



Questions remain about Google-Yahoo search-ads deal

By Glenn G. Lammi

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According to unsealed documents from a shareholder suit against Yahoo earlier this year, executives at the firm dismissed an online search-advertising collaboration with Google. The documents intimate that Yahoo officials felt long-term antitrust concerns could outweigh any short-term gains from such a deal.

It should come as no surprise, then, that Google was forced to walk away from an actually consummated deal with Yahoo after the U.S. Department of Justice indicated it would take action to stop it. Although the potential partnership has fallen apart, the issues it raises about antitrust and the future of the Internet will remain.

In a strongly worded statement, Assistant Attorney General Thomas Barnett said the proposed deal “likely would have denied consumers the benefits of competition – lower prices, better service and greater innovation.”

The injection of advertising into online searches, which ties the ads that appear to certain keywords in the search, has been a critical component of online commercial growth. Google, in the words of the Federal Trade Commission, is the “dominant provider” of search advertising, with Yahoo second and Microsoft a distant third.

Ad revenue supports not only the search technology, but also the many additional free services Google and other search platforms offer.

Importantly, Barnett said Internet search advertising is a “relevant antitrust market.” The companies had been advocating a far broader definition of the relevant market, with Yahoo’s Chief Executive Officer Jerry Yang stating at a conference, “The government in this case doesn’t understand our industry.”

Though not a formal merger, the arrangement for Google to sell search advertising for placement alongside Yahoo search results raised numerous antitrust concerns. If allowed to go through, the partnership could have locked up nearly 90 percent of the online search advertising market. This alone made many antitrust lawyers, consumer groups and customers of Google (i.e. advertisers) question the legality of the deal.

The key question for regulators, it seemed, was whether sufficient incentives remained for Yahoo to remain in the advertising search market as a distinct competitor. As professor Norman Hawker wrote in an American Antitrust Institute white paper, "It strains credulity to believe that Google would agree to an arrangement that gives its chief rival \$800 million to invest in efforts that would, if successful, reduce Google's market power."

The abandonment of the deal resolves immediate antitrust concerns for two very prominent Internet-based companies, but it certainly raises longer-lasting issues for online commerce.

DOJ's serious look at the agreement firmly demonstrates that antitrust regulators will scrutinize commerce in the online space, and apply traditional competition rules and laws to it. Dominant companies will have to carefully examine how collaborations or other activities might draw the attention of federal regulators, or even state attorneys general.

In its press release, DOJ noted that 15 states - including California, New York and Texas - had participated in its examination. Certainly, a new administration with new leadership at the Justice Department looking to make its mark will also be a factor in online companies' business calculations.

It is interesting to note the concern scholars and critics raised regarding whether the agreement created significant barriers to entering the online search market. A dominant search engine, it has been argued, could make competitor entry difficult, if not impossible, by forcing advertisers or content providers into long-term, exclusive contracts. It is unclear how much of a factor this was in regulators' review of the Google-Yahoo agreement, but it will likely continue to be an area of inquiry for future online agreements or mergers.

The "Internet startup" has not only earned its space in the lexicon of business, but also represents an important area of growth for the U.S. economy and is an essential outlet for innovators' entrepreneurial spirit. With the economic downturn already chilling the emergence of new businesses, government will no doubt look very unfavorably upon artificially created barriers to entry.

The Internet is now intricately woven into the fabric of our lives and the U.S. economy. Search engines have become the indispensable gateway to online content. Some scholars liken search engines to such essential infrastructure technologies as railroads and telephones. A Rutgers law professor even goes so far as to say that their "control over 'results' constitute[s] an awesome ability to set the course of human knowledge." Given the rapid pace of Internet growth, such descriptions could apply just as easily to future online technologies.

The questions asked and decisions made by federal regulators in this deal could have a lasting effect on the innovation and competition which fuels the Internet.

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