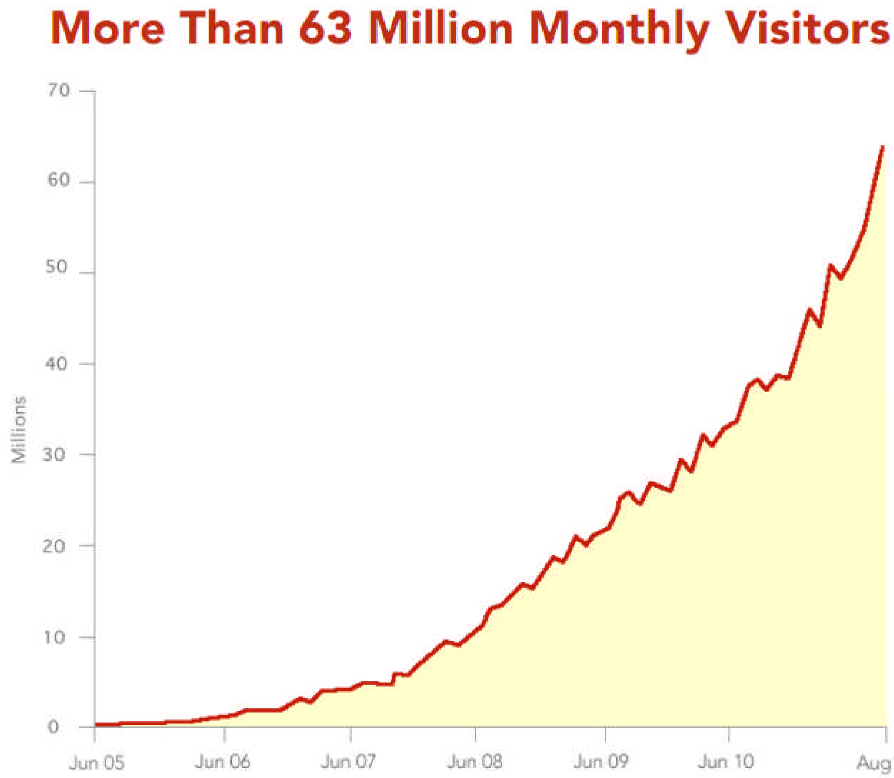
[6] *Spectrum Sports*, 506 U.S. at 458.

[7] United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377, 391 (1956).

[8] 253 F.3d 34 (D.C. Cir. 2001).



Nor does Google have the power to exclude specialized search rivals like Yelp from the market. During the period in which, according to Mr. Stoppelman, Google engaged in conduct that Yelp found objectionable, Yelp continued to grow rapidly in the market. This chart, from Yelp's own web site, illustrates just how dramatically Yelp has grown during the period at issue:



[9]

In the absence of direct evidence of the power to exclude, one can also look to indirect (circumstantial) evidence of monopoly power, such as durably high market shares protected by high barriers to entry in a well-defined antitrust market. This structural evidence, however, is likewise inconsistent with the hypothesis that Google has monopoly power. To begin with, even in the most narrowly hypothesized market, for "general search engines," Google's market share would be around 65%, below the percentage usually required to sustain a monopoly power claim.[10] In a more properly defined antitrust market, which would include, for example, specialized search engines that clearly compete with Google, Google's market share is far below 50%, which courts have found insufficient as a matter of law to show monopoly power.[11]

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[9] Press Release, Yelp, An Introduction to Yelp: Metrics as of August 2011, (Aug. 2011), *available at* http://www.yelp.com/html/pdf/Snapshot_August_2011_en_US.pdf.

[10] *See, e.g.*, PepsiCo, Inc. v. Coca-Cola Co., 315 F.3d 101, 109 (2d Cir. 2002) (finding a 64% market share insufficient to show monopoly power absent additional evidence of power to exclude competition or control prices); United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945) ("[90 percent of supply] is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough . . . .").

