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## Contents




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icarus EDITORS

Courtney Armour
Distilled Spirits Council
courtney.armour@distilledspirits.org

Kim Van Winkle
kimvanwinkle@outlook.com

The Media and Technology Committee of the ABA Section of Antitrust Law is pleased to present the Summer 2021 issue of *icarus*, our publication focusing on competition and consumer protection issues in media and technology industries.

In this issue, we continue our practice of publishing in depth articles exploring issues related to antitrust in media and technology industries and interviewing prominent members of the Section. We begin with a timely retrospective look at the landmark Microsoft case and where technological tying stands now in an article by Jacqueline Sesia and Shaina Vinayek – *Twenty Years After Microsoft: Where Does Technological Tying Stand?*

We are then pleased to rollout the first installment of a new interview series – *Frequency Boost: Amplifying Diverse Voices in Media & Technology*. In this interview series, we will be exploring the impact of women and minorities on antitrust and consumer protection jurisprudence in the media and technology sectors. In this first installment of Frequency Boost, we speak to four accomplished women who each have varying and impressive experience in the media sector.

We want to extend a heartfelt thanks to Andrew O'Keefe for his leadership in formatting and proofreading this edition. His attention to detail is unparalleled.

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

## Twenty Years After *Microsoft*: Where Does Technological Tying Stand?

Authored by Jacqueline Sesia & Shaina Vinayek*

* The views expressed in this publication reflect those of the authors alone.

### I. Introduction

When the antitrust laws were written at the turn of the nineteenth century, Congress had railroad tycoons and oil barons in mind. Now, more than one hundred years later, a new formidable presence has emerged, "Big Tech." "Big Tech," or more specifically digital platforms, are particularly amenable to tying and bundling practices. Stefan Holzweber, *Tying and Bundling in the Digital Era*, 14 EUR. COMPETITION J. 342, 342 (2018). To account for the new phenomenon, Richard Posner introduced the notion of the "new economy". Richard A. Posner, *Antitrust in the New Economy* (John M. Olin Program in Law and Economics Working Paper No. 106, 2000). Posner's new economy refers to three distinct yet related industries: (1) manufacturers of computer software, (2) Internet-based businesses, and (3) manufacturers of hardware designed to support the first two industries. Twenty years after the introduction of the new economy to the antitrust lexicon, we are now witnessing the rise of digital platform companies, part of Posner's new economy categorization as Internet-based businesses. Platform industries introduce new complexities in the analysis of technological tying. This paper discusses the evolution of and challenges in the analysis of technological tying under antitrust law that have arisen twenty years after the pivotal case of *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

### II. Microsoft - A Pivotal Point for Platform Software Markets

The *Microsoft* decision was limited to product integration in "platform software markets" and jurisdictionally to the D.C. Circuit. However, it was a pivotal point for tying analyses as courts have since regularly found reasons not to apply the per se rule. *See* Christian Ahlborn, David S. Evans & A. Jorge Padilla, *The Antitrust Economics of Tying: A Farewell to Per Se Illegality*, ANTITRUST BULL. (2004), https://www.justice.gov/atr/antitrust-economics-tying-farewell-se-illegality#a9 (explaining *Microsoft* applies to platform software tying cases, while other tying cases continue to follow *Jefferson Parish*).

Prior to *Microsoft*, tying analyses proceeded under the *Jefferson Parish* approach where a complainant needed to prove: (1) the tying and tied goods are two separate products; (2) the defendant conditioned the sale of the desired (tying) product on the sale of a second (tied) product affording consumers no choice; (3) the arrangement forecloses a substantial volume of commerce; and (4) the defendant has market power in the tying product market, for per se condemnation. *Microsoft*, 253 F.3d at 85. Under *Jefferson Parish*, an "essential characteristic of an invalid tying arrangement [lay] in the seller's exploitation of its control over the tying product to *force* the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere…." *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984) (emphasis added). The Court forged a separate-products test to determine whether there was indeed use of market power to force consumers into purchasing a product they may not have chosen if the goods were competing directly for consumer choice on their merits. *See id.* at 27-

28. The test focuses on the character of the demand of the two items as a rough proxy for whether the tying arrangement may be, on balance, welfare-enhancing. *Microsoft*, 253 F.3d at 87. Where there are no efficiencies from a tie, one can "expect distinct consumer demand for each individual component of every good." *Id.* Before *Microsoft*, in such cases where there was distinct demand, and a substantial volume of commerce was foreclosed, the tying arrangement at issue was appropriate for per se condemnation.

The D.C. Circuit transformed this analysis in *Microsoft* for the platform economy by shifting the analysis from per se to rule of reason, noting that the court did not have "considerable experience with certain business relationships" and "[t]here being no close parallel [to tying hardware/software] in prior antitrust cases, simplistic application of per se tying rules carries a serious risk of harm" in the technology space to comfortably make a per se determination. *Id.* at 84-89. *Microsoft* limited its holding to arrangements "where the tying product is software whose major purpose is to serve as a platform for third-party applications and the tied product is complementary software functionality." *Id.* at 84, 95. The court found that "the nature of the platform software market affirmatively suggest[ed] that per se rules might stunt valuable innovation" in such markets because technological integration is common in such markets and such behavior may produce efficiencies that courts have not previously encountered. *Id.* at 92-93. Under the rule of reason, courts may "afford[] the first mover an opportunity to demonstrate that an efficiency gain from its 'tie' adequately offsets any distortion of consumer choice." *Id.* at 92. *Microsoft* pointed out that such considerations are especially necessary in technologically dynamic markets where product development is non-linear and resulting efficiencies are difficult to predict and account for in the calculations underlying the adoption of a per se rule for tying. *See id.* at 94. And in fact, such was *Microsoft's* effect that a per se analysis has not been applied to tying since *Jefferson Parish*. *See, e.g.*, *Healy v. Cox Commc'ns., Inc. (In re Cox Enters., Inc.)*, 871 F.3d 1093, 1111-1112 (10th Cir. 2017) (finding that in the cable industry, consumers failed to demonstrate a per se illegal tie under *Jefferson Parish* due to lack of potential impact on competition); *Epic Games, Inc. v. Apple Inc.*, 493 F. Supp. 3d 817, 844 (N.D. Cal. 2020) (concluding that Apple had not proven a likelihood of success on the merits due to lack of demand for distinct products under either the per se or rule of reason analysis).

