ANOTHER LOOK AT PRIVACY

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INTRODUCTION

Antitrust law does not often take privacy issues into account, even when construing "privacy" in its broadest sense to include privacy policies, the collection and subsequent use or sale of personal information, and privacy regulation. Issues involving privacy and its flip side, "big data," occasionally do surface in antitrust matters, but by and large they remain on the margin. There have been a handful of attempts to move privacy more toward the center of the antitrust universe, but they have not been very successful.

In this Article, I first discuss some of the challenges consumer privacy poses and why antitrust has had a difficult time with privacy considerations. Next, I discuss several arguments that a few brave souls have made urging that privacy should be more central to antitrust—especially when consumer data is at the center of a merger, as it was in Google/DoubleClick. I then look at some of the ways that, on the periphery, antitrust law does incorporate privacy issues. Finally, I offer what is hopefully a more nuanced and productive way of thinking about the issue based on several characteristics of online markets, and suggest a few interesting implications for the future.

I. A STEP BACK: ANTITRUST AND TRADITIONAL ADVERTISING-SUPPORTED MEDIA

To understand some of the challenges privacy issues (broadly construed) pose for antitrust, we need to take a step back.

We start with the proposition that Facebook, Google, Twitter, and many other online services in which user privacy may become an issue are *media* businesses.[1] This should not be controversial, but it needs to be made

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[1] Nick Bilton, *Is Twitter a Media or Technology Company?*, N.Y. TIMES BITS BLOG (July 25, 2012, 10:02 AM), http://bits.blogs.nytimes.com/2012/07/25/is-twitter-a-media-or-technology-company/; Shel Israel, *Facebook is a Media Company -- And So Are You*, FORBES.COM (May 17, 2012, 12:27 PM), http://www.forbes.com/sites/shelisrael/2012/05/17/facebook-is-a-media-company-so-are-you-and-i/; *see* Nat Ives, *Advertisers' Top-Ranked Media Company Is . . . Google*, ADVERTISING AGE (Jan. 30, 2013), http://adage.com/article/media/advertisers-top-ranked-media-company-google/239481/.

explicit. They are *advertising-supported media*, like much of the "traditional" media, and therefore free to the user.[2] That is their business model.

Antitrust law applies without much difficulty to traditional advertising-supported media businesses such as broadcast radio, television, and newspapers. But the way antitrust typically applies to traditional media relates to the "economic" side of the business (i.e., the part that generates the revenues). In broadcast radio, for example, advertisers pay for advertising time on a radio station and consumers get to listen to the station for free. As a consequence, in analyzing radio mergers, the US Department of Justice ("DOJ") has considered the economic impact solely on advertisers and the rates they pay for advertising.[3] By contrast, daily newspapers have a dual revenue stream. Newspapers obtain revenue from both advertisers and subscribers (or purchasers of a single copy). Because there are two revenue streams, DOJ has considered the economic impact of a newspaper merger on both advertising rates and subscription prices.[4] But once again, the focus has been on the "economic" side of the business. Antitrust has followed the money, so to speak, focusing on price and price competition.

While some, myself included, have argued that the antitrust review should extend beyond price and focus as well on other, non-price factors in media mergers,[5] reviewing agencies and courts only rarely take these factors into account. Generally, non-price factors are only taken into account when they, more than price, drive competition, or when there is a very specific reason to do so. For example, in *United States v. Daily Gazette Co.*,[6] the two daily newspapers in Charleston, West Virginia, had combined their printing, advertising, subscription sales, and distribution functions in 1968 under a Joint Operating Agreement ("JOA") pursuant to the Newspaper

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2 *See, e.g.*, David S. Evans, Colloquy Essays, *Antitrust Issues Raised by the Emerging Global Internet Economy*, 102 NW. U. L. REV. 1987, 1992 (2008) ("*Many Web businesses follow the traditional advertising-supported media model.* Content is used to attract traffic. Access to that traffic is sold to advertisers. The content is usually made available for free so that advertising is the primary source of revenue and profits.").

3 *See, e.g.*, Competitive Impact Statement at 11-16, United States v. Bain Capital, LLC, 2008 WL 4000820 (D.D.C. 2008) (No. 08-0245), *available at* http://www.usdoj.gov/atr/cases/f230100/.htm; Complaint for Injunctive Relief at 10-12, 15-16, United States v. Clear Channel Commc'ns, Inc., 2000 WL 34015155 (D.D.C. Nov. 15, 2000) (No. 00-2063) (complaint filed with consent decree); *see also* United States v. CBS Corp., No. 98CV00819, 1998 U.S. Dist. LEXIS 10292, at *1-2 (D.D.C. Jun. 30, 1998) (requiring divestiture of certain radio stations in order to cure anticompetitive effects in local radio advertising markets); United States v. Westinghouse Elec. Corp., No. 96 2563, 1997 U.S. Dist. LEXIS 3263, at *7-10 (D.D.C. Mar. 10, 1997).

4 *See, e.g.*, Cmty. Publishers, Inc. v. Donrey Corp., 892 F. Supp. 1146, 1155-56 (W.D. Ark. 1995) (evaluating newspaper merger's impact on both readership and advertising markets), *aff'd sub nom.* Cmty. Publishers, Inc. v. DR Partners, 139 F.3d 1180 (8th Cir. 1998).

5 *See, e.g.*, Maurice E. Stucke & Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L.J. 249, 249-50 (2001) (arguing "that the antitrust analysis of a media merger should be expanded to include its impact on the 'marketplace of ideas'").

6 567 F. Supp. 2d 859 (S.D. W. Va. 2008).

Preservation Act.[7] Essentially, the JOA meant that the papers no longer competed on advertising rates or subscription prices in any respect.[8] But the newspapers continued to compete in other ways—notably, in terms of their editorial and newsgathering functions—which is what the Newspaper Preservation Act sought to accomplish.[9] DOJ brought an antitrust action after the parties changed the terms of the JOA to give control to the Daily Gazette Company, which then took steps to shut down the other newspaper.[10] On a motion to dismiss, the parties argued that there could be no antitrust violation for a change in the terms of the JOA because there was no longer any "economic" competition between the two newspapers.[11] The court disagreed, holding that editorial and newsgathering competition was cognizable under the antitrust laws.[12] But such cases are rare indeed.

Online media services such as Facebook, Google, Twitter, Yelp, and TripAdvisor are like radio or television in that they are free to the consumer. They are advertising-supported, meaning that advertisers subsidize the cost of producing and distributing the media, and advertising dollars account for most of the company's revenues.[13] For whatever reasons, Silicon Valley and its venture capital backers have embraced the free-to-the-consumer model enthusiastically for many online services.[14] The reasons may be partly historical—consumers got in the habit of being able to find information for free on the Internet, and younger users in particular got into the (bad) habit of using peer-to-peer services to avoid paying for content such as music—but good business reasons probably also supported this model. Pricing services such as search, user-generated content, and social media is challenging; and the existence of indirect network effects (where a service becomes more valuable to advertisers the more users it has) undoubtedly encouraged entrepreneurs to try to grow audience size as quickly as possible.[15] "Free" is usually a pretty good price to charge in order to build audiences.

