

WHEN ANTITRUST MET FACEBOOK

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INTRODUCTION

Social networks are among the hottest phenomena on the Internet. Facebook eclipsed Google as the most visited website in both 2010 and 2011.¹ Moreover, according to Nielsen estimates, as of the end of 2011 the average American spent nearly seven hours per month on Facebook, which is more time than they spent on Google, Yahoo!, YouTube, Microsoft, and Wikipedia combined.² LinkedIn's May 19, 2011 initial public offering ("IPO") surpassed expectations, placing the value of the company at nearly \$9 billion,³ and approximately a year later, its stock price had risen another 20 percent.⁴ Facebook followed suit a year later with an IPO that placed the value of the company at over \$100 billion.⁵ Other social networking sites remain hot properties, and other Internet companies are struggling to catch up.

In what may be considered a rite of passage previously faced by such high-tech giants as IBM, AT&T, Microsoft, and most recently Google, social networking companies are now facing increasing scrutiny under the antitrust laws.⁶ Early private antitrust cases have begun to appear.⁷

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¹ Press Release, Experian Hitwise, Facebook Was the Top Search Term for Third Straight Year (Dec. 21, 2011), available at <http://www.experian.com/hitwise/press-release-facebook-was-the-top-search-term-for-2011.html>.

² *December 2011—Top U.S. Web Brands*, NIELSEN WIRE (Jan. 25, 2012), http://blog.nielsen.com/nielsenwire/online_mobile/december-2011-top-u-s-web-brands.

³ Stu Woo et al., *LinkedIn IPO Soars, Feeding Web Boom*, WALL ST. J., May 20, 2011, at A1.

⁴ *Compare id.* (showing LinkedIn stock at \$94.25 after its first day of trading, May 19, 2011), with *LinkedIn Corp.: Historical Prices*, GOOGLE FIN., <http://www.google.com/finance/historical?q=NYSE:LNKD> (last visited July 8, 2012) (reporting that LinkedIn's stock closed at \$113.49 on May 16, 2012, about one year after its IPO).

⁵ Jessica Guynn, *Facebook's Future Rests on Founder*, L.A. TIMES, Feb. 3, 2012, at B1. *But see* Andrew Bary, *Facebook Flops: Look Out Below!*, BARRONS.COM (May 19, 2012), <http://online.barrons.com/article/SB50001424053111904571704577410421435718852.html> (explaining that Facebook achieved a "\$100-plus billion market value" with its May 18, 2012 IPO, but noting that the "lack of a big 'pop'" for the stock during initial trading suggests this valuation may fizzle over time).

⁶ *See* Amir Efrati, *Antitrust Regulator Makes Twitter Inquiries*, WALL ST. J., July 1, 2011, at B3; Jia Lynn Yang, *Dangerous Waters? Facebook's Link to Online Games Has Some Charging the Social Network Has Waded into Antitrust Territory*, DAILY HERALD (Chi.), June 30, 2011, § 3, at 1; J. Thomas

Anyone attempting to predict how the antitrust laws will apply to leading social networking providers must remember that a successful monopolization claim requires proof of two elements: (1) market power and (2) what is often called exclusionary conduct.⁸ This Article offers a few preliminary thoughts about whether leading social networking sites satisfy these requirements. Part I considers one of the most likely sources of market power: network effects. Part II evaluates whether a social network's refusal to facilitate data portability can create an entry barrier and constitute exclusionary conduct. Part III examines *Facebook, Inc. v. Power Ventures, Inc.*,⁹ which is a recent case that presented both of these issues.

I. NETWORK EFFECTS

Perhaps the most commonly cited source of market power in high-tech industries is *network effects*.¹⁰ Network effects exist when the value of a network depends on the number of other users connected to the network. The more people that an individual subscriber can reach through the network, the more valuable the network becomes.¹¹ In *United States v. Microsoft Corp.*,¹² network effects formed the basis for the U.S. government's case.¹³ They also played a prominent role in early explorations of whether leading social networking sites should be subject to antitrust scrutiny.¹⁴

Although many analyses presume that the presence of network effects necessarily creates monopoly power, I have discussed the theoretical ambi-

Rosch, Comm'r, Fed. Trade Comm'n, Intel, Apple, Google, Microsoft, and Facebook: Observations on Antitrust and the High-Tech Sector: Address Before the ABA Antitrust Section Fall Forum 4-6, 8-10, 16-17 (Nov. 18, 2010), available at <http://www.ftc.gov/speeches/rosch/101118fallforum.pdf>.

⁷ E.g., *LiveUniverse, Inc. v. MySpace, Inc.*, 304 F. App'x 554, 556 (9th Cir. 2008); *Facebook, Inc. v. Power Ventures, Inc.*, No. C 08-5780 JF (RS), 2009 WL 3429568, at *2 (N.D. Cal. Oct. 22, 2009) (order granting motion to dismiss counterclaim and strike affirmative defenses and vacating hearing date).

⁸ See, e.g., *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602-604 (1985); *United States v. Microsoft Corp.*, 253 F.3d 34, 50, 58 (D.C. Cir. 2001) (en banc) (per curiam); HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY* 276-77 (3d ed. 2005).

⁹ No. C 08-5780 JF (RS), 2009 WL 3429568, at *2 (N.D. Cal. Oct. 22, 2009) (order granting motion to dismiss counter-complaint and strike affirmative defenses and vacating hearing date).

¹⁰ For an overview, see Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CALIF. L. REV. 479, 503-04 (1998).

