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THE POWER OF GOOGLE: SERVING CONSUMERS OR THREATENING COMPETITION?

HEARING

BEFORE THE

SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

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CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

	Page
Feinstein, Hon. Dianne, a U.S. Senator from the State of California	5
Grassley, Hon. Charles, a U.S. Senator from the State of Iowa, prepared statement	20
Kohl, Herb, a U.S. Senator from the State of Wisconsin	1
Leahy, Hon. Patrick J., a U.S. Senator from the State of Vermont, prepared statement	217
Lee, Hon. Michael S., a U.S. Senator from the State of Utah	3
charts	219

WITNESSES

Barnett, Thomas O., Partner, Covington & Burling, LLP, Washington, DC	33
Creighton, Susan A., Partner, Wilson Sonsini Goodrich & Rosati, PC, Washington, DC	38
Katz, Jeff, Chief Executive Officer, Nextag, Inc., San Mateo, California	35
Schmidt, Eric, Executive Chairman, Google Inc., Mountain View, California	6
Stoppelman, Jeremy, Co-founder and Chief Executive Officer, Yelp, Inc., San Francisco, California	36

QUESTIONS AND ANSWERS

Responses of Thomas O. Barnett to questions submitted by Senators Grassley, Kohl and Lee	53
Responses of Susan A. Creighton to questions submitted by Senators Grassley and Kohl	65
Responses of Jeff Katz to questions submitted by Senators Grassley, Kohl and Lee	84
Responses of Eric Schmidt to questions submitted by Senators Blumenthal, Cornyn, Franken, Grassley, Kohl and Lee	102
Responses of Jeremy Stoppelman to questions submitted by Senators Kohl, Grassley and Lee	170

SUBMISSIONS FOR THE RECORD

Alschuler, John, Chair, Friends of the High Line, New York, New York, September 14, 2011, letter	178
Barnett, Thomas O., Partner, Covington & Burling, LLP, Washington, DC, statement	180
Camara, Karim, New York State Assembly, 43rd District, Kings County, Albany, New York, July 26, 2011, letter	195
Chiames, Chris, Vice President, Corporate Affairs, Orbitz Worldwide, Chicago, Illinois, statement	196
Creighton, Susan A., Partner, Wilson Sonsini Goodrich & Rosati, PC, Washington, DC, statement	198
Cumbo, Laurie A., MoCADA Founder & Executive Director, Brooklyn, New York, September 8, 2011, letter	209
Heastie, Carl, New York State Assembly, 83rd District, Bronx County, Albany, New York, August 15, 2011, letter	213
Katz, Jeff, Chief Executive Officer, Nextag, Inc., San Mateo, California, statement	214
New York Post, Garett Sloane, New York, New York, February 25, 2011, article	223

VerDate Nov 24 2008 11:11 Dec 21, 2011 Jkt 071471 PO 00000 Frm 00003 Fmt 5904 Sfmt 5904 S:\GPO\HEARINGS\71471.TXT SJUD1 PsN: CMORC

Page

New York Times, Jonathan Vatner, New York, New York, April 19, 2011, article 225
Rice, Arva R., President & CEO, New York Urban League, New York, New York, August 16, 2011, letter 228
Rudin, William C., Chairman, Abny, New York, New York, July 26, 2011, letter 230
Sampson, John, New York State Senate, Albany, New York, July 27, 2011, letter 231
Schmidt, Eric, Executive Chairman, Google Inc., Mountain View, California, statement 232
Simpson, John M., Consumer Advocate, Consumer Watchdog, Santa Monica, California, statement 240
Stoppelman, Jeremy, Co-founder and Chief Executive Officer, Yelp, Inc., San Francisco, California, statement 247
Terry, Angela, Therapy Wine Bar, Brooklyn, New York, August 5, 2011, letter 274
Titus, Michele, New York State Assembly 31st District, Queens County, Albany, New York, July 20, 2011, letter 276
Tosney, Jason, Vice President, Centro, Chicago, Illinois, letter 278
Wilshire, Albert, President Board Trustees, Brooklyn Music School, Brooklyn, New York, August 20, 2011, letter 280
Wright, Keith L.T., New York State Assembly 70th District, New York County, New York, New York, July 21, 2011, letter 281
Zaccaria, Gary, Salt Lake City, Utah, September 13, 2011, letter 283
Zuckerman, Bob, Executive Director, New York, New York, August 18, 2011, letter 295

THE POWER OF GOOGLE: SERVING CONSUMERS OR THREATENING COMPETITION?

WEDNESDAY, SEPTEMBER 21, 2011

U.S. SENATE,
SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC

The Committee met, pursuant to notice, at 2 p.m., Room SD–226, Dirksen Senate Office Building, Hon. Herb Kohl, Chairman of the subcommittee, presiding.

Present: Senators Feinstein, Schumer, Klobuchar, Franken, Blumenthal, Grassley, Cornyn, and Lee.

OPENING STATEMENT OF HON. HERB KOHL, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator KOHL. Good afternoon. Today this Subcommittee meets to consider an issue that affects everyone who searches or does business over the internet—in other words, almost everybody. We will examine how the world's dominant internet search engine, namely Google, presents its search results to consumers and treats the businesses it competes with.

Our inquiry centers on whether Google biases these results in its favor, as its critics charge, or whether Google simply does its best to present results in a manner which best serves its consumers, as it claims.

At the outset, I wish to stress that I come to this hearing with an entirely open mind, without any prejudgment of these issues. My goal is to provide both Google and its critics with a forum to air their views. In examining these issues, we recognize the incredible technological achievements of Google and the need to avoid stifling its creative energy.

At the same time, we need to be mindful of the hundreds of thousands of businesses that depend on Google to grow and prosper. We also need to recognize that as a dominant firm in internet search, Google has special obligations under antitrust law not to deploy its market power to squelch competition.

There can be no question of the astounding achievements of Google's search engine. Through the magic of its search technology, Google, a company literally started in a garage by two Stanford students less than 15 years ago, has done nothing less than organize all the billions of internet web pages into an easily accessible listing on the computer screen.

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Sixty-five to 70 percent of all U.S. internet searches on computers and 95 percent on mobile devices are done on Google's search engine. Millions of people every day run Google searches to find out the answer to nearly every question imaginable, including for the best and cheapest products and services, from electronics, to clothing, to hotels, to restaurants, to give just a few examples.

And businesses equally rely on Google to find customers. The search premise of Google at its founding was that it would build an unbiased search engine that consumers would see the most relevant search result first, and that the search results would not be influenced by the web page's commercial relationship with Google.

Its goal was to get the user off Google's home page and onto the website it lists as soon as possible. As Google's co-founder and current CEO Larry Page said in 2004, "We want you to come to Google and quickly find what you want, then we're happy to send you to the other sites. In fact, that's the point." However, as internet searches become a major channel of e-commerce, Google has grown ever more dominant and powerful and it appears its mission may have changed.

In the last 5 years or so, Google has been on an acquisition binge, acquiring dozens of internet-related businesses, culminating most recently with its proposed acquisitions of Motorola Mobility and Zagat's. It now owns numerous internet businesses, including in health, finance, travel, and product comparison.

This has transformed Google from a mere search engine into a major internet conglomerate, and these acquisitions raise a very fundamental question: is it possible for Google to be both an unbiased search engine and at the same time own a vast portfolio of web-based products and services? Does Google's transformation create an inherent conflict of interest which threatens to stifle competition?

In the last few years, internet businesses that compete with Google's new products and services have complained that Google is now behaving in a way contrary to free and fair competition. They allege that Google is trying to leverage its dominance in internet search into key areas of internet commerce, where it stands to capture from its competitors billions of dollars in advertising revenue.

Rather than fairly presenting search results, these critics claim that Google has begun to suddenly bias its search results in favor of its own services. This conduct has the potential to substantially harm competition for commerce on the internet and retard innovation by companies that fear the market power of Google.

Antitrust scrutiny is not about picking winners and losers, but it is about fostering a fully competitive environment so that consumers can fairly pick winners and losers. As more and more of our commerce moves to the internet, it should be the highest priority of antitrust policymakers that the internet remain a bastion of open and free competition, as it has been since its founding.

We need to protect the ability of the next Google to emerge, the next great website or application being developed in a garage in Silicon Valley or in Madison, Wisconsin.

Senator Lee, we would like to hear what you have to say.

STATEMENT OF HON. MIKE LEE, A U.S. SENATOR FROM THE STATE OF UTAH

Senator LEE. Thank you, Mr. Chairman.

Internet search is critical to economic growth in the United States and Google has long been a dominant force in this arena. Indeed, Americans Google so frequently and ubiquitously that the company's name has become a generic verb that means "to search the internet." In the United States, Google controls somewhere between 65 and 70 percent of the general internet search arena and more than 75 percent of paid search advertising, and 95 percent of mobile search.

Given its dominant position, most internet-based businesses rely on Google for a substantial share of their traffic in revenues. As a result, last year Google generated nearly $30 billion in search advertising revenues. Studies show what most of us know from experience, that the first few Google search results attract nearly 90 percent of all user clicks. Google's search ranking, therefore, has enormous power over the information users find, which websites receive traffic, and the amount businesses must pay to be found on the internet.

A former Reagan administration antitrust chief recently suggested that this market power has essentially made Google "a monopoly gatekeeper to the internet." Whether or not Google formally qualifies as a monopoly under our antitrust laws, one thing is clear: given its significant ability to steer e-commerce and the flow of online information, Google is in a position to help determine who will succeed and who will fail on the internet. In the words of the head of Google's Search Ranking team, Google is "the biggest kingmaker on earth."

Google has used its substantial advertising revenues to branch out into a multitude of secondary internet businesses, largely by acquiring more than 100 different companies. Google now offers YouTube video, Gmail, Chrome internet browser, Google-Plus social networking, the Android mobile Smart Phone operating system, and a host of services, including Google Maps, News, Books, Shopping, Places, and Flight Search.

With its recent purchase of Motorola Mobility, Google is now poised to get into the business of mobile handset manufacturing. With Google's expansion into so many areas, a large number of businesses, advertisers, and consumer groups have raised concerns regarding Google's activities, suggesting the company may be acting in deceptive and anti-competitive ways. As a result, Google is under investigation by antitrust authorities, both in the United States and abroad. This Subcommittee has oversight of antitrust enforcement and competition policy, and I appreciate Chairman Kohl's leadership in calling a hearing to address this important topic.

From its inception, Google's stated goal was to have users leave its website as quickly as possible, but over time the company appears to have changed its approach, to steer users not to other businesses and sources of information, but to its own complement of competing services.

Google has worked hard to cultivate the public perception that its searches are comprehensive and unbiased, but there is growing

concern that Google employs different search ranking algorithms and more attractive visual displays to advantage its own secondary sites and products, to the detriment of competing specialized search sites and to other disadvantaged businesses.

There is also evidence that Google has taken information and reviews from competing specialized search sites like Yelp and Trip Advisor, used that data as part of its own services, and in the process demoted the search result rankings of the sites from which Google acquired that information.

In addition, some reports suggest that Google has taken steps to impede competing search engines from crawling, indexing, and returning search results to its YouTube content and book scans. Access to these popular stores of content is crucial and critical to enabling other search engines to compete.

There are also allegations that Google has achieved and sought to maintain its dominance in search by imposing exclusivity restrictions and dealings with advertising partners, perhaps in an effort to block competing search tools. This includes a broad array and a broad network of exclusive search syndication deals with websites like AOL and Ebay, exclusive arrangements for Google's search box to appear on browsers like Mozilla Firefox and Safari, and agreements that Google be the exclusive default search provider on the I-Phone and on many Android models.

Similarly, Google's contracts with advertisers apparently impose limits on the advertiser's ability to transfer data associated with Google's advertising platform to any other advertising platform using third party tools that would make the process simple, or even automatic.

Studies by a Harvard Business School professor concluded that the net effect of these restrictions is to reinforce the tendency of small-to medium-sized advertisers to use only Google Ad Words to the exclusion of competing platforms. Many observers are also concerned that Google may be seeking to prevent Smart Phone manufacturers and customers who wish to use the Android platform from using competitors' services, for example, by tying Android to Google's location program in order to exclude competing geo-location services.

In assessing each of these concerns, the primary focus of our antitrust analysis should be consumer welfare. Growing complaints that Google is using its search dominance to favor its own offerings at the expense of competition deserves serious attention, especially if consumers are misled by Google's self-rankings and preferential display.

Such bias would deny user traffic and revenue to competing sites, depriving those sites of resources needed to develop more innovative content and offer better services to customers. When competing websites lose traffic, they are forced to increase their paid search advertising on Google, ultimately leading to increased prices for consumers.

As a conservative Republican who favors free markets, I believe that ensuring robust competition in this critical area of our Nation's economy will benefit consumers, it will spur innovation, and it will lead to job creation. In this instance I believe that preserving

competitive markets through antitrust principles can help forestall the imposition of burdensome government regulation.

Thank you, Mr. Chairman.

Senator KOHL. Thank you, Senator Lee.

I would like, now, to introduce our first witness who will be Mr. Eric Schmidt. Mr. Schmidt has served as the executive Chairman of Google since April of this year, and from 2001 to 2011 was the chief executive officer of the company.

We will introduce our second panel before they testify, but I would now turn to Senator Feinstein who would like to make remarks in order to introduce our witnesses from California.

Senator Feinstein.

STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Thank you very much, Mr. Chairman. I really appreciate this very special privilege.

The three gentlemen you are going to hear from today come right from the heart of the San Francisco Bay area. I have known the Chairman of Google for many years. I have always known him as a forthright man, filled with integrity. He has a long history in Silicon Valley, and at the helm of a number of America's most innovative companies. He has been with Google since 2001.

He has helped Google grow from less than 1,000 employees to 28,000, 13,000 of whom are in California. That is a 45 percent growth in employment, even in the most difficult times of the past 2 years, with 5,000 new hires in California in about that same time. Under his leadership, Google has been helping business throughout the Golden State, last year alone providing $15 billion in economic activity to nearly 300,000 small businesses, publishers, and nonprofits.

Mr. Jeff Katz, the CEO of Nextag, is from San Francisco. This is a price comparison website company in San Mateo that allows people to search for products and see lists of available online prices for those products. Mr. Katz has extensive experience in the internet and travel industries, having held a variety of positions at American Airlines, serving as president and CEO of Swiss Air, being the Chairman and founding CEO of the well-known travel website Orbitz, and serving as president and CEO of Leapfrog Enterprises, a maker of technology-based learning products, among other endeavors. He holds a master of Science degree from my alma mater, Stanford, among other degrees.

Finally, Jeremy Stoppelman, co-founder and chief executive officer of Yelp. Joining Mr. Katz on the second panel will be Jeremy Stoppelman. He is co-founder and CEO of a small, innovative company from San Francisco whose website allows people to search for local businesses or types of businesses and find profiles of the businesses in its results, including customer reviews and rankings, photographs, and other similar businesses. He worked as the vice president of engineering at PayPal before dropping out of Harvard Business School to co-found Yelp with Russell Simmons.

As you can see, Mr. Chairman, you have three very well-qualified Bay area citizens. I hope they tango rather than tangle. Thank you very much for this.

Senator KOHL. Thank you very much, Senator Feinstein.

We again thank all witnesses who are appearing here today. I would like you all now to rise and step forward and raise your right hand and take the oath as I administer it.

[Whereupon, the witnesses were duly sworn.]

Senator KOHL. Thank you all.

Mr. Schmidt, we would love to hear what you have to say.

STATEMENT OF ERIC SCHMIDT, EXECUTIVE CHAIRMAN, GOOGLE, INC., MOUNTAIN VIEW, CALIFORNIA

Mr. SCHMIDT. Well, good afternoon, Chairman Kohl, Ranking Member Lee, and members of the subcommittee. Thank you for inviting me here today.

I want to start, first, by taking a step back. Twenty years ago, a large technology firm was setting the world on fire. Its software was on nearly every computer, and its name was synonymous with innovation, but that company lost sight of what mattered and Washington stepped in. I was an executive at Sun, and later at Novell, at the time.

In the years since, many of us in Silicon Valley have absorbed the lessons of that era. So I am here today carrying a long history in the technology business—thank you, Senator—and a very short message about our company: we get it. By that I mean we get the lessons of our corporate predecessors. We also get that it's natural for you to have questions about our business, and that's certainly fine.

What we ask is that you help us ensure that the Federal Trade Commission's inquiry remains a focused and fair process, which I'm sure you'll do, and that we can continue to create jobs and building products that delight our users.

So before I talk about our perspective on the state of technology in general, I would like to start by explaining how we think about our own business and a few of the principles that guide the decisions, which I am sure you will want to talk about.

First, always put consumers first. Last year alone we made more than 500 changes to improve search. It is not an easy task. Our challenge is to return the most relevant answers first. This means that not every website can come on top, it is a ranking problem. And there are definitely complaints from businesses who want to be first in rankings even when they are not the best match, as best we can tell for a user search.

Second, focus on loyalty, not lock-in. We do not trap our users. If you do not like the answer that Google search provides you can switch to another engine with literally one click, and we have lots of evidence that people do this. If you want to leave other Google services, we make it easy for you to do so. You can even take your data with you without any hassle. We want consumers to stay with us because we are innovating and making our products better, not because they are locked in.

Third, be open, not closed. Open technology includes both open source, meaning that we release and actively support code that helps grow the internet, and open standards, meaning that we adhere to accepted standards and, if none exist, we work to create the standards that can improve the entire internet.

Fourth, be transparent. We share more information about how our search engine and other products work than any of our competitors and we give advertisers detailed information about their performance and return on investment.

Finally, the only constant is change. Ten years ago, no one would have guessed—certainly I, and I do not think anybody else—that the vocabulary in economics would look like it does today. No one knows what it will look like in 1 year, or 5 years. So despite what others say about the American economy, I think our future in America is very bright. There is no doubt that we're facing difficult times. There has never been a more exciting time to be part of a technology business, as I think you will see from all of the companies represented this afternoon.

While others have given up on the American economy, Google is certainly doubling down. We are investing in people. In 2002 we had fewer than 1,000 employees, and again, now we have more than 24,000 and we are hiring. Earlier this year we announced that 2011 would be our biggest hiring year yet, and we are clearly on target to meet, or even beat, that.

We are investing in mobile, as was earlier suggested. Just look at our plans to acquire a great American company, Motorola Mobility. We believe that our proposed acquisition of Motorola, like many previous moves that we have made, is good for competition, innovation, and the American economy. It is a big bet, but we are confident that this acquisition will lead to growth and innovation in mobile technology, which is what we care about.

We are also investing in local. Ninety-seven percent of the people look online for local goods and services, but only 63 percent of—actually, 63 percent of America's small businesses do not have a website at all. This is a missed opportunity, in my view. So we started an initiative to help small businesses get online. We've partnered with Intuit and others to offer local businesses, et cetera.

Last year alone, Google search and advertising tools provided $64 billion in economic activity to other companies, publishers, and nonprofits in the United States, and we are very, very proud of this. Of course, this year will be even greater.

So without exaggeration, high-tech is the most dynamic part of the U.S. economy. Advertising-supported internet alone is 3.1 million jobs, according to the study I just read, and according to McKenzie, the internet was responsible for 15 percent of America's GDP growth in the last 5 years.

The internet is also home to some of America's most successful companies—Amazon, Apple, Facebook, and Google. We compete hard against each other and we welcome that competition. It makes us better and it makes our competitors better, too. But most importantly it means better products for our users.

So today it's Google's turn in the spotlight and we respect the rule that you all have, and the agency, of course, in this process. I do ask you to remember that not all companies are cut from the same cloth and that one company's past need not be another's future. We live in a different world today and the open internet is the ultimate level playing field.

So if you keep that in mind, then we believe that the Federal Trade Commission's inquiry will reveal an enthusiastic company

filled with people who believe that we have only scratched the surface of what's possible. That passion to do better will not only serve our users well, but it will serve our Nation well by helping create new jobs and economic growth that our wonderful country needs.

So, thank you very much for your time and for this hearing.

[The prepared statement of Mr. Schmidt appears as a submission for the record.]

Senator KOHL. Thank you very much, Mr. Schmidt. We appreciate what you just had to say. Now we will begin our inquiries of you individually. We will ask questions for a maximum of 7 minutes.

Mr. Schmidt, many industry experts believe that the central mission of Google has fundamentally changed since its founding. At the outset, Google's goal, according to CEO Larry Page, in 2004, was to get consumers off Google's page "and send you to the other sites." Since that time Google has acquired or expanded into internet businesses in many diverse areas, including travel, videos, and shopping. Now we hear you say you want to provide consumers answers to questions, not merely links to websites that provide those answers.

What do you say to those who argue that there is a fundamental conflict of interest between only providing unbiased web links and now providing answers, when you own many of the services providing the answers? As a rational business trying to make the most profit, would we not expect Google to favor its products and services in providing these answers?

Mr. SCHMIDT. I am not sure Google is a rational business trying to maximize its own profits, Senator. As we addressed in our founding of our—the IPO letter, in the founder's letter. Google is run under a set of principles that are really quite profound within the company. One of the most important principles is, solve the problem that the consumer has. So 10 years ago, the best answer may have been the 10 links that we saw, but the best answer today may be that we can algorithmically compute an answer and do it quicker. Think of it as if you are looking for an answer, you want the answer quickly, and speed matters, especially at the scale that we are at. So if we can calculate an answer more quickly, that's an improvement for the end user.

Senator KOHL. I appreciate your response, but in a large—in measure, it's another way of saying, trust us, that we are going to do, and we do do, and we will do "the right thing." Is merely trusting Google to do the right thing really sufficient, given your clear business incentives to maximize the value of your company? Shouldn't we be guided by the words of a great president, Ronald Reagan, who said, "Trust yes, but verify"?

Mr. SCHMIDT. Well, in fact, I completely agree with "trust but verify" and I hope that this is in the process that we're going through right now. The ultimate correction against any mistakes that Google makes is how consumers behave. We live in great fear every day that consumers will switch extraordinarily quickly to other services. One of the consequences of the open internet is that people have choices that they did not have in previous generations.

In every case, the site that was—is now lower ranked is still available if you just type their name into your browser and off you

go. In all cases, what we're trying to do is, we're saying that our customers want quick and accurate answers and, if you will, the guide or the way we correct ourselves is if they switch. We know that people like what we do because we have an extraordinarily extensive testing regime.

It may be worth just describing briefly that we have some number of thousands of engineers who work on search. We think they're the best in the world and we're very proud of them, and they mathematically compute, with more than 200 signals, a whole bunch of insights of how to rank things. It's one of the hardest problems known in science because of the scale of the internet.

And because we do it so well, we think we have earned that position that you were describing, but nevertheless, what happens is that when we do that we actually get down to doing 1 percent testing, so that what happens is we actually know, we do side-by-side tests to know that our—that we are producing what customers want.

Senator KOHL. During a conference in 2007, Marissa Meyer, one of Google's top executives, discussed how Google placed its own products and services on its search results page. Speaking of the Google Finance service, she said that in the past Google ranked links "based on popularity. But when we rolled out Google Finance, we did put the Google link first. It seems only fair, isn't that right? We do all the work for the research page and all these other things, so we do it—put it first. That has actually been our policy since then."

This is your employee. "So for Google Maps, again, it is the first link, so on and so forth. After that it's ranked usually by popularity." So when she made that comment back in 2007 she was speaking, in her mind, accurately. How do you measure what she said then and what you are telling us now?

Mr. SCHMIDT. Well, again, I was not there, so maybe I should use my own voice on this question. There's a category of queries which are not well-served by the 10 links answer. You mentioned in Marissa's quote Maps. When people want a map, they actually want a map right then and there. So over a 6- or 7-year period, we not only acquired a set of companies but have also invested hundreds and hundreds of millions of dollars in producing what we think are technologically and, from an experience perspective, the best mapping products around.

We surfaced those because all of our testing, plus our own intuition, is that when somebody types in an address they actually want to have a map and we show it to them very quickly. It would be very difficult to do that with the 10 links model. So again, if we were forced to stay within the 10 links model, we would not be able to do that kind of innovation. Furthermore, I should mention that all of our competitors have similar approaches and similar products to the Maps places, and other things.

Senator KOHL. Let me just say once again, she said, "When we rolled out Google Finance we did put the Google link first. It seems only fair. We do all the work for the search page and all the other things, so we do put it first." Now, you recognize, of course, if that's company policy, that's very contrary to what you're telling us here today.

Mr. SCHMIDT. Well, again, I can speak for the policy of the company during my tenure, and I represent it as I implemented it and understood it. In our case we implemented it the way I described it. I'll let Marissa speak for herself on her quote.

If you take a look at Google Finance, we started off by presenting Google links, as you described, and then we decided that it would be better to have a simple, quick "stock quote," if you will, tool and we licensed that technology from the Nasdaq, the NYSE, and others, and that's the source of her answer. So again, we moved from the standard 10 links answer to this, what we call a simple answer.

And then what happened after that, of course, is right below it you see all of the top engines. If you do the query today, not only will you see that we show all of the other competitors, and ideas, and great sources of information—about information, but we also have hot links, as they're called, right below our answers, including, for example, Yahoo Finance, which is probably the most popular of them.

Senator KOHL. But to be listed first is an advantage, isn't it?

Mr. SCHMIDT. In this particular we don't actually list anybody first. We have an insertion which summarizes the answer, and typically the Yahoo answer comes right after our answer. It's easier if I describe it. If you want a stock quote, we'll just give you the stock quote, and then right after that we'll show you links to, for example, Yahoo Finance and the others—the others right there. So I disagree with the characterization that somehow we were discriminating against the others.

Senator KOHL. Thank you very much.

Mr. Lee.

Senator LEE. Thank you, Mr. Chairman. And thank you, Mr. Schmidt, for being with us.

Let me get right to the point of one of my concerns. Are Google products and services offered by Google subject to the same search ranking algorithmic process as all other organic search results?

Mr. SCHMIDT. They are—they are when they're actually in ranking in the answers that you're describing, but I think the core question that both of you addressed in your opening statements was this question of where we synthesize or we come up with an answer to a question. So again, I want to just repeat that if we know the answer, it is better for the consumer for us to answer that question so that they don't have to click anywhere, and in that sense we tend to use data sources that are our own because we can't engineer it any other way.

Senator LEE. OK. OK.

But I'm really not asking whether you're giving the right information, whether you're giving information that is—you know, that you regard as most helpful to the customer. I'm asking whether your own secondary services, services that Google itself offers, are they subject to the same test, to the same standard as all the other results of an organic algorithmic search?

Mr. SCHMIDT. I believe so. As I understand your question, I believe the answer is yes. I'm not aware of any unnecessary or strange boosts or biases. So, for example, you'll see everything is

intermixed in a way that often competitors' links are in along with, for example, YouTube.

Senator LEE. OK.

I'd like to show a visual aid. Let's bring up the first slide if we can, Mike. This is a chart that reflects the results of a study comparing the search rankings of three popular price comparison sites and those of Google Shopping. Now, the three popular price comparison sites' results are depicted in various shades of green, and the Google results are depicted in red.

These particular data points were gathered in April of this year and they represent the ranking results from 650 shopping-related key word searches. While Nextag, Price Grabber, and Shopper all show significant variation, ranking first for some and near 50th for others, Google has a very consistent rate of success. Google Shopping ranked 3rd in virtually every single instance.

So to be clear, your testimony a moment ago was that these Google Shopping rankings almost exclusively in the third spot are in fact the result of the same algorithm as the rankings for the other comparison sites?

Mr. SCHMIDT. There's a conflation of two different things going on in this study, which I've not seen so I shouldn't comment beyond that. There's a difference between sites that do product comparison and sites that offer products themselves.

Google Products search is about getting you to a product, and so we tend to look for the product as opposed to the product comparison in this particular case, which is why the product is more highly ranked than the result of a product comparison site. If you did the same study with all of the other product sites, you would find a very different result.

Senator LEE. OK. OK.

So if we called this a product search, if we called the result a Google product result, that is not subject to the same algorithmic search input that brings about the other organic algorithmic search results?

Mr. SCHMIDT. Again, I'm—I'm—I'm sorry I may have confused you, and I apologize. We do product search ranking. Things like—the companies that are mentioned that are price comparison shopping. They're different animals, if you will. They do different—they're important, they do different things. Google Products search is about searching for specific products. In that sense, products search does something similar to what Price Grabber, Nextag, and Shopper do, which is why the confusion exists. It's not a—it's not a—it's an apples-to-oranges comparison.

Senator LEE. Why is it that they're always 3rd? I mean, it seems to me that this is an uncanny——

Mr. SCHMIDT. Well, again, I——

Senator LEE [continuing]. Statistical coincidence, if we can call it that. Third every single time. I mean, there are a few outliers where you're 1st, or you're 3rd, or where you're 4th. You're also, interestingly enough, occasionally 11th. You're never 12th. You're certainly never 50th or anything close to it. And yet, every one of those others will find themselves everywhere along this spectrum, everywhere. You're always 3rd—almost every time. How do you explain that?

Mr. SCHMIDT. Well, again, I'd have to look at—at the specific results because we ranked——

Senator LEE. Well, we've got the results right here. Just look at——

Mr. SCHMIDT. No, I'd need to see—I'd actually need to see the technical details to give you a direct answer. But in general, what's happening here is you're having product coparison sites and their results are being compared against Google answers, which are products, and the two cannot be properly compared. That's why I think you're seeing such a strange result.

Senator LEE. OK. OK.

It seems to me, for whatever it's worth, when I see this, when I see you magically coming up 3rd every time, that seems to me that—I don't know whether you call this a separate algorithm or whether you have reverse-engineered one algorithm, but either way you've cooked it so that you're always 3rd.

Mr. SCHMIDT. Senator——

Senator LEE. Let's move on to the next slide.

Mr. SCHMIDT. Senator, may I—may I simply say that I can assure you we've not cooked anything.

Senator LEE. Well, OK. You have an uncanny ability and an uncanny natural attraction to the No. 3 in that instance.

[Laughter.]

Senator LEE. Let's look at this search result. This one is the product of a search query. Here it's a search query for a particular camera model when we bring up a Google Product listing. Now, it's near the middle of the search screen result. You know from your research that the middle of the first screen is the area where users are most likely to focus. That's the prime real estate online, correct?

Mr. SCHMIDT. Actually, clicks go from the top to the bottom.

Senator LEE. OK.

Mr. SCHMIDT. So——

Senator LEE. But you want to be at or near the top of the list. That's——

Mr. SCHMIDT. In general you want to be on the first page and among the first entries.

Senator LEE. OK.

Mr. SCHMIDT. Yes, that's correct.

Senator LEE. Now, among the natural search results the Google listing, the Google Products listing is the only result that includes the photo. We've highlighted it here in blue just to demonstrate here that it's different, but there's nothing online that actually differentiates it as necessarily a Google listing. There's nothing that indicates that this is an advertisement, that it's even Google, and it's also the most prominent given its placement.

Mr. SCHMIDT. So—so again, that's not an ad. That is an organic search result which is triggered by a product search data base which we have gathered by searching and ranking offerings from many different vendors. If you actually click within that, you'll see that you'll actually go to the vendor that will then sell you the product.

Senator LEE. OK. I'm going to want to follow up on that, but I see my time's expired.

Thank you, Mr. Chairman.

Senator KOHL. Thank you, Senator Lee.

Senator Schumer.

Senator SCHUMER. Thank you, Mr. Chairman. I want to thank you for holding this hearing. I want to thank Mr. Schmidt and the other witnesses for being here to testify.

First, I share my colleague's passion for maintaining free and fair competition in the marketplace, especially in the high-tech sector. Google and its competitors are building the infrastructure of the future economy and it's critical that technological growth not be unfairly constrained. That's how all markets work, but particularly in this area where innovation really matters and things change quickly.

So I think that the FTC investigation will help get to the heart of the facts behind the kinds of allegations we're hearing today, and that's a good thing. So it is important we examine market dominance with a critical eye, especially in an industry that's a foundation of our economic future.

Now, I've been particularly passionate about the growth of the high-tech sector because it has been, and will be, critical to the future growth of New York. I realize that when most people hear about high-tech sectors in the United States they don't necessarily think of New York, yet by many measures New York is No. 1 or two when it comes to employment or investment in the entire sector. We're now the second-largest recipient of high-tech venture capital in the country. We've passed Boston this year and only trail Silicon Valley in the amount of high-tech venture capital invested. This is the statistic that is most amazing to me.

By some measures the New York metropolitan area actually has more workers in the high-tech industry than any other region of the country: over 300,000 men and women, 22,000 firms that are classified as high-tech companies. That's right, we have more than Silicon Valley, more than Boston, more than Washington. It's sort of hidden by some of the other industries. J.P. Morgan, I've been told, has more computer programmers than companies like Google or Microsoft. So it's very important to New York.

Google, frankly, has been a very important part of that equation in New York. Last year Google bought the largest office building in Manhattan. Google employs around 3,000 people in New York, that's double its employment rate from 2010, and in 2010 it provided $8.5 billion of economic activity for New York businesses, websites, publishers, and nonprofits, and I'd like to ask unanimous consent, Mr. Chairman, a number of letters I've received from members of the New York legislature, New York businesses, describing the significant role Google plays in New York's economic development.

Senator KOHL. Without objection.

[The letters appear as a submission for the record.]

Senator SCHUMER. But obviously with that great power Google has, as my previous colleagues have mentioned, great responsibility. So I wanted to get a sort of fix on this. Frankly, the future of New York's high-tech is lots of little companies. There are hundreds of them that are burgeoning, one or two of whom might grow into a Google or a Facebook or one of the others. So if Google were

being rapacious and were shutting down the ability of these small companies to function, it would hurt New York.

Every 6 months or so, I meet with some of the leading—the heads—the CEOs of the high-tech companies in New York, the growing—the little ones, and we talk about problems they face. We don't have a good—you know, we don't have enough engineers in New York, we're trying to build an engineering school. Immigration is a huge problem to them. We need reform of H1–B visas, things like that, which we're working on in the Immigration Committee.

But without even prompting them—and I think this is important for my colleagues to hear—there are over a dozen companies at the table of different types, each of whom had 100, 200, 300 employees, and most of whom hadn't existed a couple of years ago. And I asked them, what do you think of Google? It was off the record. Is Google rapacious? Are they competing with you, trying to steal what you do? I've been through this before in previous hearings where one of New York's companies, Kodak, I thought was being very unfairly taken advantage of by another large high-tech company.

Or are they—generally do they have a more positive attitude of being open, of encouraging, et cetera? Frankly, I expected them to attack Google. That would be the natural thing, you'd think. But they didn't. Four-fifths of them said Google is a positive force, much more positive than most of the other large companies they deal with. They said "it helps us more than it hurts us", their words. The consensus was among them, Google is actually pretty good. We don't see them as rapacious. It surprised me and it's influenced me.

And so I think my colleagues ought to hear that, that while it's important of course that we pay attention to competition in the high-tech sector—I agree with you, Senator Lee, that that's the best way to get growth—it's also important we focus on growth and investment and jobs. And so I thought I'd just share that with my colleagues because I think it's interesting to hear and it was not—you know, there was no—they had no idea I was going to ask about Google, it was off the record. They are very frank with me about a lot of things, including people's politics and things like that. OK.

Now, I have a question for you that's specific for New York, and then a couple of general questions. Well, I don't have too much timing remaining. But last year Google selected Kansas City as a site for your new ultra-high speed internet service. That really helped Kansas City. The Hudson Valley is very eager to be another test place for your network. We have IMB there, we have a lot of high-tech industry. It's growing, but it's being hindered by a lack of internet capacity. Would you agree to consider the Hudson Valley as a future test site for your broad-band project?

Mr. SCHMIDT. I think the answer is absolutely. I've been there and it's both a great technology place and also a wonderful natural resource. What we're doing in Kansas City is we're actually experimenting with a new model for broad-band, different pricing, different speed, and so forth, and if it works I think it has an opportunity to really change the discussion of broad-band in this country. We want it to succeed first in Kansas City, so absolutely.

Senator SCHUMER. And last question: we've heard your answers here, but I'm sure you have to think about this because you're always a growing and evolving company. What do you think Google could be doing better to foster competition that you're not doing now that you could do to help all those little companies grow into big, successful companies?

Mr. SCHMIDT. I'm always interested in creating greater platforms for innovation. If you take a look at Android today, 550,000 phones—perhaps others will ask about this—the number of new platform opportunities for new companies to build mobile apps on Android is very exciting. We could invest a lot more money in developer support and platform support for the industry that will be built around the platforms that Google is building. I've always felt that that's something we could invest even more in.

Senator SCHUMER. My time's up, Mr. Chairman. Thank you.

Senator KOHL. Thank you very much, Senator Schumer.

Senator Cornyn.

Senator CORNYN. Thank you, Mr. Chairman.

Welcome, Mr. Schmidt.

Mr. SCHMIDT. Yes. Thanks, Senator.

Senator CORNYN. Mr. Schmidt, I'm a frequent user of your product and I've had—learned a lot when I've had a chance to visit your facilities in California. It is a marvel of modern technology. I have to confess that when I read the non-prosecution agreement between Google and the U.S. Justice Department, it gave me some concerns and I just want to give you an opportunity to comment on that because, since the Chairman talked about trust, we quoted Ronald Reagan, talked about "trust and verify", I just want to know how you put this into the context of what I would regard generally as a very positive contribution to productivity and technology.

But the non-prosecution agreement between Google and the Department of Justice, dated August the 19th, basically Google admits to helping online pharmacies illegally sell hundreds of millions of dollars of potentially counterfeit and tainted prescription drugs to U.S. consumers. And as a result, as you know, Google paid a—what is reported to be one of the largest criminal penalties levied in cooperation in U.S. history, $500 million.

And just quoting: "As early as 2003, Google was on notice that online Canadian pharmacies were advertising prescription drugs to Google users in the United States through Google's Ad Words advertising program. Although Google took steps to block pharmacies in countries other than Canada from advertising in the United States through Ad Words, Google continued to allow Canadian pharmacy advertisers to geo-target the United States in their Ad Words advertising campaigns. Google knew that U.S. consumers were making online purchases of prescription drugs from these Canadian online pharmacies."

In this document, Google admitted to knowing at the time that many of these Canadian online pharmacy advertisers distributed prescription drugs, including controlled substances, based on an online consultation rather than a valid prescription from a treating medical practitioner. And it was not until 2009 when Google became aware of the DOJ's investigation of its advertising practices in the online pharmacy area that Google took a number of signifi-

cant steps to prevent the unlawful sale of prescription drugs by online pharmacies to U.S. consumers.

So I want to give you the opportunity, Mr. Schmidt, to put that in context so we can get a complete and accurate picture of Google as a corporate citizen, and I think it also speaks directly to the issue of trust.

Mr. SCHMIDT. Well, Senator, thank you. And again, all of that is generally quite correct. We regret what happened and we entered into the agreement that you named and cited from. Unfortunately, as part of that agreement—and I've been advised very clearly by our lawyers—that we have an agreement with the Department of Justice, that we are not to speak about any of the details of it, so I'd have to ask you to speak to the Department of Justice for more of that.

All I can——

Senator CORNYN. Is that—is that in the 15-page agreement?

Mr. SCHMIDT. It's in there somewhere. Yes, sir. And so in any case the important thing for me to say is that the conduct that was covered is not—has nothing to do with any of our current advertising practices or policies. In other words, it was a historical event.

Senator CORNYN. Well, was it the result of oversight or inadvertence, or were there some employees in the company that were doing this without your knowledge or the——

Mr. SCHMIDT. Well, certainly not without my knowledge. Again, I've been advised—unfortunately I'm not allowed to go into any of the details, and I apologize, Senator, except to say that we're very regretful and it was clearly a mistake.

Senator CORNYN. My counsel advises me that, under the agreement, you're not allowed to contradict the agreement, although you can comment on it. Is your understanding different?

Mr. SCHMIDT. Let me ask my counsel. Again, I'm not allowed to go into the details or characterize it beyond the—beyond what has been cited in the agreement. We absolutely regret what happened. It was a mistake and we certainly apologize.

Senator CORNYN. Well, do you disagree with the characterization that I gave, or the words——

Mr. SCHMIDT. I agree with you, Senator. Yeah.

Senator CORNYN. And you've taken steps to make sure that that sort of thing never happens again?

Mr. SCHMIDT. Absolutely. And again, I say that with great regret.

Senator CORNYN. Mr. Schmidt, of course this is the Antitrust Subcommittee. Would you agree with me that at some point it becomes illegal under the antitrust laws to insist that customers of one product buy another separate product, generally called tying?

Mr. SCHMIDT. Yes. I'm not an attorney, but my general understanding is that that's correct.

Senator CORNYN. Do you believe that your mobile Android operating system—your mobile operating system, Android, has reached that point? It's about 40 percent of the market and growing fast, correct?

Mr. SCHMIDT. As a bit of background, as I mentioned earlier, Android is on its way to becoming the most successful mobile platform. We're extraordinarily proud of this. As I say, we have

550,000 activations and the Android operating system is, first and foremost, freely licensed. That is, there's no fee whatsoever to use it. Speculating on the basis of your question, it turns out that it's possible to use Google search along with Android, but it's expressly also possible to not use Google search. So the answer is, that's not an example of—of the—of the case you were describing.

Senator CORNYN. Can Google design Android so that other applications cannot work as well as Google applications? For example, the Gmail application will always be faster than the Yahoo mail application. Is that possible?

Mr. SCHMIDT. I'm sure that's not true in general because under the rules of open source it's possible for anyone to take open source and modify it in any way possible. So anything that we did, which we wouldn't do, that would advantage our own apps would be reversible by somebody because we give them the source code.

In other words, the—historically the problem in this case was that there was some hidden feature that a previous company would do that wasn't visible. Because Android source is made available to everyone, you can see it and we can't—we couldn't choose that if we wanted to.

Senator CORNYN. Thank you. My time's up.

Senator KOHL. Thank you very much, Senator Cornyn.

Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much, Mr. Chairman, and thank you for holding this important hearing. We all know that Google is a big component of the internet. I was going my own research as people were talking here, comparing—Googling my name—which I'm sure no one on this panel, no Senator, has ever Googled their own name. But I Googled my name on Google and then I used Bing as well.

I will note that Google, for a fourth entry, beating out my own Facebook page, featured a column that my dad wrote for an online newspaper on Sunday about the Viking game, in which he says, "The laws of chance are basically silent on the odds of another football team matching the mind-bending performance of the Minnesota Vikings on Sunday."

[Laughter.]

Senator KLOBUCHAR. So Bing, luckily, does not feature that article at all for the Vikings. But it was making me think about how you do these rankings. According to some remarks attributable to Google in the recent *Minneapolis Star Tribune* article, Google uses nearly 200 different factors to determine rankings. I know Senator Lee went through some of this with you, and Google changed its ranking formula, according to this article, about 500 times in 2010.

Obviously these change have a big impact. For example, the difference between being ranked first and being ranked second is that the first-ranked result gets about 35 percent of the clicks, the second result I believe only gets about 11 percent, and when Google changes its formula, companies that were once first might end up being on the second page, or even further down the line.

Businesses are constantly telling me how they want certainty, and I know the same time Google is innovating and changing its algorithm to improve its product. But do you think companies

should have a right to expect more certainty in how they're being ranked?

Mr. SCHMIDT. In the situation that you're describing, I have a lot of sympathy for the business whose ranking has gone down. There's no question that natural search results do drive revenue, traffic, popularity, and so forth, so when we make a change, there are ancillary or unintended consequences such as that. It's important to know that at the same time company A is pushed down, another company goes to the top. And we are the business of ranking, and by definition those ranking decisions are not perfect. They could be—you could argue them one way or the other.

Our algorithms are not specific to a specific company, so you can have a situation where the ranking has changed for no particularly good reason and the business feels upset. On the other hand, there's another business that got, from their perspective, a surprising boost and they're not the ones that are complaining. So from my perspective, I—we don't know how to be more—more precise with respect to the rankings because, as our algorithms improve, we have to touch a billion people. We make a change roughly every 12 hours in our ranking. Most of them are relatively minor. In the article I think that you're referring to——

Senator KLOBUCHAR. Yes. Actually there's a small business that makes above-ground pools in Browns Valley and they had to—they said that they paid over $40,000 for an online advertisement to make up for the fact that they had been put down in the rankings. I think they freely admitted how important Google was to their business——

Mr. SCHMIDT. Yeah. And again——

Senator KLOBUCHAR [continuing]. But you could see the cost it was for them.

Mr. SCHMIDT. No. There's—there's absolutely no question that it's a cost. And again, we don't know how to do it with more certainty, given that we're always focused on improving our algorithms based on competition and the principles that I described earlier about user testing. We did make a large change approximately 6 months ago which touched a lot of firms which had to do with low-quality content farms, which this particular example is not, but that's relatively rare when we make such a change.

Senator KLOBUCHAR. One other issue that's come up to my attention is there's reports that Google and the associated websites participate as bidders in the auctions that Google holds for search advertisements. Does Google or its associated companies participate in those auctions?

Mr. SCHMIDT. You're referring to the auctions that Google runs?

Senator KLOBUCHAR. Uh-huh.

Mr. SCHMIDT. So we run an auction around advertising. We do occasionally show what are called house ads, and—but we—so in that sense we participate in the auctions but we try to limit that for obvious—for obvious reasons. It's a very tiny number.

Senator KLOBUCHAR. OK.

One thing that I've been focused on is the stealing of intellectual property, books, movies, music, just the money that's been going out of our country because of that. And, you know, what happens sometimes, if you type in a legitimate song or you type in a legiti-

mate movie, you might be steered in some of the top rankings to an illegitimate site. And is there anything more that Google can be doing to take responsibility for this? This is obviously a different issue than some of the antitrust things, but I'm very curious about it. It's a very important issue.

And again, we agree with—that there is a real problem here. We have taken the position that we have to represent the web as it is as opposed to the way we wish it to be. We try to avoid censoring or deleting things unless by color of law, if you will. In those particular cases—and I know this is before the Senate—we favor positions which involve following the money, people who really are stealing content to the degree that the money that they're taking can be revoked from them, and so forth. We think that's the best legislative approach.

Senator KLOBUCHAR. So you follow the money. But still, there must be some way to figure out if these sites are illegitimate, if they still keep coming up.

Mr. SCHMIDT. It's difficult, and the reason is, assume that the site—let's say, you know, I'm a stealing site.com. We can identify that because we can do some kind of a test for trademark violation. That company can then surface as another site—test, and then they surface as another site. So it's a whack-a-mole problem.

The other problem we have with copyright is it's hard to know who owns the copyright. We have a very successful program on YouTube where content owners register their videos, if you will, and then if an illegally uploaded copy comes up we can actually do the comparison. We can't do that in general because of the nature—broad nature of the web.

Senator KLOBUCHAR. And are you continuing to work on this issue? Because I think it's——

Mr. SCHMIDT. Oh, it has a huge issue and it has affected our business with the content companies on whom we critically depend. So we're under great pressure to resolve this with a good technological solution.

If I might add, the core problem is that you can look at a website and you can tell that's copyright infringement just like that, absolutely. The problem is, a computer can't. To do it systematically is a very hard computer science problem.

Senator KLOBUCHAR. OK.

Just two other things I wanted to add here. One is, Google did a very good event in Minnesota. They reached out to some of our small businesses and helped them to set up websites, which was helpful. So I know that there's legitimate work being done with the small businesses, but again, I share their concerns about some of this ordering and how it affects them.

Second, since Senator Schumer mentioned having the Google site in New York when it went to Kansas City, Senator Franken and I are still focused on Duluth and I don't want you to forget that.

Mr. SCHMIDT. Yes. Absolutely.

Senator KLOBUCHAR. Thank you very much.

Mr. SCHMIDT. And if I could—if I could add, I know there's a concern about small businesses. One of the great things about Google is that small businesses can in fact be ranked higher than they would otherwise be because they can be very specific, and if we do

anything we probably show small businesses better than they would be in other approaches.

Senator KOHL. Thank you, Senator Klobuchar.

Senator Grassley.

Senator GRASSLEY. Yes. Mr. Schmidt, I want to make a statement, but before I do Senator Klobuchar reminded me that one of those workshops is going to be held in Pella, Iowa next week. If we maintain our week-long recess from Washington, I'm going to go to that.

Mr. SCHMIDT. OK. Thank you.

Senator GRASSLEY. I'm going to have a short statement, and then I want to put a longer statement in the record, Mr. Chairman.

STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. I've heard both good and bad about Google from Iowans. Some are concerned that Google is unfairly using its market power to manipulate search and drive web traffic to its own sites to the detriment of small business and consumers. They're frustrated by business practices that are not transparent. They believe Google is engaging in anti-competitive behavior, thwarting a competitive marketplace.

Now, others are extremely supportive of Google's products and services. They're concerned that the Federal Government is being overly aggressive and will place burdensome regulations on a company that is creating good jobs and innovative consumer tools. We should not be penalizing successful companies that are innovating, providing cost-effective and productive services and creating jobs.

But I also believe that companies should not take unfair advantage of their market power, engage in deceptive business practices that negatively impact the marketplace. The government should not be picking winners and losers. The antitrust laws have a role to play in ensuring that there's a level playing field. All companies must play by the rules. Companies should employ open, fair, and transparent business practices that do not harm competition and impede consumer choice.

[The prepared statement of Senator Grassley appears as a submission for the record.]

Senator GRASSLEY. I go to my questions now, Mr. Schmidt, and I'm going to quote without attribution several communications I've had with Iowans on both sides. I'll start out with, what do you say to Iowans who are concerned that Google "uses its power to manipulate consumers and drive traffic to itself and away from potential competitors for traffic and ad revenue?" So kind of, how do you respond to that? An additional quote is, are you concerned that your company has been "exerting enormous power to direct internet traffic in ways that hurt many small rural businesses?"

Mr. SCHMIDT. So I'd like to return to the philosophy that we've had for some years, which is to focus on getting to the right answer. And we have a lot of systems inside the company—internal testing, external testing, 1 percent tests as they're called—to really make sure that we're producing the results. And that is the guide that we use. It's really about consumers. As we discussed earlier, it's perfectly possible that in the course of that, extremely good and

well-meaning small businesses move up and down in the rankings. But we are in the rankings business, and so for every loser there's a winner, and so forth.

I am satisfied that the vast majority of small businesses are extremely well-served by our approach, and as I said earlier to Senator Klobuchar, I do believe that, if anything, our system promotes and enhances small business over larger businesses because it gives them a hearing and a role that they would not otherwise have because of the nature of the way the algorithms work.

Senator GRASSLEY. Here's a quote from somebody that supports Google. How would you respond to the Iowan who wrote that, "Further restrictions on successful businesses like Google are the surest way to impede innovation, entrepreneurship, ultimately threatening any sustainable economic recovery?"

Mr. SCHMIDT. Well, again, we would like to be judged, and we're happy to be reviewed and judged by you all and by all the other appropriate legal processes, based on the principles that we've set out, which are to focus on consumers and consumer choices. We are always worried about consumers being able to move from ourselves to our current largest competitor, which is Bing, and then the many new competitors that have emerged over the last few years. So we argue that we're in a highly competitive market. We welcome the oversight, but we would ask that you understand the way we're making the decisions is based on the principles.

Senator GRASSLEY. You may want to say how you help small business beyond what we talked about here, these workshops that you have. But in addition to anything you want to say along that line, how can small businesses' websites compete with large retailers and big box stores on Google?

Mr. SCHMIDT. The historic—it's interesting that Google was, first and foremost, a success in small businesses because small businesses were more nimble than the big businesses when it came to the internet. So we have a long history of promoting and helping small businesses, and we love this. Small businesses succeed precisely where the larger ones don't. Small businesses succeed because of specialization.

So what we try to do when we try to get companies online, is we try to get them to articulate the unique way in which they're different. So in your case with your constituents, there's something unique or special about the citizens and the view and the culture of your State. And if they can show off that, they're going to, on the margin, both be ranked higher and also appeal to a broader audience. What's great about it is that we can have local flavor with global impact, the local flavor seen on the website and global impact in terms of the market that you're serving.

Senator GRASSLEY. A question that would come from somebody who is not an admirer, complaints along the line that Google is directing internet users to Google-operated websites regardless of whether the organic results of the search would direct users to competing sites. Specifically, some of my constituents are concerned that small, local Iowa businesses are not treated in a fair and competitive manner and that the top search results to a query are often given to large national companies, even when a search designates a specific Iowa location in the query. So he obviously feels

small businesses are being cheated and consumers are being misled. Your response?

Mr. SCHMIDT. It's perfectly possible that you're describing failures of our algorithm. A large company can masquerade as a small business in Iowa, and it may be difficult for us to detect it. We're constantly making changes in testing to try to improve it.

In the case that you are describing, part of the answer we would give is that hopefully you will have a mixture of larger companies and smaller businesses that reflect the best of Iowa in that particular scenario. But the precise ranking algorithms are so difficult to characterize, why am I first and another second, because there are so many different signals and it's applied so broadly that it's hard to reason from a specific case out to the general case.

Senator GRASSLEY. Thank you, Mr. Chairman.

Senator KOHL. Thank you, Senator Grassley.

Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman, for this extremely important hearing.

First, I want to start out by saying that I love Google, and I said that the last time Google was here in front of my Subcommittee but I think it bears repeating. Google has utterly transformed the way we locate and use information. I have a feeling that Google is going to continue to be among those setting the standard for innovation in this country for decades to come. But in many ways Google's unprecedented growth and success is also one of the reasons we need to pay attention to what you're doing.

As you get bigger and bigger and bigger, I worry about what that means for the next Larry Page or Serge Brin, who are struggling to build the next innovative product in a garage. I am admittedly skeptical of big companies that simultaneously control both information and the distribution channels to that information. For me, that is at the heart of the problem here.

When you completely dominate how people search for information and you own separate products and services that you want to succeed, your incentives shift, your fiduciary duties to your shareholders shift, and people have reason to worry that you aren't going to play fair.

I was a little taken aback by an answer you gave when the Chairman brought up Marissa Mayer's quote that, "When we rolled out Google Finance we did put the Google link first. It seems only fair, right? We do all the work for the search page, and all these other things, so we do put it first." You answered that by saying that, well, you put a map out there. When someone wants a map to someplace, you just put a map out there and that's what they want. I sort of understand that. Or a financial answer of stock price. But then the Ranking Member asked you, well, when that's not the case——

Mr. SCHMIDT. Right.

Senator FRANKEN [continuing]. When you're not putting out the answer that people want, when you're not doing that, do all your rankings reflect an unbiased algorithm? And you said, after a little hesitation, "I believe so." That seemed like a pretty fuzzy answer to me, coming from the Chairman. If you don't know, who does? That really bothers me because that's the crux of this, isn't it? And

you don't know. So we're trying to have a hearing here about whether you favor your own stuff and you're asked that question, and you admittedly don't know the answer.

I want to talk about Yelp a little bit. I read through the testimony of Mr. Stoppelman, the co-founder and CEO of Yelp last night, and I have to say that I found his story to be quite compelling. It sounds to me that Google, first tried to license Yelp's content and did, and then when Yelp terminated that contract, Google tried to buy Yelp.

When Yelp refused, Google started taking Yelp's reviews and showed them on Google's page. We're going to hear from Mr. Stoppelman soon, but I wanted to give you a chance to respond to some of the points in his testimony. Did you get a chance to read it and did you get a chance to look at the exhibits?

Mr. SCHMIDT. In general terms, yes, not in specific. But I'm generally familiar with Yelp, so——

Senator FRANKEN. OK.

First of all, Yelp contends that even now consumers cannot find links to Yelp in Google's merged results. Mr. Stoppelman goes on to say that "it is impossible for any of Google's competitors to be displayed as prominently as Google itself, even if Google's own algorithm rates them higher." Do you think that's a fair characterization?

Mr. SCHMIDT. I generally disagree with——

Senator FRANKEN. Generally?

Mr. SCHMIDT. Again, with Mr. Stoppelman's comments, and he'll have an opportunity to say what he'd like in a minute. The background on Yelp is that they've been a partner and an important site on the web for many years, and they've been always relatively highly ranked in our search results.

We've always had them part of our index. Some years ago we decided to start working on a project built around location, and the idea was to create, if you will, a hub of information around a place, so that would be a map and information about the things that are at that map, so a restaurant, a store, or what have you.

And given that we search this information, we also took snippets of the results from Yelp, along with many others, and put those into those web results. Those became what are known as place pages today. I should say, by the way, that our competitors also have a similar offering. And if it's—if there's confusion as to why we need a place page, think about a mobile device. If you have a phone—so you have your phone here, it's going to be very difficult for you to go through the 10 links, whereas if you have a map and you can sort of thumb around and move around, that all makes sense.

So in the particular case of Yelp, I felt that Yelp would be very happy with us pointing to their site and then using a little bit of their reviews, because we had gotten those in the index, and then sending traffic to them. They were not happy with that. They sent us a letter to that effect and we took them out of the place pages.

So if you look today you'll see that they're not in there. You have the Google reviews and a bunch of other stuff like that, and ultimately we bought a company called Zagat to try to do something similar. So this is not a case of generic ranking and so forth, it's

about us trying to create these place pages and get information to solve a different problem.

Senator FRANKEN. I'm out of time. I'd just like to ask one short question and then hopefully go to a second round if we can. Is Google still using Yelp's content to drive business to Google Places?

Mr. SCHMIDT. As far as I know, not.

Senator FRANKEN. As far as you know?

Mr. SCHMIDT. Well, again, I'll have to look, but I'm not aware of any.

Senator FRANKEN. OK. Maybe Mr. Stoppelman will help us on that. Thank you.

Senator KOHL. Thank you very much.

Senator Blumenthal.

Senator BLUMENTHAL. Thank you, Mr. Chairman. And thank you to you and the Ranking Member for having this hearing which I think is very important. Thank you for being here, Mr. Schmidt. We welcome you here and I want to join my colleagues who have remarked on what a tremendous success story Google is, a great American success story, a great consumer success story.

And I certainly have formed no conclusions whatsoever as to any of the questions you've been asked, or others that may relate to the concerns that have been expressed, those concerns focusing on the size and market power of Google and whether it is of a scope and scale that it invokes certain responsibilities under our law, and whether or not Google has complied with those responsibilities.

But there's no question about the fact that Google is really the behemoth in the search market these days and that it far outsizes its nearest competitor, which has less than 30 percent of the market as compared to Google's 65 or 70 percent more in searches, and an even higher share in advertising revenue, and that the trend will be toward perhaps an even more sizable share on the part of Google in the search market. The reason I say it is your nearest competitor is losing $2 billion a year, and Google made $29 billion in 2010.

I think that the dynamic here is best summarized by Jonathan Rosenberg, who is your own vice president of Product Management, who said—and I'm quoting. He said it in 2008. It's not your voice, but I think it does speak to the dynamic in the market: "So more users, more information, more information, more users, more advertisers, more users, it's a beautiful thing: lather, rinse, repeat. That's what I do for a living. So that's the engine that can't be stopped."

The hearing and the testimony here, and a lot of what's been written and said, has many allegations. They are only allegations—they haven't been proven—about scraping content and co-opting that content. My colleague, Senator Franken, just raised Yelp's allegations, the other kinds of claims about anti-competitive conduct.

So my question to you is, drawing on the lessons that presumably you have learned as you very forthrightly acknowledge, can Google suggest measures to be taken voluntarily at this point to promote competition, to dispel those allegations, and perhaps dissipate some of the momentum toward government intervention? And I ask this question in the spirit of trying to avoid government regulation and intervention.

In my view, some of the companies who have occupied your chair before you have been their own worst enemy in that regard, and your very frank acknowledgement about Google's responsibilities and its approach, I think, speaks an approach to, in effect, try to do voluntarily what's in consumers' best interest, because competition is in consumers' best interests before there is intervention either by a government agency or by a court.

Mr. SCHMIDT. My general answer would be that making the internet win guarantees very strong competition for all of us. I understand you were asking a more narrow question, but the fact of the matter is there are many, many new startups that are potential future competitors of Google and of others. For examples, there are sites now that are seeing more than half of their traffic coming from Facebook, and Google is a very small component of the traffic that they get.

So there is every reason to believe that a broad strategy to promote the internet and promote competition and investment in companies, the IPO market is one of the hottest markets ever done, so I would argue that the levers are necessary—are necessary to guarantee the outcome you're looking for are largely already in place.

Senator BLUMENTHAL. Well, let me be more narrow in my question. Right now, as I understand it, certain Google properties—Maps, for example——

Mr. SCHMIDT. Sure.

Senator BLUMENTHAL [continuing]. Are at the top of the search results——

Mr. SCHMIDT. Right. Sure.

Senator BLUMENTHAL [continuing]. Regardless of the algorithm or the formula or the methodology.

Mr. SCHMIDT. Sure.

Senator BLUMENTHAL. They are at the top. Would, for example, eliminating that preference be a step in the right direction?

Mr. SCHMIDT. Well, I would disagree for two reasons. First, I think it would be bad for consumers because consumers actually wanted a map, and now you're—by virtue of such a rule you're forcing people to do steps. The second, of course, is that it would allow the competitors to offer such that—but without Google being able to do it because competitors all have that as well. So what I'm worried about is, such a restriction would—would essentially prevent us from meeting our primary mission.

Senator BLUMENTHAL. Are there other specific steps that you would suggest? I mean, if we were a court and liability were found and the question were remedied, what would you suggest?

Mr. SCHMIDT. Well, again, I——

Senator BLUMENTHAL. And I don't mean to put you in an unfair position.

Mr. SCHMIDT. No, no. I——

Senator BLUMENTHAL. It's a very, very, very hypothetical question.

Mr. SCHMIDT. I've actually spent a lot of time thinking about this. We had a long conversation some years ago about how Google would behave to avoid being evil when we were big. And we actually believe that we've made those changes, steps and so forth. A

classic example is, we created the Data Liberation Front so that we cannot capture or, if you will, hold your data.

If you wish to flee Google to a competitor, Bing for example, or another one, we make it very easy for you to do that both for your personal data, as well as your advertising data. So we think we've done the things that would be appropriate to make sure we stay within an appropriate competitive box. We're certainly open to suggestions as to additional steps.

In a competitive market like we're seeing with the extraordinary expansion of choices on the internet, ultimately the internet—the global playing field that is the internet is the real protection because of the combination of the one-click-away and the huge amounts of money that have been previously described going into these spaces.

Senator BLUMENTHAL. My time has expired. I thank you for your responses, and I hope there will be a second round.

Mr. SCHMIDT. Thank you, Senator.

Senator BLUMENTHAL. But that's up to the Chairman.

Senator KOHL. All right. We'll work on a second round of 3 minutes, then we'll see if we want a third round.

Mr. Schmidt, industry stats show that Google runs between 65 and 70 percent of all internet searches in the U.S. done on computers and about 95 percent on mobile devices, and has over 75 percent of all search advertising revenue in the United States.

Under common antitrust standards, this kind of a market share is considered to constitute monopoly power. Does Google recognize that as a monopolist or a dominant power? Special rules apply that there is conduct that must be taken and conduct that must be refrained from.

Mr. SCHMIDT. We certainly understand the role that we play in information and we also understand the proper role of government and your role and so forth to inspect what we're doing. We're satisfied today that the things that we're doing are well within the both legal and philosophical bounds of what we're trying to do because we answer the question based on—in a competitive market, we're very focused on consumers. So the answer, Senator, is we very much understand the role that we have to play and we're kept honest all the time, and not just by your good graces but also that of the press and the many other people who look at what we do.

Senator KOHL. But you do recognize that in the words that are used in antitrust kind of oversight, your market share constitutes monopoly, dominant—special power, dominant firm, monopoly firm? Do you recognize you're in that area?

Mr. SCHMIDT. I would agree, Senator, that we're in that area. Again, with apologies because I'm not a lawyer, my understanding of monopoly findings is it's actually a judicial process, so I'd have to let the judges and so forth actually do such a finding. From our perspective we see ourselves as having a special responsibility to debate all the issues that you're describing with us. Now we do understand it.

Senator KOHL. Thank you.

Our hearing so far has focused on issues of commerce and business competition, but even more importantly perhaps is the potential influence on news and information the American people re-

ceive. This issue points out how important it is that we preserve competition. In the internet search market, right now Google is the primary way Americans search for news and information on the internet. If your only search engine competitor, which is Bing, were to go away, for example, Google would then be the only search engine citizens could use to find this kind of information.

Given its dominant share of internet searches, Google is essentially a gatekeeper with enormous power to influence information and news coverage citizens find on the internet. For example, those searching the internet for information on today's hearing could get links to my opening statement, or a testimony of your critics on the next panel as the first search result. More people searching for information on President Obama could get links to the White House office website or a critical column on the President, or in a weekly standard.

You would argue, I suppose, that Google simply returns the most relevant results first for any news or information query free of any political bias, but is this really possible? There must be some decision as to whether my opening statement or your testimony at this hearing is at the top of the information results. Is it really possible to have truly unbiased search results for news and information queries? Should we be troubled by any one company, however well-intended like yours, having huge, huge influence over news and information citizens find on the internet? And doesn't this demonstrate the absolute need for competition, and real competition, in this area?

Mr. SCHMIDT. Well, as I said earlier, we're very strongly in favor of competition. There's a lot of evidence that much of the online news is now being consumed and generated within the social networks, and so we would want to add that into the framework, Senator, that you proposed.

With respect to the question of ranking algorithms and bias, it's—it's ultimately a judgment, what comes first or second. And in our case, because we have so many things to rank, it would not be possible for me to explain to your satisfaction or to my own why one link about this testimony was one higher or lower. It's a complex formula involving influence, and who points to whom, and the way in which it's expressed and so forth using a proprietary algorithm that Google has developed, which we're very, very proud of. It's the best that we can do, and I want to say right up front that we do occasionally make mistakes.

Senator KOHL. All right.

Now we turn to Senator Lee.

Senator LEE. Mr. Schmidt, I just want to make clear and get a statement on the record under oath: does Google give any preference to its own listings—places, or shopping results, et cetera, in its own natural search ranking results?

Mr. SCHMIDT. Again, the reason I was a little confused by your earlier question is the word "preference." We have a product called Universal Search. Universal Search chooses how to organize the page and so that decision includes many components in the natural search. It will, for example, when we think you're looking for a product, we will pop out this product search, essentially insert, that you showed earlier.

If you go through that product one—that product search thing that we put out, it actually, as I pointed out, takes you to other sites that actually then want to sell products. So the answer is, we give preference but we give preference in the context of our best judgment as to the sum of what the person wants to do. Did I help answer your question? I apologize for not answering it earlier.

Senator LEE. Yes. Yes. I think that helps answer the question. So it does give preference to those lead—perhaps in the case of the camera, not to your own camera sales port, but to another page where you're maybe not selling cameras, but you're selling advertisements, and if anyone clicks on that you get advertising.

Mr. SCHMIDT. In that case I don't actually think there's any advertising component into that decision, but I take your point.

Senator LEE. OK.

In preparing for this hearing I was uncertain as to what might be the full extent of my concerns regarding Google's current practices, but some of my fears, I have to say, have been confirmed as a result of our conversation. I'd just like to summarize, Mr. Schmidt, what some of those concerns are. I am troubled by some of Google's practices, its practice of inserting its own offerings, in the midst of natural algorithmic search results, usually in the most prominent position of the page and with the most eye-catching display.

My concerns related to this are really three-fold. First, this practice seems to me to leverage Google's primary search dominance to give its own secondary services and listings an unnatural and an extraordinary advantage. No other specialized business or search site can hope to compete on anything close to a level playing field when Google uses its significant market power to disadvantage online competitors.

Second, this same practice that I described presents a clear and inherent conflict of interest. Rather than acting as an honest broker of information, Google now has a strong financial incentive to channel users through its own listings, regardless of their quality. As Google vice president Marissa Mayer noted, "To the degree that we", meaning Google, "host content we ultimately have a monetary incentive to drive people to those pages, if those pages have ads on them."

Finally, I worry that this practice harms consumers. Manipulating algorithmic search results violates consumers' legitimate expectations, and by unfairly disadvantaging competing services it may ultimately reduce consumer choice and stifle innovation.

Again, Mr. Schmidt, I am troubled by what we've learned today about Google's practices and I hope that you will take swift action necessary to resolve these concerns. Thank you very much.

Thank you, Mr. Chairman.

Senator KOHL. Mr. Franken.

Senator FRANKEN. Thank you. I think I'm the Chairman now for a while.

[Laughter.]

Senator FRANKEN. Then the Chairman will be back.

Mr. Schmidt, let's shift to talk about mobile search because clearly the direction of growth of the Internet is going to mobile, and searches will be going to mobile. I understand you control about 97

percent of mobile search. You are the default search engine on all Apple phones. Is that true?

Mr. SCHMIDT. That is correct.

Senator FRANKEN. OK.

And you also own Android, which is the largest mobile operating system. This type of dominance ultimately means that you control what consumers use when they purchase an Android phone. Nielsen released a study last week that stated that five of the six dominant apps on the Android device are owned by Google. Only Facebook made it into the top six. I have no doubt that part of the reason for that is that Google often creates superior products.

But that isn't the only reason. What comes pre-loaded on a phone impacts what apps win—which ones win or lose in the battle for consumers' attention. Do all Android devices come pre-loaded with apps for Google Maps, Google Places, Gmail, and now Google Plus?

Mr. SCHMIDT. They do not.

Senator FRANKEN. They do not. Do many of them? Do a large——

Mr. SCHMIDT. My—my——

Senator FRANKEN [continuing]. Majority of them?

Mr. SCHMIDT. My not-too-precise estimate is that a slight majority come with it. I would estimate on the order of two-thirds come with it, pre-loaded.

Senator FRANKEN. So if an equipment manufacturer that makes Android phones for you doesn't want to pre-load Google apps on its devices, can they do that?

Mr. SCHMIDT. Absolutely.

Senator FRANKEN. OK.

If I am a customer and want to use Yelp instead of Google Places, is it easy for me to delete Google Places on my phone and upload Yelp?

Mr. SCHMIDT. Well, Google Places is essentially a result from search results, so if you simply used—if you didn't use Google search you wouldn't have Google Places at all and Yelp is available through all the browsers that are available on Android, so Yelp is always available independent of that.

Senator FRANKEN. I'm talking about as an app.

Mr. SCHMIDT. It's not an app. Google Places is not an application on Android, it's a result from a search.

Senator FRANKEN. OK.

Mr. SCHMIDT. OK.

Senator FRANKEN. So what apps—what Google apps are there?

Mr. SCHMIDT. Gmail, chat applications, those sorts of things.

Senator FRANKEN. OK.

Mr. SCHMIDT. And again, to help, I think what you're—if I may, I think what you're getting at is——

Senator FRANKEN. Sure.

Mr. SCHMIDT. I think what you're getting at is——

Senator FRANKEN. Tell me what I'm thinking.

[Laughter.]

Mr. SCHMIDT. No, I was just trying to be helpful.

Senator FRANKEN. Yes, I know. Thank you.

Mr. SCHMIDT. Many Android partners combine Google search, Gmail, chat, and a few other apps into a package. And I believe

what you are referring to is the fact that in that case we do a revenue share with them on the Google search.

Senator FRANKEN. Well, thank you. My time is up.

Senator Blumenthal.

Senator BLUMENTHAL. Thank you. Again, I want to emphasize to you, I've reached no conclusions and I will be submitting other questions in writing because——

Mr. SCHMIDT. Sure. Yes.

Senator BLUMENTHAL [continuing]. We may not have time for a third round, and I'm sure that you will be happy to be relieved of that spot.

[The questions appear under questions and answers.]

Senator BLUMENTHAL. But, you know, I've been trying to think of the analogy here to what the ordinary consumer can understand as what Google does, and as I sat here, you know, the racetrack analogy. You run the racetrack, you own the racetrack. For a long time you had no horses. Now you have horses and you have control over where those horses are placed, and your horses seem to be winning.

And, you know, I think what a lot of these questions raise is the potential conflict of interest, to use a sort of pejorative, but not necessarily to be critical, because you may have great products and you put them first and you may regard that placement as a service to consumers, but inevitably that will stimulate the kind of criticism that has brought you here today.

Mr. SCHMIDT. So it won't surprise you, Senator, to say that I disagree with your analogy completely.

Senator BLUMENTHAL. And I invite your disagreement.

Mr. SCHMIDT. So—OK. So I prefer to think of the internet as the platform. You can think of Google as a GPS, right? It's a way of getting there. One of the most important things to say here is—again, with respect to all the complaints, and comments, and so forth, Google does nothing to block access to any of the competitors and other sources of information, we encourage it. Indeed, in all the cases that have been used where we come to an answer, we also show all the other possible answers. We try to be as inclusive as possible.

So from my perspective, when I net it out, we need to be able to—to be free to get to what we think algorithmically is the best answer to the query that the person has done, and if we can do that with no clicks, zero—literally zero click and we can compute it algorithmically, that's better for the consumer. I really genuinely believe that.

Senator BLUMENTHAL. But to return to my analogy, there's no allegation that you necessarily exclude those other horses. To use your analogy, there's no allegation that you would necessarily misguide a consumer to go in the wrong direction on the Internet, but there is something different when you own a place and the directions happen to put the consumer at the place you own as opposed to some other place that, in appearance, objectively, might result in that consumer going to another place. You know, I realize that we're over simplifying a very difficult and complex area, but again, I invite your comments and disagreement.

Mr. SCHMIDT. Again, I think that the most important thing for us to do is to come up with the quickest answer the best, and this is the best we know of how to do that. We do, in fact, have the concerns that you're describing in our minds as we make these decisions, but we are—and we've said this for years—we really, really do test this stuff and we really do believe that this is the best choice for consumers and we run the company for the benefit of the consumers, frankly not for the other websites.

Senator BLUMENTHAL. My time has expired, but I thank the acting Chairman.

Senator FRANKEN. Thank you. And to carry your analogy just one step further, you might have been saying that you think Google might be doping the horses.

[Laughter.]

Senator FRANKEN. Is that what you're saying?

Mr. SCHMIDT. I didn't say that.

Senator FRANKEN. Oh, OK.

[Laughter.]

Senator FRANKEN. I guess I misunderstood.

Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much.

I was thinking of—what a lot of the questions have been focused on is just this—how the searches work and how you end up at one or how you end up on the next page suddenly in 1 day. Have you thought about how more transparency—and if there's other things that you could do to explain to people why this happening and when there's going to be a change?

Mr. SCHMIDT. I think this is, again, an excellent point. We do a lot of tools for websites so that they can understand how they're ranked and the changes that we have made. We don't, in my view, do enough, so I agree with your question there. There's a limit to how much transparency we can provide, for two reasons. One is that our algorithms, the actual ranking algorithms, are viewed as quite proprietary. They're viewed as our innovation, if you will, by our great scientists at Google.

The second is that if we're completely transparent as to how the algorithms work, they will be heavily gamed by sites that try to spam us. We've had experiences where people will latch onto some behavior and then essentially manipulate the index to produce a really false answer, which often is the butt of jokes, and so forth and so on. So there's a limit to how transparent we wish to be with respect to our actual ranking algorithm. I do agree with you that we can do a better job of describing the change and so forth. I think that's exactly right.

Senator KLOBUCHAR. OK.

Just one last question here. You know, you—online users are in many ways your customers, but then also the businesses that advertise are your customers. So does Google need to be careful that the privacy and protection of the web users doesn't come into conflict with the business interests of those that are advertising on the web, and how do you resolve that conflict?

Mr. SCHMIDT. We debate this quite a bit. We have a very detailed privacy policy about how we behave with users' data, and there have been a number of businesses suggested to us over the years

that would use—that would, in our view, misuse people's private data, search histories, and so forth, and we've said no to those. It's very, very important that the history of people's searches, where they are, what they do is not used without their permission in these advertising products. I think you'll find that Google will be one of the exemplars of that principle. And as this becomes a bigger thing for many, many companies, a lot of people will face this question.

Senator KLOBUCHAR. Thank you very much.

Senator FRANKEN. Well, we are now going to transition to the second panel. We thank you, Mr. Schmidt, for being here and for your testimony. I'm glad that my colleague from Minnesota brought up privacy. I am the Chairman of the Subcommittee on Privacy, Technology and the Law, and I would probably like to—we'll be keeping the record open for 10 days.

Senator KLOBUCHAR. One day.

Senator FRANKEN. Twenty days?

Senator KLOBUCHAR. One day.

Senator FRANKEN. Oh, one day.

[Laughter.]

Senator FRANKEN. One week. OK. It's either 10 days, one week, or 20 days.

[Laughter.]

Senator KLOBUCHAR. One week.

Senator FRANKEN. I'm the Chairman right now and——

[Laughter.]

