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President Biden's Executive Order on Promoting Competition: an Antitrust Analysis

Herbert Hovenkamp[*]

Introduction

In July, 2021, President Biden signed a far ranging Executive Order (EO) directed to promoting competition in the American economy.[1] Another closely related recent action by the Federal Trade Commission, not mentioned by the EO, is the withdrawal of its 2015 "Statement of Enforcement Principles."[2] That statement did two things, both of which were regarded as narrowing the FTC's ability to bring more expansive antitrust claims. First, it observed that the Commission would be guided by what it called the "consumer welfare" principle, although without explaining the meaning of that term. Second, it stated that practices evaluated under §5 of the FTC Act would be evaluated under "a framework similar to the rule of reason."[3]

This withdrawal is significant because it may open the way for the FTC to do more things along the lines that the EO contemplates. Although the withdrawal has produced some hand wringing even from sources such as the *Washington Post* editorial board,[4] repeal of this statement is overall a good thing. First, the rule of reason has become

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[1]Exec. Order No. 14036 on Promoting Competition in the American Economy, 86 Fed. Reg. 36,987 (July 9, 2021).

[2]Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act, (withdrawn), available at https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

[3] *Id.*

[4] *Opinion: Don't Want the FTC to Act on Antitrust? Tell Congress to Get Moving,* THE WASHINGTON POST (July 12, 2021), at https://www.washingtonpost.com/opinions/2021/07/11/dont-want-ftc-act-antitrust-tell-congress-get-moving/.

a powerful vehicle for antitrust underenforcement, a point that even conservative Justice Gorsuch acknowledged in his recent decision in NCAA v. Alston.[5] Second, the *Washington Post* Editorial Board writes as if the Sherman Act applies relatively clear rules while §5 of the Federal Trade Commission Act permits unspecified overreaching. That is simply not the case. The language of the Sherman Act ("restrain trade" and "monopolize")[6] is not appreciably clearer or more specific than is §5 of the FTC Act ("unfair methods of competition").[7] Further, nothing in any of the statutes suggests a consumer welfare principle nor the years of judge made law that has defined it, including the rule of reason. What §5 lacks is a long line of antitrust precedents that define its reach in a way similar to the extensive case law interpreting the equally opaque provisions of the Sherman Act. In fact, important precedents in competition law prior to the issuance of this statement of principles interpreted §5 as not reaching very far beyond the Sherman Act.[8]

Third, there is a good reason for using §5 of the FTC Act to reach beyond the Sherman Act: as a standalone provision §5 cannot be enforced by private plaintiffs. Much of the overreaching in the antitrust laws has come about in private actions, motivated mainly by the availability of treble damages and attorneys' fees.[9] As a result, when the FTC wants to use §5 to reach out it need not worry about debilitating damages actions and – what frequently goes with them – jury trials.

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[5]NCAA vs. Alston, 141 S.Ct. 2141, 2160 (2021). See Herbert Hovenkamp, A Miser's Rule of Reason: Student Athlete Compensation and the Alston Antitrust Case (SSRN Working paper, July 6, 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3879580.

[6] 15 U.S.C. 1, 2.

[7] 15 U.S.C. §45.

[8] *E.g.*, E.I. Du Pont De Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984) (refusing to condemn parallel pricing plus facilitating practices as collusive in the absence of evidence of an agreement).

[9] 15 U.S.C. §15.

While repeal of the FTC Act §5 Statement of Enforcement Principles is a good thing, it should come with one warning: it does not turn §5 into a tort statute or a license to go after private wrongs that do not injure competition. One common criticism of the FTC v. Brown Shoe decision, which first applied this expansionist principle, was that Brown Shoe was not doing anything anticompetitive.[10] It was imposing exclusive dealing ("single branding") on a large number of small retail stores that sold its shoes, effectively turning them into its franchisees. The market was unconcentrated, and Brown's own market share was small.[11] Further, the individual franchise stores were free to terminate their franchise agreements at will, and even under the franchise agreements about 25% of their sales were from competitors.[12] Today a ruling this broad would very likely wipe out the franchise agreements of many of the larger fast foods chains and the automobile industry. The Court simply did not understand how modern distribution systems work. Rather, it was based on a quaint image of an economy in which small manufacturers produced their products and were done. Retailers purchased and resold them at will.

Being able to reach a wide range of conduct under §5 of the FTC Act is a good thing so long as the FTC keeps in mind that it is still addressing problems of competition, which means that it should be concerned with practices that realistically threaten to reduce market wide output but that may not be reachable under the Sherman Act.

While the President's Executive Order has been touted as a "Progressive" document,[13] its content falls short of that. It does not suggest that the antitrust enforcement agencies break up any firms, other than becoming more aggressive about mergers. Nor does it

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[10] FTC v. Brown Shoe Co., 384 U.S. 316 (1966).
[11] *See* the Eighth Circuit's opinion, 339 F.2d 45, 49 (8th Cir. 1964).
[12] *Id* at 50.
[13] *See* Phil Gramm & Mike Solon, *Biden Turns Back the Progressive Clock*, Wall Street Journal (July 14, 2021, 2:12 PM), https://www.wsj.com/articles/biden-turns-back-the-progressive-clock-11626286594.

contain any general expression of concern about vertical integration as such or advocacy for removal of antitrust immunities. Consistent with antitrust policy generally, it repeatedly expresses concerns about market power, or the power to profit by charging high prices, but it never complains about large firm size as such.[14] Further, while it discusses market power repeatedly, it does not speak about displacing antitrust's current economic approach with concerns about political power or large firm size. To the contrary, it makes no reference to political power at all, except for this one telling passage that it quotes from a 1957 Supreme Court decision declaring that the Sherman Act:

> 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 conducive to the preservation of our democratic political and social institutions.[15]

The passage is important for what it does *not* say about political power, even during a period of great antitrust expansion. The goals are to achieve the best allocation of economic resources, lowest prices, highest quality, and greatest material progress – but all of this within an environment that is conducive to the preservation of our democratic institutions. That is hardly an endorsement of the proposition that antitrust should ignore economic concerns in favor of political ones. It could as easily have been written by Friedrich Hayek or Milton Friedman.

Of course, rule making of unspecified scope such as the EO authorizes could reach further. Further, the EO does represent a more aggressive approach to antitrust policy than has been reflected in the recent past. It is also a significant corrective for an anti-enforcement bias that has hampered antitrust policy for decades, that was never

[14] EO, note __, at 36,987-88.
[15] Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958) (Black, j.), quoted in EO, *supra* note __ at 36989.

economically justified, and that continues to affect portions of the federal judiciary.[16]

This paper briefly examines those portions of the Executive Order that are most immediately relevant to antitrust policy. It does not discuss recommendations that are likely to be carried out through means unrelated to antitrust enforcement.[17] To be sure, nearly any area of the economy may end up raising antitrust concerns, but that is largely because the antitrust laws are not limited to a specific sector. Their scope is nearly as broad as the scope of Congressional power to regulate commerce. Further, fact finding may uncover some antitrust violations. For example, high baggage handling fees, defense contracting prices, or beer distribution may all become antitrust violations if they involve collusion. A number of provisions may or may not have antitrust consequences depending on what happens next, and future legislation could sweep in some of them.

One of the reasons so many areas of concern covered by the EO do not immediately implicate the antitrust laws is its expression of a "whole of government" competition policy. This policy urges competitive solutions both through the antitrust laws and to other areas of law in which competitive concerns are prominent.[18] One good

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[16] *See* Herbert Hovenkamp, *Antitrust Error Costs* (Working Paper June 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3853282.

[17] Because the EO is far ranging, many of the things it discusses are likely to be addressed by means other than antitrust enforcement. These include net neutrality and other broadband regulation, unfair data collection and surveillance, control over aviation and baggage fees, bottlenecks in public transportation, plant and seed protection through the patent system, wine and beer distribution, pricing and distribution of hearing aids, transparency in hospital and medical services pricing, prescription drug pricing both in the general insurance markets and via programs such as Medicare, defense contracting, issues relating to consumer mobility among financial institutions, and competitive development of nascent technologies such as pilot-less drones.

[18] *Id*. at 36,989, the EO expressly refers to the Packers and Stockyards Act, the Federal Alcohol Administration Act (Public Law 74-401, 49 Stat. 977, 27 U.S.C. 201 et seq.), the Bank Merger Act, the Drug Price Competition and

result of a Presidentially supported "whole of government" approach to competition policy is more attention given to competition concerns by the relevant agencies and federal judges when they are applying bodies of law other than antitrust.[19] This can cut both ways. On the one hand it can increase attentiveness to competition issues in non-antitrust enforcement. On the other hand, it can also yield more regulation in situations where the uncontrolled market is viewed as failing because it is unreasonably restrictive or biased.

One example of this is the EO's strong commitment to net neutrality, or the imposition of common-carrier-like nondiscrimination rules on the suppliers of internet services.[20] These are stated in a section of the EO addressed to the Chair of the FCC entitled "To promote competition, lower prices, and a vibrant and innovative telecommunications ecosystem."[21] The EO expresses similar concerns that communications spectrum auctions be organized in ways that distribute purchasers widely and evenly, preventing hoarding, or creating entry barriers.

