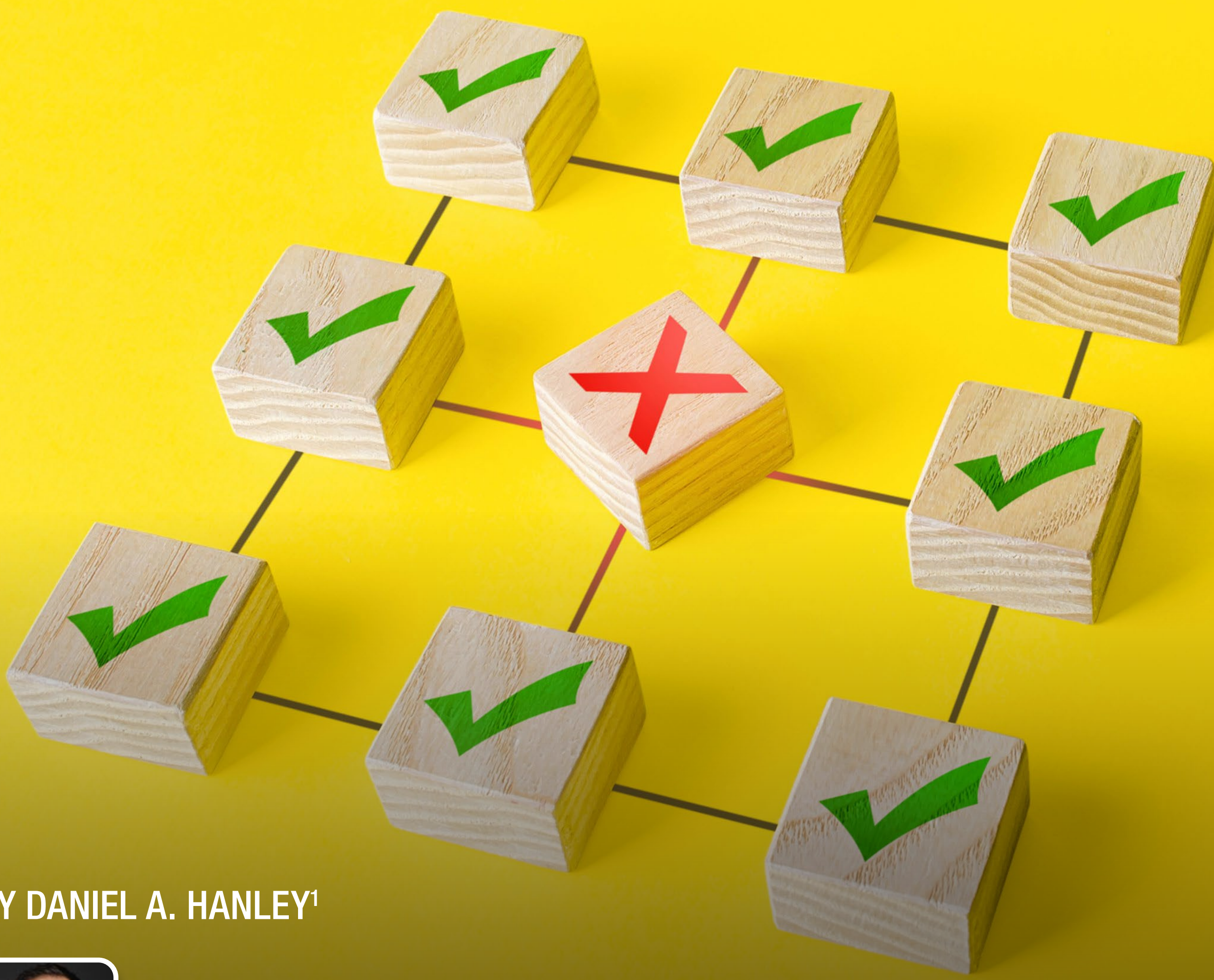
HOW SELF-PREFERENCING CAN VIOLATE SECTION 2 OF THE SHERMAN ACT



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How Self-Preferencing Can Violate Section 2 of the Sherman Act

By Daniel A. Hanley

Self-preferencing occurs when a firm unfairly modifies its operations to privilege its own, another firm's, or a set of firms' products or services. Extensive domestic and international investigations have confirmed that dominant technology corporations, like Google and Facebook, use self-preferencing to acquire, maintain, and entrench their dominant market position. This article will explain how self-preferencing can violate Section 2 of the Sherman Act. Part 2 of the article will discuss how Congress intended and designed the Sherman Act to prohibit unfair competition. Part 3 will detail the harmful and exclusionary effects of self-preferencing. Part 4 will explain how self-preferencing can violate Section 2 of the Sherman Act by analyzing the statute's current legal framework, as determined by the Supreme Court, and the statute's application to historical monopolization cases.

