ANTITRUST RESTRICTIONS ON TECHNOLOGY COMPANIES, ELECTRONIC COMMERCE AND THE DIGITAL ECONOMY

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INTERNET AND MOBILE LAW AND LITIGATION TRENDS

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Ian C. Ballon
Greenberg Traurig, LLP

Los Angeles:	Silicon Valley:	Washington, D.C.:
1840 Century Park East, Ste. 1900	1900 University Avenue, 5th Fl.	2101 L Street, N.W., Ste. 1000
Los Angeles, CA 90067	East Palo Alto, CA 914303	Washington, D.C. 20037
Direct Dial: (310) 586-6575	Direct Dial: (650) 289-7881	Direct Dial: (202) 331-3138
Direct Fax: (310) 586-0575	Direct Fax: (650) 462-7881	Fax: (202) 331-3101

Ballon@gtlaw.com
<www.ianballon.net>
LinkedIn, Twitter, Facebook: IanBallon

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Los Angeles
1840 Century Park East
Suite 1900
Los Angeles, CA 90067
T 310.586.6575
F 310.586.0575

Silicon Valley
1900 University Avenue
5th Floor
East Palo Alto, CA 94303
T 650.289.7881
F 650.462.7881

Washington, D.C.
2101 L Street, N.W.
Suite 1000
Washington, DC 20037
T 202.331.3138
F 202.331.3101

Ian C. Ballon is a litigator who is Co-Chair of Greenberg Traurig LLP's Global Intellectual Property & Technology Practice Group and represents internet, mobile, entertainment and technology companies in intellectual property and technology-related litigation and in the defense of data privacy, security breach and AdTech class action suits.

Ian has been named by the *LA and San Francisco Daily Journal* as one of the Top 75 intellectual property litigators in California in every year that the list has been published (2009 through 2022). He has been listed in Best Lawyers in America consistently every year since 2003 and was named Lawyer of the Year for Information Technology in 2023, 2022, 2020, 2019, 2018, 2016 and 2013. In 2022, 2021, 2020, 2019 and 2018 he was recognized as one of the Top 1,000 trademark attorneys in the world for his litigation practice by *World Trademark Review*. In 2022, Ian was named to Lawdragon's list of the Top 500 Lawyers in America and he has been included on the *Daily Journal's* annual list of the Top 100 Lawyers in California. In addition, in 2019 he was named one of the top 20 Cybersecurity lawyers in California and in 2018 one of the Top Cybersecurity/Artificial Intelligence lawyers in California by the *Los Angeles and San Francisco Daily Journal*. He received the "Trailblazer" Award, Intellectual Property, 2017 from *The National Law Journal and he has been* recognized as a "Groundbreaker" in *The Recorder*'s 2017 Litigation Departments of the Year Awards. He was also recognized as the 2012 New Media Lawyer of the Year by the Century City Bar Association. In 2010, he was the recipient of the California State Bar Intellectual Property Law section's Vanguard Award for significant contributions to the development of intellectual property law. Ian was listed in *Variety's* "Legal Impact Report: 50 Game-Changing Attorneys" and has been named a Northern California Super Lawyer every year from 2004 through 2021 and a Southern California Super Lawyer for every year from 2007-2021. He has also been listed in Legal 500 U.S., The Best Lawyers in America (in the areas of information technology and intellectual property) and Chambers and Partners USA Guide in the areas of privacy and data security and information technology.

Ian is also the author of the leading treatise on internet and mobile law, *E-Commerce and Internet Law: Treatise with Forms 2d edition,* the 5-volume set published by West (www.IanBallon.net) and available on Westlaw, which includes extensive coverage of intellectual property law issues. In addition, he is the author of *The Complete CAN-SPAM Act Handbook* (West 2008) and *The Complete State Security Breach Notification Compliance Handbook* (West 2009). In addition, he serves as Executive Director of Stanford University Law School's Center for the Digital Economy. He also chairs PLI's annual Advanced Defending Data Privacy, Security Breach and TCPA Class Action Litigation conference. Ian previously served as an Advisor to ALI's Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transactional Disputes (ALI Principles of the Law 2007) and as a member of the consultative group for ALI's Principles of Data Privacy Law (ALI Principles of Law 2020).

Ian holds JD and LLM degrees and the CIPP/US certification from the International Association of Privacy Professionals (IAPP).

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34.01 Antitrust Law and Its Applicability to Cyberspace and the Digital Economy—In General[1]

To a greater extent than many other areas of law, the metes and bounds of antitrust law in the United States expand and contract with evolving economic theories and the political winds of change. While mergers are subject to FTC approval and clearcut cases of monopolization, price fixing, group boycotts, and bid rigging, among other practices, may be brought at any time, traditionally, antitrust enforcement actions have increased in number when Democrats hold the White House, and declined when Republicans are in office. By 2019, however, there were calls from both the left and the right for greater antitrust scrutiny of tech companies, as part of a general *techlash*—or backlash against technology companies following the 2016 U.S. presidential election, where popular platforms were used by Russia to disseminate

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[Section 34.01]

[1]This chapter was updated most recently in 2021. Earlier versions of this chapter were co-authored with **Jonathan M. Eisenberg**, a deputy attorney general now in the Government Law Section of the California Department of Justice, and thereafter in 2014 by **Emilio E. Varanini**, a deputy attorney general in the Antitrust Law section of the California Department of Justice. Their contributions to this chapter are greatly appreciated. The 2019 edition was prepared with the research assistance of Stanford University Law School student Jared Bond. Portions of this chapter were incorporated or derived from Jonathan M. Eisenberg et al., *Antitrust and the Internet*, in California State Antitrust and Unfair Competition Law (4th ed. 2009, updated 2010). The opinions expressed and errors, if any, are solely those of the author, not the generous contributors.

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fake news to seek to influence the outcome of the election,[2] and in response to unsubstantiated allegations by alt right activists that tech platforms reflected an ostensible liberal bias.[3] These political attacks on Internet platforms culminated in lawsuits filed in late 2020, in the dying days of the Trump Administration, against Google (brought by the U.S. Department of Justice and 11 states, and premised on preloading of Google products, modeled on the *Microsoft* case from the 1990s when the tech economy was radically different[4]) and Facebook (brought by the FTC (based on a divided 3-2 vote) and the Attorneys General of 46 states, seeking to force Facebook to divest Instagram and WhatsApp), even though both companies offer popular free services and antitrust law historically has been focused on harm to consumers from monopolistic pricing. The new attacks on tech platforms reflect the thinking of so-called "antitrust hipsters" that antitrust law should focus on more than just price when considering alleged harm to consumers[5] (such as

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[2]*See* Special Counsel Robert S. Mueller, III, Report On The Investigation Into Russian Interference In The 2016 Presidential Election (Mar. 2019), https://www.justice.gov/storage/report.pdf (documenting the use of fake profiles and advertisements in support of candidates Donald Trump, Bernie Sanders, and Jill Stein, and on issues such as gun control and abortion, among other things).

[3]The term *techlash* was first used in a 2013 editorial in *The Economist,* warning of a coming backlash against technology companies. Ben Zimmer, *'Techlash': Whipping Up Criticism of the Top Tech Companies*, Wall St. J., Jan. 10, 2019; *see also* Siva Vaidhyanathan, *Why Conservatives Allege Big Tech Is Muzzling Them,* Atlantic Monthly, July 28, 2019 (debunking assertions of political bias); *see generally* Eve Smith, *The techlash against Amazon, Facebook and Google—and what they can do*, Economist, Jan. 20, 2018 (describing advocacy in the EU, among U.S. Presidential candidates and among states Attorney General, for applying greater antitrust scrutiny to internet businesses); Rana Foroohar, *Year in A Word: Techlash,* Financial Times, Dec. 16, 2018 (defining the term as a noun referring to "[t]he growing public animosity towards large Silicon Valley platform technology companies and their Chinese equivalents."); Washington Post Editorial Board, *The Justice Department's antitrust investigation is cause for caution,* Wash. Post, July 24, 2019 (decrying articulated political motivations in an announced antitrust review of online platforms).

[4]*See generally infra* § 34.10[2][C] (analyzing the *United States v. Microsoft* case). For a discussion of why today is different from the "dial-up Nineties" with respect to Google, *see* Kent Walker, *A deeply flawed lawsuit that would do nothing to help consumers*, https://blog.google/outreach-initiatives/public-policy/response-doj/ (Oct. 20, 2020).

[5]*See, e.g.,* Leah Nylen, "For Facebook, the breakup threat gets real,"

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competition based on privacy protection, in the *Facebook* case, or ostensible anti-conservative bias, in a 2020 U.S. House of Representatives Report[6]). The hostility to digital media platforms was also echoed in a concurrence by U.S. Supreme Court Justice Thomas in a First Amendment case, in which he gratuitously attacked technology platforms and suggested that they be regulated as public utilities[7] (although there is no indication that others on the Supreme Court share this view).

President Biden's July 2021 Executive Order on Promoting Competition in the American Economy,[8] which is discussed later in this section, also foreshadows greater regulation, and a more activist approach to antitrust enforcement, on the horizon.

The Internet and digital media are dynamic. Companies rise and fall over time and market dominance is never assured. At one time, MySpace was the largest social network in the world with half a billion members. And then suddenly it wasn't.

More recently, the rapid growth of TikTok underscores that markets are competitive and rapidly evolving.

Indeed, defining the relevant market for certain services in the digital economy will present a substantial challenge. A company's main competitors tomorrow may be different from those today, as consumer tastes and preferences change rapidly in ways very different from the way markets evolve in the physical world.

As the Ninth Circuit observed in late 2020, "novel business practices—*especially* in technology markets—should not be 'conclusively presumed to be unreasonable and therefore

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Politico, Dec. 10, 2020.

[6]*See* U.S. House of Representatives, Judiciary Committee Subcommittee on Antitrust, Commercial and Administrative Law, *Investigation of Competition in Digital Markets, available at* https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519 (Oct. 4, 2020). This 450 page report was released following a 16 month investigation.

[7]*See Biden v. Knight First Amendment Institute,* 141 S. Ct. 1220, 1221-25 (2021) (Thomas, J. concurring). This case is discussed in section 39.02[1] in chapter 39 in connection with First Amendment rights.

[8]Executive Order on Promoting Competition in the American Economy, 2021 WL 2886028 (White House July 9, 2021).

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illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.' "[9] Nevertheless, as District of Columbia District Court Judge James Boasberg observed in an opinion in June 2021: "As the pillars of our national economy have shifted from the concrete to the virtual, so too have the targets of government antitrust actions."[10]

Ultimately, whether and to what extent political sentiments of the moment influence antitrust law in the coming years through case law or judicial amendments remains to be seen.

In the absence of political pressures, the contours of U.S. antitrust law has been well defined, and otherwise could be expected to continue to evolve along with economic theory and antitrust scholarship.

The Supreme Court has declared that "[a]ntitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."[11]

U.S. antitrust law seeks to ensure that markets, free of

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[9] *FTC v. Qualcomm Inc.,* 969 F.3d 974, 990-91 (9th Cir. 2020) (*en banc*), *quoting United States v. Microsoft*, 253 F.3d 34, 59 (D.C. Cir. 2001) (*en banc*). The Ninth Circuit panel further observed:

> "Because innovation involves new products and business practices, courts[']and economists' initial understanding of these practices will skew initial likelihoods that innovation is anticompetitive and the proper subject of antitrust scrutiny." Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. Comp. L. & Econ. 153, 167 (2010); *see also* Rachel S. Tennis & Alexander Baier Schwab, *Business Model Innovation and Antitrust Law*, 29 Yale J. on Reg. 307, 319 (2012) (explaining how "antitrust economists, and in turn lawyers and judges, tend to treat novel products or business practices as anticompetitive" and "are likely to decide cases wrongly in rapidly changing dynamic markets," which can have long-lasting effects particularly in technological markets, where innovation "is essential to economic growth and social welfare" and "an erroneous decision will deny large consumer benefits").

FTC v. Qualcomm Inc., 969 F.3d at 991; *see also id.* at 1003 (explaining *Ohio v. American Express Co*., 138 S. Ct. 2274, 2290 (2018) as a case where "a company's novel business practice at first appeared to be anticompetitive, but in fact was disruptive in a manner that was beneficial to consumers in the long run because it forced rival credit card companies to adapt and innovate.").

[10] *See New York v. Facebook, Inc.,* __ F. Supp. 3d __, 2021 WL 2643724, at *1 (D.D.C. 2021).

[11] *United States v. Topco*, 405 U.S. 596, 610 (1972).

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anti-competitive forces, provide, for the benefit of consumers: (a) lower prices on goods and services, (b) unrestrained output of goods and services, (c) better-quality products, (d) technological innovation, (e) consumer choice, and, at least to some degree, (f) growth of the national economy.[12]

For several centuries, Anglo-American common-law courts, while usually recognizing private business enterprise as valuable, often judged businesses' (or businesspersons') practices for their beneficial or harmful effects on the public at large, and sometimes struck down arrangements deemed unreasonable "restraints of trade."[13] These courts also viewed with suspicion business monopolies, including especially mo-

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[12]*See, e.g., Data General Corp. v. Grumman Systems Support Corp*., 36 F.3d 1147, 1182 (1st Cir. 1994); *Town of Concord, Mass. v. Boston Edison Co*., 915 F.2d 17 (1st Cir. 1990) (opinion by Breyer, J.); Federal Trade Commission, Broadband Connectivity Competition Policy 155 (2007); *see also* U.S. Department of Justice & U.S. Federal Trade Commission, *Horizontal Merger Guidelines* § 5 (2010) *available at* www.justice.gov/atr/public/guidelines/hmg-2010.html; *see generally* Lawrence J. White, *The Role of Competition Policy in the Promotion of Economic Growth*, NYU Center for Law and Economics, Law & Economics Research Paper Series, Working Paper No. 08-23 (May 2008); Thomas O. Barnett, Assistant Attorney General, United States Department of Justice Antitrust Division, Address to the 4th Annual Competition Policy Conference (Jun. 20, 2008).

This focus on economic objectives constitutes a re-positioning of antitrust law away from older goals that included checking private economic power (out of fear that it was an inherently dangerous and undemocratic force) and protecting opportunities for small businesses and individuals. *Compare, e.g.*, *GTE Sylvania Inc. v. Continental T.V., Inc*., 537 F.2d 980, 1019 n.2 (9th Cir. 1976) (Browning & Wright, J.J., dissenting) *with Continental T.V., Inc. v. GTE Sylvania Inc*., 433 U.S. 36 (1977). These older objectives, however, may be relevant where regulation implicates the First Amendment, because of the need to safeguard diversity of opinion and consumer choice. *See, e.g.*, Thomas Horton & Robert Lande, *Should the Internet Exempt the Media Sector from the Antitrust Laws?*, 65 Fla. L. Rev. 1521 (2013). They also continue to be advanced by some academics and practitioners. *See, e.g.,* Albert A. Foer, President, American Antitrust Institute, Address Entitled "Small Business and Antitrust: Why the Little Guys Left the Fold and Why They Should Return," delivered to the Small Business Administration (Jan. 21, 2000); Albert A. Foer, *The Goals of Antitrust: Thoughts on Consumer Welfare* in the U.S., American Antitrust Institute Working Paper No. 05-09 3-8 (2005).

[13]*See generally Oregon Steam Nav. Co. v. Winsor*, 87 U.S. 64 (1873); *Gibbs v. Consolidated Gas Co. of Baltimore*, 130 U.S. 396 (1889); Arthur J. Eddy, The Law of Combinations Embracing Monopolies (1901); Gilbert H. Montague, Trusts of To-day (1904); Frederic J. Stimson, Popular Law-Making (1910); Hannis Taylor, The Origin and Growth of the American Constitution (1911); John S. Kreider, *A Brief History of the Growth of Anti-trust Legislation in the United States*, 7 S. Cal. L. Rev. 144 (1934);

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nopolies created by governments.[14] In late-nineteenth-century America, as the Industrial Revolution and the westward expansion of the country spawned business organizations of unheralded size and strength, the public widely came to view the new trusts and other corporate entities as menaces to society, and common-law restrictions on them as inadequate.[15] Both the U.S. Congress and state legislatures responded by enacting statutes prohibiting and punishing restraints of trade generally, as well as specific allegedly anticompetitive practices. The broadly worded federal Sherman Act,[16] passed in 1890, a time when U.S. industry was dominated by manufacturing enterprises, became and remains the cornerstone of U.S. antitrust policy and jurisprudence. The Clayton Act,[17] passed in 1914, specified and outlawed certain business practices.[18]

William L. Letwin, *Congress and the Sherman Antitrust Law: 1887–1890*, 23 U. Chicago L. Rev. 221 (1956); William E. Kovacic and Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. Econ. Persp. 43 (Winter 2000); Ernest Gellhorn, *et al.*, Antitrust Law and Economics (5th ed. 2004); Lawrence A. Sullivan and Warren S. Grimes, The Law of Antitrust: An Integrated Handbook (2d ed. 2006).

[14]*Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420, 545–46 (1837); *United States v. E. C. Knight Co.*, 156 U.S. 1, 9–10 (1895); S.C.T. Dodd, *The Present Legal Status of Trusts*, 7 Harv. L. Rev. 157, 160–61 (1893); Gilbert H. Montague, Trusts of To-day 70, 129–30 (1904); Frederic J. Stimson, Popular Law-Making 86–88, 173–75 (1910); Hannis Taylor, The Origin and Growth of the American Constitution 433–34 (1911); John S. Kreider, *A Brief History of the Growth of Anti-trust Legislation in the United States*, 7 S. Cal. L. Rev. 144, 145 (1934); William L. Letwin, *Congress and the Sherman Antitrust Law: 1887–1890*, 23 U. Chicago L. Rev. 221, 241–44 (1956).

[15]F.J. Stimson, *"Trusts,"* 1 Harv. L. Rev. 132, 132–33, 136–37 (1887); Paul L. Haworth, The United States In Our Own Times 1865–1920 189 (1921); William L. Letwin, *Congress and the Sherman Antitrust Law: 1887–1890*, 23 U. Chicago L. Rev. 221, 222–25, 232–35 (1956); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 50 Hastings L.J. 871, 905–06 (1999); Ernest Gellhorn, *et al.*, Antitrust Law and Economics at 1–5, 17–22 (5th ed. 2004).

[16]15 U.S.C.A. §§ 1, *et seq.*

[17]15 U.S.C.A. §§ 12, *et seq.*

[18]This chapter addresses federal antitrust law in the United States, particularly those aspects most likely to affect internet, mobile and ecommerce companies. These laws are supplemented by state antitrust statutes, many of which closely follow federal precedents, while others diverge from federal law in important respects. For an overview of each state's antitrust laws, see ABA section of Antitrust Law, State Antitrust

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Section 1 of the Sherman Act[19] applies only to concerted action that restrains trade, whereas section 2,[20] by contrast, covers both concerted and independent action, but only if that action "monopolize[s] . . . ."[21] Section 1 prohibits contracts, combinations, or conspiracies to restrain trade, including both *horizontal restraints* between or among competitors and *vertical restraints* imposed on companies (such as a manufacturer and a distributor) involved in different stages of production of a particular commodity or other item. Vertical restraints may involve two or more corporate entities, and therefore be actionable under the Sherman Act's section 1, or unilateral (single-firm) conduct, which would be actionable under the Sherman Act's section 2. As a matter of federal law, horizontal restraints can be viewed as being *per se* illegal under section 1, meaning no excuses or justifications are acceptable, whenever competitors engage in naked price-fixing, market allocation, output-limitations, or bid-rigging; vertical restraints, even ones involving price, are no longer *per se* illegal.[22] Section 2, by contrast, prohibits monopolization or attempts to monopolize a given market.[23] The Sherman Act expressly reaches extraterritorial conduct and thus can have an effect on a wide array of Internet

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Practice and Statutes (3d ed. 2004); for California in particular, *see* Cheryl L. Johnson (Ed. In Chief), State Bar of California Antitrust and Unfair Competition Law Section, California State Antitrust and Unfair Competition Law (4th ed. 2009, updated 2014). Moreover, although statutory antitrust law began in the United States, more than 100 countries now have antitrust statutes that govern the conduct of businesses operating within their borders. *See, e.g.*, William E. Kovacic, Chairman, Federal Trade Comm'n, Competition Policy in the European Union and the United States: Convergence or Divergence?, Address at the Bates White Fifth Annual Antitrust Conference (Jun. 2, 2008), http://www.ftc.gov/sites/default/files/documents/public_statements/competition-policy-european-union-and-united-states-convergence-or-divergence/080602bateswhite.pdf.

[19]15 U.S.C.A. § 1; *infra* § 34.04.

[20]15 U.S.C.A. § 2; *infra* § 34.05.

[21]*American Needle, Inc. v. National Football League,* 560 U.S. 183, 190 (2010).

[22]*See, e.g.*, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 893–94 (2007) (overturning federal antitrust law *per se* ban on vertical price-fixing while categorically condemning horizontal price-fixing cartels); *Palmer v. BRG of Georgia*, 498 U.S. 46 (1990) (holding a horizontal market division agreement to be *per se* illegal).

[23]15 U.S.C.A. § 2; *infra* § 34.05.

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transactions,[24] even though there may be some limitations over the extent to which U.S. antitrust laws reach foreign conduct, pursuant to the Foreign Trade Antitrust Improvement Act.[25]

Section 7 of the Clayton Act prohibits mergers and acquisitions where the effect "may be substantially to lessen competition, or to tend to create a monopoly." As amended by the Robinson-Patman Act of 1936, the Clayton Act also bans certain discriminatory prices, services, and allowances in dealings between merchants. The Hart-Scott-Rodino Antitrust Improvements Act further amended the Clayton Act in 1976 to require companies planning large mergers or acquisitions to notify the government, in advance, of their plans.[26]

Under Section 4 of the Clayton Act, "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."[27]

Clayton Act restrictions on exclusive-dealing and tying arrangements that limit a purchaser's or lessee's dealings affecting competitors,[28] and Robinson-Patman prohibitions on price discrimination,[29] both apply to tangible commodities but not to services, and therefore may have more limited applications in cyberspace. This distinction may be less important than it seems, however, because sections 1 and 2 of the Sherman Act apply to tying, exclusive dealing, and (insofar as section 2 is concerned) predatory pricing, even where services are involved.[30]

U.S. antitrust laws may be enforced by the federal govern-

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[24]15 U.S.C.A. §§ 6, 7; *see also* United States Dep't of Justice and Federal Trade Comm'n, Antitrust Enforcement Guidelines for International Operations (1995), *available at* http://www.justice.gov/atr/public/guidelines/internat.htm.

[25]15 U.S.C.A. § 6a(2); *infra* § 34.02.

[26]*See* 15 U.S.C.A. § 18a; *see generally infra* § 34.09.

[27]15 U.S.C.A. § 15(a).

[28]15 U.S.C.A. § 14; *see generally infra* § 34.06.

[29]15 U.S.C.A. § 13; *see generally infra* § 34.07.

[30]*See, e.g.*, *Eastman Kodak Co. v. Image Technical Servs. Inc.*, 504 U.S. 451 (1992) (applying tying analysis to an alleged tie between parts and aftermarket services); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984) (applying tying analysis to anesthesiology services).

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ment,[31] the state governments,[32] or in private causes of action.[33] The federal government may seek criminal convictions and fines,[34] potentially broad equitable relief[35] to remedy alleged antitrust violations and restore competition to the market (such as appointment of an external monitor empowered to conduct interviews and request documents to ensure legal compliance),[36] restitution for alleged victims, and disgorgement of profits,[37] though damages recovery itself is generally limited to situations where the federal govern-

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[31]15 U.S.C.A. §§ 4, 9, 15a, 15g.

[32]15 U.S.C.A. § 15c. State attorneys general can enforce federal antitrust laws civilly.

[33]15 U.S.C.A. § 15.

[34]15 U.S.C.A. §§ 1, 2; Thomas O. Barnett, Assistant Attorney Gen., United States Dep't of Justice Antitrust Div., Address to the 4th Annual Competition Policy Conference (Jun. 20, 2008).

[35]15 U.S.C.A. § 4.

[36]*E.g.*, *United States v. Apple, Inc.*, 791 F.3d 290, 312-13, 338 n.26 (2d Cir. 2015); *see also infra* § 34.10[2][C] (analyzing the *Microsoft* case and injunctive relief sought ostensibly to protect future markets).

[37]*See, e.g.*, *U.S. v. Morgan Stanley*, 881 F. Supp. 2d 563, 568 (S.D.N.Y. 2012); *United States v. Keyspan*, 763 F. Supp. 2d 633, 639-40 (S.D.N.Y. 2011); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. 3:07-md-01827-SI, 2011 WL 2790179, at *4 (N.D. Cal. July 11, 2011) (holding that disgorgement of ill-gotten gains from allegedly anti-competitive conduct was a proper remedy under the Oregon Antitrust Act, based in part on *Keyspan*). The Federal Trade Commission signaled its belief that it is entitled to seek disgorgement as part of any injunctive relief that a court may order in any conduct case that does not involve a "stand-alone" section 5 case, such as a section 5 case that is not tethered to a violation of the antitrust laws, by withdrawing in 2012 its 2003 Policy Statement on Restitution. Statement of the U.S. Federal Trade Commission, Withdrawal of the Commission's Policy Statement on Monetary Equitable Remedies in Competition Cases, 1-2 & n.6 (July 31, 2012), http://www.ftc.gov/os/2012/07/120731commissionstatement.pdf (last visited Aug. 25, 2013).

Historically, the Supreme Court has held that disgorgement is available as part of the inherent equitable powers of the courts under the Sherman Act. *See United States v. United Shoe Machinery Co*, 391 U.S. 244, 250 (1968) ("upon appropriate findings of violation [of section 2], it is the *duty* of the court to prescribe relief which will 'deny to the defendant the fruits of its statutory violation.' ") (emphasis added); *United States v. Paramount Pictures*, 334 U.S. 131, 171-72 (1948) ("the requirement that defendants restore what they unlawfully obtained is no more punishment than the familiar remedy of restitution."); *Porter v. Warner Holding*, 328 U.S. 395, 398 (1948) ("unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction.").

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ment itself is the victim of the violations.[38] State attorneys general may obtain injunctive relief[39] and also up to treble monetary damages on behalf of persons residing in their states, plus attorneys' fees.[40]

In private suits, plaintiffs potentially may obtain injunctive relief[41] and recover trebled actual damages and attorneys' fees.[42] To maintain suit in federal court, a private plaintiff also must establish antitrust standing.[43]

Since the passage of the Sherman Act in 1890, there have

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[38]15 U.S.C.A. § 15a. Historically, it has been rare for the federal government to seek such damages.

[39]15 U.S.C.A. § 26. Actions undertaken by state attorneys general are addressed generally in chapter 35.

[40]15 U.S.C.A. § 15c.

[41]15 U.S.C.A. § 26.

[42]15 U.S.C.A. § 15; *see generally* Herbert Hovenkamp, A Primer on Antitrust Damages (Oct. 2010).

[43]In addition to Article III standing, which must be present for any suit in federal court (*supra* §§ 26.15, 27.07), a civil plaintiff must have statutory (or antitrust) standing, demonstrating that the plaintiff is a proper party to bring a private antitrust action. *See, e.g., Associated General Contractors, Inc. v. Cal. State Council of Carpenters,* 459 U.S. 519, 535 n.31 (1983); *Philadelphia Taxi Ass'n v. Uber Technologies, Inc.,* 886 F.3d 332, 343 (3d Cir. 2018). "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." 459 U.S. at 534, *quoting Hawaii v. Standard Oil Co.,* 405 U.S. 251, 263 n.14 (1972); *see also Blue Shield of Virginia, Inc. v. McCready,* 457 U.S. 465, 477 (1982) ("Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property."). *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1066 (9th Cir. 2015) ("a plaintiff must show 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.' ") (quoting *Glenn Holly Entm't, Inc. v. Tektronix Inc*., 343 F.3d 1000, 1007-08 (9th Cir. 2003)); *Brittain v. Twitter, Inc*., No. 19-CV-00114-YGR, 2019 WL 2423375, at *5 (N.D. Cal. June 10, 2019) (dismissing plaintiffs' Sherman Act 2 claim against Twitter for lack of statutory standing where the plaintiff alleged that he lost followers on Twitter, which did not amount to an antitrust injury).

The test for antitrust standing may be articulated somewhat differently in different jurisdictions. In the Third Circuit, for example, the test is articulated as follows:

> (1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm, with neither factor alone conferring standing; (2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress; (3) the directness of the injury, which addresses the concerns that liberal application of standing principles might produce speculative claims; (4) the existence of

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been several evolutions in academic, government, and judicial thinking on the rationales for statutory antitrust laws, intervening periods of vigorous and lax enforcement, and passionate debates and theorizing about the true purposes and efficacy of the laws.[44] For many decades,

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more direct victims of the alleged antitrust violations; and (5) the potential for duplicative recovery or complex apportionment of damages.

Philadelphia Taxi Ass'n v. Uber Technologies, Inc., 886 F.3d 332, 343 n.8 (3d Cir. 2018) (quoting earlier cases; affirming dismissal).

The Second Circuit, by contrast, requires a plaintiff to allege that it (1) has suffered a "special kind of antitrust injury" and (2) is a suitable plaintiff to pursue the alleged antitrust violations and thus is an "efficient enforcer" of antitrust laws. *IQ Dental Supply, Inc. v. Henry Schein, Inc.,* 924 F.3d 57, 62 (2d Cir. 2019) (quoting earlier cases; finding the test met). To determine if a plaintiff has suffered an antitrust injury, the Second Circuit applies a 3-part test, pursuant to which a court must (1) identify the practice complained of and the reasons it is or might be anticompetitive; (2) identify the actual injury alleged by the plaintiff, which requires consideration of "the ways in which the plaintiff claims it is in a 'worse position' as a consequence of the defendant's conduct . . . ;" and (3) compare the anticompetitive effect of the specific practice at issue to the actual injury the plaintiff alleges. *Id.* at 62-63, *quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 486 (1977); *Gatt Commc'ns, Inc. v. PMC Assocs., LLC,* 711 F.3d 68, 76 (2d Cir. 2013); and *Port Dock & Stone Corp. v. Oldcastle Ne., Inc.,* 507 F.3d 117, 121-22 (2d Cir. 2007). To satisfy the efficient-enforcer test, a "four-factor test is employed to determine whether an antitrust plaintiff is an efficient enforcer; thus we must evaluate: (1) 'the directness or indirectness of the asserted injury,' (2) 'the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement,' (3) 'the speculativeness of the alleged injury,' and (4) 'the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries.' " *Henry Schein, Inc.,* 924 F.3d at 65, *quoting Daniel v. Am. Bd. of Emergency Med.,* 428 F.3d 408, 443 (2d Cir. 2005) (internal quotations marks and citations omitted). "These four factors need not be given equal weight: the relative significance of each factor will depend on the circumstances of the particular case." 924 F.3d at 65. To apply this test where more than one violation is alleged, a court must first identify and analyze the different types of antitrust violations a plaintiff seeks to enforce. *See id.*

[44] *See generally* Robert H. Bork, The Antitrust Paradox: A Policy at War with Itself (1978); Robert Pitofsky, *The Political Content of Antitrust*, 127 U. Pa. L. Rev. 1051 (1979) William E. Kovacic and Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. Econ. Persp. 43 (2000); Daniel A. Crane, *Antitrust Modesty*, 105 Mich. L. Rev. 1193 (April 2007); John B. Kirkwood and Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 Notre Dame L. Rev. 191 (2008); William H. Page, The Ideological Origins and Evolution of U.S. Antitrust Law, Issues in Competition Law and Policy (2008); Herbert Hovenkamp, *Harvard, Chicago, and*

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however, antitrust enforcement has been seen as a bipartisan political priority at least where horizontal price-fixing and monopoly-creating mergers are concerned, with debate continuing at what might be considered to be the "outer limits" of antitrust law on issues such as where monopolies, vertical resale price maintenance, or the use of conduct[45] remedies to address foreclosure in the vertical merger context, are all concerned.[46]

Transaction Cost Economics in Antitrust Analysis, 55 Antitrust Bulletin 613 (2010); J. Thomas Rosch, Commissioner, Federal Trade Comm'n, Address Entitled "Rewriting History: Antitrust Not As We Know It . . . Yet," Before the American Bar Association Section of Antitrust Law 2010 Spring Meeting (Apr. 23, 2010); Malcolm Rutherford, *The Judicial Control of Business: Walton Hamilton, Antitrust, and Chicago*, 34 Seattle U. L. Rev. 1385 (2011); Robert Van Horn, *Chicago's Shifting Attitude Toward Concentrations of Business Power (1934–1962)*, 34 Seattle L. Rev. 1527 (2011); Howard A. Shelanski, *The Case for Rebalancing Antitrust and Regulation*, 109 Michigan L. Rev. 683 (2011); Herbert Hovenkamp, Implementing Antitrust's Welfare Goals, U. Iowa Legal Studies Research Paper No. 12-39 (Jan. 2, 2013), *available at* SSRN: http://ssrn.com/abstract=2154499; Christine Varney & Jonathan J. Clarke, *Chicago & Georgetown: An Essay in Honor of George Pitofsky*, 101 Geo. L.J. 1565 (2013); Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 Fordham L. Rev. 2405 (2013).

