



UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

Office of the General Counsel

October 21, 2013

Duffy Carolan  
Davis, Wright, Tremaine LLP  
505 Montgomery Street, Suite 800  
San Francisco, CA 64111-6533

**Re: Freedom of Information Act Appeal (FOIA Request No. 2013-00857)**

Dear Ms. Carolan:

This letter responds to your September 5, 2013 letter appealing the FTC's partial denials of FOIA Request No. 2013-00857, submitted by your client Matthew Drange and the Center for Investigative Reporting/*The Bay Citizen*.

As reflected in a May 13, 2013 letter from Assistant General Counsel Dione Stearns, Mr. Drange agreed to amend the underlying request to focus only on FTC records "related solely to the Google 'search' investigation, FTC Matter Number 111-0163." As amended, FOIA-2013-00857 sought FTC correspondence related to complaints filed against Google in the recently-closed Google search investigation.

By letter dated August 6, 2013, the FTC's FOIA Unit responded to FOIA-2013-00857. The FOIA Unit located approximately 275 pages of responsive records and released some of them while withholding others under FOIA Exemptions 3, 4, 5, 7(A), 7(C), and 7(E), 5 U.S.C. §§ 552(b)(3), (b)(4), (b)(5), (b)(7)(A), (b)(7)(C), (b)(7)(E). With respect to exemptions 3 and 5, the FOIA Unit specifically cited Sections 6(f) and 21(f) of the FTC Act, 15 U.S.C. §§ 46(f) and 57b-2(f), as well as the deliberative process privilege and attorney work product doctrine.

On September 5, 2013, you mailed an appeal of this determination to the FTC, requesting that the agency release its withheld and partially-withheld records. In particular, you set forth your objections to the FOIA Unit's application of Exemptions 3, 4, 5, and 7(C) (in the final footnote) to the responsive records in this case.

I agree with your assertion that Section 21(f) of the FTC Act, 15 U.S.C. § 57b-2(f), does not necessarily protect all records voluntarily submitted to the agency during this investigation. The statute protects only written records that are "provided pursuant to any compulsory process . . . or . . . provided voluntarily in place of such compulsory process." But the vast majority of responsive records in this case are submissions that *were* explicitly requested by the agency (through civil investigative demands, subpoenas, or initial staff requests) *after* the start of its investigation. These records were properly withheld under Section 21(f) and Exemption 3.

In fact, only three responsive submissions were *not* requested by the FTC staff. The FOIA Unit released two of these (submissions from Consumer Watchdog and the American Consumer Institute Center for Citizen Research) in its initial response to your request. The last submission is being withheld under another Exemption 3 statute, Section 6(f) of the FTC Act, 15 U.S.C. § 46(f). See *Doherty v. FTC*, No. 80-0513, 1981-1 Trade Cases ¶ 64,117, 1981 WL 2094 at \*3 (D.D.C. June 24, 1981) (holding that Section 6(f) is an Exemption 3 statute).

Section 6(f) generally prohibits the FTC from releasing any “commercial or financial information which is obtained from any person and which is privileged or confidential.” When Congress drafted Section 6(f), it purposely adopted the language and reasoning of Exemption 4, but also explained that the FTC should consider some additional restrictions on release:

It is wholly improper, and forbidden by this section, for the Commission to disclose information provided by a company if, taking a realistic view of the environment in which that company operates, such disclosure would result in any significant financial harm to the company. While no conclusive formula can be devised, factors such as these are to be taken into account in determining whether a document comes within the prohibition: Whether the information is considered confidential by the submitter and given appropriate protection; Whether the information would reveal to competitors operational strengths and weaknesses or other valuable information to which the submitter does not have access about those competitors; Whether the information would harm a third party, even if not the submitter; and Whether the information is readily available from other sources. . . .

S. Rep. No. 96-500 at 10-11 (1979). In this case, the withheld records that were freely submitted to the FTC appear to be nonpublic, contain commercial information including discussions of potential commercial harms regarding interactions with Google, and include sensitive, non-public discussions with third parties who may not be aware of (and could be harmed by public release of) the submitter’s subsequent communications with the FTC. Therefore, this set of records was properly withheld under Section 6(f) and Exemption 3.

Likewise, these records were properly withheld under Exemption 4, which similarly protects confidential commercial information that is obtained from any person. Notwithstanding the continuing applicability of *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992), the records in question easily meet the standard for confidentiality set forth in *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), because disclosure would be likely to impair the government’s ability to obtain future voluntary submissions from non-targeted parties (which can prove helpful in investigations) and could cause further harm to the submitter’s competitive financial position. As indicated above, the submitter of the sole set of unsolicited records that we continue to withhold expressed credible concerns regarding commercial reprisal.

Furthermore, the FOIA Unit properly withheld even the slight portion of non-commercial information contained in these outside submissions (which were almost entirely commercial) under Exemption 7(D), 5 U.S.C. § 552(b)(7)(D), the FOIA exemption that protects the identity of any confidential source that provided information to the agency in connection with an

investigation. The courts have recognized that Exemption 7(D) protects corporate submitters' identities when the agency explicitly promises confidentiality. *See Jones v. FBI*, 41 F.3d 238, 248 (6th Cir. 1994). The FTC explicitly promised confidentiality for sources whose submissions it requested in this investigation, and most submissions were also explicitly marked as confidential. Moreover, the courts have held that an entire document may be withheld when its disclosure "would tend to reveal" a confidential source's identity. *See Pollard v. FBI*, 705 F.2d 1151, 1155 (9th Cir. 1983). Therefore, these sources' identities and their submissions (which reveal their identities) were validly withheld under Exemption 7(D).

While there is one remaining undisclosed source whose submission the agency did not request, as noted above the FTC has significant independent reasons to withhold the substance of that submission, and thus we will also continue to withhold the identity of its source. *See Council on American-Islamic Relations, California v. FBI*, 749 F. Supp. 2d. 1104 (S.D. Cal. 2010) (recognizing the implied confidentiality of a corporate source under Exemption 7(D) when other Exemptions apply to the source's submission).

With respect to Exemption 5, your appeal suggested that the FTC was relying upon that exemption to withhold third party complaints and communications with third parties. To the contrary, the agency is withholding those external submissions under Exemptions 3, 4, and 7(D), as noted above. The FOIA Unit cited the deliberative process privilege and the attorney work product doctrine as bases for withholding the staff's analyses of those third party complaints under Exemption 5. As discussed in a case you cited, *A. Michael's Piano v. FTC*, 18 F.3d 138, 146-47 (2d Cir. 1994), FTC staff attorneys' recommendations and factual discussions regarding the progress of ongoing enforcement investigations are protected under the deliberative process privilege and work product doctrine. That same analysis applies to the circumstances of this case. In particular, the work product doctrine "simply does not distinguish between factual and deliberative material," *Judicial Watch, Inc. v. DOJ*, 432 F.3d 366, 371 (D.C. Cir. 2005), so there is no reason to release any factual material out of the staff's responsive attorney work records.

Finally, your appeal asserted that the FOIA Unit wrongly applied Exemption 7(C) to protect some individuals' identities. But individual submitters' (and some FTC staff members') identities will continue to be withheld under Exemption 7(C). The courts have "consistently supported nondisclosure of names or other information identifying individuals appearing in law enforcement records, including investigators, suspects, witnesses, and informants. . . . [W]e [have] adopted a *categorical rule* permitting an agency to withhold information identifying private citizens mentioned in law enforcement records, unless disclosure is 'necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity.'" *Schrecker v. DOJ*, 349 F.3d 657, 661 (D.C. Cir. 2003) (emphasis added). In this case, there is no evidence or allegation that any agency staff members have engaged in illegal activity. Moreover, even if there were such allegations, they would not apply to *private individuals* who have cooperated with the FTC's investigation. The FTC will continue to withhold these individuals' identities.

As required by the FOIA, you are hereby advised that judicial review of this decision may be obtained under 5 U.S.C. § 552(a)(4)(B), in a United States District Court in the district where Mr. Drange resides or has his principal place of business, or in the District of Columbia.

Also, as required by the FOIA, you are hereby advised that I am the designated official responsible for denying your appeal.

Sincerely,

A handwritten signature in black ink, appearing to read "David C. Shonka". The signature is fluid and cursive, with a large initial "D" and "S".

