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Antitrust and Social Networking

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ANTITRUST AND SOCIAL NETWORKING*

SPENCER WEBER WALLER**

IBM. AT&T. Microsoft. Intel. IBM (redux). Google. Twitter. Facebook. These firms all have been the subject of actual or rumored antitrust scrutiny over the past three decades. All are (or were) leaders in key high-tech sectors. All have been referred to as “monopolies” in the colloquial sense, and in the more technical antitrust sense, and each has been the target of public and private investigation and/or antitrust litigation relating to monopolization, attempted monopolization, or the abuse of a dominant position in the United States, the European Union, the E.U. member states, and other jurisdictions.

The goal of this Article is to create a framework to analyze the competition law concerns of social networking sites. It may well be too early to definitely resolve the many antitrust issues in this rapidly evolving market, but it is not too soon to begin to define the issues and analyze the way they will be resolved as antitrust law undertakes its traditional role of defining and limiting the abuse of market power in key high-tech industries. More generally, I seek to create an antitrust framework to understand and evaluate continuing issues of network effects, essential facilities, infrastructure, and their application to social networking sites, software platforms, and the interactive web. I also deal with the added complication that most of the markets in question do not currently charge consumers and exhibit features of what economists call two-sided markets. I conclude not with a call to action, but more of a checklist to look to in order to determine what issues matter most and which of our current market leaders have the greatest antitrust risks as online social networking continues to evolve and grow in importance.

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INTRODUCTION

IBM. AT&T. Microsoft. Intel. IBM (redux). Google. Twitter. Facebook. All are present or former leaders in key high-tech sectors. These firms also have been the subject of serious antitrust scrutiny over the past three decades. All have been referred to at different times as “monopolies” in the colloquial sense and in the more technical antitrust sense. They also have been the target of public and private investigations and litigation relating to monopolization, attempted monopolization, or the abuse of a dominant position in the United States, the European Union (“E.U.”), the E.U. member states, and other jurisdictions.

This Article focuses on social networking sites as the most recent locus of these competition issues and seeks to create a framework to analyze the competition law concerns of social networking sites. It may well be too early to definitively resolve the many antitrust issues in this rapidly evolving market, but it is not too soon to define the issues and analyze how they will be resolved as antitrust law undertakes its traditional role of defining and limiting the abuse of market power in key high-tech industries.¹ I also seek to create a

1. See generally Spencer Weber Waller, *Access and Information Remedies in High-Tech Antitrust*, J. COMPETITION L. & ECON. (forthcoming 2012), available at <http://papers>

framework to understand and evaluate from an antitrust perspective continuing issues of network effects, essential facilities, infrastructure, and their application to social networking sites and related software platforms, taking into account the added complication that most of the markets in question do not currently charge consumers and exhibit features of what economists call two-sided markets. I conclude not with a call to action, but with more of a checklist of which competition law issues matter most and which represent the greatest antitrust risks faced by the current market leader, Facebook, as social networking continues to evolve and grow in importance.

This Article proceeds in four parts. Part I analyzes the difficult questions of whether Facebook can be considered to have monopoly power or a dominant position in one or more relevant markets for antitrust purposes. Part II examines current Facebook business strategies that could be deemed to violate either U.S. antitrust law or E.U. competition law. Part III looks to the future and the most likely areas of potential investigation and liability for Facebook or any subsequent dominant firms in the social networking industry. Finally, Part IV uses social networking sites as a lens to consider the broader question of the role of antitrust in industries characterized by rapid change and a pattern of one dominant firm being replaced by another as technology and consumer tastes continue to evolve.

I. WHO ARE YOU CALLING A MONOPOLIST?

In order to understand the competition issues posed by social networking, we must begin with a brief primer on the formal aspects of U.S. antitrust law.² Antitrust (or competition law as it is referred to outside the United States) deals with market power, the power to raise prices or exclude competition. Section 1 of the Sherman Act bars contracts, combinations, and conspiracies in restraint of trade.³ Section 2 prohibits the unilateral misuse of market power by barring monopolization and attempted monopolization.⁴ Section 7 of the

.ssrn.com/sol3/papers.cfm?abstract_id=1895018 (describing current antitrust remedies once market power is found for information technology firms).

2. Although beyond the scope of this Article, there are over 120 jurisdictions around the world that have their own competition systems. Most have the three main features barring anticompetitive agreements, abuse of unilateral conduct, and anticompetitive mergers outlined above, but with a wide variety of unique substantive, procedural, and institutional features. For some of the diverse jurisdictions enforcing competition law around the world, see *Antitrust Sites Worldwide*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/atr/contact/otheratr.html> (last visited Apr. 28, 2012).

3. 15 U.S.C. § 1 (2006).

4. § 2.

Clayton Act prohibits mergers and acquisitions where the transaction would substantially lessen competition or tend to create a monopoly.⁵ Numerous additional statutes and common law doctrines support and limit this basic, but sparse, statutory framework.⁶ But for virtually all of these issues, the definition of market power is key.

A. *The Popular Perspective on Monopoly*

This Section analyzes what competition lawyers mean when they use the terms “monopoly” or “dominant position” and contrasts that with the casual use of these terms in popular discourse. It is increasingly common in the press and the blogosphere to refer to Facebook (and other web-based platforms) as a monopoly or a natural monopoly.⁷ One online article from 2010 referred to Facebook’s “Curious Social Monopoly.”⁸ Another writer simply stated: “[I]t’s safe to say social networking *is* Facebook.”⁹

Later in 2010, Columbia Law Professor Tim Wu, now also a consultant to the Federal Trade Commission, touched off a fierce debate online with his essay in the *Wall Street Journal* describing the Internet as “In the Grip of the New Monopolists” and discussed at length Facebook’s dominance in social networking.¹⁰ Others have referred to Facebook as a natural monopoly derived from network effects, but maintained by anticompetitive practices.¹¹ From a more

5. § 18.

6. See generally WILLIAM C. HOLMES & MELISSA H. MANGIARACINA, ANTITRUST LAW SOURCEBOOK (2011–2012 ed. 2011) (reprinting full range of antitrust-related statutes and guidelines). The most significant for our purposes is the Federal Trade Commission Act, which prohibits unfair methods of competition and has been interpreted to cover both actual and incipient violations of the Sherman and Clayton Acts as well as anticompetitive conduct that violates the spirit of the antitrust laws. 15 U.S.C. § 45 (2006).

7. See, e.g., Marty Poulin, *Should FTC File Facebook Antitrust?*, MARTY’S MIND (May 19, 2010), <http://martysmind.com/2010/05/19/should-ftc-file-facebook-antitrust/>.

8. Erika Morphy, *Facebook’s Curious Social Monopoly*, E-COM. TIMES (May 4, 2010, 12:36 PM), <http://www.ecommercetimes.com/story/70004.html?wlc=1314056513>.

9. Kevin Kelleher, *How Facebook Learned from MySpace’s Mistakes*, CNN MONEY (Nov. 19, 2010, 11:37 AM), <http://tech.fortune.cnn.com/2010/11/19/how-facebook-learned-from-myspaces-mistakes/>.

10. Tim Wu, *In the Grip of the New Monopolists*, WALL ST. J. (Nov. 13, 2010), <http://online.wsj.com/article/SB10001424052748704635704575604993311538482.html>. But see Matthew Ingram, *Who’s Afraid of Apple, Google, Facebook?*, BLOOMBERG BUSINESSWEEK (Nov. 26, 2010, 6:11 PM), http://www.businessweek.com/technology/content/nov2010/tc20101126_023905.htm (arguing that Professor Wu’s assessment of Apple, Google, and Facebook as new technology monopolists was incorrect); Joshua Wright, *What’s an Internet Monopolist? A Reply to Professor Wu*, TECH. LIBERATION FRONT (Nov. 23, 2010), <http://techliberation.com/2010/11/23/whats-an-internet-monopolist-a-reply-to-professor-wu/> (same).

11. rubenr, *Facebook’s Anti-Privacy Monopoly*, DEOBFUSCATE (May 3, 2010), <http://>

satirical perspective, Simon Rich in the *New Yorker* published a parody called “Don’t Be Evil” where the Google Define result for “Monopoly” was: “Monopoly: A term that idiots like to throw around to sound smart at parties, but really they don’t know what the hell they’re talking about.”¹²

B. *The Antitrust Perspective on Monopoly Power*

From an antitrust standpoint, monopoly power is the power to raise price or exclude competition.¹³ Monopoly power is not unlawful in its own right,¹⁴ but unless a firm is deemed to have monopoly power (or at least a dangerous probability of acquiring such power), it cannot be held liable for monopolization or attempted monopolization.¹⁵ Similarly, in the European Union and its member states, a firm must be deemed to enjoy a dominant position before it may be held liable for the abuse of that power.¹⁶

The presence or absence of monopoly power, or a dominant position, is usually determined by first measuring the market share of the firm in question in one or more relevant product and geographic markets.¹⁷ A relevant market for antitrust purposes normally is the group of actual and potential producers of a product or service that

www.deobfuscate.org/?p=166; see also Leo Parker Dirac, *Google+ and Facebook’s Natural Monopoly in Social Networks*, EMBRACING CHAOS (July 17, 2011, 12:35 PM), <http://www.embracingchaos.com/2011/07/google-and-facebook%E2%80%99s-natural-monopoly-in-social-networks.html> (“Facebook is clearly on a path to provide a dominant monopolistic standard for social networking data.”).

12. Simon Rich, *Don’t Be Evil*, NEW YORKER, Oct. 18, 2010, at 40, 40.

13. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391–92 (1956). In the European Union, the term “dominant position” is used instead of monopoly power and is defined as the ability to hinder effective competition or act independently of existing competition. *Case 85/76, Hoffmann-La Roche & Co. v. Comm’n*, 1979 E.C.R. 461, 467, 3 C.M.L.R. 211, 218–19; see also *Communication from the Commission—Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, 2009 O.J. (C 45) 7, 8 [hereinafter *Enforcement Priorities*] (“The assessment of whether an undertaking is in a dominant position and of the degree of market power it holds is a first step . . .”).

14. *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

15. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 455 (1993).

16. Consolidated Version of the Treaty on the Functioning of the European Union art. 102, Mar. 30, 2010, 2010 O.J. (C 83) 47, 89.

17. *McQuillan*, 506 U.S. at 459; see also U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES §§ 2.1.3, 4 (2010) [hereinafter *HORIZONTAL MERGER GUIDELINES*], available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf> (“Mergers that cause significant increase in concentration and result in highly concentrated markets are presumed to be likely to enhance market power.”).

consumers would view as a reasonably effective substitute.¹⁸ Such power also can be shown by actual effects in the marketplace.¹⁹

A rough rule of thumb in the United States is that a 90% share of a well-defined relevant market is a monopoly, 66% may be a monopoly, and 33% clearly is not.²⁰ In the European Union, more than 50% of a relevant market normally is considered to be a dominant position but some cases have found dominance with shares as low as 40%.²¹

1. The Relevant Product Market

Before we define a relevant market for antitrust purposes, we must begin with a definition of social networking itself. Only then can we determine the outlines of the zone of effective competition: the group of products and services that consumers view as reasonably effective substitutes. Typically, the broader the relevant market, the less likely the determination of market power, and vice versa. This exercise is not an end unto itself, but merely one of the tools used to determine whether a firm is likely to have the power to harm competition and consumers.

