

CHAPTER 7

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Dominant Search Engines: An Essential Cultural & Political Facility

By Frank Pasquale*

Many worry about search engines' growing power. How are worldviews being biased by them? Do search engines have an interest in getting certain information prioritized or occluded?¹ Dominant search engines ("DSEs")² are a key hub of Internet traffic. They provide an ever-expanding array of services. Google, for instance, just announced its intention to go into travel shopping. As they amass information about their users, calls for regulation have focused on the threats to privacy they generate. Some of these efforts have been successful; others look more doubtful. One thing is certain: They are only the beginning of a struggle over the rights and responsibilities of key intermediaries. Some hope that competition law—and particularly the doctrine of "essential facilities"—will lead policymakers to scrutinize search engines actions.

When American lawyers talk about "essential facilities," they are referring to antitrust doctrine that has tried, at various points, to make certain "bottlenecks" in the economy provide access on fair and nondiscriminatory terms to all comers. As robust American competition law fades into a secluded corner of legal history,³ "essential facilities" doctrine still remains, for some scholars, a ray of hope for intermediary responsibility.⁴ Oren Bracha and I helped fuel this

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1 ALEX HALAVAIS, SEARCH ENGINE SOCIETY 85 (Polity 2008) ("In the process of ranking results, search engines effectively create winners and losers on the web as a whole. Now that search engines are moving into other realms, this often opaque technology of ranking becomes kingmaker in new venues."); Chi-Chu Tschang, *The Squeeze at China's Baidu*, BUSINESSWEEK, Dec. 31, 2008, at www.businessweek.com/magazine/content/09_02/b4115021710265.htm ("Salespeople working for Baidu drop sites from results to bully companies into buying sponsored links [a form of paid advertising], say some who have been approached.").

2 We can provisionally define a dominant search engine ("DSE") as one with more than 40 percent market share. Google clearly satisfies this criterion in the United States and Europe. See David S. Evans, *Antitrust Issues Raised by the Emerging Global Internet Economy*, 102 NW. U.L. REV. COLLOQUY 285 (2008) (reporting market shares for leading internet intermediaries).

3 BARRY LYNN, CORNERED: THE NEW MONOPOLY CAPITALISM AND THE ECONOMICS OF DESTRUCTION (John Wiley & Sons, Inc. 2010) (describing the declining impact of American antitrust law).

4 Brett Frischmann & Spencer Weber Waller, *Revitalizing Essential Facilities*, 75 ANTITRUST L.J. 1, 2 (2008) ("infrastructure subject to substantial access and nondiscrimination norms [has] ... been heavily regulated.").

hope in our 2008 article *Federal Search Commission*, which compared dominant search engines to railroads and common carriers in the hope that they would be recognized as infrastructural foundations of the information economy.⁵ But I now see that *Federal Search Commission*, like many other parts of the search engine accountability literature, tried too hard to shoehorn a wide variety of social concerns about search engines into the economic language of antitrust policy.⁶ It is now time for scholars and activists to move beyond the crabbed vocabulary of competition law to develop a richer normative critique of search engine dominance.

This will not be an easy sell in cyberlaw, which tends to uncritically promote competition and innovation as the highest aims of Internet policy. If a dominant search engine is abusing its position, market-oriented scholars say, market forces will usually solve the problem, and antitrust law can step in when they fail to do so. Even those who favor net neutrality rules for carriers are wary of applying them to other intermediaries, like search engines. All tend to assume that the more “innovation” happens on the Internet, the more choices users will have and the more efficient the market will become. Yet these scholars have not paid enough attention to the *kind* of innovation that is best for society, and whether the uncoordinated preferences of millions of web users for low-cost convenience are likely to address the cultural and political concerns that dominant search engines raise.

In this article, I hope to demonstrate two points. First, antitrust law terms (like “essential facility”) cannot hope to capture the complexity of concerns raised by an information landscape where one company serves as the predominant map of the web, and simultaneously attempts to exploit that dominance by endlessly expanding into adjoining fields. Second, I hope to point the way toward a new concept of “essential cultural and political facility,” which can help policymakers realize the situations where a bottleneck has become important enough that special scrutiny is warranted. This scrutiny may not always lead to regulation—which the First Amendment renders a dicey enterprise in any corner of the information economy. However, it could lead us to recognize the importance of publicly funded alternatives to the concentrated conduits and content-providers colonizing the web.

⁵ Oren Bracha & Frank Pasquale, *Federal Search Commission: Fairness, Access, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1193 (2008).

⁶ RICHARD POSNER, *ANTITRUST LAW*, at ix (2d ed. 2001) (“Almost everyone professionally involved in antitrust today—whether as litigator, prosecutor, judge, academic, or informed observer—not only agrees that the only goal of the antitrust laws should be to promote economic welfare, but also agrees on the essential tenets of economic theory that should be used to determine the consistency of specific business practices with that goal.”).

The Limits of Antitrust as Search Policy

Antitrust cases tend to consume a great deal of time, in part because economic conduct is subject to many different interpretations.⁷ One person's anticompetitive conduct is another's effective business strategy. The same unending (and indeterminate) arguments threaten to stall discourse on search policy. For example, the Federal Trade Commission's (FTC) review of the Google–DoubleClick merger focused almost entirely on the economic effects of the proposed combination, rather than the threats to privacy it posed.⁸

Search engines are among the most innovative services in the global economy. They provide extraordinary efficiencies for advertisers and consumers by targeting messages to viewers who are most likely to want to receive them. In order to attract more users, search engines use revenues from advertising to organize and index a great deal of content on the Internet. Like the major broadcast networks, search engines are now beginning to displace. They provide opportunities to view content (organic search results) in order to sell advertising (paid search results).⁹ Search engines have provoked antitrust scrutiny because proposed deals between major search engines (and between search engines and content providers) suggest undue coordination of competitors in an already concentrated industry.¹⁰

