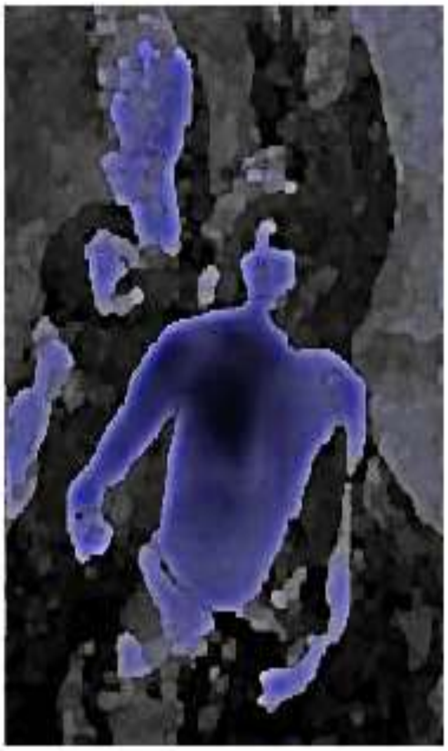

icarus

Media and Technology Committee
ABA Section of Antitrust Law

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Contents

icarus
Spring 2019

Committee Leadership

icarus
Spring 2019

icarus EDITORS

Robert Mahini
Google
robmahini@google.com

Anna Chehtova
DISH Network & Sling TV
annachehtova@dish.com

From the Editors

The Media and Technology Committee of the ABA Section of Antitrust Law is pleased to present the Spring 2019 issue of *icarus*, our publication focusing on competition and consumer protection issues in media and technology industries.

In this issue, we move to a new style with a mix of long-form articles, shorter articles, and Q&As with prominent members of the Section. We start with a long-form article by Evan Miller, which analyzes the Australian Competition and Consumer Commission's preliminary report on digital platforms and its potential implications abroad.

Our shorter pieces explore:

- whether voluntary portability may be a procompetitive solution to data enclosure (by Wyatt Fore);
- the changing perspectives on the competitive impact of standard essential patents (by Justine Haimi); and
- the competitive considerations in recent media mergers (by Bradley Pierson and Michelle Honor).

We conclude with a Q&A by Marissa Troiano with Renata Hesse, Partner at Sullivan & Cromwell LLP and former Acting Assistant Attorney General of the Department of Justice's Antitrust Division.

We hope you enjoy this edition, and any prospective authors interested in appearing in future editions should email the editors.

The Australian Digital Platforms Inquiry: Can Regulating Digital Platforms "Save" the Media Industry or Is It Fake News?

Evan Miller[1]

Since the 2016 U.S. presidential election, terms like "post-truth" and "fake news" have invaded our lexicon. The online reference Dictionary.com even named "misinformation" its word of the year in 2018, defining the term as "false information that is spread, regardless of whether there is intent to mislead."[2] At this point, to write that the internet has revolutionized the way that people spread information—or misinformation, as the case may be—borders on cliché. Still, it is worth acknowledging that digital platforms have enabled individuals and small groups to reach large audiences like never before. Prior to the internet, that type of reach was only achieved by the largest media companies. Serving as gatekeepers, these media companies had the power to decide the news of the day. The long-standing slogan of the *New York Times*—"All The News That's Fit to Print"—exemplifies this gatekeeping role. That is, if it's not in the *New York Times*, it's not newsworthy. Unlike the *New York Times*, the internet is not space-limited, and some of the news published and disseminated online may not be "fit to print."

In addition to eroding the traditional media's role as gatekeepers, the internet also impacted the traditional business model for news publishers. Primarily reliant on revenue generated through the sale of ads, news publishers began experiencing financial woes as more consumers began accessing news, and receiving ads, through a variety of online and offline channels. Now, some news publishers are blaming digital platforms that provide readers with access to news content, and serve them ads in the process, for the media industry's financial hardships. Even more, some publishers have argued that digital platforms are to blame for lower quality journalism because, under the current system, publishers do not generate enough revenue to employ enough professional journalists.

Some publishers recently raised these complaints with the Australian Competition and Consumer Commission ("ACCC") as part of its Digital Platforms Inquiry, an investigation of the "impact of digital platforms on the supply of news and journalistic content and the implications of this for media content creators, advertisers and consumers."[3] The ACCC's Digital Platforms Inquiry considered a variety of issues related to the role of digital platforms in the media industry, but also considered the impact of digital platforms on the economy as a whole, such as the effect of acquisitions by digital platforms of nascent technologies. The ACCC recently published its Preliminary Report and invited market participants to respond to the preliminary recommendations for regulatory and legal changes included therein.

By reviewing the ACCC's Preliminary Report and the responses from digital platforms—like Google and Facebook—and other commentators, this article provides insights

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[1] Evan Miller is an associate in the Washington, D.C. office of Vinson & Elkins LLP. The author represents Google on certain matters relating to the subject of this article, but the views expressed in this article are those of the author alone.
[2] DICTIONARY.COM, *Dictionary.com's 2018 Word Of The Year Is …* (2019).
[3] Digital platforms inquiry: Project overview, AUSTRALIAN COMPETITION & CONSUMER COMM'N (2018).

into the regulatory proposals that may influence other jurisdictions that are also positioned to investigate digital platforms. Section I of this article provides a brief background on the ACCC's Digital Platforms Inquiry. Section II provides a summary of some of the responses that are critical of the legal and policy recommendations included in the ACCC's Preliminary Report. Section III considers how the recommendations from the Australian investigation may influence regulators in the United States, as well as other jurisdictions.

I. The Digital Platforms Inquiry

On December 4, 2017, the Australian federal government directed the ACCC to "commence an inquiry into digital platform providers such as Facebook and Google" to determine "the effect that digital search engines, social media platforms and other digital content aggregation platforms are having on competition in media and advertising services markets."[4] The idea for the inquiry came about during negotiations between members of the Australian parliament over media reform laws.[5] The media reform laws at issue, which were adopted by the Australian parliament in September 2017, relaxed ownership laws, allowing Australia's media companies to increase market share through consolidation, and were "billed as a means to compete with online giants such as Netflix and Alphabet Inc's Google."[6]

One member of the Australian parliament who supported the media reform laws pointed to strong competition from Facebook and Google to justify his lack of concern about the potential for rapid consolidation in Australian media following the passage of relaxed ownership laws: "It can't shrink to a monopoly as long as you have international competition."[7] Despite the fact that some in the Australian parliament viewed competition from Facebook and Google as a safeguard against media monopolies, the ACCC still set out to investigate the effect that competition from such companies has on Australian media companies and to make recommendations to the government for further legal and policy changes.

The December 4 directive from the Australian government, also known as the "Terms of Reference," identified the following matters as a non-exhaustive list for the ACCC to consider during its inquiry:

> (1) The extent to which platform service providers are exercising market power in commercial arrangements with the creators of journalistic content and advertisers;
>
> (2) The impact of platform service providers on the level of choice and quality of news and journalistic content to consumers;

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[4] Press Release, Australian Competition & Consumer Comm'n, ACCC commences inquiry into digital platforms (Dec. 4, 2017).
[5] Johnathan Barret & Tom Westbrook, *Australia to probe Facebook, Google over media disruption*, REUTERS, Dec. 3, 2017.
[6] Colin Packham & Johnathan Barret, *Australian media wins relaxed ownership laws, but online rivals' threat to stay*, REUTERS, Sept. 14, 2017.
[7] *Id.*

> (3) The impact of platform service providers on media and advertising markets;
>
> (4) The impact of longer-term trends, including innovation and technological change, on competition in media and advertising markets; and
>
> (5) The impact of information asymmetry between platform service providers, advertisers and consumers and the effect on competition in media and advertising markets.[8]

The ACCC published an Issues Paper on February 26, 2018 that expanded on the topics included in the Terms of Reference and identified specific topics of concern, such as "reduced funding for quality news and journalistic content" and "digital platforms' use of big data technologies."[9] The ACCC encouraged market participants to submit responses to the Issues Paper, ultimately receiving over 75 submissions. The ACCC published its Preliminary Report on December 10, 2018.

Unlike typical general market inquiries, the ACCC's Digital Platforms Inquiry singled out two companies—Google and Facebook. The ACCC explained in its Preliminary Report that its focus on these two businesses was due to the fact that almost all of the submissions received from interested parties and consumers concerned Google and Facebook.[10] The ACCC also cited Google and Facebook's high revenue and traffic in Australia to justify its limited focus.[11] As is discussed in greater detail below, the ACCC's focus on Google and Facebook resulted in preliminary recommendations that primarily address Google and Facebook and their respective business models, as opposed to addressing business conduct in a general market, which is typically the purpose of market inquiries.

II. Preliminary Recommendations

The Preliminary Report contains eleven recommendations for regulating Google and Facebook, and comparable digital platforms. The recommendations seek to address:

> (1) Google and Facebook's "substantial market power" by amending merger control rules and, as to Google, by prohibiting operating system suppliers from setting default browsers or search engines;

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[8] Letter from Hon. Scott Morrison, Treasurer of Australia, to Rod Sims, Chairman, Australian Competition & Consumer Comm'n (Dec. 4, 2017) (requiring public inquiry into digital platforms).

[9] AUSTRALIAN COMPETITION & CONSUMER COMM'N, DIGITAL PLATFORMS INQUIRY: ISSUES PAPER 8-9 (2018) [hereinafter ISSUES PAPER].

[10] AUSTRALIAN COMPETITION & CONSUMER COMM'N, DIGITAL PLATFORMS INQUIRY: PRELIMINARY REPORT 2 (2018) [hereinafter PRELIMINARY REPORT].

[11] *Id.*

(2) the potential for Google and Facebook to engage in anticompetitive conduct toward advertisers and media companies by creating a new regulatory authority to oversee digital platforms;

(3) the regulatory imbalance between traditional media companies and digital platforms by reviewing and reforming current regulations; and

(4) the risks to consumers by strengthening consumer protection laws governing data collection and by proposing codes of practice for digital platforms.[12]

The ACCC invited market participants to respond to its Preliminary Report and has published over 85 responses to date. As a result of the public nature of the Digital Platforms Inquiry, the arguments for and against increased regulation of digital platforms are being aired like rarely before. The ACCC received responses from Google, Facebook, and Microsoft, among others. Throughout the responses, the ACCC received widespread criticism for drawing conclusions without sound economic evidence. Responses from these market participants give greater insight into the issues that are bound to reverberate in jurisdictions around the world.[13] In the subsections that follow, this Article summarizes the ACCC's preliminary recommendations relating to competition law and the critical responses from market participants.

A. Measures to Address Google and Facebook's Market Power

The ACCC found that Google and Facebook both enjoy substantial market power in a number of markets relevant to the Digital Platforms Inquiry:

Google	Facebook
• Online search • Online search advertising • News media referral services	• Social media services • Display advertising • News media referral services

To find market power, the ACCC relied heavily on estimations of market shares. For example, the ACCC justified its conclusion that Google has substantial market power in supplying general search services in Australia by pointing to an alleged market share of 94%.[14] Similarly, the ACCC concluded that Facebook has substantial market power in the supply of display advertising because it allegedly has a market share of 46% and the rest of the market is fragmented.[15]

The American Bar Association Section of Antitrust Law ("ABA") submitted a response to the Preliminary Report in which it criticized the ACCC's reliance on market shares to determine market power, noting that "reliance on market shares alone (even within properly

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[12] *Id.* at 9-14.
[13] This Article addresses the potential contagion effect of the ACCC's Digital Platforms Inquiry in Section III.
[14] PRELIMINARY REPORT, *supra* note 10, at 41.
[15] *Id.* at 59.

defined markets) is likely to invite errors when attempting to identify substantial market power."[16] The ABA also cited to the 2010 *U.S. Department of Justice and the Federal Trade Commission Horizontal Merger Guidelines*, which make clear that "the [U.S.] agencies no longer rely solely on market shares to predict whether a firm possesses durable market power or is likely to be able to sustain significant non-transitory price increases."[17]

To find Google and Facebook's market power in news media referral services, the ACCC combined the market shares of the two companies.[18] The ABA criticized this approach as well, arguing that the ACCC should not consider the combined market share of two companies unless they were engaged in "concerted action as a joint monopoly," as is the approach adopted by the European Commission ("EC").[19] Facebook also criticized the ACCC's approach, calling it "unprecedented, particularly as the Preliminary Report offers no explanation—let alone a coherent explanation grounded in well-established competition principles—for why a *combined* Google-Facebook market share means that these firms—either individually or together—possess substantial market power in the defined market."[20]

Though the Preliminary Report gave the greatest weight to market shares in its assessment of market power, the ACCC did consider other factors. Respondents, however, argued that even these additional factors do not necessarily support a finding of market power. For example, while the ACCC suggested that the large user base and high traffic volumes for Facebook and Google are indicative of market power,[21] the ABA cautioned against inferring market power from user and traffic statistics because recent academic work suggests that "network effects are not always a guarantor of substantial market power."[22] Facebook also noted the ACCC's reliance on network effects, arguing that "it is the quality of Facebook's data analysis—our ability to help advertisers reach the people they want to reach—that makes us attractive to advertisers, not the raw number of users on our platform."[23]

Moreover, commentators noted that digital platforms in particular are susceptible to rapid changes in technology that could quickly decrease user bases and traffic volumes. This risk is amplified by the fact that digital platforms do not anchor their position in the market with physical hardware that would make it more difficult for users to switch services. Multihoming digital platforms—when consumers use two competing platforms simultaneously—is also prevalent. Riders' use of both Uber and Lyft is a commonly used example of multihoming. Respondents argue that these market dynamics combine to

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[16] American Bar Ass'n, Comments of the American Bar Association Section of Antitrust Law on the Australian Competition and Consumer Commission's Preliminary Report on Digital Platforms 2 (2019) [hereinafter *ABA Response*].
[17] *Id.*
[18] PRELIMINARY REPORT, *supra* note 10, at 61.
[19] *ABA Response*, *supra* note 16, at 3.
[20] Facebook, ACCC Digital Platforms Inquiry: Response to the ACCC's Preliminary Report by Facebook Australia Pty Limited 38-39 (2019) [hereinafter *Facebook Response*].
[21] PRELIMINARY REPORT, *supra* note 10, at 35.
[22] *ABA Response*, *supra* note 16, at 2.
[23] *Facebook Response*, *supra* note 20, at 44.

undermine the inference that a sizeable user base and a high volume of internet traffic indicate the possession of durable market power.