There are many definitions for social networking or social networking sites. One commonly used definition comes from a 2007 article by danah m. boyd and Nicole B. Ellison, describing social networking sites as

[W]eb-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system.²²

Such sites typically allow users to create profiles, connect with friends, post comments, send private messages, and form relationships with other users of the same website who access their profile.²³

Other scholars have defined social networking in similar fashion. A 2010 article states that social networking sites are

18. *Brown Shoe Co. v. United States*, 370 U.S. 294, 325–26 (1962); *E.I. du Pont*, 351 U.S. at 380–81; HORIZONTAL MERGER GUIDELINES, *supra* note 17, § 4.

19. *Fed. Trade Comm'n v. Staples, Inc.*, 970 F. Supp. 1066, 1082–83 (D.D.C. 1997).

20. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d Cir. 1945).

21. See LENNART RITTER & W. DAVID BRAUN, EUROPEAN COMPETITION LAW: A PRACTITIONER'S GUIDE 398–99 (3d ed. 2005).

22. danah m. boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM. 210, 211 (2007).

23. *Id.*

Web-based software application[s] that help[] users connect and socialize with friends, family members, business partners, or other individuals. Unlike many previous computer-mediated communications systems such as e-mail, listserv, and online forums, [social networking sites] are primarily Web based and provide a collection of means—text chats, messaging, e-mail, video, voice, file sharing, blogging, discussion groups, etc.—for users to interact and socialize with one another.²⁴

Under any of these definitions, and any reasonable alternative, Facebook is obviously a social networking site²⁵ and the current target of concern from a competition law perspective because of its leading position in the industry. But it is hardly alone. In addition to Facebook, consumers can use sites such as LinkedIn, MySpace, Google+, Twitter, Tumblr, and a host of other sites that include most, if not all, of the features identified in the commonly used definitions of a social networking site.

Beyond these general social networking sites, there are an even greater number of more specialized social networking sites. These more specialized sites may revolve around age,²⁶ language or national identity,²⁷ an alma mater,²⁸ a professional field, ethnicity, religion, or other aspects of identity or affiliation.²⁹ Other sites revolve less

24. Devi R. Gnyawali, Weiguo Fan & James Penner, *Competitive Actions and Dynamics in the Digital Age: An Empirical Investigation of Social Networking Firms*, 21 INFO. SYS. RES. 594, 595–96 (2010).

25. For a detailed description of Facebook circa 2009 based on the Boyd & Ellison definition, see James Grimmelmann, *Saving Facebook*, 94 IOWA L. REV. 1137, 1144–49 (2009).

26. Leena Rao, *Disney Acquires Social Network for Kids Togetherville*, TECHCRUNCH (Feb. 23, 2011), <http://techcrunch.com/2011/02/23/disney-acquires-social-network-for-kids-togetherville/>. At the opposite end of the demographic spectrum, my daughter has described LinkedIn as the “boring version of Facebook for grownups.”

27. For example, Orkut is a general social networking site owned by Google that has become the dominant social networking site in Brazil and Estonia. newbie, *Orkut Who? Ask Google, Brazil and Estonia*, APPS NEWBIE (July 20, 2011), <http://appsnewbie.com/apps/orkut-who-ask-google-brazil-and-estonia/>. Bebo was at one time the top social networking site in Ireland and New Zealand but was ultimately closed by its corporate parent AOL. Suzanne Choney, *AOL To Sell or Close Bebo Social Networking Site*, MSNBC.COM (Apr. 6, 2010, 6:52:05 PM), http://www.msnbc.msn.com/id/36197557/ns/technology_and_science-tech_and_gadgets/t/aol-sell-or-close-bebo-social-networking-site/#.Tl6d8Kh_R8E.

28. This was the origin of Facebook, but is the focus of other current sites. See, e.g., SELECTMINDS, <http://www.selectminds.com> (last visited Apr. 28, 2012) (providing online social networking for various educational and corporate alumni groups).

29. See, e.g., A SMALL WORLD, <http://www.asmallworld.net> (last visited Apr. 28, 2012) (luxury invite-only network for wealthy members); CAFÉ MOM, <http://www.cafemom.com> (last visited Apr. 28, 2012) (mothers); DISABOOM, <http://www.disaboom.com> (last visited Apr. 28, 2012) (people with disabilities); DOWNELINK, <http://www.downelink.com>

around identity and more around personal interests such as music,³⁰ news,³¹ technology,³² charitable giving,³³ or other diverse causes, hobbies, and interests. Moreover, the line between identity-based and interest-based social networking sites is a blurry one, as is the one between specialized and general social networking sites, given the ability of most social networking site users to customize a general site to create different groups or lists of like-minded individuals.

Even within this extremely broad group of definitions for social networking sites, the term is often overextended to include many other interactive websites and software platforms where user content is generated and shared. While reasonable people may differ, such popular and successful sites like Groupon, Foursquare, Yelp, Amazon, and YouTube appear to fall outside the working definition of social networking sites, although they may be partial substitutes and more often inputs providing information and links to the social networking sites themselves.³⁴ Online dating sites also bear certain similarities to true social networking sites, but do not, from an antitrust perspective, appear to be reasonably effective substitutes for

(last visited Apr. 28, 2012) (LGBT community); PINTEREST, <http://pinterest.com> (last visited Apr. 28, 2012) (fast-growing social networking site aimed primarily at women); RAVELRY, <http://www.ravelry.com> (last visited Apr. 28, 2012) (knitting). *See generally* Farhad Manjoo, *A Tight-Knit Community: Why Facebook Can't Match Ravelry, the Social Network for Knitters*, SLATE (July 6, 2011, 5:31 PM), http://www.slate.com/articles/technology/technology/2011/07/a_tightknit_community.html (social networking site for knitters hailed by author as the best social networking site available).

30. BUZZNET, <http://www.buzznet.com> (last visited Apr. 1, 2012); MOG, <http://mog.com> (last visited Apr. 1, 2012); MYSPACE, <http://www.myspace.com> (last visited Apr. 1, 2012); PING, <http://www.apple.com/itunes/ping/> (last visited Apr. 1, 2012).

31. DIGG, <http://digg.com> (last visited Apr. 1, 2012); REDDIT, <http://www.reddit.com> (last visited Apr. 28, 2012).

32. DESIGNBUMP, <http://www.designbump.com> (last visited Apr. 28, 2012); TECHNORATI, <http://technorati.com> (last visited Apr. 28, 2012).

33. CARE2, <http://www.care2.com> (last visited Apr. 1, 2012); CROWDRISE, <http://www.crowdrise.com> (last visited Apr. 1, 2012); SOCIAL VIBE, <http://www.socialvibe.com> (last visited Apr. 1, 2012).

34. For all aspects of the interactive web, the co-creation of value is an important competitive strategy for this still nascent industry. *See generally* C.K. PRAHALAD & VENKAT RAMASWAMY, *THE FUTURE OF COMPETITION: CO-CREATING UNIQUE VALUE WITH CUSTOMERS* (2004) (discussing the co-creation of value and its importance for internet firms); Gnyawali et al., *supra* note 24 (explaining how social networking service firms can co-create value through the constantly changing online marketplace); Tim O'Reilly, *What Is Web 2.0: Design Patterns and Business Models for the Next Generation of Software*, 65 COMM. & STRATEGIES 17 (2007) (describing internet firms that were successful after the dot-com bubble burst and how they engaged in the co-creation of value); Venkat Ramaswamy, *Leading the Transformation to Co-Creation of Value*, 37 STRATEGY & LEADERSHIP 32 (2009) (arguing that businesses must adopt co-creation value models to maintain their competitiveness).

the full range of uses and functions for most social networking site users.³⁵

One of the special challenges in defining online markets generally for antitrust purposes is determining whether online markets are separate from brick and mortar competition. While this is a difficult issue in general, it seems less so for social networking sites in particular and especially for Facebook or any future market leader. As one commentator has noted:

[S]ocial networking sites do not have readily identifiable substitutes that exist in brick-and-mortar businesses. In fact, social networking Web sites are a relatively new concept and represent a new product that does not exist in brick-and-mortar form.³⁶

There is a strong case to be made that the relevant product market is the social networking itself. Here, the online experience is so qualitatively different from the real world forms of networking and social intercourse that offline networking may be no longer a meaningful substitute for some social networking sites and other forms of interactive internet use.³⁷

Finally, it is important to remember that market definition is not an all-or-nothing exercise. The enforcement agencies and the courts examine multiple relevant markets in the same case or investigation, often from multiple perspectives, such as consumers, competitors, or suppliers to determine the basic question of market power.

2. The Geographic Market

The next piece of the puzzle is the geographic scope of the relevant market. Again, the question is what geographic options consumers regard as reasonably effective substitutes such that any attempt to exercise market power would likely be ineffective.³⁸ While this determination can be complicated for many goods and services in the physical world, it is somewhat easier for software and internet products. While real world businesses must contend with

35. *LiveUniverse, Inc. v. MySpace, Inc.*, No. CV06-6994 AHM (RZx), 2007 U.S. Dist. LEXIS 43739, at *18–19 (C.D. Cal. June 4, 2007), *aff'd*, 304 F. App'x 554 (9th Cir. 2008).

36. Jared Kagan, *Bricks, Mortar, and Google: Defining the Relevant Antitrust Market for Internet-Based Companies*, 55 N.Y.L. SCH. L. REV. 271, 290 (2010–2011).

37. For purposes of this Article, I am using social networking as a distinct subset of what is frequently referred to as Web 2.0. *See generally* O'Reilly, *supra* note 34 (defining Web 2.0 as the set of new web-based applications and programs that emerged after the dot-com bubble burst).

38. HORIZONTAL MERGER GUIDELINES, *supra* note 17, § 4.2.

transportation costs, spoilage, and other issues that may limit the scope of the geographic market, this is not the case for internet access, which is cheap and not limited by distance. The only case to wrestle with this issue for social networking spent little time on this issue and accepted the plaintiff's allegation of a relevant market consisting of "Internet-based social networking in the geographic region of the United States."³⁹

Given the nature of the Internet itself, there is a possibility that the market could be global in nature, as has been the case in several prior non-Internet cases involving computer software and hardware.⁴⁰ However, the ability of foreign governments to disable or hamper internet access,⁴¹ language barriers, and the overall goals of the antitrust laws to foster competition within the United States, all suggest that a national market definition may be the most appropriate market definition.

3. Measuring Facebook's Market Share

Even if we limit the relevant market to online social networking sites in the United States, calculating actual market shares is complicated. This Article has yet to focus on the exact social networking market to be measured. At least three reasonable alternatives have been suggested.

a. User Markets

The first is simply users. User markets may be the easiest to measure, but it is far from clear that an antitrust lawyer, enforcer, or court would conclude that this is the relevant market. Even if we limit

39. *LiveUniverse*, 2007 U.S. Dist. LEXIS 43739, at *10.