Senator FRANKEN [continuing]. And I think we'll do 1 week, which I think is actually the proper answer.

Chairman Kohl apologizes for not being here for the conclusion of your testimony, but was needed for votes in the Appropriations Committee.

So we thank you. Since we're open for I think a week, I also plan to submit a few questions on privacy and intellectual property theft. But I really thank you, and I'd like to call the second panel now.

Mr. SCHMIDT. And Senator, thank you. Thank you for giving me the opportunity to appear before your—your panel here. We will be happy to answer any other questions, Senator, and so forth, and clarify any of—any of the questions that require further clarification. So, thank you very much.

Senator FRANKEN. You're very welcome. You'll have that opportunity because the record will be open for a week.

We now call the second panel. You know what? We're going to take a brief recess. So if you want to sit there, get used to that place, you can do that, or if you want to just mill around and chat idly, you can do that as well. We're going to take a brief recess, and I believe the Chairman—the real Chairman—will be back any moment. So, recess.

[Whereupon, at 3:41 p.m. the hearing was recessed.]

AFTER RECESS [3:44 p.m.]

Senator KOHL. We'll now be—the hearing is resumed. We'll now be moving to our second panel.

First on this panel will be Mr. Thomas Barnett. Mr. Barnett is a partner at Covington & Burling and co-chair of the firm's Anti-

trust and Consumer Law Practice Group. Mr. Barnett served as the Assistant Attorney General for Antitrust in the U.S. Justice Department from 2005 to 2008, and he represents Expedia, a member of the Fair Search Coalition.

Next, we'll be hearing from Jeff Katz, CEO of Nextag. Mr. Katz joined Nextag in March of 2010 after serving as president and CEO of Leapfrog Enterprises, and was the Chairman and founding CEO of Orbitz from 2000 to 2004.

Next, we'll be hearing from Jeremy Stoppelman. Mr. Stoppelman is the co-founder and CEO of Yelp, a position he has held since 2004.

Finally, we'll be hearing from Susan Creighton. Ms. Creighton is a partner at Wilson Sonsini Goodrich & Rosati, where she does serve as co-chair of the firm's Antitrust Practice. She served as Director of the FTC Bureau of Competition from 2003 to 2005, and she represents Google on antitrust matters.

We're happy to have you all here today. Mr. Barnett, we'll start with you, for 5 minutes.

STATEMENT OF THOMAS O. BARNETT, PARTNER, COVINGTON & BURLING, LLP, WASHINGTON, DC

Mr. BARNETT. Thank you, Chairman Kohl. It's good to see you again. And thank you, Ranking Member Lee and Senators, for holding this important hearing.

I would like to start with a general observation. I was heartened initially by the statement that—from Chairman Schmidt that Google "gets it." But to be frank with you, based on my experience both in the private sector and the government, Google doesn't get it. Companies that get it will step up to the plate, admit to reality, and focus on what are the real issues. Google won't even admit to reality.

Let me tell you what I'm talking about. The first element of a Section 2 monopolization claim is, is Google a dominant company? Do they have monopoly power? I think as this Committee recognizes, undoubtedly Google has monopoly power in search and paid search advertising.

You don't have to take my word for it, you all heard it. Both the Department of Justice and the Federal Trade Commission have conducted extensive investigations in this area, and both of them, the expert agencies, reached factual determinations that show that Google has monopoly power. There's a Federal judge who believes that they are dominant.

But don't take my word for it or their word for it, take the word of Chairman Schmidt. If Kelly could put up the first chart. In 2003, in a moment of candor, Chairman Schmidt acknowledged that "managing search at our scale is a very serious barrier to entry." If you have an 80 percent share of the market with barriers to entry, you have monopoly power.

Those barriers don't come from the supposed cost of switching or clicking to another site. The barriers come from building an effective search engine. You need the scale, the volume of traffic that Google has to tune the engine, and it's an ongoing process. Nobody else is going to catch Google, even if you had access to their algorithm today. They have market power.

Second, is that market power expanding? Absolutely, their dominance is expanding into maps, into video, and finance, and product. Mobile is an important area where they're expanding. I think Senator Franken pointed out, 97 percent of searches on a mobile device and 98 percent of paid search advertising served to a mobile device is from Google. Moreover, their Android operating system, which is on more than 50 percent of every Smart Phone shipped in the United States today, is rapidly becoming the dominant mobile operating system.

So from a Sherman Act monopolization/monopoly maintenance perspective, is there a problem? Yes, there is a problem if Google is engaging in any improper conduct to maintain or to expand its dominance. And the question is not, does Google do anything that is good. Google does lots of things that are good and they want to point you to that. But what they don't do is step up to the plate and acknowledge there are some things that are highly problematic.

If Kelly could put up the second chart, similar to the screen shot that Senator Lee put up there. Marissa Mayer, in her quote that we've talked about, acknowledged that Google places links above the natural search results. The blue are the natural search results. The other, the orange, are the paid search ads that are labeled as ads because they have an economic interest in that.

What's in the middle? Well, what's in the middle is not algorithmic. Does Google ever tell the user it's not algorithmic? Absolutely not. There are multiple links on this page that, when you click on it, will take you to a Google Places page. And on that Google Places page, Google will advertise and they will earn money. Google has a direct financial interest in placing that link above the natural search results. By failing to disclose what they're doing to users, they can mislead them into going to a site that they think, because we're all conditioned to think, well, what's at the top of the page, the algorithm has told us, is the most relevant to our queries. It's not an algorithmic result and they haven't disclosed that fact.

In the Android operating system there's already indication that they're using compatibility as a club to force handset manufacturers to do things to help Google and harm competitors. You will hear further, from Yelp and from Nextag, about some of the other conduct that Google has engaged in that I would suggest to you is improper and, to the extent that it has advanced Google's position in the marketplace, a problem.

Antitrust enforcement can and should play a role. It is, in fact, I agree with Senator Lee, very important that it play a role because, if Google continues to expand and control more and more of the internet, there will be increasing pressure for more direct government regulation that may be more burdensome, more difficult. The right answer is appropriate antitrust enforcement.

Thank you.

Senator KOHL. Thank you, Mr. Barnett.

[The prepared statement of Mr. Barnett appears as a submission for the record.]

Senator KOHL. Mr. Katz.

STATEMENT OF JEFF KATZ, CHIEF EXECUTIVE OFFICER, NEXTAG, INC., SAN MATEO, CALIFORNIA

Mr. KATZ. Mr. Chairman and Committee members, thank you for the opportunity to be here today to discuss what I think are very important issues to the future of our e-commerce industry.

First, a note about us. Nextag is an internet comparison shopping company. Tens of thousands of merchants list their products on our site and our visitors use our content and features to find the right products and to compare prices and services for many merchants. About 70 percent of our partners are small merchants who you've never heard of, like Crafty Corner in Oshkosh, Wisconsin.

About 30 million shoppers a month in the U.S. use our site, and we send over $1 billion of sales to our merchant partners every year. Google has been a principle partner and an outstanding partner to us for many years, but I am here today what must be said about the Google of today to ensure that e-commerce remains competitive and vibrant.

It was 10 years or so ago when I first worked with a small company that no one had heard of with a funny name from the world of mathematics: Google. At that time they were the only company who would let me, as founding CEO of another small company called Orbitz, advertise. Google's approach to letting the small thrive through an innovative bidding process that enabled all to get access to ads and a ranking process that let all websites be visible based on their relevance to consumers was brilliant and it was open. It created massive growth in our digital economy for all.

Back in 2002, this openness and competitive aspect of the internet was also available to the founders of my company, Nextag. They began to invest around Google's ideas and technology and words. They believed when—they believed it when Google said it would treat others fairly, that natural results would be unbiased, and that advertisers could not get locked out of top advertising spots. These approaches let Google stand out from other search engines back when search was actually competitive, and Nextag and others built around those ideas. They believed that Google would live up to its end of the bargain.

But Google abandoned those core principles when they started interfering with profit growth. Today, Google doesn't play fair. Google rigs its results, biasing in favor of Google Shopping and against competitors like us. Google says that competition is just one click away, but that's not even the question. The question is, should Google be able to use its market power to make it difficult for users to find us? We believed them when they'd said they'd treat all sites fairly and we built our business around that, but that is not what they do.

Our technology means we can help little companies who cannot possibly invest in the tools or the head-numbing statistical methods required to be profitably successful with Google to sell their products, from cameras, to apparel, to home and garden goods, to jewelry. Try it out sometime. Nextag will surprise you with what a good site it is.

Consider, for example, a merchant in Hastings, Minnesota, Boatingstore.com. For about 50 cents, this merchant gets a cus-

tomer from Nextag directly to their store's website that is highly likely to buy the trailer jack that customer was searching for. For that same price, there is virtually no way for that merchant to put an ad in a local newspaper or to get that customer, nor to get that same customer from Google on their own. It's a good deal for the merchant.

We are pleased to have helped Google grow their business and we are appreciative they helped us grow ours. Now, however, they are not innovating. They helped us grow our business, but they are copping our business after we invested hundreds of millions of dollars to perfect it, and they are very politely, deftly, and assuredly moving us aside.

Today, honorable Committee members, when you search for a product like running shoes or washing machines, Google is not a search engine anymore. A search engine organizes and presents information that is hard to find in an unbiased way. But Google of today doesn't present the information that users want, it presents the information that Google wants you to see based on its commercial interests.

The company that dominates the information highway controls all of the digital billboards and off-ramps, doesn't even tell the consumer this search favors Google's preferred vendors, preferred advertisers, and some beneficial results may be excluded or obscured.

A company that dominates a marketplace at least has the responsibility to provide fair access. I hope this Committee, and Google itself, will act to balance the forces that enable competition to persist. This is a very big deal. We should get it right and we should make it right.

Mr. Chairman and members of the Committee, thank you very much for your time and attention.

Senator KOHL. Thank you, Mr. Katz.

[The prepared statement of Mr. Katz appears as a submission for the record.]

Senator KOHL. Now we'll hear from Mr. Stoppelman.

STATEMENT OF JEREMY STOPPELMAN, CO-FOUNDER AND CHIEF EXECUTIVE OFFICER, YELP, INC., SAN FRANCISCO, CALIFORNIA

Mr. STOPPELMAN. Thank you, Mr. Chairman and distinguished members of the Committee. I appreciate your interest and invitation to appear today. My name is Jeremy Stoppelman and I'm the CEO of Yelp, a company I co-founded in 2004 with my former colleague from PayPal, Russell Simmons.

At Yelp our mission is to connect people with great local businesses. The site allows people throughout the country to share detailed and passionate reviews about businesses in their neighborhood. In turn, businesses that provide great value and good service are able to establish and promote themselves online.

Today, Yelp employs more than 800 people throughout the country. More than 60 million consumers use Yelp every month to decide how and where to spend their hard-earned money. And on the flip side, job growth in this country relies on small, but fast-growing and successful businesses. Yelp helps them reach new customers by amplifying their positive word-of-mouth online.

This hearing is important because it examines issues that go to the heart of innovation: whether new ideas can compete fairly against expanding monopolies. In our case, I wonder if we would have been able to start Yelp today given Google's recent actions.

Let's be clear. Google is no longer in the business of sending people to the best sources of information on the web. It now hopes to be a destination site itself for one vertical market after another, including news, shopping, travel, and now local business reviews.

It would be one thing if these efforts were conducted on a level playing field, but the reality is they're not. The experience in my industry is telling. Google forces review websites to provide their content for free to benefit Google's own competing product, not consumers. Google then gives its own product preferential treatment in Google search results.

Google first began taking our content without permission a year ago. Despite public and private protests, Google gave the ultimatum that only a monopolist can give: in order to appear in web search you must allow us to use your content to compete against you. As everyone in this room knows, not being in Google is equivalent to not existing on the internet. We had no choice.

Recently, Google has inexplicably softened its stance. What changed? Well, the FTC announced an antitrust investigation, the State Attorneys General took notice, and this Committee proposed this hearing. Was this an admission of anti-competitive conduct? Perhaps, but questionable practices remain. Websites and Google search results now take a backseat to Google's own competing products. This is typically accomplished by calling special attention to Google-owned properties through larger text, bright graphics, isolated placement, and pushing objectively ranked websites down the page.

What we're most concerned about is that Google is no longer satisfied with pointing users at the best content anywhere on the web it can be found. Instead, it seems they prefer to send users to the most profitable content on the web, which is naturally their own.

Is a consumer—or a small business, for that matter—well served when Google artificially promotes its own properties, regardless of merit? This has little to do with helping consumers get to the best information. It has everything to do with generating more revenue.

So where is the harm? I live and work in San Francisco, which sits on the border of Silicon Valley, a place that has participated in the development of some of the most amazing products and services over the last few decades, including Google. Today represents a rare opportunity for the government to protect innovation. Allowing a search engine with monopoly market share to exploit and extend its dominance hampers entrepreneurial activity.

Ensuring open and equal competition will sustain and foster innovation and job growth. It will also ensure that the price of internet advertising paid by small businesses will not—will be set by the market and not solely by a monopolist. When one company controls the market it ultimately controls consumer choice.

If competition really were just a click away as Google suggests, why have they invested so heavily to be the default choice in web browsers and mobile phones? Clearly they're not taking any

chances. So again, I thank the Committee for its time and interest, and I look forward to assisting in any way that I can. Thank you.

Senator KOHL. Thank you, Mr. Stoppelman.

[The prepared statement of Mr. Stoppelman appears as a submission for the record.]

Senator KOHL. Ms. Creighton.

STATEMENT OF SUSAN A. CREIGHTON, PARTNER, WILSON SONSINI GOODRICH & ROSATI, PC, WASHINGTON, DC

Ms. CREIGHTON. Thank you, Senator. Before I begin my remarks, Mr. Schmidt asked me to clarify for the record that Google Places and Yelp are both applications, or apps—mobile apps.

Senator KOHL. I'm sorry?

Ms. CREIGHTON. Mr. Schmidt asked me to clarify that both Places—Google Places and Yelp are mobile apps.

Senator KOHL. Oh. In response to my question?

Ms. CREIGHTON. In response to—that's correct.

Senator KOHL. All right. Thank you.

Ms. CREIGHTON. Thank you, Chairman Kohl, Ranking Member Lee, and members of the subcommittee.

From 2001 through 2005, I had the privilege of serving as the Deputy Director, and then Director of the Bureau of Competition at the Federal Trade Commission, serving as the chief antitrust enforcer at the FTC. During my tenure we brought more monopolization cases to put a stop to anti-consumer conduct than during any comparable period at the FTC, going back to the late 1970s.

As this strong enforcement record reflects, I firmly believe there is an important role for government in enforcing our antitrust laws. The same experience, however, underscored for me the need for the government to exercise extreme caution before acting against a company for its day-to-day business decisions.

These unilateral business decisions are the heart of the competition and innovation underlying our free market system. Because of the very real risk of deterring innovation and other beneficial activities, extraordinary care must be taken to ensure that government intervention in the market is truly essential, otherwise, such action is much more likely to harm consumers than to help them.

As an attorney based in Silicon Valley who has worked with high-tech companies for more than 20 years, I believe that the danger of harmful intervention is especially acute in the high-tech sector. In Silicon Valley, disruptive innovations are the rule and not the exception, and companies can watch their market positions disappear overnight.

For example, just 4 years ago My Space had a 72 percent share in social networking; today it is a fraction of 1 percent. We all know what happened. In the same length of time, Facebook grew to become the most popular destination on the internet, with 750 million registered users.

In this sector the only constant has been changed. The pace of technological innovation has been extraordinary, competition is robust, and the competitive landscape is constantly evolving. We have seen the incredible benefits to consumers that this vibrant competition has delivered, developments that were nearly unimaginable when I started in Silicon Valley 20 years ago.

Search technologies have been an important part of this American success story. Indeed, Google's founders changed the nature of search when they invented the page rank system 13 years ago. Rather than count how many times a key word appears on a page, page rank is based on the idea that the best way to rank information is based on consumers' assessment of its relevance. So, really the core of Google's success has been that the best search results are the ones that give consumers what they want.

Today Google continues to innovate to better satisfy those same users, competing against ever-growing competition, not just from other general search engines but also from social networks like Facebook, specialized search engines like Amazon, Expedia and Yelp, mobile apps for Smart Phones and tablets, and a host of others. Because it is free and easy to try different alternatives, users are quick to switch to the sources of information on the internet that they find most accurate, the easiest to use, and the most responsive.

Importantly, there is no single right answer to what information is most responsive to a consumer's question. Indeed, the essence of the competition among search services is to make judgments about how best to answer the billions of queries that they receive every day.

For the government to dictate how Google should make those judgments, whether to rank the *New York Post* above the *New York Times* or the *Washington Post* above the *Washington Times* would be to turn Google's search service into a regulated utility. This would inevitably make Google less responsive to its users and put the company at a disadvantage as it competes every day to provide the best, fastest, and most responsive answers to users' requests for information.

It has often been the case in the high-tech industry that competitors have sought to invoke the antitrust laws to freeze technology in place to prevent what they believe to be unfair competition. In the late 1970s, several independent disk drive manufacturers brought antitrust suits against IBM, arguing that IBM's physical integration of hard drives with CPUs, a major innovation, would cut into their sales of disk drives. Courts recognize that even if IBM's innovations seemed hard on competitors, it was good for consumers, and in fact this paved the way for lower costs, better products for consumers, and ultimately the IBM PC.

The core premise of our antitrust laws for more than 100 years has been that, whereas here there are no artificial restraints that prevent consumers from being able to make choices in the marketplace, the best way to benefit and protect consumers is to allow competition to flourish. If consumers are free to choose, acting to protect competitors actually has the effect of short-circuiting competition and innovation and harming the individuals the law was designed to protect. As the courts have repeatedly emphasized, the antitrust laws are meant to protect the competitive process, not competitors. We would be wise to remember that lesson.

Thank you very much, Chairman.

Senator KOHL. Thank you, Ms. Creighton.

[The prepared statement of Ms. Creighton appears as a submission for the record.]

Senator KOHL. We'll have a 5-minute round.

Mr. Barnett, do you consider Google a monopoly, or at least a dominant firm in internet search under antitrust standards as you know them? Why, if so, and why not, if so?

Mr. BARNETT. Thank you, Mr. Chairman. Yes, I consider Google to be a dominant company with monopoly power, at least in search and search advertising, likely in other markets, its mobile search, mobile advertising, mobile operating systems, it's quickly moving in that direction, maps, and a number of other areas. And I think that they are—have monopoly power both because there are expert agencies who have looked into this and concluded that, but I take the words of Mr. Schmidt: there are huge barriers to entry to getting into search. They are a dominant company there because they got there first, they have a great algorithm, and it is very difficult, if not impossible, for anybody else to catch up with them.

Senator KOHL. If Google, Mr. Barnett, is a monopoly or dominant, what are the consequences, in your opinion? Is there conduct that it may not engage in in order to maintain its market dominance?

Mr. BARNETT. There is no doubt that a dominant company with monopoly power can harm competition in a way that a company without that monopoly power cannot. That puts a special responsibility on the company to engage in fair competition on the merits and not to exclude competitors. I'll give you a specific example, because I was, frankly, somewhat offended by one of the things that Chairman Schmidt said. He talked about the issue of scraping content from Yelp and putting it on a Places page. The way he described it was, well, we did that, we thought it would be good, and then we got a letter and we took it down. That is not what happened.

My client, Trip Advisor, which has 45 million reviews on it, had a very similar problem where its content, its user reviews were being placed on Places and the CEO of Trip Advisor went to Google last year and said we don't want to appear, just take our content off Places and Google said no. The only way we will take that down is if you will never appear anywhere in our dominant search engine results.

That was a coercive tactic that was designed to enable Google to take their content, use it against them. I think that is exactly the type of behavior that a dominant company should not be able to engage in, and I completely agree with Mr. Stoppelman. The only reason that changed at all, because they said no last year, was this year, after the FTC opened up an investigation, there were presentations made to the National State Attorneys General, and within weeks if not days, Google started to back down.

Senator KOHL. Ms. Creighton, what's your view? If Google is considered to be a monopoly or a dominant firm in internet search, is there conduct that it may not engage in in order to maintain its market dominance?

Ms. CREIGHTON. Senator, respectfully, I do not believe that Google has monopoly power, and I'd like to explain why. So what we're looking for in the antitrust laws in terms of whether or not a company is a monopoly is really whether it has monopoly power.

The way we look at that is whether or not the company, if it were to raise price or exclude competitors, is there something that would cause consumers to be unable to switch and so the company basically can get away with that? We sometimes can use market shares as an indicia of whether or not there's monopoly power, but the real question is, is there this ability to foreclose competition or to raise prices?

When I was at the FTC, what I would be looking for was not only very high market share as sustained over a very long period of time, usually in the 80s, high 80s, I'd also be looking for it to have been over many years and I'd be looking for indication the consumers—there's some structural problem that causes consumers to be unable to switch.

Here, instead, what we actually see—and I thought Senator Klobuchar—I'm sorry she's not here, but she—her sort of testing of how Google and Bing ranked her name while she did the quick search just while we were here is really the key to why, in my view, Google does not have monopoly power. Each of you right now can test whether or not you like Google's results, and if you don't like them it's free and instantaneous to try someone else's results.

So if you were to enter Yelp and Google didn't return Yelp at the top of the search results, I doubt you'd ever come back to Google again, you'd be so mad. So it's—when we're—when we're looking for whether or not a company has monopoly power, I—you know, respectfully, as an antitrust enforcer, and I'm sort of wearing an antitrust enforcer has as opposed to my sort of, you know, representing Google hat, I wouldn't say that you should trust Google. I think the question is whether you can trust the market or whether there are some kinds of impediments to the way that the market is working that cause consumers to be unable to switch.

Senator KOHL. Thank you.

Senator Lee.

Senator LEE. Thank you, Mr. Chairman.

I have a couple of questions for Mr. Barnett. Sir, in your written testimony you make a statement that I find compelling. You say, "Google already possesses unprecedented power to steer users and to stifle competition. If for some reason antitrust enforcement is not able to address these concerns, there will be pressure to reign in Google's power through more direct government regulation that is likely to be more rigid and burdensome and that itself would pose a threat to innovation and economic growth on the internet."

Can you tell us more about what you see as a threat, that without Google taking action to resolve these antitrust issues may cause significant elements of the internet to become subject to intrusive regulation by government?

Mr. BARNETT. Thank you, Senator. You know, one of the experiences I had when I was the Assistant Attorney General was talking with a number of other jurisdictions, such as former Eastern bloc countries, countries in Asia, China in particular, about moving from a centrally planned economy to a market-based economy.

One of the tools for doing that was to introduce an antitrust regime. You don't need the government to dictate everything that happens. You can let the market work subject to the antitrust rules. That's part of the way we got to deregulation of airlines, de-

regulation of trucking, a lot of deregulation in the country which has produced enormous benefits.

It works the other way, too. If Google continues to expand and is dominant not only in search and search advertising but in all these other areas and continues to control more and more of these search-dependent products and services, you will see pressure—there is already pressure to give the FCC authority to regulate the internet. Then you could have people, not market participants but bureaucrats, with respect, making decisions that I think can be harmful.

Senator LEE. So it sounds like you see that pressure building rather than abating, unless there's some voluntary change in action. It's significant to me because my real interest as a free market conservative Republican is in seeing that actors like Google take voluntary action so that there's no need for antitrust enforcement in the first place, and certainly so that there's no place for, or cause for, or push for intrusive government regulation on the internet, which up to this point has remained a relatively government-free trade zone.

What can Google do, in your opinion, on a voluntary basis to resolve these concerns so as to forestall that kind of unfortunate result?

Mr. BARNETT. Well, the first thing they can do is live up to Chairman Schmidt's words and "get it." I mean, they can acknowledge that they are a dominant company and they have a special responsibility. The second thing they can do, is they can act on that. They can ensure that the way that they display the search results, particularly non-algorithmic search results, are clearly labeled and not misleading or deceptive to consumers. They can avoid and refrain from using content from other sites without their permission or authorization.

They can ensure that their algorithm really is based on objective criteria and not penalizing sites because they're competitors. If they take steps like that, I think they would go a long ways toward gaining credibility and, as you all were discussing, give people who were trusting, but verifying, comfort that they should be trusted.

Senator LEE. And some basis for verification.

Mr. BARNETT. Yes.

Senator LEE. We learned from Robert Bork that the animating principle of antitrust justice ought to be consumer welfare. My principal concern with Google's current practices is that they may not, and may not in the future, result in harm to the consumer. They may not in the future take those actions that will forestall this harm to the consumer.

Can you explain to the Committee the particular ways in which you think that Google's actions may cause harm to the consumer?

Mr. BARNETT. Two examples. First of all, remember, they are an advertising company. They made $30 billion last year in advertising. Given that they're dominant in advertising, a good portion of that is already monopoly rents. To the extent that they're maintaining or enhancing that power, that's money that advertisers have to spend that ultimately consumers pay for because it's going to flow through in the cost of the goods and services you buy.

The more fundamental problem is, if Google is the only company that is innovating in these important areas, we lose the benefit of competition in innovation, and that's really what's going to drive and promote consumer welfare in the longer run. That's why preserving competition here is so critical, so that companies like Nextag and Yelp have the environment and the circumstances where they're willing to make the investment, take the risk, and develop the next great application.

Senator LEE. Thank you, Mr. Barnett.

Mr. Chairman?

Senator KOHL. Mr. Franken.

Senator FRANKEN. Thank you, Mr. Chairman.

Mr. Stoppelman, I'd like to ask you and Mr. Katz a question, a hypothetical. Let's assume Nextag and Yelp were not in existence today. Would either of you attempt a launch of your company in today's market, given the competition in local search and product search?

Mr. STOPPELMAN. As I laid out, I personally wouldn't. I wouldn't. I would find something else to do. When we began, there was really actually a level playing field in our space, in the local business review space. I mean, I started the company because I actually that summer had done a search looking for a doctor in San Francisco, and in fact found no relevant information. I wanted to know, who's a great doctor, not just, you know, what's the nearest one, which one, you know, accepts my insurance.

So that's why we started the business. And as it got going, we found that traffic was coming in and it was bringing more users to write more reviews. Now with Google taking up so much of the real estate, there's no way I would start fresh. I mean, fortunately we've been working for 7 years and we've got a brand and a lot of traction and so we're not going anywhere, but absolutely I wouldn't even consider it these days.

Senator FRANKEN. Mr. Katz.

Mr. KATZ. I don't think we could do it. Our business requires merchants to want to participate in Nextag because we have a lot of shoppers on our site. Sixty-five percent of our shoppers come to us from Google today either through natural search or paid search, so we simply couldn't do it with the Google that exists today, where roughly the top half of the page is dominated by Google-related product interests and the right half of the page where paid advertisers compete is beginning to be dominated by unique ad placements which competitors such as ourselves can't even purchase. It would be very difficult. I think it would be impossible to get the merchants to participate in Nextag today.

Senator FRANKEN. Thank you.

Mr. Stoppelman, I was a little confused by Mr. Schmidt's testimony regarding the history between your two companies. Was his depiction correct?

Mr. STOPPELMAN. No. I'd be happy to share the time line quickly, if that would be helpful.

Senator FRANKEN. Yes, sure, if you could do it quick.

Mr. STOPPELMAN. Sure. So in 2005, Google came to us looking—looking at our content and saying they wanted to include it in a page, as Chairman Schmidt mentioned, and we initially said, OK,

we'll try it out, maybe we'll get traffic from it. And very quickly we realized that it wasn't helping, it wasn't sending us a lot of traffic, and in fact it was creating a potential competitor, and so we dropped out of that.

From 2007 to 2009, we sort of lived on our own and we did our thing and Google tried to do theirs. Then there was rumors of a potential attempted acquisition. We decided to stay independent, and immediately after that our content, which had been out of Google's Places property, or local property, whatever you wanted to call it, suddenly found its way back in without permission.

So before there was actually a written, signed license for that content, and then in 2010 it was just there. We immediately registered our complaint and, you know, there was a lot of back-and-forth dialog—we understand your concerns, we understand your concerns—but in the end nothing happened until finally there was some interest on it from the government side and Google——

Senator FRANKEN. OK. So this is scraping, right? Is that the definition of scraping?

Mr. STOPPELMAN. Yes. In 2010 they essentially took our information that they were using for web search——

Senator FRANKEN. Right.

Mr. STOPPELMAN [continuing]. And they go out and they pulled in all the web pages from the internet, including ours. They took that information from that core business, their dominant web search business, and used it in a totally separate property, Google Places.

Senator FRANKEN. Right.

And speaking of Google Places, Ms. Creighton, when I asked Mr. Schmidt whether it was an app he said it wasn't, now he's corrected himself.

Ms. CREIGHTON. That's correct.

Senator FRANKEN. You said a monopoly is something that is over 80 percent. But on mobile, isn't the concentration 97 percent for Google?

Ms. CREIGHTON. Senator, with that number—there's a couple of big problems with that number.

Senator FRANKEN. You brought up the number.

Ms. CREIGHTON. I don't remember talking about mobile, but I think——

Senator FRANKEN. No, you didn't bring—say—no, the number was 80 percent.

Ms. CREIGHTON. Oh, I'm sorry. What that excludes is that most consumers today, and if you have Smart Phones you may find this is your own experience, that number completely excludes apps, which is how most people find information on their phones today. So if—so first you have to——

Senator FRANKEN. But did Google spend money to be the default search engine on Apple. Did it spend money on that?

Ms. CREIGHTON. So Google and Bing, and I'm not sure whether or not Yahoo, all competed with Apple to be the—to be the search provider on the I-Phone and the I-Pad. In fact, about two-thirds of that number that you cited actually comes from the fact that Google prevailed in that contract. But Senator, if we step back and think about——

Senator FRANKEN. Could you answer my question?

Ms. CREIGHTON. Did Google pay? The answer is——

Senator FRANKEN. Did Google pay Apple to be the default search engine on mobile?

Ms. CREIGHTON. Google certainly entered into—Google certainly entered into a deal with Apple and prevailed against Bing. But the question is, the——

Senator FRANKEN. Did they pay money in that deal?

Ms. CREIGHTON. I—I don't know.

Senator FRANKEN. You don't know. Would it surprise you if they did?

Ms. CREIGHTON. It would not surprise me if there was a revenue——

Senator FRANKEN. And why do you think they would pay money for something that wasn't worth that much, or worth anything?

Ms. CREIGHTON. Senator, what I was—first, it was a default, not an exclusive. So if you go on your I-Phone, I think it'll probably take you about 20 seconds to download another app or a different search engine. But the real question I think from a competition perspective is——

Senator FRANKEN. OK. Keep going. I'm out of my time, but you continue as long as you would like. I'm sorry. Forgive me.

Ms. CREIGHTON. Is—is whether—is—we actually want Apple to be able to have companies like Bing and Google competing to be the best search engine. There's no reason to think that Apple didn't pick that based on what they thought was the best product. Now, having picked Google, Bing and Yahoo are going to compete that much harder the next time. So when you have that kind of a contestable market, that you have someone who's a stand-in for consumers, because Apple is not going to take the worst search engine.

Senator FRANKEN. Thank you.

Ms. CREIGHTON. Thank you, Senator.

Senator FRANKEN. Thank you. And I apologize for interrupting. Mr. Chairman?

Senator KOHL. Senator Blumenthal.

Senator BLUMENTHAL. Thank you, Mr. Chairman.

Has Google ever scraped or co-opted content?

Ms. CREIGHTON. Senator, Google has—if we—I don't know if it shows on—on the—Mr. Barnett's chart or not, but what—if you run a Google search what you'll typically see is there will be a line or two that—that tells you something about the site. The purpose of run—of having that line——

Senator BLUMENTHAL. Well, you know what I mean when I say co-opted or scraped content.

Ms. CREIGHTON. Respectfully, Senator, what I was trying to get to is the purpose of that is to enable you as a consumer to tell whether that's a site you want to click through. So Google has not ever unlawfully taken content that is not permitted. It has——

Senator BLUMENTHAL. Well, let's leave out the unlawfully part. Has it ever scraped or co-opted content?

Ms. CREIGHTON. It——

Senator BLUMENTHAL. You've just heard Mr. Stoppelman's testimony here, it's under oath, and it's really a question of whether you deny his testimony.

Ms. CREIGHTON. Senator, to the best of my knowledge, what Google has done and what Mr. Stoppelman is describing is, he did not—he wanted to have—Google's experience has been that people like having a line or two written about them because that's what drives traffic to their sites. What Mr. Stoppelman was talking about is micromanaging whether or not Google shows those results, the natural search results, but not in other parts of its site, and was asking for Google to engage in some extra engineering to be able to make that possible.

Senator BLUMENTHAL. Let me move on to your contention, as I understand it, that Google is not dominant to the point that it has a responsibility under the Sherman Act or other antitrust laws, is that correct?

Ms. CREIGHTON. What I—I think what Mr. Schmidt said was—I'm not trying to address the question of what Google thinks or its responsibilities. I was just addressing the question of whether or not, under the antitrust laws, I believe that it has monopoly power, and the answer is that I do not believe that it has monopoly power.

Senator BLUMENTHAL. Because its share of internet searches and advertising is not in excess of 80 percent?

Ms. CREIGHTON. To begin with, Senator, because I don't believe that the market is properly limited to general search—to general search engines, so——

Senator BLUMENTHAL. You think that the market definition——

Ms. CREIGHTON. Is too narrow.

Senator BLUMENTHAL [continuing]. Should be beyond search.

Ms. CREIGHTON. I believe that it should be beyond general search. So, for example, when I was at the——

Senator BLUMENTHAL. So let's say a court were to disagree with you and found liability and also found co-opting, scraping, whatever other anti-competitive allegations have been made. What would your remedy be? What would you recommend to the court?

Ms. CREIGHTON. So I think it would depend on what the alleged wrongdoing was that the court found, Senator.

Senator BLUMENTHAL. Well, anti-competitive conduct, such as excluding competing sites or placing them lower on the search analysis, or co-opting, or scraping, whatever term you want to use. Would it be injunctive relief against those practices or would you advise some kind of structural remedy?

Ms. CREIGHTON. Senator, I'm afraid that that probably has so many hypotheticals in it, I wouldn't be able to answer.

Senator BLUMENTHAL. Well, let me ask you this.

Ms. CREIGHTON. But let me give you—let me give you——

Senator BLUMENTHAL. In order to avoid a continuing potential series of government interventions, which none of us really would favor as a first choice, and again I in no way prejudge whether there should be, but what would you suggest in the way of voluntary action by Google, or would you simply say that Google should proceed with its current course of action and change it in no way?

Ms. CREIGHTON. So, Senator, I think—so for example, I represented Netscape back many years ago when it was challenging some of Microsoft's conduct, some of the conduct that was at issue there. And this really gets to the question of, are there impedi-

ments to the ability of consumers to choose. So if someone found, for example, that as Microsoft did there, that Microsoft was intimidating OEMs from being able to offer rival product so that it never got to market, then I would want to have relief that went to those provisions that were preventing consumer choice.

Senator BLUMENTHAL. And so far as monopoly power is concerned, you don't think it's relevant that its nearest competitor has less than 30 percent, is losing money and consumers—I understand the contention that competition is only a click away, but there are very strong barriers to entry, are there not?

Ms. CREIGHTON. Senator, I think, first—so Google's—I think if you just limited it to the most narrow market you'd say it's at 65 percent and declining. The fact that it's declining is a big red flag to a finding of monopoly power. So—but even beyond that, if you step back and think—one of the markets that I had to look at when I was at the FTC was whether or not general department stores constitute a separate market. That was an empirical question. Did those general department stores compete with the boutiques in the mall?

So, for example—and we concluded that in fact—even though there were only two that looked the same, there was only a Nordstrom's and a Macy's, that in fact what was constraining price were all those boutiques on the mall. So, for example, Senator, I think—if you think about, where would you go if you were looking to buy a product, I'd be really surprised if you didn't think about going to Amazon. Amazon is a special search engine that actually has three times the number of product searches conducted on it that Google does.

Similarly, I think when—if you talked to local advertisers, it's interesting that Mr. Barnett used the example of Milwaukee doctors, because what local advertisers tell you today is the number-one place you have to be is Facebook. That's where most local advertising is happening. And I think Mr. Katz actually even mentioned that the platforms of the future for local—for shopping are going to be Facebook and Twitter. So when I think you look at, what is the relevant market and what are the constraints on Google, you don't want to just look at, what are the other general search engines. You want to look at whether or not there are other competitors like the boutiques in the mall that are constraining it.

Senator BLUMENTHAL. I very much appreciate your answers, and my time has expired. I may have some more in writing, particularly as to the market definition and your analysis. But I appreciate your being here today, and thank you for your answers.

Ms. CREIGHTON. Thank you.

Senator KOHL. One more round of 3 minutes.

Mr. Katz, according to Google consumers can go directly to Nextag simply by entering www.nextag.com into their web browser, so why should it matter how you're being treated by Google's search engine?

Mr. KATZ. Well, when people shop, and this is something we've studied and they've studied, what people do is they type in "washing machine." They don't type in Amazon or Nextag, they don't type in Google Products, they type in "washing machine." From there, the rest takes place.

When you type in "washing machine" the Google—first half of the Google page begins to lay out and, as we've discussed, begins to preference advertisers or products that have a preferential or preferential advertising relationship with Google. If they did type in Nextag.com, first we would bless the Lord above, and then they would go directly to Nextag.com.

Senator KOHL. What would happen to your business in the United States if you no longer appeared near the top of Google's search results?

Mr. KATZ. About 65 percent of our search referrals come through Google today, so our business would be severely impaired. We are probably one of the most successful internet companies in the United States that nobody has ever heard of because we have really perfected the marketing and use of the Google platform, as Eric mentioned it earlier. The down side of that is, people haven't heard of us. So if we could not utilize that platform, which I've described I think is happening, we've certainly seen the benefits, that would severely impair our business.

Senator KOHL. Mr. Stoppelman, what would happen to your business if you lost access?

Mr. STOPPELMAN. Thank you, Mr. Chairman. About 75 percent—I believe that's the right number—of our traffic overall is sourced through Google one way or another. About 50 percent of that is traffic coming for people sort of generally searching, starting their search on Google, and eventually finding their way to Yelp. And then the other 25 percent of that 75 percent number is people that are qualifying, they want to go to go to Yelp so they're adding that key word in one way or another. So, needless to say, if we were not in Google it would be completely devastating to the business.

Senator KOHL. All right.

Ms. Creighton, would you argue that it is completely permissible under antitrust law for Google to favor its own products and services on its results page?

Ms. CREIGHTON. Senator, I think the question is whether or not Google has the ability to provide the answers that it—that consumers want, so I think what Google in fact does is it—it is constrained because consumers can switch away to be providing the answer it thinks is best for consumers, and it's not doing that for charitable reason, it's doing that because unless it does people are going to be going somewhere else.

So if Google thinks that it has the best answer, then it will be displaying that. But if consumers aren't picking on it—picking that—that site, then it's going to drift down over time because Google is going to be ranking higher the things that consumers are actually clicking on.

Senator KOHL. All right.

Senator Lee.

Senator LEE. Thank you, Mr. Chairman. I just have a couple of questions I wanted to ask of Mr. Stoppelman and Mr. Katz. As a prelude to that, I want to reemphasize that I'm a firm believer in the free market. I'm also an almost life-long fan of Robert Bork. In high school I once drove across town just to hear him speak. It therefore shouldn't be surprising I'm focused on consumer welfare.

That was always his emphasis in antitrust law, was consumer welfare.

My question to both of you is this: what, in your view, does Google currently do that most harms consumers, and what can Google do by way of voluntary action to help alleviate any problems that they might have caused in that regard, starting with you, Mr. Stoppelman.

Mr. STOPPELMAN. Yes. Thank you, Mr. Senator.

So what can Google do? I think the key would be separating out distribution from its own properties. For us that's—that's the most important issue. Your chart, I think, very definitively showed that Google is preferencing itself on a regular basis over a wide variety of queries, and often Yelp has the best content when users are doing local searches. And if it's not surfacing that toward the top but instead is taking out most of the real estate with its own property that it only recently decided, you know, was the most relevant, than that's—that's a big problem.

Senator LEE. Mr. Katz.

Mr. KATZ. I would say, you know, the guiding principle is really a level playing field. If that were happening I wouldn't be here today. There is a few things that Google could address if they really wanted to. I would argue its in their interests. They clearly don't agree with that. One simple premise. If they're going to create a placement or a link anywhere on their page, it should be Nextag's easy ability, without changing our business, without becoming something we aren't, that we can get access to that link or that add unit. Today that's not the case for roughly the top half of the page, and for the best ad unit they sell on the page, we can't even compete for it.

Second, they would label more clearly. Those units that you pulled out that are top dead center on the page, those aren't labeled as commercially preferential to Google. Not everybody can be there and consumers really don't know what's behind the scenes. They'll never find the benefits of Nextag or another site because the first half of the page is where everything happens. And last, I think back, I just emphasized level playing field, level playing field, level playing field. Simple principle. If they get it, they make it happen.

Senator LEE. Thank you both very much.

Thank you, Mr. Chairman.

Senator KOHL. Thank you.

Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman.

Ms. Creighton, you worked very closely on the Microsoft case over 10 years ago. There are many parallels between that case and what Google is doing today. You may not agree with that, but I think you would agree that it isn't enough for Google to just say trust us. In fact, I think you said that.

Ms. CREIGHTON. Yes.

Senator FRANKEN. They need to explain to businesses and consumers what they are doing and why. In the Microsoft case, a technical Committee was created to help monitor and enforce the obligations in the final court order. To be clear, DOJ hasn't filed suit against Google, and I'm not suggesting that they should, but I do

see some merit in Google taking the initiative to create a Committee of technologists and other small businesses that could review algorithm tweaks and help provide some assurances that Google is treating everyone equally. What do you think of that idea?

Ms. CREIGHTON. Senator, I'd have to defer to the company in terms of whether that's a good business idea. As a former antitrust enforcer and an antitrust attorney, I'd be extremely concerned about—that—that's just another word for regulation. So, you know, I don't know if you had a chance to see Mr. Barnett's—I think it's in his written testimony. He had to search for Milwaukee doctors and he shows a big Places page at the top on the Google search results. I'd encourage you to run that same search on Yahoo. It looks exactly the same.

Now, it looks different on—and Bing, and I think the real question that we have is whether or not—there's research that both Microsoft and Google have done, and it's public, that 58 percent of all users actually want an answer returned. And one of the things you've probably heard, Microsoft advertises it everywhere, that Google only returns links, Microsoft returns answers. So I think really the question we have to ask is whether or not we want to say that Google can't compete or it's going to have to go through a regulatory Committee before it can be responsive to that demand. The consumer——

Senator FRANKEN. I guess I was suggesting something voluntary.

Ms. CREIGHTON. I think, Senator, that Google—because consumers can switch, their incentive is to do exactly what you're describing today. They have no incentive. They have an incentive——

Senator FRANKEN. To do what I just described today, or what?

Ms. CREIGHTON. They have an incentive to be—to be returning what consumers want, not to be biased in favor of their own content. So, for example, I think there may be a misunderstanding as to what happens, for example, if you click on one of those Places pages. So Google is actually—is—is deflecting advertising revenue away from those pink ads onto a Places page, but that Places page is itself a set of natural search results.

Where consumers go on that Places, two-thirds of the time they actually click through to the website of the company that they're searching for, another quarter of the time they go to review sites. So, they only click 7 percent of the time on the actual Google ad, so Google is actually losing money with that in the short term. But the long term, the reason it does that, is it's competing with Yahoo, and Bing, and everyone else because it's trying to provide—the way you get a consumer back and you make more money over the long term is by providing those answers.

Senator FRANKEN. OK. So you're saying that doing this voluntarily, to maybe——

Ms. CREIGHTON. Is—is what—is what they do today.

Senator FRANKEN. No. I said——

Ms. CREIGHTON. I'm sorry

Senator FRANKEN [continuing]. That they would do—I'm sorry to go over time, but there's just some misunderstanding here, Mr. Chairman. To create a technical Committee to review what they do,

is what the Microsoft case did, which you worked on. That's what I was——

Ms. CREIGHTON. Yes, Senator. I—what I—I'm sorry. What I meant to say was that they actually, as Mr. Schmidt I think explained a little bit, they actually run live tests with us as their guinea pigs, like 1 percent of the traffic. They'll do side-by-sides: do you like this, or like this? And so I think—I think that I'm not sure I understand how——

Senator FRANKEN. OK. You worked on Microsoft and you know——

Ms. CREIGHTON. Yes.

Senator FRANKEN [continuing]. That they—as part of the settlement to comply with the settlement, that they formed a technical Committee to review this. You said that would be regulation and I said, what if they did it voluntarily? Then after that we kind of lost the strain of what we were talking about, I think.

Ms. CREIGHTON. I'm sorry, Senator. I'm sure that was my confusion. Let me try again. In short, I think Google already changes its algorithm 500 times a year. I think a technical Committee would be too slow to be able to keep up with the changes in the market.

Senator FRANKEN. Thank you.

Thank you, Mr. Chairman.

Senator KOHL. Senator Blumenthal.

Senator BLUMENTHAL. Thank you, Mr. Chairman.

Just in fairness to Mr. Schmidt, I understood his testimony actually to be that he felt Google did have a special responsibility by virtue of its size and I want to just express my appreciation for his acknowledgement, and I hope also his receptivity to suggestions to do better, which I think would distinguish him from the experience in Microsoft.

Mr. Barnett, you have had very significant antitrust enforcement experience comparable to Ms. Creighton's—yours at the Department of Justice as head of the Antitrust Division. And I wonder if you could tell us whether you think—and you have no responsibility to answer this question, but if you were in that position now whether you would bring a case, or at least begin an investigation.

Mr. BARNETT. Thank you, Senator. I guess I would start by saying, you know, in that regard Ms. Creighton referred to her background. I don't think anyone would accuse me of having been overly aggressive or prematurely pulling the trigger on bringing monopolization cases, but there was a case that we looked at.

And while I won't go into the details, that had to do with Google, who wanted to enter into a transaction with Yahoo! Where the Department looked specifically at the search and paid search advertising markets and Google abandoned that transaction in the face of a representation from the Department that we were about to file a suit to challenge it in court. So I can tell you that, based on my experience, there's at least one instance where I think they had crossed the line.

Earlier this year they acquired ITA, which is an online travel search asset. That's another issue which I won't go into, but I will say that I think the Department was right to challenge that, which they did. In this context I am more than willing to say that I would certainly open an investigation, and indeed that's—that's a really

important point here. A lot of the hard questions—many of the things we're talking about having to do with deceptive display and all that have nothing to do with the search algorithm, but there have been a lot of questions raised about, what does Google do with its search algorithm?

To the best of my knowledge, nobody has ever actually—nobody outside Google has ever actually looked at it to determine what's going on. And I'm not talking about posting the algorithm on the internet. I'm talking about, in a confidential investigation, enabling a responsible antitrust enforcement agency to gather the facts. And I would certainly want to gather the facts, and based on what I've seen, I would be very concerned that there is harm to consumers.

Senator BLUMENTHAL. I want to thank you for your testimony. I invite any of the witnesses to comment on the market analysis, market definition, related questions, but most especially on the question that has been raised by myself and others as to what Google might voluntarily do, because certainly enforcement actions, as both you and Ms. Creighton know, are costly, time consuming, cumbersome, blunt, and inexact instruments of protecting competition, and far better to have voluntary actions that can avoid even the appearance or complaints about antitrust violations. And again, to emphasize, I have formed no conclusions myself, whatever that's worth, about the merits or the issues of fact and law here. So, thank you for being here and thank you for sharing your perspectives and views.

Senator KOHL. Thank you, Senator Blumenthal.

Today's hearing demonstrates the importance of vibrant and open competition on the internet. The actions of Google as a dominant internet search firm has profound effects on the ability of businesses to prosper and to compete, as well as on the ability of consumers to find the best products and services at the best prices.

We need to continue to consider whether Google merely does its best to serve consumers' interests as it claims, or biases its search results so as to distort competition in its favor as its critics argue. We will continue to examine these issues. We very much appreciate your being here. You have added much information and light to this very important topic, and this hearing is now closed.

[Whereupon, at 4:50 p.m. the hearing was concluded.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Senate Judiciary Subcommittee on
Antitrust, Competition Policy and Consumer Rights

Hearing on "The Power of Google: Serving Consumers or Threatening Competition?"

Responses of Thomas O. Barnett (Covington & Burling LLP)
to Follow-Up Questions for the Record Received from Senator Grassley

Question 1: You've testified about allegations of improper and illegal behavior on the part of Google. What do you think federal regulators should do? What about Congress? Are you not concerned about overregulation of the internet and the possibility that government involvement will stifle innovation?

Answer 1: Federal antitrust enforcers should conduct a thorough investigation of Google's conduct. If they determine that Google has harmed competition in violation of the antitrust laws, they should take appropriate action to remedy that harm. Congress should continue to exercise its important oversight role and to encourage the agencies to enforce the antitrust laws effectively. Those laws protect the competitive process, which provides companies with the opportunity and the incentive to innovate and compete on the merits. If Americans are to benefit from the full potential that the Internet offers, Congress and federal and state antitrust enforcers must ensure that Google obeys those laws.

If Google is instead permitted to use its dominance in search and search advertising to stifle competition, then innovation, and consumers, will suffer. This is not just a theoretical concern. Jeffrey Katz and Jeremy Stoppleman -- respectively, the CEOs of Nextag and Yelp -- both testified at the Subcommittee hearing that they would not attempt to launch their companies in today's market given Google's use of its dominance in search and search advertising to exclude competition.

More generally, if Google is permitted to continue to expand and reinforce its dominance across broader and broader swaths of the Internet, there will be increasing pressure for some form of government intervention. Antitrust enforcement has the benefit of protecting free market competition. Direct government regulation -- such as through the creation of an Internet oversight agency -- could well impose more rigid and burdensome obligations that could pose an even more serious threat to innovation on the Internet.

Question 2: One of my constituents is concerned that the goal of FTC's investigation into Google's business practices "is to . . . place new rules and regulations on [a] very successful internet technology company" and that the investigation is "counterproductive, totally unwarranted, and goes against all the principles that truly make a capitalist free market economy work for the betterment of all." Do you agree with these concerns? Why or why not?

Answer 2: No, I do not agree. For the reasons set forth in the answer to the prior question and in my written testimony, antitrust enforcement is consistent with market competition and can help avoid the need for more burdensome, less efficient government regulation. The best response to Google's dominance and exclusionary conduct, I believe, is effective enforcement of

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our nation's existing antitrust laws, which will ensure that all participants in the market, including Google, are able to innovate and compete on the merits.

Question 3: The online search market is a dynamic, constantly evolving market. Do you believe that search is an essential facility that should be regulated? Are you concerned with what would happen to innovation in search if the government were to regulate it?

Answer 3: Effective antitrust enforcement is essential in order to ensure that dominant companies like Google operate within the boundaries of the law and that consumers are able to benefit from the competitive process that those laws safeguard. At the same time, more direct government regulation presents significant challenges and risks. Accordingly, the best response to Google's dominance and exclusionary conduct, I believe, is effective enforcement of our nation's existing antitrust laws.

Question 4: Google often responds to its critics by saying that "Competition is just one click away." Do you agree with that statement? Why or why not?

Answer 4: The fallacy in this slogan frequently invoked by Google is that the opportunity to click to another site does not help the user if there is no other site providing a comparable service. Because of the network effects that benefit Google from its massive scale, other general search engines simply cannot provide the same level of search service. Search engines "learn by doing." As more users enter more queries into the search engine, it gains access to more data, and it is better able to develop and improve its algorithms. Over time, this makes it more likely that the search engine will be able to return results that users find relevant, which in turn leads to even more users entering more search queries, and so on. Without sufficient scale, a search engine is less able to improve and innovate, less able to attract users, and therefore less able to compete. The self-reinforcing loop of scale also enables a dominant search provider like Google to maintain and even expand its dominance over time. Even Mr. Schmidt has acknowledged that "[m]anaging search at our scale is a very serious barrier to entry."[1]

Because of those hurdles, Google is unlikely to face significant competition in search for the foreseeable future. As a result, the ability of users to click to other sites does not impose significant competitive constraints on Google.

October 13, 2011

[1] John Markoff and G. Pascal Zachary, *In Searching the Web, Google Finds Riches* (April 13, 2003), http://www.nytimes.com/2003/04/13/business/in-searching-the-web-google-finds-riches.html?src=pm.

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Senate Judiciary Subcommittee on
Antitrust, Competition Policy and Consumer Rights

Hearing on "The Power of Google: Serving Consumers or Threatening Competition?"

Responses of Thomas O. Barnett (Covington & Burling LLP)
to Follow-Up Questions for the Record Received from Chairman Kohl

Question 1(a): In considering the competition to Google as a general search engine, is the competition offered by the Microsoft/Yahoo partnership Bing, which has a market share of about 30%, sufficient? Should the fact that Bing loses about $ 2 billion dollars a year matter in thinking of Bing as a competitive alternative?

Answer 1(a): The evidence confirms that Google wields monopoly power in general search and paid search advertising in the U.S. Google's Executive Chairman Eric Schmidt has admitted as much. He acknowledged in 2003 the major barriers to entry to general search.[1] In addition, in response to your question at the hearing about whether Google's very high market shares indicate that it has monopoly power, Mr. Schmidt said, "I would agree, Senator, that we're in that area."

Bing has not challenged Google's dominance of the general search and search advertising markets. Bing has not, for example, taken any significant share of searches away from Google since its launch in 2009; most of the market share that it has gained in that time has come from its search partner Yahoo! and from other, smaller search providers, like Ask.com.[2] Further, the large losses suffered by Bing each year raise the distinct possibility that Bing will exit the market, leaving Google as the only general search engine in the U.S.

Question 1(b): Are there high barriers to entry to anyone starting a new search engine? What are they?

Answer 1(b): There are high barriers to entry that someone starting a new general search engine would have to surmount. First, there are significant technological obstacles that any entrant must overcome. Providing high-quality search results in a fraction of a second presents an exceptionally complicated and dynamic computer science problem. To solve this problem and deliver quality search results to its users, an entrant must develop complex search algorithms, manage and store enormous quantities of data, and build a huge network of computers and servers to do so. Besides the technological challenges this presents, it also costs a great deal of money. Google, for example, runs nearly one million servers in data centers around the world[3]

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[1] John Markoff and G. Pascal Zachary, *In Searching the Web, Google Finds Riches* (April 13, 2003), http://www.nytimes.com/2003/04/13/business/in-searching-the-web-google-finds-riches.html?src=pm.

[2] David Goldman, *Microsoft's Plan to Stop Bing's $1 Billion Bleeding* (Sept. 20, 2011), http://money.cnn.com/2011/09/20/technology/microsoft_bing/index.htm.

[3] Jonathan G. Koomey, Ph.D., *Growth in Data Center Electricity Use 2005 to 2010*, at 23 (Aug. 1, 2011), http://www.analyticspress.com/datacenters.html.

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and invested $890 million in its data center infrastructure in the first three months of 2011 alone.[4]

Even if an entrant could meet these technological and financial challenges, it would also have to achieve sufficient and significant "scale" in order to compete against Google. Search engines "learn by doing." As more users enter more queries into the search engine, it gains access to more data that can be used to improve the search algorithms. Over time, this makes it more likely that the search engine will be able to return results that users find relevant, which in turn leads to even more users entering more search queries, and so on. Without sufficient scale, a search engine is less able to improve and innovate, less able to attract users, and therefore less able to compete. The self-reinforcing loop of scale also enables a dominant search provider like Google to maintain and even expand its dominance over time. As Mr. Schmidt has acknowledged, "Managing search at our scale is a very serious barrier to entry."[5]

Question 2: Google sometimes argues that it competes with social networking sites such as Facebook. Should Facebook be considered in the same market as the Google search engine? Why or why not?

Facebook does not provide general search functionality that is comparable to the general search engine available on Google.com. Indeed, my understanding is that, to the extent that a user seeks to perform a general web search on Facebook, the search is powered by Bing, not Facebook.

Question 3: Senior Google executives such as Marissa Meyer have openly acknowledged that Google lists its products and services first, ahead of organic search results. Do you believe there is an antitrust problem with Google favoring its own services in light of Google's dominant market share?

Answer: When a dominant firm like Google engages in exclusionary conduct to maintain or extend its dominance, rather than compete on the merits, its conduct raises significant antitrust issues. Google's dominance in search provides it with enormous power to steer users to particular websites. Unfortunately for consumers, Google appears to be abusing that power by using deceptive practices to induce users to click on links to Google pages in which Google has an economic interest.

Google has led users to understand that the search results displayed at the top of the page are links to those sites that Google's algorithm has indicated are most likely to be responsive to the user's query, unless the links are labeled as paid advertisements. Recently, however, Google began inserting links to Google pages at or near the top of the search results that are not the result of the normal algorithmic process. Because of this artificially prominent placement, consumers can be misled into clicking on the Google links in the mistaken belief that they are

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[4] Google Investor Relations, *Google Announces First Quarter 2011 Results* (Apr. 14, 2011), http://investor.google.com/earnings/2011/Q1_google_earnings.html.

[5] John Markoff and G. Pascal Zachary, *In Searching the Web, Google Finds Riches* (April 13, 2003), http://www.nytimes.com/2003/04/13/business/in-searching-the-web-google-finds-riches.html?src=pm.

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natural, algorithmic search results. Google can thereby steer users to its own pages and foreclose the ability of competing sites to gain visibility. For example, when a user searches for information on the stock of a given company, the Google Finance link is displayed before any algorithmic results, with no clear label that the link has been placed there artificially by Google and that it is not a natural, algorithmic result to the consumer's query. This tactic also pushes competing services, such as Yahoo! Finance, further down the search results page, regardless of whether they are better or more popular than the Google site.

Through this deceptive and exclusionary conduct, Google harms competition in specialized, or "vertical," search markets (such as finance, maps, or shopping). By artificially promoting its own products, Google deprives competing sites of traffic and advertising revenue, raises their costs as they are forced to spend more on paid search ads to make up for part of the lost traffic, and reduces their incentives and ability to innovate. This stifles the development of nascent competitors and enables Google both to maintain its dominance in general search and search advertising and to extend that dominance into vertical areas. The final result is less innovation and higher prices for consumers and businesses.

Question 4: Do you believe that the "search penalties" Nextag has been subject to in Europe – that is, placement on the search results being deliberately downgraded by Google because it, among other things has search functionality on its site and links to other sites – is an example of Google attempting to maintain its dominant market position in search? What are the antitrust implications of this conduct?

Answer: Because Google so dominates search and because search is the gateway to the Internet, Google has the power to steer enormous volumes of user traffic to -- or away -- from a given website. The tactic described in the question -- downgrading the search rankings of sites because they compete with Google -- is one means by which Google can exercise its power. Thus, such activity by Google can pose a serious threat to competition. Further, in the same manner described above, such manipulation of search result rankings would constitute a deceptive practice in that consumers have been led by Google to believe that sites ranked higher on the search results have been identified by Google's search algorithm as more likely to be relevant to a user query.

The opaque nature of Google's algorithm makes it difficult to determine from the outside whether and, if so, to what extent Google may be engaging in such conduct. Thus, it is important for the FTC and other antitrust enforcement agencies to conduct a thorough investigation that includes examination of such practices by Google.

Question 5: Mr. Barnett, do you believe that there are enough safeguards inside Google to guard against search bias – that is, favoring the websites and services it owns in search results? Should there be some outside supervision of Google's conduct to ensure against this?

Answer: Google is a for profit corporation that seeks to earn money for its shareholders. Accordingly, Google has the economic incentive to engage in conduct that can increase its profits. As discussed during the hearing, Google's incentives have changed dramatically in recent years. At one time, Google's incentive was to direct users to the most relevant sites as

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efficiently as possible. Now, Google has an economic incentive to keep users within the "Google universe," where it can continue to monetize their activity. Google therefore has an incentive to steer users to its own products, such as Google Places (hotels, restaurants and destinations), Google Product Search (product information and price comparisons), Google Finance (investment and other financial issues), Google Maps (location and direction information), and YouTube (video content). Because Google now competes with the very websites that depend on its dominant search engine and search advertising platform to reach consumers, it has both the incentive and the ability to foreclose the visibility of rival sites.

If consumers are to benefit from the full potential of the Internet, antitrust enforcers need to provide independent outside scrutiny of Google's actions to ensure that Google obeys the antitrust laws. Indeed, antitrust enforcement already has helped to preserve competition. In 2008, Google and Yahoo! abandoned their proposed partnership in the face of threatened litigation by the Antitrust Division of the Department of Justice. Earlier this year, a federal court in New York rejected the Google Books settlement on the grounds that it "would further entrench Google's market power in the online search market."[6] Also this year, the Department of Justice obtained an antitrust consent decree that imposed conditions on Google's takeover of ITA Software, the leading provider of online flight search technology.[7] Most recently, the antitrust scrutiny of ongoing investigations by the FTC and numerous state attorneys general forced Google to take an initial step back from its unauthorized use of content that it has scraped from other sites. In short, enforcement of existing antitrust laws can help preserve the benefits of competition for consumers.

Question 6: The Federal Trade Commission and several state attorneys general are currently pursuing an antitrust investigation against Google. Should they conclude the law has been violated, are there any specific remedies you believe they should pursue?

Answer: The FTC and the state attorneys general need to conduct a thorough investigation and to make enforcement decisions based on the facts discovered in that process. At this point, based on the evidence available today, it appears that Google's exclusionary and anticompetitive conduct might well have crossed the line in several respects, raising serious concerns about the possibility of a violation of Section 2 of the Sherman Act and/or Section 5 of the FTC Act: (i) Google has a dominant share of the search and search advertising markets; (ii) Google is maintaining that dominance and expanding its dominance into other markets; and (iii) Google has been doing so through a pattern of exclusionary conduct rather than by competing on the merits.

If, after a full investigation, the FTC and the state attorneys general determine that Google has violated the antitrust laws, they should pursue concrete, administrable remedies that can help preserve the benefits of competition for consumers. While any remedy should be crafted based on the violations found, the information already available points to examples of relief that an antitrust enforcement action could seek that would help consumers. For example, an order could

[6] *Authors Guild v. Google, Inc.*, No. 1:05-cv-8136, Order at 37 (S.D.N.Y. Mar. 22, 2011).

[7] *United States v. Google*, No. 11-cv-00688 (D.D.C. Oct. 5, 2011).

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prohibit Google's deceptive display of its own links, Google's practice of scraping and using content from other sites without their permission, and the reduction of a site's rankings in its search results based on whether the site competes with Google.

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Senate Judiciary Subcommittee on
Antitrust, Competition Policy and Consumer Rights

Hearing on "The Power of Google: Serving Consumers or Threatening Competition?"

Responses of Thomas O. Barnett (Covington & Burling LLP)
to Follow-Up Questions for the Record Received from Senator Lee

Question 1: In your written testimony, you make a statement that I find compelling: "Google already possesses unprecedented power to steer users and to stifle competition. If, for some reason, antitrust enforcement is not able to address these concerns, there will be pressure to reign in Google's power through more direct government regulation that is likely to be more rigid and burdensome and that itself would pose a threat to innovation and economic growth on the Internet." What are the specific aspects of the threat that (in the absence of antitrust enforcement) you believe may cause significant elements of the Internet to be subject to intrusive government regulation?

Answer: Google already wields enormous economic power through its dominance of search and paid search advertising, earning $29 billion in revenues last year.[1] Further, Google is expanding its dominance into other, search-dependent services, such as maps, finance, product search, and user-generated video. If antitrust enforcers fail to take appropriate action, government regulatory officials and consumers in the U.S. and abroad could become increasingly concerned by Google's growing power over Internet commerce and frustrated with the lack of sufficient enforcement. The result could well be louder calls for government regulatory bodies that would have the authority to dictate what companies can and cannot do under a broad, nebulous standard. For example, there have been suggestions that the government should create a "Federal Search Commission" to investigate and regulate Internet search providers.[2] The best response to Google's dominance and exclusionary conduct, I believe, is effective enforcement of our nation's existing antitrust laws to ensure that all participants in the market, not just Google, are able to innovate and compete on the merits.

Question 2: We learned from Robert Bork that the animating principle of antitrust justice ought to be consumer welfare. My principal concern with Google's current practices is that they harm consumers. What specific ways do you believe Google's actions work to harm consumers?

Answer 2: Although the growth of the Internet represents a major opportunity for American consumers, Google's conduct threatens to derail that progress in various ways. For example, Google deceives consumers as it ensures that its own products appear more prominently than those of its competitors on its search results pages, which denies consumers the opportunity to make an informed choice among alternatives. It also deprives competing sites of traffic and

[1] Google Investor Relations, *2011 Financial Tables*, http://investor.google.com/financial/tables.html.

[2] Frank Pasquale, *Internet Nondiscrimination Principles for Competition Policy Online: Testimony Before the Task Force on Competition Policy and Antitrust Laws of the House Committee on the Judiciary*, at 1 (July 15, 2008), http://judiciary.house.gov/hearings/pdf/Pasquale080715.pdf.

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advertising revenue, which reduces their ability to invest in further development and raises their costs, in part because they are forced to spend more on paid search ads to make up some of the lost traffic. Those higher costs are inevitably passed on to consumers in the form of higher prices.

Finally, and perhaps most importantly, if Google continues to foreclose the ability of sites to be seen by users, established vertical sites will have less reason to continue to invest in innovation and new sites will be less willing to take the substantial risks and incur the significant investments necessary to enter the market. This is not just a theoretical concern. Jeffrey Katz and Jeremy Stoppleman -- the CEOs of Nextag and Yelp, respectively -- both testified at the Subcommittee hearing that they would not attempt to launch their companies in today's market given Google's exclusionary conduct. Over the long run, absent effective antitrust enforcement, Google may come to dominate more and more of Internet commerce – with consumers and businesses suffering from higher prices and less innovation.

Question 3: Google has often said that competition is just "one click away." In what respects do you believe this is true and in what respects do you think this is misleading?

Answer 3: The fallacy in this slogan frequently invoked by Google is that the opportunity to click to another site does not help the user if there is no other site providing a comparable service. Because of the network effects that benefit Google from its massive scale, other general search engines simply cannot provide the same level of search service. Search engines "learn by doing." As more users enter more queries into the search engine, it gains access to more data, and it is better able to develop and improve its algorithms. Over time, this makes it more likely that the search engine will be able to return results that users find relevant, which in turn leads to even more users entering more search queries, and so on. Without sufficient scale, a search engine is less able to improve and innovate, less able to attract users, and therefore less able to compete. The self-reinforcing loop of scale also enables a dominant search provider like Google to maintain and even expand its dominance over time. Even Mr. Schmidt has acknowledged that "[m]anaging search at our scale is a very serious barrier to entry."[3]

Because of those hurdles, Google is unlikely to face significant competition in search for the foreseeable future. As a result, the ability of users to click to other sites does not impose significant competitive constraints on Google.

Question 4(a). We have been reminded many times over the last few months of the FTC's investigation into Microsoft in 1998. In what ways is the Google of 2011 similar to the Microsoft of 1998?

Answer 4(a). At its core, the antitrust case against Microsoft involved a company with a dominant position in one market -- the operating system market -- using its monopoly power to foreclose competition in related markets (e.g., internet browsers). The result was not only to

[3] John Markoff and G. Pascal Zachary, *In Searching the Web, Google Finds Riches* (April 13, 2003), http://www.nytimes.com/2003/04/13/business/in-searching-the-web-google-finds-riches.html?src=pm.

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threaten competition in the related markets, but also to stifle nascent threats to Microsoft's dominant operating system in order to maintain Microsoft's dominance.

The similarities with Google today are striking. Like Mierosoft, Google has monopoly power, albeit in at least two markets -- general search and paid search advertising. Also like Microsoft, Google is alleged to be abusing its monopoly power to foreclose competition in related markets (*e.g.*, search dependent markets, such as maps, finance, product shopping, and user-generated video). And, like Microsoft, in doing so, Google not only threatens competition in these other markets, but also quashes nascent competitive threats (such as vertical search engines) to its general search dominance.

In one respect in particular, the analogy is directly on point. Google is rapidly gaining a dominant position in mobile operating systems through its "less than free" distribution of its Android operating system. Google's control over the mobile operating system in addition to its virtual absolute control over mobile search and mobile search advertising (with a share of each that exceeds 95%)[4] gives even more control over a user's experience on a mobile device than Microsoft had over the user experience on desktop computers. Google can, for example, use compatibility with its Android operating system as a "club" to exclude competitors.

Question 4(b). Some have suggested that Google seems to be innovating more than Microsoft was in 1998. Do you agree and, if so, does that change the approach?

Answer 4(b). The question for antitrust enforcers is whether Google today is engaging in exclusionary conduct that forecloses competition. If so, then Google has denied consumers the benefits of innovation by competitors that have been foreclosed while insulating itself from competitive pressures that would spur Google's own innovative efforts.

Question 4(c). Do Google's current activities call for similar antitrust action and remedies to those agreed to in the Microsoft case?

Answer 4(c). If, after a full investigation, the FTC or a state attorney general determines that Google has violated the antitrust laws, the FTC or state attorney general should pursue concrete, administrable remedies to protect the competitive process. While any remedy should be crafted based on the violations found, the information already available points to examples of relief that an antitrust enforcement action could seek that would help consumers. For example, an order could prohibit Google's deceptive display of its own links, Google's practice of scraping and using content from other sites without their permission, and the reduction of a site's rankings in its search results based on whether the site competes with Google.

Question 5: Attaining market dominance by providing the best product is not itself a violation of antitrust principles. Can you provide examples of how you believe Google is improperly

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[4] *See* Greg Sterling, *Visualizing Google's Dominance of Mobile Advertising* (Feb. 16, 2011), http://searchengineland.com/picturing-googles-dominance-of-mobile-advertising-65114; *see also* Greg Sterling, *Google Controls 97 Percent Of Mobile Paid Search: Report* (Mar. 7, 2011), http://searchengineland.com/google-controls-97-percent-of-mobile-paid-search-report-66876.

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leveraging and fortifying its market dominance by engaging in anticompetitive behavior as opposed to relying solely on the merits of its products?

Answer 5: As a result of its dominance in search and search advertising, Google wields enormous power to steers users to -- or away from -- particular websites. Unfortunately for consumers, Google is now abusing that power to undermine competition by steering users to its own sites and foreclosing the visibility of competing sites. For example, as you illustrated during your questioning of Mr. Schmidt, Google steers users toward its own products (like Google Places or Google Maps) by deceptively displaying them prominently and consistently at or near the top of the results page in ways that mislead consumers into believing that they are top-ranked natural, algorithmic search results. Google also scrapes content developed by other websites, like user reviews from TripAdvisor and Yelp, and uses it without permission to build its own competing sites. Further, Google coerces sites into accepting such scraping by tying access to its dominant search engine results to Google's use of such scraped content in other Google products, such as Google Places or Google Product Search. In each of these cases, Google is promoting its products not by competition on the merits, but instead through misleading users and coercing competitors.

Question 6(a): In 1998, some suggested that Microsoft would "take over the world." It is difficult to speculate what may have happened had the FTC not intervened, but few could have predicted the growth of Apple and Linux, which now offer meaningful alternatives for consumers. With respect to an innovative company in a rapidly evolving industry, what potential harm may come from early enforcement of antitrust laws?

Answer 6(a). The principles of effective antitrust enforcement apply across all industries. I am aware of the suggestions made by some that antitrust enforcement has no place in dynamic, rapidly-evolving markets like Internet search. A bipartisan, congressionally-chartered panel of experts -- the Antitrust Modernization Commission (AMC) -- recently studied and rejected this very argument. The AMC concluded that "[c]urrent antitrust analysis has a sufficient grounding in economics and is sufficiently flexible to reach appropriate conclusions in matters involving industries," like Internet search, "in which innovation, intellectual property, and technological change are central features."[5] Judge Richard A. Posner has taken a similar view: "[A]ntitrust doctrine is sufficiently supple, and sufficiently informed by economic theory, to cope effectively with the distinctive-seeming antitrust problems that the new economy presents."[6]

In short, antitrust laws ensure that companies -- even those in highly innovative, rapidly-evolving industries -- have the opportunity to compete and that those who win do so by competing on the merits. This competition drives companies in a free market to reduce costs, improve quality, and invent new products and services, which benefits consumers and spurs economic growth.

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[5] Antitrust Modernization Commission, *Report and Recommendations* at 31 (Apr. 2007), http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

[6] Hon. Richard A. Posner, ANTITRUST LAW 256 (2d ed. 2001).

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Question 6(b). Is it possible or even likely that the markets in which Google operates will experience some sort of disruptive technology that will allow for new entrants or the resurgence of current competitors?

Answer 6(b). The mere existence of a theoretical possibility of competition from a disruptive, new technology at some indefinite point in the future does not warrant abdication of antitrust enforcement, which is the implication presented by this argument. Rather, appropriate antitrust enforcement protects competition and consumer welfare during the period before any such disruptive new technology emerges, which could be many years. Further, antitrust enforcement can help maintain a fertile competitive environment in which new developments are more likely to emerge and take root rather than to be crushed in their incipiency by the incumbent dominant company.

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Senate Judiciary Committee
Subcommittee on Antitrust, Competition Policy and Consumer Rights
Hearing on "The Power of Google: Serving Consumers or Threatening Competition"
September 21, 2011

Sen. Grassley's Questions for the Record for Susan Creighton

1. **You are familiar with the Microsoft case brought by the Justice Department in the late 1990s – early 2000s. Could you explain the difference between Internet Explorer and its interdependency on Windows in 1998 and Google Places' interdependency on Android today?**

There are at least three important differences between Internet Explorer's relationship to Windows and Google Places' relationship to Android.

First, Microsoft used various exclusive dealing, tying, commingling of code, and other anticompetitive conduct to foreclose distribution and use of competing browsers and ensure that Internet Explorer remained the primary web browser used on Windows systems. Google does not condition access to or use of Android on pre-installation of any Google application, including Google Places, or on making Google the default search engine. Handset makers who wish to pre-install Google applications are required to meet certain minimum compatibility standards to ensure that applications written for Android will function properly on those phones. However, Google does not condition Android compatibility determinations on pre-installation of Google applications or on making Google the default search engine.

Second, Windows had approximately 90% market share among operating systems used on PCs, and so any competing browser, such as Netscape, that attempted to penetrate the PC market had to overcome Microsoft's tactics in order to gain access to users. Android does not have comparable market share and so competitors that seek access to smartphone users are able to distribute their applications on the iPhone, on RIM (BlackBerry), on Windows Mobile, and, of course, also on Android. Users of Android, the iPhone, and other smartphones can quickly and freely download and use apps much more easily than users in 1998 could download software to be used on Windows.

Finally, Microsoft never successfully demonstrated any benefits to users from commingling the code for Internet Explorer and Windows and tying the use of Internet Explorer to Windows. In contrast, Google does not condition use of Android on the installation of Google Places, and users of the Google Places app benefit from functionality that comes with using the Google Places app on a mobile operating system because the app uses information about the user's location to help the user find nearby local businesses. For these reasons, I believe that there are fundamental differences between the anticompetitive conduct Microsoft undertook to require Windows users to use Internet Explorer, versus the free and open mobile environment created by Android with the flexibility that mobile users have to customize their mobile devices with apps from Google's competitors.

2. **Google often states that "Competition is just one click away." Do you agree with this statement? Why or why not? Does this claim hold true in a smartphone environment, where pre-installed Android applications create a high barrier for competition?**

I agree whole-heartedly with Google that "competition is just one click away." The statement also holds true for the smartphone environment, where users can easily navigate to different web pages on mobile web browsers and download applications from Google's competitors.

With respect to Internet search, it is virtually costless, both in time and money, for consumers to try different search engines. Because using another search engine is free and costs a consumer only a few seconds of time (*e.g.*, the amount of time it takes to type "www.blekko.com"), an innovative search engine that delivers better results than its rivals can expect to attract and keep users. Google cannot prevent users from switching to Bing, Yahoo!, Blekko, or any specialized search engine such as Amazon, Yelp, or NexTag.

Just as the Internet provides a level playing field for websites, on the Android platform there are no obstacles for rival application developers looking to reach their audiences and achieve success. The Android platform was designed to allow users to fully "personalize" their mobile devices – including the applications. Because Android is customizable by the user, if a user does not like a particular application (including a pre-installed one), they can easily download, install and use a competing application, typically in just a minute or two. This applies even to native applications like the email client, calendar, and browser.

