Before the

Federal Trade Commission

Hearings on Competition and Consumer Protection in the 21st Century

Comments on the September 21 Hearing
Topic 1: Updating the Consumer Welfare Standard

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The Electronic Frontier Foundation is the leading nonprofit organization defending civil liberties in the digital world. Founded in 1990, EFF champions user privacy, free expression, and innovation through impact litigation, policy analysis, grassroots activism, and technology development. We work to ensure that rights and freedoms are enhanced and protected as our use of technology grows. EFF represents tens of thousands of dues-paying members, including consumers, hobbyists, artists, computer programmers, entrepreneurs, students, teachers, and researchers.

We submit these additional comments in response to the Commission's inquiry on the continued relevance of the consumer welfare standard.[1] Due to changes in the economic landscape in the digital age, the Commission should encourage a move away from historic conceptions of the consumer welfare standard, which emphasize price above other available metrics. It is time to adapt the consumer welfare standard to better account for the prevalent non-price-related harms to consumers that dominant platforms pose in the digital economy, including censorship harms specific to services that facilitate speech. In addition to updating

[1] *FTC Hearing #2: Competition and Consumer Protection in the 21st Century,* Fed. Trade Comm'n (Sept. 21, 2018), https://www.ftc.gov/news-events/events-calendar/2018/09/ftc-hearing-2-competition-consumer-protection-21st-century.

the consumer welfare standard, the FTC should help to revitalize the essential facilities doctrine to further address the competitive challenges in the new economy.

I. In Internet Platform Markets, Although Price Is Less Relevant, Consumer Harms Including Censorship Are Pervasive.

"Antitrust law seeks to promote and protect a competitive marketplace for the benefit of the public."[2] But in today's digital economy, increasingly dominant Internet platforms escape meaningful antitrust review because their services are 'free' to consumers. That means consumer prices alone cannot capture the full range of harm to consumers. The important position these platforms occupy in users' daily lives warrants a fresh look at the consumer welfare standard to ensure that it is truly functioning for the benefit of the public.

As the Supreme Court recently recognized, social media platforms function as a "modern public square,"[3] accessible by anyone with a computer and an Internet connection, and bringing the world's voices to users' devices. The largest of these platforms serve as primary sources of news and culture, and a primary means of communication with far-flung family and friends, for hundreds of millions of people. All of these platforms enforce rules restricting certain types of expression. While moderation of content and removal of expression deemed inappropriate are common and may be motivated by business need, large platforms tend to do it poorly. They routinely over-censor, curtailing free expression and access to information for their customers.

Automated detection and removal of content is imprecise, which results in both -over and -underblocking.[4] Policies aimed at removing "harmful" speech, for example, disproportionately censor the voices of politically and economically marginalized individuals and groups.[5] The content policies themselves are often

[2] *Image Technical Services v. Eastman Kodak*, 125 F.3d 1195, 1214 (9th Cir. 1997).

[3] *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732 (2017).

[4] Corynne McSherry, *Platform Censorship: Lessons From the Copyright Wars*, Electronic Frontier Foundation (Sep. 26, 2018), https://www.eff.org/deeplinks/2018/09/platform-censorship-lessons-copyright-wars.

[5] Jillian C. York, *Blunt Policies and Secretive Enforcement Mechanisms: LGBTQ+ and Sexual Health on the Corporate Web*, Electronic Frontier Foundation (Sep. 26,

vague and opaque, and fail to provide customers with a meaningful appeal process.[6] Enforcement of these policies is often inconsistent and arbitrary.

Yet, the influence and ubiquity of the dominant social media platforms makes them difficult for consumers to avoid. Because of the lack of consumer choice, consumers have no power to push back against the censorship harms resulting from dominant platforms' content policies or the platforms' ability to control online discourse. The lack of power to address censorship harms makes them a key issue of consumer welfare—one that market forces have not been able to correct.

