

Review of the likely effects of Google's proposed Commitments dated April 25, 2013

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Professors David J. Franklyn ("Franklyn") and David A. Hyman ("Hyman")¹

1. Introduction

Google has been charged with limiting choice in Internet search by (among other things) giving Google's services (including Google Shopping, Google Places and Google Flights) more prominent page placement than it gives to its rivals in these areas. Google has proposed to settle these charges by providing more prominent placement for selected competitors' websites ("three rival links,") and by adding a label and disclosure that would indicate which services are and are not provided by Google. The stated purpose of these proposals is to give consumers the option to choose from among Google's and rivals' services.

We were retained by Clifford Chance, advisors to FairSearch Europe (hereinafter "Fairsearch"), to render opinions in this matter as to the likely impact of Google's proposals on Internet users/shoppers. To test Google's proposals, we designed and conducted an online survey in the United Kingdom which measured the likelihood that consumers would click on any of the proposed "three rival links." If consumers are not likely to click on the proposed three rival links, then Google's proposed remedy would not be likely to draw consumers to rivals and therefore would not be likely to increase competition in these areas.

The survey also measured whether respondents recognized and understood Google's proposed label and disclosure. If consumers do not recognize and understand Google's label and disclosure, then they would not be likely to exercise a meaningful choice between Google's services and those offered by Google's competitors.

As explained more fully below, we found that the three rival links, as proposed by Google, had no significant impact on consumer behavior. A trivial number of survey respondents clicked on the rival links when presented in the format proposed by Google. We conclude that the "three rival links" remedy proposed by Google would not draw consumer attention to rival websites and thereby increase competition in this space.

We also found that substantial numbers of survey respondents were confused or misled by the label and disclosure that Google proposes to differentiate its own search results and services from those of its rivals. Consumers already show a high level of ignorance of the nature and

¹ Experts' background and qualifications are detailed in an Appendix. A copy of Franklyn's Curriculum Vitae is attached as Exhibit A. A copy of Hyman's Curriculum Vitae is attached as Exhibit B. Franklyn and Hyman have written two law review articles about consumer perceptions and the Internet, including an article published in Spring, 2013 in the Harvard Journal of Law and Technology, and a forthcoming article on search bias and search neutrality. Copies of these articles are attached as Exhibits C & D.

source of search results, and we found evidence that the proposed label and disclosure would increase, not decrease, this type of consumer confusion.

We further found that modifications that do not materially affect page layout are unlikely to change preexisting competitive dynamics in search. Modifications in page layout may or may not have an impact, depending on their design attributes. Stated differently, we find the highest degree of consumer attention and competition for clicks when rival links are displayed in a manner that is comparable to the manner in which Google Shopping results are normally displayed. We find that the proposals offered by Google in its Commitments would have no significant impact and may in fact further confuse consumers.

2. Survey Methodology

Between June 18 and June 22, 2013, we completed an on-line survey of almost 1,900 respondents residing in the United Kingdom to determine the impact of Google’s proposal (as described in Google’s Commitments).² More specifically, using a series of simulated searches, the survey examined:

- Whether the Commitments resulted in a material number of clicks on any of the proposed “rival links”;
- The effect of other modification to search page layout and labeling on click patterns;
- The effectiveness of the disclosure accompanying the rival links in communicating basic information.

To examine these issues, we designed a multi-part interactive internet survey. As Table 1 reflects, our data is based on responses from individuals who completed the entire survey, and took more than 5 minutes to do so. 36% of those invited to begin the survey quit without answering a single question; of those that actually started the survey, approximately 60% quit before completion, or were excluded because they failed to answer all the questions or completed the survey from an IP location outside the U.K. Thus, we were left with a sample of 1,888 respondents – meaning that that the margin of error on the figures we report is $\pm 2.3\%$ for a 95% confidence interval.