While this approach of declaring greater amounts of regulation to be "competitive" might seem odd today, it is strictly consistent with the neoclassical approach to regulation: permit markets to do their job when they can, but use regulation that corrects market failures with a

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Patent Term Restoration Act of 1984 (Public Law 98-417, 98 Stat. 1585), the Shipping Act of 1984 (Public Law 98-237, 98 Stat. 67, 46 U.S.C. 40101 et seq.), the ICC Termination Act of 1995 (Public Law 104-88, 109 Stat. 803), the Telecommunications Act of 1996, the Fairness to Contact Lens Consumers Act (Public Law 108-164, 117 Stat. 2024, 15 U.S.C. 7601 et seq.), and the Dodd-Frank Wall Street Reform and Consumer Protection Act (Public Law 111-203, 124 Stat. 1376) (Dodd-Frank Act).

[19] *Cf.* Tom Christensen & Per Laegreid, *The Whole-of-Government Approach to Public Sector Reform*, 67 Public Administration Review 1059 (2007).

[20] As expressed during the Obama Administration by FCC, *Protecting and Promoting the Open Internet*, 80 FR 19738-01, 2015 WL 1605986(F.R.) (Apr. 12, 2015)

[21] EO, note _, at 36,994.

goal of emulating competition as closely as possible.[22] On the other hand, it is absolutely inconsistent with a theory of regulation widely shared by neoliberals since the 1970s that regulation is little more than the purchase of economic access or exclusion by interest groups.[23] The EO at least implicitly recognizes that the neoclassical theory is almost always better, but only if the government is capable of sticking to it without playing favorites or letting politics intervene.

Monopoly in the American Economy

The EO correctly describes the state of competition in the American economy as declining but does so in terms of "consolidation" and "excessive market concentration."[24] Today the level of concentration in American markets is hotly disputed. Much of the uncertainty results from the types of data that are used to define markets. Because "concentration" refers to the number of firms in a market, it is essential that markets be defined accurately. The most widely used data for this purpose, which are from the U.S. census, offer incredibly poor correlations with higher concentration in properly defined markets.[25] To say that the data are "useless" might be an exaggeration, but not by much.

There are better ways of assessing the amount of market power in the economy – namely, by direct measurement of price-cost margins. In a competitive economy overall prices should be reasonably close to marginal costs, with some adjustments for

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[22]On the neoclassical approach to regulation, *see* Herbert Hovenkamp, *Regulation and the Marginalist Revolution*, 71 FLA. L. REV. 455 (2019). The classic treatment is ALFRED E. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS (2 vols 2d ed. 1988).

[23]As in George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 6 (1971) (never discussing natural monopoly, high fixed costs, bottlenecks or other economic indicia of market failure, but only the purchase of exclusive rights from government officials).

[24] EO, note __ at 36,987

[25] *See* Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L. J. INDUS. ORG. 714, 726 (2018); Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L.J. 1996 (2018)

innovation and other fixed costs. Monopoly power is measured directly in terms of high price-cost margins.[26] The measurement tools that we have today for direct measurement of price cost margins are much more accurate and relevant to the task than concentration numbers driven by census data.[27] For example, these approaches do not need to worry about such things as whether markets are national, regional, or local, or variations in the correlation between structure and power. That is, direct measurement enables us to estimate the extent of monopoly without the need to define a market.

The EO does not mention margins or direct measurement. Nevertheless, the story at least at the general level is quite consistent with the account given in the EO: Price-cost margins have been rising, particularly since the 1980s. These new approaches also permit something that concentration data do not, and that is determine where the increased returns are going. While the returns to capital have increased significantly, the share of returns that goes to labor has been seriously in decline, particularly among the less well trained portion of the labor market.[28]

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[26] William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981); HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE, Ch. 3 (6th ed. 2020).

[27] Good recent examples are Jan De Loecker, Jan Eeckhout & Gabriel Unger, *The Rise of Market Power and the Macroeconomic Implications*, 135 Q. J. ECON. 561 (2020) (seeing dramatic rise in margins since 1980); Robert E. Hall, *Using Empirical Marginal Cost to Measure Market Power in the U.S. Economy* (NBER Working Paper 2018), available at https://www.nber.org/papers/w25251. See *id*. at 18 (finding "substantial growth in market power" over the period from 1988 to 2015, although less than some others); Jan De Loecker, Jan Eeckhout, and Simon Mongey, *Quantifying Market Power and Business Dynamism in the Macroeconomy* (CEPR Discussion Paper, May, 2021), available at https://repec.cepr.org/repec/cpr/ceprdp/DP16097.pdf; David Autor, et al, *The Fall of the Labor Share and the Rise of Superstar Firms* (NBER Working Paper May 2017), available at https://www.nber.org/papers/w23396.

[28] See Autor, *supra*; Matthias Kehrig and Nicolaw Vincent, *The Micro-Level Anatomy of the Labor Share Decline*, 136 Q.J. ECON. 1031 (2021) (also showing significant decline at the macro level, but instability at the firm

Although antitrust policy did become significantly less aggressive in the 1980s and following, this cannot be more than partly to blame for these declines in performance. They are also attributable to generally hostile attitudes toward organized labor and lack of concern about labor mobility and education. In sum, these newer methodologies for measuring monopoly provide support for several initiatives in the President's EO, including those addressing the decline in labor competition. Just as we need more aggressive antitrust enforcement in some areas, we also need more aggressive support for labor, and for education and the other institutions that support it.

"New Industries and Technologies"

The EO refers to the "challenges posed by new industries and technologies," which include the "dominant internet platforms."[29] That is a good and positive way of expressing the issue. The giant platforms that have been in the crosshairs in Congress and other areas of public debate (mainly Amazon, Apple, Facebook, and Google) are new industries and technologies. They are not fundamentally a menace to society, although they certainly do raise competitive concerns. They have been a principal contributor to economic growth, and the higher output that they facilitate benefits both consumers and labor as well as other businesses that interact with them.[30]

The reason that the big platforms are so successful, of course, is that consumers like them. It takes a special measure of arrogance and in any event would be political suicide to ignore consumer behavior. Nevertheless, metered antitrust relief is appropriate, and that

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level). For an attempt to link rising corporate returns and declining labor share to Chicago School antitrust policy, see Erdogan Bakir, Megan Hays, & Janet Knoedler, *Rising Corporate Power and Declining Labor Share in the Era of Chicago School Antitrust*, 55 J. ECON. ISSUES 397 (2021). *See also* Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536 (2019).

[29] EO, note __, at 36,988

[30] *See* Joshua P. Zoffer, *Short-Termism and Antitrust's Innovation Paradox*, 71 Stan. L. Rev. Online 308 (2019).

is where the litigation-driven, fact-intensive approach that antitrust offers is valuable. Further, the focus should be on remedies that tend toward higher output, increased consumer satisfaction, and more opportunities for labor and other input suppliers.

The relationship between a dominant platform such as Amazon and the numerous small businesses who are affected by it is very complex and cannot be captured in a single sentence. Amazon as well as other large internet firms have clearly injured many small businesses forced to compete with them. On the other hand, Amazon has also supplied distribution services to many small businesses, who are able to reach broader markets as a result.[31] While there are some vague similarities with the "chain stores" that were the targets of Louis Brandeis' wrath a century ago, there are also important differences.[32] The war between family-owned single stores and large multistore operators such as Macy's, Woolworth's, the Great Atlantic and Pacific Tea Company ("A&P"), and Sears was far more devastating to small business than the one between online sellers such as Amazon and smaller retailers. For example, A&P simply competed by selling its own products in competition with family owned grocers, who had no choice but to compete.[33] By contrast, Amazon often becomes their

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[31] *See, e.g.*, Brock Blake, *Amazon: Small Business Friend or Foe?*, Forbes (Sep. 23, 2019, 10:23 AM), https://www.forbes.com/sites/brockblake/2019/09/23/amazon-friend-or-foe/?sh=27f171057367.

[32]For a balanced evaluation of the issues, including Brandeis' involvement, see Richard C. Schragger, *The Anti-Chain Store movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920-1940*, 90 IOWA L. REV. 1011 (2005). On the "fair trade" movement to impose resale price maintenance on discounters, *see* LAURA PHILLIPS SAWYER, AMERICAN FAIR TRADE: PROPRIETARY CAPITALISM, CORPORATISM, AND THE 'NEW COMPETITION,' 1890-1940 (2017).

[33]*See* FRED ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 11-23 (1962) (large number of small grocers bankrupted by A&P led to passage of Robinson-Patman Act); Hugh C. Hansen, *Robinson-Patman Law: A Review and Analysis*, 51 FORDHAM L. REV. 1113, 1119-1124 (1983); JOSEPH C. PALAMOUNTAIN, JR., THE POLITICS OF DISTRIBUTION (1955) (similar, but more detailed)

internet broker, enabling many small businesses to find markets that they could not otherwise reach.[34] Others have been pressured into expanding their own online presence on other platforms. That is, for many small businesses the story has been repositioning and reaching out rather than bankruptcy.

In any event, the Brandeisian war against the chain stores utterly failed. Demographics are hard things to resist, and the Brandeis movement for widespread use of resale price maintenance ("fair trade") and discriminatorily high taxes on multi-store owners[35] has given way to a consumer culture that has few qualms about shopping at large retailers. More importantly, and particularly for Democrats, a policy of forcing higher costs on larger retailers in order to protect smaller ones hurts low income people the most.[36] The enemy is high prices and inadequate access to low cost alternatives, not size. A policy of expanding broadband access into low income populations is almost certain to have a much bigger welfare payoff than one of disciplining online retailers simply because they are big.

