

Searching for an Answer: Can Google Legally Manipulate Search Engine Results?

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INTRODUCTION

Search engines are the gatekeepers of online information. They can direct users *toward* particular websites by prominently listing the websites on the first page of a user's search results. They can also direct users *away* from other websites by hiding them in the last few pages of a user's search results. They can hide online content from users, either because they do not think the website content is relevant, or because they want to hide their competitor's content. For example, Google has the power to return the Zagat¹ website as the first result in response to a search for "restaurant reviews" and Yelp as the last, not because it views Yelp as less relevant, but merely because it views Yelp as a threat to Zagat's success.

This practice, frequently referred to as "search engine manipulation,"² subjected Google to an almost two-year investigation by the Federal Trade Commission (FTC). The FTC finally concluded the investigation in January of 2013.³ The investigation was in large part prompted by pressure the FTC faced from legal scholars and Google's top competitors, primarily Microsoft.⁴ These critics argued that Google engaged in anticompetitive practices by unfairly prioritizing its own proprietary services and products over its competitors' when displaying search results.⁵ Recognizing the significance of the matter, the FTC hired prominent outside counsel Beth Wilkinson, a former federal prosecutor and a current partner at Paul, Weiss, Rifkind, Wharton & Garrison, to lead the investigation.⁶ Google, of course,

1. Zagat was acquired by Google in 2011. Adam Mazmanian, *Google Flying High in Travel with Frommer's*, NAT'L J. (Aug. 14, 2012, 1:47 PM), <http://www.nationaljournal.com/tech/google-flying-high-in-travel-with-frommer-s-20120814>.

2. This practice may also be referred to as "search engine bias." The two terms are interchangeable.

3. Press Release, Fed. Trade Comm'n, Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns in the Markets for Devices Like Smart Phones, Games and Tablets, and in Online Search (Jan. 3, 2013) [hereinafter FTC Press Release], available at <http://ftc.gov/opa/2013/01/google.shtm> (discussing the close of the investigation into anti-competitive practices of Google's search engine and Google's agreement to change its business practices).

4. See Brent Kendall et al., *Behind Google's Antitrust Escape*, WALL ST. J. ONLINE (Jan. 5, 2013, 2:10 PM), <http://online.wsj.com/article/SB10001424127887323689604578221971197494496.html> (nothing that "Microsoft had pressed regulators to bring an antitrust case against Google").

5. *Id.* There is not yet any proof, however, that Google actively lowers the PageRanks of its competitors' websites.

6. David Streitfeld & Edward Wyatt, *U.S. Is Escalating Inquiry Studying Google's Power*, N.Y. TIMES, Apr. 27, 2012, at A1.

went to great lengths to defend its search engine practices, hiring First Amendment expert and law professor Eugene Volokh to draft a white paper defending Google search results primarily on First Amendment grounds.⁷

The primary legal issue concerning Google search optimization is whether Google violates federal antitrust laws by prioritizing the websites of its own products and services over websites of its competitors, and, if it does, what is the proper legal remedy? This issue raises serious constitutional issues, since search results could plausibly be considered “speech” for First Amendment purposes.

In this Comment, I argue that, even assuming that Google prioritizes its own websites in search results, this practice does not violate federal antitrust laws. Furthermore, any attempt to regulate the ranking of Google search results would violate Google’s First Amendment freedom of speech. In Part I, I provide a primer on Google search engine results and focus on two of Google’s most notable innovations: (1) PageRank, the system by which Google determines the relevance of a website which, in turn, determines the ranking in which websites appear in a particular search query; and (2) Google OneBox, which provides users with immediate responses to search queries at the top of a results page. Critics argue that PageRank and Google OneBox are examples of how Google unfairly biases its search results, hurting both competitors and consumers.⁸ In Part II, I discuss the problem of search engine bias and Google’s recent FTC settlement regarding its search engine practices. I proceed to discuss the antitrust objection to Google search in Part III and make two points. First, the goals of antitrust law are not fulfilled when applied to markets that provide free goods or services, such as search engines. Second, even if a claim were brought against Google under the Sherman Antitrust Act, the claim would fail because neither the “relevant market” nor the “willful acquisition” elements of such a claim could be satisfied. I move on to the First Amendment freedom of speech issue in Part IV and examine ways in which the First Amendment has been raised as a defense of Google search engine practices in three major cases: (1) *Search King, Inc. v. Google Tech., Inc.*;⁹ (2) *Langdon v. Google, Inc.*;¹⁰ and (3) *KinderStart.com LLC v.*

7. Eugene Volokh & Donald M. Falk, *Google: First Amendment Protection for Search Engine Results* (Apr. 20, 2012), available at <http://www.volokh.com/wp-content/uploads/2012/05/SearchEngineFirstAmendment.pdf>. Though technically a white paper, Professor Volokh’s paper resembled a legal brief in structure.

8. See, e.g., Adam Raff, *Search but You May Not Find*, N.Y. TIMES, Dec. 28, 2009, at A27 (arguing that Google’s preferential placement of its own vertical search engine results at the top of a search engine results page as opposed to competing vertical search engine results is what has allowed Google to wipe out its competition “virtually overnight”).

9. No. CIV-02-1457-M (W.D. Okla. May 27, 2003).

10. 474 F. Supp. 2d 622 (D. Del. 2007).

*Google, Inc.*¹¹ I also discuss the “transmission theory” response to First Amendment defenses of Google search engine rights, and argue that this theory ultimately fails to support a denial of First Amendment rights to search engine results. In Part V, I suggest that Google and its supporters have been improperly characterizing what constitutes Google “speech” for First Amendment purposes, and I conclude by proposing a new way of interpreting Google “speech.” I argue that this new interpretation would allow Google to claim First Amendment protection for its search engine results, thereby dodging current proposals for government regulation and escaping liability for antitrust allegations, as well as other state-law claims it faces in court.

I. A PRIMER ON GOOGLE SEARCH

One of the reasons Google has been so successful is because it has constantly innovated the search engine industry.¹² These innovations, however, have proven to be double-edged swords. On the one hand, they have revolutionized the way we think about searching the Internet and have allowed users to find relevant results more easily. On the other hand, they have subjected Google to immense litigation and even brought it under the close monitoring of the FTC.¹³ Scholars and competitors have consistently objected to these innovations as violations of federal antitrust law.¹⁴ This section will provide a primer on two of Google’s most notable, yet controversial, innovations: PageRank and Google OneBox.

A. PageRank

In order to deliver relevant search results to its users, Google uses algorithms to determine which websites will be displayed in response to a user’s search queries and in what order those websites will appear.¹⁵ Google algorithms rely on over two hundred signals, such as the frequency with which the search terms occur on the website, whether the search terms

11. *KinderStart I*, No. C 06-2057 JF (RS) (N.D. Cal. July 13, 2006).

12. For a list of some of Google’s most notable innovations in the search engine industry, see *infra* text accompanying notes 71-77.

13. The FTC investigated Google search engine practices for almost two years before finally settling in January 2013. See FTC Press Release, *supra* note 3 (discussing the FTC investigation).

14. See, e.g., *id.* (illustrating competitors’ objections, primarily Microsoft’s, to Google’s search engine practices); Raff, *supra* note 8 (criticizing Google as being anti-competitive by promoting its own products in search engine results).

15. *Facts About Google and Competition*, GOOGLE, www.google.com/competition/howgooglesearchworks.html (last visited Sept. 3, 2013) [hereinafter *Facts About Google and Competition*].

appear in the title, and whether synonyms of the search terms appear on the page.¹⁶ Google's most famous algorithm is PageRank, named after Larry Page—co-founder and CEO of Google.¹⁷

PageRank helps determine the relative importance of a website, which then determines where in a search engine results page (SERP) the website will appear.¹⁸ To determine the PageRank of a website, Google accounts for various factors, such as title tag,¹⁹ keywords, and the number and importance of links pointing to a website.²⁰ Using these factors, PageRank ranks the “relevance” of a website on a scale from one through ten, with ten being the most relevant.²¹ In short, the higher the PageRank of a website, the more prominently the website is displayed in search results. Websites with the highest PageRank will appear at the top of a SERP, whereas websites with the lowest PageRank will appear on the last of several SERPs, or will sometimes not appear at all. PageRank counts the number and quality of links to a page in order to determine the importance of a website.²² The theory behind PageRank is that if Page A links to Page B, then Page A's link indicates that Page B is a relevant page.²³ Thus, the more frequently other websites link to a page, the higher that page's PageRank will be. Although Google sells advertisement placement, it does *not* sell PageRank.²⁴ In other words, a website cannot pay Google to increase its PageRank or to decrease the PageRank of other websites.

Many critics accuse Google of manipulating its search results to

16. *Id.*

17. *Id.*

18. For an excellent primer on PageRank, see CHRIS RIDINGS & MIKE SHISHIGIN, *PAGERANK UNCOVERED* (Jill Whalen & Yuri Baranov eds., 3d ed. 2002), available at <http://www.voelspriet2.nl/PageRank.pdf>. For Google's own explanation of its search results, see *Facts About Google and Competition*, *supra* note 15.

19. “Title tag” is a hidden HTML code on a website and is considered to be one of the most important factors in achieving high search engine rankings. The title tag of a webpage appears at the top of the browser toolbar when the page is loaded and is also displayed in search-engine results. Additionally, the title page code provides a title for the page when it is added to a user's “favorites.” For more information on title tags, see James A. Ross, *Protection for Trademark Owners: The Ultimate System of Regulating Search Engine Results*, 42 SANTA CLARA L. REV. 295, 314-15 (2002).

20. RIDINGS & SHISHIGIN, *supra* note 18, at 3.

21. On rare occasions, a website can receive a PageRank of zero. See, e.g., *KinderStart I*, No. C 06-2057 JF (RS), at 20–21 (N.D. Cal. July 13, 2006) (discussing the plaintiff's claim against Google arguing, *inter alia*, that his website's PageRank score of “zero” constituted defamation).

22. *Search King, Inc. v. Google Tech., Inc.*, No. CIV-02-1457-M, slip op. at 2 (W.D. Okla. May 27, 2003) (“The PageRank is derived from a combination of factors that include text-matching and the number of links from other web sites that point to the PageRanked web site.”).

23. RIDINGS & SHISHIGIN, *supra* note 18, at 3.

24. *Search King, Inc.*, slip op. at 2.

benefit its own products and services, and these criticisms usually target PageRank.²⁵ For example, as of October 28, 2013, a Google search for “maps” produces Google Maps as its first search result. Critics argue that Google unfairly prioritizes its own products and services, such as Google Maps, over the products and services of its competitors, such as MapQuest and Bing Maps, by listing its own services first.²⁶ The critics argue that this practice deceives the public into believing that Google’s products and services are objectively more relevant and therefore superior, driving Google’s competitors out of business.²⁷ On the other hand, Google counters that search manipulation allows Google to deliver more relevant results, and it denies unfairly prioritizing its own products over others’.²⁸

Google is not alone in this regard. Most search engines are guilty of search engine manipulation,²⁹ since it is through this manipulation that search engines are able to produce relevant results.³⁰ In lawsuits challenging search engine manipulation, plaintiffs often seek search engine algorithms during discovery, but such algorithms usually are protected as trade secrets.³¹

25. See, e.g., Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149, 1183-84 (arguing that if Google assigned a higher PageRank to all YouTube videos than those on any competitor websites, such as MySpace or Veoh, users unaware of the Google-YouTube merger could believe that YouTube videos earned high rankings because of their relevance, rather than because Google was promoting its own product).

