

## First Supplement to Memorandum 2023-22

### **Antitrust Law: Presentation**

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Professor Thomas Greene made a slide presentation to the Commission at the April 20, 2023, meeting, discussing Internet platforms. Professor Greene gave permission to reproduce his slides. They are attached.

Respectfully submitted,

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Executive Director

# Internet Platforms and Antitrust

Thomas Greene  
California Law Revision Commission

April 20, 2023



UC Law San Francisco

# Disclaimer

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The views expressed are those of the presenter and do not necessarily represent the views of the U.S. Department of Justice or the University of California College of Law at San Francisco.



# Today's Agenda

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- Attributes of Internet Platforms
  - Network effects
  - Scale
  - Behavioral economics
  - “Free” services and advertising
  - Barriers to entry; tipping effects
  - Growth through acquisitions
  - Resources
- Selected Cases; Issues
  - Amazon
  - Apple
  - Facebook
  - Google
- Policy Questions

# Attributes of Internet Platforms

# Network Effects

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- Direct Network Effects
  - Value of service increases the more people use it, e.g.
    - Telephone service
    - Social networks
- Indirect Network effects
  - Conceptually, increases on one side of a network make it more valuable on the other side of the network. See Hovenkamp, *infra*, at 2020
  - Example: The more people who have an operating system, the more likely app developers will be to build for that OS, in turn, making that OS more attractive to consumers.
- Virtuous cycles
  - If growth begets growth, this phenomenon is referred to as a “virtuous cycle.”
    - See generally Stigler Report at 34



# Scale Effects

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- At least with some digital products, bigger can be better. This is referred to as a “scale effect.” Example:
  - AI algorithms get more accurate when trained on more data. Thus, more data means better results, which, in turn:
    - Increases the value of the search service to users.
    - Increases the number of searchers wishing to use a digital product
  - Advertisers, too, get better results if the company offering the ads has more information about searchers. More data means that ads can be more “targeted” on those who are more interested in buying specific products or kinds of products.
  - Such scale economies favor larger companies. See Stigler at 39

# Consumer Behavior/Bias

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- Behavioral economics is the study of our actual behavior, rather than to assume that people behave consistently with classic price theory. So far, behavioral economists have won four Nobel prizes.
- Key insights for platforms:
  - Pre-set defaults on a phone or computer will bias consumers to use that application
  - Comfort with the current application and a desire for immediate results will bias users against trying other, potentially superior, products
  - Frustration (AKA friction) with reading long privacy disclosures lead consumers to agree to trade away their own privacy
- *See generally* Stigler, *infra*, at 41-43.



# “Free” Services and Advertising

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- Many platforms offer a “free” service to consumers. Examples:
  - Google-“free” search, “free” email
  - Facebook-“free” communications, including photos and videos, with a community of friends and family
- This should be understood as a kind of trade or barter transaction
  - The consumer trades his or her attention and information to the platform for the “free” service
  - These trades power some of the most profitable companies in the world

