Truth in Advertisement

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Me: "Hey Siri, tell me a riddle." Siri: "I would, but all the riddles I know are in a distant galactic language."[2]

I. Section 2 of the Sherman Act

With over 3.5 billion searches per day, Google ("the Company") has quickly gained revenue through online advertising services such as Google Ads, AdMob, and AdSense; that host advertisements on websites.[3] The Company has arguably excluded competition by forcing publishers to transact business through Google which allows publisher and advertiser inventory to be controlled through a pattern of anticompetitive conduct.[4] This type of margin squeeze restricts publishers from selling their inventory on multiple exchanges, effectively making Google the only intermediary and squeezing others out of the online advertising market.[5] Also, this form of anticompetitive conduct has augmented the cost of transacting on an ad exchange, enabling Google to charge opaque fees that are indiscernible.[6] It would be hostile to the purpose of the Sherman Act to allow a dominant firm like Google to reign free to eliminate nascent competitors at will – particularly in industry marked by rapid technological advancement and frequent paradigm shifts.[7] Next, the Company executed agreements such as the acquisition of DoubleClick, the largest provider of internet advertising and a few years later, Google conspired with Facebook to not compete in the online advertisement market – to have Facebook exit the online advertisement market.[8] The Google agreement with Facebook

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[1] Amir Dezfuli, freelance legal writer; LL.M., Arizona State University Sandra Day O'Connor College of Law; J.D., Arizona Summit Law School; B.A. University of California at Irvine. Thank you to those who have helped me reach this point in Antitrust. Antitrust is one way of occupying the field of Artificial Intelligence ("A.I.") and I am humbled to have the opportunity to write about this subject. I find it difficult and amazed to comprehend the immense knowledge that A.I. possesses and what it can do for the future. This requires me to understand that the future includes a program that is much smarter and faster than I.

[2] *A Casual Conversation with Siri*, March 6, 2022 on Amir's iPhone 8 Software Version 15.3.1 (19D52).

[3] *Google Inc. v. Hood*, 822 F.3d 212 (5th Cir. 2016) [hereinafter *Hood*] (In exchange for using Google's search engine, the Company trades accumulates consumer personal information and attention in exchange for results on the screen. Google then sells ads by bartering consumer information and attention).

[4] *State of Texas v. Google*, Case No.: 4:20-cv-00957 (E.D. Tex. 2020) at ¶112. Noting that Google uses its control over publishers' inventory to block exchange competition.

[5] *Id*.

[6] *In re DoubleClick Inc*. Privacy Litigation, 154 F.Supp.2d 497 (S.D.N.Y. 2001) [*hereinafter* DoubleClick] ("There are two types of ad intermediation products: ad networks and ad exchanges. Ad networks and ad exchanges are alike in that they both aggregate advertising inventory. Ad networks are intermediaries that aggregate or purchase advertising inventory from a group of websites and sell this inventory to advertisers or ad agencies, taking a share of the revenue from each sale. Ad exchanges differ in that they aggregate inventory by providing platforms for advertisers and publishers to list and bid for inventory").

[7] *Alaska Airlines, Inc. v. United Airlines. Inc.*, 948 F.2d 536, 539 (1991) [hereinafter *United*].

[8] *Supra* note 4, at ¶141. (Google's efforts to gain market share in online ad served to meet the treat to Google's monopoly of ad networks by keeping rival ad buying tools from gaining the critical mass of users necessary to attract small publishers' attention away from Facebook as the platform for advertisement).

unreasonably restricted trade in the relevant market under a *rule of reason* analysis.[9] Online media companies that operate mobile application and operate websites have necessarily been restricted from advertising with non-Google specific ad formats.[10] Advertisers on the other end are blocked from trading their inventory through more than one marketplace to promote competition.[11] The totality of the evidence will prove a §1 agreement and a fundamental purpose to not compete through maintenance of a dominant monopoly position.[12] Online publishers and advertisers alike are unable to work with formats unrelated to Google which necessarily restrict online ad formats to the type specified by the Company. Should the Court impose a structural remedy or merely enjoin the offensive conduct at issue they will look to the nascency and imminence of competitive threat to charge the Company and to satisfy the Sherman Act threshold requirement of substantiality.

This note, in essence charges Google with an unlawful campaign to defend its monopoly position in the market for online advertising by designing to run as a middleman between advertisers and publishers.[13] Particularly, on more than one occasion the Company has been accused that it violated §1 and §2 of the Sherman Act ("the Act") by engaging in a series of anticompetitive, exclusionary, and predatory acts to maintain its monopoly power.[14] Google also attempted, to monopolize the online advertising market, likewise in violation of the Sherman Act.[15] Conclusively, it has been contended that certain steps taken by Google as part of its campaign to protect its monopoly power, namely tying its online ad space and entering into an exclusive dealing arrangement with Facebook, violated §1 of the Act.[16] The Company has maintained its monopoly power by anticompetitive means and attempted to monopolize online ads, both in violation of §2 and §1.[17] Google violated §1 of the Sherman Act by unlawfully tying the online ad market to Google specific ad buying tools. The facts may support

[9] *Id*. (Meritoriously, it could be in the best interest of Google to admit that its exchange should be more similar to *Qualcomm* and not like *American Airlines* because publishers and advertisers could possibly benefit if Google admits that it pushed for at least ad networks to be deregulated.)
[10] *Id.*, *Supra* note 4, at ¶63.
[11] *Supra* note 4, at ¶113.
[12] *Id.* (As part of this predatory transaction, Google violated user privacy and limited competition whereby access to American end-to-end encrypted messages, videos, audio files, and photos were compromised).
[13] *Id*.
[14] *Elon Musk Has an Agreement to Acquire Twitter*. https://cheddar.com/media/twitter-in-talks-with-musk-over-bid-to-buy-platform-report (last visited April 25, 2022). (To put it in perspective, Twitter's board on April 25, 2022, accepted Elon Musk's offer to buy nine per cent of the company at $54.20 per share. Twitter is one company that uses Google advertisement and Elon Musk alone has 83 million followers on Twitter).
[15] *Id*.
[16] *Facebook 10-K report* (2016). https://www.sec.gov/Archives/edgar/data/0001326801/000132680117000007/fb-12312016x10k.htm#s5611039F2AC75A779AB7D0EDD63A52CA (last visited April 15, 2022) [hereinafter *FB 10-K 2016*] at 9. (Facebook generates over ninety percent of its revenue from advertising that are generated from third party advertisers).
[17] *Supra* note 4, at ¶175. (Google was concerned about large entrants entering the online ad market).

the contention that Google's marketing agreements with Facebook constituted unlawful exclusive dealing under criteria established by current §§2 and 1 precedent.[18]

To establish a violation under Sherman Act §§2 and 1, the government must prove that Google's possession of the monopoly power and the willful acquisition and maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.[19] Monopoly power is the power to control prices or exclude competition.[20] More specifically, a firm is a monopolist if it can profitably raise prices substantially above the competitive level.[21] To determine whether monopoly power exists, a court will define the relevant market and then assess the defendant's power to control prices or to exclude competition form the market.[22] A relevant market includes all possible substitutes for the Company's product viewed from the buyer's perspective and the Court will consider both geographic limitations on the market.[23] Geographic limitations include tariffs or transportation costs which is less of a factor in this arena because limitations imposed by buy side and sell side production substitutions will be taken into consideration among fixed costs.[24] Buy side and sell side economies of scale include growth on the buy side which reduces cost on the sell side and makes production more attractive to other users-accelerating growth in buy side exponentially.[25] This strong effect causes entire industries to be created and destroyed far more rapidly than during advertisements pre-internet era.[26] General search services with respect to online advertisement are marketplaces that monetize inventory through Google including consumer personal information in real time.[27] This service offers consumers access to volumes of information across the internet for large advertisers and small advertisers.[28] The relevant product market is all online advertisement and the relevant geographic market is the internet with resources such as books or specialized search providers not being an interchangeable substitute for Google products.[29] By April 2018, Google has accounted for an almost ninety percent share on computer and on mobile because the Company offers an exclusive breadth of consumer information and attention in real time.[30] Online advertising is a

[18] The challenged agreement includes both Facebook and Google's agreement that Google tried to bring Facebook to the negotiating table via a Facebook employee email and an internal November 2017 Google presentation discussing Google's stated endgame. *Supra* note 4, at 178-179.
[19] *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951) [*fn. 6*].
[20] *Id*., *supra* note 4, at ¶176.
[21] *Id*.
[22] *Id*.
[23] *Id*.
[24] *Id*. citing *United States v. Griffith*, 334 U.S. 100, 106 (1948) [*Griffith*].
[25] *State of Texas v. Google*, Case No.: 4:20-cv-00957 (E.D. Tex. 2020) at ¶71.
[26] *Id*.
[27] *Supra* note 25, at ¶71.
[28] *Id*.
[29] *DoubleClick* at 7. (The Commission suggested that the transaction that later eliminated competition between Google and DoubleClick did not include all online advertising market that include search advertising, ads sold through intermediaries, and directly sold ad inventory. "The evidence, indicates that all online advertising does not constitute a relevant antitrust market. Advertisers purchase different types of ad inventory for different purposes, and one type does not significantly constrain the price of another").
[30] *Id*. at 93.

relevant geographic market because other forms of advertising are not reasonable substitutes for such cost efficiencies.[31]

