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After Search Neutrality: Drawing a Line between Promotion and Demotion

DANIEL A. CRANE*

Abstract: The Federal Trade Commission's ("FTC" or "the commission") January 3, 2013 decision to close its longstanding investigation of Google[1] brings to a close a flurry of discussion over the possibility that Google could become subject to a "search neutrality" principle in the United States.[2] Although the Commission found against Google on several grounds, it rejected petitions from Google's critics to create a search neutrality principle as a matter of antitrust law. This essay briefly analyzes what remains of U.S. antitrust scrutiny of Internet search bias after the Google settlement. In particular, it suggests that a sensible line can be drawn between promotion of a search engine's own properties and demotion of rival properties. Although distinctions of this kind are inherently slippery, in this case the distinction should serve well enough. As of this writing, the wild card remains the European Commission, which may yet upset the applecart.

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[1] Statement of the FTC, In the Matter of Google, Inc., F.T.C. File No. 121-0120 (Jan. 3, 2013), *available at* http://www.ftc.gov/os/caselist/1210120/130103googlemotorolastmtofcomm.pdf.

[2] *See* Marvin Ammori & Luke Pelican, *Competitors' Proposed Remedies for Search Bias: "Neutrality" and Other Proposals*, 15 No. 11 J. INTERNET L. 1 (2012); Daniel A. Crane, *Search Neutrality and Referral Dominance*, J. COMP. L. & ECON. (2012); Daniel A. Crane, *Search Neutrality as an Antitrust Principle*, 19 GEO. MASON L. REV. 1199 (2012); Geoffrey A. Manne & Joshua D. Wright, *If Search Neutrality is the Answer, What's the Question?*, 2012 COLUM. BUS. L. REV. 151 (2012).

I. THE SETTLEMENT

The FTC's investigation of Google grew out of two separate and largely unrelated sets of business practices. One involved a set of patent licensing issues that Google inherited in its June 2012 acquisition of Motorola Mobility. Prior to Google's acquisition, Motorola had made certain commitments to standard-setting organizations ("SSOs") to license standard-essential patents ("SEPs") relating to smartphones, tablet computers, and video games on fair, reasonable, and non-discriminatory ("FRAND") terms. Motorola supposedly breached these commitments, not only by refusing to license fairly but by seeking injunctions against alleged infringers practicing SEPs. Google supposedly continued these unfair practices after acquiring Motorola. Under the terms of the settlement, Google will have to license its SEPs on FRAND terms.[3]

A separate part of the investigation focused on Google's practices with respect to Internet search. Some advertisers and rival websites complained that Google was restricting advertisers' ability to participate in Google's AdWords platform and simultaneously advertise on rival websites using the same terms. Rival websites also complained that Google was crawling their sites and displaying their content on Google's Covered Webpages. To settle these charges, Google wrote a commitment letter to the Commission, promising to allow websites to opt out of display on Google's Covered Webpages if the website had been crawled by Google and allowing online advertisers more flexibility to simultaneously manage ad campaigns on Google's AdWords platform and on rival ad platforms.[4]

However, the big story of the Google settlement was not the commitments on SEP licensing, AdWords, or opting out of Covered WebPages. It was the Commission's rejection of claims by critics that "Google unfairly promoted its own vertical properties through changes in its search results page, such as the introduction of the 'Universal Search' box, which prominently displayed Google vertical search results in response to certain types of queries, including shopping and local."[5] Surprisingly to many observers, the Commission rejected these

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[3] Statement of the FTC, In the Matter of Google Inc., *supra* note 1.

[4] Letter from David Drummond, Senior Vice President of Corporate Development and Chief Legal Officer, Google, Inc., to the Honorable Jon Leibowitz, Chairman of the Fed. Trade Comm'n (Dec. 27, 2012), *available at* http://www.ftc.gov/os/2013/01/130103googleletterchairmanleibowitz.pdf.