David C. Shonka  
Principal Deputy General Counsel

**From:** (b)(7)(C)  
**Sent:** Thursday, October 6, 2011 3:27 PM  
**To:** (b)(3):21(f)  
**Subject:** RE: Confidential Investigation (b)(3):21(f)

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Dear (b)(3):21(f)

It was a pleasure speaking with you. As requested, I am providing some information regarding the Commission's policy on confidential information (b)(3):21(f) in the Commission's non-public investigation into Google Inc. The Federal Trade Commission Act and the Commission's Rules of Practice provide protection for information gathered in confidential investigation interviews. All information submitted to the Commission in an investigation, a purpose of which is to determine whether any person may have violated the law, is treated as confidential and is exempt from disclosure under the Freedom of Information Act under Section 21(f) of the FTC Act, 15 U.S.C. § 57b-2(f). Whether confidential information is submitted voluntarily or pursuant to compulsory process, the Commission may not disclose it except in the limited circumstances described in Section 21 of the FTC Act, 15 U.S.C. § 57b-2. See Rule 4.10(d), 16 C.F.R. § 4.10(d); 46 FR 26284, 26291 (1981).

(b)(7)(A)

I propose scheduling the telephone interview for 1:00 p.m. or 4:00 p.m. (EST) on any of the following days: October 11, 14, 17, 18, or 24<sup>th</sup>. If there is a more convenient time for (b)(3):21(f) the FTC is more than willing to accommodate. For scheduling purposes coordinating with the states is not necessary, I will invite them once we have nailed down a time.

Don't hesitate to contact me with any questions or concerns.  
Thank you again for your consideration in this matter,

(b)(7)(C)

(b)(3):21(f),(b)(7)(C)

## Mischler, Erin

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**From:** John Simpson <john@consumerwatchdog.org>  
**Sent:** Thursday, November 15, 2012 2:38 PM  
**To:** Clark, Donald S.  
**Cc:** JDL; Brill, Julie; Ramirez, Edith; Rosch, Tom; molhausen@dtc.gov; Lupovitz, Joni;  
ANTITRUST  
**Subject:** Consumer Watchdog letter about need to file antitrust suit against Google  
**Attachments:** LtrFTCGoog111512.pdf

Donald S. Clark  
Secretary  
U.S. Federal Trade Commission

Dear Secretary Clark,

Attached as a PDF file please find a letter addressed to Chairman Leibowitz and the other commissioners asking that the Federal Trade Commission file antitrust suit against Google. Thank you.

Sincerely,  
John M. Simpson  
Privacy Project Director

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John M. Simpson  
Consumer Advocate  
Consumer Watchdog  
1750 Ocean Park Blvd., Suite 200  
Santa Monica, CA, 90405  
Tel: 310-392-7041  
Cell: 310-292-1902  
[www.ConsumerWatchdog.org](http://www.ConsumerWatchdog.org)  
[john@consumerwatchdog.org](mailto:john@consumerwatchdog.org)



Chairman Jon Leibowitz  
Commissioner Julie Brill  
Commissioner Thomas Rosch  
Commissioner Edith Ramirez  
Commissioner Maureen Olhausen  
The Federal Trade Commission  
Washington, DC

Nov. 15, 2012

Dear Chairman Leibowitz and Commissioners Brill, Rosch, Ramirez and Olhausen,

I am writing on behalf of Consumer Watchdog to express our concern about the possibility that a negotiated consent agreement with Google to settle antitrust concerns about the Internet giant's business practices will be insufficient to remedy the harm that has been done to consumers and competition. We understand that the Commission's staff has recommended that a suit be filed against Google because of the way it uses its dominant position in search to unfairly and anti-competitively promote its own services. In addition we understand the Commission's staff has urged antitrust against Google for using its patents to thwart competition in the mobile space thereby harming consumers.

Consumer Watchdog believes the best course of action is to bring a suit and go to trial. The fully developed public record that would result from a trial would ensure that effective remedies could be put in place. A negotiated settlement will inevitably invite cynicism about the results, particularly if such an accord allowed Google to deny any wrongdoing.

However, should you opt to negotiate a settlement it must be strong enough to restrain Google's monopolistic behavior and redress the wrongs that have been committed.

Google's Android smartphone operating system dominates the mobile market with a 38 percent share and is growing. Apple's iPhone has 27 percent. Google controls 90 percent of the mobile search market. There is evidence it is pressuring handset manufacturers to favor Google applications when using the Android operating system. Google's earlier acquisition of AdMob gave the Internet Giant dominance in mobile ad sales.

Google's "Search, plus Your World" is but the latest example of how Google uses its dominance of the Internet in an anticompetitive way to promote its own services.

"Search, plus Your World" links Google+, Google's social network, to search and its favorable placement of the social network in results, particularly in the query box, gives Google an advantage over other social services like Facebook and Twitter.

As you know Google exerts monopoly power over Internet searches, controlling around 70 percent of the U.S. market and more than 90 percent of the market in some European

countries. For most people in the world, Google is the gateway to the Internet. Google's business practices to maximize its profits determine much of the Internet experience for most people by determining what they view.

We applaud the Commission's antitrust investigation and call upon you to take decisive action. In 2010 Consumer Watchdog's study, *Traffic Report: How Google is Squeezing out Competitors and Muscling Into New Markets* (<http://insidegoogle.com/2010/06/google-using-search-engine-to-muscle-into-internet-businesses-study-finds-2/>) demonstrated how with the launch of Universal Search Google favored its own properties and services in search results to the detriment of its competitors. One stark example was the dramatic drop-off in traffic that occurred on Mapquest's site after Google placed its Google Maps at the top of Universal Search.

Some observers had hoped that Google's arrogant anticompetitive behavior would change in the face of investigations by the FTC, several U.S. state attorneys general and the European Commission. It has not; the Internet giant will continue its monopolistic abuses unless regulators act strongly.

We urge you to file a formal antitrust complaint against Google as soon as possible.

### **Information Is Power**

Ultimately Google's monopoly power stems from its monopoly over personal information. Information is power and Google has amassed more data than anyone. How did Google gain this dominant position in consumer personal data? Very simply. The company tracked us all around the Internet and gave us no choice over whether our data was collected or not. Google tracks consumers around the Web, logs every search query and YouTube video watched and records the location of Android smartphone users.

Google's presence on the Internet is so pervasive that consumers cannot escape its reach even if they do not use its services. Google's ad network puts down tracking cookies and records consumers' activities as they surf the Internet. It is this immense database of consumer information, intentions and desires that gives the Internet giant its power.

Many people think of Google as a technology company. In actuality Google is an advertising business. Consumers make a Faustian bargain, often unknowingly, to provide personal information about their habits, desires and behaviors in return for Google's services. Google mines these massive digital dossiers and uses the information to sell ads, a lucrative business that accounts for 96 percent of its \$40 billion annual revenue.

Every platform the company buys expands its database of information on individuals. More consumer data means more information to target individuals in the ad server market. Every piece of information that is added to that database makes Google's ad targeting that much more sophisticated – in turn making it a must have for companies seeking to target advertising. The better Google's data, the more advertisers will have to go to Google to reach their audience, thus increasing its dominance of the market. If Google's unfettered absorption of companies, and the consumer information that comes with them, continues, and Google is not required to give



consumers the ability to opt out of this data collection, the ever-increasing consumer information database Google is compiling will only strengthen its dominance over the ad server market.

People who use Google aren't its customers. We are the Internet giant's product. The immense database about us, largely gathered without our informed consent, is used to target ads and bring Google billions in advertising profits.

## **Remedies**

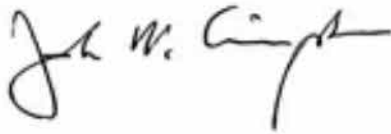
To counter the information monopoly we must be given effective control over our data – whether it's collected and how it's used. A meaningful Do Not Track standard is a way to return to consumers the control of their data. In addition, as a strong complement to data protection, strict antitrust regulation to prevent unfair practices with search and patents is necessary. Again, a public trial is the best course to follow, but if the Commission opts to negotiate, here are some specific recommendations that must be included if a settlement is to be meaningful:

- Google should be required to divest Motorola Mobility, whose standards essential patents it is using unfairly by not making them available for license on a fair basis.
- Google should be broken into different companies devoted to different lines of business so there is no incentive to unfairly use search to promote other services. Search could be separated from advertising. Gmail and the relatively new social networking service, Google +, could be spun off as a separate entity, as could YouTube, a Google acquisition that should have been denied at the time of merger. Enterprise applications could be another separate business.
- Google's search services should be separated from services where Google provides its own content.
- Google's search engine's importance as a gateway to Internet requires a maximum degree of openness and transparency. Google's monopoly position and importance to the Internet means that the company should be closely regulated like a public utility. Regulations should be designed to open up Google's ad platform to enable other competitors to compete. Rules should be crafted to create greater transparency in the operation of Google's ad platform to enable parties to negotiate more effectively. For example: Providing greater visibility into the maximum amount of the highest bid, how many search terms are shown per page, and how Google's "quality score" is derived and applied. Little, if any, of this information is currently public and openness would contribute to consumer choice and options as well as foster competition.
- Google should be forced to disgorge its monopolistic gains through the imposition of substantial financial penalties. Your change in policy regarding disgorgement over the summer was a welcome step and we urge you to apply it in this case. The payment would have to be significant enough to impact Google's future behavior.