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- ⁷ See Jonathan Zittrain, *The Un-Microsoft Un-Remedy: Law Can Prevent the Problem that It Can't Patch Later*, 31 CONN. L. REV. 1361, 1361–62 (1999) (“The main concern in finding a remedy for [‘bad monopolist behaviors’] may be time: The technology environment moves at a lightning pace, and by the time a federal case has been made out of a problem, the problem is proven, a remedy fashioned, and appeals exhausted, the damage may already be irreversible.”).
- ⁸ News Release, FTC, Federal Trade Commission Closes Google/DoubleClick Investigation (Dec. 20, 2007), available at www.ftc.gov/opa/2007/12/googledc.shtm (“The Commissioners ... wrote that ‘as the sole purpose of federal antitrust review of mergers and acquisitions is to identify and remedy transactions that harm competition,’ the FTC lacks the legal authority to block the transaction on grounds, or require conditions to this transaction, that do not relate to antitrust. Adding, however, that it takes consumer privacy issues very seriously, the Commission cross-referenced its release of a set of proposed behavioral marketing principles that were also announced today.”).
- ⁹ According to the Google corporate home page, “[W]e distinguish ads from search results or other content on a page by labeling them as ‘sponsored links’ or ‘Ads by Google.’ We don’t sell ad placement in our search results, nor do we allow people to pay for a higher ranking there.” Google, Inc., Corporate Information: Company Overview, www.google.com/corporate/ (last visited Mar. 12, 2010).
- ¹⁰ For example, the deal reached between Microsoft and Yahoo! that would have Microsoft’s Bing search engine deliver results for searches on Yahoo! has provoked antitrust concerns both domestically and internationally. See Christopher S. Rugaber, *Microsoft–Yahoo Deal to Face Tough Antitrust Probe*, ABCNEWS, July 29, 2009, http://seattletimes.nwsourc.com/html/localnews/2009563654_apusmicrosoftyaho oantitrust.html.

Those opposed to regulation often claim that antitrust law offers a more targeted and efficient response to abuses. As Justice Breyer explained in his classic work *Regulation and Its Reform*:

[T]he antitrust laws differ from classical regulation both in their aims and in their methods [T]hey act negatively, through a few highly general provisions *prohibiting* certain forms of private conduct. They do not affirmatively order firms to behave in specified ways; for the most part, they tell private firms what not to do Only rarely do the antitrust enforcement agencies create the detailed web of affirmative legal obligations that characterizes classical regulation.¹¹

Given the lack of search engine regulation in the U.S., actual and threatened antitrust investigations have been a primary government influence on Google’s business practices as its dominance in search grows. Many believe that the Department of Justice’s (DOJ) suspicion of the company’s proposed joint venture with Yahoo! in the search advertising field effectively scuttled the deal by late 2008.¹² However, antitrust enforcement appears less promising in other aspects of search.¹³ This section discusses the limits of antitrust in addressing the cultural and political dilemmas raised by Google’s proposed Book Search deal with publishers,¹⁴ and its dominance of online advertising.

¹¹ STEPHEN BREYER, REGULATION AND ITS REFORM 156–57 (Harvard Univ. Press 1982). *But see* A. Douglas Melamed, *Antitrust: The New Regulation*, 10 ANTITRUST 13, 13 (1995) (describing “two paradigms,” the law enforcement model and the regulatory model, and the shift of antitrust law from the former to the latter).

¹² Nicholas Thompson & Fred Vogelstein, *The Plot to Kill Google*, WIRED, Jan. 19, 2009, at 88, available at www.wired.com/techbiz/it/magazine/17-02/ff_killgoogle (noting that antitrust scrutiny culminated in a hearing in which the DOJ threatened to bring an antitrust case against Google and that one prominent DOJ attorney expressed the view that Google already is a monopoly).

¹³ Daniel Rubinfeld, *Foundations of Antitrust Law and Economics*, in HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 51, 57 (Robert Pitofsky ed., 2008) (describing how “conservative economics has fostered a tendency to downplay enforcement in dynamic technological industries in which innovation issues play a significant role”).

¹⁴ Despite the DOJ’s intervention to affect the terms of the proposed settlement, many leading antitrust experts have argued that the settlement would not violate the antitrust laws. *See, e.g.,* Einer Elhauge, *Why the Google Books Settlement Is Pro-Competitive* 58 (Harvard Law Sch., Law & Econ. Discussion Paper No. 646, Harvard Law Sch., Pub. Law & Theory Research Paper No. 09-45, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1459028 (“The settlement does not raise rival barriers to offering [many] books, but to the contrary lowers them. The output expansion is particularly dramatic for out-of-print books, for which there is currently no new output at all.”).

Privacy concerns are nearly impossible to address within the economic models of contemporary competition law. Antitrust scrutiny did little to address the privacy concerns raised when Google proposed to merge with the web advertising firm DoubleClick.¹⁵ The proposed deal provoked a complaint from the Electronic Privacy Information Center (EPIC). EPIC claimed that Google's modus operandi amounts to a "deceptive trade practice":

Upon arriving at the Google homepage, a Google user is not informed of Google's data collection practices until he or she clicks through four links. Most users will not reach this page Google collects user search terms in connection with his or her IP address without adequate notice to the user. Therefore, Google's representations concerning its data retention practices were, and are, deceptive practices.¹⁶

One key question raised by the proposed merger was whether privacy and consumer protection concerns like these can be addressed by traditional antitrust analysis.¹⁷ Privacy law expert Peter Swire argued that they can, because "privacy harms reduce consumer welfare . . . [and] lead to a reduction in the quality of a good or service."¹⁸ Swire believed that consumers would be worse off after the merger because of the unparalleled digital dossiers the combined entity could generate:

Google often has "deep" information about an individual's actions, such as detailed information about search terms. Currently, DoubleClick sets one or more cookies on an individual's computers, and receives detailed information about which sites the person visits while surfing. DoubleClick has

¹⁵ Dawn Kawamoto & Anne Broache, *FTC Allows Google–DoubleClick Merger to Proceed*, CNET NEWS, Dec. 20, 2007, http://news.cnet.com/FTC-allows-Google-DoubleClick-merger-to-proceed/2100-1024_3-6223631.html (describing U.S. authorities' blessing of the proposed deal).

