

Killer Acquisitions and the Death of Competition in the Digital Economy

Mikah Roberts*

I. INTRODUCTION

“It is better to buy than to compete.”¹ This quote by Mark Zuckerberg evidences a rising trend in the digital economy over the last decade. According to the House Judiciary Committee’s report, *Investigation of Competition in Digital Markets*, from 2009 to 2019, Google, Apple, Facebook, and Amazon (“GAFA”) made more than 300 global acquisitions combined.² As of September 2020, the total value of these four companies was more than \$5 trillion.³ In its report, the House Judiciary Committee also determined that a large percentage of the acquisitions made by GAFA were either killer acquisitions or nascent potential competitor acquisitions.⁴

* Associate, Husch Blackwell LLP | Juris Doctor, The University of Tennessee College of Law.

¹ First Amended Complaint for Injunctive and Other Equitable Relief at 1, Federal Trade Commission v. Facebook, Inc., No. 1:20-cv-03590-JEB (D.D.C. Aug. 19, 2021) [hereinafter First Amended Complaint Against Facebook].

² SUBCOMMITTEE ON ANTITRUST, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMM. ON THE JUDICIARY, INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 406–446 (2020),

https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf [hereinafter HOUSE REPORT].

While many economists analyze the Big Five—Google, Apple, Facebook, Amazon, and Microsoft—this paper will focus only Google, Apple, Facebook, and Amazon.

³ *Id.* at 10.

⁴ *Id.* at 11.

In this paper, I argue that merger law, as currently construed by the courts, fails to prevent dominant technology platforms from acquiring nascent competitive threats and engaging in killer acquisitions.

This issue is timely in that it will not self-correct. Clayton § 7, as currently interpreted by United States courts, places a nearly impossible burden of proof on the antitrust enforcement agencies to predict future anticompetitive outcomes of acquisitions.⁵ Because of the challenges associated with meeting the required evidentiary burdens, the Federal Trade Commission and Department of Justice (the “antitrust enforcement agencies” or the “agencies”) have been hesitant to challenge acquisitions by GAFAM and have been largely unsuccessful in the few they have challenged.⁶ As a result of the law’s underdeterrent effects, legislators across the country are proposing to expand and amend Clayton § 7 in hopes of more adequately preventing dominant technology platforms from engaging in these anticompetitive acquisitions.⁷

If the issue is left unaddressed, these dominant technology platforms will continue defending their market positions by acquiring and killing off start-up companies.⁸ Such acquisitions have proven harmful to

⁵ See *infra* Part III.

⁶ See *infra* Part III.

⁷ Cecilia Kang, *Lawmakers, Taking Aim at Big Tech, Push Sweeping Overhaul of Antitrust*, N.Y. TIMES (June 29, 2021), <https://www.nytimes.com/2021/06/11/technology/big-tech-antitrust-bills.html>; see also *infra* Part IV.

⁸ See *infra* Part II(d).

innovation in that they discourage start-ups from entering the market.⁹ Without new entrants, innovation competition has waned, allowing GAFA to abuse consumer data privacy.¹⁰ As these dominant platforms continually gain access to data, they become more powerful and more equipped to neutralize competitive threats through acquisitions.¹¹ Until antitrust enforcement agencies have a viable means by which to adequately challenge acquisitions by dominant technology platforms, these issues will continue damaging the American digital economy and its consumers.

In Part II of this paper, I define killer acquisitions and acquisitions of nascent competitive threats, outline how these acquisitions have harmed the digital economy, explore the specific characteristics of the digital economy that have made it susceptible to such harms, and cite the most recent evidence of market dominance by GAFA.

Part III analyzes Clayton § 7, its current interpretation and application by United States courts, and the difficulties such interpretations have created in challenging acquisitions by dominant technology platforms specifically. This part also explores the Federal Trade Commission's recent lawsuit against Facebook—which

⁹ RAGHURAM RAJAN ET AL., *KILL ZONE* 21, 2 (2021).

¹⁰ HOUSE REPORT, *supra* note 2, at 51.

¹¹ See *infra* Part II(d).

retroactively challenged the company's acquisitions of Instagram and WhatsApp—and reveals the likely reasons why acquisitions by GAFA have largely gone unchallenged.

Part IV discusses a recent legislative proposal aimed at deterring further killer acquisitions and acquisitions of nascent competitive threats by dominant technology platforms: The Platform Competition and Opportunity Act of 2021. This part dissects the act, analyzing the ways it could invigorate antitrust enforcement, its likely impact if it had been enacted prior to Facebook's acquisitions of Instagram and WhatsApp, and the criticisms it will likely face.

Lastly, Part V concludes this paper.

II. ANTICOMPETITIVE ACQUISITIONS AND THE DOWNFALL OF THE DIGITAL ECONOMY

Google, Apple, Facebook, and Amazon have used killer acquisitions and acquisitions of nascent competitive threats to increase their market dominance and neutralize competitive threats.¹² The use of such anticompetitive acquisitions has weakened innovation in the digital economy, harming both entrepreneurs and consumers and making entry into the market nearly impossible.¹³

¹² See *infra* Part II(d).

¹³ See *infra* Part II(b)-(c).

A. KILLER ACQUISITIONS AND ACQUISITIONS OF NASCENT
COMPETITIVE THREATS

Killer acquisitions take place when a dominant firm “acquire[s] an innovative target and terminate[s] the development of the target’s innovations to preempt future competition.”¹⁴ Alternatively, a dominant firm might acquire a target company and then “kill-off its own internal efforts to develop a competing product,” thereby removing the potential risk of competition to its newly acquired subsidiary.¹⁵

Acquisitions of nascent competitive threats, on the other hand, take place when a dominant firm acquires “young firms with products or services whose competitive significance remains highly uncertain.”¹⁶ The competitive significance of such young firms is uncertain either because their presence in existing markets overlaps only slightly with that of the

¹⁴ COLLEEN CUNNINGHAM ET AL., KILLER ACQUISITIONS 1 (2020), <https://deliverypdf.ssrn.com/delivery.php?ID=756021072024122096124083095002017069015032009051054004022007118025031124094096066078007052003023030014055091125106108092071126056022088032093127083123086079088030071033004091092082109010074085092099021075083094100112127066095028086022072070105126094&EXT=pdf&INDEX=TRUE>. COLLEEN CUNNINGHAM ET AL., KILLER ACQUISITIONS 1 (2020), <https://poseidon01.ssrn.com/delivery.php?ID=374096013001096123119118082071121069101073010028061025100080030029013093085031008000032030033008111111007025116005080127003115044057037006047083001019085077008076000011049030122107094094093087124071002071119122110004121119006083017120075018116072119&EXT=pdf&INDEX=TRUE>.

¹⁵ CHRIS PIKE, START-UPS, KILLER ACQUISITIONS AND MERGER CONTROL 6 (2020), [https://one.oecd.org/document/DAF/COMP\(2020\)5/en/pdf](https://one.oecd.org/document/DAF/COMP(2020)5/en/pdf) [hereinafter OECD REPORT].

¹⁶ *Id.*

dominant firm or because they do not currently overlap with the dominant firm but have the potential to do so in the future.¹⁷ In these situations, the dominant firm is concerned that a young firm might eventually grow its product into a competitive threat.¹⁸ Thus, by acquiring the young firm before its product becomes a rival, the dominant firm can minimize the potential of future competitive harm and use the young firm's product to further its business.¹⁹

These two types of acquisitions have allowed dominant technology platforms to gain more power through greater market dominance.²⁰ The more powerful these few companies become, the more harm that will be caused to both entrepreneurs and consumers.

B. COMPETITIVE HARMS AND THE IMPACT ON ENTREPRENEURS AND CONSUMERS

Market dominance by GAFA, as is being achieved through killer acquisitions and acquisitions of nascent competitive threats, has been harmful to entrepreneurs and consumers in two major ways. First, GAFA's market dominance has weakened innovation such that it has created a "kill zone" where dominant technology platforms are insulated "from competitive pressure simply because investors do not see new

¹⁷ *Id.*

¹⁸ *Id.* at 7.

¹⁹ *Id.*

²⁰ *See infra* Part II(d).

entrants as worthwhile investments.”²¹ Second, GAFA’s market dominance has led to inadequate privacy and data protections for consumers.²²

i. Weakened Innovation and the Creation of a Kill Zone

Competition is vitally important to innovation because it forces companies to continually improve their products and services, lest consumers switch to competitors that offer more attractive choices.²³ Often, new entrants into the market spur innovation competition.²⁴ Start-up companies enter the market with new ideas, requiring pre-existing market participants to either improve their products and services or lose customers.²⁵

GAFA’s market dominance in the digital economy, as obtained through the use of killer acquisitions and acquisitions of nascent competitive threats, has allowed it to drive start-ups out of the market.²⁶ As Google, Apple, Facebook, and Amazon have continued acquiring new market entrants, the digital economy has seen a “sharp decline in new

²¹ HOUSE REPORT, *supra* note 2 at 18, 46.<https://ssrn.com/abstract=3555915>.

²² *Id.* at 51–52.

²³ *Id.* at 46.

²⁴ KEN BUCK, THE THIRD WAY: ANTITRUST ENFORCEMENT IN BIG TECH 10 (2020) [hereinafter BUCK REPORT].
https://buck.house.gov/sites/buck.house.gov/files/wysiwyg_uploaded/Buck%20Report.pdf

²⁵ HOUSE REPORT, *supra* note 2, at 46.