# Information on You

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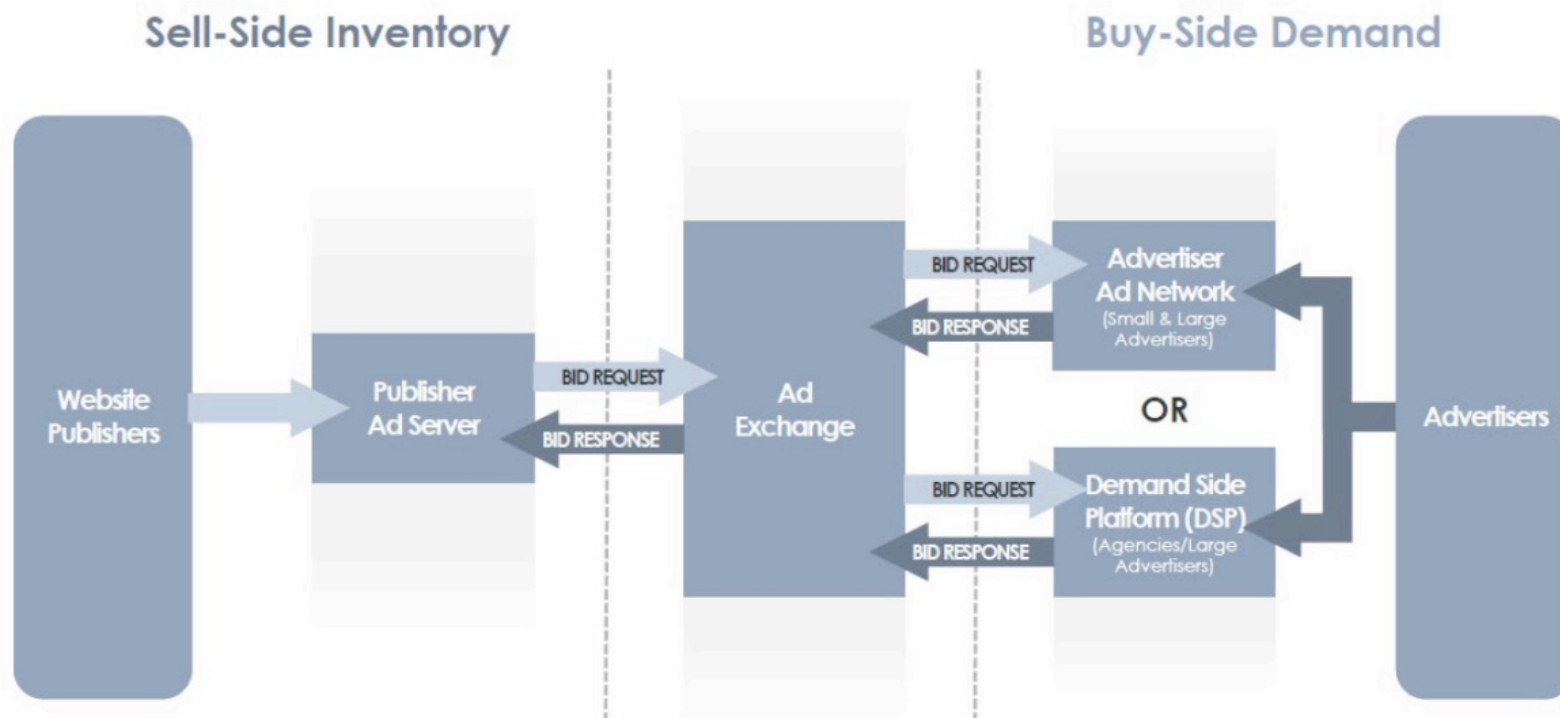
- The amounts of information retained are remarkable. A 2018 Guardian article reported that:
  - Google kept 5.5 gigabytes of data (the equivalent of 3 million Word documents) on the author including all searches and all deleted documents
  - Facebook had 600 megabytes of data (the equivalent of 400,000 Word documents) including all messages he sent or received and all contacts in his phone.
    - Dylan Curran, *Are you ready? This is all the data Facebook and Google have on you*, The Guardian, Mar. 30, 2018, <https://www.theguardian.com/commentisfree/2018/mar/28/all-the-data-facebook-google-has-on-you-privacy>.
- Multiple apps and Android, Google's mobile OS, monitor your movements throughout the day.
  - See J. Valentino-DeVries, et al., *Your Apps Know Where You Were Last Night, and They're Not Keeping It Secret*, N.Y. Times, Dec. 10, 2018, <https://www.nytimes.com/interactive/2018/12/10/business/location-data-privacy-apps.html>, Keith Collins, *Google collects Android users' locations even when location services are turned off*, Quartz, Nov. 11, 2017, <https://qz.com/1131515/google-collects-android-users-locations-even-when-location-services-are-disabled>.

# Digital Advertising

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- Broadly, there are several kinds of digital ads:
  - Search ads: Search ads enable advertisers to target marketing messages in real time in response to queries entered by a consumer. [] The ability of search ads to respond to consumer inquiries, at the moment the consumer is investigating a subject relevant to an advertiser’s product or service, makes these ads highly valuable to advertisers and distinguishes them from other types of advertising that cannot be similarly targeted, whether online or offline.” *U.S. v. Google*, Amended Complaint, ¶ 98, <https://www.justice.gov/atr/case-document/file/1428271/download>. These are sold on a cost per click (“CPC”) basis so the advertiser only pays if the consumer “clicks” on its website.
  - Display and Social ads: “[O]ther forms of online ads, such as display ads or social media ads, do not enable advertisers to target customers based on specific queries and are generally aimed at consumers who are further from the point of purchase.” *Id.* at ¶ 99. These are sold on a CPM (Cost per mille (thousand views)) basis and are significantly less expensive than search ads.