Thus, pre-installation of an application on an Android device does not serve as a barrier for competing applications. For example, Yelp's mobile apps appear to be doing quite well. Yelp boasts that "over 40% of all Yelp searches were done on one of [Yelp's] mobile apps."[1] Yelp's experience shows that users download and use mobile apps no matter what other apps may come pre-installed. Yelp's website shows that it has mobile apps for the iPhone, iPod Touch, Android, BlackBerry, Windows Phone 7, Palm Pre, and a mobile site (m.yelp.com) for mobile browsers.[2] Therefore, I also agree that "competition is only one click away," and that equally applies to the mobile environment where competition is only "one tap" or "one download" away.

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[1] *Yelp, Siri Says*, YELP WEB LOG (Oct. 17, 2011, 1:15 PM), http://officialblog.yelp.com/2011/10/yelp-siri-says.html.

[2] *See* YELP FOR MOBILE, http://www.yelp.com/yelpmobile (last visited Nov. 3, 2011).

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3. **One of my constituents praised Google's services and indicated that it gives him "the tools to help my business grow, supporting business across [Iowa], and fueling our national economy." He urged that "Government should not be picking winners and losers – it should allow successful companies like Google to continue to empower small business and promote entrepreneurial growth across our country." What is your opinion on this?**

I agree with your constituent. The antitrust laws are founded on the bedrock principle that the government should not be in the business of picking winners and losers, but should let consumers pick winners and losers through our free-market system. Only where conduct has been found to harm competition itself – not just a specific competitor or competitors – should the government take action.

There is in my view no evidence that the competitive process has been harmed. To the contrary, in the more than twenty years in which I have been an attorney representing high-technology companies in Silicon Valley, I have never seen competition flourish in the high-tech sector as it is today. As Thomas Friedman wrote a few weeks after the Senate hearing:

> While Wall Street is being rattled by a social revolution, Silicon Valley is being by transformed by another technology revolution—one that is taking the world from connected to hyperconnected and individuals from empowered to superempowered. It is the biggest leap forward in the I.T. revolution since the mainframe computer was replaced by desktops and the Web. It is going to change everything about how companies and societies operate.
>
> The latest phase in the I.T. revolution is being driven by the convergence of social media—Facebook, Twitter, LinkedIn, Groupon, Zynga—with the proliferation of cheap wireless connectivity and Web-enabled smartphones and "the cloud". . . .
>
> The emergence of the cloud, explained Alan Cohen, a vice president of Nicira, a new networking company, "means than anyone can have the computing resources of Google and rent it by the hour." This is speeding up everything—innovation, product cycles and competition. . . .
>
> The great thing about the new I.T. revolution, says Jeff Weiner, the C.E.O. of LinkedIn, is that "it makes it easier and cheaper than ever for anyone anywhere to be an entrepreneur" and to have access to all the best infrastructure of innovation. "And despite all of our challenges," he adds, "it is happening here in America."[3]

In my view, antitrust law should follow the principle of medical ethics "first do no harm." As your constituent noted, companies like Google "continue to empower small business and

[3] Thomas Friedman, *One Country, Two Revolutions*, N.Y. TIMES, Oct. 23, 2011, at SR11, *available at* http://www.nytimes.com/2011/10/23/opinion/sunday/friedman-one-country-two-revolutions.html.

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promote entrepreneurial growth across our country." Replacing this vibrant, competitive marketplace with government regulation aimed at determining the utility of billions of different results to millions of different users is, I believe, the antitrust equivalent of performing surgery on a healthy patient. Despite all the challenges we face in other economic sectors, in high technology, as Mr. Friedman observed, an extraordinary revolution is taking place, and "it is happening here in America." Government intervention in this thriving marketplace can only threaten the market's healthy vibrancy; it cannot improve it.

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4. The online search market is a dynamic, constantly evolving market. Do you believe that search is an essential facility that should be regulated? Are you concerned with what would happen to innovation in search if the government were to regulate it?

I do not believe that search is an essential facility. I am, however, very concerned regarding the harm that consumers would suffer if search were subject to government regulation, either by an agency or by the courts.

The "essential facilities" doctrine has been the subject of frequent criticism by leading antitrust scholars,[4] and has never been endorsed by the Supreme Court.[5] Some lower courts have recognized the doctrine in very limited circumstances, typically involving physical infrastructure such as stadiums or electric transmission lines that cannot be readily duplicated. To be an essential facility, courts that have recognized the doctrine have stressed that control of the asset must "carr[y] with it the power to *eliminate* competition in the downstream market."[6] A facility "is not essential even if it is widely preferred by consumers and producers in the market, as long as there is an alternative (albeit inferior) [option available]."[7] In other words, to be truly essential, "the #1 monopoly facility also establishes a #2 monopoly."[8]

Neither Google nor any other search competitor has anything remotely resembling the ability to "eliminate" competition in adjacent markets. Google cannot prevent consumers from navigating directly to other websites, going to competing search engines or social networks that provide links to other web sites, clicking on advertisements displayed on any of the thousands of other websites on the Internet, or downloading mobile apps.

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[4] *See* Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841 (1989); *see also* 3 PHILLIP E. AREEDA, DONALD F. TURNER & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 771, at 195-96 (1978) (describing essential facility doctrine as "inconsistent with antitrust's purpose"); *id.* at 196 ("Lest there be any doubt, we state our belief that the essential facility doctrine is both harmful and unnecessary and should be abandoned.").

[5] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 410-11 (2004) (stating that the Court "never recognized such a doctrine").

[6] City of Anaheim v. S. Cal. Edison Co., 955 F.2d 1373, 1380 n.5 (9th Cir. 1992) (quoting Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 544 (9th Cir. 1991)); *see also* Twin Labs., Inc. v. Weider Health & Fitness Corp., 900 F.2d 566, 570 (2d Cir. 1990).

[7] JamSports & Entm't v. Paradama Prods., 336 F. Supp. 2d 824, 839 (N.D. Ill. 2004).

[8] AREEDA ET AL., *supra* note 41, ¶ 771, at 193.

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Regarding your second question, I am extremely concerned about what would happen to innovation in search if government were to regulate it, whether through an agency or the courts. Google ranks content based on complex, rapidly evolving, and nonpublic algorithms designed to determine which results users will find most useful. Relief that requires Google to rank third-party sites in a particular way would require the courts or a regulatory agency to override Google's algorithms and, in effect, impose government-crafted ones. The regulator would need to determine how to rank literally hundreds of millions of websites as well as how to rank the results of specialized algorithms (*e.g.*, thematic search results such as video, news, etc.) against the results produced by other algorithms – an apples-to-oranges comparison that has presented an ongoing technical design challenge to general search engines since at least the late 1990s. Moreover, these metrics would necessarily need to adjust in real time, because the relevance of web pages to users is constantly changing, and webmasters continually create more sophisticated means of trying to trick Google into ranking lower-quality sites higher.

There is, in short, neither (i) an "objective" benchmark against which to rank websites, nor (ii) a feasible remedial mechanism for determining either the placement of thematic search results or where to rank websites unhappy with the ranking Google's algorithms give them. What is certain, however, is that compelling access to Google on terms regulated by an agency or a consent decree would chill the very innovation that the Sherman Act is designed to protect. In effect, Google would become a regulated utility administered by regulators (whether an agency or a court) who are not experts in Google's business and who would sit in judgment of Google's decisions how to provide service to every customer. Central planning would substitute for the market. In my opinion, a result more antithetical to the welfare of consumers or the purposes of the Sherman Act is hard to envision.

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Wilson Sonsini Goodrich & Rosati
PROFESSIONAL CORPORATION

Senate Judiciary Committee
Subcommittee on Antitrust, Competition Policy and Consumer Rights
Hearing on "The Power of Google: Serving Consumers or Threatening Competition"
September 21, 2011

Sen. Kohl's Questions for the Record for Susan Creighton

1. **Would you argue that it is completely permissible under antitrust law for Google to favor its own products and services on its results page? Or, as a dominant firm, are there any restraints on Google's practices, and, if so, what are they?**

This question presupposes that Google is a "dominant" firm. "Dominance" is a term that, although used in some jurisdictions outside the United States, does not have any established legal significance in American antitrust law. The threshold question under American antitrust law is whether a firm has what is known as "monopoly power" in a properly defined antitrust market. If a firm does have monopoly power, then it is prohibited from engaging in what is referred to as "exclusionary" conduct – that is, conduct that amounts to "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[1]

The requirements of "monopoly power" and "exclusionary conduct" contained in Section 2 of the Sherman Act reflect two key principles that long have served as underpinnings for American antitrust law. First, when reviewing a company's unilateral, day-to-day decisions, government agencies and courts need to exercise extraordinary care not to chill innovation or other marketplace conduct that benefits consumers. Accordingly, the courts have long recognized that a company's unilateral conduct should be subject to antitrust review only if it threatens to create or sustain monopoly power:

> The conduct of a single firm is governed by § 2 alone and is unlawful only when it threatens actual monopolization. It is not enough that a single firm appears to "restrain trade" unreasonably, for even a vigorous competitor may leave that impression. . . . This is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster. In part because it is sometimes difficult to distinguish robust competition from conduct with long-run anticompetitive effects, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization.[2]

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[1] United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

[2] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767-68 (1984) (internal citations omitted).

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Second, to "avoid constructions of § 2 [of the Sherman Act] which might chill competition, rather than foster it,"[3] the courts have consistently emphasized that "a monopolist, no less than any other competitor, is permitted and indeed encouraged to compete aggressively on the merits."[4] This is because "[s]ubjecting a single firm's every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote."[5] For that reason, the Sherman Act prohibits only "conduct which unfairly tends to destroy competition itself."[6]

Requirement of "Monopoly Power"

There are compelling reasons to conclude that Google does not have monopoly power in any relevant antitrust market. Monopoly power is "the power to control prices or exclude competition."[7] Because Google's search service is provided to consumers for free, and hence the power to raise price is not pertinent, the relevant question in showing monopoly power would be whether Google has the power to "exclude competitors" from the market. In *United States v. Microsoft*,[8] for example, Microsoft was able to use its ability to control access to its Windows operating system to exclude Netscape's browser from every major distribution channel, including PC manufacturers and Internet access providers (such as AOL).

Here, by comparison, Google has no ability to exclude a general search engine rival such as Microsoft from the market. Indeed, Microsoft has succeeded in having Bing installed as the default search engine on the vast majority of new desktop computers being shipped in the United States:

[3] Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459 (1993).

[4] Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 544-45 (9th Cir. 1983).

[5] *Copperweld*, 467 U.S. at 775.

[6] *Spectrum Sports*, 506 U.S. at 458.

[7] United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377, 391 (1956).

[8] 253 F.3d 34 (D.C. Cir. 2001).

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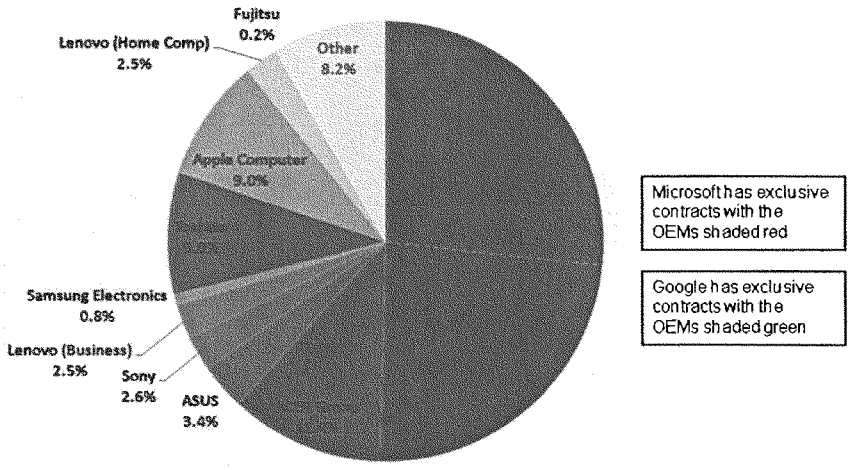
Current OEM Channel Share (based on est. 2010 shares)



Nor does Google have the power to exclude specialized search rivals like Yelp from the market. During the period in which, according to Mr. Stoppelman, Google engaged in conduct that Yelp found objectionable, Yelp continued to grow rapidly in the market. This chart, from Yelp's own web site, illustrates just how dramatically Yelp has grown during the period at issue:

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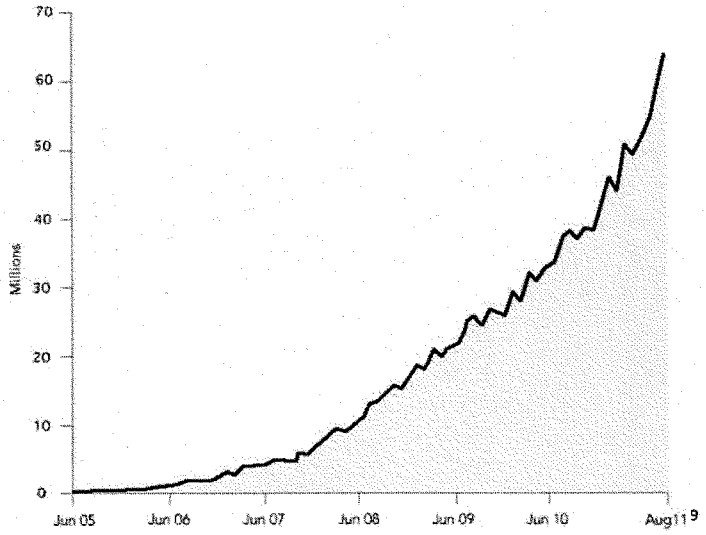
More Than 63 Million Monthly Visitors


[9]

In the absence of direct evidence of the power to exclude, one can also look to indirect (circumstantial) evidence of monopoly power, such as durably high market shares protected by high barriers to entry in a well-defined antitrust market. This structural evidence, however, is likewise inconsistent with the hypothesis that Google has monopoly power. To begin with, even in the most narrowly hypothesized market, for "general search engines," Google's market share would be around 65%, below the percentage usually required to sustain a monopoly power claim.[10] In a more properly defined antitrust market, which would include, for example, specialized search engines that clearly compete with Google, Google's market share is far below 50%, which courts have found insufficient as a matter of law to show monopoly power.[11]

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[9] Press Release, Yelp, An Introduction to Yelp: Metrics as of August 2011, (Aug. 2011), *available at* http://www.yelp.com/html/pdf/Snapshot_August_2011_en_US.pdf.

[10] *See, e.g.*, PepsiCo, Inc. v. Coca-Cola Co., 315 F.3d 101, 109 (2d Cir. 2002) (finding a 64% market share insufficient to show monopoly power absent additional evidence of power to exclude competition or control prices); United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945) ("[90 percent of supply] is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough . . . .").

[11] *See, e.g.*, Bailey v. Allgas, Inc., 284 F.3d 1237, 1250 (11th Cir. 2002) (finding that a market share of less than 50% was insufficient to establish single-firm monopoly power as a matter of law); Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic, 65 F.3d 1406, 1411

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Other structural indicia are also inconsistent with a hypothesis of monopoly power. Competitors continue to enter and expand: not only has Bing grown to nearly half Google's size in little more than two years, but smaller entrants continue to attract substantial market investments. For example, in just the few weeks that have passed since the Senate hearing, search engine start-up DuckDuckGo secured venture funding from Union Square Ventures, which issued a press release emphasizing that it thought now was an ideal time to invest in innovative new approaches to search.[12] During this same period, search engine competitor Blekko announced that it had received $30 million in funding from Russia's largest search engine, Yandex.[13] As the CEO of Blekko observed regarding the state of competition in the market, "We don't need federal intervention to level the playing field with Google. Innovation and competition are far more powerful instruments."[14]

This market assessment reflects perhaps the most important structural characteristic of this market segment, which is that it is virtually costless, both in time and money, for consumers to try different search engines. Because using another search engine is free and costs a consumer only a few seconds of time (*e.g.*, the amount of time it takes to type "www.blekko.com"), an innovative search engine that delivers better results than its rivals can expect to attract and keep users.

These facts differ sharply from those at issue, for example, in *United States v. Microsoft*. There, because most developers had written application programs that only ran on Windows, consumers could not easily switch to a non-Windows operating system (the "applications barrier to entry"). Here, by contrast, smaller search engines can compete for users as easily as larger ones: it does not matter to a search user whether other consumers also use the service; what he or she cares about is whether the service delivers answers the consumer wants.

Another distinction is that in *Microsoft*, consumers who wanted to try rival browsers could not easily overcome Microsoft's (successful) effort to foreclose those competing browsers

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(7th Cir. 1995) ("Fifty percent is below any accepted benchmark for inferring monopoly power from market share . . . ."); U.S. Anchor Mfg., Inc. v. Rule Indus., 7 F.3d 986, 1000 (11th Cir. 1993) ("[W]e have discovered no cases in which a court found the existence of actual monopoly established by a bare majority share of the market.").

[12] Brad Burnam, *Duck Duck Go*, UNION SQUARE VENTURES (Oct. 13, 2011), http://www.usv.com/2011/10/duck-duck-go.php ("We invested in DuckDuckGo because we became convinced that it was not only possible to change the basis of competition in search, it was time to do it.").

[13] Burns, *Blekko Closes $30M Funding – Yandex Strategic Investor*, BLEKKO BLOG (Sept. 29, 2011), http://blog.blekko.com/2011/09/29/618/.

[14] Rich Skrenta, Founder and CEO, Blekko, *Blekko's Not Afraid of Google, Why Is Washington?*, SKRENTABLOG (Sept. 20, 2011), http://www.skrenta.com/2011/09/blekkos_not_afraid_of_google_w.html.

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from conventional distribution channels. At that time, downloading a browser over low-speed dial-up Internet connections could take hours and would often require multiple attempts (because of the frequency of dropped connections). Consumers who wanted to experiment with other browsers therefore would have faced substantial time costs just to try a browser different from Internet Explorer. In the delivery of search engine services, by contrast, consumers can quickly (indeed, immediately) detect if they are receiving results that they do not like; and, because switching is costless, they can and do try other services to see whether the results are more to their liking. The existence of such widespread "multi-homing" – the use by most consumers of more than one search engine service – is both unsurprising and a structural feature of the market that makes a finding of monopoly power unsustainable.[15]

Requirement of "Exclusionary Conduct"

Courts generally determine if conduct is exclusionary under the structured approach articulated by *United States v. Microsoft Corp.*[16] *First*, "a monopolist's act must have an 'anticompetitive effect.' That is, it must harm the competitive process and thereby harm consumers. In contrast, harm to one or more competitors will not suffice."[17] *Second*, if the conduct is shown to have an anticompetitive effect, "then the monopolist may proffer a 'procompetitive justification' for its conduct."[18] *Third*, "if the monopolist's procompetitive justification stands unrebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit."[19]

The *Microsoft* case shows the type of conduct that a monopolist is not permitted to engage in under the antitrust laws. For example, Microsoft entered into exclusionary contracts that blocked rivals from all of the major available distribution channels; it threatened suppliers (Intel) and competitors (Apple) not to support a rival; and it engaged in deceptive conduct that caused developers unknowingly to write Microsoft-specific rather than cross-platform applications.

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[15] Image Technical Servs. v. Eastman Kodak Co., 125 F.3d 1195, 1208 (9th Cir. 1997) ("Even a 100% monopolist may not exploit its monopoly power in a market without entry barriers."); Handicomp, Inc. v. U.S. Golf Ass'n, 2000-1 Trade Cas. (CCH) ¶ 72,879, ¶¶ 87,539-40 (3d Cir. 2000) (finding 72% market share insufficient where plaintiff unable to prove substantial barriers to entry because of ease of software programming); Fabrication Enters. v. Hygenic Corp., 848 F. Supp. 1156, 1160 (S.D.N.Y. 1994) (finding that 100% market share does not imply monopoly power where barriers to entry are low), *rev'd on other grounds*, 64 F.3d 53 (2d Cir. 1995).

[16] 253 F.3d 34 (D.C. Cir. 2001).

[17] *Id.* at 58 (emphasis omitted).

[18] *Id.* at 59.

[19] *Id.*

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Microsoft was also alleged to have engaged in two types of product redesign. First, Microsoft not only shipped Internet Explorer with Windows, but it made it impossible for PC manufacturers to remove it (by commingling the code and by removing IE from the list of utilities programs that could be added or deleted). Microsoft did not identify any ways in which these steps made IE better; they simply acted to impede PC makers from adding another browser. Second, Microsoft programmed Windows so that in certain circumstances it would override a consumer's choice of browser defaults. Microsoft claimed there were technical reasons why it had to override the consumer's preference; rival browsers did not support technologies that Microsoft used in certain cases to access the Internet.

The Court of Appeals upheld Microsoft's conduct with respect to the override, even though it had the effect of thwarting a consumer's choice of browsers, because the government had failed to meet its burden "not only of rebutting a proffered justification but also of demonstrating that the anticompetitive effect of the challenged action outweighs it."[20] It was only the Microsoft conduct for which it had no legitimate justification that was found to be the basis for liability.

The approach taken by the Court of Appeals reflects the care taken by the courts in ensuring that they do not interpret the antitrust laws in a way that shackles a monopolist's ability to innovate. The court recognized that "firms routinely innovate in the hope of appealing to consumers, sometimes in the process making their products incompatible with those of rivals," and the courts should not deter innovation in a market with rapidly changing products.[21]

A monopolist "is permitted and indeed encouraged to compete aggressively on the merits"because this conduct typically benefits consumers.[22] Monopolists therefore also are allowed to take advantage of the competitive edge that flows from their scale,[23] their success in adjacent markets,[24] or their innovations.[25] As one court summarized, an integrated

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[20] *Id.* at 67.

[21] *Id.* at 65.

[22] *Foremost*, 703 F.2d at 544.

[23] Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 274 (2d Cir. 1979) ("A firm that has lawfully acquired a monopoly position is not barred from taking advantage of scale economies by constructing, for example, a large and efficient factory.").

[24] Data Gen. Corp. v. Grumman Sys. Support Corp., 761 F. Supp. 185, 192 (D. Mass. 1991) ("The Sherman Act has not been interpreted to require manufacturers to abandon their advantage in creating accessories to their systems."), *aff'd* 36 F.3d 1147, 1189 (1st Cir. 1994).

[25] Cal. Computer Prods., Inc. v. Int'l Bus. Machines Corp., 613 F.2d 727, 744 (9th Cir. 1979) ("IBM, assuming it was a monopolist, had the right to redesign its products to make them

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business does not offend the Sherman Act "whenever one of its departments benefits from association with a division possessing a monopoly," because "[s]o 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."[26]

more attractive to buyers—whether by reason of lower manufacturing cost and price or improved performance. It was under no duty to help CalComp or other peripheral equipment manufacturers survive or expand.").

[26] *Berkey Photo*, 603 F.2d at 276.

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2. **At the hearing, both the CEOs of Nextag and Yelp stated that they would have [not] entered the market today with Nextag and Yelp due to the conduct of Google today. Given that testimony, why shouldn't we be concerned that the conduct of Google is deterring new innovative web-based businesses from entering the market?**

Notwithstanding the testimony of NexTag and Yelp, the evidence in the marketplace is overwhelmingly to the contrary. As Mr. Schmidt pointed out in his testimony, we do not have to speculate as to whether there are new entrants in comparison shopping and local search and review sites, because there are new entrants in the local and product comparison market segments all the time.

To provide just a few examples, a new comparison shopping site, FindTheBest, launched by the cofounder of DoubleClick last year, just raised $6 million in venture funding over the summer.[27] Cheapism is an Internet comparison shopping site that launched in 2009.[28] Cheapism is dedicated to bargain hunters on the Internet and was recognized in the New York Times[29] and on CBS New York.[30] More recently, a new entrant called Centzy launched a web site that combines both local search and comparison shopping functionality. Centzy's CEO used to work at SnapFish[31] and is currently seeking funding following Centzy's successful launch for New York and San Francisco.[32] Unlike Yelp, Centzy integrates pricing information for goods and services on its site so that users can comparison shop for local services.[33] Barefootfloors.com is a comparison shopping site that launched in January focused on home goods and "is now helping online shoppers to educate themselves

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[27] Dylan Tweney, *Former DoubleClick team raises $6M for comparison-shopping engine*, VENTURE BEAT (July 20, 2011), http://venturebeat.com/2011/07/20/find-the-best-funding/.

[28] "Are you Cheap or are you a Cheapist," BUSINESS WIRE (Sept. 30, 2011, 10:15 AM EDT), http://www.businesswire.com/news/home/20090930005075/en.

[29] Jennifer Saranow Schultz, *A Consumer Reports for the Cheap*, NEW YORK TIMES BUCKS BLOG (Aug. 16, 2010, 11:04 AM), http://bucks.blogs.nytimes.com/2010/08/16/a-consumer-reports-for-the-cheap/.

[30] *Comparison Shopping: Use Web to Find Best Deals*, CBS NEW YORK (Oct. 20, 2010, 11:38 PM), *available at* http://newyork.cbslocal.com/2010/10/20/comparison-shopping-use-web-to-find-best-deals/.

[31] *See About*, CENTZY.COM, http://centzy.com/about.

[32] Devindra Hardawar, *Centzy Crowdsources Price Info for Local Ciomparison Shopping*, VENTURE BEAT (Sept. 23, 2011), http://venturebeat.com/2011/09/23/centzy-local-comparison/.

[33] *Id.*

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on everything related to the home and to save money on a wide variety of products for the home."[34] In February of this year, the travel comparison shopping site, Hipmunk, received $4.6 million in venture funding, even as Google continues to expand its own flight search and hotel search functionality.[35]

These are just a few of the many recent entrants in local and comparison shopping that are entering the market even as Google continues to innovate. While they may not all succeed, venture capitalists and entrepreneurs alike continue to believe they can compete with Google, Yelp, NexTag, and other established competitors.

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[34] *BarefootFloor.com: New Price Comparison Engine Helps Consumers Shop Smartly for Home Goods*, YAHOO! NEWS (Jan. 11, 2011), http://news.yahoo.com/barefootfloor-com-price-comparison-engine-helps-consumers-shop-20110111-070000-289.html.

[35] MG Siegler, *Hipmunk's Official Round: $4.2 Million Led By Ignition and a Group of Online Travel Experts*, TECHCRUNCH (Feb. 3, 2011), http://techcrunch.com/2011/02/03/hipmunk-funding-2/.

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3. **If Google was demanding that phone manufacturers use Google as the default search engine as a condition of using its Android operating system, would that raise any antitrust concerns? Isn't that conduct similar to the conduct you complained that Microsoft was engaged in the 1990s when it demanded that personal computer manufacturers install Internet Explorer as a condition of using its Windows operating system, conduct that you asserted was an antitrust violation when you represented Netscape?**

As I noted in my answer to question 1, the initial question under Section 2 of the Sherman Act is whether a company has monopoly power in a relevant antitrust market. In the *United States v. Microsoft* case, the court found that Microsoft had a durable market share in excess of 90% in the relevant market for desktop PCs. In the market segment for smartphone operating systems, by comparison, Google's share is significantly below 50%, which is insufficient as a matter of law to give rise to an inference of monopoly power under Section 2.[36]

Apart from this threshold issue, Google does not in fact demand that smartphone manufacturers make Google the default search engine as a condition of using the Android operating system. The Android source code is available for download for free from the Android Open Source Project website, and any developer or manufacturer can use, modify, and distribute the Android operating system without Google's permission and without making any payment to Google. Google does not condition access to or use of Android on pre-installation of any Google application or on making Google the default search engine.

Handset makers who wish to pre-install Google applications are required to meet certain minimum compatibility standards to ensure that applications written for Android will function properly on those phones. However, Google does not condition Android compatibility determinations on pre-installation of Google applications or on making Google the default search engine. The Android source code does not secretly favor any software (including Google apps); those wishing to verify the lack of bias need merely examine the Android source code itself which is freely available on Google's website.

Android's support for cross-platform technologies has greatly facilitated competition in the marketplace. For example, Amazon has used Android as the basis for its Kindle Fire, but it has customized nearly every element of the device to create a distinctly Amazon-branded product. In addition to a completely customized user interface (which would be impossible

[36] *See, e.g.*, Bailey, 284 F.3d at 1250 (finding that a market share of less than 50% was insufficient to establish single-firm monopoly power as a matter of law); Marshfield Clinic, 65 F.3d at 1411 ("Fifty percent is below any accepted benchmark for inferring monopoly power from market share . . . ."); U.S. Anchor Mfg., 7 F.3d at 1000 ("[W]e have discovered no cases in which a court found the existence of actual monopoly established by a bare majority share of the market.").

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using either the iOS or Windows Phone 7.5), Amazon has supplied its own apps for email, video and music playback, e-books, and even browsing. Android's support of open source, cross-platform technologies likewise has enabled RIM to announce that the developer version of its PlayBook operating system will now feature an Android software layer that makes it easy for Android applications to run on RIM devices as well.

The flexibility that Android offers manufacturers and consumers significantly exceeds that offered on either the Apple or Microsoft mobile platforms. For example, Apple not only exercises complete control over the entire suite of pre-loaded apps on iOS devices, but consumers can only download additional apps from Apple's own App Store. Microsoft's most recent Windows Phone 7.5 smartphone similarly comes with four of eight "tiles" fixed to Microsoft applications that phone manufacturers cannot change and is hard-wired to Bing (neither phone manufacturers nor users cannot change to another search engine).

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4. Are there any remedies or changes in business practices that Google would accept?

This is a question that Google would have to answer, but I can make some general observations regarding the use of remedies in antitrust law. To begin with, in order to avoid undue chilling of innovation that benefits consumers, antitrust remedies must be carefully crafted to ensure "a significant causal connection between the conduct enjoined or mandated and the violation found directed toward the remedial goal intended."[37] A remedy that is too broad will prohibit or deter a firm from undertaking competitive as well as anticompetitive conduct. Consequently, antitrust remedies are only called into question when a firm is found to have violated the antitrust laws. Google believes that its conduct is fully consistent with the antitrust laws, so it is both difficult and unwise to speculate as to remedies when no violations have been found to exist. Because consumers are free to choose between many different means of finding information on the Internet, which they can easily access with a single click, imposing antitrust remedies that create unnecessary restrictions would only serve to unfairly disadvantage Google, stifle innovation, and hurt consumers.

The type of conduct this Committee primarily addressed during the hearing relates to the way in which Google integrates local, product, video, images, news, and other types of results into its search results. This goes to the very core of what a search engine is supposed to do, which is to provide users with the best responses to their queries. Google competes with other search engines and other sites by providing its users with information that Google believes its users are searching for. Google's core technology – how it decides what information to show its users and how to rank that information – is particularly unsuited for regulation by the government. Unlike the *Microsoft* case, where anticompetitive agreements with OEMs, for example, could simply be prohibited, no such easy fix is available here. While I believe there are many things that antitrust enforcers do well, they are ill-equipped to get into the business of deciding what results should go where in response to user queries on Google. Such complex regulation would undoubtedly hamstring Google's ability to continue to compete on the merits against rival search engines and other competitors that provide users with information. Stifling Google's ability to innovate and provide the best results for its users is not what antitrust remedies are intended to do.

[37] United States v. Microsoft, 253 F.3d, 34, 105 (D.C. Cir. 2001) (quoting 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 653(b), at 91-92 (1996)).

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Response of Jeffrey Katz, Chief Executive Officer, Nextag, Inc.
Before the Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights

Hearing on "The Power of Google: Serving Consumers or Threatening Competition?"
September 21, 2011

Questions for the Record from Sen. Grassley

1. Some Iowans tell me that "at this time of economic uncertainty, the wrong choice for government would be to take steps that impede innovation and job creation. Tying up pro-consumer companies like Google in endless legal oversight and penalizing them for their success will not help the economy grow – not in [the Council Bluffs] community and not nationally. Instead, allowing the market to continue to work successfully and consumers to freely choose which online services they use is a better way to nurture additional entrepreneurship and job growth." Do you agree? Why or why not?

We agree that allowing the market to work successfully is the most effective way to promote innovation. However, Google is thwarting normal free market competition mechanisms by using its monopoly power to make it difficult for consumers and merchants to choose against Google and in favor of a competitor. For example, Google rigs its results in favor of its own services and blocks competitors from even bidding on many of the best advertising placements. The impediments that Google erects prevent consumers from freely choosing the online services that they will use. Google is hardly behaving in a "pro-consumer" manner as this question states.

Google frankly admits that it possesses and wields the power to pick winners in every market in the country -- this is contrary to free market principles and no better than having the government pick winners. Indeed, there are demonstrable examples of Google killing local merchants by arbitrarily picking against them. Merchants certainly should have the prerogative to work with Google, but in a free market economy, others should be able to make different choices and Google is using its power to make that difficult.

In addition, the value created by Google is only half the equation and fails to consider the value generated by the competitors that Google targets with its monopoly power. By limiting the opportunities for these competitors, Google harms merchants by restricting the value that they can receive from these competitors. Nextag's services are a powerful source of sales and growth for thousands of merchants across the United States, and a valuable tool for consumers to find products at great prices from outstanding merchants. Consumers who visited merchants from the Nextag sites purchased more than $1 billion of products in 2010[1] and saved millions of dollars. Thousands of merchants have registered with Nextag and listed their products on our sites –merchants benefit from working with us and recognize the value of our services in growing their customer relationships, sales and businesses.

[1] Source: Nextag internal estimates based on merchant sales data.

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Nextag is one of several vertical or specialty search engines that help consumers find in-depth information about a specific topic. In addition to product shopping sites like Nextag, other vertical search engines provide information on local services (e.g., Yelp) and travel (e.g., Kayak or Expedia). These specialized search engines help consumers find the best prices, services and products and generate tremendous sales and job growth for merchants and service providers.

Unfortunately, the market for online search is distorted by Google's use of its monopoly power to restrict competitors. Google's vertical services, such as Google Shopping, are largely immune to the forces of competition – Google promotes Google Shopping not by winning in the marketplace but by rigging the search results in its favor.

2. One of my constituents praised Google's services, saying it gives him "the tools to help my business grow, supporting business across [Iowa], and fueling our national economy." He urged that "Government should not be picking winners and losers – it should allow successful companies like Google to continue to empower small business and promote entrepreneurial growth across our country." What is your opinion on this?

As noted above, Google uses its monopoly power to pick winners and losers and to insulate itself from competition. Google uses preferences and penalties to make it difficult for consumers and merchants to choose another service over Google. Rather than Google picking the winners, the winners should be picked by the market, based on fair and robust competition. Google faces no meaningful competition in "horizontal" or general search, but the competition from these specialized search companies has driven Google to innovate, and has been a driving force in development of the tools that your constituent notes.

Nextag's services are a powerful driver of sales and growth for thousands of merchants across the United States. Merchants choose to list their products with us because we provide them with exceptional value and services. The same is true for the other specialty search companies in product shopping, travel and local services, and together we provide billions of dollars of sales for merchants and service providers across the country.

3. How do you respond to the Iowan who asked "why [should] the government . . . impose regulation on a company and industry that is creating jobs here in Iowa and helping local businesses not only compete in the global marketplace, but also thrive there?"

As noted above, specialized search companies are valuable partners for small businesses in Iowa and across the country and generate billions of dollars of sales, allowing Iowa businesses to reach consumers from Portland, Oregon to Portland, Maine, and to grow their businesses and workforces in ways that would be unimaginable for companies who only sell locally. Iowans, and consumers across the country, save money and time through Nextag, allowing them to make the most with their hard-earned money. The sales and jobs generated by specialized search companies in product shopping, local search, travel, and other verticals is very significant. The most effective way to ensure that merchants receive the best prices and the best, most innovative services to allow them to generate the most growth and sales is to promote and protect robust competition in these specialized areas of search.

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Without debating whether our service is better than Google's, competition clearly is the most effective driver of innovation. We simply desire a level playing field so that consumers and merchants have a full opportunity to choose the services that they prefer.

4. Google often responds to its critics by saying that "Competition is just one click away." Do you agree with that statement? Why or why not?

Although this slogan is catchy, it is simply a distraction from the real question of whether Google should be able to use its monopoly power to make it more difficult for merchants and consumers to find and use competitors like Nextag. The premise of the question is that Google can engage in anticompetitive actions, and can make it much more difficult for consumers to find competitors like Nextag, as long as Google does not completely foreclose all routes to reach the competitors. This is simply the wrong question, and a focus on it will inevitably allow Google to strangle competitors, eliminate competition and remove innovative drive. As Google notes, "Search is critical. If you are not found, the rest cannot follow."[2]

This question also reflects a lack of understanding of how consumers use the internet. People remember very few web sites – rather than entering a company name into the navigation bar, most people access the internet through search. In short, search is the front door to the internet. Shopping users generally enter the internet by searching for a product or a service, and expecting to find the best quality information in the search results. Relying on consumers to type into the navigation bar the name of many different websites across multiple verticals is like saying that barring the front door is ok because consumers can still climb in the unlocked second floor window around back. While this may provide theoretical comfort, the real-world result of allowing Google to disadvantage competitors is inevitably and unavoidably that the competitors will be severely minimized, and that Google will leverage its horizontal search monopoly into a position of overwhelming strength in specialized, vertical search as well, which will limit the options available to consumers and merchants and the innovative drive that is fostered by competition.

For Iowa merchants who wish to find customers, competition is not just a click away. Alternatives to Google are very limited, and Google's actions are further reducing merchants' choices. Merchants cannot switch to other online marketing providers even if they wished – Google has such a dominant position that merchants do not have substitutes.

5. Are you concerned that government intervention in the online market will impact innovation?

We believe that the greatest threat to innovation in specialty search is Google's anticompetitive actions. As noted above, the best driver of innovation is a competitive market, and monopoly power reduces the need for innovation. Google uses its monopoly power to attract users to its own services and to create difficulty for users who might otherwise choose another service. As a result, Google creates a tremendous advantage for its own sites that is unrelated to the quality or innovativeness of those sites.

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[2] Kevin J. O'Brien and Eric Pfanner, Europe Divided on Google Book Deal, *The New York Times*, Published: August 23, 2009, available at http://www.nytimes.com/2009/08/24/technology/internet/24iht-books.html?pagewanted=all

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On the other hand, Nextag has dedicated very significant resources to innovation across our business. However, if we are not able to attract sufficient users to justify the effort, this innovation will not happen. By eliminating user traffic to competitors, Google has the ability to eliminate innovation.

Because a free and competitive market is the key force in driving quality and innovation in online search and advertising, the government may in rare cases be required to act to protect fair competition. We believe that enforcing the antitrust laws to protect competition is fundamentally different than government regulation. While the latter would slow innovation and divert resources to non-regulated areas, protecting fair competition will reward and encourage innovation by allowing entrepreneurs a fair chance to succeed and to reap the benefits of their work.

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Response of Jeffrey Katz, Chief Executive Officer, Nextag, Inc.
Before the Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights

Hearing on "The Power of Google: Serving Consumers or Threatening Competition?"
September 21, 2011

Questions for the Record from Sen. Kohl

1. What happened to your business in Europe when you were subject to "search penalties"? Are you concerned the same thing could happen in the United States?

Google imposes substantial penalties on sites, and in particular competitors like Nextag, without warning or explanation. For example, we experienced substantial and unexplained decreases in Google natural traffic to our UK and German sites, which were our second and third largest sites.

We are very concerned that a penalty will be applied to our U.S. site. We are particularly concerned that Google may apply a penalty in the U.S. or in another country, such as France, which is now our second largest site, to retaliate for our participation in the Senate hearings or for our other actions to discuss concerns about Google's monopoly power.

2. Do you think that these "search penalties" were imposed simply because Nextag was trying to compete with Google?

We have dedicated considerable time and expense to analyzing these sites and have not been able to identify any reason for the penalties. We can only conclude that the penalties were applied for reasons relating to Google's competitive positioning, either to remove competition or to retaliate for our raising questions about Google's actions.

3. Do you believe the experience of Nextag and similar companies could deter new, innovative web companies from entering the market and competing with Google?

The experience of Nextag and similar companies does deter new, innovative web companies from entering the market and competing with Google. More broadly, these companies' experience deters new companies from entering not only direct competition with Google as it is today but also from entering markets that *could in the future* be of interest to Google – in short, any service where a company needs to reach users through search. Nobody knows what areas Google may move into in the future, but the experience of Nextag, Yelp and others shows that Google will attempt to control lucrative vertical search businesses. Any company that finds success based on search should expect that Google will eventually attempt to take that vertical by manipulating the search results.

Not only does Google deter new companies with the risk of harming the companies' businesses, but the Google risk also significantly limits these companies' opportunities to achieve desirable liquidity. Investors understand that Google may penalize competing

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businesses or divert users away, and that an investment in a potential competitor of Google may be worth a small fraction of the investment value. Clearly, any entrepreneur or investor who wishes to achieve a desirable outcome for a company will look at an area that is far from Google's possible expansion zone.

4. The Federal Trade Commission and several state attorneys general are currently pursuing an antitrust investigation against Google. Should they conclude the law has been violated, are there any specific remedies you believe they should pursue?

The only sure remedy is to separate Google as content provider from Google as content distributor. As noted by Sen. Blumenthal, Google runs the racetrack and provides some of the horses. The only way to ensure a fair and level playing field is to divest the Google content sites so that the motivation for bias is removed.

Other remedies should be focused on ensuring that Google provides a level playing field for all competitors. While we are not best positioned to evaluate specific ways to accomplish this, the key is that Google should provide a level playing field and not rig the results in their own favor. If they have one algorithm for their results, or put their results at the top, they should do the same for competitors. If they use a better format and appearance for their services, they should do the same for competitors. If they have new ad formats, they should make them available to all advertisers. If they banish a competitor to the deepest bowels of the search results, they should tell the competitor what they have done wrong.

Most importantly, you can't simply tell Google to go forth and sin no more. Don't underestimate the damage that Google has done already, and the advantage they have taken. Google's wants to start the marathon from mile 15 while making us run 30. Google needs to be at the starting line with everyone else.

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Response of Jeffrey Katz, Chief Executive Officer, Nextag, Inc.
Before the Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights

Hearing on "The Power of Google: Serving Consumers or Threatening Competition?"
September 21, 2011

Questions for the Record from Sen. Lee

1. *In the study of price comparison sites I referenced during the hearing, Google Shopping consistently ranked first or third when common shopping queries were entered into the general search box.*

    a. *Does Nextag experience similarly consistent Google search rankings or do its rankings vary across different search terms?*

Nextag has experienced similar results, and the data clearly have shown that Google rigs its results to favor Google Shopping. For example, we conducted a study of 40,000 product shopping keywords in November 2010. Google appeared in response to product shopping related searches in one of the first 4 positions more than twice as often as all other main product shopping vertical search engines *combined* – Google Product Shopping results appeared in the first 4 results for 32,081 of the 40,000 searches and other product shopping vertical search engines combined appeared in the first 4 results for 15,454 of the searches.[1]

Consistent with the study cited by Sen. Lee, Google Shopping almost never appeared in natural rank #2. Google Shopping appeared in Rank #2 only 384 times, while it appeared in Rank #1 more than 16,200 times and in Rank #3 more than 11,200 times. Analyzing this odd lack of Rank #2 showed that every time that Google Shopping appeared in Rank #2, a different Google service appeared in Rank #1. In other words, Google Shopping appeared in Rank #2 only when it was bumped out of Rank #1 by Google Related Search, Google News or other Google services. Eliminating the times when Google appeared in Rank #2 because Google had also taken Rank #1, Google appeared in Rank #2 exactly - never. Google Shopping never appeared in Rank #2 with a non-Google result above it.

We have not replicated this study since November 2010 and our experience is that Google changes practices when criticized to make further analysis difficult. We expect Google to adjust the algorithm after the hearing to provide for a more balanced distribution of results.

[1] Other product shopping related search engines included were PriceGrabber, Shopping.com, Shopzilla, Nextag, Bizrate, TheFind, ShopWiki, and Yahoo! Shopping.

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For example, our anecdotal experience suggests that Google's placement of Google Shopping results is more diverse since the hearing.

As Sen. Lee noted, in addition to preferencing itself through its rank, Google also preferences the Google Shopping results by including specific product listings with updating pricing information and by using superior formatting and appearance, including by providing pictures and more space for Google Shopping results compared to results from other comparison shopping services.

b. What impact do Google Shopping's consistently high results have on Nextag's search traffic?

We believe that Google's preferencing of its own results has two effects on competing shopping search engines. First, it reduces the number of users that Google refers to other shopping search engines – in short, Google will direct more shopping users to Google Shopping and will send fewer to other shopping sites. Second, we believe that the users who find Nextag far down the page, after having already been exposed to several comparison shopping results, are less likely to be actively shopping. In short, Google siphons off the most attractive users – the users who are most actively shopping and comparing prices. The users who find Nextag are likely to be less interested in comparing prices, or are not as ready to buy. For example, the screenshot below shows how a user might find Nextag – as shown in the green boxes, Google inserts two sets of vivid, robust shopping results, both of which appear "above the fold" for ease of visibility for the user. To find Nextag, the user would have to scan through these and scroll down the page to find Nextag's bland listing near the bottom.

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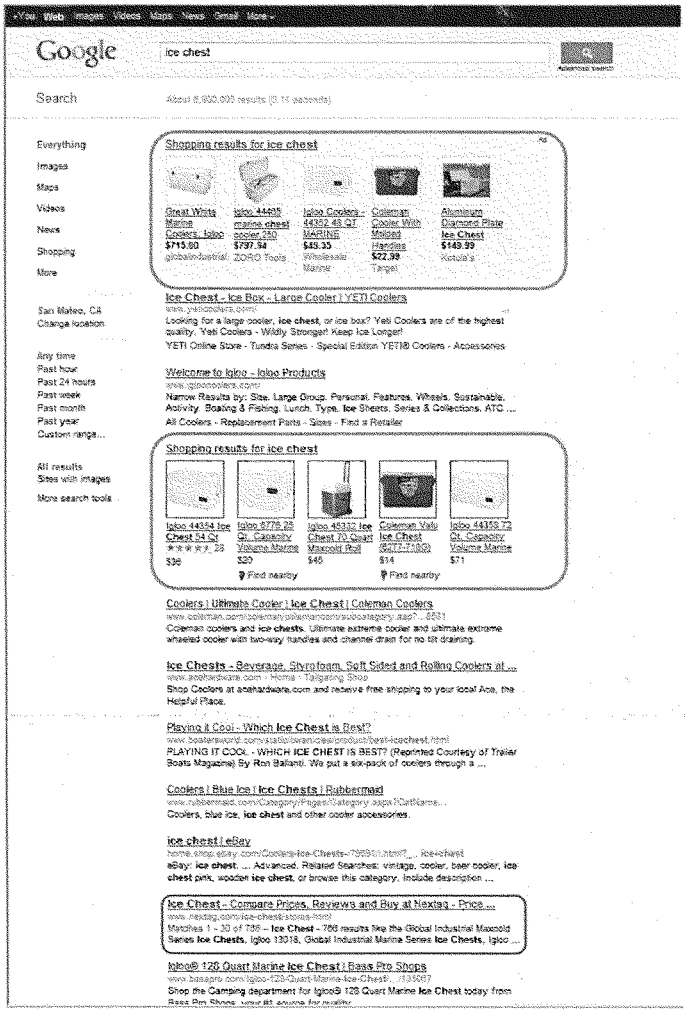

2. *Links that are accompanied by images tend to have higher click-through rates. Google search results linking to Google Shopping are almost always accompanied by images of relevant products, while Nextag's links are limited to the standard, text-only style.*

    a. *What impact has this preferential display had on Nextag's ability to draw traffic to its site?*

We believe that Google has used a variety of tactics to direct users to the preferenced Google Shopping results and away from other shopping search engines like Nextag. As noted elsewhere, Google puts its results near the top of the page. Google also provides superior formatting by including pictures and prices in a result that has neat and organized formatting and more space on the page. These results also tend to appear "above the fold" so they are immediately visible to users, unlike the results for other shopping services that appear lower on the screen. We believe that the various types of preferential display have given Google a significant advantage and have resulted in a significant reduction in traffic to other comparison shopping sites, without allowing users an opportunity to view similar results from the competing sites.

Additionally, we believe that the preferential display allows Google to retain the most serious shopping users for the Google services. As a result, the users who find Nextag are less likely to be interested in comparison shopping, and the performance of the traffic from Google has declined accordingly.

Also reference Item 1.

b. What impact does decreased traffic to Nextag have on the merchants whose products appear on the site?

Nextag provides significant benefit to merchants. Nextag's services are a powerful driver of sales and growth for thousands of merchants across the United States, and a valuable tool for consumers to find products at great prices from outstanding merchants. Consumers who visited merchants from the Nextag sites purchased more than $1 billion of products in 2010[2]. Thousands of merchants have registered with Nextag and provided inventory information to list their products on our sites – in short, merchants benefit from working with us and recognize the value of our services in growing their customer relationships, sales and businesses.

We believe that decreased traffic to merchants limits their options for finding and attracting new consumers, and leaves them more reliant on Google.

3. A frequent complaint against Google from other businesses is that their page rank drops unexpectedly and significantly in organic results or that their ad prices rise substantially overnight.

a. Have you experienced such sudden changes?

[2] Source: Nextag internal estimates based on merchant sales data.

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We have experienced sudden changes in the natural search visits from Google, without warning or explanation. For example, we have experienced very severe penalties to a number of our sites.

b. Has Google explained any such sudden changes?

We have asked Google why we were penalized, both through the formal process of requesting a reconsideration and through backchannel discussions with our ad sales team at Google and other Google employees. Jeff Katz, our CEO, also sent a personal letter to Larry Page requesting that the penalty be lifted. Google either refused to provide any information on the rationale for the penalty or simply did not respond.

c. What do you believe to be the cause of any such changes?

We have not been able to identify any issues with our sites to justify these changes. We assume these penalties are driven by anticompetitive animus.

d. Is it possible that the quality of your site simply does not merit a high quality score?

No. Our sites have been displayed prominently in Google's natural search results for many years, and the content and features on our sites have continued to improve. We made no changes to precipitate the drop in traffic. The quality of our sites did not degrade to justify the drop in natural traffic. Moreover, other of our sites, such as our site in France, continue to be ranked highly even though the content does not differ significantly from the penalized sites.

e. If you are dissatisfied with Google, why not switch to another ad publishing service?

Google has a dominant position in both natural search and paid advertising. There is no other ad publishing service, or combination of services, that could provide any meaningful substitute for Google. In short, there are no choices, nobody to whom we could switch.

In fact, Nextag has been attempting for years to diversify traffic sources. We continue to be early users of other advertising platforms and advertising types in an effort to reduce our reliance on Google. In spite of our efforts, we have been unable to find effective alternatives to Google.

4. *Google has suggested that its services, like Google Shopping, are simply a means of responding to customer demand. Do you believe that consumers benefit from having immediate shopping results prominently placed in Google search results?*

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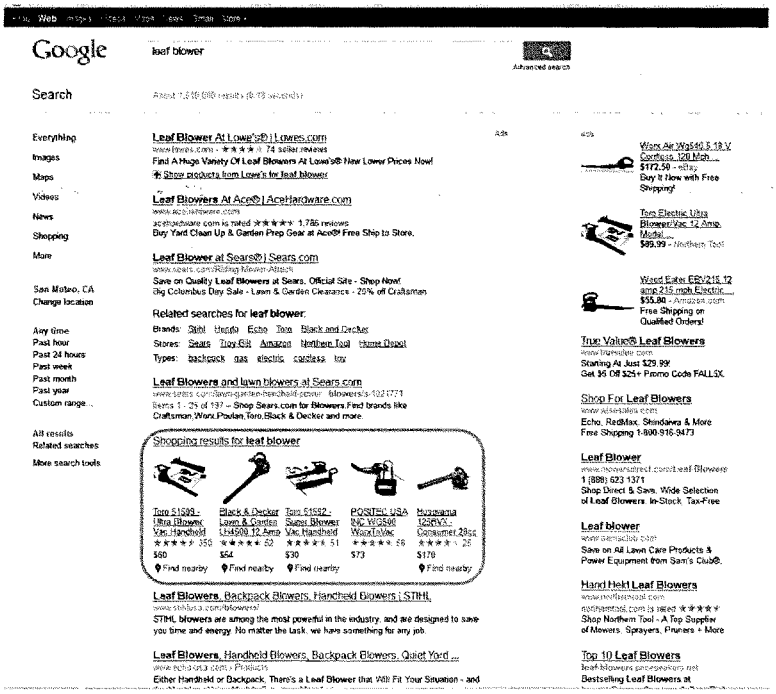
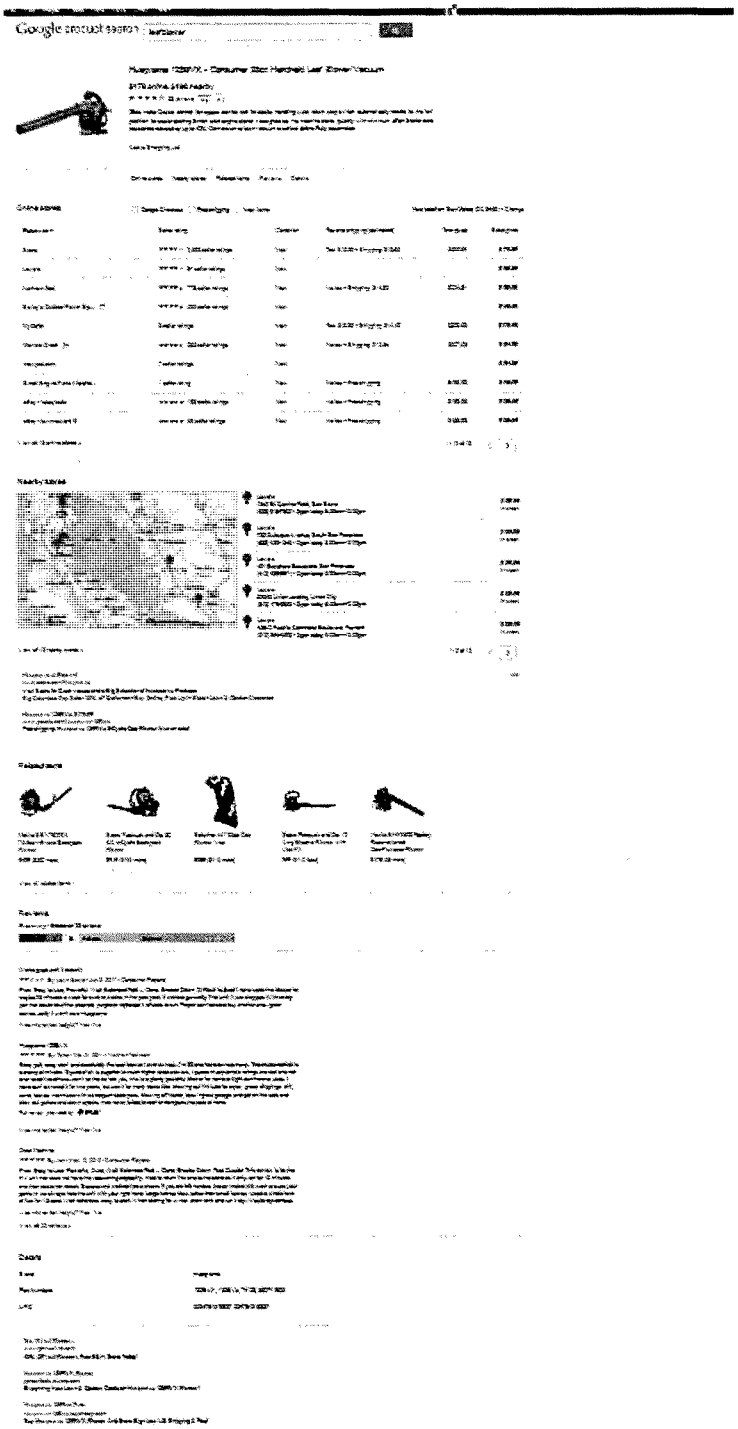
Google's argument that including shopping listings in the natural results benefits users is irrelevant to the question of whether Google's preferencing of *its own services* is wrong. Google could show product listings from other companies, such as Nextag, but it does not because it wishes to provide a competitive advantage to Google Shopping. Providing shopping listings does not mean that Google has to provide results only from Google Shopping. As a result, the benefit of providing shopping listings has nothing to do with the appropriateness of using only Google Shopping for those results.

In addition, Google's inclusion of Google Shopping listings generally does not allow users to arrive at merchants' sites more quickly than linking to a comparison shopping site, and Google has greatly exaggerated the value of the shopping listings in the natural results. The screenshot below shows a typical Google results page, which includes Google Shopping results circled in green. Google shows the user several products, but Google does not provide the user with the ability to click out directly to a merchant from any link in the green circle. Any click on the shopping results in green will take the user to another Google page, a Google Shopping page.



For example, clicking on the far right product takes the user to the Google Shopping page shown below. Clicking on a Nextag link that Google returned in the natural results would take the user to a similar page on the Nextag site. In short, the Google Shopping listings in the natural results usually does not take the user closer to the merchant or speed her time to find a merchant – it simply keeps the user on Google while she does follow-up searches.



5. *Critics have suggested that small businesses are disadvantaged in both Google Shopping results and ad displays.*

    a. *Do you believe this criticism is accurate?*

We do believe that small businesses are disadvantaged in Google Shopping. In the default display of Google Shopping, the only way for a merchant to stand out from Amazon, WalMart, Home Depot, etc., and in many cases the only way to make their way onto the first page of merchants, is to offer the lowest price of any merchant; just having lower prices will not necessarily work.

We believe that Google's default algorithm for ordering merchants in the Google Shopping results also is skewed in favor of the largest retailers and most significant advertisers. For example, Google shows a user searching for a "Canon t3i" digital camera a veritable who's who of the biggest merchants (and advertisers) on the first page of search results – Amazon, WalMart, Target, etc., as shown below.

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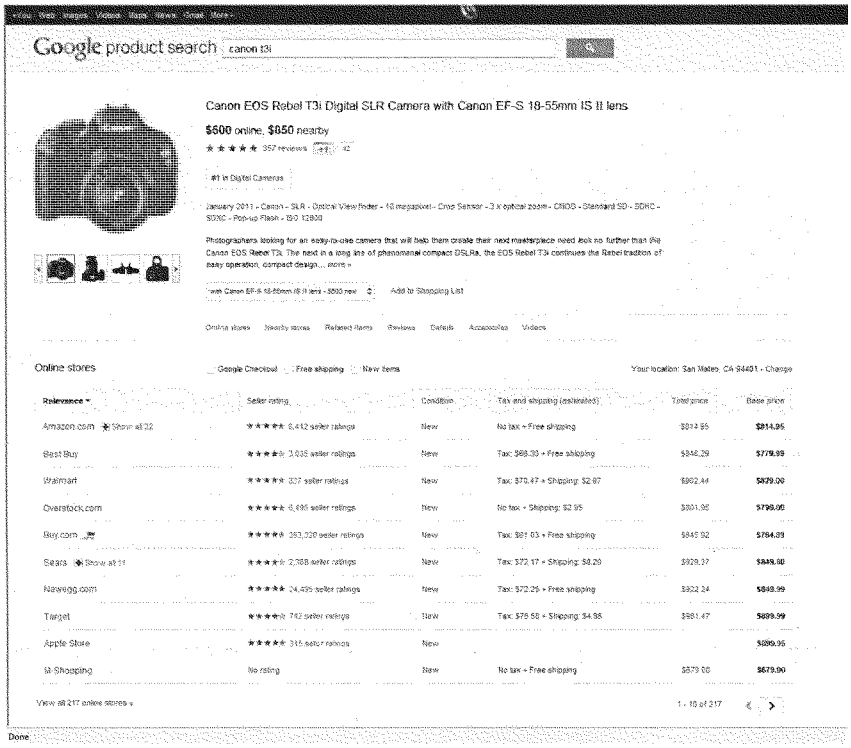
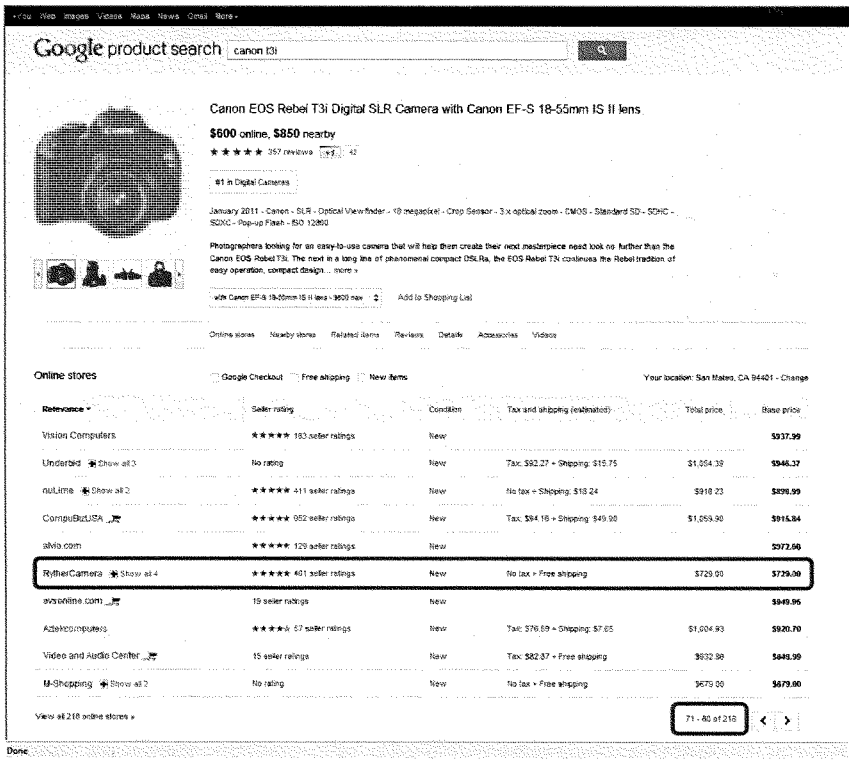


The only smaller merchant on the first page is M-Shopping, which makes the first page only because it has the lowest price of all 217 online merchants.

While the merchants on the first page are fine merchants, they are not necessarily the best merchants for this product. For example, not on the first page of results is RhytherCamera, which has five stars from 401 seller ratings and a price that is less than any of the major retailers on page 1. But Rhyther, which is not a major advertiser or large merchant, is relegated to page 8 of the results. Similarly, 42nd Street Photo has 4 ½ stars with 1,715 ratings and a price of $749, but is on page 3 of the results.



b. How does this phenomenon affect consumer welfare?

Google Shopping appears to reward the biggest advertisers regardless of whether they offer the best price or service. As a result, consumers often will pay too much or not receive the best service.

6. *What do you believe are the appropriate remedies to the issues raised by Google's behavior?*

The only sure remedy is to separate Google as content provider from Google as content distributor. As noted by Sen. Blumenthal, Google runs the racetrack and provides some of the horses. The only way to ensure a fair and level playing field is to divest the Google content sites so that the motivation for bias is removed.

Other remedies should be focused on ensuring that Google provides a level playing field for all competitors. While we are not best positioned to evaluate specific ways to accomplish this, the key is that Google should provide a level playing field and not rig the results in their own favor. If they have one algorithm for their results, or put their results at the top, they should do the same for competitors. If they use a better format and appearance for their services, they should do the same for competitors. If they have new ad formats, they should make them available to all advertisers. If they banish a competitor to the deepest bowels of the search results, they should tell the competitor what they have done wrong.

Most importantly, Google can't simply be told to go forth and sin no more. Don't underestimate the damage that Google has done already, and the advantage they have taken. Google's wants to start the marathon from mile 15. They need to be at the starting line with everyone else.

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Google

Response of Eric Schmidt, Executive Chairman, Google Inc.
Before the Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy, and Consumer Rights

Hearing on "The Power of Google: Serving Consumers or Threatening Competition?"
September 21, 2011

Questions For the Record for Eric Schmidt from Sen. Blumenthal

Questions about Google's Market Power:

1. **For 100 years, federal antitrust law and competition law have existed to protect consumers from the potential negative effects of highly concentrated market power. The bigger a company gets, the more danger there is that the company will abuse its monopoly position to stifle innovation and raise prices.**

   Justice Scalia noted this fundamental principle in his opinion in *Eastman Kodak Co. v. Image Technical Services*, where he said:

   > **"Where a defendant maintains substantial market power, his activities are examined through a special lens: Behavior that might otherwise not be of concern to the antitrust laws – or that might even be viewed as precompetitive – can take on exclusionary connotations when practiced by a monopolist."**

   Google is clearly the dominant provider of web search services worldwide. In the United States, 65% or more of all general Internet searches take place on Google. In Europe, Google has 94% of this market. The explosion of smartphones has provided a new search market – and in that space, Google processes a whopping 97% of all searches.

   Ten years ago, there were many competing search engines – AltaVista, Lycos, Ask.com, AOL Search, just to name a few. Now, there are really only two – Google, and Microsoft, which provides the underlying software for both the Bing and Yahoo search engines. Microsoft does not appear to have a sustainable alternative – they hold 30% of the market, but are losing over $2 billion a year on search services, while Google is made $29 billion in 2010.

   Q: Mr. Schmidt, your company is overwhelmingly dominant – it really has only one rival, and that rival is losing incredible sums of money each year. Given the tremendous market power of your company, do you believe it's fair to characterize Google as a monopoly?

First, I would disagree that Google is dominant. By investing smartly, hiring extremely talented engineers, and working very, very hard (and with some good luck), Google has been blessed with a great deal of success. But given the rapid pace of change in the technology industry, we take nothing for granted.

As I acknowledged during the Committee hearing, Google is "in the area" of 65% of queries in the U.S., if you look only at Google's general search competitors, such as Microsoft's Bing and Yahoo!. In fact, we find

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that the monthly general search query figures released by comScore and Hitwise don't reflect the reality of how many sites Google competes with in search. Google has many competitors that are not general search engines, including specialized search engines, social networks, and mobile apps. So inferring that Google is in any way "dominant" in search would be incorrect.

At the hearing, I noted that the question of whether such a market share, if accurate, would constitute a monopoly, is a legal determination; Ms. Creighton is more qualified to speak to those points. At a minimum, though, I am confident that Google competes vigorously with a broad range of companies that go well beyond just Microsoft's Bing and Yahoo!, and that Google has none of the characteristics that I associate with market power. The technology industry is one of the most competitive and dynamic spaces in the entire economy, with small companies as well as larger companies competing hard against each other in lots of areas. Google has many strong competitors. We compete against a broad array of companies, including, for example, general search engines (e.g., Microsoft's Bing, Yahoo!), specialized search engines (e.g., Kayak, Amazon, WebMD, eBay), social networks (e.g., Facebook, Twitter), mobile apps, and voice-activated search tools like Apple's Siri. The Internet is incredibly competitive, and new forms of accessing information are being utilized every day.

Unlike technologies of the past, on the Internet, competition is one click away. In addition, the history of the technology industry shows that technologies usually get supplanted by completely new models. Therefore, the question is not necessarily, "Who is going to beat Google in search?" but also, "What new model might take the place of search?"

2. **Google frequently argues that it is not a monopoly because it provides its service for free and competition is "one-click away." This argument sounds appealing. Consumers are not forced to use Google, and anyone can start a website. The problem is that Google, like all search engines, serves consumers and advertisers. Consumers are really just a means to an end – Google generates nearly all of its revenue from advertisers, through advertisements on its own website and through ads it places across the internet.**

   This is not a "new" model. It's similar to broadcast TV. TV shows cost millions to produce, but consumers get them for free – because they're funded by advertisers. Millions of people watch ABC, so ABC can charge advertisers high costs, are re-invested into new million-dollar TV shows. But the difficulty in building ad revenue is a significant barrier to entry into this market. You can only fund new shows if you have advertisers. You can only get advertisers if you have viewers. And you can only get viewers if you have new shows. It's great if you already have all of the viewers – but good luck starting from scratch. These markets tend to move toward concentration and monopoly – there are only a few national broadcast networks.

   Google has all the "viewers" on the internet. Since most consumers use Google's search engine, most advertisers need to advertise through the company. – Google controls 80% of the online search advertising market. Ad revenue means better products, which means more users. This "network effect" makes it hard to push Google from its dominant position.

   Jonathan Rosenberg, Google's own VP of Product Management and Marketing, actually gave the best explanation of this in 2008. He said:

   "Google is really based on this. Users go where the information is so people bring more information to us. Advertisers go where the users are, so we get more advertisers. We get more users because we have more advertisers because we can buy distribution on sites that understand that out search engine monetizes better. So more users more information,

more information more users, more advertisers more users, it's a beautiful thing, lather, rinse, repeat, that's what I do for a living. So that's ... the engine that can't be stopped."

Q: Mr. Schmidt, please indicate on an company by company basis how much revenue was shared with each of your top 100 internet advertisers in the prior fiscal year, at whatever level of specificity is appropriate. If you were running most internet businesses, do you think it would be practical to refuse to advertise with Google?

Google does not share revenue with advertisers. They pay Google, through our AdSense program, to advertise on website publishers websites.

Google does share revenue with our publishing partners through Google AdSense. Publishers, such as the New York Times, that use AdSense receive a revenue share when a user clicks on a Google-hosted ad on their site.

Google's specific revenue share agreements with our publishing partners are confidential, proprietary information that is never shared publicly. I can, however, offer the information requested through more general numbers. Google's AdSense has two main types of publisher contracts: AdSense for Content and AdSense for Search. AdSense for Content publishers, who make up the vast majority of our AdSense publishers, typically earn a 68% revenue share. AdSense for Search partners typically earn 51% revenue share.[1] The precise revenue sharing arrangement can be subject to a negotiated agreement, however.

Advertisers use the combination of advertising channels that gives them the best return on their investment. While some advertisers may only use Google, our experience shows that almost all advertisers use multiple means of advertising to reach the greatest number of customers. Additionally, there are many businesses that choose not to advertise with Google at all and instead spend their ad dollars on TV, radio, newspapers, magazines, and online banner ads. That is why we need to offer the best services for our advertisers, because if we do not, competition is just a click or a phone call away.

3. **In your testimony before the committee, you suggested that Google's market share is not a significant barrier to entry because competition is "one-click away." This seems inconsistent you're your statement in 2003, when you told the New York Times that "[m]anaging search at our scale is a very serious barrier to entry."**

   Q: Mr. Schmidt, please explain why "[m]anaging search at our scale is a very serious barrier to entry" and how this can be reconciled with your claim that competition is "one-click away."

I made that statement to the New York Times over eight years ago, and I was probably talking about search in a more narrow way than I view competition today. That same New York Times article emphasizes that Google's advantage in 2003 was that we had amassed a large number of data centers to handle a sizable volume of queries.[2] But today, data centers have been reduced to a commodity that any company can buy or rent. Moreover, both Microsoft's Bing and Yahoo! today handle *millions more queries* than Google did in 2003. In two short years, Microsoft's Bing has already reached the size that Google was in 2007.

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[1] Neal Mohan, "The AdSense Revenue Share", Inside AdSense Blog, May 24, 2010, http://adsense.blogspot.com/2010/05/adsense-revenue-share.html.

[2] John Markoff and G. Pascal Zachary, "In Searching the Web, Google Finds Riches", New York Times, April 13, 2003, http://www.nytimes.com/2003/04/13/business/in-searching-the-web-google-finds-riches.html?pagewanted=all&src=pm.

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Scale certainly plays a role in Google's success, but it is not the key to our success. Google is not successful because of the number of queries we process. Competition on the Internet is just one click away and that disciplines Google into concentrating on making our users happy. To this end, Google makes tremendous investments in research and development and in hiring the best engineers, who are extremely talented, have a huge depth of experience, and are focused like a laser on thinking of ways to deliver better services to our users. We believe we are better not because we are bigger but because our technology is better.

Google does not believe that scale is a barrier to entry. The Internet provides a level playing field for competition; Google's size has not changed that fact. Indeed, recent entry into the general search business by start-ups such as Blekko, venture capital investments in search startups like DuckDuckGo, and Microsoft's Bing's success after only two years demonstrate that entry is not only possible but real.

A lack of scale did not deter companies like Facebook, Twitter, and LinkedIn from starting, finding an audience, and achieving widespread prominence, recognition, and ultimately success. At the same time, the large size of many Internet companies like MySpace did not prevent them from losing their audience and ultimately faltering. Given the nature of the Internet, websites and services can and do get supplanted by completely new models. So the relevant question may not be, "Who will beat Google in search?" but rather, "What new model might take the place of search?"

4. **When Google argues that it is not anticompetitive, the company sometimes points to its efforts to allow consumers to easily move away from Google Products. Google actually runs an organization called the "Data Liberation Front" to help you "move your data in and out of Google Products." The group's mission statement is this:**

   "Users should be able to control the data they store in any of Google's products. Our team's goal is to make it easier to move data in and out."

   Of course, it's the advertisers who are actually generating profits for Google. Google's products are free so that they can gain additional consumers, making their platform more attractive to advertisers. It's what economists call a classic example of a "two-sided market" – a business that provides value to two separate but related groups of customers. Consumers could choose not to use Google. But advertisers certainly can't.

   Economists have noted allowing advertisers to move easily and cheaply between platforms helps to deter the market concentration and monopoly effects that are a natural result of markets that generate increasing value from large networks.

   If a small company has to invest the resources to compete in an effective internet advertising auction, it's going to invest in Google's ads, not Microsoft's. If the company could easily export its data to Microsoft, it could advertise in both places with no additional cost. But if it has to choose one, it's going to choose the dominant player.

   In your testimony before the committee, you indicated that advertisers have the same freedom to move data in and out of Google's advertising platform as users. Some companies, however, have complained that it is not easy to move advertising data they have compiled for Google's ad auctions to competing advertising platforms, like Microsoft's Bing or Yahoo.

   Q: Mr. Schmidt, please explain precisely what advertising data can and cannot be exported from Google's ad services and imported into online advertising auctions on competing platforms.

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A number of resources exist to make it as easy as possible for AdWords users to export their data out of AdWords and use it for any purpose, including uploading it to another platform. In fact, Google is a leading proponent of data portability, and our Data Liberation Front provides step-by-step instructions to guide advertisers.[3] Competitors such as Microsoft also provide advertisers with simple instructions to import their Google ad data into their advertising platforms.[4]

Google provides a free tool, AdWords Editor, that make it easy for advertisers (and agencies or resellers acting on their behalf) to move their ad campaign from Google to a competing platform. Using AdWords Editor, advertisers or their agents can download their full campaign structure to a CSV file.[5] Thereafter advertisers are free to use the data as they deem appropriate, including uploading it onto competing platforms and using third-party tools to manage it.

Google also makes an AdWords API available that enables advertisers to build their own tools, and allows third-party developers to build tools for advertisers and agencies to use. The AdWords API Terms and Conditions impose minimal restrictions on advertisers in the creation or use of their own tools, and they can build most any functionality they deem necessary with AdWords API. In fact, Google specifically exempts advertisers from the requirements of Section III.2.c (referenced in your question).[6] There are modest limitations on the programmatic bulk input and direct copying of data through the use of AdWords API-based third-party tools. In fact, bulk input restriction is not applicable to all fields, and a number of such fields can be uploaded simultaneously across platforms. This is reflected by the extremely high level of advertiser multi-homing on numerous advertising platforms.

Questions about Google's Use of Its Market Power:

5. **It's not a crime to be a big. Google's explosive growth over the last decade is a great American success story. Federal law is concerned with the responsibilities that a big company has not abuse that dominance. One classic legal concern is when a dominant company uses its market power to push into new markets and unfairly hurt competitors. This is the chief complaint that other online companies have about Google. In 2007, Google's VP Marissa Mayer said that Google favors its own content:**

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[3] Brian Fitzpatrick, "Yes You Can Export Data From AdWords, Too", Google Public Policy Blog, October 8, 2009, http://googlepublicpolicy.blogspot.com/2009/10/yes-you-can-export-data-from-adwords.html.

[4] adCenter Desktop, "Import Google AdWords Campaigns to Microsoft adCenter using adCenter Desktop (video)", http://www.youtube.com/watch?v=MyWBPOS8dVM&feature=mfu_in_order&list=UL; Microsoft Advertising, "Import a Google campaign by using Microsoft Advertising adCenter Desktop (Beta)", http://advertising.microsoft.com/small-business/product-help/adcenter/topic?query=MOONSHOT_PROC_ImportGoogleCampaignsUsingDesktopTool.htm (5-step process); *see also* Amber, "Upload Your Google AdWords Campaigns Into Yahoo and MSN adCenter in a Flash!", PPC Hero, March 17, 2009, http://www.ppchero.com/upload-your-google-adwords-campaigns-into-yahoo-and-msn-adcenter-in-a-flash/ (3-step process).

