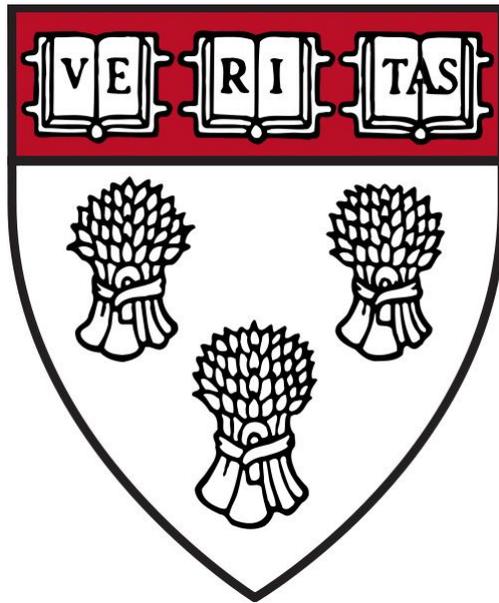


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GOOGLE AND ANTITRUST: FIVE APPROACHES TO AN EVOLVING ISSUE

By Michael A. Carrier



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I. INTRODUCTION

Each generation, a new-economy case comes along that tests anti-trust law. It features a new technology that threatens monopoly power and harm to rivals or competition. And it prompts the question of whether antitrust is up to the task. In the 1970s, it was IBM. In the 1990s, it was Microsoft. In 2013, it is Google.

This symposium offers five distinct approaches to Google’s relationship to antitrust. Pamela Samuelson discusses pricing and entry-barrier antitrust concerns presented by the Google Book Search settlement. Mark Patterson focuses on Google’s market power, emphasizing users’ inability to evaluate search results. Frank Pasquale laments the FTC’s inaction on the case related to search and calls for access to Google’s algorithms. In contrast, Marina Lao highlights the subjectiveness of “search neutrality” and explains why it should not form the basis for antitrust liability. And Geoff Manne and William Rinehart criticize antitrust condemnation of Google that is based on expansive notions of foreclosure, narrowly construed markets, and insufficient appreciation of innovative product design.

* Professor of Law, Rutgers School of Law-Camden. Copyright © 2013 Michael A. Carrier.

II. ANTITRUST CONCERNS WITH GOOGLE BOOK SEARCH

The Google Book Search project allowed Google to “scan[] millions of in-copyright books from the collections of major research libraries” to index the contents and provide snippets responding to search queries.¹ Authors and publishers filed a class action challenging the scanning, and the parties reached a settlement that would have allowed Google to commercialize entire copyrighted books.²

Pamela Samuelson begins with Judge Denny Chin’s rejection of the Amended Settlement Agreement (ASA) in the *Authors Guild v. Google* class-action lawsuit.³ A central reason was “the attempt to use the class action mechanism to implement forward-looking business arrangements that [went] far beyond the dispute” in the litigation.⁴ Samuelson explains that Judge Chin took more than a year to consider the objections to the ASA because he considered whether “a revised settlement might be approvable,” which resulted in an opinion that could be read “as a set of suggestions about what he hoped the parties would address in future settlement negotiations.”⁵

Samuelson recounts that an important development before the fairness hearing was the opening of an investigation by the Department of Justice’s Antitrust Division.⁶ In its Statement of Interest to Judge Chin, the Division highlighted concerns from pricing restrictions that (1) created a revenue-sharing formula at the wholesale level, (2) set default prices and prohibited discounting at the retail level, and (3) controlled prices for orphan books. The Division also demonstrated concern with “competing authors and publishers grant[ing] Google de facto exclusive rights for the digital distribution of orphan works.”⁷ Even after the settlement was amended, the Division lamented its reach “far beyond the dispute before the Court” and (as Samuelson put it) its “de facto exclusivity” and “troubling constraints on price-discounts and . . . negotiation of non-price terms.”⁸

