

Paradise is a Walled Garden? Towards a Sherman Act Section 2.0 for Online Monopoly

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ABSTRACT:

In the worlds of technology and cyberlaw, the term “walled garden” has become an epithet to epitomize a proprietary, and likely sterile, community – as opposed to an open community with a vibrant creative life. The dystopian view of closed, proprietary communities is presented most clearly by Zittrain (2008), who casts the choice facing society as one between sterile but safe information appliances, with his examples of the iPhone and the Xbox, and “networks of control” such as Facebook on the one hand, and vulnerable but malleable personal computers (PCs) and a “generative” Internet on the other – information technology that fosters greater creativity among users. In essence, this is a cyberspace version of the age-old choice between security and freedom.

But is this choice really so stark? Can a walled garden in fact be a kind of creative paradise? This Article attempts to explain how a purportedly sterile appliance, like the iPhone, can become quite generative, as through its App Store, while a generative platform, like Wikipedia, in fact has its own invisible fences. In particular, both examples illustrate the importance of proprietors making credible commitments to fostering generativity. Reliable commitments can stem fears that in the future, the platform “proprietor” will “lock down” users; this reliability allows creativity to flourish. Additionally, while there may well be some degree of tradeoff between security and freedom online, competitive pressure may encourage platform owners not only to keep commitments to generativity, but also to innovate so as to provide more security for a given level of freedom, and vice versa.

Critics have so far been unimpressed with antitrust law as a tool to deal with these issues. However, perhaps surprisingly, the Federal Trade Commission (FTC) may be ideally suited to play an important role. Reinvigoration of its existing authority under FTC Section 5 can help provide protection to the rights of user-creators where contract law would fail due to the diffuse and speculative harms that result from platform proprietors’ unilateral post-hoc changes. In contrast to other antitrust tools, such an approach would move faster, carry less risk of chilling private litigation, benefit from the FTC’s regulatory expertise and, importantly, create an inherent safe harbor for platform proprietors who explicitly warned prospective user-creators that they “make no promises” and who did not induce user reliance. In particular, this Article argues that because of the way this problem sits at the intersection of competitive efficiency and consumer protection, the dual goals of the FTC, this problem of online monopolization may be ideally suited to a kind of Sherman Act 2.0 based on the evolution of existing FTC authority.