Testimony of

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# Stacking the Tech: Has Google Harmed Competition in Online Advertising?

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## About NetChoice

NetChoice[1] is a trade association of leading online companies whose mission is to make the internet safe for free enterprise and for free expression. We work to promote the integrity and availability of the global internet and are engaged on issues in the states, in Washington, and in international internet governance organizations.

## Introduction

Launched in 1996 and originally christened BackRub, Google got its start when two Stanford computer science whiz kids with a knack for programming had an idea for a new search engine.[2] 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.[3]

Few in the Silicon Valley thought they'd succeed. At the time, most believed that Yahoo was so dominant in search that no one could challenge it. Fortune Magazine summed it up this way in an article titled *How Yahoo! Won the Search Wars*: "Once upon a time, Yahoo! was an Internet search site with mediocre technology. Now it has a market cap of $2.8 billion. Some people say it's the next America Online."[4] These days we look back at former giants Yahoo and AOL and know that their dominance was anything but.

We also 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.[5] 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. Not bad for a startup that Yahoo! once passed over and venture capitalists laughed at.

But this success was never guaranteed, and as the history of the tech industry amply demonstrates, never will be. Only with an obsessive focus on product quality and sound business decisions has Google been able to achieve its current position. And only through constant innovation that delivers ever-better benefits to American consumers will Google avoid becoming the next Ask Jeeves, Ask.com, Yahoo!, AltaVista, Lycos, or MSN Search.

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[1] NetChoice is a trade association of e-Commerce and online businesses, at www.netchoice.org The views expressed here do not necessarily represent the views of every NetChoice member company.
[2] Verge Staff, *Google Turns 20: How an Internet Search Engine Reshaped the World*, The Verge (Sept. 27, 2018), https://www.theverge.com/2018/9/5/17823490/google-20th-birthday-anniversary-history-milestones.
[3] *Id.*
[4] Randall E. Stross, *How Yahoo! Won the Search Wars*, Fortune Magazine (Mar 2, 1998), https://archive.fortune.com/magazines/fortune/fortune_archive/1998/03/02/238576/index.htm.
[5] *See, e.g.*, Tony Romm, *Amazon, Apple, Facebook and Google Grilled on Capitol Hill Over Their Market Power*, Wash. Post (July 29, 2020), https://www.washingtonpost.com/technology/2020/07/29/apple-google-facebook-amazon-congress-hearing/.

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Among the many Google products and services that consumers love are Google Search, YouTube, Gmail, and Google Drive—all amazingly useful, and all free. To many critics of "Big Tech," however, when consumers enthusiastically choose these free-of-charge products, it amounts to proof that something must be wrong. Every successful new service or product that proves a winner with consumers is deemed by these critics to be just another antitrust violation.[6]

But Google's greatest successes are being won in markets with the greatest competition. In the digital ads market, for example, Google faces fierce competitive pressure. You would never know that listening to the critics.

For starters, Google is no monopoly. It's wildly popular with consumers, yes. And true, it's also very popular with investors. But the company faces competition from all corners, including from other tech platforms such as Facebook and Amazon (which are simultaneously, and thus illogically, also dubbed monopolies).

Far from being evidence of any unlawful conduct, Google's success under these conditions offers abundant proof that it is meeting and exceeding the fundamental test that has been the bedrock of antitrust law for the last 40 decades*: are consumers benefitting*? There can be little doubt on this point, for Google's users vote daily with their choices. In order to dismiss this as irrelevant, the critics are now arguing that antitrust enforcement should simply abandon the consumer welfare standard, enabling them to attack "bigness" per se. This would undermine the very purpose of antitrust law since its inception more than a century ago.

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When Congress passed the Sherman Act in 1890, it enshrined in law the country's "national values of free enterprise and economic competition."[7] Back then, Congress sought to stem the "seemingly endless combinations and consolidations of industries" that led to the "great trusts of the day—the Standard Oils."[8] And even then, President Teddy Roosevelt—an aggressive "trust buster"— worried that attempts to break up of Standard Oil through slow-moving antitrust cases in the courts might in the end succeed only in robbing consumers of efficiencies in the form of high quality and lower costs that they presently enjoyed. Roosevelt lamented, "I do not see what good can come from dissolving the Standard Oil Company into 40 separate companies."[9]

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[6] *See, e.g.*, Tony Romm, *Amazon, Apple, Facebook and Google Grilled on Capitol Hill Over Their Market Power*, Wash. Post (July 29, 2020), https://www.washingtonpost.com/technology/2020/07/29/apple-google-facebook-amazon-congress-hearing/.
[7] *N.C. State Bd. of Dental Exam'rs v. Fed. Trade Comm'n*, 135 S. Ct. 1101, 1110 (2015) (citation omitted).
[8] Chris Marchese, *Debunking the Big is Bad Boogyman: How Facebook Benefits Consumers*, 28 Geo. Mason L. Rev. 1, 8 (2020), http://georgemasonlawreview.org/wp-content/uploads/2020/08/Marchese_Final_Web3.pdf.
[9] Crane, *All I Really Need to Know About Antitrust I Learned in 1912*, Iowa Law Review Vol. 100:2025, 2030.

In his biography of T.R., Ron Chernow captured the 26th president's conflicting instincts about the most effective way to limit monopoly abuses while preserving consumer benefits. "Roosevelt," he said, "was genuinely reluctant to wield the big stick against Standard Oil.… He wanted to supervise the trusts, not break them up and sacrifice their efficiency."[10]

But in 1906 the Roosevelt administration did sue Standard Oil under the Sherman Act. It would take five years before the company was ordered to divest itself of its major holdings—33 companies in all. For decades afterward, as both the executive branch and the Supreme Court struggled to arrive at a principled basis for sorting procompetitive business actions from anticompetitive ones, the default condition was the one today's critics would resurrect—that big must be bad.[11]

As former Federal Trade Commissioner Joshua Wright put it, "[t]he result of this approach was that consumers were made worse off by preventing the very competition from which they would benefit and which the competition laws were supposed to promote."[12] Instead of producing consumer benefits, antitrust enforcement based on size frequently led to higher prices and fewer goods, damaging consumers.[13] And, Commissioner Wright added, "preserving inefficient firms with higher prices and lower output," which was the result of such antitrust enforcement, had the perverse effect of favoring "corporate welfare over consumer welfare."[14]

By the 1970s, a decade marked by increasing global competition and sluggish U.S.

economic growth, leading antitrust scholars and economists sensed the urgency of rationalizing the purposes and methods of enforcement policy. Under the leadership of economist Alfred Kahn, the Carter administration launched a major regulatory reform initiative focusing administration policies on consumer welfare. The result was to bring competition to industries across the U.S. economy including railroads, airlines, and trucking. This turn toward consumer welfare was supported by antitrust experts across

the ideological spectrum,[15] who recognized that by attacking large companies regardless of the impact on consumer welfare, antitrust enforcement had produced legal uncertainty that deterred firms from innovating, boosting productivity, and offering consumers better products and services at lower cost.

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[10] Ron Chernow, *Titan: The Life of John D. Rockefeller, Sr*. 522 (2004).
[11] See Joshua D. Wright, Elyse Dorsey, Jonathan Klick, & Jan M. Rybnicek, *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 Ariz. St. L.J. 293, 298–302 (2019).
[12] *Id.*
[13] *Id.* at 300.
[14] *Id.*
[15] Chris Marchese, *Debunking the Big is Bad Boogyman: How Facebook Benefits Consumers*, 28 Geo. Mason L. Rev. 1, 10 (2020), http://georgemasonlawreview.org/wp-content/uploads/2020/08/Marchese_Final_Web3.pdf. *See, e.g.*, Robert Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York: Basic Books, 1978).