The ACCC also considered barriers to entry in its market power analysis, but quickly dismissed the threat of dynamic competition. The ACCC acknowledged that "dynamic competition may place some degree of competitive constraint on Google and Facebook," but argued that high barriers to entry minimize the impact of such competition.[24] The ACCC identified barriers arising from "same-side and cross-side network effects, branding, consumer inertia and switching costs, economies of scale and sunk costs."[25] With respect to advertising markets, Facebook argued that its access to user data does not create a barrier to entry because "the data Facebook uses to personalise advertising is not rare or unique, and because [its] competitors have access to similar data."[26]

The ACCC concluded that "strategic acquisitions by both Google and Facebook have also contributed to the market power they currently hold."[27] In particular, the ACCC highlighted concerns that Google and Facebook are acquiring nascent technologies before they can develop into competitors. Facebook, which drew particular focus in the Preliminary Report due to its acquisition of Instagram, argued in its response that "the successful acquisition of a small or new business—whether by Facebook, other digital platforms or any other participant in the technology sector—should not be taken as proof that the acquired business would have enjoyed the same degree of success, or succeeded at all, if the transaction never occurred."[28]

In addition to attacking the assessment of market power, both Google and Facebook argued that the ACCC failed to properly define a relevant market for "news referral services." Facebook argued that "there is no distinct and economically relevant market for news referral services to media businesses."[29] Even if a market for news referral services exists, Facebook argued that the ACCC's definition is under-inclusive because it did not consider (i) publisher apps through which consumers access news directly; (ii) other means of online access to news, such as email newsletters, alerts, and mobile notifications; and (iii) offline means to access news.[30] According to Facebook, these other means for consumers to access news supports its argument that "Facebook is not an essential channel for news distribution."[31] For its part, Google argued that "[t]he Preliminary Report does not contain any evidence or analysis showing that there is a market for 'news media referral services,'" and in any event Google would not compete in such a market because it competes for customers and advertisers, making news referral traffic merely incidental to providing quality search results.[32]

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24 PRELIMINARY REPORT, *supra* note 10, at 9.
25 *Id*. at 35.
26 *Facebook Response*, *supra* note 20, at 26.
27 PRELIMINARY REPORT, *supra* note 10, at 9.
28 *Facebook Response*, *supra* note 20, at 46.
29 *Id*. at 36.
30 *Id*. at 36-38.
31 *Id*. at 39.
32 Google, Digital Platforms Inquiry: Submission in Response to the ACCC's Preliminary Report 30 (Feb. 18, 2019) [hereinafter *Google Response*].

Interestingly, the Preliminary Report did not establish, or even suggest, that Google and Facebook are misusing their "substantial market power," or violating Australian competition law, in any way. The ACCC's preliminary report even acknowledged that holding substantial market power is not, in itself, a violation of Australian law.[33] Still, the ACCC proposed three recommendations to address the alleged risks posed by Google and Facebook's market power.

Preliminary Recommendation 1—Amendment to Merger Law. The ACCC's first recommendation was to amend Section 50(3) of the *Competition and Consumer Act 2010* ("CCA")—the law that identifies the factors to be taken into account in assessing the likely competitive effects of a merger or acquisition—to make clear that the following are relevant factors: "(a) the likelihood that an acquisition would result in the removal of a *potential* competitor, and (b) the amount and nature of data which the acquirer would likely have access to as a result of the acquisition."[34] The driving force behind the recommendation to clarify the law appears to be the ACCC's regret that Facebook's 2012 acquisition of Instagram did not receive closer regulatory scrutiny. The ACCC acknowledged that it did not review Facebook's acquisition of Instagram, but that "with the benefit of hindsight a view could be taken that this acquisition should not have been cleared or should have been subject to closer scrutiny."[35] The ACCC recognizes the difficulty of identifying nascent technologies that will thrive and compete, but argued that amending the CCA will "alert parties to the rigour with which the ACCC will test the removal of potential competition when considering mergers by a large existing player."[36]

Google did not object to this recommendation in its response noting that "those factors are already routinely considered by the ACCC in appropriate cases," and that amending the law "will make current practice explicit in the CCA and add valuable transparency to the merger review process."[37] Microsoft agreed that these amendments will not substantively change how the ACCC evaluates mergers, but argued that applying these factors is complex and that the ACCC should receive more public feedback before implementing them. Specifically, Microsoft argued that "an analysis of 'potential' competition can quickly become speculative and cause hypothetical future considerations to outweigh substantiated efficiencies."[38] Additionally, Microsoft argued that obtaining access to data is not necessarily problematic because data is non-exclusive, non-rivalrous, and not durable. Facebook did not respond directly to the ACCC's recommended amendments to the CCA, but its criticism of the ACCC using Facebook's data sets and its prior acquisitions to confer market power suggests that it believes such amendments are unnecessary.

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[33] PRELIMINARY REPORT, *supra* note 10, at 5.
[34] *Id.* at 10.
[35] *Id.* at 63.
[36] *Id.* at 64.
[37] *Google Response*, *supra* note 32, at 6.
[38] Letter from Tom Daemen, Director, Corporate, External, and Legal Affairs, Microsoft, to Australian Competition & Consumer Comm'n 5 (Feb. 13, 2019) [hereinafter *Microsoft Response*].

Preliminary Recommendation 2—Advanced Notice of Mergers. For its second recommendation, the ACCC announced its intention to request that "large digital platforms (such as Facebook and Google)" provide advance notice of acquisitions of businesses with activities in Australia.[39] Unlike the United States, Australia does not have a pre-notification requirement for mergers. As a result, the ACCC believes that seeking a pre-notification commitment from large digital platforms is necessary, and has made similar requests from other businesses in the past, "particularly where there had been a history of transactions which required scrutiny."[40] For the moment, the ACCC is only requesting a voluntary commitment from digital platforms to provide advance notice of appropriate mergers. However, the ACCC suggested that it may seek more formal requirements if digital platforms do not cooperate with its request.[41]

In its response, Google suggested that it would be willing to engage with the ACCC regarding advanced notice of transactions, but would want to ensure that "notice is triggered only where there is sufficient connection to Australia and [that the pre-notification requirement] does not put Google at a disadvantage compared to other firms competing to buy the same target company."[42]

Preliminary Recommendation 3—Browser and Search Engine Choice Screens. The ACCC's third recommendation was to require suppliers of operating systems for mobile devices, computers, and tablets to provide consumers with options—without pre-selection—for internet browsers and search engines instead of providing default options.[43] Interestingly, the ACCC proposed this recommendation without any evidence that defaults harm consumers.

Not surprisingly, Google took issue with this recommendation, arguing that "the concern about browser search defaults is misplaced."[44] First, Google argued that search services have historically competed for default status on browsers by: "(i) building browsers themselves to showcase their search services in the default position; and (ii) bidding to be set as the default on third-party browsers."[45] Google described this as a significant form of competition, leading to greater consumer choices and lower cost devices. Second, Google explained that users can quickly and easily download alternatives to browser and search engine defaults.[46] Google used as an example Opera's Browser and Mini Browser, which has been downloaded more than 100 million times from Android globally, despite the preinstallation of browsers from Google, Samsung, and others on Android devices.[47] The ACCC's recommendation of a default choice screen, according to Google, would "unduly interfere with the robust competition that currently exists for user attention, would disincentivize investment

[39] PRELIMINARY REPORT, *supra* note 10, at 64.
[40] *Id.*
[41] *Id.*
[42] *Google Response*, *supra* note 32, at 18.
[43] PRELIMINARY REPORT, *supra* note 10, at 65.
[44] *Google Response*, *supra* note 32, at 12.
[45] *Id.*
[46] *Id.*
[47] *Id.*

by industry participants, and would undermine a business model that has consistently support pro-user innovation by browser developers and device manufacturers."[48]

Microsoft, a company that is historically familiar with choice screen requirements, also raised concerns about Preliminary Recommendation 3. Microsoft argued that the ACCC's recommendation would "eliminate an important means for smaller competitors to gain a foothold to attract new users, depressing rather than increasing competition."[49] Microsoft argued that when users have difficulty choosing between software options, they rely on the brand. This would favor brands with substantial market power. Microsoft proposed limiting this requirement to only those companies with substantial market power. Microsoft argued that the choice screen requirement would also harm independent internet browser providers who offer their browser for free, but monetize by selling their default search setting. Finally, Microsoft argued that if the ACCC chooses to continue with this recommendation, despite the risks to competition, that it only be applied on "devices for which there is a proven problem preventing users from choosing software other than the initial default."[50]

Despite Google and Microsoft's arguments that a browser choice requirement would harm the ability of smaller search and browser suppliers to compete, DuckDuckGo supported the ACCC's recommendation. DuckDuckGo is an "internet privacy company" that operates DuckDuckGo Search and DuckDuckGo Privacy Browser. DuckDuckGo stated that the ACCC's Preliminary Recommendation 3 "is the most effective regulatory remedy to fairly increase competition in the search and browser markets within Australia, or in any country for that matter." [51] DuckDuckGo suggested that the ACCC allow participating search engines and browsers to supply a short narrative along with their product name and logo for the choice screen. This way, smaller competitors can inform the user about their distinctive features. DuckDuckGo argued that this mitigates the brand-awareness disparities that Microsoft raised in its response. Additionally, DuckDuckGo argued that the impact to smaller companies by preventing default-search-engine deals can be further mitigated by restricting the remedy "to just Google products, singling them out because of their unique monopoly market position." [52]

This type of remedy has precedent. In 2009, Microsoft agreed to offer consumers a choice of web browser to settle allegations by the EC that Microsoft used monopoly power to bundle its browser with the Windows OS to the detriment of browser competitors.[53] Microsoft presented the choice screen, which contained multiple browsers, to anyone using Windows's default browser (Internet Explorer). In its response, DuckDuckGo noted that after the implementation of the choice screen, market share for smaller browsers immediately

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[48] *Id.*

[49] *Microsoft Response*, *supra* note 38, at 3.

[50] *Id.* at 5.

[51] Letter from Megan Gray, General Counsel & Policy Advocate, DuckDuckGo, to Australian Competition & Consumer Comm'n 2 (March 7, 2019) [hereinafter *DuckDuckGo Letter*].

[52] *Id.*

[53] John Timmer, *Microsoft caves to EU pressure, will offer browser ballot*, ARS TECHNICA (July 24, 2009).

increased.[54] Small browsers eventually lost those market share gains, which DuckDuckGo attributed to a failure to differentiate their services from the services of better known brands.[55] On March 19, 2019, Google announced that it would offer a browser and search engine choice screen to Android users in Europe in response to the EC's July 2018 decision finding that Google's Android business practices violated European competition law.[56]

B. Measures to Monitor Platforms' Activities and the Potential Consequences of Those Activities for News Media Organizations and Advertisers

Preliminary Recommendations 4 and 5—Regulatory Review Boards. The next two recommendations from the ACCC involved creating a new regulatory authority to oversee the news referral and advertising markets.

