



DEPARTMENT OF JUSTICE

“...And Justice for All”¹: Antitrust Enforcement and Digital Gatekeepers

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Good afternoon. Thank you, Michal, for that introduction and thank you to Barak Orbach and the rest of the conference organizers for inviting me to speak with you today. At the outset, I want to commend all of you for taking up the timely and thought-provoking issue of antitrust enforcement in the digital economy.

Last October, I had the privilege of discussing antitrust, innovation, and “big data” at the University of Haifa. Since then, the Antitrust Division has been busy. We have invited prominent academics and industry experts into the Department to discuss the digital economy, and we have hosted an advertising workshop that explored, among other things, competition in online and mobile advertising networks. We are working hard on behalf of consumers and free markets thanks to the talented career staff of the Antitrust Division.

As a patent attorney turned antitrust lawyer, I am delighted to see the many ways that Israel promotes competition to foster an ecosystem of innovation. We in the United States know the transformative power of invention. Sound policy, buoyed by the rule of law, and markets that are governed by competition have allowed the United States to become a “cradle of innovation.” Israel has certainly contributed – and continues to contribute – to human welfare through its incredible technological breakthroughs in medicine, communications, and information science. I applaud you and encourage you to keep pushing forward. All the world over benefits from creativity and ingenuity.

As you well know, digital technologies improve our lives in myriad ways. They can facilitate the delivery of faster, better, and cheaper products and services. They can make transactions more efficient. And digital platforms, in particular, can reduce the cost of market participation for certain kinds of sellers, including workers.

The digital economy is a fact of life, but it is not all things to all people. There has been robust public discussion about whether the broader economy, undoubtedly transformed by digital technologies, is working well for everyone. While some commenters have tried to dispatch the

¹ See Metallica, ... *And Justice for All*, on ...AND JUSTICE FOR ALL (Elektra Records 1988).

antitrust laws to address these problems, I do not believe the antitrust laws are bent towards values other than competition. As Justice Black explained in *Northern Pacific Railway v. United States*, the Sherman Act, our first U.S. antitrust law, is “aimed at preserving free and unfettered competition as the rule of trade” and “the policy unequivocally laid down by the Act is competition.”²

Therefore, the right question is whether a defined market is *competitive*. That is the province of the antitrust laws.

Even with these precepts in mind, the current landscape suggests there are only one or two significant players in important digital spaces, including internet search, social networks, mobile and desktop operating systems, and electronic book sales. This is true in certain input markets as well. For example, just two firms take in the lion’s share of online ad spending.

We know that some markets lend themselves to participation by a small number of firms for reasons having nothing to do with a failure of competition. Even so, digital markets are not impervious to anticompetitive transactions, illegal restraints, and unlawfully obtained or exercised monopoly power. For many years, the Antitrust Division has borne out the task of investigating whether markets in this important economic sector are competitive.

Where there are credible concerns that a transaction or business practice is anticompetitive, timely and effective antitrust enforcement is imperative. To quote Orrin Hatch, the legendary former Chairman of the U.S. Senate Judiciary Committee, “Vigilant and effective antitrust enforcement today is preferable to the heavy hand of government regulation of the Internet tomorrow.”³ We know this firsthand. After all, the government’s successful antitrust case against Microsoft arguably paved the way for companies like Google, Yahoo, and Apple to enter the market with their own desktop and mobile products.

Fortunately for us in the United States, the dedicated men and women of the Technology & Financial Services Section of the Antitrust Division are experts on the intersection of

² 365 U.S. 1, 4 (1958).

³ Noah Shachtman, *Talking the Talk on Antitrust*, WIRED, <https://www.wired.com/1998/09/talking-the-talk-on-antitrust/> (Sept. 17, 1998).

competition law and technology, and they have been at the cutting edge of enforcing the antitrust laws in high-tech and digital markets for decades.

As we think about antitrust enforcement in the digital economy, the key issues that antitrust enforcers must untangle are whether a company is growing due to superior price, quality, and innovation, or whether some transaction or business practice is, on balance, anticompetitive in purpose and effect.

