

Internet Nondiscrimination Principles for Competition Policy Online

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Executive Summary

American search engines are among the most innovative services in the global economy. They provide extraordinary efficiencies for advertisers and consumers by targeting messages to viewers who are most likely to want to receive them. In order to attract more users, search engines use revenues from advertising to organize and index a great deal of content on the World Wide Web.¹ Like the major broadcast networks they are now beginning to displace, they provide content (organic search results) in order to sell advertising (paid search results).

Recent deals between major search engine providers have provoked scrutiny because they suggest undue coordination of competitors in an already concentrated industry. Certainly antitrust authorities should take into account the unique consumer protection and privacy issues raised by the consolidation of platforms for online advertising. However, to the extent this market naturally tends toward concentration, conventional antitrust analysis may not be able to address the worries of the Committee. Policymakers may need to focus less on promoting competition and more on regulating the inevitable near-monopolist by assuring it does not treat either advertisers or consumers unfairly.

Though I believe such concerns will ultimately warrant creation of a Federal Search Commission to parallel the Federal Communications Commission, I realize that the Committee is now seeking more immediately relevant responses to concentration. I will therefore focus my testimony on some legislative and regulatory steps that could reduce opportunities for major search engines to abuse their dominant positions. In order to reduce opportunities for clickfraud and unfair treatment of indexed entities, *qualified transparency* will be needed in order to open up the “black box” of search engine

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¹ Because of this service, I have advocated for slightly more favorable copyright treatment of search engines’ indexing projects. See Pasquale, *Copyright in an Era of Information Overload: Toward the Privileging of Categorizers*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=888410.

operations to at least some third parties.² Moreover, precisely the types of common carrier obligations that search engines have advocated for telecommunications and cable companies (in the name of “net neutrality”) should be applied to search engines themselves (to assure the fairness of these powerful intermediaries).³

Background for This Testimony

I am a Professor of Law at Seton Hall Law School, and the Associate Director of Seton Hall University’s Institute for Law, Science, and Technology. I regularly teach courses in intellectual property and administrative law. I joined Seton Hall after practicing law as an attorney at Arnold & Porter LLP, where my work included antitrust and intellectual property litigation. I have also served as a fellow at the Institute for the Defense of Competition and Protection of Intellectual Property in Lima, Peru. In 2002, my co-authored work *Beyond Napster* focused on the intersection of antitrust and intellectual property law in the music industry. Since then I have written a series of articles on the law of internet intermediaries, including search engines. I have presented these works at many venues, including Stanford, Berkeley, Yale, the University of Chicago, the University of Virginia, and NYU Law Schools.

Threats Posed by Consolidation in the Search Market

Internet sites have much riding on search engine results: as Nissenbaum & Introna memorably put it, “to exist [online] is to be indexed by a search engine.”⁴ While users can locate relevant information on the Net in other ways, search engines now constitute the dominant platform through which content producers and audiences can reach each other. Moreover, the search process itself is structured as a high-stakes, winner-takes-(almost) all competition.⁵ Search-results lists may lock sites and advertisers into a fierce

² My co-authored work *Federal Search Commission* explores the ways in which transparency here would be qualified, in order to prevent manipulation of search engines. Pasquale and Bracha, *Federal Search Commission*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1002453.

³ Frank Pasquale, *Internet Nondiscrimination Principles*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1134159 (“Just as dominant search engines fear an unfairly tiered online world, they should be required to provide access to their archives and indices in a nondiscriminatory manner. If dominant search engines want telecommunications and cable carriers to disclose their traffic management tactics, they should submit to regulation that bans stealth marketing and reliably verifies the absence of the practice. Finally, search engines’ concern about the applications and content disadvantaged by carrier fast-tracking should lead them to provide annotation remedies to indexed sites whose marks have been unfairly occluded by the search process. Fair competition online demands common commercial ethics for both dominant search engines and dominant carriers.”).

⁴ Lucas D. Introna & Helen Nissenbaum, *Shaping the Web: Why the Politics of Search Engines Matters*, 16 INFO. SOC’Y 169 (2000), available at <http://www.indiana.edu/~tisj/readers/full-text/16-3%20Introna.html>.

⁵ For a fuller description of the dynamics of network effects in situations like this, see DAVID GREWAL, *NETWORK POWER* (Yale, 2008); ROBERT H. FRANK AND PHILIP COOK, *THE WINNER TAKE ALL SOCIETY* (1995).

zero-sum competition for recognition.⁶ The number of users attracted by a listed website steeply drops in correlation with its rank, beginning with the site ranked as second. By the time one reaches later pages of the search-results list, such a rank is almost as bad as not being indexed at all. In such an environment, where both commercial and non-commercial speakers place great weight on attracting users' attention, a high ranking is critical to success. Furthermore, a very small number of significant players dominate the lion's share of the search engine market.