Throughout the Digital Platforms Inquiry, the ACCC heard repeatedly that digital platforms—specifically Google and Facebook—play a critical role in news publishers' ability to reach consumers.[57] Publishers raised specific concerns about Google and Facebook's algorithms that determine the content that consumers see in news feeds and search results. An overarching complaint was that these algorithms are "opaque," and that this lack of transparency disadvantages media companies and advertisers.[58] According to publishers and advertisers, the lack of transparency could enable Google and Facebook to favor their own business interests, or those of business partners, to the disadvantage of third parties.[59] Google and Facebook, according to complaints, could also use algorithms to influence what news content consumers see most.[60]

To address these concerns, the ACCC proposed that a regulatory authority be tasked with reviewing algorithms to monitor, investigate, and report on whether digital platforms are engaging in discriminatory conduct.[61] For advertising markets, this may include overseeing the ranking and display of advertisements, whether the acquisition of any other product or service from the same digital platform affects the display or ranking of advertisements or content, and the impact of any related business of a digital platform (*e.g.*, how referral links appear in the search engine results page or social media news feed).[62] For media markets, this may include considering how algorithms rank news and journalistic content and how they refer consumers to media businesses.[63] The ACCC suggested that digital platforms would need to

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[54] *DuckDuckGo Letter*, *supra* note 51, at 4.
[55] *Id.* at 5.
[56] Kent Walker, *Supporting choice and competition in Europe*, GOOGLE: THE KEYWORD (Mar. 19, 2019).
[57] PRELIMINARY REPORT, *supra* note 10, at 10.
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.* at 10-11.
[62] *Id.*
[63] *Id.*

provide information and documents to the regulatory authority on a regular basis and that the regulatory authority would need appropriate investigative powers to achieve its purpose.[64]

The proposal for a new regulatory authority to oversee the news referral and advertising markets has received heavy criticism. Interestingly, the discriminatory conduct that the Preliminary Report cited as justification for the new regulatory authority is purely hypothetical. The Preliminary Report did not reference any allegations that Google or Facebook have actually engaged in the discriminatory conduct at issue. Moreover, existing law may already prohibit Google and Facebook from engaging in such conduct and empowers authorities to investigate allegations of such conduct. For example, Part IV of the CCA prohibits a range of anti-competitive conduct, including misuse of market power and anti-competitive mergers and acquisitions.[65] Facebook also noted that it is "not vertically integrated in the ad tech stack, so it has no such businesses to favour" and that it "should not be conflated" with Google.[66]

Google offered a more direct response to the hypothetical concerns raised by the Preliminary Report. Google explained that its search algorithm is designed to provide the most relevant results to a user's query.[67] Google also stated that it provides "explanations and tools for publishers and businesses to understand how Google Search works" because it is in its best interest to encourage publishers to produce quality content that is ranked highly by its search algorithm.[68] Google expressed concerns, however, that providing additional transparency could allow publishers to game the algorithm by exposing additional factors that increase a search result ranking.[69] This would enable publishers to achieve a higher search result ranking for their content without necessarily improving the quality of such content. Like Google, Facebook also touted its efforts to provide greater transparency over how its news feed ranking works, but noted that it did not see the connection between transparency commitments and solving the monetization challenges faced by the media industry.

Additionally, Facebook expressed concern that regulatory involvement in news ranking would take away the personalization that Facebook offers to its users. Facebook noted that it works to provide a personalized experience by taking "into account signals about the individual, her connections, and what is being shared on [its] services (based on actions that she takes on the platform, such as liking a post)."[70] Facebook suggested that the regulatory review board would change the focus of the news feed away from each person and instead focus on "outcomes for news publishers" and "their opportunities to monetise their content."[71]

Finally, Microsoft noted that the ACCC's recommendation may actually restrain, rather than promote competition, because under the current thresholds identified by the ACCC,

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[64] *Id.*
[65] *Competition and Consumer Act 2010* (Cth) (Austl.).
[66] *Facebook Response, supra* note 20, at 4.
[67] *Google Response*, *supra* note 32, at 10.
[68] *Id.* at 8.
[69] *Id.*
[70] *Facebook Response, supra* note 20, at 9.
[71] *Id.* at 10.

complying with these regulatory authorities could place a heavy burden on new competitors, raising the barrier to entry.[72]

C. Measures to Address Regulatory Imbalance

Preliminary Recommendation 6—Review of Regulations. According to the Preliminary Report, media businesses and digital platforms operate under different regulatory frameworks.[73] The ACCC recommended reviewing these frameworks to identify unnecessary regulation and to ensure regulations are applied effectively and consistently across business types, both online and offline.[74] Google's response acknowledged that a "review of media regulation may be appropriate in certain circumstances," but noted that "any review of media regulation should be conducted with the guiding principle that companies engaged in the same activity should be consistently regulated in respect of that activity."[75] In particular, Google argued that "the review should similarly account for differences among online activities, for example, the difference between providing links to existing content that has already been generated and the writing of articles and editorial selection."[76]

II. Potential Effect on Regulators in Other Jurisdictions

Competition investigations often have a contagion effect, that is, an investigation into allegedly anti-competitive practices by one competition authority may be duplicated by other competition authorities in other jurisdictions, even in jurisdictions where there is no actual evidence that the conduct in question harmed consumers. Such contagion is certainly a goal of ACCC Chairman Rod Sims, who has expressed hopes that his recommendations be exported to other jurisdictions.[77] Chairman Sims views the Preliminary Report as timely given that "governments overseas are looking at Facebook and Google" and that the ACCC has "come up with information that others haven't had."[78]

Effecting such contagion may be difficult in the United States. Business conduct and mergers in the United States are evaluated under a consumer welfare standard that requires antitrust enforcers to find evidence of harm to consumers before bringing a case.[79] Generally speaking, if there is no evidence of consumer harm, the antitrust enforcers in the United States do not act. In 2013, for example, the FTC closed its investigation into Google's search

[72] *Microsoft Response*, *supra* note 38.
[73] PRELIMINARY REPORT, *supra* note 10, at 12.
[74] *Id.*
[75] *Google Response*, *supra* note 32, at 11.
[76] *Id.*
[77] John McDuling, *The people v Google and Facebook: ACCC's Rod Sims takes on big tech*, THE SYDNEY MORNING HERALD (Dec. 15, 2018).
[78] *Id.*
[79] Christine Wilson, Fed. Trade Comm'n, Welfare Standards Underlying Antitrust Enforcement: What You Measure is What You Get (Feb. 15, 2019).

practices, finding that Google's practices may have harmed rivals, but were generally pro-competitive and beneficial for consumers.[80]

However, some prominent officials in the United States have recently called for an approach more similar to that recommended by the ACCC. For example, Federal Trade Commissioner Rohit Chopra raised similar concerns in a recent speech: "With tech platforms serving as the gateway for Americans to consume news and ideas, their dominance has raised fears about journalism and publishing." He characterized the battle for advertising dollars as being waged not "on the basis of the quality or popularity of news content," but "on who has more data." Commissioner Chopra suggested that the FTC launch an industry-wide inquiry.[81] Soon afterwards, the FTC announced the creation of a task force "dedicated to monitoring competition in U.S. technology markets, investigating any potential anticompetitive conduct in those markets, and taking enforcement actions when warranted."[82] The task force will include attorneys with expertise in markets for "online advertising, social networking, mobile operating systems and apps, and platform businesses."[83]

Members of Congress, some of whom are now presidential candidates, have also voiced concerns similar to the ACCC. Representative David Cicilline, chairman of the House Antitrust Subcommittee, recently called on the FTC to investigate "whether Facebook's conduct has violated antitrust laws," saying that the "FTC is facing a massive credibility crisis" with respect to its ability to regulate digital platforms.[84] Similarly, Senator Amy Klobuchar, the Ranking Member of the Senate Antitrust Subcommittee and a presidential candidate, gave a speech blaming digital platforms for the prominence of fake news, accusing them of advertising dominance due to their ability to use massive data sets to target consumers, and expressed concern with algorithms that control what content reaches consumers and that change without notice.[85] Most recently, Senator Elizabeth Warren, who is also a presidential candidate, made increased regulatory scrutiny of large technology companies a major component of her campaign's platform and, for example, proposed that acquisitions such as Facebook's acquisitions of WhatsApp and Instagram be unwound.[86]

Other jurisdictions have also begun looking more closely at digital platforms. For example, following the release of a recent independent report finding that Google and Facebook "dominate" the United Kingdom's ad market, Chancellor Phillip Hammond has asked the Competition and Markets Authority to conduct a review of the digital advertising

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[80] Fed. Trade Comm'n, *Statement of the Federal Trade Commission Regarding Google's Search Practices*, *In re Google Inc.*, FTC File No. 111-0163 (Jan. 3, 2013).
[81] Rohit Chopra, Fed. Trade Comm'n, Prepared Remarks of Federal Trade Commissioner Rohit Chopra, Silicon Flatirons Conference (Feb. 10, 2019).
[82] Press Release, Fed. Trade Comm'n, FTC's Bureau of Competition Launches Task Force to Monitor Technology Markets (Feb. 26, 2019).
[83] *Id.*
[84] Rep. David N. Cicilline, *The Case for Investigating Facebook*, N.Y. TIMES (Mar. 19, 2019).
[85] Sen. Amy Klobuchar, Speech at the Open Markets Institute (June 12, 2018).
[86] Ben Brody & Molly Schuetz, *Warren Calls for Breakup of Tech Companies Like Amazon, Facebook*, BLOOMBERG (Mar. 8, 2019).

market in the U.K.[87] The independent report identified some of the same concerns as the ACCC, including that news publishers are reliant on traffic from Google and Facebook.[88] In addition, the Japanese Fair Trade Commission is reportedly launching a "massive survey" to assess the market power of digital platforms, the impact that data collection has on competition, and how to assess mergers that involve digital platforms.[89]

III. Conclusion

The ACCC's Digital Platforms Inquiry is unique in that it primarily focused on only two businesses—Google and Facebook. Interestingly, the Preliminary Report did not present evidence of wrongdoing on the part of digital platforms, but it did propose preliminary recommendations to meaningfully regulate the conduct of digital platforms. The ACCC's final report is due by June 30, 2019. Only time will tell if the Australian government will actually implement these recommendations and, if so, the effects of such changes: will they improve the quality of journalistic content in Australia or, as critics have argued, is the focus on digital platforms misplaced? In any event, the Digital Platforms Inquiry has given us insight into the focus of potential future investigations into digital platforms.

[87] Mark Sweney, *Hammond calls for regulators to investigate UK's digital ads market*, THE GUARDIAN (Mar. 13, 2019).
[88] Sarah Vizard, *Online ad market faces investigation over competition concerns*, MARKETING WEEK (Feb. 12, 2019).
[89] *Japan's antitrust watchdog to study four tech giants to see if fair business regulations are needed*, JAPAN TIMES (Dec. 12, 2018).

Voluntary Portability:
A Procompetitive Solution to Data Enclosure

Wyatt Fore[1]

Big Data is big business. Given the explosion of computing power in the 21st Century, firms are now able to organize "high-volume, high-velocity, and/or high-variety information" assets.[2] And it is no secret that American tech companies leverage the value made possible by the Internet and data.[3] For example, Mark Zuckerberg has stated that the continued success of Facebook is "not just about building the best features. It is about building the best community."[4] And Satya Nadella, CEO of Microsoft, has said that "data and digital is a new *factor of production*."[5]

Some firms have valuable positions that allow them to take advantage of this trend, especially firms whose business models involve platforms or networks. In a platform business model, "there is more surplus, more value that is built on top of the platform,"[6] and in a network, the firm operates the "roads for information traffic" to connect people or things.[7] In both, the firm's central position allows it to obtain troves of data from both the products that firm offers, as well as from third parties who operate on their platforms or networks.[8] After aggregating and analyzing the data, the firm can then monetize it by offering better, more innovative products in its primary market, and/or offering secondary products such as advertising.[9]

Some argue that aggregated data is not like other strategic inputs. Unlike other assets, which generally have "declining marginal utility, the value of any piece of data *increases* in combination with additional data."[10] Because of this, the enclosure[11] of large swaths of

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[1] Wyatt Fore is an associate in the Washington, D.C. office of Constantine Cannon.
[2] Big Data, *Gartner IT Glossary*, https://www.gartner.com/it-glossary/big-data/.
[3] Evan Osnos, *Can Mark Zuckerberg Fix Facebook Before It Breaks Democracy?*, NEW YORKER, Sept. 17, 2018.
[4] *Id.*
[5] Lianna Brinded, *Microsoft CEO Satya Nadella: We need to do to data what we did with electricity*, YAHOO FINANCE UK, Jan. 24, 2019 (emphasis added).
[6] *Id.*
[7] Network, *Gartner IT Glossary*, https://www.gartner.com/it-glossary/network.
[8] *See* Jonathan Taplin, MOVE FAST AND BREAK THINGS 76-77 (2017).
[9] *See* James Paine, *Big Data in Marketing: 5 Use Cases*, INC., Nov. 25, 2017.
[10] Sen. Mark Warner, Potential Policy Proposals for Regulation of Social Media and Technology Firms (Aug. 2, 2018) (citing Stucke & Grunes, BIG DATA AND COMPETITION POLICY (Oxford Univ. Press, 2016)); OECD, Data-Driven Innovation for Growth and Well-Being: Interim Synthesis Report 29 (Oct. 2014) [hereinafter *OECD Report*].
[11] By enclosure, I mean the creation of private property rights from "things that were formerly thought of as either common property or uncommodifiable," like information. James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMPORARY PROBLEMS 33, 37 (Winter 2003).

information within a handful of firms creates potential barriers to entry for nascent firms that rely on certain types of data as a critical factor of production.