After Judge Chin rejected the ASA, the publishers (but not authors) settled with Google. Samuelson contends that two aspects of the settlement raised “serious antitrust concerns.”⁹ The first involved

1. Pamela Samuelson, *Legislative Alternatives to the Google Book Settlement*, 34 COLUM. J. L. & ARTS 697, 697 (2011).

2. *Id.*

3. Pamela Samuelson, *A Perspective on the Merits of the Antitrust Objections to the Failed Google Books Settlement*, HARV. J.L. & TECH., July 19, 2013, <http://jolt.law.harvard.edu/antitrust/articles/Samuelson.pdf>.

4. 770 F. Supp. 2d 666, 676-77 (S.D.N.Y. 2011).

5. Samuelson, *supra* note 3, at 5.

6. *Id.* at 9.

7. *Id.* at 10-11.

8. *Id.* at 13.

9. *Id.* at 15.

the ASA's authorization of a pricing algorithm by which Google could have "set an optimal price" for each book.¹⁰ There would have been twelve price bins, ranging from \$1.99 to \$29.99, with fixed percentages of books in each bin.¹¹ The average price of the settlement books was \$8.74, which Samuelson found concerning given that Amazon sold "recently-published commercially available e-books at \$9.99" and that the settlement books would have been out-of-print and available only "in the cloud."¹² Samuelson also explains that the pricing might not have been purely unilateral activity, as "publisher and author groups" negotiating the ASA "may have been intent on seeing to it that algorithmically priced books would not undercut the prices for books that they intended to set individually."¹³

Relatedly, Samuelson mentions the "curious limitations" on the fiduciary delegated power to "represent the interests of unclaimed work rights holders" such as the inability "to make unclaimed books available on an open access basis or to set the price to \$0, even if he/she was convinced the books were true orphans or their academic authors would have preferred them to be available on an open access basis."¹⁴

The second antitrust concern was the erection of "insurmountable entry barriers" to the development of a comprehensive digital books database.¹⁵ If approved, the ASA "would have granted to Google on behalf of the fictional class of author/publisher-owners of book copyrights a set of licenses and other privileges that were truly breathtaking in their scope."¹⁶ These "licenses and privileges" would have "created impossibly high barriers to entry for any firm wanting to compete with Google in these areas."¹⁷

One barrier was the license Google would have received to "commercialize out-of-commerce works that remained unclaimed by their rights holders."¹⁸ Samuelson explains that "[m]any (and perhaps most) of those unclaimed works" were expected to be "orphan works" whose rights holders were unknown or "unlocatable after a reasonably diligent search."¹⁹ The barrier would arise because "competitors could not get a license to an estimated 2+ million orphan books because the

10. *Id.* at 16.

11. *Id.*

12. *Id.* at 17.

13. *Id.* at 18.

14. *Id.*

15. *Id.* at 19.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

class that granted this license would have ceased to exist upon approval of the settlement.”²⁰

In addition, the product that Google could have monetized from the settlement — a “comprehensive database of scholarly books from major research library collections” — would have been “impossible for anyone but Google to build and license to universities and other institutions.”²¹ Samuelson points to licenses and privileges that Google would have received from the ASA that included scanning digital copies of books, making non-display uses, running advertisements, negotiating new business models, granting sublicenses to partner libraries, and obtaining a release from infringement, immunity from certain remedies, and other limitations of liability.²²

In short, Samuelson highlights antitrust concerns with the Google Book Search settlement and points to “its abuse of the class action settlement process by trying to establish a forward-looking business arrangement that abridged the rights of class members.”²³

III. NUANCED MARKET POWER

The next four contributions focus on the issue of Google search. Mark R. Patterson analyzes market power in *Google and Search-Engine Market Power*.²⁴ He states that the issue is “more complicated and interesting” than either of the two polar approaches that have been advanced — that Google has a large market share, and that “competition is only a click away.”²⁵ Patterson emphasizes information costs, noting that “clicking away” is not likely to constrain Google if users cannot determine “just when it is advantageous” to do so.²⁶

Patterson most directly highlights the characteristics of search that make it a “credence good.”²⁷ He outlines three types of goods according to consumers’ ability to evaluate quality. “Search goods” can “be evaluated before the good is purchased.”²⁸ “Experience goods” are “difficult to evaluate before purchase” but can be “evaluated as they are used.”²⁹ And “credence goods” are “difficult for consumers to evaluate even after they are used.”³⁰

20. *Id.*

21. *Id.* at 19-20.

