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## TRADEMARKS AS SOURCES OF MARKET POWER: DRUGS, BEERS AND PRODUCT DIFFERENTIATION

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## TRADEMARKS AS SOURCES OF MARKET POWER: DRUGS, BEERS AND PRODUCT DIFFERENTIATION

*P. Sean Morris\**

### ABSTRACT

This Article defines the notion of market power and how in conjunction with trademark rights give rise to elements that are deemed anticompetitive in a free market society. This Article uses legal arguments to consider how important developments in antitrust economics, particularly product differentiation and monopolistic competition, have contributed to the notion that trademarks are a source of market power. The Article uses a number of cases in the field of trademarks to underscore the key points that trademarks are a source of market power. These case developments contribute to the monopolistic tendencies of trademarks and describe how such tendencies are associated with the theory on market power and product differentiation. Empirically, the Article examines beer products from a single large corporation and the various trademarks/brands to determine whether such brands are a source of market power, effectively giving that manufacturer a monopoly on the beer market. A discussion of product hopping in pharmaceuticals is used to supplement the theories and evidence from the beer market. The Article also develops a theory of *branded monopoly* and suggests that, as a result of single ownership of trademarks and brands that are abundant from a single owner trademark's market power, questions relating to antitrust foreclosure are often raised, despite the fact that market

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\* Faculty of Law, University of Helsinki. This Article was written in 2013 while the author was a visiting scholar at Fordham Law School in New York City. The data gathered in the Article represents figures up to June 2013 and does not discuss the relationship between ABInBEV and the 2016 merger with SAB Miller. A version of this Article was presented at the 2013 Intellectual Property Scholars Roundtable at Drake University Law School, April 12 to 13, 2013. The author is grateful for feedback from the participants including, Peter Yu, Lucas Osborn, John Cross, William Hubbard, Paul Head, Greg Vetter, and Nicolas Suzor. John Cross subsequently read the four different papers including this Article and offered additional comments. While she was at Fordham, Sonia Katyal also offered comments and Mark Lemley later offered some valuable comments.

power is not anticompetitive per se. If it is recognized that trademarks are a source of market power, and hence, a core concern for antitrust law and policy, then the legal foundations of the current trademark system would need a radical redesign. If, on the other hand, it is recognized that trademarks are a source of market power, but do not conflict with antitrust law, and antitrust enforcers are to ignore conducts such as market foreclosure and other barriers to entry as a result of excessive trademarks and brands, then both antitrust and trademark law can continue to co-exist in the current system.

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## I. FRAMING THE INQUIRY—MARKETS AND MONOPOLIZATION

To what extent is a trademark a source of market power? Does market power flow from monopoly power in trademarks? If trademarks are a source of market power—does it affect the antitrust regime? What is the nature of market power versus monopoly power? Should market power be presumed with trademarks? These are some of the questions that can affect the dynamics of how trademarks operate within our competitive economy. These very same questions also raise broader law and policy issues on the interaction of trademarks and antitrust. It is against this background that this Article seeks to investigate the claim that trademarks are a source of market power. It is a basic, yet controversial, claim given that the trademark system is unique within the realm of the intellectual property system.

The question as to whether trademarks are sources of market power has been raised on different occasions;<sup>1</sup> however, the goal of this Article is to provide more “meat” to those skeletal arguments, so to speak. It seeks to build upon those ideas and attempts to strengthen the argument that trademarks are a source of market power. This sentiment is also shared by Professor Glynn Lunney—who has immaculately argued that “trademark protection” has earned the label “trademark monopoly.”<sup>2</sup> Both Professor Lunney’s claim and previous discussions on the subject fit into the overarching investigation into whether trademarks are an antitrust problem—to which my short answer is “yes.” As such, this Article will demonstrate that trademarks, when viewed as a line or brand extension technique and/or when designed to encourage product hopping, serve as a form of market power. To demonstrate these claims the Article takes into account previously ignored scholarly positions with similar proposition that trademarks are an antitrust problem, including Professor’s Scherer’s thesis that trademarks confer monopoly power which permits anti-competitive prices.<sup>3</sup> The debate that

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<sup>1</sup> See P. Sean Morris, *The Economics of Distinctiveness: The Road to Monopolization in Trade Mark Law*, 33 LOY. L.A. INT’L & COMP. L. REV. 321 (2011); P. Sean Morris, *Trademarks as Sources of Market Power: Legal and Historical Encounters*, 38 LIVERPOOL L. REV. 159 (2017).

<sup>2</sup> Glynn S. Lunney, Jr., *Trademark Monopolies*, 48 EMORY L.J. 367, 486 (1999).

<sup>3</sup> F.M. Scherer, *The Posnerian Harvest: Separating Wheat from Chaff*, 86 YALE L.J. 974, 995–99 (1977) (“[A] well-received brand image is a form of monopoly power.”); *id.* at 995 (“[E]xercisable monopoly power appear to pursue some kind of a limit-pricing policy, restraining their prices to levels consistent with barriers to new entry and the expansion of fringe firms, and thus maintaining their market

trademarks can be used as an anticompetitive tool has been somewhat muted since its hey days from the early 1940s and 1950s, with the exception of sporadic discussion in the general trademark/intellectual property literature. The discussion in this Article, exclusively from a market power point of view, goes beyond some of the previous discussions by adding evidence from specific industries.

This Article also defines the notion of market power and how, in conjunction with trademark rights, it gives rise to elements that are deemed anticompetitive in a free market society. It argues that important developments in antitrust economics—particularly, product differentiation and monopolistic competition—have contributed to other developments in the intellectual property/antitrust divide. It further demonstrates that trademarks, which are used as a form of differentiation, are a source of market power due to product differentiation techniques. Building off of the path-breaking theoretical work of Chamberlain’s *Theory of Monopolistic Competition*,<sup>4</sup> this Article similarly argues that, with respect to product differentiation and its relationship to trademarks, “most prices involve monopoly elements” and are “mingled in various ways with competition.”<sup>5</sup>

While the task of this Article has been described by some as insurmountable,<sup>6</sup> empirical evidence is employed throughout to dismiss

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positions.”) (citation omitted). See also William Landes & Richard Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 274 (1987) (“Besides the possibility of creating monopoly rents, trademarks may transform rents into costs, as one firm’s expenditure on promoting its mark cancels out that of another firm. Although no monopoly profits are created, consumers may pay higher prices . . . .”); Thomas McCarthy, *Trademarks, Antitrust and the Federal Trade Commission*, 13 J. MARSHALL L. REV. 151, 156 n.10 (1980).

<sup>4</sup> EDWARD CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION* (Harvard Univ. Press ed. 1933).

<sup>5</sup> *Id.* at 15.

<sup>6</sup> The idea of trademarks as an antitrust problem is not well received in a number of contemporary circles, such as academia, trademark lawyers such as those in-house, or even the courts. Example, the latter has on several occasions dismissed this idea. See *Golden W. Insulation, Inc. v. Stardust Inv. Corp.*, 615 P.2d 1048, 1054 (Or. Ct. App. 1980) (“The ‘exclusive right’ of a trademark owner to prevent the unauthorized use of his mark may present a legal barrier to the use of the mark, but does not present a barrier to competition in the sale of the same product under different marks. In other words, the mere exclusive ownership of a trademark does not monopolize or foreclose competition in the market for the product . . . .”). A more skeptical approach was pronounced by the United States Supreme Court in *DuPont*, where it observed:

[O]ne can theorize that we have monopolistic competition in every non-standardized commodity with each manufacturer having power of the price and production of his own product. However, this power that, let us say, automobile or soft-drink manufacturers have

those criticisms. Certain pieces of empirical evidence, including beer industry data and pharmaceutical data-hopping figures, separate this work from that of Professor Lunney. From a broader perspective, this work also demonstrates that the notion of trademarks as an antitrust problem is not insurmountable. The data from these industries provides evidence of market power, but more importantly, the data also shows how rights holders use trademarks to *leverage* and *squeeze* the market with higher prices and other negative costs to consumers. The result of this is monopolization and entry barriers for smaller rivals. The data and evidence are central to the core argument that trademarks augment market power. The monopolization of a market (market power) is not, in itself, per se illegal under United States antitrust law, unless that market power is used in such a way that it is deemed anticompetitive conduct.<sup>7</sup> Given the intricacies of antitrust law and proof of antitrust harm, a number of factors must be considered for a successful monopolization claim under United States antitrust law, including a showing that market share forecloses competition or conspiracy to raise prices.

Trademark usages that may constitute a violation of antitrust law include: using a “strong trademark to unlawfully tie a weaker product,” engaging in “unlawful price discrimination exercised with respect to a trademark,” and “engaging in other illegal anticompetitive practices.”<sup>8</sup> These criteria will be explored through an examination of the use of trademarks with respect to pricing policies in the beer industry.

The Article first provides some clarifications of the terms “monopoly power” and “market power,” as there is a degree of confusion that often arises in (legal) literature regarding these terms. Both terms refer to the same thing and therefore mean the same thing.<sup>9</sup> In antitrust analysis, and the subsequent

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over their trademarked products is not the power that makes an illegal monopoly. Illegal power must be appraised in terms of the competitive market for the product. *United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377, 393 (1956) (citations omitted); *see also* *Blackwell v. Power Test Corp.*, 540 F. Supp. 802, 810 (D.N.J. 1981).

<sup>7</sup> *Verizon Commc’ns Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398, 407 (2004) (finding that “the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct”) (emphasis removed).

<sup>8</sup> *Car-Freshener Corp. v. Auto Aid Mfg. Corp.*, 438 F. Supp. 82, 87 (N.D.N.Y. 1977) (citing *Ungar v. Dunkin’ Donuts of America, Inc.*, 68 F.R.D. 65 (E.D. Pa. 1975), *cert. denied*, 429 U.S. 823 (1977)); *see also* *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 298 F. Supp. 1309, 1311 (S.D.N.Y. 1969).

<sup>9</sup> *Queen City Pizza, Inc. v. Domino’s Pizza, Inc.*, 922 F. Supp. 1055, 1060 (E.D. Pa. 1996) (“Monopoly power, like market power . . . is generally defined as the ability to control price and exclude

case laws, courts employ the term “monopoly power” in a majority of decisions, but often use the term “market power” in Section 1 cases, and “monopoly power” in Section 2 cases. In *United States v. E.I. DuPont de Nemours & Co.*, the United States Supreme Court interpreted the term “monopoly power” to mean “the power to control prices or exclude competition.”<sup>10</sup> It is this definition of monopoly power that legal scholars, such as Landes and Posner, developed to mean “market power.”<sup>11</sup> One way of reconciling the varying interpretations between scholars and the courts is to realize that the terms market power and monopoly power only differs in quantity and not quality. Monopoly power is, therefore, “a high degree of market power.”<sup>12</sup> Both terms are used interchangeably, to denote where there is a degree of “power over price” by sellers in a market, who “possess market power or (more pejoratively) monopoly power.”<sup>13</sup> Market power is in essence the ability to control price so that the seller can realize a handsome profit,<sup>14</sup>

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competition within the relevant product and geographic markets, and is usually determined by examining the extent of the alleged monopolist’s market share.”). There are suggestions that courts must be cautious to distinguish market power from monopoly power, in particular in intellectual markets. See HERBERT HOVENKAMP ET AL., IP AND ANTITRUST: AN ANALYSIS OF PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW § 10.02, 2015 WL 9447685 (2016) (“The use of conduct-based indicia of market power necessitates an important cautionary note . . . . Where products are differentiated, or where firms face different cost structures, a company can have constrained market power being a monopolist. This is particularly likely in markets in which intellectual property rights are important . . . brand-name toothpastes command a price higher than their generic counterparts, in part because consumers value the trademark associated with those brands.”) (citation omitted).

<sup>10</sup> *DuPont*, 351 U.S. at 391.

<sup>11</sup> William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 977 (1981); see also Gregory Werden, *The History of Antitrust Market Delineation*, 76 MARQ. L. REV. 123, 123 n.1 (1992).

<sup>12</sup> Landes & Posner, *supra* note 11, at 937.

<sup>13</sup> FREDERIC M. SCHERERT, INDUSTRIAL PRICING: THEORY AND EVIDENCE 2 (1974) (discussing a market where there is the existence of pure monopolists, oligopolists, and monopolistic competitors); see also ERNEST GELLHORN & WILLIAM E. KOVACIC, ANTITRUST LAW AND ECONOMICS IN A NUTSHELL 112 (5th ed. 2004) (“[M]arket power is the ability profitably to raise prices above the competitive level for a sustained period of time. . . . Therefore the first issue of monopolization analysis is to determine what degree of market power is so significant that its exercise warrants scrutiny and control.”).

<sup>14</sup> ABA SECTION OF ANTITRUST L., HANDBOOK OF U.S. ANTITRUST SOURCES 258 (2012) (“Market power is the ability profitably to maintain prices above, or output below, competitive levels for a significant period of time.” Explaining further in n.9 that: “Market power can be exercised in other economic dimensions, such as quality, service, and the development of new or improved goods and processes.”). See also HOVENKAMP ET AL., *supra* note 9, § 4.01, 2015 WL 9447629 (“Market power is the power to profit by charging more than marginal cost, which is the competitive price for a good or service.”).

in other words, it is an ability not to charge ultra-competitive prices indefinitely, but only for a reasonable period of time. This Article adopts the term “market power,” as opposed to “monopoly power” in order to gage the discussions on the main markets in which trademarks are present: the beer and prescription drug markets.

Most people are familiar with the concept of monopoly and the fact that a monopoly in the sense of a market is a single supplier, and therefore, as the single supplier of a good in the market, the monopolist has some form of market power. This explanation is similar to that typically found in textbooks on economics.<sup>15</sup> The degree of confusion between the two terms arises in the context of which they are being used, and by whom—economists, policy makers or lawyers. In perhaps, one of the most authoritative sources on economics, Paul Samuelson and William Nordhaus explained in elegant language the meaning of both terms, defining monopoly power as “the ability of a large firm to affect the price in a given market,”<sup>16</sup> and further likening monopoly power to market power:

In terms of market organization, industries fall along a spectrum from perfect competition to pure monopoly. In many situations, particularly in assessing whether public-policy steps are needed to curb market power, it is useful to have a quantitative measure of the extent of market power, or the degree of monopoly. Monopoly power signifies the degree of control that a single firm or a small number of firms has over the price and production decisions in an industry.<sup>17</sup>

This is the basic understanding of monopoly or market power, but it can only be used as a guide, particularly when market power has to be determined in complex litigation cases involving intellectual property and antitrust cases in the courts.

What deviates in the various literature is the adoption of either term: “monopoly” for the economist or “market power” for the antitrust lawyer. It is from the field of economics that monopoly power is imported into antitrust law as market power. A number of antitrust legislations speak of prohibiting

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<sup>15</sup> See JEFFREY PERLOFF, MICROECONOMICS 355 (7th ed. 2015) (“A monopoly has market power: the ability of a firm to charge a price above marginal cost and earn a positive profit.”).

<sup>16</sup> PAUL SAMUELSON & WILLIAM NORDHAUS, ECONOMICS 41 (14th ed. 1992).

<sup>17</sup> PAUL SAMUELSON & WILLIAM NORDHAUS, ECONOMICS 573–74 (13th ed. 1989).

attempts to “monopolize”<sup>18</sup> or “abuse of a dominant position.”<sup>19</sup> These are the concepts that collectively build on the notion of monopoly in the legal sense.<sup>20</sup> However, despite the language used in current antitrust regimes, the debate still persists on monopoly/market power interface, even after a trio of scholars made an excellent attempt to put the issue at rest: “[t]he question should be well settled because antitrust law now requires proof of actual or likely market power or monopoly power to establish most types of antitrust violations.”<sup>21</sup> What antitrust law requires for proof of violation or a monopolization offense is the possession of monopoly power and improper maintenance of that power.<sup>22</sup> One way of determining the possession of monopoly power is by calculating the market shares of the firm in question.

Setting aside the nomenclature of the nature of monopoly or market power, the broader issue is how the power that is acquired in a marketplace by a seller relates to competition and affects antitrust regulation. Antitrust laws are enacted to provide consumers with greater welfare and protection.<sup>23</sup> The goals of antitrust law are to protect consumers,<sup>24</sup> promote economic

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<sup>18</sup> 15 U.S.C. § 2 (2016).

<sup>19</sup> *E.g.*, Consolidated Version of the Treaty on the Functioning of the European Union art. 102, Oct. 26, 2010, 2010 O.J. (C 326).

<sup>20</sup> The concept of monopoly also dates back to statutory laws in England. *See* The Statute of Monopolies, 21 Jac. 1, c. 3 (1623) (“I. All monopolies and all commissions, grants, licenses, charter and letters patents, heretofore made or granted, or hereafter to be made or granted, to any person or persons, bodies politick or corporate whatsoever, of or for the sole buying, selling, making, working or using of any thing within this realm, or of any other monopolies, or power to give license or toleration to do, use or exercise any thing against any law . . . are contrary to the laws of this realm, and so are and shall be utterly void . . . IV. If any person or persons at any time shall be hindered, grieved, disturbed, or disquieted, or his or their goods or chattels any way seized, attached, distrained, taken, carried away or detained by occasion or pretext of any monopoly shall recover three times so much as the damages that he or they sustained by means or occasion of being so hindered, etc.”) (citing ANDREAS PAPANDREAU & JOHN WHEELER, *COMPETITION AND ITS REGULATION* 263 (1954)).

<sup>21</sup> Thomas G. Krattenmaker, Robert H. Lande & Steven C. Salop, *Monopoly Power and Market Power in Antitrust Law*, 76 *GEO. L.J.* 241, 241 (1987).

<sup>22</sup> *E.g.*, *United States v. Grinnell Corp.*, 384 U.S. 563, 576 (1966).

<sup>23</sup> Bork has characterized the enactment of the Sherman Act as “a consumer welfare prescription.” ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 66 (1978). The language of Article 102(b) TFEU also supports such a claim, where it invoked “prejudice of consumers.” *See also* *Eastman Kodak Co. v. Image Technical Servs. Inc.*, 504 U.S. 451, 503 (1992) (“In such circumstances . . . the seller . . . enhance[s] consumer welfare . . .”).

<sup>24</sup> *See* *Leegin Creative Leather Prods Inc. v. PSKS, Inc.*, 551 U.S. 877, 904 (2007) (stating that the “interests of consumers” was important). Justice Breyer in his dissent was more forthcoming: “The Sherman Act seeks to maintain a market free of anticompetitive practices . . . [for] lower prices, better products, and more efficient production processes that consumers typically desire.” *Id.* at 909 (Breyer, J.,

efficiency, curb restraints on trade, prevent against monopolization, and reduce the amount of market power in the economy.<sup>25</sup> These goals have not gone unnoticed by the courts. Antitrust regulations are, in effect, what the Court in *United States v. Topco*, referred to as “the Magna Carta of free enterprise.”<sup>26</sup> This is a powerful observation, and, in a free market, the antitrust regulations have provisions that are meant to prevent behaviors that may dilute or impede free enterprise.

The free market is expected to flourish and innovation thrives. All forms of aggressive behaviors that want to exclude others and monopolize the free market are forbidden. Under the principle of *antitrust magna carta*, operators in a free market are guaranteed “the freedom to compete—to assert with vigour, imagination, devotion, and ingenuity.”<sup>27</sup> Such rules are spelt out in statutes such as Article 102 of the Treaty on Functioning of the European Union (TFEU)<sup>28</sup> and similarly, Section 2 of the Sherman Antitrust Act<sup>29</sup> prohibiting monopolization (or abuse of a dominant position).

But even if imagination has flourished and business operators displayed their ingenuity with intellectual creations for their goods and services, the free market is faced with another problem. How can market power or attempts to monopolize the market through intellectual creations, that business operators assert through ownership of intellectual property rights,

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dissenting); see also Robert H. Lande, *Consumer Choice as the Ultimate Goal of Antitrust*, 62 U. PITT. L. REV. 503, 515–16 (2001) (“A focus on consumer choice as a goal will make it easier for enforcement agencies . . .”).

<sup>25</sup> *Leegin*, 551 U.S. at 906 (“[T]he purpose of the antitrust laws . . . is the protection of competition . . .”) (quotation and citation omitted); Maurice Stucke, *Reconsidering Antitrust’s Goals*, 53 B.C. L. REV. 551, 563 (2012); see also Laura Parrett, *The Multiple Personalities of EU Competition Law: Time for a Comprehensive Debate on its Objectives*, in THE GOALS OF COMPETITION LAW 61, 68 (Daniel Zimmer ed., 2012) (“Where EU competition law is concerned, consumer welfare and efficiency are often mentioned together. Efficiency is seen as the overall, general objective of competition policy although it is not cited as often by the Commission as consumer welfare.”). See also HOVENKAMP ET AL., *supra* note 9, § 4.01.

<sup>26</sup> *United States v. Topco*, 405 U.S. 596, 610 (1972).

<sup>27</sup> *Id.*

<sup>28</sup> Consolidated Version of the Treaty on the Functioning of the European Union art. 102, Oct. 26, 2010, 2010 O.J. (C 326).

<sup>29</sup> 15 U.S.C. § 2 (2016). This provision condemns monopolization, attempts to monopolize, or combinations or conspiracies “to monopolize any part of the trade or commerce among the several States . . . . Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize . . . shall be deemed guilty of a felony . . . .” The courts have also defined monopoly power as meaning to control prices or exclude competition, see, e.g., *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966).

impede the market? Can such “ingenuity” be classified as a violation of antitrust rules? Do trademarks confer market power or attempts to monopolize? These questions will be pursued further in this Article; however, some initial comments can be made here.

One of the functions of a trademark is to provide information so that consumers can reduce their search costs. However, if a consumer is “uninformed,” it is in the best interest of the seller to keep that consumer uninformed.<sup>30</sup> By doing so, the consumer will not be able to use the seller’s trademark to compare with other goods, if the seller has his trademark on a number of similar goods in a different price range. The seller may provide a range of six beers—for example: “TRADEMARK LIGHT,” “TRADEMARK LIGHT LIME,” “TRADEMARK LIGHT SKY,” “TRADEMARK LIGHT COOL,” “TRADEMARK LIGHT PINK,” and “TRADEMARK LIGHT PREMIUM.” An uninformed consumer may develop a preference or taste for any of these hypothetical lagers—and consume a six-pack, in a different range, from the single seller, six days a week. The consumer, having a preference for the brand that appeals to his or her taste to which each range of lager caters, becomes locked in only to that single seller’s brand. The effect of such a locked in situation is that the consumer creates his own brand loyalty<sup>31</sup> for all “TRADEMARK LIGHT” products irrespective of the fact that they are from a single seller. Furthermore, the consumer may not be encouraged to compare the lagers from other sellers. The different price range also encourages the single seller

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<sup>30</sup> See TIBOR SCITOVSKY, WELFARE AND COMPETITION: THE ECONOMICS OF A FULLY EMPLOYED ECONOMY 402 (1951) (discussing the uninformed and advertising). Scitovsky outlined the distinction between informed and the uninformed:

An important difference between the informed and the uninformed market is that while the variety of tastes in the former gives rise to a variety of products, each of which fills a special need and caters to a different taste, the lack of variety in the ignorant buyers’ tastes accounts for the similarity of the products competing in the uninformed market.