40. *In re Intel Corp. Microprocessor Antitrust Litig.*, No. 05-1717-JJF, 2007 WL 137152, at *9 (D. Del. Jan. 12, 2007); *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1161-66 (N.D. Cal. 2004); *Commercial Data Servers, Inc. v. Int'l Bus. Mach. Corp.*, 166 F. Supp. 2d 891, 897 (S.D.N.Y. 2001).

41. Abdullah Al-Shihri, Associated Press, *Saudi Arabia Blocks Facebook over Moral Concerns*, HUFFINGTON POST (Nov. 13, 2010, 10:39 AM), http://www.huffingtonpost.com/2010/11/13/saudi-arabia-blocks-faceb_n_783116.html; *Facebook To Be Blocked in Pakistan*, HINDUSTAN TIMES (Sept. 20, 2011, 16:04 IST), <http://www.hindustantimes.com/Block-access-to-Facebook-Pak-court/Article1-747919.aspx>; *Thousands Expected To Take to the Streets in Biggest Egypt Protest So Far, as Authorities Block Twitter and Facebook*, DAILY MAIL (Jan. 28, 2011, 2:21 AM), <http://www.dailymail.co.uk/news/article-1351070/Egypt-protests-Twitter-Facebook-blocked-Government.html>; Robin Wauters, *China Blocks Access to Twitter, Facebook After Riots*, WASH. POST (July 7, 2009, 4:41 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/07/AR2009070701162.html>.

ourselves to viewers of the social networking websites, further precision is needed.

One way to measure total users is simply by measuring total page views. Another is registered users who presumably represent a higher level of commitment. For most social networking sites, these often merge because registration is required to view full user content (subject to the other user's privacy settings). Measured either way, Facebook is on the cusp of market power, the first of the two steps in most antitrust analyses.

A November 2011 survey showed Facebook's "market share" at just over 63%, followed by YouTube at just under 20%, Twitter in third with a little over 1%, and a large number of firms clustered at or below 1%.⁴² This particular survey of web traffic included a number of firms that are at most only partially social networking sites and thus understates Facebook's market share.

These types of marginally useful market share data are also quite volatile over time. A May 2011 report showed Facebook's market share dropping by over 5% in the United States.⁴³ It was only May 2009 when MySpace and Facebook had roughly identical shares of approximately 30% each, whereas at present MySpace draws less than 1% of the total page views.⁴⁴ The history of social networking is replete with dominant firms that have crashed and burned to become also-rans or simply exited the market.⁴⁵ These include Friendster, MySpace, and could yet include Facebook.

b. Advertising Markets

A second way to look at Facebook's market share is to examine its share of advertising revenues.⁴⁶ Here, the quantity and demographics of viewers is merely secondary, or an input, for the online display ads that can be sold to advertisers seeking to reach this audience. An April 2011 web post estimated Facebook's share of such

42. Priit Kallas, *Top 10 Social Networking Sites by Market Share of Visits [December 2011]*, DREAMGROW (Jan. 16, 2012), <http://www.dreamgrow.com/top-10-social-networking-sites-market-share-of-visits-december-2011/>.

43. eyre, *Facebook Losing Ground in US*, BROTHERSOFT (June 14, 2011), <http://news.brothersoft.com/facebook-losing-ground-in-us-13536.html>.

44. Kallas, *supra* note 42.

45. There is a similar history for other internet-related services. For historical data on market share volatility in internet backbone traffic, web browser, internet search, and internet portals, see ELI M. NOAM, *MEDIA OWNERSHIP AND CONCENTRATION IN AMERICA* 273 (2009).

46. Kelleher, *supra* note 9.

display advertising at just over 30%.⁴⁷ The data for the first quarter of 2011 is in a similar range.⁴⁸ While impressive, this type of market share simply is not enough to satisfy the market power requirement for antitrust liability for monopolization or attempted monopolization in the United States or abuse of a dominant position in the European Union or most other jurisdictions applying a similar standard.⁴⁹

It is an open question whether online advertising is even a separate relevant market from its offline alternatives. While online advertising of both the search and display variety is a rapidly growing market, both pale at present in comparison to the total amount of newspaper, magazine, radio, television, billboard, and other forms of traditional advertising.⁵⁰

However, the trend in the business world is to view these different channels as part of what is referred to as integrated marketing. In such an approach, the advertisers use multiple advertising channels, public relations, promotions, and sponsorship tools to reach deeply fragmented audiences with different demographics multiple times for any campaign.⁵¹ For example, Jenn-Air, a manufacturer of high-end cooking appliances, is using a broad array of magazine ads, online advertising, public relations, social media, apps for Apple phones and tablets, and experiential marketing to reach out to different parts of its targeted demographics in an integrated marketing campaign.⁵²

47. Ken Burbary, *Facebook's Market Share of Display Advertising [Statistics]*, KEN BURBARY'S LIFESTREAM (Apr. 4, 2011), <http://kenburbary.posterous.com/facebook-market-share-of-display-advertising>.

48. *U.S. Online Display Advertising Market Delivers 1.1 Trillion Impressions in Q1 2011*, PR NEWSWIRE (May 4, 2011), <http://www.prnewswire.com/news-releases/us-online-display-advertising-market-delivers-11-trillion-impressions-in-q1-2011-121249734.html>.

49. *AD/SAT, Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 229 (2d Cir. 1999) (“[W]e have held that a 33 percent market share does not approach the level required for a showing of dangerous probability of monopoly power.”); *Case T-219/99, British Airways plc v. Comm'n*, 2003 E.C.R. II-5917, ¶¶ 211, 223–25, 4 C.M.L.R. 19, ¶¶ 211, 223–25 (finding dominant position with market share just under 40% where market shares of rivals were much smaller and fragmented).

50. KEN AULETTA, *GOOGLED: THE END OF THE WORLD AS WE KNOW IT* 16 (2009) (estimating that online advertising would constitute 13% of the total advertising market by 2011).

51. *Id.* at 237; Ilchul Kim, Dongsu Han & Don E. Schultz, *Understanding the Diffusion of Integrated Marketing Communications*, 44 J. ADVERTISING RES. 31, 32–33 (2004); Tim Peterson, *Mastering the Mix*, DIRECT MARKETING NEWS, Oct. 1, 2011, at 34, 35–38. See generally M. JOSEPH SIRGY & DON R. RAHTZ, *STRATEGIC MARKETING COMMUNICATIONS: A SYSTEMS APPROACH TO IMC* (2006) (discussing different channels used for effective integrated marketing).

52. Stuart Elliott, *Jenn-Air in Ad Deal with Architectural Digest*, N.Y. TIMES MEDIA DECODER BLOG (Mar. 18, 2011, 3:43 PM), <http://mediadecoder.blogs.nytimes.com/2011>

The limited number of relevant antitrust cases, settlements, and investigations have tread carefully in this evolving area of the advertising industry. The European Commission accepted online search advertising as a separate relevant market in its *Google/DoubleClick* decision.⁵³ The Federal Trade Commission seems to assume that online search advertising is a relevant market in the handful of its merger decisions between online advertising firms, but does not analyze, let alone decide, this issue in its public statements in these cases.⁵⁴

Obviously, there is some substitution between online and offline advertising,⁵⁵ but the changing nature of the advertising industry means that the degree of substitution may not fully answer the question of what constitutes a relevant market for antitrust purposes.⁵⁶ As a result, an online advertising market may be both overinclusive and underinclusive.⁵⁷ However, to the extent that the relevant market for online display advertising currently includes search advertising (dominated by Google) or more traditional offline print and media advertising, Facebook's share of any larger market shrinks dramatically and its likely antitrust concerns recede even further.⁵⁸

/03/18/jenn-air-in-ad-deal-with-architectural-digest/; see also Renee Cook, *Bringing It All Together: Four Examples of Integrated Marketing Campaigns*, SUND0G (Aug. 26, 2010), <http://www.sundoginteractive.com/sunblog/posts/bringing-it-all-together-four-examples-of-integrated-marketing-campaigns> (discussing additional examples of integrated marketing campaigns from Kraft Foods, Popeyes, Dickies, and Wheat Thins).

53. Press Release, European Comm'n, Mergers: Commission Clears Proposed Acquisition of DoubleClick by Google (Mar. 11, 2008), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/426>.

54. FED. TRADE COMM'N, FTC NO. 101-0031, STATEMENT OF FEDERAL TRADE COMMISSION CONCERNING GOOGLE/ADMOB 2 (2010) [hereinafter FTC, GOOGLE/ADMOB], available at <http://www.ftc.gov/os/closings/100521google-admobstmt.pdf>; FED. TRADE COMM'N, FTC NO. 071-0170, STATEMENT OF FEDERAL TRADE COMMISSION CONCERNING GOOGLE/DOUBLECLICK 8 (2007) [hereinafter FTC, GOOGLE/DOUBLECLICK], available at <http://www.ftc.gov/os/caselist/0710170/071220statement.pdf>.

55. Avi Goldfarb & Catherine Tucker, *Substitution Between Offline and Online Advertising Markets*, 7 J. COMPETITION L. & ECON. 37, 40-43 (2011).

56. James D. Ratliff & Daniel L. Rubinfeld, *Online Advertising: Defining Relevant Markets*, 6 J. COMPETITION L. & ECON. 653, 672-76 (2010).

57. Geoffrey A. Manne & Joshua D. Wright, *Google and the Limits of Antitrust: The Case Against the Case Against Google*, 34 HARV. J.L. & PUB. POL'Y 171, 194-203 (2011).

58. Other potentially relevant antitrust markets for further inquiry include a market for social networking technology or a market for online payment systems. In both cases, Facebook's large presence simply is not yet a large enough share to warrant an inference of monopoly power. See, e.g., Caroline McCarthy, *Facebook to Developers: Get Ready for Credits*, CNET NEWS (Feb. 25, 2010, 5:26 PM), http://news.cnet.com/8301-13577_3-10460201-36.html; Caroline McCarthy, *Patent Filings Reveal Facebook Shopping Spree*,

c. *Data Markets*

A third way of looking at the question of market share for social networking sites suggests that Facebook and other social networking sites compete in a market for information about users. This market consists of both the aggregate and individual information that users post to their social networking sites or reveal through their communications with others on the network, whether other users, advertisers, or application developers.

It is possible that social networking sites will compete over the protection of personal information and compete to offer the most complete form of privacy to its users.⁵⁹ While this can be a useful metric for certain antitrust purposes,⁶⁰ the more likely scenario is that most social networking sites compete in the opposite direction as to the acquisition, compilation, manipulation, exposure, and monetization (rather than the protection) of personal information in aggregate and individual forms (and intermediate level compilations where mandated by law).

Monetization comes in the form of advertising, revenues from application developers, and the ability to raise money in capital markets. Thus, a strong argument can be made that the zone of effective competition is the one in which firms monetize their operations.⁶¹ As one recent commentator has noted: “[T]he true

CNET NEWS (Aug. 5, 2010, 6:13 AM), http://news.cnet.com/8301-13577_3-20012747-36.html; Laurie Segall, *Facebook's \$600 Million Virtual Economy*, CNN MONEY (Apr. 28, 2011, 5:12 AM), http://money.cnn.com/2011/04/28/technology/facebook_credits/index.htm.

