

THERE BUT FOR THE GRACE OF GOD



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I. INTRODUCTION

The recent hearings on digital markets rest upon the assumption that these markets exhibit unique attributes that the current version of the antitrust laws cannot address. Specifically, proponents of revising the antitrust laws argue first, that there are unique competitive issues with digital markets that are likely to entrench dominant firms and retard innovation;² second, that digital markets are not behaving in a competitive manner; and third, the antitrust laws should be modified to deal with the unique issues in these markets.

Even a cursory review reveals flaws in these propositions. Many markets have high levels of concentration, economies of scale and scope, and network effects. There is no evidence that digital markets have less competition than these markets. To the contrary, there is not only significant entry in digital markets, but these markets show significant research and development (“R&D”) investment that is inconsistent with the existence of monopoly power.

Most importantly, there is no evidence that the antitrust laws must be modified to deal with the so-called unique issues in digital markets. To the contrary, modification is most likely to retard innovation and investment in digital markets, making it potentially easier for less innovative and lower quality competitors to compete.

II. DIGITAL MARKETS ARE NOT UNIQUE

It argued that there are six distinctive features of digital markets that justify new digital market regulators and legislation:³

1. Zero monetary price
2. Limitation to switching and multihoming,
3. Importance of data,
4. High levels of concentration,

5. Economies of scale and scope, and
6. Network effects.

But these statements are either not true or not unique.

It is not true that zero monetary price increases barriers to entry. When access is free, it is costless for customers to both multi-home and switch. As David Evans has explained:

People find it generally easy, and often costless, to use multiple online platforms, and many often do. The ease and prevalence of multihoming have enabled new firms, as well as cross-platform entrants, to attract significant numbers of users and secure critical mass necessary for growth. Incumbent platforms then face serious competitive pressure from new entrants—startups or other online platforms—because their network effects are reversible.⁴

Indeed, it is not uncommon for individuals to be customers of Instagram, Snapchat, TikTok, and YouTube, all of which are free services. 85 percent of teens use Instagram, 82 percent use Snapchat, 62 percent use Tiktok, which would be impossible without significant multihoming and switching.⁵

As the Department of Justice (“DOJ”) has recognized, multihoming is one of the numerous “constraint[s] on platforms. ... All else equal, multi-homing occurs more often when the cost of adopting an additional platform is low, and is especially common in zero-price markets. ...

2 See e.g. Press Release, David N. Cicilline, Congressman, *Judiciary Committee Launches Investigation into Competition in Digital Markets* (June 3, 2019), <https://cicilline.house.gov/press-release/judiciary-committee-launches-investigation-competition-digital-markets> (“Market power in digital markets presents a whole new set of dangers,” said Antitrust Subcommittee Chairman David N. Cicilline (D-RI).); *id.* (quoting Antitrust Subcommittee Ranking Member Jim Sensenbrenner, “As the world becomes more dependent on a digital marketplace, we must discuss how the regulatory framework is built to ensure fairness and competition”); Sen. Amy Klobuchar, Transcript of Senate Judiciary Committee Antitrust Subcommittee Hearing (Sept. 15, 2020) (“[T]his could be the beginning of a reckoning for our antitrust laws to start looking how we’re going to grapple with the new kinds of markets that we see across our country.”).

3 See Jason Furman et. al., *Unlocking Digital Competition, Report of the Digital Competition Expert Panel* (mar. 2019) ¶ 1.20. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf (hereinafter “Furman Report”).

4 David S. Evans, *Why The Dynamics Of Competition For Online Platforms Leads To Sleepless Nights, But Not Sleepy Monopolies*, SSRN (Aug. 23, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009438.

5 *TikTok’s Already the 3rd Favorite Social Platform Among US Teens*, MARKETING CHARTS (April 27, 2020), <https://www.marketingcharts.com/digital/social-media-112790> (citing Piper Sandler’s biennial Taking Stock With Teens survey, conducted in fall 2019, <https://www.statista.com/chart/22446/most-used-social-media-platforms-by-us-teens/#:~:text=According%20to%20the%20survey%20conducted,and%2036%20percent%20for%20Facebook>).