[11] *See, e.g.*, Bailey v. Allgas, Inc., 284 F.3d 1237, 1250 (11th Cir. 2002) (finding that a market share of less than 50% was insufficient to establish single-firm monopoly power as a matter of law); Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic, 65 F.3d 1406, 1411

Other structural indicia are also inconsistent with a hypothesis of monopoly power. Competitors continue to enter and expand: not only has Bing grown to nearly half Google's size in little more than two years, but smaller entrants continue to attract substantial market investments. For example, in just the few weeks that have passed since the Senate hearing, search engine start-up DuckDuckGo secured venture funding from Union Square Ventures, which issued a press release emphasizing that it thought now was an ideal time to invest in innovative new approaches to search.[12] During this same period, search engine competitor Blekko announced that it had received $30 million in funding from Russia's largest search engine, Yandex.[13] As the CEO of Blekko observed regarding the state of competition in the market, "We don't need federal intervention to level the playing field with Google. Innovation and competition are far more powerful instruments."[14]

This market assessment reflects perhaps the most important structural characteristic of this market segment, which is that 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.

These facts differ sharply from those at issue, for example, in *United States v. Microsoft*. There, because most developers had written application programs that only ran on Windows, consumers could not easily switch to a non-Windows operating system (the "applications barrier to entry"). Here, by contrast, smaller search engines can compete for users as easily as larger ones: it does not matter to a search user whether other consumers also use the service; what he or she cares about is whether the service delivers answers the consumer wants.

Another distinction is that in *Microsoft*, consumers who wanted to try rival browsers could not easily overcome Microsoft's (successful) effort to foreclose those competing browsers

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(7th Cir. 1995) ("Fifty percent is below any accepted benchmark for inferring monopoly power from market share . . . ."); U.S. Anchor Mfg., Inc. v. Rule Indus., 7 F.3d 986, 1000 (11th Cir. 1993) ("[W]e have discovered no cases in which a court found the existence of actual monopoly established by a bare majority share of the market.").

[12] Brad Burnam, *Duck Duck Go*, UNION SQUARE VENTURES (Oct. 13, 2011), http://www.usv.com/2011/10/duck-duck-go.php ("We invested in DuckDuckGo because we became convinced that it was not only possible to change the basis of competition in search, it was time to do it.").

[13] Burns, *Blekko Closes $30M Funding – Yandex Strategic Investor*, BLEKKO BLOG (Sept. 29, 2011), http://blog.blekko.com/2011/09/29/618/.

[14] Rich Skrenta, Founder and CEO, Blekko, *Blekko's Not Afraid of Google, Why Is Washington?*, SKRENTABLOG (Sept. 20, 2011), http://www.skrenta.com/2011/09/blekkos_not_afraid_of_google_w.html.

from conventional distribution channels. At that time, downloading a browser over low-speed dial-up Internet connections could take hours and would often require multiple attempts (because of the frequency of dropped connections). Consumers who wanted to experiment with other browsers therefore would have faced substantial time costs just to try a browser different from Internet Explorer. In the delivery of search engine services, by contrast, consumers can quickly (indeed, immediately) detect if they are receiving results that they do not like; and, because switching is costless, they can and do try other services to see whether the results are more to their liking. The existence of such widespread "multi-homing" – the use by most consumers of more than one search engine service – is both unsurprising and a structural feature of the market that makes a finding of monopoly power unsustainable.[15]

Requirement of "Exclusionary Conduct"

Courts generally determine if conduct is exclusionary under the structured approach articulated by *United States v. Microsoft Corp.*[16] *First*, "a monopolist's act must have an 'anticompetitive effect.' That is, it must harm the competitive process and thereby harm consumers. In contrast, harm to one or more competitors will not suffice."[17] *Second*, if the conduct is shown to have an anticompetitive effect, "then the monopolist may proffer a 'procompetitive justification' for its conduct."[18] *Third*, "if the monopolist's procompetitive justification stands unrebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit."[19]

The *Microsoft* case shows the type of conduct that a monopolist is not permitted to engage in under the antitrust laws. For example, Microsoft entered into exclusionary contracts that blocked rivals from all of the major available distribution channels; it threatened suppliers (Intel) and competitors (Apple) not to support a rival; and it engaged in deceptive conduct that caused developers unknowingly to write Microsoft-specific rather than cross-platform applications.