## III. Does the Rule of Reason in Platform Economy Tying Arrangements Hold Up Twenty Years After *Microsoft*?

Twenty years later, the Supreme Court's strong disapproval of tying arrangements since *Microsoft* has diminished. *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 35 (2006). In more recent opinions, the Court has required a showing of market power in the tying product before moving onto the inquiry of competitive effects. *Id*. Courts have also carved out an exception to tying when an allegedly tied product is an essential ingredient of the "method of business". *Epic Games*, 493 F. Supp. 3d at 842. This exception has been used as there have been technological innovations in payment processing. *Id.* ("As the Ninth Circuit has recognized, payment processing can be part of a single integrated product."). Additionally, courts have begun to recognize that bundled discounts may be procompetitive in that they benefit buyers because discounts are passed onto the end-user. *Cascade Health Sols. v. PeaceHealth*, 515 F.3d 883, 895 (9th Cir. 2007).

Per se analysis of antitrust illegality is "reserved for those situations where logic and experience show that the risk of injury to competition from the defendant's behavior is so pronounced that it is needless and wasteful to conduct the usual judicial inquiry into the balance between the behavior's procompetitive benefits and its anticompetitive costs." *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 486-87 (1992) (Scalia, J., dissenting). Tying, which was once thought to "epitomize [] exclusionary practices" was transformed for platform economies by the *Microsoft* court and is "now recognized to be only rarely exclusionary." RICHARD A. POSNER, ANTITRUST LAW 197 (2d ed. 2001); *Scheiber v. Dolby Laboratories, Inc.*, 293 F. 3d 1014, 1020 (7th Cir. 2002) ("as cases and a tidal wave of legal and economic scholarship point out, the idea that you can use tying to lever your way to a second . . . monopoly is economic nonsense"). This conclusion follows as antitrust laws do not protect competitors but competition itself. As such, most circuits have held that technological tying is permissible unless carried out with the sole or overwhelming purpose of hampering competition. Keith N. Hylton & Michael Salinger, *Tying Law & Policy: A Decision-Theoretic Approach*, 69 ANTITRUST L.J. 469, 472 (2001) (citing *Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307, 1330 (5th Cir. 1976); *United States v. Microsoft Corp.*, 147 F.3d 935, 949-50 (D.C. Cir. 1998)); *see Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 542 (9th Cir. 1983) ("[A] mere technological tie does not present the competitive evils which the per se prohibition of tying arrangements is designed to prevent."). Further, relying on intent evidence results in a more economically sound outcome as this approach takes into account efficiencies and lowered transaction costs. Ahlborn, et. al, *supra* (discussing the Chicago School's analysis of welfare increasing effects of tying such as reductions in transaction costs, product improvement, quality assurance, pricing efficiencies, and post-Chicago theories on foreclosure); Guy Sagi, *A Comprehensive Economic and Legal Analysis of Tying Arrangements*, 38 SEATTLE U. L. REV. 1, 6-9 (2014) (discussing economic incentives to tie such as product improvements, saving production and marketing costs, protecting reputation, and reducing risk of entering new geographic markets). Therefore, a company that can more effectively compete through the tying of a product is not guilty of an antitrust violation as such behavior is *procompetitive*. Tying arrangements violate antitrust law only when "they restrain competition on the merits by *forcing* purchases that would not otherwise be made." *Jefferson Par.*, 466 U.S. at 27-28 (emphasis added). An essential characteristic of such an arrangement is a seller's exploitation of its market power in the tying product market "to *force* the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere." *Id.* at 12 (emphasis added).

Posner has proposed the following two-part inquiry for judging conduct alleged to be exclusionary: (1) whether the defendant has monopoly power[1] and (2) whether the challenged practices are likely to exclude equally or more efficient competitors. POSNER, ANTITRUST LAW, *supra*, at 194-95. The first question in a tying analysis is whether the alleged monopolist in fact possesses market power. A firm that does not have market power is incapable of excluding competitors. *Id.* at 195. If the answer is no, the tying inquiry ends and there is no tie. If the answer is yes, then the next question is whether the alleged tie forecloses competition. *See id.* at 196 ("It would be absurd to require the firm to hold a price umbrella over less efficient entrants...because we want to encourage efficiency."). A firm with market power in the tying product must have the ability to affect market outcomes, not just the ability to control its own prices. Benjamin Klein,

[1] Posner prefers to use monopoly power over market power. We are of the opinion that monopoly power is the proper metric, but do not discuss this further in this article.

*Market Power in Antitrust: Economic Analysis After* Kodak, 3 SUP. CT. ECON. REV. 43, 80 (1993). The court contended with this theory in *Eastman Kodak Co. v. Image Technical Services, Inc.* where Kodak argued that even if it conceded monopoly share in the relevant aftermarket (for parts and service), it could not actually exercise the necessary market power for an antitrust violation due to competition in the foremarket (for equipment). Kodak argued that "it could not have the ability to raise prices of service and parts above the level that would be charged in a competitive market because any increase in profits from a higher price in the aftermarkets at least would be offset by a corresponding loss in profits from lower equipment sales [in the foremarket] as consumers began purchasing equipment with more attractive service costs." *Eastman Kodak Co.*, 504 U.S. at 465-466. The Court rejected the adoption of such a rule, citing the cross-elasticity of demand, or "[t]he extent to which one market prevents exploitation of another market depends on the extent to which consumers will change their consumption of one product in response to a price change in another," and found that "[e]ven if Kodak could not raise the price of service and parts one cent without losing equipment sales, that fact would not disprove market power in the aftermarkets." *Id.* at 469-70. The Court found that the fact that the foremarket imposes a restraint on prices in the aftermarkets by no means automatically disproves the existence of power in those markets, disproving Kodak's theory that competition in the foremarket could not coexist with market power in the aftermarkets. *Id.* at 471.

Posner has scrutinized *Eastman Kodak* commenting that "at worst, Eastman Kodak was merely exploiting its customers, *not excluding or discouraging equally or more efficient competitors.*" Posner, *Antitrust in the New Economy*, *supra*, at 5, n. 3 (emphasis added). Herbert Hovenkamp has criticized *Eastman Kodak* as "a failed experiment in a type of economic engineering where antitrust has no place." HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 310 (2005) (arguing that the Supreme Court should overrule *Eastman Kodak*). Notably, the *Eastman Kodak* majority opinion did not mention the words, per se, in its analysis.