The survey began with a series of questions designed to measure participants’ knowledge of the layout and labeling of search results. We then asked respondents how they would go about obtaining information if they were interested in purchasing a Nikon camera or finding an Italian restaurant in Madrid. Tables 2A and 2B contain the breakdown of responses to this question. We found that a Google search was the most common response to both questions.

Survey respondents were then asked to run three sets of searches – one for “Nikon camera,” one for “flights to Madrid,” and one for “Italian restaurants in Madrid.” We chose these three searches in order to test a sample product (here Nikon camera), a sample flight search (here, a

² The survey was administered by Survey Sampling International (SSI) to a demographically representative sample of Google users in the United Kingdom. We excluded from the analysis surveys that were not completed from an IP address in the UK.

hypothetical trip to Madrid by a person residing in the UK) and a sample restaurant search (here a hypothetical search for an Italian restaurant while in Madrid). Respondents were asked to click on the link they would have selected if they were trying to buy a Nikon camera, find a flight to Madrid, or trying to find an Italian restaurant at which to eat in Madrid.³ For each set of searches, respondents first viewed a “native” page of search results (*i.e.*, the search results that would have appeared if an actual Google search had been run) followed by a series of modified search results.

In order to advance through the survey, respondents had to repeatedly run the search query, and then click through on whatever link they selected. Respondents were not allowed to go back to an earlier question after progressing past it, nor could they progress without clicking on something. Because respondents had to click on something to advance, our results represent an upper-bound on clicks in a search environment where users can simply close the page without clicking on anything.

After viewing the Google native page for each of these three searches, respondents saw, in random order, search results pages incorporating either the “three rival links” or the mobile “other sites” link specified in the Commitments. For inclusion in our “three rival links,” we chose well-known companies that would qualify for rival link placement under the terms of Google’s Commitments. We used Kelkoo, Pricerunner and Bizrate as our primary “three rival link” test sites, because of their prominence in the U.K.

To validate our findings on the proposal offered by Google in the Commitments, we also tested several variations in which we modified the page layout and labeling of the search results page.⁴ Respondents were presented with these variations after re-running various Google searches. Respondents were asked to click on the site where they were most likely to find what they were looking for, *i.e.*, a Nikon camera, or an Italian restaurant in Madrid.

After completing these tasks, we asked respondents if they knew whether the Shopping region was paid or unpaid content, and evaluated the effectiveness of the label and disclosure specified in the Commitments. We also asked respondents whether they remembered seeing the three rival links and the mobile link, along with a number of other labels, and concluded with a series of questions about the demographics of those completing the survey.

³ After completing the survey, we discovered that the image mock-up we were using to test the impact of adding three rival links to Google Flights did not, in fact, represent the actual appearance of Google Flights. More specifically, if one goes to the Google UK Flights page at <http://www.google.co.uk/flights/> one sees a map and pricing pop-ups for flying to different destinations. This visually rich display is quite different than the version of Google Flights that one currently sees in the U.K. after running a search. However, we used the current version of Google Flights as the basis for our mock-up. Accordingly, we dropped Google Flights from the analysis.

⁴ Our goal in testing these variations was to provide a baseline for assessing the impact of layout and labeling on consumer search behavior. Because our primary task in this engagement was to test the actual Commitments, we focus on the results for them in this report.

3. Results

Table 3 presents the results for Nikon for the native search results, the search results including three rival links, and the search results including the mobile link.⁵ As Table 3 indicates, the three rival links and the mobile link attracted a trivial number of clicks – 0.1 to 0.5% of all clicks on the search results page, and 0.5-2.5% of the combined clicks on (Shopping + Commitments).⁶ Thus, for Google Shopping, we find no evidence that the Commitments, at least in their current form, will actually increase competition in the search space for products.

Table 4 presents similar results for Google Places. As with Google Shopping, we find a substantial number of clicks on Google Places, and a trivial number of clicks (both in absolute and percentage terms) on the three rival links and mobile link specified in the Commitments. Thus, for Google Places, we find no evidence that the Commitments, at least in their current form, will actually increase competition in search.

