# INTRODUCTION AND RELEVANTS EXCERPTS FROM

# BRAND LAW

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## Introduction

Brands matter. Brands have existed in various forms, serving various functions, for nearly four thousand years. In more modern times, brands and brand management have become a central feature of the modern economy and a staple of business theory and business practice. Businesses rely on branding to avoid 1) commoditization of their products and services, 2) distinguish themselves from their competition, and 3) build loyal customer bases for whom no other brand or item will suffice. Consumers in turn rely on brands to 1) guide their purchasing patterns, 2) express their sense of style and individuality, and 3) form important connections with the brand providers and fellow brand consumers.

Given the centrality of brands and branding, one would expect that the law to understand this critically important concept, ponder the appropriate legal regime, and develop effective legal rules in one or more areas of the law that deal with business behavior. Instead, the law has been largely blind to the power of brands.

Both trademark law and antitrust law stand out as promising discourses for understanding the significance of brands and constructing an appropriate legal regime.

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Neither has proved up to the challenge, and more dishearteningly, neither field seems to perceive much of a need.

To some extent, both trademark and antitrust law suffer from the same myopia and for the same reason. Over the past thirty years, both bodies of law have relied heavily on neo-classical price theory to define legal rules that promote efficiency. For many purposes, this is entirely appropriate. But such a focus misses the point (and often assumes away) the role that brands play in promoting product differentiation, market segmentation, price discrimination, and increasing customer loyalty to the point where price theory no longer explains well what brands (if any) consumers view as substitutes, when confusion does or does not arise in the marketplace, and how consumers choose between brands and between dealers for the same brands.

Trademark law has failed to recognize that trademarks are only a subset of businesses' broader brand strategy in the real world. A successful brand encompasses far more than a registered trademark and sometimes does not require a trademark at all. Trademark law was thus always incomplete and regulated only a fraction of the real business behavior that mattered. In addition, trademark law over time has largely abandoned effective regulation over the slice of the action that it has retained as it has expanded the subject matter of trademarks and what constitutes infringement. The combined effect is to provide greater and greater protection for trademarks from competition from products and services that do not purport to originate from the mark holder. Protection for a ***mark*** has first subtly, and then more aggressively, transformed into protection for a ***brand***.

This dramatic transformation took place with virtually no recognition of the significance of brands and branding. The overall effect was an important legal change without debate or recognition of the elevation of the brand to one of the most protected forms of legal property and one of the most valuable assets in the marketplace. Neither advocates nor opponents of these changes appreciated the subtle shift from marks to brands. This blindness led to unintended (or at least misunderstood) change and one-sided expansion of the legal regime.

To the extent this discussion took place, both sides of the debate were reassured by the presence of the antitrust laws which allegedly would regulate anti-competitive behavior involving trademarks and related rights. In the end, antitrust law as a discipline was in no better position to understand the shift to a brand-based economy and make a conscious decision as to the appropriate legal regime. Older cases identified where trademarks were used as a cover for collusion, but those were easy cases both before and after the rise of the brand. Otherwise, the increasing emphasis on neo-classical price theory in the past thirty years robbed antitrust of any chance of understanding and responding to the rise of the brand as a tool for diminishing the role of price competition, segmenting market demand, facilitating price discrimination, and locking in consumers to a favored brand. Like trademark law, antitrust law either fails to ask the right question, ignores the non-price aspects of how brands and branding affect market competition, or defers to trademark law to set the proper limits of the intellectual property rights in question.

The combined effect of this failure in both trademark law and antitrust law is a dangerous vacuum. No one is asking the right questions. No body of law is confronting what brands are, what role they play in business practice, how they affect traditional concepts of trademark law, how antitrust law should incorporate brand management in analyzing market competition, how the two fields of law should be better integrated to address the brand juggernaut, or whether there needs to be a true law of the brand.

This article is a first step in remedying this situation. For these hearings we submit only those portions of the larger work in progress that directly deal with issues relevant to revised merger guidelines. However, we have included the full road map of the larger article in progress so the reader can see where our antitrust concerns fit within the broader context of the rise of the brand.

In Part I, we survey the history of brands in both ancient and modern times. The early history shows that the nature of branding is contingent upon the nature of the political and economic structures a society has in place. The recent history focuses on key events in the $19^{th}$ century in the United States where the development of a true national, private market economy created the opportunity and need for national brands to market the manufacturer's vision directly to consumers from coast to coast. Part I then traces how strategies begun around 1900 have evolved so that in more recent decades brands are well-beyond being marks of origin and quality and constitute symbolic assertions of lifestyle choices and other affinities between manufacturers and consumers as well as between communities of consumers.

Part II shifts the analysis from history to law. We analyze the accompanying rise of a trademark regime to protect and promote the growing national brands. Next we discuss the roughly simultaneous evolution of the brand as communicative symbol to the expansion of trademark law and eventually the creation of anti-dilution statutes, all of which occurred without an explicit discussion of the brand phenomenon.

Part III changes the focus from trademark law to antitrust law. In this section, we analyze the limited ways that antitrust has sought to come to grips with competition issues relating to brands. First, antitrust law has focused entirely on notions of trademark rather than the broader notion of the brand. Second, antitrust has been preoccupied by price theory in defining relevant markets and measuring potential competitive harms thus again missing the significance of the role of the brand. Finally, we argue that antitrust perversely has become the enabler of brands with a misguided use of key concepts such as inter-brand competition and intra-brand competition which fly in the face of the realities of the business world and the current role of the brand.

Part IV discusses ways to improve how the law understands and accounts for brands. We begin with concrete suggestions in both trademark and antitrust law that better recognize the nature and importance of brands and brand management. We also suggest that branding is so central to the business world, the modern economy, and the law that the time has come to begin to build the law of the brand.

PARTS I-II DEALING WITH HISTORY OF BRANDS AND A BRAND THEORY OF TRADEMARKS OMITTED, AVAILABLE UPON REQUEST FROM AUTHORS

## III. Antitrust Law's Failure to Come to Grips with the Power of Brands

Intellectual property and antitrust law have become the enabler of the growth of brand power. Both bodies of law have been co-opted over the years from a legal regime intended to control the abuse of market power into a facilitator of the type of market power conferred by successful branding. Neither body of law has ever fully understood the role of brands and thus never developed an appropriate set of tools designed to measure brand power, distinguish lawful branding techniques from unlawful exclusionary conduct, or design functional remedies to deal with these issues. Over the years, antitrust has swung between undue hostility to undue acceptance of brands without ever grasping the essence of branding or its relationship to market definition and market power that is necessary for sound competition policy.

### A. Early Suspicion of Product Differentiation

Antitrust law and economics missed an early opportunity to take advantage of the growing importance of brands, and more generally, product differentiation, in the early decades of the twentieth century. Edward Chamberlin, one of antitrust's pioneering economists, was deeply interested in this topic and made it the focus of his principal work *The Theory of Monopolistic Competition*.[3]

In *Monopolistic Competition*, he investigated the vast middle ground between perfect or pure competition and monopoly. At the time, the only middle ground had been exploration of duopoly by Cournot and others.[4] Chamberlin instead focused on product

[3] EDWARD HASTINGS CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION: A RE-ORIENTATION OF THE THEORY OF VALUE (8th ed. 1962).
[4] ANTOINE A. COURNOT, RICHERCHES SUR LESPRINCIPES MATHEMA-TIQUES DE LA THEORIE DES RICHESSES (1838); FRANCIS Y. EDGEWORTH, MATHEMATICAL PHYSICS (1881).

differentiation, the critical real world phenomenon which rendered useless the prevailing models of pure and perfect competition.  As he noted:

> Where there is any degree of differentiation whatever, each seller has an absolute monopoly of his own product, but is subject to the competition of more or less imperfect substitutes.  Since each is a monopolist and yet has competitors, we may speak of them as 'competing monopolists,' and, with peculiar appropriateness, of the forces at work as those of 'monopolistic competition.'[5]

Chamberlin defined product differentiation broadly:

> Differentiation may be based upon certain characteristics of the product itself, such as exclusive patented features; trade-marks; trade names; peculiarities of the package or container, if any; or so singularities in quality, design, color, or style.  It may also exist with respect to the conditions surrounding the sale.  In retail trade, to take only one instance, these conditions include such factors as the convenience of the seller's location, the general tone or character of his establishment, his way of doing business, his reputation for fair dealing, courtesy, efficiency, and all the personal links which attach his customers either to himself or to those employed by him.  In so far as these and other intangible factors vary from seller to seller, the 'product' in each case is different, for buyers take them into account, more or less, and may be regarded as purchasing them along with the commodity itself.  When these two aspects of differentiation are held in mind, it is evident that virtually all products are differentiated, at least slightly, and that over a wide range of economic activity differentiation is of considerable importance.[6]

He viewed patents, trademarks, and copyrights as critical for product differentiation and considered them monopolies, though normally in competition with other more or less imperfect substitutes.[7]  He was uncertain whether patents or trademarks had the greater potential for monopoly power and pointed to the example of the prestige value of such brand names as Coca-Cola, Ivory, and Kodak.[8]  Regardless of which was more important, all types of intellectual property were critical in preventing