# AdTech Stack: Crucial Intermediaries



# Data: The New Oil?

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- Advertising based on digital information about consumers is sometimes referred to as the new oil
- Advertising provides most of the revenue stream for Google and Facebook, although Amazon is starting to supplement its sales revenues with sales of advertising.
  - In 2016, nearly 90% of Google revenue and over 95% of Facebook revenue was [from] advertising. See French Competition Authority (Autorite' de la concurrence), *Sector-specific investigation of online advertising* ¶ 78 (6 Mar. 2018), [https://www.autoritedelaconcurrence.fr/sites/default/files/integral\\_texts/2019-10/avis18a03\\_en.pdf](https://www.autoritedelaconcurrence.fr/sites/default/files/integral_texts/2019-10/avis18a03_en.pdf).
- The French Competition Authority reports that publishers receive approximately 40% of advertising dollars. *Id.* at ¶ 82.

# Virtuous cycles, barriers to entry and market tipping

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- Network effects and scale effects result in virtuous cycles, in which, a platform can grow dramatically, leaving its rivals behind. These are barriers to entry for new and existing rivals.
  - “At some point, the market tips in favor of the company that enjoys these effects leading to one or a few companies in a market.”
    - See F. Lancieri & P.M. Sakowski, *Competition in Digital Markets: A Review of Expert Reports*, 26 Stanford J. Law, Bus. & Finance 65, 75 (2021), <https://law.stanford.edu/publications/competition-in-digital-markets-a-review-of-expert-reports/>.
- However, at least some scholars argue that platforms are not “natural monopolies” and require use of exclusionary practices to maintain dominance.
  - See H. Hovenkamp, *Antitrust and Platform Monopoly*, 130 Yale L.J. 1952, 1969-1977 (2021), see also Chris May, *Taming Big Tech requires looking through ‘prism of harm,’ not anti-bigness, US DOJ’s Doshi says*, MLex, Mar. 29, 2023, <https://mlexmarketinsight.com/news/insight/taming-big-tech-requires-looking-through-prism-of-harm-not-anti-bigness-us-doj-s-doshi-says>.



# Growth by Acquisition

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- Growth of major platforms has been fueled by acquisitions. Examples:
  - Google:
    - 235 acquisitions between 2004 and 2018
    - 36 in 2014
    - Includes acquisitions of Android and DoubleClick
      - Statista, *Annual Number of Acquisitions by Google Worldwide from 2004 to 2018* (Dec. 12, 2022), <https://www.statista.com/statistics/934816/number-acquisitions-by-google-worldwide/>.
  - Facebook:
    - 98 acquisitions since inception
    - Cost: \$26.15 B
    - Includes acquisitions of Instagram and What's App
      - Tracxn, *Acquisitions by Facebook*, Jan. 6, 2023, <https://tracxn.com/d/acquisitions/acquisitionsbyFacebook>.
- Platforms have a strong interest in acquiring firms that will reduce multi-homing. See S. Athey & F.S. Morton, *Platform Annexation*, 84 Antitrust L. J. 677 (2022).

# Selected Resources

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- Stigler Comm. On Digital Platforms, *Report of the Subcommittee on Market Structure and Antitrust, in Stigler Comm. On Digital Platforms Final Report*, Stigler Ctr. for the Study of the Econ. and the State at Chicago Booth 23 (2019), <https://www.chicagobooth.edu/research/stigler/news-and-media/committee-on-digital-platforms-final-report>.
- Filippo Lancieri & Patricia M. Sakowski, *Competition in Digital Markets: A Review of Expert Reports*, 26 Stanford J. Law, Bus. & Fin. 65 (2021), <https://law.stanford.edu/publications/competition-in-digital-markets-a-review-of-expert-reports/>.
- Geoffrey A. Manne & Joshua D. Wright, *Google and the Limits of Antitrust: The Case Against the Case Against Google*, 34 Harv. J. L. & Econ. 171 (2011), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1577556](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1577556).
- Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 Yale L. J. 1952 (2021).