Take, for example, Facebook and YouTube, two of the largest content platforms on the Internet. Facebook's share of advertising revenues among social networks in the United States is 79.2%, and the company has 2.23 billion monthly active users.[7] YouTube has a share of 20.1% in the U.S. market for video advertising, and it has 1.5 billion monthly users.[8] Their dominance is solidified through *network effects*, because their value to users increases as the number of users increases. Network effects bind users to large Internet platforms and make it difficult for other platforms to compete. A person seeking to communicate with a particular audience must go where that audience is—and increasingly that means large social media platforms. Platforms without large user bases cannot offer the same opportunity to communicate with other users as those with broader audiences. Today, as a result of network effects, combined with the difficulty of moving to alternative services, Internet users are forced to rely on a few large platforms with staggeringly large user bases to communicate with each other and access information online.

These dominant platforms have capitalized on and maintained their massive networks by amassing an immense bank of their users' data, including social graphs,

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2018), https://www.eff.org/deeplinks/2018/10/blunt-policies-and-secretive-enforcement-mechanisms-lgbtq-and-sexual-health.

[6] *Id.*

[7] *Social networking ad revenue market share of Facebook from 2015 to 2018*, Statista, https://www.statista.com/statistics/241805/market-share-of-facebooks-us-social-network-ad-revenue/ (accessed Nov. 12, 2018).

[8] *Video advertising revenue market share of Youtube in the United States from 2015 to 2018*, Statista, https://www.statista.com/statistics/289666/youtube-share-of-total-ad-revenues-in-the-us/ (accessed Nov. 12, 2018).

friend lists, websites visited, behaviors such as likes, clicks, and hovers, daily habits, location information, interactions with ad services, and anything else a site may track. Platforms generate significant revenue by analyzing masses of user data, aggregated over time, and selling advertisers access to targeted user groups in the form of hyper-personalized advertisements.[9] While most social media platforms are provided 'free' to consumers, users 'pay' these companies in data.

Consumers remain bound to dominant social media platforms by the difficulty of moving this data to competing platforms, and by the lack of interoperability between platforms. Social media companies maintain this lack of interoperability and portability through legal threats, particularly litigation under the Computer Fraud and Abuse Act and broad interpretations of their rights under customer agreements, which are contracts of adhesion. A lack of data portability,[10] coupled with the strength of network effects, create a harm to competition that in turn harms consumers and implicates antitrust law.

The consumer welfare standard is the metric by which courts have historically evaluated antitrust claims. The primary measurement of consumer welfare has historically been the prices that consumers pay for goods or services, though the standard also recognizes harms to innovation and product quality. As consumers are increasingly paying with their data, rather than their dollars, price is no longer a viable metric to evaluate the anticompetitive effects of market concentration in dominant Internet platforms. To adapt to the digital economy, the Commission should support a new standard—one that recognizes broader, non-price measures of consumer welfare. In particular, censorship harms should inform an analysis of anticompetitive conduct.

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[9] Kurt Wagner, *This is how Facebook uses your data for ad* targeting, Recode (Apr. 11, 2018), https://www.recode.net/2018/4/11/17177842/facebook-advertising-ads-explained-mark-zuckerberg.

[10] Bennett Cyphers and Danny O'Brien, *Facing Facebook: Data Portability and Interoperability are Anti-Monopoly Medicine,* Electronic Frontier Foundation (July 24, 2018), https://www.eff.org/deeplinks/2018/07/facing-facebook-data-portability-and-interoperability-are-anti-monopoly-medicine.

II. Antitrust Law Can and Should Incorporate Censorship Power as a Cognizable Threat to Consumer Welfare.

We urge the Commission to issue guidance adopting, as an indicator of consumer welfare, censorship harms that result from poor content moderation practices. We urge the Commission to identify metrics for conducting rigorous analysis of censorship harms for purposes of integrating these harms into antitrust review and enforcement.

Through the first half of the twentieth century, antitrust doctrine generally disfavored large firms as inherently harmful to the competitive process, but there was no coherent metric used to measure the supposed anticompetitive effects.[11] This trend shifted course in the 1970s, with the rise of Chicago School economics.[12] The Chicago School encouraged courts to focus on price as the metric for evaluating anticompetitive effects. This effort has been driven in part by the goal of making antitrust an empirically rigorous enforcement tool.[13] In determining whether

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[11] *See U.S. v. Von's Grocery* 384 U.S. 270, 301 (1966) (Stewart, J., dissenting) ("The sole consistency that I can find is that . . . the Government always wins."). *See United States v. Aluminum Co. Of America*, 148 F.2d 416, 431 (2d Cir. 1945) (finding Alcoa's conduct exclusionary because "there is no more effective exclusion than to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel.").

