Information Product Redesign as Commercial Expression: Antitrust Treatment of Speech and Innovation

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A recent Supreme Court ruling with immense significance for antitrust is a First Amendment case that does not even mention antitrust. The case involved an "information product" that the Court found to be speech entitled to strong First Amendment protection. What does this ruling mean for sellers of information products subject to antitrust scrutiny? The question is not theoretical. The answer, at least according to two high-profile antitrust defendants, is clear - immunization. In recent decades the information product sector of the economy, fueled heavily by the Internet, has grown dramatically. The generation, processing, and distribution of information is an increasingly important part of the economy and owing to various scale, scope, or network characteristics, information product markets are often highly concentrated. Not surprisingly, these markets have attracted antitrust scrutiny. Two prominent targets of such scrutiny have been market leaders Google (Internet search engine) and Nielsen (television audience ratings). Both firms have argued that the alleged anticompetitive conduct pertaining to their product redesigns is legal because their redesigns constitute "protected speech" and embody "procompetitive innovation." Within the antitrust context those defenses have similar manifestations. Both yield binary outcomes. If the redesign at issue is deemed protected speech, it is then immunized from antitrust scrutiny. Otherwise, conventional antitrust analysis applies with no speech solicitude. This all-or-nothing approach does not support a legal middle ground wherein the First Amendment influences but does not trump antitrust considerations. In a somewhat parallel manner, if the redesign is deemed a non-pretextual innovation, it is essentially immunized regardless of its anticompetitive effect. This Article rejects such overly simplistic approaches that would effectively immunize all anticompetitive speech or innovation so long as those characteristics are not pretextual. Such extreme positions fail to protect either First Amendment rights or antitrust values; to the contrary, they openly encourage outcomes that would undermine them. Instead, this Article stakes out a middle-ground treatment that falls between immunization and no First Amendment solicitude in the case of speech and per se legality and no recognition of competition policy concerns in the case of innovation.

Biography: Previously, she served as Project Director for Intellectual Property at the Federal Trade Commission's Office of the General Counsel.

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