Multi-homing occurs in zero-price markets because they are often highly differentiated.”⁶

Furthermore, zero monetary price to users is not unique to digital markets and has existed for decades or more.⁷ Common historical examples include broadcast radio (since the 1920s); broadcast television; shopping malls, zero-price weekly newspapers; and the old Yellow Pages.⁸ Take broadcast television stations as an example. All had zero monetary price to users, and yet there was no barrier either to multi-homing, or to entry by subscription services offered by cable companies.

Zero monetary pricing is also observed outside platforms markets, including, for example: “the supply of complementary products and services; the so-called ‘freemium’ model, in which a supplier offers a free version as well as a higher quality paid-for version [e.g. Dropbox]; [and] short-term strategies (e.g. promotions).”⁹ As the DOJ has explained: “Zero-price strategies ... may enable new entrants to break into markets, increasing competition and consumer choice. Firms in zero-price markets often compete on quality and innovation, which can benefit consumers.”¹⁰

It is also not true that data is more important in digital platforms than in other markets or that digital platforms have unique access to data. Take gaming, where Microsoft, Sony, and Nintendo collectively have nearly 100 percent of the gaming console market,¹¹ and where Unity provides the engine for more than 50 percent of mobile games.¹² There is no question that these firms have important and valuable data on what their users like. Take electric cars, where Tesla has an 81.66 percent market share and presumably has more information on electronic battery performance than its rivals.¹³ Take a company like Illumina. They have nearly 90 percent of the Next Generation Sequencing (“NGS”) market in the United States,¹⁴ and an estimated 80 percent globally.¹⁵ They have more access to data on how to improve their NGS than other competitors in the market.

It is also not true that digital markets are inordinately concentrated. Altria and Reynolds have more than 80 percent of cigarette and tobacco manufacturing in the United States.¹⁶ Intel, Samsung, and Micron have over 80 percent of semiconductor and circuit manufacturing.¹⁷ Four airlines have 80 percent of the market.¹⁸ Home Depot and Lowe’s control 90 percent of the home improvement store market.¹⁹ Mars and Hershey

6 Makan Delrahim, U.S. Department of Justice, “I’m Free”: Platforms and Antitrust Enforcement in the Zero-Price Economy, at 13-14, <https://www.justice.gov/opa/speech/file/1131006/download> (hereinafter “‘I’m Free’ Speech”).

7 See *id.* at 2 (“the strategy of selling a product or service at zero price is not new, nor is it unique to the digital economy.”).

8 Davis S. Evans, *The Antitrust Economics of Free*, University of Chicago Law School Chicago Unbound (2011), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1483&context=law_and_economics.

9 DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS COMPETITION COMMITTEE, OECD at 2 (Nov. 28, 2018), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/quality_considerations_in_digital_zero-price_markets_united_states.pdf (internal citations omitted).

10 “I’m Free” Speech, *supra* note 6 at 7.

11 Nav Patel, *PS4 vs Xbox One vs Switch: Console and Game Sales Numbers - 2019*, HOOKED ON TECH (Mar. 30, 2019), <https://hookedontech.com/ps4-vs-xbox-one-vs-switch-console-and-game-sales-numbers-2019/>

12 Romain Dilet, *Unity CEO says half of all games are built on Unity*, Tech Crunch (Sept. 5, 2018), <https://techcrunch.com/2018/09/05/unity-ceo-says-half-of-all-games-are-built-on-unity/>

13 Anand Gupta, *Why a New Crop of Electric SUV Batteries are Coming up Short*, EQ INTERNATIONAL (April 9, 2019), <https://www.eqmagpro.com/why-a-new-crop-of-electric-suv-batteries-are-coming-up-short/>; Fred Lambert, *Tesla holds 80% of US EV market despite losing federal tax credit*, ELECTREK (Aug. 21, 2020), <https://electrek.co/2020/08/21/tesla-holds-us-ev-market-losing-federal-tax-credit/#:~:text=According%20to%20data%20gathered%20by,the%20first%20half%20of%202020>.

14 Compl. ¶1, *Illumina, Inc. & Pacific Biosciences of California, Inc.*, F.T.C. Case No. 9387 (Dec. 17, 2019), https://www.ftc.gov/system/files/documents/cases/d9387_illumina_pacbio_administrative_part_3_complaint_public.pdf (hereinafter “Illumina complaint”).