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[5] CHAMBERLIN, *supra* note 3, at 9.
[6] *Id.* at 56-57.
[7] *Id.* at 60 -61.
[8] *Id.* at 62.

the erosion of high returns. Intellectual property rights rendered competitors unable to create effective substitutes because of strong consumer preferences for the IP protected products.[9]

Chamberlin rejected the existing dichotomies of perfect competition and monopoly. Rather, he conceived of competition as a spectrum where perfect competition and monopoly were limits, not equilibriums.[10] He noted: "As long as the substitutes are to any degree imperfect, [the producer] still has a monopoly of his own product and control over its price within the limits imposed upon any monopolist – those of the demand."[11] The closeness of the available substitutes determined the extent that price would exceed and quantity would fall short of the predictions of a competitive model.[12]

Chamberlin introduced the notion of selling costs to his model by relaxing assumptions that buyers have given wants and perfect information on how to achieve them. The introduction of selling costs as a separate variable had the inevitable effect of changing the shape and location of the demand curve, shifting it to the right and making it less elastic.[13] Production costs were those which affected the supply of the product in question. In contrast, selling expenses were those which affected the demand for the product including, most significantly, advertising expenditures. Adding selling costs into the picture was complicated and produced indeterminate results. First, some advertising diverts sales among existing sellers. Second, other advertising creates new demand or

[9] *Id.* at 111-12.
[10] *Id.* at 63.
[11] *Id.* at 67.
[12] *Id.* at 103-04, 112, 117.
[13] *Id.* at. 118.

siphons it from distant substitutes. Finally, considering selling costs as a separate variable made it impossible to derive standard demand and cost curves.[14]

In short, product differentiation changes one's world view.[15] However, product differentiation does not automatically produce classical monopoly. Even if every producer has a monopoly of his own variety of product, he still faces the competition of imperfect substitutes.[16] But because the competitive ideal was no longer possible in a world of differentiated products, "how much and what kinds of monopoly, and with what measure of social control, become the questions."[17]

### B. The Limited Influence of Chamberlin on Antitrust Law and Policy

Chamberlin's work on monopolistic competition and the role of product differentiation was deeply influential in the economic literature, but less so in the law of antitrust. The seventh and eighth edition of Chamberlin's book contained a bibliography with hundreds of cites to the work.[18] Rudolph Peritz in his history of competition policy cites Chamberlin as the dominant intellectual influence of his generation.[19] Peritz further makes the critical connection between the use of product differentiation and a different kind of market competition. Drawing on Chamberlin, Peritz notes that monopolistic competition transformed markets for goods and services "into a commercial marketplace of ideas and images."[20]

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[14] *Id.* at 174-75.
[15] *Id.* at 204-205.
[16] *Id.* at 205-06.
[17] *Id.* at 214-15
[18] *Id.* at 332-390.
[19] RUDOLPH J. R. PERITZ, COMPETITION POLICY IN AMERICA, 1888-1992, 183 (1996).
[20] *Id.* at 109.

Chamberlin's influence in the literature has waned in more modern times. He is cited in only a limited number of places, but never relied upon, in the contemporary legal or economic treatises and textbooks dealing with antitrust and competition policy.[21]

Similarly, Chamberlin's impact on the case law was limited. He is cited in a number of older cases, but mainly for his theories of oligopolistic behavior.[22] His work on product differentiation is cited more often as background atmospherics for antitrust cases decided on other grounds.[23] The most direct engagement with his work came in the famous *Dupont* case where the Supreme Court misread and rejected Chamberlin's notion of product differentiation. The Court instead focused on substitutability and cross-elasticity of demand, defining a broader market for flexible wrapping which exonerated DuPont of monopolizing the narrower cellophane market.[24]

Most recently, the district court in *the Oracle-People Soft* merger decision[25]discussed but dismissed Chamberlin's theories. The government challenged the merger of two leading sellers of highly specialized and highly customized software

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[21] See e.g., W. KIP VISCUSI, JOSEPH E. HARRINGTON, JR. & JOHN M. VERNON, ECONOMICS OF REGULATION AND ANTITRUST 87-88, 119 (4th ed. 2005); DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 318, 344 (1990). Chamberlin's work is more central in the third edition of F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE (3d ed. 1990).

[22] Baltimore & O.R. Co. v. U.S., 386 U.S. 372, 449 (1967); Fed. Trade Comm'n v. H.J. Heinz, 246 F.3d 708, 724 (D.C. Cir. 2001); Int'l Detective Serv., Inc. v. Interstate Commerce Comm'n, 613 F.2d 1067, 1075 n. 18 (D.C. Cir. 1979); N. Natural Gas Co. v. Fed. Power Comm'n, 399 F. 2d 953, 965 n. 21 (D.C. Cir. 1968); Pevely Dairy Co. v. U.S., 178 F. 2d 363, 368 (8th Cir. 1950); Durable, Inc. v. Twin County Groceries Corp., 839 F. Supp. 257, 261 n.3 (S.D.N.Y. 1993); U.S. v. Twentieth Century-Fox Film Corp., 137 F. Supp. 78, 93 n. 22-23 (D.C.. Cal. 1956).

[23] Fed. Trade Comm'n v. Borden Co., 383 U.S. 637, 652 n. 3 (1966); Smith v. Chanel, Inc., 402 F. 2d 562, 566 n. 14, 16, 19 (9th Cir. 1968); Am. Safety Table Co. v. Schreiber, 269 F. 2d 255, 272 (2d Cir. 1959); Reily v. Hearst Corp., 107 F. Supp. 2d 1192, 1201 (N.D. Cal. 2000).

[24] U.S. v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 393 n. 20 (1956). While the DuPont case is often criticized, it is more typically cited for the Court's so-called Cellophane fallacy The Cellophane fallacy occurs when the SSNIP test is performed using the monopoly price. A rational monopolist will increase prices to the point where other products become reasonably substitutable. Consequently, a SSNIP test using the monopoly price erroneously leads to broader market definition and indicates a lack of market power. *DuPont* is rarely cited for the broader questions of product differentiation raised by Chamberlin.

[25] U.S. v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

used to integrate back room functions such as human resources, financial management, customer relations management, supply chain management, product life cycle management and business intelligence for large manufacturing clients. The government contended that the two merging firms were the closest substitutes for each other in the eyes of consumers. As a result, the merger would leave consumers with no close substitutes resulting in higher prices regardless of how one formally defined the markets for antitrust purposes. The court rejected this approach and failed to engage the product differentiation aspects crucial to the government's case. Instead, the court found that the government had failed to sustain its burden of proof as to anticompetitive effects in the absence of traditional market definition, high market shares, entry barriers, and the other requirements of merger analysis laid out in the merger guidelines.

### C. The Incoherence of Antitrust Discourse

The antitrust world heavily discounts what is obvious to the business world, that brands matter and can be the source of durable competitive advantage and the ability to sell at a premium without significant constraint from potentially competing substitutes. Cultivating powerful brands is the principal competitive strategy of many actors antitrust purports to regulate. There are several reasons why regulators and judges display willful ignorance of such key, prevalent business strategies. First, antitrust historically has relied on the language and discourse of economics, rather than business theory and discourse for its analytical heft.[26] This reliance on a different language has over the decades led to both the expansion and contraction of antitrust rules depending on the prevailing

[26] Spencer Weber Waller, *The Language of Law and the Language of Business* 52 CASE W. RES. L. REV. 283, 283-84 (2001); Spencer Weber Waller, *The Use of Business Theory in Antitrust Litigation*, 47 N.Y.L. SCH. L. REV. 119, 120 (2003).

economic theories. However, with the exception of Chamberlin, few of the economic theories have focused on product differentiation, rather than price competition, as the focal point for antitrust policy.