[45]The Federal Trade Commission issued a commentary on vertical mergers in December 2020, in the dying days of the Trump Administration. *See* Federal Trade Commission, *Commentary on Vertical Merger Enforcement* (Dec. 2020), available at https://www.ftc.gov/system/files/documents/reports/federal-trade-commissions-commentary-vertical-merger-enforcement/p180101verticalmergercommentary_1.pdf. Whether and to what extent this document guides the Federal Trade Commission in the Biden Administration, under FTC Chair Lina Khan, remains to be seen.

[46]*See, e.g.*, Christine Varney & Jonathan J. Clarke, Chicago & Georgetown: *An Essay in Honor of George Pitofsky*, 101 Geo. L.J. 1565, 1567-68 (2013). . The drafting and submission of a "report" by the United States Department of Justice under the Bush Administration in 2008 (a report from which three of the five Commissioners on the U.S. Federal Trade Commission then dissented) on the appropriate principles for analyzing monopolies under section 2 of the Sherman Act, and its subsequent withdrawal under the Obama Administration in 2009, is one illustration of how debate over the contours of antitrust policy continues at the outer edges of antitrust law, where illegal actions by monopolies to acquire or maintain those monopolies may be concerned. *See, e.g., id.* at 1569-70. The ongoing discussion over vertical resale price maintenance provides another illustration. *See*, e.g., Herbert Hovenkamp, Implementing Antitrust's 'Welfare Goals, U. Iowa Legal Studies Research Paper No. 22-23 (Jan. 2, 2013), *available at* SSRN: http://ssrn.com/abstract=2154499; Varney & Clarke, *Chicago & Georgetown: An Essay in Honor of George Pitofsky*, 101 Geo. L.J. at 1579-80; Wright & Ginsburg, *The Goals of*

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Since the late 1970s, the approach of federal antitrust policy and jurisprudence has shifted "from the protection of competition as a process of rivalry," in which industries' structures (numbers and relative sizes of competitors) usually played a dominant role in the analysis, "to the protection of competition as a means of promoting economic efficiency"[47] though debate still continues over whether the focus on efficiency should involve *total welfare* (the gain or loss to

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Antitrust: Welfare Trumps Choice, 81 Fordham L. Rev. at 2417-21; Marina Lao, *Internet Retailing and "Free Riding": A Post-Leegin Antitrust Analysis*, 14 J. of Internet L. 1, 14-15 (2011). There is also debate about the use of conduct remedies to remedy foreclosure issues in the vertical merger context. *See, e.g.*, William F. Shugart II & Diana W. Thomas, Antitrust Enforcement in the Obama Administration's First Term: A Regulatory Approach, Cato Policy Analysis No. 735 (Oct. 22, 2013), *available at* http://object.cato.org/sites/cato.org/files/pubs/pdf/pa739_web.pdf; Varney & Clarke, *Chicago & Georgetown: An Essay in Honor of George Pitofsky*, 101 Geo. L.J. at 1576-78. Finally, there also remains a dispute over the applicable mode of analysis for tying arrangements, *see, e.g.*, Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Theory*, 123 Harv. L. Rev. 397 (2009) (advocating for the current rule), especially where technological tying may be concerned, *see, e.g.*,Thomas Au, Note, *Anticompetitive Tying and Bundling Arrangements in the Smartphone Industry*, 16 Stanford Tech. L. Rev. 188 (2012); Sarita Frattaroli, *Dodging the Bullet Again: Microsoft III's Reformulation of the Foremost Technological Tying Doctrine*, 90 Boston U. L. Rev. 1909 (2010).

[47]*Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 375 (7th Cir. 1986); *see also* Robert H. Bork, The Antitrust Paradox: A Policy at War with Itself (1978); Oliver E. Williamson, *Symposium on Antitrust Law and Economics*, 127 U. Pa. L. Rev. 918 (1979); Herbert Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 Geo. Wash. L. Rev. 1 (1982); Nolan E. Clark, *Antitrust Comes Full Circle: The Return to the Cartelization Standard*, 38 Vand. L. Rev. 1125 (1985); Lawrence J. White, Antitrust Policy and Industrial Policy: A View from the U.S., Reg-Markets Center Working Paper No. 08-04 (Feb. 2008) (*available at* http://ssrn.com/abstract=1097707); Lawrence J. White, The Growing Influence of Economics and Economists on Antitrust: An Extended Discussion, Reg-Markets Center Working Paper No. 08-05 (Feb. 2008) (*available at* http://ssrn.com/abstract=1097700); Christina Bohannan and Herbert J. Hovenkamp, *IP and Antitrust: Errands into the Wilderness*, University of Iowa Legal Studies Research Paper No. 09-16 (Apr. 2009). *But see, e.g.,* Richard R. Nelson, *Comments on a Paper by Posner*, 127 U. Pa. L. Rev. 949–52 (1979) (asserting that "Chicago School" antitrust analysis relies on outdated price theory; newer price theory focuses on market participants' uncertainty and search for relevant information, and associated control and transaction costs); Albert A. Foer, The Goals of Antitrust: Thoughts on Consumer Welfare in the U.S., American Antitrust Institute Working Paper No. 05-09 (2005) (arguing that a supposed antitrust consensus on relying on economic theory and the goal of improving "consumer welfare" exists at a surface level; vital differences remain

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the economy as a whole regardless of whether consumers win or lose) or only *consumer welfare* (the gain or loss to consumers specifically without offsetting any producer gains).[48] By 2013, however, the U.S. Supreme Court recognized consumer welfare as the touchstone, with higher consumer prices being recognized as an injury under the antitrust laws, and the need for antitrust law to encourage competitive markets as a means of promoting consumer welfare to be the goal.[49]

Through at least January 2025, antitrust policy will be influenced by President Biden's July 9, 2021 Executive Or-

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in different people's and institutions' understanding of the concepts and goals); John J. Flynn, *The Role of Rules in Antitrust Analysis*, 2006 Utah L. Rev. 635, 640 (2006) (portraying Chicago School antitrust analysis as based on unrealistic assumptions as well as doctrinal rigidity analogous to *per se* liability rules, and asserting that "a fraying about the edges of both *per se* rules and the neo-classical model is taking place"); Maurice E. Stucke, *Behavioral Economists at the Gate: Antitrust in the Twenty-First Century*, 38 Loyola U. Chi. L.J. 513 (2007) (summarizing and applying theories and research in behavioral economics that call into question significant components of the Chicago School, which has influenced U.S. antitrust law since the late 1970s); Yane Svetiev, *Antitrust Governance: The New Wave of Antitrust*, 38 Loyola U. Chi. L.J. 593, 601–20 (2007) (reviewing history and the difficulties of attempting to apply economic theory to antitrust lawsuits, leading sometimes to a bias in favor of minimal intervention); John B. Kirkwood and Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 Notre Dame L. Rev. 191 (2008); *see generally* Lawrence A. Sullivan and Warren S. Grimes, The Law of Antitrust: An Integrated Handbook (2d ed. 2006); William S. Comanor, *Is There A Consensus on the Antitrust Treatment of Single-Firm Conduct*?, 2008 Wis. L. Rev. 387 (2008) (answering article's title question in the negative); Daniel A. Crane, *Chicago, Post-Chicago, Neo-Chicago*, 79 U. Chicago L. Rev. 1911 (2009); Herbert Hovenkamp, *Harvard, Chicago, and Transaction Cost Economics in Antitrust Analysis*, 55 Antitrust Bulletin 613 (2010); Gregory J. Werden, et al., *Behavioral Antitrust and Merger Control*, Vanderbilt University Law School Law and Economics Working Paper No. 10-14 (2010) (critiquing behavioral economics, which has studied individual people's actions, as basis for antitrust law enforcement or policy affecting businesses or entire industries).

[48] *See, e.g.*, Herbert Hovenkamp, *Anticompetitive Patent Settlements and the Supreme Court's Actavis Decision*, 15 Minn. J.L. Sci. & Tech. 3, 7-8 (Winter 2014); Guy Sagi, A *Comprehensive Economic and Legal Analysis of Tying Arrangements*, 38 Seattle U. L. Rev. 1, 29-32 (Fall. 2014).

[49] *See FTC v. Actavis*, 570 U.S. 136, 152-53 (2013); *id.* at 161 (Roberts, C.J. dissenting); Herbert Hovenkamp, *Anticompetitive Patent Settlements and the Supreme Court's Actavis Decision*, 15 Minn. J.L. Sci. & Tech. 3, 7-8 (Winter 2014).

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der on Promoting Competition in the American Economy,[50] a sweeping order that directs federal agencies to consider rulemaking and policy changes in a number of areas. The Executive Order identifies data collection and privacy,[51] the use of restrictive covenants,[52] and Internet marketplaces, as areas of concern, among other things. The preamble sets the tenor of the Order with respect to the digital economy as follows:

> The American information technology sector has long been an engine of innovation and growth, but today a small number of dominant Internet platforms use their power to exclude market entrants, to extract monopoly profits, and to gather intimate personal information that they can exploit for their own advantage. Too many small businesses across the economy depend on those platforms and a few online marketplaces for their survival. And too many local newspapers have shuttered or downsized, in part due to the Internet platforms' dominance in advertising markets.

With respect to the Internet and the digital economy, the Executive Order, among other things,

- directs the FTC and Department of Justice to closely scrutinize proposed mergers
- focuses attention on "the rise of the dominant Internet platforms, especially as they stem from serial mergers, the acquisition of nascent competitors, the aggregation of data, unfair competition in attention markets, the surveillance of users, and the presence of network effects."
- encourages the FTC chair "to exercise the FTC's statutory rulemaking authority, as appropriate and consistent with applicable law, in areas such as:
  - (i) unfair data collection and surveillance practices that may damage competition, consumer autonomy, and consumer privacy;
  - (ii) unfair anticompetitive restrictions on third-party repair or self-repair of items, such as the restrictions imposed by powerful manufacturers that prevent farmers from repairing their own equipment;
  - (iii) unfair anticompetitive conduct or agreements in

[50]Executive Order on Promoting Competition in the American Economy, 2021 WL 2886028 (White House July 9, 2021).

[51]Data privacy laws are analyzed in chapter 26.

[52]Restrictive covenants are analyzed in chapter 11.

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the prescription drug industries, such as agreements to delay the market entry of generic drugs or biosimilars;

(iv) unfair competition in major Internet marketplaces;

(v) unfair occupational licensing restrictions;

(vi) unfair tying practices or exclusionary practices in the brokerage or listing of real estate; and

(vii) any other unfair industry-specific practices that substantially inhibit competition.

- adopts, as policy, enforcement of "the antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony—especially as these issues arise in labor markets, agricultural markets, Internet platform industries, healthcare markets (including insurance, hospital, and prescription drug markets), repair markets, and United States markets directly affected by foreign cartel activity."
- encourages the Attorney General and Secretary of Commerce "to consider whether to revise their position on the intersection of the intellectual property and antitrust laws, including by considering whether to revise the Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments issued jointly by the Department of Justice, the United States Patent and Trademark Office, and the National Institute of Standards and Technology on December 19, 2019."[53]
- encourages the Chair of the FTC "to consider working with the rest of the Commission to exercise the FTC's statutory rulemaking authority under the Federal Trade Commission Act to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility."
- establishes a White House Competition Council within the Executive Branch.

Antitrust laws ultimately protect *competition*, not *competitors*.[54] While "[c]ompetition is at the heart of the antitrust laws; it is only anticompetitive conduct, or 'a

[53]Standard Essential Patents and F/RAND licensing are analyzed in section 34.04[7].

[54]*Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

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competition-*reducing* aspect or effect of the defendant's behavior,' that antitrust laws seek to curtail."[55] As expressed by Chief Justice Roberts in one case: "The point of antitrust law is to encourage competitive markets to promote consumer welfare."[56]

Antitrust laws apply to commerce on, or brought about by, the Internet even if, in some situations, there may be a need to recognize the unique characteristics of the Internet in the otherwise conventional application of antitrust laws and principles.[57] Indeed, the potentially dynamic nature of Internet competition where platform can compete with platform has been recognized by the Federal Trade Commission as affecting the outcome of a merger analysis in at least one case.[58]

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[55]*Philadelphia Taxi Ass'n v. Uber Technologies, Inc.,* 886 F.3d 332, 338 (3d Cir. 2018), *quoting Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990). "[I]t is inimical to the antitrust laws to award damages for losses stemming from continued competition." 886 F.3d at 338, *quoting Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 109–10 (1986) (alternations and internal quotation marks omitted).

[56]*FTC v. Actavis*, 570 U.S. 136, 161 (2013) (Roberts, C.J. dissenting).

[57]U.S. and state antitrust authorities have taken the position that the antitrust laws apply to the Internet. *See, e.g.*, Joel A. Klein, Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice, Rethinking Antitrust Principles for the New Economy, Address at Haas/Berkeley New Economy Forum, Haas School of Business, University of California at Berkeley (May 9, 2000). For other perspectives on the applicability of traditional antitrust law to Internet activities and conduct, *see* Richard A. Posner, *Antitrust in the New Economy*, 68 Antitrust L.J. 925 (2001); Albert A. Foer, *E-Commerce Meets Antitrust: A Primer*, 20 J. Pub. Pol'y & Marketing 51 (2001); Jonathan M. Jacobson, *Do We Need A "New Economy" Exception for Antitrust?*, Antitrust (Fall 2001); *cf.* Michael L. Katz and Howard A. Shelanski, *"Schumpeterian" Competition and Antitrust Policy in High-Tech Markets*, 14 Competition 47 (2005); Antitrust Modernization Commission, Report and Recommendations 31–46 (2007); Mark A. Lemley, *A New Balance Between IP and Antitrust*, 13 Sw. J. L. & Trade Am. 1 (2007); Herbert J. Hovenkamp, Innovation and the Domain of Competition Policy, University of Iowa Legal Studies Research Paper No. 08-07 (March 2008); David S. Evans, *Antitrust Issues Raised by the Emerging Global Internet Economy*, 102 Nw. L. Rev. 1987 (2008) Sunny Woan, *Antitrust in Wonderland: Regulating Markets of Innovation*, 27 Temp. J. Sci., Tech. & Envtl. L. 1 (Summer 2008); David S. Evans, The Web Economy, Two-Sided Markets and Competition Policy (2010); Albert A. Foer, President American Antitrust Institute, Digital Convergence and Competition Issues, Address Before 6th International Competition Forum (Sept. 15, 2010).

[58]*See* United States Federal Trade Commission, Statement of the

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Several aspects of electronic commerce may differ from many commercial relationships on *terra firma* and have legal significance in the field of antitrust law. These factors include:

- the phenomenon of Internet time[59] and its effect on product market definitions, the persistence of any one firm's economic power in a product market,[60] and prices;
- the pricing structure of electronic commercial transactions, which often results in software and information being sold below cost or even at zero cost (because revenues may be earned through sources other than traditional sales such as advertising,[61] and/or software systems and applications have virtually no marginal costs of production once developed);[62]
- network externalities (e.g., the fact that the value of a network increases proportionally with the number of users who have access to it and in turn create barriers to entry for would-be newcomers);[63]

Commission Concerning Google/AdMob (May 21, 2010), http://www.ftc.gov/sites/default/files/documents/closing_letters/google-inc./admob-inc/100521google-admobstmt.pdf.

[59]For a general discussion of the legal significance of Internet time, *see supra* § 1.06.

[60]What may appear to be market power for a cyberspace company may be ephemeral. The internet, throughout its short history, has been characterized by the rapid emergence (and disappearance) of disruptive technologies and services. Measuring market strength at a given moment in time thus may yield an incomplete picture. MySpace, for example, was the most visited website in the world in 2006, and America Online was the most frequently used tool to access the internet at an earlier point in time.

[61]Where product sales are subsidized through advertising or other means, the stated sales prices may even be below marginal costs of production.

[62]This Internet business model has at least a few predecessors on *terra firma*, in the traditional models used in the broadcast radio and television industries, where audio or audiovisual entertainment and news content accompanied by advertising are given away free to end users.

[63]Some pre-Internet businesses, such as telephone services and computer operating systems, exhibited network effects. Subsequent antitrust scholarship has referred to network effects as involving two-sided markets. *See, e.g.*, David S. Evans, *Antitrust Issues Raised by the Emerging Global Internet Economy*, 102 Northwestern Univ. L. Rev. 1987 (2008). Simply put, a two-sided market (or many-sided market) "provides goods or services to two or more distinct groups of customers who need each other in

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- market pressures for technological standardization and interoperability;[64] and
- the aggravating or mitigating effects of rapid information dispersion on anticompetitive practices in cyberspace.[65]

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some way and who rely on the platform to intermediate transactions between them. Multi-sided platforms usually lower transaction costs and thereby facilitate value-creating exchanges. They tend to arise where there is some value from getting multiple sides together but transactions costs or other obstacles stand in the way. eBay, for example, drastically lowered the cost of exchange between buyers and sellers of second-hand goods." *Id.* at 1995-96 (internal footnote omitted). Moreover, "[o]ne key feature of multi-sided platforms is the presence of indirect network effects. This means that the value that a customer on one side realizes from the platform increases with the number of customers on the other side. Consumers looking to buy something value a search engine more if it provides advertisements that are more relevant to their search, while companies value advertising on a search engine higher if they are more likely to reach potential consumers. [¶] Another key feature is that multi-sided platforms must cater to multiple, distinct customer groups simultaneously." *Id.* at 1996 (internal footnote omitted).

For discussion of the U.S. Supreme Court's first decision grappling with the antitrust implications of two-sided markets, see *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018); *see generally infra* § 34.05[2][B] (analyzing the case at greater length).

[64]This phenomenon likewise is not unique to Internet software or applications.

[65]*See* Robert H. Lande and Howard P. Marvel, *The Three Types of Collusion: Fixing Prices, Rivals, and Rules*, 2000 Wis. L. Rev. 941, 964–72 (2000) (addressing business competitors' agreements that have the effect of raising consumers' search costs, as a means for cartel members to obtain supracompetitive profits). In 2007, the Antitrust Modernization Commission, which was tasked by Congress to study U.S. antitrust law to determine if and how it should be modernized, reported on the "new economy" in part as follows:

> Just as in other industries, of course, antitrust enforcers evaluating business conduct in new economy industries must ensure proper attention to particular market dynamics and economic characteristics that may play a role in determining likely competitive effects. Certain characteristics may arise more frequently in markets in which innovation, intellectual property, and technological change are key factors than in some other industries. These characteristics can include:
>
> - very high rates of rapid innovation;
> - falling average costs (on a product, not a firm-wide, basis) over a broad range of output;
> - relatively modest capital requirements;
> - quick and frequent entry and exit;
> - demand-side economies of scale;
> - switching costs; and

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In addition, unlike suits involving physical world businesses, antitrust claims brought against platforms or other *interactive computer service* providers arising out of third party content will not be viable based on Good Samaritan exemption under the Telecommunications Act, also known as the Communications Decency Act, or CDA., which immunizes them for liability premised on publishing user or other third party content.[66] The applicability of the CDA is analyzed extensively in section 37.05, in chapter 37.

This chapter outlines the antitrust doctrines and principles and those factors that should be accounted for when applying existing law to cyberspace, ecommerce and the digital economy.

34.02 Extraterritorial and Cyberspace Reach of U.S. Antitrust Law

The scope of U.S. antitrust law is broad, reaching conduct occurring in international commerce. As far back as 1993, the U.S. Supreme Court reiterated that it was "well established . . . that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some

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- first-mover advantages.

That one or more of these characteristics may be important in the context of a new economy industry, however, does not suggest that such characteristics never appear in other industries or that all of the listed characteristics always appear in new economy industries. Rather, the point is simply that proper antitrust analysis in *all* industries requires careful consideration of economic characteristics of the industry . . . .

Report and Recommendations at 32–33 (emphasis in original). The Internet allows competing businesses to exchange pricing information in real-time or close to real-time and change prices rapidly in ways that may be indistinguishable from horizontal price-fixing. These characteristics of Internet commerce thus may raise antitrust concerns. *See* Robert M. Weiss and Ajay K. Mehrotra, *Online Dynamic Pricing: Efficiency, Equity, and the Future of E-Commerce*, 6 Va. J. L. & Tech. 11 (2001). To date, no significant litigation has grappled with these issues.

[66] 47 U.S.C.A. § 230(c); *Marshall's Locksmith Service Inc. v. Google, LLC,* 925 F.3d 1263 (D.C. Cir. 2019) (affirming dismissal, based on CDA immunity, of Sherman Act I and II claims brought by 14 locksmith companies, alleging that Google, Microsoft, and Yahoo! had conspired to "flood the market" of online search results with information about so-called "scam locksmiths," in order to extract additional advertising revenue, where plaintiffs' theory of liability was premised on third party content (from the scam locksmiths) and defendants merely operated neutral map location services that listed companies based on where they purported to be located).

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substantial effect in the United States."[1] The Foreign Trade and Antitrust Improvement Act extends antitrust liability for conduct that "has a direct, substantial, and reasonably foreseeable effect" on U.S. commerce (defined as (a) "trade or commerce which is not trade or commerce with foreign nations, or . . . import trade or import commerce with foreign nations . . ." or (b) "export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States . . . .").[2] Alleged internet

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[Section 34.02]

[1]*Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) (upholding the applicability of U.S. law to an alleged conspiracy in the U.K. to alter the U.S. insurance market).

[2]15 U.S.C.A. § 6a. The FTAIA imposes a unique, separately codified threshold requirement on antitrust claims involving foreign conduct. It requires a showing that a defendant's alleged foreign anticompetitive conduct have a "direct, substantial, and reasonably foreseeable effect" on U.S. domestic or import commerce, which gives rise to a plaintiff's claims. *See id.* § 6a(2). "Unlike claims involving purely domestic conduct, the FTAIA bars claims based on foreign conduct from proceeding unless the foreign conduct has a cognizable effect on the United States. Only if that prerequisite is satisfied may the plaintiff pursue a claim 'under the provisions of section 1 to 7 of [the Sherman Act], other than [the FTAIA].' 15 U.S.C. § 6a(2)." *Lotes Co. v. Hon Hai Precision Co.,* 753 F.3d 395, 406 (2d Cir. 2014). This is a substantive limitation on antitrust law, not a jurisdictional limitation. See *id.* at 405 ("[W]e have little difficulty concluding that the requirements of the FTAIA go to the merits of an antitrust claim rather than to subject matter jurisdiction."); *Animal Science Products, Inc. v. China Minmetals Corp*., 654 F.3d 462, 467–68 (3d Cir. 2011) ("[T]he FTAIA constitutes a substantive merits limitation rather than a jurisdictional limitation."); *United States v. Hui Hsiung*, 778 F.3d 738, 752-53 (9th Cir. 2015) ("The FTAIA does not limit the power of the federal courts; rather, it provides substantive elements under the Sherman Act in cases involving nonimport trade with foreign nations.").

The Second and Seventh Circuits have construed the FTAIA's requirement of a *direct* effect to require that there be "a reasonably proximate causal nexus" between foreign conduct and a domestic consequence giving rise to an antitrust claim. *See Lotes Co. v. Hon Hai Precision Co.,* 753 F.3d 395, 410 (2d Cir. 2014); *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 857 (7th Cir. 2012) (en banc). The Ninth Circuit, however, continues to apply a stricter test, requiring a showing that conduct, to have a direct effect for purposes of the domestic effects exception to the FTAIA, "follow[] as an immediate consequence of the defendant[s'] activity." *United States v. Hui Hsiung*, 778 F.3d 738, 758 (9th Cir. 2015).

The growth of global supply chains, in which items are manufactured overseas and then imported into the U.S. either directly or via incorporation into items that are imported into the U.S., have raised is-

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conspiracies or attempts at monopolization therefore potentially may violate U.S. law even in cases where the principal defendants are located overseas and act outside of the United States.[3]

Several countries have enacted "blocking" statutes intended to thwart the extraterritorial application of U.S. antitrust laws or to prohibit compliance with subpoenas issued in U.S. antitrust cases.[4] Foreign antitrust authorities,

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sues over the limits to the extraterritorial extension of U.S. laws to overseas conduct. Because import trade is exempted from the FTAIA, the Ninth Circuit held that the government may proceed against manufacturers of foreign components imported into the United States, under U.S. law, if the facts alleged and proven satisfy the domestic effects exception of the FTAIA. *See United States v. Hui Hsiung*, 778 F.3d 738, 754-60 (9th Cir. 2015) (involving global price-fixing cartel on liquid crystal displays used in computers and televisions). By contrast, the Seventh Circuit held that the Sherman Act does not extend to overseas purchases of those components by companies that then placed those components in finished products that were imported into the United States. *See Motorola Mobility v. AU Optronics Corp*., 775 F.3d 816 (7th Cir. 2015) (holding that the statutory requirement under 15 U.S.C.A. § 6a(2) that the effect of anticompetitive conduct on domestic commerce give rise to an antitrust cause of action was not met where the conduct alleged increased the cost to Motorola of cellphones that it bought from its foreign subsidiaries, "but the cartel-engendered price increase in the components and in the price of cellphones that incorporated them occurred entirely in foreign commerce."). Unlike import trade, prosecutions alleging foreign misconduct must satisfy the domestic effects exception to the FTAIA. *United States v. Hui Hsiung*, 778 F.3d 738, 756-57 (9th Cir. 2015).

[3] *See, e.g.*, *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164–67 (2004) (permitting a private plaintiff and alleged victim of international price-fixing conspiracy to bring a Sherman Act lawsuit against alleged conduct causing harm in the United States only, independent of foreign harm); *United States v. Leija-Sanchez*, 602 F.3d 797, 801 (7th Cir. 2010). Claims which have extraterritorial effect are those which arise under sections 1 through 7 of Title 15 of the U.S. Code (other than section 6a, with exceptions), which includes actions brought under sections 1 and 2 of the Sherman Act, but in virtually all cases excludes Clayton Act or Robinson-Patman violations. 15 U.S.C.A. § 6a(2). To the extent that a claim arises solely from export trade or export commerce, sections 1 through 7 apply "only for injury to export business in the United States." 15 U.S.C.A. § 6a(2) Violations of the Clayton Act may be actionable to the extent that they involve "commerce," which is defined to include "trade or commerce among the several States and *with foreign nations* . . . ." 15 U.S.C.A. § 12 (emphasis added).

[4] *See, e.g., Remington Products, Inc. v. North American Philips Corp.*, 107 F.R.D. 642 (D. Conn. 1985) (discussing a Dutch blocking statute); *In re Air Cargo Shipping Services Antitrust Litigation*, 2010-1 Trade Cas. (CCH) ¶ 76951, 2010 WL 1189341 (E.D.N.Y. 2010) (French blocking

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however, often cooperate with U.S. antitrust authorities to prosecute cross-border antitrust cases.

34.03 Applicability of Antitrust Principles to Internet Governance

U.S. antitrust laws apply to individuals and private entities.[1] Government entities, such as the National Science Foundation, which are or were involved in the operation of the Internet, are generally immune from liability.[2] Determined on a case-by-case basis is the immunity for a private party—such as Network Solutions, Inc., which at one time administered domain names pursuant to a cooperative agreement with the National Science Foundation[3]—that in effect governed aspects of the Internet in compliance with government programs.[4] Even the Internet Corporation for Assigned

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statute).

[Section 34.03]

[1]15 U.S.C.A. §§ 7, 12.

[2]*See Thomas v. Network Solutions, Inc.*, 176 F.3d 500, 508 (D.C. Cir. 1999); *Sanders v. Brown*, 504 F.3d 903, 915 (9th Cir. 2007).

[3]In 1997, the National Science Foundation transferred control of the Domain Name System (DNS) and root zone file to the Department of Commerce, which in 1998 issued a white paper proposing that management be transferred to a private, not-for-profit corporation. *See* Management of Internet Names and Addresses, 63 Fed. Reg. 31,741, 31,741 (Jun. 10, 1998). The white paper suggested that the corporation's board of directors "should be balanced to equitably represent the interests of IP number registries, domain name registries, domain name registrars, the technical community, Internet service providers (ISPs), and Internet users (commercial, not-for-profit, and individuals) from around the world." *Id.* at 31,750. ICANN is the not-for-profit entity that was ultimately created and which today administers the DNS. *See generally supra* § 7.02.

[4]*See Coalition for ICANN Transparency, Inc. v. VeriSign, Inc.*, 611 F.3d 495, 502-08 (9th Cir. 2010) (holding that the plaintiff had sufficiently pleaded (1) a Sherman Act section 1 claim against VeriSign in connection with the pricing and renewal provisions of its 2006 .com Agreement (but not its 2005 .net Agreement) where the plaintiff alleged that ICANN and VeriSign conspired to set artificially high prices for VeriSign's services and to ensure that VeriSign would receive successor contracts with ICANN without having to go through a competitive bidding process, and (2) a Sherman Act section 2 claim against VeriSign by alleging that VeriSign's allegedly predatory litigation activity was aimed at coercing ICANN to perpetuate VeriSign's role as exclusive regulator of the .com domain name market by awarding VeriSign the 2006 .com Agreement without any competitive bidding, and by agreeing to the terms that favored VeriSign); *Name.Space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573, 581–82 (2d Cir.

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Names and Numbers (ICANN),[5] the not-for-profit corporation in charge of managing the Internet's domain name system, and nonprofit organizations, such as ones founded for the purpose of bettering the Internet, potentially could be exposed to liability, if their activities violate U.S. antitrust laws.[6]

The extent to which U.S. antitrust laws reach conduct that occurred outside the United States is separately analyzed in section 34.02.

34.04 Sherman Act Section 1 in Cyberspace

34.04[1] In General

Section 1 of the Sherman Act makes illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the sev-

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2000) (finding NSI immune based on conduct, in specific factual context, but noting that other Circuit Courts of Appeals have declined to reach issue); *Byers v. Intuit, Inc.*, 600 F.3d 286, 295 (3d Cir. 2010); *PG Media, Inc. v. Network Solutions, Inc.*, 51 F. Supp. 2d 389, 407-08 (S.D.N.Y. 1999); *see generally supra* § 7.21[7].