¹¹ DANIEL F. SPULBER & CHRISTOPHER S. YOO, *NETWORKS IN TELECOMMUNICATIONS: ECONOMICS AND LAW* 120 (2009).

¹² 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam); 147 F.3d 935 (D.C. Cir. 1998).

¹³ *Microsoft*, 253 F.3d at 49-50, 55-56; *Microsoft*, 147 F.3d at 939, 953.

¹⁴ See *LiveUniverse, Inc. v. MySpace, Inc.*, No. CV 06-6994 AHM (RZx), 2007 WL 6865852, at *8-10 (C.D. Cal. June 4, 2007), *aff'd*, 304 F. App'x 554 (9th Cir. 2008); Chris Butts, Comment, *The Microsoft Case 10 Years Later: Antitrust and New Leading "New Economy" Firms*, 8 NW. J. TECH. & INTELL. PROP. 275, 289-90 (2010); Spencer Weber Waller, *Antitrust and Social Networking*, 90 N.C. L. REV. (forthcoming 2012).

guity of network effects elsewhere, pointing out that any such conclusion depends on a number of structural preconditions and may be mitigated by the actions of other actors.¹⁵ This Part emphasizes two additional points. Section A discusses how the leading models of network effects include assumptions that implicitly posit inexhaustible returns to scale. The tendency of networks to collapse into monopolies can disappear once one takes into account the possibility of congestion and associational costs as well as the fact that all network connections are not equally valuable. Section B discusses the as-yet largely unexplored literature analyzing how gateways and adapters can create bridges that connect networks. This literature at least suggests the possibility that alternative technologies can mitigate or even dissipate any market power that network effects may create.

A. *Inexhaustible Returns to Scale*

One facet of leading models of network effects is the manner in which they posit returns to scale that are inexhaustible. This Section first examines how this presumption is embodied on the supply side by the assumption that marginal costs are constant. Second, this Section discusses how this presumption is reflected on the demand side by positing that all network connections are equally valuable. As discussed below, the relaxation of either assumption can have a dramatic impact on whether network effects can give social networks monopoly power.

1. Supply-Side Considerations: Non-Constant Marginal Cost

On the supply side, the leading models on network effects typically assume that marginal costs are constant.¹⁶ From a theoretical standpoint, the presence of constant marginal costs renders the economies of scale inexhaustible.¹⁷

Understanding how constant marginal costs lead to inexhaustible economies of scale is best accomplished by examining how the interplay of fixed and variable costs give the typical average cost curve its characteristic

¹⁵ These include the magnitude of potentially offsetting network externalities, market structure, the potential for market features or institutional forms to offset the impact of network effects, heterogeneous preferences, and significant growth in market sides. See Christopher S. Yoo, *Vertical Integration and Media Regulation in the New Economy*, 19 YALE J. ON REG. 171, 278-85 (2002) (presenting the initial analysis); accord SPULBER & YOO, *supra* note 11, at 138-43 (providing additional analysis).

¹⁶ See, e.g., Joseph Farrell & Garth Saloner, *Converters, Compatibility, and the Control of Interfaces*, 40 J. INDUS. ECON. 9, 16 (1992); Michael L. Katz & Carl Shapiro, *Technology Adoption in the Presence of Network Externalities*, 94 J. POL. ECON. 822, 829 (1986).

¹⁷ S.J. Liebowitz & Stephen E. Margolis, *Are Network Externalities a New Source of Market Failure?*, 17 RES. IN L. & ECON. 1, 14-15 (1995).

“U” shape. Fixed costs place consistent downward pressure on average cost as those fixed costs are amortized over increasing quantities, although the magnitude of this downward pressure decays logarithmically as production increases.¹⁸ Variable costs are assumed initially to decline as increases in production allow firms to realize available economies of scale.¹⁹ During this period, both fixed and variable costs cause average cost to decline.²⁰ Eventually, variable costs begin to increase as the cheapest sources of inputs are exhausted and as the increase in the production makes inputs more difficult to manage.²¹ Over time, the upward pressure associated with increases in variable cost dominates the ever-decaying downward pressure on average cost associated with the amortization of fixed cost, and the average cost curve begins to rise.²² After this point, competitors can no longer obtain a cost advantage simply by increasing production.

These dynamics change dramatically if marginal cost is assumed to be constant. Under this assumption, variable cost never increases, and the only determinant of average cost is the downward pressure associated with the amortization of fixed costs over larger volumes. This means that average cost is constantly declining, and larger firms always enjoy a competitive advantage.²³

This advantage enjoyed by large networks may thus simply be the result of assumptions built into the models rather than a realistic representation of the cost curves associated with network industries. The expansion of social networks imposes congestion and organizational costs on their users because users’ newsfeeds become increasingly difficult to manage.²⁴ In addition, large social networks make it harder for users to restrict certain communications to smaller subgroups, which in turn represents another type of cost.²⁵ Together these considerations may result in the costs that end users face as social networks grow larger. The resulting diseconomies of scale can provide a counterweight to the advantages enjoyed by large social networks.

¹⁸ Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y.U. L. REV. 212, 226-27 (2004).

¹⁹ *Id.* at 227.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ See Liebowitz & Margolis, *supra* note 17, at 14-15.

²⁴ Steven Levy, *How Many Friends Is Too Many?*, NEWSWEEK, May 26, 2008, at 15.

²⁵ See *id.*; Sidney Hill, *Choosy Users May Ditch Facebook for Smaller Social Networks*, E-COMMERCE TIMES (May 20, 2011, 5:00 AM), <http://www.ecommercetimes.com/story/72495.html>.