In addition, the discourse and rhetoric of economics is simply different from that of business theory. As one of the co-authors has noted in earlier work:

> There are many interlocking reasons why business discourse has always taken a back seat to economic discourse in the formulation and enforcement of antitrust policy. Historically the modern business school and the accompanying academic business research and discourse is a post-World War II phenomenon, arising after antitrust had already established itself as its own legal discipline and after the antitrust profession already had claimed economics as its special language. Even then, academic business theory was a "fragmented adhocracy." in which there was no accepted hierarchy of what parts of business discourse held the most relevance or which theories in the various sub-specialties had uncontested acceptance. Against this background, there was no single business discourse that an antitrust outsider could readily identify and master in an effort to unseat the dominant economic language in antitrust. Much business literature was further highly descriptive, atheoretical, and prone to short-lived fads. In contrast to economics, business theory frequently appeared unscientific, less academic and less prestigious.
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> At the most fundamental level, business discourse simply has never been the language of the community of expertise, the discipline of antitrust. The community of expertise has been a blend of lawyers and economists each taking turns dominating the discourse and helping steer to preeminence different legal and economic schools of thoughts. Business leaders and theorists have never been the players in this community which consists of the present and former officials at the antitrust agencies, a handful of similar staff from Capital Hill, the leaders of the private bar as represented by the leaders of the American Bar Association Section on Antitrust Law, and a smaller group of law professors and industrial organization economists. Formal business training is relatively rare is this group and access to and interest in the cutting edge of business discourse also is rare.
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> Business theory requires a different mode of learning as exemplified by the different modes of learning embodied in the case method of business school and the case method of law school. Most business discourse posed the additional hurdle of being another voluminous body of literature to digest over and above the demands of legal research and client needs. Much of this work also tends to be more descriptive, less theoretical, and less suited to constructing a single model for analyzing all aspects. Even for the enterprising lawyer willing to tackle this literature, the nature of discipline and community of expertise would

tend to filter out as irrelevant, if not untrue, business discourse which conflicted with the prevailing norms of the discipline of antitrust…[27]

The rise of the Chicago School as the prevailing economic discourse for antitrust further cemented the focus on price theory to the exclusion of most other factors. It further relegated business discourse to the fringes of the profession of antitrust, whether practiced by the liberal or conservative wings of the discipline. Consider this quote by Judge Easterbrook in a predatory pricing as an example of the prevailing ethos in antitrust law:

> [F]irms "intend" to do all the business they can, to crush their rivals if they can ... Rivalry is harsh, and consumers gain the most when firms slash costs to the bone and pare price down to cost, all in pursuit of more business. Few firms price unaware of what they are doing; price reductions are carried out in pursuit of sales, at others' expense. Entrepreneurs who work hardest to cut their prices will do the most damage to their rivals, and they will see good in it. You cannot be a sensible business executive without understanding the link among prices, your firm's success and other firm's distress. If courts use the vigorous, nasty pursuit of sales as evidence of forbidden "intent," they run the risk of penalizing the motive forces of competition.[28]

Now compare Judge Easterbrook's rhetoric to that used by Michael Porter, an economist by training who established a preeminent reputation as a business strategist. In his classic treatise, *Competitive Strategy*, Porter lays out a roadmap of how to build and increase entry barriers, mobility barriers, and switching costs to maintain competitive advantage in the face of a strategic challenge from another firm.[29] In his catalogue of strategies for raising structural barriers, increasing expected retaliation, and lowering the inducement for attack, he continues to emphasize product differentiation, and downplay price competition,

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[27] Waller, *The Language of Law and the Language of Business, supra* note 26, at 312-13 (citations omitted).

[28] A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1401-02 (7th Cir. 1989). *See also* Frank Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 6 (1984).

[29] MICHAEL E. PORTER, COMPETITIVE STRATEGY: TECHNIQUES FOR ANALYZING INDUSTRIES AND COMPETITORS, (1980).

as the most effective strategy for obtaining a sustainable competitive advantage.[30] He tellingly states: "Any fool can cut the price, goes the old maxim, and a firm often hurts itself more than the challenger in defending in this way."[31]

As a result of this cognitive dissonance, there has been a limited incorporation of brand management in antitrust.[32] As in trademark law, this incoherence has allowed the continued and virtually unchecked growth of brand power. The result is the growth of strategic brand management with little or no IP or antitrust consequences even where brand is basis for meaningful market power as traditionally defined in antitrust law. As the following section demonstrates, antitrust law can and must do better.

## D. Where Antitrust Can Learn from Brands

Antitrust law has had little interesting to say about brands or their effect on the markets which antitrust regulates. Although there are numerous antitrust cases which involve trademarks in some way, most of these contain no discussion, let alone analysis, of the role of brands more generally.

Several reasons account for this peculiarity. First, most courts do not distinguish the general issue of brands and the specific, but lesser, role of trademarks in supporting the larger branding effort. Second, most of the leading trademark-antitrust cases have

[30] *Id.* at 21-22 and 170-171.
[31] MICHAEL E. PORTER, COMPETITIVE ADVANTAGE xv, 501 (1985) (hereinafter PORTER, COMPETITIVE ADVANTAGE).
[32] *Roundtable Discussion, Business Strategy and Antitrust*, 21 ANTITRUST 6 (Fall 2006); Business school perspective is "probably the least understood by most antitrust practitioners." Mark D. Whitener, *Business Strategy and Antitrust: Editor's Note*, 21 ANTITRUST 5 (Fall 2006); Joseph P. Guiltinan, *Choice and Variety in Antitrust Law: A Marketing Perspective*, 21 J. PUB. POL'Y & MARKETING 260 (2002)(because of emphasis on price antitrust has tended to ignored non-price aspects with marketing theory can illuminate).

been relatively easy cases where the use or licensing of a trademark has been a sham designed to implement a typical per se unlawful price fixing or market division conspiracy.[33] Thus, trademarks were important factually, but not analytically, in deciding these cases.

More troubling, antitrust law does not even take its own methodologies seriously when applied to brands. As a result antitrust law has tilted toward a laissez-faire, hands-off approach in a number of areas where the questions are much more difficult and complex than normally acknowledged. This section examines issues of market definition, anticompetitive effects in merger law, and vertical distribution issues as areas where a more significant analysis of the power of brands leads to a richer analysis even if it does not always change the outcome. This section also briefly analyzes the area of after-market restrictions where the brand issue has been discussed but ironically has served as a red herring to obscure the real issues at stake.

### 1. The Curious Case of Market Definition

Antitrust law depends heavily on market definition in almost every case and investigation except for hard-core price fixing and other cartel activity. Antitrust law has used a number of related, but slightly different, methods to define the group of products and services that are viewed as effectively competing with each other. None have properly taken account of the power of brands.

[33] Palmer v. BRG of Georgia, Inc., 498 U.S. 46 (1990); U.S. v. Sealy, Inc., 388 U.S. 350 (1967); Timken Roller Bearing Co. v. U.S., 341 U.S. 593 (1951). *See generally* 2 WILLIAM HOLMES, INTELLECTUAL PROPERTY AND ANTITRUST §§ 30.5, 31.1 n. 8 (2009) (collecting cases).

The modern law of market definition began with the Supreme Court's 1956 decision in a monopolization case involving DuPont, the company which invented cellophane. Market definition was crucial to the case because monopolization law requires both proof of market power (the power to raise price or exclude competition) and an exclusionary act which injures competition. While DuPont dominated sales of cellophane, it argued that the true relevant market was a much broader market for flexible wrapping materials in which it lacked any significant share or power.

The Court held that the relevant market for antitrust purposes consisted of those products and services which were reasonably interchangeable.[34] The opinion also identified cross-elasticity of demand, whether a decrease in price for one product would substantially reduce demand for potentially competing products, as a critical element in defining the contours of the market.[35]

The Court specifically rejected an important role for brands in this analysis stating the "power that automobile or soft-drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly."[36] The majority concluded that, except for some niche aspects of the industry, cellophane did in fact compete with such alternatives as glassine and greaseproof papers and that any attempted price increase for cellophane would cause substantial defection to these other wrapping materials for most foods and other pre-packaged consumer products.[37] As a result, DuPont could not be liable for monopolization since it lacked any significant market power in the properly defined market.

[34] U. S. v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 400 (1956).
[35] *Id.* at 400.
[36] *Id.* at 393.
[37] *Id.* at 401 and 403.

The Supreme Court returned to the question of market definition in its 1962 *Brown Shoe* merger decision.[38] As in *DuPont*, Court held that the outer boundary of a relevant market for antitrust purposes is set by reasonable interchangeability and cross-elasticity of demand.[39] The Court likewise indicated that "practical indicia" of how the products or services were sold and perceived by consumers were also a relevant part of the analysis.[40] The Court concluded that "submarkets" within broader markets may be relevant for antitrust purposes.[41]

The 1982 Merger Guidelines and its subsequent iterations introduced a somewhat more technical version of the same type of analysis to guide the Antitrust Division and the Federal Trade Commission in deciding whether to challenge proposed mergers and acquisitions between horizontal competitors.[42] These guidelines, as revised, have been adopted by numerous lower courts as the appropriate methodology for market definition in merger cases.[43]

The current version of the guidelines state:

> Absent price discrimination, the Agency will delineate the product market to be a product or group of products such that a hypothetical profit-maximizing firm that was the only present and future seller of those products ("monopolist") likely would impose at least a "small but significant and nontransitory" increase in price. That is, assuming that

[38] Brown Shoe Co. v. U.S., 370 U.S. 294 (1962).
[39] *Id.* at 1523-24.
[40] *Id.* at 1524.
[41] *Id.*
[42] The current version of the guidelines is set forth in U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (1992, revised 1997) [hereinafter Horizontal Merger Guidelines], *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104. See *also* Fed. Trade Comm'n, Horizontal Merger Investigation Data 1996-2007 (Dec. 1, 2008), *available at* http:// www.ftc.gov/os/2008/12/081201hsrmergerdata.pdf.
*See also* 20th Anniversary of the 1982 Merger Guidelines: The Contribution of the Merger Guidelines to the Evolution of Antitrust Doctrine, *available at* http://www.usdoj.gov/atr/hmerger.htm.
[43] See e.g., F.T.C. v. H.J. Heinz Co., 246 F.3d 708 (C.A.D.C. 2001); F.T.C. v. Whole Foods Market, Inc., 548 F.3d 1028 (C.A.D.C. 2008); U.S. v. Oracle Corp. 331 F.Supp.2d 1098 (N.D. Cal. 2004); F.T.C. v. Tenet Health Care Corp., 186 F.3d 1045 (8th Cir. 1999);F.T.C. v. Swedish Match, 131 F.Supp.2d 151 (D.D.C. 2000). The Supreme Court has not had an opportunity to weigh in on this issue since the guidelines were drafted.

