

REGULATING INFORMATION PLATFORMS: THE CONVERGENCE TO ANTITRUST

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INTRODUCTION

Technological methods of transmitting information, i.e. information platforms, are thought to pose significant regulatory challenges. The markets in which telecommunications and other information services firms compete are associated with natural monopoly tendencies and powerful network effects that make some cooperation among competitors essential to consumer welfare. The importance of protecting intellectual property rights and the pervasiveness of free speech concerns pose additional challenges. As a result, the prevailing wisdom has been that free market forces, coupled with antitrust enforcement, cannot maximize consumer welfare in information platform markets without substantial industry-specific regulatory assistance.

Historically, various forms of command and control regulation were employed to govern information platform industries. But over the last forty years, there has been a developing trend toward regulation that seeks to facilitate competition in information platform markets rather than dictate outcomes.¹ To date, these efforts have drawn on at least four distinct sources of law: (1) antitrust; (2) intellectual property; (3) free speech; and (4) industry specific regulation, such as the Telecommunications Act of 1996, which incorporates aspects of the other three.²

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1. See generally STEVEN SEMERARO, *Telecommunications Law: The U.S. Model For Economic Regulation of Telecommunications Providers*, in UNESCO ENCYCLOPEDIA OF LIFE SUPPORT SYSTEMS 6.31 (Aaron Schwabach, ed., forthcoming 2003).

2. Examples of provisions of the 1996 Act that incorporated these other sources of law include 47 U.S.C. §§ 251-252 (seeking to spur competition among carriers); 47 U.S.C. §251(d)(2) (requiring greater protection for proprietary intellectual property than for non-proprietary network elements); and 47 U.S.C. § 254 (seeking to ensure universal access to information platforms). 47 U.S.C. §§ 251-254 (Supp. V 1999).

By placing faith in the competitive process and recognizing the enhancement of consumer welfare as the regulatory goal,³ a unified approach to the regulation of information platforms may be found in a rather surprising place: within the existing body of antitrust law. In most industries, antitrust is the exclusive source of economic regulation. This essay defends the thesis that antitrust could also serve as the sole regulatory agent in information platform markets.

To be sure, the notion that antitrust alone could and should shoulder the burden of ensuring that information platforms serve consumer interests is more provocative than programmatic. Particularly with respect to free speech, considerable work would be needed to develop and implement the legal doctrine. But the idea of distilling this doctrine from the existing antitrust laws rather than industry-specific regulation is worth exploring. The regulatory power of existing antitrust mechanisms is widely underestimated, and the existing alternatives have proven to be largely ineffective. In the end, the practical difficulties of implementing a regulatory system relying entirely on antitrust may be overcome by enabling the same federal and state agencies to oversee the industry.⁴ Only now, they would

3. While the specific parameters of antitrust enforcement continue to evolve, there are few who continue to question the basic premise of the Chicago School approach to antitrust: “[T]he only legitimate goal of antitrust is the maximization of consumer welfare.” ROBERT BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 7 (NY Free Press 1993) (1978) (emphasizing the connection between consumer welfare and efficiency). See also Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 *HASTINGS L.J.* 65, 68 (1982) (expanding the concept of consumer welfare to include transfers of wealth between consumers and firms with market power). For the purposes of this article, consumer welfare means a belief that the goods and services innovated, produced, and distributed in a competitive marketplace will maximize the utility of the consuming public. If social engineering to directly dictate certain results – e.g. restrictions on pornographic websites, Internet access for schools – that might not emerge from the free play of marketplace forces is the intended goal of information platform regulation, antitrust alone will not suffice.

4. As Joel Klein explained in a speech shortly after the enactment of the 1996 Telecom Act, there are reasons to keep all of the existing regulatory players in the process:

This mix of players, I would suggest, sensibly reflects the fact that telephone regulation has historically been a shared function of the FCC and the state agencies and, quite naturally, both of them are necessary to the deregulatory process as well. And we [the Antitrust Division] also belong there, essentially because the goal of the process is competition and we have expertise in that area generally and with respect to telephony, in particular, because of our extensive involvement in the AT&T case.

Joel I. Klein, *Preparing for Competition in a Deregulated Telecommunications Market*, Speech at the Glasser Legalworks Seminar (Mar. 11, 1997), *available at* <http://www.usdoj.gov/atr/public/speeches/1070.htm> (last visited Aug. 8, 2002). In contrast to the proposal advanced here, some commentators have proposed eliminating the

look to the broadly drafted antitrust laws and principles of consumer welfare instead of the more precise language typical of industry-specific regulation. And litigation—and the threat of litigation—would be their primary regulatory tools.

Section I of this essay explores the ability of antitrust to generate solutions to competitive problems of the type often feared in information platform markets. Section II debunks the persistent notion of conflict between the antitrust laws and the intellectual property laws, and explains how antitrust might ensure adequate incentives to innovate without reference to intellectual property doctrine. Section III shows that First Amendment concerns should be largely ameliorated when consumer-welfare-enhancing regulation is driven by antitrust, and it explores how antitrust regulation might also further free speech values more generally. Section IV explores reasons to doubt that industry-specific legislation can improve on traditional antitrust regulation. And Section V responds to the criticism that relying on antitrust would produce substantively inferior and undemocratic regulation.

I. A FULLY REALIZED INTERPRETATION OF ANTITRUST DOCTRINE

Antitrust suffers from a disconnect between what it is and what lawyers, even knowledgeable ones in the field, think it is when they discuss it in general terms. Even the most knowledgeable antitrust scholars and practitioners tend to understand antitrust as legal doctrine that requires competition and privileges unilateral decisions to deal with particular customers, suppliers, and competitors. Of course, it does all that, and because of that many have questioned whether antitrust is really nimble enough to successfully address the complex consumer welfare issues arising in information platform industries.⁵ Cooperation among firms in standard setting, business practices, and even in the use of facilities is essential to achieving the full consumer

FCC. See PETER HUBER, *LAW AND DISORDER IN CYBERSPACE: ABOLISH THE FCC AND LET COMMON LAW RULE THE TELECOSM* 7 (1997). The proposal advanced here does rest on a similar affinity for the common law character of antitrust. *Id.* at 8. But I also envision an important role for government enforcers that contrasts with Huber's vision.

5. See Robert Pitofsky, *Challenges of the New Economy: Issues at the Intersection of Antitrust and Intellectual Property*, 68 *ANTITRUST L.J.* 913, 913-14 (2001) (recognizing and criticizing the view that antitrust law designed for nineteenth century economic problems cannot deal with twenty-first century challenges by comparing the argument to the claim that the First Amendment should not be applicable to modern media because it differs from the pamphleteering prevalent when the amendment was adopted).

welfare benefits that information platforms have to offer.⁶ If antitrust cannot require that sort of cooperation, it alone cannot provide a fully effective regulatory agent for information platform markets.

For at least a dozen years, however, federal and state antitrust enforcement officials, the antitrust plaintiffs' bar, and even the courts have pursued a regulatory-like approach to antitrust enforcement that recognizes its ability to compel cooperation that is essential to consumer welfare. The current approach sees antitrust as a flexible instrument that prohibits *not* certain types of behavior but any behavior that produces certain economic effects.⁷ When the behavior has an adverse impact on consumer welfare, antitrust should prohibit it.⁸ Although there are exceptions and enforcement officials may need to think creatively about which provision of the antitrust laws best fits the case, the working assumption is that antitrust prohibits any restraint of trade that reduces consumer welfare.

Antitrust is thus best understood as a form of economic regulation that relies on broadly-drafted, consumer-welfare-enhancing statutes rather than highly specific legislation. The critical

6. See generally Mark A. Lemley, *Antitrust and the Internet Standardization Problem*, 28 CONN. L. REV. 1041, 1056 (1996).

7. As explained below, this approach to antitrust flows comfortably from nearly a century of case law. One *does* need to reject, however, the antitrust philosophy propounded by Robert Bork in THE ANTITRUST PARADOX and perhaps pursued at least in the dreams of those who idealize antitrust enforcement during the Reagan administration. BORK, *supra* note 3. This approach can be described as a prosecutorial approach to antitrust. Competition law, according to this view, is a set of relatively straightforward prohibitions that developed from the early judicial opinions of the Sherman Act. The role of the antitrust enforcer – like a criminal prosecutor – is to identify those violations and prosecute the offenders.

8. The Court has identified a “gap” in the Sherman Act. “An unreasonable restraint of trade,” the Court has said, “may be effected not only by two independent firms acting in concert; a single firm may restrain trade to precisely the same extent if it alone possesses the combined market power of those same two firms.” *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 775 (1984). The Sherman Act, however, does not prohibit all restraints on trade. Instead, it outlaws only those restraints that are the product of agreement or monopoly. The Court has thus concluded that the Act “leaves untouched a single firm’s anticompetitive conduct (short of threatened monopolization) that may be indistinguishable in economic effect from the conduct of two firms subject to § 1 liability.” *Id.* As a practical matter, however, this gap is quite narrow. Given relatively broad definitions of conspiracy and monopoly, most conduct that really threatens consumer welfare could be attacked under the Sherman Act. And, in all events, Section 5 of the FTC Act presents an alternative that could be used to fill whatever gap may remain. 15 U.S.C. § 45 (2000); see PHILLIP E. AREEDA & HERBERT HOVENKAMP, 2 ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 305e at 13 (Little, Brown rev. ed. 1995); Pitofsky, *supra* note 5, at 922-23 (citing examples of ways in which intellectual property holders may harm competition and presumably violate the antitrust laws).

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difference between antitrust and other forms of economic regulation lies not in who enforces it—because the same agencies can (and to some extent already do) enforce both. Nor does it lie in how large a role litigation plays—because litigation plays a prominent role in any form of economic regulation.⁹ Instead, the difference lies in the source of agency authority and how it gets implemented. Congress typically provides more precise language in industry-specific legislation than it has in the antitrust laws. As a result, industry-specific legislation is characterized by *ex ante* rules while antitrust is characterized by *ex post* analysis of the consumer welfare effects of a competitor's business practices.

This competition-enhancing regulatory approach to antitrust is decidedly not a case of bureaucrats and ambulance chasers run amok. Instead, it rests firmly on modern economic principles brought to light by the Chicago School. Those commentators illuminated antitrust's true character as a consumer welfare enhancing statute by emphasizing that it does not blindly mandate rivalry.¹⁰ Rather, it requires competition only to the extent that competition serves consumer interests. In cases where rivalry would hurt consumers, or leave them unaffected, antitrust should have no role.

By establishing the goal of antitrust as consumer welfare, the Chicago School sharpened our perception. But for some, the analytical advances seem to have stopped short. While virtually everyone now understands that antitrust does not require rivalry for rivalry's sake when consumers would not benefit, many have failed to take the logical next step—recognizing that antitrust imposes positive obligations to cooperate when cooperation is essential to enable the sort of rivalry that will most benefit consumers. Instead, the dominant belief continues to be that antitrust imposes only negative duties.¹¹

While this formulation of antitrust suggests a recent transformation, in reality the case law dating back nearly a century includes many examples in which firms have been required to

9. Both the 1993 Cable Act and the 1996 Telecom Act led to massive litigation that took years to resolve.

10. See, e.g., Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984).

11. See *Goldwasser v. Amertitech Corp.*, 222 F.3d 390, 400 (7th Cir. 2000) (explaining that, generally “affirmative duties to help one’s competitors . . . do not exist under the unadorned antitrust laws”); *USM Corp. v. SPS Technologies, Inc.*, 694 F.2d 505, 513 (7th Cir. 1982) (Posner, J.) (“There is a difference between positive and negative duties, and the antitrust laws, like other legal doctrines sounding in tort, have generally been understood to impose only the latter.”).

cooperate with their competitors in order to facilitate competition. The traditional starting points are *Terminal Railroad*, where the Court required the owners of a bridge across the Mississippi to permit competitors to use it,¹² and *Associated Press*, where the Court required that a newsgathering agency be opened to the competitors of its existing members.¹³ In *Lorain Journal*,¹⁴ the Court compelled a newspaper to accept advertising from firms that also advertised with a competing radio station, a remedy that indirectly mandated cooperation. A more direct example of compulsory cooperation is *Otter Tail Power*, in which the Court required a natural monopoly over electric power transmission to cooperate with a competitor at the distribution level.¹⁵ And in *Aspen Skiing*, the Court required a ski mountain operator to cooperate with a competitor by selling tickets allowing skiers to choose to ski on any mountain.¹⁶

The breakup of AT&T's monopoly over telephone service is a prime modern example. MCI, as a private plaintiff, and the Department of Justice obtained an antitrust remedy that compelled the divested AT&T local operating companies to deal on equal terms with all competitive long distance providers.¹⁷ The Microsoft case will also certainly yield cooperative remedies.¹⁸

While this understanding of the scope of antitrust is not new, the analytical tools for applying it are sharper now than they have ever been. Antitrust comprehends a restraint of trade as either an act or an omission that restrains the ability of other firms to compete and reduces overall consumer welfare in comparison with a *but for* world in which the competitor did not restrain trade. The remedy may be either a negative command to stop a certain activity or a positive duty to cooperate in a certain way.

