Is There Evidence of Antitrust Harm in the House Judiciary Committee's Hot Docs?

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By Sarah Oh[1]

The House Judiciary Committee released a large number of business documents on July 29, 2020 alongside the Antitrust Subcommittee's hearing on "Online Platforms and Market Power."[2] The hearing featured the chief executive officers of four large U.S. technology companies. Jeff Bezos of Amazon, Sudhar Pichai of Google, Mark Zuckerberg of Facebook, and Tim Cook of Apple gave testimony and answered questions on a range of topics over five and a half hours. The business documents are a subset of the documents collected from an ongoing antitrust investigation by the House Committee. We read the files and analyze them below. In my assessment, these "hot docs," particularly combined with market evidence, reveal episodes of rapid growth and innovation in digital markets, as opposed to obvious instances of anticompetitive conduct.

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[1] Senior Fellow, Technology Policy Institute, Washington, D.C. The views expressed here are those of the author and do not necessarily reflect those of TPI's staff, board of directors, or board of academic advisors. Thanks to Jeffrey Propp for summer research assistance and document review.
[2] U.S. House of Representatives, Judiciary Committee, Antitrust Subcommittee Hearing, "Online Platforms and Market Power," July 29, 2020, https://judiciary.house.gov/online-platforms-and-market-power/.

Introduction

In conjunction with a public hearing on July 29, 2020, the House Judiciary Committee released a set of business documents from several large U.S. technology firms as evidence of anticompetitive conduct and antitrust injury. In my assessment, these "hot docs," particularly combined with market evidence, reveal episodes of rapid growth and innovation in digital markets, as opposed to obvious instances of anticompetitive conduct.[3] These documents will not be the only evidence prosecutors will bring in litigation, however, and far more hard evidence and analysis of economic conduct will be needed to prove antitrust injury.

I. Amazon

The Amazon documents focused on how the company competed with Quidsi, the parent company of Diapers.com and Soap.com, the company's acquisitions of Blink and Ring, and its rules and behavior with respect to third-party sellers.

In all of these instances, whether Amazon has acted anticompetitively will depend heavily on how a court agrees to define relevant markets at the time of the acquisitions. Today, at the very highest level is a debate about Amazon's position as a retailer. On one hand, Amazon accounts for almost 50 percent of U.S. retail ecommerce sales.[4] On the other hand, online retail sales account for only 16 percent of all U.S. retail sales, which means Amazon accounts for at most, 8 percent of all U.S. retail sales.[5] For each more narrowly-defined product, a court would have to begin by deciding whether the relevant market is online sales only or all retail sales. The answer to that question alone has major implications on the degree to which Amazon is able to act anticompetitively.

A. Diapers.com and Soap.com

Several analysts contend Amazon's price competition with Diapers.com is an example of anticompetitive conduct.[6] During the House Judiciary Committee hearing, Representative Mary Gay Scanlon (D-PA) said that in 2009, Amazon incurred $200 million in profit losses to win market share, and followed Diapers.com in raising prices months later.[7] She cited these facts as evidence of Amazon using a predatory pricing strategy to undercut Diapers.com and drive them out of business. Emails show no doubt that Amazon's strategy was to compete on lower prices.

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[3] For a discussion of the difference between business rhetoric and economic conduct in antitrust litigation, *see generally* Geoffrey A. Manne & E. Marcellus Williamson, *Hot Docs vs. Cold Economics: The Use and Misuse of Business Documents in Antitrust Enforcement and Adjudication*, 47 ARIZONA L. REV. 609 (2005).
[4] https://judiciary.house.gov/uploadedfiles/0006.pdf (HJC presentation, citing eMarketer (2019), May 2020).
[5] U.S. Department of Commerce, U.S. Census Bureau, Quarterly Retail E-Commerce Sales, 2nd Quarter 2020, https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf (August 18, 2020).
[6] *See generally* Lina Khan, *Note: Amazon's Antitrust Paradox*, 126 YALE L.J. 564-907 (2017), at 772-73.
[7] https://www.youtube.com/watch?v=WBFDQvIrWYM (Rep. Scanlon's question at 2:14:00).

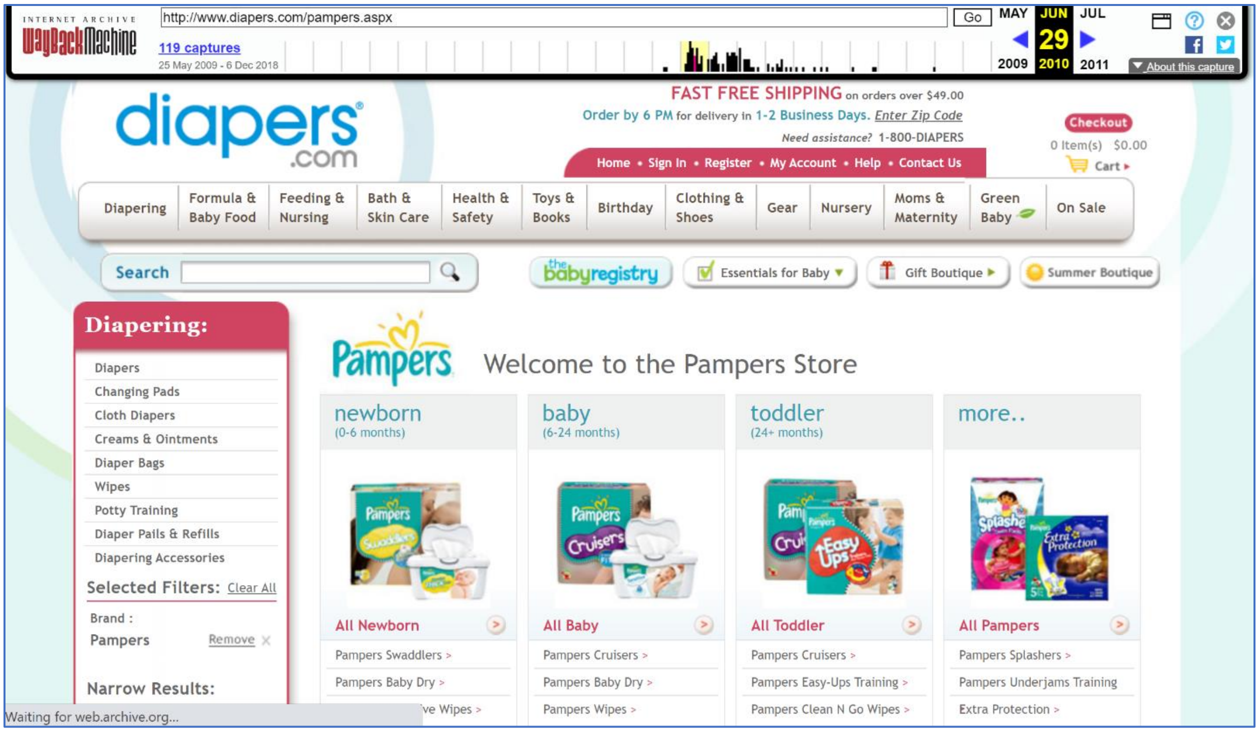

Figure 1. Diapers.com in June 2010.

In 2009, Diapers.com was, in Amazon's view, its "#1 short term competitor" with notable year-over-year revenue growth.[8] In 2010, Soap.com was Amazon's "most significant short term competitor in the [health and personal care] space."[9] In one email, Amazon's product manager wrote, "we need to match pricing on these guys no matter what the cost."[10] Amazon's plan included more than just price competition. It also planned to change order cutoff times and improve speed on its diaper product pages.

In June 2010, Amazon developed a "plan to win,"[11] which included "market leading prices on diapers," free Prime offerings, and an "Amazon Mom" program. The plan was meant to undercut Diapers.com and "slow the adoption of soap.com."[12] The Amazon team assessed the strategy a few months later in September 2010, remarking that Quidsi's management reported in company documents that "they expect to lose lots of money over the next[sic] few years[sic]."[13] In a company report, Quidsi, the parent company of Diapers.com, reported a challenging third quarter of 2010 with decelerating growth in the core diapers category.[14]

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[8] https://judiciary.house.gov/uploadedfiles/00151722.pdf (internal email dated February 9, 2009).
[9] https://judiciary.house.gov/uploadedfiles/00132026.pdf (internal email dated June 8, 2010).
[10] https://judiciary.house.gov/uploadedfiles/00151722.pdf (internal email dated February 9, 2009).
[11] https://judiciary.house.gov/uploadedfiles/00132026.pdf (internal email dated June 8, 2010).
[12] https://judiciary.house.gov/uploadedfiles/00132026.pdf (internal email dated June 8, 2010).
[13] https://judiciary.house.gov/uploadedfiles/00009716.pdf (internal email dated September 21, 2010).
[14] https://judiciary.house.gov/uploadedfiles/0004.pdf (HJC presentation slides).

