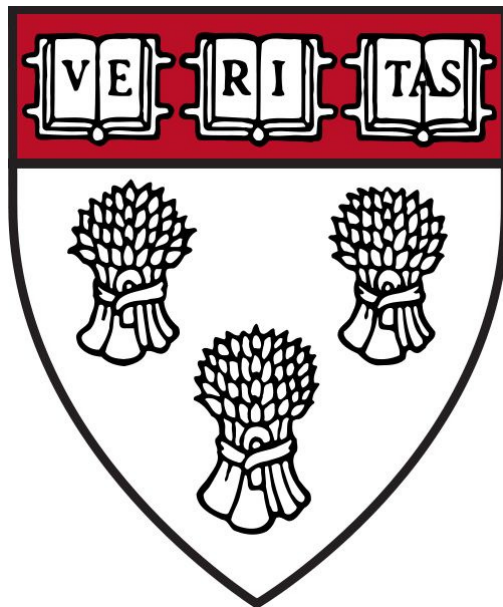


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“Neutral” Search As A Basis for Antitrust Action?

By Marina Lao



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“NEUTRAL” SEARCH AS A BASIS FOR ANTITRUST ACTION?

*Marina Lao**

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I. INTRODUCTION

After a nearly two-year probe, the Federal Trade Commission (“FTC”) recently voted unanimously to close the portion of its anti-trust investigation relating to Google’s search practices without filing a complaint.¹ While the FTC did secure a consent decree involving patent licensing in connection with Google’s mobile business,² the agency concluded that the firm’s practice of favoring its own content in the presentation of search results, sometimes referred to as “search bias,” did not violate U.S. antitrust laws.³ It determined that, although the practice may have an incidental negative impact on some competi-

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I would like to thank the participants at the Google & Antitrust Roundtable, particularly Michael Carrier, Peter Carstensen, Mark Patterson, Frank Pasquale and Charles Sullivan, for their comments. The views and conclusions expressed here are solely mine, as are any errors.

1. FED. TRADE COMM’N, STATEMENT REGARDING GOOGLE’S SEARCH PRACTICES: IN THE MATTER OF GOOGLE INC., (Jan. 3, 2013), <http://ftc.gov/os/2013/01/130103/googlesearchstmtofcomm.pdf> [hereinafter, FTC Statement Regarding Google’s Search Practices].

2. See FED. TRADE COMM’N, RELEASE: GOOGLE AGREES TO CHANGE ITS BUSINESS PRACTICES TO RESOLVE FTC COMPETITION CONCERNS IN THE MARKETS FOR DEVICES LIKE SMART PHONES, GAMES AND TABLETS, AND IN ONLINE SEARCH (Jan. 3, 2013), <http://ftc.gov/opa/2013/01/google.shtm> [hereinafter, FTC Release].

3. FTC Statement Regarding Google’s Search Practices, *supra* note 1.

tors, it was a product improvement that likely benefited consumers.⁴ Additionally, it concluded that Google did not selectively change its search algorithm to exclude competition; instead, any disadvantage to competing websites was the collateral result of changes that likely improved the quality of Google searches.⁵

By 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, the FTC seemed to have implicitly rejected the notion that Google has a duty to adopt search “neutrality,” as some have advocated.⁶ Search neutrality, a malleable term that remains largely undefined, is generally understood to mean that a search engine should not prefer its own content in search results unless its own content is “objectively” superior to competing content based on the use of a “neutral” search algorithm.⁷ In practical terms, search neutrality would not allow Google to return a Google map in response to an address query, for example, unless a Google map is determined, under some “objective” measure of relevance and quality, to be better than other maps. Under a neutral search regime, “universal search” displays — a search engine’s integration and display of its proprietary content in search results, usually ahead of links to competing websites⁸ — would likely be impermissible.