Over the years, the Supreme Court's strong disapproval of tying arrangements has substantially diminished. *Illinois Tool Works Inc. v. Independent Ink. Inc.*, 547 U.S. 28, 35 (2006). Early cases rejected the idea that tying arrangements could serve any purpose beyond the suppression of competition. *See Standard Oil Co. v. United States*, 337 U.S. 293, 305-06 (1949); *United States v. Loew's*, 371 U.S. 38, 47-48 (1962). However, in more recent opinions the Court has required a showing of market power in the tying product before reaching the competitive effects inquiry. *Illinois Tool*, 547 U.S. at 35. Notably, the Court has rejected the notion that a patent confers market power and found that even tying arrangements involving patented products should be evaluated under the rule of reason rather than the per se rule. *Id.* at 42. In *Illinois Tool*, the Court found that "[m]any tying arrangements, even those involving patents and requirements ties, are fully consistent with a free, competitive market[,]" and recognized that such arrangements "may well be procompetitive." *Id.* at 36, 45; *see also Suture Express, Inc. v. Owens & Minor Distrib.*, 2016 U.S. Dist. LEXIS 47421, at *47 (D. Kan. Apr. 7, 2016) (noting that "even in concentrated markets, tying arrangements 'may serve procompetitive purposes, such as quality control, production and sales efficiencies, and facilitation of indirect price competition'") (citations omitted); *Cascade Health Sols.*, 515 F.3d at 895 (commenting that tying in the form of bundled discounts "generally benefit buyers because the discounts allow the buyer to get more for less"). *Illinois Tool* can be read to emphasize that the rule of reason analysis is necessary to fully grasp the nuances of a particular arrangement and determine the competitive impact of the tying arrangement at issue. *See Epic Games*, 493 F. Supp. 3d at 840 ("tying arrangements under Section 1 of the Sherman Act may be evaluated under either per se or rule of reason analysis").[2]

### IV. The New Economy

Since *Microsoft*, the new economy has emerged in an antitrust space designed for "traditional" firms. The traditional industries of steel, automobiles, pipe, wire, aluminum, railroad cars, road building materials, and cigarettes are multi-plant and multi-firm productions requiring heavy capital investment, modest rates of innovation, and slow and infrequent entry and exit. New economy firms on the other hand are characterized by falling average costs (on a product-basis), modest capital investment compared to traditional firms, high rates of innovation, frequent entry and exit, economies of scale in consumption also known as "network externalities" and innovative business relationships, such as platforms.

New economy firms produce both hardware (tangible) and software (intangible) goods, which adds complexity to the tying analysis. As the D.C. Circuit noted in *Microsoft* "not all ties are bad" as "[b]undling obviously saves distribution and consumer transaction costs"[3] and "[b]undling can also capitalize on certain economies of scope." *Microsoft*, 253 F.3d at 87. The *Microsoft* court declined to extend per se analysis to a software tie because the court was unfamiliar with physically and technologically integrated platform software products saying, the "nature of the platform software market affirmatively suggests that per se rules might stunt valuable innovation" given the court's lack of familiarity with the technology. *Id.* at 90-92. Further, the "pervasively innovative character of platform software market" may result in "efficiencies that courts have not previously encountered." *Id.* at 93. In this analysis, the *Microsoft* court did cite to bundles of hardware and software but noted that purely software ties may be different, and the court did not have enough familiarity to make a per se decision. *Id.* at 91-92. The *Microsoft* case marks a turning point in technological tying because the D.C. Circuit proposed that courts should weigh a bundle's benefits against the cost to consumers in determining whether a product integration's value to consumers was more significant than its anticompetitive effects. Scott Sher, *Technology Ties: Getting Real After* Microsoft, ICARUS (2005), at 83-84. As such, plaintiffs alleging software platforms have engaged in technological tying must demonstrate that the tie was anticompetitive instead of establishing a per se case under the traditional *Jefferson Parish* approach. *Id.*

Research indicates that in the new economy when the fixed cost of engineering in the foremarket is relatively small relative to the probability of entry into the aftermarket by competitors, the monopolist has a strong incentive to tie products. Daniel E. Gaynor, *Technological Tying* 1 (Fed. Trade Comm'n Bureau of Econ./The Brattle Group Working Paper No. 284), https://www.ftc.gov/sites/default/files/documents/reports/technological-tying/wp284_0.pdf. Assuming there are low costs of investment to develop the aftermarket product, tying protects an innovator's investment from aftermarket entry, and the aftermarket

[2] In ruling on the plaintiff's motion for preliminary injunction, the district court in Epic Games analyzed the claim that Apple ties iOS app distribution to its in-app purchase system under both the per se and rule of reason analyses, ultimately concluding that Apple had not proven a likelihood of success on the merits under either approach. Epic Games, Inc. v. Apple Inc., 493 F. Supp. 3d 817, 844-45 (N.D. Cal. 2020).

[3] In fact, the court noted ""[i]n a competitive market with zero transaction costs, the computers on which this opinion was written would only be sold piecemeal". *Microsoft*, 253 F.3d at 87.

product may benefit consumers more than the anticompetitive effects, generating a net positive. *Id.* at 10. Further, the monopolist is incentivized to tie because it allows the monopolist to price discriminate among different consumer types. *Id.* at 6. Price discrimination is the practice of selling the same product to different customers at different prices even though the cost of the sale to the producer is the same. POSNER, ANTITRUST LAW, *supra*, at 79-80. This allows a monopolist to move up and down the demand curve to the highest point of intersection of the marginal-cost curve, to obtain greater profits and eliminate deadweight loss. *Id.* at 80. Discriminatory pricing in certain instances may be the most efficient pricing method if priced inversely to a purchaser's elasticity of demand.[4] *Id.* at 205. Social welfare and consumer surplus may actually improve from technological tying as long as consumers are not excluded from the market. Gaynor, *supra*, at 17 ("When quality is a choice variable for the monopolist, a technological tie may increase consumer surplus even in cases where prohibiting the tie does not lead to exclusion of consumers from the market."). A producer that price discriminates is able to capture a low value group of consumers who otherwise would not purchase the complete extended system. JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION 147-48 (1989). An example of such discrimination is Apple selling different models of its iPhones. In 2020, Apple introduced its thirteenth generation of phones consisting of the iPhone SE, iPhone 11, and iPhone Pro/Max. The iPhone SE was priced at half of the cost of the other lines and designed to capture low value group consumers. *See iPhone SE: A Powerful New Smartphone in a Popular Design*, APPLE (Apr. 15, 2020) https://www.apple.com/newsroom/2020/04/iphone-se-a-powerful-new-smartphone-in-a-popular-design/; Sareena Dayaram, *Apple iPhone SE: How Different Are the 2020 and 2016 Versions?*, CNET (May 14, 2021), https://www.cnet.com/news/apple-iphone-se-how-different-are-the-2020-and-2016-versions/.

