

**Before the
Federal Trade Commission
Washington, DC 20580**

In the matter of

Competition and Consumer Protection
in the 21st Century Hearings

Project Number P181201

COMMENTS OF PUBLIC KNOWLEDGE

3. The identification and measurement of market power and entry barriers, and the evaluation of collusive, exclusionary, or predatory conduct or conduct that violates the consumer protection statutes enforced by the FTC, in markets featuring “platform” businesses.¹

Consumer protection, fairness, and competition policy in today’s digital economy require substantially stronger enforcement of antitrust law, more aggressive use of existing regulatory powers and new laws to fill in important policy gaps. Public Knowledge commends the FTC for launching this proceeding and a series of public hearings to examine competition and consumer protection in the 21st century, and today offers some initial observations and ideas to consider on the topics the Commission has identified as central to its inquiry. We will augment these ideas through our participation in Commission workshops and through follow up filings as the Commission refines the focus of its efforts.

The recent explosion in internet distribution of goods and services, growing dependence of democratic processes on nondiscriminatory and open digital communications platforms, and ongoing market dominance of entrenched media and communications companies makes it imperative for the FTC to become more vigilant and assertive to protect incipient and potential competition, to apply all qualitatively relevant elements to its consumer welfare analysis, and to update its consumer protection enforcement to reflect the complexities of the digital marketplace. As an expert agency with

¹ Public Knowledge staff John Bergmayer, Allie Bohm, Ryan Clough, Harold Feld, Meredith Rose, Kory Gaines, Dylan Gilbert, and Gus Rossi contributed to the comments filed in this proceeding.

a specific mandate from Congress, it is also important for the FTC to inform lawmakers and the public of market imperfections and problems it lacks the tools and resources to address and to propose policy adjustments that would more effectively address inequities in the oversight of today's economy.

Today, we are highlighting a number of the complexities and issues regarding application of FTC authority to the digital economy and the exploding internet economy in response to the Commission's request for comment. Rather than delineate precisely what deserves treatment under antitrust, consumer protection or some new legal authority, we instead highlight many of the problems that deserve careful attention, definition, further analysis and refinement before precise policy action should be considered. We offer this as a first step because we believe:

- the explosion of the digital market calls first for understanding precisely what is going wrong and therefore deserves fixing;
- identifying what are the best policy tools available to fix the problems;
- evaluating how best to apply existing policy tools; and
- proposing new policy tools to address problems that fall between the gaps under existing law.

This document contains our comments relating to the identification and measurement of market power and entry barriers, and the evaluation of collusive, exclusionary, or predatory conduct or conduct that violates the consumer protection statutes enforced by the FTC, in markets featuring "platform" businesses.

We look forward to working with the FTC and all other stakeholders to flesh out the details of the concerns raised in our comments and propose meaningful policy adjustments and enforcement practices to help the Commission fully protect competition and consumers in the digital marketplace.

* * *

As digital platforms have become increasingly important in our everyday lives, the need for some sort of regulatory oversight increases. When platforms have become so central to our lives that a change in algorithm can dramatically crash third-party

businesses,² when social media plays such an important role in our lives that entire businesses exist to pump up follower numbers,³ and when a multi-billion dollar industry exists for the sole purpose of helping businesses game search engine rankings,⁴ lawmakers need to stop talking hopefully about self-regulation and start putting in place enforceable rights to protect the public interest.

We are living in a world rapidly devolving into a set of highly concentrated digital platforms around which major aspects of our economy and our lives revolve. As the CEO of Cloudflare, Matthew Prince, eloquently put it after terminating service to Nazi Organization/Publication *Der Stormer*: “In a not-so-distant future, if we’re not there already, it may be that if you’re going to put content on the internet you’ll need to use a company with a giant network like Cloudflare, Google, Microsoft, Facebook, Amazon, or Alibaba.”⁵ Or, somewhat more directly: “Literally, I woke up in a bad mood and decided someone shouldn’t be allowed on the internet. No one should have that power.”⁶

Prince was talking specifically about policing speech, but the same is true about competition and consumer protection. No company should have the power to determine what business models are acceptable and which ones to block as potential competition. People should have confidence that protection of their privacy does not depend on the whims and best efforts of CEOs. Nor is this simply a question of size and market dominance. While the conversation until now has largely focused on the largest platforms, and while there are certainly concerns that apply only to dominant platforms, one of the critical aspects of sector-specific regulation is to identify when a public policy concern needs to apply to all providers regardless of size. For example, Reddit can in no way be considered “dominant,” since as measured by either subscribers or total social media traffic it does not even come close to Facebook’s market share.⁷ But if we are trying to determine the right