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7 15 U.S.C. §§ 1801-1804 (2006).

8 *See Daily Gazette Co.*, 567 F. Supp. 2d at 862 (stating that "[a]ll significant business decisions . . . including the newspapers' . . . advertising rates, and subscription rates, were approved by a JOA committee").

9 *See id.* at 868-71.

10 *Id.* at 863-64.

11 *Id.* at 869-70.

12 *Id.* at 870-71.

13 *See, e.g.*, Evans, *supra* note 2, at 1992 (stating that, under the advertising-supported model, "content is usually made available for free so that advertising is the primary source of revenue and profits").

14 *See generally* Chris Anderson, *Free! Why $0.00 is the Future of Business*, WIRED (Feb. 25, 2008), http://www.wired.com/techbiz/it/magazine/16-03/ff_free.

15 *See, e.g.*, Evans, *supra* note 2, at 1995 (discussing indirect network effects); David J. Teece, *Business Models, Business Strategy and Innovation*, 43 LONG RANGE PLAN. 172, 178 (2010), *available at* http://www.bmcommunity.sitew.com/fs/Root/8jig8-businessmodelsbusinessstrategy.pdf ("[I]nformation is often difficult to price, and consumers have many ways to obtain certain types without paying.").

What makes online media different from traditional media is that in addition to consumers having to sit through commercials to get the service for free, there is another element present. That is where privacy enters. Almost all free online media businesses collect copious amounts of information about consumers on a real-time basis.[16] Why do they do this? For a number of reasons, this information is quite valuable to advertisers. It allows an advertiser to better match its advertisements to consumers who may be interested in its products.[17] It also allows the advertiser to measure the effectiveness of its advertising.[18]

Information solves a number of very real problems advertisers face with "traditional" media. In the offline world, advertisers had only limited, and sometimes faulty, information about how many people actually saw or heard an advertisement.[19] They paid to reach people who had no interest whatsoever in the product being advertised.[20] And even among those who were interested and were potential buyers, it was difficult to figure out whether an advertisement or campaign had any influence on a consumer's subsequent purchase decision.[21]

By collecting information about users, online advertising takes a big step toward solving these problems. An advertiser is better able to target those consumers who may be interested in its product, cutting down on

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16 *See, e.g.*, Craig Timberg, *Facebook Privacy Targeted by Austrian Law Student*, WASH. POST (Oct. 19, 2012), http://articles.washingtonpost.com/2012-10-19/business/35501337_1_facebook-privacy-facebook-headquarters-facebook-founder-mark-zuckerberg (discussing issues regarding Facebook's collection of user information).

17 *See, e.g.*, David S. Evans, *The Online Advertising Industry: Economics, Evolution, and Privacy*, J. ECON. PERSP., Summer 2009, at 37, 42-43; Catherine Tucker, The Economics of Advertising and Privacy (Nov. 19, 2011) (manuscript), *available at* http://cetucker.scripts.mit.edu/docs/econ__2011.pdf; *see also* Howard Beales, *The Value of Behavioral Targeting*, NETWORK ADVER. INITIATIVE, 6-17 (Mar. 24, 2010), http://www.networkadvertising.org/pdfs/Beales_NAI_Study.pdf (discussing the results of a study analyzing data on behaviorally targeted advertising).

18 Avi Goldfarb & Catherine Tucker, *Online Advertising*, *in* 81 ADVANCES IN COMPUTERS 289, 292-94 (2011).

19 PHILIP NAPOLI, AUDIENCE EVOLUTION: NEW TECHNOLOGIES AND THE TRANSFORMATION OF MEDIA AUDIENCES 32-33 (2011) [hereinafter NAPOLI, AUDIENCE EVOLUTION] (discussing "information vacuums regarding the nature of the interaction between content and audience" that abounded in early models of audience understanding); *cf. id.* at 41-42 ("[I]ncreased accessibility, usability, and affordability of large quantities of data has been one of the biggest changes affecting the media landscape. . . . [T]he processes of media buying and planning are becoming increasingly specialized as a result of . . . the increasing flow of complex audience data." (citation omitted)).

20 *Cf.* PHILIP M. NAPOLI, AUDIENCE ECONOMICS: MEDIA INSTITUTIONS AND THE AUDIENCE MARKETPLACE 29-31 (2003) (discussing "the exchange of goods . . . based upon . . . educated guesses about the size and composition" of the advertisement's audience and the uncertainty that inheres in the process).

21 *See, e.g.*, NAPOLI, AUDIENCE EVOLUTION, *supra* note 19, at 32 (stating that in early motion picture markets major companies "'ha[d] not the slightest idea what happen[ed] to [their] pictures,' and . . . no way of finding out 'why [their] picture didn't do well'" with certain audiences).

"waste."[22] It is able to obtain better information about the reach, frequency, and effectiveness of its advertising from initial exposure all the way to "conversion" (i.e., a sale).[23] What's more, the advertiser is able to compare results of different advertisements or campaigns and quickly make adjustments, and it is able to build audiences in an era of increasing fragmentation. Taken together, these developments represent a true innovation in advertising, not just a passing fad. The dramatic growth of online advertising and the corresponding declines suffered by much of traditional media are evidence of this fact.

II. THE PRIVACY CONUNDRUM

With this background, we can better appreciate some of the challenges online media pose to antitrust. This Part identifies and analyzes those challenges with respect to privacy.

First, the decision to make a product or service free to the consumer means that the antitrust focus generally will not be on the consumer.[24] To use the easiest example, television advertising may be intrusive, annoying, and something many television watchers would rather skip (with the exception, perhaps, of advertisements during the Super Bowl). However, the audience understands that one does not "get something for nothing," and advertising subsidizes the cost of the programming. While we may get annoyed when the last 30 minutes of a movie are repeatedly interrupted by commercials, we are not paying for the movie. So antitrust generally ignores our grumbles. Indeed, antitrust law would probably view an agreement between competing television stations to limit the number of commercial minutes as an illegal reduction in output, despite the fact that television viewers would rejoice.[25] If the focus is not on the consumer in traditional media, one would expect the same in "free" online media, unless there is a good argument to the contrary.

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22 One of the most often repeated sayings in advertising is attributed to John Wanamaker, who is supposed to have said, "Half the money I spend on advertising is wasted; the trouble is I don't know which half." *See, e.g.*, Eric Goldman, *A Cosean Analysis of Marketing*, 2006 WIS. L. REV. 1151, 1173 n.104.