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I. INTRODUCTION

Self-preferencing occurs when a firm unfairly modifies its operations to privilege its own, another firm's, or a set of firms' products or services. For example, Google can manipulate its search rankings to favor its own shopping platform and prevent dependent (often rival) firms from obtaining visibility on its site.[2] Exhaustive investigations into Google's, Apple's, Facebook's, and Amazon's (collectively, "GAFA's") operations by private and public institutions show the harms self-preferencing can cause to market participants and consumers by allowing a firm to extend and fortify its dominance across multiple markets.[3]

This article will explain how self-preferencing can constitute a form of monopolization and can violate Section 2 of the Sherman Act. Google's conduct, in particular, provides an excellent foundation for analyzing how the Sherman Act can apply to self-preferencing.

II. THE SHERMAN ACT PROHIBITS UNFAIR COMPETITION BY MONOPOLISTS

Congress enacted the Sherman Act to be a "Magna Carta of free enterprise" that acts as a "comprehensive charter of economic liberty" and "does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers" encompassing "all who are made victims of [its] forbidden practices."[4] In other words, Congress structured the Sherman Act to reach nearly all firm conduct.

Congress did not condemn monopoly as a *per se* offense.[5] Nevertheless, the Sherman Act does impose a significantly higher duty of conduct on monopolies and other dominant firms that prohibits them from engaging in a plethora of exclusionary and unfair actions that could allow the firm to acquire, maintain, or extend its power.[6] Congress wanted to prohibit certain kinds of conduct because in the decades preceding the Sherman Act's enactment in 1890, it became clear that when a firm's market power increases and as market concentration increases, it leads to foreseeable and almost certain adverse effects on markets, consumers, and democracy itself. Since the early 20th century, the Supreme Court has acknowledged that to protect markets, consumers, and democracy, stringent limitations on monopolies and other dominant firms are necessary. For example, in the often-cited 1919 Colgate decision, the Supreme Court stated that a firm can choose its customers and suppliers so long as the firm is not acting to "create or maintain a monopoly[.]"[7]

To facilitate its broad public policy goals, Congress structured the Sherman Act to prohibit firms from using a vast range of tactics to win in the marketplace. For example, the Sherman Act prevents a firm from solely using its access to superior financial resources to maintain or acquire a dominant position; using its manufacturing capacity to price below the cost of production as a means of crushing rival firms out of the market;[8] imposing exclusivity deals or practices that foreclose a substantial share of the market,[9] or tying products together when the firm has "appreciable economic power."[10] The Sherman Act also prohibits firms from engaging in unfair and unethical conduct, such as using deception or other tortious offenses, which can often be costless for a firm to engage in.[11]

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2 First Amended Civil Complaint, *Dreamstime.com, LLC v. Google, LLC* (N.D. Cal.) (No. 18-01910) [hereinafter Dreamstime Amended Complaint].

3 See Majority Staff of House Subcomm. on Antitrust, Commercial & Admin. Law, 116th Cong., Investigation of Competition in Digital Markets 182–83 (2020) [hereinafter House Report].

4 *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972); *Northern Pacific R. Co. v. United States*, 356 U.S. 1 (1958); *Mandeville Island Farms v. American Crystal Sugar*, 334 U.S. 219 (1948); *Blue Shield v. McCready*, 457 U.S. 465, 472 (1982).

5 *United States v. Int'l Harvester Co.*, 274 U.S. 693, 708 (1927).

6 *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 488 (1992) (Scalia, J., dissenting) ("Behavior that might otherwise not be of concern to the antitrust laws—or that might even be viewed as procompetitive—can take on exclusionary connotations when practiced by a monopolist."); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S 585, 605 (1985); *LePage's Inc. v. 3M*, 324 F.3d 141, 151–52, 169 (3d Cir. 2003) (en banc).