26. *Id.* Interestingly enough, however, a Google search for “email,” as of October 28, 2013, produces Yahoo! e-mail as the first search result. Google’s own e-mail service, Gmail, only appears *after* Yahoo! as the third search result. Perhaps even more interesting is a Google search for “search engine.” As of October 28, 2013, the first search result is a Wikipedia entry and the second result is Dogpile. Google.com does not even appear on the first page of search results.

27. See *supra* text accompanying notes 8 and 25.

28. *Facts About Google and Competition*, *supra* note 15 (boasting that Google search algorithms are “designed to improve the user experience by catching and demoting low-quality sites that [do] not provide useful original content or otherwise add much value . . . [and providing] better rankings for high-quality sites . . .”). Scholars also argue that Google manipulation of its search results is beneficial because it creates more personalized searches that produce more relevant results. See, e.g., Eric Goldman, *Search Engine Bias and the Demise of Search Engine Utopianism*, 8 YALE J.L. & TECH. 188 (2006) (discussing the benefits of Google search engine manipulation and the consequences of government regulation of search engine results).

29. For more background information on search engine bias, see Bracha & Pasquale, *supra* note 25, at 1167-71.

30. Goldman, *supra* note 28, at 189 (arguing that all search engine results are biased).

31. Urs Gasser, *Regulating Search Engines: Taking Stock and Looking Ahead*, 8 YALE J.L. & TECH. 201, 233 (2006) (“[A]lgorithms of search engines are generally trade secrets . . .”).

B. *Google OneBox*

Google OneBox is one of Google's more innovative improvements to the search engine industry. In response to a search query, Google will often list a direct response to entered search terms at the very top of a SERP, as opposed to the traditional list of blue hyperlinks.³² Google OneBox comes in many forms and is best explained through illustrations. For example, when I enter "map of New York" into the Google search bar, a map of New York powered by Google Maps appears at the very top of my search results.³³ That map is an example of a Google OneBox result.³⁴ When I click on the map, I am directed to Google Maps, where a map of New York appears with options to search for directions or nearby restaurants.³⁵ When I enter a ticker symbol into the Google search bar, such as "aapl," I see live quotes and information from Google Finance relating to Apple stock.³⁶ That box of stock information is an example of a Google OneBox result. Google OneBox differs from general search results because it provides a direct response to a search query, as opposed to a simple hyperlink that one must click to then find a response to a search query.

However, Google OneBox should not be confused with the "Knowledge Panel," another one of Google's search innovations. The Knowledge Panel differs from Google OneBox because the Knowledge Panel contains fragments of content scraped from other websites, such as Wikipedia or IMDB. For example, when I enter the movie title "My Cousin Vinny" into the Google search bar, images from the movie along with general information about the movie appear in a box on the right-hand side of the screen.³⁷ That box of images and general information is an example of a Knowledge Panel. Google simply compiles this content into a box, known as the Knowledge Panel.³⁸ Google OneBox content, on the other hand, is purely produced by Google. It usually comes in the form of

32. *Google OneBox Results*, GOOGLE (July 9, 2006), <http://googlesystem.blogspot.com/2006/07/google-onebox-results.html>.

33. Search for "map of New York," GOOGLE, <http://www.google.com> (enter "map of New York" into the search bar, then click "Google Search") (last visited Sept. 2, 2013).

34. *See supra* note 32.

35. *See* GOOGLE, *supra* note 33.

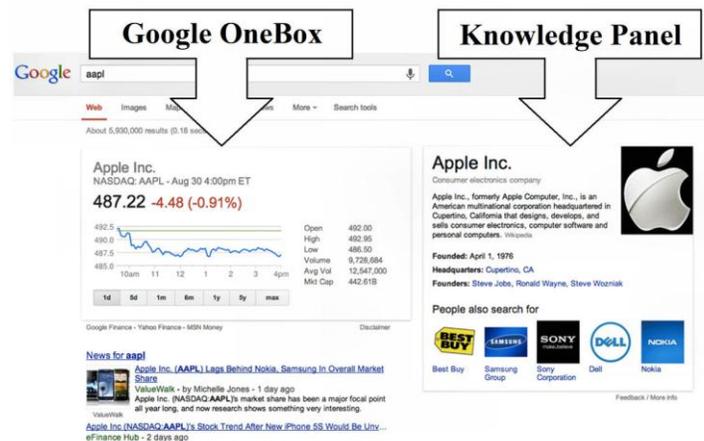
36. Search for "aapl," GOOGLE, <http://www.google.com> (enter "aapl" into the search bar, then click "Google Search") (last visited Sept. 2, 2013).

37. Search for "My Cousin Vinny," GOOGLE, <http://www.google.com> (enter "My Cousin Vinny" into the search bar, then click "Google Search") (last visited Sept. 2, 2013).

38. For more information on the Knowledge Panel, see Amir Efrati, *Google Gives Search a Refresh*, WALL ST. J., Mar. 15, 2012, at B1. *See also The Knowledge Graph*, GOOGLE, <http://www.google.com/insidesearch/features/search/knowledge.html> (discussing Google's Knowledge Graph, which is another name for the Knowledge Panel).

a direct response to a search query.

The image below illustrates the difference between Google OneBox and the Knowledge Panel by displaying results from a Google search for “apl.”³⁹ The box at the top left corner of the image that shows data for Apple stock is an example of a Google OneBox result. This contains data taken from one of Google’s own vertical search engines, Google Finance. In contrast, the box at the top right-hand corner of the image is an example of a Knowledge Panel. This Knowledge Panel contains data Google has scraped from other content on the web, such as the Wikipedia entry for Apple Inc.



Google OneBox results often take a user to one of Google’s many vertical search engines. A vertical search engine is a specialized search engine that indexes only a specific segment of content on the web.⁴⁰ Examples of vertical search engines on Google are Google Finance, Google Maps, Google News, YouTube, and Google+ Places. Examples of non-Google vertical search engines are Yelp, MapQuest, Expedia, and Travelocity.

Although Google OneBox results may seem quite helpful to users, critics argue that Google OneBox is an anticompetitive tool that Google uses to prioritize its own vertical search products over competing products.⁴¹ For example, when I enter “directions from New York to

39. GOOGLE, *supra* note 36.

40. Geoffrey A. Manne & Joshua D. Wright, *Google and the Limits of Antitrust: The Case Against the Case Against Google*, 34 HARV. J.L. & PUB. POL’Y 171, 202 (2011).

41. *See, e.g.*, Raff, *supra* note 8 (arguing that Google’s preferential placement of its own vertical search engine results at the top of a SERP as opposed to vertical search engine

Boston,” a Google Map of the route from New York to Boston appears at the very top of the page.⁴² A link to a MapQuest map of the same route appears farther down the page, below the Google Map.⁴³ Additionally, unlike the Google Map, the MapQuest link does not include an image of the route.⁴⁴ Thus, most searchers entering these search terms would click on the Google Map link of the route as opposed to the MapQuest link, because the Google Map link is (1) more prominent and (2) more convenient to click on, given that the map is embedded into the actual search results page. Furthermore, since Google advertises that it returns more relevant links at the top of a SERP,⁴⁵ a user may believe that since the Google Map appears at the top, before the MapQuest map, the Google Map must be more “relevant” to their search. Competitors object that this practice drives them out of the market.⁴⁶

II. THE PROBLEM OF SEARCH ENGINE MANIPULATION

The best and worst thing about the Internet is the breadth of its content. Search engines provide value by indexing all of the content in a way that makes the Internet manageable and useful. Instead of browsing through hundreds of websites to find exactly what is sought, search engines allow users to enter search terms that filter out irrelevant content through the use of search terms. The search engine returns only websites relating to those search terms. To do this, however, each search engine must decide how to determine what is relevant and what is not.⁴⁷ This necessarily involves a ranking of websites the search engine deems relevant and a

results of its competitors is what has allowed Google to wipe out its competition).

42. Search for “directions from New York to Boston,” GOOGLE, <http://www.google.com> (enter “directions from New York to Boston” into the search bar, then click “Google Search”) (last visited Sept. 2, 2013).

43. *Id.*

44. *Id.*

45. *Facts About Google and Competition*, *supra* note 15 (“[Google] algorithms attempt to rank the most relevant search results towards the top of the page, and less relevant search results lower down the page.”).

46. *See, e.g.*, Complaint at 3-4, *TradeComet.com LLC v. Google, Inc.*, 693 F. Supp. 2d 370 (S.D.N.Y. 2010) (No. 09 Civ. 1400(SHS)), 2009 WL 455244 [hereinafter *TradeComet Complaint*] (alleging that Google drove the plaintiff out of business by decreasing its prominence on Google’s platform because Google viewed the plaintiff as a dangerous competitor).

47. *See, e.g.*, Bracha & Pasquale, *supra* note 25, at 1163-64 (“Search engines play a crucial role in managing the enormous amount of information available on the Internet. They help users locate the information most relevant and important to them and lead an audience (and interlocutors) to content providers.”); Goldman, *supra* note 28, at 189 (“[S]earch engines make editorial choices designed to satisfy their audience. These choices systematically favor certain types of content over others, producing a phenomenon called ‘search engine bias.’”).

filtering out of websites the search engine deems irrelevant.⁴⁸ In this way, search engines have become the gatekeepers of information: They direct us toward what they think is relevant and away from what they do not think is relevant.

A. *The Impact On Competitors*

Search engine bias creates significant opportunity for abuse. Search engine operators such as Google and Microsoft have the power to manipulate search results in ways that serve their own company's interests.⁴⁹ A search engine's algorithm can lower the ranking of a website simply because the search engine operator views it as competition or because it has a personal distaste for the website.⁵⁰ For example, Google can give a high PageRank to Zagat, allowing it to appear at the top of a SERP, and Google can give a low PageRank to Yelp, pushing Yelp's website down to the bottom of a SERP. Absent a clear notice to the user, it may appear as if websites that are pushed to the bottom of a SERP, like Yelp, are less relevant and not worth visiting.⁵¹ This type of conduct can significantly decrease the traffic to that website and has the potential to force the website operator to shut down. One reporter has argued that this biased ranking is how Google Maps unseated MapQuest from its dominance in online mapping services "virtually overnight."⁵²

B. *The Impact On Consumers*

In addition to the effect search engine bias has on competitors' business, search engine bias also has a significant effect on users. As the gatekeepers of the Internet, search engines are able to control what information reaches the user and what does not. Professors Bracha and Pasquale have argued that exercise of this control can significantly diminish the autonomy of the search engine's users.⁵³ For example, if a

48. Bracha & Pasquale, *supra* note 25, at 1168.

49. *Id.* at 1170 ("[S]earch engines can and, to some extent, do manipulate results in order to serve their own self-interest.").

50. *Id.*

51. See, e.g., Letter from Gary Ruskin, Exec. Dir., Commercial Alert, to Donald Clark, Sec'y, Fed. Trade Comm'n (June 27, 2002), at 1, available at <http://www.commercialalert.org/PDFs/ftcresponse.pdf> (explaining receipt of a complaint alleging that Google's search engine bias "may mislead search engine users to believe that search results are based on relevancy alone, not marketing ploys").