*Id.* at 398. He further compared advertising and trademarks the following way:

The same intention to impress the buyer is also present in advertisements that stress the scientific research engaged in and the elaborate testing used by the producer to maintain high standards of quality. Besides impressing the buyer, such advertising in effect also tells him that he, a mere layman, would be unwise to judge quality unaided, by mere inspection, and that he should rely instead on the guaranties offered by the manufacturer’s reputation.

The same idea is conveyed also by the stress on brands and trade-marks (“Look for the trademark; only XYZ is genuine”; “Buy ABC beer; ask for it by name . . .”).

*Id.* at 402–03.

<sup>31</sup> See *Henry v. Chloride, Inc.*, 809 F.2d 1334, 1342–43 (8th Cir. 1987) (stating that brand loyalty can be an entry barrier).

to command a significant amount of market power, which can force other competitors from or prevent new entrants into the market for lagers.

The market for lagers tends to be profitable, and given regulatory requirements such as the amount of alcohol a pint should contain, lagers tend to be undifferentiated and resemble each other, with the exception for their source signal—the trademark. But in applying the *magna carta* of free enterprise—there is some level of difficulty. Should the operator be blamed for his ingenuity and innovation in competing in the free market? Does this mean that his “TRADEMARK LIGHT” ranges of lagers monopolize the market and therefore he is likely to run into trouble with the antitrust rules? Or is there a difference between “light” and “premium” beers, and beers that are at lower end of the pricing scale, and if so, what effect do they have on competition? Does this also mean that the hypothetical “TRADEMARK LIGHT PREMIUM” and “TRADEMARK LIGHT COOL” constitute a different market and as such create a basis for price discrimination? In *United States v. Joseph Schlitz Brewing Co.*,<sup>32</sup> the court explained that “premium beer” was the same product as “popularly priced beer” and “private label” beers.<sup>33</sup> The court’s observation further demonstrates that the antitrust nature of trademarks in the market for beers and how the different brands or trademarks from a single seller make trademarks sources of market power. Nevertheless, it is important to follow the evidence, at least empirically, to back up these claims. The task of this Article is to fill the evidentiary gap left after *United States v. Joseph* by providing evidence that was lacking in that opinion. What follows on the rest of these pages is a step-by-step theoretical and descriptive process, amalgamated with data collection and legal interpretations to support the claim that trademarks are sources of market power.<sup>34</sup>

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<sup>32</sup> *United States v. Joseph Schlitz Brewing Co.*, 253 F. Supp. 129, 133 (N.D. Cal.), *aff’d*, 385 U.S. 37 (1966).

<sup>33</sup> *Id.*

<sup>34</sup> See also Mark A. Lemley & Mark P. McKenna, *Is Pepsi Really a Substitute for Coke? Market Definition in Antitrust and IP*, 100 GEO. L.J. 2055 (2012); Deven R. Desai & Spencer W. Waller, *Brands, Competition, and the Law*, BYU L. REV. 1425 (2010).

## II. DEFINITION: WHAT IS A MARKET?

In the strictest sense of the word, a “market” is a place where buyers and sellers meet to determine the price of a product. Alfred Marshall defined “market” as “the whole of any region in which buyers and sellers are in such free intercourse with one another that the prices of the same goods tend to equality easily and quickly.”<sup>35</sup> In modern economic terms, the word is similarly defined as “any context in which the sale and purchase of goods and services takes place.”<sup>36</sup> By defining “market,” the foundation is essentially set for determining market power under antitrust law.<sup>37</sup>

In the new economy, a market also exists online, where both physical and digital goods are traded. Consumers may have a preference for certain physical goods irrespective of where the goods are being sold. This preference may stem from the intellectual property features of the goods such as copyrights or trademarks.<sup>38</sup> But is there a market for intellectual property goods? And if so, how do we measure market power on such a market? Does this market for intellectual property goods transcend geographic regions? Is there a relevant product market for intellectual property goods?

An intellectual property market must be properly defined for a finding or allegation of monopolization to be levied. Additionally, market definition is essential to how market power is determined in antitrust litigation.<sup>39</sup> In other words, market definition must be determined before a court or an

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<sup>35</sup> ALFRED MARSHALL, PRINCIPLES OF ECONOMICS 270 (9th ed. 1890) (translating AGUSTIN COURNOT, RESEARCHES INTO THE MATHEMATICAL PRINCIPLES OF THE THEORY OF WEALTH ch. iv. (Nathaniel Bacon trans., The MacMillan Company 1838)) (as cited in HOVENKAMP ET AL., *supra* note 9, § 4.03 n.257, 2015 WL 9447631).

<sup>36</sup> THE MIT DICTIONARY OF MODERN ECONOMICS 266 (David Pearce ed., 4th ed. 1992).

<sup>37</sup> THOMAS JORDE & DAVID TEECE, ANTITRUST, INNOVATION, AND COMPETITIVENESS 7 (1992) (“Market definition is the key pillar to antitrust theory and enforcement policy.”).

<sup>38</sup> There has been evidence that brands and trademarks increases the demand for a particular product. *See, e.g.*, H. Leibenstein, *Bandwagon, Snob, and Veblen Effects in the Theory of Consumer's Demand*, 64 Q. J. ECON. 183, 183–84 (1950).

<sup>39</sup> *See, e.g.*, Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S.172, 177 (1965) (“Without a definition of [the] market, there is no way to measure [a defendant's] ability to lessen or destroy competition.”); *see also* HOVENKAMP ET AL., *supra* note 9, § 4.01, 2015 WL 9447629 (“In antitrust analysis, market power is generally estimated by defining a relevant product and geographic market and computing the defendant's share of the market.”) (citation omitted).

argument can be made that XYZ constitutes market power.<sup>40</sup> Blair and Kaserman made an important observation about attempts in defining a market:

To some degree, these divergent opinions [among economists in defining a relevant market] are the result of biases brought about by serving as an expert witness for one side or the other in antitrust cases. Such biases may arise from a simple selling out of one's opinion (i.e., supporting any position for which one is paid) or from a much more subtle process created by our legal system in which even disinterested economists become advocates of a given position under aggressive cross-examination. The authors believe they have witnessed both in the courtroom.<sup>41</sup>

This squarely sums up the problem of market definition, at least by economists, given the consensus that there is no agreement on reaching desired definition of what constitutes a market.<sup>42</sup> Courts often arrive at different understandings of market definition that do not seem to add to how the notion should be fully developed. Thus, various approaches to market definition and/or failure of reaching acceptable consensus on market definition (in economics) only serves to “obscure”<sup>43</sup> or confuse litigants in antitrust proceedings where economists are often called upon as expert witnesses.

Augustin Cournot has defined a market as “the entire territory of which parts are so united by the relations of unrestricted commerce that prices there take the same level throughout, with ease and rapidity.”<sup>44</sup> In other words, according to Cournot, “a market is a group of buyers and sellers of a particular good or service.”<sup>45</sup> This is the general consensus in a society of a market.<sup>46</sup> In a market, there is supply and demand for goods and services.

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<sup>40</sup> See also ROGER BLAIR & DAVID KASERMAN, ANTITRUST ECONOMICS 94 (2d ed. 2009) (“[M]arket definition requires drawing both geographic and product boundaries that separate the buyers and sellers whose action influence price from those whose actions do not influence price.”).

<sup>41</sup> *Id.* at 95 n.2.

<sup>42</sup> But see Lemley & McKenna, *supra* note 34 (discussing market definition).

<sup>43</sup> Rebecca Haw, *Adversarial Economics in Antitrust Litigation: Losing Academic Consensus in the Battle of the Experts*, 106 NW. U. L. REV. 1261, 1271 (2012) (arguing that “judges often have a hard time drawing the fine line between factual expert testimony (admissible) and expert testimony that goes to the law (inadmissible)”).

<sup>44</sup> COURNOT, *supra* note 35, at 51 (defining “market” in discussing the law of demand).

<sup>45</sup> GREGORY MANKIW, PRINCIPLES OF ECONOMICS 66 (Dryden Press 1998).

<sup>46</sup> See, e.g., F.M. TAYLOR, PRINCIPLES OF ECONOMICS 246 (Ronald Press Co., 9th ed. 1937) (defining market as a “totality constituted by a group of freely and directly competing sellers or buyers

However, this broad definition of a market does not make it easier to determine the market in general or for intellectual property, so markets are compartmentalized into either “relevant markets” or “geographic markets.”<sup>47</sup> What is certain, however, is that courts use the definition of a market to determine antitrust cases, and in order to determine such cases, a general consensus shared by contemporary economists is that in a market, there are buyers and sellers.<sup>48</sup> The United States Supreme Court has established the market definition standards in various classic antitrust cases such as *United States v. DuPont*<sup>49</sup> and *Brown Shoe Co. v. United States*.<sup>50</sup>

In other jurisdictions, such as the European Union, the approach to market definition is not statutory per se; however, it is almost essential in determining anticompetitive harm under the antitrust rules in Europe that is under Articles 101 and 102 of the TFEU respectively. The Commission has issued guidelines in the form of a Notice on Market Definition,<sup>51</sup> which is the

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over against a coordinate group of freely and directly competing buyers or sellers”). See also OECD, Policy Roundtables dated June 2012, DAF/COMP 19 (2012) (The OECD has stated that market definition “is one of the most important analytical tools to examine and evaluate the competitive constraints that a firm faces and the impact of its behavior on competition.”).

<sup>47</sup> *Commission Notice on the Definition of Relevant Market for Purposes of Community Competition Law*, 1997 O.J. (C 372/5) [hereinafter Market Definition Notice] (“The definition of the relevant market in both its product and its geographic dimensions often has a decisive influence on the assessment of a competition case.”). See also ROGER MILLER, *ECONOMICS TODAY* 652 (Addison-Wesley 2001) (“It is difficult to define and measure market power precisely. As a workable proxy, courts often look to the firm’s percentage share of the ‘relevant market.’”). This is the so-called market share test. A firm is generally considered to have monopoly power if its share of the relevant market is 70 percent or more. This is not an absolute dictum, however. It is only a loose rule of thumb; in some cases, a similar share may be held to constitute monopoly power.”).

<sup>48</sup> SAMUELSON & NORDHAUS, *supra* note 16, at 39 (defining a market as “an arrangement by which buyers and sellers of a commodity interact to determine its price and quantity”).

<sup>49</sup> *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956) (the so-called “Cellophane” case, where cellophane wrapping was found to be functionally interchangeable with wax paper and similar wrappings that were flexible).

<sup>50</sup> *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). See also *Times-Picayune Publ’g v. United States*, 345 U.S. 594, 612 n.31 (1953), where the court noted:

For every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range. The circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn; in technical terms, products whose “cross elasticities of demand” are small.

The elasticity of demand is understood as the extent to which substitutes are available. See BASIL MOORE, *AN INTRODUCTION TO ECONOMIC THEORY* 28 (The Free Press 1973) (“The term elasticity has been devised to measure [the way goods differ in the degree to which the quantity demanded varies in response to a change in price.]”).

<sup>51</sup> Market Definition Notice, *supra* note 47.

crucial first step in defining markets within Europe. But it is the classic cases in EU antitrust law that have shaped the approach of market definition when assessing antitrust harm under European law.<sup>52</sup> In *United Brands v. Commission*, the CJEU underscored the importance of relevant market definition in its reasoning:

The opportunities for competition under Article [102] of the Treaty must be considered having regard to the particular features of the product in question and with reference to a clearly defined geographic area in which it is marketed . . . for the effect of the economic power of the undertaking concerned to be evaluated.<sup>53</sup>

In subsequent decisions by the CJEU, this approach to market definition has been applied.<sup>54</sup> What can be deduced from both the case law and how economists go about market definition is that market definition is a tool<sup>55</sup> that is necessary for determining how firms behave in the marketplace, and whether such behaviors signal a concern for antitrust law through the lens of market power. Therefore, for a determination of a market, and subsequently monopolization claims under antitrust law, two factors are necessary: geographic market and relevant product market.<sup>56</sup>

#### *A. Determining Geographic Market*

Where and what should comprise a geographic market? How do we know or measure geographic market? Should the geographic area be the same place in which a dispute is raised, such as a country, or should it be a geographical area, such as the European Union?<sup>57</sup> Crucially, can a geographic

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<sup>52</sup> *E.g.*, Case 85/76 *Hoffman La Roche & Co. AG v. Comm'n*, 1979 E.C.R. 461, ¶ 28 (“The concept of the relevant market in fact implies that there can be effective competition between the products which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market in so far as a specific use of such products is concerned.”). *See also* Case C-6/72, *Continental Can v. Comm'n*, 1973 E.C.R. 215, ¶ 32.

<sup>53</sup> Case 27/76, *United Brands v. Comm'n*, 1978 E.C.R. 207, ¶ 11.

<sup>54</sup> *See* Case 85/76 *Hoffman La Roche & Co. AG v. Comm'n*, 1979 E.C.R. 461.

<sup>55</sup> *See* Market Definition Notice, *supra* note 47, at 2 (“Market definition is a tool to identify and define the boundaries of competition between firms . . . . The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face.”).

<sup>56</sup> *See* GELLHORN & KOVACIC, *supra* note 13, at 97 (adding: “market power measurement is an inexact and often misunderstood process. In a monopolization case, the product and geographic markets usually are first defined”).

<sup>57</sup> It turns out that, in the case of Europe, we can rely on the Market Definition Notice, *supra* note 47, for some guidance. According to paragraph 8, a relevant geographic market is defined as “the area in

market be global? The most active antitrust enforcers in the world, the European Commission and the Federal Trade Commission (FTC) and Department of Justice (DOJ) have had similar opinions on the nature of geographic market. According the European Commission in its *Intel* decision, a geographic market can be “worldwide.”<sup>58</sup> The *Intel* decision expanded beyond a country or an economic zone the scope of geographic markets. Crucially, as an intellectual property decision, it also confirms that the market for intellectual property rights is global in nature and therefore, regional intellectual property or antitrust laws are not suitable for determining harm. The European Commission had found that Intel violated the antitrust rules in the microprocessor market from 2002 to 2007 and issued Intel a fine of over one billion euros. The *Intel* case was only one in a long line of cases both from the European Commission’s antitrust division and the Court of Justice of the European Union (CJEU) that have addressed geographic market. In *United Brands v. Commission*, the CJEU confirmed that a “geographic area” was instrumental in defining the relevant market.<sup>59</sup>

In the United States, determining the geographic market is also considered a key element in the ultimate determination of the relevant market. Although the *Intel* decision painted an optimistic picture that the relevant geographic market could be worldwide, often the relevant geographic market is considered to be the domestic market of a country or economic area. For example, in *FTC v. Procter & Gamble*, the Court acknowledged that the “relevant geographical market” was the United States

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which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.”

<sup>58</sup> Case COMP/C-3/37.990, *Intel* Commission decision of 13 May 2009, D (2009) 3727 final, ¶ 836.

There is no controversy between the parties on the geographic scope of the market—they agree that it is worldwide. The Commission shares this position. This conclusion is supported by the fact that the main suppliers compete globally, CPU [central processing unit] architectures are the same around the world, the main customers (OEMS) [original equipment manufacturers] operate on a worldwide basis, and the cost of shipping CPUs around the world is low compared to their cost of manufacture.

(Citation omitted.)

<sup>59</sup> Case 27/76, *United Brands v. Comm’n*, 1978 E.C.R. 207, ¶ 11; *see also* *Queen City Pizza, Inc. v. Domino’s Pizza, Inc.*, 922 F. Supp. 1055, 1061 (1996) (“The relevant geographic market consist of the area in which customers would look to purchase the product.”).

“and a series of regional markets.”<sup>60</sup> Indeed, a geographic market is seen as the “area or areas to which a potential buyer may rationally look for the goods or services” that he wants.<sup>61</sup> Thus, for the beer industry, which is global, and which has a number of well-known brands/trademarks, there exists a strong argument that the worldwide geographic market allowed by *Intel* would be appropriate. If the same logic and reasoning in *Intel* is applied to the market for beer manufactured by a multi-national company with several brands that operates in a number of global geographic markets, then the market for beers should be considered to be “worldwide.” A worldwide geographic market for beers would correspond to the “commercial realities’ in the industry and be economically significant.”<sup>62</sup> A beer conglomerate that operates in a number of countries with more than 200 brands fits the bill where the geographic market is considered to be worldwide, and equally fits the bill even where the geographic market is national. This is largely due to the nature of beer as the product in question.

#### *B. Determining Relevant (Product) Market*

When the United States government sued the Falstaff Brewing Company for alleged violation of the antitrust laws, the court had determined that the “relevant product market” was the “production and sale of beer.”<sup>63</sup> In *United States v. Falstaff*, the government was concerned about a merger that would substantially lessen competition or tend to create a monopoly. Under antitrust investigation, a relevant product market is deemed as “those commodities reasonably interchangeable by consumers for the same purposes.”<sup>64</sup> “In determining the relevant product market, the court examines the cross-elasticity of demand; that is, the court considers, in light of the product’s characteristics and price, the extent to which a rise in price of the product creates a rise in demand for like products in that market.”<sup>65</sup>

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<sup>60</sup> Fed. Trade Comm’n v. Procter & Gamble Co., 386 U.S. 568, 571 (1967); *see also* United States v. Grinnell Corp., 384 U.S. 563, 587 (1966) (“The geographical market is defined as nationwide.”).

<sup>61</sup> *Grinnell*, 384 U.S. at 588.

<sup>62</sup> United States v. Pabst Brewing Co., 384 U.S. 546, 556 (1966).

<sup>63</sup> United States v. Falstaff Brewing Corp., 410 U.S. 526, 549 (1973).

<sup>64</sup> *Queen City Pizza*, 922 F. Supp. at 1061 (citation omitted).

<sup>65</sup> *Id.*

The product market must be the key in settling antitrust claims of monopolization. For trademarked goods, the product market is, generally, the product's targeted consumers—for example, light beer targets certain types of consumers, and its relevant product market would be for light beer and not the general beer market.

How do we determine the relevant market for goods that are covered by intellectual property? Should the relevant market for intellectual property be global or should there be broader obligations to determine relevant market under antitrust law. In *Viacom v. Giotto*,<sup>66</sup> the CJEU appeared to have endorsed a more cautious approach.<sup>67</sup> Should the relevant market for intellectual property goods be measured the same as the general approach to relevant market under antitrust investigations? Should the relevant market be global, as the European Commission in *Intel* said that the geographic market was worldwide?<sup>68</sup> Even if the market is global, how do we reconcile the fact that intellectual property protection is purely domestic in nature (particularly as related to the beer industry studied in this Article)? Some intellectual property protection such as trademarks afford regional protection covering a geographic territory, such as a CTM in Europe. But even if innovation and commerce is no longer national, then the answer to these questions in determining the relevant market should be worldwide.<sup>69</sup> Intellectual property creations are a result of innovation, research and development and creative intuitions. A producer of a product in a small territory may find it difficult to sell enough of his manufactured goods in his home territory to earn a profit. In this case, he will need to look beyond the shores of his home territory for

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<sup>66</sup> Case C-134/03, *Viacom Outdoor Srl v. Giotto Immobiliare SARL*, 2005 E.C.R. I-1167.

<sup>67</sup> *Id.* ¶ 28.

<sup>68</sup> Case C-252/07, *Intel Corp. v. CPM UK Ltd.*, 2008 E.C.R. I-8823. See Case COMP/C-3/37.990, Intel Commission decision of 13 May 2009, D 3727 (2009).

<sup>69</sup> Two academic scholars had made a proposal in the 1980s, for United States lawmakers to consider making the definition of “relevant markets” to include “know-how,” “product features” and “innovation.” See Thomas M. Jorde & David J. Teece, *Innovation, Cooperation and Antitrust*, 4 BERKELEY HIGH TECH. L.J. 1, 90 (1989) (“(1) relevant markets shall be defined in a manner that reflects commercial realities, and will often involve *know-how markets and product markets*, (2) relevant markets shall be defined in a manner takes account of the actual and potential competitors, both foreign and domestic, who, either alone or cooperatively, are capable of timely engaging in similar *innovation and commercialization efforts*, (3) relevant markets shall be drawn with *sensitivity to product features and performance characteristics*, in addition to price elasticities, and (4) *relevant markets involving innovation are presumed to be global*, unless evidence demonstrates a more narrow market is appropriate”) (emphases added).

a larger slice of the market pie. This means taking sales globally. Herein, however, lies a paradox: by going global the seller is competing in multiple markets, and as such, if an antitrust violation or intellectual property infringement occurs, the seller would need to respond to each violation using the domestic laws of those territories.

### *C. The Market for Ideas, Technology and Goods*

The traditional antitrust doctrine of market definition in the early case law was essentially formulated for the market for goods. Thus, the question has become how to shift from the market for goods and apply the concept of market or method of determining market to ideas and technology. For technology,<sup>70</sup> determining the market depends on a variety of factors, including the type of technology, and these can be similar to the market for goods. In this sense, the market for technology does not pose a significant amount of challenge. However, this cannot be said of the market for ideas.<sup>71</sup> In this context, ideas refer to those innovative intuitions that form the basis of intellectual property such as copyrights, patents, designs and trademarks—with the focus on the latter. The next subpart is designed specifically to discuss in more details the market for ideas by focusing on current regulatory guidelines.

### *D. Guidelines and Approaches to Market Definition in Intellectual Property*

The Market Definition Notice in Europe<sup>72</sup> and a similar counterpart in the United States, the Antitrust Guidelines on intellectual property licensing,<sup>73</sup> are two of the most significant pieces of *soft-law* instruments that offer guidance on the approach to market definition in intellectual property.

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<sup>70</sup> See *Townshend v. Rockwell Int'l Corp.*, No. C99-0400SBA, 2000 WL 433505 (N.D. Cal. Mar. 28, 2000) (discussing technology market).

<sup>71</sup> I borrow the term “ideas” from a recent discussion offering a perspective on the market for ideas and its historical origins with Oliver Holmes. Note that I differentiate “ideas” to mean the ideas which resulted in intellectual property rights. See Gregory Brazeal, *How Much Does a Belief Cost?: Revisiting the Marketplace of Ideas*, 21 S. CAL. INTERDISC. L.J. 1 (discussing the dissent by Oliver Holmes in *Abrams v. United States*, 250 U.S. 616, 624 (1919)).

<sup>72</sup> Market Definition Notice, *supra* note 47.

<sup>73</sup> Antitrust Guidelines for the Licensing of Intellectual Property, U.S. DEP'T OF JUST. & FED. TRADE COMM'N (1995) [hereinafter 1995 U.S. IP Guidelines].