A. Anticompetitive Maintenance of Monopoly Power

Antitrust law was enacted in the late nineteenth century in response to unfair business acts by corporate monopolies and trusts, to control the marketplace.[32] The §2 of the Sherman Act prohibits the pursuit of "the willful acquisition or maintenance of … power" by a potential or actual monopolist."[33] It is unlawful for a person or firm to "monopolize … any part of the trade or commerce among the several States, or with foreign nations…"[34] This language limits a firm's power so as to lawfully purchase or propagate monopoly power. Essentially the offense of monopoly power under §2 has two elements; "(1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business accruement, or historic accident."[35] This section applies to most sectors of the economy where the exercise of monopoly power has been used to exclude competition.[36]

In *Otter Tail Power Co. v. United States*, the Supreme Court affirmed a finding of monopolization against a vertically integrated electric utility, applying the theory that rivals were induced to raise prices and reduce output.[37] Municipal utilities were limited in scope of transmission grid distribution from Otter Tail to customers because of a refusal to contract and protect its own presence.[38] The action of the district court was affirmed by the Court and it was held that the "use of monopoly power 'to destroy threatened competition' is a violation of the 'attempt to monopolize' clause of §2 of the Sherman Act."[39] The outward manifestation to refuse to transmit power over its lines to municipal utilities – a twinned resemblance with the conduct of Google.[40] Just like the transmission monopoly that allowed Otter Tail to confer an advantage over its municipal rivers through limitations on distribution, Google has a monopoly advantage in its search tool in adjacent markets to disadvantage rivals.[41] The Company has

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[31] *Id.* at 99 (As Google's Chief Economist explained: "[d]isplay and search advertising are complementary tools, not competing ones").
[32] *Griffith* at 108.
[33] *Grinnell* at 570-571.
[34] Sherman Act § 2, 15 U.S. C. §2 (2000).
[35] *United States v. Grinnell Corp.*, 384 U.S. 563, 570-571 (1966) ("*Grinnell*").
[36] *Id.*
[37] *Otter Tail Power Co. v. United States*, 410 U.S. 366, 370 (1973) ("*Otter Tail*"). (The economics of exclusion (monopoly) can be understood simply as pointing out that collusive outcomes can be achieved indirectly, as by denying actual or would-be competitors' access to low-cost inputs or access to customers and reducing their output).
[38] *Id.* at 377.
[39] *Id.*
[40] *Id.*
[41] *DoubleClick at 5.* (In the case, the FTC, using a merger analysis did not find, in a 4-1 decision, that advertisement space sold by search engines were not similar to space sold by publishers. Moreover, Google's merger with its DoubleClick business, made Google a dominant provider of online advertisement, and many of the time such

thus been the dominant provider of online advertisement, where much of its advertisement revenue is generated through the direct or indirect sale of space provided for on its search engine results and on third party publisher websites.[42]

Google provides search ads to websites ("publishers").[43] Google acts as a middleman between advertisers and publishers who want to profit from available space on their website and in particular, around specific search results.[44] Therefore, the Company works as an intermediation platform for online search advertisements.[45] As the strongest player in online search ad middleware, Google has a market share of over seventy per cent from 2006 to 2016.[46] The Company also maintains market share generally between seventy-five per cent and ninety per cent for online search advertisement, where it is present with its flagship product, the Google search engine.[47] The Company characterized its business in its 2021 annual report as one with formidable competition from companies as Facebook and Twitter that utilize referrals rather than through traditional search engines such as Bing.[48] Google's own search engine results and middleware may limit competitors in online search advertisements to sell ad space.[49] Therefore, other suppliers for online search ads have limited points of entry.[50] The Company maintained agreements that were individually negotiated with important publishers and these agreements were documented in the 2016 European Commission ("EC") case against the Company.[51] The agreements included exclusivity clauses that prohibited publishers from placing any search ads from competitors on their search results page.[52] Those agreements further limited placement of search ads for competitors where customers were able to clearly see and click on ads.[53] Google maintains that has competed

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merger transactions lead to one firm dominant while the other firm is dormant). *See also* Google acquisition of 24/7 Media. An instance where the smaller firm is dormant, leaving only Google).

[42] *Supra* note 4, at 94. (The evidence strongly supports an inference of an agreement.).

[43] *Antitrust: Commission fines Google £1.49 billion for abusive practices in online advertising*. [Last Visited March 21, 2021] https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1770. [hereinafter *Commission Fine].*

[44] *Id*. (To illustrate how [it] works, suppose an advertiser using the Google Ads binds a $10 Cost Per Impression ("CPM") for *Fox News'* ad impression targeted to John Connor. Because the program has access to the historical bid data belonging to Google Ads advertisers, the program can determine that the advertiser would not bid high enough for its bid to clear in Google's exchange. In such a situation, the advertiser's bid would have normally cleared in a non-Google exchange).

[45] *DoubleClick* at 500. (The FTC opposed exploitation of data sets of consumer information in a way that threatened consumer privacy because of what the FTC called *behavioral advertising)*. *See also* 2018 10-K "cost-per-impression (CPM), which means an advertiser pays us based on the number of times their ads are displayed on Google properties or Google Network Members' properties").

[46] *Id*.

[47] *Id*.

[48] *Annual Report 2021* at 5.

[49] *Id*.

[50] *Id*.

[51] *Commission Fine* at 1 (The FTC could have applied §1 of the Act to challenge a similar transaction and challenge the threat to enhance and facilitate the exercise of market power within the United States).

[52] *Id*.

[53] *Id*.

successfully in advertising-related business depending on products and technologies to the marketplace.[54]

II. Monopoly Power

The Supreme Court in *Grinnell* held that monopoly power that was willfully acquired or maintained is subject to Sherman Act liability. Grinnell manufactured plumbing supplies and fire sprinkler systems and owned majority shares in the stock of numerous companies that included alarm systems.[55] In 1906, a Grinnell Corp. subsidiary agreed to refrain from engaging in the burglar alarm business in that area.[56] However, in that case, the companies agreed to use certain equipment supplied by Grinnell and to share revenues.[57] To meet competition, the company later reduced its minimum basic rates and renewed contracts at substantially increased rate.[58] The Court argued that Grinnell's eighty-seven per cent of the entire domestic business leaves no doubt that the defendants have monopoly power.[59] Grinnell argued that the services provided were diverse and thus cannot be lumped together to make up the relevant market.[60] The Court countered that argument by pointing to a central station that receives signals and that such property protection competes constitutes a single basic service "the protection of property through use of a central service station."[61] The Court presented a question under §2 of the Sherman Act that included the accredited central station as a service that "makes up a relevant market and that domination or control of it makes out a monopoly of a 'part' of trade or commerce within the meaning of §2 …"[62]

Nevertheless, the term monopoly power defines the scope of a relevant market for consideration of whether the Company has "the power to control prices or exclude competition."[63] The court in *Grinnell* was concerned only with the permissibility of the interpretation of what counted as monopoly power in the relevant market, that is, the power to exclude competition and influence prices.[64] Here, the market share is generally the percentage of total sales, so it qualifies as a market that is entitled to antitrust scrutiny because the Company has a broad market share including the terms of the tying agreement discussed later

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[54] *Annual Report 2021* at 5.
[55] *Grinnell* at 566.
[56] *Id.* at 568.
[57] *Id.* at 570.
[58] *Id.* at 570.
[59] *Id.* at 571.
[60] *Id.* at 572.
[61] *Id.* ("We held in *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 356, that 'the cluster' of services denoted by the term 'commercial banking' is 'a distinct line of commerce.' There is, in our view, a comparable cluster of services here").
[62] *Id.*
[63] *Id.* at 571.
[64] *Id*.

in this note.[65] Here, it there is enough evidence to prove that, at least at a tacit level, there has been a previously designated anti-competitive agreement for use in the display advertising market, so whether Google qualifies as having monopoly power that is entitled to antitrust scrutiny under the terms of the agreement in question is not at issue.[66] Yet, a complaint that relies on monopoly power in the relevant market as identified in *Grinnell* justifies a requirement of a showing of anti-competitive conduct in the geographic area where it supplies publishers and advertisers.[67] Reliance on such market ambiguity shaped by Google to justify a showing of a relevant market that is anticompetitive necessarily presumes the existence of a monopolized market.[68]

Whereas publishers like newspapers and books mostly sell their inventory in marketplaces, online publishers like Fox News and ABC mostly sell their inventory through Google. [69] Other providers are unable to compete with Google's market share in excess of seventy per cent coupled with its substantial penchant to impede entry.[70] Moreover, Google charges fees that are exclusionary to actual cost or price which raise barriers to entry for rivals who cannot afford to pay industry pricing trends.[71] Advertisers also use ad buying tools to track purchases and potential customers with more ads – which are controlled by the Company.[72] Google excludes competition by unlawfully foreclosing competition in the market, including through unlawful tying arrangements that limit the ability of customers to switch to comparable firms.[73] That is, in the market for ad buying tools for advertisers, a pattern of exclusionary conduct targeting potential rivals in the online advertisement market.[74]

III. Maintenance of Monopoly Power by Anticompetitive Means

In *Aspen Skiing*, the Supreme Court discussed exclusionary conduct when it affirmed the Court of Appeals finding that the owner of three of the four mountain slopes in Aspen, Colorado violated §2 by withdrawing from an arrangement with the owner of the fourth mountain

