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**Before the U.S. Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights**

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Chairman Kohl, Ranking Member Lee, and Members of the Subcommittee:

My name is Susan Creighton, and I am a partner at the law firm Wilson Sonsini Goodrich & Rosati, P.C. I want to begin my testimony by offering my sincere thanks for the opportunity to testify before you today.

I joined Wilson Sonsini after completing my education and clerkship for Justice Sandra Day O'Connor, and I have since represented a wide variety of clients in antitrust matters, including Netscape, Google, and other participants in the Internet economy. After serving in senior positions at the Federal Trade Commission (FTC) between 2001 and 2005, I returned to private practice and now serve as co-chair of Wilson Sonsini's antitrust department. I have represented Google in a variety of matters, and I look forward to discussing with you how Google's business comports with the letter and the spirit of antitrust law and why government intervention would be against the public interest.

Drawing on my experience in antitrust enforcement and in private practice, I hope to offer the committee some insights on why the current complaints against Google are misguided and why Internet search should be allowed to continue to develop and evolve without government intervention. Google's conduct is pro-competitive. Far from "threatening competition," Google has consistently enhanced consumer welfare by increasing the services available to consumers and driving innovation in every segment in which it competes. This is precisely the type of activity the antitrust laws seek to promote. Internet search, in turn, has thrived, with new innovations arriving on the scene all the time and a wide variety of websites and applications competing vigorously for users.

I. MY RECORD OF ANTITRUST ENFORCEMENT

My service at the FTC included positions as Deputy Director of the Bureau of Competition from August 2001 to July 2003 and then as Director of the Bureau of Competition from July 2003 to December 2005. In those capacities, I oversaw the FTC's day-to-day antitrust enforcement activities during a time when the FTC brought more cases challenging monopolistic conduct than during any comparable stretch of time since the 1970s. As Commissioner William Kovacic noted at the time, "Measured simply by the number of cases that allege the Sherman Act

§ 2 offenses of monopolization or attempted monopolization, the FTC's enforcement actions over the past five years constitute the agency's most ambitious program in roughly thirty years."¹

During my tenure, for example, the Bureau of Competition challenged an attempt by a California oil company to defraud the California Air Resources Board into ordering new regulations on reformulated gasoline that would have had the effect of requiring station owners (and in turn their customers) to pay royalties on patents the company was pursuing.² This would have resulted in consumers paying hundreds of millions of dollars each year just to line the company's pocket. Likewise, we challenged attempts by pharmaceutical companies to foreclose competition in the pharmaceuticals industry by, among other tactics, using improper listings in the FDA's "Orange Book" to block generic competition for key medicines.³ The companies' illegal conduct, if unchecked, would have increased costs on treatments for cancer, anxiety disorders, and high blood pressure medication. By bringing these kinds of enforcement actions, we saved consumers hundreds of millions of dollars by preventing further abuses of monopoly power.

Just as important as the cases we brought, however, were the cases we did not bring. We received complaints from a variety of sources every day, with varying degrees of merit. Notably, many complaints that merited formal investigation did not ultimately merit an antitrust action. Indeed, I learned firsthand that competitors often seek to use federal regulators to impose costs on their rivals and undermine competition.⁴ As such, my experience in the government gave me a deep appreciation for the need to carefully consider whether or not to deploy the powerful tools of antitrust enforcement in any given case.

My career in private practice has given me similar insights. As an attorney based in Silicon Valley, I have helped clients structure their affairs to ensure compliance with the antitrust laws. I have often had to counsel clients that found themselves on the receiving end of an antitrust complaint or investigation, and on occasion, I have also been able to help clients invoke the antitrust laws to eliminate improper market barriers, as I did in my representation of Netscape against Microsoft during the 1990s. Through all of this, I have developed a deep appreciation for

¹ William E. Kovacic, *The Importance of History to the Design of Competition Policy Strategy: The Federal Trade Commission and Intellectual Property*, 30 SEATTLE U. L. REV. 319, 324-25 (2007).

² See Federal Trade Comm'n, Press Release, *FTC Charges Unocal with Anticompetitive Conduct Related to Reformulated Gasoline* (March 4, 2003).

