Protecting the Life Cycle of Competition

The power of the Internet historically arose from its edges: innovation, growth, and freedom came from its users and their contributions, rather than from some centrally controlled core of overseers. But today, for an increasing number of users, there is a powerful center to the net and the expected new entrants that will displace the giants only to be displaced by successor entrants may not come. The lack of competition and choice impacts nearly every facet of an Internet users' privacy and speech rights as a small handful of giants control the means we utilize the Internet or obtain access to the network. It is time to take a hard look at whether the laws we have are successfully reducing the power of dominant players and protecting the ability for new entrants to emerge and displace the giants.

Antitrust

Antitrust enforcement in the U.S. has become strangled in an outmoded economic doctrine that fails to recognize the realities of today's Internet. Increasingly, consumers "pay" for services not in dollars, but with our data and it makes no sense to evaluate consumer welfare solely on the basis of price. Federal antitrust regulators should consider the very real costs to consumers, such as privacy practices and corporate platform censorship, and explore other levers within antitrust law such as the "essential facilities" doctrine. Antitrust enforcers must increase scrutiny of small company acquisitions by massive vertically integrated Internet companies to ensure future competition is not being snuffed out early.

Competition policy

Broadband access is quickly devolving back into a national monopoly as cable companies deploy gigabit networks without facing competition. The United States lags behind the EU and advanced Asian markets on deployment of fiber to the home infrastructure with no clear plan to reach universal competitive high-speed access. Promotion of data portability and interoperability will allow for "follow-on innovators" that not just interact with and analyze existing Internet platforms but can build on them in ways that benefit users by giving users alternatives. Decentralized, federated services gave us email, telephony, and the World Wide Web.

Consumer Privacy

Much of the consumer frustration stems from a series of data privacy scandals that have involved big Silicon Valley companies and major Internet Service Providers. However, regulation that treats the giants as the same as startups and smaller companies seeking to displace them will only cement the dominant companies. EFF strongly discourages a one size fits all approach to privacy rules that do not take into account the differences in ability to comply. One way to distinguish between startups and established entities is the creation of an information fiduciary rule that does not apply to new entrants but rather is triggered at a certain size and scale.

Copyright

Innovative startups are dependent on the safe harbors and major fair use decisions by the judicial branch. Without clarity on liability, it would be impossible to create applications and services and avoid bankrupt inducing liability claims. This issue arises not only for startups seeking to host user-generated content or interact with media, but for any platform that builds interoperability with existing technologies and formats. Copyright law currently allows copyright holders who sue for infringement to seek "statutory damages" as high as $150,000 per work. Statutory damages drives much of the distortion in copyright liability and is in desperate need of reform so that the damage claims leveraged by litigious rights holders reflect reality.

Computer Fraud and Abuse Act (CFAA)

The CFAA is a serious criminal law meant to target malicious computer break-ins. But big companies have abused the law's notoriously vague language against would-be competitors. Under the threat of criminal prosecution, cease and desist letters citing the CFAA are a proven tool for scaring new entrants away. For example, industry giants are currently attempting to use the CFAA to block access to *publicly available* information on the open internet--and fundamentally change the open access norms that have governed the internet since its inception--in order to protect their status as market leaders. They have also relied on the CFAA to block products that would have allowed consumers to manage their social media networks in one place, view information from multiple classified ads websites in one useful interface, and rely on a single messaging app to connect with all of their various messaging tools.

Open Platform Liability

Large Internet companies with deep pockets are able to censor wide swaths of lawful content in order to comply with any new laws. But such increases in intermediary liability outright destroy the ability of startups to even launch. Major incumbents support complex obligations because it cements in their dominance by reducing competition from new entrants. Congress must not further erode the safe harbor that open platforms relied on to become the current Internet giants. Efforts to place greater liability on internet intermediaries for the speech of their users, even in the most narrow of instances, drive up the costs of deploying an open platform. Companies must find the technology and the people power to moderate their users and the content they post, a challenge given the rapid pace at which Internet products grow if they are successful. In fact, the most recent erosion of open platform immunity, in an effort to combat sex trafficking (FOSTA/SESTA), has done nothing to alleviate the problem. Sex workers have been forced to return to the streets and into the hands of sex traffickers, while existing platforms have contracted and the cost of market entry has increased for others.