² <https://slate.com/technology/2018/06/facebooks-retreat-from-the-news-has-painful-for-publishers-including-slate.html>

³ <https://www.nytimes.com/interactive/2018/01/27/technology/social-media-bots.html>

⁴ <https://searchengineland.com/seo-industry-worth-65-billion-will-ever-stop-growing-248559>

⁵ <https://blog.cloudflare.com/why-we-terminated-daily-stormer/>

⁶ <https://gizmodo.com/cloudflare-ceo-on-terminating-service-to-neo-nazi-site-1797915295>

⁷ <https://www.dreamgrow.com/top-10-social-networking-sites-market-share-of-visits/>

policy not merely for competition, but to protect consumers, then it doesn't matter whether we're talking about Facebook or Reddit or some fledgling service that doesn't yet exist.

That said, we need to recognize at the outset that a lot of things make it rather challenging to figure out what kind of regulation actually makes sense in this space. Digital platforms combine issues we've dealt with in electronic media (and elsewhere) in novel ways that make applying traditional solutions tricky. As Jean Tirole, the economist who won the Nobel Prize for defining two-sided markets has observed,⁸ unless you know what you're doing and trying to accomplish, you can't really know if you are addressing your concerns. It is therefore necessary to define digital platforms – at least to define them sufficiently to discuss them meaningfully as a class rather than simply as Google, Facebook or other well-known names.

Next, we must recognize that traditional metrics of dominance have proven inadequate to protect competition and consumers, and that we need to propose new metrics. Below, we describe how looking at the cost of exclusion (COE) can be used as a metric to determine the ability exercise market power. This solves the difficult problem of creating precise market definitions when the true strength of digital platforms lies in their combination of versatility and customer size.

Developing Standards To Judge The Behavior of Digital Platforms Requires A Working Definition of Digital Platforms.

Generally, when people say they want increased antitrust scrutiny of, or consumer protection from, “digital platforms” or “edge providers” they tend to have very specific platforms in mind. The list usually includes the largest companies such as Google, Facebook, Amazon and Twitter. But what about companies that are “platforms” that provide infrastructure support invisible to consumers, such as Cloudflare? What about social networks that are active but have a tiny market share, such as Reddit? What about highly specialized online services that essentially mimic traditional services, such as Netflix? What about application like that app that only said “yo”?⁹ Did Yo change into a platform once it

⁸ <https://qz.com/1310266/nobel-winning-economist-jean-tirole-on-how-to-regulate-tech-monopolies/>

⁹ <http://www.justyo.co/>

expanded to let you attach links and things? Why or why not? Does Walmart's increasingly doing business online transform Walmart into a digital platform?

It's therefore not enough to say that Google is just too powerful. We need to articulate exactly what it is we are trying to cover. Which brings us to the next problem. The mix of functions and markets potentially covered simultaneously by any single platform makes traditional tools for identifying either markets or unfair and deceptive behavior inadequate. When Senator Lindsey Graham and Mark Zuckerberg sparred over whether or not Facebook had competitors,¹⁰ they each had a point. Zuckerberg argued that what Facebook does overlaps with a lot of different companies and therefore Facebook existed in a "highly competitive environment." But Senator Graham pointed out that Facebook is unique in offering a service that combines many different functionalities.

But this question goes beyond market definitions. It goes to the definition of what constitutes "unfair and deceptive practices" under Section 5(a) of the FTCA.¹¹

Traditionally, we could neatly divide activities into lines of business and determine what sort of behaviors harmed consumers. For example, warnings and disclaimers considered adequate for a line of business where risk is obvious, such as sky diving, might be considered inadequate in other circumstances. While many businesses operate multiple vertical or non-related operations, digital platforms are unique in the way they potentially perform multiple diverse functions in diverse markets simultaneously. Comcast owns both Universal Studios the content company and the theme park, but consumers have no trouble distinguishing when they are renting movies from Comcast video on demand as opposed to riding a rollercoaster. By contrast, a middle school student might simultaneously use a combination of GoogleDocs, YouTube and Search to research a homework assignment that traditionally would have been done with a laptop for word processing, books for research and a librarian to help find relevant material.

Identifying Unique Attributes to Digital Platforms Does Not Make Traditional Antitrust or Consumer Protection Irrelevant.

¹⁰ <https://www.youtube.com/watch?v=VbjC4uKXbvE>

¹¹ 15 U.S.C. §45(a).