59. Pamela Jones Harbour & Tara Isa Koslov, *Section 2 in a Web 2.0 World: An Expanded Vision of Relevant Product Markets*, 76 ANTITRUST L.J. 769, 792–94 (2010) (discussing the notion of privacy as an aspect of non-price competition).

60. A merger that injures privacy protection as an element of non-price competition would be one example. *Id.*

61. Somini Sengupta & Evelyn M. Rusli, *Personal Data's Value? Facebook Set To Find Out*, N.Y. TIMES, Feb. 1, 2010, at A1 (discussing Facebook's impending initial public offering); J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Intel, Apple, Google and Facebook: Observations on Antitrust and the High-Tech Sector, Remarks Before the ABA Antitrust Section Fall Forum 18 (Nov. 18, 2010), available at <http://www.ftc.gov/speeches/rosch/101118fallforum.pdf>. This does not mean that privacy is irrelevant from an antitrust perspective. For example, privacy requirements may constitute an important barrier to entry and/or switching cost within a different relevant market. Randal C. Picker, *Competition and Privacy in Web 2.0 and the Cloud*, 103 NW. U. L. REV. COLLOQUY 1, 10–11 (2008), <http://www.law.northwestern.edu/lawreview/colloquy/2008/25/> (discussing the privacy implications of portability); cf. Steve Lohr, *You Want My Personal Data? Reward Me for It*, N.Y. TIMES, July 18, 2010, at BU3 (discussing Bynamite website where users sell right to track all online activity).

product Facebook brings to the ‘market’ is not its technology, but the social information about, and access to, its vast user base.”⁶²

Unfortunately, the usual antitrust tools are not very useful for resolving this issue. Normally, courts and enforcers begin their market definition inquiry by asking whether consumers would switch to another product or supplier in the event of a small but significant and non-transitory price (“SSNP”) increase.⁶³ If a significant number of consumers would switch to another supplier, then that supplier should be included in the relevant market. The analysis then continues until one has exhausted the number of reasonably effective substitutes to be included in the relevant market.⁶⁴

In plain English, if Facebook raised its prices 5% to 10% over the long-term, would a significant number of consumers switch to other social networking sites or other forms of online interaction? If so, then those alternatives (presumably the other leading social networking sites) should be included in the relevant market. If not, then Facebook stands alone as the relevant market with a strong presumption of market power.

While this type of SSNP test might be undertaken in markets for advertisers and application developers, it is less helpful from the user perspective. Facebook, and most other social networking sites, are free to users.⁶⁵ The furor over alleged plans or even mere rumors that Facebook would begin to charge users at some point in the future⁶⁶

62. Chris Butts, *The Microsoft Case 10 Years Later: Antitrust and New Leading “New Economy” Firms*, 8 NW. J. TECH. & INTELL. PROP. 275, 290 (2010); see also AULETTA, *supra* note 50, at 138–39 (discussing how Google’s power stems from data it gathers); O’Reilly, *supra* note 34, at 27 (arguing that data is the core competency of web 2.0 companies).

63. HORIZONTAL MERGER GUIDELINES, *supra* note 17, § 4.12.

64. *Id.*

65. They are not free to advertisers and application developers and are thus examples of two-sided markets where the revenues come from one side of the market but require analysis of both sides of the market in order to fully analyze welfare effects. See generally DAVID S. EVANS, *ESSAYS ON THE ECONOMICS OF TWO-SIDED MARKETS: ECONOMICS, ANTITRUST, & INDUSTRY STUDIES* (2011), available at <http://www.scribd.com/doc/50890892/Essays-on-the-Economics-of-Two-Sided-Markets-Economics-Antitrust-and-Strategy> (exploring full range of economic issues raised by two-sided markets); David S. Evans, *The Antitrust Economics of Free*, COMPETITION POL’Y INT’L, Spring 2011, at 771 (examining the role of free products in two-sided markets and their effect on defining the relevant product market). In addition, at least some social networking sites like LinkedIn offer paid subscription accounts that focus on the job search. See *LinkedIn Launches Two New Subscription Offerings*, LINKEDIN (Nov. 22, 2005), <http://press.linkedin.com/77/linkedin-launches-two-new-subscription-offerings>.

66. See Nick Clayton, *Facebook Changes Give New Life to Old Rumors*, WALL ST. J. TECH BLOG (Sept. 26, 2011, 7:14 AM), <http://blogs.wsj.com/tech-europe/2011/09/26>

points in both directions. The various campaigns to boycott Facebook or deactivate accounts⁶⁷ suggest that (to borrow a phrase from Google) competition is just a click away. On the other hand, the fact that most people never followed through on such plans suggests that either the threat to charge was not a credible one (in which case the relevant market is quite broad) or that users are loyal or feel bound to Facebook (in which case the relevant market is quite narrow).

4. Barriers to Entry and Exit

Measuring the market share Facebook enjoys within some relevant market or markets is not the end of the exercise. The existence or absence of entry barriers provides further information regarding whether the market shares are an accurate indication of true market power.⁶⁸ If entry barriers are low, then even quite high market shares may not indicate an ability to raise prices going forward. Conversely, high entry barriers confirm that the market shares are a meaningful indication of power and may even understate the ability of the firm in question to harm competition and consumers.⁶⁹

Like everything else in the social networking space, the question of entry barriers is a complicated one. The technology necessary to create a social networking site appears to be widely available. Capital costs similarly appear minimal. The numerous existing and newly appearing social networking sites all suggest that traditional entry barriers appear minimal. However, the mere ability to create a functioning social networking site significantly understates two more meaningful entry barriers that reinforce the market power of any existing dominant firm: network effects and stickiness.

[/facebook-changes-give-new-life-to-old-rumors/tab/](#); Manami Mallick, *Facebook Trashes 'Charging' Hoax: Will It Remain Free Always?*, INT'L BUS. TIMES (Sept. 27, 2011, 3:10 AM), <http://www.ibtimes.com/articles/220387/20110927/facebook-charges-users-hoax-free-always-rumor-web-10-attention-message-timeline-ticker-profile-messa.htm>.

67. See, e.g., Jennifer Van Grove, *Facebook Exodus Planned for May 31: Will You Quit?*, MASHABLE (May 14, 2010), <http://mashable.com/2010/05/14/quit-facebook/describing-planned-boycott-on-privacy-grounds>).

68. HORIZONTAL MERGER GUIDELINES, *supra* note 17, § 9.

69. The enforcement agencies and the courts also will consider any other evidence that suggests that the market share in a well-defined market overstates or understates the defendant's market power. See, e.g., *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 503-04 (1974).

a. *Network Effects*

The first is the concept of network effects. Network effects refer to the well-known phenomenon that systems may quickly increase in value as the number of users grow, and similarly, that the network may have little, or no, value without large scale adoption.⁷⁰ Network effects can be either direct or indirect. Direct network effects refer to systems like communications networks whose value directly increases as the number of users increase.⁷¹ Traditional examples include telephones and fax machines where the systems are of limited value until the number of users achieves a certain threshold. Indirect network effects refer to systems where the development of complements increases the value of the system to users.⁷² Well-known examples include hardware-software combinations like computers and applications, DVD players and discs, and game consoles and games. Either type of network effect can create significant entry barriers, although some commentators have argued that indirect network effects are not normally exclusionary because the costs are fully internalized by the parties in the network.⁷³

These notions have been debated in antitrust circles for more than a decade.⁷⁴ Much of the finding of market power in recent litigation involving Microsoft turned on a form of indirect network effects. The so-called application barrier to entry described the situation where entry into the operating system market was effectively blocked by the inability of new entrants (or existing fringe firms) to secure commitments from software application developers to write programs for the new or competing operating system. This phenomenon deterred effective new entry or expansion by fringe

70. CARL SHAPIRO & HAL R. VARIAN, *INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY* 13 (1999); Michael L. Katz & Carl Shapiro, *Systems Competition and Network Effects*, *J. ECON. PERSP.*, Spring 1994, at 93, 109.

71. Katz & Shapiro, *supra* note 70, at 95–96.

72. *Id.* at 96–98.

73. Stan J. Liebowitz & Stephen E. Margolis, *Network Effects and the Microsoft Case*, in *DYNAMIC COMPETITION AND PUBLIC POLICY: TECHNOLOGY, INNOVATION AND ANTITRUST ISSUES* 160, 161–62, 164–65, 190–92 (Jerry Ellig ed., 2001).

74. See, e.g., William J. Kolasky, *Network Effects: A Contrarian View*, 7 *GEO. MASON L. REV.* 577, 579–94 (1999); Mark Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 *CALIF. L. REV.* 479, 500–23 (1998); Gregory J. Werden, *Network Effects and Conditions of Entry: Lessons from the Microsoft Case*, 69 *ANTITRUST L.J.* 87, 100–02 (2001); Max Schanzbach, *Network Effects and Antitrust Law: Predation, Affirmative Defenses, and the Case of U.S. v. Microsoft*, 2002 *STAN. TECH. L. REV.* 4, ¶¶ 6–74, <http://stlr.stanford.edu/pdf/schanzenbach-network-effects.pdf>.

competitors and bolstered Microsoft's power as the dominant provider of computer operating systems.⁷⁵

For social networking sites, it is important to quickly achieve, and then maintain, a critical mass of users, advertisers, and application developers.⁷⁶ Research has shown that the ability to achieve critical mass is far more important than the so-called first mover advantage.⁷⁷ Moreover, few network effects exist until that critical mass is achieved and, until then, create little value to the network.⁷⁸

Facebook benefits from a host of both direct and indirect network effects. The sheer number of users in the system is the most obvious such effect and makes its network immensely more valuable than any of its competitors. As of the end of 2011, Facebook had approximately 900 million users.⁷⁹ In contrast, Google's fast-growing Google+ social networking site had approximately 25 million users as of September 2011.⁸⁰ The network effects that Facebook enjoys go beyond the traditional networking aspects of Facebook and encompass video, email, messaging, and other features, which are increasingly important aspects of the network.⁸¹ The number of users and the array of fine-grained information that users have posted are on a scale vastly superior to its competitors and are an important source of direct and indirect network effects for users, advertisers, application developers, and other service providers.

75. *United States v. Microsoft Corp.*, 253 F.3d 34, 55 (D.C. Cir. 2001) (per curiam).

76. Bin Wang, *Survival and Competition Among Social Networking Websites: A Research Commentary on "Critical Mass and Willingness To Pay for Social Networks"* by J. Christopher Westland, 9 *ELECTRONIC COM. RES. & APPLICATIONS* 20, 20 (2010); J. Christopher Westland, *Critical Mass and Willingness To Pay for Social Networks*, 9 *ELECTRONIC COM. RES. & APPLICATIONS* 6, 18 (2010).

77. Westland, *supra* note 76, at 16–18.

78. *Id.*

79. *Fact Sheet*, FACEBOOK, <http://newsroom.fb.com/content/default.aspx?NewsAreaID=22> (last visited Apr. 30, 2012).

