COMMENT OF HARPERCOLLINS PUBLISHERS, LCC TO THE FEDERAL TRADE COMMISSION RE: COMPETITION AND CONSUMER PROTECTION IN THE 21ST CENTURY HEARINGS, PROJECT NUMBER P181201

Comment Submitted by

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August 20, 2018

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CONTENTS

The comment below is submitted on behalf of HarperCollins Publishers, LLC ("HarperCollins"). HarperCollins greatly appreciates the Federal Trade Commission's ("FTC") attention to these matters, and we would be happy to supplement this comment with additional information or insight, if that would be helpful to FTC's mission.

I. Introduction

Seminal antitrust enforcement actions often arise during major market developments. In 1890, the Sherman Act itself was passed in response to rapid consolidation among large U.S. manufacturers. In 1910, after Standard Oil's exclusionary agreements with railroad companies threatened the entire U.S. oil industry, the government's enforcement of the Sherman Act led to the Supreme Court's adoption of the rule of reason, and the breakup of Standard Oil. In the 1940s, after an oligopoly of U.S. film studios had taken over the movie exhibition market, FTC and Department of Justice ("DOJ") brought an enforcement action that led to the "Paramount Decree," which still affects competition among movie producers and exhibitors today. In the 1970s, AT&T held a monopoly over local and long-distance telephone services, which had recently become available to customers all over the country due to major technological innovations. DOJ responded by forcing AT&T to divest its local telephone business, leading to a surge of competition from companies like Sprint, and the creation of what would become Verizon and CenturyLink. And in the 1990s, following the proliferation of personal computers and the emergence of the internet, DOJ sued Microsoft after it attempted to use its monopoly over operating systems to foreclose its nascent rival. That decision still serves as key Section 2 precedent almost 20 years later.

Which leads us to today. Major global platforms now pervade the U.S. economy—the top five most valuable public companies in the U.S. *all* operate massive platforms: Amazon, Apple,[1] Alphabet, Microsoft, and Facebook. For these companies combined, total reported net sales or revenues for fiscal year 2017 (dates vary between companies) was approximately $650 billion.[2] The emergence of these platforms, and their unprecedented accumulation of wealth, consumer data, technology, and influence, is a historic development equal if not greater in significance to the situations described above. Unlike Standard Oil, the film industry, AT&T, and even Microsoft in the 90s, platforms today operate in every corner of the economy, and indeed, consumers' lives. Simply put, they provide the primary technological infrastructure through which Americans consume. They collect and sell data; they produce and distribute consumer products; they sell apps, games, operating systems, and a bevy of software; they dominate online search and offer advertising, cloud computing, and communication services, including email, instant messenger, and photo sharing; they release and distribute movies and television shows; and they deliver products online and to our doorstep. In reality, most Americans use platforms on an hourly basis and literally walk around with them in their pockets. Some dominant platforms have reached such scale and have so many ties to consumers that no supplier can avoid doing business with them, and suppliers must play by the platform's rules in order to reach those consumers. In other words, anticompetitive conduct by dominant platforms has the potential to

[1] Apple recently became the first company ever to reach $1 trillion in market value, and Amazon is not far behind.

[2] *See* Amazon.com, Inc., Annual Report (Form 10-K) (Feb. 1, 2018) (reporting 177,866 millions of dollars in net sales for the year ended December 31, 2017); Apple Inc., Annual Report (Form 10-K) (Nov. 3, 2017) (reporting 229,234 millions of dollars in net sales for the year ending September 30, 2017); Alphabet Inc., Annual Report (Form 10-K) (Feb. 5 2018) (reporting 110,855 millions of dollars in revenues for the year ending December 31, 2017); Microsoft Corporation, Annual Report (Form 10-K) (Aug 2, 2017) (reporting 89,950 millions of dollars in revenue for the year ending June 30, 2017 while noting that this reflects net revenue deferral from Windows 10 of $6.7 billion); Facebook, Inc., Annual Report (Form 10-K) (Feb. 1, 2018) (reporting 40,653 millions of dollars in revenue for the year ended December 31, 2017).

harm competition and direct customers, including consumers and businesses alike, across countless markets.

