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Media and Technology Committee
ABA Section of Antitrust Law

Spring 2016

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From the Editors

The Media and Technology Committee of the ABA Section of Antitrust Law is pleased to present this issue of *ICARUS*, which returns after an extended vacation.

This issue includes three timely and thoughtful articles. The first considers the nature and mutability of antitrust precedent at the U.S. Supreme Court, as compared to precedent related to other statutory schemes, particularly intellectual property ("IP") which, of course, not infrequently intersects with antitrust. The FTC's Nandu Machiraju addresses this by looking through the lens of the 2015 U.S. Supreme Court decision in *Kimble v. Marvel*, which in part contrasts *stare decisis* in antitrust cases versus patent cases.

Our second article takes a look at an antitrust aspect of big data. The quantity and importance of data collected, retained, and used to reveal patterns, focus marketing, and provide insights is growing exponentially. More of the attention to big data has related to privacy and consumer protection than antitrust. Puja Patel of Allen & Overy LLP focuses on the issue of antitrust market definition in connection with big data, contributing to the developing antitrust dialogue in this area.

Finally, in our third piece, Colin West, Omar Shah, and Nitin Jindal of Morgan Lewis & Bockius LLP look to Europe and its jurisprudence regarding the extent of a firm's "special responsibility" in a market related to one where it is dominant. They consider whether a standard appropriately looks for "serious or appreciable" anticompetitive harm in the related market where the firm is non-dominant, focusing on a December 2015 decision in the High Court of Justice in England and Wales where Google prevailed on certain claims by Streetmap.co.eu and an affiliate.

If you have any thoughts on this issue's articles or, better yet, ideas for future issues of *ICARUS*, please let us know. We appreciate your interest and engagement, and welcome your participation in the Committee and all of its activities.

Which Precedent for Overturning Precedent Will the Court Follow? Lessons from *Kimble v. Marvel* Regarding the Standard for Overturning Precedent in Antitrust and Intellectual-Property Cases

By Nandu Machiraju[1]

I. Introduction

Courts repeatedly have asserted their freedom to change their minds in the face of extant antitrust precedent. Recognizing the central role that economic analysis plays in antitrust, courts have found it appropriate to revisit antitrust jurisprudence in light of evolving economic learning. That disposition to reconsider antitrust jurisprudence, however, does not extend to other statutory schemes. In interpreting other statutory schemes, courts have tended to follow Justice Louis Brandeis's counsel: "*Stare decisis* is usually the wise policy, because, in most matters, it is important that the applicable rule of law be settled than settled right."[2] While that neat division may appear straightforward on its face, antitrust law has entangled with other statutory schemes in a number of circumstances. That is especially the case with intellectual property where the two regulatory schemes have mingled with ever-growing frequency.

Indeed, over the past few years, antitrust and intellectual-property issues have converged on a number of different fronts, including (but not limited to):

- Antitrust concerns associated with the (ab)use of standard-essential patents;
- The use of non-practicing entities as so-called "privateers" to exclude competitors from practicing certain technologies; and
- Product hopping in pharmaceutical cases.

That increasing intermixing between the two schemes is unsurprising: Antitrust and intellectual property possess nominally antipodal objectives—the former committed to preventing restraints of trade and the latter restraining competition to incentivize innovation. As antitrust and intellectual-property schemes continue to collide, the specter of courts having to adjudicate new issues and, perhaps, revise old lines of thinking that bear on novel issues has grown.

The U.S. Supreme Court encountered such a situation in *Kimble v. Marvel Entertainment, LLC*.[3] There, the Court was confronted with a fifty-year-old precedent, *Brulotte v. Thys Co.*, 379 U.S. 29 (1964). *Brulotte* prohibited a patent owner from charging licensing fees on a patent past that its expiration date. Since then, *Brulotte* has been met with hostility from legal commentators who have pointed out that *Brulotte* unnecessarily prevents patent owners from structuring licensing arrangements in ways that might make more sense to the licensor

[1] Nandu Machiraju is with the Federal Trade Commission. None of the views expressed in this article should be deemed to represent the Commission or any individual Commissioners.

[2] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (dissenting opinion).

[3] 135 S. Ct. 2401 (2015).

and the licensee. In *Kimble*, the Court had a chance to take a mulligan on that pilloried precedent; yet, in a 6-3 decision penned by Justice Elena Kagan, it balked at that opportunity.

The *Kimble* Court contrasted stare decisis in antitrust cases versus patent cases. The Court noted that "[i]f *Brulotte* were an antitrust rather than a patent case," it might be more willing to reconsider its decision.[4] But, the Court countered, "*Brulotte* is a patent rather than an antitrust case."[5] It therefore applied a more deferential standard for stare decisis and chose to reaffirm *Brulotte*. Justice Samuel Alito (joined by Chief Justice Roberts and Justice Thomas) protested in a vigorous dissent. He argued that *Brulotte* "was not based on anything that can plausibly be regarded as an interpretation of the terms of the Patent Act. It was based instead on an economic theory—and one that has been debunked."[6]

The disagreement between the majority and the dissent in *Kimble* raises an interesting question regarding the appropriate stare decisis standard: In cases where antitrust and intellectual property intersect, when will courts apply a less deferential antitrust standard for overturning precedent rather than a more stringent standard applied to intellectual-property cases? This Article will review *Kimble* with an eye towards gleaning some answers to that question.

This Article will begin by surveying the intellectual backdrop informing the *Brulotte* decision, the post-*Brulotte* commentary, and the facts and relevant analysis of *Kimble*. It then will recount the role of stare decisis in antitrust cases and, in that context, consider *Kimble*'s specific lessons regarding when precedent may be viewed through the less deferential antitrust lens or the more deferential intellectual property lens.

II. Origins of the *Brulotte* Rule and Its Redux in *Kimble*

A. Mid-Twentieth Century Concern for Extending the Patent Monopoly

In the mid-twentieth century, the Supreme Court took up a litany of cases assessing whether certain uses of a patent may unreasonably restrain trade. A set of cases decided in the 1940s drove that line of thinking.

- In *Morton Salt Co. v. G.S. Suppiger Co.*, the Court scrutinized a patent owner's "use of its patent monopoly to restrain competition in the marketing of unpatented articles . . . ."[7]

- In *Mercoid Corp. v. Mid-Continent Inv. Co.*, the Court admonished: "When the patentee ties something else to his invention, he acts only by virtue of his right as the owner of property to make contracts concerning it and not otherwise. He then is subject to all the limitations upon that right which the general law imposes upon such

[4] *Id*. at 2412.

[5] *Id*. at 2413.

[6] *Id*. at 2415 (Alito, J., dissenting).

[7] 314 U.S. 488, 491 (1942).

contracts. The contract is not saved by anything in the patent laws because it relates to the invention."[8]

- In *Int'l Salt Co. v. United States*, the Court reasoned that while the patent owner's "patents confer a limited monopoly of the invention . . . . a right to restrain others from making, vending, or using the patented machines," those patents "confer no right to restrain use of, or trade in, [the unpatented product]."[9]

- And, in *United States v. Line Material Co.*, the Court observed: "As long as the inventors kept within their statutory exclusive rights, they were not engaging in unreasonable restraints of trade violating the Sherman act."[10]

As those statements show, the Court was deeply skeptical of contractual arrangements that extended the reach of patent beyond its four corners.

Fast-forward a couple decades, and those cases remained very much alive and, in fact, found new life in other judicial decisions continuing that line of thinking. For instance, cases such as *Sears, Roebuck*, *Compco*, *Walker Process*, and *Lear* challenged efforts to expand the reach of the patent beyond its term limit. The teachings of those past decisions were later synthesized by Deputy Assistant Attorney General for the Antitrust Division Bruce Wilson in a November 1970 speech entitled, "Patent and Know-How License Arrangements: Field of Use, Territorial, Price and Quantity Restrictions."[11] (That wordy title later was condensed to the sobriquet, "The Nine No-Nos.")

The Nine-No Nos spelled out nine intellectual-property licensing practices that the Antitrust Division, at the time, considered anticompetitive.[12] While it is unnecessary to go through every one of the no-nos, at a high level, they reflected a deep skepticism of licensing arrangements that extending the reach of a patent beyond its strictest ambit. Inhering in that logic was the assumption that patents created a monopoly, and, therefore, a tie to a patent would leverage that patent monopoly to other markets. It was in this crucible of patent skepticism that the *Brulotte* rule was conceived.

B. *Brulotte* and Post-*Brulotte* Commentary

In *Brulotte*, Edward Thys, the patent owner, sold a hop-picking machine that harvested dried hops. Thys sold the machine for a flat fee and licensed the patents underlying the machine's technology. Those patents expired either on or before 1957, but the license extended beyond that date. The question before the Court was: Could the patent owner continue to license the patents to his hop-picking machine past the expiration date of the

[8] 320 U.S. 661, 666 (1944).

[9] 332 U.S. 392, 394-95 (1947).

[10] 333 U.S. 287, 241 (1948).

[11] Richard Gilbert & Carl Shapiro, *Antitrust Issues in the Licensing of Intellectual Property: The Nine No-No's Meet the Nineties*, BROOKINGS PAPERS ON ECON. ACTIVITY: MICROECONOMICS 283, 284 n.6 (1997).

[12] *Id.*

patent? No, the Court answered. It concluded "that a patentee's use of a royalty agreement that projects beyond the expiration date of the patent is unlawful *per se*."[13] Put simply, the patent owner could not continue to collect licensing fees after the patent expired.