80. *Google+ Opens Social Network to Everyone*, BBC (Sept. 20, 2011, 17:02), <http://www.bbc.co.uk/news/technology-14985494>.

81. *See, e.g.*, Byron Acohido, *Latest Facebook Changes Touch Privacy Nerve*, ABC NEWS (Oct. 1, 2011), <http://abcnews.go.com/Technology/latest-facebook-touch-privacy-nerve/story?id=14647661> (discussing new features allowing sharing of user's web surfing patterns and other information); Todd Haselton, *Privacy Groups Ask FTC To Probe Facebook*, FOX BUS. (Oct. 3, 2011), <http://www.foxbusiness.com/technology/2011/10/03/privacy-groups-ask-ftc-to-probe-facebook-for-secretly-tracking-users/> (objecting to new facial recognition feature).

b. Stickiness

The durability of these network effects is reinforced by the stickiness of the system. It is well documented how difficult it is to terminate a Facebook account.⁸² Numerous people are required to maintain an account in order to post or receive information for a company, cause, or other group page. Facebook also has become de facto mandatory for millions of other users for purely social reasons.

While temporary deactivation is not particularly difficult, it can be psychologically and socially difficult, with friends, colleagues, and family members being unable to reach you through the system and inquiring offline if everything is all right. Moving from temporary to permanent deactivation is even more difficult. Facebook requires a two-week period before taking down a page.⁸³ Failure to deactivate certain links to Facebook or inadvertently hitting the “Like” or “Share” on other websites will nullify the deactivation and require beginning again.⁸⁴ Even after final deactivation, Facebook maintains ownership of the information and images posted by the user.⁸⁵

Facebook is sticky in another way that increases switching costs for users. While numerous other social networking sites exist if a user is so inclined, exporting information from Facebook to these sites is not simple. Since 2006, Facebook has offered users something called Facebook Connect, which allows users to share their information with the third-party websites and applications they choose.⁸⁶ While couched in terms of allowing the user to take his data with him across the web, it appears to be focused on connecting the information on the user’s other web-based accounts back to his Facebook account (importation not exportation) and allowing advertisers and application developers access to a broader array of user data.⁸⁷

82. See, e.g., Kristi Oloffson, *Why Is It So Hard To Delete Your Facebook Account?*, TIME (May 14, 2010), <http://newsfeed.time.com/2010/05/14/why-is-it-so-hard-to-delete-your-facebook-account/>. For discussion of how the effect of a user’s death on one’s Facebook page is fraught with difficulty, see generally Jason Mazzone, *Facebook’s Afterlife*, 90 N.C. L. REV. 1643 (2012).

83. *Help Center: Deactivating, Deleting, and Memorializing Accounts*, FACEBOOK, <http://www.facebook.com/help/?page=185698814812082> (last visited Apr. 30, 2012) [hereinafter *Help Center*]; *How To Permanently Delete a Facebook Account*, WIKIHOW, <http://www.wikihow.com/Permanently-Delete-a-Facebook-Account> (last updated Apr. 4, 2012).

84. *How to Permanently Delete a Facebook Account*, *supra* note 83.

85. *Help Center*, *supra* note 83.

86. Dave Morrin, *Announcing Facebook Connect*, FACEBOOK DEVELOPERS (May 9, 2008, 12:32 PM), <http://developers.facebook.com/blog/post/108/>.

87. *Id.* (“Today we are announcing Facebook Connect. Facebook Connect is the next iteration of Facebook Platform that allows users to “connect” their Facebook identity,

Since 2010, Facebook has permitted users to download all profile information onto a zip file and then upload that information to a new website.⁸⁸ Facebook has improved this feature in several ways,⁸⁹ partially as a result of competition from Google over control and exportability of user information.⁹⁰ It is not clear, though, how many of Facebook's more casual users know about this feature or can successfully utilize it. In addition, Facebook does not allow third-party sites (including rival social networking sites) to directly acquire a user's information. The alternative is the cumbersome reposting of profile information, wall posts, photos, videos, and other information on the new site, which is time-consuming, subject to errors, impossible in some cases, and likely to cause many users to simply live with their existing Facebook page.

friends and privacy to any site. This will now enable third party websites to implement and offer even more features of Facebook Platform off of Facebook — similar to features available to third party applications today on Facebook.”)

88. *Help Center: Download Your Information*, FACEBOOK, <http://www.facebook.com/help/?page=116481065103985> (last visited Apr. 30, 2012); see also Alexia Tsotsis, *Facebook Now Allows You To “Download Your Information,”* TECHCRUNCH (Oct. 6, 2010), <http://techcrunch.com/2010/10/06/facebook-now-allows-you-to-download-your-information/> (explaining how Facebook allows users to download their data onto zip files).

89. Emil Protalinski, *Facebook Finally Makes Your Exported Data Useful*, ZDNET (Sept. 8, 2011, 3:48 PM), <http://www.zdnet.com/blog/facebook/facebook-finally-makes-your-exported-data-useful/3452>.

90. Google has created a project called the Data Liberation Front that seeks to make data portability easier for the growing number of Google applications, including its social networking site Google+. See generally DATA LIBERATION, <http://www.dataliberation.org/> (last visited Apr. 30, 2012) (describing Google's data liberation project). The new program called Google Takeout helps users export various types of data from Google programs such as Circles, Picassa, Google+, Contacts, and Google Profile and easily bundle the data into a zip file for downloading and exporting to other websites or programs. Many commentators regard Google Takeout as a key difference between the two social networking sites and the more effective tool against data lock-in. See Clint Boulton, *Google Data Liberation Front Unlocks Data Facebook Hoards*, EWEEK.COM (July 18, 2011), <http://www.eweek.com/c/a/Messaging-and-Collaboration/Google-Data-Liberation-Front-Unlocks-Data-Facebook-Hoards-750192/>; Rory MacDonald, *Google+: Extract Your Contacts from Facebook Using Open-Xchange*, LINUX USER & DEVELOPER, <http://www.linuxuser.co.uk/news/google-extract-your-contacts-from-facebook-using-open-xchange/> (last visited Apr. 30, 2012); Declan McCullagh, *Google Wiolds Data Openness Against Facebook*, CNET NEWS (July 15, 2011, 2:16 PM), http://news.cnet.com/8301-31921_3-20079907-281/google-wiolds-data-openness-against-facebook/; Anna Sanina, *Google's Data Liberation Front Presents Takeout*, POPSOP (July 4, 2011), <http://popsop.com/47302>. For a demonstration of how to use this new feature and its relative ease, see Paul Spoerry, *How To: Download Your Google+ Data*, PLUSHEADLINES.COM (Aug. 8, 2011), <http://plusheadlines.com/how-to-download-your-google-data/909/>.

C. Market Power via Lock-in

As a result of the network and stickiness effects described above, there is a serious possibility that Facebook already has market power over current users who are, or feel, locked-in to the system. Even if Facebook lacks market power in a broader market for social networking sites, it may have market power over an installed base of users. Familiar examples include purchasers of expensive durable hardware, loyal shoppers of well-established brands, and other examples of differentiated products, where the potential substitutes seemingly available through standard market definition are in fact very poor substitutes and permit the firm to exploit their locked-in user base at the back end, rather than the front end, of the relationship.⁹¹

Information gaps, switching costs, and brand loyalty may prevent a customer from accurately pricing a product or service over its lifetime. Even if such behavior were possible, the producer may still be in a position to act opportunistically and change the terms of the bargain after the customer base has been established and locked in place. For example, the Supreme Court denied summary judgment in an antitrust case to a manufacturer of photocopier equipment with a very modest share of the copier market, which nonetheless was able to change its parts and service policy to the detriment of long-term users, thus creating triable issues of tying and monopolization with respect to customers and competitors.⁹² More broadly, other forms of deception such as false advertising, disparagement of competing products, fictitious product and feature announcements (so-called vaporware), and manipulation of standard setting processes may support liability for a dominant firm as well.⁹³

This scenario has already played out in a number of variations involving Facebook. While there is no issue of lock-in via purchase of expensive capital goods or contractual restrictions, many Facebook users feel locked-in and subject to unwanted important policy and

91. HORIZONTAL MERGER GUIDELINES, *supra* note 17, § 3; Deven R. Desai & Spencer Waller, *Brands, Competition, and the Law*, 2010 BYU L. REV. 1425, 1482–84.

92. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 477–78 (1992). At trial on remand, the jury found for the plaintiff and the verdict was affirmed on appeal. *Image Technical Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1228 (9th Cir. 1997).

93. Maurice E. Stucke, *How Do (and Should) Competition Authorities Treat a Dominant Firm's Deception*, 63 SMU L. REV. 1069, 1083–1113 (2010); Maurice E. Stucke, *When a Monopolist Deceives*, 76 ANTITRUST L.J. 823, 824–26 (2010).

operating changes.⁹⁴ There have been numerous instances of changes to Facebook's privacy policies that have provoked outrage and even the occasional user defection,⁹⁵ but no real impact on Facebook's growth.

While there are realistic theories under which Facebook already has market power, it is not inevitable that an enforcement agency or court would agree. The notion that customer lock-in can confer market power in the traditional antitrust sense is contested.⁹⁶ Even if the theory is accepted in this new context, much will depend on the facts as they evolve on the ground in this fast-changing industry. Moreover, market power is merely the beginning, rather than the end, of the inquiry.

II. WHAT, IF ANYTHING, DOES FACEBOOK DO WRONG?

Even if we surmount all the heavy lifting of concluding that Facebook has meaningful market power in some relevant antitrust market, we have completed only the first step of the inquiry. It still remains to determine whether Facebook (or any other dominant social networking site in the future) has engaged in conduct that constitutes a violation of section 2 of the Sherman Act or its foreign analogues.

A section 2 violation requires the acquisition or maintenance of monopoly power (or the abuse of a dominant position under E.U. law) through conduct that excludes competition on some basis other than competition on the merits.⁹⁷ While this is an exceptionally broad and somewhat circular definition, it has come to mean that even a monopolist may engage in conduct that harms its competitors, if it has a valid business justification for doing so. A valid business justification is one that makes sense for the firm and its customers and does not depend principally on the long-term effects of destroying its remaining competitors or deterring new entry.⁹⁸

The existing antitrust case law in the United States and the European Union provides only the beginning of a roadmap for the

94. Alex Ogle, *Profound Change for Facebook Set To 'Lock In' Users*, PHYSORG.COM (Sept. 30, 2011), <http://www.physorg.com/news/2011-09-profound-facebook-users.html>.

95. Helen A.S. Popkin, *Facebook To Share Your Phone Number, Address*, MSNBC.COM TECHNOLOG, http://technolog.msnbc.msn.com/_news/2011/03/01/6162397-facebook-to-share-your-phone-number-address (last visited Apr. 30, 2012).

96. *Eastman Kodak*, 504 U.S. at 496–500 (Scalia, J., dissenting).

