Search, Essential Facilities, and the Antitrust Duty to Deal

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I. Introduction

The Federal Trade Commission (“FTC”) recently announced its hiring of a well-known litigator, Beth Wilkinson, for its ongoing antitrust investigation into Google.1 This suggests that the agency’s investigation may be entering a more serious phase and that the government is prepared to litigate if necessary.2 Though there was no elaboration in this or other government announcement of what the antitrust case against Google might be, the core assertion appears to be that Google favors its own or its affiliates’ content over that of its competitors in an ancillary market in the unpaid search results,3 sometimes referred to as search “bias.”4

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2 While the FTC has cautioned that no decision has been made on whether to bring a case against Google, federal enforcement agencies rarely hire outside litigators to take charge of their investigations. See id.
Seeking the competitive advantages inherent in vertical integration, which is what preferential treatment of one’s own property is about, is usually not unlawful under antitrust law.\(^5\) The core issue that I will examine in this article is whether the antitrust duty to deal and the essential facility doctrine, nonetheless, provide an antitrust basis for prohibiting this practice, as some have suggested. I conclude that they do not. Even setting aside the Supreme Court’s recently expressed strong disfavor of both principles in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*,\(^6\) it is difficult to see how either concept can be manipulated to impose a duty on search engines *not* to give preference to its own or its affiliates’ content in the presentation of search results.

A threshold issue is monopoly power. On this issue, Google’s absolute size and phenomenal success have tended to obscure the improbability that Google has monopoly power in an antitrust sense. In a dynamic, ever morphing, environment where users are increasingly turning to Facebook and other Internet portals for information, it seems inconsistent with market reality to view general search engines as completely distinct from other online information businesses vying for user attention and advertising dollars.\(^7\) Moreover, regardless of how narrowly the market is defined, monopoly power cannot be inferred from high market shares in the case of search because of the unusual competitive apparently used to describe search engines’ “prefer[ring] their own content on adjacent websites in search results,” are slippery terms, and expressing skepticism of the “search neutrality” principle).

\(^5\) *See, e.g.,* Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 276 (2d Cir. 1979) (“So long as we allow a firm to compete in several fields, we must expect it to seek the competitive advantages of its broad-based activity--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.”); Olympia Equipment Leasing Co. v. Western Union Telegraph Co., 797 F.2d 370, 373, 375-76 (7th Cir. 1986) (holding that the sole provider of telex services did not violate section 2 of the Sherman Act when it told its sales staff to stop showing a list of outside vendors to its subscribers and adjusted its commissions to encourage them to sell more of the firm’s own terminals).


\(^7\) *See infra* Part III-B-1.
constraints on Google’s ability to act anticompetitively. Users can switch to other search engines in an instant, and competing search engines have the ability to meet any increased user demand. Adding to the vulnerability of Google’s market position is the mutability of the environment in which it competes--no one really knows how long search engines as they currently exist will continue.

For the essential facility doctrine, there are also critical conceptual questions that have been largely overlooked, such as which is the alleged essential facility, whether there is even any denial of access, and whether the “facility” is capable of being shared. The implicit premise of those making an essential facility case seems to be that the results list (more specifically, top ranking on that list) is the alleged essential facility. But even accepting such a shaky notion of an “essential facility,” it is still not clear that a Google rival has been “denied access.” Quality competitor websites are still highly ranked for certain keywords, though perhaps not for others or perhaps not as highly ranked as they were before Google expanded into content. Moreover, the law is clear that there is no obligation to share where a resource is not sharable, no matter how essential it may be to competition. In the case of search results, the choice spot in search results that Google is faulted for taking is obviously non-sharable.

The general duty to deal presents another set of problems. It is difficult to see how Google’s taking the top spot for itself in the rank-ordered results list would meet the strict conditions for mandating dealing with a competitor set forth in Trinko. There is no profitable

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8 See infra Part III-B-2.
9 See infra Part III-C.
preexisting business relationship that was “terminated,” causing a short-term loss of profits for
Google, when Google Maps, for example, “displaced” Mapquest in the top rank.\footnote{See infra Part IV.}

There is another generally unexamined problem common to both essential facility and
the duty to deal – mandatory cooperation, even in the limited instances where it has been
deemed appropriate, has never meant \textit{free} access or assistance.\footnote{See infra Part V.} How would mandatory
access work when a search engine’s business model does not accept payment from a website
for inclusion in its rank-ordered organic results? These are but some of the incongruities with
both principles in the search context.

Apart from these conceptual problems, there seems to be a fundamental assumption,
embedded in the discourse, that favoring its own property in search results, being good for a
search engine, must be anticompetitive. Thus, the discussion often short-circuits the
competitive effects analysis, though antitrust liability under the Rule of Reason requires a
finding of anticompetitive effects that are not outweighed by the activity’s procompetitive
benefits.\footnote{See infra Part VI.} But antitrust law is consumer-centric, and technologically savvy commentators have
often pointed out the many user benefits of directly or more efficiently giving users the
information they are seeking, such as incorporating a map, rather than linking to another
website requiring yet another query. Moreover, there is indication that the practice, embraced
even by non-dominant search engines which are obviously unable to exercise market power,
may be a competitive strategy. And, unilateral refusals to deal are generally acknowledged to be appropriate “if there are legitimate competitive reasons for the refusal.”

In addition to the doctrinal misfit of the refusal-to-deal rubric, the wisdom of prohibiting the practice of search engines’ favoring their own content in search results (sometimes termed implementing search “neutrality”) is questionable as a matter of policy, since it would likely jeopardize the search engine evolution and distort competition in the broad online information market. The concept of search “neutrality” is based on the traditional “ten blue links” vision of search engines, with search and content occupying distinct spaces. If a search engine is restricted to those original contours and may only include a map with its search results, for example, after applying some sort of “neutral” way to select the map to be displayed—Google, Mapquest or Bing—no map would probably be included. It is hard to see how that would be beneficial to users. When the entire information world is morphing and redefining itself, it seems counterproductive to confine search engines to the “boundaries” set in the initial days of the product’s development.

This is not to suggest that search rankings can never give rise to an antitrust violation. There is a distinction between a simple preference for one’s own products and services, which is not and should not be unlawful, and unjustified affirmative interference with the natural workings of the marketplace—for example, deliberately demoting the ranking of a website for purchasing advertisement with a search engine’s competitor—which would be problematic.

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14 Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 604-05, 608-10 (1985) (suggesting that the refusal would not violate Section 2 of the Sherman Act had there been non-pretextual business reasons for the refusal); Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 483 n.32 (1992) (observing that a monopolist may refuse to deal with its rivals “if there are legitimate competitive reasons for the refusal”).

15 See infra Part VII-B.

16 See infra notes 260-264 and accompanying text.
But absent such affirmative exclusionary acts, government intervention to impose “neutrality,” no matter how well-intentioned, could negatively affect innovation and distort competition and, ironically, undermine the core purpose of the antitrust laws.

This paper begins, in Part II, with a brief overview of search engines, their preference for their own content in the unpaid search rankings, and the general antitrust narrative. In Part III, I examine the historically narrowly-construed essential facilities doctrine, including the question of market definition and market power, and the thorny concepts of essentiality, denial of access, and “nonrivalrousness.” Part IV discusses unilateral refusals to deal (not involving an essential facility), focusing on the sacrifice of profits limitation. In Part V, I discuss the compensation conundrum relating to the essential facility doctrine and the general duty to deal in the search context. Part VI questions the often embedded assumption that preference for one’s own property, framed in terms of denial of access or refusal to deal, is necessarily anticompetitive. It further suggests that the practice is more likely a legitimate competitive strategy as it is used by even non-dominant search engines Bing and Yahoo!. Part VII raises policy issues, focusing on the fact that imposing search “neutrality” will likely freeze the search engine evolution and distort competition in the broader Internet information market.

II. Search Engines, Preference for Own Content, and the Antitrust Narrative

Search engines play an important role in making the Internet accessible and useful for us.17 By aggregating and organizing the innumerable webpages on the Internet,18 and

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presenting what is relevant in response to search queries, search engines help users locate information on the Internet on practically any topic no matter how obscure.\(^{19}\) And in so doing, they also help content providers connect with their audience. From a commercial perspective, search engines provide an efficient means for consumers to find businesses that best serve their needs and for businesses to reach consumers.\(^{20}\) By reducing search costs, information costs, and transaction costs in ways unimaginable little more than a decade ago, search engines greatly facilitate voluntary transactions. But they are certainly not indispensable either for users searching for information or for businesses reaching potential customers in the digital world, especially in the last few years when social networks, such as Facebook, and powerful specialized sites, such as Amazon, have transformed the way many users seek information.\(^{21}\)

The technology behind the operation of search engines is complex and sophisticated.\(^{22}\) Search engines continually search, index, and store (cache) Internet content on their servers.\(^{23}\) When a user enters a query, the search engine searches its index and cached content and

\(^{18}\) Jesse Alpert & Nissan Hajaj, \textit{We Knew the Web Was Big . . .}, \textit{THE OFFICIAL GOOGLE BLOG} (July 25, 2008, 1:12 PM), \url{http://googleblog.blogspot.com/2008/07/we-knew-web-was-big.html} (estimating as there were, in 2008, more than one trillion webpages on the Internet and more were appearing every day).

\(^{19}\) One could, as one commentator said, search “mongolian gerbils” on Google and locate authoritative information on the subject on the Internet—information that one unfamiliar with the subject would have difficulty finding without a search engine. \textit{See} James Grimmelmann, \textit{The Google Dilemma}, 53 \textit{N.Y.L. SCH. L. REV.} 939, 940 (2008/2009) [hereinafter Grimmelmann, \textit{The Google Dilemma}].

\(^{20}\) \textit{See} Press Release, the e-tailing group, 2010 Social Shopping Study Reveals Changes in Consumers’ Online Shopping Habits and Usage of Customer Reviews (May 3, 2010) (reporting that 57% of consumers used a search engine to shop online) \url{http://www.e-tailing.com/content/?p=1193}.

\(^{21}\) \textit{See infra} notes 107-117, 153-161 and accompanying text.


\(^{23}\) \textit{See}, e.g., Nancy Blachman & Jerry Peek, \textit{How Google Works}, \textit{GOOGLEGUIDE} (February 2, 2007), \url{http://www.googleguide.com/google_works.html}. It is said that Google utilizes over 450,000 servers, and that its major competitors (Bing and Yahoo!) have comparable infrastructure support. \textit{See} Grimmelmann, \textit{The Google Dilemma}, supra note 19, at 942.
generates two types of results: “organic” (or unpaid) results, and sponsored (or paid) links.24

The organic results traditionally consisted of rank-ordered links to webpages containing information the search engine deems most responsive to the search query25—the so-called ten blue links—though they have evolved beyond that26 as I will discuss later. The websites whose links appear in the organic results do not have to pay search engines for the “promotion.”27

“Sponsored links,” the source of most of a search engine’s revenues,28 are often search-based advertisements that are returned clearly identified as such along with the organic results.29 Advertisers bid to win auctions for specific keywords, which would then lead to the placement of their links on the results pages for queries that include the keyword.30 Because

25 See Goldman, Deregulating Relevancy, supra note 22, at 534-42 (describing the complex process by which search engines sort, rank, and return organic results in response to a query).
28 See Ken Auletta, Googled: THE END OF THE WORLD AS WE KNOW IT 16 (2009) (quoting former Google CEO Eric Schmidt saying, “We are in the advertising business”); Virginia Scott, Google (CORPORATIONS THAT CHANGED THE WORLD)76 (2008). As virtually everyone know, users do not have to pay to conduct searches and or use other features of a search engine; content providers are also not charged even if their inclusion in the organic results leads to revenue-producing transactions. See, e.g., The Power of Google: Serving Consumers or Threatening Competition?: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary, 112 Cong. 35-36 (2011) (statement of Susan A. Creighton, Partner, Wilson, Sonsini, Goodrich & Rosati, available at http://www.gpo.gov/fdsys/pkg/CHRG-112shrg71471/pdf/CHRG-112shrg71471.pdf (summarizing Google’s success in innovating “while keeping its services free for users” and also “provide[] free ‘promotion’ to high quality sites, including Google competitors, through the operation of its natural search functions”).
29 See Results Page, Googleguide, supra note 24.
30 For discussions of search-based advertising, including its mechanics and pricing, see Grimmelmann, Search Engine Law, supra note 22, at 11-13; Geoffrey A. Manne & Joshua D. Wright, Google and the Limits of Antitrust.
advertising space is limited, and pricing is based on the number of clicks on the sponsored link, all search engines apply a quality metric that effectively requires advertisers to bid higher (pay more) per click the less relevant their link is to the search term (that is, the fewer the predicted number of clicks).  

This has led to complaints against Google from some potential advertisers whose low scores effectively priced them out, or whose poor quality sites excluded them from bidding.  

The issues raised by these allegations are distinct from those stemming from search engines’ favoring their own content in the organic results and will not be discussed in this article.

A. The “Ten Blue Links” and Beyond

Returning to the matter of the unpaid organic search results, search engines rely primarily on complex proprietary algorithms to assess the relative value of countless webpages, though manual adjustments are occasionally made, usually to target webspam.

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32 See, e.g., [TradeComet.com LLC v. Google, Inc., 693 F.Supp. 2d 370 (S.D.N.Y. 2010).](http://lawmeme.research.yale.edu/modules.php%C2%?name=News&file=article&sid=807) TradeComet operates SourceTool, a website that focuses on businesses—a business-to-business directory that primarily lists product and service suppliers for businesses. TradeComet’s complaint alleged that Google’s implementation of a quality metric raised the amount it must pay Google per click causing it to fail to win a favorable advertisement placement on Google. This allegedly precluded SourceTool from gaining user traffic and attracting search advertisers in competition with Google. See Manne & Wright, *If Search Neutrality is the Answer, What’s the Question*, supra note 31, at 43-44. The complaint was dismissed on a Rule 12(b) motion based on a forum selection clause that TradeComet accepted when it participated in Google’s search advertising platform. *Id.*


34 See James Grimmelmann, *Google Replies to SearchKing Lawsuit*, LAW MEME @YALE LAW SCHOOL, [http://lawmeme.research.yale.edu/modules.php%2?name=News&file=article&sid=807](http://lawmeme.research.yale.edu/modules.php%2?name=News&file=article&sid=807) (analyzing Google’s answer to a lawsuit by SearchKing—thought by many to be operating a “link farm”—as a non denial of SearchKing’s claim that it had hand-tweaked the results to demote SearchKing’s link, when it said something to the effect that, if we did do it, we had reason to because SearchKing was engaging in spam).
The algorithms take into account numerous factors designed to determine the relevance and quality of the web content so as to present links to them in the order perceived to be most useful to the searcher. Each search provider’s algorithm, closely regarded as a trade secret, reflects its own judgment as to what makes content responsive and valuable. Because search engines attract advertisers by drawing users, and users like relevant results, search providers constantly update their algorithms and sometimes make manual tweaks to improve the results and to prevent spammers and scammers from “gaming” the algorithm.

Until circa 2005, the lines between web content and search were clear. The role of general search engines, which then did not create web content or provide other services, was simply to generate a list of the most useful websites for the user—the “ten blue links”—in response to a search query. More recently, all three major search engines have redesigned

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35 In the case of Google, PageRank, the proprietary algorithm that it uses to assess relevance and rank results, is said to incorporate over 200 variously weighted criteria selected by Google and is changed about 500 times a year. See James Grimmelmann, Some Skepticism About Search Neutrality, in THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET 435, 455 (2010), (Berin Szoka et al. eds., 2011) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1742444 [hereinafter Grimmelmann, Some Skepticism About Search Neutrality]; See also Udi Manber, Introduction to Google Search Quality, THE OFFICIAL GOOGLE BLOG (May 20, 2008, 9:20 PM) http://googleblog.blogspot.com/2008/05/introduction-to-google-search-quality.html#http://googleblog.blogspot.com/2008/05/introduction-to-google-search-quality.html (describing how PageRank is now supplemented by other parts of the search system including “language models,” “query models”, “time models”, and “personalized models”); Manne & Wright, If Search Neutrality Is the Answer, What’s the Question?, supra note 31 at 15 http://ssrn.com/abstract=1807951http://ssrn.com/abstract=1807951 (“These search algorithms generally parse out the content of the websites themselves to best answer a user’s query. They then attempt to ascertain the context and nature of the user’s question in order to determine what factors—such as date, age of source, credible websites linking to the site in question, and so on—should sort the relevant results.”).

