

INTERNET EXCEPTIONALISM ONLINE  
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CENSORSHIP

DOMAIN NAMES SOCIAL NETWORKS OPENNESS  
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**THE NEXT DIGITAL DECADE**  
ESSAYS ON THE FUTURE OF THE INTERNET

Edited by Berin Szoka & Adam Marcus

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# TECH FREEDOM

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# The Problem of Search Engines as Essential Facilities: An Economic & Legal Assessment

By Geoffrey A. Manne\*

What is wrong with calls for search neutrality, especially those rooted in the notion of Internet search (or, more accurately, Google, the policy scolds' *bête noir* of the day) as an "essential facility," and necessitating government-mandated access? As others have noted, the basic concept of neutrality in search is, at root, farcical.<sup>1</sup> The idea that a search engine, which offers its users edited access to the most relevant websites based on the search engine's assessment of the user's intent,<sup>2</sup> should do so "neutrally" implies that the search engine's efforts to ensure relevance should be cabined by an almost-limitless range of ancillary concerns.<sup>3</sup>

Nevertheless, proponents of this view have begun to adduce increasingly detail-laden and complex arguments in favor of their positions, and the European Commission has even opened a formal investigation into Google's practices, based largely on various claims that it has systematically denied access to its top search results (in some cases paid results, in others organic results) by competing services,<sup>4</sup> especially vertical search engines.<sup>5</sup> To my knowledge, no

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<sup>1</sup> See, e.g., Danny Sullivan, *The Incredible Stupidity of Investigating Google for Acting Like a Search Engine*, SEARCH ENGINE LAND, <http://searchengineland.com/the-incredible-stupidity-of-investigating-google-for-acting-like-a-search-engine-57268> ("A search engine's job is to point you to destination sites that have the information you are seeking, not to send you to other search engines. Getting upset that Google doesn't point to other search engines is like getting upset that the New York Times doesn't simply have headlines followed by a single paragraph of text that says 'read about this story in the Wall Street Journal.'").

<sup>2</sup> A remarkable feat, given that this intent must be inferred from simple, context-less search terms.

<sup>3</sup> Perfectly demonstrated by Frank Pasquale's call, elsewhere in this volume, for identifying search engines as "essential cultural and political facilities," thereby mandating incorporation into their structure whatever "cultural" and "political" preferences any sufficiently-influential politician (or law professors) happens to deem appropriate.

<sup>4</sup> Competing services include, for example, MapQuest ([www.mapquest.com](http://www.mapquest.com)) (competing with Google Maps), Veoh ([www.veoh.com](http://www.veoh.com)) (competing with You Tube) and Bing Shopping ([www.bing.com/shopping](http://www.bing.com/shopping)) (competing with Google Products).

<sup>5</sup> Vertical search engines are search engines that focus on a particular category of products, or on a particular type of search. Examples include Kayak ([www.kayak.com](http://www.kayak.com)) (travel search),

one has yet claimed that Google should offer up links to competing general search engines as a remedy for its perceived market foreclosure, but Microsoft’s experience with the “Browser Choice Screen” it has now agreed to offer as a consequence of the European Commission’s successful competition case against the company is not encouraging.<sup>6</sup> These more superficially sophisticated claims are rooted in the notion of Internet search as an “essential facility”—a bottleneck limiting effective competition.

These claims, as well as the more fundamental harm-to-competitor claims, are difficult to sustain on any economically-reasonable grounds. To understand this requires some basic understanding of the economics of essential facilities, of Internet search, and of the relevant product markets in which Internet search operates.

## The Basic Law & Economics of Essential Facilities

There are two ways to deal with a problematic bottleneck: Remove the bottleneck or regulate access to it. The latter is the more common course adopted in the U.S. and elsewhere. Complex, Byzantine and often counter-productive regulatory apparatuses are required to set and monitor the terms of access. Among other things, this paves the way for either intensely-problematic judicial oversight of court-imposed remedies or else the creation of sector-specific regulatory agencies subject to capture, political influence, bureaucratic inefficiency, and inefficient longevity. The Interstate Commerce Commission (and its successor agencies within the Department of Transportation) and the Federal Communications Commission (and its implementation beginning in 1996 of the monstrous Telecommunications Act) in the U.S. are paradigmatic examples of these costly effects, and it is certainly questionable whether the disease is worse than the cure.<sup>7</sup>

Obviously, an essential facility must be *essential*. Efforts over the years to shoehorn various markets into this category have sometimes strained credulity, as it has variously been claimed that Aspen, Colorado ski hills,<sup>8</sup> local voice mail

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SourceTool ([www.sourcetool.com](http://www.sourcetool.com)) (business input sourcing), and Foundem ([www.foundem.com](http://www.foundem.com)) (retail product search and price comparison).

<sup>6</sup> See European Commission, *Web browser choice for European consumers*, [http://ec.europa.eu/competition/consumers/web\\_browsers\\_choice\\_en.html](http://ec.europa.eu/competition/consumers/web_browsers_choice_en.html) (last accessed Dec. 8, 2010).

