



STATE BAR OF MICHIGAN

Michigan IT Lawyer

A Publication of the State Bar of Michigan Information Technology Law Section

<http://www.michbar.org/computer>

Table of Contents
March 2010 ■ Vol. 27, Issue 2

■ Bits and Bytes from the Chair	1
■ Recent Developments in Information Technology Law	2
■ Meet a Section Member	6
■ Google and Antitrust.....	7
■ Publicly Available Websites for IT Lawyers	17
■ Save the Date	18
■ 2010 Edward F. Langs Writing Award ...	18

Michigan IT Lawyer is published every other month. Previously published issues of the *Michigan IT Lawyer*, and its predecessor the *Michigan Computer Lawyer*, are available at <http://www.michbar.org/computer/newsletters.cfm>. If you have an article you would like considered for publication, send a copy to:

Brian A. Hall
Traverse Legal, PLC
810 Cottageview Drive
Suite G-20
Traverse City, Michigan 49684
e-mail: brianhall@traverselegal.com

Bits and Bytes from the Chair

By Jeremy D. Bisdorf, *Jaffe Raitt Heuer & Weiss PC*

I am excited about our next Section event! Please keep your calendars clear to participate in our **Spring Networking Event** on **Thursday, April 15, 2010** at the **Post Bar in Novi** from 5:00 – 8:00 PM. Our Section will be a co-sponsor of one of Michigan's premier I.T. networking events, attended by hundreds of I.T. professionals, recruiters, job-seekers and lawyers. There will be no cost to our members to attend the event. For more information, check www.detroitnet.org and our Section website at www.michbar.org/computer.

We are about half-way through our Section's year (we begin the year with our Annual Meeting in September). The first half of the year has included some solid planning sessions and involvement in interesting activities. Our section has had the opportunity to provide input on recent proposed legislation pertaining to amending *Michigan's Uniform Electronic Transaction Act*. We have also held a seminar at Cooley Law School's Ann Arbor campus on *Intellectual Property Escrow Agreements*.

The second half of our year will involve our two biggest activities. First is the Spring Networking Event that I have already mentioned. Second, on **September 22, 2010** we will hold our next **Annual Meeting** in combination with our **ICLE IT Law Seminar**. This year, we have an informative ¾ day seminar planned followed by cocktails at the **Inn at St. John in Plymouth**. Please make every effort to attend as the topics will certainly be of interest to you in your practice.

We are currently in the process of providing sponsorship opportunities for the September seminar. If you are interested in a sponsorship opportunity or know anyone else that may be, please pass that information along to me at jbisdorf@jaffelaw.com. Also, please be sure to pass along information on these activities to any colleagues that you think may have an interest in them. We are always interested in growing the Section's membership.

I look forward to seeing you at our Spring Networking Event. Happy Spring!

Jeremy D. Bisdorf, Chairperson
Information Technology Law Section
jbisdorf@jaffelaw.com





2009-2010

Information Technology Section Council

Chairperson ▪ Jeremy D. Bisdorf
Chairperson-elect ▪ Mark G. Malven
Secretary ▪ Charles A. Bieneman
Treasurer ▪ Karl A. Hochkammer

COUNCIL MEMBERS

Charles A. Bieneman
Jeremy D. Bisdorf
William Cosnowski, Jr.
Donald M. Crawford
Jeanne M. Dunk
Samuel Frederick
Brian A. Hall
Karl A. Hochkammer
Matthew M. Jakubowski
William J. Lamping, Jr.
Mark G. Malven
Ronald S. Nixon
Carla M. Perrota
Vincent I. Polley
Claudia Rast
David R. Syrowik
John L. Tatum
Mary Ann Wehr

Immediate Past Chair

Christopher J. Falkowski

Ex-Officio

Claudia V. Babiarz
Thomas Costello, Jr.
Kathy H. Damian
Christopher J. Falkowski
Robert A. Feldman
Sandra Jo Franklin
Mitchell A. Goodkin
William H. Horton
Lawrence R. Jordan
Charles P. Kaltenbach
Michael S. Khoury
J. Michael Kinney
Edward F. Langs*
Thomas L. Lockhart
Janet L. Neary
Kimberly A. Paulson
Paul J. Raine
Jeffrey G. Raphaelson
Frederick E. Schuchman III
Steven L. Schwartz
Carol R. Shepard
Anthony A. Targan
Stephen L. Tupper

Commissioner Liaison

James N. Erhart

Newsletter Co-Editors

Brian A. Hall
Michael Gallo

*denotes deceased member

Recent Developments in Information Technology Law

By David R. Syrowik, *Brooks Kushman PC*

PATENTS – Case Law – U.S. Courts of Appeal

As reported at 79 BNA's PTCJ 160, on December 2, 2009, the U.S. Court of Appeals for the Federal Circuit held that common sense made "try again" step in e-mail distribution method patent claim obvious. *Perfect Web Technologies Inc. v. Info USA Inc.*

As reported at 79 BNA's PTCJ 192, on December 7, 2009, the U.S. Court of Appeals for the Federal Circuit held that "bricks and mortar" prior art did not invalidate patent on computerized service. *Source Search Technologies, LLC v. Lending Tree LLC.*

As reported at 79 BNA's PTCJ 218, on December 22, 2009, the U.S. Court of Appeals for the Federal Circuit held that Microsoft Corp. failed to properly challenge patent obviousness and damages decisions against it, and otherwise failed to prove invalidity and noninfringement of a technology used by Microsoft Word. The court upholds a jury award of \$200 million in damages and the district court judge's \$40 million enhancement for willful infringement. *I4i L.P. v. Microsoft Corp.*

PATENTS/FOLA – Case Law – U.S. Courts of Appeal

As reported at 79 BNA's PTCJ 244, on January 4, 2010, the U.S. Court of Appeals for the Fourth Circuit ruled that communications between the alleged infringer in the BlackBerry case and the U.S. Department of Justice were privileged and can be withheld from a Freedom of Information Act request. However, the court leaves open that certain communications—including those that were forwarded by the DOJ to the Patent and Trademark Office related to reexamination of the underlying patent at issue—that occurred before the parties had signed a "common interest agreement" might still be subject to the FOIA request. *Hunton & Williams v. U.S. Department of Justice.*

TRADEMARKS – Case Law – U.S. Courts of Appeal

As reported at 79 BNA's PTCJ 47, on November 6, 2009, the U.S. Court of Appeals for the Federal Circuit affirmed the Trademark Trial and Appeal Board's ruling that "mattress.com" is generic for selling mattresses. *In re 1800Mattress.com IP LLC substituted for Dial-A-Mattress Operating Corp.*

As reported at 79 BNA's PTCJ 243, on December 23, 2009, the U.S. Court of Appeals for the Federal Circuit held that a specimen of use from a website does not necessarily have to include an image of the goods being associated with a trademark registered originally through an intent-to-use application. Vacating a rejection of a specimen of use by the Trademark Trial

and Appeal Board, the court rejects a “bright-line rule” adopted by the Patent and Trademark Office that deems a specimen of use from the Internet valid only when it includes an image of the product with which the trademark at issue is being associated. *In re Sonos*.

TRADE SECRETS – Case Law – U.S. Courts of Appeal

As reported at 311 Fed. App’x. 586, in an unpublished opinion, on February 12, 2009, the U.S. Court of Appeals for the Fourth Circuit reaffirmed that trade secret protection is afforded an entire software program as a total compilation if reasonable measures were taken to protect the secrecy of the program. At issue in the litigation was whether former employees of Decision Insights hired by Sentia disclosed trade secrets regarding its software application. *Decision Insights, Inc. v. Sentia Group, Inc.*

COMMUNICATIONS DECECY ACT – Case Law – U.S. Courts of Appeal

As reported at 568 F.3d 1169, on June 25, 2009, the U.S. Court of Appeals for the Ninth Circuit extended the CDA’s safe harbor provisions to distributors of Internet security software, which had previously protected only ISPs. *Zango, Inc. v. Kaspersky Lab, Inc.*

ANTITRUST – Case Law – U.S. Courts of Appeal

As reported at 79 BNA’s PTCJ 318, on January 13, 2010, the U.S. Court of Appeals for the Second Circuit ruled that allegations that four of the nation’s major music labels colluded to fix prices on Internet music sales may proceed to the merits, thereby overturning a district court’s holding that the allegations were too vague to set out an actionable antitrust claim under the Sherman Act. *Starr v. Sony BMG Music Entertainment*.

