

ILLUSTRATION BY TOM ROWE



THE PLOT TO KILL

BY NICHOLAS THOMPSON AND FRED VOGELSTEIN

Google may not be evil, but it sure does have enemies. How Microsoft, AT&T, and even the American Corn Growers Association are taking their fight against the search giant to Washington—and winning.

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WHEN GOOGLE'S LAWYERS ENTERED

the smooth marble hallways of the Department of Justice on the morning of October 17, they had reason to feel confident. Sure, they were about to face the antitrust division—an experience most companies dread—to defend a proposed deal with Yahoo. But they had to like their chances. In the previous seven years, only one of the mergers that had been brought here had been opposed. And Google wasn't even requesting a full merger. It just wanted the go-ahead to pursue a small deal that it was convinced would benefit consumers, the two companies, and the search-advertising market as a whole. Settling around a large oval table in the conference room, the attorneys from Google and Yahoo prepared to make their arguments. Google wanted to serve its ads for certain search terms on Yahoo's pages in exchange for a share of the revenue those ads generated. It already had similar arrangements with AOL, Ask.com, and countless other Web sites. And the deal wasn't exclusive or permanent. Tom Barnett, assistant attorney general for antitrust, took his seat at the table and called the meeting to order. The Yahoo lawyers kicked things off by describing their negotiations with DOJ staff; they had already suggested limiting the length of the deal and capping the amount of money in play. Barnett seemed unimpressed. "Staff," he proclaimed, "is irrelevant." He made the decisions around there. As five lawyers involved with the case recount it, the rest of the meeting did not go much better. For hours, Barnett picked apart the deal. Google, he argued,

was not preserving competition by keeping Yahoo solvent; it was trying to increase control over its old rival, with a goal of dominating the online search-advertising market. If the proposal was so harmless, he went on, why had he been deluged with letters and phone calls from advertisers opposing it? Then, late in the day, Barnett brought up the two words Google lawyers least wanted to hear: *Section Two*—as in, Section Two of the Sherman Antitrust Act, which criminalizes monopolies. The Justice Department invoked Section Two to splinter Standard Oil in 1911,

breakup AT&T in 1982, and prosecute Microsoft in 1998. Now Barnett was signaling not just that the Google-Yahoo deal was dead but that the government saw Google as a potential monopolist. In fact, Barnett insisted, if the deal wasn't substantially changed or scuttled, he would sue within five days. It was a stunning blow. Google had expected a speedy approval. Now the company, whose brand is defined by its "Don't be evil" slogan, faced the prospect of being hauled into court on an antitrust charge. Google and Yahoo tried to salvage the negotiations,

but on the morning of November 5, three hours before the DOJ was going to file its antitrust case, they abandoned the deal.

Google's capitulation marked a rare defeat for the search giant, which has been almost as successful among the regulators of Washington as among the coders of Silicon Valley. And it was cause for celebration in Redmond, where Microsoft spent six months on a massive effort, costing millions of dollars, to block the Yahoo deal. Microsoft played a role in persuading members of Congress to hold hearings. It initiated a campaign that filled DOJ mailboxes with letters from politicians and nonprofit groups objecting to the deal. It convinced the country's largest advertisers to join together to oppose the company in public. It's impossible to know exactly what impact all this had on the DOJ decision. But many observers believe that Barnett, who declined to be interviewed

for this article, was influenced in part by Microsoft's arguments.

The bid to stop the Yahoo deal was just one front in an emerging multi-pronged war against Google. The company's growth, ambitions, and politics have made it a target of some of the country's most powerful businesses and interest groups. When Google pressed the Federal Communications Commission to reallocate "white space"—unused chunks of radio spectrum—for wireless broadband and other uses, it ran into a counter-lobbying effort that included everyone from the National Association of Broadcasters to Dolly Parton, Google's push for net neutrality, which would forbid ISPs from giving preferential treatment to certain data providers, has been met by fierce resistance from telecom and cable companies, whose allies describe it as "special-interest legislation dressed up to sound less self-serving." It purchased YouTube, whose users' laissez-faire approach to copyright infuriates Viacom and other content providers. Google wants to digitize entire libraries, a prospect

that frightens publishers. It has terrified a legion of small businesses that feel at the mercy of its opaque but all-powerful search algorithm. It has annoyed Republicans by associating itself largely with Democrats.

The thwarting of the Yahoo deal was the most successful attack so far by the many forces aligned against Google—but it won't be the last. "There were a lot of sharks circling Google during the DOJ review," says Christopher Murray, senior counsel for Consumers Union. "Now there's a whiff of blood in the water. I expect a feeding frenzy in 2009."

