Antitrust Modernization Commission

Report and Recommendations

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Introduction and Recommendations

1. INTRODUCTION

Congress established the Antitrust Modernization Commission “to examine whether the need exists to modernize the antitrust laws and to identify and study related issues.” This Report sets forth the Commission’s recommendations and findings on how antitrust law and enforcement can best serve consumer welfare in the global, high-tech economy that exists today.

The antitrust laws seek to deter or eliminate anticompetitive restraints that impede free-market competition. To do so properly, antitrust law must reflect an economically sound understanding of how competition operates. As Congress recognized, competition in the twenty-first century increasingly involves innovation, intellectual property, technological change, and global trade.

In many high-tech sectors of the economy, firms must constantly innovate to keep pace in markets in which product life cycles are counted in months, not years. To protect their innovations, firms may rely on intellectual property. In some cases, intellectual property assets may be more important to businesses than specialized manufacturing facilities.

The digital revolution has produced new, general-purpose technologies that enable firms to create many new goods and services for consumers. New information and communication technologies have revolutionized firms’ production and distribution processes as well, allowing faster and easier access to suppliers and distributors. Technological advances have played an important role in facilitating global integration, as newly available communication technologies have shrunk the time and distance that separate markets around the world. New markets across the globe have opened for trade following the determination by policymakers in many developing countries that free-market competition yields productivity and other benefits far superior to the results produced by central planning.

Antitrust analysis must reflect a proper understanding of how these forces affect competition. To be sure, many of these seemingly new phenomena raise competitive issues parallel to those that confronted antitrust in earlier decades. So-called “general-purpose technologies,” such as electricity, railroads, and the internal combustion engine, for example, also revolutionized production, made many new goods and services available to consumers, and created industries that produced analogous competitive issues. Nonetheless, a present-day assessment of how well antitrust law is operating to address current issues is important to ensure that competitive markets continue to benefit consumer welfare. As the nature of competition evolves, so must antitrust law.
A. Antitrust Law Seeks to Protect Competition and Consumer Welfare

The Supreme Court has explained:

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conductive to the preservation of our democratic political and social institutions.9

As this language confirms, free-market competition is, and has long been, the fundamental economic policy of the United States.10 Competition in free markets—that is, markets that operate without either private or governmental anticompetitive restraints—forces firms to lower prices, improve quality, and innovate.11 Businesses in competitive markets develop and sell the kinds and quality of goods and services that consumers desire, and firms seek to do so as efficiently as possible, so they can offer those goods and services at competitive prices.12

In free markets, consumers determine which firms succeed. Consumers benefit as firms offer discounts, improve product reliability, or create new services, for example, to keep existing customers and attract new ones. The free-market mechanism generally provides greater success “to those firms that are more efficient and whose products are most closely adapted to the wishes of consumers.”13

Competitive markets also drive an economy’s resources toward their fullest and most efficient uses, thereby providing a fundamental basis for economic development.14 Competition facilitates the process by which innovative, cutting-edge technologies replace less efficient productive capacity. Market forces continuously prod firms to innovate—that is, to develop new products, services, methods of doing business, and technologies—that will enable them to compete more successfully.15 The ongoing churning of a flexible competitive economy leads to the creation of wealth, thus making possible improved living standards and greater prosperity.16

To be competitive, markets need not conform to the economic ideal in which many firms compete and no firm has control over price. In fact, the real world contains very few such markets.17 Rather, competition generally “refers to a state of affairs in which prices are sufficient to cover a firm’s costs, but not excessively higher, and firms are given the correct set of incentives to innovate.”18 Experience has shown that intense competition can take place in a wide variety of market circumstances.19 Some factors—such as many sellers and buyers, small market shares, homogeneous products, and easy entry into a market—may suggest competitive behavior is likely.20 The absence of those factors, however, “does not nec-
necessarily prevent a market from behaving competitively." Economic learning in recent decades has afforded a greater appreciation of the variety of factors that can affect competitive forces at work in particular markets.

Antitrust law prohibits anticompetitive conduct that harms consumer welfare. Antitrust law in the United States is not industrial policy; the law does not authorize the government (or any private party) to seek to “improve” competition. Instead, antitrust enforcement seeks to deter or eliminate anticompetitive restraints. Rather than create a regulatory scheme, antitrust laws establish a law enforcement framework that prohibits private (and, sometimes, governmental) restraints that frustrate the operation of free-market competition.

To determine whether and when particular forms of business conduct may harm competition requires an understanding of the market circumstances in which they are undertaken. Antitrust agencies and the courts have long looked to economic learning for assistance in understanding market circumstances and the likely competitive effects of particular business conduct. Indeed, economics now provides the core foundation for much of antitrust law. Not surprisingly, as economic learning about competition has advanced over the decades, so have the contours of antitrust doctrine.

Antitrust law also must keep pace with developments in the business world. Business practices may change, especially as technological innovation and global economic integration alter the competitive forces at work in particular markets. To protect competition and consumer welfare, antitrust analysis must offer sufficient flexibility to take account of these changes, while maintaining clear and administrable rules of antitrust enforcement.

**B. Periodic Assessments of the Antitrust Laws Are Advisable**

The antitrust laws in the United States require ongoing evaluation and assessment to ensure they are keeping pace with both economic learning and the ever-changing economy. In past decades, various entities have empowered six different commissions to assess how well antitrust law operates to serve consumers. The Antitrust Modernization Commission is the seventh such commission in almost seventy years. Prior commissions have made recommendations about both the substance and procedure of antitrust law.

The tradition of assigning commissions to evaluate antitrust law began in 1938, when President Roosevelt recommended that Congress appropriate funds for the study of the antitrust laws. Recommendations from that first commission, the Temporary National Economic Commission (TNEC), played a role in spurring Congress to strengthen the law against anticompetitive mergers. In 1955 the Attorney General’s National Committee to Study the Antitrust Laws recommended important changes to antitrust analysis, most notably to reduce the use of per se rules that deemed many types of conduct automatically illegal. Twenty years later, these proposals combined with further economic learning to produce significant changes in antitrust law.
Between 1969 and 1979, three commissions issued reports, each known by the names of those who led them—the Neal Report, the Stigler Report, and the Shenefield Report. Among other things, these reports reflected ongoing debates about whether and when monopolies, or firms with large market shares in highly concentrated markets (oligopolies), should be subject to more stringent antitrust enforcement. The recommendation of the Neal Report to reduce concentration in oligopolies by requiring firms to divest assets was opposed by the Stigler Report, which described the connection between concentration and competition as “weak.” The recommendation of the Shenefield Report to make it easier to prove monopolization also did not gain traction.