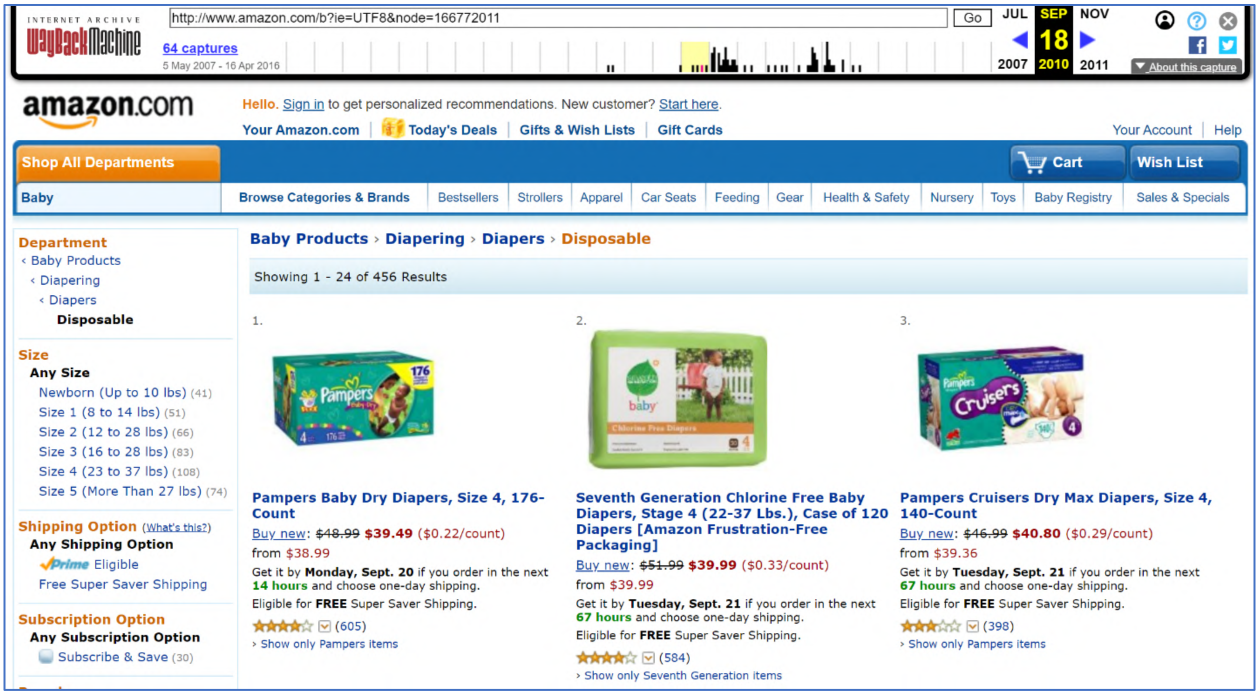

Figure 2. Amazon.com in September 2010.

In the hearing, several members of the House Committee seemed to believe that these actions were evidence of predatory pricing. Predatory pricing, however, involves more than a plan to undercut rivals' prices. After all, consumers benefit when one competitor undercuts another's prices. Under a predatory pricing strategy, a firm uses below-cost pricing to corner a market with the intention of increasing prices after competitors have exited. A strategy of aggressive price-matching and a "plan to win" may allude to the specter of anticompetitive conduct but does not prove the case.[15] On their own, the emails do little to establish whether the company acted in an injurious way.[16]

To prove that Amazon engaged in predatory pricing, plaintiffs must, according to the U.S. Department of Justice, prove that, "(1) the prices were below an appropriate measure of defendant's costs in the short term, and (2) defendant had a dangerous probability of recouping its investment in below-cost prices."[17] These principles were established in a 1993 Supreme Court decision, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.* In that case, the Court considered economic models, such as game theory, to determine whether a rival cigarette manufacturer engaged in predatory pricing.

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[15] Section 2 investigations of predatory pricing by the U.S. Department of Justice include inquiries into six key issues, "(1) the frequency of predatory pricing, (2) treatment of above-cost pricing, (3) cost measures, (4) recoupment, (5) potential defenses, and (6) equitable remedies," https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-4#N_56_.

[16] In an antitrust lawsuit, market dominance will need to be proven, and cannot simply be asserted. *But see* 126 YALE L.J. at 773-74 ("Although Amazon established its dominance in this market through aggressive price cutting and selling steeply at a loss…").

[17] https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-4#:~:text=To%20prevail%20on%20a%20predatory,investment%20in%20below%2Dcost%20prices.

In theory, both above-cost and below-cost pricing can harm consumers. But in order to interpret a firm's pricing behavior in the context of relevant market structure, an estimate of the firm's costs needs to be established. Lower courts have grappled with how to define a defendant's "appropriate measure" of costs in predatory pricing cases.[18] Ultimately, however, after an investigation of pricing and costs, the consumer welfare standard directs antitrust enforcers and litigants to prove that price-cutting resulted in harm to consumers. That harm may be in the form of less quantity, lower quality, higher prices, or loss of innovation among competitors.

Plaintiffs might question the effect of the Diapers.com acquisition on innovation. In this case, the acquisition appears to have generated new innovation and entry. The $545 million acquisition resulted in payouts to two founders, one of whom who went on to build Jet.com which he later sold to Walmart for $3.3 billion.[19] An antitrust analysis of innovation in 2009-2010 may need to take into account the incentives of serial entrepreneurs in those years of online retail markets. Without a payout from an earlier acquisition, would this founder have had the resources or track record to create another successful technology company? Incentives for entrepreneurial activity should be balanced against loss of innovation from acquisitions in an antitrust analysis of this sort.

B. The Blink and Ring Acquisitions

The key issue surrounding Amazon's acquisitions of Blink and Ring are whether the acquisitions injured nascent or potential competitors. Emails show that Blink and Ring executives held meetings to discuss possible merger and acquisition opportunities with Amazon. As Amazon moved forward with its due diligence on the Ring acquisition, executives stated that the company was "willing to pay for market position as it's hard to catch the leader."[20] Emails reveal internal deliberations about the process of absorbing Ring and how difficult it would be to replicate their technology. Jeff Bezos noted that his view was that Amazon was "buying market position, not technology. And that market position and momentum is very valuable."[21]

The Bezos comment appears to show the company bought Ring in order to enter the home security market with an established brand. But rhetoric alone does little to prove or disprove that an acquisition was anticompetitive. To show that the acquisitions of Blink or Ring were anticompetitive, prosecutors need a far more extensive economic record. It should include, for example, an attempt to define the relevant market and data outlining the relevant market. With that information, analysts can begin examining the economic effects of post-acquisition product integration. An analysis should examine whether Amazon squashed a potential competitor or improved a fledging product and its distribution.

More importantly, the analysis must address how consumers have been affected by Amazon's acquisition. In 2019 Consumer Reports rated Ring as the second-best DIY home security system,

[18] https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-4#:~:text=To%20prevail%20on%20a%20predatory,investment%20in%20below%2Dcost%20prices.
[19] https://reason.com/2019/09/05/the-new-trustbusters-are-coming-for-big-tech/ (noting subsequent entrepreneurial activity by the founders of the acquired firm, "All these monopolies, so many startups.").
[20] https://judiciary.house.gov/uploadedfiles/00214132.pdf (internal email dated October 11, 2017).
[21] https://judiciary.house.gov/uploadedfiles/00173560.pdf (internal email dated December 15, 2017).

just behind Google's Nest brand.[22] The higher-tier of Ring's professional monitoring plan is $10 per month or $100 per year.[23] The leading home security company, ADT, has monitoring plans at "starting at $28.99 per month."[24] There is little doubt that consumers are better off now than they were before Ring was on the market. The question will be whether it could have achieved its current success without Amazon or a similarly large owner.

It is those and other related questions that the Federal Trade Commission is in the process of investigating currently. In February 2020, the FTC issued special orders to the five biggest tech firms to collect information about acquisitions that did not meet threshold reporting requirements.[25] The FTC stated that its inquiry will include a study of trends in acquisitions, structure of deals, and post-acquisition product development, pricing, and integration.[26] This investigation should yield information far more informative than emails about the competitive implications of the acquisitions.

C. Suppliers and Third-Party Sellers

Certain emails shed some light on how Amazon interacts with suppliers. Amazon developed "supplier tenets" that described its own prices compared to supplier prices. "We must have equal or better prices… all the selection… and fast track offers on selection offered by SIC and IC competitors."[27] Under these rules, in the event that customers had access to better prices or selection on another website, Amazon could choose to "force the supplier to either lower the price, provide the selection or enter the Amazon reseller program."[28]

An anecdote from a small bookseller of its experiences dealing with Amazon and Amazon's marketplace platform was included in the House Committee exhibits. The bookseller claims that Amazon's growing market share was eliminating business opportunities. One presentation slide included a bookseller's plea to Amazon, affirming their compliance to Amazon's standards and begging Amazon not to squash their business.[29]

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[22] https://www.consumerreports.org/products/home-security-systems-200196/diy-home-security-systems-200197/recommended/.
[23] https://shop.ring.com/pages/protect-plans.
[24] https://www.adt.com/compare.
[25] Section 6(b) of the FTC Act; Hart-Scott-Rodino (HSR) Act.
[26] https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies.
[27] https://judiciary.house.gov/uploadedfiles/00190108.pdf (internal email dated May 31, 2016).
[28] https://judiciary.house.gov/uploadedfiles/00190108.pdf (internal email dated May 31, 2016).
[29] https://judiciary.house.gov/uploadedfiles/0006.pdf (HJC presentation, citing eMarketer (2019), May 2020).