We then evaluated whether respondents actually knew whether Google Shopping was paid content or not, and evaluated the impact of the label and disclosure statement included in the Commitments. We began by showing respondents a search results page with the Google Shopping region labeled, and asked them why the links in question appeared in that region. Table 5, Panel A indicates that notwithstanding the label, relatively few people understand that Google Shopping is paid content. Only 34% of respondents correctly responded that the content in Google Shopping represents paid Ads. More than 50% of respondents thought Google Shopping was unpaid content.⁷

Table 5, Panel B indicates that the disclosure added by the Commitments does not materially improve the situation. After having their attention called to the disclosure (by presenting it in a red-bordered box), 21% of respondents switched from the “wrong” answer to the “right” answer but 13% of respondents switched from the “right” answer to the “wrong” answer. Fully 56% of respondents either gave the “wrong” answer or did not know whether Google Shopping was paid or not. Table 6 similarly indicates that the disclosure added by the Commitments did not make it clear to respondents that the three rival links in question were the “other relevant providers” referenced in the disclosure. Only 19% of respondents correctly recognized that the rival links were “listed at the bottom of the box in the center column labeled ‘Shop for nikon camera on Google,’ just below the ‘Shop by Price’ line.” Finally, we examined whether respondents remembered various labels they had encountered over the course of the survey. On average, respondents correctly identified less than 50% of the labels they had seen.

Tables 7-9 include background information on respondent demographics, and self-reported knowledge of search page layout and labeling, and familiarity with computers.

⁵ Examples of the Google Shopping and Google Places Commitments variations we tested are attached as Exhibit E.

⁶ The figures presented in the text and attached tables reflect the cumulative clicks on all three of the rival links. Calculations using the combined clicks on (Google Shopping + Commitments) as a denominator are intended to demonstrate the “market share” of the clicks attracted by the three rival links.

⁷ To test the extent of consumer knowledge, we included a “distractor control.” This control stated that the content in Google Shopping was unpaid, but also indicated the links were selected by Google’s “Special Marketing Team,” a made-up entity. Fully 28% of respondents selected this option, indicating considerable consumer confusion as to how Google operates.

4. Summary/Conclusions:

- Google search dominates all other sources for obtaining information on products, flights, and locations. That is, respondents are more likely to start a product, place or flight search on Google than any other source.
- We found no material click-through on any of the proposed rival links specified in the EC Commitments for Google Shopping and Google Places. And, as noted previously, since respondents had to click on a link in order to advance through the survey, our results likely over-state the extent to which the proposed EC Commitments would actually be clicked on by users in the field. Based on these findings, we do not believe that the EC Commitments are likely to command consumer attention or improve competition for either Google Shopping or Google Places.
- We find that Google Shopping commands a high degree of consumer clicks and attention because of its location and visually-rich display (e.g., photographs and mini-boxes within a box). Confirming our earlier work, based on our current study, we find that page layout and design is more important than search result labels in determining click-through rates for Google Shopping.
- Modifications that do not materially affect page layout are unlikely to change preexisting competitive dynamics in search. Modifications in page layout may or may not have an impact, depending on their design attributes. Stated differently, we find the highest degree of consumer attention and competition for clicks when rival links are displayed in a manner that is comparable to the manner in which Google Shopping results are normally displayed.
- We also find that the popularity and visibility of the rival link's trade name or trademark matters in determining click prevalence. Controlling for position, more famous brands command higher click rates.
- We find that the proposed disclosure statement does not effectively communicate the necessary information (i.e., whether the region in question is paid v. unpaid, and the location and significance of the "rival links.") Indeed, the proposed language seems to confuse many respondents.