I do not pretend to have all of the answers today. Nonetheless, I would like to describe some historical analogs and set out a few scenarios that might attract the Antitrust Division's attention.

I. Past is Prologue

The United States has a long history of trustbusting. Early cases against titans of industry offer valuable lessons for today's antitrust enforcers. I will briefly discuss three of them.

The first is *Standard Oil v. United States*.⁴ Let me acknowledge at the outset that *Standard Oil* is about a decidedly non-digital world. The Standard Oil Company was an industrial giant, however, and it was revered for its patented technologies and commercial prowess. It rose in prominence during a period of rapid change that coincided with the Second Industrial Revolution. It also amplified the value of kerosene and petroleum to consumers in transformative and unforeseen ways. One can draw interesting parallels between those circumstances and the present day. Most notably, we live in a time when consumers are more aware of the power of digital data, which, according to some, may herald the next major Industrial Revolution.

Standard Oil acquired many refineries in the late 19th century. Refiners that would not sell were underpriced and driven out of the market.⁵ Price-cutting is the essence of competition, of course, but the *Standard Oil* case and later Supreme Court cases helped establish what would become settled law: there are *some* things that a monopolist cannot do. A company does not

⁴ 221 U.S. 1 (1911).

⁵ *Id.* at 23.

ordinarily violate the antitrust laws for merely exercising legitimately gained market power. But even if a company achieves monopoly position through legitimate means, it cannot take actions that do not advance plausible business goals but rather are designed to make it harder for competitors to catch up. In some other contexts, we have referred to this concept as the “no economic sense test.”⁶ That test inquires into whether a monopolist’s conduct would make no economic sense but for its tendency to eliminate or lessen competition.

Another important parallel for modern observers is that consumers actually enjoyed lower prices during the height of Standard Oil’s dominance. This was likely due to, among other things, a combination of economies of scale, superior bargaining power, and overall declining input prices.⁷ It nonetheless demonstrates that price effects are not the sole measure of harm to competition under the U.S. antitrust laws.

Innovation is also an important dimension of competition. Like today’s tech giants, Standard Oil was pioneering and generated a number of important patents. Scholars have noted, however, that Standard Oil’s innovation slowed as it became an entrenched monopolist.⁸

The United States ultimately sued Standard Oil for conspiring to restrain and monopolize trade and commerce in petroleum, refined oil, and other products of petroleum.⁹ The Supreme Court explained that Standard Oil’s “very genius for commercial development and organization which ... was manifested from the beginning soon begot an intent and purpose to exclude others which was frequently manifested by acts and dealings wholly inconsistent with ... advancing the development of business power by usual methods[.]”¹⁰ Standard Oil was broken up into 34 companies.

⁶ See, e.g., Brief of the United States as Amicus Curiae, *Viamedia, Inc. v. Comcast Corp., et al.*, No. 18-2852 (7th Cir. Nov. 8, 2018).

⁷ See Frederic M. Scherer, *Standard Oil as a Technological Innovator* (Harvard Kennedy Sch. Gov’t, Working Paper No. RWP11-008, Jan. 2011).

⁸ Frederic M. Scherer, *Technological Innovation and Monopolization* 7 (Harvard Kennedy Sch. Gov’t, Working Paper No. RWP07-043, Oct. 2007) (explaining that Standard Oil’s patenting was rapid before it began acquiring competitors, that patenting showed no significant growth and lower absolute rates during Standard Oil’s period of dominance, and that patenting grew after the dissolution of the company in 1912).

⁹ *Standard Oil*, 221 U.S. at 31.

¹⁰ *Id.* at 76.

The second case I will discuss is *United States v. AT&T*, which was filed in 1974.¹¹

The American Telephone & Telegraph Company (“AT&T”) largely grew out of the invention of the telephone. Alexander Graham Bell filed his first telephone patent application on Valentine’s Day in 1876. AT&T began installing telephone networks, which would eventually become interconnected, and acquiring local competitors over the ensuing decades.¹²

It was also an early example of network effects. As it bought local competitors and refused to connect independent companies to its long distance lines, customers obtained more value by working with AT&T.