[5]*See Name.Space, Inc. v. Internet Corp. for Assigned Names and Numbers*, 795 F.3d 1124 (9th Cir. 2015) (affirming dismissal of federal Sherman Act 1 and 2 and California Cartwright Act (Cal. Bus. & Prof. Code §§ 16700–16770) antitrust claims, brought by a disappointed potential registrant of a Top Level Domain, over ICANN's 2012 expansion of the Domain Name System, which had alleged that the rules and procedures governing the 2012 Application Round were the result of a conspiracy between ICANN, its board members, and industry insiders, but the facts alleged could equally have reflected legitimate conduct, and where plaintiff's Sherman Act section 2 claim failed because ICANN was neither a registrar nor a registry and thus not a competitor of Name.Space); *Manwin Licensing Int'l S.A.R.L. v. ICM Registry, LLC*, No. CV 11-9514 PSG, 2012 WL 3962566, at *6-7 (C.D. Cal. Aug. 24, 2012) (holding that ICANN was engaged in commercial activities and therefore could be held liable under the Sherman Act); *see also* A. Michael Froomkin & Mark A. Lemley, *ICANN and Antitrust*, 2003 U. Ill. L. Rev. 1, 12 (2003).

[6]*See National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 100 n.22 (1984) (citing earlier cases); *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 573–74 (1982) (holding that whether a nonprofit's agents acted to benefit the nonprofit was irrelevant to antitrust liability because the "anticompetitive practices of [the nonprofit's] agents are repugnant to the antitrust laws even if the agents act without any intent to aid [the nonprofit]"); *Dedication and Everlasting Love to Animals v. Humane Soc. of U.S., Inc.*, 50 F.3d 710, 713 (9th Cir. 1995); *see also, e.g.*, *Little Rock Cardiology Clinic PA v. Baptist Health*, 591 F.3d 591 (8th Cir. 2009).

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eral States, or with foreign nations . . . ."[1] For nearly 100 years, the statute has been interpreted to prohibit only those restraints of trade that are *unreasonable*.[2] The term *restraint of trade,* as used in the statute, "refers not to a particular list of agreements, but to a particular economic consequence, which may be produced by quite different sorts of agreements in varying times and circumstances."[3] "[T]he phrase 'restraint of trade' is best read to mean 'undue restraint.' "[4] Notably, the actual text of the Sherman Act generally has not been a central pillar in constructing the definition of an unreasonable restraint of trade; judicial doctrines, following a common law approach in developing doctrines through case law, have played that role.[5]

As analyzed in section 34.04[3], "[r]estraints can be unreasonable in one of two ways. A small group of restraints are unreasonable *per se* because they always or almost always tend to restrict competition and decrease output . . . , [whereas r]estraints that are not unreasonable *per se* are judged under the 'rule of reason.' "[6]

Generally, to state a claim under section 1, a plaintiff must allege: (1) an agreement, contract, or conspiracy by two or more entities; (2) designed to achieve an unlawful objective; with (3) actual or potential anticompetitive effects, unless

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[Section 34.04[1]]

[1]15 U.S.C.A. § 1. A violation of section 1 constitutes a felony and is punishable by a fine of up to $100,000,000 for corporations or up to $1,000,000 for all others and/or by imprisonment for up to ten years. 15 U.S.C.A. § 1. A civil action may be maintained for injunctive relief and/or treble damages. 15 U.S.C.A. §§ 15, 26.

[2]*Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 885–86 (2007); *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

[3]*Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 731 (1988). *Accord American Needle, Inc. v. National Football League*, 560 U.S. 183, 195 (2010).

[4]*Ohio v. American Express Co.*, 138 S. Ct. 2274, 2283 (2018), *quoting Standard Oil Co. v. United States,* 221 U.S. 1, 59-60 (1911).

[5]*See American Needle, Inc. v. National Football League*, 560 U.S. 183, 189 (2010) (noting that a literal construction of the Sherman Act would sweep in all private contracts, which is not what Congress could have meant to do); *see also* Daniel A. Farber and Brett H. McDonnell, "Is There a Text in This Class? The Conflict Between Textualism and Antitrust," Boalt Working Papers in Public Law (Jun. 7, 2004), http://escholarship.org/uc/boaltwp.

[6]*Ohio v. American Express Co.*, 138 S. Ct. 2274, 2283-84 (2018) (emphasis in original; internal quotations and citations omitted).

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the conduct is such that it is assumed to almost always have anti-competitive effects.[7]

Among other cases involving the digital economy, one court found discount real estate broker REX not likely to succeed on its Sherman Act I claim against online real estate listing service Zillow, over Zillow's decision to move from syndication agreements with hundreds of Multiple Listing Services and thousands of individual brokers and franchise brands to IDX feeds, which were provided under non-negotiable agreements that required Zillow to follow a "No-Commingling Rule," using a two-tab listing display with one tab labeled "Agent Listings" and the other labeled "Other Listings," with REX listings allegedly concealed under "Other Listings."[8]

A court likewise denied Parler's motion for a preliminary injunction against Amazon Web Services where Parler had alleged that Amazon was favoring Twitter by terminating its hosting services. In so ruling, the court noted that AWS suspended services to Parler for Terms of Use violations.[9]

34.04[2] The Fundamental Requirement of a Conspiracy, Agreement, or Contract

In all section 1 cases, an agreement, a contract, or a conspiracy—*i.e.*, a conscious commitment to a common scheme[1]—between two or more entities to restrain trade,

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[7] *See, e.g.*, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 885–86 (2007); *Texaco, Inc. v. Dagher*, 547 U.S. 1, 5 (2006); *Bolt v. Halifax Hosp. Medical Center*, 891 F.2d 810, 820 (11th Cir. 1990).

[8] *See Real Estate Exchange Inc. v. Zillow Inc.*, C21-312 TSZ, 2021 WL 2352043, at *5-7 (W.D. Wash. June 9, 2021) (denying plaintiff's motion for a preliminary injunction where plaintiff was found not likely to prevail on the merits based on application of the Rule of Reason; "Even assuming that Plaintiff could show that the challenged restraint has a substantial anticompetitive effect, thereby harming consumers in the relevant market, Zillow Defendants have demonstrated, under the second prong, that procompetitive rationales likely outweigh the alleged anticompetitive aspects of the challenged restraint.").

[9] *See Parler LLC v. Amazon Web Services, Inc.*, __ F. Supp. 3d __, 2021 WL 210721 (W.D. Wash. 2021).

[Section 34.04[2]]

[1] *Monsanto Co. v. Spray–Rite Serv. Corp.*, 465 U.S. 752, 764, 768 (1984) (holding that a plaintiff must offer "direct or circumstantial evidence that reasonably tends to prove . . . a conscious commitment to a common scheme designed to achieve an unlawful objective.").

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must be established.[2] Courts will scrutinize antitrust complaints, at the pleading stage, for sufficient factual assertions that make the existence of a conspiracy (as well as anticompetitive effects) plausible.[3] "Rarely do co-conspirators plainly state their purpose. As a result, courts often must evaluate circumstantial evidence of a conspiracy by weighing 'plus factors, which, when viewed in conjunction with the parallel acts, can serve to allow a fact-finder to infer a conspiracy.' "[4] A conspiracy may be found if there is conduct "that tends to exclude the possibility of independent action"[5] and may exist "even where one of the conspirators participates involuntarily or under coercion."[6] On the other hand, "conduct as consistent with permissible competition as with

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[2]15 U.S.C. § 1; *American Needle, Inc. v. National Football League*, 560 U.S. 183, 189 (2010).

[3]*See, e.g.*, *North American Soccer League, LLC v. United States Soccer Federation, Inc.*, 883 F.3d 32, 39-41 (2d Cir. 2018) (affirming dismissal where the plaintiff failed to allege either direct or indirect evidence of concerted action under the *Monsanto–Matsushita* framework described in this section of the chapter, noting that organizational decisions by trade associations do not necessarily constitute concerted action that violates section 1 of the Sherman Act); *Starr v. Sony BMG Music Entertainment*, 592 F.3d 314 (2d Cir. 2010) (upholding the sufficiency of the complaint that competing major record labels conspired to fix prices of music distributed over the Internet).

In *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), the U.S. Supreme Court agreed that allegations of an antitrust conspiracy must be pleaded with sufficient particularity to suggest that an agreement was made, and that allowing discovery would be reasonable. *Id.* at 556. "Because § 1 . . . does not prohibit all unreasonable restraints of trade but only restraints effected by a contract, combination, or conspiracy, . . . [t]he crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express . . . ." *Id.* at 553 (citations omitted). A complaint asserting a section 1 claim must allege facts "plausibly suggesting (not merely consistent with)" a conspiracy. *Id.* at 557.

[4]*North American Soccer League, LLC v. United States Soccer Federation, Inc.*, 883 F.3d 32, 39 (2d Cir. 2018), *quoting United States v. Apple, Inc.*, 791 F.3d 290, 315 (2d Cir. 2015) (citation and internal quotation marks omitted).

[5]*Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 768 (1984). *Accord Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554–55 (2007); *In re Elevator Antitrust Litigation*, 502 F.3d 47, 50–52 (2d Cir. 2007); *In re New Motor Vehicles Canadian Export Antitrust Litigation*, 632 F. Supp. 2d 42, 47 n.9 (D. Me. 2009).

[6]*City of Vernon v. Southern California Edison Co.*, 955 F.2d 1361, 1370 (9th Cir. 1992). *Accord MCM Partners, Inc. v. Andrews-Bartlett & Associates, Inc.*, 62 F.3d 967, 973 (7th Cir. 1995); *Cascade Health Solutions*

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illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy."[7] Mere evidence of parallel business behavior (or *conscious parallelism*) will be insufficient to prove the existence of a conspiracy absent the existence of plus factors.[8] Similarly, a corporation may not be deemed to

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v. PeaceHealth, 515 F.3d 883, 917 (9th Cir. 2008).

[7]*Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986); *see also, e.g.*, *Name.Space, Inc. v. Internet Corp. for Assigned Names and Numbers*, 795 F.3d 1124 (9th Cir. 2015) (affirming dismissal of plaintiff's Sherman Act 1 claim, brought by a disappointed potential registrant of a Top Level Domain, over ICANN's 2012 expansion of the Domain Name System, which had alleged that the rules and procedures governing the 2012 Application Round were the result of a conspiracy between ICANN, its board members, and industry insiders, because courts must consider obvious alternative explanations for a defendant's behavior when analyzing plausibility and, in this case, ICANN's decision-making was fully consistent with its agreement with the U.S. Department of Commerce to operate the Domain Name System and root zone directory); *Freedom Watch, Inc. v. Google, Inc.*, 816 F. App'x 497, 500 (D.C. Cir. 2020) (affirming dismissal of plaintiff's complaint accusing Google, Facebook, Twitter and Apple of working together to suppress politically conservative content, because "parallel conduct alone cannot support a claim under the Sherman Act" and Freedom Watch could not explain why the conduct it alleged "tends to show an unlawful conspiracy, rather than lawful independent action by the different Platforms."), *aff'g*, 368 F. Supp. 3d 30, 37-38 (D.D.C. 2019) (dismissing plaintiff's complaint because independent action is not prescribed by section 1 and plaintiffs' amended complaint presented "no facts excluding the possibility that" the companies were acting alone).

[8]*Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 540–41 (1954) ("this Court has never held that proof of parallel business behavior conclusively establishes agreement or . . . a Sherman Act offense"); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 553–54 (2007) (affirming dismissal of a claim asserting parallel action with no facts to show an actual conspiracy, in an opinion that also heightened the pleading requirements to state a claim in federal court); *Posterman v. American Airlines, Inc.*, 747 F. App'x 458 (9th Cir. 2018) (affirming dismissal where the "plus factors" alleged suggested only conscious parallelism in an interdependent oligopoly, which was insufficient to state a claim for collusion under the Sherman Act); *Quality Auto Painting Center, Inc. v. State Farm Indemnity Co.*, 917 F.3d 1249 (11th Cir. 2019) (holding, in a suit by car repair shops against a group of insurance companies, that plaintiffs failed to state a claim for price fixing because alleged uniformity of prices between insurance companies was indicative only of parallel conduct, not of price fixing); *see also, e.g., Brittain v. Twitter, Inc*., No. 19-CV-00114-YGR, 2019 WL 2423375, at *5 (N.D. Cal. June 10, 2019) (dismissing with prejudice plaintiffs' claim against Twitter because plaintiffs' assertion that Twitter, Facebook and YouTube controlled 90 perecent of the social media market alleged, at most, conscious parallelism). Older cases holding that a plaintiff could state a claim by asserting the presence of "plus factors"

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have conspired with its parent or wholly-owned subsidiary.[9] though other corporate forms of ownership may still subject that corporation to liability.[10]

Sherman Act conspiracies typically involve either *horizontal* or *vertical* restraints. "Horizontal conspiracies involve agreements among competitors at the same level of competition to restrain trade . . . [while v]ertical conspiracies . . . involve agreements between competitors at different levels of competition . . . ."[11]

34.04[3] Distinguishing Cases Requiring *Per se* and Rule of Reason Analysis

The U.S. Supreme Court has held that certain practices, by their very nature, are *per se* illegal such that no inquiry is made into their market effects or into any alleged procompetitive justifications for their conduct, while other actions must be judged by a rule of reason to determine their

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such as a market with only a few competitors who exchange information directly at trade association meetings and increase their prices even when faced with falling costs—as in *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 627-29 (7th Cir. 2010), which relied on an inference of conspiratorial conduct from ostensibly parallel conduct—may not satisfy the more exacting pleading requirements of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 553–54 (2007). *See, e.g.*, *Bona Fide Conglomerate, Inc. v. SourceAmerica*, Case No. 14cv0751-GPC-DHB, 2015 WL 12028458, at *3 (S.D. Cal. Mar. 4, 2015) (distinguishing *In re Text Messaging Antitrust Litig.* as a case decided "when *Twombly* was a 'recent decision, and its scope unsettled.' ").

[9] *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769-73 (1984). *Accord Doe v. Hammond*, 502 F. Supp. 2d 94, 98 (D.D.C. 2007).

[10] In *American Needle, Inc. v. NFL*, 560 U.S. 183 (2010), the U.S. Supreme Court held that, because joint action by companies presented a greater risk of anti-competitive outcomes than did single action by a lone actor, the test for determining whether two corporately related companies could be deemed a single actor was *not* whether the parties were legally distinct. *Id.* at 191. Rather, the test focused on how the parties actually operate. For example, if competitors form a holding company as a means of coordinating illegal activity, then they cannot argue that their relationship with that holding company is an intracorporate one that allows them to escape the ambit of the antitrust laws. *See id.* (citing and discussing, among other cases, *United States v. Sealy, Inc.*, 388 U.S. 350 (1967)).

[11] *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d 802, 805 (6th Cir. 1988) (citation omitted). *Accord Nitro Distributing, Inc. v. Alticor, Inc.*, 565 F.3d 417, 424 (8th Cir. 2009).

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legality.[1] "*Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct."[2] These horizontal practices include price fixing,[3] group boycotts,[4] and bid rigging.[5] Horizontal agreements to allocate customers or territories also have been found to be *per se* illegal.[6] Likewise, an agreement between entities in the same market to reduce production or not to compete with one another may constitute a *per se* violation of section 1 of the Sherman Act.[7] "Typically, only 'horizontal'

[Section 34.04[3]]

[1]*See Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958) ("there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without any elaborate inquiry into the precise harm they have caused or the business excuse for their use"); *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723–24 (1988); *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007); *see also, e.g.*, *Aguilar v. Atl. Richfield Co.*, 25 Cal. 4th 826, 851 (2001).

[2]*National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 103–04 (1984). *Accord Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007).

[3]*See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940) (a combination "formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*"); *see also Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007); *Arizona v. Maricopa County Medical Soc.*, 457 U.S. 332, 347–48 (1982).

[4]*See, e.g.*, *Fashion Originators' Guild of America v. Federal Trade Commission*, 312 U.S. 457 (1941); *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990); *United States v. Green*, 592 F.3d 1057, 1068 (9th Cir. 2010).

[5]*See National Soc. of Professional Engineers v. U. S.*, 435 U.S. 679 (1978); *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross and Blue Shield*, 552 F.3d 430, 434–35 (6th Cir. 2008); *United States v. Joyce*, 895 F.3d 673, 677-78 (9th Cir. 2018).

[6]*See Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007); *United States v. Topco Associates, Inc.*, 405 U.S. 596, 606-11 & n.10 (1972); *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078, 1088–89 (5th Cir. 1978); *United States v. Joyce*, 895 F.3d 673, 677-79 (9th Cir. 2018) (holding that bid rigging in the market for foreclosed property was a *per se* violation); *see generally Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958) (analyzing horizontal restraints).

[7]*See National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 109 (1984) ("As a matter of law, the absence of proof of market power does not justify a naked restriction on

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restraints—restraints 'imposed by agreement between competitors'—qualify as unreasonable *per se*."[8]

Some challenged conduct, while not *per se* illegal, may face "quick-look" or abbreviated rule of reason analysis.[9] This truncated analysis applies in situations where "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets."[10] In such a situation, the burden shifts to the defense to proffer a plausible pro-competitive justification or justifications for the challenged action(s), sufficient to traverse the evident anticompetitive effects.[11]

All other restraints, such as almost all vertical restrictions, are judged by the rule of reason.[12] As analyzed below in section 34.05[2], this test depends on an accurate definition of the relevant market. Under the rule of reason test, "the fact finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[13] The rule of reason "requires courts to conduct a fact-specific

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price or output but, to the contrary, when there is an agreement not to compete in terms of price or output, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement"). *Accord Gordon v. Lewistown Hosp.*, 423 F.3d 184, 210 (3d Cir. 2005).

[8] *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2283-84 (2018) (emphasis in original), *quoting Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 730 (1988).

[9] *See California Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999); *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290, 317 (2d Cir. 2008).

[10] *California Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999); *North Texas Specialty Physicians v. FTC*, 528 F.3d 346, 360 (5th Cir. 2008).

[11] *California Dental Ass'n v. FTC*, 526 U.S. 756, 780 (1999); *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290, 308 (2d Cir. 2008).

[12] *See Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (recognizing that non-price vertical restraints may promote inter-brand competition, even if they retard intra-brand competition); *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (holding that Sherman Act vertical price-fixing conduct henceforth to be judged under rule of reason).

[13] *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977); *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006); *E & L Consulting, Ltd. v. Doman Industries Ltd.*, 472 F.3d 23, 29 (2d Cir. 2006).

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assessment of 'market power and market structure . . . to assess the [restraint]'s actual effect' on competition."[14] Consequently, application of the rule of reason often (but not necessarily) involves a wide-ranging, nuanced, and case-specific, not to mention expensive, inquiry.[15]

The rule of reason requires courts to evaluate a practice's effect on competition by "taking into account a variety of factors, including specific information about the relevant business, its condition before and after the [practice] was imposed, and the [practice's] history, nature, and effect."[16] The "goal is to 'distinguis[h] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.' "[17]

As explained by the Supreme Court in *Ohio v. American Express Co.*,[18] a three-step burden-shifting framework should be applied in rule of reason cases: the plaintiff has the initial burden to prove that the challenged restraint has "a substantial anticompetitive effect that harms consumers in the relevant market."[19] If this burden is met, then the burden shifts to the defendant to show "a procompetitive rationale for the restraint. . . . If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means."[20] With respect to the second and third steps, the Court subsequently

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[14]*Ohio v. American Express Co.*, 138 S. Ct. 2274, 2284 (2018), *quoting Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984).

[15]*See Board of Trade of City of Chicago v. United States*, 246 U.S. 231, 238 (1918) (requiring analysis of "the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable[;] [t]he history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, [and] the purpose or end sought to be attained"); *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 34 (D.C. Cir. 2005) (calling for "more nuanced and case-specific inquiry" in many cases).

[16]*State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

[17]*Ohio v. American Express Co.*, 138 S. Ct. 2274, 2284 (2018), *quoting Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007).

[18]*Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018).

[19]*Ohio v. American Express Co.*, 138 S. Ct. 2274, 2284 (2018).

[20]*Ohio v. American Express Co.*, 138 S. Ct. 2274, 2284 (2018) (citations omitted).

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clarified that a procompetitive rationale "does not require businesses to use anything like the least restrictive means of achieving legitimate business purposes."[21] Similarly, in evaluating the third step, the Court cautioned that "antitrust courts must give wide berth to business judgments before finding liability. . . . Similar considerations apply when it comes to the remedy. Judges must be sensitive to the possibility that the 'continuing supervision of a highly detailed decree' could wind up impairing rather than enhancing competition."[22]

As further explained in *NCAA v. Alston*,[23] "[t]hese three steps do not represent a rote checklist, nor may they be employed as an inflexible substitute for careful analysis. As we have seen, what is required to assess whether a challenged restraint harms competition can vary depending on the circumstances."[24] The "whole point of the rule of reason[,]" according to Justice Gorsuch, "is to furnish 'an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint' to ensure that it unduly harms competition before a court declares it unlawful."[25]

Since the late 1970s, the U.S. Supreme Court increasingly has focused on "economic efficiency" as the guide to the

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[21]*NCAA v. Alston*,141 S. Ct. 2141, 2161 (2021). Justice Gorsuch elaborated:

> To the contrary, courts should not second-guess "degrees of reasonable necessity" so that "the lawfulness of conduct turn[s] upon judgments of degrees of efficiency." *Rothery Storage*, 792 F.2d at 227; *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58, n.29 (1977). That would be a recipe for disaster, for a "skilled lawyer" will "have little difficulty imagining possible less restrictive alternatives to most joint arrangements." 11 Areeda & Hovenkamp ¶ 1913b, p. 398 (2018). And judicial acceptance of such imaginings would risk interfering "with the legitimate objectives at issue" without "adding that much to competition." 7 *id.*, ¶ 1505b, at 435–436.

NCAA v. Alston, 141 S. Ct. at 2161.

[22]*NCAA v. Alston*,141 S. Ct. 2141, 2163 (2021).

[23]*NCAA v. Alston*,141 S. Ct. 2141, 2160 (2021).

[24]Justice Gorsuch's discussion of how the circumstances may vary was discussed earlier in section 34.04[3].

[25]*NCAA v. Alston*,141 S. Ct. 2141, 2160 (2021), *citing California Dental Ass'n v. FTC*, 526 U.S. 756, 781 (1999); *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007) (" '[T]he factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition' "); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984); 7 Areeda & Hovenkamp ¶ 1507a, at 442–44 (slightly different "decisional model" using sequential questions).

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antitrust ramifications of challenged conduct for both *per se* and rule of reason cases. Over this same time period, the distinction between *per se* cases and those analyzed under the rule of reason has become more elusive, as the Court has shown itself to be willing to look more closely at practices that previously had been condemned as *per se* illegal. As the Court wrote in 1984, in the context of a tying allegation, "there is often no bright line separating *per se* from Rule of Reason analysis."[26] Justice White explained that "whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same—whether or not the challenged restraint enhances competition."[27] Indeed, the Court noted that the inquiry into market conditions necessary to justify the application of a *per se* rule may not be that different from the analysis required to evaluate the competitive effects of a practice under the rule of reason.[28] Sometimes a court can apply the

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[26]*National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 104 n.25 (1984).

[27]*National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 104 (1984).

[28]Justice White wrote that, "[f]or example, while the Court has spoken of a '*per se*' rule against tying arrangements, it has also recognized that tying may have procompetitive justifications that make it inappropriate to condemn without considerable market analysis." *National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 104 n.25 (1984), *citing Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 11–12 (1984). *NCAA* was a case involving alleged horizontal price fixing and output limitations that were evaluated under the rule of reason because the case involved "an industry in which horizontal restraints on competition are essential if the product is to be available at all." *See* 468 U.S. at 100–01; *see also, e.g.*, *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 16–20 (1979) (upholding a blanket license agreement among composers under the rule of reason in a price-fixing case; because copyright owners have the absolute right to exclude others from using their works, and a would-be licensee such as CBS was not prohibited from contracting directly with a composer to license a single work, the blanket licenses offered by ASCAP and BMI were found to have the pro-competitive effect of promoting licenses in a market characterized by "thousands of users, thousands of copyright owners and millions of compositions" where obtaining individual licenses otherwise would be quite difficult); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 293–98 (1985) (declining to apply a *per se* rule to a group boycott case unless the group possesses "market power or exclusive access to an element essential to competition . . . "; quoting *BMI*, the Court wrote that "such cooperative arrangements would seem to be 'designed to increase economic efficiency and render markets more,

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rule of reason in the "twinkling of an eye."[29] As a consequence, courts sometimes apply what amounts to abbreviated or *quick-look* rule of reason analysis[30] when "an ob-

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rather than less, competitive' "); *In re Northwest Airlines Corp.*, 208 F.R.D. 174, 205 (E.D. Mich. 2002); *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 35 (D.C. Cir. 2005).

[29]*American Needle, Inc. v. National Football League*, 560 U.S. 183, 203 (2010).

[30]*Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820, 830 (3d Cir. 2010), *citing National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 109 n.39 (1984).

Quick-look "is 'an intermediate standard' and 'applies in cases where *per se* condemnation is inappropriate but where no elaborate industry analysis is required to demonstrate the anticompetitive character of an inherently suspect restraint.' " *Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820, 830 (3d Cir. 2010) (quoting and citing other cases). Quick-look analysis is appropriate "when the great likelihood of anticompetitive effects can easily be ascertained," where harm is presumed, and "the defendant must promulgate 'some competitive justification' for the restraint." *Id.* at 831 (quoting *NCAA,* 468 U.S. at 110; *California Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999); and *United States v. Brown University*, 5 F.3d 658, 669 (3d Cir. 1993)). If no legitimate justifications are set forth, the presumption of adverse competitive impact prevails and the practice is deemed impermissible. If the defendant offers a sound, procompetitive justification, however, the court must then proceed to weigh the overall reasonableness of the restraint using a full-scale rule of reason analysis." *Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d at 831 (applying full rule of reason analysis).

For other cases describing or applying the quick-look analysis, *see, e.g., North American Soccer League, LLC v. United States Soccer Federation, Inc.*, 883 F.3d 32, 41-42 (2d Cir. 2018) (explaining that quick-look rule of reason analysis applies when "no elaborate industry analysis is required to demonstrate the anticompetitive character of [the challenged] agreement." *Ind. Fed'n of Dentists*, 476 U.S. at 459 (internal quotation mark omitted), but was inapplicable in that case because "far from being obviously anticompetitive, the Standards [at issue in that case] could be found to have a net procompetitive effect, or no competitive effect at all. . . . Indeed, the Standards are seemingly designed to avoid a flaw in the relevant market: implosion of leagues due to minimal consumer demand and teams' financial instability. Because the alleged restraints might avoid a flaw in the market, the full rule-of-reason analysis applies."); *Viazis v. American Ass'n of Orthodontists*, 314 F.3d 758, 765–66 (5th Cir. 2002); *In re Southeastern Milk Antitrust Litigation*, 739 F.3d 262, 275-76 (6th Cir. 2014) (analyzing quick-look in connection with a summary judgment motion); *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 826 (6th Cir. 2011) (denying petition to overturn an FTC ruling that had been based on both quick-look and rule-of-reason analysis; "We uphold the Commission on the basis of the more extended rule-of-reason analysis without reaching the question of whether to apply quick-look analysis"); *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 491 F.3d 380, 387 (8th Cir. 2007); *Buccaneer Energy*

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server with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets."[31]

California Dental Ass'n v. Federal Trade Commission, a U.S. Supreme Court case from the late 1990s, posits a "sliding scale" along the spectrum from *per se* through quick-look to full-blown rule of reason for courts to use in evaluating challenged conduct.[32] Accordingly, several Circuit Courts of Appeals view the modes of analysis not as three separate tests but "as a continuum, on which the 'amount and range of information needed' to evaluate a restraint varies depending on how 'highly suspicious' and how 'unique' the restraint is."[33] The Supreme Court has suggested that quick-look analysis may be appropriate in evaluating alleged horizontal restraints, but not vertical restraints.[34]

In *NCAA v. Alston*,[35] in affirming judgment for current and former collegiate student athletes over the NCAA's objections that its restrictions on compensation should have been evaluated under abbreviated, quick look analysis, Justice Gorsuch elaborated on when quick look and full rule of reason analysis apply in horizontal restraint cases. Justice

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(USA) Inc. v. Gunnison Energy Corp., 846 F.3d 1297, 1310-12 (10th Cir. 2017) (explaining that under the abbreviated, quick look rule-of-reason analysis, courts will sometimes simply assume the existence of anticompetitive effect where the conduct at issue amounts to a "naked" and effective restraint on price or output that carries "obvious" anticompetitive consequences, which effectively shifts the burden of proof immediately to the defendant to demonstrate countervailing procompetitive effects); *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 36 (D.C. Cir. 2005).

[31] *California Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999).

[32] *California Dental Ass'n v. FTC*, 526 U.S. 756, 780 (1999).

[33] *Continental Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499, 509 (4th Cir. 2002) (internal citation omitted), *citing California Dental Ass'n v. FTC*, 526 U.S. 756, 779–81 (1999).

[34] *See Ohio v. American Express Co.*, 138 S. Ct. 2274, 2285 n.7 (2018) ("Given that horizontal restraints involve agreements between competitors not to compete in some way, this Court concluded [in cases approving of quick-look analysis] that it did not need to precisely define the relevant market to conclude that these agreements were anticompetitive. . . . But vertical restraints are different. . . . Vertical restraints often pose no risk to competition unless the entity imposing them has market power, which cannot be evaluated unless the Court first defines the relevant market.") (citations omitted); *see also Lifewatch Services Inc. v. Highmark Inc.*, 902 F.3d 323, 336 n.8 (3d Cir. 2018) (characterizing quick-look rule of reason analysis as appropriate for analyzing "some horizontal restraints").

[35] *NCAA v. Alston*,141 S. Ct. 2141 (2021).

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Gorsuch, writing for a unanimous court, conceded that joint ventures can have pro-competitive benefits, which stand as a caution against condemning their arrangements too reflexively, but even assuming (without deciding) that the NCAA was a joint venture, that status did not guarantee foreshortened review.[36] He explained:

> [T]he amount of work needed to conduct a fair assessment of these questions can vary. . . . [T]his Court has suggested that sometimes we can determine the competitive effects of a challenged restraint in the " 'twinkling of an eye.' " . . . That is true, though, only for restraints at opposite ends of the competitive spectrum. For those sorts of restraints—rather than restraints in the great in-between—a quick look is sufficient for approval or condemnation.
>
> At one end of the spectrum, some restraints may be so obviously incapable of harming competition that they require little scrutiny. . . . Usually, joint ventures enjoying such small market share are incapable of impairing competition. Should they reduce their output, "there would be no effect upon market price because firms making up the other 94% of the market would simply take over the abandoned business."
>
> At the other end, some agreements among competitors so obviously threaten to reduce output and raise prices that they might be condemned as unlawful per se or rejected after only a quick look. *See Dagher*, 547 U.S. at 7, n.3; *California Dental Assn. v. FTC*, 526 U.S. 756, 770 (1999). Recognizing the inherent limits on a court's ability to master an entire industry—and aware that there are often hard-to-see efficiencies attendant to complex business arrangements—we take special care not to deploy these condemnatory tools until we have amassed "considerable experience with the type of restraint at issue" and "can predict with confidence that it would be invalidated in all or almost all instances."[37]

The more in-depth discussion of certain issues under a rule of reason analysis (or the quasi-*per se* analysis applicable to tying) as the centrality of market definition to

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[36] *NCAA v. Alston*,141 S. Ct. 2141, 2155 (2021).

[37] *NCAA v. Alston*,141 S. Ct. 2141, 2155-56 (2021). The Court observed that "[n]one of this helps the NCAA. The NCAA *accepts* that its members collectively enjoy monopsony power in the market for student-athlete services, such that its restraints can (and in fact do) harm competition. . . . Even if the NCAA is a joint venture, then, it is hardly of the sort that would warrant quick-look approval for all its myriad rules and restrictions." *Id.* at 2156 (emphasis in original; citations omitted). Justice Gorsuch further observed "That *some* restraints are necessary to create or maintain a league sport does not mean *all* 'aspects of elaborate interleague cooperation are.' " *Id.* (emphasis in original; citation omitted).