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[15] Image Technical Servs. v. Eastman Kodak Co., 125 F.3d 1195, 1208 (9th Cir. 1997) ("Even a 100% monopolist may not exploit its monopoly power in a market without entry barriers."); Handicomp, Inc. v. U.S. Golf Ass'n, 2000-1 Trade Cas. (CCH) ¶ 72,879, ¶¶ 87,539-40 (3d Cir. 2000) (finding 72% market share insufficient where plaintiff unable to prove substantial barriers to entry because of ease of software programming); Fabrication Enters. v. Hygenic Corp., 848 F. Supp. 1156, 1160 (S.D.N.Y. 1994) (finding that 100% market share does not imply monopoly power where barriers to entry are low), *rev'd on other grounds*, 64 F.3d 53 (2d Cir. 1995).

[16] 253 F.3d 34 (D.C. Cir. 2001).

[17] *Id.* at 58 (emphasis omitted).

[18] *Id.* at 59.

[19] *Id.*

Microsoft was also alleged to have engaged in two types of product redesign. First, Microsoft not only shipped Internet Explorer with Windows, but it made it impossible for PC manufacturers to remove it (by commingling the code and by removing IE from the list of utilities programs that could be added or deleted). Microsoft did not identify any ways in which these steps made IE better; they simply acted to impede PC makers from adding another browser. Second, Microsoft programmed Windows so that in certain circumstances it would override a consumer's choice of browser defaults. Microsoft claimed there were technical reasons why it had to override the consumer's preference; rival browsers did not support technologies that Microsoft used in certain cases to access the Internet.

The Court of Appeals upheld Microsoft's conduct with respect to the override, even though it had the effect of thwarting a consumer's choice of browsers, because the government had failed to meet its burden "not only of rebutting a proffered justification but also of demonstrating that the anticompetitive effect of the challenged action outweighs it."[20] It was only the Microsoft conduct for which it had no legitimate justification that was found to be the basis for liability.

The approach taken by the Court of Appeals reflects the care taken by the courts in ensuring that they do not interpret the antitrust laws in a way that shackles a monopolist's ability to innovate. The court recognized that "firms routinely innovate in the hope of appealing to consumers, sometimes in the process making their products incompatible with those of rivals," and the courts should not deter innovation in a market with rapidly changing products.[21]

A monopolist "is permitted and indeed encouraged to compete aggressively on the merits"because this conduct typically benefits consumers.[22] Monopolists therefore also are allowed to take advantage of the competitive edge that flows from their scale,[23] their success in adjacent markets,[24] or their innovations.[25] As one court summarized, an integrated

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[20] *Id.* at 67.

[21] *Id.* at 65.

[22] *Foremost*, 703 F.2d at 544.

[23] Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 274 (2d Cir. 1979) ("A firm that has lawfully acquired a monopoly position is not barred from taking advantage of scale economies by constructing, for example, a large and efficient factory.").

[24] Data Gen. Corp. v. Grumman Sys. Support Corp., 761 F. Supp. 185, 192 (D. Mass. 1991) ("The Sherman Act has not been interpreted to require manufacturers to abandon their advantage in creating accessories to their systems."), *aff'd* 36 F.3d 1147, 1189 (1st Cir. 1994).

[25] Cal. Computer Prods., Inc. v. Int'l Bus. Machines Corp., 613 F.2d 727, 744 (9th Cir. 1979) ("IBM, assuming it was a monopolist, had the right to redesign its products to make them

business does not offend the Sherman Act "whenever one of its departments benefits from association with a division possessing a monopoly," because "[s]o long as we allow a firm to compete in several fields, we must expect it to seek the competitive advantages of its broad-based activity."[26]

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more attractive to buyers—whether by reason of lower manufacturing cost and price or improved performance. It was under no duty to help CalComp or other peripheral equipment manufacturers survive or expand.").

[26] *Berkey Photo*, 603 F.2d at 276.

2. **At the hearing, both the CEOs of Nextag and Yelp stated that they would have [not] entered the market today with Nextag and Yelp due to the conduct of Google today. Given that testimony, why shouldn't we be concerned that the conduct of Google is deterring new innovative web-based businesses from entering the market?**

Notwithstanding the testimony of NexTag and Yelp, the evidence in the marketplace is overwhelmingly to the contrary. As Mr. Schmidt pointed out in his testimony, we do not have to speculate as to whether there are new entrants in comparison shopping and local search and review sites, because there are new entrants in the local and product comparison market segments all the time.