2. Demand-Side Considerations: Heterogeneous Value in Different Network Connections

Even more importantly, models of network effects assume that all increases in network size always cause the network to increase in value.²⁶ Indeed, making network value depend on the total number of available connections effectively presumes that all network connections are equally valuable.

Economic theorists have long recognized that heterogeneity of customer preferences can offset the demand-side scale economies associated with network effects.²⁷ To the extent that rival systems have distinct features, multiple systems can survive by pursuing niche strategies that target customers who place a particular value on different types of networks.²⁸

Although one often thinks of such heterogeneity of preferences in terms of preferences for services,²⁹ it can also be with respect to the identity of the people you can reach through a particular network.³⁰ Put another way, the literature on network effects assumes that adding additional customers always makes a network more desirable no matter how large the network is already.³¹ Not only are increases in network value subject to the inevitable principle of diminishing marginal returns,³² but recent empirical studies have shown that the average Facebook user actively interacts with no more than a handful of people.³³ Even if one expands the analysis to include weak

²⁶ See, e.g., Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 AM. ECON. REV. 424, 426-27 (1985).

²⁷ See Joseph Farrell & Garth Saloner, *Standardization and Variety*, 20 ECON. LETTERS 71, 71-72 (1986); Michael L. Katz & Carl Shapiro, *Systems Competition and Network Effects*, 8 J. ECON. PERSP., Spring 1994, at 93, 106; S.J. Liebowitz & Stephen E. Margolis, *Should Technology Choice Be a Concern of Antitrust Policy?*, 9 HARV. J.L. & TECH. 283, 291-92 (1996).

²⁸ Katz & Shapiro, *supra* note 27, at 106; see also Liebowitz & Margolis, *supra* note 27, at 292 (“Where there are differences in preferences regarding alternative standards, coexistence of standards is a likely outcome.”).

²⁹ See Christopher S. Yoo, *Beyond Network Neutrality*, 19 HARV. J.L. & TECH. 1, 63-64 (2005).

³⁰ See MILTON L. MUELLER, JR., *UNIVERSAL SERVICE* 20-29 (1997) (discussing heterogeneous preferences in telephone networks).

³¹ See *supra* note 27 and accompanying text.

³² See, e.g., BRIDGER M. MITCHELL & INGO VOGELSANG, *TELECOMMUNICATIONS PRICING: THEORY AND PRACTICE* 55 (1991); George Yarrow, *Dealing with Social Obligations in Telecoms, in REGULATING UTILITIES: A TIME FOR CHANGE?* 67, 75 (Stephen Sayer et al. eds., 1996).

³³ See PAUL ADAMS, *GROUPED: HOW SMALL GROUPS OF FRIENDS ARE THE KEY TO INFLUENCE ON THE WEB* 23 (2012) (reporting an empirical study that the average Facebook user communicates with only four people per week and six people per month); Cameron Marlow, *Maintained Relationships on Facebook*, *OVERSTATED* (Mar. 9, 2009), <http://overstated.net/2009/03/09/maintained-relationships-on-facebook> (reporting that male and female users with networks of 500 friends engage in mutual communication, on average, with only ten and sixteen other people, respectively); see generally Sam G. B. Roberts & Robin I. M. Dunbar, *Communication in Social Networks: Effects of Kinship, Network Size, and Emotional Closeness*, 18 PERS. RELATIONSHIPS 439, 450 (2011).

ties, studies indicate that the average social networking user is unable to maintain more than 150 connections at any particular time.³⁴

This confirms the intuition that end users are likely to place a particularly high value on a small subgroup of people. The value of adding additional connections beyond this core group is much lower.³⁵ Nor should the presence of a core group of close connections necessarily lead to lock-in. Given their small number, core group members should find it relatively easy to agree as to which network to join and to coordinate shifting to another network should they find their current network inhospitable.³⁶

These concerns are reflected in the increasingly widespread commentary that Facebook is becoming too big, as well as in the growing attraction of social networking services that are more targeted.³⁷ Indeed, the original conception of Facebook was to support interaction with a smaller group of close friends rather than connectivity to a wide universe of end users.³⁸ In its current form, many regard Facebook as being better suited to identifying and renewing weak and distant connections than it is to organizing a close group of friends.³⁹

Put somewhat differently, social networks offer a particular user significantly less value when they expand to include subscribers who rely on languages that a specific user does not speak. Even users who share a common language may find little value if their interests do not overlap.

The widespread differences in the value that users place on particular connections represent another deviation from the inexhaustible returns to scale posited in the literature.⁴⁰ As long as a user can obtain access to his

³⁴ See, e.g., Thomas V. Polett et al., *Use of Social Network Sites and Instant Messaging Does Not Lead to Increased Offline Social Network Size, or to Emotionally Closer Relationships with Offline Network Members*, 14 CYBERPSYCHOLOGY BEHAV. & SOC. NETWORKING 253, 254-55 (2011); Bruno Gonçalves et al., *Modeling Users' Activity on Twitter Networks: Validation of Dunbar's Number*, PLOS ONE, Aug. 3, 2011, at 1, 1, available at <http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0022656>. For the seminal study, see R.I.M. Dunbar, *Coevolution of Neocortical Size, Group Size and Language in Humans*, 16 BEHAV. & BRAIN SCI. 681, 685-87 (1993).