7 *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

8 Christopher R. Leslie, *Predatory Pricing and Recoupment*, 113 Colum. L. Rev. 1695, 1717–18 (2013).

9 *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984); *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961).

10 *Eastman Kodak*, 504 U.S. at 462.

11 *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988); *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 176–78 (1965); *Prof'l Real Estate Investors v. Columbia Pictures Indus.*, 508 U.S. 49, 60–61 (1993). See also Susan A. Creighton et al., *Cheap Exclusion*, 72 Antitrust L. J. 975, 977, 989–90 (2005).

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Thus, the Sherman Act delineates between two avenues of conduct. First, the act prohibits firm conduct that is unfair and harmful to consumers, market participants, and society. Prohibiting specific unfair and exclusionary conduct prevents a firm from unfairly gaining a competitive advantage, fortifying a dominant position, or monopolizing a market. Second, the Sherman Act fosters fair competition between market participants by promoting and encouraging firm conduct that is beneficial to consumers and society as a whole.[12] By forbidding the use of certain unfair and exclusionary tactics, the Sherman Act structures a firm's operations to encourage a vast range of beneficial conduct, including competition through reductions in price, product improvements, research and development expenditures, investments in infrastructure or other distribution channels, offering more favorable terms to distributors and suppliers, and increasing benefits to workers.

III. WHAT IS SELF-PREFERENCING AND WHAT ARE ITS HARMFUL EFFECTS?

By unfairly modifying its operations to privilege its, another firm's, or a set of firms' products or services, self-preferencing enables a firm to unilaterally distort the relationships between dependent firms and customers to monopolize a market, fortify its dominance, destroy a competitor, or leverage into a new market. Self-preferencing can thus violate the Sherman Act and violate the principles of fair competition embedded in it.

Self-preferencing is not a novel behavior, but that does not put it outside the protections afforded by the Sherman Act.[13] For example, the concern that a dominant technology company would use its infrastructure to sustain its dominance, leverage into new markets, and give favorable terms to some companies was a primary concern of the Department of Justice when it initiated its lawsuit that led to the breakup of AT&T in 1982.[14] Other more modern examples of self-preferencing include manipulating search rankings to give a company's own products or services an artificial boost or giving favorable search rankings for a selected few companies while blocking off access to such terms for others to monopolize an industry.[15]

Self-preferencing causes two primary harms to market participants and consumers. First, since self-preferencing artificially weakens a rival firm's competitive position (who is often dependent on the provided service), it allows the perpetrator to unfairly maintain and extend its market power. When this happens, barriers to entry in an industry can increase, leading to less consumer choice, increased bargaining leverage of incumbent firms to extract or impose more favorable terms of service and conduct on dependent firms, and increased costs to dependent firms.

Second, self-preferencing causes significant exclusion and foreclosure effects, which can lessen consumer choice for alternative services. The exclusion of a firm can also cause consumers to lose out on the benefits of increased firm rivalry and potential innovation derived from it.[16]

The foreclosure effects caused by self-preferencing can also deprive a firm of the necessary scale to be a viable market participant.[17] Moreover, even the threat of foreclosure can cause harm to consumers by deterring the entry of potential competitors since they will likely not risk entering a market that they can be unilaterally excluded from if they start challenging the dominant incumbent firm.[18]

12 21 Cong. Rec. 3151 (1890) (statement of Sen. Hoar) ("[Monopoly is more than just commercial success] it involve[s] something like the use of means which made it impossible for other person to engage in fair competition."); 21 Cong. Rec. 2457 (1890) (statement of Sen. Sherman) (His namesake act was meant to secure "free and fair competition").

13 See generally *American Needle, Inc. v. National Football League*, 560 U.S. 183, 198 (2010) ("[A] history of concerted activity does not immunize conduct from § 1 scrutiny.").

14 *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 184 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). Press Release, Department of Justice Files a Civil Antitrust Suit Charging American Telephone and Telegraph with Monopolizing Telecommunications Service and Equipment in the United States 3 (Nov. 20, 1974), https://www.justice.gov/archive/atr/public/press_releases/1974/338834.pdf.