This essay suggests that the FTC’s decision was correct. It is difficult to build an antitrust case (against any major search engine)

4. *Id.* (“Notably, the documents, testimony and quantitative evidence the Commission examined are largely consistent with the conclusion that Google likely benefited consumers by prominently displaying its vertical content on its search results page”).

5. *Id.* (“Similarly, we have not found sufficient evidence that Google manipulates its search algorithms to unfairly disadvantage vertical websites that compete with Google-owned vertical properties. Although at points in time various vertical websites have experienced demotions, we find that this was a consequence of algorithm changes that also could plausibly be viewed as an improvement in the overall quality of Google’s search results.”).

6. *See, e.g., FTC Statement Not the Last Word, Premature*, FAIRSEARCH.ORG (Jan. 3, 2013), <http://www.fairsearch.org/general/fairsearch-ftc-settlement-not-the-last-word-premature/> (criticizing the “FTC’s inaction on the core question of search bias”); *Statement on “Deeply Disappointing” FTC Google Decision*, INITIATIVE FOR A COMPETITIVE ONLINE MARKETPLACE (Jan. 3, 2013), <http://newsroom.i-comp.org/statement-on-ftc-google-decision/> (criticizing “the FTC’s failure to address Google’s search bias”). FairSearch.org is an alliance of Google’s competitors, including Microsoft, TripAdvisor, Kayak, Hotwire, Expedia). *See* <http://www.fairsearch.org/about-fairsearch/> (listing the members of the organization).

7. *See e.g., Daniel A. Crane, Search Neutrality as an Antitrust Principle*, 1 (Univ. of Mich. Public Law Working Paper No. 256, 2011), available at <http://ssrn.com/abstract=1961742> (“Search neutrality has not yet coalesced into a generally understood principle, but at its heart is some idea that Internet search engines ought not to prefer their own content on adjacent websites in search results but should instead employ “neutral” search algorithms that determine search result rankings based on some “objective” metric of relevance.”).

8. *See* Danny Sullivan, *Google 2.0: Google Universal Search*, SEARCH ENGINE LAND (May 16, 2007, 2:33 p.m.), <http://searchengineland.com/google-20-google-universal-search-11232> (explaining “universal search”).

around the notion of search neutrality for several reasons: first, search is inherently subjective and it is unclear what would constitute a “neutral” standard or algorithm; second, there appears to be no identifiable antitrust theory of liability that would require neutral search; and third, any remedy imposing some form of neutral search is likely to be more harmful than the incidental exclusionary effects the remedy is supposed to correct.

II. WHAT WOULD CONSTITUTE “NEUTRAL” STANDARDS AND WHO WOULD MAKE THE JUDGMENT?

The notion of neutral or objective search standards is somewhat confounding because the process of search itself is inherently subjective. Search rankings effectively represent a search engine’s judgment about the relative value and relevance of web content in response to certain queries.⁹ Although the process is automated through the use of algorithms, it is nevertheless an exercise of judgment with which not all users will agree. The evaluative criteria embodied in a search algorithm may well be viewed as “objective” by one user because they generated the “correct” search results for her, but as “biased” by another user with different priorities or values who, therefore, found the results unhelpful.

PageRank, Google’s search algorithm, is said to incorporate over 200 variously weighted factors, which are modified about 500 times a year.¹⁰ Naturally, reasonable minds may differ on which factors should be included or excluded, and how much weight each factor should be given. Absent specific acts of naked exclusion, it is difficult to conclude that a search engine employed the “wrong” standards, except in extreme cases, even if one disagrees with its prioritization and search rankings.

In order to conclude that a search engine’s judgment is wrong, there must be a normative standard against which its search algorithm could be measured; however, it is unclear who would, or should, have the right to establish that normative standard. Reasonable minds can surely differ on the relative value and relevance of different types of content. For example, one search engine may be more dismissive of the value of websites that mainly republish content from other sites

9. See generally Eugene Volokh & Donald M. Falk, *First Amendment Protection for Search Engine Search Results*, THE VOLOKH CONSPIRACY (April 20, 2012), <http://www.volokh.com/wp-content/uploads/2012/05/SearchEngineFirstAmendment.pdf> (arguing that search engine results represent each search engine’s editorial judgment of which content to include and, as such, are fully protected by the First Amendment).