³⁵ See, e.g., Bob Briscoe et al., *Metcalfe's Law Is Wrong: Communications Networks Increase in Value as They Add Members—But by How Much? The Devil Is in the Details*, IEEE SPECTRUM, July 2006, at 34, 37. In addition, increases in network size may cause the cost of excluding others from the network to rise as well. Rahul Tongia & Ernest J. Wilson III, *Turning Metcalfe on His Head: The Multiple Costs of Network Exclusion* 20 (Sept. 1, 2007) (unpublished manuscript) (on file with the Carnegie Institute of Technology).

³⁶ See Liebowitz & Margolis, *supra* note 17, at 18-19.

³⁷ See, e.g., Jenna Wortham & Claire Cain Miller, *Social Networks Offer a Way to Narrow the Field of Friends*, N.Y. TIMES, May 10, 2011, at B1; J.J. Sutherland, *In Other Social Network News. How About Fewer Friends?*, NPR (Nov. 15, 2010, 10:09 AM), <http://www.npr.org/blogs/thetwo-way/2010/11/15/131327991/in-other-social-network-news-how-about-fewer-friends>.

³⁸ Sidney Hill, *Is Facebook Too Big for Its Own Good?*, E-COMMERCE TIMES (Sept. 5, 2011, 5:00 AM), <http://www.ecommercetimes.com/story/73216.html?wlc=1315770981>.

³⁹ See *id.*

⁴⁰ See MUELLER, *supra* note 30, at 27.

core group of connections, further expansions of network size will provide little-to-no value.

B. *Gateways*

Another oft-overlooked consideration that can mitigate the problems associated with network effects is the presence of gateways between networks (also sometimes called adapters or converters). Indeed, Professors Michael Katz and Carl Shapiro explored such a possibility in one of the seminal articles on network effects.⁴¹ Katz and Shapiro concluded that “if the costs of adapting are negligible, and there are no other entry barriers, the market will be perfectly competitive.”⁴² Carmen Matutes and Pierre Regibeau similarly concluded that if adapters exist that allow different actors to decide unilaterally whether their components are compatible with other systems, “compatibility arises and is always socially optimal provided that there are no costs to achieving standardization.”⁴³ Professor Paul David (writing with Julie Bunn) likewise concluded that “initial technical incompatibilities between variant formulations of such technologies . . . can have their economic importance mitigated as a result of the ex post introduction of gateway technology.”⁴⁴ The related literature on multihoming also suggests that the ability to connect to multiple networks places a natural limitation on any one network’s ability to exercise market power.⁴⁵

Together these analyses suggest that creating gateways between social networks can dissipate any monopoly power enjoyed by any particular social network. Thus, like increasing costs and heterogeneity in the value of network connections, the presence of gateways between social networks may well ameliorate anticompetitive concerns that they could pose.

These conclusions depend on the assumption that adapters achieve perfect compatibility.⁴⁶ Katz and Shapiro also subjected their conclusion to the caveat that the introduction of adapters may not be socially optimal if competition dissipates the rents necessary to support creating the network in the first place.⁴⁷

⁴¹ See generally Katz & Shapiro, *supra* note 26, at 425.

⁴² *Id.* at 439.

⁴³ Carmen Matutes & Pierre Regibeau, “*Mix and Match*”: *Product Compatibility Without Network Externalities*, 19 RAND J. ECON. 221, 232 (1988).

⁴⁴ Paul A. David & Julie Ann Bunn, *The Economics of Gateway Technologies and Network Evolution: Lessons from Electricity Supply Industry*, 3 INFO. ECON. & POL’Y 165, 197 (1988).

⁴⁵ Stanley Besen et al., *Advances in Routing Technologies and Internet Peering Agreements*, 91 AM. ECON. REV. PAPERS & PROC. 292, 294-95 (2001).

⁴⁶ See Katz & Shapiro, *supra* note 26, at 435-36 (assuming that the adapter permits presumably perfect compatibility); Matutes & Regibeau, *supra* note 43, at 223 (same).

⁴⁷ Katz & Shapiro, *supra* note 26, at 439 n.14.

Professors Joseph Farrell and Garth Saloner presented a model that enabled them to explore the implications of relaxing both of these assumptions.⁴⁸ After first confirming Katz and Shapiro's conclusion that costless and perfect gateways eliminate any adverse impact of network effects,⁴⁹ Farrell and Saloner demonstrated that the welfare impact is ambiguous when gateways are imperfect.⁵⁰ Specifically, consistent with the spirit of the Katz and Shapiro caveat discussed above, Farrell and Saloner concluded that if network effects are so important that the network should be standardized, adapters can reduce welfare by making it easier for people not to unify on the standard.⁵¹ On the other hand, if network effects are so weak that they would not induce standardization, converters tend to increase social welfare.⁵²

The current success enjoyed by social networking sites makes concerns that adapters might forestall investment in establishing social networks seem remote. However, the theoretical literature indicating that the deployment of adapters may decrease the incentives to invest in social networks suggests that it may be a concern worth monitoring.

