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Advertising is
Strong & Growing Stronger

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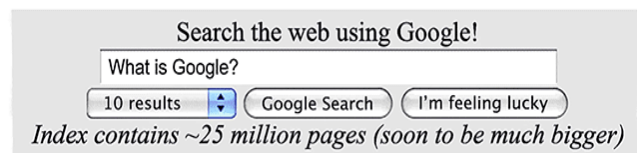
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June 2020

INTRODUCTION

No one doubts that Google has revolutionized the internet. Launched in 1996 and originally christened BackRub, the company got its start when two Stanford computer science whiz kids with a knack for programming had an idea for a new search engine.¹ Two years, countless sleepless nights, and a (wise) name change later, Google incorporated and opened its headquarters in—where else?—a spare garage in Silicon Valley.²



Few in the Valley thought they'd succeed. At the time, most believed that Yahoo! was so dominant in search that no one could challenge it. Indeed, in 1998 *Fortune Magazine* even ran an article titled "How Yahoo! Won the Search Wars," which noted that "[o]nce upon a time, Yahoo! was an Internet

¹ *Google Turns 20: How an Internet Search Engine Reshaped the World* (Sept. 27, 2018), <https://www.theverge.com/2018/9/5/17823490/google-20th-birthday-anniversary-history-milestones>.

² *Id.*

search site with mediocre technology. Now it has a market cap of \$2.8 billion. Some people say it's the next America Online."³ We look back at former giants Yahoo! and AOL and know that their dominance was anything but. And that underscores just how uncertain Google's rise was and how tech industry leaders must always innovate because competition is never far away.

Of course, we now know that Google's gamble paid off. Today, the company works out of offices located across the United States and on every continent. It processes around 40,000 search requests per second, 3.5 billion per day, and 1.2 trillion per year.⁴ And just a few months ago, it became the fourth-ever company to reach a \$1 trillion market valuation, joining the ranks of competitors Apple, Microsoft, and Amazon.⁵ Not bad for a startup that Yahoo! once passed over and venture capitalists laughed at.

But success was never guaranteed. Only through trial and error, calculated risks, costly investments, an obsessive focus on product development, and even a few flops, was Google able to get to where it is today.

This success, however, is under attack—and not just by Google's competitors. Last year, the U.S. Department of Justice and the Federal Trade Commission launched an investigation into Google and its rivals, including Apple, Amazon, and Facebook, for possible antitrust violations. As we have written elsewhere, these investigations will fail because none of these companies has harmed consumers.⁶

But the federal government is not alone in mistaking consumer benefits for competitive harm. In spring 2020, former DOJ officials turned private practitioners Fiona Scott Morton and David Dinielli authored a piece called "Roadmap for a Digital Advertising Monopolization Case Against Google." Published by Omidyar Network, the piece is meant "to explain a plausible theory of competitive

³ Randall E. Stross, *How Yahoo! Won the Search Wars*, in FORTUNE MAGAZINE (Mar 2, 1998), https://archive.fortune.com/magazines/fortune/fortune_archive/1998/03/02/238576/index.htm.

⁴ Internet Live Stats, *Google Search Statistics*, <https://www.internetlivestats.com/google-search-statistics/> (last accessed June 1, 2020).

⁵ Carmen Reinicke, *Alphabet Breaks \$1 Trillion Market Cap for First Time Ever*, BUSINESS INSIDER (Jan. 16, 2020), <https://markets.businessinsider.com/news/stocks/alphabet-google-parent-trillion-dollar-market-cap-value-stock-record-2020-1-1028824820>.

⁶ See, e.g., Carl Szabo, *Calls to Breakup Apple, Facebook, and Google are a Modern Day Fairytale*, NETCHOICE (Oct. 22, 2019), <https://medium.com/netchoice/calls-to-breakup-apple-facebook-and-google-are-a-modern-day-fairy-tale-cf632a75dda4>.

harm in the United States digital advertising market.”⁷ This plausible theory, the authors admit, rests not on facts specific to the United States but instead on preliminary facts that the United Kingdom’s Competition and Markets Authority (CMA) published late last year.⁸

Despite the authors spending hundreds of words casting Google’s business decisions as “anticompetitive,” they cite zero instances of illegal conduct.⁹ To be sure, the authors warn readers at the outset, and again at the report’s end, that their “plausible theory” is merely a “narrative.”¹⁰ And to the authors’ credit, their narrative is seductive.

It unfolds like this. First, we are told that Google swallowed up small digital advertising firms to build out its own ad service. With that service in place, Google unfairly made it better than its rivals’ services by using data collected from other Google products and platforms. Next, Google “coerce[d]” publishers and advertisers into using its service by leaving them with few alternatives. Still hungry for market control, Google gobbled up competitors or forced them out of the market through unseemly tactics—but not all of them, lest it draw attention. Despite Google’s “strategic secrecy” to help mask its monopoly power, the federal government, joined by state attorneys general, caught wind of Google’s efforts. The government is now “hard at work” investigating. The story ends on a cliffhanger: Will the government follow the authors’ Roadmap, slay Goliath, and liberate the digital advertising market?

Casual readers of the Roadmap may very well hope so. And who could blame them? Loaded up with footnotes, sprinkled with statistics, and decked out with graphics, the Roadmap tells a seemingly damning tale. But the Roadmap also gives life to the old aphorism that “all that glitters is not gold.” Just below the Roadmap’s surface lurks surreptitious use of cherry-picked facts ripped from context, and legal speculation that intrigues more than it informs.