36 See Manber, Introduction to Google Search Quality, supra note 35 (explaining, as to Google, that: “There are two reasons [for maintaining secrecy]: “competition and abuse. Competition is pretty straightforward. No company wants to share its secret recipes with its competitors. As for abuse, if we make our ranking formulas too accessible, we make it easier for people to game the system.”).

37 See Eric Goldman, Search Engine Bias and the Demise of Search Engine Utopianism, 8 Yale J.L. & Tech. 188 (2006) [hereinafter Goldman, Search Engine Bias] (explaining that the choice of which factors to include in the algorithms and how to weight each factor reflects the search engine’s editorial judgments about what content is valuable); Tom Zeller, Jr., Gaming the Search Engine in a Political Season, N.Y. TIMES, Nov. 6, 2006, http://www.nytimes.com/2006/11/06/business/media/06link.html (“Each engine has a slightly different magic formula for indexing the incomprehensively huge universe of Web pages out there.”).

38 See Grimmelmann, Some Skepticism About Search Neutrality, supra note 35, at 455 (stating that Google makes about 500 changes a year to its algorithm).
their products and evolved into integrated information portals. Among the changes is a movement away from the traditional ten blue links to the incorporation of, or interfacing with, the search engine’s specialized search results.\textsuperscript{39} This includes sometimes providing a direct answer at the top of the results list (the “OneBox” result),\textsuperscript{40} or integrating the search engine’s maps, images, videos, or information on places and products into the search results (“universal” or “blended” results), or linking to a search engine’s affiliated websites (for example, YouTube).\textsuperscript{41} In explaining the evolution, the head of Yahoo Labs and Yahoo’s strategy noted, “People don’t really want to search. Their objective is to quickly uncover the information they are looking for, not to scroll through a list of links to Web pages.”\textsuperscript{42}

It is the blurring of the lines between content/service and searches that has generated the main antitrust criticism against Google—that it is allegedly foreclosing competition in ancillary (vertical) markets by featuring its own content more prominently in search results.\textsuperscript{43}


\textsuperscript{40} For example, search for “height of statue of liberty” on Google, and the direct answer from Google appears first in the results, followed by other traditional outbound links to relevant webpages such as for Wikipedia and the National Park Service. At least, this was the result when I conducted the search in April 2012.

\textsuperscript{41} An October 2010 study showed that one-third of all searches on the three major search engines, Google, Bing, and Yahoo!, produced “blended” results—including a search engine’s own non-web sources such as news, videos, or images. Interestingly, Bing included these blended results at a higher rate than Google (54% for Bing and 33% for Google). Eli Goodman & Eli Feldblum, \textit{Blended Search and the New Rules of Engagement}, 6-8 (comScore 2010), http://www.comscore.com/Press_Events/Presentations_Whitepapers/2010/Blended_Search_and_the_New_Rules_of_Engagement.

\textsuperscript{42} Niccolai, supra note 26.

Though these changes are occurring at all three major general search engines, Google, Bing and Yahoo!, Google has always been the focus of the debate as it is the dominant search engine.

**B. Favoring A Search Engine’s Specialized Search Results, and the General Antitrust Narrative**

A grievance commonly heard against Google is that its search results tend to point search users to Google’s own content and services.\(^{44}\) For example, if a search query (such as for “Starbucks”) suggests that a user would likely find a map helpful, Google would automatically return a Google map showing the Starbucks locations closest to the user along with the other usual links.\(^{45}\) Incidentally, the same search conducted on Bing shows a similar result: a Bing map is returned at the top of the organic results, instead of a Google or Mapquest map.\(^{46}\)

These complaints are most often made by specialized websites that compete to varying degrees with Google\(^ {47}\)--sites that focus on discrete categories of searches, information and other content, such as Kayak or Expedia for travel, Nextag for product and price comparison,
Yelp for restaurant reviews, and AOL’s Mapquest for maps.\textsuperscript{48} The essence of their grievance is that, by allocating choice space on the results page to its own content in response to certain queries, the search engine deprives its rivals in ancillary markets of user traffic, thereby foreclosing them from competition in those markets.\textsuperscript{49} That is, if a Google map is returned top-ranked when a user searches for Starbucks, the user would have little incentive to navigate to a competing map site, Mapquest or Bing, making it difficult for Mapquest or Bing to compete with Google in providing map content.\textsuperscript{50} Or, if a search for “Los Angeles restaurants” produces blended results with business listings along with maps and reviews--content created or compiled by Google--at the very top, followed by a link to Yelp further down the page, presumably fewer people would navigate to Yelp’s website.\textsuperscript{51}

Another claim concerning Google’s favoring its own content relates to its treatment of certain sites that it deems inferior, such as Foundem, whose complaint to the European Commission helped launch the EC’s investigation against Google.\textsuperscript{52} Foundem, a U.K. shopping comparison site, alleged that Google applied algorithmic penalties against it because of its

\textsuperscript{48} See Bosker, supra note 3.
\textsuperscript{51} See Bosker, supra note 3.
competition with Google in product searches.\footnote{See Raff, supra note 50 (asserting that Google’s “domination of the global search market and ability to penalize competitors while placing its own services at the top of its search results” created a “virtually unassailable competitive advantage” for Google).} Google responded, as it usually does to these complaints, that its ranking algorithm merely reflects its view that websites that simply republish information found on other websites and have little original content, such as Foundem’s, are of low value.\footnote{See Emma Woollacott, Google Hits Back Against Anti-Trust Complaints, TG DAILY (Sept. 6, 2010, 9:01 AM), \url{http://www.tgdaily.com/business-and-law-features/51403-google-hits-back-against-anti-trust-complaints}. See also Geoffrey A. Manne, The Problem of Search Engines as Essential Facilities: An Economic & Legal Assessment, in THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET 424 (Berin Szoka et al. eds., 2011), available at \url{http://ssrn.com/abstract=1747289} (explaining that spam sites and the like “can and do take advantage of predictable search results to occupy desirable search results real estate” and that often requires “a host of algorithm tweaks and even human interventions” to ensure the quality of the search results).} To support its argument, Google pointed to the fact that its other competitors (presumably with top quality sites), “such as Amazon, Shopping.com and Expedia typically rank very highly.”\footnote{Woollacott, supra note 54.}

While it may be impossible to definitively conclude whose version represents the truth, a simple experiment tends to lend credence to Google’s explanation. Type in “UK shopping comparison sites,” a search term that probably best describes Foundem’s website, and a number of major product comparison sites (including Pricerunner and Pricegrabber), but not Foundem, appear on the first results page.\footnote{If one types in “product search sites,” links to Google Product Search, Twenga and Pricerunner are among those appearing on the first results page.} If Foundem and Google could be considered competitors in UK-based product and price comparison searches, and the algorithmic changes were designed to favor Google and disadvantage its competitors, one would expect that other UK price comparison or product search sites to be absent from the ranked results as well, but they were not. The fact that they were highly ranked though Foundem was not suggests that Google’s “demotion” of Foundem in the rankings was likely based on some qualitative criteria
that Google at least deemed important, and not on the desire to foreclose competition in an ancillary market.\textsuperscript{57}

Setting aside the issue of whether the \textit{factual} allegations of Foundem and others are well-grounded, let us focus on antitrust theory. Since Google’s ranking decisions are made unilaterally, any antitrust cause of action must necessarily be based on monopolization (or attempted monopolization) under Section 2 of the Sherman Act.\textsuperscript{58} Mere possession of monopoly power is, of course, insufficient to constitute monopolization; the defendant must also have engaged in “exclusionary conduct” in the achievement or maintenance of that power.\textsuperscript{59} But seeking the competitive advantages that flow to a firm from integration, which is

\underline{\textsuperscript{57}} In any event, cases that have considered this issue have consistently held that search results are a search engine’s opinion protected by the First Amendment. \textit{See, e.g.,} Search King, Inc. v. Google Tech., No. CIV-02-1457-M, 2003 WL 21464568 (W.D. Okla. May 27, 2003); Kinderstart.com, LLC v. Google, Inc., No. C 06-2057 JF (RS), 2007 WL 831806 (N.D. Ca. Mar. 16, 2007). \textit{See also} Eugene Volokh & Donald M. Falk, \textit{First Amendment Protection for Search Engine Search Results}, \textit{THE VOLOKH CONSPIRACY} (April 20, 2012), \url{http://www.volokh.com/wp-content/uploads/2012/05/SearchEngineFirstAmendment.pdf} (arguing that search engine results represent each search engine’s editorial judgment of which content to include and, as such, are fully protected by the First Amendment).

\underline{\textsuperscript{58}} 15 U.S.C. § 2 (2004) (declaring it unlawful for any person to “monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations.

\underline{\textsuperscript{59}} The offense of monopolization is often said to require proof of the possession of monopoly power in a relevant market, and “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.” United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966). The “willful acquisition or maintenance” language is generally understood to refer to improper conduct that excludes competition (or “exclusionary conduct”). \textit{See, e.g.,} Pac. Bell Tel. Co. v. Linkline Comm’n s, Inc., 555 U.S. 438, 458 (2009) (noting that a Section 2 monopolization case requires a showing that “a defendant’s monopoly power rests, not upon ‘skill, foresight and industry,’ but upon exclusionary conduct”) (citations omitted); Rambus Inc. v. Federal Trade Commission, 522 F.3d 456, 463 (D.C. Cir. 2008) (“The critical question is whether Rambus engaged in exclusionary conduct, and thereby acquired its monopoly power in the relevant markets unlawfully.”).
what the preferential treatment of one’s own products or services is about, is usually not considered exercise of monopoly power and is not unlawful.\textsuperscript{60}

Hence, embedded in any claim that Google violates antitrust law by preferring its own content over that of its rivals in ancillary markets is an assumption that Google has a duty to deal (whether or not involving an essential facility). That is, it is assumed that Google has a duty to return search results based on some form of “objective” or “neutral” standard, and may not display its own specialized results more prominently. For absent such a duty, a search engine’s practice of preferring its own content over competing content in the presentation of search results, in and of itself, could not constitute exclusionary conduct that would give rise to Section 2 liability.

In the following sections, I will consider the two duty-to-deal principles on their own terms and suggest that the imposition of such a duty in the display of search results is incoherent. But, preliminarily, I will note briefly that it is unclear whether search and content should really be considered separate markets, or whether search engines’ progression into content (and the merging of search and content) would be more aptly characterized as a product redesign. The Internet information market is highly dynamic with products/services constantly evolving and redefining themselves. In this environment, it seems inappropriate to define the search engine based strictly on its first-generation attribute (search), and to classify additional features and improvements (such as Google Maps) later integrated into the search engine product as vertical markets. Since essential facility and foreclosure are typically

\textsuperscript{60} See, \textit{e.g.}, Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 276 (2d Cir. 1979) (finding that seeking the efficiencies and other advantages that accrue to any integrated firm is not considered use of monopoly power, regardless of the firm’s market share).
predicated on separate markets, there would be no basis to speak in terms of those concepts in the absence of separate markets. In a world where search and content have seamlessly merged in many respects, it is not entirely clear whether favoring one’s own content has any antitrust significance. For now, however, let us set aside this issue and simply consider the duty to deal and essential facility paradigms on their own terms.

III. Essential Facilities

In general terms, the essential facilities doctrine holds that where a monopolist has bottleneck control over an input or resource (“facility”) essential for competition, usually in another market, and the facility cannot be duplicated, the monopolist must share access to that facility with its competitors in the second market if it is feasible to do so.61 It is easy to see why the doctrine would have initial appeal to those who fear Google’s possible “leverage” of its position in search into other business areas, given Google’s high share of general search queries.62 A closer look at the market realities, however, suggests that Google is unlikely to have the power to exclude competition even in search, let alone in the broader market including other portals of online information. Invoking the doctrine against a search engine simply for preferring its own or its affiliates’ content in search results is also legally incongruous.

61 See Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law, ¶ 771a.
62 There is considerable economic debate over whether monopoly leverage makes sense as an anticompetitive strategy. Chicago School scholars have long argued that it does not since a monopolist cannot increase its total profits through monopoly extension, due to the single-monopoly profit theory. Therefore, monopoly leverage must be motivated by efficiency concerns such as the desire to eliminate double marginalization. See, e.g., Robert H. Bork, The Antitrust Paradox: A Policy at War with Itself 372-75 (1978). Post-Chicago scholars have countered that the single monopoly profit theory only holds under a strict set of conditions, such as when the complementary products are consumed in fixed proportions, which seldom exist in real world markets. See, e.g., Nicholas Economides & William N. Hebert, Patents and Antitrust: Application to Adjacent Markets, 6 J. TELECOMM. & HIGH TECH. L. 455, 465 n.39 (2008); Louis Kaplow, Extension of Monopoly Power Through Leverage, 85 COLUM. L. REV. 515, 525-38 (1985). For the purposes of this article, I will (without entering the debate) assume that monopoly leverage can be a rational business strategy for a vertically integrated monopolist so as to examine the duty to deal and essential facility doctrine in the search context on their own terms.
In *Trinko*, the Supreme Court severely restricted a monopolist’s antitrust duty to deal with rivals and, in the process, made clear its deep skepticism of the essential facilities doctrine. It described the doctrine as having been “crafted by some lower courts” and refused to recognize (or repudiate) it in the case. But even before *Trinko*, antitrust law has long recognized that firms, including monopolists, generally have no duty to assist their rivals and has rarely imposed liability under Section 2 based on a pure unilateral refusal to deal, whether or not it was couched as a denial of access to an essential facility. The rationale for this caution centers on economic concerns that mandated dealings would decrease incentives for investment and innovation, which would undermine the underlying purposes of antitrust law. The following then examines the very limited use of the doctrine and suggests that the conditions for its possible application are wanting in almost every respect in the context of search rankings.

A. Natural Monopoly & Public Utilities—Restrictive Commonalities in the Foundational Cases

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64 *Id.* at 410-11 (commenting dismissively on the essential facilities doctrine).
65 *Id.* at 410.
66 *Id.* at 411 (“We have never recognized such as doctrine . . . and we find no need either to recognize it or to repudiate it here.”).
67 See Glen O. Robinson, *On Refusing to Deal With Rivals*, 87 CORNELL L. REV. 1177, 1206 (2002) (observing that “lower courts have adopted a conservative approach to imposing a duty to share essential facilities” and that the success rate of plaintiffs in these cases is very low); Spencer Weber Waller, *Areeda, Epithets, and Essential Facilities*, 2008 Wis. L. Rev. 359, 363-64 (2008) (concluding that plaintiffs rarely won essential facility cases).
68 See *Trinko*, 540 U.S. at 407-08; see also Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 851 (1990) (expressing “the general concern that the defendant never would have built a [facility] of that size and character in the first place if he had known that he would be required to share it. Required sharing discourages building facilities such as this, even though they benefit consumers.”). The general disapproval of the imposition of a duty to deal may also be a visceral reaction against what some consider to be the doctrine’s infringement of another’s property rights, which includes the right to exclude others if she so wishes. See *id.*, at 852 n.46 (“The trouble with . . . the essential facilities notion is that [it] start[s] with the assumption that all business assets are subject to sharing. Do we really want to assume that everything we have is up for grabs?”).
Though the Supreme Court in *Trinko* refuted the notion that any of its earlier decisions should be read as endorsing the essential facilities doctrine, it stopped short of repudiating it. Thus, it would be useful to look briefly at two Supreme Court cases most often cited (until *Trinko*) as essential facility precedents, *United States v. Terminal Railroad Association of St. Louis* and *Otter Tail Power Co. v. United States*, before turning to the specifics set forth by a few lower court decisions.