> buyers likely would respond to an increase in price for a tentatively identified product group only by shifting to other products, what would happen? If the alternatives were, in the aggregate, sufficiently attractive at their existing terms of sale, an attempt to raise prices would result in a reduction of sales large enough that the price increase would not prove profitable, and the tentatively identified product group would prove to be too narrow.
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> Specifically, the Agency will begin with each product (narrowly defined) produced or sold by each merging firm and ask what would happen if a hypothetical monopolist of that product imposed at least a "small but significant and nontransitory" increase in price, but the terms of sale of all other products remained constant. If, in response to the price increase, the reduction in sales of the product would be large enough that a hypothetical monopolist would not find it profitable to impose such an increase in price, then the Agency will add to the product group the product that is the next-best substitute for the merging firm's product.[44]

The "small but significant and nontransitory" increase in price in the Guidelines is generally referred as the SSNIP test and normally utilizes a hypothetical 5% price increase to determine the parameters of the relevant product and geographic market.[45] It has been widely adopted by other leading competition regimes for their own merger analysis processes.[46] Smaller market definitions are used when the agencies can show that the merging firms will be able to effectively price discriminate and effectively raise price against a sub-set of its customers within the relevant market.[47]

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[44] Horizontal Merger Guidelines, *supra* note 42, at § 1.11.
[45] *Id.*
[46] Commission, Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings, ¶ 10 2004 O.J. (C 31) 5 (EU) [hereinafter EC Merger Guidelines] (incorporating by reference the Commission's separate 1997 Market Definition Notice (O.J. (C 372)(1997)); Competition Bureau, Merger Enforcement Guidelines ¶ 3.4 (2004) (Can.), available at http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/01245e.html [hereinafter Canadian Guidelines]
[47] Horizontal Merger Guidelines, *supra* note 43, at § 1.22

The economics literature suggests another test for market power. The Lerner index relies on the ratio of price over price minus marginal cost.[48] The Lerner index reflects the notion that the higher the ratio, then the greater degree of monopoly power, reflecting the ability of monopolist to increase price above the limits in a perfectly competitive market. The Lerner curve is thus a measure of the firm's own price elasticity rather than the cross-elasticity of demand with other products.

An excellent hypothetical from Professor Glynn Lunney shows how none of these approaches, particularly the SSNIP test, works in a world of brands.[49] Professor Lunney posits a student lounge with a vending machine selling Coke soft drinks and one immediately next to it selling Pepsi products. As one might expect, raising or lowering the price of type of soda even more than the 5% used in the standard version of the SSNIP test is unlikely to move a substantial proportion of loyal Coke drinkers over to the Pepsi machine or vice-versa.[50] As Professor Lumley concludes:

> If we were to extend this type of pricing analysis to other products, we would almost certainly find that many popular brands do possess sufficient brand loyalty to constitute distinct product markets. To the extent a protected trademark serves as the device for capturing such brand loyalty, even narrow trademark protection will quite often prohibit competitors from marketing a product that consumers will recognize and accept as a perfect or even reasonable substitute for the popular brand.[51]

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[48] A.P. Lerner, *The Concept of Monopoly and the Measurement of Monopoly Power*, 1 REV. ECON. STUD. 157 (1934).
[49] Glenn S. Lunney, Jr., *Trademark Monopolies*, 48 EMORY L.J. 367, 424 (1999).
[50] *Id.* at 424-35.
[51] *Id.* at 426-27.

This common sense proposition is borne out by the very existence of brands and advertising.  Without contending that this is in fact the case, if cigarette smokers of a particular brand would "rather fight than switch" then there is no reasonably effective substitute for that brand and the relevant market is that brand of cigarettes.[52] Again, if it is literally true (as opposed to a catchy slogan) that "nothing Runs like a Deere" then your market definition exercise is complete for the type of farm equipment you are examining for antitrust purposes.[53] At a more technical level, scholars have analyzed of the effect of branding on internet price comparison sites and shown that successful retail branding can maintain price disparities on identical electronic goods even though lower prices for the same item are at most one mouse click away.[54]

Finally, the Merger Guidelines also state that the ability to price discriminate may be evidence of a smaller market definition than might otherwise be the case.  Here, the Guidelines state:

> Existing buyers sometimes will differ significantly in their likelihood of switching to other products in response to a "small but significant and nontransitory" price increase. If a hypothetical monopolist can identify and price differently to those buyers ("targeted buyers") who would not defeat the targeted price increase by substituting to other products in response to a "small but significant and nontransitory" price increase for the relevant product, and if other buyers likely would not purchase the relevant product and resell to targeted buyers, then a hypothetical monopolist would profitably impose a discriminatory price increase on sales to targeted buyers. This is true regardless of whether a general increase in price would cause such significant substitution that the price increase would not be profitable. The Agency will consider additional relevant product markets consisting of a particular use or uses by groups of buyers of the product for which a hypothetical monopolist would

[52] *Id.* at 427-29.
[53] *Id.* at 409 n. 161.
[54] Michael R. Baye & John Morgan, *Brand and Price Advertising in On-Line Markets*, 55 MANAGEMENT SCIENCE 1139 (2009).

> profitably and separately impose at least a "small but significant and nontransitory" increase in price.[55]

The 2006 Commentary to the Merger Guidelines point out several instances where the ability to price discriminate has been the basis for government enforcement action.[56] The current chief economists for both enforcement agencies also have noted the importance of this concept in their scholarly writings and rely on price discrimination to establish relatively narrow market definitions when courts are reluctant to accept direct proof of anticompetitive unilateral effects.[57]

What is noticeably missing is the role of brand management in establishing the ability to price discriminate. Brand management can be a critical element in facilitating price discrimination in two very different, but important, ways that are underappreciated for antitrust and market definition purposes. First, the very purpose of branding is to allow price discrimination versus unbranded or commodity goods. The same producer may thus manufacturer a branded item for a significant premium, a house (or private label) brand of the same item at a lesser price, and where necessary the bulk form of the item at prevailing market prices.[58] More generally, the branded segment of a market will typically enjoy a substantial premium over the unbranded segment even when produced

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[55] Horizontal Merger Guidelines, *supra* note 42, at § 1.12.
[56] Federal Trade Commission & U.S. Dep't of Justice, Commentary on the Horizontal Merger Guidelines at 7-9 (March 2006), available at http:// www.usdoj.gov/atr/public/guidelines/215247.htm.
[57] Gregory K. Leonard and Mario A. Lopez, *Farrell and Shapiro: The Sequel*, ANTITRUST, Sum. 2009 at 17.
[58] *See generally* PRIVATE LABELS, BRANDS, AND COMPETITION POLICY: THE CHANGING LANDSCAPE OF RETAIL COMPETITION (Ariel Ezrachi & Ulf Bernitz 2009); John A. Quelch & David Harding, *Brands versus Private Labels: Fighting to Win*, in HARVARD BUSINESS REVIEW ON BRAND MANAGEMENT 51 (1999).

by different manufacturers. This can even be the case in agricultural goods, the ultimate commodity goods for most purposes.[59]

A second type of price discrimination has received virtually no attention is what we will term intra-brand price discrimination. Most brands of consumer goods will strive to offer a series of sub-brands to further segment purchasers along different price and style points. We recognize that such further product differentiation is not price discrimination within the meaning of the Robinson-Patman Act as it normally does not involve differential pricing of the same commodity.[60] Nonetheless we contend that such price discrimination is critical to understanding branding and its relevance to market definition and antitrust policy more generally. Thus, the Armani fashion line has couture, black label, white label, Le Collezioni, Emporio Armani, and Armani A/X in roughly descending order of price.[61] Similarly, Marc Jacobs has one line for the highest end of his products and the Marc line as a starter line for younger or more price-conscious consumers.[62] Certain fashion houses use a different strategy of creating entirely separate brands under the same corporate family to slice and dice demand along every conceivable price and style distinctions.[63]

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[59] Dermot J, Hayes, Sergio H. Lence & Andrea Stoppa, *Farmer-Owned Brands?* 20 AGRIBUSINESS 269, 270(2004).
[60] 15 U.S.C. § 13.
[61] http://www.giorgioarmani.com.
[62] http://www.marcjacobs.com.
[63] http://www.gap.com/browse/home.do?ssiteID=ON provides a single portal for Old Navy, Banana Republic and Athleta brands. Liz Claiborne owns Juicy Couture, Lucky Brand Jeans, kate spade and Mexx in addition to its Liz Claiborne "family" of brands (Liz Claiborne New York, Axcess, Claiborne by John Bartlett, Concepts by Claiborne, Dana Buchman Liz & Co) and its Monet "family" ( DKNY Jeans Group, Kensie, KenzieGirl, Mac and Jac). Unlike the Gap brands, the Liz Claiborne brands each have independent websites. Abecrombie, Hollister, American Eagle, also have separate, distinct websites, though the brands are all owned by Abercrombie. Another notable example of separate brands under the same corporate family includes GM which until recently owned Buick, Chevrolet, Cadillac, GMC, Pontiac, Hummer, Saab and Saturn.

