A Roadmap for a Monopolization Case Against Google: Monopsony Power and AI Overviews

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Google's integration of AI-generated "Overviews" into general search marks a structural shift in how information is produced, distributed, and monetized on the internet. For years, Google incrementally altered its relationship with publishers that had been broadly symbiotic: publishers permitted Google to crawl their websites to build the search index, and in return Google directed traffic that could be monetized through advertising or subscriptions. The introduction of AI Overviews represents a decisive break from that arrangement. Google now uses publisher data not only to construct its search index, but also for AI training and grounding, while AI Overviews retain users on Google for longer instead of directing them to publisher websites. Google denies publishers the option to opt out of the AI uses without forfeiting search visibility. This Article argues that Google's conduct is anticompetitive. Conditioning inclusion in the search index on the use of publisher data for AI-related purposes constitutes unlawful monopsonization and illegal tying in violation of Section 2 of the Sherman Act.

Google's conduct also constitutes an exploitative abuse that is actionable in several jurisdictions, including the European Union. The use of publisher data for additional and economically significant purposes, such as AI training and grounding, without corresponding compensation amounts to unfair pricing or the imposition of unfair conditions. The anticompetitive effects of this conduct have become increasingly evident. Traffic to publishers' websites has declined, advertising revenues have fallen, and some publishers face foreclosure.

Legal challenges are already underway, but regulators in the United States have not acted. Publishers have filed Section 2 claims in the US and the European Commission has initiated an investigation. Against this backdrop, the Article provides a roadmap for regulators and courts by identifying the illegal conduct, situating it within established theories of harm, and examining its anticompetitive effects on publishers and users. It then turns to remedies, arguing that effective relief must go beyond prohibiting unlawful conduct and also restore competitive conditions. The Article evaluates several remedial frameworks, including publisher

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opt-in with granular choice, limited collective bargaining, bilateral monopoly, and judicial or regulatory rate setting, and assesses their respective advantages and limitations. The anticompetitive exclusion of publishers is not merely a loss of competition in an ordinary product market, but a threat to the sustainability of independent journalism essential to democratic governance, underscoring the importance of timely and careful regulatory intervention.

Table of Contents

I. Introduction

In 2024, Google released AI Overviews, AI-generated summaries that appear at the top of the search results page.[1] Google has claimed that the feature helps users obtain quick answers while providing links for further exploration.[2] AI Overviews do not appear for all queries, but Google has steadily increased the frequency with which they are displayed.[3] The result has been predictable: fewer users click through to publisher websites as many queries are answered directly through AI Overviews.[4] This reduction in traffic has contributed to declining advertising revenue for publishers, exacerbating financial pressures on an industry already

[1] Elizabeth Reid, *Generative AI in Search: Let Google do the Searching for you*, GOOGLE (May 14, 2024), https://blog.google/products-and-platforms/products/search/generative-ai-google-search-may-2024/.

[2] *Id*.

[3] Rob Timmermann, *AI Overview Statistics: 2025 Data, Trends & What They Mean for Your SEO*, TIMMERMANN GROUP (Jan. 21, 2026), https://www.wearetg.com/blog/ai-overview-statistics/#:~:text=Growth%20and%20Pullback%20Patterns%3A,inconsistency%20makes%20ongoing%20monitoring%20essential (55% of Google searches now display an AI Overview); *2025 Organic Traffic Crisis: Zero-Click & AI Impact Analysis Report*, BLOOM (Oct. 30, 2025), https://thedigitalbloom.com/learn/2025-organic-traffic-crisis-analysis-report/#:~:text=This%20paradox%20stems%20primarily%20from,Metric (AI Overviews, which now appear for 13.14% of all queries, more than doubling from 6.49% in January 2025).

[4] Tracy McDonald, *AIO Impact on Google CTR: September 2025 Update*, SEER INTERACTIVE (Nov. 4, 2025), https://www.seerinteractive.com/insights/aio-impact-on-google-ctr-september-2025-update (Organic click-through rates (CTR) for informational queries featuring Google AI Overviews fell 61% since mid-2024, while paid CTRs on those same queries plunged 68%); Ryan Law & Xibeijia Guan, *AI Overviews Reduce Clicks BY 34.5%*, AHREFS (Apr. 17, 2025), https://ahrefs.com/blog/ai-overviews-reduce-clicks/ (analyzed 300,000 keywords and found that the presence of an AI Overview in the search results correlated with a 34.5% lower average CTR for the top-ranking page, compared to similar informational keywords without an AI Overview); Athena Chapekis & Anna Lieb, *Google Users Are Less Likely to Click on Links When an AI Summary Appears in the Results*, PEW RESEARCH CENTER (July 22, 2025), https://www.pewresearch.org/short-reads/2025/07/22/google-users-are-less-likely-to-click-on-links-when-an-ai-summary-appears-in-the-results/ (Users who encountered an AI summary clicked on a traditional search result link in 8% of all visits. Those who did not encounter an AI summary clicked on a search result nearly twice as often, around 15% of visits); *2025 Organic Traffic Crisis: Zero-Click & AI Impact Analysis Report*, BLOOM (Oct. 30, 2025), https://thedigitalbloom.com/learn/2025-organic-traffic-crisis-analysis-report/#:~:text=This%20paradox%20stems%20primarily%20from,Metric (When AI Overviews are present, CTR plummet to just 8%, compared to 15% for traditional search results without AI summaries).

under strain, leading to layoffs of journalists and editors and diminishing the quality of online content.[5]

This harm to publisher revenue is compounded by the fact that AI Overviews are generated using models trained on publisher content scraped from their websites without consent or compensation. To date, publishers have primarily responded through copyright litigation, with mixed success.[6] Far less attention, however, has been paid to Google's monopsony power vis-à-vis publishers. A monopsony exists where a buyer has market power. Google's monopoly power in general search and its monopsony power over publisher data are two sides of the same coin.[7] Publisher content is a critical input in the construction of Google's search index, and Google is the dominant buyer of that input precisely because it is the monopolist supplier of general search.

This monopsony position has enabled Google to engage in exclusionary conduct by appropriating publisher data to train its AI models without consent, compensation, or an opt-out mechanism, while simultaneously diverting traffic and revenue away from publishers by integrating AI Overviews at the top of the search results page. Legal challenges have now begun to emerge. Penske Media Company, the parent of Rolling Stone and The Hollywood Reporter, and Chegg, an online education company, have both filed antitrust lawsuits alleging that Google's

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[5] Jason Kint, *Google's Push to AI Hurts Publisher Traffic*, DIGITAL CONTENT NEXT (Aug. 15, 2025), https://digitalcontentnext.org/blog/2025/08/14/facts-googles-push-to-ai-hurts-publisher-traffic/ (median year-over-year referral traffic from Google Search to premium publishers down 10% over just eight weeks); Isabella Simonetti & Katherine Blunt, *News Sites Are Getting Crushed by Google's New AI Tools*, WALL STREET JOURNAL (June 10, 2025), https://www.wsj.com/tech/ai/google-ai-news-publishers-7e687141?st=VijXkj&reflink=desktopwebshare_permalink (Organic search traffic to its websites declined by 55% between April 2022 and April 2025, according to data from Similarweb); *But see* Ethan Smith, *Debunking The Myth That Search Is Dying*, FIVE PERCENT, https://graphite.io/five-percent/debunking-the-myth-that-seo-traffic-has-dramatically-declined (AI Overviews does decrease (-35%) click-through rates to organic results when present. However, AI Overviews only appear roughly 30% of the time. In 80% of cases, prior to AI Overviews, Google showed Featured Snippets, which also reduced click-through rate).

[6] *See generally* David M. McIntosh et al., *A Tale of Three Cases: How Fair Use Is Playing Out in AI Copyright Lawsuits*, ROPES & GRAY (July 7, 2025), https://www.ropesgray.com/en/insights/alerts/2025/07/a-tale-of-three-cases-how-fair-use-is-playing-out-in-ai-copyright-lawsuits; Tori Noble, *Two Courts Rule on Generative AI and Fair Use – One Gets it Right*, ELECTRONIC FRONTIER FOUNDATION (June 26, 2025), https://www.eff.org/deeplinks/2025/06/two-courts-rule-generative-ai-and-fair-use-one-gets-it-right.

[7] United States v. Google LLC, 747 F. Supp. 3d 1 (D.D.C. 2024) (concluded that Google has monopoly power in the market for general search services with over 80% market share since at least 2009).

conduct constitutes illegal monopsonization in violation of Section 2 of the Sherman Act.[8] In parallel, the European Commission has initiated an investigation into whether Google's use of publisher data to generate AI Overviews without consent, compensation, or opt-out violates EU competition law.[9]

Against this backdrop, this Article argues that Google's use of publisher data for AI training and grounding without consent, compensation, or an opt-out option violates Section 2 of the Sherman Act. Specifically, conditioning the inclusion of publisher data in the search index on its use for AI-related purposes constitutes unlawful monopsonization and illegal tying. The Article provides a roadmap for enforcers seeking to prevent the foreclosure of publishers and to safeguard the health of the media ecosystem and the continued production of original journalism and other online content.

Part II traces Google's evolving relationship with publishers, showing how a previously symbiotic arrangement became increasingly extractive and exploitative as Google's market power grew. Part III identifies Google's anticompetitive conduct, including tying search indexing to AI data use and using publisher data for additional purposes without consent or compensation. Part IV examines the resulting short- and long-term harms to publishers and consumers. Part V applies the legal standards for unlawful monopsonization and anticompetitive tying and concludes that Google's conduct violates Section 2 of the Sherman Act, while also addressing Google's procompetitive justifications. Part VI considers how the same conduct also constitutes an exploitative abuse under the competition law of other jurisdictions, including the European Union. Finally, Part VII evaluates potential remedies, emphasizing the need not only to terminate unlawful conduct but also to restore competitive conditions in the market.

II. Google's Evolving Relationship with Publishers

As the internet expanded, the rapid growth of websites created a discovery problem. Users could not locate relevant information without assistance, and search engines emerged to help them.[10] While search engines could be monetized through subscriptions or bundling, Google's dominance cemented advertising as the primary revenue model.[11] The advertising business model created an inherent

[8] Complaint, Penske Media Corporation v. Google LLC, No. 1:25-CV-03192 (D.D.C. Sep. 12, 2025); Complaint, Chegg, Inc. v. Google LLC, No. 1:25-cv-00543, (D.D.C. Feb 24, 2025).

[9] *Commission opens investigation into possible anticompetitive conduct by Google in the use of online content for AI purposes*, EUROPEAN COMMISSION (Dec. 8, 2025), https://ec.europa.eu/commission/presscorner/detail/en/ip_25_2964.

[10] *See generally* Anna Crowley, GOOGLE IT: A HISTORY OF GOOGLE (2018).

[11] Dr. Tom Seymour, Dean Frantsvog & Satheesh Kumar, *History Of Search Engines*, 15 INTERNATIONAL JOURNAL OF MANAGEMENT & INFORMATION SYSTEMS (IJMIS) (2011).

tension: Google relies on publishers—ranging from news media to creators of cooking, entertainment, and weather content—to provide the underlying material, yet its business model incentivizes keeping user attention on the search engine results page (SERP) to drive ad revenue.[12]

By controlling the design of the SERP, including the labeling, size, and placement of results, Google shapes user behavior.[13] Because users disproportionately click on top-ranked results and rarely scroll, Google's design choices dictate the flow of traffic and revenue.[14] Google has used this control to progressively extract more value from publishers.[15] This extraction began with the monetization of search terms. Initially, Google placed ads related to search terms clearly on the right-hand side of the page.[16] A user searching "financial news" might see ads for the Financial Times or Wall Street Journal. However, Google soon realized that brands like the Financial Times did not need to buy ads if the first organic result was their own website. Publishers rely on two distinct strategies to attract traffic. First, they invest in brand recognition, so users navigate directly to them, e.g., a reader typing "Financial Times" to access financial news, will navigate to the FT's website in the search results. Second, they rely on referral traffic from intermediaries like Google.

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[12] *See generally* Ken Auletta, GOOGLED: THE END OF THE WORLD AS WE KNOW IT (2009); Tim Wu, THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE YOUR HEADS (2016)

[13] Erik Fubel et al., Beyond Rankings: Exploring the Impact of SERP Features on Organic Click-through Rates (May 31, 2023), http://arxiv.org/abs/2306.01785; Mari-Carmen Marcos, Ferran Gavin & Ioannis Arapakis, *Effect of Snippets on User Experience in Web Search*, *in* PROCEEDINGS OF THE XVI INTERNATIONAL CONFERENCE ON HUMAN COMPUTER INTERACTION 1 (2015), https://dl.acm.org/doi/10.1145/2829875.2829916; Yisong Yue, Rajan Patel & Hein Roehrig, *Beyond Position Bias: Examining Result Attractiveness as a Source of Presentation Bias in Clickthrough Data*, *in* PROCEEDINGS OF THE 19TH INTERNATIONAL CONFERENCE ON WORLD WIDE WEB 1011 (2010), https://dl.acm.org/doi/10.1145/1772690.1772793.

[14] Zhiwei Guan & Edward Cutrell, *An Eye Tracking Study of the Effect of Target Rank on Web Search*, *in* PROCEEDINGS OF THE SIGCHI CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS 417 (2007), https://dl.acm.org/doi/10.1145/1240624.1240691; *(PDF) A Study of First Click Behaviour and User Interaction on the Google SERP*, *in* RESEARCHGATE , https://www.researchgate.net/publication/226445576_A_Study_of_First_Click_Behaviour_and_User_Interaction_on_the_Google_SERP (last visited Jan. 26, 2026); *(PDF) An Experimental Comparison of Click Position-Bias Models*, *in* RESEARCHGATE (2026), https://www.researchgate.net/publication/200110550_An_experimental_comparison_of_click_position-bias_models.

[15] *See generally* Auletta, *supra* note 12.

[16] *Google Launches Self-Service Advertising Program – News Announcements – News from Google – Google*, https://googlepress.blogspot.com/2000/10/google-launches-self-service.html (last visited Jan. 26, 2026).

In 2004, Google altered this dynamic by allowing advertisers to bid on competitors' brand names.[17] For example, the Wall Street Journal could purchase a premium sponsorship at the top of the page for the query "Financial Times," diverting would-be readers. To retain users already attempting to navigate to their sites, brands were forced to bid on their own names. This rendered brand investment less profitable as publishers had to buy ads simply to secure traffic that organic search previously provided for free.[18]

In 2006, Google expanded its control over the top of the page with the "One Box."[19] While Google claimed this feature offered convenient answers, it occupied a large percentage of the landing page, pushing organic results further down. Google also began using publisher content not merely to rank results, but to display excerpts directly through News Previews and Knowledge Panels.[20] Consequently, high-ranking organic content appeared lower on the page, attracting fewer clicks. To maintain visibility, content providers faced pressure to pay for inclusion in these features. By 2013, Google further blurred the distinction between paid and organic results. It began listing ads in formats closely resembling organic links, distinguishing them only by a small, light-grey "Ad" label.[21] A user searching for

[17] *See generally* Gov't Emps. Ins. Co. v. Google, Inc., 330 F. Supp. 2d 700 (E.D. Va. 2004*)*; Patrick J. Carome, *Use of Trademarks in Internet Searches: Google Cases Lead to Conflicting Results*, (May 11, 2005), https://www.wilmerhale.com/en/insights/publications/use-of-trademarks-in-internet-searches-google-cases-lead-to-conflicting-results-may-11-2005; *Competitor Keyword Bidding On Trial - Location3 Media*, https://location3.com/blog/competitor-keyword-bidding-on-trial/ (last visited Jan. 26, 2026).

[18] Thomas Blake, Chris Nosko & Steven Tadelis, *Consumer Heterogeneity and Paid Search Effectiveness: A Large-Scale Field Experiment*, 83 ECONOMETRICA 155 (2015).

[19] Dave Girouard, VP, & Enterprise, *OneBox for All Your Corporate Information*, OFFICIAL GOOGLE BLOG, https://googleblog.blogspot.com/2006/04/onebox-for-all-your-corporate.html (last visited Jan. 26, 2026).

[20] Krishna Bharat, Creator & Google News, *And Now, News*, OFFICIAL GOOGLE BLOG, https://googleblog.blogspot.com/2006/01/and-now-news.html (last visited Jan. 27, 2026); *Introducing the Knowledge Graph: Things, Not Strings*, GOOGLE (May 16, 2012), https://blog.google/products-and-platforms/products/search/introducing-knowledge-graph-things-not/; Krishna Bharat et al., *Google News Turns 10*, GOOGLE NEWS BLOG, https://news.googleblog.com/2012/09/google-news-turns-10.html (last visited Jan. 27, 2026).

