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Dear Ms. Sabo and Mr. Green:

Enclosed for filing on behalf of The Media Institute, a nonprofit research foundation specializing in communications policy issues, is a white paper entitled "Google and the Media: How Google is Leveraging its Position in Search to Dominate the Media Economy."

Please direct any questions or comments relating to this matter to the undersigned.

Respectfully submitted,



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WHITE PAPER OF THE MEDIA INSTITUTE
TO THE FEDERAL TRADE COMMISSION

**GOOGLE AND THE MEDIA:
HOW GOOGLE IS LEVERAGING ITS POSITION IN SEARCH
TO DOMINATE THE MEDIA ECONOMY**

Our nation's economy and people depend increasingly on the Internet. As the Internet and the networked mobile platforms it enables grow in complexity and pervasiveness, search has become an indispensable tool to find content — including the content provided by media companies. Accordingly, the dominance of Google in search is a matter of significant concern to those who occupy the adjacent market of digital news and information content.

The Media Institute, a nonprofit research foundation specializing in communications policy issues founded in 1979 (www.mediainstitute.org), is uniquely positioned to provide the Commission with a sense of the impact of Google's dominance on the media economy. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. Unlike associations that exist to advocate the views of a particular portion of the media industry, the Media Institute's program agenda encompasses virtually all sectors of the media, ranging from traditional print and broadcast outlets to newer entrants such as cable, satellites, and online services. It has evolved into one of the country's leading think tanks focusing on the First Amendment and communications policy. It appreciates this opportunity to describe the pervasive and growing impact of Google on the media economy.

INTRODUCTION AND EXECUTIVE SUMMARY

The media industry, as the Commission has recognized, is working to adapt to the challenges of the new digital environment.¹ Some of these efforts are encouraging. The *New York Times*, which recently decided to charge readers to access more than 20 articles a month online, announced an increase in subscriptions, to 224,000.² *The Financial Times*, too, announced success with digital subscriptions, which increased by 34% in the first half of 2011.³ Gannett also reported that *USA Today* increased its digital revenue by 23 percent.⁴ At Dow Jones, revenue from online advertising and digital circulation increased by 19 percent and 22 percent, respectively.⁵ Television broadcasters and cable operators report similarly positive results. CBS, for instance, reported strong second quarter, including an increase in advertising revenue of 2.6%.⁶ Disney, too, reported

¹ See Public Workshops and Roundtables: From Town Crier to Bloggers: How Will Journalism Survive the Internet Age?, Notice Announcing Public Workshops and Opportunity for Comment (September 30, 2009).

² Nat Ives, "New York Times Paywall Subscriptions Increase to 224,000," *Ad Age* (July 21, 2011), available at: <http://adage.com/article/mediaworks/york-times-paywall-subscriptions-increase-224-000/228833/>.

³ Erik Sass, "Financial Times' Enjoys Digital Subscriptions Boom," *Media Daily News* (Aug. 2, 2011), available at: http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=155196.

⁴ Neha Chamaria, "Publishers Continue to Get Crushed," *Dailyfinance.com* (July 29, 2011), available at: <http://www.dailyfinance.com/2011/07/29/publishers-continue-to-get-crushed/>.

⁵ Rick Edmonds, "Under Murdoch's ownership, business improves at Dow Jones and The Wall Street Journal," Poynter.org (July 21, 2011), available at: <http://www.poynter.org/latest-news/business-news/the-biz-blog/139505/under-murdoch-ownership-business-improves-at-dow-jones-and-the-wall-street-journal/>.

⁶ "CBS Corp. Shines, Beats Estimates," Zacks Equity Research (Aug. 3, 2011), available at: <http://www.zacks.com/stock/news/58295/CBS+Corp.+Shines,+Beats+Estimates+>.

increases in advertising revenues.⁷ And there is room for optimism that television ad revenue may weather the current economic downturn.⁸

But the incremental progress being made by the media industry pales in comparison with the scale of Google, its major competitor in the market for digital advertising. Even though it does not create a word of its own content, “Google makes more from advertising than all of the nation’s newspapers combined.”⁹ According to one study, in 2011, Google will capture more than 40% of all online ad spending, projecting an increase to nearly 45% in 2012.¹⁰ And Google dominates the online advertising market in this way by skimming away the earnings of media companies as it scrapes up their content, denying them of the scale that would be required for effective competition with the gatekeeper to the Internet.

Google’s rise to dominate search has been breathtaking. As the Justice Department described it after investigating (and challenging) Google’s proposed partnership with rival Yahoo!, “Google is by far the largest provider of [Internet

⁷ Jon Lafayette, “Disney Earnings Up 11% in 3rd Quarter,” *Broadcasting & Cable* (Aug. 9, 2011), available at: http://www.broadcastingcable.com/article/472242-Disney_Earnings_Up_11_in_3rd_Quarter.php.

⁸ Brian Stelter and Tanzina Vega, “Ad Money Reliably Goes to Television,” *The New York Times* (Aug. 7, 2011), available at: <http://www.nytimes.com/2011/08/08/business/media/tv-advertising-still-a-reliable-engine-in-media.html?pagewanted=all>.

⁹ James Gleik, “How Google Dominates Us,” *The New York Review of Books* (August 18, 2011), available at: <http://www.nybooks.com/articles/archives/2011/aug/18/how-google-dominates-us/?pagination=false>.