Google hardly blinked when it paid half a billion dollars to the United States to settle an illegal drug sales case. The proposed \$22.5 million fine for violating the “Buzz” Consent Decree is but pocket change for the Internet giant. Perhaps the amount disgorged could be tied to paying back consumers for monetizing their private information and content without asking them permission or compensating them.

The Federal Trade Commission’s role in keeping Google’s abuses in check is essential. The Internet is too important to allow an unregulated monopolist to dominate it. We call on you to take the steps necessary to prevent it: File a formal antitrust complaint against Google and go to trial in Federal District Court in Washington, DC. If the Commission opts to settle the case the consent agreement must require Google to admit wrongdoing and be strong enough to change Google’s behavior and protect consumers from harm as outlined above in the proposed remedies. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "John M. Simpson". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

John M. Simpson  
Privacy Project Director

**Mischler, Erin**

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**From:** Steve Pociask (ACI) <steve@theamericanconsumer.org>  
**Sent:** Friday, December 14, 2012 2:17 PM  
**To:** Leibowitz, Jonathan D.; Brill, Julie; Ohlhausen, Maureen; Ramirez, Edith; Rosch, Tom  
**Cc:** Feinstein, Richard; Levitas, Pete; Shelanski, Howard; Blank, Barbara  
**Subject:** Regarding Google Search Investigation  
**Attachments:** Google Final.pdf



December 14, 2012

Chairman Leibowitz  
Commissioner Brill  
Commissioner Ohlhausen  
Commissioner Ramirez  
Commissioner Rosch

**Re: Google Search Investigation**

Attached, for your review, is a [research paper](#) that I co-authored with economics professor Joseph P. Fuhr, Jr., entitled "The Search for Market Dominance." I believe that the paper is relevant to the investigation of Google and the potential for bias in its search engine.

While our analysis found no evidence of bias in the search engines of Yahoo and Bing, Google cited its competitors only half as often but were twice as likely to cite itself. This bias was statistically significant, with a 0.003 probability that the results could have happened by chance. We concluded that Google is self-dealing. The result is consistent with events involving Google's market conduct and performance, and it corresponds with its high market concentration.

Since search is the first step used by online consumers – such as those making travel plans, finding maps, buying products online and finding other information – if Google's search engine is not a 'fair search' then Google can influence, what consumers read, where they shop and (ultimately) what they pay online. If Google is manipulating its search rankings, consumers need to be told; and if Google is collecting unauthorized personal consumer information to give itself an unfair advantage in search, policymakers need to step in and protect consumer privacy and competition. At a minimum, Google should be required to put a disclosure on its search homepage informing consumers that its search results are subjective and may be reflect a bias that favors its advertiser.

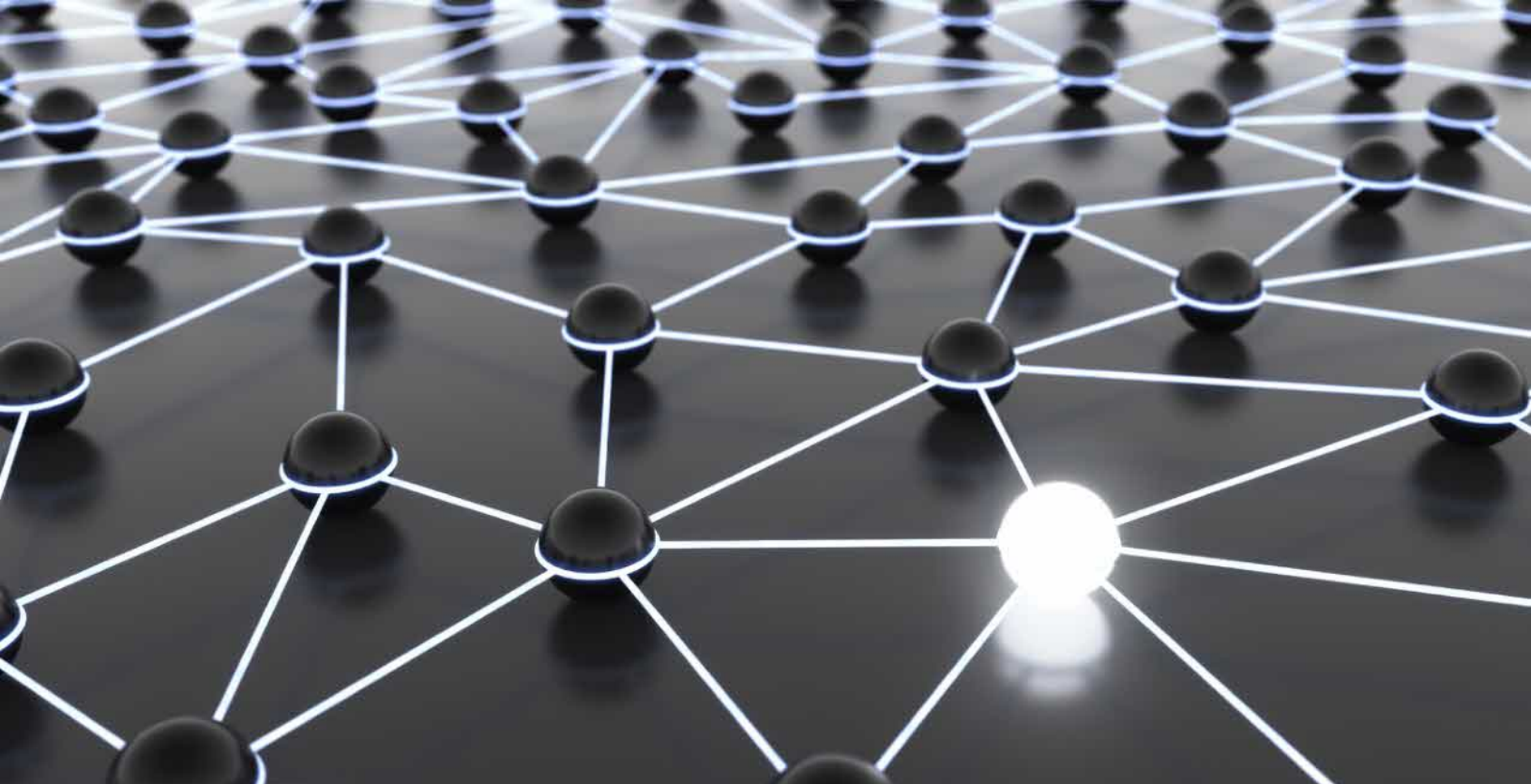
Consumers need to be informed in order to make informed choices. I am available to discuss these results and can be reached at 703-471-3954.

Sincerely,

Steve Pociask  
President  
American Consumer Institute  
Center for Citizen Research

cc: Richard Feinstein, Director, Bureau of Competition  
Pete Levitas, Deputy Director, Bureau of Competition  
Howard Shelanski, Director, Bureau of Economics  
Barbara Blank, Staff Attorney, Anticompetitive Practices Division

ATTACHMENT



# The Search for Market Dominance

**Steve Pociask and Joseph P. Fuhr, Jr.**  
**July 24, 2012**



The American Consumer Institute  
Center for Citizen Research

1701 Pennsylvania Ave., NW, Suite 300  
Washington, DC 20006

[www.TheAmericanConsumer.org](http://www.TheAmericanConsumer.org)

## The Search for Market Dominance Steve Pociask and Joseph P. Fuhr, Jr.<sup>1</sup>

### Executive Summary

Google has become one of the most successful and innovative companies of the Internet Age. Founded less than fourteen years ago, the company is one of the largest in terms of market capital, exceeding the likes of Exxon, Merck, Comcast, Verizon and Amazon. It controls a sizable market share for many of its products and services, particularly its search engine (and related online advertising) services. The company continues to grow at a double-digit pace and it is highly profitable when compared to its direct rivals and other major firms.

Despite these market successes, policymakers and Federal agencies in the U.S., state attorneys general and international regulators are taking a closer look at the company, citing a series of problems involving market conduct – including privacy breaches, complaints of potential anticompetitive risks and other matters.