This regulatory approach to antitrust does not compel a dramatic expansion of the so called *essential facilities* doctrine. In-

12. *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912).

13. *Associated Press v. United States*, 326 U.S. 1 (1945).

14. *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).

15. *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

16. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

17. *MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081 (7th Cir. 1983) (holding that local distribution facilities were "essential facilities" and therefore AT&T must provide MCI access to them); *United States v. AT&T Co.*, 552 F. Supp. 131 (D.C. 1982), *aff'd mem. sub. nom.*, *Maryland v. United States*, 460 U.S. 1001 (1983) (upholding consent decree imposing on AT&T the duty to share access to local telephone networks with competitive long distance providers).

18. See *United States v. Microsoft Corp.*, Revised Proposed Final Judgment, available at <http://www.usdoj.gov/atr/cases/f9400/9495.pdf> (last visited Sept. 18, 2002).

deed, most of the leading cases cited above did not rely on that theory. Instead, antitrust condemns improper uses of market power to maintain or extend a dominant position either through an affirmative restraint of trade or a refusal to deal.¹⁹ This complete appreciation of the scope of antitrust not only lessens concern about the ability of antitrust to compel essential cooperation in information platform markets, but as addressed below, it also helps to overcome the notion that intellectual property principles must be incorporated into information platform regulation.

II. OVERCOMING THE PERSISTENT PARADIGM OF CONFLICT BETWEEN INTELLECTUAL PROPERTY AND ANTITRUST

From the dawn of modern antitrust, courts have struggled to accommodate the ostensibly conflicting laws designed to facilitate competition, on the one hand, and to stimulate the innovation of intellectual property, on the other. This paradigm of conflict and accommodation has ebbed and flowed over the

19. At the Silicon Flatirons Telecommunications Program conference at the University of Colorado School of Law on the potential convergence to antitrust in information platform regulation, Doug Melamed posed a hypothetical designed to show that the regulatory theory of antitrust proposed in this essay is more expansive than the antitrust laws as they are actually applied in the United States. Douglas Melamed, *The New Economy, Intellectual Property, and the Challenges for Antitrust*, Address Silicon Flatirons Telecommunications Program, University of Colorado School of Law (Apr. 4, 2001). He postulated a firm that implements an efficient innovation that is so successful that the firm then monopolizes an industry and thereby lowers consumer welfare. Cf. A. Douglas Melamed & Ali M. Stoeppelwerth, *The CSU Case: Facts, Formalism and the Intersection of Antitrust and Intellectual Property Law*, 11 GEO. MASON L. REV. 2 (forthcoming 2002) (manuscript at 15, on file with author) (“antitrust law . . . explicitly permits ancillary restraints that reduce competition ex post if they are reasonably related to a procompetitive venture ex ante.”). Melamed correctly concluded that the antitrust laws would not prevent the implementation of this innovation, because those laws respect market power that is gained industriously. He then suggested that the regulatory approach would impose antitrust liability because cooperation *would be essential to maximize consumer welfare*. The hypothetical does indeed generate a conflict. But it does so at the expense of an internal postulate of the antitrust laws: competition presumptively maximizes consumer welfare in both the short and long run. The hypothetical presupposes a market in which a firm could reduce long-run consumer welfare by adopting an efficient innovation, monopolizing the market, and then charging supra-competitive prices. Antitrust does not condemn such conduct because permitting industrious firms to reap the benefits of their industry creates incentives to innovate that in the long run presumptively benefit consumers. Because of those incentives, someone will build an even better mousetrap and consumers will benefit as a result in virtually every case. Melamed’s hypothetical therefore contradicts antitrust’s core assumption—that rewarding industry will in the long run benefit consumers—and the resulting conflict with the regulatory approach to antitrust should thus be extremely rare.

years.²⁰ But as with our understanding of antitrust generally, proponents of the Chicago School did much to reveal the common purpose of intellectual property and antitrust law—advancing consumer welfare.²¹

Following the Chicago School's lead, the antitrust enforcement agencies, virtually all commentators, and many courts now claim to reject both the notion that the antitrust and intellectual property laws conflict or that an intellectual property right necessarily confers market power on its holder.²² Both legal systems enhance consumer welfare.²³ The antitrust laws achieve that goal by ensuring that marketplace forces provide firms with

20. Willard K. Tom & Joshua Newberg, *Antitrust and Intellectual Property: From Separate Spheres to a Unified Field*, 66 ANTITRUST L.J. 167, 168-75 (1997).

21. See, e.g., WARD S. BROWN, PATENTS AND ANTITRUST LAW: A LEGAL AND ECONOMIC APPRAISAL 1 (1973); William F. Baxter, *Legal Restrictions on the Exploitation of Patent Monopoly: An Economic Analysis*, 76 YALE L.J. 267 (1966).

22. See, e.g., Timothy J. Muris, Competition and Intellectual Property Policy: The Way Ahead, Remarks at the American Bar Association Antitrust Section Fall Forum (Nov. 15, 2001), available at <http://www.ftc.gov/speeches/muris/intellectual.htm>. The recently appointed Chairman of the Federal Trade Commission explained:

The tensions between [antitrust and intellectual property doctrine] tend to obscure the fact that, properly understood, IP law and antitrust law both seek to promote innovation and enhance consumer welfare. . . . IP law, properly applied, preserves the incentives for scientific and technological progress – i.e., for innovation. Innovation benefits consumers through the development of new and improved goods and services, and spurs economic growth. Similarly, antitrust law, properly applied, promotes innovation and economic growth by combating restraints on vigorous competitive activity. By deterring anticompetitive arrangements and monopolization, antitrust law also ensures that consumers have access to a wide variety of goods and services at competitive prices.

Id. The enforcement agencies' IP guidelines explain:

The intellectual property laws and the antitrust laws share the common purpose of promoting innovation and enhancing consumer welfare. The intellectual property laws provide incentives for innovation and its dissemination and commercialization by establishing enforceable property rights for the creators of new and useful products, more efficient processes, and original works of expression. In the absence of intellectual property rights, imitators could more rapidly exploit the efforts of innovators and investors without compensation. Rapid imitation would reduce the commercial value of innovation and erode incentives to invest, ultimately to the detriment of consumers. The antitrust laws promote innovation and consumer welfare by prohibiting certain actions that may harm competition with respect to either existing or new ways of serving consumers.

UNITED STATES DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 1.0 (1995) [hereinafter IPG]; see also *Atari Games Corp. v. Nintendo of Am., Inc.*, 897 F.2d 1572, 1576 (Fed. Cir. 1990) (explaining that “the aims and objectives of patent and antitrust laws may seem, at first glance, wholly at odds [but] the two bodies of law are actually complementary as both are aimed at encouraging innovation, industry and competition”).

23. Tom & Newberg, *supra* note 20, at 173-75.

incentives to offer better products at lower prices.²⁴ Market power *per se* is not condemned. Indeed, the desire to obtain it drives competitors to improve their products, services, and production techniques, and thereby enhances consumer welfare. Antitrust condemns only improper uses of market power that harm consumers.

The intellectual property laws directly create incentives to innovate products and processes of higher quality that can be produced at lower prices.²⁵ Just as antitrust does not condemn market power *per se*, intellectual property doctrine does not create it. On the contrary, intellectual property law merely grants a property right that, like any property right, may be used to compete. In most cases, a patent or copyright creates no market power at all.²⁶ Just as potential substitutes exist for most types

24. *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 423 (1990) (explaining that “the Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. . . . This judgment recognizes that all elements of a bargain – quality, service, safety, and durability – and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers”); *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958) (explaining that antitrust “rests on the premise that the unrestrained interaction of competitive forces will yield the best allocating of our economic resources, the lowest prices, the highest quality and the greatest material progress”).

25. *See* U.S. CONST. art. I, § 8, cl. 8 (declaring that federal patent and copyright law are intended “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”); *Stewart v. Abend*, 495 U.S. 207, 229 (1990) (“The limited monopoly granted to the artist is intended to provide the necessary bargaining power to garner a fair price for the value of the works passing into public use.”); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“[T]he limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.”); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 480 (1974) (stating that patent laws promote this progress by “offering a right of exclusion for a limited period as an incentive to inventors to risk the often enormous costs in terms of time, research and development” and that the productive effort fostered by the patent laws has “a positive effect on society through the introduction of new products and processes of manufacture into the economy, and the emanations by way of increased employment and better lives for our citizens.”).

26. *See* IPG, *supra* note 22, at § 2.0 (“the Agencies do not presume that intellectual property creates market power in the antitrust context”); *id.* at § 2.2 (“Although the intellectual property right confers the power to exclude with respect to the *specific* product, process, or work in question, there will often be sufficient actual or potential close substitutes for such product, process, or work to prevent the exercise of market power.”). The guidelines define market power as “the ability profitably to maintain prices above, or output below, competitive levels for a significant period of time.” *Id.* at § 2.2. The guidelines note:

Market power can be exercised in other economic dimensions, such as quality, service, and the development of new or improved goods and processes. It is

of real property and chattels, substitutes usually exist for intellectual property. Regardless of the type of property, substitutes limit the ability of the property holder to exercise market power.²⁷ Given the common consumer welfare goal, antitrust can effectively regulate information platform markets without complicating references to intellectual property law so long as it takes full account of the long-run consumer welfare benefits of innovation that are achieved through strong intellectual property protection.

Despite these well understood principles, many lawyers and judges continue to perceive a conflict that compels antitrust courts to consider intellectual property doctrine in order to safeguard incentives to innovate. The following subsections identify the sources for that continuing perception and explain why neither the historical nor the practical concerns with antitrust's ability to protect incentives to innovate are legitimate bases to continue to privilege intellectual property over other property with respect to antitrust enforcement.

A. *The Persistent Notion of Conflict*

Leading scholars, lawyers, and judges, who surely recognize that market power arises from market conditions and not property rights, nonetheless cling to the belief that antitrust must tread lightly in intellectual property cases. Though they exploit the similarity of intellectual property and other forms of property to debunk the shibboleth that intellectual property necessarily creates market power, they are unwilling to treat intellectual

assumed in this definition that all competitive dimensions are held constant except the ones in which market power is being exercised; that a seller is able to charge higher prices for a higher-quality product does not alone indicate market power. The definition . . . is stated in terms of a seller with market power. A buyer could also exercise market power (e.g., by maintaining the price below the competitive level, thereby depressing output).

Id. at n.9.

27. In the courts, this issue remains unresolved. *Compare* *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 16 (1984) (expressing the view in dictum that if a product is protected by a patent, "it is fair to presume that the inability to buy the product elsewhere gives the seller market power") *with id.* at 37 n.7 (O'Connor, J., concurring) ("[A] patent holder has no market power in any relevant sense if there are close substitutes for the patented product."). *Compare also* *Abbott Labs. v. Brennan*, 952 F.2d 1346, 1354-55 (Fed. Cir. 1991) (no presumption of market power from intellectual property right), *cert. denied*, 505 U.S. 1205 (1992), and *In re Indep. Serv. Orgs.*, 203 F.3d 1322, 1325 (Fed. Cir. 2000) ("A patent alone does not demonstrate market power."), *with* *Digidyne Corp. v. Data Gen. Corp.*, 734 F.2d 1336, 1341-42 (9th Cir. 1984) (requisite economic power is presumed from copyright), *cert. denied*, 473 U.S. 908 (1985).

property like other forms of property when its owner does in fact possess market power.²⁸

For example, the courts in *In re Independent Service Organizations Antitrust Litigation*,²⁹ and *Townshend v. Rockwell International Corp.*,³⁰ appear to have declared that the anticompetitive effect of a patent or copyright holder's refusal to deal can never give rise to antitrust liability, unless the holder uses "his statutory right to refuse to [deal] to gain a monopoly in a market beyond the scope of the patent."³¹ The courts in these cases suggest that the concept of the scope of the patent defines an antitrust immunity for intellectual property holders that applies irrespective of the effect of the intellectual property holder's conduct on consumer welfare.³² A court need not even consider the

28. See Mary L. Azcuenaga, *Recent Issues in Antitrust and Intellectual Property*, 7 B.U. J. SCI. & TECH. L. 1, 7 (2000) (quoting the guidelines' statement that "market power 'does not impose on an intellectual property owner an obligation to license the use of [its] intellectual property to others.'"); Tom & Newberg, *supra* note 20, at 174-75 (explaining why a territorial restriction in a patent license would likely pass muster under ordinary antitrust analysis and concluding that "it would . . . be unnecessary to resort to the patent laws as a 'trump' that exempts the licensor's conduct from application of the antitrust laws," but stopping short of concluding that no such power to trump should exist).

