SENATE JUDICIARY SUBCOMMITTEE ON

ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS

HEARING ON COMPETITION IN ONLINE MARKETS/INTERNET SEARCH ISSUES

STATEMENT OF

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I. Introduction

Thank you, Chairman Kohl, Ranking Member Lee, and members of the Subcommittee for holding this very important hearing today.

My name is Thomas Barnett, and I am a partner at Covington & Burling LLP, where I am the co-chair of the global Antitrust & Consumer Law Practice Group. Previously, I served as the Assistant Attorney General and was in charge of the Justice Department's Antitrust Division from 2005-2008. I also worked for the Department of Justice as the Deputy Assistant Attorney General for Civil Enforcement. I have spent the bulk of my career focused on antitrust enforcement and policy matters, and I bring this experience to the issues of competition in the online market place.

II. The Threat Posed by Google to Competition and Consumers on the Internet

The Internet has revolutionized the way that consumers and businesses engage in commercial transactions. About 240 million people in the United States regularly use the Internet,[1] and this activity generated nearly $170 billion in commerce last year, including online advertising and online transactions.[2] The enormous benefits that the Internet offers consumers, however, face an increasing threat from Google that can be summarized as follows:

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[1] *See* Internet World Stats, *Internet Usage and Broadband Usage Report*, http://www.internetworldstats.com/am/us.htm (last accessed Sept. 8 2011).

[2] ComScore, *ComScore Reports Record-Breaking $43.3 Billion in Q4 2010* (Feb. 4, 2011), http://comscore.com/index.php/Press_Events/Press_Releases/2011/2/comScore_Reports_Record-Breaking_43.4_Billion_in_Q4_2010_U.S._Retail_E-Commerce_Spending (providing retail e-commerce spending figures of approximately $142.5 billion in 2010); Clark Fredricksen, *State of the Day: Advertising Online Surpassed Newspapers In 2010*, eMarketer (Mar. 14, 2011), http://www.emarketer.com/blog/index.php/stat-day-online-advertising-surpasses-newspapers-2010/ (stating online advertising spend was $25.8 billion in 2010).

1. Search is the critical gateway by which users navigate the web: As one Google executive has noted, "[S]earch is critical. If you are not found, the rest cannot follow."[3]
2. Google dominates search and search advertising.
3. Google is expanding its dominance into a broadening range of search-dependent products and services (which also protects and reinforces its search dominance).
4. As one company gains control over access to more and more products and services on the Internet, consumers can expect to face higher prices and reduced innovation.

The key question for antitrust enforcement is *how* Google is expanding its control over the Internet. As described more fully below, there is reason to believe that Google is using its extraordinary power to manipulate users and foreclose the ability of other sites to compete. If so, Google should be found to be violating the antitrust laws and an appropriate remedy should be imposed.

There is an additional concern that warrants particular attention by this Subcommittee. Google already possesses unprecedented power to steer users and to stifle competition. If, for some reason, antitrust enforcement is not able to address these concerns, there will be pressure to reign in Google's power through more direct government regulation that is likely to be more rigid and burdensome and that itself would pose a threat to innovation and economic growth on the Internet.

A. The Crucial Role of Search

There are currently more than 312 million websites with more than a trillion web pages, and more appear every day.[4] Internet users must navigate through this vast array of information, and

[3] Kevin J. O'Brien & Eric Pfanner, *Europe Divided on Google Book Deal*, N.Y. Times (Aug. 23, 2009), *available at* http://www.nytimes.com/2009/08/24/technology/internet/24iht-books.html?pagewanted=all.

they do so principally through search engines. For example, 92% of adults online use search engines to find information on the Internet.[5] Correspondingly, whether a website is found by consumers depends largely on whether and where it appears on the results pages a search engine produces in response to users' queries. Even established sites like Expedia and TripAdvisor depend on search engines for a large portion of their traffic.

And to be found by consumers, particularly for new sites, a website needs the ability to appear at or near the top of the results displayed by a search engine. Approximately 88% of users' clicks are on links that appear in the top three search results,[6] meaning, for example, that a website that does not appear on the first results page is unlikely to attract significant traffic.

Websites denied the opportunity to attract users are likewise denied the revenue they need to invest in new products and services. Developers will not invest in new applications if they do not have a reasonable prospect of being found by users and succeeding.