[21] *See generally FTC Consumer Protection Staff Updates Agency's Guidance to Search Engine Industry on the Need to Distinguish Between Advertisements and Search Results*, FEDERAL TRADE COMMISSION (Jun. 25, 2013), https://www.ftc.gov/news-events/news/press-releases/2013/06/ftc-consumer-protection-staff-updates-agencys-guidance-search-engine-industry-need-distinguish (last visited Jan. 27, 2026); Ginny Marvin, *A Visual History of Google Ad Labeling in Search Results*, SEARCH ENGINE LAND (Jan. 28, 2020), https://searchengineland.com/search-ad-labeling-history-google-bing-254332 (last visited Jan. 27, 2026).

"Nike" might see ads for competitors like Adidas or Foot Locker that mimic organic results, distracting the user before they reach the true organic link for Nike.com lower on the page.

Simultaneously, Google vertically integrated its own services, including Google Shopping, Google Flights, and YouTube.[22] By prioritizing its own content, Google increased the share of searches that never leave its properties.[23] This integration steadily increased "zero-click" searches. Taken together, these changes reflect a steady expansion of Google's control over the organization of the SERP, shifting search away from relevance-based ranking toward designs that retain user attention on Google's own properties rather than directing users promptly to publishers' websites, increase zero-click searches, and deepen publishers' reliance on Google for visibility and traffic.[24]

Google's ability to unilaterally impose these extractive and exploitative changes which squeeze and foreclose publishers were made possible by its substantial market power.[25] In 2024, Judge Mehta ruled that Google had illegally monopolized the search market and had maintained a market share of more than 80% since at least 2009.[26] Because Google represents the vast majority of search traffic, publishers have no choice but to accept their unfavorable terms.[27]

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[22] Michael Luca et al., *Does Google Content Degrade Google Search? Experimental Evidence*, HARVARD BUSINESS SCHOOL NOM UNIT WORKING PAPER NO. 16-035 (2015).

[23] Benjamin Edelman & Benjamin Lockwood, *Measuring Bias in "Organic" Web Search* (Jan. 19, 2011), https://www.benedelman.org/searchbias/ (last visited Jan 27. 2026); Benjamin Edelman, *Hard-Coding Bias in Google "Algorithmic" Search Results* (Nov. 15, 2010), https://www.benedelman.org/hardcoding/ (last visited Jan. 27, 2026).

[24] Edelman & Lockwood, *supra* note 23.

[25] *Competition issues concerning news media and digital platforms*, OECD Competition Committee Discussion Paper, OECD (2021), https://www.oecd.org/content/dam/oecd/en/publications/reports/2021/11/competition-issues-in-news-media-and-digital-platforms_efe6218f/a877a656-en.pdf (last visited Jan. 27, 2026); Derek Wilding et al., *The Impact of Digital Platforms on News and Journalistic Content*, UNIVERSITY OF TECHNOLOGY SYDNEY (2018), https://www.accc.gov.au/system/files/ACCC+commissioned+report+-+The+impact+of+digital+platforms+on+news+and+journalistic+content,+Centre+for+Media+Transition+(2).pdf (last visited Jan. 27, 2026).

[26] *Google*, 747 F. Supp. 3d 1, 119-120.

[27] *See generally How Google Abuses Its Position as a Market Dominant Platform to Strong-Arm News Publishers and Hurt Journalism*, NEWS MEDIA ALLIANCE (Sept. 2022), https://www.newsmediaalliance.org/wp-content/uploads/2022/09/NMA-White-Paper_REVISED-Sept-2022.pdf (last visited Jan. 27, 2026) [hereinafter *News Media Alliance White Paper*].

This dynamic has entered a second stage with the introduction of AI-generated answers.[28] Google's integration of its Gemini model into Search Overviews enables it to extract additional value from publisher content by generating responses directly on the SERP. These answers draw on publisher content and often satisfy user queries without requiring a click through to the original source.[29] In doing so, Google has shifted from acting primarily as a distributor of content to functioning, in effect, as a publisher that can sell ads against content — all without bearing the costs of content creation, including information gathering, research, fact-checking, and editorial oversight.[30] As users increasingly obtain answers directly from Google, publishers lose traffic and revenue.[31] If Google succeeds in excluding publishers while appropriating the returns on publisher content at scale, content-creation business models will become less sustainable, leading to publisher exit and cementing Google's control over both search and content distribution.

III. Anticompetitive Conduct

Google has long relied on publisher data to construct its search index. That limited use of publisher data was not anticompetitive; rather, it formed the basis of the original, symbiotic relationship between Google and publishers. Publishers permitted Google to crawl their websites, and in return Google, as the primary gateway to the internet, directed users to publisher websites through its search results. This arrangement allowed Google to build its search index, the cornerstone of its search architecture, while enabling publishers to monetize referral traffic through subscriptions or advertising. However, Google's dominance in search has allowed it to eventually extract more from publishers. Specifically, in the context of Google's integration of AI into the SERP, two categories of conduct are anticompetitive: (A) tying search indexing to the use of publisher data for AI-related purposes; and (B) expanding its use of publisher data including for AI training and grounding, without consent or additional compensation.

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[28] Alex Reisner, *The End of Publishing as We Know It*, THE ATLANTIC (June 25, 2025), https://www.theatlantic.com/technology/archive/2025/06/generative-ai-pirated-articles-books/683009/.

[29] McDonald, *supra* note 4.; Law & Guan, *supra* note 4.; Chapekis & Lieb, *supra* note 4.

[30] Nico Grant, *Google's A.I. Search Errors Cause a Furor Online*, THE NEW YORK TIMES, May 24, 2024, https://www.nytimes.com/2024/05/24/technology/google-ai-overview-search.html (last visited Jan. 27, 2026); Andrew Gregory, *Google AI Overviews Put People at Risk of Harm with Misleading Health Advice*, THE GUARDIAN, Jan. 2, 2026, https://www.theguardian.com/technology/2026/jan/02/google-ai-overviews-risk-harm-misleading-health-information (last visited Jan. 27, 2026), Cade Metz & Karen Weise, *A.I. is Getting More Powerful but Its Hallucinations Are Getting Worse*, NEW YORK TIMES (May 5, 2025), https://www.nytimes.com/2025/05/05/technology/ai-hallucinations-chatgpt-google.html (last visited Jan. 27, 2026).

[31] McDonald, *supra* note 4.; Law & Guan, *supra* note 4.; Chapekis & Lieb, *supra* note 4.

A. Tying search indexing to the use of publisher data for AI-related purposes

Publishers depend on Google for discovery and traffic, and Google has leveraged that dependence to effectively prevent publishers from blocking its AI crawlers without risking exclusion from Google's search index.[32] Publishers use a web standard called robots.txt, a file placed on their websites to instruct bots which content may be crawled and which may not.[33] A robots.txt directive is neither legally binding nor a technical barrier.[34] It is simply a convention-based set of instructions indicating what a crawler is permitted to access and what is off-limits.[35] This norm is essentially an honor system that has governed web crawling for almost three decades.[36]

In 2023 Google announced a new tool called Google-Extended which could be added to robots.txt that purportedly allowed publishers to opt out of AI training.[37] Google also stated that opting out of AI training through Google-Extended would not affect a website's inclusion or ranking in Google Search.[38] A subsequent Reuters Institute study, however, found that while 79% of top U.S. news organizations had blocked OpenAI's crawlers, only 36% had blocked Google's AI crawlers through Google-Extended.[39] According to the report, publishers were more hesitant to block Google's AI crawlers because they feared negative consequences for search

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[32] Charlotte Tobitt, *How Google Forced Publishers to Accept AI Scraping as Price of Appearing in Search*, PRESS GAZETTE (May 12, 2025), https://pressgazette.co.uk/platforms/how-google-forced-publishers-to-accept-ai-scraping-as-price-of-appearing-in-search/ (last visited Jan. 27, 2026).

[33] Vlado Pavlik, *Robots.Txt Explained: Syntax, Best Practices, & SEO*, SEMRUSH BLOG (Jul. 30, 2025), https://www.semrush.com/blog/beginners-guide-robots-txt/null (last visited Jan. 27, 2026); *What Is Robots.Txt? | Robots.Txt File Guide*, CLOUDFLARE, https://www.cloudflare.com/learning/bots/what-is-robots-txt/ (last visited Jan. 27, 2026).

[34] *See generally About /robots.txt*, https://www.robotstxt.org/robotstxt.html (last visited Jan. 27, 2026).

[35] *Supra* note 33.

[36] Jonathan Bailey, *Does Robots.Txt Matter Anymore?*, PLAGIARISM TODAY (Oct. 21, 2025), https://www.plagiarismtoday.com/2025/10/21/does-robots-txt-matter-anymore/ (last visited Jan. 27, 2026).

[37] Danny Goodwin, *Google Introduces Google-Extended to Let You Block Bard, Vertex AI via Robots.Txt*, SEARCH ENGINE LAND (Sept. 28, 2023), https://searchengineland.com/google-extended-crawler-432636 (last visited Jan. 27, 2026).

[38] *Google's Common Crawlers | Google Crawling Infrastructure | Crawling Infrastructure*, GOOGLE FOR DEVELOPERS, https://developers.google.com/crawling/docs/crawlers-fetchers/google-common-crawlers (last visited Jan. 27, 2026).

[39] Richard Fletcher, *How Many News Websites Block AI Crawlers? | Reuters Institute for the Study of Journalism*, (Feb. 22, 2024), http://reutersinstitute.politics.ox.ac.uk/how-many-news-websites-block-ai-crawlers.

visibility, notwithstanding Google's assurances.[40] Thus, even where Google ostensibly offered an opt-out, the perceived risk of exclusion or demotion in search prevented publishers from exercising it.

As it turned out, the publishers were correct to be suspicious. The search remedies trial later revealed that Google did not honour this opt-out. Testimony showed that even when publishers opted out of AI training through Google-Extended, Google nonetheless used their content to power AI Overviews.[41] Its justification for disregarding the opt-out rested on a technical distinction: it interpreted the opt-out as applying only to Google DeepMind (Google's AI lab) and its products, while characterizing AI Overviews not as a DeepMind product but as a "search org" feature.[42] Hiding behind this formalism, Google continued using publisher content to generate AI Overviews, without ever informing publishers that the scope of the opt-out was so limited. Google's internal documents further showed that had it actually honored publisher opt-outs, it would have had to exclude roughly half its training corpus (about 80 billion of 160 billion tokens).[43] Notably, even under this opt-out regime (rather than a more publisher-respecting opt-in regime), half of publishers still chose to opt out of AI training, underscoring a clear preference regarding how their content should be used.[44]

Apart from this violation of the opt-out and the post-hoc rationalizations offered to defend it, documents disclosed in the Google antitrust trial also showed that Google was aware of a range of alternative options that would have afforded publishers much greater control over how their content was used.[45] These internal options included: affirmative opt-in; opt-out; granular control over which content

[40] Fletcher, *supra* note 39 (In every country apart from Germany, where the figure was 60% for both, more top news websites blocked OpenAI's crawlers than Google's. Moreover, almost every website that blocked Google AI also blocked OpenAI (97%). This could be because ChatGPT is more prominent and widely used than Bard/Gemini, or it could be because the OpenAI crawler was released first. But it is also possible that publishers are more cautious about blocking Google in case it affects their prominence in search results – even though there are separate crawlers for search and AI.); Julia Love & Davey Alba, *Google's AI Search Gives Sites Dire Choice: Share Data or Die*, BLOOMBERG.COM, Aug. 15, 2024, https://www.bloomberg.com/news/articles/2024-08-15/google-s-search-dominance-leaves-sites-little-choice-on-ai-scraping.

[41] Davey Alba, *Google Can Train Search AI With Web Content Even After Opt-Out*, BLOOMBERG.COM, May 3, 2025, https://www.bloomberg.com/news/articles/2025-05-03/google-can-train-search-ai-with-web-content-even-after-opt-out.

[42] *Id*.

[43] Alba, *supra* note 41.

[44] Alba, *supra* note 41.

[45] Davey Alba & Julia Love, *Google Decided Against Offering Publishers Options in AI Search*, BLOOMBERG.COM, May 19, 2025, https://www.bloomberg.com/news/articles/2025-05-19/google-gave-sites-little-choice-in-using-data-for-ai-search.

could be scraped; allowing publishers to opt out of AI training while remaining fully indexed for search; allowing their content to be used for training but not displayed in AI Overviews; and allowing content to be used for other AI purposes but not grounding.[46] Ultimately, Google selected the most exploitative option, one that preserved unfettered scraping access for itself and afforded publishers no meaningful control at all.[47]

Further, Google decided to "silently update" this policy and make "no public announcement," while continuing to use publisher data contrary to publisher instructions in robots.txt.[48] As a result, the only way for a publisher to prevent Google from using its content for AI training is to opt out of Google's search index entirely. This is not a realistic option for publishers because they are so heavily dependent on Google for traffic and discovery.[49] In the words of one publisher, the "choice" Google offers is between immediate death and a slower one.[50]

B. Using publisher data for additional purposes without consent or additional compensation

Google now uses publisher data not just for creating its search index but also for additional purposes like AI training and grounding. However, unlike other AI firms, it has entered into relatively few licensing agreements that would grant it permission for these additional uses; the recent deals with Reddit for real-time API access and with the developer website, Stack OverFlow, are notable exceptions.[51] Publishers have explained that Google does not experience the same pressure to license content because it uses the same crawler structure for search indexing and for AI training.[52] As a result, publishers who wish to remain visible in search results have no meaningful bargaining power and are compelled to acquiesce to the use of their data for following two additional purposes.

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[46] *Id*.
[47] *Id*.
[48] *Id*.
[49] Charlotte Tobitt, *Publisher Traffic Sources: Google Steady but Social and Direct Referrals Are Down*, PRESS GAZETTE (Aug. 14, 2025), https://pressgazette.co.uk/media-audience-and-business-data/media_metrics/publisher-traffic-sources-2019-2025/.
[50] Julia Love & Davey Alba, *Google's AI Search Gives Sites Dire Choice: Share Data or Die*, BLOOMBERG.COM, Aug. 15, 2024, https://www.bloomberg.com/news/articles/2024-08-15/google-s-search-dominance-leaves-sites-little-choice-on-ai-scraping.
[51] Anna Tong et al., *Exclusive: Reddit in AI Content Licensing Deal with Google*, REUTERS, Feb. 22, 2024, https://www.reuters.com/technology/reddit-ai-content-licensing-deal-with-google-sources-say-2024-02-22/; Frederic Lardinois, *Google Brings Stack Overflow's Knowledge Base to Gemini for Google Cloud*, TECHCRUNCH (Feb. 29, 2024), https://techcrunch.com/2024/02/29/google-brings-stack-overflows-knowledge-base-to-gemini/.
[52] Love & Alba, *supra* note 50.

1. Use of publisher data in training datasets

Google, like other AI companies, has been opaque about the precise composition and provenance of its training datasets. As regulatory and reputational concerns about the use of copyrighted material in AI training have intensified, Google has become progressively less forthcoming about the datasets underlying each successive model. What is known is that Google trains its models on "publicly available" sources from the open web, including webpages, books, scientific papers, Wikipedia, news articles, source code, social media conversations, and user chatbot conversations.[53] Although Google does not specify what it means by "publicly available," it has previously acknowledged reliance on C4, the Colossal Clean Crawled Corpus—derived from Common Crawl—which includes news and media content as one of the primary inputs.[54] Since Google's latest models are multimodal and multilingual, they are also trained on images, audio, video, and non-English data.[55] Google collects most of this data through its web crawlers, which are software programs that continuously traverse the web, scrape publisher data, and add that to Google's search index.[56] This crawling is iterative and ongoing, enabling Google to incorporate new and updated pages into its index in near real time.[57]

High-quality publicly available training data is quickly depleting, because frontier models have already been trained on the vast majority of the open-web corpus.[58] In response, Google has increasingly turned to proprietary data from its

[53] Aakanksha Chowdhery et al., PaLM: Scaling Language Modeling with Pathways (Oct. 5, 2022), http://arxiv.org/abs/2204.02311; Rohan Anil et al., PaLM 2 Technical Report (Sept. 13, 2023), http://arxiv.org/abs/2305.10403.

[54] Kevin Schaul, Szu Yu Chen & Nitasha Tiku, *Inside the Secret List of Websites That Make AI like ChatGPT Sound Smart*, WASHINGTON POST, https://www.washingtonpost.com/technology/interactive/2023/ai-chatbot-learning/ (last visited Jan. 27, 2026); Jesse Dodge et al., Documenting Large Webtext Corpora: A Case Study on the Colossal Clean Crawled Corpus (Sept. 30, 2021), http://arxiv.org/abs/2104.08758.

[55] *See* Gemini Team et al., Gemini 1.5: Unlocking Multimodal Understanding across Millions of Tokens of Context (Dec. 16, 2024), http://arxiv.org/abs/2403.05530; Gemini Team et al., Gemini: A Family of Highly Capable Multimodal Models (May 9, 2025), http://arxiv.org/abs/2312.11805.