[12] *See* Malamed et. al., *Antitrust Law and Trade Regulation Cases and Materials* 52 (7th ed. 2018) ("*Antitrust Law*") ("From the 1970s to today, the story of antitrust law is that of the rise of economic analysis as the dominant lens guiding enforcement and shaping the law.").

[13] *See Ohio v. American Express*, 138 S.Ct. 2274, 2285 (2018) (considering the feedback loop in indirect markets of price increases on one side of the market.); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459 (2009) ("A refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an agreement, impairs the ability of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them."); *Brooke Group v. Brown and Williamson Tobacco*, 113 S.Ct. 2578, 2587 (1993) ("[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

anticompetitive effects of business conduct outweigh the pro-competitive benefits, and are thus potentially illegal under the antitrust laws, this approach favors evaluating the economic efficiencies of conduct rather than the mere size of the firm in question.[14]

Courts today continue to use price as the main factor in the analysis of whether or not a firm's conduct is anticompetitive, despite the rapid evolutions in technology and market conditions over the last 50 years—particularly in advertising-supported online platforms that facilitate communication and help consumers manage their identities.[15]

Certainly, price considerations can be relevant even when products are free to the consumer. For example, in *United States v. Microsoft*, the D.C. Circuit considered price arguments from both parties when determining whether or not Microsoft's integration of Internet Explorer into Windows at no extra cost to consumers violated sections 1 and 2 of the Sherman Act.[16]

Nonetheless, price cannot be the sole metric for evaluating conduct by Internet platforms, particularly those that offer free services in exchange for collecting and aggregating historic user data. In this context, current antitrust doctrine does not capture the full range of consumer harms. Without effective competition, users must either accept the platforms' terms of service, which include the right to moderate and censor content with minimal or no transparency, and no meaningful appeals processes, or go without the service entirely. With no competing platforms to drive the adoption of terms more favorable to consumers, or to provide alternatives for

measure of its rival's costs"); *Palmer v. BRG*, 111 S.Ct. 401, 402 (1990) (considering price increase following agreement between firms as evidence of violation of per se rule against price fixing.); *see also* U.S. Dep't. of Justice and Fed. Trade Comm'n, *Horizontal Merger Guidelines* § 4.1.3 (2010) ("*Merger Guidelines*"), https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf

[14] *See Antitrust Law* at 52.

[15] *See id.*; Roomy Khan, *Google, Facebook and Others: Are They Offering Enough for Using the Consumer* Created *Content?*, Forbes (May 3, 2018), https://www.forbes.com/sites/roomykhan/2018/05/03/google-facebook-and-others-are-they-offering-enough-for-using-the-consumer-created-content/.

[16] *See U.S. v. Microsoft*., 253 F.3d 34, 64 (D.C. Cir. 2001).

consumers when a platform's policies fail to serve them, platforms can hold their users captive. These are real harms, despite having nothing to do with price; price is not a sufficient proxy for consumer welfare in the digital platform economy.

Neither the Sherman Act nor the Clayton Act mandate a myopic focus on price or otherwise limit the use of alternative indicators of consumer welfare.[17] And broadening the consumer welfare standard need not mean abandoning a rigorous approach. The harm of censorship can be measured much like price. Today, courts and agencies evaluate market power with the hypothetical monopolist test, in which a firm's monopoly power is tested by its ability to impose a SSNIP (small but significant non-transitory increase in price) without losing profits.[18] Similarly, a platform monopolist would be able to censor or otherwise control online discourse in ways that would reduce the service's value to users, limiting the amount of expressive, communicative, and informational content they can access and share with each other (or excluding some users entirely) without a corresponding reduction in profits. This effect is consistent with Facebook's current metrics, as its advertising revenue continues to increase despite reaching a plateau in user growth.[19]

We do not advocate for a return to the pre-Chicago standard of "big is bad," but rather an updated consumer welfare standard that recognizes censorship as a cognizable harm to consumer welfare, and therefore an indicator of anticompetitive effects of digital platform market power.