⁷ Fiona M. Scott Morton & David C. Dinielli, *Roadmap for a Digital Advertising Monopolization Case Against Google*, OMIDYAR NETWORK 1 (May 2020), <https://www.omidyar.com/sites/default/files/Roadmap%20for%20a%20Case%20Against%20Google.pdf> [hereinafter “Roadmap”].

⁸ *Id.*

⁹ *Id.* at 37 (“This paper does not, and has not attempted to, prove that Google has engaged in monopolization within the meaning of Section 2 of the Sherman Act or any state-law analog. Any such conclusion would be premature.”).

¹⁰ *Id.* at 1, 37-38.

Antitrust laws in the United States are meant to protect consumers. Although that mandate sounds broad, it has been reliably and effectively enforced under the consumer welfare standard. Under that standard, the government analyzes whether a company's business decisions help or harm consumers. As the authors surely know, U.S. antitrust laws are not meant to let the government give business competitors a leg-up, especially when that leg-up actually leads to consumer harm.

Even so, the authors pay little attention to antitrust legal standards. And for good reason: Neither their data nor their narrative shows that Google's business decisions hurt consumers. In fact, the authors intentionally ignore that Google's presence has helped consumers by reducing digital advertising costs by 40% since 2010. And they ignore that Google has consistently improved its ad tools because it faces competition. So, thanks to Google and its competitors, consumers get more bang for their advertising buck and reach the most-relevant viewers possible. Also, Google's ad service is designed to preference effective ads, which saves the consumer money that would have been wasted under traditional advertising strategies.

These facts undermine the authors' narrative. So, rather than grapple with them head on, they dispense with these facts altogether by casting them as evidence of elaborate schemes meant to hide anticompetitive actions in competitive camouflage. In other words, although the data shows that Google has not violated U.S. antitrust laws, that data is itself evidence of wrongdoing. Got that? Google's lawful actions are evidence of its illegal intent; that illegal intent is therefore evidence of its (still-in-hiding) illegal conduct.

This piece responds to the authors' narrative. It is neither as seductive nor as ambitious as the authors' efforts. And its conclusions are based solely on facts and on U.S. antitrust law. First, it shows that Google does not have a monopoly on digital advertising. Second, it shows that the digital advertising market is competitive and that competition is growing. And third, it shows that Google's success stems from good business judgment, not illegal conduct. Based on these conclusions, the piece proposes a counternarrative: Google is good at making products that many consumers like and it does so because its markets are competitive.

STARTING POINT: UNDERSTANDING GOOGLE'S BUSINESS MODEL & INCENTIVES

To understand Google's actions, it helps first to understand Google's business model and its incentives. Like all for-profit businesses, Google wants to make a profit. But unlike traditional for-profit businesses, Google's most famous and most popular product—Google Search—is free. So although Google Search is the most popular search engine in the United States, that popularity does not, by itself, keep the company profitable. But digital advertising does. And advertising benefits from popularity. After all, no one would pay to advertise on billboards dotting a rarely used road. But people would—and do—pay a lot to advertise during the Super Bowl.

“What common sense suggests, evidence confirms: although publishers use Google's advertising tools, they also report using anywhere from four to six other companies' advertising tools.”

Google's popularity thus drives its advertising revenue. In 2018, advertising amounted to 84% of Alphabet's, Google's parent company, revenue.¹¹ Of that, about 70% came from Google Search. Put differently: Google makes most of its money from Google Search advertising. That revenue stream is directly linked to Google Search's popularity, which means Google has a strong financial incentive to keep investing in and improving its search engine. But Google Search is only as useful as the websites that it crawls for search results. Google could build the world's best search algorithm, but if it returns content that isn't relevant or useful, then users will abandon Google Search. That means Google *also* has a strong incentive in seeing independent publishers—those that create and populate websites with content—flourish. Without them, Google Search would suffer. And like Google, many of these publishers rely on advertising to keep their companies afloat.

That means Google's advertising revenue benefits when publishers' advertising revenue rises.

Google understands this market reality; the authors, apparently, do not. They claim that Google is engaged in a calculated campaign to leave publishers with no choice but to use Google's advertising products, and to suck as much money out of publishers as possible. Common sense suggests that this cannot be the case: If publishers—including those not associated with Google—

¹¹ Hamza Shaban, *Google Parent Alphabet Reports Soaring Ad Revenue, Despite YouTube Backlash*, WASHINGTON POST (Feb. 1, 2018), <https://www.washingtonpost.com/news/the-switch/wp/2018/02/01/google-parent-alphabet-reports-soaring-ad-revenue-despite-youtube-backlash/>.

fail, Google Search will fail. And if Google Search fails, Google and its parent company will fail. And what common sense suggests, evidence confirms: As explained below, although publishers use Google’s advertising tools, they also report using anywhere from four to six other companies’ advertising tools.

With this insight in mind, Google’s actions make sense. First, Google invests heavily in its search engine so that users keep using it. Google does this not only because it must—Google Search is the company’s lifeblood—but also because Google faces competition from other general search engines like Microsoft’s Bing and DuckDuckGo, as well as from local search engines like Amazon and Yelp. Google also faces competition in voice search—Amazon’s Alexa, Apple’s Siri, and Microsoft’s Cortana all compete with Google’s Voice Search.