29. *In re Indep. Serv.*, 203 F.3d 1322.

30. *Townshend v. Rockwell Int'l Corp.*, 2000-1 Trade Cas. (CCH) ¶ 72,890 (N.D. Cal. 2000).

31. *In re Indep. Serv.*, 203 F.3d at 1327. The court further states, "[w]e therefore will not inquire into his subjective motivation for exerting his statutory rights, even though his refusal to sell or license his patented invention may have an anticompetitive effect, so long as that anticompetitive effect is not illegally extended beyond the statutory patent grant." *Id.* at 1327-28. See also *Atari Games Corp. v. Nintendo of Am., Inc.*, 897 F.2d 1572, 1576 (Fed. Cir. 1990) ("[A] patent owner may not take the property right granted by a patent and use it to extend his power in the marketplace improperly, i.e. beyond the limits of what Congress intended to give in the patent laws.") (emphasis added); *Townshend*, 2000-1 Trade Cas. (CCH) ¶ 72,890, at 12:

In a market consisting of proprietary technology . . . any party who has secured proprietary rights to such technology (i.e. – a patent) possesses the legal right to exclude others from practicing technology which has been protected. . . . The adoption of an industry standard incorporating such proprietary technology does not confer any power to exclude that exceeds the exclusionary power to which a patent holder is otherwise logally [sic] entitled.

Id. The court further held that the right to refuse to license immunizes proposed licensing terms from antitrust scrutiny. *Id.* at 16. The court applied essentially the same standard to refusal to license copyright-protected materials. *In re Indep. Serv.*, 203 F.3d at 1329.

32. See *In re Indep. Serv.*, 203 F.3d at 1327. The court notes:

The cited language from *Kodak* does nothing to limit the right of the patentee to refuse to sell or license in markets within the scope of the statutory patent grant. In fact, we have expressly held that, absent exceptional circumstances, a patent may confer the right to exclude competition altogether in more than one antitrust market.

Id. See *B. Braun Med., Inc. v. Abbott Lab.*, 124 F.3d 1419, 1427 n.4 (Fed. Cir. 1997) (patentee had right to exclude competition in both the market for patented valves

impact of the challenged conduct on consumer welfare if, under intellectual property law, the defendant is acting within the scope of the patent.³³

Former Federal Trade Commission (FTC) Commissioner Mary Azcuenaga recently endorsed this position in an October 2000 address at Boston University School of Law. She served as a Commissioner at the time that the Department of Justice, Antitrust Division, and the FTC jointly issued their Intellectual Property Guidelines, and she purports to support them.³⁴ Yet her discussion of the Federal Circuit's *In re Independent Service*

and the market for extension sets incorporating patented valves); *In re Indep. Serv.*, 203 F.3d at 1328. The court explains:

It is the infringement defendant and not the patentee that bears the burden to show that one of these exceptional situations exists and, in the absence of such proof, we will not inquire into the patentee's motivations for asserting his statutory right to exclude. Even in cases where the infringement defendant has met this burden, which CSU has not, he must then also prove the elements of the Sherman Act violation.

Id. See also *C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1368 (Fed. Cir. 1998) ("Unless the patent had been obtained by fraud such that the market position has been gained illegally, the patent right to exclude does not constitute monopoly power prohibited by the Sherman Act.").

33. *In re Indep. Serv.*, 203 F.3d at 1328 ("We answer the threshold question of whether Xerox's refusal to sell its patented parts exceeds the scope of the patent grant in the negative. Therefore, our inquiry is at an end."). The Federal Circuit cites the Intellectual Property Guidelines in support of its decision. *Id.* at 1326 ("The United States Department of Justice and Federal Trade Commission have issued guidance that, even where it exists, such market power does not impose on the intellectual property owner an obligation to license the use of that property to others.") (internal quotations omitted). Taken in context, however, the guidelines section quoted by the Federal Circuit does not support its opinion:

If a patent or other form of intellectual property does confer market power, that market power does not *by itself* offend the antitrust laws. As with any other tangible or intangible asset that enables its owner to obtain significant supracompetitive profits, market power (or even a monopoly) that is solely "a consequence of a superior product, business acumen, or historic accident" does not violate the antitrust laws. Nor does such market power impose on the intellectual property owner an obligation to license the use of that property to others. *As in other antitrust contexts, however, market power could be illegally acquired or maintained, or, even if lawfully acquired and maintained, would be relevant to the ability of an intellectual property owner to harm competition through unreasonable conduct in connection with such property.*

IPG, *supra* note 22, at § 2.2 (footnote omitted, emphasis added). The Federal Circuit rejected the Ninth Circuit approach calling for greater scrutiny of refusals to license on the ground that the subjective motive of patent or copyright holder should not be relevant. *In re Indep. Serv.*, 203 F.3d at 1327-29. While the court is correct that motive alone has no economic or consumer welfare significance, the issue is not one of motive but effect: Does the refusal harm short-term consumer interests more than increasing the value of the patent increases long-term consumer interests?

34. Azcuenaga, *supra* note 28, at 7 (describing the enforcement agency guidelines as "a very appropriate balance . . . between intellectual property and competition law").

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Organizations decision bristles with a sense of conflict between intellectual property lawyers who innately understand that “market power does not impose an obligation to license the use of that property to others” and antitrust lawyers to whom that “concept . . . is not as obvious.”³⁵ Later, she offers a rule of thumb that if intellectual property is properly obtained and the holder has not “somehow expanded the scope of the intellectual property right . . . then there should be no need to apply antitrust law.”³⁶ This view of the law weds us to a continued conflict: The scope of the right concept permits conduct under the intellectual property laws that the antitrust laws—through consumer welfare analysis—would prohibit.³⁷

If this conflict persists, so too does the need for integrated antitrust and intellectual property regulatory regimes in information platform industries. If antitrust can never compel the holder of intellectual property to license that technology to competitors, industry-specific regulation will be required whenever compulsory licensing is necessary to enhance consumer welfare. But the conflict need not persist if the nagging reluctance to

35. *Id.*

36. *Id.* at 11; *see id.* at 20 (questioning whether an agency challenge to a patent litigation settlement in which one party agrees not to compete in a way that infringes a patent should require a showing that the patent is invalid).

37. The text treats the *scope of the grant* as an intellectual property right that can be exploited by its holder irrespective of the impact on consumer welfare. No doubt, however, proponents of scope-of-the-grant analysis believe that protecting intellectual property rights in this fashion would redound to the benefit of consumers by increasing incentives to innovate. But antitrust should already incorporate that long-run benefit into its consumer welfare analysis. So, if the purpose of scope-of-the-grant analysis is instrumental rather than rights based, there is arguably no need for it. Still, scope-analysis proponents may see value in a bright-line rule insulating intellectual property rights from antitrust challenge. Adopting a conclusive presumption or rule of *per se* legality would provide a measure of certainty to those investing in the development of new products and services. And by reducing the risk of antitrust liability for procompetitive investment, the law would spur that sort of competition. Historically, however, antitrust doctrine has resisted calls for rules of *per se* legality, even in an area such as predatory pricing where the arguments have been quite persuasive. Compare Frank E. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 268, 333-37 (1981) (calling for a rule of *per se* legality with respect to predatory pricing claims), with *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) (failing to adopt a rule of *per se* legality for predatory pricing claims).

Perhaps the most fundamental problem with scope-of-the-grant analysis is that it provides no real guidance as to what should be permissible. I don't think that anyone has ever improved on the late Bill Baxter's illustration: “[A] promise by the licensee to murder the patentee's mother-in-law is as much ‘within the patent monopoly’ as is the sum of \$50; and it is not the patent laws which tell us that the former agreement is unenforceable and subjects the parties to criminal sanctions.” William F. Baxter, *Legal Restrictions on Exploitation of the Patent Monopoly: An Economic Analysis*, 76 YALE L.J. 267, 277 (1966).

abandon the paradigm of conflict can be understood and explained away.

B. Explaining the Persistent Paradigm of Conflict Through History and Misunderstanding

The continuing desire to give intellectual property a privileged place among all commercially productive property may arise from four concerns:

1. Fears that were created at a time when antitrust's goals were much less clear;
2. A misunderstanding about Congress' intent in enacting and amending the Patent Act;
3. The failure to explore carefully the real and imagined differences between intellectual and other forms of property; and
4. A concern that antitrust in practice is incapable of respecting the long-run competitive benefits that flow from strong intellectual property protection.

Historically, basic antitrust doctrine was so hostile to intellectual property rights that special protections were needed to ensure that the consumer welfare benefits from innovation were not sacrificed to the short-run consumer welfare benefits of price competition. Those special protections created an atmosphere in which intellectual property was perceived to be different from other forms of property. While antitrust has been carefully examined and has evolved appropriately, the relationship between intellectual and other forms of property for antitrust purposes has received less attention. A careful analysis reveals that there are no compelling reasons to treat intellectual property differently than any other form of property.

1. The Historical Evolution of the Paradigm of Conflict

The paradigm of conflict between antitrust and intellectual property law is in part an outgrowth of the mechanisms developed over the years to compensate for the incorrect assumptions that antitrust courts once applied. For many years, courts wrongly proclaimed that intellectual property rights always conferred market power.³⁸ Assuming that to be true, permitting the

38. Tom & Newberg, *supra* note 20, at 169-71. Examples of early antitrust cases involving intellectual property issues include: *E. Bement & Sons v. Nat'l Harrow Co.*, 186 U.S. 70, 91 (1902) (commenting that "[t]he very object of [the patent laws] is monopoly"); *Henry v. A.B. Dick Co.*, 224 U.S. 1 (1912) (approving the defendant's tie

full scope of antitrust regulation appropriate to parties that have market power would have seriously undermined the social utility of creating intellectual property rights in the first place. But ignoring antitrust principles whenever a party acted with the cover of an intellectual property right would have seriously undermined the consumer welfare goals of the antitrust laws.

The accommodation of this conflict arose in the context of intellectual property doctrines.³⁹ In general, an intellectual property right was deemed not to violate the antitrust laws. But, conduct that exceeded the scope of the patent grant—whatever that might mean—could open the door to virtual *per se* antitrust analysis.⁴⁰ Now that it is well understood that intellectual property rights do not create market power, there should be no need for special privileges for intellectual property.⁴¹

of a patented mimeograph machine to unpatented supplies), *overruled by* W. Elec. Co. v. Gen. Talking Pictures Corp., 16 F. Supp. 293 (S.D.N.Y. 1936); Motion Picture Patents Co. v. Universal Film Mfg. Co. 243 U.S. 502 (1917) (finding unlawful a license agreement requiring a user of the defendant's film projector to show only defendant's motion pictures); United States v. Gen. Elec. Co., 272 U.S. 476 (1926) (approving a price-fixing agreement in a patent license); Cabrice Corp. v. Am. Patents Dev. Corp., 283 U.S. 27 (1931) (finding unlawful a license agreement requiring the purchaser of defendant's ice box to use only dry ice). The perception of such a conflict between antitrust and intellectual property, however, is still evident in some more recent decisions. See United States v. Westinghouse Elec. Corp., 648 F.2d 642, 646 (9th Cir. 1981) ("[T]here is an obvious tension between the patent laws and the antitrust laws" because "[o]ne body of law protects monopoly power while the other seeks to proscribe it." (citing E. Bement & Sons v. Nat'l Harrow Co., 186 U.S. 70, 91 (1902))); SCM Corp. v. Xerox Corp., 645 F.2d 1195, 1203 (2d Cir. 1981) ("When . . . the patented product is so successful that it evolves into its own economic market. . . the patent and antitrust laws necessarily clash."); DiscoVision Assocs. v. Disc Mfg. Inc., 42 U.S.P.Q.2d 1749, 1756 (D. Del. 1997).

