Net Tribunal

Hal Singer

Tech Platform's Two-Part Anticompetitive Scheme

1. Appropriate an edge idea or business; and
2. Steer users to the affiliated clone using their platform power

Antitrust Is Too Slow To Protect Edge Innovation

- Average time for lower court to adjudicate a single-firm monopoly case pursuant to Section 2 is 35 months

Source: Caves & Singer (2019)
Notes: Based on a sample 22 cases adjudicated by a federal district court since 1990 that were referenced in the DOJ's Section 2, single-firm-conduct report from 2008.

Discrimination Cases Adjudicated Under Section 616 of the Cable Act

Case	Complaint	Resolution	Duration (months)
NFL Network v. Comcast†	May-08	May-09*	12
Tennis Channel v. Comcast†	Jan-10	Dec-11	23
GSN v. Cablevision†	Oct-11	Nov-16	61
MASN v. Comcast†	Aug-08	Dec-09*	15
WealthTV v. Comcast, et al	Dec-07	Oct-09	21
beIN v. Comcast†	Mar-18	Pending	NA
Average			**26**
Average without GSN			**18**

Disclaimer: †Author served as Complainant's economic expert.

Evidentiary Burden for Complainant

1. Similarly situated to the cable operator's network;
2. The cause of disparate treatment is lack of affiliation;
3. As a result of 1 and 2, the independent was materially impaired in its ability to compete.

Section 616 Associated with an Increase in Entry by Independent Programmers

Network Type	Launched by 1991	Launched by 1998	Growth 92-98
Independent	43	116	169%
Cable-Affiliated	32	78	143%

Source: FCC Fifth Annual Video Competition Report

Comcast's Profits Before and After Nondiscrimination Protections

Before

After

Evidentiary Burden for Complainant

1. Similarly situated to the cable operator's network;
2. The cause of disparate treatment is lack of affiliation;
3. As a result of 1 and 2, the independent was materially impaired in its ability to compete.

Senator Mark Warner (D-Virginia) Tech Manifesto

Essential Facilities Determinations – Certain technologies serve as critical, enabling inputs to wider technology ecosystems, such that control over them can be leveraged by a dominant provider to extract unfair terms from, or otherwise disadvantage, third parties. For instance, Google Maps maintains a dominant position in digital mapping (enhanced by its purchase of Waze), serving as the key mapping technology behind millions of third party applications (mobile and desktop) and enabling Google to extract preferential terms and conditions (such as getting lucrative in-app user data from the third-party apps as a condition of using the Maps function). Legislation could define thresholds – for instance, user base size, market share, or level of dependence of wider ecosystems – beyond which certain core functions/platforms/apps would constitute 'essential facilities', requiring a platform to provide third party access on fair, reasonable and non-discriminatory (FRAND) terms and preventing platforms from engaging in self-dealing or preferential conduct. In other words, the law would not mandate that a dominant provider offer the service for *free*; rather, it would be required to offer it on reasonable and non-discriminatory terms (including, potentially, requiring that the platform not give itself better terms than it gives third parties). Examples of this kind of condition are rife in areas such as telecommunication regulation, where similar conditions have been imposed on how Comcast's NBC-Universal subsidiary engages with Comcast and Comcast rivals.

Senator Elizabeth Warren (D-Massachusetts) Tech Plan

These companies would be prohibited from owning both the platform utility and any participants on that platform. Platform utilities would be required to meet a standard of fair, reasonable, and nondiscriminatory dealing with users. Platform utilities would not be allowed to transfer or share data with third parties.

For smaller companies (those with annual global revenue of between $90 million and $25 billion), their platform utilities would be required to meet the same standard of fair, reasonable, and nondiscriminatory dealing with users, but would not be required to structurally separate from any participant on the platform.

Committee for the Study of Digital Platforms Market Structure and Antitrust Subcommittee

Some regulations could apply only to firms that meet the DA's definition for bottleneck power. Because the cost of false negatives is high and there is uncertainty, the public interest requires the DA to take a more interventionist approach in these settings. The DA could have merger review authority over even the smallest transactions involving digital businesses with bottleneck power because nascent competition against these entities is very valuable for consumers. Non-discrimination rules could protect against a complement that is a potential competitor of the platform itself, or one that operates only on the platform as a rival provider of content.