Despite the centrality of brands to market definitions under each of these tests, most courts and commentators ignore the logic of the reasonable interchangeability test, the SSNIP, the ability to price discriminate, and/or the Lerner Index approach when applied to successful brands. Even worse, the market power of successful brands produced by any of the accepted tests is often dismissed as either trivial or irrelevant for antitrust purposes.[64] For example, as the Seventh Circuit noted in a recent case:

> What is true is that a firm selling under conditions of "monopolistic competition"- the situation in which minor product differences (or the kind of location advantage that a local store, such as a barber shop, might enjoy in competing for some customers) limit the substitutability of otherwise very similar products – will want to trademark its brand in order to distinguish it from its competitors' brands. But the exploitation of the slight monopoly power thereby enabled does not do enough harm to the economy to warrant trundling out the heavy artillery of federal antitrust law.[65]

Sometimes, the criticism of markets defined by significant brand power is simply contradictory. As one commentator states:

> "[W]here differentiation is significant among an array of products, many products that are interchangeable will not have a high degree of cross-elasticity of demand with other substitutes or may have none at all."[66]

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[64] Daniel J. Gifford, *Farewell to the Robinson-Patman Act? The Antitrust Modernization Commission's Report and Recommendation,* 53 ANTITRUST BULL. 481, 485 (2008); Benjamin Klein, *Market Power in Antitrust, Economic Analysis After Kodak*, 3 SUP. CT. ECON. REV. 43, 72 (1993); William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases,* 94 HARV. L. REV. 937, 956-57 (1981)(rejecting Telser's analysis of own elasticity of branded consumer goods as irrelevant to market power for antitrust analysis); William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J. L. & ECON. 265, 274-75 (1987); Einer Elhauge, *Defining Better Monopolization Standards,* 56 STANFORD L. REV. 253, 260 (2003); Richard Schmalensee, *On the Use of Economic Models in Antitrust: The Realemon Case* 127 U. PA. L. REV. 994, 1015-16 (Realemon, other brands of reconstituted lemon juice and fresh all imperfect substitutes but rejecting meaningful long term market power for Realemon in any of the potential relevant markets); Katarzyna A. Czapracka, *Where Antitrust Ends and IP Begins,* 9 Yale J. L. & Tech. 44 (2007) (even if IP allows price above marginal cost, there are huge sunk costs in development).

[65] Sheridan v. Marathon Petroleum Co., 530 F. 3d 590, 595 (7th Cir. 2008).

[66] James A. Keyte, *Market Definition and Differentiated Products: The Need for a Workable Standard,* 63 ANTITRUST L.J. 697, 702 (1995) (ultimately arguing for 20% or more version of SSNP test for differentiated products).

The problem with this line of analysis is, of course, that if the products do not have a significant degree of cross-elasticity then they should not be considered substitutes in the first place, despite physical similarities or other intuitive arguments. This line of attack thus trivializes a sophisticated branding industry whose entire purpose is to reduce or eliminate the substitutability of intuitively competing products or services. When branding strategies are successful, that success should be recognized rather than ignored, or assumed away.

The problem works in both directions. Too often, those who do take the power of trademarks seriously err in the other direction and often assert that trademarks frequently or inevitably constitute monopolies. Even the work in this field which is more sophisticated is rarely being done by antitrust specialists and has not had a major impact in the competition law field.[67] Much of this work is also focused more narrowly on trademark law and not on the broader concept of the brand.[68]

One of few meaningful engagements with the broader effects of branding on market definition is the second edition of the Sullivan & Grimes treatise which states:

> When market power is properly defined as power over price, it is clear that sellers of branded products often exercise market power. Just as a pure monopolist, the seller of a branded good may face an inelastic demand curve, allowing it to raise price without losing offsetting sales revenues. The origins of single brand market power are varied, but are often linked to the flow of information available to buyers. A seller with a powerful brand, for example, may have brand-loyal consumers who will absorb price increases rather than switch to a different brand. The basis for this brand loyalty may be accurate information about the characteristics of the favored brand and all rival offerings. But brand loyalty may also be based on inaccurate, out-of-date or incomplete information. Brand loyalty will be reinforced by "satisficing" conduct – where market actors are not

[67] *See e.g.*, Chad Doellinger, *A New Theory of Trademarks*, 111 PENN ST. L. REV. 823 (2007); Glynn S. Lumley, Jr., *Trademark Monopolies*, 48 EMORY L.J. 367 (1999); Doris Estelle Long, *Is Fame All There Is? Beating Global Monopolists at their Own Game*, 40 GEO. WASH. INT'L L.J. 123 (2008).
[68] *Id.*

> constantly reevaluating their alternatives and patterns tend to stabilize and be repeated until something disorienting occurs. Single brand market power may also be generated by the sales methods used by the seller. Intrabrand (vertical) distribution restraints may generate brand loyalty. Or interbrand restraints such as tie-ins may created market power in aftermarkets because of the incomplete information in the hands of the buyer.[69]

In this field, like most of life, always and never are always never the right answer. The critical question that remains underdeveloped, from the time of Edward Chamberlin to the present, is when do brands confer meaningful market power and how to integrate brand management into the calculus of existing antitrust analysis. Chamberlin recognized that the degree of monopolistic competition and the closeness of the potential substitutes are the important questions.[70] Even critics of Chamberlin acknowledge that the key issue is identifying the noticeable gaps in the chain of substitutes.[71]

Studies of brand equity suggest that successful brand management strategies can generate precisely the type of power over price that can constitute meaningful market power for antitrust purposes. Brand equity has been defined as the "differential effect of brand knowledge on consumer response to the marketing of the brand."[72] Positive brand equity occurs where a customer is familiar with a brand and reacts more favorably to the product, price, promotion, or distribution of the brand than they would for the same element of the marketing mix when it is attributed to a "fictitiously named or unnamed

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[69] LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK § 2.4e (2nd ed. 2000). *See also* Warren S. Grimes, *Brand Marketing, Intrabrand Competition, and the Multibrand Retailer: The Antitrust Law of Vertical Restraints*, 64 ANTITRUST L.J. 83 (1995).
[70] CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION, *supra* note 3, at 59.
[71] Schmalensee, *supra* note 64, at 1010. As Schmalensee noted in general that perfect markets are rare, short term market power is ubiquitous but "As long as the goods and services this aggregated are close enough substitutes, their prices will move together, and an appropriate price index can thus serve as a useful summary statistic." Schmalensee errs by assuming most markets have perfect substitutes.
[72] Kevin Lane Keller, *Conceptualizing, Measuring, and Managing Customer-Based Brand Equity*, xx J. Markt. 1, 2 (January 1993), available at http://www.jstor.org/stable/1252054.

version of the product or service."[73] Often the value attributed to a particular brand depends on the strength of a consumer's positive mental associations regarding the brand.

There is a substantial business literature on the measurement of brand equity. In general, there are both direct and indirect methods for doing so which would be a fertile ground for more research to determine whether brand equity can used as an alternate or supplemental measure of market power for antitrust purposes.[74]

Lester Telser in his 1972 article recognized this aspect of successful branding and called for its recognition in market definition and the measurement of market power.[75] Unfortunately, most commentators in the law and economics movement and most courts have not engaged this body of literature or have too reflexively come to the opposite conclusion.[76]

This does not mean that each brand is its own market for antitrust purposes or that the existence of a successful brand automatically constitutes proof of monopoly power. But taking brands seriously calls into question whether antitrust is ignoring the central reality of modern business practice in judging the competitive impact of those practices.[77]

Nor is this an excuse for lazy lawyering. Courts are correct to reject facile shortcuts where market power based on the presence of brands is asserted but not proved. For example, it is hard to argue with a decision which declines to take judicial notice that

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[73] *Id.* at 8.
[74] *See generally* Keller, *supra* note 72; Carol J. Simon & Mary W. Sullivan, *The Measurement and Determinants of Brand Equity: A Financial Approach*, MARKETING SCIENCE, Winter 1993, at 29, *available at* http://www.jstor.org/stable/183736; V. Srinivasan, Chan Su Park & Dae Ryun Chang, *An Approach to the Measurement, Analysis, and Prediction of Brand Equity and Its Sources*, MANAGEMENT SCIENCE, September 2005, at 1435-36. *See also* http://www.harrisinteractive.com/news/allnewsbydate.asp?NewsID=1063 for a good explanation of how the brand equity in the top 10 brand list was calculated.
[75] L. TELSER, COMPETITION, COLLUSION AND GAME THEORY (1972).
[76] Posner and Landes, *Market Power in Antitrust Cases*, *supra* note 64, at 957.
[77] It also calls into question the core notion of inter-brand competition if product differentiation strategies are successful or most market participants employ similar branding strategies.

