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eMonopoly: Why Internet-Based Monopolies Have an Inherent "Get-out-of-Jail-Free Card"

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NOTES

eMonopoly

WHY INTERNET-BASED MONOPOLIES HAVE AN INHERENT "GET-OUT-OF-JAIL-FREE CARD"

INTRODUCTION

The modern-day reliance on digital media has dramatically broadened access to all forms of news, ideas, and information.[1] This development is due in large part to the increased presence of the Internet, which is without precedent in openness, universal accessibility, efficiency, and versatility as a mode of communication.[2] Unfortunately, regulatory laws have failed to keep pace with the advance of technology,[3] and the Internet remains substantially unregulated.[4] As a result, the most widely used and most "dominant communications medium

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[1] *See* David S. Evans, *Antitrust Issues Raised by the Emerging Global Internet Economy*, 102 NW. U. L. REV. COLLOQUY 285, 288-89 (2008) (outlining the growing trends of access to Internet services via computers and personal computing devices); *see also Internet*, WIKIPEDIA, http://en.wikipedia.org/wiki/Internet#Information (last visited Sept. 28, 2010) ("The Web has . . . enabled individuals and organizations to publish ideas and information to a potentially large audience online at greatly reduced expense and time delay.").

[2] Jay Dratler, Jr., *Why Antitrust Matters in Cyberspace: A Brief Essay*, CYBERLAW, http://gozips.uakron.edu/~dratler/2005cyberlaw/materials/whyantitrust.htm (last visited Sept. 22, 2009).

[3] EDWARD LEE LAMOUREUX ET AL., INTELLECTUAL PROPERTY LAW & INTERACTIVE MEDIA: FREE FOR A FEE 2 (2009).

[4] Dratler, *supra* note 2. The Federal Communications Commission (FCC) has proposed net neutrality principles that would formalize rules meant to keep Internet providers from discriminating against certain content flowing over their networks. Saul Hansel, *F.C.C. Chairman Is Expected to Propose Neutrality Principles for the Internet*, N.Y. TIMES, Sept. 19, 2009, at B3. However, if anything this regulation only strengthens the claim that Internet content is to a large extent unfettered. Moreover, challenges to FCC net neutrality are taking shape in the form of legislation seeking to "keep the Internet free from government control and regulation." Marguerite Reardon, *Net Neutrality Faces Political, Legal Hurdles*, CNN.COM, Oct. 24, 2009, http://www.cnn.com/2009/TECH/10/24/net.neutrality.politics/index.html.

. . . is . . . unregulated and entirely at the mercy of domination by private commercial forces acting in their own self-interest."[5]

With the Internet's unregulated nature threatening monopolistic consolidation of Internet services, the specter of eMonopolies—those Internet domains that offer an ever-expanding menu of services, collecting more and more devoted patronage among Internet users, and deriving revenue exclusively from advertising—is a palpable possibility. In response to this threat, antitrust law has been recognized as representing the only hope of "prevent[ing] a single private firm, or single individual, from 'cornering the market' in means of [digital] expression."[6] But antitrust enforcement in what has been dubbed the "new economy"[7] could be problematic because enforcement agencies, such as the Federal Trade Commission (FTC) and the U.S. Department of Justice (DOJ), as well as the federal courts, arguably lack the resources to cope with such a dynamic, rapidly advancing, and innovative economic model.[8]

In addition to rapid Internet development, antitrust enforcement is further complicated by the nature of the Internet-based economy, which grows every year[9] and has largely been developed on a platform where "information is free."[10] The web-based economy's reliance on the use of *free*, where the market default rate for Internet services is no more than the cost of Internet access, represents a significant wrinkle for antitrust analysis.[11] It allows a web-based firm, such as Google—the ubiquitous Internet service provider—to

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[5] Dratler, *supra* note 2.

[6] KENNETH L. PORT ET AL., LICENSING INTELLECTUAL PROPERTY IN THE INFORMATION AGE 426 (2d ed. 2005).

[7] Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 925 (2001) (defining the new economy as the industries of computer software manufacturing, Internet-based business, and telecommunications services).

[8] *Id.*

[9] As of September 2009, nearly 80% of the North American population has access to the Internet—a growth of 140% since the year 2000. *Internet Usage Statistics for the Americas*, INTERNET WORLD STATS, http://internetworldstats.com/stats2.htm (last visited Oct. 24, 2010) [hereinafter INTERNET WORLD STATS]. With the advent and proliferation of mobile Internet access, this number is expected to rise considerably in the coming years. Evans, *supra* note 1, at 289.

[10] DAVID B. KOPEL, ANTITRUST AFTER MICROSOFT: THE OBSOLESCENCE OF ANTITRUST IN THE DIGITAL ERA 13 (2001).

[11] *See* Chris Anderson, *Commentary: Google and Microsoft Free-for-All*, CNN.COM (July 8, 2009, 10:08 AM), http://www.cnn.com/2009/TECH/07/08/anderson.google.antitrust.law/index.html.

offer a host of free services,[12] establish a devoted user base, and then generate substantial revenue derived exclusively from advertisements.[13] Where a firm gains legal monopoly power in one service[14]—such as Google's arguable monopoly on search queries—the firm would face no obstacle in broadening that consumer dependence to other services it chooses to acquire. In so doing, such a firm could restrict access to information, control the advertising markets, and thus control how consumers engage in commerce. The problem for antitrust analysis arises because consolidation of economic power—traditionally the target of antitrust laws[15]—in an economy where consumers are not subject to potential market abuses because the services are free, may render the antitrust laws' consumer-welfare goals inapplicable.

This note recognizes the antitrust threat imposed by eMonopolies. Specifically, the note will focus on Google,[16] which is the leading Internet-based business.[17] Google has already attracted the attention of antitrust regulators and has been characterized as "a dominant behemoth, one that ha[s] the potential to stifle innovation and squash its competitors."[18] This note explains how Internet-based businesses' reliance on free services and the inherent characteristics of the web-based business—including rapid technological advancement—complicate application of the antitrust laws against eMonopolies and make any attempts to litigate against Google difficult. Consequently, new approaches to antitrust

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[12] Services provided by Google include a search engine, e-mail server, map generator, and word processor, among many others. GOOGLE, http://www.google.com (last visited Jan. 15, 2010).

[13] Anderson, *supra* note 11.

[14] *See* United States v. Microsoft, 253 F.3d 34, 50 (D.C. Cir. 2001) (quoting United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966)) (no antitrust violation where the monopolist gained his advantage through "superior product, business acumen or history"); *see also infra* Part I.B.3.

[15] Maurice E. Stucke, *Behavioral Economists at the Gate: Antitrust in the Twenty-First Century*, 38 LOY. U. CHI. L.J. 513, 539 (2007).

[16] Because Google is the current leading Internet-based business and has attracted so much attention, this note refers to Google as an example as well as uses "Google" as an abstract placeholder for eMonopolies in general.

[17] To illustrate, as of September 2009, Google held an 80% share of the Internet search market, its primary field, while its nearest competitor, Yahoo!, held only 9%. *Internet Search Mkt Share: Bing's Loss Is Google's Gain*, ECONOMIC TIMES (Oct. 2, 2009, 4:40 PM), http://economictimes.indiatimes.com/Internet-search-mkt-share-Bings-loss-is-Googles-gain/articleshow/5080917.cms [hereinafter *Bing's Loss, Google's Gain*].

[18] Fred Vogelstein, *Why Is Obama's Top Antitrust Cop Gunning for Google?*, WIRED (July 20, 2009), *available at* http://www.wired.com/techbiz/it/magazine/17-08/mf_googlopoly?currentpage=all.

enforcement should be implemented, approaches that recognize the difficulties of traditional enforcement and take into account the noneconomic detriments of monopolies.

Part I of this note provides a brief history of federal antitrust law. It articulates the often-complicated judicial interpretation of antitrust principles, particularly with respect to Section 2 of the Sherman Antitrust Act,[19] which prohibits a single firm from becoming a monopoly. Part II explores the world of Internet business, focusing on Google's history and business development. It also examines recent Sherman Act antitrust actions against Google and other new-economy businesses.

Part III probes the antitrust implications of such Internet-based market power particularly with respect to Section 2 monopolization claims. It argues that the web-based model of *free* and the unilateral innovation of Internet technology development make application of Section 2 difficult. To do so, Part III shows the problematic application of a Section 2 claim to an eMonopoly.

Finally, Part IV suggests how antitrust enforcement in the new economy should proceed, including how the noneconomic considerations of media consolidation and privacy should be included in evaluating the impact of unilateral monopolization by eMonopolies. Part V concludes by suggesting that antitrust regulators must adopt broad, forward-looking analytical models to keep pace with the rapid entrenchment of modern eMonopolies.

I. FEDERAL ANTITRUST LAW

The underlying rationale for the federal antitrust laws, in large part, has been to combat the perceived dangers of concentrated economic power.[20] In keeping with the rationale that consolidated economic power poses a threat, the goals of antitrust legislation have been interpreted to be both social (such as maximizing competition and diversifying market power for the benefit of free-market entrepreneurs)[21] and economic (such as protecting the welfare of consumers from

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[19] 15 U.S.C. § 2 (2006).

[20] Stucke, *supra* note 15, at 539 (explaining that "growing concern for increased concentration of economic power" has led to increased antitrust enforcement).

[21] JOHN H. SHENEFIELD & IRWIN M. STELZER, THE ANTITRUST LAWS 12 (1993).

potential abuses resulting from monopoly power or collusive horizontal conduct).[22]

Competition law in the United States began as a means for the federal government to proportionally respond to the domination of the nineteenth-century marketplace by rapidly growing industrial giants.[23] As such, early antitrust enforcement targeted smoke-stack industries, such as steel and oil[24]—industries that, unlike Internet-based businesses, advanced slowly and attracted infrequent competitive entrants.[25] The antitrust laws were seen as vital to the "preservation of economic freedom and [the United States'] free-enterprise system."[26] Indeed, in *Northern Pacific Railway v. United States*, the Supreme Court noted that the antitrust regime's preservation of free and unfettered competition "provid[es] an environment conducive to the preservation of our democratic, political and social institutions."[27]

The story of U.S. antitrust law begins in 1890 with the passage of the Sherman Antitrust Act (the Sherman Act).[28] The Sherman Act is the "Magna Carta"[29] of antitrust legislation and all subsequent legislation was enacted to supplement its provisions.[30] The Sherman Act's primary operating provisions are Section 1, which declares that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal,"[31] and Section 2, which declares that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce" will be guilty of a felony.[32]

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[22] *Id.*

[23] *Id.* at 8 (describing the origin of the term "antitrust" as referring to the practice of large enterprises "collecting shareholder voting power in the hands of a single managing trustee. Efforts to control these powerful interests were known as antitrust laws.").

[24] Posner, *supra* note 7, at 926.

[25] *Id.*

[26] United States v. Topco Assoc., Inc., 405 U.S. 596, 610 (1972).

[27] N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

[28] 15 U.S.C. §§ 1-7 (2006).

[29] *Topco*, 405 U.S. at 610.

[30] SHENEFIELD & STELZER, *supra* note 21, at 14.

[31] 15 U.S.C. § 1 (2006).

[32] *Id.* § 2.