The reformation of EU antitrust law in 2003 through 2004<sup>74</sup> saw the introduction of an equally important piece of *soft-law* by the EU on the application of Article 101 to Technology Transfer Agreements.<sup>75</sup> In another paper issued by the DOJ in 2007 on antitrust enforcement in intellectual property,<sup>76</sup> the DOJ emphasized the importance of market definition.<sup>77</sup>

Though these “guidelines” are soft-law instruments, they carry tremendous importance when litigating antitrust in intellectual property rights. One noticeable trait about these soft-law instruments is that there is no mention of trademarks in them;<sup>78</sup> they are significant to this Article because the same approach to antitrust enforcement in patents and copyrights is equally applicable to trademarks. Thus, there is something that can be learned from an analysis of these soft-law instruments relating to the enforcement of antitrust in intellectual property rights.

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<sup>74</sup> Policy makers in the EU undertook a (theoretical) review of EU antitrust law and its goal, which culminated in a series of white papers and guidelines on the application of the antitrust provision of the TFEU to various sectors. This review was dubbed the “effects-based” approach to EU antitrust law, to emphasize a departure from the formal-based approach.

<sup>75</sup> European Commission Notice, Guidelines on the application of Article [101] of the [TFEU] to technology transfer agreements, 2004 O.J. (C 101/2) [hereinafter EU Technology Transfer Guidelines]. See also Commission Regulation (EC) No. 773/2004 on the application of Article [101](3) of the TFEU to categories of technology transfer agreements, OJ L/123 (2004).

<sup>76</sup> Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition, U.S. DEP’T OF JUST. AND FED. TRADE COMM’N (2007) [hereinafter DOJ’s IP Antitrust Enforcement Paper].

<sup>77</sup> The 2010 Horizontal Merger Guidelines also laid out an approach to market definition in a merger context and where innovation is involved. See Horizontal Merger Guidelines, U.S. DEP’T OF JUST. & FED. TRADE COMM’N (2010). For a discussion, see Keke Feng, *Patent-Related Mergers and Market Definition under the 2010 Horizontal Merger Guidelines: The Need to Consider Technology and Innovation Markets*, 34 T. JEFFERSON L. REV. 197 (2012) (highlighting discrepancies between the definition of market in the 1995 IP Guidelines and the 2010 Horizontal Merger Guidelines).

<sup>78</sup> The 1995 U.S. IP Guidelines, *supra* note 73, at n.1, explains the omission of trademarks: These Guidelines do not cover the antitrust treatment of trademarks. Although the same general antitrust principles that apply to other forms of intellectual property apply to trademarks as well, these Guidelines deal with technology transfer and innovation-related issues that typically arise with respect to patents, copyrights, trade secrets, and know-how agreements, rather than with product-differentiation issues that typically arise with respect to trademarks.

The DOJ’s IP Antitrust Enforcement Paper, *supra* note 76, was equally unfriendly to trademarks, only to suggest that “the duration of some, but not all, intellectual property rights is limited” (citing J. THOMAS MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 6.8, 6–11 (4th ed. 2005)), and that “[t]rademarks are protected as long as the mark continues to indicate a specific source or quality and is not abandoned by the owner.”

Historically, the 1995 United States IP Guidelines set the threshold for applying antitrust to intellectual property rights.<sup>79</sup> These Guidelines do not presume that an intellectual property right bestows upon its owner market power, but under other circumstances “market power could be illegally acquired or maintained” by the IP owner, or even use his legitimately acquired market power as a result of the intellectual property right “to harm competition through unreasonable conduct.”<sup>80</sup> The Guidelines raise two instances that affect trademarks by creating market power: these are in “quality” and “improved goods.”<sup>81</sup> In *United States v. Microsoft*,<sup>82</sup> the court said that if a firm has profitably raised prices as a result of market power, then it was a clear indication of monopoly power.<sup>83</sup> The *Microsoft* decision was perhaps the best-known case that put the IP Guidelines to the test. In that decision the court noted that “monopoly power may be inferred from a firm’s possession of a dominant share of a relevant market that is protected by entry barriers.”<sup>84</sup> Since then a number of antitrust cases involving intellectual property have been decided both in the Supreme Court and Federal Circuit Courts, making clear that the United States IP Guidelines have cleared the way for a peaceful coexistence of both antitrust and intellectual property law. This is due to one of the fundamental premises of those Guidelines: that there is no presumption of market power in intellectual property rights.

The EU Technology Transfer Guidelines embraced the notion of a market in the Market Notice Regulation.<sup>85</sup> However, for the purposes of

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<sup>79</sup> See generally ABA SECTION OF ANTITRUST L., THE FEDERAL ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY: ORIGINS AND APPLICATIONS (3d ed. 2010).

<sup>80</sup> U.S. 1995 IP Guidelines, *supra* note 73, at 4. Also defining market power as “the ability profitably to maintain prices above, or output below competitive levels for a significant period of time.” There are three general principles of the US IP Guidelines: (1) intellectual property is presumed as any other form of property; (2) there is no presumption of market power; (3) and intellectual property licensing is generally viewed as pro-competitive.

<sup>81</sup> The Guidelines raised these instances in expanding the definition of market power. See *id.* at n.9 stating: “Market power can be exercised in other economic dimensions, *such as quality*, service, and the development of new or *improved goods* and processes . . .” (emphases added). See also *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

<sup>82</sup> See *Microsoft Corp.*, 253 F.3d 34.

<sup>83</sup> *Id.* at 51 (“[Market Power is] the ability to cut back the market’s total output and so raise price. Where evidence indicates that a firm has in fact profitably done so, the existence of monopoly power is clear.”) (citations and quotations omitted).

<sup>84</sup> *Id.*

<sup>85</sup> See Market Definition Notice, *supra* note 47.

market in technology licensing, the EU Technology Guidelines define technology market as consisting of “licensed technology and its substitutes.”<sup>86</sup> For technology markets, the EU Technology Transfer Guidelines recommend that calculating market shares on the basis “of each technology’s share of total licensing income from royalties, representing a technology’s share of the market were competing technologies are licensed” is an effective way of calculating market shares to determine the strength of market players. There is one difficulty in calculating market shares for intellectual property goods: what is the exact market? Is it the goods or the intellectual property rights that are used to protect the goods? It seems as though the correct answer would be both, and providing evidence to prove market share is then a coup to a claim of monopolization.

Antitrust examination for market power in recent times has also been used by a recent test—the so-called hypothetical monopolist or the small but significant and non-transitory increase in price (SSNIP) test. The SSNIP test is used “to evaluate whether groups of products in candidate markets are sufficiently broad to constitute relevant markets.”<sup>87</sup> The SSNIP test is only an added layer of difficulty in determining relevant markets—in particular, markets for intellectual property—and at the same time, using the SSNIP test to determine relevant market can be employed best when small price movements based on brands affects consumers in the market for beer and other alcoholic beverages. Unfortunately, space does not permit for a full-scale analysis of the SSNIP test in this Article.

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<sup>86</sup> EU Technology Transfer Guidelines, *supra* note 75, at 22 (“The methodology for defining technology markets follows the same principles as the definition of product markets. Starting from the technology which is marketed by the licensor, one needs to identify those other technologies to which licensees could switch in response to a small but permanent increase in relative prices, i.e., the royalties.”).

<sup>87</sup> ABA SECTION OF ANTITRUST L., *supra* note 14, at 85 (discussing the SSNIP under the 2010 DOJ and FTC Horizontal Merger Guidelines: “The hypothetical monopolist test requires that a product contain enough substitute products so that it could be subject to post-merger exercise of market power significantly exceeding that existing absent the merger. Specifically, the test requires that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products (“hypothetical monopolist”) likely would impose at least a small but significant and non-transitory increase in price (“SSNIP”) on at least one product in the market, including at least one product sold by one of the merging firms. For the purpose of analysing this issue, the terms of sale of products outside the candidate market are held constant. The SSNIP is employed solely as a methodological tool for performing the hypothetical monopolist test; it is not a tolerance level for price increases resulting from a merger.”). The SSNIP has also been explained in the following way: “The SSNIP test begins by defining a narrow market and asking whether a hypothetical monopolist in the defined market could profitably implement a SSNIP (usually a 5 percent price increase for 1 year).”).

### III. PRODUCT DIFFERENTIATION AS SOURCES OF MARKET POWER

In a classic article titled *Sources of Monopoly Power: A Phenomenon Called "Product Differentiation,"*<sup>88</sup> Charles Mueller discussed evidence where product differentiation was acting as barrier to entry and therefore deemed anticompetitive.<sup>89</sup> Mueller's work had been one of the early works, including works by Joe Bain, examining product differentiation in an antitrust context. Ensuing scholars, such as Treece, explained that product differentiation is anticompetitive since it "provides the seller with shelter against the forces of competition," and gives the seller "means of attracting particular customers to his product" and also "control over price which he would not have if his product were undifferentiated."<sup>90</sup> Others who have studied product differentiation in the industrial organization context have noted that product differentiation is at the heart of the "monopoly" problem.<sup>91</sup> Other authors, such as Stuyck, found that product differentiation contributes to higher prices for goods,<sup>92</sup> and still others have found evidence that firms with stronger substitutes tend to find it difficult to collude in terms of their product price.<sup>93</sup>

One of the most effective means of attracting consumers to a product is advertising, which usually contains information about the trademark and the

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<sup>88</sup> Charles Mueller, *Sources of Monopoly Power: A Phenomenon Called "Product Differentiation,"* 2 ANTITRUST L. & ECON. REV. 59 (1969).

<sup>89</sup> Mueller studied several industries and found that "the power to price above the competitive level" was present in "significant amounts" and arose "primarily out of a phenomenon called 'product differentiation' . . ." *Id.* at 70.

<sup>90</sup> James Treece, *Protectability of Product Differentiation: Is and Ought Compared*, 18 RUTGERS L. REV. 1019, 1020 (1964).

<sup>91</sup> Samuel Smith, *Antitrust and the Monopoly Problem: Toward a More Relevant Legal Analysis*, 2 ANTITRUST L. & ECON. REV. 19, 38 (1969). See also Maury Harris, *Entry and Long-Term Trends in Industry Performance*, 21 ANTITRUST BULL. 295, 299 (1976) (analyzing empirical evidence that showed high levels of product differentiation in automobiles and hard-surface flooring); Lori Fisler Damrosch, *Advertising, Product Differentiation, and Monopoly Power: A Critical Look at the Proposed Solutions*, 9 ANTITRUST L. & ECON. REV. 25 (1977); Jonathan Baker, *Product Differentiation Through Space and Time: Some Antitrust Policy Issues*, 42 ANTITRUST BULL. 177 (1997); Jerry Hausman & Gregory Leonard, *Economic Analysis of Differentiated Products Mergers Using Real World Data*, 5 GEO. MASON L. REV. 321 (1997); JOHN BEATH & YANIS KATSOULACOS, *THE ECONOMIC THEORY OF PRODUCT DIFFERENTIATION* (Cambridge 1991).

<sup>92</sup> JULES STUYCK, *PRODUCT DIFFERENTIATION: THE LEGAL SITUATION* 107 (1983).

<sup>93</sup> Myong-Hun Chang, *The Effects of Product Differentiation on Collusive Pricing*, 9 INT'L J. INDUS. ORG. 453, 455 (1991); see also David Levy & James Reitzes, *Product Differentiation and the Ability to Collude: Where Being Different Can Be an Advantage*, 38 ANTITRUST BULL. (1993) (stating

product itself. This is typically the case for most products, in particular beverages, beers and most bottled drinks. One study, which analyzed how advertising was used as product differentiation in the soft-drink industry, found that competition was being suppressed.<sup>94</sup>

In the context of intellectual property, product differentiation is an instrument used to enhance the registration rights in copyrights, patents, designs and trademarks.<sup>95</sup> Both literature<sup>96</sup> and case law (where available) suggest that product differentiation is a concern mostly for trademark. In the context of intellectual property law, the focus in this Article is squarely on trademarks and its relationship with product differentiation. The difference between trademarks and product differentiation is that trademarks, broadly speaking, are one of the techniques used by manufacturers to promote goods to consumers. These techniques used by manufacturers in differentiating their goods include branding, advertising, price, packaging and property features.<sup>97</sup> In a number of industries, such as the automobile, beer and contact lens industries, product differentiation is high and encompasses all known techniques. Launching a new product, such as premium beer, would require the brewer to take into account the target market and how to differentiate his premium beer from competitors. It is during this process that the brewer must

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that “a Chamberlinian notion of product differentiation underlies the hypothesis that collusion is less likely in industries with heterogeneous products”).

<sup>94</sup> James Mongoven, *Advertising as a Barrier to Entry: Structure and Performance in the Soft-Drink Industry*, 8 ANTITRUST L. & ECON. REV. 93, 99 (1977) (“The soft-drink industry is a textbook example of a market in which the effectiveness of competition has been seriously impaired by a high degree of . . . product differentiation. . . . This phenomenon suppresses competition [by acting] as a barrier to the entry of new competitors by confronting the potential entrant with either a lower demand for his product at the same unit cost level as the established firms or a higher unit cost at a similar level of demand.”). See also William Comanor & Thomas Wilson, *Advertising, Market Structure and Performance*, 14 J. REPRINTS ANTITRUST L. & ECON. 79, 83–84 (1984) (discussing the relationships likely to exist between product differentiation, advertising and entry barriers: “The relationship between advertising outlays and product differentiation is important for an evaluation of the competitive effects of advertising because the former reflects the policies adopted by individual firms, while the latter is a dimension of market structure. . . . Product differentiation reflects two sets of factors: the characteristics of products within the market, and the present and past policies of established firms with respect to advertising, product design, servicing, and distribution. On the demand side, products are more likely to be differentiable when buyers are relatively uninformed about the relative merits of existing products. This is particularly important for differentiation achieved via advertising.”).

<sup>95</sup> STUYCK, *supra* note 92, at 109 (“Industrial property rights, trademarks, designs and models and, to a lesser extent, patent, are instruments of product differentiation.”).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 12–18.

depend on his trademark to create the market for premium beer. According to one author, “[s]uccessful differentiation based on selecting an appropriate trademark may often therefore be the only way of creating a consistent demand for a particular branded product.”<sup>98</sup> But where consumer demand feeds product differentiation, product differentiation serves as a bad omen for consumers. Consumers are gullible creatures that often behave emotionally and are *under informed* as to certain goods. Consumer goods are heavily advertised with a number of brands and varieties, and such variety (product differentiation) offers firms market power. For consumers, the effect of such product differentiation is to impede their “ability to make rational purchase decisions.”<sup>99</sup> In *First Savings Bank v. First Bank System*,<sup>100</sup> the court affirmed that trademarks are monopolies: “[w]hile service marks undoubtedly represent a beneficial form of monopoly, they are monopolies nonetheless, and should not be construed liberally unless the owner is clearly entitled.”<sup>101</sup> This affirmation by the court was similar to Lord Hardwicke’s referral to trademarks as “one of those monopolies” in 1742,<sup>102</sup> and numerous developments since.<sup>103</sup>

In recent years, some cases have reinforced the claim that product differentiation using trademarks is a source of market power. In *Siegel v. Chicken Delight*, the court noted that a trademark that differentiates product in the eyes of consumers creates a presumption of market power.<sup>104</sup>

One of the effects in markets where product differentiation is highly concentrated is that based on the various techniques of product differentiation, a monopolist will have significant market share in relevant product market and therefore becomes the target of antitrust investigation if such monopoly power leads to negative welfare effect on consumers such as price increases in differentiated products.<sup>105</sup> The Bainian notion of consumer

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<sup>98</sup> Wim Alberts, *Trade Marks: Protect What You Select*, 7 JUTA’S BUS. L.J. 16, 17 (1999).

<sup>99</sup> Treece, *supra* note 90.

<sup>100</sup> *First Sav. Bank, F.S.B. v. First Bank Sys., Inc.*, 101 F.3d 645 (10th Cir. 1996).

<sup>101</sup> *Id.* at 656.

<sup>102</sup> *Blanchard v. Hill* [1742] 26 Eng. Rep. 692.

<sup>103</sup> *See Morris, supra* note 1.

<sup>104</sup> *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43, 51–52 (9th Cir. 1971).

<sup>105</sup> *See* JOE BAIN, *INDUSTRIAL ORGANIZATION* 216–17 (1959) (suggesting that product differentiation “will frequently result in different sellers systematically obtaining significantly different shares of the market . . .”). *See also* James Treece, *Copying Methods of Product Differentiation: Fair or Unfair Competition*, 38 NOTRE DAME L. REV. 244, 253 (1963) (“Competitive forces and monopolistic

ignorance, has also been supported by other scholars, who believed that “product differentiation is anticompetitive” in a number of ways, including the fact, as argued by James Treece, that it, among other things, “impedes the individual consumer’s ability to make rational purchase decisions.”<sup>106</sup> Furthermore, as Treece elaborately laid out, “product differentiation is anticompetitive because it enables sellers to control price rather than to be controlled by price.”<sup>107</sup> Based on these notions of product differentiation, some industries would be more notorious for product differentiation, such as cereal, automobile, beers and liquors among others where branding would play a great role. However, one of the main factors of product differentiation based on the various hypotheses and evidence is that pricing of a product in (geographic) markets creates the monopoly-pricing of product differentiation. An analysis of the pricing mechanism regarding a trademarked premium product in several markets to determine what is the price gap commanded by that product is carried out further in the Article. The intention is to determine if there is a price gap of more than 10 percent for the product, and if this gap is anticompetitive.<sup>108</sup>

#### *A. Market Power and Modern Antecedents in Trademarks*

Trademark law is a form of sovereign in the intellectual property family of laws. Trademark law can easily detach itself from the intellectual property system and can be construed as a law of unfair trade practices. Trademark law rules in an entire kingdom that is not necessarily intellectual property. The purpose of trademark law is to offer consumers and trademark owners protection from harmful intruders outside the walls of its kingdom. If trademark law serves as an absolute monarch (monopoly) for its subject (affixed to goods), it can be argued that trademark law may run into conflict with a neighboring kingdom (antitrust law) and potentially cause war

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forces operate in every market where there is product differentiation, for product differentiation is, by definition, a monopolistic force. Since product differentiation is inherent in the retail process, what the consumer receives in each retail market, measured by utility or welfare, or price, is determined by a balancing of monopolistic and competitive forces.”).

<sup>106</sup> Treece, *supra* note 90, at 1021.

<sup>107</sup> *Id.* at 1022.

<sup>108</sup> See pricing table on beer below detailing price discrimination for same goods—different brand, same trademark.

(litigation). The neighboring kingdom of antitrust law may feel a sense of moral obligation to free the oppressed subjects of its absolute ruler. However, if a cause for war is unlikely, then the kingdoms of trademark law and antitrust law must live in some peaceful coexistence. The question then becomes the following: Are there likely causes for conflict between trademark law and antitrust law? If not, how do both bodies of law coexist peacefully? Should antitrust law be concerned about the monopoly granted to trademark owners? Can trademarks serve as a source of monopoly power/market power?<sup>109</sup>

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<sup>109</sup> In a number of cases in various American courts, similar questions pertaining to the market power/monopoly nature of trademarks were of concern. A search on WestLaw for “trademark monopoly” and “trademark market power” revealed the following non-exhaustive list of some of those cases. *LaTouraine Coffee Co. v. Lorraine Coffee Co.*, 157 F.2d 115, 118 (2d Cir. 1946) (noting that “trade-mark is a species of monopoly”); *United States v. Guerlain, Inc.*, 155 F. Supp. 77, 87 (D.C.N.Y. 1957) (explaining that “trade-marked product may not be expanded into an illegal monopoly”); *G. Heileman Brewing Co. v. Anheuser-Busch Inc.*, 676 F. Supp. 1436, 1473 (E.D. Wis. 1987) (noting that “test to be applied in determining whether trademark is being unlawfully used to confer monopoly in certain product is same as in any other case wherein an unlawful monopoly, or attempt to monopolize, is alleged under Sherman Act § 2; there is a violation of that provision only if defendant’s actions have led to or resulted in a dangerous probability that it will gain monopoly power over relevant market”); *Hughes v. Alfred H. Smith Co.*, 205 F. 302, 308 (D.C.N.Y. 1913) (noting that the descriptive word “IDEAL” of the quality and character of goods was not “the subject of trade-mark monopoly” and even where the court would “hold that the word is subject-matter of trade-mark monopoly” the plaintiff had a right to use the name to sell goods to the defendant); *Smith v. Chanel, Inc.*, 402 F.2d 562, 568 (9th Cir. 1968) (citing Justice Holmes arguing that “the practical effect . . . would be to extend the monopoly of the trademark to a monopoly of the product”); *Caterpillar, Inc. v. Nationwide Equip.*, 877 F. Supp. 611, 614 (M.D. Fla. 1994) (explaining that if a trademark item loses “its identity when incorporated into a product made by one other than the trademark owner, the trademark should not be adopted for the entire new article.”); *Guggenheim v. Cantrell & Cochrane*, 10 F.2d 895, 896 (Ct. App. D.C. 1926) (finding that there was no “sufficient reason for holding that the monopoly of a trade-mark” was less complete (citing *Bourjois & Co. v. Katzel*, 260 U.S. 689, 692 (1923))); *Nu-Enamel Corp. v. Armstrong Paint & Varnish Works*, 81 F.2d 1, 2 (7th Cir. 1935) (noting that the grant of a “trade-mark creates a monopoly”). In other cases, where the language of “trademark market power” was used, it was a similar acknowledgment of the existence of the monopoly created by the grant of a trademark or the existence of trademarks that are used in commerce. These cases include: *Hudson’s Bay Co. Fur Sales v. American Legend Co-op*, 651 F. Supp. 819, 841 (D.N.J. 1986) (explaining that the plaintiff failed to prove that the defendant’s “typing product—the assertedly valuable Legend trademarks-exercises the requisite market power in the market in which it competes”); *Scooter Store, Inc. v. SpinLife.com, L.L.C.*, 777 F. Supp. 2d 1102, 1117 (S.D. Ohio 2011) (explaining that sufficient market power and was close to a “dangerous probability of achieving monopoly power, and that provider was abusing its trademarks to drive others from the relevant market and exclude competitors”) (emphasis added). See also *Clorox Co. v. Wintrop*, 836 F. Supp. 983, 991 (E.D.N.Y. 1993) (noting that misusing trademark for anticompetitive purposes can violate antitrust laws); *Siegel v. Chicken Delight, Inc.* 448 F.2d 43,49 (9th Cir. 1971) (agreeing with the district court’s finding that “Chicken Delight’s unique registered trade-mark, in combination with its demonstrated power to impose tie-in, established as a matter of law the existence of sufficient market power to bring the case within the Sherman

This subpart builds upon the theoretical orientations explored in the previous parts of the paper to provide some, but not all, the answers to these questions. Furthermore, these questions are important as the line between trademarks and a brand becomes blurred. Trade in electronic commerce has expanded and brands themselves are commoditized to signal price and prestige. The problem with the commoditization of brands is that, as Chamberlin argued, “most prices involves monopoly elements” that are “mingled in various ways with competition.”<sup>110</sup> This argument has merit, as it explains the underlying nature of trademarks and antitrust. Although it is only in recent times that the scholarly legal literature has been looking at the trademarks and antitrust intersection, this does not mean that such focus has been greeted with much enthusiasm. Moreover, the policy goals of regulatory authorities are to ensure that there is some form of stability to the chaotic relationship between trademarks and antitrust, and to promote fairer competition in the welfare interests of consumers. The central position of Chamberlin is that trademarks equate to market power, particularly if those trademarks arise as a result of product differentiation under the guise of competition. If firms use their market share to monopolize the market, it is crucial to examine how economic theory can be exploited to gather empirics and then analyze from a legal point of view. In this regard, Chamberlin’s theory of product differentiation and the role of brands (trademarks) in the process of expanding firm’s market share provide effective tools to support established legal doctrines on monopolization and trademarks. There is evidence that the Courts have long been concerned about trademarks and antitrust (at least how trademarks market share monopolizes)—and the harmful effects of such monopolization.