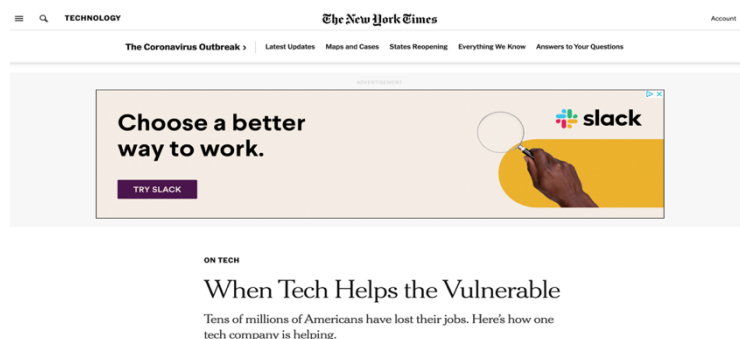
Second, because Google relies so much on advertising for revenue, it began investing heavily in advertising tools and products over a decade ago. Of course, Google’s expertise lied outside advertising, so it turned outside for help—and found it. It acquired digital advertising companies to help build out Google’s ad infrastructure. But even with these investments, Google still faces competition. Consider that many of its rivals—Amazon, Facebook, and Bing—also rely on advertising for revenue. And that’s why Google continues to innovate, invest, and improve. It does not rest on its laurels like a monopolist would. If Google did that, it would become the next MySpace.

Instead, Google is successful—for now—because it makes smart business decisions.

PRIMER ON DISPLAY ADVERTISING & AD TECH

Digital advertising is a large and diverse industry that encompasses everything from search ads (ads shown on search engines) and video ads (those that you might see before, say, watching a video on YouTube), to display ads and connected television ads. The authors focus mainly on display ads. These are ads that you might see while reading articles on websites like the NYTimes.com or while scrolling through apps like Instagram.

Below is a screenshot of a display ad that this author saw while reading a *Times* article about the power of technology to help vulnerable Americans during the coronavirus pandemic.



“Ad tech” is the catch-all phrase for the software that facilitates the buying, selling, and displaying of these ads. As discussed later in this paper, the ad tech industry is competitive. For example, Google faces competition not only from well-known companies like Oracle, Comcast, Adobe, Facebook, and Amazon, but also from ones that may be unfamiliar like The Trade Desk and Rubicon Project. Some of these companies focus solely on the demand-side (buyers); others focus on the supply-side (sellers); and others, like Google, do a little of both.

This competitive market has benefitted both consumers (those buying and running ads), as well as the public more broadly. First, this competition has cut prices for advertisers. And second, it has helped many websites, including those discussed in this paper—Google Search, Facebook, Twitter, and Amazon—remain free for us all to use. It has also helped boost content providers with small audiences who may struggle to attract paid subscribers and large digital news websites remain free or mostly free like Vox.com, MotherJones.com, and NationalReview.com.

GOOGLE SEARCH & ITS NONEXISTENT “VIRTUAL MONOPOLY”

Google Search is not a “Virtual Monopoly”

The thread that ties the authors’ narrative together is their belief that Google learned how to wield its “virtual monopoly in search” to create a virtual monopoly in digital advertising.¹² The word “virtual” does a lot of work: Although Google Search is popular, it is not a monopoly—actually, virtually, or otherwise. To be sure, Google leads the pack in sheer number of searches and users. In the United States, Google boasts 62.5% market share of all core searches.¹³ But Microsoft’s search engine, Bing, launched in 2009 and already has 24.7% market share today.¹⁴ And Verizon Media, which bought Yahoo’s and AOL’s search engines in 2017 and 2019, respectively, has 11.5%.¹⁵ Given this, Google Search cannot, by definition, be a monopoly. The U.S. Supreme Court has consistently defined monopoly power as “the power to control prices or exclude

¹² Roadmap, *supra* note 7, at 12.

¹³ Dan Blystone, *Search Engines that Compete with Google*, Investopedia (last updated Feb. 5, 2020), <https://www.investopedia.com/articles/investing/071515/search-engines-compete-google.asp>.

¹⁴ *Id.*

¹⁵ *Id.*

competition.”¹⁶ Google Search is free and faces considerable competition. It appears, then, that the authors use “virtual monopoly” to mean “most popular.” But it is not illegal to be “most popular.”

Even setting aside formal definitions, Google Search is not a virtual monopoly. One of the tell-tale signs that a company relies on its market control—and not its product quality—to gain or maintain market success is evidence of a decline in investment without a decline in demand. In economic theory, monopolists often spend little to no money on innovation because there is no need to improve products and services once the market is consolidated. (Think of the electric industry, a classic monopoly. When was the last time we heard of an innovation from PG&E?)

But an independent audit by PwC found that Google spends more on research and development than every other company bar one—Amazon, its main competitor.¹⁷ Consider that Google spent \$26 billion on research and development last year and tried over 650,000 experiments to improve its Search Engine two years ago.¹⁸ In fact, Google makes an average of 1,000 changes to its Search Engine every year.¹⁹ Economic theory states that if Google Search were a monopoly, Google would do and spend less on improving it.