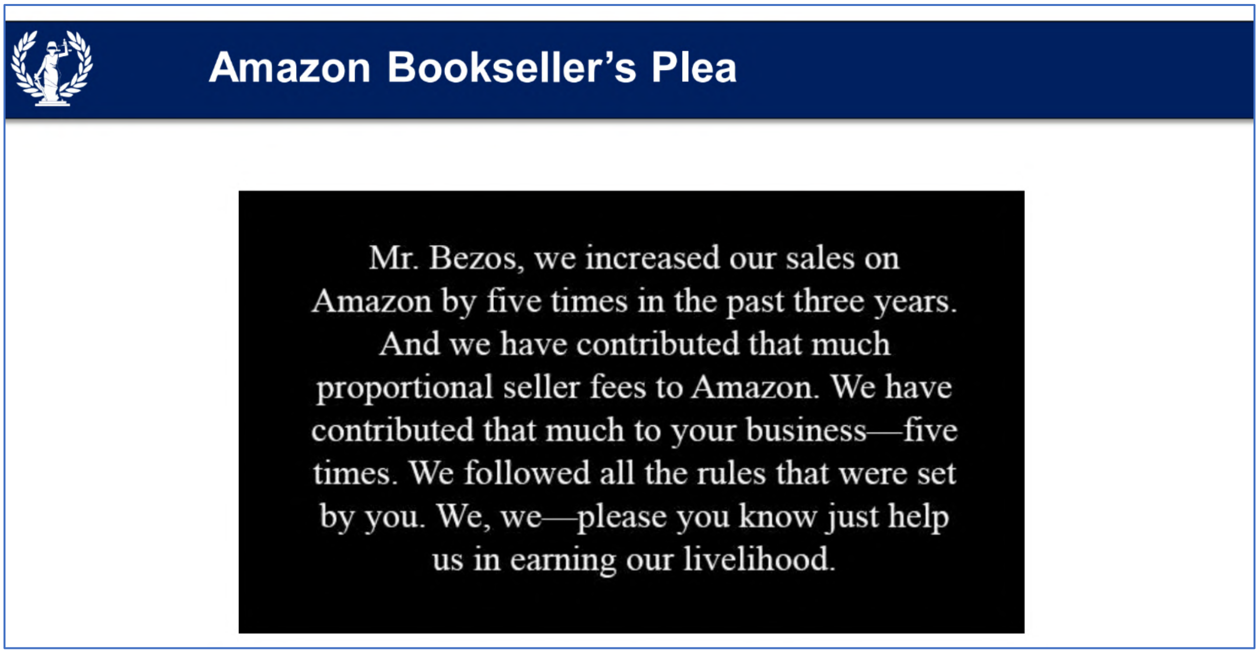

Figure 3. Third-Party Seller Quote in House Judiciary Committee Documents.

It is difficult not to feel concern for the plight of the seller. But antitrust is intended to protect consumers, not businesses, and the relevant question is how consumers fare under Amazon's marketplace rules and Amazon's behavior. The documents provide no evidence one way or another on this key question.

II. Apple

The Apple documents focus on the company's App Store policies and procedures. Specifically, the documents reveal the inner workings of the App Store's app review process, changes to parental control apps, treatment of native apps, and rules on in-app purchases (IAP).

A. Search Results and App Review in the App Store

Many of the documents involve complaints from app developers to Apple. App developers emailed the company seeking help with placement in the App Store because their apps were "virtually invisible"[30] on the store directory. One developer alleged that the search algorithm on the App Store appeared to rely on top-25 lists rather than keywords, unfairly making some apps difficult to find.[31] Another developer complained that users searching for an exact match or variations of their app's name could not find their app in the first 100 results of the App Store. Says one developer, "we simply cannot succeed if we can't be searched on your store. This is sad for us, but also sad for the iOS ecosystem."[32]

[30] https://judiciary.house.gov/uploadedfiles/007767.pdf (email dated October 10, 2012).
[31] https://judiciary.house.gov/uploadedfiles/007673.pdf (email dated August 26, 2010).
[32] https://judiciary.house.gov/uploadedfiles/008115.pdf (email dated October 3, 2017).

Another developer complained of the app review process to get an app to be distributed in the App Store. The developer spent money redesigning an app to comply with standards after its sudden removal from the App Store, only to be met with more rejection. The developer was frustrated by the app review process, saying that even if he were to design an app "in a way that we believe to be in the spirit of Apple and try to make sure we do it as Apple would want, we could still get whacked. We are now scared of Apple."[33]

Much like the story from the bookseller discussed above, it is difficult to read these emails and not feel frustrated on behalf of the petitioning developers. Still, the key question is whether Apple uses the App Store to systematically foreclose competition or engage in unfair or deceptive practices using quality control as an excuse. This question cannot be answered by claims of a few developers, whose particular apps may have been technically deficient, failed to meet some security standard, or whose apps were unfortunately harmed by legitimate changes in the App Store. By the same token, Apple cannot disprove foreclosure by explaining why any given developer in question is wrong.

Instead, to evaluate foreclosure, an investigation must begin with an understanding of the business structure of app stores and definition of the relevant markets. A few of these questions were raised in *Apple Inc. v. Pepper*,[34] and will continue to be crucial.

In the oral arguments of *Apple Inc. v. Pepper*, Justice Breyer asked whether Apple's App Store was different from any other type of distribution company. He expressed skepticism about new economic theories of two-sided markets.[35] On the other hand, Justice Sotomayor reasoned that an app store is not like vertically integrated brick suppliers, but that the app ecosystem is a "closed-loop" with Apple acting as a "spoke."[36] The business structure of app stores is relevant to a claim of foreclosure, and an antitrust investigation would need to tackle these questions on two-sided markets once again.

B. Native Apps

The documents also include rhetoric around Apple's pre-loading onto iPhones native apps such as Apple Music, Apple Mail, and Apple Maps. The company discourages copycat apps, but retains the right to distribute its own native apps even if they perform similar functions as an existing third-party app.[37]

In one document, employees discussed how rebuttals to monopolistic charges around native apps should not focus on App Store choices and review processes, but rather on market share, job creation, and competition among different apps.[38] One employee wrote, "The reason our services aren't on the app store is because of the native apps. I think we're better served looking at the

[33] https://judiciary.house.gov/uploadedfiles/015127.pdf (email dated January 25, 2015).
[34] *Apple Inc. v. Pepper*, 587 U.S. __, 139 S. Ct. 1514 (2019); *see generally* Sarah Oh and Scott Wallsten, *The Law and Economics of* Apple Inc. v. Pepper, Dec. 20, 2018, https://techpolicyinstitute.org/2018/12/20/the-law-and-economics-of-apple-inc-v-pepper/.
[35] *Apple Inc. v. Pepper*, at 11 (Breyer, J.).
[36] *Apple Inc. v. Pepper*, at 13 (Sotomayor, J.).
[37] https://judiciary.house.gov/uploadedfiles/0010.pdf (HJC presentation).
[38] https://judiciary.house.gov/uploadedfiles/011034.pdf (internal email dated March 12, 2019).

success of developers and the thriving businesses it's created."[39] Apple noted that at one point in time, native apps represented approximately 311 of 2 million total apps (0.0001%) in the App Store, and that the company "does not subordinate the exposure of 3rd party apps."[40]

Several other high-profile antitrust cases have raised questions about whether companies can bundle their own native apps without running afoul of competition concerns.[41] Determining whether Apple behaved anticompetitively with its native apps and pre-loaded defaults will involve considerations such as the difficulty of downloading and installing replacements for the pre-loaded defaults, the level of integration of the native apps with the operating system, and other effects on innovation in the app ecosystem.

C. In-App Purchases

A recent set of civil complaints by Epic Games has brought controversies about Apple (and Google's) in-app purchase policies to national headlines.[42] Internal communications about Apple's in-app purchase policy from 2010-2011 shed light on some motivations behind key decisions in the design of the App Store ecosystem.