Concentrated control over the flow of information, coupled with the ability to manipulate this flow, may reduce economic efficiency by stifling competition. The centrality of information to efficient markets is well known. Market participants need information about products and services to make informed economic decisions. To the extent information is less available or more costly to obtain, the market will be less efficient and prices will be less competitive. Search engine manipulation may adversely affect the flow of information critical to the decisions of participants in the market. It may highlight market actors that otherwise would have enjoyed less popularity or suppress other actors and their ability to compete effectively. Put differently, attaining visibility and access to users is critical to competition and cooperation online. Centralized control or manipulation by search engines may stifle innovation by firms relegated to obscurity.

Manipulation of this kind is likely to result in high barriers to entry that depress competition. Entrenched and well-established entities are more likely to have the resources necessary to induce search engines to manipulate results, and thus preserve their market dominance.⁷ New entrants and smaller competitors may find themselves excluded or unable to reach public consciousness.⁸ As the Internet becomes a central site for both market transactions and the information needed to make informed purchasing decisions, the anti-competitive effect of skewed information flows is likely to intensify.

Manipulation is unlikely to be detected if dominant search engines are permitted to keep their search algorithms completely secret. According to one of its court filings, "Google takes extraordinary measures to protect its trade secrets and confidential commercial information." Like FICO scoring and much proprietary voting machine

⁶ Frank Pasquale, *Rankings, Reductionism, and Responsibility*, 54 CLEV. ST. L. REV. 115, 130–131 (2006) ("Economists have explored how positional dynamics in a number of different markets . . . have led to socially wasteful 'arms races' for positional advantage. In ordinary markets, the presence of high-spending consumers will draw more producers so that, eventually, supply will approach demand. However, there can only be one 'top-ranked' site. Tactics to influence unpaid listings and prices for paid listings are sure to escalate, but it is not clear that this competition creates much utility.").

⁷ Frank Pasquale, *Internet Nondiscrimination Principles: Commercial Ethics for Carriers and Search Engines*, 2008 U. CHI. LEGAL F. (forthcoming Oct. 2008) (arguing that search engines' advocacy for transparency and accountability for carriers—via principles such as net neutrality—suggests guidelines for the regulation of search engines themselves).

⁸ Jon Kleinberg & Steve Lawrence, *The Structure of the Web*, 294 SCIENCE 1849 (2001), available at <http://www.sciencemag.org/cgi/reprint/294/5548/1849.pdf> ("New or niche sites with few links to them may have difficulty competing with highly prominent sites for attention. By favoring more highly linked sites, search tools may increase this effect."); see also Abbe Mowshowitz & Akira Kawaguchi, *Measuring search engine bias*, 41 INFO. PROCESSING & MGMT., 1193 (2005).

software, the algorithm that generates Google's search results is a zealously guarded trade secret.

Despite the risks of gaming, there is a strong social interest in transparency and accountability here. Suspicion about FICO scores has led some states to prohibit their use in some contexts, and Finland has prevented employers from using Google results (*inter alia*) in evaluating potential applicants. Such legislation stems from a well-justified suspicion of unaccountable data sources. Many webmasters live in fear of the "Google Death Penalty"—relegation to the bottom of results for a "gray" search engine optimization tactic. The thin and ever-shifting line between "black hat" and "white hat" search engine optimization raises serious questions about arbitrariness. More ominously, search engines can openly profit from opacity here. If there is no clear route to the top of "organic results" for a given term, the only way to assure one's association with it is to buy "paid results" from search engines' themselves. Just as search engines worry that cable and telecommunications carriers may deliberately impair quality of service in order to force application providers to pay for a "fast lane," content providers may legitimately worry that dominant search engines "churn" organic results in order to make paid ads the only guaranteed method of reaching customers.

There is a growing awareness, in a variety of contexts, of the troubling aspects of a "black box society" in which private firms are empowered to lock away information even in the face of strong public interest in disclosure. Consider, for instance, the current turmoil in financial markets resulting from the opacity of collateralized debt obligations and other complex financial instruments.⁹ In a 2003 case, Google used the same law that shields credit rating agencies from liability in order to avoid accountability for a disputed ranking.¹⁰ In many cases, it is essential that *someone* has the power to "look under the hood" and verify the fairness and reliability of business practices. Search engines insist on some degree of transparency in network operators' traffic management practices. There are many reasons for them to commit to limited forms of transparency as well.