But that view is not universally shared. Some commentators have noted that even if Big Data may give a firm an advantage in the primary market, it does not necessarily diminish competition because "users do not use a service because of a superior database but because of a superior experience."[12] Further, Big Data might not give an insurmountable position because data is not valuable in itself but rather relies on "talent knowing how to derive meaningful insights" from it.[13] And, of course, data is replicable and tends to go "stale," *i.e.*, it is "subject to . . . considerable value reduction" over time.[14] As a result, Big Data may offer firms only a temporary competitive advantage.[15]

Regardless, data enclosure is not just a potential issue for tech companies. Many industries, including retail, payments, agriculture, pharmaceutical distribution, and airlines, have shifted their business models to take advantage of Big Data. There are no easy solutions to potential concerns, but as described below, voluntary data portability can help prevent data enclosure by lowering barriers to entry for new market entrants.

I. Data Enclosure: A Possible Problem for Competition?

The effect of Big Data on competition is a hotly-debated topic. For example, the OECD notes that Big Data may cause a "'winner takes all' result" for certain firms.[16] This might occur for two reasons. First, because Big Data offers "increasing returns to scale," whereby data accumulation "can lead to significant improvements of data-driven services which in turn[] can attract more users, leading to even more data that can be collected."[17] And second, "increasing returns to scope," whereby the "diversification of services leads to even better insights if data linkage is possible."[18] When firms retain exclusive access to Big Data, this "can lead to market concentration and dominance as the inevitable outcome of market success."[19]

At least one European authority has taken an enforcement action that advances this theory of competitive harm. The German competition regulator recently ruled that Facebook abused its dominance in the German market for social networks "based on the extent of collecting, using and merging data" in violation of German competition law and the European

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[12] Jakob Kucharczyk, *Competition and Big Data: Some Trends Never Go Out of Fashion*, DISRUPTIVE COMPETITION PROJECT (Jan. 12, 2018).
[13] *Id.*
[14] *Id.*
[15] Anja Lambrecht & Catherine Tucker, *Can Big Data Protect a Firm from Competition?*, ANTITRUST CHRONICLE, Winter 2017, at 11.
[16] *OECD Report*, *supra* note 10, at 7.
[17] *Id.* at 29.
[18] *Id.*
[19] *Id.* at 30.

General Data Protection Regulation ("GDPR").[20] There, the German regulator asserted that data enclosure affected competition at two levels. First, in the primary market: Facebook's Big Data gave it undue market power "to the detriment of other providers of social networks."[21] Second, in ancillary markets that rely on Big Data, Facebook caused "competitive harm . . . for advertising customers and competitors in the advertising market" as well.[22] Under this rubric, advertising is not the only ancillary market that could suffer harm; following this argument one could imagine that the social network could leverage its market power to distort competitive markets in, for example, third-party applications.

So far, U.S. antitrust law has directly addressed the possible effects of data enclosure on competition in a few cases.[23] Generally, American enforcers have hesitated to endorse theories of anticompetitive harm from Big Data.[24] And historically enforcement decisions—including the landmark 2011 consent decree between the FTC and Facebook—have focused on the harm to consumers' privacy, rather than harm to competition.[25]

This reluctance mirrors the general rule that a company generally has a "right . . . freely to exercise [its] own independent discretion as to parties with whom [it] will deal,"—including for its data resources.[26] Of course, this rule against a duty to deal is not absolute, and courts have occasionally recognized that a dominant firm must deal with a rival.[27] However, the presumption is strong—and applies even for dominant firms, such as the defendant Verizon in *Trinko*, whose monopoly power was based on a physical network infrastructure. Although compelling that firm to share its infrastructure may temporarily boost competition, "it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities."[28] While, this "right to refuse" is "not unqualified" and exclusion "can

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[20] *See* Press Release, Bundeskartellamt, *Bundeskartellamt prohibits Facebook from combining user data from different sources* (Feb. 7, 2019).
[21] Frequently Asked Questions, Bundeskartellamt, *Bundeskartellamt prohibits Facebook from combining user data from different sources: Background Information on the Bundeskartellamt's Facebook proceeding* (Feb. 7, 2019).
[22] *Id.* The German regulator also found a consumer harm in "loss of control" that under German law was a harm to competition as an exploitative business term. *Id.*
[23] *See, e.g.*, Statement of the Federal Trade Commission concerning Google/DoubleClick at 12-13, *Proposed Acquisition of Hellman & Friedman Capital Partners V, LP by Google, Inc.*, No. 071-0170 (F.T.C. Dec. 19, 2007); *Realcomp II v. FTC*, 635 F.3d 815 (6th Cir. 2011) (regarding association website preventing information distribution to public real-estate advertising websites).
[24] *See* Victoria Graham, *'High' Threshold for Regulating Big Tech's Data: Justice Dept.*, BLOOMBERG LAW, Aug. 20, 2018.
[25] Press Release, Fed. Trade Comm'n, Facebook Settles FTC Charges That It Deceived Consumers By Failing to Keep Privacy Promises (Nov. 29, 2011).
[26] *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398, 408 (2004) ("*Trinko*") (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)).
[27] *See, e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 586 (1985).
[28] *Trinko*, 540 U.S. at 408.

constitute anticompetitive conduct,"[29] the precise boundaries of a dominant firm's legal duty to deal is highly contested.[30]

In contrast to Verizon's physical infrastructure, with Big Data there is a threshold issue of ownership. Unlike an intellectual property interest, such as copyright or trademark, there is no property interest for increasing amounts of information alone.[31] Further, data derives from information that *already* exists; thus, as a resource it is non-exclusive and also "non-rivalrous, meaning consumption of [it] does not decrease its availability to others."[32] As a result, commentators—and even some tech leaders—note that firms with access to Big Data are not "owners" of information, but rather merely "custodians" of it.[33] This creates a barrier-to-entry calculus that differs significantly from other resources, such as the physical networks in *Trinko*.

But, at least for now, there is a clear divergence between American and European approaches, particularly given Germany's recent actions against Facebook and similar proposals by the United Kingdom.[34] And unfortunately for most firms handling Big Data, they must comply with multiple regulatory regimes. As a result, it would be sensible for firms with Big Data to consider proactively any alleged anticompetitive effects.

II. Voluntary Data Portability: A Procompetitive Solution

In contrast to the United States, European officials have sought to enforce portability as a matter of regulation. The GDPR states that consumers have a right to "receive personal data they have provided to a controller in a structure, commonly used and machine-readable format," and request that a controller transmit the data directly to another controller.[35] However, commentators have noted that "it would be impractical and ineffective to copy and paste the GDPR to U.S. law—the institutions and legal systems are just too different."[36]

Recognizing that data enclosure poses possible issues for competition, firms and commentators have explored voluntary portability, "a feature that lets a user take their data

[29] *Id.*
[30] *Compare, e.g.*, Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841 (1989), *with* Sandeep Vaheesan, *Reviving an Epithet: A New Way Forward for the Essential Facilities Doctrine*, 3 UTAH L. REV. 911 (2010).
[31] *See Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991) (finding phone book white pages not copyrightable).
[32] Lambrecht & Tucker, *supra* note 15, at 1.
[33] World Economic Forum Annual Meeting, *Digital Trust and Transformation: A Conversation with Satya Nadella*, WeForum.org, Jan. 24, 2019; *cf. also* Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183 (2016) (proposing an "information fiduciary" duty on data collectors to protect privacy rights).
[34] UNITED KINGDOM EXPERT PANEL ON DIGITAL COMPETITION, UNLOCKING DIGITAL COMPETITION (Mar. 2019).
[35] General Data Protection Regulation, Regulation 2016/679, art.20(1), 2016 O.J. (L. 119) 1.
[36] Gus Rossi, *Is the GDPR Right for the United States?*, PUBLIC KNOWLEDGE BLOGS, Apr. 9, 2018.

from a service and transfer or 'port' it elsewhere."[37] Data portability thus lowers switching costs, prevents consumer lock-in, diminishes network effects, and promotes competition between services. This benefits consumers by incentivizing platforms and services to compete on quality, innovation, features, consumer privacy protections, and price.

One example is the Data Transfer Project ("DTP"), an "open source initiative to enhance the data portability ecosystem by reducing the infrastructure burden on both providers and users"[38] by "enabl[ing] consumers to transfer their data directly from one service to another, without needing to download and re-upload it."[39] Current DTP contributors include Facebook, Alphabet, Microsoft, and Twitter, but the project "encourage[s] participation of as many providers as possible."[40]

Central to the DTP's stated goals is diminishing anticompetitive effects: "If a user wants to switch to another product or service because they think it is better, they should be able to do so as easily as possible. This concept of allowing users to choose products and services based on choice, rather than being locked in, helps drive innovation and facilitates competition."[41] Thus, this portability aims to promote competition much in the same way that the "local number portability ['LNP'] requirement by Congress in the Telecommunications Act of 1996" helped to "facilitat[e] competitive switching among customers."[42] Before LNP, the practical effect of forcing a customer to give up her telephone number—and then tell all her contacts about her new number—created substantial lock-in effects to incumbent local exchanges. Thus, number portability promoted competition by diminishing switching costs.[43] Similarly here, DTP would lower the switching costs based on the fact that it is "difficult and time-consuming to move data between platforms."[44] Thus commentators have expressed cautious optimism that the DTP is "potentially offer[ing] a solution to a major problem with social networks" because companies "instantly operate with a user's existing data rather than making them start from scratch."[45]

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[37] Gennie Gebhart et al., *What We Mean When We Say 'Data Portability'*, ELECTRONIC FRONTIER FOUNDATION: DEEP LINKS (Sept. 13, 2018).
[38] Data Transfer Project Overview and Fundamentals 3 (July 20, 2018).
[39] Brian Willard, *Introducing Data Transfer Project: an open source platform promoting universal data portability*, GOOGLE OPEN SOURCE BLOG (July 20, 2018).
[40] *Id.*
[41] *Id.*
[42] Sen. Warner, *supra* note 10, at 20; 47 U.S.C. § 251(b)(2).
[43] *See* R. Hewitt Pate, Assistant Attorney General, U.S. Dep't of Justice Antitrust Div., Telecommunications Competition (Dec. 4, 2003) (citing *Telephone Number Portability, CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues*, CC Docket No. 95-116, Mem. Op. & Order & Further Notice of Proposed Rulemaking, FCC 03-284 (Nov. 10, 2003)).
[44] Rep. David N. Cicilline & Terrell McSweeny, *Competition is at the Heart of Facebook's Privacy Problem*, WIRED, Apr. 24, 2018.
[45] John Constine, *Facebook, Google and more unite to let you transfer data between apps*, TECHCRUNCH, July 2018.

Some have voiced skepticism that "data portability could be used by dominant providers *to the detriment* of smaller, emerging providers."[46] Per this concern, one could imagine that dominant firms could circle the wagons to disincentivize "portability requests to new entrants who may pose a competitive threat to them."[47] However, the DTP appears to take these concerns seriously, and the prototype "supports data transfer for several product verticals including: photos, mail, contacts, calendar, and tasks" and "enabled by existing, publicly available APIs [or Application Program Interfaces] from" both major and minor tech firms, including "Google, Microsoft, Twitter, Flickr, Instagram, Remember the Milk, and SmugMug."[48]

Further, even with incumbency advantage, data portability promotes competition in *ancillary* markets, *i.e.*, not just the firms from which data is downloaded, but the firms built on top of those firms. By lowering switching costs for consumers, data portability promotes competition among firms who create surplus value on top of networks and platforms by preventing those firms from becoming locked in to a particular network or platform. If a third-party application can compete on both Facebook and Google, consumers benefit.