Starting in the late 1970s, the hardline approach outlined by the Nine No-Nos fell out of favor.[14] Further hastening the demise of that Nine-No-No's-era thinking was the 180-degree reversal on the question of whether a patent conveyed market power to a patent holder.

In 1988, Congress eliminated the presumption in patent-misuse defenses that a patent creates market power in the relevant market for the patent or patented product.[15] In *Illinois Tool Works Inc. v. Independent Ink, Inc.*, the Court carried Congress's correction of the patent-misuse doctrine through to the area of antitrust by pronouncing that "a patent does not necessarily confer market power upon the patentee."[16] The passage of time did not endear the *Brulotte* decision to legal commentators either. Indeed, here is a smattering of post-*Brulotte* commentary:

- "The *Brulotte* rule incorrectly assumes that a patent license has significance after the patent terminates . . . . If the licensing agreement calls for royalty payments beyond the patent term, the parties base those payments on the licensees' assessment of the value of the license *during the patent period*. These payments, therefore, do not represent an extension in time of the patent monopoly."[17]

- "[I]t seems rather [*Brulotte*] to have been a free-floating product of a misplaced fear of monopoly . . . that was not even tied to one of the antitrust statutes."[18]

- ". . . *Brulotte* renders unenforceable some aspects of an otherwise valid contract. And it does so for a reason that many courts and commentators have found economically unconvincing . . . ."[19]

- [B]ecause patents are no longer viewed as monopolies in the true economic sense, the Court has largely abandoned its concerns about leverage. Thus, antitrust and misuse

[13] Brulotte v. Thys Co., 379 U.S. 29, 32 (1964).

[14] Gilbert & Shapiro, *supra* note 11, at 286.

[15] 35 U.S.C. § 271(d)(5) ("No patent owner otherwise entitled to relief for infringement or contributory infringement shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following: . . . conditioned the license of any rights to the patent or the sale of the patented product on the acquisition of a license to rights in another patent or purchase of a separate product, unless, in view of the circumstances, the patent owner has market power in the relevant market for the patent or patented product on which the license or sale is conditioned.").

[16] 547 U.S. 28, 44 (2006).

[17] Harold See & Frank M. Caprio, *The Trouble with Brulotte: The Patent Royalty Term and Patent Monopoly Extension*, 4 UTAH L. REV. 813, 814 (1990).

[18] Schieber v. Dolby Labs, Inc., 293 F.3d 1014, 1017 (7th Cir. 2002).

[19] Zila, Inc. v. Tinnell, 502 F.3d 1014, 1019 (9th Cir. 2007).

> cases from the '60s that found certain practices to be per se violations of the law have largely been overruled in favor of an approach that requires proof that the patent confers market power. In this new environment, the result in *Brulotte* . . . is highly questionable."[20]

- "[T]he *Brulotte* rule is counterintuitive and its rationale is arguably unconvincing."[21]

And so *Brulotte*, both in and out of the courts, was picked apart. Enter *Kimble*.

C. *Kimble v. Marvel*

Stephen Kimble owned the patent on a Spider-Man-themed toy that allowed the user to shoot pressurized foam string from a device attached to the palm of the hand. Kimble licensed that technology to Marvel Entertainment, LLC, the patron of the comic-book character, Spider-Man, for a lump-sum payment and a 3% royalty on Marvel's future sales of the product and other similar products. Apparently, neither side was aware of *Brulotte* at the time they negotiated the settlement. But Marvel eventually discovered *Brulotte* and sought a declaratory judgment in federal court to find the royalty provision relating to the newly expired patent unenforceable. The district court followed *Brulotte* and invalidated that royalty provision; the Ninth Circuit affirmed. Notwithstanding widespread criticism for *Brulotte*, the Supreme Court—ostensibly declining to overturn *Brulotte*—affirmed.

To be clear, the Court hardly gushed over the extension of the *Brulotte* rule. First, the Court—sidestepping the question of whether *Brulotte* reflected sound statutory interpretation—rested its decision on the standard used to overrule existing precedent. The Court observed that "an argument that we got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent."[22] Further punctuating its ambivalence, the Court sought reinforcement from Justice Brandeis's assertion "that it is usually 'more important that the applicable rule of law be settled than that it be settled right.'"[23] The subtext to the Court's discussion of *Brulotte* conjures a familiar adage: If you don't have something nice to say, don't say anything at all.

Second, the Court relied heavily on the proper role of the judiciary among the coordinated branches. It noted that because *Brulotte* is a long-standing precedent that interprets the patent laws, it is up to Congress to act. And, because Congress has had multiple opportunities to consider the continued relevance of *Brulotte* but has refused to do anything, the Court should assume that Congress has left the *Brulotte* rule in place volitionally. Indeed, Congress's 1988 amendment to the patent-misuse doctrine seemed, to the Court, to confirm Congress's decision to leave *Brulotte* alone.[24] (Interestingly, the *Illinois Tool Works* Court explicitly chose to port the change in the patent-misuse doctrine to

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[20] Rochelle Cooper Dreyfuss & Lawrence S. Pope, *Dethroning* Lear*? Incentives to Innovate After* MedImmune, 24 BERKELEY TECH. L.J. 971, 987 (2009).

[21] Kimble v. Marvel Enters. Inc., 727 F.3d 856, 857 (9th Cir. 2013).

[22] Kimble v. Marvel Enters. Inc., 135 S. Ct. 2401, 2409 (2015).

[23] *Id.* (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (dissenting opinion)).

[24] *Id*. at 2411 n. 4.

antitrust law despite the fact that the Court traced "its demise in patent law" rather than antitrust.[25])

Third, even when the Court defended *Brulotte*, it could muster no more than a tepid defense. Indeed, the Court dedicated a paragraph to pointing out that parties can work around *Brulotte*—hardly a ringing endorsement of the decision.[26] Yet, despite the Court's lukewarm esteem for *Brulotte*, the Court upheld it out of fealty for stare decisis.

The dissent, however, argued that such fealty was unnecessary. It noted that *Brulotte* "was not based on anything that can plausibly be regarded as an interpretation of the Patent Act. It was based on an economic theory—and one that has been debunked."[27] Moreover, it pointed out that *Brulotte* "[i]nvok[ed] antitrust concepts,"[28] rested on "thinly veiled antitrust reasoning,"[29] and was "an antitrust decision masquerading as a patent case."[30] Given the case's close relationship to antitrust principles, the dissent quibbled with the majority about whether it was appropriate to treat this case differently from any other antitrust case. The dissent pointed out that given the Court's acknowledged "willing[ness] to reexamine antitrust precedents because they have attributes of common-law decisions . . .," why wouldn't the same level of scrutiny apply here?

In order to understand that issue, it is worth taking a step back to consider how courts have interpreted stare decisis in the context of antitrust cases. The following Section briefly considers past statements regarding stare decisis in the context of antitrust cases and then goes on to consider the specific lessons of *Kimble*.

III. What is the Appropriate Level of Stare Decisis: Antitrust or Statutory?

A. Antitrust *Stare Decisis*

Stare decisis can mean preserving settled precedent—even if that settled precedent reflects a poor understanding of the statute. The Court has counseled that upholding suspect decisions "is the preferred course because it promotes evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[31] Traditional statutory interpretation, in particular, invites that level of circumspection because, even if a court misconstrues a statute, the political branches can fix judicial mistakes with a new statute.[32] There are, however, exceptions to that rule—namely, interpretations of the Sherman Act.

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[25] Illinois Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 31 (2006).

[26] Kimble, 135 S. Ct. at 2408.

[27] *Id*. at 2415 (Alito, J., dissenting).

[28] *Id*.

[29] *Id*. at 2418.

[30] *Id*.

[31] Payne v. Tennessee, 501 U.S. 808, 827 (1991).

[32] *See, e.g.*, Hohn v. United States, 524 U.S. 236, 251 (1998).

The Court has observed that "the general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act."[33] The Court has explained that the term "restraint of trade" used in Section 1 of the Sherman Act "invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890."[34] Put differently, the Sherman Act's statutory language envisioned a place for courts to refine previous interpretations of the statute as older precedents deteriorated against the backdrop of evolving economic understanding.[35]

As discussed above, the *Brulotte* rule arguably rests on such threadbare logic. Economic understanding has caught up and has found *Brulotte* unduly limiting to a patent owner's rights. So, why wasn't *Kimble* a candidate for such scrutinizing review?

B. What *Kimble* Teaches Us About *Stare Decisis* in Cases at the Intersection of Antitrust and Intellectual Property

The inherent tension in *Kimble* is that there are elements of antitrust and patent law in the case. From an antitrust perspective, the case involves the question of how a patent owner can leverage its exclusionary right beyond the scope of the patent. From a patent perspective, the case asks whether the patent laws grant a monetizable patent right after the expiry date of the patent. The relevant question for the *Kimble* Court, therefore, was which of those two elements dominates? The Court relied heavily on *Brulotte*'s contemporaries to find that this was a patent case.

In particular, the Court cites a number of patent cases that came out around the same time as *Brulotte*.

- *Sears, Roebuck & Co. v. Stiffel Co.* (1964): The Court explained: "To allow a State by use of its law of unfair competition to prevent the copying of an article which represents too slight an advance to be patented would be to permit the State to block off from the public something which federal law has said belongs to the public."[36]

[33] State Oil Co. v. Khan, 522 U.S. 3, 20 (1997).

