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DELINEATING DIGITAL MARKETS IN ANTITRUST CONTEXTS

❖ Note ❖

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I. INTRODUCTION

As digitization and technology increasingly affect all aspects of life, law makers and academics alike continue to consider how antitrust law can be applied to digital markets. Concerns over big data, data security, monopolization, privacy, and unfair competition practices have garnered much attention across the globe in the last decade.[1] How and whether antitrust law should effectively address these concerns remains a hotly debated topic in the antitrust community.

Many people have called for more aggressive antitrust action in order to decrease the size and influence of big digital companies like Amazon, Facebook, and Google.[2] Critics, however, have emphasized that a more economics-oriented approach suggests that mere "anti-bigness" goals may actually hinder economic growth, innovation, and, ultimately, consumer welfare.[3] Is there an economically sound way antitrust law can effectively be applied to digital markets while simultaneously keeping consumer welfare the central focus? To help answer this question, this Note analyzes the current antitrust case against Facebook and the idea of market delineation within antitrust law.

From its inception, antitrust law has delineated markets and relied, to a significant extent, on market shares to determine monopolistic behavior.[4] Section 2 of the Sherman Act prohibits monopolization or attempted monopolization.[5] Section 7 of the Clayton Act bars acquisitions that

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[1] *See generally,* Benjamin M. Fischer, *The Rise of the Data-Opoly: Consumer Harm in the Digital Economy*, 99 WASH. U. L. REV. 729 (2021); Mason Marks, *Biosupremacy: Big Data, Antitrust, and Monopolistic Power over Human Behavior*, 55 U.C. DAVIS L. REV. 513 (2021); Joshua P. Zoffer, *Short-Termism and Antitrust's Innovation Paradox*, 71 STAN. L. REV. Online 308 (2019)

[2] *See, e.g.,* Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age*, HARV. L. REV. 1655, 1681-82 (2018); Lina M. Khan, *Amazon's Antitrust Paradox,* 126 YALE L. J. 710, 802-05 (2017); Elizabeth Warren, *Here's How We Can Break Up Big Tech,* MEDIUM (Mar. 8, 2019), https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c.

[3] *See, e.g.,* Robert W. Crandall, *The Dubious Antitrust Argument for Breaking up the Internet Giants*, 54 INDUS. ORG. REV. 627, 628–34 (2019); Matt Rosoff, *Op-ed: This Week Showed How the Big Tech Antitrust Campaign is Totally Misguided*, CSNBC (June 30, 2021, 5:55 PM), https://www.cnbc.com/2021/06/30/op-ed-antitrust-crusade-against-big-tech-is-misguided.html.

[4] Gregory J. Werden, *The History of Antitrust Market Delineation*, 76 MARQ. L. REV. 123, 125-26 (1992).

[5] 15 U.S.C. § 2.

substantially decrease competition.[6] Together these two acts form the substantive backbone of antitrust law. In order to determine whether a corporation holds monopoly power, the market to which they belong must first be defined.[7] Once the market is delineated, the corporation's market share percentage is determined.[8] Traditionally, corporations who hold a high market share percentage within a particular market have been broken up by antitrust law.

Applying traditional antitrust market delineation ideas to big tech markets has proven challenging for several reasons. First, many tech companies act as intermediary platforms bringing together two or more groups that provide value to each other.[9] For example, Facebook brings together advertisers and users, and the value one group gets is dependent on the participation and interaction of the other group.[10] Furthermore, many tech companies operate in "zero-price markets," meaning that they set prices at $0 for one group.[11] Value is then derived from harvesting data from these zero-price users and analyzing the data for advertising purposes.[12] Lastly, the rapidly evolving nature of digital markets present special challenges for antitrust law makers as proposed new frameworks can become outdated quickly.[13] These challenges are especially present in the recent antitrust case against Facebook, Inc.