Recommendations from these commissions for revised or new antitrust procedures and remedies were more successful. For example, the Neal Report recommended that, in certain circumstances, businesses be required to notify the antitrust agencies before consummating a merger; in 1976 Congress enacted the Hart-Scott-Rodino Antitrust Improvements Act, which imposed pre-merger notification requirements. The Stigler Report recommended substantial increases in government antitrust penalties, a recommendation adopted into law through The Antitrust Procedures and Penalties Act of 1974. The Shenefield Report led directly to passage of the Antitrust Procedural Improvements Act of 1980 and “provided important encouragement to federal judges to manage trials—including the massive AT&T trial—effectively.” The Shenefield Report also issued twenty recommendations for further deregulation, providing significant support to the deregulation movement.

Most recently, the increasing importance of global trade spurred the 1998 establishment of the International Competition Policy Advisory Committee (ICPAC)—chaired by former Assistant Attorney General James F. Rill and former International Trade Commission Chairwoman Paula Stern—to study international aspects of antitrust law. The ICPAC Report provided the impetus for the International Competition Network, through which nearly one hundred nations now discuss antitrust procedures and policies.

C. Major Changes in Antitrust Analysis over the Past Twenty-Five Years Make this a Timely Report

In the decades since the Neal, Stigler, and Shenefield Reports undertook their assessments, antitrust law has gone through what is arguably the most important period in its development. The antitrust landscape differs greatly from earlier decades in terms of antitrust analysis and the role of antitrust enforcement agencies, among other things.

Most important, antitrust case law has become grounded in the related principles that antitrust protects competition, not competitors, and that it does so to ensure consumer welfare. Substantial economic learning now undergids and informs antitrust analysis. Time and again in recent decades, the Supreme Court has used economic reasoning to develop standards for antitrust analysis. Case-by-case decision-making has provided myriad opportunities for the integration of economics into antitrust analysis, and litigating parties and the courts have used them.
Economic learning has provided the foundation for updated antitrust analysis in part by revealing the potential procompetitive benefits of some business conduct previously assumed to be anticompetitive. The accommodation of such advances in economic learning has increased the flexibility of antitrust law, with courts and the antitrust agencies now considering a wide variety of economic factors in their analyses. Improved economic understanding and greater analytical flexibility have increased the potential for a sound competitive assessment of business conduct in all industries, including those characterized by innovation, intellectual property, and technological change.

The improvements in economic understanding and the increases in analytical flexibility have added further complexity to antitrust law, however. In response, courts have searched for standards that can make antitrust analysis more manageable. They also have given increased attention to whether businesses can understand and comply with, and courts can efficiently and competently administer, particular antitrust rules. Whether particular antitrust rules overdeter procompetitive conduct or underdeter anticompetitive conduct has received greater scrutiny as well.

D. The Commission’s History and Process

The Antitrust Modernization Commission began the three years of work that culminated in this Report in April 2004. The Commission met for the first time on April 1 that year, shortly after all appointments to the Commission had been made. The Commission has over those three years engaged in a careful, deliberate course of study to fulfill its statutory mandate of examining “whether the need exists to modernize the antitrust laws” and soliciting the “views of all parties concerned with the operation of the antitrust laws.” Interested members of the public have participated substantially through the submission of comments and testimony and attendance at the Commission’s many hearings and meetings.

1. Legislative History of the Commission

The Commission was created by an act of Congress in 2002. The original bill was introduced by F. James Sensenbrenner, Jr., then-Chairman of the House Judiciary Committee. Although the bill did not limit the scope of the Commission’s study, at the time of its introduction, Chairman Sensenbrenner highlighted three issues he believed the Commission should review in the course of its study: (1) “the role of intellectual property law in antitrust law”; (2) “how antitrust enforcement should change in the global economy”; and (3) “the role of state attorneys general in enforcing antitrust laws.”

The Act obliged the Commission to perform four tasks:

1. “to examine whether the need exists to modernize the antitrust laws and to identify and study related issues”;
2. “to solicit views of all parties concerned with the operation of the antitrust laws”;

3. “to consider the views of the government and of the public regarding the need for antitrust law reform”;
4. “to consider the views of parties to litigation, including small businesses”.

The Commission has also been mandated to consult with “private sector experts in the fields of law, economics, and business” and “to consult with representatives of small businesses, trade associations, and other concerned parties.”
3. “to evaluate the advisability of proposals and current arrangements with respect to any issues so identified”; and
4. “to prepare and submit to Congress and the President a report . . . .”

The Act provided the Commission with three years to complete these tasks and authorized $4 million to be appropriated for the Commission to perform its work.

2. Organization of the Commission

The Antitrust Modernization Commission Act called for the appointment of twelve Commissioners, four by the House of Representatives, four by the Senate, and four by the President. Appointments by both houses of Congress were split equally between the Democratic and Republican parties. No more than two of the President’s four appointments could be from the same political party. The Chair was designated by the President; the Vice-Chair was designated jointly by the Democratic leadership of the House of Representatives and the Senate.

The House of Representatives appointed as Commissioners Donald G. Kempf, Jr., John L. Warden, John H. Shenefield, and Debra A. Valentine. The Senate appointed W. Stephen Cannon, Makan Delrahim, Jonathan M. Jacobson, and Jonathan R. Yarowsky. The President appointed to the Commission Bobby R. Burchfield, Dennis W. Carlton, Deborah A. Garza, and Sanford M. Litvack. The President designated Commissioner Garza as Chair; the Democratic leadership of the House of Representatives and the Senate designated Commissioner Yarowsky as Vice-Chair. Pursuant to the AMC Act, the Commission appointed Andrew J. Heimert to be the Executive Director and General Counsel. The Commission subsequently hired additional staff and appointed advisors to assist it in its work.

3. Transparency and Involvement of the Public

The Commission’s work proceeded in three general phases: selection of issues for study, study of those issues, and deliberation upon the recommendations the Commission would make on the issues it studied. At each phase, the public was invited to participate through written comments and testimony and by observing the Commission’s hearings and deliberations.

