Rethinking Communications Policy: The Proper Scope of the FCC in a Broadband World

HAL SINGER

Suggested Reading

- *Need for Speed* (Brookings Press 2013)
- *Vertical Integration in TV Markets* (Review of Network Economics 2013)
- Testimony (House Energy and Commerce Committee June 2013)
- *Net Neutrality Is Bad Regulation* (Economists' Voice 2010)
- *Rent-Seeking in Secondary Markets* (Federal Communications Law Journal 2013)

Proper Scope of Regulation

- To fill gaps in antitrust enforcement
- Implies that FCC should have more limited role, particularly in areas that fall squarely within antitrust purview (merger review)
- FCC should retain role in policing conduct that generates a harm not cognizable under antitrust law
  - Discrimination by access provider that is vertically integrated into content

What Is Purview of Antitrust?

- To fill gaps, one must understand purview of antitrust
- Antitrust concerned with exercise of market power
  - Typically manifests in the form of price effect
- Monopoly power requirement for single-firm conduct
  - Direct measures
  - Indirect measures: Market share in some relevant market > 50-55%

Monopoly Power Requirement

- Video
  - Average local share cable ~58%
  - Largest national share ~23%
- Wireline broadband
  - Average local share cable ~56% (download > 200 kbps as of June 2011)
  - Average local share cable ~71% (download > 3 Mbps as of June 2011)
  - Largest national share ~ 23%
- Wireless
  - Average local share ~ 34%
  - Largest national share ~ 34%

Scope of Antitrust Enforcement

- Plaintiff could survive monopoly-power requirement in complaint asserting ***local market power*** for video and for wireline broadband
- Plaintiff could not survive monopoly-power requirement in complaint asserting ***national market power*** in any communications market
- Takeaway: Little scope for antitrust enforcement

What Is Purview of Antitrust?

- Conduct that produces cognizable harm
  - Mergers, conspiracies
  - Exclusive dealing, tying, bundling
  - Harm takes form of price increase/output reduction
- Conduct that may not produce cognizable harm
  - Discrimination / favoritism by vertically integrated firm
  - Harm takes form of loss of innovation/diversity

Understanding the Gaps

- Case study: Google's favoritism of its websites
- Case study: Microsoft's integration of browsers
- Case study: FTC's investigation of Transitions
- Takeaway: Vertical conduct that occurs inside the firm is generally walled off from antitrust scrutiny

Merger Review

- Horizontal mergers fall squarely in domain of antitrust
- Redundant review encourages rent seeking by competitors
  - Small wireless carriers repeatedly seeking mandatory roaming, handset interoperability, bans on handset exclusivity
- Discourages procompetitive mergers
  - Rents are bid away by rivals
- May even encourage anticompetitive mergers
  - Salop: Constituencies can be bought off

Vertical Integration and Access to Affiliated Content

- Creates incentives to price certain content beyond levels chosen by independent provider
- Caves/Singer 2013: Cable-affiliated RSNs charge more, and overcharge increases with size of downstream footprint
- Why care? Raises rival's costs (higher cable prices) OR reduces output (when rival distributors elect to tier or not to carry)
- Policy: Permit but police ex post with program access (FCC); can't use arm-length contracts as benchmark

Vertical Integration and Carriage/Handling of Independent Content

- Vertical integration from pipes into content creates incentive to discriminate in favor of affiliated content
- Incentives can also be created by exclusive contracts
- Can make life difficult for independent content providers
- Two policy options:
  - Structural separation (Tim Wu)
  - Ex post policing of discriminatory acts (Hahn, Litan, Singer, Yoo)

Who Should Be in Charge of *Ex Post* Enforcement?

- FTC/Fed. District Courts (antitrust law) or FCC (public interest)
- Problem with antitrust
  - Moves too slowly
  - Not as concerned with loss to innovation/reduction in diversity
  - Market power requirement will never be met
- Problems with FCC
  - Potentially more politicized

Lessons from the Cable Act

- Section 616 prevents vertically integrated cable operator from considering upstream benefits when making carriage decisions ("program carriage")
- When passed, the largest cable operator (TCI) supplied less than 20% of video households
- Implies that the Act went beyond antitrust protection
  - If meant to be duplicative, then all cable operators were immunized

Ex Post Adjudication of Carriage Disputes at the FCC

- Independent complains to Media Bureau (gatekeeper); case referred (or not) to ALJ
- Independent bears burden of proving
  - Similarly situated to affiliated network
  - Conduct materially impaired its ability to compete
  - DC Circuit (Tennis): Must show that incremental cost of broader carriage exceeds the benefits (in terms of reduced churn)

"*Ex Post*" Adjudication of Discrimination on the Internet

- FCC's Open Internet Order claims they have embraced *ex post* review:
  - Footnote 229: More tolerant than the "flat ban" on priority contracts proposed in the NPRM
- But by declaring such contracts "unlikely" to satisfy the standard , the Order effectively regulates them out of existence
- Need to reverse the presumption

Net Neutrality Redo

- Drop the name "net neutrality" and replace with "discrimination"
- FCC needs authority from Congress
- Embrace similar *ex post* adjudication of discrimination complaints from video industry
- Presume priority contracts are efficient but permit presumption to be overturned by complaining website
- Same mechanism could be used to police discrimination by vertically integrated search engines

Regulation of Wireless?

- Clearly no scope for antitrust enforcement given market structure
- But hard to conceive of harms that are not recognized by antitrust law
  - No analogous role for wireless-specific content creators
  - Handsets are largely interchangeable from consumers' perspective
  - Spectrum/equipment is interchangeable
  - No much in the way of integration into wireless-specific content
- Implies fairly hands off regulatory environment

Spectrum Policy

- "Success" is defined by FCC/DOJ staff as minimizing wireless concentration
- Concentration is a fuzzy measure and inferior to direct measures of pricing power
  - Lots of different kinds of players
- Concentration has held steady since 2008 but prices have continued to decline

Wireline/Wireless Convergence

- Leichtman Research: Hundreds of thousands of Americans canceled their home landline Internet service in 2012 for wireless connections
- Dish's chairman: One third of all Americans one day could find it more efficient to get their home Internet service wirelessly
- Cisco IBSG: Projects up to 15 percent of U.S. consumers could "cut their cord" in favor of a mobile data connection by 2016
- Samsung: Mobile networks could supplant wireline broadband by 2020

Policy Implications

- If FCC took light-handed approach to discrimination on the Internet, no need for wireless carve-out
- Further wireless concentration should be tolerated when one recognizes inter-modal competition and massive economies of scale
  - Short term: FCC should permit large carriers to bid for broadcaster spectrum with possible limitation on how much new spectrum each can be acquire in a given local market
  - Long term: Congress should assign review of secondary market transactions to antitrust agency; alternatively, Congress should clarify the criteria under which parties are permitted to file petitions to deny spectrum transactions at the FCC