4-2-2021

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Oh, Sarah, *IS THERE EVIDENCE OF ANTITRUST HARM IN THE HOUSE JUDICIARY COMMITTEE'S HOT DOCS?*, 37 SANTA CLARA HIGH TECH. L.J. 193 ().

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IS THERE EVIDENCE OF ANTITRUST HARM IN THE HOUSE JUDICIARY COMMITTEE’S HOT DOCS?

By Sarah Oh¹

The House Judiciary Committee released a large number of business documents on July 29, 2020 alongside the Antitrust Subcommittee’s hearing on “Online Platforms and Market Power.”² The hearing featured the chief executive officers of four large U.S. technology companies. Jeff Bezos of Amazon, Sudhar Pichai of Google, Mark Zuckerberg of Facebook, and Tim Cook of Apple gave testimony and answered questions on a range of topics over five hours.³ The business documents are a subset of the documents collected from an

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² Video of hearing on *Online Platforms and Market Power, Part 6: Examining the Dominance of Amazon, Apple, Facebook and Google*, H. COMM. ON THE JUDICIARY, SUBCOMM. ON ANTITRUST, COMM., AND ADMIN. LAW, 116TH CONG. 2 (July 29, 2020), <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=3113> [hereinafter *Hearing Video*].

³ See, e.g., Ryan Tracy, *Big Tech’s Power Comes under Fire at Congressional Antitrust Hearing*, WALL ST. J. (July 29, 2020), <https://www.wsj.com/articles/tech-ceos-defend-operations-ahead-of-congressional-hearing-11596027626>; *Antitrust Hearing Targets Big Tech—Live Analysis*, WALL ST. J. (July 29, 2020), <https://www.wsj.com/livecoverage/https-www-wsj-com-livecoverage-tech-ceos-hearing-2020>.

ongoing antitrust investigation by the House Committee.⁴ We read the files and analyze them below. In my assessment, these “hot docs,” particularly combined with market evidence, reveal episodes of rapid growth and innovation in digital markets, as opposed to obvious instances of anticompetitive conduct.

⁴ *Hearing on Online Platforms and Market Power: Examining the Dominance of Amazon, Apple, Facebook and Google Before the H. Comm. on the Judiciary, Subcomm. on Antitrust, Comm., and Admin. Law*, 116th Cong. 2 (2020), <https://judiciary.house.gov/online-platforms-and-market-power> [hereinafter *Hearing Documents*].

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INTRODUCTION

In conjunction with a public hearing on July 29, 2020, the House Judiciary Committee released a set of business documents from several large U.S. technology firms as evidence of anticompetitive conduct and antitrust injury.⁵ In my assessment, these “hot docs,” particularly combined with market evidence, reveal episodes of rapid growth and innovation in digital markets, as opposed to obvious instances of anticompetitive conduct.⁶ These documents will not be the only evidence prosecutors will bring in litigation, however, and far more hard evidence and analysis of economic conduct will be needed to prove antitrust injury.⁷

I. AMAZON

The Amazon documents focused on how the company competed with Quidsi, the parent company of Diapers.com and

⁵ *Hearing Video*, *supra* note 2 (opening statement of the Chairman of Subcommittee on Antitrust, Commercial and Administrative Law of the Committee of the Judiciary, David Cicilline, Representative, Rhode Island at 00:00:32, describing the bipartisan requests for information on September 2019 from the four firms, receiving millions of pages of documents from the firms, documents and submissions from hundreds of market participants, hundreds of hours of interviews, and five Congressional hearings, seventeen briefings and roundtables with over 35 experts and stakeholders). After six hearings, the majority staff of the subcommittee released a final report, *see* STAFF OF S. COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION ON COMPETITION IN DIGITAL MARKETS (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

⁶ For a discussion of the difference between business rhetoric and economic conduct in antitrust litigation, *see generally* Geoffrey A. Manne & E. Marcellus Williamson, *Hot Docs vs. Cold Economics: The Use and Misuse of Business Documents in Antitrust Enforcement and Adjudication*, 47 ARIZ. L. REV. 609 (2005).

⁷ *See, e.g.*, U.S. DEP’T OF JUSTICE, ANTITRUST DIVISION, ANTITRUST DIVISION MANUAL ch.3 (5th ed. 2021), <https://www.justice.gov/atr/file/761141/download>; *see generally Hearing Video*, *supra* note 2 (opening statement of the Ranking Member, James Sensenbrenner, Representative, Wisconsin at 00:09:03, describing the increased scrutiny on big technology firms with the caveat that “being big is not inherently bad, quite the opposite, in America you should be rewarded for success.”).

Soap.com, the company's acquisitions of Blink and Ring, and its rules and behavior with respect to third-party sellers.⁸

In all of these instances, whether Amazon has acted anticompetitively will depend heavily on how a court agrees to define relevant markets at the time of the acquisitions.⁹ Today, at the very highest level is a debate about Amazon's position as a retailer.¹⁰ On one hand, Amazon accounts for almost fifty percent of U.S. retail ecommerce sales.¹¹ On the other hand, online retail sales account for only sixteen percent of all U.S. retail sales, which means Amazon accounts for at most, eight percent of all U.S. retail sales.¹² For each more narrowly defined product, a court would have to begin by deciding whether the relevant market is online sales only or all retail

⁸ Amazon documents from the *Hearing on Online Platforms and Market Power: Examining the Dominance of Amazon, Apple, Facebook and Google Before the H. Comm. on the Judiciary, Subcomm. on Antitrust, Comm., and Admin. Law*, 116th Cong. 2 (2020), <https://judiciary.house.gov/online-platforms-and-market-power/#1> [hereinafter *Hearing Documents (Amazon)*].

⁹ See generally *Monopolization Defined*, FED. TRADE COMM'N: GUIDE TO ANTITRUST LAWS: SINGLE FIRM CONDUCT, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/monopolization-defined> (last visited Mar. 3, 2021).

¹⁰ *Hearing Video*, *supra* note 2 (statement of David Cicilline, Representative, Rhode Island at 00:04:28, on the question of market dominance of the four technology firms that motivates the subcommittee's investigation); *id.* (question by Joe Neguse, Representative, Colorado at 04:04:10 for Jeff Bezos about Amazon's share of global retail sales and U.S. retail sales).

¹¹ *Hearing Documents (Amazon)*, *supra* note 8, at Ex. B, <https://judiciary.house.gov/uploadedfiles/0006.pdf> (citing *Top 10 US Companies, Ranked by Retail Ecommerce Sales Share, 2020*, EMARKETER (Feb. 2020), <https://www.emarketer.com/chart/233980/top-10-us-companies-ranked-by-retail-ecommerce-sales-share-2020-of-us-retail-ecommerce-sales>); see also *Hearing Video*, *supra* note 2 (question by David Cicilline, Representative, Rhode Island at 02:31:20, citing the *EMarketer* statistic).

¹² U.S. DEP'T OF COM., U.S. CENSUS BUREAU NEWS: QUARTERLY RETAIL E-COMMERCE SALES 2 (2020), https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf.

sales.¹³ The answer to that question alone has major implications on the degree to which Amazon is able to act anticompetitively.¹⁴

A. Diapers.com and Soap.com

Several analysts contend Amazon's price competition with Diapers.com is an example of anticompetitive conduct.¹⁵ During the House Judiciary Committee hearing, Representative Mary Gay Scanlon (D-PA) said that in 2009, Amazon incurred \$200 million in profit losses to win market share and followed Diapers.com in raising prices months later.¹⁶ She cited these facts as evidence of Amazon using a predatory pricing strategy to undercut Diapers.com and drive them out of business.¹⁷ Emails show no doubt that Amazon's strategy was to compete on lower prices.¹⁸

¹³ See generally CONGRESSIONAL RESEARCH SERVICE, R45910, ANTITRUST AND "BIG TECH" at 5 n.30, 31 & 34 (2019), <https://fas.org/sgp/crs/misc/R45910.pdf> (citing Jonathan Baker, *Market Definition: An Analytical Overview*, 74 ANTITRUST L.J. 129, 129 (2007); *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962); and U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 4 (2010)).

¹⁴ *Id.*

¹⁵ See generally Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017).

¹⁶ *Hearing Video*, *supra* note 2 (question by Mary Gay Scanlon, Representative, Pennsylvania at 02:14:00 for Jeff Bezos asking for his estimate of how much Amazon was willing to lose to compete with lower prices than Diapers.com after describing Amazon emails that outlined a plan to temporarily cut prices, referencing Email from Doug Herrington to Jeff Bezos, *infra* note 20); *id.* (response from Jeff Bezos at 02:16:54 recollecting that Amazon invested \$350 million into Diapers.com after the acquisition for further development of the service).

¹⁷ *Hearing Video*, *supra* note 2 (question by Mary Gay Scanlon, Representative, Pennsylvania at 02:14:00); *id.* (response from Jeff Bezos at 02:16:54).

