Senator Josh Hawley
Questions for the Record

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1. **During the hearing, you testified that upholding the rule of law may require the deployment of anti-discrimination provisions in the antitrust context, such as those applied to the railways during the early years of antitrust enforcement. How should tech platforms, such as Google and Amazon, be compelled to maintain neutrality in the provision of their services?**

This is an excellent question, and of fundamental importance if we are to ensure that individual citizens, individual publishers, and individual businesses are fully secure in their own properties, and thereby fully in charge of their own speech, decisions, and destiny. I believe there are a variety of ways to achieve the ultimate end of ensuring that the platforms provide every user – both those who come to sell something or to say something and those who come to buy and to listen – with essentially the same service and pricing for that service as everyone else. This includes a) regulatory regimes such as those established under the Interstate Commerce Act to govern the provision of service by network monopolists and select other providers of essential services, including through the direct regulation of pricing and terms of service; b) antitrust laws designed specifically to prohibit discrimination in pricing and terms of service by providers of essential services and goods, notably the Clayton Antitrust Act and the Robinson-Patman Antitrust Act; c) Resale Price Maintenance and other "Fair Trade" regimes that prohibit intermediaries such as retailers, trading companies, and transporters and warehousers, and others, from altering the price estabished by the originator of the good or service. There are a variety of other ways to achieve these ends – at least in part. This includes a) prohibitions on advertising targeted at individuals and small groups of people; b) prohibitions on the use of data gathered about an individual to tailor the provision of services and information to that individual; and c) requirements that all pricing and services by the platforms be made public in a manner that allows for the public and the public government to audit the actions of these corporations. At Open Markets we also believe that various aspects of privacy law can be made to support non-discrimination goals. Importantly, we also believe that it is vital to ensure that the providers of platform services do not compete with their customers in the manufacture of goods or the provision of services that depend on the platforms. Such prohibitions help prevent conflicts of interest in the provision of essential services and thereby reinforce non-discrimination regimes.

2. **During the hearing, I asked you about the possibility of an abuse-of-dominance rule that would establish presumptive restrictions on certain business practices undertaken by a company designated as "dominant." What specific considerations would such a rule need to account for?**

We believe it is especially important to separate the idea of dominance from that of size. Any global or nation-spanning corporation obviously possesses at least the potential ability to exercise power over all the people in the world or in a particular nation who depend on any essential good or service provided by that corporation. But the power to make or break a particular business or a particular person can also belong to a corporation that is entirely local in nature, but that enjoys a monopoly over the provision of some essential good or service within that region.

3. **Which federal antitrust enforcement agency do you view as more effective: the Federal Trade Commission or the Department of Justice's Antitrust Division?**

I believe the last 100 years of U.S. history demonstrate that each of these agencies has been more effective than the other for certain periods of time. This history also teaches us that the division of enforcement into two separate agencies allows for law enforcers to inspire one another, to learn from one another, and in some instances to serve as a check on one another. For these and many other reasons, I believe that it is of fundamental importance to keep the two agencies entirely separate from one another.

Questions for all witnesses

Copyright Piracy

I'm concerned about how big tech companies like Google, YouTube, Facebook, and Twitter are using their market dominance to harm content creators and copyright owners. Last year, as Chairman of the Subcommittee on Intellectual Property I held a year-long series of hearings on copyright piracy and one thing I learned is that these big tech companies aren't combatting copyright piracy in a meaningful way, largely for two reasons.

First, testimony from some of my witnesses suggested these companies actually profit from the piracy of copyrighted content. Second, there was testimony showing that because of the sheer size, scope, and reach of these companies, they willfully allowed copyright piracy in order to secure the most favorable licensing terms from copyright owners. That seems wrong to me and appears to be a classic example of an antitrust violation.

1. What do you think about this behavior by big tech companies? Do you view them using their market dominance to pay content owners below market rates as anticompetitive?

I agree completely that many of these corporations do not make good faith efforts to protect the copyrighted properties of creators. In fact, it is clear that Google, Facebook, and others sometimes actively seek to undermine copyright protection regimes in ways that harm the rights, liberties, and wellbeing of creators. I believe these corporations routinely exploit their power to pay content creators well below market rates and in some cases to destroy the market for what they are selling entirely. These corporations do so sometimes by accident, merely as a function of size combined with sloppiness. In many other instances, they do so intentionally, in order to profit substantially from such actions.