¹⁶ *See* Complaint and Request for Injunction, Request for Investigation and for Other Relief, *In re* Google Inc. and DoubleClick, Inc., No. 071-0170 (FTC Apr. 20, 2007), available at http://epic.org/privacy/ftc/google/epic_complaint.pdf at 9 [hereinafter Google, Inc. and DoubleClick Complaint].

¹⁷ *See* Siva Vaidhyathan, *The Googlization of Everything*, Google and DoubleClick: A Bigger Antitrust Problem than I Had Imagined, www.googlizationofeverything.com/2007/10/google_and_doubleclick_a_bigge.php (Oct. 21, 2007, 16:05 EST).

¹⁸ Peter Swire, *Protecting Consumers: Privacy Matters in Antitrust Analysis*, CTR. FOR AM. PROGRESS, Oct. 19, 2007, www.americanprogress.org/issues/2007/10/privacy.html (italics omitted).

“broad” information about an individual’s actions, with its leading ability to pinpoint where a person surfs.¹⁹

Initial points of contention include (a) the definition of the products at issue, and (b) how to weigh the costs and benefits of a merger. The combined company would have different segments of “customers” in a two-sided market:²⁰ (1) searchers trying to find sites, and (2) ad buyers trying to reach searchers. Swire contends that many people care about privacy, and “[i]t would be illogical to count the harms to consumers from higher prices while excluding the harms from privacy invasions—both sorts of harms reduce consumer surplus and consumer welfare in the relevant market.”²¹

However, the web searcher category not only consists of consumers who care about privacy, but also includes many people who do not highly value it or who actively seek to expose their information in order to receive more targeted solicitations. According to Eric Goldman’s work on personalized search, some may even consider the gathering of data about them to be a service.²² The more information is gathered about them, the better intermediaries are able to serve them relevant ads. Many economic models of web publication assume that users “pay” for content by viewing ads;²³ they may effectively pay less if the advertisements they view bear some relation to things they want to buy. So while Swire models advertising and data collection as a cost to be endured,

¹⁹ *Id.* According to Swire, “[i]f the merger is approved, then individuals using the market leader in search may face a search product that has both ‘deep’ and ‘broad’ collection of information. For the many millions of individuals with high privacy preferences, this may be a significant reduction in the quality of the search product—search previously was conducted without the combined deep and broad tracking, and now the combination will exist.” *Id.*

²⁰ For a definition of two-sided market, see Nicholas Economides & Joacim Tåg, *Net Neutrality on the Internet: A Two-Sided Market Analysis* 1 (NET Inst., Working Paper No. 07-45, N.Y. Univ. Law and Econ., Research Paper No. 07-40, 2007), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1019121 (“[P]latforms sell Internet access services to consumers and may set fees to content and applications providers ‘on the other side’ of the Internet.”). In the search engine context, consumers “pay” by attending to ads, and ad-purchasers pay Google for the chance to get ad viewers’ attention.

²¹ Swire, *supra* note 18.

²² Eric Goldman, *A Coasean Analysis of Marketing*, 2006 WIS. L. REV. 1151, 1162–64 (“Three components determine an individual consumer’s utility from a marketing exposure: (1) the consumer’s substantive interest in the marketing, (2) the consumer’s nonsubstantive reactions to the marketing exposure, and (3) the attention consumed by evaluating and sorting the marketing. . . . [A] consumer may derive utility from the rote act of being contacted by marketers or exposed to the marketing, regardless of the marketing content.”).

²³ David S. Evans, *The Economics of the Online Advertising Industry*, 7 REV. NETWORK ECON. 359, 359 (2008), available at www.bepress.com/rne/vol7/iss3/2 (describing how many of the top websites have adopted the “free-tv” model where the publisher generates traffic by not charging for readers but then sell that traffic to advertisers).

Google and DoubleClick argue that the resulting personalized ads serve customers. Their arguments prevailed, and Google officially acquired DoubleClick in 2008.²⁴

Antitrust law is ill prepared to handle a “market” where some percentage of consumers consider loss of privacy a gain and others consider it a loss. Economic reasoning in general falters in the face of externalities, but usually we can all agree that, say, pollution is a harm (or negative externality) and flowers are a boon (or positive externality). Privacy preferences are much more idiosyncratic.

Critics of the merger do have a response to this problem of diverse preferences—they can shift from characterizing lost privacy as a cost of web searching to describing it as a reduction in the quality of the services offered by the merging entities.²⁵ Douglas Kysar’s work on the product–process distinction is encouraging here. Kysar has claimed that consumers should have a right to make choices of products based on how the products are made, not just how well they work.²⁶ Kysar argues “in favor of acknowledging and accommodating [consumer] process preferences within policy analysis, given the potential significance that such preferences may serve in the future as outlets for public-minded behavior.”²⁷ Nevertheless, the valuation problems here are daunting. How are we to determine how much consumers are willing to pay to avoid privacy-eroding companies?²⁸

Perhaps, as Lisa Heinzerling and Frank Ackerman suggest in their book *Priceless*, we should stop even trying to pretend that these decisions can be made on

²⁴ See Press Release, Google Inc., Google Closes Acquisition of DoubleClick (Mar. 11, 2008), available at www.google.com/intl/en/press/pressrel/20080311_doubleclick.html.

²⁵ Both Supreme Court precedent and DOJ guidelines support this approach. See *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 695 (1978) (“The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.”); U.S. DEP’T OF JUSTICE, HORIZONTAL MERGER GUIDELINES § 4, at 30–32 (1997) (efficient market behavior is indicated by lower prices, new products, and “improved quality”).

²⁶ Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 526, 529 (2004) (“[C]onsumer preferences may be heavily influenced by information regarding the manner in which goods are produced.”).

²⁷ *Id.* at 534.