A. Sherman Act Section 1—Combination

Given that any economic combination has at least a negligible economic effect on competition,[33] Section 1 prohibits only those combinations restraining trade that result in some cognizable injury to competition.[34] Therefore, the Sherman Act prohibits only restraints of trade that *unreasonably* restrict competition.[35] To determine reasonableness, contemporary courts rely primarily on a "rule of reason" analysis to determine whether the restraint is likely to have anticompetitive effects and, if so, whether the restraint is reasonably necessary to achieve procompetitive benefits that outweigh those anticompetitive effects.[36] Although courts have imposed per se liability where the anticompetitive effects of an agreement are readily apparent and there are no redeeming effects,[37] this imposition is strictly limited to circumstances where the negative economic impact is immediately obvious.[38]

B. Sherman Act Section 2—Monopolization

This note focuses on Sherman Act Section 2 and its applicability to eMonopolies. Unlike Section 1, which explicitly requires multilateral conduct in order to find an antitrust violation,[39] Sherman Act Section 2 outlaws unilateral monopolization. To be liable under Section 2, the alleged monopolist must possess monopoly power in a relevant market,[40] and must have acquired or maintained—or attempted to acquire or maintain—monopoly power through exclusionary,

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[33] SHENEFIELD & STELZER, *supra* note 21, at 15 ("[E]very sales contract removes one buyer and one seller from the market for the duration of the contract, and to that extent restrains trade.").

[34] Coal. for ICANN Transparency, Inc. v. Verisign, Inc., 567 F.3d 1084, 1089 (9th Cir. 2009) (citing Kendall v. Visa, 518 F.3d 1042, 1047 (9th Cir. 2008)).

[35] Standard Oil Co. v. United States, 221 U.S. 1, 87 (1911) (emphasis added).

[36] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 9 (2007) [hereinafter DOJ & FTC, PROMOTING INNOVATION AND COMPETITION], *available at* http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf.

[37] Major League Baseball Props. Inc. v. Salvino, 542 F.3d 290, 315 (2d Cir. 2008).

[38] *Id.*; *see also, e.g.*, Toledo Mack Sales & Serv. v. Mack Trucks, 530 F.3d 204, 220-21 (3d Cir. 2008) (holding that a "gentleman's agreement" among competitor dealers to control prices was a per se impermissible horizontal agreement in violation of Section 1).

[39] 15 U.S.C. § 1 (2006) (outlawing "contract[s]" and "combinations").

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

anticompetitive conduct.[41] Consequently, the acquisition of monopoly power by possessing a superior product, superior business acumen, or favorable history will not give rise to Section 2 enforcement.[42]

1. Relevant Market

Defining the *relevant market* is the first step in evaluating a Section 2 claim,[43] as it "determine[s] the boundaries within which effective competition occurs or, conversely, market power is exercised."[44] The relevant market refers to the groups of producers that, because of their products' similarity, have the ability—actual or potential—to take significant business away from each other.[45] A relevant market is composed of a product market (identifying what service or good is at issue in the applicable competition) and a geographic market (identifying the physical boundaries of the competition).[46] For our purposes, we will not dwell on establishing a geographic market. Given the widespread use and availability of the Internet—which spans the entire developed world[47]—defining a geographic market establishes no practical limit; therefore, we instead focus our efforts on defining the product market.

A relevant product market has historically been defined as products "reasonably interchangeable by consumers for the same purposes."[48] The idea behind this restriction is simply to ensure that competitors are competing in the same competition. Picture a consumer who wishes to purchase an apple; if he encounters predatory pricing of oranges, it will have little impact on his decision to buy an apple and therefore will have limited anticompetitive effect on apple merchants. Of course, the relevant market definitions litigated in real-world

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[41] *Id.* at 571.

[42] United States v. Microsoft, 253 F.3d 34, 50 (D.C. Cir. 2001).

[43] *See* Geneva Pharm. Tech. Corp. v. Barr Labs. Inc., 386 F.3d 485, 496 (2d Cir. 2004). Where a claim is based on per se unlawful activity, however, no inquiry into the relevant markets is required. *See, e.g.*, Gough v. Rossmoor Corp., 585 F.2d 381, 385 (9th Cir. 1978).

[44] SHENEFIELD & STELZER, *supra* note 21, at 29.

[45] *Microsoft*, 253 F.3d at 51-52.

[46] SHENEFIELD & STELZER, *supra* note 21, at 30-31.

[47] To illustrate, as of December 2009, 76.2% of the North American population has access to the Internet, experiencing a growth of nearly 140% between 2000 and 2009. INTERNET WORLD STATS, *supra* note 9.

[48] United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395 (1956).

antitrust actions are far less simplistic and often involve highly subtle market distinctions. To illustrate, in the seminal case *United States v. E.I. du Pont Nemours & Co.*,[49] a Section 2 suit was brought against a producer of cellophane plastic wrapping. The Court held that cellophane wrapping was not a sufficiently defined market, as there were other flexible packaging materials that a consumer could easily substitute in place of the defendant's cellophane packing material.[50] As the next section discusses, defining a relevant market in the context of an eMonopoly will not be as intuitive.[51]

2. Monopoly Power

Monopoly power is the second element of a Section 2 violation. Monopoly power refers to the "power to control prices or exclude competition" in relation to the relevant market.[52] The market share held by an alleged monopolist, although not dispositive of the ability to control the market, is a strong indicator of monopoly power, and courts ordinarily infer market power from dominant market share.[53] As a result, establishing monopoly power is a minimally controversial requirement in antitrust analysis.[54] Once again, however, application of monopoly power in the unique context of an Internet-based eMonopoly poses a problem: the inherent characteristics of Internet business predispose it to sustained monopoly power.[55]

3. Anticompetitive Conduct

The last element of Section 2 monopolization is the achievement of monopolistic market power through *anticompetitive conduct*.[56] This ensures that competitors who achieve their market power through vigorous and honest

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[49] *Id.* at 378.

[50] *Id.* at 400.

[51] *See infra* Part III.A.

[52] *E.I. du Pont Nemours*, 351 U.S. at 391.

[53] United States v. Grinnell Corp., 384 U.S. 563, 571 (1966) (outlining instances where market power was inferred from a showing of market shares of 80%, 90%, and 87%).

[54] *Id.* (stating that monopoly power can generally be inferred from market share, whereas the relevant market, in which to measure market share, may be more difficult to ascertain).

[55] *See infra* Part III.B.

[56] *Grinnell*, 384 U.S. at 570-71.

competition will not be punished for winning the competition, and in turn, avoids a disincentive to innovate.[57] Innovation is a major component of high-technology competition, where advancement and development occur at an unprecedented pace.[58] As such, it is crucial that antitrust enforcement in the new economy does not stifle innovation. Therefore, it is important that monopolistic conduct require something beyond mere dominant market share to avoid punishing a firm for securing economic success as a consequence of a "superior product, business acumen, or historic accident."[59] Indeed, "the law does not make mere size an offense."[60] An antitrust plaintiff must show that the defendant's conduct had an anticompetitive effect that outweighs any procompetitive justification the defendant may proffer.[61] Therefore, exclusion resulting from skill or foresight alone will not suffice absent a showing that the alleged monopolist acted on some basis other than profit maximization or operating efficiency.[62]

This standard appears to be straightforward—establishing a logical demarcation between permissible and prohibited conduct. In practice, however, the point at which aggressive competition becomes anticompetitive conduct is wholly unclear.[63] The clemency offered to competitors guilty of nothing more than aggressive competition reflects what seems to be a cost/benefit analysis and mirrors the "rule of reason" analysis applied in Section 1 claims.[64] Adhering to this characterization of Section 2 anticompetitive conduct, many litigants will often have to follow a pattern of allegation and counterallegation that looks as follows: (1) plaintiff must allege anticompetitive conduct and a resulting anticompetitive effect; (2) defendant must counter this allegation by proffering a pro-

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[57] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).

[58] Posner, *supra* note 7, at 925.

[59] *Grinnell*, 384 U.S. at 571.

[60] United States v. U.S. Steel Corp., 251 U.S. 417, 451 (1920).

[61] United States v. Microsoft, 253 F.3d 34, 58-59 (D.C. Cir. 2001).

[62] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 (1985).

[63] *See* U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT 34 (2008) [hereinafter DOJ, COMPETITION AND MONOPOLY], *available at* http://www.justice.gov/atr/public/reports/236681.pdf ("While there is general consensus that clearer and more predictable standards are desirable, legal scholarship and the record from the hearings suggest far less consensus on what those standards should be.").

[64] Harry First & Andrew I. Gavil, *Re-framing Windows: The Durable Meaning of the Microsoft Antitrust Litigation*, 2006 UTAH L. REV. 641, 650-51 (2006).

competitive justification; (3) the burden then shifts back to the plaintiff to rebut the defendant's procompetitive justification; and finally, (4) if the procompetitive justification remains unrebutted, the court will weigh the anticompetitive effects against the procompetitive justification.[65]

C. Sherman Act Section 2—Attempted Monopolization

Under Section 2, an antitrust action can also be brought under an *attempted-monopolization* theory.[66] Unlike straight monopolization claims—where the plaintiff must show an existing dominance in a relevant market—an attempted-monopolization claim comes before the creation of monopoly power that leads to market abuse.[67] An attempted monopolization claim requires the plaintiff to demonstrate three elements: (1) that the defendant is guilty of anticompetitive conduct, (2) that there is a "dangerous probability" of eventual monopoly power, and (3) that the defendant had a specific intent to achieve such monopolization.[68]

The distinctions between straight monopolization and attempted monopolization require a brief explanation. First, the *dangerous-probability* element calls for a consideration of the "relevant market and the defendant's ability to lessen or destroy competition in that market."[69] Courts generally consider this element in much the same way they consider the monopoly-power element of a straight monopolization claim, taking into account, of course, that they are applying a forward-looking perspective to the potential of monopolization and not the reality.[70] Given the theoretical underpinning of the claim, however, courts accept a lesser showing of market power for the dangerous-probability element.[71]

The second peculiarity that distinguishes an attempted monopolization case from a straight one—and an element that

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[65] *Microsoft*, 253 F.3d at 58-59.

[66] 15 U.S.C. § 2 (2006) ("Every person who shall monopolize, *or attempt to monopolize* . . . any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony." (emphasis added)).

[67] *See* Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 454-55 (1993).

[68] *Id.* at 456.

[69] *Id.*

[70] *See* DOJ, COMPETITION AND MONOPOLY, *supra* note 63, at 6-7.

[71] *See, e.g.*, Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1438 (9th Cir. 1995) ("[T]he minimum showing of market share required in an attempt case is a lower quantum than the minimum showing required in an actual monopolization case.").

will have consequences when applied to an attempted eMonopoly—is intent. The Supreme Court has enunciated why the intent element inheres in the attempted monopolization claim:

> Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen.[72]

The distinguishing factor is that an attempted monopolization has not yet achieved dominance; its only ostensible infraction is amassing a dangerous probability of monopoly power. Thus, to criminalize what is not yet a crime, the Court suggests, there must be intent to impermissibly "destroy competition or build monopoly."[73]

Finally, although conduct that is legal for a monopolist—efficiency-enhancing aggressive competition—is necessarily legal for an attempted monopolist, the same cannot be said for conduct that is ordinarily illegal for a monopolist.[74] If a firm lacks monopoly power but displays only a probability of potential monopoly power, its conduct could not have as much anticompetitive impact as a monopolist's conduct.[75] Although specific intent can be gleaned from the egregiousness of anticompetitive conduct,[76] such conduct by a web-based business is uniquely difficult to define, making it very difficult to sustain an attempted-monopolization claim against an attempted eMonopoly.[77]

II. ANTITRUST AND THE INTERNET

Like any other industry, the monopolization of the "information superhighway" components is not a surprising development. With the increased reliance on digital media and the near-ubiquitous presence of the Internet,[78] it is no wonder

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[72] *McQuillan*, 506 U.S. at 455 (quoting Swift & Co. v. United States, 196 U.S. 375, 396 (1905)).