¹⁰ “Consolidation of Online Ad Market Continues as Google Grabs More Share,” *eMarketer.com*, (June 21, 2011), available at: <http://www.emarketer.com/Article.aspx?R=1008452>.

search advertising and Internet search syndication], with shares of more than 70 percent in both markets.”¹¹

Google’s also owns some of the most successful properties in the media space: Google News, Google Books, YouTube, and Google Places, all of which are built — and monetize — the creations of others. In Google’s view, its main search site and these other sites promote the creative content and innovation of others, directing traffic to the webpages of major media companies and publications, and allowing users to discover and browse new content:

“The innovations brought about by the Internet economy have also delivered enormous benefits to content creators. Google empowers traditional artists and an emerging generation of new creators to promote their work to a global audience. Google drives traffic to creators’ websites, sending, for example, four billion clicks a month to news sites. Every minute, users upload 35 hours of video content to our YouTube site. YouTube has allowed performers to rocket from oblivion to fame; has given politicians, pundits, and protesters a powerful new way to communicate; has facilitated citizen journalism; and has inspired laughter at the antics of dancing babies.”¹²

Google’s sites do have this effect. As Google’s head for printing partnerships described Google’s effort to digitize the worlds books, “We believe that we are helping the industry tremendously by creating a way for authors and publishers to

¹¹ Press Release, United States Department of Justice, Yahoo! and Google Inc. Abandon Their Advertising Agreement, Nov. 5, 2008.

¹² Testimony of Kent Walker, Senior Vice President and General Counsel, Google Inc., Before the House Judiciary Subcommittee on Intellectual Property, Competition, and the Internet, Hearing on “Promoting Investment and Protecting Commerce Online: Legitimate Sites v. Parasites, Part II”, April 6, 2011.

be found . . . Search is critical. If you are not found, the rest cannot follow.”¹³

Because Google dominates search, what this really means for major publications and media outlets is that “Google is critical.” This position provides Google with tremendous advantage. Through dominance in search, it can construct new businesses — News, Books, YouTube — shaped by the content of competitors. And the sites that originate this content have little choice but to contribute. A high ranking from Google means visitors, and a low ranking can mean invisibility. Turn off the search spigot and traffic runs dry.

This is a dilemma Google’s competitors should not have to face. As Justice Kennedy said during a recent oral argument, “from an economic standpoint and a legal standpoint, [it] sounds wrong to me . . . that unlawfully expropriated property can be used by the owner of the instrumentality as part of the startup capital for his product.”¹⁴ This is precisely what Google has done.¹⁵ Yet unlike many of its

¹³ Eric J. O’Brien and Eric Pfanner, “Europe Divided on Google Book Deal,” *The New York Times* (Aug. 23, 2009).

¹⁴ Transcript of Oral Argument at 36, Justice Kennedy, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

¹⁵ Not surprisingly, Google argues that copyright laws do not apply to its aggregation: “While online piracy remains a serious enforcement problem, we should not lose sight of the overall balance of our nation’s copyright laws, which continues to spur a broad array of American-bred creativity and innovation. Google believes strongly in protecting copyright and other intellectual property rights. We understand that despite the overwhelmingly positive and legitimate uses of Internet services and technologies there will be some who misuse these for infringing purposes. Google invests millions of dollars in engineering and other resources to help rightsholders fight this misuse. Across our search engine and hosted products, we remove or disable access to millions of infringing materials each year at the request of copyright owners. We also voluntarily take several steps well beyond our legal obligation.” Testimony of Kent Walker, Senior Vice President and General Counsel, Google Inc., Before the House Judiciary Subcommittee on Intellectual Property, Competition, and the Internet, (continued...)

competitors — which Washington agencies like the FCC monitor and which comply with important rules regulating their behavior — Google faces no similar regulation in building valuable media-related properties out of its competitors' content.

Google has used two principal strategies for appropriating the creative content of others to launch new products, which, in turn, reinforce its dominance in search overall. Through Google's first strategy — exemplified by Google News — it takes content from potential competitors to launch new businesses, while depriving those competitors the revenue their original content generates. Google's other approach — which it used to promote Google Books — is to test legal limits of copyright and, when challenged, resolve any disputes by further cementing its monopoly.

I. GOOGLE NEWS: AMASSING SCALE THROUGH MISDIRECTION

It looks like the front page of a daily newspaper: “Debt Bill Passes Senate”; “U.S. weighs Syria sanctions”; “Stocks fall again on economic worries.” But the fine print proves otherwise. Google News is not the front page of a daily newspaper; it's a front page composed of articles from countless newspapers, organized conveniently by topic. On any given day, a Google News user might see on its main page headlines from *The Miami Herald*, *The Seattle Times*, *The Wall Street Journal*,

Hearing on “Promoting Investment and Protecting Commerce Online: Legitimate Sites v. Parasites, Part II”, April 6, 2011.

USA Today, The New York Times, The Houston Chronicle, The Los Angeles Times, Fortune, and even has far off as *The Jerusalem Post* and *The Times of India*.

Type in something specific — say, a search for “NFL Free Agency” — and the results, links to and snippets of content from *USA Today, ESPN, and Forbes*, tell a user without clicking through to any of those web properties that the “Raiders Los[t] [Tight End] Zach Miller to [the Seattle] Seahawks,” that “The Chicago Bears and 5 NFL Teams are Losing in Free Agency,” that “Running Back Ronnie Brown [is the] latest free agent to join [the Philadelphia] Eagles’ nest,” and that “Casey Rabach Signs Two-Year Deal with the [Baltimore] Ravens.”

But that’s not all the user will see. The user also sees one or more paid ads and a well-placed offer from Google to “See your ad here.” Like any print publication, Google rents space on its webpage to these paid advertisers, and charges them for each user who clicks through to that advertiser’s page. Major publications do this, too, on their home pages — ads for consumer goods and other products announce themselves like billboards on *The New York Times* home page (ads which are sold and placed by, among others, Google).