As a result, search traffic is the lifeblood of innovation and development on the Internet, and search engines control the flow of that traffic.

B. Google's Dominance of Online Search and Search Advertising

Google dominates online search in the U.S., as confirmed by both the Federal Trade Commission and the Department of Justice in connection with their investigations of Google.[7]

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[4] *See* Netcraft, *April 2011 Web Server Survey*, http://news.netcraft.com/archives/2011/04/06/april-2011-web-server-survey.html; Google Blog, *We Knew the Web Was Big. . .* (July 25, 2008), http://googleblog.blogspot.com/2008/07/we-knew-web-was-big.html.

[5] *See* Kristin Purcell, *Search and Email Still Top The List of Most Popular Online Activities*, PewInternet (Aug. 9, 2011), http://www.pewinternet.org/Reports/2011/Search-and-email.aspx.

[6] *See* SEO Scientist, *Google Ranking and CTR – How Clicks Distribute Over Different Rankings on Google* (July 12, 2009), http://www.seo-scientist.com/google-ranking-ctr-click-distribution-over-serps.html.

[7] *See Statement of Interest of the United States of America Regarding Proposed Amended Settlement Agreement*, U.S. Dep't of Justice, Antitrust Div. (Feb. 4, 2010), *available at* www.justice.gov/atr/cases/f255000/255012.htm#f; *Statement of the Federal Trade Commission Concerning Google/DoubleClick*, FTC File No. 071 0170 at 3 (Dec. 20, 2007), *available at* http://www.ftc.gov/os/caselist/0710170/ 071220statement.pdf.

At this point, Google faces competition from only one general search engine in the U.S. -- Bing, which is a distant second. Moreover, Google's search dominance has enabled it also to dominate paid search advertising. With control of more than 79% of searches in the U.S.[8] (and over 94% in Europe[9]), and with a share of 80% of paid search advertising in the U.S. [10] (and higher share abroad[11]), Google wields unprecedented power over a site's ability to connect with users.

C. Google's Expanding Dominance

Google has undergone a fundamental transformation in its business that has enormous consequences for competition on the Internet. Originally, Google was purely a search engine with the incentive to direct each user as quickly as possible to the websites most likely to be most relevant to the user's query. More recently, however, Google has expanded into other products and services that include the provision of information (such Google Places, Google News, Google Finance, or YouTube) and specialized "vertical" search services that operate in a specific area (such as Google Maps, Google Product Search, or Google Flight Search).

Google has been highly successful in many of these areas, often replacing the leading company (such as MapQuest) in an extraordinarily short period of time. This expansion has several important implications.

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[8] *See* StatCounter Global Stats, *Top 5 Search Engines in the U.S. from Aug 10 to Aug 11*, http://gs.statcounter.com/#search_engine-us-monthly-201008-201108 (last accessed Sept. 20, 2011).

[9] *See* StatCounter Global Stats, *Top 5 Search Engines in Europe from Aug. 10 to Aug. 11*, http://gs.statcounter.com/#search_engine-eu-monthly-201008-201108 (last accessed Sept. 20, 2011).

[10] Google's share is 80% both by spend and clicks. Efficient Frontier, *Q1 2011 Global Digital Marketing Performance Report* at 4, *available at* http://www.efrontier.com/sites/default/files/EF_1Q11GlobalReport.pdf.

[11] Google's share is 83% of paid search globally. Jonathan Allen, *Google Likely to Expand Lead in Search Ad Market*, Search Engine Watch (Jan. 20, 2011), http://searchenginewatch.com/article/2050155/Google-Likely-to-Expand-Lead-in-Search-Ad-Market.

First, Google's incentives have changed. Now it has an incentive to steer users to its own web pages and away from competing websites to enable it to increase its revenues. Google earns additional revenues from selling advertisements on the Google pages to which it steers users.

Second, by displacing competition in adjacent markets, Google reinforces its search dominance by stifling the development of nascent competitors. For example, Google benefits by displacing vertical search engines that could deprive Google of some search traffic. Because they operate in a particular vertical context such as travel, shopping and local destinations, vertical search engines can compete effectively with Google within that specific area without having to match Google's enormous scale in general search. Travel search sites like TripAdvisor and KAYAK and the local entertainment site Yelp are examples of such vertical search sites.