In December 2020, the Federal Trade Commission ("FTC") and forty-six states sued Facebook, Inc. ("Facebook"), claiming it held monopoly power and engaged in anticompetitive behavior in violation of antitrust law.[14] The FTC and the states accused Facebook of maintaining a dominant share of the "Personal Social Networking Services" market ("PSN services market") in violation of Section 2 of the Sherman Act.[15] Additionally, the FTC and the states accused Facebook of violating Section 7 of the Clayton Act when it acquired several companies that could have potentially competed with Facebook – most notably its acquisition of Instagram in 2012 and WhatsApp in 2014.[16]

In June 2021, the U.S. District Court of the District of Columbia, tossed both complaints; however, it allowed the FTC to file an amended complaint for the Section 2, monopolization claim.[17] The court held that the FTC's assertion that Facebook held over sixty percent of the PSN services market was unsupported, speculative, and conclusory as the FTC offered no indication of the metric(s) or method(s) used to calculate Facebook's market share percentage.[18] In spite of this, the Court dismissed only the complaint and not the entire case, theorizing that the defect could conceivably be overcome by repleading.[19] This effectively gave the FTC another chance to clarify the market to which Facebook belongs and how much of that market Facebook controls. A new approach in delineating Facebook's market may be advantageous for the FTC when it files its amended complaint; however, before addressing new approaches one must first understand the traditional approaches to market delineation in antitrust law. In Part II of this Note, I will discuss

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[6] *Id.* § 18.

[7] Werden, *supra* note 4, at 123-24.

[8] *Id.*

[9] Mark Jamison, *Applying Antitrust in Digital Markets: Foundations and Approaches*, B.C. INTELL. PROP. & TECH. F. 1, 14 (2020).

[10] John M. Newman, *Antitrust in Zero-Price Markets: Foundations*, 164 U. PA. L. REV. 149, 151 (2015).

[11] *Id.*

[12] *Id.* at 156-57

[13] Jamison, *supra* note 9.

[14] New York v. Facebook, Inc., 549 F. Supp. 3d 6, 14-15 (D.D.C. 2021).

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] Fed. Trade Comm'n v. Facebook, Inc., No. 20-3590 (JEB), 2021 WL 2643627, at *1 (D.D.C. June, 28 2021).

[19] *Id.*

how antitrust law has developed the idea of market delineation and the traditional goals antitrust law has sought to achieve. In Part III, I will discuss the current, working framework for delineating markets and some of its shortcomings. Finally, Part IV of this Note will provide a recommendation for how a new approach to delineating Facebook's market is workable.

II. BACKGROUND

Antitrust law originated in the United States in the late nineteenth century in response to the rapid growth of private companies due to the technological advancements of the industrial revolution.[20] The Sherman Act of 1890 was the first federal antitrust statute.[21] It codified states' pro-competition common law doctrines and allowed the federal government to bring civil and criminal actions for antitrust violations.[22] The Sherman Act contained two main prohibitions: (1) concerted actions to restrict trade and (2) monopolization or attempted monopolization.[23] In 1914, two amendments to the Sherman Act were passed – the Federal Trade Commission Act, which created the Federal Trade Commission, and the Clayton Antitrust Act.[24] The Clayton Antitrust Act clarified and expanded federal antitrust laws to cover anticompetitive acts, including price discrimination, exclusive dealing (i.e., tying arrangements), anticompetitive mergers and acquisitions, and interlocking corporate directorships.[25]

One of the most famous early antitrust cases involved the breakup of Standard Oil Company after it bought most of the oil refining companies in the United States.[26] Antitrust litigation continued to follow a pattern of breaking up big corporations in favor of smaller business during and after the Progressive Era.[27] The goal of early antitrust law was to ensure "free and fair competition" in the marketplace, and outcomes were often focused on protecting smaller, less powerful competitors.[28] Political motivations for early antitrust laws were fueled by populist sentiments.[29] But, as the Supreme Court increasingly enforced antitrust law in broader contexts, some economists became skeptical of the effects of antitrust law.[30]