In 1913, AT&T made commitments to the government that it would divest Western Union, allow independent telephone companies to use its telephone network, and refrain from acquiring independent phone companies without the government’s approval.¹³ It maintained its monopoly for decades after that.

Interestingly, independent companies complained that the commitment prevented them from selling out on advantageous terms with AT&T.¹⁴ Indeed, this complaint is evocative of start-ups for whom a popular exit strategy is acquisition by a large firm in the same or an adjacent market.

AT&T held near-monopoly positions in its telephone equipment and its telecommunications service businesses. Its maintenance of those monopolies triggered a series of antitrust complaints. In 1974, the United States sued AT&T for monopolization and alleged a long list of restrictive practices. The company defended its practices and its “integrated” structure by arguing that it offered the public superior price, performance, and innovation.¹⁵ This argument was not successful. After years of litigation, the company agreed to be broken up

¹¹ Complaint, *United States v. AT&T*, No. 74-1698 (D.D.C. Nov. 20, 1974).

¹² See Scherer, *supra* note 8, at 15.

¹³ See *id.* at 15-16.

¹⁴ *Id.* at 16.

¹⁵ *Id.* at 21.

into separate local and long-distance companies – the “baby Bells” – in 1982 by the Reagan Administration.

Lastly, I’d like to discuss *United States v. Microsoft*.¹⁶ In 1998, the United States filed a lawsuit alleging Microsoft of illegally maintaining its monopoly position in the Intel-based personal computing operating systems market by, among other things, imposing restrictions on the ability of original equipment manufacturers (or OEMs) and consumers to uninstall Internet Explorer and use alternative programs such as Netscape.

Internet Explorer and the competing browsers were free to consumers. Microsoft argued that combining Windows and Internet Explorer was the result of innovation and competition – that the products were inextricably linked and consumers benefited from getting Internet Explorer free.

The court held that Microsoft had a monopoly in the market for certain personal computer operating systems and that it had taken actions to maintain that monopoly from middleware competitors like Netscape that threatened that market power, in violation of Section 2 of the Sherman Act.

Although Microsoft was not broken up into smaller companies, the government’s successful monopolization case against Microsoft may very well have paved the way for companies like Google, Yahoo, and Apple to enter with their own desktop and mobile products.

II. Lessons from Old Monopolies

The United States has a long history of trust-busting in emerging and technologically-advanced markets. The cases I just described offer a handful of important lessons for antitrust enforcers and practitioners alike.

First, as the *Microsoft* case and other enforcement actions involving digital technologies show, we already have in our possession the tools we need to enforce the antitrust laws in cases

¹⁶ 87 F. Supp. 2d 30 (D.D.C. 2000), *aff’d*, 253 F.3d 34 (D.C. Cir. 2001).

involving digital technologies. U.S. antitrust law is flexible enough to be applied to markets old and new.

Those who say we need new or amended antitrust laws to address monopoly concerns should look to history and take heart. It turns out American concerns about monopoly are older than the Constitution itself.

In the spring of 1787, a quorum of U.S. state delegates met in Philadelphia to revise the Articles of Confederation. By the fall, the delegates had voted to replace the Articles with a Constitution, although it wouldn't be ratified until 1789.

Good students of history – and devoted fans of the Broadway hit musical *Hamilton* – will remember that Thomas Jefferson was serving as U.S. Ambassador to France at this time. On December 20, 1787, Jefferson wrote to his friend James Madison with his views about the draft Constitution. He complimented a number of aspects of the Constitution, including “the organization of government into Legislative, Judiciary and Executive.”¹⁷ He was not pleased with the entire document, however. He wrote: “I will now add what I do not like. First the omission of a bill of rights providing clearly and without the aid of sophisms for freedom of religion, freedom of the press, protection against standing armies, *restriction against monopolies*, the eternal & unremitting force of the habeas corpus laws, and trials by jury in all matters of fact triable by the laws of the land & not by the law of Nations.”¹⁸

We never got our constitutional amendment against monopoly. Although agreements in restraint of trade and monopolies were prohibited at common law, Congress nevertheless passed our first antitrust statute, the Sherman Act, in 1890.