Google Search Faces Competition—And that Competition is Increasing

Plus, Google Search faces considerable competitive pressure on multiple fronts. First, not all searches are the same. When people want to know specific information about specific things, they turn to competitors that specialize in the related field. For example, 66% of consumers turn to Amazon for product searches.²⁰ Given Amazon’s deep depository of products, user reviews and ratings, and side-by-side product comparisons, it is understandable that consumers would search for information there. In fact, Alphabet’s former executive chairman Eric Schmidt realized Amazon’s competitive advantage as far back as 2014, stating, “Many people think our main competition is

¹⁶ *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956) (often called the *Cellophane* case). The Court reaffirmed this definition of monopoly power in *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966), and in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 596 n.20 (1985).

¹⁷ Barry Jaruzelski et al., *What the Top Innovators Get Right*, PwC (Oct. 30, 2018), <https://www.strategyand.pwc.com/gx/en/insights/innovation1000.html>.

¹⁸ Google, *Online Platforms and Digital Advertising: Comments on the Market Study Interim Report 2*, https://assets.publishing.service.gov.uk/media/5e8c8290d3bf7f1fb7b91c2c/200212_Google_response_to_interim_report.pdf.

¹⁹ *Id.*

²⁰ Greg Magana, *Amazon Rules the Product Search Process*, BUSINESS INSIDER (Mar. 20, 2019), <https://www.businessinsider.com/online-shoppers-rely-heavily-on-amazon-2019-3>.

Bing or Yahoo. But, really, our biggest search competitor is Amazon.”²¹ At the time Schmidt said that, only a third of consumers began their product searches on Amazon, meaning competition has only increased in recent years.²²

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Economic theory states that if Google Search were a monopoly, Google would do and spend less on improving it.

Likewise, Google faces competition from Expedia, Kayak, Orbitz, and Travelocity on travel-related searches. And it faces competition from Yelp, Angie’s List, UrbanSpoon, and TripAdvisor on searches related to local restaurants and vendors. The competition in this space is so great, in fact, that even Yelp, one of Google’s most-vocal critics, said just last year that “[w]e compete in rapidly evolving and intensely competitive markets, and we expect competition to intensify further in the future with the emergence of new technologies and market entrants.”²³

Second, Google Search must compete on quality *and* on perception. In recent years, Google has been criticized heavily for having what some believe are lax or insufficient data-privacy protections.²⁴ Consumers took note. So much so that nearly 97% of people reported that they were somewhat or very concerned about protecting their personal data.²⁵ This consumer concern has not gone unnoticed in the market either: DuckDuckGo, a rival search engine, launched in 2008 and promised every user that it would let them “take back your privacy!”²⁶ Contrasting its data-privacy protections with Google’s, DuckDuckGo has seen its market share grow every year thereafter. It saw a total of 16.4 million searches for *all* of

²¹ Blystone, *supra* note 13.

²² *Id.*

²³ Yelp Inc., 10-Q, May 2019.

²⁴ See, e.g., Lily Hay Newman, *The Privacy Battle to Save Google*, WIRED (Nov. 1, 2018), <https://www.wired.com/story/google-privacy-data/>.

²⁵ Greg Sterling, *Nearly all Consumers are Concerned About Personal Data Privacy, Survey Finds*, MARKETINGLAND (Dec. 4, 2019), <https://marketingland.com/nearly-all-consumers-are-concerned-about-personal-data-privacy-survey-finds-272129>.

²⁶ DuckDuckGo, *About*, <https://duckduckgo.com/about>.

2010. By contrast, in just April 2020, it saw a total of 1.8 billion searches.²⁷ The company also saw its most dramatic increase from 2018 to now, with its daily search queries more than doubling in that time period.²⁸

Third, Google Search is likely to face new competition moving forward. Facebook has over 2.4 billion users and has announced plans to invest in building out the platform for searches. The company's CEO Mark Zuckerberg said, "Facebook is uniquely positioned to answer questions that people have, like, 'What sushi restaurants have my friends gone to in New York lately and really liked?' These are queries you could potentially do with Facebook that you couldn't do with anything else; we just have to do it."²⁹ Put simply, Google Search is neither an actual monopoly nor a "virtual monopoly."

GOOGLE'S INVESTMENTS IN DIGITAL ADVERTISING TOOLS

Trying to Make Sense of the Authors' Roadmap

Before debunking the authors' narrative about Google's alleged illegal behavior, it is worth trying to understand what the authors are actually arguing. This is a bit difficult because the authors' narrative appears contradictory. In their conclusion, for example, they state that their "paper does not, and has not attempted to, prove that Google has engaged in monopolization within the meaning of Section 2 of the Sherman Act."³⁰ Instead, "what [they] have shown through this **thought exercise** is that there is significant reason for concern that Google has violated US antitrust law."³¹

The authors' "thought exercise" is a strenuous mental workout because, well, the authors **never actually identify which antitrust law Google allegedly violated**. But we can glean that, protestations to the contrary, their paper does analyze Google's behavior under Section 2 of the Sherman Antitrust Act. Consider that the authors:

- ▶ Defend antitrust enforcement against Google on the grounds that "[s]ociety does not face a tradeoff between a) advertising plus **monopoly**; and b) competition with no internet content or commerce."³²

²⁷ DuckDuckGo, *Traffic*, <https://duckduckgo.com/traffic>.

²⁸ *Id.*

²⁹ Blystone, *supra* note 13.

³⁰ Roadmap, *supra* note 7, at 37.

³¹ Roadmap, *supra* note 7, at 11 (emphasis added).

³² *Id.* at 3 (emphasis added).