To provide just a few examples, a new comparison shopping site, FindTheBest, launched by the cofounder of DoubleClick last year, just raised $6 million in venture funding over the summer.[27] Cheapism is an Internet comparison shopping site that launched in 2009.[28] Cheapism is dedicated to bargain hunters on the Internet and was recognized in the New York Times[29] and on CBS New York.[30] More recently, a new entrant called Centzy launched a web site that combines both local search and comparison shopping functionality. Centzy's CEO used to work at SnapFish[31] and is currently seeking funding following Centzy's successful launch for New York and San Francisco.[32] Unlike Yelp, Centzy integrates pricing information for goods and services on its site so that users can comparison shop for local services.[33] Barefootfloors.com is a comparison shopping site that launched in January focused on home goods and "is now helping online shoppers to educate themselves

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[27] Dylan Tweney, *Former DoubleClick team raises $6M for comparison-shopping engine*, VENTURE BEAT (July 20, 2011), http://venturebeat.com/2011/07/20/find-the-best-funding/.

[28] "Are you Cheap or are you a Cheapist," BUSINESS WIRE (Sept. 30, 2011, 10:15 AM EDT), http://www.businesswire.com/news/home/20090930005075/en.

[29] Jennifer Saranow Schultz, *A Consumer Reports for the Cheap*, NEW YORK TIMES BUCKS BLOG (Aug. 16, 2010, 11:04 AM), http://bucks.blogs.nytimes.com/2010/08/16/a-consumer-reports-for-the-cheap/.

[30] *Comparison Shopping: Use Web to Find Best Deals*, CBS NEW YORK (Oct. 20, 2010, 11:38 PM), *available at* http://newyork.cbslocal.com/2010/10/20/comparison-shopping-use-web-to-find-best-deals/.

[31] *See About*, CENTZY.COM, http://centzy.com/about.

[32] Devindra Hardawar, *Centzy Crowdsources Price Info for Local Ciomparison Shopping*, VENTURE BEAT (Sept. 23, 2011), http://venturebeat.com/2011/09/23/centzy-local-comparison/.

[33] *Id.*

on everything related to the home and to save money on a wide variety of products for the home."[34] In February of this year, the travel comparison shopping site, Hipmunk, received $4.6 million in venture funding, even as Google continues to expand its own flight search and hotel search functionality.[35]

These are just a few of the many recent entrants in local and comparison shopping that are entering the market even as Google continues to innovate. While they may not all succeed, venture capitalists and entrepreneurs alike continue to believe they can compete with Google, Yelp, NexTag, and other established competitors.

[34] *BarefootFloor.com: New Price Comparison Engine Helps Consumers Shop Smartly for Home Goods*, YAHOO! NEWS (Jan. 11, 2011), http://news.yahoo.com/barefootfloor-com-price-comparison-engine-helps-consumers-shop-20110111-070000-289.html.

[35] MG Siegler, *Hipmunk's Official Round: $4.2 Million Led By Ignition and a Group of Online Travel Experts*, TECHCRUNCH (Feb. 3, 2011), http://techcrunch.com/2011/02/03/hipmunk-funding-2/.

3. **If Google was demanding that phone manufacturers use Google as the default search engine as a condition of using its Android operating system, would that raise any antitrust concerns? Isn't that conduct similar to the conduct you complained that Microsoft was engaged in the 1990s when it demanded that personal computer manufacturers install Internet Explorer as a condition of using its Windows operating system, conduct that you asserted was an antitrust violation when you represented Netscape?**

As I noted in my answer to question 1, the initial question under Section 2 of the Sherman Act is whether a company has monopoly power in a relevant antitrust market. In the *United States v. Microsoft* case, the court found that Microsoft had a durable market share in excess of 90% in the relevant market for desktop PCs. In the market segment for smartphone operating systems, by comparison, Google's share is significantly below 50%, which is insufficient as a matter of law to give rise to an inference of monopoly power under Section 2.[36]

Apart from this threshold issue, Google does not in fact demand that smartphone manufacturers make Google the default search engine as a condition of using the Android operating system. The Android source code is available for download for free from the Android Open Source Project website, and any developer or manufacturer can use, modify, and distribute the Android operating system without Google's permission and without making any payment to Google. Google does not condition access to or use of Android on pre-installation of any Google application 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. The Android source code does not secretly favor any software (including Google apps); those wishing to verify the lack of bias need merely examine the Android source code itself which is freely available on Google's website.