52. Raff, *supra* note 8 ("The preferential placement of Google Maps helped it unseat MapQuest from its position as America's leading online mapping service virtually overnight.").

53. Bracha & Pasquale, *supra* note 25, at 1176-77.

user enters “same-sex marriage” into a Google search and most of the results returned are websites in favor of same-sex marriage, a user might believe this means that more people support same-sex marriage than oppose it.⁵⁴ If a user enters “do violent video games cause gun violence among youth” into a Google search and most of the results returned are websites that suggest “yes,” a user might believe this means that violent video games do, in fact, cause violence among youth. By lowering the PageRank of these websites, Google has the power to turn users away from websites citing studies that suggest “no,” violent video games do not cause gun violence among youth. Manipulating search engine results in the way *potentially* allows search engine operators, like Google, to impact users’ beliefs.

C. The FTC Settlement

After almost twenty months of investigating Google’s search practices for antitrust violations, the FTC issued a press release on January 3, 2013, announcing that it had reached a settlement with Google and that the FTC would cease its investigation into the company.⁵⁵ After sifting through the evidence, the FTC concluded that Google’s search algorithms, “even those that may have had the effect of harming individual competitors—could be plausibly justified as innovations that improved Google’s product and the experience of its users.”⁵⁶ Furthermore, it concluded that condemning legitimate product improvements such as those Google made would risk harming consumers:

Challenging Google’s product design decisions in this case would require the Commission—or a court—to second-guess a firm’s product design decisions where plausible precompetitive justifications have been offered, and where those justifications are supported by ample evidence. Based on this evidence, we do not find Google’s business practices with respect to the claimed search bias to be, on balance, demonstrably anticompetitive⁵⁷

54. Given the way PageRank has been explained to the public—as prioritizing websites that are more frequently linked to over websites less frequently visited—a user could infer (accurately or inaccurately) that the top websites on a search engine results page are the most frequently visited websites, and may therefore infer that more people are in favor of same-sex marriage than opposed to it. *See supra* Part I.A (explaining PageRank).

55. FTC Press Release, *supra* note 3.

56. *Id.*

57. Statement of the Federal Trade Commission Regarding Google’s Search Practices, *In the Matter of Google Inc.*, FTC File No. 111-0163 (Jan. 3, 2013), at 2-3, <http://ftc.gov/os/2013/01/130103googlesearchstmttoftcomm.pdf> [hereinafter FTC Statement].

After the settlement, Microsoft and other Google critics exploded and labeled the investigation “weak and frankly—unusual.”⁵⁸

Although it may seem as if Google is safe now that the FTC has ruled in its favor, the battle continues. Critics continue lobbying against Google and pressuring the government to take action.⁵⁹ Google remains under investigation by several other entities, such as: the European Union; the South Korean Fair Trade Commission; Brazil’s Justice Ministry; and the Attorney Generals of Texas, New York, California, Ohio, Mississippi, and Oklahoma.⁶⁰ Additionally, private parties have continued to file suit against Google for violating state antitrust and consumer protection laws.⁶¹ This makes it a more critical time than ever to examine the objections to Google’s search practices and proposed solutions to search engine bias.

III. THE ANTITRUST OBJECTION

The crux of the FTC investigation into Google was determining whether or not Google manipulated its search results in ways that constitute anticompetitive conduct in violation of the Sherman Act.⁶² In this section, I argue that the goals of antitrust law are not achieved when applied to markets that provide free goods or services, such as search engines. Additionally, I argue that even if the Sherman Act applies to Google searches, Google would escape liability because there is no “relevant market” that can be alleged for purposes of the Sherman Act, and Google does not “willfully acquiesce” in its monopoly share by engaging in anticompetitive conduct. Rather, Google enjoys an increased market share because of a superior product and its numerous innovations in the search engine industry.⁶³

58. Dave Heiner, *The FTC and Google: A Missed Opportunity*, MICROSOFT ON THE ISSUES (Jan. 3, 2013, 4:27 P.M.), http://blogs.technet.com/b/microsoft_on_the_issues/archive/2013/01/03/the-ftc-and-google-a-missed-opportunity.aspx. Dave Heiner is the Vice President and Deputy General Counsel of Microsoft.

59. See, e.g., *id.* (expressing the hope that other antitrust agencies will succeed where Heiner believes the FTC has failed, and “obtain the additional relief needed to address the serious competition law concerns that remain,” regarding Google’s conduct).

60. *Global Scrutiny: Law Enforcement Agencies Around the World Are Investigating Google*, FAIRSEARCH 2 <http://www.fairsearch.org/wp-content/uploads/2012/06/global-scrutiny.pdf>; see also *Microsoft Pressures Europe After FTC Google Verdict*, CNBC (Jan. 4, 2013, 10:57 A.M.), <http://www.cnbc.com/id/100354398> (summarizing Dave Heiner’s criticisms of the FTC’s verdict regarding Google’s alleged antitrust violations, and Microsoft’s subsequent focus on the investigations being conducted in Europe).

61. See, e.g., Amended Complaint, *SMS Telecom LLC v. Google, Inc.*, No. 6:12-cv-00987 (E.D. Tex. May 17, 2013) (alleging, *inter alia*, fraud, deceptive trade practices, and unfair competition).

62. FTC Statement, *supra* note 57.

63. For examples of some of these innovations, see *infra* text accompanying notes 71-

A. The Goals of the Federal Antitrust Laws

The Sherman Act makes it unlawful to monopolize, attempt to monopolize, or conspire to monopolize any given market.⁶⁴ It is generally accepted that the purpose of antitrust laws such as the Sherman Act is to maximize “consumer welfare.”⁶⁵ Monopolies hurt consumer welfare in two ways. First, monopolies drive up prices.⁶⁶ If there is only one seller of a product, the seller can increase the price of the product and consumers will be forced to pay whatever is demanded (or suffer without the product, which is not always an option) because there are no lower priced alternatives. Second, monopolies hurt innovation.⁶⁷ If there is only one seller of a product, that seller has little incentive to innovate or to improve the product because the seller does not have to worry about a competing product.

Neither of the foregoing reasons supports the application of the Sherman Act to Google’s search engine practices. First, assuming Google has a monopoly over the search engine market, there is no harm to consumer welfare through an increase of prices, since Google search services are free.⁶⁸

Second, there is no empirical evidence that Google’s domination of the search engine market has harmed innovation within that market.⁶⁹ Monopolies are thought to hurt innovation because if a company were the only seller of a product, the company would not have to improve the product to compete.⁷⁰ However, this is not the case in the search engine market, where companies like Google offer their services for free.

Additionally, the status quo shows that despite Google’s dominance in

77.

64. 15 U.S.C. § 2 (2006).

65. KEVIN COATES, COMPETITION LAW AND REGULATION OF TECHNOLOGY MARKETS 10 (2011).

66. *Id.*

67. *Id.*; see also *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 52 (1911) (describing the “danger of deterioration in quality” of a monopolized product).

68. Of course, Google’s opponents are quick to assert that not all of Google’s services are free. For example, Google has several “customers” who pay for advertisements on Google so that their websites will appear prominently in Google search engine results. However, these are customers not of the online search market, but of the *search advertising* market, which has failed as a “relevant market” for antitrust purposes because it is indistinguishable from general online advertising. This is more thoroughly discussed a few paragraphs below in my discussion of *KinderStart.com LLC v. Google*.

69. See *infra* text accompanying notes 71–77 (discussing several Google innovations developed while it enjoyed a dominant market share of the search engine industry).

70. See *Standard Oil Co. of N.J.*, 22 U.S. at 1 (evaluating the anticompetitive practices of a large petroleum company and concluding that they amounted to a conspiracy to monopolize the oil industry).

the search engine industry, innovation in the market has *not* ceased. For example, on December 7, 2009, Google introduced “Google Goggles,” which allows Android phones to search the web by taking a picture of an object instead of typing in words.⁷¹ Less than a year later, Google introduced “Google Instant,” which displays search results as you type, even before your terms are fully entered.⁷² In 2011, Google introduced “Google Voice Search,” which allows users to search the web by speaking search terms into a microphone instead of typing in words.⁷³ In early 2012, Google introduced personalized searches, which allow users to personalize their searches when signed into a Google account.⁷⁴ Only a few months later, Google introduced “Handwrite,” which allows users to search on a tablet or smartphone by writing search terms with their fingers as opposed to entering them on a keyboard.⁷⁵ Most recently, Google introduced “Google Now,” which collects a user’s search history and, based off of the user’s search habits, delivers personalized information to the user.⁷⁶ All of these search engine innovations were developed in a short span of three to four years, and do not even begin to cover all of the innovations Google has brought to the search engine industry.

The underlying purpose of federal antitrust laws—to prevent price hikes and to encourage innovation—simply does not map onto the complex search engine industry, and enforcement of these laws would not achieve the goal of improving consumer welfare. In fact, some commentators have suggested that applying federal antitrust laws to Google may even *hinder* innovation, thereby hurting consumer welfare. For example, less than a year after the FTC ended its antitrust investigation into Google, Google launched a new search algorithm called “Hummingbird,” which has been referred to as “the biggest search change in a decade.”⁷⁷ This recent innovation might not have been possible had the FTC pursued an antitrust case against Google, as the burden of having to have its decisions approved

71. Katie Lepi, *The Evolution of Google Search Over The Past 5 Years*, EDUDEMIC (Jan. 7, 2013), <http://edudemic.com/2013/01/the-evolution-of-google-search/>.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* For a video introducing Google Handwrite, see Google, *Handwrite, a new way to search on Google*, YOUTUBE (July 26, 2012), <http://www.youtube.com/watch?v=uyeJXKfAcpc>.

76. For more information about “Google Now,” see *Google Now. The right information at just the right time*, GOOGLE, <http://www.google.com/landing/now/> (last visited Sept. 3, 2013). For a reporter’s commentary on “Google Now,” see Claire Cain Miller, *Addicted to Apps*, N.Y. TIMES, Aug. 25, 2013, at SR3.

77. Gordon Crovitz, *Google Search: Regulation Yields to Innovation*, WALL ST. J., Oct. 7, 2013, at A15 (arguing that it is no coincidence that Google was able to launch one of the biggest innovations to its search engine in the same year that the FTC ceased investigating it for anticompetitive practices).

by regulators could have convinced Google to not pursue Hummingbird.⁷⁸

B. Section 2 of the Sherman Act

The main source of antitrust law cited in objections to Google's search engine practices is section 2 of the Sherman Act, which makes it unlawful for a company to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce" in the United States.⁷⁹ To prevail on a section 2 monopolization claim, two elements must be established: (1) the possession of monopoly power in the relevant market, and (2) 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.⁸⁰ Neither one of these elements is met in the case against Google search.

1. Monopoly Power in the Relevant Market

Although there are no strict numbers dictating what constitutes a monopoly in a given market, courts have estimated that a market share between seventy and ninety percent suggests monopoly power.⁸¹ Whether or not Google possesses monopoly power by this standard in a market is not in serious dispute.⁸² The critical issue lies in determining what

78. See *id.* (pointing to the stifling of innovation that occurred at IBM after antitrust cases were brought against it).

