Antitrust and Technology Platforms (Spring 2023)

**SYLLABUS**

**Antitrust and Technology Platforms
Course Number 252.21 – Spring 2023
Last Revised:  January 2, 2023**

**Instructor Information**

Instructor Name:  Christopher B. Hockett

Instructor Information: [Berkeley Law Faculty Profile](https://www.law.berkeley.edu/our-faculty/faculty-profiles/christopher-hockett/#tab_profile)
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Phone:  415-509-6916
Zoom Office Hours:  TH 12:00 PM – 2:00 PM Pacific Time (sign up for 15-minute Office Hours slots using Calendar tab on bCourse site)
Zoom Office Hours Link:  (in process)

**Course Information

Meetings:  Tu 3:35 PM - 5:25 PM Pacific Time
From:  January 10, 2023
To:  April 18, 2023 (no class on March 28)
Location:  Law 132
Prerequisites or Co-requisites:**Antitrust is a recommended prerequisite or co-requisite
**Credit Units:** 2

Welcome to Antitrust and Technology Platforms! This newly expanded course addresses a defining legal issue of our age: how competition laws will apply to the giants of the digital economy. Tech platforms like Apple, Amazon, Facebook, and Google rank among the largest and most powerful companies in history, and are increasingly confronted with antitrust challenges based on their roles as online gatekeepers. However, the outcome of those claims is uncertain given conservative judicial interpretations of U.S. antitrust law over the last half-century. This uncertainty is elevated by the complexity of establishing antitrust violations against platforms that supply billions of consumers with goods and sophisticated online tools for low – and sometimes zero – financial prices, and provide millions of small and medium sized businesses with valuable online advertising and distribution services.

This course investigates the dynamics of digital platform competition, including network effects, multisided markets, and winner-take-all market conditions. We will explore the antitrust implications of various forms of dominant platform behaviors, including alleged exclusion and predation, acquisition of potential or nascent competitors, and self-preferencing of platform “house brands” over third-party products. We will also examine cases of alleged collusion in the tech platform context, as well as some emerging antitrust implications of artificial intelligence, including price-setting algorithms that can price discriminate between buyers or coordinate prices among competing sellers. In addition, we will explore the potential relationship between antitrust law and platform-related issues like consumer privacy, “big data,” filter bubbles, toxic content, and challenges to liberal democratic values. Finally, we will consider legislative reforms and other remedies being considered in response to platform dominance.

After the course midpoint, several of our class meetings will feature guest appearances by senior in-house antitrust lawyers from tech platforms like Google, Facebook/Meta, Spotify and Yelp. All of our class sessions will be interactive and engaging, featuring extensive visual aids, discussion questions circulated before class, and small-group exercises. Our course materials draw on a rich body of recent cases, regulatory proceedings, legislative proposals, and expert commentary. Prior coursework in antitrust or some familiarity with basic economics is recommended.

**Textbook/Course Materials**

Each week I will post the assignments for the following week’s class. Most of the readings will be available through hyperlinks. The remainder, including all cases, will be posted on our bCourse site.

I will sometimes list optional background readings, which you may find interesting and helpful. However, you are not required to read the optional background materials for class, and they will not be part of the final exam. In addition, I will post some class discussion questions shortly before each class, and will post my slides after each class.

**bCourses**

Our class bCourse site can be found [here](https://bcourses.berkeley.edu/courses/1520854).

**Learning Outcomes**

Students in the course will be expected to achieve the following Berkeley Law Learning Outcomes:

(a) Knowledge and understanding of substantive and procedural law;

(b) Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context;

(c) Other professional skills needed for competent and ethical participation as a member of the legal profession; and

(d) Using the law to solve real-world problems and to create a more just society.