[5] Statement of the Federal Trade Commission, In the Matter of Google Inc., *supra* note 1.

claims without requiring any concessions from Google.[6] Indeed, the Commission went so far as to find that the conduct complained of was procompetitive:

> Google adopted the design changes that the Commission investigated to improve the quality of its search results, and that any negative impact on actual or potential competitors was incidental to that purpose. While some of Google's rivals may have lost sales due to an improvement in Google's product, these types of adverse effects on particular competitors from vigorous rivalry are a common byproduct of 'competition on the merits' and the competitive process that the law encourages.[7]

Despite the fact that Google had to make three significant concessions in order to settle the case, the leading news media correctly reported that the settlement was a major victory for Google.[8] They could just as easily have reported it as a major defeat for Microsoft, Tripadvisor, Kayak, Hotwire, Expedia, Oracle, Nokia, and their allies in the Fair Search coalition that for several years had been promoting an aggressive antitrust case against Google's biasing of Internet search.[9] The FTC has hardly been a bastion of pro-business conservatism in recent years and has taken an aggressive position against other high-tech companies such as Intel.[10] That the FTC would walk away from the search bias claims, that had been mobilized by big monied interests and pursued by leading academics and lawyers, is a strong testament to the weakness of search neutrality demands under

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[6] *Id.*

[7] Statement of the FTC Regarding Google's Search Practices, In the Matter of Google, Inc., F.T.C. File No. 111-0163 (Jan. 3, 2013), *available at* http://ftc.gov/os/2013/01/130103googlesearchstmtofcomm.pdf.

[8] *See, e.g.,* Edward Wyatt, *A Victory for Google as F.T.C. Takes No Formal Steps*, N. Y. TIMES (Jan. 3, 2013), http://www.nytimes.com/2013/01/04/technology/google-agrees-to-changes-in-search-ending-us-antitrust-inquiry.html?_r=0.

[9] *See generally,* Fair Search, http://www.fairsearch.org.

[10] *See* Don Clark and Brent Kendall, *Intel Settles Antitrust Case: Semiconductor Giant Settles U.S. Probe, Agrees to New Restrictions on Its Business Practices*, WALL ST. J., Aug. 5, 2010, at B1, *available at* http://online.wsj.com/news/articles/SB10001424052748704017904575409152910216786.

contemporary U.S. antitrust precedents. Search neutrality was stillborn as a principle of U.S. antitrust law on January 3, 2013.

That search neutrality as a broad principle has failed in the United States does not mean that Google (or, in the future, other dominant search engines) are free from antitrust scrutiny for the design and management of their search engines. The FTC settlement represents the rejection of a particular kind of claim about Google's obligations to be "neutral" in the presentation of search results. It may leave open other types of claims about search biasing.

II. THE FAILURE OF SEARCH NEUTRALITY

At the heart of the search neutrality movement lies a claim that Google was monopolizing the Internet by leveraging its market power in organic or universal Internet search into adjacent spaces on the Internet. In this narrative, Google started out as an information broker akin to a librarian who could point customers to the books they were looking for. Google long assured its customers that its PageRank algorithm was a neutral information compiler, creating hierarchies of saliency based on the wisdom of the crowds. Google was just a mirror for the preferences of its users—it had no points of view itself. It provided ten blue links per page drawn from the wisdom of the crowds.

Over time, however, Google grew from just a librarian to an owner of some of the books in the library. For example, instead of just linking its customers to the most popular shopping sites, Google developed its own shopping site. Its properties soon included the gamut of Internet content: YouTube for video content, Google maps as an alternative to MapQuest, Google Plus for social networking, Google Travel, etc. As Google's properties grew, a conflict of interest arose. Instead of acting as the neutral librarian, Google could steer people who stopped at the reference desk or card catalogues to its own books. Google began to override its neutral algorithms and bias search results in favor of its own search verticals and other content.

Critics charge that Google is the "gateway" to the Internet; it has been able to subvert competition on the Internet by favoring its own properties. Elsewhere, I have expressed skepticism that Google is quite the Internet gateway that its strongest critics suggest.[11] Existing data suggest that Google's share of referrals to other websites, such as news or travel sites, are relatively modest, which means that users are

[11] *See* Crane, *Referral Dominance*, *supra* note 2.

finding their ways to websites through many paths other than universal search.[12] There are many ways besides entering a query into a search engine to access Internet content–think of Facebook or other social networks, linking from other websites, bookmarks, and typing in a URL. Mobile apps are a strong and increasing threat to universal search as an Internet gateway.[13]