As a result, FTC will need all of its tools under the Sherman and FTC Acts to maintain and encourage competition among existing and emerging platform rivals, and to ensure that these platforms do not erect insurmountable barriers to potential entrants, even if that means testing the boundaries of FTC's authority. With respect to platforms, FTC should take a flexible approach when analyzing competitive effects under the consumer welfare standard, which, when properly applied, condemns anticompetitive conduct that not only impacts price and output, but also limits customer choice, reduces product quality, and stifles entry and innovation.[3] FTC should aggressively police traditional anticompetitive behavior and unfair competition, and also implement modern interpretations of the Sherman and FTC Acts that explicitly account for the unique challenges raised by dominant platforms. Otherwise, as discussed below, these platforms could cause irreparable damage to competition within any number of U.S. markets.

II. HarperCollins has extensive experience dealing with platforms

HarperCollins publishes and sells print books, e-books, and audio books to consumers all over the world. For decades, HarperCollins has had extensive dealings with platforms of many kinds, including Amazon, Apple, Google, Microsoft, and others. HarperCollins believes that platforms come in many different forms and that there is no one-size-fits-all approach for analyzing their conduct. As FTC deliberates on how to identify and evaluate issues like market power, exclusionary conduct or unfair competition, harm to competition, and the consumer

[3] Makan Delrahim, Assistant Attorney General, Dep't of Justice, Remarks at the Jevons Colloquium in Rome (May 22, 2018) ("I believe that three additional indicators of consumer welfare deserve greater attention in analyzing competitive effects in digital markets: innovation, choice, and quality.").

welfare standard in the context of platforms, HarperCollins recommends that FTC consider how those differences might impact the overall analysis.

Based on HarperCollins' experience dealing with platforms, HarperCollins would like to draw FTC's attention to the following topics, which we believe are at the forefront of platform competition today:

- First, online product discovery tools, including general and specialized search engines, have never been more important for U.S. commerce and yet, with few exceptions, consumers and suppliers know almost nothing about how they operate. This is particularly dangerous with regard to vertically integrated platforms, which produce and distribute their own products or services. Such platforms have the ability and may have the incentive to manipulate their product discovery tools to hide rival products or surreptitiously steer customers to their own products. The incentive of these platforms may not align with consumer welfare and therefore overall search quality.

- Second, Most-Favored-Nation ("MFN") clauses can cause serious harm to competition when implemented by dominant platforms. Although MFNs have the potential for creating cost-savings that can be passed to consumers, MFNs in favor of dominant platforms eliminate the ability for current and future rivals to compete with the dominant platform over price, or distribution terms, which deprives these rivals of an essential tool for winning sales and building their consumer base.

- Third, platforms that serve as retailers represent two distinct product markets. Platforms sell distribution services to suppliers in return for some form of payment, such as commissions or discounts; these services represent a distinct market in which the platform is the seller and suppliers are the direct customers. Thus, anticompetitive harm caused to suppliers in this market should be considered actionable apart from any effect on consumers.

- Fourth, platforms often sell marketing services to suppliers in conjunction with their distribution services. These marketing services are also a distinct market. Platforms with market power over distribution services are well-positioned to improperly tie their marketing services to their distribution services.

We appreciate the opportunity to comment on each of these issues, and encourage FTC to use the upcoming hearings as an opportunity to examine them in closer detail.

III. Dominant platforms can manipulate their discovery tools to deceive customers and exclude rivals

Online commerce is the fastest growing and most important area of commerce today. Online retailers offer consumers many benefits as compared to brick-and-mortar stores, including search engines and other discovery features. Search engines, including those offered by retail distribution platforms, allow customers to search for products across hundreds (if not thousands) of different options with the click of a button. Other discovery tools also help consumers find the products they are looking for. For example, with respect to books, "fantasy fiction," "recommended for you," and other lists provide customers with an easy way to refine their search or explore books within a particular category.