- ▶ Preface their legal analysis with this warning: “Going forward in the paper we will primarily use the **monopoly** nomenclature as it is likely more familiar to readers.”³³
- ▶ Argue that “the conduct [they] describe below would indicate a willful maintenance of that **monopoly**.”³⁴

We can also reasonably assume that the authors believe Google violated Section 7 of the Clayton Antitrust Act, which prohibits mergers and acquisitions that substantially lessen competition. Indeed, the paper includes an entire section called “Anticompetitive Conduct” that states upfront that Google’s “conduct suggests a long-term strategy to occupy, through **acquisitions**, the entirety of the ad tech stack.”³⁵ Under either law, however, Google’s business decisions were legal and beneficial to consumers.

Google Ad Stack Isn’t a Monopoly

As stated earlier, monopolists have the power either to exclude competitors from the market or to raise prices above what the market would otherwise dictate. Under this definition, Google is not a monopoly in the ad tech market. For starters, it competes against hundreds, if not thousands, of other ad tech companies, including many profitable ones³⁶. These competitors include—you guessed it—Facebook, Amazon, and Twitter, as well as other household names like Adobe, Oracle, Verizon, Comcast, AT&T, and lesser-known companies like The Trade Desk and Rubicon Project.

And second, since Google’s entrance into the ad tech market, prices have dropped by 40%.³⁷ In fact, prices have dropped so much that advertising expenditures—as a percentage of GDP—have never been lower in U.S. history even though digital advertising has never been more popular.³⁸

That the lucrative ad tech market is competitive comes as little surprise. In 2019, the U.S. spent \$124.6 billion on digital advertising—a 15.9%



³³ *Id.* at 10 (emphasis added).

³⁴ *Id.* at 11 (emphasis added).

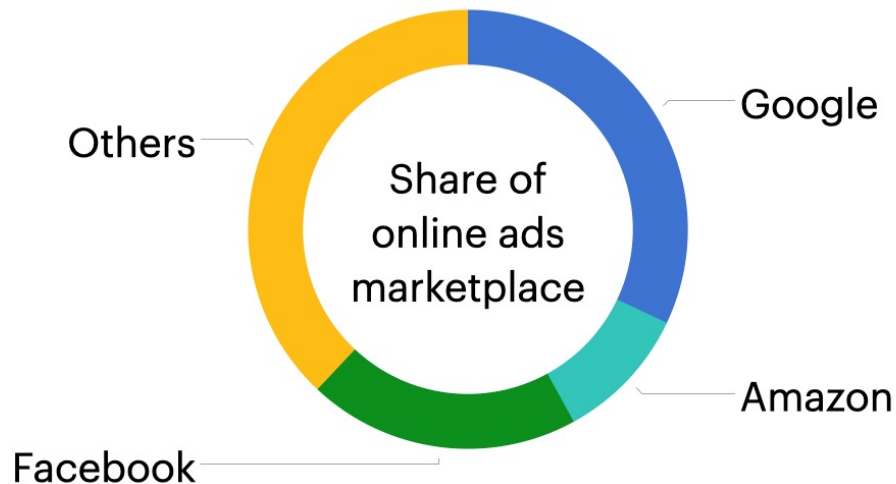
³⁵ *Id.* at 17 (emphasis added).

³⁶ James Hercher, *What Headwinds? Ad Tech Stocks are Surging this Year*, ADEXCHANGER (Sept. 10, 2019), <https://www.adexchanger.com/ad-exchange-news/what-headwinds-ad-tech-stocks-are-surging-this-year/>.

³⁷ See Michael Mandel, *The Declining Price of Advertising: Policy Implications*, PROGRESSIVE POL’Y INST. 2 (July 2019), https://www.progressivepolicy.org/wp-content/uploads/2019/07/Advertising2019_Mandel.pdf.

³⁸ Google, *supra* note 18, at 5.

increase in just one year.³⁹ With so much money on the line, and with consistent revenue growth, the market has enticed new entrants like Google’s competitor, Amazon. Although Amazon entered the market a mere three years ago, it is already the number one demand-side ad tech provider.⁴⁰ But even Amazon’s success is being tested: The Trade Desk, which analysts called the “fastest growing” demand-side platform, saw a 1,000% increase in stock value since it went public in 2015.⁴¹ On the other side of the ledger, Rubicon, which merged with Telaria in 2019, is now the largest independent supply-side platform in the world.⁴²



Even established companies that operate their own ad tech have seen their revenues increase: Last year, for example, Pinterest reported a 62% year-over-year increase in its advertising revenue; Snapchat reported a 48% increase; and Twitter reported 21%.⁴³

³⁹ Internet Advertising Bureau & PwC, *Internet Advertising Revenue Report: Full Year 2019 and Q1 2020 Revenues*, PwC 4 (May 2020), https://www.iab.com/wp-content/uploads/2020/05/FY19-IAB-Internet-Ad-Revenue-Report_Final.pdf.

⁴⁰ James Hetcher, *Ad Buyers Starting to Use The Trade Desk DSP Over Google, According To Advertiser Perceptions Report*, ADEXCHANGER (Dec. 3, 2019), <https://www.adexchanger.com/online-advertising/ad-buyers-starting-to-use-the-trade-desk-dsp-over-google-according-to-advertiser-perceptions-report/>.