II. DATA PORTABILITY AS A SOURCE OF MARKET POWER AND EXCLUSIONARY CONDUCT

Another potential source of monopoly power is the absence of data portability. The most frequently cited concern is that the inability to move data from one social networking site to another can create a form of lock-in.⁵³ Social networks follow different policies. For example, Myspace⁵⁴ condones data portability.⁵⁵ Facebook, in contrast, allows individuals to copy their own information as a backup or to move it to a different site, but

⁴⁸ Farrell & Saloner, *supra* note 16, at 32.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ See Butts, *supra* note 14, at 290-91; Michael Geist, *Getting Social Networking Sites to Socialize*, TORONTO STAR (Aug. 13, 2007), <http://www.thestar.com/business/article/245647--getting-social-networking-sites-to-socialize>; see also James Grimmelmann, *Saving Facebook*, 94 IOWA L. REV. 1137, 1192 (2009) (observing the focus on data lock-in without endorsing it); Aaron Perzanowski & Jason Schultz, *Digital Exhaustion*, 58 UCLA L. REV. 889, 900 n.50 (2011) ("Switching costs would be reduced further if consumers were assured data portability between platforms.").

⁵⁴ Formerly known as "MySpace," the company modified its name to "Myspace" in 2010. Press Release, Myspace, Inc., Meet the New Myspace (Oct. 27, 2010), available at <http://www.myspace.com/pressroom/2010/10/meet-the-new-myspace>. This Article refers to the company as Myspace, unless an article title, case caption, or quote uses the old name.

⁵⁵ Michael Arrington, *MySpace Embraces Data Portability, Partners with Yahoo, Ebay, and Twitter*, TECHCRUNCH (May 8, 2008), <http://www.techcrunch.com/2008/05/08/myspace-embraces-data-portability-partners-with-yahoo-ebay-and-twitter>.

prohibits third parties from copying the same data.⁵⁶ Social networking providers could also promote data portability by standardizing the format of the data.⁵⁷ The concern is that the lack of data portability could constitute an entry barrier.

I find the case for standardizing data and mandating data portability to be relatively unconvincing. As an initial matter, any form of standardization of data formats threatens to structure interactions in ways that can limit the functionality of these systems. Moreover, the immediacy and short shelf life of much of the information available on social networks limits the need for porting historical data. Such concerns are also greatly ameliorated by the willingness of social networking sites to facilitate the export of data.⁵⁸

Social networking sites also limit scraping so that they can maintain a high-level user experience.⁵⁹ In addition, other scholars have begun to raise concerns about the potentially adverse impact of data portability on privacy.⁶⁰ Once data becomes completely portable, people can easily evade any privacy restrictions placed by the initial social networking site simply by porting the data over to another venue not subject to those restrictions.⁶¹

Several recent cases illustrate this concern nicely. For example, in *Slater v. Tagged, Inc.*,⁶² new users to a social networking site called Tagged were asked to enter their e-mail addresses and passwords so that Tagged could import their address books.⁶³ What end users did not realize is that Tagged also sent an e-mail to all of the e-mail addresses in the new users' address books.⁶⁴ In addition, newspapers report examples of private information being scraped off Facebook and posted (with errors) on a dating website called Plenty of Fish.⁶⁵ It is for these reasons that Facebook's terms of use require its users to commit to the following: "You will not collect users' content or information, or otherwise access Facebook, using auto-

⁵⁶ Scott Gilbertson, *Google and Facebook to Join the Data Portability Debate*, WEBMONKEY, (Jan. 9, 2008), http://www.webmonkey.com/2008/01/google_and_facebook_to_join_the_data_portability_debate.

⁵⁷ See Chris Saad, *How Does Facebook View the World?*, MASHABLE (June 4, 2010), <http://mashable.com/2010/06/04/facebook-data-portability>.

⁵⁸ See Jacqui Cheng, *Data Portability Finally Comes to Facebook, Plus Friend Groups*, ARS TECHNICA, (Oct. 6, 2010, 4:13 PM), <http://arstechnica.com/media/news/2010/10/data-portability-finally-comes-to-facebook-plus-friend-groups.ars>; Gilbertson, *supra* note 56.

⁵⁹ See Grimmelmann, *supra* note 53, at 1193-94.

⁶⁰ See *id.* at 1194; Frank Pasquale, *Beyond Innovation and Competition: The Need for Qualified Transparency in Internet Intermediaries*, 104 N.W. U. L. REV. 105, 153 (2010).

⁶¹ See Grimmelmann, *supra* note 53, at 1194.

⁶² Complaint, *Slater v. Tagged, Inc.*, No. 09-CV-3697 (N.D. Cal. Aug. 12, 2009).

⁶³ *Id.* at 6-7.

⁶⁴ *Id.* at 7.

⁶⁵ Kristi L. Gustafson, *Looks Like You, But Looks Can Be Deceiving*, TIMES UNION (Albany, N.Y.) (Feb. 14, 2011, 12:00 AM), <http://www.timesunion.com/living/article/Looks-like-you-but-looks-can-be-deceiving-1012103.php>.

mated means (such as harvesting bots, robots, spiders, or scrapers) without our permission.”⁶⁶

Although Facebook does have valid business justifications for prohibiting scraping, one can also claim that this policy is intended to thwart the emergence of a rival. For example, Google developed an extension to its Chrome browser called Facebook Friend Exporter to make it easier to transfer information stored in Facebook to Google+, only to see it blocked by Facebook.⁶⁷ Facebook later blocked another tool designed to perform the same task.⁶⁸

While this conduct was no doubt frustrating for Google, it is far from clear that it constitutes an antitrust violation. As the *Microsoft* decision made clear, “a monopolist does not violate the antitrust laws simply by developing a product that is incompatible with those of its rivals.”⁶⁹ Incompatibility is only problematic if it is accompanied by deception, an exclusivity agreement, or a technical design that lacks any business justification.⁷⁰ Without more, the mere fact that a company refuses to facilitate its rival’s business is unproblematic. Moreover, the privacy-related concerns discussed above (and Facebook’s concomitant inability to ensure that any information scraped from its site is used properly) represents a sufficient business justification to render Facebook’s conduct reasonable.