In 2010, an internal email showed how executives made decisions about Apple's in-app payment policy. One executive began to discuss the implications of changes in the mobile market after viewing a YouTube ad that showed mobile users building libraries of Kindle books on an iPhone and subsequently switching to an Android phone to continue reading the same books.[43] The Kindle app was allowing iPhone users to buy books directly from Amazon, thus by-passing Apple's in-app payment system. In response, Steve Jobs decided that "I think it's time to begin applying [our payment mechanism] uniformly except for existing subscriptions..."[44]

An email between Jobs and Eddy Cue from 2011 showed continued development of this policy.[45] Cue listed the implications of big decisions around in-app purchases in light of competition from Android phones and Amazon books.[46] Jobs decided that, "iBooks is going to be the only bookstore on iOS devices. We need to hold our heads high. One can read books bought elsewhere, just not buy/rent/subscribe from iOS without paying us, which we acknowledge is prohibitive for many things."[47]

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[39] *Id*.
[40] https://judiciary.house.gov/uploadedfiles/011034.pdf (internal email dated March 12, 2019).
[41] Self-preferencing in bundled products has been investigated in antitrust litigation, most notably in *U.S. v. Microsoft Corporation*, 253 F.3d 34 (D.C. Cir. 2001).
[42] *Epic Games, Inc. v. Google LLC, et al.*, https://cdn.vox-cdn.com/uploads/chorus_asset/file/21759099/file0.243586135368002.pdf; *Epic Games, Inc. v. Apple, Inc.*, https://cdn2.unrealengine.com/apple-complaint-734589783.pdf.
[43] https://judiciary.house.gov/uploadedfiles/014701.pdf (internal email dated Nov. 23, 2010).
[44] https://judiciary.house.gov/uploadedfiles/014701.pdf (internal email dated Nov. 23, 2010).
[45] https://judiciary.house.gov/uploadedfiles/014816.pdf (internal email dated Feb. 6, 2011).
[46] https://judiciary.house.gov/uploadedfiles/014816.pdf (internal email dated Feb. 6, 2011).
[47] https://judiciary.house.gov/uploadedfiles/014816.pdf (internal email dated Feb. 6, 2011).

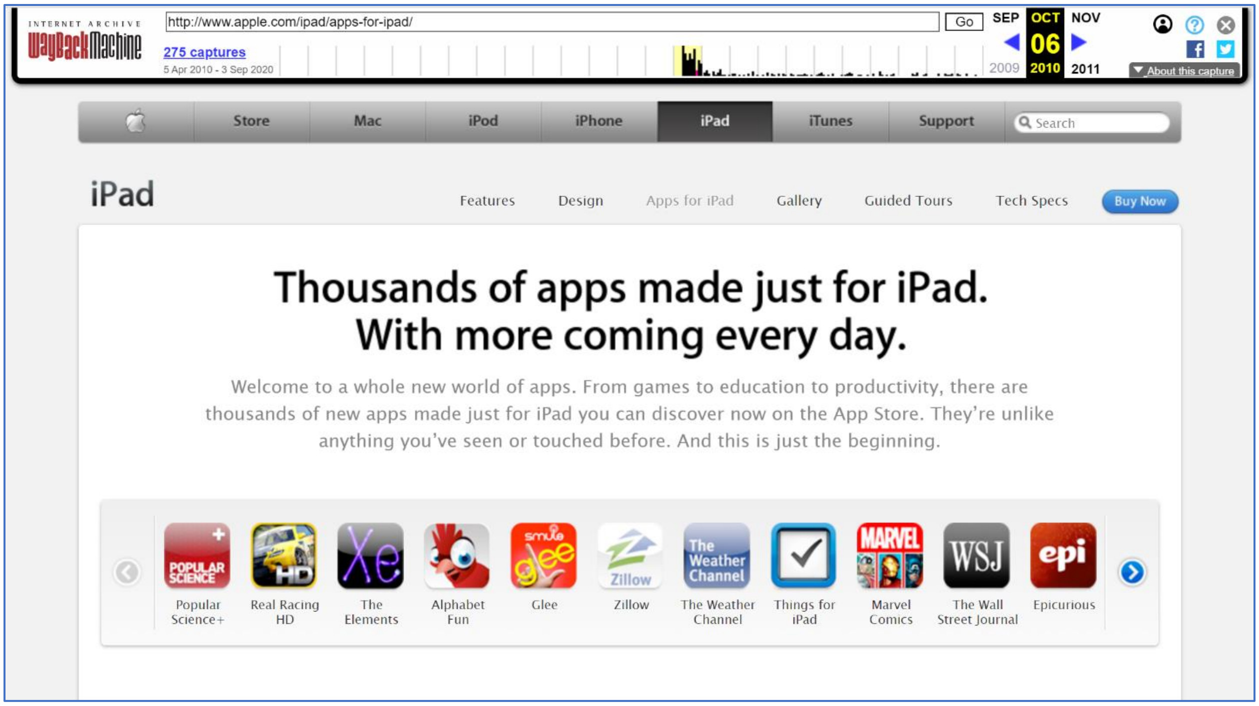

Figure 4. Apple App Store in October 2010.

The emails also included discussions on how in-app payment fees would apply to other digital goods such as, "Netflix, WSJ, MLB, Pandora." Cue said, "This is going to be a huge decision for us."[48] Later that year, the Apple team also discussed how to apply in-app payment fees for sports and other media.[49]

More recent business documents show how app developers seek to dispute Apple's in-app purchase policy. In 2017, emails show that Spotify was in non-compliance with the in-app payments policy. Spotify changed its app to allow users to click through to its external website to purchase premium subscriptions, a technical feature that violated Apple's Rule 3.1.1.[50] Apple's correspondence included reasons for company policy,

> "If a developer chooses not to use in-app purchase, it is free to do so. A developer is also free to sell traditional content such as music (including via subscription) outside of the app and then offer consumers a way to access that content from within app. What a developer cannot do is seek to use its iOS app as a marketing tool to redirect consumers outside the app to avoid in-app purchase. This fundamentally undermines the App Store business model."[51]

In 2018, T-Mobile's FamilyMode app also failed to pass the app review process due to violations of the in-app purchase policy.[52] T-Mobile designed its app to connect with T-Mobile's network infrastructure to authenticate users of the network. The app, however, allowed users to charge payments directly to T-Mobile, working around Apple's in-app payment system. According to T-

[48] https://judiciary.house.gov/uploadedfiles/014816.pdf (internal email dated Feb. 6, 2011).
[49] https://judiciary.house.gov/uploadedfiles/015059.pdf (internal email dated March 17, 2011).
[50] https://judiciary.house.gov/uploadedfiles/013578.pdf (letter dated Oct. 28, 2016).
[51] https://judiciary.house.gov/uploadedfiles/013578.pdf (letter dated Oct. 28, 2016).
[52] https://judiciary.house.gov/uploadedfiles/014870.pdf (email dated Sept. 6, 2018).

Mobile, the payments were in compliance with Apple's in-app purchase policy and essential for telephony services such as 911.[53] Apple disagreed.

Whether Apple's app review policies are antitrust violations is likely to hinge on how the policies affect the relevant market and whether prosecutors can prove that the issues raised are bigger than disputes between companies over how to distribute profits or protect user privacy or security. A plaintiff must be able to argue not just that they think a 30 percent commission is unfair, but that the commission and other App Store policies at issue have harmed consumers by, for example, keeping end-user prices higher than they would be otherwise or slowing innovation in the ecosystem. Similarly, not being able to pay for services like Netflix and Spotify within an app are not, by definition, harms. To prove harm, a plaintiff would have to demonstrate that the inability to make payments through the app foreclosed sales, thereby harming consumers.

On the other side, Apple will need to prove countervailing benefits that might offset any harms. For example, Apple argues that strict control of the payment system is necessary to prevent fraud and protect consumers. Apple will need to quantify the benefits of this (and other) payment rules if it is to argue that as one reason to maintain control of the payment system.

III. Facebook and Its Acquisition of Instagram

The Facebook documents focus on its acquisition of Instagram. The key question is whether the acquisition squashed an emerging competitor or instead gave Instagram the resources necessary to succeed. Email messages between Kevin Systrom and Mark Zuckerberg, chat messages between Kevin Systrom and Matt Cohler, internal communications between Mark Zuckerberg and David Ebersman, and corporate communications by Sheryl Sandberg reveal the inside story of how each company came to agree to the business combination.

Instagram grew rapidly in its first two years, which impressed Facebook executives. Mark Zuckerberg identified the company as Facebook's biggest threat.[54] But Zuckerberg also noted that, "one thing about startups though is that you can often acquire them."[55] Facebook needed to decide if they were "friends or foes."[56] Facebook's assessment of the smaller firm included considerations such as strategic position. One executive expressed the sentiment that "not losing strategic position in photos is worth a lot of money."[57]

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[53] https://judiciary.house.gov/uploadedfiles/014870.pdf (email dated Sept. 6, 2018).
[54] https://judiciary.house.gov/uploadedfiles/0006334000063341.pdf (internal email dated Apr. 9, 2012).
[55] https://judiciary.house.gov/uploadedfiles/0006334000063341.pdf (internal email dated Apr. 9, 2012).
[56] https://judiciary.house.gov/uploadedfiles/0008.pdf (HJC presentation).
[57] https://judiciary.house.gov/uploadedfiles/0006318000063197.pdf (internal email dated Mar. 9, 2012).