⁹ See, e.g. Stephen Mihm, *The Black Box Economy*, BOSTON GLOBE, Jan. 27, 2008, available at http://www.boston.com/bostonglobe/ideas/articles/2008/01/27/the_black_box_economy/ ("[W]hen the mortgage crisis broke last summer, it opened a window on something else: The existence of a huge wilderness of investments in the financial sector that are nearly impossible to track or measure, and which operate out of the view of both investors and regulators. . . . [A] staggeringly complex financial instrument that most Americans had never heard of, and which many financial writers still don't fully understand, became in a matter of months the most important influence on home values in America.").

¹⁰ Dahlia Lithwick, *Google-opoly: The Game Only Google Can Play*, SLATE, Jan. 29, 2003, available at <http://www.slate.com/id/2077875/> ("Google argues that the First Amendment protects its right to assemble rankings as 'evaluative opinion' and that the dissemination of that opinion cannot be tortious. [It cites as precedent a case] involving a school district's suit against a bond rating agency. The school district's claim was thrown out, and Google argues that its own rankings of Web pages are no different than a credit agency's judgment about bond ratings."). See also Frank Pasquale, *From First Amendment Absolutism to Financial Meltdown?*, at http://www.concurringopinions.com/archives/2007/08/from_first_amen.html ("We might want to suspect any institution that matches "black box" input and unaccountable output. In other words, raters may well plead that whatever goes on inside their shops cannot be transparent because scrutiny would lead to disclosure of their trade secrets. But if their First Amendment immunities grow more absolute, they could become entirely unaccountable for their outputs.").

Market Discipline Alone Will Not Solve these Problems

Defenders of a laissez-faire approach argue that legal intervention is unnecessary because market discipline already keeps search engine abuse in check and does so much more effectively than would any regulatory regime. If a search engine tries to manipulate its results in ways that are prejudicial to or unacceptable to users, the argument goes, users will simply migrate to a competing search engine. Fearful of losing users and market-share to competitors, search engines would avoid abusing their power. Thus, in the late 1990s and early 2000s, competitors overtook search engines like Overture that systematically prioritized paid listings.

While competition occurred in the past, the current search engine market has features that make robust and dynamic competition unlikely. It is unclear whether search engines fall under the strict definition of a natural monopoly, but they exhibit very similar characteristics. Search engines have very high fixed costs and a relatively low marginal cost. This, in turn, results in substantial economies of scale, creating a market with a declining average cost per unit and high barriers to entry. To understand this structure of the search engine market, consider the following:

1) *The Search Engine Algorithm.* The heart of a search engine and the key to its success is its search algorithm. Effective algorithms are protected by a veil of secrecy and by various intellectual property rights. As a result, new entrants cannot easily appropriate existing algorithms. Moreover, many algorithms are trade secrets. Unlike patents, which the patent holder must disclose and which eventually expire, these trade secrets *may never enter the public domain*. Search algorithms may be analogous to the high-cost infrastructure required for entry into the utility or railroad markets.

2) *Network Effects in Improving Search Responsiveness.* The more searches an engine gets, the better able it is to sharpen and perfect its algorithm. The result is that each additional user decreases the cost of a better quality service for all subsequent users. Thus, incumbents with large numbers of users enjoy substantial advantages over smaller entrants.

3) *Licensing Costs.* A key to competition in the search market is having a comprehensive database of searchable materials. The ability to obtain exclusive legal rights over searchable materials, however, may substantially increase the cost of obtaining and displaying this data and the metadata needed to organize it. Exclusion rights entail licensing (or legal advice) fees, which in the aggregate may raise fixed cost substantially. Google's notable fight to obtain favorable fair use treatment for an index of books, for example, obscures its licensing deals with some content providers. To what extent exclusion power through licensing is the industry norm is the subject of a host of legal battles taking place on various fronts. If such licenses become the industry practice, only the wealthiest players will be able to afford to develop a comprehensive database of searchable material.

4) *Consumer Habit*. Many searchers are accustomed to using a certain number of providers, use them relatively habitually, and are reluctant to switch, despite the existence of alternatives. Exactly how high are search engine switching costs is an empirical question that has not been satisfactorily answered to date. To switch a substantial number of users, a new entrant has to supply a product of significantly better quality, again, steeply raising fixed cost. Another factor that may raise switching costs is the trend toward personalized search, which effectively “trains” a service to tailor its results to match the patterns of a user. Just as users “invest” in learning how to use Microsoft Word or Excel, and are reluctant to switch to a new program, they “invest” in training personalized search engines how to find the materials most suited to their interests. The correlation between the quality of search and the length of use in personalized search is likely to further lock users in with an existing provider.