10. See James Grimmelman, *Some Skepticism About Search Neutrality*, in THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET 435, 455 (2010), (Berin Szoka et al. eds., 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1742444.

with little added content than another search engine.¹¹ How would one “objectively” determine whose opinion or standards on these issues are more correct? Additionally, who could or should be authorized to make these determinations?

It is theoretically possible to establish a Federal Search Commission, as Professors Frank Pasquale and Oren Bracha have suggested,¹² with the authority to examine each facet of search algorithms to determine if they provide a reasonable metric of quality and relevance. However, the problems with such an undertaking are immense,¹³ and would probably cause more harm than good. Search algorithms are extraordinarily complex, and whether regulators would have the expertise and competence to effectively (and continually) monitor and evaluate their technical details, including all changes made to them, is questionable. There is a high risk that government regulation of the search engine business would adversely affect the quality of searches and impede innovation. This would be an even greater evil than any incidental exclusionary harm that might result from search “bias.”

III. IS THERE AN APPLICABLE ANTITRUST THEORY OF LIABILITY?

Moreover, it is difficult to identify a theory under antitrust law that would require search neutrality, even assuming that search neutrality is a coherent principle.¹⁴ When a search engine favors its own property on its results page — such as through offering universal search results — it is effectively availing itself of the efficiencies derived from its engagement in several fields. This alone is usually not considered an exercise of monopoly power and is not unlawful; nor

11. See *Foundem's Google Story*, SEARCHNEUTRALITY.ORG (Aug. 18, 2009), <http://www.searchneutrality.org/foundem-google-story>. Foundem, a UK shopping comparison site, alleged that Google had applied an algorithm change against its website because of its competition with Google in product searches in the UK. In response to Google's argument that its algorithm merely reflected its view that websites with little original content, such as Foundem's, are of low value to users (and that other Google competitors, presumably with quality sites, such as Amazon, Shopping.com and Expedia, typically rank very highly), Foundem said that its site had high rankings on Bing and Yahoo!. *Id.* SearchNeutrality.org is a Foundem-created website with all content written by its founders. See *About*, SEARCHNEUTRALITY.ORG (Oct. 9, 2009), <http://www.searchneutrality.org/about>.

12. See generally Oren Bracha & Frank Pasquale, *Federal Search Commission? Fairness, Access, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149 (2008) (arguing that search engines serve as gatekeepers of the Internet and calling for their regulation).

13. See Grimmelmann, *supra* note 10, at 453–56 (discussing the reasons why “transparency” with respect to search algorithms and government regulation are unlikely to work).

14. Of course, had the FTC uncovered evidence of Google specifically changing search results to impede competition, and competition was substantially foreclosed, it would likely have had grounds to bring an antitrust case against Google. But the FTC did not find such evidence. See *FTC Statement Regarding Google's Search Practices*, *supra* note 1.

would it have been unlawful even in an earlier era of more aggressive antitrust enforcement.¹⁵

Some have suggested that Google’s search engine is a “gatekeeper” to the Internet¹⁶ and, therefore, an “essential facility,” the control of which would impose some duty on Google to assist its competitors — websites with competing content.¹⁷ The essential facilities doctrine, however, is a poor fit in the context of search results,¹⁸ even if we disregard the United States Supreme Court’s recently expressed skepticism of the doctrine in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*.¹⁹ The general concern about the doctrine is that mandated dealings may decrease incentives for investment and innovation, thereby undermining the underlying purposes of antitrust law.²⁰ Courts, probably as a consequence of these concerns, have imposed strict conditions on its application, rarely ruling for plaintiffs.²¹

The essential facilities doctrine holds that where a monopolist has bottleneck control over a resource or facility essential for competition, usually in another (vertical) market, and the facility cannot be reasonably duplicated, the facility owner must share access to that facility with its competitors in the vertical market if it is feasible to do so.²² This means that, as a threshold matter, if the doctrine is to be applied

15. See, e.g. *Berkey Photo, Inc., v. Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir. 1979) (“So long as we allow a firm to compete in several fields, we must expect it to seek the competitive advantages of its broad-based activity...[t]hese are gains that accrue to any integrated firm, regardless of its market share, and they cannot by themselves be considered uses of monopoly power.”).