In summary, we find that the proposals offered by Google in the Commitments are highly unlikely to materially increase consumer attention, offer consumers meaningful choices or improve competition. By testing various alternatives, we identified several factors that are more likely to draw consumer attention to rival links, offer consumers meaningful choices and thereby improve competition in this space. Google has not, in our view, offered a viable alternative. We also found that Google's proposed label and disclosure – which is aimed at improving consumers' ability to differentiate Google search results from rivals' search results – are actually likely to be confusing or misleading to a substantial number of consumers.

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Professors David J. Franklyn & David A. Hyman

Tables

Table 1. Overall Completion Statistics

	Number	% of those who	
		Clicked into survey	Answered ≥ 1 question
Began Survey	7,465	100%	-
Quit without answering any questions	2,719	36%	-
Started but didn't complete	2,375	32%	50%
Completed Survey	2,371	32%	50%
Usable with T >5 minutes	1,888	25%	40%

Table 2A. Preferred Strategy for Locating Products

Google search	60%
Amazon search	16%
Go to the website for product mfg./Tm owner	10%
eBay search	6%
Preferred search engine (other than Google)	5%
Preferred search engine (other than Google)	5%
Run a search on a price aggregator website (e.g., Kelkoo or Pricerunner)	2%
Other	1%
Query Facebook	0%

Table 2B: Preferred Strategy for Locating Restaurants

Google search	78%
Run a search on TripAdvisor	10%
Preferred search engine (other than Google)	7%
Other	3%
Run a search on Yelp or Qype	1%
Query Facebook	1%

Table 3. Nikon Camera Results – Native and EC Commitments

Type of Link	Native	EC Commitments: TM/Label	
		"Kelkoo, Price-runner, or Bizrate"	"Other Sites"
Organic	54.2%	50.4%	51.3%
Ads	20.7%	27.1%	25.8%
Google Shopping	23.1%	20.9%	21.3%
EC Commitments	N/A	0.5%	0.1%
Other	2.0%	1.2%	1.5%
Commitments/ (Google Shopping + Commitments)	N/A	2.5%	0.5%

Table 4. Google Places Results

Type of Link	Native	EC Commitment: TM/Label	
		"Qype, TripAdvisor, or Yelp"	"Other Sites"
Organic	83.9%	79.9%	79.0%
Ads	0.0%	0.0%	0.0%
Google Places	15.5%	19.2%	19.6%
EC Commitments	N/A	0.2%	0.1%
Other	0.6%	0.7%	1.3%
Commitments/ (Google Places + Commitments)	N/A	1.1%	0.5%

Table 5. Google Shopping: Paid v. Unpaid and Impact of Disclosure

Panel A: Why do links appear in Google Shopping Region?		
Links selected by Google's computer formula (algorithm). The listed companies do not pay Google to appear in this section		25%
Links selected by Google's special marketing team. The listed companies do not pay Google to appear in this section.		28%
Links for which the listed companies pay Google to appear in this section		34%
Don't know/Not sure		13%
Other [Specify]:		1%
Panel B: Impact of Disclosure on Paid v. Unpaid		
Yes	I thought it was unpaid, and now I think it is paid.	21%
	I thought it was paid, and now I think it is unpaid.	13%
No	I thought it was unpaid, and I still think that.	16%
	I thought it was paid, and I still think that.	33%
Don't know/none of the above.		17%

The “correct” answers in Table 7 are bolded.

Table 6. Who Are the “Other Relevant Providers” in the Google Shopping Disclosure?

Listed in the right column of search results, under the label “Ads”	18%
Listed in the shaded box in the top middle column	10%
Listed at the bottom of the box in the center column labeled “Shop for nikon camera on Google,” just below the “Shop by Price” line.	19%
Listed underneath the box in the center column labeled “Shop for nikon camera on Google.”	26%
Other/Don't know.	27%

The “correct” answers in Table 8 are bolded.