Through their general wording, and their focus on competitive process and consumer welfare, the antitrust laws allow U.S. courts to continue to apply legal principles and sound economic reasoning to identify harmful practices that the antitrust laws should prevent.

¹⁷ Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *available at* <https://founders.archives.gov/documents/Jefferson/01-12-02-0454>.

¹⁸ *Id.* (emphasis added).

Second, in order to understand what conduct is anticompetitive and thus unlawful, the Antitrust Division works hard to become expert on the commercial realities of the digital economy.

Broadly speaking, in some digital markets, the competition is for user attention or clicks. If we see the commercial dynamics of internet search, for example, in terms of the Yellow Pages that were delivered to our doors a generation ago, we cannot properly assess practices and transactions that create, enhance, or entrench market power – and in some cases monopoly power.

Like the old monopolies, firms operating in digital markets are typically built on proprietary technology. The most successful ones seek to build and leverage networks that drive down costs while amassing a large number of customers. Eventually, the more customers a platform has, the more valuable it may be for each individual user. Economists would refer to this phenomenon as an example of network effects. In many ways, *AT&T* and *Microsoft* leveraged network effects to create or heighten barriers to entry.

Third, clever positioning should not obscure what is otherwise ordinary evidence of an antitrust violation. Where a company has market power, enforcers should be circumspect about conduct that does not plausibly advance a legitimate business objective and transactions that eliminate competition. Depending on the commercial realities of a given market, enforcers may uncover facts that support taking a longer-than-usual view of entry.

Finally, the Antitrust Division does not take a myopic view of competition. Many recent calls for antitrust reform, or more radical change, are premised on the incorrect notion that antitrust policy is only concerned with keeping prices low. It is well-settled, however, that competition has price and non-price dimensions.

Price effects alone do not provide a complete picture of market dynamics, especially in digital markets in which the profit-maximizing price is zero. As the journalist Franklin Foer recently said, “Who can complain about the price that Google is charging you? Or who can

complain about Amazon's prices; they are simply lower than the competition's."¹⁹ Harm to innovation is also an important dimension of competition that can have far-reaching effects. Consider, for example, a product that never reaches the market or is withdrawn from the market due to an unlawful acquisition. The antitrust laws should protect the competition that would be lost in that scenario as well.

In addition, diminished quality is also a type of harm to competition. As an example, privacy can be an important dimension of quality. By protecting competition, we can have an impact on privacy and data protection. Moreover, two companies can compete to expand privacy protections for products or services, or for greater openness and free speech on platforms. Where competition pushes companies to develop quality elements that better satisfy consumer preferences, our enforcement can protect that sort of competition too.

III. What Kinds of Issues Might Raise Enforcers' Concerns?

Let me now offer some generalized and non-exhaustive observations about anticompetitive conduct and types of transactions in digital markets that could trigger closer scrutiny by the Antitrust Division in some circumstances.

As in any industry, broad categories of potential anticompetitive conduct might include monopolization, as well as coordinated, predatory, and exclusionary conduct that harms competition.

The Antitrust Division may look askance at coordinated conduct that creates or enhances market power. Consider, for example, the Antitrust Division's investigation of Yahoo! and Google's advertising agreement in 2008.²⁰ The companies entered into an agreement that would have enabled Yahoo! to replace a significant portion of its own internet search advertisements with advertisements sold by Google. The Antitrust Division's investigation determined that the agreement, if implemented, would have harmed the markets for internet search advertising and internet search syndication where the companies accounted for over 90 percent of each market,

¹⁹ Nicholas Thompson, *Author Franklin Foer on Controlling the Power of Big Tech*, WIRED, <https://www.wired.com/story/author-franklin-foer-on-controlling-the-power-of-big-tech/> (Oct. 11, 2017).

²⁰ Press Release, U.S. Dep't of Justice, Antitrust Div., *Yahoo! and Google Inc. Abandon Their Advertising Agreement* (Nov. 5, 2008), https://www.justice.gov/archive/atr/public/press_releases/2008/239167.htm.

respectively. The agreement was abandoned after the Antitrust Division informed the companies that it intended to file a lawsuit to block the implementation of the agreement.