This study explores these potential problems in terms of market structure, conduct and performance, and finds:

- In terms of structure, Google so dominates its markets that rivals face barriers to entry that preclude competitive market rivalry.
- In terms of conduct, Google has had an ongoing string of alleged instances that are raising public concerns, including: the unauthorized collection of consumer passwords, emails and other personal information (Wi-Spy); knowingly advertising illegal online products; the bypassing of the iPhone privacy settings to collect online information on consumer without their knowledge or permission; as well as other issues.

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<sup>1</sup> Steve Pociask is president of the American Consumer Institute, and Joseph P. Fuhr, Jr. is professor of economics at Widener University and a senior fellow for the American Consumer Institute. The Institute is a nonprofit 501c3 educational and research organization. For more information, visit [www.theamericanconsumer.org](http://www.theamericanconsumer.org).

- In terms of performance, Google is very profitable – more so than its peers – but these high profits fail to encourage market entry, as typically found in competitive markets. This may be due to large artificial barriers to entry.
- Most troubling, however, are anecdotal and statistical data suggesting that Google is “self-dealing” – manipulating its search results to punish competitors, while favoring its own websites.

Based on our preliminary statistical analysis, this study finds the disparity in these search results to be statistically significant and warrant a comprehensive analysis. To this last point, while Yahoo and Bing cite each other and both cite Google in equal proportions, Google’s search engine is twice as likely to cite itself and less likely to cite its competitors.

Since search is the first step used by online consumers – such as those making travel plans, finding maps, buying products online and finding other information – if Google’s search engine is not a “fair search” then it can influence what we read, where we shop and ultimately what we pay online. If Google is manipulating its search rankings, consumers need to be told; and if Google is collecting unauthorized personal consumer information to give itself an unfair advantage, policymakers need to step in and protect consumer privacy and competition.

The risk of not stopping these breaches in market conduct is that it invites government intervention and potentially onerous regulations of the industry, even though the problems cited here are likely isolated to one company. Ironically, broad government regulations may do more to preserve Google’s market dominance, because it can limit innovation and entry by would-be competitors.

From our preliminary analysis, it is no coincidence that the current issues involving Google’s market conduct and performance correspond with its high market concentration. While further work is needed to confirm our findings, we believe there is enough evidence to call policymakers into immediate action, including a comprehensive antitrust investigation.

The competitive risks are high and, given the importance of the Internet, consumer privacy protection is paramount.



## The Search for Market Dominance

### Steve Pociask and Joseph P. Fuhr, Jr.

#### Introduction: Structure, Conduct and Performance

Google is best known for its free web search engine, but it also offers many other free services to the public, including free reverse telephone service, free small business directory assistance, free Internet browsers, free maps, free navigation services, free email services, free websites, free translation, free online calendar and free games, as well as many other “seemingly” free services.<sup>2</sup>

To be clear, Google is not in the business of providing free services; its primary business is to find other businesses willing to pay for its online advertising programs. For Google, revenues are generated from the placement of ads on its search engine, as well as ad space on its other websites, like YouTube, and partnering with other website owners through a revenue-sharing arrangement. On Google’s search engine, advertisers identify and bid in auctions for key words that determine the priority and placement of ads on Google’s search engine. As consumers run online searches using various key words, they are exposed to advertisements. In turn, advertisers pay Google based on the auction price and volume of advertisements. To improve the matching of consumers and advertisements, Google collects online consumer information into consumer profiles, including the browsing history of online users, search terms and location information, thereby identifying attributes of those consumers most likely to click-through to specific advertiser’s websites – a practice known as *behavioral advertising*. Because Google’s free services work to aggregate online consumers, the volume of traffic attracts paying advertisers, who pass this advertising cost along to consumers in the form of higher prices.

Financially, Google’s online advertising model has been very successful. Starting just fourteen years ago, the company’s annual revenue reached \$38 billion in 2011, mostly from

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<sup>2</sup> As will be shown later, while some services appear free, they may actually come at a hidden cost – such as the loss of personal online information and/or higher prices.

advertising sales, which accounted for \$36.5 billion.<sup>3</sup> Comparing the fourth quarter of 2011 to the fourth quarter of 2010, the company grew 25%,<sup>4</sup> and it appears to be growing at a pace of nearly 20% for 2012, which would result in company revenues of \$45 billion by the year's end. In 2011, nearly half of its ad revenue came from U.S. companies.<sup>5</sup> In terms of profitability, Google's net income (as a percent of revenue) was much higher than most firms and nearly five times higher than the average profits of the major Internet Service Providers (ISPs) – and it accomplished this despite the economic slowdown.<sup>6</sup>

However, Google's advance has not been solely due to natural growth. Over its short-lived years of operation, Google has executed over 100 acquisitions, providing it the means to dominate the online search market, as well as helping it branch into new markets, including online travel, navigation, smart phones, mapping and so on.<sup>7</sup> Some allege that Google's size, profitability, and ability to direct web traffic raises antitrust concerns.<sup>8</sup> In fact, a number of governmental probes have been initiated involving Google's alleged market conduct, market power, online privacy breaches and the use of consumer online information. These actions and probes have included most state attorneys general, the U.S. Congress, various U.S. federal agencies and international governments.<sup>9</sup>

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<sup>3</sup> Annual Report, Google, 2011, p. 30.

<sup>4</sup> *Ibid.*, p. 38.

<sup>5</sup> *Ibid.*, p. 31.

<sup>6</sup> *Ibid.*, p. 29. Comparisons to ISP average included Comcast, Time Warner Cable, AT&T and Verizon for 2011.

<sup>7</sup> One list totals 113 acquisitions by Google – see [http://en.wikipedia.org/wiki/List\\_of\\_acquisitions\\_by\\_Google](http://en.wikipedia.org/wiki/List_of_acquisitions_by_Google) – (downloaded on July 3, 2012).

<sup>8</sup> For example, see Scott Cleland, "Google's Earnings Spotlight Its Antitrust Liabilities," *Forbes*, Oct. 14, 2011, <http://www.forbes.com/sites/scottcleland/2011/10/14/googles-earnings-spotlight-its-antitrust-liabilities/>;

<sup>9</sup> "36 State Attorneys General Contact Google Chief about Privacy Policy," *MetroWest Daily News*, Feb. 22, 2012, <http://www.metrowestdailynews.com/news/x565044710/36-state-attorneys-general-contact-Google-chief-about-privacy-policy>; Michael Liedtke, "Google May Pay \$500 Million after Ad Probe by the Justice Department," *Associated Press*, May 11, 2011, Huffington Post's website at [http://www.huffingtonpost.com/2011/05/11/google-ad-justice-department-investigation\\_n\\_860429.html](http://www.huffingtonpost.com/2011/05/11/google-ad-justice-department-investigation_n_860429.html); Jeff Bliss, "Google Said to be Possible Target of Antitrust Probe by FTC," *Bloomberg*, April 5, 2011, <http://www.bloomberg.com/news/2011-04-05/google-said-to-be-possible-target-of-antitrust-probe-after-ita-acquisition.html>; "FCC Fines Google \$25,000 over Street View Probe," *Associated Press*, April 16, 2012, on KSL TV's website at [http://www.ksl.com/?sid=20014544&nid=1014&title=fcc-fines-google-25000-over-street-view-probe&s\\_cid=queue-14](http://www.ksl.com/?sid=20014544&nid=1014&title=fcc-fines-google-25000-over-street-view-probe&s_cid=queue-14); "Markey Calls for Congressional Hearing on Google Street View Privacy Breach," News Release from Congressman Markey's website, April 17, 2012, <http://markey.house.gov/press-release/markey-calls-congressional-hearing-google-street-view-privacy-breach>; Edward Berridge, "Canada Launches Legal Probe into Google," *The Inquirer*, June 2, 2010, <http://www.theinquirer.net/inquirer/news/1652043/canada-launches-legal-probe-google>; and Aoife White,

The best way to evaluate these concerns is to look at Google's market structure, conduct and performance to determine the extent to which Google exhibits market power and poses an anticompetitive risk. As background, market structure (typically measured as market concentration) was traditionally considered an indicator of potential market risks, but today it is considered insufficient for determining whether market power exists or whether consumers are harmed. Indeed, there are many examples of where a market with very few competitors – including cases of duopolies – can produce competitive market outcomes.<sup>10</sup> In fact, when significant economies of scale and scope exist in an industry, a market with very few firms can outperform an atomistic market, thereby producing lower prices, increasing quantity demanded and maximizing consumer welfare.