15 Jack Nicas & Keith Collins, *How Apple's Apps Topped Rivals in the App Store It Controls*, N.Y. Times (Sept. 9, 2019), https://www.nytimes.com/interactive/2019/09/09/technology/apple-app-store-competition.html (describing an example of Apple's self-preferencing). For an example of Amazon's self-preferencing, see Julia Angwin & Surya Mattu, *Amazon Says It Puts Customers First. But Its Pricing Algorithm Doesn't*, ProPublica (Sept. 20, 2016), https://www.propublica.org/article/amazon-says-it-puts-customers-first-but-its-pricing-algorithm-doesnt. *Amazon: By Prioritizing Its Own Fashion Label Brands in Product Placement on Its Increasingly Dominant Platform, Amazon Risks Antitrust Enforcement by a Trump Administration*, Capitol Forum (Dec. 13, 2016), https://thecapitolforum.com/wp-content/uploads/2016/07/Amazon-2016.12.13.pdf.

16 Jonathan B. Baker, *Exclusion As A Core Competition Concern*, 78 Antitrust L.J. 527, 560 (2013).

17 *United States v. Microsoft Corp.*, 253 F.3d 34, 60 (D.C. Cir. 2001) (en banc). Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theorem*, 123 Harv. L. Rev. 397, 413 (2009) ("[F]oreclosing a market can create anticompetitive effects by depriving rivals of network effects or economies of scale, scope, distribution, supply, research, or learning.").

18 Daniel A. Hanley, *A Topology of Multisided Digital Platforms*, 19 Conn. Pub. Int. L.J. 271, 282 (2020).

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IV. SELF-PREFERENCING CAN VIOLATE SECTION 2 OF THE SHERMAN ACT

The Supreme Court has stated that monopolization under the Sherman Act requires "(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."[19]

Monopoly power is "the power to control prices or exclude competition" and must be "accompanied by an element of anticompetitive conduct."[20] Plaintiffs can show anticompetitive conduct by presenting direct or circumstantial evidence. Additionally, the Supreme Court requires that the anticompetitive conduct at issue cannot just adversely affect a single firm, but rather the conduct must harm the "competitive process."[21] Willful acquisition or maintenance includes predatory, exclusionary, or unfair practices as well as practices that unnecessarily and arbitrarily impair the market to the detriment of rivals.[22]

With this framing, Google's conduct exemplifies how a dominant firm can use self-preferencing to monopolize a market and violate Section 2 of the Sherman Act. Numerous government reports and anecdotal accounts detail the exclusionary effects Google's conduct has on market participants and consumers.[23]

Google's market share in search far exceeds required thresholds for monopoly power under the Sherman Act.[24] Multiple comprehensive investigations into the company's operations found that Google's market share in search is almost 90 percent.[25] Other evidence also shows that Google is an "indispensable medium" and essential for a firm's success.[26] For example, Google is the top referral site for internet traffic; thus, if a site is not on Google, it is close to not existing at all on the internet for most consumers.[27] Multiple accounts show that the corporation also has monopoly power in several other markets.[28]

Google has also engaged in "willful acquisition or maintenance of its monopoly" that harms the competitive process. In multiple instances, comprehensive reports show that Google obtained its dominant position by engaging in a surfeit of exclusionary conduct that includes the use of self-preferencing, making hundreds of acquisitions, and imposing many restrictive contracts on third parties rather than as a consequence of a "superior product, business acumen, or historic accident."[29] Specifically, concerning Google's use of self-preferencing, two cases are particularly illustrative.

In 2011, the Federal Trade Commission investigated Google for self-preferencing its comparison shopping and local shopping sites.[30] Google decided to explicitly demote the search rankings of rival sites like Yelp to promote and advantage its own digital properties, such as Google

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19 *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

20 *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956); *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (emphasis omitted).

21 *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998).

22 *Trinko*, 540 U.S. at 407; *Aspen Skiing*, 472 U.S. at 605 n.32; *Microsoft*, 253 F.3d at 66 ("[Maintaining market power] through a means other than competition on the merits, [] is anticompetitive."); *Morris Commc'ns Corp. v. PGA Golf Tour, Inc.*, 364 F.3d 1288, 1294 (11th Cir. 2004) (citing *Eastman Kodak Co. v. S. Photo Materials Co.*, 273 U.S. 359 (1927)).

23 House Report, *supra* note 3, at 174–246; Australian Competition & Consumer Comm'n, Digital Platforms Inquiry - Final Report (2019) [hereinafter Australian Report], https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report; Report of the Digital Competition Expert Panel, Unlocking Digital Competition (2019) [hereinafter UK Report], https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

24 *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945).