³ See Federal Trade Comm'n, Press Release, *FTC Charges Bristol-Myers Squibb with Pattern of Abusing Government Processes to Stifle Generic Drug Competition* (March 7, 2003); Federal Trade Comm'n, Press Release, *Wrongful "Orange Book" Listing Raises Red Flag with FTC; Leads to Consent Order with Biovail Corp. Concerning its Drug Tiazac* (Apr. 23, 2002).

⁴ See generally William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & ECON. 247 (1985).

both the great good that our antitrust laws can do and for the need to tread carefully when challenging business conduct that may enhance consumer welfare.

II. GOOGLE HAS INCREASED COMPETITION AND IMPROVED CONSUMER WELFARE

A detailed account of Google's business practices and their benefits to consumers has already been set forth in Eric Schmidt's testimony. However, I want to highlight a few aspects of Google's competitive impact that are particularly important to an antitrust analysis of its activities.

Google's own success reflects how dynamic and unpredictable the Internet can be. By 1998, *Fortune* declared that Yahoo! had "won" the competition for search engine users.⁵ Nevertheless, Google established itself as a major player by the early 2000s and surpassed Yahoo! in 2004.

What accounted for Google's success? As has so often been the case in Silicon Valley, innovation and an ability to provide better products and services were key. Sergey Brin and Larry Page founded Google in 1998 as a real-life application of the technology developed in a graduate research paper, *The Anatomy of a Large-Scale Hypertextual Web Search Engine*, which is still available on Stanford's website. In that paper, they outlined the PageRank system that improved upon existing search-engine algorithms. This is a classic story of American capitalism: two innovative young visionaries developed a better way of providing an important service and completely disrupted a seemingly established order in the process.

PageRank and subsequent advances have enabled Google to continue to innovate and improve its user experience while keeping its services free to users. Google has not allowed websites to pay for placement in natural search results, and all paid Google content has been clearly marked as such. Google also has pioneered "universal results" that offer rich content like maps, images, and other media beyond a simple "ten blue links." Similarly, in paid content Google has prioritized the user, developing the AdWords technology that estimates how likely a user is to click through an ad based on the user's query. This has helped both consumers and advertisers by ensuring users don't have to wade through irrelevant ads and advertisers get in front of users interested in their products and services.

Users have turned to Google because they have found that it responds to their needs. However, users have virtually unlimited options for finding what they need on the Internet. They can and do use other general search engines like Bing or Yahoo!, specialized search engines like Amazon, Yelp, and Expedia or social media like Twitter or Facebook. Similarly, mobile applications from any number of sources allow users to bypass search and directly access the information they need from their smartphone or tablet device. And, of course, users can always go directly to the websites they want without using a search function at all. The cost to a user of switching from Google to any of these alternatives is zero. This helps explain why,

⁵ See Randall Stross, *How Yahoo! Won The Search Wars*, FORTUNE, March 2, 1998.

despite Google's success, it has had its share of failed products.⁶ Users can and do go to alternative sources if someone meets their needs better than Google does.

Google also provides free "promotion" to high quality sites, including Google competitors, through the operation of its natural search functions. If a user searches for "pizza near 600 Pennsylvania Avenue," links to Urbanspoon and Yelp! show up in the top-10 results. Similarly, when a user enters a "navigational inquiry" (i.e., a search for a particular site), the user gets to that site. Google also includes rich content like maps, images, and Place pages where they are relevant to search results, presenting the user both with quality controlled tools that are integrated with the Google experience alongside natural search results that the user may select based on her own judgment. The fact that competitors like Bing, Yahoo!, and others all provide similar tools reflects consumer demand for these resources, which enable users to go beyond accessing a list of websites and actually find the information they are looking for within the search engine environment.

Finally, it is important to note that Google's activities in bringing the Android operating system to market have rapidly spurred innovation and competition. The presence of Android-based devices on the market has dramatically increased output, increased consumer choice, and lowered prices. In September 2011, for example, a smartphone manufacturer announced that it would bring \$29 Android-based smartphones to market, the lowest-cost smartphone yet.⁷ This decrease in price and increase in access illustrates how Google's business activities have promoted competition and increased consumer welfare.

