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Google Is No Microsoft

David Balto (Law Offices of David A. Balto) · Tuesday, June 28th, 2011

Some of Google's critics analogize Google's conduct today to that of Microsoft's during its heyday of the 1990s: Like Microsoft, Google is big. Like Microsoft, Google has hampered the opportunities of rivals. And like Microsoft, Google has abused its purported dominant position in online search by prominently displaying its own products in search results and excluding competitors. This analogy may be simple; *but it just is not true.*

I explain below four reasons why the analogy does not hold water: First, there is no harm to consumers. Second, Google is not a real monopoly. Third, unlike Microsoft, Google does not handicap or exclude competitors. Finally, there are no "bad acts" to support a Sherman Act, Section 2 claim against Google.

Well it's official. The Federal Trade Commission has served Google with subpoenas. Some of Google's critics—including Gary Reback, who some credit with "goading" the Department of Justice (DOJ) into launching its investigation into Microsoft two decades ago—analogize Google's conduct today to that of Microsoft's during the 1990s. That sounds appealing but it could not be more wrong.

Let's remember the past. (I should, I was an FTC staff attorney who worked on the FTC Microsoft investigation in the early 1990s). In the 1990s, Microsoft clearly dominated the operating system market. The DOJ had challenged a set of practices in 1994 and brought a significant monopolization case. Antitrust authorities throughout the world including the EU had sued Microsoft. In its 1998 case the DOJ condemned a wide variety of exclusionary conduct, carried out (in Microsoft's words) to "cut off the air supply" of its rivals. In particular Microsoft tied its browser to its operating system to safeguard its operating system monopoly and extend it to the web. Microsoft compelled customers to purchase products they did not want and created obstacles for rival browsers to work effectively.

After years of litigation in a landmark decision, the D.C. Circuit upheld the lower court's conclusion that Microsoft's dealings with personal computer manufacturers violated Section 2 of the Sherman Act (they monopolized the market!), specifically, contractual provisions that prevented many manufacturers from pre-installing a web browser other than Microsoft's Internet Explorer and other remedies to protect incipient competition (*U.S. v. Microsoft Corp.* 253 F.3d 34, CCH 2001-1 Trade Cases ¶73,321).

So to the Google critics this is a simple story—like Microsoft, Google is big. Like Microsoft, Google has hampered the opportunities of rivals. And like Microsoft, Google has abused its

purported dominant position in online search by prominently displaying its own products in search results and excluding competitors.

It may be simple; *but it just is not true*. There are four reasons why the analogy just does not hold water.

First, what's the harm to consumers? The hallmark of exclusionary conduct is that the alleged conduct must harm the competitive process (i.e. consumers); harm to competitors alone is insufficient to constitute a Section 2 violation. Even if we take the allegations as true… where is the harm to consumers? Let's take a look.

For consumers Google's services are almost completely free. Indeed, it is the fact that the services are free that Google search has transformed the nature of retail competition. Contrast this to the Microsoft case where the cost of Windows 95 was $200 retail and $100 for an upgrade. Consumers' pocketbooks do not see Google as any type of monopolist.

Second, is this really a monopoly? A prerequisite to any Section 2 claim is possession of monopoly power. Unlike Microsoft's 95% market share in the PC operating system market, which served as a substantial barrier to entry, Google neither dominates search to the same degree nor does the nature of search lead to a substantial consumer base that could constitute a barrier to entry. Allegations of Google's monopoly power in search are overblown, especially since Google had only 65% of the U.S. core search market in May 2011, according to comScore.com.

Additionally, unlike Microsoft's operating system product, whatever power this 65% share confers to Google is moot because search consumers face zero switching costs! You can't have monopoly power if it is costless to switch to an alternative. As explained by renowned antitrust scholar Herbert Hovenkamp, "There's no lock-in with a Google search engine. If you want to have six different search engines all on your desktop, you can do that. It's all free." Consumers have choices that are mere keystrokes away. Bing, Yahoo!, Ask.com all have measurable share of the core search market, and there are also a number of niche search sites such as WebMD, Kayak, and Wikipedia. Unlike the cost of buying and installing a new operating system, users need only type "bing.com" into their browser's address bar to use a different search engine.

Moreover, the fluidity of web-based products is a constant check on any threatened monopolization. For instance, as observed by law Professors Manne & Wright, social media sites—like Twitter and Facebook—are occupying an ever increasing amount of consumers' "eyeball" time online. Google may have a significant share of search today, but, as we have seen many times, search engines enter and exit the market with great frequency. There is nothing to prevent other technology companies, such as Facebook, from making inroads into the search market.

Third, who is being handicapped, if anyone? There is a fundamental difference between the evidence of anticompetitive harm in Microsoft and Google's alleged exclusionary conduct. In Microsoft, there was a mountain of evidence that Microsoft's conduct led to significant rivals being severely handicapped and excluded. In Google's case, there are merely anecdotal and speculative claims of exclusion and harm, mostly offered by those with an affiliation to Google's competitors.

Finally, where are the bad acts? Finally, there are no "bad acts" to support a Section 2 claim against Google. The nature of the market and nonexistent switching costs derails any predatory

pricing claim. Moreover, unlike the case in Microsoft where consumers were unable to override the default browser setting and prevented consumers from being able to remove Internet Explorer, none of Google's products frustrate a user's ability to use other search products. Lastly, any refusal to deal arguments are misguided. Google has no duty to deal, and Supreme Court precedent narrowly construes refusal to deal as a basis for an antitrust violation.

Google is not like Microsoft. Google's conduct today is not like Microsoft's conduct during the 1990s. The markets in which Google competes are vibrant, competitive, and rapidly evolving. Any analogy between a potential antitrust case against Google and the antitrust case against Microsoft ignores the underlying facts and is a misguided over-simplification of the complicated nature of the on-line search market.

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