16. See Bracha & Pasquale, *supra* note 12, at 1163–64 (describing search engines as gatekeepers who control the flow of Internet information)

17. See *id.* at 1176, 1175 n.143 (2008) (comparing search engines to nineteenth century railroads to which the essential facilities doctrine has been applied).

18. See generally Marina Lao, *Search, Essential Facilities, and the Antitrust Duty to Deal*, 11 NW. J. TECH & INTELL. PROP. 275 (2013), at 287-304.

19. 540 U.S. 398, 410–11 (2004) (describing the doctrine dismissively as having been “crafted by some lower courts” and refusing to recognize (or repudiate) it).

20. See, e.g., Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 851 (1990) (expressing “the general concern that the defendant never would have built a [facility] of that size and character in the first place if he had known that he would be required to share it. Required sharing discourages building facilities such as this, even though they benefit consumers.”). The general disapproval of the doctrine may also be a visceral reaction against infringement of another’s property rights, which includes the right to exclude others if she so wishes. See *id.* at 852 n.46 (“The trouble with . . . the essential facilities notion is that [it] start[s] with the assumption that all business assets are subject to sharing. Do we really want to assume that everything we have is up for grabs?”).

21. See Glen O. Robinson, *On Refusing to Deal With Rivals*, 87 CORNELL L. REV. 1177, 1206 (2002) (observing that “lower courts have adopted a conservative approach to imposing a duty to share essential facilities” and that the success rate of plaintiffs in these cases is very low); Spencer Weber Waller, *Areeda, Epithets, and Essential Facilities*, 2008 WIS. L. REV. 359, 363–64 (2008) (concluding that plaintiffs rarely won essential facility cases).

22. *MCI Commc’ns Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1132–33 (7th Cir. 1983); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992–93 (D.C. Cir. 1977).

to require search neutrality, the search engine must have monopoly power in a relevant market.²³ Notwithstanding Google's absolute size and success, it is not clear that Google has monopoly power in an antitrust sense.

The general assumption about Google is that it is a "monopolist" in search and search advertising,²⁴ because it has a large percentage of the general search traffic and the search-based advertising spending in the United States.²⁵ However, Google faces intense competition for user attention and advertising dollars from significant competitors, including Facebook, Amazon, and Apple.²⁶ Although we normally do not associate these Google competitors with general search engines, the various online information sectors that they occupy are evolving and overlapping rapidly, making them competitors with each other. Consequently, even though it may be impossible to reliably define the

23. See, e.g., *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 546–57 (9th Cir. 1991) (holding that a computerized reservation system could not be an essential facility where its control did not give the airline the power to "eliminate competition in a market downstream from the facility") (emphasis in original); *Ill. Bell Tel. Co. v. Haines & Co.*, 905 F.2d 1081 (7th Cir. 1990) (finding that the alleged essential facility did dominate a defined relevant market), *vacated on non-antitrust grounds*; 449 U.S. 944; *City of Malden, Mo. v. Union Elec. Co.*, 887 F.2d 157 (8th Cir. 1989) (approving jury instructions requiring relevant market definition in an essential facility case); *Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1163 (9th Cir. 2003) (rejecting essential facility claim where defendant lacked market power in its gas transmission facilities).