97. *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

98. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608–10 (1985).

social networking space. Recent antitrust cases address computer hardware and software issues only tangentially related to those most relevant for interactive social networking internet sites.⁹⁹

There are also a growing number of investigations and a handful of consent decrees requiring structural and behavioral changes to mergers between internet companies. Examples include mergers and joint ventures reviewed by the FTC, the Department of Justice, and the European Union involving a number of acquisitions by Google,¹⁰⁰ Microsoft,¹⁰¹ and other firms. All of these decisions are helpful in better understanding antitrust agency thinking on the question of online markets and entry barriers, but none directly deal with social networking sites or with issues of monopolization.¹⁰²

The current round of government investigations of Google in the United States and the European Union may shed further light, but similarly are focused elsewhere. These investigations are focused on allegations that Google has manipulated internet search results to the detriment of competitors or otherwise limited the ability of

99. Of course, social networking can be used as a communication medium for competitors to collude or exchange sensitive information that could be a traditional Sherman Act section 1 violation, but the same is true in any online or offline interaction between competitors. Jeffrey S. Tenenbaum, A.J. Zottola & Jennifer Mallon, *The Legal Aspects of Online Social Networks: An Overview for Associations*, VENABLE LLP (Oct. 12, 2009), <http://www.venable.com/the-legal-aspects-of-online-social-networks-an-overview-for-associations-10-12-2009/>; see also *United States v. Adobe Sys., Inc.*, No. 1:10-cv-01629-RBW, 2011 U.S. Dist. LEXIS 83756, at *4–10 (D.D.C. Mar. 18, 2011) (entering a consent decree barring Silicon Valley firms from agreeing not to poach rivals' employees).

100. See, e.g., *United States v. Google Inc.*, No. 1:11-cv-00688 (RLW), 2011 U.S. Dist. LEXIS 124151, at *1, *21–28 (D.D.C. July 7, 2011); FTC, *GOOGLE/ADMOB*, *supra* note 54, at 1; FTC, *GOOGLE/DOUBLECLICK*, *supra* note 54, at 1; Press Release, European Comm'n, *supra* note 53. In addition, a planned joint venture between Google and Yahoo was abandoned because of antitrust concerns. Jessica E. Vascellaro & Nick Wingfield, *Google Ditches Ad Pact with Yahoo*, WALL ST. J., Nov. 6, 2008, at B1.

101. Press Release, U.S. Dep't of Justice, Statement of the Department of Justice Antitrust Division on Its Decision To Close Its Investigation of the Internet Search and Paid Search Advertising Agreement Between Microsoft Corporation and Yahoo! Inc. (Feb. 18, 2010), available at http://www.justice.gov/atr/public/press_releases/2010/255377.pdf.

102. Similarly, antitrust issues were only peripheral in the litigation over the Google book project and the 2010 rejection of the proposed settlement of the class action suit in that matter. See Matthew Sag, *The Google Book Settlement and the Fair Use Counterfactual*, 55 N.Y.L. SCH. L. REV. 19, 72 (2010); Randal C. Picker, *Assessing Competition Issues in the Amended Google Book Search Settlement* 11–12 (Univ. of Chi. Law Sch. John M. Olin Law & Econ. Working Paper Grp., Paper No. 499, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1507172.

developers to create applications.¹⁰³ A limited number of private cases dealing with these search-related issues also exist, but none have given us a definitive ruling on liability issues or a roadmap of how these issues would play out for social networking sites.¹⁰⁴

Core issues of monopolization for social networking sites are just beginning to come to the fore. The only known government investigation is the FTC's investigation of Twitter's alleged restrictions on companies that develop applications using Twitter data for their own use.¹⁰⁵

On the private side, the decisions do not reveal much either. In 2008, an unpublished order from the Ninth Circuit affirmed the dismissal of a case against MySpace alleging that it denied access to a rival website.¹⁰⁶ In 2009, a California federal district court dismissed a claim against Facebook alleging that Facebook had blocked a smaller rival from obtaining information from the Facebook site for its own use.¹⁰⁷ Most recently, an Ohio state court dismissed for lack of antitrust injury allegations a claim that Google disfavored a rival search firm in search and advertising placement.¹⁰⁸

Beyond the reported cases and current investigations, the antitrust concerns and potential causes of action become even fuzzier.

103. Steve Lohr, *Suit Opens a Window into Google*, N.Y. TIMES, May 9, 2011, at B1; Press Release, European Comm'n, Antitrust: Commission Probes Allegations of Antitrust Violations by Google (Nov. 30, 2010), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1624>; Foo Yun Chee, *Exclusive: Nine Google Complainants in EU Probe*, REUTERS (Aug. 2, 2011, 1:10 PM), <http://www.reuters.com/article/2011/08/02/us-eu-google-idUSTRE77131I20110802>; Cade Metz, *Google Faces Antitrust Investigation in Texas*, REGISTER (Sept. 3, 2010, 23:18 GMT), http://www.theregister.co.uk/2010/09/03/google_antitrust_investigation_in_texas/; David Meyer, *EU Highlights Difficulty of Establishing Online Antitrust*, ZDNET (July 8, 2010, 17:14), <http://www.zdnet.co.uk/news/regulation/2010/07/08/eu-highlights-difficulty-of-establishing-online-antitrust-40089482/>.

104. See, e.g., *TradeComet.com LLC v. Google, Inc.*, 693 F. Supp. 2d 370, 381 (S.D.N.Y. 2009) (dismissing claim due to enforceable forum selection clause that required litigation of the antitrust claims in California), *aff'd*, 647 F.3d 472 (2d Cir. 2011); see also *Person v. Google, Inc.*, No. C06-7297JF(RS), 2007 WL 1831111, at *3 (N.D. Cal. June 25, 2007) (dismissing second amended pro se complaint alleging that Google has monopolized the "search advertising market").

105. Amir Efrati, *Antitrust Regulator Makes Twitter Inquiries*, WALL ST. J., July 1, 2011, at B3.

106. *LiveUniverse, Inc. v. MySpace*, 304 F. App'x 554, 556–58 (9th Cir. 2008) (affirming the district court's 12(b)(6) dismissal of an antitrust "refusal to deal" claim in light of *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004)).

107. See *Facebook, Inc. v. Power Ventures, Inc.*, No. C08-5780JF(RS), 2009 WL 3429568, at *1–2 (N.D. Cal. Oct. 22, 2009).

108. *Google, Inc. v. myTriggers.com, Inc.*, No. 09CVH10-14836, slip op. at 8–10 (Ohio Ct. Com. Pl. Aug. 31, 2011), available at 2011 WL 3850286.

At least one consumer group has filed complaints with the FTC alleging that Facebook has entered into exclusionary contracts with game developers.¹⁰⁹ Facebook and Google have traded allegations relating to the ability to obtain (or block) information from each other's site, a practice called "scraping."¹¹⁰ It was also revealed that Facebook created a clumsy public relations campaign to plant unfavorable stories about Google in the mainstream and online media.¹¹¹ However, none of these examples and allegations provide a clear indication of what constitutes present unlawful exclusionary conduct by Facebook.

III. ANTITRUST ISSUES GOING FORWARD

Given the uncertainties about market power and the lack of a clear roadmap as to unlawful behavior, the issue remains as to what, if anything, to be concerned about going forward. Here, the answer may differ markedly depending on whether we are discussing monopolization or attempted monopolization in the United States or the abuse of dominance in the European Union.

One key difference between section 2 of the Sherman Act and article 102 of the Treaty on the Functioning of the European Union and its analogues in many jurisdictions is the concept of attempted monopolization. Section 2 of the Sherman Act reaches attempted monopolization as well as exclusionary behavior by existing monopolists.¹¹² Attempted monopolization requires proof of a specific intent to monopolize, exclusionary behavior, and a dangerous probability of success.¹¹³

109. John M. Simpson, Carmen Balber & Jamie Court, *Consumer Watchdog Says Facebook Credits Used in Online Games Violate Antitrust Law; Asks Federal Trade Commission To Intervene*, CONSUMER WATCHDOG (June 29, 2011), <http://www.consumerwatchdog.org/newsrelease/consumer-watchdog-says-facebook-credits-used-online-games-violate-antitrust-law-asks-fed>.

110. Alexi Oreskovic, *Google Bars Data from Facebook as Rivalry Heats Up*, REUTERS (Nov. 5, 2010, 7:06 PM), <http://www.reuters.com/article/2010/11/05/us-google-facebook-idUSTRE6A455420101105>; see also David Gelles, *Facebook Accused of Restricting Its Users*, FIN. TIMES (July 11, 2009, 1:01 AM), <http://www.ft.com/intl/cms/s/2/82860a80-6da1-11de-8b19-00144feabdc0.html#axzz1ZmGrL8av> (describing dispute between Facebook and rival Power.com over restrictions on scraping data off Facebook).

111. *Facebook Exposed in Google Smear Campaign*, BBC (May 12, 2011, 21:24), <http://www.bbc.co.uk/news/technology-13374048>.

112. 15 U.S.C. § 2 (2006).

113. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

In contrast, article 102 reaches both exploitive and exclusionary abuses by a firm, but only after it has achieved a dominant position.¹¹⁴ However, the difference is not always as great as the textual differences would suggest. If anything, E.U. competition law represents a greater threat to firms with substantial market shares. Dominance for E.U. competition law purposes has been found with as little as 40% market share of a relevant market and covers a broader range of conduct than the current interpretation of section 2 of the Sherman Act by the U.S. Supreme Court.¹¹⁵

Recent cases, settlements, and remedies in a variety of high-tech industries suggest that the higher impact government investigation and enforcement will likely take place in the European Union rather than the United States.¹¹⁶ Once dominance is established, theories of liability are more robust in the European Union in comparison to the current restrictive application of section 2 by the Supreme Court.¹¹⁷ These include theories of bundling, predatory pricing, denial of access to essential facilities, and a general duty of a dominant firm not to abuse its dominance, which are unknown, or much more narrowly interpreted, in modern U.S. antitrust law.¹¹⁸ In addition, the E.U.

114. Consolidated Version of the Treaty on the Functioning of the European Union, *supra* note 16, at art. 102.

115. *See, e.g.*, Case T-219/99, *British Airways plc v. Comm'n*, 2003 E.C.R. II-5917, ¶¶ 211, 223–25, 4 C.M.L.R. 19, ¶¶ 211, 223–25 (finding dominance for respondent despite current market share just under 40% and declining in recent years); *see also* Enforcement Priorities, *supra* note 13, at 8–9 (explaining the European Union's position that a 40% percent market share may be considered a dominant position and describing the conduct the Commission considers monopolistic).

116. Spencer Weber Waller & William Tasch, *Harmonizing Essential Facilities*, 76 ANTITRUST L.J. 741, 745–52 (2010).

117. *See, e.g.*, *Pac. Bell Tel. Co. v. LinkLine Commc'ns, Inc.*, 555 U.S. 438, 456 (2009) (dismissing price squeeze allegation); *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409–11 (2004) (dismissing unilateral refusal to deal); *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 243 (1993) (dismissing predatory pricing claim).

