

## Facebook Is Not An Illegal Monopoly

By **Kristen Limarzi** (January 24, 2020, 5:37 PM EST)

In the recent law review article, "The Antitrust Case Against Facebook,"[1] former digital advertising executive Dina Srinivasan outlines a possible monopolization claim against Facebook Inc. that has generated buzz on the antitrust conference circuit and even a profile in the Wall Street Journal.[2]

Her thesis is that Facebook secured monopoly power by offering its customers better privacy protection and, then, having eliminated the competition, went back on its promises and degraded the quality of its product. Today, Srinivasan claims, Facebook is free to collect its customers' data, the modern-day equivalent of monopoly rents.



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That Srinivasan's theory is novel is no reason to condemn it. Companies can be endlessly creative in their efforts to stifle competition. Nor is the theory deficient because it relies on nonprice competition. Quality effects receive equal attention in modern antitrust enforcement. But the antitrust laws only condemn monopoly power that is acquired or maintained by excluding rivals. And Facebook's evolving privacy policies haven't excluded anyone.

### The Requirement of Exclusionary Conduct

The United States flirted with outlawing monopolies entirely in the 1960s and 1970s, based largely on the structure-conduct-performance paradigm. SCP posits that concentrated markets are more likely to result in anticompetitive conduct, which then yields inefficiency and poor performance. If true, the paradigm suggests that persistent market power presents an antitrust problem, regardless of how it was achieved.

But SCP has been thoroughly discredited. Many people attribute this shift to the right-leaning, so-called Chicago school, but the debunking of SCP was a largely bipartisan effort. It was University of California, Los Angeles economist Howard Demsetz who posited that fewer, more efficient competitors, rather than lack of competition, explained higher profit margins in concentrated industries.

More recent economic scholarship suggests that firms in concentrated markets both behave more competitively than some had assumed and achieve more beneficial economies of scale than previously thought. This may be particularly true in markets, like social media, where the product is actually more valuable to consumers the more people use it.

Thus, it's not enough to find that Facebook (or any other tech platform) has market power or even monopoly power. A viable monopolization claim requires proof that a company willfully acquired or maintained its monopoly power — not through competition on the merits or a superior product — but by anticompetitive or exclusionary conduct.

Exclusionary conduct can take many forms. For example, Dentsply International Inc. terminated dental supply distributors that carried its rivals' products, making it impossible for them to compete.[3] Microsoft Corp.'s exclusive arrangements with computer manufacturers forced Netscape Communications Corp. to adopt more costly and less effective distribution methods for its internet browser.[4] But whatever form exclusionary conduct takes, it always excludes or weakens rivals by means other than legitimate competition.

### **Predatory Quality Improvements as Exclusionary Conduct**

Srinivasan's theory most closely resembles a monopolization claim based on predatory pricing. In predatory pricing, a firm prices below cost, forcing its rivals, who cannot price so low, to exit the market. Having secured a monopoly position, the firm raises its price above competitive levels and recoups its losses.

The burden to plead and prove a predatory pricing claim is high, with good reason. Price cutting so obviously benefits customers that the antitrust laws should rarely condemn it. Thus, only illegitimate price competition — that is, pricing below cost and excluding rivals — violates the antitrust laws.

Here, Srinivasan posits that Facebook lured customers in with robust privacy protections, and, then, when rivals like MySpace Inc. exited the market, it abandoned those privacy protections and degraded the quality of its product. Like price cutting, quality improvements obviously benefit customers. But whereas pricing below cost tends to drive rivals from the marketplace, improving the quality of your product does not.

Rather, product improvements spur competition. Particularly in the case of social media, where the product is free, firms compete to improve quality and expand features. Rivals that are unable or unwilling to keep up with quality improvements are only the victims of legitimate competition, not illegal monopolization.

MySpace is a good example. As Srinivasan recounts, Facebook entered the market as a "privacy-centered alternative." Just as customers were clamoring for a safer alternative to MySpace, Facebook offered a product that "put privacy at the center of the user experience." MySpace made "little to no effort to address concerns around privacy." [5] But nothing that Facebook did prevented MySpace from improving its privacy policies — or any other aspect of its product — to better compete.