The Commission’s principal mechanism for informing the public of its work was through its website, www.amc.gov. All materials that the Commission discussed at its meetings were posted on the website in advance of the meetings. The Commission placed its entire record on the website as it was developed. Comments from the public were posted as soon after receipt as possible. Witness statements for hearings were made available on the website as far in advance of the hearing as the witnesses provided them, and transcripts from the hearings were posted shortly after each hearing.
a. Issue Selection Through Public Comment and Outreach

The first phase of the Commission’s work was to select issues for study. Consistent with its mandate to solicit the views of interested persons, the Commission requested that the public propose issues for study. The Commission received comments from fifty-six entities proposing a variety of issues for study. Commissioners also specifically solicited the views of a variety of persons and organizations, including consumer organizations, current and former state and federal antitrust enforcement officials, and federal judges. The Commission met in January 2005 to deliberate publicly on a list of approximately sixty possible issues synthesized by Commission staff from the comments and input received in the fall of 2004. Ultimately, the Commission adopted twenty-five issues (broadly defined) for study.

b. Information Gathering Through Public Comment and Hearings

Having selected issues for study, the Commission began an extended study and evaluation of these issues and proposals regarding them. The Commission compiled its record through two principal mechanisms: comments from the public and hearings.

The Commission requested comment from the public on the issues it selected, including specific questions about the U.S. antitrust laws and whether change was advisable to any of them. Although the majority of comments were provided to the Commission in 2005—during the Commission’s major study period—members of the public continued to submit comments throughout the entire period of the Commission’s work. Overall, the Commission received 192 comments from 126 persons or organizations.

Between June 2005 and October 2006, the Commission held 18 hearings over 13 days, with testimony by 120 witnesses, generating almost 2500 pages of transcripts. Witnesses were selected to provide a balance and diversity of views. The public was invited to, and did, comment on issues addressed in the hearings. All hearings were open to the public.

c. Deliberations on Possible Recommendations and Report Drafting

Commission deliberations on the recommendations in this Report occurred between May 2006 and February 2007. Overall, the Commission met to deliberate on eleven days. All deliberations of the Commission were held in public. Documents prepared by staff to assist the Commissioners in their deliberations were made available to the public in advance of the meetings and at the meetings themselves. The Report was drafted to explain the recommendations agreed to by a majority of Commissioners, and reflects the views of the Commissioners supporting each recommendation.
2. RECOMMENDATIONS

The charge to this Commission has been to study, evaluate, and make recommendations for the antitrust landscape as it now exists, much changed from earlier years. The current antitrust panorama, of course, covers a broad array of issues; to study all of the possible issues would be neither efficient nor desirable. To use its resources most productively, the Commission chose to focus on four primary areas: substantive standards of antitrust law; enforcement institutions and processes; civil and criminal remedies; and statutory and other exceptions to competition (such as immunities and exemptions from the antitrust laws). The Chapters that address these issues are briefly described below.

Chapter I addresses certain aspects of substantive antitrust law. Chapter I.A reviews changes in antitrust law in recent decades and discusses antitrust analysis in industries in which innovation, intellectual property, and technological change are central features (the “new economy”). Chapters I.B and I.C assess two areas of antitrust analysis—mergers and exclusionary conduct—in greater depth. Finally, in light of the importance of intellectual property to competition in a high-technology economy, Chapter I.D briefly discusses how the operation of patent law can affect competition.

Chapter II discusses enforcement institutions and processes. Chapter II.A deals with the two federal antitrust agencies, the Antitrust Division of the Department of Justice and the Federal Trade Commission, and Chapter II.B addresses issues surrounding these agencies’ implementation and enforcement of the Hart-Scott-Rodino Act’s pre-merger notification process. Chapter II.C discusses antitrust enforcement at the state level, while Chapter II.D addresses international antitrust enforcement.

Chapter III addresses civil and criminal antitrust remedies. Chapter III.A discusses the monetary remedies available to private parties, such as treble damages, as well as liability rules. Issues related to indirect purchaser litigation are assessed in Chapter III.B. Chapter III.C examines civil remedies available to the federal government, and Chapter III.D discusses criminal remedies that the government may obtain.

Finally, Chapter IV evaluates statutes and particular doctrines that provide exceptions to free-market competition. Chapter IV.A addresses the Robinson-Patman Act. Chapter IV.B discusses statutory immunities and exemptions from antitrust law, regulated industries, and the state action doctrine.

The following are recommendations agreed to by a majority of the Commission. Dissenting votes are identified in the text of the Report and, in some instances, are discussed in separate statements of Commissioners.
Chapter I
Substantive Standards Of Antitrust Law

In this Chapter the Commission discusses aspects of the current substantive standards of antitrust law. Those standards should meet several criteria. The rules of antitrust must be economically sound and flexible enough to accommodate new economic learning and changes in the nature of competition. The rules also should be clear, predictable, and administrable, so that businesses can comply with them and courts can administer them.

Clarity, predictability, and administrability can be hard to maintain in a system that is flexible enough to adapt to new economic learning and changing business environments. For example, per se rules that deem specified conduct automatically illegal are clear, predictable, and administrable. Yet the courts, scholars, and antitrust practitioners have reached consensus that—although appropriate in particular limited circumstances—per se rules can all too often condemn business conduct that actually benefits, not harms, consumers. As antitrust law has more fully incorporated economic learning into the substantive rules of antitrust, the courts and the antitrust agencies have sought to develop revised rules that combine economically sound principles and flexible analysis with clarity, predictability, and administrability.

This Chapter first reviews these developments and then discusses their application in industries in which innovation, intellectual property, and technological change are central features. Chapter I.A discusses general antitrust standards in light of the competitive forces at work in the twenty-first century. Chapters I.B and I.C review two areas of antitrust analysis—mergers and exclusionary conduct—in greater depth. Finally, Chapter I.D, in light of the importance of intellectual property to competition in a high-technology economy, briefly discusses how the operation of patent law can affect competition as well.
Chapter I.A
Antitrust Law and the “New Economy”

1. INTRODUCTION

The term “new economy” can describe a diverse array of markets in which new information, communication, and other technologies have produced significant changes in recent decades. For purposes of this Report, the key question is whether antitrust analysis can properly account for the economic characteristics of these markets. Those economic characteristics include innovation, intellectual property, and technological change. As referenced in this Report, the new economy includes those industries in which innovation, intellectual property, and technological change are central features.

To assess how well antitrust law addresses competitive issues in such industries first requires an understanding of the major changes in antitrust analysis in recent decades. During this period a quiet transformation has strengthened the economic foundations of antitrust and increased its flexibility. These changes have improved the likelihood of an accurate assessment of competitive effects. In particular, the flexibility to account properly for the efficiencies associated with business conduct means that antitrust analysis has become less likely to condemn improperly business conduct that in fact benefits consumer welfare.

