Antitrust Insights
Webinar Series

Friend or Foe:
The Intersection (or Collision) of Antitrust and Privacy

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Friend or Foe? The Intersection (or Collision) of Antitrust and Privacy

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October 21, 2021

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One Thing We Can All Agree On:

"Data is central to everything we do."

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Two Spheres

antitrust law (1890) **1.** The body of law designed to protect trade and commerce from restraints, monopolies, price-fixing, and price discrimination. • The principal federal antitrust laws are the Sherman Act (15 USCA §§ 1–7) and the Clayton Act (15 USCA §§ 12–27). — Often shortened to *antitrust*. — Also termed (BrE) *competition law*.

Antitrust

Privacy

privacy law (1936) **1.** A federal or state statute that protects a person's right to be left alone or that restricts public access to personal information such as tax returns and medical records. — Also termed *privacy act*. **2.** The area of legal studies dealing with a person's right to be left alone and with restricting public access to personal information such as tax returns and medical records.

Flavors of “Privacy”

Privacy

- is generally the right to be left alone or undisturbed/untracked, or not have so-called sensitive personal information come to light

Data privacy (or “data protection”)

- is more the desire to control what personal information third parties collect about you and what can be shared with outside parties, and in what ways

Data security

- is concerned with preventing unauthorized parties from accessing data from networks or systems and responsibly destroying data when it is no longer needed. Data security is needed to ensure privacy of data.

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Privacy over the Decades

ARCHIVES | 2001

Giving Web a Memory Cost Its Users Privacy

By JOHN SCHWARTZ SEPT. 4, 2001

One day in June 1994, Lou Montulli sat down at his keyboard to fix one of the biggest problems facing the fledgling World Wide Web -- and, as so often happens in the world of technology, he created another one.

At that moment in Web history, every visit to a site was like the first, with no automatic way to record that a visitor had dropped by before. Any commercial transaction would have to be handled from start to finish in one visit, and visitors would have to work their way through the same clicks again and again; it was like visiting a store where the shopkeeper had amnesia.

In the early days of the web, privacy was concerned with the information collected by website cookies.

Then it was the tracking of user's browsing activity over multiple sites.

Business

Google tracks consumers' online activities across products, and users can't opt out

Correction: *An earlier version of this article did not make clear that users who have not logged on to Google or one of its other sites, such as YouTube, are not affected by the new Google privacy policy. This version has been updated to include that information.*

By Cecilia Kang
January 24, 2012

Google will soon know far more about who you are and what you do on the Web.

The Web giant announced Tuesday that it plans to follow the activities of users across nearly all of its ubiquitous sites, including YouTube, Gmail and its leading search engine.

Facebook is being sued for failing to protect users' personal data in the Cambridge Analytica breach.

Now, it's about data leaks (e.g., Cambridge Analytica), big data and mobile data collection, location data and biometric privacy.

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Big Data Revolution

- Devices, sensors, websites and networks are producing so much new data
- Computational and statistical methods have advanced
- More data scientists and analysts

- Cost of storage, processing is now negligible

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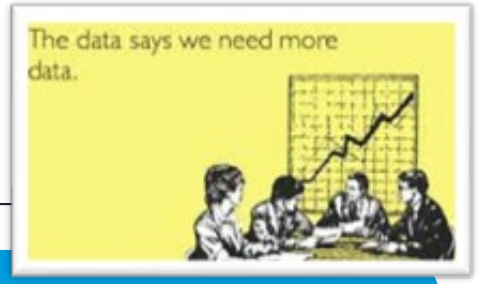
Why Do Companies Want Data?



E-commerce companies and other entities often want to collect data from customers or acquire data from third party vendors to better know their customers, their competitors and the industry.

- ❑ Used for internal product development and analytics (and might be combined with its own customer data it has collected)
- ❑ Used for advertising purposes to target known audiences for its products

Not so easy to just purchase data like a widget

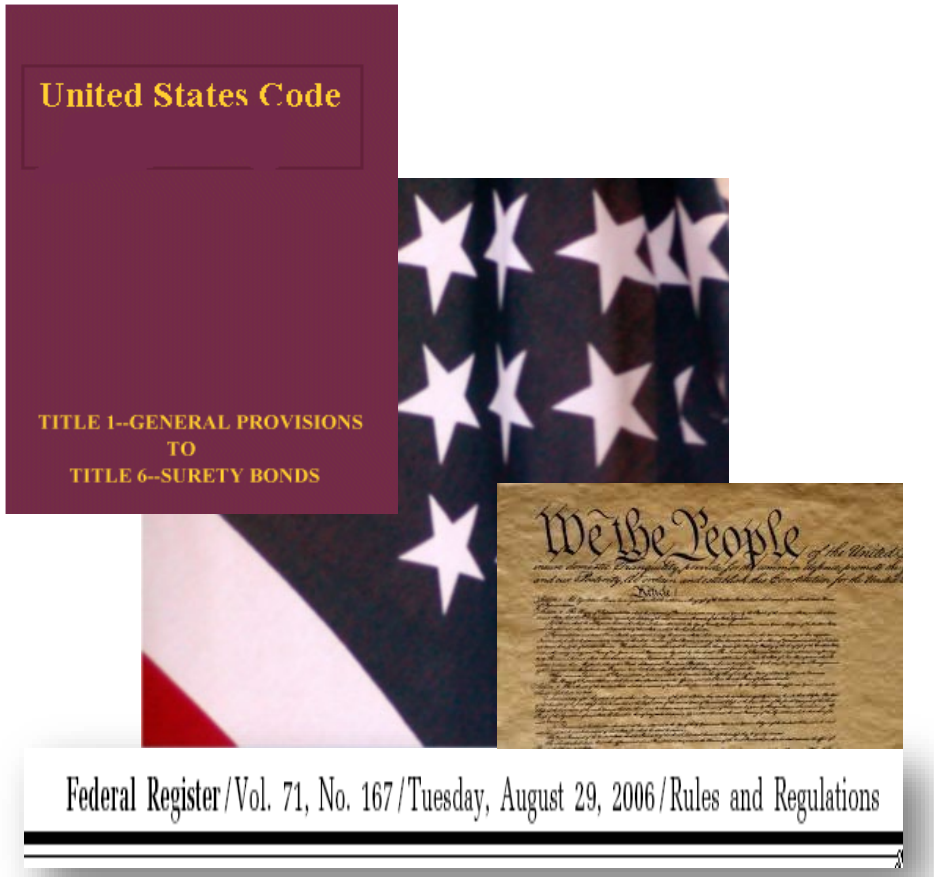
Important to check rights in data and perform due diligence:

- ☑ Did the data source acquire it lawfully, or with proper rights?
- ☑ Can the data be used for your intended purpose? What about other purposes?
- ☑ Does your privacy policy allow certain data uses or data commingling?
- ☑ What are you using the data for?
- ☑ Will the use of the data create any PR or ethical issues?