39. See, e.g., United States v. Line Materials Co., 333 U.S. 287, 308 (1948).

40. Tom & Newberg, *supra* note 20, at 171-72 (explaining that patents were believed to convey limited monopolies "in a formalistic sense, by the metes and bounds of the patent grant. Within the scope of the patent conferred by Congress, the right of the patent holder was almost absolute. One step over the line demarcated by the patent grant, however, and the patent holder subjected himself to potential antitrust liability, to loss of enforceability of the patent through the doctrine of patent misuse, or both."). For a recent example of this approach see *DiscoVision*, 42 U.S.P.Q.2d at 1756:

The court recognizes that there is an obvious tension between the patent laws and the antitrust laws since one body of law protects monopoly power while the other seeks to proscribe it. The patent laws grant a monopoly for "any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof" for a varying term. Section 2 of the Sherman Act makes it a felony "for every person who shall monopolize, or attempt to monopolize . . . any part of trade or commerce." Consequently, any anticompetitive effect giving rise to antitrust liability must extend beyond the anticompetitive effect implicit in the grant of a patent.

Id. (footnotes, citations, and internal quotations omitted).

41. The lack of Supreme Court precedent rejecting the presumption of market power in antitrust cases may be a source of some apprehension. Jefferson Parish

2. Congress Intended to Accord Intellectual Property the Same Rights as Other Property

Many invoke the Patent Act—particularly § 154, which creates the general right to exclude, and § 271(d), which codifies a patent-holder’s right to sue an infringer even though the patent-holder has chosen not to license⁴²—as a Rosetta stone, signifying that Congress has rejected in any and all circumstances a requirement that a patent holder cooperate with a competitor.⁴³ But those sections of the Patent Act speak only to intellectual property law; they do not create antitrust immunity.⁴⁴ On the contrary, they simply bring intellectual property law in line with long standing antitrust doctrine that generally privileges any competitor’s right—even a monopolist’s—to refuse to deal with a potential competitor or customer.⁴⁵ But just as that right is not absolute when a firm with market power exploits non-intellectual forms of property, it is not absolute when a dominant firm exploits intellectual property.⁴⁶

Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 16 (1984) (commenting in dicta “if the government has granted the seller a patent or similar monopoly over a product, it is fair to presume that the inability to buy the product elsewhere gives the seller market power”). But most lower courts appear to be following the IP Guidelines and not the Court’s dicta. *See supra*, note 27.

42. 35 U.S.C. § 271(d) (2000) (“No patent owner otherwise entitled to relief for infringement . . . of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having . . . refused to license or use any rights to the patent . . .”).

43. 35 U.S.C. § 154 (2000) (authorizing a patentee “to exclude others from making, using or selling the invention . . .”).

44. The Supreme Court has been quite clear in cautioning against presuming broad immunities from antitrust liability. *See Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 421 (1986) (holding that “exemptions from the [Sherman Act] are strictly construed and strongly disfavored.”); *FMC v. Seatrain Lines*, 411 U.S. 726, 733 (1973); *Silver v. New York Stock Exch.*, 373 U.S. 341, 357 (1963).

45. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984); *United States v. Colgate*, 250 U.S. 300, 307 (1919). *See Melamed & Stoepfelwerth, supra* note 19, (manuscript at 6-7). Doug Melamed and Ali Stoepfelwerth have argued persuasively that the legislative history of the Patent Act also supports the view that these sections were enacted to place intellectual property on a level playing field with other property and not to create special protections. *Id.* at 7-9.

46. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 600-01 (1985).

[E]ven a firm with monopoly power has no general duty to [cooperate] with a competitor. . . .

. . . .

The absence of an unqualified duty to cooperate [, however,] does not mean that every time a firm declines to participate in a particular cooperative venture, that decision may not have evidentiary significance, or that it may not give rise to liability in certain circumstances The high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified.

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3. Debunking the Perceived Differences Between Intellectual and Other Forms of Property for Antitrust Purposes

The proponents of special treatment for intellectual property also point to differences between intellectual and other types of property. The issue, of course, is not whether differences can logically be identified, but whether they should affect the antitrust analysis. In fact, the differences are less pronounced than many commentators assume, and antitrust analysis can fully account for those differences.

a. The Intangible Character of Intellectual Property

One perceived difference is the intangible character of intellectual property. But all property rights are intangible.⁴⁷ The rights to exclude, use, and sell—the core sticks in the bundle of property rights—have the same essential character regardless of the type of property to which they are attached.⁴⁸ Interestingly, early courts applied the same antitrust analysis to both intellectual and other forms of property, prohibiting post-sale, but not pre-sale, price restraints in both cases.⁴⁹

Id. (footnote omitted).

47. *See, e.g.*, JEREMY BENTHAM, *THEORY OF LEGISLATION* 112-113 (4th ed. 1882). There is no image, no painting, no visible trait, which can express the relation that constitutes property. It is not material, it is metaphysical; it is a mere conception of the mind The idea of property consists in an established expectation; in the persuasion of being able to draw such or such an advantage from the thing possessed, according to the nature of the case.

Id.

48. For example, the right to exclude goes to the core of both real and intellectual property rights. *Compare* *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (holding that the right to exclude others from one's land is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."), *with* *USM Corp. v. SPS Tech., Inc.*, 694 F.2d 505, 513 (7th Cir. 1982) (Posner, J.) ("[T]he essence of the patent grant is to allow the patentee to exclude competition in the use of the patented invention"), *and* *Cont'l Paper Bag Co. v. E. Paper Bag Co.*, 210 U.S. 405, 429 (1908) (holding that the power to exclude others is "the very essence of the right" conferred by patent law), *and* 35 U.S.C. §154 (2000) (codifying the right to exclude granted by patent law). Copyright law also grants the copyright holder the right to exclude others from using the work. *See, e.g.*, *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (holding that the owner of a copyright is free to "refrain from vending or licensing" and may simply "content himself with . . . the right to exclude others from using his property.").

49. *Compare* *Adams v. Burke*, 84 U.S. 453, 456 (1873) ("[W]hen . . . the person having . . . rights [in a patent] sells . . . he parts with the right to restrict . . . use. The article . . . passes without the limit of the monopoly."), *with* *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) (applying same analysis to non-patented good). Only later did the Court explicitly distinguish intellectual property from other property rights. *See, e.g.*, *Simpson v. Union Oil Co. of Cal.*, 377 U.S. 13, 24 (1964).

b. The Limited Duration of Intellectual Property

Another common current basis for distinguishing intellectual property from other forms of property—its limited duration⁵⁰—is also much less fundamental to intellectual property than has been suggested. One typically thinks of a patent with a life limited to just 20 years in contrast to a fee simple in land or buildings, interests that exist in perpetuity. But that comparison surely overstates the real differences, because all property requires continued investment to remain commercially useful. Patent rights can—as a practical matter—be extended through investment in improvement patents and associated copyrights, which themselves have quite long lives. Other property rights, while theoretically existing in perpetuity, are typically attached to property—like a manufacturing plant—with a limited productive life. Unless significant additional investment is made in a particular piece of property, whether intellectual or otherwise, a useful life longer than 20 years is probably quite unusual.

c. The Cost of Protecting Intellectual Property

The apparent differences in an owner's ability to protect against misappropriation of property rights—the most common purported distinction⁵¹—is subject to much the same analysis.

50. Azcuenaga, *supra* note 28, at 6 (recognizing the complementary nature of antitrust and intellectual property law by pointing to differences attributable to the intangible quality and duration as well as the difficulty of enforcing the right to exclude). R

51. See IPG, *supra* note 22, at § 2.1 n.9 R

(As with other forms of property, the power to exclude others from the use of intellectual property may vary substantially, depending on the nature of the property and its status under federal or state law. The greater or lesser legal power of an owner to exclude others is also taken into account by standard antitrust analysis.);

Id., at § 4.1.2.

(The antitrust principles that apply to a licensor's grant of various forms of exclusivity to and among its licensees are similar to those that apply to comparable vertical restraints outside the licensing context, such as exclusive territories and exclusive dealing. However, the fact that intellectual property may in some cases be misappropriated more easily than other forms of property may justify the use of some restrictions that might be anticompetitive in other contexts.);

Id. at § 2.1.

(That is not to say that intellectual property is in all respects the same as any other form of property. Intellectual property has important characteristics, such as ease of misappropriation, that distinguish it from many other forms of property. These characteristics can be taken into account by standard antitrust analysis, however, and do not require the application of fundamentally different principles.);

Tom & Newberg, *supra* note 20, at 173 n.35. R

One naturally thinks again of a patent or copyright on display for all to see and a chattel that can be squirreled away. But antitrust analysis focuses on productive property that is used to enhance consumer welfare. All property of this type is subject to misappropriation of one sort or another and must be protected. Buildings and factories require security and insurance. Patents and copyrights require monitoring to guard against unfair use. Break-ins and thefts may often be more obvious than misappropriation,⁵² but they may also be more harmful. While the destruction or theft of real property or chattels typically renders that property useless, a patent or copyright holder's ability to use its property profitably is not necessarily impacted significantly by unauthorized use.⁵³ While obvious differences exist, the underlying character of the problem is the same.

The critical issue is whether it costs substantially more to protect intellectual property. That is an empirical question about which I have seen little data. But my anecdotal experience representing clients competing in, and conducting antitrust investigations of, intellectual-property-intensive industries suggests that the threat of patent and copyright infringement litigation is a powerful tool against misappropriation.⁵⁴ That is not to say that this threat renders the protection of intellectual property rights a trivial matter. But it does suggest that one should not assume that protecting intellectual property rights is more expensive than protecting other types of property rights.

Even if there were a difference between intellectual property and other types of property, there would be no need to create a conflict between the two legal regimes to account for that difference. Antitrust law alone is fully capable of internalizing any differences that relate to consumer welfare. And differences relating to the cost of misappropriation surely relate to consumer welfare. Inadequate protection against theft of chattels could discourage private investment, redounding to the detriment of consumers. Antitrust should thus view theft protection mechanisms—e.g., protection of customer lists—as procompetitive practices, justifiable even in the face of some anticompetitive effect. In the same way, inadequate protection against misappropriation of intellectual property rights would discourage private investment, redounding to the detriment of consumers. Anti-

52. See sources cited *supra* note 51.

53. I'd like to thank John Tiranian for reminding me of this point by discussing it in a talk he gave at Thomas Jefferson School of Law in late November 2001.

54. See, e.g., *Tronzo v. Biomet*, 236 F.3d 1342, 1347-50 (Fed. Cir. 2001) (approving \$20 million punitive damage award in patent infringement case).

trust should thus view restrictive licensing terms that guard against misappropriation—e.g., certain field-of-use restrictions—as procompetitive practices that may be justifiable even in the face of some anticompetitive effect. In both cases, the result should turn entirely on the antitrust analysis of the value of the pro- and anti-competitive effects of the restriction at issue rather than a formalistic analysis of whether the property holder exceeded the scope of the grant.⁵⁵

d. The Dynamic Character of Intellectual Property-intensive Markets

Another potential difference between intellectual property and other forms of property arises not from the character of the property itself, but from its role in a particular form of industrial production. Many information platform markets are highly dynamic, and some argue that as a result apparent market power is likely to be short-lived as new entrants with new and better products and technologies leap frog the current dominant players.⁵⁶ To be sure, the importance of intellectual property to information platforms creates opportunities for competition that do not exist in heavy industry.

But that difference is easily overstated. Traditional property assets continue to play important roles in both wired and wireless systems. And network effects—the value of a network rises with the number of users—create the potential for anticompetitive harm that was unlikely to arise in heavy industry.⁵⁷ A first mover in an information platform market may have advan-

55. See Tom & Newberg, *supra* note 20, at 174 n.35 (“[A]ntitrust principles of the rule of reason already take into account these differences in assessing the competitive benefits and harms of a practice in a particular market circumstance.”); *id.* at 176 (“Rather than focusing on whether the defendant’s conduct falls inside or outside the narrow scope of the patent grant, the Guidelines’ approach scrutinizes the actual competitive effects of the practice.”).

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56. See, e.g., Pitofsky, *supra* note 5, at 916; Klein, *supra* note 4 (“Especially in network industries, questions of exclusive dealing, control over essential facilities, and the use of market power can raise significant antitrust concerns.”); Joel I. Klein, Re-thinking Antitrust Policies for the New Economy, Address to the Haas/Berkeley New Economy Forum (May 9, 2000), available at <http://www.usdoj.gov/atr/public/speeches/4707.htm> (“In our business, there are generally about a half-dozen or so of these techniques and they are used in the new economy in much the same way that they were used in the old.”).