Anticompetitive practices that reduce output and raise prices are another matter. It seems clear that anticompetitive things are happening and large e-retailers such as Amazon could be performing more competitively than they are. One important thing for the FTC to

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[34] *See* https://www.feedbackexpress.com/amazon-1029528-new-sellers-year-plus-stats/ (last visited May 4, 2021) (noting that roughly five million firms sell their products on Amazon)

[35] *See* Louis K. Liggett Co. v. Lee, 288 U.S. 517 (1933) (striking down progressive tax on chain stores whose rate increased with the number of stores, over a dissent by Brandeis). J.C. Penney, F.W. Woolworth Co., Montgomery Ward & Co. A&P, Kinney Shoes, United Cigar Stores and other retail chains were listed among the affected stores. See Louis K. Liggett Co. v. Amox, 104 Fla.609, 141 So.153 (1932), rev'd, Liggett v. Lee, 288 U.S. 517 (1933).

[36] *See* Ethan Kay & Woody Lewenstein, *The Problem with the Poverty Premium*, Harvard Business Review (Apr. 2013), https://hbr.org/2013/04/the-problem-with-the-poverty-premium (noting that low-income people pay much higher prices for most things than middle-class consumers do in the absence of large corporations offering low prices)

do is to study large online sellers and sort out the good from the bad. These conclusions will strongly affect the remedy. Overly aggressive remedies applied with too little thought could injure large numbers of consumers who benefit from low prices and wide access. Any remedy that reduces output will also injure labor as well as other suppliers. Particularly at the lower, or hourly wage, end of the labor spectrum, employment opportunities and wages are closely linked to product market output.[37]

The Biden EO does not mention any of the dominant digital platforms by name, does not weigh in on the question whether they have substantial market power, and does not call for breakups. While it does not accuse any particular platform of an anticompetitive practice, it does list several practices that should be investigated and pursued – namely "serial mergers, the acquisition of nascent competitors, the aggregation of data, unfair competition in attention markets, the surveillance of users, and the presence of network effects."[38] The inclusion of network effects is a mystery, as if they were inherently a bad thing. The dramatic growth of networks since the second half of the twentieth century has produced extraordinary economic growth and benefitted nearly everyone, although some more than others.[39] The task is not to get rid of them, which we could not do without reversing the telecommunications and internet revolution. Rather, government policy including antitrust should try to ensure that networked markets operate competitively and as openly as realistically possible.

The EO also makes a point of stating that nothing in the relevant portions of the EO should "be construed to suggest that the statutory standard … should be displaced or substituted by the

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[37] *See* S. Nickell et. al, *Wages and Product Market Power*, 61 Economica 457 (1994).

[38]EO, note __, at 36,988.

[39] See YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM (2006).

judgment of the Attorney general or the Chair of the FTC."[40] While that statement is of course true as a matter of law, the EO seems intent on confirming that the document should not be read as a license on the part of the antitrust enforcement agencies to go beyond existing law, at least not until such times as additional laws might be passed. Later, the EO encourages the heads of these two agencies "to enforce the antitrust laws fairly and vigorously."[41]

"Unfair Competition in Major Internet Marketplaces"

While nothing in the EO suggests aggressive structural remedies against the large internet markets, it clearly supports expanded enforcement against anticompetitive practices. This is one area where the FTC could do much good. "Major internet marketplaces" presumably refers to large internet sellers (which the EO does not name). Amazon is certainly a target, although there are others.

The idea of unfair competition, which implicitly invokes §5 of the FTC Act,[42] has provoked controversy with respect to sellers who simultaneously sell their own products in competition with those of third parties. The complaints range from antitrust claims that Amazon imposes anticompetitive most-favored-nation (MFN) clauses on its third-party merchants, that it steals information from its own third-party vendors and uses it to make look-alike copies, and other claims akin to exclusive dealing or tying. MFN's, which are already subject to state AG and private litigation against Amazon,[43] are clauses that

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[40]EO, note __, at 36,990
[41]EO, note __, at 36,991.
[42]15 U.S.C. §45 ("unfair methods of competition … are hereby declared unlawful").
[43]Cplt, D.C. v. Amazon (Superior Ct, Dist. D.C. May 25, 2021 (D.C. antitrust law), at https://oag.dc.gov/sites/default/files/2021-05/Amazon-Complaint-.pdf. See *D.C. Accuses Amazon of Controlling Online Prices*, New York Times (May 25, 2021), available at https://www.nytimes.com/2021/05/25/business/amazon-dc-lawsuit.html. In addition, a class of purchasers has filed a lawsuit challenging MFNs in e-

require Amazon's third party suppliers to provide Amazon with terms that are at least as favorable as those supplied to others, or that prohibits them from dealing with firms who charge less than Amazon charges.[44] Some of these provisions have been withdrawn, possibly in contemplation of antitrust litigation.[45] But there may be others, and even withdrawn policies can be subject to an injunction to prevent them from recurring. These are matters for fact finding and litigation or rule making.

In any event, judicially created legal standards should become more accommodating of enforcement. Under current law vertical MFNs are presumably unlawful under the Sherman Act only if the defendant has a market share in excess of 30%-40%. MFNs are not unlawful per se because under the right circumstances they can serve competitive ends. For example, a competitive dealer invited to bid on a project may be more willing to bid if it has assurance that others are not being offered a better deal, with the result that its own offerings would not be competitive. But the 30%-40% market share requirement will knock out most claims against Amazon, because there are not that many products for which its shares are that large. E-books could be an exception, depending on how the market is defined.[46]

Apropos of that, a better way to think about the MFN problem is to focus less on the total market share covered by the arrangement,

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books under federal antitrust law. Fremgen v. Amazon, No. 1:21-cv-00351-GHW-DCF (S.D.N.Y. Feb. 3, 2021), available at https://www.hbsslaw.com/sites/default/files/case-downloads/amazon-ebooks-price-fixing/02-04-21-amended-complaint.pdf.

[44]*See* Jonathan B. Baker & Fiona Scott Morton, *Antitrust Enforcement Against Platform MFNs*, 127 YALE L.J. 2176 (2018).

[45] See, e.g, "Amazon Eases Price Restrictions on Third-Party Vendors, FINANCIAL TIMES, March 11, 2019), available at https://www.ft.com/content/3beea4a6-445b-11e9-b168-96a37d002cd3.

[46]Amazon's share of the e-book market is roughly 67%., but e-books make up only about 21% of total book sales. That could give Amazon a market share of 67% if the relevant market is e-books, but more like 13% if its books generally. For 2021 data, see https://about.ebooks.com/ebook-industry-news-feed/.

but instead consider the role of marginal and less marginal distributors. A large firm need not control a large share of a market if its own outlets are more desirable than those of others. In that case it may be able to impose higher costs on rival sellers simply because small producers need its business.[47] What needs to happen is adjudication or rule making that is based on good economic evidence, and that then addresses these practices and enjoins them without undermining the overall benefits of the defendant's distribution system. If the story about Amazon's MFNs is as reported and they are still in force, enjoining them could lead to higher output and reduced prices across the covered market. This is an area where FTC input, perhaps by rule-making, could be beneficial. The FTC could also quite reasonably use its own economic expertise to investigate the effects of MFNs under §5 and come up with a more aggressive rule than the Sherman Act currently employs.

The same thing is true of Amazon's allegedly discriminatory practices as between its own products and the products that it sells as a broker or reseller for other firms on the same website. The commingled selling of one's own products with the products of third parties is a good thing, even for a dominant firm. Aggregate output increases if retail stores or platforms offer a variety of alternatives. Dual distribution of one's own and competitor's brands is a well-established practice, and it increases consumer choice by forcing firms to compete with each other even within a particular store or website.[48] For example, someone looking for an e-reader on Amazon will find

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[47]See Herbert Hovenkamp, *Vertical Control*, NYU L. REV. ONLINE (2021) (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3793733. The issue is explored further in 2B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶570 (5th ed. 2021).

[48]*See, e.g.*, Peter J. Boyle & E. Scott Lathrop, *The Value of Private label Brands to U.S. Consumers: An objective and Subjective Assessment*, 20 J. RETAILING AND CONSUMER SERVICES 80 (2013); Rajeev Batra & Indrajit Sinha, *Consumer-Level Factors Moderating the Success of Private label Brands*, 76 J. RETAILING 175 (2000).

Amazon's own Kindle products, Apple iPads, Barnes & Noble's Nook, Sony, and some others. Amazon's use of its own brands resembles the widespread use of house brands by grocery chains, who often sell one or more house brands in competition with national brands, which are typically more heavily advertised. Initially many customers believed that house brands were inferior, but that perception has changed significantly.[49]

In the case of Amazon there are also concerns that Amazon uses nonpublic data collected from sales of third-party brands to design and engineer competing brands, or that it discriminates against third party sellers in its Buy Box, which selects default alternatives among sellers of the same product.[50] Critics, such as Elizabeth Warren during her campaign for President, choose examples from among the large number of very small merchants who sell on the Amazon website.[51] Amazon has in the past made copies of merchandise that it sells for some firms and then markets variations under its own brand.[52] Others point to sales, which occur when Amazon enters with its own brand against large manufacturers. For example, Duracell is owned by Berkshire-Hathaway, a very large company. It sells alkaline household batteries on the Amazon website in competition with Amazon's own AmazonBasics house brand. Here the effect seems

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[49]See Stephen J. Hoch, *How Should National Brands Think about Private Labels*, 37 SLOAN MGM'T REV. 89 (1996).

[50]Selection of products for the Buy Box has produced some non-antitrust litigation. *See* Kangaroo Mfr., Inc. v. Amazon.com, Inc., 2019 WL 1280945 (D.Az. March 20, 2019) (partially sustaining claims based on tortious interference, unfair competition, and trademark infringement). For good introductions to the Buy Box, see Nikolas Guggenberger, *Essential Platforms*, 24 STAN. TECH. L. REV. 237 (2021); Ben Bloodstein, *Amazon and Platform Antitrust*, 88 FORDHAM L. REV. 187 (2019).