[5] AdWords Editor Help, "How Do I Export a Spreadsheet from AdWords Editor," accessed November 1, 2011, http://www.google.com/support/adwordseditor/bin/answer.py?answer=38657.

[6] Google, AdWords API Terms and Conditions, accessed November 1, 2011, http://code.google.com/apis/adwords/docs/terms.html (In Section III(2)(c), Google explicitly notes that this section "does not apply to End-Advertiser-Only AdWords API Clients.").

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"[When] we roll[ed] out Google Finance, we did put the Google link first. It seems only fair, right? ... That actually has been our policy, since then.... So for Google Maps, again, it's the first link, so on and so forth. And after that it's ranked usually by popularity."

Google calls this practice of directing users to its own products at the top of its search page "Universal Search" – and says it's an effort to provide a better consumer experience. But if Google's product always wins, there's little incentive to make it the best consumer option.

"Google Product Search" is an online shopping comparison product. Originally called "Froogle," it was seen as a failure for its first five years, with few users–until December 2007, when Google started putting Google Product Search first. Over the next two years, Product Search traffic grew by over 1,200 percent. In 2008, an online retail consultant noted:

"Previously, Google Product Search struggled to get more than 2% of Google users... [but now] Google Product Search has become the largest and most important specialty shopping search engine in existence.... Yet their shopping product itself is still inferior in its presentation and usability to some other leading shopping search engines."

Q: Mr. Schmidt, how can consumers be assured of a better experience if they are always directed to Google software first?

Before addressing your question let me first offer a little background. Google's search results seek to achieve one fundamental thing: to connect users to the information they seek. We do this in two key ways. First, we started with conventional search—the traditional ten blue links—which involved crawling and indexing the web and returning results based on general responsiveness. Second, starting in 2001, we began to incorporate search results designed to respond to signals that a user is looking for specific types of information—a map, an image, a local business, a product, a news update, etc. We sometimes call these "thematic" search results.

When presenting thematic results, Google displays them in a way that is designed to make them user friendly. Prior to the launch of universal search in 2007, Google's thematic results like news were displayed, when relevant, at the top of the search results page. With the introduction of "universal search," we began to allow these thematic results to "float" from the top position to positions in the middle and bottom of the page, based on our assessment of how relevant conventional and thematic results were to the user's query.

Other major search engines also incorporate thematic and conventional search results on their search results pages. In fact, the first efforts at blending thematic and conventional search results by other general search engines date back to the late 1990s. It reflects the effort to achieve what one industry expert described in 2001 as the "Holy Grail" of search: "The real Holy Grail of all this will be when search engines can detect the type of search we are doing and feed out more targeted results from appropriate databases."[7]

But what is crucial to understand is that thematic search results are *not* separate "products and services" from Google. Rather, the incorporation of thematic and conventional results in universal search reflects Google's effort to connect users to the information that is most responsive to their queries. Because of this, the question of whether we "favor" our "products and services" is based on an inaccurate premise. These

[7] Danny Sullivan, "Being Search Boxed to Death", Search Engine Watch, March 4, 2001, http://searchenginewatch.com/article/2065235/Being-Search-Boxed-To-Death.

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universal search results *are* our search service—they are not some separate "Google content" that can be "favored."

That said, in keeping with our focus on quality and delivering the most relevant results for consumers, Google constantly experiments with new ways to provide the most relevant information is response to a user's query. For example, for certain queries, where Google is highly confident that the user wants a specific answer, Google will provide that answer prominently on the page. These direct answers are known as "oneboxes." Oneboxes are generally displayed to convey an answer that is clear and straightforward, for example, movie showtimes, weather forecasts, mathematical calculations, stock prices, sports scores, and so on. Microsoft's Bing and Yahoo! display similar "oneboxes" prominently in their results as well, demonstrating their belief that these results are useful for consumers.

The decision whether to display a onebox is determined based on Google's assessment of user intent. Contrary to what some of Google's critics suggest, Google does not make money when users click on oneboxes. In fact, the opposite is true: oneboxes that are responsive to what users are looking for may draw users away from the ads displayed on the page. Nonetheless, because oneboxes help Google deliver a satisfying experience to users, Google believes that by displaying them we are enhancing user satisfaction, which is in the long-term best interest of the company.

In some instances, Google has licensed data from third parties for use in our oneboxes. In other instances, we have developed this data ourselves. In either case, whether users are searching for a weather forecast, a mathematical calculation (e.g., [pounds to grams]), or a stock price, Google's user studies confirm that users seeking this type of information generally do not want to click through to multiple options, whether in the form of ads or more natural links. Rather, users want a quick, direct answer that they can trust is correct. Oneboxes provide fast, accurate answers in response to this user demand.

6. **Google's effort to build its own local business reviews product provides a good example of where Google's dominance may cause problems. Yelp.Com and TripAdvisor.Com grew into significant businesses based on user-generated reviews of hotels, restaurants, and stores. Google wanted to enter this market with a competing product – "Google Places." But "Google Places" had low traffic because it had no reviews.**

   Of course, Google had all of Yelp and TripAdvisor's reviews saved in its search servers. So the company took a shortcut – they "scraped" those reviews from its competitors, and pasted them on "Google Places" pages. TripAdvisor and Yelp cried foul. Those reviews are the heart of their businesses. But Google said if they didn't like it, they could just withdraw from the search engine entirely. That is totally impractical. When Microsoft tried to do the same thing to Yelp, Yelp threatened to withdraw from Bing, and Microsoft backed down. Google, however, generates most of the traffic to TripAdvisor and Yelp. Those companies would lose half their revenue if they left Google. As TripAdvisor's CEO has said, "I don't feel like it's fair to force me to provide information to a site that's trying to compete with me." Google announced just this past July that it would no longer scrape third party reviews and put them up on Google Places pages.

   Q: Mr. Schmidt, please indicate with as much specificity as is possible why Google decided to change its policy on scraping competitor content.

Google developed Place pages to help users to access information about a local business. When Google first launched Place pages, Google displayed snippets—a few lines of text—from various review sites for each local business listed, and required that users click through to read the full review. The ultimate goal of Place pages, along with Google's other thematic local results, was to help users locate local information on the web.

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Google entered a two-year licensing agreement with Yelp in 2005 to display the full text of Yelp's reviews in our conventional search results and our thematic local search results. Two years later, Yelp chose not to renew its agreement with Google. With the expiration of the license, Google no longer displayed the full text of Yelp's reviews. Thus, we returned to simply showing snippets of third-party reviews within our conventional results as well as our thematic local search results, a practice permitted under the long-established fair use doctrine of copyright law. Snippets generally display about two or three lines of text. For users to access the full text, they must select a link that directs them to the review site. Showing snippets of websites is an important part of search; it enables users to determine whether the site in question is responsive to their queries. It also drives traffic to websites.

If, at any point, Yelp (or any other site owner) wishes to be excluded from Google's (or any other search engine's) index, it can—with relative ease—block search engine crawlers using a very simple and common protocol. Specifically, every site owner has the option to use the robots exclusion protocol, also referred to as robots.txt, to signal to Google or any other search engine that they do not want particular webpages, or even an entire site, to be crawled and indexed.[8] Site owners can easily exclude certain sites or portions of sites from being indexed, and can also specify different protocols for different search engines. The robots.txt protocol—which has been in place for over 17 years—can be utilized either by writing a new robots.txt file,[9] or by accessing one of many publicly available robots.txt files.[10]

As Google continued to develop our thematic local search results, Yelp began voicing concerns regarding how and where, exactly, within Google's search results its snippets appeared. It's worth noting that by 2009, search competitors Microsoft Bing, Yahoo!, and Ask.com all integrated third-party review snippets in essentially the same exact way within their respective local search results.

Yelp subsequently requested that Google remove snippets of Yelp reviews in Google's local search results but continue providing links to Yelp. After a series of business conversations with Yelp in an attempt to address Yelp's numerous concerns, Google agreed to comply with Yelp's request. After the requested changes were implemented, snippets from Yelp's website continued to appear in conventional search results, and no longer appeared in the thematic local search results.

In July 2011, Google redesigned Place pages. One of the major changes, implemented after careful thought about the future direction of Place pages and feedback from third-party review sites, was removing snippets of reviews from sites like Yelp, TripAdvisor, and CitySearch. Instead, Google chose to feature reviews from our own users, with links to third-party review sites. In addition, the "star rating" and "total review count" were modified to reflect only those ratings and reviews that have been submitted by Google users.

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[8] robots.txt is an industry standard that allows a site owner to control how search engines access their web site. Access can be controlled at multiple levels – the entire site, through individual directories, pages of a specific type, or even individual pages. Basically, robots.txt is a structured text file that can indicate to web-crawling robots that certain parts of a given server are off-limits. This allows search engines such as Google to determine which parts of a website a site owner wants to display in search results, and which parts to keep private and non-searchable. Dan Crow, "Controlling How Search Engines Access and Index Your Website", The Official Google Blog, January 26, 2007, http://googleblog.blogspot.com/2007/01/controlling-how-search-engines-access.html.

[9] There are a number of resources available online that provide users with information on coding robots.txt files. *See e.g.* About/robots.txt, August 23, 2010, http://www.robotstxt.org/robotstxt.html.

[10] A non-comprehensive list of robots.txt files submitted by independent programmers is available here: http://www.robotstxt.org/db.html.

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Commentators like Frank Reed of Marketing Pilgrim noted that these changes "essentially . . . gives Yelp and TripAdvisor their wish," while TechCrunch noted that "this should be a welcome change to third-party source of reviews like Yelp and TripAdvisor."[11]

Yelp has aired numerous concerns in the press over the past few years, and although Google has tried to act responsibly in addressing some of those concerns, ultimately Google builds our search results for the benefit of users, not websites. At all times, Google's primary motivation has been improving the search experience for our users by providing the most relevant and useful information in response to their queries. In the end, if users are unhappy with the answers Google provides, the openness of the web ensures that they can easily switch to Yelp or any other site with just one click.

Questions about Google's Market Power in Smartphone Operating Systems

7. **Google's dominant position in the smartphone market is under increasing scrutiny. Google's Android operating system now runs on over 50% of all smartphones. Nearly a half million new Android phones are activated daily. The growth of Android's smartphone market share raises questions around whether Google's market power is being unfairly leveraged to promote its other products – like its search engine, which runs on all Android phones, or its "Places" application, which seems to ship with every Android phone.**

   Q: Mr. Schmidt, does Google occupy a dominant position in the smartphone operating system market?

Google does not have a dominant position in the smartphone market. According to comScore, Android operates on only 34.1% while Apple's iOS runs on 43.1%.[12] Moreover, competition in the market for mobile software platforms is fierce. Innovation in the mobile space is frenetic; competitors are racing to introduce new devices which have the potential to radically change mobile market dynamics.

Furthermore, Android is a joint effort among many members of the mobile market including OEMs, carriers, application developers and chipset manufacturers. As a joint endeavor, Android's success depends on the success of these partners—not just Google's success.

One of the greatest benefits of Android is that it fosters competition at every level of the mobile market—including among application developers. Google respects the freedom of manufacturers to choose which applications should be pre-loaded on Android devices. Google does not condition manufacturers' access to or use of Android on pre-installation of any Google applications or on making Google the default search engine. Google also does not condition Android compatibility determinations on pre-installation of Google applications or making Google the default search engine.

8. **The most prominent claim of Google unfairly leveraging its market power is the case of Skyhook Wireless, who recently filed suit against Google arguing that the company pressured Motorola and other manufacturers into dropping Skyhook's mobile location**

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[11] Frank Reed, "Google Places Update Puts Focus on Google", Marketing Pilgrim, July 22, 2011, http://www.marketingpilgrim.com/2011/07/google-places-update-puts-focus-on-google.html. Erick Schonfeld, "Google Places Stops Stealing Reviews", TechCrunch, July 21, 2011, http://techcrunch.com/2011/07/21/google-places-stops-stealing-reviews/.

[12] "Smartphones and Tablets Drive Nearly 7 Percent of Total U.S. Digital Traffic," comScore press release, October 10, 2011, http://www.comscore.com/Press_Events/Press_Releases/2011/10/Smartphones_and_Tablets_Drive_Nearly_7_Percent_of_Total_U.S._Digital_Traffic.

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service in favor of Google's. Emails from within Google made public as part of that lawsuit showed significant concern over Motorola's decision to go with Skyhook instead of Google's software. One email from Steve Lee, an Android product manager, speculates that Skyhook may have beaten out Google because it's "a hungry start-up" – or because Skyhook's location accuracy was superior to Google's.

Google ultimately forced Motorola and others to drop Skyhook's technology from their phones, arguing that it violated the company's Android "compatibility" requirements. But Dan Morrill, a manager in the Android group, noted at the time that it was obvious to manufacturers that in general, "we are using compatibility as a club to make them do things we want." Last month, Google announced that it intends to buy Motorola outright.

Q: Mr. Schmidt, does Google have an obligation to ensure that it does not abuse its smartphone market position to favor its own products, and if so, what policies are in place to ensure that such abuse does not occur?

Google's dispute with Skyhook is the subject of pending litigation, so I cannot comment extensively. However, as is reflected in publicly available filings, Google did not force either Motorola or Samsung to remove Skyhook software from their devices to receive certification as an Android compatible device. Google merely requested that these manufacturers use a version of the Skyhook software that was consistent with the Android Compatibility Definition Document ("CDD"). Skyhook possessed such a version of its software but refused to provide it to Motorola and Samsung. Thus, Google never was given a copy of the compliant software to review, which is why the Skyhook software was ultimately never deemed compatible by Google.

As to Mr. Morrill's remarks, reviewed in their full context express they reflect his belief that Google's efforts to maintain compatibility across different devices *could be misperceived* as a way for Google to improperly influence manufacturers. Google does not in fact use compatibility in this way. Mobile operating system competition is fierce—Apple, RIM (Blackberry), and Microsoft are very significant competitors—and carriers and handset manufacturers have many options other than Android. Google is committed to Android's success and to maintaining our strong partnerships with device manufacturers.

Google designed Android as an open source platform to foster customization by manufacturers of mobile software and hardware. In contrast to closed, proprietary operating systems, Android allows manufacturers to modify their own implementations of Android to create their own unique features and user interfaces. Android is also particularly adaptable to new hardware configurations and chipsets. By allowing broader differentiation in software and hardware, Android enhances competition and consumer choice. There are more than 500 models of Android devices on the market.

Google has undertaken extensive efforts to protect consumers and application developers to ensure their applications run seamlessly on all Android devices. Google, with the support of our Android partners, has identified certain specifications, such as minimum screen size and security features, that help ensure applications run flawlessly across device models. These specifications are reflected in the Android CDD, which is published on Android Open Source Project's website. Google and our partners believe that this baseline preserves the maximum amount of manufacturer freedom to customize Android, while simultaneously protecting Android developers, who need consistency and rely on minimum elements appearing on all Android devices, and Android customers, who may legitimately expect that Android applications will run on their Android devices.

Questions about Google's Market Dominance and Facilitation of IP Infringement

9. **As discussed during the September 21, 2011 hearing, on August 24, 2011, the Department of Justice announced that Google had been fined $500 million for allowing online Canadian**

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pharmacies to place advertisements through its AdWords program, resulting in the unlawful importation of controlled and non-controlled prescription drugs into the United States. The Department's press release noted that "Google was aware as early as 2003, that generally, it was illegal" to ship pharmaceuticals into the U.S.

Based upon the questions, and your responses to those questions, Google is also well aware that online copyright infringement online occurs on a massive scale and that it is a "problem that [Google] takes very seriously."

In light of the Department of Justice's statement that it "will continue to hold accountable companies who in their bid for profits violate federal law," Google's approach to ensuring it does not profit from intellectual property theft should not only be of great interest to the Committee, but Google as well.

Q: Mr. Schmidt, to what extent does Google take steps to ensure that it does not profit from the violation of federal copyright or trademark laws?

Google believes strongly in protecting copyright and other intellectual property rights. We understand that despite the overwhelmingly positive and legitimate uses of Internet services and technologies, there will be some who misuse these for infringing purposes. Google has been an industry leader in developing innovative measures to protect copyright and help rightsholders control their content online. For example, Google has expended more than 50,000 engineering hours and more than $30 million to develop Content ID, our cutting-edge copyright protection tool that is helping rightsholders make money on YouTube. This powerful technology scans the more than 48 hours of video uploaded to YouTube every minute and, within seconds, compares it against more than six million references files provided by participating rightsholders. Content ID has proven to be an enormous success and is being used by a long list of content owners worldwide to make their own choices about how, where, when, or whether they want their content to appear on YouTube.

As is true for all Internet companies, the critical foundation for Google's anti-piracy efforts remains the Digital Millennium Copyright Act ("DMCA"), the seminal law Congress passed in 1998 to address copyright protection online and promote the worldwide expansion of e-commerce. Congress rightly understood that some material posted by the millions of people who use online services will infringe copyright, and that online service providers in the ordinary course of their operations engage in copying and other acts that expose them to potential copyright liability. Congress also recognized that requiring online providers to engage in pre-screening of every user-posted text, picture, and video would inhibit free expression and stifle the growth of the Internet.

At the request of copyright owners, Google in 2010 took action against approximately three million allegedly infringing items across all our products, which accounts for far less than 1% of all the materials hosted and indexed by Google. We received takedown notices by letter, fax, email, and web forms from all sorts of copyright owners (including movie studios, record labels, adult entertainment vendors, and needlepoint pattern publishers) from 70 countries and in a wide variety of languages. Hundreds of Google employees work on copyright and combating infringement online, including a growing team of employees dedicated to receiving, reviewing, and responding to DMCA notices. We check to make sure that the notices are complete and are not attempts by competitors or others to use invalid copyright claims to censor speech with which they disagree.

Last December, Google announced that we were designing new tools to enable us to act on reliable copyright takedown requests within 24 hours. We are happy to report that our average turnaround time for DMCA notices received from those using our new tools is now less than seven hours. Moreover, submissions using our new tools now account for more than 75% of all URLs identified to us for web search.

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In addition, Google has (in compliance with the DMCA) implemented repeat infringer policies on all relevant products. In each of these products, repeat infringer terminations constitute far fewer than 1% of the total subscriber accounts.

We also employ a wide array of procedures and expend considerable financial resources to prevent our advertising products from being used to monetize material that infringes copyright. For example, our AdSense program enables website publishers to display ads alongside their content. Our policies prohibit the use of this program for infringing sites, and we use automated and manual review to weed out abuse. In 2010, we took action on our own initiative against nearly 12,000 sites for violating this policy. And in 2011, we have already taken action against more than 12,000 sites. We also respond swiftly when notified by rightsholders. We recently agreed to improve our AdSense anti-piracy review procedures and are working together with rightsholders on better ways to identify websites that violate our policies.

We also committed last year to prevent terms that are closely associated with piracy from appearing in autocomplete. We have begun working to prevent several piracy-related terms from appearing in autocomplete, and have asked content industry representatives to suggest other terms for consideration that won't overly restrict legitimate speech.

We are also helping to lead industry-wide solutions through our work with the Interactive Advertising Bureau ("IAB"), comprised of more than 460 leading media and technology companies. The IAB has established quality assurance guidelines through which participating advertising companies will take standardized steps to enhance buyer control over the placement and context of advertising and build brand safety. Google has certified our compliance with these guidelines.

Google also expends great effort to fight the challenge of counterfeit goods. Just as in the offline world, people misuse legitimate online services to try to market counterfeit goods. This abuse hurts our users and our business; combating it is central to Google's operations. The integrity and quality of the sponsored links displayed alongside Google search results are of paramount importance to our overall success. A Google user duped by a fake good is less likely to click on another Google ad in the future. For this reason, Google undertakes enormous efforts to root out ads for sites that sell counterfeit goods.

Google has clear policies against advertising counterfeit goods, and we expend considerable resources to enforce those policies. In the last year, we shut down approximately 95,000 accounts for attempting to use sponsored links to advertise counterfeit goods, and more than 95% of these accounts were discovered through our own detection efforts. Even more ads themselves were blocked on suspicion of policy violations. Our automated tools analyze thousands of signals to help prevent bad ads from being shown in sponsored links. Last year alone we invested $60 million in efforts to prevent violations of our ad policies.

Despite the best efforts of the online advertising industry, proactive measures will never be a complete solution. Some publishers deliberately take steps to evade detection systems, meaning bad sites will invariably slip through. Technologically sophisticated players use tactics like "cloaking" (showing one version of their site to the public and a different version to Google) to evade the protections that Google and other companies put in place. Because of these tactics, coupled with the sheer volume of ads served per day, finding a particular ad on the web that has circumvented our systems may always be possible. While the industry is aggressively going after this abuse, it is clearly a cat-and-mouse game to stay ahead of the bad actors, and Google is committed to being an industry leader in eradicating this behavior.

We also believe that making high-value content available in authorized forms is a crucial part of the battle against online infringement. With 800 million people per month coming to YouTube, we have expanded our movie rental services, made it easier for indie labels to become YouTube partners and share revenue when their music is played (even for user-generated content), and launched a feature to enable fans to buy artists' merchandise, music downloads, and concert tickets. And we've launched the Google eBookstore, featuring a wide array of books from authors and publishers. We also continue to improve YouTube's Content ID

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system to help more copyright owners (including songwriters and music publishers) to monetize their works and we are working with WIPO on a rights registry that will help African musicians license their works.

In addition to launching our own authorized services, we also launched Music Rich Snippets, which allow other legitimate music sites to highlight content in the snippets that appear in Google's conventional web search results. Rhapsody and MySpace are among the first to implement this feature, which has been developed using open web markup standards, and we are looking forward to more sites and search engines marking up their pages. We hope that authorized music sites will take advantage of Music Rich Snippets to make their preview content stand out in search results.

10. **The DOJ announcement mentions that the $500 million forfeiture, one of the largest ever in the United States, represents, "the gross revenue received by Google as a result of Canadian pharmacies advertising" through Google services.**

    Q: Mr. Schmidt, what are the gross revenues received by Google as a result of advertising the company has placed on websites that have been identified by law enforcement, copyright owners, or Google itself as a venture that offers unauthorized copies of copyrighted materials?

As described above, Google believes strongly in protecting copyright and undertakes enormous efforts to root out publisher sites who violate our policies against using AdSense for sites that infringe copyright. Google has no interest in making or keeping any revenue from infringement and therefore our target revenues are zero.

We employ a wide array of procedures to prevent infringing sites from using our ads products, and we expend considerable financial resources to find and eject advertisers and publishers who violate our policies. For example, publishers who want to join the AdSense program are vetted upon joining for their compliance with program policies. In addition, automated systems monitor the pages on which AdSense ads appear, and bring potentially problematic material to the attention of human reviewers. Finally, Google responds swiftly when notified by a rightsholder that our AdSense program is being used to monetize infringing or counterfeit sites, and we have policies in place to terminate the accounts of repeat offenders. The volume of complaints in this regard is not high, and represents far less than 1% of all our AdSense partner sites.

Perhaps contrary to perceptions, in many ways we lose revenue opportunities from the actions of bad actors who traffic in counterfeit goods or infringing content. Often stolen credit cards are involved, and we don't collect on accounts that are terminated for counterfeit violations. Infringing or counterfeit ads also cost us space that we could have used for a legitimate ad. And a Google user duped by a fake good is less likely to click on another Google ad in the future.

Lastly, it is important to note that the DOJ announcement you referenced states that the figure "represents the gross revenue received by Google as a result of Canadian pharmacies advertising through Google's AdWords program, *plus gross revenue made by Canadian pharmacies from their sales to U.S. consumers*" (emphasis added).

11. **The August 24, 2011 release stated that, "this investigation is about the patently unsafe, unlawful, importation of prescription drugs by Canadian on-line pharmacies, with Google's knowledge and assistance, into the United States, directly to U.S. consumers… It is about taking a significant step forward in limiting the ability of rogue on-line pharmacies from reaching U.S. consumers, by compelling Google to change its behavior." As you know, I am a cosponsor of the PROTECT IP Act, which gives the government the ability – after an investigation by federal prosecutors and review by a federal judge – to cut-off a foreign-based website that profits by facilitating the online theft of works from the U.S. marketplace. This proposal was unanimously approved by the Senate Judiciary Committee earlier this year.**

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Q: Mr. Schmidt, to what extent are you aware of Ads by Google, Adsense, DoubleClick or any other Google advertising service on offshore websites that are not authorized to make available the copyrighted music or movies that are the heart of those websites?

Google employs a wide array of procedures and expends considerable financial resources to prevent our advertising products from being used to monetize material that infringes copyright. Our policies prohibit the use of our advertising services on infringing sites, and we use automated and manual review to weed out abuse. For example, last year, we took action on our own initiative against nearly 12,000 sites for violating this policy. And in 2011, we have already taken action against more than 12,000 sites. We also respond swiftly when notified by rightsholders. For AdSense, our current average response time is 24 hours.

Google supports the PROTECT IP Act's goal of targeting foreign "rogue" websites that are dedicated to copyright infringement or counterfeiting. Google could support a "follow the money" legislative approach, which would choke off revenue to "rogue" sites who are dedicated to providing infringing access to copyrighted material and/or counterfeit goods. Consistent with our policies, this means payment services (e.g., Google Checkout) and advertising networks (e.g., Google AdSense) would not be allowed to provide services to rogue sites. We are also mindful that the Internet is key to American economic growth, and we have serious concerns about certain proposed legislative provisions that not only stifle innovation and threaten the Internet economy, but also jeopardize the millions of small businesses that rely on the web everyday.

As you know, one of the most discussed provisions of the PROTECT IP Act has been the definition of an "[i]nternet site dedicated to infringing activities," and earlier versions of this legislation raised serious concerns for legitimate U.S. businesses. Distinguishing whether, for example, a given video is "authorized" to be made available on a given site is not a simple task. It is the rightsholders who know what material they own the rights to, where in the world, and for what purpose. That is why the structure of the shared responsibility of the DMCA works effectively to take down the content that rightsholders have specified. For search engines, the DMCA process already enables rightsholders to remove infringing material that is located on foreign rogue sites.

12. **Q: Mr. Schmidt, to what extent have you been contacted by property owners regarding the presence of ads that enable such rogue websites to reap financial gain?**

Google employs a wide array of procedures to prevent infringing sites from using our ads products, and we expend considerable financial resources to find and eject advertisers and publishers who violate our policies. For example, publishers who want to join the AdSense program are vetted upon joining for their compliance with program policies. In addition, automated systems monitor the pages on which AdSense ads appear, and bring potentially problematic material to the attention of human reviewers. Finally, Google responds swiftly when notified by a rightsholder that our AdSense program is being used to monetize infringing or counterfeit sites, and we have policies in place to terminate the accounts of repeat offenders. The volume of complaints in this regard is not high, and represents far less than 1% of all our AdSense partner sites. We get lots of different types of complaints, and it can take time to investigate various claims, such as a claim that a given product is being distributed without authorization.

13. **Q: Mr. Schmidt, how does Google respond when contacted by a property rights owner or advertiser regarding Google advertising on a site offering or distributing its content or product without authorization? On average, how long does it take Google to respond to such a complaint?**

We employ a wide array of procedures and expend considerable financial resources to prevent our advertising products from being used to monetize material that infringes copyright. For copyright, as noted above, last year we took action on our own initiative against nearly 12,000 sites for violating our policies against using

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AdSense for sites that infringe copyright, and we have certified our compliance with IAB's guidelines. As we also noted above, though, proactive measures will never be a complete solution, even with the best efforts of the online advertising industry. We respond swiftly when notified of violations of our AdSense policies by rightsholders and recently agreed to improve our AdSense anti-piracy review procedures. Our current average response time is 24 hours. We are working together with rightsholders on better ways to identify websites that violate our policies.

Google also has clear policies against advertising counterfeit goods, and we expend considerable resources to enforce those policies. We work with over one million advertisers in 190 countries. In the second half of 2010, we received legitimate complaints about less than 0.25% of advertisers. In the last year, we shut down approximately 95,000 accounts for attempting to use sponsored links to advertise counterfeit goods, and more than 95% of these accounts were discovered through our own detection efforts. Even more ads themselves were blocked on suspicion of policy violations. Our automated tools analyze thousands of signals to help prevent bad ads from being shown in sponsored links. Last year alone we invested $60 million in efforts to prevent violations of our ad policies.

But there is no silver bullet. It's a whack-a-mole problem, as we constantly work to improve our practices against sophisticated entities trying to game our protections. While Google's tools are quite effective, it is incredibly difficult for Google to identify a counterfeit product being advertised. This is a challenging task, even for brand owners. Online advertising companies, which do not take possession of physical goods, cannot know for sure whether any particular item out of millions advertised is indeed a counterfeit. As has always been the case with newspapers and offline advertising platforms, it is essentially impossible for Google to block all attempted abuse.

14. **Q: Mr. Schmidt, what technologies is Google developing to ensure that its companies do not place ads on sites engaged in piracy and counterfeiting?**

Google has committed significant resources to developing technology that enables detection of content that violates our copyright and counterfeit policies. We use sophisticated automated tools, which analyze thousands of signals along every step of the advertising process. We devote significant engineering and machine resources to prevent violations of our ad policies including our anti-counterfeiting policy. In fact, we invested over $60 million last year alone in these efforts. Google also regularly refers to and cooperates with law enforcement on fraud and abuse investigations, including those relating to counterfeit goods.

15. **The FDA stated that it will hold "all contributing parties accountable for conduct that results in vast profits at the expense of the public health." While the theft of music and movies does not endanger the public health, it does endanger consumers who patronize professional looking websites that are validated and made to feel legitimate with "Ads by Google." It endangers consumers because it exposes them to liability for the theft of copyrighted materials. It endangers consumers who provide credit card and other personal information to criminal organizations. It exposes their computers to malware, viruses and spam, and, is not only wrong, but also a drain on the US economy. Equally important, it allows criminal operations – and your company – to profit from crime.**

    Q: Mr. Schmidt, what can you and others in the online advertising sector do to devise a workable plan that holds all parties accountable for conduct that results in vast profits for those operating online criminal enterprises predicated on the theft of American-made intellectual property?

Google supports developing effective policy and technology tools to combat large-scale commercial infringement. Google has dedicated tens of millions of dollars in engineering and other resources to help weed out notorious bad actors.

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Our policies prohibit the use of our AdSense and AdMob programs on web pages (AdSense) or apps (AdMob) that include infringing materials or seek to sell counterfeit goods. We employ a wide array of procedures to prevent infringing sites from using our ads products, and we expend considerable financial resources to find and eject advertisers and publishers who violate our policies. For example, publishers who want to join the AdSense program are vetted upon joining for their compliance with program policies. In addition, automated systems monitor the pages on which AdSense ads appear, and bring potentially problematic material to the attention of human reviewers. Finally, Google responds swiftly when notified by a rightsholder that our AdSense program is being used to monetize infringing or counterfeit sites, and we have policies in place to terminate the accounts of repeat offenders. The volume of complaints in this regard is not high, and represents far less than 1% of all our AdSense partner sites.

Moreover, Google has long enabled advertisers directly to control where their ads appear. Using available exclusion tools for our ad programs, Ads by Google advertisers can exclude domains of their choosing from displaying their ads (whether because of infringement or any other concern). Similarly, if an advertiser discovers its ads running on an objectionable site that it had not previously been aware of, that advertiser can use the tools to prevent any future appearances on that site.

While we are proud of the policies and procedures we have in place to prevent improper use of our ads products, we are always striving to improve. As mentioned above, we will continue to work with rightsholders to identify, and, when appropriate, expel violators from the AdSense program.

In addition, Google is helping to lead industry-wide solutions to prevent legitimate ads from appearing on illegitimate sites through our work with the IAB, comprised of more than 460 leading media and technology companies. The IAB has established quality assurance guidelines through which participating advertising companies will take standardized steps to enhance buyer control over the placement and context of advertising and build brand safety. Despite the best efforts of the online advertising industry, however, technologically sophisticated players use tactics like "cloaking" (showing one version of their site to users and a different version to Google) to evade the protections that Google and other companies put in place. While the industry is aggressively going after those who abuse online advertising programs, it is clearly a cat-and-mouse game and efforts to legislate in this area must be careful not to target ad platforms for abuses of their systems that could not reasonably be prevented.

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Google

Response of Eric Schmidt, Executive Chairman, Google Inc.
Before the Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy, and Consumer Rights

Hearing on "The Power of Google: Serving Consumers or Threatening Competition?"
September 21, 2011

Questions for the Record – Senator Cornyn to Mr. Schmidt

1. **At the hearing, you referenced Google's Non-Prosecution Agreement ("NPA") with the U.S. Department of Justice. As you may recall, I asked you about that agreement and provided you the opportunity to provide a complete and accurate picture of Google as a corporate citizen. There appeared to be some confusion as to whether you could discuss the NPA. You stated that you had been advised by your lawyers not to "speak about the details" or "comment" on the NPA.**

    a. **Did you know before your testimony that the agreement explicitly states that you are "prohibited from contradicting" the factual statements?**

Under the terms of the NPA, Google and its management have to be mindful of the NPA's limitations on making public statements about the facts or the investigation to avoid any breach of our obligations under it. For this reason, I was very measured in my remarks at the hearing, but as you state and as I understand better now, I can restate the facts stipulated in the NPA and could have restated those facts with you at the hearing. I apologize for my confusion.

    b. **Do you agree that Google is expressly permitted to defend any litigation or investigation or proceeding as long as you do not contradict the factual statements?**

Yes. Of course, the Department of Justice is the arbiter of what contradicts the factual statements in the NPA, and Google intends to be very careful not to breach our obligations. The NPA's provisions regarding public statements permissible by Google speak for themselves. That being said, it is also true that Google must at all times be incredibly mindful of the very limitation you reference, that Google not contradict, intentionally or unintentionally, any of the factual statements in the NPA.

2. **I would like to provide you an opportunity to clarify the record with regard to one of my questions. I asked, regarding Google's conduct set forth in the NPA: *"Was it … the result of oversight or inadvertence or were there some employees in the company that were doing this without your knowledge…"* I believe that you responded as follows: *"Well, certainly not without my knowledge. Again, I have been advised, unfortunately, I'm not allowed to go into any of the details and I apologize, Senator, except to say that we're very regretful and it was clearly a mistake."***

    Your answer would seem to suggest that you did indeed have knowledge of the conduct set forth in paragraph 2 of the NPA. I understand that you may not have heard my question accurately and that sometimes answers can be misconstrued. I would like to give you an opportunity to clarify your answer to my question and answer some related questions.

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a. **Did you know that Canadian online pharmacies were advertising prescription drugs for sale in the U.S. using Google's AdWords or other Company advertising platforms between 2003 and 2009?**

b. **When did you learn of this conduct?**

c. **How did you learn of this conduct?**

d. **Did you alert others in the company about this conduct? Who did you alert? When did you do so? What did you say or write in alerting others in the company regarding this conduct?**

As I'm sure you can appreciate, Google has a wide variety of policies governing ads in many different countries. I do not recall the specifics of when these particular policies first came to my attention. Sometime around 2004, it was brought to management's attention generally that there were some potential issues to consider regarding pharmacies advertising via AdWords, in violation of Google's policies, and I believe I first learned of this issue around that time through meetings and internal discussions. The company's policy did not block licensed Canadian pharmacies certified by SquareTrade and later PharmacyChecker to advertise in the United States. SquareTrade verified whether online pharmacies seeking to advertise through AdWords were licensed in at least one state in the United States or in Canada. SquareTrade required pharmacies seeking to advertise through AdWords to self-certify that they would act in accordance with applicable U.S. laws and regulations. As for PharmacyChecker, although it did not certify online pharmacies that shipped controlled prescription drugs, Canadian or otherwise, it did certify advertisers of non-controlled prescription drugs, including distributors of non-controlled prescription drugs located in Canada. Some advertisers did not qualify for certification by either SquareTrade or PharmacyChecker, but nonetheless were able to circumvent Google's certification requirements by, for example, setting up advertising campaigns intended for audiences outside the U.S., thus not requiring certification, and then later changing the geo-targeting of those campaigns to include the U.S. Some advertisers also circumvented Google's manual review of ads, for example, by not including pharmaceutical terms triggering manual review by Google's systems in the text of the ads. The NPA—specifically paragraphs 2(i) and 2(l) through 2(n)—sets forth the pertinent facts about the timing and duration of that advertising. Google is not in a position to comment further on the matter for the reasons explained above.

3. **As I noted during the hearing, one of the reasons I asked you about this topic is because I believe that it speaks directly to the issue of trust. I understand from your testimony that the conduct that was covered in the NPA has nothing to do with the company's current advertising practices or policies. Because the issue of trust is so important, I would like to give you the opportunity to describe in more detail just how those practices have changed and when they did so.**

   a. **The NPA, paragraph 2(q), states that Google became aware of the government's investigation in 2009. When in 2009?**

Google became aware of the government's investigation at the end of May 2009.

   b. **What steps has Google taken to prevent this sort of thing from happening again?**

We agree that complying with the law and maintaining the trust of our users is essential. Google changed our policy regarding Canadian pharmacies in March 2010. Since that time, the AdWords program allows only online pharmacies based in the United States to run ads appearing in the United States. Further, Google became the first online search provider to require these U.S. online pharmacies to be accredited by the National Association Boards of Pharmacy VIPPS program. The VIPPS certification is stringent and fewer

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than 20 online pharmacies nationwide are currently certified by VIPPS. Google also continues to improve our existing automated screening programs and developed new tools to enhance our ability to enforce and monitor advertisers' compliance with these policies. As part of this enforcement effort, Google contracted with an independent company with knowledge of online pharmacies to conduct regular "sweeps" of ads running via AdWords to find any drug- or online-pharmacy-related advertisements from advertisers who manage to evade Google's screening programs. The NPA itself notes the changes Google has made to our policy and to our enforcement efforts. Google also took a lead role in a cross-industry effort to collaborate with government bodies to attempt to stop the problems of online pharmacy advertising at the source.

c. What, if any, disciplinary measures has Google taken against any of its executives or employees who allowed the Canadian pharmacies to illegally sell drugs in the U.S.?

d. Was anyone terminated? Who? When?

The failure to block U.S.-focused advertisements from licensed Canadian pharmacies that were certified by SquareTrade and then PharmacyChecker to advertise in the United States came as the result of a number of company decisions. Accordingly, Google has not taken any disciplinary action against any employees based on the existence of ads by Canadian pharmacies certified by SquareTrade and then PharmacyChecker. Of course, Google does discipline and even terminate employees for violations of Google policies, including our policies against various types of ads. In the course of our investigation into online pharmaceutical advertisements, we disciplined or terminated several employees who had violated our policies.

e. Are you confident that the steps the company has taken will prevent the sale of illegal drugs through ads placed via Google?

The steps Google has taken to prevent pharmacies from unlawfully advertising on Google, described above, are robust and significant, and our experience with these steps since implementing them over a year ago shows very good results. History has shown that some rogue pharmacies find ways to circumvent Google's safeguards, but we are constantly evolving our practices to meet these challenges. One way we are addressing these rogue actors is by contracting with an independent company with knowledge of online pharmacies to conduct regular "sweeps" of ads running via AdWords to find any drug- or online-pharmacy-related advertisements from advertisers who manage to evade Google's screening programs. Upon receipt of those reports, offending advertisements are removed, and the advertiser accounts for these rogue pharmacies are terminated. Of course, this is a continuing arms race, involving millions of ads every day covering a wide range of products and services, that faces us and other online platforms. We use a variety of sophisticated filters, scans, and tools for human review to identify ads that may be for illegal products or that otherwise violate our policies, and we regularly update our policies to address new categories of ads. Bad actors in many countries around the world are constantly working to circumvent these barriers, and Google is actively improving our detection and deterrence tools.

4. **I remain concerned about the reasons behind the conduct that became the subject of the DOJ investigation into Google's advertising practices. I understand that you cannot make any statements contradicting the facts set forth in paragraph 2 of the NPA. Without contradicting any statements in paragraph 2 of the NPA, please provide answers to the following questions:**

a. Who at Google would have been in a position to prevent the conduct that led to the government's investigation and the Statement of Facts in the NPA?

Not blocking licensed Canadian pharmacies certified by SquareTrade and PharmacyChecker from advertising in the United States was the result of a continuing discussion involving a variety of policy and implementation

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questions over several years. In hindsight it is possible that any of a number of individuals might have been able to influence those policies and practices.

b. Whose responsibility was it to respond to the two letters sent to Google in 2003 and 2008 by the National Association of Boards of Pharmacy warning Google that it was illegal to import prescription drugs from Canada? Did you ever see those letters? Did Google respond to them? See NPA, Para 2(f)

Google receives numerous inquiries and correspondence from many different parties about our products and services every day. We do our best to review correspondence and take appropriate action, which may or may not include a response to the sender. I understand that the National Association of Boards of Pharmacy ("NABP") sent Google the 2003 letter after we requested from it information regarding online pharmacies and the VIPPS program. Google considered the information provided by the NABP as we reviewed and updated our online pharmacy policies in 2003 and 2004. I myself do not recall seeing either letter.

c. What ultimately caused the conduct that is described in paragraph 2 of the NPA to cease?

Google disallowed Canadian pharmacies from advertising in the United States, and took the other steps described in response to Question 3b above, as a result of the government's investigation and our ongoing efforts to improve our policies and enforcement tools.

d. Who were the members of the Company's policy group in 2003 through 2009?

Google's advertising policy team had numerous members throughout this time period, many of whom no longer work at Google or on the policy team. As I noted earlier, not blocking licensed Canadian pharmacies certified by SquareTrade and PharmacyChecker from advertising in the United States was the result of a continuing discussion involving a variety of policy and implementation questions over several years, and involved many employees in the company beyond those on the policy team.

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Google

Response of Eric Schmidt, Executive Chairman, Google Inc.
Before the Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy, and Consumer Rights

Hearing on "The Power of Google: Serving Consumers or Threatening Competition?"
September 21, 2011

Questions for the Record from Senator Al Franken for Eric Schmidt

1. **In your testimony you stated that you are not aware of "any unnecessary or strange boosts or biases" in Google's algorithms for Google's own products and services. Can you confirm that Google does not give its own services an unfair advantage in its organic search results?**

Google's search results seek to achieve one fundamental thing: to connect users to the information they seek. We do this in two key ways. First, we started with conventional search—the traditional ten blue links — which involved crawling and indexing the web and returning results based on general responsiveness. Second, starting in 2001, we began to incorporate search results designed to respond to signals that a user is looking for specific types of information—a map, an image, a local business, a product, a news update, etc. We sometimes call these "thematic" search results.

Other major search engines also incorporate thematic and conventional search results on their search results pages. In fact, the first efforts at blending thematic and conventional search results by other general search engines date back to the late 1990s. It reflects the effort to achieve what one industry expert described in 2001 as the "Holy Grail" of search: "The real Holy Grail of all this will be when search engines can detect the type of search we are doing and feed out more targeted results from appropriate databases."[1]

These universal search results are not separate "products and services" from Google. Rather, the incorporation of thematic and conventional results in universal search reflects Google's effort to connect users to the information that is most responsive to their queries. Because of this, the question of whether we give an "unfair advantage" to our "products and services" is based on an inaccurate premise. These universal search results *are* our search service—they are not some separate "Google content" that can be "favored."

That said, in keeping with our focus on quality and delivering the most relevant results for consumers, Google constantly experiments with new ways to provide the most relevant information is response to a user's query. For example, for certain queries, where Google is highly confident that the user wants a specific answer, Google will provide that answer prominently on the page. These direct answers are known as "oneboxes." Oneboxes are generally displayed to convey an answer that is clear and straightforward, for example, movie showtimes, weather forecasts, mathematical calculations, stock prices, sports scores, and so on. Microsoft's Bing and Yahoo! display similar "oneboxes" prominently in their results as well, demonstrating their belief that these results are useful for consumers.

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[1] Danny Sullivan, "Being Search Boxed to Death", Search Engine Watch, March 4, 2001, http://searchenginewatch.com/article/2065235/Being-Search-Boxed-To-Death.

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The decision whether to display a onebox is determined based on Google's assessment of user intent. Contrary to what some of Google's critics suggest, Google does not make money when users click on oneboxes. In fact, the opposite is true: oneboxes that are responsive to what users are looking for may draw users away from the ads displayed on the page. Nonetheless, because oneboxes help Google deliver a satisfying experience to users, Google believes that by displaying them we are enhancing user satisfaction, which is in the long-term best interest of the company.

In some instances, Google has licensed data from third parties for use in our oneboxes. In other instances, we have developed this data ourselves. In either case, whether users are searching for a weather forecast, a mathematical calculation (e.g., [pounds to grams]), or a stock price, Google's user studies confirm that users seeking this type of information generally do not want to click through to multiple options, whether in the form of ads or more natural links. Rather, users want a quick, direct answer that they can trust is correct. Oneboxes provide fast, accurate answers in response to this user demand.

In sum, we view our thematic search results as part of our search results, not as a separate product or service. With respect to a page on a Google-owned site such as YouTube that is crawled and ranked within our search results, such a page is not placed higher than an identical page would be if it were owned by another company.

2. **Please explain why Google's products (such as Google Places and Shopping) are not clearly labeled as Google products in your organic search results. Would Google consider clearly labeling these items so consumers understand these products are owned by Google?**

As I explained in answer to Question 1, thematic search results (such as Places and Shopping) incorporated in universal search results are not separate "products" from Google. Rather, the incorporation of thematic and conventional results in universal search reflects Google's effort to connect users to the information that is most responsive to their queries. These universal search results *are* our search service—they are not separate "Google content."

In response to a query seeking local information, for example, Google may either group local results together, or may distribute local results throughout our search results. Either way, Google is simply trying to organize and display local business results so as to save users time by displaying local information in the most effective manner, in order to eliminate the need to conduct multiple searches. As with any of Google's search results, local business listings are ranked according to likely relevance. For example, typing in a query for [shoe repair 22203] will typically return local business listings organized by geographic proximity to that zip code. The ranking of local business results is not affected by payment.

3. **What factors does Google consider in making the decision when and where to rank "answers" above "links" (such as to a metasearch site like Nextag)? Has Google considered providing search "answers" that are not owned or controlled by Google, for example pointing to products listed on a different product comparison service other than Google Shopping?**

Thematic search results for particular types of content (video, images, news articles, products, and so on) are incorporated when our consumer testing and data analysis shows that those results algorithms are most likely to deliver the results sought by our users. As I noted in my response to Question 1, oneboxes are displayed when Google believes it is likely that a user is seeking a specific answer, and they often contain information or data that are licensed from third parties.

4. **During his testimony, Nextag CEO Jeffrey Katz stated that Google offers "unique ad placements, which competitors such as [Nextag] can't even purchase." Does Google prevent companies from purchasing certain ads? If so, what process does Google use to determine who is eligible to bid for certain ads?**

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NexTag is a valued customer of Google's that advertises extensively through our traditional AdWords system. What Mr. Katz was referring to was a discrete ad format where users see a specific product's picture and price. Our user studies have found that users expect to be able to purchase a product when they click on advertisements containing a product's picture and price. Accordingly, we require advertisers that use this format to direct their advertisement to a page where the product can be sold. As of this past September, we were working with NexTag to set up Product Listing Ads for the products sold directly through the site.

5. **During Mr. Stoppleman's testimony, he indicated that Yelp had difficulty removing its content from Google Places's reviews, and he was told Google would only remove Yelp content from its site if Yelp "de-indexed" its website.**

    a. **Please describe, in detail, the official process for a company to challenge Google's use of its content in a manner which the company believes is inappropriate?**

Every site owner has the option to use the robots exclusion protocol, also referred to as robots.txt, to indicate to Google or any other search engine that they do not want particular webpages, or even an entire site, to be crawled and indexed.[2] Site owners can easily exclude certain sites or portions of sites from being indexed, and can also specify different protocols for different search engines. The robots.txt protocol, which has been in place for over 17 years, can be utilized either by writing a new robots.txt file,[3] or by accessing one of many publicly available robots.txt files.[4]

In addition, Google regularly engages in business conversations with people in the search industry, from industry pundits to local businesses to SEO firms to site owners of websites both large and small. When Yelp raised issues with the way Google indexed Yelp content in Google's local search results, Google willingly engaged in a series of business conversations with Yelp in an attempt to address Yelp's numerous concerns.

    b. **Does Google "scrape" content from other websites? If so, please list the websites where Google is appropriating content and indicate whether any of these companies have complained to Google about this practice.**

Google believes strongly in protecting copyright and other intellectual property rights. Google relies, as does every other major search engine, on the established doctrine of fair use in order to display snippets of text in our search results, giving users a preview of the type of content they can find for a given link. Indeed, snippets are an important feature of search generally, and they drive traffic to websites. Google previously displayed review snippets from sites such as Yelp and TripAdvisor in our thematic local search results.

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[2] robots.txt is an industry standard that allows a site owner to control how search engines access their web site. Access can be controlled at multiple levels – the entire site, through individual directories, pages of a specific type, or even individual pages. Basically, robots.txt is a structured text file that can indicate to web-crawling robots that certain parts of a given server are off-limits. This allows search engines such as Google to determine which parts of a website a site owner wants to display in search results, and which parts to keep private and non-searchable. Dan Crow, "Controlling How Search Engines Access and Index Your Website", The Official Google Blog, January 26, 2007, http://googleblog.blogspot.com/2007/01/controlling-how-search-engines-access.html.

[3] There are a number of resources available online that provide users with information on coding robots.txt files. *See e.g.* About/robots.txt, August 23, 2010, http://www.robotstxt.org/robotstxt.html.

[4] A non-comprehensive list of robots.txt files submitted by independent programmers is available here: http://www.robotstxt.org/db.html.

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Google's practice of displaying review snippets did not disadvantage review sites—in fact, quite the opposite. In fact, Google sends millions of clicks a month to Yelp, TripAdvisor, and other review sites. Google facilitates free traffic to both Yelp and TripAdvisor, and each of the sites has reaped the benefits of this free user exposure.

Yelp has aired numerous concerns in the press over the past few years, and although Google tries to act responsibly in response to website concerns, ultimately Google builds our search results and search-related products for the benefit of users, not websites. At all times, Google's primary motivation has been improving the search experience for our users by providing the most relevant and useful information in response to their queries. In the end, if users are unhappy with the answers Google provides, the openness of the web ensures that they can easily switch to Yelp or any other site with just one click.

6. **Many small businesses depend upon the Internet for customers to find them. I have heard from a number of Minnesota businesses that are concerned that the quality assessment measures Google rolled out in "Panda" will prevent them from competing with larger companies that can invest more in "search engine optimization." What is Google doing to address this concern and ensure that small businesses are not unfairly impacted by these changes?**

Google's ongoing aim is to ensure that we return search results that provide users with best answers. We developed the Panda algorithm in response to feedback from our users who wanted more relevant answers and a better user experience. While Google aims to provide users with websites that are likely to be the most useful for our users, over the past few years, websites with low-value content have learned how to game Google's algorithms so that they often outranked better websites. The Panda algorithm simply more adeptly ranks high-quality sites—sites with original content and information such as research, in-depth reports, thoughtful analysis, etc.—regardless of the size of the business in question.

Panda was a set of algorithm changes intended to improve the quality of search results and make it harder for poor quality sites to rank highly in Google's search algorithms. Panda does not prevent small businesses from competing with larger companies. We work hard to make sure that all companies' websites are ranked according to their usefulness to queries, and we continually keep small businesses in mind when we test out new algorithms and evaluate possible improvements to the algorithms.

7. **In your testimony, you estimated that just over two-thirds of Android phones were shipped with Google products pre-installed. Please confirm the exact percentage of Android phones that are shipped with Google products pre-installed, and please specify which apps are pre-loaded or bundled, including Google Maps; Google Places; Google +; Google Shopping; Gmail; Latitude, etc..**

As I mentioned in my testimony, my estimate of the number of phones that come with Google products pre-installed was "not too precise." It was, in fact, an educated guess. Android's code is open-sourced, meaning that manufacturers are free to obtain the Android source code and create Android phones without Google's knowledge or involvement.[5] Because Google does not know the total number of Android-powered phones, it is not possible to confirm the percentage of Android phones that ship with Google products pre-installed.

Google does not demand that smartphone manufacturers make Google the default search engine as a condition of using the Android operating system. Android is a free, open source platform for mobile devices. The complete Android source code is available for download for free from the Android Open Source Project

[5] *See* Android Open Source Project, "Downloading the Source Tree", http://source.android.com/source/downloading.html.

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website.[6] Any developer or manufacturer can use, modify, and distribute the Android operating system without Google's permission or any payment to Google. For example, Amazon recently announced the Kindle Fire—its new tablet device—using the Android source code without Google's involvement. This is one of the exciting and innovative aspects of Android that will help foster innovation and competition in the smartphone market.

One of the greatest benefits of Android is that it fosters competition at every level of the mobile market—including among application developers. Google respects the freedom of manufacturers to choose which applications should be pre-loaded on Android devices. Google does not condition access to or use of Android on pre-installation of any Google applications or on making Google the default search engine.

Manufacturers can choose to pre-install Google applications on Android devices, but they can also choose to pre-install competing search applications like Yahoo! and Microsoft's Bing. Many Android devices have pre-installed the Microsoft Bing and Yahoo! search applications. No matter which applications come pre-installed, the user can easily download Yahoo!, Microsoft's Bing, and Google applications for free from the Android Market.[7] In addition, Android gives manufacturers the freedom to pre-install third-party app stores, like the Amazon Appstore for Android, where a user can download a variety of apps, including Microsoft's Bing.[8]

8. **I have heard complaints that it is difficult to delete pre-loaded apps from Android phones. Please explain the process to delete pre-loaded apps, and how it compares to the process for deleting other apps that are not pre-installed on a phone.**

During the manufacturing process, a manufacturer typically loads a mobile device with a complete system image consisting of the operating system and pre-loaded applications. The system image is loaded into read-only memory, which for technical reasons cannot be modified by the user. Because Android devices are manufactured in this manner, the user cannot alter the Android platform itself or any pre-loaded applications. As a result, any application that is pre-installed and part of the system image cannot be deleted. This is not an issue limited to Android; both Apple's iOS and Microsoft's Windows Phone are loaded as system images that prevent modifying the operating system or removing pre-loaded applications.

But Android is designed, more than any other mobile operating system, to allow users to fully personalize their mobile devices. Users are given ample freedom to modify the user interface and features of their Android devices. Users can easily move any applications they do not wish to use away from the home screen or into folders, can easily install one of over 300,000 applications available in the Android Market and other applications sources, and can use these applications to the exclusion of any pre-loaded software.

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[6] *See* Android Open Source Project, "Downloading the Source Tree", accessed on November 1, 2011, http://source.android.com/source/downloading.html.

[7] Users can access the Microsoft Bing Search application here: https://market.android.com/details?id=com.microsoft.bing&feature=search_result; the Yahoo! Search application here: https://market.android.com/details?id=com.yahoo.mobile.client.android.yahoo&feature=search_result; and the Google Search application here: https://market.android.com/details?id=com.google.android.googlequicksearchbox&feature=search_result.

[8] Amazon makes the Microsoft Bing Search application available here: http://www.amazon.com/Microsoft-Corporation-Bing/dp/B004T54Y2M/

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Furthermore, the new version of the Android platform (Android 4.0: Ice Cream Sandwich) allows the user to disable pre-loaded applications. Although the application cannot truly be deleted for the reasons described above, a disabled application is hidden from view and cannot be launched unless the user re-enables it.

9. **How does Google define whether an application is "compatible" with the Android operating system? What steps has Google taken to help application developers to understand how applications are assessed for compatibility so they are not barred from the Android market?**

Google does not define whether applications are "compatible" with the Android operating system. Google has, however, undertaken extensive efforts to protect consumers and application developers to ensure their applications run seamlessly on all Android devices. Google, with the support of our Android partners, has identified certain specifications, such as minimum screen size and security features, that help ensure applications run flawlessly across device models. These specifications are reflected in the Android Compatibility Definition Document ("CDD"), which is published on Android Open Source Project's website. Google and our partners believe that this baseline preserves the maximum amount of manufacturer freedom to customize Android, while simultaneously protecting Android developers, who need consistency and rely on minimum elements appearing on all Android devices, and Android customers, who may legitimately expect that Android applications will run on their Android devices.

Application developers seeking to create an application that runs on the Android operating system can use the Android application programming interfaces ("APIs") that are made available through the Android operating system. Developers can also download the Android software development kit ("SDK"), and Android native development kit ("NDK"), which are all available for free on the Android developer website.[9] These tools allow anyone to create rich, innovative applications that can be distributed on Android devices.

10. **If a copyright or trademark owner alerts Google that a website or application is operating illegally, what process does Google take against those sites and applications? Is there a way to expedite this process?**

When we are notified by a rightsholder of infringing activity or material, we act promptly to address the issue. The nature of our response depends on the Google product that is involved—if we are hosting the content in question, we can remove it; if it involves advertising on an infringing site, we can remove the ads and terminate the site's account; if infringing material is appearing in search results, we can prevent those links from appearing in future search results.

For example, on YouTube, we don't even wait to be notified—we proactively employ our Content ID tools to match every video against our database of "claimed" audio and video before it appears on the site. This powerful technology scans the more than 48 hours of video uploaded to YouTube every minute and, within seconds, compares it against more than six million references files provided by participating rightsholders. This is possible because YouTube is a video hosting service, which means the videos reside on servers that we control. Content ID has proven to be an enormous success and is being used by a long list of content owners worldwide to make their own choices about how, where, when, or whether they want their content to appear on YouTube. In addition to our Content ID system, we also have developed a sophisticated Digital Millennium Copyright Act ("DMCA") takedown system, the Content Verification Program ("CVP"), for reliable, high-volume submitters. The response time for those using our CVP system is effectively immediate.

In contrast, where web search is concerned, Google has no ability to "take down" the sites that exist on the web, because we don't control the web. Instead, when copyright owners notify us of infringing material appearing in search results, we remove it from future results. While we have always processed takedown

[9] Android Developers, Download the Android SDK, accessed November 1, 2011, http://developer.android.com/sdk/index.html.

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notices expeditiously, over the past several months, we have dramatically improved our turnaround time for DMCA notices for web search. We did this by building new tools for reliable, high-volume submitters. These tools are now being successfully used by more than a dozen content industry partners who together account for more than 75% of all URLs submitted in DMCA takedowns for web search. Our goal was to reduce average response time for these notices to less than 24 hours. In fact, we've exceeded that goal. Current average response time is now less than seven hours.

We also employ a wide array of procedures and expend considerable financial resources to prevent our advertising products from being used to monetize material that infringes copyright. For example, our AdSense program enables website publishers to display ads alongside their content. Our policies prohibit the use of this program for infringing sites, and we use automated and manual review to weed out abuse. Last year, we took action on our own initiative against nearly 12,000 sites for violating this policy. And in 2011, we have already taken action against more than 12,000 sites.

We also respond promptly when we are notified that our advertising products are being used by infringing sites. We recently agreed to improve our AdSense anti-piracy review procedures and are working together with rightsholders on better ways to identify websites that violate our policies.

Google also expends great effort to fight the challenge of counterfeit goods. Just as in the offline world, people misuse legitimate online services to try to market counterfeit goods. This abuse hurts our users and our business; combating it is central to Google's operations. In the last year, we shut down approximately 95,000 accounts for attempting to use sponsored links to advertise counterfeit goods, and more than 95% of these accounts were discovered through our own detection efforts. Even more ads themselves were blocked on suspicion of policy violations. Our automated tools analyze thousands of signals to help prevent bad ads from being shown in sponsored links. Last year alone we invested $60 million in efforts to prevent violations of our ad policies.

We also have a fast and easy complaint form for brand owners to notify us of ads for potentially counterfeit goods. Earlier this year, Google announced that for brand owners who use this form responsibly, we will commit to an average response time of 24 hours or less. Brand owner feedback is an important way in which we improve our systems—as we get more data about bad ads, we get better at counteracting the new ways that bad actors try to game the system.

a. If a property holder alerts Google that a new incarnation of the website or application has become available, how quickly does Google take action against this new site or application?

As mentioned above, the response time for DMCA notices varies depending on the Google product that is involved. For DMCA takedown notices submitted through our new tools, which together account for more than 75% of all URLs submitted in DMCA takedowns for web search, we are happy to announce that we've exceeded our goal of reducing average response time to less than 24 hours. Current average response times are now less than seven hours.

b. Does Google have a system in place to screen out applications that appear to advertise intellectual property infringement in the title or description of the application (i.e. – a "Freemusicdownload" app) before these applications are listed in the Android marketplace?

Android Market provides a platform for independent developers to distribute software applications ("apps"). Our policies on Android Market are clear: applications that infringe copyrights, or otherwise violate the law, are prohibited. All Android Market developers must agree to the Developer Distribution Agreement ("DDA") before submitting any apps. Section 7.2 of the DDA provides, "if Google is notified by you or otherwise becomes aware and determines in its sole discretion that a Product . . . violates the intellectual

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property rights or any other rights of any third party . . . Google may remove the Product from the Market."[10] Further, the Android Market Developer Program Policies (the "Content Policy"), incorporated by reference into the DDA, provide:

> **Intellectual Property:** Don't infringe on the intellectual property rights of others, including patent, trademark, trade secret, copyright, and other proprietary rights. We will respond to clear notices of alleged copyright infringement. For more information or to file a DMCA request, please visit our copyright procedures.
>
> **Illegal Activities:** Keep it legal. Don't engage in unlawful activities on this product.[11]

The Content Policy also states: "Serious or repeated violations of the Developer Distribution Agreement or this Content Policy will result in account termination. Repeated infringement of intellectual property rights, including copyright, will also result in account termination."[12] Correspondingly, we take steps to terminate the accounts of developers who are repeat infringers. Furthermore, we attempt to detect and terminate other accounts created by developers who have been previously terminated for repeat infringement and other policy violations. We also require all developers to register with Google Checkout and pay $25. This basic authentication step acts as a filter to keep out spammers and other bad actors. Typically, after three policy violations of any kind, we terminate the developer account. In addition, we also ban related accounts whether or not those accounts have directly incurred any policy violations.

Our practice is to remove an application pursuant to the Content Policy if we become aware, through formal DMCA complaints or otherwise, that such application violates those policies.

We offer a web form designed to enable rightsholders to submit DMCA notices electronically for Android Market. During 2010, Google removed 1,026 applications through our DMCA copyright process for Android Market. Through September 2011, Google has removed 1,960 applications through our DMCA copyright process for Android Market.

Our response time for DMCA copyright notices for Android Market has varied depending on the incoming volume of notices and the app in question. Currently, our average response time is less than 48 hours for notices submitted electronically through our web form.

11. What measures does Google take to make sure that its ads are not placed on websites engaged in copyright or trademark infringement? Please explain if these policies are consistent across all Google advertising products, including AdSense, DoubleClick, and AdMob.

Our policies prohibit the use of our AdSense and AdMob programs on web pages (AdSense) or apps (AdMob) that include infringing materials or seek to sell counterfeit goods. DoubleClick is an ad management and ad serving platform. As with our other advertising tools, we are prepared to take appropriate action, including account termination, where DoubleClick publishers are shown to be using our product to serve ads on infringing content.

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[10] Android, "Android Market Developer Distribution Agreement", accessed November 1, 2011, http://www.android.com/us/developer-distribution-agreement.html.

[11] Android, "Android Market Developer Program Policies", accessed November 1, 2011, http://www.android.com/us/developer-content-policy.html.

[12] *Id.*

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It is generally through the AdSense program that Google places ads on other websites. We employ a wide array of procedures to prevent infringing sites from using our ads products, and we expend considerable financial resources to find and eject advertisers and publishers who violate our policies. For example, publishers who want to join the AdSense program are vetted upon joining for their compliance with program policies. In addition, automated systems monitor the pages on which AdSense ads appear and bring potentially problematic material to the attention of human reviewers. Finally, Google responds swiftly when notified by a rightsholder that our AdSense program is being used to monetize infringing or counterfeit sites and we have policies in place to terminate the accounts of repeat offenders. The volume of complaints in this regard is not high and represents far less than 1% of all our AdSense partner sites.

Moreover, Google has long enabled advertisers directly to control where their ads appear. Using available exclusion tools for our ad programs, advertisers can exclude domains of their choosing from displaying their ads (whether because of infringement or any other concern). Similarly, if an advertiser discovers its ads running on an objectionable site that it had not previously been aware of, that advertiser can use the tools to prevent any future appearances on that site.

While we are proud of the policies and procedures we have in place to prevent improper use of our ads products, we are always striving to improve. We continue to work with rightsholders to identify, and, when appropriate, expel violators from the AdSense program.

In addition, Google is helping to lead industry-wide solutions to prevent legitimate ads from appearing on illegitimate sites through our work with the Interactive Advertising Bureau ("IAB"), comprised of more than 460 leading media and technology companies. The IAB has established quality assurance guidelines through which participating advertising companies will take standardized steps to enhance buyer control over the placement and context of advertising and build brand safety. Despite the best efforts of the online advertising industry, however, technologically sophisticated players use tactics like "cloaking" (showing one version of their site to users and a different version to Google) to evade the protections that Google and other companies put in place. While the industry is aggressively going after those who abuse online advertising programs, it is clearly a cat-and-mouse game, and efforts to legislate in this area must be careful not to target ad platforms for abuses of their systems that could not reasonably be prevented.

12. **How many copyright and trademark violators have been expelled from AdSense and other Google advertising services in 2010 and 2011? What measures has Google adopted to prevent violators from re-joining these services using a new account? Does Google have a system in place to pre-screen websites prior to them signing up with one of Google's advertising services?**

For copyright, last year we took action on our own initiative against nearly 12,000 sites for violating our policy against using AdSense for sites infringing copyright. In 2011, we have already taken action against more than 12,000 sites, and we have certified our compliance with IAB's guidelines. As described above, we employ a wide array of procedures to prevent infringing sites from using our ads products, and we expend considerable financial resources to find and eject advertisers and publishers who violate our policies. For example, publishers who want to join the AdSense program are vetted upon joining for their compliance with program policies. In addition, automated systems monitor the pages on which AdSense ads appear, and bring potentially problematic material to the attention of human reviewers. Finally, Google responds swiftly when notified by a rightsholder that our AdSense program is being used to monetize infringing or counterfeit sites and we have policies in place to terminate the accounts of repeat offenders.

Google also has clear policies against advertising counterfeit goods, and we expend considerable resources to enforce those policies. In the last year, we shut down approximately 95,000 accounts for attempting to use sponsored links to advertise counterfeit goods, and more than 95% of these accounts were discovered through our own detection efforts. Even more ads themselves were blocked on suspicion of policy

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violations. Our automated tools analyze thousands of signals to help prevent bad ads from being shown in sponsored links. Last year alone we invested $60 million in efforts to prevent violations of our ad policies.

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Google

Response of Eric Schmidt, Executive Chairman, Google Inc.
Before the Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy, and Consumer Rights

Hearing on "The Power of Google: Serving Consumers or Threatening Competition?"
September 21, 2011

Senator Grassley's Written Questions for Eric Schmidt

1. **Some Iowans question whether "Google promotes fairness, competition and transparency in the online search business." What can you tell them about this? Do Google's business practices promote fairness, competition and transparency? How?**

Google is proud of its business practices. The open web of high-quality publishers is important to Google's success. Through Google Webmaster Central, the company has made substantial investments in tools and transparency for websites. In addition to building industry-leading tools to help websites diagnose problems and improve performance, Google provides more information about how our rankings work than any other major search engine.

In order to continue to provide good results, however, some aspects of search algorithms need to be kept secret. Otherwise spammers would game their way to the top of search result rankings with tricks and gimmicks. Because spammers consistently try to game Google's search algorithms, Google has published detailed quality guidelines for webmasters. In addition to providing constructive advice for improving website performance on Google, these guidelines clearly articulate spam tactics that are against the rules and could lead to a site being demoted or removed from our index.

Competition is just one click away. Google does not—and cannot—make it more difficult for users to switch to Microsoft's Bing, Yahoo!, Blekko, or any specialized search engine such as Amazon (for products), Yelp (for local reviews), or OpenTable (for restaurant reviews). As Microsoft researcher Ryen White observed this year in summarizing his research findings, "The barrier to switching Web Search engines is low and multiple engine usage is common."[1] In fact, according to multiple studies, including one from Microsoft,[2] it is clear that a majority of searchers use more than one search engine in any given month (what the industry refers to as "multi-homing").[3] Multi-homing is evidence that there is no lock-in: if there were, the studies should demonstrate no multi-homing because users are locked-in to a single search engine.

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[1] Qi Guo, Ryen W. White, Yunqiao Zhang, Blake Anderson, and Susan T. Dumais, "Why Searchers Switch: Understanding and Predicting Engine Switching Rationales", SIGIR 2011, July 24-28, 2011, http://research.microsoft.com/en-us/um/people/ryenw/papers/GuoSIGIR2011.pdf.

[2] *Id.*

[3] *See* Jake Loechner, "Websearchers Are Tenacious", Center for Media Research, October 4, 2010, http://www.mediapost.com/publications/article/136907/ (reporting on 2010 Performics Study that found 79% of Internet searchers will try a different site if they do not initally find what they seek); *see also* Jacqui Cheng, "Nielsen: Fickle Search Engine Users Could Benefit Bing", Ars Technica, June 2, 2009, http://arstechnica.com/web/news/2009/06/nielsen-fickle-search-engine-users-could-benefit-bing.ars

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2. **In the 1990's when Microsoft added enhanced desktop search to Windows, Google took the position that it was an illegal tying of the dominant Windows platform. Today, many competitors are concerned that Google is illegally tying services to Google's dominant Search and Search advertising businesses in a similar way. For example, Google Maps and Google Places have been given priority placing in Google search results at the expense of competitors like MapQuest, Yelp or Trip Advisor. How is tying like this acceptable, but Microsoft's was not?**

The manner in which Google and other search engines (including Microsoft's Bing) display their search results does not "tie" one kind of result to another. There is one product—search—and numerous means of displaying information that may be useful and responsive to queries. Users are not coerced in any way; they can click on what they want or navigate to an entirely different information source.

3. **Some Iowans have expressed concerns that because of Google's dominance in the online search market, it "can easily pick winners and losers based on some arbitrary and undisclosed system." Another Iowan wrote, "Over the past few years, Google has ratcheted up competition with established websites by developing its own products and often promoting them above regular search results. . . . How will a startup compete with a giant like Google that has essentially monopolized the Internet?" Are these valid concerns?**

Google's efforts to deliver responsive results to our users in no way harm competition or deter innovators from entering the market. To the contrary, Google actually provides free promotion to millions of innovative websites through our search results. Indeed, innovation on the Internet is happening at an unprecedented rate. As the CEO of Blekko (a relatively new firm that offers a general search engine and recently attracted $30 million in additional financing) noted last month: "We don't need federal intervention to level the playing field with Google. Innovation and competition are far more powerful instruments."[4]

The Internet is incredibly dynamic and new companies with tremendous ideas are being created every day. Facebook, Twitter, and LinkedIn all achieved extraordinary success long after Google began integrating thematic algorithms into our search results—and all are changing the way in which users think about finding information online. Already, many users utilize these sites, and others like them, to find the information they need. The New York Times, for example, receives only 16% of its web traffic from Google.[5] Similarly, ComedyCentral.com receives more traffic from Facebook than it does from Google.[6] Amazon, Travelocity, and Expedia, among others, provide thematic search results and do not need Google to find an audience—they are quite successful in finding an audience on the Internet.

Moreover, history shows that popular technology is often supplanted by entirely new models. Even in the few weeks since the hearing, Apple has launched an entirely new approach to search technology with Siri, its voice-activated search and task-completion service built into the iPhone 4S. As one respected technology site

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(finding that 72 percent of all heavy Internet searchers use more than three different search engines in a month).

[4] Rich Skrenta (co-founder and CEO of Blekko), "Blekko's not afraid of Google, why is Washington?", Skrentablog, September 20, 2011, http://www.skrenta.com/2011/09/blekkos_not_afraid_of_google_w.html.

[5] Compete.com, September 2011 Site Analytics Data for The New York Times, accessed October 27, 2011, http://siteanalytics.compete.com/nytimes.com/.

[6] Compete.com, September 2011 Site Analytics Data for Comedy Central, accessed October 27, 2011, http://siteanalytics.compete.com/comedycentral.com/.

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reported: "[E]veryone keeps insisting that Apple will eventually get into the search engine business. Well they have. But not in the way that everyone was thinking. Siri is their entry point."[7] Another commentator has described Siri more simply as intended to be a "Google killer."[8]

Finally, we do not have to speculate as to whether there are new entrants in vertical search services such as comparison shopping and local search and review sites. There are new entrants in these market segments all the time. A new comparison shopping site, FindTheBest, launched by the co-founder of DoubleClick last year, just raised $6 million in venture funding over the summer. Cheapism is an comparison shopping site that launched in 2009, dedicated to bargain hunters on the Internet and was recognized in the New York Times and on CBS New York. More recently, a new entrant called Centzy launched a website that combines both local search and comparison shopping functionality. Centzy's CEO used to work at SnapFish and is currently seeking funding following its successful launch for New York and San Francisco. Unlike Yelp, Centzy integrates pricing information for goods and services on its site so that users can comparison shop for local services. Barefootfloors.com is a comparison shopping site that launched in January that is focused on home goods and "is now helping online shoppers to educate themselves on everything related to the home and to save money on a wide variety of products for the home."[9] In February of this year, the travel comparison shopping site, Hipmunk, received $4.6 million in venture funding, even as Google continues to expand its own flight search and hotel search functionality.

These are just a few of the many recent entrants in local and comparison shopping that are entering the market even as Google continues to innovate. While they may not all succeed, venture capitalists and entrepreneurs alike continue to believe they can compete with Google, Yelp, Nextag, and other established competitors.

4. **How would you characterize Google's view of intellectual property and its role in the economy?**

Google believes in a strong and balanced approach to protecting copyright and other intellectual property rights, in line with the Constitution's goal of promoting "the progress of science and useful arts." We understand that despite the overwhelmingly positive and legitimate uses of Internet services and technologies, there will be some who misuse these for infringing purposes. Google invests millions of dollars in engineering and other resources to help rightsholders fight this misuse.

Google adheres to the takedown process Congress established under the Digital Millennium Copyright Act ("DMCA"), which provides copyright owners with expeditious recourse when they discover infringement online while also giving online service providers like Google the certainty necessary to invest in the services that millions of Americans rely on each day. Across our search engine and hosted products, we remove or disable access to millions of infringing items each year at the request of copyright owners. We voluntarily take several steps well beyond our legal obligations, and we regularly cooperate with a wide array of law enforcement authorities.

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[7] MG Siegler, "Why So Siri-ous?", TechCrunch, October 16, 2011, http://techcrunch.com/2011/10/16/iphone-siri/.

[8] Eric Jackson, "Why Siri Is a Google Killer", Forbes, October 28, 2011, http://www.forbes.com/sites/ericjackson/2011/10/28/why-siri-is-a-google-killer/2/.

[9] Tanya Tymoshuk, "BarefootFloor.com: New Price Comparison Engine Helps Consumers Shop Smartly for Home Goods", Yahoo! News, January 11, 2011, http://news.yahoo.com/barefootfloor-com-price-comparison-engine-helps-consumers-shop-20110111-070000-289.html.

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With the explosive growth of the Internet and skyrocketing demand for Internet-enabled devices, it is innovation-friendly copyright limitations and exceptions, principally fair use and the DMCA safe harbors, that have directly led to the creation of entirely new marketplaces for promoting and monetizing content. Online platforms like YouTube, Facebook, and Twitter in turn have unleashed new sources of creativity, economic development, and jobs. It is no exaggeration to note that the DMCA set the legal foundation for e-commerce. The Computer and Communications Industry Association has found that industries that rely on fair use and other limitations generate $4.7 trillion in revenue, represent one sixth of total U.S. GDP, and support 17 million jobs. While online piracy remains a serious enforcement problem, we should not lose sight of the overall balance of our nation's copyright laws, which continue to spur a broad array of American-bred creativity and innovation.

Google also works closely with rightsholders to make authorized content more accessible on the Internet. We realize that providing users with access to legitimate content is critical to addressing the problem of copyright infringement online. From its startup phase in 2005, YouTube is now monetizing for content owners over three billion video views per week. We create revenue for more than 20,000 partners. Record labels are now making millions of dollars a month on YouTube. Hundreds of YouTube users make six figures a year. Today over 2,000 media companies—including every major U.S. network broadcaster, movie studio, and record label—use the copyright protection tools that YouTube offers, and a majority of them choose to monetize rather than block their content online.