Splenda brand artificial sweetener is a separate market onto itself.[78] An attempt to prove that Marathon brand gasoline had market power in the gasoline or credit card market based solely on submission of volume of sales and number of dealers seems appropriately doomed to failure.[79] Similarly, most attempts to prove that franchise systems are their own markets will be problematic, particularly if viewed ex ante in a broader market of similarly branded franchise opportunities.[80] Mere invocation of the existence of brand power without rigorous proof is insufficient and not what we advocate.

If one does take the notion of brands and branding seriously, however, there will be instances where a single brand of a product or service is the relevant market, even if there are physically identical or similar alternatives. The courts and the agencies must look beyond the physical similarities and focus on whether the branding campaign has been successful enough so that consumers do not view the possible alternatives as reasonably effective substitutes.[81] This can also be true even when the brand is not accompanied by a registered trademark.[82]

There has been a somewhat greater willingness to recognize the importance of branded products as a separate market segment from the unbranded and private label segments of the same industry. For example, the 2006 Commentary to the Merger Guidelines discusses several enforcement actions in the butter, flour, tissue, and bread

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[78] Diamond Crystal Brands, Inc. v. Food Movers Int'l , Inc., 2008 WL 2811940, 3 (S.D. Ga. 2008).
[79] Sheridan v. Marathon Petroleum Co. L.L.C., 530 F. 3d 590 (7th Cir. 2008).
[80] Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F. 2d 480, 487 (5th Cir. 1984)(rejecting market of Holiday Inn franchises); Midwestern Waffles, Inc. v Waffle House, Inc., 734 F. 2d 705, 712-13 (11th Cir. 1984)(no market for Waffle House franchise system). *See generally* Keyte, *supra* note 66, at 668 n. 6 (collecting cases).
[81] U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F. 3d 986, 997-98 (11th Cir. 1993), *cert. denied*, __ U.S. __, 114 S. Ct. 2710 (1994)(dominant brand of anchor its own product market because of consumer perception and behavior that competing makes and models of anchors not effective substitutes).
[82] Vitale v. Marlborough Gallery 1994-1 Trade Cas. (CCH) ¶ 70,654 (S.D.N.Y. 1994) (Jackson Pollack sub-market)(example of powerful brand without trademark).

industries where branded products were recognized as distinct markets for merger analysis, despite the presence of additional producers of generic and private label goods.[83] In addition, there is an older FTC challenge to a merger in the soft drink industry which focused on the major branded segment of the industry as the relevant market for merger analysis.[84]

2. Brands, Entry Barriers, and Remedies

Even when the role of brands is not emphasized in defining the market, brands are often relevant at a later stage in the analysis. Once the relevant markets are defined, power within those markets is measured, and anticompetitive harm is shown to be likely, the agency or court will normally proceed with an analysis of barriers to entry. If barriers to entry are low, then the firms are presumed to lack the ability to raise price or restrict entry and the merger is normally allowed.[85]

It has long been recognized that the possession of a strong brand or brands by the merging firms can constitute a barrier to entry suggesting that the anticompetitive effect of the transaction will be meaningful and of substantial duration. If the presence of strong branding (or any other factor) would prevent timely and effective entry at pre-merger prices then the Merger Guidelines and the Commentary will deem there to be substantial barriers to entry and continue on to later steps in the merger analysis.[86]

[83] Commentary to the Merger Guidelines, *supra* note 56, at 4, *citing* U.S. v. Diary Farmers of America, 2001-1 Trade Cas. (CCH) ¶ 73,136 (E.D. Pa. 2000); U.S. v. Kimberly-Clark Corp. and Scott Paper Co., 1996-1 Trade Cas. (CCH) 71,405 (N.D. Tex. 1996); U.S. v. Interstate Bakeries Corp., 1996-1 Trade Cas. (CCH) 71,271 (N.D. Il. 1995).
[84] Coca-cola Bottling Co. of the Southwest v. F.T.C. 85 F.3d 1139 (5th Cir. 1996). *See generally*, EZRACHI & BERNITZ, *supra* note 58.
[85] Horizontal Merger Guidelines, *supra* note 42, at 1.
[86] Czarparka, *supra* note 64;Horizontal Merger Guidelines, *supra* note 42, at §3.0-3.3. Commentary to the Merger Guidelines, *supra* note 56, at 38, 45. In addition, the presence or absence of strong brands can be a

Conversely, the Commentary also suggest that if competing producers can reposition their existing brands then this will also be considered as an alternative to entry to determine whether the merger is likely to pose a threat to competition.[87]

On the remedy side, brands have played an important role in deciding what to do about a transaction once the Agencies conclude that it represents a substantial risk to competition going forward. The Agencies will work with the parties before proceeding to court to remedy areas of concern if the threat to competition can be remedied through partial divestitures, rather than a challenge to the entire transaction.[88] In this situation, numerous challenges to mergers have been resolved through the divestiture of assets which have consisted of, or included, competing brands so the post-merger market will consist of the same number of viable competitors as before.[89]

Outside of these two limited areas, brands have been relegated to the sidelines of market definition and merger analysis more generally. As discussed in the next section, that unfortunate result is beginning to change in the all-important area of assessing the competitive harm of the transaction under the rubric of unilateral effects.

### 3. Brands and Proof of Anticompetitive Harm

The closest antitrust comes to the effective recognition of the unique role of brands comes in the prediction of anticompetitive harm in merger cases. Following the definition of the relevant market and the measurement of the market share of the merging

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factor in determining whether a firm is deemed an uncommitted entrant, one whose ability to enter is so timely and effective that it should be considered a current participant in the relevant market. *Id.* at § 1.31.

[87] Commentary to the Merger Guidelines, *supra* note 56, at 31.

[88] U.S. Dep't of Justice, Antitrust Division, Policy Guide to Merger Remedies, 30 (Oct. 2004), *available at* http:// www.usdoj.gov/atr/public/guidelines/205108.pdf.

[89] Commentary to the Merger Guidelines, *supra* note 56, at 38.

firms, the government or private plaintiff must show that the transaction is likely to produce a "substantial lessening of competition" or a tendency to monopoly.[90]

There are two theories of competitive harm in merger cases. The first, coordinated effects theory, is only rarely of relevance to brand issues. Coordinated effects theories of harm focus on whether the merger will raise likelihood of collusion or oligopolistic interdependency as a result of changes in the structure of the market. It is the most traditional of merger theories and focuses on the change in the market share of the merging firm, the increase in the concentration of the industry, and whether these changes will make it more likely that the merging firms will take the behavior of the remaining firms into account and limit their competitive zeal.[91]

In contrast, unilateral effects theories of harm focus on the effect of the merger *regardless* of behavior of other firms.[92] Harm from unilateral effects can be shown at far less than near monopoly market shares in markets with more differentiated products. Mergers at relatively low market share levels can be barred on this theory when government or another plaintiff can prove that customers view the merging firms as the closest substitutes to each other. If no other firm is viewed as a close substitute, this would allow the merging firms to raise price or limit output and capture more profits than they would lose through customers migrating to weak substitutes. In its strongest form, proponents of the unilateral effects theory suggest that proof of likely anticompetitive

[90] 15 U.S.C. § 18.
[91] Horizontal Merger Guidelines, *supra* note 42, at §2.1. The FTC did challenge the *Diageo-Vivendi* merger in the liquor industry on the grounds that the consolidation of the brands of rum caused by the merger would make coordination more likely with Seagrams, the remaining important player in the market. *Diageo plc and Vivendi Universal S.A.*, 66 Fed. Reg. 66,896 (FTC Dec. 27, 2001).
[92] Horizontal Merger Guidelines, supra note 42, at § 2.2. *See generally* Herbert J. Hovenkamp, *Unilateral Effects in Product-Differentiated Markets, U Iowa Legal Studies Research Paper No. 09-12* (2009), *available at* http://ssrn.com/abstract=1359288.

harm can be shown directly through proof of low customer loss without the indirect proxy of proof of market definition and market share.[93]

The most detailed treatment of unilateral effects comes in the scholarly literature and the commentary on the merger guidelines. Here the role of branding in product differentiation, segmenting of markets between different levels of brands, has played a more significant role. For example, the Federal Trade Commission challenged a merger between Dreyer and Nestle in a market they defined as "super premium ice cream."[94]

The older General Mills-Pillsbury merger involving flour is of importance because of the commodity nature of business.[95] The key to understanding the competitive harm alleged by the government lies in success of these two firms in creating effective brands for what was otherwise a functionally equivalent baking product. Because of the branding, neither unbranded flour nor the imperfect substitute of certain regional brands were predicted to be an effective constraint on the merged companies' ability to raise price and the merger was permitted subject to divestiture of Pilsbury's baking products line. Along those same lines, the merger commentary discusses the 1996 merger between Kimberly Clark and Scott as likely to produce anticompetitive harm for consumers of tissue paper and baby wipes on a similar theory. In both cases, successful branding was the only meaningful basis for being concerned about the transactions, given

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[93] Jonathan B. Baker & Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement* in HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON US ANTITRUST 235 (Robert Pitofsky, ed. 2008). However courts have been suspicious when the government's proof of harm under any theory has not also been accompanied by traditional market definition. F.T.C, v, Whole Foods Market, Inc., 548 F.3d 1028, 1036 (C.A.D.C. 2008); U.S. v. Oracle Corp., 331 F.Supp.2d 1098, 1110 (N.D. Cal. 2004).