24. See, e.g., *The Power of Google: Serving Consumers or Threatening Competition?: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 112th Cong. 33–35 (2011) (statement of Thomas O. Barnett, Partner, Covington & Burling, LLP), available at <http://www.gpo.gov/fdsys/pkg/CHRG-112shrg71471/pdf/CHRG-112shrg71471.pdf> ("Google dominates online search in the U.S. . . . Moreover, Google's search dominance has enabled it also to dominate paid search advertising."); Geoffrey A. Manne & Joshua D. Wright, *Google and the Limits of Antitrust: The Case Against the Antitrust Case Against Google*, 34 HARV. J.L. & PUB. POL'Y 171, 194 (2011) (noting the colloquial reference to Google as "the dominant search and search advertising provider in an online search market comprised of Google, Microsoft, and Yahoo!" and questioning its antitrust relevance). The assumption that Google has substantial monopoly power in search is also implicit in the commentaries arguing for the need to regulate Google's dominant search engine. See generally Bracha & Pasquale, *supra* note 12.

25. See Zack Whittaker, *comScore: Google, Bing Gain Search Share as Yahoo Dips*, ZDNET (Mar. 12, 2012), <http://www.zdnet.com/blog/btl/comscore-google-bing-gain-search-share-as-yahoo-dips/71334> (citing February 2012 comScore data showing Google's share of general search traffic was 66.4%, while Bing and Yahoo! had 15.3% and 13.8%, respectively); Brian Womack, *Google Increases U.S. Search Market Share as Yahoo Slips*, *ComScore Says*, BLOOMBERG (Nov. 9, 2011, 6:17 PM), <http://www.bloomberg.com/news/2011-11-09/google-gains-u-s-search-market-share-in-october-comscore-says.html> (reporting ComScore data showing that Google has about 76% of search-based advertising dollars while Microsoft and Yahoo! collectively have 16%).

26. See Farhad Manjoo, *The Great Tech War of 2012: Apple, Facebook, Google, and Amazon Battle for the Future of the Innovation Economy*, FAST COMPANY (Nov. 2011), <http://www.fastcompany.com/magazine/160/tech-wars-2012-amazon-apple-google-facebook>; *Research and Markets: Gang of Four (and Possibly Five) Apple, Google, Facebook, Amazon – and PayPal*, BUSINESS WIRE (Mar. 23, 2012), <http://www.businesswire.com/news/home/20120323005260/en/Research-Markets-Gang-Possibly-Apple-Google-Facebook>.

market encompassing general search engines, the market realities suggest that its contours cannot be as narrow as general search (on the user side) and search-based advertising (on the advertiser side).²⁷

Moreover, regardless of *how* the market is defined, it is unlikely that monopoly power can be inferred from a search engine’s high *share* of the general search traffic.²⁸ Unhappy Google users can instantly switch to another search engine, such as Bing or Yahoo!, without incurring any penalties or costs. And competing search engines have the capacity to immediately increase “output” — that is, generate more search results — to meet this increase in demand. The ease of users switching to a competitor (and of competitors increasing output) serves to constrain a search engine with substantial market share from exercising market *power*.

Aside from the market power issue, there are other obstacles to the possible use of the essential facilities doctrine to mandate search neutrality. Courts have consistently held that, for the doctrine to apply, (1) the “facility” in question must be essential and practically infeasible to duplicate; (2) the monopolist must have denied its competitors access; and (3) the facility must be capable of being shared.²⁹ These requirements, particularly the latter two, present significant challenges in the context of search.

First, courts have always strictly construed the essentiality requirement, holding that a facility is deemed essential only if its control carries with it “the power to *eliminate* competition in the downstream market,”³⁰ and that power “must not be momentary, but must be at least relatively permanent.”³¹ It is difficult to argue that any search engine (including Google) is essential under this stringent standard or, indeed, even under a more lenient one.³² Though Google handles the most general search queries, there are other comparable search engines, notably Bing and Yahoo!, to which users can easily switch without incurring any costs, and through which websites can reach potential customers.