It is common for industries with unique characteristics to argue that these characteristics make traditional laws and policies unsuitable. Proponents of deregulation simultaneously argue that because these business did not exist previously, existing laws are inapplicable, while at the same time no new regulation is needed. “How can a 1914 law like the FTCA, or a 19th Century law like the Sherman Act, possibly be relevant,” special interest lobbyists ask rhetorically, “they didn’t even stream video or have iPhones back then.” At the same time of course, they argue that those who insist on the need for new regulation are simply technophobes standing in the way of progress.¹²

Let us therefore be clear. First and foremost, describing the common attributes of platforms does not make value judgments about whether these attributes are bad or good. We readily acknowledge that many of the attributes described below have enormous positive effects for consumers, competition, and civic discourse. Additionally, however, these new business are not merely capable of traditional anticompetitive action or traditional forms of consumer abuse. The specific attributes of digital platforms give rise to a number of unique concerns that we read about every day, ranging from companies using targeted advertising to stalk people¹³ to extremists using social media to radicalize and recruit.¹⁴

Finally, we recognize that this is a field very much in flux. We have identified what we think are the important elements which, taken together, make digital platforms different from other lines of business or even other “internet companies.” Additional attributes or modifications of this definition may evolve further over time as the economics of the “platform economy” become better understood. But the FTC cannot let the perfect be the enemy of the good. As noted above, we have reached a point where these digital platforms are ubiquitous and – in some cases – virtually unavoidable.¹⁵ The fact that we

¹² See, e.g. Robert Atkinson, Daniel Castro, and Alan McQuinn, “How Tech Populism Is Undermining Innovation,” ITIF (2015). <http://www2.itif.org/2015-tech-populism.pdf>

¹³ <https://www.wired.com/story/track-location-with-mobile-ads-1000-dollars-study/>

¹⁴ <https://www.cnn.com/2017/08/23/opinions/social-media-fuels-right-wing-extremism-opinion-peterson-densley/index.html>

¹⁵ See Testimony of Laura Moy, Deputy Director of the Georgetown Law Center on Privacy and Technology before the U.S. House of Representatives Committee on Energy and Commerce, Subcommittee on Communications and Technology, “Protecting Customer Proprietary Network Information In The Digital Age,” July 11, 2018. <https://democrats->

will continue to learn more about the nature of platforms and platform economy as it continues to mature does not translate into a “get out of Section 5 free” card.

Digital Platforms Are Online Multisided Markets With At Least One Market Operating As A Mass Market Open to The General Public.

As Public Knowledge noted in a recent white paper,¹⁶ the term “platform” is rather ambiguous. People have used “platform” to mean a forum for speech, as an operating system for development, or as a set of components around which users organize their activities. Looking at commonalities of these uses, as well as what the economics and business models of businesses commonly referred to as “digital platforms,” we propose the following definition for “digital platform:”

- 1. Operates as a two-sided or multi-sided market;*
- 2. the service is accessed via the internet; and,*
- 3. at least one component of the platform is “open” and a mass market service.*

These three factors combine to produce entities operating under broadly similar economic incentives, and which raise a set of issues/concerns that are common to all such platforms (even if the services delivered are radically different). They also give rise to issues and concerns not wholly shared by other services.

This definition will exclude some companies that many might expect to find, and group together some companies that others do not see as related. Importantly, this is not an attempt to define an antitrust product market. It is an effort to identify the unique challenges of applying Section 5 of the FTCA to a particular type of business in whatever product market it operates. Walmart and Amazon both sell groceries and generally compete in the retail market, but the way in which these businesses operate are radically different. Likewise, it may seem odd to treat Youtube and Amazon as digital platforms, but

energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Testimony-Moy-CAT-Hrg-on-Protecting-Customer-Proprietary-Network-Information-in-the-Internet-Age-2018-07-11.pdf

¹⁶ John Bergmayer, “Even Under Kind Masters,” Public Knowledge (2018).

<https://www.publicknowledge.org/documents/paper-on-dominant-online-platforms-and-due-process>

exclude Netflix. But Netflix is essentially an online version of HBO, creating content or licensing it and then making it available to consumers. If simply reselling products defined a two-sided market, then any reseller is a “two-sided market.”

Similarly, some will object to excluding broadband providers, operating systems, or other companies considered part of the internet infrastructure from the definition of “digital platform.” Again, it is important to emphasize that what is important here are the actual costs of doing business and the way in which the economic realities of digital platforms changes their incentive. Whether one thinks it is “fair” to apply the same standards of antitrust or consumer protection to ISPs and “edge providers” is a separate question from how digital platforms actually operate.

