Let's make Google a public good

In the United States, Ohio's attorney general has asked for a judicial declaration that Google has evolved into a common carrier. Here's why

American law recognises that some critically important businesses must accept all customers and treat everyone fairly because they are not easily or economically efficient to duplicate — think railroads, electricity providers and telephone companies.

As Ohio's attorney general, I went to court last month asking for a judicial declaration that Google has evolved into such an entity: a public utility of internet search.

Google is ubiquitous. More web traffic goes to Google and YouTube, a subsidiary of Google, than the other top 50 websites combined. And it's not just internet traffic: Google dominates internet search, cornering nearly 90 per cent of the US search market, and even more globally. Bing, the runner-up in internet search, claims a mere 6 per cent of the US market and 2 per cent globally.

Google as a public utility

More than 30 states, including my own, have joined in a bipartisan antitrust action against Google. But, separately, Ohio is pursuing Google under the common law of public utility — a tactic that I urge other states to consider.

Should Ohio prevail in its lawsuit, there will be no heavy-handed 'Mother May I?' antitrust regulation in which the government tells Google how to run its business or how to write its algorithms. Nor, unlike antitrust law, does Ohio's suit seek to reduce the number of Google users. We are not even asking for monetary damages — just a simple declaration that, under the law, Google is a public utility, or more generally, a common carrier.

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then have a legal duty to act with consideration of the public interest, to provide equal access to all users and all information providers and to act without unreasonable bias against information providers, particularly Google's competitors in other business lines. That's it. As legal touches go, it's a lot lighter than what antitrust law would demand. (Google has said the Ohio lawsuit 'has no basis in fact or law' and that it will defend itself against it in court.)

How Google is abusing its market dominance

Once Google is declared a common carrier, the average web user's experience of search would, for the most part, remain the same. That's largely because, when you use Google to search, you're not the customer — you're the product. Google uses your detailed personal information for targeting ads.

The subtle common-carrier changes for users will be positive, such as showing you the results you requested instead of being steered to Google products. My lawsuit alleges that Google prioritises its own products and platforms in search results. According to the market research company SparkToro, at least 65 per cent of Google searches in 2020 were 'zero-click searches' — that is, the consumer never left Google when conducting a search. And an investigation by The Markup found that a search for, say, flights, first brings up integrated results from Google Flights — while competitors such as Travelocity and Orbitz can be shut out.

As a public utility, Google search would have to give others a better shot. Those searching would get results that are not skewed to Google, and the marketplace would be a bit more competitive.

Once a court declares Google a public utility, the marketplace itself would provide the guard rails. Those who felt they were not getting a fair shake could seek redress in court, though modern public utilities largely follow the rules, and we would not expect Google to face an avalanche of litigation.

The history of common law

The duty for a public utility to operate in the public interest dates back to

English common law, when key economic players such as ferry operators had to fulfil certain obligations to the public. During the Gilded Age, the railroad magnate Cornelius Vanderbilt controlled a bridge that was key to getting to New York City by train. In the late 1860s, he closed the bridge to rivals, effectively shutting the rest of the country out of its largest port, and the city off from food supplies from the west.

As the competing railroads' stock crashed, he quickly bought up a controlling position. As a result, Vanderbilt used his control of a chokepoint to help establish a monopoly. To curb such predations, Congress passed the Sherman Antitrust Act in 1890 and subsequently began codifying common-carrier and public-utility law.

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But the common law regarding public utilities remains in many places — including Ohio. Statutory regulation will produce different results from the common law because while codification requires detailed regulations addressing all issues upfront, the common law allows for nuanced law-making tailored to each specific dispute.

Against the critics

Critics of Ohio's lawsuit abound, of course. To knock down a few straw men: Ohio's action is not chilling Google's right to free speech. To the contrary, Google will remain free to say anything it pleases. What it may not do is restrain the commerce of others by using its monopolistic powers in search to corner other markets.

Critics also say that this creates a 'dormant Commerce Clause' problem — that one state among 50 is using its law in manner that burdens interstate commerce, a violation of sovereignty and federalism. But Google can geo-fence Ohio if it chooses (and the other states that will most likely follow Ohio's lead).

The truth of the matter is that foreign governments already are regulating cyberspaces around the world, and with a far heavier hand. The European Union requires cookie warnings and privacy safeguards. Google just settled France's lawsuit about Google's advertising infrastructure.

Google's initial response in our case is due in the next few weeks. The preface to Google's parent company's code of conduct says, 'Do the right thing — follow the law, act honorably and treat co-workers with courtesy, support and respect.' Google could do that by acknowledging

what is obvious: It's so dominant that the rules of private companies no longer apply to it.

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