[51]*See* Herbert Hovenkamp, *The Looming Crisis in Antitrust Economics*, 101 B.U. L. REV. 489, 540-542 (2021).

[52] *See* Dana Mattioli, *Amazon Scooped Up Data from Its Own Sellers to Launch Competing Products*, Wall Street Journal (Apr. 23, 2020, 9:51 PM), https://www.wsj.com/articles/amazon-scooped-up-data-from-its-own-sellers-to-launch-competing-products-11587650015.

clear: the presence of the Amazon brand forces Duracell to cuts its own price if it wants to make more sales.[53] That kind of competition between "house brands" and "name brands" brings higher output, lower prices for consumers, and a higher degree of choice. These things need to be investigated empirically and dispassionately, with an eye toward the possibility of conduct that violates the antitrust laws or perhaps intellectual property laws. When such conduct is discovered, the most effective and least disruptive remedy is most often an injunction that forces it to stop.[54]

Eliminating Amazon's right to sell its own house brand batteries in competition with Duracell will not solve any problem worth solving. It will force higher prices by eliminating an important arena of low-switching-cost competition. To the extent the higher prices reduce output it will also harm labor and other input suppliers. It will of course benefit Berkshire Hathaway by freeing it from an aggressive competitor, but that would not be something to crow about. More fundamentally it would run counter to the entire thrust of this EO as well as President Biden's economic policy generally, which is to strengthen economic growth by bringing more output, more competition, lower prices, and broader choice to consumers. Antitrust's role in promoting economic growth is surely limited, but it should not operate as an affirmative obstacle.

Mergers

Merger policy in the United States is currently enforced by the two antitrust enforcement Agencies acting mainly under Guidelines

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[53] *See* Julie Creswell, *How Amazon Steers Shoppers to Its Own Products*, The New York Times (June 23, 2018), https://www.nytimes.com/2018/06/23/business/amazon-the-brand-buster.html.

[54] *See* Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 YALE L.J. 1952, 2016 (2021).

issued in 2010 for horizontal mergers[55] and 2020 for vertical mergers.[56] There are no current Guidelines for "conglomerate" mergers, which are mergers that are neither horizontal nor vertical. In addition, the entire thrust of the current Guidelines is against mergers that enable the parties to charge higher prices, whether it be the two parties to the merger or the entire market in which the merger occurs.

Mergers are not addressed in the Guidelines as exclusionary practices, and that has turned out to be an important oversight. Many acquisitions of smaller firms by large tech platforms are very likely intended to prevent the emergence of these small firms as new competitors.[57] A July 2021 article in the *Wall Street Journal* observed that one feature of U.S. antitrust law has been its traditional reliance on the rise of upstarts to discipline monopoly – but that reliance is unjustified in an environment in which most of the promising upstarts are acquired by their potential rivals.[58] The FTC explicitly alleged in its Facebook complaint[59] that the reason FB acquired Instagram was because it feared Instagram's emergence as a viable competitor to Facebook. Significantly, the FTC's challenge was under §2 of the Sherman Act and the judge dismissed the merger complaint without

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[55]U.S. Dept. of Justice and FTC, Horizontal Merger Guidelines (Aug. 19, 2010), available at https://www.justice.gov/atr/horizontal-merger-guidelines-08192010.

[56]U.S. Dept. of Justice and FTC, Vertical Merger Guidelines (June 30, 2020), available at https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf.

[57]*See* Kevin A. Bryan & Erik Hovenkamp, *Startup Acquisitions, Error Costs, and Antitrsut Policy*, 87 UNIV. CHI. L. REV. 221 (2020).

[58]Daniel Michaels and Brent Kendall, *U.S. Competition Policy is Aligning with Europe, and Deeper Cooperation Could Follow*, WALL ST. JOURNAL, July 15, 2021).

[59]FTC v. Facebook, Civ. Act. No. 20-3590 (JEB), at https://www.pacermonitor.com/view/ITKR63Y/FEDERAL_TRADE_COMMISSION_v_FACEBOOK_INC__dcdce-20-03590__0073.0.pdf?mcid=tGE3TEOA.

prejudice for that reason, holding that the FTC had not made out the market power requirements for a §2 violation.[60]

New Guidelines should address these concerns with respect to all firms, including the platforms. The concerns include both mergers that are neither horizontal nor vertical, and the use of mergers to prevent the emergence of new rivals. Beyond that are other concerns. For example, several recent empirical studies indicate that prices have increased following close but approved mergers, indicating that the current thresholds are too lenient.[61] One thing that would go a long way is to eliminate an anti-enforcement bias that too often inclines courts to understate the competitive threats, while exaggerating anticipated efficiencies.[62]

Labor and Employee Non-Competition Agreements

The EO also recommends that the relevant enforcement agencies further policies intended to protect workers from agreements that suppress wages or worker mobility.[63] This is a reference to agreements among *employers* to suppress wages or not to poach one another's employees. These are already illegal per se under United States antitrust law and may be criminal offenses.[64] The reference is not to agreements among *employees* to withhold their labor for a higher

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[60]FTC v. Facebook, Inc., ___ F.Supp.3d ___, 2021 WL 2643627 (D.D.C. June 28, 2021).

[61]E.g., JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY (2015).

[62]*See generally* Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L.J. 1996 (2018).

[63] EO, note __, at 36,992.

[64]See Department of Justice, Antitrust Dvision, "No-Poach Approach", https://www.justice.gov/atr/division-operations/division-update-spring-2019/no-poach-approach. *See also* Indictment, United States of America v. Surgical Care Affiliates, LLC, No. 3-21CR0011-L (N.D. Tex. Jan. 5, 2021), ECF No. 1 (naked market division among competitors agreeing not to hire one another's senior level employees); Indictment, United States v. Davita, Inc., No. 21-cr-00229 (D. Colo. 2021), ECF No. 1 (competitors agreeing not to hire or solicit one another's senior level employees)

wage. Most such agreements are immune from the antitrust laws under §6 of the Sherman Act as well as several other provisions and a long case law recognizing a labor immunity from antitrust.[65] The EO also urges the Attorney General and the FTC to consider revising the Antitrust Guidance for Human Resource Professionals, which the Agencies issued jointly in October, 2016.[66] Those guidelines already make clear that naked anti-poaching or wage fixing agreements are illegal per se, while similar agreement in bona fide joint ventures that involve shared employment are not.[67] The current Guidelines also take the position that exchanges of information about wages or other terms of employment are not illegal per se.[68] However, even an unaccepted invitation to engage in wage fixing can be unlawful under the FTC Act.[69] Such unaccepted invitations generally do not violate §1 of the Sherman Act, which requires an "agreement" between the parties and does not contain an attempt offense. Section 5 of the FTC Act contains no such limitations, however. As a result, this is one of those areas where the FTC Act can reach further than the Sherman Act.[70]

The EO also urges the chair of the FTC to engage in rulemaking with respect the "unfair use of non-compete clauses" or other clauses limiting worker mobility. Here the problems are significant. Employee noncompete agreements are typically clauses contained in employment agreements that prohibit employees from moving to competitors for a defined period after job termination. Historically they were used mainly to protect firms whose employees possessed significant trade secrets or managerial know how, or else

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[65]*See* 15 U.S. C. §17. On the scope of the labor immunity, *see* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶¶255-257 (5th ed. 2021).

[66]Antitrust Guidance for Human Resource Professionals (Oct. 2016), available at https://www.justice.gov/atr/file/903511/download.

[67] *Id*. at 2.

[68] *Id*. at 4.

[69] *Id*. at 7.

[70] *See* discussion *supra*, text at note __. On unaccepted solicitations under the FTC Act, *see* 6 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶1419 (4th ed. 2018).

who had received substantial on-the-job training at their employers' expense.[71] In these cases, the fear was that hiring employers could free ride by stealing employees who possessed these things from their current employment. Even under these limitations there was always a question about whether employee noncompetition covenants produced the social benefits that were claimed for them. For example, studies examining technically trained employees in California, which forbids most employee noncompete covenants, and Massachusetts, which enforces them, tended to conclude that the California model actually facilitated economic development more than the Massachusetts model. Indeed, some studies even suggested that the reason Silicon Valley grew up in the Stanford, California, area rather than the Cambridge/MIT/Harvard area was California's refusal to enforce agreements limiting employee mobility.[72] Others dispute these results.[73]

Even covenants that involve highly trained employees should be re-examined, and consideration given to less restrictive alternatives,

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[71] *See* Matt Marx, *The Firm Strikes Back: Non-compete Agreements and the Mobility of Technical Professionals*, 76 Am. Socio. Rev. 695

[72] David P. Twomey, *The Developing Law of Employee Non-Competition Agreements: Correcting Abuses: Making Adjustment fo Enhance Economic Growth*, 50 NO. ATL. REG. BUS. L. ASSN. #87 (2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3119986 ("Non-compete agreements adversely impact job mobility, wage growth and new professional opportunities"); Matt Marx, Jasjit Singh, & Lee Fleming, *Regional Disadvantage? Employee Noncopete Agreements and Brain Drain*, 44 RES. POL. 394 (2015) ("employee non-compete agreements encourage the migration of workers from states where such contracts are enforceable to states where they are not"); Paul Almeida & Bruce Kogut, *Localization of Knowledge and the Mobility of Engineers in Regional Networks*, 45 MGM'T SCI. 905 (1999) (worker mobility is most conducive to the flow of knowledge). More qualified, but still finding a positive effect of California non-enforcement policy in the computer industry is Bruce Fallick, Charles A. Fleischman, & James B. Rebitzer, *Job-Hopping in Silcon Valley: Some Evidence Concerning the Microfoundations of a High-Technology Cluster*, 88 REV. ECON. & STAT. 472 (2006).