# Selected Cases; Issues

# *People of the State of California v. Amazon.com Inc.* (S.F. Sup. Ct.)

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Plaintiffs: People of the State of California

Claims: Allegations under the Cartwright Act and the Unfair Competition Law:

- Retailers build into their prices on Amazon the costs imposed by Amazon for its services
  - Most favored nations clauses (MFNs) preclude retailers from selling goods at a lower price on other platforms even though their costs are less. It is alleged that this creates a market-wide price floor that benefits Amazon.
  - Separately, Amazon precludes any price cuts by retailers on other platforms that jeopardize its profit margins on the sale of the retailer's goods on its platform

# People v. Amazon: Defense Arguments

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- In a demurrer filed in Superior Court in September, defendant, represented by national law firms, argued that:
  - The Cartwright Act does not include a single-firm prohibition so plaintiff must show the existence of an agreement, but:
    - Amazon’s agreements are unilateral in the sense that they are take-it-or-leave-it to the retailers so there is no agreement within the meaning of the Cartwright Act
    - Amazon’s agreements are vertical restraints and should be judged under the rule of reason, as they are under federal law.
  - The UCL’s “unlawful” prong only includes California law, so does not include cross references to the monopolization provisions of the Sherman Act.
- Status: Demurrer denied. Malathi Nayak, *Amazon Fails to Dismiss California Suit Over Inflated Prices*, Bloomberg, Mar. 13, 2023, <https://www.bloomberg.com/news/articles/2023-03-14/amazon-can-t-shake-california-antitrust-suit-on-inflated-prices#xj4y7vzkg>.  
<https://www.law360.com/articles/1524464>.

# *Epic v. Apple*

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- Plaintiffs alleged that:
  - Apple had a monopoly share of its own app store
  - Apple improperly acted to maintain and exploit that monopoly by precluding Epic from offering its own app store and using its own financial intermediaries
- After trial, N.D. Cal. Judge Gonzales Rogers concluded that:
  - The relevant market was “digital mobile transactions,” within which Apple had a 52-57% share, so not a monopoly
  - Although Apple had a high share and consistent high profits, this is not enough. “Success is not illegal.” (at 921)
  - Insufficient evidence of “other critical factors” like barriers to entry, reduction in output or reduction in innovation. (at 922)
  - But Apple’s anti-steering policies were not properly disclosed and constituted a violation of California’s Unfair Competition Law. (at 1052)
    - *Epic Games, Inc. v. Apple, Inc.*, 559 F. Supp. 3d 898 (2022)

# *Epic v. Apple*: Status

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- Argument before the 9<sup>th</sup> Circuit on November 14, 2022.
  - See Alaina Lancaster, *9<sup>th</sup> Circuit Judge Asks Lawyers How to Square 'Inconsistent' Opinion in Epic-Apple Antitrust Case*, Recorder, Nov. 11, 2022, <https://www.law.com/therecorder/2022/11/14/9th-circuit-judge-asks-lawyers-how-to-square-inconsistent-opinion-in-epic-apple-antitrust-case/>.
- Appeal pending; case designated as one of special interest by the 9<sup>th</sup> Circuit so has own status link.
  - See Ninth Circuit Court of Appeals, Cases of Interest, Epic Games v. Apple Inc., <https://www.ca9.uscourts.gov/cases-of-interest/epic-games-v-apple-inc/>.

# *Epic v. Google*: Initial Complaint

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- Parties: Epic Games (subsequently joined by Pure Sweat Basketball, Inc. and Peekya App Services, Inc.)
- Allegations:
  - Defined and asserted monopoly shares in an Android App Distribution Market
    - In the App Distribution market, alleged anticompetitive contracts with OEM and cellular service providers and app distributors and developers
  - Defined and asserted monopoly shares in an Android In-App Payment Processing Market
    - In this market, Epic asserted that Google imposed anticompetitive contracts on app distributors and developers

# *Epic v. Google*: Motion to Dismiss

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- Google filed a motion to dismiss asserting that:
  - Defendant had no duty to deal with plaintiffs under controlling Supreme Court and 9<sup>th</sup> Circuit cases
  - Plaintiffs suffered no anticompetitive harm because they had alternate channels of distribution
  - Defendant had no duty to allow apps distributed through Google Play to run rival billing systems
  - Plaintiffs' claim that Google tied distribution through Google Play with its IAP processing because no duty to plaintiffs.
- See Motion to dismiss (11/13/2020) at <https://www.law360.com/dockets/documents/5fb2aa773e57bc003493d93c>

# *Epic v. Google*: Plaintiffs Response to Motion to Dismiss

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- Plaintiffs’ claims do not turn on a duty to deal but the “freedom not to deal with Google.”
- Google has affirmatively foreclosed alternative paths of distribution via its contracts
- Google has prevented all but the most tech-savvy users to independently get apps or use alternate payment systems
- Contrary to Google’s assertions, the Supreme Court has held that sales “to third parties on the condition that they buy” another product is not a “unilateral refusal to deal,” citing *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 463 n. 8 (1992).
  - See Joint Opposition (Dec. 21, 2020), <https://www.law360.com/dockets/documents/5fe2207427bdc500347b23f5>.