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[65] *Lorain Journal v. United States*, 342 U.S. 143 (1951) ("attempt to monopolize clause of §2 when it uses its monopoly to destroy threatened competition").
[66] *Id.* at 145.
[67] *Grinnell* at 568.
[68] *Grinnell* at 563. *See also* 2018 10-K ("[Google] face[s] challenges from low-quality and irrelevant content websites, including *content farms*, which are websites that generate large quantities of low-quality content to help them improve their search rankings. [Google is] continually launching algorithmic changes focused on low-quality websites. If search results display an increasing number of web span and content farm, this could … reduce user traffic to [Google] websites").
[69] *Id., supra* note 4, at ¶50.
[70] *Supra* note 4, at ¶97.
[71] *Supra* note 25, at 37. *See also* 2018 10-k ("[Google] continue[s] to take actions to improve search quality and reduce low-quality content, this may in the short run reduce Google Network Members' revenues, since some of these websites are Google Network Members").
[72] *Id*. (Advertisers are thus unable to switch to a different provider without incurring significant switching costs – if at all).
[73] *Id.*
[74] *Id.*

slope.[75] Exclusionary conduct by a monopolist must be considered as a whole to look to whether the Company has unlawfully maintained power over it.[76] The maintenance of monopoly power is established under prior precedent as one that set prices below cost to drive out rivals and the disparagement of competitors so as to limit the size and strength of competing companies.[77] Thus, liability for monopolization has a threshold question as to whether such conduct was exclusionary.[78] A finding of a dominant market share and a barrier to entry establishes a presumption of monopoly power. Of these factors, the most significant is the control of natural advantages, or the ease with which a competitor may expand output.[79] Unless evidence reveals specific procompetitive business motivations that explain exclusionary conduct, Google's conduct could be held liable as anticompetitive under the *Kodak* analysis.[80] In that case, the Court stated that "the use of monopoly power to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful."[81] With Google's acquisition of DoubleClick, the FTC's Statement concerning the transaction noted that after careful review of the evidence, the Google acquisition of DoubleClick is not likely to substantially lessen competition.[82] The evidence today, however, indicates the contrary – that DoubleClick is not the same size or strength of what it was prior to the agreement in 2007.[83]

Google entered the exchange market prior to 2006 with significant competition for ad exchanges and publisher ad servers.[84] Internal Google documents unveil, unlawful tying arrangements with Facebook, its largest potential competitive threat,[85] and furthered patterns of exclusionary conduct limited competition by targeting rivals through price fixing, limitations on market allocation.[86] To enter the online advertisement market, and to maintain a competitive advantage Google acquired its publisher ad server from DoubleClick in 2008 but faced competition from Microsoft.[87] During the early days of online advertisement, prior to acquisition, DoubleClick was a threat to Google because DoubleClick was the largest provider of Internet advertising services globally.[88] Immediately after acquiring DoubleClick in 2009,

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[75] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) ("*Highlands*").
[76] *Supra* note 25, at 37.
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Image Technical Services, Inc. v. Eastman Kodak Co.*, 125 F.3d. 1195, 1208 (9th Cir. 1997) ("*Kodak*").
[81] *Id.*
[82] *Statement of FTC Concerning Google/DoubleClick*, FTC File No. 071-0170 (December 20, 2007) [hereinafter *FTC*].
[83] *Supra* note 75, at 4.
[84] *Kodak* at 488 (Scalia. J., dissenting) (it must be shown that anticompetitive methods were used to achieve or maintain monopoly power in a relevant market under §2).
[85] 2018 10-K at 58. ("Certain customers may receive cash-based incentives or credits, which are accounted for as variable consideration. [Google] estimate[s] these amounts based on the excepted amount to be provided to customers and reduce revenues recognized. [Google] believe[s] that there will not be significant changes to estimates of variable consideration").
[86] *Lorain* at 155 (holding that the second element of a monopoly maintenance claim is satisfied by proof of "behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way").
[87] *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001) [*Microsoft*].
[88] *Id., supra* note 25, at ¶177.

Google formulated a strategy to foreclose competition in the online advertisement market.[89] This strategy required large publishers requesting bids from advertisers, who used Google to maintain a representation for Google on the buy-side, the sell-side, and exchange-side, where the Company collected a fee respectively.[90] A practice like this left no alternative tools for advertisers – a market of 300,000 small sized to medium sized advertising firms in the United States – using Google tools to purchase search, text, and display ads.[91] Google maintained representation on each niche for ad buying tools for small advertisers that promoted profit-maximizing to promote predatory action.[92] This kind of incitement caused customers to have less products available to them. A court may deem conduct of this sort predatory because customers were forced to forfeit opportunities because of barriers against competition by equally efficient firms.[93]

The Company's exclusionary conduct in preserving its monopoly in the online ad market include the willful engagement of exclusionary conduct such as pricing below cost, disparagement of competitor's products, and exclusive dealings.[94] Specific attempts to monopolize the online ad market such as the unlawfully tying with Facebook to foreclose competition continue to injure competition in the market.[95] Much like the case against *Microsoft*, Google recognized early on that middleware was to be the *Trojan horse* that, once established, guided market share and the overall development of the industry.[96] In pursuit of maintaining its monopoly Microsoft sought to prevent middleware technologies from fostering the development of cross-platform application and promote barriers to entry.[97] Microsoft further noticed that middleware threatened to demolish its coveted monopoly power and effectively prevented programs such as Navigator and Java from competing.[98] As a middleman, Google is able to supply its own set of APIs.[99] Google has effectively acted to protect a barrier to entry into the online advertising market and maintain its monopoly position through APIs that allow Google to access blocks of code that perform important tasks for ad networks and ad exchanges.[100] For example, Google's

[89] *Id.* (The Commission voted to close the investigation of the Google acquisition through examination bearing on the transaction).
[90] *Id.*
[91] *Highlands* at 610.
[92] *Id*.
[93] *Id.* ("'motivated entirely by a decision to avoid providing any benefit' . . . 'the evidence supports an inference that Ski Co. was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival'").
[94] *Id*. at 60. (The online advertising market support business functions through its exposure of interfaces called "application programming interfaces" ("API's"). Microsoft sought to further its goals by motivating developers to concentrate on Windows-specific API's and ignore interfaces of middleware platforms that posed the greatest threat to Microsoft's goals. With a strong penchant for limiting competition, Google had left most advertisers only one way to purchase online advertisement.
[95] *Supra* note 25, at ¶304.
[96] *Microsoft* at 38.
[97] *Id*. at 39.
[98] *Id*. at ¶80.
[99] 2018 10-K at 70. ("In October 2016, Google completed the acquisition of Apigee Corp., a provider of API management").
[100] *Id.*

Ad Manager ("GAM") is an example of middleware that requires an underlying operating system which is Google itself.[101] Google introduced its GAM programming language which they contracted with Facebook to include a GAM runtime environment with Facebook's social media platform.[102] Fearing that Facebook would develop their own version of GAM as a competing platform, Google delayed release of technical information to publishers and advertisers, thereby preventing Facebook from having a compatible version of GAM when Facebook had recently acquired WhatsApp and Instagram.[103] Google then released the third version of GAM and contracted for agreement to disturbed and promote their online advertising market for an undiscernible amount of money and inhibit the distribution of Facebook version of GAM.[104]

A. **Combatting the Middleware Threat**

Customers were thwarted from switching to competing ad servers because Google not only had market power but also had its own ad server.[105] After the acquisition of DoubleClick ad server in 2008, Google was able to face significant competition on both the ad serve and ad exchange markets with about 50% market share.[106] Between 2011 and 2019, Google cornered the market and was used by a majority of publishers within the United States.[107] Exclusionary conduct followed the acquisition of DoubleClick so as to maintain monopoly power over ad serves and limit competition in the ad exchange market.[108] However, it can be argued that Google did not unfasten its AdWords-exchange-ad server tie.[109] Yet again, Google required users to adhere to mandatory price floors.[110] On July 27, 2016, Sundar Pichai, the Chief Executive Officer of Google, told reporters that an immediate 46% increase in the price floor for advertisements was required to pressure advertisers and publishers onto the Google platform.[111] According to Pichai, the most recent increase of 22.2% hike was inadequate for Google to cover production costs.[112] Several ad networks and ad exchanges declared bankruptcy in the years following the price hike.[113] In a recent Ninth Circuit case against *Qualcomm*, the court argued that Qualcomm did not *compete* in the antitrust sense against Original Equipment Manufacturers ("OEMs") like Samsung and Apple in manufacturing or selling cellphones and other end-use

[101] *Id*. at ¶41.
[102] *Id*.
[103] *Id*. at ¶141.
[104] *Id*.
[105] *Supra* note 4, at ¶109.
[106] *Id*.
[107] *Id.*
[108] *Id.*
[109] *Id*. at 110.
[110] *Id*. at 111.
[111] 2018 10-K at 16 ("In particular, Larry Page and Sergey Brin are critical to the overall management of Alphabet and its subsidiaries, and they, along with Sundar Pichai, the Chief Executive Officer of Google, play an important role in the development of [Google] technology.").
[112] "46% Price Floor Increase Required to save Advertising Industry" [March 18, 2022]. https://time.com/6128977/brands-announce-price-increases/.
[113] *Id.*

products like smart cars that consumers purchase and use.[114] Instead, Apple and Samsung are Qualcomm's customers.[115] To have established liability on restraining trade under Sherman Act §1, it must be proven that the defendant (1) established an agreement, and (2) the agreement was in unreasonable restraint of trade.[116] Restraints that are not unreasonable *per se* are judged under the *rule of reason* as in the case of agreements that are inferred from circumstantial evidence and defined as "a unity of purpose or a common design and understanding or a meeting of the minds in an unlawful arrangement".[117] Qualcomm charged unduly high royalty rates which enabled Qualcomm to control rivals' prices because Qualcomm received the royalty even when an OEM uses one of Qualcomm's rival's chips.[118] Thus, that "all-in" price of any modern chip sold by one of Qualcomm's rivals effectively included two components: (1) the normal chip price, and (2) Qualcomm's royalty surcharge.[119] The District Court held that Qualcomm violated Sherman Act §2 via *Highlands* analysis, holding that Qualcomm is under an antitrust duty to license rival chip manufacturers.[120] Still, the Ninth Circuit held that the district court erred in its holding because Qualcomm's novel OEM policy was not a Sherman Act violation.[121] On remand, the Court looked into the factual inquiry as to common control and independence of such respective companies where proof of an existing agreement is all that is required to establish illegality and sided with Qualcomm.[122]

a. The Auction Channel – Limiting User IDs [barriers but increased consumer satisfaction]