[73] Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 626 (1953).

[74] DOJ, COMPETITION AND MONOPOLY, *supra* note 63, at 6.

[75] *Id.*

[76] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 609 n.39 (1985) ("Proof of specific intent to engage in [monopolistic conduct] may be in the form of . . . *evidence that the conduct was not related to any apparent efficiency*.").

[77] *See infra* Part IV.B.

[78] *See* INTERNET WORLD STATS, *supra* note 9.

that Internet-based businesses are seeing growing profits and expanding.[79] With the growth of some web-based businesses and the resulting entrenchment of dominant players, antitrust enforcement on behalf of less powerful competitors naturally follows to counter this pattern.[80] This part will briefly explore the nature of Internet businesses. It will focus on Google—the modern-day Internet giant—and explore Google's business practices, including its free services and the link to profit-producing components. In addition, this part will discuss how eMonopolies, Google in particular, have been challenged under the Sherman Act in the recent years.

A. Google's Internet Business

Google serves as a good example of a potential eMonopoly for several reasons. First, Google is the current monolith of the digital business world. Not only does it possess overwhelming market share in its primary search capacity,[81] but its menu of services seems to grow every day.[82] Second, Google displays characteristics that both warrant examination under, and discourage application of, the antitrust laws. Finally, the Obama administration has signaled that it plans to reverse the lax enforcement policies of its predecessor and step up antitrust enforcement in high-technology markets.[83] Google is a likely target given its growing stranglehold on Internet

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[79] Google announced on October 15, 2009 that its quarterly revenues for the quarter ending September 30, 2009 reached $5.94 billion, which represented a 7% increase over the revenues generated in the same quarter for the year 2008. Press Release, Google, Google Announces Third Quarter 2009 Results 1 (Oct. 15, 2009) [hereinafter Google 2009 Third Quarter], *available at* http://static.googleusercontent.com/external_content/untrusted_dlcp/www.google.com/en/us/intl/en/press/pressrel/2009Q3_earnings_google.pdf.

[80] In contrast to the increasing revenues reported by Google, *see id.*, Yahoo! reported third quarter revenues of $1.575 billion, which represents a 12% decrease from the third quarter 2008. Press Release, Yahoo, Inc., Yahoo! Reports Third Quarter 2009 Results 1 (Oct. 20, 2009), *available at* http://files.shareholder.com/downloads/YHOO/763515423x0x325221/05a85efe-1094-49b2-95bb-6de5ab880392/YHOO_Q32009EarningsRelease_Final.pdf.

[81] *See supra* note 17.

[82] For example, in October 2009, Google released a program called "Google Wave" to a limited number of testers. This program combines e-mail, chat, blogs and photo sharing into one comprehensive digital format. The program is contemplated by Google developers to be the future of online communication, supplanting e-mail. John D. Sutter, *Google Wave to Be Released to 100,000 Testers Wednesday*, CNN.COM (Sept. 30, 2009, 8:02 AM), http://www.cnn.com/2009/TECH/09/29/google.wave.beta/index.html. In addition, Google has recently expanded into travel services, providing information on flights and fares directly on its website. Brad Stone & Jad Mouawad, *Giant Step into Travel for Google*, N.Y. TIMES, July 2, 2010, at B1.

[83] Vogelstein, *supra* note 18.

business. It has even been singled out as a target by the head of the Antitrust Division.[84]

So far, Google's unilateral Internet domination has avoided monopolization scrutiny. Although its various combinations, such as Google-DoubleClick,[85] have raised eyebrows across the antitrust-enforcement regime, its unilateral conduct has not been subject to scrutiny.[86] This can be attributed in large part to the very reason for its dominance: its superior product and an altruistic business philosophy, exemplified by Google's motto, "Don't be evil."[87] But because it has amassed such dominant market power and because government oversight is likely to increase, every new product and service Google launches is likely to attract vigorous antitrust scrutiny.[88]

Google was founded in 1997, offering only a search engine.[89] This was the first service offered by Google[90] and remains the service for which it most well known. At the time of Google's founding, search engines were in their infancy and were not nearly as effective as they are today.[91] Rather than directing patrons to the sites that best served their needs, early search engines directed patrons to the sites that best served the needs of their advertising partners by funneling patrons to sponsored sites.[92]

Rejecting this consumer-second philosophy, Google implemented a revolutionary search-engine model known as PageRank, developed by founders Sergey Brin and Larry

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[84] *Id.*

[85] *See infra* Part II.B.1.

[86] Tom Krazit, *Google Adjusts to Life with Trustbusters*, CNETNEWS.COM (Sept. 29, 2009, 4:00 AM), http://news.cnet.com/8301-30684_3-10362108-265.html.

[87] The code of conduct states:

> "Don't be evil." Googlers generally apply those words to how we serve our users. But "Don't be evil" is much more than that. Yes, it's about providing our users unbiased access to information, focusing on their needs and giving them the best products and services that we can. But it's also about doing the right thing more generally—following the law, acting honorably and treating each other with respect.

Investor Relations, Code of Conduct, GOOGLE, http://investor.google.com/conduct.html (last updated Apr. 8, 2009).

[88] Krazit, *supra* note 86.

[89] Greg Lastowka, *Google's Law*, 73 BROOK. L. REV. 1327, 1334-35 (2008).

[90] *Id.*

[91] *Id.* at 1335.

[92] *Id.* at 1335-36.

Page.[93] PageRank is an algorithm-based program that calculates a website's relevance to a user's query. The program first calculates the popularity and importance of a website by the frequency with which it is linked throughout the Internet.[94] PageRank then analyzes the text, content, and even surrounding web pages of a site to determine how relevant those sites are to specific user searches.[95] By displaying its search results this way, Google separated itself from other search engines by returning "noticeably better [results] and allow[ing] users to obtain more relevant results in response to their search terms."[96]

With its superior product and growing user base, Google was able to adopt an advertising scheme that would eventually generate 97% of its total revenue.[97] Google's advertising scheme employs two main systems, AdWords and AdSense. AdWords allows advertisers to select keywords associated with their product.[98] When a user enters these keywords into a search query, the advertiser's ad is displayed alongside the search results as a link in a neutral panel under a header titled "Sponsored Links"; the link leads the user to the advertiser's web content.[99] This system allows Google to maintain the integrity of its search results while simultaneously directing users to the maximum number of relevant, paid advertisements.[100]

AdSense is Google's second major advertising scheme. In some respects, AdSense is a reverse of AdWords. Under this program, Google pays third-party websites to display AdWord ads generated by Google.[101] These are paid directly by Google, while Google receives the same revenue generated by AdWords

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[93] *Id.* at 1337.

[94] *Corporate Info, Technology Overview*, GOOGLE, http://www.google.com/corporate/tech.html (last visited Feb. 5, 2011).

[95] *Id.*

[96] Lastowka, *supra* note 89, at 1337.

[97] Google 2009 Third Quarter, *supra* note 79.

[98] *AdWords*, GOOGLE, https://adwords.google.com (last visited Feb. 5, 2011).

[99] Lastowka, *supra* note 89, at 1339. The neutral panel displaying the advertisement is not necessarily related to the search results. Therefore, Google simultaneously returns search results relevant to the search query and unrelated to sites from which Google generates revenue—thereby maximizing exposure of advertising partners without sacrificing search result integrity. *Id.*

[100] *Id.* at 1338-40.

[101] *See AdSense*, GOOGLE, http://adsense.google.com (last visited Feb. 5, 2011).

when the embedded AdWords-generated links are used on the third-party sites.[102]

With the ability to feed off of its dominant market share in search and generate impressive advertisement revenues as a result of that dominance, Google supplements its search service with other programs, such as Google News, Google Docs, and Gmail.[103] It is capable of such drastic expansion because this type of digital expansion requires very minimal start-up costs.[104] In fact, an increasingly common characteristic of Internet content is that it is user-generated.[105] For example, there is social-networking content on Facebook, MySpace, and Twitter, and multimedia content on YouTube—virtually all of which are user-generated.[106] Because these websites have to allot minimal resources into generating content, they have very small overhead costs, enabling a monopolist like Google to freely expand, grow, and entrench itself.

B. Recent Antitrust Enforcement

It is no wonder that the characteristics of web-based businesses—high rates of innovation, minimal start-up costs, and devoted user patronage—can quickly result in substantial domination in relevant digital markets. It follows, then, that such players in dominant positions are subject to intense antitrust investigation. Below is a sample of recent investigations and enforcement efforts triggered by the conduct of high-technology corporations. Note that investigation of Google has focused almost entirely on its multilateral combinations, not its unilateral anticompetitive conduct.

1. Google/DoubleClick Deal—2007

On April 13, 2007, Google announced its plans to "acquire DoubleClick, Inc., a global leader in digital marketing technology and services."[107] According to a Google press release,

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[102] Lastowka, *supra* note 89, at 1349.

[103] *See List of Google Products*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_Google_products (last modified Oct. 20, 2010).

[104] Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to High Technology Competition*, 44 WM. & MARY L. REV. 65, 86-87 (2002).

[105] *See* Evans, *supra* note 1, at 291.

[106] *Id.*

[107] Press Release, Google, Google to Acquire DoubleClick (Apr. 13, 2007), http://www.google.com/intl/en/press/pressrel/doubleclick.html.

"[the] transaction [would] strengthen [their] advertising network by expanding [their] access to publisher inventory and enabling [them] to serve the needs of a broader set of advertisers and ad agencies."[108] This result would be achieved by combining Google's already growing search-advertising platform with DoubleClick's innovative digital marketing technology that provides graphical display images.[109] This combination would expand Google's appeal to corporate advertisers and allow it to incorporate third-party advertisers,[110] such as those associated with Google's AdSense program.[111]

This merger was instantly recognized as an antitrust concern and was investigated by the FTC[112] and later by lawmakers in Congress.[113] Although much attention was given to the privacy concerns implicated by the agreement,[114] the anticompetitive potential inherent in such a combination threatened to further entrench Google in the search-advertising market to the point where no rival could compete.[115] The FTC eventually approved the agreement when the agency found that the agreement did not threaten to reduce competition since neither Google nor DoubleClick held "market power" in a relevant market.[116] Although the agreement eventually escaped antitrust enforcement, it is a good example

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[108] *Id.* (quoting Tim Armstrong, Google's President, Advertising and Commerce, North America).

[109] *Id.*

[110] *Id*.

[111] *See AdSense*, *supra* note 101.

[112] Iain Thomson, *FTC Investigates Google DoubleClick Deal*, PCAUTHORITY (May 30, 2007), http://www.pcauthority.com.au/News/82399,ftc-investigates-google-doubleclick-deal.aspx.

[113] Peter Kaplan, *US Lawmakers Plan Google-DoubleClick Deal Hearings*, REUTERS, July 18, 2008, *available at* http://www.reuters.com/article/idUSN183266972 0070719.

[114] The agreement increased Google's capacity to

> stor[e] information obtained through the retention of users' search terms in ways and for purposes other than those consented to or relied upon by such consumers; causing them to believe, falsely, that their online activities would remain anonymous; and undermining their ability to avail themselves of the privacy protections promised by online companies.