### i. Network Effects

Because new economy firms require high fixed costs and low marginal costs, the successful new economy firm may have a business model that utilizes either direct or indirect network effects. Direct network effects are the incremental benefits an existing user gains when a new user joins the network. Indirect network effects are the incremental benefits to one group of users when a new user from a different user group joins the network. Paul A. Johnson, *Indirect Network Effects, Usage Externalities, and Platform Competition* 2 (Oct. 2, 2019), https://ssrn.com/abstract=3335121. These indirect network effects are commonly found in platform businesses where there are two or more groups of users connected by a platform. Direct and indirect network effects may be built into a new economy firm's business model because these Internet-based businesses need a large number of customers in order to commoditize. New economy businesses that build products and services off network effects are faced with a question of whether these new products and services are ties. This is a nuanced question and whether such conduct is an anticompetitive tie or procompetitive design is a complex question requiring economic analysis. The products and services built off a platform may be categorized as innovations or complements. We will discuss innovations in detail *infra* in Section V.

[4] This is also referred to as third-degree price discrimination.

*Complements*. Tying of complementary products may be anticompetitive, but this is a fact-dependent inquiry as one must adjudicate whether there has been any *leverage*[5] in the tying product market to induce a tie. *See* Jay Pil Choi & Doh-Shin Jeon, *A Leverage Theory of Tying in Two-Sided Markets* 5-15 (Mar. 13, 2018), https://www.tse-fr.eu/sites/default/files/TSE/documents/doc/wp/2016/wp_tse_689.pdf. The leverage concept refers to a firm using its market power in one market and extending it to a second market. Jeff Miles, *Principles of Antitrust Law*, OBER | KALER 90-91 (Apr. 2016) https://www.americanbar.org/content/dam/aba/administrative/healthlaw/01_antitrust_primer_01.authcheckdam.pdf; Ward S. Bowman, Jr., *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19, 20 (1957). This is distinct from the concepts of "force" and "coercion," which involve contractual pressure. A complement may be tied when the monopolist has market power and is able to leverage the purchase of a distinct product;[6] however, the logic of this is not entirely obvious. If the price of the tied product is higher than the purchaser would have to pay on the open market, there would be an increase in the price of the final product or service so the consumer will purchase less. POSNER, ANTITRUST LAW, *supra*, at 199. It flows logically that it is difficult to leverage a monopoly over the tied product because overall demand for the complements will decrease. *Id.* Complementary design changes do not lend themselves to a per se analysis as they are not inherently anticompetitive. The analysis should turn on *leverage*, which is fact-dependent and more appropriate for a rule of reason analysis.

The concept of leverage does not fully anticipate instances in which the tying or tied product is free of cost. Network monopolists are unique in that they generate high rates of innovations at low or sometimes even zero price strategy. The low marginal cost associated with many Internet-based businesses allow these companies to offer products at low prices. A tied product offered at no cost may be viewed as procompetitive. The procompetitive perspective is the monopolist is not leveraging its market power by offering an aftermarket free product or service.[7] This could even be categorized as generating greater competition in the foremarket. *See* POSNER, ANTITRUST LAW, *supra*, at 199-200. Vigorous competition in the foremarket that does not induce the purchase of the aftermarket product is not anticompetitive tying. *See Eastman*

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[5] Posner has questioned the leverage theory saying, a "fatal - weakness of the leverage theory is the inability to explain why a firm with a monopoly of one product would want to monopolize a complementary product as well." POSNER, ANTITRUST LAW, *supra*, at 198-99. Although we do not question the leverage theory, we agree with Posner's logic that with complementary products it is difficult to leverage the monopoly over a tying product into a monopoly of a tied product. We also acknowledge contrary scholarship by Elhauge, Wickelgren etc. *See* John Simpson & Abraham L. Wickelgren, *Bundled Discounts, Leverage Theory, and Downstream Competition*, 9 AM. L. & ECON. REV. 370, 370 (2007) ("Under plausible circumstances, a monopolist in one market can use its control of prices in that market to force competing downstream buyers to sign tying contracts that will lever its monopoly into another market."); Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397, 399 (2009) ("Even without a substantial foreclosure share, tying by a firm with market power generally increases monopoly profits and harms consumer and total welfare, absent offsetting efficiencies").

[6] Choi and Jeon extend their model finding tying forecloses rivals even in the case of perfect complements, which differs from the established proposition that a monopolist selling a perfect complementary product has no incentive to tie. *Id.* at 5 (citing Proposition 3 of Whinston, 1990). We do not explore this issue in this paper, but do note that perfect complements, although theoretically possible, rarely exist.

[7] Under first principles, tying arrangements are condemned because they "deny competitors and consumers free access to the tied product market" instead of providing a superior product. *Rosebrough Monument Co. v. Memorial Park Cemetery Assoc.*, 666 F.2d 1130, 1140 (8th Cir. 1981) (citations omitted). The concern with a monopolist providing a free tied product in a separate market is that the monopolist is trying to achieve an illegitimate monopoly. However, it is unclear under first principles why this is obviously problematic because it is unclear that this actually denies competitors and consumers free access to the separate product market. This analysis is complicated by the fact that when either the tying or tied product is offered for free, this may be viewed as an innovation or vertical integration which could be framed as a superior product offering.

*Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 493 (1992) (Scalia, J., dissenting) ("[T]he Court holds told that such a facial showing of a market share in a single-brand aftermarket is sufficient to invoke the per se rule.").

The analysis becomes trickier when the tying product is free. The tying product may be used as a sales tactic to influence the purchase of a second product at cost. This may not anticompetitive as long as there is no leverage. If the aftermarket product can be purchased without the tying product, there are no competition concerns due to the lack of leverage. *See In re Apple iPod iTunes Antitrust Litig.*, 2009 WL 10678940, at *5 (N.D. Cal. Oct. 30, 2009) ("if the buyer is free to take either product by itself, there is no tying"). In fact, this would not be characterized a tie at all. We do not deny that economic power may be created in a tying product by offering the tying product for free. Michal S. Gal & Daniel L. Rubinfeld, *The Hidden Costs of Free Goods*, 80 ANTITRUST L.J. 521, 528-31, 552-53, 559 (2016). When this occurs, the firm is able to generate a "surplus stack," which can be leveraged to the tied goods market. Choi & Jeon, *supra,* at 19. Instead, we note that the central inquiry should be on leverage and whether there would be injury to competition. Now, this leaves open the possibility that the tying product is priced below cost (i.e., predatory pricing) in order to drive out competition in the foremarket. Take *Consolidated Terminal Systems, Inc. v. ITT World Communications, Inc.*, 535 F. Supp. 225 (S.D.N.Y. 1982) for example. In *Consolidated Terminal*, Consolidated Terminated alleged defendant had engaged in unlawful tying when defendant provided terminals and equipment free or below cost on the condition that customers also purchase a telex transmission service from defendant. *Id*. at 227. The court held that Consolidated Terminal lacked standing to challenge tying, recharacterizing the conduct as predatory pricing. Notably, the court reasoned that "[a]nalytically the *injury to a tying product competitor cannot result from the tie itself* . . . because in such circumstances the *availability of the tying product is conditioned on acceptance of the tied product*, not vise [sic] versa." *Id*. at 232 (emphasis added). For example, if a seller of flashlights and batteries offers free batteries on the condition that the customer purchases the seller's flashlights, this is not a tie because the potential foreclosure is to the tied product (flashlights) and not the tying product (batteries) and any injury to a competitor is independent of the tie. *Id*. This is less of a concern with new economy firms possessing low marginal costs - low marginal costs mean the optimal pricing strategy entails negative pricing. Choi & Jeon, *supra*, at 1.