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The DTP and other similar voluntary data portability initiatives[49] are in their infancy. Notably, there are "difficult tensions between data portability and privacy that must be balanced,"[50] as well as continuing technical challenges. As a result, firms and commentators should continue to analyze the competitive effects of voluntary data portability and continue the conversation.

Regardless, data portability offers a potential straightforward solution to the problem of data enclosure by lowering switching costs for users and preventing barriers to entry for nascent firms. This promotes competition—allowing consumers to benefit from cheaper and more innovative products as the digital marketplace expands.

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[46] Sen. Warner, *supra* note 10, at 21.
[47] *Id.*
[48] Willard, *supra* note 39.
[49] *E.g.*, Red Hat's Open Shift Container Platform, https://www.redhat.com/en/technologies/cloud-computing/openshift.
[50] New America Open Technology Institute, Comments on Federal Trade Commission Hearing on Competition and Consumer Protection in the 21st Century of New America's Open Technology Institute 4 (Aug. 20, 2018).

Hold Up or Hold Out: Differing Perspectives on Standard Essential Patent Licensing at the DOJ and FTC

Justine Haimi[1]

Antitrust regulators have been giving increasing thought to the intersection of intellectual property and antitrust as technology has taken a central role in the day-to-day life of consumers. Industry standards play a vital role in ensuring that this technology functions properly and that complementary products interoperate. In a series of recent speeches, Makan Delrahim, the Assistant Attorney General ("AAG") for the Antitrust Division of the Department of Justice ("DOJ"), has signaled a departure from previous DOJ guidance focused on the behavior of patent holders in the standard setting space. Instead, AAG Delrahim suggests that the true risk lies with entities seeking to use standard patented technology in their products. This shift in attention is in stark contrast to the ongoing enforcement action by the Federal Trade Commission ("FTC") against Qualcomm, a patent holder alleged to have used the inclusion of its technology in a standard to maintain a monopoly.

I. What is Standard Setting?

Standard setting organizations ("SSOs") are private organizations that adopt standards containing technical specifications and other criteria to ensure that the components of technological devices are interoperable. Standards are voted on by SSO members, who are industry participants—both those that invent technology ("innovators") and those that incorporate technology into their products ("implementers"). Standard-essential patents ("SEPs") are patents for any part of the technology that are necessary to meet a technical standard. Some SSO members may own the SEPs that are incorporated into these standards. Implementers seeking to use the technology claimed by a SEP must seek a license from the innovator who owns that SEP.

To prevent innovators from charging excessive royalties on SEPs required to meet a chosen technical standard, many SSOs rely on voluntary licensing commitments by SSO members.[2] Under these voluntary commitments, member SEP holders agree to license their patents on fair, reasonable, and non-discriminatory ("FRAND" or "RAND") terms to both SSO members and non-members. These commitments facilitate negotiations between innovators and implementers and enable industry-wide adoption of standards.

II. History of Standard-Setting Guidance at the FTC and DOJ

Historically, guidance from the DOJ and FTC has been concerned with the issue of patent "hold up," which includes the charging of high licensing royalties or fees by a SEP owner once the technology claimed by its patent has been adopted as an industry-wide standard

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[1] Justine Haimi is an associate at Skadden, Arps, Slate, Meagher & Flom, LLP.

[2] While non-member patent holders typically have no legal obligations under SSO policies, an SSO may request that a non-member undertake to grant licenses to patents that may be included in a technical standard on FRAND terms. *See, e.g.*, ETSI, *Guide on Intellectual Property Rights (IPRs)* 54 (Sept. 19, 2013).

and implementers have no choice but to use that technology. Less discussion has focused on patent "hold out," or an implementer's refusal to pay FRAND royalties or negotiate FRAND terms after an innovator has incurred sunk costs into developing technology.

In 2007, the DOJ and FTC published a joint report that provided guidance to SSOs to help "mitigate the potential for hold up," suggesting mechanisms such as the *ex ante* consideration of licensing terms.[3] In 2011, the FTC published a report stating that "[h]old-up may have especially severe consequences for innovation and competition in the context of standardized technology."[4] Noting that RAND is not clearly defined, the report provided guidance to courts attempting to value RAND royalties.[5] Both this 2011 report and a 2013 joint policy statement released by the DOJ and U.S. Patent and Trademark Office ("USPTO")[6] addressed the use of injunctions in patent infringement suits involving a SEP. The reports suggested that a RAND commitment by a SEP holder evinces that royalties may suffice as a remedy and could weigh against the granting of an injunction.[7] Further, the 2011 report stated that courts should consider whether an injunction would "deprive consumers of interoperable products; raise costs above the incremental value of the invention compared to alternatives at the time the standard was set; or threaten to undermine the collaborative innovation that can result from the standard setting process."[8]

This concern was reiterated in the 2013 statement, which stated that "determinations on the appropriate remedy in cases involving FRAND-encumbered, standards-essential patents should be made against the backdrop of promoting both appropriate compensation to patent holders and strong incentives for innovators to participate in standards-setting activities."[9] However, the 2013 statement acknowledged that an injunction may be appropriate where an implementer is unable or refuses to take a FRAND license in an attempt to avoid compensating the SEP holder or where a court could not award damages.[10]

III. Recent DOJ Statements

AAG Delrahim, the first registered patent lawyer to head the Antitrust Division,[11] has discussed the application of antitrust law to intellectual property rights at length. Describing

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[3] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 37 (2007).
[4] FED. TRADE COMM'N, THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION 22 (2011) [hereinafter *2011 Report*].
[5] *Id.* at 23.
[6] U.S. DEP'T OF JUSTICE & U.S. PATENT & TRADEMARK OFFICE, *Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments* (2013) [hereinafter *2013 Statement*].
[7] *2011 Report*, *supra* note 4, at 28; *2013 Statement*, *supra* note 6, at 5 n.11.
[8] *2011 Report*, *supra* note 4, at 28.
[9] *2013 Statement*, *supra* note 6, at 10.
[10] *Id.* at 7.
[11] Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Remarks at the USC Gould School of Law's Center for Transnational Law and Business Conference (Nov. 10, 2017).

his "New Madison" approach, AAG Delrahim set out four basic principles aimed at ensuring continued innovation and dynamic competition in the context of standard setting:

> (1) antitrust law should not be used as a tool to police FRAND commitments that innovators make to SSOs;
>
> (2) SSOs should not become vehicles for concerted action by implementers, which would reduce incentives to innovate and encourage hold out;
>
> (3) a key feature of patent rights is the right to exclude, therefore SSOs and courts should have a very high burden before adopting rules that restrict that right or amount to a compulsory licensing scheme; and
>
> (4) consistent with this right to exclude, unilateral and unconditional refusals to license a patent are *per se* legal under the antitrust laws.[12]

First, AAG Delrahim posited that condemning hold up in isolation, while ignoring hold out, risks over-enforcement under the antitrust laws.[13] This over-enforcement would, in turn, discourage innovation, particularly in light of the deterrent effect of treble damages available under the Sherman Act.[14] Therefore, antitrust laws should not be used as a tool to ensure that SEP holders fulfill voluntary FRAND commitments. AAG Delrahim supported this principle by pointing to Supreme Court jurisprudence interpreting the Sherman Act, which cautioned against "false positives" condemning lawful pro-competitive conduct and found that there is no antitrust duty to deal with another company or a competitor.[15] Additionally, the Supreme Court has emphasized that the Sherman Act does not recognize a cause of action that would require antitrust courts to determine pricing and deal terms.[16] With this Supreme Court guidance in mind, AAG Delrahim stated that a unilateral refusal to license a SEP is not a form of unlawful exclusionary conduct, and that there is no antitrust-imposed duty for a SEP holder to license on FRAND terms, even after making a voluntary commitment.[17] Further, contrary to the FTC's guidance in its 2011 report, AAG Delrahim counseled that antitrust courts are not authorized to determine what royalty rates meet FRAND requirements.[18] Instead, AAG Delrahim suggested that FRAND disputes are best remedied under contract law because "contract remedies do not involve the threat of treble damages that can deter lawful, pro-competitive conduct."[19]

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[12] Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, The "New Madison" Approach to Antitrust and Intellectual Property Law (Mar. 16, 2018).
[13] *Id.*
[14] Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Remarks at IAM's Patent Licensing Conference in San Francisco (Sept. 18, 2018).
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*; Delrahim, *supra* note 11.

In support of the second New Madison principle, AAG Delrahim warned against the "collective exertion of monopsony power" by implementers within an SSO who "come together to dictate licensing terms to a patent holder as a condition for inclusion in a standard."[20] AAG Delrahim described this collective hold out as "a more serious impediment to innovation" than hold up and asserted that "under-investment by the innovator should be of greater concern than under-investment by the implementer."[21] This is because, unlike implementers who may not have incurred certain sunk costs when faced with hold up, innovators must invest in the patent before the standard setting process even begins.[22] To mitigate against the risk that implementers will exploit the standard setting process, AAG Delrahim encouraged SSOs to institute safeguards to avoid voting blocks of competitors and to implement a diversity of patent policies among SSOs within the same industry.[23]

In support of the third New Madison principle, which is based on a patent holder's right to exclude, AAG Delrahim cited to the "Copyright and Patent Clause" of the Constitution, which grants "to authors and inventors the exclusive right to their respective writings and discoveries."[24] In recognition of this exclusive right, AAG Delrahim stated that "[r]ules that deprive a patent holder from exercising this right—whether imposed by an SSO or by a court—undermine the incentive to innovate and worsen the problem of hold-out. After all, without the threat of an injunction, the implementer can proceed to infringe without a license, knowing that it is only on the hook only for reasonable royalties."[25] Accordingly, AAG Delrahim contended that injunctions against infringement serve the public interest by incentivizing and rewarding inventors.[26] Clarifying that the 2013 Joint DOJ/USPTO Statement misconstrued the DOJ's position about when SEP holders should be allowed to exclude competitors, AAG Delrahim withdrew the DOJ's assent to that policy statement.[27] He stated that the DOJ and USPTO would engage to draft a clearer joint statement that balances the interests at stake when a SEP holder seeks an injunction against an infringer.[28]

Turning to the final principle, AAG Delrahim again cited to the protection of patent rights by statute and the Constitution.[29] He asserted that the enforcement of valid patent rights should not be a violation of antitrust law, and a patent holder cannot violate the antitrust laws by properly asserting its right to exclude (*e.g.*, by seeking an injunction or refusing to license).[30] AAG Delrahim elaborated that while "contract law may very well require a SEP-holder to deal with any willing licensee, . . . the Sherman Act does not convert FRAND commitments into a

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[20] Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Remarks at the 19th Annual Berkeley-Stanford Advanced Patent Law Institute (Dec. 7, 2018).
[21] Delrahim, *supra* note 11.
[22] *Id.*
[23] Delrahim, *supra* note 12, at 12; Delrahim, *supra* note 20.
[24] Delrahim, *supra* note 20 (citing U.S. CONST. art. I, § 8, cl. 8).
[25] Delrahim, *supra* note 11.
[26] *Id.*
[27] *Id.*
[28] *2013 Statement*, *supra* note 6, at 8.
[29] Delrahim, *supra* note 11.
[30] *Id.*

compulsory licensing scheme."[31] Therefore, it would be an error to infer that a FRAND commitment establishes an antitrust duty to license.[32] AAG Delrahim concluded that a SEP holder's unilateral and unconditional refusal to license is *per se* legal under the antitrust laws, noting that "competition and consumers both benefit when inventors have full incentives to exploit their patent rights."[33]

In summary, AAG Delrahim's recent statements signal a shift in DOJ policy, from a focus on the competitive harm that can result from SEP holders seeking injunctive relief to the negative effects on innovation that can result from implementers misusing the SSO process to strong arm SEP holders into unfavorable licensing terms. To avoid the latter harm, AAG Delrahim strongly supports the use of injunctive relief by SEP holders to protect their patent rights, in accordance with a patent holder's constitutionally recognized right to exclude. He also recommends against the use of antitrust laws to police FRAND commitments, suggesting that contract law is a more appropriate forum for FRAND disputes.

