

United States v. Google - Implications of the Antitrust Lawsuit for Health Information

By: [Gregory Curfman, MD](#)

On October 20, 2020, the U.S. Department of Justice joined by 11 state attorneys general filed a stunning civil antitrust lawsuit in the United States District Court for the District of Columbia against Google.[\[1\]](#) What will this antitrust case mean for health information, and what other questions are health policy makers asking about Google's control of health information?

The complaint in this high-profile case is that Google engages in anticompetitive practices in the two principal components of its business, general internet search and advertising related to internet search. The complaint alleges that Google maintains monopolies in these two areas in violation of [Section 2 of the Sherman Antitrust Act](#). Regardless of the outcome, this suit will be one of the most significant antitrust lawsuits since the 1904 U.S. Supreme Court decision in *Northern Securities Company vs. United States*, in which the Court ruled that the railroad monopoly created by J.P. Morgan, John D. Rockefeller, E.H. Harriman, and James J. Hill must be broken up. This post will focus specifically on Google's practices in regard to health information and how the outcome of the antitrust lawsuit may affect those practices.

Implications for Health Information

Google's monopolistic control over internet searches and related advertising extends into searches for health information and advertising of health products. Although Google is not primarily a health entity, it is the [largest provider](#) of online health information to the public, and through its search algorithms and advertising policies

controls much of the content of the health information, both noncommercial and commercial, viewed by internet users.

How might Google's monopolies affect health information received by the public? Google receives a staggering [1 billion health-related searches per day](#), accounting for 7 percent of the total searches it receives. Stated differently, Google receives approximately 70,000 searches for health information every minute. In many cases, these searches for health information will also result in the appearance of an advertisement (or advertisements) at the top of the search results. Consequently, it is apparent that Google controls a vast amount of health information sought by the public and distributed through online searches.

Google controls health information in multiple ways. It determines the order in which the search results are displayed, along with which search results appear on the first page and therefore have highest visibility to users. By virtue of the size of payments from advertisers, Google determines which advertisements will appear at the top of the page. In addition to the search results, Google has added [Knowledge Panels](#) to search pages, which provide summaries of search information, in addition to other search terms related to the primary search. Knowledge Panels are applied to searches for health information as well as general searches, and Google decides which searches will be highlighted in Knowledge Panels and the content of the information that is placed in them. [Wikipedia and Wikidata](#) are the principal sources of information for the Knowledge Panels, and this is important for internet searchers to keep in mind in interpreting the quality of the information contained in Knowledge Panels. In [recent research](#), it was concluded that academic literature is limited on understanding the reliability of health information provided on Wikipedia. Further, who within Google is making decisions about the information that will be displayed in response to a health search? To what extent are these decisions made by physicians or other health professionals, versus specialists in information technology or business? The basis on which these decisions are made is, to say the least, opaque. Simply put, Google's search strategies are a black box.

Google's monopolies over internet search and the associated advertising, which have been underscored by the filing of *United States v. Google*, consequently, have significant implications for the health information that is derived from searching the

internet. From the standpoint of the consumer, is this the most reliable health information? A [recent study](#) concluded, “The vast amount of information that is possible to be retrieved makes it difficult to separate fact from fiction and interpret the findings, even for highly motivated individuals.” Practicing physicians are often faced with patients who arrive at their office appointments with reams of online health information, requiring the physician to separate the fact from the fiction. Even setting aside that health information derived from internet searches may not be highly reliable, the fact that a single entity controls the distribution of this information and influences its content adds another element of concern in regard to the welfare of consumers and to policy makers.

An issue that should be of concern to those who search for health information using Google’s search engine, and to policy makers, is personal privacy. Google collects vast troves of personal information about users. For example, [Google records](#) every search that users conduct, every ad opened, every YouTube video viewed, and whether users have an iPhone or Android phone, among other categories of personal information. Users must decide whether they actually benefit from this degree of information sharing, or if they are putting their private information, including information that is relevant to their personal health, at risk.