Yet when *The New York Times* sells an ad on its homepage, it books the revenue; the investment it makes in content yields a direct return, and that revenue, in turn, can be used to fund further investment in gathering and creating additional content. *The New York Times* receives nothing from the paid ad that Google has displayed over its and other publications’ content; the best *The New*

York Times might do is generate a hit to its website, hits that are notoriously difficult to convert to revenue.

In short, Google News' homepage aggregates content from approximately 20,000 publishers across the Internet, putting their content onto a single page. Google's precise algorithm is unknown, it most likely accounts for a user's location, browser history, and the recency of any particular news source. Google News succeeds by sleight of hand that, in turn, misdirects readers from original source material to Google's aggregated homepage.

Google is explicit that it aims to design a competing product to newspaper and magazine websites not by generating its own content, but instead by building a "computer-generated news site that aggregates headlines from news sources worldwide."¹⁶ In effect, Google News is a competitor whose only product is the top stories from the front pages of its direct competition.

To achieve competitive advantage, Google's main search page biases Google News results over results of news organizations and other publishers. For a search that Google identifies as news related, Google posts a link, ahead of most other options, to redirect the user to a news page aggregating content from various news sources. Google engages in similar conduct in other vertical search areas.¹⁷ A

¹⁶ http://news.google.com/intl/en/about_google_news.html.

¹⁷ Marissa Mayer, Speech on Scaling Google for Every User at the Google Seattle Conference on Scalability, available at <http://www.youtube.com/watch?v=LT1UFZSbcxE>, at 44:35 (emphasis added) ("We roll out Google Finance, we did put the Google link first. It seems only fair right, we do all the (continued...)")

search for “debt ceiling,” for example, aggregates hits from *The Wall Street Journal*, *The Washington Post*, and CBS, all beside a conspicuously displayed link for “More news on debt ceiling,” which sends a user through to Google News. Links to *The New York Times*, NPR, and other news organizations are relegated to levels below Google’s prominent link to its own property.

Google has argued that it simply optimizes search, and that a news site that wishes to be displayed more prominently ought to tweak its content or update more frequently so that Google’s search views it as highly relevant. But there is no way for a publication to do so with any confidence; in fact, Google’s founders have explicitly stated how difficult it would be to detect bias in search results:

“Currently, the predominant business model for commercial search engines is advertising. The goals of the advertising business model do not always correspond to providing quality search to users.... [W]e expect that advertising funded search engines will be inherently biased towards the advertisers and away from the needs of the consumers.... Since it is very difficult even for experts to evaluate search engines, search engine bias is particularly insidious.... This type of bias is very difficult to detect but could still have a significant effect on the market. Furthermore, advertising income often provides an incentive to provide poor quality search results.”¹⁸

work for the search page and all these other things, so we do put it first. . . . But that has actually been our policy since then because of Finance. So for Google Maps again, it’s the first link.”).

¹⁸ Sergey Brin and Larry Page, *The Anatomy of a Large-Scale Hypertext Web Search*, Stanford University 1998, available at: <http://infolab.stanford.edu/~backrub/google.html>.

While Brin and Page speculated bias might exist before launching Google, the company today confesses to adding a human dimension to its news search, something it disavows in almost all other areas:

“We actually do that [human intervention] in the case of Google News. Google News uses a relatively fixed set of sources which are selected based on exactly the kind of trust that you're describing. So the answer to your question is yes on Google News. For general search, we've been careful not to bias it using our own judgment of trust because we're never sure if we get it right. So we use complicated ranking signals, as they're called, to determine rank and relevance. And we change them periodically, which drives everybody crazy, as our algorithms get better.”¹⁹

Jonathan Rosenberg, Google's Senior Vice President for Product Management, was blunter: “We won't (and shouldn't) try to stop the faceless scribes of drivel, but we can move them to the back row of the arena.”²⁰

Journalists have noticed this manipulation. Matthew Lee, editor-in-chief of Inner City Press, for example, was de-listed from Google News entirely after writing controversial pieces criticizing the United Nations.²¹ After having been displayed prominently in News search results for the United Nations, Lee received a brief note from Google: “We periodically review news sources, particularly following user

¹⁹ Transcript of Google CEO Eric Schmidt's Q&A at the Newspaper Association of America Convention, April 7, 2009, *available at*: <http://www.poynter.org/column.asp?id=101&aid=161441>.

²⁰ Jonathan Rosenberg, “From the height of this place,” *The Official Google Blog* (Feb. 16, 2009): <http://googleblog.blogspot.com/2009/02/from-height-of-this-place.html>.

²¹ Michael Y. Park, “Journalist Who Exposes U.N. Corruption Disappears From Google,” *Fox News.com* (Feb. 18, 2008), *available at*: <http://www.foxnews.com/story/0,2933,331106,00.html>.

complaints, to ensure Google News offers a high quality experience for our users. When we received your site we've found that we can no longer include it in Google News."²² So, at the very least, Google responds to user feedback and manipulates its News results accordingly. Google has also suggested, however, that it has built a preference for *The New York Times* into its algorithm.²³ In other words, Google has the tools to alter its search rankings, whether it uses a hatchet to cut off a publication manually or a paring knife to shape its algorithm to its benefit. For this reason, rivals have no ability to compete and rise above Google News in a search result — Google News will almost always win.²⁴

While Eric Schmidt makes light of its human manipulation of News results and attempts to justify some level of human interaction, there is simply no way for a media outlet to know whether a poor ranking or misdirected traffic flow is the product of its own failings or Google's mischief. Just this year, Google reindexed a set of Belgian newspapers owned by Copiepresse after having removed the publications from its search altogether. Copiepresse had won a court order requiring Google to remove its publications from the News site. To its surprise, Google's main search index did not list them, either. Google claimed that the

²² *Id.*

²³ Ken Auletta, *Googled: The End of the World as We Know It*, The Penguin Press (2009).