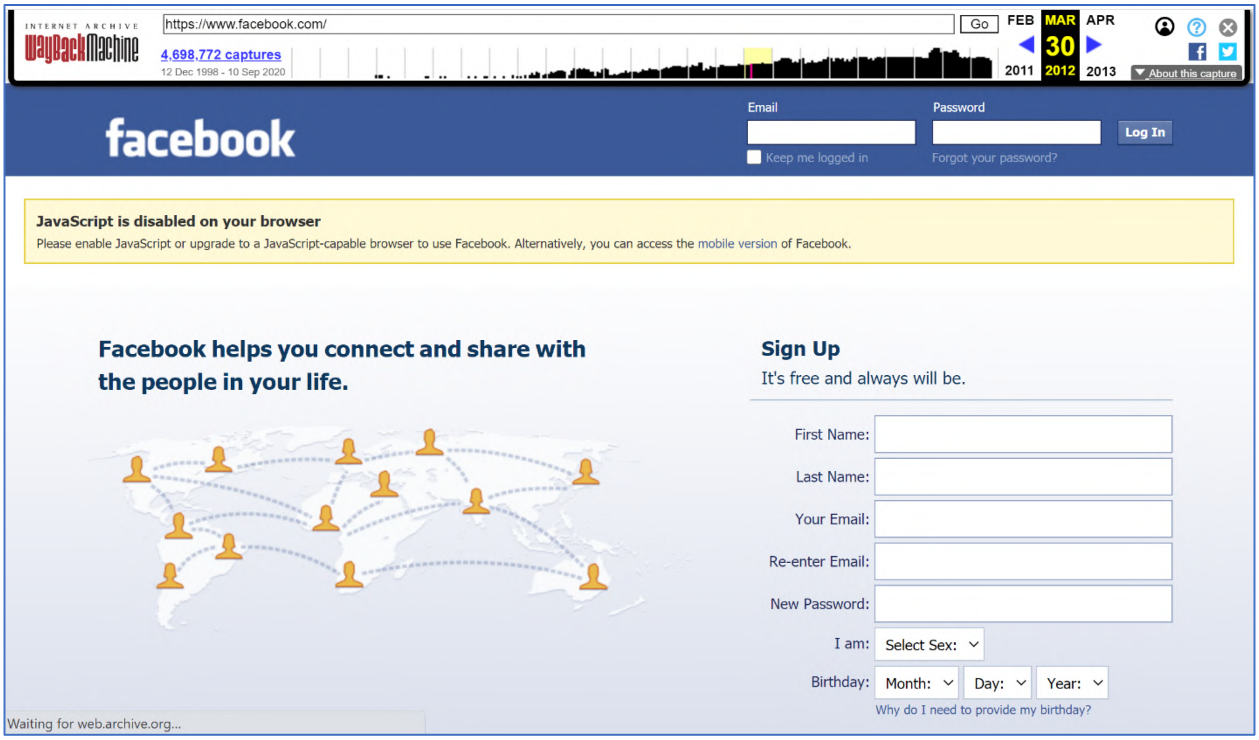

Figure 5. Facebook.com in March 2012.

Emails between Kevin Systrom of Instagram and Zuckerberg showed Systrom's initial reluctance to sell, and Zuckerberg's efforts to persuade Systrom to sell. Zuckerberg's emails described his view on the inevitability of a relationship between the two companies.

In a lengthy email discussion of the social media market, the growth of Instagram, and the benefits of joining Facebook, Zuckerberg and Systrom laid out the terms of the acquisition.[58] Systrom set an initial value of Instagram at $500 million, then changed his offer to $2 billion.[59] Zuckerberg would eventually work out a deal for $1 billion. In the course of negotiations, Zuckerberg writes,

> "Of course, at the same time we're developing our own photos strategy, so how we engage now will also determine how much we're partners vs. competitors down the line – and I'd like to make sure we decide that thoughtfully as well."[60]

This conversation on whether to join forces or remain independent with estimates on its value varying from $500 million to $2 billion from one day to the next shows how uncertain Instagram's future was at the time.

[58] https://judiciary.house.gov/Uploadedfiles/0009164800091654.pdf (emails dated Mar. 19 - Apr. 9, 2012).
[59] https://judiciary.house.gov/Uploadedfiles/0009164800091654.pdf (emails dated Mar. 19 - Apr. 9, 2012).
[60] https://judiciary.house.gov/uploadedfiles/0009164800091654.pdf (emails dated Mar. 19 - Apr. 9, 2012).

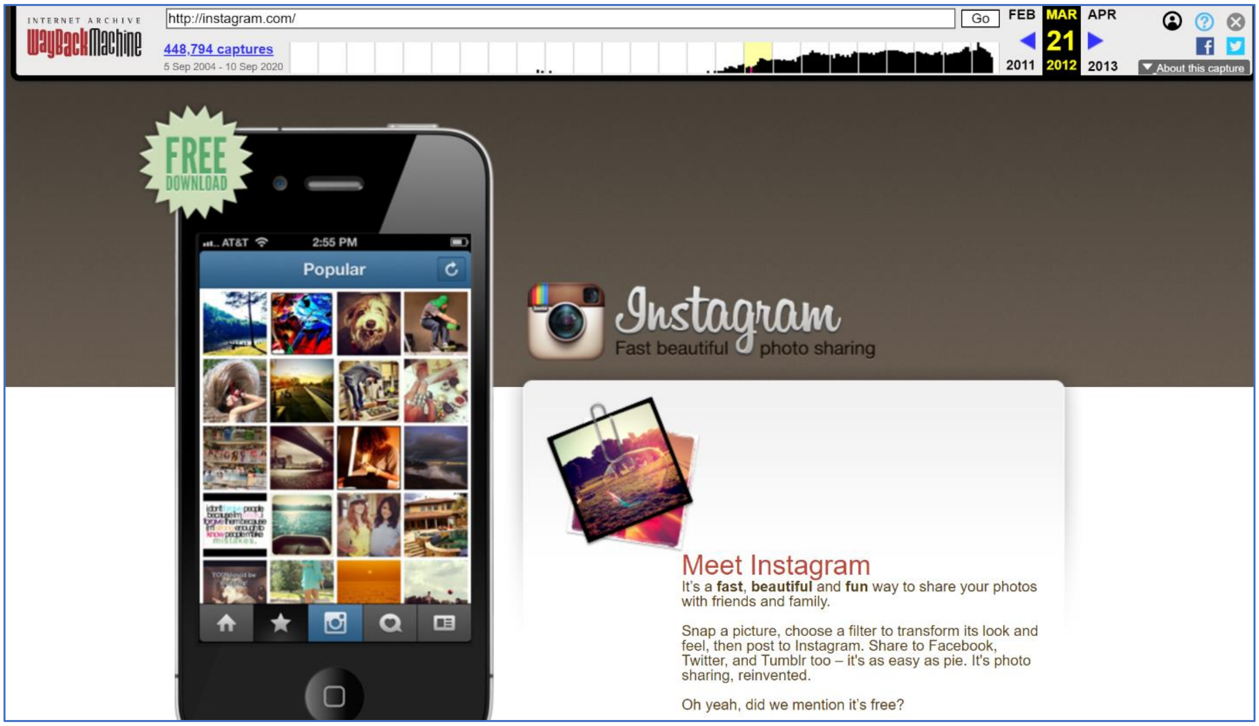

Figure 6. Instagram.com in March 2012.

The deal between Zuckerberg and Systrom included terms familiar to many in Silicon Valley. They discussed the terms of the deal,

> "Most of the upfront deal consideration portion for you guys also needs to vest in addition to the retention package. It will have the same provisions of double-trigger etc [sic] to guarantee you eventually get it, but we can't just transfer all of the money immediately. You probably understood what I was saying here from other deals you've done, but I just wanted to clear this up since I think I misspoke on it."[61]

Internal emails between Zuckerberg and David Ebersman, Facebook's counsel, show the deliberations that occurred within Facebook at the time of these negotiations. Zuckerberg describes possible reasons for an acquisition to "neutralize competition" and to "integrate their products."[62] "What we're really buying is time," writes Zuckerberg, as there are a "finite number of different social mechanics to invent."[63] Purchasing a company like Instagram, FourSquare, or Path would allow Facebook to integrate their mechanics at scale, increasing barriers to entry for other startups. Zuckerberg reasoned that "the businesses are nascent but the networks are established, the brands are already meaningful and if they grow to a large scale they could be very disruptive to us."[64]

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[61] https://judiciary.house.gov/uploadedfiles/00091648000091654.pdf (internal email dated emails dated Mar. 19 - Apr. 9, 2012).
[62] https://judiciary.house.gov/uploadedfiles/0006322000063223.pdf (internal email dated Feb. 27, 2012).
[63] https://judiciary.house.gov/uploadedfiles/0006322000063223.pdf (internal email dated Feb. 27, 2012).
[64] https://judiciary.house.gov/uploadedfiles/0006322000063223.pdf (internal email dated Feb. 27, 2012).