Third, Google has begun forcing the natural search results down to the bottom of the first page, and sometimes even to the second page. As a result, Google forces sites seeking to obtain visibility on the first page to spend more for Google paid search advertising, thereby increasing their costs while increasing Google's profits.

D. Google's Exclusionary Conduct

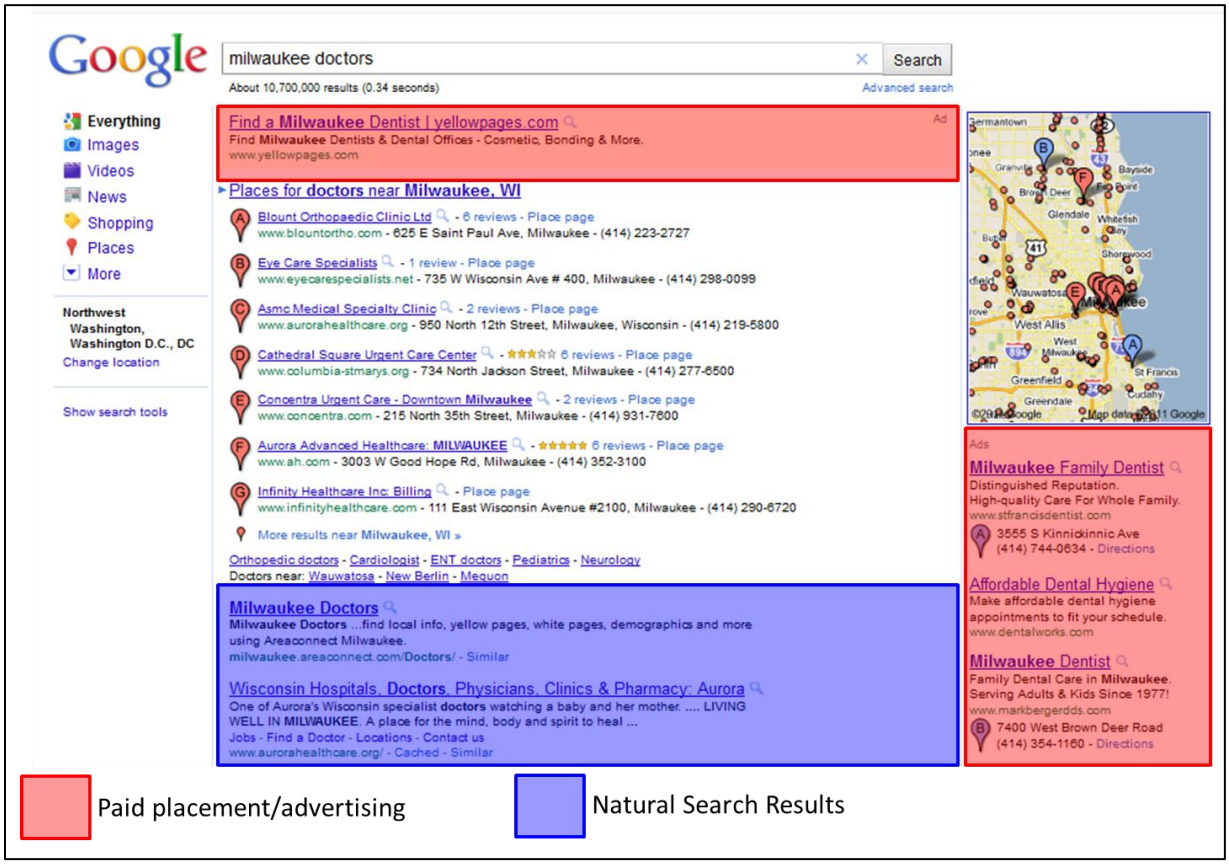
The key issue for antitrust enforcement is *how* Google has been able to expand into these search-dependent areas. If Google has relied in part on exclusionary tactics, then its expanding dominance presents serious antitrust concerns. Unfortunately for consumers, there are strong indications that Google is, in fact, foreclosing competition rather than simply competing on the merits of its own products. Several examples illustrate the concern:

1. Deceptive Display

Google's display of search results is deceptive to users and forecloses the ability of other sites to be seen. Google has long said and users have long come to expect that Google's search results are presented in order of likely relevance to the user's query. This is why paid search ads

are separated from the natural search results and labeled as "ads." Users are entitled to know that these "sponsored" links were not placed at the top of the results by the algorithm and that Google has an economic interest in placing the links on the page.