Why Do These Features Matter More than Others?

Potentially low marginal costs, network effects (particularly the cost of exclusion), and the ability to scale rapidly to absorb millions of new customers make these platforms distinct from other types of businesses. The digital nature of the platform allows it to rapidly deploy new features, and integrate data across multiple apparently unrelated business lines or sources. These factors allow platforms to avoid many of the traditional costs associated with rapid expansion, both vertically and horizontally. These features distinguish platforms from other traditional two-sided markets, and allow platforms to combine elements of traditional communications networks and mass media, as well as traditional retail market networks.

As noted by Jean Tirole, today’s dominant platforms began as niche segment vendors.¹⁷ Amazon, for example, began exclusively as an online bookstore. The features described above allowed it to expand relatively rapidly first from books, to other products, then to streaming, and finally to manufacturing of its own generic brands. Once a sufficiently large customer base began using Amazon for one purpose, it was much easier for Amazon to expand to other very diverse products and services than it would have been

¹⁷ <https://qz.com/1310266/nobel-winning-economist-jean-tirole-on-how-to-regulate-tech-monopolies/>

for a traditional book chain such as Barnes & Noble or Borders.¹⁸ Its established distribution network (both the online access and the physical process of moving goods from one place to another) could be readily adapted for other goods, without any need to alter existing physical stores or dealing with what products to display in scarce shelf space. The relationship, algorithms for recommending related items, and the convenience of “one click” shopping were all readily and seamlessly expandable in a way that would be impossible for comparable brick-and-mortar retailers.

It is important to note that, as with any of the characteristics described above, other successful (or even dominant) businesses will replicate some of the features described. Walmart, for example, likewise expanded its retail services to include pharmaceuticals, groceries, and even pre-paid cell phone service. It is the combination of being online, multi-sided, and open, so as to capture a giant audience, that confer unique advantages, shape incentives, and raise concerns of enduring (rather than merely transitory) market power. In particular, the fact that platform users potentially play multiple roles simultaneously distinguishes digital platforms from other two-sided platforms or internet businesses that have clear distinctions between providers and consumers.

A Multi-Role User in a Multi-Sided Market.

Unlike in traditional two-sided markets, a single user may simultaneously engage in multiple roles on the platform. A subscriber to YouTube is potentially a producer of content and a consumer of content. A customer on Amazon may simultaneously be a reviewer, a buyer, and a publisher or retailer. This has several effects on the ability of the platform to extract value, avoid traditional costs, and maximize bargaining power over all platform users regardless of their comparative value or what role they play in the transaction.

First, this “multi-sided market” maximizes the “long tail” effect, which is where the true value of the platform lies. This is distinct from the more traditional network effect (although platforms also experience network effects). It is also different from economies of scale, which allow businesses to reduce marginal cost per unit due to increased scale

¹⁸ This is not to minimize the enormous cash expense needed to expand into new markets.

(again, sufficiently large platforms may enjoy these as well). Rather, as popularized by Chris Anderson in his book of the same name, the idea of the “long tail” is that the value of a platform is derived from aggregating large numbers of niche products (the “tail”) rather than focusing on a few very successful products (the “hits”).¹⁹

Consider, for example, a traditional cable package or an online streaming service such as Netflix. It is easy to divide the platform between subscribers/viewers and programmers. The value to the user derives chiefly from the availability of a suite of programming. If a major programmer withdraws its programming, the video provider may suffer as customers migrate to rival distributors of the programming. A package that lacks “must-have” programming (such as local live sports) will prove less able to attract subscribers than rivals who have the “must-have” programming. By contrast, Amazon does not particularly worry about any specific streaming content because its streaming service is merely part of its overall bundle. Streaming is simply one more product, like batteries or self-published novels, that attracts some portion of consumers. It is part of the overall long tail of goods and services Amazon offers.

Alternatively, consider Google and YouTube. There is no single content that attracts all of YouTube’s customers. Even the most popular YouTube channel accounts for a tiny fraction of total YouTube views. As a result, no single programmer, or even group of programmers, can effectively negotiate with YouTube. Similarly, any website can withdraw its content from Google’s search index. Doing so, however, will have little impact on the value of Google to users and will therefore have *de minimis* impact on Google’s revenue -- which derives from targeted ads. It would require some huge portion of the internet to “go dark” to Google Search (but remain accessible to a rival search engine) to significantly impact the value of Google Search to customers -- and therefore to advertisers. This is simply not realistic to expect.