[73] *E.g.*, Jonathan M. Barnett & Ted Sichelman, *The Case for Noncompetes*, 87 UNIV. CHI. L. REV. 953 (2020).

including such things as direct enforcement for trade secret theft. If the studies in the majority are correct, however, a strong rule against enforcing such covenants may not do much harm and could even do some good. It does bear noting, however, that the bulk of noncompetition enforcement actions occur under state statutory and common law.

A relatively recent phenomenon concerning noncompetes is more disturbing because it involves employees who have not received a high degree of technical training or generally do not possess valuable trade secrets. This current phenomenon is the widespread use of noncompetition agreements imposed on low wage workers in industries such as fast food service that have only minimum training. The covenants are hard to defend economically even on traditional grounds. At this writing a few franchisors have terminated these agreements in the face of antitrust litigation.[74]

A complicating factor for antitrust policy is that these covenants are vertical agreements and typically in competitively structured product markets. Many of those that are currently being litigated arise within single franchises. For example DesLandes vs. McDonald's was a challenge to noncompetition agreements that MacDonald's placed in the franchise agreements of all of its franchisees, and that are drafted so as to prevent employees from moving from one MacDonald's franchise location to another.[75] While

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[74]*See* Conrad v. Jimmy John's Franchise, LLC, 2021 WL 718320 (S.D.Il. Feb. 24, 2021) (noting that Jimmy John's comprehensive employee noncompete provision was terminated in 2018).
[75] Deslandes v. McDonald's USA, LLC, 2018 WL 3105955 (N.D.Il. Jn. 25, 2018) (partially sustaining complaint). *See also* Arrington v. Burger King Worldwide, Inc., 448 F.Supp.3d 1322 (S.D.Fl. 2020), app. docketed (11th Cir. Sep. 23, 2020) (concluding that franchisor and franchisees were a single firm, so there was no concerted action; court noted that 50 out of 7226 restaurants were owned by BK; the rest were independently owned with franchise agreements); Blanton v. Domino's Pizza Franchising, LLC, 2019 WL 2247731 (E.D. Mi. May 24, 2019) (denying motion to dismiss on claim of a horizontal restraint). For a straightforward evaluation, *see* Michael Ladevaia,

a horizontal agreement of this nature between competing restaurants would be unlawful per se,[76] the MacDonald's agreements are formally a set of vertical agreements between MacDonald's as franchisor and each of its individual franchisees. Under current antitrust law a purely vertical agreement of this nature must be governed by the rule of reason,[77] and even a large fast food company such as MacDonald's does not possess the 30% to 40% market share that the courts generally require for rule of reason illegality.

The question whether these formally vertical noncompete agreements are actually horizontal and for the (anticompetitive) benefit of the competing franchisees can then be important. Sometimes the terms are a giveaway. For example, in declining to dismiss an antitrust complaint against a noncompete agreement imposed by the Jimmy John's sandwich franchise in its franchisee agreements, the court noted a third-party beneficiary provision that permitted one Jimmy John's franchisee to enforce the agreement with respect to a different franchisee.[78] That strongly indicates that this particular set of noncompete agreements was in fact horizontal, for the benefit of the franchisees by enabling them to limit wage competition among themselves.

The EO encourages the Chair of the FTC, in the Chair's discretion, to work with the rest of the commission to engage in rule making "appropriate and consistent with applicable law" respecting "agreements that may unduly limit workers' ability to change jobs."[79] As noted previously,[80] §5 of the FTC Act can be used against

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Poach-no-More: Antitrust Considerations for Intra-Franchise No-Poach Agreements, 38 ABA J. LAB. & EMP. L. 151 (2020).

[76] *See* discussion *supra*, text at notes __.

[77] NYNEX Corp. v. Discon, Inc., 525 U.S. 128 (1998) (purely vertical exclusionary agreement to be addressed under rule of reason).

[78] Butler v. Jimmy John's Franchise, LLC, 331 F.Supp.3d 786, 793 (S.D.Ill. 2018). As noted in note __, Jimmy John's subsequently withdrew its noncompete agreement.

[79] EO, *supra* note __ at 36,992.

[80] *See* discussion *supra*, text at notes __.

everything covered by the Sherman Act plus a penumbra of practices that may not fall within the letter of the Sherman Act but are within its spirit.[81] In this case, rule making that applies a harsh rule against intra-franchise noncompetes, even if not formally horizontal, seems well justified. The agreements serve to limit the mobility of employees in a vulnerable, low wage sector and promise very little benefit in return – particularly, as in these cases, when they are applied more-or-less universally to all employees.

Another limit on employee mobility is occupational licensing restrictions, which the EO mentions but does not cover in any detail.[82] This may be a reference to state-issued licenses thought to be too restrictive. If so, that would almost certainly require preemptive federal legislation and would raise major disputes over federalism and the right of the states to license internal practitioners of various occupations. Closely related but more easily reachable under the antitrust laws are "unauthorized practice" rules that are often promulgated by interested professional groups themselves. Here federal antitrust policy has a role. For example, in North Carolina Board of Dental Examiners v. FTC,[83] a divided (6-3) Supreme Court held that antitrust "state action" immunity did not apply when a state board controlled entirely by practicing dentists and not supervised by any public agency passed and enforced a rule prohibiting teeth whitening by non-dentists.[84]

What is not clear from the statement is whether the President wishes to go further. The "state action" doctrine, which has a long history,[85] has always been a balancing act of federalism, as the dissent in the *North Carolina Dental* case makes clear. Under it the states are free to engage in as much occupational licensing as they wish,

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[81] FTC v. Brown Shoe Co., Inc., 384 U.S. 316 (1966).
[82] EO, note __, at 36,992.
[83] 574 U.S. 494 (2015).
[84] On the "state action" doctrine, *see* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶¶221-231 (5th ed. 2020).
[85] Parker vs. Brown, 317 U.S. 341 (1943).

provided that it is actually the state rather than private parties doing the regulating. For example, if a state wished to license dog walkers it could do so, provided that it clearly stated its intent to do so via appropriate legislation or other action, and that any private decision making was adequately supervised by an independent government actor. At that point, antitrust policy has nothing further to say and stands aside. Going further might be Constitutionally possible, but it would require a different judgment about the division of federal and state regulatory power in an area that for most occupations was traditionally reserved to the states, with a few exceptions such as the granting of airplane pilots' licenses.[86] In any event, federal intrusion more deeply into state control of the professions is not likely to be something that the antitrust enforcement agencies can accomplish on their own, and Congress may not even think it desirable.

Patents, Standard Essential Patents, and Practices Involving Anticompetitive Patent Agreements

One place that a "whole of government" approach to competition policy could go even further than the EO pushes it is patents. Patent law has often taken the exclusionary privilege conferred by patents to extremes, often writing as if competition were the enemy to be conquered rather than a body of law that should be made to work in tandem with antitrust law.[87] This level of disdain for antitrust policy is in sharp conflict with the fact that the impact of competition policy is much easier to assess than is the impact of patent policy. As a general matter, patent protection operates as a severe exception to the free movement of resources and ideas, and its coverage should not extend further than the Patent Act expressly

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[86] https://www.faa.gov/licenses_certificates/.

[87] *E.g.*, Trebro Mfg., Inc. v. Firefly Equip., LLC, 748 F.3d 1159, 1172 (Fed. Cir. 2014). *See* Erik Hovenkamp & Thomas F. Cotter, *Anticompetitive Patent Injunctions*, 100 MINN. L. REV. 871 (2016).

authorizes. Beginning with that premise enforcement authorities can do much good.[88]

In what can only be regarded a serious understatement, the EO asks the Attorney General and the Secretary of Commerce to reconsider the position taken on standard-essential patents and FRAND commitments.[89] Consistent with that policy statement the Antitrust Division parted ways with the FTC and intervened against it in an important case involving exclusionary practices in the market for standard essential patents.[90] The Ninth Circuit's decision, which reversed a well-reasoned and well-supported decision in the Northern District of California,[91] did very considerable damage to the usefulness of antitrust to police anticompetitive practices in FRAND patent licensing. For its part, the Policy Statement that is now put into question, was inconsistent with well-established law on the entitlement to an injunction.[92]

The Ninth Circuit's decision threatens to undermine highly successful, voluntary arrangements for technology sharing in areas

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[88]*See* Herbert Hovenkamp, *Antitrust and the Patent System: A Reexamination*, 76 OHIO ST. L.J. 467 (2015).

[89] Referring to "Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments," issued jointly by the Department of Justice, the United States Patent and Trademark Office, and the National Institute of Standards and Technology on December 19, 2019, available at https://www.justice.gov/atr/page/file/1228016/. The FTC did not join. The term "FRAND" refers to "Fair Reasonable and Non-Discriminatory" royalties. Sometimes the F is dropped to "Rand," yielding the EO's usage of F/RAND. EO, supra note 36,991.

[90]FTC v. Qualcomm, 969 F.3d 974 (9th Cir. 2020).

[91]FTC v. Qualcomm Corp., 411 F.Supp.3d 658 (N.D.Cal. 2019).