23 *See, e.g.*, REX BRIGGS & GREG STUART, WHAT STICKS: WHY MOST ADVERTISING FAILS AND HOW TO GUARANTEE YOURS SUCCEEDS 11 (2006) (discussing media measurements for online advertising); Goldfarb & Tucker, *supra* note 18, at 294-98 (discussing ad targeting).

24 *See supra* Part I (discussing traditional antitrust inquiry in advertising-supported media).

25 *See, e.g.*, United States v. Nat'l Ass'n of Broadcasters, 553 F. Supp. 621, 624 (D.D.C. 1982) (stating that the question in an antitrust action involving advertising "does not concern the desirability in the abstract . . . but whether the providers of commercial time . . . may band together artificially to limit the supply of their product or to increase the demand therefor in apparent violation of the antitrust laws").

Second, advertising-supported media, whether traditional or online, are two-sided markets, with consumers on one side and advertisers on the other.[26] These multisided markets exist in a number of industries.[27] They tend to arise when there are two or more distinct groups of customers, a benefit in connecting or coordinating these distinct groups, and an intermediary that can make each group better off by coordinating their demands. Examples include auction houses, securities exchanges, shopping malls, credit card networks, and media companies.[28] It is difficult to try to balance benefits to one side of the market against harms to the other side of the market, even under the best of circumstances. But it is even more difficult when the benefits and harms cannot be calculated in dollars. How should a court balance the benefits to an advertiser from being able to better target its advertisements against the harms to consumers who have given up some of their privacy?

A third challenge is that firms compete on many dimensions, and one of these may be commitment to user privacy, but that sort of competition seems very limited. Firms do compete on privacy protection; think, for example, of Microsoft's advertising campaign aimed at Safari users after Google got caught bypassing Safari's privacy settings.[29] Or think of DuckDuckGo, the little search engine that differentiates itself on the basis of user privacy.[30] But this dimension of competition is not very widespread or intense today. One would look in vain for any DOJ or Federal Trade Commission ("FTC") cases that speak of a "loss of privacy competition" as a competitive effect.[31] And there are reasons to doubt that privacy will ever reach the status of price, quality, or innovation in an antitrust review. In fact, to the extent that firms compete vigorously to obtain an information advantage over other firms, there may be something of a "race to the bottom" with regard to privacy protection. This raises interesting questions about whether privacy would be better protected under monopoly than under competition, and whether privacy problems tend to arise from too much competition rather than too little.

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26 Evans, *supra* note 2, at 1994-96.

27 *See* DAVID S. EVANS & RICHARD SCHMALENSEE, PAYING WITH PLASTIC: THE DIGITAL REVOLUTION IN BUYING AND BORROWING 136-39 (2d ed. 2005).

28 *Id.* at 137; *see also* Geoffrey G. Parker & Marshall W. Van Alstyne, *Two-Sided Network Effects: A Theory of Information Product Design*, 51 MGMT. SCI. 1494, 1495 (2005).

29 *See, e.g.*, Emil Protalinski, *Microsoft Confirms Google Privacy Campaign to Promote Bing is Aimed at Apple Safari Users*, THE NEXT WEB (Sept. 20, 2012), http://thenextweb.com/microsoft/ /09/20/microsoft-confirms-google-privacy-campaign-aimed-apple-safari-users/.

30 *See, e.g.*, Ryan Singel, *DuckDuckGo Challenges Google on Privacy (with a Billboard)*, WIRED (Jan. 19, 2011, 8:08 PM), http://www.wired.com/business/2011/01/duckduckgo-google-privacy/.

31 Darren S. Tucker & Alexander Okuliar, *Internet Ready: Agency Enforcement of Online Mergers*, 26 ANTITRUST 80, 83 (2011) ("Despite repeated calls from some public interest groups, the agencies have not incorporated consumer protection considerations like privacy into their analysis of Internet (or other) mergers.").

Fourth, privacy itself is a bit of a squishy concept to antitrust lawyers. It is not an attribute of goods or services, like price or quality. It is not a feature of markets, like innovation. Rather, it is a consumer preference, and different consumers appear to value it differently. In fact, consumers themselves appear somewhat confused—one might even say schizophrenic—in how much they value privacy. Thus, consumers routinely give up massive amounts of information about themselves, apparently happily, while at the same time voicing grave concerns about loss of privacy in the abstract.[32] Now this disconnect may be evidence that the disclosure and consent regime for consumer privacy is somewhat ineffective when applied to commercial websites and online services, but that does not turn it into an antitrust problem. The difficulty is only made worse by the fact that privacy is considered by some—including courts in some contexts—not just as a preference, but as an affirmative right.[33] In bridge terms, antitrust law typically plays its hand in no trump. Converting the game to one with a trump card is outside of our normal experience as antitrust lawyers.

Fifth, privacy harms tend not to be direct and immediate. Presumably, machines—not human beings—have access to most of our information. If a computer indexes my email, or matches an advertisement to my search history, has my privacy been violated? Not at all clear. The worry is more with what could happen to our information rather than what routinely does. Many of the concerns voiced by privacy advocates have to do with how information is used or transferred after it has been collected, or with data security breaches.[34] While bad things do occasionally happen—as when Target used predictive analytics to determine which of its female customers were pregnant, and then sent them baby product advertisements during their

32 *See, e.g.*, Joseph Turow et al., Americans Reject Tailored Advertising and Three Activities That Enable It 10 (Sept. 2009) (manuscript), *available at* http://repository.upenn.edu/cgi/viewcontent.cgi?=1138&context=asc_papers ("'I am comfortable with advertisers using my browsing history to serve me relevant ads, as long as that information cannot be tied to my name or any other personal information.'").

33 *See, e.g.*, Commission Regulation 45/2001, On the Protection of Individuals with Regard to the Processing of Personal Data by the Community Institutions and Bodies and on the Free Movement of Such Data, 2001 O.J. (L 8) 1, 3-4 (stating that the object of the Commission Regulation covering processing of personal data is to "protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy"); Julie Brill, *Competition and Consumer Protection: Strange Bedfellows or Best Friends?*, ANTITRUST SOURCE, Dec. 2010, at 1, 4, *available at* http://www.ftc.gov/peeches/brill/1012abamasternewsletter.pdf ("Notwithstanding the important role of market entry to competition, consumer protection concerns sometimes trump the otherwise important goal of promoting entry"); s*ee also* Berin Szoka, *Balancing Privacy and Innovation: Does the President's Proposal Tip the Scale?*, TECHFREEDOM, 4-5 (May 29, 2012), http://techfreedom.org/sites/default/files/Szoka%20%20Testimony%20to%20CMT%203.29.12%20v3%20(final)_0.pdf.

34 *See, e.g.*, Brill, *supra* note 33, at 7-10 (discussing privacy concerns sparked by advances in technology that allow companies to "easily collect, combine, and use . . . information from consumers").

second trimester of pregnancy[35]—these events, while dramatic, are rare and seem better dealt with by privacy laws or adverse publicity than by antitrust litigation.