79. 15 U.S.C. § 2 (2006).

80. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

81. See *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 187 (3d Cir. 2005) (holding that 75% to 80% market share of a dental supply manufacturer on a revenue basis was "more than adequate to establish a prima facie case of [monopoly] power"); *Exxon Corp. v. Berwick Bay Real Estate Partners*, 748 F.2d 937, 939-40 (5th Cir. 1984) (*per curiam*) (finding that a 52% share of the market was "an insufficient basis as a matter of law," to prove that a major oil company was guilty of antitrust violations); *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416, 424 (2d Cir. 1945) (stating that a 90% market share "is enough to constitute a monopoly"). It is typically required that a monopolist foreclose at least 40% of the relevant market before antitrust liability can be found. See, e.g., *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 7 (1984) (finding that a hospital with 30% of the relevant market share did not possess sufficient market power for antitrust liability purposes).

82. Roughly 65% to 70% of all Internet searches on computers in the United States are done through Google. *The Power of Google: Serving Consumers or Threatening Competition?: Hearing Before the Subcommittee on Antitrust, Competition Policy and Consumer Rights of the Comm. on the Judiciary*, 112th Cong. 6-7 (2011) (statement of Sen. Herb Kohl). Roughly 95% of all mobile device searches are done on Google. *Id.* In second place, Microsoft's Bing accounts for around 15% of Internet searches in the U.S., with Yahoo in a close third, accounting for 14% of Internet searches in the United States.

“relevant market” is at stake. Defining the “relevant market” is critical in antitrust cases because it often determines the outcome of the case.⁸³ A “relevant market” for purposes of a section 2 claim is defined as “the field in which meaningful competition is said to exist.”⁸⁴

Citing the large number of searches conducted on Google as opposed to other search engines, Google opponents often breeze through the analysis of what the “relevant market” is. For example, FairSearch, a coalition of businesses and organizations devoted to fostering competition and fair practices in online search, published a report arguing that Google search violates section 2 of the Sherman Act.⁸⁵ The report devoted most of its analysis to the collection of data showing how many searches are done on Google as opposed to other search engines, while giving little to no analysis on what constitutes the “relevant market.”⁸⁶ Instead, the report simply asserted that Google’s monopoly exists in the “Internet search and search advertising” markets.⁸⁷

Failing to define the relevant market might cause a section 2 claim to fail. New innovations in online search and search advertising have complicated the search engine market.⁸⁸ Given that the allegation is that Google manipulates its *search engine results* by prioritizing its own products and services over those of its competitors, the “relevant market” at stake is the search engine market, not the search advertising market.⁸⁹ This failure to pinpoint the precise “relevant market” for section 2 purposes is the reason KinderStart, an Internet website that served as a directory and search engine linking to resources on subjects relating to young children, failed in its section 2 claim against Google when it tried to sue in federal

Streitfeld & Wyatt, *supra* note 6.

83. Robert Pitofsky, *New Definitions of Relevant Market and the Assault on Antitrust*, 90 COLUM. L. REV. 1805, 1806 (1990); *see also* Eastman Kodak Co. v. Image Tech. Servs., 504 U.S. 451, 469 (1992) (“[M]arket definition generally determines the result of the case.”).

84. KinderStart.com LLC v. Google, Inc. (*KinderStart II*), No. C 06-2057 JF (RS), slip op. at 7 (N.D. Cal. Mar. 16, 2007) (quoting Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1202 (9th Cir. 1997)).

85. *Google’s Transformation From Gateway to Gatekeeper: How Google’s Exclusionary and Anticompetitive Conduct Restricts Innovation and Deceives Consumers*, FAIRSEARCH (last visited Apr. 1, 2013), <http://www.fairsearch.org/wp-content/uploads/2011/10/Googles-Transformation-from-Gateway-to-Gatekeeper.pdf>.

86. *Id.* at 5-14.

87. *Id.* at 10.

88. *See supra* text accompanying notes 71-77 (discussing several of Google’s innovations in the search engine industry).

89. Of course, there are also objections that Google opponents have made to Google AdWords and other Google practices related to its online advertising. *See, e.g.*, Steve Lohr, *Antitrust Cry From Microsoft*, N.Y. TIMES, Mar. 31, 2011, at B1 (discussing Microsoft claims against Google, including one that Google’s contracts prohibit the use of third-party software to move advertisers’ data from one ad platform to another).

court.⁹⁰ In fact, KinderStart alleged the same two “relevant markets” that FairSearch did, but ultimately to no avail.⁹¹

In 2003, KinderStart enrolled in Google’s AdSense program, under which it would pay Google for a series of sponsored links.⁹² Later that year, KinderStart began placing ads from Google onto its site in exchange for payments from Google.⁹³ KinderStart alleged that two years later, its website suffered a seventy percent reduction in monthly page views and traffic.⁹⁴ It subsequently realized that common search terms on Google’s search engine no longer listed KinderStart as a result as prominently as it had done in the past.⁹⁵ As a result of this drop in search engine referrals and prominence, KinderStart alleged that its monthly AdSense revenue dropped by over eighty percent. KinderStart’s PageRank dropped to a zero, the lowest ranking a website could receive.⁹⁶ Having not received any advance notice of this significant change and believing it had not violated any of Google’s website guidelines, KinderStart filed a section 2 claim against Google in the Northern District of California.⁹⁷

Like FairSearch, KinderStart alleged that Google was guilty of attempted monopolization in two relevant markets.⁹⁸ First, it alleged that Google owned and operated its engine in the “Search Market,” which it claimed to be “the market of search engine design, implementation and usage in the United States.”⁹⁹ Second, KinderStart alleged that Google dominated the “Search Ad Market,” which consisted of a “universe of advertisers who seek and pay for online advertising” and who “target and reach Internet browsers and users of search engines.”¹⁰⁰

The Northern District of California rejected both theories. The “Search Market” theory failed as a “relevant market” because Google, like most other search engines, provides its search services free of cost, and antitrust law does not concern itself with “competition in the provision of free services.”¹⁰¹ Thus, the court held that “the Search Market [was] not a

90. *KinderStart.com LLC v. Google, Inc. (KinderStart II)*, No. C 06-2057 JF (RS), slip op. at 2 (N.D. Cal. Mar. 16, 2007).

91. Second Amended Complaint ¶¶ 34, 38, *KinderStart.com LLC v. Google, Inc.*, No. C 06-2057 JF (RS) (N.D. Cal. Mar. 16, 2007) [hereinafter *KinderStart SAC*].

92. *KinderStart II*, No. C 06-2057 JF (RS), at 4.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 5.

97. *Id.*

98. *Id.* at 3.

99. *KinderStart SAC*, *supra* note 91, ¶ 34.

100. *Id.* ¶ 38.

101. *KinderStart.com LLC v. Google, Inc. (KinderStart II)*, No. C 06-2057 JF (RS), slip op. at 8 (N.D. Cal. Mar. 16, 2007).

‘[relevant] market’ for purposes of antitrust law.’¹⁰² The court also rejected the “Search Ad Market” theory because the court was not persuaded by KinderStart’s distinction of the Search Ad Market from other forms of online advertising.¹⁰³ Because a website can choose to engage in search-based advertising or advertising through postings independent of any search, the court found that search-based advertising was “reasonably interchangeable with other forms of Internet advertising.”¹⁰⁴ It therefore found the Search Ad Market “too narrow” to constitute a relevant market for antitrust purposes.¹⁰⁵

As explained by the Northern District of California, there is no “relevant market” that Google monopolizes or attempts to monopolize, since the actual market at stake—the search engine market—is one where services are provided free of cost, and antitrust law is not concerned with competition in the provision of free services. The “search ad market” would also fail as a relevant market because it is “too narrow” to constitute a relevant market for antitrust purposes and is indistinguishable from other forms of online advertising. Therefore, the first element of a Sherman Act section 2 claim cannot be established against Google.

2. Willful Acquisition or Maintenance of Power

The second element of a section 2 claim is the willful acquisition or maintenance of monopoly power, which is to be distinguished from growth or development as a consequence of a superior product.¹⁰⁶ This generally requires showing that the monopoly was achieved through anticompetitive conduct.¹⁰⁷ This ensures that competitors who achieve monopoly power through honest competition and a superior product will not be punished for their success, which would have the counterproductive effect of discouraging innovation.¹⁰⁸

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* Although not argued by KinderStart, the court also noted that the Search Market and Search Ad Market combined together would still fail to constitute a “relevant market” for antitrust purposes, since such a combination would “suffer from the same lack of breadth” that renders the Search Ad Market inadequate to suffice as a “relevant market.” *Id.* at 8-9.

106. 15 U.S.C. § 2 (2006).

107. *See* United States v. Grinnell, 384 U.S. 563, 570-71 (1966) (finding a monopoly where a security company achieved its hold on the market through exclusionary practices).

108. *See* Verizon Commc’ns Inc. v. Law Offices of Curtis v. Trinko, LLP, 540 U.S. 398, 407 (2004) (discussing that in order to “safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.” (emphasis in original)).

Google opponents argue that if Google demotes the ranking of its competitors' websites and prioritizes its own websites in its display of search results, it willfully denies competitors of the opportunity to compete in the market by denying them traffic they would have gotten had Google not demoted their ranking, thereby engaging in anticompetitive conduct.¹⁰⁹ There are two fundamental flaws with this assumption. First, Google has no duty to its competitors.¹¹⁰ There is a distinction between (1) Google taking action to promote its own product, such as returning its own vertical search engine results at the top of a SERP (such as Google Maps), which necessarily involves a lowering of the ranking of other non-Google websites (such as MapQuest); and (2) Google buying out its competitors (such as MapQuest) so that Google Maps becomes the only online map service in the market. The first action is a legitimate, business action and the second is an unlawful practice in violation of federal antitrust laws.¹¹¹

Of course, all companies have the right to create a website for Internet users to view. However, there is no right to have one's website prominently listed in the first page of a SERP on Google's platform.¹¹² To argue otherwise would be as absurd as arguing that CVS would be violating the Sherman Act if it placed its own CVS-branded over-the-counter medication prominently at the very front of the store, while burying in the back of the store non-CVS-branded over-the-counter medication, such as Tylenol and Excedrin. Just as CVS has the right to promote its own products, such as by placing CVS-branded medication at the front of its store, Google has the right to promote its own product, such as by displaying Google Maps at the top of its search platform. The mere fact that promoting one's own product may have a negative business effect on one's competitors does not itself make the practice anticompetitive.¹¹³

109. See, e.g., TradeComet Complaint, *supra* note 46, at 3-4 (alleging that Google drove the plaintiff out of business by decreasing its prominence on Google's platform because Google viewed the plaintiff as a dangerous competitor).

110. *KinderStart I*, No. C 06-2057 JF (RS), at 12 (N.D. Cal. July 13, 2006) (“[T]here is no duty to aid competitors.”) (quoting *MetroNet Servs., Corp. v. Qwest Corp.*, 383 F.3d 1124, 1131 (9th Cir. 2004)).

111. “The law is violated only if the company tries to maintain or acquire a monopoly through unreasonable methods.” *Single Firm Conduct*, FEDERAL TRADE COMMISSION, <http://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct> (last visited Dec. 23, 2013).

