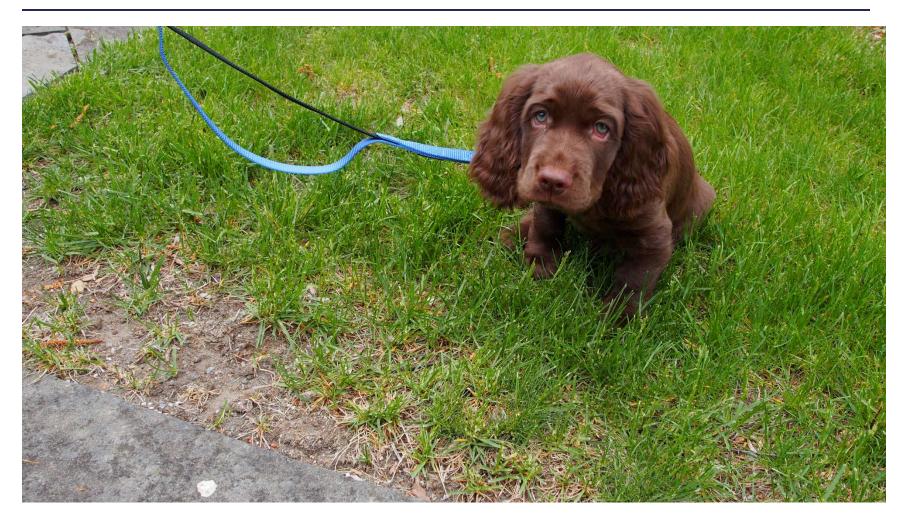
Muzzling Antitrust:

Information Product Redesign, Innovation & Free Speech

New York State Bar Association – Antitrust Section May 18, 2016

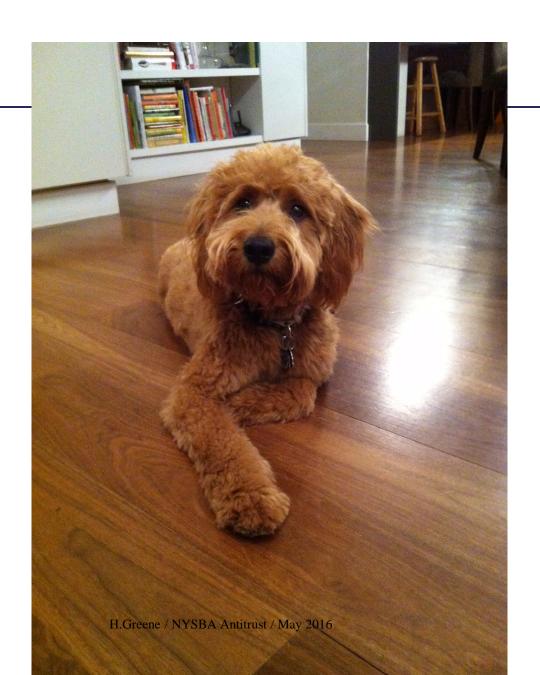
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Milo 2.0



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Milo 1.0



Information products

"[A]nything that can be digitized.... [B]aseball scores, books, databases, magazines, movies, music, stock quotes, and Web pages are all information goods...."

CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY 3 (1999)

Information products (re)design

- Google rankings
 - Approximately 70% of general search engine market
 - Changes to search engine algorithm
 - Search bias alleged (advantage Google and disadvantage vertical competitors)
- A.C. Nielsen ratings
 - Effectively 100% television ratings market
 - Changes to people meter technology
 - Predatory innovation alleged

Treatment of speech and innovation-based defenses in antitrust matters?

• Δ "information product" • speech ?

• "The First Amendment Protects Search Engine Results Against Antitrust Law"

Eugene Volokh & Donald Falk (White Paper Commissioned by Google (April 2012))

• "[Nielsen's] are opinions that are protected by the First Amendment and, thus, cannot give rise to antitrust liability."

Sunbeam v. Nielsen, Defendant's Motion to Dismiss & Memorandum (July 2009)

• Δ "information product" • innovation ?

• "We make hundreds of changes to our algorithms every year to improve consumers' search experience."

Eric Schmidt (Senate Testimony (Sept. 2011)

• "[Antitrust] is not supposed to be in the business of policing ... the quality [of a monopolist's] services."

Sunbeam v. Nielsen, Defendant's Motion to Dismiss & Memorandum (July 2009)

All-or-nothing protection re. "speech"

- Binary approach immunity or no solicitude
 - *U.S. v. Lorain Journal* (U.S. 1951)
 - E. R.R. Pres. Conf. v. Noerr Motor Freight (U.S. 1961)
- Insufficiency of binary approach
 - NAACP v. Claiborne County Hardware (U.S. 1982)
 - FTC v. Superior Court Trial Lawyers Assoc. (U.S. 1990)
- Alternatives to binary approach
 - *Central Hudson* (intermediate scrutiny ("restriction proportional to interest"))(U.S. 1980)
 - NYT v. Sullivan (conditional privilege ("actual malice"))(U.S. 1964)
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De facto all-or-nothing protection re. "innovation"

- De facto binary approach
 - Explicitly eschews balancing *Allied Orthopedic v. Tyco Health* (9th Cir. 2010)
 - Embraces balancing in theory *US v. Microsoft* (D.C. Cir. 2001)
- Insufficiency of de facto binary approach
 - Redesigns do not have concurrently pro & anticompetitive effects
 - Very small innovations trump all anticompetitive effects
- Alternatives to binary approach
 - Limited approach first order and not "full blown" balancing

Recommendations – Speech

- Political speech receives immunization
- Nominal speech receives no solicitude
- Additional legal infrastructure proposed cognizable speech (not a single "outcome category")
 - Definition: Significant speech content related to cause of action
 - Mechanism: "Minus factor" provides sliding scale protection
 - Presumption: Tie-breaker unless strong speech content

Recommendations – Innovation

- Recognition and estimation of pro/anticompetitive effects
- Translation between dynamic and static effects
- Implementation of sliding scale and presumptions
 - Balance when confident of large relative differences
 - Retain default in favor of innovation

		"Size" of Innovation		
		small	unsure	large
"Size" of Anticompetitive Effect	small	no	no	no
	unsure	no	no	no
	large	yes	no	no

Take away...



- ◆ Inappropriate abdication → appropriately tailored assessments
- ◆ Limitations of existing case law → learning by doing
- Middle ground alternatives to binary treatment
- More speech regarding these First Amendment considerations
- More innovation regarding dynamic efficiency considerations

Thank you & further reading

- Hillary Greene, *Muzzling Antitrust: Information Products, Innovation and Free Speech*, 95 BOSTON UNIVERSITY LAW REVIEW 35 (2015), *available at*, http://papers.ssrn.com/sol3/papers.cfm abstract_id=2577920
- Hillary Greene, Weighing Google's Antitrust Defenses, WALL STREET JOURNAL (Oct. 1, 2015), available at, http://on.wsj.com/1TOtNXM