Likewise, Google Inc.'s Orkut and Google+ lost customers because they weren't mobile-friendly; Friendster Inc. because it focused more on crafting a profile than interacting with friends; and the list goes on. Social media rivals have come and gone, but none because they were excluded by Facebook's better privacy policies.

Srinivasan also charges that Facebook violated its privacy policies and deceived customers about how it was using customer data. And deception of buyers can support a monopolization claim, but only where it impedes the opportunities of rivals. That is so rarely the case that courts have adopted a presumption

that the effect of deception on competition is de minimus.

That is not to say that deception is without consequence — indeed, Facebook has agreed to pay hefty fines as a result of privacy issues. But unless there is evidence that the deception actually harmed competition, it's not an antitrust violation.

### **Facebook Facing Competition**

Stripped of evidence of exclusionary conduct, Srinivasan's theory amounts to a condemnation of Facebook because it is big. And if Facebook can indeed degrade the quality of its product without fear of competition, that is lamentable. But that sort of no-fault monopolization claim isn't cognizable under the law. Of course, it's also not necessarily true.

While Facebook remains the most widely used social media platform, Snapchat has an especially strong following among young adults.[6] In one survey, 45% of teens named Snapchat as their favorite social media platform, compared to 8% for Facebook.[7] And earlier this year, Bank of America Corp. reported that Facebook's mobile downloads dropped 15%, while downloads of Snapchat, Twitter and Pinterest all rose.[8]

Facebook appears to be responding to this competition. In the last few years, it has introduced an ephemeral messaging feature, Facebook Stories, and a camera-first messaging app, Threads, to better compete with Snapchat. Facebook also announced a move toward end-to-end encryption on its family of apps to ensure that neither Facebook itself or third parties can read users' data.

While some may debate how innovative these changes are or their various the costs and benefits, there is no doubt Facebook took these steps[9] in response to public demand for better privacy protection and competition from other social media platforms.

In other words, Facebook is changing its privacy policies in response to competition. True monopolists don't do that.

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***Disclosure: Although the firm has done work for Facebook, it is not representing Facebook in the pending antitrust investigations.***

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[1] Dina Srinivasan, The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy, 16 BERKELEY BUS. L.J. 39 (2019).

[2] Jeff Horwitz, See Argued Facebook Is a Monopoly. To Her Surprise, People Listened., Wall St. J. (Dec. 10, 2019), <https://www.wsj.com/articles/yale-law-grads-hipster-antitrust-argument-against-facebook-finds-mainstream-support-11575987274> (last visited Jan. 22, 2020).

[3] United States v. Dentsply Int'l, Inc., 399 F.3d 181 (3d Cir. 2005).

[4] United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

[5] Srinivasan, *supra* at 48.

[6] Andrew Perrin & Monica Anderson, Share of U.S. adults using social media, including Facebook, is mostly unchanged since 2018 (April 10, 2019), <https://www.pewresearch.org/fact-tank/2019/04/10/share-of-u-s-adults-using-social-media-including-facebook-is-mostly-unchanged-since-2018/> (last visited Jan. 22, 2020).

[7] Infographic, Piper Jaffray 35th Semi-Annual Taking Stock with Teens Survey (Spring 2018), [https://mms.businesswire.com/media/20180410006093/en/650797/5/CM-18-0285\\_TSWT\\_Spring\\_Infographic\\_11x17.jpg?download=1](https://mms.businesswire.com/media/20180410006093/en/650797/5/CM-18-0285_TSWT_Spring_Infographic_11x17.jpg?download=1) (last visited Jan. 22, 2020).

[8] Lauren Feiner, Facebook and Instagram app downloads are declining, says BofA (Sept. 9, 2019), <https://www.cnbc.com/2019/09/09/facebook-and-instagram-downloads-are-declining-bank-of-america-analysis-says.html> (last visited Jan. 22, 2020).

[9] Elizabeth Dwoskin, Facebook's Mark Zuckerberg says he'll reorient the company toward encryption and privacy, Wash. Post (March 6, 2019), <https://www.washingtonpost.com/technology/2019/03/06/facebooks-mark-zuckerberg-says-hell-reorient-company-towards-encryption-privacy/> (last visited Jan. 22, 2020).