But as popular as these tools may be, they also pose a risk to consumers (even if they can be sorted or filtered). Consumers reasonably expect that search engines and other discovery tools are based on objective criteria, but this is not always the case. Platforms have total control over these features and they rarely explain in any meaningful detail why or how they are designed to operate. Moreover, platforms typically distribute products for most, if not all, suppliers in a given market, which gives the platform access to highly valuable commercial data for nearly all products and suppliers. These market-wide data are not available to any individual supplier, and they enable platforms to develop a comprehensive understanding of consumer demand. As a result, platforms are perfectly positioned to manipulate their discovery tools for their benefit.

To be clear, paid results are not always a bad thing. Platforms often sell visibility within these discovery tools to suppliers, and then label those results accordingly (such as "sponsored" links). Consumers understand that these products have been boosted to the front of the line and the platform can potentially pass on some of that marketing revenue to consumers in the form of lower prices.

But today, it is common for platforms to sell products under their own label within markets in which they also act as a distributor for other suppliers. Such vertically integrated platforms have the ability and may have the incentive to boost the discovery of their own products, even if it means harming competition or deceiving consumers. In contrast to "sponsored" links that are paid for by third-party suppliers, platforms largely do not notify consumers whatsoever when they provide their own products with an advantage within their own discovery tools. In fact, platforms have myriad ways in which they can favor their own products without informing the consumer. If a platform's products tend to be less expensive, but of a lower quality, it might weigh price more heavily than customer review scores within search results. Platforms can also design lists that favor characteristics unique to their own products without pointing this out to the consumer. Alternatively, a more aggressive platform might simply exclude rival products under certain circumstances or design its discovery tools such that rival products or products distributed by rival sellers always appear further down.

The above examples are important because, absent sufficient notice or transparency to the consumer, discovery manipulation can be a form of deception and unfair competition that harms consumers. When a platform designs its platform to favor its own products—whether it be through explicit exclusion or purposeful weighting—consumers' reasonable expectations of objective search criteria are violated. This is particularly true with respect to promotional lists and rankings because they are purportedly compiled based entirely on an objective criteria (such as "based on your search history" or "most sold") and almost never include labels or explanations to the customer about how these lists were compiled. By way of analogy, imagine a grocery store that labeled its own peanut butter "twice as popular" as the name brand alternative. Upon seeing this label, customers would assume that more people prefer the grocery store peanut butter over the name brand version. But if the grocery store counted free samples equal to full purchases, and it offered free samples of only its own brand, then the grocery store could say that its peanut butter was "twice as popular" as the name brand version even if it had never sold a single jar of its own peanut butter. This would be highly deceptive, but in the realm of online retail distribution platforms, analogous conduct is entirely possible. Unfortunately, platforms deliberately withhold information about the way they design their discovery tools from both suppliers and consumers, making it difficult to say how widespread such conduct may be.

Moreover, consumer choice is also harmed by discovery manipulation. In HarperCollins' experience, the further a product is listed from the top of any search results or promotional list, the less likely consumers are to click on it, and this is especially true for products listed on the second page. This means that depressing rival products within discovery tools can have the same effect as excluding the products altogether. And of course, each platform knows exactly how likely customers are to purchase (or not purchase) products based on where they appear within discovery tools on their platform, which means platforms can design their discovery tools to exclude rival products without creating the appearance of anticompetitive intent.

With respect to discovery tools, HarperCollins recognizes that the line between anticompetitive conduct and unfair competition on the one hand, and improvements to overall quality of search results on the other, can be blurry. We believe the following criteria may help clarify this distinction:

1. Is the manipulation motivated by exclusionary intent?
2. Is the manipulation intended to favor the platform's own products or vertical businesses?
3. Is the manipulation based on product quality overall, or is it based on cherry-picked variables?

4. Is the manipulation used as a means of gaining leverage over suppliers during or in anticipation of contract negotiations?