²⁸ Christopher Yoo has demanded this kind of accounting in the context of net neutrality. See Christopher Yoo, *Beyond Network Neutrality*, 19 HARV. J.L. & TECH. 1, 54 (2005) (“There is nothing incoherent about imposing regulation to promote values other than economic welfare. . . . [but] such a theory must provide a basis for quantifying the noneconomic benefits and for determining when those benefits justify the economic costs.”).

anything approaching a purely economic basis.²⁹ Engaging in a cost–benefit analysis diminishes privacy’s status as a right. Though many scholars have compellingly argued for broader foundations for competition law, the mainstream of contemporary antitrust policy in the United States cannot accommodate such concerns. Antitrust’s *summum bonum* is the maximization of “consumer welfare,” and this measure of efficiency is notoriously narrow.³⁰ For example, the DOJ was hard pressed to adequately factor in a basic democratic commitment to diverse communicative channels during many media mergers.³¹

Given antitrust doctrine’s pronounced tendency to suppress or elide the cultural and political consequences of concentrated corporate power, the Bureau of Competition and the Bureau of Economics within the FTC are ill-equipped to respond to the most compelling issues raised by search engines.³² The Google–DoubleClick merger proceedings ultimately ended with an overwhelming win for Google at the FTC.³³ This outcome was all but inevitable given the foundations of contemporary antitrust doctrine,³⁴ and is the logical outgrowth of overreliance on legal economic theory that uncritically privileges market

²⁹ Frank Ackerman & Lisa Heinzerling, *Priceless: On Knowing the Price of Everything and the Value of Nothing* 8–9 (The New Press 2004).

³⁰ See Maurice E. Stucke, *Better Competition Advocacy*, 82 ST. JOHN’S L. REV. 951, 1001 (2008) (observing the primacy of allocative efficiency in antitrust analysis). Stucke notes that “[b]ehind allocative efficiency’s façade of positivism lie [many] moral questions” *Id.* See also Julie E. Cohen, *Network Stories*, 70 LAW & CONTEMP. PROBS. 91, 92 (2007) (“What makes the network good can only be defined by generating richly detailed ethnographies of the experiences the network enables and the activities it supports, and articulating a normative theory to explain what is good, and worth preserving, about those experiences and activities.”).

³¹ See C. Edwin Baker, *Media Concentration: Giving Up on Democracy*, 54 FLA. L. REV. 839, 857 (2002) (“[T]he dominant antitrust focus on *power over pricing* can be distinguished from *power over the content available for consumer choice*. In the currently dominant paradigm, a merger that dramatically reduced the number of independent suppliers of a particular category of content—say, news or local news or Black activist news—creates no antitrust problem if, as likely, it does not lead to power to raise prices.”).

³² See STATEMENT OF THE FEDERAL TRADE COMMISSION CONCERNING GOOGLE/DOUBLECLICK, FTC File No. 071-0170 (FTC Dec. 20, 2007), available at <http://www.ftc.gov/os/caselist/0710170/071220statement.pdf> [hereinafter STATEMENT OF FTC CONCERNING GOOGLE/DOUBLECLICK] (“Although [privacy concerns] may present important policy questions for the Nation, the sole purpose of federal antitrust review of mergers and acquisitions is to identify and remedy transactions that harm competition.”).

³³ *Id.*

³⁴ Maurice Stucke describes and critiques this bias in some detail. See Stucke, *supra* note 30, at 1031 (describing a “mishmash of neoclassical economic theory, vignettes of zero-sum competition, and normative weighing of the anticompetitive ethereal—deadweight welfare loss—against the conjectures of procompetitive efficiencies” at the core of too much antitrust law and theory). Among his many important contributions to the literature, Stucke makes it clear that competition policy includes far more goals and tactics than antitrust enforcement alone. *Id.* at 987–1008.

outcomes.³⁵ As long as contemporary doctrine holds that antitrust is singularly focused on the “consumer welfare” a proposed transaction will generate,³⁶ antitrust policymakers will be unable to address the cultural and political consequences of consolidation in the search industry.

Antitrust challenges to the proposed settlement of a copyright lawsuit by authors and publishers against Google’s Book Search program are likely to be similarly constrained.³⁷ As in the Google-DoubleClick merger, the privacy implications of Google’s proposed deal with publishers are profound.³⁸ Anyone who cares about public input into the future of access to knowledge should approach the potential deal here warily, even if the prospect of constructing a digital Library of Alexandria tempts scholars.³⁹ As Harvard librarian Robert Darnton has argued, only a naive optimist could ignore the perils of having one profit-driven company effectively entrusted with a comprehensive collection of the world’s books.⁴⁰

When publishers challenged Google’s book scanning in 2007, many hoped that public interest groups could leverage copyright challenges to Google’s book

- ³⁵ Reza Dibađj, *Beyond Facile Assumptions and Radical Assertions: A Case for “Critical Legal Economics,”* 2003 UTAH L. REV. 1155, 1161 (“[T]hree of the most basic assumptions to the popular [law & economics] enterprise—that people are rational, that ability to pay determines value, and that the common law is efficient—while couched in the metaphors of science, remain unsubstantiated.”). *But see* JAMES R. HACKNEY, JR., UNDER COVER OF SCIENCE: AMERICAN LEGAL–ECONOMIC THEORY AND THE QUEST FOR OBJECTIVITY 164–66 (Duke Univ. Press 2007) (describing the “notable movement to broaden the scope of legal–economic theory under the rubric of socioeconomic”).
- ³⁶ *See* *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 906 (2007) (acknowledging the economic foundations of U.S. antitrust law).
- ³⁷ Motoko Rich, *Google and Authors Win Extension for Book Settlement*, N.Y. TIMES, Nov. 9, 2009, at B3, available at www.nytimes.com/2009/11/10/technology/companies/10gbooks.html?_r=1. The DOJ expressed dissatisfaction with the parties’ most recent proposed settlement, as well. *See* Cecilia Kang, *Judge Puts Off Ruling on Google’s Proposed Digital Book Settlement*, WASH. POST, Feb. 19, 2010, available at www.washingtonpost.com/wp-dyn/content/article/2010/02/18/AR2010021800944.html?hpid=moreheadlines.
- ³⁸ Electronic Frontier Foundation, *Google Book Search Settlement and Reader Privacy*, available at www.eff.org/issues/privacy/google-book-search-settlement (last visited July 11, 2010). As author Michael Chabon argues, “if there is no privacy of thought — which includes implicitly the right to read what one wants, without the approval, consent or knowledge of others — then there is no privacy, period.” *Id.*
- ³⁹ *See, e.g.*, Diane Leenheer Zimmerman, *Can Our Culture Be Saved? The Future of Digital Archiving*, 91 MINN. L. REV. 989, 990–91 (2007) (looking at the Google Book Search project as a means of saving culture and “explor[ing] whether saving culture and saving copyright can be made compatible goals”).
- ⁴⁰ Robert Darnton, *The Library in the New Age*, 55 N.Y. REV. BOOKS, June 12, 2008, at 39, available at www.nybooks.com/articles/21514.