²⁴ Fred Vogelstein, "Why Is Obama's Top Antitrust Cop Gunning for Google?," *Wired.com*, (Jul. 20, 2009) available at: http://www.wired.com/techbiz/it/magazine/17-08/mf_googopoly ("[T]here is no way for competitors or partners to know whether Google tweaks results to direct traffic to its own properties over theirs . . . Type in 'Britney Spears' and Google News comes up before People magazine or TMZ.com.").

publications had been removed from the main search site pursuant to the order.

Copiepresse, however, insisted that Google simply retaliated against it for bringing legal action in the first place.²⁵ That’s just the problem — Google exercises tremendous control over media platforms. There is no way for these sites to compete against the very company that is responsible for giving them worldwide visibility.

This exercise of dominance falls within the standard framework of illegal monopolization under Section 2 of the Sherman Act, which requires: “the possession of monopoly power in the relevant market” (which Google unquestionably has in search) and “the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”²⁶ Absent a procompetitive justification, a company that, like Google, has a monopoly in a relevant market, violates Section 2 when it uses that monopoly power to “foreclose competition, to gain a competitive advantage, or to destroy a competitor.”²⁷ Here, Google lacks a procompetitive motive. While it claims that News search simply provides users with the most relevant results, Google’s goal is far wider: By providing content of countless publications on a single page, Google keeps its users in the Google ecosystem, where

²⁵ Chloe Albanesius, PCMag.com, *Google to Reindex Belgian Newspapers Amidst ‘Boycott’ Complaints* (July 18, 2011), available at: <http://www.pcmag.com/article2/0,2817,2388635,00.asp>.

²⁶ *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

²⁷ *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 482-83 (1992) (internal citations and quotation marks omitted).

Google — not the content creators — is best positioned to monetize their clicks.

Google wants relevant results, but its greater incentive is to fence in and monetize search traffic with the help of content that it uses without permission.

Google's efforts have worked — it has used its dominance as a search platform to siphon off approximately 50% of news traffic, feeding yet another Google property with massive scale as nearly half of Google News users skip their preferred news sites altogether for this aggregated content.²⁸ Google's strategy is to build scale on its main search by directing News users away from publisher websites and to Google — where Google then sells paid advertising. As Google's Marissa Mayer explained: Google News generates \$100 million in revenues per year for Google (even before considering the value of search ads placed against news content on the search engine itself). Fortune writer Jon Fortt explained Mayer's thinking:

"The online giant figures that Google News funnels readers over to the main Google search engine, where they do searches that do produce ads. And that's a nice business. Think of Google News as a \$100 million search referral machine."²⁹

²⁸ Outsell, Inc., Press Release, *Outsell Report Shows Nearly Half of News Users Bypass Newspaper Sites in Favor of Google* (Jan. 19, 2010), available at: http://www.outsellinc.com/press/press_releases/news_users_2009.

²⁹ "Ad-free Google News generates \$100 million a year — and soon, some lawsuits," *Gawker Media*, (July 23, 2008), available at: <http://valleywag.gawker.com/5028304/ad+free-google-news-generates-100-million-a-year-+-and-soon-some-lawsuits>.

Google defends its actions with a well-worn claim: Newspapers, periodicals, journalists' blogs, and similar media sites benefit from News' referrals. Even if Google cannibalizes some News traffic for itself, it directs untold numbers of visitors to media sites across the web. Yet these click-throughs are notoriously difficult to monetize. When Rupert Murdoch warned that he was going to de-index his publications from Google News, one tech writer pointedly explained the problem with this traffic:

“The ugly truth is that Google traffic is hard to monetize. . . . Google traffic is low quality, it is people who stumbled upon the article. Usually, about one-half is new to the site, it had never been there before. The other half knows who you are. For well established brands this offers incremental value.

“More importantly, Google traffic doesn't help the newspaper advertisers much because they are trying to buy a specific sector, a specific readership. For example, the Wall Street Journal advertisers are very business and stock trade oriented. For other newspapers, the advertisers want that particular local metro. Having random readers brought in by Google from all around the world doesn't do much for the advertisers or the newspapers.”³⁰

As *The New York Times* reported, a consortium of publishers in Germany described Google's business model as especially parasitic: “Google says it brings us traffic, but

³⁰ Tom Foremeski, “Rupert Murdoch and the dirty little secret about Google traffic . . .,” *Zdnet.com* (Nov. 11, 2009), available at: <http://www.zdnet.com/blog/foremski/rupert-murdoch-and-the-dirty-little-secret-about-google-traffic/939>.

the problem is that Google earns billions, and we earn nothing.”³¹

Media companies’ dependence on Google is not at odds with the difficulty they have monetizing the traffic Google in fact sends. Display advertising — the online billboards a user sees when visiting a webpage — are sold in advance as a price per “impression” in advance, based on the amount of traffic a site expects to over the time period for which an advertiser is making a purchase. Google News’ fickle rankings, however, mean that a site cannot necessarily predict when it will see a spike in traffic for a major local or national event that generates hits. Nor will a publisher know when Google opts to list its site first among competitors on a particular day. These websites need Google’s traffic to sell ad space, but cannot simply convert each unique visitor into new revenue.

So what options are newspapers and other media sites left with?