22. *Id.* at 20-21.

23. *Id.* at 23.

24. Mark R. Patterson, *Google and Search-Engine Market Power*, HARV. J.L. & TECH., July 19, 2013, <http://jolt.law.harvard.edu/antitrust/articles/Patterson.pdf>.

25. *Id.* at 4.

26. *Id.*

27. For Patterson’s discussion of other considerations relevant to determining market power, see *id.* at 6 (expansion of output), 14-15 (search engine optimization).

28. *Id.* at 11.

29. *Id.*

30. *Id.*

Patterson explains that search results can sometimes be a search good (in finding a recent sports score) or an experience good (in locating a long-lost friend), but will often be a credence good.³¹ For example, users will not be able to evaluate the results from searches for “best price iPhone 5” (are better prices available?) or “nice inexpensive New York hotels” (are they nice? inexpensive?).³²

As a result of search often being a credence good, it is “less likely that Google, or any other search engine, will be constrained by competition.”³³ Google thus has “some freedom to provide less-than-optimal results, particularly if it does so only in certain areas and not routinely.”³⁴ Patterson analogizes the setting to Wikipedia, which is a “commonly used information source” even though “it is known to contain inaccuracies.”³⁵

Also relevant to the market power determination is the presence of a “two-sided market” made up of “two different customer groups that provide each other with network benefits.”³⁶ Google has separate interactions with searchers and advertisers, with “price, quality, and output relationships” that “are interrelated.”³⁷ Patterson seeks to “use the advertiser side of the two-sided market to infer power on the searcher side.”³⁸ He introduces a model to do this by “us[ing] the prices paid for placement in Google’s AdWords results.”³⁹ The AdWords results can be used “as a proxy for the organic results” since “consumers value more highly the unpaid-for organic results than they do the paid-for AdWords results.”⁴⁰

In particular, “[a]lthough actual prices for AdWords are not easy to obtain, one can use Google’s own ‘Traffic Estimator’ to estimate some figures.”⁴¹ Patterson compares the “costs per click” for various advertising positions to conclude that moving “from position 1 to position 2” or “from position 2 to position 3” would “decreas[e] the value of its placement by approximately 25%.”⁴² This price differential could be relevant in assessing Google’s level of market power.

In short, Patterson raises issues related to market power that highlight unique aspects of information that could increase market power, as well as two-sided markets.

31. *Id.* at 11-12.

32. *Id.*

33. *Id.* at 12.

34. *Id.* at 12-13.

35. *Id.* at 13.

36. *Id.* at 16.

37. *Id.*

38. *Id.* at 17.

39. *Id.* at 18.

40. *Id.*

41. *Id.* at 20.

42. *Id.* at 20-22.

IV. REVIEWING THE ALGORITHM

Despite claims that Google had market power (and engaged in anticompetitive conduct), the FTC decided in January 2013 not to challenge its behavior related to search.⁴³ In *Paradoxes of Digital Antitrust: Why the FTC Failed to Explain Its Inaction on Search Bias*, Frank Pasquale laments the FTC's termination of its 19-month investigation into Google's search practices based on "little more than a page of assurances that FTC interviews and economic analyses had found little to no problematic behavior."⁴⁴ He nonetheless holds out hope that the enforcement decisions of "competition authorities beyond the FTC" will "shape the future of the digital marketplace."⁴⁵ In contrast, if antitrust law "continues to decline in power and scope, we should expect a digital replay of the domination of monopolistic trusts in the late 19th century."⁴⁶

