FREE AS AIR?

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Free as Air?

By Salil K. Mehra

"Free" once had a simple meaning – something without constraint whatsoever, as in "free as air." At times, some have suggested that antitrust enforcement should not target "free" services – but "free" is Protean in meaning. After all, "there ain't no such thing as a free lunch." "No-monetary-payment" is not the same thing as "free." Making someone else pay is not "free." Finally, receiving something in exchange for the alteration of one's mind is not "free." Firms, products and markets have changed; so too, must competition law. Recent cases against firms that provide users applications without monetary payment, such as Google and Facebook, suggest that competition law enforcers increasingly understand that "free" cannot be a get-out-of-antitrust enforcement card. These cases bear watching to gauge whether and how competition law can evolve as firms, products, and markets have done.

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"Free as air; that's what they say – 'free as air.' Now they bring me my air in an iron barrel."
– Evelyn Waugh, Brideshead Revisited

The "rule of threes" recognizes that a person can survive three weeks without food, three days without water, but only three minutes without air.[2] At the end of Evelyn Waugh's *Brideshead Revisited*, a nobleman who has lived a dissolute life fairly free from the constraints of money or social norms gets his comedown in the shape of respiratory reliance on costly machinery. COVID-19 has forced us to consider the freedom, in several senses, of our very breath.

It has long been said that "there ain't no such thing as a free lunch."[3] While the word "free" has several related meanings, they have in common the notion of being unconstrained, whether by a financial cost, physical bond, or legal or other restraint. Though popularized by the science fiction writer Robert Heinlein, the "free lunch" is believed to refer originally to the practice in 19th century American saloons of providing their customers with a "free lunch" consisting of a buffet of well-salted food likely to provoke further drinking. Free drinks were sometimes provided as well for youth, since, as the Brewers' Association proclaimed, "[a] few cents on free drinks for boys was a good investment; the money would be amply recovered as these youths became habitual drinkers!" However, the free lunch was often monitored by the tavern's bouncer to discourage too much eating[4] – an early example by which a high-consumption user might, literally, find himself "throttled."[5]

No payment now, but we *will* get you later is not anyone's definition of "free." Nor do many consider to be "free" a good or service provided at no charge if you buy another product – you cannot successfully respond to a "buy one, get one free" offer by saying, "I'll take only the free one, thanks!" In a similar vein, "free" should not limit antitrust, to the extent that free lunches are not a thing. "Free" goods and services often involve several kinds of "payment." First, and perhaps most familiarly, individuals trade personal data that benefits the seller for these "free" products – so not at all free, just "no-monetary-payment" required. Second, individuals receive "no-monetary-payment" products but thereby "lock in" other individuals, who "pay" instead. Finally, "free" products that trigger dopamine or other behavioral responses may alter individuals' brains to their detriment, as 19th century saloon owners knew. Just as we might take the air we freely breathe for granted, until it suddenly turns potentially COVID-19 infective, we might consider that so-called "free" services may only be such at that instant, with possibly expensive consequences.

I. NO-MONETARY-PAYMENT IS NOT NECESSARILY "FREE"

The law, especially that of contracts, has long recognized that not having to pay money is not the same thing as "free." If you provide a pharmaceutical company data on your body's reactions in a drug trial, its promise to give you a supply of its products in exchange is not a gift.[6] This is unsurprising; you have provided the company a benefit, at its request.[7] Despite that, it is not rare to read someone arguing that antitrust action against services that platforms provide to consumers without payment must be misguided – a trope that goes back to the turn-of-the-century *Microsoft* litigation.[8] Indeed, the respected antitrust economist Hal Varian has recently argued, in connection with the Department of Justice's ongoing action against Google, that the latter is no monopolist, despite an 80 percent market share in search, on the grounds that it offers a high-quality service to consumers "for free."[9]

2 Colin Towell, *Essential Survival Skills,* p.154 (Penguin, 2011).

3 Mark Edward Lender & James Kirby Martin, *Drinking in America: A History,* p.104 (Free Press, 1982).

4 *Id.*

5 "Throttling" has been used metaphorically to refer to ISPs' constraining the use of those customers who, in the ISPs' view, excessively use "unlimited" data. See, e.g. Jon Brodkin, *Verizon Throttled Fire Department's "Unlimited" Data during Calif. Wildfire,* Ars Technica, Aug. 21, 2018 (reporting allegations in lawsuit against Verizon), *at* https://arstechnica.com/tech-policy/2018/08/verizon-throttled-fire-departments-unlimited-data-during-calif-wildfire/.

6 *Dahl v. HEM Pharmaceuticals*, 7 F.3d 1399 (9th Cirl 1993) (pointing out precedents for this view going back to *Hamer* v. *Sidway* (N.Y. 1891)).