Nevertheless, Google has begun inserting at or near the top of the search results page links to its own web pages. For example, a query for "milwaukee doctors," returns nearly a full screen of links -- which include multiple links to Google Places pages -- that are separate from the natural search results that begin only at the bottom of the page.



Indeed, Google has a "policy" of putting links to its own products above the natural search results. As a senior Google executive acknowledged in a moment of candor:

> [When] we roll[ed] out Google Finance, we did put the Google link first. . . . [T]hat has actually been our policy since then,

> because of Finance. So for Google Maps, again, it's the first link.[12]

Notwithstanding the fact that these links are not "natural" results determined by Google's normal search algorithm and the fact that Google has an economic interest in placing links to its own pages there,[13] Google does not disclose the nature or placement of these links to users. By placing these Google links strategically on its results page, Google can induce users to click on the links under the mistaken impression that they are natural search results that are most likely to be relevant to a query. Moreover, by inserting these Google links onto the first page, Google pushes the natural search results further down, often onto the second page, making it more difficult for competing sites to gain visibility.

Winning by deception is hardly competition on the merits. Nor does it live up to Google's supposed principles to "label advertisements clearly" and "do what's best for the user."

2. Unauthorized Use of Scraped Content

Google also has a history of scraping content, such as user reviews, from other websites and displaying that content without authorization on its own pages, such as Google Places, Google Hotpot and Google Product Search pages. This practice enables Google to expropriate the value of the content (developed through significant investment by others) and deprives the original content creators of user traffic and advertising revenue. For example, Google has scraped content directly from Yelp and TripAdvisor for its Places pages. When TripAdvisor objected and asked Google not to display its content on Google Places pages, Google refused. Instead, Google told TripAdvisor that the only way in which it could prevent Google from using TripAdvisor content on Places pages was to block Google from crawling TripAdvisor pages for

[12] Marissa Mayer, *Speech on Scaling Google for Every User at the Google Seattle Conference on Scalability* at 44:35 (video *available at* http://www.youtube.com/watch?v=LT1UFZSbcxE).

[13] *Id.* at 43:23 ("To the degree that we host content, we ultimately have a monetary incentive to drive people to those pages if those pages have ads on it.").

any purpose, which would prevent any TripAdvisor page from ever appearing as a result on Google's dominant search engine. In short, Google was tying access to Google's dominant search engine to acquiescing in Google's use of scraped content on another Google product. Again, hardly competition on the merits.

Only when government enforcement officials and the press focused on this practice did Google recently stop scraping content from others for its Places page. Google has yet to commit not to return to this practice in the future and may well be scraping and using content without authorization in other contexts today.

3. Failure to Live Up to Representations Regarding the ITA Acquisition

In April 2011, the Justice Department challenged Google's acquisition of ITA Software as a violation of the antitrust laws and obtained a judicial decree that limits Google's ability to use its control over this key technology to undermine competition for online travel search. Prior to being acquired by Google, ITA had a long history of developing innovative new flight search technology that it made available to its numerous licensees, including Orbitz, TripAdvisor, Bing Travel, and other online travel search sites. In an effort to deflect this concern, Google sought to defend the transaction by claiming that it would use ITA technology to "benefit passengers, airlines and online travel agencies by making it easier for users to comparison shop for flights and airfares." Just last week, Google launched its own online travel search service. Notwithstanding the judicial decree and Google's promise, the service excludes any link to online travel agencies, which are key options for comparison shopping. Further, the Google service utilizes a new version of ITA software that, now that Google owns ITA, is available only to Google, also continuing to undermine choices for consumers.

4. Other Tactics

Google also has been accused of a range of other exclusionary tactics. For example, there are numerous complaints that Google is manipulating its algorithm to promote its own sites. If Google is penalizing the rankings of other sites because they compete with Google sites, such a practice would be inconsistent with Google's representations about its search algorithm.

E. Mobile

The future of the Internet is mobile. By 2014, the number of mobile Internet users will surpass the number of users accessing the Internet via a desktop computer.[14] Several facts already warrant serious concern for competition and consumers in the mobile space.

