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Robert H. Lande

University of Baltimore School of Law, rlande@ubalt.edu

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The aai column

The Microsoft-Yahoo merger: Yes, privacy is an antitrust concern

by Robert H. Lande

The same day that Microsoft announced it was about to offer \$44.6 billion offer for Yahoo, Senator Herb Kohl (D-Wisc.), chairman of the Senate Antitrust Subcommittee, issued a statement: “We will need to scrutinize the deal carefully to ensure that it will not cause any harm to the competitiveness of what has been a vibrant high tech marketplace, nor negatively impact the privacy rights of internet users.”

Similarly, the Federal Trade Commission, in its Dec. 20, 2007 majority Statement analyzing but ultimately deciding not to challenge the Google/DoubleClick merger on antitrust grounds, noted: “We investigated the possibility that this transaction could adversely affect ... consumers’ privacy. We have concluded that the evidence does not support a conclusion that it would do so.” One Commissioner dissented, largely because she believed the transaction would be likely to detrimentally affect consumers’ privacy.

Privacy and antitrust? Isn’t antitrust only supposed to be concerned with price – will prices rise as a result of a merger?

Well, no. Antitrust is actually about consumer choice, and price is only one type of choice. The ultimate purpose of the antitrust laws is to help ensure that the free market will bring to consumers everything they want from competition. This starts with competitive prices, of course, but consumers also want an optimal level of variety, innovation, quality, and other forms of nonprice competition. Including privacy protection.

The antitrust laws have traditionally focused on price effects because the other dimensions of competition will usually follow naturally in markets that have effective price competition.

But not always. There are some key situations where non-price issues must be analyzed separately.

For example, some cases involve markets where there is little or no price competition as a result of regulation or third party insurance payers. If all the taxicab companies in a city are required to charge the same amount, then they have to compete on service and quality. If all the shops that might replace a driver’s broken windshield will be reimbursed by an insurance company, then the customer will choose on the basis of service, convenience, or some other factor. In neither of these circumstances could a complete analysis look at price alone.

Some other cases involve markets where firms compete primarily through independent product development or creativity, rather than through price. This creative competition may involve things like high-tech innovation, delivery of new patient-friendly hospital services, or editorial independence in the news media. Effective innovation may sometimes require more providers than are needed just to have price competition, since the

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path of successful innovation may be impossible to identify beforehand, and multiple paths may have to be explored.

Is privacy another situation where a price analysis alone would be incomplete?

There is no doubt that privacy is a significant, serious, and separate concern for a large number of people. Indeed, for many of us privacy is not something we are willing to trade away lightly, or at all, no matter how inexpensive the product or service we get in return. This can be an especially acute problem because consumers might at times not be fully aware of the privacy ramifications of their online transactions.

The consumer protection laws are the primary method society uses to protect privacy. But competition also plays a role. Businesses can and do vie with one another in promising to respect consumers' privacy. In some areas, such as private banking, auction services, security services, or resorts catering to celebrities, the assurances of privacy are obviously some of the most important parts of the package. In other areas, such as the medical and legal fields, privacy is such an important value and so ubiquitously desired that we take it for granted.

When a market is competitive, any information-heavy firm that does not respect consumers' privacy rights will pay a penalty. Consider the bad publicity that has resulted when companies have compromised thousands of consumers' privacy by losing laptops that contained

sensitive personal medical information. Consider the ramifications that could arise if a search engine seriously ignored its own stated corporate privacy policy in ways that consumers cared about greatly. Or consider, hypothetically, the public anger that would greet the discovery that a search-engine company was selling potential insurers information about the medical conditions that an individual has researched online.

A monopoly probably could weather even the worst public relations storm, but a firm making a habit of huge privacy mistakes in a competitive market could soon go out of business as customers took their business elsewhere. Knowledge of this helps to keep the firms careful.

This means that a merger which significantly reduces the intensity of competition in any information-based market must be examined for its potential effects on all dimensions of competition – including privacy – rather than just for its price effects.

There is not enough publicly available information to assess whether the Microsoft/Yahoo merger will have a significant impact on users' privacy. But Senator Kohl should be applauded for raising the privacy issue, and there is little doubt that the antitrust enforcers evaluating the merger also will analyze its privacy ramifications carefully.

Robert H. Lande is the Venable Professor of Law at the University of Baltimore School of Law and a Director of the American Antitrust Institute. He can be reached at rlande@ubalt.edu