

When Self-Protection is Not Protectionism: The EU, Privacy, and Illegal Corporate Behavior

Prepared as Keynote Address for:

“Die Zukunft der informationellen Selbstbestimmung”
[“The future of informational/privacy self-determination”]

Professor Eric K. Clemons
clemons@wharton.upenn.edu
Operations, Information, and Decisions
The Wharton School
November 2015

Welcome

🇪🇺 Ich bin nicht ein Berliner



Welcome

- Welcome to a well-designed interdisciplinary conference
- Economists focus on efficiency, so economic systems can produce the most *goodness*
- Ethicists focus on fairness, and how to divide the *goodness* that well-designed economies produce
- Business strategists focus on how firms can use one asset, like the profits from a monopoly business, to create new businesses and extend and defend a monopoly
- While regulators talk about whether or not this monopoly activity is good for society, fair, or even legal
- While computer scientists address when data can and cannot be protected

Welcome

- Indeed, this conference *must* be interdisciplinary, because the issues are so complex
- In the US, under ObamaCare, an insurance company cannot charge patients more for medical insurance just because they are sick
- How are companies already cheating?
 - I ask for information on applicants' health *voluntarily*
 - (Now I know who is *not* sick, which tells me who *is* sick)
 - And I pay for the information if it proves that you *are* healthy, although I don't actually give you a discount
 - (Which amounts to providing a discount for healthy people, which is the same as charging more for sick people)

Background

- I have been interested in search, information, competition, and control of online gateways since the mid-1980s
- With Paul Kleindorfer, a regulatory economist, I published my first paper on the abuse of search and gateway systems in 1991, long before the arrival of eCommerce, online search, or Google
- I have studied privacy, and consumers' attitudes towards privacy, in the US, Germany, Japan, Korea, Argentina, Brazil, Chile, Colombia, and Mexico
- I have lectured on online search, abuse of power, and the future of competition law at Peking University Law School
- I have constructed mathematical models and computer simulations of the impact of online search on businesses and on social welfare

Background

- I am not a lawyer and I have no opinion on what EU law or regulations should be; I merely argue that they should be enforced, and enforced equally
- I am pro-business and pro-American business
- There are abuses that the EU can and should address now
- I am talking today about European self-determination, not about the self-determination of individual Europeans
- I am not talking about the value of privacy as a philosophical ideal
- I am talking about the harm caused to Europe by privacy violations of a few firms

Introduction

- The EU is intensifying its investigation of American firms that it believes may be unfairly dominating the internet
- American firms will argue that this is EU ***protectionism***
- We will argue that it is legitimate EU ***self-defense***
- American firms will argue that their domination is a result of ***superior products and services***, introduced as ***early innovations***, which ***legitimately captured the market in Europe*** and around the world
- We will argue that this domination is a result of ***deliberate anticompetitive behaviors***, combined with ***flagrant violation of European privacy laws and regulations***
- We will examine implications and available responses
- For concreteness, we will focus on Google

Intent of this Talk

- I do not want to reiterate the list of Google's privacy abuses, which no doubt will be discussed by others in this workshop
- I do not want to reiterate the list of Google's alleged abuse of power, which likewise will be discussed by others
- I want to explain how **expensive** these abuses are for European businesses, consumers, and regional security
- I want to explain how the profits from privacy abuse **strengthen Google's monopoly** in a range of related and unrelated businesses
- I want to explain the sources of Google's abusive power
- Only when this is understood can legitimate actions for self-defense be designed and implemented

Sources of American Domination of the Net

- Superior American Technological Competence or Abuse of Power?
- The entire EU did not suddenly lose its technical prowess
- American firms enjoy three advantages
 - 🕒 First mover / network effects — sort of ***accidental monopolies***
 - 🕒 Abuse of privacy — providing ***revenue from illegal sources to cross subsidize*** entire new businesses
 - 🕒 Control of gateways / supporting ***illegal extension of monopoly power***
 - 🕒 We will discuss these three in more detail below

Sources of American Domination of the Net

- First mover / network effects — sort of ***accidental monopolies***
- Abuse of privacy — providing ***illegal revenue to cross subsidize*** entire new businesses
 - Well documented — you can review sources
 - Google's abuse of privacy has been well documented
 - Abuse of customers' privacy for targeted ads
 - Plus Wi-Spy and Apple iOS hacks and illegal violation of US Federal law on data mining students' information (FERPA)
 - Google's abuse of privacy has been basis for numerous complaints in Europe and elsewhere

Sources of American Domination of the Net

- 🇪🇺 Control of gateways / ***illegal extension of monopoly power***

Also well- studied and well-documented — <http://marketingland.com/highlights-of-the-ftc-staff-report-on-google-antitrust-investigation-122724>

- 🌐 Principal basis of European Commission on Competition objection to Google's behavior
- 🌐 See Margrethe Vestager, European Commissioner for Competition

<http://charlierose.com/watch/60632319>

Why Should You Care?

- Privacy violations are ***not free to individuals***, even in a strictly commercial sense
- Privacy violations lead to ***higher prices for some individuals***, or to ***denial of critical services***
 - Imagine that you communicate with a friend: *“So sorry about Julie’s mother, I’ll be in Chicago for the weekend, I don’t care what it costs”*
 - Imagine that you search for HIV/AIDS symptoms, delay between exposure and testing positive, and legal requirements to disclose test results, and then get an email ad for life insurance
- Abuse of the power of gateway systems add enormously to sellers’ cost of doing business
 - Sellers have to know as much as other sellers, and have to pay for information
 - Sellers have to pay for access to customers
 - Extra costs for sellers lead to higher prices for buyers

Why Should You Care?

- 🇪🇺 It's not possible to compete with services that ***appear to be free*** and already have a network of users
- 🇪🇺 These services ***are not free*** to European companies
 - 🇪🇺 Act as a ***massive tax*** on European businesses
 - 🇪🇺 Act as a ***massive wealth transfer*** from European companies and consumers
- 🇪🇺 These services ***are not free*** to European consumers
 - 🇪🇺 Higher prices due to ***pass-through effects***
 - 🇪🇺 Higher prices due to ***price discrimination***

Why Should You Care?

- It's not possible to compete with services that appear free and already have a network of users
- These services are ***critical to economic growth***
- These services are ***critical to national security / regional security***
- ***Right to be Forgotten*** has ***no impact*** on abusive pricing or abusive marketing
- ***Safe Haven*** has ***no impact*** on abusive pricing or abusive marketing
- ***Safe Haven*** would not have stabilized Tunisia
- Anecdotal reports of threats in the Far East

What's Next?

- The EU should ***strictly enforce privacy laws*** — fines to Google would be measured in **€ Billions!**
- The EU should ***strictly enforce competition laws*** — Google's abuse of its gateway, and its abuse of its Android platform, would be curtailed
- Google ***cannot be supplanted in the EU as long as it remains active*** in the EU

What's Next?

- Google ***could readily be supplanted in search almost immediately after it withdrew*** from the EU
 - Market share is essential for the data that drives search algorithms
 - If Google withdrew from the EU, other firms would rapidly obtain the data they need for superior search performance
- Therefore, Google will not withdraw from the EU, even if forced to observe EU laws and regulations
- However, other firms will then be able to compete ***if they are good enough***

Thank You

- 🇪🇺 Thank you for inviting me
- 🇪🇺 Good luck moving forward