Privacy and Data Security Laws in the United States

Sources of Privacy and Data Security Law

There is no uniform privacy or data security legislation in the United States. Instead, there is a "patchwork" of federal and state laws addressing data protection, overseen by various federal and state agencies



United States Constitution

State Constitutions

Federal Statutes

Federal Regulations

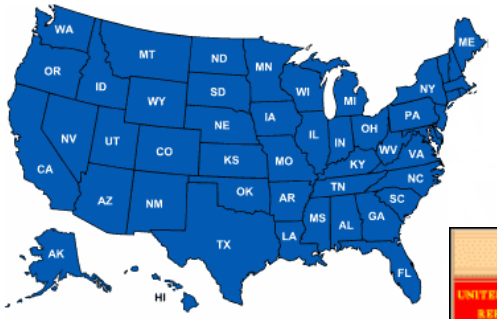
State Statutes

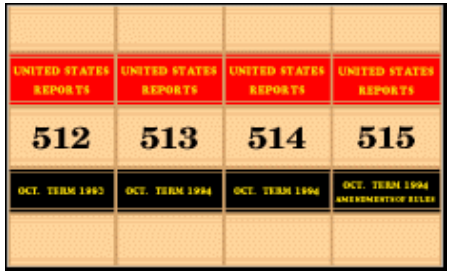
State Regulations

Local Ordinances

Contract

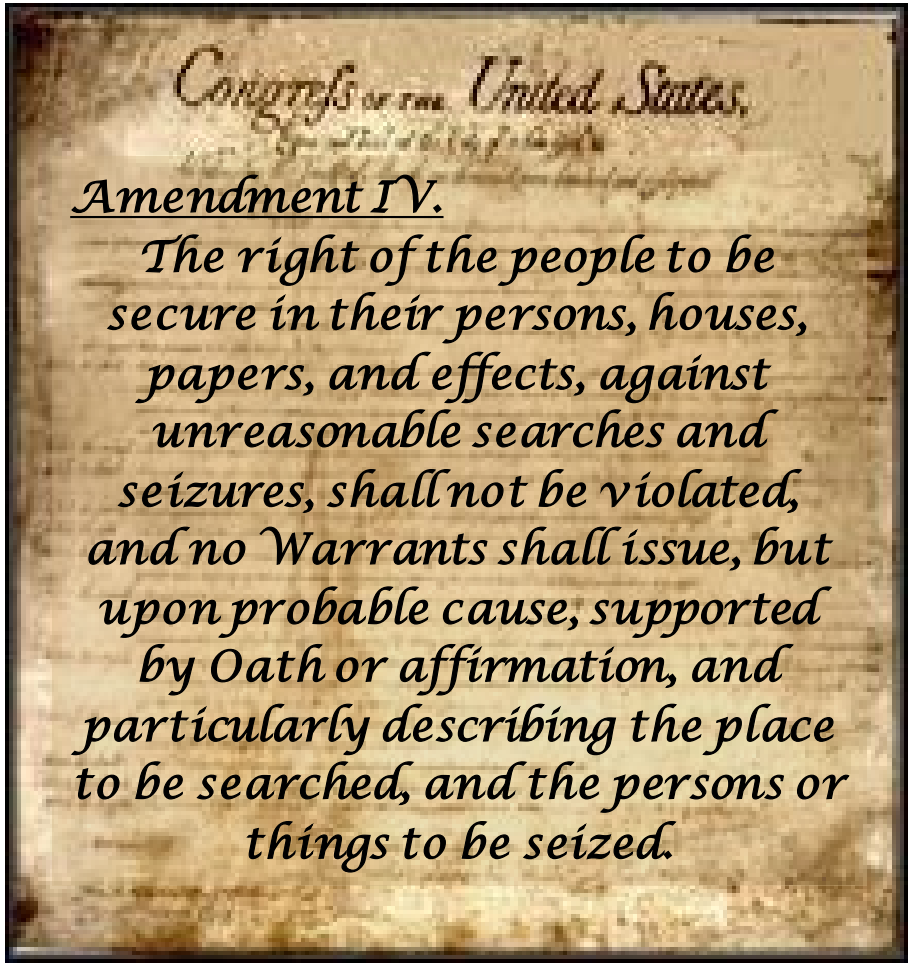
Common Law





California
OFFICE OF
Privacy
Protection

Federal and State Constitutions



- **Federal Constitution:** various privacy rights can be found in and/or interpreted from such amendments as the 4th and 14th Amendments

- **State Constitutions:** can grant broader privacy rights than U.S. Constitution, but not less

U.S. Privacy and Data Security Law is "Sectoral"

- The various Federal laws address specific subject matter:

Medical information	Financial information	Employment information
Sensitive personal information	Children's privacy	School records
Telecommunications	Computers	Cable subscriber information

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The Alphabet Soup of Regulated Data

Data can of course be regulated by a variety of legal regimes, including:

CCPA – California Consumer Privacy Act (California)

COPPA – Children's Online Privacy Protection Act (Federal)

FERPA – Family Education Rights and Privacy Act (Federal)

FTC – Federal Trade Commission

GDPR – the General Data Privacy Regulation (EU)

GLBA – Gramm-Leach-Bliley Act (Federal, applies to financial institutions)

HIPAA – Health Insurance Portability and Accountability Act (Federal)

Various US state laws and ex-US legal regimes

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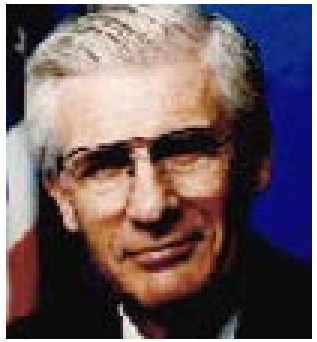
Selected Federal Statutes



- **Gramm-Leach-Bliley Act - GLBA**
  - Requires financial institutions to provide customers with notice of privacy policies.
  - Prohibits disclosure of non-public personal information about a consumer to non-affiliated third parties, unless specific disclosure and opt-out are requirements are met.
  - Under the statute's Safeguards Rule, covered entities must, among other things, develop, implement and maintain a comprehensive written information security program.

