# Prudence Is The Right Answer To 'Search Neutrality' Claims




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Law360, New York (December 13, 2012, 10:26 AM ET) -- Politics is too often about making promises elected officials may be unable to (or even know they cannot) deliver. Yet where law enforcement is concerned — especially antitrust, which directly affects the economic future of our country — politics typically yields subjective and biased results. So it is with much irony that competitors of Google recently began a very public political offensive aimed at pressuring the Federal Trade Commission to sue the Web search giant for unlawful monopolization.

This is not the first such initiative, just the most unprincipled and wrong-headed. Citing anonymous sources, the Washington Post reported recently that the nearly two-year antitrust investigation by the FTC of competitor complaints against Google would end soon with a settlement "without addressing the most serious charge" of alleged "search bias." Those same competitors have, in response, dramatically accused the FTC of abandoning its "institutional integrity" and begun actively shopping for a more receptive audience at the U.S. Department of Justice's Antitrust Division, saying they "are losing faith that the FTC will act forcefully on their complaints."

Every competition lawyer can repeat the maxim that the antitrust laws protect competition, not competitors. That means hitting competitors where it hurts is a good thing because it helps consumers. So media leaks, revealing that — despite a committed chairman and the hiring of a high-profile litigator to bring a case against Google to trial — the FTC uncovered no evidence that any "manipulation" of search results actually harmed consumers, are revealing. Revealing the absence of legitimate grounds to file a search monopolization case against Google, that is. A settlement that does not include restrictions on Google's Web search activities is not one which fails to "address" that serious charge, however, but instead one that eschews politicized antitrust enforcement in favor of following the evidence. When there is no compelling proof of a legal violation, prosecutors should and, absent outside interference usually will, stand down.

This author has said before that the idea of "search neutrality" — positing some objective standard for search engine results — is an oxymoron and an invalid basis for antitrust liability. What the search complainants and their lawyers, like Silicon Valley's outspoken Gary Reback, do not get is that governmental intervention in a dynamic, rapidly evolving industry, in which the dominant firm of today was hardly a speck merely a decade ago and has no power to force anyone to use its services, smacks of subjectivity. Are the antitrust lawyers and economists in the federal government supposed to function as a Federal Search Commission? Should the FTC ask federal judges and juries to determine when search result rankings are "fair" and, if so, how could anyone possibly make that determination?

Even apart from the reality that the settled legal elements of monopolization are totally absent when applied to Google (market share, monopoly power over prices, barriers to entry, network effects, etc.), that has always been the Achilles' Heel of the complaining competitors

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like Yelp and their FairSearch.org coalition. Google's search algorithms represent its secret sauce and crown jewels, the code that tumbled Yahoo and long-forgotten firms like Alta Vista from their perch as erstwhile Web search leaders. Looking under the search hood would effectively put the federal government in the position of confiscating, or at least deflating the value, of those trade secrets. To do so under the guise of "fairness" is doubly misguided; the Supreme Court has definitively ruled that firms have no duty of fairness nor to assist rivals, and that even the most malicious attacks against individual competitors do not, without adverse consequences to broader market competition, give rise to an antitrust offense.

The media reports indicating that its antitrust investigation found no evidence of consumer harm in search or search advertising simply show that the FTC has done the right thing. As FTC Commissioner Thomas Rosch remarked, it is "not embarrassing" for the agency to vote not to bring a case, because the commission is "just doing its job." No amount of taunting from competitors will or can change that fact. Far from a cop out, this is what we pay these public officials to do, in a dispassionate and principled manner. Keeping an open mind until the facts are collected and sorted through is commendable for public law enforcement officials, the opposite of an abdication of responsibility.

In this context, turning to the Justice Department in the face of the FTC's conclusions is unseemly. Justice reviewed and approved Google's earlier acquisition of travel software provider ITA, imposing competition conditions but pointedly not accepting FairSearch's claims that the antitrust laws compel search neutrality. The FTC and DOJ agreed that the former would conduct the broader federal investigation into Google's search practices. Unlike the Microsoft antitrust case of 1998, where the FTC was frozen into inaction by a deadlock, here the FTC appears to have at least a majority, if not unanimity, against a monopolization prosecution. It is Mr. Reback and his clients who should be embarrassed by their brazen forum-shopping, not the FTC and its chairman, which have conducted a thorough and careful investigation. That competitors do not like the result is sour grapes, rather than a failure of will by the antitrust agencies. Governmental prudence toward search neutrality represents wisdom, not capitulation.

--By Glenn B. Manishin, Troutman Sanders LLP

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