[56] *See generally Overview of Google Crawlers and Fetchers (User Agents)*, GOOGLE FOR DEVELOPERS, https://developers.google.com/crawling/docs/crawlers-fetchers/overview-google-crawlers?utm_source=chatgpt.com (last visited Jan. 27, 2026).

[57] *See generally In-depth Guide to How Google Search Works*, GOOGLE SEARCH CENTRAL, https://developers.google.com/search/docs/fundamentals/how-search-works (last visited Jan. 27, 2026).

[58] Nicola Jones, *The AI Revolution Is Running out of Data. What Can Researchers Do?*, 636 NATURE 290 (2024); Kevin Roose, *The Data That Powers A.I. Is Disappearing Fast*, THE

own applications for model training, and has clandestinely modified its privacy policy to enable such uses. [59] Google's access to vast troves of user data gives it a competitive advantage over other AI companies.[60] First it was revealed that Google was using YouTube data to train its models, a practice that many creators and publishers did not know was occurring.[61] YouTube creators can prevent their content from being used for AI training by third parties (such as OpenAI, Anthropic, or Perplexity), they have no comparable right to opt out of Google's own use of that same content for model training.[28]

Although Google initially denied training its models on data from its other verticals, such as Photos or Gmail, that position began to erode with the recent launch of Personal Intelligence, an AI feature that generates customized responses within Gemini.[62] This development marked a further step toward granting Google access to user data across its ecosystem, including Photos, and Gmail.[63] The shift is a natural extension of Google's broader strategy, given its ongoing integration of

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NEW YORK TIMES (July 19, 2024), https://www.nytimes.com/2024/07/19/technology/ai-data-restrictions.html (last visited Jan. 27, 2026).

[59] Cade Metz et al., *How Tech Giants Cut Corners to Harvest Data for A.I.*, THE NEW YORK TIMES (Apr. 6, 2024), https://www.nytimes.com/2024/04/06/technology/tech-giants-harvest-data-artificial-intelligence.html (last visited Jan. 27, 2026); Sara Morrison, *The Tricky Truth about How Generative AI Uses Your Data*, VOX (July 27, 2023), https://www.vox.com/technology/2023/7/27/23808499/ai-openai-google-meta-data-privacy-nope (last visited Jan. 27, 2026).

[60] Erin Woo, *Google Exec Says Data Gives It an Edge in AI Search*, THE INFORMATION (Oct. 8, 2024), https://www.theinformation.com/articles/google-exec-says-data-gives-it-an-edge-in-ai-search (last visited Jan. 27, 2026); Alistair Barr, *Google Is Leaning on Its App Empire to Give Gemini an Edge with "Personal Intelligence,"* BUSINESS INSIDER (Jan. 14, 2026), https://www.businessinsider.com/google-personal-intelligence-app-empire-gemini-edge-openai-anthropic-ai-2026-1 (last visited Jan. 27, 2026); Sarah Perez, *One of Google's Biggest AI Advantages Is What It Already Knows about You*, TECHCRUNCH (Dec. 1, 2025), https://techcrunch.com/2025/12/01/one-of-googles-biggest-ai-advantages-is-what-it-already-knows-about-you/ (last visited Jan. 27, 2026).

[61] Zach Vallese, *Creators Say They Didn't Know Google Uses YouTube to Train AI*, CNBC (June 19, 2025), https://www.cnbc.com/2025/06/19/google-youtube-ai-training-veo-3.html (last visited Jan. 27, 2026).

[62] Geoggrey A. Fowler, *Google wants your emails and photos to 'personalize' its AI. Should you let it?*, THE WASHINGTON POST (Jan. 27, 2026), https://www.washingtonpost.com/technology/2026/01/27/google-personal-intelligence-privacy/ (last visited Jan. 27, 2026).

[63] Robby Stein, *Personal Intelligence in AI Mode in Search: Help That's Uniquely Yours*, GOOGLE (Jan. 22, 2026), https://blog.google/products-and-platforms/products/search/personal-intelligence-ai-mode-search/ (last visited Jan. 27, 2026); Ryan Whitwam, *Google Adds Your Gmail and Photos to AI Mode to Enable "Personal Intelligence,"* ARS TECHNICA (Jan. 22, 2026), https://arstechnica.com/google/2026/01/google-ai-mode-can-now-customize-responses-with-your-email-and-photos/ (last visited Jan. 27, 2026).

Gemini into user-facing functions across these products.[64] While user data is an important source, the bulk of Google's training data appears to derive from what the company classifies as "publicly available" internet sources, which are disproportionately composed of high-quality content published by news and media websites.[65]

2. Use of publisher data for grounding

In addition to using publisher content to train its AI models, Google also uses this content for 'retrieval-augmented generation' (RAG), also referred to as 'grounding.' Grounding allows large language models to draw on fresh information that was not part of the original training dataset in order to generate contextually relevant, up-to-date outputs.[66] For example, if a user asks a chatbot about a sports team, they are probably interested in not just historical facts, but also current rankings, recent player news, or the outcome of a recent game. To provide such current information, the model retrieves and retrains on more recent, targeted sources (such as sports blogs or news feeds) so that the output remains contextually accurate. RAG also relies heavily on publisher content retrieved via search which requires publishers to invest in information gathering, investigation, fact-checking, editing, and other core journalistic functions.[67]

Grounding is not merely a useful technique for AI companies to make their models more accurate and contemporaneous; it also creates a new licensing opportunity for publishers.[68] Even if most high-quality publicly available publisher content has already been swept into model training datasets, AI companies must continuously return to publisher material to obtain fresh information through RAG.[69] Unlike training, where the use is a one-time ingestion, grounding/ retrieval

[64] *Id*.

[65] George Wukoson, *The Predominant Use of High-Authority Commercial Web Publisher Content to Train Leading LLMs*, https://www.ziffdavis.com/wp-content/uploads/2024/11/The-Predominant-Use-of-High-Authority-Commercial-Web-Publisher-Content-to-Train-Leading-LLMs.pdf (last visited Jan. 27, 2026).

[66] *What Is Retrieval-Augmented Generation (RAG)?*, GOOGLE CLOUD, https://cloud.google.com/use-cases/retrieval-augmented-generation (last visited Jan. 27, 2026); *What Is RAG (Retrieval Augmented Generation)*, MCKINSEY (Oct. 30, 2024), https://www.mckinsey.com/featured-insights/mckinsey-explainers/what-is-retrieval-augmented-generation-rag (last visited Jan. 27, 2026).

[67] *Id*.

[68] Jessica Davies, *WTF Is AI 'Grounding' Licensing, and Why Do Publishers Say It Matters over* Training *Deals?*, DIGIDAY (Aug. 22, 2025), https://digiday.com/media/wtf-is-ai-grounding-licensing-and-why-do-publishers-say-it-matters-over-training-deals/.

[69] *AI Scraping Is on The Rise: TollBit State of the Bots - Q1 2025*, TOLLBIT (June 11, 2025), https://tollbit.com/bots/25q1/ (last visited Jan. 27, 2026) ("RAG bots scrapes now exceed Training bot scrapes across the TollBit network. RAG bot scrapes grew 49% from Q4 to Q1"); Catherine Perloff, *News Publishers Shift AI Licensing Focus to Usage-Based Deals*,

occurs continuously at inference, and can thus be metered, tracked, and priced.[70] This dynamic gives publishers a new potential lever for monetizing their content.[71] Several firms are now attempting to build commercial marketplaces for publisher content that would enable monetization of retrieval on a per-query basis.[72] Google's refusal to allow publishers to opt out of grounding and RAG training is therefore especially consequential.[73] As discussed, in the emerging AI market structure, grounding and RAG are likely to become the most valuable recurring monetization vectors for publisher content, and Google's conduct forecloses publishers from accessing this revenue stream.

IV. Anti-Competitive Effects

Google's exclusionary conduct, namely, using publisher content for AI-related purposes without consent, compensation and opt-out, results in both immediate and long-term harms to publishers and users.

A. Harm to publishers

THE INFORMATION (Aug. 19, 2025), https://www.theinformation.com/articles/news-publishers-shift-ai-licensing-focus-usage-based-deals?rc=pbcupj (last visited Jan. 27, 2026).

[70] *See IAB Tech Lab LLM, Content Ingest API Overview*, IAB TECH LAB (June 4, 2025), https://iabtechlab.com/standards/iab-tech-lab-llm-content-ingest-api-overview/ (last visited Jan. 28, 2026) (Proposes a Cost per crawl method of monetization using bot authentication, access control, crawl metadata, logging infrastructure and crawl verification. The pricing model is tiered based on content type, content volume, bot type, and crawl frequency); Will Allen & Simon Newton, *Introducing Pay per Crawl: Enabling Content Owners to Charge AI Crawlers for Access*, THE CLOUDFLARE BLOG (July 1, 2025), https://blog.cloudflare.com/introducing-pay-per-crawl/ (last visited Jan. 27, 2026) (Their pay per crawl model integrates with existing web infrastructure, leveraging HTTP status codes and established authentication mechanisms to create a framework for paid content access).

[71] *Id*.

[72] Ron Miller, *Dappier Is Building a Marketplace for Publishers to Sell Their Content to LLM Builders*, TECHCRUNCH (June 26, 2024), https://techcrunch.com/2024/06/26/dappier-is-building-a-marketplace-for-publishers-to-sell-their-content-to-llm-builders/ (last visited Jan. 27, 2026); Maxwell Zeff, *Cloudflare Launches a Marketplace That Lets Websites Charge AI Bots for Scraping*, TECHCRUNCH (July 1, 2025), https://techcrunch.com/2025/07/01/cloudflare-launches-a-marketplace-that-lets-websites-charge-ai-bots-for-scraping/ (last visited Jan. 27, 2026); Anya Schiffrin & Mateen Haaris, *Startup Aims To Help Publishers Collect Fees from AI Companies*, TECH POLICY PRESS (May 14, 2024), https://techpolicy.press/startup-aims-to-help-publishers-collect-fees-from-ai-companies (last visited Jan. 27, 2026).

[73] *See infra* Part III.A.

Google claims that total organic click volume from Search has remained relatively stable year-over-year and that "click quality" has increased.[74] However, empirical evidence points in the opposite direction. The integration of AI Overviews into search results has increased zero-click searches and reduced referral traffic to publishers.[75] Although not every query triggers an AI Overview, Google has steadily expanded both the frequency and the categories of queries for which AI summaries are returned.[76] Google claims that AI Overviews are displayed in search results when their systems determine that its especially helpful, for example, when users want to quickly understand information from a range of sources.[77] As of June 2025, AI Overviews appeared in more than half of all search results.[78] In addition to occupying the premium, top-of-page location, Google has also expanded the screen real estate devoted to AI Overviews, leaving much less space for organic results.[79] The rollout of AI Overviews has been linked to an increase in zero-click searches and declining click-through rates, because most user queries are now answered directly by the AI summary without requiring users to click on any links.[80]

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[74] Liz Reid, *AI in Search Is Driving More Queries and Higher Quality Clicks*, GOOGLE (Aug. 6, 2025), https://blog.google/products-and-platforms/products/search/ai-search-driving-more-queries-higher-quality-clicks/ (last visited Jan. 27, 2026).

[75] McDonald, *supra* note 4.; Law & Guan, *supra* note 4.; Chapekis & Lieb, *supra* note 4; Kint, *supra* note 5; Simonetti & Blunt, *supra* note 5.

[76] Timmermann, *supra* note 3; *2025 Organic Traffic Crisis*, *supra* note 3.

[77] *Find Information in Faster & Easier Ways with AI Overviews in Google Search*, GOOGLE SEARCH HELP, https://support.google.com/websearch/answer/14901683?hl=en (last visited Jan. 28, 2026).

[78] Roger Montti, *Google AI Overviews Claims More Pixel Height in SERPs*, SEARCH ENGINE JOURNAL (Dec. 30, 2024), https://www.searchenginejournal.com/data-shows-aio-expanding-above-the-fold/536433/ (last visited Jan. 28, 2026); David Pierce, *Google Is Adding More AI Overviews and a New 'AI Mode' to Search*, THE VERGE (Mar. 5, 2025), https://www.theverge.com/news/624064/google-ai-mode-overviews-search (last visited Jan. 28, 2026); Jay Peters, *Google's AI Overviews Now Reach More than 1.5 Billion People Every Month*, THE VERGE (Apr. 24, 2025), https://www.theverge.com/news/655930/google-q1-2025-earnings (last visited Jan. 28, 2026).

[79] Montti, *supra* note 78 (BrightEdge's research shows that AI Overviews started out in May 2024 taking up to 600 pixels of screen space . . . By the end of summer the amount of space taken over by Google's AIO increased to 800 pixels and continued to climb).

[80] Michael Savage, *AI Summaries Cause 'Devastating' Drop in Audiences*, THE GUARDIAN (July 24, 2025), https://www.theguardian.com/technology/2025/jul/24/ai-summaries-causing-devastating-drop-in-online-news-audiences-study-finds (last visited Jan. 28, 2026); Ariel Zilber, *Google AI Pummeling News Sites as Traffic Dips across the Board*, NEW YORK POST (July 1, 2025), https://nypost.com/2025/07/01/business/google-ai-pummeling-news-sites-as-traffic-dips-across-the-board/ (last visited Jan. 28, 2026); Isabella Simonetti & Katherine Blunt, *News Sites Are Getting Crushed by Google's New AI Tools*, WALL STREET JOURNAL (June 10, 2025), https://www.wsj.com/tech/ai/google-ai-news-publishers-7e687141 (last visited Jan. 28, 2026); Rebecca Bellan, *Google's AI Search Features Are Killing Traffic to Publishers*, TECHCRUNCH (June 10, 2025),

These effects extend beyond news media to other content creators, website owners, and businesses, all of whom rely on search referral traffic for discovery.[81]

A recent analysis by Digital Content Next reported that premium publishers experienced a median 10% year-over-year decline in referral traffic from Google Search.[82] The losses were not uniform: traffic to non-news brands declined by roughly 14%, and news publishers saw a 7% decline.[83] Across the dataset, declines outnumbered gains by a ratio of approximately two to one, with most individual publisher declines falling within the 1 to 25 percent range.[84] Other studies have found click-through rates dropping by as much as 50%.[85] This in turn has squeezed publishers, triggered mass layoffs, and even caused exits.[86] While major publishers like CNN and Business Insider saw traffic decline by 30% and 40% respectively, small publishers have been hit even worse.[87] Commentators have warned that this trajectory may culminate in "Google Zero": the point at which Google effectively ceases sending meaningful traffic to publishers.[88] Google's role is shifting from a distributor of publisher content to a substitute for publishers themselves, because an increasing share of queries are now answered directly on the search page, via AI summaries and knowledge panels, without any clicks at all. Thus, Google is displacing publishers and appropriating their role in the market while failing to invest in the core journalistic functions necessary to produce original, reliable

https://techcrunch.com/2025/06/10/googles-ai-overviews-are-killing-traffic-for-publishers/ (last visited Jan. 28, 2026); *Publishers Fear AI Summaries Are Hitting Online Traffic*, BBC (Sept. 8, 2025), https://www.bbc.com/news/articles/c0mlvryx0exo (last visited Jan. 28, 2026).

[81] Davey Alba & Julia Love, *Google AI Search Shift Leaves Website Makers Feeling 'Betrayed'*, BLOOMBERG, https://www.bloomberg.com/news/articles/2025-04-07/google-ai-search-shift-leaves-website-makers-feeling-betrayed (last visited Jan. 28, 2026).

[82] Kint, *supra* note 5.

[83] Kint, *supra* note 5.

[84] Kint, *supra* note 5.

[85] Alice Brooker, *AI Overviews Cutting Publisher Clickthrough Rates by 50%, New Report Finds*, PRESS GAZETTE (July 30, 2025), https://pressgazette.co.uk/media-audience-and-business-data/google-ai-overviews-publishers-report-clickthroughs-authoritas-report/ (last visited Jan. 28, 2026).

[86] Jack Benjamin, *One-Third of Indie Publishers Could Shut down by next Year as AI Search Hits Traffic*, THE MEDIA LEADER (Sept. 19, 2025), https://uk.themedialeader.com/one-third-of-indie-publishers-could-shut-down-by-next-year-as-ai-search-hits-traffic/ (last visited Jan. 28, 2026); Alba & Love, *supra* note 81.

[87] Bobby Allyn & John Ruwitch, *Online News Publishers Face "extinction-Level Event" from Google's AI-Powered Search*, NPR (July 31, 2025), https://www.npr.org/2025/07/31/nx-s1-5484118/google-ai-overview-online-publishers (last visited Jan. 28, 2026).

[88] Nilay Patel, *Google Zero Is Here - Now What?*, THE VERGE (May 30, 2024), https://www.theverge.com/24167865/google-zero-search-crash-housefresh-ai-overviews-traffic-data-audience (last visited Jan. 28, 2026).

reporting, with the result that overall content quality on the internet is likely to decline.