Thomson, *supra* note 112 (quoting Complaint and Request for Injunction, Request for Investigation and Other Relief, *In re* Google, Inc. and DoubleClick Inc., *available at* http://epic.org/privacy/ftc/google/epic_complaint.pdf); *see also infra* Part IV.C.2.

[115] *See* Kaplan, *supra* note 113.

[116] Fed. Trade Comm'n, Statement of the FTC Concerning Google/DoubleClick, FTC File No.071-0170, at 8-9 [hereinafter FTC on Google/DoubleClick], *available at* http://www.ftc.gov/os/caselist/0710170/071220statement.pdf.

of how Google's dominant position exposes each of its combinations to potential antitrust enforcement. It also shows how enforcement efforts have focused almost exclusively on Google's multilateral combinations.[117]

2. Proposed Google Books Settlement Agreement—2008-2009

Google was also the subject of an antitrust investigation in October 2008.[118] At that time, a settlement agreement was announced in the ongoing copyright-infringement litigation between Google, Inc., and the Association of American Publishers over the Google Books Project.[119] The Google Books Project attempted to scan millions of copyrighted works of literature into Google's digital database.[120] The agreement—which would have released Google from copyright liability and established a Book Rights Registry with the authority to negotiate on behalf of the copyright owners as a class[121]—awakened fears of an Internet-based monopoly on digital literature.[122]

The potential for a single information source through the consolidation of media outlets is not unlikely. And it would hinder the achievement of media's primary purpose: a gateway to "information that enables citizens to participate in the democratic process."[123] The Google Book Settlement Agreement would have effectively established a single source for digital copyrighted literature and appeared to be an initial stepping stone to a

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[117] *See* Krazit, *supra* note 86 (highlighting recent antitrust scrutiny limited to multi-party collusive conduct).

[118] *See generally* James Grimmelman, *How to Fix the Google Book Search Settlement*, J. INTERNET L., Apr. 2009, at 1, 11-20; Statement of Interest of the United States of America Regarding Proposed Class Settlement, Authors Guild, Inc., v. Google Inc., No. 05-CV-8136-DC (S.D.N.Y. Sept. 18, 2009) [hereinafter DOJ Brief], *available at* http://thepublicindex.org/docs/letters/usa.pdf.

[119] *See* Proposed Settlement, *Authors Guild*, No. 05-CV-8136-DC, *available at* http://www.googlebooksettlement.com/r/view_settlement_agreement.

[120] Jonathan Band, *A Guide for the Perplexed: Libraries and the Google Library Project Settlement*, AMERICAN LIBRARY ASSOCIATION (Nov. 13, 2008), http://www.arl.org/bm~doc/google-settlement-13nov08.pdf.

[121] Proposed Settlement—Article VI, *Authors Guild*, No. 05-CV-8136-DC, *available at* http://www.googlebooksettlement.com/r/view_settlement_agreement.

[122] *See generally* Grimmelman, *supra* note 118.

[123] Sen. Paul Wellstone, *Growing Media Consolidation Must Be Examined to Preserve Our Democracy*, 52 FED. COMM. L.J. 551, 551 (2001).

consolidation of information sources, akin to the consolidation observed in other media.[124]

Indeed, the antitrust implications of the settlement garnered so much opposition that the agreement was scrapped,[125] and a modified settlement was negotiated. Paramount among the opponents was the DOJ, which filed a statement of interest in the case.[126] The DOJ's brief highlighted the difficulties raised by the Books Rights Registry—namely, its exclusive authority to negotiate on behalf of the certified class and its inclusion of orphan works.[127]

The DOJ raised several arguments. After making arguments not directly relevant to this note,[128] the DOJ contended that the agreement granted Google substantially unrivaled ability to sell a complete database of "orphan works."[129] Orphan works are copyrighted works of copyright holders who are difficult or impossible to contact.[130] If Google is given exclusive right to display these works, and their orphan status precludes others from making similar agreements, no other competitor would be able to match that capability. In so doing, the DOJ argued, Google would erase any possibility of interchangeability.[131]

In light of the DOJ's objections and the accompanying threat of litigation, the settlement was revised, and a modified agreement was filed in federal district court on November 13, 2009.[132] The revised agreement addressed the DOJ's concerns

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[124] *See* Viktor Mayer-Shonberger, *In Search of a Story: Narratives of Intellectual Property*, 10 VA. J.L. & TECH. 11, ¶¶ 36-37 (2005). Mayer-Shonberger documents how the "six major" telecommunications companies control over 96% of the market in cinemas and that the mergers creating AOL/Time-Warner and the like will only expedite that consolidation. *Id.* ¶ 42.

[125] Motoko Rich, *Google to Revise a Book Pact by Nov. 9*, N.Y. TIMES, Oct. 8, 2009, at B2.

[126] *See generally* DOJ Brief, *supra* note 118.

[127] *Id.* at 24.

[128] The DOJ first challenged the class certification arguing that it violated Federal Rule of Civil Procedure 23. *Id.* at 4-5. Next, the DOJ argued that the Books Rights Registry would give the publishers, acting collectively, impressible authority to restrict prices in violation of Section 1 of the Sherman Act. *Id.* at 16.

[129] *Id.* at 24.

[130] *Orphan Works*, WIKIPEDIA, http://en.wikipedia.org/wiki/Orphan_works (last modified Sept. 14, 2010).

[131] DOJ Brief, *supra* note 118, at 24.

[132] Amended Settlement Agreement, Authors Guild, Inc. v. Google Inc., No. 05-CV-8136-DC (S.D.N.Y. Nov. 13, 2009), *available at* http://books.google.com/google books/agreement. The Court granted preliminary approval on November 19, 2009. *See* Order Granting Preliminary Approval of Amended Settlement Agreement, Authors

and amended those sections that would have granted Google sole control over orphan works.[133] It stipulated that the "power to act with respect to the exploitation of [orphan works] . . . under the Amended Settlement will be delegated to an independent fiduciary."[134] The fiduciary would act as a trustee and would contract, on behalf of the unclaimed works, with companies that wished to digitize these works.[135] Therefore, under the amended agreement, companies other than Google would have the opportunity to digitize orphan works, whereas the original agreement gave these rights only to Google, eliminating any potential competitive advantage.[136]

Google Books provides a good example of how a web-based business can use the unique capabilities of the Internet to expand a well-established business platform. Google attempted to garner a settlement that not only would have given it sole control of an entire category of literature—orphan works—but also would have imposed a heavy burden on its competitors that sought to reach an analogous agreement.[137] As a result, Google raised the eyebrows of antitrust enforcers and attracted heavy criticism. But once again, that criticism, exemplified by the DOJ's brief, relied on antitrust violations resulting from combination and contract, not unilateral anticompetitive conduct.[138]

3. Intel Litigation—2009

Although Google seems to have escaped antitrust liability under Section 2, other new-economy firms have been successfully sued for Section 2 violations. A recent example is the New York State Attorney General's suit against Intel Corp.

Guild, Inc. v. Google Inc., No. 05-CV-8136-DC (S.D.N.Y. Nov. 19, 2009), *available at* http://books.google.com/googlebooks/agreement.

[133] Brad Stone & Michael Helft, *Google and Partners Revise Terms of Digital Book Deal*, N.Y. TIMES, Nov. 14, 2009, at B2.

[134] Amended Settlement Agreement at sec. 6.2(b)(iii), *Authors Guild*, No. 05-CV-8136-DC, *available at* http://books.google.com/googlebooks/agreement.

[135] Stone & Helft, *supra* note 133.

[136] *Id.*

[137] *See* Grimmelman, *supra* note 122, at 14. Professor Grimmelman argues that, although the settlement agreement did not explicitly prevent others from implementing a book scanning program and seeking licenses independently, the transactional costs associated therewith would have precluded any such effort, while Google would take advantage of a settlement giving it clean release and an instantly negotiated position. *Id.*

[138] DOJ Brief, *supra* note 118, at 17 (citing violations of 15 U.S.C. § 1, which outlaws collective action).

Filed on November 3, 2009, the attorney general's complaint alleged that Intel illegally monopolized the microprocessor market.[139] Specifically, the complaint alleged that Intel abused its 80% market share of the microprocessor market by using "threats and coercion, bribing and bullying to preserve its market dominance."[140] In so doing, the complaint contended, Intel anticompetitively strengthened its position in the market by preventing computer manufacturers (such as Dell) from installing microprocessors manufactured by Intel rivals (such as Advanced Micro Devices).[141]

The allegations in New York's suit are certainly serious. Intel argued that its conduct benefitted consumers by providing lower prices and promoting efficient innovation.[142] This argument highlights the difficulty of Section 2 enforcement in high-technology markets. Nevertheless, the allegations represent the nature of anticompetitive conduct typical of successful Section 2 claims. In fact, Intel eventually settled the suit—and others based on similar impermissible conduct—for $1.25 billion.[143] While the Intel litigation is a good example of high-technology Section 2 enforcement, it falls short of showing how like claims would be levied against web-based businesses like Google, whose anticompetitive conduct is more ambiguous and whose business takes place in a far more innovative environment.

III. APPLICATION OF ANTITRUST PRINCIPLES TO EMONOPOLIES

Antitrust enforcement of new-economy markets faces obstacles for various reasons, ranging from the industry's dynamic nature to the antitrust enforcement regime's relative inexperience in the industry.[144] Further complications arise

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[139] *See generally* Complaint, New York v. Intel Corp., No. 09-CV-827 (D. Del. filed Nov. 3, 2009), *available at* http://www.oag.state.ny.us/media_center/2009/nov/NYAG_v_Intel_COMPLAINT_FINAL.pdf.

[140] *Id.* ¶ 9.

[141] Ashlee Vance, *State Accuses Intel in an Antitrust Suit*, N.Y. TIMES, Nov. 5, 2009, at B1.

[142] *Id.*

[143] Press Release, Intel Inc., AMD and Intel Announce Settlement of All Antitrust and IP Disputes (Nov. 12, 2009), http://www.intel.com/pressroom/archive/releases/2009/20091112corp_a.htm?iid=pr1_releasepri_20091112ra.

[144] *See* Piraino, *supra* note 104, at 69-71. Piraino argues that antitrust enforcement may not be apt for high technology markets because the "pace of technological change is so swift, and so transforming, that no firm can hold monopoly power in a high technology market for a meaningful period," *id.* at 70, and that "courts

from the Internet's model of free, as it is incongruent with the underlying rationale of antitrust law. Antitrust law stems from the idea that competition in a relevant market requires potential competitors to make products at a minimal input cost, and at a price likely to attract consumers—all while turning a profit.[145] Internet businesses' model of free, on the other hand, operates mostly on advertising revenue with near-zero production costs.[146] This translates to no cost for the consumer. Therefore, the traditional model of antitrust—where economic effects like pricing take center stage—is seemingly inapplicable when confronting an Internet business unlikely to impose abusive price restrictions on consumers.

