WHEN “FREE” IS NOT “FREE”

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Consumers on the Internet routinely give away data — information about their habits, preferences, purchasing patterns, contacts and more — in return for “free” access to an abundance of platforms and sites. While this may be an attractive model for some users, most are operating with less than full information. In the digital world, what is “freely” given can actually come with embedded costs. Defining large quantities of user data as a product cognizable under antitrust laws raises questions as to whether such data can confer market power, and what the consumer welfare implications of its use are. In addition to the personal cost to individuals, effective control of the data comes with a community cost: other innovators are barred from using those “free” inputs. This essay assesses the current state of antitrust matters related to the monetization of “free” data and where the landscape might be headed.

Little in this world is actually free. A particularly American salivation response is activated when we are informed, or believe, that something we receive, or could acquire, is "free." A coupon for "buy 2 get 1 free" often inspires additional purchases; sales of bulk products at mega supermarkets may result in the acquisition of more mayonnaise jars than any family could consume in a decade. In the digital sphere, the Internet presents itself as a smorgasbord of "free": free information, news, podcasts, social media platforms, YouTube videos on every conceivable topic.

Consumers are not alone in liking "free" — our digital world has created companies with inexhaustible appetites for what we give them for "free." The irony in 2021 is that when as consumers we give tech companies valuable data for "free," that "free" data is assembled, packaged in a variety of forms, and sold back to us. In effect, giving away our data for "free" costs us. Let's look at this more closely.

The most pressing antitrust matters today concern the monetization of "free" data: investigations, enforcement actions and litigations brought against tech companies using data acquired from consumers. A common thread is some form of allegation that a tech company takes that which is "freely" given by users: their digital activity encompassing browsing and search, purchasing patterns, time spent on websites, numbers of emails sent and received to various addresses. According to various complaints scattered about the courts and agencies, aggregation of this data can lead to market power (in a variety of differently conceptualized markets) and potential abuse. This article does not take a position on the merits of these matters. Rather, I want to pause on where we are and where we might be headed.

When the Internet was born, it provided a superhighway to connection and information. It took some time for users to realize that tire tracks of our personal journeys on that highway could never be erased — and in fact, could be harvested into a whole new set of products. The tire tracks of our journeys over the Internet highway attained value when companies understood that most users were creatures of habit, following similar routes: the types of websites previously visited were indicative of where a user, or one with a similar demographic profile, traveled next. The companies that most quickly figured out how to monetize travel patterns were those that controlled the superhighway infrastructure: companies such as Google, Apple, Facebook and others. Large data sets of information about Internet travel patterns are now routinely monetized into targeted sales, and we can more easily see that what we once assumed was "free" has a cost.

In 2021, we are now used to hearing that prior searches are sold to companies who want to pitch products to us; or that our Instagram histories are used to sell us particular clothes, vacations, goods or services. We are all used to seeing and clicking through the pop-up requests to use tracking "cookies." Every click along the Internet superhighway is watched, analyzed and sold.

How should we conceptualize product definition, market power, and consumer welfare in this digital world when inputs are free but the end product may come at a cost?

All people and all companies possess some form of data. Indeed, all living things possess forms of data encoded into their cellular make-up. The antitrust laws are concerned with the particular ability of certain large tech companies to gather, aggregate and analyze data from our journeys on the Internet superhighway. Data obtains value when it comes in large quantities. Large quantities — large data sets — activate a kind of alchemy: patterns resident in data become valuable predictors of monetizable human behavior (put differently: a company that knows where we have been and what we care about can sell us stuff).

Is "data" obtained, for instance, from an Internet search *a product* cognizable under the antitrust laws? Interestingly, granular data derived from only a single person's digital journey may have no value at all; even less valuable is data based on one set of observations for one person, relevant to a single moment in time.

Instead, the value of "free" data is in *patterns* of behavior that can be derived only from some number of observations. Such patterns transform single data points into a data set that can meet the definition of product: a data set is definable, subject to separate demand, and useful for clear, articulable purposes.

Once we have defined freely given data as a potential product when aggregated, the question follows as to whether such data can confer market power. Numerous investigations and lawsuits assume the answer to this question to be in the affirmative. But let's pause on it for a moment because there is a reality of economic theory being extended in the answer: an individual's personal digital history, freely given, can be given again and again and again. Individual data can be collected again and again — as consumers continuously create digital footprints. The key aspect is control of the superhighway — because it is the control of the means of collection that limits access, creating scarcity. The product then — the data — is not, as traditionally considered, what gives direct rise to "market power." Rather, the power, to the extent it exists, is derived from control of the means of aggregation and control of access. In the absence of such control, the inputs (similar to water sourced from a well-fed spring) are endlessly and freely replicable.

With this as essential background, the product at issue with free digital data comes in two pieces: data in gross, and control of access.

Let's assume that data in gross quantities plus control constitute a product of tremendous value: the control leads to scarcity and the scarcity increases the value. The base inputs were freely given by consumers — how do we conceptualize the welfare impact of control of such freely given information?

It has long been accepted that consumer welfare may be enhanced or reduced by what are defined as "free" products. As an initial matter, a "free" product that in fact has a cost is not free. Determining the cost of such a product might well be an individualized inquiry, however. Imagine, for instance, that I am content to accept all tracking cookies, and traverse the digital superhighway frequently and without a care as to who gathers my history as I go. I may in fact enjoy targeted advertising — preferring it over advertising having no bearing on any of my interests. For me (speaking here hypothetically, of course), my freely given data has come with a positive value associated with it. But let's take a second example: perhaps a person even in the same household as the first. This person eschews cookies, engages in private browsing when possible, but uses apps that nonetheless create, retain and monetize records of usage. This individual has freely but carefully given digital information and will similarly be subject to targeted advertising of various sorts that he or she may deem offensive by virtue of its very existence. The transmogrification of this individual's "free" information into advertisements with a personal cost, has led to a feeling of personal invasion, being surveilled, and perhaps even of being taken advantage of. Here, this individual has experienced a diminution in consumer welfare.

Apart from individuals, there are additional community costs that have welfare implications. Returning to our point above about control: when control of the free input is effective, it precludes other innovators from utilizing free inputs to create new end products. One such end product could be a type of sandbox around the freely given digital information, protecting the example of the second individual above from the welfare-reducing costs. New companies able to access the same digital superhighway information could, in effect, create "off-ramps"; in antitrust terms, this would be output expanding.

What is clear from all of this is that in the digital world, what is freely given can actually come with embedded costs, and has diverse consumer welfare implications.

We all like a good deal — as I said at the outset, a good deal activates a salivation response. We are used to understanding some of the more obvious hidden costs in the brick and mortar world (that we have too much mayonnaise, or we really didn't need three pairs of jeans anyway). In the digital world, consumers are operating with less than full information — less information about what is collected and how it is used. Even more fundamentally, we don't fully understand the scope of how digital information is collected, controlled and monetized. Consumer welfare may be enhanced when free conveys a positive value (as the person in the first example), or harmed when the value proposition turns negative.

We will all be watching with great interest the many antitrust matters now underway that will provide guidance as to how to think about new products, market power, and consumer welfare in this world when "free" is really not free at all.

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