The easiest way to prevent content from being aggregated onto Google News would be to block Google’s crawlers entirely. Doing so, however, would cut off a publishers flow of traffic entirely — a pure blocking strategy would not distinguish Google News from Google search. Although Google maintains that it is possible to “opt out” from Google News without blocking Google search, this is not altogether clear. Italian authorities, for example, reached an agreement with Google and its EU affiliates that require Google to permit publishers to de-list from Google News

³¹ Eric Pfanner, “An Antitrust Complaint for Google in Germany,” *The New York Times*, Jan. 18, 2010.

without compromising their visibility on Google's search homepage, an agreement that would seem unnecessary if opting out of Google News truly was independent of Google search.³² Even if opt-out is feasible, Google's all-or-nothing approach means that publishers that do not opt-out are left with little ability to challenge Google's use of their content on News because, in the face of a legal challenge, Google is apt to play hardball. As one commentator explained following Google's agreement to restore Copiepresse's titles to Google search and News, "the whole situation seems a bit ominous, in that Google was willing to use the cutthroat tactic of removing the [Copiepresse] publications before they came to an agreement."³³ A publisher questioning Google's use of its content, then, may risk depriving itself of Google generated traffic altogether.

Alternatively, rather than suffer self-inflicted wounds from shutting off Google's crawlers, publishers could collaborate with Google more effectively, to understand better how to capitalize on the traffic Google and Google News direct towards their sites. Here again, Google is notoriously secretive about how it generates revenue through news sites. Google places billboard ads on newspaper websites via AdSense, its display advertising unit (another way Google profits from content it has no part in generating). Yet Google declines to share relevant

³² See Form for Submission of Commitments Under Article 14 (Third) of Law No. 287/1990, No. A 420. See also note 5, *supra*.

³³ Liz Gannes, *After Copiepress "Boycott," Google Restores Search of News Sites*, All Things D (July 18, 2011), available at <http://allthingsd.com/20110718/after-copiepresse-boycott-google-restores-search-of-news-sites/>.

information with those publishers about revenue share, leaving publishers without information necessary to determine how to optimize their content for the site.

Simply put, publishers are not only left with no viable options; they are stuck with a classic Catch-22. Google takes content from them, but few can afford to turn away from Google search. Through its massive scale, Google forces news organizations to “opt-in” to Google News; this aggregation, in turn, allows Google to optimize its algorithm and magnify its scale even further. The reward Google reaps is entrenched dominance in search at the expense of the newspapers and publishers that feed original content to Google.

The lesson Google learned from repeatedly aggregating content has been the wrong one: other businesses’ investments in new ideas are to Google’s advantage precisely because, through its search dominance, Google can wait for a product to become viable and then misdirect its users back to Google. This year, Google announced its “Places” feature, which draws in content from review websites such as Yelp.com but never requires users to leave the Google landscape:

“Google Places appears to aggregate just about all the information you could possibly need when looking for location-relevant information. Best of all, you don’t need to load up Yelp to find nearby restaurants as all of the company’s reviews have been imported into Google Places. While Google is also taking content from spruce.com, lowcostholidays.com, kudzu.com, citysearch.com, and numerous others, there’s no doubt that Yelp is the

primary company who will find this new product to be crossing the boundary from search to straight up theft.”³⁴

Google’s defense of Places echoes its justification for News: any traffic that Google keeps for itself is balanced by new traffic it generates for sites such as Yelp. Even if this untested hypothesis were accurate, “they’ve kindly ‘provided’ this traffic by duplicating much of the functionality provided by Yelp’s core mobile application.”³⁵ Of course, Google need not even provide the favor of linking back to Yelp. In a snafu it attributed to a technical glitch earlier this year, Google Places displayed Yelp content without attribution or link to the original source.³⁶ Google’s fix of the error should not disguise its underlying purpose: to take traffic from sites such as Yelp and Citysearch.com until users become dependent on Google rather than those sites. Soon enough, Google will solidify Places’ dominance and render its one-time competitors obsolete.

Google purports to have eliminated Yelp and similar content from Places, now relying solely on reviews generated by Google Places users and not competitor websites.³⁷ Perhaps not coincidentally, Google’s decision to modify Places

³⁴ “Did Google Just Steal Yelp’s Business?”, *The Social Times* (Jan. 1, 2011), available at: http://socialtimes.com/did-google-just-steal-yelps-business_b34477.

³⁵ *Id.*

³⁶ “Google Places Now Borrowing Yelp Content with Attribution in iPhone App,” *Techcrunch.com* (June 1, 2011), available at: http://techcrunch.com/2011/06/01/google-places-borrowing-yelp-iphone-app/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+Techcrunch+%28TechCrunch%29.

³⁷ “FTC Ramping Up Pressure in Google Probe” *Forbes.com* (Aug. 11, 2011), available at: <http://www.forbes.com/sites/mobiledia/2011/08/11/ftc-ramping-up-pressure-in-google-probe/>.

“follow[ed] the disclosure of a U.S. antitrust investigation of its business practices” — an investigation which appears to have included requests for information about Places’ aggregation of competitors’ content.³⁸ Whatever Google’s reasons for the change, the damage has been done. Google launched a new product with rivals’ content, and only dropped its use of this content after becoming satisfied it had tapped enough of their traffic. And, in any event, Google’s action was purely voluntary; without agency action, nothing would stop Google from reverting to its prior tactics.

Google News reflects the first of Google’s strategies for becoming a dominant media player — it collects content from across the Internet and markets it as its own product, all while generating millions in revenue at the expense of publishers. In launching Google Places, the company has shown that, without regulatory intervention, it will pursue this tactic so long as its competitors continue to generate content.