As an example, concentration in various information technology industries seems to fit this characterization, as exemplified by the large capital costs required by Internet services providers, as well as the automation and scale necessary to mass produce laptop computers, smart phones, computer chips and other manufactured technology devices. Therefore, while market structure was once thought to determine market conduct and performance (notably profitability), modern economic thought concludes that this causality is often reversed – namely, that market conduct and performance are more likely determinants of market structure. As such, when presented with strong evidence of anticompetitive conduct and market power, the presence of high market concentration can be no coincidence.

With this in mind, the next sections will investigate the market structure, conduct and performance of Google to determine whether it exhibits market power and poses anticompetitive risks or whether Google is just another large firm, as typical of the information technology sector.

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"Google Given Weeks to Submit Remedies in EU Antitrust Probe," *Bloomberg*, May 21, 2012, <http://www.bloomberg.com/news/2012-05-21/google-given-a-matter-of-weeks-to-submit-remedies-in-eu-probe.html>.

<sup>10</sup> Blackstone, Erwin A., Darby, Larry F. and Fuhr, Joseph P. Jr., "The Case of Duopoly: Industry Structure is not a Sufficient Basis for Imposing Regulation," *Regulation*, Cato Institute, Winter 2011-12, pp. 12-17.

## Market Structure and “Tipping”

As mentioned earlier, dominant market share does not necessitate market power, and some will aver that Google’s success is a reflection of consumer approval, not harm. However, Google’s rise to size and market dominance was not all due to growth in demand, but significant accretion – namely through acquisitions. For example, about one year after its IPO, Google’s search engine market share reached 36.9%, and by June 2006 its share rose to 44.7%.<sup>11</sup> While several acquisitions helped Google expand its search advertising market in 2006, its acquisition of DoubleClick in 2007 and AdMob in 2009, provided the company significant gains. Its purchase of YouTube in 2006, gave the Google additional traffic as well. The result of these key acquisitions has helped Google’s develop a significant market presence beyond those of its competitors.

Most troubling, however, are recent events suggesting that rivalry in the search engine and search advertising markets has waned altogether. Not only are many of the early search engine rivals gone, but most of the remaining competitors are using Google’s search capability to some extent or through revenue-sharing deals. For example, for years now, AOL has been using Google’s search engine and, consequently, Google’s advertising program. Similarly, Ask.com downsized its staff several years ago and signed a five-year multi-billion dollar deal to use Google’s advertising/sponsored links program. More recently, both AOL and Ask.com have reaffirmed their dependence on Google.<sup>12</sup> As recently as last October, there are reports that Google was looking to finance a deal for others to buyout Yahoo.<sup>13</sup> Bing continues to sustain billions of dollars in losses and single-digit market share worldwide.<sup>14</sup> Google has locked into

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<sup>11</sup> ComScore, IR, July 18, 2006

<sup>12</sup> Nicholas Carlson, “AOL and Google Renew Search Deal Through 2015,” *Business Insider*, September 2010, [http://articles.businessinsider.com/2010-09-02/tech/29987558\\_1\\_exclusive-search-provider-google-mobile-search](http://articles.businessinsider.com/2010-09-02/tech/29987558_1_exclusive-search-provider-google-mobile-search); and Loren Baker, “Ask.com & Google Sign \$3.5 Billion Search Advertising Deal,” *Search Engine Journal*, November 6, 2007, <http://www.searchenginejournal.com/askcom-google-sign-35-billion-search-advertising-deal/5951/>.

<sup>13</sup> Paul Sakuma, “Google May Finance Deal for Yahoo Buyout: Report,” Associated Press, in the Chicago Sun-Times, Oct. 22, 2011, <http://www.suntimes.com/business/8362453-420/google-may-finance-deal-for-yahoo-report.html>.

<sup>14</sup> Bill Rigby and Andre Grenon, “Microsoft Redesigns Bing, Plays up Facebook Link,” Reuters, May 10, 2012, <http://www.reuters.com/article/2012/05/10/us-microsoft-bing-idUSBRE84918720120510>; and “Microsoft Stung by Web Woes,” Shira Ovide, *Wall Street Journal*, July 3, 2012, p. B1.

exclusive deals with various providers, making it the default search engine on many online web devices. By all indications, competitors are waning, rivals are using Google's own services, and not even Microsoft can make a profitable dent into the market. It appears that the market has tipped to Google, which funnels much of the web's traffic to and from its websites and partner websites.

As a result of these activities, Google's online search market share has substantially increased. ComScore reports Google to have a 71.2% market share in the U.S. – 66.7% directly through Google's search engine, as well as indirectly through deals with Ask Network (3.0%) and AOL (1.5%).<sup>15</sup> Google's Global share is reportedly higher, accounting for 82% overall and 92% for mobile devices and tablets.<sup>16</sup> Advertisers logically pay Google more for its services, since their advertising dollars can reach the vast majority of the market, whereas Google's competitors have a single-digit reach worldwide. Why would advertisers want to duplicate their ads on another search engine when they can get nearly full exposure via Google's online search engine and partners? For this reason, it appears that in the future it would be difficult for smaller search engines to challenge Google's dominance.

Since Google commands a large share of the market and advertisers are apt to be drawn to Google's advertising services, it can command higher prices than its competitors can. In fact, some claim that Google's ads earn nearly twice as much as other advertising programs, which means that Google's actual market share (based on revenue) is higher than commonly reported (based on the number of searches).<sup>17</sup>

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<sup>15</sup> "ComScore Releases May 2012 U.S. Search Engine Rankings," ComScore Press Release, Reston, VA, June 13, 2012.

<sup>16</sup> Global search engine market share is available on Stat Owl at [www.statowl.com](http://www.statowl.com) for April 2012 and [www.Marketshare.hitslink.com](http://www.Marketshare.hitslink.com) (including desktop and mobile devices) for May 2012. The data shown here were downloaded on June 19, 2012.

<sup>17</sup> For example, see "PPC Platform Competition and Google's *May Not Copy* Restriction," Benedelman, June 27, 2008, at <http://www.benedelman.org/news/062708-1.html>; and Benjamin G. Edelman, "Google-Yahoo Ad Deal is Bad for Online Advertising," *Working Knowledge*, Harvard Business School, August 12, 2008, at <http://hbswk.hbs.edu/cgi-bin/print?id=5995>. If Google can charge twice as high as its competitors, then a 71% domestic search share is actually 83% in terms of revenue share; and an 82% global market share is actually 90% in terms of revenue share.

What this means for consumers is simple – Internet searches are the most common activity on the web. Google can influence what consumers see in terms of advertising and search ranking, which leads consumers to “click ahead” in ways that benefit Google, its advertisers and its sponsors. That dominance makes it harder for small firms to enter the market and differentiate themselves to gain web traffic and succeed. In fact, even larger industry players, such as ISPs, wireless providers and Microsoft are being pushed to the sidelines. In the end, what consumers lose is choice, differentiation and innovation.

To summarize this problem is to understand “market tipping.” In network economics, “market tipping” can occur when one very dominant firm achieves increased market share and consumers perceive this increase as an increase in the value of the network. Said differently, an increase in market share leads to “increasing returns to consumption” and bestows value upon the dominant firm – a value that does not accrue to its rivals. Once the market tips, a dominant firm has an advantage over its would-be competitors – an advantage that is difficult to overcome. The advantage becomes a barrier to entry for would-be competitors. When the market tips, the dominant firm will have market power, enabling it to raise prices and reap excessive profits, much like any monopolist would. This poses an anticompetitive risk for consumers.

## **Market Conduct and Performance**

Google is highly profitable, more so than its peers. There have been numerous historical comparisons between Google’s profits and those of other industries (including other tech companies) which have found Google to be several times more profitable than other firms, including Exxon, Merck, AT&T and Time Warner.<sup>18</sup> In 2011, Google achieved gross profits of 65% (as a percent of revenue) and net income of 26%.<sup>19</sup> For that year, Google’s net income as a

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<sup>18</sup> For a few examples, see “A Cost/Benefit Look at Internet Regulations,” *ConsumerGram*, The American Consumer Institute, Dec. 2010; “Financial Performance, Consumer Welfare and Two-Sided Internet Markets,” *ConsumerGram*, The American Consumer Institute, June 2008.

<sup>19</sup> Downloaded on July 17, 2012 from Yahoo Finance at [www.yahoo.com](http://www.yahoo.com).

percent of revenue was nearly five times that of the largest four ISPs.<sup>20</sup> Google also outperformed large blue chip companies in terms of profit margins, return on invested capital and return on assets.<sup>21</sup> The combination of sustained high profits and high concentration suggest market power, particularly in light of a long list of issues concerning Google's market conduct.