search program to promote the public interest. Courts could condition a pro-Google fair use finding on universal access to the contents of the resulting database. Landmark cases like *Sony v. Universal*⁴¹ set a precedent for taking such broad public interests into account in the course of copyright litigation.⁴² Those who opt out of the settlement may be able to fight for such concessions, but for now the battle centers on challenges to the settlement itself.

Both James Grimmelmann and Pamela Samuelson have suggested several principles and recommendations to guide judicial deliberations on the proposed settlement.⁴³ Grimmelmann’s work has focused primarily on antitrust issues,⁴⁴ while Samuelson has concentrated on the concerns of academic authors.⁴⁵ Grimmelmann has succinctly summarized the settlement’s potential threats to innovation and competition in the market for book indices, and books themselves:

The antitrust danger here is that the settlement puts Google in a highly privileged position for book search and book sales. . . . The authors and publishers settled voluntarily with Google, but there’s no guarantee they’ll offer similar terms, or any terms at all, to anyone else. . . . [They] could unilaterally decide only to talk to Google.⁴⁶

⁴¹ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984).

⁴² Frank Pasquale, *Breaking the Vicious Circularity: Sony’s Contribution to the Fair Use Doctrine*, 55 *CASE W. RES. L. REV.* 777, 790 (2005).

⁴³ See Pamela Samuelson, *Google Book Search and the Future of Books in Cyberspace*, 94 *MINN. L. REV.* (forthcoming, 2010), available at <http://digital-scholarship.org/digitalkoans/2010/01/13/google-book-search-and-the-future-of-books-in-cyberspace/> (discussing the “six categories of serious reservations that have emerged about the settlement . . . reflected in the hundreds of objections and numerous amicus curiae briefs filed with the court responsible for determining whether to approve the settlement.”).

⁴⁴ See generally James Grimmelmann, *How to Fix the Google Book Search Settlement*, 12 *J. INTERNET L.*, Apr. 2009, at 1 (arguing that the Google Book Search antitrust case settlement should be approved with additional measures designed to promote competition and protect consumers) [hereinafter Grimmelmann, *Google Book Search Settlement*].

⁴⁵ Letter from Pamela Samuelson, Richard M. Sherman Distinguished Professor of Law, University of California, Berkeley School of Law, to Hon. Denny Chin, Judge, S.D.N.Y. (Sept. 3, 2009), available at www.scribd.com/doc/19409346/Academic-Author-Letter-090309 (urging the judge to condition “approval of the Settlement Agreement on modification of various terms identified herein so that the Agreement will be fairer and more adequate toward academic authors.”).

⁴⁶ James Grimmelmann, *In Google We Antitrust*, TPMCAFÉ BOOK CLUB, Jan. 15, 2009, http://tpmcafe.talkingpointsmemo.com/2009/01/15/in_google_we_antitrust.

Grimmelmann proposes several methods of assuring that the publishers will deal with other book search services.⁴⁷ Grimmelmann suggests an “[a]ntitrust consent decree” and “[n]ondiscrimination among copyright owners” as potential responses to the issues raised by the settlement.⁴⁸ Most of his proposal reflects a policy consensus that presumes competition is the ideal solution to abuses of power online.⁴⁹

Yet there are many reasons why competition is unlikely to arise in book search services, even if the settlement is altered in order to promote it.⁵⁰ Licensing costs are likely to be a substantial barrier to entry. A key to competition in the search market is having a comprehensive database of searchable materials; the more these materials need to be licensed, the less likely it is that a second comer can set up its own book archive. As scholars have demonstrated, deals like Google’s proposed settlement help entrench copyright holders’ claims for licensing revenue.⁵¹ Moreover, innovation in search is heavily dependent on having an installed base of users that effectively “train” the search engine to be responsive.⁵² The more search queries an engine gets, the better able it is to sharpen and perfect its algorithm.⁵³ Each additional user tends to decrease the cost of a better quality service for all subsequent users by contributing activity that helps the search engine differentiate between high and low quality organizational strategies.⁵⁴ Thus, incumbents with large numbers of users enjoy

⁴⁷ *Id.*

⁴⁸ Grimmelmann, *Google Book Search Settlement*, *supra* note 44, at 15.

⁴⁹ Grimmelmann does also propose some revised terms that would not be primarily designed to incentivize the development of new alternatives to Google Book Search; for example, he proposes “[l]ibrary and reader representation at the [Book Rights R]egistry” that would administer many aspects of the settlement. *Id.*

⁵⁰ See Bracha & Pasquale, *supra* note 5, at 1152 (“Though the market choices of users and technological developments constrain search engine abuse to some extent, they are unlikely to vindicate [certain social] values”); Frank Pasquale, *Seven Reasons to Doubt Competition in the General Search Engine Market*, MADISONIAN, Mar. 18, 2009, <http://madisonian.net/2009/03/18/seven-reasons-to-doubt-competition-in-the-general-search-engine-market>.

⁵¹ See James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 884 (2007) (describing how the decision as to whether to fight for fair use or license a copyrighted work can be difficult “because the penalties for infringement typically include supracompensatory damages and injunctive relief”).