Google and Apple

How did Google establish, and how does it maintain, its search and advertising monopolies, including its monopoly on search for health information? Having a monopoly is not in itself illegal, but actions taken to sustain a monopoly may be, if anticompetitive strategies are employed. As is discussed in the [complaint](#) in United States v. Google, Google captures distribution channels for information by making exclusive agreements with other entities to stave off search competition in the use of its web browser (Google Chrome). For example, Google has made [agreements with Apple](#) to pay the company between \$8 and \$12 billion per year for Google’s web browser to serve as the default browser on Apple devices. Although users are free to change the default if they wish, most do not switch defaults. A [substantial fraction](#) of Google searches, approximately one half, are conducted on Apple devices. When

users perform searches for health information on Apple devices, much of the information retrieved will be delivered via Google's search algorithms. As part of the agreement with Apple, a collection of Google apps, which cannot be deleted, must be installed on Apple's mobile devices and displayed in prominent positions on the screens. The Apple agreement has the added benefit to Google of keeping Apple out of the search market, including searches for health information. In addition, Google maintains a monopoly on search advertising, such that advertisers pay Google [\\$146.9 billion per year](#) to secure placement of their advertisements (including health advertisements) on Google's search results pages. Thus, advertising for health products on Google's search results pages will be more, or less, visible to users on the basis of the size of the payments made to Google from sponsors.

Google's Monopolies

As a result of this anticompetitive activity, [Google controls nearly 90%](#) of all general internet searches in the U.S. and 95% of searches made on mobile devices, particularly cellular phones. The searches include searches for health information. How are consumers harmed by Google's anticompetitive activities? By impeding the activities of competing search engines (such as Microsoft Bing and DuckDuckGo, among others), Google restricts consumer choice and the potential for innovation in the search space. Also, Google is virtually the sole provider of search information, including health information, to consumers, which calls into question whether consumers are receiving the highest possible quality information. Not every searcher sees the same results in response to the same search terms. Google's search algorithms may modify the search results on the basis of a person's search history and geographic location, among other characteristics. On the basis of these characteristics, Google may also restrict the spectrum of advertising that consumers see when they conduct internet searches. With respect to health information, the principal concern is that consumers seeking online health information have only one search engine to use, and Google provides no transparency on how its health-search algorithms are built.

On October 6, 2020, the Subcommittee on Antitrust, Commercial and

Administrative Law of the House Committee on the Judiciary issued a [450-page report](#) on the four dominant online platforms, Amazon, Apple, Facebook, and Google. The report provides numerous important details that suggest or indicate antitrust activity by the four major technology platforms (the section on Google can be found on pages 174-247). The Subcommittee concluded:

“To put it simply, companies that were once scrappy, underdog start-ups that challenged the status quo have become the kinds of monopolies we last saw in the era of oil barons and railroad tycoons.”

The report went on to state:

“Nearly a century ago, Supreme Court Justice Louis Brandeis wrote, ‘We must make our choice. We may have Democracy, or we may have wealth concentrated in the hands of a few, but we cannot have both.’ Those words speak to us with great urgency today.”

From the perspective of Google’s control of health information, one aspect of the Congressional report is of special relevance. Vertical search providers are focused search engines that find information on particular topic areas, such as medical information. Instead of conducting general searches, vertical search proceeds on the basis of the genre of content.

The report notes that Google has been quite successful in undermining vertical search providers that Google has perceived as a threat to its search monopoly through the use of anti-competitive tactics. For example, Google has used search strategies to boost its own inferior vertical searches “while imposing search penalties to demote third-party vertical search providers.”^[2] Given that vertical search providers focused on delivering search content on health would be in direct competition with Google’s extensive search capacity for health information, it may be realistically expected that Google is well positioned, with its experience in using anti-competitive tactics against vertical search providers, to eliminate the threat of competition from specialized vertical providers of health information.

Thus, the report forcefully underscored the Subcommittee’s profound concerns about anti-competitive conduct on the part of Google and the other three technology

platforms and presented these concerns for public scrutiny. The report's coverage of vertical search providers is of special concern in regard to Google's anti-competitive strategies to preserve its monopoly on search for health information. Policy makers and consumers alike need to be concerned.

Consumer Welfare

In conducting an antitrust analysis, experts in antitrust law typically consider ["consumer welfare"](#) in making determinations of whether antitrust law has been violated by putative anti-competitive activity. The consumer welfare standard usually involves making a judgment about whether the alleged anti-competitive activity leads to harm to consumers, particularly in the form of higher prices for goods. Some [antitrust experts](#) believe that the consumer welfare standard established by Judge Robert Bork^[3] and the Chicago School of Antitrust Law sets the burden of proof too high and that the focus should instead be placed on concentrated power. In his 2018 book, *The Curse of Bigness - Antitrust in the New Gilded Age* (Columbia Global Reports), Professor Tim Wu argues strongly against use of the consumer welfare standard and instead promotes more aggressive trustbusting in the modern era of mega-platforms, such as Amazon, Apple, FaceBook, and Google. In the case of Google's monopolies, one "price" that consumers pay is that online health information they retrieve in searches is controlled by a single entity that has an enormous financial interest in the advertising that accompanies health searches. Google dictates the price of that advertising, which is then passed along to consumers in the form of higher prices for goods.