III. GOOGLE'S INNOVATIONS IN SEARCH ARE EXACTLY WHAT THE ANTITRUST LAWS SEEK TO PROMOTE

Antitrust law protects "*competition*, not *competitors*."⁸ A corollary to this rule is that the antitrust laws concern themselves with efficiency and consumer welfare, not competitor welfare.⁹

By this measure, consumers have benefited enormously from Google's competitive impact. Google has dramatically improved search quality over the years, all while keeping search free to users. The benefits to American society of such activities also have been widely noted. For example, a recent McKinsey study of search details the immense positive impact

⁶ See Alan Eustice, *A fall spring-clean*, The Official Google Blog, Sept. 2, 2011.

⁷ See Kevin C. Tofel, *Huawei's \$29 Android aims at AT&T feature phone users*, CNN.com, Sept. 7, 2011.

⁸ *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quotations omitted).

⁹ See *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 (D.C. Cir. 1986).

search technologies have had on the American economy.¹⁰ Search saves workers 30-45 hours each year.¹¹ It drives between \$57 billion and \$67 billion dollars in U.S. commerce annually.¹² Search also saves the U.S. government between \$3.7 billion and \$5.6 billion each year through improved productivity.¹³ Given this positive impact, any call for government intervention should be approached with circumspection.

A. Google Has Complied with the Letter and the Spirit of U.S. Antitrust Law

Consistent with the pro-competitive impact Google has had on the American economy, Google's conduct has fully complied with U.S. antitrust law. There are two major provisions of the current federal antitrust laws that regulate "unilateral conduct," that is, actions taken by one firm (as opposed to agreements among multiple firms). These are Section 2 of the Sherman Act, which prohibits unlawful "monopolization," and Section 5 of the Federal Trade Commission Act, which allows the FTC to prevent "unfair" competition. These laws promote consumer welfare by preventing activities that improperly foreclose competitors from the market or improperly reduce the amount and quality of goods and services available to consumers. As I know from experience, enforcement of these provisions must be carefully balanced against the need to allow competitors room to innovate. Otherwise they can undermine rather than promote consumer welfare.

Successful cases under Section 2 of the Sherman Act are rare. As Judge Frank Easterbrook has noted, "Section 2 . . . must be used with the greatest caution."¹⁴ This is due to the potentially devastating competitive impact of "false positives" that condemn conduct that ultimately promotes consumer welfare and innovation.¹⁵ As the Supreme Court has recognized, "[m]istaken inferences and the resulting false condemnations are especially costly, because they chill the very conduct the antitrust laws are designed to protect."¹⁶

In light of the costs of false positives, companies are, as a general rule, "permitted, and indeed encouraged, by § 2 to compete aggressively on the merits, any success that [they] may achieve through the process of invention and innovation is clearly tolerated by the antitrust

¹⁰ See Jacques Bughin, *et al.*, *The impact of internet technologies: Search*, McKinsey & Co. (2011).

¹¹ *Id.* at 16.

¹² *Id.* at 25.

¹³ *Id.* at 36.

¹⁴ See *Ball Mem'l Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1338 (7th Cir. 1986).

¹⁵ See *Verizon Comm'cns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) ("*Trinko*").

¹⁶ *Id.* (quotations omitted).

laws.”¹⁷ Such product innovations are nearly always pro-competitive, and imposing antitrust liability could, contrary to the purposes of antitrust, lead to a chilling of innovation and competition. The whole point of antitrust is to promote consumer welfare by preventing artificial restraints on competition, not to prevent “big” companies from competing on the merits.

Google’s product improvements should be viewed in this light. As the Second Circuit has eloquently explained, “So long as we allow a firm to compete in several fields, we must expect it to seek the competitive advantages of its broad-based activity – more efficient production, greater ability to develop complementary products, reduced transaction costs, and so forth. These are gains that accrue to any integrated firm, regardless of its market share, and they cannot by themselves be considered uses of monopoly power.”¹⁸ This is exactly what Google has been doing: engaging in efficient, broad-based activity in the market to compete for users. Such activities have increased competition, enhanced the user experience, and are pro-competitive.

Furthermore, Google’s apparent “bigness” obscures the fact that it lacks anything resembling monopoly power. “Monopoly power has long been defined in the courts as the power to exclude competition or to control price”¹⁹ Google has neither power. Because search is free to users and switching from one search function to another is as simple and costless as typing a different web address into the web browser, Google cannot prevent new websites from opening, it cannot exclude new search functions, it cannot prevent users from switching to competitors, and it cannot otherwise lock users in to its products.