Finally, there is a natural reluctance—at least in a post-*Antitrust Paradox* world—to interfere with new methods of commerce that have appeared on the scene, especially those that have in some sense revolutionized part of commerce.[36] Behaviorally targeted advertising is a marketplace innovation, and something of a success story at that.[37] Modern antitrust thinking is much less skeptical of novel business practices than it once was, recognizing that erroneous intervention may deter investment and harm innovation.[38] In Judge Frank H. Easterbrook's often-quoted words, "The inhospitality tradition of antitrust has proven very costly. . . . Wisdom lags far behind the market."[39]

The conundrum privacy poses for antitrust may be simply expressed. Antitrust law has had a difficult time weighing a consumer's interest in privacy against an advertiser's interest in information. As a result, some scholars have concluded—not without good reason—that antitrust law is not likely to be particularly useful when it comes to effectively addressing issues of privacy.[40]

III. EFFORTS TO BRING PRIVACY INTO THE MAINSTREAM

Despite the challenges, there have been a number of attempts to articulate theories under which privacy could factor significantly in the antitrust analysis of a merger or other conduct.[41] These efforts have sought to move privacy away from the outskirts of antitrust law and more into the center, at

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35 *See* Charles Duhigg, *How Companies Learn Your Secrets*, N.Y. TIMES MAG. (Feb. 16, 2012), http://www.nytimes.com/2012/02/19/magazine/shopping-habits.html?pagewanted=all&_r=1&.

36 *See* Geoffrey A. Manne & Joshua D. Wright, *Google and the Limits of Antitrust: The Case Against the Case Against Google*, 34 HARV. J.L. & PUB. POL'Y 171, 181-82 & n.31 (2011) (making the case against reductionist assumptions that new business methods automatically violate antitrust law); *see generally* ROBERT BORK, THE ANTITRUST PARADOX (The Free Press 1993) (1978).

37 *See* Duhigg, *supra* note 35 (discussing Target's development of predictive analytics to direct advertisements at specific moments in individuals' lives).

38 *See, e.g.*, Manne & Wright, *supra* note 36, at 188-89.

39 Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 5 (1984).

40 *See, e.g.*, Frank Pasquale, *Beyond Innovation and Competition: The Need for Qualified Transparency in Internet Intermediaries*, 104 NW. U. L. REV. 105, 152 (2010) ("Antitrust law has been slow to recognize privacy as a dimension of product quality, and the competition that it promotes can do as much to trample privacy as to protect it.").

41 *See e.g.*, Pamela Jones Harbour & Tara Isa Koslov, *Section 2 in a Web 2.0 World: An Expanded Vision of Relevant Product Markets*, 76 ANTITRUST L.J. 769, 773-74 (2010); Peter Swire, *Protecting Consumers: Privacy Matters in Antitrust Analysis*, CTR. FOR AM. PROGRESS (Oct. 19, 2007), http://www.americanprogress.org/issues/regulation/news/2007/10/19/3564/protecting-consumers-privacy-matters-in-antitrust-analysis/.

least in cases that potentially raise serious privacy issues. They have sought to treat privacy in terms that modern antitrust doctrine is comfortable with.

Perhaps the most successful of these attempts to date has been by Peter Swire, who made a two-fold argument. First, he argues, privacy harms can reduce consumer welfare, which is a principal goal of modern antitrust law.[42] He argues that "[i]t would be illogical to count the harms to consumers from higher prices while excluding the harms from privacy invasions—both sorts of harms reduce consumer surplus and consumer welfare in the relevant market." [43] Swire uses "'consumer welfare'" here synonymously with "'consumer preference'" and goes on to discuss how research has shown that many consumers have significant concerns about privacy.[44] "For these individuals, their consumer preferences are subject to harm if standard online surfing shifts to a less privacy-protective structure due to a merger or dominant firm behavior."[45] He then equates this with price: "In essence, consumers 'pay' more for a good if greater privacy intrusions are contrary to their preferences."[46] So Swire's first argument is that antitrust focuses on welfare, privacy is part of welfare, and therefore antitrust should also focus on privacy.

Second, Swire argues that a loss of privacy may be viewed as a "reduction in the *quality of a good or service*," especially to consumers who prefer more rather than less privacy.[47] Writing in 2007, at the time of the Google/DoubleClick merger, he noted that the merger would combine Google's "deep" information about users who are on Google sites with DoubleClick's "broad" information about where a user goes after leaving Google.[48] "For the many millions of individuals with high privacy preferences, this may be a significant reduction in the quality of the search product," he wrote.[49] Antitrust law recognizes that market power may not only result in price effects, but may also result in non-price effects such as reduced product quality, reduced product variety, reduced service, or diminished innovation.[50] Thus, Swire's second argument is that antitrust regards reduced product quality as a cognizable competitive effect, consumers may perceive privacy as an aspect of product quality, and therefore antitrust should focus on privacy.[51]

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42 *See* Swire, *supra* note 41.

43 *Id.*

44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.*

48 Swire, *supra* note 41 (internal quotation marks omitted).

49 *Id.*

50 U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 1, at 2 (2010), *available at* http://www.ftc.gov/os/2010/08/100819hmg.pdf.

51 Swire, *supra* note 41.

Former FTC Commissioner Pamela Jones Harbour developed a slightly different argument in her dissent from the FTC's decision to close its investigation of the Google/DoubleClick merger.[52] Commissioner Harbour believed that the "traditional" antitrust analysis did not present the whole picture of the merger, noting in particular that the majority's analysis focused on online advertisers, while ignoring the potential impact of the transaction on consumers and consumer privacy.[53] "Under the majority's application of Section 7, there is no adequate proxy for consumers whose privacy is at stake, because consumers have no business relationship with Google or DoubleClick," she wrote.[54] Both Google and DoubleClick collected massive amounts of data from consumers who searched and browsed the Web, and Commissioner Harbour suggested that "it might have been possible to define a putative relevant product market comprising data that may be useful to advertisers and publishers who wish to engage in behavioral targeting."[55] Thus, her argument was that merger analysis defines product markets, it is possible to define such a market to consist of data for online advertisers, and therefore the analysis should consider a merger's impact on this data market.[56]

Commissioner Harbour also raised the question of whether other firms could ever hope to match the data that Google and DoubleClick combined would possess about consumers, presenting the issue as whether the merger raised perhaps insurmountable entry barriers to other firms.[57] Of course, it is noteworthy that Commissioner Harbour's view only merited a dissent; the other four Commissioners signed onto a statement that strongly suggested consumer privacy was outside the proper scope of antitrust merger review.[58]

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52 Google/DoubleClick, FTC File No. 071-0170, at 1 (2007), *available at* http://www.ftc.gov//caselist/0710170/ 071220harbour.pdf (dissenting statement of Comm'r Pamela Jones Harbour) [hereinafter Dissenting Statement of Comm'r Harbour].