[92]Criticized in Herbert Hovenkamp, *Justice Department's New Position on Patents, Standard Setting, and Injunctions* (Reg Rev. Jan. 6, 2020) available at https://www.theregreview.org/2020/01/06/hovenkamp-justice-department-new-position-patents-standard-setting-injunctions/. On the legacy of the Trump-Era position, which is apparently already on the outs in the Antitrust Division, see Foss Patents (April 16, 2021), at http://www.fosspatents.com/2021/04/doj-downgrades-delrahim-letter-to-ieee.html.

such as cellular phones and autonomous vehicles that produce enormous social benefits but are also quite vulnerable to manipulation, particularly by larger participants.[93] Of course, one cannot be sure that the same thing would not have happened if the Antitrust Division had not "switched sides" and decided to speak in behalf of a FRAND violator rather than the FTC. Further, care must still be taken not to breach the line between contract and antitrust. FRAND agreements are fundamentally contractual and not every breach of contract violates the antitrust laws. But neither is contract law a defense, and in the *Qualcomm* case the record of Qualcomm's antitrust violations seemed clear enough.[94]

One important thing to understand about FRAND is its inherently private, contractual nature, as well as its ability to pull large numbers of developers into a competitive but networked infrastructure. This makes it an engine of truly incredible economic growth in networked high tech markets. It enables both private cooperation and competition in technology development.

Nevertheless, destabilizing temptations such as those that befell Qualcomm are a serious threat. Declaring a patent to be "standard essential," which is a prerequisite to placing it within the FRAND system, makes it worth far more because standard essential patents can be adopted by other firms without worry that they will later be surprised by infringement actions after they have made a significant investment in technology that writes on that standard.[95] The FRAND system addresses this with an important tradeoff: FRAND patents will get adopted into the standard, but with important limitations on the power to exclude that patent law would otherwise grant. First, the FRAND system imposes component level (rather than final product)

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[93]Herbert Hovenkamp, *FRAND and Antitrust*, 105 CORN. L. REV. 1683 (2020).

[94]*Id*. at 1700-1728.

[95]*See* Aminta Raffalovich & Steven Schwartz, *Antitrust Analysis of FRAND Licensing Post-FTC v. Qualcomm*, 31 J. Antitrust & Unfair Competition L. (2021); Hovenkamp, *FRAND, supra* note __, at 1728-1734.

licensing based on the *ex ante* value of the patent prior to its FRAND declaration – i.e., at a time when it was still in competition with a broader range of alternatives.[96] FRAND then also requires that such patents be licensed to all takers at FRAND rates, without regard to whether the putative licensee is a competitor.

Qualcomm flaunted these rules by charging royalties higher than FRAND-determined rates, and selectively refusing to license to competitors, in violation of FRAND commitments.[97] The evidence based on market power and exclusion was more than sufficient to support claims of antitrust violations. This was a case that the FTC should not have lost. Hopefully the FTC can write rules for FRAND that will indicate the types of conduct that will trigger FTC actions, and a new DOJ will cooperate. Simple breaches of FRAND agreements are not enough, but when market power and exclusionary effects are present, as they clearly were in *Qualcomm*, antitrust intervention is appropriate. That then leaves the issue to the federal courts, and many judges remain suspicious. That gives the FTC a particularly high burden to justify and clarify its position.

The EO also unfortunately states its concerns about patent abuses too narrowly by seeking to "avoid the potential for anticompetitive extension of market power beyond the scope of granted patents…."[98] That is certainly a problem, but by relying on this ancient "beyond the scope"[99] formulation the EO overlooks the potential for anticompetitive abuse that can arise *within* the scope of a patent. Pay-for-delay itself is an example. The question in a pay-for-delay case is not whether the conduct – a settlement of patent

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[96] *See* Erik Hovenkamp, *Tying, Exclusivity, and Standard-Essential Patents*, 19 COL. SCI. & TECH. L. REV. 79 (2017).
[97] *Qualcomm*, 969 F.3d at 983-86.
[98] EO, *supra* note __, at 36,991.
[99]E.g., Coupe v. Royer, 155 U.S. 565, 576 (1895) (the courts have no right to enlarge a patent beyond the scope of its claim…).
See Herbert Hovenkamp, *The Rule of Reason and the Scope of the Patent*, 52 SAN DIEGO L. REV. 515 (2015).

infringement litigation – lies outside the scope of the patent. Rather, the practice results from serious doubts that the patent itself is any good to begin with. For that reason, it was the anti-enforcement *dissenters* in *Actavis* who argued in favor of the "scope of the patent" test.[100] In most of the cases that condemned anticompetitive conduct for being "beyond the scope" of the patent, the patent itself was presumed to be valid. Rather, the defendant was asserting some kind of right to exclude, such as the tying of unpatented goods that the patent did not protect.[101]

The same thing is true of anticompetitive patent acquisitions and much of the activities of patent assertion entities (PAEs) in acquiring and aggregating large numbers of patents from outside inventors. In most of these cases the problem is not that the defendant is acting beyond the scope of the patent, but that the patents themselves are either invalid or the activities, such as post-issuance acquisitions, are not protected by the patent act at all.[102] For these, stronger guidance from the FTC would be a good idea.

Aggregations of issued patents by non-practicing entities who bring them simply to file infringement suits actually has a remedy in existing law. Section 7 of the Clayton Act,[103] the merger provision,

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[100]FTC v. Actavis Inc., 570 U.S. 136, 162, 167 (2013) (Roberts, C.J., dissenting) (under the "scope of the patent" test the pay for delay settlement would not violate the antitrust laws). *See also* Impax Laboratories, Inc. v. Federal Trade Commission, 994 F.3d 484 (5th Cir. 2021) (a recent FTC victory in a pay-for-delay case) (not mentioning scope of the patent test).

[101]*E.g.*, Motion Picture Patents Co. v Universal Film Mfg. Co., 243 U.S. 502, 517 (1917) (tying of patented film projector to unpatented films was attempt to create a monopoly "wholly without the scope of the patent….")

[102]*See*, *e.g*., Intellectual Ventures I, LLC v. Capital One Fin. Corp., 280 F.Supp.3d 691 (D.Md. 2017) (defendant's practice of buying up all patents by outside inventors relating to an area of technology and then using them to extract royalties from unknowing infringers not unlawful where at least some of the patents were valid; further, observing that the enforcement fell within the scope of the patents).

[103] 15 U.S.C. §18.

prohibits assets as well as stock acquisitions, and a patent is clearly an "asset" for this purpose.[104] While patents are transferable assets, patent acquisitions can become unlawful mergers when they threaten competition, and patent validity is not a defense.[105] While a patent itself creates a right to exclude it does not create the right to create a monopoly after the patent has been issued. This is a simple principle that derives from the difference between a property right and an economic monopoly. For example, ownership of a factory gives its owner the power to exclude trespassers, but that does not protect the parties when the sale of the factory becomes an unlawful merger.

The EO invites the FTC to engage in rule-making with respect to pay-for-delay pharmaceutical settlements.[106] In its *Actavis* decision in 2013 the Supreme Court held that pay-for-delay pharmaceutical settlements are reachable under the antitrust laws.[107] Briefly, the Hatch-Waxman Act grants a 180-day period of exclusivity, kind of a short second patent, to the first generic to come into the market upon the expiration of a primary patent in a particular drug.[108] This system has become heavily gamed. While initial drug patents, particularly those on molecules, are usually very strong, the drug companies have developed a variety of ways to patent lookalike products that serve the same market need as the pioneer drug. These patents, in contrast to the pioneer patents, are notoriously weak and have a high invalidity rate.

The simplest variation of the pay-for-delay practice is that a generic drug maker files its intent to enter the market when the primary patent expires. The owner of that patent then files an infringement suit

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[104]*See* 5 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶1202f (5th ed. 2021) (forthcoming).

[105] *See* Erik Hovenkamp & Herbert Hovenkamp, Buying Monopoly: *Antitrust Limits on Damages for Externally Acquired Patents*, 25 TEX. INTEL. PROP. L.J. 39 (2017).

[106] EO, *supra* note __, 36,997.

[107] FTC v. Actavis, Inc., 570 U.S. 136 (2013).

[108] 21 U.S.C.A. § 355(j)(5)(B)(iv).

on the weak follow-on patent – a suit that the patentee would be likely to lose on grounds of invalidity. At that time, however, the pioneer patentee pays the generic a very large sum, often in the hundreds of millions of dollars, to delay its entry for several years. Under the Hatch-Waxman Act no other generic can enter during that time either. The effect of this "reverse payment" settlement – that is from the patentee to the alleged infringer, rather than the other way around – is to extend the primary drug's period of exclusivity, often for several years. The more important result is that the settlement serves to preserve the drug's price at the high level it obtained during the period of the pioneer patent.[109] This was one of those cases where the dissenters gave voice to a "consumer welfare" standard for antitrust while approving a practice that unambiguously increased consumer prices, often by hundreds of millions of dollars.[110]

Justice Breyer's *Actavis'* opinion for the majority found a basis for illegality but also held that, given offsetting considerations due to the patents, the rule of reason should be applied.[111] That meant that the practice entered the rule-of-reason labyrinth which under current law is subject to a severe anti-enforcement bias. The result is very costly litigation. On top of that causation and damages requirements are heroic, making it exceedingly difficult for private plaintiffs to win cases.