112. However, one may pay for the privilege of appearing at the top of all search results in a “paid results” section. GOOGLE ADWORDS, <http://www.google.com/adwords> (last visited Nov. 25, 2013).

113. For an action to be an impermissible anticompetitive behavior under the Sherman Act, it must be “unreasonable.” For example, aggressive exclusionary or predatory actions would be considered violations. AN FTC GUIDE TO THE ANTITRUST LAWS, *supra* note 111, at 24.

Companies are not required to promote the products of their competitors.¹¹⁴

To be sure, Google theoretically could become the only search engine in common use and Google could lower the ranking of certain websites. In that case, the lowest rank websites could become the “unknown unknown,”¹¹⁵ meaning users would never know about these websites because they would not come up within the first few pages of search results. Such an argument assumes that Google is the only way users can find a website. However, websites have other advertising options. For example, Angie’s List, a website that compiles reviews of local service companies, advertises through TV commercials, as opposed to relying on Google to advertise its website.¹¹⁶ As a result, Angie’s List has achieved nationwide recognition, in part by relying upon sources other than Google for advertising. The fact that some companies are unwilling to advertise their own product, and instead choose to rely upon Google to “advertise” their product for them, does not transform Google’s refusal to “advertise” for them into an anticompetitive act.

This is where I diverge from other scholars that have written on the subject, for I believe not only that Google has no obligation to list its competitors at the top of a SERP, but I also argue that Google has no obligation to list its competitors on a SERP at all.¹¹⁷ By listing a competitor’s website as a search result, the competitor essentially is receiving advertisement space on Google’s platform.¹¹⁸ Google is under no

114. *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 375 (7th Cir. 1986) (“[I]t is clear that a firm with lawful monopoly power has no general duty to help its competitors . . .”).

115. Raff, *supra* note 8; *see also* Bracha & Pasquale, *supra* note 25, at 1178 (“Missing results are an ‘unknown unknown[.]’ users for whom certain information is suppressed do not even know that they do not know the information.”).

116. To view one of Angie’s List commercials, see *Angie’s List TV Spot, ‘Saving Time For Members,’* iSPOT.TV, <http://www.ispot.tv/ad/7oc2/angies-list-saving-time-for-members> (last visited Sept. 3, 2013). The website for Angie’s List also lists other non-Google companies that have assisted in its advertisement, including MSNBC, the *New York Times*, Fox & Friends, and the Today Show. ANGIE’S LIST, <http://www.angieslist.com/quick-tour.htm> (last visited Sept. 3, 2013).

117. While there is great disagreement over whether Google must refrain from removing its competitors from appearing at the top of a SERP, even scholars who believe Google need not refrain from such an act believe that Google must refrain from removing its competitors from a SERP altogether. *See, e.g.*, James Grimmelman, *Speech Engines*, 94 MINN. L. REV. (forthcoming 2014) (proposing that many of Google’s seemingly biased search practices are defensible but advocating close monitoring by the Federal Trade Commission of these practices in the future).

118. Appearing as a search result in a Google search is so powerful that companies frequently pay Google to display their website in response to search queries, though the websites appear in a paid advertisements section on the right-hand side of the page labeled “Ads.” GOOGLE ADWORDS, *supra* note 112. For example, a search for “sweaters” will return standard search results on the left-hand side and paid search results on the right-hand

obligation to advertise for its competitors and therefore is free to remove a competitor entirely from appearing in particular searches on its platform, so long as Google makes no misrepresentation claiming that it does not do so. To return to the CVS example, not only does CVS have the right to bury Tylenol and Excedrin medication at the back of the store while prominently displaying CVS-branded medication at the front, CVS also has the right not to carry Tylenol and Excedrin at all. It would be nonsensical to accuse CVS of violating the Sherman Act simply because it refused to carry medication sold by its competitors.

Additionally, this second element of willful acquisition or maintenance cannot be satisfied because a company will not be penalized under the Sherman Act for achieving monopoly power if it did so as a result of a “superior product, business acumen, or historic accident.”¹¹⁹ Anticompetitive conduct must be shown.¹²⁰ Attempts to establish this element against Google would fail because Google can easily claim its success results from its superior product. Google was the first search engine to depart from the traditional template initial search engines followed.¹²¹ Rather than exclusively relying on algorithms to sort data and calculate relevance, Google developed PageRank, a new formula that accounted for the number of times other websites linked to a given page in its determination of relevance.¹²² PageRank was radically different from the formulas used by other search engines and immediately proved quite successful, allowing Google to produce more relevant results than the results of its competitors.¹²³

As mentioned earlier, critics also object to Google OneBox as an anticompetitive practice. They argue that it gives priority to Google’s own vertical search engines over its competitors, thereby directing traffic away from Google’s competitors and directly hurting competition.¹²⁴ However, as the FTC investigation concluded, Google OneBox is not anticompetitive conduct; it is legitimate business conduct aimed at improving Google’s products and services to its users.¹²⁵ According to the *New York Times*, Google had presented the FTC with test results from outside focus groups hired to review different versions of Google SERPs, and the results showed

side, with “Sweaters at JCPenney” appearing as the first paid advertisement.

119. *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966).

120. *Id.*

121. See Greg Lastowka, *Google’s Law*, 73 BROOK. L. REV. 1327, 1335-36 (2008) (outlining Google’s rise to prominence and the ways in which its methods diverged from those of its competitors).

122. *Id.* at 1337.

123. *Id.*

124. See, e.g., Raff, *supra* note 8 (arguing that Google’s preferential placement of its own websites over its competitors’ websites hurts competition).

125. FTC Press Release, *supra* note 3.

that more users preferred SERPs that displayed a Google OneBox result at the top, as opposed to SERPs that did not.¹²⁶ When subjects were asked to compare side-by-side examples of a SERP with the traditional blue hyperlinks to specialty travel sites with a SERP displaying a Google OneBox result containing links to airlines and fares through GoogleFlights, “fewer than one in five users preferred the page with links only.”¹²⁷ Thus, the FTC concluded that Google engaged in legitimate, business activity to improve its product design when it determined the change to using Google OneBox results would be better for the consumer.¹²⁸ While acknowledging that Google OneBox would have had a negative business impact on many of Google’s competitors, the FTC found that the “totality of the evidence” showed that “any negative impact on actual or potential competitors was incidental . . .”¹²⁹ Google did not engage in anticompetitive conduct and therefore did not violate the Sherman Act.

IV. THE FIRST AMENDMENT

In addition to raising antitrust issues, Google search engine manipulation also raises First Amendment issues. In this section, I first analyze cases where plaintiffs sued Google alleging search engine manipulation. In these cases, Google was able to escape liability on First Amendment grounds for a wide variety of claims, including tortious interference with contractual relationships, fraud, deceptive business practices, and defamation. Second, I outline the “transmission theory” response to First Amendment defenses of Google search engine practices, and argue that this theory ultimately fails to deny Google of its First Amendment rights.

A. How Courts Have Treated the First Amendment Issue

There are three major cases in which courts have adjudicated claims alleging search engine manipulation by Google and Google has raised a First Amendment defense. In all three cases, the court dismissed the complaint.¹³⁰ This section will discuss each one in turn.

126. Edward Wyatt, *Critics of Google Antitrust Ruling Fault the Focus*, N.Y. TIMES, Jan. 7, 2013, at B1.

127. *Id.*

128. *Id.*

129. FTC Statement, *supra* note 57, at 2.

130. *KinderStart.com LLC v. Google, Inc. (KinderStart II)*, No. C 06-2057 JF (RS), slip op. at 36-7 (N.D. Cal. Mar. 16, 2007); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 634-35 (D. Del. 2007); *Search King, Inc. v. Google Tech., Inc.*, No. CIV-02-1457-M, slip op. at 8 (W.D. Okla. May 27, 2003).

1. *Search King, Inc. v. Google, Tech, Inc.*

In *Search King, Inc. v. Google Tech, Inc.*, the Western District of Oklahoma was presented with two questions: (1) whether a representation of the relative significance of a website is a form of protected speech, and (2) if so, whether the search engine responsible for making these representations is insulated from tort liability arising out of the intentional manipulation of such a representation.¹³¹

Search King was a private company specializing in search engine optimization. Website operators pay search engine optimizers (SEOs) such as Search King to increase the “ranking” of their website so that their website appears as one of the first few search results in certain search queries. This allows websites to “game the system” by manipulating PageRank into believing that their website is more relevant than Google’s algorithms ordinarily would find. Search King does this by seeking out and paying highly-ranked websites to sell advertisement placements on their website to Search King’s clients. By increasing the number of websites that link to one page, Search King is able to increase the ranking of their client’s website. Therefore, by selling enough advertisement placements, websites can pay Search King to essentially “increase” their PageRank so that they appear higher in a SERP than they ordinarily would, thereby bringing more traffic to their website and ultimately bringing them more revenue.

From February 2001 until July 2002, Search King was assigned a PageRank of seven.¹³² By September 2002, Search King’s PageRank had dropped to a four.¹³³ Search King alleged that this decrease in rank adversely impacted its business and filed a tortious interference with contract¹³⁴ claim against Google, seeking injunctive relief.¹³⁵ Search King argued that PageRanks are objectively verifiable, noting that the PageRank system is patented and that since ideas cannot be patented, PageRank must be “objective in nature, and therefore capable of being proven true or

131. *Search King, Inc.*, slip op. at 1.

132. *Id.* at 2.

133. *Id.* at 2–3.

134. To prevail on a tortious interference with contract claim under Oklahoma state law, the plaintiff must prove three elements: (1) the defendant interfered with one of the plaintiff’s a business or contractual relationships, (2) the interference was malicious and wrongful, without excuse or justification, and (3) the interference was a proximate cause for an injury suffered by the plaintiff. *Id.* at 4; *see also* Daniels v. Union Baptist Ass’n, 2001 OK 63, 55 P.3d 1012, 1015 (Okla. 2001) (listing the elements necessary to establish a cause of action for malicious interference with contract or business relations under Oklahoma state law).

135. *Search King, Inc.*, slip op. at 3.

false.”¹³⁶ Search King argued that its lowered PageRank score was therefore a provably false statement made by Google. Google responded that PageRank consists of opinions entitled to First Amendment protection and that Google was therefore shielded from tort liability.¹³⁷

The court ultimately agreed with Google, finding that PageRank consisted of “constitutionally protected opinions.”¹³⁸ The court explained that although the PageRank algorithm certainly has an objective nature, the algorithm was not at issue; rather, it was the *subjective result* produced by the algorithm that Search King was contesting.¹³⁹ The court distinguished between process and result.¹⁴⁰ The *process* by which Google arranges its search results is through the PageRank algorithm, which is objective.¹⁴¹ However, the *result* is the actual PageRank, or the numerical representation of the significance of a website, which the court found to be “fundamentally subjective in nature.”¹⁴² Since PageRank consists merely of opinions on the relevance of certain websites, there is no way to prove that the PageRank of a given website is false, and the court thus concluded that PageRank was entitled to “full constitutional protection.”¹⁴³

2. *Langdon v. Google, Inc.*

The second case accusing Google of search engine manipulation was *Langdon v. Google, Inc.*, a case decided by the District of Delaware in 2007.¹⁴⁴ The plaintiff argued that Google had a duty to carry his advertisements, which charged North Carolina government officials with fraud and the Chinese government with committing various atrocities.¹⁴⁵ The plaintiff argued that Google’s refusal to run his advertisements and Google’s alleged removal of his websites from certain search queries (which allegedly hurt his ranking on other search engines) violated his First Amendment rights.¹⁴⁶ He further alleged violations of Delaware law through fraud, breach of contract, and deceptive business practices.¹⁴⁷

In response, Google argued that the injunctive relief sought by the

136. *Id.* at 5.