In *Terminal Railroad*, a coalition of railroad companies that had purchased control of a railroad bridge across the Mississippi River in St. Louis, along with other terminal facilities, refused to grant competing railroads access to those facilities. The bridge was indispensable to the competing railroads and the railroad was extremely important to transportation in that era. In *Otter Tail*, a vertically integrated regulated power company that generated wholesale power, engaged in its retail distribution, and also owned the transmission lines, refused to "wheel" wholesale power that some municipalities wanted to buy more cheaply from other sources in order to operate their own retail distribution systems. Access to the transmission

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69 *See id.* at 410 (dismissively describing the doctrine as merely a creation of the lower courts).
70 224 U.S. 383 (1912).
72 A third Supreme Court decision sometimes considered an essential facility case is *Associated Press v. United States*, 326 U.S. 1 (1945). *Associated Press* did not involve a traditional natural monopoly or public utility, but it had peculiarities that suggest that it was more of a Section 1 conspiracy case. It involved a combination of some 1,200 newspapers, forming AP, who pooled their efforts to produce and distribute news. The association’s bylaws permitted any existing member to veto member applications from its rivals. This was clearly concerted action and not a simple unilateral refusal to deal. The veto provision was also particularly problematic as it seemed to have had no purpose other than to protect incumbents from potential competition. The selective rejection of applications, turning on nothing more than the applicant’s status as an existing member’s rival, places this case squarely in the Section 1 conspiracy category, and some lower courts have declined to view AP as a precedent for unilateral refusal-to-deal cases. *See, e.g., Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 542 (9th Cir. 1991).
74 *Otter Tail*, 410 U.S. at 368-72.
lines was obviously essential for the municipalities since there was no other way for the wholesale power to be transported to their local distribution systems.

A commonality in *Terminal Railroad* and *Otter Tail* is that both facilities in question were natural monopolies: each enjoyed such economies of scale relative to demand that the market could only efficiently support a single producer or provider. The railroad bridge could accommodate all traffic, and building another railroad bridge, even if it were possible, would have been economically inefficient and socially wasteful. The same was also true for the transmission lines in *Otter Tail*; it was economically efficient to have only a single set of transmission lines, which apparently had sufficient capacity to serve all. *Otter Tail* was additionally a price-regulated public utility.

Of the two lower court cases generally credited with articulating the specifics of the doctrine, *MCI Communications Corp. v. AT&T* and *Hecht v. Pro-Football, Inc.*, one also clearly involved a natural monopoly facility, and the facility in the other—a publicly-subsidized arena—closely resembled one. AT&T, the then-regulated integrated telephone monopolist in *MCI*, had monopolies in both long-distance and local telephone service markets. Its local telephone service was a natural monopoly and was regulated as such. By refusing to allow its emerging competitors in the long-distance market to interconnect with its local telephone system, AT&T

76 Otter Tail operated under long-term municipally granted franchises, and was partially regulated by the then-Federal Power Commission under the Federal Power Act. *Otter Tail*, 410 U.S. at 369-72.
79 MCI Commc’ns Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1133 (7th Cir. 1983) (“Given present technology, local telephone service is generally regarded as a natural monopoly and is regulated as such.”)
successfully precluded them from offering competing long-distance service since access to the local exchange is needed to originate and complete long distance calls.\footnote{80}{See id. at 1132.}

While a government-subsidized stadium, in \textit{Hecht}, probably does not fit our usual conception of a classic natural monopoly, it can be analogized to one: the fact that public subsidies were necessary for its construction suggests that the market probably could not have supported one stadium, let alone two. That government money was involved in the building of the facility, in contrast to the situation with truly privately owned facilities, was very likely an additional factor that tipped the scales toward requiring shared access.

One commentator has noted that virtually every case that has found a duty to provide access to an essential facility has, in fact, involved a natural monopoly or regulated utility, and the facilities were capital assets that could not be feasibly duplicated—“a communications network, a central terminal facility, stadium, or energy transmission facilities.”\footnote{81}{Robinson, \textit{supra} note 67, at 1206, 1207. A noteworthy exception is Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc., 194 F.2d 484 (1st Cir. 1952) (finding the refusal to renew a tenant’s lease for space in a building specially located and equipped for wholesale marketing of produce was actionable under the essential facilities doctrine).} And, the leading antitrust treatise asserts that the doctrine could only be even arguably appropriate in those situations.\footnote{82}{Areeda & Hovenkamp, \textit{Antitrust Law}, \textit{supra} note 61, ¶ 771c (recognizing natural monopoly, price-regulated monopoly utilities, and publicly owned facilities such as sports arenas as the “only three situations in which an essential doctrine is even arguably appropriate”).} Facilities that constitute natural monopolies generally make the strongest cases for compelling access because, by definition, having competing facilities is economically inefficient in a natural monopoly market; at the same time, the denial of access would eliminate downstream competition.\footnote{83}{See Marina Lao, \textit{Networks, Access, and ‘Essential Facilities’: From Terminal Railroad to Microsoft}, 62 SMU L. REV. 557, 567-68 (discussing why natural monopoly facilities make the strongest essential facility cases).} If the doctrine were indeed limited to natural monopolies and public utilities, it would be inapplicable against Google since its search engine,
which handles only about two-thirds of the general search traffic,\textsuperscript{84} does not fit the natural monopoly or public utility framework.\textsuperscript{85}

While search engines may benefit from economies of scale, there are clearly commercially viable general search engines that compete against Google,\textsuperscript{86} notably Microsoft’s Bing and Yahoo! which together have about 30 percent share of the general search traffic.\textsuperscript{87} New search providers, such as DuckDuckGo and Blekko, have also emerged and succeeded in obtaining venture capital funding, suggesting that at least some investment experts believe that there is still room for additional search engines.\textsuperscript{88} Thus, the market reality does not support the arguments of some commentators that Google’s search engine is a natural monopoly.\textsuperscript{89}

Analogizing search engines to public utilities would be even more forced. While the term “public utility” is not clearly defined, it generally refers to providers of indispensable services affected with the public interest, such as water and electricity.\textsuperscript{90} Because the services are vital, special obligations to serve all within a particular area at regulated prices are usually imposed on the provider in return for a public franchise and other government privileges.\textsuperscript{91}

\textsuperscript{84} See Zack Whittaker, \textit{comScore: Google, Bing Gain Search Share as Yahoo Dips}, ZDNET, March 12, 2012, \url{http://www.zdnet.com/blog/btl/comscore-google-bing-gain-search-share-as-yahoo-dips/71334} (citing comScore data showing that Google had 66.4% share of the general search traffic in February 2012).


\textsuperscript{86} See \textit{The Search Engine List}, \url{http://www.thesearchenginelist.com/} (providing a list of all search engines).

\textsuperscript{87} See Whittaker, supra note 84 (citing comScore data showing that Microsoft’s Bing and Yahoo had 15.3% and 13.8%, respectively, of the general search traffic in February 2012, and Ask and AOL had 3% and 1.5% respectively).

\textsuperscript{88} See Jamison, supra note 85, at 8, 10.


Even if they could be considered indispensable to modern life, search engines do not conform to the public utility model at all: they are already universally and freely available to anyone with a computer with Internet access, without any government incentives and price regulation, and they clearly have no government-granted franchise.\textsuperscript{92} To the extent that the scope of the essential facilities doctrine is limited to natural monopolies and public utilities, the doctrine should have no application in the context of search.

\textit{B. Monopoly Power}

However, no case has explicitly so restricted the doctrine, notwithstanding its real-world limited application. Instead, the court of appeals imposed strict rules in \textit{MCI} (and \textit{Hecht}): the plaintiff must show that 1) a monopolist controls access to an essential facility; 2) a competitor cannot reasonably duplicate the facility; 3) the monopolist has denied access of the facility to a competitor; and 4) it is feasible for the monopolist to share access.\textsuperscript{93} Virtually every lower court that has subsequently considered an essential facility claim has adopted this stringent \textit{MCI} standard.\textsuperscript{94}

\textsuperscript{92} See Adam Thierer, \textit{The Perils of Classifying Social Media Platforms as Public Utilities} 38 (Mercatus Center at George Mason University, Working Paper No. 12-11, 2012), available at http://ssrn.com/abstract=2025674 (arguing that social networks, such as Facebook, are not public utilities for various reasons, including the fact that they are “already available to everyone and are almost universally free of charge.”). Search engines are similar to social networks in this regard.

\textsuperscript{93} MCI Commc’ns Corp. v. AT&T, 708 F.2d 1081, 1132-133 (7th Cir. 1983); Hecht v. Pro-Football, Inc., 570 F.2d 982, 992-93 (D.C. Cir. 1977).

\textsuperscript{94} See, \textit{e.g.}, Integraph Corp. v. Intel Corp., 195 F.3d 1346, 1356-1357 (Fed. Cir. 1999); Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC, 148 F.3d 1080, 1088 (D.C. Cir. 1998); Ideal Dairy Farms, Inc. v. John Labatt, Ltd., 90 F.3d 737, 748 (3d Cir. 1996); City of Anaheim v. S. Cal. Edison Co., 955 F.2d 1373, 1380 (9th Cir. 1992); Laurel Sand & Gravel, Inc. v. CSX Transp., Inc., 924 F.2d 539, 544 (4th Cir. 1991); Delaware & Hudson Ry. Co. v. Consol. Rail Corp., 902 F.2d 174, 179 (2d Cir. 1990); Advanced Health-Care Servs., Inc. v. Radford Cnty. Hosp., 910 F.2d 139, 150-51 (4th Cir. 1990); City of Malden, Mo. v. Union Elec. Co., 887 F.2d 157, 160 (8th Cir. 1989); Ferguson v. Greater Pocatello Chamber of Commerce, Inc., 848 F.2d 976, 983 (9th Cir. 1988); McKenzie v. Mercy Hosp., 854 F.2d 365, 370 (10th Cir. 1988), overruled on other grounds, 117 F.3d 1137 (10th Cir. 1997).
As a threshold matter, under MCI, the owner of the facility must have monopoly power in a properly defined market.\textsuperscript{95} Defining the market involving search is extremely difficult, if not impossible, because of the dynamic environment in which search engines compete.\textsuperscript{96} But however the market is defined, it is doubtful that we can infer monopoly power from Google’s high share of the general search traffic: the competitive reality shows that Google is vulnerable to competition and is not in a position to act in a way that is harmful to consumer welfare despite its current status as the largest general search engine.\textsuperscript{97}

1. Defining the Market in a Rapidly Changing Internet World

Google is often said to be a monopolist in search and search advertising\textsuperscript{98} but, in reality, not much effort has been made to define the relevant market or to properly evaluate whether Google has monopoly power in an antitrust sense.\textsuperscript{99} Data shows that Google handles

\begin{itemize}
  \item \textsuperscript{95} See, e.g., Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 546-57 (9th Cir. 1991) (holding that a computerized reservation system could not be an essential facility where its control did not give the airline the power to “eliminate competition in a market downstream from the facility”) (emphasis in original); Ill. Bell Tel. Co. v. Haines & Co., 905 F.2d 1081 (7th Cir. 1990) (finding that alleged essential facility does dominate a defined relevant market), vacated on non-antitrust grounds, 449 U.S. 944 (1991); City of Malden, Mo. v. Union Elec. Co., 887 F.2d 157 (8th Cir. 1989) (approving jury instructions requiring relevant market definition in an essential facility case); Paladin Assocs., Inc. v. Mont. Power Co., 328 F.3d 1145, 1163 (9th Cir. 2003) (rejecting essential facility claim where defendant lacked market power in its gas transmission facilities).
  \item \textsuperscript{96} See infra Part III-B-1.
  \item \textsuperscript{97} See infra Part III-B-2.
  \item \textsuperscript{98} See, e.g., The Power of Google: Serving Consumers or Threatening Competition?: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary, 112th Cong. 33-35 (2011) (statement of Thomas O. Barnett, Partner, Covington & Burling, LLP), available at http://www.gpo.gov/fdsys/pkg/CHRG-112shrg71471/pdf/CHRG-112shrg71471.pdf (“Google dominates online search in the U.S. . . .Moreover, Google’s search dominance has enabled it also to dominate paid search advertising.”); Manne & Wright, Google and the Limits of Antitrust, supra note 30, at 194 (referring to the colloquial reference to Google as “the dominant search and search advertising provider in an online search market comprised of Google, Microsoft, and Yahoo!” and questioning its antitrust relevance); Bosker, supra note 3 (writing that the federal antitrust investigation into Google centers on “the company’s use of its dominant position as a search engine” to allegedly disadvantage its competitors in other markets). The assumption that Google has substantial monopoly power in search is also implicit in the commentaries arguing for the need to regulate Google’s dominant search engine. See generally Bracha & Pasquale, supra note 89.
  \item \textsuperscript{99} For the few articles that have addressed the market definition issue in search, see Manne & Wright, Google and the Limits of Antitrust, supra note 30, at 194-203; Mark R. Patterson, Google and Search Engine Market Power (Fordham University Sch. of Law, Research Paper No 2047047, 2012), available at
\end{itemize}
approximately two-thirds of the U.S. general search queries and receives about three-quarters of all U.S. search-based advertising spending. Thus, working backwards, the underlying assumptions of the statements that Google is a monopolist in search and search advertising must be that the relevant markets consist of general search (queries on general search engines) and search-based advertising, and that substantial market power can be inferred from its high market shares. Both assumptions are suspect, however, given that search engines compete in an environment characterized by rapid and unceasing change.

An antitrust market is basically the smallest grouping of products or services that a firm would need to control in order to raise prices profitably without competitive constraints. Defining the market generally entails identifying and including all reasonable substitutes available to the buyer for the seller’s product. In the Internet world where new technologies frequently emerge to displace the old and the products themselves are in a constant state of

http://ssrn.com/abstract=2047047 (discussing generally the difficulties of assessing Google’s market power and tentatively suggesting pricing of Google’s search advertising as a means of measuring power).

100 See Whittaker, supra note 84 (citing February 2012 comScore data showing Google’s share of general search traffic was 66.4%, while Bing and Yahoo! had 15.3 percent and 13.8 percent, respectively).

101 See Brian Womack, Google Increases U.S. Search Market Share as Yahoo Slips, ComScore Says, BLOOMBERG (NOV. 9, 2011, 6:17 PM), http://www.bloomberg.com/news/2011-11-09/google-gains-u-s-search-market-share-in-october-comscore-says.html (reporting ComScore data showing that Google has about 76% of search-based advertising dollars while Microsoft and Yahoo! collectively have 16%).

102 See, e.g., Jamison, supra note 85, at 12 (“[T]he definition of search and the technologies of search are moving targets. For example, Apple is not considered a direct rival [of Google] in general search, but its Siri product could be the next generation of search... Services such as Yelp and UrbanSpoon for restaurants, and MapQuest for locations, are constantly changing and redefining the meaning of search.”); Stephen D. Houck, The Microsoft Case and Google, 5 CPI ANTITRUST CHRONICLE (2012) (arguing that consumers have many options and, given the unceasing change and innovation that characterize competition on the Internet, Google search does not have durable market power).

103 See U.S. v. E.I. du Pont Nemours & Co., 351 U.S. 377 (1956) (appraising the cross-elasticity of demand and determining whether the product in question has reasonable substitutes; if it does, the reasonable substitutes should be included in the market definition).
change, this is an almost hopeless task. But though the relevant market for general search engines may be practically impossible to define with any degree of reliability, it is unlikely to be as narrow as general search on the user side and search-based advertising on the advertiser side, because both users and advertisers have reasonable alternatives to general search engines for their needs. Search engines today face intense competition from other portals of online information, both for user attention and advertising dollars.

For users, those interested in a specific category of content, such as books or travel, can (and often do) turn to specialized websites for information, bypassing general search engines. A consumer interested in buying a digital camera, for example, could probably gather information and complete the purchase more efficiently on Amazon’s website (which is focused on products and books) than through the use of a general search engine. Indeed, studies show that search on specialized sites, including Amazon, eBay and Facebook, now accounts for over one-third of all web searches, and Amazon and eBay together handle ten times more product searches than Google.

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104 There is seldom any econometric data available to determine cross-elasticities of demand in very dynamic markets. And, qualitative assessments as to reasonable substitutes may be imprecise. Also, where technology changes rapidly, it is perilous to assume that the contours of a market will remain stable for any length of time.

105 Search engines are multi-sided platforms, and thus there is more than one market definition. It is generally assumed that the relevant market on the user side is general search (search conducted on general search engines) and that the relevant market on the advertiser side is search advertising. For a discussion of multi-sided platforms, which include search engines and social networks, see generally David S. Evans, Governing Bad Behavior by Users of Multi-Sided Platforms, 28 BERKELEY TECH. L.J. (forthcoming Spring 2012), available at http://ssrn.com/abstract=1950474.

