

FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

DEC 6 2022

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

DREAMSTIME.COM, LLC,

No. 20-16472

Plaintiff-Appellant,

D.C. No. 3:18-cv-01910-WHA

v.

OPINION

GOOGLE LLC,

Defendant-Appellee.

Appeal from the United States District Court  
for the Northern District of California  
William Alsup, District Judge, Presiding

Argued and Submitted February 16, 2022  
San Francisco, California

Before: Ronald M. Gould and Johnnie B. Rawlinson, Circuit Judges, and Jennifer  
G. Zipps,\* District Judge.

Opinion by Judge Gould

---

\* The Honorable Jennifer G. Zipps, United States District Judge for the  
District of Arizona, sitting by designation.

## SUMMARY\*\*

---

### Antitrust

The panel affirmed the district court's dismissal of an antitrust claim brought by Dreamstime.com, LLC, an online supplier of stock images, against Google LLC.

Dreamstime alleged that Google violated § 2 of the Sherman Act by maintaining a monopoly in the online search advertising market. Dreamstime asserted that Google furthered this monopoly by impeding Dreamstime's use of Google's paid advertising services as well as harming Dreamstime's performance on Google's free search engine. The district court dismissed on the ground that Dreamstime did not sufficiently allege anticompetitive conduct in the relevant market of online search advertising.

A § 2 claim includes two elements: (1) the defendant has monopoly power in the relevant market, and (2) the defendant has willfully acquired or maintained monopoly power in that market. To meet the first element, a plaintiff generally must (1) define the relevant market, (2) establish that the defendant possesses market share in that market sufficient to constitute monopoly power, and (3) show that there are significant barriers to entering that market. The second element requires that the defendant engaged in willful acts to acquire or maintain a monopoly in the relevant market. This element requires a showing that a defendant possessing monopoly power undertook anticompetitive conduct and did so with an intent to control process or exclude competition in the relevant market.

The panel held that the record did not support Dreamstime's contention that it defined the relevant market to include the online, organic search market (in addition to the online search advertising market). Rather, by its course of conduct before the district court, Dreamstime waived any § 2 claim arising from the online search market.

The panel affirmed the district court's conclusion that Dreamstime failed to allege anticompetitive conduct in the online search advertising market. The panel

---

\*\* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

held that, as to Dreamstime's allegations that Google mistreated Dreamstime as a Google customer, Dreamstime did not show that this mistreatment harmed competition in the online search advertising market, and so there was no antitrust injury. Allegations related to Dreamstime's performance in Google's unpaid, organic search results did not plausibly state a claim for anticompetitive conduct in the online search advertising market. Dreamstime's allegation that Google unlawfully captured data from users and advertisers also did not state anticompetitive behavior.

Finally, the panel held that the district court properly dismissed Dreamstime's § 2 claim with prejudice and without leave to amend.

The panel addressed additional issues in a separate memorandum disposition filed simultaneously with this opinion.

---

## COUNSEL

---

Jaime W. Marquart (argued), Donald R. Pepperman, and Brian T. Grace, Waymaker LLP, Los Angeles, California; James Bailey, Bailey Duquette PC, New York, New York; Jason A. Fischer, Bryn & Associates PA, Miami, Florida; for Plaintiff-Appellant.

Jonathan M. Jacobson (argued) and Brian M. Wilen, Wilson Sonsini Goodrich & Rosati, New York, New York; Lauren Gallo White (argued) and Paul N. Harold, Wilson Sonsini Goodrich & Rosati, San Francisco, California; Kelly M. Knoll and Dylan J. Liddiard, Wilson Sonsini Goodrich & Rosati, Palo Alto, California; for Defendant-Appellee.

Sandeep Vaheesan, Open Markets Institute, Washington, D.C., for Amicus Curiae Open Markets Institute.

GOULD, Circuit Judge:

This appeal arises from an antitrust action brought by Dreamstime.com, LLC (“Dreamstime”), an online supplier of stock images, against Google LLC. In short, Dreamstime alleged that Google violated Section 2 of the Sherman Act by maintaining a monopoly in the online search advertising market. Dreamstime asserted that Google furthered this monopoly by impeding Dreamstime’s use of Google’s paid advertising services as well as harming Dreamstime’s performance on Google’s free search engine. The district court dismissed Dreamstime’s Section 2 claim with prejudice. The district court reasoned that Dreamstime had not sufficiently alleged anticompetitive conduct in the relevant market of online search advertising. Dreamstime appeals, and we affirm.

## **FACTUAL BACKGROUND**

### **I**

Google operates the most used search engine in the world. Google’s search engine connects users to websites based on the search query that a user enters into the search bar on Google. Google uses proprietary algorithms to interpret user search queries, cross-reference Google’s index of webpages, and display a ranked list of webpages to users. Google’s algorithms take into account, among other things, the page’s relevance, usability, and age, as well as the user’s past behavior and browser settings, to identify and rank relevant webpages. Google also operates

a search engine for images (“Google Images”) that shows relevant pictures at the top of the search results. Google Images has become the largest image repository in the world. Google does not charge users for its search services.

Instead, Google’s search services are monetized, in part, by advertising revenues. Google’s online advertising service is called “Google Ads.”<sup>1</sup> Google Ads charges companies to display their ads next to the search results generated by Google’s search engines as well as on other websites. When displayed next to Google’s search results, these advertisements are referred to as “sponsored” or “paid” search results. By contrast, the search results generated by Google’s search engines—and displayed alongside these advertisements—are referred to as “organic” or “free” search results.

## II

Dreamstime, a supplier of online stock images, is based in Romania. Dreamstime offers a searchable repository of tens of millions of stock photos for purchase as well as millions of free images. Dreamstime, for its business model, relies heavily on user traffic directed to it from search engines like Google. About two-thirds of Dreamstime’s customers come to its website from search results generated by such search engines.

---

<sup>1</sup> Google Ads was formerly known as “Google AdWords” and is, at times, referred to as such in the parties’ briefing.

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.