25 House Report, *supra* note 3, at 78; Australian Report, *supra* note 23, at 42; UK Report, *supra* note 23, at 25.

26 *Lorain Journal Co. v. United States*, 342 U.S. 143, 152 (1951). Franklin Foer, World Without Mind: The Existential Threat of Big Tech 81–82 (2017) ("Every writer, every media outlet, every book publisher depends on [the GAFA companies] for their financial survival.").

27 Viola Eva, *Where is all That Traffic Coming From? A Referrer Traffic Analysis.*, Flow SEO (Oct. 3, 2019), https://www.flow-seo.com/seo/referral-traffic-data/.

28 Hanley, *supra* note 18, at 346–48; House Report, *supra* note 3, at 174–246.

29 House Report, *supra* note 3, at 78; Australian Report, *supra* note 23, at 8, 13, 58; UK Report, *supra* note 23, at 11, 23. *Grinnell*, 384 U.S. at 570–71.

30 Leah Nylen, *How Washington Fumbled the Future*, Politico (Mar. 16, 2020), https://www.politico.com/news/2021/03/16/google-files-ftc-antitrust-investigation-475573.

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Maps and Google Shopping.[31] Google effectively used its horizontal monopoly in general search (i.e. Google.com) to extend its market power into vertical search services (i.e. restaurant ratings and reviews).

In another instance, starting around 2015, Google wanted to maintain its dominant position in digital images. To do this, Google changed its search ranking algorithm and entered into agreements with Shutterstock and Getty Images to supply it with high-quality stock photos. Google's changes and agreements significantly demoted the search ranking of Dreamstime, a rival stock photo provider. Since Google relegated Dreamstime's site to the back pages of its search results, it effectively made Dreamstime's site and other similarly situated sites that do not have an agreement with Google invisible to consumers and depriving consumers of an alternative service.[32] Dreamstime even tried to increase their spending by millions of dollars on Google's advertising platform, hired advertising and search consultants, and implemented a series of changes recommended by Google to improve their search ranking, all to no avail.[33]

Both of these instances provide an adequate basis for a violation of Section 2 of the Sherman Act. In both examples, Google used self-preferencing derived from its "dominant economic power" to "foreclose competition, to gain a competitive advantage, or to destroy a competitor" and harm the competitive process, — as opposed to succeeding on account of "superior service, lower costs, and improved efficiency."[34] Since Google is indispensable to third parties,[35] an artificially lower search ranking from self-preferencing can be devastating for a firm's competitive position. As such, self-preferencing not only leads to substantial foreclosure of a rival site, but it also can raise the costs to dependent firms because a firm may have to either enter into a special deal with Google or pay for advertising on Google's search platform to ensure they are at a higher search position.[36] All of this has the effect of raising a rival's costs or forcing a dependent firm to operate in a significantly weaker bargaining position as a direct result of the firm's market power and self-preferencing.[37]

Google's actions are similar to those in a previous Supreme Court case that affirmed a finding of monopolization and a violation of Section 2 of the Sherman Act in 1973.[38] Like Google, Otter Tail Power Company was a vertically integrated corporation (in this case, an electrical utility) that had monopoly power in its relevant market.[39] Like Google's search engine, Otter Tail's electrical generation and distribution infrastructure were not easily replicable by rivals.[40] Like Google's actions toward Dreamstime, Yelp, and others, Otter Tail used its "strategic dominance" and control of its infrastructure to disadvantage and foreclose municipal rivals by refusing to transmit power over its own power lines from generators to municipal utilities to protect its distribution monopoly.[41]

The primary rationale for the Supreme Court's decision that Otter Tail violated Section 2 of the Sherman Act is because the company "[used its] monopoly power to destroy threatened competition[.]"[42] Importantly, the Court also distinguished Otter Tail's conduct from fair competition principles in which firms, including monopolists, succeed through "superior service, lower costs, and improved efficiency" rather than the use of unfair or exclusionary tactics.[43]

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31 *Id.*

32 Dreamstime Amended Complaint at 5, 20–23, 27.

33 Civil Complaint at 39–42, *Dreamstime.com, LLC v. Google, LLC* (N.D. Cal.) (No. 18-01910).

34 *Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973); *Aspen Skiing*, 472 U.S. at 605; *Image Technical Services, Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1208 (9th Cir. 1997) (quoting *United States v. Griffith*, 334 U.S. 100, 107 (1948)).