The net results of these structural features of the general purpose search market are substantial advantages for large incumbents and very high barriers to entry. These results suggest that the market’s current composition—one dominant firm and a handful of smaller players—is likely to persist.

The assumption of users’ responsiveness leading to optimal disciplining of search engines is equally problematic. Due to several characteristics of the search market, users’ response is not likely to be highly attuned to search engines’ behavior. Moreover, it is unclear why users’ preferences, even if they were free from market failures, should be the ultimate measure for evaluating and responding to many of the normative concerns described above.

One major impediment to users’ responsiveness is a systematic information gap. If a user looks for a particular business and no relevant result appears or if a search engine completely corrupts its results by paid listings, users are likely to switch to a competitor. But it is difficult to see how consumers can check less drastic manipulations of results. Search tends to be a “credence good,” whose value a consumer will have difficulty evaluating even after consuming it. Often the user will have no idea that results are manipulated in a particular way. Even if we assume that a search engine abides by the FTC’s guidance letter, and always strictly separates “editorial content” and paid listings, subtler forms of manipulation could slip into the ranking algorithm. In many, if not most cases, consumers lack both the incentive and the even the ability to detect such manipulation or determine its reasons. Given the lack of transparency of the search algorithms, search consumers simply cannot reverse engineer the hundreds of factors that go into a ranking, and they have little incentive to compare dozens of search results to assess the relative efficacy of different search engines.

For example, imagine that after the Google-YouTube merger, Google assigns a higher “authoritativeness” rating to all YouTube videos than those on any competitor sites (such as MySpace, Vheo, Bolt, and Grouper). Such an assignment might be an entirely “objective” decision; if Google itself happens to have the highest PageRanking, it may accurately assign that rank to its new subsidiary. But consumers unaware of the deal may simply believe that the YouTube videos served at the top of the rankings pile are there merely because of “disinterested” ranking algorithms, and not understand the possibility that some proprietary interest of Google (in advancing its new subsidiary’s visibility) is driving the ranking. Admittedly, an entirely objective ranking mechanism may produce this result. The problem is that, given the emphasis on secrecy in the search engine business model, no one can verify that such rankings have not been manipulated or that subtler biases in favor of search engines’ partners are not being worked into the

search algorithm.

Often search dynamics do not follow the classic economic model under which consumers with predetermined preferences evaluate the extent to which competing goods satisfy these preferences and behave accordingly. The paradigmatic case following this pattern would involve a “navigational” search where a user is searching for a particular known website, or a narrow “informational” search where a user looks for specific and well-defined information. Yet many searches follow a very different pattern. Users conduct searches with varying degrees of prior expectations, and the sought-after information is defined with differing levels of specificity.

Consider a search for the term “net neutrality.” There are some results that would clearly poorly satisfy the preexisting expectations of most searchers for this term. But there are also a large variety of significantly different alternative results that are not irrelevant. Note that in such cases the issue is not just the difficulty of the search engine in “mind reading” the user’s exact wishes. Initially, the user’s preferences are incomplete and not clearly defined, even from the point of view of the user herself.

The implication of such open-ended searches is twofold. First, initial preferences form only a partial yardstick by which a user can evaluate search results and only a weak constraint on search engine’s behavior. Second, in such situations the particular results presented to the user are likely to affect and shape her future views and interests. Search engines, in other words, often function not as mere satisfiers of predetermined preferences, but as shapers of preferences.¹¹ When one types “net neutrality” into a Google search query screen, the vast majority of “organic” links are connected to pro-net-neutrality organizations.¹² There could be many reasons for this state of affairs. One might think that this is a sign that the vast majority of Internet users favor net neutrality and only a handful of companies oppose it. A more skeptical observer might find her suspicions raised by Google’s own strong support for net neutrality. There could be other explanations, such as the fact that sites whose Top Level Domain Name (TLD) ends in “.edu” are often prioritized above sites with “.com” or “.org” TLDs. How is a searcher likely to assess these results in view of his preferences when he searched for an open-ended term such as “net-neutrality?” For many users it is hard to imagine in such a case a clear process of judgment in view of preexisting preferences.

Even users who engage in relatively open-ended searches without concrete preexisting preferences may have preferences about their preferences or about the procedure in which their preferences are being shaped. Yet evaluating the performance of a search engine on the basis of such second-order preferences is likely to prove difficult. In most cases it would require access to information that is not readily available on the surface of the search results. Such information about the way the search results were shaped would rather be buried in the black box of the search algorithm and kept away from public view.