⁴¹ Aditya Raghunath, *If You Invested \$1,000 in The Trade Desk IPO, Here’s How Much You’d Have Today*, THE MOTLEY FOOL (Apr. 17, 2020), <https://www.fool.com/investing/2020/04/17/if-invested-1000-in-the-trade-desk-ipo-how-much.aspx>.

⁴² Daniel Sparks, *Rubicon Project and Telaria Combine, Forming the Largest Independent Sell-Side Ad Tech Company*, THE MOTLEY FOOL (Apr. 1, 2020), https://www.fool.com/investing/2020/04/01/rubicon-project-telaria-combine-forming-largest-in.aspx?source=awin&awc=12195_1591411102_bcc94fc1bdfb2aeeb4ee93cf3628ebb2&utm_source=aw&utm_medium=affiliate&utm_campaign=101248.

⁴³ Lauren Feiner, *Facebook and Google’s Dominance in Online Ads is Starting to Show Some Cracks*, CNBC (Aug. 2, 2019), <https://www.cnbc.com/2019/08/02/facebook-and-googles-ad-dominance-is-showing-more-cracks.html>.

Google's Practices Have Helped, Not Hurt, Consumers

Understanding the Authors' Analytical Gymnastics: Round II

These facts are rather inconvenient for the authors' narrative that Google is a monopolist at worst or anticompetitive at best. To sidestep this problem, the authors home in on one type of digital advertising: display ads.⁴⁴

But even by limiting the market just to display ads, the authors still have a problem—namely, that Google still faces competition and that prices are still lower than they once were. So, to get around yet another factual hurdle, the authors proceed to narrow the market even further by looking only at supply-side ad tech platforms that are open. By doing this, the authors are able to exclude one of Google's biggest competitors: Facebook. Facebook runs a "closed" display advertising platform exchange, so by narrowing the market, they are able to exclude a company that "holds 50% of the total display supply."⁴⁵

Yet even with this narrow market as their focus, the authors *still* have a problem: Google's actions have helped, not hurt, consumers. So, they again narrow their focus—this time, by focusing solely on consumers who are "publishers."

But—you guessed it—the authors still have a problem. Objective evidence shows that Google's ad tech has helped, not hurt, publishers. And with their magnifying lens as close as it can be, the authors rest their argument on speculative evidence that, absent Google, publishers would "likely" receive an increase in payments from advertisers.⁴⁶

This arbitrarily narrow market definition suggests the authors' reversed engineered their analysis to fit their preferred outcome that Google's conduct is illegal under some unspecified antitrust law.

But a simple hypothetical clinches why the authors' narrow focus is wrong at best and deceptive at worst. Imagine you wanted to study the market for national coffee chains in the United States. You'd learn that Starbucks' market share is about 40% and that Dunkin' Donuts' is about 26%.⁴⁷ Now imagine you focus only on coffee chains in the United States that follow Fair Trade practices. Well, those numbers wouldn't change much because both companies have signed on to Fair Trade. But now imagine you narrow your focus even more and look only at coffee chains in the United States that follow Fair Trade practices for Americano coffee. Under this scenario, Starbucks' market share

⁴⁴ Roadmap, *supra* note 7, at 8-12.

⁴⁵ *Id.* at 5.

⁴⁶ *Id.* at 14

⁴⁷ World Coffee Portal, "Major Chains Driving U.S. Coffee Shop Growth - But Overall Market Slows," ALLEGRA (Oct. 22, 2019), <https://www.worldcoffeeportal.com/Latest/News/2019/Major-chains-driving-US-coffee-shop-growth-%E2%80%93-But-o#:~:text=Starbucks%20is%20by%20far%20the,achieve%20a%2026%25%20market%20share.>

would approach 100% because Dunkin' does not sell Americano coffee, let alone Americano coffee that complies with Fair Trade practices.

Starbucks and Dunkin' compete against each other, which is reflected in the first and broadest scenario, and even in the second scenario. Yet the third scenario does not capture that. To the contrary, it leaves the impression that Starbucks is a monopolist. And maybe Starbucks does have a monopoly on Americano coffee that complies with Fair Trade. But that raises the question: So?

Put simply, antitrust analysis is like a camera's zoom function: the more you zoom in, the more distorted the picture becomes.

But even if the authors' distorted picture is correct, and even if Google were the dominant or only player in the authors' artificially defined market, there is still no consumer harm. Indeed, as the authors' former employer—the Department of Justice Antitrust Division—explains, “[m]onopoly power can harm society by making output lower, prices higher, and innovation less than would be the case in a competitive market.”⁴⁸

Yet none of these harms is present. First, output has never been higher; indeed, as mentioned above, the market is growing. Second, prices are down by 40%. And third, innovation has continued uninterrupted for over a decade. This includes, for example, new advertising formats that allow ads to be placed on mobile apps and websites, as well as ads specific to social media.

Even ignoring all those benefits and turning solely to publishers, we see the same results. But first, who are publishers? Well, consider that although display ads run on third-party websites, they often are not made by those websites. In other words, these ads are like those in a print copy of a newspaper. And because these websites run ads just like newspapers do, they are often called “publishers.” These publishers—both digital and printed—use the ad revenue to support their businesses.

But display ads are different from printed ads in an important respect: They are better at targeting their intended audiences. In the past, advertisers had to rely on limited data to place ads. They might know, for example, that the average reader of the *New York Times* is college-educated and has a disposable income above average. Based on this information, advertisers for Walmart may decide that their money is best spent elsewhere; advertisers for Whole Foods, however, may reach the opposite conclusion.