PATENTS – Case Law – U.S. District Courts

As reported at 79 BNA’s PTCJ 327, on January 6, 2010, the U.S. District Court for the Eastern District of Texas upheld a jury award of \$52 million for infringement of a patent on reading optical disks. *Laser Dynamics Inc. v. Quanta Computer Inc.*

COPYRIGHTS – Case Law – U.S. District Courts

As reported at 79 BNA’s PTCJ 109, on November 13, 2009, the U.S. District Court for the Northern District of

California held the software that lets the Mac operating system run on PCs infringes Apple Inc.’s copyrights and violates the Digital Millennium Copyright Act. *Apple Inc. v. Psystar Corp.*

As reported at 79 BNA’s PTCJ 101, on November 19, 2009, the U.S. District Court for the Southern District of New York granted preliminary approval to an amended proposal to settle a dispute between Google Inc. and authors and publishers over the wholesale scanning of the content of several of the world’s major libraries. *Authors Guild Inc. v. Google Inc.*

As reported at 79 BNA’s PTCJ 153, on December 1, 2009, the U.S. District Court for the Southern District of New York denied a request by Amazon.com Inc. to reconsider its preliminary approval of an amended proposal to settle a dispute between Google Inc. and authors and publishers over the wholesale scanning of the content of several of the world’s major libraries. *Authors Guild Inc. v. Google Inc.*

As reported at 79 BNA’s PTCJ 189, on December 7, 2009, the U.S. District Court for the District of Massachusetts rejected a student file sharer’s fair use defense and ordered copies be destroyed. *Sony BMG Music Entertainment v. Tenenbaum*.

As reported at 79 BNA’s PTCJ 351, on January 14, 2010, the U.S. District Court for the Eastern District of New York ruled that an online perfume distributor sufficiently asserted infringement claims against a competitor to survive dismissal. *FragranceNet.com v. FragranceX.com Inc.*

As reported at 79 BNA’s PTCJ 353, on January 22, 2010, the U.S. District Court for the District of Minnesota cut a jury award of \$1.92 million down to \$54,000 against an online file sharer. *Capitol Records Inc. v. Thomas-Rasset*.

As reported at 79 BNA’s PTCJ 273, on January 5, 2010, a U.S. software company sued the Chinese government and others in the U.S. District Court for the Central District of California for copyright and trade secrets infringement involving a web content censoring program that sparked U.S.-China trade tensions last year. *CYBERSITTER LLC v. Peoples’ Republic of China*.

As reported at 79 BNA’s PTCJ 278, on December 21, 2009, the U.S. District Court for the Central District of California held that Torrent network is liable for inducing infringement through sites’ design. *Columbia Pictures Industries Inc. v. Fung*.

COPYRIGHTS/DMCA – Case Law – U.S. District Courts

As reported at 79 BNA's PTCJ 229, on December 10, 2009, the U.S. District Court for the Northern District of California held that removal of automated copyright notices from open source software violated the DMCA. *Jacobsen v. Katzer*.

As reported at 93 USPQ2d 1282, on October 11, 2009, the U.S. District Court for the Southern Division of New York ruled that infringement claims asserted against defendant Internet music service by plaintiffs who were not identified in pre-complaint takedown notices will not be dismissed on ground that defendant is protected by safe harbor provision of Digital Millennium Copyright Act, since complaint cannot be dismissed on motion asserting affirmative defense unless defense appears on face of complaint, and complaint in present case does not establish that defendant meets threshold requirements for safe harbor protection. *Capitol Records Inc. v. MP3tunes LLC*.

COPYRIGHTS/PERSONAL JURISDICTION – Case Law – U.S. District Courts

As reported at 93 USPQ2d 1414, on December 16, 2009, the U.S. District Court for the Southern District of New York ruled that Internet search engine based in China is not subject to personal jurisdiction under New York's jurisdiction statute, N.Y. C.P.L.R. §§ 301-302, in copyright infringement action, even though defendant is listed on NASDAQ Stock Market. *Stormhale Inc. v. Baidu.com Inc.*

TRADE SECRETS – Case Law – U.S. District Courts

As reported at 79 BNA's PTCJ 352, on January 14, 2010, the U.S. District Court for the District of New Hampshire ruled that a computer mouse substitute was a protectable trade secret even though it was still in development. *Contour Design Inc. v. Chance Mold Steel Co.*

TRADEMARKS – Case Law – U.S. District Courts

As reported at 93 USPQ2d 1349, on August 26, 2009, the U.S. District Court for the Eastern District of Virginia ruled that both parties' motions for summary judgment

are denied in action alleging that plaintiff's "Spiegelaw.com" trademark is infringed by defendant's "Spiegellaw.com" Internet domain name, and parties are left in same position as when case began, since neither party has produced sufficient evidence to allow grant of summary judgment in its favor, parties have no additional evidence to put on before trial, and neither party has submitted sufficient evidence to prove their claims by preponderance of evidence. *H. Jay Spiegel & Associates PC v. Spiegel*.

As reported at 93 USPQ 1477, on January 20, 2010, the U.S. District Court for the Eastern District of California ruled that plaintiff seeking temporary restraining order is not likely to succeed on merits of claim that defendants' use of logo for website supporting right to homosexual marriage infringes plaintiff's logo for non-profit organization that opposed such right, even though defendants' logo is derived from plaintiff's logo. *Protectmarriage.com – Yes on 8, a Project of California Renewal v. Courage Campaign*.

TRADEMARKS/CYBERSQUATTING – Case Law – U.S. District Courts

As reported at 79 BNA's PTCJ 328, on December 3, 2009, the U.S. District Court for the Southern District of New York ruled that an accused cybersquatter was barred from using domains similar to merged banks' marks. *Web Adviser v. Bank of America Corp.*

As reported at 79 BNA's PTCJ 355, in a decision issued January 19, 2010, the World Intellectual Property Organization (*i.e.* WIPO) transfers 1,500 domain names in a dispute contesting ownership. *InterContinental Hotel Corp. v. Kirchhof*.

As reported at 79 BNA's PTCJ 451, on February 16, 2010, the U.S. District Court for the Southern District of New York granted summary judgment in favor of Bank of America and Merrill Lynch in a cybersquatting case involving the merger of the two companies and their domain names. *Webadviso v. Bank of America Corp.*

LANHAM ACT – Case Law – U.S. District Courts

As reported at 93 USPQ2d 1453, on January 20, 2010, the U.S. District Court for the District of Columbia ruled that a claim for violation of 15 U.S.C. § 1125(a), based on

allegation that U.S. Department of Justice falsely represented that its program for compliance with information security management law would include plaintiff's software product, is essentially Lanham Act claim, not contract claim, and district court therefore has subject matter jurisdiction over claim; complaint, which alleges that Justice Department misled consumers as to its "affiliation, connection, or association" with plaintiff's software product, sufficiently pleads Lanham Act claim. *Trusted Integration Inc. v. United States*.

TRADEMARKS/CONTRACT/VENUE – Case Law – U.S. District Courts

As reported at 93 USPQ2d 1540, on December 22, 2009, the U.S. District Court for the Southern District of Indiana ruled that the terms-of-service agreement associated with defendant's comparison-shopping website is valid and enforceable against plaintiff, and plaintiff's infringement action, stemming from defendant's use of plaintiff's trademarks on website to promote prices and goods of plaintiff's competitors, is dismissed for improper venue based on forum selection clause in agreement. *Appliance Zone LLC v. NexTag*.

PRIVACY – Case Law – U.S. District Courts

As reported at 598 F.Supp.2d 695, on February 17, 2009, the U.S. District Court for the Western District of Pennsylvania dismissed claims of invasion of privacy and trespass against Google for using photographs of the plaintiff's home in Google's "Street View" application available through Google maps. *Boring v. Google, Inc.*

RIGHT OF PUBLICITY – Case Law – U.S. District Courts

As reported at 79 BNA's PTCJ 446, on February 8, 2010, the U.S. District Court for the Northern District of California ruled that borrowing the likeness and biographical data of college athletes for inclusion in a video game allowing the creation of "fantasy" teams is neither transformative nor a protected public interest use, and if not authorized, is actionable as a violation of California's right of publicity. *Keller v. Electronic Arts Inc.*

PATENTS – U.S. Patent and Trademark Office

As reported at 79 BNA's PTCJ 222, on August 20, 2009, the Board of Patent Appeals and Interferences ruled

that patent application claims on systems and machines involving a mathematical algorithm are subject to a two-inquiry test drawing in part from the *Bilski* test for process claim patentability. The board applies a new test that requires the claim to show both a "real-world use" of the algorithm and no preemption of all practical applications, even if in only one field of use. *Ex parte Gutta*.