Pasquale finds the FTC's explanation of its inaction unsatisfactory. He criticizes the hold that the Chicago School has on antitrust today, which results in an inability to address "digital businesses driven by complex algorithms" where "intent and effect can be hidden in millions of lines of computer code subject to multiple interpretations."⁴⁷ "When 'new economy' firms enter the mix, regulators are liable to throw up their hands in frustration, unwilling to even try to give a reliable, public estimate of the harms and benefits arising out of any particular transaction or practice."⁴⁸

Pasquale explains why competition is not "one click away." Google's data centers "use the equivalent of Salt Lake City's voltage."⁴⁹ And Google is "far, far more likely to purchase a start-up with

43. The FTC concluded that Google did not "manipulate[] its search algorithms to harm vertical websites and unfairly promote its own competing vertical properties, a practice commonly known as 'search bias.'" FTC, *Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns in the Markets for Devices like Smartphones, Games and Tablets, and in Online Search 2*, Jan. 2, 2013, available at <http://ftc.gov/opa/2013/01/google.shtm>. But the Commission required Google to (1) not "seek[] injunctions against a willing licensee . . . to block the use of any standard-essential patents that the company has previously committed to license on FRAND [fair, reasonable, and nondiscriminatory] terms"; (2) "remove restrictions on the use of its online search advertising platform, AdWords, that may make it more difficult for advertisers to coordinate online advertising campaigns across multiple platforms"; and (3) "provide all websites the option to keep their content out of Google's vertical search offerings, while still having them appear in Google's general, or 'organic,' web search results." *Id.* at 1–2.

44. Frank Pasquale, *Paradoxes of Digital Antitrust: Why the FTC Failed to Explain Its Inaction on Search Bias*, HARV. J.L. & TECH., July 19, 2013, <http://jolt.law.harvard.edu/antitrust/articles/Pasquale.pdf>, at 2.

45. *Id.* at 3.

46. *Id.*

47. *Id.* at 10.

48. *Id.* at 11.

49. *Id.* at 5.

valuable search technology” than “it is to be displaced by one.”⁵⁰ Even the large companies that have challenged Google have suffered, with Microsoft losing billions of dollars on its Bing search engine.⁵¹ Rivals lack access to the “critical ‘raw material’” of data, which harms them as innovation is “heavily dependent on a base of users that ‘train’ algorithms to be more responsive.”⁵² Google’s advantage is “likely to be self-reinforcing” and consumers likely will not even notice problems as they “lack both the incentive and the ability to detect manipulation as long as they are getting ‘good enough’ results.”⁵³

Pasquale calls on competition agencies in the future to treat search bias claims more seriously “to avoid the embarrassing denouement of the FTC’s investigation.”⁵⁴ He calls for “a panel advising the FTC” to obtain “extensive access to the relevant Google search algorithms, to assess the company’s treatment of upstart vertical search services.”⁵⁵ Because “Google keeps close tabs on its users’ every click . . . it is not too much to ask the company itself to document all the changes to its algorithms (and especially manual interventions by human beings) so that someone — such as a regulatory agency, a nonprofit organization, a judge, or a standard-setting body — can look under the hood and understand what is going on.”⁵⁶ Such a remedy would bear precedent in the *Microsoft* case, in which “the parties to the litigation agreed to appoint a Technical Committee to be empowered to understand how decisions at [the] company originated and how they were implemented.”⁵⁷ Pasquale concludes that “[a] similar body should be appointed in the case of Google, and quite possibly for Facebook, Apple, Amazon, and Twitter as well.”⁵⁸

Pasquale contends that reporting to a Technical Committee would not be a major burden, as “changes in ranking methodology . . . are rigorously tested and documented.”⁵⁹ “When a website suddenly tumbles dozens of places, and has a plausible story about being targeted as a potential rival of an established Google interest or a space the company is planning to invest in, is it too much to ask for some third party to review the particular factors that led to the demotion?”⁶⁰ He continues: “Given how quickly a sudden drop usually occurs, we are

50. *Id.* at 6.