[34] *Id*. at 21 (internal citations omitted).

[35] *But see* Barak Orbach, *Antitrust Stare Decisis*, 15 ANTITRUST SOURCE 1, 8 (2015). Orbach provides a more nuanced view of courts' treatment of antitrust stare decisis. In particular, he identifies "anomalous antitrust stare decisis" that enjoy "a super-strong presumption of correctness" (quoting William N. Eskridge, Jr., *Overruling Precedents*, 76 GEO. L.J. 1361, 1376-81 (1988)) even though those decisions "were never seriously related to beliefs about competitive evils." *Id.* at 8. Orbach identifies two prime examples: the baseball exemption and the filed-rate doctrine. The former shields Major League Baseball from the antitrust laws, and the latter immunizes regulated firms from antitrust challenges so long as the firm files those rates with certain regulatory agencies; as Orbach puts it: "[n]either doctrine can be justified other than by the reluctance of the Court to overrule it." *Id*. at 9.

[36] 376 U.S. 225, 231-32 (1964).

- *Compco Corp. v. Day-Brite Lighting, Inc.* (1964): Like *Sears*, the Court struck down, on preemption grounds, a state law that forbids individuals from copying unpatented inventions because such a restriction conflicted with federal patent law.[37]

- *Lear, Inc. v. Adkins* (1969): The Court held that someone challenging the validity of a patent should not be required to pay the patent owner royalties through the pendency of the invalidity challenge.[38]

Those contemporary cases all possess a familiar theme: The Court struck down attempts to extend the scope of the patent to restrict access to inventions.

A review of a selection of cases around that time might suggest that courts were primarily concerned with the use of a patent to engage in anticompetitive exclusionary conduct. For instance, the Court in *Morton Salt*, *Mercoid*, *International Salt*, and *Liner Material* frequently used terms like "ties," "restraints of trade," "monopoly," and "anticompetitive"—conversant lexicon among members of the antitrust bar. Moreover, the Antitrust Division's Nine No-Nos synthesized contemporary thinking regarding the anticompetitive effects from certain patent licensing arrangements, which seemingly framed those concerns as antitrust issues. Given those intellectual tie-ins with antitrust, it is tempting to trace the intellectual lineage of *Brulotte* and its confederates to the world of antitrust rather than intellectual property.

Yet, a broader review of *Brulotte* in the context of other patent cases shows that the *Brulotte* Court was principally worried about defining the reach of patent rights. Even if some of those concerns flowed from economic logic that informed contemporary antitrust analysis, the Court was faced with a multi-front effort—*e.g.*, patent term, the scope of the patent, state laws—to extend the reach of patent rights. The Court over those years was trying to cabin the reach of patent law, which is why in a number decisions, it emphasized the inconsistency between attempts (both from state and private actors) to expand patent rights and federal patent policy.[39] Reflecting on those cases, the *Kimble* Court noted: "*Brulotte* was brewed in the same barrel." And, therefore, *Brulotte*, in view of the *Kimble* Court, should be considered a patent—not an antitrust—case.

Related to that point, the Court also considered how *Brulotte* fit within the constellation of other similar patent cases. *Brulotte* heavily relied upon the reasoning of *Scott Paper Co. v. Marcalus Mfg. Co.*, which held that an individual who assigned a patent and then infringed that assigned patent was free to seek, as a defense, a declaratory judgment that the purportedly infringed patent was invalid.[40] That decision—like *Sears*, *Compco*, and *Lear*—rested on a general policy towards promoting open use of a technology. In particular, the *Scott Paper* decision eliminated roadblocks to challenging the patent. Given that *Brulotte* relied on *Scott Paper* and other contemporary patent decisions, the question that the Court had to consider was whether it could surgically remove *Brulotte* from the body of other patent-related cases of the time.

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[37] 376 U.S. 234, 237-38 (1964).

[38] 395 U.S. 653, 673 (1969).

[39] *See, e.g.*, *id.* at 656 (citing *Sears*, 376 U.S. 225 and *Compco*, 376 U.S. 234).

[40] 326 U.S. 249, 251 (1945).

Had *Brulotte* been such an isolated precedent, the Court may have had greater leeway to overturn this antiquated precedent. But the Court seemed to believe that *Brulotte* fit snuggly within a broader set of other patent precedent. Were the Court to overturn *Brulotte*, it would have to come up with reasons for why the contract-based cases (*i.e.*, *Morton Salt*, *Mercoid*, *International Salt*, and *Liner Material*), which have a distinctly antitrust feel, are different from the preemption cases (*i.e.*, *Sears* and *Compco*). Drawing such a fine distinction likely would have created a hodge-podge out of those contemporary patent cases.

The *Kimble* Court lists other justifications for not treating *Brulotte* like an antitrust precedent. For example, the Court claimed that the case implicates property and contract issues that create reliance interests. The Court also pointed out that Congress had ample opportunity to consider the *Brulotte* rule and decided not to overturn it. Both justifications, however, appear to be secondary reasons counseling against overturning *Brulotte* rather than core lessons of the decision. The concern over disturbing reliance interests was a weak one considering that overturning *Brulotte* simply would have provided patent owners and licensees *more* options for structuring licensing arrangements rather than undermining contracts that are already in existence. And the point that Congress had an opportunity to act in this space is only relevant once the Court concludes that it is adjudicating a patent case, which is bound by sturdier precedent, rather than an antitrust case. Moreover, the *Illinois Tool Works* Court showed no similar compunction to revise *antitrust* law based on a legislative change to *patent* law, which raises doubt that the *Kimble* Court's genuflection to Congress on related tying concerns really had much to do with the breadth of Congress's legislative activity. Consequently, neither explanation likely informed the core question of whether *Kimble* should be treated as an antitrust case rather than a patent case from the perspective of *stare decisis*.

IV. So What Have We Learned from *Kimble*?

In understanding whether the Court is likely to accord antiquated precedent with intermingled antitrust and intellectual property issues more or less deference, *Kimble* offers the following two lessons:

- Look at the case in the context of other antitrust and intellectual-property cases. If the Court that created that antiquated precedent was broadly interpreting the reaches of a particular scheme, it should not matter whether aspects of other schemes should creep into the decision.

- Consider whether removing one or many like precedent will leave behind an incoherent body of precedent.

Here, the *Kimble* Court apparently believed that *Brulotte* was "brewed" more in a patent barrel than an antitrust one.

Big Data, Big Market?
Defining the Relevant Product Market in Big Data Mergers

By Puja Patel[1]

In today's digital age, more and more businesses are taking advantage of the extensive volumes of data that they have gathered about their customers, colloquially referred to as "big data." If analyzed correctly, big data can help companies gain valuable insights on their customers and products while enabling advertisers to better understand consumer preferences. A report issued by consulting firm McKinsey & Company predicts that "big data may well become a new type of corporate asset that will cut across business units and function much as a powerful brand does, representing a key basis for competition."[2] In light of big data's potential value, an increasing number of companies are consolidating in order to combine their stockpiles of data.[3] With this surge in big data-related mergers, businesses should expect increased scrutiny from the antitrust agencies.[4] According to the Director of the Bureau of Competition at the Federal Trade Commission ("FTC"), Deborah Feinstein, "[m]ergers involving competing data providers can present unique, but not different, issues for competition analysis."[5] In light of the very thin existing literature on the subject,[6] this article brings into focus a critical consideration in the antitrust of analysis of big data mergers: product market definition.

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[1] Puja Patel is an Associate in the antitrust practice group at Allen & Overy LLP.

[2] Brad Brown et al., *Are You Ready for the Era of 'Big Data'?*, MCKINSEY Q. (Oct. 2011), http://www.mckinsey.com/insights/strategy/are_you_ready_for_the_era_of_big_data.

[3] The Organization of Economic Cooperation and Development reports that the number of mergers and acquisitions motivated by combinations of big data more than doubled between 2008 and 2012. *See* EUROPEAN DATA PROTECTION SUPERVISOR, REPORT OF WORKSHOP ON PRIVACY, CONSUMERS, COMPETITION AND BIG DATA 2 JUNE 1 (2014), https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Big%20data/14-07-11_EDPS_Report_Workshop_Big_data_EN.pdf.

[4] *See generally* Deborah Feinstein, *Big Data in a Competition Environment*, CPI ANTITRUST CHRON. (May 2015), https://www.competitionpolicyinternationals.com/assets/Uploads/FeinsteinMay-152.pdf.

[5] *Id*.

[6] *See id*. (discussing the entry conditions and privacy concerns relating to big data mergers); FED. TRADE COMM'N, BIG DATA: A TOOL FOR INCLUSION OR EXCLUSION? 1 (2016) (discussing the "benefits and risks created by the use of big data analytics" and the consumer protection laws that apply to big data); D. Daniel Sokol & Roisin Comerford, *Does Antitrust Have a Role to Play in Regulating Big Data?*, CAMBRIDGE HANDBOOK OF ANTITRUST, INTELL. PROP. & HIGH TECH, (Jan. 27, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2723693 (reviewing the existing academic work on big data and outlining the pro- and anti-competitive effects of big data mergers); Darren S. Tucker & Hill B. Wellford, *Big Mistakes Regarding Big Data*, 14 ANTITRUST SOURCE 1, 3 (2014) (discussing the relevant market and entry conditions of personal data mergers); *see also* President's Council of Advisors on Science and Technology, *Report to the President, Big Data and Privacy: A Technological Perspective*, Executive Office of the President (May 2014).

