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How the FTC Could Beat Google

Robert H. Lande
University of Baltimore School of Law, rlande@ubalt.edu

Jonathan L. Rubin
Rubin PLLC

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The U.S. Federal Trade Commission ("FTC") is rumored to be deciding whether to bring a "pure Section 5" case against Google as a result of complaints that the company unfairly favors its own offerings over those of its rivals in its search results. If successful, the case could do more than improve competition in the crucial multi-billion dollar online marketplace. It also could revitalize Section 5 of the FTC Act and solidify the agency's authority to prevent the "unfair methods of competition" or "unfair or deceptive acts or practices" that do not violate the other Antitrust or Consumer Protection statutes. But the case will fail miserably at the hands of a reviewing court and the agency will be confined to relatively non-controversial enforcement violations if the FTC fails to impose upon itself a tightly bounded and constrained legal framework that contains clear limiting principles.

As former FTC Chairman Bill Kovacic recently warned, an unbounded Section 5 case will never be sustained by a reviewing court. He is correct. The FTC's 2008 *N-Data* settlement, for example, would have been overturned if it had reached the appellate court because its Section 5 formulation was without constraining principles. There is clear Supreme Court precedent holding that the FTC Act is broader than the other antitrust laws and covers incipient violations and conduct violating even the "spirit" of, or policies underlying, the other antitrust laws. Nevertheless, the only way a court will allow the FTC to pursue a pure Section 5 theory against Google would be if the agency constrains itself with a coherent principle of competitive harm: the consumer choice framework.

The consumer choice framework focuses on actual or potential choice in the marketplace and the key factors necessary for markets to function competitively. This means that any complaint against Google should expressly declare that Section 5 violations are limited to two types of conduct:

1. Conduct that does or will significantly restrict or distort the choices available to consumers, such as incipient exclusive dealing or other exclusionary strategies that materially restrict the array of alternatives on the market; or
2. Conduct that significantly distorts consumers' ability freely to choose among the alternatives the market provides, such as deceptively presented search results.

This approach confines Section 5 within the bounds of the two traditional responsibilities of the FTC: antitrust law and consumer protection law. Another advantage of a consumer choice framework, moreover, is that it offers a coherent theory of anticompetitive harm flexible enough

[1] Robert H. Lande is the Venable Professor of Law at the University of Baltimore School of Law and a co-founding Director of the American Antitrust Institute ("AAI"), a non-partisan antitrust think tank. Jonathan L. Rubin is a Washington, D.C.-based antitrust attorney and a member of the AAI Advisory Board. The views expressed in this article are solely those of the authors and do not necessarily reflect the views of the American Antitrust Institute or any client of Rubin PLLC.

to accommodate conduct that has elements of both an antitrust violation and a consumer protection violation.

Under the consumer choice framework, non-price issues that consumers care about—not just price, but also variety, quality, privacy, and innovation—play a much more prominent role in the analysis and result. But the key advantage of a consumer choice approach is its limiting principles. For example, not every decrease in choice qualifies as an injury to competition. Only significant and material decreases count. Second, more choice is not necessarily good because too much choice can cause confusion and can, as a practical matter, mean costs increase unduly. The goal of competition policy should not be to maximize consumer choice, but only to eliminate practices that artificially restrict the choices the free market would have provided. Third, every antitrust violation reduces consumer choice, but not every reduction in consumer choice is an antitrust violation.

Because the evidence against Google amassed by the FTC during its investigation is confidential we do not know whether the Commission ultimately will decide to pursue a pure Section 5 case or a traditional antitrust or consumer protection case, or both, against Google. Nor can we speculate whether a pure Section 5 case would be based upon conduct analogous to deception (if Google misrepresented the neutrality of its search results), incipient exclusive dealing (if consumers are unduly influenced but not required to use related Google products), or some other theory. Indeed, we cannot determine whether the evidence will demonstrate any type of law violation at all.

Regardless, we urge the FTC to view its task as analogous to that of writing a Shakespearean sonnet in iambic pentameter, an approach that constrains the poet yet allows her to achieve greatness. If the Commission instead promulgates an approach to Section 5 that is insufficiently bounded, or gives it undue discretion, the relatively conservative reviewing courts of today are certain to dismiss its case against Google, and they might well restrict the scope of Section 5 to make it coterminous with the other antitrust laws. For the FTC to have any chance successfully to bring a pure Section 5 case against Google, it must impose upon itself the limits of the consumer choice framework.