²⁶ *Id.*

business formation as well as early-stage start-up funding.”²⁷ The House Judiciary Committee’s report notes that the “entrepreneurship rate” in the technology industry has declined from 60% in 1982 to 38% in 2011.²⁸ The decline of new entrants in the digital market has led to decreased innovation competition, allowing the dominant technology platforms to control innovation “rather than being creatively spread across directions chosen by entrants.”²⁹ As is discussed further in subsection (ii), the lack of competitive pressure, and GAFAs’ control of innovation in the digital economy has led to inadequate privacy protections for consumers.³⁰

This lack of innovation competition has also created what economists refer to as a “kill zone,” where venture capitalists are discouraged from investing in digital market entrants and, in turn, entrepreneurs are discouraged from attempting to enter the digital marketplace.³¹ First, venture capitalists are discouraged from investing because GAFAs possess monopoly power that a new entrant is highly unlikely to overcome due to the unique characteristics of the digital market.³² Second, venture capitalists are discouraged from investing

²⁷ *Id.*

²⁸ *Id.* at 47.

²⁹ *See id.* at 50 (quoting *Innovation and Entrepreneurship Hearings* at 81 (statement of Fiona Scott Morton, Theodore Nierenberg Prof. of Econ. Yale Sch. of Mgmt.)).

³⁰ HOUSE REPORT, *supra* note 2, at 50–52; UNLOCKING DIGITAL COMPETITION, *infra* note 52, at 50; *see also infra* Part II(b)(ii).

³¹ RAJAN, *supra* note 9, at 2.

³² HOUSE REPORT, *supra* note 2, at 48 (quoting Venture Capital and Antitrust Workshop Transcript at 24 (statement of Paul Arnold, Founder & Partner, Switch Partners)).

because of the likelihood that a new entrant will be acquired by GAFA.³³ When antitrust authorities fail to block a merger by one of the dominant technology platforms, “it signals that there is a higher likelihood that other similar acquisitions will not be blocked.”³⁴ In their paper, “Kill Zone,” Raghuram G. Rajan, Luigi Zingales, and Sai Krishna Kamepalli note that, “[i]n the three years following an acquisition by Google or Facebook in a certain industry sector, [venture capital] investments in that sector . . . drop by over 40%.”³⁵

They argue that this issue is exacerbated by the multi-sided nature of digital platforms.³⁶ Digital platforms serve customers on one side and advertisers on the other.³⁷ Customers are not charged monetary fees to use digital platforms, thus, customers are incentivized to adopt a new digital platform through network effects.³⁸ Network effects, as is discussed in subsection (c), exist when a product becomes more valuable as it is used by more people.³⁹ Here, customer incentive to adopt a new digital platform

³³ RAJAN, *supra* note 9, at 2.

³⁴ *Id.* at 2.

³⁵ *Id.* at 2.

³⁶ *Id.* at 3; *see also* UFUK AKCIGIT ET AL., INTERNATIONAL MONETARY FUND, RISING CORPORATE MARKET POWER: EMERGING POLICY ISSUES 25 (2021)<https://www.imf.org/en/Publications/Staff-Discussion-Notes/Issues/2021/03/10/Rising-Corporate-Market-Power-Emerging-Policy-Issues-48619> [hereinafter IMF REPORT].

³⁷ RAJAN, *supra* note 9, at 3.

³⁸ *Id.* at 3.

³⁹ HOUSE REPORT, *supra* note 2, at 40; *see also infra* Part II(c).

depends largely on adoption by early app developers.⁴⁰ When a new digital platform, such as a social media platform, enters the market, early app developers can adopt the platform by adapting their apps to be compatible with the platform.⁴¹ As more app developers' applications become compatible with a new platform, ordinary consumers are incentivized to use that platform as well.⁴²

However, when an app developer anticipates that a new digital platform will rapidly be acquired by a dominant technology firm, they are discouraged from investing their time and resources into adopting the platform.⁴³ This dilemma exists because when an entrant platform is acquired by a dominant platform like GAFa, the dominant platform integrates the new platform into its existing technology.⁴⁴ Thus, any app developers' apps that were already compatible with the dominant platform will automatically become compatible with the acquired entrant platform as well.⁴⁵ Because app developers have come to anticipate mergers soon after a platform's entry into the market, they have been slow to adopt the

⁴⁰ RAJAN, *supra* note 9, at 3.

⁴¹ *Id.* at 3.

⁴² *Id.*

⁴³ *Id.* at 4.

⁴⁴ *Id.*

⁴⁵ *Id.*

new platforms.⁴⁶ As a result, ordinary customers are not incentivized to adopt the new platform.⁴⁷

The decline of investment and entry into the digital market has allowed dominant technology platforms to face very little competition.⁴⁸ Without competition incentivizing improvement, innovation has stalled.⁴⁹ The decline in innovation and the devastating impacts this decline has on the digital economy can be seen in the inadequate privacy protections being offered by GAFA.⁵⁰

ii. Inadequate Privacy Protections

Market power is typically defined as “the ability to raise prices without a loss to demand.”⁵¹ However, because digital platforms typically do not charge monetary fees to customers, market power takes a different form.⁵² Rather than impacting prices charged, market power in the digital

⁴⁶ *Id.*

⁴⁷ *Id.* at 3.

⁴⁸ HOUSE REPORT, *supra* note 2, at 46–47.

⁴⁹ *Id.* at 47.

⁵⁰ *Id.* at 52 (quoting Giuseppe Colangelo & Mariateresa Maggiolino, *Data Protection in Attention Markets: Protecting Privacy through Competition?*, 8 J. OF EUR. COMPETITION L. & PRACTICE 363, 365 (2017)).

⁵¹ *Id.* at 51. (citing W. KIP VISCUSI ET AL., *ECONOMICS OF REGULATION AND ANTITRUST* 164 (3d ed. 2000)).

⁵² *Id.*; *see also* THE DIGITAL COMPETITION EXPERT PANEL, *UNLOCKING DIGITAL COMPETITION* 4 (2019),

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf

market impacts “the degree to which platforms have eroded consumer privacy without prompting a response from the market.”⁵³

Absent competitive threats, dominant technology platforms are not motivated to offer sufficient privacy protections.⁵⁴ Dominant platforms then benefit from the lack of customer privacy protections because, in turn, the platform has greater access to customer data.⁵⁵ The House Judiciary Committee’s report noted that dominant technology platforms have abused customer privacy by hiding their data collection practices “in dense and lengthy disclosures,” by tricking customers into consenting to tracking through “[t]he use of manipulative design interfaces,” and by using customers’ personal data for personalized advertising “with no or limited controls available to consumers.”⁵⁶ As is discussed further below, access to data allows dominant platforms to maintain and increase their market power.⁵⁷ Thus, start-ups that attempt to enter the digital market and offer more rigorous privacy protections for

⁵³ HOUSE REPORT, *supra* note 2, at 51

⁵⁴ *Id.* at 52; *see also* UNLOCKING DIGITAL COMPETITION, *supra* note 52, at 50.

⁵⁵ HOUSE REPORT, *supra* note 2, at 52.

⁵⁶ *Id.* at 52–53. (quoting Colangelo & Maggolino, *supra* note 50, at 365; and then citing Arvind Narayanan, Arunesh Mathur, Marshini Chetty & Mihir Kshirsagar, *Dark Patterns: Past, Present, and Future*, 18(2) ACM QUEUE 67, 77 (2020) <https://queue.acm.org/detail.cfm?id=3400901>).

⁵⁷ *Id.* at 44; *see also* discussion *infra* Part II(c).

customers are disadvantaged by their lack of access to data and are driven out by the dominant platforms.⁵⁸

The unique characteristics of the digital market, some of which have already been discussed, have made it especially vulnerable to these competitive harms.⁵⁹

C. CHARACTERISTICS OF THE DIGITAL MARKET

Digital markets are uniquely susceptible to the previously discussed competitive harms because, in addition to containing multi-sided platforms,⁶⁰ they are characterized by strong network effects, high switching costs, data accumulation, and economies of scale and scope.⁶¹

i. Network Effects

Direct network effects exist when a product or service becomes more valuable as more people use that product or service.⁶² For example, Facebook becomes more valuable to the individual user when more of the user's family members and friends are also on Facebook.⁶³ Similarly, Amazon Marketplace becomes more valuable as more buyers and sellers use the platform because buyers have access to a greater range of products,

⁵⁸ HOUSE REPORT, *supra* note 2, at 48; *see also* UNLOCKING DIGITAL COMPETITION, *supra* note 52, at 4.

⁵⁹ *See infra* Part II(c).

⁶⁰ Rajan et al., *supra* note 9, at 3.

⁶¹ HOUSE REPORT, *supra* note 2, at 40–46; IMF Report, *supra* note 36, at 25.

⁶² *Id.* at 40.

⁶³ *Id.* at 41.

and sellers are more likely to sell their products.⁶⁴ Direct network effects in digital markets facilitate monopoly formation because they make it difficult for newcomers to enter the market and adequately compete.⁶⁵ A new social media platform, online marketplace, or search engine can only effectively compete if it has enough users to make its service valuable.⁶⁶

Because digital markets are characterized by these strong network effects, they are “subject to ‘tipping’ in which a winner will take most of the market.”⁶⁷ As discussed above, direct network effects and tipping facilitate the “kill zone” because when investors and early app developers are discouraged from investing in a new digital platform, ordinary customers are unlikely to adopt the platform.⁶⁸ Without such early adoption by customers, a digital platform is unlikely to stand a chance at competing with GAFA.⁶⁹

ii. Switching Costs

Digital markets are also characterized by high switching costs, meaning that users face difficulties in switching away from a dominant firm’s product to a new product.⁷⁰ For example, users who engage with Facebook contribute a significant amount of time and data to building

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ UNLOCKING DIGITAL COMPETITION, *supra* note 52, at 4.