15 Maxx Chatsko, *What Happens Next for Illumina and Pacific Biosciences?*, Motley Fool (Dec. 28, 2019), <https://www.fool.com/investing/2019/12/28/what-happens-next-for-illumina-and-pacific-bioscie.aspx> (“Illumina boasts an 80% market share of the global next generation sequencing (NGS) market, making it the undisputed king of reading genomes.”).

16 CIGARETTE & TOBACCO MANUFACTURING IN THE US - MARKET RESEARCH REPORT, IBISWORLD (May 15, 2020); see also Marisa Lifschutz, *Top 5 Highly Concentrated Manufacturing Industries*, IBISWORLD INDUSTRY INSIDER (May 2, 2019), <https://www.ibisworld.com/industry-insider/analyst-insights/top-5-highly-concentrated-manufacturing-industries/>.

17 *Id.*

18 *Monopoly by the Numbers*, Open Markets, <https://www.openmarketsinstitute.org/learn/monopoly-by-the-numbers>

19 CLAIRE O’CONNOR, HOME IMPROVEMENT STORES IN THE US, IBISWORLD (June 2020).

control nearly 75 percent of the chocolate market.²⁰ Visa, MasterCard, and American Express have virtually 100 percent of the credit card market.²¹

Many of these markets also have scale and scope economies and network effects. The more people who use Illumina's NGS platform, the more applications are built for Illumina sequencers, the more people use Illumina's NGS platform. The same is true for gaming, credit cards, and countless other alternatives. Should these companies be regulated? Should the antitrust laws be altered for them as well?

III. NO EVIDENCE THAT DIGITAL MARKETS ARE NOT COMPETITIVE

Digital markets are characterized by several indicators of competitive markets. For example, digitally-focused companies led the world in R&D spending by public companies for 2018, with Amazon and Google spending the most, Microsoft and Apple in the top ten, and Facebook in the top fifteen, above pharmaceutical giant Pfizer.²² Apple's R&D spending has grown from \$1 billion in 2009 to an estimated \$13 billion in 2019, an amount some observers say "illustrates Apple's push to keep up with new rival technologies and to innovate in new categories."²³

Amazon has surpassed Google as the leader in product searches, growing from 46 percent to 54 percent of searches between 2015 and 2018, while Google declined.²⁴ Among Amazon Prime subscribers, 74 percent report starting their searches on Amazon.²⁵ Nearly 90 percent of Amazon's product views now come from its own product search features,²⁶ and its revenues for advertising against those searches have been growing significantly, increasing 40 percent year-over-year as of Q4 2019.²⁷ There is no question that Amazon's share of search advertising is growing faster than Google's business.

Snapchat reaches more 13 to 24-year olds than Facebook or Instagram in the United States, United Kingdom, France, Canada, and Australia, reaching nearly 90 percent of Americans in this demographic and 75 percent of those aged 13 to 34.²⁸ Snapchat has 238 million daily active users, up 17 percent year-over-year as of July 2020, with steady quarterly growth.²⁹

TikTok has grown 800 percent since January 2018 with approximately 100 million monthly active users in the United States as of August 2020. About half of these users are engaged daily.³⁰ Globally, TikTok has grown to 689 million monthly active users as of July 2020.³¹

Google's share of digital advertising has declined steadily over the past four years, from 40.8 percent in 2016³² to 29 percent

20 *North America Chocolate Market - Growth, Trends, and Forecasts (2020-2025)*, Mordor Intelligence, <https://www.mordorintelligence.com/industry-reports/north-america-chocolate-market>.

21 *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

22 Furman Report, *supra* note 3 (citing PwC 2018 Global Innovation 1000 study).

23 *Apple's R&D Spending Goes from \$1B to \$13B in 2019*, PYMNTS.com (May 17, 2019), <https://www.pymnts.com/apple/2019/research-development-spending-innovations/>.

24 Press Release, Jumpshot, *Jumpshot Releases State of eCommerce Data Report that Reveals New Retail Strategies for Sponsored Search, Affiliate Marketing and Influencers* (May 16, 2019), <https://www.prnewswire.com/news-releases/jumpshot-releases-state-of-e-commerce-data-report-that-reveals-new-retail-strategies-for-sponsored-search-affiliate-marketing-and-influencers-300851315.html> (hereinafter "Jumpshot State of eCommerce Report"); see also *Do Most Searches Really Start on Amazon?*, EMARKETER (Jan. 7, 2020), <https://www.emarketer.com/content/do-most-searchers-really-start-on-amazon>.