With respect to exclusive access to publishers' ad server user identifications ("IDs"), Google campaigns on three fronts.[123] First, Google developed a number of internal non-transparent auction programs – such as limited ad server user IDs to ensure the prominent presence of its middleware on a monopoly share somewhere between 75% to 90% during the relevant years in question,[124] and to increase the cost of relying on Google's platform.[125] Second, Google excluded competition in the online ad market with imposed limits on freedom of contracts to modify in way that allowed publishers and advertisers to lay product on other platforms.[126] Essentially publishers and advertisers do not have the ability to switch customers to

[114] *FTC v. Qualcomm Inc.*, 969 F.3d 974 (9th Cir. 2020) [*Qualcomm*]. *Citing* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985) [*Highlands*].
[115] *Qualcomm* at 984.
[116] *Qualcomm* citing *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, 836 F.3d 1171, 1178 (9th Cir. 2016).
[117] Qualcomm citing *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988).
[118] *Id*. at 996.
[119] *Id*. at 998.
[120] *Id*. at 995 *citing* Highlands.
[121] *Id*.
[122] *Id.*
[123] *Id.*
[124] *Commission Fine* at 1.
[125] *Id.*
[126] *2016 Report* at 7.

comparable services unless Google's advertisement products were being utilized.[127] By blocking the ability to access information about user impressions new companies were incapable to enter the market owing to limited demand, high capital costs, and control of supplies.[128] Thus, the strategical encryption of IDs is not discoverable and evaluation of monopoly power is made simpler when coupled with these barriers which could likely be considered a commodity.[129]

Second, these overly restrictive practices moved to restrict publishers' ability to access IDs with publishers' impressions within Google's new ad server.[130] Those impressions provided publishers and advertisers knowledge of consumer preferences motivated by a decision to avoid providing IDs even though such sharing of information would have provided immediate benefits to consumers.[131] That is, Google made it difficult to differentiate multiple IDs that belonged to the same consumer.[132] However, Google's network provided superior IDs that provided publishers and advertisers the ability to perform a variety of tasks—such as identifying IDs and publishers' impressions— if they used Google's ad buying tools and exchange.[133] Operations such as ID sharing, would have benefited consumers, who would have gained if publishers were permitted to maximize competition for inventory.[134] The Company's arrangement with publishers and advertisers foreclosed enough competition in the relevant market to constitute a §1 violation under the rule of reason.[135] As noted further below, the company's agreements, including non-exclusive agreements, may have restricted access to channels to advertising by making it more difficult to associate user IDs through an ad buying tool or exchange other than Google.[136]

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[127] *Supra* note 4, at 128.
[128] *Id*. at 125. *See also* Press Release FTC closes Google/DoubleClick Investigation. [Last Visited April 29, 2022] https://www.ftc.gov/news-events/news/press-releases/2007/12/federal-trade-commission-closes-googledoubleclick-investigation. [hereinafter *Press Release*] (The Commission defined *behavioral advertising* as one that includes tracking of consumer activities such as terms used, web pages visited, and content viewed for the purpose of delivering adverting targeted to the individual consumer's interest) at 2.
[129] *Supra* note 4 at 47-48. (Plaintiffs alleged that Google withheld consumer benefits associated with ID sharing that would permit competition for their inventory for an unreasonably long amount of time. The record comfortably supports deliberate efforts to discourage business with other possible ad companies. IDs include most user information through small blocks of data such as cookies that limits entry into the market.
[130] *Id.*
[131] *FTC* at 9. ("online advertising fuels the diversity and wealth of free information available on the Internet today." The evidence supports the inference that user IDs had become a commodity and that short-run benefits were sacrificed in the related market).
[132] *Id*. at 127. (Subsequently, competitors were unable to identify users and were forced to sell impressions at a lower price. In addition, there is evidence that such differentiated practice relative to previously existing third-party ad servers had significant financial resources in the market).
[133] *Id*. at 128.
[134] *Supra* note 25, at ¶129.
[135] *Id.*
[136] FTC at 9. ("In a common §1 rule of reason analysis, the plaintiff must weigh anticompetitive effects against pro-competitive benefits and conclude that the challenged agreement limits competition substantially.").

Consequently, publishers' inability to access ad server IDs gave Google the upper hand to recoup losses plus time value of money invested in non-Google products through opaque pricing for impression bid values, advertisement frequency, or second-bidding on targeted audiences.[137] These costs were capitalized or expensed based on the result of future advertisement activity and development decisions.[138] These practices subjected the company to various lawsuits claiming disparagement of competitor products and other contingent liabilities as disclosed in the consolidated Company statements.[139] Google maintained that an increase in revenues year over year was primarily driven by strength in programmatic advertisement buying, aimed at enriching user experience.[140] In 2016, the Company generated 90% of its total revenue from online advertising.[141] The Company maintained that digital publishers and advertisers could terminate their contracts at any time noting that those partners may choose available alternatives if more value is not created with Google ad products.[142] Unfortunately, revenue on online advertisement was limited by user activity for identifying the spending generated by click activity on Google properties and by impression activity on Google properties.[143]

On February 2, 2022, a similar charge was brought in the General Court and the Company's 2021 annual report noted that the "EC's Directorate General for Competition opened an investigation regarding display and ranking of shopping search results and advertisements.[144] On June 27, 2017, the EC announced a decision that imposed a $2.7 billion fine on the Company and an appeal was rejected by the General Court.[145] The decision concluded that Google had a national market with a dominant position since 2007, apart from the Czech Republic, where Google maintained monopoly power since 2011.[146] That case was originally filed about the same time as an Android-related distribution agreement case that infringed European competition law.[147] It has been noted that the two cases were separate and it was found that there had been (1) monopoly power at the time of the case, (2) there would have been more

[137] *Supra* note 128, at 7.
[138] *Id.*
[139] Alphabet Inc. 2016 10-K Annual Report ("2016 Report") ("Google properties revenues consist primarily of advertising revenue that is generated on: Google search properties. This includes revenue from traffic generated by search distribution partners who use Google.com as their default search in browser, toolbar, etc.; Other Google owned and operated properties like Gmail, Maps, and Google Play; and YouTube, including but not limited to, YouTube TrueView and Google Preferred. . . . Google Network Members' properties revenue consist primarily of advertising revenues generated from ads placed on Google Network Member properties through: AdSense [such as AdSense for Search, AdSense for Content, etc.]; AdMob; and DoubleClick AdExchange") *Id*. at 24.
[140] *Id*. at 25. (Other lawsuits against Google include patent infringement suits and unjustified refusals to deal).
[141] *Id*. at 7.
[142] *Id*. at 27.
[143] *Id*. at 7.
[144] Alphabet Inc. 2021 10-k Annual Report at 76. [*2021 Report*]. ("Adverse results in these lawsuits may include awards of substantial monetary damages, costly royalty or licensing agreements, or orders preventing [Google] from offering certain features, functionalities, products, or services, and may also cause [Google] to change business practices … which could result in a loss of revenues").
[145] *Id*. at 76.
[146] *Commission Fine.*
[147] *Supra* note 136, at 76.

competition had the Company not combined either computer and cellular service.[148] Thus, the company is subject to general business conditions and change in market conditions for the advertisement issue and also the issue relating to the two different monopoly power across open market transactions.[149] Ergo, the EC announced that on March 20, 2019 that certain contractual provision in agreements that Google had with AdSense for Search partners infringed European competition law.[150] The decision imposed a hefty fine and directed actions related to AdSense for Search partners' agreements.[151]

The Company mains that its primary auction-based advertising platform, Google Ads, competes with other online advertising platforms and networks, such as Amazon, Facebook, Criteo, and AppNexus.[152] Google had exclusive access to publishers' ad server IDs to develop programs designed to exclude competition in both ad buying tool market and the exchange[153] generally purchased through Google properties.[154] "A firm that has lawfully acquired a monopoly position is not barred from taking advantage of scale economies by constructing a large and efficient factory."[155] Yet, Google was found to have abused its monopoly power in 2018, in the case illustrated above where it was noted that Google placed restrictive covenants in third-party website contracts which prevented Google's competitors from placing their search ad on those websites.[156] And "if a firm has been attempting to exclude rivals on some basis other than efficiency, it is fair to characterize its behavior as predatory."[157]

B. Attempting to Obtain Monopoly Power by Anticompetitive Means

Google has a strong argument under *McQuillan* that publishers and advertisers do not have a patent right to use of either ad networks or ad exchanges.[158] However, unlike *McQuillan* which was about Sorbothane – a rubber product used in various forms of sport equipment; Google is merely advertising online a product and not forming the product.[159] Yet again, publishers and advertisers can argue about licensing with particular applications and their right to go beyond

