

Responses to Questions for the Record
Senate Judiciary Committee
Subcommittee on Competition Policy, Antitrust, and Consumer Rights
Competition Policy for the Twenty-First Century:
The Case for Antitrust Reform
March 11, 2021

Questions from Senator Booker

You stated in your written testimony:

“There is absolutely no tension between protecting choice for workers, suppliers, farmers, producers, and creators, and protecting it for consumers. Indeed, they all go necessarily hand in hand.”

Studies have confirmed that corporate concentration has a direct relationship to market power in labor markets. According to one such study, the most concentrated labor markets saw a 15 to 25 percent decline in posted wages over those in less concentrated ones.¹

I have spoken out in the past in favor of the Justice Department and the Federal Trade Commission updating their Horizontal Merger Guidelines to expressly include the impact on labor markets, so that the government can better ensure that workers have “meaningful choices that allow them to fairly bargain among potential employers.”

- a. Do you think such a revision to the Horizontal Merger Guidelines would be a beneficial change, and, if so, why?

ANSWER: We would not oppose such a change, and we think it could be a useful clarification that existing antitrust laws protect workers as well as consumers and independent businesses. (The Merger Guidelines are not a constraint on enforcement authority, and do not carry the force of law, but are the agencies’ own description of how they approach enforcement decisions.) Antitrust enforcers recognize that the antitrust laws apply in labor markets, and have brought cases against collusive agreements among employers not to compete for workers, and thus unfairly limit their choices. We believe this ultimately affects the ability of

the best talent to be hired most effectively to provide the best products and services to consumers at the best prices. For that reason, there is no conflict between consumers having meaningful choices and workers having meaningful choices. A healthy competitive marketplace should promote meaningful choices for all.

A pertinent example I gave in my written testimony is that a merger typically allows the new combined corporation to cut costs by eliminating jobs that have become redundant for the merged firm, because before the merger, each firm needed its own workforce, and now the workforces have been combined. But it is incorrect to regard these cost savings as a pro-competitive efficiency that weighs on the side of the scale for deeming a merger to increase competition. In fact, the opposite is generally the case. The elimination of jobs that were previously essential for two companies competing against each other is a by-product of the *reduction* in competition that results from the merger. If the reduction in competition is enough to violate section 7 of the Clayton Act, the reduction in the labor force and the accompanying labor cost savings is not a mitigating factor; it is a symptom of the harm to competition.

- b. What other kinds of high-level changes to competition policy would specifically help to strengthen the bargaining position of workers?

ANSWER: There is already a recognition that actions to suppress competition for workers violates the antitrust laws. That recognition can be reflected in antitrust enforcement actions. The changes to the antitrust laws that I recommend in my testimony, and that are proposed in Chairwoman Klobuchar's bill S. 225, would strengthen antitrust enforcement in general, including as it protects workers. One of those proposed changes is to add references to monopsony, which describes a corporation with market power as a buyer, which includes its role as an employer or purchaser of labor services.

These changes will all help protect the freedom of workers to choose among meaningful alternatives for work. Beyond those changes, further efforts to strengthen the bargaining position of workers are likely to be in the area of labor law rather than antitrust law.

- c. More broadly, can you elaborate on how protecting choices for workers as well as consumers "all go necessarily hand in hand"?

ANSWER: What creates the meaningful choices for consumers is having attractive alternatives offered by viable competing sellers – fed by viable

competing manufacturers, distributors, input suppliers, and content creators. For them to be viable, they each need a workforce with the requisite talents and skills. Just as competition for consumers generates a better selection of choices, competition for workers generates the ability of manufacturers, distributors, input suppliers, and content creators to provide those choices.

Questions from Senator Tillis

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?

ANSWER: The situation you describe is symptomatic of a marketplace where there is too much market power in the hands of a few tech platform giants, and not enough healthy competition, resulting in an unnatural imbalance in bargaining power and the potential for exploitation. Depending on the circumstances, this conduct could in itself be an anticompetitive violation of the antitrust laws. But even if not, it is an illustration of why Congressional intervention to create a market structure more conducive to competition is needed in the online marketplace.

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?

ANSWER: Some aspects of protecting a marketplace against abuse fall outside the scope of antitrust. This is likely one of them. It is, however, an appropriate subject for Congress to consider as part of ensuring suitable protections for intellectual property.

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?

ANSWER: The appropriate remedies in these enforcement actions will be tailored to the scope of antitrust violations proved, or the violations alleged and made part of a consent decree. Antitrust remedies that create a more competitive online platform marketplace will incentivize platforms to improve services they provide to users, including stronger protections for intellectual property against piracy. The primary source for those protections, however, will come from intellectual property law.

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?

ANSWER: Consumer Reports has not been directly engaged in the recent consideration of updating the ASCAP-BMI consent decree.

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?

ANSWER: Patent law is an important protector of innovators against misappropriation by others, and thus an important protector of competitive opportunities for new entrants and inventors with innovative ideas.

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.

ANSWER: Enforceable intellectual property rights are a critical aspect of a marketplace in which competition is protected and promoted. At the same time, an over-expansive concept of intellectual property rights can be abused to block competitive entry. It is important that the intellectual property laws and the antitrust laws work appropriately in balance to promote competition and consumer choice. One example is anticompetitive "pay for delay" agreements, where a brand-name drug manufacturer pays off a generic drug maker to delay its more affordable alternative so the brand-name manufacturer can continue charging high monopoly prices. The brand-name manufacturers claimed that their patents gave them an absolute right to enter into these agreements. After sustained FTC challenge, the Supreme Court ruled that these agreements were indeed subject to the antitrust laws.