Another reason that makes market forces an unreliable means for disciplining search engines is the incomplete overlap between users’ preferences and the social values underlying the concerns about search engine manipulation. This claim can be cast in the economic language of externalities. Certain manipulations of results may have little effect on users or even leave users completely indifferent, yet impose substantial cost on

¹¹ C. E. Baker made a similar point about traditional media. *See* C. EDWIN BAKER, MEDIA, MARKETS, AND DEMOCRACY 12–13, 87–95 (2002).

¹² Screenshot of “Net Neutrality” Search (Oct. 23, 2006); *see also* screenshot from Apr. 15, 2008.

others. C. E. Baker's famous "catalog" of externalities demonstrates the various ways in which this dynamics plays out in the context of traditional media.¹³ At least some of those typical media externalities seem likely to occur in the different context of search engines.

The externalities formulation, however, fails to capture the full extent of the misfit between some of the normative concerns described above and an exclusive reliance on consumer preferences for disciplining search engines. Whether or not one can point at a substantial cost not internalized by users, a lack of significant response by users is not necessarily sufficient to allay concerns about fairness and democratic discourse. Think, for example, about an exclusion of a commercial website that enjoys only limited popularity and is easily replaceable from the point of view of most users. The fact that users will be relatively indifferent to such exclusion, simply does not answer the concerns about fairness and the arbitrary exercise of (private) power. Similarly, even if it turns out that users' behavior demonstrates no concern about possible biases in favor of content supplied by the search engine allies, this does not necessarily dispel the concerns about a degrading effect that such behavior may have on the public sphere or public discourse. Satisfying users' preference is an important interest that search engines should be able to pursue, but these preferences can not always be counted on to guarantee other social values.

In sum, market discipline imposed by users is certainly not irrelevant. It is likely to have some effect in curbing the more blatant and radical forms of search engine manipulation. Given the combination of a centralized market structure and the severe limitations on users' responsiveness to manipulation, however, it is bound to be an insufficient constraint.

Toward Qualified Transparency

In *Copyright in an Era of Information Overload*, I presented Google as a company that could break the dominance of concentrated cultural industries on distribution networks and reviewing capabilities. However, as Google becomes more of an online conglomerate,¹⁴ it may create problems in new areas similar to the ones it is

¹³ C. Edwin Baker, *Giving The Audience What It Wants*, 58 OHIO ST. L.J. 311, 350–66 (1997).

¹⁴ Google, Inc. now offers the following services (and records the following data from each):

- a. Google search: any search term a user enters into Google;
- b. Google Desktop: an index of the user's computer files, e-mails, music, photos, and chat and web browser history;
- c. Google Talk: instant-message chats between users;
- d. Google Maps: address information requested, often including the user's home address for use in obtaining directions;
- e. Google Mail (Gmail): a user's e-mail history, with default settings set to retain emails "forever";
- f. Google Calendar: a user's schedule as inputted by the user;
- g. Google Orkut: social networking tool storing personal information such as name, location, relationship status, etc.;
- h. Google Reader: which ATOM/RSS feeds a user reads;
- i. Google Video/YouTube: videos watched by user;
- j. Google Checkout: credit card/payment information for use on other sites.

helping to solve elsewhere. Consider the complexities caused by Google's purchase of YouTube. Does the fact that a company does business with Google lead Google to make it more salient in search results than a company that (*ceteris paribus*) does not? How well are YouTube's rivals doing in searches on Google for videos? Will Google compensate participants in its Android open handset alliance with more salience in search results? Just as Google wants carriers to be open about how they manage traffic, it should be transparent about exactly how its commercial relationships affect the ranking of its business partners and customers. Without such transparency, regulators will not be able to assess whether the company is engaged in stealth marketing, a deceptive trade practice.¹⁵

As Ellen Goodman has observed, “American mass media law has long been hostile to stealth marketing. It is illegal . . . for a record company to make secret payments to radio stations to play music . . . or for an advertiser or organization to pay broadcasters to feature products . . . without identifying the sponsor.”¹⁶ The Federal Trade Commission has made some tentative steps toward recognizing the potential for consumer deception here. In 2002, it sent a letter to various search engine firms recommending that they clearly and conspicuously distinguish paid placements from other results.¹⁷ The letter was sent in response to a complaint by the organization Commercial Alert¹⁸ that requested FTC investigation of whether paid placements practices of several search engines constituted unlawful deceptive advertising.¹⁹ The deception argument as applied to search engines is a variant of the more general criticism

EPIC Complaint and Request for Injunction, Request for Investigation and other Relief, *In the Matter of Google, Inc and DoubleClick, Inc*, before the Federal Trade Commission (Feb 10, 2000), available at <http://www.epic.org/privacy/ftc/DCLK_complaint.pdf> (last visited Mar 27, 2008) (urging the FTC to address the increasing collection of personal data by internet advertisers).