⁵² James Pitkow et al., *Personalized Search*, 45 COMMS. ACM, Sept. 2002, at 50 (discussing methods of personalizing search systems).

⁵³ For example, if 100 people search for “alternatives to Microsoft Word software” on a search engine on a given day and all pick the third-ranked result, the search algorithm may adjust itself and put the third-ranked result as the first result the next day. The most-used search engine will have more data to tweak its algorithms than its less-used rivals.

⁵⁴ Oren Bracha & Frank Pasquale, *Federal Search Commission: Fairness, Access, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1141, 1181 (2008); David A. Vise & Mark Malseed,

substantial advantages over smaller entrants. Restrictive terms of service also deter competitors who aspire to reverse engineer and develop better versions of such services.⁵⁵ In general purpose search, users cannot reproduce, copy, or resell any Google service for *any* reason, even if the behavior is manual and non-disruptive.⁵⁶ Another section proscribes “creat[ing] a derivative work of ... the Software.”⁵⁷ Advertisers face other restrictions, as Google’s AdWords Application Programming Interface (API) Terms & Conditions “impede advertisers’ efforts to efficiently copy their ad campaigns to other providers.”⁵⁸ All of these factors militate against robust competition in the comprehensive book search field.

Quantum leaps in technology capable of overcoming these brute disadvantages are unlikely, particularly because search is as much about personalized service as it is about technical principles of information organization and retrieval.⁵⁹ Current advantage in search is likely to be self-reinforcing, especially given that so many more people are using the services now than when Google overtook other search engines in the early 2000s.⁶⁰

What does an online world featuring an entrenched Google Book Search as gatekeeper look like? Initially, it will prove a vast improvement on the status

The Google Story 215 (2005) (noting that the most-used search engine will have more data to tweak its algorithms than its less-used rivals). (

⁵⁵ Though the precise terms of service of Google Book Search have not been finalized, Google’s more general terms of service are not promising. Google’s terms of service prohibit any action that “interferes with or disrupts” Google’s services, networks, or computers. Google Inc., Terms of Service § 5.4 (Apr. 16, 2007), www.google.com/accounts/TOS. Repeated queries to the service necessary to gather data on its operations may well violate these terms.

⁵⁶ *Id.* § 5.5.

⁵⁷ *Id.* § 10.2. Section 5.3 would proscribe both the automatic data collection and the use of a nonapproved “interface” for accessing Google’s database, regardless of the exact means. *Id.* § 5.3.

⁵⁸ Ben Edelman, *PPC Platform Competition and Google’s ‘May Not Copy’ Restriction*, June 27, 2008, <http://www.benedelman.org/news/062708-1.html> (arguing that “Google’s restrictions on export and copying of advertisers’ campaigns ... hinder competition in Internet advertising”). Though the hearing at which Professor Edelman was to testify was cancelled, he has documented these problems in some detail at his website, www.benedelman.org.

⁵⁹ John Battelle, *THE SEARCH: HOW GOOGLE AND ITS RIVALS REWROTE THE RULES OF BUSINESS AND TRANSFORMED OUR CULTURE* 8 (2005).at 8 (describing how personalized search enhances the value of search engines to both users and advertisers). Due to trade secrecy, it is impossible for policymakers to discover how much of the intermediary’s success is due to its employees’ inventive genius, and how much is due to the collective contributions of millions of users to the training of the intermediary’s computers.

⁶⁰ See Randall Stross, *Planet Google: One Company’s Audacious Plan to Organize Everything We Know* 98 (Free Press 2008) (describing success of YouTube, a subsidiary of Google).

quo of bulky, hard-to-acquire, physical copies of books. But when we consider the ways in which knowledge can be rationed for profit, or structured to promote political ends, some worries arise. Google plans to monetize the book search corpus, and one predictable way of increasing its value is to make parts of it unavailable to those unwilling to pay high licensing fees. If the settlement allowed Google to charge such fees in an unconstrained manner, unmoored from the underlying costs of operating the project, the company would essentially be exploiting a public easement (to copy books) for unlimited private gain.⁶¹ The Open Content Alliance has questioned the restrictive terms of the contracts that Google strikes when it agrees to scan and create a digital database of a library's books.⁶² Those restrictive terms foreshadow potential future restrictions on book search services. The proposed deal raises fundamental questions about the proper scope of private initiative in organizing and rationing access to knowledge.

Well-funded libraries may pay a premium to gain access to all sources; lesser institutions may be granted inferior access. If permitted to become prevalent, such tiered access to information could rigidify and reinforce existing inequalities in access to knowledge.⁶³ Information tiering inequitably disadvantages many groups, promoting the leveraging of wealth into status, educational, or other occupational advantage. Information is not only intrinsically valuable, but also can be a positional good, useful for scoring advantages over others.⁶⁴

⁶¹ Writers' Reps and Richard A. Epstein Objection filed with the Southern District of New York in re Google Book Search, available at <http://www.writersreps.com/feature.aspx?FeatureID=172> (arguing that the Google Book Search Settlement "would accomplish[] orphan legislation—but just for Google. ... If [Google] is to be handed exclusive possession after stealing the scans to begin with, then it should be required to share those scans.").

⁶² See Open Content Alliance, Let's Not Settle for This Settlement, www.opencontentalliance.org/2008/11/05/lets-not-settle-for-this-settlement (last visited Mar. 12, 2010) ("At its heart, the settlement agreement grants Google an effective monopoly on an entirely new commercial model for accessing books. It re-conceives reading as a billable event. This reading event is therefore controllable and trackable. It also forces libraries into financing a vending service that requires they perpetually buy back what they have already paid for over many years of careful collection.").

⁶³ Frank Pasquale, *Technology, Competition, and Values*, 8 MINN. J. L. SCI. & TECH. 607, 608 (2007) (explaining how "much technology is used not just simply to improve its user's life, but also to help its user gain advantage over others"). For example, "[t]est-preparation technologies ... creat[e] inequalities; students able to afford test-preparation courses, such as those offered by Kaplan, have a definite advantage over those who do not have access to such courses." *Id.* at 615 (internal citation omitted).