The danger is that as true media enterprises continue to pay for reporting and writing and Google continues to scrape that content for its own economic benefit, fewer and fewer news sources will be able to profit and thrive. Google, through its dominance, threatens a future where aggregation is standard, and original content rare.

³⁸ Amir Efrati, “Google Bows to Web Rivals: Internet Giant Removes Outside Customer Reviews from Search Results,” *The Wall Street Journal* (July 23, 2011), available at: <http://online.wsj.com/article/SB10001424053111904233404576462420054134918.html>.

II. GOOGLE BOOKS: BUILDING A MONOPOLY BY ELIMINATING LEGAL RISK

When it comes to the news, Google can dispatch its crawlers to aggregate revenue generating content to display on Google News. Google has had to use a different strategy for other content — testing legal boundaries in order to induce competitors to accept terms of settlement favorable to Google.

Published works collected in libraries presented the quintessential challenge that Google could overcome through this approach. In 2004 Google announced an ambitious project to digitize massive library collections so that “people everywhere [could] search through all of the world’s books to find the ones they’re looking for.”³⁹ In launching the project, Google faced (and, in keeping with its pattern, ignored) a familiar problem. It lacked permission from any of those works’ copyright holders to digitize and display their content. The logistics of seeking consent from authors generally prior to copying their works would be time-consuming and many would refuse to grant consent; in a few cases, so-called orphan works, the copyright owners could not be identified at all. As with Google’s other projects, its goal was not simply to create a searchable trove of world literature: it was to generate revenue in search. Sergey Brin commented that “We want as many works as possible in some form, because that’s of tremendous value.”⁴⁰

³⁹ About Google Books, History of Google Books, *available at*:
<http://www.google.com/googlebooks/history.html>.

⁴⁰ Peter Kafka, “Google: We’re Hiring, and Spending, Again,” (Oct. 7, 2009), *available at*:
<http://allthingsd.com/20091007/live-from-new-york-google-cofounder-sergey-brin-meets-the-press/>.

Accordingly, Google simply began making full-scale copies of copyright-protected works without seeking prior consent of the copyright holders. Not surprisingly, one year into its digitization project, Google was sued for copyright infringement in a class action brought by the Authors Guild and several book publishers.

After three years of litigation, the parties arrived at an initial settlement agreement. The hundreds of objections against that settlement — from copyright holders, publishers, and the United States Department of Justice — were so forceful that the parties scrapped their initial deal and sought leave from Judge Denny Chin to amend their initial agreement. After another two years, the parties reached an amended settlement agreement (“ASA”). The settlement not only resolved the claims raised in the initial lawsuit, but also would have consummated a complex business transaction: Google could have continued to scan works, including orphan works, it could sell subscriptions to its Google Books database and online access to entire books contained in the database, and, in keeping with Google’s principal business model, sell advertising on book search pages.⁴¹

In short, the Google Books Settlement, which Judge Chin rejected, did not just terminate copyright infringement claims against the company. It also provided

⁴¹ Authors Guild et al v. Google Inc., No. 05 Civ. 8136 (S.D.N.Y. 2011).

a shortcut to a new monopoly, and greater dominance and scale in search.⁴² Judge

Chin worried about the overbroad terms of the settlement:

“[The settlement] would permit this class action . . . to implement a forward-looking business arrangement that would grant Google significant rights to exploit entire books, without permission of copyright owners. Indeed, the [settlement] would give Google a significant advantage over competitors, rewarding it for engaging in wholesale copying of copyrighted works without permission, while releasing claims well beyond those presented in the case.”⁴³

Google resorted to its usual defense: In collecting, scanning and digitizing the world’s libraries, it was undertaking massive investment and extraordinary risk that no other company was willing to take. In return, it would provide tremendous return to Google’s users, who would could search Google’s vast digitized collection. But as the Open Book Alliance argued in a brief filed *amicus curiae*, any risk Google took was fleeting:

“The company took no risk. It continued to scan books with impunity because it had already worked out the details in secret negotiations of a business arrangement that shielded it from liability, an arrangement never offered by the publishers to any of Google’s competitors. . . [E]very day that went by with Google scanning books while its competitors pursued a false objective for want of accurate information pushed the company further into an insurmountable lead.”⁴⁴

⁴² *Id.* at 1.

⁴³ *Id.* at 1-2.

⁴⁴ Memorandum of Amicus Curiae Open Book Alliance in Opposition to the Proposed Settlement, at 21, *The Authors Guild v. Google Inc.*, No. 05 Civ. 8136 (S.D.N.Y.).

As Judge Chin’s opinion rejecting the settlement and the Open Book Alliance brief make clear, if Google took any risk, it was the legal risk that scanning millions of books would lead to copyright infringement claims. For Google, this delivered opportunity, not danger. A class action lawsuit offered the chance to negotiate with all class members — essentially any copyright holder worldwide who did not opt out of a settlement — and execute a forward-looking agreement granting Google the exclusive right to exploit these works, not only increasing its scale in search, but guaranteeing that none of its competitors would catch up.

In opposing the ASA, the Department of Justice clearly outlined the consequences for competition that the bargain Google struck would have:

“A core issue that arises out of the parties’ effort to resolve this matter is the ability of Google, and no other entity, to compete in a marketplace that the parties seek to create. Nothing in the ASA addresses this concern. . . .