⁶⁸ *See supra* Part II(b)(i).

⁶⁹ Rajan et al., *supra* note 9, at 3.

⁷⁰ HOUSE REPORT, *supra* note 2, at 41.

their profiles, connecting with friends, uploading pictures, and sharing personal information.⁷¹ If a user decides to switch to a different social network, they cannot import their Facebook profile into that new network; instead, they must “start from scratch, re-uploading [] photos and re-entering [] personal information to the new platform.”⁷² Similar difficulties exist for sellers on Amazon, as they cannot easily transfer their Amazon product reviews and ratings to a new online marketplace.⁷³

These high switching costs create “lock-in,” where users remain with the dominant firm out of convenience, even though they would prefer to switch to another firm’s product or service.⁷⁴ Lock-in is another significant barrier to entry for start-up firms in the digital market.⁷⁵

iii. Data Accumulation

Data accumulation is an essential part of competing in the digital market.⁷⁶ Data accumulation is “self-reinforcing.”⁷⁷ Companies with access to large amounts of data can “use that data to better target users or improve product quality,” thus attracting more users, which allows the

⁷¹ *Id.* at 42.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 41–42 .

⁷⁵ *Id.* at 42.

⁷⁶ *Id.* at 43; *see also* IMF Report, *supra* note 36, at 26.

⁷⁷ HOUSE REPORT, *supra* note 2, at 43.

company to accumulate more data.⁷⁸ This “advantageous feedback loop” poses a significant barrier to entry for new firms that have few users and minimal access to data.⁷⁹ Additionally, data advantages assist dominant platforms in identifying and acquiring rivals before they become significant competitive threats.⁸⁰ As noted in the House Judiciary Committee’s report—Google has used Android’s operating system to track third-party apps, Facebook has used its platform to “identify and then acquire fast-growing third-party apps,” and Amazon has used data from third-party merchants to “inform [its] own private label strategy.”⁸¹ Additionally, Apple has been pre-installing its “Find My” app, an app that tracks the phone’s location, on iPhones, in such a way that users can only opt out of the location tracking if they go through the phone’s extensive menu settings.⁸²

In turn, dominant technology platforms are not motivated to provide adequate privacy protections for consumers, and, without innovation competition from market entrants, dominant platforms continue gaining power despite the inadequacy of the protections they offer.⁸³

⁷⁸ *Id.*

⁷⁹ *Id.* at 42–43.

⁸⁰ *Id.* at 44.

⁸¹ *Id.* at 378.

⁸² *Id.* at 357.

⁸³ *Id.* at 51; *see also* IMF Report, *supra* note 36, at 24–25.

iv. Economies of Scale and Scope

Finally, digital markets are susceptible to monopolization because of economies of scale and scope.⁸⁴ Entry into digital markets is expensive on the front end, but successful entrants enjoy increasing returns to scale, meaning that “as [their] sales increase, [the] average unit cost decreases.”⁸⁵ For example, Facebook faced significant upfront costs in the construction of its platform but does not face increasing costs as more users join the platform.⁸⁶ Instead, its average unit cost decreases with each new user it gains.⁸⁷ Dominant technology platforms also enjoy economies of scope in that, once a firm has “sufficient technical expertise or access to consumer data, the cost of applying this resource into a new market is relatively low.”⁸⁸ While many dominant technology platforms do not charge money for their consumer services, they benefit significantly from the accumulation of user data.⁸⁹ This data accumulation makes it easier for dominant firms to maintain their market shares while simultaneously creating an incredibly high cost of entry for start-up firms.⁹⁰

⁸⁴ HOUSE REPORT, *supra* note 2, at 45; *see also* IMF Report, *supra* note 36, at 25.

⁸⁵ HOUSE REPORT, *supra* note 2, at 45.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 45–46.

⁹⁰ *Id.*

These four characteristics have made the digital market uniquely susceptible to competitive harm and have facilitated Google, Apple, Facebook, and Amazons' accumulation of market power.⁹¹

d. EVIDENCE OF MARKET DOMINANCE BY GAFA

Google, Apple, Facebook, and Amazon each benefitted from being early entrants into the digital market. As these dominant platforms have developed their products and accumulated data over the last several years, the unique evolving characteristics of the digital economy have allowed them to maintain their dominant positions and have facilitated their acquisitions of start-up firms before such firms could grow into legitimate competitors.⁹² Recent statistics from the House Judiciary Committee's report show that much of GAFA's growth over the years is attributable to the firms' uses of acquisitions.⁹³

First, the House Judiciary Committee report showed that Google has acquired over 260 companies in twenty years.⁹⁴ Google dominates the online search market, making up over 87% of U.S. searches and over 92% of global searches.⁹⁵

⁹¹ HOUSE REPORT, *supra* note 2, at 40–46.

⁹² HOUSE REPORT, *supra* note 2, at 40–46.

⁹³ *Id.*

⁹⁴ *Id.* at 174.

⁹⁵ *Id.* at 176.

Next, the Committee found that Apple has acquired over 100 companies in the last twenty years.⁹⁶ In 2019, Apple’s CEO Tim Cook stated that Apple buys a new company every two to three weeks and that Apple’s “approach on acquisitions has been to buy companies where [they] have challenges, and IP, and then make them a feature of the phone.”⁹⁷

Concerning Facebook, the Committee found that the company has acquired at least 63 companies since its founding in 2004, including Instagram, WhatsApp, Atlas, LiveWire, and Onavo.⁹⁸ Facebook has maintained an extremely high market share, with its products making up three of the seven most popular apps in the United States.⁹⁹ Additionally, Facebook’s senior executives have called Facebook’s acquisition strategy a “land grab” to “shore up [their] position,” evidencing their intention to use acquisitions as means by which to avoid competitive threats.¹⁰⁰

Lastly, the Committee found that Amazon has acquired over 100 companies in the last twenty years.¹⁰¹ Amazon made several large acquisitions in recent years, including Ring, Zappos, IMDB.com, Audible,

⁹⁶ *Id.* at 414–423.

⁹⁷ *Id.* at 337.

⁹⁸ HOUSE REPORT, *supra* note 2, at 149.

⁹⁹ *Id.* at 136.

¹⁰⁰ *Id.* at 149.

¹⁰¹ *Id.* at 261.

and Goodreads, with its largest acquisition occurring in 2017 when it purchased Whole Foods for \$13.7 billion.¹⁰²

Laws aimed at limiting anticompetitive mergers certainly exist.¹⁰³ However, the interpretation of such laws in U.S. courts has created an environment where dominant technology platforms can engage in anticompetitive mergers with very little accountability.¹⁰⁴

III. THE EVOLUTION OF CLAYTON § 7

a. CLAYTON § 7

Section 7 of the Clayton Act currently addresses acquisitions by dominant firms.¹⁰⁵ Enacted in 1914 and last amended in 1996, Clayton § 7 prohibits mergers or acquisitions that may have the effect of substantially lessening competition or tending to create a monopoly.¹⁰⁶ The statute applies to acquisitions of stock, assets, or non-corporate interests and exempts certain acquisitions, including those solely for investment.¹⁰⁷

Additionally, the Hart-Scott Rodino Act, also known as Clayton Act § 7A, establishes notification requirements and a waiting period for persons that plan to acquire the stock or assets of another.¹⁰⁸ The statute imposes

¹⁰² *Id.* at 262.

¹⁰³ *See* 15 U.S.C. § 18 (West 2000); 15 U.S.C. § 18(a) (West 2000).

¹⁰⁴ *See infra* Part III. *See infra* note 121; *see also* Clayton Act, ch. 323, § 7, 38 Stat. 730, 731–32 (1914) (current version at 15 U.S.C. § 18).

¹⁰⁵ 15 U.S.C. § 18.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Clayton Act, ch. 323, § 7A, 38 Stat. 730, 731–32 (1914) (current version at 15 U.S.C. § 18a).

these requirements upon large acquisitions meeting specific criteria under subsection (a).¹⁰⁹ Firms whose acquisitions are subject to this act must file a notification with the Federal Trade Commission.¹¹⁰ During the following thirty-day waiting period, the Federal Trade Commission or Department of Justice reviews the notification and may request additional information to ensure that the acquisition will not violate antitrust laws, including Section 7 of the Clayton Act.¹¹¹ If the reviewing agency believes that a proposed merger may substantially lessen competition or tend to create a monopoly, and the parties cannot resolve such concerns, the agency may attempt to prevent the merger by going to federal court.¹¹²

b. INTERPRETATIONS OF CLAYTON § 7

i. *Historical Application of Clayton §§ 7 and 7A*

Historically, federal courts interpreted Clayton § 7 in such a way that emphasized the statute’s use of the word “may,” holding that the antitrust enforcement agencies could prohibit mergers or acquisitions that “*may* have the effect of substantially lessening competition or tending to create a monopoly,” and not requiring that the agencies prove that a merger or

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Mergers*, FED. TRADE COMM’N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers> (last visited Sept. 18, 2022).

acquisition definitely would create such anticompetitive effects.¹¹³ In *United States v. Aluminum Co. of America*, the United States Supreme Court reversed the District Court's holding that a merger between two producers of aluminum conductor would not violate Clayton § 7.¹¹⁴ In its decision, the Supreme Court emphasized that Clayton § 7 is concerned with “probabilities, not certainties.”¹¹⁵ The Supreme Court held that, although Alcoa's acquisition of Rome would add only 1.3% to Alcoa's control of the aluminum conductor market, such an acquisition would be reasonably likely to produce “substantial lessening of competition within the meaning of [Clayton] § 7” given the fact that the aluminum conductor market was already highly concentrated.¹¹⁶ The Supreme Court emphasized that “if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great.”¹¹⁷

United States v. Aluminum Co. of America created a reasonable burden for antitrust agencies to carry in challenging potential mergers.¹¹⁸

¹¹³ *United States v. Aluminum Co. of America*, 377 U.S. 271, 272–73, 280 (1964) (emphasis added).