IV. Recent FTC Statements and Enforcement Actions

Joseph Simons, Chairman of the FTC, has expressed agreement with AAG Delrahim's view that neither breach of a FRAND commitment nor a fraudulent promise to license on FRAND terms alone constitute a violation of the Sherman Act.[34] However, Chairman Simons recognized that the standard-setting process "can be exclusionary or anticompetitive" where breach of a FRAND commitment "contribute[s] to the acquisition or maintenance of monopoly power in a properly-defined market, or involve[s] an agreement that unreasonably restrains trade."[35] Chairman Simons clarified that exclusionary conduct is not exempt from antitrust scrutiny just because the conduct occurred within a standard setting process.[36] Stating that the FTC is not focused on whether hold up or hold out is more likely, Chairman Simons made clear that "the FTC will continue . . . economically grounded and fact-based enforcement of the antitrust laws in this area."[37] Notably, the FTC has brought seven significant enforcement actions challenging patent hold up over the past two decades, whereas the DOJ has never brought an action on hold up grounds.[38]

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[31] Delrahim, *supra* note 14.
[32] *Id.*
[33] Delrahim, *supra* note 11, at 16.
[34] Joseph Simons, Chairman, Fed. Trade Comm'n, Prepared Remarks at Georgetown Law Global Antitrust Enforcement Symposium 5-6 (Sept. 25, 2018).
[35] *Id.* at 6.
[36] *Id.*
[37] *Id.*
[38] Terrell McSweeny, Commissioner, Fed. Trade Comm'n, Holding the Line on Patent Holdup: Why Antitrust Enforcement Matters n.21 (Mar. 21, 2018) (listing *In re Dell*, 121 F.T.C. 616 (1996); *In re Rambus, Inc.*, No. 9302 (2002); *In re Union Oil Co. of Cal.*, No. 9305 (2003); *In re Negotiated Data Solutions LLC*, No. 051-0094 (2008); *In re Robert Bosch GmbH*, No. 121-0081 (2012); *In re Motorola Mobility*, No. 121-0120 (2013); and *FTC v. Qualcomm* (N.D. Cal. filed Jan. 17, 2017)).

The FTC policy articulated by Chairman Simons is consistent with the Commission's enforcement action against Qualcomm.[39] In its complaint, the FTC alleged that Qualcomm violated the FTC Act by using anticompetitive tactics to maintain a monopoly in baseband processors, which enable cellular communications in mobile products.[40] In order to communicate with a particular cellphone network, a baseband processor must comply with the cellular communication standards supported by that network.[41] Qualcomm owns several cellular SEPs which it advocated for inclusion in industry standards and had committed to license on FRAND terms to several SSOs' members.[42] Specific to these cellular SEPs, the FTC alleged that Qualcomm:

> (1) maintains a "no license-no chips" policy under which it withholds baseband processors unless a customer accepts Qualcomm's preferred licensing terms for its cellular SEPs, including elevated royalties if a customer uses competitors' processors;
>
> (2) has consistently refused to license its related SEPs to competitors, violating its FRAND commitments.[43]

In its Complaint, the FTC stated that in a typical dispute between a SEP holder and implementer, the SEP holder can use patent litigation to be awarded reasonable royalties—usually well below the rates offered by a SEP holder prior to litigation.[44] Since SEP holders know an implementer can go to court to seek better terms, the parties' negotiations occur "in the shadow of the law," which benefits implementers to the extent the costs of defending against infringement are not too high.[45] Qualcomm's "no license-no chips" policy, the FTC argued, "effectively denies OEMs the opportunity to challenge Qualcomm's royalty demands . . . by dramatically increasing OEMs' costs of going to court."[46] These costs include not only the typical costs associated with litigation, but also the cost of losing access to Qualcomm's "dominant" supply of baseband processors.[47] Because Qualcomm could threaten implementers with supply disruptions by virtue of its alleged dominance, the FTC asserted that

[39] Chairman Simons was not at the FTC when the complaint was filed and recused himself from the Qualcomm lawsuit after joining the agency.
[40] Complaint at 2, *Fed. Trade Comm'n v. Qualcomm*, No. 17-cv-00220-LHK (N.D. Cal. Feb. 1, 2017) [hereinafter *Complaint*].
[41] Order Denying Motion to Dismiss at 4, *Fed. Trade Comm'n v. Qualcomm*, No. 17-cv-00220-LHK (N.D. Cal. June 26, 2017).
[42] *Complaint*, *supra* note 40, at 12.
[43] *Id.* at 2-3. The FTC also alleged that Qualcomm violated the antitrust laws by (1) offering customers incentive payments, often tied to the purchase of Qualcomm processors, to induce customers to accept Qualcomm's license terms and (2) entering into exclusive dealing arrangements with Apple, Inc.
[44] *Id.* at 16.
[45] *Id.*
[46] *Id.* at 18.
[47] *Id.*

implementers acceded to non-FRAND terms in order to have access to Qualcomm processors.[48]

Addressing Qualcomm's refusal to license its SEPs to baseband processor competitors, the FTC stated that Qualcomm is, in the first instance, violating its FRAND commitments to several SSOs.[49] Additionally, Qualcomm's refusal to license its SEPs to competitors contributes to its ability to charge implementers elevated royalties for using a competitor's processor.[50] The FTC concluded that Qualcomm would be unable to charge these elevated royalties if it granted SEPs to its competitors—since baseband processor competitors, unlike implementers, do not depend on Qualcomm for processor supply, Qualcomm could not use the threat of supply disruption to skew negotiations in its favor.[51]

The FTC's arguments against Qualcomm are seemingly misaligned with AAG Delrahim's New Madison approach, which views antitrust as the improper vehicle for litigating FRAND disputes, particularly around appropriate licensing rates. Further, in AAG Delrahim's view, SEP holders like Qualcomm have an absolute right to exclude and no duty to deal with a competitor.[52] However, in a move more aligned with AAG Delrahim's suggestion that FRAND commitments be policed under contract law, the FTC moved for partial summary judgment under California contract law and not the FTC Act, claiming that Qualcomm's failure to license to competitors on FRAND terms violated its written commitment to two SSOs. The district court agreed with the FTC that "as a matter of law, the [SSOs'] policies both require

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[48] *Id.*

[49] *Id.* at 24.

[50] *Id.*

[51] *Id.*

[52] In July 2017, Qualcomm filed a patent infringement case against Apple at the U.S. International Trade Commission ("ITC"), alleging infringement of certain SEPs related to smartphone battery maintenance and requesting an import ban on infringing Apple devices. The USITC, which adjudicates cases involving imports that allegedly infringe intellectual property rights, in its initial determination declined to issue an exclusion order against Apple despite finding that imported iPhones using Intel chips infringed Qualcomm SEPs. *In re Certain Mobile Electronic Devices and Radio Frequency and Processing Components Thereof*, Inv. No. 337-TA-1065 (Sept. 28, 2018). While it has issued exclusion orders in previous cases (e.g., against Sony for infringement of Fujifilm's SEPs), historically the ITC has limited exclusion orders due to concerns including those around patent hold up. J. Gregory Sidak, *International Trade Commission Exclusion Orders for the Infringement of Standard-Essential Patents*, 26 CORNELL J.L. & PUB. POL'Y 125 (2016). On March 26, 2019, an ITC administrative judge issued an initial determination that Apple infringed on certain Qualcomm patents, but this non-binding determination is still subject to review by the ITC. *In re Certain Mobile Electronic Devices and Radio Frequency and Processing Components Thereof (II)*, Inv. No. 337-TA-1093 (Mar. 26, 2019). On the same day, the ITC rejected Qualcomm's patent infringement claim based on another patent, finding that Apple presented "clear and convincing evidence" that Qualcomm's intellectual property claim was invalid as obvious over two previously issued patents. *In re Certain Mobile Electronic Devices and Radio Frequency and Processing Components Thereof*, Inv. No. 337-TA-1065 (Mar. 26, 2019).

Qualcomm to license its SEPs' to competitors, and required Qualcomm to begin licensing its patents to all comers in accordance with those policies.[53]

V. Conclusion

At a recent event, AAG Delrahim appeared to criticize the FTC, referring to it as "another agency that happens to share enforcement powers with the Justice Department antitrust division that shall go unnamed," for basing its enforcement action against Qualcomm on a theory of excessive SEP royalties.[54] A few days later, the FTC concluded its trial against Qualcomm and the court's decision is currently pending. While the divergence in views between the DOJ and FTC may signal a theoretical policy rift in the agencies' views of standard setting, in practice there may not be much real-world change: the FTC likely will continue to challenge hold up by SEP holders as it has over the past two decades, while the DOJ, in accordance with past practice, likely will continue not to pursue enforcement actions in this area.

[53] Order Granting FTC's Partial Motion for Summary Judgment at 25, Fed. Trade Comm'n v. Qualcomm, No. 17-cv-00220-LHK (N.D. Cal. Nov. 6, 2018).
[54] Leah Nylen, *DOJ's Delrahim criticizes "theory" underlying FTC's Qualcomm case*, MLEX (Jan. 25, 2019).

Media Deal Fever: The Rush for Content Creation and Distribution Assets

Bradley Pierson and Michelle Honor[1]

Changing industry dynamics and consumer preferences, including the emergence of vertically integrated, direct-to-consumer content ("DTC") providers such as Netflix, Hulu, and Amazon's Prime Video, are fundamentally altering the way people consume media content. To adapt to this evolving media landscape and boost their appeal to consumers, advertisers, and licensees like cable and satellite companies, media firms and telecommunications companies are using M&A to expand their offerings and add content to their portfolios. This has led to a flurry of recent M&A activity in the media industry. The Department of Justice Antitrust Division's ("DOJ") probes of these media deals have focused primarily on determining whether the consolidation of content rights and distribution services will harm competition in markets for content licensing and TV advertising, and DOJ has favored the use of structural rather than behavioral remedies to resolve competitive concerns.

I. Horizontal Mergers of Broadcasters

A. *Sinclair/Tribune*

Interest among some media heavyweights in expanding product offerings and securing control of desirable programming has helped drive recent merger activity involving broadcasters. For example, the failed $3.9 billion acquisition of Tribune Media Company by Sinclair Broadcasting Group would have combined two of the largest owners of TV stations in the U.S. to create a single mega broadcasting firm capable of reaching nearly half of all American TV viewers.[2] In addition to expanding Sinclair's broadcasting footprint, the transaction would have transferred valuable content rights to Sinclair, including ownership of the cable network WGA America and the digital multicast network Antenna TV, as well as a minority stake in the TV Food Network.[3] The parties argued that the merger was procompetitive because "[t]he Tribune stations are highly complementary to Sinclair's existing footprint,"[4] and because the transaction would enable Sinclair to build a next-generation broadcasting platform, scale emerging networks, "bolster local news coverage and be a stronger competitor to internet giants like Facebook and Google."[5]

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[1] Bradley Pierson and Michelle Honor are associates at Skadden, Arps, Slate, Meagher & Flom, LLP.

[2] Kelcee Griffs, *FCC Opens Comment Period On Sinclair-Tribune Merger*, LAW360 (May 22, 2018) ("Under the FCC's media ownership rules, a single broadcaster may reach only 39 percent of U.S. households, but the combined Sinclair-Tribune machine could reach about 59 percent of American TV viewers, even after its planned station spinoffs. That number plummets to 37 percent — right under the cap — after applying FCC 'discounts' such as the UHF discount, Sinclair's April merger amendment shows.").

[3] Press Release, Tribune Media, Sinclair Broadcast Group To Acquire Tribune Media Company For Approximately $3.9 Billion (May 8, 2018).

[4] *Id.*

[5] Cecelia Kang & Sydney Ember, *Sinclair Deal With Tribune Hits Complications in Washington*, N.Y. TIMES (Feb. 27, 2018).

After the public announcement of the deal in May 2017, the DOJ and the Federal Communications Commission ("FCC") both investigated the transaction. The DOJ's probe focused primarily on determining whether the merger would harm competition in certain local regions by unduly concentrating control of TV stations (and thus content transmission) in those areas. The DOJ appeared to be specifically concerned that the transaction would "give Sinclair too much power over television advertising and over licensing deals with cable and satellite companies that retransmit their broadcasts."[6] In an effort to remedy these concerns, Sinclair and the DOJ began to discuss potential structural remedies. By mid-July 2017, several news outlets reported that the two sides were close to an agreement, and that the DOJ was just days away from announcing a consent decree pursuant to which Sinclair would agree to divest roughly twelve TV stations in cities where it and Tribune both owned stations.[7] Before Sinclair and the DOJ could finalize the consent decree, however, the FCC, which also had concerns about the merger's consolidation of TV stations in certain local areas, referred the transaction to an administrative law judge for review, effectively blocking the deal.[8] The transaction fell apart shortly thereafter.