TRADEMARKS – U.S. Patent and Trademark Office

As reported at 92 USPQ2d 1630, on October 26, 2009, the Trademark Trial and Appeal Board ruled that applicant's use of "Vudu" as trademark for computer software for transmission, storage, and playback of audio and video content is likely to cause confusion with opposer's "Voodoo" mark for personal and gaming computers; however, applicant's use of its mark for information services, broadcasting services, and Web site is not likely to cause confusion with opposer's use of "Voodoo" as service mark for customer design and manufacturing of computers. *Hewlett-Packard Co. v. Vudu Inc.*

As reported at 92 USPQ2d 1926, on December 2, 2009, the Trademark Trial and Appeal Board ruled that opposition to registration of "Black Mail," as trademark for computer software for facilitating interactive communication over information networks, is sustained on ground that applicant lacked *bona fide* intent to use mark when it filed involved application, since applicant has no documentary evidence to show requisite *bona fide* intent, and applicant's discovery responses indicate that it has made no plans relating to use of mark. *Research In Motion Ltd. v. NBOR Corp.*

PATENTS – International Trade Commission

As reported at 79 BNA's PTCJ 472, on February 17, 2010, the International Trade Commission instituted an investigation based on Eastman Kodak Co.'s allegations of patent infringement by Research in Motion Ltd.'s Black-Berry devices and Apple Inc.'s iPhone. *In the Matter of Mobile Telephones and Wireless Communication Devices Featuring Digital Cameras, and Components Thereof*.

PATENTS – France

As reported at 79 BNA's PTCJ 226, on December 18, 2009, the Paris county court ruled that Google Inc.'s bulk scanning of books for its Google Book Search website infringed the copyrights held by parties who sued in France. *Editions du Seuil v. Google Inc.* ■

Meet a Section Member: **Carla M. Perrotta**



Carla M. Perrotta

Miller Canfield Paddock &
Stone PLC
150 W Jefferson Ave
Ste 2500
Detroit, MI 48226

P: (313) 496-8472
F: (313) 496-8454
E: perrotta@millercafield.com

- **What is the name of your firm/corporation/employer?** Miller Canfield Paddock and Stone, PLC
- **What is your area of practice?** Information Technology/Intellectual Property
- **When did you first become involved with the Section?** In 2005
- **Where did you grow up?** Cincinnati, Ohio
- **Where else have you lived?** Toledo, Ohio; Sao Paulo, Brazil; Detroit, Michigan
- **Where did you attend undergraduate and law school?** University of Cincinnati; University of Toledo
- **What was your undergraduate major?** International Affairs
- **What are your hobbies, other interests?** Films, cooking, singing, travel
- **Favorite restaurant?** Primavista in Cincinnati
- **A recent book you read?** *A Thousand Splendid Suns*
- **Last vacation?** Attended a family wedding in Rio de Janeiro, Brazil
- **Who is your hero?** (a parent, a celebrity, an influential person in one's life) My immigrant parents who taught me the meaning of hard work and sacrifice.
- **If you had to describe yourself using three words, they would be...** ... kind, compassionate, and loyal
- **What is your favorite movie of the past ten years?** This is a tough one. I love movies. I would have to go with *La Vita E` Bella* (although that may be more than 10 years ago. If so, then I'd go with *Slumdog Millionaire*).
- **What do you like to do most with a free hour?** Hang out with my husband and two-year old daughter.
- **What is the most significant event of the last three months?** Awaiting the arrival of our second child and coming this close to closing on a house and having the deal fall apart at the last minute.
- **What one word would you put on your gravestone?** Arrivederci
- **What e-mail can Section members use to contact you?** perrotta@millercafield.com
- **A short comment on why you became involved with the Information Law Technology Section:** I wanted to be part of a group that enjoys this field of law as much as I do!

The *Michigan IT Lawyer* is pleased to present “Google and Antitrust” by William K. Li. Mr. Li is one of three student authors to receive a 2009 Edward F. Langs Writing Award from the State Bar of Michigan’s Information Technology Law Section. The statements made and opinions expressed in this essay are strictly those of the author, and not the State Bar of Michigan or the Information Technology Law Section. Comments regarding this article can be forwarded to the Michigan IT Lawyer, care of brianhall@traverselegal.com or michael@gallo.us.com. Enjoy!

Google and Antitrust¹

By William K. Li

“Don’t be evil.”²

“Don’t be evil” is Google’s code of conduct.³ This code of conduct is supposed to be the corporate mantra that requires Google to be a good corporate citizen and obey the laws.⁴ However, as Google has grown into one of the largest corporations in the world, it is time to examine whether Google still abides by its own code of conduct.⁵ Specifically, this paper will examine whether Google is abusing its market leadership in violation of antitrust laws.⁶ This paper will argue that Google could be violating antitrust laws under the attempt monopolization theory.⁷

First, this paper will define Google’s business model and the search advertising industry. Second, this paper will discuss the relevant antitrust laws that might apply to Google. Finally, this paper will suggest a potential remedy against Google.

The Google Business Model

Google is a “multi-sided [platform] that serves several distinct but interdependent customer groups.”⁸ Google could be compartmentalized into three distinct business groups.⁹ First, it could be defined as a general algorithm internet search engine company.¹⁰ Google has 72 percent share of the internet search market.¹¹ Moreover, the Google subsidiary YouTube, albeit a vertical search engine, is the second most used search engine.¹² However, the internet search portion of the company generates relatively little, if any, revenue on its own.¹³ The internet search business merely helps generate revenue for Google’s

other industry-leading endeavor, contextual online advertising.¹⁴ Google has a 73 percent market share of the contextual online advertising.¹⁵ Google has two advertising programs, called Adwords and Adsense.¹⁶

In addition, Google is also a developer of cloud computing applications and mobile phone technologies.¹⁷ Google has the ambition of taking market shares from desktop software companies with its cloud applications.¹⁸ In sum, Google is a multi-sided platform company that uses its internet search technology and its other web services to help its advertising programs generate revenue.¹⁹ This paper will next define internet search engine, Adwords, Adsense, and cloud computing and explain why interconnecting these products might cause antitrust violations.

The Google Search Engine

An internet search engine is a

tool designed to search for information on the World Wide Web. The search results are usually presented in a list and are commonly called *hits*. The information may consist of web pages, images, information and other types of files. Some search engines also mine data available in newsbooks, databases, or open directories. Unlike Web directories, which are maintained by human editors, search engines operate algorithmically or are a mixture of algorithmic and human input.²⁰

Google uses two technologies called “PageRank” and “Hyper-Matching Analysis” to determine which search re-

Google and Antitrust

Continued from page 7

sult would appear first in the result page.²¹ To generate the search results, the search engine uses a “web crawler,” to search the internet and index its results.²² Due to Google’s dominant market share, many websites try to design their sites so that they would rank higher in the Google search results.²³

Internet search engines are divided into two sub-categories. The first is a “general search engine,” that searches and indexes everything on the internet.²⁴ Google is predominantly a general search engine. The second subcategory is a “vertical” or “specialized search” engine that “typically focuses their indices on specific categories of content.”²⁵ Examples of vertical search websites include sites for health information, videos, comparison shopping and business-to-business goods and services.²⁶ Google is trying to increase its market share in the vertical search business.²⁷

Contextual Advertising

Google’s core revenue source is its contextual advertising program.²⁸ Contextual advertisements appear based on the search keywords or based on the texts of a website.²⁹ Advertisers would have to first tell Google the keywords that would trigger its advertisement to appear.³⁰ These contextual advertisements generally appear on the right hand side of the search results, or on the top and bottom of a third-party syndicated website.³¹ Google has two primary advertising programs, called Adwords and Adsense.³² In addition to Adwords and Adsense, Google is also testing a video based advertisement platform for its subsidiary YouTube.³³

Adwords is the program for advertisers who wish to place advertisements with Google.³⁴ When they do, the advertisement appears either in Google’s search results page, in Google’s applications such as Gmail, or in third-party syndicated website that hosts Google advertisements.³⁵ The appearances of the advertisements are based on the keywords entered.³⁶ The advertiser is charged a fee every time a user clicks on the advertisement.³⁷ The fee is determined by an auctioning system.³⁸ The advertisement from the highest bidder will appear first.³⁹ In theory, the auction uses an automated system. However, there is an allegation that Google manually manipulates the system to raise the prices of advertisers that Google dislikes.⁴⁰

The other Google revenue source is Adsense.⁴¹ Adsense is a program for syndicated content providers that host contextual advertisements.⁴² Adsense could be applied to traditional websites, search results within a website (for those content providers that have implemented the Google search box to specifically search its own website), mobile contents, RSS feeds, and unused domains.⁴³ There are two ways that a syndicated content provider could make money.⁴⁴ In the first method, Google would split the fee received from advertisers with the content provider whenever someone clicks on an advertisement.⁴⁵ In the second method, the syndicated content provider gets paid for every 1,000th time that an advertisement appears.⁴⁶ Google itself has many cloud computing services and applications that utilizes its search technology and displays its advertisements. The next section will explain the role that cloud computing plays in Google’s business plan.