The replacement of antitrust-by-gut-instinct with the consumer welfare standard that took place nearly a half century ago enjoys broad, bipartisan support still today.[16] It is buttressed now by the empirical evidence of two generations of enforcement policy and case law. But as the critics' attacks on Google demonstrate, that support isn't universal. While these critics are not in the main antitrust experts, it is easy to find political pundits on both the left and right who unite in their agreement that American tech companies are just too big.

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Antitrust enforcement is an extraordinary remedy for an extraordinary problem. The Senate Subcommittee on Antitrust, Competition Policy, and Consumer Rights thus deserves praise for providing this "forum to assess the most important antitrust investigation of the 21st century."[17] Today's hearing provides a good opportunity for Congress to dig deep into the consumer welfare standard's continued relevance and success. Using Google's advertising business as an example, I expect lawmakers will see firsthand both the benefits of the current antitrust approach and the pitfalls of upending it, which would turn back the clock to days when "big" meant "guilty until proven innocent."

To help in that effort, NetChoice prepared this testimony. The first part imagines a hypothetical question-and-answer session about Google and the digital advertising market. This is meant to give a broad, bird's-eye view of market realities. The second part is a deep dive into Google's business model, the search engine market, the digital ads market, and business practices that touch on all three.

At bottom, this testimony makes clear that Google is no monopoly, that its business decisions are not only lawful but benefit consumers immensely, and that the consumer welfare standard works and should be retained.

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[16] *See* John Kwoka, *Mergers, Merger Control, And Remedies* 1 (2015); Michael Vita & F. David Osinski, John Kwoka's *Mergers, Merger Control, and Remedies: A Critical Review*, 82 Antitrust L.J. 361, 362–63 (2018).

[17] Press Release, Senator Mike Lee, *Sen. Lee Announces Antitrust Subcommittee Hearing on Online Advertising Market* (July 27, 2020), https://www.lee.senate.gov/public/index.cfm/2020/7/sen-lee-announces-antitrust-subcommittee-hearing-on-online-advertising-market.

# Part I. Q&A

1. **Some say that Google controls 90% of the market. Doesn't that prove it's a monopoly?**

Before determining a company's market share, the relevant market must be defined. Google's critics try to inflate market share by narrowing the relevant market. According to them, digital advertising breaks down into (1) search ads, (2) video ads, and (3) display ads. Under this definition, they contend that Google has market share in the search ads market. That number is of little use to antitrust analysis as the standard tells us we must look at how consumers use a product. By defining the market so narrowly, critics not only miss the forest for the trees, but fail to follow the rules laid out for antitrust analysis.

That is so because at its core Google competes in the "attention market." Put simply, Google attracts users—and their eyeballs—by developing great products that it then provides to consumers for free. When consumers use those products, they may see search ads on Google Search, video ads on YouTube, or personalized ads on third-party websites such as NYTimes.com. So every minute a user spends elsewhere—on Netflix, Snapchat, Facebook, Twitter, etc.—is a minute Google loses to a competitor who also sells digital ads and thus competes for a user's attention. At the same time Google Search faces robust competition from niche search tools designed to provide specific results – search tools like Yelp for restaurant reviews and Angie's List for home repair services.

Because digital ads boil down to getting ads before a user, the relevant market must at least include all online platforms that operate to do just that. Viewed this way, Google's market share is a modest 29%. In other words, it's nowhere close to being a monopoly, which the Supreme Court informally defines as having at least 75% market share and the DOJ defines as above 66%.

Defining the relevant market, especially when it comes to tech companies, involves looking backwards in time to make decisions about the future. This job is hard to begin with, but it's even harder in digital markets where innovation routinely disrupts markets and creates new "hybrid" ones. Consider Walmart, for example: Is it merely the largest retailer in the US[18] with an online retailer that sells directly to consumers? Or is it a marketplace that connects buyers and third-party sellers?[19] Or is it a marketplace that also serves as a search engine for the "100 million unique Walmart.com visitors each month" looking for products and read reviews?[20] As it turns out, it's both. Indeed, millions of Americans begin

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[18] *See*, Walmart Media Group, https://www.walmartmedia.com/
[19] *See* Walmart Marketplace, https://marketplace.walmart.com/
[20] *Id.*

their product searches on the platform. Walmart also sells digital ads on its platform, which makes it a direct competitor to Google.[21]

### 2. But if market definition is easily manipulated, isn't that a strike against the consumer welfare standard and claims that it's superior because it's objective?

No, it's a strike against those who seek to reverse engineer the consumer welfare model to yield their preferred results. While market definition is difficult and there is scholarly debate about its application, it remains essential to determining market share and the opportunity a company has to exploit market power.

Digital ads are a good example of how the consumer welfare standard helps get us to the best possible answer about market definition and market share. Because the standard tells us to look at how consumers use a product, we know right off the bat that the market can't just be digital search ads. That is because advertisers—the main purchasers of digital ads—use search ads interchangeably with other forms of advertising, including digital display ads.

In addition, advertisers are increasingly using digital ads as a replacement for traditional ads, including those that run on television. If these competitors are considered part of the relevant market, Google's market share is even lower than 28%, because it directly competes with cable television, newspapers, and other media for these advertising revenues.

Without the objective consumer welfare standard, the government could simply define the relevant market in any way it likes. That would make it impossible for companies to comply with the law, because they could not know in advance the standard to which they must conform their conduct. Instead, businesses would be left to wonder whether doing "x" will irritate the government enough to bring about enforcement even though, objectively, consumers and competition are benefitting from "x."

### 3. Google is one of the few digital ads providers that operates across the entire advertising spectrum. Isn't that cause for concern?

Google has developed a complete suite of ad products, each of which competes against different companies and different competitive products. It offers services for buyers (placing ads), sellers (selling space), an auction system (matching the two), and it offers its own tools to help advertisers place ads on Google's platforms. These distinct and varied product

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[21] *See*, Walmart Media Group, https://www.walmartmedia.com/

offerings compete with hundreds of companies, including such heavyweights as Adobe, Amazon, AT&T, Comcast, Facebook, Microsoft, Twitter, Snap, Verizon, and Oracle.

The result of this vibrant competition shows that rather than cause for concern, it is a boon to consumers. Digital ad prices are down 40% since 2010, output is up significantly, and quality has never been better.

Moreover, advertisers and publishers engage in multihoming – simultaneously using multiple Demand Side Platform (DSP) and more than Sale Side Platform (SSP). On average, advertisers use 4.2 DSP[22] and publishers average 5.7.[23] For example, the LATimes.com uses twelve DSPs for display ads alone.[24]

Finally, just because a business is vertically integrated is no reason to bring an antitrust action. If that were so, Starbucks would be inherently anticompetitive, because it sources and prepares its own beans.[25]

### 4. You say Google benefits consumers—can you elaborate?

Google Search and YouTube are multisided platforms. That means that Google plays matchmaker among many participants operating in different facets of the same market. For example, it links users with advertisers, and it links advertisers with publishers. In order to meet the needs of each of these different customers, Google must keeps its platforms attractive to consumers. Attracting consumers is necessary to attract advertisers, and keeping its services free for consumers requires keeping advertisers interested.