¹⁸ Email from Doug Herrington, Senior Vice President of North American Retail, Amazon, to Tom Furphy, Vice President of AmazonFresh, Amazon, Michelle Rothman, Vice President of Amazon Fashion, Amazon, David Nenke, Dir. of Marketing and Product for Cloud Drive, Amazon, and Chance Wales, Dir. of Worldwide Brand Merchandising and Content, Amazon (Feb. 9, 2009), <https://judiciary.house.gov/uploadedfiles/00151722.pdf>).

Figure 1. Diapers.com in June 2010

In 2009, Diapers.com was, in Amazon’s view, its “#1 short term competitor” with notable year-over-year revenue growth.¹⁹ In 2010, Soap.com was Amazon’s “most significant short term competitor in the [health and personal care] space.”²⁰ In one email, Amazon’s product manager wrote, “we need to match pricing on these guys no matter what the cost.”²¹ Amazon’s plan included more than just price competition. It also planned to change order cutoff times and improve speed on its diaper product pages.²²

In June 2010, Amazon developed a “plan to win,”²³ which included “market leading prices on diapers,” free Prime offerings, and an “Amazon Mom” program.²⁴ The plan was meant to undercut Diapers.com and “slow the adoption of soap.com.”²⁵ The Amazon team assessed the strategy a few months later in September 2010, remarking that Quidsi’s management reported in company documents that “they

¹⁹ *Id.*

²⁰ Email from Doug Herrington, Senior Vice President of North American Retail, Amazon, to Jeff Bezos, Chief Exec. Officer, Amazon, Jeff Wilke, Chief Exec. Officer of Consumer Bus., Amazon, Diego Piacentini, Senior Vice President of Int’l Consumer Bus., Amazon, Greg Hart, Head of Worldwide Video, Amazon and Jeff Blackburn Vice President of Bus. Dev. and Dig. Entm’t, Amazon (June 8, 2010), <https://judiciary.house.gov/uploadedfiles/00132026.pdf>.

²¹ Email from Doug Herrington to Tom Furphy, *supra* note 18.

²² *Id.*

²³ Email from Doug Herrington to Jeff Bezos, *supra* note 20.

²⁴ *Id.*

²⁵ *Id.*

expect to lose lots of money over the next[sic] few years[sic].”²⁶ In a company report, Quidsi, the parent company of Diapers.com, reported a challenging third quarter of 2010 with decelerating growth in the core diapers category.²⁷

Figure 2. Amazon.com in September 2010

In the hearing, several members of the House Committee seemed to believe that these actions were evidence of predatory pricing.²⁸ Predatory pricing, however, involves more than a plan to undercut rivals' prices.²⁹ After all, consumers benefit when one

²⁶ Email from Peter Krawiec, Vice President of Worldwide Corporate Dev., Amazon, to Jeff Wilke, Chief Exec. Officer of Consumer Bus., Amazon, Doug Herrington, Senior Vice President of North American Retail, Amazon, and Jeff Blackburn Vice President of Bus. Dev. and Dig. Entm't, Amazon (Sept. 21, 2010), <https://judiciary.house.gov/uploadedfiles/00009716.pdf>.

²⁷ *Hearing Documents (Amazon)*, *supra* note 8, at Ex. A, <https://judiciary.house.gov/uploadedfiles/0004.pdf>.

²⁸ *Hearing Video*, *supra* note 2 (statement of Mary Gay Scanlon, Representative, Pennsylvania at 02:14:00; statement of Jamie Raskin, Representative, Maryland at 02:56:18, asking Jeff Bezos if the Amazon Echo was priced below-cost, with response by Jeff Bezos that it is not priced below-cost at its list price, but on promotion, yes, it may be priced below-cost.).

²⁹ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226 (1993) (“Evidence of below-cost pricing is not alone sufficient to permit an inference of probable recoupment and injury to competition.”). Historical accounts of claims of predatory pricing has been questioned even in retrospectives of *Standard Oil v. New Jersey*, 221 U.S. 1 (1911). *See, e.g.*, John S. McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. & ECON. 137-69, 137 (1958) (re-examining whether or not the facts in *Standard Oil* actually revealed predatory price cutting).

competitor undercuts another's prices.³⁰ Under a predatory pricing strategy, a firm uses below-cost pricing to corner a market with the intention of increasing prices after competitors have exited.³¹ A strategy of aggressive price-matching and a "plan to win" may allude to the specter of anticompetitive conduct but does not prove the case.³² On their own, the emails do little to establish whether the company acted in an injurious way.³³

To prove that Amazon engaged in predatory pricing, plaintiffs must, according to the U.S. Department of Justice, prove that, "(1) the prices were below an appropriate measure of defendant's costs in the short term, and (2) defendant had a dangerous probability of recouping its investment in below-cost prices."³⁴ These principles were established in the 1993 Supreme Court decision, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*³⁵ In that case, the Court

³⁰ *Brooke Group*, 509 U.S. at 226 ("[T]he mechanism by which a firm engages in predatory pricing—lowering prices—is the same mechanism by which a firm stimulates competition; because 'cutting prices in order to increase business often is the very essence of competition ... [;] mistaken inferences ... are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'").

³¹ *Id.* at 225 ("The plaintiff must demonstrate that there is a likelihood that the predatory scheme alleged would cause a rise in prices above a competitive level that would be sufficient to compensate for the amounts expended on the predation, including the time value of the money invested in it.").

³² See U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT ch. 4 (2015), https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-4#N_56 (stating Section 2 investigations of predatory pricing by the U.S. Department of Justice include inquiries into six key issues, "(1) the frequency of predatory pricing, (2) treatment of above-cost pricing, (3) cost measures, (4) recoupment, (5) potential defenses, and (6) equitable remedies").

³³ In an antitrust lawsuit, market dominance will need to be proven and cannot simply be asserted. *But see Khan*, *supra* note 15, at 774 ("Although Amazon established its dominance in this market through aggressive price cutting and selling steeply at a loss...").

³⁴ U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT 53 (2008), <https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-4>.

³⁵ *Brooke Group*, 509 U.S. at 226.

considered economic models, such as game theory, to determine whether a rival cigarette manufacturer engaged in predatory pricing.³⁶

In theory, both above-cost and below-cost pricing can harm consumers.³⁷ But in order to interpret a firm's pricing behavior in the context of relevant market structure, an estimate of the firm's costs needs to be established.³⁸ Lower courts have grappled with how to define a defendant's "appropriate measure" of costs in predatory pricing cases.³⁹ Ultimately, however, after an investigation of pricing and costs, the consumer welfare standard directs antitrust enforcers and litigants to prove that price-cutting resulted in harm to consumers.⁴⁰ That harm may be in the form of less quantity, lower quality, higher prices, or loss of innovation among competitors.⁴¹

³⁶ *Id.* at 230–31 (theory of the case depends on "a complex chain of cause and effect"); *id.* at 226 (citing Kenneth G. Elzinga & David E. Mills, *Testing for Predation: Is Recoupment Feasible?*, 34 ANTITRUST BULL. 869 (1989)); *see generally* Donald J. Boudreaux, Kenneth G. Elzinga, & David E. Mills, *The Supreme Court's Predation Odyssey: From Fruit Pies to Cigarettes*, 4 SUPREME CT. ECON. REV. 57-93 (1995).

³⁷ *Brooke Group*, 509 U.S. at 230–31.

³⁸ *Id.* at 222–24 ("First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs The second prerequisite to holding a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor had a reasonable prospect, or under §2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices Recoupment is the ultimate object of an unlawful predatory pricing scheme, it is the means by which a predator profits from predation.").

³⁹ *Id.* at 222 n.1 (parties agreed to "average variable cost" as the appropriate measure of cost allowing the court in this case to avoid the question posed by lower courts on how to select the appropriate measure of cost in a predatory pricing case).

⁴⁰ *Id.* at 224 (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)) ("It is axiomatic that the antitrust laws were passed for 'the protection of competition, not competitors.'") (emphasis in original); *see also*, *Hearing Video*, *supra* note 2 (opening statement of the Ranking Member, James Sensenbrenner, Representative, Wisconsin at 00:10:37, stating that "antitrust law and the consumer welfare standard have served the country well for over a century," but emphasizes the need to "ensure established antitrust laws are applied to meet needs of the country and its consumers;" and questions for Jeff Bezos and Sudhar Pichai at 02:40:25, on efficiency losses and higher prices for consumers from a hypothetical breakup of one-stop shopping).

⁴¹ *Brooke Group*, 509 U.S. at 233 (discussing evidence of restricted output from increased prices, not finding a reasonable inference from price or output data).