***Course-Specific Learning Outcomes***

By the end of the semester, students should be able to:

* Describe the basic foundations and intellectual progression of United States antitrust policy and jurisprudence, and the recent challenges to orthodox antitrust analysis
* Explain the factual, economic, and legal issues and arguments relevant to the application of antitrust laws to digital platforms, including:
	+ The nature of competition among and within multisided platforms, and the market conditions that increase the likelihood that platforms will obtain durable market power
	+ Different ways that dominant platforms respond to competitive threats, both unilaterally and in combination with other market actors
	+ How existing antitrust law frameworks apply to allegedly anticompetitive digital platform behaviors
	+ The relationship between antitrust law and various social problems associated with online platforms
* Analyze and evaluate the strengths and weaknesses of potential legal, regulatory and legislative antitrust responses to problems in digital markets

**Mid-Semester Assignment/Final Exam/Grading/Class Participation**

Your grade will be based on a take-home final examination and a short (500-word) mid-semester writing assignment (likely a response/reflection on one of the assigned readings). The take-home final examination will count for 90% of your grade and the mid-semester written assignment will count for 10% of your grade. The take-home final exam will be open book and open notes, but without use of the internet. Students will have 5 hours to complete the final exam.

I will take class participation into account to break any ties that must be broken due to the law school’s curved grading system. Posting discussion items on bCourses will also count as class participation.

Classes will involve detailed consideration and discussion of cases, scholarly articles, and hypotheticals.  Each student should participate in class, as an active listener and contributor. I encourage students to volunteer answers and to ask questions. You should come to class even if you are unprepared – a situation I hope will be rare. If you need to miss class for an emergency, please email me ahead of time.

You may use a laptop or other device to access reading assignments during class. However, I encourage you to take hand-written notes, as research shows that people absorb information better this way.  Except for class-related activities, please don’t use the internet, text or use apps during class.

Timely submission of assignments is an important part of professionalism. Accordingly, I will expect you to submit your mid-semester writing assignment by the due date. I understand, though, that extenuating circumstances might prevent you from doing so. If you need to submit an assignment late for a valid reason (e.g. illness or family emergency), please email me before the due date or as soon as possible in light of the circumstances. I will be happy to provide you with an extension if necessary. However, if you fail to communicate with me, unexcused late or incomplete submissions will result in reduced points.

**Course Schedule**

Below is a chart with dates of our class meetings and planned topics for each class. The topics are subject to adjustment based on new developments and the pace of our class discussions. If there are changes, I will let you know in class or via bCourse announcements. Tentative dates for confirmed guest speakers are also noted.