106 For a detailed analysis of the market definition issue in search, see generally Manne & Wright, Google and the Limits of Antitrust, supra note 30.

107 See Eli Goodman, Searcher Intent: Why Vertical Search is Now Giving Ground to Core Search, SEARCH ENGINE WATCH (SEPT. 19, 2011), http://blog.comscore.com/2011/09/searcher_intent_why_vertical_s.html (“If you only desire travel searches, you best go to an Online Travel Agent because they are the only ones that really understand your travel needs and won’t inundate you with extraneous results. Same idea with shopping engines or job search sites – the results you get will be filtered to the right universe of results you’re seeking.”).

108 See id. (“In August 2011, of the 27 billion searches conducted on desktops in the United States, more than one-third occurred on non-search engines. Search on sites like Amazon, eBay, and Facebook has been growing faster
Social networks, such as Facebook and Twitter, present another serious competitive challenge to general search engines. Though we normally do not associate social networks with search, they offer features for finding information, getting recommendations, and even reviewing products and services; and users are increasingly taking advantage of those features. Facebook now far surpasses Google as the most visited site on the Internet. Its competitive challenge to Google will likely further intensify as it strengthens its alliance with Bing, which already powers Facebook searches. And, the up-to-date nature of search on Twitter has apparently already prompted a competitive response from Google—a recent tweaking of its algorithm to provide more timely search. All of this suggests that Facebook and Twitter are, indeed, Google’s competitors in a free-form and fluid Internet information market, however that market may be defined.

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110 See id. (showing, in a study published in 2011, that 30 percent of U.S. Internet users now use social networks to find content, and users are also increasingly navigating to websites from links on social networks).
113 See Claire Cain Miller, Google Changes Search Algorithm, Trying to Make Results More Timely, BITS BLOG (Nov. 3, 2011, 1:23 PM), http://bits.blogs.nytimes.comhttp://bits.blogs.nytimes.comhttp://bits.blogs.nytimes.com/2011/11/03/google-changes-search-algorithm-trying-to-make-results-more-timely/ (“The new algorithm is recognition that Google, whose dominance depends on providing the most useful results, is being increasingly challenged by services like Twitter and Facebook, which have trained people to expect constant updates with seconds-old-news.”).
Mobile apps are also emerging as a substitute for search in certain contexts for a large segment of Internet users.\textsuperscript{114} As with social networks, we may not immediately associate mobile apps with search but they fulfill aspects of that function.\textsuperscript{115} The use of smartphones, which has been steadily growing, is expected to reach about 60 percent of the American population by 2016.\textsuperscript{116} And, numerous apps have been developed for their users who apparently find them less cumbersome to use than mobile search.\textsuperscript{117}

From the perspective of advertisers, they too have alternatives to search-based advertising on general search engines. The objective of advertisers is obviously to promote their products or brand to potential customers. To the extent that users now spend much of their online time using Facebook and other social networks, these networks are naturally attractive alternative or supplemental advertising platforms for advertisers. Unsurprisingly, a recent survey of online advertisers showed that the greatest growth of online advertising spending in 2011 was with Facebook.\textsuperscript{118} Advertising on Facebook is not search-based but is in

\textsuperscript{114}The momentum is shifting toward using smartphones rather than computers to access information available on the Internet. See Jenna Wortham, \textit{A Billion-Dollar Turning Point in Mobile Apps}, \textit{N.Y. Times}, Apr. 10, 2012, at A1, available at http://www.nytimes.com/2012/04/11/technology/instagram-deal-is-billion-dollar-move-toward-cellphone-from-pc.html (giving that as one reason for Facebook’s recent deal to purchase Instagram, a mobile app start-up, for $1 billion).


\textsuperscript{117}ECONSULTANCY DIGITAL MARKETERS UNITED, \textit{SAMPLE ONLINE ADVERTISERS SURVEY REPORT} (Sept. 2011) (http://econsultancy.com/us/reports/online-advertising-survey) (“The fastest growing area of investment is Facebook advertising, where almost three-quarters of respondents say they have increased spending in the last 12 months.”)
the form of “display ads,” but there is no apparent economic reason for treating display ads and
search-based advertising as being in distinct relevant markets.119

Once we include display ads in the relevant market with search-based advertising, Google would not have sufficient market share to be considered a monopolist. Facebook currently leads in the display ads category with about 30 percent share while Google trails with less than five percent.120 To limit the relevant market (on the advertiser side of search engines) to search-based advertising in the face of this sea change seems to show a disconnect with competitive reality.121

My purpose in this discussion is not to try to define the relevant antitrust market for search since it is probably impossible to do so in a morphing and open Internet world. Rather, it is simply to suggest it cannot be as narrow as general search for users or search advertising for advertisers. The future of search engines, social networks and mobile devices, their related technologies and business models, and user behavior are evolving so rapidly that it is unrealistic to view general search engines as completely distinct from other forms of competition on the Internet.

2. Inference of Durable Monopoly Power?

More importantly, regardless of how the market is defined, it is doubtful that monopoly power can be inferred from market shares, given the nature of competition in search and on the Internet. Unhappy Google users can instantly switch to another search engine without

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119 See Jamison, supra note 85, at 17 (citing a 2011 survey finding that 23% of online advertisers had recently shifted budget from search to display ads).
121 In fact, there is some evidence that online and offline advertisements compete with each other as well. See generally Avi Goldfarb & Catherine Tucker, Search Engine Advertising: Channel Substitution When Pricing Ads to Context, 57 MGMT. SCI. 458 (2011).
incurring any penalties or costs. Google’s market share is also vulnerable to competition from new waves of Internet products and services that, though not general search engines, are able to satisfy consumers’ evolving preferences in the way they seek and experience Internet information.\textsuperscript{122} And, advertising spending logically follows users. Hence, Google’s market position in online advertising can be no stronger or more durable than its market position with users.

In antitrust, market share in a properly defined market is often used as a proxy for market power.\textsuperscript{123} Monopoly power is inferred from a firm’s substantial market share within the defined market, though the inference may be qualified by ease of entry.\textsuperscript{124} Market share is normally a reasonable surrogate for power because firms with large market shares can typically raise prices profitably without competitive constraints. If they raise prices and reduce output, their small rivals’ competitive response will usually be limited because they do not have the capacity to quickly increase output to meet the demand of the dominant firm’s disaffected customers. Thus, the dominant firm is not constrained by the fear of losing substantial sales to its rivals if it raises prices or otherwise acts anticompetitively.

\textsuperscript{122} See, e.g., Houck, \textit{supra} note 102, at 7 (discussing the mutability of competition on the Internet and why it is not conducive to durable market power for Google).

\textsuperscript{123} See, e.g., \textit{U.S. v. Aluminum Corp. of America et. al.}, 148 F.2d 416, 424 (2d Cir. 1945) (stating that 90\% market share is clearly sufficient to constitute a monopoly, 60-64\% is unlikely to be sufficient, and 33\% is clearly not enough to find monopoly power).

\textsuperscript{124} In contemporary antitrust analysis, courts often look to entry barriers to qualify inferences drawn from market shares. Ease of entry could rebut the inference of market power from high market shares. \textit{See, e.g., U.S v. Microsoft Corp.}, 253 F.3d 34, 54-55 (D.C. Cir. 2001) (stating that looking only at market share to infer market power can be “misleading” but finding that barriers to entry existed to protect Microsoft’s operating systems market share); \textit{Tops Mkts., Inc. v. Quality Mkts., Inc.}, 142 F.3d 90, 99 (2d Cir. 1998) (finding that, though a 70 percent share of the relevant market was strong evidence of monopoly power, it was rebutted by ease of entry); \textit{Reazin v. Blue Cross & Blue Shield of Kan. Inc.}, 899 F.2d 951 (10\textsuperscript{th} Cir. 1990) (considering also entry barriers, supply and demand elasticities and other factors when drawing inferences from market share data).
In the context of search, however, this analysis does not hold, and high market shares are not good surrogates for market power. It is possible for a smaller search engine, such as Bing or Yahoo!, to constrain Google because they can easily and immediately “increase output” to serve the needs of unhappy Google users looking for an alternative. That is because a search engine’s “product” is information (search results) automatically generated by an algorithm that is available. “Product expansion” to meet increased demand basically means automatically applying an existing algorithm to answer more search queries, which can be easily accomplished with no time lag, unlike the product expansion of other more prototypical goods and services.125

Switching to another search engine is also extraordinarily easy for users. There are no switching costs and no user lock-in. Studies show that a majority of users already regularly use more than one search engine,126 and 89 percent would use a different search engine if they cannot find the information they are seeking with their preferred engine.127 A well-publicized incident involving a one-hour glitch on Google in 2009 illustrates both the ease of turning to another search engine and users’ readiness to do so if Google does not perform according to

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125 While a search engine might have to expand its server capacity if demand from new users increases significantly, this limitation is small as compared to the costs and other usual difficulties of expanding production of the typical good or service (that is not information).
127 Press Release, Performics, Search Engine Usage Study: 92 Percent of Searchers Click on Sponsored Results,(Sept. 28, 2010) (http://www.performics.com/news-room/press-releases/Search-Engine-Usage-Study-92-Percent/1422) (showing that 66% of users who prefer Google frequently or occasionally use a different search engine, and 89% of users try another search engine if their preferred engine does not generate the information that they are looking for).
their expectations. In that one hour of poor Google performance, the number of Yahoo!
searches doubled, indicating that a large number of Google users had immediately moved to
Yahoo! (and probably other search engines), though they returned to Google when the problem
was solved.

This suggests that, despite its current high market share in general search, Google does
not have much market power in an antitrust sense as there are competitive constraints on its
ability to act anticompetitively. If it fails, for whatever reason, to satisfy its users, they can
switch to another search engine in an instant, and the competing search engines have the
ability to immediately “increase output” to meet the increase in demand. Hence, Google’s
market share overstates its market power.

The history of search is, in fact, replete with examples of companies with dominant
shares that quickly lost their dominance when superior products became available, or
consumer preferences simply changed. AltaVista and Lycos, for example, were popular search
engines in the early Internet days but have largely disappeared. In 1998, the year that
Google was incorporated, Fortune had declared that Yahoo! had “won the search wars.”

128 See Marissa Mayer, ‘This Site May Harm Your Computer’ on Every Search Result?!?, GOOGLE: OFFICIAL BLOG (Jan.
31, 2009), http://googleblog.blogspot.com/2009/01/this-site-may-harm-your-computer-on.html
129 See Jessica E. Vascellaro, Fresh Evidence That Search Is Still Competitive? Not So Fast, WALL ST. J., DIGITS (Mar. 17,
fast/
130 Phillip Bump, Flashback from 1998: When Altavista, Lycos, and Blue Mountain Arts Ruled the Web, GEEKOSYSTEM,
131 See Our history in depth, GOOGLE (last visited June 2, 2012),
132 Randall E. Stross, How Yahoo! Won the Search Wars Once Upon a Time, Yahoo! Was an Internet Search Site with
Mediocre Technology. Now it has a Market Cap of $2.8 Billion. Some People Say it’s the Next America Online,
CNNMONEY, FORTUNE (Mar. 2, 1998),
Yet, Google surpassed Yahoo! only a few years later, in 2004. There is no reason to believe that Google will be more insulated from competition than the earlier dominant search engines if it ceases to be innovative or to anticipate user desires and expectations, or if a better product is introduced.

Another factor adding to the vulnerability of Google’s market position is the mutability of the environment in which it competes. The products themselves, including how they are offered, are constantly evolving. New competitors and new forms of competition frequently emerge to change the face of competition. For example, while Apple may not be a direct Google competitor in search, its new Siri product could develop into the future generation of search. Existing market players are also teaming up with various rivals and, in so doing, expanding or changing the contours of the market. One example is the Bing/Facebook alliance which, among other things, is expected to provide a new search experience by tapping into the user’s Facebook network. In the face of the rapid transformation and innovation occurring on the Internet, it is difficult to see how Google could have monopoly power (that is, the power to raise prices or degrade quality without competitive constraints).

On the advertising side, Google also does not have durable monopoly power notwithstanding its current high market share in search-advertising spending. Logically, if

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133 See Statement of Susan A. Creighton, Partner, Wilson, Sonsini, Goodrich & Rosati, supra note 28, at 36., available at http://www.gpo.gov/fdsys/pkg/CHRG-112shrg71471/pdf/CHRG-112shrg71471.pdf. See also Our history in depth, supra note 131 (indicating that Google officially became the world’s largest search engine in June 2000 when it had indexed over one billion websites).


135 See Wingfield, supra note 112 (reporting on the strengthening of the ties between Bing and Facebook).

136 Search results on Bing for “best hotels in Maui,” for example, would include relevant information, recommendations and pictures gleaned from the postings of the user’s Facebook friends; the user could then also interact with those friends and seek additional information from them without leaving the Bing results page. See id.
Google users increasingly turn to Facebook, Twitter or other non-general search engines for information and entertainment, advertisers will adjust their advertising budgets accordingly. A survey showing that advertising spending on Facebook (not search engines) experienced the greatest growth in 2011, and that 35 percent of online advertisers had moved budget from search advertising to advertising on Facebook, confirms this.137

Businesses are also free to advertise on multiple search engines (assuming they win the keyword auctions) since they are not bound by any exclusive contracts with Google.138 Since search-based advertising costs are based on the number of user clicks on a paid link,139 firms can purchase search advertising on more than one search engine without having to effectively double or triple their advertising spending. If users leave Google for Bing, for example, an advertiser with paid links on both search engines would likely experience an increase in user clicks on its search advertisements on Bing and a decrease in the clicks on its paid links on Google. Thus, an increase in the firm’s advertising costs on Bing would probably be roughly netted out by a corresponding decrease in costs for the same advertising on Google, making search-based advertising on more than one search-engine economically viable.

In short, no matter how the market for search engines is defined on either the user or advertiser side, it is unlikely that Google’s current significant market share will give it durable monopoly power. Google faces numerous forms of competition and can lose market share quite easily if it fails to live up to customer expectations or if superior rival products or services become available. The open and dynamic Internet information market in which Google

137 See Jamison, supra note 85, at 17 (citing an E-consultancy 2011 report).
139 See Manne & Wright, If Search Neutrality Is the Answer, What’s the Question, supra note 31, at 16-17 (discussing the click-through pricing system of “sponsored links” or search-based advertisements).
competes is simply not conducive to the exercise of monopoly power. Indeed, none of the characteristics usually associated with monopoly power—high prices, lack of innovation, unresponsiveness to customers, complacency, and indifference toward competitors—seem to be present in Google.

C. Essentiality, Denial of Access, and “Nonrivalrousness” Concepts

But even assuming that Google does have monopoly power through its search engine, before the essential facility doctrine can be applicable, the “facility” Google controls must be essential and practically infeasible to duplicate, Google must have denied competitors access to it, and the facility must be capable of being shared.141 The last two factors, denial of access and the sharability of the facility, have been mostly overlooked in the debate on whether Google has any legal duty to assist its rivals in vertical markets. On essentiality, those who advocate finding Google search an essential facility tend to generally assert that Google is the gateway to the Internet and hence essential for both users and websites,142 but have not discussed the issue in greater depth.