5. Is the manipulation conspicuously disclosed to consumers?

6. Is the manipulation congruent with customers' reasonable expectations based on how the discovery tool is presented?

With these criteria in mind, HarperCollins encourages FTC to use the hearings to investigate all popular product discovery tools. FTC's action could drastically improve consumer choice, and discourage vertically integrated platforms from deceiving customers now and in the future.[4]

IV. Dominant platforms can use MFNs to maintain their market power over distribution

It is widely accepted among regulators and economists that MFNs are a dangerous tool in the hands of a firm with significant market power.[5] Recent literature on this topic finds that this is equally true for dominant platforms, particularly with respect to platforms that operate under an agency model wherein the platform sells products for third-party suppliers at prices set by the

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[4] For example, FTC could adopt (and advocate for) a legal presumption of anticompetitive harm "when a platform has market power—such that it is unconstrained by user preferences—and plaintiffs show that the output of its algorithms disproportionately demotes competitors or promotes harmful content." *See* David Pitofsky, Comment of News Corp to the Federal Trade Commission re: Hearings on Competition and Consumer Protection in the 21st Century, Part IX (Aug. 20, 2018).

[5] *See, e.g.*, Jonathan B. Baker & Judith A. Chevalier, *The Competitive Consequences of Most-Favored-Nations Provisions*, 27 ANTITRUST 20, 22–25 (2013) ("An MFN can harm competition through exclusion by making it impossible for a dominant incumbent firm's rivals, including entrants, to bargain with input suppliers or distributors for a low price. When the suppliers or distributors have an MFN with a large incumbent, they would lose too much if they made that kind of deal with a small rival or entrant. In this way, the MFN discourages the rivals from lowering their own costs, and so prevents them from competing aggressively."); Steven C. Salop & Fiona Scott Morton, *Developing an Administrable MFN Enforcement Policy*, 27 ANTITRUST 15, 18–19 (2013) (summarizing the economic literature on the competitive effects of MFNs); *see also* Compl. at ¶ 46, *U.S. v. Blue Cross Blue Shield of Mich.*, No. 2:10-cv-15155 (E.D. Mich. Oct. 18, 2010) ("Prior to Blue Cross' obtaining MFNs, some hospitals gave greater discounts to some other commercial health insurers than they gave to Blue Cross. Without Blue Cross' MFNs, some hospitals had an incentive to offer lower prices to other insurers seeking to enter or expand in the hospital's service area and increase competition in the sale of commercial health insurance."); Compl. at ¶ 16, *U.S. v. Delta Dental of Rhode Island*, No. CA-96-113-ML (D.R.I. Feb. 29, 1996) ("Delta's MFN clause has reduced competition in Rhode Island dental services markets by inhibiting participating dentists from lowering their fees below the level paid by Delta. The clause's deterrent effect on discounting of dental services has led to the further exclusionary effect of preventing competing dental plans from offering limited-panel insurance plans at premiums significantly below those of Delta.").

supplier, and collects a commission from each sale; this literature is consistent with HarperCollins' real-world experience.

In a recent article published by the Yale Law Journal,[6] Jonathan Baker and Fiona Scott Morton explain why there is a "need for more vigorous antitrust enforcement" of platform MFNs.[7] Baker and Scott Morton make their case using Hotel.com as an example, while noting that other online platforms for "transportation bookings, consumer goods, digital goods, and handmade craft products are often similarly organized."[8] According to Baker and Scott Morton, Hotel.com uses a "platform MFN" to protect its dominant position in the market for hotel booking services. A platform MFN is defined as an agreement between a supplier and platform about the prices that the supplier will charge to consumers for products that it sells through rival platforms. Such MFNs prevent competition among platforms in the following ways.

In the absence of an MFN, a rival platform could compete with Hotel.com by charging a lower commission rate to hotels in exchange for lower prices on the rooms those hotels list on the rival platform (as compared to the price of the rooms listed on Hotel.com). This type of competition could be profitable for both existing competitors attempting to win sales from Hotel.com and new entrants trying to break into the market. The rival platform makes less money per booking than they would at the higher commission, but these lower commissions could be offset by the incremental bookings that occur due to the lower hotel prices. Moreover, the hotel benefits from this competition because it gets to keep a higher percentage of the revenue from each booking, and also has incremental sales due to the lower prices. And of course, consumers benefit from the lower prices as well.

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[6] Jonathan B. Baker, Fiona Scott Morton, *Antitrust Enforcement Against Platform MFNs*, 127 YALE L.J. 2176 (2018).
[7] ***Id***. at 2177.
[8] ***Id***.