Some competitors try to describe Google as an “essential facility” in order to bolster their antitrust arguments. This doctrine is of questionable use in any context as its implications – namely that the antitrust laws should force a competitor to serve essentially as a regulated common carrier and share its resources with another – is, in the words of a leading treatise, “inconsistent with antitrust’s purpose.”²⁰ Even if the doctrine were still viable, it could not apply to Google. Google’s search engine does not give it the power to “eliminate competition” on the Internet, as is required by the essential facilities doctrine, given that most websites only receive a small fraction of their traffic from Google.²¹ Moreover, Google offers “reasonable access” to its search results: high quality, popular, and relevant websites rank highly for free in Google’s natural results, and websites that wish to participate in the advertising auction can buy placement in the ads associated with such searches. Indeed, ads for sites with a high “predicted click-

¹⁷ See *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 281 (2d Cir. 1979) (quotations omitted).

¹⁸ *Id.* at 276.

¹⁹ *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1414 (7th Cir. 1986).

²⁰ 3B Phillip E. Areeda & Herbert Hovenkamp, *ANTITRUST LAW* ¶ 771b, at 195 (3d ed. 2008).

²¹ See *City of Anaheim v. S. Cal. Edison Co.*, 955 F.2d 1371, 1380 n.5 (9th Cir. 1992) (quoting *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 544 (9th Cir. 1991)).

through rate” have a good chance of occupying the most attractive place on Google’s results page: the very top. This level of access eliminates any need to apply the essential facilities doctrine.²² Google’s activities thus fully comply with the letter and the spirit of the Sherman Act.

The analysis under Section 5 of the FTC Act is similar as courts have generally declined to read Section 5 as covering conduct substantially beyond the scope of the Sherman Act. For example, in *Official Airline Guides, Inc. v. FTC*,²³ the Second Circuit found that exercising editorial control over one’s own product (there, a compilation of flight schedules) and choosing with whom one will deal do not constitute “unfair” competition. The court observed that “even a monopolist, as long as he has no purpose to restrain competition or to enhance or expand his monopoly, and does not act coercively, retains” the fundamental right “freely to exercise his own independent discretion as to parties with whom he will deal.”²⁴ Ultimately, whether under Section 2 of the Sherman Act or Section 5 of the FTC Act, scrutiny of Google’s conduct must occur against the background of the primary purpose of antitrust law – promoting competition and enhancing consumer welfare. This principle allows for innovations and product enhancements that benefit consumers.

This background helps explain why courts routinely dismiss antitrust cases brought against Google over Internet search. For example, in *Kinderstart.com LLC v. Google Inc.*,²⁵ the district court dismissed as meritless a case challenging Google’s AdWords auction practices, finding that the plaintiff could not adequately define a relevant antitrust market and had failed to allege predatory conduct (as opposed to legitimate business decisions). The Ninth Circuit summarily affirmed a similar dismissal in *Person v. Google Inc.*²⁶ Most recently, an Ohio state court dismissed an attempt by myTriggers.com to assert antitrust counterclaims in a collections suit brought by Google because myTriggers could not allege harm to competition from Google’s activities.²⁷ The running theme of all these decisions is that Google has not harmed competition or consumers. That makes sense: Google has been good for consumers, saving them time and money. Thus, it is not surprising that Google’s activities have been vindicated by the courts.

²² See *MetroNet Services Corp. v. Qwest Corp.*, 383 F.3d 1124, 1130 (9th Cir. 2004) (“[W]here access exists, the doctrine serves no purpose.”) (quoting *Trinko*, 540 U.S. at 411).

²³ 630 F.2d 920 (2d Cir. 1980).

²⁴ *Id.* at 927-28 (quotations omitted).

²⁵ 2007 WL 831806 (N.D. Cal. Mar. 16, 2007).

²⁶ 346 Fed. Appx. 230 (9th Cir. 2009).

²⁷ *Google Inc. v. myTriggers.com, Inc.*, Case No. 09CVH10-14836 (Franklin Cnty. Ct. of Common Pleas, Aug. 31, 2011).

B. Internet Search has Thrived on Free Competition

The antitrust laws stand as “the Magna Carta of free enterprise”²⁸ because they provide tools to clear illicit market obstructions while otherwise leaving businesses free to innovate and compete on the merits. This allows for the economy to operate on a free market basis rather than under central planning, and in turn unleashes the vibrancy and creativity that have characterized American business since the days of Henry Ford.