137. *Id.* at 4.

138. *Id.* at 7.

139. *Id.*

140. *Id.* at 6.

141. *Id.*

142. *Id.*

143. *Id.* at 7 (quoting *Jefferson County Sch. Dist. No. R-1 v. Moody’s Investor’s Services, Inc.*, 175 F. 3d 848 (10th Cir. 1999)).

144. *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 626 (D. Del. 2007).

145. *Id.*

146. *Id.*

147. *Id.*

plaintiff would compel Google to speak in a manner that would violate Google's own First Amendment rights.¹⁴⁸ The court agreed, explaining that the First Amendment guarantees not only the right to speak, but also the right *not* to speak.¹⁴⁹ On this ground, the court granted Google's motion to dismiss the complaint.¹⁵⁰ The court also held that Google was immunized from the plaintiff's claims under section 230 of the Communications Decency Act, which reads in relevant part:

No provider or user of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or *otherwise objectionable*, whether or not such material is constitutionally protected.¹⁵¹

Analogizing Google to a publisher, entitled to editorial discretion in "deciding whether to publish, withdraw, postpone, or alter content" as it sees fit, the court ruled in favor of Google.¹⁵² In rejecting the plaintiff's argument that section 230 was inapplicable because his ads were not obscene or harassing, the court held that Google's refusal to run the plaintiff's ads fell under the "otherwise objectionable" prong of section 230 and was therefore protected against suit.¹⁵³

The court further held that the plaintiff failed to state a claim that Google had violated his First Amendment right to free speech because Google is a "private, for profit" company, "not subject to constitutional free speech guarantees."¹⁵⁴ Rather, Google is a search engine that "uses the internet as a medium to conduct business."¹⁵⁵ The plaintiff's argument that Google was a state actor because it worked with state universities was found "specious."¹⁵⁶ The court also rejected the plaintiff's argument that there was a sufficient nexus between Google and the State that Google's actions could fairly be treated as those of the State itself.¹⁵⁷ Because Google was not a state actor, it could not be found to have violated the

148. *Id.* at 629-30.

149. *Id.* The first Amendment protects not only the right to speak, but also the right not to speak. *See, e.g.,* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that compelling schoolchildren to salute the flag violated their First Amendment right not to speak).

150. *Langdon*, 474 F. Supp. 2d at 629-30.

151. *Id.* at 630 (quoting the Communications Decency Act, 47 U.S.C. § 230(c)(2)(A) (2006)) (emphasis added).

152. *Id.* (quoting *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)).

153. *Id.* at 630-31.

154. *Id.* at 631.

155. *Id.*

156. *Id.* The state action doctrine will be discussed more thoroughly in Part IV.A.3.

157. *Id.* at 631-32.

plaintiff's First Amendment rights.¹⁵⁸

The plaintiff's claim that Google engaged in deceptive business practice was also dismissed. The dismissal, however, was due to a failure to allege that the acts at issue took place in Delaware, an essential element of the Delaware state law claim for deceptive trade practices.¹⁵⁹ The court did not substantively conclude that Google had not engaged in deceptive business practices. This leaves open the possibility for a future deceptive business practices claim against Google, as long as the jurisdictional requirements of the claim are met.

3. *KinderStart.com LLC v. Google, Inc.*

The third case alleging Google search engine manipulation was *KinderStart.com LLC v. Google, Inc.*,¹⁶⁰ discussed earlier in Part III.B.1 of this Comment. To briefly summarize, KinderStart was an Internet website that enrolled in Google's AdSense program, under which it would pay Google for a series of sponsored links.¹⁶¹ Two years later, KinderStart suffered a significant reduction in monthly page views and traffic and subsequently realized that common search terms on Google's search engine no longer listed KinderStart as a result as prominently as it had done in the past.¹⁶² KinderStart's PageRank dropped to a zero, the lowest PageRank a website can receive.¹⁶³ In 2006, KinderStart filed suit against Google, alleging, *inter alia*, freedom of speech violations under the United States and California Constitutions, deceptive business practices under California state law, and defamation.¹⁶⁴

158. *Id.* at 632.

159. *Id.* at 633-34 (referring to Delaware's Consumer Protection Act, 6 DEL. CODE ANN. tit. 6 §§ 2501-2598 (1953)). Although Google was successful in having most of Plaintiff's claims dismissed, the court denied Google's motion to dismiss on Plaintiff's breach of contract claim, finding that Plaintiff adequately alleged such a claim, which requires establishing: (1) that a contract existed, (2) that Google breached an obligation imposed by the contract, and (3) that the breach resulted in damage to Plaintiff. *Langdon*, 474 F. Supp. 2d at 632 (citing *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003)).

160. *KinderStart II*, No. C 06-2057 JF (RS) (N.D. Cal. Mar. 16, 2007).

161. *Id.* at 4.

162. *Id.*

163. *Id.* at 5.

164. *Id.* at 2. In the first amended complaint, KinderStart alleged nine claims for relief: (1) freedom of speech violations under the United States and California Constitutions, (2) attempted monopolization under the Sherman Act, (3) monopolization under the Sherman Act, (4) violations of the Communications Act, (5) unfair competition under California state law, (6) prior discrimination under California state law, (7) breach of the implied covenant of good faith and fair dealing, (8) defamation and libel, and (9) negligent interference with prospective economic advantage. First Amended Complaint, *KinderStart.com LLC v. Google, Inc.*, No. C 06-2057 JF (RS), 2006 U.S. Dist. LEXIS 82481 (N.D. Cal. July 13,

First, KinderStart argued that Google violated the California Business and Professions Code by engaging in unlawful business practices, including PageRank deflation and blockage of competitors' websites.¹⁶⁵ The court rejected this claim, explaining that KinderStart failed to identify "specific terms of the AdSense agreement that are deceptive" and also failed to indicate how the agreement was deceptive.¹⁶⁶ However, this ruling was specific to the AdSense agreement between KinderStart and Google and was grounded in the technical issue of pleading requirements, as opposed to a substantive conclusion that Google does not engage in deceptive business practices.¹⁶⁷ Thus, the court left open the possibility for a deceptive business practices claim by *consumers* alleging manipulative practices in the search process, rather than by website operators suing on their unhappy with their AdSense agreements.

Second, KinderStart alleged defamation against Google based on Google's public presentation of KinderStart.com as having a PageRank of zero.¹⁶⁸ Under California state law, defamation exists "whenever a false and unprivileged statement which has a natural tendency to injure or which causes special damage is communicated to one or more persons who understand its defamatory meaning and its application to the injured party."¹⁶⁹ To prevail on its defamation claim, KinderStart had to allege a provably false statement.¹⁷⁰ KinderStart argued that the PageRank assigned to its website was a false statement because its website retained relevance, and a PageRank assignment of zero was "mathematically impossible within the normal operation"¹⁷¹ of PageRank. In sum, KinderStart argued that KinderStart was harmed by Google's false statement "that Google had determined objectively that the KinderStart website was not worth visiting."¹⁷²

However, the court found that KinderStart failed to adequately allege that Google actually represented its PageRank algorithm as "objective" and therefore dismissed the claim, since if Google represented PageRank as a

2006) [hereinafter KinderStart FAC]. The Northern District of California delivered an order ruling on these claims on July 13, 2006. *KinderStart I*, No. C 06-2057 JF (RS) (N.D. Cal. July 13, 2006). Most claims were dismissed with leave to amend. Because the KinderStart II opinion frequently references analysis in KinderStart I to support its decision to dismiss KinderStart's claims, usually *without* leave to amend, both opinions will be referenced.

165. *KinderStart II*, No. C 06-2057 JF (RS), slip op. at 26.

166. *Id.*

167. *Id.*

168. *Id.* at 27.

169. *Id.* (quoting *Jackson v. Paramount Pictures Corp.*, 80 Cal. Rptr. 2d 1, 9 (Cal. Ct. App. 1998)).

170. *Id.*

171. *Id.* at 28.

172. *Id.*

subjective opinion, there could be no defamation claim.¹⁷³ This leaves open the possibility that, with sufficient evidence showing that Google represents PageRank as a purely objective algorithm, a plaintiff could plausibly allege a defamation claim based on an assignment of a zero PageRank to its website.

KinderStart also alleged that Google violated its First Amendment¹⁷⁴ rights by blocking search engine results from showing KinderStart's website content, and further alleging that its website consequently suffered "irreparable harm in the suppression of [its] thoughts, facts, opinions, information, and communications that should have otherwise been accessed and received"¹⁷⁵ However, a demonstration of state action is a necessary prerequisite to any First Amendment claim.¹⁷⁶ In the case of private-party defendants, plaintiffs must show that the defendant's infringement constituted state action.¹⁷⁷ In its case against Google, KinderStart alleged three theories of state action: (1) entwinement, (2) a symbiotic relationship with the government, and (3) public forum.¹⁷⁸

The test for whether there is state action under the entwinement theory is whether there is a "sufficiently close nexus between the State and the challenged action . . . that the action of the latter may be fairly treated as that of the State itself."¹⁷⁹ KinderStart argued that Google was sufficiently entwined with the government because of its digital library projects,¹⁸⁰ which digitally archived at least one state-owned university library and which also supported a project by the Library of Congress.¹⁸¹ In evaluating this claim, the court compared the case to *Brentwood Academy v. Tennessee Secondary School Athletic Association*,¹⁸² where entwinement was found. In *Brentwood*, eighty-four percent of a private association's members were public schools, which provided significant financial support for the association.¹⁸³ Additionally, the state appointed members to the governing body of the private association, and association employees

173. *Id.* at 28-30.

174. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech."). KinderStart also alleged violations of its freedom of speech rights under the California Constitution, which is more protective and inclusive than the United States Constitution.

175. KinderStart FAC, *supra* note 164, ¶¶ 107, 108.

176. *KinderStart II*, No. C 06-2057 JF (RS), slip op. at 20 (N.D. Cal. Mar. 16, 2007).

177. *Id.* (citing *George v. Furlough*, 91 F.3d 1227, 1230 (9th Cir. 1996)).

178. *Id.* at 20-21.

179. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974).

180. For an explanation of Google's digital library project, see *Google Books Library Project—An Enhanced Card Catalog of the World's Books*, GOOGLE, <http://www.google.com/googlebooks/library.html> (last visited Sept. 3, 2013).

181. *KinderStart I*, No. C 06-2057 JF (RS), at 8 (N.D. Cal. July 13, 2006).

182. 531 U.S. 288 (2001).