In a follow-up email, however, Zuckerberg backtracked with Ebersman that he "didn't mean to imply that we're buying them to prevent them from competing with us in any way."[65] He stated procompetitive reasons that motivated his interest in Instagram, "I'm mostly excited about what the companies could do together if we worked to build what they've invented into more people's experiences."[66]

Zuckerberg's comment reveals the tension between finding economic conduct that hurts nascent competition rather than improving fledgling products and enhancing consumer welfare through better distribution. While his followup email has the tone of someone who just sat through a lecture from his general counsel about the dangers of email, other evidence suggests Facebook believed that it faced real weaknesses that it had to address.

In 2011, a presentation by Sheryl Sandberg showed that Facebook owned 95% of social media usage in the U.S.[67] However, the slides also showed Facebook's weakness in mobile and desire to grow in mobile, emphasized by Facebook's partnership with Vodafone. Facebook executives expressed their concern at losing market position and advocated to aggressively to move into the mobile space. An email read, "I hate the word 'land grab' but I think that is the best convincing argument and we should own that."[68]

In 2014, board meeting minutes showed Sheryl Sandberg's concern that the high concentration of the smartphone market between Apple and Google "poses a significant strategic threat to the Company's business"[69] and that another mobile app would increase Facebook's hold in the mobile market. Sandberg remarked, "high concentration of the mobile operating system market . . . poses a significant strategic threat to the business."[70]

These presentations by Sandberg over the span of several years suggest that Facebook was threatened by growth in the mobile market for social media. Strategic partnerships with Vodafone and with mobile OS systems by Apple and Google were all part of the set of options by Facebook to stay competitive in the rapidly changing ecosystem that migrated from primarily desktop to mobile usage.

The question facing antitrust investigators will be whether the rhetoric reflects a view by Facebook that it was dominant and needed to squash any emerging competitors, or whether it saw a potentially fatal weakness in its own business model and moved to address it as a matter of survival. The former could represent an antitrust violation while the latter could be an example of Facebook applying its scale to keep up with emerging trends.

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[65] https://judiciary.house.gov/uploadedfiles/0006322000063223.pdf (internal email dated Feb. 27, 2012).
[66] https://judiciary.house.gov/uploadedfiles/0006322000063223.pdf (internal email dated Feb. 27, 2012).
[67] https://judiciary.house.gov/uploadedfiles/00057113_Picture.pdf (corporate presentation from 2011).
[68] https://judiciary.house.gov/uploadedfiles/0005.pdf (HJC presentation).
[69] https://judiciary.house.gov/uploadedfiles/0004537600045378.pdf (board meeting minutes dated Feb. 14, 2014).
[70] https://judiciary.house.gov/uploadedfiles/0007.pdf (HJC presentation).

IV. Google

The Google documents focus on its acquisition of YouTube beginning in 2006, the development of strategy around vertical search in 2006 and 2007, and issues surrounding the Chrome web browser in 2011.[71] These documents are particularly difficult to contextualize given that they focus on events that occurred relatively long ago. Google's market capitalization then was 20 percent of what it is now and it ranked 27th on the list of largest public companies by market cap.[72]

A. The YouTube Acquisition

After initial evaluations of YouTube in 2006, one Google executive wrote, "YouTube's value to us would be a smart team and a platform we could build from,"[73] saying later, "I want to be aggressive about deals that make Google the default place to store photos and videos."[73] Other correspondence downplayed YouTube's value, however. A Google executive noted that YouTube's talent, systems, and content quality would not be particularly valuable to Google, even though YouTube recently turned down another $500 million acquisition offer.[74] Instead, rather "if we pick them up it would be defensive vs yahoo."[75] Similarly, Eric Schmidt seemed more inclined to acquire the talent and leadership team rather the company. Upon YouTube's rejection of Google's initial $200 million offer, he wrote, "please do figure out a way for us to help them achieve their vision. We won't be pursuing them as an acquisition."[76]

Again, rhetoric alone proves little. Negotiations regarding the acquisition reveal the uncertainty regarding YouTube's value. Business documents show that the estimated value of the company varied from a lower bound offer of $200 million to the final 2006 sale price of $1.65 billion. An antitrust investigation of Google's acquisition of YouTube would need to incorporate the economics of start-up valuation. Did Google pay too little at $1.65 billion for YouTube?[77] Did the YouTube creators underestimate the value of their company and accept too low a price? A court should also want to know how Google's acquisition affected innovation on video streaming and what a counterfactual world in which YouTube was not acquired would look like. Given that 14 years has gone by, it is difficult to imagine designing a counterfactual that would carry much weight in an argument.

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[71] https://en.wikipedia.org/wiki/Vertical_search (vertical search is a specialty or domain-specific search engine, distinct from a general search engine).
[72] https://www.macrotrends.net/stocks/charts/GOOGL/alphabet/market-cap.
[73] https://judiciary.house.gov/uploadedfiles/04189233.pdf (internal email dated Feb. 1, 2006).
[74] https://judiciary.house.gov/uploadedfiles/04189266.pdf (internal email dated May 1, 2006).
[75] https://judiciary.house.gov/uploadedfiles/04189266.pdf (internal email dated May 1, 2006).
[76] https://judiciary.house.gov/uploadedfiles/04189250.pdf (internal email dated Feb. 13, 2006).
[77] A balanced research study should include the full set of acquisition targets that were completed and rejected, with counterfactual analysis of how the small firms would have fared with or without acquisition.

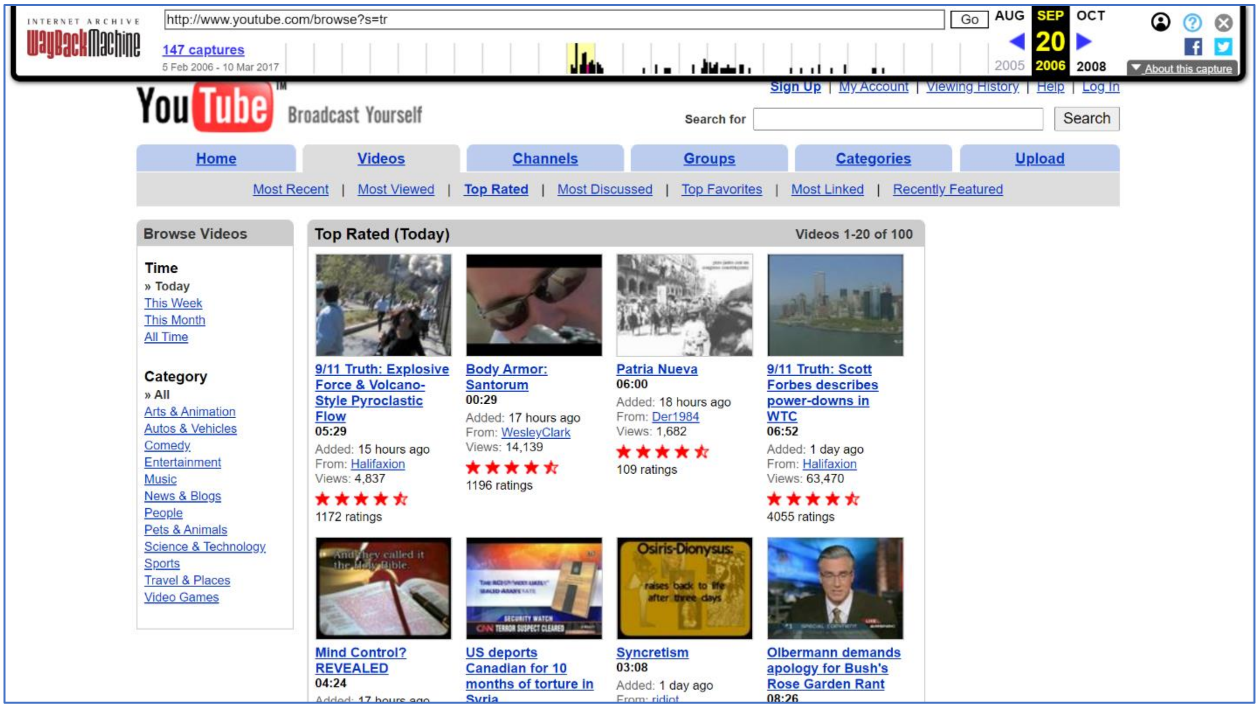

Figure 7. YouTube.com in September 2006.