This loss of referral traffic has not been offset by referrals through AI Overviews or chatbots, quite the opposite.[89] A Pew Research study found that users who encounter an AI summary are less likely to click through to any external website than users who do not see one; only 1 in 100 users clicked on a link within the AI summary.[90] Moreover, AI Overviews suffer from attribution failures: even when users might otherwise click through, links are frequently missing, misattributed, or broken.[91] Google's AI models have reproduced publisher content, sometimes nearly verbatim, and other times through close paraphrase, without proper attribution.[92] Although all large language models exhibit problems of misattribution and "hallucinated" sources, a March 2025 study by Columbia's Tow Center for Digital Journalism found that more than half of Gemini's cited URLs were fabricated or broken, roughly the same rate as Grok, and substantially higher than other chatbots tested.[93] Similarly, an October 2025 study by the European Broadcasting Union and the BBC reported that Gemini had a 72% error rate in sourcing (including missing sources, misattribution, unverifiable URLs, and fabricated citations), nearly three times higher than other chatbots in the sample, all of which had sourcing error rates

[89] Sara Guaglione, *In Graphic Detail: AI Platforms Are Driving More Traffic — but Not Enough to Offset 'Zero-Click' Search*, DIGIDAY (July 10, 2025), https://digiday.com/media/in-graphic-detail-ai-platforms-are-driving-more-traffic-but-not-enough-to-offset-zero-click-search/ (last visited Jan. 28, 2026); Danny Goodwin, *Google Sends 831x More Visitors than AI Systems: Report*, SEARCH ENGINE LAND (Oct. 1, 2025), https://searchengineland.com/google-more-visitors-ai-systems-report-462905 (last visited Jan. 28, 2026).

[90] Athena Chapekis and Anna Lieb, *Google Users Are Less Likely to Click on Links When an AI Summary Appears in the Results*, PEW RESEARCH CENTER (July 22, 2025), https://www.pewresearch.org/short-reads/2025/07/22/google-users-are-less-likely-to-click-on-links-when-an-ai-summary-appears-in-the-results/ (last visited Jan. 28, 2026).

[91] Klaudia Jaźwińska & Aisvarya Chandrasekar, *AI Search Has a Citation Problem*, COLUMBIA JOURNALISM REVIEW, https://www.cjr.org/tow_center/we-compared-eight-ai-search-engines-theyre-all-bad-at-citing-news.php (last visited Jan. 28, 2026).

[92] Reece Rogers, *Google's AI Overview Search Results Copied My Original Work*, WIRED (June 5, 2024), https://www.wired.com/story/google-ai-overview-search-results-copied-my-original-work/ (last visited Jan. 28, 2026); Avram Piltch, *Google Bard Plagiarized Our Article, Then Apologized When Caught*, TOM'S HARDWARE (Mar. 22, 2023), https://www.tomshardware.com/news/google-bard-plagiarizing-article; Larysa Rarenko, *Does Gemini AI Plagiarize?* (last visited Jan. 28, 2026); *Google AI Chatbot Gemini Caught Plagiarizing: Plagiarism Check's Research*, PLAGIARISMCHECK.ORG (Feb. 20, 2025), https://plagiarismcheck.org/blog/google-ai-chatbot-bard-generated-to-45-of-plagiarism-plagiarismchecks-research/ (last visited Jan. 28, 2026).

[93] Jaźwińska & Chandrasekar, *supra* note 91.

below 25%.[94] Problems of non-attribution, misattribution, and broken links further diminish the already limited value of the small fraction of users who click through from AI Overviews.

Moreover, Google's conduct deprives publishers of an emerging revenue stream: licensing data for AI training. In 2024, for the first time, bots scraping the internet exceeded human traffic—51% of all internet traffic was automated bot traffic—and this shift has been largely attributed to the rise of AI models.[95] Charging crawlers for access to publisher data is widely projected to become a significant source of revenue for publishers, yet most of this traffic is currently unmonetized.[96] The value of publisher data for AI training is evidenced by the licensing deals that some AI companies—under regulatory scrutiny and reputational pressure—have begun to sign with legacy publishers.[97] Worryingly, under Google's current practice, where publisher data is scraped for AI training by default, with no additional compensation, most publishers are denied this revenue stream altogether.

Two factors further exacerbate the anti-competitive effects experienced by publishers. First, monopsony power is especially harmful when the dominant buyer faces fragmented and weak suppliers.[98] Supplier surplus falls, and long-term

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[94] *News Integrity in AI Assistants: An International PSM Study*, EUROPEAN BROADCASTING UNION & BRITISH BROADCASTING CORPORATION (Oct. 2025), https://www.bbc.co.uk/mediacentre/documents/news-integrity-in-ai-assistants-report.pdf (last visited Jan. 28, 2026).

[95] Kevin Townsend, *Bot Traffic Surpasses Humans Online—Driven by AI and Criminal Innovation*, SECURITYWEEK (Apr. 21, 2025), https://www.securityweek.com/bot-traffic-surpasses-humans-online-driven-by-ai-and-criminal-innovation/ (last visited Jan. 28, 2026); *AI-Driven Bots Surpass Human Traffic - Bad Bot Report 2025*, (June 10, 2025), https://cpl.thalesgroup.com/about-us/newsroom/2025-imperva-bad-bot-report-ai-internet-traffic (last visited Jan. 28, 2026).

[96] Miller, *supra* note 72; Zeff, *supra* note 72; Schiffrin & Haaris, *supra* note 72.

[97] *Sam Altman's OpenAI Signs Content Agreement with News Corp*, REUTERS (May 22, 2024), https://www.reuters.com/technology/sam-altmans-openai-signs-content-agreement-with-news-corp-2024-05-22/ (last visited Jan. 28, 2026); Kyle Wiggers, *OpenAI's Deals with Publishers Could Spell Trouble for Rivals*, TECHCRUNCH (Mar. 13, 2024), https://techcrunch.com/2024/03/13/are-openais-deals-with-publishers-edging-out-the-competition/ (last visited Jan. 28, 2026); Andrew Deck, *The Financial Times Inks New Licensing Deal with OpenAI*, NIEMAN LAB (Apr. 29, 2024), https://www.niemanlab.org/2024/04/the-financial-times-inks-new-licensing-deal-with-openai/ (last visited Jan. 28, 2026); Kritika Lamba, *Getty, Perplexity Sign Multi-Year Licensing Deal to Boost AI-Powered Search Visuals*, REUTERS (Oct. 31, 2025), https://www.reuters.com/business/getty-perplexity-sign-multi-year-licensing-deal-boost-ai-powered-search-visuals-2025-10-31/ (last visited Jan. 28, 2026).

[98] Zhiqi Chen, *Buyer Power: Economic Theory and Antitrust Policy*, 22 RESEARCH IN LAW & ECONOMICS 17 (2007); Zhiqi Chen, *Defining Buyer Power*, 53 ANTITRUST BULL. 241 (2008);

viability declines. Publishers are in precisely this position: they are dispersed and lack collective bargaining power. Second, when a monopsonist secures an input at below-competitive prices or on superior terms, it can raise rival buyers' costs.[99] That dynamic is also present here. Google acquires the critical input for creating a search engine i.e., publisher data, at below-competitive prices by extracting more data in exchange for less referral traffic and advertising revenue. Competing search engines such as DuckDuckGo, Ecosia, and Qwant lack the bargaining power to obtain publisher data on comparable terms. This makes it even harder for Google's search rivals to challenge its already uncontestable position in the market for general search services, producing foreclosure effects even in the market for general search services.

B. Harm to users

As revenue pressures force publishers to exit or scale back, users find fewer independent sources of original content, reducing choice and diversity in information.[100] The overall quality and diversity of content available online decreases. Even when publishers remain, lower margins push them to move away from human-generated reporting toward AI-generated content which is lower quality than the content it replaces. Many publishers including mainstream news media like the New York Times, NewsWeek, Washington Post, and the Independent are already delegating some writing, editing, and related newsroom functions to AI.[101] Alternatively, revenue losses force layoffs of journalists, writers, and editors,

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Warren S. Grimes, *Buyer Power and Retail Gatekeeper Power: Protecting Competition and the Atomistic Seller*, 72 ANTITRUST L.J. 563 (2005).

[99] Roman Inderst & Tommaso M. Valletti, *Buyer Power And The 'Waterbed Effect'*, 59(1) THE JOURNAL OF INDUSTRIAL ECONOMICS 1 (2011); Paul Dobson et al., *The Welfare Consequences of the Exercise of Buyer Power*, OFFICE OF FAIR TRADING, RESEARCH PAPER 16 (Sept. 1998).

[100] Benjamin, *supra* note 86.

[101] Jess Weatherbed, *The New York Times Adopts AI Tools in the Newsroom*, THE VERGE (Feb. 17, 2025), https://www.theverge.com/news/613989/new-york-times-internal-ai-tools-echo (last visited Jan. 28, 2026); Andrew Deck, *Newsweek Is Making Generative AI a Fixture in Its Newsroom*, NIEMAN LAB (Apr. 17, 2024), https://www.niemanlab.org/2024/04/inside-newsweek-ai-experiment/ (last visited Jan. 28, 2026); *The Washington Post to Use Artificial Intelligence to Cover Nearly 500 Races on Election Day*, THE WASHINGTON POST (Oct. 19, 2016), https://www.washingtonpost.com/pr/wp/2016/10/19/the-washington-post-uses-artificial-intelligence-to-cover-nearly-500-races-on-election-day/ (last visited Jan. 28, 2026); *The Washington Post Experiments with Automated Storytelling to Help Power 2016 Rio Olympics Coverage*, THE WASHINGTON POST (Aug. 5, 2016), https://www.washingtonpost.com/pr/wp/2016/08/05/the-washington-post-experiments-with-automated-storytelling-to-help-power-2016-rio-olympics-coverage/ (last visited Jan. 28, 2026); *BuzzFeed Will Start Using AI to Write Quizzes and Other Content*, NIEMAN LAB (Jan. 26, 2023), https://www.niemanlab.org/2023/01/buzzfeed-will-start-using-ai-to-write-quizzes-and-other-content/ (last visited Jan. 28, 2026); Daniel Thomas, *The Independent to*

reducing both the quantity and quality of original reporting.[102] In an already concentrated media environment, where local publishers struggle to survive and consolidation is accelerating, the drying up of revenue streams will further concentrate the market.[103] Google is displacing publishers without replacing the underlying journalistic functions, including original reporting, investigation, research, fact-checking, editorial judgment, and institutional accountability, that are necessary to produce reliable information. This lowers the quality of the product.[104] Lower quality, variety, and quantity of online content is the short run harm suffered by users.

Additionally, as high-quality publicly available training data becomes depleted and publishers producing original content exit the market, AI models will have diminishing access to new original training data.[105] One study estimates that by November 2024, AI-generated articles online had already surpassed human-written articles.[106] As AI models exhaust the remaining corpus of original content, and human-generated material is displaced by synthetic AI "slop," training data becomes increasingly polluted. The ingestion of AI-generated content by AI models has been shown to degrade model performance, a phenomenon variously described

Launch News Service Supported by Google AI, FINANCIAL TIMES (Mar. 18, 2025), https://www.ft.com/content/fc5d4642-af71-4ac6-8311-1920726f8baa (last visited Jan. 28, 2026).

[102] Jon Henley, *German Tabloid Bild Cuts 200 Jobs and Says Some Roles Will Be Replaced by AI*, THE GUARDIAN (June 20, 2023), https://www.theguardian.com/world/2023/jun/20/german-tabloid-bild-to-replace-range-of-editorial-jobs-with-ai (last visited Jan. 28, 2026); Jonathan Yerushalmy, *German Publisher Axel Springer Says Journalists Could Be Replaced by AI*, THE GUARDIAN (Mar. 1, 2023), https://www.theguardian.com/technology/2023/mar/01/german-publisher-axel-springer-says-journalists-could-be-replaced-by-ai (last visited Jan. 28, 2026); Jim Waterson, *Microsoft Sacks Journalists to Replace Them with Robots*, THE GUARDIAN (May 30, 2020), https://www.theguardian.com/technology/2020/may/30/microsoft-sacks-journalists-to-replace-them-with-robots (last visited Jan. 28, 2026).

[103] *See generally* Eli M. Naomi, MEDIA OWNERSHIP AND CONCENTRATION IN AMERICA (2009); Marcel Garz & Mart Ots, *Media Consolidation And News Content Quality*, 75(3) JOURNAL OF COMMUNICATION 195 (2025); Rupert Neate, *'Extra Level of Power': Billionaires Who Have Bought up the Media*, THE GUARDIAN (May 3, 2022), https://www.theguardian.com/news/2022/may/03/billionaires-extra-power-media-ownership-elon-musk (last visited Jan. 28, 2026).

[104] Grant, *supra* note 30; Gregory, *supra* note 30; Metz & Weise, *supra* note 30.

[105] Jones, *supra* note 58, Roose, *supra* note 58.

[106] Jose Luis Paredes et al., *More Articles Are Now Created by AI Than Humans*, FIVE PERCENT, https://graphite.io/five-percent/more-articles-are-now-created-by-ai-than-humans (last visited Jan. 28, 2026); Matt Jancer, *Over 50% of New Online Articles Are Being Cranked Out by AI*, VICE (Oct. 17, 2025), https://www.vice.com/en/article/more-than-half-new-articles-ai-written/ (last visited Jan. 28, 2026).

as "model collapse," "model decay," or "AI cannibalism."[107] Research indicates that models trained on synthetic text do not merely become stale (i.e., produce outdated content), but they also hallucinate more and produce more gibberish.[108] Similar effects have been observed in image-generation systems, which produce lower-quality images with greater distortion when trained on AI-generated images.[109] And once the training data is polluted, models struggle to recover even after subsequent retraining on real human-generated data.[110] Thus, Google's conduct forecloses publishers, reduces the production of new human-generated content, and ultimately degrades the quality of information available on the internet, including the quality of AI Overviews that are trained on that content. The open web, a place where users could formerly find content of great variety and value, becomes a pool of recycled AI slop. The long run harm to users is the destruction of the open web.

V. Violations of the Sherman Act

The preceding sections described Google's conduct and its anticompetitive effects. This Part explains how that conduct fits within existing antitrust doctrine, arguing that it constitutes an illegal tying arrangement by a monopsonist. A monopsony exists where a buyer has market power. It is the mirror image of a monopoly, where the seller has market power.[111] Since monopsony is simply a buyer monopoly, exclusionary conduct by a monopsonist that produces anti-competitive effects is also a violation of section 2 of the Sherman Act.[112] Typical

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[107] Ilia Shumailov et al., *AI Models Collapse When Trained on Recursively Generated Data*, 631 NATURE 755 (2024); Mohamed El Amine Seddik et al., *How Bad Is Training on Synthetic Data? A Statistical Analysis of Language Model Collapse* (Apr. 7, 2024), http://arxiv.org/abs/2404.05090 (last visited Jan. 28, 2026); Aatish Bhatia, *When A.I.'s Output Is a Threat to A.I. Itself*, THE NEW YORK TIMES (Aug. 26, 2024), https://www.nytimes.com/interactive/2024/08/26/upshot/ai-synthetic-data.html (last visited Jan. 28, 2026); Devika Rao, *AI Is Cannibalizing Itself. And Creating More AI.*, THE WEEK (Aug. 30, 2024), https://theweek.com/tech/ai-cannibalization-model-collapse(last visited Jan. 28, 2026); Lauren Leffer, *Yes, AI Models Can Get Worse over Time*, SCIENTIFIC AMERICAN, https://www.scientificamerican.com/article/yes-ai-models-can-get-worse-over-time/ (last visited Jan. 28, 2026).

[108] *Id*.

[109] Sina Alemohammad et al., Self-Consuming Generative Models Go MAD (July 4, 2023), http://arxiv.org/abs/2307.01850 (last visited Jan. 28, 2026).

[110] Matyas Bohacek & Hany Farid, *Nepotistically Trained Generative-AI Models Collapse* (Mar. 29, 2025), http://arxiv.org/abs/2311.12202 (last visited Jan. 28, 2026).

[111] Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297 (1990-1991); Roger G. Noll, *"Buyer Power" and Economic Policy*, 72 ANTITRUST L.J. 589 (2005).

