Concurring and Dissenting Statement of Commissioner J. Thomas Rosch
Regarding Google's Search Practices

In the Matter of Google Inc., FTC File No. 111-0163

January 3, 2012

The Commission has voted to close its investigation of Google's non-SEP search engine practices following the company's non-binding pledge to resolve concerns related to its alleged misappropriation ("scraping") of content from other websites and its multihoming policy. None of my colleagues has concluded that there is reason to believe that these practices violate any antitrust statute, including Section 5 of the FTC Act. Three of them simply express "strong concerns" about Google's alleged scraping and two of them similarly express "strong concerns" about Google's multihoming restrictions. (Commission Statement at 1 n.2.) Those same two commissioners suggest that their "strong concerns" have been resolved by Google's unilateral pledge not to revive those practices. However, this "settlement" is not embodied in a consent decree or other order.

Although I concur with the Commission's decision to close this investigation, I have dissented from the Commission's Closing Statement for two reasons.[1] The first is substantive: the two practices do not violate the antitrust laws in any respect. The second is procedural: without a consent decree, the practices could be revived at any time without penalty, even if they constituted a law violation. In other words, after promising an elephant more than a year ago, the Commission instead has brought forth a couple of mice.

Scraping

Google has committed to provide a mechanism that will allow websites to opt out of being displayed in Google's vertical search results but remain in Google's organic search results. This new functionality is intended to remedy allegations that Google misappropriated, or "scraped," the content of three rival websites that supply local information or shopping comparison services. I do not agree that Google's alleged scraping violated the antitrust laws for several reasons.

[1] I also have concerns that insofar as Google has monopoly or near-monopoly power in the search advertising market and this power is due in whole or in part to its power over searches generally, nothing in this "settlement" prevents Google from telling "half-truths"—for example, that its gathering of information about the characteristics of a consumer is done solely for the consumer's benefit, instead of also to maintain a monopoly or near-monopoly position. *See International Harvester Co.*, 104 F.T.C. 949, 1058 (1984) ("[I]t can be deceptive to tell only half the truth, and to omit the rest."); *North American Philips Co.*, 111 F.T.C. 139, 188 (1988) (initial decision) (holding that half-truths can be deceptive). That is a genuine cause for "strong concern."

First, there is no factual or legal basis for a monopoly maintenance claim under Section 2 of the Sherman Act based on scraping. As an initial matter, Google does not have monopoly or near-monopoly power in any conceivable relevant market related to the challenged practice.[2] In a local information or shopping comparison market, for example, Google's share at the time of the scraping was in the single digits.

In addition, I am not aware of any legal authority that scraping a rival's public website is a form of exclusionary conduct that is actionable under Section 2. The Supreme Court has cautioned against creating antitrust liability for ordinary business torts. *See Brooke Group v. Brown & Williamson Tobacco Corp*., 509 U.S. 209, 225 (1993) ("[T]he federal antitrust laws . . . do not create a federal law of unfair competition or 'purport to afford remedies for all torts committed by or against persons engaged in interstate commerce.'" (quoting *Hunt v. Crumboch*, 325 U.S. 821, 826 (1945))). The lower federal courts have only found misappropriation to be an exclusionary act that is actionable under Section 2 when (1) the information is confidential, (2) the theft is of sufficient scale as to affect the competition in the relevant market as a whole, and (3) the theft will create or maintain monopoly power.[3] None of these conditions is satisfied here. The challenged conduct does not even meet the requirements for a conditional refusal to deal claim, given that (1) Google did not threaten to remove the websites from its search engine and (2) the alleged "victims," not Google, were the ones to terminate their relationship.

Second, the Commission has not previously challenged misappropriation as a standalone violation of Section 5. To do so would be an unwarranted and unprincipled expansion of that statute's reach. The majority offers no explanation of why Section 5 should encompass scraping or of the limits of a standalone Section 5 claim. Members of Congress and the business

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[2] Google's lack of monopoly power in local information and shopping services also casts doubt on a standalone Section 5 count. All of the Commission's recent Section 5 cases (other than invitation to collude cases) have involved firms with monopoly power. *See* Complaint ¶ 3, Intel Corp., FTC File No. 061-0247 (Dec. 16, 2009), *available at* http://www.ftc.gov/os/adjpro/d9341/091216intelcmpt.pdf (alleging that Intel had monopoly power); Complaint ¶ 21, Negotiated Data Solutions LLC, Docket No. C-4234 (Jan 23, 2008), *available at* http://www.ftc.gov/os/caselist/0510094/080122complaint.pdf (alleging monopoly power).