Google has benefitted all these groups. With digital ads prices down 40% since 2010, advertisers are getting more bang for their buck. Publishers are earning money from digital ads without having to invest in developing and maintaining the intricate technology that makes it all happen. Thanks to its advertising revenue, Google is able to keep its services free. And that, in turn, has put competitive pressure on the likes of Microsoft, which responded by cutting prices on its Office products after Google released its own suite of office products for free.

In sum, Google's ad business, in conjunction with its innovative ecosystem of free consumer products like Gmail, Youtube, Maps, Photos, and many more, has produced enormous benefits for consumers.

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[22] eMarketer, *Average Number of DPSs Used by Advertisers, Jan 2016-April 2018*, https://www.emarketer.com/chart/219189/average-number-of-dsps-used-by-us-advertisers-jan-2016-april-2018-among-largest-100-advertisers-on-pathmatics-platform
[23] eMarketer, *Average Number of Ad Exchanges and Supply-Side Publishers (SSPs) Used by US Publishers June 2016-June 2018*, https://www.emarketer.com/chart/220505/average-number-of-ad-networks-exchanges-supply-side-platforms-ssps-used-by-us-publishers-june-2016-june-2018-among-largest-500-publishers-on-pathmatics-platform
[24] *See,* https://www.latimes.com/ads.txt (last visited Sept. 10, 2020)
[25] Emily York, *Starbucks buys coffee farm to control sourcing, develop new beans*, Chi. Trib. (Mar. 19, 2013).

## 5. But isn't Google the reason newspapers went out of business and publishers are hurting?

To the contrary, Google is helping newspapers transition to the new Information Economy. Consider the *New York Times*. It currently uses Google's ad tech to sell display ads, and with web traffic higher than ever before, its website is valuable real estate for advertisers. Thanks to Google, the *Times* is able to capitalize on that asset. And because it has seen just how profitable digital ads are, the *Times* and the *Washington Post* have announced that it'll be creating its own ad tech—thus competing with Google.

Although many critics would like to blame "Big Tech," the truth is that for decades the internet itself has presented a challenge for print newspapers and publishers, who have struggled to adapt their pre-internet business models to the prevailing consumer reality. For centuries, print newspapers relied on advertising and classified ads for the major portion of their revenue. Because newspapers were the main source of local information and in wide circulation, advertisers of all shapes and sizes bought ads.[26] But when consumers in the United States began to go online, newspapers suddenly faced a changed landscape.

Indeed, even before digital advertising developed in the mid-2000s and grew in the latter half of the decade, newspapers struggled, in part because the advent of 24/7 television and radio news rendered their product stale. Americans simply weren't buying as many print newspapers anymore. With the advent of instantaneous worldwide communication via the internet and online classified ads, the newspapers' model of delivering the news the following day and monopolizing classified advertising took an even harder hit. And because consumers could no longer be counted on to wait for the printed word to arrive at their doorstep the next weekday or the next Sunday, traditional display ad revenue fell.

## 6. But doesn't Google's acquisition of YouTube show anticompetitive behavior?

Google's acquisition of YouTube has benefited users and advertisers alike. It is emblematic of Google's business strategy. Consider how it unfolded.

Animated by a desire to "prevent staleness," and not to become "our father's Oldsmobile," Google has long sought to stay ahead of the curve. So much so that as far back as 2006 it predicted that "social networking sites will ultimately represent a threat to our search business as people will spend more time on those sites and ultimately may do most searches from the search boxes available there."[27]

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[26] Google, *De-classified: What Really Happened to Newspapers*, Google Australia Blog (Sept. 4, 2020), https://australia.googleblog.com/2020/09/de-classified-what-really-happened-to.html.
[27] Google confidential internal presentation (2006).

Time would later prove Google right. But instead of falling victim to changing market dynamics, Google made three wise decisions that enabled it to compete. First, it entered the social media market by acquiring one of the several participants in that space, YouTube. Second, it committed to a policy of continuously developing consumer-friendly innovations to enhance Google Search. And third, it built out its ad tech services, connecting its social media, search, and advertising products.

Google's acquisition of YouTube in 2006 came after much internal strategizing. Their market analysis convinced them of social media's potential to transform how people spent their time online, in turn making entertainment sites likely places from which consumers would want to conduct online searches. This highlighted the value of "own[ing] the search box on the entertainment sites"[28]—an opportunity for all of their social media competitors, and something Google itself needed to pursue. Among possible acquisition candidates, YouTube was particularly attractive because of its "smart team" and its "platform [that Google] could build from."[29]

Without Google's participation in the social media marketplace through its acquisition and subsequent development of YouTube over the last 14 years, there would be less competition, fewer offerings to consumers, diminished consumer choice, and higher prices for lower quality services.

**7. But surely Google's other business practices—such as displaying publisher information directly on its search results page—are anticompetitive, right?**

Search engines used to display results by displaying each publisher's URL below the branded result. By displaying the URL on top of the branded result, consumers could more easily see where the information is coming from. Giving the URL top billing means that users will naturally look there first, making it easier for them to determine whether the particular search result is a reputable site. These enhancements that add to consumer value are the result of the company's ongoing commitment to research and development. Its annual R&D spending is nearly $30 billion—reflective of a commitment to constant product improvement rather than the cheaper shortcut of anticompetitive practices.

Google has enhanced the consumer experience and the value to consumers from its various search services in other, similar ways as well. For example, it has introduced what it calls "Universal Search," which integrates search results from a variety of different media sources (links, video, photos), and from services including Google Maps and Google Flights.

Integrating YouTube videos with Google Search has enabled consumers to see relevant videos in their search results as links on the search engine's main page and under its

[28] *See*, Taylor Hatmaker, Devin Coldewey, *Secret documents from US antitrust probe reveal big tech's plot to control or crush the competition*, TechCrunch (July 31, 2020)
[29] *Id.*

"Videos" tab as well. No longer do consumers have to visit multiple websites to find what they're looking for.

Many of Google's rivals have pursued similar pro-consumer strategies to improve their offerings. Microsoft's Bing, as Google itself has noted, "has explicitly made improving verticals a key part of [its] strategy to beat Google."[30] To do that, Microsoft began to offer consumers "cashback (shopping), purchased Farecast (flights), partnered with Wikipedia (reference), Wolfram (calculations and facts), and built vertices for events and recipes."[31]

This constant product improvement is necessary in order to compete in search, because even many niche search engines that compete with Google are provided by large companies with significant resources. These include Walmart, which offers extensive search capabilities for shopping; Yelp, which provides search results for local goods and services; Kayak, which delivers comprehensive search information on flights; and a host of other specialty search providers such as Hotels.com, AllRecipes, and Edmunds that provide specially tailored search services for items ranging from lodging and cooking to car buying, and virtually every other consumer need.

**8. There's one group, though, that hasn't benefitted: conservatives. How do you explain Google's censoring of them?**

The oft-heard complaint from the critics is that Google has "censored" news and political commentary from a conservative perspective. This inaccurate criticism is based on a kernel of truth: Google does moderate content, including removing or limiting it when warranted by its community standards. But these standards are applied across the board, and empirically, have resulted in far more politically progressive content being limited and removed.