<sup>7</sup> Oren Bracha and Frank Pasquale’s call for a “Federal Search Commission” modeled on the Federal Trade Commission is in fact an *embrace* of the need for a bureaucratic apparatus to regulate the forced access called for by search neutrality proponents. See Oren Bracha and Frank Pasquale, *Federal Search Commission: Fairness, Access, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1193 (2008).

<sup>8</sup> *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509 (10th Cir. 1984), *aff’d* on other grounds, 472 U.S. 585 (1985).

services,<sup>9</sup> soft drinks<sup>10</sup> and direct freight flights between New York and San Juan<sup>11</sup> (among many other things) were essential facilities necessitating mandated access under the antitrust laws.<sup>12</sup> In these and many other cases, myriad alternatives to the allegedly-monopolized market exist and it is arguable that there was nothing whatsoever “essential” about these markets.

In antitrust literature and jurisprudence, a plaintiff would need to prove the following to prevail in a monopolization case rooted in the essential facilities doctrine:

1. Control of the essential facility by a monopolist;
2. A competitor’s inability practically or reasonably to duplicate the essential facility;
3. The denial of the use of the facility to a competitor; and
4. The feasibility of providing the facility to competitors.<sup>13</sup>

Arguably, since the Supreme Court’s 2004 *Trinko* decision,<sup>14</sup> a plaintiff would also need to demonstrate the absence of federal regulation governing access. The *Trinko* decision significantly circumscribed the area subject to essential facilities arguments, limiting such claims to instances where, as in the *Aspen Skiing* case, a competitor refuses to deal on reasonable terms with another competitor with whom it has, in fact, dealt in the past.<sup>15</sup>

A key problem with many essential facilities cases is the non-essentiality of the relevant facility. While there can be no doubt that to particular competitors, particularly those constrained to only one avenue of access to consumers by geography or natural monopoly, a facility may indeed seem essential, the touchstone of U.S. antitrust law has long been consumer, not competitor, welfare. So while, indeed, Aspen Highlands may have had difficulty competing with the Aspen Ski Company for consumers who had already chosen to ski in Aspen, consumers nonetheless had unfettered access to a wide range of alternative ski (and other vacation) destinations, such that the likelihood of the

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<sup>9</sup> CTC Communications Corp. v. Bell Atlantic Corp., 77 F. Supp. 2d 124 (D. Me. 1999).

<sup>10</sup> Sun Dun v. Coca-Cola Co., 740 F. Supp. 381 (D. Md. 1990).

<sup>11</sup> Century Air Freight, Inc. v. American Airlines, Inc., 597 F. Supp. 564 (S.D.N.Y. 1984).

<sup>12</sup> For a more complete list of essential facilities (and attempted essential facilities) cases, as well as an important treatment of the essential facilities doctrine in US antitrust law, see Abbott B. Lipsky, Jr. & J. Gregory Sidak, *Essential Facilities*, 51 STAN. L. REV. 1187 (1999).

<sup>13</sup> MCI Comm’ns Corp. v. American Tel. & Tel. Co., 708 F.2d 1081 (7<sup>th</sup> Cir. 1982).

<sup>14</sup> Verizon Comm’ns. v. Law Offices of Curtis V. Trinko LLP, 540 U.S. 398 (2004).

<sup>15</sup> *See, e.g.*, PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW (2004 supp.) at 199.

monopolization of Aspen’s ski hills affecting overall consumer welfare was essentially non-existent.<sup>16</sup> In such a circumstance, should it matter if a particular competitor is harmed? Is that a function of antitrust-relevant conduct on the part of another firm, or an unfortunate set of business decisions on the part of the first firm?

As Phillip Areeda and Herbert Hovenkamp have famously said of the essential facilities doctrine, “[it] is both harmful and unnecessary and should be abandoned.”<sup>17</sup> As another antitrust expert has described it:

At bottom, a plaintiff making an essential facilities argument is saying that the defendant has a valuable facility that it would be difficult to reproduce, and suggesting that is a reason for a court to intervene and impose a sharing duty. But at least in the vast majority of the cases, the fact that the defendant has a highly valued facility is a reason to *reject* sharing, not to *require* it, since forced sharing “may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.”<sup>18</sup>

This perennial problem—antitrust laws being used to protect competitors rather than consumers—lies at the heart of claims surrounding Internet search as an essential facility.

There is much tied up in the argument, and proponents have often been careful to at least go through the motions of drawing the rhetorical line back to consumers. In its fullest expression, it is claimed that harm to competitors now will mean the absence of competitors later and thus an unfettered monopoly with the intent and power to harm consumers.<sup>19</sup> It is also often argued that consumers (in this case Internet users searching for certain websites or the products they sell) are intrinsically harmed by the unavailability of access to the information contained in sites that are denied access to the search engine’s “essential facility.”<sup>20</sup>

<sup>16</sup> The courts, however, did not agree.

<sup>17</sup> 3A AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 771c, at 173 (2002).

<sup>18</sup> 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](http://www.justice.gov/atr/public/hearings/single_firm/docs/218649.htm) (quoting *Trinko*, 540 U.S. at 408).

