The Google Empire: The United States District Court for the District of Columbia Determines Google Violates Section 2 of the Sherman Act Through Monopolistic Practices

I. OVERVIEW

Two Stanford students founded Google in 1998 as a general search engine.[1] Since then, Google has become one of the most successful companies in the world and dominates the search engine market.[2] One of the core strategies that Google employed to initiate this market takeover involved distribution agreements that set Google as the default search engine on various products and Internet browsers.[3] Consequentially, Google can procure massive amounts of prized user data through these exclusive distribution agreements.[4] Google values exclusive distribution agreements highly and is willing to invest significant capital to secure them.[5]

On October 20, 2020, the U.S. Department of Justice was joined by eleven states in an action against Google, alleging a violation of Section 2 of the Sherman Act.[6] The specific allegation claimed that Google unlawfully maintained its monopoly in three product markets by entering into exclusive agreements to secure default distribution across nearly every desktop and mobile technology device in the United States.[7] On December 17, 2020, thirty-eight states filed a joint lawsuit against Google under Section 16 of the Clayton Act on behalf of their citizens, the general welfare, and the economy of their states.[8] The court consolidated the two

1. U.S. v. Google LLC, 2024 WL 3647498, *5 (D.D.C., 2024).
2. *Id.* at *2.
3. *Id.* at *3.
4. *Id.*
5. *Id.*
6. *Id.* at *4.
7. *Id.*
8. *Id.*

cases for pretrial and trial purposes.[9] Google subsequently moved for summary judgment in both cases.[10] The United States District Court for the District of Columbia *held* that Google is a monopolist and has acted in a way that maintains its monopoly in the relevant general search service and text advertisement markets, thereby violating Section 2 of the Sherman Act due to the anticompetitive effects of their exclusionary agreements.[11]

II. BACKGROUND

Section 2 of the Sherman Act states,

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.[12]

It is established through past precedent that Section 2 of the Sherman Act makes it illegal for a firm to "monopolize."[13] In *Standard Oil*, the U.S. Supreme Court stated based on the language of Section 2 that there could be no doubt that the attempt to monopolize and monopolization are the subject of Section 2.[14] In *Appalachian Coals*, the Supreme Court articulated that one of the main purposes of the Sherman Act is affording protection against the incendiary influences of monopolistic behavior.[15]

When examining the elements that define monopolization, two factors are consistently referenced by courts and were established in the landmark case, *Grinnell*.[16] Grinnell was a corporation that manufactured plumbing supplies and fire sprinkler systems.[17] Grinnell owned large amounts of stock in home protection service companies.[18] The court in *Grinnell* defined the two factors of monopolization as (1) the possession of monopoly power in a relevant market and (2) the willful acquisition and maintenance of that power in a manner that is not a result of a superior product, business acumen, or a historical accident.[19] The court concluded

9. *Id.* at *5.
10. *Id.*
11. *Id.* at 134.
12. 15 U.S.C.A §2.
13. U.S. v. Microsoft Corp., 253 F.3d 34, 50 (D.C. Cir. 2001); 15 U.S.C.A § 2.
14. Standard Oil Co. of New Jersey v. U.S., 221 U.S. 1, 50 (1911).
15. Appalachian Coals, Inc. v. U.S., 288 U.S. 344, 359 (1933).
16. U.S. v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).
17. *Id.* at 566.
18. *Id.*
19. *Id.* at 570-71.

that due to the high percentage of stock ownership in other closely related companies and restrictive agreements granting companies segments of the market free from competition, Grinnell violated Section 2 of the Sherman Act.[20]

In *Brown Shoe*, the court looked to further define the *Grinnell* factors by identifying what defines a relevant market. Congress did not accept or endorse any particular tests for what constitutes a relevant market in the context of monopolization.[21] Thus, the court established the *Brown Shoe* factors: industry or public perception of the submarket as a separate economic entity, the product's particular characteristics and uses, uncommon production methods, distinct customers, distinct prices, reactivity to price changes, and unique vendors.[22] These factors are to be used in a totality of the circumstances analysis, taking into account both mitigating and supporting factors.[23]