# *Epic v. Google*: Status

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- Epic allowed to amend its complaint.
  - See Amended Complaint (11/17/2022), at <https://www.law360.com/cases/5f360dc2edc27351a73fb8b3/dockets?page=7>
- Trial court concluded that Google improperly allowed executives to delete chats on relevant issues. Specific remedy to be determined.
  - J. Elias & L. Feiner, *Google's failure to preserve employee messages in Epic antitrust case merits sanctions*, CNBC, Mar. 28, 2023, <https://www.cnbc.com/2023/03/28/google-not-preserving-chats-in-epic-case-merits-sanctions-judge-says-.html>.
- Trial set for November 6, 2023.
  - See Sarah Perez, *Epic and Match's antitrust cases against Google heads to jury trial on November 6*, Tech Crunch, Jan. 19, 2023, <https://techcrunch.com/2023/01/19/epic-and-matches-antitrust-case-against-google-heads-to-jury-trial-on-november-6/>.

# FTC v. Facebook

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- FTC and 48 states filed separate actions alleging:
  - FB has monopoly power in a Personal Social Networking Services market
  - FB engaged in monopoly maintenance by:
    - Purchasing potential competitors Instagram and WhatsApp
    - Preventing interoperability between Facebook and certain other apps that it saw as threats, thereby impeding their growth into viable competitors

# FTC v. Facebook: 1<sup>st</sup> Motion to Dismiss

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- Defendant Facebook moved to dismiss on various grounds, with the trial court deciding the following:
  - FTC failed to sufficiently plead its relevant market and provided little information about how it calculated shares within that market, so it did not adequately plead monopoly power. *FTC v. Facebook*, 560 F. Supp.3d 1, 17 (D.D.C. 2021).
  - FTC failed to plead “narrow-eyed needle” of the *Aspen Skiing’s* exception to the *Trinko’s* broad rejection of a monopolist’s duty to deal with respect to interoperability claims. *Id.* at 22.
  - FTC failed to adequately plead a *Lorain Journal*-style refusal to deal that affected the ability of apps to deal with other platforms *Id.* at 28.
  - FTC did better with its pleading against the two mergers because Clayton Act allows challenges to continuing effects of mergers. *Id.* at 30.
  - FTC complaint dismissed with leave to amend
- States’ complaint dismissed for the foregoing but also because their challenge to the Instagram and WhatsApp mergers was barred by laches.
- Dismissal of the States’ complaint is on appeal.

# FTC v. Facebook: 2<sup>nd</sup> Motion to Dismiss; Trial Date TBD

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- FTC filed an amended complaint, which was also challenged by Facebook. The results:
  - Market for personal social networking services proper. *FTC v. Facebook*, 581 F.Supp.3d 34, 44 (D.D.C. 2022)
  - Augmented claims of shares in that market adequately asserted that Facebook had an 80+% share of the market since 2011 (at 45)
  - This market protected by entry barriers, notably network effects and difficulty users have in switching their data, experiences and photos to another provider. (at 49)
  - Merger allegations are sufficient to support monopoly maintenance claims, noting particularly emails from CEO (at 52)
  - Interoperability claims insufficient because no adequate explanation of why these policies—already dropped by Facebook—were cognizable under FTC injunctive powers (at 56)
- FTC and Facebook have not agreed on a trial date. The FTC proposed starting in December 2023; Facebook says it needs more time. See <https://www.reuters.com/legal/litigation/us-meta-spar-over-date-antitrust-trial-2022-02-23/>.



# United States v. Google (Search)

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- Parties: United States and 14 States, including California
- Allegations:
  - Defined markets for Search, Search Ads and Search Text Ads
  - Network effects create massive barriers to entry into these markets
  - Within each of these markets, Google has monopoly power
  - Using exclusionary contracts with OEMs (including Apple) and wireless carriers, Google denies rivals the ability to efficiently access these markets.
  - Without such access, the quality of rivals' search products are diminished as is the effectiveness of their advertising offerings
    - See Complaint (Oct. 20, 2020), <https://www.justice.gov/atr/case-document/file/1329131/download>.