[112] *See generally* Note by the United States, ROUNDTABLE ON MONOPSONY AND BUYER POWER, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (2008),

examples of anticompetitive monopsonies include sugar refiners artificially depressing prices of sugar beets;[113] movie exhibitors imposing exclusivity requirements on movie distributors or refraining from engaging in competitive bidding;[114] dominant employers paying artificially low wages or imposing exploitative terms on labor;[115] the dominant sawmill driving out rivals by bidding up the cost of sawlogs (predatory bidding);[116] and a dominant retail buyer extracting exclusive supply or discounted pricing from manufacturers and distributors.[117]

The legal test for illegal monopsonization is the same as for illegal monopolization.[118] A Section 2 monopsony claim therefore, requires two elements: (1) possession of monopsony power, and (2) the willful acquisition or maintenance of that power through exclusionary conduct. In the recent Google search case, the court already found that Google holds monopoly power in the market for general search services after a full trial and detailed factual findings.[119] Google's monopoly power in general search and its monopsony power over publisher data are two sides of the same coin. Publisher content is the critical input used to build the search index, and Google is the monopolist buyer of that input precisely because it is the monopolist supplier of search.

For the second element, Google's tying of search indexing to the use of publisher data for AI-related purposes amounts to an exclusionary conduct.[120] A tying arrangement is 'an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.'[121] Google ties the inclusion of publisher data in the search index (the tied service) to the use of this data for AI-related purposes, including model training and grounding (the

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https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/monopsony.pdf (last visited Jan. 28, 2026).

[113] Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219 (1948).

[114] United States v. Griffith, 334 U.S. 100 (1948); Beech Cinema, Inc. v. Twentieth Century-Fox Film Corp., 622 F.2d 1106 (2d Cir. 1980); United States v. Crescent Amusement Co., 323 U.S. 173 (1944).

[115] Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69 (2021); Deslandes v. McDonald's USA, LLC, 81 F.4th 699 (7th Cir. 2023).

[116] Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc., 549 U.S. 312 (2007).

[117] Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Toys "R" Us, Inc. v. F.T.C., 221 F.3d 928 (7th Cir. 2000).

[118] Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc., 549 U.S. 312 (2007).

[119] United States v. Google LLC, 747 F.Supp.3d 1 (D.D.C. 2024).

[120] *See generally* Madhavi Singh, The Antitrust Case Against AI Overviews, HARVARD JOURNAL OF LAW & TECHNOLOGY DIGEST (Oct. 6, 2025), https://jolt.law.harvard.edu/digest/the-antitrust-case-against-ai-overviews (last visited Jan. 29, 2026).

[121] N. Pac. R. Co. v. United States, 356 U.S. 1 (1958), 5–6.

tying service). Because publishers must appear in Google's search index to be discoverable, they have no meaningful choice but to accept the tied AI-related uses of their content. As discussed earlier, publishers lack any mechanism to opt out of AI training or grounding without simultaneously removing themselves from Google Search entirely.[122]

Tying cases can be brought under either section 1 or section 2 of the Sherman Act and are usually brought under both. The core competitive concern in tying is that it allows a monopolist to extend their monopoly into another market.[123] To prove the existence of a tie, two elements must be shown: 1) the existence of two *distinct* products or services; and 2) a *conditioned* sale i.e., the tying product must be available only on the condition that the tied product also be purchased.[124] Both elements exist in the present case.

First, supplying publisher data for inclusion in the search index and supplying publisher data for AI training and grounding are clearly two distinct services. To ascertain the distinctiveness of the service, courts apply a consumer-demand test to assess whether there is sufficient consumer demand to make it efficient for a firm to offer the two services separately.[125] The existence of separate products is inferred from readily observed facts, including consumer requests to offer the products separately, disentangling of the products by competitors, analogous practices in related markets, and the defendant's historical practice.[126] Each of these indicators points to two distinct products here. Publishers have offered data licensing for AI training as a standalone product, and numerous publishers have entered into licensing agreements with OpenAI, Microsoft, ProRata.ai, Perplexity, Mistral, Amazon, and Meta.[127] This demonstrates a clear, independent demand for AI-training use that is separate from the demand for inclusion in a search index. It is both feasible and efficient to supply these uses separately. Google's own internal documents acknowledge that the two uses can be technically separated.[128] Indeed, for many years, Google used publisher data exclusively to build its search index and did not use it to train AI models.

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[122] *See infra* Part III.A.

[123] N. Pac. Ry. Co., 356 U.S. 1 (1958), 11 ("[T]he vice of tying arrangements lies in the use of economic power in one market to restrict competition on the merits in another").

[124] N. Pac. Ry. Co., 356 U.S. 1 (1958), 5–6; Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 461 (1992).

[125] Eastman Kodak, 504 U.S. 451, 462-463; Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 21-22 (1984).

[126] Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 995 (2023); Eastman Kodak, 504 U.S. 451, 462-463 (1992).

[127] *See supra* note 97.

[128] Alba & Love, *supra* note 45.

Second, proving *coercion* in a monopsony-based tying claim requires showing that the buyer *forced* the seller to sell the tied product, either when the seller might not have preferred to sell it at all or would have sold it on different terms.[129] That coercion is evident here. Publishers have repeatedly demanded an opt-out mechanism and have objected to Google's uncompensated use of their data for AI purposes.[130] Where limited opt-out options have been offered, many publishers exercised them, and more would have done so absent the credible fear that opting out would result in exclusion from Google's search index.[131] Publishers therefore are not voluntarily supplying their data for AI training and grounding, but are being coerced to do so by the absence of an opt-out and the threat of exclusion from the search index.

Although tying can be per se illegal under Section 1, courts have sharply limited the per se rule in this area and rarely apply it.[132] For a tying agreement to be *per se* illegal, a plaintiff must show that: 1) the defendant has *appreciable economic power* in the tying product market; and 2) the tie-in agreement has a *not insubstantial impact* on interstate commerce.[133] Market power is essential because, without it, a seller cannot compel buyers to accept both products—and, conversely, a buyer without market power cannot compel sellers to provide both products, since the seller could simply transact with another purchaser.[134] Here, a court has already found that Google possesses monopsony power in the tying-product market: the market for general search services, for which publisher content is a critical input. Publishers cannot turn to another buyer because no comparable general search

[129] Jefferson Parish, 466 U.S. 2, 12 (1984).

[130] News Media Alliance White Paper, *supra* note 27.

[131] Charlotte Tobitt, *Eight in Ten of World's Biggest News Websites Now Block AI Training Bots*, PRESS GAZETTE (Jan. 22, 2026), https://pressgazette.co.uk/platforms/eight-in-ten-of-worlds-biggest-news-websites-now-block-ai-training-bots/ (last visited Jan. 28, 2026) (Google Extended lets publishers opt out from AI chatbot Gemini and AI development platform Vertex scraping their content, but does not stop sites from being accessed and used in Google's AI Overviews. To avoid this publishers would have to opt out of being scraped by Googlebot, which indexes for search).

[132] Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 468 (7th Cir. 2020) ("Tying is still nominally subject to a per se rule of illegality, but it is a most peculiar per se rule."); Illinois Tool Works Inc. v. Independent Ink, Inc., 547 U.S. 28, 35 (2006) ("Over the years, however, this Court's strong disapproval of tying arrangements has substantially diminished.").

[133] Fortner Enters., Inc. v. United States Steel Corp., 394 U.S. 495, 503 (1969) ("Fortner I"); Northern Pac. Ry. Co., 356 U.S. 1, 5–6 (1958); United States v. Loew's, Inc., 371 U.S. 38 (1962); U. S. Steel Corp. v. Fortner Enters., Inc., 429 U.S. 610, 613–16 (1977); Jefferson Parish, 466 U.S. 2, 12–16 (1984).

[134] Illinois Tool Works Inc. v. Independent Ink, Inc., 547 U.S. 28, 36 (2006); Collins Inkjet Corp. v. Eastman Kodak Co., 781 F.3d 264, 277 (6th Cir. 2015).

engine can provide substitute referral traffic. And internet content is a substantial market. The two conditions are met.

Although Google's conduct appears to satisfy the threshold requirements for the modified per se rule, courts have been inconsistent about whether the per se standard applies in technological tying cases. The courts in *Microsoft* and *Epic Games* held that such arrangements should be evaluated under the rule of reason rather than the per se rule.[135] By contrast, a federal court in the Eastern District of Virginia recently held in the *Google Ad Tech* case that Google's tying of its publisher ad server (DFP) to its ad exchange (AdX) was per se illegal.[136]

Several courts have also observed that the modified per se approach and the rule-of-reason analysis in tying cases are, in practice, nearly indistinguishable because both require a showing of market power.[137] Satisfying these threshold conditions is functionally equivalent to demonstrating anticompetitive effects.[138] As

[135] Epic Games, Inc. v. Apple Inc., 67 F.4th 946, 997 (9th Cir. 2023) (Nonetheless, we join the D.C. Circuit in holding that per se condemnation is inappropriate for ties "involv[ing] software that serves as a platform for third-party applications." It is only after considerable experience with certain business relationships that courts classify them as per se violations. . . . Based on the record, we do not have the level of confidence needed to universally condemn ties related to app transaction platforms that combine multiple functionalities. . . . Software markets are highly innovative and feature short product lifetimes—with a constant process of bundling, unbundling, and rebundling of various functions. In such a market, any first-mover product risks being labeled a tie pursuant to the separate-products test. If per se condemnation were to follow, we could remove would-be popular products from the market—dampening innovation and undermining the very competitive process that antitrust law is meant to protect.); United States v. Microsoft Corp. 253 F.3d 34, 93-94 (D.C. Cir. 2001) (("[B]ecause of the pervasively innovative character of platform software markets, tying in such markets may produce efficiencies that courts have not previously encountered and thus the Supreme Court had not factored into the per se rule as originally conceived. We do not have enough empirical evidence regarding the effect of [the] practice ... to exercise sensible judgment regarding that entire class of behavior).

[136] United States v. Google LLC, 778 F. Supp. 3d 797, 859-863 (E.D. Va. 2025).

[137] Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 468 (7th Cir. 2020) (Tying is still nominally subject to a per se rule of illegality, but it is "a most peculiar per se rule." The factual elements that must be proven for a tying claim capture much of what must be demonstrated in a rule of reason case. Showing that the purchase of the tied product was forced uses many of the same concepts used to analyze refusals to deal: some assessment of market power, rough predictions of anticompetitive harm, and consideration of procompetitive justifications.); Suture Express, Inc. v. Owens & Minor Distrib., Inc., 851 F.3d 1029, 1038 (10th Cir. 2017) (Beyond this general proposition, caselaw on tying claims under the rule of reason is "amazingly sparse." Because the Supreme Court has continued to add more real-market analysis to the requirements of a per se tying claim, though, the rule of reason seems to be mainly different in degree, not necessarily in kind).

[138] In re Cox Enterprises, Inc., 871 F.3d 1093, 1107 (10th Cir. 2017) ("[P]laintiffs alleging per se unlawful tying arrangements must do more to meet the foreclosure element than point to

a result, the so-called per se standard in tying cases is per se in name only and closely resembles a rule-of-reason inquiry.[139] Regardless, even if Google's tying arrangement in this case were evaluated under the more demanding rule-of-reason standard, the outcome would be the same.

The rule-of-reason analysis for monopolization and monopsonization follows a burden-shifting framework: (1) the plaintiff bears the burden to show anti-competitive effect; (2) the burden then shifts to the defendant to prove the existence of procompetitive justifications; (3) the burden returns to the plaintiff to demonstrate that these procompetitive objectives could be achieved through less restrictive means; and (4) finally, if the pro-competitive justifications stand unrebutted, then the plaintiff must demonstrate that the anticompetitive harms outweigh the procompetitive benefits.[140] Commentators have noted that, in practice, most cases are disposed of at the first stage itself as courts often avoid complex balancing and once a defendant articulates any plausible procompetitive justification, courts are generally reluctant to find a violation.[141] The anticompetitive effects of Google's conduct have already been discussed in a preceding section and the potential procompetitive justifications are addressed below.

Google may argue that using publisher data to power AI models benefits consumers by improving search quality and that features such as AI Overviews and AI Mode enhance the user experience.[142] At the outset it must be stressed that harms

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a dollar amount. . . . They must show that the alleged tying arrangement had the potential to or actually did injure competition."); *id*. at 1100 ("[E]ven if tying plaintiffs show that a tie affected a substantial dollar volume of sales, they must still show that the tie meets Jefferson Parish's threshold requirements to trigger the per se rule. In other words, the tying arrangement must be the type of tie that could potentially harm competition in the tied product market. . . . [T]hough the per se rule against tying doesn't require an exhaustive analysis into a tie's anticompetitive effects in the tied product market, the rule can be coherent only if tying is defined by reference to the economic effect of the arrangement."); Kaufman v. Time Warner, 836 F.3d 137, 141 (2d Cir. 2016) (requiring "anticompetitive effects in the tied market"); Wells Real Est., Inc. v. Greater Lowell Bd. of Realtors, 850 F.2d 803, 815 (1st Cir. 1988) ("The tying claim must fail absent any proof of anti-competitive effects in the market for the tied product").

[139] *Id*.

[140] Ohio v. Am. Express Co., 585 U.S. 529, 541 (2018); NCAA v. Alston, 141 S. Ct. 2141, 2160 (2021); Michael A. Carrier & Mark A. Lemley, *Rule or Reason? The Role of Balancing in Antitrust Law*, 100(3) NOTRE DAME LAW REV. 139 (2025) (discusses the confusion between whether this a three-step or a four-step balancing test).

[141] Michael A. Carrier, The Rule of Reason: An Empirical Update for the 21st Century, 16 GEO. MASON L. REV. 827 (2009) (Between 1999 and 2009, courts dismissed 97% of cases at the first stage, reaching the balancing stage in only 2% of cases).

[142] James Martin, *The AI Trust Gap: 82% Are Skeptical, Yet Only 8% Always Check Sources*, EXPLODING TOPICS (June 30, 2025), https://explodingtopics.com/blog/ai-trust-gap-research

in one market cannot be offset by benefits in another.[143] Even if downstream consumers were to obtain some benefit, that cannot offset the harm suffered by upstream input suppliers (publishers in this case).[144] Specifically, in monopsony cases, the inquiry focuses on buyer-side competitive effects (i.e., impact on publishers), not consumer-side outcomes.[145] The Tenth Circuit's decision in *Telecor Communications* illustrates this principle.[146] Southwestern Bell held a monopoly over pay-phone services in Oklahoma and a monopsony over pay-phone locations. Its long-term contracts with location providers were challenged as exclusionary under Section 2. The court rejected Southwestern Bell's argument that the plaintiff had to prove harm to consumers. Harm to input suppliers alone was sufficient to sustain a monopsony-based Section 2 claim.[147] This principle has been reaffirmed in other monopsony cases: proving illegal monopsonization does not require evidence of harm to consumers; harm to input suppliers alone is sufficient.[148]

(last visited Jan. 28, 2026) (While nearly 82% of respondents report skepticism toward AI Overviews and do not fully trust them to provide accurate information or proper source citations, most still prefer to keep the feature).

[143] U.S. v. Philadelphia National Bank, 374 U.S. 321, 370 (1963) ("anticompetitive effects in one market [cannot] be justified by procompetitive consequences in another"); *but see* Ohio v. Am. Express Co., 585 U.S. 529 (2018) (where the Supreme Court in a two-sided market considered the impact on both merchant and cardholders in a rule-of-reason assessment).

[144] To the extent that consumers are reading an AI generated summary and not clicking through to content providers, the market is even less like the simultaneous transaction market envisioned in the American Express case.

[145] *See* Mandeville Island Farms v. Am. Crystal Sugar Co., 334 U.S. 219, 235-236 (1948) (It is clear that the [anti-competitive buyer's price-fixing] agreement is the sort of combination condemned by the [Sherman] Act, even though the price-fixing was by purchasers, and the persons specially injured under the treble damage claim are sellers, not customers or consumers.....The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers.); Telecor Commc'ns, Inc. v. Sw. Bell Tel. Co., 305 F.3d 1124, 1133-1134 (10th Cir. 2002) (The Supreme Court's treatment of monopsony cases strongly suggests that suppliers . . . are protected by antitrust laws even when the anti-competitive activity does not harm end-users.); United States v. Anthem, Inc., 855 F.3d 345 (D.C. Cir. 2017) (Merger between the second and third largest health insurance companies in the US was challenged. The court discounted Anthem's argument that the merger could be justified through an "efficiency" argument, based on the price reductions the merged company might be able to impose on health care providers).

[146] Telecor Commc'ns, Inc. v. Sw. Bell Tel. Co., 305 F.3d 1124 (10th Cir. 2002).

[147] Telecor Commc'ns, Inc., 305 F.3d 1124, 1133 (10th Cir. 2002) (Although Southwestern Bell is correct that antitrust laws were "especially intended to serve consumers," that hardly suffices to prove that a monopolist may act with impunity so long as end-use consumer prices are unaffected. And, in any event, the Plaintiffs' antitrust theory was that the location owners were consumers of the placement of pay phone facilities on their locations, and that the price for such location placements was affected by Southwestern Bell's monopolistic conduct).

[148] *See supra* note 145.

The same logic applies here. There is clear evidence of harm to input suppliers, i.e., publishers, and those harms cannot be offset by any purported benefits to downstream consumers. There is no evidence that Google's conduct produces any procompetitive effect in the relevant input market for publisher content.