The foregoing discussion of data portability underscores the extent to which a monopolization claim requires more than proof of market power. Indeed, as Judge Learned Hand noted in *United States v. Aluminum Co. of America*⁷¹ (*Alcoa*), antitrust law does not reach monopolies obtained through natural features of the market, such as when “[a] market may . . . be so limited that it is impossible to produce at all and meet the cost of production except by a plant large enough to supply the whole demand.”⁷² Later courts have followed suit and held that monopolization does not apply to

⁶⁶ *Statement of Rights and Responsibilities*, FACEBOOK (Apr. 26, 2011), <http://www.facebook.com/legal/terms>.

⁶⁷ Erica Swallow, *How to: Import Your Facebook Contacts on Google+*, MASHABLE (July 5, 2011), <http://mashable.com/2011/07/04/google-plus-contacts>.

⁶⁸ Stephen Shankland, *Facebook Blocks a Second Contact Export Tool*, CNET (July 11, 2011, 9:28 AM), http://news.cnet.com/8301-30685_3-20078435-264/facebook-blocks-a-second-contact-export-tool.

⁶⁹ *United States v. Microsoft Corp.*, 253 F.3d 34, 75 (D.C. Cir. 2001) (en banc) (per curiam); accord *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 542 (9th Cir. 1983) (“The creation of technological incompatibilities, without more, does not foreclose competition; rather, it increases competition by providing consumers with a choice among differing technologies, advanced and standard, and by providing competing manufacturers the incentive to enter the new product market by developing similar products of advanced technology.”).

⁷⁰ *Microsoft*, 253 F.3d at 76; Philip J. Weiser, *Regulating Interoperability: Lessons from AT&T, Microsoft, and Beyond*, 76 ANTITRUST L.J. 271, 281 (2009); see also *C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1371 (Fed. Cir. 1998).

⁷¹ 148 F.2d 416 (2d Cir. 1945).

⁷² *Id.* at 430.

natural monopolies.⁷³ Commentators have concluded that this applies to natural monopolies resulting from network effects.⁷⁴ To hold otherwise, in the words of another leading court of appeals decision, would be to “require the impossible—a competitive market under conditions of natural monopoly.”⁷⁵

Instead, monopolization doctrine requires that the defendant have engaged in some form of exclusionary conduct, which the Supreme Court has described as “the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”⁷⁶ Various commentators have advocated so-called “no fault” monopolization over the years.⁷⁷ Courts have rejected these invitations out of concern that doing so would deter firms from engaging in the competition on the merits (through product innovation and cost reduction) that the antitrust laws are designed to foster.⁷⁸ As Judge Hand so eloquently put it, “[t]he successful competitor, having been urged to compete, must not be turned upon when he wins.”⁷⁹

Simply put, the fact that a firm may possess market power does not by itself put it under a duty to help its rivals.⁸⁰ The mere fact that it is maximizing its own profits is not sufficient to subject it to liability.⁸¹ Whatever limited duty to deal exists under the Supreme Court’s precedents applies only

⁷³ See *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 548 (9th Cir. 1991) (“The Sherman Act . . . has not been interpreted to penalize natural monopolies.”); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 990-91 (D.C. Cir. 1977) (noting that particular characteristics of natural monopoly make it unsuitable for application of antitrust laws absent predatory conduct); *Greenville Publ’g Co. v. Daily Reflector, Inc.*, 496 F.2d 391, 397 (4th Cir. 1974) (“The characteristics of a natural monopoly make it inappropriate to apply the usual rule that success in driving competitors from the market is evidence of illegal monopolization.”); *Lamb Enters., Inc. v. Toledo Blade Co.*, 461 F.2d 506, 515 (6th Cir. 1972) (“In a natural monopoly situation any successful competitor gets the market. Thus, it cannot be unreasonable, per se, to foreclose competitors from any substantial market where such foreclosure is the natural result of success in a natural monopoly situation.” (citation and internal quotation marks omitted)); *Am. Football League v. Nat’l Football League*, 323 F.2d 124, 131 (4th Cir. 1963) (“When one has acquired a natural monopoly by means which are neither exclusionary, unfair, nor predatory, he is not disempowered to defend his position fairly.”); *Union Leader Corp. v. Newspapers of New England, Inc.*, 284 F.2d 582, 584 (1st Cir. 1960) (“[A] natural monopoly market does not of itself impose restrictions on one who actively, but fairly, competes for it, any more than it does on one who passively acquires it.”).

⁷⁴ See Lemley & McGowan, *supra* note 10, at 503 (“Courts cannot normally ‘undo’ network effects with the tools of antitrust. Network effects are an inherent part of certain markets, not a ‘market failure’ for which the law must necessarily correct.” (citation omitted)).

⁷⁵ *Omega Satellite Prods. Co. v. City of Indianapolis*, 694 F.2d 119, 126 (7th Cir. 1982).

⁷⁶ *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

⁷⁷ See, e.g., *SPULBER & YOO*, *supra* note 11, at 284 & n.6.

⁷⁸ See, e.g., *Alaska Airlines*, 948 F.2d at 547-49 (rejecting calls to penalize firms that achieve monopoly through superior competitive performance without engaging in predatory conduct).

⁷⁹ *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945).

⁸⁰ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 600 (1985).