#### A. Self-Dealing

Searching is the most important means for online consumers to find goods and services, news and information on the web. If Google can manipulate its search rankings, it can direct traffic to various websites and away from its competitors. In fact, some have suggested that Google is intentionally altering its search rankings to undermine its competition. For instance, ad competitor SearchKing claimed its website's Google ranking dropped to zero,<sup>22</sup> and search competitor Kinderstart claimed its traffic dropped 70% when Google reset its ranking to zero.<sup>23</sup> These examples suggest that Google may be manipulating its search rank to its advantage and at the detriment of its competitors.

There may also be evidence that Google is manipulating the placement of its ads, not just to disadvantage competitors, but to affect public policy. Google can direct traffic to policy positions favorable to Google's position. For example, Google banned U.S. Senator Susan Collins' ads that were intended to defend her against attacks by a group sharing mutual policy interests with Google.<sup>24</sup> In addition, Google has admitted to taking certain search terms for itself and giving them to others for political ends. For example, *Multichannel News* reported that "Google's top Washington Lobbyist disclosed that the company had configured its search engine to return paid links that support Google's position on net neutrality after the entry of

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<sup>20</sup> Ibid.

<sup>21</sup> Data retrieved on June 11, 2012 from MSN Money at [www.msn.com](http://www.msn.com) and covers the year 2011.

<sup>22</sup> For example, Dahlia Lithwich, "Google-Opoly: The Game No One but Google Can Play," *Slate*, Jan. 29, 2003, [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2003/01/googleopoly\\_the\\_game\\_no\\_one\\_but\\_google\\_can\\_play.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2003/01/googleopoly_the_game_no_one_but_google_can_play.html).

<sup>23</sup> "Website Sues over Google Blacklist," *Associated Press*, March 17, 2006, available on MSN at [http://www.msnbc.msn.com/id/11883353/ns/technology\\_and\\_science-tech\\_and\\_gadgets/t/web-site-sues-over-google-blacklist/](http://www.msnbc.msn.com/id/11883353/ns/technology_and_science-tech_and_gadgets/t/web-site-sues-over-google-blacklist/).

<sup>24</sup> Initially reported in the Washington Examiner on October 11, 2007.

certain keywords.”<sup>25</sup> If Google were to take key words for its own use over auctioned words, it can override any keyword and any advertisement or its placement. This also means that Google can bid-up what it considers to be low auction prices, it can include the placement of ads that favor its public policy positions over paying advertisers, and it can use its market dominance to funnel traffic to its own websites. Google has the market power and incentive to act in these ways. But, does it?

### **B. Foundem and NextTag**

Several online e-commerce websites have alleged that Google changed their search ranking, adversely affecting their web traffic and decreased their ability to compete in the search market. Foundem’s traffic analysis was filed with the FCC, which suggested that Google penalizes rivals and favors its own services.<sup>26</sup> At a Senate Judiciary antitrust hearing, a number of online competitors have made similar allegations, including Yelp and NextTag.<sup>27</sup> Yelp’s CEO has expressed concerns about Google’s dominance and called for Google to stop using Yelp’s “review” content without its permission – to which Google threatened to drop Yelp from its search indexing.<sup>28</sup> TripAdvisor, as well as WebMD and City Search, reported a similar unauthorized use of their content, and complained about Google’s practice of “promoting links to Google’s own websites above those of non-Google sites in the results of its search engine.”<sup>29</sup>

These examples, similar to early ones involving Search King and Kinderstart, raise questions about Google’s bias in its search ranking and how it directs online web traffic. Given Google’s size, the contention is that it controls consumer access to information – specifically what consumers see and what they don’t see. By manipulating search rankings and ad placement, Google has the power to affect the outcomes (successes) of new competitors; it can

<sup>25</sup> “Google Web Search: Do No Evil,” *Multichannel Newsday*, June 12, 2006.

<sup>26</sup> “Comments of Foundem,” In the Matter of Preserving the Open Internet Broadband Industry Practices, GN Docket No. 09-191 and WC Docket No. 07-52, , filed with the Federal Communications Commission, Feb. 23, 2010, <http://apps.fcc.gov/ecfs/document/view?id=7020389727>.

<sup>27</sup> Scott Cleland, “Google’s ‘Bait & Switch’ Deception Exposed at Hearing,” *Forbes*, September 22, 2011.

<sup>28</sup> Jason Kincaid, “Stoppelman: 75% of Yelp’s Traffic Comes from Google,” *TechCrunch*, Sept. 21, 2011, at <http://techcrunch.com/2011/09/21/stoppelman-75-of-yelps-traffic-comes-from-google/>.

<sup>29</sup> Amir Efrati, “TripAdvisor Says Google Won’t Stop Using Its Content,” *Wall Street Journal*, January 21, 2011, at <http://blogs.wsj.com/digits/2011/01/21/standoff-continues-between-google-other-sites/>.



make or break reputations; it can suppress adversarial viewpoints in favor of its own positions; and it can do all of this while invading consumer privacy, leaving cookies that track consumer online browsing and scanning consumer emails – often without consumer consent and knowledge.

### C. Evidence on Search Bias

Senators Lee and Kohl have called on the FTC to investigate Google’s alleged use of its search tool to direct traffic away from its competitors to Google’s own websites and services.<sup>30</sup> If this search bias exists then it will increase Google’s profit, harm its competitors and limit consumer choice – and it could explain, in part, why Google’s search market shares are so high.

To test these allegations, we selected 50 key technology words and ran searches using the three top search engines – Google, Yahoo and Bing.<sup>31</sup> The results were tabulated to see how often a search term would generate a result pointing to the website affiliated with a particular search engine. The hypothesis is that Google searches would produce organic search results that favor Google’s websites over its search competitors. **Table 1** shows the tally for the first (organic) search result for each key word, and the tally appears to support the Congressional concern that Google favors its own websites over its competitors:

**Table 1: Search Engine Provider’s Propensity to Cite Themselves<sup>32</sup>  
(Based on a Sample of 50 Key Words)**

<b><u>1<sup>st</sup> Organic Result</u></b>	<b>Yahoo Search</b>	<b>Bing Search</b>	<b>Google Search</b>
<b>Yahoo websites</b>	6	5	2
<b>Bing websites</b>	1	0	0
<b>Google websites</b>	11	13	25

<sup>30</sup> Eric Savitz, “Sens. Kohl, Lee Seek FTC Antitrust Probe on Google,” *Forbes*, Dec. 19, 2011, <http://www.forbes.com/sites/ericsavitz/2011/12/19/sens-kohl-lee-seek-ftc-antitrust-probe-on-google/>.

<sup>31</sup> The key words are listed at the end of this paper in the appendix. The analysis included only organic search results, excluding advertisements.

<sup>32</sup> The count includes the results for affiliated websites. For example, Google count includes results for YouTube and the Bing count includes results for MSN and Microsoft.

Comparing the first search result for each of the fifty key words, the results show that Yahoo tends to favor its own websites (6 times) to roughly the same degree as Bing favors Yahoo's websites (5 times), and Bing tends to favor its own websites (0 times) to roughly the same degree as Yahoo favors Bing's websites (1 time). Similarly, Yahoo finds Google as the first search result in 11 of the 50 key words, while Bing finds Google 13 times. This suggests that there is no obvious favoritism between Bing and Yahoo with respect to any of the three search engine providers. However, Google searches find Bing and Yahoo less often, while finding its own websites at more than twice the rate, suggesting that Google may be favoring its own websites over its competitors.

To take this analysis a step further, a statistical test was employed. Using a similar comparison, the sample was expanded to consider the top five search results for the fifty key search words. The analysis appeared to produce similar results, with Google finding Google websites 83 times, while finding its competitors only 19 times. Alternatively, the competitors found Google 40.5 times (on average), while finding its own websites 26 times. Again, Google search engine is twice as likely to bring up its websites within the first 5 search entries, compared to its rivals, and it is less likely to find search results that click to its rivals. Using a simple two-by-two contingency, the Chi-square value for this distribution is 8.6, indicating that Google's tendency to direct its search results to itself is statistically significant for the key words selected. Based on this statistical test, we conclude that it is highly unlikely that the results could have happened by pure chance (a 0.003 probability in fact), meaning that there appears to be a bias in Google's search engine that favors its own websites over its competitors. If true, Google can use its size to drive traffic away from its smaller competitors. Since this analysis only looked at 50 key words, further research and statistical testing is recommended to provide evidence to substantiate these results.