7 See Restatement (Second) of Contracts (American Law Institute, 1981), Section 71.

8 See, e.g. Joe Kennedy, *The Myth of Data Monopoly: Why Antitrust Concerns About Data Are Overblown*, Info. Tech. & Innovation Found. 1, 25 (2017), http://www2.itif.org/2017-data-competition.pdf [https://perma.cc/5QH8-V5TK] (arguing against antitrust action because "many data-rich companies offer free or low-cost services that are extremely valuable to billions of people, most of whom have a pretty good idea of what data they are providing companies and how it might be used."); J. Gregory Sidak, *Do Free Mobile Apps Harm Consumers?,* 52 San Diego L. Rev. 619, 625 (2015) (answering the title negatively).

9 "Google Case is a Chance to Reframe Antitrust Debate," Financial Times, Oct. 21, 2020 (describing Varian's argument).

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To some extent, serious antitrust discussion has long treated the "for free" argument as hollow. This idea was rebuffed by the district court in *U.S. v. Microsoft* more than 20 years ago,[10] based on the intuition that a firm cannot make money giving things away for free, so there must be some "catch"—"in other words, there ain't no such thing as a free lunch." More recently, social media and other Internet-based platforms have promoted a deeper understanding of no-payment services. Most prominently, Professor John Newman has provided in-depth examination of what he calls, not free, but "zero-price" markets, and introduced a taxonomy of consumer-facing costs to watch out for. In particular, he emphasizes a focus on costs to consumers that provide market signals as a keystone for antitrust enforcement.[11]

Fortunately, it appears that version of "free" in which users "pay" producers benefits in non-monetary ways has been rejected as grounds for an "antitrust-free zone." First, the European Commission's Directorate-General for Competition, and now the U.S. antitrust authorities, have focused their attention on Facebook and Google, both of which offer consumers myriad services without monetary payment. This energized scrutiny extends to the critical area of merger review – witness the FTC's challenge of Facebook's proposed acquisition of Giphy.[12] While the endgame of this revitalized enforcement awaits us, it seems as though the no-monetary-cost version of "free" may be done as a get-out-of-antitrust-enforcement card.

II. MAKING SOMEONE ELSE PAY IS NOT "FREE"

Another model of "free" is to offer goods and services without payment to a consumer in a way that extracts costs from someone else. The classic textbook – if quite gender-normative – example in economics is a local bar ladies' night when "discounted or even "free" (in the sense of no monetary payment) drinks are offered to female customers."[13] Putting aside the ways in which the female customers may have to "pay" for cheap or free drinks by fending off unwanted attention,[14] the reality is that, as the textbooks suggest, the bar profits by the increased volume of sales to male customers seeking to socialize with the female customers drawn in by the discount.

But cross-subsidization with no-monetary charge products exists beyond nightlife. For example, while the COVID-19 vaccines may have been provided in the U.S. without monetary charge, vaccination is rapidly becoming a requirement to attend or teach at colleges, and to hold one's job in many workplaces. Because many students, professors and workers who have been vaccinated do not wish to share the air they breathe with unvaccinated people, as the proportion who are vaccinated grow, it makes it easier for administrators and managers to impose vaccine requirements. As a result, the "free" vaccine has the effect of locking-in or imposing costs – such as unemployment – on others.

Contract law has long recognized that the fact that a third party pays for something does not make it gratuitous. Indeed, the concept of exchange is not limited to two parties making an offer and an acceptance, including the enforcement of a promise based on consideration provided by someone other than the promisee.[15] Similarly, antitrust law should engage more deeply with "no-monetary-payment" services. The U.S. Federal Trade Commission's complaint against Facebook in particular is a step in the right direction, recognizing the lock-in effects that so-called "free" services can generate so others effectively pay. Certainly, the Internet has encouraged the proliferation and increased economic importance of such business models, and there is nothing to suggest that they will disappear anytime soon.

10 87 F. Supp. 2d. 30, 50 (D.D.C. 2000) (concluding that "the fact that Microsoft ostensibly priced Internet Explorer at zero does not detract from the conclusion that consumers were forced to pay, one way or another, for the browser along with Windows").

11 John Mark Newman, *Antitrust in Zero-Price Markets: Foundations,* 164 U. Pa. L. Rev. 149 (2015).

12 David McLaughlin, "Facebook's Stealth M&A Puts Focus on Deals Under Antitrust Radar," *Bloomberg,* Aug. 23, 2021, https://www.bloomberg.com/news/articles/2021-08-23/facebook-s-stealth-m-a-puts-focus-on-deals-under-antitrust-radar.

13 Geoffrey G. Parker, Marshall w. Van Alstyne, Sangeet Paul Choudary, *Platform Revolution: How Networked Markets Are Transforming the Economy and How to Make Them Work For You* (Norton, 2016), Chapter 2; James D. Gwartney, et al., *Microeconomics: Private and Public Choice* (Cengage, 2016), pp. 200-203.