But with display ads, advertisers do not have to rely on such generalizations. Using tools like those provided by Google and many other companies, they can craft ads that appeal to specific consumers and then run those ads on websites those consumers are most likely to visit. To be sure, the ads (output) are only as good as their data (input). So, as the authors point out, tools that use a

⁴⁸ U.S. Dep't of Justice, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act,

lot of data are often more valuable than tools that do not.⁴⁹ But all that proves is that Google's tools are popular among publishers and other consumers precisely because their inputs and outputs are strong.

Step-by-Step Guide to Tracking the Authors' Argument

Step 1: Examine digital advertising market

No market power: market is very competitive



Step 2: Examine only the digital display market

No market power: market remains competitive



Step 3: Examine only the supply-side digital display market

No market power: market is competitive



Step 4: Examine only the open supply-side digital display market

No market power: market is very competitive



Step 5: Pivot to consumers within the open supply-side digital display market

No consumer harm: prices are down; quality is up



Step 6: Examine only one subset of consumers (i.e., publishers)

No consumer harm: prices are down; quality is up

⁴⁹ *Id.* at 4.

Relying on data from the CMA, the authors conclude that Google's success in display ads is from anticompetitive behavior.⁵⁰ They reach this conclusion only by tweaking U.S. antitrust analysis to fit their preferred outcome.

Viewed properly, it is clear that Google's practices do not harm consumers; indeed, they have helped reduce advertising prices by 40%.

But even under the authors' framework, Google's services help publishers. In fact, publishers earn 68% of the revenue Google earns from AdSense when those ads are placed on the publishers' websites.⁵¹ And they get to capitalize on and profit from Google's ad services, which allow them to monetize their own websites and apps. That monetization then supports the development of free and diverse content that everyone can then enjoy. All these benefits flow from the billions of dollars' worth of intellectual property and access Google provides publishers at little to no cost.

Advertisers benefit too. For a fraction of what they paid a decade ago, advertisers can reach millions of potential customers and receive information about which ads work and which do not.

Google's Ad Tech Helps Consumers

Before the internet, traditional publishers relied heavily on running advertisements in their print publications for revenue. But with more and more Americans turning to the internet for their news, publications have transitioned to using digital advertising to augment their revenue streams.

All this has been good for advertisers: They pay 40% less for digital advertising today than before Google entered the market. But the authors shift the focus from these consumers to another group, the publishers. Because the publishers no longer command the advertising rates that they once did, the authors argue that Google has engaged in anticompetitive behavior that has harmed them.⁵²

As mentioned at the beginning of this paper, Google has every incentive to see publishers succeed. Google Search would not command the use it currently does if the internet lacked content. Thus, Google's fortunes are intertwined with the publishers' success.

Google's Ad Tech Even Helps Competitors

Publishers who use Google's supply-side ad tools are able to sell to advertisers that use Google's competitors' tools. And advertisers can use Google's tools to buy ad space on ad exchanges that

⁵⁰ *Id.* at 4-6.

⁵¹ Google, *AdSense Revenue Share*, <https://support.google.com/adsense/answer/180195?hl=en> (last accessed June 1, 2020).

⁵² Roadmap, *supra* note 7, at 33.

aren't run by Google, as well as on sites that do not use Google's services. In numerical terms, that means Google's tools give publishers access to demand from over 700 advertising platforms and give advertisers access to supply on more than 80 publisher platforms.⁵³

If Google were a monopolist, or if it were trying to squash competition, all this access would be counterproductive.

LOOKING FOR HELP & EXPERTISE: GOOGLE'S ACQUISITIONS

Recall that Google's founders—the computer science whiz kids at Stanford—were experts in programming, not digital advertising. So, when it became clear that advertising revenue would be the company's main source of income, Google made the smart decision to turn to outside help in improving its ad services. To do this, Google bought nine digital advertising companies between 2007 and the present.⁵⁴ In other words, Google vertically integrated: It brought digital advertising in house. This had three benefits. First, Google maximized efficiencies. Second, it ensured quality control. And third, it ensured that all the steps worked together.

But the authors see these common-sense investments as something nefarious. As they put it, "these acquisitions reveal a sustained effort to occupy the entire tech stack as well as the related analytics market through mergers."⁵⁵ If that were true, then the company failed big time. Google competes against Amazon, Facebook, Oracle, Comcast, AT&T, Verizon, Telaria, Rubicon Project, The Trade Desk, Index Exchange, MediaMath, OpenX—well, and more.

Even when narrowing the market to publishers, we see that competition remains healthy. Although the authors claim that Google "coerces" publishers to use Google's advertising

The anti-Google authors see common-sense investments as something nefarious—much in the way that someone with a hammer sees everything as a nail.

⁵³ Daniel S. Bitton & Stephen Lewis, *Clearing Up Misconceptions About Google's Ad Tech Business* 11-12 (May 5, 2020), <https://www.accc.gov.au/system/files/Google%20-%20Report%20from%20Daniel%20Bitton%20and%20Stephen%20Lewis%20%285%20May%202020%29.pdf>.

⁵⁴ *Id.* at 18.