1. Essentiality

Perhaps because firms in a competitive economy are normally expected to rely on their own resources to compete, essentiality has always been strictly construed. To be deemed essential, the facility or input must be critical to competitive viability, not merely desirable or

140 See U.S. v. Aluminum Co. of America, 148 F.2d 416, 427 (2d Cir. 1945) (“Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant; to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone.”)
141 See MCI Commc’ns Corp. v. AT&T, 708 F.2d 1081, 1132-133 (7th Cir. 1983); Hecht v. Pro-Football, Inc., 570 F.2d 982, 992-93 (D.C. Cir. 1977).
142 See, e.g., Bracha & Pasquale, supra note 89, at 1152-71 (elaborating on the claim that search engines serve as gatekeepers on the Internet and calling for their regulation).
superior to the alternatives.\textsuperscript{143} In \textit{Alaska Airlines, Inc. v. United Airlines, Inc.},\textsuperscript{144} the Ninth Circuit concluded, after analyzing a number of cases, that “[a] facility that is controlled by a single firm will be considered ‘essential’ only if its control of the facility carries with it the power to \textit{eliminate} competition in the downstream market.”\textsuperscript{145} Moreover, the “power to eliminate competition must not be momentary, but must be at least relatively permanent.”\textsuperscript{146}

Every key essential facility case that has mandated access has involved a resource that unmistakably met this strict standard. For example, absent access to the railroad bridge in \textit{Terminal Railroad}, railroad competition in the region would have been impossible (and duplicating the bridge was not reasonably feasible give the terrain and prohibitive costs).\textsuperscript{147} Similarly, without access to the monopolist utility’s transmission lines in \textit{Otter Tail}, the municipalities could not have competed in the retail distribution of power since it would have no means to transmit the power it purchased wholesale to the local distribution systems.\textsuperscript{148} Like the railroad bridge, the transmission lines were practically infeasible to duplicate. AT&T’s local telephone exchanges in \textit{MCI} were likewise indispensable to any long-distance telephone competitor since interconnection was absolutely necessary to either originate or complete

\textsuperscript{143} See, e.g., Castelli v. Meadville Med. Ctr., 702 F. Supp. 1201, 1209 (W.D. Pa. 1988), \textit{aff’d}, 872 F.2d 411 (3d Cir. 1989) (finding that a small-town hospital was not an essential facility for an excluded doctor, where the doctor could perform surgical procedures in other reasonable alternative facilities, including in an outpatient setting in an office). See also McKenzie v. Mercy Hosp., 854 F.2d 365, 371 (10\textsuperscript{th} Cir. 1988); Twin Labs., Inc. v. Weider Health & Fitness, 900 F.2d 566, 569 (2d Cir. 1990) (rejecting essential facilities claims where the plaintiff wanted to be able to advertise in a competitor’s magazine—the alleged essential facility—because, the court held, it was free to create its own magazine or advertise through other channels). See also Areeda, \textit{supra} note 68, at 852 (adding that “critical to the plaintiff’s competitive viability” means that the plaintiff cannot compete effectively without it and practical alternatives or duplication are not available).

\textsuperscript{144} Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536 (9\textsuperscript{th} Cir. 1991).

\textsuperscript{145} Id. at 544 (emphasis in original); see also City of Anaheim v. S. Cal. Edison Co., 955 F.2d 1373, 1380, n.5 (9\textsuperscript{th} Cir. 1992) (citing \textit{Alaska Airlines} on this point, though not reaching the factual issue in the case).

\textsuperscript{146} \textit{Alaska Airlines}, 948 F.2d at 544, n.11 (citations omitted).

\textsuperscript{147} U.S. v. Terminal R.R. Ass’n of St. Louis, 224 U.S. 383, 395-97 (1912).

long-distance calls, and duplication of the entire local exchange network was practically infeasible.\textsuperscript{149}

Whenever there has been a reasonable functional alternative to a facility, however, courts have generally rejected essentiality arguments. Thus, the only hospital in a small town was found not essential for an excluded doctor where surgical procedures could be performed in other settings, such as outpatient in a doctor’s office.\textsuperscript{150} And, in a case where a downstream competitor wanted access to a dominant firm’s magazine for advertising, the court found that the “facility” was not essential since the plaintiff could advertise through other channels or create its own magazine.\textsuperscript{151} The need for a stringent essentiality standard is not particularly controversial and has been embraced by even the doctrine’s strongest champions.\textsuperscript{152}

It would be extremely difficult to find Google’s search engine “essential” under this strict standard or, indeed, even under a more lenient one. As earlier discussed, there are other comparable search engines, notably Bing and Yahoo!, and possibly newer ones such as DuckDuckGo and Blekko, to which users can easily switch without incurring any costs, and through which websites can reach potential customers.\textsuperscript{153} Moreover, search engines themselves are not essential portals from the perspective of any side in the multisided search engine platform.

\textsuperscript{149} MCI Commc’ns Corp. v. AT&T, 708 F.2d 1081, 1132-33 (7th Cir. 1983).
\textsuperscript{151} Twin Labs., Inc. v. Weider Health & Fitness, 900 F.2d 566, 569 (2d Cir. 1990).
\textsuperscript{152} \textit{See} Waller, \textit{supra} note 67, at 376 (“[T]he very definition of infrastructure means that questions of open access would not arise in the first place if the plaintiff can compete without access to the defendant’s facility or can duplicate that facility itself.”); Brett Frischmann & Spencer Weber Waller, \textit{Revitalizing Essential Facilities}, 75 ANTITRUST L.J. 1, 11 (2008).
\textsuperscript{153} \textit{See supra} notes 86-88, 126-129 and accompanying text.
For users, while search engines may be a useful tool for reaching websites on the Internet, they are not indispensable for that purpose. We can access any website by typing its “url” into a browser, or from links appearing on other websites, in emails, or on Facebook.154 Many Internet users apparently often know which websites they wish to access without conducting a search.155 A recent report shows, for example, that Google accounts for only sixteen percent of traffic to the top thirty websites.156

More importantly, there are increasingly additional sources that are not general search engines to which users can turn to find useful information, which is what search is about. Specialized websites, such as Amazon, eBay, and Tripadvisor, are already very popular with users, especially when their queries pertain to products and services.157 Facebook, Twitter and other social networks are also fast becoming important portals of online information.158 A recent McKinsey study, for example, suggests that about one-third of U.S. Internet users now use social networks to find content.159 As social networks evolve and improve their features, they will likely become even better search tools. Another convenient way for smartphone users to access Internet information is through mobile apps.160 Experts have found that smartphone users far prefer apps to mobile search in certain contexts because of their relative ease of

154 See Bughin et al, supra note 109, at 13 (showing that users navigate to online content through various features/web sites, in addition to search engines, including social network, search toolbars, bookmarks, portal web sites, links from friends via email, and direct entry of web address).
155 See David Gelles, Facebook’s Grand Plan for the Future, FIN. TIMES (Dec. 3, 2010, 5:24 PM), http://www.ft.com/cms/s/2/57933bb8-fcd9-11df-ae2d-00144feab49a.html#axzz1H27SlfZM (noting that while many computer uses use a search access as an access point to the Internet, many more do not).
156 CITIGROUP, INC., ANNUAL NET INFLUENCE REPORT: GOOGLE CONTINUES TO LEAD AS SOURCE OF TRAFFIC TO WEBSITES, at 3 (Feb. 5, 2012), available at https://ir.citi.com/Nz%2FXjA8taabnbYmERmo1s9uJ10gHQZa35F5WBi9%2B98Tl8SNeGUKS4g%3D%3D
157 See supra notes 107-109 and accompanying text.
158 See supra notes 109-113 and accompanying text.
159 Bughin et al, supra note 109, at 7.
160 See supra notes 114-117 and accompanying text.
use.\textsuperscript{161} As the number of smartphone users continues to rise, mobile apps could become an even more important avenue for seeking information for a large segment of consumers.

For websites (content/service providers), Google’s search platform is also not strictly essential. Ranking high in the organic results of the most popular search engine is undoubtedly an excellent way to reach potential customers. Studies have shown that top rankings on a results page receive the vast majority of all user attention, with the first spot receiving twice as many user clicks as the second.\textsuperscript{162} But websites that have been displaced by a search engine’s own content in the coveted top ranking, or who otherwise fail to attain the high ranking that they desire, certainly have alternative ways of attracting customers.\textsuperscript{163}

They can purchase advertising through a wide range of media, including search-based advertising on Google, Bing or Yahoo!, display ads on Facebook and other websites, or on more traditional offline broadcast and print advertising platforms.\textsuperscript{164} Or they can enter into creative alliances with other market participants; one such example is the recent Bing/Yelp deal which will result in excerpts of Yelp restaurant reviews being prominently featured in searches on Bing.\textsuperscript{165} They can also expand their mobile apps, as Yelp has recently done, so that smartphone

\textsuperscript{161} See supra note 117.
\textsuperscript{162} See Daniel Ruby, \textit{The Value of Google Result Positioning}, CHITIKA INSIGHTS (May 25, 2010), \url{http://insights.chitika.com/2010/the-value-of-google-result-positioning} (showing that the top-ranked result received more than a third of users clicks, the second-ranked received about 17 percent, and the tenth-ranked less than three percent).
\textsuperscript{163} See supra notes 118-120 and accompanying text.
\textsuperscript{164} The evidence is mixed as to whether online and offline advertising are reasonable substitutes for each other. Some studies suggest that they are while others show that offline advertising is not as effective as online advertising for online-only retailers. See Manne & Wright, \textit{Google and the Limits of Antitrust}, supra note 30, at 197-98 (discussing various studies and anecdotal evidence).
\textsuperscript{165} See Yelp Serves Restaurant Reviews to Microsoft’s Bing, USA TODAY (June 14, 2012), \url{http://www.usatoday.com/tech/news/story/2012-06-14/yelp-bing/55600758/1}. 
users can access their services directly without having to navigate through a search engine.\textsuperscript{166} That being top-ranked in Google’s organic results may be a superior (and free) platform for targeting potential customers relative to the non-free alternatives is not sufficient to make it “essential” for competitive viability in ancillary markets.

Almost inextricable from the essentiality concept is the infeasibility of duplication requirement.\textsuperscript{167} It requires a showing that the functionality of the facility, not necessarily the facility itself, cannot be reasonably duplicated or obtained from another source.\textsuperscript{168} From a rival content provider’s perspective, the functionality of Google search is the platform’s ability to help the rival reach potential customers in an ancillary market in which Google also competes. As earlier mentioned, there are many ways for businesses to promote themselves other than through high visibility in the top ranks of the free organic results, though they may be less attractive. To the extent that functional alternatives are available, it would seem that duplication of the facility is reasonably feasible and, hence, the Google search platform is not “essential” to competition.

2. Is There Denial of Access?

Denial of access, which must be found under the MCI test,\textsuperscript{169} is generally clear cut and a non-issue in essential facility cases. But, in the case of search, the question of whether there is


\textsuperscript{167} See, e.g., MCI Commc’ns Corp. v. AT&T, 708 F.2d 1081, 1132 (7th Cir. 1983) (setting forth “a competitor’s inability practically or reasonably to duplicate the essential facility” as the second element necessary to establish liability under the essential facilities doctrine); Hecht v. Pro-Football, Inc., 570 F.2d 982, 992-93 (D.C. Cir. 1977).

\textsuperscript{168} See Robinson, supra note 67, at 1211-12 (explaining that “[w]hat is important is not whether a particular asset owned by a monopolist can be duplicated but whether the specific economic uses performed by the asset can be replicated.”).

\textsuperscript{169} MCI, 708 F.2d at 1132-33 (setting forth “the denial of the use of the facility to a competitor” as the third element necessary to establish liability under the essential facilities doctrine).
any denial of access is a complicated one that has been largely overlooked. In fact, it is not even clear which is the alleged essential facility. If it is the *search engine*, then there is no denial of access at all. Websites of Google’s vertical rivals, such as Mapquest or Kayak, are readily accessible to anyone using Google search via various keywords (or via searching the business name, or a portion of it). They are not excluded from the search process. It is just that, for certain queries, Google may list its own content or specialized search results prominently whereas a rival website is lower in the rankings or is not shown.

For example, enter “map sites” (or “Mapquest”) into the Google search box, and the organic results list will lead off with a link to the Mapquest site. However, if a user enters “Starbucks,” Google assumes that the user may be interested in finding a Starbucks nearby and will automatically return a Google map marking the Starbucks closest to the user along with the usual relevant links.

As another example, type in “travel sites” as the search query in Google, and the organic search results will display links to Google’s major competitors in travel in the following order: Kayak, Expedia, Hotwire, Priceline, Travelocity, Orbitz, Travelzoo, and Tripadvisor. But if one enters “Newark to San Francisco” as the search query, Google assumes that the user is interested in quickly seeing flight information and will return its “universal search” results (listing a few select flights and integrating a flight search box) at the top of the results list, followed by links to the major travel sites.

Or, search for “restaurant review sites” on Google, and Urbanspoon and Yelp will top the organic results list. However, a search for “San Francisco restaurants” will yield Google’s universal search results, which include a number of San Francisco restaurant listings along with
Google maps pinpointing their locations, and some Google reviews, followed by the traditional links to Yelp, OpenTable, and Urbanspoon. Because Google’s own content appears first, links to Yelp and other top-ranked external sites appear near the middle of the results page rather than at the top, as was the case when “restaurant review sites” was the search query.

Since no competitor website is excluded from the Google search platform itself for competitive reasons, the implicit premise of any denial of access claim must be that the organic ranked results list is the alleged essential facility, and that the failure to make the top of the list effectively renders the competing site invisible. But even accepting this dubious notion of what constitutes the essential facility in search, it is still not clear that a Google rival has been “denied access.” As shown, quality competitor websites, such as Mapquest or the major travel or review sites, are in fact still highly ranked for certain keywords, though perhaps not for others or perhaps not as highly ranked as they were before Google expanded into content. But it is conceptually difficult to equate this outcome to denial-of-access unless one takes the position that “access” requires nothing less than access to top ranking for all search terms that might reasonably direct traffic to one’s business.

Though the issue has rarely been discussed, there is nothing to suggest that courts would (or should) interpret “denial of access” this loosely. Such a construction would be untenable under the usual understanding of those words. Moreover, courts have consistently construed essentiality strictly and, even before Trinko, taken a conservative approach to the

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170 Sometimes websites are removed from Google’s search index for non-competitive reasons, such as spam content or child pornography. But apart from those limited categories (which have obvious pro-consumer and social justifications for exclusion), Google does not exclude sites from its index.
essential facility doctrine. It is, therefore, highly unlikely that they would find denial of access even if the ranked results list were considered the “essential facility.”

3. “Nonrivalrousness,” Or the Feasibility of Sharing

An important related issue that commentators have tended to overlook is whether the alleged essential facility is capable of being shared in the context of search. A monopolist is not required to “share,” no matter how essential its facility may be to competition, if “sharing would be impractical or would inhibit the defendant’s ability to serve its customers adequately.” It was for that reason that the Ninth Circuit Court of Appeals rejected essential facility claims in two cases that were factually very similar to Otter Tail, except on the issue of the feasibility of sharing.

In City of Anaheim v. Southern California Edison Co. and City of Vernon v. Southern California Edison Co., the utility company would not allow municipalities access to its transmission lines to transmit wholesale power purchased from another vendor to their own local distribution systems. The reason for the refusal was that the utility planned to use the full capacity of the lines if inexpensive power were to become available for its own purchase. Though, as in Otter Tail, the transmission lines were clearly essential to the municipalities if

171 See supra notes 143-152 and accompanying text. See also Robinson, supra note 67, at 1232 (“A review of the lower court opinions indicates that lower courts are quite conservative in their application of the essential facilities doctrine.”).
172 The feasibility of providing the facility is an element necessary to establish liability under the essential facility doctrine. See, e.g., MCI, 708 F.2d at 1132-33; Hecht, 570 F.2d at 992-993.
173 Hecht, 570 F.2d at 992-93.
175 City of Vernon v. S. California Edison Co., 955 F.2d 1361 (9th Cir. 1992)
176 City of Anaheim, 955 F.2d at 1381 (“Edison’s reason for denying firm access was simply that when Northwest Power was available and inexpensive Edison was fully using its capacity to import that power into its whole system.”); City of Vernon, 955 F.2d at 1366 (“Vernon fails to demonstrate just why Edison is required to cease using its own facility so that Vernon can begin using it. This is not a situation where Edison had no use for the facility and arbitrarily denied someone else its use”).
they were to run their own retail power distribution, the Ninth Circuit held that the monopolist utility was not under any obligation “to cease using its facility so that [its rival] can begin using it.” ¹⁷⁷ To require it to do so would “stand[] the essential facility doctrine on its head.” ¹⁷⁸ It is hard to argue with the rationality of this limitation. And even the strongest contemporary advocates of the essential facility doctrine seem to agree, setting as a condition for application under their theory the nonrivalrous nature of the facility or resource. ¹⁷⁹ “Nonrivalrous” means that the resource can be accessed and used by multiple persons at the same time—that is, a resource that is capable of being shared. ¹⁸⁰

In the context of search, if the search engine is the alleged essential facility, then shareability does not present a problem—it can be used by multiple persons at the same time. But, in that case, there would be no denial of access. There is no allegation that the website of a Google rival, such as Mapquest, Expedia or Tripadvisor, has been excluded from the search process. The claim is merely that Google’s ranking methodology tends to favor its own content and feature it prominently in response to certain search queries.