5. **I've heard complaints from a number of rights holders regarding Google's approach to intellectual property rights. In the opinion of many of Google's critics, Google has taken a cavalier attitude toward the intellectual property of others. The issues that are being raised are not insignificant, considering the ease in which a site engaged in counterfeiting or piracy can be found with a search, the profits earned from advertising on such sites, and the large number of mobile applications on the Android platform that facilitate piracy. After reading about the recent Google $500 million settlement with the Department of Justice regarding the placement of ads on rogue pharmaceutical sites, I'm interested in hearing about Google's approach to ensuring the protection of intellectual property rights. As you know, a few months ago the Senate Judiciary Committee favorably reported the PROTECT-IP Act that is intended to address the rampant problem of online infringement. I believe that Google as a company should do more voluntarily to protect intellectual property rights. How does Google plan to do better?**

Google understands that despite the overwhelmingly positive and legitimate uses of Internet services and technologies, there will be some who misuse these for infringing purposes. Google has been an industry leader in developing innovative measures to protect copyright and help rightsholders control their content online. For example, Google has expended more than 50,000 engineering hours and more than $30 million to develop Content ID, our cutting-edge copyright protection tool that is helping rightsholders make money on YouTube. This powerful technology scans the more than 48 hours of video uploaded to YouTube every minute and, within seconds, compares it against more than six million references files provided by participating rightsholders. Content ID has proven to be an enormous success and is being used by a long list of content owners worldwide to make their own choices about how, where, when, or whether they want their content to appear on YouTube.

As is true for all Internet companies, the critical foundation for Google's anti-piracy efforts remains the DMCA, the seminal law Congress passed in 1998 to address copyright protection online and promote the worldwide expansion of e-commerce. Congress rightly understood that some material posted by the millions of people who use online services will infringe copyright, and that online service providers in the ordinary course of their operations engage in copying and other acts that expose them to potential copyright liability. Congress also recognized that requiring online providers to engage in pre-screening of every user-posted text, picture, and video would inhibit free expression and stifle the growth of the Internet.

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At the request of copyright owners, Google in 2010 took action against approximately three million allegedly infringing items across all our products, which accounts for far less than 1% of all the materials hosted and indexed by Google. We received takedown notices by letter, fax, email, and web forms from all sorts of copyright owners (including movie studios, record labels, adult entertainment vendors, and needlepoint pattern publishers) from 70 countries and in a wide variety of languages. Hundreds of Google employees work on copyright and combating infringement online, including a growing team of employees dedicated to receiving, reviewing, and responding to DMCA notices. We check to make sure that the notices are complete and are not attempts by competitors or others to use invalid copyright claims to censor speech with which they disagree.

Last December, Google announced that we were designing new tools to enable us to act on reliable copyright takedown requests within 24 hours. We are happy to report that our average turnaround time for DMCA notices received from those using our new tools is now less than seven hours. Moreover, submissions using our new tools now account for more than 75% of all URLs identified to us for web search.

In addition, Google has (in compliance with the DMCA) implemented repeat infringer policies on all relevant products. In each of these products, repeat infringer terminations constitute far fewer than 1% of the total subscriber accounts.

We also employ a wide array of procedures and expend considerable financial resources to prevent our advertising products from being used to monetize material that infringes copyright. For example, our AdSense program enables website publishers to display ads alongside their content. Our policies prohibit the use of this program for infringing sites, and we use automated and manual review to weed out abuse. In 2010, we took action on our own initiative against nearly 12,000 sites for violating this policy. And in 2011, we have already taken action against more than 12,000 sites. We also respond swiftly when notified by rightsholders. We recently agreed to improve our AdSense anti-piracy review procedures and are working together with rightsholders on better ways to identify websites that violate our policies.

We also committed last year to prevent terms that are closely associated with piracy from appearing in autocomplete. We have begun working to prevent several piracy-related terms from appearing in autocomplete and have asked content industry representatives to suggest other terms for consideration that won't overly restrict legitimate speech.

We are also helping to lead industry-wide solutions through our work with the Interactive Advertising Bureau ("IAB"), comprised of more than 460 leading media and technology companies. The IAB has established quality-assurance guidelines through which participating advertising companies will take standardized steps to enhance buyer control over the placement and context of advertising and build brand safety. Google has certified our compliance with these guidelines.

Google also expends great effort to fight the challenge of counterfeit goods. Just as in the offline world, people misuse legitimate online services to try to market counterfeit goods. This abuse hurts our users and our business; combating it is central to Google's operations. The integrity and quality of the sponsored links displayed alongside Google search results are of paramount importance to our overall success. A Google user duped by a fake good is less likely to click on another Google ad in the future. For this reason, Google undertakes enormous efforts to root out ads for sites that sell counterfeit goods.

Google has clear policies against advertising counterfeit goods, and we expend considerable resources to enforce those policies. In the last year, we shut down approximately 95,000 accounts for attempting to use sponsored links to advertise counterfeit goods, and more than 95% of these accounts were discovered through our own detection efforts. Even more ads themselves were blocked on suspicion of policy violations. Our automated tools analyze thousands of signals to help prevent bad ads from being shown in sponsored links. Last year alone we invested $60 million in efforts to prevent violations of our ad policies.

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Despite the best efforts of the online advertising industry, proactive measures will never be a complete solution. Some publishers deliberately take steps to evade detection systems, meaning bad sites will invariably slip through. Technologically sophisticated players use tactics like "cloaking" (showing one version of their site to the public and a different version to Google) to evade the protections that Google and other companies put in place. Because of these tactics, coupled with the sheer volume of ads served per day, finding a particular ad on the web that has circumvented our systems may always be possible. While the industry is aggressively going after this abuse, it is clearly a cat-and-mouse game to stay ahead of the bad actors, and Google is committed to being an industry leader in eradicating this behavior.

We also believe that making high-value content available in authorized forms is a crucial part of the battle against online infringement. With 800 million people per month coming to YouTube, we have expanded our movie rental services, made it easier for indie labels to become YouTube partners and share revenue when their music is played (even for user-generated content), and launched a feature to enable fans to buy artists' merchandise, music downloads, and concert tickets. And we've launched the Google eBookstore, featuring a wide array of books from authors and publishers. We also continue to improve YouTube's Content ID system to help more copyright owners (including songwriters and music publishers) to monetize their works, and we are working with WIPO on a rights registry that will help African musicians license their works.

In addition to launching our own authorized services, we also launched Music Rich Snippets, which allow other legitimate music sites to highlight content in the snippets that appear in Google's conventional web search results. Rhapsody and MySpace are among the first to implement this feature, which has been developed using open web markup standards, and we are looking forward to more sites and search engines marking up their pages. We hope that authorized music sites will take advantage of Music Rich Snippets to make their preview content stand out in search results.

6. **With so many people now using smart phones, one of my constituents wonders what sort of data Google is collecting from smart phone users. Do you track more than Google searches? Are you able to track text messages and the use of applications? She is concerned about the amount of personal information that Google may have access to, and if there are any privacy issues that are implicated by Google's practices.**

Google respects our users' privacy. The ordinary phone and text messaging features of mobile devices are not handled by Google, but rather by the mobile network operator. Therefore, Google does not track these user phone calls or text message.

The Google search service, as well as other Google applications and Google web services (such as Gmail and YouTube) are available to users on mobile devices, whether they use Android or another operating system. The Google Mobile Privacy Policy (http://www.google.com/mobile/privacy.html) and Google Privacy Policy (http://www.google.com/intl/en/privacy/privacy-policy.html) describe the types of information collected by Google from mobile devices.

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Google

Response of Eric Schmidt, Executive Chairman, Google Inc.
Before the Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy, and Consumer Rights

Hearing on "The Power of Google: Serving Consumers or Threatening Competition?"
September 21, 2011

Sen. Kohl's Follow-Up Questions for the Record for Eric Schmidt

1. **At the hearing, we discussed the 2007 statement of Google senior executive (currently Vice President for Location and Local Services) Marissa Mayer that Google used to rank links "based on popularity, but when we roll[ed] out Google Finance, we did put the Google link first. It seems only fair, right? We do all the work for the search page and all these other things, so we do put it first... That has actually been our policy, since then . . . So for Google Maps again, it's the first link, so on and so forth. And after that it's ranked usually by popularity."**

    a. **At the hearing, I asked you whether Ms. Mayer's statement was an accurate statement of Google policy. You replied, "I wasn't there [when Ms. Mayer made the statement], so maybe I should use my own voice on this question," and later added, "I'll let Marissa speak for herself on her quote." You never stated whether Ms. Mayer correctly described Google's policy in 2007. However, in answering Senator Blumenthal's question, "As I understand it, certain Google properties – Maps, for example – are at the top of the search results regardless of the algorithm or formula or methodology," you responded "Right. Sure." So does Ms. Mayer's quote accurately describe Google's policy regarding Google content (not only Google Finance) at the time she said it 2007? Did this policy change at any time? If so, when, and what was the change(s)? In general, does Google put the Google Finance and other Google content, such as Google Maps, Local Search, Shopping, etc., results at or near the top of non-sponsored search results on the search results page (or above the search results), regardless of its popularity?**

Before I address Ms. Mayer's statements, let me first address some questions of terminology. To begin with, Google's search results seek to achieve one fundamental thing: to connect users to the information they seek. We do this in two key ways. First, we started with conventional search—the traditional ten blue links—which involved crawling and indexing the web and returning results based on general responsiveness. Second, starting in 2001, we began to incorporate search results designed to respond to signals that a user is looking for specific types of information—a map, an image, a local business, a product, a news update, etc. We sometimes call these "thematic" search results.

When presenting thematic results, Google displays them in a way that is designed to make them user friendly. Prior to the launch of universal search in 2007, Google's thematic results like news were displayed, when relevant, at the top of the search results page. With the introduction of "universal search," we began to allow these thematic results to "float" from the top position to positions in the middle and bottom of the page, based on our assessment of how relevant conventional and thematic results were to the user's query.

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Other major search engines also incorporate thematic and conventional search results on their search results pages. In fact, the first efforts at blending thematic and conventional search results by other general search engines date back to the late 1990s. It reflects the effort to achieve what one industry expert described in 2001 as the "Holy Grail" of search: "The real Holy Grail of all this will be when search engines can detect the type of search we are doing and feed out more targeted results from appropriate databases."[1]

But what is crucial to understand is that universal search results are *not* separate "products and services" from Google. Rather, the incorporation of thematic and conventional results in universal search reflects Google's effort to connect users to the information that is most responsive to their queries. Because of this, the question of whether we "favor" our "products and services" is based on an inaccurate premise. These universal search results *are* our search service—they are not some separate "Google content" that can be "favored."

That said, in keeping with our focus on quality and delivering the most relevant results for consumers, Google constantly experiments with new ways to provide the most relevant information is response to a user's query. For example, for certain queries, where Google is highly confident that the user wants a specific answer, Google will provide that answer prominently on the page. These direct answers are known as "oneboxes." Oneboxes are generally displayed to convey an answer that is clear and straightforward, for example, movie showtimes, weather forecasts, mathematical calculations, stock prices, sports scores, and so on. Microsoft's Bing and Yahoo! display similar "oneboxes" prominently in their results as well, demonstrating their belief that these results are useful for consumers.

The decision whether to display a onebox is determined based on Google's assessment of user intent. Contrary to what some of Google's critics suggest, Google does not make money when users click on oneboxes. In fact, the opposite is true: oneboxes that are responsive to what users are looking for may draw users away from the ads displayed on the page. Nonetheless, because oneboxes help Google deliver a satisfying experience to users, Google believes that by displaying them we are enhancing user satisfaction, which is in the long-term best interest of the company.

In some instances, Google has licensed data from third parties for use in our oneboxes. In other instances, we have developed this data ourselves. In either case, whether users are searching for a weather forecast, a mathematical calculation (e.g., "pounds to grams"), or a stock price, Google's user studies confirm that users seeking this type of information generally do not want to click through to multiple options, whether in the form of ads or more natural links. Rather, users want a quick, direct answer that they can trust is correct. Oneboxes provide fast, accurate answers in response to this user demand.

With regard to Ms. Mayer's quote, it is my understanding that she was referring to the placement of links within a onebox (but not the ranking of other thematic results within search results), and her description was accurate.

b. If your answer is that Ms. Mayer did accurately describe Google's policy, doesn't ranking Google's sites automatically first in this manner give Google an unfair competitive advantage over non-Google web sites? And doesn't this policy deter new innovative services from entering the market?

For certain types of queries, such as stock quotes and weather forecasts, our studies show that users like direct answers. As stated above, it is my understanding that Ms. Mayer was referring to the placement of links within a onebox (but not the ranking of other thematic results within search results), and her description was accurate.

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[1] Danny Sullivan, "Being Search Boxed to Death", Search Engine Watch, March 4, 2001, http://searchenginewatch.com/article/2065235/Being-Search-Boxed-To-Death.

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Google's primary goal is to give users the information they seek, and if for any reason we do not succeed in providing the best answers for our users, they can and will quickly switch to another source of information.

With respect to the second question, Google's efforts to deliver responsive results to our users in no way harm competition or deter innovators from entering the market. To the contrary, Google actually provides free promotion to millions of innovative websites through our search results. Indeed, innovation on the Internet is happening at an unprecedented rate. As the CEO of Blekko (a relatively new firm that offers a general search engine and recently attracted $30 million in additional financing) noted last month: "We don't need federal intervention to level the playing field with Google. Innovation and competition are far more powerful instruments."[2]

The Internet is incredibly dynamic and new companies with tremendous ideas are being created every day. Facebook, Twitter, and LinkedIn all achieved extraordinary success long after Google began integrating thematic algorithms into our search results—and all are changing the way in which users think about finding information online. Already, many users utilize these sites, and others like them, to find the information they need. The New York Times, for example, receives only 16% of its web traffic from Google.[3] Similarly, ComedyCentral.com receives more traffic from Facebook than it does from Google.[4] Amazon, Travelocity, and Expedia, among others, provide thematic search results and do not need Google to find an audience—they are quite successful in finding an audience on the Internet.

Moreover, history shows that popular technology is often supplanted by entirely new models. Even in the few weeks since the hearing, Apple has launched an entirely new approach to search technology with Siri, its voice-activated search and task-completion service built into the iPhone 4S. As one respected technology site reported: "[E]veryone keeps insisting that Apple will eventually get into the search engine business. Well they have. But not in the way that everyone was thinking. Siri is their entry point."[5] Another commentator has described Siri more simply as intended to be a "Google killer."[6]

Finally, we do not have to speculate as to whether there are new entrants in vertical search services such as comparison shopping and local search and review sites. There are new entrants in these market segments all the time. A new comparison shopping site, FindTheBest, launched by the co-founder of DoubleClick last year, just raised $6 million in venture funding over the summer. Cheapism is a comparison shopping site that launched in 2009, dedicated to bargain hunters on the Internet and was recognized in the New York Times and on CBS New York. More recently, a new entrant called Centzy launched a website that combines both local search and comparison shopping functionality. Centzy's CEO used to work at SnapFish and is currently seeking funding following its successful launch for New York and San Francisco. Unlike Yelp, Centzy integrates pricing information for goods and services on its site so that users can comparison shop for local

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[2] Rich Skrenta (co-founder and CEO of Blekko), "Blekko's not afraid of Google, why is Washington?", Skrentablog, September 20, 2011, http://www.skrenta.com/2011/09/blekkos_not_afraid_of_google_w.html.

[3] Compete.com, September 2011 Site Analytics Data for The New York Times, accessed October 27, 2011, http://siteanalytics.compete.com/nytimes.com/.

[4] Compete.com, September 2011 Site Analytics Data for Comedy Central, accessed October 27, 2011, http://siteanalytics.compete.com/comedycentral.com/.

[5] MG Siegler, "Why So Siri-ous?", TechCrunch, October 16, 2011, http://techcrunch.com/2011/10/16/iphone-siri/.

[6] Eric Jackson, "Why Siri Is a Google Killer", Forbes, October 28, 2011, http://www.forbes.com/sites/ericjackson/2011/10/28/why-siri-is-a-google-killer/2/.

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services. Barefootfloors.com is a comparison shopping site that launched in January that is focused on home goods and "is now helping online shoppers to educate themselves on everything related to the home and to save money on a wide variety of products for the home."[7] In February of this year, the travel comparison shopping site, Hipmunk, received $4.6 million in venture funding, even as Google continues to expand its own flight search and hotel search functionality.

These are just a few of the many recent entrants in local and comparison shopping that are entering the market even as Google continues to innovate. While they may not all succeed, venture capitalists and entrepreneurs alike continue to believe they can compete with Google, Yelp, Nextag, and other established competitors.

c. If your answer is that Ms. Mayer did not accurate describe Google's policy, why did Ms. Mayer say it was in 2007? And what is Google's policy?

As described above in response to Questions 1a and 1b, I do not believe that Ms. Mayer's quote was inaccurate.

d. Google's recently announced its plans to purchase the restaurant review service Zagat. Does Google intend to place Zagat's results ahead of Yelp, OpenTable, or other sites that currently compete with Zagat's?

Google wants to provide users with high-quality information about local businesses. Zagat provides survey-based aggregate ratings of businesses and curated user reviews. Acquiring Zagat is part of our efforts to ensure that we can provide high-quality information about and ratings of local businesses.

After acquiring Zagat, we are likely to include Zagat ratings in Google's local results in some way, but we have not yet determined exactly how. Nonetheless, we will continue to rely on our user feedback and testing to provide guidance about how Zagat can enhance the answers we provide our users.

e. How do you respond to Mr. Stoppelman's charge that he would not start Yelp today given Google's practice of putting its local search at or near the top of search results and as a result taking so much "real estate" on the search results page? How can a new start up expect to compete with Google's own content in search results?

Yelp has many means of promoting its service, including advertising, promotion, and mobile apps. I would note that Mr. Stoppelman, when previously asked about Yelp's competitors, said "I worry about neither [Google nor Groupon]."[8]

Despite Mr. Stoppelman's statement, Yelp's continuing growth demonstrates that new web services have many means of attracting users. This chart, from Yelp's own web site, illustrates how Yelp has continued to thrive during the period covering Yelp's complaints:[9]

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[7] Tanya Tymoshuk, "BarefootFloor.com: New Price Comparison Engine Helps Consumers Shop Smartly for Home Goods", Yahoo! News, January 11, 2011, http://news.yahoo.com/barefootfloor-com-price-comparison-engine-helps-consumers-shop-20110111-070000-289.html.

[8] Jeremy Stoppelman, "Interview at TechCrunch Disrupt SF 2011", September 13, 2011, http://www.ustream.tv/recorded/17252745 ("I worry about neither [Google nor Groupon]... We're doing something that is very unique... Google doesn't have the content. They just have people starting web searches... We actually have people that are coming to our site everyday that are saying, 'I trust you to steer me to the right business.' I think that's a very special place to be.").

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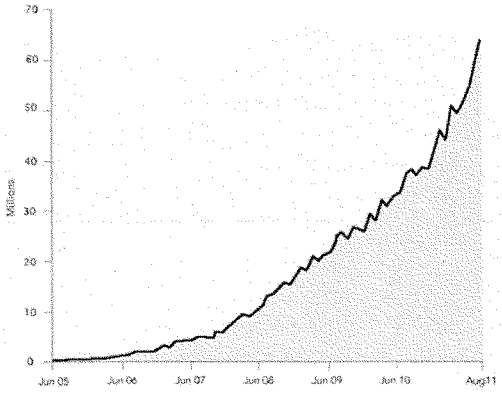
More Than 63 Million Monthly Visitors



What I can comment on is that the Internet remains a very vibrant and innovative space. As I noted earlier, we do not have to speculate as to whether there are new entrants in vertical search services such as local search and comparison shopping sites. There are new entrants in these market segments all the time. A new comparison shopping site, FindTheBest, launched by the co-founder of DoubleClick last year, just raised $6 million in venture funding over the summer. Cheapism is a comparison shopping site that launched in 2009, dedicated to bargain hunters on the Internet and was recognized in the New York Times and on CBS New York. More recently, a new entrant called Centzy launched a website that combines both local search and comparison shopping functionality. Centzy's CEO used to work at SnapFish and is currently seeking funding following its successful launch for New York and San Francisco. Unlike Yelp, Centzy integrates pricing information for goods and services on its site so that users can comparison shop for local services. Barefootfloors.com is a comparison shopping site that launched in January that is focused on home goods and "is now helping online shoppers to educate themselves on everything related to the home and to save money on a wide variety of products for the home."[10] In February of this year, the travel comparison shopping site, Hipmunk, received $4.6 million in venture funding, even as Google continues to expand its own flight search and hotel search functionality.

These are just a few of the many recent entrants in local and comparison shopping that are entering the market even as Google continues to innovate. While they may not all succeed, venture capitalists and entrepreneurs alike continue to believe they can compete with Google, Yelp, Nextag, and other established competitors.

2. **Have you put in place any safeguards at Google to insure search results do not favor Google products and services merely because they are owned by Google? If so, what are they, and if not, why not?**

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[9] Yelp, "An Introduction to Yelp: Metrics as of August 2011", accessed on November 1, 2011, http://www.yelp.com/html/pdf/Snapshot_August_2011_en_US.pdf.

[10] Tanya Tymoshuk, "BarefootFloor.com: New Price Comparison Engine Helps Consumers Shop Smartly for Home Goods", Yahoo! News, January 11, 2011, http://news.yahoo.com/barefootfloor-com-price-comparison-engine-helps-consumers-shop-20110111-070000-289.html.

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As mentioned in Question 1a, universal search results are not separate "products and services" from Google. Rather, the incorporation of thematic and conventional results in universal search reflects Google's effort to connect users to the information that is most responsive to their queries. Because of this, the question of whether we "favor" our "products and services" is based on an inaccurate premise. These universal search results *are* our search service—they are not some separate "Google product or service" that can be "favored."

The fundamental openness of the Internet places powerful competitive pressure on Google to ensure that our search results are those that are most responsive to what users are looking for. As Microsoft researcher Ryen White observed this year in summarizing his research findings, "The barrier to switching Web Search engines is low and multiple engine usage is common."[11] There are even sites that allow Internet users to simultaneously compare Google's results against those of our competitors. If Google stops delivering the most relevant results to users, they can and will switch away. That is what we mean by competition being "one click away," and it is that reality that drives Google's constant effort to improve the results we deliver to users.

3. **At the hearing, you argued that Google now seeks to provide consumers with the best answers, not just links to websites with the answers. While we understand your desire to provide answers and not just links, why are the answers always provided by Google products and services rather than any other website? And, if you contend that your products and services are "better," please provide with any objective criteria or consumer studies you believe demonstrate this contention?**

As I noted in my response to Question 1a, oneboxes are displayed when Google believes it is likely that a user is seeking a specific answer, and they often contain information or data that are licensed from third parties. And as also noted previously, universal search results are not separate "Google products and services" distinct from Google's search results. Rather, as I said in response to Question 1a, these *are* Google's search results. Thematic search results for particular types of content (video, images, news articles, products, and so on) are incorporated when our consumer testing and data analysis shows that those results algorithms are most likely to deliver the results sought by our users. This analysis is reinforced by research conducted by Microsoft, which indicates that 58% of heavy users want to complete tasks inside the search engine.[12]

4. **At the hearing, you stated that as opposed to merely providing links to websites, "there's a category of queries which are not well served by the 10 links answer." Please list all such categories of searches for which Google believes the search is either not "well served by the 10 links answer" or in which Google modifies search results to provide a "one box" or presumed superior answer to the search.**

Google currently provides specialized search results or onebox answers for the following types of queries: videos, images, products, news, maps, books, local businesses, flights, finance, sports scores, weather, math results, among others.

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[11] Qi Guo, Ryen W. White, Yunqiao Zhang, Blake Anderson, and Susan T. Dumais, "Why Searchers Switch: Understanding and Predicting Engine Switching Rationales," SIGIR 2011, July 24-28, 2011, http://research.microsoft.com/en-us/um/people/ryenw/papers/GuoSIGIR2011.pdf.

[12] Robert Andrews, "Interview: Microsoft's 'Not Walking Away From Search'", paidContent.org, August 2, 2011, http://m.paidcontent.org/article/419-interview-microsofts-not-walking-away-from-search/ (interviewing Stefan Weitz, Microsoft Bing's Director).

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5. **In 1998 at the same time they were founding Google, its co-founders Larry Page and Sergey Brin wrote a thesis at Stanford University which addressed search engine bias. They wrote that**

   [Search] bias is much more insidious than advertising, because it is not clear who 'deserves' to be there, and who is willing to pay money to be listed...For example, a search engine could add a small factor to search results from 'friendly' companies, and subtract a factor from results from competitors. This type of bias is very difficult to detect but could still have a significant effect on the market.

   They added that they expected that advertising-funded search engines "will be inherently biased towards advertisers and away from the needs of consumers."

   Do you disagree with their view then that search engine bias is "insidious" and "difficult to detect"? Or that advertising funded search engines are "inherently biased"?

Larry and Sergey's thesis, which was written 13 years ago, addressed industry practices prevailing at that time. During the time they were students at Stanford, most search engines operated under a "paid inclusion" model. Specifically, search engines like Yahoo! integrated paid advertising among the conventional search results without labeling them as ads. This practice continued to be sufficiently prevalent that it was the subject of a complaint filed with the Federal Trade Commission in 2001 that named eight search engine companies as engaging in this practice, including Lycos, MSN.com, Altavista, and HotBot. Google was not among the companies accused of engaging in this practice.

Many websites today continue to use this kind of "pay to play" placement model, including sites that have complained about Google (for example, Nextag and Foundem). Obviously, those sites may pursue such a business model, but one of Google's founding principles has been that advertiser payment should not affect advertiser's search result rankings.

Google recognizes the importance of advertising to the search business, but we believe that ads should always be clearly labeled. Indeed, paid inclusion in search results—without labeling—was the subject of Larry and Sergey's thesis. In our opinion, advertisements and natural results both serve to create a positive user experience. This is similar to a well-run newspaper, where the advertisements are clear and the articles are not influenced by the advertisers' payments.

6. **At the hearing, in answering my question as to whether Google had an incentive to favor its own products and services in search results because in doing so it would be behaving as we would expect as a rational business would to maximize its profits, you replied that "I'm not sure Google is a rational business trying to maximize its own profits." Is it really your position that Google does not conduct itself as rational business trying to maximize its profits? If so, can you point to any SEC disclosure which supports this view?**

As we stated in our 2004 IPO letter, "Google is not a conventional company."[13] From the very beginning, we have sought to protect Google's ability to innovate because we were confident that, in the long run, this would benefit Google and our shareholders. Indeed, we told our potential shareholders in 2004 that in pursuing our goal of "developing services that significantly improve the lives of as many people as possible, . . . we may do things . . . even if the near term financial returns are not obvious."

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[13] Larry Page and Sergey Brin, 2004 Founders' Letter, August 18, 2004, http://investor.google.com/corporate/2004/ipo-founders-letter.html.

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We often work on projects that do not have an immediate revenue model, e.g., Google Translate, because we anticipate that they will ultimately contribute to a positive user experience, which will maximize the company's returns in the long run. As we stated in the 2004 IPO letter, "if opportunities arise that might cause us to sacrifice short term results but are in the best long-term interest of our shareholders, we will take those opportunities." Thus, Google sometimes foregoes short-term profits in order to provide users with the best experience in the belief that such a strategy will benefit our shareholders in the long run.

7. **Google has argued that one cannot merely examine Google's market share as a search engine in determining whether it is a dominant firm, because it allegedly competes with Facebook and, further, that consumers can go directly to websites.**

    a. **As to Facebook, it is primarily a social-networking site and its Internet Search is powered by Bing. In other words, to search the Internet on Facebook, one must use Bing. So Facebook is not an additional competitor for Internet search beyond Bing, isn't that correct?**

That is not correct. Social networks have become a significant, potentially game-changing competitor. When consumers search for information online, they are looking for answers to their questions. Google seeks to provide answers to users' queries, and social networking sites like Facebook and Twitter also allow users to leverage their social networks to find answers to their questions. Google is therefore competing with all methods available to access information on the Internet, not just other general search engines. The source of Facebook's competition with Google is not only through using Bing to search the Internet but, also, by offering users a fundamentally different way to discover and connect with information on the Internet.

Consumers have a lot of options for accessing information, and recent statistics show that they are using them. Users can use general search engines and, at the same time or in lieu of online search, they can use social search to access information. The Internet is a robust and dynamic environment where new modes of thinking and technological innovation are constantly changing the way we view the competitive marketplace.

Outside experts agree with this assessment. One tech analyst explained that "the nascent search behaviors we see developing on Facebook right now suggest it not only has the potential to become a viable search engine, but in fact has a chance to help redefine the way we currently think of search."[14] Another noted that Facebook's "treasure trove of distinctive data . . . could put Google out of business."[15] Facebook agrees as well; an executive recently said that search in its current form "just didn't work," and it would have to "go social."[16]

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[14] Eli Goodman, "What History Tells Us About Facebook's Potential as a Search Engine," comScore Voices Blog, June 3, 2010, http://blog.comscore.com/2010/06/facebook_search_engine.html.

[15] Ben Elowitz, "How Facebook Can Put Google Out of Business," TechCrunch, June 3, 2011, http://techcrunch.com/2011/06/03/facebook-google-out-of-business/.

[16] Emma Barnett, "Google and other search engines are "failing" says top Facebook executive," The Telegraph, October 25, 2011, http://www.telegraph.co.uk/technology/facebook/8846314/Google-and-other-search-engines-are-failing-says-top-Facebook-executive.html (quoting Ethan Beard, Director of the Facebook Platform).

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Some sites already get a significant portion of their traffic from social networks. Comedy Central gets almost one-third of its visits from Facebook and only 15% from Google.[17] Twenty-four percent of Twitter's traffic comes from Facebook, and only 10% comes from Google.[18]

b. In September 2010, you were quoted as saying, referring to Facebook and Apple, "We consider neither to be a competitive threat . . . our competitor is Bing." Do you stand by that quote, or do you contend that Google does compete with Facebook? If the latter, why were your views different in September 2010?

As I noted this past June, my statement last September was clearly wrong.[19] The Internet is dynamic and has changed significantly. The importance of social networking to consumers' online experience has changed remarkably—even over the past year. Consumers are looking for answers when they conduct searches online, and social search has become a serious competitor in helping people find those answers online. Similarly, Apple's Siri is a significant development—a voice-activated means of accessing answers through iPhones that demonstrates the innovations in search. The tech industry is one of the most competitive and dynamic spaces in the entire economy, with small companies as well as larger companies competing hard against each other in lots of areas. Google has many strong competitors and we sometimes fail to anticipate the competitive threat posed by new methods of accessing information. We compete against a broader array of companies than most people realize, including general search engines (Microsoft's Bing, Yahoo!), specialized search engines (Kayak, Amazon, WebMD, eBay), social networks (Facebook, Twitter), commercial software companies (Apple, Microsoft), mobile apps, and even direct navigation. The Internet is incredibly competitive, and new forms of accessing information are being utilized every day.

c. Doesn't the fact that survey data shows that 92% of adults use search engines to find information on the Internet belie the contention that Google competes with other websites that are not search engines?

Having not seen this study, I cannot speak directly to the statistic mentioned. This survey data, however, does not seem to indicate that consumers that use search engines do not also use other means of finding information on the Internet. For example, a consumer looking for a restaurant could start a Google search. But increasingly consumers might, instead or in addition, ask their friends on Facebook or Twitter for restaurant recommendations, or search their Yelp mobile application for restaurants. Users have a plethora of options to access information on the Internet, including general and specialized search engines, mobile apps, and social networks. They can use all of these methods, including search, to find answers to their questions.

Indeed, surveys have shown that users resort to various methods to access information online. Consumers have driven the demand for these multiple access points and Google competes vigorously with all of the other methods for accessing information over the Internet. As David Balto, the former policy director of the Federal Trade Commission, recently observed:

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[17] Compete.com, September 2011 Site Analytics Data for Comedy Central, accessed October 27, 2011, http://siteanalytics.compete.com/comedycentral.com/.

[18] Compete.com, September 2011 Site Analytics Data for Twitter, accessed October 27, 2011http://siteanalytics.compete.com/twitter.com/.

[19] As I mentioned during the D9: All Things Digital Conference this past June, people want to know what their friends are interested in. This is just as true in the online world as it is in the physical one. *See* Geoffrey Fowler and Ian Sherr, "Google Missed the 'Friend Thing'", The Wall Street Journal, June 1, 2011, http://online.wsj.com/article/SB10001424052702303745304576358343688967086.html.

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Google has consistently led the industry in innovations, and has played an important role in the evolution of search. But complacency would lead to certain obscurity. Websites such as Facebook, Amazon, eBay, Expedia, and Wikipedia all aggregate and organize information, steering users away from traditional search providers such as Google, Bing and Yahoo. Facebook is a particularly dangerous threat to the traditional search providers because it not only takes traffic away from Google, Bing, and Yahoo, but it also a growing source of redirected traffic for original content providers.[20]

8. **Millions of consumers now search the Internet using mobile devices like smartphones rather than on their computers. According to a leading industry expert, by 2014 the number of users accessing the Internet through mobile devices will exceed those doing so through desktop computers. Google's Android phones are now the most popular smartphones, with a 40% market share and growing. And just a few weeks ago Google announced it was purchasing Motorola, a major smartphone manufacturer.**

   Your critics fear that Google could demand from phone manufacturers that Google be made the default search engine for all Android smartphones, and in that way lock in your dominance on mobile devices. This is very similar to the tactic that Microsoft used in the 1990s when it demanded that computer manufacturers install Internet Explorer as the default web browser as a condition of using the Windows computer operating system.

   a. **Has Google demanded that smartphone manufacturers make Google the default search engine as a condition of using the Android operating system? Will you pledge that Google will not do this in the future?**

Google does not demand that smartphone manufacturers make Google the default search engine as a condition of using the Android operating system. Android is a free, open source platform for mobile devices. The complete Android source code is available for download for free from the Android Open Source Project website.[21] Any developer or manufacturer can use, modify, and distribute the Android operating system without Google's permission or any payment to Google. For example, Amazon recently announced the Kindle Fire—its new tablet device—using the Android source code without Google's involvement. This is one of the exciting and innovative aspects of Android that will help foster innovation and competition in the smartphone market.

One of the greatest benefits of Android is that it fosters competition at every level of the mobile market—including among application developers. Google respects the freedom of manufacturers to choose which applications should be pre-loaded on Android devices. Google does not condition access to or use of Android on pre-installation of any Google applications or on making Google the default search engine.

Manufacturers can choose to pre-install Google applications on Android devices, but they can also choose to pre-install competing search applications like Yahoo! and Microsoft's Bing. Many Android devices have pre-installed the Microsoft Bing and Yahoo! search applications. No matter which applications come pre-installed, the user can easily download Yahoo!, Microsoft's Bing, and Google applications for free from the

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[20] David Balto, "Internet Search Competition: Where is the Beef?", June 23, 2011, http://www.dcantitrustlaw.com/assets/content/documents/googlesearchfinal-Balto.pdf.

[21] *See* Android Open Source Project, "Downloading the Source Tree", accessed on November 1, 2011, http://source.android.com/source/downloading.html.

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Android Market.[22] In addition, Android gives manufacturers the freedom to pre-install third-party app stores, like the Amazon Appstore for Android, where a user can download a variety of apps, including Microsoft's Bing.[23]

b. New York magazine reports that an email from one of your executives, Dan Morrill, was disclosed in a lawsuit. In this email, Mr. Morrill suggested that Google was using compatibility with Android "as a club to make [phone manufacturers] do things we want." Could you explain what he meant? Further, if the Department of Justice decides not to block Google's proposed acquisition of Motorola Mobility, will Google commit not to use the patents it acquires through that acquisition "as a club" against other companies in the mobile space? Specifically, will Google commit to license these patents to competitors and others on reasonable and non-discriminatory terms?

As to the New York Magazine article, Mr. Morrill's remarks reviewed in their full context express his belief that Google's efforts to maintain compatibility across different devices *could be misperceived* as a way for Google to improperly influence manufacturers. Google does not in fact use compatibility in this way. Mobile operating system competition is fierce—Apple, RIM (Blackberry), and Microsoft are very significant competitors—and carriers and handset manufacturers have many options other than Android. Google is committed to Android's success and to maintaining our strong partnerships with device manufacturers.

Google designed Android as an open source platform to foster customization by manufacturers of mobile software and hardware. In contrast to closed, proprietary operating systems, Android allows manufacturers to modify their own implementations of Android to create their own unique features and user interfaces. Android is also particularly adaptable to new hardware configurations and chipsets. By allowing broader differentiation in software and hardware, Android enhances competition and consumer choice. There are more than 500 models of Android devices on the market.

Google has undertaken extensive efforts to protect consumers and application developers to ensure their applications run seamlessly on all Android devices. Google, with the support of our Android partners, has identified certain specifications, such as minimum screen size and security features, that help ensure applications run flawlessly across device models. These specifications are reflected in the Android Compatibility Definition Document ("CDD"), which is published on Android Open Source Project's website. Google and our partners believe that this baseline preserves the maximum amount of manufacturer freedom to customize Android, while simultaneously protecting Android developers, who need consistency and rely on minimum elements appearing on all Android devices, and Android customers, who may legitimately expect that Android applications will run on their Android devices.

One of the most significant benefits of Android is that it is free. This has significantly reduced Android device costs and has helped drive down handset prices across the wireless industry.[24] But Android and our

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[22] Users can access the Microsoft Bing Search application here: https://market.android.com/details?id=com.microsoft.bing&feature=search_result; the Yahoo! Search application here: https://market.android.com/details?id=com.yahoo.mobile.client.android.yahoo&feature=search_result; and the Google Search application here: https://market.android.com/details?id=com.google.android.googlequicksearchbox&feature=search_result.

[23] Amazon makes the Microsoft Bing Search application available here: http://www.amazon.com/Microsoft-Corporation-Bing/dp/B004T54Y2M/

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partners have recently come under significant fire by firms attempting to use patent infringement suits to drive up the cost of Android phones and jeopardize the Android platform. Google's intent in acquiring Motorola Mobility is to provide a defense against these suits. Google hopes that Motorola Mobility's patent portfolio will deter other companies from suing to limit the distribution of Android or from attempting to burden it with unreasonable licensing fees.

9. **Prior to its acquisition of ITA, Google gave several assurances that Online Travel Agencies (OTAs) would be included in its flight search products. Google's statements included the following:**

   The "acquisition will benefit passengers, airlines and online travel agencies by making it easier for users to comparison shop for flights and airfares and by driving more potential customers to airlines' and online travel agencies' websites."

   "Our goal is to build tools that drive more traffic to airline and online travel agency sites where customers can purchase tickets."

   "Google does not plan to sell airline tickets directly; our goal is to build a tool that drives more traffic to airline and online travel agency sites where customers can purchase tickets."

   It is my understanding that Google's new Flight Search tool shows a list of flights and links only to airlines where flights can be booked; there are no links to online travel agencies. How is this consistent with Google's promises that the ITA acquisition would drive more traffic to online travel agencies? Why is there no link to OTAs on Google's new Flight Search tool? Is this because Google now competes with OTAs for advertising revenues?

We're excited about the initial positive reaction to our new flight search tools. But like any other partner, Google needs to honor the airline's distribution decisions. With the flight search feature, that means we continue to explore opportunities to showcase online travel agents ("OTAs") and metasearch firms further. In fact, Expedia CEO Dara Khosrowshahi recently observed, "We are happy to see OTA links at the bottom of the Google Flight result. . . ."[25]

The ITA transaction was approved by the Department of Justice with conditions that are incorporated into a consent decree. Google has carefully adhered to the decree.

10. **Various companies that offer consumer reviews such as our witness Yelp have accused Google "scraping" its user reviews of restaurants, hotels and other services, and using these reviews on the Google own "places" page, which also contains reviews. Yelp testify at the hearing that Google was doing this without Yelp's permission, and instead offered them a Hobson's choice of Yelp allowing this practice, or Yelp's website would not be listed on Google search results. This past summer, Google changed this practice and ceased**

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[24] Dan Nystedt, "They're Here: Cheap Android Smartphones", PC World, February 26, 2010, http://www.pcworld.com/article/190271/theyre_here_cheap_android_smartphones.html ("A new group of companies, electronics contract manufacturers, are starting to make high-end mobile phones, including smartphones, for mobile network operators around the world, and these are companies adept at slashing prices.").

[25] Dennis Schaal, "Expedia Sees Hotel Improvements, But Still Admires Booking.com From Afar", Tnooz, October 28, 2011, http://www.tnooz.com/2011/10/28/news/expedia-sees-hotel-improvements-but-still-admires-booking-com-from-afar/.

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including Yelp content in Google places pages. Why did Google change its policy this summer? Prior to the policy being changed, did Google use Yelp and other similar review sites content without their permission?

Google developed Place pages to help users to access information about a local business. When Google first launched Place pages, Google displayed snippets—a few lines of text—from various review sites for each local business listed, and required that users click through to read the full review. The ultimate goal of Place pages, along with Google's other thematic local results, was to help users locate local information on the web.

Google entered a two-year licensing agreement with Yelp in 2005 to display the full text of Yelp's reviews in our conventional search results and our thematic local search results. Two years later, Yelp chose not to renew its agreement with Google. With the expiration of the license, Google no longer displayed the full text of Yelp's reviews. Thus, we returned to simply showing snippets of third-party reviews within our conventional results as well as our thematic local search results, a practice permitted under the long-established fair use doctrine of copyright law. Snippets generally display about two or three lines of text. For users to access the full text, they must select a link that directs them to the review site. Showing snippets of websites is an important part of search; it enables users to determine whether the site in question is responsive to their queries. It also drives traffic to websites.

If, at any point, Yelp (or any other site owner) wishes to be excluded from Google's (or any other search engine's) index, it can—with relative ease—block search engine crawlers using a very simple and common protocol. Specifically, every site owner has the option to use the robots exclusion protocol, also referred to as robots.txt, to signal to Google or any other search engine that they do not want particular webpages, or even an entire site, to be crawled and indexed.[26] Site owners can easily exclude certain sites or portions of sites from being indexed, and can also specify different protocols for different search engines. The robots.txt protocol—which has been in place for over 17 years—can be utilized either by writing a new robots.txt file,[27] or by accessing one of many publicly available robots.txt files.[28]

As Google continued to develop our thematic local search results, Yelp began voicing concerns regarding how and where, exactly, within Google's search results its snippets appeared. It's worth noting that by 2009, search competitors Microsoft Bing, Yahoo!, and Ask.com all integrated third-party review snippets in essentially the same exact way within their respective local search results.

Yelp subsequently requested that Google remove snippets of Yelp reviews in Google's local search results but continue providing links to Yelp. After a series of business conversations with Yelp in an attempt to address Yelp's numerous concerns, Google agreed to comply with Yelp's request. After the requested changes were

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[26] robots.txt is an industry standard that allows a site owner to control how search engines access their web site. Access can be controlled at multiple levels – the entire site, through individual directories, pages of a specific type, or even individual pages. Basically, robots.txt is a structured text file that can indicate to web-crawling robots that certain parts of a given server are off-limits. This allows search engines such as Google to determine which parts of a website a site owner wants to display in search results, and which parts to keep private and non-searchable. Dan Crow, "Controlling How Search Engines Access and Index Your Website", The Official Google Blog, January 26, 2007, http://googleblog.blogspot.com/2007/01/controlling-how-search-engines-access.html.

[27] There are a number of resources available online that provide users with information on coding robots.txt files. *See e.g.* About/robots.txt, August 23, 2010, http://www.robotstxt.org/robotstxt.html.

[28] A non-comprehensive list of robots.txt files submitted by independent programmers is available here: http://www.robotstxt.org/db.html.

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implemented, snippets from Yelp's website continued to appear in conventional search results, and no longer appeared in the thematic local search results.

In July 2011, Google redesigned Place pages. One of the major changes, implemented after careful thought about the future direction of Place pages and feedback from third-party review sites, was removing snippets of reviews from sites like Yelp, TripAdvisor, and CitySearch. Instead, Google chose to feature reviews from our own users, with links to third-party review sites. In addition, the "star rating" and "total review count" were modified to reflect only those ratings and reviews that have been submitted by Google users.

Commentators like Frank Reed of Marketing Pilgrim noted that these changes "essentially . . . gives Yelp and TripAdvisor their wish," while TechCrunch noted that "this should be a welcome change to third party source of reviews like Yelp and TripAdvisor."[29]

Yelp has aired numerous concerns in the press over the past few years, and although Google has tried to act responsibly in addressing some of those concerns, ultimately Google builds our search results for the benefit of users, not websites. At all times, Google's primary motivation has been improving the search experience for our users by providing the most relevant and useful information in response to their queries. In the end, if users are unhappy with the answers Google provides, the openness of the web ensures that they can easily switch to Yelp.com or any other site with just one click.

11. **Vertical search companies, companies that help consumers search for a specific product or service -- such as Nextag and the British product comparison site Foundem -- have complained they have been the subject of "search penalties" on the Google search engine. They allege that they are dropped down in the search rankings by these penalties by among other things, the fact that they have their own search functionality on their sites, and that they contain links to other sites. Allegedly, these search penalties occur whether or not these websites are popular with consumers.**

    a. **A web site that has search functionality and offer links to other sites resembles Google itself. What do you say to your critics who would argue that Google deliberately penalizes websites that resemble Google in order to defeat your competition and maintain your dominant share in search?**

We never take actions to hurt specific websites for competitive reasons. Our search quality and ad quality systems assess the quality of webpages and ads without regard to whether a site competes with Google, only on the basis of what is most likely to be useful for consumers.

We rank search results to deliver the best answers to users. We built Google for consumers, not websites. To achieve this result, we consistently rank high-quality sites with original content in the highest position regardless of whether they compete with Google. While we understand that there is no objective right answer to most search queries and that the answer is a "scientific opinion," we also recognize that if we do not give users the best possible search results, they are likely to click away to one of our competitors. This necessarily means that not every website can come out on top, or even appear on the first page of our results, so there will almost always be website owners who are unhappy about their rankings. The most important thing is that we satisfy our users.

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[29] Frank Reed, "Google Places Update Puts Focus on Google", Marketing Pilgrim, July 22, 2011, http://www.marketingpilgrim.com/2011/07/google-places-update-puts-focus-on-google.html. Erick Schonfeld, "Google Places Stops Stealing Reviews", TechCrunch, July 21, 2011, http://techcrunch.com/2011/07/21/google-places-stops-stealing-reviews/.

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b. Do you deny that Google has the ability to manually alter the ranking of websites in its search results?

Ideally, we would never have to manually intervene with the search results returned by our algorithms. Search, however, is still in its infancy, and our algorithms are still learning how to rank certain types of results. There are a few, limited instances in which we may utilize manual controls—spam, security, legal requirements (copyright, child pornography), and exception lists for results that are improperly excluded by the algorithms. However, we do not manually elevate specific sites in the search results.

When we manually intervene in our conventional search rankings, we do so to enhance the general user experience. As many Internet users are aware, the worldwide web contains many poor quality sites that range from annoying (webspam) to destructive (malware). Without manual intervention, unwitting users might accidentally access such a site through a Google search result. Rather than finding the answers they seek, these users will instead have their search derailed or, much worse, their computer infected. Similarly, displaying content from certain websites can violate the law. Finally, Google's algorithms are not infallible. To account for this, we use exception lists to reintegrate results that should not have been removed by the algorithms from the search results.

I should also note that this is standard industry procedure. Microsoft's Bing, Yahoo!, and other search engines have acknowledged that they also utilize manual controls.[30]

12. Google has stated that consumers prefer to go to sites offering products directly for sale rather than product comparison sites like Nextag that compare prices, offer product reviews, and themselves contain links to retailers. Does Google sell products on its Shopping results page or does it provide links to websites that sell the product? And, please provide the factual basis for this assertion, including the results of any consumer studies that support this assertion.

Google does not sell merchandise through Google product search. Rather, we provide links to merchants who sell merchandise. These links can include inventory and price information provided by those merchants via a dynamic feed. More than 200,000 merchants participate in this program, providing us with information for more than one billion products.

Google product search results can float within the search results page, based on our assessment of the nature of the user's search. Search is about answers, and we have found that when a user submits a query about a specific product, there is a high probability that he expects to see shopping results. This expectation has been validated by our testing process, which is driven by user feedback. For example, a few years ago, we started thinking that when our users search for products, like [sony digital camera prices], they would likely find shopping results useful. So we conducted a test with our user raters, and asked them whether they preferred a results page with shopping results, or without. Users overwhelmingly preferred the page with shopping results. This is consistent with research conducted by Microsoft indicating that 58% of heavy users want to

[30] *See e.g.*, "How Bing Delivers Search Results", Microsoft Bing Help, accessed October 28, 2011, http://onlinehelp.microsoft.com/en-us/bing/ff808447.aspx. ("In limited cases, to comply with applicable laws and/or to address public policy concerns such as privacy, intellectual property protection, and the protection of children, we might remove particular resources from the index of available information. In each case where we are required to do so by law, we try to limit our removal of search results to a narrow set of circumstances so as to comply with applicable law but not to overly restrict access of Bing users to relevant information.").

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complete tasks inside the search engine.[31] Further, our own research conducted through user studies, independent rater evaluations, and click data consistently show that consumers like a mixture of retailer, review, and manufacturer sites like Amazon.com, CNET, or Sony.

In addition, in the course of our testing process, Google has found that users prefer results that are distinct and diversified. Users do not want sites that provide duplicative and unoriginal content. Google's search results provide consumers with product prices from different merchants so that our users can make the most informed decision about the products they want to purchase. Our rankings are driven by consumer signals about what sites they find useful. Consumers can easily switch from Google to a competing site if they disagree with our rankings or believe we are not providing the best possible results.

13. **Please explain why Google Shopping results appear near the top of Google search results when users enter a query for consumer products, and why, as alleged by Nextag, other product comparison sites are not generally placed in the same favorable position.**

Search is about answers, and we have found that when a user submits a query about a specific product, there is a high probability that he wants to go directly to a page featuring detailed information about the product, including where it can be purchased and at what price. This expectation has been validated by our testing process, which is driven by user feedback. For example, a few years ago, we started thinking that when our users search for products, like [sony digital camera prices], they would likely find shopping results of this kind useful. So we conducted a test with our user raters, and asked them whether they preferred a results page with shopping results, or without. Users overwhelmingly preferred the page with shopping results. This is consistent with research conducted by Microsoft indicating that 58% of heavy users want to complete tasks inside the search engine.[32]

That said, it would not be accurate to suggest that Google product search results are always displayed at the top of the search results page. Thematic search results may be displayed at the top, middle, or bottom of the search results page—or may not be displayed at all—based on our assessment of the likelihood that the user wants shopping results of this kind. Notably, Google is significantly more conservative in deciding whether to trigger thematic search results than some of our competitors. Bing, for example, triggers thematic results within its search results approximately 50% more frequently than Google does.

14. **Please explain why the Google "Places" listing for local searches such restaurants, hotels, and other local products and services are typically placed in the first Google results page, near the top of the results, but without any designation that the "Places" results is a Google product and not an organic search result? How can a consumer be expected to know this is a Google product, not an organic search result? Would Google agree to label its "Places" listing as a Google product, and set it off with a different color background?**

As explained previously, thematic search results (such as Places) incorporated in universal search results are *not* separate "products and services" from Google. Rather, the incorporation of thematic and conventional results in universal search reflects Google's effort to connect users to the information that is most responsive to their queries. These universal search results *are* our search service—they are not some separate "Google product" that can be "favored."

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[31] Robert Andrews, "Interview: Microsoft's 'Not Walking Away From Search'", paidContent.org, August 2, 2011, http://m.paidcontent.org/article/419-interview-microsofts-not-walking-away-from-search/ (interviewing Stefan Weitz, Microsoft Bing's Director).

[32] Robert Andrews, "Interview: Microsoft's 'Not Walking Away From Search'", paidContent.org, August 2, 2011, http://m.paidcontent.org/article/419-interview-microsofts-not-walking-away-from-search/ (interviewing Stefan Weitz, Microsoft Bing's Director).

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Depending on the search query, Google may either group local results together, or may distribute local results throughout our search results. Either way, Google is simply trying to organize and display local business results so as to save users time by displaying local information in the most effective manner, in order to eliminate the need to conduct multiple searches. As with any of Google's search results, local business listings are ranked according to likely relevance. For example, typing in a query for [shoe repair 22203] will typically return local business listings organized by geographic proximity to that zip code. The ranking of local business results is not affected by payment.

We are always assessing how we can provide a better service to our users and are always open to suggestions about how to improve the user experience.

15. **How is it determined which establishments are listed in the Google Places listing, and in which order? Is a different method used than used for ordering in Google organic search results, and if so how is it different? Does advertising or a commercial relationship with Google play any role in which businesses are listed in Google Places, and in which order?**

Please see answer above. Advertising or commercial relationships are irrelevant with respect to what order business listings are displayed in search results.

16. **At the hearing, you stated several times that because Google is in the business of ranking, when one website's ranking goes up, another's necessarily has to go down. But competition concerns arise when Google consistently ranks its *own* websites (such as shopping, local search, maps, etc.) in the top few search results, pushing competing websites down. Such a strategy seems to financially benefits Google in two ways: (1) Google captures advertising revenue by keeping users on its own websites rather than its competitors'; and (2) in order to be found by consumers, companies who are pushed further down the screen or onto subsequent search results pages need to invest more in advertising in order to show up in a prominent place on Google's search results page. Do you agree that Google benefits financially benefits when competitors' websites are found further down the search results page?**

Google benefits financially in the long term when we help users find the information they are looking for. Consumers can easily compare the results they get from Google with information provided by other websites. If we do not do a good job of connecting users to the information they seek, they can and will look elsewhere. It is not in our interest to frustrate our users by making it more difficult to find information they want.

17. **At the hearing in answer to a question from Senator Klobuchar, you were asked about Google's participation in advertising auctions. You said that Google participates in auctions, but that you limit your participation for "obvious reasons." Can you explain those reasons? And, if the concerns about your participation are obvious, why do you participate in them even in a limited way?**

Online marketing is a great tool by which we can connect with users; therefore, we sometimes use AdWords to promote our own products and new product features ("house ads"). On rare occasions, Google also uses AdWords to provide information to our users on specific issues of public interest, e.g., ongoing crises or disasters such as earthquakes. Google's house ads may appear on Google sites and on AdSense for Search and AdSense for Content partner sites.

Google's participation in AdWords auctions is commercially appropriate, but we have limited our participation as follows. Google has established an internal review committee that monitors our compliance with house ad policies and processes. First, Google's house ads are not guaranteed to display in any given

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position. Second, our house ads must comply with the same advertising policies that apply to any other AdWords advertiser. Third, only quality ads that are directly relevant to a user's query will appear (based on the same criteria applicable to all other AdWords advertisers). Thus, when Google's house ads are triggered, it is because Google is acting as any other rational advertiser would.

It is also important to note that Google's participation in an auction has no impact on the price paid by external advertisers. The AdWords system has been set up so that advertisers who compete with house ads in auctions pay as if the house ad were not participating in the auction.

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Google

Response of Eric Schmidt, Executive Chairman, Google Inc.
Before the Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy, and Consumer Rights

Hearing on "The Power of Google: Serving Consumers or Threatening Competition?"
September 21, 2011

Senator Mike Lee Questions for the Record for Eric Schmidt

1. **Are Google products and services subject to the same search-ranking algorithmic process as all other organic search results?**

Before addressing your question let me first offer a little background. Google's search results seek to achieve one fundamental thing: to connect users to the information they seek. We do this in two key ways. First, we started with conventional search—the traditional ten blue links—which involved crawling and indexing the web and returning results based on general responsiveness. Second, starting in 2001, we began to incorporate search results designed to respond to signals that a user is looking for specific types of information—a map, an image, a local business, a product, a news update, etc. We sometimes call these "thematic" search results.

When presenting thematic results, Google displays them in a way that is designed to make them user friendly. Prior to the launch of universal search in 2007, Google's thematic results like news were displayed, when relevant, at the top of the search results page. With the introduction of "universal search," we began to allow these thematic results to "float" from the top position to positions in the middle and bottom of the page, based on our assessment of how relevant conventional and thematic results were to the user's query.

Other major search engines also incorporate thematic and conventional search results on their search results pages. In fact, the first efforts at blending thematic and conventional search results by other general search engines date back to the late 1990s. It reflects the effort to achieve what one industry expert described in 2001 as the "Holy Grail" of search: "The real Holy Grail of all this will be when search engines can detect the type of search we are doing and feed out more targeted results from appropriate databases."[1]

But what is crucial to understand is that thematic search results are *not* separate "products and services" from Google. Rather, the incorporation of thematic and conventional results in universal search reflects Google's effort to connect users to the information that is most responsive to their queries. Because of this, the question of whether we "favor" our "products and services" is based on an inaccurate premise. These universal search results *are* our search service—they are not some separate "Google content" that can be "favored."

That said, in keeping with our focus on quality and delivering the most relevant results for consumers, Google constantly experiments with new ways to provide the most relevant information is response to a user's query. For example, for certain queries, where Google is highly confident that the user wants a specific answer, Google will provide that answer prominently on the page. These direct answers are known as "oneboxes." Oneboxes are generally displayed to convey an answer that is clear and straightforward, for

[1] Danny Sullivan, "Being Search Boxed to Death", Search Engine Watch, March 4, 2001, http://searchenginewatch.com/article/2065235/Being-Search-Boxed-To-Death.

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example, movie showtimes, weather forecasts, mathematical calculations, stock prices, sports scores, and so on. Microsoft's Bing and Yahoo! display similar "oneboxes" prominently in their results as well, demonstrating their belief that these results are useful for consumers.

The decision whether to display a onebox is determined based on Google's assessment of user intent. Contrary to what some of Google's critics suggest, Google does not make money when users click on oneboxes. In fact, the opposite is true: oneboxes that are responsive to what users are looking for may draw users away from the ads displayed on the page. Nonetheless, because oneboxes help Google deliver a satisfying experience to users, Google believes that by displaying them we are enhancing user satisfaction, which is in the long-term best interest of the company.

In some instances, Google has licensed data from third parties for use in our oneboxes. In other instances, we have developed this data ourselves. In either case, whether users are searching for a weather forecast, a mathematical calculation (e.g., [pounds to grams]), or a stock price, Google's user studies confirm that users seeking this type of information generally do not want to click through to multiple options, whether in the form of ads or more natural links. Rather, users want a quick, direct answer that they can trust is correct. Oneboxes provide fast, accurate answers in response to this user demand.

2. **Does the algorithm used to produce organic search results place a Google product or service higher than it would an identical page owned by another business?**

As mentioned in response to Question 1, we view our thematic search results as part of our search results, not as a separate product or service. With respect to a page on a Google-owned site such as YouTube that is crawled and ranked within our search results, such a page is not placed higher because it is on a site owned by Google than an identical page would be if it were owned by another business.

3. **Does Google favor sites that display Google AdSense advertisements in its natural or organic search results?**

Google does not give preference to sites that advertise with Google, via our AdWords program, or to sites that accept Google ads via our AdSense program. Ranking in natural search results is not affected by payment or financial benefit to Google.

4. **You will recall that during the hearing I displayed and described to you results of a study that compared Google's search rankings of three popular price comparison sites with the search ranking for Google Shopping results (displayed as a "OneBox" result using "Universal Search").**

   In response to evidence that Google consistently ranks and displays Google Shopping results higher than competing price comparison sites, you responded that it was "an apples to oranges comparison" because the Google Shopping results are "answers" that take users directly to the websites of companies that sell the product in question.

   a. **On September 28, 2011, a search query on Google for "UK product search" returned Google Product Search as the first result, described as "Google's UK price comparison service." Is Google Product Search a price comparison service?**

Google product search is a type of thematic search that allows consumers to compare prices and see which websites are selling a particular product.

   b. **Does Google Product Search compete with other price comparison services?**

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As mentioned in response to Question 1, we view our thematic search results as part of our search results, not as a separate Google product or service. Google's search service competes with stand-alone price comparison services to provide consumers with relevant product-related information, and also competes with other websites, such as Amazon and eBay, as well as competing search engines, such as Microsoft's Bing and Yahoo!, that include comparative product information.

c. The Google 2009 Annual Report reads, in part, as follows:

> **We face competition from [v]ertical search engines and e-commerce sites, such as WebMD (for health queries), Kayak (travel queries), Monster.com (job queries), and Amazon.com and eBay (commerce). We compete with these sites because they, like us, are trying to attract users to their web sites to search for product or service information, and some users will navigate directly to those sites rather than go through Google.**

Does Google compete with vertical search engines?

Yes. Google competes with all of the methods for accessing information on the Internet. Users seek answers to their questions, and Google, along with specialized search engines, social networks, mobile apps, and other websites, is competing to provide users with the most relevant information available. Unlike technologies of the past, on the Internet competition is one click away. The history of the technology industry shows that technologies often get supplanted by completely new models, thus creating a robust and competitive market within which consumer demand drives innovation. For many commentators, specialized search services operate according to this new model with which Google will now have to compete. As Jeffrey Rayport from Businessweek observed,

> Google's . . . real threat is not from such Goliaths as Microsoft, but from a myriad of Davids—specialized search engines tailored to conduct "vertical" search tasks. Examples of these include restaurant reservations by OpenTable . . . job hunting at Simply Hired, and online travel with sites like Orbitz . . . and Priceline . . . . These sites are not promoted explicitly as "search engines," but that's what they are; they also happen to execute transactions.[2]

You do not have to take Google's word for it, either. Every one of the companies that Google lists as a competitor in its 10-K, including Amazon, WebMD, Monster, and eBay also list Google or search engines generally as their competitors.[3] Unfortunately, the conventional general search query share figures released by comScore and Hitwise do not reflect the reality that Google competes against all of these specialized sites, plus social networks, mobile apps, and now voice-activated search like Apple's Siri when it comes to accessing information.

d. Is the information displayed when a user clicks on a Google Shopping result often similar to the information provided by competing price comparison sites?

Google believes that our shopping results are more comprehensive and current than most comparison shopping sites. In addition to crawled content, we have direct feeds that allow more than 200,000 online

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[2] Jeffrey F. Rayport, "Google's Search Gold Mine Could Tap Out", Bloomberg Businessweek, February 13, 2011, http://www.businessweek.com/technology/content/feb2011/tc20110211_680322.htm.

[3] *See e.g.*, Amazon 2010 10-K, WebMD Health Corp. 2010 10-K, Monster Worldwide, Inc. 2010 10-K, and eBay 2010 10-K at http://www.sec.gov/edgar/searchedgar/companysearch.html. Kayak is not publicly owned and therefore does not file 10-K forms with the Securities and Exchange Commission.

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merchants to publicize their inventory and prices—in real time—to interested shoppers searching Google. Currently, more than one billion products are available for sale through these partners' websites.

e. Does Google display Google Shopping results within its natural search results without any label identifying them as Google results or as otherwise distinct from true "search results"?

As stated in my response to Question 1, universal search results are *not* separate "products and services;" they *are* our "true" results.

f. Does clicking on various links within a Google Shopping result take the user to another Google page and not always, as you suggested in your testimony, directly to the site of a company that sells the product in question?

Depending on the specificity of the user's query, clicking on a shopping result will either take a user to a page where they can compare the prices of many different merchants, or directly to a merchant's site. For example, a search for a specific camera model might show shopping results that link directly to merchant sites, but a broader query like [sony digital camera] might yield broader shopping results that the user can then refine in order to find the product he wants.

g. Is it possible that consumers consider competing price comparison sites as potential substitutes for Google Shopping results?

As stated above, Google product search is a type of thematic search that allows consumers to compare prices and see which websites are selling a particular product. In that sense, Google product search competes with stand-alone price comparison services and also competes with other websites, such as Amazon and eBay, as well as competing search engines, such as Microsoft's Bing and Yahoo!, that include comparative product information.

h. Is it possible that Google's practice of preferencing its own Google Shopping results may deprive competing price comparison sites of user traffic and thus decrease competition from such sites?

As stated in my response to Question 1, universal search results that integrate conventional and thematic search results are not different "results." The suggestion that Google "preferences" Google shopping results is thus based on an inaccurate premise.

Google was built to benefit users, not any website or group of websites. As I said above, our primary goal is to give users answers, and if, for any reason, we do not provide the best answers for our users, they can and will switch to another source of information. For example, users can go to websites by directly navigating to the website (i.e., entering the address in their browsers), through advertisements on other websites, through mobile apps, or through their social networks. Google does not prevent users from reaching other shopping comparison sites.

Consumer research has confirmed that users prefer the incorporation of thematic and conventional search results, which is why all of the largest general search engines today provide such blended results. In fact, an October 2010 analysis by comScore showed that Microsoft's Bing displays thematic results as part of its search results 54% of the time, while Google displays them 33% of the time.[4] Indeed, as I mentioned in my

[4] Eli Goodman, "Universal Search: Not All Blends Are Created Equal," comScore Voices blog, October 26, 2010, http://blog.comscore.com/2010/10/universal_search.html.

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answer to Question 1, general search engines have been providing such blended results since at least the late 1990s.

i. Do customers normally believe that the first few results are the most relevant?

While we have not surveyed customers' beliefs on this issue, we hope that the better job we do of providing useful and interesting information, the more they will find that information relevant and helpful.

We hope that we continue to improve our ability to discern user intent. We believe that we are able to provide superior search results because our ranking algorithms allow us to identify the most useful material and present it to the user first. We make over 500 changes to the algorithms every year to improve search and fight malicious websites. Search has become more than just providing links to relevant information; users want search engines to give them answers. Sometimes the best answer is a list of links, but sometimes it is a map, a stock quote, a sports score, or shopping results, which both Google and our competitors sometimes incorporate into search results to better serve consumers. As Microsoft's president of its online services division, Qi Lu, observed: "Search is a means to an end. We want our product to go substantially beyond just finding information, go all the way to help the user make decisions and complete tasks."[5]

5. **You testified that you were "not sure Google is a rational business trying to maximize its own profits" in every respect. But more specifically, does Google have a financial incentive to preference its own secondary pages, many of which include advertisements that may generate revenue, above those of its competitors?**

As we stated in our 2004 IPO letter, "Google is not a conventional company."[6] From the very beginning, we have sought to protect Google's ability to innovate because we were confident that, in the long run, this would benefit Google and our shareholders. Indeed, we told our potential shareholders in 2004 that in pursuing our goal of "developing services that significantly improve the lives of as many people as possible, . . . we may do things . . . even if the near term financial returns are not obvious."

Google's financial incentive is to do a good job in connecting users to the information they seek, and thematic search results are intended to connect users to information they seek. Users can easily compare our search results with information available from other websites; and they can and will switch to other sources if we do a poor job. Google's thematic search results frequently contain extensive specific information of the kind understood to be sought by a user, such as natural links to merchants selling a particular product, or links to the site of a restaurant listed in a Places page; Google receives no revenue when a user clicks on one of these links.

6. **When asked at the hearing whether Google's own services "are . . . subject to the same test, the same standard as all the other results" in Google's non-sponsored search results, you said, "I believe so. . . . I'm not aware of any unnecessary or strange boosts or biases." Please provide the Subcommittee with a direct, definitive, and precise answer to this question.**

As mentioned in response to Question 1, we view our thematic search results as part of our search results, not as a separate product or service. With respect to a page on a Google-owned site such as YouTube that is

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[5] Qi Lu, Comments at Microsoft Financial Analyst Meeting, Anaheim, California, September 14, 2011, http://www.microsoft.com/investor/downloads/events/09142011_FAM_Qi.docx (downloads Word document).

[6] Larry Page and Sergey Brin, 2004 Founders' Letter, August 18, 2004, http://investor.google.com/corporate/2004/ipo-founders-letter.html.

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ranked within our search results, such a page does not appear higher on our search results page because it is on a site owned by Google than an identical page would be if it were owned by another company.

7. **At the May 2007 Seattle Conference on Sustainability, Marissa Mayer stated the following:**

   [When] we roll[ed] out Google Finance, we did put the Google link first. It seems only fair, right? We do all the work for the search page and all these other things, so we do put it first . . . That has actually been our policy since then, because of Finance. So for Google Maps again, it's the first link.

   Is this statement accurate?

It is my understanding that Ms. Mayer was referring to the placement of links within a onebox (but not the ranking of other thematic results within search results), and her description was accurate.

8. **What has Google done to let its users know that its natural search algorithm gives preference to Google's own products and services?**

As described in my response to Question 1 above, I believe that the premise of this question is incorrect.

9. **Do you find anything problematic with respect to the way in which Google prioritizes the search rankings and enhances the display of its own products and services?**

As I said in response to Question 1, thematic search results are *not* separate "products and services" from Google. Rather, the incorporation of thematic and conventional results in universal search reflects Google's effort to connect users to the information that is most responsive to their queries. Because of this, the question of whether we "prioritize" our "products and services" is based on an inaccurate premise. These universal search results *are* our search service—they are not some separate "Google product" that can be "prioritized."

10. **In April of this year, Google's Chief Financial Officer, Patrick Pichette, when asked on an investment community call to discuss Google's investment in its Chrome Browser, stated that "everybody that uses Chrome is a guaranteed locked-in user for us..." (See http://www.zdnet.com/blog/btl/why-is-chrome-so-important-to-google-its-a-locked-in-user/47295.)**

    a. **Do you agree with Mr. Pichette's statement?**

Mr. Pichette's comment is not correct. Chrome users are not in any way "locked-in" for Google. Chrome users can easily change the browser's default search engine to any competing search engine.[7] It is as easy as selecting the "Preference" menu in Chrome and selecting your desired search engine from the drop-down menu. In addition, a user who downloads Chrome actually has to select the search engine he or she wants; Google is not set as the default.

On the other hand, Microsoft's Internet Explorer—the web browser with the largest share of users (with a 40-50% market share)—includes Microsoft's Bing as the default search engine, and we believe that it is cumbersome to switch to another search engine as the default.

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[7] *See* Chrome Help, Setting Your Default Search Engine, accessed November 1, 2011, http://www.google.com/support/chrome/bin/answer.py?answer=95426.

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b. **Given your testimony at the hearing that Google lives by the principle of "loyalty, not lock in," will Google commit to ensuring that its Chrome Browser, Toolbar, and other software applications make it easy for users to switch from the default Google search engine to other offerings?**

As described above, in response to Question 10a, Google already makes it easy for users to switch from Chrome and other software applications.

11. **At IBM's Business Partner Leadership Conference in 2008, you said: "If it's not searchable by Google, it's not open, and open is best for the consumer." You have a long personal history as a leading advocate for open-source software and a reputation for creating and participating in open movements such as OpenSocial and the Open Handset Alliance.**

    In your written testimony, you stated that "[a]t Google we believe that open is better than closed" and that "open sourcing software has real benefits in the marketplace." You also said:

    > **"Open" also means supporting features that have been approved by formal standards bodies, and, if none exist, working to create standards that improve the entire ecosystem. And "open" means releasing the source code to numerous projects that were developed by Google so that third parties can utilize these technologies to build their own products without having to reinvent the wheel, thereby speeding up the innovation cycle and providing consumers with even more choices.**

    It appears to some that Google's "open" initiatives have centered on areas where Google lags behind competitors in a market. Conversely, many claim that Google seems to avoid open initiatives in areas where it is a market leader, as with Google Books, YouTube, and its own search index.

    Some commentators, such as Danny Sullivan, editor-in-chief of Search Engine Land, advocate for Google's participation in an open index project. This is an example of an area in which Google is a clear industry leader and could foster innovation and marketplace growth by allowing others access to its index, without requiring Google to reveal trade secrets such as its search algorithm. Will Google commit to lead a search-index open initiative?

I am not familiar with Mr. Sullivan's proposed initiative. I do know that Google has made a number of our key innovations available as open source software, including Android (mobile operating system), WebM (video codec), Chromium (desktop/mobile OS), and Tesseract (optical character recognition software). We do not limit our open source projects to areas where we lag behind competitors. Google's open source projects have spurred innovation and competition in several markets. Some of Google's open source initiatives have been hailed as the most significant open source initiatives in the software industry.

12. **There have been reports that Google has acted to obstruct access to some of its substantive content, preventing competing search engines from offering results that include a full index of that content. In the case of YouTube, rival search engines claim to have been granted access only to some of YouTube's video content. Reports also suggest that Google attempted to settle litigation surrounding Google Books by signing an agreement that would give Google exclusive control over who may index its digitized copyrighted books. It would come as a surprise to many users that a company so vocal in its dedication to openness might be attempting to block some of its content from competitors. Will Google commit to**

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ensure that other search engines may fully crawl and index all non-secure Google content, now and in the future?

Google has not restricted legitimate third-party search engines from accessing YouTube to index the site. However, to prevent the wholesale copying of videos from YouTube in violation of existing partner agreements, Google has placed automated restrictions on bots' ability to access YouTube. Any legitimate search engines, including Microsoft's Bing, Yahoo!, and China's Baidu, that wish to crawl and index YouTube, are given an exception to the bot restrictions.

Google is aware that Microsoft has complained that, for a time, it was unable to crawl YouTube. Google believes that Microsoft was unable to do so because Microsoft changed the name of its web crawler from "MSNBot," which was allowed to crawl and index YouTube, to "Bingbot" without informing Google of that name change. Thus, when Microsoft's newly-named Bingbot attempted to crawl YouTube, it was denied access because Google's automated systems believed that the newly-named crawler was not a legitimate search engine. The first time Microsoft made us aware of the problem was through their antitrust complaint in the EU. We promptly granted an exemption for Bingbot so that it could crawl and index YouTube. Google has been committed, and remains committed, to allowing third-party search engines to index YouTube content.

Google does not allow third parties to crawl our book content. First, because of copyright laws, Google does not allow third parties unfettered access to scan and reproduce Google Books content that is under copyright, including that which Google has licensed from third parties for our own use. Second, Google has invested many millions of dollars in our scanning project because we believe that users benefit from getting access to out-of-print and public domain books. Google's competitors, including Microsoft, could have done the same, but chose not to because they believed that the cost of doing so was not worth the benefit. Indeed, as an example, Microsoft began scanning the same corpus of books but abandoned its efforts, deciding to concentrate on other areas that it believed were more profitable, like travel search.[8] Nothing in the proposed Google Books settlement agreement would have prevented third parties from scanning and indexing books.

13. **In both your written and oral testimony, you stated that Google believes in "loyalty, not lock-in." You also testified that Google has a team of engineers whose sole goal is "to help our users move their data in and out of Google's products." On the day of the hearing, Google spokespeople were quoted in the press saying that Google "place[s] no restrictions on advertisers transferring their own ad campaign data to other platforms." Google's own AdWords API Terms and Conditions, however, purport to impose restrictions on advertisers' use of this data, including by restricting the tools that advertisers may use to manage their ad campaigns (see, e.g., section III.2.c). Some claim that the tools Google prohibits would allow businesses, particularly small businesses, to run ad campaigns on multiple ad platforms more easily and efficiently.**

    a. **Does the current version of the AdWords API Terms and Conditions (http://code.google.com/apis/adwords/docs/terms.html) permit advertisers to use their data on other platforms "without restriction," including use of third-party tools for this purpose?**

A number of resources exist to make it as easy as possible for AdWords users to export their data out of AdWords and use it for any purpose, including uploading it to another platform. In fact, Google is a leading proponent of data portability, and our Data Liberation Front provides step by step instructions to guide

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[8] *See* Betsy Schiffman, "Microsoft Gives Up on Book Search", Wired Magazine, May 23, 2008, http://www.wired.com/epicenter/2008/05/microsoft-cans/.

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advertisers.[9] Competitors such as Microsoft also provide advertisers with simple instructions to import their Google ad data into their advertising platforms.[10]

Google provides a free tool, AdWords Editor, that make it easy for advertisers (and agencies or resellers acting on their behalf) to move their ad campaign from Google to a competing platform. Using AdWords Editor, advertisers or their agents can download their full campaign structure to a CSV file.[11] Thereafter advertisers are free to use the data as they deem appropriate, including uploading it onto competing platforms and using third-party tools to manage it.

Google also makes an AdWords API available that enables advertisers to build their own tools, and allows third-party developers to build tools for advertisers and agencies to use. The AdWords API Terms and Conditions impose minimal restrictions on advertisers in the creation or use of their own tools, and they can build most any functionality they deem necessary with AdWords API. In fact, Google specifically exempts advertisers from the requirements of Section III.2.c (referenced in your question).[12] There are modest limitations on the programmatic bulk input and direct copying of data through the use of AdWords API-based third-party tools. In fact, bulk input restriction is not applicable to all fields, and a number of such fields can be uploaded simultaneously across platforms. This is reflected by the extremely high level of advertiser multi-homing on numerous advertising platforms.

b. If not, will Google commit to remove this and all other restrictions in the API Terms and Conditions on advertisers' use of ad campaign data?

