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Antitrust Law in the New Economy by Mark R Patterson

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Book Review



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Abstract

THE DRAFTERS OF THE SHERMAN ANTITRUST ACT of 1890 would understandably be perplexed by the complexity of modern economic systems. These drafters, including the Act's namesake, US Senator John Sherman, were operating in a world where protectionist economics dominated. Karl Marx had just recently completed his critique of untethered capitalism, *Das Kapital*, and international trade was largely confined to the exchange of raw materials. These drafters were responding to an issue very topical to the late-nineteenth century— John D. Rockefeller's monopoly over American oil. The situation came to a head in 1882 when Samuel Dodd, the attorney to Rockefeller's company, Standard Oil, ingeniously used the doctrine of trusts to consolidate all of Rockefeller's oil holdings—representing 90 per cent of the market—under a single controlling trust. It took the government 21 years to successfully use the Act to dismantle Rockefeller's Standard Oil Trust.

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Book Review

***Antitrust Law in the New Economy* by
Mark R Patterson¹**THOMAS DICSI²

THE DRAFTERS OF THE SHERMAN ANTITRUST ACT³ of 1890 would understandably be perplexed by the complexity of modern economic systems. These drafters, including the Act's namesake, US Senator John Sherman, were operating in a world where protectionist economics dominated. Karl Marx had just recently completed his critique of untethered capitalism, *Das Kapital*, and international trade was largely confined to the exchange of raw materials. These drafters were responding to an issue very topical to the late-nineteenth century—John D. Rockefeller's monopoly over American oil. The situation came to a head in 1882 when Samuel Dodd, the attorney to Rockefeller's company, Standard Oil, ingeniously used the doctrine of trusts to consolidate all of Rockefeller's oil holdings—representing 90 per cent of the market—under a single controlling trust. It took the government 21 years to successfully use the Act to dismantle Rockefeller's Standard Oil Trust.⁴

Times have changed. As in the late-nineteenth century, current economic relations are at risk of anti-competitive influences. In addition to the traditional

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1. (Cambridge, Mass: Harvard University Press, 2017).
 2. Juris Doctor (2019), Osgoode Hall Law School, Toronto, Canada.
 3. 15 USC §§ 1-38 (1890).
 4. *Standard Oil Co of New Jersey v United States*, 222 US 1 (1911).

monopolistic risks,⁵ however, a new type of economic relationship has emerged that warrants discussion. In the traditional Rockefeller-type monopoly, the economic relationship influenced by monopolistic practices was between the supplier and consumer. The Rockefeller monopoly as the supplier, with effective control over the oil industry, could price gouge and drive-out competition, raising the costs of oil for the end consumer. The new type of economic relationship is instead focused on third-party information providers that serve as “middle-men” between the supplier and the consumer. These middle-men—including Google, Yelp, Amazon, and eBay—are instead pure information providers, who, with sufficient market share of their respective fields (search results, reviews, online sales, et cetera), can engage in monopolistic practices. One such practice could be to have suppliers bid for preferential treatment, which could include increasing the frequency a product appears in a search query. If done by Google or Amazon, this could have a significant effect on consumer preference.

Take for example Google’s altruistic decision in April 2017 to change their search algorithm. These changes, according to Google, were done to address the issue of individuals and companies manipulating their website content so Google’s algorithm would provide them with more favourable treatment during search queries.⁶ Google’s changes were also partly in response to the 2016 presidential election and what Google referred to as the “phenomenon of ‘fake news.’”⁷ The changes favoured more established news networks over independent, “fringe” outlets. Within months, these alternative fringe news outlets experienced significant drops in readership.⁸ One outlet, the “World Socialist Web Site,”

5. See generally David Leonhardt, “The Monopolization of America”, *The New York Times* (25 November 2018), online: <www.nytimes.com> [perma.cc/H26F-JK57]; Barry C Lynn, “America’s Monopolies Are Holding Back the Economy”, *The Atlantic* (22 February 2017), online: <www.theatlantic.com> [perma.cc/8NHL-RF4X].

6. Ben Gomes, “Our Latest Quality Improvements for Search” (25 April 2017), online: *Google* <blog.google/products/search/our-latest-quality-improvements-search> [perma.cc/DBL6-AYR6].