Selected Federal Statutes

- **Health Insurance Portability and Accountability Act – HIPAA**
  - As amended by H.R. 1 (11th Cong., 1st Sess. Feb. 17, 2009) ("the stimulus legislation") (among other things, amending HIPAA and adding certain additional privacy protections).
  - Covered entities must ensure the confidentiality, integrity and availability of all electronic protected health information
  - Requires all health care providers, plans and clearinghouses that electronically maintain or transmit health information to comply with applicable regulations
  - Sets standards to be met in numerous areas, including:
    - implementation of policies and procedures to address security incidents, including mitigating harmful effects thereof
    - Use and disclosure of information
    - Individual access to records
    - Documentation of policies and procedures
    - Accounting for disclosures
    - All business associates must be under contract to adopt HIPAA's privacy standards
  - Enforcement actions against entities that violate HIPAA security protocols
  - Notably gaps in HIPAA: health data shared among non-covered entities (e.g., mobile apps, wearables, tech companies)

HIPAA
Health Insurance Portability & Accountability Act

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Selected Federal Statutes

- **Computer Fraud and Abuse Act - CFAA**
  - The CFAA penalizes, among other things, unauthorized access to protected computers, either by someone acting knowingly, or exceeding authorized access that was already granted, with intent to defraud or cause damage
  - In addition to provisions for felony offenses, including penalties such as fines and imprisonment, the CFAA provides for a private civil right of action, allowing for awards of damages and injunctive relief in favor of any person who suffers a loss due to a violation of the Act
  - Important cause of action with regard to web scraping
  - There are numerous state law equivalents to the CFAA

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State Privacy Laws

- Some states protect privacy in general terms, while others address specific privacy issues in particular circumstances, such as the unauthorized interception of or access to communications and the disclosure of personal information in connection with financial services.
- Most states have right of publicity protections (either statutory or based in common law)
- States have also enacted privacy legislation relating to medical records and employment records, and other various areas including telemarketing.
- States have also passed cybersecurity regulations and security requirements for certain industries (e.g., data broker, insurance)
- Some of these state law enactments present issues of federal preemption.

ELECTRONIC PRIVACY INFORMATION CENTER

Privacy Laws by State

New Jersey

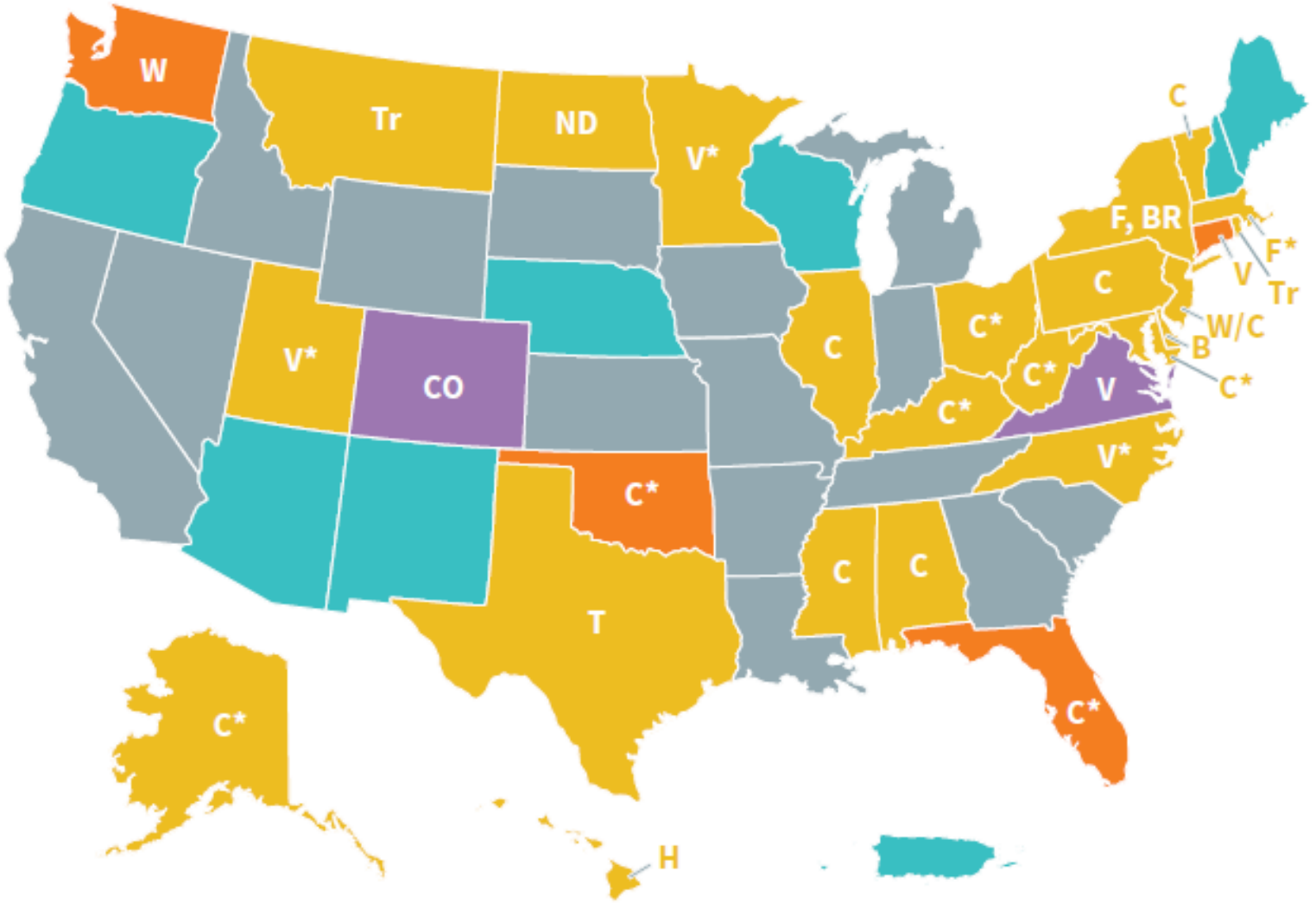
Arrest Records	X
Bank Records	c
Cable TV	X
Computer Crime	X
Credit	X
Criminal Justice	X
Gov't Data Banks	X
Employment	X
Insurance	X
Mailing Lists	0
Medical	X
Miscellaneous	0
Polygraphing	X
Privacy Statutes	0
Privileges	X
School Records	X
Soc. Security Numbers	0
Tax Records	0
Tele. Service/Solicit	X
Testing	0
Wiretaps	X