The Second Circuit in *Berkey Photo* also sought to further narrow the second element of monopolization by defining what constitutes the exception of a superior product or business acumen within the context of Section 2 of the Sherman Act.[24] The court found that punishing firms for engaging in activities that promote the possibility of success is detrimental to the purpose of the free economic system upon which our country was founded.[25] Furthermore, if a firm were required to share all of its innovations, it would be less incentivized to invest in research and development, resulting in an inferior product for consumers.[26] The court noted that once a firm gains monopolistic power as a result of a superior product, it can maintain that power simply by leveraging that advantage.[27] The court held that Kodak did not violate Section 2 of the Sherman Act due to its superior product and business strategy without use of coercive means to maintain a monopoly.[28]

In 2001, the Court of Appeals for the District of Columbia concluded that Microsoft could have violated Section 2 of the Sherman Act regarding the system market but did not violate it in relation to the Internet browser market.[29] The distinction between the system market and the

20. *Id.* at 576.
21. Brown Shoe Co., Inc. v. U.S., 370 U.S. 294, 320 (1962).
22. *Id.* at 325.
23. *Id.* at 346.
24. Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 286-87 (2nd Cir. 1979).
25. *Id.* at 281.
26. *Id.*
27. *Id.* at 274.
28. *Id.* at 288.
29. *Microsoft Corp.*, 253 F.3d at 46.

Internet browser market is essential for defining the relevant market in which Microsoft operates a monopoly.[30] The court then analyzed the anticompetitive effects that Microsoft promoted in the relevant markets.[31] The court found sufficient anticompetitive effects from Microsoft's use of exclusionary agreements with Internet providers, licensing restrictions on manufacturers, dealings with Internet providers, and general anticompetitive conduct.[32]

III. COURT'S DECISION

In the noted case, the District Court for the District of Columbia followed the analysis formulated via *Microsoft*, concluding that Google had violated Section 2 of the Sherman Act by acting as a monopoly.[33] First, the court defined the relevant markets for Google as those of general search services and general text advertisements.[34] Second, the court concluded that Google had maintained a monopoly in these two relevant markets.[35] Lastly, the court determined that the distribution agreements that Google engaged in with multiple vendors had anticompetitive effects and that there were no proffered justifications for these anticompetitive actions.[36]

The court used an analysis based on *Brown Shoe* to determine whether general search services or general search text advertisements constitute relevant markets for Google.[37] General search services are Internet search query providers, such as Bing.[38] General search text advertisements refer to advertisements displayed when engaging with a firm's general search services.[39] In the context of general search services, the court found that general search engines perform a unique function as both sources of information and gateways to various resources on the web.[40] General search services represent a distinct product with a unique composition within a specialized market.[41] General search services possess a unique production facility, as they are a zero-cost product that

30. *Id.* at 54.
31. *Id.* at 58.
32. *Id.* at 60-80.
33. *Google LLC*., 2024 WL 3647498 at *3.
34. *Id.* at *74, 77.
35. *Id.* at *80, 92.
36. *Id.* at *125.
37. *Brown Shoe Co*., 370 U.S. at 325; *id.* at *68.
38. *Google LLC*, 2024 WL 3647498 at *70.
39. *Id.* at *89.
40. *Id.* at *70.
41. *Id.*

cannot be replicated without significant expense by other firms attempting to duplicate that product.[42]

Additionally, the court determined that general search text advertisements are a relevant product market.[43] Text advertisements possess characteristics that distinguish them from other forms of search advertisements.[44] They resemble organic search results and typically link to the advertiser's domain.[45] Text advertisements can withstand price fluctuations without losing their consumer base.[46] Moreover, text advertisements are sold through different channels compared to other search advertisements.[47]

