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Media and Technology Committee  
ABA Section of Antitrust Law

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**Current Antitrust Enforcement in Media and Technology:  
An Interview with Jon Jacobson**

Interview by Courtney Armour<sup>1</sup>  
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Jonathan (“Jon”) Jacobson is a partner in Wilson Sonsini Goodrich & Rosati’s New York office, and served as the Chair of the ABA’s Section of Antitrust Law from 2017-2018. Jon has taken a lead role in many high-profile antitrust litigations, investigations, trials, and appeals—including recently arguing a case at the U.S. Supreme Court. Jon has represented a number of media and technology companies in antitrust matters, including defending Google in the Dreamstime, KinderStart, Person, TradeComet, and myTriggers cases; defending Netflix in *In re Online DVD Rental Antitrust Litigation*; defending Live Nation and Clear Channel in *Heerwagen v. Clear Channel*; and most recently defending Twitter in a case brought by Freedom Watch. Jon was appointed by Congress to serve on the Antitrust Modernization Commission, responsible for reviewing and recommending potential changes to the nation’s antitrust laws. He was also a presenter in the FTC’s 2018 Competition Hearings, DOJ’s 2018 Roundtable series, the DOJ/FTC Intellectual Property Hearings, the DOJ/FTC Single-Firm Conduct Hearings, the DOJ/FTC Merger Guideline Workshops, the DOJ/FTC Most Favored Nations Clause Workshop, and the DOJ/FTC Conditional Pricing Practices Workshop.

**Jon, you have a long history of involvement with the ABA Antitrust Section, even leading the Section as Chair a few years ago. What is your view of how the Section has covered media and technology issues over the years?**

We reconstituted what is now the Media and Technology committee a few years ago to focus specifically on media and technology issues. That change has been quite successful. The committee has increased membership, put on excellent programs, and put out great written product too. The *Icarus* newsletter has been terrific.

The Section also regularly provides of comments on matters of the committee’s interest, such as proposed and implemented measures taken inside and outside the US directed at technology companies and technology issues. On the intellectual property issues that are so prevalent in media and technology representations, we have the excellent and regularly-updated Intellectual Property and Antitrust Handbook and Antitrust Counterattack in Intellectual Property Litigation Handbook, plus a full chapter on IP in ALD, and a book on the Federal Antitrust Guidelines for the Licensing of Intellectual Property. And we regularly have programs directed at these issues.

That is not to say we couldn’t do more. But given that we are a volunteer organization and also must reach consensus before acting, doing a lot more would be challenging. We have had good success in attracting members and leaders from media and technology companies. And these issues have been front and center at our big meetings, such as the Fall Forum, Spring (even when

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<sup>1</sup> Courtney Armour is the Chief Legal Officer for the Distilled Spirits Council and Responsibility.org. Previously, Ms. Armour practiced antitrust law with Mr. Jacobson at Wilson Sonsini Goodrich & Rosati.

virtual), and the IP conference. Playing policy issues “down the middle,” as we have always tried to do, makes this effort easier.

**You have represented a number of leading technology companies, from Netflix to Google, and most recently successfully representing Twitter in a lawsuit alleging that Twitter, Facebook, Apple, and Google violated the First Amendment and antitrust law by censoring conservative content. What is your take on the perceived or claimed anti-conservative bias of online platforms and how does it factor into modern day antitrust analysis?**

The case you mention, called Freedom Watch, was entirely frivolous. The idea that any of these companies “suppress conservative viewpoints” on their platforms is false, and the idea that they conspired to do so is positively ludicrous. The conspiracy claim in the case was based entirely on what Freedom Watch called parallel conduct but, as anyone conscious can easily see, each of the companies has a different policy and implements it differently. The two plaintiffs, Freedom Watch and a provocateur named Laura Loomer, also alleged a shared monopoly claim, which of course is invalid as a matter of law. And they alleged a First Amendment claim against these private actors contrary to all Supreme Court precedent. The district court and court of appeals had no difficulty in throwing the case out.

We have seen over the past several weeks some balanced actions by Twitter in labeling or removing tweets from the President as promoting racial violence and falsely attacking voting-by-mail. YouTube has long had a content moderation policy, especially for children. News reports on June 27 indicate that Facebook may be taking baby steps to enhance its content moderation after previously allowing false or inflammatory posts if offered by political leaders. To label this content moderation “suppressing conservative voices” is nonsense.

There is no indication that the large Internet platforms treat “conservative” comments any differently than “liberal” comments.

**The claims around anti-conservative bias are just one side to the technology-political coin. On the other side, some claim that allegations of bias are an attempt to manipulate platforms to favor their point of view and/or that many government investigations are politically motivated to punish a platform for perceived favoritism or to boost a political career. Do you think political motivations are impacting the practice of antitrust law and, if so, do you think it will change the direction of the law?**

No one is suggesting political interference at the FTC. I’m certainly not aware of any.

There has been, of course, a lot of news about political interference at the Justice Department, including recently at the Antitrust Division. I will say this: I am one of those exceedingly troubled by what the Attorney General has done across the board, including antitrust. But I draw the line at Division leadership, who I think have been unfortunately tarred with the Attorney General’s wide brush. I have not agreed with him on everything, but Makan and his team have handled themselves honorably and professionally throughout. The attacks on them are unfounded in my view.