Users may also turn to alternative sources of online information not characterized as general search engines.³³ They include specialized websites, sometimes called vertical search engines, such as Amazon, eBay, and TripAdvisor, all of which can be good substitutes for

27. See Lao, *supra* note 18, at 291-94.

28. See *id.* at 295-97 (analyzing why market share is not a good proxy for market power in the context of general search).

29. *MCI*, 708 F.2d at 1132-33.

30. *Alaska Airlines, Inc.*, 948 F.2d at 544 (emphasis in original); see also *City of Anaheim v. S. Cal. Edison Co.*, 955 F.2d 1373, 1380 (9th Cir. 1992) (citing *Alaska Airlines* on this point, though not reaching the factual issue in the case).

31. *Alaska Airlines*, 948 F.2d at 544 (citations omitted).

32. See Lao, *supra* note 18, at 299-301.

33. See *id.* at 293, 300.

general search engines for certain product and service searches.³⁴ Additionally, social networks such as Facebook and Twitter are evolving into important portals of online information,³⁵ as are mobile apps.³⁶

For content and service providers, the essentiality argument is likely a bit stronger. Top ranking in a general search engine's organic results provides free promotion for a website and is probably superior to most, if not all, alternative ways of reaching potential customers in a digital age. However, there is obviously more than one general search engine. Additionally, other reasonable methods of promotion exist, for example, through advertisements on various online and off-line platforms, including on search engines themselves.³⁷ The strict essentiality standard that is applied almost certainly requires more than a showing that these alternatives are probably inferior to free top ranking on a search results page.

Second, the denial of access requirement presents a unique problem in the search context that is rarely seen in essential facility cases.³⁸ Denial of access is usually straightforward, but that is not the case in search. The implicit premise of any essential facility claim in the context of search rankings must be that top ranking in the organic *results listing* is the essential facility.³⁹ Even accepting this dubious designation of the alleged "essential facility," it would be a stretch to argue that Google has denied access to any competitor. Simple experiments show that the websites of various Google competitors, such as Amazon, TripAdvisor, Yelp, Expedia, Mapquest and others, are still highly ranked for certain relevant keywords,⁴⁰ although perhaps not

34. See JACQUES BUGHIN ET AL, MCKINSEY & CO., *THE IMPACT OF INTERNET TECHNOLOGIES: SEARCH*, (July 2011), available at http://www.gstatic.com/ads/research/en/2011_Impact_of_Search.pdf. (reporting that Amazon and eBay together handle ten times more product searches than Google).

35. See Lao, *supra* note 18, at 293, 300.

36. See John Battelle, *The Evolving Search Interface: Mobile Drives Search as App*, JOHN BATTELLE'S SEARCH BLOG (Jan. 15, 2010), http://battellemedia.com/archives/2010/01/the_evolution_search_interface_mobile_drives_search_as_app.php ("On their face, these apps don't seem like search at all. Except they are."); Aaron Goldman, *Mobile Matters: 15 Mobile Search Stats that Ring True*, SEARCH INSIDER (Oct. 19, 2011, 10:30 AM), <http://www.mediapost.com/publications/article/160766/mobile-matters-15-mobile-search-stats-that-ring-t.html> ("Behold the biggest threat to mobile search—apps . . . It's much easier to interact with content through an app than through Web pages."); see also Lao, *supra* note 18, at 293-94, 300.

37. See Lao, *supra* note 18, at 300-01.

38. See *id.* at 301-02.

39. While it is not clear which is the alleged essential facility, if it is the *search engine* itself, there would be no denial of access at all. The websites of Google's vertical rivals, such as Mapquest or Kayak, are readily accessible to anyone using Google search via various keywords or via searching the business name. They are not excluded from the search process.

40. For example, enter "map sites" into the Google search box, and the organic results listing will lead off with a link to the Mapquest site. Or, type in "travel sites" as the search query in Google, and the organic search results will begin with links to Google's major

as highly ranked as they were before Google expanded into content, or for other keywords.⁴¹ Therefore, unless one takes the position that “access” requires top ranking in search results for *all* search terms that might reasonably direct traffic to one’s business, it is hard to characterize a search engine’s favorable treatment of its own content in response to certain search terms as “denial of access.”