51. *Id.*

52. *Id.* at 6-7.

53. *Id.* at 8-9.

54. *Id.* at 3.

55. *Id.* at 14-15.

56. *Id.* at 15.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

not discussing an infinite variety of changes to be reviewed.”⁶¹ Such action could rely on the “secretive Foreign Intelligence Surveillance Act (FISA) court as a model.”⁶²

Pasquale echoes Patterson in highlighting two characteristics that affect the standards to be applied to search engines. First, the search engines “operate not only as simple sellers of services, but as multi-sided platforms, bringing together advertisers, consumers, and all manner of other cultural and political entities,” which leads them to become “intermediaries that users must use and trust for reliability.”⁶³ Second, Pasquale explains that search is a “credence” service in that “the ordinary consumer must trust the provider more than an ordinary vendor, because it’s expensive (and sometimes impossible) to know if the provider has actually given her best efforts (let alone provided appropriate advice or care).”⁶⁴ “[R]are is the person who takes the time to compare results at one search engine with those at another,” and “given the importance of personalization to many good search results, it’s hard to imagine how this could even be done.”⁶⁵

Pasquale concludes with a clarion call: “We either commit to a 21st century antitrust law capable of detecting and deterring misuses of power online, or we allow centrifugal tendencies to centralize innovation in the few mega-firms capable of gathering critical data and promoting new services on an ever-less-level playing field.”⁶⁶

V. NO NEUTRAL SEARCH

In contrast to Pasquale, Marina Lao, in “*Neutral’ Search As A Basis for Antitrust Action?*,” criticizes the notion of neutral search that could have led to antitrust liability for Google. She begins by explaining that the FTC, “[b]y declining to bring a case after determining that Google did not manipulate its search algorithms and search results pages to target particular competitors or to thwart competition . . . seemed to have implicitly rejected the notion that Google has a duty to adopt search ‘neutrality.’”⁶⁷ The term “search neutrality” is “generally understood to mean that a search engine should not prefer its own content in search results unless its own content is ‘objectively’ superi-

61. *Id.*

62. *Id.* at 15-16.

63. *Id.* at 17.

64. *Id.* at 18.

65. *Id.*

66. *Id.* at 19-20.

67. Marina Lao, “*Neutral’ Search as a Basis for Antitrust Action?*,” HARV. J.L. & TECH., July 19, 2013, <http://jolt.law.harvard.edu/antitrust/articles/Lao.pdf>, at 2.

or to competing content based on the use of a ‘neutral’ search algorithm.”⁶⁸ Lao points to three problems with such a standard.

First, it is inherently subjective, as it is not clear what would constitute a neutral algorithm and who would make that determination. Search rankings “represent a search engine’s judgment about the relative value and relevance of web content in response to certain queries,” and Google’s algorithm apparently “incorporate[s] over 200 variously weighted factors” that are “modified about 500 times a year.”⁶⁹ For these reasons, “it is difficult to conclude that a search engine employed the ‘wrong’ standards, except in extreme cases.”⁷⁰ In particular, to determine that a search engine’s judgment is wrong, “there must be a normative standard against which its search algorithm could be measured, but it is unclear who would, or should, have the right to establish that normative standard.”⁷¹

Lao states that the problems of creating and carrying out a Federal Search Commission would be “immense” since “[s]earch algorithms are extraordinarily complex, and it is questionable whether regulators would have the expertise and competence to effectively (and continually) monitor and evaluate their technical details, including all changes made to them.”⁷² As a result of “government regulation of the search engine business,” search quality and innovation could be adversely affected.⁷³