At the same time, conservatives have benefitted immensely from Google's products and free services. By offering conservative voices an enormous audience free of charge, YouTube has enabled them to bypass traditional TV, radio, and publishing to get their message out. Even better, YouTube lets conservatives monetize those messages. Prager University, for example, has over a billion YouTube views, and earns considerable revenue from that.[32] ABC, CBS, NBC, Fox and other traditional media, including print, offer nothing like these opportunities to PragerU and other politically conservative voices.

Conservative content routinely makes up the majority of the most popular channels on YouTube. And unlike the traditional media, YouTube streamed the Republican National Convention in full, without commercial interruption.

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[30] *Google email from Kavi Goel* - House Judiciary Committee, https://judiciary.house.gov/uploadedfiles/03815864.pdf
[31] *Id.*
[32] *See* https://socialblade.com/youtube/user/prageruniversit.

Critics maintain that Google shouldn't do any moderating—all content should be allowed. That's neither realistic nor desirable. To use but one obvious example, in demanding that Google follow the First Amendment, critics are saying that Google should allow pornography on its site. Beyond that, Google's advertisers are very conscious of the context in which their brands appear. They won't pay to be featured alongside offensive, crude, or violent content, even if it is protected by the First Amendment. And without advertising revenue, Google could no longer offer its services including YouTube to conservatives and all others for free.

### 9. But what about Google Search—doesn't it suppress conservative news and amplify news critical of the president and Republican Party?

Google Search's algorithms aren't perfect—that's why the company makes an average of 3,600 tweaks in 2019 alone.[33] But neither are they biased against conservatives.

The technology is complex but the concept is simple: Google Search continuously crawls the internet's two billion pages to create an ever-changing, constantly updated index of the world's online content. When a user enters a search query, Google retrieves relevant results based on that index.

Once retrieved, the information is ranked based on about 200 factors. One factor is authoritativeness, determined by a site's popularity (as measured by clicks) and the number of other pages that link to that site. That may seem circular—after all, if Google helps connect users to websites, it plays a role in determining which websites get clicks. But that's true only to a small extent. What matters most is the search phrase. So if many Americans are searching for and reading negative stories about a topic, general searches about that topic will increasingly rank those stories higher because they are the most widely read.

It's also true that many news websites with the highest viewership, including the New York Times, the Washington Post, CNN, and MSNBC, produce a disproportionate share of digital articles critical of conservatives and their policies. Here's an example of how this affects Google's search results: When Republicans cut tax rates for middle and low income Americans in 2017, progressives nonetheless criticized the legislation because it also cut tax rates for higher earners. This produced a rash of stories that were critical of the tax cut. So as Google users searched using a neutral term such as "tax cut," they increasingly saw the negative stories higher up.[34]

This understandably irks Republicans, but the alternative would have Google explicitly giving positive stories about conservative policies a boost. This "affirmative action" of sorts

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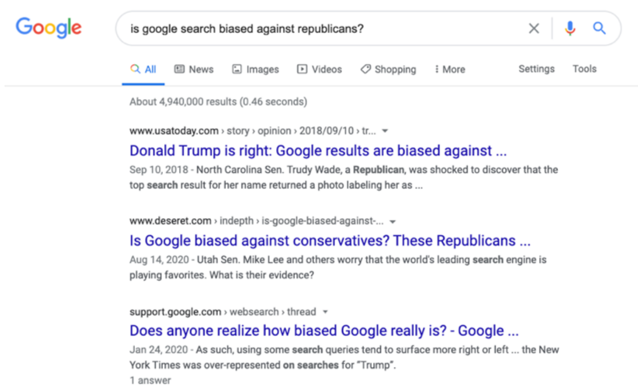
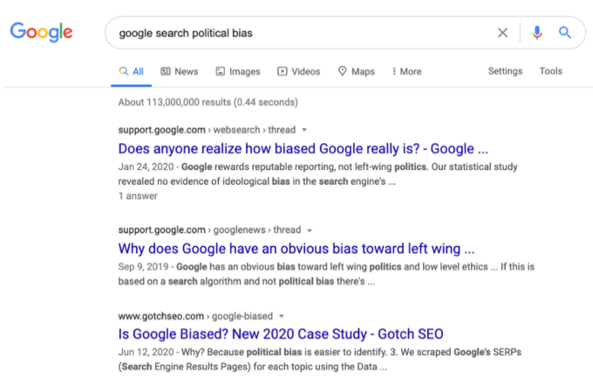
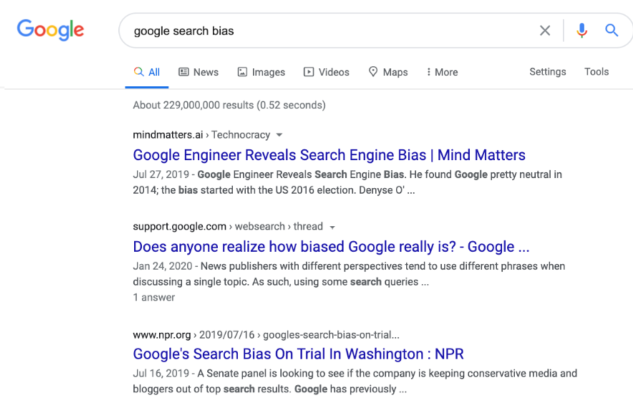
[33] Rigorous testing, https://www.google.com/search/howsearchworks/mission/users/
[34] Sue Halpern, *The Search for Anti-Conservative Bias on Google*, New Yorker (Dec. 19, 2018), https://www.newyorker.com/tech/annals-of-technology/the-search-for-anti-conservative-bias-on-google.

would force Google to make explicitly political decisions—something no one wants—by singling out conservative sources for specially favorable treatment.

And to be clear, the algorithms turn up unflattering links about everything—including Google itself. One would assume that, if Google really were biasing its algorithms, it would do a better job suppressing stories critical of it. And yet here are the top results, based on several variations of the same search request. Each shows links to negative stories about Google.



# Part II. Deep Dive into Tech Market Realities

## What's Past is Prologue: The Gut Instinct of Big-is-Bad

Antitrust laws in the United States are meant to promote consumer benefits through competitive markets.[35] Businesses that have to compete will usually cut prices and/or improve the quality of their products or services.[36] As the Supreme Court stated in 2019, "'protecting consumers from monopoly prices' has been 'the central concern of antitrust.'"[37] Antitrust laws, the court added, also "stimulate businesses to find new, innovative, and more efficient methods of production," which also benefits consumers.[38]

But for much of our history, antitrust relied on "confused doctrines that pursued populist notions"—most particularly, the idea that the size of a business was all that mattered, regardless of whether consumers benefitted or were injured.[39] As a result, the government's enforcement decisions often "led to contradictory results," by seeking to "advance a variety of social and political goals, but doing so at the expense of American consumers."[40] In the Sherman Act's first decade, for example, the Supreme Court held that the law was meant to protect "small dealers and worthy men."[41] Decades later, the Court reaffirmed that interpretation, holding that antitrust laws are meant to protect "viable, small, locally owned business" even when that protection means "higher costs and prices."[42]

By the 1970s, this confusion had dissipated, as antitrust experts including economists, academics, and practicing lawyers reached a general consensus that ever since has anchored antitrust analysis in consumer welfare.[43] This achievement made the United States the first country to root antitrust analysis in economics.[44] Under the consumer welfare standard, economic evidence is analyzed to assess whether a business's actions benefit or harm consumers.[45] Economists, antitrust scholars,[46] and U.S. courts[47] agree that the consumer welfare standard has succeeded in protecting consumers. That success came only once the government replaced the old model of antitrust analysis based merely on the