⁵⁵ Roadmap, *supra* note 7, at 18.

products⁵⁶, publishers say otherwise. In a study published last year, publishers reported that they use six supply-side platforms and about four demand-side platforms on average.⁵⁷

It's also worth noting that the nine companies Google bought decided—on their own—to sell. Although acquisitions can be abused, they provide a useful “off-ramp” for many entrepreneurs. Starting any business is risky; starting a tech company, though, is even riskier. Sometimes, then, tech companies prefer to cut their risks and accept guaranteed profits from mergers. Sometimes, though, these companies refuse. Consider Instagram and Snapchat: the former accepted Facebook's offer; the latter rejected it. Both continue to exist and thrive. Put simply, Google did not coerce these businesses to sell.

DATA USE & PRIVACY: GOOGLE'S RESPONSE TO CONSUMER DEMAND

The authors also fault Google for creating a “superior” ad tech service for publishers to use. Their argument goes like this: Because Google has a lot of data, it has been better than competitors at placing ads so that the relevant consumers see them, and that competitive advantage is unfair and anticompetitive.⁵⁸ Although it is true that Google has a lot of data—from Google Search, YouTube, and other Google products—that does not mean Google's engaged in anticompetitive behavior. It simply means that Google has better inputs than do some—but not all—competitors. Indeed, Amazon has comparable data about consumers' product searches, and likely leverages that data to improve its own advertising tools. And, as mentioned earlier, Facebook also has a lot of data that the company is eager to use.

But even if Google's ad tech did not face current competition from these other companies, the authors' argument still fails because data is neither finite nor limited to one company. Facebook could just as easily have access to it. Same for Amazon. So although Google's data inputs make its ad tech superior to many other services, they do not render it immune from competition. Google does not own your data, nor does it prohibit you from sharing it with its competitors.

Interestingly, the authors also fail to grapple with another interest Google must consider - user privacy. Google does not voluntarily share its data sets with competitors or allow its data to be used outside Google's own “closed” ad system. But that makes sense. First, it's not Google's job to do its competitors' work for them. And second, Google has been under intense scrutiny—from the public,

⁵⁶ *Id.* at 17, 19, 26, 37.

⁵⁷ *Id.*

⁵⁸ See Roadmap, *supra* note 7, at 20-21.

from commentators, and even from the U.S. Congress—to better protect data privacy. This is a political and public-relations reality that Google must contend with; the authors, however, ignore it completely.

In fact, the authors explicitly condemn Google for taking steps to protect users' privacy *outside* the advertising space. In early 2020, the company announced that in two years it would ban third-party cookies from its web browser, Google Chrome.⁵⁹ The authors point to this as proof that the company engages in anticompetitive practices.⁶⁰ But by making it harder for third parties, including publishers, to track and collect data on users, Google is merely responding to industry trends and public pressure. After the Cambridge Analytica debacle in 2016, government regulators, elected officials, and average Americans made clear that they wanted companies to better protect data.

Google is not alone—in fact, it is late to the game. Apple's Safari web browser and Mozilla's Firefox web browser have already restricted third-party cookies. They too were met with backlash from advertisers. But like Apple and Mozilla, Google is responding to public demand. And since the public drives Google's popularity—across all its platforms and products—the decision is not only necessary but also strategic. The authors, meanwhile, cast it as anticompetitive. Perhaps they should try persuading the government and public to care less about data privacy and more about data's importance. Until they are successful, however, Google should be applauded for responding to genuine concerns, not chastised for heeding the call for better privacy protections.

CONCLUSION

Google is guilty of one thing: being big. But being big is not the same as being a monopoly. Of course, Google should not be immune from criticism; sometimes it is warranted. Like other businesses, Google makes mistakes. But the authors' narrative misses the mark—big time. It casts sensible business decisions as something unseemly, something illegal. And it proves that a company is damned if it does and damned if it does not. Here, Google has invested heavily to give consumers—from web searchers to advertisers to publishers—access to superior products and services. Google delivered time and again. And yet, the authors credit this success not to Google's decision-making but to illegal conduct.

Worst of all, the authors jettison the consumer welfare standard to backfill their preferred outcome. They ignore, rather conspicuously, all the benefits Google's ad tech has given consumers, including publishers. Prices are down; quality is up. Publishers can reach targeted audiences domestically

⁵⁹ Peter Adams, *With Google's Decision to Kill 3rd-Party Cookies, Marketers Forecast a Doomy Scenario*, *MARKETINGDIVE* (Jan. 22, 2020), <https://www.marketingdive.com/news/google-kill-3rd-party-cookies-marketers-forecast-doomy-scenario/570846/>.

⁶⁰ Roadmap, *supra* note 7, at 23-24.

and internationally. Advertisers can more bang for their buck. And viewers like you and me get ads that are relevant to our lives.

To be sure, they never explicitly say that Google broke the law. Instead, they dance around the subject. They suggest only that their narrative, pursued as they suggest, *could* serve as a roadmap to an antitrust case against Google. But the government should not pursue antitrust enforcement merely to penalize success, or to make “big” less big, or to protect competitors who fail to innovate. The evidence shows that Google faces substantial competition in digital advertising. If the government were to interfere with Google’s ad tech, it could very well end up making the market more expensive for small businesses to advertise.

And for what? Competition is alive, well, and growing. Google’s ad tech helps consumers, including publishers. And Google has managed to reduce market prices while still offering high-quality products. So if the government follows the authors’ Roadmap, it’ll interfere in a market that’s already competitive and inflict harm on consumers for no reason other than big is apparently bad. That’s a narrative that should scare us all.