B. Vertical Search

Documents from 2006 and 2007 show Google's internal strategy development around vertical search and its importance to Google's growth in the effort to make Google a global leader in search.[78] In 2005, Google was developing a strategy around vertical search that would influence the search engine's growth for the next 15 years.[79]

A strategy document noted that "the growth of sites like MySpace and YouTube puts the search business in jeopardy."[80] To account for these threats, the strategy document advises that Google,

> "need[s] to own the search box on the entertainment sites, we need to be the search site where you can find entertainment content, we need to succeed in social networking, and we need to build better entertainment and social interaction into our search experience."[81]

Google should "turn having the largest user base into an unfair advantage by building out technology that improves linearly with base size."[82] According to the document, in order to prevent MySpace from becoming the default social search function, "Google should host all information about a person, including MySpace info."[83]

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[78] https://judiciary.house.gov/uploadedfiles/04137557.pdf (internal email dated Nov. 29, 2005).
[79] https://judiciary.house.gov/uploadedfiles/04137557.pdf (internal email dated Nov. 29, 2005).
[80] https://judiciary.house.gov/uploadedfiles/01099367.pdf (internal memorandum from 2006).
[81] https://judiciary.house.gov/uploadedfiles/01099367.pdf (internal memorandum from 2006).
[82] https://judiciary.house.gov/uploadedfiles/01099367.pdf (internal memorandum from 2006).
[83] https://judiciary.house.gov/uploadedfiles/01099367.pdf (internal memorandum from 2006).

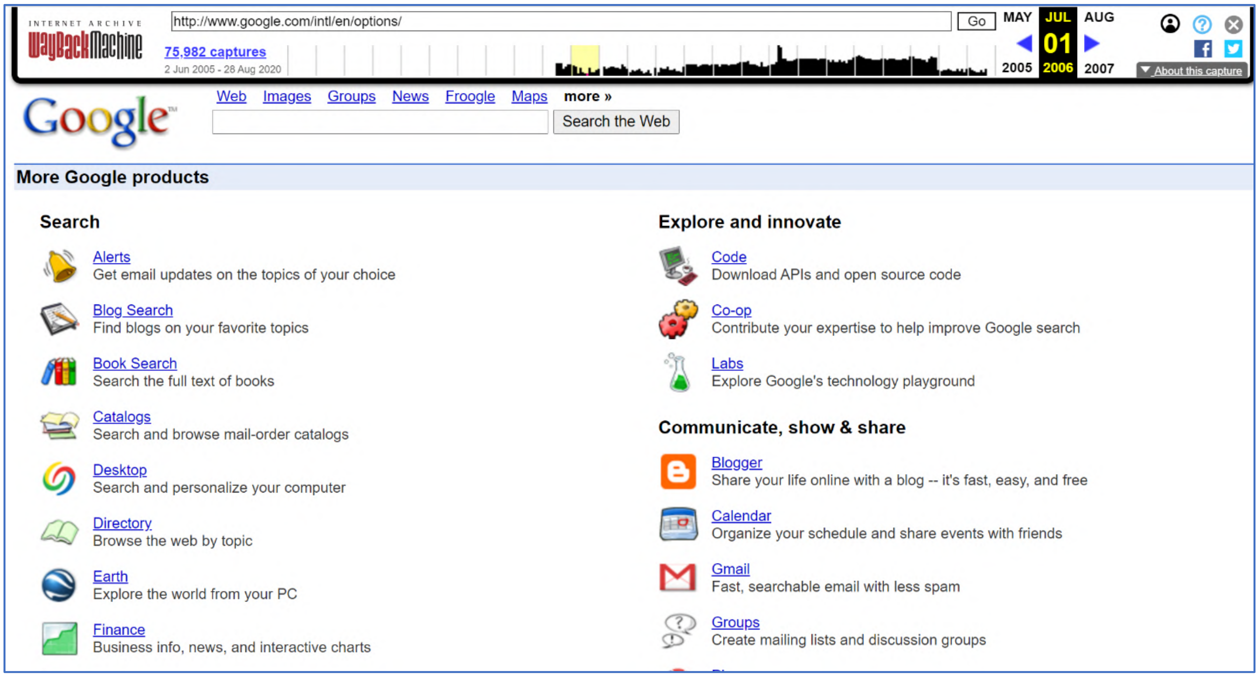

Figure 8. Google.com in July 2006.

Internal emails showed employees expressing concern that third-party sellers were putting Google at risk of disintermediation, providing the company with less data and less revenue. A report noted the threat of “proliferating verticals,”[84] and mandated that Google execute on its verticals so as not to give ground to competition. The company was “driv[ing] too much traffic to competitors monster and hotjobs.”[85]

A letter from the founder of a website called CelebrityNetWorth expressed outrage at Google’s control over search to favor its own verticals. The founder wrote,

> “If someone came to me with an idea for a website or a web service today, I would tell them to run. Run as far away from the web as possible. Launch a lawn care business or a dog grooming business – something Google can’t take away as soon as he or she is thriving.”[86]

This series of documents reveal, at most, evolving views on the business strategy of building a general search engine or vertical search categories. They show some Google people worrying about the future of their business and a competitor upset that Google’s new business plans make it more difficult for companies, like CelebrityNetWorth, with very specialized searches to succeed.

[84] https://judiciary.house.gov/uploadedfiles/0001.pdf (HJC presentation).
[85] https://judiciary.house.gov/uploadedfiles/0001.pdf (HJC presentation).
[86] https://judiciary.house.gov/uploadedfiles/0001.pdf (HJC presentation).

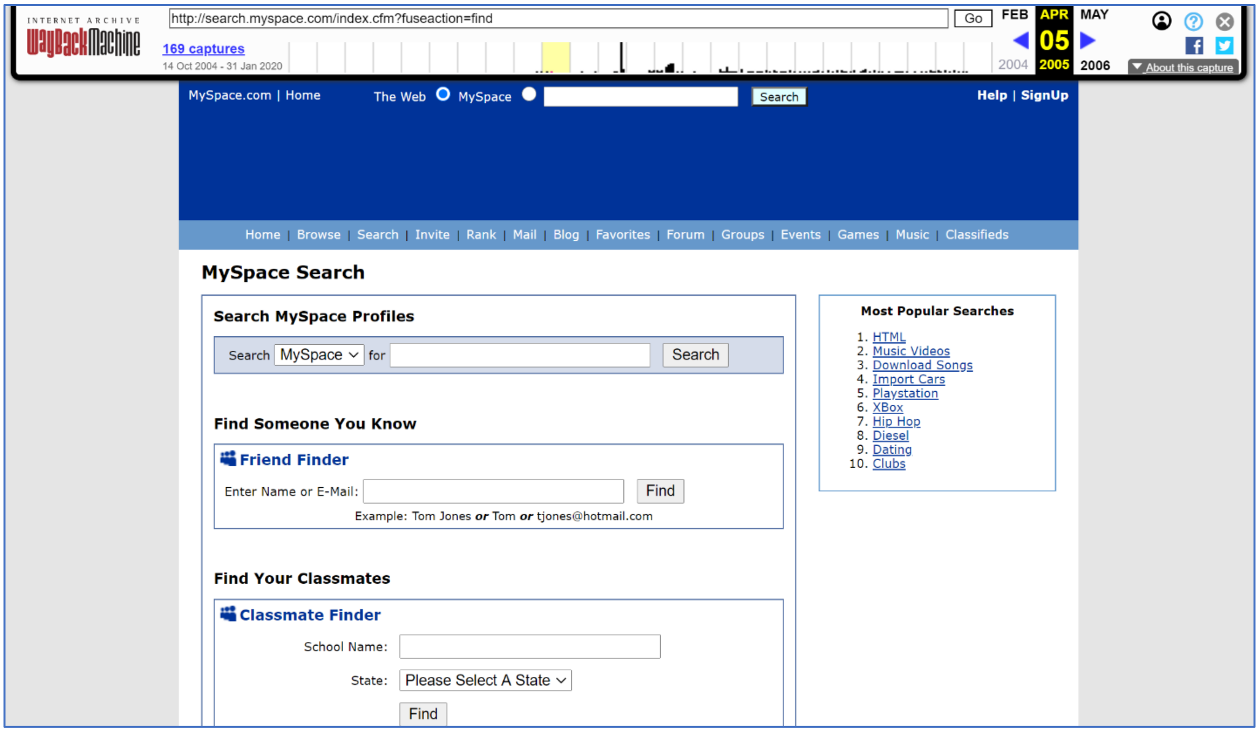

Figure 9. MySpace in April 2005.