Admittedly, there might be some short-term consumer appeal. About 70.6% of consumers believe that Google Search is either the same or better than before the launch of AI Overviews, and if given the choice, only 36.6% would choose to turn the feature off.[149] Short-term consumer appeal does not legitimize conduct that rests on coercive extraction from upstream trading partners. Moreover, in the long run, consumer welfare depends on sustained quality and reliability. Inaccuracies, hallucinations, misattribution, and other quality failures in AI outputs threaten to erode the value of the service over time.[150] Consumers' willingness to keep a feature of uncertain quality must be set against both the long run harm to welfare of consumers and the short and long run harm to welfare of the other side of the market, the publishers.[151]

Moreover, the effects on publishers directly feed back into consumer welfare. As discussed above, uncompensated use of publisher data squeezes and forecloses publishers, reduces investment in original content, and accelerates publisher exit. That process reduces consumer choice and degrades the quality of content online. It also diminishes the supply of high-quality original training data, increasing the risk of "model collapse" and degrading the performance of AI systems themselves. Any claimed consumer benefits from integrating AI Overviews into Search must (at the very least) be weighed against these immediate and long-term harms to both sides of the market.

A monopsonist often argues that acquiring an input at below-competitive prices ultimately benefits consumers because the cost savings are passed downstream in the form of lower prices. Google may argue that obtaining publisher data for free (instead of paying publishers a fair price) allows it to integrate AI-based features

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[149] Martin, *supra* note 142.

[150] Grant, *supra* note 30; Gregory, *supra* note 30; Metz & Weise, *supra* note 30.

[151] Although welfare assessment in this case should properly focus on input suppliers, *Amex* may introduce some confusion by directing attention to both sides of a two-sided platform. Even if welfare analysis nonetheless accounts for both publishers and consumers, it still reveals substantial short- and long-run harms to consumers. *See generally* Michael Katz & Jonathan Sallet, *Multisided Platforms and Antitrust Enforcement*, 127 YALE L.J. 2142 (2018); Dennis W. Carlton, *The Anticompetitive Effects of Vertical Most-Favored-Nation Restraints and the Error of Amex*, 2019 COLUM. BUS. L. REV. 93 (2019); Michael L. Katz & A. Douglas Melamed, *Competition Law as Common Law: American Express and the Evolution of Antitrust*, 168 U. PA. L. REV. 2061 (2020); Steven C. Salop et al., *Rebuilding Platform Antitrust: Moving on From Ohio v. American Express*, ANTITRUST LAW. J. 883 (2022).

into Search at no additional cost, and these savings are passed on to users. However, because users do not pay a monetary price for the Google search engine, the argument must be that the price decline takes the form of improved quality or innovation. Evidence of quality, variety, exit, and the health of content on the open web may not support this argument. Secondly, the pass-on premise is conceptually incorrect when the monopsonist lowers the price below the competitive level, as this will reduce the supply of the input and restrict the ability of consumers to purchase the quantity and quality they would demand in a competitive market.[152] Further, scholars have long argued that the monopsonist captures most of the wealth transfer and does not pass it on to consumers, meaning that both sides of the market are harmed.[153] Several commentators have asserted that monopsony warrants the same treatment as monopoly, given that its long-run harms to both suppliers and consumers often mirror those produced by seller-side market power.[154]

VI. Theory of Harm based on Exploitation

The exercise of monopoly power can generate two distinct forms of harm: exploitative and exclusionary. Exploitative harm occurs when a monopolist insulated from competitive pressures uses its market power to exploit consumers, for example by charging higher prices, degrading quality, or imposing unfavorable terms.[155] Exclusionary harm, by contrast, arises when a monopolist impairs the competitive process by excluding rivals through means other than competition on the merits.[156] Under U.S. antitrust law, exploitative conduct is generally not unlawful; liability under Section 2 of the Sherman Act is limited to exclusionary conduct.[157] By contrast, competition law in some other jurisdictions, most notably

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[152] See *generally* C. Scott Hemphill & Nancy L. Rose, *Mergers that Harm Sellers*, 127(7) YALE L.J. 2078 (2018); Jonathan Sallet, *Buyer Power in Recent Merger Reviews*, 32(1) ANTITRUST 82 (2017).

[153] See generally: Roger D. Blair & Kelsey A. Clemons, *Is Monopsony the New Monopoly: Yes*; 34 ANTITRUST 84 (2019); Debbie Feinstein & Albert Teng, *Buyer Power: Is Monopsony the New Monopoly*, 33(2) ANTITRUST 12 (2019) Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony,* 76 CORNELL L. REV. 297 (1990-1991); Roger G. Noll, *Buyer Power and Economic Policy*, 72 ANTITRUST L.J. 589 (2005); Warren S. Grimes, *Buyer Power and Retail Gatekeeper Power: Protecting Competition and the Atomistic Seller*, 72 ANTITRUST L.J. 563 (2005).

[154] Laura Alexander, *Monopsony and the Consumer Harm Standard*, 95 GEO. L.J. 1611 (2007).

[155] *See* GUIDANCE ON THE COMMISSION'S ENFORCEMENT PRIORITIES IN APPLYING ARTICLE 82 OF THE EC TREATY TO ABUSIVE EXCLUSIONARY CONDUCT BY DOMINANT UNDERTAKINGS, EUROPEAN COMMISSION (2009).

[156] *See* GUIDANCE ON THE COMMISSION'S ENFORCEMENT PRIORITIES IN APPLYING ARTICLE 82 OF THE EC TREATY TO ABUSIVE EXCLUSIONARY CONDUCT BY DOMINANT UNDERTAKINGS, EUROPEAN COMMISSION (2009).

[157] Michal S. Gal, *Monopoly Pricing as an Antitrust Offense in the U.S. and the EC: Two Systems of Belief about Monopoly?*, 49(-2) THE ANTITRUST BULLETIN 343 (2004), Marco

the EU, prohibits the 'abuse' of dominance, a category that encompasses both exploitative and exclusionary harms.[158] The preceding section explained how Google's conduct (conditioning inclusion of publisher data in the search index on its use for AI-related purposes) constitutes exclusionary conduct in violation of Section 2. This section examines how Google's use of publisher data for AI-related purposes also constitutes exploitative conduct, which may violate competition law in some jurisdictions, including the EU.[159]

A. Unfair price

The imposition of an unfair price by a dominant firm is an abuse of dominance in violation of Art 102 of the TFEU. As discussed above, Google initially used publisher data to construct its search index and, in exchange, directed traffic to publishers that could be monetized through advertising or subscriptions. Over time, however, Google's monopoly position in general search has made publishers heavily dependent on it for discovery and traffic. Google has exploited this dependence by extracting more from publishers while providing less in return. This is a classic manifestation of monopsony power, in which the dominant buyer extracts more from the sellers while paying less than competitive prices in return.[160] Google's conduct follows this pattern. It now scrapes publisher data not only to construct its search index, but also for additional economically significant purposes such as training and grounding its AI models, thereby extracting greater value while imposing exploitative conditions, including the absence of meaningful consent or compensation. At the same time, Google sends less traffic to publishers through the integration of AI Overviews, which operates effectively as a reduction in price below competitive levels.[161]

In *United Brands*, the seminal case for unfair pricing in the EU, the ECJ held that a price can be considered unfair when it has "no reasonable relation to the economic value of the product supplied."[162] The ECJ created a two-limb test: (1) the price must be 'excessive,' for example, if the price is much higher in relation to the cost of production (excessive limb); and (2) the price must be 'unfair' either (i) in itself or (ii) when compared to competing products (unfair limb).[163] This same

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Botta, *Exploitative Abuses: Recent Trends and Comparative Perspectives*, *in* RESEARCH HANDBOOK ON ABUSE OF DOMINANCE AND MONOPOLIZATION (2023).

[158] *Id*.

[159] Singh, *supra* note 120.

[160] Blair & Harrison, *supra* note 153.

[161] McDonald, *supra* note 4.; Law & Guan, *supra* note 4.; Chapekis & Lieb, *supra* note 4; Kint, *supra* note 5; Simonetti & Blunt, *supra* note 5.

[162] United Brands Co. v. Comm'n, 1978 E.C.R. 207, 250 (CJ); *see also* CMA v Flynn Pharma Ltd, [2020] EWCA Civ 339, 2017 WL 11508568.

[163] CMA v Flynn Pharma Ltd, [2020] EWCA Civ 339, 2017 WL 11508568.

test has been applied to digital products and services, for instance, in *Kent* the UK's Competition Appellate Tribunal concluded that Apple's 30% commission on in-app purchases in the App Store constituted an excessive price.[164]

Where the relationship at issue is one of monopsony rather than monopoly, the relevant abuse is not excessive pricing but price suppression. Article 102 TFEU applies symmetrically to abuses of monopsony power, and the United Brands unfair pricing framework can be adapted accordingly.[165] The relevant inquiry is whether the compensation paid by the dominant buyer bears a reasonable relation to the economic value of the input supplied. Applied here, Google's conduct satisfies both limbs of the unfair-pricing analysis. With respect to the first limb, the effective price paid to publishers has declined relative to the economic value extracted. Publisher content, which was originally used to create the search index, is now used for additional and economically significant purposes, including AI training and grounding, without corresponding compensation. At the same time, the volume of referral traffic has diminished, further depressing the effective price paid for publisher data. With respect to the second limb, this suppressed compensation is unfair both in itself and by comparison to relevant benchmarks. Comparable AI firms increasingly license publisher content for similar training and grounding uses for a significant fee, while Google uses its monopsony position in search to obtain the same inputs for free.[166] The resulting gap between the value extracted and the compensation provided reflects an 'unfair' price which is an abuse of dominance within the meaning of Article 102.[167]

B. Unfair condition

In addition to unfair pricing, the imposition of unfair trading conditions may also constitute an abuse of dominance in violation of Article 102 TFEU.[168] Claims based on unfair conditions, however, are generally even more difficult to assess than excessive pricing claims, as courts have struggled to articulate an objective standard for "unfairness."[169] This is further complicated by the fact that the EU has

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[164] Kent v. Apple Inc., [2025] CAT 67.

[165] Comité des industries cinématographiques des Communautés européennes (CICCE) v Commission, Case 298/83 (The applicant, an association of filmmakers, complained that TV stations, as the collectively dominant buyers, were buying the rights to show films at prices that were too low. At the time of the dispute the three TV stations in question held exclusive rights to broadcast and the allegation was that they dominated the market collectively.).

[166] *See supra* note 97.

[167] Giorgio Monti & Alexandre de Streel, *Exploitative Abuses: The Scope and the Limits of Article 102 TFEU*, RSC 2023/62, ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES, CENTRE FOR A DIGITAL SOCIETY, https://cadmus.eui.eu/entities/publication/87f9d481-e2cb-58ac-9865-081f501c69f4 (last visited Jan. 28, 2026).

[168] Case 127/73, BRT v SABAM (BRT-II) EU:C:1974:25.

[169] Monti & Streel, *supra* note 167.

adopted the approach of solving the problem of unequal bargaining power between publishers and Google through copyright regulation.[170] As a result, assessments of unfairness under competition law risk being improperly influenced by whether the challenged conduct is permissible under the copyright regime.

This tension is illustrated by early disputes between Google and publishers which were framed as exploitative abuse. In 2013, Germany adopted legislation granting copyright protection to news snippets and images.[171] Following the law's enactment, instead of entering into licensing agreements at fair remuneration, Google gave publishers the option to either give permission for free use or their snippets and images would be excluded from search.[172] Publishers that declined these terms would have only their headlines displayed, without snippets or images, a change that significantly reduced traffic.[173] Most publishers accepted these terms for fear of going bankrupt.[174] However, the German competition regulator, Bundeskartellamt, concluded that Google's conduct did not constitute an exploitative abuse and could be objectively justified because the arrangement was

[170] Cory Doctorow, *The European Copyright Directive: What Is It, and Why Has It Drawn More Controversy Than Any Other Directive In EU History?*, ELECTRONIC FRONTIER FOUNDATION (Mar. 19, 2019), https://www.eff.org/deeplinks/2019/03/european-copyright-directive-what-it-and-why-has-it-drawn-more-controversy-any (last visited Jan. 28, 2026); Ally Boutelle & John Villasenor, *The European Copyright Directive: Potential Impacts on Free Expression and Privacy*, BROOKINGS (Feb. 2, 2021), https://www.brookings.edu/articles/the-european-copyright-directive-potential-impacts-on-free-expression-and-privacy/ (last visited Jan. 29, 2026).

[171] Loek Essers, *German Online Copyright Law to Take Effect in August*, COMPUTERWORLD (May 16, 2013), https://www.computerworld.com/article/1399635/german-online-copyright-law-to-take-effect-in-august.html (last visited Jan. 29, 2026); Natasha Lomas, *German Publishers Can't Wean Themselves Off Google News, Despite Winning Copyright Law Change*, TECHCRUNCH (Aug. 1, 2013), https://techcrunch.com/2013/08/01/google-publishers-love-hate/ (last visited Jan. 29, 2026).

[172] Matt Brian, *German Publishers Opt in to Google News, despite Lobbying for Opt-out Law*, THE VERGE (Aug. 1, 2013), https://www.theverge.com/2013/8/1/4577992/google-news-publishers-germany-opt-in (last visited Jan. 29, 2026).

[173] See *Axel Springer Concludes Its Data Documentation: Major Losses Resulting from Downgraded Search Notices on Google*, AXEL SRPINGER (Nov. 5, 2014), https://www.axelspringer.com/en/ax-press-release/axel-springer-concludes-its-data-documentation-major-losses-resulting-from-downgraded-search-notices-on-google (last visited Jan. 29, 2026) (German publisher, Axel Springer, refused to accept Google's terms and issue free licenses and recorded a traffic loss of 40%).

[174] Greg Sterling, *German Publishers To Google: We Want Our Snippets Back*, SEARCH ENGINE LAND (Oct. 23, 2014), https://searchengineland.com/german-publishers-google-want-snippets-back-206520 (last visited Jan. 27, 2026) (A consortium of roughly 200 companies, together known as "VG Media," said that the loss of traffic from the disappearance of these elements could cause some of their members "to go bankrupt." After trying for a year to get compensation from Google, they acquiesced due to the economic pressure).

mutually beneficial: publishers received increased traffic through snippets and previews, Google improved the quality of its search results and advertising revenues, and users benefited from a richer search experience.[175]

A different conclusion was reached in France following the implementation of the 2019 EU Copyright Directive, which grants publishers the right to claim remuneration for certain online uses of their content.[176] After France passed a domestic law implementing the 2019 Directive, Google announced that it would cease displaying snippets unless publishers granted it permission to use snippets for free.[177] In the absence of collective bargaining, any individual publisher that refused Google's terms risked losing visibility and traffic to rival publishers willing to acquiesce. This dynamic eliminated the credibility of holdout strategies and effectively compelled acceptance of Google's conditions. The French Competition Authority concluded that Google's offer—either zero remuneration or no display of snippets—did not constitute a real choice and was likely an unfair trading condition in violation of competition law.[178] It imposed interim measures requiring Google to negotiate in good faith with publishers.[179] The dispute was ultimately resolved through commitments requiring Google to conduct time-bound negotiations and to share key information, including data on impressions and click-through rates.[180]

These cases expose a broader analytical difficulty. Since the Google–publisher relationship is partly governed by copyright law, assessments of unfairness under competition law risk being conflated with copyright legality. This tension is

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[175] Decision according to Section 32c German Competition Act (Gesetz Gegen Wettbewerbsbeschränkungen, GWB) in the dispute Google versus various press publishers and VG Media about the use of the ancillary copyright of press publishers, B6-126/14 (Sept. 8, 2019), https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2016/B6-126-14.pdf?__blob=publicationFile&v=2 (last visited Jan. 29, 2026).

[176] DIRECTIVE (EU) 2019/790 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 17 APRIL 2019 ON COPYRIGHT AND RELATED RIGHTS IN THE DIGITAL SINGLE MARKET AND AMENDING DIRECTIVES 96/9/EC AND 2001/29/EC.

[177] Laura Kayali, *Google Refuses to Pay Publishers in France*, POLITICO (Sept. 25, 2019), https://www.politico.eu/article/licensing-agreements-with-press-publishers-france-google/ (last visited Jan. 29, 2026).

[178] *Related Rights: The Autorité Has Granted Requests for Urgent Interim Measures Presented by Press Publishers and the News Agency AFP (Agence France Presse).*, AUTORITÉ DE LA CONCURRENCE (Apr. 9, 2020), https://www.autoritedelaconcurrence.fr/en/communiques-de-presse/related-rights-autorite-has-granted-requests-urgent-interim-measures (last visited Jan. 29, 2026).

[179] *Id*.