183. *KinderStart I*, No. C 06-2057 JF (RS), at 8.

participated in the state retirement system.¹⁸⁴ In comparing KinderStart’s case to *Brentwood*, the court found that KinderStart fell far short of establishing a “sufficiently close nexus” between Google and the state, and therefore found no state action under the entwinement theory.¹⁸⁵

KinderStart also alleged that there was a symbiotic relationship between Google and the government.¹⁸⁶ If a private entity confers significant financial benefits to the government that are indispensable to the government’s financial success, then a symbiotic relationship may be established.¹⁸⁷ The court rejected this theory with little to no analysis, however, because KinderStart failed to allege a symbiotic relationship between Google and the State “with respect to the activities that *form[ed] the basis of the [Second Amended Complaint].*”¹⁸⁸ The facts that KinderStart alleged to support its symbiotic relationship theory were Google’s digital library projects, which were not of concern in the complaint.¹⁸⁹ The complaint only concerned PageRank and the listing of Google’s search engine results.

The third theory KinderStart pursued was the public forum theory. KinderStart argued that the Google search engine is a public forum because “[a]nyone with Internet access [could] go to [Google’s] own website or any number of thousands of other Websites having a ‘Google Search Box’ as provided by Google to use the Engine without payment or charge . . . Google has willfully dedicated the Engine for public use.”¹⁹⁰ KinderStart further alleged:

Defendant Google created and now manages, with the largest search engine in history, a freely accessible, nationwide public forum for the exchange and flow of Speech Content by virtue of the Engine. Defendant Google has intentionally, willfully and openly dedicated the Engine for public use and public benefit. Defendant Google, by and through the Engine, is a speech intermediary.¹⁹¹

The court began its analysis by noting there was no precedent to

184. *Id.*

185. *Id.*

186. *Id.*; see also *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961) (holding that actions by a private lessee who leased space for a restaurant from a state parking authority in a publicly owned building constituted state action).

187. *KinderStart II*, No. C 06-2057 JF (RS), slip op. at 22 (N.D. Cal. Mar. 16, 2007) (“In a symbiotic relationship the government has ‘so far insinuated itself into a position of interdependence (with a private entity) that it must be recognized as a joint participant in the challenged activity.’” (quoting *Burton*, 365 U.S. at 725)).

188. *Id.* (emphasis added).

189. *Id.* at 22-23.

190. *KinderStart SAC*, *supra* note 91, ¶ 91.

191. *Id.* ¶ 251.

support KinderStart's claim that "a search engine was a public forum for speech merely because it gives consumers the ability to find speech on the Internet."¹⁹² The court explained that a private space does not become a public forum simply because it is used for speech.¹⁹³ Rather, the point of inquiry must focus on the *manner* in which a forum is used.¹⁹⁴ Other considerations in the analysis include the nature of the "property" at issue (in this case, the Internet) and the disruption that might be caused by the speaker's activities.¹⁹⁵ However, the court did not provide much clarification on this analysis, perhaps because there exists little to no authority for the court to cite on how to determine whether "property" on the web constitutes a public forum or not.

B. The "Transmission of Speech" Theory

An interesting part of KinderStart's public forum argument can be found in its characterization of Google as a "speech intermediary."¹⁹⁶ KinderStart argued that access to Internet speech through Google's search engine warrants treating it as a public forum.¹⁹⁷ As indicated above, the court dismissed this argument as lacking any merit since there was no precedential authority to support it.¹⁹⁸

KinderStart's characterization of Google does not do much to support its public forum analysis. However, such a characterization *could* gain traction in arguing that Google search engine results really are not speech at all. While it is widely recognized that speech is generally entitled to government protection under the First Amendment, it is less clear whether the mere *transmission* of speech, an action done by "speech intermediaries," would be entitled to those same First Amendment protections.¹⁹⁹ This raises the following question: Under what circumstances is the mere *transmission* of speech encompassed by the "freedom of speech" protected under the First Amendment?

Professor Stuart Benjamin, professor of law at Duke University School of Law, argues that if search engines merely *transmit* speech, then they are not protected under the First Amendment and thus the government

192. KinderStart.com LLC v. Google, Inc. (*KinderStart II*), No. C 06-2057 JF (RS), slip op. at 23 (N.D. Cal. Mar. 16, 2007) (citing *Cornelius v. NAACP*, 473 U.S. 788, 800 (1985)).

193. *Id.* at 23.

194. *Id.* (citing *Cornelius v. NAACP*, 473 U.S. 788, 800 (1985)).

195. *Cornelius*, 473 U.S. at 799-800.

196. KinderStart FAC, *supra* note 164, ¶ 104.

197. *KinderStart II*, No. C 06-2057 JF (RS), slip op. at 22-23.

198. *Id.* at 23.

199. Stuart Minor Benjamin, *Transmitting, Editing, and Communicating: Determining What "The Freedom of Speech" Encompasses*, 60 DUKE L.J. 1673, 1682-95 (2011).

is free to regulate these search engines however they see fit.²⁰⁰ Thus, KinderStart could have used its characterization of Google as a “speech intermediary” not to argue that Google engages in state action, but rather, that Google does not engage in “speech” at all, and thus is not entitled to any First Amendment protections. KinderStart alleged that Google represents its search engine as nothing more than an objective algorithm.²⁰¹ If this is the case, then KinderStart should have argued that Google does not actually “speak” when it returns search results in response to search queries, and that it does not actually “speak” when it assigns a numerical PageRank score representing the relevance of a given website. Rather, Google merely “transmits” speech by entering input it is given from users into a computer algorithm, which then automatically returns results that represent an objective product of an objective formula.²⁰² If this were the case, Google would not be expressing itself in any way that can be analogized to speech; it would be merely acting as a short-cut for searchers to obtain access more easily to speech. To illustrate this theory, Professor Benjamin offers the following analogy:

Imagine that FedEx decided to speed up the delivery of documents addressed to companies with which it had a financial relationship; that is, FedEx would give preferential treatment in its delivery schedule to documents sent to companies that paid it for the privilege. A congressional decision to ban such a practice may or may not be good policy, but it would not seem to raise First Amendment issues. Yes, FedEx would be moving First

200. *See generally id.* (arguing that bare transmission of speech, while doing nothing more, does not constitute speech entitled to First Amendment protections); *see also id.* at 1695–96 (“[A] company’s nondiscriminatory transportation (of bits or anything else) enables communication, but it has no content, and thus expresses no ideas . . . so regulations prohibiting discrimination in transmission do not, without more, trigger application of the Free Speech Clause.”). This Comment refers to this theory as the “transmission of speech” theory. However, this theory has also been referred to as the “conduit theory,” suggesting that search engines are to be regarded as conduits that simply exist to carry the speech of others. *See, e.g.,* Grimmelmann, *supra* note 117. Proponents of this theory argue that search engines are not “means of speech” like printing presses or cable networks, but rather, are “selection intermediaries” that direct users to third party speech. *See, e.g.,* Jennifer A. Chandler, *A Right to Reach an Audience: An Approach to Intermediary Bias on the Internet*, 35 HOFSTRA L. REV. 1095, 1097 (2007) (discussing Professor Jerome Barron’s argument that the freedom of speech “should encompass a right of access to the media”); *see also* Bracha & Pasquale, *supra* note 25, at 1199 (“[S]earch engine rankings play a central *instrumental* role in facilitating effective speech by others.”).

201. *See, e.g.,* KinderStart SAC, *supra* note 91, ¶ 2 (“Defendant Google . . . promotes itself as delivering . . . unblocked objective results emerging out of millions of websites in the United States and worldwide . . .”).

202. Benjamin, *supra* note 199, at 1685 (“[A]nalogical reasoning highlights the implausibility of an interpretation of the Free Speech Clause that bare transmission is speech.”).

Amendment-protected materials—documents—from one user to another, but it is hard to see how transporting documents turns a company into a speaker for First Amendment purposes.²⁰³

In the same way, Google could be seen not as actually speaking, but as “transporting” speech from the web to the user.

However persuasive one may find this analogy, Professor Benjamin’s transmission of speech theory is ultimately inapplicable to Google search for two reasons. First, Google does far more than merely “transmit” speech. For example, Google innovations such as the OneBox and Google Now do not merely “transmit” speech; they provide direct responses to a search query.²⁰⁴ These results are Google’s actual “speech.” They consist of content that Google creates to respond to specific search terms (or in Google Now’s case, on Google’s own accord); they do not merely “transmit” speech from other websites through a display of hyperlinks.

Even assuming that Google returned to the “ordinary search” world where it only listed hyperlinks in response to search queries, there is a second reason the transmission theory fails—it ignores the *Search King* distinction between process and result.²⁰⁵ In a way, it is true that Google simply transmits speech when it displays hyperlinks of other websites in response to a search query. However, Google employees choose what factors their objective algorithms, like PageRank, should consider—such as title tags, keywords, the importance of websites containing links pointing to the destination website, the frequency of the search terms’ occurrence on the website, whether synonyms of the search terms appear on the page, and many others.²⁰⁶ Google employees also decide how much weight the algorithms should give each factor in determining what websites to display. Thus, while Google may appear to merely *transmit* speech when it displays websites in response to a search query, this looks only to the *process* by which Google speaks, and ignores the subjective *result* of the algorithm, which is Google’s opinion on the significance of each website. Google’s opinions on what factors should be considered determine the ultimate result. In this way, we are brought back full circle to the *Search King* opinion and find that Google search results are not merely instances of transmitted speech; they are speech themselves in the form of opinions by Google, opinions entitled to constitutional protection.²⁰⁷

To be sure, *Search King* is not the only case that has held opinions to be constitutionally protected speech. For example, in *Castle Rock*

203. *Id.* at 1685.

204. *See supra* Part I.B (discussing Google OneBox).

205. *Search King, Inc. v. Google Tech., Inc.*, No. CIV-02-1457-M, slip op. at 6 (W.D. Okla. May 27, 2003).

206. *See supra* Part I.A (explaining PageRank).

207. *Search King, Inc.*, slip op. at 7.

Remodeling, LLC v. Better Business Bureau of Greater St. Louis, Inc., the Eastern District of Missouri dismissed a retailer’s defamation claim against the Better Business Bureau for statements in one of its reports on the basis that those statements were constitutionally protected opinions.²⁰⁸ Similarly, the Western District of Washington dismissed a claim that a website which ranked attorneys violated the Washington Consumer Protection Act because the court held that those rankings were constitutionally protected opinions.²⁰⁹ Thus, the “transmission of speech” theory is ultimately an insufficient tool for plaintiffs challenging Google search engine manipulation and, more importantly, PageRanks are constitutionally protected opinions that do not infringe upon the First Amendment rights of other websites.

C. Fact-Based Opinions

Even accepting the premise that Google PageRanks are opinions and not statements of fact, some scholars maintain that Google can still be held liable for assigning a low PageRank to a particular website.²¹⁰ For example, Google represents its algorithms as ranking results based only on what is most relevant to users.²¹¹ Some scholars argue that Google is free to establish its own criteria to enter into its algorithms for determining what is relevant to users, but once the criteria is established, Google is not free to disregard the results of the algorithm. Professor James Grimmelmann notes that if Google were to lower the original PageRank its algorithm assigned to a website, the new, altered PageRank would be a “false statement of fact” and such false statements of fact could subject Google to liability.²¹² Professor Grimmelmann cites the Supreme Court’s opinion in *Milkovich v. Lorain Journal Co.* to point out that the mere fact that a statement is held out as an “opinion” does not shield the speaker from liability.²¹³ As the Court in *Milkovich* explained:

For instance, the statement, “I think Jones lied,” may be provable as false on two levels. First, that the speaker really did not think

208. 354 S.W.3d 234 (E.D. Mo. 2011).