¹⁵ Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEXAS L REV at 89, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=896239 (“Stealth marketing [can take the form of] conventional payola, where the sponsor promotes a media experience, such as a musical work, by purchasing audience exposure to the experience as a form of advertisement. Pay-for-play in broadcasting is similar to the use of slotting fees in the retail industries to obtain preferential shelf space in supermarkets and book stores. Online retail outlets also use slotting fees of a sort when portals like Amazon and Google accept payments for exposure of a particular product or service.”).

¹⁶ *Id.* at 84. See the Federal Communications Act of 1934, 47 USC § 317(a)(1) (2000) (requiring broadcast stations to disclose the identity of sponsors when “any type of valuable consideration is directly or indirectly paid or promised, charged or accepted.”).

¹⁷ Letter from Heather Hipsley, Acting Associate Director of the Division of Advertising Practices, *Re Commercial Alert Complaint Requesting Investigation of Various Internet Search Engine Companies for Paid Placement and Paid Inclusion Programs* (June 27, 2002), available at <<http://www.ftc.gov/os/closings/staff/commercialalertattach.shtm>> (last visited Mar 27, 2008) (urging search engines to clearly delineate paid ranking results).

¹⁸ Letter from Gary Ruskin, Executive Director of Commercial Alert, *Re Deceptive Advertising Complaint Against AltaVista Co, AOL-Time Warner Inc, Direct Hit Technologies, iWon Inc, LookSmart Ltd, Microsoft Corp and Terra Lycos SA* (July 16, 2001), available at <<http://www.commercialalert.org/PDFs/SearchEngines.pdf>> (last visited Mar 27, 2008).

¹⁹ Federal Trade Commission Act, 15 USC § 45(a)(1) (2008).

of stealth marketing in the media. Users, the argument goes, are misled to believe that “search results are based on relevancy alone,” when in fact they are based on other grounds.²⁰

Of course, those aware of the YouTube merger may assume that Google is going to elevate results from its subsidiary, and may diversify their search custom accordingly. They can use other search engines, or consult the second or third search pages for the results they seek. However, given searchers’ documented inertia and unsophisticated understandings of extant search results, it is unlikely that these “self-help” measures will do much to level the playing field.²¹ Though consumer education may be helpful here, given search’s status as a credence service, it cannot entirely supplant regulation.²²

Admittedly, for Google to demonstrate that it did not unfairly privilege subsidiaries or business partners, it may seem to need to give away trade secrets about the way its rankings work. For example, a rival video search site might challenge the fact that YouTube’s results always appear as the first thirty results in response to certain video queries for which it has demonstrably more relevant content. Google might respond with the following data:

1. The content on YouTube has more comments and therefore is weighted higher in search results.
2. The content on YouTube is clicked on more by searchers.
3. The content on YouTube has been through a copyright filter and therefore is less likely to infringe copyrights owned by large media conglomerates that partner with Google.
4. The opposite of 3: slowing down or de-prioritizing the content of companies like Viacom that sue the search engine for copyright infringement.

Responses (1) and (2) may both provoke gaming of Google’s system. Once rival video sites know that comments or clicks directly increase PageRank and salience, they can try to artificially inflate those numbers. The fourth option could make the assertion of copyrights an inevitably Pyrrhic enterprise, as judicial victories might appear trivial compared to the prospect of losing a vital distribution channel. In either case (3) or (4), private lawmaking by search engines and copyright holders may supplant statutory duties in counterproductive ways.

Note that a public avowal of (3) may lose Google customers who flee to less restrictive sites (just as Napster lost many users to upstart P2P sites when it started installing filters for copyrighted content). The more responses Google has to make public, the more plausibly it may claim that the trade secrets embodied in its ranking algorithm are being eroded. Nevertheless, as Oren Bracha and I have argued in *Federal*

²⁰ Letter from Gary Ruskin at 1 (cited in note 18).

²⁴ Andrew Sinclair, Note, *Regulation of Paid Listings in Internet Search Engines: A Proposal for FTC Action*, available at <http://www.bu.edu/law/central/jd/organizations/journals/scitech/volume102/sinclair.pdf>, 10 BU J Sci & Tech L 353, 357–364 (2004) (discussing which regulatory body is best suited to regulate search engines, arguing that the FTC is the appropriate arm of government, and concluding that “Consumers . . . are unaware that they are not getting the most relevant search results”).