Although some courts have raised novel approaches to establish some connection or criteria for market share where trademarks are involved, such

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Act,” citing *Fortner Enterprises, Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 502–03 (1969)) (“The standard of ‘sufficient economic power’ does not . . . require that the defendant have a monopoly power or even a dominant position throughout the market for the tying product. Our tie-in cases have made unmistakably clear that the economic power over the typing product can be sufficient even though the power falls far short of dominance and even though the power exists only with respect to some of the buyers in the market.”). In *Siegel v. Chicken Delight*, the court found that the “District Court did not err in ruling as a matter of law that the tying product . . . Chicken Delight trade-mark—possessed sufficient market power.” 448 F.2d at 49.

<sup>110</sup> EDWARD CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION* 15 (7th ed. 1960).

as the form of “market” and “market harm,”<sup>111</sup> such approaches were only for legal innovation.<sup>112</sup> The definition of the word “market” is not the only factor in determining where there is any harm to both the relevant and geographic markets, rather, relevant market has to be defined and then must empirically demonstrate the amount of market share a firm commands in order to determine the extent of market power.

This Article does not subscribe to the *DuPont*<sup>113</sup> approach that one can only theorize that trademarks are an antitrust problem. Instead, trademarks are seen as peculiar and they exist in the intellectual property system in a self-contained regime. Trademarks and their regulatory structure projects independence. This sense of difference is also endorsed by the courts—which have constantly rejected antitrust claims that involve trademarks in the last few decades. This does not mean that the greater good of trademarks (i.e., that trademarks serve as a means of identifying a product and its qualities) is to be discarded. Viewed from an antitrust perspective, trademarks make “effective competition possible in a complex, impersonal marketplace by providing a means through which the consumer can identify products which please him and reward the producer with continued patronage. Without such method of product identification, informed consumer choice, and hence meaningful competition in quality, could not exist.”<sup>114</sup> Although trademarks exist to serve as a source identifier and promote competition in the marketplace, they also create tension for antitrust. The result of the tension created by trademark monopolistic nature<sup>115</sup> suggests that the greater good of trademarks from a consumer’s perspective is then obliterated.

Trademarks create an antitrust problem because they are exclusive and may be utilized in several ways. A strong trademark can be utilized to circumvent antitrust law to tie-in weaker products or may serve as a bloodline that affects price discrimination, often to the profit of the producer and the

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<sup>111</sup> *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 805 (9th Cir. 2003) (“[W]e look more generally . . . to the type of work itself in determining market harm.”).

<sup>112</sup> According to *Mattel v. Walking Mountain, id.*, a junior infringer “could lead to market harm” of the senior mark and may even damage “potential markets”; furthermore, the court appeared to have introduced another key test in determining market harm—that is, “potential markets.”

<sup>113</sup> *United States v. E.I. de Pont de Nemours & Co.*, 351 U.S. 377 (1956).

<sup>114</sup> *Smith v. Chanel, Inc.*, 402 F.2d 562, 566 (9th Cir. 1968).

<sup>115</sup> See, e.g., CHAMBERLIN, *supra* note 110, at 59–62, 270–74 (arguing that the monopolistic consequences inherent in the protection of trademarks does outweighs consumer welfare).

detriment to the consumer.<sup>116</sup> Trademarks also create downstream monopoly by brand proliferation and serve in other methods to props up activities that are deemed anticompetitive.

In *Car-Freshner Corp. v. Auto Aid Manufacturing*,<sup>117</sup> the court explained that a trademark claim on monopolization should be treated the same as any other claims of monopolization under antitrust law. In this case, the plaintiff sued for alleged trademark infringement whilst the defendant alleged that the plaintiff engaged in monopolistic practices using the trademark for pine-tree shaped automobile air fresheners. According to the court, the “appropriate product unit [was] not pine-tree shaped air fresheners” but “all air fresheners suitable for use in automobiles.”<sup>118</sup> By defining the relevant product market, the court was able to dismiss the defendant’s counterclaim on alleged monopoly. The court appeared to have done so reluctantly:

This Court is of the opinion that, under any set of facts which could be proven by the defendants in support of their antitrust counterclaim, the acts of the plaintiffs in registering and enforcing the trademark in issue did not create a dangerous probability that the plaintiff would gain monopoly in the market for auto air

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<sup>116</sup> *Car-Freshner Corp. v. Auto Aid Mfg. Corp.*, 438 F. Supp. 82, 86–87 (N.D.N.Y. 1977) (“There is no doubt that a trademark may be utilized in such a manner as to constitute a violation of antitrust laws. Good examples would be the use of a strong trademark to unlawfully tie in a weaker product . . . unlawful price discrimination exercised with respect to a trademark . . . or engaging in other illegal anti-competitive practices.”). See also *Smith v. Chanel, Inc.*, 402 F.2d 562, 568 (9th Cir. 1968) (stating that the manufacturer of [unprotected] product is not entitled to monopolize public’s desire for product even though manufacturer created that desire at great effort and expense). See also *id.* at 566–67 (discussing advertising and trademarks: “The object of [trademarks] is to impregnate the atmosphere of the market with drawing power of a congenial symbol . . . rather than to communicate information as to quality or price. The primary value of the modern trademark lies in the conditioned reflex developed in the buyer by imaginative or often purely monotonous selling of the mark itself. . . . [T]he trademark is endowed with sales appeal independent of the quality or price of the product to which it is attached; economically irrational elements are introduced into consumer choices; and the trademark owner is insulated from the normal pressures of price and quality competition. In consequence the competitive system fails to perform its functions of allocating available resources efficiently.” (internal citation and quotation omitted)).

<sup>117</sup> 438 F. Supp. at 86–87.

<sup>118</sup> *Id.* at 87 (“The first, and perhaps most important, task required to be performed is to define the relevant product in issue. In this particular case, there is little doubt that, for purposes of this analysis, the appropriate product unit is not pine-tree shaped air fresheners. Rather, based upon the theory of interchangeability, or ‘cross-elasticity,’ which allows for closely related product substitute to be considered in the relevant market, the appropriate unit here is de minimis comprised of all air fresheners suitable for use in automobiles and other similar vehicles.”).

fresheners. Rather, the acts complained of merely represent fair and aggressive competitive which does not constitute a violation of the antitrust laws.<sup>119</sup>

The court illustrated the flaw in arguing an antitrust claim on monopolization, given that it must be proven that there is a dangerous probability that the alleged monopolist will gain a monopoly over the product at issue and intends to use that monopoly.<sup>120</sup>

One industry in which it is possible to demonstrate that trademarks are a source of monopoly power, by using the tests for monopolization, which include: (1) market power, and (2) intention to use that market power, is the brewing industry. The global brewing industry is currently dominated by a few large corporations such as ABInBev, Heineken International, SAB Miller (at the writing of this Article) and The Carlsberg Group, all of which have had increasing global sales in the past decade. Moreover, the various brands used by beer producers to market different quality of beers will be examined, especially the brands by ABInBev. The brewing industry brings together the notion of trademarks as an antitrust problem in perfect unison. In *G. Heileman Brewing Co. v. Anheuser-Busch Inc.*,<sup>121</sup> a federal court addressed the nexus of trademarks as an antitrust problem when it examined the plaintiffs' monopolization claims. Some of the arguments in that case are tested in this Article.

### *B. The Functions of Trademarks in a Competitive Economy*

Scholars have argued that the functions of trademarks are to reduce consumer search costs.<sup>122</sup> This position is also supported by a number of judicial decisions.<sup>123</sup> The protection that is offered by various statutes, such

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<sup>119</sup> *Id.*

<sup>120</sup> *E.g.*, *G. Heileman Brewing Co., Inc. v. Anheuser-Busch Inc.*, 676 F. Supp. 1436, 1473 (E.D. Wis. 1987) (“In order to prove an attempt to monopolize, a plaintiff must prove by a preponderance of the evidence: (1) a specific intent to achieve a monopoly in a relevant market; (2) predatory or anticompetitive conduct in furtherance of the purpose to monopolize; and (3) a dangerous probability of success in the relevant market.”).

<sup>121</sup> *Id.*

<sup>122</sup> Landes & Posner, *supra* note 3.

<sup>123</sup> *See Ty, Inc. v. Perryman*, 306 F.3d 509, 510 (7th Cir. 2002) (stating that “[t]he fundamental purpose of a trademark is to reduce consumer search costs by providing a concise and unequivocal identifier of the particular source of particular goods”).

as the European Trademark Directive,<sup>124</sup> offers trademark owners the right to prevent third parties from using his or her trademark.<sup>125</sup> According to the recitals of this statute, the purpose of trademark protection is to guarantee “an indication of origin.”<sup>126</sup> In similar statutes, such as the United States Lanham Act,<sup>127</sup> false representation as to the origin of trademark use is forbidden. In *Mattel Inc. v. Walking Mountain Productions*, the court reaffirmed the goals of trademark protection in order to “avoid confusion in the marketplace,” and to this effect, a trademark owner has the right to prevent “others from duping consumers into buying a product they mistakenly believe is sponsored by the trademark owner.”<sup>128</sup> Additionally, “trademark law aims to protect trademark owners from a false perception that they are associated with or endorse a product.”<sup>129</sup> These “goals of trademark law” place three actors in the thick of how trademarks operate: (1) the *consumer* is to be protected from any false designation of a good (the so-called source function); (2) the *trademark owner* must announce himself to the public with his trademark, which may or may not represent quality (the so-called quality function); and (3) the final actor is the *good or service* itself, which must represent some form of fair competition in the marketplace. For the purposes of this Article, the third factor is designated as the product competitiveness function in the marketplace.

The functions of trademarks listed above represent the *traditional* functions of trademarks.<sup>130</sup> Trademarks nowadays serve other functions,

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<sup>124</sup> 2015 O.J. (L 336) 1.

<sup>125</sup> *Id.* art. 5.

<sup>126</sup> *Id.* Recital 11 (stating “[t]he protection afforded by the registered trade mark, the function of which is in particular to guarantee the trade mark as an indication of origin . . . .”); see also *Arsenal Football Club Plc. v. Matthew Reed*, 2002 E.C.R. I-10273, ¶¶ 47–48 (stating “[t]rade mark rights constitute an essential element in the system of undistorted competition . . . . In such a system, undertakings must be able to attract and retain customers by the quality of their goods or services . . . . [T]he essential function of a trade mark is to guarantee the identity of origin of the marked goods or services to the consumer . . . .”); *The Gillette Company and Gillette Group Finland Oy v. LA-Laboratories Ltd. Oy*, 2005 E.C.R. I-02337; *Boehringer Ingelheim KG v. Swingward Ltd.*, 2002 E.C.R. I-03759.

<sup>127</sup> 15 U.S.C. § 1125(a) (2016).

<sup>128</sup> 353 F.3d 792, 805 (9th Cir. 2003).

<sup>129</sup> *Id.* at 805–06.

<sup>130</sup> *Frits Loendersloot, trading as F. Loendersloot Internationale Expeditie v. George Ballantine & Son Ltd. and Others*, 1997 E.C.R. I-6227 (stating “the essential function of the trade mark . . . is to guarantee to the consumer or end use the identity of the trade-marked product’s origin . . . .”). See also Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839 (2007) (describing the traditional functions of trademark law).

including advertising, investment,<sup>131</sup> communication,<sup>132</sup> social, and linguistic,<sup>133</sup> all of which guarantee the consumer quality of goods or services. The argument, however, is that trademarks also have a monopolistic function, which is in the best interest of the trademark owner. In Europe, an example of this legitimate interest can be seen in *Parfums Christian Dior BV v. Evora BV*,<sup>134</sup> where the CJEU said that “the owner of a trademark has a legitimate interest” in the promotion and presentation of products using his trademark.<sup>135</sup> Does this legitimate interest by the trademark owner mean that he can obtain a stake in a reseller’s business that is using his trademark? If this is the case, does it then mean that it is a case of downstream monopolization?<sup>136</sup> The *Dior* court did not address these questions specifically, however, there was room for debate, in particular, when the court pronounced that a “balance must be struck between the legitimate interest of the trade mark owner.”<sup>137</sup> If one of the functions of a trademark is to signal quality,<sup>138</sup> it can be argued that owners of trademarks (especially trademarks on luxury goods) would be concerned with how their brands are presented by resellers. This was a concern in *Dior*, where the Dutch company was advertising Dior’s luxury perfumes. Had the court addressed legitimate interest in more detail and whether such legitimate interest entails also having

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<sup>131</sup> See *Interflora Inc. v. Marks & Spencer Plc.*, 2011 E.C.R. at 16.

<sup>132</sup> *Id.* ¶ 38.

<sup>133</sup> See Ariel Katz, *Beyond Search Costs: The Linguistic and Trust Functions of Trademarks*, 2010 BYU L. REV. 1555 (2010).

<sup>134</sup> 1997 E.C.R. I-6013.

<sup>135</sup> *Id.* at 43.

<sup>136</sup> See *Joined Cases C-236/08, C-237/08 & C-238/08, Google France SARL and Google Inc. v. Louis Vuitton Malletier SA*, 2010 E.C.R. I-02417 (where a third party’s business structure and cooperation with a manufacturer “suggests that there is an economic link between that third party and the proprietor of the trade mark”).

<sup>137</sup> *Dior*, 1997 E.C.R. I-6013 at 44 (explaining the Advocate General did suggest that the trademark owner, may take steps to protect his reputation, even if such steps would impede parallel trade: “It seems clear that a manufacturer who uses a selective distribution system may have a legitimate interest in preventing consumers from having the false impression that a reseller is an authorized distributor. The manufacturer may therefore be able to make use of any means available under national law to prevent consumers from being misled . . . even if the indirect effect of the national measures were to be an impediment to parallel trade . . .”).

<sup>138</sup> *Frits Loendersloot*, 1997 E.C.R. I-6227 (“With respect to trade mark rights undertakings must be able to attract and retain customers by the quality of their products or service. For the trade mark to be able to fulfill that function, it must constitute a guarantee that all products which bear it have been manufactured under the control of a single undertaking to which responsibility for their quality may be attributed.”).

ownership in Evora BV, the question of a controlling stake would not have been a concern.

Whilst the traditional functions of trademarks often drive the narrative in trademark disputes, there are occasions when courts can be novel and apply new tests for trademark functions, or even get carried away. In reviewing *Interflora v. Marks & Spencer*,<sup>139</sup> it is hard to say which of these two categories the court painted itself into when it ruled that trademarks have an investment function.<sup>140</sup> Even with the novel application of an investment function test (which was not properly explained by the court), the *Interflora* court further explained trademark functions the following way:

[T]he proprietor of a trade mark is entitled to prevent a competitor from advertising on the basis of a keyword which is identical with the trade mark and which has been selected in an internet referencing service by the competitor without the proprietor's consent—goods or services identical with those for which that mark is registered, where that use is liable to have an *adverse effect on one of the functions of the trade mark*.<sup>141</sup>

An argument can be made that the functions of trademarks go beyond traditional functions, and also reduce consumer search costs, advertising, source indication, quality and the *new* investment function, as per *Interflora*. Trademarks may also include several additional functions, as pointed out by the CJEU in *Interflora*. By leaving the door open to a broader interpretation of trademark functions, the *Interflora* court was forced to analyze and apply a set of trademark rules that were not designed specifically for the internet era.

Of the four functions of a trademark that the CJEU identified in *Interflora*, including the function of indicating origin, advertising function, name function, and investment function, it is the investment function that has drawn the most criticism.<sup>142</sup> It should be noted that not all the criticisms are fair, especially those relating to the investment function, which arguably secures the financial and asset stability of the trademark owner and protects the trademark owner's welfare. The investment function allows firms to prove to their shareholders and customers that they are stable by virtue of trademark ownership itself. Moreover, this function can be used to leverage

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<sup>139</sup> 2011 E.C.R. at 16.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 66 (emphasis added).

<sup>142</sup> See *Interflora Inc. v. Marks & Spencer Plc.*, 2011 E.C.R. at 16.

other assets that the firm owns so that the firm can continue to earn significant rewards in other investments and stay competitive. But this is not to say that there is no concern regarding trademarks as whole—and their monopolistic tendencies, which are discussed below.

### *C. Trademarks as Sources of Market Power*

The purpose of this subpart is to present arguments that go beyond the “insurmountable”<sup>143</sup> aspects of the claim, whereas, in the final analysis, the claim is not insurmountable as one could argue. The counterarguments to whether trademarks are an antitrust problem can be summed up the following, as per *Golden West Insulation, Inc. v. Stardust Investment Corp.*:

The “exclusive right” of a trademark owner to prevent the unauthorized use of his mark may present a legal barrier to the use of the mark, but does not present a barrier to competition in the sale of the same product under different marks. In other words, the mere exclusive ownership of a trademark does not monopolize or foreclose competition in the market for the product.<sup>144</sup>

In the same paragraph, quoting Callmann,<sup>145</sup> the court then acknowledged that an argument can be made that trademarks are an antitrust problem—and suddenly, the task in this Article is not so insurmountable after all:

This does not mean that a trademark owner may not be dominant in the market. But *the trademark*, as such, does not result in market dominance although it *might aid the manufacturer of the trademarked article who seeks such status . . . . For example, a manufacturer may spend millions of dollars to advertise its trademark and to acquire prominence, goodwill, public acceptance, and economic power. But not every trademark may be presumed to possess economic power by itself.*<sup>146</sup>

The court then added:

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<sup>143</sup> See *Golden West Insulation, Inc. v. Stardust Inv. Corp.*, 615 P.2d 1048 (Or. App. 1980).

<sup>144</sup> *Id.*

<sup>145</sup> RUDOLPH CALLMAN, UNFAIR COMPETITION, TRADEMARKS, AND COMPETITION 461 (1967); *Raybestos Products Co. v. Coni-Seal, Inc.*, 989 F. Supp. 166 (D. Conn. 1997) (where a manufacturer of automotive parts brought trademark infringement action against a manufacturer of replacement parts, and the defendant counterclaimed by alleging monopolization under the Sherman Act, and the court denied the plaintiffs motion to dismiss the defendant’s antitrust counterclaims).

<sup>146</sup> *Golden W. Insulation, Inc.*, 615 P.2d 1048 (emphases added) (adding further: “[a]ccordingly, we hold that an exclusive trademark or service mark alone cannot create a presumption of sufficient economic power over the market for the tying product”).

*The proper focus of concern is whether the trademark owner, by virtue of his trademark or any unique advantages, in fact has sufficient economic power in the market for the tying product to raise prices or impose other burdensome terms, such as tie-in, with respect to any appreciable number of buyers within the market.*<sup>147</sup>

Trademark disputes may arise in various settings, and though there are established remedies under trademark statutes, it is still unclear if there are remedies under antitrust law. Since *DuPont*,<sup>148</sup> courts have steadily ignored remedies “to restrict a relevant market to a company’s trademarked product.”<sup>149</sup>

Though the grant of an intellectual property right does not confer market power, some courts have held that there is a presumption of market power in patents,<sup>150</sup> copyrights,<sup>151</sup> and trademarks.<sup>152</sup> In *United States v. Loew’s Inc.*,<sup>153</sup> the court acknowledged this presumption of power in copyrights.<sup>154</sup> The *Loew’s* decision was about whether specific tying arrangements violated Section 1 of the Sherman Act, for which the court found that the tying arrangements “injuriously restrained trade.”<sup>155</sup> This presumption of market power in copyright has also been applied to trademarks.<sup>156</sup>

This application of the presumption of market power was a lower court’s decision, as opposed to a Supreme Court decision in both *Loew’s* and *Motion Picture Patents v. Universal*, mentioned above. According to Hovenkamp

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<sup>147</sup> *Id.* (emphasis added).

<sup>148</sup> *United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377 (1955).

<sup>149</sup> *Shaw v. Rolex Watch, U.S.A., Inc.*, 673 F. Supp. 674, 678, (S.D.N.Y. 1987) (citing *Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors*, 637 F.2d 1376, 1387 (9th Cir. 1981), *cert denied*, 454 U.S. 831 (1981)); *Morse v. Swank, Inc.*, 493 F. Supp. 110, 115, (S.D.N.Y. 1980); *Donald B. Rice Tire Co. v. Michelin Tire Corp.*, 483 F. Supp. 750, 755 (D. Md. 1980), *aff’d sub nom.* *Donald B. Rice Tire Co. v. Michelin Tire Corp.*, 638 F.2d 15 (4th Cir. 1981), *cert denied*, 454 U.S. 864 (1981); *H.L. Moore Drug Exchange v. Eli Lilly & Co.*, 457 F. Supp. 75 (S.D.N.Y. 1978); *Mogul v. General Motors Corp.*, 391 F. Supp. 1305, 1313 (E.D. Pa. 1975); *Carlo C. Gelardi Corp. v. Miller Brewing Co.*, 421 F. Supp. 237, 243–44 (D.N.J. 1976); *Mt. Lebanon Motors, Inc. v. Chrysler Corp.*, 283 F. Supp. 453, 461 (W.D. Pa. 1968).

<sup>150</sup> *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917).

<sup>151</sup> 371 U.S. 38 (1962).

<sup>152</sup> *Siegel v. Chicken Delight*, 448 F.2d 43 (9th Cir. 1971).

<sup>153</sup> 371 U.S. 38 (1962).

<sup>154</sup> *Id.* at 48.

<sup>155</sup> *Id.* at 49 (stating “[a]ccommodation between the statutorily dispensed monopoly in the combination of contents in the patented or copyrighted product and the statutorily principles of free competition demands that extension of the patent or copyright monopoly by the use of tying agreements be strictly confined”).