Cloud Computing and Google’s Other Endeavors

Besides Google’s core business of search and advertising, Google has created web services, web applications, a mobile phone operating system, and a cloud computing operating system.⁴⁷ Google has also partnered with Mozilla and original equipment manufacturers to make the Google search engine their default search engine.⁴⁸ Such product tie-ins help Google increase its search market share, which in turn would increase the times that its advertisements are displayed.⁴⁹

Most of Google’s secondary services generate relatively little or no revenue.⁵⁰ Many of these secondary services are not even the market leader of their fields.⁵¹ Google does try to convert all of its non-revenue generating services and applications into a revenue source.⁵² However, the primary role of these secondary services is to help increase the network effects of Google search and the Google advertising programs.⁵³

There are opinions that some of Google’s applications, such as Google Docs and the Chrome browser (“Chrome”), are part of Google’s plan to become the leader of cloud computing.⁵⁴ Since cloud computing seems to be a big part of Google’s plan, it would be useful to briefly describe what cloud computing is and the role that Chrome plays in the development of cloud computing.

Cloud computing is essentially the ability to access software, applications, and data over a computing network

instead of accessing them from a local computer.⁵⁵ There are two reasons that cloud computing is the next logical development for Google. First, Google already has developed many applications accessible via the internet and mobile phone networks. Second, Google already has the basic architecture to run a cloud computing network because

[c]loud computing is often used to sort through enormous amounts of data. In fact, Google has an initial edge in cloud computing precisely because of its need to produce instant, accurate results for millions of incoming search inquiries every day, parsing through the terabytes of Internet data cached on its servers. Google's approach has been to design and manufacture hundreds of thousands of its own servers from commodity components, connecting relatively inexpensive processors in parallel to create an immensely powerful, scalable system.⁵⁶

One of the features of cloud computing is the ability access all the applications with only an internet browser. Most of the browsers that are on the market today were not designed to handle web-based applications.⁵⁷ Thus, Google created the Chrome browser with the intention of making it the Google cloud computing operating system that ties in all of Google's products and applications.⁵⁸ The Chrome is another tool to help Google expand its search and advertising platform.⁵⁹

Given that Google is by far the industry leader in internet search and internet advertising, the next section will analyze whether Google is a monopoly. If so, the next step is to decide whether Google has abused its monopoly power in violation of antitrust laws.

Antitrust Laws Analysis

Despite being a relatively young company, Google is already associated with being a monopolist.⁶⁰ In 2007, the Department of Justice ("D.O.J.") investigated Google in relation to Google's acquisition of DoubleClick.⁶¹ In 2008, the D.O.J. investigated Google for attempting to integrate its search and advertisement into Yahoo.⁶² The D.O.J. investigation was dropped because the joint venture never came to fruition.⁶³ Most recently, in February 2009, Tradecom.com LLC ("Tradecom") filed a civil suit against Google, alleging anticompetitive conducts.⁶⁴ This section will analyze whether Google is violating antitrust laws.

In order to prove that Google is violating antitrust laws, this section will first define the relevant market(s) in which

Google compete(s). Second, this section will analyze whether Google has a monopoly in its relevant market. Lastly, this section will analyze whether Google is willfully exploiting its monopoly power.

Monopoly

The relevant antitrust statutes are the Sherman Antitrust Act ("Act") sections 1 and 2.⁶⁵ This paper will first discuss section 2 of the Act because it is more relevant to Google.⁶⁶ The offense of monopoly under section 2 of the Act 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 acumen, or historic accident."⁶⁷ The term monopoly power is defined as the power to "control prices or exclude competition" within the relevant markets.⁶⁸

Rules of Element 1 of Section 2 of the Act

The first prong of element 1 of section 2 of the Act is to define the "relevant market" that a company competes in.⁶⁹ The "relevant market" inquiry has two dimensions, which are the "relevant product market" and the "relevant geographic market."⁷⁰ There are two factors that traditionally determine the "relevant product market" dimension.⁷¹ The first factor requires that a defendant's and a complainant's products to be "reasonably interchangeable [to be used] for the same purposes."⁷² The second factor is a "cross elasticity" test that requires the change in price of one product to alter the demand of the other company's product.⁷³ If both tests are met, then the first dimension of a relevant market is met.⁷⁴ The second dimension, "relevant geographic market inquiry," merely asks whether the companies' products compete in the same geographic area.⁷⁵

The second prong of element 1 of section 2 of the Act is to prove that a company possesses monopoly power.⁷⁶ There are several methods to establish this. The first method is the existence of a high-market share within a market that has high entry barriers.⁷⁷ The second method is evidence that the defendant has actually exercised price leadership control over the industry (the ability to raise price substantially without losing market share).⁷⁸ The third method is evidence that a company has taken affirmative action to exclude actual or potential competitors.⁷⁹

Google and Antitrust

Continued from page 9

Application of the Rules of Element 1 of section 2 of the Act to Google

Prong 1 – Relevant Market and Relevant Geography. The first step is to define the “Relevant Market” that Google competes in.⁸⁰ The first dimension of “Relevant Market” is to analyze the “relevant product market.”⁸¹ Google is a multi-platform company that competes in internet search, online contextual advertisement, and cloud computing.⁸² Thus any internet search engines or contextual advertising services are “reasonably interchangeable...for the same purposes.”⁸³ In addition, any internet application that serves the same function as Google’s cloud applications, such as web-based email service, are “reasonably interchangeable...for the same purposes.”⁸⁴ The second step is to determine the “cross-elasticity.”⁸⁵ The internet search engine and most of Google’s cloud computing applications are free. A price increase (from a price of \$0) would alter the demand.⁸⁶ Online advertising is the only service for which Google generates substantial revenue.⁸⁷ When Google raises its advertising rate, the advertisers would not be able to afford the same number of advertisement placements.⁸⁸ Thus, a change in price would also alter the demand of the advertising product.⁸⁹

The second dimension of the “Relevant Market” test is to analyze the “relevant geographic market” that Google competes in.⁹⁰ This dimension is easily met for internet companies because the internet presents no geographic constraint.⁹¹ Thus any internet-based company competes in the same geographic market as Google.⁹²

Prong 2 – Possession of Monopoly. The second prong of element 1 of section 2 of the Act is to prove that a company possesses monopoly power.⁹³ Under the first method, Google is a monopoly because it has an overwhelming majority share in internet search and online advertisement.⁹⁴ Both the internet search engine and online advertising market have a high entry barrier. The search engine market has a high barrier to entry for several reasons. First, a search engine requires high start-up costs because it requires massive computer servers to hold the indexed data.⁹⁵ Second, a new competitor would have to compete with established companies for talented personnel. Third, even if a competitor is able to get the funding and the talent, there is very little chance of succeeding

because it is hard to overcome the network effects of the established companies.⁹⁶ This is evidenced by the lack of new successful search engines in recent years.⁹⁷ The failure of Cuil is a good example.⁹⁸ Cuil is a search engine launched with much fanfare in July of 2008.⁹⁹ The company was started by former Google employees and indexes more web pages than anyone else.¹⁰⁰ Yet, the company went from having a .02 percent of the internet traffic in its debut to a mere .007 percent of the internet traffic in April 2009.¹⁰¹ Given the high barrier of entry to starting a search engine, Google has a monopoly in the search engine business under method one.¹⁰² Google also has a monopoly in the online advertising business under method one because it is difficult for a new competitor to overcome Google’s network effect.