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determining a presumption of anti-competitive effects appears later in this chapter.[38] In general, however, the following additional issues are important to keep in mind:

First, a company can rebut evidence of anticompetitive conduct by establishing that it had a valid justification for the conduct—that is, one related directly or indirectly to enhancing consumer welfare.[39] For example, conduct may generate cost savings that will be passed on to consumers, or the restraint may be necessary to bring a new product to the market.[40] Assuming that a company can show it had a valid business justification for that conduct, it then needs to be determined whether the conduct substantially promotes those efficiencies[41] and whether efficiencies can be achieved by substantially less restrictive available alternatives.[42] Though the balancing of anti- and pro- competitive effects is required in the rule of reason context, it is disputed whether this type of balancing is also required in deciding section 2 monopoly claims discussed earlier.[43] Similarly, while

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[38] *See, e.g., infra* § 34.05[2].

[39] *See, e.g.*, *Data General Corp. v. Grumman Systems Support Corp.*, 36 F.3d 1147, 1183 (1st Cir. 1994), *abrogated on other grounds by Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 160 n.2 (2010); *see also, e.g.*, *Aspen Skiing Co. v. Aspen Skiing Highlands Corp.*, 472 U.S. 585, 609-11 (1985). There is also the question of whether a plaintiff or the government should bear the burden of disproving efficiencies, once a firm with substantial market power has shown that they are plausible results of its conduct. *See United States v. Microsoft*, 253 F.3d 34, 59 (D.C. Cir. 2001) (*en banc*).

[40] *See, e.g.*, Philip E. Areeda & Herbert Hovenkamp, Antitrust Law, ¶ 1504e, at 410-11 (3d ed. 2010).

[41] *See, e.g.,* Philip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1505a, at 415-16 (3d ed. 2010); *see also id.* ¶ 1507a, at 426.

[42] *See, e.g.,* Philip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 658f2, at 192 (3d ed. 2010); *id.* ¶ 1505b, at 417-19; *id.* ¶ 1505a, at 384-85; *id.* ¶ 1505b, at 385-87; *see also, e.g.*, *National Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 119 (1984).

[43] *Compare, e.g.,* Philip E. Areeda & Herbert Hovenkamp, Antitrust Law, ¶¶ 1507d, 1508a, at 403, 435-36 (3d ed. 2010) (explaining that this type of balancing occurs in rule of reason cases involving joint conduct); *Microsoft*, 253 F.3d at 59 (construing the balancing of pro- and anti- competitive effects under the rule of reason as being applicable in the monopoly context); *with id* ¶ 658f, at 189, 191-92 (explaining that balancing should not be undertaken in monopolization cases "except in the gross sense that trivial justifications should be disregarded or in circumstances where the proffered business justification is "insubstantial" such as when a less restrictive alternative is "obvious"). However, even such balancing

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conducting a less restrictive alternative analysis is required in applying the rule of reason, who carries the burden of proof is still disputed, let alone whether this same analysis is also appropriate in section 2 monopoly claims.[44]

34.04[4] Digital Books

The application of *per se* liability to tech companies, saw a resurgence during the Obama Administration, as evidenced by *United States v. Apple, Inc*.[1] In that case, which resulted in three separate opinions from a 3-judge appellate panel, the federal government brought suit under section 1 of the Sherman Act, alleging that Apple and five book publishers conspired to raise prices on ebooks (digital books published online for reading on the web, on computers, tablets and smartphones) as a quid pro quo for the publishers' supporting the introduction of Apple's then-new iBook platform for reading ebooks.[2] The publishers settled; only Apple proceeded to trial.

The trial addressed the alleged intersection of two issues: On the one hand, Apple wanted to introduce a new product to enter the ebooks market and compete with Amazon's Kindle; on the other hand, the book publishers, facing declining prices from Amazon as the leading ebooks seller, wanted some means of stabilizing or even increasing prices.[3] Apple worked with the publishers to help them, in exchange for their support of the iBookstore.

The government alleged that Apple served as the hub among the various publisher spokes to raise prices for Amazon and allegedly implemented an agency model for pricing applicable to all ebooks under which the publisher (not the

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may be done in the "twinkling of an eye" because economic theory allows for a judgment to be made on the obvious effects of a restraint, *see, e.g., id.* ¶ 1508a, at 435-6; *American Needle, Inc. v. National Football League*, 560 U.S. 183, 203 (2010), or it may be more involved, Philip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1507d, at 430-31 (3d ed. 2010).

[44]*See, e.g.,* Philip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 658f2, at 192 (3d ed. 2010); *id.* ¶ 1505b, at 417-19; ¶ 1505a, at 384-85; *id.* ¶ 1505b, at 385-87; *see also, e.g.*, *National Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 119 (1984).

[Section 34.04[4]]

[1]*United States v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1376 (2016).

[2]*United States v. Apple, Inc.*, 791 F.3d 290, 296-97 (2d Cir. 2015).

[3]*United States v. Apple, Inc.*, 791 F.3d 290, 296 (2d Cir. 2015).

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retailer) set ebook prices, with the retailer getting a commission.[4] It alleged that Apple employed most-favored nation clauses ("MFNs"), pursuant to which Apple allegedly incentivized publishers to commit to its agency pricing model, because these clauses would otherwise have required the publishers to give Apple the same lower prices for ebooks that they gave to Amazon.[5]

The trial court found that Apple's agreement with major publishers succeeded in raising prices for ebooks.[6] Within two weeks, the weighted average price of Publisher Defendants' ebooks increased by 18.6%.[7] The increase in prices for ebooks even caused certain hardcover prices to increase because the price for an ebook was derived from the price for its corresponding hardcover edition.[8]

The trial court found evidence of an alleged conspiracy between Apple and the five publishers, allegedly to fix prices on ebooks, which the Second Circuit affirmed on appeal.[9] The court held that Apple's alleged participation in, and facilitation of, the conspiracy, including its use of most-favored-nation clauses, was essential to prevent Amazon from picking off the publishers one by one.[10]

Despite the existence of alleged horizontal agreements, Apple contended that (1) *per se* condemnation was inappropriate because its contracts with the publisher defendants were vertical, not horizontal, (2) even if the agreements were horizontal, they promoted "enterprise and productivity," and (3) even if the agreements were horizontal, they did not involve the kind of alleged price-fixing conspiracy that

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[4]*United States v. Apple, Inc.*, 791 F.3d 290, 302-04 (2d Cir. 2015).

[5]*United States v. Apple, Inc.*, 791 F.3d 290, 304-05 (2d Cir. 2015). Amazon was not a party to the litigation and therefore did not have an opportunity to contest the government's assertions, which were treated as true on appeal.

[6]*United States v. Apple, Inc.*, 791 F.3d 290, 327 (2d Cir. 2015).

[7]*United States v. Apple, Inc.*, 791 F.3d 290, 328 (2d Cir. 2015). The trial court had found that the price of defendants' ebooks had increased 14.2% for new releases, 42.7% for New York Times Bestsellers and 18.6% overall. *United States v. Apple, Inc.*, 952 F. Supp. 2d 638, 682 (S.D.N.Y. 2014), *aff'd,* 791 F.3d 290, 328 (2d Cir. 2015).

[8]*See United States v. Apple, Inc.*, 791 F.3d 290, 310 (2d Cir. 2015).

[9]*United States v. Apple, Inc.*, 791 F.3d 290, 319 (2d Cir. 2015).

[10]*See United States v. Apple, Inc.*, 791 F.3d 290, 319-20 (2d Cir. 2015).

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deserved *per se* condemnation.[11]

Judge Deborah Ann Livingston, writing for the majority of the Second Circuit panel, rejected Apple's first argument because she found the restraint to be horizontal. The correct question, in her view, was not whether a defendant's particular relationship was vertical or whether its *role* in an alleged scheme was unreasonable, but whether the specific *restraint* at issue was unreasonable.[12] The majority drew support from other circuits and the Supreme Court for the proposition that in an alleged hub and spoke conspiracy, all participants are liable when the objective of the conspiracy is a *per se* unreasonable restraint of trade.[13]

Judge Livingston rejected Apple's second argument because even under a broad reading of Supreme Court precedent, the only kinds of "enterprise and productivity" that provide cognizable procompetitive justifications for applying rule of reason analysis, in the view of the majority, are those that result from a potentially efficient joint venture, which was not found in that case.[14] Nor, she reasoned, was price-

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[11]*United States v. Apple, Inc.*, 791 F.3d 290, 321 (2d Cir. 2015).

[12]*United States v. Apple, Inc.*, 791 F.3d 290, 322-25 (2d Cir. 2015).

[13]*United States v. Apple, Inc.*, 791 F.3d 290, 322-24 (2d Cir. 2015), *citing Leegin Creative Leather Products, Inc. v. PSKS, Inc.,* 551 U.S. 877, 893 (2007); *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 435 n.3 (6th Cir. 2008).

[14]*United States v. Apple, Inc.*, 791 F.3d 290, 325-26 (2d Cir. 2015). The panel explained that in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.,* 441 U.S. 1 (1979), the defendants were corporations formed by copyright owners to negotiate "blanket licenses" allowing licensees to perform any of the licensed works for a flat fee. 441 U.S. at 4–6. It explained that "[a]lthough this scheme literally amounted to 'price fixing' by the defendants' members, the Court upheld it under the rule of reason because blanket licenses were the only way to eliminate the 'prohibitive' cost of each copyright owner's individually negotiating licenses, monitoring licensees' use of their work, and enforcing the licenses' terms." 791 F.3d at 326, *quoting BMI,* 441 U.S. at 20–21.

In *National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 103 (1984), the Supreme Court relied on *BMI* in applying the rule of reason to (but ultimately striking down) restrictions placed by the NCAA on the number of football games that its members could agree with television networks to broadcast. Contrasting that case, the Second Circuit panel in *Apple* explained that "[m]any of the NCAA's restrictions on its members were 'essential if the product [amateur athletics] is to be available at all,' so a 'fair evaluation' of the broadcast restrictions' 'competitive character require[d] consider-

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fixing necessary for there to be a retail ebook market.[15]

Finally, the majority rejected Apple's third argument because *per se* condemnation is not limited to agreements that "literally set or restrict prices," but rather is justified for any alleged conspiracy "formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity."[16] Because the alleged purpose of the agreements was to counter Amazon's allegedly low pricing of ebooks and raise prices—and because the agreements actually did allegedly result in increased prices—the appellate panel affirmed application of the *per se* rule".[17]

The majority also rejected the dissent's argument that Apple's alleged actions were necessary as a form of self-help to reduce the market share of Amazon:

> [T]he dissent's theory—that the presence of a strong competitor justifies a horizontal price-fixing conspiracy—endorses a concept of marketplace vigilantism that is wholly foreign to the antitrust laws. By organizing a price-fixing conspiracy, Apple found an easy path to opening its iBookstore, but it did so by ensuring that market-wide ebook prices would rise to a level that it, and the Publisher Defendants, had jointly agreed upon. Plainly, competition is not served by permitting a market entrant to *eliminate price competition* as a condition of entry, and it is cold comfort to consumers that they gained a new ebook retailer at the expense of passing control over all ebook prices to a cartel of book publishers—publishers who, with Apple's help, collectively agreed on a new pricing model precisely to *raise* the price of ebooks and thus protect their profit margins and their very existence in the marketplace in the face of the admittedly strong headwinds created by the new technology.[18]

Judge Lohier concurred in Judge Livingston's *per se* analysis but did not join the part of her opinion which rejected procompetitive benefits of Apple's agreement with the publishers (which Judge Livingston found failed even under rule of reason analysis), such as the eventual price decreases in the ebook industry and the various technological innovations embedded in an iPad, because Judge Lohier believed

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ation of the NCAA's justifications for the restraints.' " *Apple,* 791 F.3d at 326, *quoting NCAA*, 468 U.S. at 101, 103.

[15] *United States v. Apple, Inc.*, 791 F.3d 290, 326 (2d Cir. 2015).

[16] *United States v. Apple, Inc.*, 791 F.3d 290, 327 (2d Cir. 2015), *quoting United States v. Socony-Vacuum Oil*, 310 U.S. 150, 223 (1940)).

[17] *United States v. Apple, Inc.*, 791 F.3d 290, 326-29 (2d Cir. 2015).

[18] *United States v. Apple, Inc.*, 791 F.3d 290, 298 (2d Cir. 2015).

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that Apple's appeal rose or fell based on the application of the *per se* rule.

Judge Dennis Jacobs dissented, writing that he would have reversed the district court's finding of liability. In Judge Jacobs view, Apple could not match the existing price of $9.99, which for many books was lower than what Amazon was actually paying publishers, and therefore proposed a distribution model to publishers that would lower that barrier to retail entry. The new distribution model was implemented by several terms in Apple's contracts with publishers: agency pricing, tiered price caps, and a most-favored-nation clause. The publishers were not in a position individually to challenge Amazon's alleged below-price cost for ebooks, but as a group of the six largest publishers agreed to Apple's terms and jointly pressured Amazon to adopt agency pricing. The publishers thereby prevailed in what the district court found to be a horizontal price-fixing conspiracy. The barrier to entry thus removed, Apple entered the retail market as a formidable competitor. In Judge Jacobs' view, the district court committed three major errors: (1) it ruled that a vertical enabler of a horizontal price-fixing conspiracy is in *per se* violation of antitrust laws, but the Supreme Court has held that a vertical agreement designed to facilitate a horizontal cartel would need to be unlawful under the rule of reason;[19] (2) the district court's alternative ruling, under the rule of reason, was erroneous because it failed to recognize that Apple's role as a vertical player differentiated it from the publishers; and (3) Apple's conduct, assessed under the rule of reason on the horizontal plane of retail competition, was "unambiguously and overwhelmingly" pro-competitive because Apple was a major potential competitor in a market dominated by a third party company that possessed a 90 percent market share.

Judge Jacobs also disagreed with the majority's (and district court's) "implicit assumption that competition should be genteel, lawyer-designed, and fair under sporting rules, and that antitrust law is offended by gloves-off competition."[20]

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[19] *United States v. Apple, Inc.*, 791 F.3d 290, 340-53 (2d Cir. 2015) (Jacobs, J. dissenting), *citing Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 893 (2007).

[20] *United States v. Apple, Inc.*, 791 F.3d 290, 342 (2d Cir. 2015) (Jacobs, J. dissenting).

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34.04[5] Tying—and Its Implications For Technology Companies

Section 1 of the Sherman Act has been held to prohibit a seller from *tying* the sale of one product to the purchase of another if the seller thereby avoids competition in the market for the "tied" product.[1] Potential ties involving ecommerce businesses have been closely scrutinized because information-based goods or services can be relatively easily packaged together for sale.[2] The phenomenon has been alleged in computer operating systems, audio-video content distribution mechanisms, and "smart" mobile telephones. As explained by the U.S. Supreme Court in 1984, "[t]he essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms."[3] Subsequently, the Court has clarified that the Sherman Act forbids not only *positive ties*, which compel the purchase of another product and thus are likely to restrain competition, but also *negative ties*, which are arrangements that condition the sale of one product on an agreement not to purchase a second product from competing suppliers.[4]

In order to state a *per se* claim of tying, a plaintiff must show the following:

[Section 34.04[5]]

[1]*See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 9–18 (1984); *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 463 n.8 (1992); *Blough v. Holland Realty, Inc*, 574 F.3d 1084, 1088 (9th Cir. 2009). It can sometimes be questioned whether section 1 instead of section 2 is appropriate, particularly where only a single entity is accused of tying its own two products together. *Cf. Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal and Professional Publications, Inc.*, 63 F.3d 1540, 1550 (10th Cir. 1995). *See Jefferson Parish Hosp.*, 466 U.S. at 23 n.39.

[2]*See, e.g., United States v. Microsoft Corp.*, 253 F.3d 34, 84–95 (D.C. Cir. 2001); *see generally Datel Holdings Ltd. v. Microsoft Corp.*, 712 F. Supp. 2d 974 (N.D. Cal. 2010).

[3]*Jefferson Parish Hosp.*, 466 U.S. at 12.

[4]*See Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 463 (1992) (evidence that Kodak would sell photocopier parts to third parties only if they agreed not to purchase service from ISOs was insufficient to preclude summary judgment on the issue of tying); *Abraham v. Intermountain Health Care, Inc.*, 394 F. Supp. 2d 1312, 1320 (D. Utah 2005).

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(1) the tied products are actually two distinct products;
(2) there is an agreement or condition (express or implied) that establishes the tie;
(3) the entity accused of tying has sufficient economic power in the market for the tying product to distort consumers' choices with respect to the tied product; and
(4) the tie forecloses a substantial amount of commerce in the market for the tied product.[5]

Tying law now incorporates the concept of "market power," essentially "the power to force a purchaser to do something that he [or she] would not do in a competitive market,"[6] or more technically defined as the power to raise prices.[7] The fact that a defendant has a patent in the alleged tying product, however, does not give rise to a presumption of market power, which the plaintiff must still prove.[8] In determining what market share of the tying product market is sufficiently high to infer market power, the Court has rejected a thirty percent market share as being sufficient.[9] However, the Court has never defined a specific market share threshold for inferring market power[10] and has held that a firm need not have a monopoly or dominant position in the tying product market for it to have market power.[11] This market screen reflects not only congressional intent on when tying conduct

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[5] *Eastman Kodak Co.*, 504 U.S. at 460–66; *Data General Corp. v. Grumman Systems Support Corp.*, 36 F.3d 1147, 1178–79 (1st Cir. 1994); *BookLocker.com, Inc. v. Amazon.com, Inc.*, 650 F. Supp. 2d 89, 98 (D. Me. 2009); *see also Static Control Components v. Lexmark Int'l*, 487 F. Supp. 2d 81 (E.D. Ky. 2007) (concerning alleged tying arrangement involving printer toner cartridges).

[6] *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 14 (1984). *Accord National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 109 n.8 (1984); *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 36 (2006).

[7] *See, e.g., Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 533 (3d Cir. 1998); *Port Dock & Stone Corp. v. Oldcastle Northeast, Inc.*, 507 F.3d 117, 123–24 (2d Cir. 2007).

[8] *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 31 (2006).

[9] *See Jefferson Parish Hosp.*, 466 U.S at 26-27 (30% not enough).

[10] *Id.* at 38 n.2 (concurring op.).

[11] *United States Steel Co. v. Fortner Corp.*, 429 U.S. 610, 620 (1977) ("these decisions do not require that the defendant have a monopoly or even a dominant position throughout the market for a tying product.").

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should be *per se* illegal but also when tying conduct presents the potential for anti-competitive effects.[12] Those effects principally involve foreclosure in the *tied product* market although, as the tying firm obtains market share in the tied product market, those effects can include increased prices paid by consumers in the tying or tied product markets as well.[13]

In the absence of an express agreement, tying may be proven by evidence of coercion or unwanted sales.[14] Merely because a company markets its goods or services to discourage sales to competitors, however, does not make a practice illegal where there is no evidence that consumers chose the defendant's product for any reason other than its perceived superiority to those of competitors.[15] In most jurisdictions, products generally may be bundled and sold together—so long as they also can be separately purchased in a competitive market.[16] Courts of appeal have taken different positions on the proper way to analyze bundled discounts and

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[12]*See, e.g.*, *Jefferson Parish Hosp.*, 466 U.S. at 10-12 (majority op.) (refusing to reconsider modified *per se* rule against tying arrangements because rule reflected anti-competitive dangers of tying arrangements and fit congressional intent regarding the Clayton Act).

[13]*See, e.g.*, *Jefferson Parish Hosp.*, 466 U.S. at 10-11 & n.15 (in passing the Clayton Act, Congress expressed great concern about the anti-competitive effects of tying, including the use of tying arrangements in different industries to build up and shut out competition); *id.* at 14 (noting that a tying arrangement can be used to shield inferior products from competition); *id.* at 36 (conc. op.) (acknowledging that tying arrangements may be anti-competitive because they can be used to create additional market power in the tied product market); *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 6 (1958) (basis for rule on tying is to prevent foreclosure in the tied product market); European Commission Guidelines on Vertical Restraints, 2000 O.J. (C291) 42 ("The main negative effect of tying on competition is possible foreclosure on the market of the tied product"); Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 Harv. L. Rev. 397, 400-02, 477-78 (2009).

[14]*Data General Corp. v. Grumman Systems Support Corp.*, 36 F.3d 1147, 1180 (1st Cir. 1994); *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1500 (8th Cir. 1992); *Datel Holdings Ltd. v. Microsoft Corp.*, 712 F. Supp. 2d 974 (N.D. Cal. 2010).

[15]*See Data General Corp. v. Grumman Systems Support Corp.*, 36 F.3d 1147, 1181 (1st Cir. 1994) (tying not found despite evidence that Data General organized its service program to prevent sales to competing service providers, based on the absence of any evidence of coercion); *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 913 (9th Cir. 2008).

[16]*See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 11–12

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rebates.[17]

In software- and information-based industries, it may not always be readily apparent whether different features or services actually constitute separate products. To constitute a separate product, there must be evidence of sufficient consumer demand for each individual product, and not merely as part of an integrated product or package.[18]

Tying claims may be especially difficult to prove in cases involving multimedia content, information technology, or software, because courts are loath to stifle innovation, which would run contrary to one of the principles underlying antitrust law, and are reluctant to enmesh themselves in technological questions which they may be ill equipped to handle. One may question whether the complexity of a legal analysis is an appropriate basis for a court to decline to apply antitrust principles. Nevertheless, in *United States v. Microsoft Corp.*,[19] and other cases[20] courts have generally avoided finding tie-ins except where the integration of products was done "for the purpose of tying the products, rather than to achieve some technologically beneficial result."[21]

(1984); *Subsolutions, Inc. v. Doctor's Associates, Inc.*, 436 F. Supp. 2d 348, 352–53 (D. Conn. 2006).

[17]*Compare LePage's Inc. v. 3M*, 324 F.3d 141, 147 (3d Cir. 2003) (condemning bundling even where sales not made below cost) *with Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 902 (9th Cir. 2008) (applying to bundling an analysis similar to predatory-pricing analysis); *see generally* Nicholas Economides, Tying, Bundling, and Loyalty/Requirement Rebates, NET Institute, Working Paper # 10-26 (Dec. 2010).

[18]*Data Gen. Corp.*, 36 F.3d at 1179 (summarizing other cases); *see also Jefferson Parish Hosp.*, 466 U.S. at 40 (O'Connor, J., concurring) ("When the economic advantages of joint packaging are substantial the package is not appropriately viewed as two products, and that should be the end of the tying inquiry"); *Subsolutions, Inc. v. Doctor's Associates, Inc.*, 436 F. Supp. 2d 348, 352–53 (D. Conn. 2006).

[19]*United States v. Microsoft Corp.*, 147 F.3d 935, 948–50 (D.C. Cir. 1998); *see generally infra* § 34.10[2][C] (analyzing the case).

[20]*See, e.g., Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307, 1330 (5th Cir. 1976); *U.S. Philips Corp. v. International Trade Com'n*, 424 F.3d 1179, 1192 (Fed. Cir. 2005); *ILC Peripherals Leasing Corp. v. International Business Machines Corp.*, 458 F. Supp. 423, 439 (N.D. Cal. 1978).

[21]*Microsoft Corp.*, 147 F.3d at 950, quoting *Leasco Response, Inc.*, 537 F.2d at 1330; *see generally New York v. Microsoft Corp.*, 224 F. Supp. 2d 76 (D.D.C. 2002).

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34.04[6] Internet Joint Ventures

Joint ventures, while generally permissible, may violate antitrust laws if they restrain prices or competition.[1] Where a joint venture is a sham—for example, to cover up price fixing by competitors—it may be found illegal as a matter of law.[2] In general, however, where joint ventures even plausibly "mak[e] possible a new product by reaping otherwise unattainable efficiencies" they are subject to, and may well be permissible, under a more discerning rule of reason analysis.[3] In *BMI, Inc. v. CBS, Inc.*,[4] for example, the U.S. Supreme Court upheld BMI and ASCAP's practice of granting blanket licenses to allow performances of copyrighted songs because permission was needed to perform these works and the market was characterized as involving "thousands of users, thousands of copyright owners, and millions of compositions[,]"[5] such that licenses would be difficult to obtain without the practice. *BMI* was subsequently explained as "squarely hold[ing] that a joint selling arrangement may be so efficient that it will increase sellers' aggregate output and

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[Section 34.04[6]]

[1]*Cf. Texaco Inc. v. Dagher*, 547 U.S. 1, 6 (2006) (holding that lawfully created joint venture of multiple entities that separately retail the product of the joint venture can literally price fix through the joint venture without the practice being *per se* illegal); *American Needle, Inc. v. National Football League*, 560 U.S. 183, 196 (2010) (entities cannot necessarily escape the operation of antitrust laws just because they have formed an integrated joint venture); *see generally* United States Dep't of Justice and U.S. Federal Trade Comm'n, Antitrust Guidelines for Collaborations Among Competitors (2000), *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf, for explication of the federal antitrust authorities' enforcement approaches to these types of arrangements.

[2]*See, e.g.*, *Addamax Comp. v. Open Software Found.*, 152 F.3d 48, 52 (1st Cir. 1998). Whether competitors engaged in cartel activities with others in the market can shed liability for those activities by divesting those corporate arms engaged in these activities to a joint venture, from which they still derive profits, is also open to question in light of *dicta* in *American Needle*.

[3]*National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 113 (1984) (quoting and discussing earlier cases). *Accord American Needle, Inc. v. National Football League*, 560 U.S. 183, 202-03 (2010).

[4]*Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979).

[5]*Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 20 (1979).

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thus be procompetitive."[6] Likewise, in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*,[7] the Supreme Court upheld a cooperative arrangement that permitted participating retailers "to achieve economies of scale in both the purchasing and warehousing of wholesale supplies, and also ensure[d] ready access to a stock of goods that might otherwise be unavailable on short notice."[8]

Correspondingly, to the extent Internet joint ventures create new markets or technology, that could not be created separately by the partners to those joint ventures, or achieve other pro-competitive goals that could not be achieved separately such as improving quality, these joint ventures should pass muster under *BMI*. Indeed, federal antitrust authorities did not impede the creation of the Covisint joint venture among the "Big Three" U.S. automakers to streamline interactions and transactions with and among auto parts suppliers using the Internet, or the Orbitz joint venture among the major U.S. airlines regarding online airplane ticket sales. The same was true of the U.S. Department of Justice Antitrust Division's investigation of the Pressplay joint venture of certain major record labels, formed to block illegal music distribution over the Internet.[9]

Yet, joint ventures, which may not, in fact, create new synergies or which are viewed as potentially hindering competition in a relevant market to a degree that may outstrip any potential synergies, will be subject to closer scrutiny.[10] How this standard is applied, of course, may vary from

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[6] *National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 103 (1984).

[7] *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284 (1985).

[8] *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 295 (1985); *see also American Needle, Inc. v. National Football League*, 560 U.S. 183, 202-03 (2010).

[9] *See UMG Recordings, Inc. v. MySpace, Inc.*, 526 F. Supp. 2d 1046, 1049 (C.D. Cal. 2007).

[10] Since concerted restraints of trade under section 1 of the Sherman Act are "judged more sternly than unilateral actions under § 2" (*Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984); *Virginia Vermiculite, Ltd. v. Historic Green Springs, Inc.*, 307 F.3d 277, 281 (4th Cir. 2002)), some large companies seem to find it a safer practice simply to acquire potential joint venture partners. If an acquisition is approved by the U.S. Department of Justice or the Federal Trade Commission (and state antitrust authorities), post-acquisition conduct may not be as closely scrutinized as if the same activities had been undertaken by separate

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Administration to Administration. For example, the U.S. Department of Justice and several state attorneys general effectively scuttled a proposed Google-Yahoo! Internet advertising placement joint venture out of concern that, at the time, Google and Yahoo!, together, would have controlled 85% of the online search-engine market for advertising.[11]

In the aftermath of this blocked joint venture, with Yahoo's revenues declining,[12] Microsoft, in the summer of 2009, proposed a partnership with Yahoo! in which Yahoo!'s website would use only Microsoft's search engine. The U.S. Department of Justice, along with the Attorneys General for Washington and California, ultimately cleared this venture based on arguments, supported by third parties, that only a Microsoft-Yahoo! match-up could compete with Google's dominance at the time in the internet search advertising market, and that the expected improvement in Microsoft's search engine performance from its access to Yahoo! search queries, could improve Microsoft's competitive position in the relevant market.[13]

Research joint ventures, registered under the National Co-

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companies operating as a joint venture.

On the other hand, joint ventures may be viewed with less skepticism than mergers, holding all other relevant factors equal, due to the greater inability in the case of mergers to separate out the former assets of each merged entity if the merger is a failure. *See, e.g.*, Michael L. Katz & Howard A. Shelanski, *Merger Analysis and the Treatment of Uncertainty: Should We Expect Better?*, 74 Antitrust L.J. 537, 573 (2007); Dane Holbrook, *International Merger Control Convergence: Resolving Multijurisdictional Review Problems*, 7 UCLA J. Int'l Law & Foreign Aff. 345, 346-47 (Fall/Winter 2002-03).

[11]In August of 2007, for example, Google was the leading search engine with 57% of the market. Press Release, comScore, Inc., com, comScore Releases Rankings of Top U.S. Internet Properties Based on Number of Display Ads Delivered (Feb. 1, 2008), http://www.comscore.com/Press_Events/Press_Releases/2008/02/Top_US_Web_Sites_based_on_Ads. Yahoo! had more than 23% of the market while Microsoft had only 11%. *Id.*

[12]Nathania Johnson, *Yahoo!'s Revenues (Including Search-Based) Decline in Q1 2009: Layoffs Planned*, SEM News (Apr. 21, 2009), blogsearchenginewatch.com/090421-174357.

[13]U.S. Dept. of Justice, *Statement of the U.S. Department of Justice Antitrust Division on Its Decision to Close Its Investigation of the Internet Search and Paid Search Advertising Agreement Between Microsoft Corp. and Yahoo! Inc.* (Feb. 18, 2010), http://www.justice.gov/opa/pr/2010/February/10-at-163.html.

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operative Research Act of 1984,[14] cannot be condemned as *per se* antitrust violations, but rather receive rule of reason scrutiny, and often are evaluated by courts as being beneficial to competition.[15] However, that solicitude for research joint ventures may not necessarily extend to mergers themselves that involve research and development markets or have negative effects on innovation.[16]

Finally, a restraint imposed by a joint venture may be illegal under a rule of reason analysis even if the venture itself is procompetitive. Any restraint on competition imposed by a joint venture must still enhance consumer welfare.[17] If a restraint imposed by a joint venture is merely designed to enable smaller competitors to shield themselves from the competitive process, then the restraint in question may be found illegal even under a rule of reason analysis.[18]

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[14]15 U.S.C.A. §§ 4301 et seq.

[15]*See, e.g., TYR Sport, Inc. v. Warnaco Swimwear, Inc.*, 709 F. Supp. 2d 802 (C.D. Cal. 2010).

[16]*See, e.g.*, *In re Glaxo Welcome PLC*, 131 F.T.C. 56 (2001) (requiring divestiture in six pharmaceutical markets of assets, and the assignment of intellectual property rights to third parties in three research drug development markets, involving proposed merger that would create the world's largest research-based pharmaceutical company because the proposed merger would otherwise limit consumer choice, increase prices, and reduce innovation); *In re Autodesk, Inc. & Softdesk, Inc.*, 123 F.T.C. 1694 (1997) (requiring the acquired company to divest its computer-aided software design product and allow its employees who worked on that product to be hired by third party competitors without any hindrance); *In re Sensormatic Electronics Corp.*, 119 F.T.C. 520 (1995) (compelling the company acquiring certain assets of a competitor in a market for research and development of new systems to prevent retail shoplifting, to refrain from acquiring patents and other exclusive rights for the manufacture of anti-shoplifting labels or disposable labels).