HIGH-PROFILE LEGAL BATTLES AREN'T FOUGHT

only in the courtroom. Public perceptions matter. Momentum matters. Relationships matter. For John Kelly, Microsoft's head of strategic relations, this lesson didn't come easy. In the 1990s, the lawyer and former lobbyist watched as Microsoft defended itself against charges that its practice of bundling its software onto computers constituted anticompetitive behavior. The company settled the case in 2001. But by then it had already won a reputation as an unrepentant and thuggish monopolist, thanks in part to shrewd lobbying by competitors like Sun Microsystems and Netscape, uninspiring testimony by Bill Gates, and masterful media relations by David Boies, the government lawyer on the case.

"Ten years ago we said, 'This is all going to depend on being right in court,'" Kelly says. "'Don't worry about all the noise, rhetoric, and lobbying by our competitors.'

While the facts and the law are still what matters in the end, the important lesson we took away from that experience was that you could not let your competitors define you in the court of public opinion."

A decade later, Microsoft's reputation was still getting in its way. In January 2008, Microsoft made an unsolicited bid to purchase Yahoo. The takeover would help Microsoft bulk up its search advertising business, an area where Google held a huge advantage. But Yahoo CEO Jerry Yang, who viewed Microsoft as an uncompromising leviathan, was determined to block the deal. In early May, Microsoft dropped its bid—a tough defeat made even more frustrating when Google CEO Eric Schmidt celebrated the failure in comments to the media. "We're obviously happy it's not going to happen," Schmidt said at a press conference. "Had the merger gone through, we would have had to have a meeting around it. We would have had to have a campaign against it."

It was a stark reversal for Schmidt, who had made few public statements against Microsoft since joining Google in 2001. Kelly took the saber-rattling as a warning that Google was preparing to join the fray, per-

haps by proposing its own deal to keep Yahoo out of Microsoft's hands. (Sure enough, Google did just that on June 12.) For years, Microsoft had quietly seethed as Google waltzed into a position of immense power while charming regulators and politicians with an aura of gee-whiz innocence. Even when Google hired a small team of lobbyists and took the occasional swing at Redmond, the company's feel-good reputation remained intact. The idea that Google would end up inking a deal with Yahoo, increasing its domination of search advertising while successfully casting Microsoft—again!—as a power-mad Darth Vader, was more than Kelly could stand. "Frankly, we saw history repeating itself," he says. "We realized that we were going to have to speak up."

Kelly sprang into action, activating his company's vast Washington infrastructure. Microsoft's protracted antitrust battles had left it with an army of lawyers and lobbyists and deep institutional knowledge of which politicians to approach and how best to sway them. Soon, Microsoft's lobbyists were meeting with Herbert Kohl, chair of the Senate's Antitrust Subcommittee. By early July the subcommittee was holding

The Enemies List

Google is under fire on 4 fronts.

WHAT'S AT STAKE:

How much do you trust Google? The search giant says there's no reason to fear its purchase of DoubleClick or its proposed revenue-sharing deal with Yahoo. But competitors and major advertisers think it's plotting world domination.

WHO'S UPSET:

Association of National Advertisers, Microsoft, WPP Group

ANTITRUST

SPECTRUM

WHAT'S AT STAKE:

Every time a new chunk of radio spectrum becomes available, Google argues it should be opened to the public. Sounds great—except to telcos that have wanted it for themselves and broadcasters that worry new devices will mess with their transmissions.

WHO'S UPSET:

AT&T, National Association of Broadcasters, Verizon

Google

NET NEUTRALITY

PRIVACY

WHAT'S AT STAKE:

Google thinks all information is created equal and favors laws forbidding internet service providers from determining how fast content from different providers will download. ISPs, not surprisingly, beg to differ.

WHO'S UPSET:

AT&T, Comcast, Verizon

WHAT'S AT STAKE:

Google's insatiable hunger for data scares even some of its allies. Now its business rivals have launched a privacy crusade to drum up fears that Big Brother lives in Mountain View.

WHO'S UPSET:

AT&T, Center for Digital Democracy, Microsoft

hearings. In October, Kohl wrote to Harriett warning that "important competition issues are raised by this transaction."

But that was all familiar, the kind of campaign Microsoft had routinely run. Kelly wanted to take a different approach this time—not just opposing the deal but persuading other interested parties to speak out as well. The arguments of a known competitor may not sway the Justice Department, but customers' opinions hold special influence. If advertisers—Google's customers—voluntarily declared their opposition, the DOJ would listen closely.