Google is a monopoly under the second method because it is able to exercise “price leadership control” over the industry.¹⁰³ It has a 72 percent share of the search market and over 70 percent of the contextual advertising market. No search engine competitor can expect to charge a fee to access its search engine because the Google search is free. Advertisers cannot afford to not place their advertisements in the platform that the majority of the internet visitors use.¹⁰⁴ For example, Google has allegedly raised the price of Tradecomets’ advertisement by as much as 10,000 percent.¹⁰⁵ Despite the alleged price increase, Tradecomets has to continue to advertise on Google because of the audience it is able to reach.¹⁰⁶

The third method of proving a monopoly is to ask whether a company has taken affirmative steps to exclude actual or potential competitors.¹⁰⁷ Thus far, Google has not excluded any competitors from advertising on its website or from its search results. However, if the allegations that Google manually lowered the page rank and substantially raised the prices of competitors are true, there could be an argument that this is just another way of trying to exclude competitors that recruit customers from contextual advertisements.¹⁰⁸ Now that it is established that Google has monopoly power in the search engine and contextual advertising market, the next step is to analyze element 2 of section 2 of the Act.

Rules of Element 2 of Section 2 of the Act. Element 2 of section 2 of the Act asks whether Google willfully acquired

or maintained its monopoly power or whether it grew or developed “as a consequence of a superior product, business acumen, or historic accident.”¹⁰⁹ The mere possession of monopoly power is not an antitrust violation.¹¹⁰ A company that has gained market dominance by being the most effective competitor is not to be penalized simply for having been successful.¹¹¹

In several instances, courts have proved a company was engaged in willful monopolizing conduct. The first instance is when a company “has utilized practices that are in themselves illegal under a different provision of the antitrust laws (e.g., exclusionary boycotts, horizontal market allocations, tying agreements, exclusive dealing agreements that foreclose competitors from a substantial portion of the market, and anticompetitive acquisitions of competitors).¹¹²

The challenged conduct must relate to a market in which the defendant itself competes and tend towards the acquisition or further entrenchment of the defendant’s monopoly power in that market. ... [h]ence, allegedly exclusionary conduct by a firm with monopoly power in one market, but directed at a different market in which it is not a competitor, is not viewed as monopolization.¹¹³

Even if the actions of a company are not independently illegal, the courts have asked whether the company “has acquired or enhanced its monopoly power through competitively unreasonable means, as determined using much the same analysis employed under the rule of reason, but with the significant added element of substantial market power.”¹¹⁴ The rule of reason is a test favored by the District of Columbia Circuit Court when looking at fast-changing industries such as the high-tech sector.¹¹⁵ The rule of reason is “not really so much a set standard of behavior as it is a general inquiry into whether, under ‘all the circumstances,’ the challenged practice ‘impos[es] an unreasonable restraint on competition.’”¹¹⁶

When applying the “rule of reason,” courts are careful not to “penalize a dominant firm for engaging in the same market behavior lawfully and economically available to its smaller rivals.”¹¹⁷ Courts use a balancing test that asks whether a company’s behavior is based on a rational business decision or whether it is designed for exclusionary purposes.¹¹⁸

Application of Element 2 of Section 2 of the Act to Google. The first method of element 2 of section 2 of the Act asks

whether Google conducted any activities that by itself violated any antitrust laws.¹¹⁹ Of the types of possible antitrust violations, the only questionable activities that Google has conducted so far are anticompetitive acquisition of competitors and tying.¹²⁰ Google has acquired many companies and competitors.¹²¹ The acquisition of DoubleClick is Google’s most prominent purchase.¹²² DoubleClick was one of the largest of online advertising platforms.¹²³ In addition, DoubleClick had a very advanced behavioral system that helped advertisers create targeted advertisements.¹²⁴ Google was able to incorporate DoubleClick’s behavioral technology and expand the Google advertising network.¹²⁵ The D.O.J. approved the acquisition after a lengthy antitrust investigation so it will not use that as a proof that Google willfully violated antitrust laws in potential cases.¹²⁶

The second method of element 2 is to use the theory of “tying.” This is a better way to prove that Google willfully abused its monopoly power. A *per se* tying violation is when one party agrees “to sell one product but only on the condition that the buyer also purchase a different (or tied product).”¹²⁷ Under this analysis, Google has a tying violation because it interconnects all of its services and applications together.¹²⁸ However, under the rule of reason analysis, Google’s tying conduct in the past probably does not violate any antitrust laws.¹²⁹

Under the rule of reason, courts look at whether an activity is a common industry practice.¹³⁰ Companies are allowed to have “nonpredatory development of new product features or expansion of services that adversely affect competitors,” and promote “one’s own product or service over those of competitors.”¹³¹ Additionally, this conduct is allowed if it is the industry norm and the products are tied for some legitimate purpose other than to destroy the competition.¹³² In Google’s situation, its search engine and internet portal competitors all tie in similar services and applications.¹³³ Since the tying of the internet engine, advertising platform and web applications is the norm among Google’s competitors, it is unlikely that Google is willfully monopolizing the market under the rule of reason analysis.¹³⁴

Attempted Monopoly Theory. The “attempted monopoly” theory is another way to prove antitrust violations. It allows a court to speculate whether a company might achieve a monopoly.¹³⁵ For example, the Fifth Circuit held that a company violated antitrust laws based on the speculated result of a failed merger.¹³⁶

Google and Antitrust

Continued from page 11

Application of Attempt Monopolization to Google. In 2008, Google and Yahoo voluntarily cancelled a potential search and contextual advertising partnership.¹³⁷ By using the “attempted monopoly” theory, a court could speculate as to the results of this potential partnership. Had this partnership succeeded, it would have given Google 90 percent of the search market, 90 percent of the advertising market, and 95 percent of the syndication advertising market.¹³⁸ It would be difficult for Google to claim that there is no intention of monopolizing the market because the company must have known of the benefits of the partnership.¹³⁹ With a potential 90 percent market share, Google should have forecasted that the network effect would further accelerate its market share and destroy smaller competitors.¹⁴⁰ Thus, it is more likely that Google is violating antitrust trust laws under the “attempted monopoly” theory.

Essential Facilities Doctrine. Given Google’s network effect power and that advertisers cannot afford to not advertise on Google, this section will examine whether Google is the provider of an essential facility. The essential facilities doctrine is used to prove the “willful” or “predatory” acts required to “support a claim of actual or attempted monopolization.”¹⁴¹ The essential facilities doctrine is invoked “when a monopolist or near monopolist controls a facility or resource that is ‘essential’ in the sense that competitors must have access to it if they are to be able to meaningfully compete with the defendant.”¹⁴² The action “can be an act of actual or attempted monopolization for the defendant in such a situation to unjustifiably deny competitors access at a fair rate to the facility or resource, where granting access is reasonably feasible and denying access is without countervailing competitive justification.”¹⁴³

Application of the Essential Facilities Doctrine to Google. If Google is an essential facility and if the allegations in *Tradecom v. Google* are true, then Google could be found to be in violation of antitrust laws.¹⁴⁴ Tradecom alleges that Google manipulated its advertising auction system and manually raised its advertising rate by as much as 10,000 percent.¹⁴⁵ Tradecom claims that it has no choice but to pay the higher price because Google could help them reach over 70 percent of the internet search users.¹⁴⁶

This paper argues that Google is not an essential facility. Previous claims that Google is an essential facility have been unsuccessful.¹⁴⁷ When AT&T was a monopoly, it owned all of the telephone lines and other telecoms had no way of connecting the phone users without access to AT&T’s infrastructure.¹⁴⁸ It is difficult to claim that Google is an essential facility because people can still use the internet without Google and advertisers can still reach its customers without Google. Google is the equivalent of a telephone directory and an advertising platform. People can still make telephone calls without the assistance of a telephone directory, just as people are able to use the internet without a search engine. The online advertising industry will not become extinct even if Google refuses to sell any keywords. Thus, potential plaintiffs will not succeed in claiming that Google is violating antitrust laws by using the essential facilities doctrine.

Antitrust Legal Analysis Section Summary

Google competes in the algorithm internet search, contextual online advertising, and cloud computing market. It possesses monopoly power in the internet search and the contextual online advertising market. It could be found guilty of abusing its monopoly power under the attempted monopoly theory. The next section will suggest a remedy against Google if the company is proven to be violating antitrust laws under the attempted monopoly theory.

Remedies

This section will recommend a remedy on the assumption that Google is violating antitrust laws under the attempt monopolization theory. The two general categories of antitrust remedies are “damages” and “injunctions.”¹⁴⁹ “Injunctive remedies can be further classified into behavioral remedies and structural remedies.”¹⁵⁰ “Behavioral injunctions bar a defendant firm from engaging in particular actions that a court has deemed anticompetitive.”¹⁵¹ “[S]tructural remedies affect market structure directly by redistributing competitive assets in the relevant market.”¹⁵² This paper recommends that a structural remedy be applied to Google. Applying the “damages” remedy is not effective against large monopolists because they are not deterred by fines.¹⁵³ In addition, fining Google will not destroy the monopoly.¹⁵⁴

Specifically, this paper recommends a vertical divestiture against Google, in which a company is broken into its various parts.¹⁵⁵ In *U.S. v. Microsoft*, the government wanted to divest Microsoft's Operating System division and its other applications divisions into two different companies.¹⁵⁶ The government chose this remedy because the Operating System and other applications are individual products that can be developed separately.¹⁵⁷ Such divestiture would stop the network effects of a monopolist.