Internet search reflects this dynamism. New innovations in search quality and search options are introduced all the time, from rich content results like maps, images, and local pages that have become standard content for all generalist search engines to new and creative mobile applications that provide useful search functions. Google faces substantial competitive pressures from shopping and travel sites like Amazon and Kayak, encyclopedia-style sites like Wikipedia, and any number of new mobile apps, just to name a few. Even if one were to focus narrowly on share of U.S. searches using general search engines, third parties report a consistent drop in Google’s share of general search engine traffic, which is inconsistent with any hypothesis of monopoly power.²⁹

Most importantly, consumers face zero switching costs. A user desiring a non-Google product for search does not need to purchase new technology, invest extensive time installing new software, or do anything at all beyond typing in a different website. A vast array of companies compete for each user’s clicks and attention, so the user is truly in the driver’s seat when it comes to navigating the Internet. And, indeed, statistics bear this out: almost three-fourths of all heavy search engine users use multiple search engines each month.³⁰ All of this competition for users and the attendant innovation generated by such competition demonstrates that the market works.

Search has evolved rapidly and dynamically, and continues to evolve to this day. In just a few years, the title of leading search engine has passed from WebCrawler to AltaVista to Yahoo! to Google. Moreover, no one knows how long search engines as they currently exist will continue, given the wide array of new approaches arriving on the scene, ranging from the skyrocketing importance of social networks to the explosion in mobile applications. Courts and antitrust agencies are “ill suited” to the task of “act[ing] as central planners, identifying the proper price, quantity, and other terms of dealing” for a complex area like Internet search.³¹ This

²⁸ *Trinko*, 540 U.S. at 415 (quoting *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972)).

²⁹ See Matt McGee, *One Year Later, Bing-Powered Search Takes 4% Market Share From Google – Hitwise*, Search Engine Land, Sept. 8, 2011.

³⁰ See Jacqui Cheng, *Nielsen: fickle search engine users could benefit Bing*, ars technica, June 2, 2009.

³¹ See *Trinko*, 540 U.S. at 408.

is because “[e]ffective remediation of violations of regulatory sharing requirements will ordinarily require continuing supervision of a highly detailed decree.”³²

Consumers would be particularly harmed if Google or other Internet companies were hampered in their ability to combat spammers and other purveyors of low quality or harmful content. It can be easy to underestimate the risk posed to consumers by what amounts to an entire industry of “blackhat” sites whose aim is to trick search algorithms in order to achieve high search engine rankings and get malicious content in front of users. For example, the fraudster behind the DecorMyEyes website relied on traffic generated by negative reviews on review sites to drive up his search rankings.³³ Other examples of questionable conduct that falls short of outright fraud abound, such as attempts by owners of establishments to pay for favorable reviews on user review sites.³⁴ In fact, prior to Google’s recent algorithm updates, which were intended to improve the quality of Google’s search results, some commentators were complaining that “Google has become a jungle: a tropical paradise for spammers and marketers.”³⁵ Internet companies need flexibility to combat the ever-evolving tactics of spammers and others who try to game the system, and imposing government regulation is certain to slow that process and thereby undermine efforts to improve the user experience.

Ultimately, regulation of Internet search would result in a significant expenditure of government resources and a decline of quality and innovation in search. Defining what factors may be considered in a “neutral” search would be an impossible task. Any Internet search regulatory agency would find itself flooded with requests from website proprietors seeking to improve their search rankings, and would find it impossible to sort through such claims in a neutral and coherent way. The end result would be a loss of user choice, a loss of dynamic competition, a loss of creativity and innovation, and a loss of consumer welfare, all at substantial cost to the federal government.

The Ninth Circuit’s treatment of IBM’s innovation in the 1970s to combine disk drives and computer processing units (CPUs) provides a great example of the benefits from deferring to the market’s judgment in dynamic industries. By creating an integrated set of control circuitry for computers, IBM was able to drive down the costs of the control devices necessary to run a computer.³⁶ The Ninth Circuit rejected a competitor’s claim that this integration violated the

³² *Id.* at 414-15.

³³ *See* David Segal, *Online Seller Who Bullied Customers Pleads Guilty*, N.Y. TIMES, May 13, 2011 at B2.