Be that as it may, the FTC did not reject claims that Google is dominant in referring users to websites. Rather, it found that Google's evolutionary modification of the architecture of search was procompetitive and consistent with advancement of consumer interests. The FTC's decision not to pursue the claim that Google violated the antitrust laws by switching from a library catalogue "ten blue links" model to an integrated information portal model eliminates any serious possibility that claims about the increasing integration of Google content into Google universal search will be subject to antitrust liability in the United States. By not only finding that Google's evolution did not harm competition but that it was affirmatively procompetitive, the Commission strongly signaled that it would not employ Section 5 of the FTC Act–which is arguably the most potent antitrust weapon available to any U.S. antitrust enforcer[14] –to scrutinize the architecture of Internet search.

The FTC's decision was consistent with a longstanding reluctance by courts and antitrust enforcers to employ antitrust law to supervise product design, particularly in highly dynamic markets such as Internet search. As the D.C. Circuit recognized in one of its *Microsoft* decisions, "[a]ntitrust scholars have long recognized the undesirability of having courts oversee product design, and any dampening of technological innovation would be at cross-purposes with antitrust

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[12] *Id.*

[13] Claire Cain Miller, As Web Search Goes Mobile, Competitors Chip at Google's Lead, N. Y. TIMES (Apr. 3, 2013),http://www.nytimes.com/2013/04/04/technology/as-web-search-goes-mobile-apps-chip-at-googleslead.html?pagewanted=all (reporting that the nature of search is changing as customers increasingly access Internet content using apps on mobile devices); Charles Arthur, Google and Microsoft under threat from the march of the mobiles, THE GUARDIAN (Oct. 19, 2012), http://www.theguardian.com/technology/2012/oct/19/google-microsoft-smartphone-apps ("People are turning to apps more and more for services, which has led to a serious decline in PC and search engine use.").

[14] *See* Daniel A. Crane, Reflections on *Section 5* of the FTC Act and the FTC's Case Against Intel, CPI Antitrust Chron. (Feb. 28, 2010), https://www.competitionpolicyinternational.com/reflections-on-section-5-of-the-ftc-act-the-ftc-s-case-against-intel.

law."[15] A broad search neutrality principle would have meant comprehensive oversight of universal search design to ensure access, neutrality, and competition. It could easily have chilled innovation. The FTC was wise to decline the invitation. Such a role would have stretched the Commission's institutional capabilities to the breaking point, emboldened Google's rivals to use the regulatory process rather than the marketplace to compete, and ultimately produced little of value to consumers.

III. PROMOTION VS. DEMOTION

While declining to invoke antitrust principles to scrutinize Google's designing and redesigning of Internet search, the Commission did not directly rule out antitrust scrutiny of a different kind of potentially anticompetitive action relating to Google: deliberately demoting rivals' search results rankings in order to stymie competition. Google may be protected if it promotes its own search verticals or other Internet properties by advantaging them in the display of universal search results, but what if it demotes a rival? Does the freedom to promote Google properties include the right to demote rival properties?

Before answering that question, consider the allegations in a currently pending "demotion" case brought by Foundem, a U.K. vertical search company that has become the poster child David in the David vs. Goliath stories told about Google. (Microsoft, another leading Google antagonist, doesn't play the "David" role as well). Founded in 2005, Foundem specializes in vertical search and price comparisons in various product categories such as flights, electronics, appliances, hotels, and real estate.[16] According to Foundem, "[F]rom June 2006 to December 2009 Foundem was effectively 'disappeared from the Internet' by a Google penalty that systematically excluded all of its content from Google's search results."[17] Foundem alleges that it was caught in Google's filters that are designed to keep spammers or other sites that try to cheat on Google's algorithms from being

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[15] *U. S. v. Microsoft Corp.,* 147 F.3d 935, 948 (D.C. Cir. 1998).

[16] *The Foundem Difference*, FOUNDEM.COM, http://www.foundem.co.uk.