The court then analyzed whether or not Google has monopoly power within the general search services market.[48] The court found indirect evidence to be persuasive in the form of market share and barriers to entry.[49] When analyzing market share, the court looked to the precedent established in *Grinnell* that indicates a two-thirds share of the domestic market for a particular product can be considered a "predominant share."[50] When looking at Google's market share in general search services the court found that Google maintains an 89.2% share, which exceeds the two-thirds threshold set in *Grinnell* significantly.[51] The court then identified four factors that were presented as compelling reasons for why Google has furthered barriers to entry in the general search services market: (1) high capital costs, (2) control of key distribution channels, (3) brand recognition, and (4) scale.[52] Google countered these factors by attempting to show that the barriers to entry are not significant by alluding to evidence of new entrants, the emergence of technology like artificial intelligence, and the emergence of Google itself into a market that was dominated in the past by general search services such as Yahoo.[53] The court ultimately was not motivated by these counter factors and indicated

42. *Id.* at *71.
43. *Id.* at *89.
44. *Id.*
45. *Id.*
46. *Id.* at *91.
47. *Id.*
48. *Id.* at *74.
49. *Id.* at *76.
50. *Grinnell*, 384 U.S. at 571; *id.*
51. *Google LLC*, 2024 WL 3647498 at *76.
52. *Id.*
53. *Id.* at *79.

that none of them were sufficient evidence that Google does not provide barriers to entry for the general search services market.[54]

The court took a similar approach when discussing whether Google possesses monopoly power in the general text advertisement market.[55] The court examined indirect evidence of market share and barriers to entry while concluding that the specific direct evidence presented is unnecessary for discussion.[56] The court determined that Google commands an eighty-eight percent share of the text ad market, which was corroborated by the capital expenditures advertisers made on text advertisements from Google compared to what they spent on competitors such as Bing.[57] The court also noted that high barriers to entry exist within this market.[58] Google invests a substantial amount ($11.1 billion) annually on search advertisements, indicating a significant financial challenge in developing and maintaining a service capable of producing these advertisements.[59] These conclusions were sufficient for the court to conclude that Google does hold monopoly power in the general text advertisement market.[60]

The court proceeded by discussing the second factor of the *Grinnell* two-part test for determining whether a monopoly has occurred in the general search services or general text advertisement markets.[61] The plaintiff states' focused on Google's distribution contracts and exclusive agreements and how they have been used to maintain Google's monopoly in these markets.[62] These agreements have created significant inequality in search distribution, as Google is the exclusive search engine on most common browsers—such as Safari, Firefox, and Internet Explorer—creating a massive divide between Google and its competitors.[63] Additionally, Google is preloaded on many popular devices, including Android and Apple products, which contributes to the substantial gap in market power between Google and its competitors.[64] The court rejected

54. *Id.* at *79-80.
55. *Id.* at *91.
56. *Id.* at *91-92.
57. *Id.* at *91.
58. *Id.* at *92.
59. *Id.*
60. *Id.* at *91.
61. *Id.* at *95.
62. *Id.* States include Colo., Neb., Ariz., Iowa, N.Y., Tenn., Utah, Ark., Conn., Del., Haw., Idaho, Ill., Kan., Me., Md., Mass., Minn., Nev., N.H., N.J., N.M., N.D., Ohio, Okla., Or., Pa., R.I., S.D., Vt., Va., Wash., W. Va., and Wyo, joined by D.C. and Puerto Rico.
63. *Id.*
64. *Id.*

Google's assertion that their distribution agreements were not exclusionary, but rather the result of superior business acumen and unrivaled products.[65] The court emphasized that the issue was not how Google had obtained its power, but whether it had maintained that power through means outside the natural course of competition in an open market.[66] The court concluded that Google had hindered its competitors' abilities to establish themselves in the market by eliminating their options through these exclusive agreements, which contributed to preserving their monopoly.[67] The court then analyzed the anticompetitive effects of the exclusive agreements within the context of the general search services market.[68] The court established that the plaintiff states had demonstrated a prima facie case under Section 2 of the Sherman Act by exhibiting an anticompetitive effect.[69]