[148] *Id*.
[149] *Id*.
[150] *Id*. (This form of lawsuit illustrates the change in market conditions during the years ending 2017-2019).
[151] *Id*.
[152] *Supra* note 131, at 5.
[153] *Supra* note 4 at ¶131.
[154] *Supra* note 131, at 48. (Google properties: AdWords, DoubleClick, Bid Manager, DoubleClick AdExchange, etc.).
[155] Highlands at 597. *See also Verizon Commc'ns Inc. v. Law Offices of Cirtis v. Trinko, LLP*, 540 U.S. 398 (2004).
[156] *Commission Fine*.
[157] *Highlands* at 605. ("there was insufficient evidence to present a jury issue of monopolization and (2) there was sufficient evidence to support a finding that Ski Co.'s intent in refusing to market the four-area ticket, 'considered together with its other conduct,' was to create or maintain a monopoly because Highlands share of the relevant market steadily declined after the four-area ticket was terminated"). *Id.* at 599.
[158] *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993) [McQuillan].
[159] *Id*. "There is sufficient evidence from which the jury could conclude that the S.I Group and Spectrum Group engaged in unfair or predatory conduct and thus inferred that they had the specific intent and the dangerous probability of success and, therefore, McQuillan did not have to prove relevant market or the defendant's marketing power." *Citing* McQuillan v. Sorbothane, Inc., 907 F.2df 154 (9th Cir. 1990).

the bounds of a particular application without being thwarted – much like the Plaintiffs in *McQuillan*.[160] In *McQuillan*, manufacturers sued distributers in a vertical case – a portion of antitrust which has been virtually eliminated from Antitrust enforcement. Enforcement of these forms of monopolistic power must now be attempted under §2 or they might lose under market definition because there are different ways to advertise outside of the online business and marketing is not the product itself.[161] §2 of the Sherman Act declares that it is unlawful for a person or firm to "attempt to monopolize . . . any part of the trade or commerce among the several states, or with foreign nations. . . ".[162] Relying on this language, in many of the cases against the Company, the plaintiffs argued that Google's anticompetitive efforts to maintain its monopoly power in the market for ad servers and exchange warrant additional liability as an illegal attempt to amass monopoly power in the relevant market.[163] To attach liability for attempted monopolization, it must be generally proven that "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize, and (3) that there is a dangerous probability that the defendant will succeed in achieving monopoly power."[164]

The crux of the case against Google here is that they have used their dominant market position in the online ad exchanges and ad networks markets to attempt to monopolize the online advertising market and to limit the development of middleware technologies.[165] Google sustains a barrier to entry into the online advertising market and maintains its monopoly position with full knowledge that its position could affect continued research and development in ways that my substantially lessen competition.[166] New economy antitrust analysis could look into marginal costs relative to fixed costs, supply chain issues, and economies of scale for middleware. [167] In order to present a framework that is broad enough to focus on competitive outcomes, in addition to effects that are addressed through results driven analysis, evidence should focus on clear tests for an antitrust market in a new middleware economy.[168] Additionally, evidence of anticompetitive effects that has resulted in harm to competition from exits of rival firms and limited entry dates requires greater transparency from the Company. [169] Nevertheless, under §2, new products and services, includes those that fall short of actual

[160] *McQuillan* at 457.
[161] *McQuillan* at 449. "the District Court entered a judgement ruling that petitioners had violated §2, and the Court of Appeals affirmed on the ground that petitioners had attempted to monopolize," and the Supreme Court "reversing because the §2 verdict rested on the attempt to monopolize ground alone. *Id.* at 460.
[162] 15 U.S.C. §2.
[163] *Microsoft* at 45.
[164] *Microsoft* at 45 *citing* Spectrum Sports, Inc. v. McQuillan, 506 U.S 447, 456 (1993).
[165] *Supra* note 25 at ¶140.
[166] *Id*. at ¶80. (Middleware requires an underlying operating system which is Google itself).
[167] *Id*. at ¶141.
[168] *Id*. at ¶41.
[169] *Id*. at ¶250, *Supra* note 80, at 55. The online advertising market support business functions through its exposure of interfaces called "application programming interfaces" ("API's"). APIs allowed Google to access blocks of code that perform important tasks for ad networks and ad exchanges. As a middleman, Google supplied its own set of APIs with full knowledge that it would have left competitors with such a small share of ad tools as to endow Google with *de facto* monopoly power in the middleware market.

monopolization can also be unlawful through the attempt of conduct, intent and success.[170] In assessing the probability of success, the Company and the court must identify the market share which must generally require adequate representations of revenues from advertisement and other specific attempts to affect business conduct.[171]

a. Price Discrimination and Restraints

Customers were thwarted from switching to competing ad servers because Google not only had market power but also had its own ad server.[172] After the acquisition of DoubleClick ad server in 2008, Google was able to face significant competition on both the ad serve and ad exchange markets with about 50% market share.[173] Between 2011 and 2019, Google cornered the market and was used by a majority of publishers within the United States.[174] Exclusionary conduct followed the acquisition of DoubleClick so as to maintain monopoly power over ad serves and limit competition in the ad exchange market. However, it can be argued that Google did not unfasten its AdWords-exchange-ad server tie.[175] Yet again, Google required users to adhere to mandatory price discrepancies.[176] On July 27, 2016, Sundar Pichai, M.S., Google Chief Executive Officer (affiliated with Alphabet Corporation), told reports that an immediate 46% increase in the price floor for advertisements was required to pressure advertisers and publishers onto the Google platform. According to Pichai, the most recent increase of 22.2% hike was inadequate for Google to cover production costs. Several ad networks and ad exchanges declared bankruptcy in the years following the price hike.[177] In a recent Ninth Circuit case against *Qualcomm*, the court argued that Qualcomm did not "compete" in the antitrust sense against Original Equipment Manufacturers ("OEMs") like Samsung and Apple in manufacturing or selling cellphones and other end-use products like smart cars that consumers purchase and use.[178] Instead, Apple and Samsung are Qualcomm's customers.[179] To establish liability in

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[170] *Id*. (GAM is an example of middleware. The Company introduced its GAM programming language which they contracted with Facebook to include a GAM runtime environment with Facebook's social media platform. Fearing that Facebook would develop their own version of GAM as a competing platform, Google delayed release of technical information to publishers and advertisers, thereby preventing Facebook from having a compatible version of GAM when Facebook had recently acquired WhatsApp and Instagram and the Company did not intend to abandon the development of its own ad space. Google then released the third version of GAM and contracted for agreement to disturbed and promote their ad network and ad exchange for an undiscernible amount of money and inhibit the distribution of Facebook version of GAM).

[171] Jonathan Baker et al., Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy 310 (West Academic Publishing, 3rd ed. 2016) [hereinafter *Baker*].

[172] *Supra* note 25, at ¶109.

[173] *Id*.

[174] *Id.*

[175] *Id*. at ¶110.

[176] *Id*. at 111.

[177] "46% Price Floor Increase Required to save Advertising Industry" [March 18, 2022]. https://time.com/6128977/brands-announce-price-increases/.

[178] *FTC v. Qualcomm Inc.*, 969 F.3d 974 (9th Cir. 2020) [*Qualcomm*]. *Citing* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985) [*Highlands*].

[179] *Qualcomm* at 984.

restraint of trade under Sherman Act §1, it must be proven that the defendant (1) established an agreement, and (2) the agreement was in unreasonable restraint of trade.[180] Restraints that are no unreasonable *per se* are judged under the *rule of reason*.[181] Qualcomm was charging unreasonably high royalty rates which enabled Qualcomm to control rivals' prices because Qualcomm received the royalty even when an OEM uses one of Qualcomm's rival's chips.[182] Thus, that all-in price of any modern chip sold by one of Qualcomm's rivals effectively included two components: (1) the normal chip price, and (2) Qualcomm's royalty surcharge.[183] The District Court held that Qualcomm violated Sherman Act §2 via *Highlands*, holding that *Qualcomm* is under an antitrust duty to license rival chip manufacturers.[184] Yet the Ninth Circuit held that the district court erred in its holding because Qualcomm's novel OEM policy was not a Sherman Act violation.[185]

IV. Section One of the Sherman Act

In a §1 case, "every contract, combination . . ., or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . ."[186] Pursuant to this statute, courts have condemned tying arrangements, reciprocal dealings, and exclusive dealing contracts.[187] In *Jefferson Parish v. Hyde*, Justice O'Connor stressed that "there must be a coherent economic basis for treating the tying and tied products as distinct."[188] Further, "for products to be treated as distinct, the tied product must, at a minimum, be one that some consumers might wish to purchase separately without also purchasing the tying product."[189] Where agreements have been challenged as exclusive dealings, one party sells a product or service on a contingent basis that substantially foreclose competition in a relevant market by agreeing on the condition that the customer not obtain some other product or service and therefore reducing the number of outlets available to a competitor to reach prospective customers of that party.[190] In a 1974 case, the Supreme Court held that such an arrangement may have an overall pro-competitive effect in terms of efficiency and innovation to consumers, thus making it clear that the presumption of anticompetitive effects derived from concentration are rebuttable.[191] The *General Dynamics* Court agreed with the Majority in *Hyde*, however, when it sided more with Justice Stevens that an evil of tying lies in its ability to