The Commission sought comment on and testimony about the application of antitrust analysis in industries in which innovation, intellectual property, and technological change are central features. Among other things, the Commission asked whether antitrust law encouraged a static analysis of dynamic industries or whether particular features of new economy industries posed distinctive problems for antitrust analysis. The Commission also asked whether antitrust law should use different benchmarks for market definition or market power assessments in new economy industries because innovation-driven firms may need to set prices above marginal costs to earn reasonable returns on their investments in innovation.

Commenters and witnesses largely agree that antitrust analysis has sufficient grounding in sound economic analysis, openness to new economic learning, and flexibility to enable the courts and the antitrust agencies properly to assess competitive issues in new economy industries. Most importantly, commenters noted, the economic principles on which antitrust is based do not require revision for application to those industries. As one economist noted, basic economic principles do not become “outdated” simply because industries become highly dynamic.1
The Commission agrees and makes the following recommendations.

1. There is no need to revise the antitrust laws to apply different rules to industries in which innovation, intellectual property, and technological change are central features.

2. In industries in which innovation, intellectual property, and technological change are central features, just as in other industries, antitrust enforcers should carefully consider market dynamics in assessing competitive effects and should ensure proper attention to economic and other characteristics of particular industries that may, depending on the facts at issue, have an important bearing on a valid antitrust analysis.

The economic principles that guide antitrust law remain relevant to and appropriate for the antitrust analysis of industries in which innovation, intellectual property, and technological change are central features. Antitrust analysis, as refined to incorporate new economic learning, is sufficiently flexible to provide a sound competitive assessment in such industries. This has improved the potential for a sound competitive assessment in all industries, including those characterized by innovation, intellectual property, and technological change.

To be sure, not all agree with the results in particular cases. That antitrust has the proper tools for an economically sound analysis of competitive effects does not mean that everyone agrees on how to use those tools in particular cases or interpret the results of their use. Nonetheless, the Commission concluded that current antitrust analysis is up to the task of properly assessing the competitive effects of business conduct in new economy industries.

Just as in other industries, of course, antitrust enforcers evaluating business conduct in new economy industries must ensure proper attention to particular market dynamics and economic characteristics that may play a role in determining likely competitive effects. Certain characteristics may arise more frequently in markets in which innovation, intellectual property, and technological change are key factors than in some other industries. These characteristics can include:

- very high rates of rapid innovation;
- falling average costs (on a product, not a firm-wide, basis) over a broad range of output;
- relatively modest capital requirements;
- quick and frequent entry and exit;
- demand-side economies of scale;
● switching costs; and
● first-mover advantages.

That one or more of these characteristics may be important in the context of a new economy industry, however, does not suggest that such characteristics never appear in other industries or that all of the listed characteristics always appear in new economy industries. Rather, the point is simply that proper antitrust analysis in all industries requires careful consideration of economic characteristics of the industry, and the listed characteristics are ones that may play important roles in industries in which innovation, intellectual property, and technological change are central features.

2. BACKGROUND

Antitrust law has gone through many changes. From the 1950s through the early 1970s, antitrust law was expansively interpreted and broadly enforced. Plaintiffs frequently won, and a wide variety of business practices were presumed to be illegal.2 The bases for such expansive interpretations was sometimes questionable, however. Courts, for example, in some cases seemed more concerned about protecting competitors than consumers. Business practices might be quickly condemned, seemingly on the basis of courts’ skepticism that businesses would try to maximize profits by becoming more efficient, rather than by obtaining greater market power.

These expansive interpretations of antitrust law precipitated a sea change, led by critics who questioned the basic premises of antitrust law as it was then enforced. “In the 1960s through the 1980s, [antitrust scholars generally associated with the University of Chicago] explained how many market structures and practices that antitrust treated with hostility could be beneficial.”3 Around the same time, antitrust scholars generally associated with Harvard advanced the concept that, in developing antitrust rules, courts and enforcers should keep in mind institutional limits, so that “antitrust rules [do] not outrun the capabilities of implementing institutions.”4 In the 1980s, developments in economics continued to influence antitrust thinking, with “‘post-Chicago’ economic literature argu[ing] that certain market structures and types of collaborative activity are more likely to be anticompetitive than Chicago School antitrust writers imagined.”5

All of these schools of thought “emphasize[] reliance on economic theory in the formulation of antitrust rules.”6 The reassessment of antitrust doctrine based on economic learning has resulted in significant improvements to antitrust law over the past thirty years. This Section briefly reviews a few of the most important developments below. First, antitrust case law integrated the related principles that antitrust protects competition, not competitors, and it does so in order to ensure consumer welfare. Second, as new economic learning suggested possible procompetitive explanations for conduct previously assumed to be anticompetitive, the courts moved away from per se rules of automatic illegality toward a more
flexible rule of reason analysis that would allow consideration of procompetitive explanations of challenged business conduct. Finally, antitrust enforcers have recognized the importance of intellectual property as a spur to innovation and have adopted policies that reflect a greater sensitivity to the need to protect incentives to innovate.

A. Antitrust Protects Competition, Not Competitors, and Should Ensure Consumer Welfare

During the 1960s and early 1970s antitrust decisions from the Supreme Court sometimes seemed more directed to protecting small businesses than to protecting competition that would benefit consumers through lower prices, improved quality, or innovation. Indeed, in some instances the Court “condemned conduct precisely because it reduced costs or generated more desirable products [for consumers].” For example, in *FTC v. Procter & Gamble* the Court affirmed that a merger was illegal because it created efficiencies its rivals could not match. Decisions such as this were criticized as likely to deprive consumers of lower prices or other benefits from the increased competition that a more efficient merged firm could provide.

Such decisions also were criticized for the absence of a coherent rule of law that could explain them. On what basis should courts decide to disallow cost-saving, pro-consumer transactions so that smaller, less efficient firms could be kept afloat? The Court’s premise seemed to be that all markets should be made up of many small firms, staying as close as possible to the economic ideal of “perfect competition.” “The Warren Court defined ‘competitive’ as a market containing many firms, the small ones having a ‘right’ to compete with the bigger ones.” The underlying economic assumption was that a “certain [industry] structure made certain types of conduct inevitable, so antitrust should be directed mainly toward anticompetitive industry structures.”

Developments in economic learning seriously undermined these premises and sent antitrust law in a new direction. Economic research found procompetitive reasons to explain highly concentrated markets—that is, that the most efficient firms were winning the competitive struggle and thereby achieving high market shares. Some economists and lawyers further contended that effective competition did not require dozens of little firms, but instead could occur with relatively few firms in a market. If effective competition could occur without many small firms in a market, then courts did not need to interpret antitrust law to protect small businesses at the expense of consumers.