¹¹⁴ *Id.* at 273, 281.

¹¹⁵ *Id.* at 280 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962)).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 279. (quoting *United States v. Philadelphia National Bank*, 374 U.S. 321, 365, n. 42 (1963)).

¹¹⁸ *Id.* at 272–73.

Unfortunately, reliance on the case has greatly waned in recent years.¹¹⁹ Since 2011, courts have cited the case only four times, with no case relying on the standard the Supreme Court set forward.¹²⁰ Instead, federal courts have tended toward a much more rigorous burden of proof for antitrust agencies seeking to challenge a merger.¹²¹

ii. Modern Application of Clayton §§ 7 and 7A

Modern federal courts now require the Federal Trade Commission and Department of Justice to present extensive evidence in proving that a merger is likely to violate Clayton § 7.¹²² For example, in *Federal Trade Commission v. Tronox Ltd.*, the Federal Trade Commission was required to meet three evidentiary burdens in making its case that a merger between Tronox Limited and Cristal, two titanium dioxide producers, would be violative of Clayton § 7.¹²³ First, the agency had to demonstrate the relevant product market.¹²⁴ Second, the agency had to demonstrate the

¹¹⁹ See *infra*, note 120. See *DeHoog v. Anheuser-Busch InBev SA/NV*, 899 F.3d 758, 764 (9th Cir. 2018); *Universal Surveillance Corp. v. Checkpoint Sys., Inc.*, No. 5:11-CV-1755, 2015 WL 6082122 (N.D. Ohio Sept. 30, 2015); *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 762 F.3d 1114, 1122 (10th Cir. 2014); *F.T.C. v. Lab'y Corp. of Am.*, No. SACV 10-1873 AG MLGX, 2011 WL 3100372 (C.D. Cal. Feb. 22, 2011).

¹²⁰ See *supra* note 119.

¹²¹ *Fed. Trade Comm'n v. Tronox Ltd.*, 332 F. Supp. 3d 187, 198 (D.D.C. 2018); see also FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 1 (2010), [HTTPS://WWW.FTC.GOV/SYSTEM/FILES/DOCUMENTS/PUBLIC_STATEMENTS/804291/100819HMG.PDF](https://www.ftc.gov/system/files/documents/public_statements/804291/100819HMG.PDF).

¹²² *Tronox Ltd.*, 332 F. Supp. 3d at 197; see also FED. TRADE COMM'N, *supra* note 121, at 1.

¹²³ *Tronox Ltd.*, 332 F. Supp. 3d at 197.

¹²⁴ *Id.*

relevant geographic market.¹²⁵ Third, the agency had to demonstrate that the proposed merger “*would* substantially increase concentration.”¹²⁶

A challenging aspect of identifying the relevant product market is that the agency had to prove that it was not defining the market too narrowly.¹²⁷ In arguing that the relevant product market was the market for chloride-process titanium dioxide, the agency presented evidence showing that consumers recognize chloride-process titanium dioxide as a product separate from sulfate-process titanium dioxide.¹²⁸ Using factors established in *Brown Shoe Co., v. United States*, the agency set forth information showing chloride-process titanium dioxide’s unique characteristics, the distinct customers that use it, the price differences between it and sulfate-process titanium dioxide, and more.¹²⁹

In its argument that North America was the relevant geographic market, the agency had to present extensive quantitative evidence showing the existence of regional markets, as opposed to one global market.¹³⁰ In doing so, the agency brought in an expert witness who explained the agency’s “Hypothetical Monopolist Test” results.¹³¹ The Hypothetical Monopolist Test determines that “a proposed market is sufficiently broad

¹²⁵ *Id.*

¹²⁶ *Id.* at 207 (emphasis added).

¹²⁷ *Id.* at 198 .

¹²⁸ *Id.* at 198–99.

¹²⁹ *Id.* at 198; *see also* *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

¹³⁰ *Tronox Ltd.*, 332 F. Supp. 3d at 203.

¹³¹ *Id.* at 204; *see also* FED. TRADE COMM’N, *supra* note 121, at 8.

if an absolute monopolist of the posited market would likely find it profit-maximizing to impose a [small but significant] non-transitory price increase [“(SSNIP)”] of at least 5%.”¹³² The agency found that with a SSNIP of 10%, a hypothetical monopolist in the North American chloride-process titanium dioxide market could lose up to 15.4% of its sales and still break even.¹³³ Because this critical loss calculation of 15.4% was less than the calculated predicted loss the agency set forward, the court accepted the agency’s argument that the North American market was the correct geographic market.¹³⁴

Lastly, to meet its third burden of proof, the Federal Trade Commission had to present additional expert witness testimony and extensive economic evidence in order to calculate and prove the market participants’ shares in the relevant product and geographic markets.¹³⁵ The agency then determined the relevant market’s concentration level by calculating its Herfindahl–Hirschman Index (“HHI”) score by squaring the market share of each firm in a market and adding the values.¹³⁶ Next,

¹³² ELHAUGE GERADIN, *GLOBAL ANTITRUST LAW AND ECONOMICS* 352 (Robert C. Clark et al. eds., 3rd ed. 2018); *see also* FED. TRADE COMM’N, *HORIZONTAL MERGER GUIDELINES* (2010).

¹³³ *Tronox Ltd.*, 332 F. Supp. 3d at 204.

¹³⁴ *Id.* at 204–06.

¹³⁵ *Id.* at 207–09.

¹³⁶ *Id.* at 207; *see also* FED. TRADE COMM’N, *HORIZONTAL MERGER GUIDELINES* (2010).

the agency presented evidence showing that if the merger were to go through, the HHI score of the chloride-process titanium dioxide market would be 3,046, shifting the market from “moderately concentrated” to “highly concentrated.”¹³⁷ Finally, the agency also presented evidence showing that post-merger strategic output withholding was likely.¹³⁸

While the Federal Trade Commission was able to successfully meet its evidentiary burdens and ultimately won the *Tronox* case, blocking the merger between Tronox and Cristal,¹³⁹ this heightened and detailed standard has proved extremely difficult for the agencies to meet in other cases.¹⁴⁰ In many ways, it is as if courts now require evidence that a merger will *certainly* prove anticompetitive.¹⁴¹ This rigorous burden has led to fewer merger challenges by the Department of Justice and Federal Trade Commission.¹⁴² For example, in 2018, the Department of Justice lost its case against AT&T, wherein it challenged AT&T’s \$108 billion vertical merger with Time Warner, because the court held that the agency failed to establish that the merger *was likely to* substantially lessen competition.¹⁴³

¹³⁷ *Id.* at 207.

¹³⁸ *Id.* at 208.

¹³⁹ *Id.* at 219–20;

¹⁴⁰ Fed. Trade Comm’n v. Facebook, Inc., 560 F. Supp. 3d (D.D.C. 2021);

United States v. AT & T Inc., 310 F. Supp. 3d 161 (D.D.C. 2018).

¹⁴¹ *Tronox Ltd.*, 332 F. Supp. 3d at 207–09.

¹⁴² UNLOCKING DIGITAL COMPETITION, *supra* note 52, at 91.

¹⁴³ *AT & T Inc.*, 310 F. Supp. 3d at 161. (emphasis added).

This was the first vertical merger challenge the Department of Justice had brought in over forty years.¹⁴⁴

As for the dominant technology platforms, the Federal Trade Commission and Department of Justice have not proactively challenged a single GAFA acquisition in court.¹⁴⁵ This is likely because the heightened evidentiary burden is especially difficult to meet when analyzing digital platforms.¹⁴⁶ Such challenges can be understood more fully in light of the Federal Trade Commission's recent lawsuit against Facebook.

c. FEDERAL TRADE COMMISSION V. FACEBOOK

The Federal Trade Commission's recent, unsuccessful lawsuit against Facebook reveals that unique challenges in defining the relevant product market for and market share of digital platforms are the likely reasons why the antitrust enforcement agencies have failed to challenge GAFA acquisitions.¹⁴⁷

¹⁴⁴ Mark McCareins, *AT&T-Time Warner Ruling a Milestone for Vertical Mergers*, THE HILL, June 14, 2018, <https://thehill.com/opinion/finance/392158-att-time-warner-ruling-a-watershed-moment-for-vertical-mergers>.

¹⁴⁵ UNLOCKING DIGITAL COMPETITION, *supra* note 52, at 91.

¹⁴⁶ *See infra* Part III(c).