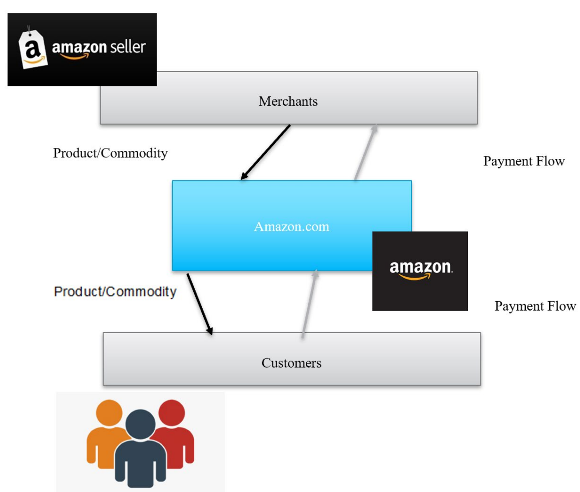
### ii. Digital Platforms

As Posner identified in his discussion of the new economy, networks are valuable not simply because networks are valuable to the customer themselves, but because networks are *conduits* for the services the consumer values. *See* POSNER, ANTITRUST LAW, *supra*, at 248. Platform industries are in and of themselves conduits that facilitate transactions. Therefore, it should come as no surprise that platforms are filled with network efficiencies, as discussed in the preceding section.

As the name suggests, platform companies facilitate economic and social activity via a platform. Two- or multi-sided platforms have a significantly different approach to value creation compared to non-platform businesses. The value of the platform lies in the company's ability to operate as a "digital matchmaker" connecting two (or more) sides of a transaction. Daniel Mandrescu, Comment, *Tying and Bundling by Online Platforms – Distinguishing Between Lawful Expansion Strategies and Anti-Competitive Practices*, 40 COMPUT. L. & SEC. R. 1, 4 (2021).

Platforms are monetized in various ways depending on the value that the platform wishes to create for its customer groups. *Id.* The platform company can be profitable by taking a fee, often in the form of a flat number or take rate from one or both sides. *See* Sissie Hsiao, *How Our Display Buying Platforms Share Revenue With Publishers*, GOOGLE AD MANAGER (Jun. 23, 2020), https://blog.google/products/admanager/display-buying-share-revenue-publishers/; Melissa Lambarena, *How Do Credit Card Companies Make Money?*, NERDWALLET (May 17, 2021), https://www.nerdwallet.com/article/credit-cards/credit-card-companies-money. It is important to note that in general a platform is not required to grant its competitors access to the platform. *See, e.g.*, *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1066 (10th Cir. 2013) (Microsoft did not have a duty to share its intellectual property related to software with rival Novell); *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 376-80 (7th Cir. 1986) (no obligation to let rivals sell defendant's inventory); *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188, 1194-96 (10th Cir. 2009) (resort owner not obligated to allow a third party to continue to sell ski equipment on its premises); *Bayou Bottling Inc. v. Dr Pepper Co.*, 725 F.2d 300, 304 (5th Cir. 1984) (Coke not obligated to allow Pepsi to be sold in Coke-supplied vending machines); *Viamedia, Inc. v. Comcast Corp.,* 951 F.3d 429, 434, 455-61 (7th Cir. 2020) (Comcast required to deal with rival Viamedia in the advertising representative services market only due to the specific circumstances present). However, as with all businesses, the platform simply cannot engage in exclusionary practices that would foreclose competition. We will discuss one example of platform industries: Amazon.com ("Amazon").

Amazon is a two-sided platform with merchant-sellers on one side and customers on the other. Amazon's role is to connect businesses with customers, with Amazon taking a fee from the merchant. The platform administrator, Amazon in this example, structures its entire model on transaction costs. [8] The cost of the transaction fee is pushed onto the merchant, but the platform administrator succeeds in the business model by generating network effects that make the platform administrator necessary.




[8] Amazon also competes with merchants on its platform for the same transactions. For simplicity, we only use the example of Amazon to demonstrate the two-sided platform and consider Amazon as a pure platform instead of a competitor to the merchants it houses on its platform.

Tying can be used as a leveraging tool for achieving ultra-competitive profits in two-sided and multi-sided platforms. Mandrescu, *supra*, at 12. For example, a platform with significant market power constrained from offering negative prices to customers on one side of the platform (side A) can use tying of zero-priced goods and services to bypass the pricing limitation and increase customer participation on that side of the platform. Assuming network effects are positive, the platform can use increased participation on side A to extract higher prices from platform customers on side B of the platform that values the increased participation/audience on side A. *Id.* at 12. For example, Amazon gained popularity by offering free shipping to Prime members, a service customers valued, on its platform. This increased the popularity of the customer-side of the platform which then induced more merchants to join the platform on side B. Amazon now leverages its popularity on side A with customers to allegedly leverage side B merchants into entering disfavorable contract terms as a condition for access to side A customers. A further example of such behavior can be found in the recent case of *Epic Games v. Apple Inc.*, Case No. 4:20-cv-05640-YGR. In *Epic Games*, Epic Games alleged that Apple conditioned app developers' access to iOS on an agreement that these developers distribute their apps solely through the app store. Complaint, *Epic Games v. Apple Inc.*, Case No. 4:20-cv-05640-YGR (Aug. 13, 2020), Dkt No. 1 at ¶¶ 235-44. Such tying has been shown to deter entrants or foreclose competitors on the tied product market where the platform and its competitors are constrained from competing on negative prices for the tied goods. Mandrescu, *supra*, at 13. The effects and profitability of the tying strategies are dependent on the two-sidedness of the tying and tied product markets. *Id.*

## V. Predatory Innovation and Interoperability

In a winner-take-all market in which firms invest to improve their products, a vertically integrated firm may have an incentive to advantage itself by technologically tying a product to foreclose rivals. Richard J. Gilbert & Michael H. Riordan, *Product Improvement and Technological Tying in a Winner-Take-All Market*, UC BERKELEY COMPETITION POL'Y CTR. (2005), at 1, https://escholarship.org/uc/item/3v04b2rx. Such behavior may be considered predatory if it falls into the category of "conduct which has the purpose and the effect of advancing the actor's competitive position, not by improving the actor's market performance, but by threatening to injure or actually injuring potential competitors, as to drive and keep them out of the market, or force them to compete less effectively." LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 108 (West 1977). Predatory behavior may center on prices, known as predatory pricing, or other non-pricing predatory practices, such as innovation, research and development, advertising, and product designs.