35 House Report, *supra* note 3, at 180; Foer, *supra* note 26, at 81–82.

36 GoogleAds is a service where advertisements can be shown to users on Google.com and are located either above traditional search results or on the side of search results. GoogleAds, https://ads.google.com/home/ (last visited Apr. 19, 2021).

37 *Sanderson v. Culligan Int'l Co.*, 415 F.3d 620, 623 (7th Cir. 2005).

38 *Otter Tail*, 410 U.S. at 370.

39 *Id.* at 368–71.

40 *Id.*

41 *Id.* at 371, 377.

42 *Id.* at 377 (internal quotations omitted).

43 *Id.* at 380.

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In addition to Google's monopoly power and exclusionary tactics, other aggravating factors increase the likelihood that the corporation is seeking to maintain its monopoly in violation of the Sherman Act. First, similar to other exclusionary monopolization offenses (like exclusive dealing or tying), self-preferencing does not need to be used against every possible competitor or cause full foreclosure of a rival or dependent firm to obtain the desired adverse effect.[44] For example, Google does not need to demote the search rankings of every rival vertical search engine or even remove a rival firm like Yelp or Dreamstime from their site entirely. Detailed analysis shows that less than 1 percent of users clicked on a link on the second page of a Google search result, and most user clicks are confined to the first few search results.[45] Thus, getting demoted even slightly would effectively relegate a site to digital jail. Similar effects exist across other sites like Amazon.[46] In fact, selective manipulation, exclusion, or demotion of a site like Yelp or Dreamstime may actually be just as, if not more of, an effective indicator to determine whether a firm is intending to exclude a rival to leverage into a market or attempting to succeed in the marketplace by providing "superior service, lower costs, and improved efficiency."[47] Additionally, excluding individual firms by self-preferencing may also prove to be an easier path to maintain a firm's dominance.[48] As the Supreme Court stated in 1959, violations of the Sherman Act are "not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups."[49]

Along similar lines, since self-preferencing needs to be only applied selectively to obtain significant exclusion of a rival or dependent firm, consumers would generally be unable to know or discover that such actions are taking place.[50] The founders of Google admitted this and were acutely aware that self-preferencing would also be "very difficult to detect" and have "a significant effect on the market."[51]

Second, many technology industries, like internet search, have high barriers to entry and the GAFA corporations have durable and persistent monopoly power.[52] In Google's case, no competitor has meaningfully challenged its dominant position in almost two decades. Such a situation increases the presumption that antitrust action is warranted.[53]

44 *Eastman Kodak*, 504 U.S. at 462 (Tying requires "appreciable economic power"); *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 283 (3d Cir. 2012) ("'[T]otal foreclosure' is not required for an exclusive dealing arrangement to be unlawful."); *MetroNet Services Corp. v. Qwest Corp.*, 383 F.3d 1124, 1132–33 (9th Cir. 2004) ("An offer to deal with a competitor only on unreasonable terms and conditions can amount to a practical refusal to deal.").

45 Brian Dean, *We Analyzed 5 Million Google Search Results*, Backlinko (Aug. 27, 2019), https://backlinko.com/google-ctr-stats. In fact, the first result is often extremely important too. See Matt Southern, *Over 25% of People Click the First Google Search Result*, Search Engine J. (July 14, 2020), https://www.searchenginejournal.com/google-first-page-clicks/374516/.

46 Loren Baker, *Amazon's Search Engine Ranking Algorithm: What Marketers Need to Know*, Search Engine J. (Aug. 14, 2018), https://www.searchenginejournal.com/amazon-search-engine-ranking-algorithm-explained/265173 (stating 70 percent of users on Amazon never go past the first page of search results).

47 *Otter Tail*, 410 U.S. at 380; *Aspen Skiing*, 472 U.S. at 605 ("If a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory."); *Lorain Journal*, 342 U.S. at 154–55; *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918) ("[K]nowledge of intent may help the court to interpret facts and predict consequences [of an exclusionary practice]."). Mark R. Patterson, *Antitrust, Consumer Protection, and the New Information Platforms Antitrust*, 31 Antitrust, Summer 2017, at 100–01 (2017).

48 *Lorain Journal*, 342 U.S. at 149–53, 157.

49 *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 (1959).