New York

Arrest Records	X
Bank Records	0
Cable TV	0
Computer Crime	X
Credit	X
Criminal Justice	0
Gov't Data Banks	X
Employment	X
Insurance	0
Mailing Lists	X
Medical	X
Miscellaneous	X
Polygraphing	X
Privacy Statutes	X
Privileges	X
School Records	X
Soc. Security Numbers	0
Tax Records	X
Tele. Service/Solicit	X
Testing	0
Wiretaps	X

Chamber Technology Engagement Center (C_TEC)

STATE PRIVACY ACTIVITY IN 2021**



- Considered Legislation in 2020
- Legislation Introduced in 2021
- Legislation Passed a Chamber of Legislature
- Bill signed into law

- CO — Colorado Model
- C — California Model
- W — Washington State Model
- BR — Bill Of Rights
- V — Virginia Model
- Tr — Transparency Model
- F — Fiduciary Model
- ND — North Dakota Model
- H — Hawaii Model
- T — Texas Model
- B — Broker Bill

In the matter of Google/DoubleClick
F.T.C. File No. 071-0170

DISSENTING STATEMENT OF
COMMISSIONER PAMELA JONES HARBOUR

"In many ways, the acquisition of DoubleClick by Google is a case of ***first impression*** for the Commission. The transaction will combine not only the two firms' products and services, but also their vast troves of ***data*** about consumer behavior on the Internet. Thus, the transaction reflects an interplay between traditional competition and consumer protection issues. "

"Traditional competition analysis … ***fails to capture*** the interests of all the relevant parties. Google and DoubleClick's customers are web-based publishers and advertisers who will profit from better-targeted advertising. … But this analysis ***does not reflect*** the values of the consumers whose data will be gathered and analyzed. … I have considered (and continue to consider) various theories that might make privacy "cognizable" under the antitrust laws, and thus would have enabled the Commission to reach the privacy issues as part of its antitrust analysis of the transaction."

Horizontal Merger Guidelines

U.S. Department of Justice

and the

Federal Trade Commission

"Enhanced market power can also be manifested in ***non-price terms and conditions*** that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation. Such non-price effects may coexist with price effects, or can arise in their absence. "

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Towards Convergence (2019)

"Privacy and data collection is also a function of price. When [a company is] changing terms [of service] … the net effect of it is that it's an ongoing price increase. If they … lock in a consumer and change the terms of service over and over to collect more and ***more and more data, that's a price increase*** to me."

"With quality metrics or innovation metrics, it's much harder to assign some value to that in order to engage in a balancing test, but we have to do that. And I think we can think about ***privacy as a quality metric*** for sure."

"For digital markets in particular, where consumers often pay nothing, price effects alone do not provide a complete picture of market dynamics. Harms to innovation and quality are also important dimensions of competition that can have far reaching effects. ***Privacy, for example can be an important dimension of quality***, and so by protecting competition, we can have an impact on privacy and data protection."

Towards Convergence (2020)

"There are a lot of different ways that privacy rules might ***entrench incumbents.*** It is a concern to the commission."

"[A]s long as key digital markets are controlled by just a few large data hungry online platforms, both ***consumers and prospective entrants*** are at their mercy…. We absolutely must look at these issues holistically rather than myopically viewing them through the lens of either competition or consumer protection."

Towards Convergence (Today)

BRIEFING ROOM

Executive Order on Promoting Competition in the American Economy

JULY 09, 2021 • PRESIDENTIAL ACTIONS

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to promote the interests of American workers, businesses, and consumers, it is hereby ordered as follows:

Section 1. Policy.

A fair, open, and competitive marketplace has long been a cornerstone of th economy, while excessive market concentration threatens basic economic libe accountability, and the welfare of workers, farmers, small businesses, startups

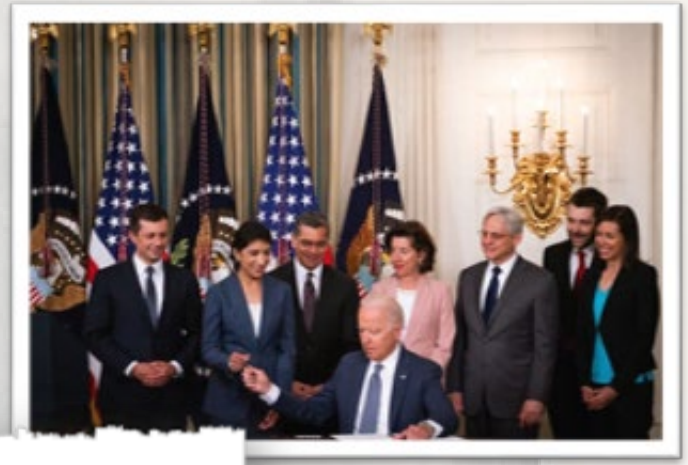
The American promise of a broad and sustained prosperity depends on an o competitive economy. For workers, a competitive marketplace creates more h and the economic freedom to switch jobs or negotiate a higher wage. For sma farmers, it creates more choices among suppliers and major buyers, leading to income, which they can reinvest in their enterprises. For entrepreneurs, it pr experiment, innovate, and pursue the new ideas that have for centuries power economy and improved our quality of life. And for consumers, it means more service, and lower prices.

Robust competition is critical to preserving America's role as the world's le

Yet over the last several decades, as industries have consolidated, competiti in too many markets, denying Americans the benefits of an open economy and income, and wealth inequality. Federal Government inaction has contributed problems, with workers, farmers, small businesses, and consumers paying the

Consolidation has increased the power of corporate employers, making it ha workers to bargain for higher wages and better work conditions. Powerful companies require workers to sign non-compete agreements that restrict their ability to change jobs. And, while many occupational licenses are critical to increasing wages for workers and especially workers of color, some overly restrictive occupational licensing requirements can impede workers' ability to find jobs and to move between States.

