Antitrust and Social Networking

Spencer Weber Waller
Professor and Director
Institute for Consumer Antitrust Studies
Loyola University Chicago School of Law
swaller@luc.edu
http://www.luc.edu/antitrust
Or... Is Facebook a Monopolist?

- Popular Conceptions of Monopoly
  - “Natural Monopoly”
  - “Curious Social Monopoly”
  - Tim Wu Debate
  - Simon Rich Parody
- Technical Antitrust Meaning
  - Power to Raise Price
  - Power to Exclude Competition
How Antitrust Identifies Monopoly

- Section 2 Sherman Act Prohibits Monopolization and Attempted Monopolization
- Article 102 TFEU Prohibits the Abuse of a Dominant Position
- Usually Defined in Terms of Share of Relevant Product/Service and Geographic Market
- Usually the Narrower the Market, the Higher the Shares, and the Greater Likelihood of Monopoly Power
- Rule of Thumb in the U.S., 90% is Monopoly, 66% Might be, 33% is not
- In EU, Above 50% is Dominant Position, 40% Might be
Defining the Relevant Market

- Remember Market Definition is Merely a Tool to Identify Power or Lack Thereof, Not an End to Itself
- Real Question is What do Consumers View as Reasonably Effective Substitutes?
- Assume U.S. Geographic Market Although Case Could be Made for Broader Global Market
- For Consumers Product Market Appears to be General Social Networking Sites
  - Definition from boyd & Ellison
  - Specialized SNS only Partial Substitutes or Complements
  - Groupon, Yelp, Amazon, You Tube Mostly Inputs or at Most Partial Substitutes
  - No Reasonably Effective Off-Line Substitute for General SNS
- May be More Than One Relevant Market at Issue in a Particular Case or Investigation
  - Advertisers
  - Application Developers
How to Measure Market Share?

- Page Views?
- Registered Users?
- Advertising Revenues?
- Market for User Information?
- Market for Privacy Protection?
- Limitation of Traditional Tools
  - Cross-Elasticity of Demand
  - SSNP Test
  - If Facebook Raised Price 5-10% Would Consumers, Advertisers, or Developers Flee in Droves?
What is Facebook’s Current Market Share?

- October 2011 Estimate Shows Facebook Holding Steady Around 63%
- This Underreports Share of True Relevant Market by Including You Tube and other Inputs or Partial Substitutes
- Current Shares, Trends, Small Fringe, and Entry Barriers Suggest Market Power for Both US and Dominance for EU
What Do Market Shares Mean?

- Can Overstate or Understate True Degree of Market Power
- Presence or Absence of Barriers to Entry Key Issue but as Complicated as Market Definition Itself
- Technical Barriers and Capital Costs Minimal
- Presence of Direct and Indirect Network
- Stickiness
  - Difficulty of Deactivation
  - Data Portability
  - Brand Effects
- Lock in Issues
- Dilemma: What if Competition is Just a Click Away But the Average Consumer Never Clicks?
What if Anything Does Facebook Do Wrong?

- Finding Market Power Just First Step of Analysis
- Having Monopoly Power by Itself Not Unlawful in U.S. or EU
- Monopoly Power Actually Praised by Supreme Court in 2004 *Trinko* decision
- Defined as Excluding Competition on Something Other than Competition on the Merits (somewhat circular)
  - Predation
  - Lack of Business Justification
  - Conduct That Predominately Injures Competitors Rather than Serving Consumer Needs
- Microsoft and Intel as Roadmaps
- Google Yet to Come
- Attempted Monopolization Separate Offense in US but not EU
Abuse of Dominance in EU

- Thresholds for Dominance Lower than U.S.
- Unlawful Conduct Broader
- Role of Member States Law Broader Still
- Differences in EU Microsoft Case as Illustration
  - Tying
  - Bundling
  - Interoperability Concerns
  - Fines
  - Limitations on Private Rights of Action

- Special Duty of Dominant Firms To Avoid Injuring Competition in EU
Antitrust Track Record to Date

- Operating Systems
- Browser Wars
- Search Engines
- Merger Investigations
- Only Minor Private Antitrust Litigation Involving Social Networking Sites So Far
  - Deception
  - Lack of Access
Antitrust Issues Moving Forward

- Greater Salience of EU Competition Law
- Increasing Ease of Showing Market Power
- Bundling
- Changes in Behavior
- Access to Essential Facilities and Infrastructure
- Merger Issues Around the Globe
- Private Litigation Still Almost Exclusive Province of the U.S.
Real Schumpeterian Competition

- Facebook as Lens to Consider Competition Policy More Broadly
- Joseph Schumpeter and Creative Destructive
- How Good an Example is Facebook?
  - It Supplanted Others
  - Will Others Supplant it?
- Why Laissez Faire is Not the Right Public Policy