Innovation is at the core of the new economy, driving progress and growth, but not all innovation is beneficial and can in fact be predatory. In high-tech markets, innovation often follows the same basic model evident in the *Microsoft* case, as what often makes high-tech products better is the combination of previously separate functionalities into a single, integrated product. M. Sean Royall, *Coping with the Antitrust Risks of Technological Integration*, 68 ANTITRUST L.J. 1023, 1023 (2001). Post-*Microsoft* the question is what aspect of technological integration or tying exposes a firm to liability under the antitrust laws? *Id.* Undoubtedly, product redesign that is meant to impede competition, entrench a dominant firm's position in the market, or artificially change the structure of the market so as to make it more difficult for new entrants should be discouraged as the type of behavior that may be considered predatory conduct under antitrust laws. Jonathan Jacobson, Scott Sher & Edward Holman, *Predatory Innovation: An Analysis of* Allied Orthopedic v. Tyco *in the Context of Section 2 Jurisprudence*, 23 LOY. CONSUMER L. REV. 1, 1 (2010). Such redesign may interact with the market in different ways by making it: (1) more difficult for competitor products to interoperate with firm products; or (2) more difficult for competitors to compete. *Id.* at 8. In the latter instance, the magnitude of the product improvement must be weighed against the consumer welfare to determine whether the act is predatory and therefore anticompetitive. *Id.*

Redesign that makes it more difficult for competitors to compete may be especially harmful in the context of networked markets "where the redesign creates a strategic incompatibility such that providers of complementary products are 'locked out' or foreclosed from interoperating with the dominant firm's platform." *Id.* In a networked market, such as the Apple iPhone operating system ("iOS"), the ability for third-party application developers to "hook" into the iOS is essential to operate within the environment. Apple could "redesign" or "innovate" on its iOS in one of two ways that could raise antitrust concerns. It could either create an incompatibility that makes it more difficult for applications to interoperate with the iOS or it could incorporate the functionality provided by the third-party application making the need for it obsolete. *See id.*

The relevant antitrust inquiry with regard to product redesign is whether the incompatibility is necessary to facilitate a product improvement or avoid unnecessary costs. *See id.* at 9. In the Apple example, if an update to the iOS bolsters network security but also has an ancillary effect of foreclosing a third-party application from working within the iOS environment – the redesign is, on balance, not considered anticompetitive. *See id.* In contrast, if the change only relates to a superficial or aesthetic change, such as placement or appearance of a logo, and has the effect of foreclosing third-party applications, the change can be considered to be pretextual, with the marginal improvement outweighed by the exclusionary effect on competitors. *Id.*

Predatory innovation may violate Section 2 of the Sherman Act, or Section 5 of the FTC Act. Under *Microsoft,* the plaintiff has the burden of establishing the prima facie case of predation and must demonstrate that the defendant is a monopolist extending or preserving its monopoly power or using its monopoly position in one market to gain market power in an adjacent market. *See, e.g.*, *United States v. Microsoft Corp.*, 253 F.3d 34, 50-51, 80-81 (D.C. Cir. 2001) (analyzing alleged predatory innovation under the rubrics of monopolization and attempted monopolization claims). *Microsoft* set forth the appropriate framework for determining when "innovation" becomes exclusionary or predatory conduct that violates the antitrust laws. Courts should "properly [be] very skeptical" about antitrust claims arising from a dominant firm's product design changes, particularly in technology markets where products are constantly changing. *Microsoft*, 253 F.3d at 65; *see also Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991, 998-99 (2009) (rejecting the balancing test and reasoning that "[a] design change that improves a product by providing a new benefit to consumers does not violate Section 2 absent some associated anti-competitive conduct").

One lingering question that continues to be discussed is whether the courts should be deciding what is sufficiently innovative. *Allied Orthopedic* strongly counseled against such practices, stating that:

> [t]here is no room in this analysis for balancing the benefits or worth of a product improvement against its anticompetitive effects. ... To weigh the benefits of an improved product design against the resulting injuries to competitors is not just unwise, it is unadministrable. There are no criteria that courts can use to calculate the "right" amount of innovation, which would maximize social goals and minimize competitive injury. A seemingly minor technological improvement today can lead to much greater advances in the future.[9] The balancing test proposed [] would therefore require courts to weigh as-yet-unknown benefits against current competitive injuries.

*Allied Orthopedic*, 592 F.3d at 1000. However, even 20 years after *Microsoft*, the question of whether a firm has engaged in redesign or integration for the purposes of harming competition or competing vigorously is still too complex to be subject to a bright line rule. As such, because of the difficulty of balancing technological improvements versus harm, tying should not be subject to a bright line rule if consumer welfare is to be maximized. For now, courts must continue to evaluate such conduct under the rule of reason. *See Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 881 (2007) (explaining, in the context of Section 1 violations, that the rule of reason "distinguishes between restraints with anticompetitive effect that are harmful to the consumer and those with procompetitive effect that are in the consumer's best interest").

## VI. Conclusion

This article has analyzed the evolution of and challenges in the analysis of technological tying that have arisen twenty years after the pivotal *Microsoft* case. We have built on Posner's new economy, extending this analysis to the rise of platform industries. As we have noted, the *Microsoft* rule of reason analysis has been applied to platform tying cases while other tying cases nominally continue to follow the per se approach from *Jefferson Parish*, *see* Ahlborn, et. al, *supra*., but generally find a way to rule in the tying defendant's favor. In closing, we would like to highlight that new economy firms are continuously innovating, and the question of whether a firm that has engaged in zero or negative price strategy or redesigned its products is harming competition is a question better suited for a rule of reason analysis.

[9] A similar statement may be expanded to nascent competitors and entrants. We reserve this for a later discussion.

## Frequency Boost

### Amplifying Diverse Voices in Media & Technology

Frequency Boost is an interview series focused on learning more about the diverse community of people who have and continue to impact antitrust and consumer protection in the media & technology sectors.

In the first installment of our series, we will be speaking with four accomplished women who have made their mark on antitrust and consumer protection law in the media sector.

## Women in Media and Consumer Protection & Antitrust

Interview by Courtney Armour[1]
July 13, 2021

From Hedy Lamarr inventing the spread-spectrum technology that underpins how many of us consume media today (i.e., Bluetooth and Wi-Fi) to Oprah Winfrey's groundbreaking example on stretching a media business to uncharted lengths, women have long played an influential role in shaping the future of the media industry. This also holds true for how consumer protection and antitrust laws have been applied to the media industry. In this issue, we discuss this topic with four accomplished female attorneys who all have significant and varying experience in this space – Mary Ellen Callahan, Renata Hesse, Victoria Luxardo Jeffries, and Melanie Kiser.