7. *Ibid.*

8. Daisuke Wakabayashi, “As Google Fights Fake News, Voices on the Margins Raise Alarm,” *The New York Times* (26 September 2017), online: <www.nytimes.com> [perma.cc/UX9A-YVZK].

wrote in an open letter to Google that various left-wing news outlets had seen a significant drop in readership.⁹

As with anything in law, a simple deviation in fact or focus of analysis can completely upend the applicability of a legal doctrine. Mark Patterson's book, *Antitrust Law in the New Economy*, explores the applicability of American antitrust law regarding these new economic relationships. Patterson argues for the reconceptualization of information as a formal product—and thus under the purview of antitrust law—acknowledging that information has the same potential for monopoly and collusion as traditional products.

Patterson starts the discussion by providing a comprehensive and, at times, rather theoretical explanation regarding the intersections of antitrust law, consumer protection law, and the new economics of information. He uses the first three chapters to define the “new economy” of information and explore whether this new economy should be regulated under consumer protection law or antitrust law. Unsurprisingly, he suggests that antitrust law is in the best position to tackle the antitrust problems of the new economy. According to Patterson, consumer protection is unable to tackle these problems due to its focus on fraud within individual transactions (as opposed to the more macro considerations of antitrust law). Consumer protection is an individualized body of law; the issue is still one of deception of individuals by particular statements.¹⁰ Antitrust law on the otherhand focuses on the effects of a firm's monopolistic practices rather than on more macro-considerations, such as the overall price of a product.

In part II, Patterson presents four scenarios where information providers could utilize their control over their product to hurt competition. As with traditional antitrust situations, information providers could enter into agreements with other firms to limit information. Although such practices are not uncommon in traditional antitrust cases, Patterson suggests that the new economy has exacerbated the situation, pointing to the severity of the LIBOR-benchmark-rate scandal of 2008.¹¹ Patterson points to companies with substantial market power unilaterally excluding information, such as Google. Undeniably, Google

9. The letter noted, for example, that “www.mediamatters.org” saw a 42 percent drop in Google search results and “democracynow.org” similarly saw 36 percent drop. World Socialist Website, “An open letter to Google: Stop the censorship of the internet! Stop the political blacklisting of the World Socialist Web Site!” (August 2017), online: <www.wsws.org/en/articles/2017/08/25/pers-a25.html> [perma.cc/WA4W-64XD].

10. Patterson, *supra* note 1 at 25-27.

11. *Ibid* at 87-115. See generally James McBride, “Understanding the Libor Scandal” (12 October 2016), online: Council on Foreign Relations <www.cfr.org/background/understanding-libor-scandal> [perma.cc/S9ZB-DPRV].

has substantial market power as is evident in the consequences of their changes in search algorithm and in the phenomenon of “lead generators” discussed in the book.¹² The problem is determining whether Google’s search algorithm is anti-competitive. For example, should the antitrust focus be on exclusionary practices in general, or exclusionary practices that have anti-competitive consequences? They are both equally troublesome, but, as Patterson suggests, “if the effect of a change is as significant for non-competitors as for competitors, a court might be unwilling to treat a change [in algorithm] as exclusionary.”¹³

Patterson shifts focus for his last two scenarios to issues relating to the quantity of product information available in the market. The first scenario, coined as “confusopoly” from Scott Adam’s Dilbert comic-strip, evaluates instances where firms overload information onto consumers to essentially confuse them. Patterson provides the example of the cell-phone market with its abundance of phone plans: Various plans are offered with different combinations of minutes, data, and other services, which result in roughly the same cost, but confuse the customers into believing there are significant cost-savings. The scenario creates the impression that the customer is making an informed decision, when in reality there is a substantial information asymmetry.¹⁴ Interestingly, Patterson shifts the focus here from large information conglomerates like Google and Amazon and focuses on retailers like Kodak and Toys R’ Us. He even explores whether information providers like Yelp, Amazon, and Standard & Poor could alleviate the information asymmetry that retailers like Kodak have in relation to their customers by providing alternative, clear products on one central, virtual marketplace.

Finally, Patterson offers what is arguably the most topical of his scenarios: Situations where companies utilize personal information to tailor their responses.¹⁵ The obvious example would be Google and Facebook’s use of personal information to individually tailor advertisements for their respective

12. Patterson, *supra* note 1 at 138-142, citing David Segal, “Fake Online Locksmiths May Be Out to Pick Your Pocket, Too,” *The New York Times* (30 January 2016), online: <www.nytimes.com> [perma.cc/F4GE-9YN7].

13. *Ibid* at 142.

14. *Ibid* at 146-47.