³⁴ *See* David Streitfeld, *In a Race to Out-Rave, 5-Star Web Reviews Go for \$5*, N.Y. TIMES, Aug. 20, 2011 at A1.

³⁵ *See* Vivek Wadhwa, *Why We Desperately Need a New (and Better) Google*, TechCrunch, Jan. 1, 2011; *see also* Danny Sullivan, *Google Forecloses On Content Farms With “Panda” Algorithm Update*, Search Engine Land, Feb. 24, 2011.

³⁶ *See Cal. Computer Prods. v. Int’l Bus. Machs.*, 613 F.2d 727, 744 (9th Cir. 1979); *see also Transamerica Computer Co., Inc. v. Int’l Bus. Machs.*, 698 F.2d 1377 (9th Cir.

Sherman Act, recognizing that IBM “had the right to redesign its products to make them more attractive to buyers – whether by reason of lower manufacturing cost and price or improved performance.”³⁷ This laid the groundwork for low-cost computer hardware, which ultimately led to the creation of the personal computer and the widespread use of computing technology. The Ninth Circuit thus facilitated innovation and enhanced consumer welfare precisely by refraining from interjecting government mandates into a dynamic industry. The government should do the same here and allow Internet search to continue to evolve and develop freely in the competitive market.

IV. CONCLUSION

Judge Learned Hand wrote that “[t]he successful competitor, having been urged to compete, must not be turned upon when he wins.”³⁸ This statement reflects a profound truth about the American economy: we want businesses to work hard and innovate to gain customers. Competition leads to new and better products, improved services, and lower consumer prices, all of which ultimately contribute to the high standard of living enjoyed by the American people.

Businesses must play by the rules and compete through such means as “better service or lower prices, or . . . superior planning initiative or managerial skills.”³⁹ If they do so, then they should have the freedom to choose how to improve their products and manage their resources, allowing the market to sort through what is and is not worthwhile to consumers through the free play of the competitive process rather than having the government pick winners and losers. As discussed above, Google has had success through innovating and competing on the merits, and new innovations from Google and other competitors come out all the time. The end result has been that consumers have more and better choices, thus demonstrating that the free market, protected by antitrust, has achieved the foundational goal of U.S. competition policy: improving consumer welfare. Thank you.

1983); *Memorex Corp. v. Int’l Bus. Machs.*, 636 F.2d 1188 (9th Cir. 1980); *Telex Corp. v. Int’l Bus. Machs.*, 510 F.2d 894 (10th Cir. 1975).

³⁷ *Cal. Computer Prods.*, 613 F.2d at 744.

³⁸ *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945).

³⁹ *See Times-Picayune Publ’g Co. v. United States*, 345 U.S. 594, 621-22 (1953).

APPENDIX: NONE OF GOOGLE'S ACTIONS IS COMPARABLE TO MICROSOFT'S

Some have sought to compare Google's actions with those of Microsoft in the well-known case brought by the Department of Justice and decided by the D.C. Circuit in *United States v. Microsoft Corp.*⁴⁰ I am quite familiar with the *Microsoft* case, having served as one of Netscape's lawyers. The attempted comparison, however, is simply wrong. Microsoft took affirmative and aggressive steps to keep Netscape and Sun's Java virtual machine off personal computers entirely. It effectively prohibited computer makers from installing Netscape, and ensured that Netscape could not get distribution through Internet service providers or independent software vendors either; in the case of Java, it configured Windows to ensure that Java would not work, forcing users to rely on Microsoft's own virtual machine. Likewise, Microsoft exploited the high cost of switching operating systems as well as the network effects of Microsoft applications (e.g., Word) to lock users into the full array of Microsoft products.

Google has done nothing of the kind. Nor could it as the switching costs for a search engine are miniscule and the network effects are far weaker. Finding Bing, or Yahoo!, or Yelp!, or Expedia, or Amazon, or Wikipedia, or eBay on the Internet is inherently easy, and nothing Google could ever control. Quite the opposite: through its frequent links to these and other sites, Google in fact promotes them for free. Google's efforts are uniformly designed to improve search for the benefit of users. Further, Google's applications (e.g., Google Docs) enable users to work with a variety of file types regardless of the software available to them. Microsoft's activities, in contrast, were designed to shut out rivals regardless of user desires.

⁴⁰ 253 F.3d 34 (D.C. Cir. 2001).