***Tell us about your experience in consumer protection and/or antitrust in the media industry – significant matters, representative clients, government experience with investigations or mergers, etc.***

**Mary Ellen:** I was a privacy/consumer protection partner at two law firms – (then) Hogan and Hartson, and Jenner and Block. Both of them had numerous entertainment clients, which quickly became a significant part of my practice. This was true in part because the online environment kept evolving, and data collection and use was a crucial part of that evolution. Three and a half years ago, one of my clients, the Walt Disney Company, asked me to join their Privacy Legal team, rather than just serving as outside counsel. The move has allowed me to get more deeply involved in this evolving media landscape.

**Victoria:** I've had the good fortune of working at the intersection of media and antitrust since the beginning of my career as an FTC staff attorney investigating matters such as Electronic Art's proposed acquisition of Take-Two Interactive. In-house, I look after competition policy at Facebook, and previously led public policy at the Spanish-

[1] Courtney Armour is the Chief Legal Officer for the Distilled Spirits Council and Responsibility.org. Armour previously practiced antitrust law at Wilson Sonsini Goodrich & Rosati in New York City and Washington, D.C., representing several media and technology companies.

language media company Univision, and at Netflix on public policy issues ranging from net neutrality to audiovisual media regulation across jurisdictions. My first large scale competition campaign was also in media as outside counsel to Netflix and other clients opposing the Comcast/Time Warner Cable merger.

**Melanie:** I spent six years in DOJ's Media, Entertainment, and Communications section, which was previously known as the Telecommunications & Media Enforcement section, or TEL. While at DOJ, I worked on Comcast-Time Warner Cable and AT&T-Time Warner Inc., as well as a variety of other matters involving broadcast stations, video programming and distribution (cable, satellite, and online), advertising, and music licensing. Since entering private practice, I've advised clients in the broadcast, cable television, and music industries. Before DOJ, I learned a lot about media businesses in journalism school, where digital entrepreneurship was a big focus, and interned throughout law school at the Texas Attorney General's Office, where I worked on matters involving Internet and publishing industries.

**Renata:** At Sullivan & Cromwell, I have had the opportunity to counsel clients on a wide range of issues touching the media sector, including both advocacy and work on transactions. But my experience in this space began quite some time ago during my time in government. At the FCC, I worked on the review of the license transfers associated with the proposed AT&T/T-Mobile transaction. At DOJ, I oversaw the review of a variety of media-related transactions, including Comcast's proposed acquisition of Time Warner Cable, which was abandoned, and Charter's later acquisition of Time Warner Cable, which was approved with conditions.

***The media industry and how the public consumes media has dramatically shifted over the last 10 to 15 years – as more Americans cut the cord and shifted from cable subscriptions to streaming services. What has been the biggest impact to consumer protection or antitrust application due to this dramatic shift in business models and competition?***

**Mary Ellen:** The customization of content, tailoring viewing experiences based on previous interests, has transformed media consumption. As noted earlier, the amount of data collected about viewing, and how that is leveraged also creates new opportunities and markets. With that said, the role of the platforms as gatekeepers in delivering content is unique.

**Victoria:** The disruptive effect of over the top and other new content distribution platforms has led to an explosion of choice for creating, enjoying, and sharing content. At the same time, this proliferation of spaces for people to engage with content has also led to unprecedented competition for advertising resulting in lower prices and greater accessibility to advertising for firms of all sizes.

**Melanie:** It has certainly been a sea change before our eyes. There is more media vying for consumer attention than ever before, and it is harder to predict winners and losers than it used to be. In some types of media, such as video programming, we are seeing exceptionally high quality and volume. In others, like news, it is more of a mixed bag, with a growing separation between those that succeed and those that struggle to survive. But even in the markets that appear to be thriving, we don't yet know if the status quo is sustainable, or for whom.

Market definition, and really the whole antitrust analysis, has become more complicated as we see so many different business models in competition with one another. In video alone, you have subscription models, ad-supported models, hybrids, and ones that are essentially subsidized by other businesses. That is not your textbook antitrust analysis at all. And the antitrust agencies have done much better adapting to this than they are given credit these days (especially when you consider that they must work within the law as interpreted by the courts and unaddressed by Congress).

**Renata:** I think the biggest changes in the industry relate to the proliferation of content across a variety of different platforms and the changes in the ways that people consume content. The pandemic has accelerated those changes. My own sense is that antitrust is still figuring out how to deal with these changes and that we haven't yet landed on a consistent approach.

***Do recent U.S. trends toward increasing vertical/conglomerate consolidation and integration of media companies reflect what is happening in the rest of the world?***

**Melanie:** I don't fully agree with the premise that there is a clear trend in one direction. While there has been some consolidation, there have also been a lot of spinoffs over the years and recently. AT&T is selling Time Warner Inc. to Discovery Inc., and Verizon is selling its media division to private equity. This continues a long history of the pendulum swinging back and forth, not just in TV but in the rest of media and beyond.

Time Warner is an especially interesting case study. The programming networks were first acquired by a cable company in 1996, then in 2008 the cable assets were spun off. Ten years later, in 2018, AT&T acquired the programming networks that are now being separated from distribution once again. I think what we are really seeing, rather than a clear trend of consolidation, is a lot of trial and error as businesses evolve and adapt.

***With all of the dramatic changes in this space, how would you currently define "media"?***

**Victoria:** Media is an incredibly expansive term and concept, in part because of the convergence we have seen in content types, technologies, and business models. What is a book? You could say it's a series of papers bound together that tell a story or convey information under a certain organizing theme. But what happens when you digitize it – is it still a book when we read it on a tablet, listen to it read by a machine-generated voice, or read a virtual copy of it in a virtual library in the metaverse? When you start layering in other functionality and business models, that further complicates the picture. Businesses that provide consumers or creators the tools to enjoy, create, or share content—in this case a "book"—are all competing against each other for consumer and creator interest, as well as potentially other audiences on the platform depending on business model (e.g., advertisers).

**Melanie:** As the plural form of "medium," I think of "media" as the channels of mass communication that deliver information or content to people. In addition to traditional media such as television, news, book publishing, and advertising, where content flowed primarily from companies to consumers, there is now social media and the Internet writ large, where content flows more in both directions. And even the traditional media are far more interactive and consumer-driven than they once were.