50 Patterson, *supra* note 47, at 100–01; Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 Cornell L. Rev. 1149, 1178–79, 1183 (2008). *Eastman Kodak*, 504 U.S. at 473–77.

51 Sergey Brin & Lawrence Page, *The Anatomy of a Large-Scale Hypertextual Web Search Engine*, 30 Computer Networks 107 (1998), http://infolab.stanford.edu/~backrub/google.html.

52 Hanley, *supra* note 18, at 291–308; Bracha & Pasquale, *supra* note 50, at 1182 (detailing how personalized search may also lock in users and increase switching costs); Creighton et al., *supra* note 11, at 986–87, 989.

53 Sandeep Vaheesan, *Resurrecting* "A Comprehensive Charter of Economic Liberty": *The Latent Power of the Federal Trade Commission*, 19 U. Pa. J. Bus. L. 645, 684 (2017); Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 Antitrust L.J. 1, 11–12 (2015).

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Third, self-preferencing facilitates other kinds of predatory and exclusionary behavior condemned by the antitrust laws, including tying.[54] Self-preferencing can operate as a form of tying since a company like Google, by preferencing its own services (or the services of other companies) and demoting rivals, encourages users to adopt its products and services together, potentially locking them in. Thus, self-preferencing can raise barriers to entry such that a rival service is unfairly inhibited from obtaining a sufficient number of users to be a viable market participant.[55]

Lastly, while benign forms of self-preferencing exist, such as a non-dominant grocery store changing the shelving placement of food items to favor its own in-store brands,[56] there are critical differences that distinguish that conduct from Google's and similarly situated digital giants.[57] Unlike an individual grocery store, Google has monopoly power.

Also, as opposed to the physical world, in the digital realm, users confine their searches to the first set of results they are shown. In the digital realm, searching for a particular website or product is a nearly endless process. There will always be more results than a user can review. Thus, in part, there is a "paradox of choice" that exists, and consumers feel that it is not worth their time to endlessly explore options they are presented with.[58] As such, users, across multiple technology platforms, confine their search to the first page they are presented with rather than engage in a more scrupulous search as they likely would for a product if they were at a physical retail outlet.[59] Thus, self-preferencing in the digital realm can have significant foreclosure effects that are not analogous to physical retailers. All these aggravating factors can just as easily apply to the conduct or industries of the other digital giants.

V. CONCLUSION

Self-preferencing can violate Section 2 of the Sherman Act, as Google's conduct shows. Fortunately, antitrust enforcers have a range of remedies at their disposal that would inhibit the use of self-preferencing or substantially weaken its adverse effects.[60] Structural separation would immediately enhance competition so that the effect of any one firm's self-preferencing would not result in near-total foreclosure of a rival and dependent firm. Interoperability requirements would also significantly inhibit the adverse effects of self-preferencing by lowering barriers to entry into an industry and allowing dependent firms or new firms to create an alternative service for consumers or other dependent firms.

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54 See generally *Jefferson Parish*, 466 U.S. 2 (1984). *Eastman Kodak*, 504 U.S. 451.

55 See note 50. *Microsoft*, 253 F.3d at 79 ("[S]uffice it to say that it would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will[.]"); Maurice E. Stucke & Allen P. Grunes, *Data-opolies*, (March 3, 2017) at 10 (Concurrences No. 2-2017 (2017) (Univ. Tenn. Knoxville Legal Studies Research Paper Series No. 316), available at https://ssrn.com/abstract=2927018 (stating, "A dominant data-driven company can use exclusionary tactics to prevent rivals from achieving the minimum efficient scale.").

56 Patterson, *supra* note 47, at 100.

57 Bracha & Pasquale, *supra* note 50, at 1183; Patterson, *supra* note 47, at 100–01.

58 See Barry Schwartz, The Paradox of Choice – Why More Is Less 55 (2004).

59 See generally Terry Clark, *Benefits of Physical Store vs Online Shop*, Retail Focus (Mar. 23, 2020), https://www.retail-focus.co.uk/benefits-of-physical-store-vs-online-shop (detailing the differences of online sales versus in-stores sales and how it affects a consumer's shopping habits).

60 Daniel A. Hanley et al., *Financing Free Speech: A Typology of Government Competition Policies in Media and Communications Markets*, Ctr. for Journalism & Liberty (Sept. 2020) (detailing many antimonopoly remedies), https://www.journalismliberty.org/publications/basics-financing-free-speech.

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