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57. See Pitofsky, *supra* note 5, at 916. For a broad ranging discussion of network effects in law and economics, see Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479 (1998), Michael L. Katz & Carl Shapiro, *Systems Competition and Network Effects*, 8 J. ECON. PERSP. 93, 94 (1994) (“Because the value of membership [in a network] to one user is positively affected when another user joins and enlarges the network, such markets are said to exhibit ‘network effects’ or ‘network externalities.’”), and Michael L. Katz &

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tages over competitors because of the value of compatibility and interoperability.⁵⁸ Consumers are reluctant to switch to new networks because of investments in hardware and time spent learning a system.⁵⁹ Suppliers of ancillary products—knowing the reluctance of consumers to switch—are unlikely to provide support to new competitors.⁶⁰ Brand name recognition and the consumer confidence it inspires may be even more powerful barriers to new competition in information platform industries where consumers rely heavily on suppliers for continuing support.⁶¹ While antitrust must be attentive to the interests of consumers in dynamic industries, the potential for competitive mischief counsels strongly against bright line exemptions for intellectual property.

4. A Lack of Confidence in the Ability of Antitrust Courts to Strike the Delicate Balance Between Short-run and Long-run Consumer Welfare Effects

While Congressional intent, history, and the improperly assumed *differences* between intellectual property and other property are partly responsible for the difficulty many have accepting an antitrust-driven regulatory program for information platforms, a deeper concern may motivate the most thoughtful skeptics. Antitrust doctrine is most widely accepted when it deals with short-run competitive concerns like price fixing and market division. Even cases that compel affirmative cooperation tend to deal predominantly, if not entirely, with the short-run competitive effects of refusals to deal. Some may question whether antitrust—even if it has abandoned the mistaken assumption that intellectual property creates market power—is capable of safeguarding the consumer-welfare enhancing benefits of innovation over the long term, the very benefits most directly enhanced by the intellectual property laws.⁶²

Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 AM. ECON. REV. 424, 424 (1985).

58. See Pitofsky, *supra* note 5, at 916.

59. *Id.*

60. *Id.*

61. *Id.*

62. Michelle Burtis and Bruce Kobayashi present this view explicitly: Limits on Section 2 monopolization claims applied to intellectual property refusals to deal are necessary to reduce the costs of type I error by ensuring that the patent, copyright, and antitrust laws “promote the progress of science and the useful arts.” . . . Because economists and courts do not fully understand the innovation process, they are unlikely to be able reliably to differentiate between pro-competitive and anti-competitive effects of conduct. Thus, there

Many antitrust/intellectual property cases require just this sort of balance. Condemning a licensing practice will often enhance short-run consumer welfare by increasing output and lowering prices given the existing technology, as long as the technology is still licensed. But a legal action of this type would reduce the value of intellectual property and thereby reduce the incentives of firms to innovate better and cheaper technologies in the future. In theory, antitrust alone can deal with this problem because it is properly concerned with both short- and long-term consumer welfare. Nevertheless, skeptics may fear that in practice antitrust doctrine is not precise enough or nimble enough to strike the appropriate balance.

This practical concern lies at the root of the most sophisticated arguments against giving antitrust its full scope in intellectual property cases. For example, Carl Shapiro has expressed concern that vigorous antitrust enforcement might hinder efforts to employ cross-licensing and patent pooling arrangements that are necessary to optimize innovation and enhance consumer welfare in certain intellectual-property-intensive industries.⁶³ But this concern boils down to a lack of faith in the ability of antitrust enforcers to take full account of the long run benefits of cross-licensing and pooling. If those practices do in fact create more efficient use of patented technology, they should benefit consumers and therefore not run afoul of the antitrust laws.

David McGowan also offers a thoughtful argument in favor of special protection for intellectual property where the owner engages in a pure refusal to deal. Exposing a pure refusal to potential liability, he contends, would undermine the return structure pre-supposed by the intellectual property laws to be

will be a high incidence of type I errors. If the expected cost of type II errors is likely to be small when courts give antitrust immunity to a refusal to deal involving only patented parts and copyrighted works, this immunity will reduce total error costs. This analytical framework also would reduce direct costs by resolving such cases at an early stage on summary judgment.

Michelle M. Burtis & Bruce H. Kobayashi, *Why an Original Can Be Better than a Copy: Intellectual Property, the Antitrust Refusal to Deal, and ISO Antitrust Litigation*, 9 SUP. CT. ECON. REV. 143, 155, 158 (2001) (footnotes omitted).

63. Carl Shapiro, *Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard-Setting*, in INNOVATION POLICY AND THE ECONOMY 3 (Adam Jaffe et al. eds., 2001), available at <http://haas.berkeley.edu/~shapiro/thicket.pdf>, at 3.

(Under these circumstances, we can ill afford to further raise transactions costs by making it difficult [for] patentees possessing complementary and potentially blocking patents to coordinate to engage in cross-licensing, package licensing, or to form patent pools. Yet antitrust law can potentially play such a counterproductive role, especially since antitrust jurisprudence starts with a hostility towards cooperation among horizontal rivals.)

necessary to provide adequate incentives to innovate.⁶⁴ But if McGowan means that absolute discretion to refuse to deal in the pure case is a necessary condition to providing adequate incentives to innovate in the telecommunications industry, he would almost surely be mistaken.⁶⁵

Absolute protection for an initial innovator will undermine the incentives of follow-on innovators who could be blocked by the initial innovator from implementing their improvement or have all of their profits taxed away as royalties. To conclude that a regime of absolute refusal rights would provide appropriate incentives to innovate would require three debatable presumptions: (1) that the first inventor would choose to license the most efficient follow-on technologies, (2) that it would choose a royalty rate that provided sufficient incentives to follow-on innovators, and, most heroically, (3) that follow-on innovators would realize all of this *ex ante*.⁶⁶ Given the number of closely related patent grants in telecommunications industries, an absolute right to refuse to deal is more likely to stymie innovation than foster it.⁶⁷ A

64. David McGowan, *Innovation, Uncertainty, and Stability in Antitrust Law*, 16 BERKELEY TECH. L.J. 729, 781-82 (2001) (“A unilateral refusal to license a work protected by a lawfully acquired intellectual property right is nothing more than the exercise of economic power that Congress has granted, and it should not be made the basis for a claim under the antitrust laws.”); David McGowan, *Networks and Intention in Antitrust and Intellectual Property*, 24 J. CORP. L. 485, 523 (1999) (“The intellectual property laws imply a rate-of-return structure based on the right to exclude and on accompanying limitations; imposing antitrust liability in a case of pure exclusion would fundamentally alter that structure.”).

65. Ian Ayres & Paul Klemperer, *Limiting Patentees’ Market Power Without Reducing Innovation Incentives: The Perverse Benefits of Uncertainty and Non-injunctive Remedies*, 97 MICH. L. REV. 985, 987 (1999)

(Legal scholars have failed to appreciate that unconstrained monopoly pricing is not a cost-justified means of rewarding patentees. . . . [A]llowing patentees to raise price all the way to the monopoly level is a little like giving them a license to steal car radios—it produces a social cost (to car owners) far greater than the private benefit.).

66. Linda R. Cohen & Roger G. Noll, *Intellectual Property, Antitrust and the New Economy*, 62 U. PITT. L. REV. 453, 460-61 (2001). Cohen and Noll suggest that recent calls for absolute intellectual property rights effectively abandon the goal of providing incentives to innovate to improve consumer welfare in favor of “maximizing the wealth of current rights holders regardless of the effects on aggregate economic welfare.” *Id.* at 473.

67. MA Heller & RS Eisenberg, CAN PATENTS DETER INNOVATION? THE ANTI-COMMONS IN BIOMEDICAL RESEARCH, SCIENCE 280, 698-701 (1998); SHAPIRO, *supra* note 63, at 6-8; FEDERAL TRADE COMMISSION STAFF REPORT, COMPETITION POLICY IN THE NEW HIGH-TECH GLOBAL MARKETPLACE, at 6 (May 1996)

([S]ome people jump . . . to the conclusion that the broader the patent rights are, the better it is for innovation, and that isn’t always correct, because we have an innovation system in which one innovation builds on another. . . . the breadth and utilization of patent rights can . . . have adverse effects in the long run on innovation.).

finely tuned antitrust enforcement policy that takes full account of the long-run benefits of innovation, and occasionally compels cooperation, is more likely—at least in theory—to fulfill the goals of the intellectual property laws than a meat-ax, absolute property right to refuse to deal.⁶⁸ McGowan's concern then, like Shapiro's, is best understood not as a theoretical legal or economic argument, but as a practical one. Even if antitrust theoretically accounts for long-run incentives, they doubt that as a practical matter it could ever be so finely tuned.

This fear is understandable. But there are reasons to believe that antitrust can carefully discriminate between the many refusals to deal with long-run pro-competitive effects and the few that would harm consumer welfare. Antitrust courts have for decades performed a similar balancing act when they evaluate competitive restraints among joint venturers.⁶⁹ A joint venture is a cooperative effort among otherwise separate and competing firms. By definition, joint venturers surrender some of their independent decision-making authority to the venture, restraining short-run competition, and if the venture has market power, lessening consumer welfare in the short run. But joint ventures often provide efficiencies realized over the long term that enhance consumer welfare. When a particular joint venture practice is challenged as an antitrust violation, the courts must balance the procompetitive benefits of the joint venture against the anticompetitive effects of the restraint.⁷⁰ This balance is not

Alternatively, McGowan's views might be read as an interpretation of what Congress intended in the Patent Act, however ill-advised. Doug Melamed and Ali Stoepelwerth have argued persuasively against that interpretation of the patent laws. Melamed & Stoepelwerth, *supra* note 19, at 12-13.

68. Cf. F.M. Scherer & David Ross, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 456-57 (2nd ed. 1980) ("All in all, the substantial amount of evidence now available suggest that compulsory patent licensing, judiciously confined to cases in which patent-based monopoly power has been abused . . . would have little or no adverse impact on the rate of technological progress.")

69. See, e.g., *SCFC ILC, Inc. v. Visa USA Inc.*, 36 F.3d 958, 964-65 (10th Cir. 1994); *Sullivan v. NFL*, 34 F.3d 1091, 1102; *Los Angeles Mem'l Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1395 (9th Cir. 1984) ("[T]he rule of reason inquiry requires us to consider the harms and benefits to competition caused by the [joint venture] restraint . . ."); *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 399 (S.D.N.Y. 2001) (recognizing that even in the case of joint ventures, "the rule of reason still requires an analysis of whether the injury to competition effected by the restraint outweighs its purported benefits").

70. Gregory J. Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 *ANTITRUST L.J.* 701, 708 (1998) ("Precisely how a restraint furthers the procompetitive purposes of the venture and why obvious less restrictive means would not adequately accomplish the same ends must be evaluated in the factual context of each joint venture."); *id.* at 720 (explaining that once a plaintiff shows a potential anticompetitive effect from a joint venture restraint, the venture "must put forward

fundamentally different from the balance that would be required in intellectual property cases.⁷¹

C. Enforcement Agency Support for an Antitrust-Driven Approach

The Clinton era antitrust regulators were poised to give antitrust the broad scope that would have enabled it to serve as an effective regulatory tool for information platform markets. This view is reflected quite explicitly in a speech by the then-Chairman of the FTC, Robert Pitofsky, the agencies' jointly-issued Intellectual Property Guidelines (IP Guidelines), and the amicus brief filed by the United States respecting the petition for certiorari from the Federal Circuit in *CSU v. Xerox*.

In a 2001 speech, Pitofsky portrayed antitrust as fully capable of resolving competitive problems in intellectual property dominant industries while criticizing cases suggesting that intellectual property deserved something less than full antitrust scrutiny.⁷² In particular, Pitofsky criticized the Federal Circuit's "sweeping language that exalts patent and copyright rights over other consideration and throws into doubt the validity of previous lines of authority that attempted to strike a balance between intellectual property and antitrust."⁷³

In the IP Guidelines, the enforcement agencies state that "[a]n intellectual property owner's rights to exclude are similar to the rights enjoyed by owners of other forms of private property."⁷⁴ Regardless of the form of property, "certain types of conduct . . . may have anti-competitive effects against which the antitrust laws can and do protect. Intellectual property is thus neither particularly free from scrutiny under the antitrust laws,

evidence demonstrating a clear causal nexus between the restraint and the social benefit and indicate why the social benefit could not reasonably be achieved in a substantially less anticompetitive manner."