²⁵ Alejandro M. Diaz, *Through the Google Goggles: Sociopolitical Bias in Search Engine Design* 147 (Stanford Honors Thesis 2005) (“The complexity and opacity of search technology makes it almost impossible for users to notice what is ‘missing’ from their search results.”).

Search Commission: Fairness, Access, and Accountability in the Law of Search, there are methods of litigating such cases without exposing trade secrets.

Stalwarts of deregulation may well complain that such procedures would still risk compromising the secrecy essential for search engines' operation and put an undue burden on their legal departments. However, Google has already complied with a government request for information about its search process and a judge has ruled that a protective order in that dispute adequately protected its trade secrecy interests. Such limitations on secrecy are in order. If search engines are to be accountable at all, if their interest is to be balanced against those of the various other claimants involved in search-related disputes, and if social values are to be given any weight, some governmental agent should be able to peer into the black box of search and determine whether or not illegitimate manipulation has occurred.

Beyond Consumer Preferences

Another key question raised by the proposed deal is whether privacy concerns²³ can be folded into traditional antitrust analysis. Peter Swire convincingly argued that they can and should;²⁴ he believes that "privacy harms reduce consumer welfare [and] lead to a reduction in the quality of a good or service." I am broadly sympathetic with Swire's aims, but I worry that contemporary antitrust doctrine is too etiolated to encompass his concerns.

First, here is Swire's perspective on how things may change for the worse for consumers after the Google/DoubleClick merger:

Google often has "deep" information about an individual's actions, such as detailed information about search terms. Currently, DoubleClick sets one or more cookies on an individual's computers, and receives detailed information about which sites the person visits while surfing. DoubleClick has "broad" information about an individual's actions, with its leading ability to pinpoint where a person surfs.

If the merger is approved, then individuals using the market leader in search may face a search product that has both "deep" and "broad" collection of information. For the many millions of individuals with high privacy preferences, this may be a significant reduction in the quality of the search product—search previously was conducted without the combined deep and broad tracking, and now the combination will exist.

²³ See Siva Vaidhyanathan, *Google and DoubleClick: A Bigger Anti-Trust Problem Than I Had Imagined*, THE GOOGLIZATION OF EVERYTHING, http://www.googlizationofeverything.com/2007/10/google_and_doubleclick_a_bigge.php (Oct. 21, 2007 16:05 EST)

²⁴ See Peter Swire, *Protecting Consumers: Privacy Matters In Antitrust Analysis*, CENTER FOR AMERICAN PROGRESS, Oct. 19, 2007, <http://www.americanprogress.org/issues/2007/10/privacy.html>.

Initial points of contention here include a) the definition of the products at issue and b) how to weigh the costs and benefits of a merger. The combined company would have different segments of "customers" in a multi-sided market:

- 1) searchers trying to find sites
- 2) ad-buyers trying to reach searchers

Swire argues that many people care about privacy, and "[i]t would be illogical to count the harms to consumers from higher prices while excluding the harms from privacy invasions—both sorts of harms reduce consumer surplus and consumer welfare in the relevant market." But the web searcher category not only includes people who care about privacy, but also includes many people who don't care. According to Eric Goldman's work on personalized search, some may even consider the gathering of data about them to be a service²⁵. The more information is gathered about them, the more targeted ads to them may become. If you're going to "pay" for a service by viewing ads, you may well be paying less if the ads bear some relation to things you might buy.

So while Swire models advertising and data collection as a cost to be endured, Google is likely to reply that "deep and broad tracking" (and the resulting ads) are a service to customers. Swire might respond that individuals hyperbolically discount future privacy protection for small monetary gains in the present, and that public policy should prevent that²⁶. But in my view, privacy might better be considered an "irreducibly social good"²⁷ than some quantum of enjoyment individuals trade off for money. As Cass Sunstein and Robert H. Frank suggested in their work on cost-benefit analysis and relative position,²⁸ given the importance of positional goods in today's society, people who trade off safety or privacy or other intangibles will likely "outcompete" peers who refuse to do so (and therefore have less money). Though this observation was inspired by health and safety regulations, its upshot applies equally well to privacy:

When a regulation requires all [individuals to purchase] additional [privacy], each . . . gives up the same amount of other goods, so no [one] experiences a decline in relative living standards. The upshot is that an individual will value an across-the-board increase in [privacy] much more highly than an increase in safety that he alone purchases.

²⁵ Frank Pasquale on Eric Goldman's A Coasean Analysis of Marketing, THE CONGLOMERATE, http://www.theconglomerate.org/2006/07/frank_pasquale_.html (July 5, 2006).