Second, Lao explains that no antitrust theory of liability requires search neutrality. For starters, and presenting a different perspective than Patterson and Pasquale, “it is not clear that Google has monopoly power.”⁷⁴ The “various online information sectors” are “evolving and overlapping rapidly,” and Google “faces intense competition for user attention and advertising dollars from significant competitors, including Facebook, Amazon, and Apple.”⁷⁵ In addition, “it is unlikely that monopoly power can be inferred from a search engine’s high share of the general search traffic” since users “can instantly switch to another search engine.”⁷⁶

Lao also concludes that the essential facilities doctrine is not appropriate. Courts have “strictly construed” the requirement of essentiality, and users can “turn to alternative sources of online information not characterized as general search engines” such as specialized web-

68. *Id.*

69. *Id.* at 3.

70. *Id.*

71. *Id.*

72. *Id.* at 4.

73. *Id.*

74. *Id.* at 6.

75. *Id.* at 6-7.

76. *Id.* at 7 (emphasis omitted).

sites, social networks, and mobile apps.⁷⁷ Moreover, “it would be a stretch to argue that Google has denied access to any competitor” as rivals occupy high rankings for certain keywords.⁷⁸ Finally, the top ranking cannot be shared, which precludes the doctrine’s requirement that it not be “impractical” for the facility to be shared.⁷⁹

Third, Lao points out that any remedy requiring neutral search “is likely to do more harm than good.”⁸⁰ Google’s “universal search” benefits users that prefer direct answers to information rather than being confronted with a screen of “ten blue links.”⁸¹ If a search engine were allowed to “embed its proprietary content in the results” only by satisfying an “objective” standard, “no integrated search results would likely be offered” since the search engine would be required to “somehow formulate complex and cumbersome schemes to determine which vertical option (its own or a competitor’s) should be integrated.”⁸² Such a rule would harm consumers and “distort competition in the larger Internet information market” where there is “fierce competition” among Google, Facebook, Apple, and Amazon, each of which has “evolved and spilled into other sectors.”⁸³

In short, the FTC “was correct in closing its investigation” of Google’s search practices since search neutrality “is generally not a workable antitrust principle” and “incidental foreclosure effects in vertical markets” suffered by rivals are not sufficient to prove an antitrust case.⁸⁴

VI. NO FORECLOSURE, BROAD MARKETS, AND SACROSANCT PRODUCT DESIGN

In *The Market Realities that Undermined the FTC’s Antitrust Case Against Google*, Geoffrey A. Manne and William Rinehart (“Manne”) contend that “[t]he public claims by Google’s critics . . . reflect an over-simplified and inaccurate conception of the competitive conditions facing Google and its competitors.”⁸⁵ In contrast, the “reality” is “far more complex” and “paints a picture that undermines

77. *Id.* at 7-8.

78. *Id.* at 8-9.

79. *Id.* at 9.

80. *Id.* at 10.

81. *Id.* at 10.

82. *Id.* at 10-11.

83. *Id.* at 11.

84. *Id.* at 12.

85. Geoffrey A. Manne & William Rinehart, *The Market Realities that Undermined the FTC’s Antitrust Case Against Google*, HARV. J.L. & TECH., July 19, 2013, <http://jolt.law.harvard.edu/antitrust/articles/ManneRinehart.pdf>, at 2.

the basic, essential elements of an antitrust case against the company.”⁸⁶ Three main points support this conclusion.

First is the rigorous legal standard for foreclosure.⁸⁷ The “core claim” in the case against the search engine was that “Google’s vertical integration of its own content . . . into its organic search results . . . foreclosed competitors from access to Internet users, resulting in anti-competitive harm.”⁸⁸ This showed a “naïve foreclosure analysis” since “acts that have the effect of excluding rivals are deemed anti-competitive, subject only to balancing against procompetitive justification.”⁸⁹ But as Manne (relying on Josh Wright) points out, “if rivals would have been only marginally less foreclosed *absent* the complained of conduct, the case is not actionable” since “[a]nticompetitive foreclosure requires not merely *any* foreclosure effect, but *substantial* foreclosure, sufficient to prevent rivals from achieving minimum viable scale.”⁹⁰ Only if there is substantial exclusion would the conduct proceed to the second stage, asking if the “procompetitive justifications outweigh its *net* anticompetitive effect, properly measured.”⁹¹ As applied to the facts, Manne concludes that the “net foreclosure effect of the addition of Google’s Universal Search results would seem to be marginal.”⁹²