Kelly turned to Michael Kassan, an advertising consultant who had been advising Microsoft off and on since 2002. Kassan—whose clients have included AT&T, Disney, and Viacom—recently had been named by *Advertising Age* as possessing the third-most-impressive Rolodex in the industry. Kelly asked Kassan to start talking to his contacts and drum up opposition to Google. Kassan assured him he knew just how to do it; there was plenty of fear and mistrust of Google among advertisers. "Google has badly misjudged how it is perceived," he reassured Kelly. "We have a clear and easy story to tell."

It went like this: Google had 70 percent of the search advertising business, and Yahoo had 20 percent. Now those two companies were proposing a business deal. That would give advertisers less leverage to negotiate ad rates, and they would end up paying more.

Kassan was eager to make his case. He flew to Cannes, France, where he pitched the board of the International Association of Advertisers. He traveled to conferences in New York, Washington, Los Angeles, and Florida. He talked to many of the 32 chief marketing officers on the board of the Association of National Advertisers, the trade group that represents the top 375 advertisers in the country. By late August, Kelly and Kassan were conducting as many as three conference calls a day with major national advertisers. Google, meanwhile, hadn't started any serious outreach effort to defend the deal to the advertising community.

The hardest part of the campaign wasn't convincing ANA's board members that the Google-Yahoo proposal was bad for them. The trick, Kassan says, was getting them to say so. Indeed, Kassan was rebuffed in June, when he first asked the head of the ANA to take a public stand. "They wanted me to do something right away," ANA president Bob Liodice says. "I told them I'd look at it. But at the time I had no ability to say whether the deal was bad or good, and the last thing

business and gain a stranglehold on online advertising. "The more we dug in, the more we realized that we had to say something," Liodice says. "The tipping point for me was that I had all these advertisers on my board opposing the deal. Meanwhile, Google and Yahoo couldn't produce any significant advertisers who were supporting it." In September, the ANA formally voiced its opposition. It wasn't alone; individual advertisers piled on with additional letters to the Justice Department expressing their own disapproval. DOJ staffers were talking about the "telephone book of complaints" they had received.

Microsoft's arguments weren't just winning over advertisers. Back in July, the company penned one of a series of confidential memos titled "Google + Yahoo? *Competition" and sent it to its allies and the Justice Department. The memo claimed that the Google-Yahoo deal was illegal on its face, mentioning as precedent the 68-year old case *United States v. Socony-Vacuum Oil Co. Inc.*, which Microsoft also cited in congressional testimony that same month. When Yahoo lawyer Dan Wall heard the argument, he didn't see how a 1940s case against conspiring oil companies bore much relevance to a deal in which prices are set by electronic auctions. But then a Justice official brought up *Socony* during one of their regular phone calls. "I thought, 'Good grief, they're buying the Microsoft BS,'" Wall says. "I don't have any doubt that Microsoft put that in DOJ's mind."

Meanwhile, the fight against Google quickly spread beyond Redmond, as other companies and trade groups began to lend support. Some had no obvious interest in the deal; Microsoft hired lobbyists who knew how to drum up support among rural and Latino groups, and before long organizations as far-reaching as the American Corn Growers Association and the Dominican American Business Network had voiced their opposition.

Other companies joined *hi*, including AT&T. Many observers believe that the telecom company hopes to compete directly with Google someday by going into the business of serving online ads to its users, and it



I wanted to do was have the organization looking like a shill for Microsoft."

Kassan and Kelly kept at Liodice, seeding his inbox with position papers, briefing documents, and news stories. Their goal was straightforward: Convince him that the AWA's position on the deal not only mattered but was crucial to stopping it. Liodice went on a fact-finding mission, inviting Google and Yahoo to answer questions and then sending written queries to executives at all three companies. Ultimately, he concluded that Google would drive Yahoo out of busi-

was happy for the opportunity to beat up on its future rival. On September 24, 10 members of Congress sent a letter to the DOJ opposing the deal. All of them have received donations from AT&T over their careers (average total contribution since 1996: \$29,000), and most counted the telecom giant as one of their largest contributors.

These campaigns converged at the October 17 Justice Department hearing, in which Barnett threatened to bring an antitrust case against Google. Publicly, Google remained upbeat after the arrangement fell apart. Lobbyists for the company maintained that even in failure they had kept Yahoo out of the hands of Microsoft for at least six months, perhaps permanently. And if Microsoft eventually tries to snap up Yahoo, Google can respond with the same kind of antitrust arguments that were deployed against it.

