

CORRECTION TO THIS ARTICLE

The Big Money column incorrectly said that a court had approved Google's settlement of a lawsuit over its book-scanning project. Final approval is pending.

Google Says It's Actually Quite Small

By Jeff Horwitz

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Three times in the past month, government agencies have targeted Google for antitrust reviews. An outstanding private lawsuit alleges that Google tried to kill a business-to-business search engine with predatory pricing. And during the waning months of the Bush administration, soon-to-be Obama antitrust chief Christine Varney declared that Google "has acquired a monopoly in Internet online advertising." Last month she asserted that the Bush administration had been too lax in combating monopolistic behavior and that the Obama Justice Department would no longer "stand on the sidelines."

That should explain why Dana Wagner, a former Department of Justice antitrust lawyer hired by Google just last year, is rapidly becoming one of the company's public faces. Along with Adam Kovacevich, a company public-policy spokesman, Wagner has been talking to advertising clients, public officials, reporters and academics in an effort to diffuse the impression that Google has a competition law problem.

As might be expected, Google's presentation highlights the company's many good works and "don't be evil" corporate philosophy. But there's another element at front and center of the presentation: According to Warner and Kovacevich, their company holds only a 2.66 percent share of its total market.

If that number seems low for the runaway success story of the Internet age, Google wants you to believe that it's just a question of market definition. Google rejects the idea that it's in the search advertising business, an industry in which it holds more than a 70 percent share of revenue. Instead, the company says that its competition is all advertising, a category broad enough to include newspaper, radio and highway billboards. Google's argument is not simply that it's not a big bully. If you believe the company, it's not even that big.

"We need to move past intuitive market definitions and actually look at how consumers, advertisers and publishers are shifting their spending," Wagner said. "Market definition is job one, and hopefully people aren't bringing too many preconceived notions to that."

At first glance, this seems like a tough position to defend. There's a sharp difference between how companies use mass-market tools like billboards and how they use search-based advertising, which targets consumers far closer to the point of sale. And even if you buy Google's claim that the lines between media have been blurred by technology, it's still hard to explain how the company could maintain a 30 percent operating margin, despite money-losing outlays in a host of adjacent fields, if it faced serious competition. As Wagner himself notes, arguing that Google's market is broader than search advertising is not intuitive. When [Microsoft](#) tried to argue that it didn't have a monopoly in the 1990s, that strategy was widely seen as disingenuous.

But that raises the question: "Why bother?" There's no law against trouncing your business competitors. Ever since Judge Learned Hand's landmark decision in *U.S. v. Aluminum Co. of America* 64 years ago, the court has recognized that under certain circumstances a company may come to dominate its field through "superior skill, foresight, and industry."

It's hard to see Google as anything other than a model example of such a company.

Moreover, nobody's come up with a particularly good case that the company has been stifling other companies. One of the government's antitrust reviews looks into Google's book-scanning settlement -- a deal that was already approved by a court and was forced by publishers. Another investigates a mild overlap between Google's and [Apple's](#) boards of directors -- a situation that could easily be fixed by a resignation, assuming any court thought it was a problem. A third has just become public, focusing on whether Google and other leading tech

firms have shied away from stealing one another's most talented employees. None of the concerns threatens Google's core business or suggests a dastardly plot.

Still, Google has reason to dread the perception of even benign dominance. Just ask Gary Reback, an attorney for Carr & Ferrell who played a big role in pinning monopoly status to Microsoft in the 1990s. Even if U.S. antitrust law allows for justly earned monopolies, it's rare that a high-profile company ever gets to enjoy that status in peace.

As Reback puts it, the government's approach has traditionally been: "We won't punish you for being successful. But if you're a monopolist and you spit on the sidewalk, we'll break up your company."

Thus monopoly Google could expect a relentless stream of litigation. Historically, this has been a nightmare for the target companies, hemming in their management and constraining their business decisions. It was an antitrust problem that forced AT&T to license the transistor in 1956 at no cost. And as Reback notes in a recent book, "Free the Market!," advocating for more interventionist competition policies, it wasn't a government monopoly lawsuit that broke Standard Oil's power -- it was Texas regulators' decision to hound Standard Oil with litigation. With Standard unable to exploit major new oil discoveries in the state, new competitors such as Texaco arose.

Substitute tech fields for oil fields and you've got an approximation of Google's potential problem. Many routine parts of the company's growth, such as buying small companies to stake out a position in search-related fields, could potentially be construed as anticompetitive if Google is already deemed to have market dominance.

"I think they're going to have trouble with damn near any acquisition, including acquiring your local dry cleaner," Reback said.

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