In response to this and other advances in economic understanding, the Supreme Court in 1977 stated without caveat that the “antitrust laws . . . were enacted for ‘the protection of competition, not competitors.’” The adoption of this principle represented a marked change in the direction of antitrust law. There is now a better understanding that trade-offs exist between the goals of consumer welfare and protecting small firms. To protect small firms can mean a less efficient economy in which consumers must pay higher prices.
Conversely, to allow firms to achieve economies of scale may harm small firms. “For example, large scale production and distribution may reduce costs but also eliminate competitive opportunities for small firms.”

In 1979 the Supreme Court once again chose to interpret the antitrust law to protect consumers, not small businesses, describing the Sherman Act as a “consumer welfare prescription.” Other courts have adopted similar views. For the last few decades courts, agencies, and antitrust practitioners have recognized consumer welfare as the unifying goal of antitrust law. “Few people dispute that antitrust’s core mission is protecting consumers’ right to the low prices, innovation, and diverse production that competition promises.”

B. Procompetitive Explanations May Exist for Much Business Conduct, So Antitrust Law Should Avoid Per Se Rules of Automatic Illegality

Over time, new economic learning has brought to the fore procompetitive explanations for certain business practices previously condemned outright. Some have argued that many practices reflect aggressive competition or innovation and “that nearly all vertical practices [e.g., arrangements between manufacturers and distributors], price discrimination and most strategic pricing, many patent practices, and business torts were rarely or never anticompetitive.” New anticompetitive theories have also emerged. Given the potential for either procompetitive or anticompetitive explanations for business conduct, antitrust analysis needed to move away from per se rules of automatic illegality.

In 1977 in Continental T.V., Inc. v. GTE Sylvania Inc., the Supreme Court relied on economic reasoning to hold that territorial restraints on franchisees should be evaluated under the rule of reason, rather than viewed as per se illegal. Territorial restraints forbid franchisee retailers from selling the manufacturer’s products outside their agreed-upon locations, which typically do not overlap with those of other franchisees. Although such restrictions could reduce competition among franchisees of the same manufacturer (“intrabrand competition”), the Court explained that they also could increase competition among different manufacturers’ franchisees (“interbrand competition”).

“Economists have identified a number of ways in which manufacturers can use such restrictions to compete more effectively against other manufacturers,” the Court stated. For example, such restrictions may be used to provide franchisees with sufficient incentives to engage in promotional activities or to provide service and repair facilities for the manufacturer’s products. Franchisees might be reluctant to make such investments without territorial restraints because they would worry that other franchisees of the same manufacturer would “free ride” on their efforts to promote the manufacturer’s brand, the Court pointed out. In light of these potentially “redeeming virtues,” the rule of reason, not a per se rule of automatic illegality, should be applied. Moreover, the Court directed, “departure from
the rule of reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing.”

The Court’s decision in *Sylvania* marked a major turning point in antitrust law. After this decision, “the Court systematically went about the task of dismantling many of the per se rules it had created in the prior fifty years, and increasingly turned to modern economic theory to inform its interpretation and application of the Sherman Act.” Indeed, only two years later, in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, the Court refused to apply a per se rule to circumstances in which alleged price-fixing among competitors provided substantial efficiencies that could not be obtained through other means. Defendants were the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), both of which had thousands of composers as members. The composers granted nonexclusive licenses to their compositions to ASCAP or BMI, which then created blanket licenses authorizing the playing of millions of copyrighted musical compositions at agreed-upon fees. Plaintiff CBS objected that the blanket licenses issued to television networks were per se illegal price-fixing. The Court described the critical question as “whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to ‘increase economic efficiency and render markets more, rather than less, competitive.’” For several reasons, including a substantial lowering of costs through eliminating thousands of individual transactions, the Court held the blanket licenses should be “subjected to a more discriminating examination under the rule of reason.”

Since *Sylvania* and *BMI*, the Supreme Court and lower courts have often looked to economic learning to understand why firms may use particular business practices. Rule of reason analysis allows this examination of potential efficiency rationales for challenged conduct. Although there are exceptions, of course, the use of per se rules of automatic illegality is now substantially reduced, replaced by a more discriminating analysis under the rule of reason.

**C. Antitrust Analysis Has Incorporated a More Sophisticated Understanding of How Intellectual Property Can Benefit Competition and Consumer Welfare**

During much of the twentieth century, the courts, antitrust enforcers, and antitrust practitioners viewed intellectual property with deep skepticism. Most assumed that a patent or other intellectual property automatically created a monopoly, and Supreme Court cases fostered that presumption. Antitrust enforcers attempted to restrict the use of intellectual property so that competition would be protected. Over-zealous antitrust rules for the use of patents reached a pinnacle when, in 1972, the Antitrust Division of the Department of Justice (DOJ) issued the so-called “Nine No-Nos,” a list of nine patent licensing practices the DOJ generally viewed as per se illegal.
The influence of economic learning about the competitive benefits of intellectual property and the potential efficiencies of intellectual property licensing and other conduct reversed this trend. In 1981 the Chief of the Intellectual Property Section of the Antitrust Division explained that because patents increase the reward for research and development, inventions are produced that otherwise would not have come about (or would not have come about as quickly); in those cases, “the availability of a patent [serves] only to benefit competition—to make additional or less expensive choices available to consumers.” 42 In 1981 officials from the DOJ renounced the Nine No-Nos. 43 The 1995 Antitrust Guidelines for the Licensing of Intellectual Property (DOJ/FTC IP Guidelines), issued jointly by the DOJ and the Federal Trade Commission (FTC), take the view that “intellectual property licensing . . . is generally procompetitive” 44 and should be examined under the rule of reason. 45

As part of this trend, Congress in 1988 amended the Patent Code to eliminate a presumption that a patent confers market power in the context of patent misuse. 46 The antitrust agencies expanded that concept to include copyrights and trade secrets, stating in the DOJ/FTC IP Guidelines that the antitrust agencies “will not presume that a patent, copyright, or trade secret necessarily confers market power upon its owner.” 47 In 2006 the Supreme Court recognized that “Congress, the antitrust enforcement agencies, and most economists have all reached the conclusion that a patent does not necessarily confer market power upon the patentee.” 48 In light of this consensus, the Court reversed its prior holdings and held that, in a tying case, “the mere fact that a tying product is patented does not support . . . a presumption [of market power.]” 49

Over the course of recent decades, the courts and the antitrust agencies have thus moved away from a presumption that intellectual property automatically creates a monopoly and intellectual property arrangements are likely to harm competition. They now assess whether particular intellectual property in fact confers market power and consider how business arrangements involving intellectual property can benefit consumer welfare. This move has opened antitrust analysis to a more economically sophisticated approach to intellectual property issues, increasing the likelihood that antitrust will properly value the contribution of intellectual property rights to innovation and competition.
3. RECOMMENDATIONS AND FINDINGS

1. There is no need to revise the antitrust laws to apply different rules to industries in which innovation, intellectual property, and technological change are central features.