In 1978, Professor Robert Bork, then a law professor at Yale Law School, wrote *The Antitrust Paradox,* in which he argued that consumers often benefited from corporate mergers and that many theories of antitrust law were economically irrational and hurt consumers.[31] He argued that antitrust law had gone too far and should focus on consumer welfare, not ensuring competition.[32] This prompted a dramatic decrease in antitrust litigation during the Reagan Administration; a shift that is largely still in effect today.[33] Today, antitrust law is still heavily influenced by Professor Bork's ideas

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[20] Laura Phillips Sawyer, *US Antitrust Law and Policy in Historical Perspective* 3-5 (Harv. Bus. Sch, Working Paper No. 19-110, 2019).

[21] *Id.*

[22] *Id.*

[23] 15 U.S.C. § 2.

[24] Sawyer, *supra* note 20.

[25] 15 U.S.C. § 18.

[26] *See generally* United States v. Standard Oil Co. of New Jersey, 221 U.S. 1 (1911).

[27] *See generally* Brown Shoe Co. v. United States, 370 U.S. 294 (1962); United States v. Von's Grocery Co., 384 U.S. 270, 86 (1966); Utah Pie Co. v. Cont'l Baking Co., 386 U.S. 685 (1967).

[28] *Antitrust 2: The Paradox*, NPR (Feb. 20, 2019, 4:29 PM), https://www.npr.org/transcripts/696337392.

[29] Jamison, *supra* note 9, at 7.

[30] *Antitrust 2: The Paradox*, *supra* note 28.

[31] *See generally* ROBERT BORK, THE ANTITRUST PARADOX (1978).

[32] *Id.*

[33] *Antitrust 2: The Paradox*, *supra* note 28.

that consumer welfare and innovation are best achieved by largely leaving the market to itself.[34] However, with the rapid rise of big tech and concerns over the commodification of data and human attention, some have questioned whether Professor Bork's idea and called for far-reaching antitrust reform.

Among those at the forefront of antitrust reform are Senators Elizabeth Warren and Amy Klobuchar. In Klobuchar's 2021 book *Antitrust: Taking on Monopoly Power from the Gilded Age to the Digital Age*, Senator Klobuchar provides a narrative backdrop to her current legislative efforts to reform antitrust law in regard to how it deals with large technology companies.[35] Senator Warren suggests breaking up all "platform utilities," which she defines as "[c]ompanies with an annual global revenue of $25 billion or more and that offer to the public an online marketplace, an exchange, or a platform for connecting third parties."[36] Critics of Senator Warren and Klobuchar's attempts at legislative antitrust reformation argue that current antitrust law is equipped to deal with digital markets and that in many cases current antitrust law has led to the right conclusion.[37] While perhaps an entirely new framework for dealing with digital markets may be on the horizon, looking at market delineation in digital market contexts may be helpful to make the current structure work more effectively in the meantime.

III. ANALYSIS

In a famous early antitrust law case, Judge Learned Hand declared that while ninety percent "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough."[38] Despite Judge Hand's less-than-clear declaration on *how much* of a market share makes up a monopoly, he did not comment on how to determine what makes up a particular market in the first place. In fact, many early antitrust cases failed to address core market delineation concerns and often focused on exclusionary conduct instead of market structure.[39] By the mid-twentieth century, however, the substantive concerns of market delineation in antitrust contexts became unavoidable.

In the 1953 U.S. Supreme Court case *Times-Picayune Publishing Co. v. United States*, the court employed an idea in economics known as "cross-elasticity of demand" for the first time to help define markets.[40] In economics, cross elasticity of demand measures the quantity demanded of one good in response to the change in price of another.[41] If a change in price in one good causes an increase in demand in another, similar good, then those goods are considered substitutes of one another.[42] A market consists of substitutes identified on the basis of cross-elasticity of demand. The

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[34] *Id.*

[35] *See generally* AMY KLOBUCHAR, ANTITRUST TAKING on MONOPOLY POWER from the GILDED AGES to the DIGITAL AGES (1st ed. 2021).