III. The FTC Should Revitalize the Essential Facilities Doctrine to Address Internet Platform Dominance and Censorship.

The Commission should also revitalize the essential facilities doctrine to address Internet platform censorship. The first appearance of the doctrine is widely

[17] *See* Sherman Act, 15 U.S.C. §§ 1 & 3 (addressing "restraint of trade"); § 2 (addressing monopolization); *see also Image Technical*, 125 F.3d at 1214 ("Antitrust law seeks to promote and protect a competitive marketplace for the benefit of the public.").

[18] *See Merger Guidelines* at § 4.1.3.

[19] *See* Katie Canales and Shayanne Gal, *Facebook's user growth is showing signs of stalling out*, Business Insider, (Jul. 26, 2018), https://www.businessinsider.com/facebook-user-growth-charts-2018-7.

traced back to the 1912 *U.S. v. Terminal Railroad* case.[20] In that case, the Supreme Court recognized that there are certain circumstances where one firm has control over a certain asset or resource that a competitor needs access to in order to compete.[21] The Court has held in numerous cases that refusal to grant competitors access to essential facilities, resources, and services can constitute a violation of antitrust law:

- In *Terminal Railroad*, the Court held that a bridge owned by the defendant railroad company was essential to trade because in order to effectively compete, railroads needed to have the ability to cross the Mississippi River.[22] Because the bridge was essential to trade, the railroad company's restrictions on competitors' access to it constituted a violation of antitrust law.[23]

- In 1945, the Court extended the doctrine to intangible property by applying the doctrine to news. In *Associated Press v. U.S.*, the Court held that news provided by Associated Press's members was necessary for rival newspapers to survive in the market.[24] Thus, AP's attempt to preclude non-members from accessing member news constituted a violation of antitrust law.[25]

- In *Lorain Journal v. U.S.*, the Court held that refusing to accept advertising from businesses that placed advertisements with a local radio station constituted a violation of antitrust law because the defendant's newspaper served as an "indispensable medium" for advertisers.[26]

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[20] Robert Pitofsky et al., *The Essential Facilities Doctrine Under United States Antitrust Law*, 70 Antitrust L.J. 443, 445 (2002).

[21] *See Terminal Railroad*, 224 U.S. 383, 397 (1912); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977).

[22] *Id.*

[23] *Id.*

[24] *Associated Press*, 326 U.S. 1 (1945).

[25] *Id.*

[26] 342 U.S. 143, 186 (1951).

In evaluating these claims, the Seventh Circuit developed a general framework.[27] To determine whether an asset is an essential facility, the Seventh Circuit framework requires that the asset meet four requirements:

1. It must be controlled by a monopolist;
2. The monopolist's competitors could not reasonably duplicate it;
3. A competitor is denied access to it; and
4. It would be feasible for the monopolist to provide access to the competitor.[28]

This approach has been widely adopted by "virtually every court to consider an essential facilities claim."[29]

Monopolist Control. Major social media platforms have proprietary control over users' social graphs and other personal data. They maintain this control by means of lawsuits under the Computer Fraud and Abuse Act, the Copyright Act, and other legal mechanisms.[30]

Competitors are Unable to Duplicate. The nature of a user's social graph is such that it cannot reasonably be duplicated; a user's transaction costs involved in attempting to reproduce their social graph are prohibitively high. These transaction costs include not only the amount of time and effort that a user must reinvest, but also the cost of foregoing participation in social interactions that give rise to network effects.

The concept of a social graph revolves around the relationships that a user has reflected in their online presence. Creating one is a time-consuming process that requires considerable investment from the user. In the current digital age, it is commonplace for users to have spent upwards of ten years curating their graph. Social graphs often reflect accurate and detailed accounts of users' personal and

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[27] *See* Pitofsky, *supra* note 27, at 447.

[28] *MCI v. AT&T*, 512 U.S. 21 (1994).

[29] Pitofsky, *supra* note 27, at 449.

[30] *See, e.g.*, *Facebook, Inc. v. Power Ventures, Inc*, 91 U.S.P.Q.2d 1430 (N.D. Cal. 2009).

professional journeys through life, and those accounts cannot feasibly be replicated from scratch.