[17] *Foundem's Google Story*, SEARCHNEUTRALITY.ORG (Aug. 18, 2009), http://www.searchneutrality.org/eu-launches-formal-investigation/foundem-google-story.

promoted in Google's PageRanks.[18] When legitimate "high profile sites that would be conspicuous if absent from Google's search results" fall afoul of the filers, Google grants them immunity through "'whitelisting' (a.k.a. 'manual lift')."[19] However, Google supposedly refused to whitelist Foundem, allowing the company to stay trapped in the purgatory of demoted page ranking. Further, Foundem alleges that Google's intentions in keeping Foundem in ranking purgatory were anticompetitive. Google supposedly did not want to see Foundem emerge as a competitor to its own search verticals, and hence used its power in universal search to keep Google users from linking to Foundem.

Foundem has been playing hardball. A week after the FTC closed its investigation, Foundem brought an antitrust suit against Google in the U.K.[20] It has been prodding the European Commission to take action against Google and vocally advocating against Google's proposed remedial commitments in Europe.[21]

Google, of course, has a very different take. It claims that Foundem was demoted because it had little to offer users and therefore deserved to be lower in Google's page ranks.[22] It points to an Econsultancy study finding that "Foundem is pretty much an aggregator of third party content, with very little unique content of its own."[23] Google thus claims that Foundem was demoted not because it was a competitive threat but because it was a lousy service.

Are claims like Foundem's barred by the logic of the FTC's decision? The FTC deals with "demotion" claims in the following paragraph of its statement:

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[18] *Id.*

[19] *Id.*

[20] Infederation Ltd. v. Google, Inc., [2013] EWHC (Ch) 2295, 2013 WL 3811075 (Eng.)

[21] Stephanie Bodoni, *Google Plans to Settle EU Probe Should Be Rejected, Foundem Says*, BLOOMBERG NEWS (May 14, 2013), http://www.bloomberg.com/news/2013-05-14/google-plans-to-settle-eu-probe-should-be-rejected-foundem-says.html.

[22] Julia Holtz, *Committed to Competing Fairly*, GOOGLE PUBLIC POLICY BLOG (Feb. 23, 2010), http://googlepublicpolicy.blogspot.com/2010/02/committed-to-competing-fairly.html.

[23] Chris Lake, *Foundem vs. Google: A Case Study in SEO Fail,* ECONSULTANCY (Aug. 18, 2009), http://econsultancy.com/us/blog/4456-foundem-vs-google-a-case-study-in-seo-fail.

> [F]or shopping queries, Google demoted all but one or two comparison shopping properties from the first page of Google's search results to a later page. Demoting comparison shopping properties had the effect of elevating to page one certain merchant and other websites. These changes resulted in significant traffic loss to the demoted comparison shopping properties, arguably weakening those websites as rivals to Google's own shopping vertical. On the other hand, these changes to Google's search algorithm could reasonably be viewed as improving the overall quality of Google's search results because the first search page now presented the user with a greater diversity of websites.[24]

One interpretation of this statement is that demotion is merely the converse of promotion and that antitrust law should not be in the business of scrutinizing either. If Google changes its algorithms to favor merchants in its page ranks (promotion), then it necessarily is bumping down third party aggregators (demotion). One could not allow Google to adjust its algorithms to promote one kind of result but prohibit it to demote other types of results since the presentation of results is purely ordinal. Arguably, promoting one kind of content necessarily involves demoting another, and any distinction between promotion and demotion is therefore vacuous.

That logic would suggest that claims like Foundem's are out of luck on the FTC's pro-innovation and freedom of design reasoning. But that need not follow. Recall that Foundem's complaint is not just that Google reengineered its algorithms to demote third party aggregators (although that is part of the complaint), but that Google employed a secret and selective system to manually promote particular sites that it did not believe posed a competitive threat while allowing disfavored sites to languish down the hierarchy of page rankings. If that claim is correct, Google's sin was not merely redesigning its algorithms to reflect more accurately its users' preferences, but making individualized decisions on which search verticals should be allowed on the first results page and which should be kept off.