<sup>19</sup> See, e.g., *European Commission Launches Antitrust Investigation of Google*, SEARCH NEUTRALITY.ORG, Nov. 30, 2010, <http://www.searchneutrality.org> (“Google is exploiting its dominance of search in ways that stifle innovation, suppress competition, and erode consumer choice.”). Meanwhile, complainants have gone to Europe where a showing of consumer harm is not necessary to prevail under its competition laws.

<sup>20</sup> As Oren Bracha and Frank Pasquale put it, “Search engines, in other words, often function not as mere satisfiers of predetermined preferences, but as shapers of preferences,” *Federal Search Commission*, 93 CORNELL L. REV. at 1185. Bracha and Pasquale also claim that “Market participants need information about products and services to make informed economic

The basic essential facilities case against Google is that it controls a bottleneck for the Internet—it is the access point for most consumers, and search results on Google determine which websites are successful and which end up in oblivion.<sup>21</sup> More particularly, it is argued that Google has used its control over this bottleneck to deny access by competitors to Google’s users. To understand this requires a brief discussion of the economics relevant to Internet Search and its relevant market.

## The Basic Economics of Internet Search

Implicit in claims that Google controls access to an essential facility is that access by some relevant set of consumers (or competitors) to relevant content is accessible only (or virtually only) through Google. It is necessary, then, to assess whether Google’s search results pages are, in fact, without significant competition for the economic activity at their heart. Of course the economic activity at their heart is advertising.<sup>22</sup>

It is hard to conceive of Internet search—let alone Google’s website—as the only means of reducing search costs for potential consumers (Internet searchers) and prospective sellers. Leaving aside the incredible range of alternative sources to the Internet for commerce,<sup>23</sup> off the top of my head, I can imagine Google’s competitor websites finding access to users by 1) advertising in print publications and TV; 2) using social networking sites to promote their sites, 3) being linked to by other websites including sites specializing in rating websites, online magazines, review sites, and the like; 4) implementing affiliate programs or other creative marketing schemes; 5) purchasing paid advertising, both in Google’s own paid search results, as well as on other, heavily-trafficked websites; and 6) securing access via Google’s general search competitors like Yahoo! and Bing. Competitors denied access to the top few search results at

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decisions. ... [A]ttaining visibility and access to users is critical to competition and cooperation online. Centralized control or manipulation by search engines may stifle innovation by firms relegated to obscurity.” *Id.* at 1173-74.

- <sup>21</sup> *Id.* at 1173 (“Concentrated control over the flow of information, coupled with the ability to manipulate this flow, may reduce economic efficiency by stifling competition.”).
- <sup>22</sup> See KEN AULETTA, *GOOGLED: THE END OF THE WORLD AS WE KNOW IT* 16 (2009) (quoting Google CEO Eric Schmidt as saying, “We are in the advertising business”).
- <sup>23</sup> There is a tendency for Web sites to view their Internet enterprises as different than their offline counterparts’, but, at root, most Internet sites (other than branded ones attached directly to offline stores) are founded by entrepreneurs who made a simple business decision to ply their trade online rather than off. That this decision may have foreclosed easy access to certain offline customers, or put the entrepreneur in a position where access to customers could be frustrated by certain competitive disadvantages specific to the Internet, does not convert these competitive disadvantages into special problems deserving of antitrust treatment. To do so would be to inappropriately and inefficiently insulate the online/offline business decision from the healthy effects of Schumpeter’s “perennial gale of creative destruction.” JOSEPH SCHUMPETER, *THE PROCESS OF CREATIVE DESTRUCTION* (1942).

Google’s site are still able to advertise their existence and attract users through a wide range of other advertising outlets—extremely wide, in fact: According to one estimate Google was responsible in 2007 for only about 7.5% of the world’s advertising.<sup>24</sup>

For Google to profit from its business—whether as a monopolist or not—it must deliver up to its advertisers a set of users. Interestingly, users of Google’s general search engine are mostly uninterested in the paid results. They click through the unpaid or “organic” search results by a wide margin ahead of paid results.<sup>25</sup> There is thus an asymmetry. On one side of its platform are advertisers who care about the quantity and quality (the likelihood that users who see an ad will click through to advertisers’ sites and purchase something while there) of the users on the other side. Meanwhile, users care very little about the quantity of advertisers and care only somewhat about the quality of advertisers (preferring greater relevance to lesser, but frequently ignoring paid results anyway). Nevertheless, the core of this enterprise is search result relevance. Greater relevance improves the quality of searchers from the advertisers’ point of view, ensuring that advertisers’ paid results are clicked on by the users most likely to find the advertiser’s site of interest and to purchase something there.