<sup>156</sup> *E.g.*, *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979).

and Leslie, who were consulted in the *Illinois Tool* decisions by the defendants and the plaintiffs, respectively, only older cases recognize the presumption of market power in trademarks, but modern cases do not.<sup>157</sup> Hovenkamp and cohorts argue collectively that, “no inference of market power can be drawn from a trademark, even if the mark is prestigious.”<sup>158</sup> However, this is not the way to view the market power trademarks confer. The market power that trademarks confer should be viewed from the entry barriers they create to preserve any advantages a firm derives from product differentiation. This is particularly the situation in modern times, where trademarks are expanding and brands continue to play signal games and send mixed messages to consumers.

Because trademarks are a significant asset to firms, one consideration that must be taken into account is how trademarks contribute to, or are a source of, market power. The calculation of market shares is one of the determinants of market power, and trademarks are a source of market shares.<sup>159</sup>

### *1. Entry Barriers*

In *Smith v. Chanel*,<sup>160</sup> the court noted that trademarks constitute a barrier to entry to new competition as it dissected an action brought by a trademark owner of a perfume to prevent another manufacturer from promoting its perfume as equivalents to the plaintiffs. According to the court, high barriers to entry produce “high excess profits and monopolistic output restriction.”<sup>161</sup>

[T]he economically irrelevant appeal of highly publicized trademarks is thought to constitute a barrier to the entry of new competition into the market. The presence of irrational consumer allegiances may constitute an effective barrier to entry. Consumer allegiances built over the years with intensive advertising, trademarks, trade names, copyrights and so forth extend substantial protection to firms already in the market. In some markets this barrier to entry may be insuperable.<sup>162</sup>

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<sup>157</sup> HOVENKAMP ET AL., *supra* note 9.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> 402 F.2d 562 (1968).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

The issue of brand loyalty as a barrier to entry has also been raised on other occasions, such as in *TradeComet v. Google*, in which the plaintiff alleged that Google attempted to monopolize the online market by increasing barriers to entry.<sup>163</sup>

The application of a trademark to certain goods, in particular *Veblen goods*, the haute couture of conspicuous consumptions, based on the reasoning in *Chanel*, suggests that barriers to entry are created in certain product markets, due to the mark that represents those products. Again, this is notably so, in the luxury goods area and this comes about because by purchasing those goods, consumers are under the illusion that they are of conspicuous royal stock. The trademark may then serve as a barrier to entry to markets, thus thwarting effective competition on such a market.<sup>164</sup>

Another form of barrier to entry involving trademarks is advertising. According to the United States Supreme Court in *FTC v. Procter & Gamble*,<sup>165</sup> extensive trademark advertising can have anticompetitive consequences of barriers to new entry.<sup>166</sup> In another case, the plaintiff claimed that the illegal use of trademarks by the defendant has harmed the competitive process and erected barriers to entry (of his legitimate trademark) in the market for Vodka on the United States domestic market. “The plaintiffs in the case before us claim that they have suffered or are suffering . . . due to the defendant’s illegal conduct. These are (1) the barrier to entry into the United States vodka market erected by Defendant’s false advertising, false designation of origin, and illegal obtained trademarks . . . .”<sup>167</sup> This case concerned a Russian vodka producer and its

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<sup>163</sup> *TradeComet.com LLC v. Google, Inc.*, 693 F. Supp. 2d 370 (S.D.N.Y. 2010); see also *Henry v. Chloride, Inc.*, 809 F.2d 1334, 1342 (8th Cir. 1987) (noting that brand loyalty can be entry barrier).

<sup>164</sup> See, e.g., *Thompson Medical Co., Inc. v. Pfizer Inc.*, 753 F.2d 208, 217 (1985) (“The trademark law should not grant, in effect, a monopoly . . . that effectively and concisely describes a product’s use or function. Where this exclusive appropriation to occur, future entrants would be required to adopt a ‘less-descriptive’ term, and engage in increased advertising to recoup the lost consumer appeal. Entry barriers would be created, discourage entry and competition, particularly from small firms. This result is expressly at odds with the purposes of the trademarks laws.”).

<sup>165</sup> *Fed. Trade Comm’n v. Procter & Gamble Co.*, 386 U.S. 568, 578–79 (1967).

<sup>166</sup> *Id.* (“The acquisition may also have the tendency of raising the barriers to new entry. The major competitive weapon . . . is advertising . . . [and this] would be able to use [to] volume discounts to advantage in advertising [the defendants product].”).

<sup>167</sup> *Joint Stock Soc’y v. UDV N. Am., Inc.*, 266 F.3d. 164, 175 (3d Cir. 2001).

intended licensee who sued American vodka distiller for false designation of origin, false advertising, and trademark cancellation under the Lanham Act.

In other areas of trademarks, such as color marks, courts are more hostile to conclude that trademarks serves as a barrier to entry. This was evident in *Owens-Corning*<sup>168</sup> over the color mark “pink,” where the court found that the pink color mark did not confer a monopoly or act as a barrier to entry in the market.<sup>169</sup> Given that entry barrier analysis is a relevant area for determining antitrust market, color trademarks cannot be excluded when determining entry barriers as a result of trademarks. Thus, color trademarks, on the one hand could serve as specific analysis for one aspect of market definition, as how other types of trademarks can be analyzed for the purposes of market definition.

## 2. Exclusionary Brands (Rebranding)

What happens when a manufacturer re-brands a product or re-designs a famous product in order to maintain monopoly profits? Does this mean that the “new” brand was designed purposefully as an exclusionary brand for maintaining market share of the same product and monopoly profits? These conducts are what this Article refer to as exclusionary brands. An exclusionary brand is a re-design or re-branding of a leading product or lines of product by a manufacture for the purpose of maintaining market power and monopoly profits. Exclusionary brands are primarily for keeping a similar product by a rival out of the market or attaining as much low sales as possible.

A United States federal court rejected an argument that improvements in a product redesign violated antitrust laws.<sup>170</sup> The change was brought about as a result of product innovation and the plaintiff claimed that Tyco violated Section 2 of the Sherman Act by creating a new product design to unlawfully maintain monopoly power in the United States pulse oximetry sensor market. Although it can be argued that clinging to the goodwill of an old brand helps to create a transition for the “new” product in the minds of

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<sup>168</sup> *In re Owens-Corning Fiberglas Corp.*, 774 F.2d 1116 (1985).

<sup>169</sup> *Id.* at 1123 (“A pink color mark registered . . . does not confer a monopoly or act as a barrier to entry in the market . . . . It serves the classical trademark function of indicating the origin of the goods . . . .”); *see also* *Societe des Produits Nestle S.A. v. Cadbury UK Ltd.* [2012] EWHC 2637 (Ch) (over the colour mark purple).

<sup>170</sup> *Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991 (9th Cir. 2010).

the consumers, the problem is that the profits of the firm continue to soar—creating monopoly profits. The “old brand” (trademark) contributes to this monopoly profits.

Despite the rejection of the court, there are some merits that need further elaboration given that the case raised a core argument on exclusionary brands. In *Allied Orthopedic v. Tyco*, the court applied the exclusionary brand and observed that it was upon the plaintiffs to demonstrate a new and improved product which, as a result of redesign, was anticompetitive by “abuse of monopoly power or exclusionary means of attempting to obtain monopoly in the market.”<sup>171</sup> The implication of exclusion in this context is that brands can be used to raise rival costs, which ultimately provides little access to consumers and markets for rivals.

The raising of rivals’ costs is not the only purpose of rebranding. Firms may rebrand for a number of reasons, but more importantly, when a firm rebrands, it still wants to maintain a sense of identity with its consumers and often times, the trademark is the only link between a branded product and consumers. But rebranding results in both positive and negative associations of a trademark in the minds of consumers. A negative association can stem from the fact that a firm produces terrible goods, and the trademarks have lost their value—both financially and morally on the consumer market. In this scenario the firm will often rebrand, selling the same product, under a new identity protected by trademark law. On the other hand, a firm may rebrand in order to maintain or improve its profits. The firm can go about this by creating a “new” mark, virtually to deceive consumers. One caveat of this risk is that the “new” mark can free-ride on the old mark, and this creates positive association in the minds of the consumers. The more important question, however, is whether this amounts to an antitrust violation. The courts are not forthcoming on this issue.

### 3. Trademarks, Price Fixing and Price Movements

To what extent do trademarks affect prices? Do trademarks cause the price of goods or services to increase or decrease? These are the questions that this subpart seeks to answer. Now let us set aside the argument of parallel

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<sup>171</sup> Nicholas Smith, *Innovative Breakthrough or Monopoly Bullying?: Determining Antitrust Liability of Dominant Firms in Exclusionary Product Redesign Cases*, 84 TEMP. L. REV. 995, 1028 (2012) (discussing the *Tyco* case).

imported goods and or counterfeit goods, because in those situations, trademarked goods are priced differently. This leaves us with one option: genuine goods that are on the market in a single geographic location. As a matter of straightforward antitrust inquiry, pricing discussions can cover price discrimination, predatory pricing, excessive pricing, price fixing, resale price mechanism (RPM) and or price discounts. Again, not all these inquiries fit the ambit of this subpart, and thus, from a price fixing perspective, an attempt is being made to determine whether trademarks affect prices.

A trademarked product usually leaves its point of manufacture with a recommended retail price, and retailers are free to mark-up the price that would result in the earning of a profit, based on transportation, advertising and other costs. This form of price fixing is something that some courts have also endorsed. “The price-fixing effect is simply a method by which the owner of the trademark can protect his property interest in the mark.”<sup>172</sup> In other cases, courts have also debated the extent of price fixing in relation to the trademarked goods. Trademarks, by all accounts, do have the ability to affect prices, which is demonstrated in *United States v. Sealy*<sup>173</sup> and *Eastman Kodak v. Schwartz*.<sup>174</sup>

In *Eastman Kodak*, contractual arrangements that involved the trademarked product were seen by the court as a way of eliminating price competition:

[T]he producer or distributor of a commodity which bears the producer's or distributor's trade-mark may, by contract, eliminate all price competition between retail vendors of his trade-marked commodity provided that there is free and open competition between his trade-marked commodity and commodities of the same general class produced by others. There obviously would not be the requisite free and open competition pricewise in commodities of the same general class if the producer of the trade-marked commodity had a monopoly in the manufacture and distribution of that class of commodity or if the producer or other vendees of the commodity were to enter into agreements eliminating price competition with respect to all commodities of the same general class.<sup>175</sup>

In this case, the core concern was agreements that were entered into by the parties and how contractual restraints were interpreted that would affect the goods in question. However, for the court, the contractual relationship

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<sup>172</sup> *Quality Oil Co. v. E. I. Du Pont De Nemours & Co.*, 322 P.2d 731, 739 (1958).

<sup>173</sup> *United States v. Sealy, Inc.*, 388 U.S. 350 (1967).

<sup>174</sup> *Eastman Kodak Co. v. Schwartz*, 133 N.Y.S.2d 908 (1954).

<sup>175</sup> *Id.* at 917.

Eastman Kodak had with its distributional partners amounted to price fixing, as Eastman Kodak sought to control prices and was therefore an unlawful restraint on trade.

In *Sealy*, another aspect of price fixing was raised with respect to trademarks and licensing arrangements and the court explained that unlawful price fixing and policing by licensees could not be ignored. “[Trademark] territorial exclusivity served many other purposes. But its connection with the unlawful price-fixing is enough to require that it be condemned as an unlawful restraint . . . .”<sup>176</sup> *Sealy* was about an alleged violation of Section 1 Sherman Act regarding the licensing of trademarks for Sealy branded mattresses which were licensed to various manufacturers. The concern was whether restrictions were placed on entry into established territories through price fixing. Moving away from the price fixing exigencies in trademarks contractual arrangements as seen above, there appears to lurk a more sinister issue of trademarks and pricing—and that is trademark’s unique ability to raise prices. The evidence for this hypothesis seemingly lies in the phenomenon of brand (line) extensions of a trademark and the brand loyalty that is attached to the original trademark and the extension in the form of a brand. Chamberlin has observed that “the more substitutes controlled by any one seller, the higher he can put his price.”<sup>177</sup> This observation can hypothetically be applied to some industries where trademarks/brands are essential. A situation where this scenario could be likely is the price for CAR—V1 that is sold on a geographic market for EUR1.00, where inflation has remained zero percent. Over a five-year period, due to the immense popularity of CAR—V1, there had been six instances of line extensions, all linking to the CAR—V1 trademark/brand. These extensions were CAR—V1 MINI, CAR—V1 FLOW, CAR—V1 ESCAPE, CAR—V1 CITY, CAR—V1 COMPACT and CAR—V1 SERENE. All extensions in this hypothetical situation would then be sold for the base price of EUR1.00, plus an additional ten percent mark-up on each line extension, though they are materially lower in prestige than the original CAR—V1. The mark up in prices would be as a result of the market power held by CAR—V1 and the use of trademarks, which has the allure of the trademark to keep customers loyal. There are no

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<sup>176</sup> *Sealy*, 388 U.S. at 356–57.

<sup>177</sup> CHAMBERLIN, *supra* note 4, at 15.

incentives for the owners of CAR—V1 to keep prices low. “Those with real [market] power do not offer uniquely advantageous deals to their customers; they raise prices.”<sup>178</sup> That is how the Supreme Court summed up a situation involving the market for financial credit, where the defendant was accused of tying loans to other services.<sup>179</sup> For branded products and services, there is always the power of attraction due to the trademarks/brands that are involved, and those trademarks/brands may use their reputation to influence the pricing outcome of products to which they are related.

#### 4. Trademark Submarkets

The multi-branding of products that are similar is a gift to rights holders as they employ their trademarks to create more brands for a product. The “new” brand creates a form of trademark submarket<sup>180</sup> for the product’s manufacturer, and continues a process of brand proliferation. For the purposes of antitrust law, submarkets can be used in bringing a claim of antitrust violation. In *Hudson’s v. American Legend*, the court also discussed the nature of submarkets. Trademark submarkets arise when a product’s “peculiar characteristics” along with other forms of changes, in particular changes that are related to price—such as “distinct prices, and sensitivity to price changes.”<sup>181</sup> These features that buttress brand proliferation contributes to the overall “indicia in determining boundaries of a submarket for antitrust purposes.”<sup>182</sup> The question is how the nature of trademarks submarkets using product differentiation and line extension by companies do create a submarket. A submarket is an integrated part of the discourse of relevant market in antitrust—and therefore essential to finding antitrust violation. The question is the amount in which submarkets created by product differentiation and line extensions affect trademarks and whether it reflects upon or impacts antitrust law, if at all.

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<sup>178</sup> *Fortner Enters. v. U.S. Steel Corp.*, 394 U.S. 495, 519 (1969).

<sup>179</sup> *Id.*

<sup>180</sup> *See, e.g., G. Heileman Brewing Co. v. Anheuser-Busch Inc.*, 676 F. Supp. at 1475 (stating that submarkets exist within the broad context of product markets and “well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes”).

<sup>181</sup> *Brown Shoe Co. v. United States*, 370 U.S. 294, 325–26 (1962).

<sup>182</sup> *Am. Aloe Corp. v. Aloe Crème Labs.*, 420 F.2d 1248 (1970).

In *Brown Shoe Co. v. United States*,<sup>183</sup> the court formally introduced the notion of submarkets in the antitrust context by explaining: “The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it . . . . However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes.”<sup>184</sup> Trademark submarkets that occur under the rubric of brand extensions pose a singular challenge to the monopolization offense under antitrust law. Trademark submarkets are an inherent part of the monopolization offense and can only be treated as one of the tenets of monopolizing or acquiring greater market power. The concept and propagation of submarkets under trademark law has been an effective tool for brand proliferations and circumventing antitrust law. This should be inspected more closely in order to determine whether there is in fact a relationship between trademark law and submarkets. In analyzing submarkets and to ascertain whether products are directly competing and if there is a likelihood of confusion under trademark law, a number of factors are taken into account. These factors range from (1) industry or public recognition of the submarket or the separate economic entity, (2) products’ peculiar characteristics and uses, (3) unique production facilities, (4) distinct customers, (5) distinct prices, (6) sensitivity to price changes, and (7) specialized vendors.<sup>185</sup> The court in *Worthington Foods* used these factors to find that the plaintiff’s egg and breakfast meat substitutes and defendant’s cold cereal were not in the same market and or even the same submarket—and thus were not directly competing within the meaning of the Lanham Act.<sup>186</sup>

The important lesson for submarkets and its relation to trademark law is that trademark products creates submarkets and raises questions of market

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<sup>183</sup> *Brown*, 370 U.S. at 325.

<sup>184</sup> *Id.*

<sup>185</sup> See *Worthington Foods, Inc. v. Kellogg Co.*, 732 F. Supp. 1417 (S.D. Ohio 1990). See also *Brown*, 370 U.S. at 325.

<sup>186</sup> *Worthington Foods*, 732 F. Supp. at 1438 (“Goods which are in the same market but in different submarkets do not compete directly and are not in the same relevant product market for the purposes of the antitrust laws.”). But see *Corsearch, Inc. v. Thomson & Thomson*, 792 F. Supp. 305, 325 (1992) (“Based on the definition of the relevant submarket [the defendant] has had a dominant position in that submarket for many years.”).

power. While *Worthington Foods* may have applied a skewed interpretation of “relevant product market for the purposes of antitrust laws,” an antitrust law analysis of markets and relevant product markets is appropriate when determining submarkets. A strict trademark law approach will only serve to further suppress the notion of market power and any relevant submarket.<sup>187</sup> In *Corsearch v. Thomson & Thomson*,<sup>188</sup> the court applied a well-established analysis of antitrust law when a competitor brought an antitrust action against the owner of a copyright on a state trademark computer database, alleging that the owner’s termination of permission for competitor to use database violated the Sherman Act. The broader implications of trademark submarkets for trademark law is that they give rise to the likelihood of confusion<sup>189</sup> and therefore, are actionable under both trademark law and antitrust law. For example, in *AMF v. Sleekcraft*,<sup>190</sup> where the marks “SLEEK CRAFT” and “SLIK CRAFT” were in contention over boats, the court held that the potential for each competitor to enter each “other’s submarket with a competing model” was strong.<sup>191</sup>

#### 5. Illinois Tool Works—*The Trademark Lesson*

The relevant lesson from the Supreme Court’s decision in *Illinois Tool Works*<sup>192</sup> is that direct proof of market power is required when making claims of tying arrangements in intellectual property.<sup>193</sup> This case is important for two reasons: (1) it squarely addresses the intersection of intellectual property law and antitrust law, and (2) it specifically addresses the notion of market

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<sup>187</sup> *But see* *Daddy’s Junky Music Stores v. Big Daddy’s Family Music Center*, 913 F. Supp. 1065, 1073 (1996) (“[N]ew and used musical instruments are sufficiently similar to one another as to be contained within in one submarket.”); *Medici Classics Productions LLC v. Medici Group LLC*, 590 F. Supp. 2d 548 (2008) (“[The] plaintiff is in a highly specialized submarket distributing under its trademark the work of a single performer . . .”).

<sup>188</sup> *Corsearch*, 792 F. Supp. at 325.

<sup>189</sup> *E.g.*, *Lane Capital Mgmt. v. Lane Capital Mgmt.*, 15 F. Supp. 2d 389, 398 (S.D.N.Y. 1998) (“This . . . strongly suggests a likelihood of consumer confusion, even across service submarkets, but that such consumer mistake is inevitable.”).

<sup>190</sup> *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d. 341 (9th Cir. 1979).

<sup>191</sup> *Id.* at 354. *See also* *Saks & Co. v. Hill*, 843 F. Supp. 620 (S.D. Cal. 1993) (where the marks “Sacks Thrift Avenue” and “Saks Fifth Avenue” were in contention over confusion and competition).

<sup>192</sup> *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006).

<sup>193</sup> *Id.* at 46 (“[I]n all cases, involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product.”).

power in patents. Therefore, the case is important when addressing similar questions and thus, has implications on how the question of market power is addressed in other areas such as trademarks. For example, in relation to trademarks, an important concern is whether the protection afforded to marks allows for price leveraging if the trademarks on products attain significant market share and gain monopoly advantage over similar products. This will be further illustrated in the below discussion regarding the market for beers and trademarks market power.

In *Illinois Tool Works*, the Supreme Court concluded that “a patent does not necessarily confer market power upon the patentee.”<sup>194</sup> The Court was asked to determine whether “the presumption of market power in a patented product should survive as a matter of antitrust law despite its demise in patent law.”<sup>195</sup> The Court held that even though a tying product is patented, such a presumption of market power was not supported. Independent Ink sued Illinois Tool Works, alleging that Illinois Tool Works engaged in “illegal tying and monopolization,” in violation of Sections 1 and 2 of the Sherman Act.<sup>196</sup> The Supreme Court explained that its “disapproval of tying arrangements has substantially diminished,” and therefore, “rather than relying on assumptions” it has now “required a showing of market power in the tying product.”<sup>197</sup> The Court, having examined its historical approach to market power in a number of cases, noted that the presumption of market power has transposed from patent law into antitrust law, and that in recent times it has been more cautious in applying the presumption of market power on a whole scale basis: “[W]e have repeatedly grounded the presumption of market power over a patented device.”<sup>198</sup> It seems clear, albeit with some level of reservation, that the Supreme Court has found itself in a corner. Its previous jurisprudence has found market power in cases such as *Loews*<sup>199</sup> and *Motion Picture*.<sup>200</sup> In order to dig itself outside of the corner the Supreme Court found itself in, it suggested that that a new threshold was required in intellectual property; namely, that it would be necessary to do away with

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<sup>194</sup> *Id.* at 45.

<sup>195</sup> *Id.* at 31.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 35.

<sup>198</sup> *Id.* at 40.

<sup>199</sup> *United States v. Loew's Inc.*, 371 U.S. 38 (1962).

<sup>200</sup> *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917).

presumptions and produce evidence of market power.<sup>201</sup> This was a disappointment for some experts and theorists who would argue and mathematically demonstrate that market power exists in intellectual property rights. As discussed in the preceding pages, the existence of market power in itself is not a bad thing, nor does it violate antitrust law. In order for market power to be deemed anticompetitive, it must also be shown that that market power was used to foreclose competition.

*Illinois Tool Works'* lesson for trademarks is that the presumption of market power in intellectual property cases should be supported by evidence rather than the presumption that intellectual property confers market power. The intertwining of antitrust law and intellectual property law often presents the issue market power based on presumptions. A presumption cannot necessarily be made for trademark, which by its exclusivity, is already a monopoly. For a finding of antitrust violation by the existence of trademarks, evidence of market power by the trademarked good and line extension of brands is also useful to support such a claim. Based upon the evidence requirement test that the Court set in *Illinois Tool Works*, the next major Part of this Article turns to the beer industry and attempts to gather evidence of brand proliferation and line extensions, the effects of single seller trademarks in relevant beer markets and how trademarks are a source of market power.

