Venture Capital Kill Zones: Defining Harm to Consumers by Big Tech's Long Shadow
This post explores how courts and attorneys can overcome the difficulty of defining antitrust harms in Big Tech antitrust litigation, where the zero-price market creates problems for determining whether anticompetitive conduct has occurred. By defining the consumer harm in terms of reduced consumer choice, as a result of venture capital kill zones, this problem can be overcome.

Leading antitrust scholar Tim Wu, Columbia Law professor and recent addition to the Biden Administration's National Economic Council, has asserted that Big Tech companies are creating a new 'Gilded Age' in the American Economy.[1] The original Gilded Age was defined by "robber-barons" who controlled industry spanning trusts, and whose power challenged that of the federal government.[2] Titans of industry such as J.P. Morgan and John D. Rockefeller created the largest companies of their time, and amassed immense fortunes that have not been seen since.[3] Even today, the companies they created rank among the world's most valuable: Chase Bank and Exxon Mobil are prominent examples. Exxon-Mobil, created by the merger of two companies once part of the original Standard Oil trust, was the wealthiest company in the world until the new guard of robber-baron corporations came into force.

Today, Apple is the world's most valuable company. Google, Facebook, and Amazon rank not far behind. Just as the Standard Oil and US Steel did in the First Gilded Age, these companies and the vast economic, social, and political power they wield, have come under scrutiny from state and federal government, and the public more generally. This has spurred a renaissance of antitrust enforcement. Unfortunately, the antitrust laws and judicial precedent were developed to address the creation of trusts for commodities markets and railroad systems. This has left the law ill-equipped to address the vast power of today's tech giants, giving them special solicitude to act in anticompetitive ways.

A particular problem facing antitrust enforcers (FTC/DOJ) is the prevalence of zero-price markets in tech.[4] Companies such as Google and Facebook offer their primary services (search and general social media, respectively) for free to users.[5] Therefore, finding harm to consumers within the narrow consumer welfare standard, which prioritizes prices for consumers over essentially all else, is difficult.[6] Such a narrow definition of consumer harm fails to account for the kinds of anticompetitive actions that Big Tech firms are able to take.[7]

Antitrust laws in the United States focus on harms to the competitive process, not harm to competitors.[8] The consumer welfare standard has been the predominant way to determine whether harm to competition has occurred, but it is not the only method available. Antitrust jurisprudence recognizes that consumers may be harmed in ways other than increased price, such as decreased quality, reduced choice or lessened innovation.

Big Tech companies have raised barriers to entry using psychological intimidation, as highlighted by reports from venture capital funds who say there is a 'kill zone' around any tech

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[1] https://www.cnbc.com/2021/03/05/big-tech-critic-tim-wu-joins-biden-administration-to-work-on-competition-policy.html; https://scholarship.law.columbia.edu/books/63/
[2] https://scholarship.law.columbia.edu/books/63/
[3] *Id.*
[4] https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9504&context=penn_law_review
[5] *Id.*
[6] https://www.yalelawjournal.org/note/amazons-antitrust-paradox
[7] *Id.*
[8] *Verizon v. Trinko*

startup that my challenge the industries represented by the big four: Apple, Amazon, Google, and Facebook.[9] Due to the size of these firms, and their willingness to leverage their market power to crush any nascent competition either through mimicry, acquisition, or refusals to deal, investors are unwilling to provide the capital for new companies to compete.[10] This capital is vital, because tech startups often have to operate at a loss for many years before gaining enough market share to become profitable.

The nature of digital markets and network effects means the current model of competition is not just competition in the market, but competition *for the entire market*.[11] The best way to accomplish this is rapid growth at the expense of profits, as highlighted by Amazon and Uber.[12] By creating investment 'kill zones,' Big Tech companies are able to stave off nascent competition, and lessen the risk of leapfrog innovations springing up and taking over the market. Understanding this, it is clear that the effect on consumers is reduced choice, decreased innovation, and lower product quality as a result of entrenched monopolists becoming copasetic, cutting corners to increase monopoly profits.

This problem is further exacerbated by the investment funds that these tech companies run themselves, funding their future competitors with the hope of acquisition down the road by offering a deal they cannot refuse.[13]

However, not all legal commentators buy this argument, and continue to believe that Big Tech companies are dynamic innovators and not entrenched monopolists.[14] Skeptics look to the vast sums of money offered by the tech giants in their acquisition as justification for the argument that these whale-minnow mergers are pro-competitive, but this ignores history. The anticompetitive conduct of the tech giants is right out of the traditional monopolist's playbook. When J.P. Morgan bought out Andrew Carnegie and created the US Steel trust, the sale immediately made Carnegie the wealthiest man in history.[15]

Before history repeats itself, the antitrust laws should be aggressively enforced against the anticompetitive conduct of big tech by utilizing the new approaches to consumer harm, such as reduced consumer choice caused by 'kill zones' created by Big Tech's long shadow.

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[9] https://www.protocol.com/doj-antitrust-venture-capital-workshop; https://financialpost.com/technology/inside-the-kill-zone-big-tech-makes-life-miserable-for-some-startups-but-others-embrace-its-power
[10] https://www.economist.com/business/2018/06/02/american-tech-giants-are-making-life-tough-for-startups
[11] https://www.yalelawjournal.org/note/amazons-antitrust-paradox
[12] *Id.*
[13] https://www.capitalg.com/
[14] https://www.aei.org/economics/a-new-analysis-takes-a-shot-at-the-idea-big-tech-has-created-a-kill-zone-for-startups/
[15] https://scholarship.law.columbia.edu/books/63/