If the Department of Justice prevails in *United States v. Google* and Google's deal with Apple is ultimately negated, Apple might decide to pursue its own internet search strategy and compete directly with Google. It can only be speculated whether competition in this space would result in more innovation, but [scholarship](#) strongly supports the idea that competition may promote innovation and benefit consumers.

Dinerstein v. Google and University of Chicago

Internet search is not Google's only business interest in health information. In recent years the company has created business arrangements with large U.S. medical centers to gain access to their patients' medical records. [Google's purpose](#) is to leverage extensive troves of personal health information to develop algorithms using artificial intelligence methodology for the objectives of predicting patient outcomes, modifying clinical management strategies, and influencing billing decisions, among other purposes. Although this initiative is not directly related to the antitrust lawsuit, it provides important context for understanding the broad and growing landscape of Google's vast business interest in health information.

Earlier in this article, potential risk to personal privacy was discussed in relation to Google's internet search and search advertising. In 2019, Google negotiated an arrangement with the University of Chicago Medical Center to gain access to all its medical records between the years 2009 and 2016. This amounted to the transfer of a vast quantity of HIPAA-protected personal health information, which Google and the University claimed was de-identified, without the explicit permission of the patients. One of the patients, Matt Dinerstein, represented by a Chicago law firm specializing in privacy and class-action cases, filed a [class action lawsuit](#) against Google and the University of Chicago. Dinerstein claimed that because he visited the Medical Center with his cell phone in hand, Google would be able to re-identify him on the basis of location information, along with date and time information from the medical records. The medical privacy case, which has received widespread media attention, was filed in the U.S. District Court for the Northern District of Illinois in Chicago.

In September 2020, Chief Judge Rebecca Pallmeyer dismissed the [case](#) on the basis of motions submitted by both Google and the University of Chicago. A motion to dismiss tests the sufficiency of the complaint in a case, and not the merits. An important aspect of the Judge's decision was her determination that Dinerstein lacked standing to bring the case since he had not suffered any personal injury from the transfer of his medical records. Dinerstein's additional claims about breach of contract (with the University Medical Center) and the commercial value of his personal medical records, were also [dismissed](#). The Judge ruled that HIPAA does not authorize a private right of action (in regard to the University's sharing of private health information without consent) and patients do not have a property right to

their personal health data. Although Google and the University have won the first round, the case is not concluded since Dinerstein's attorneys have filed an appeal in the U.S. Court of Appeals for the Seventh Circuit. The appeal remains pending at this writing.

Unless the dismissal of the case is overturned by the Seventh Circuit, Google will be unhindered in pursuing similar arrangements with other medical centers, as it has already done with Mayo Clinic and Ascension Health (the so-called [Project Nightingale](#)). Google is, therefore, well positioned to gain access to massive quantities of personal health data, which when added to its established monopoly on internet search for health information generated by its proprietary algorithms, will further secure its dominance in the health information field. The potential implications for the privacy of consumer health information and for those who establish health information policy may be quite significant.

Conclusion

The outcome of *United States v. Google* will likely not be known for some time, perhaps years. Legal authorities are divided on the question of the relative merits of the case. Should Google prevail, its monopolies will not only survive, but thrive, and Google will remain the [principal purveyor](#) of online health information. Competition from other search engines will be squelched, and the potential for innovation in search for health information, including innovation by vertical search providers, will be stifled, if not eliminated. But if the government prevails, there may be a structural remedy, in which antitrust action could be taken to divide Google up in some manner (such as a spinoff of Google Chrome). This could theoretically allow more competitors, such as Apple and others, in internet search, including search for health information. Noted University of Pennsylvania antitrust scholar, [Professor Herb Hovenkamp](#), believes that such a structural remedy is unlikely and more likely there would be a lesser remedy, such as requiring a choice of search engines for purchasers of new Android cellular phones (which are produced and marketed by Google). Irrespective of its eventual outcome, *United States v. Google* is a major antitrust lawsuit that highlights another compelling reason why we should be

concerned about the quality of health information derived from the internet.

[1] United States of America v. Google LLC, No. 1:cv-20-03010 (D.C. Cir. Oct. 20, 2020).

[2] Jerrold Nadler and David N. Cicilline, *Investigation of Competition in Digital Markets*, Majority Staff Report and Recommendations, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, at 14 (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

[3] Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (Free Press 1993).

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