NetCompetition's Reply Comments on the FCC "AllVid" Set Top Box NPRM

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Note: Comments are from Scott Cleland, Chairman of NetCompetition

- NETCompetition.org is a pro-competition e-forum representing broadband interests. **See** www.netcompetition.org**.**

Google's Growing US Search/Android Share Complicates FCC's AllVid Proposal

As more evidence comes to light exposing Google's much increased search and Android dominance in the U.S. since the FTC closed its search and Android antitrust probes in January 2013, it only becomes clearer that the FCC's AllVid proposed rulemaking to "*Unlock the* [set-top] *Box*" is obviously anticompetitive overall, not pro-competitive as the FCC naively claims.

> (A brief context refresh is needed here. In a nutshell, Google is the primary impetus behind the FCC's controversial AllVid set top box proposal that would force U.S. pay-TV providers to effectively open-source cable set-top boxes and the $200b worth of proprietary video programming/information that flows through them, so that Google and other edge platforms could monetize that proprietary video programming without a license -- for free.
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> If passed this summer, Google will be the lion's share commercial beneficiary of this FCC rulemaking, because Google commands the Internet's dominant "navigation device," its dominant search engine, and it commands the world's and America's dominant licensable mobile operating system, Android, the "gateway software" for the mobile Internet.)

The core problem here is the FCC's misrepresentation that when one "unlocks" something of great value, it presents no risk to the great value previously protected by the lock.

In other words, the FCC is cherry-picking and selectively framing the question to be about the $20b in annual set-top-box revenue, when it is really about the business viability and sustainability of America's entire $200b a year, pay-TV ecosystem, in which set top boxes currently serve as the linchpin security component.

Consider the evidence that Google has become an even more dominant Internet gatekeeper since the FCC announced its AllVid rulemaking.

Search

This May, the Sunday Telegraph reported that the EU plans to fine Google an EU record ~€3b for "*web search monopoly abuse*" and that "*Google will be banned from continuing to manipulate search results to favour itself and harm rivals.*" The EU's 2015 Statement of Objections put Google's search share at >90% in the EU.

Earlier in May, Politico reported that the U.S. Federal Trade Commission was reopening its Google Search antitrust investigation.

Thus the FTC and the media need to update their thinking from 2012 when the FTC shut down their Google search bias and Android investigations without any action on those particular complaints.

When they do, **they will find a very different factual story in 2016 -- to the extent they investigate *beyond* Google's U.S. *desktop* search market share** of 64% per comScore, **and investigate Google's mobile and mobile + desktop market shares.**

Mobile search matters much more now, because Google announced a year ago that over half of all Google searches in the U.S. are mobile searches; and because mobile's rate of growth far exceeds desktop's rate of growth.

Google's U.S. mobile search market share is now ~90%, given StatCounter's current estimate of ~91% U.S. mobile search market share; and Netmarketshare's implicit estimate of ~90% share given: Android and iOS comprise ~90% of U.S. OS mobile share and Apple iOS uses Google search by default; and given Google's global mobile share is currently ~95%.

In addition to mobile searches growing faster than desktop searches, Google's only significant U.S. search competitor, the combined Microsoft-Bing-Yahoo search platform, is losing share steadily because Microsoft effectively has conceded the mobile search and search advertising markets by writing off Nokia, and in selling off display ad assets to Verizon and map assets to Uber. And its former happy search partner, Yahoo, is now unhappy with Bing and petitioning the DOJ for permission to use Google's platform for up to half of its search inventory.

Simply, the two estimates above indicate Google's 2016 search share is 33% higher than it was in 2012 (from 64% for desktop in 2012 to 85% for desktop-mobile combined in 2016); and 41% higher than 2012,if the baseline is 64% desktop share to ~90% mobile share.

That is a huge change in the underlying fact predicate at the FTC in just a little over three years. This is damning evidence that Google's monopoly network effects are exceptionally powerful.

Operating System

In addition to search shares being very different today from 2016, the search and Android investigations that the FTC decided to drop in late 2012, are completely different than the search-driven Android case that the EU charged Google with last month, in its April 2016 Android Statement of Objections.

Simply, the EU charged competitive foreclosure behavior: "*Google has implemented a strategy on mobile devices to preserve and strengthen its dominance in general internet search. First, the practices mean that Google Search is pre-installed and set as the default, or exclusive, search service on most Android devices sold in Europe. Second, the practices appear to close off ways for rival search engines to access the market, via competing mobile browsers and operating systems*."

Importantly, the FTC's 2012 staff report on the Google antitrust investigation concluded that "*Google has strengthened its monopolies over search and search advertising through anticompetitive means, and has forestalled competitors and would be competitors' ability to challenge those monopolies, and this will have lasting negative effects on consumer welfare*." (p. 116)

The point here is that, if a majority of FTC commissioners were willing to investigate and prosecute Google for straightforward antitrust violations, there is ample evidence to do so, given this particular case and the EU's evidentiary findings.

There is also additional powerful evidence today that Android is a U.S. licensable mobile operating system monopoly because, the only company still trying to develop a competing operating system to Android and iOS, Acadine Technologies effectively gave-up this week because it could not attract the necessary capital to try get fully started. This comes on the heels of Mozilla giving up a few months ago on its attempt to create a Firefox mobile OS to compete with Android.

What this means is that for everybody else than Apple (which has its own iOS), most every maker of a FCC mandated set top box would have to use Android as its operating system.

Conclusion

What does this all mean for the FCC and its AllVid set top box proposal?

First it means that what the FCC is proposing to do -- open sourcing the most valuable corpus of premium video programming in the world for the primary commercial benefit of Google's search, search advertising, and licensable mobile OS monopolies -- is profoundly anti-competitive.

Second it's also the functional equivalent of an improper, FCC no-bid, sole source government contract to supply an operating system to millions of navigation devices that would not exist, but for the FCC especially creating them particularly for Google's commercial benefit.

The FCC should start over from scratch.

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House antitrust subcommittees on Google and also before the relevant House oversight subcommittee on Google's privacy problems.

Respectfully submitted,

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