71. Pitofsky, *supra* note 5, at 923-24 ("Traditionally, cases at the intersection between intellectual property and antitrust have been analyzed by examining the impact on economic incentives to innovate and balancing them against the anticompetitive effects."); E. Thomas Sullivan, *The Confluence of Antitrust and Intellectual Property at the New Century*, 1 MINN. INTELL. PROP. REV. 1, 18 (2000) ("Rule of reason analysis permits the courts to compare the innovation and competition benefits of protecting intellectual property rights with the anticompetitive effects of the defendant's conduct.")

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72. Pitofsky, *supra* note 5, at 920 ("I am concerned that recent cases, and particularly the Federal Circuit's opinion in Independent Service Organizations Antitrust Litigation (Xerox), have upset th[e] traditional balance [between antitrust and intellectual property] in a way that has disturbing implications for the future of antitrust in high-technology industries.")

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73. *Id.*

74. IPG, *supra* note 22, at § 2.1.

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nor particularly suspect under them.”⁷⁵ A careful reading of the IP Guidelines demonstrates that the agencies seldom stray from that position.

In the more recent *CSU v. Xerox* brief, the government demonstrated a continued commitment to the fundamental principle that antitrust applies to intellectual property without special safeguards. It recommended against granting certiorari to review the Federal Circuit’s decision apparently to truncate antitrust’s applicability to an intellectual property holder’s refusal to deal. But the Government did not endorse the Federal Circuit’s approach. Instead, it pointed to ambiguities in the opinion suggesting that the Federal Circuit may not have meant what it said.⁷⁶

The Government’s brief endorsed a vision of antitrust that takes account of the procompetitive affects of strong intellectual property protection without looking to intellectual property doctrine. “If the Federal Circuit had clearly held that a refusal to sell or license property protected by a valid patent may never be the basis of an antitrust violation except in the circumstances of an illegal tying arrangement,” the Government wrote, “we would have serious concerns about such a holding and would not be prepared to endorse it.”⁷⁷ Throughout the brief, the Government studiously avoided any reference to intellectual property concepts such as the scope of the patent when describing its own views.⁷⁸ “[T]he antitrust laws, properly construed,” it argued,

75. *Id.*

76. See Brief for the United States as Amicus Curiae at 7-8, *CSU L.L.C. v. Xerox Corp.*, 531 U.S. 922 (2000) (No. 00-62), *cert. denied*, 531 U.S. 1143 (2001), available at <http://www.usdoj.gov/osg/briefs/2000/2pet/6invt/2000-0062.pet.ami.inv.pdf> [hereinafter *Gov. CSU Br.*].

First, there are significant ambiguities in the decision below about the applicability of antitrust law to intellectual property. Unlike petitioners, we do not believe the Federal Circuit’s decision must be read as holding that no Section 2 claim may ever be based on the unilateral refusal to sell or license such intellectual property (even setting aside the three circumstances expressly recognized by the court of appeals in its decision in which an antitrust claim could be based on such a unilateral refusal to deal). While it is conceivable that the court of appeals intended to go that far, its opinion does not compel that conclusion, and that uncertainty makes this case an undesirable one for resolving the important issues presented.

Id.

77. *Id.* at 10.

78. The concept of the “scope of the intellectual property right” is an uncertain one that is likely given different meanings in different contexts. At its core, however, is the intellectual property law concept that a patent or copyright grant includes certain rights within its scope, just as a fee simple grant includes certain rights within its scope. While consumer welfare considerations, among others, may impact the definition of all property rights in general, the question of the scope of a

“afford ample scope for the exercise of lawfully obtained intellectual property rights.” A patent holder’s statutory right to exclude others from making, using or selling,⁷⁹ the government recognized, is no different in kind from the right to exclude enjoyed by all tangible property holders.⁸⁰

Regardless of the source of market power, the antitrust laws do not interfere with the efforts of those who “have advanced the common well-being to benefit fully from their contributions.”⁸¹ Antitrust permits even a monopolist—whether an intellectual property holder or not—to charge whatever price the market will bear, recognizing the benefits to consumers that result from the “skill, foresight and industry” that is thereby encouraged.⁸² Contrary to the view that intellectual property holders need special protections, the government maintained, antitrust has long recognized that a monopolist may exploit its well earned position by choosing with whom to do its business.⁸³ Only when a monopolist attempts to exclude rivals,—at the expense of increasing its own profit made possible by the monopoly,—in order to expand its market power do the antitrust laws permit a court to impose liability.⁸⁴ Given the carefully crafted parameters of the antitrust laws, the government saw no need to make “patent holders immune from liability under Section 2.”⁸⁵

property right in a particular case does not turn on whether recognizing the right will advance or detract from consumer welfare. In this way, an analysis of the scope of the right differs from an antitrust analysis, which always turns exclusively on consumer welfare-driven goals.

79. See 35 U.S.C. § 154(a)(1) (2000).

80. See *Gov. CSU Br.*, *supra* note 76, at 10-11 (citing and quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979), characterizing the right to exclude as “one of the most essential sticks in the bundle of rights that are commonly characterized as property”); *Consol. Fruit Jar Co. v. Wright*, 94 U.S. 92, 96 (1896) (“A patent for an invention is as much property as a patent for land. The right rests on the same foundation and is surrounded and protected by the same sanctions.”).

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81. *Gov. CSU Br.*, *supra* note 76, at 11.

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82. *Id.* (quoting *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945) (L. Hand, J.)).

83. See *Gov. CSU Br.*, *supra* note 76, (citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984)); *United States v. Colgate*, 250 U.S. 300, 307 (1919) (“In the absence of any purpose to create or maintain a monopoly, the [Sherman] act does not restrict the long recognized right of a trader or manufacturer . . . freely to exercise his own independent discretion as to parties with whom he will deal.”).

84. See *Gov. CSU Br.*, *supra* note 76, at 12 (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985) (“[a]ttempting to exclude rivals on some basis other than efficiency”) (internal quotations omitted); *BORK*, *supra* note 3, at 144 (defining predation as conduct “that would not be considered profit maximizing except for the expectation” of a resulting reduction in competition)).

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85. *Gov. CSU Br.*, *supra* note 76, at 12-13 (citing *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 480 n.29 (1992); see *AREEDA & HOVENKAMP*, *supra* note 8, at 229, ¶ 704.1 (Supp. 2000) (discussing potential antitrust liability

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The realization that both antitrust and intellectual property serve the same goals should enable law makers to choose their tools more precisely. Intellectual property law should govern the acquisition and scope of intellectual property rights. Antitrust should govern the use of those property rights in the marketplace, just as it governs the use of other property rights.⁸⁶ No special accommodation is needed for patents and copyrights, because antitrust doctrine now recognizes that the mere use of intellectual property in certain formalistic ways does not raise antitrust concern.⁸⁷ The abuse of market power is the key issue in intellectual property cases just as it is in all other cases. Where an intellectual property holder has no market power, the use of his property raises no antitrust concern. But where market power exists, antitrust should pay close attention. The concept of the scope of the intellectual property right and similar intellectual property doctrines are simply unnecessary and unhelpful in answering the consumer welfare question.⁸⁸ It remains to be seen whether the current antitrust enforcement

from refusals to license intellectual property in conditions such as price fixing, reciprocity, and exclusive dealing).

86. IPG, *supra* note 22, at § 2.0 (“for the purpose of antitrust analysis, the Agencies regard intellectual property as being essentially comparable to any other form of property”); *id.* at § 2.1 n.9

(“As with other forms of property, the power to exclude others from the use of intellectual property may vary substantially, depending on the nature of the property and its status under federal or state law. The greater or lesser legal power of an owner to exclude others is also taken into account by standard antitrust analysis.”)

Id.

Intellectual property law bestows on the owners of intellectual property certain rights to exclude others. These rights help the owners to profit from the use of their property. An intellectual property owner’s rights to exclude are similar to the rights enjoyed by owners of other forms of private property. As with other forms of private property, certain types of conduct with respect to intellectual property may have anticompetitive effects against which the antitrust laws can and do protect. Intellectual property is thus neither particularly free from scrutiny under the antitrust laws, nor particularly suspect under them.

Id.

87. This article does not advocate a return to the era of the “Nine No-Nos,” the laundry list of nine – more or less – patent licensing practices that may at one time have been thought to raise serious anticompetitive concerns by virtue of their form alone. Tom & Newberg, *supra* note 20, at 178-81.

88. This is not to say that we should simply go about enforcing the antitrust laws without thinking about the interests of intellectual property holders. On the contrary, the FTC hearings on these issues should yield useful information about the competitive dynamics of intellectual property intensive industries. The point is that the goal of these hearings should be to understand competition more fully and thereby apply the antitrust laws more appropriately. They should not be seen as a platform to trumpet immunity for intellectual property holders from antitrust scrutiny.

authorities will follow this approach or whether the ebb and flow of the antitrust/intellectual property paradigm of conflict will once again flow back in the opposite direction.

III. ANTITRUST-BASED REGULATION WOULD NOT VIOLATE THE FIRST AMENDMENT AND COULD ADEQUATELY PROMOTE FREE SPEECH VALUES

Antitrust's relationship to the First Amendment, and free speech values more generally, has received less attention than the antitrust/intellectual property intersection. But the relationship is surprisingly similar. Just as antitrust's consumer welfare goal incorporates the values advanced by the intellectual property laws, that goal enables antitrust-based regulation to avoid conflict with the First Amendment and, more controversially, to enhance free speech values more generally.

Because information platforms deal in speech, regulating them necessarily impacts First Amendment values. But using antitrust as the regulatory benchmark can eliminate virtually any need to incorporate free speech legal doctrine into the regulatory framework. With respect to core political speech designed to influence government decisions, antitrust doctrine has its own firewall—the *Noerr/Pennington* doctrine—blocking antitrust enforcement that might tread on First Amendment values.⁸⁹ With respect to commercial speech, antitrust's consumer welfare enhancing goals have been held sufficiently important and reasonably tailored to avoid conflict with First Amendment interests even where the antitrust violation arises from a *per se* presumption of consumer harm rather than proof of actual market power.⁹⁰ A difficult question remains, however, as to whether additional industry-specific regulation is needed to promote free speech values. While the case law is less definitive, antitrust's

89. See, e.g., *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988).

90. See *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 428-36 (1990) (rejecting First Amendment challenge to a *per se* price fixing judgment by court-appointed criminal defense lawyers who were using a boycott to seek a fee increase); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662-663 (1994) (holding that "promoting fair competition in the market for television programming" is "an important government interest"); *id.* at 664 ("[T]he Government's interest in eliminating restraints on fair competition is always substantial, even when the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment."); *id.* at 672 (Stevens, J., concurring in part and concurring in the judgment) ("An industry need not be in its death throes before Congress may act to protect it from economic harm threatened by a monopoly. . . . The must-carry mechanism is analogous to the relief that might be appropriate for a threatened violation of the antitrust laws").

consumer welfare goals and market-enhancing tools may be the best available safeguards for the marketplace of ideas.

A. *Antitrust Does Not Apply to Efforts to Influence Governmental Action*

More than 40 years ago, the Court avoided the need to test the Sherman Act against a First Amendment challenge by declaring that the antitrust laws were not intended to regulate political activity.⁹¹ The Court has thus held that cooperative efforts to achieve government action that would lessen consumer welfare are not subject to antitrust scrutiny. Neither are the collateral anticompetitive effects of a lobbying campaign.⁹² In short, political speech is fully insulated from antitrust challenge.⁹³

B. *Full Antitrust Scrutiny is Applied to Commercial Speech*

The Supreme Court has held unequivocally that antitrust may be applied without alteration to industries that deal in speech and to cases where the remedy necessarily limits speech. In either case, the harm needed to prove the antitrust violation is sufficient to justify any effect on free speech. This result contrasts sharply with industry-specific regulation that does not require proof of antitrust harm.⁹⁴

1. *Antitrust Applies With Full Force to Industries that Deal in Speech*

Applying antitrust to an industry in which the commodity traded is speech probably does not implicate the First Amendment at all.⁹⁵ While the specific parameters of the doctrine exempting laws of general applicability from First Amendment

91. See *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136-37 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 671 (1965).

92. See *Eastern R.R.*, 365 U.S. at 143-44.

93. Conversely, conduct that directly restrains trade is not protected if it amounts to a sham attempt to influence government policy, *California Motor Transp. v. Trucking Unlimited*, 404 U.S. 508, 512-13 (1972), or if the restraint is directly imposed by self-interested, private parties. *Allied Tube*, 486 U.S. at 502.