Consolidation in the agricultural industry is making it too hard for small family farms to survive. Farmers are squeezed between concentrated market power in the agricultural input



"To address persistent and recurrent practices that ***inhibit competition***, the Chair of the FTC, in the Chair's discretion, is also encouraged to consider working with the rest of the Commission to exercise the FTC's statutory rulemaking authority, as appropriate and consistent with applicable law, in areas such as: ***unfair data collection*** and surveillance practices that may damage competition, consumer autonomy, and consumer privacy"

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Towards Convergence (Today)

THE YALE LAW JOURNAL

LINA M. KHAN

Amazon's Antitrust Paradox

ABSTRACT. Amazon is the titan of twenty-first century commerce. In addition to being a retailer, it is now a marketing platform, a delivery and logistics network, a payment service, a credit lender, an auction house, a major book publisher, a producer of television and films, a fashion designer, a hardware manufacturer, and a leading host of cloud server space. Although Amazon has clocked staggering growth, it generates meager profits, choosing to price below-cost and expand widely instead. Through this strategy, the company has positioned itself at the center of e-commerce and now serves as essential infrastructure for a host of other businesses that depend upon it. Elements of the firm's structure and conduct pose anticompetitive concerns—yet it has escaped antitrust scrutiny.

This Note argues that the current framework in antitrust—specifically its pegging competition to "consumer welfare," defined as short-term price effects—is unequipped to capture the architecture of market power in the modern economy. We cannot cognize the potential harms to competition posed by Amazon's dominance if we measure competition primarily through price and output. Specifically, current doctrine underappreciates the risk of predatory pricing and how integration across distinct business lines may prove anticompetitive. These concerns are heightened in the context of online platforms for two reasons. First, the economics of platform markets create incentives for a company to pursue growth over profits, a strategy that investors have rewarded. Under these conditions, predatory pricing becomes highly rational—even as existing doctrine treats it as irrational and therefore implausible. Second, because online platforms serve as critical intermediaries, integrating across business lines positions these platforms to control the essential infrastructure on which their rivals depend. This dual role also enables a platform to exploit information collected on companies using its services to undermine them as competitors.

This Note maps out facets of Amazon's dominance. Doing so enables us to make sense of its business strategy, illuminates anticompetitive aspects of Amazon's structure and conduct, and underscores deficiencies in current doctrine. The Note closes by considering two potential regimes for addressing Amazon's power: restoring traditional antitrust and competition policy principles or applying common carrier obligations and duties.

AUTHOR. I am deeply grateful to David Singh Grewal for encouraging me to pursue this project and to Barry C. Lynn for introducing me to these issues in the first place. For thoughtful feedback at various stages of this project, I am also grateful to Christopher R. Leslie, Daniel Markovits, Stacy Mitchell, Frank Pasquale, George Priest, Maurice Stucke, and Sandeep Vaheesan. Lastly, many thanks to Juliana Brint, Urja Mittal, and the *Yale Law Journal* staff for insightful comments and careful editing. All errors are my own.

"The swaths of data that Amazon has collected on consumers' browsing and searching histories can create the same problem that Google's would-be competitors encounter: an insurmountable barrier to entry for new competition."

"[T]he current antitrust regime has yet to reckon with the fact that firms with concentrated control over data can systematically tilt a market."

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Towards Convergence (Today)

"When ***big data inhibits competition*** – by allowing those who have it to block access to markets for those who do not – we need to step in and fix it. This means enforcing our existing antitrust laws to their fullest extent…."

"We need to take a ***holistic approach*** to identifying harms, recognizing that antitrust and consumer protection violations harm workers and independent businesses as well as consumers. … Broadening our frame can also help surface the macro effects of our policy decisions, such as the relationship between market structure and supply chain fragility, or ***data consolidation*** and security vulnerabilities"

Congress should "vigorously explore new questions in antitrust to ensure that U.S. antitrust law remains relevant to the realities of today's economy and society…. It is imperative that the U.S. antitrust law and policy match these new market realities and technologies."

Who are the customers?

Can More Privacy Harm Competition?

The Issues

Consumer Harm in a Zero Price Environment

Market Definition

Data as private information v. data as competitive advantage

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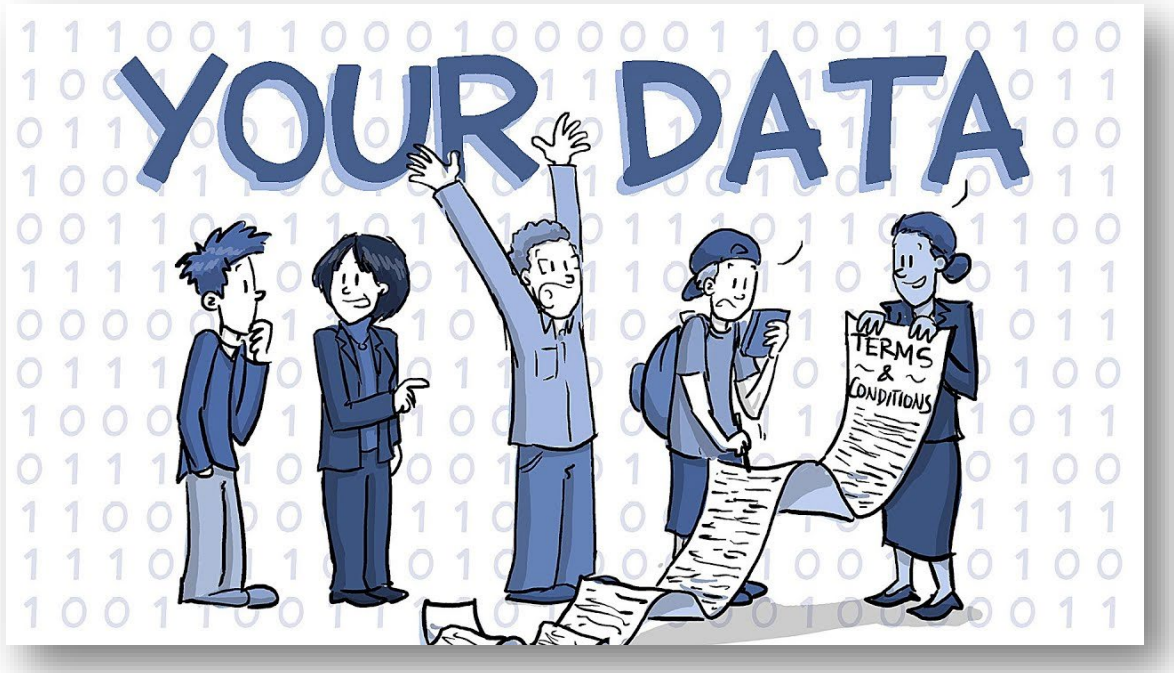
“…. even if some users retain some privacy interests in their information notwithstanding their decision to make their profiles public, we cannot, on the record before us, conclude that those interests—or more specifically, LinkedIn's interest in preventing hiQ from scraping those profiles—are significant enough to outweigh hiQ's interest in continuing its business[.]”