# *United States v. Google*: Google's Motion for Summary Judgment

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- Google argues that:
  - Google's allegedly exclusionary contracts are actually "competition on the merits."
  - *U.S. v. Microsoft* does not condemn the kinds of contracts at issue in this case
  - Google competes to supply the needs of browser developers including Apple, Firefox and Mozilla
  - The challenged agreements do not foreclose a "substantial share" of the relevant markets
    - See Motion for Summary Judgment (Jan. 11, 2023), <https://storage.courtlistener.com/recap/gov.uscourts.dcd.223205/gov.uscourts.dcd.223205.451.0.pdf>, see also Adi Roberson, *Google strikes back in search antitrust lawsuit*, The Verge, Jan. 11, 2023, <https://www.theverge.com/2023/1/11/23550023/google-search-antitrust-doj-state-lawsuit-unsealed>.

# United States v. Google: Plaintiffs' Opposition to Google's MSJ

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- DOJ and States countered that:
  - Google's dominance confers significant scale advantages
  - Defaults are the most powerful and efficient means of distributing search engines
  - Google's contracts are not among the very few contracts that may be considered *ex ante* "competition on the merits."
  - Google ignores the teaching of *U.S. v. Microsoft*, 253 F.3d 34, 58-59 (D.C. Cir. 2001), that anticompetitive effects are determinative of actionable exclusionary conduct
  - Google pays billions every year for default exclusivity on major channels of distribution, which payments are inconsistent with competition on the merits.
  - Google's exclusionary contracts lock rivals out of the most efficient channels of distribution.
    - See Pls. Memorandum in Response to Defendant Google's M. Summary Judgment, *U.S. v. Google*, D.D.C., No. 1:20-cv-03010, Doc. 506, Feb. 16, 2023, <https://www.justice.gov/atr/case-document/file/1577881/download>.

# *United States v. Google: Status*

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- Argument on Google's Motion for Summary Judgment on April 13, 2023
- Briefing completed but argument not set on plaintiffs' motion for sanctions against Google for destruction of chats among senior executives
- Trial on the merits: September 12, 2023; Trial on remedies TBD



# *United States v. Google (Advertising)*

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- Parties: United States and 17 states, including California
- Venue: Eastern District of Virginia (Alexandria) (AKA Rocket Docket); Jury trial demanded
- Allegations:
  - Plaintiffs allege 3 markets: publisher ad servers, ad exchanges and advertiser ad networks
  - Monopoly maintenance and attempted monopolization
  - Google dominates key elements of the adtech “stack,” and uses that power together with exclusionary agreements to hobble rivals
  - Relief requested:
    - Injunctive relief
    - Divestiture “at a minimum” of the Google Ad Manager suite, including its publisher ad server, DFP, and Google’s ad exchange, AdX
    - Damages
    - See Complaint (Jan. 24, 2023), <https://www.justice.gov/atr/case-document/file/1566706/download>.