Table 7: Demographics of Survey Respondents

Age	
18 – 24	12%
25 – 34	20%
34 – 44	23%
45 – 54	20%
55 – 64	15%
65 – 74	9%
75+	1%
Marital Status	
Single	41%
Married	43%
Living together / Domestic partners	15%
Race	
Caucasian / White	89%
Afro-Caribbean	2%
Latino / Hispanic / Mexican	0%
Asian / Pacific Islander	4%
Mixed race	2%
Other	3%
Income	
Prefer not to say	15%
Less than £25,000	36%
£25,000-£49,999	34%
£50,000 - £74,999	10%
£75,000-£99,999	3%
£100,000 - £199,999	2%
More than £200,000	0%
Preferred Search Engine	
Bing	2%
Google	89%
Yahoo	6%
Other	3%

Table 8: Familiarity with search page layout and labeling

Extremely familiar	15%
Very familiar	27%
Moderately familiar	35%
Slightly familiar	12%
Not at all familiar	11%

Table 9: Computer knowledge/expertise

I am afraid to modify my computer system and software for fear I might break it and be unable to repair it	7%
I can follow instructions and install / change things, but I don't know what I'm doing	40%
I know what I'm doing with computers and I know how to get what I want	38%
People acknowledge me as a resource for computer help and I help them with their problems	14%

Appendix

Franklyn is a tenured, full professor of law, specializing in trademark law, at the University of San Francisco School of Law (“USF”). Franklyn is the Executive Director of the McCarthy Institute for Intellectual Property and Technology Law at USF and Director of the Center for the Empirical Study of Trademark Law (CEST). The McCarthy Institute, of which Franklyn is Executive Director, conducts wide-ranging empirical research on consumer perception issues in both the United States and Europe. Franklyn is also the Director of the Masters of Law Program for U.S. and foreign lawyers in Intellectual Property Law at USF. Franklyn teaches and writes primarily about trademark law and consumer perception issues. Franklyn is editor-in-chief and co-author of McCarthy’s Desk Encyclopedia of Intellectual Property Law.

Franklyn works in collaboration with Professor McCarthy on a number of projects, including his treatise on trademark law. Professor McCarthy is the author of a seven-volume treatise on trademark law. It is the most-widely cited treatise on trademark law in the United States, having been cited by courts in over 3,500 judicial opinions, including in a recent decision by the United States Supreme Court in a case in which Franklyn was retained as an expert.

Franklyn has consulted and/or served as an expert witness on behalf of numerous clients in numerous cases involving consumer perception issues, including in matters in the United States, Asia, the European Union, the Middle East and South America. Franklyn has been retained as an expert in several matters involving the issue of consumer perceptions. Franklyn was recently retained by the International Olympic Committee to provide trademark advice and advice regarding the consumer impact of various logos regarding the 2016 Olympic Games. Franklyn is a licensed attorney in Illinois and California. Franklyn has written several law review articles about consumer perceptions on the Internet. Franklyn has also acted as a consultant to several clients in matters related to trademark law, consumer perceptions and the Internet.

Hyman is the H. Ross and Helen Workman Chair in Law and Professor of Medicine at the University of Illinois. He is tenured in both the College of Law and the College of Medicine. He heads the Epstein Program in Health Law and Policy at the University of Illinois College of Law. He teaches and writes about empirical law and economics, principally involving the regulation of health care, and competition law and policy. He is the author of more than 100 articles in student edited law reviews, and peer-reviewed medical, health policy, and law journals.

In competition law and policy, Professor Hyman served as Special Counsel to the Federal Trade Commission from 2001-2004. In that capacity, Professor Hyman was principal author and project leader for the first joint report ever issued by the Federal Trade Commission and Department of Justice, “Improving Health Care: A Dose of Competition” (2004). He has also published numerous other articles involving competition law and policy, including a series of articles with Professor William Kovacic, the former Chairman of the United States Federal Trade Commission.

Hyman has been deposed in various cases involving health care fraud and pharmaceutical pricing, and has testified in one case involving pharmaceutical pricing.