“If companies like LinkedIn, whose servers hold vast amounts of public data, are permitted selectively to ban only potential competitors from accessing and using that otherwise public data, the result—complete exclusion of the original innovator in aggregating and analyzing the public information—may well be considered unfair competition under California law.”

Who owns the data?



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Who Are The Customers?

vs.

Users

Advertisers

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The Regulators Across The Pond

European Commission

"[T]he Commission has analyzed potential data concentration only to the extent that it is likely to strengthen Facebook's position in the online advertising market or in any sub-segments thereof. Any privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the Transaction do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules."

Bundeskartellamt

"Dominant companies are subject to special obligations. These include the use of adequate terms of service as far as these are relevant to the market. For advertising-financed internet service such as Facebook, user data are hugely important. For this reason it is essential to also examine under the aspect of abuse of market power whether the consumers are sufficiently informed about the type and extent of data collected."

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Cross Purposes?

"Privacy can be evaluated as a qualitative parameter of competition, like any number of non-price dimensions of output; but competition law is ***not designed*** to protect privacy. Put to the task, ***it will fail***; and both competition and privacy will suffer."

"Privacy is not like prices, where it's obvious what is better and what is worse."

"People are really concerned about [data brokers] in the privacy world, but there is no question in my mind that they are a mechanism for allowing more competition to happen."

Privacy: a benefit to consumers or an alleged subterfuge for anticompetitive behavior?

EU and US investigations into Google Chrome upgrade

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Epic's Position on Privacy

"…Apple has asserted that blocking third-party app distribution platforms is necessary to enforce privacy and security safeguards. This is a pretext that Apple has used to foreclose all competition in the iOS App Distribution Market in which it has absolute monopoly power."

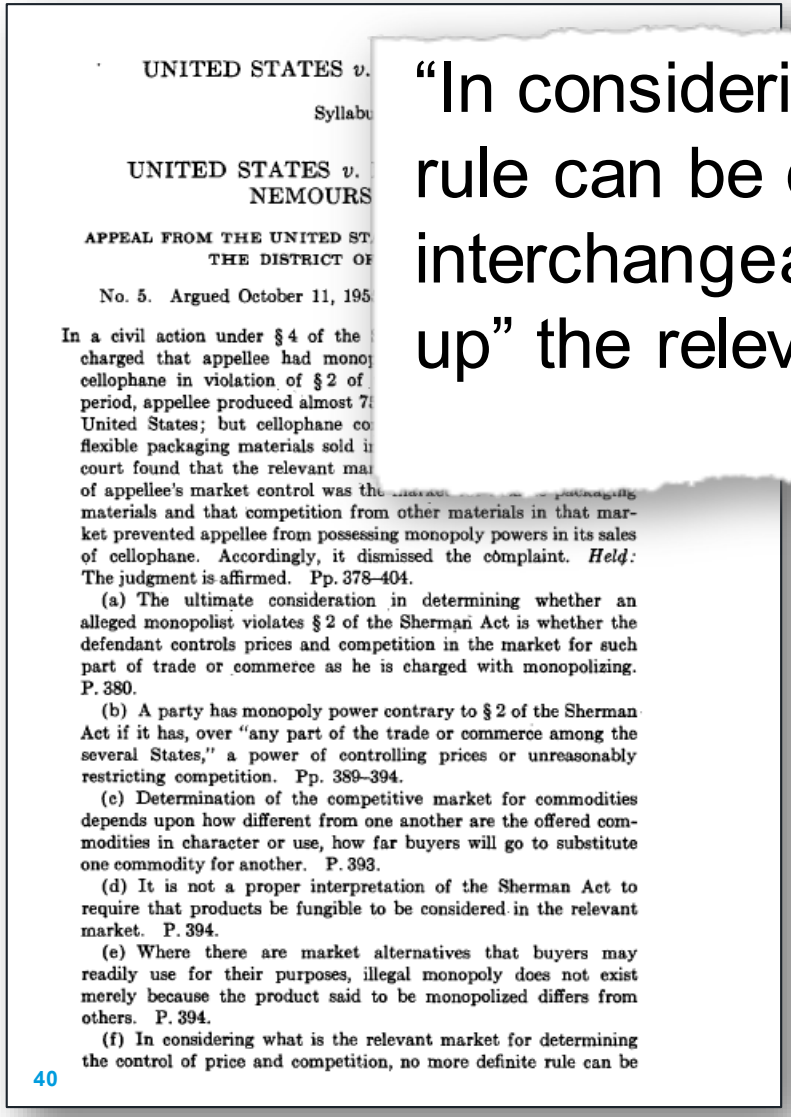
Apple's Position on Privacy

"…Apple's requirement that every iOS app undergo rigorous, human-assisted review…is critical to its ability to maintain the App Store as a secure and trusted platform for consumers to discover and download software."

Court's Position on Privacy

> …[T]he Court finds Apple's security justification to be a valid and nonpretextual business reason for restricting app distribution. . . . Human review…helps protect security by preventing social engineering attacks [and] also helps protect against fraud, privacy intrusion, and objectionable content beyond levels achievable by purely technical measures. By providing these protections, Apple provides a safe and trusted user experience on iOS, which encourages both users and developers to transact freely and is mutually beneficial…."

Market Definition: The Supreme Court



UNITED STATES *v.*

Syllabu

UNITED STATES *v.*
NEMOURS

APPEAL FROM THE UNITED ST
THE DISTRICT OF

No. 5. Argued October 11, 195

In a civil action under § 4 of the
charged that appellee had mono
cellophane in violation of § 2 of
period, appellee produced almost 7
United States; but cellophane co
flexible packaging materials sold i
court found that the relevant ma
of appellee's market control was th
materials and that competition from other materials in that market prevented appellee from possessing monopoly powers in its sales of cellophane. Accordingly, it dismissed the complaint. *Held:* The judgment is affirmed. Pp. 378–404.