53 *Id.* at 9-10.

54 *Id.* at 10.

55 *Id.* at 9. After Commissioner Harbour left the FTC, she and Tara Koslov, a former FTC legal advisor, expanded on the idea of "data markets" in an article they wrote together. *See generally* Harbour & Koslov, *supra* note 41.

56 Dissenting Statement of Comm'r Harbour, *supra* note 52, at 9.

57 *Id.* at 8.

58 The closing statement fudges this a bit. It first analogizes privacy to "concerns about environmental quality or impact on employees" that are "important policy questions for the nation" but "unrelated to antitrust concerns" and therefore beyond the Commission's "legal authority" in merger review. Google/DoubleClick, FTC File No. 071-0170, at 2 (2007), http://www.ftc.gov/os/caselist/0710170/071220statement.pdf (statement of the Fed. Trade Comm'n) [hereinafter Statement of the Fed. Trade Comm'n]. However, the closing statement goes on to claim that the FTC had in fact "investigated the possibility that this transaction could adversely affect non-price attributes of competition, such as consumer privacy," but concluded that the evidence was not there. *Id.* at 2-3. In a suitably ambiguous conclusion, it ends on this note: "We have therefore concluded that privacy considerations, as such, do not provide a basis to challenge this transaction." *Id.* at 3.

Overall, Swire and Harbour present us with four possible ways privacy can come front and center into mainstream antitrust analysis: as part of consumer welfare, as part of product quality, in the form of a "data market," and as an entry barrier.[59]

Each of these situations has difficulties. The consumer welfare test, as commonly used in antitrust, looks at whether consumers are harmed by reduced output, lower product quality, or higher prices resulting from the exercise of market power.[60] So Swire's two-part argument may really represent two sides of the same coin, and the key question is whether harm to privacy can fit within the framework of lower product quality.

To this end, we have already mentioned some obstacles. The consumer who gives up some privacy to watch a video on YouTube for free seems to be no different from the consumer who has to sit through commercials to watch a movie on television for free. Even if we assumed that both of these situations made the product lower in quality to the viewer than in a perfect commercial-free, privacy-protected world, antitrust does not generally look at the consumer side of the market when the consumer is not paying for the product or service. In contrast, on the other side of the market, more information allows an advertiser to improve the quality of its product, just as more television commercials represent more output. Stated differently, the "consumer" whose "welfare" antitrust is concerned about is not the television watcher or the surfer of the net—it is the advertiser who is paying to get its message out.

Commissioner Harbour's arguments also have difficulties. In terms of market definition, a "data market" seems too abstract a concept; most firms, and online media firms in particular, simply do not operate in such generalized markets. As discussed below, information may be an input into other goods and services, but information itself is rarely considered a separate product market.[61]

An exception, where information is indeed considered a separate market product, might be a merger involving firms that sell financial data to investors or that sell pharmaceutical data to pharmacies. But in these cases, the data itself is the product being marketed and sold; it is not an input into

59 *See* Dissenting Statement of Comm'r Harbour, *supra* note 52, at 5, 8 (stressing the importance of network effects in online advertising markets and arguing that such network effects could "tip" the search and display markets to Google as a result of the Google/DoubleClick transaction and make it more difficult for other companies to challenge the combined firm); Harbour & Koslov, *supra* note 41, at 773, 784 (calling for "the definition of markets for data, separate and apart from markets for the services fueled by these data" and "framing relevant product markets around privacy issues"); Swire, *supra* note 41 (discussing privacy as an element of consumer welfare and as a factor related to product quality).

60 Herbert Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 GEO. WASH. L. REV. 1, 7-8 (1982).

61 *See supra* Part II.

another product in the sense that information is an input into online advertising.

Furthermore, while amassing a great deal of information about consumers may give a firm a competitive advantage, and thus may act as an entry barrier, this seems like the old-fashioned idea of "unfair competitive advantage," which current antitrust doctrine rejects.[62] For example, the Google/DoubleClick merger allegedly allowed Google to develop a better, more information-rich product for advertisers.[63] That fact appears to be uncontested, even by Commissioner Harbour.[64] Efficiency gains may raise entry barriers and make it harder for other firms to compete successfully, but higher entry barriers by themselves do not justify an antitrust response.

In sum, there have been a few attempts to move privacy more toward the center of antitrust analysis. However, these attempts have not been particularly successful and have felt a bit like fitting a square peg into a round hole.

IV. PRIVACY ON THE PERIPHERY

If we back away from the attempts to move privacy to the center of antitrust and simply ask how it enters on the periphery, I think we can identify a few ways. Each of these is, not surprisingly, somewhat modest.

First, we have already mentioned that privacy is a dimension on which firms compete, although it is not currently a very significant dimension and is eclipsed by competition in the other direction—namely to gather as much data as possible.[65] And, as already noted, there are many reasons why, today at least, antitrust law does not regard this form of competition as particularly worthy of protection, including the fact that the competition is on the free side and not the paying side of the market.[66]

Second, privacy regulation has implications for market structure. From an antitrust perspective, the regulatory environment is a given; so strictly speaking, it does not enter the picture.[67] But privacy regulation—which in the United States is really a patchwork of regulations that shows no sign of becoming coherent anytime soon—does seem like a pretty clear case where

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62 *See, e.g.*, Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225 (1993) (explaining that "federal antitrust laws . . . do not create a federal law of unfair competition").

63 *See* Dissenting Statement of Comm'r Harbour, *supra* note 52, at 6.

64 *See id.*

65 *See supra* Part II.

66 *See supra* Part I.

67 *See generally* Howard A. Shelanski, *Antitrust Law as Mass Media Regulation: Can Merger Standards Protect the Public Interest?*, 94 CALIF. L. REV. 371 (2006) (describing how relaxation of FCC media ownership rules has resulted in greater reliance on antitrust review, but questioning whether antitrust law, as currently applied, adequately serves media policy goals).

the costs of compliance will fall most heavily on smaller firms.[68] And that will probably make entry less likely and reinforce the positions of incumbents.[69] Perhaps perversely, privacy regulation may therefore, to some extent, prevent privacy competition from ever really getting off the ground. Or perhaps that is not so perverse; regulation often interferes with competition, and there is no reason to believe that privacy is a special case.