Collusion is sometimes the easiest type of anticompetitive conduct to identify, especially *per se* offenses like price-fixing, bid-rigging, and market allocations. Notably, these categories of conduct are criminal violations of the Sherman Act. Between 2010 and 2012, the United States filed complaints against Adobe, Apple, eBay, Google, Lucasfilm, Intel, Intuit, and Pixar alleging that the companies had entered into unlawful agreements not to poach each other's employees, which constituted *per se* violations of Section 1 of the Sherman Act.

Exclusivity is another important category of potentially anticompetitive conduct. The Antitrust Division has had a long history of analyzing exclusive conduct in traditional industries under both Sections 1 and 2 of the Sherman Act. Generally speaking, an exclusivity agreement is an agreement in which a firm requires its customers to buy exclusively from it, or its suppliers to sell exclusively to it. There are variations of this restraint, such as requirements contracts or volume discounts.

To be sure, in some circumstances, these can be procompetitive, especially where they enable OEMs and retailers to maximize output and overcome free-riding by contractual partners. In digital markets, they can be beneficial to new entrants, particularly in markets characterized by network effects and a dominant incumbent.

They also can be anticompetitive, however, where a dominant firm uses exclusive dealing to prevent entry or diminish the ability of rivals to achieve necessary scale, thereby substantially foreclosing competition. This is true in digital markets as well.

The line between when exclusivity agreements are procompetitive and when they substantially foreclose competition may not always be easy to determine, but cases like *United States v. Dentsply* give us a framework to analyze them.²¹ In that case, the Antitrust Division alleged that Dentsply, which held approximately 70 to 80 percent of the market for the manufacture of artificial teeth, entered into exclusive dealing arrangements with 30 independent

²¹ 399 F.3d 181 (3d Cir. 2005).

dealers. The U.S. Court of Appeals for the Third Circuit held that the contracts violate Section 2 of the Sherman Act because Dentsply was the dominant or exclusive choice of key distributors. Thus, the contracts helped Dentsply preserve its monopoly and harmed competition by keeping sales of competing teeth manufacturers below the critical level necessary to pose a real threat to Dentsply's market share.

The *Microsoft* case, which I described earlier, is a useful illustration of how problematic exclusive tying arrangements may occur in technology markets. Microsoft tied its Windows operating system to internet explorer by taking action to discourage OEMS and users from uninstalling to the detriment of competition. This theory is broadly applicable to other technology markets.

The last topic I will discuss today is anticompetitive transactions in the digital economy, particularly acquisitions of early stage companies. Section 7 of the Clayton Act prohibits mergers and acquisitions "where the effect may be substantially to lessen competition, or to tend to create a monopoly."²²

Acquisitions of nascent competitors can be procompetitive in certain instances and anticompetitive in others. They can be beneficial to the extent they combine complementary technologies or bring products and services to market that would not have been made available to consumers otherwise. It is not possible to describe here each way that a transaction may harm competition in a digital market, but I will note the potential for mischief if the purpose and effect of an acquisition is to block potential competitors, protect a monopoly, or otherwise harm competition by reducing consumer choice, increasing prices, diminishing or slowing innovation, or reducing quality. Such circumstances may raise the Antitrust Division's suspicions.

IV. Conclusion

While antitrust is not a panacea for every policy challenge presented by the digital market, the Antitrust Division will not shrink from the critical work of investigating and challenging anticompetitive conduct and transactions where justified.

²² 15 U.S.C. § 18.

That is because where competition is harmed, consumers and markets lose with higher prices, lower quality, lower rate of innovation, less free speech, and even lower privacy protections. Protecting competition means protecting all of those dimensions of competition.

In supporting the passage of the law that came to bear his name, Senator Sherman said: “If we will not endure a king as a political power, we should not endure a king over the production, transportation, and sale of any of the necessities of life. If we would not submit to an emperor, we should not submit to an autocrat of trade”²³

The Antitrust Division is working hard to stay true to this vision today.

Thank you.

²³ 21 Cong. Rec. 2457 (1890).