Similar to Microsoft, Google's three main products (search engine, online advertising, and cloud computing) are wholly separate products that can be developed separately. Thus it is recommended that the algorithm internet search, the advertising platform, and the internet application be divided into three separate companies. This way, these separated departments can no longer rely on other internal divisions to increase Google's network effect.¹⁵⁸

In the hypothetical post-divestiture scenario, the search engine company would need to generate revenue by licensing its technology for other websites, and to partner with an external advertisement service provider. The advertising service company would need to negotiate and partner with other websites to host its advertisements rather than being able to automatically place advertisements on Google. The cloud computing division would need to partner with advertising providers or charge its customers fees to generate revenues.

Conclusion

Google is a multi-sided platform company. It competes in the algorithm internet search, contextual online advertising, and cloud computing markets. It has a monopoly in the internet search and contextual advertising. It could be found guilty of abusing its monopoly power under the attempted monopoly theory. If a court determines that Google is violating antitrust laws, this paper recommends a vertical divestiture remedy against it. The divestiture would separate the internet search, contextual advertising, and the cloud computing division into three separate companies.

Endnotes

- 1 This paper was written during Spring 2009 by William K. Li, william.k.li@gmail.com, a student at St. John's University School of Law.
- 2 *Google Code of Conduct*, <http://investor.google.com/conduct.html> (last visited Apr. 19, 2009).
- 3 See *id.*
- 4 *Id.*
- 5 See Forbes's Global 2000, FORBES, (Apr. 8, 2009), available at http://www.forbes.com/lists/2009/18/global-09_The-Global-2000_Rank_2.html (ranking Google as the 55th largest company in the world); see also Om Malik, *Google's Market Cap Now Bigger than GE*, GIGAOM, (Mar. 30, 2009), <http://gigaom.com/2009/03/30/googles-market-cap-now-bigger-than-ge>.
- 6 See Hitwise Top 20 Sites & Engines 4/11/2009, HITWISE, <http://www.hitwise.com/datacenter/main/dashboard-10133.html> (last visited Apr. 18, 2009).
- 7 See *infra* notes 135-140.
- 8 David S. Evans, *Antitrust Issues Raised By The Emerging Global Internet Economy*, 102 N.W. U.L. REV. 1987, 1989 (2008).
- 9 *Id.* ("Google...serves people who are searching the Web, advertisers who want to reach these users, and application developers who are using Google's software to develop complementary products").
- 10 *Google Company Overview*, <http://www.google.com/intl/en/corporate> (last visited Apr. 18, 2009).
- 11 U.S. Search Engine Ranking (Feb. 18, 2009), COMSCORE, <http://www.comscore.com/press/release.asp?press=2729>.
- 12 U.S. Search Engine Ranking, *supra* note 11; *infra* note 23 (defining vertical search engine).
- 13 *Google 2008 Balance Sheet*, available at http://www.google.com/intl/en/press/pressrel/revenues_q408.html; see, *Earnings Preview: Google, Media General Offer First Taste Of Q1 '09 Results*, PAIDCONTENT (Apr. 9, 2009), <http://www.paidcontent.org/entry/419-earnings-preview-google-media-general-reveal-first-taste-of-q109-result>. Google's 2008 balance sheet shows that its revenue came predominantly from advertising, and a small portion of its revenue came from the licensing of its internet search technology.
- 14 See *id.*
- 15 Kristine Laudadio Devine, *Preserving Competition In Multi-Sided Innovative Markets: How Do You Solve A Problem Like Google?*, 10 N.C. J.L. & TECH 59, (2008).
- 16 *Google Advertising Programs*, http://www.google.com/intl/en_us/ads/ads_1.html (last visited Apr. 18, 2009).
- 17 *More Google Products*, <http://www.google.com/intl/en/options> (last visited April 18, 2009) (listing all of Google's products); Chris Kanaracus and Juan Carlos Perez, *Google Working to Add 'Every Damn' Service to Apps*, PC WORLD, Apr. 9, 2009, http://www.pcworld.com/businesscenter/article/162877/google_working_to_add_every_damn_service_to_apps.html; Ryan Paul, *Google's Android Platform: Not So Open After All*, ARS TECHNICA, July 15, 2008, <http://arstechnica.com/open-source/news/2008/07/googles-android-platform-not-so-open-after-all.ars> (stating that Google is entering into the mobile phone business to help expand its core businesses).
- 18 Henry Blodget, *Google Launches Cloud Operating System "Chrome" and Calls it a "Browser"*, BUSINESS INSIDER, Sept. 2, 2008, <http://www.businessinsider.com/2008/9/google-chrome-browser-takes-page-out-of-microsoft-book-link-and-lever>.
- 19 See Evans, *supra* note 8.

Google and Antitrust

Continued from page 13

- 20 *Web Search Engine*, WIKIPEDIA, http://en.wikipedia.org/wiki/Web_search_engine (last visited Apr. 19, 2009).
- 21 *Google Technology Overview*, <http://www.google.com/corporate/tech.html> (last visited Apr. 19, 2009).
- 22 *How Google Works*, GOOGLE GUIDE, http://www.googleguide.com/google_works.html (last visited Apr. 19, 2009).
- 23 *Tradecomet v. Google*, No. 09-1400 at 6 (S.D.N.Y. Feb. 17, 2009).
- 24 *Id.* at 5.
- 25 *Id.*
- 26 *Id.*
- 27 *Id.* at 25-26.
- 28 Google 2008 Balance Sheet, *supra* note 13.
- 29 *Contextual Marketing Definition*, PC MAGAZINE, http://www.pcmag.com/encyclopedia_term/0,2542,t=contextual+marketing&i=56351,00.asp.
- 30 *Google Adwords*, <https://www.google.com/accounts/ServiceLogin?service=adwords&hl=en-US<mpl=adwords&passive=true&ifrf=false&alwf=true&continue=https%3A%2F%2Fadwords.google.com%2Fselect%2Fgaiaauth%3Fapt%3DNone%26ugl%3Dtrue&sourceid=awo&subid=ww-en-et-ads-oldawhptest2> (last visited Apr. 19, 2009).
- 31 *Id.*; See *Google AdSense For Contents*, https://www.google.com/adsense/static/en_US/AfcOverview.html?sourceid=aso&subid=ww-ww-et-pubsol&medium=link.
- 32 *Google Advertising Programs*, *supra* note 16.
- 33 *Google Video Advertising Solutions*, <http://www.google.com/ads/videoadsolutions/publisher.html#sourceid=aso&subid=ww-ww-et-pubsol&medium=link> (last visited Apr. 19, 2009).
- 34 *Google Adwords*, *supra* note 30.
- 35 *Id.*
- 36 *Id.*
- 37 *Id.*
- 38 *Id.*
- 39 *Id.*
- 40 *Tradecomet*, No. 09-1400 at 14.
- 41 *Google AdSense*, https://www.google.com/adsense/static/en_US/PublisherTools.html?sourceid=aso&subid=ww-en-et-storefrontEN_v2_PubSolLink&medium=link (last visited Apr. 19, 2009).
- 42 *Id.*
- 43 *Id.*
- 44 *Google AdSense Help Page*, <https://www.google.com/adsense/support/bin/answer.py?answer=9902&cbid=1pjkkiloyvbot&src=cb&lev=answer> (last visited Apr. 9, 2009).
- 45 *Id.*
- 46 *Id.*
- 47 See *Blodget*, *supra* note 18.
- 48 Jason Kincaid, *Mozilla Extends Lucrative Deal with Google for 3 Years*, TECHCRUNCH, Aug. 28, 2009, <http://www.techcrunch.com/2008/08/28/mozilla-extends-lucrative-deal-with-google-for-3-years/> (explaining how the toolbar helps Google increase its search market share).
- 49 *Id.*
- 50 Eric Savitz, *The Next Step for Google: Enterprise Revenue in the Cloud*, SEEKING ALPHA, Mar. 22, 2009, <http://seekingalpha.com/article/127214-the-next-step-for-google-enterprise-revenue-in-the-cloud> (explaining that Google's enterprise applications generate very little income and have very little market share).
- 51 Quentin Hardy and Evan Hessel, *Goo Tube*, FORBES, Jun. 16, 2008, available at <http://www.forbes.com/forbes/2008/0616/050.html>.
- 52 See *Google Patents*, <http://www.google.com/patents> (last visited Apr. 19, 2009) (showing an example of a Google service that does not display any advertisement); Josh Cohen, *Ads in Google News Search Results*, Feb. 25, 2009, <http://googlenewsblog.blogspot.com/2009/02/ads-in-google-news-search-results.html> (explaining that Google News is a service that previously did not have advertisement placements but will have advertisements from now on).
- 53 *Ads in Gmail*, <http://mail.google.com/support/bin/answer.py?hl=en&answer=6603> (last visited Apr. 19, 2009); *Google Maps*, <http://maps.google.com> (last visited Apr. 19, 2009); *Google Books*, http://books.google.com/books?id=dvvhyt3wlbMC&printsec=frontcover&source=gbs_hpintrst (last visited Apr. 19, 2009). These are examples of Google services that display Google advertisements.
- 54 See Charlie White, *Google Chrome Signals the Death of the Operating System*, DVICE, Sep. 18, 2008, http://dvice.com/archives/2008/09/shift_chrome_si.php; see also Roger Smith, *Google Chrome: Browser or Cloud Operating System?*, INFORMATION WEEK, Sep. 2, 2008, http://www.informationweek.com/blog/main/archives/2008/09/google_chrome_b.html.
- 55 *What is Cloud Computing?*, SEARCHENTERPRISEDESKTOP.COM, http://searchenterprisedesktop.techtarget.com/sDefinition/0,,sid192_gci1287881,00.html (last visited Apr. 19, 2009).
- 56 *Id.*
- 57 *Google Chrome Comic Book*, <http://www.google.com/googlebooks/chrome/index.html> (last visited Apr. 19, 2009).
- 58 *Id.*; Savitz, *supra* note 50; Smith, *supra* note 54.
- 59 *Google Chrome Comic Book*, *supra* note 57; Savitz, *supra* note 50; Smith, *supra* note 54.
- 60 See Devine, *supra* note 15; see Evans, *supra* note 8.
- 61 David J. Saylor, *Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series*, PRACTICING LAW INSTITUTE, 817, 845-49 (2009).