¹⁴⁷ *Facebook, Inc.*, 560 F. Supp. 3d.

i. Facebook's Acquisition of Instagram

Facebook acquired Instagram in 2012 for \$1 billion.¹⁴⁸ As of 2021, the Facebook-Instagram merger is the only Facebook acquisition that the Federal Trade Commission has investigated.¹⁴⁹ Despite its investigation, the Federal Trade Commission did not challenge the merger.¹⁵⁰ In 2021, however, the Federal Trade Commission initiated litigation against Facebook, arguing that, by acquiring and continuing to own Instagram, the company is illegally maintaining a monopoly in violation of Sherman Act § 2.¹⁵¹ The Federal Trade Commission brought this complaint under Section 13(b) of the Federal Trade Commission Act, which “authorizes it to seek an injunction against an entity that ‘is violating’ or ‘is about to violate’ the antitrust laws.”¹⁵²

In its initial complaint against Facebook, the Federal Trade Commission alleged that, as of 2011, Facebook had become the “dominant personal social networking provider in the United States.”¹⁵³ However, as smartphones became more popular, Facebook’s executives worried that new apps would compete with Facebook for users.¹⁵⁴ Because Facebook originated as a website and its mobile functionality was limited,

¹⁴⁸ *Id.* at 3–4.

¹⁴⁹ HOUSE REPORT, *supra* note 2, at 11.

¹⁵⁰ UNLOCKING DIGITAL COMPETITION, *supra* note 52, at 91.

¹⁵¹ *Facebook, Inc.*, 560 F. Supp. 3d at 11.

¹⁵² *Id.*

¹⁵³ *Id.* at 6 .

¹⁵⁴ *Id.* at 6-7.

the company feared that emerging app-based social networking services would surpass Facebook.¹⁵⁵

Facebook executives were especially concerned about competition spurred by Instagram, a “photo-editing and -sharing app designed for the era of smartphones with built-in cameras,” whose user base was growing rapidly.¹⁵⁶ Because Instagram’s model as a photo-sharing social network differed from Facebook’s, Facebook initially attempted to compete by creating its own photo-sharing app, “Snap.”¹⁵⁷ Instagram continued growing rapidly while Facebook was attempting to develop its own app, and Facebook became increasingly worried that a direct competitor, like Google, Apple, or Twitter, would acquire Instagram.¹⁵⁸ Facebook eventually shifted away from its own photo-sharing app development and began negotiations to acquire Instagram.¹⁵⁹

Facebook successfully acquired Instagram in April of 2012 and, less than two weeks later, began scaling back on the development of its own app, eventually abandoning the project altogether.¹⁶⁰ Facebook’s

¹⁵⁵ *Id.* at 7.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*; First Amended Complaint Against Facebook, *supra* note 1, at 27.

¹⁵⁸ *Facebook, Inc.*, 560 F. Supp. 3d at 7; First Amended Complaint Against Facebook, *supra* note 1, at 27–8.

¹⁵⁹ *Facebook, Inc.*, 560 F. Supp. 3d at 7; First Amended Complaint Against Facebook, *supra* note 1, at 28.

¹⁶⁰ *Facebook, Inc.*, 560 F. Supp. 3d at 7-8; First Amended Complaint Against Facebook, *supra* note 1, at 33.

acquisition of Instagram can be categorized as a killer acquisition in that Facebook acquired Instagram and “killed off its own internal efforts to develop a competing product.”¹⁶¹ The Federal Trade Commission’s complaint against Facebook specifically argued that Facebook was maintaining a monopoly in the market for personal social networking (“PSN”) services by its acquisition and continued ownership of Instagram.¹⁶² Defining PSN services as “online services that enable and are used by people to maintain personal relationships and share experiences with friends, family, and other personal connections in a shared space,” the Federal Trade Commission stated that Facebook has a monopoly in the relevant market because there are no other types of internet services that are adequate substitutes for Facebook.¹⁶³ Instagram previously served as a competitor in the PSN services market until Facebook acquired it, neutralizing its threat.¹⁶⁴

Despite the Federal Trade Commission’s arguments, the United States District Court for the District of Columbia dismissed the complaint for failure to state a claim, holding that the Federal Trade Commission did not adequately plead that Facebook possessed monopoly power in the PSN services market.¹⁶⁵ Specifically, the court held that the agency’s

¹⁶¹ OECD REPORT, *supra* note 15, at 6.

¹⁶² *Facebook, Inc.*, 560 F. Supp. 3d, at 4.

¹⁶³ *Id.* at 14.

¹⁶⁴ *Id.* at 7.

¹⁶⁵ *Id.* at 7, 12–13.

complaint failed to show that Facebook holds market power in the PSN services market.¹⁶⁶ The court’s opinion stated that the agency’s evidence was “too conclusory” because they did not provide an “estimated actual figure or range for Facebook’s market share” but simply stated that Facebook’s market share had been in excess of 60% of the PSN services market since 2011.¹⁶⁷ The court went on to explain the existing difficulties in measuring Facebook’s market power.¹⁶⁸ Its market power cannot be measured by revenue, because revenues earned by PSN services are earned in the market for advertising, which is a separate market.¹⁶⁹ Facebook’s market power also cannot be measured by its share of the total number of users of PSN services because this figure would not account for users who are part of multiple PSN services.¹⁷⁰ Lastly, the court stated that Facebook’s market share cannot be measured by its share of the total time that users spend on PSN services because this metric would not account for features offered by Facebook or Instagram that could be characterized as “non-PSN services,” such as watching an online video.¹⁷¹

¹⁶⁶ *Id.* at 4 .

¹⁶⁷ *Id.* at 18 .

¹⁶⁸ *Id.* at 19.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

The dismissal of the Federal Trade Commission’s complaint, along with the court’s analysis of the difficulties in measuring Facebook’s market share, are very likely the reasons why the agency did not challenge the merger in 2012. As discussed previously, digital platforms are multi-sided markets where customers are not charged monetary fees, and revenues are earned in a separate advertising market.¹⁷² Because customers “pay” for digital platform services in the form of data, it can be extremely difficult to measure a particular platform’s market share.¹⁷³ Additionally, as discussed previously, in reviewing merger challenges under Clayton § 7, courts have become more demanding, requiring the Federal Trade Commission and Department of Justice to present detailed evidence of the relevant market, the merging firms’ market shares, and the likely market concentration and anticompetitive effects that would result from the merger.¹⁷⁴ In the relevant case, the Federal Trade Commission had the benefit of being able to access almost ten years of post-merger activity and statistics in making its arguments, yet it still failed to meet the court’s evidentiary requirements.¹⁷⁵ Had the agency attempted to challenge Facebook’s acquisition of Instagram in 2012, it is very likely that it would

¹⁷² *Kill Zone*, *supra* note 9, at 2; *see also* IMF Report, *supra* note 36, at 25.

¹⁷³ HOUSE REPORT, *supra* note 2, at 51; *Facebook, Inc.*, 560 F. Supp. 3d at 13.

¹⁷⁴ *Tronox Ltd.*, 332 F. Supp. 3d at 198–209.

¹⁷⁵ *Facebook, Inc.*, 560 F. Supp. 3d at 1.

have had an even harder time meeting its burden of proof because it would have had the additional burden of *predicting* the outcomes of the merger.

ii. Facebook's Acquisition of WhatsApp

Facebook acquired WhatsApp in 2014 for \$19 billion.¹⁷⁶ Once again, the Federal Trade Commission and Department of Justice did not challenge the merger, but in its 2021 complaint against Facebook, the Federal Trade Commission also accused the company of monopoly maintenance by its acquisition and continued ownership of WhatsApp.¹⁷⁷

The agency's attack on the WhatsApp merger differed from the Instagram merger in that WhatsApp was not a competitor in the PSN services market.¹⁷⁸ Instead, the agency argued that Facebook feared WhatsApp, which was part of the mobile messaging services market, might *become* a competitor in the PSN services market.¹⁷⁹ Like Instagram, WhatsApp was an app-based platform gaining popularity with the rise of smartphones.¹⁸⁰ In an initial attempt to compete, Facebook released its Facebook Messenger app, hoping that it would slow the growth of WhatsApp, preventing WhatsApp from expanding into the PSN services

¹⁷⁶ *Facebook, Inc.*, 560 F. Supp. 3d at 8.

¹⁷⁷ UNLOCKING DIGITAL COMPETITION, *supra* note 52, at 91; *Facebook, Inc.*, 560 F. Supp. 3d at 9.

¹⁷⁸ *Facebook, Inc.*, 560 F. Supp. 3d at 8.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

market.¹⁸¹ But to Facebook's dismay, WhatsApp continued growing, reaching 450 million active users by 2014.¹⁸² Driven by fear of competition, Facebook began attempts to neutralize the threat through an acquisition.¹⁸³ After failed negotiations in 2012, Facebook successfully acquired WhatsApp in 2014.¹⁸⁴ Facebook's acquisition of WhatsApp can be categorized as an acquisition of a nascent competitive threat in that Facebook acquired WhatsApp to neutralize the potential that WhatsApp might develop into a PSN services competitor in the future.¹⁸⁵

The Federal Trade Commission argued that, since the acquisition, Facebook had maintained its monopoly in the PSN services market by keeping WhatsApp “cabinéd to providing mobile messaging services rather than allowing’ it to grow into a standalone PSN service.”¹⁸⁶ As mentioned previously, the Federal Trade Commission's complaint was ultimately dismissed for failure to state a claim.¹⁸⁷ The District Court's dismissal of the complaint cited the same reasoning for dismissing both the Instagram and WhatsApp merger arguments: the Federal Trade Commission failed to show that Facebook holds power in the PSN services market and the agency failed to present an actual figure or range

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*; HOUSE REPORT, *supra* note 2, at 157.

¹⁸⁵ OECD REPORT, *supra* note 15, at 6.