Third, the “non-sharability” of top ranking in search results presents an insurmountable problem for the application of the essential facility doctrine to implement search neutrality.⁴² The law is clear that a monopolist is not required to share, no matter how essential its facility may be to competition, if “sharing would be impractical or would inhibit the defendant’s ability to serve its customers adequately.”⁴³ In a pair of cases, the Ninth Circuit Court of Appeals held that no firm should be required to step aside to let a competitor use its facility if the facility cannot accommodate both,⁴⁴ because requiring a monopolist to do so would “stand[] the essential facility doctrine on its head.”⁴⁵ This requirement is generally non-controversial and has the support of even the strongest contemporary advocates of the doctrine.⁴⁶

In the context of search rankings, because there is only one first-ranked position on any results page (the alleged essential facility), the facility is incapable of being shared. Since a search engine has no legal obligation to “share” in this situation, it would logically have no duty to adopt a “neutral” standard to allocate this scarce resource — top ranking in the search results.

competitors in travel, including Kayak, Expedia, Hotwire, Priceline, Travelocity, Orbitz, Travelzoo, and Tripadvisor. In a search for “restaurant review sites” on Google, Urbanspoon and Yelp top the organic results listing.

41. For example, enter “Starbucks” as the search query, and Google will return a Google map pinpointing the Starbucks locations closest to the user along with the usual relevant links. Or, enter “Newark to San Francisco,” and Google will return its “universal search” results (listing a few select flights and integrating a flight search box) ahead of links to the major travel sites. A search for “San Francisco restaurants” will also yield universal search results, which include several San Francisco restaurant listings along with Google maps marking their locations, and some Google reviews, followed by the traditional links to Yelp, OpenTable, and Urbanspoon.

42. Lao, *supra* note 18, at 302-04.

43. *Hecht*, 570 F.2d at 992-93.

44. *See City of Vernon v. S. Cal. Edison Co.*, 955 F.2d 1361, 1366 (9th Cir. 1992); *City of Anaheim v. S. Cal. Edison Co.*, 955 F.2d 1373, 1381 (9th Cir. 1992).

45. *City of Vernon*, 955 F.2d at 1367.

46. *See* Brett Frischmann & Spencer Weber Waller, *Revitalizing Essential Facilities*, 75 ANTITRUST L.J. 1, 12-13 (2008) (incorporating nonrivalrousness into their definition of an “infrastructure,” to which the essential facility doctrine could apply).

IV. A REMEDY MORE HARMFUL THAN THE INCIDENTAL ADVERSE EFFECTS OF NON-NEUTRAL SEARCH?

A final reason for skepticism about search neutrality as a remedy for any incidental exclusionary effects of search “bias” is that it is likely to do more harm than good. Search neutrality could inhibit innovation, product improvements, and the evolution of search engines.⁴⁷ It may effectively return general search engines to their “ten blue links” origin, a result that few users would likely favor.

Prior to 2005, the lines between search and web content were clear. The role of general search engines, which then did not create web content or provide other services, was simply to generate a list of the most useful websites — the “ten blue links” — in response to search queries.⁴⁸ All three major search engines have since redesigned their products and evolved into integrated information portals, apparently in response to user desires.⁴⁹ Among the changes was the introduction of “universal search” for certain types of queries.

Universal search involves integrating the search engine’s maps, images, videos, or other information it has created or compiled into its search results, and prominently displaying that proprietary content ahead of the blue links. For example, in response to a “Newark to San Francisco” search query, Google (or Bing or Yahoo!) will include information on a few select flights (including their fares) and incorporate a flight search box, followed by traditional links to the major travel sites. Because the search engine’s content comes first, links to the travel sites appear further down the results page than they did before universal search was introduced. This typically reduces user traffic to those external websites, foreclosing them from some competition in the affected vertical markets. In essence, this was the core complaint against Google.