Investigators might question the effect of the Diapers.com acquisition on innovation.⁴² In this case, the acquisition appears to have generated new innovation and entry.⁴³ The \$545 million acquisition resulted in payouts to two founders, one of whom went on to build Jet.com, which he later sold to Walmart for \$3.3 billion.⁴⁴ An antitrust analysis of innovation in 2009–2010 may need to take into account the incentives of serial entrepreneurs in those years of online retail markets.⁴⁵ Without a payout from an earlier acquisition, would this founder have had the resources or track record to create another successful technology company?⁴⁶ Incentives for entrepreneurial activity should be balanced against loss of innovation from acquisitions in an antitrust analysis of this sort.⁴⁷

B. *The Blink and Ring Acquisitions*

The key issue surrounding Amazon's acquisitions of Blink and Ring is whether the acquisitions injured nascent or potential competitors.⁴⁸ The emails show that Blink and Ring executives held meetings to discuss possible merger and acquisition opportunities with

⁴² See generally Michael L. Katz & Howard A. Shelanski, *Merger Policy and Innovation: Must Enforcement Change to Account for Technological Change?*, in INNOVATION POLICY AND THE ECONOMY (eds. Adam B. Jaffe, Josh Lerner, & Scott Stern) (MIT Press, 2005), <https://www.nber.org/system/files/chapters/c10809/c10809.pdf>.

⁴³ Thomas W. Hazlett, *The New Trustbusters Are Coming for Big Tech*, REASON MAGAZINE (Sept. 5, 2019), <https://reason.com/2019/09/05/the-new-trustbusters-are-coming-for-big-tech> (noting subsequent entrepreneurial activity by the founders of the acquired firm, "All these monopolies, so many startups.").

⁴⁴ *Id.*

⁴⁵ *Id.*; see also Joseph J. Simons, Chairman, Fed. Trade Comm'n, Prepared Remarks at the ABA Section of Antitrust Law Fall Forum 2020 (Nov. 12, 2020),

https://www.ftc.gov/system/files/documents/public_statements/1583022/simons_-_remarks_at_antitrust_law_fall_forum_2020.pdf ("Large firms often acquire small firms, and the payout associated with the acquisition may incentivize individuals and small firms to engage in costly and risky innovation in the first place. If the law prohibits all acquisitions of this type, then we might expect a lower amount of such innovation.").

⁴⁶ Hazlett, *supra* note 43.

⁴⁷ *Id.*

⁴⁸ See generally John Yun, *Potential Competition, Nascent Competitors, and Killer Acquisitions*, in THE GLOBAL ANTITRUST INSTITUTE REPORT ON THE DIGITAL ECONOMY 18 (2020), <https://ssrn.com/abstract=3733716>.

Amazon.⁴⁹ As Amazon moved forward with its due diligence on the Ring acquisition, executives stated that the company was “willing to pay for market position as it’s hard to catch the leader.”⁵⁰ The emails reveal internal deliberations about the process of absorbing Ring and how difficult it would be to replicate their technology.⁵¹ Jeff Bezos noted his view that Amazon was “buying market position – not technology. And that market position and momentum is very valuable.”⁵²

The Bezos comment appears to show that the company bought Ring in order to enter the home security market with an established brand.⁵³ But rhetoric alone does little to prove or disprove that an acquisition was anticompetitive. To show that the acquisitions of Blink or Ring were anticompetitive, prosecutors need a far more extensive economic record.⁵⁴ It should include, for example, an attempt to define the relevant market and data outlining the relevant market.⁵⁵ With that information, analysts can begin examining the economic effects of post-acquisition product integration.⁵⁶ An analysis should examine whether Amazon squashed a potential competitor or improved a fledgling product and its distribution.⁵⁷

⁴⁹ Email from Allen Parker, Vice President of Finance, World-wide Operations and Customer, Service, Amazon, to Brian Olsavsky, Chief Financial Officer, Amazon (Oct. 11, 2017), <https://judiciary.house.gov/uploadedfiles/00214132.pdf>.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Email from Jeff Bezos, Chief Exec. Officer, Amazon, to Dave Limp, Vice President, Kindle, Amazon (Dec. 15, 2017), <https://judiciary.house.gov/uploadedfiles/00173560.pdf>.

⁵³ *Id.*

⁵⁴ *See generally Competitive Effects*, FED. TRADE COMM’N: GUIDE TO ANTITRUST LAWS: MERGERS, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/competitive-effects> (last visited Mar. 3, 2021).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*; *see also Entry and Efficiencies*, FED. TRADE COMM’N: GUIDE TO ANTITRUST LAWS, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/entry-efficiencies> (last visited Mar. 3, 2021).

More importantly, the analysis must address how consumers have been affected by Amazon's acquisition.⁵⁸ In 2019, Consumer Reports rated Ring as the second-best DIY home security system, just behind Google's Nest brand.⁵⁹ The higher tier of Ring's professional monitoring plan is \$10 per month or \$100 per year.⁶⁰ The leading home security company, ADT, has monitoring plans "starting at \$28.99 per month."⁶¹ There is little doubt that consumers are better off now than they were before Ring was on the market.⁶² The question will be whether it could have achieved its current success without Amazon or a similarly large owner.

It is those and other related questions that the Federal Trade Commission is in the process of investigating currently.⁶³ In February 2020, the FTC issued special orders to the five biggest tech firms to collect information about acquisitions that did not meet threshold reporting requirements.⁶⁴ The FTC stated that its inquiry will include a

⁵⁸ *Competitive Effects*, *supra* note 54; *see also The Antitrust Laws*, FED. TRADE COMM'N, GUIDE TO ANTITRUST LAWS, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> ("Yet for over 100 years, the antitrust laws have had the same basic objective: to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up.").

⁵⁹ *Home Security Systems*, CONSUMER REPORTS, <https://www.consumerreports.org/products/home-security-systems-200196/diy-home-security-systems-200197/recommended/> (last visited Feb. 9, 2021).

⁶⁰ *Protect Plans*, RING, <https://shop.ring.com/pages/protect-plans> (last visited Feb. 21, 2021).

⁶¹ *Compare Our Home Security Systems*, ADT, <https://www.adt.com/compare> (last visited Feb. 21, 2021).

⁶² *See generally* Michael Brown, *Ring Alarm, Product Review*, 25 MACWORLD 38 (Aug. 2018) (introducing the new app and home security system, "Ring Alarm is positioned as a mainstream home security system, and it's already equipped with everything it needs to grow into a comprehensive smart home system.").

⁶³ *FTC to Examine Past Acquisitions by Large Technology Companies*, FED. TRADE COMM'N: PRESS RELEASES (Feb. 11, 2020), <https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies> (special orders approved by a 5-0 commission vote with authority to conduct a 6(b) study under the Federal Trade Commission Act, 15 U.S.C. § 46(b) (2018), with reference to its implementation of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18(a) (2018)).

⁶⁴ *Id.*

study of trends in acquisitions, structure of deals, and post-acquisition product development, pricing, and integration.⁶⁵ This investigation should yield information far more informative than emails about the competitive implications of the acquisitions.⁶⁶

C. Suppliers and Third-Party Sellers

Certain emails shed some light on how Amazon interacts with suppliers.⁶⁷ Amazon developed “supplier tenets” that described its own prices compared to supplier prices.⁶⁸ “We must have equal or better prices . . . all the selection . . . and fast track offers on selection offered by SIC and IC competitors.”⁶⁹ Under these rules, in the event that customers had access to better prices or selection on another website, Amazon could choose to “force the supplier to either lower the price, provide the selection or enter the Amazon Reseller program.”⁷⁰

An anecdote from a small bookseller on its experiences dealing with Amazon and Amazon’s marketplace platform was included in the House Committee exhibits.⁷¹ The bookseller claims that Amazon’s growing market share was eliminating business opportunities.⁷² One presentation slide includes the bookseller’s plea to Amazon, affirming

⁶⁵ *Id.*

⁶⁶ See generally CHRISTINE S. WILSON & ROHIT CHOPRA, FED. TRADE COMM’N, STATEMENT CONCERNING NON-REPORTABLE HART-SCOTT-RODINO ACT FILING 6(B) ORDERS (Feb. 11, 2020), https://www.ftc.gov/system/files/documents/reports/6b-orders-file-special-reports-technology-platform-companies/statement_by_commissioners_wilson_and_chopra_re_hsr_6b_0.pdf; Kadhim Shubber, *Big Tech Ordered to Reveal Details of Smaller Deals*, FINANCIAL TIMES, Feb. 11, 2020, <https://www.ft.com/content/e56d2820-4cef-11ea-95a0-43d18ec715f5>; John D. McKinnon & Deepa Seetharaman, *FTC Expands Antitrust Investigation Into Big Tech*, WALL ST. J. (Feb. 11, 2020), <https://www.wsj.com/articles/ftc-plans-to-examine-past-acquisitions-by-big-tech-companies-11581440270>.