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[35] Dep't. Of Justice, *Antitrust Enforcement and the Consumer* (last accessed Mar. 6, 2020), https://www.justice.gov/atr/file/800691/download.
[36] *Id.*
[37] *Apple v. Pepper*, 139 S. Ct. 1514, 1525 (2019) (internal citation omitted).
[38] *Id.*
[39] Joshua D. Wright et al., *Requiem for a Paradox: The Dubious Rise & Inevitable Fall of Hipster Antitrust*, 51 Ariz. St. L.J. 293, 294, 299 (May 2019), http://arizonastatelawjournal.org/wp-content/uploads/2019/05/Wright-et-al.-Final.pdf.
[40] *Id.* at 294.
[41] *United States v. Trans-Mo. Freight Ass'n*, 166 U.S. 290, 323 (1897).
[42] *Brown Shoe Co. v. United States*, 370 U.S. 294, 333, 344 (1962).
[43] *Id.*
[44] Roger D. Blair & D. Daniel Sokol, *Welfare Standards in U.S. and E.U. Antitrust Enforcement*, 81 Fordham L. Rev. 2497, 2508-09 (2013).
[45] *Id.*
[46] Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 Fordham L. Rev. 2405, 2406 (2013).
[47] *See, e.g.*, *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438 (2009).

size of an enterprise with the more logically rigorous approach of determining anticompetitive harm to consumers through objective economic analysis.[48]

Ironically, given the success of this approach, today's critics of "Big Tech" have mounted an attack on the consumer welfare standard that is the basis of modern antitrust law. Just as in the early 20th century, generalized concerns about such social ills as corporate power, income inequality, and wage stagnation have sparked calls to "solve" these problems by reviving the discredited antitrust theory of "big is bad,"[49] in place of the consumer welfare standard.

The critics can point to Europe, where antitrust enforcement focuses far less on economic analysis than the United States does.[50] But such a move would be a major departure and a dangerous change for our nation. There is a reason Europe has no companies on the list of the top 10 tech companies in the world. Indeed, Europe has only one—Spotify—in the top 30. The United States, by contrast, leads the world in technology. Should we follow Europe's lead, only foreign competitors will benefit. American consumers, by contrast, will suffer.

The European Union's experience with antitrust enforcement should serve as a cautionary tale for America. The E.U.'s main antitrust law, the Treaty on the Functioning of the European Union (TFEU), is designed "to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers."[51] By leaving it to the discretion of the courts to determine what is in "the public interest," Europeans have made their standard of antitrust enforcement entirely subjective. Free to choose their own notions of what is fair, and unbounded by any rigorous economic analysis that is the *sine qua non* of U.S. antitrust analysis, E.U. courts have produced a smorgasbord of results, the net effect of which has been the diminution of competition, higher prices, and reduced benefits for consumers.

As explained in detail below, that's not necessary. The consumer welfare standard works well and Google's advertising business shows that.

## Starting Point: Understanding Google's Business Model

Like any for-profit business, Google must make a profit. But unlike traditional for-profit businesses, Google's most famous and popular product—Google Search—is given free of

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[48] Joshua D. Wright, Elyse Dorsey, Jonathan Klick, & Jan M. Rybnicek, *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 Ariz. St. L.J. 293, 305 (2019).
[49] *Id.* at 294.
[50] Roger D. Blair & D. Daniel Sokol, *Welfare Standards in U.S. and E.U. Antitrust Enforcement*, 81 Fordham L. Rev. 2497, 2514 (2013), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4889&context=flr.
[51] Case C-52/09, 2011 E.C.R. I-00527, ¶¶ 22–23 (emphasis added).

charge to its users. To understand Google, therefore, it helps first to understand its unique business model and the incentive structure within which it operates in the marketplace.

Google Search is currently the most popular search engine, but because it is free, that popularity does not provide the company with any revenue, let alone profit. As with free over-the-air television, revenue comes not from viewers or users but from advertising. In 2018, advertising amounted to 84% of revenues for Alphabet, Google's parent company.[52]

The willingness of advertisers to pay for digital ads on Google's site is directly connected to its popularity. No one would pay to advertise on billboards dotting a rarely used road. But people would—and do—pay millions for a 30-second spot during the Super Bowl. Google's popularity thus drives its advertising revenue, and it is strongly incentivized to provide consumers with the highest-quality products and services, even though they are free.

But Google Search is only as useful to consumers as the websites that it displays to them in the form of search results. Google may build the world's best search algorithm, but if the content responsive to consumer search requests isn't itself relevant or useful, then those consumers will find using Google Search to be less useful. That means Google *also* has a strong incentive to see to it that publishers—those who create the wide variety of news, entertainment, research, educational material, and commentary that is published on the internet—flourish.

The relationship between Google and web publishers is largely symbiotic.  Many of these publishers rely on advertising as a principal source of revenue. When their advertising revenue rises, the publishers flourish. Flourishing publishers that are in financial good health produce higher quality content. And when publishers produce higher quality content that benefits consumers, more people have reason to use Google Search.

While Google understands and lives by this market reality, many of its critics seem to believe that Google is motivated to run publishers into the ground by extracting as much money from them as possible. Common sense suggests this cannot be so: when publishers fail, Google Search suffers. And what common sense suggests, evidence confirms. As explained below, although many publishers use Google's advertising tools, they typically also use from four to six other companies' advertising tools.

In sum: Google invests heavily in its search engine so that consumers find it ever more useful. Google does this not only because Google Search is the company's lifeblood, but because failing to do so would yield ground to competitors ranging from Microsoft's Bing to DuckDuckGo to 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

[52] Hamza Shaban, *Google Parent Alphabet Reports Soaring Ad Revenue, Despite YouTube Backlash*, Wash. 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/.

Search.) Google also invests heavily in its advertising tools and products because it relies on advertising for revenue, as do many of its rivals in the marketplace including Amazon, Facebook, and Bing.

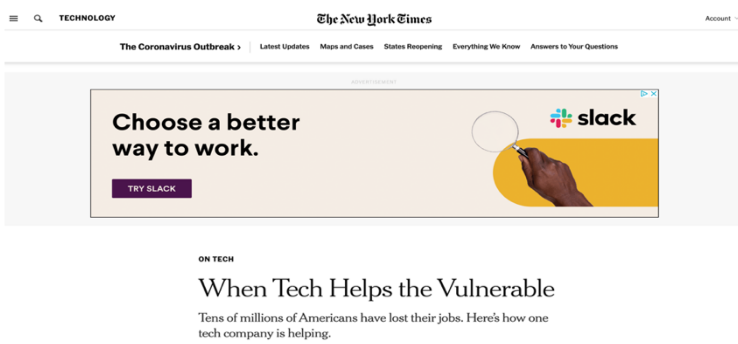
In the world of online business, the position of any market leader is precarious, as history has shown. That is why Google continues to innovate, invest, and improve. It does not rest on its laurels or cut corners like a monopolist would. If Google did that, rather than continuously improving, it would quickly become the next MySpace.

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

## About Display Advertising and Ad Tech

Digital advertising is a large and diverse industry that encompasses everything from search ads (ads shown on search engines), to video ads (those that you might see before, say, watching a video on YouTube), to display ads (those you might see while reading an article on NYTimes.com or while scrolling through Instagram).