Under a search neutrality principle, a search engine would only be able to embed its proprietary content in the results if that content merits prominent placement via an “objective” standard.⁵⁰ In practice, no

47. See generally Crane, *supra* note 7.

48. See *The Evolution of Search in Six Minutes*, GOOGLE BLOG (Nov. 28, 2011, 10:41 AM), <http://googleblog.blogspot.com/2011/11/evolution-of-search-in-six-minutes.html#/2011/11/evolution-of-search-in-six-minutes.html>.

49. See *FTC Statement Regarding Google’s Search Practices*, *supra* note 1, at 2–3.

50. Theoretically, a search engine could also provide users with a choice of vertical content instead of automatically returning its integrated system in response to certain search queries. For example, when a user enters a business name as the search query, she could be asked to indicate whether she would like a map showing the business location and, if so, to check off a box indicating her preferred map provider (e.g., Mapquest, Google Maps, Bing Maps . . .), instead of automatically seeing a Google map integrated with the search results. I thank Peter Carstensen for this suggestion. However, the substantial drawback of this approach is that it is cumbersome and defeats an important purpose of universal search, which

integrated search results would likely be offered if the above were required.⁵¹ Even if it were feasible to fashion “objective” standards to determine which provider’s maps are qualitatively superior, for example, there are substantial disincentives for search engines to develop integrated systems if they must somehow formulate complex and cumbersome schemes to determine which vertical content (its own or a competitor’s) should be integrated.

To the extent that these design changes are quality improvements (and the FTC found that they were with respect to Google),⁵² a rule that effectively discourages and inhibits such improvements would likely be much more detrimental to consumers than the incidental exclusionary harms caused by a search engine favoring its own content. Such a result would contravene the widely accepted principle that antitrust law protects “competition, not competitors.”⁵³ While the cabining of search engines to their “ten blue links” would benefit a search engine’s *competitors* in vertical markets, its effects on users would almost certainly be negative.

Confining search engines to their original niche would also tend to distort competition in the larger Internet information market. Currently, there is fierce competition among Google, Facebook, Apple, and Amazon;⁵⁴ although these firms are popularly associated with different segments of the digital world, all have evolved and spilled into other sectors.⁵⁵ Regardless of how one chooses to define the relevant market or markets, few will dispute that intense competition among these firms exists, greatly benefiting consumers and the economy. Preventing general search engines from organically transforming themselves would only artificially interfere with the natural process of competition that is occurring.

is to provide users with the information they are seeking as quickly and seamlessly as possible.

51. See generally Crane, *supra* note 7 (arguing that search neutrality would freeze the search engine evolution).

52. *FTC Statement Regarding Google’s Search Practices*, *supra* note 1 (“Notably, the documents, testimony and quantitative evidence the Commission examined are largely consistent with the conclusion that Google likely benefited consumers by prominently displaying its vertical content on its search results page...[a]nalysis of ‘click through’ data showing how consumers reacted to the proprietary content displayed by Google also suggest that users benefited from these changes to Google’s search results.”).

53. *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quotations omitted).

54. See Manjoo, *supra* note 26.

55. See *id.* (describing how Amazon, Apple, Facebook and Google are all expanding beyond their boundaries and encroaching into one another’s space).

V. CONCLUSION

A search engine's favoring of its own property in its search results will usually have some incidental foreclosure effects in vertical markets. However, the FTC was correct in closing its investigation into Google's search practices after determining that Google did not selectively demote the ranking of competing websites to impede competition. Search neutrality is generally not a workable antitrust principle. This is not to suggest that a dominant search engine's search practices can never give rise to an antitrust violation. But any antitrust liability should be based on specific obstruction of competition or of the competitive process, and not merely on a dominant search engine's favoring of its own proprietary content in search results that has some collateral effect on competition.