[3] *See, e.g.*, *Taylor Publ'g Co. v. Jostens Inc*., 216 F.3d 465, 482-83 (5th Cir. 2000) (plaintiff "failed to introduce sufficient evidence to prove that acquisition of information concerning Taylor's manufacturing processes, sales techniques, strategies, and goals would harm the market as a whole rather than a particular competitor"); *Associated Radio Service Co. v. Page Airways, Inc.*, 624 F.2d 1342, 1356 (5th Cir. 1980) (holding that misappropriation of engineering drawings and data, along with various other acts, violated Section 2 because the defendant's conduct had injured competition but cautioning that "[p]robably no one of the instances of improper conduct, standing alone, would lead to section 2 liability"); *Chapdelaine Corporate Sec. & Co. v. Depository Trust & Clearing Corp*., 2006-2 Trade Cas. (CCH) ¶ 75,361 (S.D.N.Y. 2006) (denying motion to dismiss based on allegation that defendant "misappropriated proprietary information and breached a Non-Disclosure Agreement" because such conduct was alleged to have caused "harm to competition as a whole as well as adverse effects on price, quality, and output of the relevant service").

community have urged the Commission on many occasions not to expand the scope of Section 5 without a clear explanation of the reach of this statute. The lack of any limiting principles is particularly problematic in this case given that remedies already exist for misappropriation under copyright and tort law. *Cf. Verizon Communications v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 412 (2004) (counseling against an expansion of the antitrust laws where other legal structures already exist "to deter and remedy anticompetitive harm").

Furthermore, the federal courts have cautioned against the use of Section 5 where that would unsettle settled Section 2 case law. *See Boise Cascade Corp. v. FTC*, 637 F.2d 573, 581-82 (9th Cir. 1980) (rejecting a Section 5 claim when there was "well forged" antitrust case law governing the conduct, lest it "blur the distinction between guilty and innocent commercial behavior"). To the extent a standalone Section 5 claim is based on a refusal to deal or conditional refusal to deal theory, Section 5 cannot be used to evade the requirements of the Supreme Court's *Trinko* decision.

Third, I am aware not aware of any evidence of any actual injury to consumers (whether end users or advertisers) or competition as a result of Google's conduct. This lack of injury conflicts with the Commission's unanimous statement to Congress that in any Section 5 case, there must be "clear harm to the competitive process and to consumers."[4] Furthermore, the Supreme Court has, in an oft-quoted passage, cautioned that the antitrust laws are for "the protection of competition, not competitors." *Brooke Group. Ltd. v. Brown & Williamson Tobacco Corp*., 509 U.S. 209, 224 (1993) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)); *see also FTC v. Klesner*, 280 U.S. 19, 27-28 (1929) (Section 5 proceedings must be premised on the "protection of the public," not the vindication of private rights). In any event, the investigation revealed that the alleged "victims" of Google's scraping were *not* injured: overall traffic to the alleged victims increased substantially while the alleged scraping was occurring and traffic to these websites from Google grew at an even faster rate.

Any claim that Google's alleged scraping harmed innovation is likewise lacking in factual support. The deficiency of evidence in this regard is not surprising, given the limited scope and duration of Google's alleged scraping.[5] Marketplace developments also cast doubt on the likelihood of harm to innovation. Vertical search engines—including the alleged "victims" of Google's scraping—have continued to thrive and expand, and entry has continued apace since this conduct occurred. Any assumption that there has been harm to innovation, despite all evidence to the contrary, is also in tension with the fair use doctrine, under which the limited use of another's work without permission is not deemed to harm innovation. *See* 17 U.S.C. § 107.

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[4] Prepared Statement of the Federal Trade Commission Before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, How the Federal Trade Commission Works to Promote Competition and Benefit Consumers in a Dynamic Economy (June 9, 2010), *available at* http://www.ftc.gov/os/testimony/100609dynamiceconomy.pdf.

[5] The scraping of the two websites supplying local information occurred for about a year. The scraping of the shopping comparison website ended just a few months after that website raised its concerns with Google.