As stated above, every advertiser—big or small—can export their ad campaign data and easily move it in and out themselves with no restrictions.

14. Among the concerns raised about Google's relationship with specialized search engines is scraping. "Scraping" refers to the unauthorized use of content that is collected, or "scraped," when a site is crawled and indexed by a search engine. Both Trip Advisor and Yelp, whose reviews appeared without permission on Google Places and whose CEO also testified at the hearing, have made such complaints. It is my understanding that Google has recently discontinued the practice of scraping reviews for use on its Places page.

a. Will Google commit to preventing any future occurrence of unauthorized scraping?

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[9] Brian Fitzpatrick, "Yes You Can Export Data From AdWords, Too", Google Public Policy Blog, October 8, 2009, http://googlepublicpolicy.blogspot.com/2009/10/yes-you-can-export-data-from-adwords.html.

[10] adCenter Desktop, "Import Google AdWords Campaigns to Microsoft adCenter using adCenter Desktop (video)", http://www.youtube.com/watch?v=MyWBPOS8dVM&feature=mfu_in_order&list=UL; Microsoft Advertising, "Import a Google campaign by using Microsoft Advertising adCenter Desktop (Beta)", http://advertising.microsoft.com/small-business/product-help/adcenter/topic?query=MOONSHOT_PROC_ImportGoogleCampaignsUsingDesktopTool.htm (5-step process); *see also* Amber, "Upload Your Google AdWords Campaigns Into Yahoo and MSN adCenter in a Flash!", PPC Hero, March 17, 2009, http://www.ppchero.com/upload-your-google-adwords-campaigns-into-yahoo-and-msn-adcenter-in-a-flash/ (3-step process).

[11] AdWords Editor Help, "How Do I Export a Spreadsheet from AdWords Editor," accessed November 1, 2011, http://www.google.com/support/adwordseditor/bin/answer.py?answer=38657.

[12] Google, AdWords API Terms and Conditions, accessed November 1, 2011, http://code.google.com/apis/adwords/docs/terms.html (In Section III(2)(c), Google explicitly notes that this section "does not apply to End-Advertiser-Only AdWords API Clients.").

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b. There is, of course, a great benefit that Google has already received as a result of scraping reviews from sites like Yelp and Trip Advisor. Users tend to visit sites that have amassed numerous reviews. As a result, companies invest substantial time and resources in developing robust databases of user reviews. Google Places was able to attract traffic and generate its own reviews on the basis of content—one might even say intellectual property—it took from competing sites. What does Google plan to do to address the problems caused by your prior scraping policy and the manner in which it has disadvantaged competing user review sites?

Google believes strongly in protecting copyright and other intellectual property rights. Google relies, as does every other major search engine, on the established doctrine of fair use in order to display snippets of text in our search results, giving users a preview of the type of content they can find for a given link. Indeed, snippets are an important feature of search generally, and they drive traffic to websites. Google previously displayed review snippets from sites such as Yelp and TripAdvisor in our thematic local search results. Google's practice of displaying review snippets did not disadvantage review sites—in fact, quite the opposite. Google sends millions of clicks a month to Yelp, TripAdvisor, and other review sites. Google facilitates free traffic to both Yelp and TripAdvisor, and each of the sites has reaped the benefits of this free user exposure.

Yelp has aired numerous concerns in the press over the past few years, and although Google tries to act responsibly in response to website concerns, ultimately Google builds our search results and search-related products for the benefit of users, not websites. At all times, Google's primary motivation has been improving the search experience for our users by providing the most relevant and useful information in response to their queries. In the end, if users are unhappy with the answers Google provides, the openness of the web ensures that they can easily switch to Yelp or any other site with just one click.

15. According to a Nielsen report from this month, 40 percent of U.S. mobile consumers now use smartphones, and Google's Android is the fastest growing and most popular mobile operating system. Some have expressed concern that Google may be using Android "compatibility issues" as a means of excluding competitors. For example, Skyhook, a company that produces geolocation software for mobile devices, claims that Google, a direct competitor, informed both Samsung and Motorola that handsets loaded with Skyhook software could not be shipped due to incompatibility issues between Skyhook software and the Android platform.

a. Does Google ask or require handset manufacturers that contract with you to ship mobile phones with only software that you approve?

No. Google does not require handset manufacturers to ship mobile phones with only software that we approve. In contrast to closed, proprietary operating systems, Android allows manufacturers to modify their own implementations of Android to create their own unique features and user interfaces. Android is also particularly adaptable to new hardware configurations and chipsets. By allowing broader differentiation in software and hardware, Android enhances competition and consumer choice. There are more than 500 models of Android devices on the market.

Google has undertaken extensive efforts to protect consumers and application developers to ensure their applications run seamlessly on all Android devices. Google, with the support of our Android partners, has identified certain specifications, such as minimum screen size and security features, that help ensure applications run flawlessly across device models. These specifications are reflected in the Android Compatibility Definition Document ("CDD"), which is published on Android Open Source Project's website. Google and our partners believe that this baseline preserves the maximum amount of manufacturer freedom to customize Android, while simultaneously protecting Android developers, who need consistency

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and rely on minimum elements appearing on all Android devices, and Android customers, who may legitimately expect that Android applications will run on their Android devices.

b. Does Google ask or require manufacturers to preload phones with Google applications?

No. Google does not require that smartphone manufacturers preload phones with Google applications.

Android is a free, open source platform for mobile devices. The complete Android source code is available for download for free from the Android Open Source Project website.[13] Any developer or manufacturer can use, modify, and distribute the Android operating system without Google's permission or any payment to Google. For example, Amazon recently announced the Kindle Fire—its new tablet device—using the Android source code without Google's involvement. This is one of the exciting and innovative aspects of Android that will help foster innovation and competition in the smartphone market.

One of the greatest benefits of Android is that it fosters competition at every level of the mobile market—including among application developers. Google respects the freedom of manufacturers to choose which applications should be pre-loaded on Android devices. Google does not condition manufacturers' access to or use of Android on pre-installation of any Google applications or on making Google the default search engine.

Manufacturers can choose to pre-install Google applications on Android devices, but they can also choose to pre-install competing search applications like Yahoo! and Microsoft's Bing. Many Android devices have pre-installed the Microsoft Bing and Yahoo! search applications. No matter which applications come pre-installed, the user can easily download Yahoo!, Microsoft's Bing, and Google applications for free from the Android Market.[14] In addition, Android gives manufacturers the freedom to pre-install third-party app stores, like the Amazon Appstore for Android, where a user can download a variety of apps, including Microsoft's Bing.[15]

c. Will Google commit to removing its own view of "compatibility" with Android as a prerequisite to the shipment or sale of handsets?

As noted in our answers to Questions 15a and b, Google has undertaken extensive efforts to protect consumers and application developers to ensure their applications run seamlessly on all Android devices. Google, with the support of our Android partners, has identified certain specifications, such as minimum screen size and security features, that help ensure applications run flawlessly across device models. These specifications are reflected in the Android Compatibility Definition Document ("CDD"), which is published on Android Open Source Project's website. Google and our partners believe that this baseline preserves the maximum amount of manufacturer freedom to customize Android, while simultaneously protecting Android

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[13] *See* Android Open Source Project, "Downloading the Source Tree", accessed on November 1, 2011, http://source.android.com/source/downloading.html.

[14] Users can access the Microsoft Bing Search application here: https://market.android.com/details?id=com.microsoft.bing&feature=search_result; the Yahoo! Search application here: https://market.android.com/details?id=com.yahoo.mobile.client.android.yahoo&feature=search_result; and the Google Search application here: https://market.android.com/details?id=com.google.android.googlequicksearchbox&feature=search_result.

[15] Amazon makes the Microsoft Bing Search application available here: http://www.amazon.com/Microsoft-Corporation-Bing/dp/B004T54Y2M/

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developers, who need consistency and rely on minimum elements appearing on all Android devices, and Android customers, who may legitimately expect that Android applications will run on their Android devices.

16. In 2003, you were quoted in the New York Times as stating that "[m]anaging search at our scale is a very serious barrier to entry."

a. Why is scale a "very serious barrier to entry" in search?

I made that statement to the New York Times over eight years ago, and I was probably talking about search in a more narrow way than I view competition today. That same New York Times article emphasizes that Google's advantage in 2003 was that we had amassed a large number of data centers to handle a sizable volume of queries.[16] But today, data centers have been reduced to a commodity that any company can buy or rent. Moreover, both Microsoft's Bing and Yahoo! today handle *millions more queries* than Google did in 2003. In two short years, Microsoft's Bing has already reached the size that Google was in 2007.

Scale is not the key to our success. Google is not successful because of the number of queries we process. Competition on the Internet is just one click away and that disciplines Google into concentrating on making our users happy. To this end, Google makes tremendous investments in research and development and in hiring the best engineers, who are extremely talented, have a huge depth of experience, and are focused like a laser on thinking of ways to deliver better services to our users. We believe we are better not because we are bigger but because our technology is better.

Google does not believe that scale is a barrier to entry. The Internet provides a level playing field for competition; Google's size has not changed that fact. Indeed, recent entry into the general search business by start-ups such as Blekko, venture capital investments in search startups like DuckDuckGo, and Microsoft's Bing's success after only two years demonstrate that entry is not only possible but real.

A lack of scale did not deter companies like Facebook, Twitter, and LinkedIn from starting, finding an audience, and achieving widespread prominence, recognition, and ultimately success. At the same time, the large size of many Internet companies like MySpace did not prevent them from losing their audience and ultimately faltering. Given the nature of the Internet, websites, and services can and do get supplanted by completely new models. So the relevant question may not be, "Who will beat Google in search?" but rather, "What new model might take the place of search?"

b. Given that scale constitutes such a serious barrier to entry, do you agree that search engines lacking Google's scale are unable to offer as comprehensive and relevant results as those provided by Google, regardless of whether such search engines are "one click away" for users?

As explained above, Google does not believe that scale constitutes a barrier to entry. Google's size has not prevented competitors from reaching audiences and achieving success. Indeed, in just two short years, Microsoft's Bing has grown to the same volume of queries that Google had in 2007. Google believes that Microsoft's Bing and Yahoo! achieved the scale necessary to compete with Google long ago.

Google offers better results than Microsoft's Bing or Yahoo! not because we are bigger but because our engineers are better, our technology is better, and our indexing and crawling solutions are more sophisticated. A comprehensive crawl is the first ingredient to precise query matching, and Google devotes significant resources and manpower to constructing, updating, and maintaining a highly sophisticated crawling and

[16] John Markoff and G. Pascal Zachary, "In Searching the Web, Google Finds Riches", New York Times, April 13, 2003, http://www.nytimes.com/2003/04/13/business/in-searching-the-web-google-finds-riches.html?pagewanted=all&src=pm.

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indexing system. Independent analysts have confirmed the superiority of Google's index; as reported in June 2011, "the experts at SMX [a conference for search marketing experts] seemed to believe that Google's crawler is currently much better at discovering content than Microsoft Bing's search bot (undoubtedly part of why Google is still the No. 1 search engine in the market, by comScore's latest measure)."[17]

17. During the hearing, some Senators suggested a panel to oversee changes in your company's algorithm. I want to state clearly and for the record that I oppose subjecting a company's core intellectual property to such regulation. Please describe the problems that could result from opening Google's algorithm to regulatory oversight.

In the open world of the Internet where competition is a click away, innovation happens at a feverish pace. In this rapidly changing industry, Google has evolved to operate at lightning speed; our engineers test more than ten thousand changes per year and ultimately make more than 500 changes a year to our search algorithms, or one to two changes *per day*. Each change focuses on improving the user experience, with the understanding that if Google does not deliver the best search results, someone else will.

Google's engineers also work tirelessly to modify the algorithms to protect users from spam, malware, viruses, and scams. Purveyors of these fraudulent devices are always looking for ways to get around Google's algorithms to entrap consumers. Having a government panel oversee each change to the algorithms would tie Google's hands, and make it impossible for our engineers to react quickly and effectively to improve user experience and keep users safe. This would severely harm consumers.

Having a government panel oversee algorithm changes raises other serious concerns. There is no "correct" search result. Results are generated in response to user queries. For example, a search for [President Obama address] could be asking for the location of the President's residence or a speech that the President made. Google's formulation of search results is a type of "scientific opinion"—a prediction of what the user might be looking for. Those results have been deemed by several courts to be a protected form of free speech under the First Amendment.[18] Just as a government panel could not dictate to the New York Times, the Drudge Report, or the Huffington Post what stories they could publish on their websites without infringing their freedom of speech, so too would government-mandated results likely violate Google's freedom of speech.

A government oversight panel for search would also enable firms that compete with Google to file spurious complaints in an effort to slow down Google's innovations. This would hurt consumers.

The purpose of the antitrust laws is to protect competition (not competitors) for the benefit of consumers. To this end, the openness of the Internet and the ability of users to switch easily between rival websites ensure robust competition and consumer welfare. Where users can effectively inform Google which changes they like by clicking away from Google, there is no need for a government panel to ensure changes are made for the benefit of consumers.

18. While under review by the Justice Department for the acquisition of ITA Software, Google said on its website that "our goal will be to refer people quickly to a site where they can actually purchase flights, and that we have no plans to sell flights ourselves," specifying that "Google does not plan to sell airline tickets directly."

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[17] "SEO Case Study: Sites See More Pages Indexed by Google Than Bing -- Even Post Panda," Brafton News, June 9, 2011, http://www.brafton.com/news/seo-case-study-sites-see-more-pages-indexed-by-google-than-bing-even-post-panda-800527170.

[18] *See Kinderstart.com, LLC v. Google, Inc.*, Case No. C 06-2057 JF (RS) (N.D. Ca., March 16, 2007); *Search King, Inc. v. Google Technology, Inc.*, Case No. Civ-02-1457-M (W.D. Okla., Jan. 13, 2003).

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a. Does this remain Google's position in regard to travel transactions?

We do not currently plan to sell airline tickets directly, and the first version of Google flight search contains links to airline websites where you can buy a ticket.

b. Please update the Subcommittee on Google's current and future plans to be involved in facilitating the sale of travel services, including booking flights and hotels.

We've been excited about the opportunity to work with ITA to build extraordinary tools for flight search. We continue to look for areas where we can offer users compelling travel services. At present, we have no plans to offer flight or hotel bookings.

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U.S. Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights

"The Power of Google: Serving Consumers or Threatening Competition?"

Responses of Jeremy Stoppelman, Cofounder and CEO, Yelp! Inc.

Senator Kohl

1. Do you depend on links from Google's search engine for a substantial portion of your business?

Yes, like many other websites, we draw a sizable portion of our traffic from Google.

How much?

Approximately 75% of Yelp traffic comes from Google in one form or another.

And what would happen to your business in the United States if you no longer appeared near the top of Google search results?

I would like to think that Yelp features some of the most relevant information when it comes to local businesses, but I can only assume that Yelp would be negatively affected if Google prevented links to the Yelp site from appearing near the top of Google search results.

2. Do you believe the experience of Yelp and similar companies could deter new, innovative web companies from entering the market and competing with Google?

Yes.

3. The Federal Trade Commission and several state attorneys general are currently pursuing an antitrust investigation against Google. Should they conclude the law has been violated, are there any specific remedies you believe they should pursue?

Google has demonstrated it cannot be trusted to police itself. It is my hope that regulators will ensure that Google competes on a level playing field. For example, Google should not be permitted to preference its own products ahead of its competitors in search results. In addition, Google should not be permitted to incorporate third party content from its web search index into its other products without permission. Similarly, competitors should not be

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forced to contribute their content to Google under the threat of removal from any portion of Google's web search results.

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Senator Grassley

1. Would you create Yelp today knowing what you know about Google's business practices?

It is my belief that markets work best when the competitive landscape allows innovators to challenge the entrenched interests (regardless of whether the innovators ultimately succeed). It is extraordinarily difficult to innovate, however, if a single company abuses its dominant position in the market.

Yelp has worked hard to build a fantastic product and credible brand. It is difficult for me to imagine if we would have been able to accomplish what we have accomplished had Google engaged in anticompetitive practices in the early going. Were I to tackle a new industry tomorrow, I would undoubtedly look to a market that is less prone to the manipulative influences of a dominant market power.

Do you think this is a good environment for innovation?

I see wonderful innovations in areas which -- at least today -- are not threatened by Google's anticompetitive practices. At the same time, it is hard to ignore the sentiment I hear from entrepreneurial veterans every day: it is no longer enough to focus on your own business – you also need to spend substantial time and energy worrying about the 800-lb Google gorilla in the room.

2. What trends are you seeing in the industry that suggest content companies are under threat from anti-competitive behavior?

Google's conduct may ultimately spell trouble for a number of content verticals, such as news and travel, as long as the conduct goes unchecked. We may see less original content, and as a result, less choice for consumers in those verticals.

What can we do about them?

Congress can shine a light on anticompetitive practices, encourage voluntary compliance, and provide guidance for regulatory authorities to enforce laws that are already on the books. More simply, it is my hope and expectation that Google will learn to compete on a level playing field -- that it will agree not to take content from third parties without permission for the benefit of its own competing products, and that it will treat its own competing products consistent with the manner in which it treats its competitors.

3. Do you have any concerns with Google's search algorithm? Do you believe that Google manipulates search placement at the expense of competition?

Google's tactics have less to do with its search algorithm than its design decisions. These design decisions effectively push objectively ranked search results off the screen, and give Google's

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own products more prominent placement, larger fonts, and eye-catching graphics.

For example, while Google's own finance product may not always have the best or most relevant information about a particular stock, its link always appears first. Similarly, Google gives Google Places special treatment when users search for information about local businesses, even if other sites rank higher in relevance.

Indeed, the much-discussed and little-understood algorithm has proven an effective red herring in the debate, allowing Google to insist that the algorithm uses objective criteria to rank websites while ignoring difficult questions about results that have nothing to do with the algorithm.

4. One of my constituents is concerned that the goal of FTC's investigation into Google's business practices "is to . . . place new rules and regulations on [a] very successful internet technology company" and that the investigation is "counterproductive, totally unwarranted, and goes against all the principles that truly make a capitalist free market economy work for the betterment of all." Do you agree with these concerns?

Why or why not?

I share your constituents' concerns about "new rules and regulations." That said, I believe that we should enforce rules and regulations that are already on the books for very good reasons. Antitrust enforcement exists precisely to protect the free market.

5. One of my constituents indicated that Google's search engine is "highly satisfactory" for his use and if he "wanted something different, it is readily available on the internet." He says that "with unemployment at an all time high and the country being spent into bankruptcy, [he hopes that Congress] will not waste more time on these hearings and vote to keep out further government intrusion into how the internet is used by private citizens and private businesses." What do you think?

Are you concerned that government intervention will impact innovation?

Google has a great product, but it also uses its dominant position in the market to limit access to the competition. Antitrust laws serve an extraordinarily important purpose, and their enforcement provides a rare opportunity for the government to positively impact job growth, innovation, and the broader free market.

6. Google often responds to its critics by saying that "Competition is just one click away." Do you agree with that statement?

Why or why not?

Google goes to great lengths to reduce choice in the marketplace, preferencing its own

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products ahead of competitors and investing heavily to be the world's default web browser, search provider, mobile platform, and content publisher, among other functions. Google appears entirely unwilling to allow consumers to make their own choices.

Senator Lee

1. Until very recently, Google Places featured significant portions of Yelp reviews, without your permission.

a. How did Google's use of Yelp reviews on its Places pages differ from traditional use of content displayed in search results?

Google's use of Yelp reviews on its Places pages differed significantly from the way Google uses content from Yelp in Google web search results.

First, although most web services otherwise prohibit third parties from scraping or indexing content from their websites, they usually allow and enable search engines like Google to index the content on their websites for search purposes only. This is typically accomplished by technical means through the "Robots Exclusion Standard." When Google uses third party content for other purposes -- specifically, to construct a competing service -- it exceeds the authority that the third parties grant it in the first place.

In Yelp's case, Google had previously acknowledged in 2005 that it required a license in order to use Yelp's content in its competing Google Places product. When Yelp later balked because of the growing competitive threat from Google, the executives responsible for Google Places simply took Yelp's content over Yelp's express objection. As a threshold matter, then, Google's use of Yelp's content in Google Places differs from its use of Yelp's content in web search results because Google simply does not have permission to use Yelp's content in Google's competitive products.

Second, Google's use of Yelp content in its own local products is different in the sense that it is intended to direct users to Google's own products rather than the information that users seek. For example, Google boasted that Google Places featured more than one thousand reviews of a well-known steakhouse in Washington D.C., but in reality, it only featured a handful of reviews – the rest were taken from Yelp. As a result, users were lured into Google Places, but could not find the information they were looking for.

Third, Google uses content from its competitors to power search results *within* its own local products, even when its own local products do not have the information that its users seek. For example, Google has very little of its own information about pizzerias in San Francisco, but it relies on information from Yelp to drive users to its own Place pages. Indeed, the most prominent links in Google Maps search results appear at first glance to link to local businesses, but they really link to Google Place pages.

Put differently, Google's use of Yelp's content in web search results is intended to be mutually beneficial: it allows Google to direct its users to the information they seek, and it allows Yelp to be discovered by those same users. In contrast, Google's use of Yelp's content in its own competing product is only intended to benefit Google since it creates an interstitial page

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(monetized by Google) between users and the information they seek.

b. What went into developing Yelp's collection of reviews?

Yelp has focused obsessively on consumers, fostering relationships both online and offline between and among our community of users. The community is diverse, but the one commonality is that its members love to share local information. Yelp's users have contributed more than 21 million reviews to the site since we started in 2004.

c. What role does scale – the number of reviews available – play in the amount of traffic to a user-review site like Yelp?

Scale matters to the extent that it drives trust and branding, which in turn should drive traffic and new contributors. For example, Craigslist is one of the most recognized classified listing brands because of the sheer volume and breadth of its classified listing database. As a result, Craigslist would likely have an exponential (and not just a proportional) advantage over a comparable new classifieds service with only a few listings in its database.

In addition, scale may matter for the purposes of "page rank" in Google's organic search results. Using the same Craigslist example above, Craigslist likely features more prominently in organic search results as compared to an upstart because of its massive classified listing database -- even when the upstart has more relevant information in response to a particular search query.

d. How did Google use Yelp's reviews to grow scale for its Places pages?

Google used Yelp reviews to avoid the long, arduous, and expensive task of building its own compendium of reviews from scratch. In effect, Google used Yelp's content as a "honeypot" to attract new users and content contributors in order to achieve scale more quickly and cheaply than it otherwise could without Yelp's content. Indeed, Google publicly touted the growth of review content and mobile traffic during the period when it misappropriated Yelp's content.

e. Were the Google Places pages beneficial in directing more attention and traffic to your reviews?

No. Less than one half of one percent of the traffic that Yelp received from Google came from Google Places.

f. What was Google's reaction when Yelp requested that Google stop using its review content on Google Places?

Google explained that the only circumstance under which Google would stop using Yelp's content was if Yelp removed itself entirely from Google's web search index. Even now, Google

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still insists that it must remove links to Yelp in portions of its web search results in order to comply with Yelp's demand that Google cease using Yelp's content in Google Maps.

2. In response to your company's complaints, Google removed the links to Yelp on Google Places, although links to reviews by Urban Spoon, Metro Mix, and local newspapers and magazines remain. How has this affected Yelp's traffic?

While it is difficult to measure the impact in isolation, once Google removed Yelp's content from Google Places, Yelp's traffic increased significantly across several metrics.

3. The prominence and size of Google Places listings often push competing sites to a significantly lower position on the page. How have the search rank and placement of Google Places affected traffic to Yelp?

It is difficult to measure the impact in isolation, particularly because Google's practices apparently differ from month to month, market to market, and search to search. We do know that studies routinely indicate that prominence and placement matter, and Eric Schmidt underscored this point in his testimony to the Subcommittee.

4. Google recently acquired Zagat, a review-based site similar in many ways to Yelp. In your view, how might Google's acquisition of Zagat affect Yelp's traffic?

Google's acquisition of Zagat is presumably designed to bolster Google's review content, and strengthen its local product offering. It is unclear at this point how the acquisition will affect Yelp's traffic.

5. What corrective action could Google take to ameliorate the current situation?

Google has demonstrated it cannot be trusted to police itself. It is my hope that regulators will ensure that Google competes on a level playing field. For example, Google should not be permitted to preference its own products ahead of its competitors in search results. In addition, Google should not be permitted to incorporate third party content from its web search index into its other products without permission. Similarly, competitors should not be forced to contribute their content to Google under the threat of removal from any portion of Google's web search results.

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SUBMISSIONS FOR THE RECORD

Wednesday September 14, 2011

FRIENDS OF THE HIGH LINE

529 WEST 20TH STREET SUITE 8W NEW YORK, NY 10011 T (212) 206-9922 F (212) 206-9118 INFO@THEHIGHLINE.ORG WWW.THEHIGHLINE.ORG

Senator Schumer
757 Third Ave
Suite 17-02
New York, NY 10017

Dear Senator Schumer,

As chair of Friends of the High Line, I want to thank you for your continued support for what has quickly become a New York treasure and a national model for urban landscapes. I am writing to you today to discuss with you the importance of online visibility, which is facilitated by the role that companies like Google have played in this effort.

Friends of the High Line was established in 1999 with a mission to preserve the unused rail line that runs through New York City, and to redevelop it as a public park area. We have had tremendous success so far. Section 1 (running from Gansevoort Street to West 20th Street) has now been open to the public for two years, and Section 2 (running from West 20th Street to West 30th Street) just opened to the public this past June. In this time, Friends of the High Line has raised over $44 million for our cause. The High Line has quickly become a top attraction in New York – as of April 2010 it has had over 2 million visitors. Our success has been a boon to New York City's economy, generating $2 billion in private investment surrounding the park, creating 12,000 new jobs in the area, including 8,000 new construction jobs.

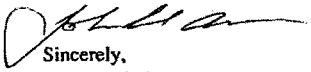
Both our fundraising achievements and our incredible visitation numbers are directly related to our strong web presence. Google has been a critical tool in this effort. If a tourist types "New York City parks" into Google, the High Line web site comes up as the third link, topped only by the NYC Parks Department and the NYC Parks entry in Wikipedia. The High Line tops even long-established parks like Central Park, Bryant Park and Prospect Park.

We rely on Google's search and advertising programs to get word out and bring in resources such as volunteers and donors. In addition, Google has been a strong corporate supporter of the High Line and an indispensible neighbor in a re-energized Chelsea. Not only does Google help the High Line, but it helps both the non-profit sector as a whole and local businesses grow. It fuels information sharing, educational outreach, service delivery and economic growth statewide. In total, Google has provided $8.5 billion of economic activity for New York State businesses, website publishers, and non-profits.

Of course, tourists can find us just as easily using other sources besides Google, including Bing, Facebook and other search engines. As we have seen again and again with technological innovation, customers will always gravitate to the technologies and companies that meet their needs and find the results for which they are searching.

Friends of the High Line – and New York City tourism overall – has reaped the benefits of a strong and vibrant and dynamic neighbor in Google.

Sincerely,



Sincerely,
John Alschuler

SENATE JUDICIARY SUBCOMMITTEE ON

ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS

HEARING ON COMPETITION IN ONLINE MARKETS/INTERNET SEARCH ISSUES

STATEMENT OF

THOMAS O. BARNETT

COVINGTON & BURLING LLP

SEPTEMBER 21, 2011

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I. Introduction

Thank you, Chairman Kohl, Ranking Member Lee, and members of the Subcommittee for holding this very important hearing today.

My name is Thomas Barnett, and I am a partner at Covington & Burling LLP, where I am the co-chair of the global Antitrust & Consumer Law Practice Group. Previously, I served as the Assistant Attorney General and was in charge of the Justice Department's Antitrust Division from 2005-2008. I also worked for the Department of Justice as the Deputy Assistant Attorney General for Civil Enforcement. I have spent the bulk of my career focused on antitrust enforcement and policy matters, and I bring this experience to the issues of competition in the online market place.

II. The Threat Posed by Google to Competition and Consumers on the Internet

The Internet has revolutionized the way that consumers and businesses engage in commercial transactions. About 240 million people in the United States regularly use the Internet,[1] and this activity generated nearly $170 billion in commerce last year, including online advertising and online transactions.[2] The enormous benefits that the Internet offers consumers, however, face an increasing threat from Google that can be summarized as follows:

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[1] *See* Internet World Stats, *Internet Usage and Broadband Usage Report*, http://www.internetworldstats.com/am/us.htm (last accessed Sept. 8 2011).

[2] ComScore, *ComScore Reports Record-Breaking $43.3 Billion in Q4 2010* (Feb. 4, 2011), http://comscore.com/index.php/Press_Events/Press_Releases/2011/2/comScore_Reports_Record-Breaking_43.4_Billion_in_Q4_2010_U.S._Retail_E-Commerce_Spending (providing retail e-commerce spending figures of approximately $142.5 billion in 2010); Clark Fredricksen, *State of the Day: Advertising Online Surpassed Newspapers In 2010*, eMarketer (Mar. 14, 2011), http://www.emarketer.com/blog/index.php/stat-day-online-advertising-surpasses-newspapers-2010/ (stating online advertising spend was $25.8 billion in 2010).

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1. Search is the critical gateway by which users navigate the web: As one Google executive has noted, "[S]earch is critical. If you are not found, the rest cannot follow."[3]
2. Google dominates search and search advertising.
3. Google is expanding its dominance into a broadening range of search-dependent products and services (which also protects and reinforces its search dominance).
4. As one company gains control over access to more and more products and services on the Internet, consumers can expect to face higher prices and reduced innovation.

The key question for antitrust enforcement is *how* Google is expanding its control over the Internet. As described more fully below, there is reason to believe that Google is using its extraordinary power to manipulate users and foreclose the ability of other sites to compete. If so, Google should be found to be violating the antitrust laws and an appropriate remedy should be imposed.

There is an additional concern that warrants particular attention by this Subcommittee. Google already possesses unprecedented power to steer users and to stifle competition. If, for some reason, antitrust enforcement is not able to address these concerns, there will be pressure to reign in Google's power through more direct government regulation that is likely to be more rigid and burdensome and that itself would pose a threat to innovation and economic growth on the Internet.

A. The Crucial Role of Search

There are currently more than 312 million websites with more than a trillion web pages, and more appear every day.[4] Internet users must navigate through this vast array of information, and

[3] Kevin J. O'Brien & Eric Pfanner, *Europe Divided on Google Book Deal*, N.Y. Times (Aug. 23, 2009), *available at* http://www.nytimes.com/2009/08/24/technology/internet/24iht-books.html?pagewanted=all.

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they do so principally through search engines. For example, 92% of adults online use search engines to find information on the Internet.[5] Correspondingly, whether a website is found by consumers depends largely on whether and where it appears on the results pages a search engine produces in response to users' queries. Even established sites like Expedia and TripAdvisor depend on search engines for a large portion of their traffic.

And to be found by consumers, particularly for new sites, a website needs the ability to appear at or near the top of the results displayed by a search engine. Approximately 88% of users' clicks are on links that appear in the top three search results,[6] meaning, for example, that a website that does not appear on the first results page is unlikely to attract significant traffic.

Websites denied the opportunity to attract users are likewise denied the revenue they need to invest in new products and services. Developers will not invest in new applications if they do not have a reasonable prospect of being found by users and succeeding.

As a result, search traffic is the lifeblood of innovation and development on the Internet, and search engines control the flow of that traffic.

B. Google's Dominance of Online Search and Search Advertising

Google dominates online search in the U.S., as confirmed by both the Federal Trade Commission and the Department of Justice in connection with their investigations of Google.[7]

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[4] *See* Netcraft, *April 2011 Web Server Survey*, http://news.netcraft.com/archives/2011/04/06/april-2011-web-server-survey.html; Google Blog, *We Knew the Web Was Big. . .* (July 25, 2008), http://googleblog.blogspot.com/2008/07/we-knew-web-was-big.html.

[5] *See* Kristin Purcell, *Search and Email Still Top The List of Most Popular Online Activities*, PewInternet (Aug. 9, 2011), http://www.pewinternet.org/Reports/2011/Search-and-email.aspx.

[6] *See* SEO Scientist, *Google Ranking and CTR – How Clicks Distribute Over Different Rankings on Google* (July 12, 2009), http://www.seo-scientist.com/google-ranking-ctr-click-distribution-over-serps.html.

[7] *See Statement of Interest of the United States of America Regarding Proposed Amended Settlement Agreement*, U.S. Dep't of Justice, Antitrust Div. (Feb. 4, 2010), *available at* www.justice.gov/atr/cases/f255000/255012.htm#f; *Statement of the Federal Trade Commission Concerning Google/DoubleClick*, FTC File No. 071 0170 at 3 (Dec. 20, 2007), *available at* http://www.ftc.gov/os/caselist/0710170/ 071220statement.pdf.

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At this point, Google faces competition from only one general search engine in the U.S. -- Bing, which is a distant second. Moreover, Google's search dominance has enabled it also to dominate paid search advertising. With control of more than 79% of searches in the U.S.[8] (and over 94% in Europe[9]), and with a share of 80% of paid search advertising in the U.S. [10] (and higher share abroad[11]), Google wields unprecedented power over a site's ability to connect with users.

C. Google's Expanding Dominance

Google has undergone a fundamental transformation in its business that has enormous consequences for competition on the Internet. Originally, Google was purely a search engine with the incentive to direct each user as quickly as possible to the websites most likely to be most relevant to the user's query. More recently, however, Google has expanded into other products and services that include the provision of information (such Google Places, Google News, Google Finance, or YouTube) and specialized "vertical" search services that operate in a specific area (such as Google Maps, Google Product Search, or Google Flight Search).

Google has been highly successful in many of these areas, often replacing the leading company (such as MapQuest) in an extraordinarily short period of time. This expansion has several important implications.

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[8] *See* StatCounter Global Stats, *Top 5 Search Engines in the U.S. from Aug 10 to Aug 11*, http://gs.statcounter.com/#search_engine-us-monthly-201008-201108 (last accessed Sept. 20, 2011).

[9] *See* StatCounter Global Stats, *Top 5 Search Engines in Europe from Aug. 10 to Aug. 11*, http://gs.statcounter.com/#search_engine-eu-monthly-201008-201108 (last accessed Sept. 20, 2011).

[10] Google's share is 80% both by spend and clicks. Efficient Frontier, *Q1 2011 Global Digital Marketing Performance Report* at 4, *available at* http://www.efrontier.com/sites/default/files/EF_1Q11GlobalReport.pdf.

[11] Google's share is 83% of paid search globally. Jonathan Allen, *Google Likely to Expand Lead in Search Ad Market*, Search Engine Watch (Jan. 20, 2011), http://searchenginewatch.com/article/2050155/Google-Likely-to-Expand-Lead-in-Search-Ad-Market.

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First, Google's incentives have changed. Now it has an incentive to steer users to its own web pages and away from competing websites to enable it to increase its revenues. Google earns additional revenues from selling advertisements on the Google pages to which it steers users.

Second, by displacing competition in adjacent markets, Google reinforces its search dominance by stifling the development of nascent competitors. For example, Google benefits by displacing vertical search engines that could deprive Google of some search traffic. Because they operate in a particular vertical context such as travel, shopping and local destinations, vertical search engines can compete effectively with Google within that specific area without having to match Google's enormous scale in general search. Travel search sites like TripAdvisor and KAYAK and the local entertainment site Yelp are examples of such vertical search sites.

Third, Google has begun forcing the natural search results down to the bottom of the first page, and sometimes even to the second page. As a result, Google forces sites seeking to obtain visibility on the first page to spend more for Google paid search advertising, thereby increasing their costs while increasing Google's profits.

D. Google's Exclusionary Conduct

The key issue for antitrust enforcement is *how* Google has been able to expand into these search-dependent areas. If Google has relied in part on exclusionary tactics, then its expanding dominance presents serious antitrust concerns. Unfortunately for consumers, there are strong indications that Google is, in fact, foreclosing competition rather than simply competing on the merits of its own products. Several examples illustrate the concern:

1. Deceptive Display

Google's display of search results is deceptive to users and forecloses the ability of other sites to be seen. Google has long said and users have long come to expect that Google's search results are presented in order of likely relevance to the user's query. This is why paid search ads

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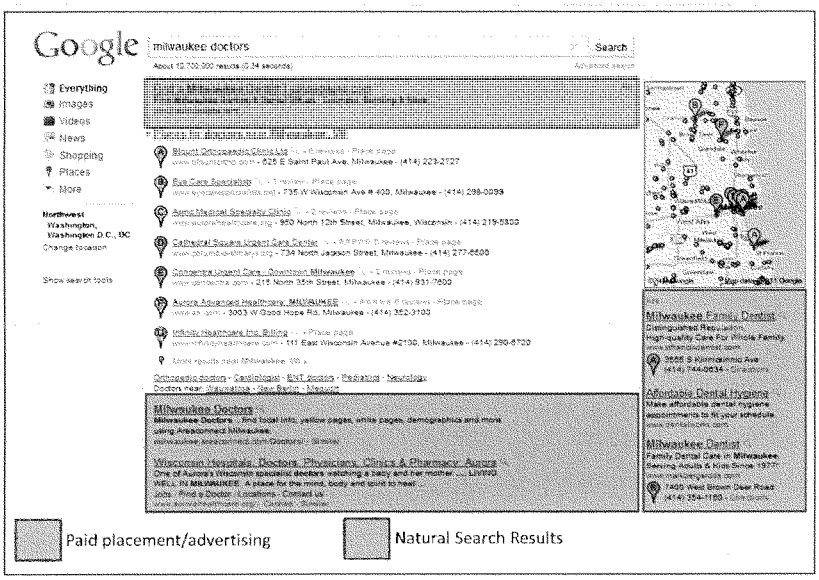
are separated from the natural search results and labeled as "ads." Users are entitled to know that these "sponsored" links were not placed at the top of the results by the algorithm and that Google has an economic interest in placing the links on the page.

Nevertheless, Google has begun inserting at or near the top of the search results page links to its own web pages. For example, a query for "milwaukee doctors," returns nearly a full screen of links -- which include multiple links to Google Places pages -- that are separate from the natural search results that begin only at the bottom of the page.



Indeed, Google has a "policy" of putting links to its own products above the natural search results. As a senior Google executive acknowledged in a moment of candor:

> [When] we roll[ed] out Google Finance, we did put the Google link first. . . . [T]hat has actually been our policy since then,

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> because of Finance. So for Google Maps, again, it's the first link.[12]

Notwithstanding the fact that these links are not "natural" results determined by Google's normal search algorithm and the fact that Google has an economic interest in placing links to its own pages there,[13] Google does not disclose the nature or placement of these links to users. By placing these Google links strategically on its results page, Google can induce users to click on the links under the mistaken impression that they are natural search results that are most likely to be relevant to a query. Moreover, by inserting these Google links onto the first page, Google pushes the natural search results further down, often onto the second page, making it more difficult for competing sites to gain visibility.

Winning by deception is hardly competition on the merits. Nor does it live up to Google's supposed principles to "label advertisements clearly" and "do what's best for the user."

2. Unauthorized Use of Scraped Content

Google also has a history of scraping content, such as user reviews, from other websites and displaying that content without authorization on its own pages, such as Google Places, Google Hotpot and Google Product Search pages. This practice enables Google to expropriate the value of the content (developed through significant investment by others) and deprives the original content creators of user traffic and advertising revenue. For example, Google has scraped content directly from Yelp and TripAdvisor for its Places pages. When TripAdvisor objected and asked Google not to display its content on Google Places pages, Google refused. Instead, Google told TripAdvisor that the only way in which it could prevent Google from using TripAdvisor content on Places pages was to block Google from crawling TripAdvisor pages for

[12] Marissa Mayer, *Speech on Scaling Google for Every User at the Google Seattle Conference on Scalability* at 44:35 (video *available at* http://www.youtube.com/watch?v=LT1UFZSbcxE).

[13] *Id.* at 43:23 ("To the degree that we host content, we ultimately have a monetary incentive to drive people to those pages if those pages have ads on it.").

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any purpose, which would prevent any TripAdvisor page from ever appearing as a result on Google's dominant search engine. In short, Google was tying access to Google's dominant search engine to acquiescing in Google's use of scraped content on another Google product. Again, hardly competition on the merits.

Only when government enforcement officials and the press focused on this practice did Google recently stop scraping content from others for its Places page. Google has yet to commit not to return to this practice in the future and may well be scraping and using content without authorization in other contexts today.

3. Failure to Live Up to Representations Regarding the ITA Acquisition

In April 2011, the Justice Department challenged Google's acquisition of ITA Software as a violation of the antitrust laws and obtained a judicial decree that limits Google's ability to use its control over this key technology to undermine competition for online travel search. Prior to being acquired by Google, ITA had a long history of developing innovative new flight search technology that it made available to its numerous licensees, including Orbitz, TripAdvisor, Bing Travel, and other online travel search sites. In an effort to deflect this concern, Google sought to defend the transaction by claiming that it would use ITA technology to "benefit passengers, airlines and online travel agencies by making it easier for users to comparison shop for flights and airfares." Just last week, Google launched its own online travel search service. Notwithstanding the judicial decree and Google's promise, the service excludes any link to online travel agencies, which are key options for comparison shopping. Further, the Google service utilizes a new version of ITA software that, now that Google owns ITA, is available only to Google, also continuing to undermine choices for consumers.

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4. Other Tactics

Google also has been accused of a range of other exclusionary tactics. For example, there are numerous complaints that Google is manipulating its algorithm to promote its own sites. If Google is penalizing the rankings of other sites because they compete with Google sites, such a practice would be inconsistent with Google's representations about its search algorithm.

E. Mobile

The future of the Internet is mobile. By 2014, the number of mobile Internet users will surpass the number of users accessing the Internet via a desktop computer.[14] Several facts already warrant serious concern for competition and consumers in the mobile space.

First, Google's dominance in mobile search and search advertising is virtually absolute. Recent estimates indicate that Google controls around 98% of mobile search in the U.S. and 97% of mobile search advertising.[15] And Google is transferring its search practices described above to the mobile arena. For example, the following illustrates how Google has scraped user reviews from TripAdvisor and Yelp and displayed them without authorization (and without attribution in these cases).

[14] Morgan Stanley, *The Mobile Internet Report, available at* http://www.morganstanley.com/institutional/techresearch/mobile_internet_report122009.html.

[15] Greg Sterling, *Google Controls 97% of the Mobile Paid Search: Report*, Search Engine Land (Mar. 7, 2011).

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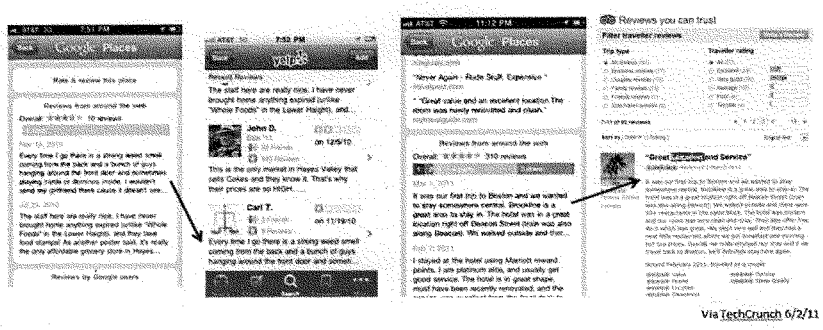
CONTENT SCRAPING IN MOBILE



Second, Google is obtaining a new, potentially even more powerful tool for controlling the mobile Internet experience: its Android mobile operating system. By bundling its dominant search advertising service with its Android operating system, Google can give away Android for "less than free." As a result, it has grown in less than two years from a tiny fraction of the market to 40% percent or more today.[16] Further, Android continues to gain share rapidly as more than 50% of all smart phones shipped in the U.S. today use the Android operating system.[17]

Thus, Android appears to be rapidly becoming the dominant mobile operating system. Further, there are signs that Google is already using Android as a "club" with which to force

[16] Don Kellogg, *40 Percent of U.S. Mobile Users Own Smartphones; 40 Percent are Android*, NielsenWire (Sept. 1, 2011), http://blog.nielsen.com/nielsenwire/online_mobile/40-percent-of-u-s-mobile-users-own-smartphones-40-percent-are-android/.

[17] *The NPD Group: As Android Solidifies Lead, Google Acquisition Has Potential to Revitalize Flagging Motorola*, Port Wash. (Aug. 22, 2011), *available at* http://www.npd.com/press/releases/press_110822a.html.

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handset manufacturers to take actions to favor Google products over those of competing products.[18]

The mobile arena bears close scrutiny from both policymakers and antitrust enforcement officials.

I. Harm to Consumers

Google's tactics result in real harm to consumers in the form of deception, increased prices, and less innovation.

Deception: Users expect search results to be returned in order from most relevant to least relevant. As discussed above, when Google places links to its own products (*e.g.*, News, Product Search, Places) in one of the top positions without any indication that these are "unnatural," hard-coded links, the result is deceptive to the user. Whereas many consumers recognize that the sponsored links at the top or along the right side of the screen are advertisements -- and indeed they are labeled as such -- there is no such distinction for links to Google's own products.

Further, Google's own links often take up a significant amount of the screen real estate, limiting the number of natural results that can appear, making it even more difficult for users to find quickly the link most likely to be relevant to the query.

Higher Prices: In 2010, Google made over $28 billion from advertising. Google's dominant share in search makes its advertising platform, AdWords, a "must-buy" for businesses that seek to advertise on the Internet. In the absence of a competitive search advertising marketplace, the prices Google commands for advertisements are higher than they otherwise would be. Just as in the offline world, higher advertising prices are passed along to consumers in the form of higher prices on goods and services.

[18] Steve Lohr, *Suit Opens a Window Into Google*, N.Y. Times (May 8, 2011), *available at* http://www.nytimes.com/2011/05/09/technology/09google.html?pagewanted=all.

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Reduced Innovation: Google's tactics foreclose the ability of other sites to compete on the merits and to achieve the scale necessary to succeed. Without search traffic and the resulting revenues, these sites are unable to deliver innovative content and better services to consumers. Further, websites and content creators often must spend more money on paid search advertising to offset in part their loss of visibility, taking away further resources from investment in innovation. In the end, the result is that a single company, Google, becomes the only company capable of significant investment in innovation across many areas of the Internet, and such a lack of competition means less innovation.

III. Antitrust Scrutiny and Enforcement Can Make a Difference

A close examination of Google and its business practices demonstrates that the elements of a monopolization or monopoly maintenance violation appear to have been met. Google has a dominant share of the search and search advertising markets. Google is reinforcing its dominance in these markets while expanding its dominance into other areas. And Google has been pursuing these goals through exclusionary means rather than simply though competition on the merits.

As part of an effort to defend Google against a potential antitrust enforcement action, some have argued that these markets are too complex and dynamic for antitrust enforcement. This argument is simply wrong for several reasons.

As an initial matter, the argument suggests that we should abdicate all antitrust enforcement in this area and permit Google to stifle competition with impunity. The bipartisan Antitrust Modernization Commission (AMC) studied and rejected just such a proposition. The AMC concluded that industries in the "new economy" that involve rapid innovation and technological change can still be policed under existing antitrust laws. In fact, the Commission goes on to report that "just as in other industries, antitrust enforcers should carefully consider market

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dynamics in assessing competitive effects and should ensure proper attention to economic forces at work."[19]

The AMC's conclusion is supported by recent examples. In 2008, the Justice Department's threat of litigation prevented Google from entering into a paid-search agreement with Yahoo! that the Department concluded "likely would have denied consumers the benefits of competition — lower prices, better service and greater innovation."[20]

Similarly, when the Department of Justice scrutinized Google's acquisition of travel software provider, ITA Software, the Department concluded that Google's unrestricted control over ITA's key flight search technology would have violated antitrust laws. As a result, the Department obtained a judicial decree requiring Google to continue to make ITA's key flight search technology available to competing travel search sites.

Most recently, scrutiny by antitrust enforcers has prompted Google to pull back somewhat on its unauthorized use of content scraped from competitors' web pages. This is an example of how antitrust scrutiny can help preserve competition. Of course, to ensure that Google will not resume its prior practice, an enforceable order would be needed.

It is important that antitrust enforcement agencies take action where warranted. Failure to do so will lead to further and further control by Google over larger and larger portions of the Internet. As Google's dominance grows, so will the pressure for some form of government intervention. The benefit of antitrust enforcement is that it preserves freedom to compete in the marketplace. If, however, a more rigid government regulatory regime were to be put in place, the limits on innovation and development could be severe.

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[19] *Antitrust Modernization Commission Chapter 1A Antitrust Law and the "New Economy"* at 32, *available at* http://govinfo.library.unt.edu/amc/report_recommendation/chapter1.pdf.

[20] Miguel Helft and Steve Lohr, *Google Won't Pursue Yahoo Ad Deal*, N.Y. Times (Nov. 5, 2008), at B1, *available at* http://www.nytimes.com/2008/11/06/technology/internet/06google.html.

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IV. Conclusion

Thank you for the opportunity to testify before the Subcommittee this afternoon. I appreciate your attention to these complex, yet important issues as they relate to the growing online market place and future innovation on the Internet. I look forward to answering any questions that you may have.

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THE ASSEMBLY
STATE OF NEW YORK
ALBANY

KARIM CAMARA
Assemblyman 43RD District
Kings County

COMMITTEES
Banks
Children and Families
Consumer Affairs and Protection
Education
Housing
Mental Health

July 26, 2011

Honorable Charles Schumer
United State Senator
757 Third Avenue
New York, NY 10017

Dear Senator Schumer,

As the recovery of our fragile economy struggles to take hold, Congress' top priority must be to embrace policies that lead to job creation and economic growth.

Local small businesses and the companies that are innovating and creating the jobs of the future should be a main focus. These companies have been central to the rise of the Internet marketplace – a principle driver of economic growth for businesses both large and small. Google has been a leader in this regard and we have seen the positive impact from its growth and innovation in communities throughout New York State.

In my district which comprises Crown Heights, Lefferts Gardens, and East Flatbush communities in Brooklyn businesses are looking to expand their customer base. Google provides a path to that, as consumers seeking to make informed decisions look to this search engine for its useful online services. In fact, Google provided over $8 billion in economic activity for over 100,000 businesses, non-profits, and website publishers across the state in 2010.

Nationally, Google is a major driver of economic growth as well, with offices in 20 states and almost 30,000 employees worldwide. Google is a major employer, not just in New York State, but across the country.

Government should not make decisions that can impede job creation in this economic state. Subjecting Google and other pro-consume companies in legal oversights and penalties for their success will not help the economy grow. Instead, allowing consumers to freely utilize services of their choosing is a better way to nurture additional entrepreneurship and job growth.

Sincerely,

Karim Camara
New York State Assembly, 43rd A.D.

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Statement of Chris Chiames
Vice President, Corporate Affairs
Orbitz Worldwide

Submitted to the Senate Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights

Comments for the record for the September 21, 2011 hearing on "The Power of Google: Serving Consumers or Threatening Competition?"

Mr. Chairman and members of the Committee:

Orbitz Worldwide is a leading global online travel company that uses innovative technology to enable leisure and business travelers to research, plan and book a broad range of travel products. Orbitz Worldwide owns and operates a portfolio of consumer brands that includes Orbitz ® (www.orbitz.com), CheapTickets® (www.cheaptickets.com), ebookers® (www.ebookers.com), HotelClub™ (www.hotelclub.com), RatesToGo™ (www.ratestogo.com), the Away Network™ (www.away.com) and corporate travel brand Orbitz for Business™ (www.orbitzforbusiness.com).

In 2010, our collective brands sold more than $11 billion in travel. As impressive as this number is, Orbitz Worldwide is only the third-largest global online travel agency (OTA), underscoring the tremendous opportunity for online travel, and the obvious interest that Google holds in getting into this business, as evidenced by its $700 million purchase of ITA Software and its recent launch of the Google flight search product earlier this month. It is worth noting that Orbitz has utilized the technology of ITA Software since our company's launch in 2001. Therefore, we are watching Google's foray into travel e-commerce with a careful point of view and will keep our comments focused on online travel and Google's impact on that market.

It appears that Google has chosen to launch its flight search product with a very limited set of airlines, offering a subset of destinations and trip types (domestic only, round trip only), and featuring only extremely limited interline capability (whereby a passenger connects from one airline to another, or travels outbound on one airline and back on another.) The product will certainly improve over time, but for the time being, offers only a subset of the capabilities offered by Orbitz. Orbitz not only provides consumers a much broader selection of airlines and destinations, but also other capabilities that meta search sites will find it challenging to match such as the ability to save money through packaging of air travel with hotel and car rental bookings, 24x7 customer service, broad consumer choice with hundreds of airlines and multi-carrier itineraries, and price protection such as that offered by Orbitz Price Assurance.

Consequently, we were surprised that the launch version of Google flight does not provide links to OTAs - only to a handful of select airlines - despite the fact that OTAs represent nearly 40 percent of all travel booked online. Further, Google appears to favor its own flight search service above others as links to OTAs including Orbitz are now lower in the search results, following the so-called "Google box" of flight information.

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As it relates to Google and its growth in travel e-commerce, we hope that this committee and regulators will watch these developments and be guided by Google's own words that were shared with customers following the recent news that the Federal Trade Commission (FTC) had opened a review of Google's business practices. At that time, Google pledged to cooperate with the FTC and affirmed to customers such as Orbitz how they work to serve our interests by telling us that Google operates using these principles:

- **Value.** Google provides tremendous value to consumers, by democratizing access to information, and to businesses, by driving more customers to their websites.
- **Answers.** Google is for consumers, and search is about giving people the answers they're looking for -- whether it's a web result, a map, a video, images, or shopping results. Consequently, Google does not want outside entities dictating search results that could make it harder for to give people the answers they're looking for.
- **Transparency.** Google is committed to transparency -- whether it's telling webmasters how to create high quality websites that rank highly, or clearly labeling ads or sponsored results.
- **Choice.** In search, competition is always just a click away. Google works hard to delight users so they continue to use Google.

Furthermore, the consent decree associated with Google's acquisition of ITA specifically requires Google to make technology available to ITA customers (such as Orbitz) that has not been specifically developed for Google. We expect Google to abide by the letter and spirit of this order, and not look for loopholes to classify updated technology or renamed products as exempt.

It remains to be seen whether travel consumers, as well as Orbitz and other online travel agencies, will be properly served by Google's tenets of fairness. At the moment, there is certainly no evidence of that, but we would expect that the next version of Google flight and all subsequent versions to be focused on giving all sellers of travel true and equitable access, and all consumers unbiased information and choice. On the commercial side, Orbitz will continue to seek fair and equitable treatment by Google in its flight search offering, and access to the technology that is rightfully ours to use through our pre-existing contract with ITA. Specifically:

- Online travel agencies shall be given the opportunity to fully participate and on comparable terms to airlines and other travel providers in Google flight.
- Consistent with our contractual relationship with ITA and the DOJ consent decree, Orbitz expects access to all technologies to which we are entitled.

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Testimony of Susan A. Creighton, Partner, Wilson Sonsini Goodrich & Rosati, P.C.

Before the U.S. Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights

September 21, 2011

Chairman Kohl, Ranking Member Lee, and Members of the Subcommittee:

My name is Susan Creighton, and I am a partner at the law firm Wilson Sonsini Goodrich & Rosati, P.C. I want to begin my testimony by offering my sincere thanks for the opportunity to testify before you today.

I joined Wilson Sonsini after completing my education and clerkship for Justice Sandra Day O'Connor, and I have since represented a wide variety of clients in antitrust matters, including Netscape, Google, and other participants in the Internet economy. After serving in senior positions at the Federal Trade Commission (FTC) between 2001 and 2005, I returned to private practice and now serve as co-chair of Wilson Sonsini's antitrust department. I have represented Google in a variety of matters, and I look forward to discussing with you how Google's business comports with the letter and the spirit of antitrust law and why government intervention would be against the public interest.

Drawing on my experience in antitrust enforcement and in private practice, I hope to offer the committee some insights on why the current complaints against Google are misguided and why Internet search should be allowed to continue to develop and evolve without government intervention. Google's conduct is pro-competitive. Far from "threatening competition," Google has consistently enhanced consumer welfare by increasing the services available to consumers and driving innovation in every segment in which it competes. This is precisely the type of activity the antitrust laws seek to promote. Internet search, in turn, has thrived, with new innovations arriving on the scene all the time and a wide variety of websites and applications competing vigorously for users.

I. MY RECORD OF ANTITRUST ENFORCEMENT

My service at the FTC included positions as Deputy Director of the Bureau of Competition from August 2001 to July 2003 and then as Director of the Bureau of Competition from July 2003 to December 2005. In those capacities, I oversaw the FTC's day-to-day antitrust enforcement activities during a time when the FTC brought more cases challenging monopolistic conduct than during any comparable stretch of time since the 1970s. As Commissioner William Kovacic noted at the time, "Measured simply by the number of cases that allege the Sherman Act

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§ 2 offenses of monopolization or attempted monopolization, the FTC's enforcement actions over the past five years constitute the agency's most ambitious program in roughly thirty years."[1]

During my tenure, for example, the Bureau of Competition challenged an attempt by a California oil company to defraud the California Air Resources Board into ordering new regulations on reformulated gasoline that would have had the effect of requiring station owners (and in turn their customers) to pay royalties on patents the company was pursuing.[2] This would have resulted in consumers paying hundreds of millions of dollars each year just to line the company's pocket. Likewise, we challenged attempts by pharmaceutical companies to foreclose competition in the pharmaceuticals industry by, among other tactics, using improper listings in the FDA's "Orange Book" to block generic competition for key medicines.[3] The companies' illegal conduct, if unchecked, would have increased costs on treatments for cancer, anxiety disorders, and high blood pressure medication. By bringing these kinds of enforcement actions, we saved consumers hundreds of millions of dollars by preventing further abuses of monopoly power.

Just as important as the cases we brought, however, were the cases we did not bring. We received complaints from a variety of sources every day, with varying degrees of merit. Notably, many complaints that merited formal investigation did not ultimately merit an antitrust action. Indeed, I learned firsthand that competitors often seek to use federal regulators to impose costs on their rivals and undermine competition.[4] As such, my experience in the government gave me a deep appreciation for the need to carefully consider whether or not to deploy the powerful tools of antitrust enforcement in any given case.

My career in private practice has given me similar insights. As an attorney based in Silicon Valley, I have helped clients structure their affairs to ensure compliance with the antitrust laws. I have often had to counsel clients that found themselves on the receiving end of an antitrust complaint or investigation, and on occasion, I have also been able to help clients invoke the antitrust laws to eliminate improper market barriers, as I did in my representation of Netscape against Microsoft during the 1990s. Through all of this, I have developed a deep appreciation for

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1 William E. Kovacic, *The Importance of History to the Design of Competition Policy Strategy: The Federal Trade Commission and Intellectual Property*, 30 SEATTLE U. L. REV. 319, 324-25 (2007).

2 *See* Federal Trade Comm'n, Press Release, *FTC Charges Unocal with Anticompetitive Conduct Related to Reformulated Gasoline* (March 4, 2003).

3 *See* Federal Trade Comm'n, Press Release, *FTC Charges Bristol-Myers Squibb with Pattern of Abusing Government Processes to Stifle Generic Drug Competition* (March 7, 2003); Federal Trade Comm'n, Press Release, *Wrongful "Orange Book" Listing Raises Red Flag with FTC; Leads to Consent Order with Biovail Corp. Concerning its Drug Tiazac* (Apr. 23, 2002).

4 *See generally* William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & ECON. 247 (1985).

both the great good that our antitrust laws can do and for the need to tread carefully when challenging business conduct that may enhance consumer welfare.

II. GOOGLE HAS INCREASED COMPETITION AND IMPROVED CONSUMER WELFARE

A detailed account of Google's business practices and their benefits to consumers has already been set forth in Eric Schmidt's testimony. However, I want to highlight a few aspects of Google's competitive impact that are particularly important to an antitrust analysis of its activities.

Google's own success reflects how dynamic and unpredictable the Internet can be. By 1998, *Fortune* declared that Yahoo! had "won" the competition for search engine users.[5] Nevertheless, Google established itself as a major player by the early 2000s and surpassed Yahoo! in 2004.

What accounted for Google's success? As has so often been the case in Silicon Valley, innovation and an ability to provide better products and services were key. Sergey Brin and Larry Page founded Google in 1998 as a real-life application of the technology developed in a graduate research paper, *The Anatomy of a Large-Scale Hypertextual Web Search Engine*, which is still available on Stanford's website. In that paper, they outlined the PageRank system that improved upon existing search-engine algorithms. This is a classic story of American capitalism: two innovative young visionaries developed a better way of providing an important service and completely disrupted a seemingly established order in the process.

PageRank and subsequent advances have enabled Google to continue to innovate and improve its user experience while keeping its services free to users. Google has not allowed websites to pay for placement in natural search results, and all paid Google content has been clearly marked as such. Google also has pioneered "universal results" that offer rich content like maps, images, and other media beyond a simple "ten blue links." Similarly, in paid content Google has prioritized the user, developing the AdWords technology that estimates how likely a user is to click through an ad based on the user's query. This has helped both consumers and advertisers by ensuring users don't have to wade through irrelevant ads and advertisers get in front of users interested in their products and services.

Users have turned to Google because they have found that it responds to their needs. However, users have virtually unlimited options for finding what they need on the Internet. They can and do use other general search engines like Bing or Yahoo!, specialized search engines like Amazon, Yelp, and Expedia or social media like Twitter or Facebook. Similarly, mobile applications from any number of sources allow users to bypass search and directly access the information they need from their smartphone or tablet device. And, of course, users can always go directly to the websites they want without using a search function at all. The cost to a user of switching from Google to any of these alternatives is zero. This helps explain why,

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[5] *See* Randall Stross, *How Yahoo! Won The Search Wars*, FORTUNE, March 2, 1998.

despite Google's success, it has had its share of failed products.[6] Users can and do go to alternative sources if someone meets their needs better than Google does.

Google also provides free "promotion" to high quality sites, including Google competitors, through the operation of its natural search functions. If a user searches for "pizza near 600 Pennsylvania Avenue," links to Urbanspoon and Yelp! show up in the top-10 results. Similarly, when a user enters a "navigational inquiry" (i.e., a search for a particular site), the user gets to that site. Google also includes rich content like maps, images, and Place pages where they are relevant to search results, presenting the user both with quality controlled tools that are integrated with the Google experience alongside natural search results that the user may select based on her own judgment. The fact that competitors like Bing, Yahoo!, and others all provide similar tools reflects consumer demand for these resources, which enable users to go beyond accessing a list of websites and actually find the information they are looking for within the search engine environment.

Finally, it is important to note that Google's activities in bringing the Android operating system to market have rapidly spurred innovation and competition. The presence of Android-based devices on the market has dramatically increased output, increased consumer choice, and lowered prices. In September 2011, for example, a smartphone manufacturer announced that it would bring $29 Android-based smartphones to market, the lowest-cost smartphone yet.[7] This decrease in price and increase in access illustrates how Google's business activities have promoted competition and increased consumer welfare.

III. GOOGLE'S INNOVATIONS IN SEARCH ARE EXACTLY WHAT THE ANTITRUST LAWS SEEK TO PROMOTE

Antitrust law protects "*competition*, not *competitors*."[8] A corollary to this rule is that the antitrust laws concern themselves with efficiency and consumer welfare, not competitor welfare.[9]

By this measure, consumers have benefited enormously from Google's competitive impact. Google has dramatically improved search quality over the years, all while keeping search free to users. The benefits to American society of such activities also have been widely noted. For example, a recent McKinsey study of search details the immense positive impact

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6 *See* Alan Eustice, *A fall spring-clean*, The Official Google Blog, Sept. 2, 2011.

7 *See* Kevin C. Tofel, *Huawei's $29 Android aims at AT&T feature phone users*, CNN.com, Sept. 7, 2011.

8 *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quotations omitted).

9 *See Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 (D.C. Cir. 1986).

search technologies have had on the American economy.[10] Search saves workers 30-45 hours each year.[11] It drives between $57 billion and $67 billion dollars in U.S. commerce annually.[12] Search also saves the U.S. government between $3.7 billion and $5.6 billion each year through improved productivity.[13] Given this positive impact, any call for government intervention should be approached with circumspection.

A. Google Has Complied with the Letter and the Spirit of U.S. Antitrust Law

Consistent with the pro-competitive impact Google has had on the American economy, Google's conduct has fully complied with U.S. antitrust law. There are two major provisions of the current federal antitrust laws that regulate "unilateral conduct," that is, actions taken by one firm (as opposed to agreements among multiple firms). These are Section 2 of the Sherman Act, which prohibits unlawful "monopolization," and Section 5 of the Federal Trade Commission Act, which allows the FTC to prevent "unfair" competition. These laws promote consumer welfare by preventing activities that improperly foreclose competitors from the market or improperly reduce the amount and quality of goods and services available to consumers. As I know from experience, enforcement of these provisions must be carefully balanced against the need to allow competitors room to innovate. Otherwise they can undermine rather than promote consumer welfare.

Successful cases under Section 2 of the Sherman Act are rare. As Judge Frank Easterbrook has noted, "Section 2 . . . must be used with the greatest caution."[14] This is due to the potentially devastating competitive impact of "false positives" that condemn conduct that ultimately promotes consumer welfare and innovation.[15] As the Supreme Court has recognized, "[m]istaken inferences and the resulting false condemnations are especially costly, because they chill the very conduct the antitrust laws are designed to protect."[16]

In light of the costs of false positives, companies are, as a general rule, "permitted, and indeed encouraged, by § 2 to compete aggressively on the merits, any success that [they] may achieve through the process of invention and innovation is clearly tolerated by the antitrust

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10 *See* Jacques Bughin, *et al.*, *The impact of internet technologies: Search*, McKinsey & Co. (2011).

11 *Id.* at 16.

12 *Id.* at 25.

13 *Id.* at 36.

14 *See Ball Mem'l Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1338 (7th Cir. 1986).

15 *See Verizon Comm'cns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) ("*Trinko*").

16 *Id.* (quotations omitted).

laws."[17] Such product innovations are nearly always pro-competitive, and imposing antitrust liability could, contrary to the purposes of antitrust, lead to a chilling of innovation and competition. The whole point of antitrust is to promote consumer welfare by preventing artificial restraints on competition, not to prevent "big" companies from competing on the merits.

Google's product improvements should be viewed in this light. As the Second Circuit has eloquently explained, "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 – more efficient production, greater ability to develop complementary products, reduced transaction costs, and so forth. These are gains that accrue to any integrated firm, regardless of its market share, and they cannot by themselves be considered uses of monopoly power."[18] This is exactly what Google has been doing: engaging in efficient, broad-based activity in the market to compete for users. Such activities have increased competition, enhanced the user experience, and are pro-competitive.

Furthermore, Google's apparent "bigness" obscures the fact that it lacks anything resembling monopoly power. "Monopoly power has long been defined in the courts as the power to exclude competition or to control price . . . ."[19] Google has neither power. Because search is free to users and switching from one search function to another is as simple and costless as typing a different web address into the web browser, Google cannot prevent new websites from opening, it cannot exclude new search functions, it cannot prevent users from switching to competitors, and it cannot otherwise lock users in to its products.

Some competitors try to describe Google as an "essential facility" in order to bolster their antitrust arguments. This doctrine is of questionable use in any context as its implications – namely that the antitrust laws should force a competitor to serve essentially as a regulated common carrier and share its resources with another – is, in the words of a leading treatise, "inconsistent with antitrust's purpose."[20] Even if the doctrine were still viable, it could not apply to Google. Google's search engine does not give it the power to "*eliminate* competition" on the Internet, as is required by the essential facilities doctrine, given that most websites only receive a small fraction of their traffic from Google.[21] Moreover, Google offers "reasonable access" to its search results: high quality, popular, and relevant websites rank highly for free in Google's natural results, and websites that wish to participate in the advertising auction can buy placement in the ads associated with such searches. Indeed, ads for sites with a high "predicted click-

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17 *See Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 281 (2d Cir. 1979) (quotations omitted).

18 *Id.* at 276.

19 *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1414 (7th Cir. 1986).

20 3B Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 771b, at 195 (3d ed. 2008).

21 *See City of Anaheim v. S. Cal. Edison Co.*, 955 F.2d 1371, 1380 n.5 (9th Cir. 1992) (quoting *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 544 (9th Cir. 1991)).

through rate" have a good chance of occupying the most attractive place on Google's results page: the very top. This level of access eliminates any need to apply the essential facilities doctrine.[22] Google's activities thus fully comply with the letter and the spirit of the Sherman Act.

The analysis under Section 5 of the FTC Act is similar as courts have generally declined to read Section 5 as covering conduct substantially beyond the scope of the Sherman Act. For example, in *Official Airline Guides, Inc. v. FTC*,[23] the Second Circuit found that exercising editorial control over one's own product (there, a compilation of flight schedules) and choosing with whom one will deal do not constitute "unfair" competition. The court observed that "even a monopolist, as long as he has no purpose to restrain competition or to enhance or expand his monopoly, and does not act coercively, retains" the fundamental right "freely to exercise his own independent discretion as to parties with whom he will deal."[24] Ultimately, whether under Section 2 of the Sherman Act or Section 5 of the FTC Act, scrutiny of Google's conduct must occur against the background of the primary purpose of antitrust law – promoting competition and enhancing consumer welfare. This principle allows for innovations and product enhancements that benefit consumers.

This background helps explain why courts routinely dismiss antitrust cases brought against Google over Internet search. For example, in *Kinderstart.com LLC v. Google Inc.*,[25] the district court dismissed as meritless a case challenging Google's AdWords auction practices, finding that the plaintiff could not adequately define a relevant antitrust market and had failed to allege predatory conduct (as opposed to legitimate business decisions). The Ninth Circuit summarily affirmed a similar dismissal in *Person v. Google Inc.*[26] Most recently, an Ohio state court dismissed an attempt by myTriggers.com to assert antitrust counterclaims in a collections suit brought by Google because myTriggers could not allege harm to competition from Google's activities.[27] The running theme of all these decisions is that Google has not harmed competition or consumers. That makes sense: Google has been good for consumers, saving them time and money. Thus, it is not surprising that Google's activities have been vindicated by the courts.

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22 *See MetroNet Services Corp. v. Qwest Corp.*, 383 F.3d 1124, 1130 (9th Cir. 2004) ("[W]here access exists, the doctrine serves no purpose.") (quoting *Trinko*, 540 U.S. at 411).

23 630 F.2d 920 (2d Cir. 1980).

24 *Id.* at 927-28 (quotations omitted).

25 2007 WL 831806 (N.D. Cal. Mar. 16, 2007).

26 346 Fed. Appx. 230 (9th Cir. 2009).

27 *Google Inc. v. myTriggers.com, Inc.*, Case No. 09CVH10-14836 (Franklin Cnty. Ct. of Common Pleas, Aug. 31, 2011).

B. Internet Search has Thrived on Free Competition

The antitrust laws stand as "the Magna Carta of free enterprise"[28] because they provide tools to clear illicit market obstructions while otherwise leaving businesses free to innovate and compete on the merits. This allows for the economy to operate on a free market basis rather than under central planning, and in turn unleashes the vibrancy and creativity that have characterized American business since the days of Henry Ford.

Internet search reflects this dynamism. New innovations in search quality and search options are introduced all the time, from rich content results like maps, images, and local pages that have become standard content for all generalist search engines to new and creative mobile applications that provide useful search functions. Google faces substantial competitive pressures from shopping and travel sites like Amazon and Kayak, encyclopedia-style sites like Wikipedia, and any number of new mobile apps, just to name a few. Even if one were to focus narrowly on share of U.S. searches using general search engines, third parties report a consistent drop in Google's share of general search engine traffic, which is inconsistent with any hypothesis of monopoly power.[29]

Most importantly, consumers face zero switching costs. A user desiring a non-Google product for search does not need to purchase new technology, invest extensive time installing new software, or do anything at all beyond typing in a different website. A vast array of companies compete for each user's clicks and attention, so the user is truly in the driver's seat when it comes to navigating the Internet. And, indeed, statistics bear this out: almost three-fourths of all heavy search engine users use multiple search engines each month.[30] All of this competition for users and the attendant innovation generated by such competition demonstrates that the market works.

Search has evolved rapidly and dynamically, and continues to evolve to this day. In just a few years, the title of leading search engine has passed from WebCrawler to AltaVista to Yahoo! to Google. Moreover, no one knows how long search engines as they currently exist will continue, given the wide array of new approaches arriving on the scene, ranging from the skyrocketing importance of social networks to the explosion in mobile applications. Courts and antitrust agencies are "ill suited" to the task of "act[ing] as central planners, identifying the proper price, quantity, and other terms of dealing" for a complex area like Internet search.[31] This

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28 *Trinko*, 540 U.S. at 415 (quoting *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972)).

29 *See* Matt McGee, *One Year Later, Bing-Powered Search Takes 4% Market Share From Google – Hitwise*, Search Engine Land, Sept. 8, 2011.

30 *See* Jacqui Cheng, *Nielsen: fickle search engine users could benefit Bing*, ars technica, June 2, 2009.

31 *See Trinko*, 540 U.S. at 408.

is because "[e]ffective remediation of violations of regulatory sharing requirements will ordinarily require continuing supervision of a highly detailed decree."[32]

Consumers would be particularly harmed if Google or other Internet companies were hampered in their ability to combat spammers and other purveyors of low quality or harmful content. It can be easy to underestimate the risk posed to consumers by what amounts to an entire industry of "blackhat" sites whose aim is to trick search algorithms in order to achieve high search engine rankings and get malicious content in front of users. For example, the fraudster behind the DecorMyEyes website relied on traffic generated by negative reviews on review sites to drive up his search rankings.[33] Other examples of questionable conduct that falls short of outright fraud abound, such as attempts by owners of establishments to pay for favorable reviews on user review sites.[34] In fact, prior to Google's recent algorithm updates, which were intended to improve the quality of Google's search results, some commentators were complaining that "Google has become a jungle: a tropical paradise for spammers and marketers."[35] Internet companies need flexibility to combat the ever-evolving tactics of spammers and others who try to game the system, and imposing government regulation is certain to slow that process and thereby undermine efforts to improve the user experience.

Ultimately, regulation of Internet search would result in a significant expenditure of government resources and a decline of quality and innovation in search. Defining what factors may be considered in a "neutral" search would be an impossible task. Any Internet search regulatory agency would find itself flooded with requests from website proprietors seeking to improve their search rankings, and would find it impossible to sort through such claims in a neutral and coherent way. The end result would be a loss of user choice, a loss of dynamic competition, a loss of creativity and innovation, and a loss of consumer welfare, all at substantial cost to the federal government.

The Ninth Circuit's treatment of IBM's innovation in the 1970s to combine disk drives and computer processing units (CPUs) provides a great example of the benefits from deferring to the market's judgment in dynamic industries. By creating an integrated set of control circuitry for computers, IBM was able to drive down the costs of the control devices necessary to run a computer.[36] The Ninth Circuit rejected a competitor's claim that this integration violated the

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32 *Id.* at 414-15.

33 *See* David Segal, *Online Seller Who Bullied Customers Pleads Guilty*, N.Y. TIMES, May 13, 2011 at B2.

34 *See* David Streitfeld, *In a Race to Out-Rave, 5-Star Web Reviews Go for $5*, N.Y. TIMES, Aug. 20, 2011 at A1.

35 *See* Vivek Wadhwa, *Why We Desperately Need a New (and Better) Google*, TechCrunch, Jan. 1, 2011; *see also* Danny Sullivan, *Google Forecloses On Content Farms With "Panda" Algorithm Update*, Search Engine Land, Feb. 24, 2011.

36 *See Cal. Computer Prods. v. Int'l Bus. Machs.*, 613 F.2d 727, 744 (9th Cir. 1979); *see also Transamerica Computer Co., Inc. v. Int'l Bus. Machs.*, 698 F.2d 1377 (9th Cir.

Sherman Act, recognizing that IBM "had the right to redesign its products to make them more attractive to buyers – whether by reason of lower manufacturing cost and price or improved performance."[37] This laid the groundwork for low-cost computer hardware, which ultimately led to the creation of the personal computer and the widespread use of computing technology. The Ninth Circuit thus facilitated innovation and enhanced consumer welfare precisely by refraining from interjecting government mandates into a dynamic industry. The government should do the same here and allow Internet search to continue to evolve and develop freely in the competitive market.