[36] Warren, *supra* note 2.

[37] John Ceccio, Christopher Mufarrige, *Digital Platform Competition, Merger Control, and the Incentive to Innovate: Don't Kill the Goose That Lays the Golden Egg*, 30 COMPETITION: J. ANTI., UCL & PRIVACY SEC. CAL. L. ASSOC. 52, 69 (2020).

[38] United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945).

[39] *See, e.g.,* United States v. United States Steel Corp., 251 U.S. 417, 451 (1920) ("[T]he law does not make mere size an offence or the existence of unexerted power an offence."); Standard Oil Co. v. United States, 221 U.S. 1, 62 (1911) (stating that there is no "direct prohibition against monopoly in the concrete").

[40] Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 612 n.31 (1953).

[41] F.T.C. v. Staples, Inc., 970 F. Supp. 1066, 1074 (D.D.C. 1997)

[42] *Id.*

court in *Times-Picayune Publishing Co.* emphasized that markets should be narrowly delineated and limited substitutes that make up a market to "reasonable substitutes."[43]

The famous "cellophane case" soon followed the *Times-Picayune Publishing Co.* case highlighting both the advantages and disadvantages of the "reasonable substitutes" test. Du Pont, a cellophane producer, was sued by the U.S. Department of Justice under the Sherman Act for monopolization.[44] At the time, du Pont accounted for three-quarters of cellophane sales in the United States.[45] The case ultimately hinged on whether cellophane was its own market or part of a broader "flexible packaging materials" market.[46] Du Pont argued that other wrapping materials were reasonable substitutes of cellophane; therefore, cellophane should be part of this broader market.[47] The Supreme Court sided with du Pont using cross-elasticity of demand to determine it was part of the larger "flexible packaging market."[48] Since du Pont was considered part of the broader "flexible packaging market" it held a much smaller market share.[49] The decision was heavily criticized as the other flexible packaging materials had sprung up in the market chiefly because of du Pont's exercise of monopoly power in increasing prices substantially.[50] The Court's error was evaluating the cross-elasticity of demand at the monopoly price; a mistake that has come to be known as the "Cellophane fallacy."[51]

Although several cases since *Times-Picayune Publishing Co.* and the *Cellophane Case* have refined the use of cross-elasticity of demand in determining market delineation, the two cases laid the bedrock for market definition in antitrust law.[52] Today, the relevant product market is often defined as composed of "products that have reasonable interchangeability for the purposes for which they are produced – price, use and qualities considered."[53] The market is still defined with regard to demand substitution; however, courts are careful to take into account the "cellophane fallacy" for monopoly-maintenance cases.[54] In modern antitrust contexts, market definition also considers the relevant geographic area that consumers within a market might rationally turn to; however, geographic considerations are often irrelevant in digital markets as the internet transcends geographic boundaries.

Litigators continue to delineate markets by employing the idea of "reasonably interchangeable" products in modern cases.[55] However, in dealing with digital two-sided platforms like Facebook, one is left wondering which products should be analyzed. The Supreme Court dealt with the issue of two-sided, transactional platforms in *Ohio v. American Express Co.* which involved credit card companies who profit off both merchants and consumers.[56] Justice Thomas concluded

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[43] *Id.*

[44] United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 377–79 (1956).

[45] *See id.*

[46] *See id.*

[47] *Id.* at 401.

[48] *Id.* at 403–04.

[49] *Id.*

[50] *See generally* George W. Stocking, Willard F. Mueller, *The Cellophane Case and the New Competition*, 45 AM. ECON. REV. 29 (1955).

[51] *See, e.g.*, Gene C. Schaerr, *The Cellophane Fallacy and the Justice Department's Guidelines for Horizontal Mergers*, 94 YALE L. J. 670, 671 (1985).

[52] *See generally* Brown Shoe Co. v. United States, 370 U.S. 294 (1962); United States v. Phila. Nat'l. Bank, 374 U.S. 321 (1963); Int'l Boxing Club of N. Y., Inc. v. United States, 358 U.S. 242 (1959); Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961).