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




"Ad tech" is the colloquial term 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 such as Oracle, Comcast, Adobe, Facebook, and Amazon, but also from competitors that may be unfamiliar such as The Trade Desk and Magnite. 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.

The fact that there is so much competition in this market has benefitted both consumers (those buying and running ads) and the public generally. The robust competition has resulted in lower prices for advertisers. And it has enabled many websites to continue to offer their content for free—especially content providers with small audiences who may struggle to attract paid subscribers, as well as news and opinion websites such as Vox.com, MotherJones.com, and NationalReview.com.

## Google Search is No Monopoly

Although Google Search is highly 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.[53] But Microsoft's search engine, Bing, launched in 2009, already has 24.7% market share today.[54] Verizon Media, which bought Yahoo's and AOL's search engines in 2017 and 2019, respectively, has 11.5%.[55] And DuckDuckGo is one of the fastest growing search engines in the world.[56] Given this, Google Search cannot, by definition, be a monopoly as that term is understood in antitrust law.

The U.S. Supreme Court has consistently defined monopoly power as "the power to control prices or exclude competition."[57] The price that Google charges for its search service is *zero*—no high-price umbrella sustained by monopoly practices here—while at the same time, it faces considerable competition. Even setting aside formal definitions, Google Search has none of the trappings of a monopoly. One of the tell-tale signs indicating that a company is relying on its market control—and not its product quality—to gain or maintain market share is that it decides to cut its investment even in good times. Economists tell us that 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 power industry, a classic monopoly. When was the last time we heard of an innovation from PG&E?)

An independent evaluation by PwC found that Google spends more on research and development than every other company in America save one—Amazon, its main competitor.[58] Last year, Google spent $26 billion on research and development. Two years ago, it undertook over 650,000 experiments to improve its Search Engine.[59] Every year, as a result of this R&D, Google makes an average of 3,600 tweaks in 2019 alone.[60] If Google

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[53] 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.
[54] *Id.*
[55] *Id.*
[56] Barry Schwartz, DuckDuckGo broke 9 billion searches in 2018, and it's growing, SearchEngineLand (Jan. 4, 2019).
[57] *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).
[58] Barry Jaruzelski et al., *What the Top Innovators Get Right*, PwC (Oct. 30, 2018), https://www.strategyand.pwc.com/gx/en/insights/innovation1000.html.
[59] 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.
[60] Rigorous testing, https://www.google.com/search/howsearchworks/mission/users/

Search were a monopoly, Google could worry a lot less about maintaining its market leadership, and it could spend a lot less on improving its flagship product.

Google Search faces considerable competitive pressure on multiple fronts. When people want to know specific information about specific things, they frequently turn to competitors that specialize in that particular field. 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."[61]

DuckDuckGo, a rival search engine launched in 2008, promises every user that it will let them "take back your privacy!"[62] Contrasting its data-privacy protections with Google's protections,[63] DuckDuckGo has seen its market share grow every year since its founding. In 2010, DuckDuckGo hosted 16.4 million searches during the entire year. In April 2020, over the course of just that one month, it hosted 1.8 *billion* searches.[64] Its most explosive growth has occurred in the last two years. Since 2018, DuckDuckGo's daily search queries have more than doubled.[65] With nearly 97% of people reporting that they are somewhat or very concerned about protecting their personal data,[66] competition on this basis can be expected to be intense.

Facebook, with its over 2.4 billion users, has announced plans to invest in building out and expanding its own search platform. According to the company's CEO, Mark Zuckerberg, "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 that Facebook is uniquely positioned to answer. As Zuckerberg sees it, "you couldn't do [such searches] with anything else; we just have to do it."[67] Facebook's entry into the search market is yet another formidable competitive challenge for Google, and a further illustration of the truism that no market leader in the field of technology is ever secure.

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[61] Yelp Inc., 10-Q, May 2019.
[62] DuckDuckGo, *About*, https://duckduckgo.com/about.
[63] *See, e.g.*, Lily Hay Newman, *The Privacy Battle to Save Google*, Wired (Nov. 1, 2018), https://www.wired.com/story/google-privacy-data/.
[64] DuckDuckGo, *Traffic*, https://duckduckgo.com/traffic.
[65] *Id.*
[66] 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.
[67] 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.

## The Google Ad Stack Isn't a Monopoly

Google is not a monopoly in the ad tech market. To the contrary, it competes against hundreds, if not thousands, of other ad tech companies, including many profitable ones.[68] These competitors include Facebook, Amazon, and Twitter, as well as other household names such as Adobe, Amazon, Oracle, Verizon, Comcast, and AT&T, and less well-known companies such as The Trade Desk and Magnite.

According to the principles of antitrust law, a monopolist has the power either to exclude competitors from the market, or to raise prices above what the market would otherwise dictate.[69] Manifestly, Google has not excluded competitors from the market. As for prices, since Google's entrance into the ad tech market, **prices have dropped by 40%.**[70] 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.[71]

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% increase in just one year.[72] With so much money on the line, and with consistent revenue growth, the market has enticed new entrants including one of Google's major competitors, Amazon. Although Amazon Amazon's buy-side platform launched in 2014 it became the most popular platform just 3 years later. And while Amazon launched its sell-side platform only three years ago, it is already the number two sell-side ad tech provider.[73]

And 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 its stock value since it went public in 2015.[74] Meanwhile, Rubicon—which merged with Telaria in 2019—is now the largest independent supply-side platform in the world.[75]

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[68] 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/.
[69] U.S. Dep't of Justice, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act.
[70] *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.
[71] Google confidential internal presentation (2006) at 5.
[72] 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.
[73] 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/.
[74] 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.
[75] 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-

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%.[76]

A simple hypothetical helps explain why the critics' narrow focus on digital search ads as the relevant market 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%.[77] 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 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 what?

*Put simply, antitrust analysis is like zooming in on a digital image: the more you zoom, the more distorted the picture becomes.*

Even if the critics' distorted picture were correct—and it isn't—and even if Google were the dominant or only player in this artificially defined market—the fact remains that there is no consumer harm, but rather substantial benefits to consumers as a result of Google's participation in the digital ad market. As mentioned above, the overall market is growing, while Google's share is shrinking. Output of digital advertising has never been higher. Ad prices are down by 40%. Robust investment in innovation has continued uninterruptedly for over a decade. This includes new technology that allows ads to be placed on mobile apps and websites, as well as ads specific to social media.

in.aspx?source=awin&awc=12195_1591411102_bcc94fc1bdfb2aeeb4ee93cf3628ebb2&utm_source=aw&utm_medium=affiliate&utm_campaign=101248.

[76] 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.

[77] World Coffee Portal, "*Major Chains Driving U.S. Coffee Shop Growth – But Overall Market Slows*," Algebra (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.

Turning to publishers who sell ads, we see the same results: benefits, not harm, in the form of more effective advertisements that are better targeted to their audiences, delivered at lower prices than ever before.

Although display ads run on third-party websites, they often are not made by those websites. In that sense these ads are just like those in a printed copy of a newspaper. When websites run such ads, they are often called "publishers," just as a newspaper is called a publisher.

Publishers—both digital and print—use the ad revenue they receive for placing display ads to support their businesses. But digital display ads are different from printed ads in an important respect. They are far better at targeting their intended audiences.

In the past, advertisers had to rely on limited data in deciding where 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 overbroad 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 some critics point out, tools that use a lot of data are often more valuable than tools that do not.[78] But what this really proves is that Google's tools are popular among publishers and other consumers precisely because their inputs and outputs are strong.