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[180] *Qualcomm* citing *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, 836 F.3d 1171, 1178 (9th Cir. 2016).
[181] Qualcomm citing *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988).
[182] *Id*. at 996.
[183] *Id*. at 998.
[184] *Id*. at 995 *citing* Highlands.
[185] *Id*.
[186] 15 U.S.C. §1 (1890).
[187] *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984) (*discussing* Reasonableness) [hereinafter *Hyde*].
[188] *Id*.
[189] *Id*.
[190] *Id*.
[191] *United States v. General Dynamics Corp*., 415 U.S. 486 (1974) (*discussing* erosion of Structure Presumption) [hereinafter *General Dynamics*].

facilitate price discrimination.[192] The Court made clear that price discrimination might decrease rather than increase the economic cost of a seller's [monopoly] power, but it may not shift monopoly rents . . . to do so extends its monopoly unlawfully, and the resulting tie forecloses [competition].[193] Here, to limit transparency, complex programs were designed to help advertisement through Google ad buying only.[194]

An agreement that may tend to restrain trade are classified through one of two categories.[195] The first category is in and of itself unreasonable and is therefore *per se* illegal; or second, restraints that require analysis via the *rule of reason*.[196] More nuanced analysis can be found under latter Court precedent, nonetheless, particular restraints often require a traditional approach.[197] Practices that restrict competition and decrease output are *per se* illegal and do not require further analysis under §1.[198] *Per se* rules include conduct such as concerted activities, limited output, and fixed prices.[199] In most §1 cases the Court will apply the rule of reason, which weighs anticompetitive effects against procompetitive benefits.[200] Under this approach, the burden of persuasion is on the plaintiff to prove that the agreement being challenged has substantially harmed competition.[201] Liability for tying under the rule of reason requires three met conditions.[202] First, the company would need market power in the tying product; second, the company would need a not insubstantial market power threat in the tied product; and third, treating the products as distinct requires a coherent economic basis.[203] All three elements are required to be seen through the lens of a rule of reason or *per se* analysis which is however less fixed than they appear.[204] Subsequently, the Court has held, "naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis."[205] Further, "no elaborate industry analysis is required to demonstrate the anticompetitive character of . . ." such agreements to withhold a particular

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[192] *Hyde* at 54.
[193] *Id*.
[194] *Supra* note 25, at ¶134.
[195] *Baker* at 685.
[196] *Id.* at 118.
[197] *Id.* at 210. *Citing* Hyde.
[198] *Id*. ("horizontal agreements between actual or potential competitors to fix or stabilize prices" as discussed on pages 210 and 2011. "Horizontal territorial, consumer, output, and other market restraints between competitors" as discussed on page 213. "Group boycotts by competitors with shared market power or control over a scarce resource or facility" a discussed-on page 216).
[199] *Id*.
[200] *Id*.
[201] *Id*.
[202] *Hyde* at 54. [*citing* Highlands (Contractual and technological artifices that are clearly illegal my dispose of a cause on those basic facts. In a horizontal price fixing situation, some acts may also be considered *per se* unlawful so as to entitle the plaintiff judgement only by making out the elements of the *prima facie* case described above].
[203] *Highlands* at n.9 (In 1975, the Colorado Attorney General filed a complaint against Ski Co. and Highlands alleging a form for price fixing in violation of §1 of the Sherman Act and the case was settled by a consent decree that permitted the parties to continue to offer the four-area ticket provided that they set their own ticket prices unilaterally before negotiating terms.) Tr. 229-231.
[204] *California Dental Ass'n v. F.T.C.*, 526 U.S. 756, 760 (1999).
[205] *Id*.

desired service.[206] In each of these cases, the Court has noted that contracts, combinations, or conspiracies in restraint of trade that are not *per se* illegal are judged under a truncated version of the *rule of reason* known as the *quick look* approach.[207] However, practices considered *per se* illegal include horizontal agreements between potential competitors and actual competitors to stabilize prices or fix prices.[208] Moreover, horizontal group boycotts by competitors with shared market power or control over a scarce recourse of facility are subject to *per se* consideration.[209]

Under the *per se* rule, Google has the ability to counter the accusations against it by arguing that the evidence against it is almost entirely to manipulate advertisers' bid without knowledge prior to routing it to the exchange.[210] Nonetheless, the Google exchange ensures that advertisers bidding through Google Ads are customer centric and preferred by smaller firms.[211] In *Socony*, the Court was able to hold the defendant liable under an indictment alleging that, they "conspired to raise and maintain spot market prices of gasoline . . . in the Midwestern Area" –arguing that such price fixing in interstate commerce are unlawful *per se* under the Sherman Act.[212] Here, although Google has effective prices, internal Google documents showed inside information trading that gave a competitive edge in the advertising market.[213] Thus, Google having changed the nature of its business to be more in line with its acquisition of DoubleClick may have similarly violated the issue of horizontal price fixing discussed in *Socony* because "prices rose and jobbers and consumers in the mid-western area paid more for their gas than they would have paid by for the conspiracy."[214] And price fixing are similar to these complex programs by serving a simple purpose –to gain an advantage in ways that no other exchange can replicate.[215]

A. Tying

In *Socony*, the defendant's conduct violated §1 of the Sherman Act because "prices rose and jobbers and consumers in the Mid-Western area paid more for their gas than they would have paid but for the conspiracy."[216] Here, Google's purpose is not merely to affect information but,

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[206] *Id*.
[207] *Id*. at 761.
[208] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007) ("the crucial question" in a §1 case "Is whether the challenged anticompetitive conduct 'stems from independent decision or from an agreement, tacit or express'" and inferences that are logical and supported by facts stated in the complaint).
[209] *Id*. (To support whether there was an agreement under §1, the issue is whether the parties negotiated to arrange the market in their favor. The Act requires proof and analysis of anticompetitive effect in the interest of efficiency).
[210] *United States v. Socony-vacuumed Oil Co*. 310 U.S. 150 (1940) (*per se* violation) [hereinafter *Socony*].
[211] *Id., supra* note 4, at ¶135.
[212] *Id.*
[213] *Supra* note 4, at §136.
[214] *Supra.*
[215] *Supra* note 4, at ¶137.
[216] *Supra*.

like *Socony,* collusively affected market price for the product.[217] Namely, Google's combination of its ad network and ad exchange by technological and contractual artifices raise the issue of unlawful tying to the extent that those actions forced customers and consumers to take the ad network as a condition of obtaining the ad exchange.[218] Similarly, such publisher ad servers and exchanges suggest a basic support structure function would limit Google's advantage and competitors would offer similar feature on which applications can rely.[219] Google quants use its obvious monopoly power to provide unique APIs which manipulate auction algorithms that modify exchange architecture to promote revenue and promote barriers.[220] The facts underlying tying publishers' user IDs, are contrary to representations made to the United States Congress during the DoubleClick acquisition.[221] The Company specified to Congress that "DoubleClick data is owned by the customers, publishers, and advertisers, and DoubleClick or Google cannot do anything with it."[222] Google reported to Congress that DoubleClick contracts rendered publisher data confidential which prohibited Google access to such data to act against publishers' interest.[223] Departure of competitive firms in the ad middleware market are largely attributable these deceptive acts.[224]

Regardless of whether exchanges operate in financial markets or openly traded display ads, transversion of networks forces exchanges to compete on quality and price.[225] To promote price and quality, publishers want to drive competition between exchanges.[226] However, from 2009 through 2016, Google foreclosed such exchange competition and used it power over publishers' inventory through its publisher ad server to tie a one-exchange-rule that routed inventory and impeded competition between exchanges.[227] Moreover, Google routed publisher inventory to its own ad exchange and blocked competition to its own exchange.[228] Under a process called *dynamic allocation* Google granted itself a superior right of first refusal on all publisher *impressions* made available to exchanges.[229] Impressions are individual spaces for ads targeted to that user when a user views a website or mobile app.[230] Online ad impressions are sold by Google to advertisers who target individual users based on information that is personal to that user.[231] "Google blocked other exchanges from competing against its exchange for the same inventory on the same footing."[232] Agreements not to be a part of the

[217] *Socony* (market prices for oil which like LIBOR, were determined by average submitted price quotes).
[218] *Microsoft* at 47.
[219] *United States v. Microsoft Corp.*, 147 F.3d 935, 939 (D.C.D.C. 1998) [hereinafter *Microsoft II*].
[220] *Id. Supra* note 25, at ¶138.
[221] *Id., supra* note 25, at ¶139.
[222] *Id*.
[223] *Supra* note 25, at ¶139.
[224] *DoubleClick* at 8 [fn. 8].
[225] *Id*.
[226] *Id.* at ¶116.
[227] *Id.* at ¶117.
[228] *Id.* at ¶118. ("Google is an ad intermediary. The ad intermediation market in the United States was transformed … by a series of acquisitions…") *citing* DoubleClick at 5.
[229] *Id*.
[230] *Id.* at ¶31.
[231] *Id.*
[232] *Id*.

market has and will continue to create a reasonable probability of harm to competition in violation of the Act.[233] Actions like this are presumptively anticompetitive although the before and after analysis will inform whether such transactions have actually harmed competition.[234] And but for the transactions that occurred between Google and other smaller companies consumers would have been able to find other ways to advertise and publish which would have proven that those companies were actual competitors at the time of agreeing to hand over control of one or more stages in the online advertisement market.[235]

In *Microsoft*, the Court argued that every business relationship [tie] features an up-close look at the technological integration of added functionality.[236] That is, the ad server permitted Googles' exchange to purchase valuable inside information such as impressions at lower than par value.[237] Low-valued impressions that were not valuable to Google were included with competing exchanges.[238] Google's dominance of publisher inventory allowed access to valuable publisher impressions for a fee – making it more difficult for other exchanges to compete simultaneously for impressions.[239] Some argue that Google middleware has a significant pro-competitive effect as a unitary platform because the evidence tends to show the current market dynamic as a pivotal consideration for any potential rule of reason analysis.[240] Others may consider this analysis only if Google's middleware was not considered proprietary.[241] In *Microsoft*, the overarching argument was that middleware was an appropriate substitute that promoted competition – an argument that was rejected by the Court.[242] Monopolization is also evidenced through the elimination of potential competition given that DoubleClick was in the practice of developing real time.[243] The most that one could

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[233] *FTC v. Facebook, Inc.*, Case No.: 1:20-cv-03590. (This form of conduct is similar to the 2021 Federal Trade Commission case against Facebook alleging that Facebook illegally maintained a years-long course of anticompetitive conduct to maintain its personal social networking monopoly. In that case, Facebook engaged in a systematic strategy including acquisitions of rivals to eliminate threats to its social media networking sight Facebook).