2. Some of these companies—I'm thinking of Google and YouTube in particular—have rights manager's tools to help content owners fight online copyright piracy. Unfortunately, the criteria for accessing these tools isn't always clear, transparent, or consistently applied. Given the market dominance of these actors, and given the sheer amount of copyright piracy occurring on their platforms, should antitrust law require them to make these tools available to all rights holders on fair, reasonable, and non-discriminatory terms?

Yes, absolutely, given the size and power of these corporations, and the sheer amount of piracy and other forms of copyright abuse that occur on their platforms, antitrust enforcers should require these corporations to make these tools available to all rights holders on fair, reasonable, and non-discriminatory terms. And they should face severe penalties for not doing so in a very timely way, and for not providing any supplementary services necessary to make full and timely use of these tools. If law enforcers discover that they do not have all the tools necessary to achieve these goals, then I believe Congress should amend the law to achieve these ends.

3. As the FTC and Department of Justice pursue their antitrust enforcement actions against Facebook and Google, how should those agencies address the issue of platform market dominance and copyright piracy? In other words, what type of behavioral remedies should they consider pursuing in order to force these platforms to proactively combat copyright piracy?

As I have made clear elsewhere, it is vital to address this abuse of copyright first by addressing the power and structure of Google, Amazon, Facebook, and other similar platforms. This should include imposing strong non-discrimination regimes on these corporations. It should also include separating the different monopoly components within these corporations. Google, for instance, is best understood not as a single monopoly but as a cluster of monopolies that can often be used to reinforce one another's power. This includes YouTube, Mapping, Chrome, Android, Gmail, Search and a variety of other components, none of which need to be joined under the ownership of a single corporation. But separating these components only gets us part of the way, by limiting the overall power of any one corporation in relation to the state. To ensure that any provider of essential services to the actors in a particular market does not abuse that power vis a vis individual citizens and businesses – such as by promoting or abetting copyright piracy – it is vital to establish means for the auditing and punishment of such behavior, and for making the punishments sufficiently severe to ensure compliance.

Music Consent Decrees

I'd like to ask about the ASCAP and BMI consent decrees. I've long been a supporter of a largely free market in music. Critics have raised significant concerns about the ASCAP and BMI consent decrees for a number of years. The ASCAP and BMI consent decrees, some critics argue, fail to reflect the way Americans consume music today. Some critics also assert that the decrees discourage innovation by locking in existing practices and licensing terms. According to these critics, the decrees prevent ASCAP and BMI from experimenting with innovative licensing terms. These new or different terms would foster competition.

Moreover, the decrees regulate only ASCAP and BMI, leaving other PROs free to operate without the same constraints. I agree with all of these criticisms. I think we need to sunset the decrees and move to a largely free market in music.

1. Can you give me your thoughts about the anticompetitive impact of the current consent decrees? Specifically, can you address the valid concerns I have that the current decrees actually discourage innovation and experimentation, something that ultimately harms music consumers?
2. What about the fact that ASCAP and BMI have to operate under the decrees and other PROs don't? What are the effects of this dual track system—one involving government regulation and one involving a completely free market—on competition and innovation in the music industry?

Patents

I'm a firm believer in strong patent rights. I believe patents are the ultimate inhibitor of anticompetitive and monopolistic behavior. Patents are one of the few ways that individual inventors or small and medium sized enterprises can force larger, market dominant competitors to negotiate. Without a patent, big companies like Google and Facebook would simply copy their competitor's product for free and swallow up and dominate them.

1. Can you share your views on the role of patents in promoting competition? In particular, I want to hear your thoughts about how patent rights promote the ability of individual inventors and small startups to compete against larger, more dominant market?

2. What role does strong intellectual property rights play in promoting competition? In other words, I'm curious to hear your thoughts about the nexus between strong, predictable, and enforceable intellectual property rights and the ability of individual inventors and small entities to compete against large market actors.