- 62 Press Release, *Yahoo! Inc. and Google Inc. Abandon Their Advertising Agreement*, DEPARTMENT OF JUSTICE, Nov. 5, 2008, available at <http://www.usdoj.gov/opa/pr/2008/November/08-at-981.html>.
- 63 *Id.*
- 64 Tradecom, No. 09-1400 at 1.
- 65 15 U.S.C.A. §1, (2004). Section 1 applies to companies acting in concert; 15 U.S.C.A. §2, (2004). Antitrust laws are mostly developed from case laws, thus these statutes will not be discussed extensively.
- 66 See 15 U.S.C.A. §2. Section 2 applies to a company that achieved monopoly acting alone.
- 67 *U.S. v. Grinnell*, 384 U.S. 563, 570–571 (1966).
- 68 WILLIAM C. HOLMES, *ANTITRUST LAW HANDBOOK* (2006) (citing *U.S. v. du Pont*, 351 U.S. 377, 391 (1956)).
- 69 *Grinnell*, 384 U.S. at 570–571.
- 70 *T. Harris Young & Assocs., Inc. v. Marquette Electronics, Inc.*, 931 F.2d 816, 823 (11th Cir. 1991); see *U.S. v. Microsoft* 253 F.3d 34, 51 (D.C. Cir. 2001).
- 71 *du Pont*, 351 U.S. at 391.
- 72 *Id.*
- 73 *Id.*
- 74 *Id.*
- 75 See *id.*
- 76 *Grinnell*, 384 U.S. at 570–571.
- 77 *U.S. v. Dentsply Intern*, 399 F.3d 181, 187(3d Cir. 2005), *cert. denied*, 546 U.S. 1089 (2006).
- 78 See *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599 (7th Cir. 1997).
- 79 *Advanced Health-Care Services v. Radford Community Hosp.*, 910 F.2d 139 (4th Cir. 1990).
- 80 See *T. Harris Young & Assocs.*, 931 F.2d at 823.
- 81 *Id.*
- 82 See *Evans*, *supra* note 8.
- 83 *Id.*
- 84 *Id.*
- 85 *du Pont*, 351 U.S. at 391.
- 86 See *id.*
- 87 Google Company Overview, *supra* note 10.
- 88 *Tradecom*, No. 09-1400 at 13.
- 89 See *du Pont*, 351 U.S. at 391.
- 90 *T. Harris Young & Assocs.*, 931 F.2d at 823.
- 91 See *id.*
- 92 *Id.*
- 93 *Grinnell*, 384 U.S. at 570–571.
- 94 See U.S. Search Engine Ranking, *Supra* note 10 (showing Google has 72% of search market and YouTube is the second most used searched engine); see also *Dentsply*, 399 F.3d at 187 (holding that having a 55% market share is enough to be a monopolist).
- 95 Stephanie N. Mehta, *Behold the Server Farm! Glorious Temple of the Information Age!*, FORTUNE MAGAZINE, Aug. 1, 2006, available at http://money.cnn.com/magazines/fortune/fortune_archive/2006/08/07/8382587/index.htm.
- 96 *Microsoft*, 253 F.3d 34 at 83; Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestiture In Network Industries*, 68 U. CHI. L. REV. 1, 8 (2001).
- 97 See List of Search Engines, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_search_engines (listing the year that every search engine was created); see also Search Engines, WIKIPEDIA, http://en.wikipedia.org/wiki/Search_engines (showing that there were many more prominent search engines in the 1990s and early 2000s).
- 98 See Cuil.com Traffic Data, ALEXA, <http://alexa.com/siteinfo/cuil.com> (last visited Apr. 18, 2009) (showing that Cuil's visitor traffic dropped from .2% in its debut month of July 2008 to .007% in April 2009).
- 99 *Most Successful U.S. Startups 2008*, BUSINESSWEEK, available at http://images.businessweek.com/ss/08/12/1217_hottest_startups/8.htm (calling cuil.com one of the most successful startups of 2008).
- 100 *About Us*, <http://www.cuil.com/info>, last visited Apr. 9, 2009; *Search Site Aims to Rival Google*, BBC NEWS, Jul. 28, 2008, <http://news.bbc.co.uk/1/hi/technology/7528503.stm>.
- 101 Cuil.com Traffic Data, *supra* note 98.
- 102 Ina Friedman, *Microsoft's Search Must Begin in Redmond*, CNET NEWS, Apr. 13, 2009, http://news.cnet.com/8301-13860_3-10217273-56.html (indicating that despite having tremendous wealth and resources, even Microsoft cannot create a good search product to compete with Google or even Yahoo in the search engine business).
- 103 See *Grinnell*, 384 U.S. at 570–571.
- 104 *Tradecom*, No. 09-1400 at 17.
- 105 *Id.* (alleging that Google manipulated its auctioning system and manually raised Tradecom's advertising rate).
- 106 *Id.*
- 107 See generally *Advanced Health-Care Services*, 910 F.2d 139 (4th Cir. 1990).
- 108 *Tradecom*, No. 09-1400 at 9, 13.
- 109 *Grinnell*, 384 U.S. at 570–571.
- 110 *Northeastern Tel. Co. v. AT & T*, 651 F.2d 76, 84–85 (2d Cir.1981).
- 111 *Microsoft*, 253 F.3d 34 at 53–54; *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 398 (7th Cir. 2000).
- 112 Holmes, *supra* note 68 at 438.
- 113 *Id.* at 441.
- 114 *Id.* at 442.
- 115 *Microsoft*, 253 F.3d 34 at 92.
- 116 *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977) (citing *White Motor Co. v. United States*, 372 U.S. 253 (1963)).