[234] *FTC Complaint* at ¶1 (December 9, 2020) [*FTC Complaint*].

[235] *Id*. at 9. (Facebook shut down the APIs that would have allowed certain up-and-coming rivals to access friends on Facebook and furthered suppressing access to its platform. As such the APIs that allowed for developers' apps to interface with Facebook Blue were effectively valueless. Facebook then made key APIs available to developers on the condition the they do not develop competing functionalities, and from promoting or connecting other social networking services).

[236] *Microsoft* at 84.

[237] *Supra* note 25, at ¶132.

[238] *Supra* note 4, at ¶121. See Also 2018 10-K at 4 "[Google's] advertising solutions help millions grow their business."

[239] *Id.* at ¶120.

[240] *DoubleClick* at 8.

[241] *Microsoft* at 83. (District Court acknowledging the possibility of a different kind of entry barrier in its Conclusions of Law: "In the time it would have taken an aspiring entrant to launch a serious effort to compete against Internet Explorer, Microsoft could have erected the same type of barrier that protects its existing monopoly power by adding proprietary extensions to the browsing software under its control and by extracting commitments from OEMs, IAPs, and other similar to the ones discussed in [the monopoly maintenance section]"). *Conclusions of Law*, at 46 (emphasis added).

[242] *Microsoft* at 91.

[243] *Supra* note 4, at 31.

say that that Google and Facebook were going to use their APIs to control the development of software.[244] It is important enough for Google to presume the effect from the intent but in reality, Google went into a different business.[245] There was no middleware provider that actually went ahead with a broad-based API alternative and the advertisement market today is highly concentrated and correspondingly anti-competitive, and there is no evidence suggesting dynamic sharing has not maximized publisher revenue.[246] Unfortunately, the publisher ad server has not acted in the best interest of its customers because Google has obscured its conduct with statements to the contrary.[247]

a. Benefits Inquiry

In the case against *Otter Tail Power Company*, an ending contract for wheeling electric power in four cities gave rise to a refusal to transfer electric power to a neighboring municipal utility.[248] *Otter Tail* relied on its franchise which barred the use of its lines for wheeling power to municipalities because it served in a retail capacity.[249] Each town then proceeded to access power through legal means such as an agency order, renewed franchise, or zoning a new generating station.[250] The Court held *Otter Tail* liable because it used its monopoly power to destroy threatened competition and agreed not to compete with the aim of preserving is monopoly power in violation of the Sherman Act.[251] *Otter Tail* is similar to this case because Google has gained monopoly power by purchasing DoubleClick and limiting the relevant market for online advertisement.[252] Google is not unique among such institutions in that they are not permitted by law to refuse user IDs with other technology companies or to delay measures that could protect user privacy and thus making Google liable for undermining the Sherman Act's effort to enhance consumer welfare.[253] Unlike Otter Tail, Google's operations are varied and complex; online advertisement describes a congeries of services and devices that requires resiliency.[254] It is therefore not surprising that Google's form of advertisement should be subject to extensive regulation at the state and federal level.[255]

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[244] *Id*.
[245] *Id*. at 53.
[246] *Supra* note 25, at ¶123-24.
[247] *Id*.
[248] *Otter Tail* at 372.
[249] *Id*.
[250] *Id*.
[251] *Id*.
[252] *Id*. ("Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions"). *Citing* United States v. Philadelphia National Bank, 374 U.S. 321 (1963).
[253] *Supra* note 4, at ¶142.
[254] *Id*., *citing* United State v. Philadelphia National Bank, 374 U.S. 321 (1963).
[255] *Id*.

As noted above, the Supreme Court has not yet stated an exact tying test but has given some guidance.[256] In such scenarios, the Court has tended toward a rule of reason analysis through a three-prong conditional framework.[257] First, the Company would need to have [monopoly] power in the product it could easily be argued that Google has [monopoly] power in advertisement because it earns record breaking revenues through advertisement in addition to over forty-million advertisements created each day.[258] Google also controls over ninety per cent of essentially every major website of publisher GAMs plus such creation is not pure sleight of hand.[259] And much like *Otter Tail*, Google refused to provide IDs for impressions which caused online advertisers and publishers to depend on Google properties to sell their inventory such as (1) the ad server, which is helps the publisher manage inventory, (2) the exchange and networks match buyers and sellers, and (3) the ad buying tool that requires Google middlemen to buy display inventory from exchanges.[260] Monopoly power is further maintained by pricing, clearing, and settling voluminous display impressions monthly.[261] Whether it is determined that this analysis constitutes one market or distinct markets, Google possesses monopoly power respectively.[262] Secondly, the system must present a not insubstantial [monopoly] power threat.[263] through multiple channels such as the publisher ad server market confirmed by its high market share it is without a doubt that the Company has monopoly power in online advertising.[264] For at least a decade, the Company has also had monopoly power in the ad exchange market, the ad network market, and adjacent markets to, *inter alia*, restrict multiple exchanges to publishers. Unlike *Hyde*, that did not prevail because there was not enough evidence to violate the Sherman Act, such as the impact for the product that can spread monopoly power to numerous products or limit it to one of the products –Google seems to pose a notorious power threat.

The D.C. Circuit issued a considerable victory for Microsoft in 2001 because the conclusions finding of attempted monopolization and *per se* tying were reversed.[265] The case against *Microsoft* taught that allegation of bundling markets within the technology industry suggest some that the *per se* analysis, as it is enforced today, may be difficult to prove due to efficiencies from the tie.[266] The nature of such antitrust cases may find the tie justified because consumer demand for instant access to data is satisfied.[267] Indeed, however, Google's

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[256] *Hyde* at 53.
[257] *Id*. (The discussion in this section of the note drawn on evidence supplemented by pertinent online reference materials. See for example DoubleClick, AdWords, and other similar websites).
[258] *Google, Inc. v. Hood*, 822 F.3d 212, 217 (5th Cir. 2016) ("which places third-party advertisements on its search engine and on third party vendors") (Over 40 million AdWords advertisements are created each day).
[259] *Supra* note 4, at ¶41. *See also* Alphabet Inc. 2018 10-K Annual Report [hereinafter "2018 Report"] at 3 ("Google's core products … each have over one billion monthly active users").
[260] *Id*. at ¶33.
[261] *Id*.
[262] *Id*.
[263] *Hyde* at 54.
[264] *Supra* note 4, at ¶67.
[265] *Microsoft* at 119.
[266] *Id*. at 92.
[267] *Id*. at 233.

monopoly power today, tends to prevent competition in another exchange by denying publishers inventory.[268] The Court in *Microsoft* noted that they could not comfortably say that bundling in [such] markets … would be so 'very little loss to society' from its ban, that 'an inquiry into its costs in the individual case [can be] considered [] unnecessary."[269] Google's ad server did not allow other exchanges to compete for and purchase valuable impressions.[270] The Company's ad server then gave advertisers bundled impressions tailored for specific advertisers.[271] With control over inventory, Google and Microsoft did not allow others to compete for the same inventory.[272] The Google exchange exercised high volume trades of valuable impressions not available anywhere else.[273] Certainly, efficiencies from such a tie meets consumer demand for immediate data so as to make it difficult to justify under either *rule of reason* or *per se* analysis. What is more is that in *Microsoft*, issues of a possible corporate break-up was met with testimony from numerous corporations to the effect that: (1) "dividing Microsoft … would devastate the company's Next Generation Windows Services platform;"[274] (2) "there are no natural lines along which Microsoft could be broken up without causing serious problems;"[275] (3) "splitting Microsoft in two 'will make it more difficult for OEMs to provide customers with the tightly integrated product offerings they demand;"[276] (4) "dissolution would adversely affect shareholder value.[277]"[278]

b. Tying Analysis

The issue of a section 1 tying claim arises when a consumer buys one product and is required to forego another product. The allegations against Google overlap with §2 monopoly maintenance claims because competition in the exchange market require bundling of a single product such as trade volume or valuable impressions.[279] For that reason, the Company tried to refuse other exchanges from trading publishers' valuable impressions.[280] Indeed, the issues in this case and in *Microsoft* arose from the competition authority in Europe. Google has already been cited by the EC as having abused its dominant position in online advertisement by