[94] Commentary to the Merger Guidelines *supra* note 56, at 28-29. Nestle Holdings, Inc., 68 Fed. Reg. 39,564 (FTC July 2, 2003). *But see* In re Super Premium Ice Cream Distrib. Antitrust Litig., 691 F. Supp. 1262, 1268 (N.D. Cal. 1988) (no separate market for superpremium ice just a continuum of price and quality).

[95] General Mills, Inc./Diageo plc/PillsburyCo., F.T.C. file No. 001 0213, *available at* http://www.ftc.gov/os/2001/10/index.shtm#23.

the large number of suppliers of functionally interchangeable, and often physically identical, potential substitutes.

Unilateral effects theory so far has not proved to be a viable entry point of brand management into antitrust theory and practice. It remains the more controversial of two different theories in merger law, which is merely one of the three important segments of antitrust practice. In addition, it become highly technical and lose sight of the importance of product differentiation and branding which gave birth to the theory in the first place.[96] It further substitutes the uncertainties of calculating and predicting the elasticity of the merging firm's own demand curve and the likely customer diversion for the uncertainties of traditional market definition and its reliance on cross-elasticity of demand and the SSNIP test. Finally, the unilateral effects theory is often applied in auction markets or auction-like contexts with no real connection to brands.

Despite these limitations, unilateral effects analysis is not always blind to the power of brand in market definition and does focus directly on the likely harms of product differentiation. It addresses the vital question of the closeness of the available substitutes and avoids the artificial line drawing common to traditional market definition. It also suggests that harm to competition may occur at market shares not normally defined as potentially anticompetitive. When successful branding generates customer loyalty, customers simply do not regard other products as reasonably effective substitutes and are unwilling to switch.

Unfortunately, unilateral effects theory has received a mixed reception in the limited number of court decisions where it has been proposed so far. Courts have too often ignored such evidence and insisted that the government define markets and market

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[96] Herbert J. Hovenkamp, *Unilateral Effects in Product-Differentiated Markets*, *supra* note 92.

share in the traditional fashion as set forth in the Guidelines. As a result, the government may instead use brands to narrow the market definition and suggest harm based on increased market share and concentration. Nonetheless, unilateral effects, and the product differentiation upon which it rests, will continue to inform government case selection and investigative practice. Thus, both sides will have to consider the role of brands more intensively both under current guidelines and anticipated revisions under the Obama administration.[97]

4. The Slightly More Realistic Treatment of Brands in the European Union

These same issues arise under the competition law of the European Union. The analysis of the effects of branding is addressed somewhat more frequently, but no more systematically than in the United States. For example, the EU Merger Guidelines are quite similar to their US counterparts and have little direct discussion of branding and the overall effects of product differentiation.[98] Unilateral effects theory is mentioned but is a relatively new development and little explored in the EU.

The EC's horizontal merger guidelines reference brands when discussing non-coordinated effects (their version of unilateral effects) and barriers to entry.[99] More generally, the Guidelines note that customer preference surveys and purchasing patterns

[97] There are also opportunities to better integrate branding into traditional coordinated effects merger theories such as the baby food merger between Heinz and Beach Nut where brand strategies were just background information rather than integral part of the case. FTC v. H.J. Heinz, 246 F. 3d 708, 711 (C.A.D.C. 2001).

[98] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, Official Journal C 31, 05.02.2004, p. 5-18 (EC Merger Guidelines), at ¶ 14-21.

[99] *Id.* at ¶ 36.

may be used to evaluate substitutability.[100] However, the Guidelines do not indicate whether customer preference alone, regardless of similarity in product characteristics, can create a relevant product market.

In *Babyliss SA v Commission*, a potential entrant to the small kitchen appliance market challenged the Commission's decision to permit a merger on the grounds that the Commission had not sufficiently considered the potential anti-competitive effects.[101] The plaintiffs argued that the merger would consolidate most of the powerful small kitchen appliance brands into one already dominant company.[102] Furthermore, because public awareness of brands requires great time and cost investment, particularly for new entrants, such a consolidation would be dangerously anticompetitive.[103] The court, without rejecting the importance of brands, nonetheless denied the appeal finding that such non-coordinated effects would be diminished by the Commission's requirements that the merged entity license the newly acquired trademark to other companies for five years and refrain from using the trademark in question for another three years.[104]

The EU Merger Guidelines also state brands and patents may create entry barriers. "Incumbents may…enjoy technical advantages, such as preferential access to essential facilities, natural resources, innovation and R & D, or intellectual property rights….In particular, it may be difficult to enter a particular industry because experience or reputation is necessary to compete effectively, both of which may be difficult to obtain as an entrant. Factors such as consumer loyalty to a particular brand, the closeness of relationships between suppliers and customers, the importance of promotion or

[100] *Id.* at ¶ 29.
[101] Babyliss SA v Commission ('Seb/Moulinex'), [2003] ECR II-000, ¶ 176.
[102] EC Merger Guidelines, *supra* note 98, at ¶ 43.
[103] *Id*. at ¶ 197.
[104] *Id.* at ¶ 197-221.

advertising, or other advantages relating to reputation will be taken into account in this context."[105]

Notable EU merger cases involving brand loyalty and entry barriers include *The Coca-Cola Company/Carlsberg A/S* case. In *Coca Cola,* the court permitted the merger between the Danish beer and soft drink manufacturer and Coca Cola. [106] The court noted that the merger would create barriers to entry because of the high risks, costs and time needed to launch competing international brands with a corresponding brand image, customer loyalty, advertising, and distribution networks.[107] The risk of harm was particularly great because the merger reduced the market from four international brand owners to three. Additionally, the court found that customer loyalty to established brands would make it difficult for a new supplier to persuade retail customers to change suppliers and would further hinder entry.[108] Ultimately, however, the court allowed the merger subject to divestiture of the Carlsberg's Dansk Coladrink shareholding to another company.[109]

As in the United States, branding has figured prominently in EU merger enforcement in the paper industry, an otherwise homogenous product market where companies hold relatively low market shares. In *SCA/Metsä Tissue,* the court found that a merger combining the four major brands of toilet paper into one company would create barriers to entry particularly when few customers surveyed were aware of competing

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[105] *Id.* at ¶ 71.
[106] Commission Decision 98/327/EC in Case IV/M.833 — The Coca-Cola Company/Carlsberg A/S, OJ L 145, 15.5.1998 at ¶ 118.
[107] *Id.* at ¶72.
[108] *Id.* at ¶ 73.
[109] *Id.* at ¶ 110.

brands with smaller market shares.[110] The court also noted that customers expressed worries about the effects of the merger.[111] Unlike in *Coca Cola*, the merger of toilet paper producers was denied because the firms failed to take the actions required by the Commission which would reduce the anticompetitive effects of the merger. [112]

The EU Enforcement Guidelines on the Abuse of a Dominant Position do not speak specifically to the issue of brands in conferring dominance, noting only that "a dominant position derives from a combination of several factors which, taken separately, are not necessarily determinative."[113] However, the guidelines cite to *United Brands and United Brands Continentaal* v. *Commission* where possession of the strong Chiquita brand was evidence of dominance.[114] The brand contributed to the creation of a "privileged position" because distributors could not afford not to offer Chiquita, the premier brand, to the customer.[115]

Brands are also discussed in the analysis of specific forms of abuse such as exclusive dealing and refusal to supply. The Guidelines state that "competitors may not be able to compete for an individual customer's entire demand because the dominant undertaking is an unavoidable trading partner at least for part of the demand on the market, for instance because its brand is a 'must stock item' preferred by many final consumers or because the capacity constraints on the other suppliers are such that a part

[110] Commission Decision 2002/156/EC in Case COMP/M.2097 — SCA/Metsä Tissue, OJ L 57, 27.2.2002, p. 1, ¶ 83, ¶ 94.
[111] *Id.* at ¶ 84.
[112] *Id.* at ¶ 248.
[113] European Commission, Directorate-General for Competition, Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses ¶ 10 (Dec. 2005) (Draft Article 82 Guidelines), *available at* http:// ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf.
[114] Case 27/76 United Brands and United Brands Continentaal v. Commission [1978] ECR 207, ¶ 89-94
[115] *Id.* at ¶ 93.