#### IV. ANHEUSER-BUSCH INBEV: MARKET POWER AND BRANDED BEERS

On January 31, 2013, the United States Justice Department announced that it would be filing a suit against Anheuser-Busch InBev's (ABI) takeover of Mexican brewing giant, Modelo.<sup>202</sup> The complaint by the Federal Trade Commission, over the merger of two brewing giants, fell under the domain

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<sup>201</sup> *Ill. Tool Works*, 547 U.S. at 43 (“[Tying arrangements in market power] must be supported by proof of power in the relevant market rather than by a mere presumption of power.”).

<sup>202</sup> See Press Release, U.S. Dep’t of Justice, Justice Department Files Antitrust Lawsuit Challenging Anheuser-Busch InBev’s Proposed Acquisition of Grupo Modelo (Jan. 31, 2013). On a personal note, I had conceived this section in the Summer of 2012, and started working on it in early January 2013, and I somehow felt vindicated on my thoughts (even though they were not public). The advocacy organization, the American Antitrust Institute was among the first to laud the efforts of the Justice Department. See Press Release, Am. Antitrust Inst., AAI Welcomes Justice Department’s Suit to Block Anheuser-Busch InBev’s Acquisition of Grupo Modelo (Jan. 31, 2013). The AAI itself had released a report in 2012 where it argued that such a transaction would lead to greater concentration in the beer industry. See BERNARD ASCHER, GLOBAL BEER: THE ROAD TO MONOPOLY? (Am. Antitrust Inst. 2012).

of the Clayton Act.<sup>203</sup> However, mergers can also run afoul of Section 2 of the Sherman Antitrust Act, and it is with this in mind that the complaint raises a number of questions and possible implications of the use of trademarks in acquiring market power and whether that market power will be used to foreclose competition.<sup>204</sup>

At the heart of the antitrust concern for the Justice Department was that the acquisition of the additional fifty percent of Modelo's shares by ABI "would substantially lessen competition in the market for beer,"<sup>205</sup> which would affect the prices consumers pay for beers and result in "fewer new products from which to choose."<sup>206</sup> The Justice Department, according to the press release, alleges that:

ABI's acquisition of total ownership and control of Modelo would eliminate the existing competition between ABI and Modelo, further concentrating the beer industry, *enhancing ABI's market power and facilitating coordinated pricing* between ABI and the remaining large players. Consumers would, as a result, see *higher prices and less innovation.*<sup>207</sup>

In this passage alone, a number of questions arise that relate to the nature of trademarks and antitrust, in particular, the concentration of market power from a merger. Crucially, the effect of such concentration on prices on various brands of beers will not only affect consumers but that such a merger would prove as a disincentive to innovate.

The four main concerns for trademarks and antitrust that the quoted section raises are (1) market power, (2) price coordination, (3) higher prices, and (4) less innovation. All of these concerns ultimately affect the welfare of consumers who pay the price. Market power only facilitates higher prices,

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<sup>203</sup> 15 U.S.C. § 12 *et seq.* (2016).

<sup>204</sup> See *Worthington Foods, Inc. v. Kellogg Co.*, 732 F. Supp. 1417 (S.D. Ohio 1990) (discussing Section 2 Sherman Act and its relation to trademarks).

<sup>205</sup> Press Release, U.S. Dep't of Justice, *supra* note 202.

<sup>206</sup> *Id.* The sub-heading in the press release states: "Merger Would Result in U.S. Consumers Paying More for Beer, Less Innovation; Lawsuit Seeks to Maintain Competition in the Beer Industry Nationwide." The proposed suit set off a flurry of comments, in particular on the prospects of keeping beer cheap. See, e.g., Steven Pearlstein, *Drink Up: The Justice Department just came out in favor of cheaper beer*, WASH. POST (Jan. 31, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/01/31/drink-up-the-justice-department-just-came-out-in-favor-of-cheaper-beer/>; Pat Summers, *Justice Department Suit Fights Domestic Beer Monopoly and Higher Prices*, NEWJERSEYNEWSROOM.COM (Feb. 1, 2013), <http://www.newjerseynewsroom.com/nation/justice-dept-suit-fights-domestic-beer-monopoly-a-higher-prices>.

<sup>207</sup> Press Release, U.S. Dep't of Justice, *supra* note 202 (emphases added).

and market power can lead to distortions in the antitrust regime. But the main question is—does market power as a result of merger affect prices and innovation in the beer market? If so, how and are consumers locked into the brands of a single trademark holder in the brewing industry? The beer antitrust suit allows for additional investigation to these and similar questions in this Part.

It is also appropriate at this stage to do some historical reflection on antitrust and the beer market. In *Coors v. FTC*,<sup>208</sup> there was the question of resale price maintenance and also the issue of intra-brand restraints in a similar case.<sup>209</sup> The court said that resale price maintenance was illegal and an agreement to do so can be explicit or implied:

Price fixing is illegal per se under the Sherman Antitrust Act . . . . Prices are fixed when they are agreed upon . . . . The agreement to fix prices renders the conspiracy illegal. The agreement may be inferred or implied from the acts and conducts of the parties, as well as from surrounding circumstances.<sup>210</sup>

Another instance where beer played a central role in antitrust disputes or potential antitrust disputes was in distribution.<sup>211</sup> The rule has, however, changed in recent times whereas RPMs are allowed and judged by a rule of reason.

For Anheuser-Busch, certainly, it was not the first time the brewing behemoth ran into potential antitrust problems.<sup>212</sup> The proposed merger of Anheuser-Busch InBev and Modelo reflected two things: (1) the continued trend of mergers in the brewing industry and (2) such merger trends in the beer industry are subjected to repeated claims of antitrust violations. Mergers in the brewing industry are not limited to the United States beer market, and historically, other markets such as those in the United Kingdom brewing

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<sup>208</sup> *Adolph Coors Co. v. Fed. Trade Comm'n*, 497 F.2d 1178 (10th Cir. 1974), discussed in Fred C. Brigman, Jr., *Antitrust—Price Fixing—Territorial Divisions*, 52 DENV. L.J. 55 (1975).

<sup>209</sup> See *Copper Liquor, Inc. v. Adolph Coors Co.*, 506 F.2d 934 (5th Cir. 1975) (discussing *Coors*, 497 F.2d 1178).

<sup>210</sup> *Coors*, 497 F.2d at 1184.

<sup>211</sup> See, e.g., *In re Beer Distrib. Antitrust Litig.*, 188 F.R.D. 557, 565 (N.D. Cal. 1999); see also Brian O'Connor, *Beer Wholesalers are Facing Brouhaha Over Antitrust Law*, SUNSENTINEL (Sept. 15, 1986), [http://articles.sun-sentinel.com/1986-09-15/business/8602240618\\_1\\_beer-distributors-exclusive-territories-beer-industry](http://articles.sun-sentinel.com/1986-09-15/business/8602240618_1_beer-distributors-exclusive-territories-beer-industry).

<sup>212</sup> In the Matter of Anheuser-Busch, Inc., 54 F.T.C. 277, 301 (1957) (price of premium beer lowered to same price as non-premium beer); Al Stamborski, *Antitrust Inquiry for Brewery: Anheuser-Busch Accused of Tactics to other brands' availability*, ST. LOUIS POST-DISPATCH, Oct. 3, 1997.

industry have had an effect on prices.<sup>213</sup> Based on these historical occurrences in the beer market, some of the more urgent concerns for antitrust law are distribution deals, market power (market dominance) and conspiracy to eliminate competition. The market for beer is peculiar in the sense that the markets are diverse based on branding in specific geographic markets and where branding promotes competition, consumers are often ignorant of price movements in the various brands of beer in their geographic market. If joint ventures, mergers and other forms of consolidation<sup>214</sup> and distribution agreements are prevalent in the industry, leading to concentrations, then the antitrust regime is either slow to react or there is a form of branded monopoly that exists in the market for beer that eludes the uninformed consumer or operate within yards of the antitrust regime. These reflections warrant a careful analysis within the current antitrust rules.

The modern beer industry is notorious for its hundreds of trademarks and brands. Some companies in the beer industry have over 200 brands, most of which are registered in more than one jurisdiction or used simultaneously as a trademark and as a brand. This is in addition to the number of other trademarks that a company owns. For all intents and purposes, “brands” in this Part should also be construed as meaning or referring to “trademarks,” meaning there is no distinction between them. This is to narrow the focus on those brands that are used to market hundreds of beers by a single brewer.

Nevertheless, the issue of brands in the beer industry is only part of the larger problem that this Article addresses. In order to prove the hypothesis that trademarks are a source of market power, there is a need to gather and analyze empirical evidence on the beer market—in particular, ABI’s beer market. The need for empirical evidence (descriptively) serves to demonstrate a market power claim under antitrust law. A market power claim under antitrust law consists of three factors: (a) the relevant market; (b) market shares; and (c) abuse of a dominant position. The focus is

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<sup>213</sup> See Margaret E. Slade, *Beer and the Tie: Did Divestiture of Brewer-Owned Public Houses Lead to Higher Beer Prices?*, 108 *ECON. J.* 565 (1998) (discussing situations in the United Kingdom beer market).

<sup>214</sup> See, e.g., Charles Krakoff, *Beer, Competition, and Emerging Markets*, KOIOS, LLC, EMERGING MARKETS BLOG (Aug. 27, 2009), <http://www.koiosllc.com/2009/08/27/beer-free-markets-and-emerging-economies/> (discussing the consolidation among the large beer companies and their acquisition of smaller breweries in new markets, and stating: “companies typically use dominant market share to raise prices only in markets with high barriers to entry”).

specifically on the market share of ABI and its brands. The focus on market share is important given that “market power is often inferred from market share.”<sup>215</sup>

One of the difficult issues in examining an industry, particularly when the producers in that industry are coy about antitrust law, is the availability and reliability of verifiable data that can paint a true picture of an individual operator in that industry, and whether there are other concerns for antitrust law, outside the usual antitrust normative. The beer industry is no different, and the availability of data and statistics can be sourced from multiple places, such as an industry association representing the beer industry, consultancies that carry out studies for beer producers, and internal studies by the beer producers. Independent studies on the beer industry are rare or have a number of shortfalls,<sup>216</sup> but often they are the most reliable. The other two sources of reliable data are regulatory filings by beer producers,<sup>217</sup> and compulsory information handed over during the course of an investigation or merger. The discussion in this Part relies on three main sources: independent studies, regulatory filings and data obtained from the internet. But even these sources and, ultimately, this Part of the Article also contains shortfalls; a broader study—perhaps a book—would do more justice.

The competitive process among firms encourages them to innovate and create more or better products. In the beer industry, applying or identifying innovation and creativity is something that cannot be easily measured. Furthermore, such “innovation” and “creativity” are often passed on simply as a new brand—thus the branding of a beer, will sometimes represent nothing more than ambitions to gain more market share over a rival in the market for beer. If this hypothesis is correct, then one major difficulty arises: Are brands used by beer producers to maintain or create more market share? If so, does that create problems for antitrust enforcers? Most brands are registered trademarks<sup>218</sup> that are used to market a particular product and, in the beer industry, brand proliferation is rampant. Brands are used by beer producers to maintain market share, and thus market power. To demonstrate

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<sup>215</sup> Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 469 n.15 (1992).

<sup>216</sup> ASCHER, *supra* note 202.

<sup>217</sup> U.S. Sec. Exch. Comm’n, Annual Report for Anheuser-Busch InBev (Form 20-F) (2011) [hereinafter Form 20-F].

<sup>218</sup> For example, Stella Artois, Budweiser, Beck’s are registered trademarks, and also are used to brand certain beers.

this claim, empirical data from the three sources identified above will lead the trajectory of this Article in that direction and in particular, the market share situation with ABI—the main case study in this Article.

Firms compete on the market in order to stay relevant and to create profit. However, in pursuing these goals, firms that engage in brand proliferation create a disadvantage for consumers. Consumers are locked-in on that firm branding and price differences especially beer brands and prices that compete in the lower premium market for beers. A characteristic of the lower premium market for beers is the prevalence of beers being sold in what is often referred to as “six-packs” or higher. As such, in the lower premium market for beers, beer brands manufacturers are able to leverage one brand against the other to keep the six-pack consumer locked-in.

The *Ascher* study is one of the few studies to address the concerns of beer monopolization.<sup>219</sup> This study, carried out under the auspices of the American Antitrust Institute, suggested that the lack of antitrust enforcement in the American beer industry has largely shaped the general market for beer in the United States.<sup>220</sup>

The focus on brands in this Article is based on the notion that “brands are regulated by trademark law.”<sup>221</sup> Brands function in the same way as trademarks—signaling a source to consumers and to reduce their search costs. Brands are therefore difficult to separate from trademarks, and furthermore, this difficulty is often linked to brand loyalty. Brand masters are able to capitalize on brand loyalty to create line extensions to further monopolize the market in which the branded product is traded.

The ABI Corporation traces its history to 1366.<sup>222</sup> In many respects, the ABI Corporation’s history is as a result of mergers and buying out of smaller breweries over the years. Currently, ABI boasts of having “six of the 10 most valuable beer brands in the world”<sup>223</sup> and that, of its over 200 brands, many

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<sup>219</sup> ASCHER, *supra* note 202.

<sup>220</sup> *Id.* at 21.

<sup>221</sup> Devin R. Resai, *From Trademarks to Brands*, 64 FLA. L. REV. 982, 983 (2012).

<sup>222</sup> In this instance, these are previous breweries that were well-known in their respective countries, before they became a part of ABI. For example, Leffe is said to have a brewing history dating back to 1240, whilst Stella Artois is said to have started in 1366 in Leuven; ABI announced in its annual report for 2012 that it has 47.6 percent of the United States Beer market. *See* Anheuser-Busch InBev, Annual Report 6 (2012) [hereinafter 2012 Anheuser-Busch InBev Annual Report]. *See also* Form 20-F, *supra* note 217.

<sup>223</sup> *See* 2012 Anheuser-Busch InBev Annual Report, *supra* note 222, at i.

are local jewels<sup>224</sup> or what trademark lawyers sometimes refers to as well-known/famous marks.

### *A. Beers and Competition*

The current situation for beers on the market is concentrated in the hands of a few large breweries. According to available statistics in 2013, ABI, COORS and SAB Miller are the three market leaders in beer production.<sup>225</sup> The market for beers can range from “light” to “premium,” and “premium range” beers are branded to compete against a similar premium range in a specific geographic market. This situation occurs in the market where the competitors are concentrated, typically three to five large companies. Outside of the major breweries, a number of smaller brewers operate alongside “homemade beers” and other “family-type” breweries that offer beers with different flavors or taste. Even if large manufacturers can stave off strong competition, they can lobby for distribution relationships and any possible distribution agreements may contain provisions that are anticompetitive and also a distribution relationship may cause significant anticompetitive harm.<sup>226</sup>

The effect of such efforts by large brewers would be the elimination of smaller brands (although there is evidence that in the United States, smaller

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<sup>224</sup> *Id.* (“Our portfolio consists of 200 beer brands, including three global brands, Budweiser, Stella Artois and Beck’s; fast-growing multi-country brands Leffe and Hoegaarden; and strong ‘local champions,’ such as Bud Light, Skol, Brahma, Antarctica, Quilmes, Michelob Ultra, Harbin, Sedrin, Klinskoye, Sibirskaya Korona, Chernigivske, Hasseroder and Jupiler, among others.”).

<sup>225</sup> See Beer Marketer’s INSIGHTS, Inc., Chart, *The US Beer Industry: Keep Shipments Data-Brands* (2013), <http://www.beerinsights.com/popups/topbrands07.html>.

<sup>226</sup> For example, in 2005, manufacturers and distributors of beer lobbied for a franchise act in California that would govern the contractual relationships between beer manufacturers and beer wholesalers. See Fed. Trade Comm’n, Comment Letter on California’s Proposed Beer Franchise Act to the California State Senate (Aug. 24, 2005), [https://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/ftc-staff-comment-honorable-wesley-chesbro-concerning-proposed-california-franchise-act-govern/050826beerfranchiseact.pdf](https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-honorable-wesley-chesbro-concerning-proposed-california-franchise-act-govern/050826beerfranchiseact.pdf) [hereinafter Fed. Trade Comm’n Comment] (“The Proposed Franchise Act would reduce wholesaler’s incentives to lower wholesale prices and to undertake efforts to increase the demand for brewers’ brands, and therefore is likely to increase the costs of beer distribution and to reduce competition among wholesalers. Further, the Proposal may reduce competition among certain brands of beer.”).

beer brands are expanding)<sup>227</sup> and higher prices for consumers. As the FTC commented:

[T]he Proposed Franchise Act may lead to less variety as smaller brewers find it more difficult to market their product than larger brewers . . . . [L]arger brewers have brands that compete with small brewers' brands . . . it may have the effect of reducing the aggressiveness of large brewers' pricing for those brands that compete with small brewers' brands, thus raising the price . . . .<sup>228</sup>

Two scholars who have studied the beer franchises acts in the United States market suggested that “prohibition on exclusive dealing contracts in the beer market is associated with an economically and statically significant increase in sales.”<sup>229</sup> Their study further noted that “franchise termination restrictions are likely to reduce welfare.”<sup>230</sup> In general, manufacturers need to remain competitive, and hence, they are often concerned about getting their goods to market. An efficient way of doing so is by entering into agreements with distributors or wholesalers. Some distributors or wholesalers may be indirectly connected to a manufacturer. However, in the absence of distributors or wholesalers that are deemed efficient, manufacturers will be forced to enter the distribution chain themselves.

One factor that suggests the need for manufacturers to enter the distribution chain is the need to cut costs so that consumers can get a better price product.

### *B. The Market for Beers*

The market for beers is a concentrated area where the sale of beer is constantly on a significant increase in terms of quantity. The increase in the sale of beer is maintained through the use of different brands from a manufacturer to maintain prices that are easily met by beer consumers for a typical pack of the lager at the point of sale. On the market for beer, a consumer typically makes a repeat purchase more than two times per week

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<sup>227</sup> See Press Release, Brewers Ass'n: Craft Continues to Brew Growth: Volume and Sales Significantly Outpaced Overall Market in 2012 (Mar. 18, 2013).

<sup>228</sup> Fed. Trade Comm'n Comment, *supra* note 226, at 8.

<sup>229</sup> Jonathan Klick & Joshua Wright, The Effects of Vertical Restraints on Output: Evidence from the Beer Industry 20 (Nov. 17, 2008) (unpublished research paper) (on file with the University of Texas).

<sup>230</sup> *Id.* at 20–21; see also Tim Sass, *The Competitive Effects of Exclusive Dealing: Evidence from the U.S. Beer Industry*, 23 INT'L J. OF INDUS. ORG. 203 (2005) (arguing that exclusive dealing serves to minimize manufacturer-dealer incentive).

for any branded beer from a single manufacturer who produces a different range of branded beers. The market for beer is further affected by post-sale confusion because of intensive competition from more than one beer manufacturer that produces similar premium beers and an irregular consumer who would purchase a premium beer believes that the beer he purchases was his desired premium beer, when in fact; it was similar premium beer from a rival manufacturer. This form of confusion is a result of the similarities in the premium beers ranging from the design of bottles, similar sounding brands, colors and visual impact. The market for beer based on this argument targets two types of consumers: the regular consumer, who makes repeat purchases in a single week, and an irregular consumer who desires a premium beer and considers beer drinking a social form of interaction on an occasional basis.

### *C. The Rise of Beer Monopolization*

The current global beer industry is moving toward a highly concentrated model, which suggests that beer monopolization is on the rise.<sup>231</sup> A highly concentrated (product) market suggests that market power is on the rise and therefore, there is some form of monopoly in the making. In the *Ascher* study, it was claimed that world markets for beer “are becoming more concentrated and, perhaps, are moving toward a global world monopoly.”<sup>232</sup> In the situation of ABI, the world’s largest brewing company, the evidence gathered in this Article, and discussed in the next part supports this claim. In addition, ABI is still seeking to grow its own portfolio of beers and beer brands by means of mergers and acquisitions. When ABI announced that it was seeking to acquire the remaining shares in Modelo—which ABI would then fully own, the DOJ in a lawsuit alleged that “the proposed acquisition would eliminate . . . competition by further concentrating the beer industry, enhancing ABI’s market power, and facilitating coordinated pricing between ABI and the next largest brewer . . . .”<sup>233</sup> The data that is produced in the tables below shows that ABI has been pursuing numerous line extensions from use of its various trademarks signaling that it is determined to hold on to its position as a market leader.

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<sup>231</sup> See ASCHER, *supra* note 202, at ii.

<sup>232</sup> *Id.*

<sup>233</sup> Complaint, United States v. Anheuser-Busch InBev and Grupo Modelo, No. 1:13-cv-00127 (D.D.C. Jan. 31, 2013).

#### *D. ABI Brands Market Shares*

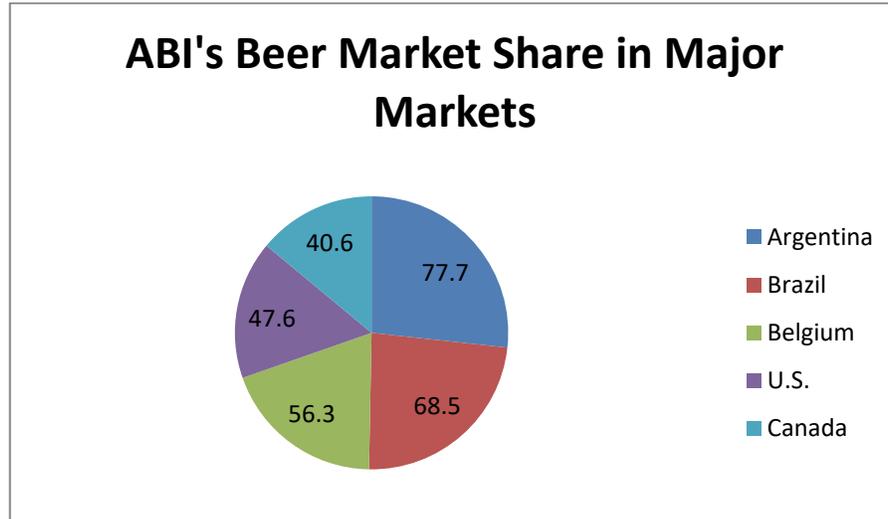
A study in 2012 found that of the 13,000 different brands of beer available on the United States market, ABI was responsible for 200 of those brands,<sup>234</sup> or close to fifty percent of the United States beer market.<sup>235</sup> The significance of the number of brands that are owned by ABI on the United States market for beer (and generally globally where ABI operates) is that ABI can control the prices for its brands of beer that would likely affect prices and how consumers respond to those prices. In *United States v. ABI (Modelo)*, it was alleged that ABI can “increase the prices of its existing brands across all beer segments,” if it were to acquire Modelo. This is because ABI currently owns a number of brands in several regions of the world—and a price increase by ABI on any of its brands would trigger a benefit to other brands in the ABI family—mitigating any loss on a brand. This is due to the significant market share that ABI has on the major markets in which it operates. Figures 1 and 2 depict and analyze ABI’s market share in five countries at the end of the year 2012.<sup>236</sup>

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<sup>234</sup> ASCHER, *supra* note 202, at 3, 24 (stating that some 13,000 brands of beers are available to United States consumers, and that over 200 of the 13,000 belong to ABI: “Anheuser-Busch makes more than 200 brands, including the world-renowned Budweiser, Bud Light, Michelob, Rolling Rock, and other leading brands; Inbev makes Stella Artois and Becks, among others”). *See also* 2012 Anheuser-Busch InBev Annual Report, *supra* note 223, at 46 (confirming that ABI’s beer brands exceeds “well over 200 beer brands”).