¹⁸⁶ *Facebook, Inc.*, 560 F. Supp. 3d at 8.

¹⁸⁷ *Id.* at 12.

for Facebook's market share.¹⁸⁸¹⁸⁹ Given the court's insistence on quantitative data and hard evidence of market power,¹⁹⁰ it is highly unlikely that, in 2014, the court would not have accepted an argument that the merger was anticompetitive because WhatsApp *could* and *might* someday enter the PSN services market. This dilemma further enables dominant technology platforms in their acquisitions of nascent competitive threats because the anticompetitive effects are very difficult to prove under the current interpretation of Clayton § 7 and Sherman § 2.¹⁹¹

Because of the challenges of proving the relevant product market and market share of digital platforms, especially those that are nascent competitors, the antitrust enforcement agencies have been extremely hesitant in challenging GAFBA acquisitions.¹⁹² Even in its retroactive challenges of acquisitions, the Federal Trade Commission has been unsuccessful.¹⁹³ Courts' interpretations of the relevant laws must be refined if such anticompetitive acquisitions are to be prevented.

¹⁸⁸ *Id.* at 12–13.

¹⁸⁹ *Id.* at 4.

¹⁹⁰ *Id.* at 12–13.

¹⁹¹ *See infra* Part IV.

¹⁹² *See supra* Part III.

¹⁹³ *Facebook, Inc.*, 560 F. Supp. 3d.

IV. RESTORATION IN THE DIGITAL ECONOMY THROUGH LEGISLATIVE CHANGE

Recognition of the need for change in antitrust enforcement has been growing rapidly over the last two years.¹⁹⁴ Both Republican and Democratic politicians have acknowledged the need for legislation that reinforces anticompetitive presumptions on certain behaviors by dominant platforms and lowers evidentiary burdens for antitrust agencies in court.¹⁹⁵ In June of 2021, as sponsored by Congressman Hakeem Jeffries, the “Platform Competition and Opportunity Act of 2021” was introduced before the House of Representatives.¹⁹⁶ Later that month, the Committee on the Judiciary voted to issue a report to the full chamber.¹⁹⁷ More recently, in November of 2021, Senator Amy Klobuchar introduced a companion bill before the Senate.¹⁹⁸ This paper will analyze Senator Klobuchar’s companion bill in detail, though the language of the two bills is nearly identical.

¹⁹⁴ HOUSE REPORT, *supra* note 2, at 376–403; Cecilia Kang, *Lawmakers, Taking Aim at Big Tech, Push Sweeping Overhaul of Antitrust*, N.Y. TIMES, June 29, 2021.

¹⁹⁵ HOUSE REPORT, *supra* note 2, at 376–403; *see also* BUCK REPORT, *supra* note 25, at 5.

¹⁹⁶ H.R. 3826, 117th Cong. (2021).

¹⁹⁷ Platform Competition and Opportunity Act of 2021, H.R. 3826, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/house-bill/3826/text>.

¹⁹⁸ *Klobuchar, Cotton Introduce Bipartisan Legislation to Protect Competition and Consumer Choice Online*, AMY KLOBUCHAR (Nov. 5, 2021), <https://www.klobuchar.senate.gov/public/index.cfm/2021/11/klobuchar-cotton-introduce-bipartisan-legislation-to-protect-competition-and-consumer-choice-online>.

a. THE PLATFORM COMPETITION AND OPPORTUNITY ACT OF
2021

The Platform Competition and Opportunity Act of 2021 (“the Platform Act”) seeks to “promote competition and economic opportunity in digital markets by establishing that certain acquisitions by dominant online platforms are unlawful.”¹⁹⁹ This legislation shifts the burden of proof from the antitrust enforcement agencies to the “covered platform” seeking to acquire the stock or assets of another.²⁰⁰ A “covered platform” is defined as an online platform that has met certain criteria pertaining to its number of monthly active users and market capitalization as well as being “a critical trading partner for the sale or provision of any service offered on or directly related to the platform.”²⁰¹ Additionally, a “covered

¹⁹⁹ S. 3197, 117th Cong. (2021).

²⁰⁰ *Id.*

²⁰¹ *Id.* (stating “The term ‘covered platform’ means an online platform (1) that has been designated as a ‘covered platform’ under section 4(a); or (2) that (A) at any point during the 12 months preceding a designation under section 4(a) or at any point during the 12 months preceding the filing of a complaint for an alleged violation of this Act (i) has at least 50,000,000 United States-based monthly active users on the online platform operator; or (ii) has at least 100,000 United States-based monthly active business users on the online platform; (B) as of the date of enactment of this Act, was owned or controlled by a person with United States net annual sales of \$600,000,000,000 in the prior calendar year or with a market capitalization of greater than \$600,000,000,000, as measured by the simple average of the closing price per share of the common stock issued by the person for the trading days in the 180-day period ending on the date of enactment of this Act; and (C) is a critical trading partner for the sale or provision of any product or service offered on or directly related to the online platform.”).

platform operator” is defined as a person that “owns or controls a covered platform.”²⁰²

Under the Platform Act, it would be *deemed unlawful* for a covered platform operator to acquire the stock or assets of another person engaged in commerce, either directly or indirectly, *unless* the covered platform could demonstrate by clear and convincing evidence that (1) the transaction would be exempt under Clayton § 7A(c),²⁰³ (2) the acquired stock or assets are valued at less than \$50,000,000, or (3) the acquired assets or stock would not: (a) “compete with the covered platform or covered platform operator for the sale or provision of any product or service,” (b) “constitute nascent or potential competition to the covered platform or covered platform operator for the sale or provision of any product or service,” (c) “enhance or increase the covered platform’s or covered platform operator’s market position with respect to the sale or provision of any product or service,” *and* (d) “enhance or increase the covered platform’s or covered platform operator’s ability to maintain its market position with respect to the sale or provision of any product or service offered on or directly related to the covered platform.”²⁰⁴

²⁰² *Id.*

²⁰³ 15 U.S.C. § 18(a).

²⁰⁴ S. 3197, 117th Cong. (2021).

The legislation also specifies that competition for the sale of any product or service includes competition for a user's attention.²⁰⁵ Additionally, the legislation clarifies that an acquisition resulting in access to additional data, without more, may enhance or increase the market position of a covered platform or the covered platform's ability to *maintain* its market position.²⁰⁶

b. ANALYSIS OF THE PLATFORM ACT

This legislation would shift the burden of proof to the dominant technology platforms by changing the default presumption.²⁰⁷ Now, instead of presuming an acquisition to be legal and requiring the antitrust enforcement agencies to prove otherwise, certain acquisitions by covered platforms would be presumed illegal, unless the *platform* could show otherwise.²⁰⁸ Covered platforms engaging in acquisitions would be required to show that the companies they acquire are not direct competitors, nascent competitors, or potential competitors and that their acquisitions would not facilitate the acquirer's maintenance of or increase in market power.²⁰⁹ Additionally, the standard of proof for the covered

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*; *see also* 15 U.S.C. § 18.

²⁰⁸ S. 3197; 15 U.S.C. § 18(a).

²⁰⁹ S. 3197.

platforms would be clear and convincing evidence, a rigorous standard requiring proof that “a particular fact is substantially more likely than not to be true.”²¹⁰

In court, the antitrust enforcement agencies would no longer have to present extensive evidence of the dominant technology platform’s relevant product market, geographic market, and market concentration.²¹¹ Thus, the agencies would no longer be tied to the use of the Hypothetical Monopolist Test, HHI scores, and other economic data measures.²¹² Instead, a merger resulting in any increase in market power to a dominant technology platform would be deemed illegal.²¹³

Because the platforms engaging in acquisitions have easier access to their own plans and financial data, they are more equipped to present necessary evidence in defense of their acquisition plans, unlike the current system whereby the antitrust enforcement agencies are required to present the bulk of the necessary evidence.²¹⁴ This would greatly simplify the process of merger review, allowing the antitrust enforcement agencies to adequately review merger plans and to challenge mergers without fear of imminent failure in court.

²¹⁰ *Id.*; *Evidentiary Standards and Burdens of Proof in Legal Proceedings*, JUSTIA, <https://www.justia.com/trials-litigation/lawsuits-and-the-court-process/evidentiary-standards-and-burdens-of-proof/> (last visited Dec. 5, 2021).

²¹¹ S. 3197.

²¹² *See supra* Part III.

²¹³ S. 3197.

²¹⁴ *See supra* Part III.

The proposal also addresses the issues associated with determining the market share of a multi-sided digital platform. Digital platforms' main source of "currency" on the user side, rather than money, is the access to data it gains through reaching more users.²¹⁵ By expanding the concept of market power to include user attention and access to data, courts will be able to more accurately determine the extent to which a merger will increase a dominant technology platform's power.²¹⁶

This legislation could also help address the competitive harms previously mentioned—the decline in innovation and inadequate privacy protections. First, by prohibiting covered platforms from acquiring new start-ups that pose actual or potential competitive threats, start-up companies will be given greater opportunities for their ideas to be realized. Preventing these acquisitions will likely help to undo the "kill zone" that has been created by GAF A, incentivizing venture capital investment in technology start-ups.²¹⁷ With increased funding for start-up companies and more opportunity to grow without death by acquisition, start-ups will have greater potential to reach scale and become viable competitors in the technology market.²¹⁸

²¹⁵ *Kill Zone*, *supra* note 9, at 2; *see also* IMF Report, *supra* note 36, at 25.

²¹⁶ S. 3197, 117th Cong. § 2 (2021).