#### **D. Book Search**

Google had attempted to get an exclusive court-approved deal to put books online, including the free use of all orphaned works. This attempt began when Google illegally copied

libraries of works and put them online. The deal was rejected by the judge hearing the case, which would have allowed Google to dominate the book search market. The deal would also have given Google a monopoly in book search advertising, permitted Google free use of orphaned works, and made it impossible for would-be competitors to obtain better terms than Google's deal.<sup>33</sup> The bypassing of intellectual property rights could have consequences on authors, who could find their works online with a search and accompanying advertisements. Besides the loss of intellectual property and potentially lost revenue from online book sales, authors might see their works alongside paid-for ads that they did not authorize nor endorse. Google will profit directly from use of the copyrighted material while authors may not. Germany has proposed legislation that search engines and news aggregators that are profiting from other's works should pay for them.<sup>34</sup>

#### **E. Consumer Safety vs. Online Ads**

There are also allegations that Google knowingly let its search engine direct consumers to purchase illegally imported pharmaceuticals. Last year, Google entered into a non-prosecution agreement with the Justice Department and paid \$500 million for knowingly providing advertising and selling "Google AdWords" to an online Canadian pharmacy that sold and dispensed drugs to American's without a prescription.<sup>35</sup> Also, it is illegal to import pharmaceutical drugs into the United States. Thus, Google was promoting ads for illegal activities. Another concern was that even though the drugs were being promoted by a Canadian pharmacy there was no guarantee that the drugs were manufactured in Canada. The Justice Department stated that "Canadian pharmacies that ship prescription drugs to U.S. residents are not subject to Canadian regulatory authority, and many sell drugs obtained from countries other than Canada which lack adequate pharmacy regulations."<sup>36</sup> These drugs could

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<sup>33</sup> Steve Pociask, "Google's One Million Books," *Forbes*, Aug. 28, 2009,

<http://www.forbes.com/2009/08/27/google-book-copyright-opinions-contributors-steve-pociask.html>.

<sup>34</sup> Cynthia Boris, "German News Producers Want Search Engines to Pay for Content," *Marketing Pilgrim*, Mar. 2012,

<http://www.marketingpilgrim.com/2012/03/germany-wants-search-engines-to-pay-for-content.html>.

<sup>35</sup> Dianne Bartz, "Google to Pay \$500 Million over Online Drug Ads," *Reuters*, Aug. 24, 2011,

<http://www.reuters.com/article/2011/08/24/us-google-idUSTRE77N4A220110824>.

<sup>36</sup> *Ibid.*

be inferior to those produced in the U.S. and may even be counterfeit, leading to inferior health outcomes for many individuals.

#### **F. Net Neutrality Policy**

Google's market success has also met with regulatory success. Google has successfully led the way for the Federal Communications Commission to impose regulation to inhibit Internet Service Providers (ISPs) from competing with it. The regulation, due to be promulgated, will constrain ISPs from developing competing web content, as well as preventing ISPs from price differentiation and prioritizing traffic on its own network. In addition, the rules would also prevent a portion of Internet investment costs from being passed along to companies like Google, who profit handsomely from the generation of Internet traffic on networks owned by other companies. Many experts believe that these rules will raise consumer prices and impede investment, costing American jobs and reducing consumer welfare.<sup>37</sup>

#### **G. Wireless Auctions and Policy**

During one wireless auction proceeding, when Google committed to bid for wireless broadband spectrum, the FCC changed its spectrum bidding rules requiring winning bidders to open their network to Google's software and services.<sup>38</sup> Bidding only once, Google did not win a single wireless license, but it got regulations that favored its wireless platform of products. So, while the auction winners are now obliged to let Google's devices ride for free, Google has no obligation to invest in the network. Some experts believe that FCC deal cost the U.S.

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<sup>37</sup> For a collection of articles (filed with the FCC) on the adverse effects of these regulations on Consumers, see *The Consequences of Net Neutrality Regulations on Broadband Investment and Consumer Welfare*, The American Consumer Institute, Nov. 19, 2009, <http://www.theamericanconsumer.org/wp-content/uploads/2009/11/final-consequences-of-net-neutrality.pdf>.

<sup>38</sup> "Google Intends to Bid in Spectrum Auction if FCC Adopts Consumer Choice and Competition Requirements," News Release, Google, July 20, 2007, [http://www.google.com/intl/en/press/pressrel/20070720\\_wireless.html](http://www.google.com/intl/en/press/pressrel/20070720_wireless.html).

Treasury billions of dollars.<sup>39</sup> In any case, Google currently has the highest market share in the wireless device market.<sup>40</sup>

## H. Travel Market

Sixty percent of consumers start their travel planning with an online search.<sup>41</sup> So when Google acquired ITA software – the software running behind the flight searches for CheapTickets, Kayak, Orbitz, Hotwire, United Airlines, US Airways and many other travel and carrier-direct sales websites – there was great concern that Google might favor its travel search results over popular travel websites.<sup>42</sup> The risk is that Google’s dominance over search will now send many consumers to its own travel deals, reducing competition among online travel companies and potentially raising consumer prices. In a settlement, the Department of Justice (DOJ) imposed safeguards to give competitors access to ITA's software and create a firewall to protect Google from using commercially sensitive information about its competitors. However, if Google's search engine directs customers to its own site, then its site will have a competitive advantage over its rivals.

## Knowledge is Power

Microeconomic theory typically assumes perfect information, a market in which buyers and sellers have the same information to influence their choices of production, investment and consumption, thereby leading to efficient pricing of goods and services, as well as minimizing costs for factors of production. However, when imperfect information is present, it is possible that one-party (seller) is advantaged over another (buyer). Likewise, producers should have similar information about the market in order to effectively compete.

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<sup>39</sup> Anna-Maria Kovacs, “The Merits of Open and Competitive Spectrum Actions,” *FierceWireless*, March 3, 2012, <http://www.fiercewireless.com/story/merits-open-and-competitive-spectrum-auctions/2012-03-13>.

<sup>40</sup> “ComScore Reports February 2012 U.S. Mobile Subscriber Market Share,” Release, ComScore, April 3, 2012, [http://www.comscore.com/Press\\_Events/Press\\_Releases/2012/4/comScore\\_Reports\\_February\\_2012\\_U.S.\\_Mobile\\_Subscriber\\_Market\\_Share](http://www.comscore.com/Press_Events/Press_Releases/2012/4/comScore_Reports_February_2012_U.S._Mobile_Subscriber_Market_Share).

<sup>41</sup> Roger Yu, “Google Moves into Online Travel Business,” *USA Today*, May 5, 2010, [http://www.usatoday.com/money/industries/travel/2010-05-05-googletravel05\\_ST\\_N.htm](http://www.usatoday.com/money/industries/travel/2010-05-05-googletravel05_ST_N.htm).

<sup>42</sup> “Lee Calls for Antitrust Oversight Hearings on Google,” Press Release, March 11, 2011, includes a Letter from Senator Lee to Senate Judiciary Chairman Kohl dated March 10, 2011. See, <http://www.lee.senate.gov/record.cfm?id=331843>.

Search advertising becomes more valuable when the search engine is able to match online consumers with more relevant ads. For this reason, search companies tend to collect and use consumer online browsing and search history to develop consumer profiles. This behavioral advertising can be beneficial to consumers looking for information and shopping, and it can be very profitable for advertisers seeking to sell their goods and services. When you use a search service, your search is tied to your computer's IP address, and that online history is used, tracked and stored. Google's various online services store your calendar events, SMS messages, location and other information. The recent Google announcement that it will combine consumer profiles across its nearly 60 services, giving it even better information over its rivals.<sup>43</sup>

When one company dominates search, they have clear advantage in developing a better and more comprehensive profiles on individuals, whereas smaller search engines have fewer potential observations and sometimes incomplete information. However, beyond Google's competitive size, its aggressive and controversial attempts to collect online consumer information provide it with better market information than its competitors, thus presenting a further disadvantage to rivals. This advantage allows Google to better target consumers with its advertisements than its competitors, which allows Google to command higher prices and/or take higher market share. This advantage means that information is power in the search advertising market.

In economics, asymmetric information is sometimes considered a market failure. When one company has better market information than its competitors, it could pose anticompetitive risks if this information is collected through privacy breaches, online hacking, eavesdropping and other unscrupulous activities. As the remaining portion of this section will show, Google may have collected and used data in questionable ways, which may provide it a competitive

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<sup>43</sup> Google recently announced that it will combine its user information for roughly 60 of its services. See, Hayley Tsukayama, "FAQ: Google's New Privacy Policy," Washington Post, January 24, 2011, at [http://www.washingtonpost.com/business/technology/faq-googles-new-privacy-policy/2012/01/24/gIQA rw8GOQ\\_story.html](http://www.washingtonpost.com/business/technology/faq-googles-new-privacy-policy/2012/01/24/gIQA rw8GOQ_story.html).

edge over its rivals. Much of these data collection has been done without consumer knowledge and consent.