Finally, I am concerned that the majority's apparent position that scraping is a violation of Section 5 of the FTC Act will put the FTC in the position of becoming the enforcer of the copyright laws on the Internet—a task for which it has neither the resources nor expertise, and was surely not envisioned by Congress. As any casual user of the Internet knows, many websites make use of other websites' content; indeed, the business model for many popular websites is based on aggregating or summarizing the content of other websites.[6] As a result of the majority's apparent condemnation of scraping, the legality of these aggregators may be called into question, and the Commission may be inundated with rent-seeking complaints from firms like the alleged "victims" here.

Multihoming Restrictions

Google has also committed to eliminate a particular restriction on the use of its AdWords search advertising platform. Previously, Google's standard licensing terms and conditions for its AdWords application programming interface (API) prevented licensees from using third-party tools that provide a single user interface for managing multiple advertising campaigns. In essence, the restriction prevented an advertiser from using software developed or used by a third party (but not the advertiser itself) to comingle data and simultaneously manage an ad campaign involving both Google and its rivals.[7] This restriction was deemed impermissible on the theory that Google, as a monopolist in search advertising, has a duty to assist its rivals or may not engage in conduct that has the effect of raising its rivals' costs.

As an initial matter, it is important to recognize that Google's API restriction was limited in scope. This was not an exclusive dealing arrangement of the kind condemned in *Microsoft* or *Dentsply*.[8] All Google advertisers were free to continue to use other platforms, including APIs associated with those platforms. In addition, advertisers could develop their own tools to

[6] Studies have found that the limited use of other websites' content is a common feature on the Internet and that this practice is responsible for a large and growing part of the growth of the Internet economy. *See, e.g.*, Computer & Communications Industry Association, *Economic Contribution of Industries Relying on Fair Use* (2011), *available at* http://tinyurl.com/7r4yrjy ("Fair use of copyrighted material and other limitations and exceptions are an important foundation of the Internet economy.").

[7] An analogy might be helpful here. Suppose it is the busy Christmas shopping season and shoppers are struggling to carry all of their purchases to their cars, which may be parked some distance away from the mall. As an incentive for its customers to make more purchases, the most popular store at the mall provides golf carts equipped with special shopping baskets to carry purchases from the store to customers' cars. As a condition of using its carts, the store requires that customers agree not to transport merchandise from competing stores on the carts, even though doing so would be costless to the store. The store providing the carts does *not* prohibit its customers from shopping at competing stores while they are at the mall, from accepting similar modes of transportation offered by competing stores, or from loading all of their purchases at the mall into a golf cart (or other vehicle) that they happen to own.

[8] *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001); *United States v. Dentsply Int'l*, 399 F.3d 181 (3d Cir. 2005).

manage an ad campaign across different platforms. Larger advertisers, in fact, did this. Also, the restriction did not prevent users from exporting AdWords data onto a rival's platform. This could be done manually or from a rival platform's software, as Google's principal search rival acknowledged.[9]

Second, there is no precedent for this theory of liability. No federal court has ever found liability for similar conduct. The Supreme Court has held that refusals to assist competitors are not illegal under Section 2 except in unusual circumstances. *See Verizon Communications v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*., 472 U.S. 585 (1985). Following the Supreme Court's decision in *Trinko*, most courts of appeals, including the circuit in which Google is based,[10] require a unilateral termination of a profitable prior course of dealing to establish such a claim. That would not be satisfied here because Google's API restriction has been in place since Google introduced the AdWords API in 2005. Furthermore, the same circuit court has held that the introduction of a new product by a monopolist that improves performance or lowers costs is lawful, even if the product is incompatible with rivals' products. *See Allied Orthopedic Appliances Inc. v. Tyco Health Care Group LP*, 592 F.3d 991, 998-1002 (9th Cir. 2010).

Indeed, our own enforcement guidelines state that the "Agencies will not require the owner of intellectual property to create competition in its own technology." U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property § 3.1 (1995); *see also id.* § 2.2 ("Nor does such market power impose on the intellectual property owner an obligation to license the use of that property to others."). The IP Guidelines do state that license agreements may be anticompetitive if they "foreclose access to, or increase competitors' costs of obtaining important inputs." *Id*. § 4.1.2. But neither of these conditions is satisfied here. The first condition—foreclosure—is not met because Google places no contractual restrictions on the use of other advertising networks. The second—raising rivals' costs—is not met because Google's API restriction has no discernible effect on Google's rivals (or advertisers).[11] The lack of competitive injury is not surprising given the modesty of the API restriction.