<sup>235</sup> ABI in its annual report for 2012 announced that it has 47.6 percent of the United States beer market. 2012 Anheuser-Busch InBev Annual Report, *supra* note 222, at 10.

<sup>236</sup> *Id.* at 10. The figures for ABI were selected from their top ten markets, as supplemented in their 2012 annual report. Only those markets where the market share was more than 40 percent were chosen for the purposes of this Article.

**Figure 1.****Figure 2.**

Country	ABI Market Share	Global Brands	Multi-Country Brands	Local Brands	Ranking
Argentina	77.7%	Budweiser, Stella Artois	Hoegaarden, Leffe	Andes, Brahma, Norte, Patagonia, Quilmes	1
Brazil	68.5%	Budweiser, Stella Artois	Hoegaarden, Leffe	Antartica, Bohemia, Brahma, Skol	1
Belgium	56.3%	Bud, Stella Artois, Beck's	Hoegaarden, Leffe	Belle-Vue, Jupiler, Vieux Temps	1

Country	ABI Market Share	Global Brands	Multi-Country Brands	Local Brands	Ranking
U.S.	47.6%	Budweiser, Stella Artois, Beck's	Hoegaarden, Leffe	Bass, Brahma, Bud Light, Busch, Michelob, Natural Light	1
Canada	40.3%	Budweiser, Stella Artois, Beck's	Hoegaarden, Leffe	Alexander Keith's, Bass, Bud Light, Kokanee, Labatt, Lucky, Lakeport, Oland	1

*1. ABI Brands—With Line Extensions (Multiple Brandings)*

In this subpart, it should be noted that brands are synonymous with trademarks, and this has been confirmed by the court in *Qualitex v. Jacobson*: “We cannot find in the basic objectives of trademark law any obvious theoretical objection to the use of color alone as a trademark, where that color has attained ‘secondary meaning’ and therefore identifies and distinguishes a particular brand (and thus indicates its source).”<sup>237</sup> Thus, by identifying the main brands and their line extensions, such brands are interpreted to mean a trademark.

Figure 3 utilizes only brands that are available on AB-InBev’s website that are classified as “local champions.” These are brands that are marketed in different countries—and which also contain “line extensions.” Not all local champions were selected, but only those listed with line extensions, since these line extensions are crucial to the claim on trademarks (brands) as sources of market power. The Figure also excludes breweries owned by ABI

<sup>237</sup> *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159, 163 (1995).

in other countries which are not only a brand for the beer, but also have other brands. A case in point is the brand ANTARCTICA in Brazil.<sup>238</sup> In addition, the table does not distinguish between premium and non-premium beers, or beers with less than three extensions. Thus, Brazil's premium beer Bohemia and its portfolio of two extensions—Bohemia Weiss and Bohemia Escura—are also excluded. In some markets, such as Canada and Russia, the brand proliferation for beers is quite large, and thus, only three brands were selected representing those countries. Note that ABI owns the rights to their main brands and trademarks in perpetuity for the main countries in which they operate.

**Figure 3.**

Country	Brand	Extension	Extension	Extension	Extension	Extension
Canada	Alexander Keith's	Alexander Keith's India Pale Ale	Alexander Keith's Light Ale	Alexander Keith's Honey Brown	Alexander Keith's Amber Ale	
Canada	Labatt Family*	Labatt .5	Labatt Lite	Labatt 50	Labatt Genuine	(Extra Dry Lager, Wildcat)
Canada	Lakeport Pilsner	Lakeport Honey	Lakeport Light	Lakeport Red	Lakeport Strong	(Ice, Brava, Wee Willy, Steeler Lager)
Russia	BagBier	BagBier	BagBier Classicheskoye	BagBier Krepkoye	BagBier Nashe	
Russia	Klinskoye	Klinskoye Svetloye	Klinskoye Zolotoye	Klinskoye Lux	Klinskoye Redkoye	(Arriva, Samurai)
Russia	Sibirskaya Korona	SK Klassicheskoye	SK Originalnoye	SK Prazdnichnoye	SK Krepkoye Lux	(SK Rubinovoye, SK Yantarnoye, SK Belye, SK Georgievskoye)
Russia	Tolstiak	Tolstiak Dobroye	Tolstiak Svetloye	Tolstiak Zabroistoye	Tolstiak Krepkoye	(Grechishnoye)
Belgium	Belle-Vue	Belle-Vue Kriek	Belle-Vue Kriek Extra	Belle-Vue Framboise	Belle-Vue Gueuze	
Luxemburg	Diekirch	Diekirch Premium	Diekirch Grand Cru	Diekirch Grande Reserve	Diekirch Exclusive	
The Netherlands	Hertog Jan	Hertog Jan Karakter	Hertog Jan Grand Prestige	Hertog Jan Lentebock	Hertog Jan Bockbier	(Dubbel, Tripel)
Ukraine	Rogan	Rogan Legke	Rogan Tradytsiynе	Rogan Monastyrskе Svitle	Rogan Monastyrskе Temne	(Veselyi Monach, Bezalkogolne, Kampai, Arriva)

<sup>238</sup> For example, on its website, Ab-Inbev states that "Antarctica is not just a beer brand, but also a brewery in itself, with a large product portfolio." Other example brands include the following: Cristal, Serramalte, Original, Malzbier, Chopp, and Antartica Pilsen.

\* For this portfolio, AbInbev states that "the Labatt family of beers extends far beyond Labatt Blue with over 30 beers in the portfolio."

Country	Brand	Extension	Extension	Extension	Extension	Extension
Ukraine	Chernigivske	Chernigivske Svitle	Chernigivske Premium	Chernigivske Mitsne	Chernigivske Temne	(Bile, Bila Nich, Bagryane, Fitness+)
U.S.	Budlight	Budlight Lime	Budlight Platinum	Budlight Golden Wheat	Budlight Chelada	(etc.)
Benelux	Leffe*	Leffe Blond	Leffe Brown	Leffe Triple	Leffe Radiouse (Cuvee)	

The country with the largest consumption of beer per capita in 2010, the Czech Republic, was eliminated from the analysis in Figure 3. A number of the “line extensions” in Figure 3 are covered by the initial trademark for the first product, or trademark registration is being sought to cover such extensions.<sup>239</sup>

#### *Focus Brands in ABI's Line Up*

Despite having more than 200 brands of beers, ABI has strategized to build what it calls “focus brands,”<sup>240</sup> the segmentation of brands in three categories: global brands, such as Budweiser; multi-country brands, such as Leffe; and local champions or jewels, such as Klinskoye in Russia. “We have 14 brands with estimated retail sales of over 1 billion USD and six brands—Bud Light, Budweiser, Skol, Stella Artois, Brahma and Beck’s—ranked among the 10 most valuable beer brands by Brandz.”<sup>241</sup> The three brands that best describe ABI as the “global behemoth of beer” are: Stella Artois, Becks, and Budweiser. Both Leffe and Hoegaarden are multi-jurisdictional beer brands owned by ABI. “Focus Brand volume increased 1.5% and accounted for approximately 70% of our own beer volume.”<sup>242</sup>

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\* This brand is multijurisdictional and can be found in the Benelux and other European countries mostly.

<sup>239</sup> See Form 20-F, *supra* note 217, at 11 (“We have been granted numerous trademark registrations covering our brands and products and have filed, and expect to continue to file, trade and patent applications seeking to protect newly developed brands and products.”).

<sup>240</sup> *Id.* at 43 (“Focus brands are those in which we invest the majority of our resources . . . They are a small group of brands which we believe have the most growth potential within each relevant consumer group.”).

<sup>241</sup> 2012 Anheuser-Busch InBev Annual Report, *supra* note 222, at 6.

<sup>242</sup> *Id.* at 2 (“Focus Brand volumes, which represents approximately 70% of our total global beer volumes, grew by 1.5% in 2012, while volumes of our global brands, Budweiser, Stella Artois and Beck’s, increased by 4.1%. Budweiser sold outside the U.S now represents 51% of global Budweiser volume, driven by strong growth in China, a sharp volume increase in Bud sales in Russia and gains in the premium

Figure 4 is a table that shows the market share for the top twenty beer brands in the United States for the period of 2009 to 2011.<sup>243</sup> Highlighted in the table are nine ABI Brands that contribute to the “bud-effect,” a term describing the tendency for consumers to fall back on various ABI brands that have been leveraged on the beer market as a result of their constant status in the top twenty beer brands from the years 2009 to 2011.

**Figure 4.**

Brand	Market Share 2009	Market Share 2010	Market Share 2011
Bud Light	19.2	19.0	19.0
Coors Light	8.3	8.5	8.7
Budweiser	9.3	8.7	8.4
Miller Lite	7.7	7.4	7.2
Natural Light	4.3	4.2	4.0
Corona Extra	3.3	3.4	3.4
Busch Light	3.2	3.2	3.1
Busch	3.0	2.9	2.8
Miller High Life	2.5	2.4	2.2
Keystone Light	2.1	2.2	2.1
Heineken	2.1	2.0	1.9
Michelob Ultra	1.6	1.6	1.7
Natural Ice	1.6	1.6	1.6
Modelo Especial	0.9	1.1	1.2
Pabst Blue Ribbon	0.9	1.0	1.2
Bud Ice	0.9	0.9	1.0
Yeungling Lager	0.8	0.9	1.0
Blue Moon (all)	0.5	0.7	0.8
Miller Gen Draft	1.1	0.9	0.8
Bud Light Lime	0.9	0.8	0.7

In the American beer market, ABI owns two of the top three brands that command the highest market share. The Bud Light market share is at a constant of 19 percent, and is the market leader, whilst another ABI brand, Budweiser, commands the third spot, at an average 8.4 percent in 2011. This scheme results in the so-called “bud-effect.” On other occasions, the bud-

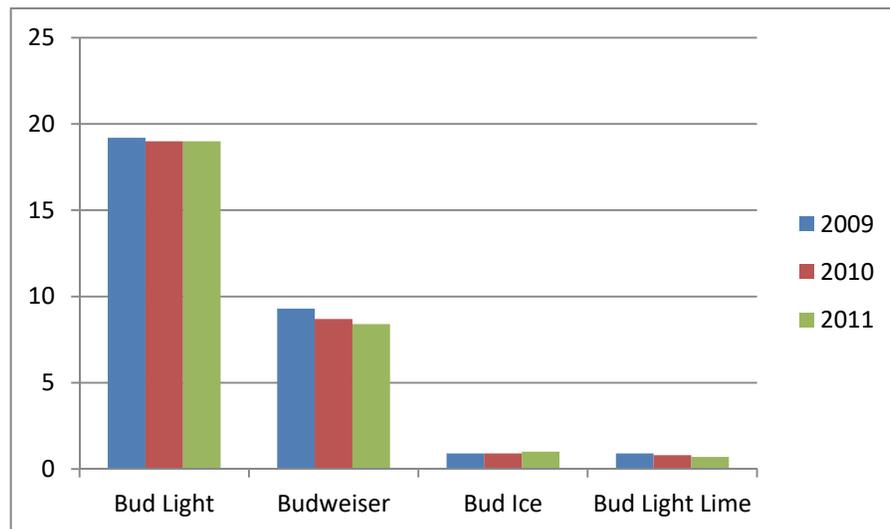
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segment in Brazil. We also received an excellent response to Bud’s launch in the Ukraine, where the brand has already captured 1% share. Stella Artois delivered double-digit growth in the U.S., increased volume by almost 50% in Brazil and made solid gains in Russia. Beck’s performed well in Germany and China.”)

<sup>243</sup> These figures were obtained from BEER MARKETER’S INSIGHTS, <https://www.beerinsights.com> (last visited Mar. 12, 2013).

effect is also spilled over to other brands, such as Corona, a company of which ABI owns at least 50 percent. As a result of such brand proliferation, American beer consumers easily become “locked-in” to an ABI brand. Because each of ABI’s brands are priced in a certain range, it means that a consumer who does not wish to drink a Bud Light can fall back to a Bud Ice or Budweiser. As shown by Figure 4, the following nine ABI brands that all hold a place in the top twenty beers in the market contribute to the bud-effect: Bud Light, Budweiser, Busch Light, Busch, Bud Ice, Bud Light Lime, Natural Light, Michelob Ultra and Modelo Especial. Figure 5 depicts the same effect graphically.

**Figure 5.**



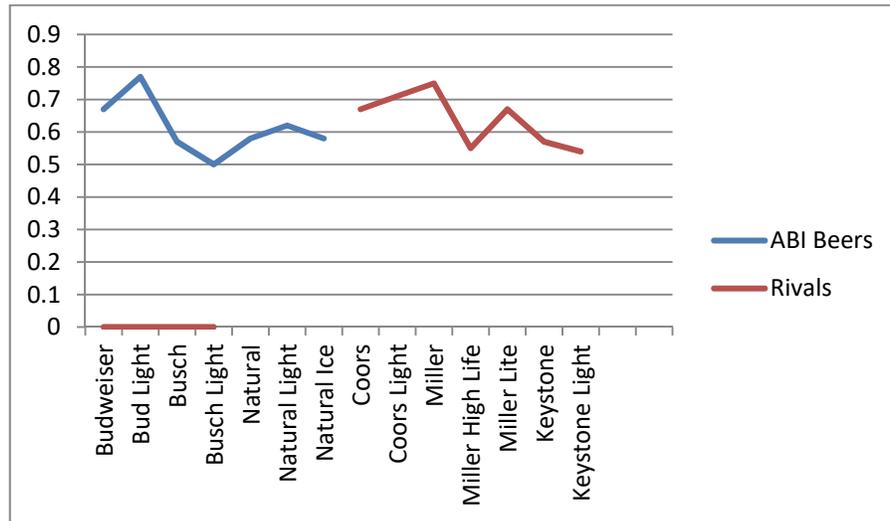
Analogically, the bud-effect is akin to a galaxy with a sun-like essential facility for man's well-being. In this this galaxy the focus brands of ABI are at its core—whilst the line extensions are revolving around the focus brands. The focus brands differ in target group and pricing, and thus, no matter ones' taste—one can always fall back to an ABI's focus brand beer. The bud-effect is maintained by ABI through both quality and price, which is reflected in branding of ABI beers.<sup>244</sup>

## 2. *The “Bud Effect” on Prices*

The following diagram, Figure 6, demonstrates the “fall back” or “bud-effect” of ABI beers based on measurements of the price per can from fourteen random states in the United States. The data reveals that ABI-branded beers are in price unison with their closest rivals, or slightly below the competition. The price for an average “Budweiser” is found to be \$0.67 in some instances and a “Busch Light for \$0.50, on other occasions. It is this low price that creates the “fall back effect.”

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<sup>244</sup> See Form 20-F, *supra* note 217, at 32 (discussing brand differentiation: “[o]n the basis of quality and price, beer can be differentiated into the following categories: premium brands; core brands and value, discount or sub-premium brands”).

**Figure 6.**<sup>245</sup>

The results from the above chart can be analyzed further from Table 1 below.

<sup>245</sup> Figure 6 graphically depicts beer prices in the United States—randomly selected from various major cities. The data analyzed to create this chart was collected on April 24, 2013, using [www.saveonbrew.com](http://www.saveonbrew.com). This site offers the possibility to enter a Zip Code and results from various sellers would be displayed. A number of traders offered several brands of beers and their price margin often differs from \$0.01–1.00. The prices in this chart were selected for a beer brand that was available on that market based on the search results.

**Table 1.**

Beer Name	Case 30-12oz Cans	Case 24-12oz Cans	Case 18-12oz Cans	Case 12-12oz Cans	State	City	Average Price Per Can
Bud Light	22.99				CT (06101)	Hartford	0.77
Budweiser	19.99				AZ (85001)	Phoenix	0.67
Busch	16.99				MO (64101)	Kansas City	0.57
Busch Light	14.99				OK (73106)	Oklahoma City	0.5
Natural		13.99			KY (40217)	Louisville	0.58
Natural Light		14.99			AL (35201)	Birmingham	0.62
Natural Ice				6.99	NY (10027)	Upper West Side	0.58
Coors		15.98			ID (46801)	Fort Wayne	0.67
Coors Light		16.99			IA (50301)	Des Moines	0.71
Miller		17.97			OR (97086)	Portland	0.75
Miller High Life	16.49				WI (53704)	Madison	0.55
Miller Lite		15.99			NE (68601)	Columbus	0.67
Keystone Light		12.99			NC (27601)	Raleigh	0.54
Keystone	16.99				LS (70821)	Baton Rouge	0.57

*Further Observations on the Data Collection*

The areas and zip codes were chosen at random to reflect geographic diversity in the United States. Not all the data collected is reflected in the above table, but those missing data are discussed herein. Prices are per can in a single pack with 12 to 30 cans per pack. Sellers were selected at random, mostly to reflect the lowest possible price per can of 12-ounce beer. However, attention was paid to the fact that that such seller had all or most of the beers listed in the table. In terms of prices, the average price for ABI's

leading brand, Budweiser, was the same price as competing beer prices in the same category, e.g., Coors or Miller, in the majority of states. Six-packs were unusually absent from the search results, and in the St. Cloud, Minnesota area, the number of 12-packs were more prominent when compared to the 30-packs in Camden, Arkansas. The price for Budweiser in the St. Cloud area varied by retailer, and this was also typical in a number of other locations, even when offered by the same retail chain. These observations were similar for Bud Light and Busch Light, in St. Cloud.

One crucial observation is the geographic listing of ABI beers. The search results returned Budweiser or Bud Light in a number of locations, and in other locations, Bud Light would not return; however, other ABI-branded beers showed up in the search results. In Lansing, Michigan and Homestead, Florida, for example, Bud Light was not listed in the search results, but a number of Bud Light line extensions, such as “Bud Light Platinum,” were listed. Lansing had one of the most diverse supplies of beers, from the well-known brands outside of the ABI group or brands that are known internationally, such as Heineken and Guinness. However, ABI-branded beers, such as Budweiser and Busch, still remain the price leaders for consumers to fall back on in that area. There lies a similar result in Spokane, Washington, where a number of well-known ABI and other beer brands were found, including what appears to be regional brands and premium imports. In Colorado Springs, ABI and its main competitors, Coors and Miller battled equally for the same prices with no visible price difference. In Homestead, Florida, ABI was represented by Budweiser only, but its other family of brands were well-represented in the search results, as were brands owned by companies in which ABI has a stake, such as Modelo.

There were a number of limitations involved in the collection of the above data. One limitation with the search results was that stores that are not necessarily located in the zip code would pop up. For example, when the St. Cloud, Minnesota zip code was entered, results from Milwaukee were also displayed. The results often displayed stores in a 5-mile radius, and this could be adjusted to a maximum of 20 miles. Another difficulty in the data collection was that the standard (European) “6 pack” was not readily available in the results of the data. The packs were mostly in bulks, ranging from 12, 18, 24 or 30. This, however, had the effect of driving down the price of those beers, when bought in those bulks. The result of the table shows that ABI brands such as Budweiser are often fall-back brands, due to their low

price, or often compete on the same price level with competing beer brands such as Coors or Miller.

Table 2 below shows a comparison of ABI's two leading brands with their nearest rivals, Coors and Miller, in the single state of California. The data again shows that ABI brands are lower than their rivals and have the "bud effect" on which to fall back.

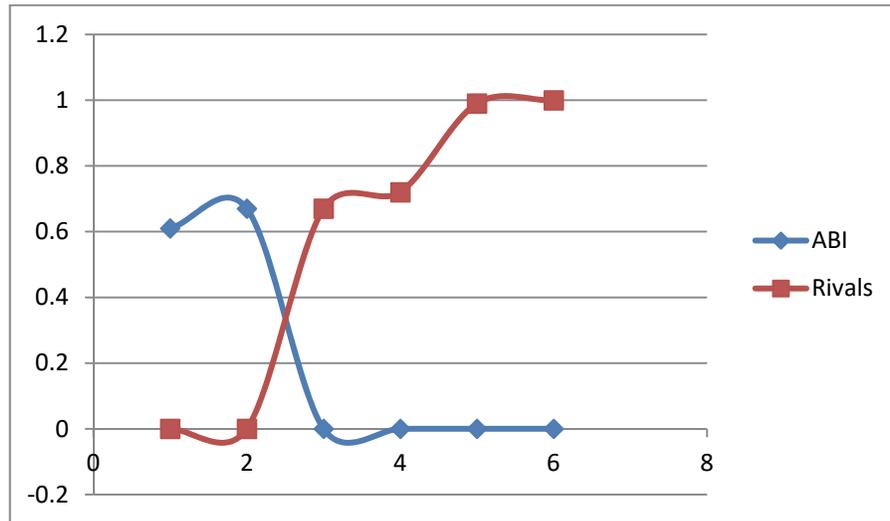
**Table 2.**<sup>246</sup>

Beer Brands	Price	Price/Beer	Quantity	Container	Zip	Town	Store
Budweiser	10.96	0.61	18	12ozC	95661	Roseville	RiteAid
Bud light	11.99	0.67	18	12ozC	93701	Fresno	Valero C
Natural Light	-	-	-	-	-	-	-
Busch	-	-	-	-	-	-	-
Busch Light	-	-	-	-	--	-	-
Coors	11.99	0.67	18	12ozC	92145	S. Diego	Valero C
Miller	12.99	0.72	18	12ozC	91367	L. A.	Ralphs
Blue Moon	11.99	1.00	12	12ozB	94203	Sacramento	Sprouts
Heineken	11.88	0.99	12	12ozB	95501	Eureka	CVS

The data from Table 2 is graphically depicted in Figure 7 below.

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<sup>246</sup> The data in the above table was collected April 24, 2013. Neither Busch nor Busch Light showed up in the search results for California, however, a number of ABI brands, such as Michelob, Modelo among others surfaced. The same was for Natural, which showed up in most of the search, however, in this instance, of interest was only the line extension "Natural Light."

**Figure 7.**

### 3. Does the “Bud-effect” Violate Antitrust Law?

While a company may use brands to position itself among competitors in the marketplace, the problem with branding, as far as they are proliferated through line extensions and in general, is that they can also be used to elevate a dominant position.<sup>247</sup> A company treats its brands as assets, in the sense that they are goodwill and can serve as a form of cash generation.<sup>248</sup> The treatment of goodwill itself is not so clear-cut under antitrust law from an intellectual property perspective. However, one plausible effect of accumulating brands as a form of goodwill is that larger firms are able to create a “storage basket of brands” and hence prevent the use of such brands in a similar category of product for market entry.