14 This seems to have become a recurring source of pained comedy in pop music. See Lily Allen, *Knock 'Em Out* (2006); Meghan Trainor, *No* (2015).

15 See Restatement (Second) of Contracts, Section 71(4) (American Law Institute, 1981) (stating that "[t]he performance or return promise [given as consideration making a promise enforceable] . . . may be given by the promisee or by some other person").

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III. ALTERING BRAINS IS NOT "FREE"

An additional example of "free" is to offer goods and services without monetary payment in order to get consumers "hooked" – a model well-known not just to 19th century saloon keepers, but also to other sellers of addictive substances.[16] That said, the concept of a good, usually typified by heroin or cocaine, whose consumption increases the consumer's demand for more of that good, despite the law of diminishing marginal utility, has been taught in microeconomics for years.[17] While the boundaries of such goods have traditionally been set by legislatures rather than antitrust enforcers, technological advances may require more attention from the latter.

In particular, the ability of technology firms to trigger consumers' dopamine responses in an addictive way via apps may require competition law attention. In fact, antitrust scholars have long considered whether the consumer welfare standard should deem increased output of tobacco a positive thing for consumers, considering the product's addictive qualities and negative effects on user health.[18] That said, antitrust enforcers do continue to regulate conduct and mergers that may reduce the output of addictive products, notwithstanding their adverse health effects.[19]

The Internet, smartphone and video gaming technology has opened the door to no-monetary-charge services that the user can enjoy with little effort, but whose consumption may have literal mind-altering effects. This discussion has already commenced, and is likely to continue.[20] In a similar manner to antitrust and tobacco, Professors Niels Rosenquist, Fiona Scott Morton & Samuel Weinstein have pointed out that "robust medical evidence" is starting to show that digital platforms can be addictive and "harmful to users' mental health."

As a result, where more use actually injures the consumer, the increased output of some addictive digital platforms may not be a reliable proxy for positive effects on consumer welfare. Such services are certainly not "free" just because no money is paid by the user; contract law has long understood that non-monetary detriment can ground an exchange. Antitrust commentators have an unfortunate tendency to wave away such problems as best dealt with other areas of law, or by Congress. While that may be true for some issues, the Federal Trade Commission's long history with consumer protection and deception may make it particular suited to considering how antitrust law should handle mergers and conduct involving firms that sell mind-altering, no-money-payment products, and, if necessary, leading efforts to reshape antitrust accordingly.

IV. CONCLUSION

Contract law has understood for centuries that lack of a monetary payment does not make something free; antitrust law recognized this as far back as the *Microsoft* browser case. When a customer provides the seller benefits in non-monetary ways, or their action forces someone else to pay, or they suffer psychological change, a transaction cannot reasonably be called "free." The Internet and the changes it has spawned have raise the importance of no-monetary-payment services that are, in these ways, not "free." Just as the air we breathe can have costs we did not anticipate before COVID-19 first appeared in Wuhan, underestimating the antitrust implications of no-charge services is undermining consumers' faith in our law and our markets. To breathe free again requires an appropriate response.

16 See *infra* n.3 and accompanying text; Ray Fisman & Michael Luca, *Did Free Pens Cause the Opioid Crisis?* The Atlantic, Jan./Feb. 2019 (suggesting that free pens, meats and Christmas trees as gifts to physicians from Perdue Pharma representatives hawking OxyContin elicited a psychological response of gratitude in those physicians, who were then more likely to prescribe an addictive medication to their patients), *at https://www.theatlantic.com/magazine/archive/2019/01/did-free-pens-cause-the-opioid-crisis/576394/.*

17 Kenyon A. Knopf, *A Lexicon of Economics* (Academic, 2014), p.80 (defining "diminishing marginal utility" as a "'law' in the marginal utility of consumption [that] states that as an individual consumes more and more of a good in a given time period, the satisfaction derived from each additional unit will be less than the satisfaction from the preceding unit," but stating that "[a] major exception to the law is an addictive drug such as heroin, cocaine or 'crack.'").

18 See Daniel Crane, *Harmful Output in the Antitrust Domain: Lesson from the Tobacco Industry,* 39 Ga. L. Rev. 321 (2005); Barak Y. Orbach, The Antitrust Consumer Welfare Paradox, 7 J. Comp. L. & Econ. 133, 152 (2010) (questioning whether increased output of tobacco, with its harmful effects, does in fact benefit consumers, and if it does not, how the consumer welfare standard should be altered).

19 See, e.g. Complaint, *U.S. v. Anheuser-Busch InBev SA/NV and Grupo Modelo S.A.B. de C.V.* (Jan. 31, 2013) (challenging merger in beer industry).

20 Niels J. Rosenquist, Fiona M. Scott Morton & Samuel Weinstein, *Addictive Technology and Its Implications for Antitrust Enforcement,* Mar. 22, 2021.

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