***Since you have been practicing in this area, what has been the most surprising development in the media industry and consumer protection or antitrust jurisprudence?***

**Mary Ellen:** I first started working with media companies as part of the implementation of CAN-SPAM in 2002, so I really have seen companies' business model evolve and grow. The linear model of promoting channels has morphed into customized content and predictive algorithms. Before the launch of the iPhone, this amount of tailored and multi-directional communications would have been impossible to predict. Now, we cannot imagine a world where we cannot consume all the media we want at any time we want it.

**Victoria:** The massive disruption spurred by digital entrants leading to the disaggregation of content from incumbent media gatekeepers (newspapers, broadcasters, and cable). We're living through a Cambrian explosion in vehicles for content consumption, creation, and sharing. That shift has had positive competitive reverberations across the media landscape: Today, consumers enjoy a diversity of content across formats and subjects. Creators can meet their market no matter how niche. Advertising has become accessible -- both in terms of price and efficiency of meeting the right audience.

The democratization of advertising has had second order competitive benefits for direct-to-consumer brands and SMBs providing new or increased competition to incumbent national, or international, brands. All of this redounds to consumers' benefit. Fierce competition exists for people's time and attention. Antitrust jurisprudence has, rightly, continued to focus on economic and empirical analysis. This demonstrates that although the technologies and business models enforcers must address continue to change, the flexible analytical tools at their disposal are fit to meet the moment. It elucidates the elegance and power of the Sherman and Clayton acts and of the consumer welfare standard as the North Star of analysis in the U.S.

**Melanie:** I think the evolution of trying to get consumers to pay for their content—news, music, and video programming—has been very intriguing to watch. On one hand, there has been more success than I might have expected at earlier points in each industry's history. On the other, many businesses have really struggled to make the economics work and found that their target audiences are averse to contributing to any revenue stream —ads, data, or subscription fees. Some have found that it's not necessarily enough to offer compelling value, because a lot of consumers will just share login credentials or spend their time other ways.

Within antitrust specifically, it has to be how the tide has turned towards more aggressive enforcement, and the reform proposals that are getting the most attention. I entered the antitrust bar firmly on the pro-enforcement side of the spectrum that existed at that time. I saw a lot of opportunities for antitrust to do more or better but also appreciated and saw validity in so much of what we had learned from the Chicago School. I don't think my beliefs have changed much, but the spectrum has moved beneath our feet. Those opportunities I saw for improvement to antitrust are not high on many political agendas, and that is a product of how the discourse has evolved since antitrust entered the mainstream.

**Renata:** The most surprising development to me has been the rapid transformation of content creation, so that we now see content being created and consumed in ways that weren't contemplated even 10 years ago. I referenced this above and noted that I don't think antitrust has quite figured out how to deal with it yet. The fact that it hasn't is not the fault of anyone working in the area (either in the government or in the private sector, in law or in economics); rather, I think it has more to do with the fact that these industries and business models are all interrelated and we haven't quite figured out the economics of how either to think of them separately in an appropriate way or how to think about them combined in a way that takes account of all of the interactions that happen across platforms and providers. And since this is an area that is still in evolution, making predictions about how it is all going to play out in the end is extremely difficult.

***What do you view as the biggest potential consumer protection or antitrust challenge that the media industry may face in years to come?***

**Victoria:** Media convergence and complexification continue apace. Antitrust enforcers will face the challenge of separating what are true competition concerns in digital markets from issues that should rightly be addressed through regulation in other areas such as privacy, data security, or content moderation. Relatedly, all participants—policymakers, innovators and creators, consumers—will increasingly have to navigate the countervailing pressure between open and closed systems. We will have to balance the tradeoffs those choices result in for competition, innovation, privacy, integrity, safety, and freedom of expression.

**Melanie:** There is tremendous uncertainty about antitrust law and policy right now, as the political tide presses for a level of enforcement that is beyond the law as we know it. For example, it's hard to square *Verizon v. Trinko* and *Ohio v. American Express* (binding Supreme Court precedents on monopolization and market definition) with the current enforcement agenda. And this uncertainty comes at the same time that companies are trying to evolve with the media landscape and figure out what business models can succeed in the 2020s. That's a tough combination.

There are also the challenges I discussed above with respect to market definition and merger analyses in an industry where the business models have become nearly as differentiated as the products themselves. And as companies experiment with their business models and try to adapt to an ever-changing landscape, some will probably find the only or most viable paths forward foreclosed by antitrust obstacles or uncertainty. At the same time, others will find themselves foreclosed by exclusionary conduct that the agencies don't have enough resources to pursue, or which keeps evolving to evade enforcement or stay just within the lines set by the courts.

***What has been your most memorable experience while working on these topics?***

**Mary Ellen:** When I was at Hogan, I represented MySpace on privacy and security issues (when it was owned by then-News Corporation). MySpace was then the largest social media company; Facebook and YouTube were just starting to gain traction, but had not yet surpassed MySpace. Children's privacy is always of political interest; there was a rumor that registered sex offenders were leveraging social media to gain access to minors. As a result, eight Attorneys General wrote to MySpace (courtesy of their outside counsel – me) demanding I get the registered sex offenders off of MySpace. The letter was international news; it was one of the first times my mother understood what I did for a living.

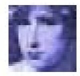
**Victoria:** I'll never forget the conclusion of my first blockbuster case in media: In April 2015, Comcast and Time Warner Cable decided to abandon their proposed merger. When the deal was announced in early 2014, it was treated as a fait accompli in the press because the parties did not have overlapping last mile footprints. Over a year of hard-fought advocacy—backed by economic analysis and proof points in the market—managed to turn all of that around. It was challenging and exhilarating.

**Melanie:** In the AT&T-Time Warner trial, I presented DOJ's second witness, an executive from DISH Network and SlingTV. He testified about programming negotiations and SlingTV, which was the first virtual MVPD and really a groundbreaking service in offering consumers a low-priced skinny bundle that could be customized with genre-based add-on packs. That is still the closest to a la carte TV we've come, unless you count how every consumer now constructs their own bundle of video services, and it helped pave the way for an entire category that now includes Philo, Fubo, and others. Another favorite was learning the ins and outs of how content flows over the Internet in the Comcast-Time Warner Cable investigation, on which I had the privilege of working with a great Front Office (including Renata) and the FCC.

**Renata:** I have two: (1) working on Comcast/Time Warner while at the antitrust division; and (2) working on net neutrality issues during the Obama Administration.

My experience working on Comcast/Time Warner was memorable for both substantive and "whole government" reasons. First, from a substantive perspective, we were tackling complex factual, legal, and economic issues in evolving industry landscapes, against a backdrop of a public narrative that the transaction was bound for approval by the agencies. Second, the close working relationship that developed between the antitrust division and the FCC brought tremendous satisfaction and lasting friendships.

And being part of the policy process around net neutrality was like nothing I had ever experienced.

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