[17]*See Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 20-21 (1979); *see also, e.g.*, *National Bancard Corp. (NaBanco) v. VISA U.S.A, Inc.*, 596 F. Supp. 1231, 1256-57 (S.D. Fla. 1984). This assumes that the restraint is "ancillary" or otherwise not essential to the operation of the joint venture itself. If the restraint is essential to the joint venture, e.g., the venture is fixing the price of a new product it plans to produce, then the analysis of the restraint under the rule of reason is indistinguishable from the analysis of the venture itself. *Texaco, Inc. v. Dagher*, 547 U.S. 1, 6 n.1 (2006).

[18]*See National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 117 (1984) (voiding restraint of otherwise legal NCAA organization that restricted broadcasts even though NCAA that restraint was necessary to protect smaller schools); *Freeman v.*

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34.04[7] Intellectual Property Licenses and Agreements, Patent Pools, and Internet Technological Standards and Standard-Setting Bodies

Although much of the law of the Internet is based on common law or statutes, Internet standard-setting bodies establish engineering protocols which may be viewed as akin to a civil law code governing Internet conduct.[1] Given how rapidly Internet technologies and business models evolve and metamorphose, industry groups—following the lead of the engineers who helped create the Internet—have formed associations intended to promote the development of Internet technology and business standards. The standards developed by these organizations encompass the features of the Internet, as well as the mechanisms by which Internet services are provided, such as Internet protocols, wireless service, mobile telecommunications, and Bluetooth.[2] While the objectives of these organizations generally are to foster the development of electronic commerce, they are not immune from antitrust regulation, and neither are their members for acts within the organizations. Nor are actions by intellectual property holders that read on the standards of these organizations necessarily immune from antitrust scrutiny.

Generally, industry or trade group practices that promote competition will not violate antitrust laws, while those agreements that suppress competition may be held invalid under the rule of reason.[3] The U.S. Supreme Court has held, however, that even where "the special characteristics of a

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San Diego Ass'n of Realtors, 322 F.3d 1133, 1154 (9th Cir. 2003) (otherwise legal multiple listing service could not justify fixing fees for support services on ground of need to protect smaller real estate associations from competitive pricing).

[Section 34.04[7]]

[1]*See supra* § 1.02.

[2]*See, e.g.*, Jorge L. Contreras, *Fixing FRAND: A Pseudo-Pool Approach to Standards-Based Patent Licensing*, 79 Antitrust L.J. 47, 47-48 n.3, 49 n.13 (2013).

[3]*See National Soc. of Professional Engineers v. U. S.*, 435 U.S. 679, 691 (1978); *American Council of Certified Podiatric Physicians and Surgeons v. American Bd. of Podiatric Surgery, Inc.*, 185 F.3d 606, 619–20 (6th Cir. 1999); *Coalition for ICANN Transparency, Inc. v. VeriSign, Inc.*, 611 F.3d 495, 507 (9th Cir. 2010). *But see U. S. v. National Ass'n of Broadcasters*, 536 F. Supp. 149 (D.D.C. 1982) (holding that a limitation on the number of minutes of television time per hour that could contain advertisements would be evaluated under the rule of reason because the restriction

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particular industry" may be such that "monopolistic arrangements will better promote trade and commerce than competition,"[4] these arrangements will not be immune from antitrust liability, absent an express exemption from Congress.[5] Thus, in *National Society of Professional Engineers v. United States*, the Court held that a professional organization's prohibition on competitive bids violated section 1 of the Sherman Act despite arguments that the rule was intended to promote public safety.[6]

Private standard-setting bodies historically have been the object of antitrust scrutiny because "[a]greement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products."[7] The actions of private standard-setting bodies

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could be justified by the unique attributes of the medium; but holding that a television code standard that prohibited more than one product to be featured in commercials lasting less than sixty seconds was *per se* illegal because it compelled the purchase of more advertising time than economic circumstances would dictate).

[4]On the topic of when if ever a monopoly can achieve innovation better than a competitive marketplace can, *see* F.M. Scherer, *Technological Innovation and Monopolization*, American Antitrust Institute Working Paper No. 05-07 (2005), http://www.antitrustinstitute.org/files/431.pdf (reviewing history of seven great U.S. monopolies and the extent of each one's technological achievements).

[5]*National Soc. of Professional Engineers v. U. S.*, 435 U.S. 679, 689–90 (1978).

[6]*National Soc. of Professional Engineers v. U. S.*, 435 U.S. 679, 689–90 (1978).

[7]*Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988). By contrast, efforts to influence a government or "quasi-legislative" body generally are exempt from antitrust liability, under the *Noerr-Pennington* doctrine. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499–500 (1988). Under the *Noerr–Pennington* doctrine—established by *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc*., 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965)—defendants are immune from antitrust liability for engaging in conduct (including litigation) aimed at influencing decision-making by the government. *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 56 (1993). As stated more bluntly in one case, "[t]he federal antitrust laws . . . . do not regulate the conduct of private individuals in seeking anticompetitive action from the government." *Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 379-80 (1991).

A narrow exception to this doctrine, however, allows for suits based on sham efforts to petition the government. "[A]ctivity 'ostensibly directed toward influencing governmental action' does not qualify for *Noerr* im-

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are evaluated under the rule of reason because of their potential for procompetitive activities.[8] In *American Society of Mechanical Engineers v. Hydro Level Corp.*[9] the U.S.

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munity if it 'is a mere sham to cover . . . an attempt to interfere directly with the business relationships of a competitor.' " *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 51 (1993). To qualify as a *sham*, a "lawsuit must be objectively baseless" and must "concea[l] 'an attempt to interfere directly with the business relationships of a competitor . . . ' " *Id*. at 60–61 (citation omitted). "In other words, the plaintiff must have brought baseless claims in an attempt to thwart competition (*i.e*., in bad faith)." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 556 (2014) (*dicta*). As further explained:

> The "sham" exception to *Noerr* encompasses situations in which persons use the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon. A classic example is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972). A "sham" situation involves a defendant whose activities are "not genuinely aimed at procuring favorable government action" at all, *Allied Tube & Conduit Corp. v. Indian Head, Inc*., 486 U.S. 492, 500, n. 4, 108 S. Ct. 1931, 1937, n. 4, 100 L. Ed. 2d 497 (1988), not one "who 'genuinely seeks to achieve his governmental result, but does so through improper means,' " *id*. at 508, n.10, 108 S.Ct., at 1941, n.10 (quoting *Sessions Tank Liners, Inc. v. Joor Mfg., Inc*., 827 F.2d 458, 465, n. 5 (CA9 1987)).

Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 380 (1991) (rejecting a conspiracy exception to *Noerr-Pennington*); *see also hiQ Labs, Inc. v. LinkedIn Corp.*, 485 F. Supp. 3d 1137, 1144-47 (N.D. Cal. 2020) (holding that hiQ's antitrust and interference claims were not barred by the *Noerr-Pennington* doctrine in a case where hiQ, a data analytics company, alleged antitrust and other claims arising out of LinkedIn's efforts to block its access to public information on the LinkedIn website); *Hynix Semiconductor Inc. v. Rambus, Inc.*, 527 F. Supp. 2d 1084, 1089-95 (N.D. Cal. 2007) (surveying the law of when patent litigation may provide the basis for an antitrust claim, and holding that Hynix could state a claim based on Rambus's " 'overall course of conduct'—including [its] patent litigation" where Hynix alleged that Rambus was a member of an SSO (standard-setting organization) and allegedly used its membership in the SSO to discover how a particular standard was developing and then drafted patent claims to cover the standard and, thereafter, "[o]nce the industry became 'locked in' to the DRAM standard, Rambus sprang the 'patent trap' and demanded royalties," and further "backed up its royalty demands with infringement litigation.").

A corollary to *Noerr-Pennington* in speech cases is the anti-SLAPP statute, which, in states where enacted, provides a mechanism for early resolution of cases allegedly brought to deter public participation or free speech. *See supra* § 37.02[3] (analyzing anti-SLAPP statutes).

[8] *See* 15 U.S.C.A. §§ 4301 et seq. (mandating rule of reason analysis for antitrust challenges to acts of standards-setting bodies).

[9] *American Soc. of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982).

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Supreme Court held that a nonprofit trade association, which promulgated codes and standards for areas of engineering and industry, was subject to liability in a case where the plaintiff alleged that the organization promulgated a false safety report of its product that was then used by a competitor which had urged the adoption of the report to discourage customers from purchasing the plaintiff's products. In so ruling, the Court held that the organization itself could be held liable under the theory of apparent authority, based on the conduct of those acting on its behalf. Liability also potentially may be found short of nefarious conduct, such as where a private association adopts standards that adversely affect competition. Merely that an individual competitor may be harmed by the actions of a standard-setting body, however, will be insufficient to state a claim if the competitive process itself has not been harmed.[10]

There have also been several antitrust cases brought by public authorities and private parties against companies that allegedly deceived standard-setting organizations about whether the companies had patents, or pending patents, or were thinking about applying for patents, for technologies being advocated for adoption as standards; the cases have had mixed outcomes often depending largely on the clarity of the standard-setting bodies' disclosure rules.[11]

Another issue to consider is whether antitrust law imposes commitments, and if so, what those commitments are, on those who hold standard-essential patents and who did give a commitment to license those patents on fair, reasonable,

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[10] *See Clamp-All Corp. v. Cast Iron Soil Pipe Institute*, 851 F.2d 478, 486 (1st Cir. 1988); *Coalition for ICANN Transparency, Inc. v. VeriSign, Inc.*, 611 F.3d 495, 502 (9th Cir. 2010).

[11] *Compare, e.g., Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 317–19 (3d Cir. 2007) (patent holder with near monopoly power in one market was trying to get monopoly power in a second market by using licensing practices that rewarded licensees who purchased licenses from the patent holder in both markets; in doing so, patent holder breached duty arising from a clear commitment on its part to license standard-essential patents in market where it had a near-monopoly on F/RAND terms) *with Rambus Inc. v. F.T.C.*, 522 F.3d 456, 463-69 (D.C. Cir. 2008) (policy of standard-setting body to require F/RAND commitment not clear and the U.S. Federal Trade Commission did not meet its burden of showing that, in a but-for world, the standard-setting body would not have incorporated the defendant's technology anyway into its standard), *cert. denied*, 555 U.S. 1171 (2009); *Hynix Semiconductor, Inc. v. Rambus, Inc.*, No. C-05-00334 RMW, 2008 WL 2951341, at *3 (N.D. Cal. July 14, 2008) (noting same about policy of standard-setting body being unclear).

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and non-discriminatory terms (e.g., F/RAND) as a condition precedent to those patents being incorporated into a standard.[12] U.S. authorities encourage standard-setting organizations to require such a commitment from their members with patents that may read on a proposed standard, although to pass muster the commitment must be made voluntarily, as a means of encouraging follow-on innovation.[13] That commitment may not be negated by a transfer of the intellectual property right to a third party that then seeks to enforce the standard-essential patent on terms other than those agreed-to by the original patent holder.[14] And the FTC has taken the position that a breach of that commitment can constitute a violation of antitrust law.[15]

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[12]The mechanics of how F/RAND should be calculated, especially when there are patent stacking problems involved with a standard or with a product comprised of a myriad of components, is beyond the scope of this chapter. For an interesting discussion of the issues, along with a proposed solution, *see, e.g.*, Jorge L. Contreras, *Fixing FRAND: A Pseudo-Pool Approach to Standards-Based Patent Licensing*, 79 Antitrust L.J. 47, 49-50, 51, 75-94 (2013); *see also* Mark A. Lemley & Timothy Simcoe, *How Essential Are Standard-Essential Patents?*, 104 Cornell L. Rev. 607 (2019).

[13]*See* U.S. Dep't of Justice & U.S. Patent and Trademark Office, Policy Statement on Remedies for Standard Essential Patents Subject to Voluntary F/RAND Commitments 5-6 (2013), *available at* http://www.justice.gov/atr/public/guidelines/290994.pdf.

[14]*See, e.g.*, *Negotiated Data Solutions LLC*, 73 Fed. Reg. 5806, 5848-51 (FTC 2008). However, there are dissenting views over whether, and under what circumstances, antitrust principles compel this result. *See, e.g., id.* at 5852-54 (dis. op. of Chairperson Majoras); *id.* at 5854-55 (dis. op. of Commissioner Kovacic).

[15]For example, in *In re Motorola Mobility LLC and Google, Inc.*, the U.S. Federal Trade Commission found that Motorola (and then Google, which acquired Motorola) had breached its commitments to license its standard-essential patents involving cellular communication standards on F/RAND terms when it sought to enjoin (e.g., seek a court order against) willing licensees barring them from practicing or using those patents. U.S. Federal Trade Commission, Complaint, *In re Motorola Mobility LLC, and Google Inc.*, FTC Docket No. C-4410, 2013 WL 124100, at *4-5 (July 23, 2013), *available at* http://ftc.gov/os/caselist/1210120/130724googlemotorolado.pdf. By way of a remedy, the Federal Trade Commission required that Motorola/Google not seek injunctive relief against licensees willing to take a license on F/RAND terms and set up an arbitration process by which F/RAND could be determined if the parties could not reach an agreement. U.S. Federal Trade Commission, Decision and Order, *In re Motorola Mobility LLC, and Google Inc.*, FTC Docket No. C-4410, 2013 WL 124100, at *7-10, §§ I, II (July 23, 2013), *available at*

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In *FTC v. Qualcomm Inc.*,[16] however, the Ninth Circuit, sitting *en banc,* rejected this view, vacating the district court's Sherman Act order and worldwide injunction, and declining to find Qualcomm's alleged breach of its Standard Setting Organization (SSO) commitments to license its standard essential patents on F/RAND terms amounted to anticompetitive conduct, suggesting instead that violations of F/RAND commitments should be addressed as breach of contract or patent claims, rather than through "the hammer of antitrust law."[17]

In *Qualcomm,* the FTC had taken issue with Qualcomm's practice of licensing its patent portfolios exclusively to OEMs (mobile phone manufacturers) and setting the royalty rates on its CDMA and LTE patent portfolios as a percentage of the end-product sales price, among other things. Judge Consuelo Callahan, writing for a unanimous *en banc* panel, observed that "OEM-level licensing allows . . . companies to obtain the maximum value for their patented technologies while avoiding the problem of patent exhaustion, whereby 'the initial authorized [or licensed] sale of a patented item terminates all patent rights to that item.' "[18] Qualcomm had adopted a "no license, no chips" policy, under which Qual-

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http://ftc.gov/os/caselist/1210120/130724googlemotorolado.pdf. Whether this conduct constitutes an antitrust violation is also subject to dispute, at least in the absence of limiting principles, such as deception and a showing of monopoly power. *See, e.g.*, Dissenting Op. of Commissioner Ohlhausen, *In re Motorola Mobility LLC, and Google Inc.*, FTC Docket No. C-4410, 2013 WL 124100, at *25-31 (July 23, 2013), *available at* http://ftc.gov/os/caselist/1210120/130724googlemotorolado.pdf.

[16]*FTC v. Qualcomm Inc.,* 969 F.3d 974 (9th Cir. 2020) (*en banc*).

[17]*FTC v. Qualcomm Inc.,* 969 F.3d 974, 997 (9th Cir. 2020) (*en banc*) (quoting former Federal Circuit Judge Paul Michel, as amicus curiae). For the proposition that alleged breaches of F/RAND terms should be addressed under patent or licensing laws—not antitrust—the court also cited favorably the observation of former FTC Commissioner Joshua Wright that "the antitrust laws are not well suited to govern contract disputes between private parties in light of remedies available under contract or patent law," and that "imposing antitrust remedies in pure contract disputes can have harmful effects in terms of dampening incentives to participate in standard-setting bodies and to commercialize innovation." *Id., quoting* Joshua D. Wright, *SSOs, FRAND, and Antitrust: Lessons from the Economics of Incomplete Contracts*, 21 Geo. Mason L. Rev. 791, 808-09 (2014).

[18]*FTC v. Qualcomm Inc.,* 969 F.3d 974, 984 (9th Cir. 2020) (*en banc*), *quoting Quanta Computing, Inc. v. LG Electronics, Inc.*, 553 U.S. 617, 625 (2008). Judge Callahan elaborated that:

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comm refused to sell modem chips to OEMs that did not take licenses to practice Qualcomm's SEPs.[19] Qualcomm's competitors in the modem chip markets contended that Qualcomm's business practices, in particular its refusal to license them, hampered or slowed their ability to develop and retain OEM customer bases, limited their growth, delayed or prevented their entry into the market, and in some cases forced them out of the market entirely. They argued that this result was not just anticompetitive, but a violation of Qualcomm's contractual commitments to two cellular Standard Setting Organizations—the Telecommunications Industry Association ("TIA") and Alliance for Telecommunications Industry Solutions ("ATIS")—to license its Standard Essential Patents "to all applicants" on F/RAND terms.[20]

The Ninth Circuit, however, ruled that Qualcomm's

> Due to patent exhaustion, if Qualcomm licensed its SEPs further "upstream" in the manufacturing process to competing chip suppliers, then its patent rights would be exhausted when these rivals sold their products to OEMs. OEMs would then have little incentive to pay Qualcomm for patent licenses, as they could instead become "downstream" recipients of the already exhausted patents embodied in these rivals' products.

FTC v. Qualcomm Inc., 969 F.3d at 984. Because rival chip manufacturers practiced many of Qualcomm's SEPs by necessity, the court explained that Qualcomm offered these companies what it termed "CDMA ASIC Agreements," pursuant to which Qualcomm promised not to assert its patents in exchange for the licensee promising not to sell its chips to unlicensed OEMs. "These agreements, which essentially function as patent-infringement indemnifications, include reporting requirements that allow Qualcomm to know the details of its rivals' chip supply agreements with various OEMs. But they also allow Qualcomm's competitors to practice Qualcomm's SEPs royalty-free." *Id.* at 984-85.

For a discussion of patent exhaustion, *see generally supra* § 16.02[2].

[19]The panel explained that:

> Otherwise, because of patent exhaustion, OEMs could decline to take licenses, arguing instead that their purchase of chips from Qualcomm extinguished Qualcomm's patent rights with respect to any CDMA or premium LTE technologies embodied in the chips. This would not only prevent Qualcomm from obtaining the maximum value for its patents, it would result in OEMs having to pay more money (in licensing royalties) to purchase and use a competitor's chips, which are unlicensed. Instead, Qualcomm's practices, taken together, are "chip supplier neutral"—that is, OEMs are required to pay a per-unit licensing royalty to Qualcomm for its patent portfolios regardless of which company they choose to source their chips from.

FTC v. Qualcomm Inc., 969 F.3d 974, 985 (9th Cir. 2020) (*en banc*).

[20]Under the TIA contract, Qualcomm agreed to make its SEPs "available to all applicants under terms and conditions that are reasonable and non-discriminatory . . . and only to the extent necessary for the practice of any or all of the Normative portions for the field of use of practice of the

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practice of licensing its SEPs exclusively at the OEM level did not amount to anticompetitive conduct in violation of section 2 of the Sherman Act, as Qualcomm was under no antitrust duty to license rival chip suppliers. The appellate panel concluded that "[t]o the extent Qualcomm has breached any of its FRAND commitments, a conclusion we need not and do not reach, the remedy for such a breach lies in contract and patent law."[21]

Standard." *FTC v. Qualcomm Inc.,* 969 F.3d 974, 986 n.9 (9th Cir. 2020) (*en banc*), *quoting FTC v. Qualcomm Inc*., No. 17-CV-00220-LHK, 2018 WL 5848999, at *3 (N.D. Cal. Nov. 6, 2018). Under the ATIS contract, Qualcomm committed to making its SEPs "available to applicants desiring to utilize the license for the purpose of implementing the standard... under reasonable terms and conditions that are demonstrably free of any unfair discrimination." *Id*

[21]*FTC v. Qualcomm Inc.,* 969 F.3d 974, 1005 (9th Cir. 2020) (*en banc*). The appellate panel agreed with the district court that the relevant market for antitrust analysis was "the market for CDMA modem chips and the market for premium LTE modem chips." *Id.* at 992. But the Ninth Circuit strongly disagreed with the district court's expansion of *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*., 472 U.S. 585 (1985) to find a duty to license chips.

The appellate panel emphasized that, except for the narrow exception recognized in *Aspen Skiing Co.*, which did not fit the facts of the *Qualcomm* case, there is no duty to deal under the terms and conditions preferred by a competitor's rival. *FTC v. Qualcomm Inc.,* 969 F.3d at 993. *Aspen Ski,* the panel explained, "should be applied only in rare circumstances" and was inapplicable because there was no evidence that Qualcomm terminated a voluntary and profitable course of dealing, and there was unrebutted evidence that Qualcomm's refusal to provide "exhaustive" standard essential patent licenses to rival chip suppliers was based on developments in patent law's exhaustion doctrine. *See id.* at 993-94. "The FTC offered no evidence that, from the time Qualcomm first gained monopoly power in the modem chip market in 2006 until now, it ever had a practice of providing exhaustive licenses at the modem chip level rather than the OEM level." *Id.* at 994. Second, "Qualcomm responded to the change in patent-exhaustion law by choosing the path that was "far more lucrative," both in the short term and the long term, regardless of any impacts on competition." *Id.* Third, "unlike in *Aspen Skiing*, the district court found no evidence that Qualcomm single[d] out any specific chip supplier for anticompetitive treatment in its SEP-licensing." *Id.* at 995. It licensed OEMs under its "no license, no chips" policy, while the panel characterized Qualcomm's policy towards rival chipmakers as a "no license no problem" policy. *Id.*

The appellate panel disputed the FTC's argument that *Broadcom Corp. v. Qualcomm Inc*., 501 F.3d 297 (3d Cir. 2007) supported its argument that a company's breach of its SSO commitments may rise to the level of an antitrust violation. The court explained, "in that earlier antitrust action against Qualcomm, the alleged anticompetitive conduct

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was not Qualcomm's practice of licensing at the OEM level while not enforcing its patents against rival chip suppliers; instead, Broadcom asserted that Qualcomm intentionally deceived SSOs by inducing them to standardize one of its patented technologies, which it then licensed at 'discriminatorily higher' royalty rates to competitors and customers using non-Qualcomm chipsets." 969 F.3d at 996, *citing Broadcom,* 501 F.3d at 304. The *Broadcom* court held that Qualcomm's "intentionally false promise to license [its SEP] on FRAND terms . . . coupled with an SDO's reliance on that promise" and Qualcomm's subsequent discriminatory pricing sufficiently alleged "actionable anticompetitive conduct" under § 2 to overcome Qualcomm's motion to dismiss. 969 F.3d at 996, *quoting Broadcom,* 501 F.3d at 314. But in ***FTC v. Qualcomm,*** Judge Callahan wrote that

> the district court found neither intentional deception of SSOs on the part of Qualcomm nor that Qualcomm charged discriminatorily higher royalty rates to competitors and OEM customers using non-Qualcomm chips. Instead, it [wa]s undisputed that Qualcomm's current royalty rates—which the district court found "unreasonably high" (a finding discussed in greater detail in the next section of our opinion)—are based on the patent portfolio chosen by the OEM customer regardless of where the OEM sources its chips. Furthermore, competing chip suppliers are permitted to practice Qualcomm's SEPs freely without paying any royalties at all. Thus, the Third Circuit's "intentional deception" exception to the general rule that breaches of SSO commitments do not give rise to antitrust liability does not apply to this case.

969 F.3d at 996-97.

The panel further criticized the district court for analyzing Qualcomm's "no license, no chips" policy's ostensibly "anticomptetitive harms" on OEMs –that is, impacts outside the relevant antitrust market." *Id.* at 1001. The panel explained:

> According to the FTC, the problem with "no license, no chips" is that, under the policy, "Qualcomm will not sell chips to a cellphone [OEM] like Apple or Samsung unless the OEM agrees to a license that requires it to pay a substantial per-phone surcharge even on phones that use rivals' chips." . . . At worst, the policy raises the "all-in" price that an OEM must pay for modem chips (chipset + licensing royalties) regardless of which chip supplier the OEM chooses to source its chips from. As we have already discussed, whether that all-in price is reasonable or unreasonable is an issue that sounds in patent law, not antitrust law. . . . [N]either the Sherman Act nor any other law prohibits companies like Qualcomm from (1) licensing their SEPs independently from their chip sales and collecting royalties, and/or (2) limiting their chip customer base to licensed OEMs.
>
> In addition, the district court's criticism of "no license, no chips" treats that policy as if Qualcomm is making SEP licenses contingent upon chip purchases, instead of the other way around. If Qualcomm were to refuse to license its SEPs to OEMs unless they first agreed to purchase Qualcomm's chips ("no chips, no license"), then rival chip suppliers indeed might have an antitrust claim under both §§ 1 and 2 of the Sherman Act based on exclusionary conduct. This is because OEMs cannot sell their products *without* obtaining Qualcomm's SEP licenses, so a "no chips, no license" policy would essentially force OEMs to either purchase Qualcomm's chips or pay for *both* Qualcomm's and a competitor's chips (similar to the no-win situation faced by OEMs in the *Caldera* case). But unlike a hypothetical "no chips, no license" policy, "no license, no chips" is chip-neutral: it makes no difference whether an OEM buys Qualcomm's

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The Ninth Circuit also held that Qualcomm's patent-licensing royalties and "no license, no chips" policy did not impose an anticompetitive surcharge on rivals' modem chip sales. Instead, the appellate panel considered these aspects of Qualcomm's business model to be "chip-supplier neutral" and "did not undermine competition in the relevant antitrust markets."[22] Judge Callahan wrote that the district court failed to state a cogent theory of anticompetitive harm and instead its "anticompetitive surcharge" theory was premised on "a misunderstanding of Federal Circuit law pertaining to the calculation of patent damages . . . [that] incorrectly conflate[d] antitrust liability and patent law liability, and . . . improperly consider[ed] 'anticompetitive harms to OEMs' that fall outside the relevant antitrust markets."[23] Additionally, the appellate panel criticized the focus on patent royalty calculations to determine if royalty rates were reasonable because a royalty higher than a "reasonable royalty" under patent law isn't necessarily anticompetitive (and unreasonable) under antitrust law.[24] The court further

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chip or a rival's chips. The policy only insists that, whatever chip source an OEM chooses, the OEM pay Qualcomm for the right to practice the patented technologies embodied in the chip, as well as in other parts of the phone or other cellular device.

Id. at 1002-03 (emphasis in original). The Ninth Circuit viewed the relevant market as dynamic, as in *Ohio v. American Express Co*., 138 S. Ct. 2274, 2290 (2018)—where "a company's novel business practice at first appeared to be anticompetitive, but in fact was disruptive in a manner that was beneficial to consumers in the long run because it forced rival credit card companies to adapt and innovate"—because although Qualcomm's "no license, no chips" policy was unique in the industry, companies such as Nokia and Ericsson subsequently adopted similar licensing schemes. *Id.* at 1003. Judge Callahan wrote: "We decline to ascribe antitrust liability in these dynamic and rapidly changing technology markets without clearer proof of anticompetitive effect." *Id.*

[22]*FTC v. Qualcomm Inc.,* 969 F.3d 974, 1005 (9th Cir. 2020) (*en banc*). The Ninth Circuit also ruled that Qualcomm's 2011 and 2013 agreements with Apple did not have "the actual or practical effect of substantially foreclosing competition in the CDMA modem chip market. Furthermore, because these agreements were terminated years ago by Apple itself," when it stopped purchasing chips from Qualcomm and started buying them from Intel, there was "nothing to be enjoined." *Id.*; *see also id.* at 1003-04. The court also characterized Qualcomm's agreements with Apple as volume discount contracts, not exclusive dealing.

[23]*FTC v. Qualcomm Inc.,* 969 F.3d 974, 989 (9th Cir. 2020) (*en banc*).

[24]*FTC v. Qualcomm Inc.,* 969 F.3d 974, 999 (9th Cir. 2020) (*en banc*). The appellate panel explained that the district court's "unreasonable royalty rate" conclusion

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criticized the theory because the harm alleged from Qualcomm's alleged surcharges impacted, if anyone, OEMs, who agreed to pay Quolcomm's royalty rates—in other words, "Qualcomm's *customers*, not its *competitors*."[25]

The panel further rejected the argument that the royalty rates constituted an "artificial surcharge" on rivals' chip sales, writing that the district court had "faulted Qualcomm for lowering its prices only when other companies introduced CDMA modem chips to the market to effectively compete. . . . [But] this is exactly the type of 'garden-variety price competition that the law encourages' . . . ."[26]

In conclusion, Judge Callahan wrote that:

> Anticompetitive behavior is illegal under federal antitrust law. Hypercompetitive behavior is not. Qualcomm has exercised market dominance in the 3G and 4G cellular modem chip markets for many years, and its business practices have played a powerful and disruptive role in those markets, as well as in the broader cellular services and technology markets. The company has asserted its economic muscle "with vigor, imagination, devotion, and ingenuity." *Topco Assocs*., 405 U.S. at 610. It has also "acted with sharp elbows—as businesses often do." *Tension Envelope Corp. v. JBM Envelope Co*., 876 F.3d 1112, 1122 (8th Cir. 2017). Our job is not to condone or punish Qualcomm for its success, but rather to assess whether the FTC has met its burden under the rule of reason to show that Qualcomm's practices have crossed the line to "conduct which unfairly tends to destroy competition itself." *Spectrum Sports*, 506 U.S. at 458. We conclude that the FTC has not met its burden.[27]

Separately, where an infringing firm practicing the

> erroneously assume[d] that royalties are "anticompetitive"—in the antitrust sense—unless they precisely reflect a patent's current, intrinsic value and are in line with the rates other companies charge for their own patent portfolios. Neither the district court nor the FTC provides any case law to support this proposition, which sounds in patent law, not antitrust law. *See* 35 U.S.C. § 284 (entitling a patent owner to "damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer" (emphasis added)). We decline to adopt a theory of antitrust liability that would presume anticompetitive conduct any time a company could not prove that the "fair value" of its SEP portfolios corresponds to the prices the market appears willing to pay for those SEPs in the form of licensing royalty rates.

Id.

[25]*FTC v. Qualcomm Inc.,* 969 F.3d 974, 999-1000 (9th Cir. 2020) (*en banc*).

[26]*FTC v. Qualcomm Inc.,* 969 F.3d 974, 1001 (9th Cir. 2020) (*en banc*).

[27]*FTC v. Qualcomm Inc.,* 969 F.3d 974, 1005 (9th Cir. 2020) (*en banc*).

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standard-essential patent refuses to pay F/RAND or negotiate in good faith on F/RAND (for example by insisting on terms clearly outside the bounds of what could reasonably be considered F/RAND terms in an attempt to evade its obligations), the FTC and ITC have acknowledged that injunctive relief may be appropriate to prevent anti-competitive effects on the market.[28]

President Biden's July 9, 2021 Executive Order on Promoting Competition in the American Economy, encourages the Attorney General and Secretary of Commerce "to consider whether to revise their position on the intersection of the intellectual property and antitrust laws, including by considering whether to revise the Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments issued jointly by the Department of Justice, the United States Patent and Trademark Office, and the National Institute of Standards and Technology on December 19, 2019."[29]

The intersection between intellectual property and antitrust can be complex for some technology, internet and mobile companies. Case law provides that a group of competitors cannot combine their intellectual property rights together as a means of disadvantaging other competitors or fixing prices on a product in an industry by going beyond the scope of those rights.[30] But competitors may combine their intellectual property rights in a patent pool where that pool

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[28]*See* U.S. Dep't of Justice & U.S. Patent and Trademark Office, *Policy Statement on Remedies for Standard Essential Patents Subject to Voluntary F/RAND Commitments* 7 (2013), *available at* http://www.justice.gov/atr/public/guidelines/290994.pdf; *see also* Decision and Order, *In re Motorola Mobility LLC, and Google Inc.*, FTC Docket No. C-4410, 2013 WL 124100, at *11, § II.E (referring to these types of conduct as a "constructive refusal to negotiate" or an "unwillingness to [take a] license on FRAND terms"); Opinion, *In re Certain Electronic Devices, Including Wireless Communication Devices, Portable Music and Data Processing Devices, and Tablet Computers*, Inv. No. 337-TA-794, at 63 (Int'l Trade Comm'n June 4, 2013) (defining reverse hold-up as an "expensive litigation" scenario under which "an implementer utilizes declared-essential technology without compensation to the patent owner under the guise that the patent owner's offers to license were not fair or reasonable").