⁶⁷ Email from Doug Herrington, Senior Vice President of North American Retail, Amazon, to Jeff Wilke, Chief Exec. Officer, Consumer Bus., Amazon and Sebastian Gunningham, Senior Vice President of Amazon Marketplace, Amazon (June 2, 2016), <https://judiciary.house.gov/uploadedfiles/00190108.pdf>.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Hearing Documents (Amazon)*, *supra* note 8, at Ex. B, <https://judiciary.house.gov/uploadedfiles/0006.pdf>.

⁷² *Id.*

its compliance to Amazon's standards and begging Amazon to not squash its business.⁷³

Figure 3. Third-Party Seller Quote in House Judiciary Committee Documents

It is difficult not to feel concern for the plight of the seller. But antitrust laws are intended to protect consumers, not businesses, and the relevant question is how consumers fare under Amazon's marketplace rules and Amazon's behavior.⁷⁴ The documents provide no evidence one way or another on this key question.⁷⁵

⁷³ *Id.*

⁷⁴ Several members of Congress focused on alleged harms to small sellers, as reported in Dana Mattioli, *Amazon Scooped Up Data From Its Own Sellers to Launch Competing Products*, WALL ST. J. (Apr. 23, 2020), <https://www.wsj.com/articles/amazon-scooped-up-data-from-its-own-sellers-to-launch-competing-products-11587650015>; see *Hearing Video*, *supra* note 2 (question by Pramila Jayapal, Representative, Washington at 01:51:00, for Jeff Bezos asking how Amazon uses data to compete with third-party sellers); *id.* (question by Lucy McBath, Representative, Georgia at 02:25:35, to Jeff Bezos); *id.* (question by David Cicilline, Representative, Rhode Island at 02:31:31, to Jeff Bezos); *id.* (question by Kelly Armstrong, Representative, North Dakota, at 03:43:00 for Jeff Bezos on use of aggregate data on third-party sellers in the development of Amazon's private label products); *id.* (question by Joe Neguse, Representative, Colorado at 04:06:11 for Jeff Bezos on Amazon's use of data on users of AWS).

⁷⁵ *Hearing Video*, *supra* note 2 (response by Jeff Bezos to Pramila Jayapal, Representative, Washington, at 01:56:00, regarding Amazon's treatment of third-party sellers: "I'm very proud of what we've done for third-party sellers on our platform.").

II. APPLE

The Apple documents focus on the company's App Store policies and procedures.⁷⁶ Specifically, the documents reveal the inner workings of the App Store's app review process, changes to parental control apps, treatment of native apps, and rules on in-app purchases (IAP).⁷⁷

A. Search Results and App Review in the App Store

Many of the documents involve complaints from app developers to Apple. App developers emailed the company seeking help with placement in the App Store because their apps were "virtually invisible"⁷⁸ on the store's directory. One developer alleged that the search algorithm on the App Store appeared to rely on top-25 lists rather than keywords, unfairly making some apps difficult to find.⁷⁹ Another developer complained that users searching for an exact match or variations of their app's name could not find their app in the first 100 results of the App Store. One developer said, "we simply cannot succeed if we can't be searched on your store. This is sad for us, but also sad for the iOS ecosystem."⁸⁰

Another developer complained of the app review process to get an app to be distributed in the App Store.⁸¹ The developer spent money redesigning an app to comply with standards after its sudden removal

⁷⁶ Apple documents from the *Hearing on Online Platforms and Market Power: Examining the Dominance of Amazon, Apple, Facebook and Google Before the H. Comm. on the Judiciary Hearing Documents*, 116th Cong. 2 (2020), <https://judiciary.house.gov/online-platforms-and-market-power/#2> [hereinafter *Hearing Documents (Apple)*].

⁷⁷ *Id.*

⁷⁸ Email from Tim Cook, Chief Exec. Officer, Apple, Inc. to Eddy Cue, Senior Vice President of Internet Software and Services, Apple Inc. and Philip Schiller, Apple Fellow, Apple Inc. (Oct. 10, 2012), <https://judiciary.house.gov/uploadedfiles/007767.pdf>.

⁷⁹ Email from Eddy Cue, Senior Vice President of Internet Software and Services, Apple Inc., to Patrice Gautier, Vice President Eng'g, Apple Inc. (Aug. 26, 2010), <https://judiciary.house.gov/uploadedfiles/007673.pdf>.

⁸⁰ Email from Confidential to Confidential (Oct. 3, 2017), <https://judiciary.house.gov/uploadedfiles/008115.pdf>.

⁸¹ Email from Tim Cook, Chief Exec. Officer, Apple Inc., to Eddy Cue, Senior Vice President of Internet Software and Services, Apple Inc., Phil Schiller, Apple Fellow, Apple Inc., and Craig Federighi, Senior Vice President of Software Eng'g, Apple Inc. (Jan. 25, 2015), <https://judiciary.house.gov/uploadedfiles/015127.pdf>.

from the App Store, only to be met with more rejection.⁸² The developer was frustrated by the app review process, saying that even if he were to design an app “in a way that we believe to be in the spirit of Apple and try to make sure we do it as Apple would want, we could still get whacked. We are now scared of Apple.”⁸³

Much like the story from the bookseller discussed above, it is difficult to read these emails and not feel frustrated on behalf of the petitioning developers. Still, the key question is whether Apple uses the App Store to systematically foreclose competition or engage in unfair or deceptive practices using quality control as an excuse. This question cannot be answered by claims of a few developers, whose particular apps may have been technically deficient, failed to meet some security standard, or whose apps were unfortunately harmed by legitimate changes in the App Store.⁸⁴ By the same token, Apple cannot disprove foreclosure by explaining why any given developer in question is wrong.

Instead, to evaluate foreclosure, an investigation must begin with an understanding of the business structure of app stores and definition of the relevant markets.⁸⁵ A few of these questions were raised in *Apple Inc. v. Pepper*,⁸⁶ and will continue to be crucial.

In the oral arguments of *Apple Inc. v. Pepper*, Justice Breyer asked whether Apple’s App Store was different from any other type of distribution company.⁸⁷ He expressed skepticism about new economic theories of two-sided markets.⁸⁸ On the other hand, Justice Sotomayor reasoned that an App Store is not like vertically integrated brick suppliers, but that the app ecosystem is a “closed-loop” with Apple acting as a “spoke.”⁸⁹ The business structure of app stores is relevant

⁸² *Id.*

⁸³ *Id.*

⁸⁴ For an analysis of the economics of app stores, *see generally* Sarah Oh & Scott Wallsten, *The Law and Economics of Apple Inc. v. Pepper*, TECH. POL’Y INST. (Dec. 20, 2018), <https://techpolicyinstitute.org/2018/12/20/the-law-and-economics-of-apple-inc-v-pepper>.

⁸⁵ *Id.*

⁸⁶ *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1516 (2019).

⁸⁷ *Id.*; Transcript of Oral Argument at 14, *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019) (No. 17-204), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-204_32q3.pdf.

⁸⁸ Transcript of Oral Argument at 11, *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019) (No. 17-204).

⁸⁹ *Id.* at 6.

to a claim of foreclosure, and an antitrust investigation would need to tackle these questions on two-sided markets once again.⁹⁰

B. Native Apps

The documents also include rhetoric around Apple's pre-loading onto iPhones native apps such as Apple Music, Apple Mail, and Apple Maps.⁹¹ The company discourages copycat apps, but retains the right to distribute its own native apps even if they perform similar functions as an existing third-party app.⁹²

In one document, employees discussed how rebuttals to monopolistic charges around native apps should not focus on App Store choices and review processes, but rather on market share, job creation, and competition among different apps.⁹³ One employee wrote, "The reason our services aren't on the app store is because of the native apps. I think we're better served looking at the success of developers and the thriving businesses it's created."⁹⁴ Apple noted that at one point in time, native apps represented approximately 311 of 2 million total apps (0.0001%) in the App Store, and that the company "does not subordinate the exposure of 3rd party apps."⁹⁵

Several other high-profile antitrust cases have raised questions about whether companies can bundle their own native apps without running afoul of competition concerns.⁹⁶ Determining whether Apple behaved anticompetitively with its native apps and pre-loaded defaults will involve considerations such as the difficulty of downloading and installing replacements for the pre-loaded defaults, the level of integration of the native apps with the operating system, and other effects on innovation in the app ecosystem.⁹⁷

⁹⁰ See Oh & Wallsten, *supra* note 84.

⁹¹ *Hearing Documents (Apple)*, *supra* note 76.

⁹² *Hearing Documents (Apple)*, *supra* note 76, at Ex. C, <https://judiciary.house.gov/uploadedfiles/0010.pdf>.