The value derived from this graph is the ability for an individual to expand their real-life persona into the digital realm and maintain connections to those whom they may not have been able to in the past. Thus, without the ability to transfer their social graph to a new platform and maintain those connections the transaction costs of leaving one service for a competitor are prohibitive. Even if an individual is willing to reinvest time and effort, a competing platform will be less valuable to them unless others in their network are also willing to make that substantial investment in the same alternative platform. This creates barriers to entry for new platforms by making it difficult to attract new users, despite the potential for offering a superior service.

Because of the realities of this significant investment and barrier to entry, social graphs housed on dominant platforms that prevent users from leaving are analogous to a bridge over the Mississippi or access to news. Just as in *Terminal Railroad*, in which competitors needed access to the bridge in order to carry customers' freight across the river, platform competitors need to be able to provide access to the user's well-established social graphs to overcome the incentives to stay where they are. As in *Associated Press*, where a competitor needed to be able to offer its customers an intangible good in order to offer a comparable product, potential competitors of dominant platforms need to have a way to allow users to port their social graphs over to the new platform. Without the ability to do so, the transaction costs of changing platforms will remain too high. The practical consequence is that the graphs cannot be duplicated.

Competitors Denied Access. Dominant platforms routinely deny access to competitors, including indirect access through users porting their data. Facebook, for example, has historically viewed individual contact information of users as a competitive advantage and sought to prevent both users and competitors from downloading the data, keeping it locked within Facebook's services.[31] Facebook has recently joined an initiative with other large Internet platforms called the Data Transfer Project that seeks "an open-source, service-to-service data portability

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[31] Kevin Bankston, *How We can 'Free' Our Facebook Friends,* New America Foundation (June 28, 2018), https://www.newamerica.org/weekly/edition-211/how-we-can-free-our-facebook-friends/.

platform."[32] However, we are concerned that this initiative may deflect legal and regulatory scrutiny without providing effective portability.[33] Without the technical means of porting user data between services, potential competitors face the daunting task of convincing users to abandon their investment in incumbent platforms.

Feasibility of Access. While interoperability between online services can be challenging, we believe that it is feasible.[34] Moreover, new European Union requirements for data portability mean that platforms are moving towards greater user access to personal data.[35]

While courts have narrowed the essential facilities doctrine in recent years, it has not been repudiated.[36] We believe that the anticompetitive and censorship harms that dominant platforms impose are a type of problem the essential facilities doctrine was designed to address. That we are already seeing the harmful effects of Internet platform dominance makes the timing ideal for a fresh look at the doctrine.

Doing so would help to give users a more meaningful choice over the platforms they use and create space for the emergence of new platforms on which to voice their opinions, share news, and communicate with each other. As mentioned previously, online filtering and moderation are not per se problematic. Filtering and moderation become censorship when used to exclude a person or message from a platform with the result that the individual has no equivalent place to voice opinions or hear others. Thus, by increasing the opportunity for alternative platforms to flourish where individuals can meaningfully express their opinions, we can reduce the harm and danger of censorship by dominant Internet platforms.

A fresh application of the essential facilities doctrine does not mean requiring Internet platforms to interoperate with all services on request.[37] The owner of an

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[32] https://datatransferproject.dev/ (accessed Nov. 15, 2018).

[33] Cyphers & O'Brien, *supra* n. 12.

[34] *Id.*

[35] *See e.g.,* GDPR Art. 20;

[36] *Verizon Communications v. Law Offices of Curtis v. Trinko,* 540 U.S. 398, 411 (2004).

[37] *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (accused monopolist has no "unqualified duty to cooperate" with competitors).

essential facility is not necessarily a common carrier. Indeed, imposing common carrier duties on social networks would be inappropriate, and would itself risk speech harms. In contrast, the availability of essential facilities claims by competitors who can show an anticompetitive denial of access would promote a diversity of approaches to content moderation and other user concerns. The availability of such claims would encourage the development of new social media competitors in the first instance.

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We request that the FTC consider these arguments in order to reframe antitrust doctrine for the Internet platform economy. We must create a new conception of the consumer welfare standard to ensure that antitrust laws properly protect consumers in the digital marketplace where price is no longer the most effective means of measuring market power. A broader view of consumer welfare will recognize censorship as a form of diminished product quality that harms consumers.

Respectfully submitted,

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