⁶⁴ Harry Brighouse & Adam Swift, *Equality, Priority, and Positional Goods*, 116 ETHICS 471, 472 (2006) ("[Positional goods] are goods with the property that one's relative place in the distribution of the good affects one's absolute position with respect to its value. The very fact that one is worse off than others with respect to a positional good means that one is

Admittedly, Google Book Search has so far proven a great resource for scholars. It has made “book learning accessible on a new, worldwide scale, despite the great digital divide that separates the poor from the computerized.”⁶⁵ Current access to knowledge is stratified in many troubling ways; the works of John Willinsky⁶⁶ and Peter Suber⁶⁷ identify many troubling current forms of tiering that pale before the present impact of Google Book Search.⁶⁸ Given the aggressive pricing strategies of many publishers and content owners, Google Book Search is a vital alternative for scholars.

Nevertheless, there is no guarantee in the current version of the settlement that Google Book Search will preserve its public-regarding features.⁶⁹ It may well end up like the powerful “group purchasing organizations” in the American health care system that started promisingly, but have evolved to exploit their intermediary role in troubling ways.⁷⁰ Google is more than just one among many online service providers jostling for a competitive edge on the web. It is likely to be the key private entity capable of competing or cooperating with academic publishers and other content providers. Dedicated monitoring and regulation of the settlement terms now could help ensure that book digitization

worse off, in some respect, than one would be if that good were distributed equally. So while it might indeed be perverse to advocate leveling down all things considered, leveling down with respect to positional goods benefits absolutely, in some respect, those who would otherwise have less than others.

⁶⁵ Darnton, *supra* note 40, at 76.

⁶⁶ JOHN WILLINSKY, *THE ACCESS PRINCIPLE: THE CASE FOR OPEN ACCESS TO RESEARCH AND SCHOLARSHIP* 5 (The MIT Press 2005) (describing extreme “digital divide” between those most connected to information resources and those cut off from them).

⁶⁷ *See generally* Peter Suber, *Open Access News*, www.earlham.edu/~peters/fos/fosblog.html. Suber is a leader of the open access movement, which aims to “[p]ut[] peer-reviewed scientific and scholarly literature on the internet[,] [m]ak[e] it available free of charge and free of most copyright and licensing restrictions[,] [and] remov[e] the barriers to serious research.” *Id.*

⁶⁸ *See id.* (chronicling on a daily basis news and controversies related to open access to scholarly materials on the Internet).

⁶⁹ Siva Vaidhyanathan, *Baidu.com Accused of Rigging Search*, *The Googlization of Everything*, Global Google, Jan. 2009, http://www.googlizationofeverything.com/2009/01/baiducom_accused_of_rigging_se.php (Feb. 19, 2009, 14:20 EST) (“‘Public failure’ [is a] phenomenon in which a private firm steps into a vacuum created by incompetent or gutted public institutions. A firm does this not for immediate rent seeking or even revenue generation. It does so to enhance presence, reputation, or to build a platform on which to generate revenue later or elsewhere. It’s the opposite of ‘market failure.’ And it explains a lot of what Google does.”).

⁷⁰ For background on group purchasing organizations, *see* S. PRAKASH SETHI, *GROUP PURCHASING ORGANIZATIONS: AN UNDISCLOSED SCANDAL IN THE U.S. HEALTH CARE INDUSTRY* 122 (Palgrave MacMillan 2009) (“The benefits of combined purchases would be greatly reduced in conditions where the middlemen . . . control the entire process through restrictive arrangements with suppliers and customers.”).

protects privacy, diverse stakeholder interests, and fair pricing of access to knowledge. Alliances between Google Book Search and publishers deserve public scrutiny because they permit private parties to take on what have often been public functions of determining access to and pricing of information. Where “regulatory copyright”⁷¹ has answered such questions with compulsory licenses,⁷² the new alliances aspire to put into place a regime of cross-subsidization resistant to public scrutiny or input.⁷³ Given the vital public interests at stake in the development of this information infrastructure, monitoring is vital.⁷⁴ Extant law provides little assurance that it will actually occur.

A Public Alternative?

In other work, I have proposed a number of regulations that would permit either government or public accountability groups to monitor search engines to detect abuses of their dominant position. To conclude this piece, I would like to raise one other alternative: a publicly funded search engine.

To the extent that search engines resist monitoring and accountability, governments should consider establishing public alternatives to them. Here, lessons from recent debates over health insurance may be instructive. There are structural parallels between the intermediary role of private health insurers (which stand as a gatekeeper between patients and providers of health products and services) and that of search engines (which stand between searchers and

⁷¹ See Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 91 (2004) (describing the growth and scope of compulsory licensing statutes that provide for compensation for copyright holders while denying them the right to veto particular uses of their work).

⁷² Marybeth Peters, the U.S. Register of Copyrights, has objected to the proposed Google Books Settlement on the grounds that it would violate traditional norms of separation of powers in copyright policy. See *Hearing on Competition and Commerce in Digital Books: The Proposed Google Book Settlement Before the House Comm. on the Judiciary*, 111th Cong. (2009) (statement of Marybeth Peters, Register of Copyrights), available at <http://judiciary.house.gov/hearings/pdf/Peters090910.pdf>, at 2 (“In the view of the Copyright Office, the settlement proposed by the parties would encroach on responsibility for copyright policy that traditionally has been the domain of Congress. . . . We are greatly concerned by the parties’ end run around legislative process and prerogatives, and we submit that this Committee should be equally concerned.”).

⁷³ Google considers its pricing and ranking decisions a closely held trade secret—an assertion that would seem very strange if it came from a public library. See Pamela Samuelson, *Google Books Is Not a Library*, THE HUFFINGTON POST, Oct. 13, 2009, www.huffingtonpost.com/pamela-samuelson/google-books-is-not-a-lib_b_317518.html (“Libraries everywhere are terrified that Google will engage in price-gouging when setting prices for institutional subscriptions to [Google Book Search] contents.”).