²¹⁷ *Kill Zone*, *supra* note 9, at 3.

²¹⁸ *Id.*

This legislation could also incentivize digital platforms to offer greater privacy protections because the Platform Act treats data and user attention like currency, in a sense, dominant platforms will be mostly prohibited from acquiring smaller firms in attempts to gain greater access to data.²¹⁹ Additionally, as start-up firms survive and grow without being acquired and subsequently killed off or neutralized, they will provide competitive pressure that will likely spur greater privacy protections.²²⁰ With increased competitive pressure, dominant platforms will be required to hear and respond to customer demand for increased privacy protections, no longer able to “erode consumer privacy without prompting a response from the market.”²²¹

Despite its potential to benefit the digital economy, this legislation sparks concerns as well. First, the Platform Act excludes acquisitions valued at less than \$50 million from its coverage.²²² According to the House Judiciary Report, GAFAM has been actively engaging in acquisitions valued at less than \$50 million, in addition to those valued in the billions.²²³ By excusing these smaller, yet significant, acquisitions, the Platform Act could fail to adequately prevent killer acquisitions and

²¹⁹ S. 3197, 117th Cong. § 2 (2021).

²²⁰ HOUSE REPORT, *supra* note 2, at 51; *see also* UNLOCKING DIGITAL COMPETITION , *supra* note 52, at 50.

²²¹ HOUSE REPORT, *supra* note 2, at 51.

²²² S. 3197, 117th Cong. § 2 (2021).

²²³ HOUSE REPORT, *supra* note 2, at 406–450.

acquisitions of nascent competitive threats. Instead, this type of legislation could cause dominant technology platforms to become even more defensive, incentivizing them to more rigorously scout out and acquire start-ups while they are small, successfully avoiding the need to comply with the Platform Act and simultaneously undermining its goals. As previously mentioned, GAFA's immense access to data has enabled it to identify and acquire nascent competitors very early in their development.²²⁴ This legislation could simply reinforce such behavior, ultimately making it impossible for start-up companies to enter the market without an immediate takeover.

c. THE PLATFORM ACT AS APPLIED TO FACEBOOK'S
ACQUISITIONS OF INSTAGRAM AND WHATSAPP

In addition, the Platform Act may be too narrowly tailored to GAFA as it stands today. The Platform Act appears to be focused solely on preventing the largest technology platforms from gaining *more* power, such that it fails to adequately address the fact that Google, Apple, Facebook, and Amazon also obtained the power they already have through these anticompetitive acquisitions.²²⁵ This concern may be understood more clearly by applying the Platform Act to the previously discussed Facebook

²²⁴ *Id.* at 44.

²²⁵ S. 3197, 117th Cong. § 3 (2021).

acquisitions. While Facebook would certainly qualify as “covered platform” today, it is not clear that the Platform Act would have prevented the Instagram and WhatsApp acquisitions, had it been in place at the time.²²⁶

i. Facebook’s Acquisition of Instagram

If the Platform Act had been law at the time of Facebook’s acquisition of Instagram, the merger would likely still have been allowed because Facebook would not have qualified as a covered platform at the time.²²⁷ By the end of 2011, Facebook had 179 million actively monthly users in North America.²²⁸ However, it did not yet have a market capitalization of \$600 billion, nor did it have \$600 billion of net annual sales.²²⁹ Despite these numerical shortcomings, every other aspect of the

²²⁶ HOUSE REPORT, *supra* note 2, at 92; *Number of Monthly Active Facebook Users in United States and Canada as of Third Quarter of 2021*, STATISTICA (July 28, 2022), <https://www.statista.com/statistics/247614/number-of-monthly-active-facebook-users-worldwide/>; Salvador Rodriguez, *Facebook Closes Above \$1 Trillion Market Cap for the First Time*, CNBC (June 28, 2021), <https://www.cnbc.com/2021/06/28/facebook-hits-trillion-dollar-market-cap-for-first-time.html>.

Facebook would qualify as a covered platform in 2021 because it has over 50 million U.S.-based monthly active users, its market capitalization is in excess of \$600 billion, and it is a critical trading partner for the sale or provision of social media services.

²²⁷ S. 3197, 117th Cong. (2021).

²²⁸ *Number of Monthly Active Facebook Users in United States and Canada as of Third Quarter of 2021*, STATISTICA (July 28, 2022), <https://www.statista.com/statistics/247614/number-of-monthly-active-facebook-users-worldwide/>.

While the exact number of monthly active Facebook users specifically from America in 2011 is not available, it is extremely likely that with 179 million active monthly users in the United States and Canada, at least 50 million were based in America.

²²⁹ Susanne Craig & Andrew Ross Sorkin, *Goldman Offering Clients a Chance to Invest in Facebook*, N.Y. TIMES (Jan 2, 2011), <https://dealbook.nytimes.com/2011/01/02/goldman-invests-in-facebook-at-50-billion-valuation/>; *Facebook’s Revenue and Net Income from 2007 to 2020*, STATISTICA (July

acquisition would have fallen under the control of the Platform Act: Facebook would certainly have been deemed a critical trading partner for the provision of social media services;²³⁰ the acquisition did not qualify for the enumerated exceptions in Clayton § 7A(c) because Facebook was required to file a notification of the transaction;²³¹ and Instagram was purchased for \$1 billion, which surpassed the Platform Act's exception for acquired stock or assets worth less than \$50 million.²³² It also is likely that Facebook would not have been able to meet the Platform Act's burden of proof, showing by clear and convincing evidence that Instagram was not a competitor for the provision of social media services. Competition, as defined by the Platform Act, includes competition for user attention.²³³ Even though Facebook and Instagram's models were different—one being web-based and the other being a photo-sharing app—they most certainly competed for user attention in general social media services.²³⁴ Facebook also would likely have had a very difficult time arguing that the

27, 2022), [https://www.statista.com/statistics/277229/facebooks-annual-revenue-and-net-income/Tomio Geron, Facebook's \\$5 Billion IPO Filing: \\$3.7 Billion in 2011 Revenue](https://www.statista.com/statistics/277229/facebooks-annual-revenue-and-net-income/Tomio_Geron_Facebooks_5_Billion_IPO_Filing_3.7_Billion_in_2011_Revenue), FORBES (Feb 1, 2012), <https://www.forbes.com/sites/tomiogeron/2012/02/01/facebooks-5-billion-ipo-filing-3-7-billion-in-2011-revenue/?sh=455473d331a8>.

²³⁰ HOUSE REPORT, *supra* note 2, at 92.

²³¹ Fed. Trade Comm'n v. *Facebook, Inc.*, 560 F. Supp. 3d 1, 31 (D.D.C. 2021).

²³² *Id.* at 7 .

²³³ S. 3197, 117th Cong. § 2 (2021).

²³⁴ *Facebook, Inc.*, 560 F. Supp. 3d at 7.

acquisition of Instagram would not enhance its market position. Because access to data alone can enhance a platform's market position and Instagram had 100 million users by the time of the transaction's closing,²³⁵ Facebook most certainly gained access to data through the acquisition.

Facebook's acquisition of Instagram allowed it to gain immense market power while simultaneously avoiding competition.²³⁶ Additionally, Facebook likely would not have been able to meet the Platform Act's required showings. Despite these facts, under the Platform Act, Facebook's acquisition of Instagram would likely *still* have been successful, because Facebook did not qualify as a covered platform at the time.²³⁷

ii. Facebook's Acquisition of WhatsApp

The results of Facebook's acquisition of WhatsApp would have been very similar to those of its acquisition of Instagram. By the end of 2014, Facebook had 208 million active monthly users in North America, almost certainly surpassing the 50 million United States-based user requirement of the Platform Act.²³⁸ However, Facebook still did not have a market capitalization of \$600 billion at this time, nor did it have net

²³⁵ S. 3197, 117th Cong. § 2 (2021); HOUSE REPORT, *supra* note 2, at 155.

²³⁶ HOUSE REPORT, *supra* note 2, at 137.

²³⁷ S. 3197, 117th Cong. § 3 (2021).

²³⁸ *Number of Monthly Active Facebook Users in United States and Canada as of Third Quarter of 2021*, STATISTICA (July 28, 2022), <https://www.statista.com/statistics/247614/number-of-monthly-active-facebook-users-worldwide/>.

annual sales of \$600 billion.²³⁹ Despite these shortcomings, every other aspect of the acquisition would have fallen under the control of the Platform Act.²⁴⁰ Once again, Facebook's acquisition of WhatsApp did not qualify for an exception under Clayton § 7A(c) because Facebook was required to file a notification statement for the transaction.²⁴¹ Facebook was certainly a critical trading partner for the provision of social media services.²⁴² And WhatsApp was purchased for \$19 billion, greatly surpassing the exception in the Platform Act for assets or stock valued below \$50 million.²⁴³

Again, were Facebook required to comply with the Platform Act's requirements, it likely would not have been successful. Facebook potentially could have argued that WhatsApp did not compete with it for the provision of services, because WhatsApp focused on providing messaging services.²⁴⁴ However, a court would likely find that WhatsApp competed with Facebook's Messenger app for user attention.²⁴⁵

²³⁹ *Facebook's Revenue and Net Income from 2007 to 2020*, STATISTICA (July 27, 2022), <https://www.statista.com/statistics/277229/facebooks-annual-revenue-and-net-income/>; *Market Cap History of Meta (Facebook) from 2012 to 2020*, COMPANIES MARKET CAP (July 5, 2022), 7, 2021).<https://companiesmarketcap.com/facebook/marketcap/>.