94. See generally Stuart M. Benjamin, *Proactive Legislation and the First Amendment*, 99 MICH. L. REV. 281 (2000) (discussing the First Amendment review of regulatory legislation based on predictions of future harm).

95. See *Turner Broad. Sys.*, 512 U.S. at 640-41; *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566-67 (1991).

review remain uncertain,⁹⁶ there appears to be broad agreement that the generally applicable antitrust laws apply fully to speech-oriented industries despite the incidental impact the law may have on the ability of those industries to communicate their message.⁹⁷

2. Speech-Related Antitrust Offenses and Remedies are Not Subject to First Amendment Scrutiny

Antitrust is also applied without alteration to specific offenses that involve speech and remedies that restrain it. In *Superior Court Trial Lawyers Association*, the Court assumed that a boycott by court-appointed criminal defense lawyers served an important goal of increasing the quality of representation for criminal defendants *that could not have been effectively achieved by other forms of speech*.⁹⁸ Even though the antitrust judgment in that case would have withstood scrutiny under First Amendment principles, the Court went out of its way to emphasize that

96. On the one hand, Justice Scalia has argued that generally applicable laws that restrain only conduct should not be subject to First Amendment scrutiny unless the purpose of the law is to restrain the communicative impact of the conduct. *Barnes*, 501 U.S. at 578 (Scalia, J., concurring in judgment). On the other hand, other members of the Court apply the O'Brien test in situations where a generally applicable law has a significant impact on communicative conduct. *Id.* at 566-72. By contrast, industry specific regulation that restrains speech is subject to searching First Amendment scrutiny. *Turner Broad. Sys.*, 512 U.S. at 640-41 ("[L]aws that single out the press, or certain elements thereof, for special treatment 'pose a particular danger of abuse by the State' . . . and so are always subject to at least some degree of heightened First Amendment scrutiny.") (quoting *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987)); *id.* at 682 (O'Connor, J., concurring in part and dissenting in part)

That some speech within a broad category causes [antitrust] harm, however, does not justify restricting the whole category. If Congress wants to protect those stations that are in danger of going out of business, or bar cable operators from preferring programmers in which the operators have an ownership stake, it may do that. But it may not, in the course of advancing these interests restrict cable operators and programmers in circumstances where neither of these interests is threatened.

Id.

97. For example, in *Citizen Publ'g Co. v. United States*, 394 U.S. 131 (1969), the Court applied the antitrust laws to a merger of two newspapers. Any impact on the speech rights of the newspapers, the Court apparently believed, is far outweighed by the positive impact on the rights of all to "the widest possible dissemination of information from diverse and antagonistic sources" that would result from vigorous antitrust enforcement. *Id.* at 139-40 (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)). See also *Cohen*, 501 U.S. at 669 ("[G]enerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.").

98. *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 421-22 (1990).

no examination of those principles was warranted.⁹⁹ Justice Stevens, writing for a six member majority, explained that “[a] rule that requires courts to apply the antitrust laws ‘prudently and with sensitivity’ whenever an economic boycott has an ‘expressive component’ would create a gaping hole in the fabric of those laws.”¹⁰⁰ Such a hole was unacceptable because of the important state interest in enhancing consumer welfare.¹⁰¹

The Court had reached a similar conclusion in *National Society of Professional Engineers*.¹⁰² In that case, the Society argued that the remedy imposed—a decree prohibiting, *inter alia*, comment on competitive pricing practices—violated its free speech rights.¹⁰³ In a portion of the opinion joined by eight justices, the Court rejected the First Amendment challenge, holding that an antitrust court may fashion whatever remedy is necessary to avoid recurrence of the violation and eliminate the consequences of the illegal activity. “The resulting order,” the Court recognized, “may curtail the exercise of liberties that the society might otherwise enjoy.”¹⁰⁴ But that result did not offend the Constitution.

To be sure, the trial judge should take account of free speech values in fashioning a remedy.¹⁰⁵ But the legality of an antitrust remedy is determined as a matter of antitrust law, not First Amendment law. “The standard against which the order must be judged,” the Court declared, “is whether the relief represents a reasonable method of eliminating the consequences of the illegal conduct.”¹⁰⁶ A court may comport with that standard even where it prohibits more than “the precise conduct previously pursued.”¹⁰⁷ Properly applied, the antitrust laws should never run afoul of the First Amendment, because an antitrust violation

99. *Id.* at 430-31.

100. *Id.* at 431-32.

101. *Trial Lawyers* was tried on a *per se* theory that did not require the government to prove the actual impact of the restraint on consumer welfare. *Id.* at 428-36. The Court nevertheless upheld the use of the antitrust laws because *per se* rules have been developed to combat restraints that would reduce consumer welfare overall, even if in a rare case the restraint did not produce that result.

102. 435 U.S. 679 (1978).

103. *Id.* at 697 (explaining that the judgment prohibited the society “from adopting any official opinion, policy statement, or guideline stating or implying that competitive bidding is unethical.”).

104. *Id.* at 697; *id.* at 697-98 (recognizing that an antitrust remedy may restrain rights “that would otherwise be constitutionally protected”).

105. *See id.* at 697-98.

106. *Id.* at 698.

107. *Id.*

cannot be established without a sufficient threat of consumer harm to justify the incidental effect on speech.¹⁰⁸

C. Antitrust Can Adequately Promote Free Speech Values

The Court has definitively established that antitrust enforcement does not violate the First Amendment. Industry-specific regulation might nonetheless be necessary to ensure that the marketplace of ideas receives the same attention as the marketplace of goods and services. On the one hand, antitrust generally favors numerous competitors and thus should favor a market with numerous voices as well. On the other hand, antitrust recognizes that reducing the number of competitors may increase consumer welfare when economies of scale and scope enable a small number of firms to produce goods more efficiently. One could certainly imagine a case in which economic analysis might call for two or three competitors, but free speech advocates might justifiably claim that more voices are needed.¹⁰⁹

Any industry-specific regulation designed to foster speech in this way is likely to be on shaky ground. The government cannot decide how many voices are enough to ensure a sufficiently robust marketplace of ideas without at least threatening to violate the First Amendment.¹¹⁰ One might conclude that economic markets are better able to determine how much speech consumers want. Indeed, if they want more, they ought to be willing to pay for it. For example, a cable system might be forbidden to refuse to carry a popular over-the-air station in favor of a less popular, cable-system-owned station. But less profitable stations

108. A possible exception may be politically motivated boycotts in which the participants in the boycott actually hurt their own interests as consumers in order to secure a more important civil, political, or social end. An example is *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886 (1982), in which the Court held that those participating in a boycott of white merchants in order to secure equal rights for blacks were entitled to First Amendment protection. Similarly, wholly non-economic activities fall outside the scope of the antitrust laws because they do not affect commerce. *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940) (labor union strike does not implicate commerce under Sherman Act); *Nat'l Org. for Women, Inc. v. Scheidler*, 968 F.2d 612 (7th Cir.1992) (violent pro-life protests that successfully closed abortion clinics do not implicate commerce), *cert. granted in part*, 508 U.S. 971 (1993). But commercial activity that serves the public interest in some way is covered. *Goldfarb v. Va. State Bar*, 421 U.S. 773, 787-88 (1975).

109. Mark Cooper, *Open Communications Platforms: Cornerstone of Innovation and Democratic Discourse in the Internet Age*, 2 J. TELECOMMS. & HIGH TECH. L. (manuscript at 2-3, on file with Journal office) (forthcoming 2003) ("The role of regulation is to ensure that strategically placed actors cannot deter *expression or innovation* at any layer of the platform." (emphasis added)).

110. See generally *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997).

could always be dropped in favor of more popular ones even if the diversity of voices was reduced.

Alternatively, however, there may be room for free speech values to be considered within antitrust's overall consumer welfare goal. Antitrust has predominantly been about economic competition. Courts are thus likely to interpret the scope of antitrust narrowly when it intersects with non-economic factors. For example, in the mid-1990s, the Eastern District of Pennsylvania rejected an antitrust claim based on non-economic harm.¹¹¹ The plaintiff argued that the defendant, an electric utility, had reduced consumer welfare by, *inter alia*, "reducing the availability to consumers of power produced using alternative, environmentally pro-active energy sources."¹¹² The court dismissed the claim on the ground that "the reliability and environmental qualities of energy sources may be worthwhile concerns, [but] they are not within the scope of federal antitrust laws."¹¹³ Citing *Professional Engineers*, the district court declared that "[c]ourts have rejected attempts to expand the scope of the antitrust laws to encompass noneconomic interests."¹¹⁴

This unnuanced view of antitrust shortchanges the potential of its broad consumer welfare goals. To be sure, the Supreme Court has been reluctant to enable a defendant *to escape antitrust liability* by arguing that a restraint has non-economic benefits.¹¹⁵ But the Court has never ruled this possibility out entirely.¹¹⁶ On the contrary, it has often applied the rule of rea-

111. *Schuylkill Energy Res., Inc., v. Pennsylvania Power & Light Co.*, 1996 WL 284994 (E.D.Pa. 1996).

112. *Id.* at 3.

113. *Id.*

114. *Id.*

115. In *Professional Engineers*, the Court rejected the engineers' claim that a ban on competitive bidding was needed to ensure quality work necessary to protect "the public health, safety and welfare." *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 685 (1978). The Court rejected this *public safety* argument, because it imposed the engineers' "views of the costs and benefits of competition on the entire marketplace." *Id.* at 695. Because the antitrust laws rest on the assumption that competition benefits consumers, a defense may not rest "on the assumption that competition itself is unreasonable." *Id.* at 696. In *Indiana Dentists*, a group of dentists agreed to withhold x-rays from their patients' insurers, arguing that the quality of care would suffer if insurers based payment decisions on x-rays alone. *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 462-63 (1986). Following *Professional Engineers*, the Court rejected the defense. "The argument is, in essence, that an unrestrained market in which consumers are given access to the information they believe to be relevant to their choices will lead them to make unwise and even dangerous choices. Such an argument amounts to 'nothing less than a frontal assault on the basic policy of the Sherman Act.'" *Id.* at 463 (quoting *Professional Engineers*, 435 U.S. at 695).

116. For example, in *Goldfarb*, the Court explained that:

son instead of a *per se* rule in cases where defendants raised non-economic defenses.¹¹⁷

In any event, whether non-economic factors may mitigate economic harm that rises to an antitrust violation poses a different question from whether antitrust should consider non-economic factors in determining which consumer harms to condemn. Where a restraint of trade may have ambiguous pure economic effects, antitrust might nonetheless condemn it where the restraint also has a significant anti-free-speech effect.¹¹⁸

Using antitrust in this way may be particularly appropriate because of the close relationship between free speech interests and consumer choice, a widely recognized goal of the antitrust laws.¹¹⁹ Preserving opportunities for more voices in the marketplace would directly further the goal of enhancing consumer choice. Just as balancing short-run and long-run consumer welfare in intellectual property and joint venture cases is difficult, incorporating consumer choice into the balance of consumer welfare interests poses doctrinal challenges. But courts are already

The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.

Goldfarb v. Va. State Bar, 421 U.S. 713, 788-89 n.17 (1975).

117. See, e.g., *Goldfarb*, 421 U.S. 773; *Professional Engineers*, 435 U.S. at 679; *Indiana Dentists*, 476 U.S. at 447.

118. The Third Circuit's opinion in *United States v. Brown Univ.*, 5 F.3d 658 (3rd Cir. 1993), may provide some insight into how antitrust might account for non-economic factors. There, Ivy League universities had agreed not to compete on certain scholarships. The court held relevant to antitrust analysis that the restraint would improve the diversity of higher education and make that education available to more students. *Id.* at 674. The court distinguished *Professional Engineers*, 435 U.S. at 679, and *Indiana Dentists*, 476 U.S. at 447, as follows:

Both the public safety justification rejected by the Supreme Court in *Professional Engineers* and the public health justification rejected by the Court in *Indiana Dentists* were based on the defendants' faulty premise that consumer choices made under competitive market conditions are "unwise" or "dangerous." Here MIT argues that [the restraint] provided some consumers, the needy, with additional choices which an entirely free market would deny them. The facts and arguments before us may suggest some significant areas of distinction from those in *Professional Engineers* and *Indiana Dentists* in that MIT is asserting [the restraint] not only serves a social benefit, but actually enhances consumer choice.

Brown Univ., 5 F.3d at 677.