¹⁹ Of course, platforms also seek to have “hits” and not just “long tail” products and services. But while useful to deepening engagement and attracting more revenue, they are not a critical or even necessarily significant part of the platform’s revenue. “House of Cards” transformed Netflix, and its subsequent independent video creations are a reason for people to subscribe. By contrast, “The Marvelous Mrs Maisel” or “Transparent” help the value proposition of Prime and deepen engagement with Amazon users, but are not a primary driver of income or even a primary driver of Prime subscribers.

Accordingly, digital platforms may begin with much greater market power vis-à-vis parties using the platform to market or otherwise distribute goods and services. This was dramatically illustrated during Amazon’s dispute with Hachette in 2014.²⁰ Amazon was able to sustain an extended negotiating dispute with the fourth largest book publisher in the United States. As reported by the New York Times: “supporters of Amazon publicly questioned the need for Hachette, the fourth largest publisher, to exist in an era when authors can publish themselves.”²¹ The combination of Amazon deriving enormous revenue from multiple sources and its ability to replace Hachette’s authors with enough independent authors to mitigate the loss of popular Hachette titles gave Amazon enormous power to set terms.²²

Why This Potentially Creates Enduring Market Power in Ways That Challenge Modern Antitrust Analysis.

At this point, it is worthwhile to point out (and repeat) several things. First, these features of platforms are not intrinsically anticompetitive or otherwise bad in and of themselves. To the contrary, platforms empower consumers and producers to play multiple roles simultaneously, which creates many important benefits. Services like Patreon or Twitter make it easy for anyone to disintermediate traditional gatekeepers and leverage that platform to find other interested parties and engage in whatever joint, community related activities the platform supports. For example, “Black Twitter” describes how traditionally fragmented and marginalized African American activists and communities can bypass traditional bottlenecks to disseminate news, organize, and otherwise create a distinct cultural identity using the open Twitter platform. Teachers organizing for higher pay in West Virginia and elsewhere credit Facebook for providing them with the tools to communicate and organize.²³ Millions of people are able to use

²⁰ <https://www.nytimes.com/2014/11/14/technology/amazon-hachette-ebook-dispute.html>

²¹ *Id.*

²² Amazon did not achieve a total victory. But business negotiations are not all or nothing. The point here is simply to illustrate how Amazon’s ability to allow any customer to be simultaneously an independent author, combined with its vast inventory of products, gave it far greater power than would have expected.

²³ https://www.buzzfeed.com/carolineodonovan/facebook-group-west-virginia-teachers-strike?utm_term=.bwry8o9OY#.exLQpxEzL

platforms such as eBay or Etsy to supplement their income or create entirely new businesses without the need to negotiate individually with the platforms. The ability to create content and distribute it through platforms such as YouTube, Amazon, or Facebook allows individuals and organizations freedom to make their work accessible broadly whether or not they can prove to a traditional publisher it will be a commercial success.

But the ability of platforms to potentially put all this together creates a combination of user “stickiness” and a flexibility of revenue stream that, once enormous market share is achieved, is likely to become enduring. It creates a common set of incentives among platforms to engage in a strategy of taking long-term losses and cross-subsidizing services in order to defeat new entrants and maintain sufficient dominance across sufficient markets to hold monopsony power across a wide swath of related industries. It drives innovative startups to seek acquisition by dominant platforms rather than invest in competing services, and it drives dominant platforms to acquire potential competitors not merely because the acquisition of the potential competitor increases this depth of services, but because it neutralizes a potential rival.

This challenges existing antitrust jurisprudence in several ways. For example, ease of entry and low switching cost -- features associated with platforms because of their digital nature and accessibility online -- are usually mitigating factors against a finding of market power when considering potential mergers such as the acquisition of Instagram and WhatsApp by Facebook. This is particularly true where the service does not directly compete in a traditional sense (e.g., Instagram is designed for distribution of images, whereas Facebook at the time was primarily a “microblogging” site). But in the realm of digital platforms, this may eliminate a potential competitor. As described above, the online and digital nature of the service would have potentially allowed Instagram to expand quickly into services provided by Facebook. The more significant challenge than entering a new “market” is building a sufficiently large audience.

By focusing on acquisition of platforms that are experiencing high growth, even where they do not directly compete in a traditional sense, dominant platforms can dramatically delay, or even prevent, the emergence of future competitors. The digital and online nature of the dominant platform and the acquired platform reduce the cost of

integration and increase the depth of service offered by the dominant platform, making it more difficult for firms to compete.