But with a platform MFN in place, all the benefits of this competition disappear for the rival platform and potentially the hotel. The rival platform no longer has incremental sales sufficient to offset its reduced commission because Hotel.com also has the same price. For the same reason, the rival platform can no longer expect to grow its market share by winning sales from Hotel.com. Without the ability to draw users away from Hotel.com, the rival platform cannot benefit from the various network effects that reinforce a platform's attractiveness for users, such as customer reviews, customer Q&As, order histories, and so on. And if the rival platform cannot benefit from these network effects, it is much easier for Hotel.com to maintain its dominance. Moreover, if Hotel.com gets to keep its higher commission under the terms of its MFN, the hotels also lose money from lowering prices because they now make less money per sale at Hotel.com without any incremental sales at the rival platform to offset these losses. In other words, the platform MFN completely eliminates the incentive for rival platforms to engage in price competition with Hotel.com by offering to accept a lower commission (or some other form of valuable consideration), and could remove the incentive for hotels to support platforms with discount-driven business models.

Baker and Scott Morton also explain that these anticompetitive effects scale with the share of the dominant platform. The more that hotels agree to Hotel.com's platform MFN, the fewer hotels there are that can offer rival platforms discounted listings. Likewise, as Hotel.com's share of customers increases, so too does the potential cost of offering rival platforms discounted prices because Hotel.com will also receive the lower prices but without any offsetting decrease in its commission (depending on the terms of the MFN). Moreover, even in a market where no single platform dominates, platform MFNs "could [still] exclude the entry of rival platforms that would compete on price."[9]

Platform MFNs can also harm innovation. For example, a hotel listing platform might enter the market with an innovative business model in which it focuses on a small number of hotels, in exchange for exclusive deals. A market-wide platform MFN that covers price or room selection would completely prevent this type of innovation. Platform MFNs can even be drafted to explicitly cover business models, entitling the dominant platform to notice of any alternative business models and even the same terms. Such MFNs would significantly undermine the incentive for rivals to innovate and the ability for those rivals to gain an advantage over the dominant platform.[10]

Baker and Scott Morton conclude their article with the following: "The prevalence of MFN contract terms on online platforms and the steadily growing share of GDP spend on such platforms suggests that greater antitrust enforcement against anticompetitive platform MFNs could have noticeable benefits for productivity and consumer welfare."[11] HarperCollins could not agree more, and in fact, regulators in Japan, U.K., Germany, and the EU that have recently investigated the use of MFNs by dominant platforms have all determined that these MFNs could or likely would harm competition.[12] HarperCollins believes the upcoming hearings present a valuable opportunity for FTC to scrutinize the widespread use of MFNs by dominant platforms.

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[9] ***Id***. at 2197.
[10] *See* Commission Decision, (EC) Case AT.40153 – E-book MFNs and related matters of 4 May 2017, ¶¶74–90, *available at* http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40153. MFNs can also be viewed as vertical restraints that raise rival costs. MFNs disincentivize rivals from offering exclusivity (or some other form of valuable consideration) to suppliers in exchange for lower costs because the lower costs would also be owed to the dominant platform thereby negating any potential benefits to the smaller rival and potentially the supplier.
[11] Baker, *supra*, at 2201.
[12] *See, e.g.*, *Amazon online retailer: investigation into anti-competitive practices,* COMPETITION AND MARKETS AUTHORITY (Oct. 1, 2013), https://www.gov.uk/cma-cases/amazon-online-retailer-investigation-into-anti-

V. Distribution services is a distinct antitrust market in which suppliers are the customers and platforms are the sellers

Online retail platforms that distribute consumer products serve two customer groups.[13] On the one hand, these platforms sell products to consumers. On the other hand, platforms sell distribution services to suppliers. Distribution services are a key input for suppliers. First, distributors provide a secure website for consumers to find, purchase, and download / order products. Distributors also provide customer service and display detailed information about each product. And finally, distributors collect and remit the proceeds from each sale. In exchange for these services, distributors receive some type of payment from suppliers, whether it be a commission from each sale or a significant discount on the MSRP. Suppliers typically treat these payments as the price charged by the platform for its distribution services.