118. *See, e.g.*, Case C-202/07, *France Télécom SA v. Comm'n*, 2009 E.C.R. I-2369, ¶¶ 1–2, 4 C.M.L.R. 25, ¶¶ 1–2, 4 (examining predatory pricing practices as possible abuse of a dominant position); Case T-210/01, *Gen. Elec. Co. v. Comm'n*, 2005 E.C.R. II-5575, ¶¶ 15, 732 (concluding General Electric abused its dominant position through bundling practices); *British Airways*, 2003 E.C.R. ¶¶ 211, 223–25, 4 C.M.L.R. ¶¶ 211, 223–25 (concluding British Airways occupied and abused a dominant position); Case T-203/01, *Michelin v. Comm'n (Michelin II)*, 2003 E.C.R. II-407, ¶¶ 307–12 (imposing penalties for abuse of a dominant position); DAVID J. GERBER, *GLOBAL COMPETITION: LAW, MARKETS, AND GLOBALIZATION* 186 (2010) (explaining the special responsibility in the European Union not to abuse power); Waller & Tasch, *supra* note 116, at 745–52 (analyzing expanded use of essential facilities doctrine in the European Union and member states); Press Release, European Comm'n, High Speed Internet: The Commission

member nations have the right to apply article 102 more expansively in their national competition legislation, raising the prospect of investigation and challenge on even broader grounds.¹¹⁹ At the same time, the existence of a more robust private right of action, jury trials, broad discovery, the lure of treble damages, and what remains of the class action remedy, suggest that these actions may yet be tested in U.S. courts, particularly in private treble damage litigation by competitors or by consumers.

One possible real world scenario for Facebook, or future dominant social networking sites, is an antitrust challenge based on the maintenance of its dominant position through its role as a platform for software applications developed by third-party software companies. The so-called application barrier to entry was a key component of the finding of monopoly power in the 2001 case *United States v. Microsoft*.¹²⁰ Windows as an operating system was able to maintain its market power since developers overwhelmingly wrote their programs to run on Windows and were less likely to support other operating systems.¹²¹ Similarly, other operating systems had difficulty gaining market share without a full range of application programs that would run on their operating system.

The case hinged on what further unlawful anticompetitive behavior Microsoft engaged in to maintain market power. The court identified a number of exclusive contracts, changes to products and services that only disadvantaged competitors (rather than helping users), and certain patterns of deceptions that further locked in purchasers, users, and programmers.¹²²

Facebook, for the foreseeable future, is in a different situation than the Microsoft of a decade ago or Google today. It is less likely to use restrictions on application developers to maintain its dominance

Imposes a Fine on Wanadoo for Abuse of a Dominant Position (July 16, 2003), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/03/1025&format=HTML&aged=1&language=EN&guiLanguage=en>; (explaining imposition of a fine after finding high speed internet company abused dominant position).

119. Council Regulation 1/2003, of 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, 2003 O.J. (L1) 1, 1–5 (EC). Articles 81 and 82 have been renumbered as Articles 101 and 102, respectively, in the founding treaty for the European Union. *Application of Articles 101 and 102 TFEU (Formerly Articles 81 and 82 of the EC Treaty)*, EUROPA.EU, http://europa.eu/legislation_summaries/competition/firms/l26092_en.htm (last updated Mar. 14, 2011).

120. *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (per curiam).

121. *Id.* at 60–62.

122. *Id.* at 70–78; David Evans, *Antitrust Issues Raised by the Emerging Global Internet Economy*, 102 NW. U. L. REV. COLLOQUY 285, 304 (2008), <http://colloquy.law.northwestern.edu/main/2008/05/anti-trust-issue.html>.

over the platform, since it is not itself an application developer and benefits from more applications and developers available to its user base.¹²³

Another possible issue down the road is the issue of tying and bundling that plagued Microsoft and is beginning to be raised in connection with Google's role in search. Google's continuing addition of new free features such as Google Maps, Google News, and Google Travel has competition implications for competitors who provide competing products. Here too, the outcome in the United States may differ from the outcome in the European Union and other key jurisdictions. Each time new features are incorporated into existing dominant platform software, less integrated competitors are harmed. Consumers are also potentially harmed as well by the diminution of choice and the possible exclusion of better options.

The U.S. courts have tread lightly in this area and have been reluctant to impose liability for such conduct. Despite affirming liability against Microsoft on most counts, the D.C. Circuit was quite deferential to the company's design choices. The appellate court refused to hold the company liable for tying internet browsing software to the basic operating system absent a full rule of reason analysis,¹²⁴ which the Government chose not to pursue on remand. As to bundling, a handful of courts in the United States have affirmed liability for bundling, but have done so in non-software industries and under circumstances far removed from the integration of new features into dominant software platforms.¹²⁵

Bundling of new features, even for free, becomes grounds for scrutiny outside the United States where competition from less integrated competitors is harmed. The European version of the *Microsoft* case, *Microsoft Corp. v. Commissioner*,¹²⁶ focused directly on the bundling of media-playing software with the operating system and required the unbundling of this feature as part of the remedy.¹²⁷ Facebook may face similar bundling scrutiny in the European Union

123. Butts, *supra* note 62, at 290.

124. *Microsoft*, 253 F.3d at 84. For a full analysis of the development and nature of modern rule of reason analysis in U.S. antitrust, see generally Spencer Weber Waller, *Justice Stevens and the Rule of Reason*, 62 SMU L. REV. 693 (2009).

125. See, e.g., *LePage's Inc. v. 3M*, 324 F.3d 141, 154–56 (3d Cir. 2003); *Ortho Diagnostics Sys., Inc. v. Abbott Labs., Inc.*, 920 F. Supp. 455, 465–71 (S.D.N.Y. 1996).

126. Case T-201/04, *Microsoft Corp. v. Comm'n*, 2007 E.C.R. II-3601.

127. *Id.* ¶¶ 859–72, 1232. The failure of the particular remedy chosen by the European Commission is discussed in Spencer Weber Waller, *The Past, Present, and Future of Monopolization Remedies*, 76 ANTITRUST L.J. 11, 28 (2009).

as it incorporates a plethora of new software features into its basic platform.

While Facebook may be less vulnerable than Microsoft or Google to some of the charges of anticompetitive conduct that have come to characterize the computer software industry, it faces its own unique challenge over the control of information that has defined its dominance in the present social networking industry. If Facebook's market dominance remains durable, the question of market power becomes easier over time as network effects and data lock-in make it increasingly likely that Facebook is a market unto itself. Any changes in information and data policy that harm competition become serious matters of concern, as do changes in behavior or policies that make access or interoperability more difficult for present and future competitors and application developers. Here, U.S. and E.U. competition law and policy is more in sync. Each jurisdiction required in the *Microsoft* case and other monopolization cases interoperability requirements as a remedy for the unlawful maintenance of a monopoly or the abuse of a dominant position.¹²⁸

More speculatively, Facebook (or some future dominant social networking site) may evolve into the type of infrastructure that requires open access to both consumers and competitors at fair, reasonable, and nondiscriminatory prices and other terms.¹²⁹ From medieval times through the present, a number of businesses have been deemed to affect the public interest and then regulated as common carriers.¹³⁰ In the antitrust realm, denial of access to competitors under certain circumstances has been considered a violation of the essential facilities doctrine and a violation of sections 1 or 2 of the Sherman Act when the other elements of the violation are present.¹³¹ As I have discussed in other work, the essential

128. Waller, *supra* note 1.

129. See, e.g., Brett M. Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917, 974–78 (2005); Brett Frischmann & Spencer Weber Waller, *Revitalizing Essential Facilities*, 75 ANTITRUST L.J. 1, 10–18 (2008); Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257, 282–83 (2007); Spencer Weber Waller, *Areeda, Epithets, and Essential Facilities*, 2008 WIS. L. REV. 359, 371–85; Waller & Tasch, *supra* note 116, at 762–66.

130. RICHARD A. EPSTEIN, *PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY WITH THE COMMON GOOD* 279–323 (1998). Such concerns have led Oren Bracha and Frank Pasquale to call for the creation of a Federal Search Commission to explicitly regulate internet search. Oren Bracha & Frank Pasquale, *Federal Search Commission? Fairness, Access, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149, 1208–09 (2008).

131. See *Otter Tail Power Co. v. United States*, 410 U.S. 366, 368, 378–82 (1973) (requiring vertically integrated utility to wheel power from competing generator to

facilities doctrine works best when applied to denials of access to historical and modern infrastructure, whether that consists of railroad bridges, telephone networks, or software platforms.¹³² The more Facebook resembles the infrastructure of the future, the more it will be treated as such for competition law purposes. Either separately or in combination, these are major factors that could create the perfect antitrust storm for this market leader.

IV. FACEBOOK AND REAL SCHUMPETERIAN COMPETITION

Thinking about the antitrust law implications of social networking also provides a lens to examine the nature of competition and public policy more generally. The Austrian economic historian Joseph Schumpeter coined the term “Creative Destruction” to represent his findings as to the nature of competition in nineteenth and early twentieth century markets.¹³³ For Schumpeter, competition consisted of one dominant firm being replaced by another, and then yet another new dominant firm. Firms thus tended to compete for market dominance in existing and newly created industries through innovation and other highly disruptive strategies.¹³⁴ This is a very different vision than competition (largely based on price) within well-defined markets that dominates most microeconomic thinking and public policy based on price theory.¹³⁵ This vision of competition is

downstream customers); *Associated Press v. United States*, 326 U.S. 1, 17–19 (1945) (holding newspaper network must admit competitors of members on a nondiscriminatory basis); *United States v. Terminal R.R. Ass’n of St. Louis*, 224 U.S. 383, 409 (1912) (ordering group controlling railroad traffic across the Mississippi River to provide access to nonmembers on a nondiscriminatory basis); *MCI Commc’ns Corp. v. AT&T Co.*, 708 F.2d 1081, 1132–33 (7th Cir. 1983) (requiring local phone monopolist to provide interconnection to competing long distance provider).

132. Frischmann & Waller, *supra* note 129, at 22–28, 46–64; Waller, *supra* note 129, at 375–85; Waller & Tasch, *supra* note 116, at 762–66; *see also* Frischmann, *supra* note 129, at 961–70 (developing economic theory of infrastructure and management of infrastructure as commons); Frischmann & Lemley, *supra* note 129, at 258–71 (discussing the analogous concepts of spillovers and positive externalities and arguing that spillovers produce net benefits in the intellectual property field, despite the traditional law and economics theory that spillovers cause market inefficiencies); Sandeep Vaheesan, *Reviving an Epithet: A New Way Forward for the Essential Facilities Doctrine*, 2010 UTAH L. REV. 911, 951–59 (urging application of essential facilities to unregulated software platforms).

133. JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 83 (3d ed. 1950). *See generally* THOMAS K. MCGRAW, *PROPHET OF INNOVATION: JOSEPH SCHUMPETER AND CREATIVE DESTRUCTION* (2007) (providing a scholarly biography of the life and work of Schumpeter).

134. *See* SCHUMPETER, *supra* note 133, at 83–86.