Even under the critics' framework, Google's services help publishers. In fact, publishers **earn 69% of the revenue** that Google itself earns from AdSense whenever those ads are placed on the publishers' websites.[79] Publishers also profit from Google's ad services that allow them to monetize their own websites and apps. The revenue this generates for publishers in turn supports their provision of free and diverse online content that everyone can then enjoy. All these benefits flow from the billions of dollars' worth of investment that Google makes year in and year out, resulting in products and services that are made available to publishers at little to no cost.

Advertisers benefit too. For a fraction of what they paid a decade ago, advertisers can now reach millions more potential customers, and receive highly accurate, real-time information about which ads work and which do not, saving them even more ad dollars.

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[78] *Id.* at 4.
[79] Google, *How our display buying platforms share revenue with publishers*, https://blog.google/products/admanager/display-buying-share-revenue-publishers/ (last accessed Sept. 13, 2020).

## 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 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.[80]

If Google were a monopolist, or if it were trying to stifle competition, providing all of this access to publishers would be counterproductive. In fact, however, Google's business model requires that it support a healthy publisher ecosystem, from which publishers and Google itself all benefit.

## Looking for Help and Expertise: Google's Ad Acquisitions

Google's founders—the computer science whiz kids at Stanford—were experts in programming, not digital advertising. When it became clear that advertising revenue would be the company's main source of income, Google's entry into this new market included targeted acquisitions that allowed it to import outside help in order to develop and improve its ad services. In all, beginning in 2007, Google acquired nine digital advertising companies.[81] Bringing digital advertising in house had three benefits. First, Google maximized efficiencies. Second, it ensured quality control. And third, it ensured that all the facets of its business worked together.

Some former Justice Department officials have sought to portray these common-sense investments as something nefarious. They claim that "these acquisitions reveal a sustained effort to occupy the entire tech stack as well as the related analytics market through mergers."[82] That is obviously not true. Far from "occupying" the "entire tech stack," Google competes against Amazon, Facebook, Oracle, Comcast, AT&T, Verizon, Telaria, Magnite, The Trade Desk, Index Exchange, MediaMath, OpenX—and more.

Even if one looks only at the narrow market of publishers, the competition is robust. Although some critics claim that Google "coerces" publishers to use Google's advertising products,[83] publishers say otherwise. In a study published last year, publishers reported

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[80] 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.
[81] *Id.* at 18.
[82] Fiona M. Scott Morton & David C. Dinielli, *Roadmap for a Digital Advertising Monopolization Case Against Google*, Omidyar Network 18 (May 2020), https://www.omidyar.com/sites/default/files/Roadmap%20for%20a%20Case%20Against%20Google.pdf.
[83] *Id.* at 17, 19, 26, 37.

that they routinely use, on average, no fewer than six supply-side ad platforms, and about four demand-side ad platforms.[84]

It is also worth noting that far from being a market abuse, mergers and acquisitions, which occur routinely not only in the technology field but across the board in U.S. business, are a necessary and healthy part of the entrepreneurial ecosystem. Starting any business is risky; starting a tech company is usually even riskier. Without the prospect of a future acquisition as an "off-ramp" for investors, many entrepreneurs would never be able to raise the capital to start a business in the first place.

It is, of course, always up to the individual company whether it wishes to accept an offer to be acquired. Sometimes a tech company will choose to cut its risks and accept the guaranteed return on investment it receives in a merger or acquisition. Sometimes, though, companies turn down these offers. Consider Instagram and Snapchat: the former accepted Facebook's offer; the latter rejected it. Both continue to exist and thrive. It should go without saying that Google did not coerce the companies it acquired. These nine companies each decided—on their own—to sell.

## Data Privacy: Google's Response to Consumer Demand

A particularly unwarranted criticism from Google's detractors is that the company has created 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.[85]

There is perhaps no better illustration of why these critics want to abandon the consumer welfare standard in antitrust. Winning market share by building a better mousetrap is how competition is supposed to work. The fact that Google's superior service—the critics' own characterization—is favored by the advertisers who are the consumers of that service can hardly come as a surprise. In order for this criticism to succeed, the critics have to relieve themselves of the responsibility to point to anticompetitive behavior and consumer harm. In reality, there are only consumer benefits.

Moreover, observing that Google's ad tech services are "superior" is far different than claiming that Google faces no competition in this market. That claim is not made, nor could it be. Not only does Google face competition from numerous other ad tech companies, and not only does the typical publisher use a half-dozen different supply-side ad platforms on average, but the very same data that Google uses in its ad tech services is available to other companies. Data is neither finite nor limited to one company. Google does not own

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[84] *Id.*
[85] *See* Fiona M. Scott Morton & David C. Dinielli, *Roadmap for a Digital Advertising Monopolization Case Against Google*, Omidyar Network 20-21 (May 2020), https://www.omidyar.com/sites/default/files/Roadmap%20for%20a%20Case%20Against%20Google.pdf.

consumer data, nor does it in any way prevent consumers from providing the same data to its competitors, including Comcast, AT&T, Facebook and Amazon.

So although Google's data inputs make its ad tech superior to many other competitor services, they do not and cannot render it immune from competition. Indeed, Microsoft has comparable data about consumers' product searches, and likely leverages that data to improve its own advertising tools. As Facebook's CEO has stated publicly, it too possesses substantial amounts of such data that the company is eager to use.

At the same time, there is growing competition spurred by consumer privacy concerns that will restrict the amounts and kinds of data that Google and any competitor will employ in ad tech in the very near future. Apple's Safari web browser and Mozilla's Firefox web browser have already restricted third-party cookies. Like Apple and Mozilla, Google, too, is responding to public demand and has announced its intention to phase out the use of third-party cookies in its Chrome web browser. To that end, it is investing in new technologies that are less invasive than tracking cookies, making it possible for advertisers to target various demographics without identifying specific people. Since consumers drive Google's popularity—across all its platforms and products—that decision is not only necessary but strategic, impelled by the demands of a highly competitive marketplace.

In all of these ways, competition in digital advertising is strong and growing ever more intense. But Google's critics maintain the opposite. An oft-repeated claim is that Google controls about 93% of the market.[86] This would indeed define Google as a monopoly, but the claim is not true. In reality, Google's share of the ad tech market is a far more modest 29%.[87]

## 'Self-Preferencing': A Clever Slogan in Search of Consumer Harm

"Self-preferencing" is the latest buzzword of the critics, meant to pejoratively re-brand the perfectly benign practice of businesses in every industry commonly known as vertical integration.[88] Vertical integration enables a business to take responsibility for producing more of the products its sells to its customers, while giving it greater quality control and often yielding efficiencies reflected in lower consumer prices. It is widely accepted as good for consumers. Re-branding it as "self-preferencing," however, suggests something unseemly is at work. As former Federal Trade Commissioner Joshua Wright has observed,

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[86] *See, e.g.*, Fiona M. Scott Morton & David C. Dinielli, *Roadmap for a Digital Advertising Monopolization Case Against Google*, Omidyar Network 4 (May 2020), https://www.omidyar.com/sites/default/files/Roadmap%20for%20a%20Case%20Against%20Google.pdf.

[87] Mike Vorhaus, *The New Advertising Zeitgeist—Google's U.S. Ad Revenue to Decline*, Forbes (July 6, 2020), https://www.forbes.com/sites/mikevorhaus/2020/07/06/the-new-advertising-zeitgeistgoogles-us-ad-revenue-to-decline/#3d8a756c236e.