209. *Browne v. Avvo, Inc.*, 525 F. Supp. 2d 1249 (W.D. Wa. 2007).

210. *See, e.g.*, Grimmelmann, *supra* note 117, at 1 (proposing the “advisor theory” of liability).

211. *The Power of Google: Serving Consumers or Threatening Competition?: Hearing Before the Subcommittee on Antitrust, Competition Policy and Consumer Rights of the Comm. on the Judiciary*, 112th Cong. 6-7 (2011) (statement of Eric Schmidt, Executive Chairman of Google).

212. Grimmelmann, *supra* note 117, at 52.

213. 497 U.S. 1 (1990); *see also* Tim Wu, *Machine Speech*, 161 U. PA. L. REV. 1495, 1527 (2013) (“Holding that any communication is protected speech if it can be called an ‘opinion’ is hopelessly overbroad.”).

Jones had lied but said it anyway, and second that Jones really had not lied. It is, of course, the second level of falsity which would ordinarily serve as the basis for a defamation action, though falsity at the first level may serve to establish malice where that is required for recovery.²¹⁴

Professor Grimmelmann analogizes this passage to search rankings. He explains that if a Google algorithm assigned a low PageRank to a website because the criteria used in the algorithm suggested the website to be less relevant than other websites, then such a PageRank would be a non-falsifiable statement that Google could not be held liable for.²¹⁵ However, Google *could* be held liable for a first-level statement, which would exist where Google's algorithm assigns a high PageRank to a website and a Google engineer then manually lowers the PageRank, even if the engineer believed the website relevant (for example, if Google lowered the PageRank of a website simply because the website was operated by one of its direct competitors).²¹⁶ Therefore, although the PageRank of a website can be categorized as Google's "opinion" of a website, it is a "fact-based opinion" that, notwithstanding its status as an opinion, would subject Google to liability if it did not actually represent how "relevant" Google's algorithm found the website to be.²¹⁷

V. A NEW THEORY OF GOOGLE "SPEECH"

In reviewing the cases and theories detailed above, the state of the law surrounding search engine manipulation appears to be as follows: (1) Google rankings of how websites appear in search results are constitutionally protected opinions,²¹⁸ though some suggest these opinions are protected only if they are not further manipulated by Google engineers after the algorithm has produced a ranking,²¹⁹ (2) Google is a private entity, not a state actor, and therefore cannot be guilty of violating First Amendment protections of other parties,²²⁰ and (3) Google cannot be found

214. 497 U.S. at 20 n.7.

215. See Grimmelmann, *supra* note 117, at 55 (arguing that the FTC's investigation finding Google without fault was correct).

216. *Id.* at 51.

217. *Id.* ("If a rating agency *knowingly* issues a rating that is either unsupported by reasoned analysis or without a factual foundation, it is stating a *fact-based* opinion that it does not believe to be true." (quoting *Abu Dhabi Commercial Bank v. Morgan Stanley & Co.*, No. 08-cv-07508, 2012 U.S. Dist. LEXIS 119671 (S.D.N.Y. Aug. 17, 2012))).

218. *KinderStart I*, No. C 06-2057 JF (RS) (N.D. Cal. July 13, 2006); *Search King, Inc. v. Google Tech, Inc.*, No. CIV-02-1457-M (W.D. Okla. May 27, 2003).

219. Grimmelmann, *supra* note 117; *supra* Part IV.C.

220. *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 626 (D. Del. 2007); *KinderStart I*, No. C 06-2057 JF (RS).

guilty of monopolization under section 2 of the Sherman Act because there is no “relevant market” for antitrust purposes that Google can be found to be monopolizing, and further, Google does not engage in anticompetitive conduct by lowering the PageRank of websites.²²¹

Does this mean that Google is entirely shielded from suits alleging search engine manipulation? Not exactly. A review of the cases above will show that there are two claims that can still be plausibly alleged against Google, if more adequately pleaded: (1) deceptive business practices under relevant state law and (2) defamation under relevant state law. Based on the courts’ analyses above, a plaintiff could allege that Google engages in deceptive business practices under relevant state law (the California Business and Professions Code, for example) by representing its search results as objective representations of the most relevant websites for the search terms entered, when in fact, Google manipulates them by inputting its subjective opinions. For example, Google could prioritize its own products and services by representing its own websites as the most relevant and competitors’ websites as less relevant. Second, a plaintiff could allege a defamation claim against Google if Google unjustifiably lowered its PageRank and if, as explained above, Google made representations to the public that its PageRank assignment to websites was an objective determination of the relevance of a website, free of human manipulation and subjective influence.

If a plaintiff were to make these claims, a court, if using the analyses the courts gave in *Search King*, *Langdon*, and *KinderStart*, would likely allow these claims to survive a motion to dismiss. However, in all three of those cases, the “speech” attributed to Google that was being evaluated was always either (1) the numerical PageRank score Google assigns to websites or (2) the entire SERP, i.e., the ranking of websites in response to a search query. It is both curious and unfortunate that there is such a wealth of scholarship discussing Google search engine manipulation claims, yet very little of that scholarship devotes any attention to discussing what the actual “speech” at issue is. I propose a new theory of Google speech to raise attention to this paucity.

If Google continues to face claims of search engine manipulation, as it likely will, it should argue that the Google speech at issue is not the PageRank of a website or the appearance of a SERP. Rather, the display of each individual search result should be treated as an individual recommendation Google is making to us. In other words, when we conduct Google searches, we are having a conversation with Google. By entering search terms into a Google search bar, we are asking Google a question, such as, “What are good sushi restaurants to try?” In response, Google

221. *KinderStart I*, No. C 06-2057 JF (RS).

answers us in question format. Each individual search result is a response posed in question format by Google, asking us, “Is this what you are looking for?” By clicking on a search result, I am answering Google’s question by responding “yes, this is what I am looking for.” I argue that by interpreting Google “speech” in this way, many of the legal objections to Google search engine manipulation will be far more difficult to allege and government regulation will similarly be more difficult to justify.

I call this theory of speech the “recommendation theory,” because Google treats each individual search result as a recommendation by Google—Google is recommending websites to the user based on the user’s search query. There would be no representation that the first search result is objectively the most relevant website, but simply a representation of what Google, in its own subjective opinion, would recommend to the user.

By adopting this recommendation theory, a plaintiff can no longer argue that Google is unfairly prioritizing allegedly less relevant websites (Google’s own websites) over competitor’s websites because there is a new understanding that neither PageRank nor the ranking of Google’s search results is purporting to represent an objective statement of fact or, as Professor Grimmelmann has put it, a “fact-based opinion.” Rather, Google is listing websites simply in the order of what it would like to recommend, and recommendations cannot be treated as objective. Google is a speaker that responds to our questions—our “questions” come in the form of search terms and Google’s “answers” come in the form of recommendations. The mere fact that Google, in this sense, is a computer algorithm, as opposed to an actual person, cannot deny Google search the right to freedom of speech rights. For example, video games can be considered “speakers” that “speak,” and that speech is entitled to First Amendment rights.²²² Thus, while the question posed in the title of Professor Tim Wu’s *New York Times* article, *Free Speech for Computers?*, is humorous, it ignores the current state of the law—that the application of First Amendment rights to a speaker does not depend on whether or not that speaker is a human.²²³

This “recommendation theory” of Google speech would allow Google to avoid many of the claims alleged in *Search King*, *Langdon*, and *KinderStart*, as well as Professor Grimmelmann’s fact-based opinion theory. One could hardly argue that Google is required to recommend websites of its competitors. For example, if a friend asked me to recommend a bakery

222. *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2732 (2011).

223. See Tim Wu, *Free Speech for Computers?*, N.Y. TIMES, June 20, 2012, at A29 (discussing an argument for protecting computer speech based on the theory that the computer inherits the programmer’s rights). Of course, this is a simplified version of the argument. Video games are not actually the “speakers”; their programmers are. Similarly, search engines are not actually the “speakers” either; their programmers are, which is what Professor Wu is *actually* referring to in the text of his article.

and my mother happens to run a bakery, I am entitled to recommend my mother's bakery to my friend, and such a recommendation is not interpreted as an objective statement of fact that her bakery is the best. Nor could such a recommendation be treated as a "fact-based opinion" capable of being falsified. Similarly, Google can recommend its own proprietary services first by listing its vertical search engine results at the top of a SERP, and that should not be treated as a statement of fact that Google's services are the most relevant. Rather, it simply means that Google highly recommends its own services, which of course, is not unlawful. It would be nonsensical to argue that recommending one's own products and services would be a violation of standard business practices under any state law, such as the California Business and Professions Code in *KinderStart*. Therefore, the recommendation theory would allow search engines like Google to evade antitrust claims and deceptive business practices claims.

Further, it would make little sense to say that Google's failure to highly recommend a competitor's website (by assigning a low PageRank to the website) could constitute defamation. The mere fact that Google does not give a strong recommendation for one of its competitor's products (for example, by assigning its competitor's website a low PageRank or pushing the competitor's website to the bottom of a SERP) could not constitute defamation because a failure to recommend a competitor does not constitute a false statement of fact. I could hardly be liable for defamation of my competitor simply for failing to recommend my competitor's product to the public. Therefore, the recommendation theory would allow Google to escape liability for defamation claims it faces from websites suing Google for assigning them a low PageRank. In sum, the recommendation theory would allow Google to dodge claims that *Search King*, *Langdon*, and *KinderStart* left it exposed to—antitrust, deceptive business practices, and defamation.

CONCLUSION

Search engine speech is a murky, unsettled area of law. The Supreme Court has not yet adjudicated whether search engine manipulation violates federal antitrust laws or whether search engines are entitled to First Amendment protection. Further, the recent FTC investigation failed to resolve the legal debate surrounding these legal issues, since very little evidence was publicized and little to no legal analysis was provided to justify the settlement. To no surprise, Google's opponents were unhappy after the settlement, accusing the FTC of missing a golden opportunity to enforce antitrust laws against Google.²²⁴

224. *The FTC's Missed Opportunity on Google*, BLOOMBERG (Jan. 3, 2013, 3:05 PM),

In this Comment, I have argued that Google search engine manipulation does *not* violate federal antitrust laws and that search engines like Google are entitled to First Amendment protection. Google has the right to produce search results in whatever order it pleases, regardless of whether it is driven by innocent reasons, such as wishing to better serve the user, or less innocent reasons, such as wishing to boost its own products and services. Although demoting the ranking of websites has the effect of diverting traffic away from these websites, thereby denying those websites potential revenue, those websites never had a right to that revenue because they have no right to a space on Google's platform. Thus, Google is not denying them anything they were ever entitled to.

I have also argued that any attempt to force Google to promote its competitors' websites would be compelled speech, and thus government regulation aimed at controlling the way in which Google ranks its search results would violate the First Amendment. After analyzing cases in which Google raised the First Amendment as a defense against search engine manipulation claims, I have argued that current understandings of what constitutes Google "speech" for First Amendment purposes are flawed. In response, I have proposed a new way of understanding Google "speech" through the recommendation theory, which, if adopted, will more adequately defend Google against the many claims it continues to face in court. I hope that with this proposal, Google will be able to spend less time in court defending its search practices, and more time out of court doing what it does best: innovating online search.