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competitive-practices; *Case Report: Amazon Removes Price Parity Obligation for Retailers on Its Marketplace Platform*, BUNDESKARTELLAMT (Dec. 9, 2013) https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2013/B6-46-12.html;jsessionid=B90A8E2C0A73D49A7B9ACA9979F7D8B1.2_cid362; *Online Hotel Portal HRS's 'Best Price' Clause Violates Competition Law—Proceedings Also Initiated Against Other Hotel Portals*, BUNDESKARTELLAMT (Dec. 20, 2013), https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2016/B9-121-13.html;jsessionid=839A9EACDDC0766595EF61CD9DDC88AA.1_cid362; *Private motor insurance market investigation, Final report*, COMPETITION & MARKETS AUTHORITY, ¶¶8.32-8.43 (Sept. 24, 2014), https://assets.publishing.service.gov.uk/media/5421c2ade5274a1314000001/Final_report.pdf; *Antitrust: Commission accepts commitments from Amazon on e-books*, EUROPEAN COMM'N (May 4, 2017), http://europa.eu/rapid/press-release_IP-17-1223_en.htm; *Report on e-Books Agreements from Amazon Services International, Inc.*, JAPAN FAIR TRADE COMM'N (Aug. 15, 2017), https://www.jftc.go.jp/en/pressreleases/yearly-2017/August/170815_files/170815_2.pdf.

[13] Online intermediaries often follow two models: the marketplace model or the retailer model. With the marketplace model, intermediaries connect suppliers directly to consumers, similar to a bazaar. With the retailer model, intermediaries sell products to the consumer without creating a direct connection between the supplier and consumer, similar to a typical store. This section focuses on the retail model rather than the marketplace model. It is worth noting that the formal selling arrangement that exists between the supplier and platform does not necessarily dictate which model—retailer versus marketplace—the platform operates; the antitrust analysis must be based on the "actual market realities" rather than "formalistic distinctions." *Ohio v. American Express Co.*, 585 U.S. __, 138 S. Ct. 2274, 2285 (2018) (quoting *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 466-67 (1992)). Also, some online platforms operate under both the retail model and the marketplace model.

These distribution services represent a cognizable market under U.S. antitrust law,[14] and anticompetitive harm to suppliers within this market should be considered actionable by FTC.[15] Although anticompetitive harm to suppliers is likely to harm consumers due to pass through effects, as discussed below, consumer harm should not be a prerequisite for antitrust enforcement because suppliers are direct customers within this market as properly defined.

In *Ohio v. American Express Co.*,[16] the United States Supreme Court dealt with the question of whether two sides of the same platform should be treated as a single market such that harm to customers on one side of the platform should be weighed against benefits to customers on the other side of the platform when analyzing vertical agreements under the rule of reason. This question arose when DOJ and several states sued American Express ("AmEx") for including "antisteering" provisions in its contracts with merchants, which prohibited merchants from encouraging cardholders to use credit cards with lower transaction fees. DOJ argued that these provisions allowed AmEx to charge merchants inflated transaction fees, but AmEx countered that the antisteering provisions were necessary for providing cardholders with special benefits and promotions. In a 5-4 decision, the Supreme Court ruled that credit card platforms should be treated as a single market.

[14] It may well be the case that there is a separate market for each different product category, but the main point is that a distinct market for distribution services exists between suppliers and platforms, and it is separate from the market between platforms and consumers.
[15] This proposed framework is not novel. *See, e.g.*, *Ticketmaster L.L.C. v. RMG Techs., Inc.*, 536 F. Supp. 2d 1191, 1193 (C.D. Cal. 2008) ("[T]he Court has no difficulty whatsoever in finding, as a matter of law, that ticket distribution services and tickets do not belong in the same market."); *N.W.S. Michigan, Inc. v. Gen. Wine & Liquor Co.*, 58 F. App'x 127, 128 (6th Cir. 2003) ("[Plaintiff] and the defendant… compete in Michigan's liquor distribution market … In the wine segment of the market, both companies are licensed wine wholesalers, providing warehousing and distribution services to wine suppliers."); *see also* Thomas G. Krattenmaker & Steven Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209, 226 (1986) ("[I]t is sometimes appropriate to describe the retailers as the 'upstream' firms, supplying retailing services … as inputs to 'downstream' [producers]…To assess claims of anticompetitive exclusion, the proper question is not which firm is a buyer and which a seller, but whether one (or both) is the purchaser of an exclusionary right that raises rivals' costs and gives the purchaser power over price in its market.").
[16] 585 U.S. __, 138 S. Ct. 2274 (2018).