IV. CONCLUSION

Judge Learned Hand wrote that "[t]he successful competitor, having been urged to compete, must not be turned upon when he wins."[38] This statement reflects a profound truth about the American economy: we want businesses to work hard and innovate to gain customers. Competition leads to new and better products, improved services, and lower consumer prices, all of which ultimately contribute to the high standard of living enjoyed by the American people.

Businesses must play by the rules and compete through such means as "better service or lower prices, or . . . superior planning initiative or managerial skills."[39] If they do so, then they should have the freedom to choose how to improve their products and manage their resources, allowing the market to sort through what is and is not worthwhile to consumers through the free play of the competitive process rather than having the government pick winners and losers. As discussed above, Google has had success through innovating and competing on the merits, and new innovations from Google and other competitors come out all the time. The end result has been that consumers have more and better choices, thus demonstrating that the free market, protected by antitrust, has achieved the foundational goal of U.S. competition policy: improving consumer welfare. Thank you.

1983); *Memorex Corp. v. Int'l Bus. Machs.*, 636 F.2d 1188 (9th Cir. 1980); *Telex Corp. v. Int'l Bus. Machs.*, 510 F.2d 894 (10th Cir. 1975).

37 *Cal. Computer Prods.*, 613 F.2d at 744.

38 *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945).

39 *See Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 621-22 (1953).

APPENDIX: NONE OF GOOGLE'S ACTIONS IS COMPARABLE TO MICROSOFT'S

Some have sought to compare Google's actions with those of Microsoft in the well-known case brought by the Department of Justice and decided by the D.C. Circuit in *United States v. Microsoft Corp.*[40] I am quite familiar with the *Microsoft* case, having served as one of Netscape's lawyers. The attempted comparison, however, is simply wrong. Microsoft took affirmative and aggressive steps to keep Netscape and Sun's Java virtual machine off personal computers entirely. It effectively prohibited computer makers from installing Netscape, and ensured that Netscape could not get distribution through Internet service providers or independent software vendors either; in the case of Java, it configured Windows to ensure that Java would not work, forcing users to rely on Microsoft's own virtual machine. Likewise, Microsoft exploited the high cost of switching operating systems as well as the network effects of Microsoft applications (e.g., Word) to lock users into the full array of Microsoft products.

Google has done nothing of the kind. Nor could it as the switching costs for a search engine are miniscule and the network effects are far weaker. Finding Bing, or Yahoo!, or Yelp!, or Expedia, or Amazon, or Wikipedia, or eBay on the Internet is inherently easy, and nothing Google could ever control. Quite the opposite: through its frequent links to these and other sites, Google in fact promotes them for free. Google's efforts are uniformly designed to improve search for the benefit of users. Further, Google's applications (e.g., Google Docs) enable users to work with a variety of file types regardless of the software available to them. Microsoft's activities, in contrast, were designed to shut out rivals regardless of user desires.

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[40] 253 F.3d 34 (D.C. Cir. 2001).

MoCADA

MUSEUM OF CONTEMPORARY AFRICAN DIASPORAN ARTS

September 8, 2011

Honorable Charles Schumer
United State Senator
757 Third Avenue
New York, NY 10017

Dear Senator Schumer,

As the founder and executive director of the Museum of Contemporary African Diasporan Arts (MoCADA), I know well the far-reaching consequences of an economic downturn. During a recession, we experience a shortage of donors and volunteers, which hinders our ability to expand, especially in our various public interest initiatives that serve to cultivate the next generation of artists and arts professionals. We know well that the success of our museum and associated initiatives depends on the success of the large economy. Congress needs to do everything in its power to focus on creating jobs and putting the economy back on track. The first thing congress can do is avoid placing undue restrictions on thriving and innovative companies.

Online companies have managed to weather the recent recession far better than most other industries. Non-profits and small businesses are able to take advantage of the services of innovative online companies during both good and bad economic times. Google, one of these online companies, has made information far easier to share, to the benefit of MoCADA.

Google's search and information allow MoCADA to gain exposure not otherwise possible. If one searches for "diasporan art" MoCADA's home page (www.mocada.org) is the first link to appear. The third result is a Wikipedia entry for MoCADA allowing users obtain information about our museum in another context. Google's exposure allows MoCADA to gain more donors and volunteers. This gives us the ability to expand our services and continue to employ programs that serve the public interest and help to cultivate young artists.

Google has invested in non-profit organizations across the state, using grants, in-kind advertising donations, free tutorials and other tools. Small businesses across New York State have turned to Google as well. Google has provided $8.5 billion of economic activity for New York State businesses, website publishers, and non-profits. Additionally, Google provided $64 billion of economic activity nationally in 2010. Google helps small businesses as well as non-profits grow. It fuels information sharing, educational outreach, service delivery and economic growth statewide.

The success of MoCADA relies on the overall health of the economy. The last thing our economy can currently afford is for Washington to stifle the progress good corporate citizens like Google are making to help small businesses and non-profits.

Sincerely,

Laurie A. Cumbo
MoCADA Founder & Executive Director

80 Arts | The James E. Davis Arts Building
80 Hanson Place Brooklyn NY 11217-1506 USA t 718 230 0492 f 718 230 0246 e info@mocada.org www.mocada.or

Senator Grassley's Intro Statement for Google Oversight Hearing, September 21, 2011

Chairman Kohl and Senator Lee, I appreciate you holding this antitrust oversight hearing this afternoon. I know that folks back in my great home state of Iowa are following what is going on in this Committee room with interest. That's because in rural Iowa, many companies – both big and small – depend on open and fair access to the internet to reach potential customers and to expand their businesses.

I've heard from Iowans who are concerned that Google is unfairly using its market power to manipulate internet search and drive web traffic to its own sites to the detriment of small businesses and consumers. They are frustrated by business practices that are not transparent or fair. They are concerned that Google is engaging in anti-competitive behavior that is thwarting a competitive marketplace.

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However, I've also heard from Iowans who are extremely supportive of Google's products and services. These people rely on those products and services to access customers and grow their businesses. They are concerned that the federal government is being overly aggressive, and will place burdensome rules and regulations on a company that is creating good jobs and innovative consumer tools for Iowans.

I agree that we should not be penalizing successful companies that are innovating, providing cost-effective and productive services, and creating the jobs of the future. I agree with those constituents that tell me that "it is important to let the free market continue to work, and for consumers to be able to freely choose which online services they use" because "this is a better way to provide additional entrepreneurship and job growth."

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However, I also believe that companies should not take unfair advantage of their market power, use their dominance to quash worthy competitors, and engage in deceptive business practices that negatively impact the marketplace, small businesses and consumers. I don't believe that the government should be imposing burdensome regulations or "picking winners and losers." Yet, I also believe that the antitrust laws have a role to play in ensuring that there is a level playing field for all. I don't have a problem with companies being fierce competitors – however, all companies must play by the rules. I agree that companies should employ open, fair and transparent business practices that do not harm competition or impede consumer choice.

So I come to this hearing to ask questions from both sides. I'm here to listen and ask questions raised by my constituents. I'm here to make sure that the voices of Iowans are heard in this discussion. Thank you.

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THE ASSEMBLY
STATE OF NEW YORK
ALBANY

CARL E. HEASTIE
83rd Assembly District
Bronx County

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CHAIRMAN
Committee on Cities

COMMITTEES
Corporations, Authorities and Commissions
Education
Housing
Labor
Small Business

August 15, 2011

Honorable Charles Schumer
United State Senator
757 Third Avenue
New York, NY 10017

Dear Senator Schumer,

As a member of the New York State Assembly committee on Small Business and Labor committee, I speak regularly with members of the community who are struggling to find jobs in our weak economy. As the fragile recovery struggles to take hold, Congress' top priority must be to embrace policies that lead to job creation and economic growth.

In particular, we should promote – not hinder – start-ups, local small businesses, and the companies that are innovating and creating the jobs of the future. These companies have been central to the rise of the Internet marketplace – which remains one of America's economic success stories and a principle driver of economic growth for businesses both large and small. Google has been an innovator and leader in this new American success story, and we have seen the positive impact from its growth and innovation in my community.

In my district which covers the Williamsbridge, Wakefield, Edenwald, Eastchester, and Baychester sections of the Northeast Bronx businesses are looking to expand their customer base and consumers seeking to make informed decisions look to Google and its useful online services.

Small businesses across New York State make use of Google's cost-effective search and advertising programs to bring them customers – customers that help them expand and add jobs. In fact, Google provided $8,570,080,000 of economic activity for 125,300 businesses, non-profits, and website publishers across the state in 2010. Nationally, Google is a major driver of economic growth as well. Last year, the company provided $64 billion of economic activity in the United States. Google has offices in 20 states and almost 30,000 employees worldwide. Google is a major employer, not just in New York State, but across the country.

At this time of economic uncertainty, the wrong choice for government would be to take steps that impede innovation and job creation. Tying up pro-consumer companies like Google in endless legal oversight and penalizing them for their success will not help the economy grow—not in my community and not nationally. Instead, allowing the market to continue to work successfully and consumers to freely choose which online services they use is a better way to nurture additional entrepreneurship and job growth.

Sincerely,

Carl Heastie
New York State Assembly, 83rd A.D.

PREPARED REMARKS

JEFFREY KATZ

CHIEF EXECUTIVE OFFICER, NEXTAG, INC.

Mr. Chairman, and Committee Members, thank you for the opportunity to be here today to discuss what I think are very important issues to the future of our e-commerce industry.

First, a note about us. Nextag is an internet comparison shopping company. Thousands of merchants list their products on our sites, and our visitors use our content and features to find the right products and to compare prices and services from many merchants. About 70% of our partners are small merchants who you've never heard of, and before today, many of you probably had never heard of us either. But about 30 million shoppers a month use our site and we send over $1 billion of sales to our merchant partners.

Google has been a principal and an outstanding partner to us for many years so I am here with due respect and regard for their company and their people – but I am here to say what must be said about the Google of today to ensure that e-commerce remains competitive and vibrant.

Will we have a growing and competitive e-commerce marketplace where Google's capabilities allow anyone to harness the economic power and growth of the internet? Or – will we have what the numbers show is quickly happening - will Google continue their powerful practices that make e-commerce a market mostly for large brands, and for those who don't compete in sectors that Google intends to dominate.

Will the internet be as open and competitive as it was 10 or so years ago when I first worked with a small company that no one had heard of with a funny name from the world of mathematics – Google? At that time they were the only online company who would let me advertise as a younger Founding CEO of a travel company no one had heard of called Orbitz. Google's approach to letting the small thrive through an innovative bidding process that enabled all to get access to ads, and a ranking process that let all websites be visible based on their relevance to consumers, was brilliant and it was open. It created massive growth in the digital economy for all. Back in 2002 this openness and competitive aspect of the internet was also available to the founders of Nextag. They began to invest around Google's ideas, and technology.

But what Google engineering giveth, Google marketing taketh away. Google abandoned these core principles when they started interfering with profits and profit growth. Today, Google doesn't play fair. Google rigs its results, biasing in favor of Google Shopping and against competitors like us. As a result, Nextag's access is more and more discriminated against. Not because our service has gotten worse –in fact our service is much better than it has ever been – but because we compete with Google where it matters most, for very lucrative shopping users.

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We are here today to speak before you because our example makes it clear, and our data makes is expressly clear, that if this is happening to us, a sophisticated, best-practices, large advertiser in Google, then it is also true that is happening to many. With every passing month of Google's approach, it is becoming more true that e-commerce is less and less competitive. Every day other companies like ours will fare worse and consumers will see less choice and investment in this arena will become more about haves and have-nots. And that is a very big deal. Google says that competition is just one click away, but that is like saying move to Panama if you don't like the tax rate in America. It's a fake choice because no one has Google's scope or capabilities and consumers won't, don't, and in fact can't jump.

In spite of our success, we estimate that under 10% of our shoppers remember us when asked, and that is precisely because we are among the world's experts in how to use Google as a marketplace. For example, we are a very large Google search advertiser, we believe among the top 25 advertisers on Google's AdWords platform based on a third party ranking. We manage and bid on hundreds of millions of Google search keywords using very sophisticated software, elaborate statistical methods, and extensive and geographically distributed hardware which we have developed at great cost. What we do, very few companies can replicate. In fact I do not believe any company has invested nor has the scope of technology in this field that we do.

This technology means we can help little companies — who cannot possibly invest in the tools or the head-numbing-statistical methods required to be profitably successful within Google – sell their products, from cameras, to apparel, to home and garden goods, to jewelry. Try it out sometime. Nextag will surprise you with what a good site it is.

Competition drives us to improve our services for our merchant partners and for users. For example, last week we previewed new features for our merchants that give them more flexibility and control, so they can work with us in the way that's best for them, and generate as many sales and find as many new customers as possible. Google Shopping does not have these features.

For users, we have developed many new features that help consumers find better deals and track products they are interested in, both on the internet and on mobile devices, and we have added new, more useful information to our sites and more original content. Google Shopping has few features and almost no original content.

Merchants also benefit by having several robust comparison shopping providers so that they are not beholden to a single monopolist. Robust competition drives down price and gives merchants a choice if Google shuts them off or deranks them because Google has a new plan or because maybe they just bought Amazon. As we have seen many times with companies like Overstock, even sophisticated companies can be impacted by the whims - Google calls them policies - of Google's dominance. Competition keeps Google from being the sole judge and jury on which merchants succeed and which fail.

Google tells you that its actions help consumers. But when competition shrivels, consumers are hurt. Try Google Shopping and you will see. It is very pretty and has

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many sellers – Google's biased results give it a tremendous amount of influence after all. And of course it displays other Google services like YouTube. But there's little new or innovative - because there needn't be much. Google attracts users to Google Shopping by rigging the results to favor itself, not by winning against its competitors.

I think Google is a great company and remarkable success story. We are pleased to have helped them grow their business and we are appreciative they helped us grow ours. Now, however, they are not innovating, they are copying our business after we invested hundreds of millions of dollars to perfect it, and they are very politely, deftly, and assuredly moving us aside.

Today, honorable Committee Members, when you search for a product, like fishing poles, or running shoes, or washing machines, Google is not a search engine anymore, it's a commerce site, biased and organized to suit Google's commercial needs. Rigging the results to keep specialists like us at bay is the moat that Google has dug around its search crown jewels. But the consumer doesn't know that. It's not stated clearly in any way that that is what is occurring. It is not stated that good options have been excluded or obscured because Google believes that is best for Google. If they dominate a marketplace, they have at least the responsibility to provide fair access. Of course, other more stringent requirements would be needed too, but it needs to be addressed or competition will wane, and consumer interests will be diminished on the world's biggest internet information company. The company that dominates the information highway, and controls all of its digital billboards, and all of the digital park benches along its digital rest stops that tell shoppers on that highway where to go and what to buy. And that's something I never thought I'd see from this company nor have to be here to say.

I hope this committee, and Google itself will act to balance the forces that enable competition to persist. This is a very big deal. We should get it right and make it right.

Mr. Chairman and Members of the Committee, thank you very much for your time and attention.

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Statement of Senator Patrick Leahy (D-Vt.)
Chairman, Senate Judiciary Committee
Hearing on "The Power of Google: Serving Consumers or Threatening Competition"
September 21, 2011

Today, the Antitrust Subcommittee examines the state of competition in online search. This hearing focuses primarily on one company – Google – which has become an emblem for success in the new economy. I look forward to hearing from all of the witnesses today as they assess Google's business practices and the state of competition in the Internet search and advertising markets more generally.

Whether it is Gmail, Google Books, YouTube, or Google Travel, few companies have invested as much money and creative energy in online ventures – both successes and failures – to improve the online experience, as Google. Today's hearing, however, is focused on the business with which the very name "Google" has become synonymous – Internet search.

The Internet provides access to an astonishing collection of free and easily accessible content and information. The ability of search engines to direct users quickly to the most relevant content has spurred creativity and the rapid growth of diverse businesses. Google is the operator of the most successful search engine.

The antitrust laws do not exist to punish success. What we try to do through these laws is ensure that business on the Internet remains dynamic, and that new entrants with new business models that will create jobs and improve our economy are not stifled. Although the Internet economy is complex and evolving, the antitrust laws are as necessary online as in any other area of our economy.

Any antitrust investigation into this industry should start with a threshold question: Does Google have a level of market power in online search or search advertising that brings with it certain obligations under the competition laws? This involves an analysis not only of market share, but of the structure of the search market, including whether barriers to entry exist that might prevent new competitors. If Google does indeed have market power, the subsequent question is whether Google leverages this market power to harm competitors in its other lines of business. This inquiry will ultimately be the responsibility of the antitrust authorities at the Federal Trade Commission and the Department of Justice. I have confidence in their commitment to conduct a fair investigation.

Internet search and advertising has the ability, when working at its most efficient, not only to connect us globally but also locally. Internet users across the world can quickly search for and connect to Green Mountain Coffee in Vermont. But just as importantly, Vermonters in Essex Junction looking for a local florist can use a similar Internet search to quickly find Maplehurst Florist, and not just national chains. Competition, which is

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the bedrock of the antitrust laws, ensures that consumers will continue to have this choice.

I thank the witnesses for appearing and look forward to their testimony.

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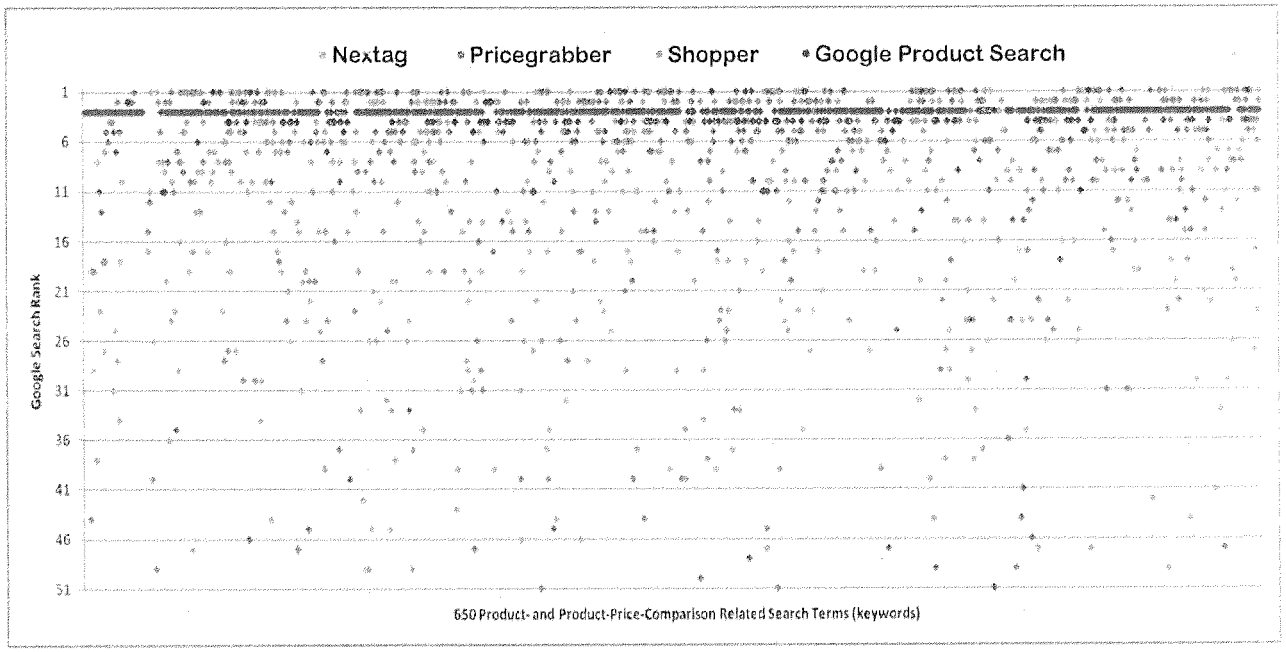
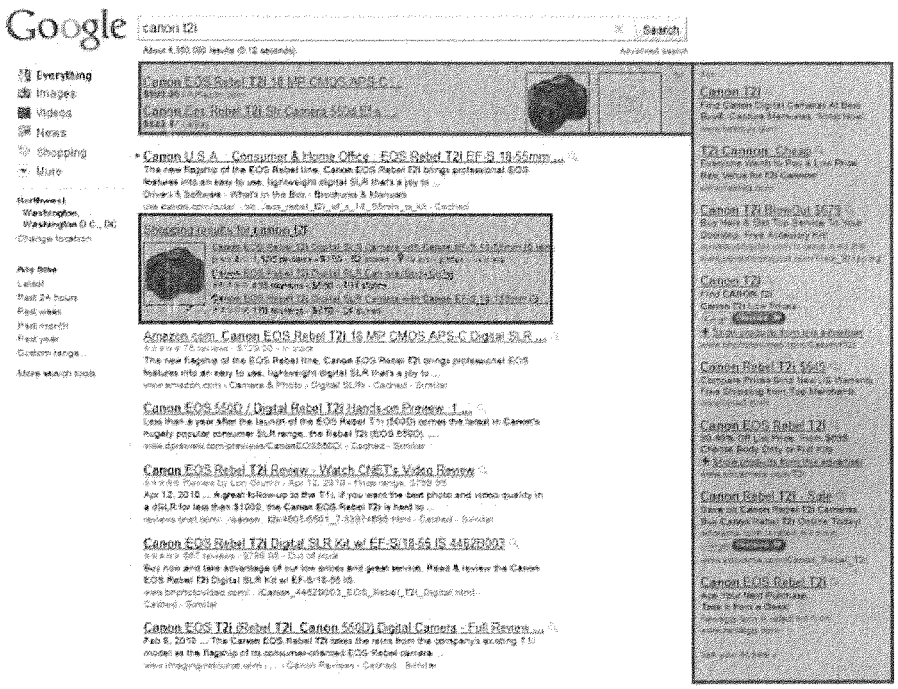
Google Product Search vs. Popular Price Comparison Sites



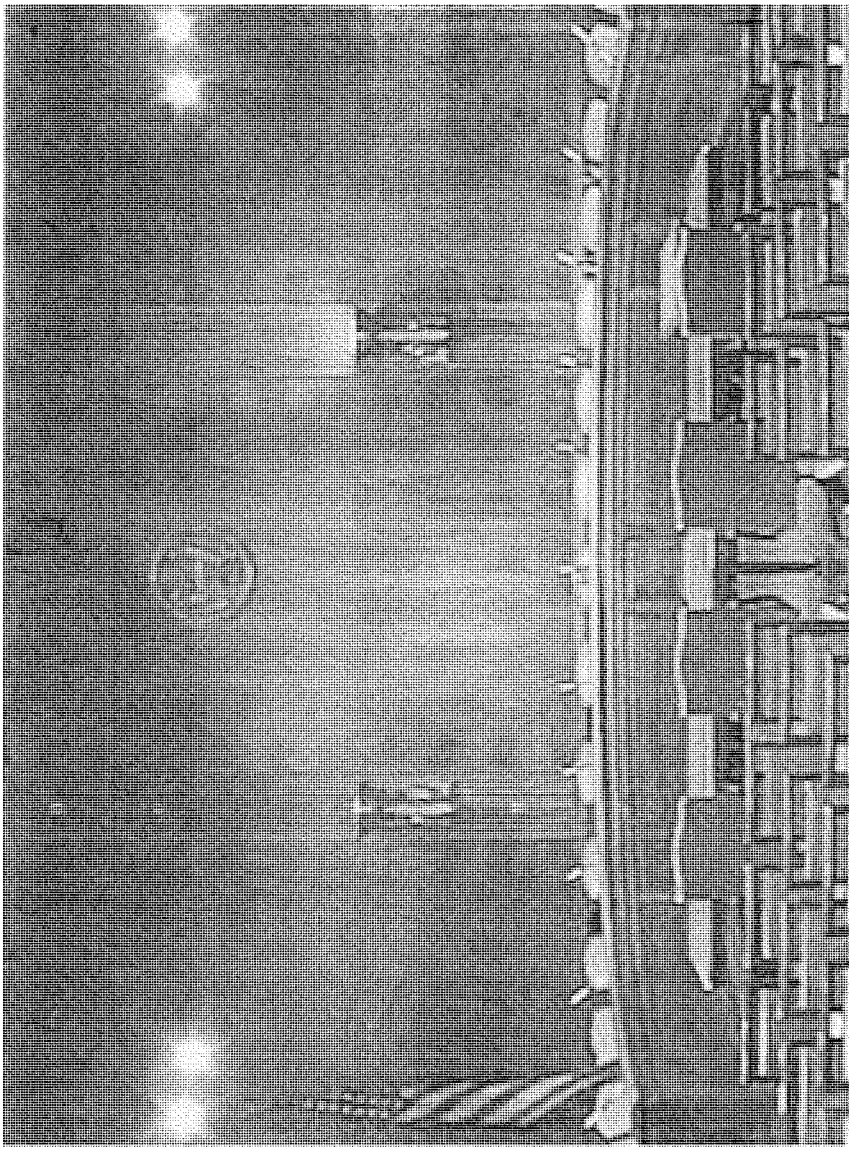
Data Collected 15 April 2011

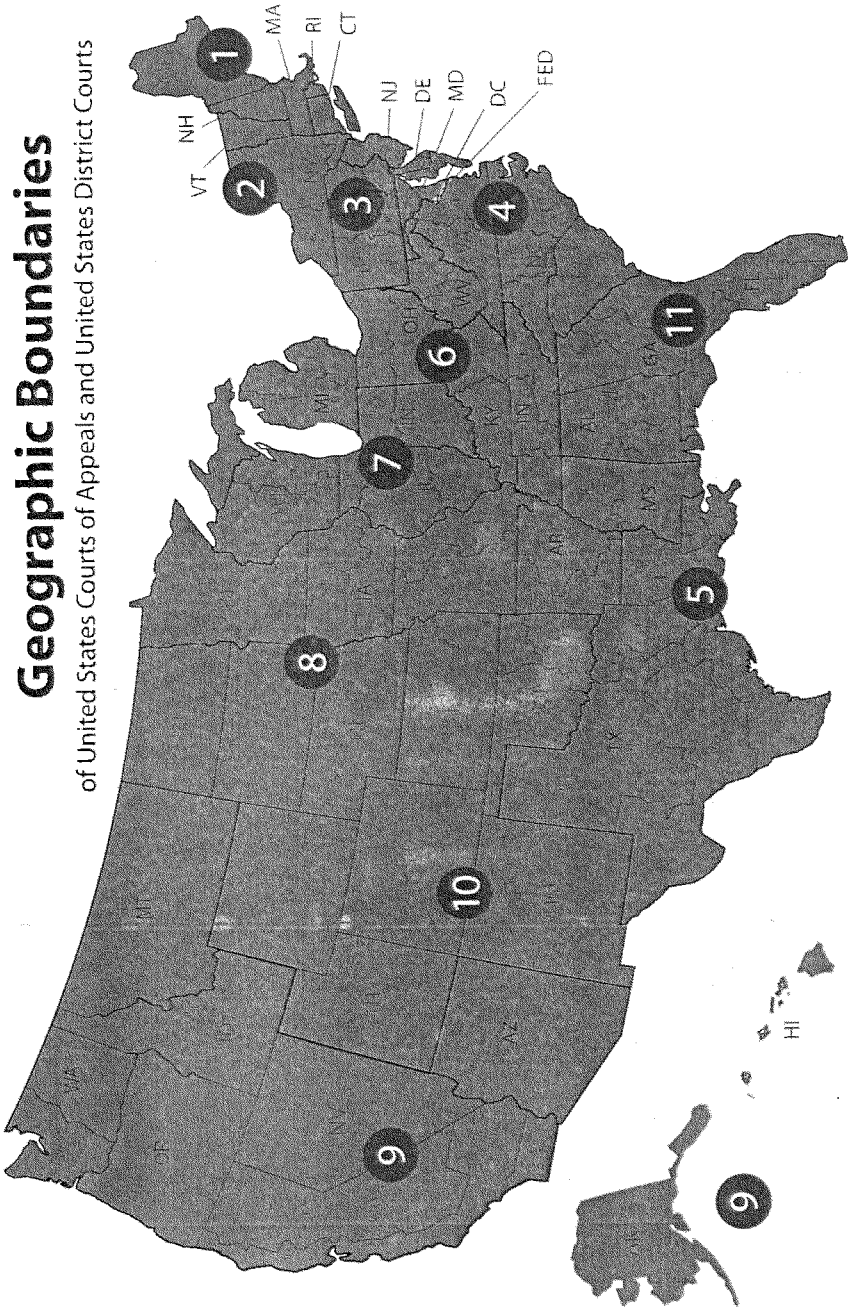
Google Product Search



Paid placement/advertising

Google-sponsored content




Geographic Boundaries
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NEW YORK POST

New York Post: YouTube millionaires

By GARETT SLOANE
New York, New York
February 25, 2011

Google's success in wringing more ad revenue from YouTube is giving rise to a new class of dot-com millionaires.

Google revealed last week that it is running ads against three billion videos a week on YouTube, up 50 percent from last year. That means the amount of cash it shares with its YouTube partners is going up as well. Google gives its content makers more than 50 percent of the ad money from their videos.

Hundreds of YouTube stars are making more than six figures, and hundreds more are making more than $40,000 a year -- roughly the median salary in the US. There are even stars who have topped a million dollars, although the company wouldn't say how many.

"However well YouTube does, the partners are doing better," said Kate Rose, a member of YouTube's communications team.

That means a number of people are quitting their day jobs for a full-time stint on YouTube. They start as amateurs and when Google sees their stars rising, the company reaches out to them to join the YouTube Partners program. There is also a program for one-hit wonders to attach ads to their viral videos.

Maangchi, a.k.a. Emily Kim, started posting Korean clips on YouTube from her kitchen in Canada three years ago. She later moved to Manhattan's West Side and worked as a counselor for a nonprofit while continuing to post her Korean cooking show on YouTube.

She has grown into a minor Web celebrity and quit her day job to focus on developing her brand. She has a YouTube channel, a Web site and an iPad app.

"I had to choose," she said. "So I quit my counseling and I chose YouTube."

She now makes a living equivalent to what she was making in the nonprofit sector -- but not yet six figures, she said. Maangchi has invested in the quality of her productions and now delivers a more polished product to her followers, which is how a lot of YouTubers progress.

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"We've seen partners evolve over the last three years," said Shenaz Zack, product manager at YouTube. "We've seen the production value of these videos have gone up tremendously. No longer are they bedroom-only [video bloggers]."

There was a time when Google was criticized for paying $1.65 billion for YouTube in 2006. The site was popular but not profitable, and making money off it seemed questionable.

Today, the site is paying off. Evercore Partners forecast that the site will generate $900 million in revenue this year, up from $640 million last year.

Google says it has 15,000 partners around the world, and they take home a bigger slice of the ads than the company. That means a YouTube Partner could pull in $30,000 on average this year if they split the pot evenly with Google.

Of course, that's just a rough estimate, and not all of Google's YouTube ad money is generated through the partners program. Still, the potential to make a living on YouTube is clear.

"Yes, you can make millions of dollars on YouTube," Zack said. "But if you want to consistently keep at it, it's a full-time job."

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The New York Times

The New York Times: Manhattan's Tech Start-Ups Settle in the Flatiron District and Chelsea

By JONATHAN VATNER
New York, New York
April 19, 2011

New York City's technology sector has sometimes been called "Silicon Alley," in deference to its Western big brother, which sprawls across the San Francisco Bay Area. Now, a decade after the dot-com crash stopped the rapid growth of the city's booming Internet sector, a high-tech corridor has developed in the Flatiron district and neighboring Chelsea.

"When people talk about Silicon Alley, it's always been just a concept," said Michael Kirven, the principal of Bluewolf Inc., a technical consulting company that has moved three times within the Flatiron district in the last decade. "Within five years, you're going to have a true Silicon Alley. Every company that's a tech start-up will be here."

The older, small office buildings in the Flatiron district have attracted start-ups, while large companies like Google and IAC/InterActiveCorp have found homes in Chelsea.

It is no accident, for example, that General Assembly, a new educational institute, meeting place and co-working environment devoted to technology entrepreneurs, was established at 902 Broadway, at East 20th Street, in the middle of the Flatiron district.

"There were a lot of young companies, a lot of designers and artists, and a lot of venture capitalists working in that neighborhood," said Adam Pritzker, a co-founder of General Assembly. "There were a lot of these pieces that we wanted to put together."

Craig Nevill-Manning, the engineering director at Google who is largely responsible for the company's New York presence, said, "New York has not traditionally been known as a center of technological innovation, but it is true now." He added, "There's a pretty exciting start-up scene now that there wasn't in 2003, when I arrived."

Much of what attracts those start-ups is the loftlike space that the Flatiron district offers, in relatively small footprints. Adams & Company, a property management and leasing company that has almost two million square feet in the Flatiron district under management, oversees spaces as small as 1,500 square feet.

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"You have a lot of buildings with high ceilings and natural light, overlooking Madison Square Park," said James Buslik, principal of Adams & Company, who leased space recently to several tech companies, including Mashable, Demand Media, Tremor Media and Bluewolf. "Creative people find creative space."

After an exhaustive search through much of Manhattan, David Mojica, the facilities director of Demand Media, said he was drawn to the exposed ventilation system and ceilings at 121 East 24th Street.

"It definitely has that upbeat technology vibe when you walk in," Mr. Mojica said. "As soon as we saw it, we fell in love with it."

Bluewolf has been in the neighborhood a bit longer, nearly a decade. The company recently signed a 12-year lease for 12,000 square feet at 11 East 26th Street, the same building that houses Yelp, the online city guide based in San Francisco. Bluewolf chose the building for its central location, the character of the space and its proximity to many of the company's customers, Mr. Kirven of Bluewolf said. The private roof deck did not hurt, either.

"You get the amenities of a Midtown building but the flexibility of a loft in Brooklyn," Mr. Kirven said. "Obviously without the Midtown rents, either."

Prices are substantially lower than in Midtown and other prime office neighborhoods. Along Fifth, Madison and Park Avenues, rents can range from $50 to $75 per square foot, said Grant Greenspan, a principal of theKaufman Organization. On the side streets, prices can fall to $26 or $27.

The Kaufman Organization has been getting more involved with the Flatiron district. In December the company bought 100-104 Fifth Avenue, a building with 275,000 square feet of space. Apple snapped up a short-term lease of 10,000 square feet on the sixth floor for its mobile advertising network, iAd.

The Kaufman Organization has also helped Paperless Post, Break Media and Zemoga find space in the neighborhood.

"You've got everyone from someone who's selling a phone app to online retail," Mr. Greenspan said. "Anything in terms of taking advantage of the Internet."

Another appealing characteristic of the Flatiron district is that the landlords seem to be flexible about the lengths of leases. A short lease is a major advantage for start-ups, because they often grow at an exponential rate, or disappear, in the blink of an eye.

Bonobos, an online men's apparel store, is only three and a half years old and has already outgrown two offices (three if the apartment of the founder and chief executive, Andy Dunn, is

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included). After looking at 70 possibilities throughout downtown Manhattan, the company signed a three-year lease at 45 West 25th Street, about 10,000 square feet of space.

"A lot of landlords are looking at 10-year leases," Mr. Dunn said. "As a start-up, there's no way to do that. Even a three-year lease was a scary thought."

One more perk of the Flatiron district is its proximity to venture capital, which provides the rocket fuel for start-ups. A number of venture capital businesses, including Union Square Ventures, First Round Capital and IA Ventures, have offices nearby.

If start-ups look to Flatiron for its small spaces, larger tech companies are choosing Chelsea for its sprawling floors. IAC, for example, opened its Frank Gehry-designed world headquarters at 555 West 18th Street in 2007. And Google moved to the hulking 111 Eighth Avenue in 2006 partly so all employees could be on the same floor, which was 200,000 square feet — or about five acres. In December, the company bought the entire building, 2.9 million square feet.

"There's a psychological barrier to going to a different floor to talk to somebody," Mr. Nevill-Manning said. "Having 800 people on a single floor means we're much more productive and much more creative as a result."

Google also has leased space in nearby Chelsea Market, which spans 9th and 10th Avenues between 15th and 16th Streets. Of that building's 1.2 million square feet of commercial space, 780,000 square feet is leased to technology and media companies like Scripps Networks (which owns the Food Network) and Yext, an Internet marketing company, said Michael Phillips, a managing director of Jamestown Properties, which owns the building.

"I don't think Midtown has inventory that's interesting the way this is interesting," Mr. Phillips said. "And I think the public amenities are almost incomparable," he added, referring to Hudson River Park, the High Line, Chelsea Piers and the concourse of Chelsea Market.

Many companies have chosen Silicon Alley to be close to similar companies, which might be their clients, their suppliers, their competitors or a source of new hires. Mr. Dunn of Bonobos, for example, hired his vice president of merchandising from J. Crew, which is at 770 Broadway at East Ninth Street, and his vice president of marketing from the Gilt Groupe, at 2 Park Avenue, between 32nd and 33rd Streets, both nearby.

For Google, on the other hand, the proximity has not been that important.
"From a recruiting point of view, a lot of those connections get made virtually," Mr. Nevill-Manning said. "They know where to find us online."

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New York
Urban League

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August 16, 2011

Honorable Charles Schumer
United State Senator
757 Third Avenue
New York, NY 10017

Dear Senator Schumer,

As the President of the New York Urban League (NYUL), I have experienced firsthand how many of the new economic developments generated by the internet have encouraged innovation. These innovations helped non-profit companies make the most of their resources in good and bad economic times. Google, one of those companies, has made information much easier to share, to benefit NYUL.

In order to reach and educate the children and families in our community and maximize our effectiveness, we rely on Google's search program to get the word out and to bring in resources such as volunteers and donors. Not only do we rely on Google's search engine but also their community relationships and responsibility. Just recently, a group of young woman had the opportunity to take part in the Google Technovation Challenge to create a mobile phone application. This activity brought together young women from throughout New York City to learn the skills of teamwork, creativity and follow-through. Google's positive impact has been felt at the New York Urban League through their commitment to the community and to bringing information to our constituents about programs, services and our signature events such as the Football Classic, Historically Black College Universities College Fair, Golf Classic and our Frederick Douglas Dinner to name a few.

While, many of my peers use Google search and advertising programs, many others use competing advertising services. Frankly, this is a highly competitive marketplace, and our members have multiple options for many different types of web services. From Bing to Facebook to Twitter, there is no shortage of ways to obtain new information or advertise to reach consumers. We, as an organization, also do not rely solely on Google. We continue to expand our reach through sites such as Facebook, Twitter, Youtube and Linked-In, to name only a few.

The New York Urban League, Inc (NYUL) is a non-profit organization founded in 1919 and incorporated in the State of New York in 1920. The League was founded by an inter-racial group of concerned New Yorkers in response to the difficulties faced by African Americans migrating from the agricultural and rural south, to the industrial, urban centers of the north. The NYUL is headquartered in Harlem, New York and has offices in Staten Island, Queens, and the Bronx but for all residents, our research and information is available online – vital information is just a click away for the children and families that need it most.

New York
Urban League

Today, the mission of the New York Urban League (NYUL) is to enable African Americans and other underserved communities to secure a first class education, economic self-reliance and equal respect of their civil rights through programs, services and advocacy. Over its 90 year history, the NYUL has been at the forefront of change, from leading efforts to create a public school system in New York to developing street academies that served nearly 2,000 young people to advocating on behalf of workers who found themselves unemployed due to egregious acts of discrimination and a slow job market to negotiating the opening of employment for blacks in the airline, brewing, and baking industries.

If you have any questions, please do not hesitate to contact me at (212) 926-8000 ext. 145.

Sincerely,

Arva R. Rice
President & CEO

abny

William C. Rudin
Chairman

Jennifer M. Hensley
Executive Director

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July 26, 2011

Dear Senator Schumer:

In an economy still recovering from the recession of the past few years, Washington's top priority must be to encourage job creation and economic growth. We commend you for always being a strong leader in promoting economic development and in seeking to diversify our economy, particularly through the promotion of high tech and digital industry.

As you pointed out in your speech at ABNY in early May, New York is on the cusp of becoming a true high-tech center. New York recently passed Boston to become the second largest target of venture capital dollars in the nation and your efforts to attract high-tech businesses both in New York City and in the Capital Region have been instrumental.

As you know, Google's investment in New York has been one of the most important economic developments in the city in years. Google's $1.9 Billion purchase of 111 Eighth Avenue with 3 million square feet of office space, has been a boon to the real estate market. With over 1,500 full-time, well-paid employees in New York City, and it's role as a major economic catalyst for a wide variety of New York businesses, Google is contributing significantly to the city and state's economy.

Throughout its history, Google has been a pioneer in the fields of internet searching and data management, and as it continues to grow, Google faces ever more threatening regulatory scrutiny. But competition remains fierce in this industry, with companies like Bing, Facebook and Twitter building market share. Google is determined to remain competitive and innovative, and will continue making investments in the people and infrastructure it needs to succeed.

Google's model is exactly what the business community, and our economy, needs – a company reliant on intellectual capital that is making investments in our country's graduates, in our city, and in other innovative start-ups. All of this activity should be encouraged and supported by our Federal government, not stifled by regulatory intervention.

I hope you will to continue to advocate for the technological innovation, capital investment, and economic development that Google represents, and support the high-tech industry in New York and around the country. Feel free to give me a call to discuss further at 212-407-2433.

Yours for a Better New York,

Bill Rudin

William C. Rudin
Chairman

JOHN L. SAMPSON
MINORITY LEADER

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July 27, 2011

Honorable Charles Schumer
United State Senator
757 Third Avenue
New York, NY 10017

Dear Senator Schumer,

As a member of the New York State Senate, I speak regularly with members of the community who are struggling to find jobs in our weak economy. As the fragile recovery struggles to take hold, Congress' top priority must be to embrace policies that lead to job creation and economic growth.

In particular, we should promote – not hinder – start-ups, local small businesses, and the companies that are innovating and creating the jobs of the future. These companies have been central to the rise of the Internet marketplace – which remains one of America's economic success stories and a principle driver of economic growth for businesses both large and small. Google has been an innovator and leader in this new American success story, and we have seen the positive impact from its growth and innovation in my community.

In my district which comprises Canarsie, East Flatbush, Parts of Brownsville, Crown Heights, East New York, portions of Old Mill Basin, Spring Creek Towers, and parts of Midwood and Kensington in Brooklyn businesses are looking to expand their customer base and consumers seeking to make informed decisions look to Google and its useful online services.

At this time of economic uncertainty, the wrong choice for government would be to take steps that impede innovation and job creation. Instead, allow the market to continue to work successfully and consumers to freely choose which online services they use is a better way to nurture additional entrepreneurship and job growth.

Sincerely,

John L. Sampson

John Sampson
New York State Senate, 19th S.D

Google™

Testimony of Eric Schmidt, Executive Chairman, Google Inc.
Before the Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy, and Consumer Rights

September 21, 2011

Chairman Kohl, Ranking Member Lee, and members of the Subcommittee.

Thank you for inviting me to testify before you today. I'm Eric Schmidt and I currently serve as the Executive Chairman of Google Inc. I am responsible for the external matters of Google including building partnerships and broader business relationships, government outreach, and technology thought leadership. I also advise Google's Chief Executive Officer, Larry Page, and senior Google leadership on business and policy issues.

From 2001 until earlier this year, I served as Google's Chief Executive Officer, overseeing the company's technical and business strategy alongside Google's founders Sergey Brin and Larry Page. Prior to joining Google, I was the Chairman of the Board and Chief Executive Officer of Novell and before then the Chief Technology Officer at Sun Microsystems.

As a technology veteran of some 30 years, I look forward to talking to you today about the dynamic environment in which Google competes and the new and innovative choices that we are bringing to consumers to help improve their access to information and ultimately help them live better lives.

At Google, we've always focused on putting consumers – our users – first. For example, we aim to provide relevant answers as quickly as possible, and our product innovation and engineering talent deliver results that we believe users like, in a world where the competition is only one click away.

We believe that this focus on serving consumers has not just helped Google succeed but has also led us to create products and services that help other businesses thrive. Just in 2010 Google Search and our advertising products helped generate $64 billion in economic activity for hundreds of thousands of small businesses throughout the United States. We are proud of the work that we do with small businesses and of the fact that we help them connect with customers and partners around the world in a way not possible just a decade ago.

I'll add that, according to independent research commissioned by Google, 63 percent of America's small businesses do not have a website or online presence. So there's still a lot that Google and others can do to help small businesses get on the web and thereby connect with the world. That's why we've started an initiative to help small businesses get online. We've partnered with Intuit and dozens of local organizations to offer local businesses free websites and tips on how to grow their

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online presence. To date, we have helped thousands of businesses begin the process of building an online presence at events around the country, and we'll continue to do so in the months to come.

In my written testimony I would like to focus on three key issues relating to Google and how we compete in the digital world:

- First, I'll describe the tremendously competitive and dynamic space in which we operate.
- Second, I'll describe the business principles that guide us and that we know will stand up to scrutiny.
- Finally, I will touch on the Federal Trade Commission's investigation and our view that such a process should be focused and fair.

Before I discuss these key issues, though, I'll provide you with a brief history of Google and search.

A Brief History of Google and Search

As hard as it may be to believe, Google is only 13 years old. When I started with Google in 2001, I was employee number 223. Today, Google employs thousands of people in the United States, in California, New York, Texas, Wisconsin, and points in between.

In 1998, the year Google was incorporated, Yahoo!, which had hundreds of millions of users, was declared the winner of the "search engine wars" – it got twice as many visitors as its nearest competitor and had "eviscerated the competition."

Nevertheless, Google's founders, Stanford graduate students Larry Page and Sergey Brin, believed they could build a better mousetrap, and they set out to do so in their dorm room. Over time, they overcame naysayers who thought Yahoo! had permanently won the competition for the best search engine.

Google's entry into search was based on a major innovation: the PageRank system for using web links to tap into the "wisdom of the users" to identify the most relevant websites for any given query. This represented a major advance on Yahoo!, which was offering "categories," and other search engines, which typically only used the number of times a keyword appeared on a page to rank websites. Many sites at the time, including Yahoo!, allowed advertisers to pay to be included in search results without any indication to consumers that those results were paid. Google never engaged in this practice and instead focused on improving its search results to serve users, with the result that in 2004 Google passed Yahoo! in the number of active U.S. users.

Despite the major innovations in search since 1998, the underlying principles of how search works remain the same. A search engine's software "crawls" pages available on the Internet and catalogues them. When a consumer enters search terms, those terms are processed by the search engine's mathematical algorithms, which determine the probability that any given webpage will be responsive to the search. The user then receives results that are rank-ordered based on the search engine's judgment of the likelihood that each result matches what the user was seeking in entering the search terms. This process necessarily depends on multiple variables and constant refinement.

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From the start, Google has constantly refined its search algorithm, which now considers over 200 factors in assessing site quality and relevance. When a user types a query into Google Search, Google's proprietary technology analyzes these signals to provide a determination as to what the user is looking for. Google uses this ever-improving technology to organize information, rank sites, and present results to users. Google's search results are ultimately a scientific *opinion* as to what information users will find most useful.

In keeping with our focus on quality and delivering the most relevant results for consumers, Google is constantly experimenting with new innovations in presenting information. Potential refinements to the algorithm go through a rigorous testing process, from conception to initial testing in Google's internal "sandbox" to focused testing to final approval. Consumer testing is key to the algorithm refining process, and Google uses both human reviewers and samples of real search traffic in order to measure whether a proposed algorithm change improves the user experience or not.

To give you a sense of the scale of the changes that Google considers, in 2010 we conducted 13,311 precision evaluations to see whether proposed algorithm changes improved the quality of its search results, 8,157 side-by-side experiments where it presented two sets of search results to a panel of human testers and had the evaluators rank which set of results was better, and 2,800 click evaluations to see how a small sample of real-life Google users responded to the change. Ultimately, the process resulted in 516 changes that were determined to be useful to users based on the data and, therefore, were made to Google's algorithm. Most of these changes are imperceptible to users and affect a very small percentage of websites, but each one of them is implemented only if we believe the change will benefit our users.

The Dynamic and Competitive Internet Space

One of the main drivers of Google's constant innovation is the fact that we face an extremely competitive landscape in which consumers have a multitude of options to access information. If we want consumers to keep coming back to Google, we have to give them the best possible experience. And that pushes us to keep putting consumers first.

Google faces competition from numerous sources including other general search engines (such as Microsoft's Bing, Yahoo!, and Blekko); specialized search sites, including travel sites (like Expedia and Travelocity), restaurant reviews (like Yelp), and shopping sites (like Amazon and eBay); social media sites (like Facebook); and mobile applications beyond count, just to name a few.

For example, let's say you're looking for a local restaurant. You might search on Google for "local restaurant," but increasingly people are going on to Facebook and Twitter to ask their friends for restaurant recommendations. Or, you might use the Yelp mobile application on your iPhone or Android phone to find restaurants near your location. More than ever before we're competing vigorously against each of these other ways for users to access information.

Consumers have a truly vast array of options – some search and some not – from which to access information. Well-known shopping sites like Amazon, Wal-Mart, and eBay are essentially search engines that focus on product search and provide customers with an opportunity to buy a good at the end of their search. In this category, they have been extremely successful. For example, eBay

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handled more than 2 billion U.S. searches in the third quarter of 2010, and Amazon saw 847 million searches during the same period, while Google handled only 226 million product searches during that quarter. Among these three companies eBay had 65 percent of product searches for the period while Google had just seven percent.

The same holds true for popular travel search sites like Kayak, Priceline, and Expedia. Students looking for encyclopedia-like entries on different topics often go directly to sites like Wikipedia and About.com. Patients searching for medical information often go directly to sites such as WebMD and eHealth. For current events, news-seekers can visit the websites of major publications like *The New York Times*, *The Wall Street Journal*, or *The Washington Post*. And all of these websites have corresponding apps to make them even more readily accessible on mobile devices.

Among major search engines, Microsoft's Bing has continued to gain in popularity, perhaps because it comes pre-installed as the search default on over 70 percent of new computers sold. Microsoft's Bing is the exclusive search provider for Yahoo! and Facebook. Microsoft recently signed a deal for Bing to power English language search on the fast-rising Chinese search engine Baidu, which Baidu has acknowledged will help it become more competitive in markets outside of China. In addition to Internet Explorer, Microsoft has integrated Bing into its popular gaming console, the Xbox 360, which it is in talks with cable companies to convert into the set-top box of the future. Microsoft's Bing launched in June 2009 and has grown so rapidly that some commentators have speculated that it could overtake Google as early as 2012.

And there's the most popular website on the Internet, by an "enormous margin": Facebook. Facebook and similar sites have extensive search and information functions. Facebook Questions, for example, allows users to determine the best pizza restaurant in Washington, DC or the best movies of the 1970s. Consumers, particularly young ones, increasingly are turning to their online friends to find out what to wear, where to eat, and what to watch. And because of its exclusive search arrangement with Microsoft's Bing, Facebook and Bing can harness the power of search algorithms and a customer's social graph to answer a query. This is a tremendous competitive advantage.

Most importantly, all of these options for obtaining information can be accessed *without ever using Google.*

From an advertising perspective, Google's search advertising tools compete for ad dollars every day against other forms of advertising including TV, radio, newspapers, magazines, direct mail, and online banner ads. Our advertising system is based on an auction where advertisers bid what they're willing to pay, so advertisers set their own prices and can easily assess the return on their advertising investment. Advertisers know that they have other options and they can and do turn off their Google ad campaigns whenever they want.

Google's success despite strong competition is based on its persistent focus on satisfying consumers – getting them to the answers they want quickly and accurately. Keeping up requires constant investment and innovation, and if Google fails in this effort users can and will switch. The cost of going elsewhere is zero, and users can and do use other sources to find the information they want.

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Our Business Principles

These are the principles that have guided us from the beginning:

Do what's best for the user

We make hundreds of changes to our algorithms every year to improve consumers' search experience. Not every website can come out at the top of the page, or even appear on the first page of our search results. That's why our search rankings and the format of our results are designed to give users the most useful answer.

Provide the most relevant answers as quickly as possible

Today, when a consumer types "weather in Madison" or "how many feet in a mile" into our search box, you get the answers directly – often before you hit "enter." Sometimes the most useful answer to a query is a link to website, but other times it might be a map, video, flight time, mathematical equation, quick fact, or shopping result.

All search engines – including Microsoft's Bing and Yahoo! – have been working to provide new forms of answers for users, beyond the traditional "ten blue links." In fact, according to an October 2010 study published by Comscore, Bing contained these "rich results" on their results pages 54 percent of the time, while Google only provided rich results 33 percent of the time.

Advertisements offer useful information, too, which is why we also work hard to ensure that our ads are relevant to consumers. Our ad systems ensure that the ads users see next to their search results aren't just from the highest bidder, but also reflect the relevance of that ad to the user's query.

Label advertisements clearly

Google was one of the first search engines to clearly distinguish advertisements from our organic search results, and when the FTC issued guidelines in 2002 to search engines about ad labeling, Google already met the recommended guidelines. As we experiment with new ad formats and new types of content (such as hotel and flight booking ads), we will continue to be transparent about what is an ad and what isn't.

Be transparent

We share more information about how our rankings work than any other search engine, through our Webmaster Central site, blog, diagnostic tools, support forum, and video instruction on YouTube. We recently introduced an option in our support center for webmasters to contact Google privately. Through our Webmaster Help channel on YouTube, we provide more than 400 videos to help websites understand our rankings and how to improve their sites.

We also give advertisers detailed information about the ad auction – including their ad quality score, our "bid simulator" to help them estimate their ad performance, and tips to improve their ad quality scores.

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We've recently introduced even more transparency efforts, including announcing major changes to our algorithm, providing more notice when a website is demoted due to spam violations, and giving advertisers new information about ads that break our rules.

Loyalty, not lock-in

As much as we would like them to stay with Google, if consumers don't like the answer that Google Search provides, they can switch to another search engine with just one click. And we make it easy to leave our other services too. We have a team of engineers – nicknamed the "Data Liberation Front" – whose only goal is to help our users move their data in and out of Google products.

We want consumers to stay with us not because they're locked in, but because we're innovating and making our products better. For example, if a user wants to switch from Gmail to Yahoo! Mail or Microsoft's Hotmail, we make it easy for her to export contacts and messages easily and for free. If a user wants to leave Google+, our social networking service, we provide a tool called Google Takeout that lets users download all their posts, contacts, and photos. We do this for dozens of Google products – Maps, Voice, YouTube, Calendar, Finance, etc. – all listed on dataliberation.org. And we make sure the files that consumers take out are actually useful; they're in flexible formats a user can read or upload into a competing service.

Our "loyalty, not lock-in" approach is good for our users and also a smart long-term business strategy. Would you eat at a restaurant where they lock the doors behind you when you sit down to eat? Of course not. We think it's smarter to leave the door open all the time. That's how we get rapid, candid feedback on what's good and what's not. It spurs us to innovate faster and build better products. And that freedom makes for happier, more loyal customers.

Be open, not closed

When we think about the meaning of open, we think about open technology, which includes open source software (meaning we release and actively support code that helps grow the Internet) and open standards (meaning we adhere to and help develop accepted standards) that improve the entire Internet.

At Google we believe that open is better than closed. "Open" means developing an open marketplace like the Android Market and the Chrome Web Store, where any developer can submit her applications for the world to try. "Open" means extending our products through application programming interfaces – APIs – so developers can build on top of these unique tools, helping them create great applications that would be practically impossible to develop otherwise.

"Open" also means supporting features that have been approved by formal standards bodies, and, if none exist, working to create standards that improve the entire ecosystem. And "open" means releasing the source code to numerous projects that were developed by Google so that third parties can utilize these technologies to build their own products without having to reinvent the wheel, thereby speeding up the innovation cycle and providing consumers with even more choices.

Open sourcing software has real benefits in the marketplace, as competing browsers like Rockmelt and Flock have already been developed using the Chrome code base. Similarly, rather than having

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to build their own operating systems, companies can and do use Android, as a full-fledged operating system, to power many different types of devices. In fact Android 's openness allows anyone to take it and develop it independently – Amazon reportedly is doing this with a tablet expected to go on sale this fall and others have too. Android's openness has helped make mobile computing competitive by allowing the introduction of lower-priced smartphones and pushing other companies to innovate and improve their products – all resulting in better phones for less.

The Federal Trade Commission's Investigation

In June of this year, Google received Civil Investigative Demands from the Federal Trade Commission regarding certain aspects of our business practices. While no company would request such a government investigation, we are confident that our business practices will stand up to scrutiny.

We are fully cooperating with the FTC's investigation, and we hope that it will be conducted in a focused and fair manner so that we can continue creating jobs and building products that delight our users.

We know that several companies have complaints with Google, which they may have raised with government regulators here and abroad. In our experience, most of these complaints come from websites that don't like where their sites rank on Google's search results page or argue that in providing better answers like maps, shopping, or local results, we are hurting individual sites.

When you hear these complaints, I'd urge you to keep two things in mind.

First, we built search for users, not websites, and no matter what we do, there will always be some websites unhappy with where they rank. Search is subjective, and there's no "correct" set of search results. Our scientific process is designed to provide the answers that consumers will find most useful.

Second, unlike technologies of the past, the great thing about the fundamental openness of the Internet is that, if consumers don't like what one website is providing them, they can switch to another website with just one click. Using Google is a choice (and a free one), and there are no barriers to consumers navigating to www.kayak.com, www.nextag.com, www.bing.com, www.yelp.com, www.expedia.com, or any other website.

I am not a lawyer, but I take comfort from the fact that every decided antitrust suit that has been brought against Google regarding our search results has been dismissed. As recently as last month, an Ohio state court dismissed a private antitrust suit brought against Google. I believe that this demonstrates that our business principles and, in particular, Google's focus on putting consumers first, are also the same values that are behind the antitrust laws.

That does not mean that we do everything perfectly. The fact that we made over 500 changes to the algorithm last year is an indication that we are constantly refining the way that we organize and display information. And, like any good business, we are always happy to hear criticisms and concerns from consumers so that we can continue to improve.

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Conclusion

Chairman Kohl, Ranking Member Lee, and members of the Subcommittee, thank you for inviting me to testify today.

At Google we recognize that with success comes scrutiny. By investing smartly, hiring extremely talented engineers, and working very, very hard (and with some good luck), Google has been blessed with a great deal of success. But given the rapid pace of change in the technology industry, we take nothing for granted.

I look forward to answering questions you might have about our efforts, and Google looks forward to working with members of the Subcommittee and others to ensure vibrant and consumer-focused competition on the Internet.

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Consumer Watchdog

Testimony
of
JOHN M. SIMPSON
Consumer Advocate
with
CONSUMER WATCHDOG

Hearing on
THE POWER OF GOOGLE
SERVING CONSUMERS OR THREATENING COMPETITION?

Submitted to the
Judiciary Committee
Subcommittee on Antitrust, Competition Policy and Consumer Rights
of the
United States Senate
Sept. 21, 2011

Thank you, Chairman Kohl, Ranking Member Lee, and members of the committee for considering my written testimony. My name is John M. Simpson and I am a consumer advocate with the nonprofit, nonpartisan public interest group Consumer Watchdog. I direct our group's Privacy Project. We have been calling for Google Executive Chairman Eric Schmidt to testify before Congress for a year and a half and are grateful the Subcommittee has scheduled this hearing.

Established in 1985, Consumer Watchdog is a nationally recognized nonpartisan, nonprofit organization representing the interests of taxpayers and consumers. Our mission is to provide an effective voice for the public interest. Consumer Watchdog's programs include health care reform, oversight of insurance rates, energy policy, protecting civil justice, corporate reform, and political accountability.

Background

When Consumer Watchdog launched our Privacy Project, funded by The Rose Foundation, a charitable nonprofit organization, in 2008, we focused on Google's privacy practices and sought better privacy guarantees from the company for users of its services. Rather than deal in abstract concepts, the Privacy Project focused on Google as the company that has

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come to dominate consumers' use of the Internet. In fact, Google is so pervasive on the Internet its reach cannot be escaped.

We have attempted to convince Google of the social and economic importance of giving consumers control over their online lives. By persuading Google, the Internet's dominant company, to adopt adequate privacy guarantees, we believe its policies could become the gold standard for the industry, improving the behavior of the entire online sector.

The Privacy Project has since moved beyond its singular focus on Google to confront the abuses of other online companies as well. Consumer Watchdog has promoted federal online privacy legislation that would include a Do Not Track Me function and has worked to educate consumers about how Internet companies gather and use personal information. We sponsored a Do Not Track Me bill in the California Legislature, and have brought various possible privacy and antitrust violations to the attention of the Federal Trade Commission and the Department of Justice.

During this project we became aware of the proposed Google Books class action settlement and were concerned about its impact on consumer privacy and its anticompetitive aspects. In April 2009 we called upon the Department of Justice to intervene in the proposed settlement and it subsequently intervened, successfully blocking the deal as proposed to the court. We also unsuccessfully opposed Google's acquisition of the mobile advertising company AdMob on antitrust grounds.

Consumer Watchdog Calls For Antitrust Investigation

Consumer Watchdog's opposition to the Google Books settlement was based on the monopoly control of digital books that the settlement would have given Google. The company had scanned works under copyright without asking permission, while others had followed the law. Under the agreement Google would have had control of a huge digitized database of books that competitors would not have been able to access.

While contemplating this potential monopoly over digitized books, it became clear to us that Google has much broader monopoly power because of the unprecedented amount of data the company has gathered about its users. Its information – or more accurately consumer information often gathered without consumer permission – is the basis for Google's power. By April 2010 we were convinced it was necessary to move beyond considering the anticompetitive aspects of Google's ever-growing number of acquisitions on an ad hoc, case-by-case basis, and examine the Internet giant's core ongoing business practices because of its power over the entire Internet. We called on the Justice Department to launch an investigation.

Thus, we were gratified this summer when the Federal Trade Commission announced just such a full-blown probe. In addition, we have consistently supported this Subcommittee's efforts to examine Google's behavior. Consumer Watchdog especially applauds your insistence that Eric Schmidt, Google CEO for most of the past decade, answer your questions. We also strongly believe that the current CEO, Larry Page, should appear before the Subcommittee in the near future to explain how and why he condoned Google flouting the law regarding drug sales to the United States from Canadian pharmacies. Google's abuses in this case resulted in a record $500 million settlement with the Justice Department to avoid criminal charges.

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Google derives monopoly power from both its dominance of search and from the consumer data that the company gathers as people surf the web. The time is long past for federal action to actively restrain Google's broad ability to abuse users, competitors and advertisers. Such action could include breaking Google Inc. into multiple separate companies, regulating search as a public utility and requiring the company to allow consumers to opt out of data tracking.

Search Dominance and Bias

Google exerts monopoly power over Internet searches, controlling around 70 percent of the U.S. market. For most Americans – indeed, for most people in the world – Google is the gateway to the Internet. In the mobile market Google's monopoly power is even greater. It controls more than 95 percent of mobile search. Android, Google's smartphone operating system, dominates the mobile market with 38 percent of the market. Apple's iPhone has 27 percent.

Google's dominance of the search market forces advertisers to use Google's advertising products – those that do not will not reach their customers. How Google tweaks its proprietary search algorithms can ensure a business's success or doom it to failure. Google's business practices determine much of the Internet experience for most consumers by determining what they view. Google demands openness of others, but when it comes to its own activities that can spell success or failure to millions of businesses small, medium and large, it is a closed black box.

Our study, *Traffic Report: How Google is Squeezing out Competitors and Muscling Into New Markets* (http://insidegoogle.com/2010/06/google-using-search-engine-to-muscle-into-internet-businesses-study-finds-2/) shows how with the launch of Universal Search Google favored its own properties and services in search results to the detriment of its competitors. One stark example is the dramatic drop-off in traffic that occurred on Mapquest's site after Google placed its Google Maps at the top of Universal Search.

Google uses a third-party payment business model. Its ad prices are completely separated from the users of search. But because Google commands such a substantial share of the search market, many companies must pay for listings to remain viable. The reality is that for many small online vendors Google is the only way to develop traffic to their services. Google's dominant search position allows it to charge high ad prices and it uses these monopoly revenues to subsidize other lines of business. Of course, consumers ultimately pay these monopoly ad prices when they pay higher prices for the goods and services advertised.

Other companies find it difficult, if not impossible, to compete with Google in offering the products Google provides for "free" with the subsidies generated from its monopolistic search revenues. This becomes a vicious circle when Google uses these "free" products as yet another vehicle to sell advertisements. The inability of potential competitors to enter these subsidized markets stifles innovation.

Once Google's self-proclaimed mission was to organize the world's information and make it universally accessible. Increasingly, however, Google is buying the information itself or otherwise controlling content. A recent example is the just-announced purchase of Zagat. Google has become a true content provider, which means it has a fundamental conflict of interest

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in an attempt to provide unbiased search results. There is simply too much incentive for Google to favor its own services and products.

Moreover, to the extent that Google manipulates search algorithms, engages in conduct that trims its auctions or otherwise denies competitive alternatives, users plainly are harmed because they will not even have the opportunity to experience such alternatives.

Information Is Power

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

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

You may think of Google as a technology company. In actuality Google is an advertising business. Consumers make a Faustian bargain, often unknowingly, to provide personal information about their habits, desires and behaviors in return for Google's services. Google mines these massive digital dossiers and uses the information to sell ads, a lucrative business that accounts for 96 percent of its $30 billion annual revenue.

Google gives most of its services away for "free." Its billions of dollars in monopoly revenues fund those services, undercut competitors and thwart innovation. These "free" products and services serve as new avenues for the company to collect more consumer information.

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

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

Google's Arrogance

In addition to anticompetitive behavior that runs afoul of antitrust laws, Google has repeatedly displayed an arrogant approach that has too frequently harmed consumers. Operating with a Silicon Valley engineering ethos, Google doesn't seek permission; if it encounters objections it can ask forgiveness. Consider Google Books. When Google decided to digitize the

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world's books, Google just did it, ignoring copyright law and prompting a still unsettled lawsuit. Often executives will answer questions about their actions by citing the corporate motto, "Don't be evil," insisting that all Google activities therefore are above criticism. The record shows otherwise.

As mentioned above Google has just paid a record $500 million settlement to avoid criminal prosecution for its role in selling drugs illegally from Canada. CEO Larry Page knew about and condoned the practice. He and Eric Schmidt must be called upon to explain how this happened. Why did Google executives believe they could flout the law for nearly six years?

In February we released a report, *Liars and Loans: How Deceptive Advertisers Use Google* (http://www.consumerwatchdog.org/resources/liarsandloansplus021011.pdf) showing how Google has become a leading purveyor of ads by scammers who prey on struggling homeowners. In a complaint to the Federal Trade Commission Consumer Watchdog wrote, "Because Google so far has turned a blind eye to these fraudsters, perhaps because of the substantial revenue such advertising can generate, we ask that the FTC investigate Google's role as a facilitator of deceptive and fraudulent advertising and act to prevent the Internet giant from continuing its harmful behavior."

The complaint was written before Google's $500 million drug settlement with the Justice Department. Now that it's clear CEO Larry Page condoned those illegal drug sales, the question is, what other illegal activities do he and other Google executives condone? We have renewed our request to the FTC to investigate Google's role in offering the questionable real estate ads in light of what the drug settlement revealed about the company's willingness to flout the law. What other deceptive, illegal and harmful ads is Google willing to offer in the quest for greater profits?

When Google launched its ill-fated social network, "Buzz," it brazenly made Gmail users' frequent contacts public. That resulted in an $8 million class action settlement and an agreement with the FTC for privacy audits of the company for the next 20 years.

In what was the biggest wire-tapping incident in history, Google's "Street View" cars sucked up information from private Wi-Fi networks in more than 30 countries during a three-year period. Google claimed the "Wi-Spy" incident was a mistake. The claim is unbelievable when you consider that Google had applied for a patent on the technique used to gather the information. Executive Chairman Eric Schmidt and CEO Larry Page must give a full accounting of what happened and why. Among the questions about Wi-Spy Schmidt should answer are:

- Google has claimed the "Wi-Spy" data was collected by accident. Will Google publicly disclose full documentation, including planning, personnel and oversight of the project, that could prove or disprove this claim?
- How does the company explain seeking a patent on the process that was used to gather the data if it was, as the company claims, collected by mistake?
- How many Americans' private information was collected by Google?
- What kind of information was collected? Emails, passwords, financial information, medical data, searches, videos? What else?
- Will Google assure the American people that it will never again collect and store consumers' private information without their knowledge and consent?

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Google Chairman Eric Schmidt has said: "I actually think people don't want Google to answer their questions. They want Google to be telling them what they should be doing next." This shows the depth of Google's and Schmidt's arrogance. They actually believe that consumers would prefer Google make choices for them, rather than make those choices themselves.

Remedies

On the one hand search needs to be regulated like the public utility it is. On the consumer side, consumers must be given effective control over their data – whether it's collected and how it's used. Do Not Track rules are the way to do that.

If we take those two broad steps– and don't accept Google's claims that everything it does is about the user – competitors and consumers will both be well and fairly served. We will also see better and increased innovation in Silicon Valley.

There is little doubt that Google is succeeding in its audacious corporate mission "to organize the world's information and make it universally accessible and useful." The unprecedented database it has collected has given Google monopoly power over that mass of information and the company has shown itself willing to use that power against competitors. Google's mission also puts Google directly at odds with our privacy rights, and Google appears unwilling to give consumers enough control of their data. There are solutions:

- One possibility would be to break Google into different companies devoted to different lines of business. Search could be separated from advertising. Gmail and the new social networking service, Google +, could be spun off as a separate entity, as could YouTube, a Google acquisition that should have been denied at the time of merger. Enterprise applications could be another separate business.

- Google's search engine's importance as a gateway to cyberspace requires a maximum degree of openness and transparency with the potential for government regulation. Google's monopoly position and importance to the Internet means that the company should be regarded as a public utility and regulated. Regulations could be designed to open up Google's ad platform to enable other competitors to compete. Rules could be crafted to create greater transparency in the operation of Google's ad platform to enable parties to negotiate more effectively. For example: Providing greater visibility into the maximum amount of the highest bid, how many search terms are shown per page, and how Google's "quality score" is derived and applied. Little, if any, of this information is currently public and openness would contribute to consumer choice and options as well as foster competition.

- Another remedy would be to force Google to disgorge its monopolistic gains through the imposition of financial penalties. The payment would have to be significant enough to impact Google's future behavior. Google hardly blinked when it paid half a billion to settle the illegal drug sales case. Perhaps the amount could be tied to paying back consumers for monetizing their private information and content without asking them permission or compensating them.

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The Internet is too important to allow an unregulated monopolist to dominate it. To ensure that no online company can have an unfettered ability to exercise monopoly power with our data, we must have the right to control how data about our online activities is used or if it is even gathered.

Strict application of antitrust law will thwart Google's most flagrant anticompetitive practices. Do Not Track Me regulations will loosen Google's powerful grasp on the Internet and give consumers the true control over their online activity that they deserve.

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SUBMISSION

TO: U.S. Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights

FROM: Jeremy Stoppelman, Cofounder and CEO, Yelp! Inc.

DATE: September 21, 2011

RE: The Power of Google: Serving Consumers or Threatening Competition?

I. ABOUT YELP

My name is Jeremy Stoppelman, and I am the CEO of Yelp! Inc., a company I co-founded in 2004 with my former colleague from PayPal, Russell Simmons.

At Yelp, our mission is to connect consumers with great local businesses. The site allows people throughout the country to share detailed and passionate reviews about businesses in their neighborhoods. In turn, businesses that provide great service and good value are able to establish and promote themselves online. [See Exhibit A]

Today, Yelp employs more than 800 people throughout the country. More than 60 million consumers use Yelp every month to decide how and where to spend their hard earned money. And on the flip side, job growth in this country relies on small, but fast growing and successful businesses. Yelp helps them reach new customers by amplifying their positive word-of-mouth, online.

This hearing is important because it examines issues that go to the heart of innovation: whether new ideas can compete fairly against expanding monopolies. In our case, I wonder if we would have been able to start Yelp today given Google's recent actions.

II. ABOUT GOOGLE

Google is no longer in the business of sending people to the best sources of information on the web. It now hopes to be a destination site itself for one vertical market after another, including news, shopping, travel, and now, local business reviews. It would be one thing if these efforts were conducted on a level playing field, but the reality is they are not.

The experience in my industry is telling: Google forces review websites to provide their content for free to benefit Google's own competing product – not consumers. Google then gives its own product preferential treatment in Google search results.

III. GOOGLE LOCAL

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Google's destination site for local business reviews is dubbed Google Local. In its original form, Google Local looked like little more than an online version of the phonebook, featuring names, addresses, and phone numbers, but little in the way of rich, social, qualitative information. [See Exhibit B]

Perhaps recognizing this deficiency, Google Local sought a license from Yelp in 2005 to use portions of Yelp's rating and review content, a relationship which ended in 2007 after Google Local began soliciting ratings and reviews from its own users. In 2009, the media reported that Google tried to acquire Yelp and its consumer review content outright, though the reported acquisition never came to pass, and Yelp remained an independent company.

Google Local remained relatively threadbare during these years, and services like Yelp remained better positioned than Google itself to provide the sort of information that users were seeking about local businesses. In 2010, Google appointed a new executive to lead Google Local, and they launched a series of anticompetitive initiatives designed to shore up the threat posed by partial substitutes like Yelp.

A. Google Uses its Dominant Position to Force Services Like Yelp to Contribute their Content to Benefit Google Local

Websites typically allow search engines like Google to crawl and index their sites so that links to their sites can appear in response to relevant search engine queries. For example, if you search for "antitrust law", Google will display a relevant link to the FTC website as its fifth search result because the FTC has allowed Google to crawl and index that portion of its website.

In 2010, Google began incorporating the content that it indexed from its competitors into Google Local without permission. Although Google had previously acknowledged that it needed a license to use Yelp's content, it was now using it without permission to prop up its own, less effective product. In some instances, Google even presented this content to its users as if it were its own. [See Exhibit C]

1. Google's Offers a False Choice

In response to our objections, Google informed us that it would cease the practice only if we agreed to be removed from Google's web search index, thereby preventing Yelp from appearing anywhere in Google web search results. This, of course, was a false choice. Google's dominant position in the market prevents services like Yelp from exercising any sort of meaningful choice in the matter: it is a choice between allowing Google to co-opt one's content and not competing at all.

Google's private position with companies like Yelp was in stark contrast to its public position, which curried the public's favor. For example, in the wake of a lawsuit relating to Google News, a Google spokesman insisted: "We wouldn't demand that anyone include their content in any of

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our services at risk of being removed from search."[1] For whatever reason, this message clearly had not yet made its way to the executives in charge of Google Local.

2. Google Backtracks Under Public Scrutiny, But Privately Reprises the False Choice

Shortly after the FTC announced its investigation into Google's practices, and shortly after Yelp publicly presented its concerns at the Conference of Western Attorneys General in July 2011, Google announced that it would cease misappropriating content from its competitors.

The victory was short-lived, however. Just one week later, it was revealed that Google Local was continuing to use content from services like Yelp in order to power its own local business search product, driving traffic to its own pages. [See Exhibit D]

We again asked that Google cease its practice of co-opting content from Yelp for its own benefit. Google responded by removing Yelp links from portions of Google's web search product, providing a new twist on the same old false choice: if we chose not to help power Google Local, we could not appear in the "merged" portions of Google's web search results.[2] To date, consumers cannot find links to Yelp in Google's merged results, belying Google's public pronouncements that "the competition is just one click away."[3] [See Exhibit E]

B. Forget the Algorithm: Google Favors its Own Sites by Design

Google favors its own Google Local product in web search results, too. Rather than favoring them algorithmically, however, Google simply favors them as a matter of design.

For example, when users search for a barber in Madison, Wisconsin, Google will always present links to its own consumer review website in the most prominent position regardless of whether the algorithm has actually determined that it has the most relevant content. Put differently, it is impossible for any of Google's competitors to be displayed as prominently as Google itself, even if Google's own algorithm rates them higher. In some instances, Google simply excludes competitor results as a matter of design, not as a matter of objective, algorithmically-driven analysis. [See Exhibit F]

Is a consumer (or a small business, for that matter) well served when Google artificially promotes its own properties regardless of merit? This has nothing to do with helping consumers get to the best information; it has everything to do with generating more revenue. [See Exhibit G]

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[1] Source: Simon Morrison of Google, July 18, 2011 (http://allthingsd.com/20110718/after-copiepresse-boycott-google-restores-search-of-news-sites/).

[2] The "merged" portion of Google search results have effectively replaced organic search results for local searches.