First, Google's dominance in mobile search and search advertising is virtually absolute. Recent estimates indicate that Google controls around 98% of mobile search in the U.S. and 97% of mobile search advertising.[15] And Google is transferring its search practices described above to the mobile arena. For example, the following illustrates how Google has scraped user reviews from TripAdvisor and Yelp and displayed them without authorization (and without attribution in these cases).

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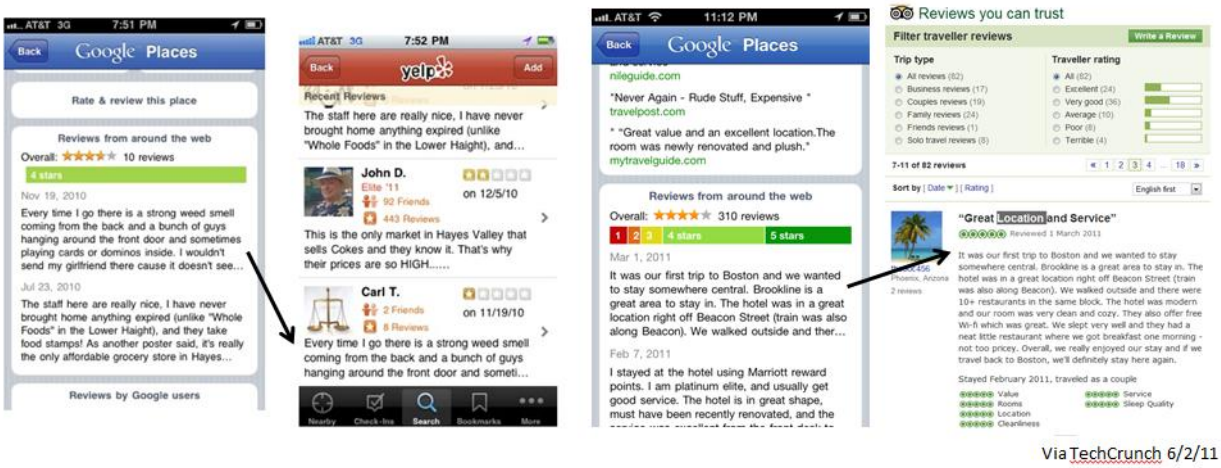
[14] Morgan Stanley, *The Mobile Internet Report*, *available at* http://www.morganstanley.com/institutional/techresearch/mobile_internet_report122009.html.

[15] Greg Sterling, *Google Controls 97% of the Mobile Paid Search: Report*, Search Engine Land (Mar. 7, 2011).

CONTENT SCRAPING IN MOBILE



Second, Google is obtaining a new, potentially even more powerful tool for controlling the mobile Internet experience: its Android mobile operating system. By bundling its dominant search advertising service with its Android operating system, Google can give away Android for "less than free." As a result, it has grown in less than two years from a tiny fraction of the market to 40% percent or more today.[16] Further, Android continues to gain share rapidly as more than 50% of all smart phones shipped in the U.S. today use the Android operating system.[17]

Thus, Android appears to be rapidly becoming the dominant mobile operating system. Further, there are signs that Google is already using Android as a "club" with which to force

[16] Don Kellogg, *40 Percent of U.S. Mobile Users Own Smartphones; 40 Percent are Android*, NielsenWire (Sept. 1, 2011), http://blog.nielsen.com/nielsenwire/online_mobile/40-percent-of-u-s-mobile-users-own-smartphones-40-percent-are-android/.

[17] *The NPD Group: As Android Solidifies Lead, Google Acquisition Has Potential to Revitalize Flagging Motorola*, Port Wash. (Aug. 22, 2011), *available at* http://www.npd.com/press/releases/press_110822a.html.

handset manufacturers to take actions to favor Google products over those of competing products.[18]

The mobile arena bears close scrutiny from both policymakers and antitrust enforcement officials.

I. Harm to Consumers

Google's tactics result in real harm to consumers in the form of deception, increased prices, and less innovation.

Deception: Users expect search results to be returned in order from most relevant to least relevant. As discussed above, when Google places links to its own products (*e.g.*, News, Product Search, Places) in one of the top positions without any indication that these are "unnatural," hard-coded links, the result is deceptive to the user. Whereas many consumers recognize that the sponsored links at the top or along the right side of the screen are advertisements -- and indeed they are labeled as such -- there is no such distinction for links to Google's own products.