But there are problems inherent in the ambiguity of search terms and the ability to “game the system” that prevent even the most sophisticated algorithms from offering up perfect relevance. First, search terms are often context-less, and a user searching for “jaguar” may be searching for information on the car company, the operating system, the big cat, or something else.<sup>26</sup> Along a different dimension, a user searching for “Nikon camera” might be looking to *buy* a Nikon camera or might be looking for a *picture* of a Nikon camera to post on his blog. Obviously advertisers care very much which of these users clicks on their paid result. At the same time, many undesirable websites (spam sites and the like) can and do take advantage of predictable search results to occupy desirable search result real estate to the detriment of the search engine, its users and its advertisers. Efforts to keep these sites out of the top results and to ensure maximum relevance from ambiguous search terms require a host of algorithm tweaks and even human interventions. That these may (intentionally or inadvertently) harm some websites’ rank in certain search results is consistent with a well-functioning search platform.

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<sup>24</sup> See Erick Schonfeld, *Estimates Put Internet Advertising at \$21 Billion in U.S., \$45 Billion Globally*, TECHCRUNCH, Feb. 26, 2008, <http://techcrunch.com/2008/02/26/estimates-put-internet-advertising-at-21-billion-in-us-45-billion-globally/>.

<sup>25</sup> See, e.g., Neil Walker, *Google Organic Click Through Rate (CTR)*, UK SEO CONSULTANT, May 11, 2010, <http://www.seomad.com/SEOBlog/google-organic-click-through-rate-ctr.html>.

<sup>26</sup> See Bill Slawski, *A Look at Google Midpage Query Refinements*, SEO BY THE SEA, Apr. 20, 2006, <http://www.seobythesea.com/?p=174>.

Google offers its organic search results and its other services as a solution to the two-sided platform problem mentioned above: In order to attract paying advertisers, Google also has to attract (and match up) the advertisers' target audience. Google offers everything it does to its users in an effort to attract these users and to glean information from them that facilitates its all-important matching (relevance) function. In the process, Google generates revenue from advertisers eager to "sell" to this audience. For a host of reasons, Google (like all search engines) does not charge searchers to access its various services, but it does charge advertisers. Just because search is an ancillary business to Google's true advertising business does not necessarily mean it is not a relevant market for purposes of antitrust analysis; nevertheless it is essential to avoid the pitfall of examining one side of a two-sided market in isolation. As David Evans notes, "[t]he analysis of either side of a two-sided platform in isolation yields a distorted picture of the business."<sup>27</sup> Two-sided market definition is complex, and little understood—especially by non-experts throwing around various alleged markets in which companies like Google are said to be "dominant."

There is actually substantial reason to doubt the propriety of a narrow market definition limited to online search advertising.<sup>28</sup> Even where there are different purposes for different types of advertising—*e.g.* brand recognition for display ads and efforts to sell for search ads and other outlets like coupons—this is merely a difference in degree. Both are fundamentally forms of reducing the costs of a user's search for a product, as we have understood since George Stigler's seminal work on the subject in 1968,<sup>29</sup> and the relevant question is whether the difference is significant enough to render decisions in one market essentially unaffected by decisions or prices in the other.

There is evidence that advertisers view online and offline advertising as substitutes, and this applies not only to traditional advertisers but also Internet companies. Thus, in 2009, Pepsi decided not to advertise during the 2010 Super Bowl, in order to focus instead on a particular type of online campaign. "This year for the first time in 23 years, Pepsi will not have ads in the Super Bowl telecast .... Instead it is redirecting the millions it has spent annually to the

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<sup>27</sup> David S. Evans, *Two-Sided Market Definition*, ABA SECTION OF ANTITRUST LAW, MARKET DEFINITION IN ANTITRUST: THEORY AND CASE STUDIES (forthcoming), available at <http://ssrn.com/abstract=1396751> at p. 9.

<sup>28</sup> Readers interested in a fuller treatment of the market definition question surrounding Google are directed toward Geoffrey A. Manne & Joshua D. Wright, *Google and the Limits of Antitrust: The Case Against the Case Against Google*, 34 HARV. J. L. & PUB. POL'Y 1 (2011) (forthcoming), from which much of the discussion of Google's markets and economics in this essay is drawn.

<sup>29</sup> GEORGE JOSEPH STIGLER, *THE ORGANIZATION OF INDUSTRY* 201 (Univ. of Chi. Press 1983) (1968).

Internet.”<sup>30</sup> And even Google itself advertises offline.<sup>31</sup> Another study suggests that there is indeed a trade-off between online and more traditional types of advertising: Avid Goldfarb and Catherine Tucker have demonstrated that display advertising pricing is sensitive to the availability of offline alternatives.<sup>32</sup> And of course companies have limited advertising budgets, distributed across a broad range of media and promotional efforts. As one commentator notes: “By 2011 web advertising in the United States was expected to climb to sixty billion dollars, or 13 percent of all ad dollars. This meant more dollars siphoned from traditional media, with the largest slice probably going to Google.”<sup>33</sup>

Advertising revenue on the Internet is driven initially by the size of the audience, with a significant multiplier for the likelihood that those consumers will purchase the advertisers’ products<sup>34</sup> (based on a viewer’s propensity to “click through” to the advertiser’s site). Google’s competition in selling ads thus comes, in varying degrees, not only from other search sites, but also from any other site that offers a service, product, or experience that consumers might otherwise find in Google’s “organic” search results, for which Google is not paid. For Google’s competitors, this means seeking forced access to its users. But access to eyeballs can be had from a large range of access points around the Web.