Of course, a distinction must be made in the ability to impose price restrictions between the impact on consumers and the impact on customers. The customer of a search engine is not a web user. The contention that Google—or any other eMonopoly—operates entirely on free is a mischaracterization of the industry. If this were the case, and there were no revenue generating component, there would be no desire to ensure free competition in the first place. Rather, Google operates as a "multi-sided platform," providing "goods or services to two or more distinct groups of customers who need each other in some way and who rely on the platform to intermediate transactions between them."[147]

Advertisers are the customers of a web-service provider, and it is advertising space and other for-pay services[148] offered by these Internet businesses that give rise to the threat of anticompetitive and abusive conduct. But a potential advertiser would not allot substantial expense for advertising space on Google just because it is available. Rather, an advertiser invests substantial advertising expenses on those sites that offer the broadest exposure. Therefore, advertisers will intuitively prefer sites with a wider market share of popular, free online services. As a result, a business that offers one component, infinite in supply and at no cost (i.e., a search engine, e-mail, instant messaging, etc.), uses the dominant

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and antitrust enforcement agencies" simply know too little about the economic implications of these businesses. *Id.* at 69.

[145] SHENEFIELD & STELZER, *supra* note 21, at 7.

[146] *See* Anderson, *supra* note 11 ("[T]he incremental cost of serving one more Web page to one more user is almost nothing—and falling as technology gets cheaper.").

[147] Evans, *supra* note 1, at 292-93.

[148] Take, for example, the profits that would be generated under the Google Books Settlement Agreement. *See supra* Part II.B.2.

market share in that component to influence the value of an unrelated component that is in finite supply (i.e., advertising space) and for which it can charge a price.[149] In other words, it is a website's popularity with consumers that makes it wealthy, not its popularity with advertisers.[150] As a result, monopolization of the former threatens monopolization of the latter.

Section 2 of the Sherman Antitrust Act prohibits the unilateral monopolization of a relevant market by means of exclusionary or anticompetitive conduct.[151] But due to the peculiarities of the Google monopoly—particularly with respect to the means by which market power has been amassed—traditional Section 2 actions will have difficulty surviving motions to dismiss. To present a cognizable claim under Section 2, plaintiffs must show not only monopoly power in a relevant market, but also 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."[152] Plaintiffs have struggled to establish relevant markets in the context of search-engine monopolization and distinguish unlawful anticompetitive conduct from lawful acquisition of market power,[153] both of which suggest hampered potential for antitrust enforcement.

This part will look at how the development of high-technology antitrust application and the nature of Internet business pose a problem for Section 2 enforcement against unilateral eMonopolies by demonstrating the difficulty of satisfying the essential elements of a Section 2 claim.

A. Relevant Market

The first issue in relevant market analysis is how the concept of interchangeability carries over to Internet

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[149] *See* Mike Masnick, *The Grand Unified Theory on the Economics of Free*, TECHDIRT.COM (May 3, 2007, 12:23 PM), http://www.techdirt.com/articles/20070503/012939.shtml.

[150] *Cf.* Lastowka, *supra* note 89, at 1330-32 (explaining the Google founders' understanding that a successful search engine tailors to the needs of the consumer first).

[151] 15 U.S.C. § 2 (2006).

[152] Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) (quoting United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966)).

[153] *See, e.g.*, Live Universe, Inc. v. MySpace, Inc., 304 Fed. App'x 554 (9th Cir. 2008); Person v. Google, Inc., No. C 06-7297, 2007 U.S. Dist. LEXIS 47920 (N.D. Cal. June 25, 2007); Kinderstart.com, LLC, v. Google, Inc., No. C 06-7297, 2007 U.S. Dist. LEXIS 22637 (N.D. Cal. Mar. 16, 2007); *see also infra* Parts III.A.1, III.A.3.

businesses, many of which provide their services free of charge. Some courts have held that, where services are provided for free, the absence of sales precludes the existence of a relevant market.[154] Other courts have been less restrictive in their interpretation, holding that relevant markets can exist in the absence of sales where services are provided for free.[155]

As noted above, the free services offered by websites like Google, including e-mail, maps, and search, are not the only products offered. On the contrary, what these companies sell is advertising space, a limited resource that rises in value in direct proportion to the popularity of the free, infinite resources.[156] In this regard, antitrust plaintiffs have argued that search advertising is a relevant market "because there are no effective competitive alternatives to search advertising available to search advertisers."[157] Moreover, they argue, search advertising is unique compared to other advertising because search advertising is married to search queries in a way that allows an unparalleled level of relevance in the advertising displayed on the webpage.[158] In other words, search advertising displays advertisements calculated to appeal to specific users because they are generated by a manifestation of that user's interest—the search query. Other forms of advertising do not have such fine-tuned mechanism for identifying consumer interests.

At least one court has rejected the argument that search and search advertising are, in and of themselves, relevant markets. In *Kinderstart.com LLC v. Google, Inc.*, the plaintiff alleged that Google had violated Section 2 by attempting to monopolize two distinct markets: the Search Market and the Search Ad Market.[159] The Northern District of California disposed of the Search Market argument on the grounds that search is only a gateway to revenue from other sources and

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[154] *See, e.g.*, *Person*, 2007 U.S. Dist. LEXIS 47920, at *11 n.6 (acknowledging the rejection of the search market as a relevant market); *Kinderstart.com*, 2007 U.S. Dist. LEXIS 22637, at *15 (declining to define a relevant market in terms of search engines, noting that there is "no authority indicating that antitrust law concerns itself with competition in the provision of free services").

[155] *See, e.g.*, *Live Universe*, 304 Fed. App'x at 556 (acknowledging the existence of defendant's dominant market share in the social networking website market).

[156] *See* Masnick, *supra* note 149.

[157] Complaint at ¶ 61, TradeComet.com LLC v. Google, Inc., 693 F. Supp. 2d 370 (S.D.N.Y. 2009) (No. 09-CV-1400), *available at* http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2009cv01400/340565/1/0.pdf.

[158] *Id.*

[159] *Kinderstart.com*, 2007 U.S. Dist. LEXIS 22637, at *12-13.

that no revenue is derived directly from search.[160] Because the service is free and nothing is being sold, the court held that the plaintiff could not demonstrate a "grouping of sales" necessary to establish a relevant market.[161]

The court disposed of the Search Ad Market theory as well, holding that search advertising is too narrow a definition of a relevant market because it is no different than general advertising; therefore, the two can be reasonably interchanged.[162] The court reasoned that search and general advertising were indistinct because an advertiser can simply choose to post advertisements independently of any search.[163]

There is not much judicial analysis of search and search advertising as a relevant market under Section 2. The search market—and the fact that it is free—represents a uniquely difficult application. Although a product exists that can be interchanged by users, the absence of sales may make that fact irrelevant. As the *Kinderstart.com* court noted, some courts characterize relevant markets in terms of "grouping of sales" and "buyers."[164] This definition could indicate that sales or exchanges are required for a relevant market. But this remains an open question.

As for the search ad market, it is likely that future courts will not follow *Kinderstart.com*'s narrow interpretation of relevant markets to search advertising. If the underlying limit of a relevant market is the set of products that are "reasonably interchangeable by consumers for the same purposes,"[165] and in this context, the consumer is an advertiser, there may be weight to the argument that the search ad results are programmed differently and provide a substantially different product—namely, results catered to the interests of the user versus general advertising.[166] On the other hand, the argument can be made that search advertising is simply superior (as opposed to different) and, therefore, the court in

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[160] *Id.* at *15.

[161] *Id.*

[162] *Id.* at *16.

[163] *Id.*

[164] *See id.* at *14 (quoting Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995) ("A 'market' is any *grouping of sales* whose sellers, if unified by a monopolist or a hypothetical cartel, would have market power in dealing with any group of *buyers*." (emphasis added))).

[165] United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395 (1956).

[166] *See* Complaint at ¶ 61, TradeComet.com LLC v. Google, Inc., 693 F. Supp. 2d 370 (S.D.N.Y. 2009) (No. 09-CV-1400), *available at* http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2009cv01400/340565/1/0.pdf.

Kinderstart.com was right to reject a distinction between search advertising and general advertising.[167]

Given the limited litigation on search and search advertising as relevant markets, it remains unclear how they will be interpreted in the future. One suggested approach has been to define relevant markets based on a distinction between markets for data and markets for the expanded use of data.[168] Commentators have argued that drawing this distinction would appropriately acknowledge the function of Internet business and, in so doing, identify markets actionable under Section 2.[169] It would seem, however, that this approach, which defines markets abstractly based on the subtle nuances of Internet business, would be just as problematic as definitions based on the subtle differences between search and search advertising. Regardless of the approach, application of this Section 2 element poses a potential obstacle to future antitrust enforcement against eMonopolies.

B. Monopoly Power

After defining the relevant market, a Section 2 claim requires a showing that the alleged monopolist possesses monopoly power in the relevant market sufficient control that market.[170] Although market share is a powerful indicator of monopoly power in a relevant market, other characteristics can contribute to a finding of monopoly power, such as the freedom of entry into the field.[171]

1. Market Share

By all accounts, Google has a dominant share of the Internet-search market.[172] As discussed above, the general view is that "high market share, though it may ordinarily raise an inference of monopoly power, will not do so in a market" where

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[167] *See Kinderstart.com*, 2007 U.S. Dist. LEXIS 22637, at *16.

[168] Pamela Jones Harbour & Tara Isa Koslov, *Section 2 in a Web 2.0 World: An Expanded Vision of Relevant Product Markets*, 76 ANTITRUST L.J. 769, 772-73 (2010).

[169] *Id.* at 773, 785-86. In addition, the authors point to investigatory precedent to defend the position of defining markets based on data collection. *See id.* at 787-92.

[170] *See E.I. du Pont de Nemours*, 351 U.S. at 391 (monopoly power is "the power to control prices or exclude competition").

[171] *See* United States v. Microsoft, 253 F.3d 34, 54-55 (D.C. Cir. 2001).

[172] *See supra* note 17.

the alleged monopolist cannot exert market control.[173] But Google's share of the Internet-search market is nearly 80%.[174] This market share, although not a complete domination of the search market, embodies overwhelming market power given that Google's nearest competitor is Yahoo! at a paltry 9%.[175] In light of the Google search engine's strong user base and vitality to the overall structure of e-commerce,[176] such a disproportionate market share may very well indicate monopoly power.

2. Barriers to Entry

Although market share alone may be sufficient to establish monopoly power in a relevant market,[177] market share can be misleading because it represents today's reality without consideration of contrary developments tomorrow.[178] Other factors thus become relevant in the analysis as well. One intriguing concept in determining the existence of monopoly power is the presence of *barriers to entry*. A barrier to entry is essentially a characteristic or structural reality of the relevant market that prevents emerging entrants from establishing a foothold, and, as a result, protects an entrenched competitor's dominant position.[179]

In *United States v. Microsoft,* the court examined the barriers to entry in the software market.[180] The court explained how the software industry is subject to a "chicken-and-egg" scenario that precludes emerging entrants from entering the field.[181] According to the court, because most consumers prefer

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[173] Oahu Gas Serv., Inc. v. Pac. Res., Inc., 838 F.2d 360, 366 (9th Cir. 1988) (internal citations omitted).

[174] *Bing's Loss, Google's Gain*, *supra* note 17.

[175] *Id.*

[176] *See* Kinderstart.com, LLC v. Google, 2007 U.S. Dist. LEXIS 22637, at *11 (N.D. Cal. 2007) (plaintiff argued that Google's search engine is an "essential facility" for offering, marketing and delivering services over the Internet and Google's conduct in administering the search engine affected competition).

[177] *See* United States v. Grinnell Corp., 384 U.S. 563, 571 (1966).