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| **Class Date** | **Topic** | **Issues**  |
| **Class 1**Jan. 10 | **Course Intro + Legal Foundations**  | * Introduction and course roadmap
* Overview of tech platform antitrust concerns
* Review of antitrust laws and enforcement mechanisms
* The evolution of U.S. antitrust goals, philosophy and jurisprudence
* Introduction to market definition, market power and monopolization
* *U.S. v. Microsoft*
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| **Class 2**Jan. 17 | **Legal Foundations (cont’d) + Intro to Multisided Platforms and Network Effects** | * *U.S. v. Microsoft* (cont’d)
* *Verizon v. Trinko*
* Platform business models, multi-sided markets, and network effects
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| **Class 3**Jan. 24 | **Tech Platforms, Market Power, and Barriers to Entry** | * Platform business models, multi-sided markets, and network effects (cont’d)
* “Winner take all” market conditions: market power and barriers to entry in the digital platform context
* *Ohio v. American Express*
* Competition implications of “Big Data”
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| **Class 4**Jan. 31 | **Tech Platform Responses to Competitive Threats: Exclusionary Conduct** | * Potential exclusionary conduct:
	+ Copying rivals’ features or products
	+ Foreclosure of platform access (Google-Android, *U.S. v. Google*)
	+ Law of refusals to deal (*Colgate*, *Aspen Skiing, Kodak)*
	+ App store restrictions on app developers (*Epic v. Apple*)
* Distinguishing anticompetitive from competitive responses
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| **Class 5**Feb.7 | **Tech Platform Responses to Competitive Threats: Predation** | * Predation:
	+ Predatory pricing (*Brooke Group* test)
	+ Predatory foreclosure of an essential input
	+ Predatory product design or design change
* Distinguishing anticompetitive from competitive responses
 |
| **Class 6**Feb.14 | **Tech Platform Responses to Competitive Threats: Acquisitions** | * Merger law standards and process
* Types of acquisitions
	+ Horizontal: Alleged nascent competitors (e.g., Facebook-Instagram; Amazon-Quidsi)
	+ Vertical: Firms offering complementary products or services
* Distinguishing anticompetitive from competitive responses
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| **Class 7**Feb. 21 | **Self-Preferencing** | * The concept of “fairness” in antitrust value systems
* Platform self-preferencing and allegations of abuse of third-party complementors
	+ Google Shopping EU decision
	+ Amazon and third-party sellers
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| **Class 8**Feb. 28 | **Coordinated Conduct in the Digital Economy** | * Review of antitrust law that applies to joint conduct
* Collusion facilitated or imposed by platforms
	+ The Apple e-books case
	+ Litigation re alleged Amazon MFN price agreements:
		- *Frame-Wilson v. Amazon* (2020)
		- *District of Columbia v. Amazon* (2021)
		- *California v. Amazon* (2022)
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| **Class 9**Mar. 7 | **Coordinated Conduct in the Digital Economy (cont’d)** | * Platforms, AI, and algorithmic collusion
	+ *U.S. v. Topkins* (posters)
	+ *Meyer v. Kalanick* (Uber)
	+ RealPage rent-setting algorithm litigation and investigations (2022)
* **Guest speaker: Gene Burrus, Director, Global Competition Policy, Spotify**
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| **Class 10**Mar. 14 | **Competition and Privacy** | * The relationship between antitrust enforcement and mass surveillance, loss of privacy and lack of control over personal data
* **Guest speaker: Rosanna Garza Lipscomb, Director, North American Competition Law, Google**
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| **Class 11**Mar. 21 | **Big Tech, Broader Social Values, and Antitrust** | Antitrust enforcement or reform as a potential response to concerns about:* Increases in corporate concentration, economic and political power
* Destabilization of democratic institutions
* The decline of socially important legacy industries, e.g., journalism, newspapers, physical retail
* **Guest speaker: Aaron Schur, General Counsel and Senior Vice President, Yelp**
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| **Spring Break March 27-31** |
| **Class 12**April 4 | **Big Tech, Broader Social Values, and Antitrust(cont’d)** | Antitrust enforcement or reform as a potential response to concerns about:* Harmful online content, misinformation, political bias, and increased polarization
	+ Human behavior and the monetization of attention
	+ User-generated content, moderator immunity and Section 230 of the Communications Decency Act (1996)
	+ Moderation, ranking, and amplification – *NetChoice* and *Gonzalez*
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| **Class 13**April 11 | **The Future of Tech Antitrust** | * Enforcement of existing laws
	+ - Prospects for pending cases
		- U.S. Supreme Court antitrust outlook
* Proposed legislative reforms and executive action
* Sector-specific regulatory regimes
* Privacy and content laws and regulations
* Global antitrust enforcement/regulation
	+ - Digital Markets Act
		- Digital Services Act
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| **Class 14**April 18 | **The Future of Tech Antitrust (cont’d)** | * Continued discussion of above topics
* Course wrap up
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| **Exam Review Session April 26 or 27** |

**School-wide Policies and Resources**

1) A “credit hour” at Berkeley Law is an amount of work that reasonably approximates three to four hours of work per week for 15 weeks, including a) classroom time, b) time spent preparing for class, c) time spent in review sessions and studying and taking, final exams, d) time spent researching, writing, and revising papers and other written work, and e) time spent preparing for and completing any other final project, presentation, or performance. For the purposes of these calculations, 50 minutes of classroom instruction counts as one hour, and the 15 weeks includes the exam period. You can expect to spend this amount of time per unit per week on in-class and out-of-class, course-related work as described above. (Note that this total workload will be distributed differently in classes that only meet for part of the semester.)