The cannabis inquiry was one on which both the FTC and DOJ sought clearance and involved difficult issues in assessing the interplay between competition rules and other federal law, under which cannabis is illegal. The auto emissions inquiry was commenced long before it was suggested in a tweet and was supported by an independent analysis at DOJ before any process was served. The DOJ's Office of Professional Responsibility confirmed the appropriate nature of the work.

As for the spate of tech company investigations, much of the conduct and transactions in the current investigations was reviewed carefully before and permitted based on a lack of evidence of consumer harm. That's one of the reasons I believe the tech probes are heavily impacted by political considerations, and I also fear any ensuing litigation will bear that taint. Having said that, the applicable legal standards are well established, e.g., *Bayou Bottling v Dr Pepper*, 725 F.2d 300, 304 (CA5 1984) (self-preferencing actions "are competitive acts. It ought to be apparent that 'a monopolist's right to compete is not limited to actions undertaken with an altruistic purpose. Even monopolists must be allowed to do as well as they can with their business.'"), and I hope and expect they will be applied consistently when the case or cases get to court. If so, the law won't change.

**The current Administration and the Department of Justice have taken a new stance on Section 230 immunity, through an Executive Order and a DOJ Statement recommending reform. What do you make of the ongoing debate over reforming Section 230?**

Section 230 is one of the reasons why the Internet has become such an important part of our daily lives. It has propelled some of the greatest expansion of productivity in human history. It should not be repealed or modified.

Much of the attack on § 230 is from the same voices that claim that the large Internet platforms "suppress conservative viewpoints." As I said, that is nonsense.

On the other side, of course, are different calls to amend § 230 in a way that would force Internet platforms to do more to ban false and inflammatory posts. A lot of people don't want to rely on the platforms to prevent harmful misinformation. I'm sympathetic to that concern, but in the end still would not touch § 230. Forcing censorship in the aim of doing good has a way of turning around and later doing very bad. And although the free market may not work as well here as in other areas, it seems to be beginning to work. We are already seeing political and economic (advertiser) pressure brought to bear with some reported positive effects.

It's fair to say that § 230 has allowed companies like Facebook to refrain from tagging or removing dangerous posts – although, as I said, indications are that Facebook is considering more active monitoring. But that seems to me to be a price we should want to pay for freedom of expression. It is not worth gutting § 230. Having the government (including courts) decide (administratively or through litigation) which post should be removed and which should not is fundamentally inconsistent with the First Amendment.

If § 230 were removed, then platforms might just allow only vanilla milquetoast statements on the Internet, for fear if they published anything with an opinion that couldn't be 100% verified, they

would be liable. The natural response would be to pull almost everything. The freedom of expression we have become accustomed to would erode.

**Is the current matrix of antitrust laws sufficient to address concerns raised about the largest online platforms or are statutory reforms needed? Relatedly, is there merit to recent legislative proposals addressing platforms and antitrust more generally?**

I of course have clients I represent but when I try to look at this wholly objectively, I still come to an answer of “no way” on changes to antitrust to address Internet platforms.

I’ve opposed modifications to antitrust to address novel market conditions as long as I can remember.

During the Microsoft days 20 years ago, Microsoft was arguing in public and antitrust forums that new economy markets were so different and so fast moving that conduct like Microsoft’s should be given a pass. I put out a piece then in Antitrust Magazine opposing that idea and explaining why antitrust analysis is flexible enough to account for changing industry conditions and why similar arguments – like those of the railroads 125 years ago and by many industries since – had been conclusively proven wrong by history.  
[https://www.wsgr.com/images/content/1/8/v1/180/jacobson\\_neweconomy.pdf](https://www.wsgr.com/images/content/1/8/v1/180/jacobson_neweconomy.pdf)

My views today are the same. Although antitrust analysis is adjusting the way we look at two-sided markets and vertical restraints, that is just part of the evolutionary, common-law process of antitrust. Conduct that enhances innovation, generates new and useful products and services, increases productivity, and reduces costs and prices is not made anticompetitive just because the conduct is by an Internet platform. We do not need new legislation to address Internet platforms.

This is not to say that modifications to any antitrust law are all out of bounds. I would never touch the Sherman Act, but there have been proposals to lower the government’s burden of proof in merger cases under Clayton § 7, and some aspects of some of those proposals may make sense. Mergers like USAirways/American Airlines a few years might have come out differently under a lower proof burden, and consumers might be better off.

**What is the most challenging aspect to representing a media or technology company these days? What is the best part?**

Intellectually, of course you love new and different markets and legal challenges. That can be challenging especially since everything is moving so quickly. The one thing that can be really challenging is getting data. Engineers generally don’t treat lawyer requests for information as priorities.

The best part is working on the most cutting issues of the day. Wow.

**In the current environment, many lawyers are crunched for both time and money. What can the Section, and the ABA more generally, do to continue to deliver value and remain relevant to practicing lawyers?**

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We all need to take steps to increase our commitment to diversity, That's clearly #1.

Separately, I want to commend Brian Henry, the programs teams, and staff, who did a fantastic and heroic job in making Spring work so great virtually, and I know that Gary Zanfagna, Joanne Travis, and Margaret Stafford are working hard on the Post-Annual Meeting and several meetings in the Fall that we hope can happen as planned.

My impression is that antitrust legal practice has not changed too much. Deadlines are being pushed back but courts are warming to Zoom, even for evidentiary hearings and trials. Agencies haven't lost much of a step.

So my one piece of advice is do your best to be normal. We have no idea how long this will really last, but stay in touch by phone or video with your friends and colleagues and make it as normal as you can.

And wear a mask.