# United States v. Google: AdTech Stack Shares

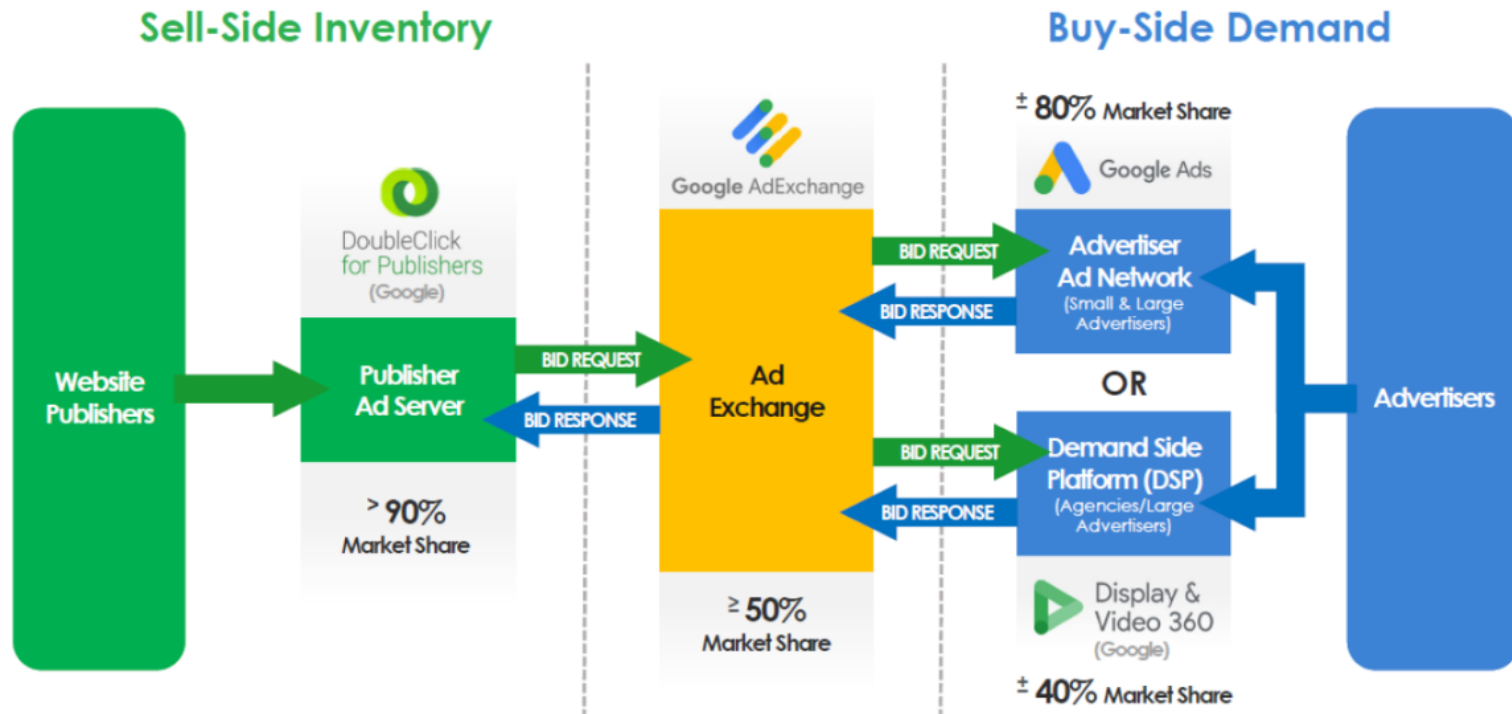


Fig. 5

# *United States v. Google*: Selected Challenged Conduct

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- Acquisition of Double Click and AdEx
- Restriction of Google Ads' advertiser demand to AdX
- Restriction of effective real-time access to AdX exclusively to DFP
- Deployment of sell-side Dynamic Revenue Share to secretly manipulate auction bids
- Suppression of Header Bidding
- Suppression of multi-homing threat by purchasing AdMeld
- Without permission from advertisers, lowered bids for publishers who dared to use competitors' services
- Introduction of Unified Pricing Rules that denied publishers' powers to transact with rival ad exchanges at certain prices
  - Complaint at ¶¶ 312,319,326

# United States v. Google: Status

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- Trial court rejected motion to shift case from Alexandria, Virginia to New York to join a pending case by states. Matthew Barakat, *Judge allows Google antitrust case to move ahead in Virginia*, AP, Mar. 10, 2023, <https://apnews.com/article/antitrust-google-virginia-lawsuit-685d5cff242b3951aeaaf95a696c7bfd>.
- Google has filed a motion to dismiss. See Cat Zekrzewski, *Google seeks dismissal of Justice Dept. lawsuit alleging ad monopoly*, Wash. Post, Mar. 27, 2023 (allegations that DOJ markets too narrow, so no monopoly power), <https://www.washingtonpost.com/technology/2023/03/27/google-doj-lawsuit-antitrust/>.
- DOJ and States countered: "The complaint alleges plausible relevant markets, asserts meritorious claims for monopolization and tying in the ad tech markets at issue, and establishes the United States as a direct purchaser of digital advertising." See <https://www.law360.com/articles/1595771/doj-defends-google-ad-tech-case-from-dismissal-bid>.



# Policy Questions

# Monopolization?

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- Amend California law to explicitly address single-firm conduct?
  - Adopt federal power + conduct structure?
  - Adopt new approaches to the power element?
    - Reduce market share requirements from 60-65% to 40%, consistent with EU practice?
    - Clarify that direct evidence of monopoly power is sufficient?
  - Adopt new approaches to the conduct element?
    - Define the legal standard?
      - See e.g. S. 225, §§ 9,13 (exclusionary conduct is conduct that presents an “appreciable risk of harming competition.” This means conduct that (1) “materially disadvantages” an actual or potential competitor, or (2) “tends to limit or foreclose” the ability of an actual or potential competitor to compete.”
    - Shift the burden of proof to defendant for (1) specific kinds of conduct, consistent with EU practice, or (2) if the defendant has a large share of the market? See e.g. S. 225, § 9?