Social media sites like Twitter and Facebook are therefore significant access points, occupying, as they do, a considerable amount of Internet “eyeball” time. The Pepsi deviation of advertising revenue from the Super Bowl to the Internet is not likely to have inured much to Google’s benefit as the strategy was a “social media play,” building on the expressed brand loyalties and peer communications that propel social media.<sup>35</sup> In a world of scarce advertising dollars and effective marketing via social media sites, Google and all other advertisers, online and off, must compete with the growing threat to their revenue from these still-novel marketing outlets. “If Facebook’s community of

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<sup>30</sup> Larry D. Woodard, *Pepsi’s Big Gamble: Ditching Super Bowl for Social Media*, ABC NEWS, Dec. 23, 2009, <http://abcnews.go.com/print?id=9402514>.

<sup>31</sup> See Danny Sullivan, *Google Pushes Chrome Browser Via Newspaper Ads*, SEARCH ENGINE LAND, Nov. 21, 2010, <http://searchengineland.com/google-pushes-chrome-browser-via-newspaper-ads-56600>.

<sup>32</sup> Avi Goldfarb & Catherine Tucker, *Search Engine Advertising: Pricing Ads to Context* 96 (NET Institute Working Paper No. 07-23, 2007) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1021451&rec=1&srcabs=10084](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1021451&rec=1&srcabs=10084)

<sup>33</sup> KEN AULETTA, GOOGLED: THE END OF THE WORLD AS WE KNOW IT 16 (2009).

<sup>34</sup> David S. Evans, *The Economics of the Online Advertising Industry*, 7 REV. OF NETWORK ECON. 359, 359-60 (2008).

<sup>35</sup> See Larry D. Woodard, *Pepsi’s Big Gamble: Ditching Super Bowl for Social Media*, ABC NEWS, Dec. 23, 2009, <http://abcnews.go.com/print?id=9402514>.

users got more of their information through [the Facebook] network, their Internet search engine and navigator might become Facebook, not Google.”<sup>36</sup>

The upshot: To the extent that inclusion in Google search results is about “Stiglerian” search-cost reduction for websites (and it can hardly be anything else), the range of alternate facilities for this function is nearly limitless.

Finally, Google competes not only with other general search engines (and possibly all other forms of advertising) but also with so-called vertical search engines. These are search engines and e-commerce websites with search functionality that specializes in specific content: Amazon in books, music, and other consumer goods; Kayak in travel services; eBay in consumer auctions; WebMD in medical information and products; SourceTool in business-to-business supplies; Yelp in local businesses, and many others. To the extent that Internet users bypass Google and begin their searches at one of these specialized sites (as is increasingly the case), the value to these heavily-trafficked websites from access to Google’s users decreases.<sup>37</sup>

Competition from vertical search engines is important because ad click-through rates likely are higher when consumers are actively searching for something to buy—just as search advertising targets consumers who express some interest in a particular search term, the effect is magnified if the searcher can be identified as an immediate consumer. Thus online retailers like CDnow that can establish their own brands and their own navigation channels<sup>38</sup> have a significant advantage in drawing searchers—and advertisers—away from Google: The fact that a consumer is performing a search on a retail site itself conveys important and valuable information to advertisers that is not otherwise available from most undifferentiated Google searches—it certainly increases the chance that the searcher is searching to buy a CD rather than learn something about the singer. Because this “ready-to-buy” traffic is the most valuable, there is a possibility of two separate search markets, with most high-value traffic bypassing general-purpose search engines for product search sites like eBay and Amazon.com, and with Google and other general-purpose search engines serving primarily non-targeted, lower-value traffic. The implication is that, while even relatively small-scale competition may present a potentially significant threat to Google’s search business, this threat does not depend on links to these sites from Google’s search results. And thus these competitors have a strong,

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<sup>36</sup> KEN AULETTA, *GOOGLED: THE END OF THE WORLD AS WE KNOW IT* 172–73 (2009).

<sup>37</sup> For example, in the thirty days ending on February 23, 2010, less than ten percent of visits to eBay.com originated from a search engine. See ALEXA, *eBay.com Site Info*, <http://www.alex.com/siteinfo/eBay.com>.

<sup>38</sup> See Donna L. Hoffman & Thomas P. Novak, *How to Acquire Customers on the Web*, HARV. BUS. REV., May–June 2000, at 3, 5, 7. (CDnow was acquired by Amazon.com in 2001.)

independent incentive to develop marketing programs outside of Google’s search pages—and there is good reason not to deputize Google in the process.

## Is Google an Essential Facility?

Recall that the basic claim is that Google’s competitors are foreclosed from access to Google’s desirable (essential) marketing platform and thereby suffer significant harm. Of course from the outset, this has it backwards (and this is a core problem with the essential facilities doctrine as a whole).