25 Laurie Wilson, *Most Americans Still Start Product Searches on Amazon Before Google*, CIVIC SCIENCE (May 20, 2020), <https://civicscience.com/most-americans-still-start-with-amazon-before-google-for-product-searches>.

26 Jumpshot State of eCommerce Report, *supra*, note 25.

27 Ginny Marvin, *Amazon's Booming Ad Business Grew by 40% in 2019*, MARKETING LAND, <https://marketingland.com/amazons-booming-ad-business-grew-by-40-in-2019-275312>

28 Josh Constine, *Snapchat launches Scan, its AR utility platform*, TECH CRUNCH, <https://techcrunch.com/2019/04/04/snapchat-scan-platform/>; Transcript of Snap Inc at JPMorgan Technology, Media and Communications Conference (Virtual), NewsRoom (May 12, 2020).

29 Transcript of Snap Inc. Q2 2020 Earnings Call (July 21, 2020), https://s25.q4cdn.com/442043304/files/doc_financials/2020/q2/snap-inc-q2-2020-earnings-transcript-v1.pdf.

30 Alex Sherman, *TikTok Reveals Detailed User Numbers For the First Time*, CNBC (Aug. 24, 2020), <https://www.cnbc.com/2020/08/24/tiktok-reveals-us-global-user-growth-numbers-for-first-time.html>.

31 *Id.*

32 *Facebook* vs. Google Share of Total US Digital Ad Spending*, EMARKETER, <https://www.emarketer.com/chart/217028/facebook-vs-google-share-of-total-us-digital-ad-spending-2016-2020-of-total-digital-ad-spending>.

in 2020, even as the overall market has grown.³³ Even before the pandemic, Google's share had declined to 36.3 percent in early 2020.

One cannot seriously argue that there is less entry in digital markets than in other markets that are not subject to special rules. For example, name an entrant in automobiles in the last 50 years with more than a 5 percent share. Or name a new credit card company with more than a 5% share, new significant tobacco company, new significant daily urban newspaper, new significant broadcast television station, new significant cable company, new significant oil and gas company. You can't.

IV. CONCLUSION

Most of Google's complainants are not consumers or even small competitors. They are incumbent dominant firms who own once-monopolistic daily newspapers (NewsCorp), cable companies (Comcast who owns Freewheel), and phone companies (AT&T who owns AppNexus). They hate technology companies that reduce prices and improve product quality for the same reason all competitors hate these things.

These large firms want nothing more than to saddle innovative technology companies with the heavy hand of regulation, hoping that such regulation will retard the innovation and investment of technology companies.

But these firms are not alone. They have joined with frequently well-intentioned academics who have an ambitious goal that extends far beyond technology firms. The basic premise of these academics is that the United States has a widespread "monopoly problem" that far extends beyond digital markets.³⁴ These critics have long maintained that the antitrust laws must be altered to deal with this alleged problem.

Concerns like income inequality and equal opportunity are important in their own right as are concerns over privacy and data protections. These concerns should not be manipulated by dominant firms to deprive consumers of the many benefits of technology - free, high quality, innovative products. Especially when the very firms who are complaining want nothing more than to charge consumers for the very products that technology companies are frequently providing to consumers for free.

In the end, the focus on digital platforms should not be understood as a narrowly tailored focus on the unique attributes of

these platforms, but rather should be seen as the first in what is likely to be a widespread effort to reform the antitrust laws that have so far incentivized firms to innovate and grow. The tech firms are the first, but not the last firms by any stretch of the imagination. And this should be concerning to any successful firm with a great product that consumers love and competitors hate. After all, the next hearings most certainly will be about how non-technology companies' need to let regulators and politicians redesign their products and share their data and innovations with rivals.■

33 Brad Adgate, *In A First, Google Ad Revenue Expected To Drop In 2020 Despite Growing Digital Ad Market*, FORBES (June 22, 2020), <https://www.forbes.com/sites/bradadgate/2020/06/22/in-a-first-google-ad-revenue-expected-to-drop-in-2020-despite-growing-digital-ad-market/#76aabe44607d>;

34 See, e.g. Joseph Stiglitz, *America Has a Monopoly Problem--and It's Huge*, THE NATION (Oct. 23, 2017), <https://www.thenation.com/article/archive/america-has-a-monopoly-problem-and-its-huge/>.