Section I of this article provides a brief overview of big data, discussing its defining characteristics and the role it plays in today's economy. Section II outlines the framework for analyzing the relevant product market under Section 7 of the Clayton Act. Through the lens of the three "V"s of big data—volume, variety and velocity—this article proposes how to draw the boundaries of the relevant product market in big data merger challenges. Section III analyzes potential market definitions for big data based on its variety and ultimately proposes that the market should be narrowed based on the specific purpose served by the data. Section IV suggests that—given the diminishing value of big data over time—the relevant market must be limited to real-time or nearly-real-time big data. Section V proposes that "dark" or unused big data should also be excluded from the relevant market, as such data fails to satisfy the relevant tests for product market definition. Finally, this article includes a brief conclusion.

I. WHAT IS BIG DATA?

"Big data," a phrase that has gained much popularity in recent years, refers to large collections of unstructured data that may be analyzed "to reveal patterns, trends, and associations, especially relating to human behavior and interactions."[7] Big data can be explained according to the three "V"s: volume, variety, and velocity.[8] "Volume" describes the vast amounts of information that companies have collected on their customers as a result of advances in modern technology. Consider that most companies in the U.S. store an average of 100 terabytes of data, more data than is contained in the US Library of Congress.[9] In terms of "variety," big data comes in many forms, from in-store purchase data, online purchase data, click-through rates, browsing behavior, social media interactions, mobile device usage, and geolocation data, and from a variety of sources, including social media, internet searches, GPS devices, mobile devices, business transactions, and public records.[10] Finally, the "velocity" of big data describes the massive and continuous pace at which data flows from its original source.[11] According to the FTC, "[t]echnological improvements allow

[7] *Big Data*, OXFORD DICTIONARY, http://www.oxforddictionaries.com/us/definition/american_english/big-data (last visited Mar. 10, 2016).

[8] Andrew McAfee & Erik Brynjolfsson, *Big Data: The Management Revolution*, HARV. BUS. REV. (Oct. 2012), https://hbr.org/2012/10/big-data-the-management-revolution/ar.

[9] IBM, THE FOUR V'S OF BIG DATA, http://www.ibmbigdatahub.com/infographic/four-vs-big-data (last visited Mar. 2, 2016); James E. Tcheng, *So Just What is "Big Data"?*, 64TH ANNUAL SCIENTIFIC SESSION & EXPO (Mar. 14-16, 2015), https://www.dcri.org/events/presentations/acc-2015/Tcheng%20Big%20Data%20-%20CIO.pdf.

[10] SAS, BIG DATA, BIGGER MARKET, http://www.sas.com/en_us/insights/big-data/big-data-marketing.html (last visited Mar. 10, 2016); UNECE, CLASSIFICATION OF TYPES OF BIG DATA, http://www1.unece.org/stat/platform/display/bigdata/Classification+of+Types+of+Big+Data (last visited Mar. 10, 2016).

[11] McAfee & Brynjolfsson, *supra* note 8 (noting that "[f]or many applications, the speed of data creation is even more important than the volume").

companies to harness the predictive power of data more quickly than ever before, sometimes instantaneously."[12]

Given its size, diversity, and speed, big data is transforming the way businesses operate and generate revenue. When used as an input, big data can help businesses improve the quality of their products and services and even develop new offerings.[13] Social media companies such as Facebook and Google are amassing large volumes of information about their users that they are able to sell to advertisers at a significant premium.[14] Online retailer Amazon uses its bank of online consumer purchasing data to provide more targeted shopping recommendations and offer superior customer service, among other purposes.[15]

But the big data business is not just limited to traditional social media and technology companies—corporations in a range of industries are also moving forward with big data strategies of their own.[16] Retail chain Macy's, for instance, recently developed a strategy to analyze the data it has collected on out-of-stock rates, price promotions, and sell-through rates, among other data points, to create more localized and personalized promotions.[17] Airline companies are also leveraging big data to track baggage and better predict flight arrival times.[18] And these companies are not just using their big data internally, but are also selling it to other businesses. For example, it is estimated that supermarket retailer Kroger generates $100 million in data sales by selling its data to consumer product companies like Procter & Gamble who look to gain better insights into customer preferences.[19] And as more businesses begin to develop strategies to monetize their big data, we can expect an increasing number of consolidations among big data providers. The remainder of this article focuses on a critical step in the antitrust analysis of such mergers.

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[12] *Big Data: A Tool for Inclusion or Exclusion*?, *supra* note 6, at 2.

[13] *See* Sokol & Comerford, *supra* note 6, at 4.

[14] *See generally* Daniel Newman, *Big Data: Why Facebook Knows Us Better Than Our Therapist*, FORBES, Feb. 24, 2015, http://www.forbes.com/sites/danielnewman/2015/02/24/big-data-why-facebook-knows-us-better-than-our-therapist/#6f6db733192e.

[15] Mark van Rijmenam, *How Amazon is Leveraging Big Data*, DATAFLOQ (Jan. 24, 2015), https://datafloq.com/read/amazon-leveraging-big-data/517.

[16] *See* Brad Brown, et. al., *supra* note 2; *see also* Jacques Bughin, *et. al*, *Seizing the Potential of 'Big Data'*, MCKINSEY Q. (Oct. 2011), http://www.mckinsey.com/insights/business_technology/seizing_the_potential_of_big_data.

[17] Mark van Rijmenam, *Macy's Is Changing the Shopping Experience with Big Data Analytics*, DATAFLOQ (Mar. 14, 2015), https://datafloq.com/read/macys-changing-shopping-experience-big-data-analyt/286.

[18] Katherine Noyes, *For the Airline Industry, Big Data is Cleared for Take-off*, FORTUNE, June 19, 2014, http://fortune.com/2014/06/19/big-data-airline-industry/; McAfee & Brynjolfsson, *supra* note 8.

[19] Vipal Mogal, *The Big Mystery: What's Big Data Really Worth?*, WALL STREET JOURNAL, Oct. 12, 2014, http://www.wsj.com/articles/whats-all-that-data-worth-1413157156.

II. DEFINING THE RELEVANT PRODUCT MARKET

A. Importance of Market Definition in Section 7 Analysis

Section 7 of the Clayton Act prohibits mergers and acquisitions if, "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."[20] To allege a Section 7 violation, the FTC and DOJ must define the relevant product and geographic market in which the acquisition would lessen competition or create a monopoly. In many cases, market definition will play an outcome-determinative role in Section 7 analysis. The agencies will typically seek to define the market in the narrowest sense possible in order to demonstrate that the merging firm possesses market power in the relevant market. Conversely, companies seeking to merge are advantaged by defining the market more broadly. Because market power is often a direct negative corollary to the size of the relevant market, the party that wins the market definition battle will quite likely also win the Section 7 war. Given this importance, this article seeks to identify the proper boundaries of the relevant *product* market in big data mergers.

B. Framework of Product Market Definition

According to the Horizontal Merger Guidelines issued by the FTC and DOJ, a relevant product market must identify a group of substitute products or services that includes the products or services sold by the merging firm.[21] Whether goods are substitutes depends on their functional interchangeability and the cross-elasticity of demand.[22] Functional interchangeability refers to whether and to what extent consumers are willing to substitute one product for another.[23] Cross elasticity describes "the responsiveness of the sales of one product to price changes of the other."[24] Markets also may be delineated based on the seven "practical indicia" identified by the Supreme Court in the seminal case *Brown Shoe Co. v. United States*:[25] "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."[26] The agencies also often apply the "hypothetical monopolist" test, which posits whether a

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[20] 15 U.S.C. § 18.

[21] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 4.1 (2010).

[22] Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962) ("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] *Id.*; *see also* FTC v. Sysco Corp., 113 F. Supp. 3d 1, 25 (D.D.C. 2015) ("'Functional interchangeability' refers to whether buyers view similar products as substitutes"); FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 119 (D.D.C. 2004) ("Courts will generally include functionally interchangeable products in the same product market unless factors other than use indicate that they are not actually part of the same market").

[24] United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 400 (1956).

[25] Brown Shoe, 370 U.S. at 325.

[26] *Id.*

hypothetical monopolist can profitably impose a "small but significant and non-transitory" increase in the price of the product under investigation.[27]

In today's modern economy, setting the bounds of the relevant product market can often be a daunting and complex task, with the agencies and parties arguing a myriad of possible distinctions and parameters. By way of illustration, consider the recent case *FTC v. Sysco Corp.*,[28] in which the FTC sought a preliminary injunction to prevent a merger between the two largest foodservice distributors in the U.S., Sysco Corp. and US Foods, Inc.[29] At the heart of the dispute was a disagreement over the proper market in which to evaluate the anticompetitive effects of the proposed merger. The FTC urged that the parties competed in the markets for "broadline foodservice distribution" and "broadline foodservice distribution services sold to National Customers," whereas the defendants argued that they competed in a wider foodservice distribution market that included not only broadline foodservice distributors, but also other types of distributors such as systems and specialty distributors and cash-and-carry clubs.[30] Citing the *Brown Shoe* list of "practical indicia," the court held that the key attributes of broadline foodservice distribution – including the breadth and diversity of products, size of facilities, reputation for timely and reliable delivery, and distinct customers and pricing – all weighed in favor of adopting the Commission's proposed definition.[31] After siding with the FTC on market definition, the court ultimately granted the Commission's motion to preliminarily enjoin the merger.[32]

Thus, whether mergers of big data providers are found to substantially lessen competition will significantly depend on how the relevant markets in which they compete are defined. When used as an input, big data cannot form its own relevant market since there is "no competition between providers for the actual sale of data, and no substitution."[33] However, big data may be its own product market when sold directly to data brokers and/or end-user customers. In light of the growing trend among businesses to sell their big data, this article will outline three potential categories of market distinctions based on the three "V"s that characterize big data: variety, velocity, and volume.