2) Students who need accommodations for disability or pregnancy or want to discuss the implementation of their accommodations, including accommodated exams, should contact Chelsea Yuan, Director for Student Services, Accessible Education.

Student Services schedules all exams, including accommodated exams, as the law school is committed to anonymous grading. PROFESSORS DO NOT HAVE THE AUTHORITY TO RESCHEDULE EXAMS.

3) The [Academic Honor Code](https://www.law.berkeley.edu/academics/registrar/academic-rules/academic-honor-code/) governs the conduct of all students during examinations and in all other academic and pre-professional activities at Berkeley Law. We expect students to adhere to this code scrupulously. If you have any questions about whether your conduct may violate the code, please contact your professor or the Dean of Students before you act. You may face severe consequences, including a failing grade in this class or removal from the program, and the Bar will receive notification of your conduct.

4) Berkeley Law Academic Skills Program. Every student admitted to Berkeley Law has the ability to succeed in law school and we are committed to fostering an academic environment in which all students can achieve their full potential. To schedule an individual appointment and for handouts on core law school skills and study strategies, free online study aids, information about practice exams and hypos, and much more, please visit and bookmark [the Academic Skills Program website](https://www.law.berkeley.edu/students/student-services/academic-skills-program/).

5) Student Technology Help As a Berkeley Law student, you are entitled to general software support for your computer from the law school, and certain free software downloads from UC Berkeley, while enrolled.  If you have issues with internet access or computer equipment required to participate in classes remotely, contact studentcomputing@law.berkeley.edu. Information, links, and instructions for many common computer/technical questions can be found in the [law library's online computing guide](http://libguides.law.berkeley.edu/computing/home). For bCourses, Zoom, and technical support questions, please email studentcomputing@law.berkeley.edu or you can use the [Student Computing chat.](https://www.law.berkeley.edu/library/internal/techChat.php) In both cases, someone will respond to you during our regular business hours.

If you have research-related questions, please contact the reference librarians by filling out the [reference request form](https://www.law.berkeley.edu/library/dynamic/students/researchRequest.php). You can also reach reference librarians during business hours by using the [law library’s chat service](https://www.law.berkeley.edu/library/dynamic/internal/chat.php).

6) If you are in need of economic, food, or housing support, you can find basic needs information [here](https://basicneeds.berkeley.edu/) You may be eligible for money to buy groceries via [CalFresh](http://calfresh.berkeley.edu/) or our Food Assistance Program. If you need food immediately, please visit our [UC Berkeley Food Pantry](https://pantry.berkeley.edu/).

7) The University of California is committed to creating and maintaining a community dedicated to the advancement, application, and transmission of knowledge and creative endeavors through academic excellence, where all individuals who participate in University programs and activities can work and learn together in an atmosphere free of harassment, exploitation, or intimidation. Every member of the community should be aware that the University prohibits sexual violence and sexual harassment, retaliation, and other prohibited behavior (“Prohibited Conduct”) that violates the law and/or University policy. The University will respond promptly and effectively to reports of Prohibited Conduct and will take appropriate action to prevent, correct, and when necessary, to discipline behavior that violates this policy. For the complete UC Policy, definitions, compliance, and procedures, please access the [Sexual Violence and Sexual Harassment Policy](https://policy.ucop.edu/doc/4000385/SVSH).

Resources: If you have further questions or concerns about reporting behavior related to sexual harassment, sexual violence, and/or protected category discrimination, please contact the Office for the Prevention of Harassment and Discrimination (OPHD) by phone 510-643-7985 or email ask\_ophd@berkeley.edu.

[Path to Care Center](https://care.berkeley.edu/) Confidential Advocates provide affirming, empowering, and confidential support for those that have experienced gendered violence, including sexual harassment, emotional abuse, dating, and intimate partner violence, sexual assault, stalking, and sexual exploitation. Advocates bring a non-judgmental, caring approach to exploring all options, rights, and resources. They can be reached by phone at (510) 642-1988.