### **A. Safari-Work Around**

As Apple's iPhone users opted to use Safari browser's *Do-Not-Track* option, little did they know that Google found a work-around in Safari's software, collecting information without Safari's, Apple's or consumers' knowledge.<sup>44</sup> In other words, consumers felt they had opted-out of online tracking, only to later discover that Google figured out a way around Safari's protections. There is a pending Federal Trade Commission decision on this security breach, including a potential fine to be levied on Google.

### **B. Street View/Wi-Spy**

Dozens of state attorneys general announced that are investigating Google Street View, suggesting that, among other things, Google collected private consumer information from encrypted Wi-Fi networks. Affecting a number of countries, including the U.S., Google's unauthorized collection of information included downloading consumer passwords, emails, medical records and other sensitive personal information.<sup>45</sup> European authorities have particularly questioned Google's privacy breaches, including Street View pictures in Denmark and YouTube in Italy and other potential privacy problems.<sup>46</sup>

### **C. Location Tracking**

Completely undercutting Garmin and other navigation device companies, Google's Android phone gives away its navigation app for free, but at a hidden cost. In the process, Google has collected mobile phone device identifiers (called media access control addresses or

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<sup>44</sup> Heather Perlberg and Brian Womack, "Google Violated Apple Users' Privacy, Stanford Study Finds," *Bloomberg News*, February 21, 2012, available on Business Week's website at <http://www.businessweek.com/news/2012-02-21/google-violated-apple-users-privacy-stanford-study-finds.html>.

<sup>45</sup> Josh Halliday, "Google Street View Broke Canada's Privacy Law with Wi-Fi Capture," *Guardian*, Oct. 20, 2010, <http://www.guardian.co.uk/technology/2010/oct/19/google-street-view-privacy-canada>.

<sup>46</sup> Bas van den Beld, "Avoiding Google's European Privacy Gaffes," *Search Engine Land*, May 30, 2010, at <http://searchengineland.com/avoiding-googles-european-privacy-gaffes-38887>.

MAC addressees) on devices like smart phones and Internet devices, thereby allowing them to track your physical location as you travel shop, work and go home.

#### **D. Doodle-for-Google**

Google's online art contest required children to provide their birth city, date and social security numbers.<sup>47</sup> Google says that it did not intend to do anything inappropriate with the information.

#### **E. Gmail**

By using free Gmail accounts, your messages are scanned so that Google can better target you with web advertisements. However, it is contended that those consumers who are not Gmail users, but merely respond to a Gmail message, are also getting their emails scanned without their consent.<sup>48</sup> These emails are collecting key words that go into your profile and are used to target consumers with advertisements.

#### **F. Google Buzz**

This controversy stems from the fact that Google did not notify its "Gmail" users that Google Buzz would use and potentially expose their email account information. Many users complained when they were caught off guard. Jon Leibowitz, Chairman of the FTC had this to say – *"When companies make privacy pledges, they need to honor them. This is a tough settlement that ensures that Google will honor its commitments to consumers and build strong privacy protections into all of its operations."*<sup>49</sup> The FTC's ruling could subject Google to fines of \$16,000 per day per violation for future deceptive practices.

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<sup>47</sup> Chris Matyszczyk, "Why did Google Ask for Kid's Social Security Numbers?" *CNET*, Feb 2, 2011, [http://news.cnet.com/8301-17852\\_3-20035164-71.html](http://news.cnet.com/8301-17852_3-20035164-71.html).

<sup>48</sup> Abby Ellin, "Lawsuit: Gmail, Yahoo Email Invade Privacy, Even Non-Users'," *ABC News*, July 2, 2012, <http://abcnews.go.com/Business/lawsuit-gmail-yahoo-invade-privacy-email-account/story?id=16680463>.

<sup>49</sup> Byron Acohido, "FTC Slaps Google with Audits over Buzz," *USA Today*, March 31, 2011, <http://www.usatoday.com/tech/news/2011-03-30-google-ftc-settlement.htm>.



Companies have a responsibility to respect the privacy of consumers who use and trust their products. Under this settlement, the FTC will now conduct biennial reviews of Google's practices to ensure they can no longer say one thing and do another.

### **G. Browser**

Some allegations emerged that an early version of Chrome, Google's web browser, recorded all of the keystrokes of online consumers and stored them on its servers, much like viruses referred to as *key loggers*. Concerning this allegation, Google responded that it would stop storing this consumer information.<sup>50</sup>

The list of examples above shows Google's attempt to collect, track and store consumer information, often without consumer knowledge. These examples go beyond tracking consumer web browsing history. They include the collection of consumer information from calendars and emails, as well as collecting consumer information by intercepting wireless communications and hacking Safari's Do-Not-Track option. If knowledge is power, consumer online information is a key to achieving and maintaining online market dominance. The ability of Google to gain better information through these questionable means creates imperfect information in online markets and may constitute a market failure.

The government's reaction to Google's market conduct has, so far, been inconsequential. Mergers are being approved, investigations are being dropped or settled, and the FCC has leveled an insignificantly small \$25,000 fine as a result of Google's refusal to cooperate with an investigation.<sup>51</sup> It also does not hurt that Google has former staff in key positions in the White House, Federal Trade Commission, Federal Communications Commission and Department of Justice.

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<sup>50</sup> Gregg Keizer, "Google Bends Chrome Privacy Criticism," *PCWorld*, Sept. 9, 2008, at [http://www.pcworld.com/businesscenter/article/150860/google\\_bends\\_to\\_chrome\\_privacy\\_criticism.html](http://www.pcworld.com/businesscenter/article/150860/google_bends_to_chrome_privacy_criticism.html).

<sup>51</sup> Andrea Chang, "FCC Fines Google \$25,000 for Impeding Data-Collection Probe," *Los Angeles Times*, April 15, 2012, <http://articles.latimes.com/2012/apr/15/business/la-fi-tn-google-fine-20120415>.

These examples demonstrate that Google's market structure is supported by its ongoing market conduct, which together explains the high and sustained profitability of the business. This analysis suggests anticompetitive risks that cannot be self-corrected.

## **Conclusions and Recommendations**

Google has become one of the most successful companies in modern times, both in terms of growth, market capitalization and enormous profits. That success, to a large degree, reflects the fact that it dominates the search advertising market. Even several of Google's competitors now use Google's own search engine. This means that Google now controls a basic input of several of its competitors, which could raise antitrust concerns.

Google has a dominant market position and has often used questionable market conduct to maintain that position. This suggests that the market may have well tipped to Google, thereby creating barriers to entry and perpetuating a lack of competition. Furthermore, with Google recording and archiving the personal browsing history of the vast majority of online consumers (as well as collecting unauthorized personal information of consumers), it is very difficult for any firm to enter the market and produce better targeted online ads. In other words, market rivalry has all but ended and Google's dominance will be difficult to reverse.

What does this mean for consumers? Evidence presented in this paper suggests that Google may be manipulating its search results in ways that punish its competitors and favor its own websites. In fact, if Google's search algorithm favors its own websites as evidence suggests, then Google is in a position to pick winners and losers in the marketplace -- influencing the books and news you read online, as well as the products you shop and prices you pay for travel and online products. Google's dominance means that it can shut out its competition and funnel traffic to its websites and those of its advertisers.

Based on this questionable conduct, there needs to be an extensive investigation into these antitrust concerns, the risks that Google's dominance poses to the industry and consumers, and the extent to which remedies are needed to mitigate these anticompetitive risks. The research presented in this paper is incomplete and limited in scope. However, while more research is needed to verify and quantify these risks, the sheer number of incidences should be a concern to policymakers.

The problems cited in this study appear to be isolated to one company and are not an industry-wide problem. As such, broad government intervention and potentially onerous regulations of the industry would seem excessive and could ironically preserve Google's market dominance and inhibit market entry. Therefore, it is important to focus this issue on Google, the potential sources of these problems, and correct actions.

**APPENDIX:**

## 50 Key Words Used to Compare Results from the Top Three Search Engines

academic papers	movies
airline search	music
apps	music search
article search	navigation
blog search	net neutrality
blogs	news
book search	news feeds
bookmarks	online documents
books	optimize your website
browser	patent search
calendar	photo search
customized search	photos
discussion groups	presentations
documents	product search
email	searchable email
finance	share photos
flight search	spreadsheets
game search	translate
instant messaging	travel search
location	video search
map search	videos
maps	voice
market	voice mail
mobile search	web search
movie search	website trends