“There is no serious contention that Google’s competitors are likely to obtain comparable rights independently. . . . The suggestion that a competitor should follow Google’s lead by copying books *en masse* without permission in the hope of prompting a class action suit to be settled on terms comparable to the ASA is a poor public policy and not something the antitrust laws require a competitor to do.”⁴⁵

As the government argued, competitors are unable to generate genuine competition through innovation and ingenuity, not because of Google’s superior

⁴⁵ Statement of Interest of the United States, Feb. 4, 2010, at 4, *The Authors Guild v. Google Inc.*, No. 05 Civ. 8136 (S.D.N.Y.).

know-how, but because Google induced accusations of widespread copyright infringement and attempted to eliminate competition through a settlement in which none of its competitors had a role. As Judge Chin observed: “The ASA would give Google a de facto monopoly over unclaimed works. Only Google has engaged in copying of books en masse without copyright permission.”⁴⁶

Google’s effort to monopolize the market for a digital book search injures competition. Worse, by eliminating competition there, Google digs an even deeper foundation for its monopoly in universal search:

“The ASA would arguably give Google control over the search market Google’s ability to deny competitors the ability to search orphan books would further entrench Google’s market power in the online search market.”⁴⁷

This secondary effect on Google’s main search monopoly was by design.⁴⁸ By linking search of Google Books to its universal search, Google can return more relevant results, which in turn draws more traffic and enhanced scale. As the Open Book Alliance noted, “By crawling and indexing a collection of all the world’s books, Google can vastly improve its search engine. By denying its competitors the opportunity to index a similarly comprehensive collection, Google increases its

⁴⁶ Authors Guild et al v. Google Inc., No. 05 Civ. 8136, at 12 (S.D.N.Y. 2011).

⁴⁷ *Id.*

⁴⁸ Eric Schmidt, “Books of Revelation,” *The Wall Street Journal* (Oct 18, 2005) (“Whenever you do a Google web search, you’re also searching our book index.”)

share and gains an insurmountable lead.”⁴⁹ Google’s investment is little more than the burden of potential litigation, and its reward is a deeper advantage in search, to the detriment of those that created the content in the first place.

At least part of the solution to Google’s monopoly in this case would be access — it can build scale and develop algorithms that yield more relevant results precisely because it closes off content to other search sites. While closing its search universe contradicts Google’s stated values — Eric Schmidt has famously said that “If it’s not searchable by Google, it’s not open, and open is best for the consumer”⁵⁰ — excluding competitors is central to Google’s success. For this reason, the settlement Judge Chin rejected would have given to Google the authority to open or close the ability to “index and search” scanned books, requiring any commercial entity to have Google’s “prior written consent.”⁵¹ Likewise, the settlement would have prohibited all “commercial use of information extracted from” Google Books’ database without Google’s “express permission.”⁵²

This type of monopolistic exclusion is precisely the kind that the Supreme Court has said can constitute illegal anticompetitive conduct. Quoting Professor

⁴⁹ Memorandum of Amicus Curiae Open Book Alliance in Opposition to the Proposed Settlement, at 21, *The Authors Guild v. Google Inc.*, No. 05 Civ. 8136 (S.D.N.Y.).

⁵⁰ Dan Farber, “Google CEO Eric Schmidt: Social Networks are Still Too Closed” (May 1, 2008), available at: http://news.cnet.com/8301-13953_3-9933627_80.html.

⁵¹ Amended Settlement Agreement, Section 1.93, *Authors Guild et al. v. Google Inc.*, No. 05 Civ. 8136.

⁵² *Id.* at Section 7.2(d)(iii).

Robert Bork, the Supreme Court found that “If a firm has been ‘attempting to exclude rivals on some basis other than efficiency,’ it is fair to characterize its behavior as predatory,” and therefore potentially anticompetitive.⁵³ While Google would claim that the settlement promotes efficiency by encouraging innovation, Google is not merely attempting to protect its “investment” (however controversial the nature of that investment). If it were, it would not have signed on to a settlement agreement requiring Google to provide access to any party *except for* its direct competition. Had Judge Chin accepted the settlement, Google’s efforts would have inhibited competition because the settlement excluded rivals both from the digital database the settlement authorized and from building their own counterpart to Google Books free from the risk of copyright infringement claims. Google’s willingness to agree to distribute for free what it would not provide to direct rivals at any cost signals not an efficient business practice, but an anticompetitive effort to maintain its monopoly.

Google values openness only when it needs content, as it does with Google News. Offered the opportunity to close competitors off to its Google Books collection, Google did not hesitate to accept. So while Google purports to value

⁵³ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 604 (1985) (quoting Robert Bork, *The Antitrust Paradox* 138 (1978)). See also *Verizon Commc’ns v. Trinko*, 540 U.S. 398, 407 (2004) (“To safeguard the incentive to innovate, the possession of monopoly power will not be found unless it is accompanied by an element of anticompetitive conduct.”); *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 483 n.32 (1992) (“It is true that as a general matter a firm can refuse to deal with its competitors. But such a right is not absolute; it exists only if there are legitimate competitive reasons for the refusal.”) (citing *Aspen Skiing Co.*, 472 U.S., at 602-605).

openness, its intent was to hold for itself the ability to generate revenue via a search of its books database.

III. YOUTUBE: USING MEDIA'S OWN CONTENT TO CREATE A DOMINANT FORCE

Google exhibits a pattern of entering and dominating a market through potential violations of copyright and then subsequently locking others out. In the case of its acquisition and commercialization of YouTube, for example, Google purchased a site conceived of by copyright infringement, conduct which Google did not discourage after its acquisition.