[268] *Id*. at 144.
[269] *Microsoft* at 94 (*citing* Hyde, 466 U.S. at 533-534 (O'Connor. J., concurring).
[270] *Supra note 25,* at 145.
[271] *Id*.
[272] *Id*. at 146.
[273] *Id*. at 147. (Last month, Facebook CEO Mark Zuckerberg began something new. This new beginning is what he calls the Metaverse. The Metaverse is a new realm in the digital age where people are lured into a virtual reality where they are able to converse with friends, go to shows, and take vacations all in the comfort of their home. In this world, you will be able to start a business and meet with customers just like in the real world. Not to mention the time and energy that is saved by not having to physically go anywhere.)
[274] *Microsoft* at 99 ("Testimony of Bill Gates, Microsoft Chairman").
[275] *Id*. ("Testimony of Steve Ballmer, Microsoft CEO and President" (*citing* United States v. Alcoa, 91 F.Supp. 333, 416 (S.D.N.Y. 1950)).
[276] Microsoft at 99 ("Testimony from Michael Capellas, CEO of Compaq Computers").
[277] *Id*. ("Testimony of Goldman, Sachs & Co. and Morgan Stanley Dean Witter").
[278] *Microsoft* at 98-99.
[279] *Supra* note 25, at 147.
[280] *Id*.

preventing competition as a result causing some of the other Big Tech firms to exit the market.[281] Moreover, in 1993, Microsoft was cited by the EC has having tied its operating system to a graphical user interface under an anti-tying provision.[282] However, Google participated in other forms of positive development for advertisers and consumers.[283] Some of the Big Tech firms adopted innovation by 2015 to increase exchanges to as many as 20 in 2016.[284] Some advertisers were able to save while enjoying increased revenue that publishers provided because of increased ad revenue, content, and better subsidized content access.[285] And as *Microsoft II* indicates, such a "decree does not embody either the entirety of the Sherman Act or even all 'tying' law under the Act."[286]

But not all ties are anti-competitive.[287] For example, in 2017, Facebook publicly announce that it would enable web and mobile app publishers to bypass transaction fees associated with Google's ad server.[288] Moreover, Facebook promoted a zero-cost bidding process through their own network where publishers, mobile app publishers, and advertisers saved on fees.[289] This form of zero transaction costs, the market on which these advertisements were written could only be purchased piecemeal – possibly directly without an exchange.[290] Recognizing such benefits from a tie, the wider industry in a new economy like the one discussed in this note look to net efficiencies.[291] For example, Facebook's network seemed to be challenging Google's monopoly and attempted to screen out a potential tie not by declaring a *Microsoft* defense but by eliminating transaction cost and helping publishers and advertisers match more users.[292] In such an arrangement, the tying issue focuses more on consumer efficiencies rather than the relationship between companies such as Google and Facebook.[293]

The Court is left with the task to decide which practices complained of establish the competing models that guide the resolution of the present note.[294] Whatever discussed in the EC case is similar to the relation between Google and other such cases that presumably forbid tying between products and other relevant evaluations in such economy.[295] The Court must further establish similar §2 claims to exclude competition from exchanges such as the Company's want

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[281] *Supra* note 25, at 152.
[282] *Microsoft II* at 945 (Citing Directorate General IV of the European Union ("DG IV").
[283] *Id.* at 946.
[284] *Id*.
[285] *Supra note 25,* at 158. *See also* ("Exclusive dealings and tying arrangements that may tend to lessen competition (Section 3 of the Clayton Act).
[286] *Microsoft II* at 946.
[287] *Microsoft* at 87.
[288] *Supra* note 25, at ¶172.
[289] *Id*., *citing* Baker at 555 ("According to *Kodak*, 504 U.S. at 463, the mere fact that two items are compliments, that "one … is useless without the other," does not make them a single 'product' for purposes of tying law").
[290] *Microsoft* at 88.
[291] *Hyde* at 21.
[292] *Supra* note 25, at ¶175.
[293] Hyde at 23.
[294] *Microsoft II* at 946.
[295] *Id. citing* Baker at 566 ("Consumer demand for the tied service, when given a choice, included purchase of the hospital surgery and anesthesiologic services where distinct goods").

to diminish the relation between products and services so as to make a counter-analogy similar to *Windows* that such products are a single unit and not separate.[296] In *Hyde*, the Court determined that hospital surgery and anesthesiologic services were distinct.[297] Here, the Company required publishers to route their ad space from their ad server directly through Google's exchange.[298] The Company also lessened competition by exclusively dealing to win publisher inventory in "the circumstances surrounding … formation."[299] To further understand the logic behind Google's consumer demand, it is important to see the postulated harm from a potential tie.[300] The likelihood that the tie can prevent goods or services from competing directly for consumer choice relates to the principal concern of §1.[301] Despite this risk, Google may have deceived consumers by forcing publishers into its ad server.[302] With such a potential tie, "freedom to select the best bargain in the second market [could be] impaired by his need to purchase the tying product, and perhaps by an inability to evaluate the true cost of either product…."[303]

V. Conclusion

Otter Tail and *Microsoft* make clear the Court's charge to discern where a dominant firm "used its monopoly power … to foreclose competition gain a competitive advantage or to destroy a competitor, all in violation of the antitrust laws."[304] Eliminating the competition by refusing to deal protected exchange margins and destroying innovation made Google's ad buying middlemen more useful in optimizing their own bidding strategy.[305] Similarly, Google used its monopoly power in online advertisement to trade valuable user information, set its own price competition, and foreclose against its publisher ad server monopoly.[306] This is similar to allowing products to sell separately in a competitive market because not every refusal to sell products separately restrains competition.[307] If each product is sold together in a market set by Google, an advertisers decision to deal with the Company may not impose an unreasonable

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[296] *Id*., citing Hyde at 13 ("To understand the logical behind the Court's consumer demand test, consider first the postulated harms from tying. The core concern is that tying prevents good from competing directly for consumer choice on their merits, i.e., being selected as a result of 'buyers' independent judgement").
[297] *Hyde* at 22.
[298] *Id*. at 13 ("Accordingly, we have condemned tying arrangements when the seller has some special ability – usually called "market power" – to force a purchaser to do something that he would not do in a competitive market").
[299] *Supra* note 4, at ¶167.
[300] *Id*.
[301] Id.
[302] *Id*. at 169.
[303] *Hyde* at 15
[304] *Otter Tail* at 370 [fn.10]. ("The public interest is far broader than the economic interest of a particular power supplier. It is our legal responsibility, as the Supreme Court made clear in Pennsylvania Water & Power Co. v. FPC, 343 U.S. 414 (1952), to use [] statutory authority to assure 'an abundant supply of electric energy throughout the United States'").
[305] Id. at ¶161.
[306] *Supra note 4,* at ¶`59.
[307] *Hyde* at 11.

restrain on either market, particularly if publishers are free to incorporate user information.[308] For example, to eliminate competition with its publisher ad server monopoly, the Company was well-position to control publishers' inventory and increase its ability to block exchange competition with Facebook.[309] To further tie its products together publishers often found other forms of advertisement less attractive and such deliberation concluded that such is an essential element of an invalid tying arrangement –the ability to control the tying product, to force the tied product, even if a preferred purchase elsewhere is warranted.[310]

The crux of the issue here is that that the Company has used a dominant market position in the online ad exchanges and ad networks markets to attempt to monopolize the online advertising market and to limit the development of middleware technologies.[311] Google has effectively forced businesses to transact online advertisements in only one way.[312] This note maintains that Google's conduct has been anticompetitive because the Company is defending its monopoly position in the online advertisement market by placing itself between advertisers and publishers.[313] Online advertisements are the market that brings the Company over ninety per cent of its revenue.[314] As a dominant provider of online advertisement, Google has a strong incentive to further limit the future of such advertisements through marginalizing smaller businesses that are finding it difficult to compete with Google.[315] Google maintains that it has competed successfully in advertising-related business depending on products and technologies to the marketplace.[316] Regardless of whether exchanges operate in financial markets or openly traded display ads, transversion of networks forces exchanges to compete on quality and price.[317] Nevertheless, the Company has established agreements with Facebook to further its "power to control prices or exclude competition."[318] Specific attempts to monopolize the online ad market such as the unlawfully tying with Facebook to foreclose competition continue to injure competition in the market.[319] Under established Antitrust precedent the limited ability of customers to switch providers constitutes an unlawful tying arrangement – and this practice is only getting worse.[320] The evidence today, however, indicates ad servers like DoubleClick are not the same size or strength prior to its agreement with Google in 2007.[321] The Court may deem conduct of this sort predatory because customers re forced to forfeit

[308] *Id.* at 12.
[309] *Supra* note 4, at ¶162.
[310] *Hyde* at 12.
[311] *Supra* note 25 at ¶140.
[312] *Id.*
[313] *Id*.
[314] *Id.* at 99 (As Google's Chief Economist explained: "[d]isplay and search advertising are complementary tools, not competing ones").
[315] *Supra* note 4, at 94. (The evidence strongly supports an inference of an agreement.).
[316] *Annual Report 2021* at 5.
[317] *Id*.
[318] *Id.* at 71.
[319] *Supra* note 25, at ¶304.
[320] *Id.*
[321] *Supra* note 75, at 4.

opportunities because of barriers against competition by equally efficient firms.[322] And as the market for online advertisements spill over into new forms of business, it is essential that Google maintains its integrity and ethics.[323]

[322] *Id.* ("'motivated entirely by a decision to avoid providing any benefit' . . . 'the evidence supports an inference that Ski Co. was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival'").
[323] *Id*.