

ADDITIONAL DEVELOPMENTS— ANTITRUST LAW

GOOGLE AND ANTITRUST

Google Inc. (Google) has faced several antitrust examinations within the past several years. As a result, the company has begun a public relations offensive. Within the past several years, antitrust examinations have placed Google Inc. within a public relations effort to convince the public that it is not a monopoly.

In 2008, Yahoo! Inc. (Yahoo!) and Google abandoned their advertising agreement after the Department of Justice (DOJ) stated that it would file an antitrust lawsuit to block the implementation of the agreement. Under the agreement, Google would have placed sponsored search and contextual ads on Yahoo! search result pages and on the web pages of Yahoo! syndication partners in the United States and Canada. After an extensive investigation in which both companies cooperated, the DOJ concluded that Google and Yahoo! would have become collaborators rather than competitors for a significant portion of their search advertising businesses, materially reducing important competitive rivalry between the two companies.

Specifically, the DOJ's investigation revealed that Internet search advertising and Internet search syndication are each relevant antitrust markets. It found Google to be the largest provider of such services, with shares of more than 70 % in both markets, and Yahoo! to be Google's most significant competitor. Because combined market shares would have amounted to 90 % of the search advertising market and 95 % of the search syndication market, the DOJ concluded that if implemented, the Google-Yahoo agreement would likely harm competition in both markets.

In addition, Google faces three other government investigations. In summer of 2009, the DOJ began to investigate whether some of the nation's largest technology companies including Google, Yahoo!, and Apple violated antitrust laws by agreeing not to hire away top talents. Specifically, the DOJ is looking into whether the companies' hiring practices are costing computer engineers and other workers opportunities to change jobs for higher pay or better benefits. After more than a year of investigation, DOJ investigators concluded that the agreements do raise competitive concerns. The DOJ is continuing to meet with various companies and has not yet decided whether to challenge the practices.

In September of 2009, the the DOJ filed a memorandum opposing Google's October 2008 agreement between Google with the Authors Guild

(AG) and the Association of American Publishers (AAP). This settlement sought to end lawsuits brought by the AG and AAP in 2005, which challenged Google's unauthorized scanning of in-copyright books for its Google Book Search project. Under the 125 million dollar settlement, Google would have had the right to make available and to profit from digitalization of millions of books. The Justice Department argued, however, that the agreement raised significant issues regarding class-action, copyright, and antitrust. In particular, the DOJ argued that the agreement would give Google exclusive rights for the digital distribution of orphan works, which are books whose rights holders cannot be located through a reasonably diligent search.

On Nov. 13, 2009, Google and groups representing book publishers and authors filed a modified version of their books settlement with the federal district court, which provided for the appointment of an independent fiduciary for decisions regarding orphan work. The trustee, with congressional approval, could also grant licenses to other companies who wanted to sell these works. In a February 2010 filing with the court, however, the DOJ stated that changes in the revised settlement were not enough to placate its concerns that Google would gain a monopoly over millions of orphan works through the settlement.

Last year, the Federal Trade Commission (FTC) also undertook antitrust investigation into the ties between the boards of Apple and Google. Apple and Google shared two directors, Eric E. Schmidt, chief executive of Google, and Arthur Levinson, former chief executive of Genentech. Under the Clayton Antitrust Act, a person may not serve on the boards of two rival companies when that dual presence would reduce competition between the companies. In August of 2009, Eric E. Schmidt stepped down from the board of Apple. Following the resignation of Eric Schmidt, Arthur D. Levinson also stepped down from the board of Google. In a statement, FTC Chairman Jon Leibowitz commended the companies and Levinson "for their willingness to resolve [the FTC's] concerns without the need for litigation."

In March of 2010, venture capitalist John Doerr announced that he would step down from the board of Amazon.com. Although Doerr, Amazon, and Google did not comment on the matter, some have suggested that Doerr's decision to step down was prompted by a Federal Trade Commission inquiry into ties between Amazon and Google, where Doerr is a director. It was not clear whether the Commission had begun a preliminary inquiry or a formal investigation or whether it was still merely looking into the matter.