[3] Source: Google Public Policy Blog, May 8, 2009 (http://googlepublicpolicy.blogspot.com/2009/05/googles-approach-to-competition.html).

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IV. CONCLUSION

I live and work in San Francisco which sits on the border of Silicon Valley, a place that has participated in the development of some of the most amazing products and services over the last few decades – including Google.

Today represents a rare opportunity for the government to protect innovation. Allowing a search engine with monopoly market share to exploit and extend its dominance hampers entrepreneurial activity. Ensuring open and equal competition will sustain and foster innovation and job growth. It will also ensure that the price of internet advertising paid by small businesses will be set by the market, and not by a monopolist.

When one company controls the market, it ultimately controls consumer choice. If competition really were just "one click away" as Google suggests, why have they invested so heavily to be the default choice on web browsers and mobile phones? Clearly they are not taking any chances.

I thank the Subcommittee for its time and interest, and I look forward to assisting in any way that I can.

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Exhibit A

About Yelp
yelp
Real people. Real reviews.
Search for (e.g. taco, cheap dinner, Max's)
Near (Address, Neighborhood, City, State or Zip)
Washington, DC
Search
Welcome
About Me
Write a Review
Find Reviews
Invite Friends
Messaging
Talk
Events
Member Search
The Capital Grille
Rating Details
Category: Steakhouses (Edit)
601 Pennsylvania Ave NW
(at N 6th St)
Washington, DC 20004
(202) 737-6200
www.thecapitalgrille.com
Make a Reservation
Date & Time
Party Size
07/08/2011
6:00 pm
2
Find a Table
or $25 for 9 Exceptional Wines
Visit us for our Generous Pour Wine Event, 7/12 - 9/4, and discover 9 world-class wines. Enjoy as many as you like with dinner for only $25
Announced one week ago
Add Photos
View All Photos
View Larger Map/Directions
Browse Nearby:
Restaurants | Nightlife | Shopping | Movies | All
People Who Viewed This Also Viewed...
Charlie Palmer Steak

About Yelp

yelp
Real People. Real Reviews.™

Elite '11 Colleen M.
37 I'm done-I only jog far enough to burn off the cheesecake I had for...
138 Washington, DC

Compliment
Send Message
Follow This Reviewer

1/27/2011

Thank you restaurant week for making me able to go to this restaurant on my shoestring budget! YUM! I had the dry aged sirloin, my friend had the filet. Go with the filet! Great quality meat, you could cut it with a spoon. They have garlic mashed potatoes there, and yes they leave the redskins on when they mash them, the only way mashed potatoes should be served! We had clam chowder and ceaser to start with, both were pretty darn good! It's been a while since I have had quality clam chowder. Then we ended with key lime pie, which I didn't think I liked until I had theirs, and some chocolate espresso cake or something. I rarely want chocolate for dessert, but oh man! It's very compressed and heavy, not like an airy cake. WOW-soo good!

I do not think we could have had a nicer server or a better experience. The only problem I had was I got there about 5 minutes early for my reservation and they said they could not seat me yet but would let me know when my table was ready. About 20 minutes after my reservation they said htey were ready. At this point I was at the bar and she said I could finish my drink. 5 minutes later another lady from the hostess stand came up and asked if I would mind being seated as it was now almost 30 minutes from my reservation time. She was VERY rude and used a nasty tone. But I was glad to be seated and just took my drink with me. Bartender, clientele, and waitor, all were more than perfect. It was a great experience, and I do want to go back soon. I hear the coconut cream pie and some lobster app are to die for... I'll keep you posted :)

The prices for drinks weren't that bad either, like 12 something for my hendricks on the rocks...

Was this review ...? Useful 0 Funny 0 Cool 0

Bookmark Send to a Friend Link to This Review

Add owner comment Flag this review

Exhibit B

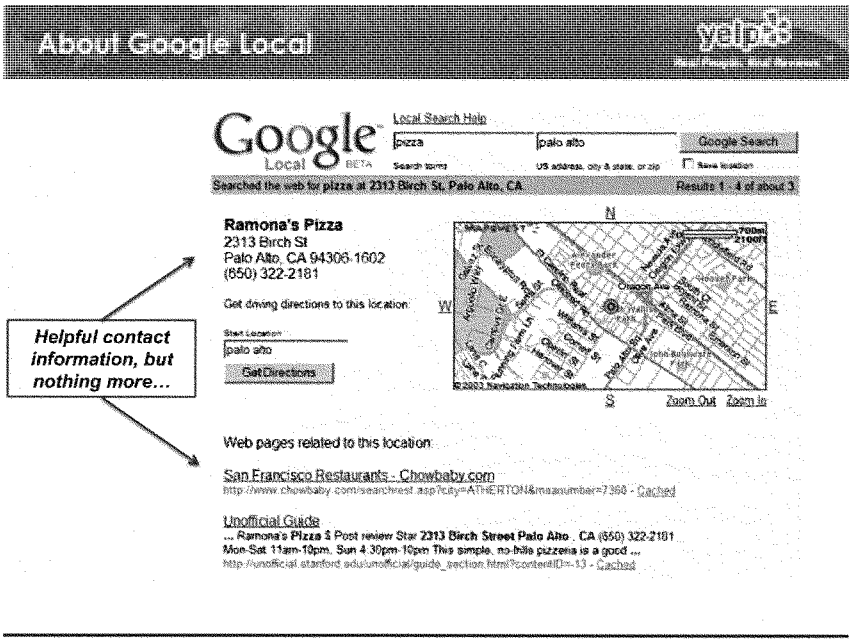
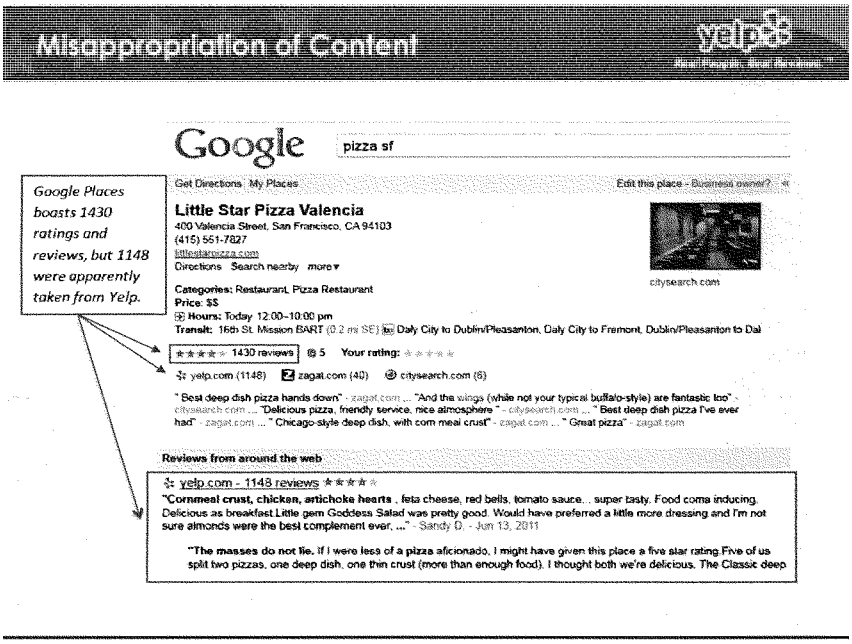
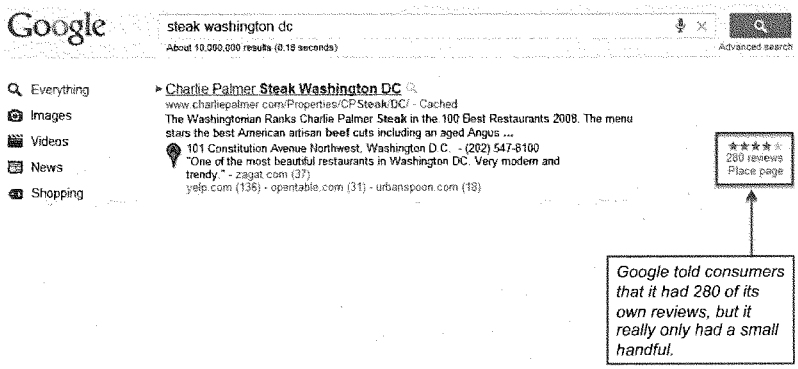

About Google Local
yelp
Google Local BETA
Local Search Help
pizza
palo alto
Google Search
Searched the web for pizza at 2313 Birch St, Palo Alto, CA
Results 1 - 4 of about 3
Ramona's Pizza
2313 Birch St
Palo Alto, CA 94306-1602
(650) 322-2181
Get driving directions to this location:
Start Location
palo alto
Get Directions
Helpful contact information, but nothing more…
Zoom Out
Zoom In
Web pages related to this location:
San Francisco Restaurants - Chowbaby.com
Unofficial Guide
... Ramona's Pizza $ Post review Star 2313 Birch Street Palo Alto , CA (650) 322-2181
Mon-Sat 11am-10pm, Sun 4:30pm-10pm This simple, no-frills pizzeria is a good ...

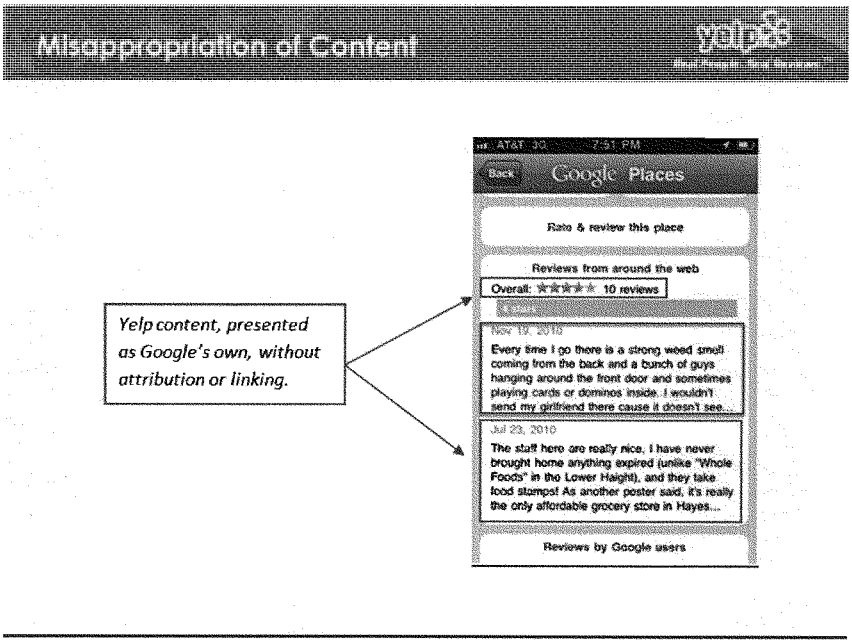
Exhibit C


Misappropriation of Content
yelp
Google
pizza sf
Google Places boasts 1430 ratings and reviews, but 1148 were apparently taken from Yelp.
Get Directions My Places
Edit this place - Business owner?
Little Star Pizza Valencia
400 Valencia Street, San Francisco, CA 94103
(415) 551-7827
littlestarpizza.com
Directions Search nearby more
citysearch.com
Categories: Restaurant, Pizza Restaurant
Price: $$
Hours: Today 12:00–10:00 pm
Transit: 16th St. Mission BART (0.2 mi SE) Daly City to Dublin/Pleasanton, Daly City to Fremont, Dublin/Pleasanton to Dal
1430 reviews 5 Your rating:
yelp.com (1148) zagat.com (40) citysearch.com (6)
" Best deep dish pizza hands down" - zagat.com ... "And the wings (while not your typical buffalo-style) are fantastic too" - citysearch.com ... "Delicious pizza, friendly service, nice atmosphere " - citysearch.com ... " Best deep dish pizza I've ever had" - zagat.com ... " Chicago-style deep dish, with corn meal crust" - zagat.com ... " Great pizza" - zagat.com
Reviews from around the web
yelp.com - 1148 reviews
"Cornmeal crust, chicken, artichoke hearts , feta cheese, red bells, tomato sauce. . super tasty. Food coma inducing. Delicious as breakfast Little gem Goddess Salad was pretty good. Would have preferred a little more dressing and I'm not sure almonds were the best complement ever, ..." - Sandy D. - Jun 13, 2011
"The masses do not lie. If I were less of a pizza aficionado, I might have given this place a five star rating.Five of us split two pizzas, one deep dish, one thin crust (more than enough food). I thought both we're delicious. The Classic deep

Misappropriation of Content



Google told consumers that it had 280 of its own reviews, but it really only had a small handful.


Misappropriation of Content
yelp
Yelp content, presented as Google's own, without attribution or linking.
Back
Google Places
Rate & review this place
Reviews from around the web
Overall: 10 reviews
Every time I go there is a strong weed smell coming from the back and a bunch of guys hanging around the front door and sometimes playing cards or dominos inside. I wouldn't send my girlfriend there cause it doesn't see...
Jul 23, 2010
The staff here are really nice. I have never brought home anything expired (unlike "Whole Foods" in the Lower Haight), and they take food stamps! As another poster said, it's really the only affordable grocery store in Hayes...
Reviews by Google users

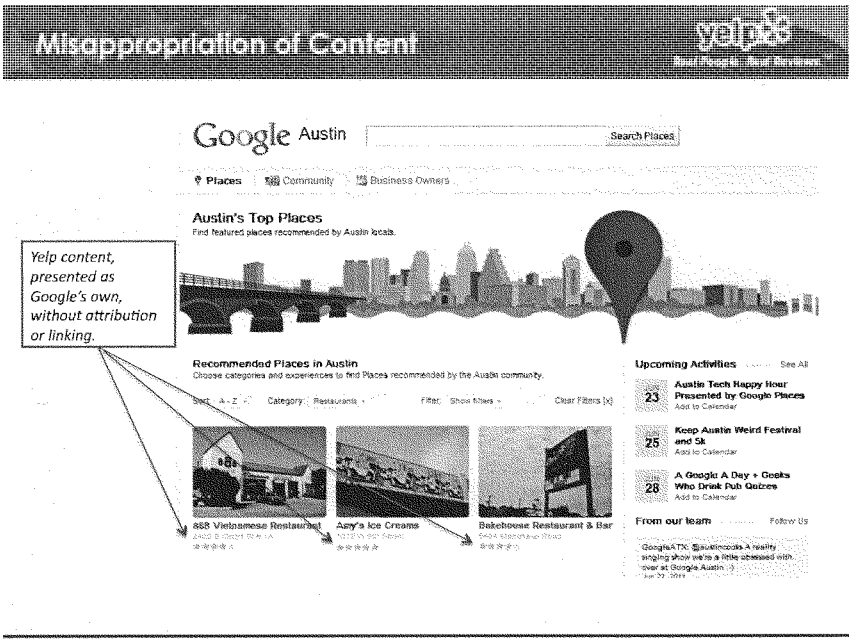
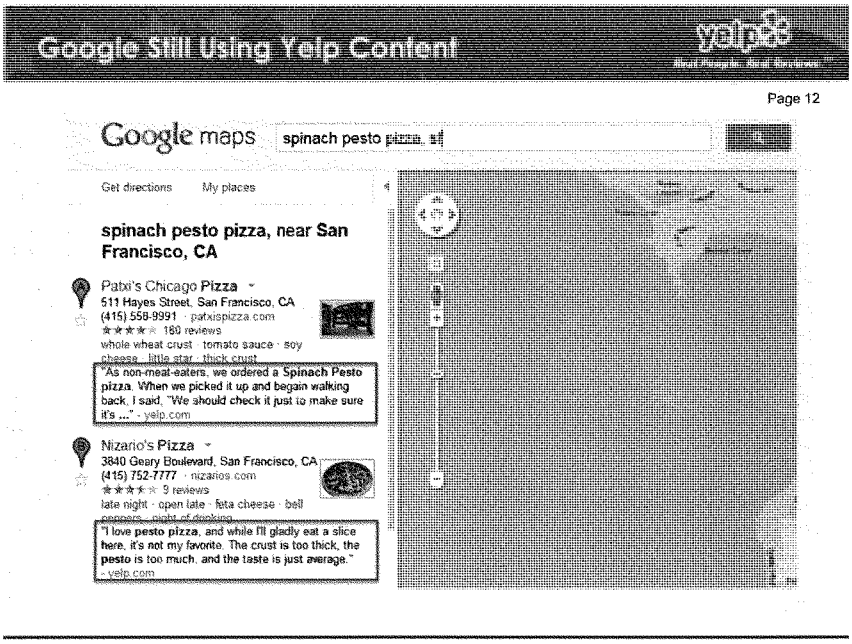
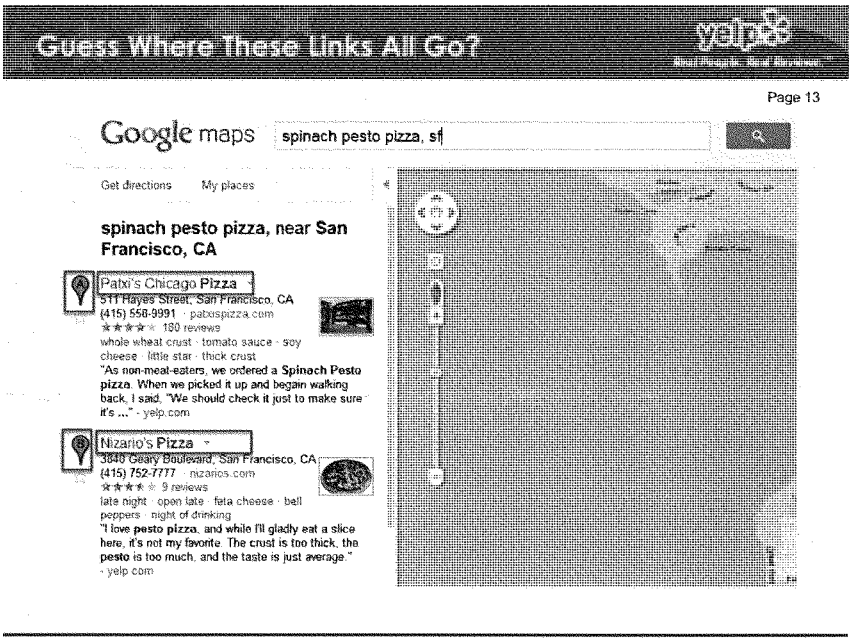

Misappropriation of Content
yelp
Google Austin
Search Places
Places
Community
Business Owners
Austin's Top Places
Find featured places recommended by Austin locals.
Yelp content, presented as Google's own, without attribution or linking.
Recommended Places in Austin
Choose categories and experiences to find Places recommended by the Austin community.
Sort: A - Z
Category: Restaurants
Filter: Show filters
Clear Filters [x]
Upcoming Activities
See All
23
Austin Tech Happy Hour Presented by Google Places
Add to Calendar
25
Keep Austin Weird Festival and 5k
Add to Calendar
28
A Google A Day + Geeks Who Drink Pub Quizes
Add to Calendar
From our team
Follow Us
888 Vietnamese Restaurant
Amy's Ice Creams
Bakehouse Restaurant & Bar

Exhibit D


Google Still Using Yelp Content
yelp
Page 12
Google maps
spinach pesto pizza, sf
Get directions
My places
spinach pesto pizza, near San Francisco, CA
Patxi's Chicago Pizza
511 Hayes Street, San Francisco, CA
(415) 558-9991 · patxispizza.com
180 reviews
whole wheat crust · tomato sauce · soy cheese · little star · thick crust
"As non-meat-eaters, we ordered a Spinach Pesto pizza. When we picked it up and begain walking back, I said, "We should check it just to make sure it's ..." - yelp.com
Nizario's Pizza
3840 Geary Boulevard, San Francisco, CA
(415) 752-7777 · nizarios.com
9 reviews
late night · open late · feta cheese · bell peppers · night of drinking
"I love pesto pizza, and while I'll gladly eat a slice here, it's not my favorite. The crust is too thick, the pesto is too much, and the taste is just average." - yelp.com


Guess Where These Links All Go?
yelp
Page 13
Google maps
spinach pesto pizza, sf
Get directions
My places
spinach pesto pizza, near San Francisco, CA
Patxi's Chicago Pizza
511 Hayes Street, San Francisco, CA
(415) 558-9991 · patxispizza.com
180 reviews
whole wheat crust · tomato sauce · soy cheese · little star · thick crust
"As non-meat-eaters, we ordered a Spinach Pesto pizza. When we picked it up and begain walking back, I said, "We should check it just to make sure it's ..." - yelp.com
Nizario's Pizza
3848 Geary Boulevard, San Francisco, CA
(415) 752-7777 · nizarios.com
9 reviews
late night · open late · feta cheese · bell peppers · night of drinking
"I love pesto pizza, and while I'll gladly eat a slice here, it's not my favorite. The crust is too thick, the pesto is too much, and the taste is just average."
- yelp.com

Isn't Google Doing this for the Consumer?

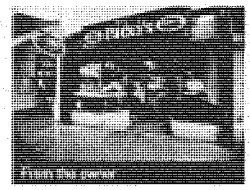
yelp

Page 14

Google maps spinach pesto pizza, sf

Patxi's Chicago Pizza
511 Hayes Street, San Francisco, CA 94102
(415) 558-9991
patxispizza.com
Directions Search nearby more ▾

Write a review Upload a photo



› **Categories:** Patxi's Chicago Pizza, Thin Crust Pizza, Deep Dish Pizza, ...
› **Hours:** Today 11:00 am – 10:30 pm
Transit: Market St & South Van Ness Ave (0.3 mi E) F, J, KT, L, M, N, ... 6, 47, 49, 71, ...

★★★★☆ 180 reviews 2 **Your rating:** ☆☆☆☆☆

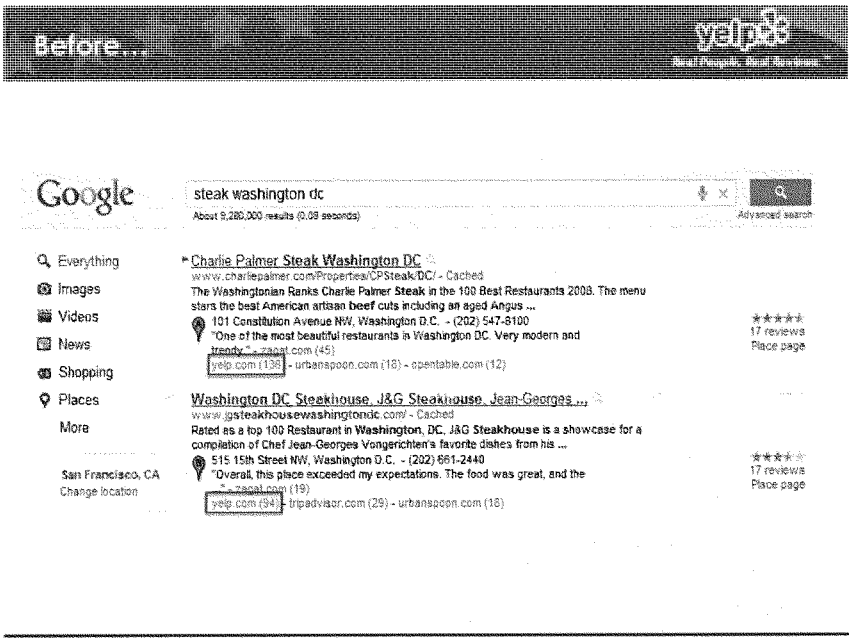
whole wheat crust · tomato sauce · soy cheese · little star · thick crust

Great Chicago deep dish and thin crust pizzas, beers and wine! - From the owner

Not a single reference to "spinach pesto pizza", so why are we here?

Confidential

Exhibit E


Before...
yelp
Real People. Real Reviews.
Google
steak washington dc
About 9,280,000 results (0.09 seconds)
Advanced search
Everything
Images
Videos
News
Shopping
Places
More
San Francisco, CA
Change location
Charlie Palmer Steak Washington DC
www.charliepalmer.com/Properties/CPSteak/DC/ - Cached
The Washingtonian Ranks Charlie Palmer Steak in the 100 Best Restaurants 2008. The menu stars the best American artisan beef cuts including an aged Angus ...
101 Constitution Avenue NW, Washington D.C. - (202) 547-8100
"One of the most beautiful restaurants in Washington DC. Very modern and trendy." - zagat.com (45)
yelp.com (138) - urbanspoon.com (18) - opentable.com (12)
17 reviews
Place page
Washington DC Steakhouse, J&G Steakhouse, Jean-Georges ...
www.jgsteakhousewashingtondc.com/ - Cached
Rated as a top 100 Restaurant in Washington, DC, J&G Steakhouse is a showcase for a compilation of Chef Jean-Georges Vongerichten's favorite dishes from his ...
515 15th Street NW, Washington D.C. - (202) 661-2440
"Overall, this place exceeded my expectations. The food was great, and the" - zagat.com (19)
yelp.com (94) - tripadvisor.com (29) - urbanspoon.com (18)
17 reviews
Place page

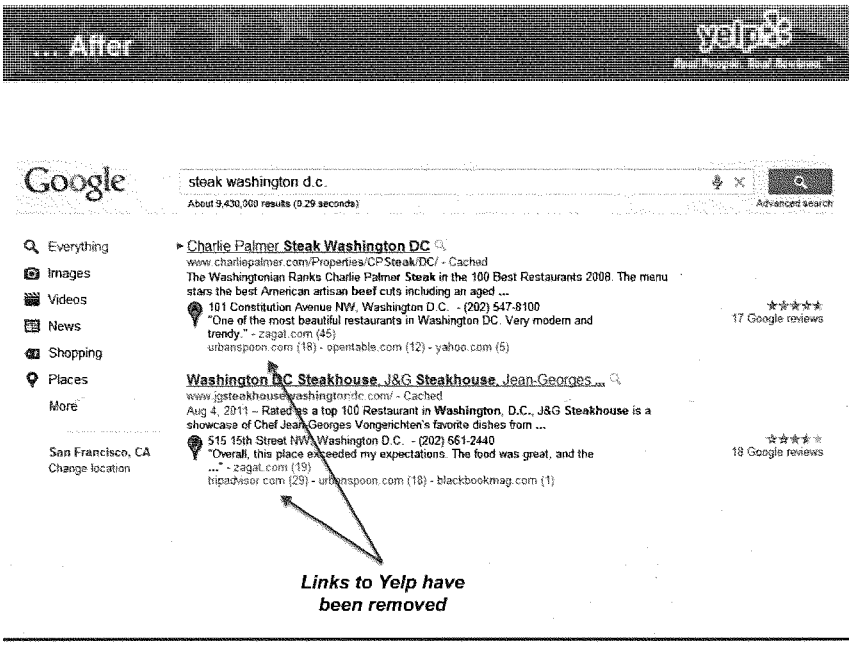
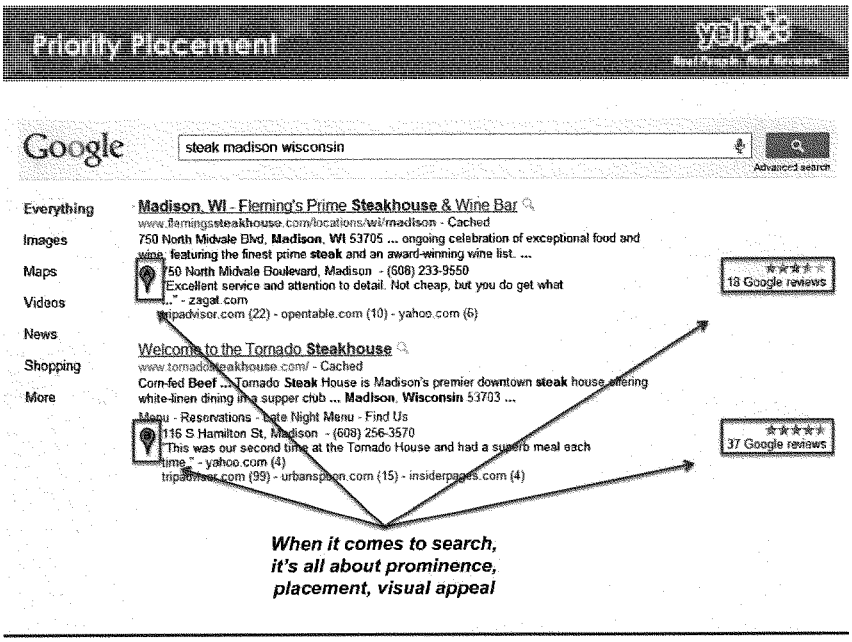
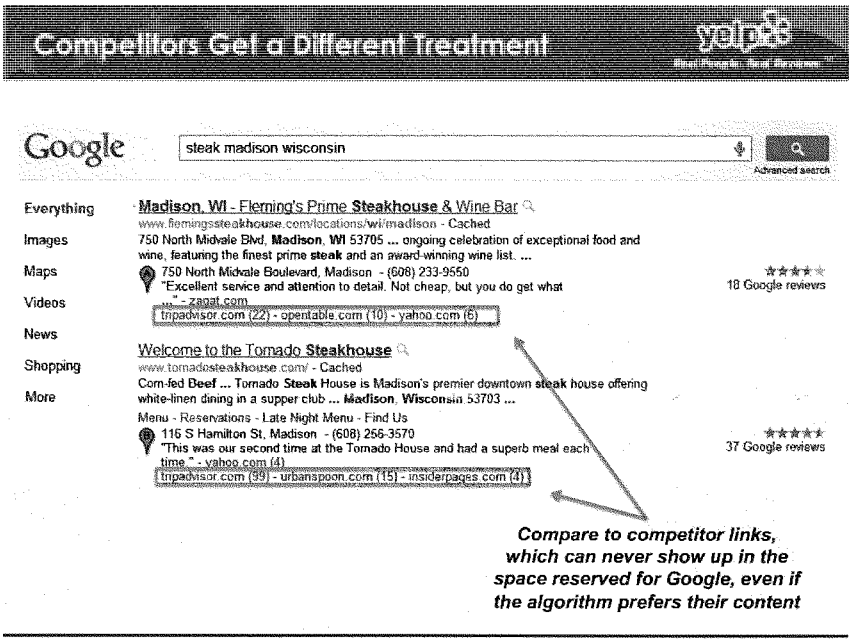
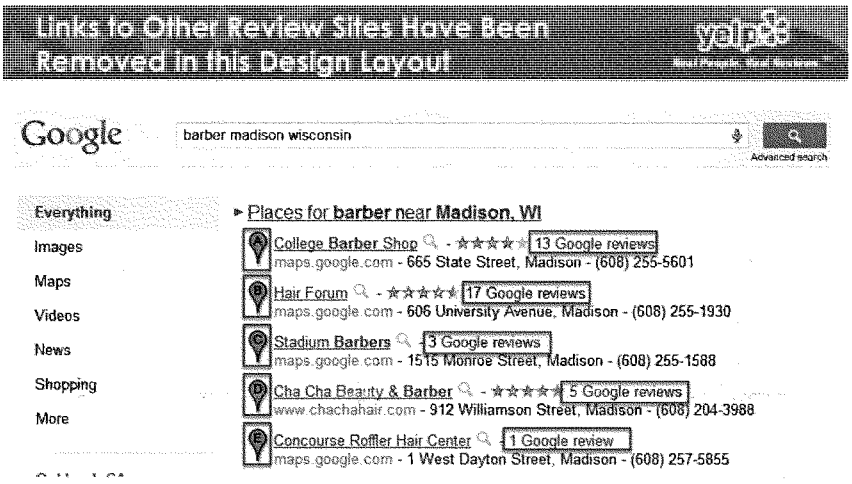

... After
yelp
Google
steak washington d.c.
About 9,430,000 results (0.29 seconds)
Advanced search
Everything
Images
Videos
News
Shopping
Places
More
San Francisco, CA
Change location
Charlie Palmer Steak Washington DC
www.charliepalmer.com/Properties/CPSteak/DC/ - Cached
The Washingtonian Ranks Charlie Palmer Steak in the 100 Best Restaurants 2008. The menu stars the best American artisan beef cuts including an aged ...
101 Constitution Avenue NW, Washington D.C. - (202) 547-8100
"One of the most beautiful restaurants in Washington DC. Very modern and trendy." - zagat.com (45)
urbanspoon.com (18) - opentable.com (12) - yahoo.com (5)
17 Google reviews
Washington DC Steakhouse, J&G Steakhouse, Jean-Georges ...
www.jgsteakhousewashingtondc.com/ - Cached
Aug 4, 2011 – Rated as a top 100 Restaurant in Washington, D.C., J&G Steakhouse is a showcase of Chef Jean-Georges Vongerichten's favorite dishes from ...
515 15th Street NW, Washington D.C. - (202) 661-2440
"Overall, this place exceeded my expectations. The food was great, and the ..." - zagat.com (19)
tripadvisor.com (29) - urbanspoon.com (18) - blackbookmag.com (1)
18 Google reviews
Links to Yelp have been removed

Exhibit F


Priority Placement
yelp
Google
steak madison wisconsin
Advanced search
Everything
Images
Maps
Videos
News
Shopping
More
Madison, WI - Fleming's Prime Steakhouse & Wine Bar
www.flemingssteakhouse.com/locations/wi/madison - Cached
750 North Midvale Blvd, Madison, WI 53705 ... ongoing celebration of exceptional food and wine, featuring the finest prime steak and an award-winning wine list. ...
750 North Midvale Boulevard, Madison - (608) 233-9550
"Excellent service and attention to detail. Not cheap, but you do get what ..." - zagat.com
tripadvisor.com (22) - opentable.com (10) - yahoo.com (6)
18 Google reviews
Welcome to the Tornado Steakhouse
www.tornadosteakhouse.com/ - Cached
Corn-fed Beef ...Tornado Steak House is Madison's premier downtown steak house offering white-linen dining in a supper club ... Madison, Wisconsin 53703 ...
Menu - Reservations - Late Night Menu - Find Us
116 S Hamilton St, Madison - (608) 256-3570
"This was our second time at the Tornado House and had a superb meal each time." - yahoo.com (4)
tripadvisor.com (99) - urbanspoon.com (15) - insiderpages.com (4)
37 Google reviews
When it comes to search, it's all about prominence, placement, visual appeal

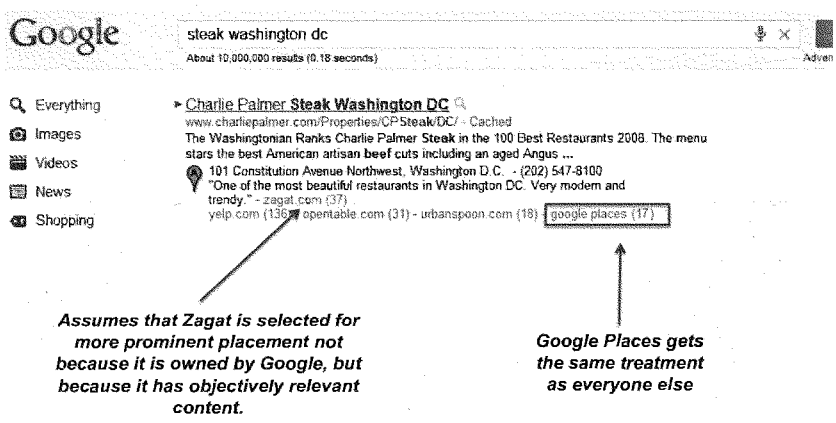

Competitors Get a Different Treatment
yelp
Google
steak madison wisconsin
Advanced search
Everything
Images
Maps
Videos
News
Shopping
More
Madison, WI - Fleming's Prime Steakhouse & Wine Bar
www.flemingssteakhouse.com/locations/wi/madison - Cached
750 North Midvale Blvd, Madison, WI 53705 ... ongoing celebration of exceptional food and wine, featuring the finest prime steak and an award-winning wine list. ...
750 North Midvale Boulevard, Madison - (608) 233-9550
"Excellent service and attention to detail. Not cheap, but you do get what ..." - zagat.com
tripadvisor.com (22) - opentable.com (10) - yahoo.com (6)
18 Google reviews
Welcome to the Tornado Steakhouse
www.tornadosteakhouse.com/ - Cached
Corn-fed Beef ... Tornado Steak House is Madison's premier downtown steak house offering white-linen dining in a supper club ... Madison, Wisconsin 53703 ...
Menu - Reservations - Late Night Menu - Find Us
116 S Hamilton St, Madison - (608) 256-3570
"This was our second time at the Tornado House and had a superb meal each time." - yahoo.com (4)
tripadvisor.com (99) - urbanspoon.com (15) - insiderpages.com (4)
37 Google reviews
Compare to competitor links, which can never show up in the space reserved for Google, even if the algorithm prefers their content



Google executives (not the algorithm) have decided that Google Local always has the most helpful content for consumers

Exhibit G

What the Design Layout Might Look Like If Google Played on a Level Playing Field



Assumes that Zagat is selected for more prominent placement not because it is owned by Google, but because it has objectively relevant content.

Google Places gets the same treatment as everyone else

Therapy Wine Bar
364 Lewis Avenue
Brooklyn, NY 11233
(718)513-0686
Therapywinebar@aol.com

August 5, 2011

Honorable Charles Schumber
United State Senator
757 Third Avenue
New York, NY 10017

Dear Senator Schumer,

As a small business owner, I have experienced firsthand the effects of our struggling economy. I own Therapy Wine Bar in Brooklyn, and my small business has experienced an overall decrease in customers since the economy took a turn for the worse. I know well that the success of Therapy Wine Bar depends in large part on the success of the larger economy, and that's why Congress needs to place an importance upon job creation and putting the economy on the right track. An important step Congress should take is to avoid placing unnecessary and unfair restrictions upon thriving enterprises which, in fact, help small enterprises grow.

Online companies have weathered the recent recession better than most other industries. The new economic developments generated by the internet have encouraged innovation, helping small businesses make the most of their resources during both good and bad economic times. Google, one of those companies, has made information much easier to share, to the benefit of my small business.

When consumers search for "wine" in the zip code 11233 or even a "bar" in that zip code using Google Maps, Therapy Wine Bar is the first search result that appears. In fact, if users search on Google, "wine bar Brooklyn", my small business is the sixth search result to appear. Google's search tools allow my business to gain exposure that was previously only obtained through word of mouth. It is impossible to quantify the effect that Google's search function has had on my flow of customers, but it is surely a positive one.

Google has not just positively impacted my business. Google has provided $8.5 billion worth of economic activity for New York State businesses, website publishers, and non-profits. Additionally, Google provided $64 billion of economic activity nationally in 2010. Google encourages local businesses to grow. It fuels information sharing, educational outreach, service delivery and economic growth statewide.

VerDate Nov 24 2008 11:11 Dec 21, 2011 Jkt 071471 PO 00000 Frm 00278 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\71471.TXT SJUD1 PsN: CMORC

71471.222

Therapy Wine Bar
364 Lewis Avenue
Brooklyn, NY 11233
(718)513-0686
Therapywinebar@aol.com

Many of my peers use Google search and advertising services. However, many others take advantage of different web services like Facebook and Bing in order to obtain new information and reach consumers. There is no question that Google is in a competitive marketplace. In fact, in the case of internet companies, competition is only one click away. Google's approach to information is unique in allowing users to take their data and leave for a competitor's at no cost. It baffles me that the government would involve itself in what seems to be a battle for market share between a bunch of big companies.

The success of Therapy Wine Bar depends on the success of the overall economy. The last thing our economy can afford is overregulation of thriving companies like Google that happen to provide small businesses like my own.

Sincerely,

Angela Terry

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71471.223

THE ASSEMBLY
STATE OF NEW YORK
ALBANY

MICHELE R. TITUS
Assemblywoman 31st Assembly District
Queens County

CHAIR
Legislative Women's Caucus
COMMITTEES
Children and Families
Codes
Ethics and Guidance
Judiciary
Local Government
Small Business
SUBCOMMITTEES
Airport and Economic Development
Foster Care
TASK FORCES
People with Disabilities

July 20, 2011

Honorable Charles Schumer
United State Senator
757 Third Avenue
New York, NY 10017

Dear Senator Schumer,

As a member of the New York State Assembly, I speak regularly with members of the community who are struggling to find jobs in our weak economy. As the fragile recovery struggles to take hold, Congress' priority must be to embrace policies that lead to job creation and economic growth.

In particular, we should promote – not hinder – start-ups, local small businesses, and the companies that are innovating and creating the jobs of the future. These companies have been central to the rise of the Internet marketplace – which remains one of America's economic success stories and a principle driver of economic growth for businesses both large and small. Google has been an innovator and leader in this new American success story, and we have seen the positive impact from its growth and innovation in my community.

In my district which comprises Far Rockaway, Rosedale, Laurelton, Springfield Gardens and South Ozone Park section of Queens, businesses looking to expand their customer base and consumers seeking to make informed decisions look to Google and its useful online services. Small businesses across New York State make use of Google's cost-effective search and advertising programs to bring them customers – customers that help them expand and add jobs. In fact, Google provided $8,570,080,000 of economic activity for 125,300 businesses, non-profits, and website publishers across the state in 2010. Nationally, Google is a major driver of economic growth as well. Last year, the company provided $64 billion of economic activity in the United States. Google has offices in 20 states and almost 30,000 employees worldwide. Google is a major employer, not just in New York State, but across the country.

Recently, there has been talk in Washington that Google has been too successful and as such deserves greater regulatory and investigative scrutiny. It is important to examine the source of these complaints: frequently, Google's competitors are the ones drumming up concerns about Google's business model. We should remember, however, that competition policy is designed to protect consumers, not companies – and, for Google, competition is always just a click away.

☐ Room 741, Legislative Office Building, Albany, New York 12248 • 518-455-5668 • FAX: 518-455-3992
☐ 19-31 Mott Avenue, Room 301, Far Rockaway, New York 11691 • 718-327-1845 • FAX: 718-327-1876
☐ 131-17 Rockaway Blvd., South Ozone Park, New York 11420 • 718-322-4956 • FAX: 718-322-5267
titusm@assembly.state.ny.us

Each time consumers go online, they have myriad search options at their fingertips. Microsoft has committed to investing up to $2.5 billion per year in their search engine Bing, which is already a significant competitor to Google. Many consumers turn to Facebook, Twitter, and other sites to find news, product recommendation or other information, rather than relying on an Internet search.

At this time of economic uncertainty, the wrong choice for government would be to take steps that impede innovation and job creation. Tying up pro-consumer companies like Google in endless legal oversight and penalizing them for their success will not help the economy grow—not in my community and not nationally. Instead, allowing the market to continue to work successfully and consumers to freely choose which online services they use is a better way to nurture additional entrepreneurship and job growth.

Sincerely,

Michele Titus
New York State Assembly, 31st A.D.

centro

Honorable Charles Schumer
United State Senator
757 Third Avenue
New York, NY 10017

Dear Senator Schumer,

Centro is a digital media services and technology company with 30 offices across the country including New York City. We represent more than 1,000 advertisers and agencies who are constantly seeking to improve the way in which they communicate to their customers and raise awareness among potential customers. Igniting customer demand is obviously critical to their bottom lines, but in these challenging economic times, sparking customer demand is also critical to our nation's economic health.

Online search advertising has been the greatest single technical innovation in advertising in decades. Google and its competitors like Yahoo and Bing help companies and non-profit organizations reach their audiences much more efficiently and effectively than they could through traditional advertising alone. For many small businesses and non-profits who cannot afford television or radio advertising, online search advertising provides a level of visibility unavailable to them even ten years ago. With each passing year, new technologies are being created that make it even easier for small businesses and non-profits to reach customers and for customers to find what they are looking for online.

For my business, Google is key to our successful adaptation to rapidly changing and challenging conditions. Centro is a partner to both agencies and media companies. We provide technology and services in order to better facilitate the navigation of the growing online media market. Centro relies on Google's search and advertising programs in order to maximize our client base and coordinate our services.

We are not the only business that has benefited from the services Google provides. In New York, Google has provided over $8.5 billion worth of economic activity for businesses, website publishers, and non-profits. Additionally, Google provided $64 billion of economic activity nationally in 2010. Google fuels information sharing, educational outreach, service delivery and economic growth among businesses nationwide.

centro

While Google is certainly an industry leader, they do not have anything close to a monopoly on search advertising. Bing and Yahoo and a myriad of specialty search sites are valued alternatives. Facebook is successfully vying for market share and providing innovative advertising opportunities.

In short, this is a healthy, vigorous and ever-changing marketplace. Government should protect consumers vigorously, but should not take steps that will undermine innovation. The last thing our economy can currently afford is for Washington to over-regulate successful companies, such as Google, who provide pro-consumer tools to a critical sector of our economy.

Sincerely,

Jason Tosney
VP Northeast
Centro | Transis
P: 212. 253. 1639
E: jason.tosney@centro.net

BROOKLYN MUSIC SCHOOL
120 Sidney Lefkowitz Street, Brooklyn, NY 11217 tel 718.638.5600

August 20, 2011

Honorable Charles Schumer
United States Senate
757 Third Avenue
New York, NY 10017

Dear Senator Schumer,

As the President of the Board of Trustee of The Brooklyn Music School, I know well the negative effects of our struggling economy. When the greater economy is doing poorly, funding goes down and fewer parents choose to purchase music lessons for their children. We know well that the success of our cause depends in large part on the success of the larger economy. An important part of this effort must be avoiding placing undue burdens on thriving and innovative enterprises.

Online companies bave helped small businesses and non-profits weather the recent recession. Google, an online company that does much to encourage innovation, has made information far easier to share, to the benefit of The Brooklyn Music School.

For The Brooklyn Music School, Google is key to our successful adaptation to rapidly changing and challenging conditions. The school views art as essential to a child's basic education and aims to educate as many children as possible in arts and music. Google's search and advertising services have allowed The Brooklyn Music School to reach far more parents than would otherwise be possible, and allows us the exposure necessary to get word out and bring in resources such as volunteers and donors.

Businesses all across New York State have turned to Google for support. Google has provided over $8.5 billion of economic activity for New York State businesses, website publishers, and non-profits. At the national level, Google provided $64 for United States businesses in 2010. Not only does Google help The Brooklyn Music School, it helps the non-profit sector and small businesses grow. It fuels information sharing, educational outreach, service delivery and economic growth statewide.

The success of The Brooklyn Music School is affected by the overall health of the economy. The needs are greater and the resources fewer in bad economic times.

Thank you for your time and consideration to this very important issue.

Sincerely,

Albert C Wiltshire

Mr. Albert Wiltshire
President Board Trustees
The Brooklyn Music School

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71471.228

THE ASSEMBLY
STATE OF NEW YORK
ALBANY

KEITH L. T. WRIGHT
Assemblyman 70TH District
New York County

REPLY TO:
Harlem State Office Building
163 West 125th Street, Suite 911
New York, New York 10027
(212) 866-5809
FAX (212) 864-1368

Room 522
Legislative Office Building
Albany, New York 12248
(518) 455-4793
FAX (518) 455-3890

CHAIRMAN
Labor

CHAIRMAN
Subcommittee on Public Housing

CHAIRMAN
Subcommittee on Equal Economic
Opportunity and Human Rights

MEMBER
Black, Puerto Rican and
Hispanic Legislative Caucus
MTA Capital Program Review Board
Puerto Rican/Hispanic Task Force
Task Force on Criminal Justice Reform
High Speed Rail Task Force

COMMITTEES
Ways and Means
Codes
Correction
Housing

July 21, 2011

Honorable Charles Schumer
United State Senator
757 Third Avenue
New York, NY 10017

Dear Senator Schumer,

As a member of the New York State Assembly, I speak regularly with members of the community who are struggling to find jobs in our weak economy. As the fragile recovery struggles to take hold, Congress' top priority must be to embrace policies that lead to job creation and economic growth.

In particular, we should promote – not hinder – start-ups, local small businesses, and the companies that are innovating and creating the jobs of the future. These companies have been central to the rise of the Internet marketplace – which remains one of America's economic success stories and a principle driver of economic growth for businesses both large and small. Google has been an innovator and leader in this new American success story, and we have seen the positive impact from its growth and innovation in my community.

In my district which comprises the Harlem section of Manhattan, businesses looking to expand their customer base and consumers seeking to make informed decisions look to Google and its useful online services. Small businesses across New York State make use of Google's cost-effective search and advertising programs to bring them customers – customers that help them expand and add jobs. In fact, Google provided $8,570,080,000 of economic activity for 125,300 businesses, non-profits, and website publishers across the state in 2010. Nationally, Google is a major driver of economic growth as well. Last year, the company provided $64 billion of economic activity in the United States. Google has offices in 20 states and almost 30,000 employees worldwide. Google is a major

employer, not just in New York State, but across the country.

Recently, there has been talk in Washington that Google has been too successful and as such deserves greater regulatory and investigative scrutiny. It is important to examine the source of these complaints: frequently, Google's competitors are the ones drumming up concerns about Google's business model. We should remember, however, that competition policy is designed to protect consumers, not companies – and, for Google, competition is always just a click away.

Each time consumers go online, they have myriad search options at their fingertips. Microsoft has committed to investing up to $2.5 billion per year in their search engine Bing, which is already a significant competitor to Google. Many consumers turn to Facebook, Twitter, and other sites to find news, product recommendation or other information, rather than relying on an Internet search.

At this time of economic uncertainty, the wrong choice for government would be to take steps that impede innovation and job creation. Tying up pro-consumer companies like Google in endless legal oversight and penalizing them for their success will not help the economy grow—not in my community and not nationally. Instead, allowing the market to continue to work successfully and consumers to freely choose which online services they use is a better way to nurture additional entrepreneurship and job growth.

Sincerely,

Keith L.T. Wright
New York State Assembly, 70th A.D.

September 13, 2011

To the Attention of the United States Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights, Senator Kohl, Chairman, Ranking Member, Senator Lee, Senator Schumer, Senator Kiobuchar, Senator Franken, Senator Blumenthal, Senator Grassley, and Senator Cornyn:

Representative of the interests of small business persons who have websites or who operate internet related businesses or conducting affiliate marketing or other types of advertising or marketing, I would like to enter this statement into the Subcommittee record in the proceedings for "The Power of Google: Serving Consumers or Threatening Competition?"

On April 11, 2011, my website business suffered a major setback and loss of revenue when Google Adwords, without prior notice or warning or any means of recourse, notified me that my advertising account had been closed and that I had been personally "banned" from using Google Adwords now, or in the future. In the world of operating a successful business on the internet, this action was tantamount to "capital punishment" because Google controls about 80% of the U.S. consumer keyword searches being conducted, including various keywords searches associated with my website and business.

I had been a paying advertising customer of Google Adwords for over 5 years. All advertising I ran on Google had been submitted to Google for approval and was approved. All website landing pages which I had advertised had been submitted to Google for approval and were approved. All advertisements that I ran on the Google Search and Content networks had been submitted to Google for approval and were approved. All search "keywords" which I used in association with my advertisements had been submitted to Google for approval and were approved. There is no way that an advertisement can run without prior approval from Google.

However, on April 11, 2011, when Google shut down my advertising account, I was advertising only one website that I had been advertising for over 5 years, using the same landing page, keywords, and advertisements that had been approved by Google.

When I contacted Google to discuss the reasons for the action taken, Google representatives began trying to build a case to support their decision to "permanently suspend" my account, citing prior ads that I had ran for brief periods more than 3 years ago advertising legitimate affiliate programs which Google now deemed unacceptable to Google Adwords, which they now referred to as "repeated violations". Again, the advertisements for the affiliate program websites which I had advertised and the landing pages had all been approved by Google and allowed to run on the Google search and content networks and Google collected the advertising payments for more than 5 years.

Google stated that the travel affiliate program I had advertised was a scam. Without naming the travel company here, it should be noted that the company operated a "travel

comparison shopping" search engine portal similar to major travel companies that are household names and are used to find low prices on airline travel, hotels, car rentals, and vacation packages. Here is a link to the travel affiliate program search engine site that was referred to as "a scam" by Google representatives: http://sl.rovia.com/rovia

It should be noted that Google had entered directly into the travel business on or about July 1, 2010 with its $700 million acquisition of ITA Software. According to a Search Engine site news report:
http://searchengineland.com/google-takes-on-travel-sites-courts-ftc-action-with-ita-acquisition-45590

> "ITA is behind the reservations systems for many major airlines around the world, as well as travel sites such as Kayak, Orbitz, Hotwire and many others. Bing Travel also relies on the software. Google, if allowed to complete the acquisition, would thus **own the "infrastructure"** behind its direct competitor's travel product."

According to Eric Schmidt:

> "We expect this will go through the regulators. We're pretty comfortable that this is pro competitive and pro consumer."

According to the Google press release:

> "I wanted to let you know that Google has just announced that we have signed an agreement to acquire *ITA Software*, a Cambridge, Massachusetts flight information software company. Once we've completed our acquisition of ITA, we'll work on creating new flight search tools that will make it easier for consumers to search for flights, compare flight options and prices — and get consumers quickly to a site where they can buy a ticket. Though 49% of travelers purchase travel online, it is still time consuming and slow to search for travel options online. This deal will benefit passengers, airlines and online travel agencies by making it easier for users to comparison shop for flights and airfares online, and by driving more potential customers to airlines' and online travel agencies' websites. Google won't be setting airfare prices and has no plans to sell airline tickets to consumers. Our goal is to build tools that drive more traffic to airline and online travel agency sites where customers can purchase tickets. Because Google doesn't currently compete against ITA Software, the deal will not change existing market shares. We are looking forward to working with ITA's current and future customers, and we will honor all existing agreements.

Google has also acquired Ruba and Zagat in its efforts to consolidate its position in the travel industry by controlling content and locations.

It is evident that the actions taken against the "small business" travel affiliate program referred to by Google was nothing more than another heavy handed strike against a small

competitor in both search engine traffic and travel services by leaving travel affiliates unable to advertise on Google's consumer search engine.

Another affiliate program I had advertised is an authority on fitness and weight lifting programs and the site regularly has experts write on the topics of nutrition, and fitness, and exercise programs. Google's representatives deemed the website as "false and misleading", but could not provide any supporting evidence. The site is authored by a Certified Nutrition Specialist and Certified Personal Trainer and provides researched information on the topics related to fitness, weight lifting and nutrition. Here is the website link: http://www.truthaboutabs.com/

Again, Google had previously reviewed the website for nutrition, fitness, and weightlifting landing page and the associated advertisement and allowed it to run and was compensated for "clicks" generated to this affiliate program website.

Another affiliate program was referenced by Google as having a "poor online reputation" and again, the website and advertisement had previously been approved by Google. It is also interesting to note that Google had recently started their own affiliate program called "Google Affiliate Network" after acquiring DoubleClick and it's affiliate advertising network program, Performics in 2008, which was about the time that Google began it's pattern and practice of terminating advertising accounts of those who advertised affiliate programs that were not part of the Google Affiliate network. Here is information on Google's Affiliate Network acquisition:
http://www.searchenginejournal.com/google-affiliate-network/7228/

Again it is evident that actions taken by Google against advertisers who participate in programs other than the Google affiliate programs have been targeted to strike down competition and to drive affiliate marketers and affiliate programs from other affiliate platforms and into the Google Affiliate Network program for the sole purpose of eliminating competition which translates into more revenue for Google as it takes its slice of affiliate program revenues.

I e-mailed and called the Google representatives explaining my response to the adverse action that had been taken against me and asking for help and reinstatement but my requests were ignored. In fact I was told that I should not contact them anymore and that the decision is final, with a Google representative saying, "Do you GET that?"

I sent a FedEx letter to Larry Page the CEO, as well as Kent Walker, Google's legal counsel, and asked that the decision be reviewed and asked for reinstatement but my letters were ignored and after having been a paying advertiser for more than 5 years I did not even receive the courtesy of a reply.

It would be naive to believe that Google can use the excuse that they didn't know what they were approving, when they have the most sophisticated system on the planet for evaluating websites, links, and content. No, Google knew what they were approving when they approved the ads, landing pages, keywords and websites to be advertised.

During the same time, Google permitted the unlawful advertising by many Canadian rogue "pharmacies" on Google Adwords and no adverse actions were taken against advertisers. Google was required to forfeit $500 million in Adwords revenue generated by the "pharmacy" advertising. According to the Department of Justice http://www.justice.gov/opa/pr/2011/August/11-dag-1078.html :

> "Online search engine Google Inc. has agreed to forfeit $500 million for allowing online Canadian pharmacies to place advertisements through its AdWords program targeting consumers in the United States, resulting in the unlawful importation of controlled and non-controlled prescription drugs into the United States, announced Deputy Attorney General James M. Cole; Peter F. Neronha, U.S. Attorney for the District of Rhode Island; and Kathleen Martin-Weis, Acting Director of the U.S. Food and Drug Administration's Office of Criminal Investigations (FDA/OCI). The forfeiture, one of the largest ever in the United States, represents the gross revenue received by Google as a result of Canadian pharmacies advertising through Google's AdWords program, plus gross revenue made by Canadian pharmacies from their sales to U.S. consumers. The shipment of prescription drugs from pharmacies outside the United States to customers in the United States typically violates the Federal Food, Drug and Cosmetic Act and in the case of controlled prescription drugs, the Controlled Substances Act. **Google was aware as early as 2003**, that generally, it was illegal for pharmacies to ship controlled and non-controlled prescription drugs into the United States from Canada....This investigation is about the patently unsafe, unlawful, importation of prescription drugs by Canadian on-line pharmacies, with Google's knowledge and assistance, into the United States, directly to U.S. consumers," said U.S. Attorney Neronha. "It is about taking a significant step forward in limiting the ability of rogue on-line pharmacies from reaching U.S. consumers, by compelling Google to change its behavior. It is about holding Google responsible for its conduct by imposing a $500 million forfeiture, the kind of forfeiture that will not only get Google's attention, but the attention of all those who contribute to America's pill problem....Further, from 2003 through 2009, Google provided customer support to some of these Canadian online pharmacy advertisers to assist them in placing and optimizing their AdWords advertisements, and in improving the effectiveness of their websites. "

Google cannot claim that what is happening is unknown to them or that it can be attributed to mistakes or errors. According to the Wall Street Journal, prosecutors claim to have found emails and documents indicating that Google CEO Larry Page "was aware of the allegedly illicit ad sales." The publication quotes:

> "Larry Page knew what was going on," Peter Neronha, the Rhode Island U.S. Attorney who led the probe, said in an interview. "We know it from the investigation. We simply know it from the documents we reviewed, witnesses that we interviewed, that Larry Page knew what was going on."

At the same time during which Google did not "police" the drug traffic advertisers, they actually assisted these big spending drug advertisers to help them become more successful. Instead, Google concentrated their efforts on knocking thousands of "mom and pop" websites off the Google Adwords advertising platform for allegedly "egregious violations" such as advertising a travel agency affiliate program or a health and fitness affiliate program which they labeled as "false and misleading".

In conducting research on Internet forums I discovered that what had happened to me was known as the "Google Slap" and that tens of thousands of small website businesses and Internet marketers and affiliate program marketers had been systematically eliminated by Google. That figure may be substantially higher by now. The stories of these Internet marketers were similar. People who had tried their best to build an online business and then see their income end abruptly as Google pulled the plug on their advertising and issued personal "banning" of advertisers as if they were criminals.

I read stories on the Google ad forums from dissatisfied Google Adwords advertisers and later returned to discover that Google had either "closed the forum" or had sanitized the comments made by advertisers complaining. People told stories of losing their homes, their cars and families breaking up as a result of the loss of income and resulting emotional stress in dealing with it. In my own case, due to Google's action of terminating my advertising account, in a matter of no time, more than 70% of my website business revenue disappeared causing my website domain to instantly lose business value and my monthly income that I had relied upon for 5 years, to evaporate.

I also read stories online of special treatment by Google where advertisers were selectively "reinstated" while other similar cases were not, or a large advertiser spending millions of dollars on Adwords was given repeated "warnings" and not banned and even cases where big advertising budget spenders claimed that they had made phone calls in to Google and that their keyword quality scores were manually changed from low to high, which would result in paying lower "per click" rates and that they could not understand why others in the forum were complaining.

Google's actions are reprehensible and egregious. Their policies and processes lack transparency, are vague and over reaching, and do not promulgate even-handed and fair dealings with their advertisers and that instead, there may be inherent policy abuse in the Google Adwords and Adsense program administration that needs to be investigated further, rectified or subject to regulation to prevent what seems to be an ever widening problem. I have never seen advertisers treated this way by other advertising media. The "banning" known as the "Google Slap" was recently ruled on by the French Regulators who have ruled that Google cannot just "terminate" an internet business advertiser without notice, nor can Google conduct the practice of "banning" internet business advertisers or individuals. The French ruling required that Google reinstate the advertisers accounts and Google indicated to the French Authority that they would comply with the same anywhere Google conducts business. That has not been the case. Google has waged a campaign against "small advertisers" and has terminated tens of thousands of accounts during the past year without any concern of the impact and

financial harm created by its actions. For all intents and purposes, Google is conducting itself as if the principles of law do not apply.

This committee needs to ask Google to produce a report on the total number of advertiser accounts and company and individuals which were "permanently suspended" and/or banned since 2007 and to provide that information for review, year by year so regulatory considerations can be made similar to the what the French Authority had to do in order to ensure that small businesses have access to consumer search engine traffic.

Here is the reference on the recent French Authority case which Google submitted to for the same practice:

http://www.computerworld.com/s/article/9193659/Google_will_warn_of_Adwords_policy_changes_to_settle_case

Note from that article:

> "The undertakings to improve warnings of policy changes and account suspensions are only legally binding on Google in its dealings with French advertisers of radar warning products and services. However, **the company promised in discussions with the competition authority to apply the same principles to advertisers in all other product segments, in any country where Google operates the Adwords service** -- promises the authority said in its 24-page ruling were **"duly noted."**

However Google has not honored that promise and in fact have stepped up efforts against small Internet businesses and individuals in favor of "large advertising spenders" such as the Canadian rogue pharmacies who are treated differently in terms of Google Adwords "Policies and Terms of Service." The actions of Google are harmful to American business and small business in particular and stifle emerging competition because of evidence of such a widespread pattern and practice of targeting small businesses and individuals, must be subject to regulation similar to what Google agreed to with the French Authority in order to require reinstatement of legitimate Google Adwords advertisers accounts and to protect such accounts from future retaliation for participating in these hearings to for attempting to be reinstated. Furtber, Google should be fined and required to compensate these thousands of terminated advertisers for financial losses and damages to their business reputations and value.

Here is an example of a typical termination of a Google Adwords advertiser:

http://www.everstatus.com/03/29/google-bans-11-year-old-adwords-account-over-deleted-ads/

The official Google Adwords forum on the Google website also contains the complaints of former Google Adwords advertisers whose accounts were "permanently banned" Note at the bottom of the Google forum webpage that it states: **"This discussion is**

closed to new replies."

http://www.google.com/support/forum/p/AdWords/thread?tid=322156ec28e83062&hl=en

And other Internet forums discuss Google's actions against small business advertisers:

http://www.jonasblog.com/2008/01/suspended-from-google-adwords.html#idc-cover

Google has argued that advertisers have other choices. The argument is ridiculous. Web site businesses must rely on consumer "keyword" search traffic in or to be a competitive and viable business. To prevent a website or Internet marketer from advertising on Google Adwords is the tantamount to "capital punishment" for that web based business. In addition, Google has expanded into print advertising, television advertising and radio advertising through its Google Adwords program.

I have never heard of an advertiser "personally banned" in any other media by any other company. If a newspaper took your classified ad they didn't come back on your 5 years later and tell you that you're banned now because of that ad we approved for you 5 years ago, or we didn't like that used car you tried to sell, or that stuff in your garage sale, or the way you described your home for sale, or we don't like that company that made that used exercise equipment you placed in your classified ad.

To Google these tens of thousands of businesses now mean nothing. But it should be noted that Google built its success on the backs of these small Internet markers who were early adopters of the Google Adwords and Adsense programs only to be cast off after Google became a multi-billion dollar public corporation. But, these are small businesses and individuals. Single mothers working at home try to make extra money to support their kids, by becoming an affiliate marketer part time on their computer at home. Unemployed people trying to learn how to be productive again in the digital age by learning basic computer skills and trying to begin by hopefully setting up a website storefront or an affiliate business. People trying to become part of the Internet as jobs are hard to come buy. The internet website business opportunity may be one of the only real solutions to solve our economic crisis and help people become gainfully employed, but it now appears that Google has little if any interest in helping internet startups and that, in fact, it is instead targeting these small internet marketing businesses and running them out of business and stifling competition both large and small.

When large companies conduct business on the Internet there is potential for abuse of power by virtual monopoly. Small businesses and individuals who depend upon search engine advertising need to have access to advertising for legitimate business purposes. If these search engines are to have access to file and index public information and then use that information for commercial purposes by acting as a "toll gate" where they direct traffic and clicks, they must also accept the responsibility to the public and to small businesses and large businesses alike and must be prevented from adopting patterns and practices which harm the interests of individuals and businesses by restricting access the

access to "consumer keyword search traffic" by advertisers of legitimate business concerns. And I stress that again—legitimate business concerns.

Part of any proposed settlement by Google, should also include a submission to a regulatory ruling similar to what the French Authority had to do to deal with Google, and a legal review and modifications of the Terms of Service contracts and relating policies used by Google in providing Google Adwords and Google Adsense. Google should be required to not only address, but to rectify these wrong doings, as well as the reinstatement of accounts for those legitimate businesses individuals "banned" or unjustly terminated without warning or recourse, as well as compensation for losses and damages to individual business reputation and website value as well as protection against retaliation by Google via harassment, or any of its affiliated businesses for testifying in these proceedings and or filing a case with the Federal Trade Commission. I would ask this committee on behalf of small business owners, websites, and individuals, to appoint a task force to investigate and develop further regulation and implementation to promote equal access to Google's Internet search engine advertising.

We all know that the Internet has transformed dramatically over the past 15 years. At its onset the Internet represented another opportunity for free enterprise for businesses and individuals both small and large. The doorway was opening to unlimited opportunities of the digital economy and for thousands of small businesses leading to the growing enterprises and jobs. That doorway is rapidly closing.

The trend in recent years has been for large public and privately held corporations expand their business operations on the internet by merging and acquiring competition and effectively stifling the opportunities for the average individual or small business to succeed in the internet arena.

Search engines which were once designed and developed to provide a value service to help individuals locate information, conduct research, find businesses, products, services and entertainment have evolved into businesses which have such expansive reach that they have successfully "cornered the market" on internet advertising by placing their companies in the "toll gate" position for almost all activities now being conducted on the internet and have reaped the financial benefits of doing so. These multi-billion dollar companies have grown to the point that their advertising service reach virtually every corner of the Internet whereby they literally earn money from almost every "click" a person makes.

Google now dominates almost 80% of the U. S. search engine traffic as a result of placing Google search toolbars on web browsers, websites, cell phones, and applications. At the core of this business is the profit motive as a public corporation. However, it is not to be forgotten that Google's origins. The National Science Foundation, together with DARPA and NASA, launched the Digital Libraries Initiative and one of the first six grants, funded by American taxpayers, goes to Stanford University, where two graduate students, Larry Page and Sergey Brin, begin to develop a search engine that uses the links between Web pages as a ranking method. They will later commercialize their search

engine under the "Google". The initial patent was assigned to Stanford University and then purchased back in exchange for "shares" in what was to become known as Google. It is unknown whether or not any compensation went back to the National Science Foundation received for its grant support, especially noting that the National Science Foundation was instrumental in the development of the Internet in beginning in 1977.

Since that time, Google has become far more than a search engine. By employing a system of "monetizing" "keyword" search engine and content advertising on the internet, Google began marketing Adsense advertising to both small and large website owners to place "content related" advertising on the website owner's website in exchange for a share in the profit made when a website visitor "clicked" on the site and an advertiser was charged a pay-per-click charge ranging from pennies to dollars. By instigating a "bid system" for this advertising placement, soon advertisers were faced with stiff competition and ever increasing advertising rates as one advertiser was pitted against the other for ranking and placement, in order to get advertisements placed on websites. No longer were there viable opportunities for independent website owners to work out advertising deals with other website owners because the Adsense system cornered the market by giving the website owner the opportunity to earn advertising revenue commissions without having to do more than integrate Google's Adsense html code into the website owner's html code and "wala" Google was able to begin serving content related ads. For example if the website visitor clicked on an advertisement and the advertiser was charged 50 cents for the "click", then Google would earn 25 cents and the website owner would earn 25 cents. And this would go on for each click made by a website visitor whether. In fact website visitors would be clicking on Google ads from site to site and a never-ending revenue stream was generated. Google charges some advertisers in excess of $20 for a single "keyword" click.

Google soon recognized that this was the key to it's astronomical growth and Google began offering "free advertising coupons" of up to $100 for Google advertisers to start-up a "self service" advertising account. The advertiser would then begin offering ads for various products and services by using the Google Adwords account that had been created Google would permit the advertiser select certain "keywords" that were related to the content of the website information, product or services being offered by the advertiser. The Adwords ads would then be deployed on the Google search engine pages when a search was conducted by a consumer and would be displayed as sponsored advertising results next to the "organic" Google indexed search results that were displayed. The Google Adwords ads would also appear on the websites of participating Google Adsense sites.

Google, the exact amount unknown, to encourage advertisers to start a Google Adwords account, offered the hundreds of millions of dollars or even billions of dollars of these "free advertising coupons". It is now estimated that over 1.6 million websites deploy Google Adsense advertising and it is unknown how many Google Adwords advertisers exist. Google could accurately provide both of these figures.

Google also required that all Adwords advertisers and participating Adsense websites sign one-sided agreements which gave Google carte blanche to do anything it wanted with no recourse for the advertiser. Subsequent actions taken included confiscation of Adsense revenue owed to advertisers, termination of advertising accounts without warning, and even "banning" individuals from advertising with Google, which is tantamount to "capital punishment for a small business person or individual to conduct any form of viable business on the internet. It is probably no coincidence either, that after I removed Adsense advertising from my website that my Google Adwords account was "permanently suspended".

The Adsense agreement also forbids the participating website from offering any similar type of advertising, effectively striking out competition. In addition, by locking up the websites for Adsense, Google effectively eliminated the most viable option for any small business to place advertising on content related websites. Early on in the Internet, website owners frequently exchanged banner advertisements and other advertising means. Now, with Adsense, Google effectively controls the advertising market and has continued to expand its operations and influence by buying out competitors and consolidating them into the Google program. Google also formed partnerships with other larger concerns such as AOL, replacing the AOL search engine with the Google search engine, and Google Adwords products, tightening it's grip on the advertising options for both small and large internet businesses and stifling the seeds of competition. Banned on Google Adwords and you're now automatically banned on AOL Search.

In a recent interview with the Atlantic Monthly, Eric Schmidt, CEO for Google made some interesting statements that weigh into the concerns:

Watch the full video of this session

"The average American doesn't realize how much of the laws are written by lobbyists" to protect incumbent interests, Google CEO Eric Schmidt told Atlantic editor James Bennet at the Washington Ideas Forum. "It's shocking how the system actually works."

In a wide-ranging interview that spanned human nature, the future of machines, and how Google could have helped the stimulus, Schmidt said technology could "completely change the way government works."

"Washington is an incumbent protection machine," Schmidt said. "Technology is fundamentally disruptive." Mobile phones and personal technology, for example, could be used to record the bills that members of Congress actually read and then determine what stimulus funds were successfully spent"

The end of the interview turned to the future of technology. When Bennet asked about the possibility of a Google "implant," Schmidt invoked what the company calls the "creepy line."

> **"Google policy is to get right up to the creepy line and not cross it,"** he said. Google implants, he added, probably crosses that line.
>
> At the same time, Schmidt envisions a future where we embrace a larger role for machines and technology. "With your permission you give us more information about you, about your friends, and we can improve the quality of our searches," he said. "We don't need you to type at all. We know where you are. We know where you've been. We can more or less know what you're thinking about."

According to Reuters Google has hired 12 Washington DC lobbyist firms:

http://www.reuters.com/article/2011/07/01/us-google-lobbyists-idUSTRE76056T20110701

> "Search giant Google Inc, facing a broad antitrust probe into its business practices, has hired 12 lobbying firms, a spokeswoman from the company said on Friday. The Federal Trade Commission, which investigates violations of antitrust law, is expected to look into complaints that Google's search results favor the company's other services, among other issues. Google, which runs an estimated 69 percent of Web searches worldwide, can make or break a company depending on its search ranking."

In Summary:

Google's search engine business must be separated from it's other businesses and companies in order to eliminate it's ability to use it's earnings to "create, extend, and exploit a monopoly" by leveraging the power of the consumer keyword search engine market hub both online and by mobile phone and by combining it's business operations and consolidating competition, expanding into mapping, video by it's acquisition of YouTube and it's plans to target HULU, social media, phones, travel, and a full range of other internet offerings too long to list here. Further Google has acquired "competitor platforms" such as Motorola the phone manufacturer which also uses the Google Android search system, which "locks" the Google search engine to the phone of all manufacturers who use the Google Android operating system, setting in place a method to lock phone hardware users to the Google search engine products. Similarly, with the ITA software acquisition in which Google now owns it's competitors travel search engine "platform and technology".

Similar to the French Authority ruling, Google's search engine business must be regulated to ensure that all advertisers are treated fairly, have access to consumer search engine advertising and that advertisers are not subject to adverse actions without warning or issued "permanent suspensions" or otherwise banned to ensure that small website businesses have the opportunity to operate and advertise their businesses to consumers searching for them by using keyword search terms that result in "clicks" and site visits.

Google has taken actions to lock users to Google, through exclusive agreements with America Online and other "partner advertisers" as well as by requiring that participating Google Adsense websites not carry any competing advertising further eliminating viable advertising opportunities for advertisers who have been "banned" by Google.

Google's search management officials have publicly stated that Google businesses receive preferential ranking, which is to the detriment of competitors and paying advertisers. In a recent ACT article, http://actonline.org/act-blog/2011/02/03/googles-admits-it-favors-its-own-properties-in-search-results/
Google's Marissa Mayer, one of the company's first 20 employees who is described in the video as "responsible for all product management related activities for Google search," explains it this way:

> "When we rolled out Google Finance, we did put the Google link first. It seems only fair, right? We do all the work for the search page and all these other things, so we do put it first. **That's actually been a policy**, then, because of Finance we implemented it in other places. So for Google Maps, again, it's the first link. http://www.youtube.com/watch?v=LT1UFZSbcxE#t=44m50s

Google has conducted a pattern and practice of eliminating and banning thousands of small business websites and individual internet marketers from being able to access 80% of the consumer "keyword search" traffic which has resulted in financial harm and losses to small business and restraint of small business in it's efforts to compete with big spending Google Adwords advertisers who are given preferential treatment.

Google has restricted the choices of consumers by censoring the advertising of thousands of small businesses that offer various types of products, services and information. Customers and ready buyers who are searching and ready to conduct business by simply making "one click" are not able to find thousands of alternative consumer choices due to Google's actions of making choices for consumers rather than simply facilitating consumer search and allowing consumers to make their own choices.

Thank you,

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August 18, 2011

Honorable Charles Schumer
United State Senator
757 Third Avenue
New York, NY 10017

Dear Senator Schumer,

In an economy still struggling to recover from a recession, Washington's top priority must be to encourage job creation and economic growth. In New York, the unemployment rate remains high and businesses are not expanding. Congress must ensure that burdensome regulations do not stifle companies that are creating new jobs.

As the Executive Director of the Lower East Side Business Improvement District I represent some 400 businesses both small and large on the Lower East Side of Manhattan. I see how my members are constantly working to seize new opportunities – particularly those created by the uniquely American success of the Internet economy. The innovation spawned by this sector has helped businesses of all sizes; Google has been a key leader in creating a positive impact here in my community.

Today we live in an era of the internet - the most powerful, most accessible, dynamic communication system ever known to human kind. Most of us will turn immediately to the internet for answers to the simplest quests to find products and services. For my members the internet is the best chance they have to fully and completely express who they are, how and why they are special and best able to provide the value people are looking for.

In short, many of my members use Google search and advertising programs, many others use competing advertising services. Frankly, this is a highly competitive marketplace, and our members have multiple options for many different types of web services. From Bing to Facebook to Twitter, there is no shortage of ways to obtain new information or advertise to reach consumers. Competition is indeed only one click away, and Google's approach to information is unique in allowing users to take their data and leave for a competitors' offering at no cost.

As our local economy continues to recover, Washington needs to encourage, not undermine, that recovery. Unnecessary government interventions motivated by competitors and aimed at companies that are helping local businesses grow threaten to impede economic progress. I urge you to allow the market to work without the intervention of regulators; consumers will decide which of the many available online options work best for them.

Sincerely,

Bob Zuckerman
Executive Director

L.E.S. is More. Explore.