Google and Antitrust

Continued from page 15

- 117 Holmes, *supra* note 68 at 442 (the allowable conducts include:
the nondisclosure of a new product innovation until market conditions are most advantageous for introducing it; the nonpredatory development of new product features or expansion of services that adversely affect competitors' complementary products or services; refusals to share internally developed data or technology; nonpredatory price reductions; the refusal to provide marketing assistance, parts, and other support to competitors; the exploitation of the legitimate attributes of an integrated business; pursuing bona fide legal claims, promoting one's own product or service over those of competitors).
- 118 *Id.* at 452.
- 119 See *id.* at 438.
- 120 *Id.*, see generally *Tradecomet*, No. 09-1400. So far only the complaint was filed by Tradecomet without any discovery or hearings, thus the allegations by Tradecomet cannot be used as definitive proof against Google for having conducted the alleged anticompetitive practices.
- 121 *List of Acquisitions by Google*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_acquisitions_by_Google (last visited Apr. 18, 2009).
- 122 Saylor, *supra* note 61 at 847.
- 123 Alex Kinnier, *Why We Are Buying Doubleclick*, THE OFFICIAL GOOGLE BLOG, Jun. 26, 2007, <http://googleblog.blogspot.com/2007/06/why-were-buying-doubleclick.html>.
- 124 *Id.*
- 125 *Id.*
- 126 Saylor, *supra* note 61 at 847.
- 127 Northern Pac. Ry. Co. v. U.S., 356 U.S. 1, 5-6 (1958); *Microsoft*, 253 F.3d 34 at 95 (applying 15 U.S.C.A. §1 to a company that acted alone in tying its own products).
- 128 *Id.*
- 129 Holmes, *supra* note 117.
- 130 *Microsoft*, 253 F.3d 34 at 95.
- 131 Holmes, *supra* note 117.
- 132 *Microsoft*, 253 F.3d 34 at 97.
- 133 See Yahoo!, www.yahoo.com (last visited Apr. 18, 2009) (listing all of Yahoo's web services and applications); see also msn, www.msn.com (last visited Apr. 18, 2009) (listing all of msn and Live search's web services and applications).
- 134 See *id.*
- 135 See *id.* at 80; see generally *U.S. v. American Airlines, Inc.*, 743 F.2d 1114 (5th Cir. 1984)
- 136 See generally *American Airlines*, 743 F.2d 1114.
- 137 Yahoo! Inc. and Google Inc. Abandon Their Advertising Agreement, *supra* note 62.
- 138 *Id.*
- 139 *Id.*
- 140 *Microsoft*, 253 F.3d 34, at 83.
- 141 Holmes, *supra* note 68 at 521-22.
- 142 *Id.* at 522.
- 143 *Id.*
- 144 See generally *Tradecomet*, No. 09-1400 as of April 17, 2009.
- 145 *Tradecomet*, No. 09-1400 at 13.
- 146 *Id.*, see *supra* note 131 (stating that a company does not have to promote a competitor's product, thus if Tradecomet truly believes that its own vertical search engine is in competition with Google, then Google may exclude Tradecomet's advertisements).
- 147 Evan Brown, *Suit Over Drop In Search Engine Placement Dismissed*, 10 No. 3 J. OF INT'L L. 16, 16 (2006).
- 148 *MCI v. AT&T*, 708 F.2d 1081, 1132 (7th Cir. 1983).
- 149 Shelanski & Sidak, *supra* note 96 at 15.
- 150 *Id.*
- 151 *Id.*
- 152 *Id.* "The redistribution can be accomplished by breaking the defendant company into two or more pieces and reorganizing the company's assets (which can include employees) among the two or more newly created competitors. Alternatively, these assets can be redistributed by requiring the defendant to sell or otherwise to make available to its competitors some input, right, or facility that will allow rivals to compete in the market."
- 153 Mike Ricciuti, *EU Slaps Microsoft with \$1.35 Billion Fine*, CNET NEWS, Feb. 27, 2009, http://news.cnet.com/8301-10784_3-9880256-7.html. Microsoft defied the European Commission's order to stop its antitrust violations despite knowing that a massive fine would be imposed for the noncompliance.
- 154 Shelanski & Sidak, *supra* note 96 at 77.
- 155 See *id.* at 4-6, 73. Microsoft is an application company that is most analogous to Google, thus it is logical to apply the remedy directed against Microsoft to be applied to Google; *Id.* at 73 (citing *U.S. v. Microsoft*, 87 F. Supp .3d 30, 48 (D. D.C. 2000) (showing one of the proposed remedies against Microsoft included vertical divestiture of "Microsoft into distinct companies along lines of business (that is, operating systems ("OS") software, applications programs, and Internet services, sites, and products)"). Divestiture is better than behavioral injunction. Although both remedies try to bring about the same result, behavioral injunction requires more monitoring and oversight because practically a company cannot be expected to truly not communicate internally about its developments.
- 156 *Id.*
- 157 *Id.*
- 158 *Id.* at 8-10.

Publicly Available Websites for IT Lawyers

Following are some publicly available websites relating to varying aspects of information technology law practice. Some of these websites may require payment for certain services. Neither the State Bar of Michigan nor the IT Law Section endorses these websites, the providers of the website, or the goods or services offered in connection therewith. Rather these websites are provided for information purposes only and as possible useful tools for your law practice.

Please provide any feedback or recommendations for additional websites to michael@gallo.us.com.

Electronic Discovery

- http://www.abanet.org/litigation/issuecenter/issue_ediscovery.html - The ABA's library of electronic discovery resources
- <http://technology.findlaw.com/electronic-discovery/electronic-discovery-wizard.html> - FindLaw's click-able list of Federal Rules regarding electronic discovery, with summaries, checklists and links to relevant articles
- http://www.fjc.gov/public/home.nsf/autoframe?openform&url_1=/public/home.nsf/inavgeneral?openpage&url_r=/public/home.nsf/pages/196 - The Federal Judicial Center's materials on electronic discovery for civil litigation
- http://www.fjc.gov/public/home.nsf/autoframe?openform&url_1=/public/home.nsf/inavgeneral?openpage&url_r=/public/home.nsf/pages/334 - The Federal Judicial Center's materials on electronic discovery for search and seizure of computers and data in criminal cases
- <http://edrm.net> - The 'Electronic Discovery Reference Model', which develops guidelines and standards for electronic discovery consumers and providers
- <http://www.edrm.net/wiki/index.php/Glossary> - Wiki-based glossary of electronic discovery terms facilitated by EDRM (the 'Electronic Discovery Reference Model')
- <http://www.ediscoverylaw.com> - Blog on legal issues, news and best practices relating to electronic discovery
- <http://www.ediscoverylaw.com/articles/ediscovery-case-database> - Electronic discovery case database
- <http://www.discoveryresources.org> - Electronic discovery resources
- <http://discoveryresources.dreamhosters.com/wp-content/uploads/2008/05/collectionforms.pdf> - Sample form for electronic discovery information collection
- <http://discoveryresources.dreamhosters.com/wp-content/uploads/2008/05/eddrequest.doc> - Sample electronic discovery interrogatories and requests for production
- <http://www.fiosinc.com/e-discovery-knowledge-center/default.aspx?cid=DG> - Fios' library of electronic discovery whitepapers, webcasts, case studies, articles, checklists, and other resources
- <http://www.fiosinc.com/case-law-rules/e-discovery-state-rules-civil-procedure.aspx> - State Rules of Civil Procedure for electronic discovery

Save the Date!!!

On **Thursday, April 15, 2010**, instead of doing something taxing, plan on something more relaxing: Join the **Information Technology Law Section** for our **Spring Networking Event!** This year we are joining forces with *DetroitNET.org* at the Post Bar in Novi from 5:00 to 8:00 PM. Our Section will be a co-sponsor of one of Michigan's premier I.T. networking events, which is attended by hundreds of I.T. professionals, recruiters, job-seekers and lawyers. And best of all, the event is FREE to attend! Registration details will follow soon. For more information, check www.detroitnet.org and the Section website at www.michbar.org/computer.

On **Wednesday, September 22, 2010**, the **Information Technology Law Section** will convene for an annual meeting and an ICLE event!



2010 Edward F. Langs Writing Award

Essay Competition Rules

1. Awards will be given to up to three student essays, which in the opinion of the judges make the most significant contribution to the knowledge and understanding of information technology law. Factors to be taken into consideration include: originality; timeliness of the subject; depth of research; accuracy; readability; and the potential for impact on the law.
2. Essay must be original, deemed to be of publishing quality, and must not have been submitted to any other contest within the previous 12 months.
3. Essay must be typed, double spaced, at least ten pages in length, must contain proper citations listed as either end-notes or footnotes, and must have left, right, top, and bottom margins of one inch.
4. Essay must include the submitter's name, email address, mailing address, telephone number, and school attended.
5. A total of \$1,500 in US dollars shall be divided between the award winning essays, and all rights to award winning essays shall become the property of the State Bar of Michigan.
6. The Information Technology Section of the State Bar of Michigan reserves the right to make editorial changes, and to publish award winning essays in the Section's newsletter, the *Michigan IT Lawyer*.
7. Essay must be submitted as a Microsoft Word document, postmarked by June 30, 2010, and emailed to dsyrowik@brookskushman.com.