Manne explains that foreclosure was not shown in the case: “Google’s complaining competitors have not been prevented from obtaining scale.”⁹³ Kayak receives 61% of visits among “meta-search travel sites,” far more than Google’s 1.4%, and obtains “75% of its traffic through direct navigation” as opposed to 10% through search.⁹⁴ Microsoft’s search engine Bing “touts its advantages over Google” and new entrants like DuckDuckGo and Blekko “have seen triple digit growth and attract fervent followers.”⁹⁵

The second argument addresses markets. Manne notes that the relevant market is not “search” or “search advertising” since there is “nothing especially antitrust-relevant” about these categories.⁹⁶ Instead, a “more accurate” definition would focus on “the range of firms that participate in the market for ‘targeted eyeballs,’” which would

86. *Id.*

87. *Id.* at 4 (judging the FTC standard “from the limited insight into its analysis offered by its short Statement”).

88. *Id.* at 2.

89. *Id.* at 4.

90. *Id.*

91. *Id.*

92. *Id.* at 5.

93. *Id.* at 6.

94. *Id.*

95. *Id.* at 7.

96. *Id.* at 8.

encompass “any of a range of products attractive to consumers (general search, product search, social networking, emailing, [and] online retailing . . .), the use of which generate data, context, or secondary actions that enable the firm to target advertising to specific, likely consumers.”⁹⁷ Google faces “significant competition” from Amazon and “is not likely dominant” in this market.⁹⁸

The market for advertisers also reaches more broadly. Advertisers “care about effectiveness and the returns on an entire campaign,” not “the specific technology that supports their ads.”⁹⁹ In particular, advertisers “don’t care whether consumers see their ads and navigate to their sites (or buy their wares) via a search page, a friend’s Facebook post, or a porn site.”¹⁰⁰ There are “myriad (and growing)” mechanisms other than search “to access consumers online.”¹⁰¹ The “vast majority of competing advertising outlets” are “in no way affected, let alone foreclosed, by Google’s alleged bias.”¹⁰² The “broader online advertising market is significant and growing in importance” and, in addition, offline advertising can be viewed as a substitute.¹⁰³

Third, Manne contends that antitrust tribunals should not second-guess Google’s “sensible, even necessary, product design decisions.”¹⁰⁴ Google changed its business model to incorporate more direct responses to users’ search queries to address a “vulnerability” revealed by its responses to primarily non-monetizable searches focused on informational or navigational queries.¹⁰⁵ Relatedly, internet monopolies “are notoriously fleeting,” as shown by the decline of AOL, Yahoo!, AltaVista, and MySpace.¹⁰⁶ Even Google’s data “can be bought” and Microsoft is “culling data directly from Google itself.”¹⁰⁷

In short, Manne criticizes the prosecution of Google search that takes place under the guise of expansive notions of foreclosure and market power, and with insufficient attention to innovative product design.

97. *Id.*

98. *Id.*

99. *Id.* at 9.

100. *Id.*

101. *Id.* at 10.

102. *Id.*

103. *Id.* at 10-11.

104. *Id.* at 12.

105. *Id.*

106. *Id.* at 14-15.

107. *Id.* at 16.

VII. CONCLUSION

Google presents an array of crucial, fast-moving antitrust issues that include barriers to entry, market power (in two-sided markets and with credence goods), neutral search, and innovation. Although the FTC decided not to challenge the search behavior in 2013, these issues will confront antitrust enforcers for years to come.