(a) The ultimate consideration in determining whether an alleged monopolist violates § 2 of the Sherman Act is whether the defendant controls prices and competition in the market for such part of trade or commerce as he is charged with monopolizing. P. 380.

(b) A party has monopoly power contrary to § 2 of the Sherman Act if it has, over "any part of the trade or commerce among the several States," a power of controlling prices or unreasonably restricting competition. Pp. 389–394.

(c) Determination of the competitive market for commodities depends upon how different from one another are the offered commodities in character or use, how far buyers will go to substitute one commodity for another. P. 393.

(d) It is not a proper interpretation of the Sherman Act to require that products be fungible to be considered in the relevant market. P. 394.

(e) Where there are market alternatives that buyers may readily use for their purposes, illegal monopoly does not exist merely because the product said to be monopolized differs from others. P. 394.

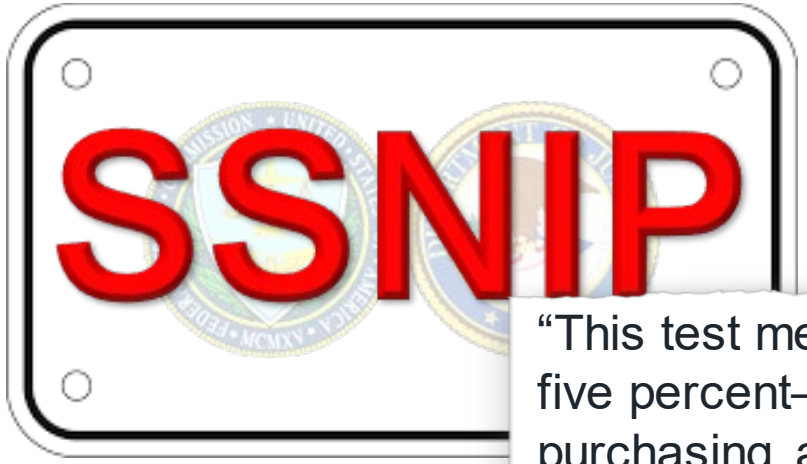
(f) In considering what is the relevant market for determining the control of price and competition, no more definite rule can be

"In considering what is the relevant market.., no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up" the relevant market.

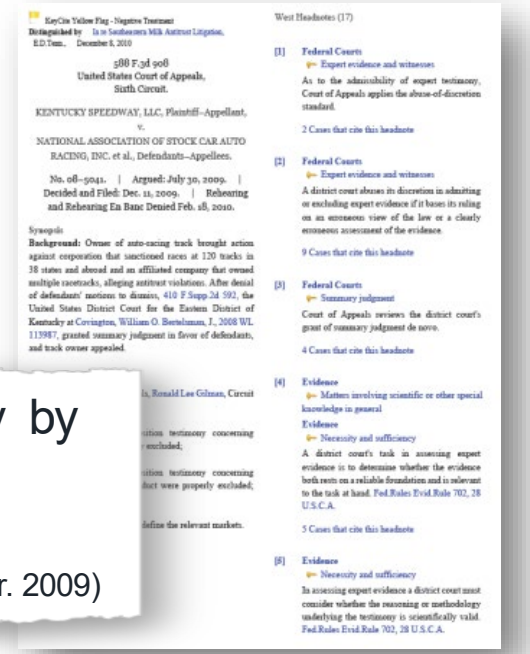
United States v. E.I. du Pont de Nemours & Co., Cellophane, 351 U.S. 377, 395 (1956)

Market Definition: The License Plate Acronyms

- **Hypothetical Monopolist Test**
  - DOJ/FTC Originated Test
  - Yields narrow markets
  - Maximum condemnation



- **Small but Significant Non-transitory Increase in Price**



"This test measures whether increasing a product's price—usually by five percent—results in a substantial number of consumers purchasing an alternative product."

Kentucky Speedway, LLC v. NASCAR, 588 F.3d 908 (6th Cir. 2009)

Time for a New Test?

- **Small, But Significant, Non-Transitory Decline in Quality**
  - To date, "unworkable"

"The market at issue here is unusual in … that the products therein are not sold for a price, meaning that PSN services earn no direct revenue from users.

The Court is thus unable to understand exactly what the agency's "60%-plus" figure is even referring to, let alone able to infer the underlying facts that might substantiate it."

Quality =

Quality is a "multidimensional," "relative" concept that "incorporate a significant element of subjectivity, because certain quality aspects may be valuable only to some consumers, or more valuable to some than others."

- OECD

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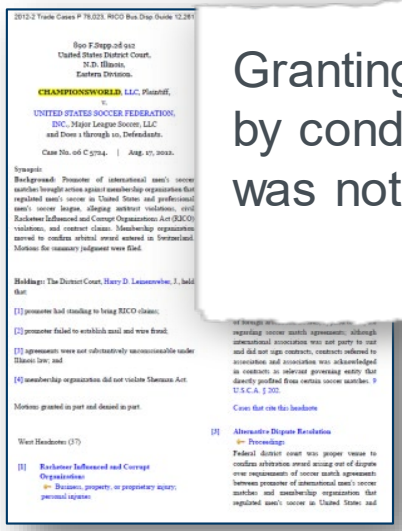
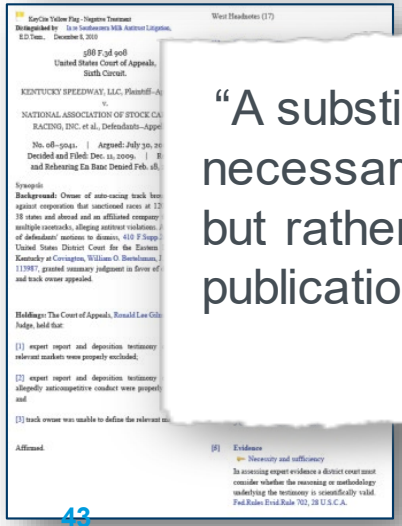
Courts are Watchful for Knock-Off HMT and SSNIP Tests.



Granting summary judgment where plaintiffs' expert "admitted that he did not define the market by conducting a Small but Significant and Non-transitory Increase in Price ("SSNIP") test, and was not familiar with the Hypothetical Monopolist Test ("HMT")."