III. COMPETITION AMONG "VARIETIES" OF BIG DATA

As discussed in Section I above, big data comes in a variety of different types and forms, thereby resulting in numerous possible cuts and slices of the relevant market. The market could be divided by metric,[34] source,[35] or type of information. Take for example Kroger's in-

[27] HORIZONTAL MERGER GUIDELINES, *supra* note 21, at § 4.1.1.

[28] 113 F. Supp. 3d 1 (D.D.C. 2015).

[29] *Id*. at 15.

[30] *Id*. at 24-25.

[31] *Id*. at 27-37.

[32] *Id*. at 52-87.

[33] *See* Sokol & Comerford, *supra* note 6, at 17 (conceding that there can be no separate market for big data when used as an input).

[34] *E.g.*, in-store purchase data, online purchase data, click-through rates, browsing behavior, social media interactions, mobile device usage, and geolocation data.

store purchase data on its toothpaste products which it sells to the likes of Procter & Gamble. Does this data compete with other metrics of data that provide insights on toothpaste purchases, such as the geolocation data of customers purchasing Kroger's toothpaste products? And, what about data deriving from other sources such as Facebook and Twitter? And should agencies consider data on other oral hygiene products such as toothbrushes and mouthwash? The answer to these questions may be found by reviewing previous enforcement challenges in the data space.

Since 2000, the FTC and DOJ have brought challenges to mergers involving data on pharmaceutical drugs,[36] car repair costs,[37] educational marketing,[38] financial trading and performance,[39]and real estate records.[40] In several of these cases, data was alleged as a separate and distinct market. For example, in its review of the proposed acquisition of real estate data provider, DataQuick, by data and analytics company CoreLogic, the FTC alleged separate product markets in national assessor and recorder bulk data.[41] "Assessor data" was defined as "public record information concerning characteristics of individual real property parcels" and "recorder data" was described as "public record information that is abstracted from transactions related to real property."[42] These markets included data from a variety of sources, such as deeds, mortgages, and liens, and by a variety of metrics, such as square footage, sales price, and assessed value.[43] What set these two markets apart from others was not the type of data sold but rather the purpose achieved from application of that data. According to the FTC, customers use such data "to create reliable internal analyses or value-added products."[44] Thus, from the Commission's perspective, the key consideration for consumers was not the exact shape and form of this data but rather the distinct functionality that it provided. To restore competition in these data markets, the Commission required CoreLogic to license its national assessor and recorder bulk data to a competitor.[45]

The FTC espoused a similar market definition approach in the *Dun & Bradstreet/Quality Education Data* case, which involved a combination of two of the nation's largest education

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[35] *E.g.*, social media, internet searches, GPS devices, mobile devices, business transactions, and public records.

[36] Complaint, FTC v. The Hearst Trust, No. 1:01-cv-00734 (D.D.C. Apr. 4, 2001).

[37] FTC v. CCC Holdings Inc., 605 F. Supp. 2d 26 (D.D.C. 2009).

[38] Complaint, Dun & Bradstreet Corp./Quality Education Data, F.T.C. File No. 091-0081 (May 7, 2010).

[39] Complaint, United States v. Thomson Corp., No. 1:08-cv-00262 (D.D.C. Feb. 19, 2008); Complaint, United States v. Deutsche Börse AG, No. 1:11-cv-02280 (D.D.C. Dec. 22, 2001).

[40] Complaint, CoreLogic, Inc./DataQuick, F.T.C. File No. 131-0199 (Mar. 24, 2014); Complaint, Fidelity National Financial, Inc., F.T.C. File No. 131-0159 (Dec. 24, 2013).

[41] Analysis of Agreement Containing Consent Order to Aid Public Comment at 2, CoreLogic, Inc./DataQuick, F.T.C. File No. 131-0199 (Mar. 24, 2014).

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

data providers.[46] In its complaint, the Commission defined the relevant product market as the market for "kindergarten through twelfth grade educational marketing data, including but not limited to, contact, demographic and other information relating to teachers, administrators, schools and individual school districts, that is sold or leased to customers."[47] Much like in *CoreLogic/DataQuick*, the relevant market included a range of data types.[48] According to the FTC, customers, in this case companies that sell education materials to schools and teachers, could use any of these data points to market their products to educators.[49] Thus, the FTC determined that this data all competed within the same relevant product market.[50] In light of the merged entity's 90% market share, the Commission ordered the parties to sell their K-12 database to a competing educational data company.[51]

So too in its challenge of financial data company Thomson Corp.'s acquisition of Reuters did the DOJ allege data markets based on use rather than type.[52] According to the DOJ, the acquisition would lessen competition in the markets for "fundamentals data," relating to "the financial performance and other attributes of companies" and "earnings estimation data," described as data on the prediction of a company's earnings.[53] Each of these data markets encompassed a broad range of data types and sources.[54] But each also had a "peculiar use"[55] unique to that specific market. Fundamentals data was used by institutional customers to develop and test their statistical trading models while earnings estimation data helped users to "decide whether to trade or invest in individual securities."[56]

Thus, as these cases remind us, what defines the outer boundaries of the relevant product market in data cases is "the reasonable interchangeability of use."[57] Many companies utilize big data to create more targeted product promotions. As in *Bradstreet/Quality Education Data*, the question for these cases will be to whom the advertisements are targeted. Customers are also using big data to improve their own products, understand customer

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[46] Complaint, Dun & Bradstreet Corp./Quality Education Data, *supra* note 38.

[47] *Id*. at 3.

[48] *Id*.

[49] Analysis of Agreement Containing Consent Order to Aid Public Comment at 1, Dun & Bradstreet Corp./Quality Education Data, F.T.C. File No. 091-0081 (Sept. 10, 2010).

[50] *Id*. at 2.

[51] *Id*.

[52] Competitive Impact Statement at 5-8, United States v. Thomson Corp., No. 1:08-cv-00262 (D.D.C. Feb. 19, 2008).

[53] *Id*. at 5-7.

[54] For example, fundamentals data included information from financial statements, calculated financial ratios, per share data, product information, and company profile data; earnings estimation data could be identified from research reports from brokerages and financial institutions, internal databases, and consensus estimates. *Id*.

[55] *Id*.

[56] *Id*.

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

demand, or benchmark against their competitors. Agencies must therefore also be cognizant of these expanding capabilities in their approach to market definition.

IV. DISTINCTIONS BY "VELOCITY" OF DATA

In addition to its variety, another key source of value from big data is its ability to provide up-to-the minute, timely information. Advances in modern information technology have allowed companies to process and retain data at the very instant it is created.[58] As a result, big data will lose much of its value in a short time after creation.[59] And although historical data may be used to analyze trends, most applications of big data involve real-time decisions.[60] Take for instance a retailer's use of geolocation data on a particular customer. Knowing when the customer is shopping at its store will allow the retailer to provide the customer a more differentiated or targeted shopping experience.[61] And if the data shows that the customer is close by, then the retailer can send the customer geo-located messages and advertisements about special offers and discounts.[62] But the vast bulk of this data's value is lost by the time the consumer arrives home. And with businesses compiling an increasing volume of mobility, fraud detection, geolocation, and customer retention data, the time value of big data will only further decrease.[63] In fact, some commentators believe that 70% of raw data is stale after only ninety days of creation.[64]

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[58] *See* Amir Gandomi & Murtaza Haider, *Beyond the Hype: Big Data Concepts, Methods and Analytics*, 35 INT'L JOURNAL OF INFO. MGMT. 137-144 (2015) http://ac.els-cdn.com/S0268401214001066/1-s2.0-S0268401214001066-main.pdf?_tid=a95d5ae0-e6c2-11e5-b722-00000aab0f27&acdnat=1457616124_9632deefe46ab7fcf47e4f5a64a6b706.

[59] *Id*. at 138 ("The proliferation of digital devices such as smartphones and sensors has led to an unprecedented rate of data creation and is driving a growing need for real-time analytics and evidence-based planning"); Sokol & Comerford, *supra* note 6, at 7 ("Data has a limited lifespan – old data is not nearly as valuable as new data – and the value of data lessens considerably over time. Additionally, the returns on scale diminish over time").

[60] *See* McAfee & Brynjolfsson, *supra* note 8 ("Real-time or nearly real-time information makes it possible for a company to be much more agile than its competitors"); *see also* James Taylor, *Real-Time Responses with Big Data*, DECISION MGMT. SOLUTIONS, http://www.oracle.com/us/products/middleware/bus-int/realtime-responses-big-data-wp-2524527.pdf (last visited Mar. 10, 2016).

[61] *See, e.g.*, *Geolocation is Changing the Retail Business Model Yet Again*, FORBES ASIA, Nov. 4, 2014, http://www.forbes.com/sites/insead/2014/11/04/geolocation-is-changing-the-retail-business-model-yet-again/#3fb878c8638f (describing Baysensors.com, a company whose product "picks up signals sent by mobile phones, allowing a store to track customers' movements around and within a store").