135. *See, e.g.*, F.M. SCHERER & DAVID ROSS, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 15–18 (3d ed. 1990).

more similar to what a number of commentators have referred to as competition for the market, rather than within the market.¹³⁶

Commentators such as Richard Posner have applied this vision to newer high-tech industries where the prospect of monopoly returns drives competition in innovation.¹³⁷ More generally, commentators debate whether monopoly or competition is more conducive to innovation and what is the proper public policy to encourage innovation as an engine of growth.¹³⁸

Until recently, the social networking space has shown a high degree of contestability, suggesting that it shares in common much of the Schumpeterian vision of competition via successive waves of creative destruction. Early on, Friendster was the dominant firm, then MySpace, and now Facebook. We have seen the exit or irrelevance of venerable sites such as Propeller, Digg, and Google's previous failures to launch prior social networking sites such as Buzz.¹³⁹ In addition, we have the evolving nature of social networking sites in general, which are quickly converging with formerly separate software applications such as search, email, music streaming, video chat, and instant messaging.¹⁴⁰ As a result of these and other

136. See Adi Ayal, *Monopolization Via Voluntary Network Effects*, 76 ANTITRUST L.J. 799, 800, 812–14 (2010); David S. Evans & Richard Schmalensee, *Some Economic Aspects of Antitrust Analysis in Dynamically Competitive Industries*, in 2 INNOVATION POLICY AND THE ECONOMY 1, 1 (Adam B. Jaffe, Josh Lerner & Scott Stern, Nat'l Bureau of Econ. Research, eds., 2002).

137. Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 929–30 (2001).

138. For discussions by prominent commentators who find competitive markets a more reliable generator of innovation, see KENNETH J. ARROW, *ESSAYS IN THE THEORY OF RISK BEARING* 144, 157 (3d ed. 1976); Jonathan B. Baker, *Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation*, 74 ANTITRUST L.J. 575, 587–88 (2007); Robert Pitofsky, *Challenges of the New Economy: Issues at the Intersection of Antitrust and Intellectual Property*, 68 ANTITRUST L.J. 913, 916–18 (2001). While this debate remains unsettled and is probably incapable of definitive resolution, most would agree with Professor Herbert Hovenkamp who stated that: “Many antitrust violations restrain rather than promote innovation.” Herbert J. Hovenkamp, *Schumpeterian Competition and Antitrust* 4 (Univ. of Iowa Legal Studies Research Paper, Paper No. 08-83, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1275986.

139. See, e.g., Todd Wasserman, *Can Digg Find Its Way in the Crowd?*, N.Y. TIMES, Sept. 19, 2010, at BU1; Bob Brown, *AOL Shuts Down Propeller Social News Aggregation*, COMPUTERWORLDUK (Oct. 1, 2010, 11:46), <http://www.computerworlduk.com/news/it-business/3241977/aol-shuts-down-propeller-social-news-aggregation/>.

140. See AULETTA, *supra* note 50, at 172–73 (discussing Facebook acting as search engine and navigator in competition with Google); Amir Efrati, *Google Wants Search To Be More Social*, WALL ST. J., Mar. 31, 2011, at B1; Brendan Lynch, *Facebook vs. Google+*, BOS. HERALD, Sept. 23, 2011, at 3; *Facebook Revamps Messaging System*, BBC (Nov. 15, 2010), <http://www.bbc.co.uk/news/technology-11743524>; David Meyer, *EU Highlights Difficulty of Establishing Online Antitrust*, ZDNET (July 8, 2010, 17:14),

unforeseen factors, it is entirely possible that Facebook will be replaced with another social networking site or an altogether new technology or software platform.

The question remains as to what is the preferable public policy so that Facebook, and any present or future rivals, can compete on the merits and prevail or fail based on consumer demands, rather than exclusionary practices or governmental dictates. Many have suggested laissez faire as the proper policy complement to Schumpeterian competition.¹⁴¹ This Article suggests that the answer is somewhat more complicated.

First, Schumpeter himself did not advocate the complete absence of a government role in the formulation of competition policy. Over his long and prolific career, the bulk of his writing consisted of an historical analysis of economic thought and actual market behavior in the many industries and macroeconomic cycles that he studied.¹⁴² As his most recent biographer has noted, he typically avoided prescribing economic programs for governments.¹⁴³ Where he addressed these themes, he was not always opposed to state intervention, but was most concerned about the importance of innovation and avoiding attacks on big business per se.¹⁴⁴ At different times in his career, he

<http://www.zdnet.co.uk/news/regulation/2010/07/08/eu-highlights-difficulty-of-establishing-online-antitrust-40089482/> (discussing the “contestability” of social networking and online markets); Alexei Oreskovic, *Microsoft Deepens Facebook Ties in Web Search Battle*, REUTERS (Oct. 14, 2010, 1:44 AM), <http://www.reuters.com/article/2010/10/14/us-microsoft-idUSTRE69C5MW20101014>; Wailin Wong, *Facebook To Team Up with Skype To Offer Video Calling*, CHI. TRIB. (July 6, 2011), http://articles.chicagotribune.com/2011-07-06/business/chi-facebook-to-team-up-with-skype-to-offer-video-calling-20110706_1_skype-chief-executive-mark-zuckerberg-social-networking-platform.

141. See, e.g., Arthur M. Diamond, Jr., *Creative Destruction: The Essential Fact About Capitalism* 31 (June 6, 2007) (unpublished manuscript), available at <http://www.artdiamond.com/DiamondPDFs/CreativeDestructionEssentialFact03.pdf>.

142. See generally JOSEPH A. SCHUMPETER, *BUSINESS CYCLES: A THEORETICAL, HISTORICAL, AND STATISTICAL ANALYSIS OF THE CAPITALIST PROCESS* (1939) [hereinafter SCHUMPETER, *BUSINESS CYCLES*] (proposing a macroeconomic theory of business cycles and applying the theory to explain historical cyclical fluctuations); JOSEPH SCHUMPETER, *ECONOMIC DOCTRINE AND METHOD: AN HISTORICAL SKETCH* (R. Aris trans., Oxford Univ. Press 1954) (1912) (surveying the history of economics as an academic discipline, the development of classical economics, and the theory of marginal utility); JOSEPH A. SCHUMPETER, *HISTORY OF ECONOMIC ANALYSIS* (Elizabeth Boody Schumpeter ed., 1954) [hereinafter SCHUMPETER, *HISTORY OF ECONOMIC ANALYSIS*] (chronicling the development of economic theory from ancient Greece through modern Keynesian economics).

143. MCGRAW, *supra* note 133, at 179.

144. *Id.* at 481; SCHUMPETER, *supra* note 133, at 91, 100; Joseph A. Schumpeter, *Science and Ideology*, 39 AM. ECON. REV. 345, 357–58 (1949).

was critical of monopoly, opposed public entry barriers, and found inequality of opportunity unacceptable.¹⁴⁵

Finally, he did consider a world where would-be monopolists could achieve market power and then take action to prevent the next wave of creative destruction from affecting them. As Schumpeter noted in his *History of Economic Analysis*: “[T]here are means available to the successful entrepreneur—patents, ‘strategy,’ and so on—for prolonging the life of his monopolistic or quasi-monopolistic position and for rendering it more difficult for competitors to close up on him.”¹⁴⁶

The recent past suggests that firms with market power in the technology space often engage in a variety of tactics to prevent the second wave of creative destruction from ever occurring. While reasonable people can differ as to whether Schumpeterian competition produces an optimal amount of innovation, competition, or social welfare,¹⁴⁷ even a true Schumpeterian should be concerned about a world where open competition in stage one leads to durable market power in stage two. Most commentators would be concerned when governmental processes and entry barriers are used to bolster monopoly power, even if lawfully obtained.¹⁴⁸ Current antitrust policy should be similarly concerned with private action that unlawfully maintains monopoly power, even when being quite lenient or encouraging to the acquisition of that power in the first place.

This is largely the antitrust world in which we live today and it is an appropriate one.¹⁴⁹ It is appropriate to insist on rigorous definition of market power before proceeding to the question of identifying exclusionary and harmful behavior that inappropriately maintains this

145. MCGRAW, *supra* note 133, at 175–76, 481, 502.

146. SCHUMPETER, *HISTORY OF ECONOMIC ANALYSIS*, *supra* note 142, at 897–98; *see also* SCHUMPETER, *BUSINESS CYCLES*, *supra* note 142, at 67 (explaining how a monopolist can prevent creative destruction).

147. *See* Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in *THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS* 609, 609–10 (Nat’l Bureau Econ. Research ed., 1962); Baker, *supra* note 138, at 579–83.

148. *See* ROBERT H. BORK, *THE ANTITRUST PARADOX* 347–64 (1978); MCGRAW, *supra* note 131, at 256; RICHARD A. POSNER, *ANTITRUST LAW* 74, 114 (2d ed. 2001); SCHUMPETER, *supra* note 131, at 99.

149. *See generally* *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (*per curiam*) (upholding antitrust liability for a manufacturer of a personal computer operating system and an internet web browser for engaging in anticompetitive practices to maintain market power); Decision and Order, *In re Intel Corp.*, No. 9341 (F.T.C. Oct. 29, 2010), *available at* <http://www.ftc.gov/os/adjpro/d9341/101102inteldo.pdf> (settling claims brought against Intel Corp. for the use of anticompetitive measures to maintain market power).

power and blocks the emergence of even more disruptive technologies and other forms of innovation. Where monopoly has been achieved unlawfully, that too should be addressed. However, the mere fact that true monopoly power has been achieved lawfully, whether through innovation, creative destruction, or merely dumb luck, does not counsel in favor of a policy of laissez faire from that point forward. The focus should not be on size, but on the abuse of power. This may be inconvenient for the firms that currently dominate high technology industries, but such rules are the very point of meaningful competition policy.

While Judge Learned Hand was undoubtedly correct when he wrote in *United States v. Aluminum Co. of America*¹⁵⁰ that “[t]he successful competitor, having been urged to compete, must not be turned upon when he wins,”¹⁵¹ it is equally important that we do not allow the current frontrunner in a race to declare permanent victory at the moment of his choosing. As Professor Tim Wu has noted more recently, the government has too often “stood beside concentrated power against the underdog at the expense of economic dynamism.”¹⁵² Both wise antitrust and regulatory policy may be needed to prevent markets from being won through innovation, but maintained through capture and predation.

CONCLUSION

This Article seeks to describe a framework to analyze whether Facebook, or any future dominant social networking firm, is a monopolist and whether such firms have abused their power to monopolize, attempt to monopolize, or abuse a dominant position within the meaning of competition law and policy. The current answer is probably no, or at least not yet. Under conventional antitrust analysis, Facebook does not have the dominant market share of well-defined product and geographic markets with high entry barriers that normally constitute evidence of the market power prong of monopolization and abuse of dominance. However, network effects, evidence of lock-in, limitations on data portability, and common sense all suggest that the question is a close one and that Facebook’s market power is growing, rather than receding.

150. 148 F.2d 416 (2d Cir. 1945).

151. *Id.* at 430.

152. TIM WU, *THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES* 308 (2010).

Since the market and the competitive strategies continue to evolve so quickly and in unexpected directions, the framework for analysis is probably more important than the snapshot at any particular instant. Social networking, even more than internet search, is likely to be one of the areas where traditional notions of market power give way before the reality that even though choice is available, it is not a meaningful option for most consumers for a variety of reasons. Even committed admirers of theories of creative waves of destruction should be wary of a complete hands-off competition policy toward the market leaders of today, lest the open markets of the present become the entrenched monopolies of the future.