A better approach would be a much harsher substantive rule – close to per se illegality, but with allowance for reasonably anticipated litigation costs (roughly $5 million).[112] A patentee still has a right to

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[109] *See* Aaron Edlin, Scott Hemphill Herbert Hovenkamp, & Carl Shapiro, *The Actavis Inference: Theory and Practice*, 67 RUTGERS L. REV. 585 (2015).
[110] FTC v. Actavis, Inc., 570 U.S. 136, 161 (2013) (Roberts, C.J., dissenting, joined by Justices Scalia and Thomas).
[111] *Id.* at 159.
[112] See Jongsub Lee, Seungjoon Oh, & Paula Suh, *Inter-Firm Patent Litigation and Innovation Competition* (SSRN working paper, 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3298557

defend a patent reasonably believed to be valid, and also to settle rather than confront the cost and uncertainties of litigation. When reverse payment settlemets in the Hatch-Waxman setting reach into the hundreds of millions of dollars, however, it is pretty clear that the parties are not disputing over a patent presumed to be valid. Rather they are gaming the system so as to divide rents from a practice that uses that Act precisely in the opposite way from intended, which was to facilitate the prompt entry of generic drugs.[113]

Finally, the EO contains statements directed mainly to the Secretary of Health and Human Services addressing practices that unreasonably delay the competitive introduction and production of biosimilar drugs, as well as outside producer access to drug products for purposes of litigation.[114] A biosimilar drug is a distinguishable compound from the original, but that one that has no clinically meaningful differences in terms of safety and effectiveness.[115] One particularly pernicious abuse of the patent process is a pioneer drug maker's acquisitions of patents on similar drugs to its own products. The firm does not practice these patents, but holds them to make sure that no outside firm can innovate a similar competitor.[116] At present there is a small amount of antitrust litigation involving firms who delay the entry of biosimilars by acquiring the relevant patent

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(median of all patent litigation through trial; could be larger for valuable patents)

[113]S*ee* Erik Hovenkamp, *Antitrust Law and Patent Settlement Design*, 32 HARV. J. L. & TECH. 417 (2019) (stating the relevant conditions for such rules).

[114] EO, note __, at 36,997.

[115]*See* Michael A. Carrier & Carl J. Minniti III, *Biologics: The New Antitrust Frontier*, 2018 UNIV. ILL. L. REV. 1.

[116]*See* Gregory R. Day & W. Michael Schuster, *Patent Inequality*, 71 ALA. L. REV. 115, 130-121 (2019); *see also* Peter Loftus & Denise Roland, *By Adding Patents, Drugmaker Keeps Cheaper Humira Copies Out of U.S.*, WALL ST. J. (Oct. 16, 2018), https://www.wsj.com/articles/biosimilar-humira-goes-on-sale-in-europe-widening-gap-with-u-s-1539687603?ns=prod/accounts-wsj.

preemptively.[117] Other claims are of anticompetitive bundled discounts that tie packages or cocktails of drugs together, effectively excluding a biosimilar competitor.[118] There is also litigation, not exclusively under the antitrust laws, involving agreements with insurers that restrict payment for use of biosimilars.[119]

For much of patent/antitrust litigation the FTC has a distinctive advantage over private plaintiffs. Acting as an enforcer, the FTC need not prove causation or damages, but only the violation itself. A private plaintiff needs to prove both.[120] This is particularly important in innovation intensive areas because the requirement that private plaintiffs prove causation and damages – both essential statutory features of private claims – require them to establish "but for" situations that are extremely difficult to establish in complex markets where the effects of innovation are an important element.[121]

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[117] *E.g.*, *In re* Humira Antitrust Litigation, 465 F.Supp.3d 811 (N.D.Il. 2020), app. docketed 7th Cir. July 30, 2020 (*Noerr-Pennington* doctrine precluded antitrust liability where roughly half of the patents that the defendant asserted were found to be valid). *Cf.* Biocad JSC v. Hoffman-La Roche, 942 F.3d 88 (2d Cir. 2019) (foreign manufacturers failed to show that their claim that defendant's scheme to exclude biosimilar drugs fell within exclusion of the Foreign Trade Antitrust Improvements Act, 15 U.S.C. §6a, given that in the first instance the injuries accrued entirely to foreign firms). The problem of antitrust and new entry by biosimilars is treated in HERBERT HOVENKAMP, MARK D. JANIS, MARK A. LEMLEY, CHRISTOPHER LESLIE AND MICHAEL CARRIER, IP AND ANTITRSUT: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW (3d ed. 2017 & 2021 Supp.).

[118] Pfizer, Inc. v. Johnson & Johnson, 333 F.Supp.3d 494 (E.D.Pa. 2018) (denying motion to dismiss bundled discount claim).

[119] *In re* Remicade Antitrust Litig., 345 F.Supp.3d 566 (E.D.Pa. Dec. 7, 2018).

[120] For a good examination, see Kevin B. Soter, *Causation in Reverse Payment Antitrust Claims*, 70 STAN. L. REV. 1295 (2018).

[121] See Herbert Hovenkamp, *Antitrust Harm and Causation*, __ WASH. UNIV. L. REV (2021) (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3771399.

Right to Repair

The issue of right to repair one's own durable equipment, or alternatively to choose one's own repair technician, sounds somewhat removed from antitrust, and much of it is. In fact, however, the right to select one's own repair service was the subject of a controversial Supreme Court antitrust decision in 1992.[122] The Court held that a nondominant firm's restraints on third-party repairs of its photocopiers was actionable in at least some circumstances where the owner of the photocopier was "locked in" by virtue of its purchase and thus needed repair parts and service that were specific to that particular brand. After remand, the plaintiffs won a significant victory at trial.[123] As a result a type of antitrust right to repair still has some vitality under the Sherman Act, particularly if the restraint imposed by the manufacturer can be characterized as a tying arrangement.[124]

The right to repair can also raise issues under patent law – in particular, in patent law's ancient distinction between "repair" and "reconstruction."[125] Under the Patent Act the purchaser/user of a patented good has a right to "repair" it but not to "reconstruct" it. The Supreme Court has generally interpreted this law in a way that is favorable to users. For example, in its fractured plurality decision in Aro Manufacturing Co. v. Convertible Top Replacement Co.,[126] the court held that an independent firm could lawfully replace the entire canvas top of a traditional "ragtop" convertible automobile, leaving only the metal supports as original. As is so often the case, the patented good had parts that are either single-use or else that wear out more quickly than other parts. Relying on that decision, the Federal Circuit

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[122] Eastman Kodak Co. v. Image tech. Servs., 504 U.S. 451 (1992).
[123]Largely affirmed by 125 F.3d 1195 (9th Cir. 1997).
[124] The decision was widely criticized, including by this author. *See* HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note __ at §3.3a.
[125] See Natali Richter, *"Substantial Embodiments" and "Readily replaceable Parts": A Contemporary Understanding of the Doctrine of Permissible Repair*, 59 UNIV. LOUISVILLE L. REV. 333 (2021) (summarizing many doctrine developments to date).
[126]365 U.S. 336 (1961), subsequently qualified in 377 U.S. 476 (1964).

held in Jazz Photo Corp. v. ITC,[127] that firms who completely refurbished disposable cameras that were intended for a single use were conducting a permissible "repair," not a reconstruction. This right by the purchaser to rebuild is also strongly reflected in the patent "exhaustion" doctrine, which holds that the purchase of a patented article exhausts all of the patentee rights in that article, leaving the owner free to repair it. For example, once a printer maker sells a patented toner cartridge it cannot enforce by patent law a restriction prohibiting users from refilling it and replacing worn parts as needed.[128] Patent exhaustion is not an antitrust doctrine, but it is often applied in such a way as to reach the same vertical practices that antitrust law reaches.[129]

Looking only at products that are sold, the right of the purchaser to make her own repairs appears to be strongly embedded in American law. Indeed, patent exhaustion doctrine stated as much since the beginning of the twentieth century,[130] and even tilted toward expansive permission of repairs in the 1850s.[131]

Two important variations can provoke serious problems, however. One is when the aftermarket part is itself patented and the

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[127]264 F.3d 1094 (Fed. Cir. 2001)

[128]Impression Products, Inc. v. Lexmark Intern., Inc., 137 S.Ct. 1523 (2017).

[129]The practice is most frequently analogized to tying. *See* 10 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶1782 (4th ed 2019).

[130]Goodyear Shoe Mach. Co. v. Jackson, 112 F. 146, 150 (1st Cir. 1901) (finding permissible repair rather than reconstruction when purchasers of heavy duty sewing machines used for making shoes replaced the machines' worn out cams); Morrin v. Robert White Eng'g Works, 138 F. 68, 77 (C.C.E.D.N.Y. 1905) (holding that part replacement constituted a repair rather than reconstruction when consumption of the replaced part is an essential element of the device).

[131]Wilson v. Simpson, 50 U.S. 109 (1850) ("repairing" permissible, but not "replacing"; here, purchaser of patented wood-planing machine had right to replace the blades, or cutters, which wore out frequently). On the history prior to the Sherman Act, *see* Herbert Hovenkamp, *Antitrust and the Design of Production*, 103 CORNELL L. REV. 1155 (2018).

other is when essential diagnostic or repair tools include software, which is licensed rather than sold.