⁹³ E-mail from Kristin Huguet, Spokeswoman, Apple Inc., to Steve Dowling, Vice President of Comm'ns, Apple Inc. (Mar. 12, 2019) <https://judiciary.house.gov/uploadedfiles/011034.pdf>.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Self-preferencing in bundled products has been investigated in other antitrust litigation, most notably in *U.S. v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

⁹⁷ The European Commission completed its investigation of the pre-loaded Google search app on the Google Android operating system in 2018 based on

C. *In-App Purchases*

A recent set of civil complaints by Epic Games has brought controversies about Apple (and Google's) in-app purchase policies to national headlines.⁹⁸ Internal communications about Apple's in-app purchase policy from 2010-2011 shed light on some motivations behind key decisions in the design of the App Store ecosystem.⁹⁹

In 2010, an internal email showed how executives made decisions about Apple's in-app payment policy.¹⁰⁰ One executive began to discuss the implications of changes in the mobile market after viewing a YouTube ad that showed mobile users building libraries of Kindle books on an iPhone and subsequently switching to an Android phone to continue reading the same books.¹⁰¹ The Kindle app was allowing iPhone users to buy books directly from Amazon, thus bypassing Apple's in-app payment system. In response, Steve Jobs said, "I think it's time to begin applying [our payment mechanism] uniformly except for existing subscriptions..."¹⁰²

An email between Jobs and Eddy Cue from 2011 showed continued development of this policy.¹⁰³ Cue listed the implications of big decisions around in-app purchases in light of competition from

its assessment of market structure in mobile applications. Analysis of Apple's App Store would involve similar considerations. *See generally* European Commission Press Release IP/18/4581, Antitrust: Commission Fines Google €4.34 Billion for Illegal Practices Regarding Android Mobile Devices to Strengthen Dominance of Google's Search Engine (July 18, 2018), https://europa.eu/rapid/press-release_IP-18-4581_en.htm.

⁹⁸ *See* Complaint for Injunctive Relief, Epic Games, Inc. v. Google LLC, et al., No. 3:20-cv-05671, at 21 (N.D. Cal. Aug. 13, 2020), https://cdn.vox-cdn.com/uploads/chorus_asset/file/21759099/file0.243586135368002.pdf; *see also* Complaint for Injunctive Relief, Epic Games, Inc. v. Apple, Inc., No. 4:20-cv-05640-YGR, at 1 (N.D. Cal. Aug. 13, 2020), <https://cdn2.unrealengine.com/apple-complaint-734589783.pdf>.

⁹⁹ *Hearing Documents (Apple)*, *supra* note 76.

¹⁰⁰ E-mail from Steve Jobs, Chief Exec. Officer, Apple Inc., to Philip Schiller, Apple Fellow, Apple Inc. (Nov. 23, 2010), <https://judiciary.house.gov/uploadedfiles/014701.pdf>.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Email from Steve Jobs, Chief Exec. Officer, Apple Inc., to Eddy Cue, Senior Vice President of Internet Software and Services, Apple Inc. (Feb. 6, 2011), <https://judiciary.house.gov/uploadedfiles/014816.pdf>.

Android phones and Amazon books.¹⁰⁴ Jobs decided that, “iBooks is going to be the only bookstore on iOS devices. We need to hold our heads high. One can read books bought elsewhere, just not buy/rent/subscribe from iOS without paying us, which we acknowledge is prohibitive for many things.”¹⁰⁵

Figure 4. Apple App Store in October 2010

The emails also included discussions on how in-app payment fees would apply to other digital goods such as “Netflix, WSJ, MLB, Pandora.”¹⁰⁶ Cue said, “[t]his is going to be a huge decision for us.”¹⁰⁷ Later that year, the Apple team also discussed how to apply in-app payment fees for sports and other media.¹⁰⁸

More recent business documents show how app developers seek to dispute Apple’s in-app purchase policy. In 2017, emails show that Spotify was in non-compliance with the in-app payments policy in the fourth quarter of 2016.¹⁰⁹ Spotify changed its app to allow users to

¹⁰⁴ Email from Eddy Cue, Senior Vice President of Internet Software & Servs., Apple Inc., to Steve Jobs, Chief Exec. Officer, Apple Inc. (Feb. 6, 2011), <https://judiciary.house.gov/uploadedfiles/014816.pdf>.

¹⁰⁵ Email from Steve Jobs to Eddy Cue, *supra* note 103.

¹⁰⁶ Email from Eddy Cue to Steve Jobs, *supra* note 104.

¹⁰⁷ *Id.*

¹⁰⁸ E-mail from Jai Chulani, Dir. of Worldwide Prod. Mktg: Apple TV & Dig. Media Prods., Airport Wi-Fi Prods., Apple Inc., to Eddy Cue, Senior Vice President of Internet Software & Servs., Apple Inc. (Mar. 17, 2011), <https://judiciary.house.gov/uploadedfiles/015059.pdf>.

¹⁰⁹ Memorandum from Bruce Sewell, Vice President & Gen. Counsel, Apple Inc., to Horacio Gutierrez, Gen. Counsel & Sec’y, Spotify USA Inc. (Oct. 28, 2016), <https://judiciary.house.gov/uploadedfiles/013578.pdf>.

click through to its external website to purchase premium subscriptions, a technical feature that violated Apple's Rule 3.1.1.¹¹⁰ Apple's correspondence included reasons for company policy,

"If a developer chooses not to use in-app purchase, it is free to do so. A developer is also free to sell traditional content such as music (including via subscription) outside of the app and then offer consumers a way to access that content from within app. What a developer cannot do is seek to use its iOS app as a marketing tool to redirect consumers outside the app to avoid in-app purchase. This fundamentally undermines the App Store business model."¹¹¹

In 2018, T-Mobile's FamilyMode app also failed to pass the app review process due to violations of the in-app purchase policy.¹¹² T-Mobile designed its app to connect with T-Mobile's network infrastructure to authenticate users of the network.¹¹³ The app, however, allowed users to charge payments directly to T-Mobile, working around Apple's in-app payment system.¹¹⁴ According to T-Mobile, the payments were in compliance with Apple's in-app purchase policy and essential for telephony services such as 911.¹¹⁵ Apple disagreed.¹¹⁶

Whether Apple's app review policies are antitrust violations is likely to hinge on how the policies affect the relevant market and whether prosecutors can prove that the issues raised are bigger than disputes between companies over how to distribute profits or protect user privacy or security.¹¹⁷ A plaintiff must be able to successfully argue not just that they think a 30 percent commission is unfair, but that the commission and other App Store policies at issue have harmed consumers by, for example, keeping end-user prices higher than they would be otherwise or slowing innovation in the ecosystem.¹¹⁸

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² E-mail from Mike Sievert, President and Chief Operating Officer, T-Mobile Inc., to Philip Schiller, Senior Vice President of Worldwide Mktg., Apple Inc. (Sept. 6, 2018), <https://judiciary.house.gov/uploadedfiles/014870.pdf>.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ See Oh & Wallsten, *supra* note 84.

¹¹⁸ *Id.*

Similarly, not being able to pay for services like Netflix and Spotify within an app are not, by definition, harms.¹¹⁹ To prove harm, a plaintiff would have to demonstrate that the inability to make payments through the app foreclosed sales, thereby harming consumers.¹²⁰

On the other side, Apple will need to prove countervailing benefits that might offset any harms.¹²¹ For example, Apple argues that strict control of the payment system is necessary to prevent fraud and protect consumers.¹²² Apple will need to quantify the benefits of this (and other) payment rules if it is to argue that as one reason to maintain control of the payment system.¹²³

¹¹⁹ *Id.*

¹²⁰ On foreclosure theory in industrial organization and antitrust case law, see generally Joshua D. Wright & Alexander Krzepicki, *Rethinking Foreclosure Analysis in Antitrust Law: From Standard Stations to Google*, CONCURRENTIALISTE: J. OF ANTITRUST L. (Dec. 17, 2020) (citing Patrick Rey & Jean Tirole, *A Primer on Foreclosure*, in HANDBOOK OF INDUSTRIAL ORGANIZATION III (eds. Mark Armstrong and Rob Porter) (North Holland, 2007)), <https://leconcurrentialiste.com/wright-krzepicki-foreclosure>.

¹²¹ Unilateral effects analysis would include a balancing of countervailing benefits against harms. For an explanation of how foreclosure would be analyzed in a vertical merger, see generally U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, VERTICAL MERGER GUIDELINES (2020), https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf.

¹²² For a defense of Apple's in-app payments Rule 3.1.1, see Apple's Opposition to Epic's Motion for a TRO/PI, *Epic Games, Inc., v. Apple Inc.*, No. 3:20-cv-05640-YGR, at 21 (N.D. Cal. Aug. 21, 2020), https://cdn.vox-cdn.com/uploads/chorus_asset/file/21807196/file0.58943333434048.pdf [hereinafter *Apple's Opposition*] ("Epic's claim also depends on holding that Apple's App Store requirements—which ensure security, privacy and a quality user experience—are a “tie,” monopoly maintenance and a violation of the rule of reason. Product and technology choices such as how Apple structures the App Store and its Guidelines do not constitute anticompetitive conduct.”); see also *App Store Review Guidelines*, APPLE DEVELOPER (Feb. 1, 2021), <https://developer.apple.com/app-store/review/guidelines>.