Thus, the essential facility argument must be premised on the notions that the ranked results list is itself the essential facility, and that the lack of access to a desired top ranking constitutes denial of access. But if the list of top search results is the alleged essential facility,

¹⁷⁷ City of Vernon, 955 F.2d, at 1366; see also City of Anaheim, 955 F.2d, at 1381 (“It is a situation where Edison can use its own facility in full to obtain inexpensive power. The Cities seem to contend that Edison has to disable itself so that they can get cheap power. The law requires no such thing.”).
¹⁷⁸ City of Vernon, 955 F.2d, at 1367 (“Edison clearly had a use for its lines. . . [T]he demand that Edison turn over its facility to a city simply because the city could save money by obtaining cheaper power stands the essential facility doctrine on its head.”)(citing City of Anaheim, 955 F.2d, at 1381).
¹⁷⁹ See Frischmann & Waller, supra note 152, at 12-13 (incorporating into the definition of an infrastructure—to which the essential facility doctrine could apply—the requirement that the resource is one that “may be consumed non-rivalrously,” that is, it is “sharable.”); Waller, supra note 67, at 373 (same).
¹⁸⁰ See Frischmann & Waller, supra note 152, at 12-13.
then the “facility” is clearly not nonrivalrous. There is only one first-ranked position, one second-ranked, and so on. Where a facility cannot accommodate both the monopolist-owner and its rival, the law is crystal clear that the monopolist does not have to “share,” no matter how essential access may be to competition. And if there is no legal obligation to share in that situation, there would naturally be no need for the search engine to adopt some “neutral” standard for the allocation of the scarce resource—top-ranking—but can simply use the non-sharable resource itself.

Hence, even accepting the argument that access to top ranking for a slew of specific keywords is essential for competitive viability, Google has no legal obligation to give up its non-sharable property—the top spot on its unpaid results lists—to a competitor, regardless of which product (e.g. Google Maps, Mapquest, or Bing Maps) is better by some “objective” metric. As for the limited number of other high-ranked positions, e.g., second and third-ranked, an effective search engine must have the ability to adopt and apply criteria that it believes will return results meeting its users’ expectations. But opinions regarding quality and relevance of web content are necessarily subjective, and more firms are likely to be dissatisfied than satisfied with their rankings in the search results. Because rankings are inherently not nonrivalrous, invoking the essential facility principle in the context of search and search results seems incongruous.

IV. Unilateral Refusal to Deal and Sacrifice of Profits

The essential facilities doctrine is basically a subset of the general antitrust duty to deal. Even where no essential facility is involved, a monopolist’s unilateral refusal to deal with a competitor can give rise to liability under Section 2 of the Sherman Act in exceptional
circumstances.\(^\text{181}\) But basing Section 2 liability on pure unilateral refusals has always been somewhat controversial because it comes quite close to finding an antitrust violation for no-fault monopolization.\(^\text{182}\) Thus, just as with the essential facilities doctrine, the general duty to deal has been applied only sparingly.\(^\text{183}\) There are, in fact, few conceptual differences between the two antitrust principles, and their discussion tends to become merged in antitrust commentaries.\(^\text{184}\) A general duty to deal, not tied to an essential facility, is no more appropriate (or likely to be found applicable) for Google’s search rankings under *Trinko* than the essential facility doctrine.

### A. Termination of Prior Profitable Relationship Evidencing Sacrifice of Short-Term Profits

In *Trinko*, the most recent case involving a monopolist’s alleged duty to deal, a unanimous Supreme Court reiterated that “as a general matter, the Sherman Act ‘does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.’”\(^\text{185}\) And it said bluntly that antitrust law disfavors the imposition of duties to deal

\(^{181}\) See, e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601 (1985) ("The high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified.").

\(^{182}\) Even earlier cases that took a more aggressive approach toward monopolization have implicitly rejected the notion of liability for no-fault monopolization. See United States v. Aluminum Co. of America, 148 F.2d 416, 430 (2d Cir. 1945) (cautioning that a “single producer may be the survivor out of a group of active companies, merely by virtue of his superior skill, foresight, and industry . . . The successful competitor, having been urged to compete, must not be turned upon when he wins.”).

\(^{183}\) See, e.g., Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP., 540 U.S. 398, 408 (2004) (“Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2. We have been very cautious in recognizing such exceptions, however, because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm.”).

\(^{184}\) Perhaps one distinction is that courts have not tried to craft a systematic test for unilateral refusals to deal as they have for the essential facility doctrine, but have tended to focus on the particular facts of a case, including the monopolist’s intent. Compare Aspen Skiing, 472 U.S. 585, with MCI Commc’ns Corp. v. American Tel. & Tel. Co., 708 F.2d 1081 (7th Cir. 1983).

\(^{185}\) *Trinko*, 540 U.S. at 408 (internal citations omitted).
because of concerns about its disincentive effect on investments and innovations.\textsuperscript{186} While \textit{Trinko} did not repudiate \textit{Aspen Skiing Co. v. Aspen Highlands Skiing Corp.}, which had found a Section 2 violation based on a dominant firm’s unjustified refusal to deal with a competitor,\textsuperscript{187} it severely limited \textit{Aspen’s} scope and described the case as being “at or near the outer boundary of section 2 liability.”\textsuperscript{188}

\textit{Aspen} involved a ski operator who, after becoming dominant in the relevant market,\textsuperscript{189} would not continue to join its rival in offering a highly popular and profitable joint multi-day, all-Aspen, ski ticket.\textsuperscript{190} It also refused to sell its daily ski tickets—an item it normally sold to the public—in bulk to the competitor, even at the full retail price, so as to prevent the competitor from cobbling together an alternative to the terminated joint ticket.\textsuperscript{191} The Court concluded that the jury could infer anticompetitive intent from the defendant’s willingness to sacrifice short-term profits by terminating a profitable prior relationship with its rival.\textsuperscript{192}

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\textsuperscript{186} \textit{id.} at 407-08.
\textsuperscript{187} 472 U.S. 585 (1985).
\textsuperscript{188} \textit{Trinko}, 540 U.S. at 409.
\textsuperscript{189} The defendant Ski Co. initially owned only one of the four ski mountain facilities in Aspen but later (through acquisitions) owned three. For some reason, it did not appeal the lower court’s definition of the relevant market as consisting of downhill skiing in Aspen. Under this definition, ski resorts outside of Aspen were excluded, which allowed Ski Co. to be characterized as a monopolist. A good argument could have been made that the relevant geographic market should not have been so limited because skiers dissatisfied with the offerings in Aspen could easily visit ski resorts elsewhere. However, because the defendant did not appeal the market definition and the finding of market power, the only issue before the Supreme Court was whether the defendant’s unilateral refusal to deal satisfied the conduct element of Section 2.
\textsuperscript{190} \textit{Aspen Skiing}, 472 U.S. 585, 603 (1985) (“[T]he monopolist elected to make an important change in a pattern of distribution that had originated in a pattern of distribution that had originated in a competitive market and had persisted for several years.”).
\textsuperscript{191} The joint multi-day ski ticket was popular with skiers because it allowed them to ski on all four ski mountains in Aspen (three owned by defendant, and one by plaintiff) over a period of days. When it was discontinued because of the defendant’s refusal to deal, the plaintiff tried to purchase daily tickets for defendant’s ski mountains in order to include them in a ski package with daily tickets for its own mountain, as a substitute for the terminated popular joint ticket. \textit{See Aspen Skiing}, 472 U.S. at 589, 593-94.
\textsuperscript{192} \textit{Aspen Skiing}, 472 U.S. at 608 (noting that the jury could have concluded from defendant’s refusal to make profitable sales of tickets to plaintiff that it “elected to forego these short-run benefits because it was more interested in reducing competition in the Aspen market over the long run by harming its smaller competitor.”); \textit{id.} at 610-11 (“Thus the evidence supports an inference that Ski Co. was not motivated by efficiency concerns and
The Trinko Court construed Aspen very narrowly, limiting it to its facts. It read Aspen’s imposition of a duty to deal as hinging on the monopolist’s termination of a preexisting profitable course of dealing with its rival, which evidenced a “willingness to forsake short-term profits to achieve an anticompetitive end.”\(^{193}\) The theory is that a monopolist’s voluntary sacrifice of short-term profits makes no economic sense and suggests “a calculation that its future monopoly retail price would be higher,”\(^{194}\) which could justify an exception to the general no duty-to-deal rule. Accordingly, the Court suggests that, before unilateral refusals can give rise to Section 2 liability, there must usually be a prior profitable business relationship between the monopolist and its competitor, the termination of which entailed a short-term sacrifice of profits for the monopolist.

These conditions cannot be satisfied in the context of Google’s favoring its own content and services in returning relevant search results. Google cannot reasonably be said to have a prior course of dealing with a firm based on the fact that its algorithm has previously returned a link to the firm’s webpage in response to a search query. A search engine generates results for millions upon millions of search queries every day. To view it as having a preexisting business relationship with every entity whose website link has been automatically included in a results page, free of charge, goes beyond the general understanding of the concept of a business relationship or course of dealing.

But even if a website’s previous top ranking in various search results could be characterized as a prior course of dealing with Google, which Google then “terminated” by

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\(^{193}\) Trinko, 540 U.S. at 409 (commenting on Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985)).
\(^{194}\) Id.
taking the top rank for itself, the "termination" does not require Google to sacrifice any short-term profits. Google does not charge websites any fees when its algorithm returns a link to them and, therefore, "termination" of the "relationship" does not cost Google lost profits. Nor is there evidence that by giving preference to its own content, Google has suffered a drop in its advertising revenues. Stated differently, even if Google can be said to have terminated a prior course of dealing with Mapquest when it started returning its own maps instead of a first-ranked link to Mapquest, this "termination" does not entail any sacrifice of short-term profits on the part of Google. Nor can the "termination" be considered economically irrational but for the exclusionary effect it would have on Mapquest. Thus, the Aspen factors that Trinko seems to require are absent, and it is difficult to envision a court applying an Aspen-like duty to deal in connection with Google’s search rankings.

B. Lorain Journal?

Trinko, however, made no reference to Lorain Journal Co. v. United States,195 a 1951 case relied upon by the Aspen Court to find the existence of a duty to deal.196 Given that Trinko arguably left Lorain Journal untouched, it makes sense to ask whether there are parallels between Google’s preference for its own content and services and the defendant’s conduct in Lorain Journal that could justify applying Lorain Journal’s rationale to Google search to find antitrust liability.

In Lorain Journal, the Court found a Section 2 violation where the sole newspaper serving the area refused to accept advertisements from businesses that also advertised or planned to advertise on a newly established radio station, the area’s only other disseminator of

news and advertising.\textsuperscript{197} The publisher’s objective was to “cut off [the radio station’s] bloodstream of existence—the advertising revenues,”\textsuperscript{198} so as to regain its monopoly in the dissemination of news and advertising in the area.\textsuperscript{199} To execute its plan, the newspaper monitored the radio station’s broadcasts to identify its advertisers, then terminated their advertising contracts and would only renew them after the advertisers ceased advertising on the radio.\textsuperscript{200}

While \textit{Lorain Journal} is usually considered a unilateral refusal-to-deal case—standing for the proposition that a monopolist’s right to choose with whom it will do business is not unqualified\textsuperscript{201}—the case, in fact, was not about a pure unilateral refusal. Rather, it involved a \textit{conditional} refusal. The monopolist publisher’s willingness to do business with its advertising customers was effectively conditional on their not patronizing the monopolist’s rival, the radio station. This conduct, specifically aimed at the “complete destruction and elimination” of the radio station,\textsuperscript{202} is qualitatively very different from a dominant search engine’s simply favoring its own products and services over that of its competitors in its display of search results. To be comparable to \textit{Lorain Journal}, there would have to be some affirmative unjustified act or condition that takes it beyond a pure refusal to deal, such as, for example, Google’s specifically demoting a website for advertising on Bing or Yahoo! or for soliciting an advertiser for its own website in competition with Google, or for refusing to purchase advertising on Google. Absent

\begin{itemize}
  \item \textsuperscript{197} \textit{Lorain Journal}, 342 U.S. at 146-49.
  \item \textsuperscript{198} \textit{Id.} at 149.
  \item \textsuperscript{199} \textit{Id.} at 151 (“. . . the publisher’s attempt to destroy WEOL was in fact an attempt to end the invasion by radio of the Lorain newspaper’s monopoly” of the mass dissemination of local news and advertising in Lorain).
  \item \textsuperscript{200} \textit{Id.} at 149
  \item \textsuperscript{201} \textit{See} Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601-02 (1985) (describing \textit{Lorain Journal} as squarely holding that the important right of a firm not to deal with other firms is not unqualified).
  \item \textsuperscript{202} \textit{Lorain Journal}, 342 U.S. at 150.
\end{itemize}
some such affirmative conduct or condition aimed at hindering competition, Google’s choice to display its own property more prominently in search results bears little resemblance to *Lorain Journal*.  

V. The Compensation Conundrum

There are other problematic issues common to both the duty to deal and the essential facility doctrine as possible legal tools for mandating search “neutrality.” Preliminarily, it is extremely difficult to say what a truly “neutral” result would be (such as whether Google or Mapquest maps are qualitatively superior), and who would have the right to set the norm and why. More importantly, even if we can somehow sort out these complex issues, it is important to note that compulsory access does not mean free access. Courts have never ordered a monopolist-defendant to grant uncompensated access or provide free assistance to a rival in a pure essential facility or duty to deal case. Indeed, no case has even held that any compensated dealing must be at the competitive price. That mandatory access does not mean free access is also implicit in cases cautioning that courts should not be thrust into a role requiring them to determine prices at which the forced sharing must take place. In fact, the

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203 In any event, whatever the vitality of *Lorain Journal*, it seems hard to apply to Google because favoring its own property in the display of search results cannot really characterized as refusing to deal with others.

204 See Grimmelmann, *Some Skepticism About Search Neutrality*, supra note 35, at 443-45 (disputing the notion that search queries can have objectively right and wrong answers and explaining that search itself if subjective).

205 See Volokh & Falk, *supra* note 57 (making the case that search engine results reflect a search engine’s editorial judgment of relevant content that is fully protected by the First Amendment).

206 Even those who advocate revitalizing the essential facilities doctrine have emphasized this point. See Frischmann & Waller, *supra* note 152, at 11 (“Open access does not mean that access is free.”).

207 The Supreme Court recently specifically held that an upstream monopolist with no duty to deal is free to charge whatever wholesale price it wishes to a competitor in the retail market, but did not say whether the monopolist would have the same discretion if it had a duty to deal with the retail competitor. Pac. Bell Tel. Co. v. Linkline Comm’ns, Inc., 555 U.S. 438 (2009). However, given that the Sherman Act generally allows a monopolist to charge monopoly prices, there is no logical argument why a monopolist that is vertically integrated would not be permitted to sell its input or make available its resource at the wholesale level at a monopoly price as well.

208 See, e.g., *Trinko*, 540 U.S. at 408 (stating, as a reason for severely limiting the duty to deal, the fact that courts are not suited to determining the proper price for any forced sharing); Antitrust Modernization Comm’n, Report
difficulty of setting prices to ensure just compensation to the monopolist for granting access is one reason for the general judicial reluctance to order compulsory access in the first place.\(^{209}\)

Though the issue has apparently not been explicitly addressed, the notion that mandated dealings requires compensation for the monopolist seems correct as a matter of private property right. The freedom to choose with whom one wishes to do business or not do business is associated with the right to exclude, which is a property right.\(^{210}\) Mandated access necessarily involves a compromise of the monopolist’s exclusive property rights. Therefore, to be consistent with private property rights, not even a monopolist should be required to permit an uncompensated intrusion on its property right—its right to exclude—for the greater good of facilitating competition.\(^{211}\)

To the extent that any compulsory dealing requires compensation to the monopolist, it is difficult to see how courts can mandate access in terms of search results. Google cannot be compelled to offer its competitors access to the choice locations on its results pages without reasonable compensation. At the same time, under Google’s business model, web publishers are not charged if the search algorithm returns links to their websites in response to any search query. It seems unlikely that any firm would (or should) be ordered to alter its business model—in the case of search engines, take payment for ranking a particular rival site in the organic results (assuming that it is even possible to determine fair compensation)—just to

\(^{209}\) See Trinko, 540 U.S. at 408 (“Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill suited.”).