Suppose a particular patented electronic part in a cellular phone fails and must be replaced. Here, the Patent Act provides that a patentee has no duty to license a patent to someone else, and this entails that a manufacturer of the patented part has no duty to sell it.[132] In that case, under current law the owner of the phone may be stuck: she can obtain the part only from the manufacturer/patentee, who may insist on installing it as well. That could be a tie of parts and service, which under some circumstances could be unlawful under the antitrust laws.[133]

A related variation occurs when the replacement part bears design features and the replacement part is covered by a design patent. This issue has arisen in the market for aftermarket "crash" parts for automobiles and could threaten the enterprise of making and selling non-OEM parts. In Automotive Body Parts Assn. v. Ford Global Tech, LLC, the Federal Circuit held that an automobile manufacturer could lawfully enforce design patents on aftermarket parts such as bumpers.[134] The result can prevent third parties from manufacturing replacement parts for automobiles – or practically anything else – if the replacement part has a visible, nonfunctional design component protected by a patent. For example, an independent manufacturer could not produce a lookalike aftermarket bumper for a car that was an exact copy but would have to make its appearance sufficiently different that it did not infringe the design patent. This decision could effectively wipe out a large portion of the market for third party design

[132] 35 U.S.C. §271(d)(4). The *Kodak* case got around the problem by reasoning that the provision merely codified existing law, although that did not explain why the court could impose a duty that neither the statute nor pre-existing common law would have recognized. Image Tech. Svces., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1214 n.7 (9th Cir. 1997).

[133] *See* the discussion of Kodak v. Image Tech. Services, *supra*, note __.

[134] Automotive Body Parts Assn. (ABPA) v. Ford Global Tech., LLC, 930 F.3d 1314 (Fed. Cir. 2019).

of aftermarket parts. Insurers often prefer third-party parts because they are less expansive. Design patents are supposed to cover non-functional features, which is an important distinction with utility patents. In the past the Federal Circuit had been more sensitive to this problem – holding, for example, that a design patent on a key blade could not be enforced if its principal purpose was to make the key blade incompatible with locks made by others.[135] This issue could be addressed by advocacy to the Federal Circuit, where most of these cases land on appeal. Otherwise, new legislation may be needed to broaden the design patent statute's exclusion of functional content.

The other situation arises when the repair in question requires access to diagnostic software that is licensed to users subject to restrictions that effectively prohibit diagnostic use by third parties, including even the owner of the device. For example, John Deere has used such clauses in software licenses for some of its tractors.[136] As a general matter the first sale doctrine does not apply because software is licensed, not sold. Two doctrines that could be applied, however, are copyright misuse and fair use.

IP "misuse" occurs when the owner of an IP right places restrictions that are thought to impair competition unreasonably, even though they might not be antitrust violations.[137] For example, in Lasercomb America, Inc. v. Reynolds,[138] the Fourth Circuit found copyright misuse in a software license for a design package that prevented the licensee from designing any competing software. While that agreement very likely did not violate the antitrust laws, it did impose an anticompetitive restraint on the use of the software product

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[135]Best Lock Corp. v. Ilco Unican Corp., 94 F.3d 1563 (Fed. Cir. 1996).
[136] For a good survey of the issues, including discussion of John Deere's restriction on tractor repairs, see Nicholar A. Mirr, *Defending the Right to Repair: An Argument for Federal Legislation Guaranteeing the Right to Repair*, 105 IOWA L. REV. 2193 (2020).
[137] *See* Kathryn Judge, *Rethinking Copyright Misuse*, 57 Stan. L. Rev. 901, 905-14 (describing the history of copyright misuse).
[138]911 F.2d 970 (4th Cir. 1990).

at issue. Or in Assessment Techs., LLC v. WIREdata, Inc.[139] judge Posner – who never read misuse law expansively[140] – struck down as "akin to misuse" the attempt by an owner of a copyrighted database to use it in such a way as to restrict unreasonably access to uncopyrightable data contained in the database. In this case the database was designed to store property tax data and tax assessors used it to collect this data. As a result, the only way to access the tax data was by using the database, which the owner denied.

The *Wiredata* case seems quite relevant. The farmer in question, or her service provider, wants access to the software not to make pirated copies but only to read it in order to diagnose the tractor that the farmer already owns.

An alternative to the same result is the doctrine of fair use, recently expanded by the Supreme Court in Google, LLC v. Oracle America, Inc.[141] That decision found fair use in Google's copying of application programming interface code in an Oracle software. In the right to repair situation, by contrast, the service provider or owner of the device seeks to use it only to make a repair.

The FTC has already addressed some of these issues in a *Report* on the right to repair, issued in May, 2021.[142] That report recommends new legislation, which may be necessary for many

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[139] 350 F.3d 640, 647 (7th Cir. 2003). For additional analysis of the problem *see* CHRISTINA BOHANNAN & HERBERT HOVENKAMP, CREATION WITHOUT RESTRAINT: PROMOTING LIBERTY AND RIVALRY IN INNOVATION 265-258 (2013).

[140] *E.g.*, USM Corp. v. SPS Tech., Inc. 694 F2d 505, 510-512 (9th Cir. 1982).

[141] 141 S.Ct. 1183 (2021). *See also* Chamberlain Group v. Skylink tech., 381 F.3d 1178 (Fed. Cir. 2004) (neither copyright act nor digital millennium copyright act prohibited a competitor from simply reading the plaintiff's code in order to make a compatible garage door opener).

[142] FTC, Nixing the Fix: An FTC Report to Congress on Repair Restriction (May 2021), available at https://www.ftc.gov/system/files/documents/reports/nixing-fix-ftc-report-congress-repair-restrictions/nixing_the_fix_report_final_5521_630pm-508_002.pdf.

situations. The discussion here simply observes that current legislation will address at least a part of the problem.

Agriculture; Packers and Stockyard Act (PSA) and Agricultural Seed

The EO instructs the Secretary of Agriculture to consider practices in agricultural markets and ways to improve enforcement of the Packers and Stockyards Act (PSA).[143] That statute, which is not part of the antitrust laws, is enforced by the Secretary of Agriculture, although delinquent penalties may be recovered by the Attorney General.[144] Under a related statute a private person who is injured by a violation of the PSA or certain related orders of the Secretary of Agriculture may obtain single damages, and expressly provides that an injured plaintiff may also sue under state law.[145] In addition, the Secretary may Act upon the complaint of a private plaintiff or a state.[146]

The statute prohibits unfair and deceptive practices, as well as such practices as manipulating or controlling prices or giving "undue preferences" for some participants over other. The broad and vague language led Chief Justice Taft to describe the Act in 1922 as treating United States stockyards as "great national public utilities."[147] More recently, the courts have responded to this statutory breadth by reading into it market power and competitive harm requirements akin to those contained in the antitrust laws.[148] Many of the covered practices

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[143]EO, note __, at 36,992-93.

[144]7 USC §§192, 213, 215-216. For coverage under the statute, see §3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶363 (5th ed. 2021). See also Herbert Hovenkamp, *Does the Packers and Stockyards Act Require Antitrust Harm?* (SSRN Working Paper 2011), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1737440.

[145] 7 U.S.C. §209.

[146] 7 U.S.C. §210.

[147] Stafford v. Wallace, 258 U.S. 495, 516 (1922).

[148] E.g., *in re* Pilgrim's Pride Corp., 728 F.3d 457 (5th Cir 2013) (reading statute narrowly to as to impose competitive harm requirements analogous to those created by the Sherman Act.).

resemble business torts more than antitrust violation, and the statute was drafted so as to treat them that way. In Terry v. Tyson Farms, Inc.,[149] however, the court decided that Tyson's alleged practice of underweighing chickens presented to it by contract growers did not violate the act because it did not cause injury to competition. But the deceptive practices provision in the statute contains no competitive injury requirement.

Decisions such as *Terry* are incorrectly reading antitrust-like competitive harm requirements into the PSA. The first two subsections of the statute contain no market power or competitive injury requirement at all.[150] The subsequent three sections do contain a competitive harm requirement.[151] Clearly it is inconsistent with the

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[149] 604 F.3d 272 (6th Cir. 2010).

[150] Substantive violations are enumerated in 7 U.S.C. §192:

> [i]t shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to:
>
> > (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or
> >
> > (b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect; or…

[151] 7 U.S.C. §192:

> > (c) Sell or otherwise transfer to or for any other packer, swine contractor, or any live poultry dealer, or buy or otherwise receive from or for any other packer, swine contractor, or any live

language of the statute to read the competitive harm provisions into the first two subsections. Terry action was under the first subsection. As a result, this concern of President Biden's EO is clearly supported by the existing statute without amendment. If the statute is opened up to become more tort-like in its approach, the amount of litigation will certainly increase, effectively expanding the reach of federal law into agricultural business torts.

Finally, the EO briefly refers to ensuring that the intellectual property system does not unnecessarily reduce competition in seed "beyond that reasonably contemplated by the Patent Act"[152] and also by the Plant Variety Protection Act of 1970.[153]

> poultry dealer, any article for the purpose or with the effect of apportioning the supply between any such persons, *if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly*; or
>
> (d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose or *with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce*; or
>
> (e) Engage in any course of business or do any act for the purpose or *with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce*;…

(emphasis added).

[152] 35 U.S.C.

[153] 7 U.S.D. §§2321-2582.

Conclusion

President Biden's efforts to restore the American economy have pointed consistently in one direction, which is getting economic output up. High output benefits consumers with lower prices. It benefits labor and other suppliers with increased work opportunities and greater competitiveness in job markets, and it benefits business overall as well.

The goal the antitrust laws is also to promote maximum output in the individual markets where antitrust claims are addressed. Antitrust should be not be a device for punishing firms or for making them less productive just in order to satisfy some noneconomic goal. One feature of this approach is that it can be quite tolerant of large firms, provided that they do not behave anticompetitively. Sometimes it is tempting to look back nostalgically at the age of Brandeis and admire the protection of small firms from the incursions of chain stores and organized distribution. But that movement failed miserably at it should have – for the simple reason that customers did not prefer it. By contrast, anticompetitive practices need to be carefully investigated, prosecuted where appropriate, and enjoined. That is where antitrust policy can create the most, and most widely distributed, benefits.