¹²³ *Apple's Opposition*, *supra* note 122; *App Store Review Guidelines*, *supra* note 122.

III. FACEBOOK AND ITS ACQUISITION OF INSTAGRAM

The Facebook documents focus on its acquisition of Instagram.¹²⁴ The key question is whether the acquisition squashed an emerging competitor or instead gave Instagram the resources necessary to succeed.¹²⁵ Email messages between Kevin Systrom and Mark Zuckerberg, chat messages between Kevin Systrom and Matt Cohler, internal communications between Mark Zuckerberg and David Ebersman, and corporate communications by Sheryl Sandberg reveal the inside story of how each company came to agree to the business combination.¹²⁶

Instagram grew rapidly in its first two years, which impressed Facebook executives. Mark Zuckerberg identified the company as Facebook's biggest threat.¹²⁷ But Zuckerberg also noted that, "one thing about startups though is that you can often acquire them."¹²⁸ Facebook needed to decide if they were "friends or foes."¹²⁹

¹²⁴ Facebook documents from the *Hearing on Online Platforms and Market Power: Examining the Dominance of Amazon, Apple, Facebook and Google Before the H. Comm. on the Judiciary, Subcomm. on Antitrust, Comm., and Admin. Law*, 116th Cong. 2 (2020), <https://judiciary.house.gov/online-platforms-and-market-power/#3> [hereinafter *Hearing Documents (Facebook)*].

¹²⁵ *Id.*; see also *Hearing Video*, *supra* note 2 (statement by Jerrold Nadler, Representative, New York at 01:01:39, characterizing the acquisition of Instagram by Facebook as "exactly the kind of anticompetitive acquisition that the antitrust laws were designed to prevent.").

¹²⁶ *Hearing Documents (Facebook)*, *supra* note 124; see also *Hearing Video*, *supra* note 2 (statement by Jerrold Nadler, Representative, New York at 01:01:39).

¹²⁷ E-mail from Mark Zuckerberg, Chief Exec. Officer, Facebook Inc. (Apr. 9, 2012), <https://judiciary.house.gov/uploadedfiles/0006334000063341.pdf>.

¹²⁸ *Id.*; see also *Hearing Video*, *supra* note 2 (question by Jerrold Nadler, Representative, New York at 01:02:05, quoting Mark Zuckerberg's email and Mark Zuckerberg's response, "in the growing space around—after smart phones started getting big, they competed with us in the space of mobile cameras and mobile photo sharing, but, at the time, almost no one thought of them as a general social network, and people didn't think of them as competing with us in that space, and I think the acquisition has been wildly successful. We were able to, by acquiring them, to continue investing in it and growing it as a standalone brand that now reaches many more people than I think Kevin, the founder at the time, or I, thought to be possible at the time while also incorporating the technology to making Facebook's photo sharing products better.").

¹²⁹ *Hearing Documents (Facebook)*, *supra* note 124, at Ex. C, <https://judiciary.house.gov/uploadedfiles/0008.pdf>.

Facebook's assessment of the smaller firm included considerations, such as strategic position.¹³⁰ One executive expressed the sentiment that "not losing strategic position in photos is worth a lot of money."¹³¹

Figure 5. Facebook.com in March 2012

Emails between Kevin Systrom of Instagram and Zuckerberg showed Systrom's initial reluctance to sell, and Zuckerberg's efforts to persuade Systrom to sell.¹³² Zuckerberg's emails described his view on the inevitability of a relationship between the two companies.¹³³

In a lengthy email discussion of the social media market, the growth of Instagram, and the benefits of joining Facebook, Zuckerberg and Systrom laid out the terms of the acquisition.¹³⁴ Systrom set an initial value of Instagram at \$500 million, then changed his offer to \$2

¹³⁰ *Id.*; see also *Hearing Video*, *supra* note 2 (question by Jerrold Nadler, Representative, New York at 01:04:00, quoting Mark Zuckerberg's email and Mark Zuckerberg's response, "in the space of mobile photos and camera apps, which was growing, they were a competitor.").

¹³¹ E-mail from Mike Schroepfer, Vice President of Eng'g, Apple Inc., to Mark Zuckerberg, Chief Exec. Officer, Facebook Inc. (Mar. 9, 2012), <https://judiciary.house.gov/uploadedfiles/0006318000063197.pdf>.

¹³² E-mails between Mark Zuckerberg, Chief Exec. Officer, Facebook Inc., and Kevin Systrom, Chief Exec. Officer, Instagram Inc. (Mar. 19–Apr. 9, 2012), <https://judiciary.house.gov/uploadedfiles/0009164800091654.pdf>.

¹³³ *Id.*

¹³⁴ *Id.*

billion.¹³⁵ Zuckerberg would eventually work out a deal for \$1 billion.¹³⁶ In the course of negotiations, Zuckerberg wrote,

“Of course, at the same time we’re developing our own photos strategy, so how we engage now will also determine how much we’re partners vs competitors down the line -- and I’d like to make sure we decide that thoughtfully as well.”¹³⁷

This conversation on whether to join forces or remain independent with estimates on its value varying from \$500 million to \$2 billion from one day to the next shows how uncertain Instagram’s future was at the time.

Figure 6. *Instagram.com in March 2012*

The deal between Zuckerberg and Systrom included terms familiar to many in Silicon Valley. They discussed the terms of the deal:

“Most of the upfront deal consideration portion for you guys also needs to vest in addition to the retention package. It will have the same provisions of double-trigger etc [sic] to guarantee you eventually get it, but we can’t just transfer all of the money immediately. You probably understood what I was saying here from

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ E-mails between Mark Zuckerberg and Kevin Systrom, *supra* note 132.

other deals you've done, but I just wanted to clear this up since I think I misspoke on it."¹³⁸

Internal emails between Zuckerberg and David Ebersman, Facebook's counsel, show the deliberations that occurred within Facebook at the time of these negotiations. Zuckerberg describes possible reasons for an acquisition to "neutralize competition" and to "integrate their products."¹³⁹ "What we're really buying is time," writes Zuckerberg, as there are a "finite number of different social mechanics to invent."¹⁴⁰ Purchasing a company like Instagram, FourSquare, or Path would allow Facebook to integrate their mechanics at scale, increasing barriers to entry for other startups.¹⁴¹ Zuckerberg reasoned that "the businesses are nascent but the networks are established, the brands are already meaningful and if they grow to a large scale they could be very disruptive to us."¹⁴²

In a follow-up email, however, Zuckerberg backtracked with Ebersman that he "didn't mean to imply that we're buying them to prevent them from competing with us in any way."¹⁴³ He stated procompetitive reasons that motivated his interest in Instagram, "I'm mostly excited about what the companies could do together if we worked to build what they've invented into more people's experiences."¹⁴⁴

Zuckerberg's comment reveals the tension between finding economic conduct that hurts nascent competition rather than improving

¹³⁸ *Id.*

¹³⁹ E-mail from Mark Zuckerberg, Chief Exec. Officer, Facebook Inc., to David Ebersman, Counsel, Facebook Inc. (Feb. 27, 2012), <https://judiciary.house.gov/uploadedfiles/0006322000063223.pdf>.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*; see also *Hearing Video*, *supra* note 2 (question by Jerrold Nadler, Representative, New York at 01:06:04, and Mark Zuckerberg's response: "The FTC had all these documents and at the time unanimously voted at the time not to challenge the acquisition...at the time it was far from obvious. A lot of the competitors that they competed with in mobile sharing, including companies such as Path which were hot at the time with great founders. I don't think Path exists today. It was not a guarantee that Instagram was going to succeed. The acquisition has done wildly well, largely because, not just because of the founder's talent but because we invested heavily in building up the infrastructure, promoting it, and working on security and working on a lot of things around this, I think this has been an American success story.").

¹⁴² E-mail from Mark Zuckerberg to David Ebersman, *supra* note 139.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

fledgling products and enhancing consumer welfare through better distribution. While his followup email has the tone of someone who just sat through a lecture from his general counsel about the dangers of email, other evidence suggests Facebook believed that it faced real weaknesses that it had to address.