That sort of claim may not present the concerns that led the FTC to reject a broad search neutrality principle. To the extent that the

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[24] Statement of the FTC, In the Matter of Google, Inc., *supra* note 1.

demotion of particular sites is not part of the overall design of the Google system but an individualized decision on the merits of particular rivals, antitrust institutions might have fewer concerns that they will be called upon to oversee "product design" in determining whether a particular demotion is anticompetitive. The relevant antitrust decision would ultimately not turn on engineering considerations of the kind that antitrust courts and agencies prefer not to make (i.e., the composition of the algorithm) but rather on individualized business judgments of the kind that antitrust courts and agencies are much more comfortable scrutinizing (i.e., whether a particular search vertical should be promoted or demoted). Once the question is not explicitly about Google's product design–about essentially engineering choices–but about its tailored categorization of a particular competitor, concerns about agency or judicial intervention and impairing innovation diminish.

To be sure, such claims would not be easy to win. I have previously suggested that such claims should have to overcome a series of strenuous hurdles, including proof that Google overrode its general algorithms as to a particular competitor, that it did not have any legitimate reason for making that decision, that Google should be accorded a "business judgment rule" on its reasons for the manual override, and that the demotion increased or maintained Google's market power (which would be a necessary element of any antitrust claim).[25] I offer no opinion on whether Foundem or other complaints (such as the one lodged by the French legal search vertical ejustice.fr)[26] have merit. My observation is simply that the (quite proper) rejection of a general search neutrality principle need not bar scrutiny of the demotion of particular rivals for anticompetitive reasons.

IV. THE EUROPEAN COMMISSION WILD CARD

As of this writing, the European Commission ("EC") continues to mull its options with respect to Google. The European Commission gave a surprisingly cold shoulder to the FTC, saying that the FTC

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[25] Crane, *Search Neutrality as an Antitrust Principle*, *supra* note 2, at 1207-08.

[26] Foo Yun Chee, *French site Ejustice.fr charges Google with Fresh Abuse,* REUTERS (Feb. 22, 2011) http://www.reuters.com/article/2011/02/22/us-google-ejustice-idUSTRE71L1SJ20110222.

decision would have no effect on the EC's ongoing investigation.[27] Google has since offered "commitments" to solve the Commission's concerns, and the Commission has responded by opening a month-long "consultation" process to allow comments by third parties–an apparent signal of unenthusiasm for Google's proposal.[28] Europe has long been more assertive on unilateral abuse of dominance issues than the United States. A broad search neutrality principle remains possible in Europe.

It is also worth noting that the issue of Internet search dominance is not purely a Google question. Although Google is dominant in much of the world, it has a very small share of search in some important world markets including Russia, South Korea, and China. In each of those markets, a home-grown (and sometimes government-promoted) search engine holds a similar position of dominance to Google's in the United States. Already, there have been complaints of search bias against some of these search engines as well.[29] The decisions of the FTC and EC may set influential precedents on the legal treatment of search bias claims around the world. In the meantime, Google may not be free and clear in the United States either. Claims of selective demotion of rival sites may still have legs.

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[27] *US Google Ruling to have no Effect on EU Probe*, REUTERS, (Jan. 7, 2013), http://www.iol.co.za/scitech/technology/news/us-google-ruling-to-have-no-effect-on-eu-probe-1.1448314#.UlBjK2rD9Ms.

[28] Alex Barker & Bede McCarthy, *Google's Rivals Try to Hit Brussels Pact*, FINANCIAL TIMES (Apr. 25, 2013), http://www.ft.com/cms/s/0/e52fd8d0-ad9b-11e2-a2c7-00144feabdc0.html#axzz2TO4hp35i.

[29] *See* Bai du bei su long duan shi chang "fan long duan di yi an" jin ri kai ting [Baidu is Sued for Monopoly "First Antitrust Lawsuit" and Opened a Court Session Today], BEIJING NO. 1 INTERMEDIATE PEOPLE COURT ONLINE PRESS, Apr. 22, 2009, *available at* http://bj1zy.chinacourt.org/public/detail.php?id=612 (in Chinese) (describing a social networking site – one similar to Facebook – and its 2009 complaint, which alleged that the Baidu search engine intentionally blocked the social networking site from its search results.); *see also* Jiangxiao Athena Hou & Jane Yi, *A Progress Report on the Implementation of China's Anti-Monopoly Law*, 20 NO. 1 COMPETITION: J. ANTI. & UNFAIR COMP. L. SEC. ST. B. CAL. 79, 85-86 (2011).