# Treatment of Behavioral Economics?

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- Particularly in tech cases, consumers' actual behavior is important to understanding how markets work, but defendants often prefer to rely on traditional economic assumptions.
  - Authorize judicial consideration and reliance on expert behavioral economic insights?

# Duty to Deal?

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- Adopt limitations on the duty to deal expressed in *Verizon Comms., Inc. v. Trinko, LLP*, 540 U.S. 398 (2004).
  - Note that *Trinko* is being distinguished in major tech cases. See, e.g. Amicus Brief of the United States in Support of New York, et al., *New York v. Facebook*, Case No. 21-7078, D.C. Cir., Jan. 28, 2022, ¶¶ 19-27, <https://www.justice.gov/atr/case-document/file/1467321/download>
- State that *Trinko* is not the law of California
  - See e.g. S. 225 (117<sup>th</sup> Cong.), § 9.
- *Adopt some version of the essential facilities doctrine*
  - See e.g., *MCI Comms. Corp. v. Am. Telephone & Telegraph Co.*, 708 F.2d 1081, 1132-33 (7<sup>th</sup> Cir. 1982), see also *Otter Tail Power Co. v. U.S.*, 410 U.S. 366 (1973).
    - Monopolist controls an essential facility
    - Competitor is unable practically or reasonably to duplicate the essential facility
    - Monopolist is denying use of the essential facility to a competitor
    - Providing the facility is feasible





# Non-Discrimination/Equal Treatment?

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- Concerns about providing non-discriminatory treatment of rivals and retailers on large platforms test the bounds of current duty to deal case law.
  - Adopt current federal duty to deal case law?
  - Provide that California law:
    - Require separation of elements of large platforms to eliminate conflicts of interest between the platform's offerings and those of other retailers or rivals. See e.g. H.R. 3825 (17<sup>th</sup> Cong.), or
    - Preclude self-preferencing by platforms of a specific size or scope. See, e.g. American Innovation and Choice Online Act, S. 2992 (117<sup>th</sup> Cong.), § 3(a)(1)?
      - See also EU's Digital Markets Act, [https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets\\_en](https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en).

# Mergers?

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- Rely on federal courts or the use of federal law under the Unfair Competition Law (Bus. & Prof. Code § 17200)?
- If considering a state-level merger provision:
  - Prohibit mergers that “create an appreciable risk of materially lessening competition (vs. the current Clayton Act standard that prohibits mergers that “substantially” lessen competition). See, e.g. S. 225, (17<sup>th</sup> Cong.), § 9;
  - Prohibit mergers of a certain size or effect. See, e.g. S. 3847 (117<sup>th</sup> Cong.), § 3; or
  - Burden shifting, such that large platforms may not acquire other firms, unless they demonstrate that the acquisition is procompetitive, including an affirmative obligation to demonstrate that the to-be-acquired firm does not represent “nascent or potential competition” for the platform. See, e.g. H.R. 3826 (117th Cong.) § 2(b)(2)(B).

# Resources

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- Congressional Research Service (CRS), *Antitrust Reform and Big Tech Firms (R46875)*, Updated Mar. 22, 2023, <https://crsreports.congress.gov/product/pdf/R/R46875>.
- Fiona Scott Morton, Testimony, “Reining in Dominant Digital Platforms: Restoring Competition to Our Digital Markets,” before the Senate Committee on the Judiciary, Subcommittee on Competition Policy, Antitrust, and Consumer Rights, Mar. 23, 2023, <https://www.judiciary.senate.gov/imo/media/doc/2023-03-07%20-%20Testimony%20-%20Morton.pdf>.
  - Note particularly cross references to the EU Digital Markets Act at 10-11.
- Richard J. Gilbert, *Antitrust Reforms: An Economic Perspective*, 15 Ann. Rev. Econ. 1 (Aug. 2023), <https://www.annualreviews.org/doi/abs/10.1146/annurev-economics-082222-070822?journalCode=economics>.

Thank you and questions