[180] *Related Rights: The Autorité Accepts Google's Commitments*, AUTORITÉ DE LA CONCURRENCE (June 21, 2022), https://www.autoritedelaconcurrence.fr/en/press-release/related-rights-autorite-accepts-googles-commitments (last visited Jan. 29, 2026).

especially acute for AI-related data scraping, which is expressly exempt from copyright protection under the 2019 Directive.

At the outset, it is well established that conduct lawful under another body of law may nonetheless violate competition law.[181] Exclusive agreements that are valid under contract law, for example, may still be anticompetitive, and data collection practices that are governed by GDPR may nonetheless constitute an abuse of dominance.[182] Specifically, in the context of copyright, the ECJ in *BRT v. SABAM* held that if a Collecting Society (societies which manage the rights of right holders), being a monopolist, requires its members to unduly assign broad categories of rights, such terms may nevertheless constitute an unfair condition in violation of competition law, even though such assignment of rights are otherwise permissible under the copyright regime.[183] The legality of Google's conduct under the copyright regime should not affect the determination of whether such conduct constitutes an 'unfair' condition under competition law.[184]

A condition is considered unfair and therefore, abusive if it is: (1) imposed by a dominant undertaking on its trading partners, (2) unfavourable or detrimental to the interests of that undertaking's trading partners, and (3) not necessary for the achievement of a legitimate objective or in any event not proportionate for that purpose, that is there are less restrictive ways to achieve the objective.[185] As discussed above, Google occupies a dominant position in general search and is able to leverage that position to impose conditions requiring publishers to permit the use of their data for AI training and grounding.[186] Were publishers not so heavily dependent on Google for traffic—such that exclusion from the search index poses an existential threat—they could block Google's AI crawlers, as they do with other AI firms.[187]

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[181] Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) (just because conduct is legal under relevant sectoral regulation does not make it immune from antitrust liability); United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948) (practices valid under copyright may nonetheless violate antitrust laws).

[182] *See* Meta Platforms Inc. v. Bundeskartellamt (Case C-252/21) EU:C:2023:537 (the European Court of Justice confirmed that Meta's data collection practices may constitute a violation of Art. 102, TFEU).

[183] The fact that an undertaking entrusted with the exploitation of copyrights and occupying a dominant position within the meaning of Article [102] imposes on its members obligations which are not absolutely necessary for the attainment of its object and which thus encroach unfairly upon a member's freedom to exercise his copyright can constitute an abuse. (BRT v SABAM, para 15)

[184] *See* Monti & Streel, *supra* note 167, at 17.

[185] Case AT.40437 – Apple – App Store Practices (music streaming), Para 529.

[186] *See infra* Part III.

[187] *See infra* Part III.A.

The second element is also met. The uncompensated and non-consensual scraping of publisher data for AI-related uses is detrimental to publishers, depriving them of a potential revenue stream while simultaneously enabling the creation of AI Overviews that divert traffic and reduce ad revenue. The analysis of whether a condition imposed by a dominant undertaking is 'unfair' focuses on the exchange between the dominant undertaking and its trading partners and whether the benefits received by each are proportionate.[188] In the current exchange, the benefits received by Google are disproportionate. Google is able to use publisher data for economically significant additional purposes, including AI training and grounding, while publishers receive no compensation for those uses and, in fact, suffer declining traffic and revenues. Publishers also lack any ability to opt out of this exchange. Finally, for the third element, even if Google's purported legitimate objective in the scraping of publisher data is that large troves of data are required for training AI models, then there are less restrictive ways to achieve this objective, namely, finding ways to fairly compensate publishers for providing this critical input.

VII. Remedies

Deliberation about remedies should sit at the center of any enforcement strategy from the outset. Recent monopolization cases show that even long, hard-fought antitrust litigation can feel hollow, if not wasteful, when it culminates in an inadequate remedy.[189] Former Assistant Attorney General Thomas Barnett captured the stakes of early remedial planning succinctly:[190]

> It is critical to think hard about what you are going to do with the tiger before you grab its tail. If you cannot do something constructive, you should

[188] *See* Monti & Streel, *supra* note 167, at 10, 17.

[189] *See* Kate Brennan, *Decision in US vs. Google Gets It Wrong on Generative AI*, TECH POLICY PRESS (Sept. 11, 2025), https://techpolicy.press/decision-in-us-vs-google-gets-it-wrong-on-generative-ai (last visited Jan. 29, 2026); Julia Angwin, *Google Wins, We Lose*, THE NEW YORK TIMES (Sept. 26, 2025), https://www.nytimes.com/2025/09/26/opinion/google-judge-mehta-remedy-monopoly.html (last visited Jan. 29, 2026); Steve Lohr, *The Message for Big Tech in the Google Ruling: Play Nice, but Play On*, THE NEW YORK TIMES, (Sept. 3, 2025), https://www.nytimes.com/2025/09/03/technology/google-ruling-antitrust.html (last visited Jan. 29, 2026); Shiva Stella, *Public Knowledge Denounces U.S. v. Google Search Remedies Decision Avoiding Breakup*, PUBLIC KNOWLEDGE (Sept. 2, 2025), https://publicknowledge.org/public-knowledge-denounces-u-s-v-google-search-remedies-decision-avoiding-breakup/ (last visited Jan. 29, 2026) (criticizing the remedies in the recent Google search antitrust case for being inadequate).

[190] Thomas O. Barnett, *Section 2 Remedies: What To Do After Catching The Tiger By The Tail*, 76(1) ANTITRUST LAW JOURNAL 31(2009).

> consider not grabbing it in the first place. And in any event, it is not the best time to determine what to do with the tiger while holding on to its tail.

Accordingly, in addition to outlining the relevant theories of harm and the anticompetitive effects of Google's scraping of publisher data, this Article also discusses potential remedies.

A. Eliminating the tie: Publisher opt-in with granular choice

First, the court must terminate the illegal conduct i.e., Google must be prohibited from tying the inclusion of publisher data in the search index to its use for AI-related purposes. Any injunction must be drafted with sufficient precision to prevent Google from circumventing it through technical or contractual workarounds, or with choice architecture design that replicate the same exclusionary effect.[191] For example, Google might respond by offering publishers an opt-out mechanism that is difficult to locate or burdensome to exercise. Empirical research shows that most consent frameworks, and especially opt-out regimes provide only illusory control.[192] Larger firms are far more likely to exercise opt-out rights because they possess the resources to identify, understand, and implement them, whereas smaller firms face significantly higher costs in doing so.[193] Accordingly, if left to its own devices, Google could comply formally by offering a nominal opt-out buried in obscure settings, one that is effectively

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[191] Google has previously engaged in such forms of strategic or "malicious" compliance. Following the European Commission's comparison-shopping decision, which prohibited Google from preferentially treating its Google Shopping vertical, Google formally ceased overt self-preferencing but replaced it with an auction mechanism that required rival comparison-shopping services to pay for placement they might otherwise have achieved on the merits. That remedy preserved Google's anticompetitively acquired advantage and failed to restore effective competition in the shopping vertical. *See* Foo Yun Chee, *Exclusive: Scores of Google Rivals Want EU Tech Law Used in Antitrust Case*, REUTERS, Oct. 17, 2022, https://www.reuters.com/technology/exclusive-scores-google-rivals-want-eu-tech-law-used-antitrust-case-letter-2022-10-17/ (last visited Jan. 29, 2026); Thomas Hoppner, Google's (Non-) Compliance with the EU Shopping Decision, HAUSFELD (Sept. 2020), https://www.hausfeld.com/media/ok4ip4ld/final_googles_-non-_compliance_with_google_search_-shopping-_stand_15-12-2020_reduced_size.pdf (last visited Jan. 29, 2026).

[192] *See* Sean O'Connor et al., (Un)Clear and (In)Conspicuous: The Right to Opt-out of Sale under CCPA (July 14, 2021), http://arxiv.org/abs/2009.07884; Christine Utz et al., *(Un)Informed Consent: Studying GDPR Consent Notices in the Field*, *in* PROCEEDINGS OF THE 2019 ACM SIGSAC CONFERENCE ON COMPUTER AND COMMUNICATIONS SECURITY 973 (2019), http://arxiv.org/abs/1909.02638; Paul Graßl et al., *Dark and Bright Patterns in Cookie Consent Requests*, 3 JDSR 1 (2021).

[193] Fletcher, *supra* note 39 (Over half (57%) of the websites of legacy print publications were blocking OpenAI's crawlers by the end of 2023, compared to 48% of television and radio broadcasters, and around one-third (31%) of digital-born outlets).

inaccessible, particularly for smaller publishers. At a minimum, therefore, termination of the tie should not take the form of an opt-out regime but should instead require publishers to affirmatively opt in to the use of their data for AI training and grounding.

The technical committee tasked with monitoring compliance must also ensure that any opt-in process does not devolve into a perfunctory checklist to which publishers routinely assent without meaningful understanding.[194] Even under an opt-in regime, Google could deploy sophisticated interface strategies, commonly referred to as dark patterns, to steer publishers toward consent or to introduce friction that discourages refusal.[195] A 2022 FTC report documented the pervasive use of such tactics by large technology firms, including Google, to nudge users into unintended decisions.[196] In other contexts, Google has been reported to obscure privacy-protective choices, rely on coercive pop-ups, downplay material information, and design interfaces that are difficult to navigate.[197] The same playbook could easily be repurposed here, particularly to manipulate smaller publishers into acquiescence. Accordingly, the technical committee must ensure that the opt-in process secures meaningful and informed consent. At a minimum, publishers must clearly understand that withholding consent for AI-related uses of their data will not affect their search ranking or discoverability.

The opt-in mechanism for publishers could go further by providing more nuanced control than a binary all-in or all-out choice. Several initiatives have begun to articulate models of granular control for publishers. Creative Commons' CC Signals project introduces machine-readable 'preference signals' that allow publishers to express expectations about attribution, financial contribution, and other conditions for reuse.[198] CC designed Signals as a flexible layer that sits on top

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[194] *See* generally in the context of the GDPR, compliance being undermined through the use of dark patterns. Midas Nouwens et al., *Dark Patterns after the GDPR: Scraping Consent Pop-Ups and Demonstrating Their Influence*, *in* PROCEEDINGS OF THE 2020 CHI CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS 1 (2020), http://arxiv.org/abs/2001.02479.

[195] *See* Midas Nouwens et al., *Dark Patterns after the GDPR: Scraping Consent Pop-Ups and Demonstrating Their Influence*, *in* PROCEEDINGS OF THE 2020 CHI CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS 1 (2020), http://arxiv.org/abs/2001.02479; Than Htut Soe et al., *Circumvention by Design -- Dark Patterns in Cookie Consents for Online News Outlets* (June 24, 2020), http://arxiv.org/abs/2006.13985.

[196] *Bringing Dark Patterns to Light*, STAFF REPORT, FEDERAL TRADE COMMISSION (Sept. 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P214800+Dark+Patterns+Report+9.14.2022+-+FINAL.pdf (last visited Jan. 29, 2026).

[197] *Facebook and Google Use "dark Patterns" around Privacy Settings, Report Says*, BBC (June 28, 2018), https://www.bbc.com/news/technology-44642569.

[198] *CC Signals: A New Social Contract for the Age of AI*, CREATIVE COMMONS, https://creativecommons.org/ai-and-the-commons/cc-signals/ (last visited Jan. 29, 2026).

of traditional copyright rules and lets publishers articulate graduated permissions rather than a single yes-or-no choice.[199] The Text and Data Mining Reservation Protocol (TDMRep) takes a more formal approach. It allows publishers to indicate, through simple technical signals embedded in HTTP headers, HTML meta tags, or robots.txt, whether text and data mining is permitted for specific purposes.[200] The related TDM AI protocol brings this a step further by enabling creators to persistently and verifiably attach machine-readable usage preferences – such as an opt-out from text and data mining (TDM), automated processing, or AI training – to their digital works.[201] Cloudflare's Content Signals framework adds another layer by giving website operators a dashboard to specify whether their content may be used for generative-AI training, summarisation, or other automated uses.[202] These private initiatives also point toward a more robust remedial approach. Rather than limiting relief to a binary all-in or all-out choice, a court or technical committee could require Google to offer publishers a standardized menu of granular usage options as a default baseline.

B. Additional Remedies

The objective of remedies in monopolization cases is not merely to enjoin illegal conduct but also restore competition and prevent future monopolization.[203] Even a clear and accessible opt-in mechanism for all publishers, while necessary, would be insufficient on its own. Such a remedy would not dismantle Google's monopsony power, which could be exercised through numerous alternative mechanisms to achieve the same exclusionary effects. Most publishers, particularly small outlets and independent creators, lack the leverage or resources to negotiate bespoke licensing arrangements with a dominant buyer. Experience in the European Union illustrates this problem. Following the adoption of the 2019 Copyright Directive, which recognized publishers' rights over certain online uses of their content, lawmakers hoped that platforms would be forced to enter into licensing

[199] Jack Hardinges, *From Human Content to Machine Data: Introducing CC Signals*, CREATIVE COMMONS (June 2025), https://creativecommons.org/wp-content/uploads/2025/06/Human-Content-to-Machine-Data_Final.pdf (last visited Jan. 29, 2026).

[200] *TDM Reservation Protocol (TDMRep): Final Community Repor* (May 10, 2024), https://www.w3.org/community/reports/tdmrep/CG-FINAL-tdmrep-20240510/ (last visited Jan. 29, 2026).

[201] *What Is the TDM·AI Protocol? | TDM·AI*, (Nov. 4, 2025), https://docs.tdmai.org (last visited Jan. 29, 2026).

[202] *Giving Users Choice with Cloudflare's New Content Signals Policy*, THE CLOUDFLARE BLOG (Sept. 24, 2025), https://blog.cloudflare.com/content-signals-policy/ (last visited Jan. 29, 2026).

[203] United States v. Microsoft Corp., 253 F.3d 34, 103 (D.C. Cir. 2001) (en banc).

agreements.[204] Instead, Google leveraged its monopoly position by ceasing to display publisher snippets unless publishers granted permission for free use.[205] Publishers lacked meaningful bargaining power and were afraid that if they held out they risked losing traffic to competitors willing to acquiesce to Google's terms, so most publishers agreed to provide this content to Google for free. Although the French Competition Authority ultimately intervened, issuing interim measures and securing commitments from Google to negotiate, the episode demonstrated that prohibiting unauthorized uses alone does not automatically yield competitive outcomes or fair compensation.[206]

To restore competition and prevent recurrence of exclusionary effects arising from Google's exercise of monopsony power, the court would need to establish a negotiation framework that compels meaningful bargaining rather than leaving outcomes to market forces distorted by monopsony power. Such a framework should allow the parties to determine fair terms under which publishers, if they choose, could license their data for AI training and grounding. Absent such a negotiation framework, even if the tying arrangement were formally undone, Google would remain able to dictate terms as the monopsonist, leaving publishers with little effective bargaining power. A court fashioning remedies in such a case can choose among several negotiation frameworks.

1. Limited collective bargaining

One potential remedial approach would permit publishers to engage in limited, structured collective negotiation with Google over the licensing of publisher data for AI training and grounding.[207] The core objective of such an approach would not be to authorize broad seller-side coordination, but to reduce transaction costs and

[204] DIRECTIVE (EU) 2019/790 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 17 APRIL 2019 ON COPYRIGHT AND RELATED RIGHTS IN THE DIGITAL SINGLE MARKET AND AMENDING DIRECTIVES 96/9/EC AND 2001/29/EC.

[205] *"It's a Power Play" – Google's Test to Remove EU-Based News Content Raises Concerns*, THE FIX (Dec. 13, 2024), https://thefix.media/2024/12/13/its-a-power-play-googles-test-to-remove-eu-based-news-content-raises-concerns/; Kayali, *supra* note 177.

[206] *Related Rights: The Autorité Accepts Google's Commitments*, AUTORITÉ DE LA CONCURRENCE (June 21, 2022), https://www.autoritedelaconcurrence.fr/en/press-release/related-rights-autorite-accepts-googles-commitments (last visited Jan. 29, 2026).

[207] See Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021, https://www.accc.gov.au/by-industry/digital-platforms-and-services/news-media-bargaining-code/news-media-bargaining-code/final-legislation (last visited Jan. 29, 2026) (Australia's News Media Bargaining Code allows publishers to negotiate individually or collectively.)

counteract Google's monopsony power in circumstances where individual publishers lack any meaningful ability to negotiate.[208]

In practice, this could be accomplished by allowing publishers to form multiple, differentiated bargaining groups organized around shared licensing interests.[209] Publishers do not face uniform risks or derive uniform value from AI scraping. For example, publishers producing rapidly updating sports, financial, or election-related content may have heightened concerns about real-time scraping/ grounding, attribution, and free riding, whereas publishers producing evergreen content such as recipes or lifestyle content may place greater weight on long-term reuse and archival value. Allowing publishers to organize into groups based on objective characteristics, such as update frequency, time sensitivity, or content category, would enable negotiations to reflect these distinct licensing interests, rather than forcing heterogeneous publishers into a single, undifferentiated bargaining posture.[210] Collective negotiation would be limited exclusively to terms governing AI-related data use, and coordination amongst publishers on downstream pricing, subscriptions, advertising rates, or output would remain prohibited.