²⁶ See Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not An Oxymoron*, U. CHI. L. REV. (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=405940.

²⁷ See Charles Taylor, *Philosophical Arguments (1995) Questions & Answers #7: "Irreducibly Social Goods"*, University Research Alliance, available at <http://www.uraweb.org/writing/Tay7.html>.

²⁸ See Cass R. Sunstein & Robert H. Frank, *Cost-Benefit Analysis And Relative Position*, AEI-Brookings Joint Center Working Paper No. 00-05; U. CHI. L. & ECON., Olin Working Paper No. 102 (July 2000), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=237665.

A collective commitment to privacy may be far more valuable than a private, transactional approach that all but guarantees a "race to the bottom."

Can contemporary antitrust accommodate such concerns? Many now believe that consumer welfare only takes into account allocative efficiency. For example, the DOJ was hard-pressed to adequately factor in a basic democratic commitment to diverse communicative channels during many media mergers.²⁹ The FTC might find it equally difficult to address the political and cultural implications of search engines now.

But what if we shift from thinking of loss of privacy as a "cost" of web searching, to considering it as a reduction in the quality of the product of web searching? Swire quotes *National Society of Professional Engineers v. U.S.*, to validate this consideration:

"The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain: quality, service, safety, and durability - and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers" (435 U.S. 679, 695 (1978)). The Merger Guidelines, § 4, specifically mention "improved quality" among the possible effects of efficient market behavior, along with lower prices and new products

Douglas Kysar's work on the product/process distinction supports Swire's case.³⁰ Kysar has claimed that consumers should have a right to make choices of products based on how the products are made, not just how well they work. Kysar argues "in favor of acknowledging and accommodating consumer process preferences within theoretical frameworks for policy analysis, given the potential significance that such preferences may serve in the future as outlets for public-regarding behavior."

Admittedly, the valuation problems here might be difficult; how exactly are we to determine how much consumers are willing to pay to avoid privacy-eroding companies? But on the other hand, consider the array of incommensurables already entering into the decisionmaking process: the different markets for Google's products, the weighing of the value of potential new services against the potential diminution in quality of old ones, etc. Perhaps, as Heinzerling and Ackerman suggest in their book *Priceless*, we should stop even trying to pretend that these decisions can be made on anything approaching a quantitative basis. Or at least acknowledge that the numbers can be cooked in many different ways to produce a desired end result.

Perhaps consumer concerns like the ones Kysar raises can't fit easily into contemporary antitrust analysis. But that might be one reason to establish a regulatory body that could take a more holistic view of the role of search in the contemporary economy--and to suspect any proposals to move to antitrust as the sole constraint on business conduct in certain fields.

²⁹ See C. Edwin Baker, *Media Concentration: Giving Up on Democracy*, 54 FLA. L. REV. 843 (Dec. 2002), available at <http://www.flr.law.ufl.edu/pdf/jan03/baker.pdf>.

³⁰ See Douglas Kysar, *Preferences for Processes: the Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARVARD L. REV. (2005), available at <http://lsr.nellco.org/cgi/viewcontent.cgi?article=1007&context=cornell/lrsp>.

Conclusion

Unaccountable power at any “layer” of online life can stifle innovation elsewhere. Microsoft’s antitrust woes arose in part because it tried to manipulate complementary products to maintain its dominance in the operating system market. Now dominant search engines rightly worry that carriers will use their own power at the physical layer of Internet infrastructure to “pick winners” among content and application providers. Search engines have been much less quick to recognize the threat to openness and fair play their own practices may pose.

There are many parallels between dominant search engines and dominant carriers: at each layer intermediaries accumulate great power over the structure of online life. Just as search engines fear an unfairly tiered online world, they should be required to provide access to their archives and indices in a nondiscriminatory manner. If search engines want carriers to disclose their traffic management tactics, they should submit to regulation that bans stealth marketing and reliably verifies the absence of the practice. Finally, search engines’ concern about the applications and content disadvantaged by carrier fast-tracking should lead them to provide annotation remedies to indexed sites whose marks have been unfairly occluded by the search process. Fair competition on the internet demands common commercial ethics for the dominant players at all layers of online life.³¹

³¹ For a very thoughtful look at the ambiguities of the meaning of “competition,” see Maurice Stucke, *Better Competition Advocacy*, 82 ST. JOHN’S L. REV. (2008) (evaluating conventional wisdom underlying competition agencies’ advocacy efforts). Stucke’s insights struck me as particularly relevant to the deals the Committee is considering, since joint ventures might simultaneously reduce barriers to entry and increase opportunities for collusion.