[29]Executive Order on Promoting Competition in the American Economy, 2021 WL 2886028 (White House July 9, 2021); *see generally supra* § 34.01.

[30]*See, e.g.*, *United States v. Singer Mfg. Co.*, 374 U.S. 174, 194-95 (1963) (ruling that several patent holders with competing claims violated the antitrust laws by entering into a settlement agreement that involved

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involves complementary patents on components of a technology product.[31] This assumes, however, that the pool contains certain safeguards to ensure that it is no broader than necessary to achieve that pro-competitive purpose. For example, the pool should not include invalid or competing patents.[32]

The U.S. Supreme Court, over the past few years, has evidenced its willingness to look more closely at intellectual property activities that may violate antitrust laws even under a rule of reason analysis. In *FTC v. Actavis*, for example, the Supreme Court held in a 6-3 decision that re-

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the cross-licensing of patents in order to disadvantage Japanese competitors, thereby going beyond the scope of the patents); *United States v. New Wrinkle, Inc.*, 342 U.S. 371, 379-80 (1952) (holding that competitors in a product market cannot price-control that product through a system of cross-licensing of patents that in effect goes beyond the scope of the patents); *Standard Oil Co. (Indiana) v. United States*, 283 U.S. 163, 174-75 (1931) (holding that competitors could not settle competing claims regarding patented processes for the same unpatented product when the purpose was to curtail supply for the unpatented product). The U.S. Supreme Court endorsed the notion that these cases were still good law in *FTC v. Actavis*, 570 U.S. 136, 149-51 (2013) (maj. op.); *id.* at 165-67 (dis. op.).

[31]Patent pools that are formed by patent owners whose patents are all essential to the production of a product "can provide pro-competitive benefits by integrating complementary technologies, reducing transaction costs, clearing blocking positions, and avoiding costly infringement litigation." United States Dep't. of Justice and U.S. Federal Trade Commission, Antitrust Guidelines For The Licensing Of Intellectual Property § 5.5 (1995); *see* U.S. Dep't. of Justice and U.S. Federal Trade Commission, Antitrust Guidelines For Collaborations Among Competitors, Agreements Challenged as Per Se Illegal § 3.2 (2000) (explaining that competitor collaborations, such as patent pools, are analyzed under the rule of reason if they are "participants in an efficiency-enhancing integration of economic activity," and if they enter into an agreement, *i.e.*, on price, which is "reasonably related to the integration and reasonably necessary to achieve [these] procompetitive benefits." These guidelines further note that "[p]articipants in an efficiency enhancing integration typically combine, by contract or otherwise, significant capital, technology, or other complementary assets to achieve pro-competitive benefits that the participants could not achieve separately.")

[32]United States Dep't. of Justice and U.S. Federal Trade Commission, Antitrust Guidelines For The Licensing Of Intellectual Property § 5.5 (1995); U.S. Dept. of Justice, Business Rev. Ltr. to MPEG-LA, at 6-7 (June 26, 1997) [§ II(A) (1)-(3)], http://www.usdoj.gov/atr/public/busreview/1170.htm. Cases that elaborate on this point include the following: *United States v. Glaxo Group, Inc.*, 410 U.S. 52, 54-55, 58-59, 60-64 (1973); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 139-140 (1969); *United States v. United States Gypsum*, 333 U.S. 364, 370-89 (1948); *Vulcan Power Co. v. Hercules Powder Co.*, 96 Cal. 510, 512-17 (1892) (applying common law).

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verse payment settlements in patent litigation, under which a patent holder may pay off a competitor not to produce a competing product, may sometimes violate the antitrust laws under a rule of reason analysis.[33]

Applying *Actavis* in the context of trademarks, the FTC, by a 3-2 decision in November 2018, held that 1-800-Contacts' settlement agreements with 14 competitors in trademark infringement suits—compelling 1-800 Contacts and its competitors to (a) refrain from bidding on each other's trademarks as keywords for sponsored link or other online advertising, and (b) use "negative keywords" to prevent their advertisements from being displayed in response to a search for a competitor's trademark—violated section 1 of the Sherman Act.[34] In addition to alleging consumer harm from reduced competition, the majority held that the agreements consisted of a form of bid rigging that artificially depressed the price search engines received for online advertising.[35] Commissioner Phillips, in dissent, argued that the settlement agreements restricted only paid search advertising results tied to the use of trademarked terms, not comparative advertisements or similar noninfringing uses, and even then only impacted the placement of advertisements, not a competitor's ability to advertise online (or in other media, for that matter).[36] The Second Circuit, however, vacated the FTC Order, ruling that, although trademark settlement

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[33]*FTC v. Actavis*, 570 U.S. 136, 149-60 (2013).

[34]*See* Opinion of the Commission, 1-800 Contacts, Inc., FTC Docket No. 9372, 2018 WL 6078349 (Nov. 7, 2018); *see generally supra* § 9.11 (analyzing the law of sponsored links and keyword advertisements and explaining negative keywords).

[35]Commissioner Slaughter concurred in the legal outcome but wrote separately to note that she would not have supported pursuing the case based on harm to search engines alone because "[t]he resources of the Commission are limited, and should generally be used to protect consumers, not large companies with substantial market share." Concurring Statement of Commissioner Rebecca Kelly Slaughter, FTC Docket No. 9372, 2018 WL 6075666 (Nov. 14, 2018).

[36]Dissenting Statement of Commissioner Noah Joshua Phillips, FTC Docket No. 9372, 2018 WL 6075667 (Nov. 14, 2018). For a critical commentary on the legal and economic underpinnings of the decision, *see* Geoffrey A. Manne, Hal Singer, & Joshua D. Wright, *Antitrust Out of Focus: The FTC's Myopic Pursuit of 1-800 Contacts' Trademark Settlements,* The Antitrust Source (ABA Apr. 2019) (arguing, among other things, that while 1-800 Contact accounted for 50-60 percent of online sales of contact lenses, it only accounted for 8-10 percent of all U.S. sales of contact lenses, given that online sales only amount to 17 percent of the

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agreements are not automatically immune from antitrust scrutiny, the Commission's analysis of the alleged restraints under the "inherently suspect" framework was improper and the FTC incorrectly concluded that the agreements are an unfair method of competition under the FTC Act.[37] The Second Circuit held that the Commission erred in assuming the 13 settlement agreements were inherently suspect because agreements to protect trademarks should be presumed to be procompetitive and therefore evaluated under the rule of reason analysis, rather than the abbreviated analysis employed by the Commission.[38]

Applying the rule of reason, the Second Circuit held that the FTC had not met its burden of establishing a *prima facie* case of anticompetitive effect by adducing evidence of increased contact lens prices and a reduction in the quantity of advertisements. Applying the three step test established by the U.S. Supreme Court in *Ohio v. American Express Co.*,[39] the appellate panel concluded that it didn't need to evaluate whether the Commission's theory of harm was viable because 1-800-Contacts showed a procompetitive justification for the settlement agreements and the FTC failed to overcome its burden in the third step of the analysis.[40] Specifically, the Second Circuit found that the agreements were justified based on reduced litigation costs and protecting 1-800-Contacts' trademark rights. The appellate panel criticized the Commission for making assumptions about the merits of the underlying claims, writing that:

> The Commission . . . decided that the trademark claims that led to the Challenged Agreements were likely meritless. While it claimed not to be determining the validity of Petitioner's trademark claims, it did just that by weighing the potential validity of the trademark claims in order to show that Petitioner's procompetitive justification was invalid. Even if the Commission's analysis of the underlying trademark claims

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market, with most consumers purchasing contact lenses at brick and mortar stores or from eyecare practitioners).

[37] *See 1-800 Contacts, Inc. v. Federal Trade Commission,* __ F.3d __, 2021 WL 2385274 (2d Cir. 2021).

[38] *1-800 Contacts, Inc. v. Federal Trade Commission,* __ F.3d __, 2021 WL 2385274, at *7 (2d Cir. 2021), *citing California Dental Ass'n v. FTC,* 526 U.S. 756, 779 (1999).

[39] *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2284 (2018); *supra* § 34.04[3].

[40] *1-800 Contacts, Inc. v. Federal Trade Commission,* __ F.3d __, 2021 WL 2385274, at *9 (2d Cir. 2021).

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> were correct, trademark agreements that "only marginally advance[ ] trademark policies" can be procompetitive. . . . Under *Clorox*, "[e]fforts to protect trademarks, even aggressive ones, serve the competitive purpose of furthering trademark policies."
>
> That does not mean that every trademark agreement has a legitimate procompetitive justification. If the "provisions relating to trademark protection are auxiliary to an underlying illegal agreement between competitors," or if there were other exceptional circumstances, we would think twice before concluding the challenged conduct has a procompetitive justification. . . . As in *Clorox*, however, there is a lack of evidence here that the Challenged Agreements are the "product of anything other than hard-nosed trademark negotiations." . . . Consequently, we find Petitioner met its burden at step two.[41]

Because the Second Circuit found that 1-800-Contracts carried its burden of identifying a procompetitive justification, the burden shifted to the government to show that a less restrictive alternative existed that achieved the same legitimate competitive benefits, which it could not do.[42] To meet that burden, the Second Circuit explained, the government would have needed "to show more than the mere possibility there could be crafted an alternative form of the trademark agreement. The alternative must be '*substantially less restrictive*.' The alternative must also achieve the same legitimate competitive benefits outlined by the Petitioner."[43]

The Second Circuit also cautioned, "[w]hen the restraint

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[41] *1-800 Contacts, Inc. v. Federal Trade Commission,* __ F.3d __, 2021 WL 2385274, at *9-10 (2d Cir. 2021) (footnotes omitted), *quoting Clorox Co. v. Sterling Winthrop, Inc.,* 117 F.3d 50, 57, 60, 61 (2d Cir. 1997).

The merits of sponsored link and keyword advertising claims is separately analyzed in section 9.11 in chapter 9.

[42] *See 1-800 Contacts, Inc. v. Federal Trade Commission,* __ F.3d __, 2021 WL 2385274, at *10-11 (2d Cir. 2021). The panel observed:

> In *Clorox*, . . . we noted that "it is usually unwise for courts to second-guess" trademark agreements between competitors. 117 F.3d at 60. In this context, what is "reasonably necessary," *Brown Univ.*, 5 F.3d at 679, is likely to be determined by competitors during settlement negotiations, *Clorox*, 117 F.3d at 60. And, . . . absent something that would negate the typically procompetitive nature of these agreements, "the parties' determination of the scope of needed trademark protections is entitled to substantial weight." *Clorox*, 117 F.3d at 60.

2021 WL 2385274, at *10.

[43] *1-800 Contacts, Inc. v. Federal Trade Commission,* __ F.3d __, 2021 WL 2385274, at *11 (2d Cir. 2021) (emphasis added), *quoting* Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 1502 (3rd & 4th eds., 2019 Cum. Supp. 2010-2018).

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at issue in an antitrust action implicates IP rights, *Actavis* directs us to consider the policy goals of the relevant IP law. . . . Here, those considerations must include the practical implications of the government's proffered alternatives on the parties' ability to protect and enforce their trademarks."[44] The panel observed:

> While trademark agreements limit competitors from competing as effectively as they otherwise might, we owe significant deference to arm's length use agreements negotiated by parties to those agreements. . . . Doing so may give rise to collateral harm in a relevant market. But forcing companies to be less aggressive in enforcing their trademarks is antithetical to the procompetitive goals of trademark policy.[45]

34.05 Sherman Act Section 2 in Cyberspace

34.05[1] In General

The Sherman Act, in addition to prohibiting concerted activity, proscribes certain actions undertaken unilaterally by an entity exercising monopoly power or coming dangerously close to doing so. Section 2 of the Sherman Act makes it a felony to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations . . . ."[1]

To prevail in a section 2 monopolization claim, a plaintiff must prove that a defendant: (1) possesses monopoly power in the relevant market; and (2) has willfully acquired or maintained this power through exclusionary conduct, as distinguished from business acumen, historic accident, or having a superior product.[2] A plaintiff in a civil case must

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[44] *1-800 Contacts, Inc. v. Federal Trade Commission,* __ F.3d __, 2021 WL 2385274, at *11 (2d Cir. 2021), *citing FTC v. Actavis,* 570 U.S. 136, 149 (2013).

[45] *1-800 Contacts, Inc. v. Federal Trade Commission,* __ F.3d __, 2021 WL 2385274, at *11 (2d Cir. 2021), *citing Clorox Co. v. Sterling Winthrop, Inc.,* 117 F.3d 50, 59-61 (2d Cir. 1997).

[Section 34.05[1]]

[1] 15 U.S.C.A. § 2. A violation of section 2 constitutes a felony and is punishable by a fine of up to $100,000,000 for corporations or up to $1,000,000 for all others and/or by imprisonment for up to ten years. 15 U.S.C.A. § 2 A civil action may be maintained for injunctive relief and/or treble damages. 15 U.S.C.A. §§ 15, 26.

[2] *See United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966);

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also establish a causal antitrust injury.[3] It is "[n]ot the possession, but the abuse, of monopoly power [that] violates section 2."[4] If it is established that a defendant is a monopolist, "[e]ven conduct . . . that is otherwise lawful may violate the

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Data General Corp. v. Grumman Systems Support Corp., 36 F.3d 1147, 1181–82 (1st Cir. 1994) (citing other cases); *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories Inc.*, 386 F.3d 485, 495 (2d Cir. 2004); *see also Freedom Watch, Inc. v. Google, Inc.*, 816 F. App'x 497, 500 (D.C. Cir. 2020) (affirming dismissal of plaintiff's section 2 claim because "a complainant must allege that monopoly powers were acquired through 'anticompetitive conduct.' . . . The only anticompetitive conduct that Freedom Watch alleges (without supporting factual allegations) is that the Platforms conspired against it to suppress conservative content, but not that the Platforms conspired to acquire or maintain monopoly power. A § 2 claim requires the latter allegation."), *aff'g*, 368 F. Supp. 3d 30, 38-39 (D.D.C. 2019) (dismissing plaintiff's section 2 claim accusing Google, Facebook, Twitter and Apple of working together to suppress conservative viewpoints, where the amended complaint alleged that 59% of Twitter users got their news through the Twitter platform and that 48% of all Americans got their news from Facebook, but offered no support for the notion that either firm had achieved or tried to achieve monopolization of the nationwide media and news publications market).

Exclusionary conduct alternatively may be defined as "conduct designed to maintain or enhance that power improperly." *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 373 (7th Cir. 1986); *Z-Tel Communications, Inc. v. SBC Communications, Inc.*, 331 F. Supp. 2d 513, 522 (E.D. Tex. 2004).

[3]*See, e.g.*, *Name.Space, Inc. v. Internet Corp. for Assigned Names and Numbers*, 795 F.3d 1124, 1131 (9th Cir. 2015) (affirming dismissal of the Sherman Act section 2 claim of a disappointed bidder for new Top Level Domains, which questioned the fairness of ICANN's 2012 rules; "The complaint posits three relevant markets: (a) the market to act as a TLD registry; (b) the international market for domain names; and (c) the market for blocking or defensive registration services. ICANN, however, is neither a registry nor a registrar. Because ICANN is not a competitor in any of the three markets, they cannot serve as the basis for a § 2 monopoly claim."); *Manwin Licensing Int'l S.A.R.L. v. ICM Registry, LLC*, No. CV 11-9514 PSG, 2013 WL 12123772, at *5-6 (C.D. Cal. Feb. 26, 2013) (dismissing plaintiff's Sherman Act section 2 claim alleging that Manwin was impairing ICM's ability to commercialize the .XXX Top Level Domain, where ICM failed to make an argument that failure to commercialize the .XXX TLD would reduce the number of competitors in the market for "online search and access to adult entertainment via websites"; "The only potential harm is to ICM itself. Harm to ICM only is not sufficient to constitute antitrust injury. It must allege harm to the competitive process."); s*ee generally supra* § 7.02 (analyzing the Domain Name System).

[4]*Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 374 (7th Cir. 1986); *Digene Corp. v. Third Wave Technologies, Inc.*, 536 F. Supp. 2d 996, 1005 (W.D. Wis. 2008).

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antitrust laws where it has a substantial economic effect."[5]

Monopoly power is "the power to control prices or exclude competition."[6] Many courts have held that this power must be durable to be actionable.[7] Courts typically determine monopoly power indirectly, first by examining a defendant's market share in the relevant market.[8] A market share greater than 70% generally establishes a *prima facie* case of monopoly power,[9] whereas a market share of less than 50% will almost never suffice for a *prima facie* case.[10] Courts will also look at barriers to entry or expansion in the marketplace, as well as the speed with which viable competitors can emerge.[11] In general, a section 2 claim may not be based on the alleged market share of more than one defendant allegedly acting collectively.[12]

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[5]*See Intergraph Corp. v. Intel Corp.*, 3 F. Supp. 2d 1255, 1277 (N.D. Ala. 1998) (*citing Image Technical Services, Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1207 (9th Cir. 1997)); *E.I. Du Pont De Nemours and Co. v. Kolon Industries, Inc.*, 683 F. Supp. 2d 401 (E.D. Va. 2009). For a discussion of the rest of the *Intergraph* case, *see infra* § 34.11[5][B][2].

[6]*U. S. v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956); *Four Corners Nephrology Associates, P.C. v. Mercy Medical Center of Durango*, 582 F.3d 1216, 1220 (10th Cir. 2009).

[7]*See, e.g., Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America*, 885 F.2d 683, 695–96 (10th Cir. 1989). *But see Thompson's Gas & Elec. Service, Inc. v. BP America Inc.*, 691 F. Supp. 2d 860, 863–65 (N.D. Ill. 2010) (citing legal authority for both proposition and opposite proposition, i.e., that monopoly need not persist for long time to be illegal).

[8]*Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, 431 F.3d 917, 935–36 (6th Cir. 2005).

[9]*Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, 431 F.3d 917, 935–36 (6th Cir. 2005); *In re Mushroom Direct Purchaser Antitrust Litigation*, 514 F. Supp. 2d 683, 699 (E.D. Pa. 2007).

[10]*Bailey v. Allgas, Inc.*, 284 F.3d 1237, 1250 (11th Cir. 2002).

[11]*Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995); *Cyntegra, Inc. v. Idexx Laboratories, Inc.*, 520 F. Supp. 2d 1199, 1209 (C.D. Cal. 2007).

[12]*See Freedom Watch, Inc. v. Google, Inc.*, 368 F. Supp. 3d 30, 38-39 (D.D.C. 2019) (dismissing plaintiff's section 2 claim accusing Google, Facebook, Twitter and Apple of working together because, among other things, "collective or 'shared monopoly' arguments are generally insufficient to state a claim that defendants have monopolized or attempted to monopolize the [relevant] market . . . ."), *aff'd*, 816 F. App'x 497, 500 (D.C. Cir. 2020) (affirming dismissal of plaintiff's section 2 claim because "[t]o state a § 2 claim—collective monopolization by several parties or individual monopolization by a single party—a complainant must allege that monopoly powers were acquired through 'anticompetitive conduct.' ").

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An *attempted monopolization* claim requires (1) specific intent to control prices or destroy competition, (2) predatory or anticompetitive conduct, (3) a dangerous probability of success, and (4) causal antitrust injury.[13] In a case based on an attempt to monopolize, rather than actual monopolization, a plaintiff must show that even though a defendant failed actually to achieve a monopoly, it came so close that it would have created "a dangerous probability" of monopolization if the "methods, means and practices" employed had been successful.[14]

A 60%–65% market share has been held to establish a *prima facie* case of market power and to create a genuine issue of dangerous probability of monopolization.[15]

In cases involving a *monopsony*, or a buyer's side monopoly where the market is the pool of competing buyers, "[t]he proper focus is . . . the commonality and interchangeability of the buyers, not the commonality and interchangeability of the sellers."[16]

Where suit is brought claiming that a retailer used

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[13]*See, e.g.*, *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 811 (9th Cir. 1988).

[14]*See American Tobacco Co. v. United States*, 328 U.S. 781, 785 (1946); *Philadelphia Taxi Ass'n v. Uber Technologies, Inc.*, 886 F.3d 332, 338 (3d Cir. 2018) (affirming dismissal of attempted monopolization claims brought by taxi cab companies and drivers); *Sun Microsystems, Inc. v. Versata Enterprises, Inc.*, 630 F. Supp. 2d 395, 403 (D. Del. 2009).

[15]*See Walter Kidde Portable Equipment, Inc. v. Universal Sec. Instruments, Inc.*, 669 F. Supp. 2d 895, 901 (N.D. Ill. 2009) (65% market share); *Intergraph Corp. v. Intel Corp.*, 3 F. Supp. 2d 1255, 1275–76 (N.D. Ala. 1998) (citing other cases), *vacated*, 195 F.3d 1346 (Fed. Cir. 1999).

[16]*Todd v. Exxon Corp.*, 275 F.3d 191, 202 (2d Cir. 2001) (quoting Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 Cornell L. Rev. 297, 324 (1991)); *see also, e.g., Lasoff v. Amazon.com Inc.,* Case No. C16-151 BJR, 2017 WL 372948 (W.D. Wash. Jan. 26, 2017) (granting summary judgment for Amazon.com on plaintiff's monopolization claim because of (1) the interchangeability of search engine advertising with other forms of internet advertising ("Because there is no basis for distinguishing the 'search engine advertising' market from the larger market of all internet advertising, the former is simply too narrow to form a meaningful 'relevant market' for purposes of antitrust liability. *See Person v. Google, Inc.*, 2007 WL 832941 at *4 (N.D. Cal. Mar. 16, 2007)"); and (2) the pool of competing purchasers was simply too large (there were multiple alternative buyers of online search engine advertising) and plaintiff failed to address the interchangeability of purchasers of online search engine advertising for artificial turf products; "Where the 'service offeror' has "too many alternative buyers for [its] services,' monopsony is not possible.").

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monopoly power to overcharge consumers, a plaintiff must be a *direct purchaser*—meaning that the plaintiff must have been an "immediate buyer[] from the alleged antitrust violators . . . ."[17] In contrast, "indirect purchasers who are two or more steps removed from the antitrust violator in a distribution chain may not sue."[18] In *Apple v. Pepper,* the U.S. Supreme Court held, in a 5-4 opinion, that iPhone purchasers had stated a claim alleging that Apple had exercised monopoly power to allegedly charge supracompetitive prices to consumers of its App Store even though prices were set by app publishers, who paid Apple a flat $99/year membership fee and 30% of any revenue derived from App Store sales. The majority held that the plaintiffs were direct purchasers entitled to sue Apple, as the platform provider, because consumers purchased the apps directly from Apple without the involvement of an intermediary.[19]

The majority opinion, written by Justice Kavanaugh, appears to put form over substance in treating a platform provider as a seller to a direct purchaser. In dissent, Justice Gorsuch, on behalf of himself, Chief Justice Roberts and Justices Thomas and Alito, argued that the majority, by their opinion, replaced "a rule of proximate causation and economic reality with an easily manipulated and formalistic rule of contractual privity.[20] Justice Gorsuch explained that *Illinois Brick Co. v. Illinois,*[21] the case on which the majority relied for its holding in *Pepper*, had stood for the proposition that an antitrust plaintiff can't sue a defendant for overcharging *someone else* who might (or might not) have passed on all (or some) of the overcharge to the plaintiff. The majority, however, had recast *Illinois Brick,* in Justice Gorsuch's view, "as a rule forbidding only suits where the plaintiff does not contract directly with the defendant."[22] He explained:

> Seizing on *Illinois Brick*'s use of the shorthand phrase "direct purchasers" to describe the parties immediately injured by the monopoly overcharge in that case, the Court (re)characterizes

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[17] *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1520 (2019).

[18] *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1521 (2019).

[19] *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1519-24 (2019).

[20] *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1526 (2019) (Gorsuch, J. dissenting).

[21] *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

[22] *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1525-26 (2019) (Gorsuch, J. dissenting).

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> *Illinois Brick* as a rule that anyone who purchases goods directly from an alleged antitrust violator can sue, while anyone who doesn't, can't. Under this revisionist version of *Illinois Brick*, the dispositive question becomes whether an "intermediary in the distribution chain" stands between the plaintiff and the defendant. . . . And because the plaintiff app purchasers in this case happen to have purchased apps directly from Apple, the Court reasons, they may sue.
>
> This exalts form over substance. Instead of focusing on the traditional proximate cause question where the alleged overcharge is first (and thus surely) felt, the Court's test turns on who happens to be in privity of contract with whom. But we've long recognized that antitrust law should look at "the economic reality of the relevant transactions" rather than "formal conceptions of contract law." *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 208 (1968). And this case illustrates why. To evade the Court's test, all Apple must do is amend its contracts. Instead of collecting payments for apps sold in the App Store and remitting the balance (less its commission) to developers, Apple can simply specify that consumers' payments will flow the other way: directly to the developers, who will then remit commissions to Apple. No antitrust reason exists to treat these contractual arrangements differently, and doing so will only induce firms to abandon their preferred—and presumably more efficient—distribution arrangements in favor of less efficient ones, all so they might avoid an arbitrary legal rule. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 763, 772–774 (1984) (rejecting an " 'artificial distinction' " that "serves no valid antitrust goals but merely deprives consumers and producers of the benefits" of a particular business model).[23]

Although the *Pepper* opinion only involved the narrow

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[23] *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1529-30 (2019) (Gorsuch, J. dissenting). Justice Gorsuch further elaborated that:

> [T]here is nothing arbitrary or unprincipled about *Illinois Brick*'s rule or results. The notion that the causal chain must stop somewhere is an ancient and venerable one. As with most any rule of proximate cause, reasonable people can debate whether *Illinois Brick* drew exactly the right line in cutting off claims where it did. But the line it drew is intelligible, principled, administrable, and far more reasonable than the Court's artificial rule of contractual privity. Nor do the Court's hypotheticals come close to proving otherwise. In the first scenario, the markup falls initially on the consumer, so there's no doubt that the retailer's anticompetitive conduct proximately caused the consumer's injury. Meanwhile, in the second scenario the commission falls initially on the manufacturer, and the consumer won't feel the pain unless the manufacturer can and does recoup some or all of the elevated commission by raising its own prices. In *that* situation, the manufacturer is the directly injured party, and the difficulty of disaggregating damages between those directly and indirectly harmed means that the consumer can't establish proximate cause under traditional principles.

139 S. Ct. at 1530-31 (italics in original).

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question of whether plaintiffs had sufficiently stated a claim to withstand a motion to dismiss based on the allegations contained in plaintiff's complaint, and by no means establishes liability, it potentially emboldens plaintiffs who may wish to sue platform providers that process transactions between third party buyers and sellers and retain a percentage of the proceeds.

Efforts by the FTC and state attorneys general to sue Facebook under section 2 of the Sherman Act have been unsuccessful thus far. D.C. Judge James E. Boasberg, Jr dismissed the Federal Trade Commission's suit against Facebook because its conclusory assertions did not plausibly establish market power and Facebook's adoption of a policy of not offering application programming interface (API) access to competitors with which it had no previous voluntary course of dealing did not violate the Sherman Act.[24] Judge Boasberg also dismissed an antitrust suit brought by multiple states against Facebook, because of delay. The court held that the states' Sherman Act section 2 and Clayton Act section 7 challenges to Facebook's acquisitions of Instagram in 2012 and WhatsApp in 2014, which were filed in December 2020, were barred by the doctrine of laches, which precludes relief for those who sleep on their rights.[25] Likewise, Judge Boasberg dismissed the states' Sherman Act 2 challenge to Facebook's policy of preventing interoperability with competing apps because the revocations of access occurred more than five years before suit was filed and therefore couldn't serve as the bass for injunctive relief.[26]

Among other district court digital economy cases, Delaware Judge Leonard P. Stark dismissed Sherman Act 2 and tying claims brought against Apple by Blix, Inc., whose claim

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[24]*See Federal Trade Commission v. Facebook, Inc.*, __ F. Supp. 3d __, 2021 WL 2643627 (D.D.C. 2021). The court observed that the FTC's assertion that Facebook has "maintained a dominant share of the U.S. personal social networking market (in excess of 60%)" since 2011, and that "no other social network of comparable scale exists in the United States" were "allegations — which do not even provide an estimated actual figure or range for Facebook's market share at any point over the past ten years — [that] ultimately fall short of plausibly establishing that Facebook holds market power" (and thus the court did not address the issue of whether the FTC had sufficiently alleged entry barriers). Id. at *12.

[25]*See New York v. Facebook, Inc.*, __ F. Supp. 3d __, 2021 WL 2643724 (D.D.C. 2021).

[26]*See New York v. Facebook, Inc.*, __ F. Supp. 3d __, 2021 WL 2643724 (D.D.C. 2021).

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of monopoly maintenance based on Apple's alleged infringement of Blix's patent was undermined by dismissal of the patent infringement claim.[27] Blix had also alleged monopoly maintenance by a practice it called "Sherlocking," which it described as Apple's requirement that every application made available to end users be pre-reviewed by Apple, ostensibly to allow Apple to roll out its own version. The court agreed with Apple, however that Blix did not show, in the context of its Complaint, how "Sherlocking" was any different from patent infringement or how it provided a cognizable basis for alleging competitive harm.[28]

34.05[2] The Centrality of Market Definition

34.05[2][A] In General

The proper product and geographic market definition often is the most hotly contested issue in a lawsuit brought under section 2 of the Sherman Act[1] (and often under section 1 rule of reason cases[2] and Clayton Act section 7[3] cases, as well) because the more narrowly a market is defined the easier it may be to show that a defendant possesses market power. Whereas some companies may possess "market power in the trivial sense that no one else makes" exactly the same product, "true market power," according to the Sixth Circuit, suggests "power sufficient to change and sustain anticompetitive prices . . . ."[4]

Product definition may be based on the goods allegedly the subject of a monopolization claim and those commodities reasonably interchangeable by consumers for the same purposes, including products for which there is a cross-

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[27] *See Blix, Inc. v. Apple, Inc.*, C.A. No. 19-1869-LPS, 2021 WL 2895654, at *3-5 (D. Del. July 9, 2021).

[28] *Blix, Inc. v. Apple, Inc.*, C.A. No. 19-1869-LPS, 2021 WL 2895654, at *3 n.1 (D. Del. July 9, 2021).

[Section 34.05[2][A]]

[1] 15 U.S.C.A. § 2.

[2] 15 U.S.C.A. § 1.

[3] 15 U.S.C.A. § 18.

[4] *Virtual Maintenance, Inc. v. Prime Computer, Inc.*, 11 F.3d 660, 665 (6th Cir. 1993). *Accord Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 315 (3d Cir. 2007); *In re Mushroom Direct Purchaser Antitrust Litigation*, 514 F. Supp. 2d 683, 699 (E.D. Pa. 2007). As noted above, many courts have held that plaintiffs must prove the existence of barriers to entry for potential competitors of the defendants, as well.

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elasticity of demand.[5] The range of competitive goods or services online may make it difficult to define the relevant product precisely, especially given how quickly ecommerce business models and technology have been changing.[6]

A geographic market will be determined based on the area where parties compete with one another.[7] Limiting the geographic market in cyberspace to something less than world-wide or nation-wide in scope will sometimes be difficult in the absence of regulatory differences or restrictions, language, legal, or delivery barriers, or sales restrictions by website owners. One possible way for a party to limit the scope of the defined market for an online seller operating world-wide might be to analyze the product sales of all competitors, so that the market is defined by reference to actual, rather than potential, sales. Yet, such a limitation could be viewed as artificial, reflecting primarily past, rather than likely future, sales.[8]

In the 1950s and 1960s the U.S. Supreme Court set out the criteria for proving a market in a trio of cases, *United States v. E.I. du Pont Nemours and Co.*,[9] *Brown Shoe Co. v. United States*,[10] and *United States v. Grinnell Corp*.[11] In *du Pont*, the Court addressed whether the defendant could be

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[5]*United States v. E.I. duPont de Nemours & Co.*, 551 U.S. 377, 394 (1956) (holding the relevant market to include flexible wrapping material, rather than merely cellophane wrapping (in what has often been criticized as the "cellophane fallacy")); *HDC Medical, Inc. v. Minntech Corp.*, 474 F.3d 543, 547 (8th Cir. 2007) (holding that product market definition looks to not only price differentials among allegedly distinct products but also industry or public recognition of distinction, product uses and peculiar characteristics, uniqueness of production facilities, sensitivity to price changes, distinctness of customers, and specialization of vendors).