Finally, the multiple roles/depth of service of platforms also stymies traditional antitrust analysis because there is no single, easily definable market. Facebook is not merely a “social network” competing with LinkedIn, Twitter, Reddit, and Livejournal. Facebook is a unique combination of services that includes a massive network of businesses, political speakers, and other social networks like WhatsApp and Instagram. This goes beyond traditional product and market differentiation, because the value to users on both sides of the platform is in part derived by the *combination of services*, not *competition among services*.

Again, we can find some analogies in other markets. For example, cable operators argued for decades that individual broadcast television stations, movies, and home video recordings were all competitors for “eyeballs” and thus part of the same market. Regulators rejected this argument because while each of these replicated some piece of what a cable subscription provided, the unique combination of multiple sources of programming distinguished cable (and later other “multichannel video programming distributors”) from these other providers of video.

Similarly, the attempt to define a new “attention economy” and concomitant “attention marketplace” falls short of the way in which this multifaceted combination creates value to the platform (and, to be fair, to users as well) and plays havoc with traditional market definitions. Because switching costs are extremely low, and because applications through which these services are accessed are generally non-rivalrous, the platform can continue quite nicely as users cycle from low engagement to high engagement. Certainly the incentive of the platform is to maximize engagement. But market power by dominant platforms proves more enduring than predicted because, in contrast to other markets where consumers buy one product or another, I can happily continue to consume several competing products with virtually no effort. The ability of these platforms to form joint promotional partnerships further enhances the endurance of market power once established.

Contrast this with the traditional voice/broadband/video subscription package. When a subscriber to Verizon FIOS switches to RCN, FIOS loses a customer while RCN gains

a customer. Zero-sum game. By contrast, although Twitch, Prime, and Youtube are theoretical competitors in the video streaming market using classic antitrust analysis, none of them have lost a customer. They still derive value from me by tracking personal information. Even if my attention shifts from one service to the other, the cost of reacquiring my attention is far lower than the cost requiring me to entirely switch from one product to another.

Perfect Information Asymmetry.

Finally, the combination of features puts the platform in a unique position with regard to platform users and control of information. The platform enjoys essentially perfect information with regard to the activities of users on the platform. Importantly, this includes not simply information about consumers, but also information about content producers, advertisers, or anyone else using the platform for any purpose. By contrast, the user will only have access to the information that the platform enables the user to collect. Additionally, the platform can make different levels of information available to different users on an individualized basis – although sophisticated users may also find ways to reverse engineer data and exploit the platform in potentially harmful or even dangerous ways.

This has implications well beyond privacy and surveillance (although these are obviously enormous concerns). For example, Amazon reportedly uses the information about sales by third-party vendors through its platform as market research to develop its own line of competing products.²⁴ Google has been accused of manipulating search results to favor its own products.²⁵ Facebook has admitted to conducting secret experiments on its users to influence their moods.²⁶ Advocates have raised concerns that the ability to

²⁴ https://www.nytimes.com/2018/06/23/business/amazon-the-brand-buster.html?rref=collection%2Fbyline%2Fjulie-creswell&action=click&contentCollection=undefined®ion=stream&module=stream_unit&version=latest&contentPlacement=1&pgtype=collection

²⁵ <http://people.hbs.edu/mluca/SearchDegradation.pdf>

²⁶ <https://www.nytimes.com/2014/06/30/technology/facebook-tinkers-with-users-emotions-in-news-feed-experiment-stirring-outcry.html>

understand users and their behavior to an unprecedented degree facilitates “design for addiction.”²⁷

In particular, it is the opacity of the algorithm that platforms use to make recommendations and order the presentation of products, news, or services that can create concerns in ways even the platforms cannot anticipate. The ability of the platforms to analyze user behavior drives the recommendations of Google’s search algorithms, Facebook’s news feeds, and Amazon’s product recommendations. But a user -- whether a consumer or a content producer -- cannot easily determine what factors drive the recommendations. Even advertisers who specify particular attributes they desire for targeted placement have tremendous difficulty confirming that these advertisements are being placed appropriately beyond the tools provided by the platform.

To repeat a now familiar caveat, this ability of the platform to potentially control the information flow is not, in itself, a good or bad thing. It is a feature of the digital nature of the platform, combined with the integration of the component parts via the internet. Consumers enjoy enormous benefits from recommendations tailored to their needs or tastes. Search tools and tools for organizing the proliferating deluge of information depend on absorbing and processing vast amounts of information, and the ability of the platform to limit dissemination of that information plays an important role in protecting user privacy.