⁷⁴ Frank Pasquale, *Beyond Competition and Innovation: The Need for Qualified Transparency in Internet Intermediaries*, 104 Nw. U. L. REV. 105 (2010) (offering proposals for monitoring internet intermediaries).

providers of information). The 1965 decision to establish Medicare as a public option for an elderly population ill-served by private providers and insurers may prove a model for an information economy plagued by persistent digital divides.

As the United States debated health reform from 2009 to 2010, there was a tension between regulation-focused approaches (which would require revelation and alteration of private insurers’ unfair practices) and a public option that would compete with existing insurers. Democrats ultimately gave up on pushing the public option, but the debate exposed the many positive aspects a state-sponsored alternative can provide in certain markets. A public option could play a role in search parallel to the role that Medicare plays in the health system: guaranteeing some baseline of transparency in pricing and evaluation.⁷⁵

The recent Google Book Search settlement negotiations have led Siva Vaidhyanathan to characterize Google’s archive project as evidence of a “public failure.”⁷⁶ Whereas government intervention is often necessary in cases of “market failure,” Vaidhyanathan argues that the reverse can occur: market actors can step into a vacuum where government should have been. In the case of digitized books, the problem is presented starkly: Why has the Library of Congress failed to require *digital* deposit of books, instead of merely accepting paper copies? We can debate when such a requirement became plausible; however, had the government required such deposit as soon as it became feasible, the problematic possibility of a Google monopoly here would be much less troubling. If digital deposit ever is adopted, the government could license its corpus to alternative search services. There is no good reason why the company that is best capable of reproducing books (and settling lawsuits based on that reproduction) should have a monopoly on search technologies used to organize and distribute them.

More ambitiously, an NGO or quasi-administrative NGO could undertake to index and archive the web, licensing opportunities to search and organize it to various entities that promise to maintain open standards for ranking and rating websites and other Internet presences.⁷⁷ Wikipedia, Slashdot, and eBay all

⁷⁵ For more on the role of public options like Medicare in the modern medical sector, see Frank Pasquale, *Making the Case for the Public Plan, Part II: Public Option as Private Benchmark*, July 15, 2009, available at <http://balkin.blogspot.com/2009/06/making-case-for-public-plan-part-ii.html>.

⁷⁶ Vaidhyanathan, *supra* note 69. (“‘Public failure’ [is a] phenomenon in which a private firm steps into a vacuum created by incompetent or gutted public institutions. A firm does this not for immediate rent seeking or even revenue generation. It does so to enhance presence, reputation, or to build a platform on which to generate revenue later or elsewhere. It’s the opposite of ‘market failure.’ And it explains a lot of what Google does.”)

⁷⁷ For a cultural case for government intervention here, see Mário J. Silva, *The Case for a Portuguese Web Search Engine*, <http://www.google.com/url?sa=t&source=web&cd=1&ved=0CBUQFjAA&url=http%3A%2F%2Fciteseerx.ist.psu.edu%2Fviewdoc%2Fdownload%3Fdoi%3D10.1.1.106>.

suggest methods of evaluating relevance and authority that could be employed by public, open search engines. If such a search engine became at least somewhat popular (or popular within a given niche), it could provide an important alternative source of information and metadata on ranking processes.

The need for a public option in search becomes even more apparent when we consider the waste and inefficiency caused by opaque intermediaries in other fields. Like private health insurers, Google is a middleman, standing between consumers and producers of knowledge. In programs like Book Search, it will effectively collaborate with copyright owners to determine what access people get, how much they have to pay, and on what terms. In the health field, providers and private insurers are both very concentrated in the U.S., and consumers (*i.e.*, the businesses and individuals who buy insurance plans) are not. Insurers and providers also jealously guard the secrecy of many pricing decisions.⁷⁸ That is one key reason why the U.S. spends so much more on health care than other industrialized nations, without getting consistently better results, access, or quality.

Health care reformers often split into two camps: those who believe that regulation of middlemen like insurers can bring about fair results, and those who believe that only a public option can serve as a benchmark for judging the behavior of private insurers. The Patient Protection and Affordable Care Act (PPACA) of 2010 decisively opted for the regulatory option, and the early stages of its implementation have been rocky. The constitutional challenges to search engine regulation would likely prove more serious than the many lawsuits now attacking PPACA. Therefore, even if the public option in health care is off the table now, it should inspire future proposals in information policy, where regulation of intermediaries may be even more difficult than it has proven to be in health care. If search engines consistently block or frustrate measures to increase their accountability, public alternatives could prove to be an indispensable foundation of a fair, just, and open information environment.

5334%26rep%3Drep1%26type%3Dpdf&ei=IWZYTJbaCoKC8gapvY2xCw&usg=AFQjCNHdTPpTBUuNHZhTOZtGaRiVKP6C4g&sig2=9a0aKLXiXOOuYHMewopVQ (describing the value of a Portuguese-oriented search engine); JEAN NOEL JENNENY, *GOOGLE AND THE MYTH OF UNIVERSAL KNOWLEDGE: A VIEW FROM EUROPE* (Univ. of Chicago Press 2007). Whereas these authors believe that English-language bias is a particularly problematic aspect of Google's hegemony in the field, I argue that the possibility of many kinds of hidden bias counsel in favor of at least one robust, publicly funded alternative.

⁷⁸ See, e.g., Uwe Reinhart, *The Pricing of U.S. Hospital Services: Chaos Behind a Veil of Secrecy*, at <http://healthaffairs.org/cgi/content/abstract/25/1/57>; Annemarie Bridy, *Trade Secret Prices and High-Tech Devices: How Medical Device Manufacturers are Seeking to Sustain Profits by Propertizing Prices*, 17 TEX. INTEL. PROP. L.J. 187 (2009) (discussing "recent claims by the medical device manufacturer Guidant that the actual prices its hospital customers pay for implantable devices, including cardiac pacemakers and defibrillators, are protectable as trade secrets under the Uniform Trade Secrets Act.").