The court rejected Google's claims of three types of pro-competitive effects arising from distribution agreements related to general search services.[70] Google argued that these agreements enhance the quality of user experience and production in the general search services market, foster competition in related markets—which in turn benefits the search market—and yields consumer benefits.[71] Ultimately, the court determined that none of these effects are substantiated by the record, concluding that Google was liable under Section 2 of the Sherman Act for maintaining a monopoly in the general search services market through exclusionary agreements that generate anticompetitive effects.[72]

For the general text services market, the court considered three anticompetitive effects of the distribution agreements in this market.[73] The court examines market foreclosure, supra-competitive pricing of text advertisements, and product degradation due to diminished transparency regarding text advertisement auctions.[74] Google did not provide an explanation for pro-competitive effects in the general text advertisements market that the court had not already dismissed earlier in its opinion.[75] Therefore, the court concluded that Google violated Section 2 of the

65. *Id.* at *96.
66. *Id.* at *97.
67. *Id.*
68. *See id.* at *98-120.
69. *Id.* at *120.
70. *Id.*
71. *Id.* at *120-22.
72. *Id.* at *125.
73. *Id.*
74. *See id.*
75. *Id.* at *129.

Sherman Act in the general text advertisements market as well, due to the anticompetitive effects of exclusionary distribution agreements.[76]

IV. ANALYSIS

What constitutes a monopoly is highly unpredictable in its interpretation by courts.[77] As defined in *Grinnell*, monopolization requires the possession of monopoly power in a relevant market along with the willful acquisition and maintenance of that power in a manner that is not the result of a better product, business savvy, or a historic accident.[78] The court in the noted case does not fully address a core aspect of Google's rise to prominence: the development and production of a product vastly superior to those of its competitors. While it can be argued that the definition of a superior search engine is subjective, there are tangible factors that distinguish Google from rivals such as Bing or Yahoo.

The Second Circuit in *Berkey Photo* discussed situations in which preference is incorporated into the sufficiency of what constitutes a superior product or advanced business strategy.[79] The court inferred that the market dictates what would be considered to be a superior product the context of the superior product standard established in *Grinnell*.[80] As the court stated in *Google*, Google has no true competitor; its market share as a general search engine in 2009 was eighty percent and had grown to ninety percent as of 2020.[81] In comparison, Yahoo, which was once one of Google's largest competitors, holds around 2.5% of the market share.[82] The court posited that there was no price that Bing could pay Apple, for instance, to preload Bing on their products.[83]

Google could not have risen to prominence without a superior product and a better business model than its competitors. Since its founding in the garage of two college students, Google has become one of the most powerful and influential companies in the world.[84] While there is a strong argument to be made that Google maintains its monopoly

76. *Id.*

77. Daniel E. Feld, Comment, *What Constituted "Attempt to Monopolize," Within Meaning of §2 of Sherman Act (15 U.S.C.A. §2)*, 27 A.L.R. FED. 762 (originally published in 1976).

78. *Grinnell Corp*., 384 U.S. at 570-71.

79. *Berkey Photo, Inc*., 603 F.2d at 287.

80. *Berkey Photo, Inc*., 603 F.2d at 287; *see Grinnell Corp*., 384 U.S. at 570-71.

81. *Google LLC*., 2024 WL 3647498 at *96.

82. *Id.*

83. *Id.*

84. *Id.* at *2.

through monopolistic practices, users still have free choice and free will to use whichever service they prefer regardless of exclusive agreements with Internet browsers and tech products. There are no restrictions preventing users from engaging with Bing or Yahoo for their Internet browser needs, and there is a logical solution to the statistical trends. Users choose Google because of their faith in the service that Google provides and its vastly superior user experience. Punishing a firm for maintaining a dominant market share through the continued offering of a constantly innovating product line has the potential to undermine the purpose of the Sherman Act and contradict established precedent.

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