[62] *See, e.g.*, Ashley Smith, *Location-based Apps Present Opportunities – and Data Challenges*, TECH TARGET (Aug. 2014), http://searchcrm.techtarget.com/feature/Location-based-apps-present-opportunities-and-data-challenges (describing coffee chain Starbucks' use of geolocation data to tailor perks, rewards and discounts to customers).

[63] Sokol & Comerford, *supra* note 6, at 6 ("Data is ubiquitous, inexpensive, and easy to collect. Users are constantly creating data – increased internet and smartphone usage means

Any efforts in defining the relevant product market in big data cases should thus recognize the significance of the time value of big data. For some cases, this may mean that the relevant market includes only real-time big data. For others, the market may also include recently-created big data. But for most applications, the market should exclude any stale and/or historical big data that is of little-to-no value to consumers.

This distinction between historical and timely data finds some support in previous DOJ and FTC enforcement actions. For example, in its review of NYSE Euronext's acquisition of Deutsche Börse, the DOJ alleged anticompetitive effects in the market for "real-time proprietary equity data."[65] According to the DOJ, "[a]ccess to affordable, reliable and timely data about the stock market is essential for informed stock trading" and such data "helps traders determine where liquidity for a given stock exists during the day and the depth of that liquidity."[66] Likewise, in *Verisk Analytics, Inc./EagleView Technology Corp.*,[67] the FTC alleged that insurance analytic company Verisk's proposed acquisition of competitor EagleView would lessen competition in the market for "rooftop aerial measurement products for insurance purposes, which provide roof measurements derived from high-resolution, low-altitude aerial imagery, and associated data."[68] In defining the market this way, the Commission explained that "insurance carriers seek aerial images used for Rooftop Aerial Measurement Products that are up-to-date . . . to calculate measurements of current structures and to allow their adjusters to identify attributes of their insured properties."[69] By contrast, in *Dun & Bradstreet/Quality Education Data*, the Commission found that teacher association lists were not close substitutes to other types of educational data in part because this data was subject to "much less frequent updating."[70] Thus, as Deborah Feinstein argues in a recently published article on antitrust review of big data mergers, "market definition must account . . . for the dynamic nature of data, which must be updated and verified to retain its value."[71] For the retailer in the example above, yesterday's geolocation data is simply no substitute for today's geolocation data.

V. SEGREGATING CERTAIN "VOLUMES" OF DATA

Having narrowed the relevant market by functionality and timeliness, the question remains whether agencies should further distinguish big data markets based on the data that

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customers are continuously leaving behind traces of their needs and preferences") (internal citations omitted).

[64] Tucker & Wellford, *supra* note 6, at 3.

[65] Competitive Impact Statement at 6, United States v. Deutsche Börse AG, No. 1:11-cv-02280 (D.D.C. Dec. 22, 2001).

[66] *Id*.

[67] Complaint, Verisk Analytics, Inc./EagleView Technology Corp., F.T.C. File No. 141-0085 (Dec. 16, 2014).

[68] *Id*. at 4-7.

[69] *Id*. at 6.

[70] Analysis of Agreement Containing Consent Order to Aid Public Comment, Dun & Bradstreet Corp./Quality Education Data, *supra* note 49, at 1.

[71] Feinstein, *supra* note 4.

is actually being used and sold by data owners. Despite the growing volume of data that is being collected and stored by businesses today, much of that data will remain untapped for any analytical value.[72] Commonly referred to as "dark data," such unexploited data may be the product of lack of communication among departmental silos, technological constraints, and/or lack of focus on data analytics.[73] And according to several experts, dark data often represents the largest portion of the total pool of big data collected by companies each year.[74]

Each of the well-accepted product market analyses, including the tests for interchangeability, cross-elasticity of demand, and hypothetical monopolist, all hinge on the degree to which customers are willing to substitute one product for another. In the context of dark data, it is difficult to imagine how a customer could substitute one set of big data with a set that is not available for purchase.[75] Most owners of big data do not even realize the full extent of data that they own, let alone the analytical value of that data.

A similar problem arises in the context of data used as an input.[76] Much like dark data, this data is not available for purchase but is rather used as an input to a downstream product. In none of the cases involving input data do the agencies define a separate and distinct market for input data.[77] For example, in *CCC Holdings Inc.*, an action to enjoin a merger between two providers of specialized software for automobile insurers to help estimate claims, the FTC alleged relevant markets in estimatics software and total loss valuation.[78] Of relevance here is the estimatics software market, which according to the FTC, consisted of "(1) a database containing data on parts and labor times associated with makes, years, and models of passenger vehicles driven in the United States; and (2) application software that accesses the database and calculates repair costs based on inputted damage information."[79] Although the merged entities each owned a relatively large estimatics database, the

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[72] *Dark Data*, GARTNER IT GLOSSARY, http://www.gartner.com/it-glossary/dark-data (defining dark data as "information assets organizations collect, process and store during regular business activities, but generally fail to use for other purposes (for example, analytics, business relationships and direct monetizing)").

[73] Kaushil Pal, *What is the importance of Dark Data in Big Data world?*, KDNUGGETS NEWS, http://www.kdnuggets.com/2015/11/importance-dark-data-big-data-world.html (last visited Mar. 10, 2016).

[74] *Id.*; Alex Woodie, *Connecting the Dots on Dark Data*, DATANAMI (Jan. 17, 2015), http://www.datanami.com/2015/02/17/connecting-the-dots-on-dark-data/.

[75] *See also* Tucker & Wellford, *supra* note 6, at 4 ("Personal data used as an input to another product cannot constitute a relevant product market because a product market presupposes that a product or service is available to customers. Only where data is sold to customers could providing that information potentially constitute a relevant market").

[76] *See, e.g.*, FTC v. CCC Holdings Inc., 605 F. Supp. 2d 26, 32 (D.D.C. 2009); Complaint, Nielsen Holdings N.V./Arbitron, Inc., F.T.C. File No. 131-0058 (Sept. 20, 2013).

[77] *Id.*

[78] CCC Holdings, 605 F. Supp. at 30.

[79] Complaint at 3-4, CCC Holdings, Inc./Aurora Equity Partners, F.T.C. File No. 081-055 (Nov. 25, 2008).

Commission and court declined to define a separate market for such data, likely because this market was not available for purchase by itself.[80]

The same issue comes to play in the *Nielsen/Arbitron* case, involving a merger between two providers of television and radio audience measurement services.[81] The Commission recognized that the companies owned "the most accurate and preferred sources of individual-level demographic data for audience measurement purposes."[82] But because this data was only an input, the court defined the market in terms of the downstream service, national syndicated cross-platform audience measurement services.[83] Thus, given that the focus of product market definition is on the "competitive alternatives *available* to customers,"[84] courts and agencies must exclude dark data from any relevant market definition.

VI. CONCLUSION

Many believe that the antitrust agencies are not doing enough to protect customers from the anticompetitive effects of big data mergers. The DOJ, for example, was recently criticized for granting early termination to Oracle Corp.'s $1.2 billion acquisition of big data provider and analytics company Datalogix.[85] The agencies might be concerned about their ability to argue that these mergers take place in narrow markets. After all, the way in which the relevant market is defined will quite likely determine the ultimate result of the case. But from an antitrust perspective, big data markets may not be as broad and far-reaching as their name suggests. As earlier data-related cases show us, these markets must be narrowed in scope to account for considerations of functionality, timeliness, and utility. And with big data only getting bigger, such distinctions may be the difference between a Section 7 win and Section 7 loss.

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[80] *Id.*

[81] Complaint, Nielsen Holdings N.V./Arbitron, Inc., *supra* note 76.

[82] Analysis of Agreement Containing Consent Order to Aid Public Comment at 2, Nielsen Holdings N.V./Arbitron, Inc., F.T.C. File No. 131-0058 (Sept. 20, 2013).

[83] *Id.*

[84] HORIZONTAL MERGER GUIDELINES, *supra* note 21, at § 4.

[85] Melissa Lipman, *FTC Urged to Take Closer Look at Big Data Mergers*, LAW360 (last visited Feb. 6, 2015), http://www.law360.com/articles/618819/ftc-urged-to-take-closer-look-at-big-data-mergers.

Streetmap.eu Ltd. v. Google Inc.: Placing an Outer Bound on a Dominant Firm's Special Responsibility in Related Markets

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1. INTRODUCTION

On December 2, 2015, the High Court of Justice of England and Wales rejected online map provider Streetmap.eu Limited's claim that Google Inc. ("Google") abused its dominance in the online search market to exclude Streetmap.co.uk (together, with Streemap.eu Limited, "Streetmap") from a separate online map market in the United Kingdom ("UK") pursuant to Chapter II of the 1998 UK Competition Act and Article 102 of the Treaty on the Functioning of the European Union ("TFEU"). Streetmap claimed that Google improperly drove online traffic to Google Maps and away from Streetmap by including a clickable Google Maps image at the top of its search results for geographic inquiries.

The court's decision followed a trial on the preliminary issue of whether there was an alleged abuse. Each side called one fact witness and five expert witnesses were called in total. After a rigorous analysis of the evidence, the court found that Streetmap failed to demonstrate that Google's inclusion of Google Maps images at the top of its search results harmed Streetmap. The court further found that Google's conduct provided a pro-competitive benefit to its search users that could not practically be accomplished by any alternative Streetmap had proposed.