In its decision, the Supreme Court reasoned that credit card platforms represent a single market because they fall into the category of "two-sided transaction platforms," which it defined as "platforms [that] facilitate a single, simultaneous transaction between participants."[17]

Online retail distribution platforms do not meet this definition. With respect to AmEx, its credit card enables customers on both sides of the platform to enter direct commercial relationships with each other, while simultaneously selling both customer groups transaction services. In contrast, online retail distribution platforms typically only facilitate relationships between the consumer and the platform, not the consumer and supplier. From the consumer's perspective, its relationship is with the platform because the platform collects its money, delivers the product, and provides customer service. In this sense, online retail distribution platforms are closer to a traditional retailer than a two-sided transaction platform.

The Court also reasoned that, even when dealing with two-sided transaction platforms, "it is not always necessary to consider both sides."[18] A platform may represent two distinct markets "when the impacts of indirect network effects and relative pricing in the market are minor."[19] Such is the case with online retail distribution platforms. Indirect network effects exist where the value of the platform for customers on one side depends on how many customers value the platform on the other side. Credit cards exhibit significant indirect network effects; a credit card is more valuable to cardholders when more merchants accept it, and is more valuable to merchants when more cardholders use it. For this reason, if AmEx increased its annual fee to cardholders and lost cardholders in the process, the value of that credit card would decrease for merchants. If merchants, in turn, ceased accepting the credit card, then the platform would have

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[17] *Id*. at 2286.
[18] *Id*. at 2285.
[19] *Id*. at 2286.

even less value to cardholders, creating a "feedback loop of declining demand."[20] Therefore, credit card platforms must take these indirect network effects into account when setting prices for both cardholders and merchants.

Online retail distribution platforms do not contend with the same level of indirect network effects. Although the value of a platform increases for consumers the more suppliers sell through that platform, the value of a platform to suppliers is less dependent on the number of users. Google is the perfect example; Google sells less than two percent of HarperCollins' e-books in the U.S., but HarperCollins still purchases e-book distribution services from Google because it is economic to do so even at a smaller scale. For this reason, unlike credit cards, the price an online retail distribution platform charges consumers for access to its platform has little impact on suppliers' demand for its distribution services.[21]

Therefore, online retail distribution platforms should be viewed by FTC as serving two separate markets—one in which the platform sells products to consumers and one in which the platform sells distribution services to suppliers—because such platforms do not meet the definition of a two-sided transaction platform identified by the Supreme Court. And even if they do, such platforms do not exhibit the requisite level of indirect network effects to justify a combined market analysis. FTC should not overlook the potential anticompetitive harm these platforms may be imposing on suppliers within product distribution markets, such as with the tying tactics discussed below. Such harm is actionable under U.S. antitrust law irrespective of its effect on the ultimate consumers because those consumers do not exist within the relevant

[20] *Id*. at 2281.
[21] HarperCollins also believes that anticompetitive practices by online retail distribution platforms that harm suppliers in the market for distribution services for particular products will inevitably harm consumers of those products, and such practices would therefore be found anticompetitive under a combined market analysis.

market. HarperCollins urges FTC to use the hearings to explore this important market definition issue.

VI. Dominant platforms are well-positioned to tie distribution services to marketing services

As discussed above, many suppliers are customers of platforms with respect to product distribution. But suppliers are also customers of platforms in another market—online advertising and marketing services. Indeed, platforms that distribute products often sell advertising and marketing services, and this makes perfect sense. Platforms design their websites to enable customers to search for products using discovery tools that can be infused with various advertisements, and platforms also collect data from all of their users and suppliers, which means they can offer targeted promotions. Platforms that distribute products can also offer something that most advertisers cannot—proof of increased purchases following an advertisement or promotion. As a result, platforms that distribute products typically sell advertising and marketing services as well.