If there is a problem, it should be the problem of limited access *by Google’s users* to Google’s competitors. Sometimes the absence of access by competitors to consumers is the same thing as the absence of access by consumers to competitors, but it depends on how well the market has been defined. In the most fundamental sense Google has precisely zero control over access by consumers (meaning users who use Google to search the Internet) to competitors: Anyone with access to a browser can access any site on the Internet simply by typing its URL into the browser. Perhaps understanding this, proponents of the “Internet search is an essential facility” claim argue that mere access is insufficient, and that consumers are essentially ignorant about the valuable content on the web except by search engines, which are subject to the search engine’s editorial control over that access. To the typical Google user, according to this view, Google’s competitors are effectively non-existent unless they appear in the top few search results.

Now we are dangerously close to the sort of arbitrary market definition exercise, devoid of the discipline imposed by economics, that identifies an anticompetitive problem by narrowing the market until every company is a monopolist over some small group of consumers. Indeed, one can always define a market by focusing on idiosyncratic preferences or product variations. Justice Fortas decried this type of analysis in his dissent in *Grinnell* (regarding home security systems), and it merits quoting at length:

The trial court’s definition of the “product” market even more dramatically demonstrates that its action has been Procrustean—that it has tailored the market to the dimensions of the defendants. It recognizes that a person seeking protective services has many alternative sources. It lists “watchmen, watchdogs, automatic proprietary systems confined to one site, (often, but not always,) alarm systems connected with some local police or fire station, often unaccredited CSPS [central station protective services], and often accredited CSPS.” The court finds that even in the same city a single customer seeking protection for several premises may “exercise its option” differently for different locations. It may choose accredited CSPS for one of its locations and a different type of service for another.

But the court isolates from all of these alternatives only those services in which defendants engage. It eliminates all of the alternative sources despite its conscientious enumeration of them. Its definition of the “relevant market” is not merely confined to “central station” protective services, but to those central station protective services which are “accredited” by insurance companies.

There is no pretense that these furnish peculiar services for which there is no alternative in the market place, on either a price or a functional basis. *The court relies solely upon its finding that the services offered by accredited central stations are of better quality*, and upon its conclusion that the insurance companies tend to give “noticeably larger” discounts to policyholders who use accredited central station protective services. This Court now approves this strange red-haired, bearded, one-eyed man-with-a-limp classification.<sup>39</sup>

In Internet search as well, complainants imply a market based on the fact that Google offers “better quality” access to a larger set of Internet users than the myriad existing alternatives. But claiming essentiality based on a competitor’s relative high quality is deeply problematic.

This point is of great importance in assessing the economics of the essential facilities doctrine generally and its application to Internet search in particular. It is clear, even under a fairly expansive reading of the essential facilities doctrine, that even a monopolist has no duty to subsidize the efforts of a less-effective rival.<sup>40</sup> Arguably the Aspen Skiing case should have been tossed out on this basis. As a practical matter, the Aspen Ski Company, by entering into a joint marketing agreement with its smaller rival, Aspen Highlands, allowed Highlands to take advantage of its markedly larger productivity (both in developing ski terrain and amenities, as well as marketing Aspen as a ski destination). Its subsequent decision to drop Highlands from its marketing program for failing to offer sufficient return on its investment should have been unobjectionable.<sup>41</sup>

Similarly, the explicit claim in cases brought against Google by its allegedly-foreclosed rivals is that these (relatively miniscule) sites should have access to Google’s effective and inexpensive marketing tool. But it is by no means clear that Google does or should have this duty to promote its rivals (without compensation to Google, as it happens). This is particularly true when, as discussed above, other modes of access exist for competitors’ activities, even if

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<sup>39</sup> *U.S. v. Grinnell Corp.*, 384 U.S. 563, 590-91 (1966) (emphasis added).

<sup>40</sup> *See Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370 (7<sup>th</sup> Cir. 1986).

<sup>41</sup> *See* KEITH N. HYLTON, *ANTITRUST LAW: ECONOMIC THEORY AND COMMON LAW EVOLUTION* 205-06 (2003).

these modes of access are of lower quality or higher cost. Particularly where, as here, the alleged bottleneck arises not out of a combination with another firm or firms but out of unilateral conduct (success in the marketplace), the claim that a superior access point among many (inferior) access points should be pried open for the benefit of its competitors is specious.

It is worth noting that an alleged Google competitor, SourceTool, in the TradeComet complaint,<sup>42</sup> has made a version of this argument, alleging that Google once engaged in profitable commerce with SourceTool (by selling SourceTool ads next to Google search results) and then penalized SourceTool to its (Google’s) economic detriment.<sup>43</sup> The shape of this argument is a transparent effort to remain under what is left of the essential facilities doctrine following *Trinko*. But notice that even if it is true that Google intentionally ended a profitable arrangement with SourceTool (which is by no means clear), the claim still doesn’t pass muster. It is almost impossible that Google could be receiving less revenue from whatever site has replaced SourceTool in the paid search result spots SourceTool once paid for. As a result, even if Google were foregoing a previously-profitable relationship *with SourceTool*, it is not, in fact, suffering any economic harm because another advertiser has stepped into SourceTool’s shoes.