Third, privacy may be relevant to market definition. Internet advertising has grown dramatically over the past decade while many forms of traditional advertising have been in decline.[70] In the past, DOJ has found that different media were in separate advertising markets.[71] In part, this was because advertisers use different media for different purposes. For example, advertisers typically use broadcast television advertising—which is expensive to produce and difficult to change quickly—as a "branding" medium, while they use radio advertising—which is much cheaper to produce and may be changed quickly—more to reach audiences on their way to or from work.[72] As a practical matter, this meant that antitrust concerns were most often raised when mergers involved the same medium. Antitrust had very little to say about mergers between different media—which, if anything, were governed by "cross-ownership" rules instead.[73] One relevant question here is whether the decline of traditional media means that product markets should be relaxed and redefined to include both offline and online media.[74] Another question is whether particular online media, such as search and non-search advertisements, are in the same product market or in different product markets. Empirical research (which is made easier by the wealth of data) suggests that there is enough substitution between these two forms of online advertising that they are likely to be in the same product market.[75] However, the jury is still out on whether Internet advertising is a close

68 *See, e.g.*, James Campbell, Avi Goldfarb & Catherine Tucker, Privacy Regulation and Market Structure 2 (Dec. 9, 2011) (unpublished manuscript), *available at* http://ebusiness.mit.edu/research//2011.12_Campbell_Goldfarb_Tucker_Privacy%20Regulation%20and%20Market%20Structure_.pdf.

69 *See, e.g.*, *id.* at 3-4.

70 *See* Evans, *supra* note 17.

71 *See* Cmty. Publishers, Inc. v. DR Partners, 139 F.3d 1180, 1182 (8th Cir. 1998) (daily newspapers); Competitive Impact Statement at 1-2, United States v. News Corp. Ltd., No. Civ.A.010771, 2001 WL 34038534 (D.D.C. May 14, 2001) (broadcast television advertising); Competitive Impact Statement at 2, United States v. Clear Channel Commc'ns, Inc., No. 1:00CV02063 (D.D.C. Nov. 15, 2000) (radio advertising); Competitive Impact Statement at 2, United States v. CBS Corp., No. 1:99-CV3212, 2000 WL 33115902 (D.D.C. Dec. 6, 1999) (outdoor advertising).

72 *See* Thales S. Teixeira et al., *Moment-to-Moment Optimal Branding in TV Commercials: Preventing Avoidance by Pulsing*, 29 MKTG. SCI. 783, 784 (2010); *About Radio Advertising*, STRATEGIC MEDIA, http://www.strategicmediainc.com/radio-advertising.php (last visited May 27, 2013).

73 Shelanski, *supra* note 67, at 389-90 (explaining that mergers across media will largely escape antitrust scrutiny because they do not increase concentration in any relevant antitrust market).

74 *See* Manne & Wright, *supra* note 36, at 196.

75 *See, e.g.*, *id.* at 199-200; James D. Ratliff & Daniel L. Rubinfeld, *Online Advertising: Defining Relevant Markets*, 6 J. COMPETITION L. & ECON. 653, 659 (2010).

enough substitute for traditional media that the old product markets no longer are supportable.[76]

A fourth way that privacy enters the periphery of antitrust concerns is when information about users may be an input into other products or services.[77] Think about a vertical merger between a firm that relies on this type of information for a product or service and a firm that collects it. Are there circumstances when such a merger could harm competition? On the one hand, information seems to be so ubiquitous that one firm could not possibly "corner the market." There are lots of companies that know how to gather, analyze, and package information.[78] Furthermore, having access to better information seems like a good thing in a world where better information can lead to innovative products.

On the other hand, some of the traditional concerns about input foreclosure may apply in this context, perhaps made worse because of characteristics of the downstream market and the fact that information is an input. The structure may be like a market with network effects that can tip to a winner; more customers lead to more information, which leads in turn to more customers. Commissioner Harbour alluded to network effects and tipping in her dissent in Google/DoubleClick.[79] It seems probable that one reason this theory did not get more traction with the rest of the Commission was because Google's competitors were most likely the ones making the argument, and agencies view competitor complaints with suspicion.[80] But in any event, the argument was not developed to the point at which it could have been a viable theory to challenge the merger.

In most of the above examples regarding how privacy plays a peripheral role in antitrust, however, the interests of the non-paying consumer are largely left behind. In the next section, I suggest a few reasons that should not be the case.

V. ANTITRUST, PRIVACY, AND "FREE" SERVICES: A SUGGESTED APPROACH

In traditional media, like radio or television, the business relationship is exclusively between the advertisers and the media company. A radio listener does not enter a business relationship with Clear Channel when he or she listens to one of its stations in the car. Commissioner Harbour's com-

76 *See, e.g.*, Avi Goldfarb & Catherine Tucker, *Substitution Between Offline and Online Advertising Markets*, 7 J. COMPETITION L. & ECON. 37, 38-39 (2011); Ratliff & Rubinfeld, *supra* note 75, at 662-63.

77 *See supra* notes 41-51 and accompanying text.

78 *See, e.g.*, Joel Stein, *Data Mining: How Companies Now Know Everything About You*, TIME (Mar. 10, 2011), http://www.time.com/time/magazine/article/0,9171,2058205,00.html.

79 Dissenting Statement of Comm'r Harbour, *supra* note 52, at 5.

80 *See* Statement of the Fed. Trade Comm'n, *supra* note 58, at 9 & n.9.

ment that there is no business relationship between consumers and advertising intermediaries like Google or DoubleClick suggests that the same is true with online media.[81] But is that correct? If not, what are the antitrust implications? This Part focuses on that question next.

First, it is time to define more precisely what we mean by "free." Economist David Evans, who has done a considerable amount of work in multisided markets, has developed the issue in an article provocatively titled "The Antitrust Economics of Free."[82] In it, he suggests several things that are relevant. First, in a two-sided market, setting the price for consumers on one side of the market at zero while actually charging consumers on the other side of the market may well be the overall profit-maximizing price.[83]

The antitrust analysis, according to Evans, should consider the free product together with its companion money-making product:

> The fact that a product is sold for free usually indicates there is a companion product and that the economics of those products are inextricably intertwined. Profit-maximizing firms do not provide products for free unless it helps them make money somewhere else. Formally, when a firm sets a price at zero, it is the result of a firm selecting the prices for several interrelated goods and finding that the profit-maximizing prices involve setting price equal to zero for one or more of those goods so long as at least one good is sold for a positive price.[84]

Any other result would, as Evans suggests, create an "antitrust exemption" for the free side of the market.[85]

Second, he notes that economic tools need to be used more carefully.[86] Some of the standard tools of market definition and market power break down when the price is zero.[87] For example, one cannot use the "hypothetical monopolist" test, which considers whether a hypothetical monopolist could raise prices by a small but significant amount, such as 5 or 10 percent.[88] Why not? "[B]ecause 5 percent of nothing is nothing, and because the nature of the product may be such that the hypothetical monopolist would still find it profit-maximizing to price at zero."[89] While it is theoretically possible to extend the hypothetical monopolist test to two-sided plat-

81 *See* Dissenting Statement of Comm'r Harbour, *supra* note 52, at 10.

82 David S. Evans, *The Antitrust Economics of Free* (Univ. of Chicago John M. Olin Law & Econ., Working Paper No. 555, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_=1813193.

83 *Id.* at 10.

84 *Id.* at 18.