In reaching its robust and carefully-reasoned judgment on an "unusual and challenging"[2] question on which there was little direct authority, the court applied a standard for finding an abuse of a dominant position under UK or European Union ("EU") law that was logically consistent with prior case law, enforcement practice of the European Commission and academic commentary. Specifically, the court found that where claims against a firm that is dominant in one market are based on alleged competitive harm in a second "related" market in which the firm is *not* dominant, the claimant must prove that it is reasonably likely that the challenged conduct would cause "serious or appreciable" anticompetitive harm in the "related" market. By contrast, in light of the "special responsibility" dominant firms are deemed to have under EU competition law, courts find that proof of *any* harm is sufficient to demonstrate abuse when allegations relate to the market *in which the firm is dominant*.

In this article, we conclude that the adoption of a "serious or appreciable" standard for related markets in which a firm is not dominant recognizes a logical outer bound on a firm's "special responsibility" consistent with the scope of its market power, and could encourage firms to take greater pro-competitive actions in markets in which they are dominant.

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[1] The views in this article are the authors alone and do not necessarily reflect the views of Morgan Lewis & Bockius or its clients.

[2] Judgment, Streetmap.eu Ltd. v. Google Inc. [2016] EWHC 253 (Ch), [84], [2016] ALL ER (D) 129 (Feb.).

2. THE HIGH COURT'S JUDGMENT

a. Streetmap's Claims

Streetmap provided online mapping services in the UK from 1997 until May 2009, when its business collapsed.[3] Streetmap blamed its downfall on Google. Streetmap claimed that Google's inclusion of a clickable thumbnail image from Google Maps in response to certain geographical queries (the "new-style OneBox") was an abuse of Google's alleged dominant position in the market for online search.[4] Streetmap claimed that by displaying the new-style OneBox, Google gave preferential treatment to its own Google Maps product, which led to foreclosure of competing online map providers.[5]

Streetmap's claim was found by the court to be "appropriately characterised as an allegation of discrimination."[6] As the court described, "Google's display of a clickable thumbnail map on its [search results pages] exclusively from Google Maps, at the prime position at the top of the page, involves a form of presentation of its online mapping product that is not given to other online maps; and this preference is alleged to place those competing online maps at a competitive disadvantage unrelated to their intrinsic merits."[7]

b. Legal Standard

As a preliminary issue, the court analyzed Streetmap's claims under UK and EU competition law, which provide the same legal framework:

> For a defendant to infringe the prohibition of abuse of a dominant position it must: i) hold a dominant position in a relevant market; ii) by its conduct abuse that position; and iii) be unable to show that such conduct is objectively justified.

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[3] *Id.* ¶ 5.

[4] *Id.* ¶ 35.

[5] Google started displaying the new-style OneBox in its search results in the United States in January 2007 and in the UK in June 2007. *Id.* ¶ 29. Images from other online map services were not included in the new-style OneBox, nor were links to those sites. *Id.* Before then, Google still displayed a Google Maps OneBox in response to certain geographic searches, but the box did not include any images and contained links to Google Maps and two other online map services (the "old-style OneBox"). *Id.* ¶¶ 26-27.

[6] *Id.* ¶ 54. The court rejected Streetmap's claim that this conduct could be characterized as bundling pursuant to Article 102(d) TFEU. *Id.* ¶¶ 51-54. While the court stated that the essence of discrimination in competition law is treating like products (or customers) in an unlike way, it did not focus on this aspect in its reasoning but focused instead on whether Streetmap was placed at a competitive disadvantage to Google because of Google's (allegedly discriminatory) conduct.

[7] *Id.* ¶ 54.

> The burden of establishing the first two elements is on the claimant; for the third, it rests on the defendant.[8]

For purposes of the court's ruling only, the court assumed that Google held a dominant market share in the market for general online search.[9]

With respect to the question of abuse, the court defined anticompetitive foreclosure as a dominant firm's use of "its market power to limit effective competitors' ability to compete by depriving or hindering their necessary access to inputs or customers." [10] The court broke this down into three sub-issues: (1) was Google's conduct motivated by an anticompetitive strategy; (2) did Streetmap have to establish an actual anticompetitive effect or was a potential effect sufficient; and (3) did the effect have to be appreciable? [11]

As to the first issue, the court noted that although abuse is an objective concept, the question of intention may be taken into account in determining whether there has been an abuse.[12]

As to the second issue, the court found that Streetmap needed to establish that Google's conduct was *reasonably likely* to harm competition.[13] The focus of the inquiry was not on harm to competitors, but to "the competitive structure of the market."[14] Nonetheless, where the conduct at issue did not have a specifically anticompetitive object, as was the case with Google,[15] the court would "take into account, as a very relevant consideration, evidence as to what the *actual* effect of the conduct had been."[16] The court noted that it would "find it difficult in practical terms" to find that conduct was "reasonably likely to have" anticompetitive effect if it found that there was in fact no actual anticompetitive effect.[17] With respect to the third issue, Streetmap sought to rely on cases finding that *any* amount of

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[8] *Id*. ¶ 40.

[9] *Id*. ¶¶ 42-43. Google denied that it was dominant, and disputed the definition of online search as a relevant market. *Id*. ¶ 42. The court noted that if Google was found to have committed an abuse without objective justification, a subsequent trial would be held to determine the question of dominance. *Id*.

[10] *Id.* ¶ 63. The court found that, in this case, the "relevant input" was "the promotion afforded by display on the Google [search page results]; or put another way, display on the Google [search page results] is a form of access to customers." *Id.*

[11] *Id.* ¶¶ 83, 85.

[12] *See id.* ¶ 66. This is particularly relevant whether determining whether conduct constitutes competition on the merits.

[13] *Id*. ¶ 88; *see also id*. ¶ 90.

[14] *Id.* ¶ 88.

[15] *See id.* ¶ 66-83.

[16] *Id.* ¶ 90 (emphasis added).

[17] *Id.*

reasonably likely harm was sufficient to demonstrate an abuse of dominance.[18] That authority reasoned that because the "structure of competition" "has already been weakened by the presence of the dominant undertaking … *any* further weakening" would constitute an abuse.[19] However, the court distinguished this authority as inapplicable because the alleged harm in those cases took place in the *same* market in which the firm held a dominant position; it did not apply where the alleged harm occurs in "a separate market where the undertaking is not dominant."[20] Accordingly, the court found that Streetmap needed to demonstrate more than *de minimis* harm from the alleged conduct in the online maps market. Relying on the standard from cases alleging Article 101 TFEU violations (in relation to anticompetitive agreements or arrangements between undertakings where dominance is not an issue),[21] the court held that for Google's conduct "to constitute an abuse, it must be reasonably likely to have a *serious or appreciable effect* in the market for online maps."[22] The court reasoned that "[w]here – as here – [a dominant firm's] conduct is pro-competitive on the market where it is dominant, it would … be perverse to find that it contravenes competition law because it may have a *non-appreciable* effect on a related market where competition is not otherwise weakened."[23]

Finally, even if Streetmap could show sufficient injury in the online maps market, or if the court was wrong about the standard, Google's conduct could be "objectively justified" and thus lawful if it proved that (1) "any exclusionary effect on the market [was] counter-balanced or outweighed by advantages that also benefit consumers"; and (2) the conduct in question was "proportionate."[24] To determine proportionality, Google would have to show that "the conduct in question [was] indispensible and proportionate to the goal" it was pursuing.[25] "[T]here must be no less anti-competitive alternatives to the conduct that are capable of producing the same efficiencies."[26]

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[18] *Id.* ¶ 95 (discussing Case 85/76, Hoffmann-La Roche v Comm'n, 1979 E.C.R. 36 and Case C-23/14, Post Danmark II ("Post Danmark II"), 1979 E.C.R. 36).

[19] Post Danmark II, *supra* note 18, at ¶ 91 (emphasis added); Judgment, *supra* note 2 at ¶ 94 (quoting Post Danmark II).

[20] Judgment, *supra* note 2, at ¶ 96.

[21] *Id.* ¶ 96 (noting that it is "well-established that an agreement or arrangement will not be prohibited unless it may have an appreciable [anticompetitive] effect").

[22] *Id.* ¶ 98 (emphasis added).

[23] *Id.* ¶ 98.

[24] *Id.* ¶ 143.

[25] *Id.* ¶ 146 (quoting Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009/C 45/02, ¶ 28).

[26] *Id.* (quoting Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009/C 45/02, ¶ 30).

c. The Court's Rejection of Streetmap's Claims

The court found that Google did not engage in abusive conduct because the new-style OneBox "was not reasonably likely to give rise to anti-competitive foreclosure."[27] The court concluded that Google's introduction of the new-style OneBox was intended to improve its offering in the market for general search which was "pro-competitive" as it "indisputably" enhanced the quality of Google's product.[28] The court then evaluated the actual effect of the new-style OneBox on competition in the online maps market.