Current antitrust analysis has a sufficient grounding in economics and is sufficiently flexible to reach appropriate conclusions in matters involving industries in which innovation, intellectual property, and technological change are central features. Judge Richard A. Posner, for example, has concluded that “antitrust doctrine is sufficiently supple, and sufficiently informed by economic theory, to cope effectively with the distinctive-seeming antitrust problems that the new economy presents.” Others agree, finding, for example, that “[w]hile the new economy has a number of distinct characteristics, antitrust enforcement is sufficiently flexible to account for the distinguishing features of the new economy and to preserve competition when it benefits consumers.”

The fundamental economic principles that guide antitrust law remain relevant to and appropriate for the antitrust analysis of new economy industries. Over the years, antitrust analysis has been refined to incorporate useful aspects of new economic learning. This has improved the potential for a proper competitive assessment in all industries, including those characterized by innovation, intellectual property, and technological change.

Moreover, antitrust analysis, guided by valid economic principles, is sufficiently flexible to provide a sound competitive assessment in such industries. Rule of reason analysis, for example, can accommodate the assessment of a wide variety of factors, including likely pro-competitive effects of challenged conduct. As discussed above, advances in economic learning have persuaded courts to replace many per se rules of automatic illegality with a more flexible analysis under the rule of reason.

Increased flexibility and improved economic understanding can be seen in the evaluation of both joint and unilateral conduct under the Sherman Act, where courts have largely turned away from the application of per se rules of automatic illegality and moved toward rule of reason analysis. Likewise, the analysis of mergers has moved away from structural presumptions that increased concentration will necessarily result in anticompetitive conduct, toward a more complex analysis that incorporates predictions of competitive effects using tools of modern economic analysis. Significantly, both rule of reason analysis and current merger analysis require an evaluation of procompetitive efficiencies that may result from firms’ agreements, unilateral conduct, or proposed transactions. This is a significant positive change from the typical antitrust analysis of thirty years ago.

In addition, as discussed above, the courts and the antitrust agencies in recent decades have evidenced a greater appreciation of the importance of intellectual property in promoting
innovation and, accordingly, the need to incorporate this recognition into a dynamic analysis of competitive effects. Witnesses and commenters remarked there is an improved understanding that antitrust law and patent law are complementary, with both seeking to encourage innovation and competition.52

Antitrust analysis can be properly applied in dynamic, innovation-driven industries.53 Rapid technological progress and innovation are not new issues in antitrust law.54 One witness pointed out “innovation has been the driver of American economic growth since at least the passage of the Sherman Act in 1890” and maintained “antitrust doctrine does not focus on static analysis.”55 Yet another stated that “[a]ntitrust law is sufficiently flexible to take innovation concerns into account, and today’s theories, which may be replaced over time, need not be codified into the statute.”56

Indeed, the evolution of antitrust law—both through case law and agency guidelines—has shown that new or improved economic learning can be incorporated into antitrust analysis as appropriate. Allowing the ongoing incorporation of economic learning into antitrust case law and agency guidelines is preferable to attempts at legislative change to specify different antitrust analyses for industries characterized by innovation, intellectual property, and technological change. Industries that fall into those categories will keep changing over time; attempts to define them would likely be difficult and impermanent at best. Furthermore, economic learning continues to evolve, and antitrust law needs to be able to incorporate this new learning as appropriate. It is important that antitrust develops through mechanisms, such as case law development in the courts and agency guidelines, that allow ongoing reassessments of existing law and economic principles relevant to antitrust analysis.

2. In industries in which innovation, intellectual property, and technological change are central features, just as in other industries, antitrust enforcers should carefully consider market dynamics in assessing competitive effects and should ensure proper attention to economic and other characteristics of particular industries that may, depending on the facts at issue, have an important bearing on a valid antitrust analysis.

Antitrust analysis in all industries requires careful assessments of each industry’s market dynamics and economic characteristics. To take proper account of market dynamics, antitrust analysis should carefully consider the incentives and obstacles that firms seeking to develop and commercialize new technologies may face.57 Antitrust enforcers should “explicitly recognize that market conditions, business strategies, and industry structure can be highly dynamic.”58

Innovation provides a significant share of the consumer benefits associated with competition, particularly in the most dynamic industries.59 New and improved products and serv-
ices, as well as new business methods and production processes, are created through innovation.\textsuperscript{60} To improve the application of antitrust in new economy industries, antitrust enforcers should give further consideration to efficiencies that lead to more rapid or enhanced innovation.\textsuperscript{61} The potential benefits to consumer welfare from such efficiencies are great, thus warranting careful assessments of the potential for certain business conduct to create more rapid or enhanced innovation.

“[A] proper market-power inquiry in new economy industries must include a serious analysis of the vigor of dynamic competition” that looks beyond current sales figures.\textsuperscript{62} To account properly for dynamic effects, antitrust enforcers must recognize that current market shares may overstate or understate likely future competitive significance. The Supreme Court identified this issue thirty years ago in \textit{United States v. General Dynamics}, a merger case in which a coal company’s share of uncommitted coal reserves was a better indicator of its likely ability to compete for future supply contracts than its historical market share.\textsuperscript{63}

Analogous examples can be found in new economy industries, in which there may be “sequences of races to develop a new product or . . . to replace an existing product through drastic innovation.”\textsuperscript{64} For example, if a firm has failed recently to introduce new and improved products comparable to rivals’ new offerings, and has no plans to do so, its likely future competitive significance may be far less than would be indicated by its historical market share.\textsuperscript{65} A recent entrant with a promising new product, on the other hand, may have greater likely future competitive significance than its current low market share might suggest.\textsuperscript{66}

Intellectual property may be critical to future innovation in an industry, so it is also important “to examine ownership of and investment in relevant intellectual property—which may involve technologies not currently in commercial use.”\textsuperscript{67} If, for example, the current leader “owns all intellectual property necessary for radical innovation, dynamic competition will not be effective.”\textsuperscript{68} If a firm with a low market share holds an intellectual property asset essential for future product development, that firm’s likely future competitive significance may be far greater than that of a current market leader that has no promising new products or intellectual property assets in the pipeline.\textsuperscript{69}