[178] *See* Ball Mem'l Hosp. v. Mutual Hosp. Ins., 784 F.2d 1325, 1336 (7th Cir. 1986) ("Market share reflects current sales, but today's sales do not always indicate power over sales and price tomorrow."); Hunt-Wesson Food, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 924 (9th Cir. 1980) ("Blind reliance upon market share, divorced from commercial reality, could give a misleading picture of a firm's actual ability to control prices or exclude competition.").

[179] *See* United States v. Microsoft, 253 F.3d 34, 54-55 (D.C. Cir. 2001).

[180] *Id.*

[181] *Id.*

operating systems that already support a large number of applications, and because most manufacturers will develop applications supported by only the most popular operating systems, Microsoft's current market control will only perpetuate and expand.[182] A competitor would not be able to muscle into the market because application developers would not write applications for their operating systems as there are no consumers. Likewise, no consumers would purchase the operating system because it does not have applications written for its use.

This phenomenon is clearly present in the case of a Google eMonopoly and may in fact be even more restrictive than Microsoft's monopoly against potential competitors. In the case of an eMonopoly that predicates its dominant market position on free online services through a website, there is a substantial likelihood that the website will have a large user base. With a large user base comes more advertising revenue. This finite market for revenue-generating advertising is contingent upon the value of the unlimited free component[183]—the very same component over which the eMonopoly already possesses a monopoly market share. Therefore, an emerging entrant will not have the opportunity to generate sufficient user traffic to overcome the entrenched competitor's dominance.[184] Moreover, at least in the case of Google, the predicate monopoly over search has arguably been achieved through a substantially superior product.[185] Although there is a barrier to entry precluding a competitor from establishing a foothold in the market, the barrier was erected through superiority, not an attempt to exclude a rival. Therefore, the barrier may not be an impermissible result of anticompetitive behavior.[186]

C. Anticompetitive Conduct

The third element of a Section 2 claim presents the biggest obstacle when applied to Internet-based monopolies like Google. Because anticompetitive conduct must be

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[182] *Id.*

[183] *See* Masnick, *supra* note 149.

[184] TradeComet.com LLC v. Google, Inc., No. 09-CV-1400 at ¶ 67 (S.D.N.Y. filed Feb. 17, 2009), *available at* http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2009cv01400/340565/1/0.pdf.

[185] *See infra* Part III.C.

[186] *See* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 (1985) (prohibiting exclusion of a rival only when doing so achieves no efficiency).

aggressively competitive (directly impeding the success of competitors), as opposed to passively competitive (impeding the success of competitors indirectly by having a better product), the conduct of a major online monopoly does not fall clearly within the definition of anticompetitive conduct.

To illustrate this concept, consider Google's market share in Internet search and search advertising. Assuming, under the above analysis, that Google does have the power to shape the e-commerce marketplace,[187] this lopsided market share only satisfies the first prong of a Section 2 claim. The plaintiff would still have to show anticompetitive conduct.

In Google's case, anticompetitive conduct would be difficult to establish because Google's dominance is the result of an arguably superior product, which is perfectly permissible under Section 2 jurisprudence.[188] At the time Google launched in 1997, the search-engine market was infested with inefficient systems that failed to provide users with relevant or useful results.[189] Instead, early search engines offered search results linked to advertisers.[190] Google's founders brought a new philosophy to search engines that revolutionized the industry.[191] Google veered from the default algorithm approach to parsing a website's relevance, instead using a formula that calculated the frequency with which a website is hyperlinked as a barometer for relevance.[192] The PageRank system "made Google's search results noticeably better and allowed users to obtain more relevant results in response to their search terms."[193]

Therefore, we see that Google has not developed its dominant market share of the search market by illegal anticompetitive means. Rather, through its superior product, Google has "acquire[d] monopoly power by establishing an infrastructure that renders [it] uniquely suited to serve [its] customers."[194] As a result, advertisers naturally gravitated to Google.[195] Unfortunately for Google's competitors, the antitrust

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[187] *See supra* Part III.B.

[188] *See* United States v. Grinnell Corp., 384 U.S. 563, 571 (1966).

[189] Lastowka, *supra* note 89, at 1335.

[190] *Id.* at 1335-36.

[191] *See id.* at 1337.

[192] *Id.*

[193] *Id.*

[194] Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).

[195] *See* Lastowka, *supra* note 89, at 1339-40 (discussing the development of Google's advertising platform and resulting advertising revenue).

laws do not prohibit "compet[ition], whether against the competitive fringe in its monopoly market or against potential competitors, as vigorously as a firm in an ordinary competitive market . . . [,] provided it doesn't employ tactics calculated to drive an equally" equipped competitor from the market.[196]

That being said, a large focus of antitrust in the new economy is the ability of a firm with monopoly share to ward off new entrants and prevent efficient challenges to a monopoly in another market.[197] In this sense, it is possible for Google to take its dominant market share in search, which is free to the consumer, and link it to another service. In so doing, Google would effectively bar competitors that do not enjoy a dominant, preexisting client base from challenging a potential Google monopoly in that ancillary service.[198]

Would Google's attempt to link its preexisting search market dominance with a secondary digital service, such as a potential Google Books Project, constitute anticompetitive conduct rendering the monopoly illegitimate?[199] Generally, conduct will be deemed anticompetitive if it negatively effects the competitive opportunities of rivals and lacks an independent business justification that furthers competition on the merits.[200]

Two Section 2 cases shed light on the practice of linking a new service to preexisting market power. In *Live Universe, Inc. v. MySpace, Inc.*, the plaintiff alleged that MySpace deactivated the embedded links on its social-networking site that led users to the plaintiff's networking site.[201] The plaintiff

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[196] Posner, *supra* note 7, at 931.

[197] *Id.* at 931-32.

[198] *See* Gary L. Reback, Remarks at the New York Law School Conference: D Is for Digitize (Oct. 10, 2009), *video available at* http://www.nyls.edu/centers/harlan_scholar_centers/institute_for_information_law_and_policy/events/d_is_for_digitize/program).

[199] *See* Stone & Mouawad, *supra* note 82 (quoting Samuel R. Miller, antitrust lawyer at Sidley Austin) ("Every time Google makes another acquisition, it only reinforces the argument that they are basically trying to acquire other companies that may present potential competition to their core dominance in paid search.").

[200] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 n.32 (1985); *see, e.g.*, Coal. for ICANN Transparency, Inc. v. VeriSign, Inc., 611 F.3d 495, 503-09 (9th Cir. 2010) (defendant's predatory litigation activity aimed at coercing plaintiff to perpetuate defendant's role as exclusive regulator of the dot-com domain name market by awarding defendant contract extension without any competitive bidding was found to be anticompetitive conduct because it lacked any independent business justification).

[201] Live Universe, Inc. v. MySpace, Inc., 304 Fed. App'x 554, 556-57 (9th Cir. 2008).

alleged that this was a refusal-to-deal[202] course of conduct and constituted anticompetitive exclusion of a competitor.[203] The Ninth Circuit disagreed and held that MySpace's decisions concerning the content that it displayed on its site were not made for any purpose beyond maximization of profits.[204] Therefore, despite MySpace's concession that it had monopoly market share in social networking,[205] MySpace's conduct in administering and censoring that monopoly was not subject to antitrust oversight absent a claim that the conduct lacked an independent business justification.[206]

In *United States v. Microsoft*, the government accused Microsoft of anticompetitive monopolization in bundling its self-designed Internet browser, Internet Explorer, with its already popular Windows operating system.[207] Microsoft was found to have an overwhelming dominant market share: 95% of the defined market of Intel-compatible PC operating systems.[208] Because Microsoft prohibited removal of Internet Explorer from its operating interface, computer manufactures were given no choice but to promulgate the use of Microsoft's browser.[209] By mandating retention of its own browser and effectively barring the use of rival browsers (specifically the Netscape-designed Navigator browser) Microsoft could avoid the threat of other browser manufacturers amassing enough usage to attract developers to other operating systems.[210]

The D.C. Circuit concluded that Microsoft's conduct had an anticompetitive effect because manufacturers had a disincentive to install rival browsers.[211] This effect, the court noted, "reduce[d] the usage share of rival browsers not by making Microsoft's own browser more attractive to consumers but, rather, by discouraging [manufacturers] from distributing

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[202] Refusal to deal is a theory of liability wherein a monopolist, under certain circumstances, cannot refuse to deal with a rival. *See* DOJ, COMPETITION AND MONOPOLY, *supra* note 63, at 119-20.

[203] *Live Universe*, 304 Fed. App'x at 556.

[204] *Id.* at 557.

[205] *Id.* at 556.

[206] *Id.* at 557.

[207] United States v. Microsoft, 253 F.3d 34, 47 (D.C. Cir. 2001).

[208] *Id.* at 54.

[209] *Id.* at 60-61.

[210] *Id.* at 60.

[211] *Id.* at 61. The Court accepted the manufacturers' claim that dual installation of rival browsers would lead to user confusion, which would increase the manufacturers' support costs when they inevitably dealt with associated consumer inquiries. *Id.*

rival products"[212] and, in the absence of any justification beyond preserving operating system monopoly, Microsoft's conduct was most decidedly anticompetitive.[213] This case provides a useful look at a high-technology firm linking a preexisting market share with burgeoning aspects of its overall business scheme. Microsoft was found liable under Section 2 because it took affirmative steps to reduce its rivals' market share with no independent business justification of furthering competition on the merits.

Live Universe and *Microsoft* do not bode well for antitrust enforcement against modern eMonopolies, notwithstanding the distinct advantage firms like Google would possess. It is unlikely that Google's conduct would be considered tantamount to Microsoft's "unlawful campaign to eliminate competition, deter innovation, and restrict consumer choice."[214]

First, by supplementing its menu of services and expanding on its dominant control of web traffic, Google would be doing nothing more than controlling the content on its own web pages in an effort to maximize profits. As in *Live Universe*, without a showing that Google is acting contrary or beyond this objective, no anticompetitive conduct will be found.[215] Generally, courts refuse to find anticompetitive conduct where the defendant acts to promote its own competitive appeal.[216]

Similarly, Google would not be forcing anyone's hand in mandating use of the ancillary service. Microsoft was admonished for prohibiting removal of an application from an operating system of which it had a monopoly market share[217] because, by doing so, it prevented rival software developers from offering their own browsers. As a platform provider, Microsoft could impermissibly control the availability of competitor-developed applications because it controlled the

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[212] *Id.* at 65.

[213] United States v. Microsoft, 253 F.3d at 66.

[214] Press Release, U.S. Dep't of Justice, Statement of Assistant Attorney General Joel I. Klein, Filing of Antitrust Suit Against Microsoft (May 18, 1998), http://www.justice.gov/atr/public/press_releases/1998/1770.pdf.

[215] *See* Live Universe, Inc. v. MySpace, Inc., 304 Fed. App'x 554, 557 (9th Cir. 2008).

[216] *See, e.g.*, Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr. of Durango, 582 F.3d 1216, 1225 (10th Cir. 2009) (holding that a refusal to deal with plaintiff was justifiable because it sought to "avoid an *unprofitable* relationship, and that the [defendant] pursued the course it did to protect and maximize its chances of profitability in the short-term.").

[217] United States v. Microsoft, 253 F.3d 34, 61 (D.C. Cir. 2001).

medium by which those applications were delivered—the operating system.[218] Google, on the other hand, would be supplementing its own online services. It would be providing its own applications to its own platform, unlike Microsoft's vertical restriction that allowed it to control the service that gave life to competitors' products.[219] Where Microsoft mandated implementation of its product, Google would be merely making its services available to anyone who chooses to use it. Those that choose not to use it can simply use the Internet without going through Google.[220]

An argument can be made, however, that Google, in returning results for its own services more favorably than those of competitors, is eschewing its PageRank search formula and promoting its own welfare anticompetitively.[221] If Google is indeed promoting its own self-interest at the expense of even-handed application of its PageRank formula, any resulting monopoly in ancillary services would stem from something beyond its superior product.