YouTube's founders saw the possibility to redirect traffic from sites of major media websites to their own site. To do so required copying of content on immense scale — the question remains before the United States Court of Appeals for the Second Circuit whether this copying was lawful. In any event, YouTube's founders were keenly aware that they were, at best, borrowing the content of others. With respect to a video that had been loaded to the site owned by CNN, one wrote:

“i really don't see what will happen. what? someone from cnn sees it? he happens to be someone with power? he happens to want to take it down right away. he gets in touch with cnn legal. 2 weeks later, we get a cease & desist letter. we take the video down.”⁵⁴

This email correspondences puts more brazenly Google's approach to content in general. In the dispute over Google Books, a class action lawsuit was filed rather

⁵⁴ Brief of Appellants, at 11, *Viacom Intl. Inc. v. YouTube, Inc.*, No 10-3270, (2d Cir. 2010).

than a cease-and-desist notice, but nevertheless, the strategy was the same: Risk legal action while accumulating dominance. As Viacom explained in its suit against YouTube, after the acquisition,

“[I]nstead of purging YouTube of infringing content, Google embraced YouTube’s policy of retaining infringing videos unless and until the copyright owner detected it and served a cease-and-desist demand.”⁵⁵

Google did not stop there; consistent with habit, it sought to strong-arm its media competitors into a revenue-generating deal. Media companies who wanted to safeguard their content would be offered a copyright protection service, but only if they “partnered” with Google:

“As Google’s Vice President of Content Partnerships explained, the ‘Claim Your Content’ tool that included [a copyright protection feature] would be offered ‘only . . . to partners who enter into a revenue deal with us.’ In February 2007, YouTube told the MPAA and Viacom that it would not use [that feature] to prevent copyright infringement unless Viacom agreed to a license deal. In other words, unless copyright owners agreed to YouTube’s terms, YouTube would simply allow controllable infringement to continue.”⁵⁶

Once again, Google’s ability to leverage its dominance resulted from its willingness to push legal boundaries and its aggressive approach to competitors that sought to assert their legal rights, not from superior inventiveness or products.

⁵⁵ *Id.* at 15.

⁵⁶ *Id.* at 16.

Meanwhile, Google locks competitors out of searching YouTube in any adequate manner. Just as it did with Google Books, Google primed YouTube to become the dominant player for video, and, having done so, it stopped crawlers of other search engines from browsing the full catalogue of YouTube content, assuring that no competitor could close in on the lead that Google acquired through possible copyright infringement. Before the acquisition, YouTube permitted any search engine to crawl its content; once it completed the acquisition, Google effectively prevented other sites from crawling and indexing large portions of YouTube content. Google engineered its new property so that only Google's search page would provide users the most relevant and complete results. Unmonitored, Google once again exploited the interest of content creators to have their work seen, read, and admired in order to further its own goal of search dominance.⁵⁷

⁵⁷ As with News, Google's principal goal is advertising revenue. Through YouTube, Google can capture users — who otherwise might visit, for example, ABC.com or Hulu for content — within its ecosystem, feeding advertisements and skimming ad revenue from media companies. Google's recent announcement that it will seek to acquire Motorola Mobility — and its invaluable patent portfolio — enhances Google's ability to do so:

“Google could use [Motorola Mobility's] market clout to strengthen its ties with major [cable] operators looking to deliver more content to more devices . . . That might allow Google to build on the popularity of YouTube to expand its over-the-top video services or even deploy its Android platform on set-top boxes, which would help Google get a chunk of the \$70 billion TV advertising business.” George Winslow, “News Analysis: What the Google-Motorola Deal Means for TV,” *Broadcasting & Cable*, (Aug. 17, 2011), available at: http://www.broadcastingcable.com/article/472485-News_Analysis_What_the_Google_Motorola_Deal_Means_for_TV.php

In short, an unmonitored Google will continue to amass scale not necessary to create new products, but instead to divert revenue from content creators to its own advertising coffers.

Google drew from a different set of tools in seeking dominance in books and video. Simply put, Google collected as much as it could without regard to copyright law, and having stockpiled this content, locked out competitors, all but assuring that Google's search results would be more likely to display relevant hits. Google's conduct with respect to both Google Books and YouTube demonstrates that Google will continue to resort to this pattern, and if possible, enter into private agreements to settle disputes, in order to maintain dominance and exclude competitors.

CONCLUSION

Every smartphone, e-reader, tablet, and desktop computer represents a household's worth of eyes, ready to increase digital circulation, advertising penetration and, in turn, revenue. As media enterprises explore new ways to monetize this content — digital mobile distribution, iPad and Android apps, digital subscriptions — they are innovating the business. But they can only advance so far without bumping into the obstacles to competition that Google has used to shape the market for digital media and to exclude competitors, whether it is copying content in the case of Google News or hoarding content in the case of Google Books. That these two strategies are at odds with each other — to aggregate content on the one hand, and to close collected content to rival search engines on the other — reflects Google's double-sided approach to competition. In Google's view, when it collects content, it is making an investment; when it closes off rivals, it is protecting this investment. Such an oversimplified position ignores the investments of others

— particularly those that have created the content without which Google News, Google Books and YouTube rely.

Despite its stated values to the contrary, Google has shown a willingness to exercise its monopoly power to the detriment of media companies, publishers, and journalists. These are companies ready to compete in the digital age, and prepared to rise or fall on the quality of their content and the strength of their creativity. They face challenges that will promote innovation. But they also face a challenge — from Google — that discourages improvement, and that transforms any advance into a setback as Google misdirects users to its own webpages, displaying the content of others and foreclosing competitors from that same aggregated content. Absent intervention by the Commission, the future of the media economy will remain in significant danger of being dominated by a single entity that will foreclose competition.

The Commission is in an ideal position to take action to prevent this result, and we urge it to use this unique opportunity to preserve and enhance competition. The question of an appropriate remedy is a complex one that deserves careful consideration and analysis. But we are confident that the Commission can find an appropriate prospective remedy to protect competition in the media, search, online and mobile markets that have become so essential to the future of our economy and society.