of demand can only be provided for by the dominant supplier." [116]

The case of *Van den Bergh Foods* v. *Commission* exemplifies such a scenario. In *Van den Bergh*, the court found that high brand recognition was an indication of dominance in the single wrapped impulse ice-cream market.[117] As a result, free provision of freezer cabinets on a condition of exclusively filling them with the respondent's ice cream was an abuse of dominance.[118] This conclusion was buttressed by the following findings: (1) the defendant had the most extensive and most popular range of products on the relevant market; (2) that 27% of the sales outlets in question were not interested in stocking another brand of ice cream; and (3) the small percentage of those outlets that were interested in stocking other brands nevertheless did not take the steps necessary to do so.[119]

The fullest treatment of brands has occurred in UK national competition law. The leading study examined the full range of cases in the UK from 1950 to 2007.[120] Fifty six market cases and thirty one merger cases out of a total of 423 case studies were defined as brand related.[121] These cases mostly involved large firms in concentrated manufacturing markets.[122] The study concludes that managers need to be more cognizant of competition law, but does not explore the mirror image problem that competition decision makers need to be more cognizant of brand management.[123]

[116] Draft Article 82 Guidelines, supra note 113, at ¶ 36.
[117] Case T-65/98 Van den Bergh Foods v. Commission [2003] ECR II-4653], ¶ 90.
[118] *Id.* at ¶ 159.
[119] *Id.* at ¶ 156.
[120] John K. Ashton & Andrew D. Pressey, *The Regulatory Challenge to Branding: An Interpretation of UK Competition Authority Investigations 1950-2007*, ESRC Centre for Competition Policy Working Paper No. 09-2, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1331407.
[121] *Id.* at 3.
[122] *Id.*
[123] *Id.*

5. The Red Herring of After-Markets

Ironically, the one place where the role of single market brands has been debated most vigorously turns out to be the ultimate red herring. A line of cases addresses whether a firm can exploit the aftermarket for parts or services of its own product. The most famous case is the 1992 *Kodak* case in the United States Supreme Court.[124] Kodak was accused of unlawful tying and monopolization of the market for parts and service for the line of its brand of photocopiers. In the market for original photocopying equipment, Kodak was a small player with "no significant share" of the market. Initially customers who purchased a Kodak copier could service it through Kodak or through independent service operators ("ISOs") who purchased replacement parts from Kodak. Kodak subsequently changed this policy and refused to sell parts to such ISOs or even to the customers themselves unless they self-serviced. This had the effect of requiring most customers to get both their replacement parts and their service from Kodak at higher prices.

An independent service operator sued alleging that the change in policy constituted both unlawful monopolization under Section 2 of the Sherman Act and unlawful tying under Section 1 of the Sherman Act. Kodak moved for summary judgment on the grounds that it lacked the necessary market power prerequisite to liability under either of the plaintiff's theory. Kodak argued since it lacked market power in the original copier equipment market, as a matter of law it lacked power over replacement parts or service for such equipment.

The Supreme Court held that there were material questions of fact whether or not Kodak enjoyed market power over the parts and service for its own copiers. The

[124] Eastman Kodak Co. v. Image Technical Servs. Inc., 504 U.S. 451 (1992).

defendant had offered evidence that customers could factor in parts and service along with the original purchase price of the equipment and life cycle price. As a result, attempts to raise any component of the life cycle price would be unsuccessful given Kodak's small share of the equipment market.

The Court reasoned that the plaintiff had proffered evidence that certain customers could not or would not engage in life cycle pricing. In addition, other customers were locked in or subject to significant informational disadvantages that rendered them subject to post-purchase opportunism of the kind raised in the complaint. Finally, the fact that Kodak had changed its policy after purchase, combined with the other aspects of the case, created triable issues of fact about Kodak's market power warranting the denial of the defendant's motion for summary judgment.

This decision produced a dissent by Justice Scalia who argued that:

> The Court today finds in the typical manufacturer's inherent power over its own brand of equipment – over the sale of distinctive repair parts for that equipment, for example -- the sort of "monopoly power" sufficient to bring the sledgehammer of § 2 into play …. In my opinion, this makes no economic sense. The holding that market power can be found on the present record causes these venerable rules of selective proscription to extend well beyond the point where the reasoning that supports them leaves off. Moreover, because the sort of power condemned by the Court today is possessed by every manufacturer of durable goods with distinctive parts, the Court's opinion threatens to release a torrent of litigation and a flood of commercial intimidation that will do much more harm than good to enforcement of the antitrust laws and to genuine competition.[125]

The aftermath of *Kodak* produced little of the torrent of litigation predicted by Justice Scalia[126] but did produce a vigorous debate in the literature about the validity of

[125] Eastman Kodak Co. v. Image Technical Servs. Inc., 504 U.S. 451, 489 (1992) (Scalia dissenting).
[126] *But see* Hilti AG v. Commission, Case T-30/89, [1991] E.C.R. II-1439, [[[1992] 4 C.M.L.R. 16 (Ct. First Instance).

after-markets and single market brands.[127] Whether lock-in theories and related after-market claims should be recognized has nothing to do with brand power and everything to do with contractual opportunism.[128] The Kodak brand has nothing to do whether the defendant should be held liable to its customers or competitors for its policies with respect to replacement parts and services. What commentators are really debating is the validity and importance of after-markets as the proper level of analysis for such antitrust claims and not whether the brand defines the market. As a result, the controversies surrounding *Kodak* and its progeny in the United States and the EU have tarred more legitimate questions of how brands shape definitions of markets, power, and liability and unhelpfully suggested that these are "single brand" cases. Instead they speak to whether the market in a particular case (whether there are powerful brands, weak brands, or no brands at all) should be defined at the original equipment stage or the downstream parts and service stage for those who are already customers. Either way, it sheds no light on the more fundamental questions we are seeking to explore about the nature of brands and the power they may confer.

**127** *Compare* Benjamin Klein, *Market Power in Aftermarkets*, 17 MANAGERIAL & DECISION ECON. 143, 157 (1996); Benjamin Klein, *Market Power in Antitrust, Economic Analysis After Kodak,* 3 SUP. CT. ECON. REV. 43 (1993); Thomas Arthur, *The Costly Quest for Perfect Competition: Kodak and Nonstructural Market Power*, 69 N.Y.U. L. REV. 1, 60-71 (1994) *with* Rudolph J.R. Peritz, *Theory and Fact in Antitrust Doctrine: Summary Judgment Standards, Single-Brand Aftermarkets and the Clash of Microeconomic Models*, 45 ANTITRUST BULL. 887 (2000); Mark R. Patterson, *Product Definition, Product Information, and Market Power*, 73 N. C. L. REV. 185 (1994); Eleanor M. Fox, *Eastman Kodak Company v. Image Technical Services, Inc. – Information Failure as Soul or Hook?*, 62 ANTITRUST L.J. 759 (1994); Joseph Kattan, *Market Power in the Presence of an Installed Base*, 62 ANTITRUST L.J. 1 (1993);

128 *See* Warren S. Grimes, *Brand Marketing, Intrabrand Competition, and the Multibrand Retailer: The Antitrust Law of Vertical Restraints*, 64 ANTITRUST L.J. 83, 88 and 121 (1995).

## Conclusion

The role of brands is too central in the modern economy to be relegated to the sidelines in any legal debate about the regulation of business behavior. Any proposed revisions to the merger guidelines should take advantage of the opportunity to introduce the role of brands more directly into the analysis of market definition, proof of market power, prediction of competitive harms, entry barriers, remedies, and the other issues in the analysis of mergers and acquisitions under the Clayton Act. The language of brands and the business literature that analyzes brand management should be added as an alternative or supplemental language to the merger guidelines and antitrust discourse more generally. Currently, there are a number of places in the guidelines where such concepts could be utilized, but we believe it is appropriate to do so through the front door rather than the side or back entrance.

The SSNIP test may be appropriate for the analysis of commodity markets and those where branding is incomplete or unsuccessful. However, the nearly exclusive reliance on cross-elasticity of demand in the guidelines fails to capture any of the dynamics of brand and brand management which seek, and often succeed, to create loyal customers who will not switch between seemingly identical products, even in the face of substantial hypothetical or real price changes. Adding a more realistic discussion of branding will give meaning and content to already existing language about the role of price discrimination in defining markets, clarify the ongoing debate about the role of sub-markets, and enrich the dialogue of antitrust law more generally by introducing the real world language of business to the existing discourse of neo-classical price theory. This body of literature is the very literature that the business community has relied upon for years to build loyal customers who are resistant to the effects of price competition or the allures of seemingly competing alternatives in the market.

Dealing with the effects of branding openly and explicitly will sometimes help enforcers and sometimes help parties to the transactions. Either way, recognizing the reality of both price sensitive shoppers and brand loyal consumers will bring antitrust law and future merger guidelines more in touch with the real world and the firms whose behavior is being scrutinized by the antitrust agencies.