Antitrust analysis also must recognize that a price above marginal cost, by itself, does not necessarily suggest that a firm has market power that should be relevant in an antitrust matter or is operating anticompetitively in a relevant antitrust market.\textsuperscript{70} Particularly in innovative industries, such as those in which intellectual property assets are key, firms may have large, up-front fixed costs for research and development, and relatively small marginal costs of production.\textsuperscript{71} In pharmaceuticals, for example, a drug that costs millions of dollars to research, develop, and put through clinical testing may cost only a few cents per pill to produce.\textsuperscript{72} Over the long run, the pharmaceutical company must set a competitive price that will cover its up-front fixed costs, including a risk-adjusted cost of capital.\textsuperscript{73} Firms in innovative industries also must cover the costs of innovation failures, such as drug products that fail before or during clinical testing.\textsuperscript{74}
For these reasons, firms with low marginal costs but large fixed costs, for research and development and other innovative activity, for instance, often need to price significantly above marginal costs simply to earn a competitive return in the long run. “This basic economic observation is not new, either in practice or in theory: it holds in any industry with large fixed costs, from railroads to microprocessors, from newspapers to computer software.”

A number of industries in which innovation, intellectual property, and technological change are central features also have one or more of the characteristics described briefly below. Depending on the facts at issue, such characteristics may have an important bearing on a proper antitrust analysis.

Very high rates of rapid innovation. One critical feature of new economy industries is innovation competition. Competitive pressure to get new products or services to market ahead of one’s competitors can lead to short product life cycles, with new products replacing the old every few months instead of years. In addition, in some industries, “[s]uccessful incumbents . . . are constrained primarily . . . by the threat that another firm will come up with a drastic innovation that causes demand for the incumbent’s product to collapse.” Threats of drastic innovations may “force new-economy firms to invest heavily in R&D and to bring out new versions of their products—including versions that lead to the demise of their old versions.”

Relatively modest capital requirements. Some new economy industries do not require entrants to incur substantial sunk costs. Depending on the circumstances, some software markets, for example, may require only modest capital investments for entry. Ease of entry is relevant to assessment of whether a firm has or could obtain market power.

Quick and frequent entry and exit. In industries with relatively modest capital requirements entry and exit may be quick and frequent. Start-up software enterprises, for instance, particularly during the 1990s, were frequently born only to die while very young. The extent to which quick and frequent entry and exit characterize an industry also will be relevant to whether a firm in such an industry could possess durable market power.

Falling average costs (on a product, not a firm, basis) over a broad range of output. Economies of scale over a wide range of output are typical of industries with “large fixed costs (most of which are sunk R&D expenditures) and low marginal costs.” New entrants may not be able to duplicate these economies of scale and therefore may not be able to constrain incumbent firms.

Demand-side economies of scale. “Economies of scale in consumption describe the situation in which the larger the firm’s output is, up to some point, the more valuable that output is to its customers.” Examples include telephones and other interactive services, such as email and online auctions. Computer programs also “tend to be more valuable the more people use them because training, support by information-technology personnel, and standardization of equipment and procedures are facilitated.” The presence of demand-side
economies of scale can have a variety of implications for antitrust analysis, including that common standards typically are necessary to benefit from such economies.

Switching costs. In industries with demand-side economies of scale consumers may need to incur costs to switch from one competitor to another. Such switching costs may deter customers from moving from an incumbent to a new entrant and thus cause entrants to be an ineffective competitive constraint.86

First-mover advantages. “There is often a substantial advantage to being the first in a high-tech industry to develop and introduce a new product or the first to gain a significant market presence.”87 This advantage can arise, for instance, because the first to market can quickly take advantage of demand-side economies of scale or gain a head-start on moving down the learning curve for making the new product.88 Whatever the source of a first-mover advantage in a particular industry, its effect is to encourage fierce competition by firms to be the first to market. Antitrust analysis should take into account such competitive incentives.

In sum, antitrust law has sufficient grounding in economic learning and flexibility to provide appropriate analyses of competitive issues in new economy industries. Developments in antitrust law in recent decades have made this possible. To tether antitrust law to the goal of consumer welfare, achieved through free-market competition, with an analysis based on economic learning, has benefited consumers and produced more consistency and predictability in antitrust doctrine.

Notes

1 Prof. Carl Shapiro, Statement at AMC New Economy Hearing, at 2 (Nov. 8, 2005) [hereinafter Shapiro Statement re New Economy].


5 Hovenkamp, Antitrust Enterprise, at 36.


7 See Hovenkamp, Antitrust Enterprise, at 2; Gellhorn, Antitrust Law and Economics, at 47 & n.14.

8 Hovenkamp, Antitrust Enterprise, at 1 (citing Albrecht v. Herald Co., 390 U.S. 145 (1968) (per se unlawful for dealer to limit maximum price charged by its dealers); Brown Shoe Co. v. United States, 370 U.S. 294 (1962) (merger unlawful, in part because it would enable resulting firm to undersell its rivals);
FTC v. Procter & Gamble, 386 U.S. 568 (1967) (merger illegal for creating efficiencies its rivals could not match)).

9 See Procter & Gamble, 386 U.S. at 579.

10 See, e.g., HOVENKAMP, ANTITRUST ENTERPRISE, at 2 (“[I]n the 1960s and 1970s the Supreme Court went overboard in protecting small business from larger firms, often at the expense of consumers.”).

11 See, e.g., id. (result “was a mélange of incoherent policies that confused competition with small business protection”).

12 GELLHORN, ANTITRUST LAW AND ECONOMICS, at 105 (“During the 1960s, when the antitrust laws were applied expansively, real market divergences from the model of perfect competition were viewed suspiciously and often were subject to prosecution.”).

13 HOVENKAMP, ANTITRUST ENTERPRISE, at 2.

14 Id. at 37.

15 See GELLHORN, ANTITRUST LAW AND ECONOMICS, at 92–93 (quoting Harold Demsetz, Two Systems of Belief about Monopoly, in INDUSTRIAL CONCENTRATION: THE NEW LEARNING 164 (Harvey J. Goldschmid et al. eds., 1974)).

16 HOVENKAMP, ANTITRUST ENTERPRISE, at 32.

17 Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (quoting Brown Shoe, 370 U.S. at 320). The Court had made this observation fifteen years earlier as well, but in that case had disallowed a merger that would produce a firm with a 5 percent market share, noting “Congress’ desire to promote competition through the protection of viable, small, locally owned businesses.” Brown Shoe, 370 U.S. at 344. By contrast, “[i]n Brunswick, the Court studied the Janus-like features of Brown Shoe and ignored the face of business egalitarianism.” GELLHORN, ANTITRUST LAW AND ECONOMICS, at 47.