B. *Gray Television/Raycom Media*

The DOJ similarly scrutinized Gray Television's $3.65 billion acquisition of rival broadcaster Raycom Media in 2018. This transaction combined two of the largest owners of top-rated local TV stations and digital assets in the U.S., creating a combined company owning 142 TV stations in 92 markets (including 62 stations ranked first in all-day Nielson ratings in their local markets), that is capable of reaching 24% of U.S. households.[9] The merging parties claimed that the deal combined "highly complementary portfolios" of TV stations and would facilitate Gray's transformation "from a small, regional broadcaster into a leading media company with nationwide scale."[10]

As in its investigation of the failed *Sinclair/Tribune* deal, the DOJ considered whether the *Gray/Raycom* transaction "would eliminate head-to-head competition between" the merging parties in certain local areas and give the combined company the ability to "charge cable and satellite companies higher retransmission fees to carry the combined company's broadcast stations."[11] Specifically, the DOJ expressed concerns that the merger would reduce competition for the licensing of "Big 4" TV network (*i.e.*, NBC, CBS, ABC, and FOX)

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[6] *Id.*

[7] Kelcee Griffis, *FCC's Sinclair-Tribune Protest Preempted DOJ Approval*, LAW360 (July 17, 2018).

[8] Brent Kendall & John D. McKinnon, *Sinclair's Purchase of Tribune Likely to Win Approval of Justice Department*, WALL ST. J. (Dec. 14, 2017).

[9] Press Release, Gray Television Inc., Gray And Raycom To Combine In A $3.6 Billion Transaction (June 25, 2018) [hereinafter *Gray Press Release*]; Darcey Reddan, *Gray Television, Raycom Agree On $3.65B Media Merger*, LAW360 (June 25, 2018).

[10] *Gray Press Release*, *supra* note 9.

[11] Press Release, U.S. Dep't of Justice, Justice Department Requires Divestitures to Resolve Antitrust Concerns in Gray's Merger With Raycom (Dec. 14, 2018).

retransmission content in the nine local markets where Gray and Raycom each owned at least one Big 4 affiliate broadcast TV station.[12]

In its complaint, the DOJ alleged that the licensing of Big 4 TV retransmission content constituted a distinct product market because Big 4 networks carry "unique offerings such as local news, sports, and highly ranked primetime programs," which have unique appeal to viewers, and because multichannel video programming distributors ("MVPDs") "regard Big 4 programming as highly desirable for inclusion in the packages they offer subscribers."[13] Further, the DOJ claimed that "[n]on-Big 4 broadcast stations are typically not close substitutes for viewers of Big 4 stations."[14] By eliminating competition between Gray and Raycom for the licensing of Big 4 programming in these nine markets, the DOJ argued, "the merger would likely give Gray the power to charge MVPDs higher fees for its programming—fees that those companies would likely pass on" to their subscribers.[15] The DOJ also alleged that the merger would enable Gray to charge advertisers higher prices to reach audiences.[16] The DOJ and Gray reached a settlement to resolve these concerns on December 14, 2018, pursuant to which the DOJ approved the deal on the condition that Gray divest Big 4 affiliate stations in the nine local areas where the merging parties owned overlapping Big 4 affiliate stations.[17]

C. *Nexstar Media/Tribune*

Raising issues similar to those posed by the above transactions, Nexstar Media Group's proposed acquisition of Tribune Media Company will continue to test the DOJ's tolerance for horizontal consolidation in broadcasting. Announced on December 3, 2018, the proposed deal would make Nexstar the largest local TV broadcaster in the U.S., with 213 stations, and arguably give Nexstar excessive power in the markets for broadcast television and local advertising.[18]

Critics of the transaction fear that the deal will lead to increased prices for cable subscribers in markets with Tribune stations,[19] and the Chairman of the House Antitrust Subcommittee, Representative David Cicilline, publicly stated that the merger would "raise the specter of less choice and higher prices" by creating "the largest local television station owner in the country" and "eliminat[ing] direct competition in more than a dozen local

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[12] Complaint ¶ 3, *United States v. Gray Television, Inc.*, No. 1:18-cv-02951 (D.D.C. Dec. 14, 2018).
[13] *Id.* ¶¶ 16-17.
[14] *Id.* ¶ 18.
[15] *Id.* ¶ 6.
[16] *Id.*
[17] Proposed Final Judgment ¶ IV.A, *United States v. Gray Television, Inc.*, No. 1:18-cv-02951 (D.D.C. Dec. 14, 2018).
[18] CONGRESSIONAL RESEARCH SERVICE, NEXSTAR-TRIBUNE MERGER: POTENTIAL COMPETITION ISSUES (2019); *see also* Charlotte Slaiman, *Nexstar-Tribune Merger Threatens Our Public Discourse*, PUBLIC KNOWLEDGE BLOGS (Dec. 10, 2018).
[19] Slaiman, *supra* note 18.

markets."[20] Adding to critics' concerns, Nexstar purportedly shared its plans to increase prices for Tribune content immediately after the merger closes and to implement additional price increases in the future. Nexstar has made an effort to assuage these concerns, however, by offering to divest certain TV stations in order to obtain regulatory approval. Indeed, Nexstar has proposed selling 19 of its local TV stations in 15 overlapping markets to broadcast groups Tegna and E.W. Scripps and is in "active negotiations" to divest two additional stations in Indianapolis, Indiana.[21]

II. Horizontal Merger of Content Creators: *Disney/Fox*

Unlike the mergers described above, which primarily involved consolidations of media *broadcasting* services, The Walt Disney Company's $71.3 billion acquisition of Twenty-First Century Fox joined together two major media content *creators*. Under the terms of the deal, Fox spun off the Fox Broadcasting Network, Fox News Channel, and several other networks and TV stations into a newly listed company.[22] Disney then sought to acquire Fox's film and TV production businesses, as well as FX Networks, National Geographic Partners, Fox's regional sports networks ("RSNs"), and Fox's minority interest in Hulu, thereby giving Disney a controlling 60% stake in the popular streaming service.[23]

Disney claimed that the transaction would benefit consumers because it would "significantly increase Disney's international footprint and expand the content and distribution for its direct-to-consumer ("DTC") offerings," including Hulu, ESPN+, and the new Disney-branded streaming service Disney+, which will launch in late 2019.[24] Specifically, Disney argued that by combining the two companies' complementary content portfolios (*e.g.*, Disney's Marvel and Star Wars universes with Fox's Avatar and X-Men), the deal would enable Disney's DTC content platforms (Disney+, ESPN+) to offer appealing alternatives to incumbent DTC providers like Netflix and Amazon.[25]

The DOJ's probe of the *Disney/Fox* transaction focused primarily on whether Disney's ownership of both ESPN and Fox's RSNs would substantially harm competition for sports

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[20] Ted Johnson, *Key House Democrat Warns of Mass Newsroom Layoffs With Nexstar's Tribune Acquisition*, VARIETY (Dec. 3, 2018).
[21] Tony Maglio, *Nexstar to Sell 19 TV Stations, Including New York's WPIX, for $1.32 Billion in Cash*, THEWRAP (Mar. 20, 2019).
[22] Press Release, The Walt Disney Company, The Walt Disney Company To Acquire Twenty-First Century Fox, Inc., After Spinoff Of Certain Businesses, For $52.4 Billion In Stock (Dec. 14, 2017).
[23] Matthew Perlman, Disney's Fox Deal To Get Scrutiny, But Will Likely Clear, LAW360 (Dec. 14, 2017) [hereinafter *Disney/Fox Announcement*].
[24] Press Release, The Walt Disney Company, The Walt Disney Company Signs Amended Acquisition Agreement To Acquire Twenty-First Century Fox, Inc., For $71.3 Billion In Cash And Stock (June 20, 2018).
[25] *Disney/Fox Announcement*, *supra* note 23.

programming in the local areas where the RSNs operate.[26] Specifically, the DOJ alleged that the transaction would "likely diminish competition in the negotiation of licenses for cable sports programming with MVPDs" because "[a]fter the merger, an MVPD negotiating with Disney would" have to agree to stepped up licensing fees or else "face the prospect of a dual blackout of ESPN and the local RSN in one or more" areas and suffer the likely resulting subscriber losses.[27] The DOJ argued that this increased leverage "would likely lead to an increase in total licensing fees," which would be passed on to customers of the MVPDs in the form of increased subscription fees.[28] Disney and the DOJ reached a settlement to resolve these concerns on June 27, 2018, pursuant to which Disney agreed to divest 22 of the Fox RSNs in exchange for deal approval. The transaction closed on March 20, 2019.[29]

III. Horizontal Merger of Integrated Content Providers: *Comcast/Sky*

The battle between U.S. media giants Comcast and Twenty-First Century Fox for the majority stake of vertically integrated British broadcasting company Sky illustrates the media industry's intense interest in consolidation throughout all stages of the supply chain.[30] With Comcast's eventual success in becoming Sky's controlling shareholder,[31] the transaction merged the two vertically integrated broadcasters and content producers, combining Comcast's broadcasting, cable television, internet services, telephone services and content production businesses, with Sky's broadcasting services, internet services and content production businesses, including Sky's broadcasting rights to English Premier League games, Formula One races and other sporting events.

While the transaction avoided scrutiny in the U.S. because Sky does not serve customers in the U.S., the European Commission ("EC") did review the transaction. The EC ultimately approved the merger without conditions on June 15, 2018,[32] reasoning that the transaction would lead to only a small increase in Sky's existing share of the markets for the acquisition of TV content and for the wholesale supply of TV channels in Austria, Germany, Ireland, Italy, the U.K., and Spain. Further, the EC determined that Comcast would not have

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[26] Press Release, U.S. Dep't of Justice, The Walt Disney Company Required to Divest Twenty-Two Regional Sports Networks in Order to Complete Acquisition of Certain Assets from Twenty-First Century Fox (June 27, 2018).
[27] Complaint ¶¶ 23-24, *United States v. Walt Disney Company*, No. 1:18-cv-50800 (S.D.N.Y June 27, 2018).
[28] Complaint ¶ 24, *United States v. Walt Disney Company*, No. 1:18-cv-50800 (S.D.N.Y June 27, 2018).
[29] Final Judgment ¶ IV.A., *United States v. Walt Disney Company*, No. 1:18-cv-50800 (S.D.N.Y June 27, 2018); Erich Schwartzel and Joe Flint, *Disney Closes $71.3 Billion Deal for 21st Century Fox Assets*, WALL ST. J. (Mar. 20, 2019).
[30] Michael J. de la Merced, *U.K. Clears Way for Bidding War Between Comcast and Disney Over Sky*, NEW YORK TIMES (June 5, 2018); *see also* Stu Woo & Ben Dummet, *21st Century Fox to Sell Sky Stake to Comcast*, WALL STREET JOURNAL (Sept. 26, 2018).
[31] Mike Farrell, *Comcast Completes Buy of Majority of Sky Shares*, MULTICHANNEL NEWS (Oct. 9, 2018).
[32] Aoife White, *Comcast Clears EU Antitrust Hurdle for Sky Ahead of Disney Fight*, BLOOMBERG (June 15, 2018).

the economic incentive to prevent or limit Sky's competitors from accessing its films, TV content, or channels because pay-TV distributors would continue to have access to comparable content from other providers. The EC also determined that Sky would not have the incentive to stop purchasing content from Comcast's competitors because doing so would reduce the quality and breadth of Sky's product offerings, leading to subscriber losses.[33] With the EC's blessing, the deal closed in late 2018, highlighting the value that media companies place on consolidation in both content creation and content distribution capabilities.