Of course the argument that Google’s competitors are effectively absent without (guaranteed?) access to Google’s top few search results proves too much. There is a scarcity of “top few search results,” and any effective search engine must have the ability to ensure that those results are the most relevant possible, as well as that they do not violate various quality, safety, moral or other standards that the search engine chooses to promote. “Forcing [owners of essential facilities] to share access may not enhance consumer welfare.”<sup>44</sup> Pure “neutrality” is neither possible nor desirable, and the exclusion of certain websites from these coveted positions should be deemed utterly unpersuasive in making out even a *prima facie* monopolization case against a search engine.

And it is not even the case that SourceTool, Foundem,<sup>45</sup> and other competing websites are absent from Google; it is, however, sometimes the case that these

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<sup>42</sup> Complaint, *TradeComet.Com LLC v. Google, Inc.*, 693 F. Supp. 2d 370 (S.D.N.Y. 2009) (No. 09Civ.1400(SHS)).

<sup>43</sup> *Id.* ¶ 8.

<sup>44</sup> KEITH N. HYLTON, ANTITRUST LAW: ECONOMIC THEORY AND COMMON LAW EVOLUTION 208 (2003).

<sup>45</sup> Foundem is a “vertical search and price comparison” site in the UK. See [www.foundem.co.uk](http://www.foundem.co.uk). The company is at the heart of the “search neutrality” debate in Internet search. It has created a website to advocate its views on the neutrality issue at [www.searchneutrality.org](http://www.searchneutrality.org), and its claims are at the heart of the European Commission’s investigation of Google. See Foundem’s discussion of the EU action and its relationship to Foundem’s claims in *European Commission Launches Antitrust Investigation of Google*, SEARCH NEUTRALITY.ORG, Nov. 30, 2010, <http://www.searchneutrality.org>.

sites do not show up in the top few organic search results (and, often at the same time, Google's own competing product search results do). But if access to the top few search results is required to ensure the requisite access sought by Google's competitors, the relevant market has been narrowed considerably, creating a standard that can't possibly be met, no matter how "neutral" a search engine's results.

Meanwhile, if Foundem were to disappear from the face of the Earth, who, other than its investors and employees (and perhaps their landlords), would be harmed? The implicit claim (if an antitrust case is to be made) is that websites like Foundem apply a constraint on Google's ability to extract monopoly rents (presumably from advertisers). But this is a curious claim to make while simultaneously arguing that Google itself is made "better" (as in, searchers are indeed looking for Foundem in searches from which the site may be excluded) by the inclusion of Foundem in its search results (thus, presumably, increasing Google's attractiveness to its users and thus its advertisers), while also claiming that Foundem would cease to exist without access to the top few Google search results.

Google does not sell retail goods, and does not profit directly from its own product search offerings (which compete with Foundem), instead receiving benefit by increasing its customer base and the efficacy (presumably) of paid advertisements on its search pages that include a link to its own price comparison results. It is a remarkably tenuous claim to make that Google profits more by degrading its search results than by improving them. If the contrary claim is really true—if, that is, Google harms itself or its advertisers by intentionally penalizing competing sites like Foundem—then that argument and any evidence for it is absent from the current debate. And, of course, if Google is, as it claims, actually improving its product by applying qualitative decisions to demote sites like Foundem and others that, Google claims, merely re-publish information from elsewhere on the web with precious little original content, then Google's efforts should be seen as a feature and not a bug.

Moreover, the extension of the essential facilities logic to competition between Google and competitors like Foundem, MapQuest or Kayak is extremely problematic. To the extent that Google and Foundem, for example, are competitors, they are competitors not in the advertising space but rather in the "information dissemination and retail distribution channel" space. I'm not sure what else to call it. Foundem earns revenue by directing customers to retail sites to purchase goods. In this sense, Foundem acts like a shopping mall. Google does the same, only instead of receiving a cut from the sale, as Foundem does, Google sells advertisements. Thus, when Foundem complains about access to Google's site, it is a competing channel of distribution, complaining that it needs access to its competitor's distribution channel in order to compete.

It's a weird sort of complaint. It isn't the same as the classic essential facilities sort of complaint where, to simplify, the owner of a vertically-integrated railroad

and rail transport company prevents access by other transport companies to its railroad line. Instead this would be like railroad company A arguing that railroad B must give A access to B’s tracks so A can sell access to those tracks to other rail transport companies.

But even this doesn’t completely capture the audacity of the complaint, because for the analogy to hold, railroad A would actually be asking the court to force railroad B to put up a sign at the head of its tracks allowing railroad A to offer to trains already on B’s railroad the opportunity to jump off B’s railroad and start over again on A’s railroad that follows another route—but without knowing for sure if the route is better or worse until you jump onto A’s tracks. Something like that. Again, it’s weird.

And note, of course, the problem that “at the head of the tracks” (as in something like “the first, second or third organic result”) is a problematic requirement as only three sites at any given time can occupy those spots—but there may be many more than three firms complaining of Google’s conduct and/or affected by the vagaries of its product design decisions. Or to keep with the shopping mall analogy, it’s like the owner of any of a number of small, new shopping malls requiring the owner of a large, established shopping mall to permit each of the new mall’s owners to set up a bus line to ferry shoppers to the new mall as they enter the established mall. Even where the established mall has a geographic, reputational and resource advantage, no one would argue that this access was essential to efficient commerce, and the cost to the successful incumbent would be manifestly too high.