To try to establish that Google's conduct had an appreciable anticompetitive effect in the online maps market, Streetmap presented (1) results from a pre-launch experiment Google ran in the United States to test the effect of using the new-style OneBox, (2) data showing a decrease in visitors to Streetmap's website following Google's launch of the new-style OneBox, and (3) data about Streetmap's shares of *all* Google searches over time.[29] The court found that all three sources failed to isolate whether the 2007 launch of the new-style OneBox itself caused the decrease in online traffic to Streetmap, or if instead other factors caused that decrease. For example, Google's U.S. experiment, while showing a user preference for the new-style OneBox compared to the earlier design, was not designed to address and did not provide an answer to the "pertinent question" of what effect the new-style OneBox had on third party mapping providers.[30] Moreover, any decrease in Streetmap users after 2007, despite a growing market for online map usage, could have been the result of user preference for the Google Maps product.[31] And the "relative success of Google Maps in the UK in 2007-2008" was, according to the court, "readily explicable by a range of factors involving competition on the merits and wholly unrelated to the introduction of the new-style [] OneBox."[32] For these reasons, the court concluded that the introduction of the new-style OneBox "did not in itself have an appreciable effect in taking custom[ers] away from Streetmap."[33]

Although it was unnecessary given its finding of a lack of any appreciable anticompetitive effect in the online maps market, the court went on to analyze whether Google's conduct was objectively justified, and found that it was because it created technical efficiencies which could not be achieved by less restrictive means. In particular, the court held that the new-style One Box was a pro-competitive technical advancement in the search

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[27] *Id*. ¶ 139.

[28] *Id*. ¶ 66-85.

[29] *Id*. ¶¶ 108, 120, 128.

[30] *Id*. ¶ 114.

[31] *Id*. ¶ 116. As the court noted, it appeared from other evidence that (i) Google was not the route by which a majority of visitors reached Streetmap or its principal UK competitor prior to the introduction of the new-style OneBox, and (ii) the majority of clicks from Google to Streetmap or its principal competitor were from results pages that would not have included a Google Maps OneBox. *Id*. ¶ 124.

[32] *Id*. ¶ 119.

[33] *Id*. ¶ 139.

market, which Google added "to improve its general search engine,"[34] it was "clearly of benefit to users,"[35] and it was "indisputable" that it "enhance[d] the quality of Google [search results]."[36]

The court thus focused on the proportionality of Google's conduct, i.e., whether less anticompetitive means could have achieved Google's goals. The court noted that where, as here, the efficiency was a technical improvement, proportionality did not require the adoption of an alternative that was less efficient in terms of a greatly increased cost or the imposition of an unreasonable burden.[37]

In this regard, Streetmap claimed Google could have adopted different versions of its OneBox that would have avoided any foreclosure: displaying thumbnail maps from other providers along with a Google Maps thumbnail in the Google Maps OneBox, providing users the ability to choose which provider's map would be displayed in the Google Maps OneBox (either through user settings or by clicking on a link in the Google Maps OneBox), or including links to other online map websites below the Google Maps thumbnail.[38]

The court rejected each of these alternatives as disproportionate because they: (a) would have decreased the quality of Google's search results, including because they would cause delays in generating results for users, or might cause errors from links that did not work, which would "have a serious impact on the quality of the Maps OneBox as perceived by users;"[39] and/or (b) were plagued with implementation difficulties, including because Google Maps was able to translate certain user searches into maps that other online map providers could not process, and because different maps providers provided different levels of services in different countries, any requirement that Google adopt a change would apply to the entire EU.[40] The only proposed way to avoid many of these issues was for Google to store on its own servers a regularly-updated database of static images of all map "tiles" from all major European third party online map providers.[41] The court found that option disproportionate as well, because of the substantial burden and cost involved.[42]

3. DISCUSSION

It is well established under EU and UK competition law that dominant firms have a "special responsibility not to allow [their] conduct to impair genuine undistorted competition

[34] *Id.* ¶ 79.

[35] *Id.* ¶ 55.

[36] *Id.* ¶ 84.

[37] *Id.* ¶ 149.

[38] *Id.* ¶¶ 151, 163.

[39] *Id.* ¶ 166; *see also id.* ¶ 170.

[40] *E.g.*, *id.* ¶¶ 159, 168.

[41] *Id.* ¶¶ 173-174.

[42] *Id.* ¶ 175.

on the common market."[43] As competition in markets with dominant firms is considered already to be weakened, courts have held that conduct that is reasonably likely to cause *any* anticompetitive harm in the market in which they are dominant violates that responsibility and is abusive.[44] If the conduct at issue also creates efficiencies, the firm's "special responsibility" then requires that there are "no less anti-competitive alternatives" to accomplish the firm's objective.[45]

Tetra Pak International SA v. Commission ("Tetra Pak II") is the leading case on the question of whether a dominant firm's "special responsibility" should also extend to related markets in which a firm is not dominant.[46] In *Tetra Pak II*, the EU Court of Justice found that "[i]n the case of distinct, but associated, markets . . . application of Article 86 [now 102] to conduct found on the associated, non-dominated, market and having effects on that associated market can only be justified by special circumstances."[47] There, the court found such circumstances existed and that the markets were related because the dominant firm operated in both markets, had a "quasi-monopolistic" share of one market and a "leading position" in the second, had market shares in both markets that were seven times greater than the nearest competitor, the products at issue were used in both markets, thirty-five percent of the dominant firm's customers operated in both markets, and the firm's biggest competitor operated in both markets.[48] Following *Tetra Pak II*, related markets have been within the scope of a dominant firm's "special responsibility." However, without any clear limits placed on that responsibility in the EU case law or practice, a firm dominant in one market (and even more so where it was super-dominant) could face claims that it had engaged in abusive conduct where *any level of anticompetitive effect* was reasonably likely *in any related market*, regardless of the existence of, or effect on, competition in that related market. This was the position advocated for by the claimant in *Streetmap*.

By requiring a "serious or appreciable" effect in related markets where a firm has no dominance and thus competition has not already been weakened, the *Streetmap* court placed an outer bound on a dominant firm's "special responsibility." This limit on a dominant firm's "special responsibility" is logical and consistent with the scope of the firm's market power because, as Advocate General Jacobs noted in his Opinion in *Bronner v. Mediaprint*, "the primary purpose of Article 102" is to "prevent distortion of competition – and in particular to safeguard the interests of consumers – rather than to protect the position of particular competitors."[49] According to Advocate General Jacobs, conduct by a dominant

[43] Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, 2009/C 45/02, ¶ 1; *see, e.g.*, Judgment, *supra* note 2, at ¶ 57; Case 332/81, Michelin v Comm'n, 1983 E.C.R. 313, ¶ 57.

[44] *See* cases cited *supra* note 19 and accompanying text.

[45] Judgment, *supra* note 2, at ¶ 146 (quoting Guidance on the Commission's Enforcement Priorities, *supra* note 43 at ¶ 28).

[46] Case C-333-94-P, Tetra Pak Int'l SA v. Comm'n, 1996 E.C.R. I-05951, ¶ 27.

[47] *Id*.

[48] *Id.* ¶¶ 28-29.

[49] Case C-7/97, Bronner v. Mediaprint, 1998 E.C.R. 364, ¶ 58.

firm in a related non-dominated market "will not have an adverse impact on consumers [in that market] unless the dominant firm's … [products in that related market are] sufficiently insulated from competition to give it market power."[50] In addition, as the *Streetmap* court noted, the standard of anticompetitive effect applicable to a dominant firm's conduct affecting a related market should logically be aligned with the standard applicable under Article 101 TFEU where there is no requirement of dominance.[51] Finally, adoption of a "serious or appreciable" effects standard is consistent with the European Commission's enforcement practice.[52]

The *Streetmap* appreciability threshold for abuse in related non-dominated markets therefor provides welcome clarity[53] to dominant firms regarding the scope of their "special responsibility."[54] If adopted more widely, one effect of this could be to give firms that dominate in one market more flexibility to engage in conduct that may have an effect on competition in related markets. It would also place the appropriate focus on overall consumer welfare by not dissuading a dominant firm from engaging in pro-competitive conduct for fear that the conduct might have even a *de minimis* anticompetitive effect in a related market.

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[50] *Id*.

[51] Judgment, *supra* note 2, at ¶ 96. It is also arguably consistent with the EU merger regulation which applies only to a *significant* impediment to effective competition. *See also* Case 6/72, Cont'l Can v. Comm'n, 1973 E.C.R. 215, ¶ 25.

[52] *See, e.g.*, Alpha Flight Servs./Aéroports de Paris, EC Dec. Case IV/35.613, OJ 1998 L230/10, ¶ 109; European Commission, DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses, ¶ 101 and n.67, http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf.

[53] Streetmap has publicly stated that it believes this finding was erroneous, even though the court's finding that Google's conduct was objectively justified means that Google would have been absolved regardless of what standard the court used. Samuel Gibbs, *U.K.'s Streetmap Loses 'Anticompetitive' Search Abuse Case Against Google*, THE GUARDIAN, http://www.theguardian.com/technology/2016/feb/12/streetmap-loses-google-anticompetitive-search-abuse-case.

[54] Adopting *Streetmap*'s logic would more explicitly align EU case law with U.S. antitrust law, which limits "monopoly leveraging" claims to cases where the defendant's conduct threatens competition in the market in which the defendant is not dominant. *See* Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459 (1993) (stating Sherman Act "§ 2 makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so"); Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 415 n.4 (2004) ("To the extent the Court of Appeals dispensed with a requirement that there be a 'dangerous probability of success' in monopolizing a second market, it erred . . . ."); Sun Microsystems, Inc. v. Microsoft Corp., 333 F.3d 517, 532 (4th Cir. 2003), *abrogated on other grounds by* eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006) ("[T]he monopoly leveraging theory . . . has not been recognized in this circuit nor has it received general acceptance. . . . Indeed, monopoly leveraging may have been seriously undermined and perhaps been entirely foreclosed by" *Spectrum Sports*).

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