[53] United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 404 (1956); *see also* United States v. Microsoft Corp., 253 F.3d 34, 51–52 (D.C. Cir. 2001).

[54] *Id.*

[55] *See id.*

[56] Ohio v. Am. Express Co., 138 S. Ct. 2274, 2274 (2018).

that courts must treat what has traditionally been considered two separate markets as one for cases brough against "transaction platforms."[57] However, this has left some puzzling over what exactly are "transaction platforms,"[58] and whether Amex applies to platforms like Facebook, as Facebook only generates revenue from one "side," namely its advertisement market? In the Facebook case, the prosecution focused on only one side of the market – the "personal social networking" side.[59] Attempting to better define what a personal social networking service is, the FTC identified three key elements:

> "First, [personal social networking services] are built on a social graph that maps the connections between users and their friends, family, and other personal connections. Second, [they] include features that many users regularly employ to interact with personal connections and share their personal experiences in a shared [virtual] social space, including in a one-to-many 'broadcast' format. And [t]hird, [they] include features that allow users to find and connect with other users, to make it easier for each user to build and expand their set of personal connections. The social graph also supports this feature by informing [the user] which [new] connections might be available based on her existing network."[60]

Reasonably interchangeable services would be services that exhibit the three key elements listed above; but, serious ambiguities arise. Should LinkedIn be considered a personal social networking service as it is used to primarily share professional content? Does TikTok exhibit these three elements? No precise metrics are available to clear these ambiguities under this model.

IV. RECOMMENDATION

When delineating markets, focusing on concrete data is important to get consistent results across cases. In tangible markets, antitrust law has historically analyzed products that produce revenue.[61] Perhaps one of the most consistent metrics in digital markets is advertisement revenue. Using ad revenue metrics to define the boundaries of the "digital advertisement market" eliminates the ambiguity of the personal social networking services market. Furthermore, using ad revenue metrics fits the reasonably interchangeable paradigm. Advertisers are likely to jump across platforms based on prices. For example, if Facebook raised its advertising prices, advertisers would likely jump to other platforms like Google or LinkedIn. Under the PSN market model, this analysis is entirely overlooked. While using advertisement revenue does broaden the market to which Facebook belongs, it still challenges Facebooks monopolistic behavior as Facebook will likely still hold a significant percentage of all-over internet ad revenue.

Many digital platforms primarily generate revenue through advertisement, while others generate revenue through various means. For example, Amazon generates revenue from advertisements, Amazon product sales, and commissions from third-party sales. Antitrust law can still address the role of these companies by analyzing the market share of each of the relevant markets to determine monopoly power. In this analysis, Facebook and Amazon would be part of the same market, but only with respect to Amazon's ad revenue, not its entire profits. This approach

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[57] *Id.* at 2287.

[58] *See* Michael Katz & Jonathan Sallet, *Multisided Platforms and Antitrust Enforcement*, 127 YALE L.J. 2142, 2151 (2018).

[59] Fed. Trade Comm'n v. Facebook, Inc., No. 20-3590 (JEB), 2021 WL 2643627, at *10 (D.D.C. June 28 2021).

[60] *Id.*

[61] *See generally* United States v. U.S. Steel Corp., 251 U.S. 417 (1920); Brown Shoe Co. v. United States, 370 U.S. 294 (1962); United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377 (1956)

reduces ambiguity within antitrust litigation and allows digital companies to clearly know when they are and are not in violation of federal antitrust law.

V. CONCLUSION

As antitrust law adapts to rapidly changing digital markets, it is important that consistent metrics are used when delineating markets. When analyzing the reasonable interchangeability of products and services in digital markets, one should look to where revenue is generated. In digital markets, revenue is often generated from selling advertisement space. Calculating market share by looking at ad revenue metrics would reduce ambiguity and allow current antitrust law to function without undergoing sweeping transformation.