As discussed above, sites like Foundem do indeed have access to Google’s end users via any number of keywords on Google’s site. Type “UK price comparison site” into Google and a number of Google competitors come up including Foundem (and Google’s own price comparison site is seemingly absent). The claim thus becomes one that is either inappropriately aggregated (“for all search terms on average that may direct users to Foundem, Foundem is effectively denied access to the top search results”) or else overly narrow (“we prefer customers to find us by typing ‘Nikon camera’ into Google, not by typing ‘price comparison Nikon camera’ into Google”). In any case, access is in fact available for these competitors, and “the indispensable requirement for invoking the [essential facilities] doctrine is the unavailability of access to the ‘essential facilities’; where access exists, the doctrine serves no purpose.”<sup>46</sup>

Meanwhile, it is difficult to see how relevance (and thus efficiency) could be well-served by a neutrality principle that required a tool that *reduces* search costs to inherently *increase* those costs by directing searchers to a duplicate search on another site. If one is searching for a specific product and hoping to find price comparisons on Google, why on earth would that person be hoping to find not Google’s own efforts at price comparison, built right into its search engine, but

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<sup>46</sup> *Trinko*, 540 U.S. at 411.

instead a link to another site that requires another several steps before finding the information?

Seen this way, Google's decision to promote its own price comparison results is a simple product pricing and design decision, protected by good sense and the *Trinko* decision (at least in the U.S.). Unlike the majority of its vertical search competitors and by design, Google makes no direct revenue from users clicking through to purchase anything from its shopping search results, and this allows it to offer a different (and, to many consumers, a significantly better) set of results. The page has paid search results only in small boxes at the top and bottom, the information is all algorithmically generated, and retailers do not pay to have their information on the page. For this product design—by definition of great value to users (in effect lowering the price to them of their product search)—to merit Google's investment, it is necessary that its own, more-relevant and less-expensive results receive priority. If this is generating something of value for Google it is doing so only in the most salutary fashion: by offering additional resources for users to improve their “search experience” and thus induce them to use Google's search engine. To require “neutrality” in this setting is to impair the site's ability to design and price its own product. Even the *Aspen Skiing* decision didn't go that far, requiring access to a joint marketing arrangement but not obligating Aspen Ski Company to alter its prices for skiers seeking to access only its own slopes.

And the same analysis holds for assessments of Google's other offerings (maps and videos, for example) that compete with other sites. Look for the nearest McDonalds in Google and a Google Map is bound to top the list (but not be the exclusive result, of course). But why should it be any other way? In effect, what Google does is give you the Web's content in as accessible and appropriate a form as it can—design decisions that, Google must believe, increase quality and reduce effective price for its users. By offering not only a link to McDonalds' web site, as well as various other links, but also a map showing the locations of the nearest restaurants, Google is offering up results in different forms, hoping that one is what the user is looking for. There is no economic justification for requiring a search engine in this setting to offer another site's rather than its own simply because there happen to be other sites that do, indeed, offer such content (and would like cheaper access to consumers).

## Conclusion

Search neutrality and forced access to Google's results pages is based on the proposition that—Google's users' interests be damned—if Google is the easiest way competitors can get to potential users, Google must provide that access. The essential facilities doctrine, dealt a near-death blow by the Supreme Court in *Trinko*, has long been on the ropes. It should remain moribund here. On the one hand Google does not preclude, nor does it have the power to preclude, users from accessing competitors' sites; all users need do is type “foundem.com” into their web browser—which works even if it's Google's

own Chrome browser! To the extent that Google can and does limit competitors’ access to its search results page, it is not controlling access to an “essential facility” in any sense other than Wal-Mart controls access to its own stores. “Google search results generated by its proprietary algorithm and found on its own web pages” do not constitute a market to which access should be forcibly granted by the courts or legislature.

The set of claims that are adduced under the rubric of “search neutrality” or the “essential facilities doctrine” against Internet search engines in general and, as a practical matter, Google in particular, are deeply problematic. They risk encouraging courts and other decision makers to find antitrust violations where none actually exist, threatening to chill innovation and efficiency-enhancing conduct. In part for this reason, the essential facilities doctrine has been relegated by most antitrust experts to the dustbin of history. As Joshua Wright and I conclude elsewhere:

Indeed, it is our view that in light of the antitrust claims arising out of innovative contractual and pricing conduct, and the apparent lack of any concrete evidence of anticompetitive effects or harm to competition, an enforcement action against Google on these grounds creates substantial risk for a “false positive” which would chill innovation and competition currently providing immense benefits to consumers.<sup>47</sup>

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<sup>47</sup> Geoffrey A. Manne & Joshua D. Wright, *Google and the Limits of Antitrust: The Case Against the Case Against Google*, 34 HARV. J. L. & PUB. POL’Y at 62.