In 2011, a presentation by Sheryl Sandberg showed that Facebook owned 95 percent of social media usage in the U.S.¹⁴⁵ However, the slides also showed Facebook's weakness in mobile and desire to grow in mobile, emphasized by Facebook's partnership with Vodafone.¹⁴⁶ Facebook executives expressed their concern at losing market position and advocated to aggressively move into the mobile space.¹⁴⁷ An email read, "I hate the word 'land grab' but I think that is the best convincing argument and we should own that."¹⁴⁸

In 2014, board meeting minutes showed Sheryl Sandberg's concern that the high concentration of the smartphone market between Apple and Google "poses a significant strategic threat to the Company's business"¹⁴⁹ and that another mobile app would increase Facebook's hold in the mobile market. Sandberg remarked, "high concentration of the mobile operating system market . . . poses a significant strategic threat to the business."¹⁵⁰

These presentations by Sandberg over the span of several years suggest that Facebook was threatened by growth in the mobile market for social media. Strategic partnerships with Vodafone and with mobile OS systems by Apple and Google were all part of the set of options by Facebook to stay competitive in the rapidly changing ecosystem that migrated from primarily desktop to mobile usage.

The question facing antitrust investigators will be whether the rhetoric reflects a view by Facebook that it was dominant and needed to squash any emerging competitors,¹⁵¹ or whether it saw a potentially

¹⁴⁵ Sheryl Sandberg, Chief Operating Officer, Facebook Inc., Facebook Corporate Presentation (2011), https://judiciary.house.gov/uploadedfiles/00057113_Picture.pdf.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Hearing Documents (Facebook)*, *supra* note 124, at Ex. B, <https://judiciary.house.gov/uploadedfiles/0005.pdf>.

¹⁴⁹ Minutes of a Meeting of the Board of Directors of Facebook, Inc. 2 (Feb. 14, 2014), <https://judiciary.house.gov/uploadedfiles/0004537600045378.pdf>.

¹⁵⁰ *Id.*

¹⁵¹ *See Hearing Video*, *supra* note 2 (statement by Pramila Jayapar, Representative, Washington at 02:47:40, asserting that Facebook engaged in

fatal weakness in its own business model and moved to address it as a matter of survival. The former could represent an antitrust violation while the latter could be an example of Facebook applying its scale to keep up with emerging trends.¹⁵²

IV. GOOGLE

The Google documents focus on its acquisition of YouTube beginning in 2006, the development of strategy around vertical search in 2006 and 2007, and issues surrounding the Chrome web browser in 2011.¹⁵³ These documents are particularly difficult to contextualize given that they focus on events that occurred relatively long ago. Google's market capitalization then was 20 percent of what it is now and it ranked 27th on the list of largest public companies by market cap.¹⁵⁴

A. *The YouTube Acquisition*

After initial evaluations of YouTube in 2006, one Google executive wrote, "YouTube's value to us would be a smart team and a platform we could build from,"¹⁵⁵ saying later, "I want to be aggressive about deals that make Google the default place to store photos and videos."¹⁵⁵ Other correspondence downplayed YouTube's value,

anticompetitive conduct as a monopoly by threatening competitors and copying features); *id.* (statement by Val Demings, Representative, Florida at 03:50:20, characterizing internal deliberations by Facebook's product managers on platform access to Pinterest and Netflix in 2014 as an effort to "weaponize" its platform policy and enforcing it selectively to undermine competitors).

¹⁵² *Id.* (questions by Pramila Jayapar, Representative, Washington at 02:44:40, for Mark Zuckerberg on Facebook's efforts to copy and clone features as trends changed, and Mark Zuckerberg's response with examples of successful and unsuccessful features developed by Facebook that were simultaneously being developed by smaller startups at the time).

¹⁵³ Google documents from the *Hearing on Online Platforms and Market Power: Examining the Dominance of Amazon, Apple, Facebook and Google Before the H. Comm. on the Judiciary, Subcomm. on Antitrust, Comm., and Admin. Law*, 116th Cong. 2 (2020), <https://judiciary.house.gov/online-platforms-and-market-power/#4> [hereinafter *Hearing Documents (Google)*].

¹⁵⁴ *Alphabet Market Cap 2006-2020*, MACROTRENDS, <https://www.macrotrends.net/stocks/charts/GOOGL/alphabet/market-cap> (last visited Feb. 20, 2021).

¹⁵⁵ E-mail from Salar Kamangar, Senior Vice President, Google, to Jeff Huber, Senior Vice President, Google (Feb. 1, 2006), <https://judiciary.house.gov/uploadedfiles/04189233.pdf>.

however. A Google executive noted that YouTube's talent, systems, and content quality would not be particularly valuable to Google, even though YouTube recently turned down another \$500 million acquisition offer.¹⁵⁶ Instead, rather "if we pick them up it would be defensive vs yahoo."¹⁵⁷ Similarly, Eric Schmidt seemed more inclined to acquire the talent and leadership team rather than the company. Upon YouTube's rejection of Google's initial \$200 million offer, he wrote, "please do figure out a way for us to help them achieve their vision. We won't be pursuing them as an acquisition."¹⁵⁸

Again, rhetoric alone proves little. Negotiations regarding the acquisition reveal the uncertainty regarding YouTube's value. Business documents show that the estimated value of the company varied from a lower bound offer of \$200 million to the final 2006 sale price of \$1.65 billion.¹⁵⁹

An antitrust investigation of Google's acquisition of YouTube would need to incorporate the economics of start-up valuation.¹⁶⁰ Did Google pay too little at \$1.65 billion for YouTube?¹⁶¹ Did the YouTube

¹⁵⁶ E-mail from Susan Wojcicki, Senior Vice President of Advertising & Commerce, Google, to Jonathan Rosenberg, Senior Vice President, Google (May 1, 2006), <https://judiciary.house.gov/uploadedfiles/04189266.pdf>.

¹⁵⁷ *Id.*

¹⁵⁸ E-mail from Eric Schmidt, Chief Exec. Officer, Google, to Sean Dempsey, Principal Corp. Dev., Google (Feb. 13, 2006), <https://judiciary.house.gov/uploadedfiles/04189250.pdf>.

¹⁵⁹ *Id.*

¹⁶⁰ At the time of the acquisition, the Federal Trade Commission issued an early termination notice, which indicated that the agency and the U.S. Department of Justice reviewed the \$1.65 billion proposed merger and declined to take further action. *See 20070088: Google Inc.; YouTube, Inc.*, FED. TRADE COMM'N, EARLY TERMINATION NOTICES, PREMERGER NOTIFICATION PROGRAM (Nov. 2, 2006), <https://www.ftc.gov/enforcement/premerger-notification-program/early-termination-notices/20070088>; *see generally* Greg Sandoval, *Schmidt: We Paid \$1 Billion Premium for YouTube*, CNET (Oct. 6, 2009), <https://www.cnet.com/news/schmidt-we-paid-1-billion-premium-for-youtube> ("Since 2006, many observers have scratched their head over what prompted Google to pay \$1.65 billion for the video site YouTube. We're now a little closer to the answer.").

¹⁶¹ A balanced research study should include the full set of acquisition targets that were completed and rejected, with counterfactual analysis of how the small firms would have fared with or without acquisition. *See generally Hearing Video*, *supra* note 2 (question by Mary Gay Scanlon, Representative, Pennsylvania at 03:58:55 for Sudhar Pichai about the disparity between the

creators underestimate the value of their company and accept too low a price? A court should also want to know how Google's acquisition affected innovation on video streaming and what a counterfactual world in which YouTube was not acquired would look like.¹⁶² Given that 14 years have gone by, it is difficult to imagine designing a counterfactual that would carry much weight in an argument.

Figure 7. YouTube.com in September 2006

B. Vertical Search

Documents from 2006 and 2007 show Google's internal strategy development around vertical search and its importance to Google's growth in the effort to make Google a global leader in search.¹⁶³ In 2005, Google was developing a strategy around vertical

first bid and final acquisition price of \$1.65 billion for YouTube which was nearly 30 times the initial bid of \$50 million).

¹⁶² See *Overview of the Merger Retrospective Program in the Bureau of Economics*, FED. TRADE COMM'N: MERGER RETROSPECTIVE PROGRAM, <https://www.ftc.gov/policy/studies/merger-retrospectives/overview> (describing the agency's effort to evaluate its internal analytical tools and models in premerger notification reviews by comparing predicted results with actual results and measuring the efficacy of analytical thresholds and empirical methods used by antitrust economists to predict merger effects and counterfactual scenarios).

¹⁶³ E-mail from Bill Brougher, Product Manager, Google, to Ben Gomes, Vice President of Search, Google, Ramanathan Guha, Google Fellow, Google, and Amit Singhai, Head of Search, Google (Nov. 29, 2005), <https://judiciary.house.gov/uploadedfiles/04137557.pdf>.

search that would influence the search engine's growth for the next 15 years.¹⁶⁴

A strategy document noted that “the growth of sites like MySpace and YouTube puts the search business in jeopardy.”¹⁶⁵ To account for these threats, the strategy document advises that Google,

“need[s] to own the search box on the entertainment sites, we need to be the search site where you can find entertainment content, we need to succeed in social networking, and we need to build better entertainment and social interaction into our search experience.”¹⁶⁶

Google should “[t]urn having the largest user base into an unfair advantage by building out technology that improves linearly with base size.”¹⁶⁷ According to the document, in order to prevent MySpace from becoming the default social search function, “Google should host all information about a person, including MySpace [sic] info.”¹⁶⁸

Figure 8. Google.com in July 2006

Internal emails showed employees expressing concern that third-party sellers were putting Google at risk of disintermediation, providing the company with less data and less revenue.¹⁶⁹ A report

¹⁶⁴ *Id.*

¹⁶⁵ Internal Memorandum from the Google Search Team 1 (2006), <https://judiciary.house.gov/uploadedfiles/01099367.pdf>.