18 GELLHORN, ANTITRUST LAW AND ECONOMICS, at 45.

19 Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (quoting ROBERT H. BORK, THE ANTITRUST PARADOX 66 (1978)); see GELLHORN, ANTITRUST LAW AND ECONOMICS, at 47. Debate continues over whether the Supreme Court implicitly adopted the goal of allocative efficiency or the goal of preventing wealth transfers as the standard by which consumer welfare should be measured. See Merger Enforcement Transcript at 112–15 (Rule) (Nov. 17, 2005). See generally Introduction of this Report, note 22.

20 See GELLHORN, ANTITRUST LAW AND ECONOMICS, at 47.

21 See, e.g., Id.

22 HOVENKAMP, ANTITRUST ENTERPRISE, at 1.

23 See generally id. at 25–39.

24 Id. at 32.

25 For example, “[p]ost-Chicago scholars developed a fairly robust theory of ‘raising rivals’ costs,’ under which dominant firms or cartels adopt strategies that impose higher costs on rivals, thus creating a price umbrella for the strategizing firms.” Id. at 38.


27 Id. at 54–55.

28 Id. (citation omitted).

29 Id. at 55.

30 Id. at 54–59.

31 Id. at 58–59.

32 GAVIL ET AL., ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 358 (2002) [hereinafter GAVIL, ANTITRUST LAW IN PERSPECTIVE].

Id. at 19–20 (quoting United States v. United States Gypsum Co., 438 U.S. 422, 441 n.16 (1978)).

BMI, 441 U.S. at 24.


See generally Gavil, Antitrust Law in Perspective, at 1109.

See, e.g., Robert P. Merges & John F. Duffy, Patent Law and Policy: Cases and Materials 1349 (3d ed. 2002) (“During the middle part of the twentieth century, the courts tended to associate patents with monopolies, and hence to view them as narrow exceptions to the nation’s antitrust laws. This view [was] especially prominent in the Supreme Court cases from the 1930s until the 1960s . . . .”).


See Bruce B. Wilson, Deputy Ass’t Att’y Gen., Antitrust Div., Dep’t of Justice, Remarks Before Michigan State Bar Antitrust Law Section and Patent, Trademark and Copyright Law Section (Sept. 21, 1972), reprinted in 5 CCH Trade Reg. Rep. 50,146 (current comment transfer binder 1969–83) (DOJ official’s speech articulating what came to be called the “Nine No-Nos”).


See Abbott B. Lipsky, Jr., Current Antitrust Division Views on Patent Licensing Practices, 50 Antitrust L.J. 515, 517–24 (1981). Mr. Lipsky was then a Deputy Assistant Attorney General in the Antitrust Division of the DOJ.


The DOJ/FTC IP Guidelines call for per se treatment in certain limited circumstances, but still make clear that the agencies use the rule of reason “[i]n the vast majority of cases.” Id. § 3.4.

35 U.S.C. § 271(d)(5); see also Independent Ink, 126 S. Ct. at 1290.

DOJ/FTC IP Guidelines, § 2.2.

Independent Ink, 126 S. Ct. at 1292.

Id. at 1284.

Posner, Antitrust Law, at 256. Judge Posner finds more “troublesome” the institutional structure of antitrust enforcement. Id. The Commission addresses antitrust enforcement institutions in Chapter II of this Report.

Prof. Richard J. Gilbert, Statement at AMC New Economy Hearing, at 2 (Nov. 8, 2005) [hereinafter Gilbert Statement].

See, e.g., M. Howard Morse, Statement at AMC New Economy Hearing, at 6 (Nov. 8, 2005) [hereinafter Morse Statement] (patents and antitrust are complementary, “as both are aimed at encouraging innovation, industry, and competition”) (citing Atari Games Corp. v. Nintendo of Am., Inc., 897 F.2d 1572, 1576 (Fed. Cir. 1990)).

See, e.g., Gilbert Statement, at 4.

See, e.g., Jonathan M. Jacobson, Do We Need a “New Economy” Exception for Antitrust Law?, 16 Antitrust, Fall 2001, at 89, 89–90.
Shapiro Statement re New Economy, at 2–3.

Morse Statement, at 5.

See Shapiro Statement re New Economy, at 2; see also id. (endorsing this Commission’s description of new economy industries because it focuses on the economic characteristics of those industries).

See id.

See, e.g., Gilbert Statement, at 4 (“[D]ynamic competition to develop new products and to improve existing products [in innovation-driven industries] can have much greater impacts on consumer welfare than static price competition.”); Morse Statement, at 5 (“Everyone should understand that small increases in productivity from innovation dwarf even significant reductions in static efficiency over time.”) (citing F.M. Scherer & D. Ross, Industrial Market Structure and Economic Performance 31, 613 (3d ed. 1990)); Shapiro Statement re New Economy, at 2 (“At least over the medium to long term, the lion’s share of consumer benefits associated with competition in our most dynamic industries results from innovation.”).

See id.

See Morse Statement, at 4 (noting that “such efficiencies often drive [merger] transactions in high-tech industries”). Conversely, because of innovation’s importance, “anticompetitive effects on innovation can have much greater impact than effects on price.” Id. at 5.


See Evans & Schmalensee, Antitrust Analysis in Dynamically Competitive Industries, at 11.

Shapiro Statement re New Economy, at 3.

Id. at 3–4.

Evans & Schmalensee, Antitrust Analysis in Dynamically Competitive Industries, at 25.

Id.


See Gilbert Statement, at 9–10; Shapiro Statement re New Economy, at 6–7.

See, e.g., Gilbert Statement, at 9–10; Morse Statement, at 7; Shapiro Statement re New Economy, at 7.

See, e.g., Gilbert Statement, at 9 (reporting an estimate that researching, developing, and testing a new drug costs $800 million) (citing Joseph DiMasi et al., The Price of Innovation: New Estimates of Drug Development Costs, 22 J. Health Econ. 151 (2003)).

See Shapiro Statement re New Economy, at 7.

See id.

Id.

See Gilbert Statement, at 7.

Morse Statement, at 6.

Evans & Schmalensee, Antitrust Analysis in Dynamically Competitive Industries, at 20.

Id. at 21.


Gilbert Statement, at 4.

See id. at 4–5.
83 POSNER, ANTITRUST LAW, at 247.
84 Id.
85 Id. at 248.
86 See Gilbert Statement, at 5.
87 Morse Statement, at 8.
88 Id.