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[9] Microsoft, Bing ads, http://advertise.bingads.microsoft.com/en-us/product-help/bingads/topic?query=moonshot_proc_importcampaign.htm ("If you already have campaigns in other online advertising programs, you can move them to Bing Ads. You have two options to do this. You can create an import file and upload it to Bing Ads, or if you are using Google AdWords, you can import directly from your Google AdWords account.").

[10] *LiveUniverse, Inc. v. MySpace, Inc.*, 304 F. App'x 554, 556 (9th Cir. 2008) (unpublished opinion) ("This court has since recognized the narrow scope of the refusal to deal exception, which requires, *inter alia*, 'the unilateral termination of a voluntary and profitable course of dealing.'"); *MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1132 (9th Cir. 2004) (observing that liability in *Trinko* was premised on "the unilateral termination of a voluntary and profitable course of dealing").

[11] The vast majority of search engine marketing firms and advertisers stated that Google's API restriction was irrelevant to their advertising platform decision.

Third, Google's justification for the API restriction—ensuring that third-party intermediaries take advantage of the unique features available on AdWords—is supported by numerous documents going back at least six years.[12] It is also noteworthy that Google introduced the restriction in 2005, when its market share was a fraction of its current share. This suggests that there were legitimate business reasons, not an exclusionary purpose, behind the restriction.

Fourth, I am concerned that imposing a duty on monopolists to allow their customers to interoperate and share data with rivals could discourage innovation, particularly in the software industry. *See* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 775c (2012) ("Any judicial rule for condemning possibly anticompetitive innovation under the antitrust laws must be formulated so as not to discourage the great majority of innovations that are competitive.").

Finally, insofar as one of the alleged disadvantaged rivals is Microsoft, I have seen no evidence that it lacks the resources to file its own private antitrust action—instead of "free riding" on a government action to achieve the same result.

Settlement Procedure

Instead of following standard Commission procedure and entering into a binding consent agreement to resolve the majority's concerns, Google has instead made non-binding commitments with respect to its search practices. Only two of my colleagues have concluded that these nonbinding promises are an acceptable means of resolving their concerns with Google's search practices.[13] (Commission Statement on Search at 1. n.2.) More importantly, our "settlement" with Google creates very bad precedent and may lead to the impression that well-heeled firms such as Google will receive special treatment at the Commission.

The FTC's Rules of Practice permit settlements to resolve potential violations of the FTC Act. These settlements must be in the form of a *consent order*. FTC Rule 2.31, 16 C.F.R. § 2.31. Consent orders typically include admissions of jurisdictional facts, a waiver of the FTC's

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[12] Even the Commissioners expressing "strong concerns" about Google's API restriction apparently recognize the legitimacy of Google's justification, as Google will continue to be able to require that third-party tools used to synchronize advertising campaigns offer certain minimal functionality.

[13] As precedent for their acceptance of Google's non-binding commitments, Chairman Leibowitz and Commissioner Brill point to the FTC's 2001 investigation of the acquisition of Pillsbury by General Mills. That case, however, has no bearing here. In General Mills, the respondents offered *structural relief* that, unlike the *conduct relief* offered by Google, (1) could not be unilaterally reversed by the respondents and (2) did not require ongoing Commission oversight to ensure compliance. Furthermore, even the two Commissioners that found the relief in General Mills acceptable stated that they "strongly preferred that these commitments be memorialized in a formal Commission order, consistent with usual practice." Statement of Commissioners Orson Swindle and Thomas B. Leary, In re General Mills, Inc./Diageo plc/Pillsbury Co., FTC File No. 001-0213 (Oct. 23, 2001), *available at* http://www.ftc.gov/os/2001/10/gmstmtswinleary.htm.

obligation to make findings of fact and conclusions of law, and a waiver of all rights to judicial review or to otherwise challenge the validity of the order. FTC Rule 2.32(a), 16 C.F.R. § 2.32(a). The Department of Justice and the FTC can bring actions in federal court to enforce *FTC orders* and obtain civil penalties of up to $16,000 per day of the violation. 15 U.S.C. § 45(*l*); *see also* 16 C.F.R. § 1.98. Federal courts enforcing *FTC orders* can also "grant mandatory injunctions and such other and further equitable relief as they deem appropriate." 15 U.S.C. § 45(*l*).