Android's support for cross-platform technologies has greatly facilitated competition in the marketplace. For example, Amazon has used Android as the basis for its Kindle Fire, but it has customized nearly every element of the device to create a distinctly Amazon-branded product. In addition to a completely customized user interface (which would be impossible

[36] *See, e.g.*, Bailey, 284 F.3d at 1250 (finding that a market share of less than 50% was insufficient to establish single-firm monopoly power as a matter of law); Marshfield Clinic, 65 F.3d at 1411 ("Fifty percent is below any accepted benchmark for inferring monopoly power from market share . . . ."); U.S. Anchor Mfg., 7 F.3d at 1000 ("[W]e have discovered no cases in which a court found the existence of actual monopoly established by a bare majority share of the market.").

using either the iOS or Windows Phone 7.5), Amazon has supplied its own apps for email, video and music playback, e-books, and even browsing. Android's support of open source, cross-platform technologies likewise has enabled RIM to announce that the developer version of its PlayBook operating system will now feature an Android software layer that makes it easy for Android applications to run on RIM devices as well.

The flexibility that Android offers manufacturers and consumers significantly exceeds that offered on either the Apple or Microsoft mobile platforms. For example, Apple not only exercises complete control over the entire suite of pre-loaded apps on iOS devices, but consumers can only download additional apps from Apple's own App Store. Microsoft's most recent Windows Phone 7.5 smartphone similarly comes with four of eight "tiles" fixed to Microsoft applications that phone manufacturers cannot change and is hard-wired to Bing (neither phone manufacturers nor users cannot change to another search engine).

4. **Are there any remedies or changes in business practices that Google would accept?**

This is a question that Google would have to answer, but I can make some general observations regarding the use of remedies in antitrust law. To begin with, in order to avoid undue chilling of innovation that benefits consumers, antitrust remedies must be carefully crafted to ensure "a significant causal connection between the conduct enjoined or mandated and the violation found directed toward the remedial goal intended."[37] A remedy that is too broad will prohibit or deter a firm from undertaking competitive as well as anticompetitive conduct. Consequently, antitrust remedies are only called into question when a firm is found to have violated the antitrust laws. Google believes that its conduct is fully consistent with the antitrust laws, so it is both difficult and unwise to speculate as to remedies when no violations have been found to exist. Because consumers are free to choose between many different means of finding information on the Internet, which they can easily access with a single click, imposing antitrust remedies that create unnecessary restrictions would only serve to unfairly disadvantage Google, stifle innovation, and hurt consumers.

The type of conduct this Committee primarily addressed during the hearing relates to the way in which Google integrates local, product, video, images, news, and other types of results into its search results. This goes to the very core of what a search engine is supposed to do, which is to provide users with the best responses to their queries. Google competes with other search engines and other sites by providing its users with information that Google believes its users are searching for. Google's core technology – how it decides what information to show its users and how to rank that information – is particularly unsuited for regulation by the government. Unlike the *Microsoft* case, where anticompetitive agreements with OEMs, for example, could simply be prohibited, no such easy fix is available here. While I believe there are many things that antitrust enforcers do well, they are ill-equipped to get into the business of deciding what results should go where in response to user queries on Google. Such complex regulation would undoubtedly hamstring Google's ability to continue to compete on the merits against rival search engines and other competitors that provide users with information. Stifling Google's ability to innovate and provide the best results for its users is not what antitrust remedies are intended to do.

[37] United States v. Microsoft, 253 F.3d, 34, 105 (D.C. Cir. 2001) (quoting 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 653(b), at 91-92 (1996)).