Kassan doesn't share Google's optimistic interpretation. "They have permanently invited the scrutiny of the Justice Department into every future deal they do," he says. "Nine months ago everyone aspired to be Google. Now they have *monopolist* written all over them."

GOOGLE BARELY HAD TIME TO RECOVER

from the failed Yahoo deal before its staff learned of a 94-page document titled "Google Data Collection and Retention," that had been circulating around Washington. The treatise listed all the ways that Google hoards user information. Google Checkout remembers credit card numbers. Gmail reads private email. Blogger saves draft posts. As one annotation on the document helpfully notes, Google's privacy policy "gives Google the right to retain personal information over the wishes of a user." Overall, Google is painted as a Big Brother with an insatiable desire for private data.

The document, written by a consulting firm, was commissioned by AT&T, which says it was intended only for internal use. Protection from snooping, says AT&T public policy chief James Cicconi, is one of his firm's top priorities. "We sell our customers access to the Internet," he says, "and we want them to have a good experience."

Privacy is a newfound concern for the company, which in 2005 was one of the telecoms that allowed the National Security Agency to listen in on millions of phone calls. AT&T was accused of "warrantless wiretapping" before successfully lobbying Congress to grant it immunity against suits by its customers. But now AT&T is trumpeting the cause of consumer privacy, unveiling an elaborate policy stating that it will not sell its customers' browsing histories to advertisers without explicit permission.

But AT&T's nascent crusade may also be in the service of a less noble agenda: keeping up its attack on Google. Over the past couple of months, several AT&T allies have spoken out against what they describe as Google's disdain for privacy. Scott Cleland, who serves as CEO of a telecom-funded consultancy, has turned his widely read blog into a Google attack machine, with posts titled "Why Google Is the Biggest Threat to Americans' Privacy" and "Google Protecting Its Privacy to Invade Your Privacy." In late November, a cochair of an advocacy group called the Future of Privacy Forum published an op-ed in the *Bangkok Post* titled "Google Is Watching You." The writer was a former lawyer for AT&T, which is the group's sole funder. AT&T is also launching volleys under its own name: When its senior vice president of public policy introduced the company's new set of policies in front of the Senate, she repeatedly named Google as a privacy threat—and mentioned no other company in the entire testimony.

Once again, AT&T has found an ally in Microsoft. LMG, a public-relations firm that Microsoft hired to help defeat the Yahoo deal, has emailed public-interest advocates accusing Google of privacy violations. Last spring, Microsoft supported bills in the New York and Connecticut legislatures to impose strict regulations on businesses that gather personal information online for marketing purposes. The bills would hurt Microsoft, too, given that it also wants to sell advertisements based on customer behavior. But the self-inflicted wound may be worth it for the damage it causes Google.

True to form, Google remains cheery and confident. The company's reputation still beats the stodgy, unfriendly images of Microsoft and AT&T. Google executives also know they may be able to win some supporters on this issue; advertisers, the same group whose complaints torpedoed

the Yahoo deal, aren't put off by Google's attempts to collect user data—it only helps them create more targeted ads.

And for all its woes in Washington, Google is finally learning how to operate there. It has hired more lobbyists, and its policy experts are starting to attend the cocktail parties they have long ignored. Schmidt serves as chair of the New America Foundation (a think tank at which one of the authors of this article was a fellow). And Google can now boast a uniquely powerful ally: Barack Obama, who benefited from Google employees' extensive campaign contributions and from Schmidt's well-timed endorsement.

AT&T maintains that even Google's Democratic pals might turn against the company over privacy. "Civil libertarians have fought hard over decades to establish a right to privacy as fundamental to preserving all other liberties enshrined in our Constitution," Cicconi says. "It would be shameful if liberals now toss that achievement over the side because a liberal, pro-Obama, hip-cool-trendy company comes along that wants to run roughshod over those rights." Leslie Harris, president of the Center for Democracy and Technology, a nonprofit that has long fought Google on privacy grounds, says she considers AT&T's recent interest in her cause "a perfect storm in our favor." And Google isn't out of the antitrust woods yet, either. Sanford Litvack—a government lawyer who would have run the DOJ's suit against Google had it not withdrawn the Yahoo proposal—says that, in his opinion, Google's current position may already constitute a monopoly, even without Yahoo.

Traditionally, Google has fought off powerful rivals with masterful code. It took on the established search behemoths by creating more effective software. It bested Microsoft's and Yahoo's advertising efforts by inventing an entirely new ad platform. But the war today is being fought in Washington, in the press, and perhaps even in the Justice Department again. And these aren't battles you can win with engineers and algorithms. 

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