85 *Id.* at 2-3.

86 *Id.* at 17.

87 *Id.* at 17-18.

88 Evans, *supra* note 82, at 22.

89 *Id.*

forms, Evans suggests the challenges are likely to be overwhelming in practice.[90]

In sum, Evans argues that done correctly, the antitrust analysis needs to look at both sides of the market.[91] Looking at only the "paid" side may conserve resources, but it misses the fact that consumers on the "free" side will directly feel the consequences of a business practice for the product for which a market has been defined.[92] This seems to be an important insight.

And contrary to Commissioner Harbour's suggestion that "consumers have no business relationship" with an online company when they get services for free, there is in fact a business relationship between the consumer and an online media firm.[93] In almost all online media business models, the price to consumers can generally be set at zero only when consumers are willing to provide the sort of information that advertisers value. And in order to get that information, online media enter a contractual relationship with consumers. This is a key difference from traditional media. When I watch free over-the-air television, I do not have to enter a contract with a television network. The same thing is true when I listen to my radio, or look at a billboard, or read the weekly community newspaper dropped off on my driveway. Unlike traditional "free" media, however, online media have terms of service. Those terms of service govern the relationship between consumers and the media company. Google, for example, states: "By using our Services, you are agreeing to these terms."[94] This is, of course, contractual language. If you search on Google, you are agreeing to the terms of service, including Google's privacy policy which governs what it can and cannot do with your information. If you sign up for Facebook, you are entering a more conventional bilateral contract.

Unlike traditional media, therefore, whenever a consumer uses online media—whether Facebook, YouTube, Bing, Dropbox, Yelp, TripAdvisor, or Twitter—there is in fact a contractual relationship. It may be an incomplete contract; the full terms of the exchange may not be clear to most users. In fact, they may not even be clear to the provider at the time the contract is entered into. But the fact remains that online media are different from traditional media in this respect. You did not need to sign a contract in order to watch the A-Team on television in the 1980s. CBS never found out that you watched, unless Nielsen surveyed you. But online, you do need to sign a contract.

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90 *Id.* at 23; *see also* David S. Evans, Two-Sided Market Definition 21-22 (Nov. 11, 2009) (manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1396751.

91 Evans, *supra* note 82, at 25.

92 *See id.* at 22.

93 Dissenting Statement of Comm'r Harbour, *supra* note 52, at 10.

94 *Google Terms of Service*, GOOGLE, http://www.google.com/intl/en/policies/terms/ (last visited May 28, 2013).

How does user information fit into the business models of online firms like Facebook? Professors Jan Whittington and Chris Jay Hoofnagle, building on work by Professor Hal Varian and others, have suggestively argued that these information-based businesses exhibit increasing returns to scale.[95] More users generating more information becomes increasingly valuable to advertisers, never reaching a point (as in traditional industries) at which there are decreasing returns to scale.[96] This means that most of the profits go to the firms with the most customers and, therefore, the most information.[97] As we have noted, these businesses also exhibit indirect network effects: the more people that belong to a social network, the more valuable it is to advertisers.[98] Increasing returns to scale and indirect network effects may be two important reasons why there are relatively few competitors in such businesses. We are in the world of small numbers competition.

More controversially, Professors Whittington and Hoofnagle take this a step further. They suggest that consumers who provide information to social network services are making investments specific to the firms to which they provide information.[99] The firms have an incentive to engage in opportunistic behavior, such as changing privacy policies or making such policies difficult to enforce.[100] And consumers may not easily exit these transactions and can rarely (if ever) reclaim their investment or transfer it elsewhere.[101] They argue that these characteristics create an online version of customer lock-in.[102]

Taken together, these insights suggest a number of important points:

(1) "zero" is a price like any other price. When a firm sets a price of "zero" on one side of the market, that does not mean consumers on that side of the market are economically irrelevant;

(2) market power and competitive effects on the "paying" side of the market are also likely to be felt on the "free" side;

(3) in the case of most online media, there is, in fact, a business relationship between consumers and the media company;

(4) this business relationship takes the form of a contract that governs the exchange and use of consumer information; and

(5) information investments resulting in consumer lock-in may make market power more durable in some online media markets.[103]

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95 Jan Whittington & Chris Jay Hoofnagle, *Unpacking Privacy's Price*, 90 N.C. L. REV. 1327, 1351 (2012).

96 *See id.* at 1353.

97 *See id.* at 1353-54.

98 *See supra* notes 15-18 and accompanying text; *see also* Whittington & Hoofnagle, *supra* note 95, at 1353.

99 *See* Whittington & Hoofnagle, *supra* note 95, at 1354.

100 *See id.* at 1364-65.

101 *Id.* at 1354.

102 *Id.*

103 *See supra* notes 81-102 and accompanying text.

VI. IMPLICATIONS FOR THE FUTURE

It remains for us to draw out some of the implications of this difference between online and traditional media. The most obvious implication is that online firms should not be able to trivialize the consumer relationship by asserting that the product is "free" and that most consumers are happy to agree to terms of service and privacy policies, often without even stopping to read them. In fact, if the business model is to work at all, the economic exchange taking place between consumer and online firm is critical. Without it, advertisers would likely not be willing to pay nearly as much for online advertising, nor would third parties pay nearly as much for data.

For this reason, antitrust cannot simply walk away from what is happening to the consumer—the way it often has in cases involving "free" traditional media. The fact that online media companies have been able to convince some courts that there is no product market for "free" goods,[104] and convince agencies to treat online media as just another form of traditional media where the consumer can be ignored, is a sleight of hand. It paints a false picture.

For reasons already stated, trying to balance benefits to advertisers against harm to consumers' privacy interests is unlikely to work as a matter of antitrust.[105] It is like comparing apples to oranges, and it may be the wrong comparison. It makes more sense to consider user information as something that online firms are trading for the ability to use their services. The information is an input into another service that is, in fact, a relevant antitrust market: online advertising. In fact, the Google/DoubleClick merger was all about this input.[106] Google and DoubleClick represented two information paths for online advertisers.[107] The proper approach would have been to weigh the benefits to online advertisers from the merger against the harm to competition in the form of input foreclosure.[108] The FTC made at least three analytical errors in this regard:

(1) it treated online media as synonymous with traditional media and therefore disregarded the consumer side of the equation—thus missing most of the competitive action;

(2) it trivialized complaints by competitors who knew what the consequences of the merger were likely to be better than the customers did, since the harm was likely to take the form of exclusion; and

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104 *See, e.g.*, Kinderstart.com, LLC v. Google, Inc., No. C 06-2057 JF (RS), 2007 WL 831806, at *7 (N.D. Cal. Mar. 16, 2007) ("KinderStart cites no authority indicating that antitrust law concerns itself with competition in the provision of free services.").

105 *See supra* notes 26-28 and accompanying text.

106 *See* Swire, *supra* note 41.