In this case, Google may be exposed to liability under the *essential-facilities doctrine*. The essential-facilities doctrine imposes liability when a firm in control of an essential facility denies a second firm access to a service necessary for competition and accessible only through that essential facility.[222] It requires a showing that (1) a monopolist had control of an essential facility, (2) a competitor lacks the ability to duplicate the facility, (3) the monopolist denied use of the facility to the competitor, and (4) the facility could be reasonably provided.[223] The argument would allege that Google's search engine, powered by PageRank, represents an essential facility for offering, marketing and delivering services

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[218] *See* Philip J. Weiser, *Regulating Interoperability: Lessons from AT&T, Microsoft, and Beyond*, 76 ANTITRUST L.J. 271, 271 (2009) (examining the antitrust implications of the tensions between producers of applications and the producers of the platforms on which applications are run).

[219] *See id.*

[220] Vogelstein, *supra* note 18. In fact, Google CEO Eric Schmidt contends that this voluntary use of Google is a conscious strategy implemented in response to Microsoft's "misdeeds." *Id.*

[221] *Cf.* GARY L. REBACK, FREE THE MARKET!: WHY ONLY GOVERNMENT CAN KEEP THE MARKETPLACE COMPETITIVE 160-61 (2009) (explaining the allegations that Microsoft, in the 1990s, used its dominant position in the operating system market to anticompetitively enable Microsoft software developers to obtain an advantage over competitors).

[222] Robert Pitofsky et al., *The Essential Facilities Doctrine Under U.S. Antitrust Law*, 70 ANTITRUST L.J. 443, 446 (2002).

[223] MCI Commc'ns Corp. v. AT&T Co., 708 F.2d 1081, 1132-33 (7th Cir. 1983).

over the Internet.[224] By refusing to grant certain competitors access to the benefits of PageRank, the agreement goes, Google is denying those competitors access to the facility. Given Google's predominance in search and its large user base, rivals would be unable to duplicate its utility.

This argument will fall flat as well. Courts impose liability based on the essential-facilities doctrine infrequently because it is difficult to characterize a facility as truly essential.[225] A facility is essential "only if control of the facility carries with it the power to eliminate competition."[226] Thus, "a plaintiff must show more than inconvenience, or even some economic loss; he must show that an alternative to the facility is not feasible."[227] Although Google's PageRank-powered search engine has been proven to be the superior alternative, it is not the only feasible alternative. A competitor can use any number of other search engines to expose Internet users to its product. Therefore, although Google's refusal to grant a competitor equal access to the PageRank system might reduce the competitor's expectant profits, it does not eliminate competition; as a result, it will not trigger liability under the essential-facilities doctrine.[228]

Google's rapid development of services—a characteristic of the eMonopoly environment—does not naturally implicate anticompetitive conduct. Innovation in Internet services is a fast-paced phenomenon; therefore, it is very easy for an entrenched firm to legally pursue expansion and efficiency to strengthen its dominant position.[229] Innovation gives a web-based business the ability to maximize its efficiency and expand its user base by providing products of increasing quality at marginally increasing costs.[230] Therefore, Google is arguably not engaging in anticompetitive conduct because its goal is merely to

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[224] *See* Kinderstart.com, LLC, v. Google, Inc., No. C 06-7297, 2007 U.S. Dist. LEXIS 22637, at *11 (N.D. Cal. 2007).

[225] Pitofsky et al., *supra* note 222, at 449.

[226] Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 544 (9th Cir. 1991).

[227] Twin Labs., Inc. v. Weider Health & Fitness, 900 F.2d 566, 570 (2d Cir. 1990).

[228] *See Alaska Airlines*, 948 F.2d at 545-46 (stating that Alaska Airlines' exclusive control of computerized reservation systems did not implicate essential facilities doctrine because, although control of the system gave them a monetary advantage over competitors, it did not grant them the power to entirely eliminate competition given the existence of other, albeit inferior, alternatives).

[229] Piraino, *supra* note 104, at 84-85.

[230] *Id.* at 86.

provide useful and diverse services for Internet users.[231] Any resulting monopoly is simply a natural byproduct.

IV. FUTURE ANTITRUST ENFORCEMENT OF EMONOPOLIES

The antitrust enforcement regime has several avenues of recourse to prevent an eMonopoly from escaping unilateral antitrust scrutiny. But the peculiarities of the eMonopoly environment, as applied to the conduct of a unilateral monopolist, impede effective enforcement. This suggests that an unconventional approach may be required and that nontraditional considerations be taken into account.

A. The Waiting Game—The Naturally Correcting Market

One of the most fervent arguments in modern antitrust enforcement is that free markets will eventually correct themselves and if left alone by government regulators and enforcers, will often reallocate resources efficiently.[232] As a result, "any company's attempt to secure market power would most likely be defeated by other profit-maximizers," whether they are "new entrants or existing competitors."[233]

This argument is appealing to the new-economy markets in which eMonopolies operate because of the propensity for fast and efficient technological turnover, which can quickly relegate a one-time monopolist to a second-tier player. Oftentimes, "the pace of technological change is so swift, and so transforming, that no firm can hold monopoly power in a high technology market for a meaningful period."[234]

The *Microsoft* case[235] is illustrative. At the time of the government's suit, Microsoft was found to possess 95% market share of the defined market of Intel-compatible PC operating systems.[236] But at the dawn of the twenty-first century, before the *Microsoft* appeal was even concluded, technology and Internet dependence were pushing PCs out as the dominant mode of computing. The trend moved towards non-PC Internet

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[231] Verizon Commc'ns, Inc. v. Law Offices of Cutis V. Trinko, 540 U.S. 398, 407 (2004) (explaining that the purpose of the anticompetitive conduct requirement is "[t]o safeguard the incentive to innovate").

[232] Stucke, *supra* note 15, at 539-40.

[233] *Id.*

[234] Piraino, *supra* note 104, at 70.

[235] United States v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001).

[236] *Id.* at 54.

devices eschewing physical hard drives and operating systems for the Internet-based data storage and application services that Google exemplifies.[237] In fact, by 2002, it was estimated that Microsoft produced less than 50% of the devices providing Internet access.[238] Indeed, Microsoft currently finds itself as a spectator to the growth of Google, which is quickly expanding and dominating the modern high-technology marketplaces.[239] As a result of the naturally occurring innovation and turnover present in high-technology markets, antitrust suits could be faced with the threat that, "[b]y the time [a] case is over, the court may be asked to restructure an industry that has already restructured itself."[240]

This same capacity for innovation and quick, efficient modernization, however, will ultimately preclude a naturally-correcting-market strategy. The main reason is that a dominant firm in today's Internet-based economy will continue to dominate rather than yield to the next wave of technological advancement. Google continues to grow and expand.[241] What was originally a search engine is now a search engine, e-mail service, news outlet, and web-browser developer among other services.[242] In fact, as technology made its most recent evolution into mobile computing and mobile Internet access, Google adapted accordingly and unveiled its own mobile computing device—an attempt to retain dominance as computing shifts from one generation to the next.[243] The same characteristics that erected a barrier to entry for emerging competitors in established markets will carry over to emerging markets, and passive resistance will only result in further entrenchment.[244]

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[237] *See* KOPEL, *supra* note 10, at 24.

[238] *Id.*

[239] Sharon Gaudin, *Google and Microsoft to Escalate War in 2010*, COMPUTERWORLD (Dec. 22, 2009, 12:17 PM), http://www.computerworld.com/s/article/9142593/Google_and_Microsoft_to_escalate_war_in_2010 ("Google [has] grown so much that it has become a threat to Microsoft, which has had a long and storied history of high-tech industry dominance.").

[240] WILLIAM H. PAGE & JOHN E. LOPATKA, THE MICROSOFT CASE: ANTITRUST, HIGH TECHNOLOGY, AND CONSUMER WELFARE 5 (2007).

[241] *See Corporate Information, Google Milestone*, GOOGLE, http://www.google.com/intl/en/corporate/history.html (last visited Sept. 28, 2010) (outlining Google's history of development and expansion); *see also List of Google Products*, *supra* note 103.

[242] *Id.*

[243] Miguel Helft, *Developing Its Own Phone, Google Is Taking on Apple*, N.Y. TIMES, Dec. 14, 2009, at B1.

[244] Kristine Laudadio Devine, *Preserving Competition in Multi-Sided Innovative Markets: How Do you Solve a Problem Like Google?*, 10 N.C. J.L. & TECH.

B. Proactive Attempted-Monopolization Litigation

If waiting will only exacerbate the problem, perhaps Google's expansion into other areas could give rise to an attempted monopolization claim.[245] As discussed above, attempted-monopolization is present when there is a "dangerous probability" of eventual monopoly power as a result of anticompetitive conduct.[246] The threat remains that Google could use its dominant position to expand into other areas while competitors would be precluded from doing so.[247] Not only would Google benefit from the resources it could employ in research and development, but it would benefit from an established preexisting platform to offer its new service. Given Google's preexisting user base and reputation for offering unique, efficient web-based services, it would enjoy large immediate exposure as well as a level of immediate legitimacy. This would most certainly give them an advantage over competitors, which would only perpetuate their dominance over the Internet.

However, modern antitrust jurisprudence does not preclude a firm from benefitting from a permissibly obtained competitive advantage.[248] Indeed, "[i]t is the possibility of success in the marketplace, attributable to superior performance that provides the incentives on which the proper functioning of our competitive economy rests."[249] Therefore, it would be unfair and unsupported to penalize Google for taking the intuitive step of expanding on what has proven successful.

Attempted monopolization based on illegal bundling or tying is another possible route for antitrust litigation. Tying occurs when a firm "sell[s] one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that [it] will not purchase that product from any other supplier."[250] A violation of Section 2 under a tying theory requires the sale of

> two separate products or services . . . [whereby] the sale or agreement to sell one product or service is conditioned on the purchase of another . . . [and where] the seller has sufficient

59, 107 (2008) ("Given the information asymmetries and barriers to entry, the market appears unlikely to 'heal itself' . . . .").

[245] Vogelstein, *supra* note 18.

[246] *See* Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993).

[247] Krazit, *supra* note 86.

[248] PAGE & LOPATKA, *supra* note 240, at 16.

[249] Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 281 (2d Cir. 1979).

[250] N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5-6 (1958).

> economic power in the market for the tying product to enable it to restrain trade in the market for the tied product . . . .[251]

Fortunately for Google, several factors bar this theory from prohibiting its expansion into, and offering of, new Internet services. First, as discussed above, Google's services are offered for free, and no consumer is placed in the position where the purchase of *A* necessitates the purchase of *B*. Second, and perhaps more importantly, Google is not bundling its services to the point of coercion. As Google CEO Eric Schmidt points out, Google has made it a conscious business strategy not to mandate use of its services.[252] Internet users are free to avoid the use of Google and its services; it is reliance on their superior product that allows them to maintain dominance. Finally, the practice of combining its services may simply provide Google with an added economic bonus based on an efficient interconnected business model, unencumbered by high marginal costs.[253] Therefore, when a Google search turns up results for Google Maps, or Google News, or even a video on Google-owned YouTube, it would not constitute tying. Google would be merely offering the user the services and not mandating its selection.