119. See *NCAA v. Board of Regents*, 468 U.S. 85, 102 (1984); *Brown Univ.*, 5 F.3d at 675 ("Enhancement of consumer choice is a traditional objective of the antitrust laws and has also been acknowledged as a procompetitive benefit.").

rising to this challenge, balancing purely economic consumer choice arguments against other economic concerns.¹²⁰

If information platform regulation fully converged to anti-trust, courts could extend their analysis to consider the benefit of preserving a multitude of voices. Determining how much speech is enough—like determining how much innovation is enough—will not be easy. But an on-going dialog through common law litigation has served us well in developing First Amendment doctrine just as it has in the antitrust realm. Conversely, prior efforts at more specific speech regulation—e.g., FCC public interest hearings to license broadcast spectrum—have been, on the whole, no more successful than industry-specific economic regulation. Industry-specific speech regulation also raises the specter of too much government involvement in free speech. Antitrust with its natural preference for consumer choice may thus serve as a more productive and less objectionable forum within which to debate both economic and non-economic consumer welfare effects.

IV. INDUSTRY-SPECIFIC REGULATION

Industry-specific regulation is believed to be needed where cooperation among competitors is necessary in order to maximize consumer welfare and where the public interest demands consideration of goals other than short-run consumer welfare. Antitrust is generally thought to be incapable of achieving these results because it rarely imposes duties to cooperate.¹²¹ As explained in Section I, however, antitrust has proven quite adept at requiring cooperation when it is really essential.¹²² And Sections II and III explained how antitrust may incorporate long-run consumer welfare and free speech values. There is thus no inherent

120. For example, in the recent credit card litigation, the government argued that Visa and MasterCard violated the antitrust laws by adopting rules that prohibit banks from issuing American Express and Discover credit cards, and thereby reducing consumer choice. The court agreed, explaining that:

The addition of American Express and Discover will also increase the available supply and variety of network services. This will result in more card products for bank issuers and more options for consumers. . . . Whether or not similar products could also be issued on the Visa or MasterCard networks, restricting banks from issuing on the American Express or Discover networks restricts the choices available to them and their customers

. . . .
 . . . No amount of effort by American Express and Discover to issue through non-member banks, retailers or other organizations will provide consumers with the range of choices to which they are entitled.

United States v. Visa U.S.A., Inc., 163 F. Supp. 2d 322, 382-83 (S.D.N.Y. 2001).

121. See *supra* note 11.

122. See *supra* notes 12-17.

need for specifically tailored legislative pronouncements when the general body of antitrust law is seen as flexible enough to reach all threats to consumer welfare.

Nevertheless, industry-specific consumer-welfare regulation arguably could provide substantial benefits by clearly identifying *ex ante* the rights and obligations of the competitors in a way that the general antitrust laws cannot. But that theoretical benefit is unlikely to be realized. Congress has demonstrated a singular inability, or at least an unwillingness, to draft regulatory legislation that is clear enough to obtain this benefit. As Justice Scalia wrote in his opinion for the Court in *Iowa Utilities*:

It would be a gross understatement to say that the 1996 [Telecommunications] Act is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction. That is most unfortunate for a piece of legislation that profoundly affects a crucial segment of the economy worth tens of billions of dollars.¹²³

In the absence of industry-specific regulation, litigation would often be necessary to resolve particular disputes. Given the inherent uncertainties in the antitrust laws, the notion that private parties could often settle differences in the shadow of those laws is unlikely.¹²⁴ But industry specific regulation may be no better. The 1996 Telecommunications Act produced an explosion of litigation that remains unresolved five years later.¹²⁵

123. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999).

124. The uncertainty inherent in an antitrust regime has produced much criticism. See, e.g., Tom W. Bell, *The Common Law in Cyberspace*, 97 MICH. L. REV. 1746, 1754-55 (1999) ("Uncertainty about what constitutes an antitrust violation continues to undermine the rule of law and expose commerce to undue legal risks.") (citing sources). But as described in Section I above, the contributions of the Chicago School have done much to rationalize antitrust over the last decade and a half. Indeed, Bell cites little that has been written post-1986. More important, criticism along these lines fails to appreciate both the virtue in uncertainty and false sense of certainty that *ex ante* legislative rules generate.

125. Joel Klein described the process of implementing the 1996 Act as follows: Now, as I see it, the paradox of this kind of deregulatory effort is that it depends upon a series of regulatory steps — all taken, to be sure, in the name of deregulation — and those regulatory steps, in turn, can significantly affect the long-term prospects for full-scale competition in telephony. There is no formula or equation that one can look to in order to get these things right. They involve the exercise of discretion by government agencies, which in turn requires careful, sound judgments. And, given that these predictive judgments are necessarily based on incomplete information, we should all be somewhat humble in second-guessing those who have to make the calls.

Klein, *supra* note 4, at 5-6. Unfortunately, such a complicated task does lead to second-guessing and extensive litigation. A December 2001 Lexis-Nexis search turned up hundreds of cases dealing in some fashion with the 1996 Telecommunications Act. And, of course, many issues remain unresolved.

Even when industry-specific regulation is interpreted in a way that provides clear rules to govern competitive behavior in information platform markets, the antitrust laws may remain a substantively better regulatory device. By their nature, industry-specific rules intended to enhance consumer welfare would necessarily require both (a) costly conduct to conform to the rules that in some situations would have no measurable consumer-welfare benefit, and (b) permit some conduct that reduced consumer welfare but did not violate an *ex ante* rule.¹²⁶ The problem would likely worsen over time as firms learned to walk the line along the rule, figuring out ways to comply with the letter of the law without providing the intended consumer welfare benefits.¹²⁷ For example, firms may learn the maximum permissible delays in the implementation of a rule-required behavior. All this is not to say that clear rules are never useful. But the resistance to using clear rules in antitrust doctrine generally should lead us to think twice before assuming that industry-specific legislation is a superior alternative to antitrust as a regulator of competition among information platforms.

V. THE LEGISLATIVE/JUDICIAL POLICY MAKING DEBATE AND A TENTATIVE PROPOSAL

Even accepting that industry-specific regulation may not be administratively or substantively better than antitrust litigation driven policy-making, one might nonetheless favor industry-specific legislation simply because it is, well, legislation.¹²⁸ Indeed, a rallying call behind the 1996 Telecommunications Act charged

126. See LON L. FULLER, *THE MORALITY OF LAW* 64 (rev. ed. 1969) (“A specious clarity can be more damaging than an honest open-ended vagueness.”); MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 27-28, 40 (1987); FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE*, 32-33 (1991) (“Factual predicates will therefore in some cases turn on features of the case that do not serve the rule’s justification, and in others fail to recognize features of the case whose recognition *would* serve the rule’s justification.”); *id.* at 149 (“These errors are not a function of mistakes that decision-makers may make, but instead are generated by decision-makers faithfully and accurately following the rules.”); *id.* at 50 (“This under- and over-inclusiveness . . . is largely ineliminable, the product of entrenchment and not simply of how specific or how general a rule happens to be.”); *id.* at 50 n.14 (“But rules achieve clarity, certainty, and determinateness, at the price of including either more or fewer cases in the legal categories defined by the rules than the rationale underlying the rule calls for.”) (quoting GERALD POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* 447 (1986)).

127. See KELMAN, *supra* note 126, at 41-42.

128. BORK, *supra* note 3, at 10 (“Antitrust is . . . law made primarily by judges. We are right to be concerned about the integrity and legitimacy of that lawmaking process At issue is the question central to democratic society: Who governs?”).

that a single federal judge, in the AT&T case the Honorable Harold Greene, should not be responsible for making telecommunications policy. Judge Greene was not acting alone, of course, the enforcement agencies contributed significantly. But our elected representatives—who we charge with the duty to make important policy decisions—were largely absent from the process.

Legislatively made policy may be preferable for two reasons: (1) a legislature is a deliberative body institutionally competent to take account of the broad spectrum of interests affected, and (2) it responds to democratic checks. The structural advantages usually attributed to legislatures, however, could be mimicked within agencies and courts in ways that would enable them to function more effectively than the legislature when dealing with information platform regulation. The legislature's openness and ability to take account of all interested views is often contrasted to the agency's isolated bureaucracy or the court's party-centered focus. But legislative openness can be mimicked through the public hearing process or through aggressive reliance on *amicus curiae* submissions. In addition, both agencies and courts may be superior to legislatures in that lobbying need not be complicated by campaign financing issues.

The benefits of democratic checks can also be achieved through aggressive legislative oversight of agency and litigation-based policy making. Legislative committees could monitor agency action and litigation and propose legislation to clarify, amend, or reverse a decision with which the legislature disagrees. This approach has been successfully employed many times, including the 1991 amendments to the Civil Rights Act,¹²⁹ and the supplemental jurisdiction statute.¹³⁰ Specifically in the antitrust context, Congress responded to *Citizens Publishing* with the Newspaper Preservation Act.¹³¹

In addition to structure, however, one might believe that legislators are more knowledgeable or better able to assemble relevant information with the assistance of their staffs than courts or agencies. But given the broad array of issues on which legislators must concern themselves and the political considerations that necessarily play a part in their decisions, expecting legisla-

129. The Civil Rights Act of 1991, Pub. L. No. 102-166 § 118, 105 Stat. 1071 (1991) (effectively overruling Supreme Court cases interpreting prior civil rights statutes).

130. 28 U.S.C. § 1367 (2000) (overruling a Supreme Court case interpreting the pendant and ancillary jurisdiction doctrine).

131. 15 U.S.C. § 1801 (2000) (creating certain antitrust privileges for newspapers).

tors to be experts in areas as complex as competition in information platform markets and to act on that expertise in an unbiased way is wholly unrealistic. Indeed, we should expect what we have gotten: Internally inconsistent legislation that provides legislators with language that they can cite to their constituencies and contributors as a victory, but that does little to guide agencies and courts in deciding the difficult issues.

The Federal Communications Commission and the Telecommunications Task Force of the Antitrust Division, by contrast, really are experts in the field. Each has a near 20-year history of cooperation in the regulation of information platforms through the enforcement of the Modified Final Judgment in the AT&T case and the 1996 Act. They meet regularly with firms and constantly study and analyze competition in the various markets through merger reviews, conduct investigations, and simply by listening to interested market participants. While individual bureaucrats surely have their biases, they are, at least, out of the direct campaign-finance line of fire.

Regulatory decisions, however, are ultimately made by judges, not bureaucrats. Antitrust law, to be sure, expects a great deal from judges. They must apply “an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint,” and then “explain the logic of their conclusions . . . to subject . . . [them] to others’ critical analyses”¹³² Whether they live up to that expectation is another matter. The results in at least some of the litigation under the 1996 Telecommunications Act confirm the fear that district court judges, and even appellate panels, may not be sufficiently sophisticated to make competition policy in information platform markets.

But there is an alternative. The FTC has an existing network of administrative law judges (ALJs) with expertise in competition law and policy. A group of these ALJs could be developed with telecommunications expertise as well. While the notion of FCC and DOJ lawyers litigating before FTC ALJ’s certainly has no historical precedent, one could imagine an Article I tribunal in this mold in which the agencies and private plaintiffs brought antitrust cases dealing with information platform markets. Those cases could then be appealed to the District of Columbia Circuit, which would develop, if indeed it does not already have significant telecommunications and competition law expertise.

132. *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 780-81 (1999).

The bottom line is that despite the appealing structural safeguards inherent in the legislative process, agencies and courts could regulate information platforms more effectively through litigation and common law decision making if three criteria were satisfied. First, Congress would need to create a judicial forum with expertise in both competition policy and information platforms. Second, agency proceedings must be open to public comment and courts must receive and carefully consider amicus briefs. And third, Congress must actively monitor litigation driven policy-making, standing at the ready to correct missteps.

CONCLUSION

Antitrust law alone could serve as the single, unified regulatory doctrine for information platforms. Antitrust is broad enough to require the sort of cooperation that is essential to enhancing consumer welfare in information platform markets, and it is flexible enough to protect the incentives to innovate created by intellectual property law. Antitrust law is also capable of avoiding conflict with the First Amendment and even enhancing free speech interests generally.

Despite traditional reasons to prefer legislatively driven policy-making, Congress has not done a good job of drafting legislation that provides clear regulatory rules, perhaps because of unavoidable political pressures. Antitrust's more flexible consumer-welfare driven approach could better regulate cooperative competitive conduct in information platform markets. Further, the institutional benefits normally associated with legislation – institutional competence and democratic checks – could be preserved within an antitrust-driven regulatory structure through measures designed to ensure that (1) agency and judicial processes are more open and (2) legislatures aggressively oversee agency and court decisions.