[6]*See, e.g., Coalition for ICANN Transparency Inc. v. VeriSign, Inc.*, 464 F. Supp. 2d 948 (N.D. Cal. 2006) (dismissing claims by an association comprised of domain name registrars, registrants, and back order service providers, who had sued ICANN and the registry operator for the *.com* and *.net* domain names, challenging a proposed 2006 .com agreement under the Sherman Act); *see generally infra* § 34.11[5][A] (analyzing the case in greater detail).

[7]*See Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962); *Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, 431 F.3d 917, 932 (6th Cir. 2005).

[8]For further information about this topic, *see* Michael R. Baye, Market Definition in Online Markets (2008).

[9]*United States v. E.I. du Pont Nemours and Co.*, 351 U.S. 377 (1956).

[10]*Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

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considered to have monopolized the market for cellophane and for cellophane caps and brands under section 2 of the Sherman Act.[12] Based on the principle that monopoly power is the power to control prices or exclude competition in a relevant market, the Court observed that it must determine the competitive market in question before it could answer the question of whether the defendant has illegal power in that market.[13] To determine the contours of a competitive market for commodities, the Court had to determine how far buyers would go to substitute one commodity for another.[14] In *du Pont*, this inquiry meant that the Court would have to determine whether there were ready alternatives for cellophane such that the defendant could not have monopoly power in the cellophane market, an inquiry which required an assessment of the cross-elasticity of demand between cellophane and other wrappings.[15]

In looking to the uses to which cellophane is put *vis-à-vis* other wrappings, the Court referred to the factual findings of the district court that the uses of other wrappings were as extensive as cellophane and that many of the characteristics of other wrappings were equally (or more) satisfactory to users.[16] The Court also found evidence in the record sufficient to support additional findings of the district court that sales of other wrappings were responsive to price changes in cellophane and vice versa.[17] However, on this latter point, the holding of the Court has been criticized—even by the Court itself in subsequent cases—as creating the so-called cellophane fallacy or trap under which "[t]he existence of significant substitution in the event of *further* price increases or even at the *current* price does not tell us whether

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[11] *United States v. Grinnell Corp*, 384 U.S. 563 (1966).

[12] *United States v. E.I. du Pont Nemours and Co.*, 351 U.S. 377, 380-85 (1956).

[13] *United States v. E.I. du Pont Nemours and Co.*, 351 U.S. 377, 390-93 (1956).

[14] *United States v. E.I. du Pont Nemours and Co.*, 351 U.S. 377, 393 (1956).

[15] *United States v. E.I. du Pont Nemours and Co.*, 351 U.S. 377, 394-95 (1956).

[16] *United States v. E.I. du Pont Nemours and Co.*, 351 U.S. 377, 399-99 (1956).

[17] *United States v. E.I. du Pont Nemours and Co.*, 351 U.S. 377, 400-02 (1956).

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the defendant *already* exercises significant market power."[18]

Finally, the Court found it probative that there was ease of entry into the relevant market.[19] In so doing, it rejected the government's contention ease of entry did not matter because that did not include cellophane—both because it had found other wrappings to be functionally interchangeable with cellophane and because the district court found to the contrary even as to ease of entry into the production of cellophane.[20] Consequently, the Court sustained the conclusion of the district court that the defendant did not have the power to monopolize the market for cellophane.[21]

In *Brown Shoe*, the Court addressed the question under section 7 of the Clayton Act whether the merger of two manufacturers and sellers of shoes should be proscribed by elaborating on how the relevant market should be determined for purposes of assessing the impact of the merger.[22] The Court first imported *du Pont*'s analysis for when a relevant market exists into *Brown Shoe*, noting that "the outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."[23] The Court, however, further noted that submarkets may exist within this overall broader market based on such criteria "as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors."[24]

Deferring to the findings of the district court, the Court

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[18]*Eastman Kodak Co. v. Image Technical Serv. Co.*, 504 U.S. 451, 471 (1992) (internal citations and quotation marks omitted).

[19]*United States v. E.I. du Pont Nemours and Co.*, 351 U.S. 377, 403-04 (1956).

[20]*United States v. E.I. du Pont Nemours and Co.*, 351 U.S. 377, 403-04 (1956).

[21]*United States v. E.I. du Pont Nemours and Co.*, 351 U.S. 377, 404 (1956).

[22]*Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962).

[23]*Brown Shoe Co. v. United States*, 370 U.S. 294, 324-25 (1962). In footnote 42 of its opinion, the Court further noted that the cross-elasticity of supply may be relevant and, though the factual findings were limited, found that those findings supported the conclusion that factories could not be retooled to produce competing footwear. *Id.* at 325 n.42.

[24]*Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

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agreed that the relevant markets under these principles were men's shoes, women's shoes, and children's shoes.[25] The Court rejected the argument of the defendant that "low-priced" shoes constituted a distinct market from "high-priced" shoes.[26] The Court further agreed with the district court's rejection of the defendant's argument that the market for children's shoes should have been further subdivided by gender: the Court noted that retailers sold children's shoes without such fine gradations and that the defendant had otherwise failed to demonstrate how making finer gradations would make a difference in assessing the competitive impact of the merger.[27]

Though the Court found the relevant geographic market to be nationwide in addressing the vertical and horizontal aspects of this merger insofar as shoe manufacturing was concerned,[28] it had to address the disagreement of the parties over the relevant geographic market regarding shoe retailing.[29] The Court observed that the "pragmatic" approach to defining a relevant geographic market was essentially similar to that used to define a relevant product market, that relevant geographic submarkets may exist, that relevant geographic markets must correspond to commercial realities and be economically significant, and that a relevant geographic market could be as large as the Nation itself or as small as a single metropolitan area.[30] In delineating this approach, the Court not only cited *du Pont*, a section 2 case, and cases involving mergers, but also lower court cases involving section 1 of the Sherman Act.[31]

After delineating these principles, the Court addressed the propriety of the district court's findings that the relevant geographical areas were (1) the entire city as opposed to just

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[25]*Brown Shoe Co. v. United States*, 370 U.S. 294, 326 (1962).

[26]*Brown Shoe Co. v. United States*, 370 U.S. 294, 326 (1962).

[27]*Brown Shoe Co. v. United States*, 370 U.S. 294, 327 (1962). The rest of the opinion addresses how the competitive effects of the merger are to be assessed under section 7 of the Clayton Act once a market is properly defined. *See id.* at 328-33, 339-46.

[28]*Brown Shoe Co. v. United States*, 370 U.S. 294, 327 (1962).

[29]*Brown Shoe Co. v. United States*, 370 U.S. 294, 327, 338 (1962).

[30]*Brown Shoe Co. v. United States*, 370 U.S. 294, 336–37 (1962).

[31]*See, e.g.*, *Brown Shoe Co. v. United States*, 370 U.S. 294, 337 (1962), *citing United States v. Columbia Pictures Corp.*, 189 F. Supp. 153, 193-94 (S.D.N.Y. 1960).

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the downtown business district but (2) did not include areas that were beyond the immediate environs of a city.[32] The Court found that the record sufficiently supported these findings.[33]

Finally, in *Grinnell*, the Court addressed the "important" question under section 2 of the Sherman Act of whether the district court properly defined the relevant market in finding that the defendant alarm companies, some of which provided burglary alarms and some of which provided fire alarms, violated section 2 via acquisitions of other companies, market allocation agreements, and even price-fixing agreements.[34] Insofar as these acquisitions are concerned, one of the defendant alarm companies had acquired between 76-100% of stock in the other three alarm companies.[35]

The Court first sustained the factual findings of the district court that the relevant product market was the protection of property through a central station that receives signals without breaking this market down into the type of alarm involved, e.g., fire or burglary.[36] Citing section 7 cases by way of analogy, the Court observed that not only could the district court find a single overarching use of those services to be controlling in defining the relevant product market but also the district court could find that the defendants, in order to compete, had to offer a closely related cluster of services.[37] The Court also upheld the findings of the district court that fringe competition from other types of alarm or watchman services did not sufficiently constrain the defendants because "the high degree of differentiation between central station protection and the other forms means that for many customers, only central station protection will do."[38] Finally, the Court upheld the findings of the court that unaccredited services were not in the same market as the accredited services provided by the defendants given that customers (e.g., underwriters) consider unaccredited services to be

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[32] *Brown Shoe Co. v. United States*, 370 U.S. 294, 337–38 (1962).

[33] *Brown Shoe Co. v. United States*, 370 U.S. 294, 337–38 (1962).

[34] *United States v. Grinnell Corp.*, 384 U.S. 563, 566-70 (1966).

[35] *United States v. Grinnell Corp.*, 384 U.S. 563, 566 (1966).

[36] *United States v. Grinnell Corp.*, 384 U.S. 563, 571-72 (1966).

[37] *United States v. Grinnell Corp.*, 384 U.S. 563, 572-73 (1966), *citing United States v. Philadelphia National Bank*, 374 U.S. 321, 356 (1963).

[38] *United States v. Grinnell Corp.*, 384 U.S. 563, 574 (1966).

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inferior.[39]

The Court next upheld the factual findings of the district court that the relevant geographical market for these services was national. Although the services were provided locally, the defendants conducted business planning on a national level, reached agreements mentioned above that covered activities in many states, dealt with nationwide insurers, had nationwide price schedules that were adjusted to local conditions, and dealt with multistate businesses.[40]

34.05[2][B] Two-Sided Transaction Platforms

In *Ohio v. American Express Co.*,[1] the U.S. Supreme Court addressed the special case of how to define the relevant market when analyzing two-sided transaction platforms, concluding that "in two-sided transaction markets, only one market should be defined."[2] That case involved a challenge by the federal government and several states to the antisteering provisions of American Express's contracts with merchants, which prohibited merchants from seeking to dissuade cardholders from paying for goods or services with American Express, in favor of competing credit cards such as those issued by Visa and MasterCard, which typically charged merchants lower fees. The Court, however, held that the plaintiffs could not carry their burden to show anticompetitive effects (under the rule of reason) based on evidence that Amex's antisteering provisions increased merchant fees because credit card companies like Amex operated "two-sided platforms"—providing services to two different groups (cardholders and merchants) who depended on the platform to intermediate between them—and the two-sided market for credit card transactions should be analyzed as a whole.

Justice Thomas, writing for the majority of five justices, explained that two-sided platforms are markets that offer "different products or services to two different groups who

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[39] *United States v. Grinnell Corp.*, 384 U.S. 563, 575 (1966).

[40] *United States v. Grinnell Corp.*, 384 U.S. 563, 575-76 (1966). The Court went on to address whether the defendants (which were all part of a single conglomerate) had a monopoly share of this market. *See id.* at 576.

[Section 34.05[2][B]]

[1] *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018).

[2] *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2287 (2018) (internal quotation marks and citation omitted).

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both depend on the platform to intermediate between them."[3] Transaction platforms such as Amex are a specific type of two-sided platform that "cannot make a sale to one side of the platform without simultaneously making a sale to the other."[4] Thus, in a sense, transaction platforms are "better understood as supplying only one product—transactions."[5] In characterizing credit card companies as operating a two-sided transaction platform that intermediated between merchants and cardholders, Justice Thomas elaborated that "no credit-card transaction can occur unless both the merchant and the cardholder simultaneously agree to use the same credit-card network."[6]

Unlike traditional markets, two-sided platforms reflect "indirect network effects," i.e., the "value of the services that a two-sided platform provides increases as the number of participants on both sides of the platform increases."[7] Justice Thomas explained that some two-sided platforms—such as the market for newspaper advertisements—may be treated as one-sided when the impacts of indirect network effects and relative pricing in that market are minor. In the newspaper advertisement market, "the indirect networks effects operate in only one direction; newspaper readers are largely indifferent to the amount of advertising that a newspaper contains. . . . Because of these weak indirect network effects, the market for newspaper advertising behaves like a one-sided market and should be analyzed as such."[8]

By contrast, Justice Thomas explained that two-sided transaction platforms, like the credit card market are different. They "facilitate a single, simultaneous transaction between participants. For credit cards, the network can sell its services only if a merchant and cardholder both simulta-

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[3] *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2280 (2018).

[4] *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2280 (2018).

[5] *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2286 (2018) (internal quotation marks and citation omitted).

[6] *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2280 (2018).

[7] *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2281 (2018).

[8] *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2286 (2018), *citing Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 610 (1953) (defining the relevant market as newspaper advertising alone rather than newspaper advertising and readership combined); Filistrucchi, Geradin, Van Damme, & Affeldt, *Market Definition in Two–Sided Markets: Theory and Practice*, 10 J. Competition L. & Econ. 293, 321 (2014).

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neously choose to use the network."[9] Because credit card networks cannot make a sale unless both sides of the platform simultaneously agree to use their services, "they exhibit more pronounced indirect network effects and interconnected pricing and demand. . . . To optimize sales, the network must find the balance of pricing that encourages the greatest number of matches between cardholders and merchants."[10] Indeed, two-sided platforms may even charge one side of the platform higher prices than the other, to maintain optimal participation.[11]

In *American Express*, the Court explained that credit card markets are subject to indirect network effects because a credit card is "more valuable to cardholders when more merchants accept it, and is more valuable to merchants when more cardholders use it."[12] Furthermore, because higher interest rates depress cardholder demand more than high transaction costs do for merchants, credit card networks often impose higher prices on merchants than cardholders.[13] The majority explained that while Visa and MasterCard charged lower transaction fees than American Express, they generated revenue primarily from cardholder lending. By contrast, Amex's business model depended on cardholder spending, not financing, and it therefore offered its customers better rewards than Visa and MasterCard, to encourage cardholder loyalty and increased spending. "While Visa and MasterCard earn half of their revenue by collecting interest from their cardholders, . . . Amex instead earns most of its revenue from merchant fees. Amex's business model thus focuses on cardholder spending rather than cardholder lending."[14]

Visa and MasterCard, the Court explained, had significant structural advantages over Amex because they began as bank cooperatives and thus almost every bank that offered credit cards to its customers was in the Visa or MasterCard network. Visa and MasterCard accounted for more than 432 million cards, while Amex had only 53 million. As the Court explained, "the vast majority of Amex cardholders have a

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[9] *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2286 (2018).

[10] *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2286 (2018).

[11] *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2281 (2018).

[12] *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2281 (2018).

[13] *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2281 (2018).

[14] *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2282 (2018).

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Visa or MasterCard, but only a small number of Visa and MasterCard cardholders have an Amex."[15] Similarly, while 3.4 million merchants at 6.4 million locations accepted Amex at the time of the suit, nearly three million more locations accepted Visa, MasterCard and Discover.[16] Amex, the Court explained, must continually invest in its rewards program to maintain customer loyalty, which it financed through merchant fees. Even though Amex's investments benefitted merchants by encouraging cardholders to spend more money, merchants would prefer to avoid higher fees, and therefore one way that merchants sought to avoid them while still enticing Amex cardholders to shop at their stores was to dissuade cardholders from using Amex at the point of sale—a practice known as *steering*. Amex, since the 1950s, thus has prohibited steering by placing antisteering provisions in its contracts with merchants.[17]

The parties and the Court had identified Amex's antisteering provisions as vertical restraints to be assessed under the rule of reason.[18] Because the plaintiffs "stake[d] their entire case on proving that Amex's agreements increase[d] merchant fees" to show an anticompetitive effect, they failed to meet their burden.[19] "Evidence of a price increase on one side of a two-sided transaction platform cannot by itself demonstrate an anticompetitive exercise of market power. To demonstrate anticompetitive effects on the two-sided credit-card market as a whole, the plaintiffs would have had to have proven that Amex's antisteering provisions increased the cost of credit-card transactions above a competitive level,[20] reduced the number of credit-card transactions, or otherwise stifled competition in the credit-card market," which they failed to do.[21]

Justice Breyer, joined by Justices Ginsburg, Sotomayor

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[15]*Ohio v. American Express Co.*, 138 S. Ct. 2274, 2282 (2018).

[16]*Ohio v. American Express Co.*, 138 S. Ct. 2274, 2282 (2018).

[17]*Ohio v. American Express Co.*, 138 S. Ct. 2274, 2283-84 (2018).

[18]*Ohio v. American Express Co.*, 138 S. Ct. 2274, 2284 (2018).

[19]*Ohio v. American Express Co.*, 138 S. Ct. 2274, 2287 (2018).

[20]While plaintiffs did offer evidence that Amex increased the percentage of the purchase price it charged merchants by an average of 0.09% between 2005 and 2010 and that this increase was not entirely spent on cardholder rewards, the majority held that this evidence did not prove that Amex's antisteering provisions gave it the power to charge anticompetitive prices. *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2288 (2018).

[21]*Ohio v. American Express Co.*, 138 S. Ct. 2274, 2287-88 (2018).

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and Kagan, dissented, finding the contractual term to have serious anticompetitive effects.

It remains to be seen how expansively courts will apply the two-sided platform analysis.[22] But online platforms that facilitate simultaneous transactions, such as gig economy platforms used for ride sharing and home sharing services, may benefit from the higher burden placed on antitrust plaintiffs to show anticompetitive effects on both sides of a platform rather than one side alone.[23]

34.05[3] Exclusionary Conduct, Lock-Ins, and the Essential Facilities Doctrine

Exclusionary conduct means "conduct, other than competition on the merits or restraints reasonably 'necessary' to competition on the merits, that reasonably appears capable of making a significant contribution to creating or maintaining monopoly power."[1] By contrast, exclusionary conduct is not merely behavior that "poses no unreasonable threat to consumer welfare but is merely a manifestation of healthy competition, an absence of competition, or a natural mo-

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Rather than stifling competition, the majority found that while these provisions were in force, the credit card market experienced expanding output and increased quality. Amex's business model had spurred Visa and MasterCard to offer new premium card categories with higher rewards, Amex lost merchants and had to lower its fees at different points in time, and Visa, MasterCard and Discover achieved broader market acceptance—in the form of approximately 3 million more locations than Amex—because of their lower fees. *Id.* at 2289.

[22]*Cf. Ohio v. American Express Co.*, 138 S. Ct. 2274, 2297-99 (2018) (Breyer, J., dissenting) (criticizing the majority's definition of "two-sided transaction platform" as overbroad and arguing that it effectuated an unjustified departure from settled antitrust market definition principles).

[23]*See* Ina Fried & David McCabe, *DOJ Antitrust Official: Supreme Court Ruling Won't Shield Big Tech*, Axios (June 26, 2018), https://www.axios.com/makan-delrahim-in-aspen-1530038874-a289ad1a-012b-4ccb-9cb7-69658ee78c33.html (Assistant Attorney General for the Antitrust Division of the U.S. Department of Justice Makan Delrahim differentiating between the effect of *American Express* on platforms that directly connect two parties, like Uber and Airbnb, and ad-supported platforms).

[Section 34.05[3]]

[1]*Data General Corp. v. Grumman Systems Support Corp.*, 36 F.3d 1147, 1181–82 (1st Cir. 1994) (citing other cases and 3 X. Phillip Areeda & Donald F. Turner, Antitrust Law § 626, at 83 (1978)). *Cf. Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

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nopoly"[2] or that represents "growth or development as a consequence of a superior product, business acumen, or historic accident" as opposed to the willful acquisition or maintenance of monopoly power.[3] Antitrust scrutiny will be especially focused where an alleged monopolist's customers are *locked in* and cannot readily switch to alternative technologies.[4] Antitrust scrutiny will *also* involve considering whether the industry operates under "a regulatory structure designed to deter and remedy anticompetitive harm. Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny."[5]

Where a party possesses monopoly power, the party's unilateral refusal to deal with competitors may constitute *prima facie* evidence of exclusionary conduct where the refusal harms the competitive process.[6] This may be especially true where a monopolist previously allowed or encouraged compe-

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[2]*Data General Corp. v. Grumman Systems Support Corp.*, 36 F.3d 1147, 1182 (1st Cir. 1994), *citing United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966). *Accord Port Dock & Stone Corp. v. Oldcastle Northeast, Inc.*, 507 F.3d 117, 124 (2d Cir. 2007).

[3]*United States v. Grinnell Corp.*, 384 U.S. at 570–71; *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories Inc.*, 386 F.3d 485, 495 (2d Cir. 2004).

[4]*See Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 477 (1992); *Xerox Corp. v. Media Sciences Intern., Inc.*, 511 F. Supp. 2d 372, 382–83 (S.D.N.Y. 2007). In some circuits, the plaintiff must demonstrate that it did not have knowledge of the seller's lock-in policy in advance of making the relevant purchase. *See PSI Repair Services, Inc. v. Honeywell, Inc.*, 104 F.3d 811, 819–20 (6th Cir. 1997) (citing cases from two other circuits).

[5]*Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 412 (2004).

[6]*See Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 483 n.32 (1992) (manufacturer's refusal to supply spare parts for independent service organization that provided post-warranty repair service); *see also Lorain Journal Co. v. United States*, 342 U.S. 143 (1951) (refusal by newspaper to sell advertising space to customers who patronized a competing radio station); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) (wholesale utility supplier's refusal to supply electric power to a power system that competed with it in the retail electrical power market and had no other source of supply); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) (ski lift operator's refusal to continue joint ski pass venture with a smaller competitor); *CTC Communications Corp. v. Bell Atlantic Corp.*, 77 F. Supp. 2d 124, 147 (D. Me. 1999).

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tition and then withdrew the right to compete.[7] Nevertheless, even in such cases, an alleged monopolist may avoid liability where it establishes that there was a legitimate, procompetitive business justification for the conduct.[8]

A defendant's refusal to deal "may be unlawful because a monopolist's control of an *essential facility* (sometimes called a 'bottleneck') can extend monopoly power from one stage of production to another, and from one market into another."[9] An essential facility "is one which is not merely helpful but vital to the claimant's competitive viability." Examples found to constitute essential facilities include the only feasible railroad line that existed between St. Louis and the western

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[7]*See Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602–05 (1985) (withdrawal of the right to participate in joint marketing of a ski pass at the only one of four adjacent ski slopes not owned by the defendant, after those passes were sold for several years). In *Aspen Ski*, liability was imposed because the U.S. Supreme Court found no business justification for the defendant's refusal to continue the general access ski pass other than eliminating a competitor. The Court found that the defendant "was not motivated by efficiency concerns and . . . was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival." 472 U.S. at 610–11. The U.S. Supreme Court subsequently clarified, however, that, the U.S. Supreme Court stated, "*Aspen Skiing* is at or near the outer boundary of Section 2 liability." *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004).

[8]*Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 483 n.32 (1992) (justification for refusing to deal "exists only if there are legitimate competitive reasons for the refusal"); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608-10 (1985). *Accord HDC Medical, Inc. v. Minntech Corp.*, 474 F.3d 543, 549–50 (8th Cir. 2007). *But see Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973) ("[t]he promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct"). As of mid-2011, litigation was pending challenging Apple's prior, exclusive arrangement with AT&T to be the exclusive U.S. service provider for iPhones. *See, e.g., In re Apple & AT & TM Antitrust Litigation*, 596 F. Supp. 2d 1288 (N.D. Cal. 2008).

[9]*MCI Communications Corp. v. American Tel. and Tel. Co.*, 708 F.2d 1081, 1132 (7th Cir. 1983). The U.S. Supreme Court, however, reiterated in 2004 that it had "never recognized such a doctrine, and we find no need either to recognize it or to repudiate it here." *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004); *see also* Spencer Weber Waller, *Areeda, Epithets, and Essential Facilities*, 2008 Wis. L. Rev. 359 (2008) (providing an overview of the history, criticism of, and apparent subsequent constriction of the essential facilities doctrine).

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United States at the beginning of the twentieth century,[10] and the nation's telephone system, at the time when both local and long-distance service were provided on lines run by a single company.[11] In such cases, antitrust laws impose on firms controlling an essential facility the obligation to make the facility available on non-discriminatory terms.[12] There is no antitrust requirement that the monopolist make the facility available to competitors at pricing low enough to permit the competitors to operate competing businesses profitably and with comparable pricing.[13]

To state a claim under the essential facilities doctrine, a plaintiff typically must show (1) an essential facility, (2) being controlled by a monopolist; (3) the competitor's inability practically or reasonably to duplicate the essential facility; (4) denial of the use of the facility to a competitor; and (5) the feasibility of providing the facility.[14]

The essential facilities doctrine generally applies to natural monopolies, facilities whose duplication may be forbidden by law, or which could not practicably be built privately.[15] Several cases involving service providers or Internet-related technology have addressed the issue of what constitutes an essential facility in cyberspace. In *Intergraph Corp. v. Intel Corp.*,[16] the district court found that Intel's provision of CPUs, Advance Chip Samples, advance technical and design

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[10]*See U. S. v. Terminal R. R. Ass'n of St. Louis*, 224 U.S. 383 (1912).

[11]*See MCI Communications Corp. v. American Tel. and Tel. Co.*, 708 F.2d 1081 (7th Cir. 1983).

[12]*See, e.g.*, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 600–02 (1985); *MCI Communications Corp. v. American Tel. and Tel. Co.*, 708 F.2d 1081, 1132 (7th Cir. 1983); *Tic-X-Press, Inc. v. Omni Promotions Co. of Georgia*, 815 F.2d 1407, 1420 (11th Cir. 1987) (lack of viable alternatives to the Omni arena gave the owner substantial market power); *Gregory v. Fort Bridger Rendezvous Ass'n*, 448 F.3d 1195, 1204 (10th Cir. 2006).

[13]*Pacific Bell Telephone Co. v. Linkline Communications, Inc.*, 555 U.S. 438 (2009).

[14]*Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 748 (3d Cir. 1996); *MetroNet Services Corp. v. Qwest Corp.*, 383 F.3d 1124, 1128–1129 (9th Cir. 2004); *Pittsburg County Rural Water Dist. No. 7 v. City of McAlester*, 358 F.3d 694, 721 (10th Cir. 2004).

[15]*See Cyber Promotions, Inc. v. America Online, Inc.*, 948 F. Supp. 456, 460 (E.D. Pa. 1996) (citation omitted); *Yankees Entertainment and Sports Network, LLC v. Cablevision Systems Corp.*, 224 F. Supp. 2d 657, 674 n.13 (S.D.N.Y. 2002).

[16]*Intergraph Corp. v. Intel Corp.*, 3 F. Supp. 2d 1255, 1269 (N.D. Ala.

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assistance, and information "as quickly as possible and no later than Intergraph's competitors" constituted an "essential facility" critical to Intergraph's competitive survival. This information and assistance had been provided to Intergraph since 1993, when Intergraph abandoned its own chip technology, and had been withdrawn, in the court's view, without a legitimate business justification.

On appeal, however, the Federal Circuit ruled that the essential facilities doctrine could not be invoked where there was no direct competitive relationship between the parties; according to the appellate court, a "non-competitor's asserted need for a manufacturer's business information does not convert the withholding of that information into an antitrust violation."[17]

Along those lines AOL's email system was found not to constitute an essential facility in a suit brought by a company which disseminated unsolicited commercial email and which objected to AOL's introduction in 1996 of blocking software intended to prevent delivery of its communications, except where users affirmatively asked to receive it.[18] Access to AOL's game channels was also alleged to be an essential facility in one case which ultimately settled before trial.[19]

Plaintiffs likewise have argued unsuccessfully that Google's search engine constitutes an essential facility for ecommerce companies to reach the general public. They have argued unsuccessfully that Google's sales to the highest bidders of certain key words to trigger the display of Internet advertising to users inputting the keywords on Google's search engine unfairly suppress necessary advertising by people or entities unable to afford the prices for the key words.[20] Indeed, application of the essential facilities doctrine may be particularly difficult where intellectual prop-

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1998).

[17]195 F.3d at 1357.

[18]*See Cyber Promotions, Inc. v. America Online, Inc.*, 948 F. Supp. 456 (E.D. Pa. 1996).

[19]*See Kesmai Corp. v. America Online, Inc.*, Case No. 1:97cv01544 (E.D. Va. filed Sept. 29, 1997).

[20]*See, e.g., Person v. Google, Inc.*, 2007-1 Trade Cas. (CCH) ¶ 75759, 2007 WL 1831111 (N.D. Cal. 2007); *Kinderstart.com LLC v. Google, Inc.*, 2007-1 Trade Cas. (CCH) ¶ 75643, 2007 WL 831806 (N.D. Cal. 2007). In the case of *In re Google, Inc.*, the U.S. Federal Trade Commission closed its investigation into Google's practices regarding its search engine and search engine rankings but accepted the following voluntary undertakings

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erty is involved.[21]

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by Google: (1) Google removed restrictions that allegedly made it more difficult for online advertisers to coordinate across multiple platforms and (2) rival online providers of services such as Yelp were permitted to opt-out, even though those websites would still show up in general search results. *See In Re Google, Inc.*, FTC File No. 121-0120, Letter from Google to Chairman Leibowitz (Dec. 27, 2012), http://www.ftc.gov/system/files/documents/closing_letters/google-inc./130103googleletterchairmanleibowitz.pdf; *id.*, Statement of the Federal Trade Commission Regarding Google's Search Practices (January 3, 2013), http://www.ftc.gov/system/files/documents/public_statements/295971/130103googlesearchstmtofcomm.pdf. *But see In re Google, Inc.*, 2013 WL 268924, at *1-2 (Jan. 3, 2013) (dis. op. of Commissioner Ohlhausen) (arguing that "[t]echnology industries are notoriously fast-paced, particularly industries involving the Internet. Poor or misguided antitrust enforcement action in such industries can have detrimental and long-lasting effects. . . . The decision to close the search preferencing part of this investigation, in my view, is evidence that this agency understands the need to tread carefully in the Internet space.").

[21]For example, Professor Hovenkamp, a leading antitrust law scholar, has written that "[r]egardless of the merits of the essential facilities doctrine in general, its application to intellectual property cases is particularly problematic." Herbert Hovenkamp, IP and Antitrust (Ch.13 *Unilateral Refusals to License*) 13-15 (2d ed. 2013). The U.S. Supreme Court has expressed doubts about the continued vitality of this judicially created doctrine (though not going so far as to overrule or limit the doctrine itself). *See Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407-08 (2004) (addressing a case in which access to facilities in the market in question was already compelled and regulated by an independent government agency).

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34.05[4] Monopoly Rights in Intellectual Property and Monopoly Leveraging

Most courts generally have held that a patent[1] or copyright[2] owner may justifiably refuse to license its intellectual property, but courts have not taken a uniform approach.[3] The creation and protection of intellectual property, after all, usually fosters economic efficiency by "encourag[ing] innovation and its fruits: new jobs and new industries, new consumer goods and trade benefits."[4]

On the other hand, "[w]hen a patent owner uses his patent rights not only as a shield to protect his invention but as a sword to eviscerate competition unfairly, that owner may be found to have abused the grant and may become liable for antitrust violations when sufficient power in the relevant

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[Section 34.05[4]]

[1]*See Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1362 (Fed. Cir. 1999) ("antitrust laws do not negate the patentee's right to exclude others from patent property"); *In re Independent Service Organizations Antitrust Litigation*, 989 F. Supp. 1131, 1136–39 (D. Kan. 1997) (holding that refusing to license a patent is not patent misuse, pursuant to 35 U.S.C.A. § 271(d)(4), and may not constitute an actionable antitrust violation either); *Monsanto Co. v. Scruggs*, 459 F.3d 1328, 1339 (Fed. Cir. 2006) ("[n]o patent owner otherwise entitled to relief . . . shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having . . . refused to license or use any rights to the patent . . . " (quoting 35 U.S.C.A. § 271(d))); *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, 381 F.3d 1178, 1201 (Fed. Cir. 2004).

