

Muzzling Antitrust: Information Product Redesign, Innovation & Free Speech



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Milo 2.0



Milo 1.0



Information products

- ◆ “[A]nything that can be digitized.... [B]aseball scores, books, databases, magazines, movies, music, stock quotes, and Web pages are all information goods....”

CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES:
A STRATEGIC GUIDE TO THE NETWORK ECONOMY 3 (1999)

Information products (re)design

◆ Google – rankings

- Approximately 70% of general search engine market
- Changes to search engine algorithm
- Search bias alleged (advantage Google and disadvantage vertical competitors)

◆ A.C. Nielsen – ratings

- Effectively 100% television ratings market
- Changes to people meter technology
- Predatory innovation alleged

Treatment of speech and innovation-based defenses in antitrust matters?

◆ Δ “information product” → speech ?

- “The First Amendment Protects Search Engine Results Against Antitrust Law”

Eugene Volokh & Donald Falk (White Paper Commissioned by Google (April 2012))

- “[Nielsen’s] are opinions that are protected by the First Amendment and, thus, cannot give rise to antitrust liability.”

Sunbeam v. Nielsen, Defendant’s Motion to Dismiss & Memorandum (July 2009)

◆ Δ “information product” → innovation ?

- “We make hundreds of changes to our algorithms every year to improve consumers’ search experience.”

Eric Schmidt (Senate Testimony (Sept. 2011))

- “[Antitrust] is not supposed to be in the business of policing ... the quality [of a monopolist’s] services.”

Sunbeam v. Nielsen, Defendant’s Motion to Dismiss & Memorandum (July 2009)

All-or-nothing protection re. “speech”

- ◆ Binary approach – immunity or no solicitude
 - *U.S. v. Lorain Journal* (U.S. 1951)
 - *E. R.R. Pres. Conf. v. Noerr Motor Freight* (U.S. 1961)
- ◆ Insufficiency of binary approach
 - *NAACP v. Claiborne County Hardware* (U.S. 1982)
 - *FTC v. Superior Court Trial Lawyers Assoc.* (U.S. 1990)
- ◆ Alternatives to binary approach
 - *Central Hudson* (intermediate scrutiny (“restriction proportional to interest”))(U.S. 1980)
 - *NYT v. Sullivan* (conditional privilege (“actual malice”))(U.S. 1964)

De facto all-or-nothing protection re. “innovation”

◆ De facto binary approach

- Explicitly eschews balancing – *Allied Orthopedic v. Tyco Health* (9th Cir. 2010)
- Embraces balancing in theory – *US v. Microsoft* (D.C. Cir. 2001)

◆ Insufficiency of de facto binary approach

- Redesigns do not have concurrently pro & anticompetitive effects
- Very small innovations trump all anticompetitive effects

◆ Alternatives to binary approach

- Limited approach – first order and not “full blown” balancing

Recommendations – Speech

- ◆ Political speech receives immunization
- ◆ Nominal speech receives no solicitude
- ◆ Additional legal infrastructure proposed cognizable speech (not a single “outcome category”)
 - Definition: Significant speech content related to cause of action
 - Mechanism: “Minus factor” provides sliding scale protection
 - Presumption: Tie-breaker unless strong speech content

Recommendations – Innovation

- ◆ Recognition and estimation of pro/anticompetitive effects
- ◆ Translation between dynamic and static effects
- ◆ Implementation of sliding scale and presumptions
 - Balance when confident of large relative differences
 - Retain default in favor of innovation

		“Size” of Innovation		
		small	unsure	large
“Size” of Anticompetitive Effect	small	no	no	no
	unsure	no	no	no
	large	yes	no	no

Take away...



- ◆ Inappropriate abdication → appropriately tailored assessments
- ◆ Limitations of existing case law → learning by doing
- ◆ Middle ground alternatives to binary treatment
- ◆ More speech regarding these First Amendment considerations
- ◆ More innovation regarding dynamic efficiency considerations

Thank you & further reading

- Hillary Greene, *Muzzling Antitrust: Information Products, Innovation and Free Speech*, 95 BOSTON UNIVERSITY LAW REVIEW 35 (2015), available at, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2577920
- Hillary Greene, *Weighing Google's Antitrust Defenses*, WALL STREET JOURNAL (Oct. 1, 2015), available at, <http://on.wsj.com/1TOtNXM>