107 *Id.*

108 *See supra* note 79 and accompanying text.

(3) the FTC did not demand strict proof of the putative benefits to advertisers from the combination. Rather, it seems to have spent most of its time considering if Google and DoubleClick were actual or potential competitors.[109]

Of course, Google/DoubleClick is a done deal, and it is not worth crying over spilled milk. Arguably, even if the FTC had asked the right questions, Google might have been able to give satisfactory answers. But that brings us to another implication of our analysis. Google (among others) has been using the information it obtains from consumers to offer them "personalized search."[110] Personalized search appears to be an innovation. Having more information allows the search engine to be better "trained" to respond to a query. Is it a genuine innovation like online advertising? Does it change the calculus by giving consumers (not just advertisers) a better, more innovative product in exchange for their information? I would suggest the answer is, probably not.

We need to ask, as we did in the case of online advertising, what problems does "personalized search" solve? And the answer is that it gives users search results that are more in tune with what they are looking for. So, for example, some search engines personalize search based on a user's likely geographic location and search history. Some also rank results higher if a user has shared that result with others on a social network (like Google+) or if others have shared it with the user. But on the whole, these efforts at personalization are not new (geographic personalization has been around for a long time), or they simply make assumptions about the user's search based on social networking or search history.

Contrast this with another recent change. The search engine makes a guess, based on the term a user supplies, if the search is for information (such as who George Mason was) or for a purchase (such as making a hotel reservation in Fairfax, Virginia). If the former, there are unlikely to be many advertisements on the results page.[111] If the latter, the page may be

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109 The 2010 Horizontal Merger Guidelines, which were not in effect at the time of the Google/DoubleClick merger, suggest that suspicion of competitor concerns is not always appropriate. The Guidelines state that "[t]he interests of rival firms often diverge from the interests of customers, since customers normally lose, but rival firms gain, if the merged entity raises its prices." U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, s*upra* note 50, at § 2.2.3. However, the Guidelines go on to state that "rival firms may provide relevant facts, and even their overall views may be instructive, especially in cases where the Agencies are concerned that the merged entity may engage in exclusionary conduct." *Id.*

110 *Basics: Search History Personalization*, GOOGLE, http://support.google.com/accounts/answer/?hl=en (last visited May 22, 2013). The product was renamed "Google Web History" in 2007.

111 *See Google Ad Words Frequently Asked Questions*, GOOGLE, http://www.google.com/adwords/it-works/faq.html#q=9&subid=ww-et-awhp_nelsontest3_nel_p (last visited May 25, 2013) (describing how Google returns an advertisement based on user search terms); *see also* Search for "Who Was George Mason", GOOGLE, http://www.google.com (last visited May 25, 2013).

more than half advertisements.[112] Couple that with Jeffrey Rosen's discovery that it was possible to "train" the search engine to believe he was either a Democrat or a Republican and to get advertisements customized to his assumed interests,[113] and I think we can see that the advances are on the advertising side of the market much more than on the consumer side. This is not surprising because the advertisers are the ones paying. The users are just providing the information. Thus, although precisely targeted advertising based on personal information is a true innovation for advertisers and may increase effectiveness and reduce cost and waste, the same may not be true of "personalized search," which provides fewer benefits while potentially eliminating some exposure to conflicting viewpoints in the marketplace of ideas. This may have implications for the justification of collecting information from users who are not searching for a product or service.

The potential expansion of price discrimination is another intriguing possibility. Price discrimination to advertisers is not new; even in traditional advertising markets, media companies are able to price accordingly after determining, to some extent, which advertisers have more choices and which have fewer choices. In the world of search advertising, the evidence suggests that price discrimination is even more widespread.[114] Why stop with advertisers? When consumers give an enormous amount of information about themselves, businesses can analyze and use that information to price discriminate based on a consumer's likely price sensitivity and range of other options.[115] Some sellers already use personal information to charge different prices to different customers—for example, Home Depot apparently looks at your IP address and Orbitz considers whether you are on an Apple device.[116] Is that just the tip of the iceberg? Ultimately, antitrust may have little to say about the welfare effects of this possible seismic shift in price setting, but it is noteworthy nonetheless.

Finally, and perhaps paradoxically, research indicates that some level of consumer choice regarding privacy may actually enhance the performance of advertising while preserving consumer control over data usage.[117] This research suggests that enhanced privacy protection, as long as it is part of a choice, may not result in worse performance for advertisers—in fact,

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112 Search for "Hotel Reservation in Fairfax VA," GOOGLE, http://www.google.com (last visited May 25, 2013).

113 *See* Jeffrey Rosen, *Who Do They Think You Are?*, N.Y. TIMES MAG., Dec. 2, 2012, at 40, 42.

114 *See* Anthony Danna & Oscar H. Gandy, Jr., *All that Glitters Is Not Gold: Digging Beneath the Surface of Data Mining*, 40 J. BUS. ETHICS 373, 381-82 (2002).

115 *See id.*

116 *See* Jennifer Valentino-Devries, Jeremy Singer-Vine & Ashkan Soltani, *Websites Vary Prices, Deals Based on Users' Information*, WALL ST. J. (Dec. 24, 2012), http://online.wsj.com/article/.html.

117 Avi Goldfarb & Catherine Tucker, Comments on 'A Preliminary FTC Staff Report on 'Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers" 3-4 (Jan. 19, 2011) (manuscript), *available at* http://www.ftc.gov/os/comments//00234-57398.pdf.

the contrary may be true.[118] This is more evidence that what happens on the consumer side of the market matters. More of this work should be done, as well as work to better determine the price of "free" services.[119] That would be useful for any number of reasons. It might help consumers better understand what they are trading when they sign up for a "free" service, and it might give the antitrust agencies a different way to think about consumer harm from mergers and other conduct involving online firms.

CONCLUSION

The proper role of an antitrust analysis in the world of privacy is limited at best. Though there have been numerous attempts to factor privacy into the antitrust discussion, no theory has completely encapsulated the many facets of the privacy conundrum. As technology develops and our world becomes increasingly information driven, the antitrust concerns associated with privacy will become more apparent. As courts formulate the boundaries of privacy with regard to online search and other user information, it will be important to keep in mind the business relationship between consumers, advertisers, and online services. While the relationship is certainly not traditional, it exists, and the associated privacy concerns may become more relevant to modern antitrust thought over time.

118 *Id.*

119 There is a website that estimates what Facebook subscribers are "worth" to Facebook in dollar terms. Consumers may be surprised by how much they are worth. *See* Kate Freeman, *What Are You Worth to Facebook? Val-You Calculator Knows*, MASHABLE (May 14, 2012), http://mashable.com/ /05/14/val-you-calculator-worth-facebook/. The actual calculator may be found at https://goprivate..com/. *How Much are You Worth to Facebook?*, GO PRIVATE, https://goprivate. abine.com (last visited May 25, 2013).