The size of these groups could be capped, for example, at no more than 15–20 percent of relevant publisher content, traffic, or search visibility. Such caps could create competition among bargaining units to attract small publishers and limit the ability of large, incumbent publishers to dominate collective bargaining arrangements. In the absence of a size constraint, a small number of major legacy publishers could aggregate a large share of publisher participation into a single coalition and effectively set the terms of negotiation for the industry as a whole. Their preferences need not represent a competitive outcome, nor outcomes preferred by consumers or smaller publishers. A cap constrains this dynamic by

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[208] *See* Johannes Munter, *Australia's News Media Bargaining Code Is a Major Success That the U.S. Can Emulate*, NEWS MEDIA ALLIANCE (Aug. 5, 2022), https://www.newsmediaalliance.org/australias-news-media-bargaining-code-is-a-major-success-that-the-u-s-can-emulate/ (last visited Jan. 29, 2026); Rhodri Davies, *Policy Case Study: The Impact of Digital Platforms Paying for News in Australia - Media Freedom Coalition*, MEDIA FREEDOM COALITION (Aug. 31, 2023), https://mediafreedomcoalition.org/news/2023/bargaining-codes-what-benefits/ (last visited Jan. 31, 2026) (While the impact of Australia's News Media Bargaining Code has been overall positive, small publishers have been less well-equipped to negotiate with Google and Meta and often don't know about the collective bargaining provisions).

[209] See generally *Major Publishers Unite Behind New AI Licensing Standard*, TECHBUZZ (Sept. 10, 2025) https://www.techbuzz.ai/articles/major-publishers-unite-behind-new-ai-licensing-standard (last visited Jan. 31, 2026) (the Really Simple Licensing (RSL) Standard, a framework that transforms the humble robots.txt file into a pricing menu for AI training data).

[210] *See* IAB Tech Lab, *supra* note 70 (Recognizes that publishers have different needs depending on their type of content and business model and accordingly proposes different monetization models like content partnerships, cost per crawl, and LLM ingest content API).

preventing any one coalition from becoming the default or unavoidable bargaining vehicle. By limiting the size of any single group, caps help preserve space for multiple coalitions to coexist, allowing publishers with shared objectives to organize without being subsumed by larger players.

The economic logic for permitting such limited collective bargaining is not novel. U.S. law has long recognized that, in markets characterized by severe asymmetries in bargaining power, atomized sellers may be unable to secure competitive terms when negotiating individually with a dominant buyer. In response, the law has permitted collective bargaining in specific contexts, including labor markets and agriculture.[211] For instance, labor unions enjoy some immunity from antitrust liability.[212] Similarly, the Capper-Volstead Co-operative Marketing Associations Act exempts collective bargaining by farm cooperatives from antitrust liability.[213] These arrangements reflect a recognition that collective negotiation can, in some circumstances, function as a corrective to monopsony power rather than a source of anticompetitive harm.

On balance, limited and supervised collective negotiation offers a plausible and relatively nonintrusive remedy. It directly targets the core problem—the absence of any meaningful bargaining process—while preserving flexibility, heterogeneity among publishers, and the possibility of competition on licensing terms.

2. Bilateral Monopoly

A second option would permit publishers to bargain with Google through a single, industry-wide entity. Under this approach, publishers would negotiate collectively over AI training and grounding terms, creating a bilateral monopoly: a single dominant buyer facing a single consolidated seller. The appeal of this model is intuitive. By eliminating fragmentation among publishers, an industry-wide entity would prevent Google from exploiting divisions among sellers and would, in theory, counterbalance Google's monopsony power. All publishers would speak with one voice, and Google would be unable to play one publisher, or one category of publishers, against another.

Bilateral monopolies exist in limited contexts, such as, defense procurement where a single contractor controls essential IP or production capabilities and sells

[211] *See generally* John Kenneth Galbraith, *Countervailing Power*, 44(2) THE AMERICAN ECONOMIC REVIEW 1 (1954).

[212] *See Federal Trade Commission Enforcement Policy Statement on Exemption of Protected Labor Activity by Workers from Antitrust Liability*, FEDERAL TRADE COMMISSION (Jan. 14, 2025), P251201, https://www.ftc.gov/legal-library/browse/enforcement-policy-statement-exemption-protected-labor-activity-workers-antitrust-liability (last visited Jan. 29, 2026).

[213] 7 U.S.C. §§ 291–92.

exclusively to the government;[214] or certain public utility settings, where a regulated utility serves a defined geographic area and transacts with a single purchaser, often a municipal or state entity acquiring power or services. In these settings, however, the transaction is often regulated because of the significant risk to competition.

This approach to a remedy does have some inherent problems. Most fundamentally, two wrongs do not make a right. Constructing a second monopoly to combat the first monopoly is far less effective than restoring competition.[215] Instead of restoring competitive conditions, this remedy institutionalizes market power on both sides of the transaction.[216] An industry-wide publisher entity would risk entrenching incumbents within the publishing ecosystem and making the whole industry more rigid and less innovative. The negotiating agenda might be captured by a subgroup of publishers who then shape licensing terms around their own business interests. Smaller, digital-native, or specialized publishers, whose interests may differ substantially, might have their needs overlooked, or be unable to pursue alternative licensing strategies on their own. Moreover, an industry-wide bargaining structure could also risk excluding new or nontraditional publishers whose business model may span boundaries or even not exist at the time the remedy is adopted.[217] These could fall outside the coalition's scope and be vulnerable to the exercise of monopsony power.

Timing considerations further weaken this approach. By the time an industry-wide bargaining entity could be established, Google's AI systems would already have been trained on years of historical data, enabling Google to generate substitute content without relying on publishers. As a result, publishers' bargaining leverage would be substantially reduced, and any negotiated outcome in a bilateral monopoly would be unlikely to resemble a competitive market outcome.

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[214] *See generally* Nayantara Hensel, *Can Industry Consolidation Lead to Greater Efficiencies? Evidence from the U.S. Defense Industry*, 45(3) BUSINESS ECONOMICS 187 (2010); A. M. Agapos, *Competition in the Defense Industry: An Economic Paradox*, 5(2) JOURNAL OF ECONOMIC ISSUES 41 (1971).

[215] Jonathan B. Baker et al., *Merger to Monopoly to Serve a Single Buyer: Comment*, 75 ANTITRUST L.J. 637 (2008).

[216] *Id*.

[217] See Rod Sims, *Three Ways Australia Can Stop Tech Giants from Walking Away from Journalism That Serves Us All*, THE GUARDIAN (Dec. 22, 2025), https://www.theguardian.com/commentisfree/2025/dec/22/australia-news-bargaining-incentive-nbi-google-facebook-meta-journalism-rod-sims-comment (last visited Jan. 29, 2026); *Australia's news bargaining code must widen to AI, TikTok*, FUTURE MEDIA W/ RICKY SUTTON AND CHAPELL (INTERVIEW OF ROD SIMS), https://www.art19.com/shows/future-media (last visited Jan. 29, 2026) (discussing how the News Media Bargaining Code could be adapted for the age of AI and TikTok).

3. Judicial or Regulatory Rate Setting

A third possible remedial framework is regulation: the court to order rate setting for the use of publisher data in AI training and grounding. Under this approach, prices and other key terms would be determined by a court or a specialized regulatory body rather than through private negotiation between Google and publishers. Rate setting is a familiar institutional response in U.S. law where market structure or bargaining conditions make negotiated outcomes unreliable. In particular, it has been used in settings characterized by extreme asymmetries in bargaining power, bilateral monopoly, or high coordination costs among sellers. Rather than attempting to recreate competitive bargaining conditions, the law in these contexts substitutes administered pricing to ensure access to essential inputs on reasonable and nondiscriminatory terms. The most prominent example is music licensing. Organizations such as ASCAP and BMI license musical compositions on an industry-wide basis, but prices are not left to unfettered negotiation.[218] Instead, rates are subject to judicial oversight through rate courts operating under consent decrees.[219]

Applied to the use of publisher data in AI systems, a rate-setting regime could take several forms. A court or commission could establish uniform rates applicable to all publishers, differentiated rates based on content type or update frequency, or a framework in which arbitration is available subject to judicial review. Rate setting could operate as a permanent regime or as an interim measure while other remedies are implemented. Given the rate of change in the industry, administered rates risk becoming outdated or misaligned with underlying value if they are not adjusted frequently, so a court will also need to take that into account.

Rate setting offers several potential advantages. It can mitigate disparities in bargaining power, reduce transaction costs, and ensure that smaller or nontraditional publishers are not excluded from compensation mechanisms. It also provides predictability and may prevent strategic delay or holdout behavior on either side. At the same time, rate setting presents significant challenges. Courts and regulators will need to develop the information and expertise necessary to set prices in rapidly evolving technology markets. If a court knows it will be setting prices for years to come, the judges will invest in acquiring this knowledge and the parties can assist in that process. The need for expertise suggests that the proceeding should take place in a specialized court and not bounce from one judge to another every

[218] Michael A. Einhorn, *Intellectual Property and Antitrust: Music Performing Rights in Broadcasting*, 24 COLUM. VLA J.L. & ARTS 349 (2001).

[219] Second Amended Final Judgment, United States v. ASCAP, No. 41-1395 (S.D.N.Y. 2001) (entered June 11, 2001), https://www.justice.gov/atr/case-document/file/485966/dl (last visited Jan. 29, 2026)

year. Placing the task in the hands of a specialized court raises the concerns of institutional capacity and regulatory entrenchment. But the alternative options are equally risky.

VIII. Conclusion

Google's legal transgressions warrant serious and immediate enforcement attention for several reasons. First, Google is a recidivist. Courts have already found that Google illegally monopolized both general search and digital advertising markets.[220] It is now leveraging that unlawfully maintained dominance in search to engage in a new round of anticompetitive exclusionary conduct against publishers. Enforcers have yet to remedy the harms caused by Google's prior violations.[221] Google should not be permitted to commit a second antitrust offense atop the wreckage of the first.

Second, enforcement experience with digital markets shows that lost competition can be extraordinarily difficult to restore. Early intervention can prevent harm before it becomes irreversible. That concern is especially acute here. Publishers are already experiencing significant foreclosure effects. If these pressures continue unchecked, and if publishers exit the market or substantially scale back investment, competition may not be recoverable. Building independent, credible publishers requires time, capital, institutional knowledge, and skilled journalists and editors. Once those institutions erode, the market cannot be easily rebuilt. Delayed enforcement therefore carries unusually high costs.

Third, Google sits at the center of a broad digital ecosystem, which allows the anticompetitive effects of its conduct to compound and spill over into adjacent markets. Google initially integrated its Gemini model into search in order to retain control over the gateway to the internet and avoid ceding that position to emerging rivals such as ChatGPT.[222] It has since begun integrating Gemini across its entire

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[220] United States v. Google LLC, 747 F. Supp. 3d 1 (D.D.C. 2024) (Google illegally maintained its monopoly position in general search through anticompetitive exclusive distribution agreements); United States v. Google LLC, 778 F. Supp. 3d 797, 859-863 (E.D. Va. 2025) (Google violated antitrust law by monopolizing open-web digital advertising markets)

[221] *See supra* note 189.

[222] Nico Grant & Cade Metz, *A New Chat Bot Is a 'Code Red' for Google's Search Business*, THE NEW YORK TIMES (Dec. 21, 2022), https://www.nytimes.com/2022/12/21/technology/ai-chatgpt-google-search.html (last visited Jan. 29, 2026); Nico Grant, *Google Calls In Help From Larry Page and Sergey Brin for A.I. Fight*, THE NEW YORK TIMES (Jan. 20, 2023), https://www.nytimes.com/2023/01/20/technology/google-chatgpt-artificial-intelligence.html (last visited Jan. 29, 2026); Nico Grant, *Google Devising Radical Search Changes to Beat Back A.I. Rivals*, THE NEW YORK TIMES (Apr. 16, 2023),

suite of applications. As a result, an AI model trained on data obtained through anticompetitive conduct is now being deployed throughout Google's ecosystem, conferring advantages that competitors cannot readily replicate. Gemini has already begun clawing away market share from ChatGPT and has emerged as one of the fastest-growing AI models.[223] As discussed above, publishers routinely block OpenAI's crawlers, but they are reluctant or even unable to block Google's, given their dependence on search visibility.[224] Google's recent gains in the market for "AI answer engines" therefore appear to rest on advantages that are, at least in part, ill-gotten through anticompetitive conduct.

Google's position at the center of a vast ecosystem, combined with its longstanding relationships with key third parties such as Apple, further amplifies these advantages.[225] Google has entered into an agreement under which its AI models will power Apple Intelligence, giving Gemini—built on the anticompetitive use of publisher content—significant distribution benefits.[226] Similarly, the integration of Gemini into Google products such as Maps or Photos may allow those services to compete more effectively with rivals that lack access to comparable AI features, data or distribution channels.[227] These spillover effects in

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https://www.nytimes.com/2023/04/16/technology/google-search-engine-ai.html (last visited Jan. 29, 2026).

[223] Katherine Blunt, *How Google Got Its Groove Back and Edged Ahead of OpenAI*, WALL STREET JOURNAL (Jan. 7, 2026), https://www.wsj.com/tech/ai/google-ai-openai-gemini-chatgpt-b766e160 (last visited Jan. 29, 2026); Berber Jin, *OpenAI Declares 'Code Red' as Google Threatens AI Lead*, WALL STREET JOURNAL (Dec. 2, 2025), https://www.wsj.com/tech/ai/openais-altman-declares-code-red-to-improve-chatgpt-as-google-threatens-ai-lead-7faf5ea6 (last visited Jan. 29, 2026); David Pierce, *Gemini Is Winning*, THE VERGE (Jan. 14, 2026), https://www.theverge.com/ai-artificial-intelligence/861863/google-gemini-ai-race-winner (last visited Jan. 29, 2026).

[224] *See infra* Part III.

[225] Samantha Subin, *Apple Picks Google's Gemini to Run AI-Powered Siri Coming This Year*, CNBC (Jan. 12, 2026), https://www.cnbc.com/2026/01/12/apple-google-ai-siri-gemini.html (last visited Jan. 29, 2026).

[226] Madhavi Singh, *Google–Apple Gemini Deal Underscores Tech's Antitrust Catch-22*, (Jan. 26, 2026), https://news.bloomberglaw.com/legal-exchange-insights-and-commentary/google-apple-gemini-deal-underscores-techs-antitrust-catch-22 (last visited Jan. 29, 2026).

[227] Aisha Malik, *Google Maps Now Lets You Access Gemini While Walking and Cycling*, TECHCRUNCH (Jan. 29, 2026), https://techcrunch.com/2026/01/29/google-maps-now-lets-you-access-gemini-while-walking-and-cycling/ (last visited Jan. 29, 2026); Jennifer Elias, *Google Brings More Gemini AI Features to Chrome Browser*, CNBC (Jan. 28, 2026), https://www.cnbc.com/2026/01/28/google-brings-more-gemini-ai-features-to-chrome-browser-.html (last visited Jan. 29, 2026); Jennifer Elias, *Google Is Unleashing Gemini AI Features on Gmail. Users Will Have to Opt Out*, CNBC (Jan. 8, 2026), https://www.cnbc.com/2026/01/08/google-adds-gemini-features-to-gmail-message-summaries-proofreading-.html (last visited Jan. 29, 2026).

related markets may be difficult or even impossible to unwind through antitrust remedies. Early enforcement is therefore essential to prevent the entrenchment and multiplication of these harms across related markets.

Finally, Google's broader AI strategy reflects an effort to co-opt creative disruption rather than compete on the merits.[228] After maintaining persistently high market shares in general search for years, Google confronted a genuine competitive threat from chatbot-based interfaces.[229] It responded by rapidly integrating AI features into search to avoid relinquishing its gatekeeper role.[230] However, as this Article shows, that strategy rests on a series of legal transgressions that exploit and exclude publishers. Creative disruption, once absorbed by a monopolist, cannot be recreated. Fortunately, as the article outlines, regulators already have the necessary legal tools to act. What is required now is the will to act before competition is irreversibly harmed.

[228] See *generally* Mark A. Lemley et al., *Coopting Disruption*, 105 BOSTON UNIVERSITY LAW REVIEW 457 (2025); Mark Lemley & Matt Wansley, *How Big Tech Is Killing Innovation*, THE NEW YORK TIMES (June 13, 2024), https://www.nytimes.com/2024/06/13/opinion/big-tech-ftc-ai.html (last visited Jan. 29, 2026).

[229] Grant & Metz, *supra* note 222.

[230] Grant, *supra* note 222.