ChampionsWorld, LLC v. USSF, 890 F. Supp. 2d 912, 948 (N.D. Ill. 2012)



"A substitutability analysis that encompasses all the alternative forms of entertainment is necessary.… By his own admission, [plaintiff's expert] did not perform the standard SSNIP test" but rather his "own version" of [it]," which has not been tested, … subjected to peer review and publication," or gained "general acceptance within the scientific community."

Kentucky Speedway, LLC v. NASCAR, 588 F.3d 908 (6th Cir. 2009)

Proskauer

Market Definition Depends on the Type of Conduct at Issue, but …

64 F.Supp.2d 1097 (1999)

ADIDAS AMERICA, INC., Plaintiff,

NATIONAL COLLEGIATE AT

No. Civ

United States D

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1099 *1098 *1099 Lori R. Schultz, W. Dennis Cross, Morriso
Morrison & Hecker L.L.P., Overland Park, KS, David T
Herrington & Sutcliffe, San Francisco, CA, Bruce Kepli
Park, KS, Eric S. Walters, Jackson, Tufts, Cole & Blac
adidas America, Inc., Beaverton, OR, for Adidas Ameri

Heather Suzanne Woodson, Stinson, Mag & Fizzell, P
Thomas P. Schult, Stinson, Mag & Fizzell, P.C., Kanss
Stone, P.C., Ann Arbor, MI, for National Collegiate Athl

MEMORANDUM AND ORDER

VANBEBBER, Chief Judge.

Adidas America, Inc. ("Adidas")[1] filed this action for dar
Collegiate Athletic Association ("the NCAA") alleging violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and state law claims of tortious interference with contractual relations, tortious interference with prospective economic advantage, breach of contract, and violations of public policy and NCAA bylaws and rules. The case is before the court on the NCAA's motion for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c). For the reasons set forth in this memorandum and order, the NCAA's 12(c) motion (Doc. 87) is granted.

I. FACTUAL BACKGROUND

When considering a motion to dismiss, the court assumes the truth of all well-pleaded factual allegations and makes all possible reasonable inferences in favor of the plaintiff. Thus, for purposes of the NCAA's motion to dismiss, the court takes the following allegations of facts from Adidas' Complaint.

1100 The NCAA is a voluntary, unincorporated association of approximately 1,100 fouryear *1100 colleges and universities, conferences, affiliated associations and other educational institutions. Adidas is a Delaware Corporation with its principal place of business in Beaverton, Oregon. Adidas is one of the United States' leading suppliers of athletic footwear, apparel, and accessories.

Adidas currently contracts with NCAA member institutions and their coaches to advertise and promote its products. Pursuant to these contracts, known as sponsorship agreements, Adidas provides cash, free or discounted athletic shoes and apparel, and other goods and services to a particular school's teams, coaches, or entire athletic program. In exchange, Adidas obtains various promotional rights, the most significant of which is the team's or coach's agreement to wear Adidas' trademarked apparel and footwear bearing Adidas' advertising logos in intercollegiate competition, practice, and other athletic activities. These sponsorship agreements and, therefore, the promotional rights offered by

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"[A]n antitrust plaintiff may not define a market so as to cover only the practice complained of, this would be circular or at least result-oriented reasoning."

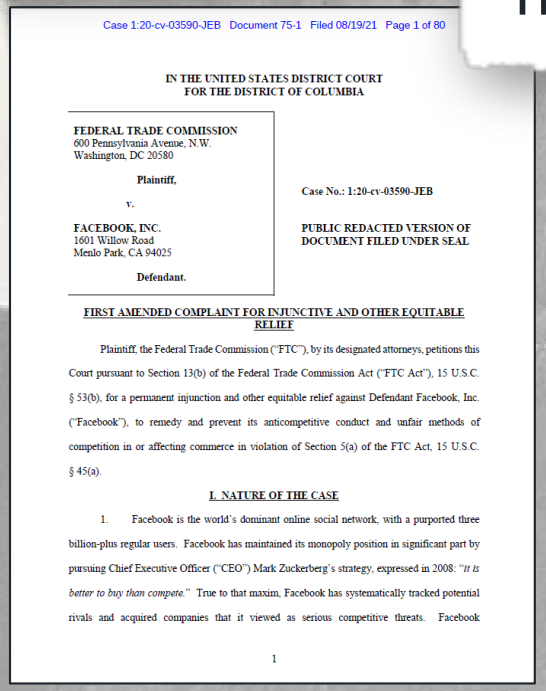
Adidas Am., Inc. v. NCAA, 64 F. Supp. 2d 1097, 1102 (D. Kan. 1999)

adidas v. NCAA

Proskauer

What's the Harm in Free?

"If you tick the box, your information can be exchanged with others…. Actually, you are paying a price, an extra price for the product that you are purchasing. You give away something that was valuable. I think that point is underestimated as a factor as to how competition works."



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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Plaintiff,

v.

FACEBOOK, INC.
1601 Willow Road
Menlo Park, CA 94025

Defendant.

Case No.: 1:20-cv-03590-JEB

PUBLIC REDACTED VERSION OF DOCUMENT FILED UNDER SEAL

FIRST AMENDED COMPLAINT FOR INJUNCTIVE AND OTHER EQUITABLE RELIEF

Plaintiff, the Federal Trade Commission ("FTC"), by its designated attorneys, petitions this Court pursuant to Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b), for a permanent injunction and other equitable relief against Defendant Facebook, Inc. ("Facebook"), to remedy and prevent its anticompetitive conduct and unfair methods of competition in or affecting commerce in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

I. NATURE OF THE CASE

1. Facebook is the world's dominant online social network, with a purported three billion-plus regular users. Facebook has maintained its monopoly position in significant part by pursuing Chief Executive Officer ("CEO") Mark Zuckerberg's strategy, expressed in 2008: "*It is better to buy than compete.*" True to that maxim, Facebook has systematically tracked potential rivals and acquired companies that it viewed as serious competitive threats. Facebook

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"Consumers have been harmed by the lack of sufficient competitive constraints on Facebook, which has enabled Facebook to exercise its monopoly power. Without meaningful competition, Facebook has been able to provide lower levels of service quality on privacy and data protection than it would have to provide in a competitive market."

Proskauer

Take-Aways & Parting Thoughts

Proskauer