¹⁶⁶ *Id.* at 5.

¹⁶⁷ *Id.* at 1.

¹⁶⁸ *Id.* at 9.

¹⁶⁹ *Hearing Documents (Google)*, *supra* note 153.

noted the threat of “proliferating verticals,”¹⁷⁰ and mandated that Google execute on its verticals so as not to give ground to competition. The company was “[d]riv[ing] too much traffic to competitors monster [sic] and hotjobs [sic].”¹⁷¹

A letter from the founder of a website called Celebrity Net Worth expressed outrage at Google’s control over search to favor its own verticals. The founder wrote,

“If someone came to me with an idea for a website or a web service today, I would tell them to run. Run as far away from the web as possible. Launch a lawn care business or a dog grooming business – something Google can’t take away as soon as he or she is thriving.”¹⁷²

This series of documents reveal, at most, evolving views on the business strategy of building a general search engine or vertical search categories. They show some Google people worrying about the future of their business and a competitor upset that Google’s new business plans make it more difficult for companies, like Celebrity Net Worth, with very specialized searches to succeed.

¹⁷⁰ *Hearing Documents (Google)*, *supra* note 153, at Ex. A, <https://judiciary.house.gov/uploadedfiles/0001.pdf>; *see also Hearing Video*, *supra* note 2 (question by David Cicilline, Representative, Rhode Island at 00:51:45, regarding Google’s fear of competitors in vertical search and the “proliferating threat” of certain websites getting “too much traffic,” with response from Sudhar Pichai that “when we look at vertical searches, it validates the competition we see...”).

¹⁷¹ *Hearing Documents (Google)*, *supra* note 153, at Ex. A.

¹⁷² *Id.*

Figure 9. MySpace in April 2005

Figure 10. Yahoo! Hotjobs in July 2006

The internal debate about general and vertical search in 2006 may seem quaint today in 2020. Google is a general search engine that generates results on an enormous number of vertical categories. From the user’s perspective, Google’s search engine delivers the results that fit the user’s request—if the user enters a general query, the results offered are general. If the user enters a specific query, the results

offered are specialized to a vertical category such as travel or shopping.¹⁷³

As with YouTube, this controversy happened so long ago it is difficult to draw conclusions regarding today's market. Still, the general approach to looking for anticompetitive behavior would be similar. The first step would be to define the relevant market.¹⁷⁴ In this case, one question might be whether the relevant market includes search engines such as Edge and DuckDuckGo or vertical search sites such as Yelp and Expedia. An investigation would also have to define general and vertical search in a precise way that may not be so easy today.¹⁷⁵

With those definitions, a key set of questions would be whether Google foreclosed competition from competing vertical search engines by giving preference to its own vertical category and whether that self-preference harmed consumers.¹⁷⁶ Celebrity Net Worth could have argued that it harmed consumers, but Google could counter that anyone seeking to learn a celebrity's net worth would prefer to type it into

¹⁷³ See, e.g., *Hearing Video*, *supra* note 2 (response from Sudhar Pichai to question from David Cicilline, Representative, Rhode Island at 00:51:45, with the statement that "we see vigorous competition in [vertical categories such as] travel and real estate...").

¹⁷⁴ See generally *Markets*, FED. TRADE COMM'N: GUIDE TO ANTITRUST LAWS MERGERS, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/markets> (describing the product dimension and geographic dimension of market analysis in premerger notification review).

¹⁷⁵ On the challenge of defining vertical and general search in a dynamic market, see generally Joshua Gans, *Google, Yelp, and the Future of Search*, HARV. BUS. REV. (July 10, 2015), <https://hbr.org/2015/07/google-yelp-and-the-future-of-search>. For an explanation of vertical search from the perspective of a vertical search competitor, see Memorandum from Jeremy Stoppelman, Cofounder and CEO, Yelp! Inc. to the U.S. Senate Comm. on the Judiciary, Subcomm. on Antitrust, Competition Policy and Consumer Rights (Sept. 21, 2011), <https://www.judiciary.senate.gov/imo/media/doc/11-9-21StoppelmanTestimony.pdf>.

¹⁷⁶ See generally, *Hearing Video*, *supra* note 2 (allegation by David Cicilline, Representative, Rhode Island at 00:54:34, claiming that Google is "increasingly a walled garden keeping users on Google's sites."). For an explanation of the theory of foreclosure through self-preferencing, see Michael Luca et al., *Is Google Degrading Search? Consumer Harm from Universal Search* (Berkeley Law Sch., Working Paper), <https://www.law.berkeley.edu/wp-content/uploads/2015/04/Luca-Wu-Yelp-Is-Google-Degrading-Search-2015.pdf>.

Google than to conduct a general search for a site that specializes in celebrity net worth and then click to that site to ask the specific query.

C. Default Search and the Chrome Browser

One email from 2011 shows Google's desire for Chrome to become the default web browser on Dell computers with the default homepage set to Google.com.¹⁷⁷ The email included several strategic goals, including installing the Google Toolbar if Internet Explorer was also pre-loaded.¹⁷⁸ In an internal email, Google executives noted the U.S. Department of Justice's rules on whether personal computers can be shipped with or without browsers pre-loaded.¹⁷⁹

Another email shows that Google pushed for Google.com to be the default browser homepage on AT&T devices.¹⁸⁰ The att.net portal at the time was powered by Yahoo! search, but the Google team pushed for their contract to require that Android devices have either att.net powered by Google or directed to Google.com.¹⁸¹

There is no doubt Google was trying to reach a deal for something it saw as beneficial to its business. Companies frequently disagree with each other as competitors and partners. The failure to agree or complaints by one side do not necessarily indicate any antitrust harm. Context in 2011 matters, as well. At the time, Chrome was the third most popular desktop browser, behind Internet Explorer and Firefox.¹⁸²

¹⁷⁷ E-mail from Jim Kolotouros, Vice President, Android Platform Partnerships, Google, to Jim Holden, Senior Director of Strategic Partnerships, Google, Joan Braddi, Vice President of Partnerships, Google (Feb. 18, 2011), <https://judiciary.house.gov/uploadedfiles/00013117.pdf>.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ E-mail from Ornella Indonie, Vice President Global Devices and Services, Google, to Philipp Schindler, Senior Vice President and Chief Business Officer Global Sales and Operations, Google, Joan Braddi Vice President of Partnerships, Google (June 20, 2015), <https://judiciary.house.gov/uploadedfiles/04297908.pdf>.

¹⁸¹ *Id.*

¹⁸² *Desktop Browser Market Share Worldwide*, GLOBALSTATS: STATCOUNTER, <https://gs.statcounter.com/browser-market-share/desktop/worldwide/2011> (last visited Jan. 31, 2021).

Figure 11. att.net powered by Yahoo! in June 2015

Whether these actions were anticompetitive or an abuse of market power depends on a number of questions, including what other options Dell and AT&T had for default search engines to display on their homepages and the costs, if any, that Google could impose on those companies for failing to reach an agreement.¹⁸³

CONCLUSION

In the documents released by the House Judiciary Committee on July 29, 2020, many pages of internal emails reveal the process by which business executives evaluated and assessed competitors, changing markets, and the development of consumer products and services, much of which occurred in the years of 2006–2012. These “hot docs” provide interesting insights into some of the inner workings of companies, but on their own prove little.

Depending on one’s prior beliefs about these companies, the documents either show intensely competitive firms operating in ways that society desires to increase productivity and economic growth, or firms determined to foreclose markets and forestall competition. Understanding whether firms behaved anticompetitively requires more

¹⁸³ See generally Robert A. Guth & Kevin J. Delaney, *Pressuring Microsoft, PC Makers Team Up With Its Software Rivals*, WALL ST. J. (Feb. 7, 2006), <https://www.wsj.com/articles/SB113928066242466882> (“Under the deal being discussed, Google, of Mountain View, Calif., could pay Dell fees approaching \$1 billion over three years, these people estimate. The terms might change and the discussions could fail. Any agreement would be the latest in a series of similar deals with computer manufacturers the giant Internet search company has signed.”).

fact-finding by parties in private litigation and investigations brought by the Federal Trade Commission, U.S. Department of Justice, and state attorney generals.