15. For recent trends of Google and Facebook’s use of personal information, see Jennifer Valentino-DeVries et al, “Your Apps Know Where You Were Last Night and They’re Not Keeping It Secret,” *The New York Times* (30 January 2016), online: <www.nytimes.com> [perma.cc/F4GE-9YN7]; Brian X Chen, “Google’s File on Me Was Huge. Here’s Why It Wasn’t As Creepy as My Facebook Data,” *The New York Times* (16 May 2018), online: <www.nytimes.com> [perma.cc/P4VS-3ERF].

users. Patterson's analysis of the commodification of personal information in this chapter is illuminating, but there is a glaring, very topical issue not discussed: Facebook's role as a primary news source and the consequences this had on the 2016 US presidential election.¹⁶ This is not Patterson's fault, as the realities of Facebook's role only became apparent in late 2017. Further, Patterson seems to want the book's focus to be of "commercially significant information,"¹⁷ and not on the role of information providers in political matters. However, this raises the issue of what role antitrust plays for information providers when their power as information providers is (allegedly) manipulated by third-parties. Patterson seems to be hinting at a sequel tackling this issue, evident from the final section of the book, "Beyond Commerce?"¹⁸

Part III discusses two complications when trying to apply antitrust principles to information providers: intellectual property law and First Amendment rights. The former is easily understandable, as intellectual property rights empower the rights-holder to limit the use of the protected information. The latter can be used to protect information providers, as their information could be considered "speech" and thus protected under the First Amendment. Again, this section begged for a discussion about the 2016 US presidential election and Facebook's role in the dissemination of political information. Particularly, whether Facebook could claim their platform as a medium for free speech, which seems to be its automatic response. For example, in the 10 April 2017 US Senate hearing with Mark Zuckerberg, Senator John Thune questioned the Facebook CEO about the alleged suppressing of conservative news: "[C]ould you assure us that when you are improving tools to stop bad actors, that you will err on the side of protecting speech especially political speech from all different corners?"¹⁹ Mark Zuckerberg responded:

16. Mike Isaac & Daisuke Wakabayashi, "Russian Influence Reached 126 Million Through Facebook Alone," *The New York Times* (30 October 2017), online: <www.nytimes.com/perma.cc/WC6P-FPPZ>. There are arguments that it is impossible to measure how much, if any, influence Russia had through their social media interference campaign. It is undeniable, however, that a substantial portion of Americans sometimes get the news from social media platforms like Facebook. See Elisa Shearer & Katerina Eva Matsa, *News Use Across Social Media Platforms 2018* (Washington, DC: Pew Research Center, September 2018).

17. Patterson, *supra* note 1 at 236.

18. *Ibid.*

19. US, *Hearing Before the United States Senate Committee on the Judiciary and the United States Committee on Commerce, Science, and Transportation: Testimony of Mark Zuckerberg*, 115th Cong (2018).

Senator, yes. That's our—that's our approach. If there is an eminent threat of harm, we're going to take [a] conservative position on that and make sure that we flag that and understand that more broadly. But overall, I want to make sure that we provide people with the most voice possible. I want the widest possible expression and I don't want anyone at our company to make any decisions based on the—the political ideology of the content.²⁰

Although the question was not necessarily about the role of Facebook in the 2016 election, Zuckerberg's evoking of First Amendment principles seems to be part of a larger trend by information providers to divert attention away from their substantial market power.

Overall, the book could have benefited from incorporating the political consequences of informational power. Although Patterson makes it clear that his focus is on the commercial consequences of powerful information providers rather than political, this suggests that the two are separable. While antitrust law is not generally concerned with non-commercial considerations, it is undeniable that considerable market share could have political effects that inherently cause consumers "commercial harm." Despite this minor criticism, Patterson's book provides an impressive discussion of an undeniably complex topic. Patterson accomplishes far more than what he set out to do. He begins the book with the simple phrase, "knowledge is power."²¹ He then proceeds to hook the reader for 237 pages, elaborating on this phrase. His analysis is rigorous and detailed, yet laid out with impressive simplicity. He connects the seemingly high-level discussion of antitrust law to everyday life: from toys to hotels, to photocopiers, and to gym contracts.²² Patterson's work is a must-read for anyone remotely interested in the new economy or antitrust law.

20. *Ibid* [emphasis added].

21. Patterson, *supra* note 1 at 1.

22. *Ibid* at 131, 149, 152-5.