\(^{211}\) See Robinson, supra note 67, at 1192 (analogizing mandatory dealing to “a private power of eminent domain”).
facilitate compulsory dealing. This compensation conundrum further highlights the incongruity of the duty to deal and essential facility paradigms in the context of search.

VI. Competitive Effects and Legitimate Justifications?

Those who advocate prohibiting Google from displaying specialized search results seem to assume that a practice that happens to be in Google’s self-interest is necessarily anticompetitive. But as some commentators have suggested, that assumption does not seem valid.\footnote{See generally Grimmelmann, Some Skepticism About Search Neutrality, supra note 35, at 450-52 (giving examples of Google’s ranking decisions that are both in its self-interest and also benefit users); Crane, supra note 4, at 5-6 (approving of universal search results and the need for search engines to have freedom to make strategic choices regarding embedding additional functions in their search engines that were formerly performed by external websites).} Google is often faulted for having dislodged the previously dominant Mapquest and Yahoo! Maps when it “put its own [map] service atop all others for generic address searches.”\footnote{See TRAFFIC REPORT, supra note 44, at 5.} Yet Google Maps has been praised as “groundbreaking when launched” and an “astonishingly clever” service.\footnote{See Grimmelmann, Some Skepticism About Search Neutrality, supra note 35, at 452. See also John Carroll, Google Maps and Innovation, A Developer’s View (Oct. 12, 2005), http://www.zdnet.com/blog/carroll/google-maps-and-innovation/1488 (lauding Google Maps).} Moreover, when Google provides its map when it surmises from a search query that a user would like to see a map, it is helping most users by directly giving them the information that they probably need instead of merely linking them to another site where they must enter another query. Because a practice that is good for Google can also enhance consumer welfare, it is important not to short-circuit the competitive effects analysis, which should focus on the effects on consumers and not on competitors.

Before antitrust liability can be found under the rule of reason, a business practice alleged to be exclusionary must have anticompetitive effects that are not outweighed by its
procompetitive benefits.\textsuperscript{215} The standard economic theory of harm for unilateral refusals is foreclosure--the exclusion of competition, usually in a downstream market, to the detriment of consumers.\textsuperscript{216} In the context of search, the basic foreclosure argument seems to be that Google’s favoring of its own content and services would deprive competing vertical providers of user traffic, diminish their sales and advertising revenues, and impair their product development.\textsuperscript{217} Kayak and Expedia, for example, have contended that if Google favors its own travel products, they would have to turn to less efficient alternatives to reach consumers, hampering their ability to compete effectively with Google in travel search.\textsuperscript{218} To the extent that the highest-ranked search result usually receives substantially more clicks than the second-ranked, which receives more clicks than the third-ranked and so on,\textsuperscript{219} failure to place at the top of the search results would likely result in some foreclosure.

However, it is doubtful that there would be substantial foreclosure, which is required for antitrust liability.\textsuperscript{220} As discussed, businesses have other reasonable options for reaching

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\begin{enumerate}
\item See United States v. Microsoft Corp., 253 F.3d 34, 58-59 (D.C. Cir. 2001) (en banc) (per curiam) (“[T]o be condemned as exclusionary, a monopolist’s act must have an ‘anticompetitive effect.’ . . . [I]f a plaintiff successfully establishes a \textit{prima facie} case under § 2 by demonstrating anticompetitive effect, then the monopolist may proffer a [nonpretextual] ‘procompetitive justification’ for its conduct. . . . [I]f the monopolist’s procompetitive justification stands unrebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit.”)
\item See, \textit{e.g.} Statement of Thomas O. Barnett, \textit{supra} note 98, at 13 (“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.”).
\item See \textit{supra} note 162 and accompanying text.
\item Usually, foreclosure of at least 40 percent of the relevant market is required for antitrust liability but a lower percentage can suffice where competitors were prevented from achieving the critical mass needed to pose a
\end{enumerate}
\end{footnotesize}
potential customers. In fact, for the top thirty websites, which include many of Google’s competitors in ancillary markets (such as Kayak, Yelp, Amazon, eBay, Expedia, Travelocity and Priceline), a study shows that they rely on Google for only sixteen percent of their user traffic.\textsuperscript{221} This suggests that, while access to the most desirable space on a results page is obviously desirable and the lack of access may have some foreclosure effect, the data does not suggest that the effect is sufficiently substantial to raise antitrust concerns.

Furthermore, antitrust law is consumer-centric—it protects “competition, not competitors,”\textsuperscript{222} which means that our focus must be on the impact of Google’s practice of favoring its own services on search users, not on competing websites. The practice would not be anticompetitive if it is good for search users even if it also happens to benefit Google. An example given by Professor James Grimmelmann, a technologically savvy commentator, involving Foundem and some price-comparison sites is instructive in this regard. Grimmelmann argued that many of these sites are “worthless” and “junk,” and a ranking system that incorporates a penalty for them would be a service to most users.\textsuperscript{223} Since Google also offers product searches, such a penalty might incidentally give it some competitive advantage. This shows that a practice that could have the effect of improving Google’s position vis-à-vis a competitor may also be procompetitive.

Similarly, the use of universal search results, which effectively favors the search engine’s own content and services, cannot be assumed to be anticompetitive simply because it may

\textsuperscript{221} See supra note 156.
\textsuperscript{223} See Grimmelmann, Some Skepticism About Search Neutrality, supra note 35, at 450 (using examples to explain why applying penalties to reduce many vertical search sites’ ranking is beneficial to users).
adversely affect some rival content providers. When Google integrates its own news, maps, videos, images, and other content into the search results, along with the traditional blue links, it probably does reduce some user traffic to the sites of its competitors in those vertical markets. But what might hurt competitors may not impair consumer welfare. To the contrary, commentators seem to agree that the increasing use of universal search results is a beneficial phenomenon.224 Viewed from the perspective of search users and not rival websites, the inclusion of maps and local results, for example, is almost certainly positive since it helps users get the information that they are seeking more directly and efficiently.

To the extent that the consumer benefits of some content integration may be more ambiguous, it is reasonable to ask if Google might indiscriminately prefer its own content in a way that degrades its search results, to the detriment of consumers. While that is of course a possibility, one factor is likely to weigh against it--Google's dependence on search-based advertisements. Google does not presently sell retail goods or services, or receive fees from websites to which it directs user traffic. Nor does it receive commissions based on its product search offerings, unlike many comparison shopping sites.225 Because Google depends primarily on search-based advertising for its profitability and a large user base attracts advertisements,

224 See, e.g., Crane, supra note 4; Wingfield, supra note 112 (commenting favorably on the Bing/Facebook alliance which would allow Bing to integrate data from Facebook into its search results); Ryan Singel, Times Case for Gov Regulation of Google Search Is Weak, WIRED.COM, Jul. 16, 2010, 3:35 PM, http://www.wired.com/business/2010/07/nyt-google-regulation/ (“Clearly, the map is useful to searchers, who’d rather see a map than a link to one. While that might be bad for Mapquest’s business, it’s not bad for users. . . . Microsoft’s Bing and Yahoo are doing similar things, and are going even beyond that. Search on a music artist on Yahoo and you get an information box, with a bio, a picture, and links to songs you can stream. . . While that may reduce traffic to a band [], it’s hard to argue that’s anti-competitive or a disservice to users.”)
225 See Singel, supra note 224 (observing that “Google doesn’t make its money from referring traffic to websites the way that say the shopping search engine TheFind does.”).
increasing or retaining its user base is critical for Google’s success.\textsuperscript{226} To protect and expand its user base in the face of intense competition from other general search engines, Facebook and other portals of online information all vying for consumer attention, Google must continually anticipate user expectations in its search results and other offerings.

If Google were to degrade its search results by deliberately omitting or demoting quality, and relevant, websites simply because Google views them as competitors in various market segments, it would risk losing users to other search engines and to non-general search engine competitors.\textsuperscript{227} A loss of user base would likely mean a loss of advertising revenues. Google’s market incentives, therefore, are to satisfy and exceed user expectations, which should help counter whatever self-interested motivations Google might otherwise have to promote its own services over its competitors regardless of their impact on consumer welfare. Stated differently, given its current business model, it is unlikely that Google would favor its own content in a way that would harm search users.

Moreover, a strong case can be made that the movement toward universal search results and other integration of (or interface with) a search engine’s own services represents the search engine’s competitive strategy.\textsuperscript{228} This is evidenced by the fact that the strategy is employed, not only by Google, but also by Bing and Yahoo!\textsuperscript{229} Since neither Bing nor Yahoo!

\textsuperscript{226} Evans, \textit{supra} note 105, at manuscript 4-6 (explaining strategies for increasing value for multi-sided platforms, which include the search engine).

\textsuperscript{227} \textit{See} Singel, \textit{supra} note 224 (“The better the real results, the more often users will come back in the long run and the more likely that in one of their searches, they decide to click the ads, instead of a link. . . . That means rigging your algorithm is the worst thing a search engine can do and would be the fastest way to lose users to a competing search engine.”).

\textsuperscript{228} \textit{See} Wright, \textit{Defining and Measuring Search Bias, supra} note 4, at 47 (concluding from his empirical study that search bias “emerged as an efficient competitive strategy, allowing search engines to differentiate their products in ways that benefit consumers.”).

\textsuperscript{229} \textit{See id.} (showing, in his study, that the absolute level of search engine “bias” was extremely low but, to the extent that it existed, it was seen more frequently in Bing search results than in Google); Benjamin Edelman &
have sufficient share of the search traffic to exercise market power, it is safe to assume that the practice is more likely an effective form of competition than an anticompetitive strategy.230

If the trend toward universal search results and other forms of favoring one’s own content is primarily a manifestation of search engine evolution and competition,231 it would mean that the practice is supported by a legitimate business justification. It is clear from Aspen and earlier cases that a competitive justification excuses any unilateral refusal to deal.232 In fact, if a legitimate business justification exists, a refusal is deemed appropriate without the need to even balance its competitive effects.233 The same is also true with respect to the law on essential facility.234

Benjamin Lockwood, Measuring Bias in “Organic” Web Search, BENEDELMAN.ORG (Jan. 19, 2011), http://www.benedelman.org/searchbias/ (showing, through a study, that both Yahoo and Google engage in some search bias); Singel, supra note 224 (giving examples of Microsoft’s Bing and Yahoo! apparently going beyond what Google does, and finding that it’s hard to argue that it is bad for users).

230 This would be consistent with the economic literature that tends to show that vertical integration often produces efficiencies. See Manne & Wright, If Search Neutrality is the Answer, What’s the Question, supra note 31, at 28-30 (discussing the efficiencies of vertical integration generally and of the integration of a search engine and a downstream product in particular).

231 See Wright, Defining and Measuring Search Bias, supra note 4, at 46 (concluding, from his study of search bias, that search engines’ favoring their own content is driven by “the evolution of consumer preferences for more sophisticated and useful search results”).

232 Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 604-05, 608-10 (1985) (suggesting that the refusal would not violate Section 2 of the Sherman Act had there been non-pretextual business reasons for the refusal); Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 483 n.32 (1992) (observing that a monopolist may refuse to deal with its rivals “if there are legitimate competitive reasons for the refusal”).

233 The Supreme Court in Aspen did not call for any balancing of the competitive gains from a refusal to deal against the anticompetitive losses; rather it suggested that had Aspen Skiing’s proffered business justifications not been pretextual, there would have arisen from its refusal to deal. See Aspen Skiing, 472 U.S. at 608.

234 See, e.g., Morris Commc’ns Corp. v. PGA Tour, Inc., 364 F.3d 1288, 1295 (11th Cir. 2004); City of Anaheim v. S. Cal. Edison Co., 955 F.2d 1373, 1381 (9th Cir. 1992) (“[The monopolist] could still deny access if it had legitimate business reasons for that denial.”); City of Vernon v. S. Cal. Edison Co., 955 F.2d 1361, 1366 (9th Cir. 1992) (noting that the plaintiff ultimately has the burden of proving that the defendant’s refusal to share access was without a legitimate business justification); United Asset Coverage, Inc. v. Avaya, Inc., 409 F. Supp. 2d 1008, 1047 (N.D. Ill. 2006). See also MCI Commc’ns Corp. v. AT&T Co., 708 F.2d 1081 (7th Cir. 1983) (implying that there would be no liability had AT&T’s proffered business justification for refusing to provide interconnection to its facility been non-pretextual); Areeda, supra note 68, at 852 (arguing that “legitimate business purpose always saves the defendant” and that, once the defendant comes forward with a legitimate business purpose, the burden is on the plaintiff to overcome the claim).
With the online information sector transforming so rapidly, it seems unlikely that Google can afford to be complacent. The broad Internet market in which Google competes is one that experiences what economist Joseph Schumpeter famously referred to as the “perennial gales of creative destruction” that blow through our economy benefiting society.\(^{235}\) In this highly dynamic environment, change is a constant and new technologies continually emerge changing the competitive landscape.\(^{236}\) Well-known specialized websites such as Amazon and Kayak, for example, now have powerful search capabilities; and Amazon, in particular, is hardly just a large web store.\(^{237}\) Facebook is gaining on Google as the online destination for users, and some have predicted that its network could replace Google as the search engine and navigator for its community of users.\(^{238}\) And, smartphones have moved us to a more mobile/app-centric rather than a web approach to the Internet.\(^{239}\)

One would expect Google and other search engines, faced with intense competition on various fronts, to evolve and innovate in order to remain competitive. This tends to lend support to Google’s assertions that the evolution of its search engine—from a pure search tool to merging content into search—is primarily a competitive strategy designed to satisfy consumer desires to have the most relevant information presented quickly and in a user-friendly

\(^{235}\) \textit{JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY} 84 (1942).
\(^{237}\) \textit{See id.} (naming Amazon as one of the four large companies that “don’t recognize any borders” and “encroach further and further into one another’s space”).
\(^{238}\) \textit{See Farhad Manjoo, Everything is Social – and Zuckerberg Hasn’t even Gone Public Yet, FAST COMPANY,} October 2011, \url{http://www.fastcompany.com/magazine/160/why-facebook-will-win} (“The promise of Facebook lies in its servers, in the data it collects about how we interact with one another and with brands. . . Facebook now boasts more than 800 million users around the world. More than half of them log in every single day, and more than 2 million posts a day are liked and commented upon.”). \textit{See also supra} notes 110-113 and accompanying text.
\(^{239}\) \textit{See supra} notes 114-117 and accompanying text.
format. If that is the case, it would mean that its favoring of its own content in search results is supported by a legitimate business justification.

VII. Policy Considerations

The above discussion has highlighted the doctrinal incongruity of juxtaposing essential facility and the antitrust duty to deal in the context of search rankings. But it is also worth considering whether policy concerns might tilt in favor of a broader construction of these doctrines. I do not believe they do. To the contrary, policy considerations seem to further strengthen the case for the current restrictive approach.

A. Incentives to Innovate and Invest as a Macro Policy Rationale

The usual macro argument in favor of strictly limiting the duty to deal and the essential facility doctrine is that mandated dealings with rivals would decrease the incentives for investment and innovation. In *Trinko*, the Supreme Court bluntly voiced those concerns, saying:

Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.

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240 This is an assertion that all search engines have made. See, e.g., Greg Sterling, Yahoo: We’re Moving From Web of Pages to Web of Objects, SEARCH ENGINE LAND (May 19, 2009), http://searchengineland.com/yahoo-were-moving-from-web-of-pages-to-web-of-objects-19524 (explaining Yahoo!’s move beyond ten blue links as “more closely aligning user intent with search results and mapping those to real-world tasks.”).