[2]*See Data General Corp. v. Grumman Systems Support Corp.*, 36 F.3d 1147, 1184 (1st Cir. 1994); *In re Independent Service Organizations Antitrust Litigation*, 203 F.3d 1322, 1329 (Fed. Cir. 2000).

[3]*See Data Gen.,* 36 F.3d at 1185–87 (and cases discussed therein). *But see United States v. General Elec. Co.*, 82 F. Supp. 753, 905 (D.N.J. 1949) (finding that General Electric had "developed a tremendous patent framework and sought to stretch the monopoly acquired by patents far beyond the intendment of those grants"); *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391–92 (2006) (establishing that patentee might not always be able to obtain preliminary injunction against infringing activity). The protection of trademarks and trade secrets also may be found to be legitimate grounds for imposing license restrictions. *See*, *e.g.*, *Inflight Newspapers, Inc. v. Magazines In-Flight, LLC*, 990 F. Supp. 119, 139 (E.D.N.Y. 1997); *see generally* United States Dep't of Justice and U.S. Federal Trade Comm'n, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition (2007), http://www.justice.gov/atr/public/hearings/ip/222655.htm.

[4]*Paulik v. Rizkalla*, 760 F.2d 1270, 1276 (Fed. Cir. 1985) (*en banc*); *see also Sanofi-Synthelabo v. Apotex, Inc.*, 470 F.3d 1368, 1383 (Fed. Cir. 2006).

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market is present."[5] Likewise, the attempted enforcement of a non-compete agreement beyond what may be necessary legitimately to protect trade secrets may constitute a violation of the Sherman Act.[6] In addition, "[t]he [Supreme] Court has held many times that power gained through some natural and legal advantage such as a patent, copyright or business acumen can give rise to liability if a 'seller exploits his dominant position in one market to expand his empire into the next.' "[7] This phenomenon may be referred to as *monopoly leveraging*.

Monopoly leveraging may be shown where a plaintiff can establish that (1) a defendant has monopoly power in one market, (2) the defendant has used that power, "however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor in another market . . . ," and (3) the plaintiff has been injured by the challenged conduct.[8] In 2004, the U.S. Supreme Court held that such a claim would require proof of a dangerous possibility

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[5]*Atari Games Corp. v. Nintendo of America, Inc.*, 897 F.2d 1572, 1576 (Fed. Cir. 1990); *see also Carl Schenck, A.G. v. Nortron Corp.*, 713 F.2d 782, 786 n.3 (Fed. Cir. 1983) ("That the property right represented by a patent, like other property rights, may be *used* in a scheme violative of antitrust laws creates no 'conflict' between laws establishing any of those property rights and antitrust laws."); *Senza-Gel Corp. v. Seiffhart*, 803 F.2d 661, 667–71 (Fed. Cir. 1986); *Virginia Panel Corp. v. MAC Panel Co.*, 133 F.3d 860, 868–69 (Fed. Cir. 1997); *Dippin' Dots, Inc. v. Mosey*, 476 F.3d 1337, 1339 (Fed. Cir. 2007).

[6]*Compare Inflight Newspapers, Inc. v. Magazines In-Flight, LLC*, 990 F. Supp. 119, 138–40 (E.D.N.Y. 1997) (provision enforceable) *with Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 508 (E.D. Pa. 1972) (finding an antitrust violation); *compare Eichorn v. AT & T Corp.*, 248 F.3d 131, 145–148 (3d Cir. 2001) (finding a no-hire agreement a subset of covenants not to compete, and upholding agreement) *with In re K-Dur Antitrust Litigation*, 338 F. Supp. 2d 517, 532–533 (D.N.J. 2004) (finding plaintiffs had alleged sufficient facts to defeat motion to dismiss antitrust claim).

[7]*Leitch Mfg. Co. v. Barber Co.*, 302 U.S. 458, 463 (1938); *United States v. Paramount Pictures*, 334 U.S. 131 (1948); *Eastman Kodak*, 504 U.S. at 479 n.29, *quoting Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 611 (1953); *and citing Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958); *Virgin Atlantic Airways Ltd. v. British Airways PLC*, 257 F.3d 256 (2d Cir. 2001); *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 415 n.4 (2004) (not embracing doctrine); *Allied Orthopedic Appliances Inc. v. Tyco Health Care Group LP*, 592 F.3d 991, 999–1000 (9th Cir. 2010).

[8]*Grand Light & Supply Co., Inc. v. Honeywell, Inc.*, 771 F.2d 672, 681, 41 U.C.C. Rep. Serv. 1610 (2d Cir. 1985); *Olde Monmouth Stock*

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of monopolizing the second market.[9]

Related to monopoly leveraging is the concept of *coercive reciprocity*, which refers to the practice of using economic leverage in one product to coerce dealing in another product.[10] Because of its similarity to tying, coercive reciprocity cases are evaluated based on tie-in analysis and may be treated in appropriate circumstances as *per se* illegal.[11]

34.05[5] Predatory Pricing

A company with monopoly power may be held to violate section 2 of the Sherman Act if it (1) sells its products below cost for the purpose of driving out competitors and (2) has a dangerous probability of being able to recoup its losses if it is successful in driving out competitors.[1] The same test applies for alleged predatory buying of an input when such a

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Transfer Co., Inc. v. Depository Trust & Clearing Corp., 485 F. Supp. 2d 387, 395 (S.D.N.Y. 2007); *see also Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 276(2d Cir. 1979). In *Berkey Photo*, the Second Circuit held that "a firm violates Section 2 by using its monopoly power in one market to gain a competitive advantage in another, albeit without an attempt to monopolize the second market." 603 F.2d at 275. A "tangible harm to competition" in the second market, however, must be shown. *See Twin Laboratories, Inc. v. Weider Health & Fitness*, 900 F.2d 566 (2d Cir. 1990).

[9]*Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 415 (2004).

[10]*See Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1361(Fed. Cir. 1999); *see also Betaseed, Inc. v. U and I Inc.*, 681 F.2d 1203, 1216(9th Cir. 1982); *Precision CPAP, Inc. v. Jackson Hospital*, 2010-1 Trade Cas. (CCH) ¶ 76939, 2010 WL 797170 (M.D. Ala. 2010).

[11]*See Betaseed, Inc.*, 681 F.2d at 1216–17, 1221, 1228; *Spartan Grain & Mill Co. v. Ayers*, 581 F.2d 419, 425 (5th Cir. 1978); *see also Singh v. Memorial Medical Center, Inc.*, 536 F. Supp. 2d 1244, 1250–1251 (D.N.M. 2008).

[Section 34.05[5]]

[1]*See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222–24 (1993). "Predatory pricing occurs when a defendant 'sacrifice[s] present revenues for the purpose of driving [a competitor] out of the market with the hope of recouping the losses through subsequent higher prices.' " *Felder's Collision Parts, Inc. v. All Star Advert. Agency, Inc.*, 777 F.3d 756, 759 (5th Cir. 2015) (alterations in the original; quoting an earlier case).

Predatory pricing under the Robinson-Patman Act, by contrast, merely requires that there be a reasonable possibility of substantial injury to competition, rather than a dangerous probability of monopolization shown. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993) (citing other cases); *see also Bailey v. Allgas, Inc.*, 284 F.3d

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practice by one company is challenged by its competitor.[2]

"Cutting prices in order to increase business often is the very essence of competition."[3] Lower prices, as long as they are not predatory, benefit consumers, and lost business due to price competition, without more, cannot be deemed an anticompetitive act.[4]

34.06 Exclusive Dealing

Section 3 of the Clayton Act prohibits restrictions on the ability of a purchaser or lessee to use or market a competitor's product where the effect of this restriction "substantially lessen[s] competition or tend[s] to create a monopoly in any line of commerce."[1] Specifically, the statute makes it unlawful for any person engaged in commerce, in the course of that commerce, "to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, . . . " or fix a price (or a discount from or rebate on the price), "on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller . . . ," where the effect substantially lessens competition or tends to cre-

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1237, 1245 n.14 (11th Cir. 2002); *Feesers, Inc. v. Michael Foods, Inc.*, 498 F.3d 206, 212–13 (3d Cir. 2007).

[2]*See Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, 549 U.S. 312, 320-26 (2007). However, if the alleged predatory buying practices involve squeezing upstream suppliers on price, or downstream consumers who are facing a reduction in output or an increase in output prices, then this standard for predatory pricing may not apply. *See, e.g., id.; see also id.* at 321 n.2, 324 n.5.

[3]*Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 592 (1986).

[4]*Philadelphia Taxi Ass'n v. Uber Technologies, Inc.*, 886 F.3d 332, 340 (3d Cir. 2018) (affirming dismissal of attempted monopolization claims brought by taxi cab companies and drivers in part because "inundating the Philadelphia taxicab market with Uber vehicles, even if it served to eliminate competitors, was not *anticompetitive*. Rather, this bolstered competition by offering customers lower prices, more available taxicabs, and a high-tech alternative to the customary method of hailing taxicabs and paying for rides."), *citing Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 337, 340 (1990).

[Section 34.06]

[1]15 U.S.C.A. § 14.

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ate a monopoly in any line of commerce.[2]

This provision of the Clayton Act prohibits both exclusive dealing arrangements and tying sales.[3] It does not relate to the provision of services,[4] however, and therefore has more narrow Internet applications than the Sherman Act. In evaluating whether a particular agreement relates to "goods, wares, merchandise, machinery, supplies, or other commodities," the caption given to an agreement will not be determinative,[5] although a few incidental goods sales in a services contract will not bring the agreement within the scope of the Act.[6]

Exclusive dealing, like tying, however also violates section 1 of the Sherman Act. These dealing agreements, in which a distributor agrees to distribute only the goods of a certain manufacturer to the detriment of other manufacturers, are subject to full rule of reason treatment because these "agreements can achieve legitimate economic benefits (reduced

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[2]15 U.S.C.A. § 14; *United Shoe Machinery Corporation v. United States*, 258 U.S. 451 (1922); *Apani Southwest, Inc. v. Coca-Cola Enterprises, Inc.*, 300 F.3d 620, 625 (5th Cir. 2002).

[3]*See Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 605–09 (1953); *see also Apani Southwest, Inc. v. Coca-Cola Enterprises, Inc.*, 300 F.3d 620, 625 (5th Cir. 2002); *Boyle v. Douglas Dynamics, LLC*, 292 F. Supp. 2d 198, 217 (D. Mass. 2003); *Campbell v. Austin Air Systems, Ltd.*, 423 F. Supp. 2d 61, 70 (W.D.N.Y. 2005).

[4]*See, e.g.*, *Hodge v. Villages of Homestead Homeowners Ass'n, Inc.*, 726 F. Supp. 297, 297 (S.D. Fla. 1989) (holding that both the tied and tying product must constitute "goods, wares, merchandise, machinery, supplies or other commodities" within the meaning of 15 U.S.C.A. § 14 to state a claim under section 3 of the Clayton Act and that land and service contracts do not come within this definition); *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 953 F. Supp. 617, 662 (E.D. Pa. 1997) (real property, advertising and services are excluded from the scope of the Act); *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of Rhode Island*, 239 F. Supp. 2d 180, 193 (D.R.I. 2003); *CTUnify, Inc. v. Nortel Networks, Inc.*, 115 F. App'x 831, 836 (6th Cir. 2004) ("section 3 of the Clayton Act does not apply if either the tying product or the tied product is a service."); *HDC Medical, Inc. v. Minntech Corp.*, 411 F. Supp. 2d 1096, 1105 (D. Minn. 2006).

[5]*See Carter Carburetor Corporation v. Federal Trade Commission*, 112 F.2d 722, 731 (C.C.A. 8th Cir. 1940) (denomination of an agreement as a "service station contract" held not determinative). *Cf. TRW Financial Systems, Inc. v. Unisys Corp.*, 835 F. Supp. 994, 1004 (E.D. Mich. 1993) (in context of patent on-sale bar); *Qwest Communications Corp. v. City of Berkeley*, 146 F. Supp. 2d 1081, 1091 (N.D. Cal. 2001) (in context of municipal assessment or tax).

[6]*Hodge,* 726 F. Supp. at 298 (citing other cases).

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cost, stable long-term supply, predictable prices)."[7] To draw an inference of anti-competitive effects under this full rule of reason analysis, plaintiffs must show a significant enough foreclosure share in the relevant market, i.e., that the exclusive agreement covers a significant percentage of the relevant market for a sufficiently long enough a period of time that these agreements may give the defendants market power and drive rivals out of the market—all other factors being equal.[8] Generally speaking, the foreclosure market screen requires a minimum market share for these agreements of 20% to 40%.[9] It is noteworthy that the use of this foreclosure market screen does not involve only the exclusive dealing agreement under consideration but also other exclusive dealing agreements in the relevant market[10] as

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[7]*Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I.*, 373 F.3d 57, 65-66 (1st Cir. 2004).

[8]*See, e.g.*, *Jefferson Parish*, 466 U.S. at 45 (O'Connor, J., concurring); *Sterling Merchandising, Inc. v. Nestle, S.A.*, 656 F.3d 112, 123-24 (1st Cir. 2011); *Stop & Shop Supermarket*, 373 F.3d at 66-68; *Eastern Food Serv. v. Pontifical Catholic University Services Ass'n*, 357 F.3d 1, 8-9 (1st Cir. 2004); *Maxon Hyundai Mazda v. Carfax, Inc.*, 726 F. App'x 66, 70 (2d Cir. 2018) (affirming summary judgment for the defendant where, among other things, the trial court found that a reasonable jury could have found that Carfax's website agreements foreclosed competition and had the practical effect of locking dealers into buying Carfax vehicle history reports, but their short duration (3-5 years) was such that they did not raise antitrust concerns); *Omega Environmental, Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1163-64 (9th Cir. 1997); *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.*, 676 F.2d 1291, 1301-02, 1304-05 (9th Cir. 1982); Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Theory*, 123 Harv. L. Rev. 397, 469-70 & n.219 (2009) (citing cases and commentators).

[9]*See, e.g.*, *Stop & Shop Supermarket*, 373 F.3d at 68 (citing cases and commentators); *Twin City Sportservice*, 676 F.2d at 1301, 1304 (24% foreclosure sufficient); Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Theory*, 123 Harv. L. Rev. 397, 469-70 & n.219 (2009) (citing cases and commentators). There is a question over whether the lower bound for this market screen is generally 20%, as Professor Elhauge believes based on certain statements made by Professor Hovenkamp and certain cases, or 30% as the *Stop & Shop Supermarket* case believes based on other cases and other statements made by Professor Hovenkamp, although the *Stop & Shop Supermarket* court acknowledges that there are other courts out there with a lower bound.

[10]*Stop & Shop Supermarket*, 373 F.3d at 66; Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Theory*, 123 Harv. L. Rev. 397, 469-70, 476-77 (2009) (citing and discussing cases).

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well as tying agreements (if any).[11]

34.07 Robinson-Patman Act—Price Discrimination[1]

The Robinson-Patman Anti-Discrimination Act, enacted in 1936 during the Great Depression, prohibits price discrimination in the sale of commodities of like grade and quality to different purchasers, where the effect of discrimination "*may be* substantially to lessen competition or tend to create a monopoly in any line of commerce" (or to "injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . .").[2]

The U.S. Supreme Court has held:

> Our decisions describe three categories of competitive injury that may give rise to a Robinson-Patman Act claim: primary-line, secondary-line, and tertiary-line. Primary-line cases entail conduct-most conspicuously, predatory pricing-that injures competition at the level of the discriminating seller and its direct competitors. Secondary-line cases . . . involve price discrimination that injures competition among the discriminating seller's customers . . .; cases in this category typically refer to "favored" and "disfavored" purchasers. Tertiary-line cases involve injury to competition at the level of the purchaser's customers.[3]

To prevail on a claim, a plaintiff must prove:

(1) that the defendant charged different purchasers different prices in contemporaneous transactions,
(2) for products of like grade and quality,

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[11] *See Twin City Sportservice*, 676 F.2d at 1303; Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Theory*, 123 Harv. L. Rev. 397, 469-70 (2009).

[Section 34.07]

[1] For a summary of this topic, *see* Hanno F. Kaiser, A Quick Look at the Robinson-Patman Act (Oct. 2009). More detailed treatments may be found in D. Daniel Sokol, *Analyzing Robinson-Patman*, 83 Geo. Wash. L. Rev. 2064 (2015); Harvey I. Saferstein, An Overview and Update of the Federal and State Law of Price Discrimination, Practising Law Institute, Corporate Law and Practice Course Handbook Series, PLI Order No. 28409 (Jan. 2011-Mar. 2011).

[2] 15 U.S.C.A. § 13 (emphasis added). Despite the seemingly broad reach of the Robinson-Patman Act as reflected in the "may be" language, the federal government has rarely enforced the law since the 1970s. Private-party plaintiffs do use the law, however.

[3] *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 176 (2006) (citations omitted).

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(3) where the favored purchaser was in actual competition with the disfavored purchaser, and
(4) there is a likelihood of competitive injury resulting from the discrimination.[4]

A plaintiff need only prove that it *may be* injured to satisfy this test and an inference of injury may be drawn from evidence that competing purchasers paid different prices for the same goods.[5] Stated differently, unlike section 2 of the Sherman Act—which requires that a dangerous probability of monopolization be shown when a business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market—the more flexible standard of the Robinson-Patman Act merely "requires that there be 'a reasonable possibility' of substantial injury to competition before its protections are triggered."[6]

The Robinson-Patman Act permits price differentials "which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . . ."[7] The Act likewise does not prevent "persons engaged in selling goods, wares or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade . . . ."[8] The statute further permits "price changes from time to time" in response to changing conditions such as "the actual or imminent deterioration of perishable goods, obso-

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[4] *Best Brands Beverage, Inc. v. Falstaff Brewing Corp.*, 842 F.2d 578, 584–85 (2d Cir. 1987); *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 176 (2006).

[5] 15 U.S.C.A. § 13(a); *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 47 (1948); *National Ass'n of College Bookstores, Inc. v. Cambridge University Press*, 990 F. Supp. 245, 250 (S.D.N.Y. 1997); *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 185 (2006); *Feesers, Inc. v. Michael Foods, Inc.*, 498 F.3d 206, 213 (3d Cir. 2007).

[6] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222–24 (1993), *quoting Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 455 (1993) *and Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 434 (1983); *see also Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 185 (2006); *Feesers, Inc. v. Michael Foods, Inc.*, 498 F.3d 206, 212–13 (3d Cir. 2007); *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 903 n.12 (9th Cir. 2008).

[7] 15 U.S.C.A. § 13(a).

[8] 15 U.S.C.A. § 13(a)

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lescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned."[9] The Act does, however, prohibit making certain payments for processing sales[10] and knowingly inducing or receiving discriminatory prices.[11]

The federal prohibition on price discrimination applies only to "commodities" and therefore has more limited application to cyberspace than sections 1 or 2 of the Sherman Act.[12] Accordingly, in *Windsor Auctions v. eBay, Inc.*, Judge Ronald M. Whyte of the Northern District of California held that the Act does not apply to eBay's online hosting of auctions for goods as that online hosting constitutes an intangible service and not a commodity.[13]

The statute also is narrower in that it requires that the allegedly offending activity occur "in commerce," rather than merely have an "effect on commerce," as allowed under the Sherman Act.[14] The Robinson-Patman Act affords prospective remedies, as well as potentially criminal penalties.[15]

34.08 2017 U.S. Department of Justice/Federal Trade Commission Antitrust Guidelines Regarding Technology Licenses

In 1995, the U.S. Department of Justice and the FTC issued antitrust guidelines governing technology licenses. The guidelines are significant, in that they represented the most ambitious effort since the Carter Administration to regulate commerce in information industries and, as updated in 2017, remain relevant today. Federal appellate courts take the

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[9] 15 U.S.C.A. § 13(a)

[10] 15 U.S.C.A. § 13(d).

[11] 15 U.S.C.A. § 13(f).

[12] "[W]ebsite maintenance, an electronics retail franchise, credit card processing services, and order processing services are not 'commodities' for purposes of the Robinson-Patman Act." *Goodloe v. National Wholesale Co., Inc.,* No. 03 C 7176, 2004 WL 1631729, at *10 (N.D. Ill. Jul. 19, 2004).

[13] *Windsor Auctions, Inc. v. eBay, Inc.*, No. C-07-06454 RMW, 2008 WL 2622791, at *2-4 (N.D. Cal. July 1, 2008).

[14] *See Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 208–09 (5th Cir. 1969); *see also Rotec Industries, Inc. v. Mitsubishi Corp.*, 348 F.3d 1116, 1120 (9th Cir. 2003); *Able Sales Co., Inc. v. Compania de Azucar de Puerto Rico*, 406 F.3d 56, 61 (1st Cir. 2005).

[15] *See, e.g.*, *Doyle v. FTC*, 356 F.2d 381, 383–84 (5th Cir. 1966).

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guidelines into consideration in major cases.[1] A copy of the guidelines may be downloaded from the U.S. Department of Justice website at https://www.justice.gov/atr/IPguidelines/download.

Although the guidelines are not binding on courts, companies should adhere to the guidelines to the extent possible to minimize the chance of having a given license arrangement challenged by the federal government.

34.09 Mergers and Acquisitions

Section 7 of the Clayton Act restricts mergers and acquisitions "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[1] The section applies to acquisitions of stock or assets, but does not apply to purchases of stock solely for investment where the purchaser does not use the stock "by voting or otherwise to bring about, or . . . attemp[t] to bring about, the substantial lessening of competition."[2] Pre-merger notification of large transactions must be provided to the U.S. Department of Justice or the Federal Trade Commission, under the Hart-Scott-Rodino Act (15 U.S.C.A. § 18a),[3] both of which can take action to block proposed mergers or acquisitions. Although mergers are typically challenged before they are consummated, the legality of a merger under Section 7 may be challenged after-the-fact at "any time."[4] The state Attorneys General also have the power to seek injunctions against mergers and acquisitions.[5]

The U.S. Department of Justice and Federal Trade Com-

[Section 34.08]

[1]*See, e.g., In re Indep. Serv. Orgs. Antitrust Litig.*, 202 F.3d 1322, 1326 (Fed. Cir. 2000); *County Materials Corp. v. Allan Block Corp.*, 502 F.3d 730, 736 (7th Cir. 2007).

[Section 34.09]

[1]15 U.S.C.A. § 18.

[2]15 U.S.C.A. § 18. Other exceptions are set forth in the statute.

[3]Pre-merger disclosures are filed with the Federal Trade Commission and U.S. Department of Justice. *See* https://www.ftc.gov/enforcement/premerger-notification-program.

[4]*See United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 597 (1957). Indeed, the challenge in the *du Pont* case occurred 30 years after the transaction closed. *See id.* at 598.

[5]*California v. American Stores Co.*, 495 U.S. 271, 280-82 (1990).

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mission (the "Agencies") issued joint guidelines in 2010 (which remain in effect), reflecting their approach to analyzing mergers and acquisitions.[6] The guidelines set out "a fact-specific process through which the Agencies. . . apply a range of analytical tools to the reasonably available and reliable evidence to evaluate competitive concerns in a limited period."[7] They explain that the Agencies "may evaluate a merger in any relevant market satisfying the [hypothetical monopolist] test, guided by the overarching principle that the purpose of defining the market and measuring market shares is to illuminate the evaluation of competitive effects."[8] But the guidelines make clear that market definition is merely one of various tools used to assess the potential competitive effects of a horizontal merger.[9]

The Agencies apply a hypothetical monopolist test to examine whether a hypothetical profit-maximizing monopolist, not subject to price regulation, "that was the only present and future seller of those products . . . likely would impose at least a small but significant and non-transitory increase in price (SSNIP) on at least one product in the market, including at least one product sold by one of the merging firms."[10] The goal of the test is to define a relevant product and geographic market for purposes of analyzing the com-

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[6]*See* U.S. Dep't Of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010) *available at* www.justice.gov/atr/public/guidelines/hmg-2010.html; United States Dep't of Justice, Antitrust Division Policy Guide to Merger Remedies (2011), *available at* http://www.justice.gov/atr/public/guidelines/272350.pdf.

[7]U.S. Department of Justice & U.S. Federal Trade Commission, *Horizontal Merger Guidelines* § 1 (2010) *available at* www.justice.gov/atr/public/guidelines/hmg-2010.html.

[8]U.S. Department of Justice & U.S. Federal Trade Commission, *Horizontal Merger Guidelines* § 4.1.1 (2010) *available at* www.justice.gov/atr/public/guidelines/hmg-2010.html.

[9]U.S. Department of Justice & U.S. Federal Trade Commission, *Horizontal Merger Guidelines* § 4 (2010) *available at* www.justice.gov/atr/public/guidelines/hmg-2010.html.

[10]*See* U.S. Department of Justice & U.S. Federal Trade Commission, *Horizontal Merger Guidelines* § 4.1.1 (2010) *available at* www.justice.gov/atr/public/guidelines/hmg-2010.html. These guidelines set out a benchmark of a five percent price increase within one year, but warn that this benchmark may be greater or lower depending on the particular industry. *See id.* § 4.1.2.

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petitive effects of a merger.[11] The Agencies also examine the effects of a merger on non-price competition and will incorporate innovation-based competition in the merger review analysis.

Once the market is defined, the Agencies focus on which companies participate in the defined market, either as producers or as sellers (depending upon the nature of the market).[12] Market participants also include so-called *rapid entrants*—or firms that would likely enter the market within one year without incurring significant sunk costs of entry or exit in the event of a SSNIP.[13]

Next, the Agencies determine market concentration by looking at market share data on competing firms to calculate the degree of concentration in the relevant markets employing the Herfindahl-Hirschman Index (HHI), which adds the squares of the market shares of all market participants.[14] The agencies consider both the post-merger market concentration and the increase in concentration resulting from the merger to determine if anti-competitive effects should be presumed.[15]

After that step, the Agencies determine whether new

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[11]*See* 15 U.S.C. § 18; *see also, e.g.*, *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962) (interpreting the "line of commerce" as product market and "section of the country" as geographic market); *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 156 (D.D.C. 2000); *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1073 (D.D.C. 1997).

[12]*Id.* § 9.

[13]Sunk costs include market specific investments such as production facilities, research and development, and the cost of regulatory approvals. *Id.* § 5.1.

[14]*Id.* § 5.3.

[15]The analysis generally divides markets into three types—unconcentrated, moderately concentrated, and highly concentrated—depending on the pre-merger HHI. *See id.* It then applies the following principles: (1) mergers that result in changes of less than 100 points in the HHI or in unconcentrated markets (HHI below 1500) are "unlikely to have adverse competitive effects and ordinarily require no further analysis"; (2) in moderately concentrated markets (HHI between 1500 and 2500), mergers that involve an increase in the HHI of more than 100 points potentially raise significant competitive concerns and often warrant scrutiny; and (3) in highly concentrated markets (HHI above 2500), mergers that involve an increase in the HHI of between 100 points and 200 points potentially raise significant competitive concerns and often warrant scrutiny. Mergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power. The presumption may be rebutted by

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entrants could enter the market and counteract presumed (or actual) anti-competitive effects i.e., whether entry will be "rapid enough that customers . . . [won't be] significantly harmed by the merger."[16] Finally, the Agencies will look at other factors such as (1) evidence of changing market conditions; (2) the possibility of industry collusion; (3) the possibility of single-firm anticompetitive behavior;[17] (4) possible efficiencies or pro-competitive benefits created by the merger;[18] and (5) whether the acquired or acquiring firm is a failing firm or failing division.[19]

34.10 Federal Antitrust Law Enforcement Against Internet Companies

34.10[1] Merger-Related Enforcement

Where the horizontal merger of competitors is proposed among internet or other technology companies, U.S. antitrust authorities are capable of blocking or conditioning the merger. The following case studies illustrate the government's response, and the outcomes, in particular cases.

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persuasive evidence showing that the merger is unlikely to enhance market power. *See id.*

[16]*Id.* §§ 9, 9.1.

[17]*Id.* § 6 (noting that "exclusionary unilateral effects" can arise from a merger).

[18]Claimed efficiencies must be substantiated so that the agencies can verify by reasonable means the likelihood, magnitude, timing, and costs of each asserted efficiency. *Id.* § 10. Furthermore, the efficiencies must be merger-specific. The less the weight of the potential anti-competitive effects of a merger, the greater the weight will be given to efficiencies. *Id.* § 10; *see FTC v. H.J. Heinz, Co.*, 246 F.3d 708, 720-22 (D.D.C. 2001) (noting that the burden to show cognizable, significant, and merger-specific efficiencies is particularly heavy when concentration levels are high; the merging parties must show "extraordinary efficiencies," which must be subjected to "rigorous analysis" by the court, and which must not be achievable by either company absent the merger).

[19]*See* U.S. Department of Justice & U.S. Federal Trade Commission, *Horizontal Merger Guidelines* § 11 (2010) *available at* www.justice.gov/atr/public/guidelines/hmg-2010.html (noting that "a merger is not likely to create or enhance market power or to facilitate its exercise, if imminent failure . . . of one of the merging firms would cause the assets of that firm to exit the relevant market. . . . If the relevant assets would otherwise exit the market, customers are not worse off after the merger than they would have been had the merger been enjoined."). For a more extensive discussion of merger principles and analysis in the context of the technology industry, *see, e.g.*, American Bar Association Section of Antitrust Law, Telecom Antitrust Handbook (2d ed. 2013).

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ABOUT THE AUTHOR

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IAN C. BALLON

Ian Ballon is Co-Chair of Greenberg Traurig LLP's Global Intellectual Property and Technology Practice Group and is a litigator in the firm's Silicon Valley Los Angeles and Washington, DC offices. He defends data privacy, cybersecurity breach, AdTech, TCPA, and other Internet and mobile class action suits and litigates copyright, trademark, patent, trade secret, right of publicity, database, AI and other intellectual property cases, including disputes involving safe harbors and exemptions, platform liability and fair use.

Mr. Ballon was the recipient of the 2010 Vanguard Award from the State Bar of California's Intellectual Property Law Section. He also has been recognized by *The Los Angeles and San Francisco Daily Journal* as one of the Top Intellectual Property litigators in every year the list has been published (2009-2021), Top Cybersecurity and Artificial Intelligence (AI) lawyers, and Top 100 lawyers in California.

Mr. Ballon was named a "Groundbreaker" by *The Recorder* at its 2017 Bay Area Litigation Departments of the Year awards ceremony and was selected as an "Intellectual Property Trailblazer" by the *National Law Journal*.

Mr. Ballon was selected as the Lawyer of the Year for information technology law in the 2022, 2021, 2020, 2019, 2018, 2016 and 2013 editions of *The Best Lawyers in America* and is listed in Legal 500 U.S., Law Dragon and Chambers and Partners USA Guide. He also serves as Executive Director of Stanford University Law School's Center for the Digital Economy.

Mr. Ballon received his B.A. *magna cum laude* from Tufts University, his J.D. *with honors* from George Washington University Law School and an LLM in international and comparative law from Georgetown University Law Center. He also holds the C.I.P.P./U.S. certification from the International Association of Privacy Professionals (IAPP).

Mr. Ballon is also the author of *The Complete CAN-SPAM Act Handbook* (West 2008) and *The Complete State Security Breach Notification Compliance Handbook* (West 2009), published by Thomson West (www.lanBallon.net).

He may be contacted at BALLON@GTLAW.COM and followed on Twitter and LinkedIn (@lanBallon).

Contributing authors: Parry Aftab, Darren Abernethy, Viola Bensinger, Ed Chansky, Francoise Gilbert, Rebekah Guyon, Tucker McCrady, Josh Raskin, & Tom Smedinghoff.

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