Nevertheless, the fact that near-perfect control of information is both a natural artifact of the platform and in some cases a necessary (or socially desirable) feature in providing the service does not eliminate concerns. To the contrary, it highlights the need for regulators to carefully analyze both the dangers and the benefits, and arrive at a reasonable trade-off between enabling the positive and mitigating the negative.

Defining “Dominant” Is Generally Tricky, and It’s Especially Difficult in the World of Digital Platforms.

We must recognize at the outset that the FTCA is not limited solely to cases of “market failure.” Especially when a business becomes central to our economic or social well-being, it requires some level of oversight to ensure that all members of the public are

²⁷ <https://money.cnn.com/2018/02/05/technology/truth-about-tech-campaign/index.html>

treated fairly and that unexpected or unanticipated problems don't cause significant disruptions in commerce. At the same time, both antitrust and consumer protection take into account the impact that a dominant firm has. The same actions that may be pro-consumer or pro-competitive when done by non-dominant firms may be anti-consumer or anticompetitive when done by a dominant firm. Restrictive contractual terms that might allow non-dominant players to serve niche markets, for example, may be abusive when employed by dominant firms to limit consumer choice or avoid liability for negligent conduct.

There is no generally accepted definition of what "dominance" means. Just as regulators struggled with "how big is too big to fail" after the financial crisis 10 years ago, regulators and antitrust enforcers have repeatedly struggled with the question of what makes a firm "dominant" or "non-dominant." In the past, regulators and antitrust enforcers have looked to things like "market share," or "incumbency," or being a "critical buyer," or some other indicia of the ability to exert control over the behavior of others contrary to how we might otherwise expect them to behave in a competitive market. Sometimes, as with too big to fail, regulators look to balance the cost of regulation against the potential risk to the sector or economy as a whole.

Even if we could settle on a specific metric, what constitutes dominant is subject to considerable debate. At one time, antitrust law established a presumption that any entity with 30 percent market share would be considered "dominant." This presumption, called the Philadelphia National Bank presumption,²⁸ is inconsistently applied in the U.S., but 30% market share is still generally used in Europe for creating a rebuttable presumption of market power. The Federal Communications Commission declared AT&T a non-dominant long-distance carrier despite a 60 [percent market share](#). On the other hand, in *FTC v. ToysRus*, the court affirmed the FTC's finding that TRU had sufficient market power to support an antitrust enforcement action at approximately 20% market share. What actual market share constitutes dominance varies depending on multiple factors.

Furthermore, for reasons discussed above, traditional economic measures of dominance and market power are particularly difficult to apply to digital platforms. It is a

²⁸ See *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963).

characteristic of these firms that they achieve dominance by a breadth and depth of services that makes traditional market definition and identification of actual or potential competitors challenging. In addition, because digital platforms have varied and novel business models, traditional tools of economic analysis have struggled to identify an appropriate approach to digital platforms, let alone create consensus around how to define market power or dominance among online platforms.

The Cost of Exclusion From the Platform Is the Appropriate Metric.

One of the elements of network effects is that the network becomes more valuable to everyone on it when more people use it. The inverse is equally true. The larger the network, the greater the cost of exclusion from the network.

Consider as an example the traditional evolution of unregulated interconnection regimes from the telecom and internet transit worlds. Initially, no network is dominant, and so carriers have incentive to exchange traffic for free. Everyone needs everyone else and derives roughly equal value from interconnection. As some firms grow faster than others, the larger networks are much more valuable. Smaller carriers suffer much more from the inability to interconnect with larger carriers than larger carriers suffer from the inability to interconnect with smaller carriers. Larger carriers are therefore able to demand payment from smaller networks for reaching the customers on their larger networks. If the cycle continues and the size disparity increases, it becomes increasingly easier for the larger network to offer value to customers without the smaller network, and harder for the smaller network to offer value to customers without the larger network. In an extreme case, such as AT&T's control over the "long lines" (national long-distance lines) at the beginning of the 20th Century, this network dynamic can create a monopoly.

But one does not need extreme cases to see how the cost of exclusion from the platform can allow a provider to drive up prices on either side of the platform, or both simultaneously. Consider credit cards. As merchants testified in the Department of Justice antitrust action against American Express, merchants felt they would suffer significant losses if they did not accede to Amex's demands – even though Amex has an approximate 25 percent market share of credit card transactions in the United States. While the

Supreme Court found for American Express, the majority opinion was insistent that this rested on the specifics of the case.