[88] Maurits Dolmans & Tobias Pesch, *Should We Disrupt Antitrust Law?*, Cleary Gottlieb Steen & Hamilton LLP 10 (July 15, 2019), https://www.clearygottlieb.com/-/media/files/should-we-disrupt-antitrust-law-pdf.pdf.

the term reflects a "general hostility to firm size regardless of its actual impact on competition or consumer welfare."[89]

Today's calls to ban or restrict "self-preferencing" are targeted almost exclusively at digital platforms such as Google and digital marketplaces such as Amazon.[90] Indeed, brick-and-mortar marketplaces have been vertically integrating for decades, with no complaint from those now aiming their barbs at "Big Tech." The "problem" of "self-preferencing" arose only once certain politicians and competitors began turning against the technology industry. Yet from the consumer's perspective, it is relatively much easier to switch digital providers in order to find more product choices, than it is to switch to a different brick-and-mortar retailer in order to find choices beyond that retailer's own branded products.

How common is vertical integration throughout the U.S. economy? The commercial world around us is replete with examples. Thinking of these well-known consumer product companies and retailers as guilty of "self-preferencing" illustrates the absurdity of the concept.  Is Gillete harming consumers by "preferring" to include its own replacement blades with its razors? Is Coca-Cola harming consumers by "preferring" its own beverages in its vending machines?

Consider the following further examples:

**CVS Health brand**
**Gold Emblem brand**
**Beauty 360 brand**

**Kirkland Brand products**

**Sam's Club products**
**Great Value products**
**Equate brand**

**Townhouse brand**
**Edwards Coffee brand**
**Bel Air Frozen Food brand**
**Busy Baker Cookies & Crackers**

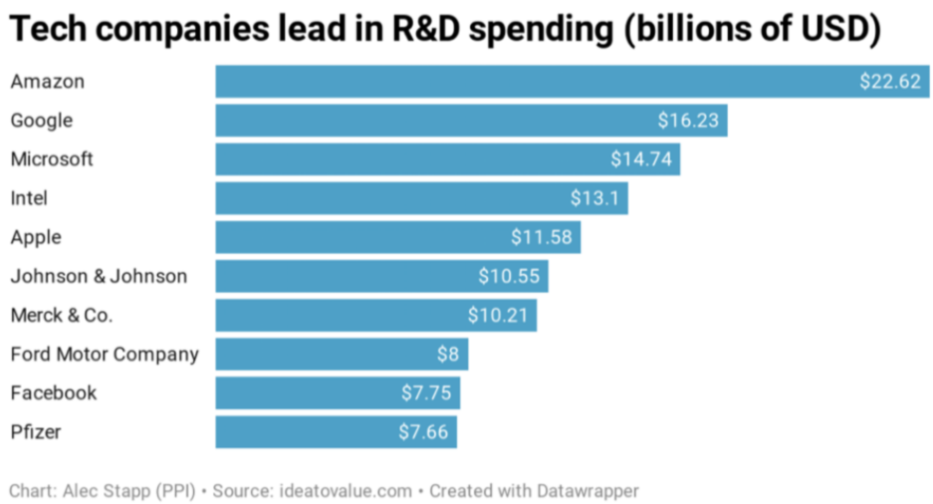
Vertical integration operates no differently in an online marketplace than in a brick-and-mortar marketplace. But critics of American tech want to define it as a supposed antitrust violation, and they want to enforce their new rule against "self-preferencing" only against tech. Indeed, the creation of a new term to describe vertical integration allows the critics to

[89] Wright, Joshua D. Wright, Elyse Dorsey, Jonathan Klick, & Jan M. Rybnicek, *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 Ariz. St. L.J. 293, 341 (2019.
[90] *See, e.g.*, Lina M. Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710, 792-97 (2017).

discriminate against the tech industry more discreetly: brick-and-mortar marketplaces can continue to engage in "vertical integration"; online marketplaces must be prosecuted for engaging in "self-preferencing."

## New and Innovative Business Practices

Technology companies based in the United States lead the world, setting the standard for increased productivity, consumer satisfaction, and innovation. There is no comparable flagship industry that is winning the global competition to this degree. A large part of the reason for this is that the U.S. tech industry spends more on research and development than any other U.S. industry.



The U.S. tech industry also leads in capital investment:

**TABLE 5: NON-ENERGY U.S. INVESTMENT HEROES: TOP 25 NONFINANCIAL COMPANIES BY ESTIMATED U.S. CAPITAL EXPENDITURE***

| | COMPANY | ESTIMATED 2018 U.S. CAPITAL EXPENDITURES (MILLIONS USD) |
|---|---|---|
| 1 | ALPHABET | 20,188 |
| 2 | AT&T | 19,209 |
| 3 | AMAZON.COM | 15,577 |
| 4 | VERIZON COMMUNICATIONS | 14,912 |
| 5 | MICROSOFT | 11469 |
| 6 | COMCAST | 10,890 |
| 7 | FACEBOOK | 10,763 |
| 8 | CHARTER COMMUNICATIONS | 9,125 |
| 9 | WALMART | 7,683 |
| 10 | INTEL | 7,426 |
| 11 | APPLE | 7,129 |
| 12 | FORD MOTOR | 6,513 |
| 13 | GENERAL MOTORS | 5,756 |
| 14 | FEDEX | 5,255 |
| 15 | DELTA AIR LINES | 5,168 |

What's more, the technology industry innovations that flow from these investments are not restricted to semiconductors and electromagnetic waves. The digital economy has produced remarkable benefits for consumers worldwide, and innovation in business models is a big reason. It continues to provide a competitive edge for U.S. industry.

Because tech's business strategies, models, and practices benefit both consumers and the entire economy, much is at stake in ensuring that innovation can continue. As new business methods are perfected, other industries, too, will likely adopt them in order to enhance their own competitiveness in markets that are becoming ever-more integrated with the digital economy each day. To use but one example, the financial services industry, typified by banks with large marble columns and physical retail branches everywhere, is not only moving online but becoming an entirely digital market for some consumers.

Caution and circumspection are required in evaluating new and innovative business practices in the tech arena, in large measure because the pace of change is so rapid. When a new technology proves successful with consumers, the migration to that product or service can be instantaneous. This produces lopsided "market share" for the successful technology, particularly if the "market" is defined as the one dominated by that very tech innovation. The ill-wisdom of viewing the marketplace in this way should be obvious.

Failing to recognize the difference between a "better mousetrap" and anticompetitive business practices would likely inflict significant harm on consumers and the economy. Product innovation would suffer; lacking the opportunity for constant improvement in business models, efficiencies would be lost and prices to consumers would rise; and the consequent losses in productivity and employment would ripple across the entire U.S. economy. It is therefore of vital importance that antitrust enforcement distinguishes between business conduct that is actually procompetitive and yields consumer benefits, on the one hand, and conduct that is actually anticompetitive and exclusionary, on the other hand.

The two are often brewed in the same barrel. Conduct that benefits consumers also tends to increase market share, which can be viewed as circumstantial evidence of excluding competitors. So even with an eye toward consumer welfare, spotting the difference can be difficult. This is especially true in multi-sided markets—such as those in which Amazon, Apple, Facebook, and Google compete—where a platform's conduct that benefits consumers inevitably takes business away from a competitor.