241 See supra notes 231-234

242 See Verizon Comm’ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 407-08 (2004); see also R. Hewitt Pate, Refusals to Deal and Essential Facilities, Testimony Submitted to DOJ/FTC Hearings on Single Firm Conduct, Jul. 18, 2006, available at http://www.justice.gov/atr/public/hearings/single_firm/docs/218649.htm (asserting that “the fact that the defendant has a highly valued facility is a reason to reject sharing, not to require it,” because compulsory sharing will reduce incentives to invest).

243 *Trinko*, 540 U.S. at 407-08.
The theory underlying this argument is that compelling a monopolist to share its advantage with a rival would prevent it from fully appropriating the rewards of its investment, leading the monopolist to reduce its investment and resulting in less innovation. The rival, being assured of access to the monopolist’s source of advantage, would be less motivated to find a creative alternative to it. Additionally, the knowledge that they may not be able to reap the full rewards of their investment might adversely affect would-be investors’ willingness to invest and innovate in the future.

These incentive concerns, though widely accepted, seem overstated. It is difficult to know the actual long-term economic effect of placing some limitations on a monopolist’s reward through the imposition of a duty to deal in limited circumstances. While reducing the returns to innovations through compulsory sharing will likely reduce investment at the margins in the future, economic analysis cannot tell us how much less investment, and whether it would actually decrease useful innovation. Moreover, mandatory sharing may unleash innovation and competition from rivals in the downstream market, which ought to be taken into account in the calculus of the total effects on innovation of compulsory access. Economic analysis, no matter

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244 See Howard A. Shelanski, Unilateral Refusals to Deal In Intellectual and Other Property, 76 ANTITRUST L.J. 369, 380 (2009) (“In discussions of why refusals to deal should be legal, courts and commentators usually emphasize the potential deterrent effect of mandatory dealing on the investment incentives of the would-be defendant and of all others who would see imposition of liability as a signal of what might await them should their business succeed too well.”).
245 See Alaska Airlines v. United States, Inc., 948 F.2d 536, 549 (9th Cir. 1991) (“Every time the monopolist asserts its market dominance” by refusing to grant access to a resource to its competitor, that competitor “has more incentive to find an alternative supplier, which in turn gives alternate suppliers more reason to think that they can compete with the monopolist.”)
246 See Shelanski, supra note 244, at 380.
247 Id. at 381-82 (explaining that there may be cases where mandatory dealing would not interfere with investment incentives and where imposing liability for unilateral refusal to deal would not be economically harmful).
how rigorous, is probably inadequate to make these assessments.\textsuperscript{248} Therefore, I am somewhat skeptical of incentive effects as a macro policy rationale against compulsory access.

\textbf{B. Risk of Freezing Search Evolution and Innovation, and Distorting Competition}

In the specific instance of search engines, however, imposing search “neutrality” may actually impede their organic growth, and not merely reduce incentives to innovate in an abstract sense. For search, “sharing access” probably means that a search engine would have to find a “neutral” way to determine whose content—its own or a competitor’s—should be provided or ranked first on the results page. But if a search engine has to do that before returning a map, for example, in its search results in response to a query suggesting that the user might be interested in one, probably \textit{no} map will be included. And no universal search results would likely be offered, effectively freezing the natural growth and the contours of general search engines.\textsuperscript{249} It is difficult to see how that would be beneficial to users.

In the early days of Google, search and content were clearly distinct and the role of a general search engine was straightforward: apply its algorithm to the millions of websites to generate a list of those deemed most responsive to a search query—the so-called ten blue links. But it makes sense for general search engines to apply and extend their expertise into specialized search. Once they do that, it makes sense for them to integrate those specialized results or content into the general search results, especially when that is what users apparently

\textsuperscript{248} See \textit{id.} at 394 (“Because the path of innovation is likely much harder to predict than short-term changes in price and output levels, it will be impossible in most cases definitively to calculate the comparative static and dynamic welfare effects of economic conduct.”).

\textsuperscript{249} See Crane, \textit{supra} note 4, at 5-6 (giving examples of universal search results and arguing that disallowing them would freeze the evolution of the search engine).
want. As a commentator has observed, not allowing general search engines to make these strategic choices would effectively lock them in a dated vision of search and freeze the search engine evolution. While this would benefit Google’s competitors in the ancillary markets, it is hard to see the gain for users.

Moreover, limiting search engines to the contours that were established in the early days of their development would distort competition. In a world where the various portals of online information are morphing and redefining themselves, no one, probably not even Google and the other major players, knows how this world will evolve and what it will look like in a few years. At this time, there is fierce competition among Google, Facebook, Apple, and Amazon. Preventing general search engines from organically transforming themselves, as social networks and other well-known online information businesses are doing, would artificially interfere with the natural process of competition that is presently occurring.

Some might argue that application of essential facilities or the duty to deal to impose search “neutrality” would not, in fact, obstruct the search engine evolution since these

250 See, e.g., Shashi Seth, A New Era of Search is About the Answers, Not Just the Links, TECHCRUNCH, May 7, 2009, http://techcrunch.com/2011/05/07/search-answers-not-just-links/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+Techncrunch+%28TechCrunch%29 (quoting a Yahoo! executive who observed that users want to be able to get the answers they need without having “to interact with a page of traditional blue links.”); Singel, supra note 224 (noting that “the whole industry is moving away from what it now dismisses as ‘10 blue links’ – with the goal of providing answers to user queries instead of straight search results.”).
251 Crane, supra note 4, at 6 (“Unless the search engine is to remain stuck in the ten blue links paradigm, search engine companies must have the freedom to make strategic choices about the design of their services, including the decision to embed proprietary functions traditionally performed by websites in the engine’s search properties.”).
252 See Manjoo, supra note 236 (describing how the four major American companies that have come to define the information world, Amazon, Apple, Facebook, and Google, are increasingly moving beyond their borders and encroaching into one another’s space).
253 See id. (detailing some of the initiatives of each of the four companies and how they compete against those of the other three firms).
principles can only possibly be applied against Google, the dominant general search provider.\(^{254}\)

The other major search engines, notably Bing and Yahoo!, do not have sufficient share of the general search traffic to expose them to Section 2 liability no matter how narrowly the market may be defined.\(^{255}\) Thus, they would remain free to design their search services as they see fit, including embedding their own content into the search results. In other words, only Google, by virtue of its dominance among general search engines, would be subject to a special obligation to “evolve” in a “neutral” manner even if the essential facility doctrine or the general duty to deal were to apply in the search context.

Such a “solution”, however, would present its own set of problems. It would lock only Google into place in the development of search engines while allowing Microsoft’s Bing, Yahoo!, and other rivals to improve and adapt to the changing competitive environment. While dominant firms are sometimes held to a different antitrust standard than their smaller rivals,\(^{256}\) antitrust law has long recognized that even monopolists “should be free to compete like everyone else.”\(^{257}\) Indeed, “[a] monopolist, no less than any other competitor, is permitted and [] encouraged to compete aggressively on the merits”.\(^{258}\) In a rapidly changing Internet world

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\(^{255}\) Bing and Yahoo! handle approximately 15 percent and 14 percent, respectively, of the general search traffic in the United States. See Whittaker, supra note 84 (citing comScore data).

\(^{256}\) For example, unilateral acts by a firm without monopoly power can never constitute an antitrust violation whereas a similar act by a monopolist that has the effect of unreasonably excluding competition could give rise to liability under Section 2 of the Sherman Act. See 15 U.S.C. § 2.

\(^{257}\) Olympia Equipment Leasing Co. v. Western Union Telegraph Co., 797 F.2d 370 (7th Cir. 1986). See also Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP., 540 U.S. 398, 407-08 (2004) (cautioning against lessening a monopolist’s incentive to innovate by compelling them to share their competitive advantage with rivals).

\(^{258}\) Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 544 (9th Cir. 1983).
where dominance can evaporate in an instant, a selective handicapping of the firm with current dominance in this manner seems particularly troubling. Preventing Google from innovating and adding features similar to those provided by other major general search engines, which users apparently want, seems to be poor antitrust policy.

That a search engine should be allowed to favor its own content does not mean that no conduct relating to search rankings could or should be condemned under antitrust law. A distinction should be drawn between a simple preference for one’s own products and services on one hand and unjustified affirmative conduct to block the competitive process on the other. The former merely reflects efforts by an integrated firm to derive the competitive benefits that flow from being in different productive activities. It is not, in and of itself, an unlawful exercise of monopoly power that should be prohibited.

The latter is more comparable to Lorain Journal, which has already been discussed, and to the well-known United States v. Microsoft Corp. case. Microsoft had affirmatively and aggressively prohibited computer makers from installing a browser (Netscape’s Navigator) that competed against Microsoft Explorer, and took steps to block the competing browser from being distributed through Internet service providers and independent software vendors. In the case of Java, Microsoft reconfigured the Windows version of the program to create incompatibility and deceived Java developers about it, causing them to create programs that

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259 See Manjoo, supra note 236 (noting that “[t]he best tech companies stay at their peak for a decade at most,” though Amazon, Apple, Facebook, and Google may be different because they have shown “competitive excellence, strategic genius, and superb execution”).

260 See, e.g. Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 276 (2d Cir. 1979) (stating that it is not unlawful for integrated firms to seek the efficiencies and other competitive benefits that accrue to them because of their involvement in several fields).

261 See supra notes 195-202 and accompanying text.

262 253 F.3d 34 (D.C. Cir. 2001).

263 Id. at 60-61.
could only run on the Windows version of Java.\textsuperscript{264} Those were affirmative acts that sought to interfere with the competitive process, and the court quite rightly found them to be exclusionary.\textsuperscript{265}

Giving priority to its own content or services in the presentation of search results is quite different as it does not affirmatively block a competitor’s efforts to compete. It would be a different matter if Google, for example, made an algorithmic change specifically reducing a website’s ranking in retaliation for its buying advertisements on other search engines or on Facebook, or for soliciting advertisers for its website in competition with Google, or perhaps for refusing to buy advertisements from Google. In that case, its conduct would go beyond the simple preference of one’s own property and would be more closely parallel to \textit{Lorain Journal} or \textit{Microsoft}.

\textbf{C. “Big is Bad”?}

One final policy consideration is Google’s absolute size. While modern antitrust law does not target bigness, there has historically been some fear of an excessive concentration of economic power, which could also lead to undue political influence.\textsuperscript{266} It seems that some of the antitrust focus on Google may be driven in part by these unspoken sentiments. The concern may be that, even if Google is not acting affirmatively to exclude competitors (as Microsoft had with Netscape and Java) and may not even have monopoly power in an antitrust sense, its size and skill alone could crush competitors if nothing is done to clip its wings.

\footnotesize\textsuperscript{264} \textit{Id.} at 74-77.  
\textsuperscript{265} \textit{Id.} at 61-62, 65-66, 76.  
If fear of Google’s absolute size and its potentially having a hand in too many businesses is the true impetus behind various proposals to regulate Google, then there should be a fuller and more thoughtful consideration of the nuances and implications of pursuing such a course of action. Google is big, but so are Facebook, Apple and Amazon.\(^{267}\) If we are concerned with Google becoming an information monopolist in a generic non-antitrust sense of the word “monopolist,” shouldn’t we be equally concerned with the other information monopolists and their straying outside of their original sectors?\(^{268}\) But if we limit the freedom of these dynamic firms to innovate across the information economy due to fears of excessive concentration of economic power, what would be the efficiency and innovation tradeoffs?

Given that these are some of our (currently) most innovative and successful companies, those concerned about firm size should seriously consider whether the dangers that might be associated with bigness are sufficiently acute that courts and antitrust enforcers should interfere with their organic growth absent affirmative exclusionary conduct. In markets characterized by constant technological upheaval, there is considerably less reason to fear absolute size since there is not as much correlation between size and staying power. As an example, as recently as in 2000, AOL was widely viewed as an information giant with an unassailable position. And, the AOL and Time Warner merger in 2000 provoked dire predictions of the rise of “new totalitarianisms” and corporate “Big Brother.”\(^{269}\) Only a decade later, AOL is

\(^{267}\) See Manjoo, supra note 236 (discussing the battle among Apple, Facebook, Google, and Amazon for the future of the innovation economy).

\(^{268}\) See id (describing how Amazon, Apple, Facebook, and Google are all expanding beyond their boundaries and encroaching into one another’s space).

almost a non-factor in the online information world. Predictions about AOL’s possible monopolization of instant messaging and so forth expressed then seem quaint today.\footnote{270}

Other examples of established information titans being displaced by small start-ups with new visions and new technologies abound in the information world. Facebook, which started only in the mid-2000s (and whose founder is still in his 20s), succeeded in short order to supplant the then-social media Goliath, MySpace,\footnote{271} and is now widely viewed as a formidable competitor of Google.\footnote{272} Google itself started little more than a decade ago, at a time when Yahoo! was the dominant search company.\footnote{273} It overtook Yahoo! in 2004 in the number of active U.S. users,\footnote{274} and almost completely changed the way many of us interact with the Internet.

Whatever the merits of the argument that “big is bad” in other contexts (such as in banking), creating special limiting rules for any of the so-called information monopolists seems unwarranted when the durability of power does not appear to be strongly correlated with size.


\footnote{272}{See Nick Wingfield, \textit{Facebook (and Microsoft) vs. Google}, \textit{N.Y. Times Technology Blog: Bits} (May 17, 2012, 12:00 PM), http://bits.blogs.nytimes.com/2012/05/17/facebook-vs-google-and-microsoft ("As Facebook inches toward an I.P.O., it’s Google’s turn to feel the sting of a younger competitor passing a key milestone that will fill its war chest and, if history repeats itself, lead to a new wave of battles over the Internet.").}

\footnote{273}{In 1998, Yahoo! was widely believed to have won the competition for search engine users. \textit{See Stross, supra note 132. That was the year that Google was incorporated. Google Timeline, http://www.google.com/corporate/timeline/#start.}}

When competition for user attention online is so intense, there is good reason to suspect that fears of exploitation of the public by Google or any information “monopolist” for that matter are much overstated.

VIII. Conclusion

Even in an earlier era, when U.S. antitrust enforcement was much more aggressive than it is today, it was understood that it is not a violation of antitrust law for “any integrated firm, regardless of its market share,” simply 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.”\(^{275}\) In giving a prominent position to its own or its affiliates’ content and services in the unpaid results page, Google is effectively availing itself of the efficiencies derived from its being engaged in several fields. That, as the Second Circuit stated in *Berkey Photo, Inc. v. Eastman Kodak Co.*, “cannot by [itself] be considered uses of monopoly power.”\(^{276}\)

In an effort to find an antitrust basis to prohibit this practice, some have invoked the essential facilities doctrine or the more general antitrust duty to deal. However, these two principles simply do not fit in the context of search results. Google’s bigness and involvement in many segments of the information market tend to obscure the fact that it lacks monopoly power in an antitrust sense. It is doubtful that Google can foreclose competition in search, let alone in the ever-changing dynamic and free-form information market in which it faces competitors such as Facebook, Apple, Amazon and others. If the past is any guide, competitive challenge could also come from some as yet unknown tech visionary—a future Steve Jobs, Larry

\(^{275}\) *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir. 1979).
\(^{276}\) *Id.*
Page or Sergei Brin, or Mark Zuckerman. Probably no one, not even Google, knows how long search engines as they currently exist will continue, and it would be strange to base antitrust liability on the notion that search engines are somehow essential platforms both for users seeking information and for firms reaching out to potential customers.

Policy considerations also do not seem to support prohibiting search engines from favoring their own content. An attempt to impose “search neutrality” would likely impede the natural evolution of search engines and constrain innovation. While Google’s size may give one pause, it is important to note that in the dynamic information market in which it competes, size provides little protection from competition. Google is no less vulnerable to market forces than Yahoo!, which Google displaced as the dominant search engine, or other previous business giants such as IBM. And, one day, like them, Google may lose its market position as a result of the normal workings of the marketplace if it is slow to appreciate changes in consumer preference or the importance of an emerging technology.

The core objective of antitrust law is to enhance consumer welfare by preventing artificial restraints on competition. Antitrust enforcers should be vigilant in ensuring that Google and other dominant firms do not affirmatively block competition. At the same time, it would be a mistake to limit Google’s freedom to add new features and improve its product, such as through offering universal search results, out of well-intentioned concerns about their impact on other businesses.