⁸¹ *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

where the alleged monopolist unilaterally abandoned a preexisting, profitable course of dealing.⁸² These limitations to a firm's duty, along with the privacy-related business justifications, make it unlikely that the refusal to facilitate data compatibility will provide the basis for a monopolization claim.

III. TWO EARLY EMERGING EXAMPLES

Two early cases may offer some clues as to how antitrust will apply to social networking sites. The fact that the antitrust claims in both cases were dismissed because of a failure to allege exclusionary conduct suggests that would-be plaintiffs may be unlikely to prevail.

A. LiveUniverse, Inc. v. MySpace, Inc.

LiveUniverse is the operator of a rival social networking site called vidilife.com.⁸³ Although users were initially able to incorporate vidilife content into their Myspace pages, Myspace reconfigured its site to prevent the embedding of vidilife videos on Myspace webpages, removed all references to vidilife, and even prevented users from including links to vidilife in their Myspace profiles.⁸⁴

After LiveUniverse filed an antitrust suit regarding Myspace's conduct, the district court dismissed the claim for failure to allege actionable exclusionary conduct.⁸⁵ As an initial matter, "[a] company generally has a right to deal, or refuse to deal, with whomever it likes."⁸⁶ Although the Supreme Court had imposed a duty to deal in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,⁸⁷ a district court noted that more recently the Court, in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*,⁸⁸ held that *Aspen* "is at or near the boundary of [Section] 2 liability."⁸⁹ Moreover, *Trinko* held that *Aspen* applied only to situations where the defendant had voluntarily engaged in a profitable course of dealing and subsequently sacrificed short-term profits by unilaterally abandoning that course of deal-

⁸² *Id.* at 409.

⁸³ *LiveUniverse, Inc. v. MySpace, Inc.*, No. CV 06-6994 AHM (RZx), 2007 WL 6865852, at *1 (C.D. Cal. June 4, 2007), *aff'd*, 304 F. App'x 554 (9th Cir. 2008).

⁸⁴ *Id.*

⁸⁵ *Id.* at *15.

⁸⁶ *Id.* at *11 (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984)) (quotation marks omitted in original).

⁸⁷ 472 U.S. 585, 610 (1985).

⁸⁸ 540 U.S. 398 (2004).

⁸⁹ *LiveUniverse*, 2007 WL 6865852, at *12 (quoting *Trinko*, 540 U.S. at 409).

ing in an attempt to secure long-term exclusion of competition.⁹⁰ *LiveUniverse, Inc. v. MySpace, Inc.*,⁹¹ in contrast, never involved a voluntary agreement between LiveUniverse and Myspace, but rather involved decisions by their users to incorporate content from LiveUniverse into Myspace.⁹² Moreover, the district court held that LiveUniverse had no right to free ride on the traffic that Myspace was attracting to its website.⁹³ Lastly, the district court rejected LiveUniverse's attempt to invoke the *Microsoft* case as support for its claim that Myspace's product design change constituted exclusionary conduct.⁹⁴ Not only was Myspace under no obligation to ensure that its competitor's products remained compatible with its new products, but unlike in *Microsoft*, Myspace could do nothing to block access to vidilife, which remained accessible directly over the Internet.⁹⁵ All Myspace did was to prevent consumers from using its site to do so.⁹⁶

The Ninth Circuit endorsed the district court's reasoning and conclusion in a brief opinion, noting first that, "[a]s a general matter, the Sherman Act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to the parties with whom he will deal."⁹⁷ The limited exception to this rule recognized in *Aspen* applied only to unilateral terminations of voluntary arrangements that were profitable.⁹⁸ In this case, the only prior course of dealing alleged by LiveUniverse was between Myspace and its users, not between Myspace and LiveUniverse.⁹⁹ Moreover, LiveUniverse had failed to allege that the prior arrangement was profitable to Myspace.¹⁰⁰

B. Facebook, Inc. v. Power Ventures, Inc.

All of the elements previously discussed in this Article—adapters as a solution to network effects, exclusionary conduct, and data portability—came together in *Facebook, Inc. v. Power Ventures, Inc.* Power Ventures offers a website called Power.com, which is designed to allow end users to

⁹⁰ *Trinko*, 540 U.S. at 409.

⁹¹ No. CV 06-6994 AHM (RZx), 2007 WL 6865852 (C.D. Cal. June 4, 2007), *aff'd*, 304 F. App'x 554 (9th Cir. 2008).

⁹² *Id.* at *13.

⁹³ *Id.*

⁹⁴ *Id.* at *15.

⁹⁵ *Id.* at *15-16.

⁹⁶ *LiveUniverse*, 2007 WL 6865852, at *15-16.

⁹⁷ *LiveUniverse, Inc. v. MySpace, Inc.*, 304 F. App'x 554, 556 (9th Cir. 2008) (quoting *Verizon Comm'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004)).

⁹⁸ *Id.*

⁹⁹ *Id.* at 557.

¹⁰⁰ *Id.*

integrate all of their social networking contacts into a single site.¹⁰¹ Power.com uses Facebook login information provided by its users to scrape information off Facebook and display it on Power.com.¹⁰² In short, Power.com represented precisely the type of adapter that could dissipate the market power stemming from network effects.