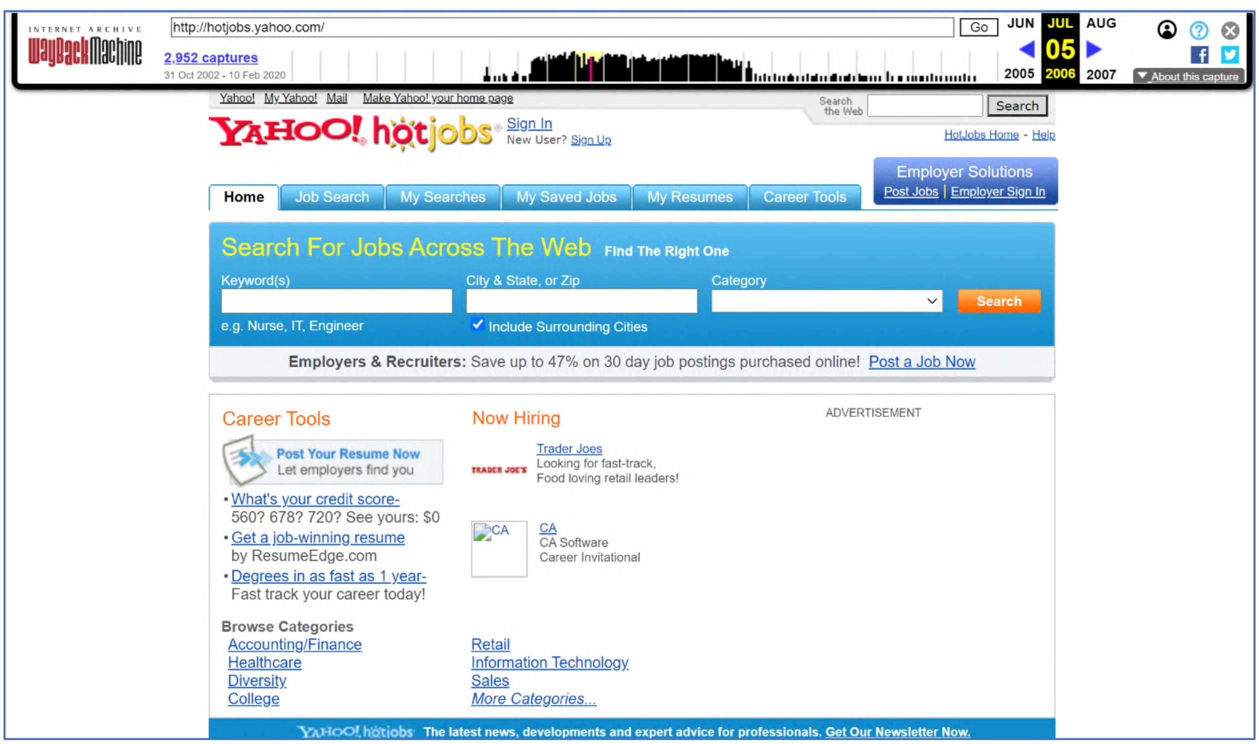

Figure 10. Yahoo! Hotjobs in July 2006.

The internal debate about general and vertical search in 2006 may seem quaint today in 2020. Google is a general search engine that generates results on an enormous number of vertical categories. From the user's perspective, Google's search engine delivers the results that fit the user's request – if the user enters a general query, the results offered are general. If the user enters a specific query, the results offered are specialized to a vertical category such as travel or shopping.

As with YouTube, this controversy happened so long ago it is difficult to draw conclusions regarding today's market. Still, the general approach to looking for anticompetitive behavior would be similar. The first step would be to define the relevant market. In this case one question might be whether the relevant market includes search engines such as Edge and DuckDuckGo or vertical search sites such as Yelp and Expedia. An investigation would also have to define general and vertical search in a precise way that may not be so easy today.

With those definitions, a key set of questions would be whether Google foreclosed competition from competing vertical search engines by giving preference to its own vertical category and whether that self-preference harmed consumers. CelebrityNetWorth could have argued that it harmed consumers, but Google could counter that anyone seeking to learn a celebrity's net worth would prefer to type it into Google than to conduct a general search for a site that specializes in celebrity net worth and then click to that site to ask the specific query.

C. Default Search and the Chrome Browser

One email from 2011 shows Google's desire for Chrome to become the default web browser on Dell computers with the default homepage set to Google.com.[87] The email included several strategic goals, including installing the Google Toolbar if Internet Explorer was also pre-loaded.[88] In an internal email, Google executives noted the U.S. Department of Justice's rules on whether personal computers can be shipped with or without browsers pre-loaded.[89]

Another email shows that Google pushed for Google.com to be the default browser homepage on AT&T devices.[90] The att.net portal at the time was powered by Yahoo! search, but the Google team pushed for their contract to require that Android devices have either att.net powered by Google or directed to Google.com.[91]

There is no doubt Google was trying to reach a deal for something it saw as beneficial to its business. Companies frequently disagree with each other as competitors and partners. The failure to agree or complaints by one side do not necessarily indicate any antitrust harm. Context in 2011 matters, as well. At the time, Chrome was the third most popular desktop browser, behind Internet Explorer and Firefox.[92]

[87] https://judiciary.house.gov/uploadedfiles/00013117.pdf (internal email dated Feb. 18, 2011).
[88] https://judiciary.house.gov/uploadedfiles/00013117.pdf (internal email dated Feb. 18, 2011).
[89] https://judiciary.house.gov/uploadedfiles/00013117.pdf (internal email dated Feb. 18, 2011).
[90] https://judiciary.house.gov/uploadedfiles/04297908.pdf (internal email dated Jun. 20, 2015).
[91] https://judiciary.house.gov/uploadedfiles/04297908.pdf (internal email dated Jun. 20, 2015).
[92] https://gs.statcounter.com/browser-market-share/desktop/worldwide/2011.

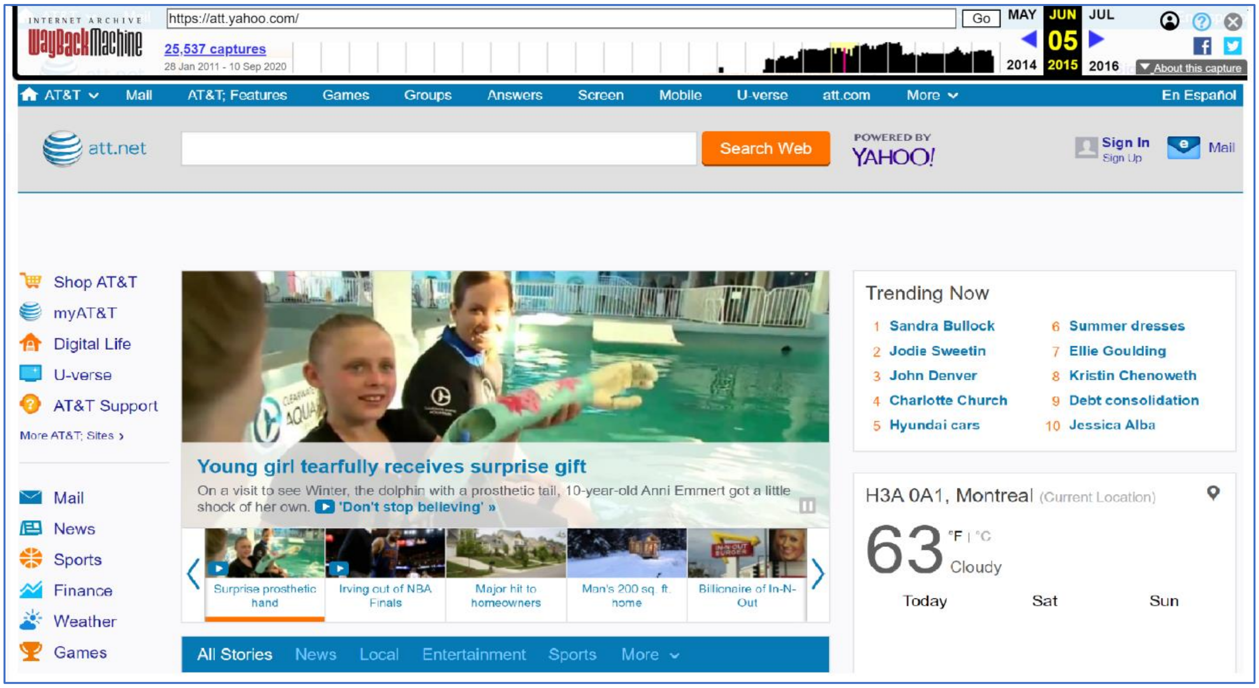

Figure 11. Att.Net powered by Yahoo! in June 2015.

Whether these actions were anticompetitive or an abuse of market power depends on a number of questions, including what other options Dell and AT&T had for default search engines to display on their homepages and the costs, if any, that Google could impose on those companies for failing to reach an agreement.

Conclusion

In the documents released by the House Judiciary Committee on July 29, 2020, many pages of internal emails reveal the process by which business executives evaluated and assessed competitors, changing markets, and the development of consumer products and services, much of which occurred in the years of 2006-2012. These "hot docs" provide interesting insights into some of the inner workings of companies, but on their own prove little.

Depending on one's prior beliefs about these companies, the documents either show intensely competitive firms operating in ways that society desires to increase productivity and economic growth, or firms determined to foreclose markets and forestall competition. Understanding whether firms behaved anticompetitively requires more fact-finding by parties in private litigation and investigations brought by the Federal Trade Commission, U.S. Department of Justice, and state attorney's generals.