²⁴⁰ S. 3197, 117th Cong. § 3 (2021).

²⁴¹ *Facebook, Inc.*, 560 F. Supp. 3d at 8.

²⁴² HOUSE REPORT, *supra* note 2, at 92.

²⁴³ *Facebook, Inc.*, 560 F. Supp. 3d at 8.

²⁴⁴ *Id.*

²⁴⁵ S. 3197, 117th Cong. § 2 (2021).

Additionally, Facebook would have had a difficult time arguing that WhatsApp was not a potential competitor, because WhatsApp’s mobile-messaging app was gaining popularity so quickly, a likely next step would have been for WhatsApp to venture into social media services.²⁴⁶

Lastly, similar to Facebook’s acquisition of Instagram, Facebook’s acquisition of WhatsApp undoubtedly allowed it greater access to data.²⁴⁷ By the end of 2013, WhatsApp had 400 million monthly active users, providing Facebook with data that enhanced its market position.²⁴⁸ Even though Facebook would likely have failed to prove that this acquisition would not be anticompetitive, the transaction would have been approved because Facebook did not qualify as a “covered platform” at the time.²⁴⁹

It is important to note that the Platform Act was drafted with the 2021 digital market’s dominant platforms in mind.²⁵⁰ If the Platform Act had been drafted in 2012, it likely would not have required such a high market capitalization and net annual sales rate in its definition of “covered

²⁴⁶ *Facebook, Inc.*, 560 F. Supp. 3d at 8.

²⁴⁷ HOUSE REPORT, *supra* note 2, at 92, 136.

²⁴⁸ *Number of Monthly Active WhatsApp Users Worldwide from April 2013 to March 2020*, STATISTICA, <https://www.statista.com/statistics/260819/number-of-monthly-active-whatsapp-users/> (last visited Dec. 7, 2021).

²⁴⁹ S. 3197, 117th Cong. (2021).

²⁵⁰ *Klobuchar, Cotton Introduce Bipartisan Legislation to Protect Competition and Consumer Choice Online*, AMY KLOBUCHAR (Nov. 5, 2021), <https://www.klobuchar.senate.gov/public/index.cfm/2021/11/klobuchar-cotton-introduce-bipartisan-legislation-to-protect-competition-and-consumer-choice-online>.

platform.” Nevertheless, the boundaries of the Platform Act raise concerns as to its ultimate goals. If the goal of the act is simply to prevent GAFA from gaining *more* power through the use of anticompetitive acquisitions, it will likely succeed. However, if the goal of the Platform Act is to prevent future dominant platforms from rising to the level of GAFA through the use of killer acquisitions and acquisitions of nascent competitive threats, it is unclear whether the legislation will accomplish this goal.

As previously discussed, given the current conditions of the digital market, it would be extremely difficult for a new entrant to gain scale in the digital economy.²⁵¹ Network effects, switching costs, data accumulation, and economies of scale have made it so that new entrants cannot compete with GAFA.²⁵² However, if laws like the Platform Act—which limit GAFA’s ability to acquire new entrants—are enacted, it could create room in the digital market for new platforms to enter and grow. If new entrants successfully develop into competitive forces in the market, nothing will prevent them from using killer acquisitions and acquisitions of nascent competitive threats to gain scale.²⁵³ Only once they become big

²⁵¹ See *supra* Part II.

²⁵² HOUSE REPORT, *supra* note 2, at 40–46; IMF Report, *supra* note 36, at 24.

²⁵³ See *supra* note 249.

enough and powerful enough to qualify as “covered platforms” will their use of anticompetitive acquisitions be limited.²⁵⁴ Thus, it seems that if new legislation is to prevent future dominant platforms from gaining power through the use of anticompetitive acquisitions, the definition of “covered platform” should be expanded to include the “Facebooks” of the early 2010s.

d. ADDITIONAL POTENTIAL CRITICISMS OF THE PLATFORM ACT

Many economists have expressed concern about the idea of new antitrust legislation that would establish a “bright-line” presumption against acquisitions by dominant platforms.²⁵⁵ Republican representative Ken Buck, in his response report to the House Judiciary Committee’s findings, *The Third Way*, stated that “Congress must be cautious not to establish a new bright line presumption that Big Tech should be banned from making any and all future acquisitions.”²⁵⁶ Representative Buck explains that such bright-line rules could harm start-up companies because many rely on developing a successful product and then subsequently selling the product to a larger company.²⁵⁷ Representative Buck also opines that a bright-line presumption would further discourage venture capital investment because without the possibility of acquisition by a larger

²⁵⁴ *Id.*

²⁵⁵ BUCK REPORT, *supra* note 24, at 15; *see also Kill Zone*, *supra* note 9, at 32–33.

²⁵⁶ BUCK REPORT, *supra* note 24, at 15.

²⁵⁷ *Id.*

company upon the development of a successful project, many investors would be disincentivized to invest.²⁵⁸ While the Platform Act would not ban *all* acquisitions by dominant technology platforms, it is clear that a tension exists between preventing harmful acquisitions and encouraging acquisitions that introduce new technology into the market.²⁵⁹ Other economists have expressed similar concerns and offered opinions as to how this delicate line might be toed.

In their article “Kill Zone,” Raghuram G. Rajan, Luigi Zingales, and Sai Krishna Kamepalli argue that simply preventing mergers by dominant technology platforms will leave users split between multiple platforms.²⁶⁰ As discussed in Part II, mergers by dominant technology platforms “immediately transmit superior technology to everybody.”²⁶¹ Dominant platforms make the technology of a newly acquired company compatible with their pre-existing technology, thereby giving all the dominant platform’s users immediate access to the new technology.²⁶² While this process can be harmful in that it eliminates the incentive for early app developers to adopt apps, it is beneficial in that it creates consumer

²⁵⁸ *Id.*

²⁵⁹ *Supra* note 249.

²⁶⁰ *Kill Zone*, *supra* note 9, at 32.

²⁶¹ *Id.* at 3–4, 35.

²⁶² *Id.* at 3–4.

welfare, automatically giving consumers access to new technology which becomes interconnected with their existing profiles on the dominant platforms.²⁶³ If dominant firms are no longer able to acquire new entrants, an increase in technology platform providers will likely result in consumers being split between multiple platforms.²⁶⁴ For example, because of interoperability between Facebook and Instagram, users can share a photo on Instagram and Facebook simultaneously. If platforms become divided, such efficiencies will likely decline.²⁶⁵

The House Judiciary Committee also expressed concern that digital markets have become so prone to tipping that they are “no longer contestable by new entrants.”²⁶⁶ Even with new legislation limiting further acquisitions by dominant technology platforms, it is likely that such platforms have become so powerful, new entrants will still not be able to adequately compete.²⁶⁷ Because of network effects and switching costs, consumers will be hesitant to switch to a newer platform and entrants will struggle to be successful in the digital market.²⁶⁸

Both the authors of “Kill Zone” and the members of the House Judiciary Committee recommend that an interoperability standard be

²⁶³ *Id.* at 32–35.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ HOUSE REPORT, *supra* note 2, at 384.

²⁶⁷ *Id.*

²⁶⁸ *Id.*; see also *Kill Zone*, *supra* note 9, at 32–35.

adopted to address these issues.²⁶⁹ They argue that an interoperability requirement would “allow competing social networking platforms to interconnect with dominant firms to ensure that users can communicate across services” and would break down the power of network effects “by allowing new entrants to take advantage of existing network effects” at the market level, rather than the company level.²⁷⁰ The authors of “Kill Zone” believe that such a requirement would also restore the “proper incentive to innovate.”²⁷¹ Because all platforms and consumers would have access to the “externalities associated with the whole network...the better product [would] always prevail.”²⁷² The power of switching costs on consumers would also decrease.²⁷³ Consumers would be free to adopt new platforms, while simultaneously maintaining their pre-existing networks.²⁷⁴

Thus, to adequately address the competitive issues created by underdeterrence of anticompetitive acquisitions, new legislation must prevent further acquisitions by dominant platforms from taking place, while simultaneously reinvigorating new entry into the digital economy.²⁷⁵ It is likely that the inclusion of interoperability requirements in the

²⁶⁹ HOUSE REPORT, *supra* note 2, at 384–86; *Kill Zone*, *supra* note 9, at 31–35.

²⁷⁰ HOUSE REPORT, *supra* note 2, at 385.

²⁷¹ *Kill Zone*, *supra* note 9, at 32.

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ HOUSE REPORT, *supra* note 2, at 384.

Platform Act, or the establishment of such standards through additional legislation, would give the digital economy the boost it needs, increasing incentives to innovate, leading to better competitive balance.

V. CONCLUSION

Merger law, as currently construed by federal courts, fails to prevent dominant technology platforms from engaging in killer acquisitions and acquisitions of nascent competitive threats. The burden of proof placed on the Department of Justice and Federal Trade Commission is too demanding and often unattainable, creating an environment where the agencies are unlikely or unable to challenge acquisitions by GAFA.

Google, Apple, Facebook, and Amazon have used these anticompetitive acquisitions to gain power, neutralize competitive threats, and drive new entrants from the market. With less competition in the digital market, incentives to innovate have declined, enabling GAFA to continually gain power through the abuse of consumer data privacy. If merger law does not address these issues, GAFA will continue gaining power, decreasing competition, and harming both entrepreneurs and consumers.

Merger law must be reformed so that it can both limit the dominant technology platforms' uses of anticompetitive acquisitions and address the competitive harms created by such acquisitions.