Further, Google's own links often take up a significant amount of the screen real estate, limiting the number of natural results that can appear, making it even more difficult for users to find quickly the link most likely to be relevant to the query.

Higher Prices: In 2010, Google made over $28 billion from advertising. Google's dominant share in search makes its advertising platform, AdWords, a "must-buy" for businesses that seek to advertise on the Internet. In the absence of a competitive search advertising marketplace, the prices Google commands for advertisements are higher than they otherwise would be. Just as in the offline world, higher advertising prices are passed along to consumers in the form of higher prices on goods and services.

[18] Steve Lohr, *Suit Opens a Window Into Google*, N.Y. Times (May 8, 2011), *available at* http://www.nytimes.com/2011/05/09/technology/09google.html?pagewanted=all.

Reduced Innovation: Google's tactics foreclose the ability of other sites to compete on the merits and to achieve the scale necessary to succeed. Without search traffic and the resulting revenues, these sites are unable to deliver innovative content and better services to consumers. Further, websites and content creators often must spend more money on paid search advertising to offset in part their loss of visibility, taking away further resources from investment in innovation. In the end, the result is that a single company, Google, becomes the only company capable of significant investment in innovation across many areas of the Internet, and such a lack of competition means less innovation.

III. Antitrust Scrutiny and Enforcement Can Make a Difference

A close examination of Google and its business practices demonstrates that the elements of a monopolization or monopoly maintenance violation appear to have been met. Google has a dominant share of the search and search advertising markets. Google is reinforcing its dominance in these markets while expanding its dominance into other areas. And Google has been pursuing these goals through exclusionary means rather than simply though competition on the merits.

As part of an effort to defend Google against a potential antitrust enforcement action, some have argued that these markets are too complex and dynamic for antitrust enforcement. This argument is simply wrong for several reasons.

As an initial matter, the argument suggests that we should abdicate all antitrust enforcement in this area and permit Google to stifle competition with impunity. The bipartisan Antitrust Modernization Commission (AMC) studied and rejected just such a proposition. The AMC concluded that industries in the "new economy" that involve rapid innovation and technological change can still be policed under existing antitrust laws. In fact, the Commission goes on to report that "just as in other industries, antitrust enforcers should carefully consider market

dynamics in assessing competitive effects and should ensure proper attention to economic forces at work."[19]

The AMC's conclusion is supported by recent examples. In 2008, the Justice Department's threat of litigation prevented Google from entering into a paid-search agreement with Yahoo! that the Department concluded "likely would have denied consumers the benefits of competition — lower prices, better service and greater innovation."[20]

Similarly, when the Department of Justice scrutinized Google's acquisition of travel software provider, ITA Software, the Department concluded that Google's unrestricted control over ITA's key flight search technology would have violated antitrust laws. As a result, the Department obtained a judicial decree requiring Google to continue to make ITA's key flight search technology available to competing travel search sites.

Most recently, scrutiny by antitrust enforcers has prompted Google to pull back somewhat on its unauthorized use of content scraped from competitors' web pages. This is an example of how antitrust scrutiny can help preserve competition. Of course, to ensure that Google will not resume its prior practice, an enforceable order would be needed.

It is important that antitrust enforcement agencies take action where warranted. Failure to do so will lead to further and further control by Google over larger and larger portions of the Internet. As Google's dominance grows, so will the pressure for some form of government intervention. The benefit of antitrust enforcement is that it preserves freedom to compete in the marketplace. If, however, a more rigid government regulatory regime were to be put in place, the limits on innovation and development could be severe.

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[19] *Antitrust Modernization Commission Chapter 1A Antitrust Law and the "New Economy"* at 32, *available at* http://govinfo.library.unt.edu/amc/report_recommendation/chapter1.pdf.

[20] Miguel Helft and Steve Lohr, *Google Won't Pursue Yahoo Ad Deal*, N.Y. Times (Nov. 5, 2008), at B1, *available at* http://www.nytimes.com/2008/11/06/technology/internet/06google.html.

IV. Conclusion

Thank you for the opportunity to testify before the Subcommittee this afternoon. I appreciate your attention to these complex, yet important issues as they relate to the growing online market place and future innovation on the Internet. I look forward to answering any questions that you may have.