IV. Vertical Media Transactions: *AT&T/Time Warner*

Interest in securing control of desirable programming is not only driving recent merger activity between competing media conglomerates (*e.g.*, *Comcast/Sky*); it is also prompting vertical merger activity between content distributors and the content creators that supply them. By gaining control of the content delivery supply chain—including the creation, distribution, and licensing of content—MVPDs are hoping to bolster their value proposition and better compete with vertically integrated streaming services like Netflix, Hulu, and Amazon's Prime Video. However, while vertical mergers can generate significant cost savings that may be passed on to consumers in the form of lower prices, they sometimes may also present competitive problems. The DOJ's concerns with vertical integration in the media space are well illustrated by the agency's attempt to block AT&T's acquisition of Time Warner. The acquisition combines AT&T's mobile and fixed telecommunications networks and content distribution services with Time Warner's content production capabilities.[34]

The DOJ's challenge of this transaction marks its first court challenge of a vertical merger in nearly forty years and signals a significant departure from the behavioral remedies that the DOJ used to clear Comcast's acquisition of NBC Universal in 2011.[35] The DOJ alleged that the vertical integration of Time Warner video content, such as the networks HBO, CNN, TNT and TBS, with AT&T's video distribution services, namely DirecTV's satellite TV offerings, would give AT&T undue leverage over competing video distributors. Specifically, the DOJ was concerned that a video distributor negotiating with the combined company would have no choice but to either agree to increased content licensing fees, which would ultimately be passed on to subscribers, or else lose the right to display AT&T's premium content to its customers, also known as a "blackout."[36]

Following a trial, the District Court held that the transaction was not likely to substantially lessen competition. The court rejected the DOJ's contention that the transaction would increase AT&T's bargaining leverage such that it would be able to impose price increases on rival distributors seeking to license its content. The District Court concluded that Time Warner's content is not "must have" because, as the court pointed out, there are some

[33] *Id.*; *see also* Press Release, European Comm'n, Mergers: Commission clears Comcast's proposed acquisition of Sky under EU merger rules (June 15, 2018).
[34] Press Release, AT&T Inc., AT&T Completes Acquisition of Time Warner Inc. (June 15, 2018).
[35] Joel Grosberg & Matt Evola, TAKEAWAYS FROM AT&T-TIME WARNER MERGER WIN, LAW360 (Feb. 27, 2018).
[36] *Id.*

content distributors that are successfully operating without Time Warner's networks and related programming. Further, the District Court reasoned that it was not in AT&T's financial interest to "black out" or foreclose rival distributors from licensing its programing because its business model depends on advertising and licensing fees that increase with the number of viewers, and noted that blackouts were contractually impossible here because Time Warner sent letters to distributors irrevocably offering to engage in arbitration for seven years.[37]

At the end of February, a three-judge panel from the U.S. Court of Appeals for the D.C. Circuit upheld the district court's decision.[38] The panel found that the district court rightfully rejected DOJ's assertion that the transaction would give AT&T undue bargaining leverage in negotiations with other video distributors, citing "real-world" evidence that an integrated content programmer and distributor has little economic incentive to withhold its content from other distributors and emphasized that blackouts were no longer contractually possible.[39] Following the D.C. Circuit's decision, the DOJ announced that it does not plan to appeal the decision to the U.S. Supreme Court, thereby ending the agency's initiative to block the merger. While the D.C. Circuit's decision effectively ended the Trump administration's efforts to undo the blockbuster media merger, some speculate that the decision may not have been a total loss for the government because it may have laid the groundwork for future agency challenges of vertical transactions on criteria other than price, including decreased product quality and reduced innovation.[40]

V. Conclusion

The DOJ's actions in the transactions discussed above suggest that the agency is particularly concerned about the dangers of consolidated control of content rights and distribution services. This concern appears to stem from the DOJ's belief that some media content is more valuable than others (*e.g.*, Big 4 programming in *Gray TV/Raycom Media* and sports programming in *Disney/Fox*), and that if one company gains too much control over the delivery of such content (*e.g.*, *Sinclair/Tribune* would have created a company reaching 50% of Americans), then it will have disproportionate leverage over advertisers and rival distributors seeking licensing rights, which will ultimately result in higher subscription fees for consumers. Recently, the DOJ has relied primarily on structural remedies (*e.g.*, divestitures) and has even pursued litigation to resolve its concerns with recent consolidation in the media industry. However, it is unclear whether the agency will change its approach in the wake of its failed attempt to block the *AT&T/Time Warner* merger.

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[37] Matthew Perlman, 3 TAKEAWAYS FROM JUDGE LEON'S RULING ON TIME WARNER DEAL, LAW360 (June 13, 2018).
[38] Bryan Koenig, AT&T, TIME WARNER'S MERGER WIN STANDS AT DC CIRC., LAW360 (Feb. 26, 2019).
[39] Grosberg & Evola, *supra* note 35.
[40] Koenig, *supra* note 38.

Antitrust Challenges in High-Tech Industries:
An Interview with Renata Hesse

Marissa Troiano[1]

Renata Hesse has been a leading antitrust and intellectual property lawyer for over 25 years. She joined Sullivan & Cromwell following a distinguished career in government, including leading the Antitrust Division at the Department of Justice ("DOJ") as Acting Assistant Attorney General and as Chief of the Networks and Technology Section (now the Technology and Financial Services Section). She also served as Senior Counsel to the Chairman of the Federal Communications Commission ("FCC"). In this interview with Marissa Troiano she discusses current trends and challenges in antitrust law with respect to technology, media, and communications companies ("high-tech industries").

Ms. Hesse, throughout your career, you have been involved with many transactions and litigations at the intersection of antitrust and intellectual property law in high-tech industries. What drove your interest in these issues?

After graduating law school in 1990, I started as an intellectual property litigator on the West Coast in the Bay Area. I worked with many Silicon Valley clients who were part of the technology boom before the bubble burst—including software companies such as Nintendo, focusing on intellectual property issues. I was introduced to antitrust through the Sherman Act counterclaims that were often deployed in patent infringement cases in particular. When I was introduced to antitrust, I found that it overlapped with intellectual property in some sense because in both disciplines you were dealing with old statutes and the challenge was to figure out how to apply them to new technologies.

What advice would you have for young attorneys who want to work on antitrust issues in high-tech industries?

What you work on will depend in part on where you end up working. The real question is whether you are able to access a practice in either the government, in-house or private practice that has an element of technology or media in it, and if you are, the biggest thing is to demonstrate an interest in and facility with high-tech industries. Volunteer to write an article with a partner with whom you are working or take up opportunities to help or to present at a speaking engagement on these issues (even at a practice group meeting at your firm!) The more you are able to show people that you have both an interest in and an ability to grapple with complex issues that arise in the antitrust and technology space, the more likely you will be to get more of that work. If you express interest and demonstrate knowledge, over time you will be a person who people in your workplace come to when they have issues that relate to high-tech companies.

[1] The interview was conducted by Marissa Troiano, who is an associate at the New York office of Skadden, Arps, Slate, Meagher & Flom, LLP.

From your perspective as someone who has worked on transactions from both the enforcement and private sector side, what do you see as the most significant unique challenges involved in reviewing transactions in high-tech industries?

I think this issue can be even harder from the enforcement side than the private sector side, actually, but for both, the question of market definition—including entry and expansion—can be a major challenge. One of the big issues that you encounter in high-tech industries is that the lines between product offerings and companies that are offering different technologies often blur. From the perspective of a government enforcer, it is often hard to know if there is actually a line there or if the relevant market is broader than what you initially thought.

Businesses do not really think about their products and services in the antitrust market definition way—they think their product addresses a particular need, and often there are lots of different ways to address that need, and they are hoping that they are the best. So, the private sector lawyer is trying to solve the same problem from the opposite perspective, by asking whether or not products that seem like substitutes or potential substitutes in the business sense actually are in the antitrust sense. This dynamic can make delineating the relevant market in a proper antitrust way hard, and this gets even more difficult when looking at potential entry and expansion of products or services from adjacent markets.

What do you view as the most interesting emerging questions for merger review in technological markets?

To me, the most interesting question is how you think about digital platforms. A lot is being asked of antitrust in this context. For example, people ask whether more antitrust enforcement is the answer for any number of other issues that our society currently faces. My own view is that it is not the job of antitrust law to solve all these problems, and that legislators and policy leaders need to think about all of the available tools that we have to address these issues as opposed to just pointing to antitrust.

This is not to say that antirust policy and enforcement has no role to play. But we have to have a balanced approach to how we think about antitrust. So, for example, I think we should be asking the question of whether too much antitrust enforcement has the potential to slow down our innovation economy. Again, none of this is to say that there is nothing that antitrust can do, or even that maybe it cannot do more, but I think that there are limits to what it can do and we should not look at it as a cure-all.

Some highly publicized recent merger challenges in the technology sector involve vertical transactions, which are often described by the merging parties as less dangerous to competition than horizontal mergers. Do you think, given the level of scrutiny that has been given to these transactions, that we can expect more challenges to vertical transactions between technology companies in the near future?

Thought has to be given to which questions we need to ask with respect to vertical mergers, and we should be careful to make sure we are asking the right ones. Are these vertical mergers actually efficiency enhancing and do they affect competition in the downstream market? I have long been a proponent of getting rid of the vertical merger guidelines on the DOJ's website because I think they are outdated, but it has traditionally been the case that the focus of vertical merger analysis is actually on horizontal, downstream competition and less on the vertical chain that the merger is in.

What people are now really asking is, is that the right way to think about vertical mergers? Or, should we demand more in terms of proof that the efficiencies that companies claim they are getting from vertical integration are actually efficiencies and not competitive harm. This is how we get into questions about employment, whether efficiencies are achieved, and whether those efficiencies are delivered to consumers in the form of lower prices or better or more products as opposed to delivered to someone else.

So, I think where a lot of this discussion leads is to question whether what we have traditionally called efficiencies are cognizable in a way that we think is actually procompetitive. I am not sure people realize how big a question that is and how different that would make merger analysis.

As a caveat to all of this, I would say that anyone who has worked in the government will tell you that an efficiency defense rarely carries the day, especially in court. But what does matter to people in the government is the answer to the question: why are you doing the deal? That is fundamentally an efficiencies question—why does the deal make sense? We should want companies to be able to have that conversation with the government and to be able to demonstrate cost savings and how those will translate into good things for consumers.

Another issue posed by some mergers in the internet and mobile phone space is the (potentially different) effects on regional versus national competition. What advice would you give to attorneys who counsel clients in the internet and mobile phone space about how to best analyze potential competitive effects in these geographic markets?

My advice would be not to make assumptions. People tend to assume national and global markets and say how can there be a local market—we sell these products across the globe. So, it is important to really ask the question and make sure you have buttoned it down. Are there any dimensions of local competition? Do you need to have a sales force on the ground in local places? Do clients depend on any local kinds of products or services from you that can only be offered in that particular place? Is it true that you only price nationally or worldwide, or is there local price competition? You can probably check these boxes quickly, but you should ask them initially.

Another hot topic in antitrust and technology law is whether the consumer welfare standard is sufficient, in the face of the growing size of some tech companies. Do you think current laws can adequately protect consumers from potential predatory behavior by companies with market power?

This is related to some of the earlier questions. I tend to think that the consumer welfare standard is just fine. The real question is how we enforce it and think about it, and whether that needs to be changed. A perfect example is growing concentration and the effect that has on labor markets. People argue that if we think only about consumer welfare, we think only about what would happen to prices for consumers in the downstream market. We have not traditionally thought that the antitrust laws are then also supposed to ask whether cost savings—such as the elimination of employees and a reduction in the labor force—are a harm in and of themselves, and if so, how do we factor those harms into the consumer welfare standard.

I think it is important to ask the question and think about whether there is an exercise of market power that would result from the transaction that would create harm in the upstream labor market—and if there is, I think the consumer welfare standard is adequate to capture that. The question is whether the cost savings are the result of an elimination of competition. Depending on the nature of the labor force, it may be that there is not really a competitive issue. But, there may be some instances where the vertical exercise of market power going upstream could cause harm.

To me, there is not a failing of the consumer welfare standard. This is a reflection of the uni-directional way that we typically have thought about competition. We are thinking about what is happening to the consumer of the end product.

You worked for the FCC and the DOJ before moving to Sullivan & Cromwell. While in practice, some of the considerations for merger review at the FCC and DOJ overlap, what do you see as the potential distinct role for the FCC in determining whether a transaction would "serve the public interest, convenience, and necessity?"

The public interest standard is much broader and includes considerations other than competition or a merger's impact on prices, output, innovation, etc. The FCC has a very unique and important role to play in making a determination about whether or not a transaction serves the public interest. Lots of questions get asked and debated in the FCC context that are not asked and debated in the DOJ context. For example, in *AT&T/T-Mobile*, we asked the questions about what the impact was going to be on labor, particularly on organized labor. You would not normally see that question being delved into in the antitrust context.

One of the nice things about my experience in the FCC was that we spent a lot of time thinking about how the industry would look post-merger if we took one action versus another. We thought about whether if a competitor is eliminated, how was the industry likely to evolve in the wake of that event. What would the future look like? A lot of consideration was given to these more general "industry structure" questions, as opposed to the strict focus on competition issues (though the two obviously can be interlinked).

Is there anything else you would like to add, specifically thinking big picture about how the antitrust laws should be applied to high-tech industries?

I would add that these industries are dynamic and right now they are changing a lot. That is not a reason not to do anything as an antitrust enforcer, but I do think it is a reason to have some humility when you are thinking about how to think about these markets. People need to be able to have a more holistic view of what is happening. Sometimes that means you will think it is right to do something when you might otherwise not have. If you see a technological evolution that is happening that will eliminate a bunch of competitors, you might be more concerned than you otherwise would have been, or it might have the opposite effect. You might notice that soon you will have a ton of competitors in a field, and that is the way the market is moving. It is important to internalize that dynamism and think about what you are doing in terms of the evolution of these markets. Do not be afraid, but be careful.