Nevertheless, future antitrust enforcement against Google should focus on its attempts to monopolize markets as opposed to those markets over which it has already established monopoly power. By focusing on its future conduct and remaining vigilant, regulators can avoid the assumption that Google has developed its monopoly based solely on its superior product and instead catch any of its anticompetitive behavior.

C. Sociopolitical Considerations

The difficulty of traditional antitrust enforcement of eMonopolies suggests that the economic effects of antitrust are not the only considerations that should be taken into account. Noneconomic considerations should be made a component of antitrust analysis as well.[254] As Robert Pitofsky observed, "It is bad history, bad policy, and bad law to exclude certain political

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[251] 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 177 (6th ed. 2007).

[252] Vogelstein, *supra* note 18.

[253] *See* Evans, *supra* note 1, at 304.

[254] Louis B. Schwartz, *"Justice" and Other Non-Economic Goals of Antitrust*, 127 U. PA. L. REV. 1076, 1080 (1979).

values in interpreting the antitrust laws."[255] Indeed, as the Supreme Court has noted, the antitrust laws "provid[e] an environment conducive to the preservation of our democratic, political and social institutions"[256] not limited to economic markets. Given the difficulties of antitrust application to eMonopolies, socioeconomic considerations may well provide an alternative means of checking unilateral domination of the Internet economy.

Specifically, the social effects of a consolidated Internet media must play a role in finding antitrust violations.[257] In applying the "rule of reason"—which weighs the anticompetitive and pro-competitive effects of monopolistic conduct[258]—the sociopolitical goal of maintaining firm diversity in media can provide antitrust enforcers with a legitimate foothold to attack Internet monopolies. Moreover, the potentially detrimental privacy concerns associated with domination by an eMonopoly like Google provide yet another anticompetitive effect that should be considered.

1. Media Consolidation

An important caveat to antitrust analysis in the context of eMonopolies lies in the nature of the business. Much of the content offered by Internet-based monopolies revolves around consolidation of information and digital media.[259] Given the increasing access to the Internet[260] and the consolidation of services on a limited number of websites, media consolidation is a real possibility.

Suppose a single Internet service provider, in the Google mold, builds a web-based conglomerate that has an exclusive license to display the content of the top-twenty American newspapers. The exclusivity of the agreement, under which a licensor has granted a right to display certain material

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[255] Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979).

[256] N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

[257] *See* Pitofsky, *supra* note 255, at 1051 ("It is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws.").

[258] DOJ & FTC, PROMOTING INNOVATION AND COMPETITION, *supra* note 36, at 9.

[259] *See* Wellstone, *supra* note 123, at 551; *see also supra* Part II.B.2 (discussing the Google Books Project).

[260] *See supra* note 9.

exclusively to one licensee,[261] implicates antitrust laws because the potential output and price abuses may adversely affect on competition.[262] A restraint in a licensing agreement (such as the restraint of exclusivity) requires an evaluation under the "rule of reason,"[263] which necessitates a showing that the "particular contract or combination is in fact unreasonable and anticompetitive."[264]

Any anticompetitive effects that may result from this (hypothetically) broad exclusive license could be justified if the restraint is necessary to achieve legitimate procompetitive effects.[265] But where an exclusive agreement of such breadth involves the licensing of ideas, information, and news, it has the potential to directly affect consumers—implicating concerns beyond economics. When diversity of ideas and opinions is so restricted and media access is whittled to a single source—producing a single stream of thought—there may be lasting effects on the efficient administration of a representative democracy,[266] which relies on popular access to diverse sources of information.[267]

Although this appears to be an issue of free speech and free press implicated by the First Amendment to the U.S. Constitution, First Amendment protections apply only against government action.[268] Therefore, where the restriction is imposed by private contract, the First Amendment does not

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[261] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 4.1.2 (Apr. 6, 1995) [hereinafter DOJ & FTC, ANTITRUST GUIDELINES], *available at* http://www.justice.gov/atr/public/guidelines/0558.pdf.

[262] *Id.* § 3.2.

[263] *Id.* § 3.4.

[264] Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006). This "rule of reason" analysis takes place in connection to a Section 1 claim.

[265] DOJ & FTC, ANTITRUST GUIDELINES, *supra* note 261, at § 3.4. Courts have held that exclusive licensing agreements can enhance competition by reducing costs, expediting contract negotiation, and by otherwise contributing to economic efficiency. *See, e.g.*, Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 321 (2d Cir. 2008).

[266] *See* PORT ET AL., *supra* note 6, at 426.

[267] *See* Letter from Thomas Jefferson to John Tyler (June 28, 1804), *in* 11 THE WRITINGS OF THOMAS JEFFERSON 32, 33 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1904) ("Our first object should therefore be, to leave open to [man] all the avenues to truth. The most effectual hitherto found, is the freedom of the press."); *see also* Wellstone, *supra* note 123, at 552.

[268] Denver Area Educ. Telecomm. Consortium, Inc., v. FCC, 518 U.S. 727, 737 (1996) ("[T]he First Amendment, the terms of which apply to governmental action, ordinarily does not itself throw into constitutional doubt the decisions of private citizens to permit, or to restrict, speech . . . .").

apply.[269] Antitrust laws, on the other hand, apply almost exclusively to private conduct and are therefore the only means to avoid a detrimental effect on information access.[270]

The anticompetitive effects resulting from such a broad exclusive agreement go beyond economics and enter the sociopolitical realm—restricting access to diverse media and limiting the available streams of ideas, which, in turn, can hinder the functioning of the democratic process. Because these consequences are so important and far-reaching, they should be considered in balancing the anticompetitive consequences with the procompetitive benefits.[271]

2. Privacy Concerns

Privacy concerns represent another effect of Internet monopolization that warrant consideration under the "rule of reason" analysis.[272] The nature of Internet business requires user input in return for a service; in the case of Google, a user inputs a search query and is rewarded with search results. But to provide web-based businesses with a basis to tailor appropriate advertising, businesses collect enormous amounts of data about users without their permission and, in many cases, without their knowledge.[273] Google has been accused of recording "all data being transmitted over open Wi-Fi networks," websites visited, videos watched, and even every e-mail sent or received.[274]

The natural propensity for Internet businesses to rely on users' personal information raises a profound issue of

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[269] This would be so even if the restrictive decision took place within the framework of a government-imposed regulatory regime. *Id.*

[270] PORT ET AL., *supra* note 6, at 426. In addition to government enforcement, the antitrust laws provide for a private right of action strengthening their weight against efforts at web-based consolidation. 15 U.S.C. § 15(a) ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . .").

[271] *See* Pitofsky, *supra* note 254, at 1051 ("It is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws.").

[272] Recent scholarship has called for the consideration of privacy concerns in antitrust analysis when defining relevant product markets. *Cf.* Harbour & Koslov, *supra* note 168, at 793-97 (2010) (arguing for privacy-based relevant product markets and insisting, abstractly, for inclusion of privacy in antitrust analysis by any means). Privacy concerns were not considered for application in a rule of reason anticompetitive conduct analysis.

[273] Randal C. Picker, *Competition and Privacy in Web 2.0 and the Cloud*, 103 NW. U. L. REV. COLLOQUY 1, 3 (2008).

[274] *See* Complaint at ¶¶ 3-4, Stokes v. Google, No. CV-10-2306 (N.D. Cal. May 26, 2010); *see also* Reuters, *States to Investigate Google Data Collection*, N.Y. TIMES, June 21, 2010.

privacy. Indeed, the very scope of collected personal information is vast. Consider that millions of searches are recorded on Google every day; with each entry Google can archive personal "interests, needs, desires, fears, pleasures, and intentions," as demonstrated by each search.[275] This collected personal information is a danger to personal privacy—one that, some commentators argue, the current privacy protection framework is not suited to cope.[276]

Given that monopoly share for a web-based business relies on a monopoly-sized user base, it follows that those companies with dominating user share will likewise pose the biggest threat to privacy on the Internet. Accordingly, antitrust analysis may offer a solution to the murky privacy concerns raised by eMonopolies.

For example, much of the FTC investigation surrounding Google's merger with DoubleClick arose from the privacy concerns raised by the merger. The concerns generally focused on the fact that both companies dealt largely with online advertising and relied to a large extent on collecting user information. The fear was that combining the two sets of personal information increased the potential that a large number of Internet users would be subjected to privacy invasion.[277] In the end, the FTC refused to consider privacy concerns as "the sole purpose of federal antitrust review of mergers and acquisitions is to identify and remedy transactions that harm competition."[278]

Still, given the breadth of the privacy intrusions and the inability of other areas to cope with the potential threat, Section 2 claims of unilateral monopolization offer an intriguing platform to address these concerns. Considering that contemporary antitrust law focuses on consumer welfare—and therefore looks at how certain conduct will affect the consumer—it makes sense that consumer-welfare considerations not be limited to economics.

Rather, antitrust review should take into account normative factors and the overall impact an eMonopoly can have on the lives of a consumer. Put simply, if an eMonopoly is

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[275] Omer Tene, *What Google Knows: Privacy and Internet Search Engines*, 2008 UTAH L. REV. 1433, 1435 (2008).

[276] *See, e.g.*, *id.* at 1464 ("[C]urrent approaches [to solving Internet privacy problems] are flawed and afford inadequate protection to search-engine users.").

[277] FTC on Google/DoubleClick, *supra* note 116, at 2, 12.

[278] *Id.* at 2.

allowed to dominate the digital markets, and its domination relies on the collection and implementation of private personal information, the growth of the eMonopoly will affect the privacy of more and more individuals. As a result, consumers may become wary of blindly providing personal information. However unlikely, if manipulation of private information continues, it could spell decreased reliance on Internet businesses and an anticompetitively harmful effect on the market as a whole.

V. CONCLUSION

Application of federal antitrust laws to Internet-based businesses poses a major problem. For a variety of reasons, eMonopolies represent a unique context for contemporary antitrust enforcement. This is particularly true with respect to Section 2 unilateral monopolization claims. Rapid innovation and technological advancement allow dominant players to rapidly grow and expand, further entrenching their dominant position. In addition, eMonopolies' dominant positions are predicated on free services, supported by a "multi-sided platform."[279] And therefore, without a threat of consumer abuse, the consumer welfare goal of antitrust legislation is inapplicable. Finally, as is the case with Google, technological innovation tends to produce products that are simply superior; consequently, any resulting monopoly would not be impermissible.

Nevertheless, it is important that steps be taken to prevent eMonopolies from abusing a legally obtained monopoly in order to anticompetitively dominate other markets. Because there is substantially limited regulation of the Internet in other areas, antitrust may be the only existing solution.[280] Therefore, antitrust enforcement should adopt a forward-looking approach and be vigilant of Internet-based monopolies' activities. Although monopolists will have already gained monopoly power, this tactic will prevent them from abusing that position and acting anticompetitively in other markets. Alternatively, traditional antitrust enforcement should broaden the scope of its analytical considerations and consider sociopolitical issues like media consolidation and privacy. Both are implicated by eMonopoly development, and both represent serious concerns.

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[279] *See supra* note 147 and accompanying text.

[280] *See* PORT ET AL., *supra* note 6, at 426.

As a result, these factors should be included in weighing anticompetitive effects. Only by adopting these measures can antitrust effectively challenge eMonopolies and promote competition on the Internet.

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