COE Is Extremely Flexible and Focuses on the Central Reason Why We Care About Dominance.

An advantage of using COE is that it encompasses a wide range of potential costs and potential actors, while avoiding the arbitrary definitions that have plagued traditional efforts to determine market dominance. For example, it is clear that COE includes the loss of a substantial market for producers of goods and services, or loss of an important distribution network. At the same time, however, it takes into account the loss to consumers from being excluded from a specific platform. For example, whether or not we consider Twitter “dominant” in a traditional economic sense, it is clear that a business excluded from Twitter experiences some cost from its inability to communicate with Twitter subscribers. These costs include more than those associated with traditional advertising or direct sales: Companies use Twitter to respond to real-time events such as a blackout during the Superbowl²⁹ or a Tweet from a celebrity,³⁰ and companies monitor social media to address concerns and respond to criticism. These benefits won’t necessarily make or break a business, but loss of access to the platform would certainly carry the significant cost of losing a valuable channel of communication with the public.

We can equally apply this analysis to Twitter subscribers. In a case involving President Trump blocking critics from his Twitter feed, the district court observed that blocking the individuals in question deprived them of the ability to interact directly with the President’s statements, denying them the ability to engage in important and timely political discourse.³¹ Greg Norcie and L. Jean Camp have written an analysis examining the costs of abstaining from social media generally.³² As they demonstrate, exclusion from

²⁹ https://www.huffingtonpost.com/2013/02/04/oreos-super-bowl-tweet-dunk-dark_n_2615333.html

³⁰ https://www.washingtonpost.com/news/business/wp/2018/05/30/racism-is-not-a-known-side-effect-ambien-maker-says-after-roseanne-barr-blames-it-for-tweets/?utm_term=.0eb862dfacf3

³¹ https://motherboard.vice.com/en_us/article/9k8a7d/trump-cant-block-people-on-twitter-court-ruling

³² “The Price of Privacy: An Examination of the Economic Costs of Abstention From Social Networks.” <http://www.ljean.com/files/abstain.pdf>

social media platforms can have significant costs to the individual that traditional metrics for measuring dominance do not address.

As an additional benefit, using COE directly addresses the reason we want to distinguish dominant platforms from non-dominant platforms in this context. Where the cost of exclusion is small, we are unlikely to have any particular concern about the practices of the platform distinct from whatever general concerns we may have about platforms more broadly.

It is important to note that COE does not tell what regulation to use, but rather what to regulate. Once COE shows us that a firm is dominant, that may indicate a need for some kind of action that only addresses this dominance indirectly. For example, if we determine that a platform such as Google is dominant and that the key to that dominance is high market share search, the remedy might involve actions to stimulate competition rather than directly regulating how Google manages its search engine. By contrast, if the primary harm in being excluded from Twitter is the more limited harm of losing one of several important conduits of reaching customers, the necessary regulation may be limited to an explanation and right to challenge arbitrary. Again, context matters enormously.

Finally, while the COE is the measure of dominance, that does not mean that exclusion is the only harm. Rather, COE works as a measure of dominance in this context because if the platform imposes some new rule or cost on a take-it-or-leave-it basis, the platform participant must decide whether the cost of acceptance outweighs the cost of abandoning the platform. This is roughly the digital platform equivalent of SSNIP.

Finally, we stress that simply because exclusion may impose costs -- perhaps substantial costs -- that does not mean that exclusion is necessarily anti-competitive or anti-consumer. Indeed, in some cases it may even be warranted. Even public utilities, services so essential that we consider it the responsibility of government to make them accessible to everyone, have circumstances when they may terminate service. For example, although public utilities generally must provide customers with significant grace periods for late payments, and may have lengthy procedures to prevent consumers from being cut off, a utility may ultimately refuse to serve a customer who does not pay. The telephone network is a common carrier network, but it may refuse to allow a customer to connect a device that will do damage to the network.

Similarly, there may well be circumstances where dominant platforms/platforms with high cost of exclusion can (or arguably even should) exclude certain kinds of speech or certain types of businesses or products. Again, the point of using COE to measure dominance is not to ensure that users of platforms never experience costs. The point of using COE as a proxy for dominance is to determine when the (potential) behavior of a digital platform potentially threatens the public interest. Determining what regulation, if any, is needed is an entirely separate exercise. Now that we have determined what sort of entities we are talking about, and the circumstances under which regulation may be appropriate, we are finally prepared to explore what about these platforms we may need to address to protect the public interest.

Respectfully submitted,
Public Knowledge
August 20, 2018