These advertising and marketing services come in many forms. For example, platforms may sell favored placement within search results; establish special lists that focus entirely on one supplier's products; sell banners or promotional graphics; or include particular products within popular discovery tools, such as "new & notable" or "products that we love." In addition, platforms typically will meet with suppliers to discuss how best to promote their products, and provide suppliers with regular reports on the effectiveness of past advertisements or promotions. But all of these services come with a price.

There is nothing inherently anticompetitive about platforms charging for advertising and marketing services. However, if a platform gains market power over distribution within a particular product market, it may also gain the incentive to tie its advertising and marketing services to its distribution services. For example, dominant platforms may refuse to distribute certain products absent a minimum level of advertising spend per year by the supplier; agree to economically viable terms with respect to distribution only if the supplier pays an increased amount on advertising; or threaten to significantly degrade the value of its distribution services by manipulating its discovery tools to make the suppliers' products difficult or impossible to find.

HarperCollins believes that the above tactics would qualify as an anticompetitive tie under established U.S. antitrust precedent, assuming they are carried out by a platform with market power over distribution services.[22] In the examples above, the platform is conditioning the purchase of one product—distribution services—on the purchase of another product—advertising services. This tie is the result of threats or economic coercion, and given most suppliers' significant advertising spend, this conduct certainly impacts a substantial amount of commerce in the advertising services market. Finally, and most importantly, such conduct harms competition for advertising and marketing services because rival platforms cannot compete for any of the tied advertising dollars. And just like the distribution market discussed in Section V, anticompetitive harm to suppliers is sufficient to bring an enforcement action because suppliers are the customer in the market for marketing and advertising services.

Given the proliferation of distribution platforms that also sell marketing and advertising services, HarperCollins invites FTC to use the hearings to investigate the manner in which platforms link distribution services to advertising and marketing.

[22] *See, e.g.*, *Kaufman v. Time Warner*, 836 F.3d 137, 141 (2d. Cir. 2016) ("To state a valid tying claim under the Sherman Act, a plaintiff must allege facts plausibly showing that: (i) the sale of one product (the tying product) is conditioned on the purchase of a separate product (the tied product); (ii) the seller uses actual coercion to force buyers to purchase the tied product; (iii) the seller has sufficient economic power in the tying product market to coerce purchasers into buying the tied product; (iv) the tie-in has anticompetitive effects in the tied market; and (v) a not insubstantial amount of interstate commerce is involved in the tied market.").

VII. Conclusion

In conclusion, we believe that platforms have the ability and may have the incentive to violate the antitrust and unfair competition laws in the U.S. through various forms of deceptive and exclusionary conduct. HarperCollins urges FTC to meet this challenge with renewed focus on the conduct of dominant platforms that now rule the U.S. economy. In the spirit of the original Pitofsky Hearings, FTC should not be afraid to investigate the application of traditional theories of harm to modern technology and new business practices. We would encourage FTC not to focus only or primarily on price and output effects and instead strongly consider whether decreased quality or consumer choice, or the stifling of innovation and entry, is of greater importance in the context of dominant platforms, and issue new guidance that curtails future abuses.

HarperCollins would welcome a regulatory framework for platforms that ensures that the largest platforms can continue to develop, but also allows for new and smaller rivals to be able to emerge, innovate, and grow so that consumers have a range of choices for discovering and purchasing consumer goods, including books. HarperCollins fears that, absent forward-thinking applications of the antitrust laws, we soon are headed to a world where consumers may have no choice but to purchase from a single platform that is supplier, marketer, and distributor.

Again, HarperCollins appreciates the opportunity to comment on these important topics, and would be happy to discuss them further with FTC. HarperCollins is available to discuss any non-confidential information that FTC would find most useful to its efforts. Moreover, HarperCollins' business personnel look forward to discussing these issues further in the context of the hearings.