Our "settlement" with Google is not in the form of a binding consent order and, as a result, the Commission cannot enforce it by initiating contempt proceedings. The inability to enforce Google's commitments through contempt proceedings is particularly problematic given that the Commission has charged Google with violating a prior FTC consent agreement.[14]

Enforcement of Google's obligations requires a Commission *order*, not a unilateral commitment by Google to stop its practices. If Google were really willing to abandon its scraping or its API policy, it would have tendered a consent decree to that effect instead of a unilateral commitment that is not enforceable. The current settlement's structure is nothing more than a denial of liability in another form.[15] I am not the first to object to this form of "settlement." In the past, the FTC used various informal means of resolving enforcement matters, such as "Assurances of Voluntary Compliance" and "Informal Corrective Actions." However, as a result of well-deserved criticism of these practices by the Nader Commission and the 1969 ABA Commission,[16] the FTC abandoned the use of informal settlement agreements decades ago.

The Commission has, at times, permitted respondents to avoid an enforcement action by terminating the offending conduct, but only when the underlying conduct was promptly corrected upon notice of a possible violation and the risk of a future violation was remote.[17] This

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[14] The FTC charged that Google made misrepresentations to users of Apple's Safari Internet browser, in violation of a settlement it reached with the agency in October 2011. *See* Press Release, Fed. Trade Comm'n, Google Will Pay $22.5 Million to Settle FTC Charges it Misrepresented Privacy Assurances to Users of Apple's Safari Internet Browser (Aug. 9, 2012), *available at* http://www.ftc.gov/opa/2012/08/google.shtm.

[15] At least Google's denial of liability with regard to the Safari settlement was transparent. *See supra*, note 15.

[16] Edward F. Cox et al., *The Nader Report on the Federal Trade Commission* 61 (1969) ("The general decline in formal enforcement at the FTC has been accompanied by greater reliance on 'voluntary' enforcement tools. The FTC rationalizes this as the most efficient means of enforcing the law. Nothing could be further from the truth."); American Bar Association, Commission to Study the FTC, *Report of the ABA Commission to Study the Federal Trade Commission* 26 (1969) ("Absent a program of careful compliance surveillance, coupled with strong sanctions when necessary, the voluntary compliance program cannot be regarded as effective law enforcement.").

[17] *See, e.g.*, Closing letter, Northwest Natural Products – L'il Critters, FTC File No. 092-3153 (Oct. 30, 2009) (closing advertising practices investigation based on the "very limited

exception has no application here because, for the reasons previously stated, Google can resume engaging in its alleged scraping or API restrictions at any time, without penalty.

Conclusion

The Commission's mission is to protect competition and consumers. The proposed "settlement" here will do the opposite. The Commission's acceptance of a commitment letter to resolve an alleged violation of the antitrust laws is an unjustified and dangerous weakening of the Commission's law enforcement authority. Going forward, parties under investigation are likely to demand similar treatment. Failure to do so would imply that Google has received preferential treatment in this investigation.

In addition, the seeking of relief by some of my colleagues for Google's scraping and API restrictions—practices that are legal under the Sherman Act—puts the Commission's standalone Section 5 authority at severe risk. Congress would be unlikely to stand idly by if the Commission continues to challenge conduct under Section 5 without explaining the limiting principles of that authority. The majority's exercise of that authority in this case is particularly problematic and deserving of scrutiny given the utter lack of evidence that Google's actions have harmed consumers or competition—the bare minimum requirements for the use of Section 5.

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duration" of the conduct and the company's "swift and voluntary action" to rectify the conduct); Closing letter, Genelex Corp., FTC File No. 072-3128 (Aug. 14, 2009) (closing advertising practices investigation based on the company's discontinuation of the marketing activities at issue and its "representations that the company has no plans to market [similar products] in the future"); Closing letter, Baby Bee Bright Corp., FTC File No. 082-3018 (Mar. 23, 2009) (closing advertising practices investigation based on "changes made recently" to the company's marketing and representations that future advertising claims will be adequately substantiated); *see also FTC v. Evans Prods. Co.*, 775 F.2d 1084 (9th Cir. 1985) (affirming a denial of preliminary injunctive relief where the offending conduct had completely ceased three years before the complaint was filed and was not likely to recur).