Facebook sued Power Ventures for violating Facebook's terms of service, which in turn violated a plethora of state and federal statutes.¹⁰³ Power Ventures filed a counterclaim alleging, among other things, that Facebook had violated the antitrust laws.¹⁰⁴ After the district court dismissed the antitrust counterclaim without prejudice for lack of specificity,¹⁰⁵ Power Ventures filed amended counterclaims only to see them dismissed as well.¹⁰⁶

Power Ventures alleged that Facebook was engaged in exclusionary conduct by asking its users to provide it with user names and passwords to Gmail, AOL, Yahoo!, Hotmail, and other third-party websites and using that information to access those accounts through Facebook while denying its competitors from doing the same.¹⁰⁷ The district court ruled that the fact that other third-party websites allowed Facebook to access them did not place Facebook under the obligation to provide third-party websites with unfettered access to Facebook.¹⁰⁸ Indeed, Ninth Circuit precedent establishes that simply introducing a product that is not interoperable with competing products does not violate the antitrust laws.¹⁰⁹ Moreover, "[i]f Facebook has the right to manage access to and use of its website, then there can be nothing anticompetitive about taking legal action to enforce that right."¹¹⁰

Together, *LiveUniverse* and *Power Ventures* raise serious questions about the likely success of antitrust claims against social networks. Absent some other exclusionary conduct, the facts that a social network refuses to deal with a rival, designs its website to be incompatible with its competitors, and refuses to enable data portability are unlikely to support antitrust liability.

¹⁰¹ Complaint at 2-3, *Facebook, Inc. v. Power Ventures, Inc.*, No. C 08-5780 WDB (N.D. Cal. Dec. 30, 2008).

¹⁰² *Facebook, Inc. v. Power Ventures, Inc.*, No. C 08-5780 JF (RS), 2009 WL 3429568, at *1 (N.D. Cal. Oct. 22, 2009).

¹⁰³ Specifically, Facebook alleged that Power Ventures violated the Controlling the Assault of Non-Solicited Pornography and Marketing ("CAN-SPAM") Act, the Computer Fraud and Abuse Act, the California Comprehensive Computer Data Access and Fraud Act, the Digital Millennium Copyright Act, state and federal trademark law, and California's Unfair Competition Law as well as that Power Ventures committed direct and indirect copyright infringement. *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at *2.

¹⁰⁶ *Facebook, Inc. v. Power Ventures, Inc.*, No. C 08-5780 JW, 2010 WL 3291750, at *1, *13-14 (N.D. Cal. July 20, 2010).

¹⁰⁷ *Id.* at *13.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at *14.

CONCLUSION

The nuances discussed above underscore the potential hazards of adopting simplistic visions of prospective anticompetitive harms posed by social networking sites. As the D.C. Circuit noted in *Microsoft*, “[s]imply invoking the phrase ‘network effects’ without pointing to more evidence does not suffice to carry plaintiffs’ burden in this respect.”¹¹¹ Similarly, a close analysis of mandating data portability reveals that it is something of a two-edged sword.

The potential misuses of such ideas highlight the key insight in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*¹¹² that “if the factual context renders respondents’ claim implausible—if the claim is one that simply makes no economic sense—respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary.”¹¹³ Stated more generally, *Matsushita* teaches that antitrust claims cannot be based on generalized concerns about a particular company’s size or business conduct. Instead, antitrust claims should be asserted in the context of a coherent economic theory and should be based on data consistent with that theory. Any other approach risks protecting competitors instead of competition.

The history of high-tech companies underscores the dangers of playing too fast and loose with antitrust claims. While companies such as AT&T and IBM once dominated the landscape, IBM no longer makes computers, while AT&T has ceased to exist as an independent company (having been acquired by SBC).¹¹⁴ In addition, although the merger between America Online and Time Warner was once regarded as the end of history, subsequent events have revealed that “it was simply the end of . . . \$200 billion in Time Warner shareholder value.”¹¹⁵ Warning signs exist with respect to social networking, as reflected in the *LiveUniverse* case.¹¹⁶ Whereas Myspace was once so dominant that LiveUniverse was able to allege that it had 89-percent market share, the company is now teetering on the edge of

¹¹¹ *United States v. Microsoft Corp.*, 253 F.3d 34, 84 (D.C. Cir. 2001) (en banc) (per curiam).

¹¹² 475 U.S. 574 (1986).

¹¹³ *Id.* at 587.

¹¹⁴ Michael Bierut, *The Final Days of AT&T*, DESIGN OBSERVER GRP. (Oct. 29, 2005), <http://observatory.designobserver.com/entryprint.html?entry=3817>; Bob Doughty & Faith Lapidus, *Rethinking the Personal Computer in an Internet World*, VOICE AM. (Aug. 15, 2006, 12:00 AM), <http://learningenglish.voanews.com/content/a-23-2006-08-15-voa7-83131182/126601.html>.

¹¹⁵ Peter DeCherney et al., *Are Those Who Ignore History Doomed to Repeat It?*, 78 U. CHI. L. REV. 1627, 1666 (2011).

¹¹⁶ *LiveUniverse, Inc. v. MySpace, Inc.*, No. CV 06-6994 AHM (RZx), 2007 WL 6865852, at *7 (C.D. Cal. June 4, 2007), *aff’d*, 304 F. App’x 554 (9th Cir. 2008).

insignificance.¹¹⁷ This legacy cautions against being too facile in identifying putative anticompetitive conduct and demonstrates the importance of remaining disciplined in the evaluation of antitrust claims.

¹¹⁷ Priit Kallas, *Top 10 Social Networking Sites by Market Share of Visits [February 2012]*, DREAMGROW (Mar. 13, 2012), <http://www.dreamgrow.com/top-10-social-networking-sites-by-market-share-of-visits-february-2012>.