<sup>247</sup> See JOHNATHAN TURNER, INTELLECTUAL PROPERTY AND EU COMPETITION LAW 248 (2010).

<sup>248</sup> See, e.g., Form 20-F, *supra* note 217, at 9 (ABI noted that by acquiring other breweries with strong brands, they were able to “recognized USD 32.9 billion of goodwill,” and that several brands in the Anheuser-Busch business are treated as intangible assets “with indefinite life with a fair value of USD 21.4 billion”).

The figures in the tables above suggest that ABI dominates the beer industry globally and on most major markets in which it operates. Thus, ABI has some form of organic monopoly in the beer industry, and, as a result of ABI's organic monopoly, it has the power to price.<sup>249</sup> The next major antitrust issue is whether ABI engages in predatory pricing. With most forms of predatory pricing, this practice is next to impossible to detect. Nevertheless, given the strong market share of ABI and its brands of beers, it can be argued that some form of predatory pricing was used to establish the market power ABI currently has in the beer market.

As a result of its strong market share, in particular to the Bud Light and Budweiser brands, on some markets, ABI is in a position to direct more spending on other brands down the line that competes with similar brands for competitors in the same relevant market, such as "light beer." This creates a "knock-out" scenario, where the bud-effect is used to push competitor's brands in certain segments of the beer market out of competition. The result of the knock-out scenario is the fall-back approach, where Joe Six Pack then falls back on any of ABI's beers in the different segments of the beer market due to brand-level pricing. In *Microsoft v. Commission*, the court noted that Microsoft had a pricing strategy in which it charged "different prices for different versions of its server operating systems."<sup>250</sup> Analogically, the same scenario can be applied to ABI's domination of the beer market.

#### V. BETWEEN CONSUMER WELFARE AND ANTITRUST LAW: STRATEGIC BRANDING, PROLIFERATION AND MONOPOLY LEVERAGING

The discussions in the preceding parts reveal that there is a paradox between consumer welfare and antitrust law. The paradox manifests itself through branding strategies. While the existence of various brands on the market (for beers) is good for consumers, branding strategy sits uncomfortably with antitrust law by engaging strategic brands in one market to gain advantage in another (such as the relevant market for light lager). The mere existence of market power itself on the beer market as shown above does not mean that antitrust laws are violated. However, if the beer producer

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<sup>249</sup> It is quite possible that ABI offers discount prices to retailers—and the effect of this would be to increase sale of ABI beer brands.

<sup>250</sup> T-201/04, ¶ 516 (2007).

uses that market power to foreclose competition then antitrust law should be able to step in. One form of market foreclosure is monopoly leveraging.

The monopoly leverage theory in United States antitrust law began with *Henry v. A.B. Dick* and reached the Supreme Court in *Motion Picture Patents*.<sup>251</sup> The leverage theory is described as follows: if a firm with significant market power (the monopolist) uses that power in one market to foreclose competition in another market and becomes the monopolist in the second market, then the monopolist is able to monopolize the second market by leveraging.<sup>252</sup> The point of discussion on leveraging in this Part is related to Section 2 of the Sherman Act, despite the historical development of monopoly leveraging under other areas of antitrust law, such as Section 1 of the Clayton Act. The Section 2 focus of monopoly leveraging<sup>253</sup> relates to alleged market foreclosure that brand extensions strategies can potentially cause.

The monopoly leverage debate has been robust both in the courts and academic circles; however, the debate is split between two major camps. On the one hand, there is the Chicago School—both academically and judicially,<sup>254</sup> and on the other hand, there is the *modernist* camp, those

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<sup>251</sup> *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. at 502; Roger Blair & Amanda Esquibel, *Some Remarks on Monopoly Leveraging*, 40 ANTITRUST BULLETIN 371, 377–88 (1995) (tracing the development of the leveraging theory through the courts). See also Eun K. Chang, *Expanding Definition of Monopoly Leveraging*, 17 U. MIAMI BUS. L. REV. 325 (2008).

<sup>252</sup> E.g., *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 611 (1953) (explaining that “monopoly leveraging” as when a seller exploits its dominant position in one market to expand its empire into the next); see also Blair & Esquibel, *supra* note 251, at 373–74 (“Monopoly leveraging has two meanings in connection with the enforcement of section 2 of the Sherman Act. In some context, it is used as a description of the way(s) in which actual or attempted monopolization is pursued. Used in this way, monopoly leveraging is relatively noncontroversial as a legal matter and constitutes a violation of section 2. Controversy arises, however, when monopoly leveraging is used to mean the use of monopoly power in one market to gain a competitive advantage—albeit one short of monopoly—in a second market. This second meaning is, in fact, decidedly controversial and probably does not constitute a violation of section 2.” (citations omitted)).

<sup>253</sup> *United States v. Griffith*, 334 U.S. 100, 107 (1948) (“[T]he use of monopoly power, however lawfully acquired to foreclose competition, to gain a competitive advantage, or to destroy a competitor is unlawful.”).

<sup>254</sup> Robin Feldman, *Defensive Leveraging in Antitrust*, 87 GEORGETOWN L.J. 2079, 2080–84 (1999) (giving an overview of the Chicago’s School approach to leveraging: “Traditional leverage theory lost ground with the emergence of the Chicago School of antitrust and its focus on price theory to analyze behavior. Chicago school scholars sharply criticized leverage theory. They acknowledged that leveraging changes the secondary market from a competitive one to a monopoly. They argued, however, that the

preferring game theory. The latter camp—some including post-Chicago and other contemporary scholars—view the leverage theory as flawed, and suggests that firms can attain monopoly power by using strategic behavior to harm rivals.<sup>255</sup> But despite the rich history of the leveraging problem, there is still a conception that antitrust law *should* and *should not* respond to the leveraging problem. This Article posits that the antitrust laws should respond to the leveraging problem where there exists a *problem*—and where that problem can be proven with evidence. As in the previous Part, the leveraging problem exists with use of brand strategies and extensions. It is this evidence-based approach, as promulgated by the modernist, whereas intricate sets of facts can reduce the leverage theory down to narrower harmful acts to foreclose competition. For this reason, the position of this Article is that *strategic branding* and or brand proliferation with trademarks forms a conduit for monopoly leveraging.

The above discussion has shown the meaning and conditions of market power, proliferation and product differentiation. There are two principal effects of harm to competition that the evidence from the beer industry and the proliferation of brands reveal: (1) trademarks are used to sub-markets and further dominance, and (2) trademarks are instruments of predatory pricing on the market for beer.

#### *A. Should Market Power be Presumed with Trademarks?*

In 1742, Lord Hardwicke noted that trademarks were “one of those monopolies.”<sup>256</sup> This situation still applies today. Furthermore, an argument can be made that trademark owners engage in predatory brand proliferation in order to drive a competitor out of business or accessing shelf space in stores. Predatory brand proliferation occurs when the owner of several brands and trademarks for a concentrated product such as beer creates several brands that are similar to a competitor in order to compete on price and force the competitor from the market. According to Schmalensee, “firms have

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interaction of pricing in the two markets [primary and secondary] prevents the monopolist from charging monopoly prices in both.” (footnotes omitted).

<sup>255</sup> *Id.* (citing Thomas Krattenmaker & Steven Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209 (1986)).

<sup>256</sup> *Blanchard v. Hill*, 26 Eng. Rep. 692, 693 (Ch. 1742).

proliferated brands”<sup>257</sup> and established firms generally position their brands in economic space.<sup>258</sup>

One impact of this competition of brands for economic space is that entrants cannot compete effectively on the market, and are often forced to yield the economic space (or shelf space) to the established firm. According to Schmalensee, “the more effectively established brands are differentiated, the less incentive any seller would have to engage in price competition.”<sup>259</sup> This statement is only useful to the extent that presumably, there are two sellers in a market that compete for the same shelf space and collude tacitly not to engage in price competition if they have similar differentiated products. On the other hand, if there is only one seller in the market with differentiated products, that seller will engage in price competition as deterrent to a new entrant on the market. In other words, the single seller may differentiate its products to “crowd-out” a rival entrant.<sup>260</sup>

### *1. Tying Claims in Trademarks*

Claims of illegal tying persist in trademark cases that border on the intersection of trademarks and antitrust.<sup>261</sup> Statutes such as the Clayton Act<sup>262</sup>

<sup>257</sup> Richard Schmalensee, *Entry Deterrence in the Ready-to-Eat Breakfast Cereal Industry*, 9 BELL J. ECON. 305, 314 (1978).

<sup>258</sup> *Id.* at 316.

<sup>259</sup> *Id.*

<sup>260</sup> HOVENKAMP ET AL., *supra* note 9, § 12.02 (“[B]rand proliferation could conceivably have the effect of “crowding out” rivals competing for scarce shelf space in stores . . .”). See also *Car-Freshener Corp.*, 70 F.3d at 269 (stating “[i]t is a fundamental principle marking an outer boundary of the trademark monopoly . . .”).

<sup>261</sup> *Eastman Kodak*, 504 U.S. 451; *Photovest Corp.*, 606 F.2d at 725; *Susser v. Carvel Corp.*, 332 F.2d 505, 512 (2d Cir. 1964).

<sup>262</sup> Clayton Act § 3, 15 U.S.C. § 14 (2016). Under antitrust law, a per se tying claim requires three elements (1) the conduct in question was a tie in:

an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product . . . (2) the plaintiff must establish that the seller “has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product,” and (3) he must establish that “a not insubstantial” amount of interstate commerce is affected

*N. Pac. Ry. v. United States*, 356 U.S. 1, 5–6 (1958). The Supreme Court has stressed the importance of the second element for a tying claim, stating the following:

From the “tying” cases a perceptible pattern of illegality emerges: When the seller enjoys a monopolistic position in the market for the “tying” product, or if a substantial volume of commerce in the “tied” product is restrained, a tying arrangement violates the narrower

note that a tying arrangement occurs where a seller refuses to sell one product, the tying product, unless the buyer also purchases another product (the tied product). In *Hudson's Bay Co. Fur Sales v. American Legend Cooperative*, there were claims of illegal tying arrangement by "coercion," but the court dismissed such claims. Moreover, claims of illegal tying arrangements have been raised in different contexts. For example, in *FF Orthotics, Inc. v. Paul*, the plaintiff made an attempt "to plead and prove a tying claim by asserting that defendant's trademark and branded product, over which defendants clearly held the dominant market power, was the relevant tying product."<sup>263</sup> Taking *Orthotics* into consideration, then trademarked goods and branded products should be seen as different from the *Orthotics* claim. The position in this Article is that the branded goods create a downstream monopoly buttressed by significant market shares of the relevant goods, such as beer, in the relevant product market. Thus, according to the *Susser* Court, the same criteria for determining market power in patents or copyrights can be applied to trademarks: "I can find little reason to distinguish, in determining the legality of an allegedly unlawful tying arrangement, between the economic power generated by a patent or copyright on the one hand and that generated by a trademark on the other."<sup>264</sup> Tie in cases in trademarks are a phenomena that operates under the rubric of cleverly designed efforts to mask the anticompetitive effects of trademarks, and therefore, their unmasking either by the courts or legal analysis requires factual evidence of how a manufacturer gains economic power.

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standards expressed in [Section] 3 of the Clayton Act because from either factor the requisite potential lessening of competition is inferred. And because for even a lawful monopolist it is "unreasonable, per se, to foreclose competitors from any substantial market," a tying arrangement is banned by [Section] 1 of the Sherman Act whenever both conditions are met.

See *Times-Picayune Publ'g Co.*, 345 U.S. at 608–09. The role of market dominance was then highlighted by the *Times-Picayune* case: "But the essence of illegality in tying arrangements is the wielding of monopolistic leverage; a seller exploits his dominant position in one market to expand his empire into the next. Solely for testing the strength of that lever, the whole and not part of a relevant market must be assigned controlling weight." *Id.* at 611.

<sup>263</sup> *FF Orthotics, Inc. v. Paul*, No. D04226, 2006 WL 1980270, at \*6 n.11 (Cal. App. 4th July 17, 2006).

<sup>264</sup> *Susser v. Carvel Corp.*, 332 F.2d 505, 512, 513 (2d Cir. 1964).

## 2. *The Merger Problem and Trademarks*

Firms acquire intellectual property rights through mergers and acquisitions. The result is that a rival who purchased his main competitor acquires all the brands for the same product in the market in which they were competing. This was evident in the ABI merger/acquisition, where AB ended up with all of InBev's beer brands. In *Hudson's Bay v. American Legend*, the plaintiff alleged that the defendant misused trademarks and also violated the antitrust provisions of the Sherman Act.<sup>265</sup> Both parties engaged in marketing and sale of mink pelts produced by United States mink ranchers.

Both associations owned several trademarks used in the marketing of mink pelts and garments. Legend, in an effort to increase the sale of mink produced by its members, "restricted use of the various EMBA [(Emba Mink Breeders Association)] and GLMA [(Great Lakes Mink Association)] trademarks to those minks pelts" auctioned by one of its subsidiaries.<sup>266</sup> Hudson claimed that the restrictions imposed by Legend violated the antitrust laws, claiming that (1) Legend's trademark restriction constitutes an unlawful tying arrangement, and (2) that Legend and others conspired to monopolize the American mink pelt industry.

The court first determined the relevant product and geographic market<sup>267</sup>—fur pelts for the former, but for the latter, the court took into account both worldwide and American fur pelt production,<sup>268</sup> and argued that the "definition of a relevant market is based upon a determination of available substitutes,"<sup>269</sup> before finding that the relevant geographic market was worldwide.<sup>270</sup> The court also added that:

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<sup>265</sup> *Hudson's Bay Co. Fur Sales, Inc. v. Am. Legion Coop.*, 651 F. Supp. 819, 822 (D.N.J. 1986).

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 834–35 (adding: "To define a market in product and geographic terms is to say that if prices were appreciably raised or volume appreciably curtailed for the product within a given area, while demand held constant, supply from other sources could not be expected to enter promptly enough and in large enough amounts to restore the old price or volume").

<sup>268</sup> *See id.* at 836 (suggesting that the relevant geographic market was the American market, as claimed by Hudson, though the court would later reject this claim. "Even if it is assumed the relevant product market is limited to pelts produced in the United States, only one-ninth of that total is of Blackglama quality which does not translate into market power."). *See also id.* at 837 (where the parties also agreed that the geographic scope of the market as worldwide).

<sup>269</sup> *Id.* at 835.

<sup>270</sup> *Id.* at 837 ("The part of commerce or 'relevant market' in which the conduct described herein operates is the world-wide market.").

To measure the cross elasticity of demand is to determine whether a similar product will be substituted for the product in question. Likewise, cross-elasticity of supply is based upon the capability of other production facilities to produce a substitute product. The likelihood that similar products or production facilities are to be included in a relevant market increases in direct proportion to the increase of cross-elasticity or interchangeability of use of these products or facilities.<sup>271</sup>

The court then turned its attention to market share, having said that “practical indicia” can be used for the delineation of “submarkets.” One key concern for the court was the well-known trademark “BLACKGLAMA” that was owned by GLMA, and ownership of each trademarks remained with EMBA and GLMA following the merger.<sup>272</sup> The new entity, Legend, was merely a police organization for the various trademarks owned by both EMBA and GLMA. It was the mark BLACKGLAMA that stirred up the claims on the intersectionality of trademarks and antitrust in this case, and a finding on how the mark as a sign of quality, was used to violate the antitrust rules, in particular, monopolizing the market for mink pelts would depend on how much market share mink pelts labeled with the mark in question commands. But, as the court said, “one-ninth” was not sufficient to address this claim.<sup>273</sup>

Pertaining to both antitrust claims under Sections 1 and 2 of the Sherman Act, the court first noted that Hudson could not demonstrate a Section 1 claim,<sup>274</sup> since the Legend members (and board members) were “not in competition among themselves or with Legend,” and therefore, “competition among the ranchers or Legend . . . does not run the risk of elimination or even reduction by the restriction on the availability of the trademarks.”<sup>275</sup> The more substantial claim of a tying arrangement, where it was alleged that Legend used its valuable trademarks to coerce ranchers to sell pelts though

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<sup>271</sup> *Id.* at 835–36.

<sup>272</sup> *Id.* at 825.

<sup>273</sup> *Id.* at 836 (adding: “[w]ith regard to the Blackglama trademark and its availability to only those pelts produced in the United States . . . it makes no sense to say the product market is only domestically produced pelts and therefore Legend has monopoly power because of such a market definition. [T]he market cannot be limited . . . to a product eligible for a trademark which is subject to the impact of cross-elasticity and interchangeability of use of products, which are ineligible for the trademark.”).

<sup>274</sup> *Id.* at 839 (stating, “I am not satisfied Hudson has demonstrated the existence of concerted action, that is action which is more than unilateral in nature with regard to the imposition of the restraint concerning the availability of the trademark”).

<sup>275</sup> *Id.* at 838.

Legend's subsidiary company, was then addressed by the court. According to the court, if Hudson were to prove that "(1) Legend has sufficient 'market power' in the tying product market to appreciably restrain trade in the tied product market, and (2) a substantial volume of interstate commerce in the tied product market is foreclosed,"<sup>276</sup> then Legend's practices would be considered a violation of Section 2. The court was not convinced that Hudson presented evidence to demonstrate that Legend practices were in violation of Section 2:

[H]udson has failed to prove that Legend's tying product—the assertedly valuable Legend trademarks—exercises the requisite market power in the market in which it competes, the worldwide mink pelt market . . . . A second context in which courts have recognized the requisite market power is where the tying products exhibits significant economic power in the market in which it competes. A third situation in which the requisite market power can be found is where the tying product enjoys a high share of the relevant market . . . . Hudson has not demonstrated that Legend's trademarks possess any of these "market power" attributes . . . . Hudson has not, and indeed could not have, proved the Legend trademarks to be unique . . . .<sup>277</sup>

The court ultimately ruled that Legend did not possess monopoly power and that by linking its trademarks to the use of its auction services, Legend "has not used its trademarks to foreclose, exclude or reduce competition in the relevant markets."<sup>278</sup>

Hudson's section two arguments assumes a relevant product market defined by American mink or American fur auction houses, and the relevant geographic market to be limited to the United States. [T]hese definitions are rejected; the appropriate relevant product and geographic market are worldwide. Even if Legend can be said to have control over the sale of American fur pelts, what is at issue—presently about one-eighth of the worldwide production . . . of which approximately less than one-ninth is qualified for the Blackglama label . . . is hardly monopoly power. . . . Legend has no ability to control prices or supply or competition.<sup>279</sup>

According to the court, even if Hudson had established that Legend had a monopoly in the United States, Hudson did not do a good job in making the

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<sup>276</sup> *Id.* at 841 (stating further that Hudson could also prove that Legend "restriction unreasonably restrained competition in the tied product market").

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 846, points 12–13.

<sup>279</sup> *Id.* at 845.

argument.<sup>280</sup> In the final analysis of the court, “Legend’s decision to make the EMBA and the GLMA trademarks available for use only on member pelts” did not violate the Sherman Act, nor did they “constitute monopolization, attempted monopolization or conspiracy to monopolize within the meaning of Section 2 of the Sherman Act.”<sup>281</sup>

This case is important for several reasons. Firstly, although it was ultimately dismissed, it raised the important issues in antitrust that confronts trademarks, but are either not confronted directly or raised in the relevant arenas. Moreover, it addressed how to determine the use or abuse of trademarks in merger cases that must be addressed by antitrust law. While it may be argued that the parties to the case did not put forth strong arguments by failing to introduce sufficient evidence towards the monopolization claims, this does not mean that the case is insignificant. The case is of immense importance since the court was faced with one fundamental question: are trademarks an antitrust problem? This question has also been raised in a number of other cases<sup>282</sup>—albeit in a slightly different way. In *W.H. Brady Co. v. Lem Products, Inc.*, a claim was brought against the competitor for trademark infringement, and the competitor counterclaimed with a suit alleging violation of the Sherman and Clayton Antitrust Acts. Though not all of these cases have reached the Supreme Court, they are significant because they clutter the lower-level courts. Another problem raised by merger issues for trademarks is the question of entry barriers, as discussed above, and the product extension of trademark/brands.<sup>283</sup>

### 3. One Source, One Ownership and Many Trademarks

The evidence in this Article shows that the branding of beers that originate from a single source, that is, manufacturer or owner, allow beer producers to leverage the branding of beers as a competitive market strategy.

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<sup>280</sup> *Id.*

<sup>281</sup> *Id.* at 846 (“Legend’s decision to make the EMBA and GLMA trademarks available for use only on member pelts sold [in] auction does not constitute an unlawful tying arrangement . . .”).

<sup>282</sup> See *W.H. Brady Co. v. Lem Prods., Inc.*, 659 F. Supp. 1355 (N.D. Ill. 1987).

<sup>283</sup> Fed. Trade Comm’n v. Procter & Gamble, 386 U.S. 568, 578 (1967) (“The anticompetitive effects with which this product-extension merger is fraught can easily be seen: (1) the substitution of the powerful acquiring firm for the smaller but already dominant, firm may substantially reduce the competitive structure of the industry by raising entry barriers and by dissuading the smaller firms from aggressively competing; (2) the acquisition eliminates the potential competition of the acquiring firm.”).

However, one of the effects of this strategy on consumers is that beers originating from a single ownership structure create a monopoly on the beer markets and other entry barriers for new producers. Rival beer producers tend to be excluded from the market that are dominated by large single source beer producers, who rely on various branding and trademarks to dominate the beer market. This is especially the case in some markets where brand leveraging of beers tends to cost less than in other markets, particularly metropolitan markets. While beer brands and trademarks serve as source indicators, the leveraging techniques do not indicate to consumers the ownership of the trademarks as consumers often rely on the brand per se in their decision-making. As a result of the leveraging techniques, beer owners are generally satisfied; however, beer consumers are unconscious of incremental increases in buying leverage beer brands that have been differentiated to suit their particular tastes. Because of the single source and ownership of multiple beer brands and associated trademarks, most of the forms of leveraging and product differentiation lead to higher prices for other beer brands that originate from the single source trademark owner (manufacturers) and also to a high degree of dominance on the market for beers.

### *B. A Theory of Branded Monopoly*

Branded monopolies exist in situations in which a single or parent company controls several brands of a concentrated product that are consumer friendly. However, such consumer friendly products usually affect uninformed consumers who are blindsided by cheap pricing, or, who are locked-in to a compulsory shopping habit by purchasing a branded monopoly product. When locked-in to a single manufacturer's product, uninformed consumers contribute to the maintenance of significant market power of the producer who engages in product proliferation or line extensions, and this does not make the uninformed consumer "better off." A beer company offering six ranges of premium lager is an example of a branded monopoly. The theory of branded monopoly is applicable to markets for trademarked goods, which has more than one brand from a single manufacturer in the same product. This creates a relevant market for trademarks, and under current analysis of relevant market, can be considered in attempts at monopolization.

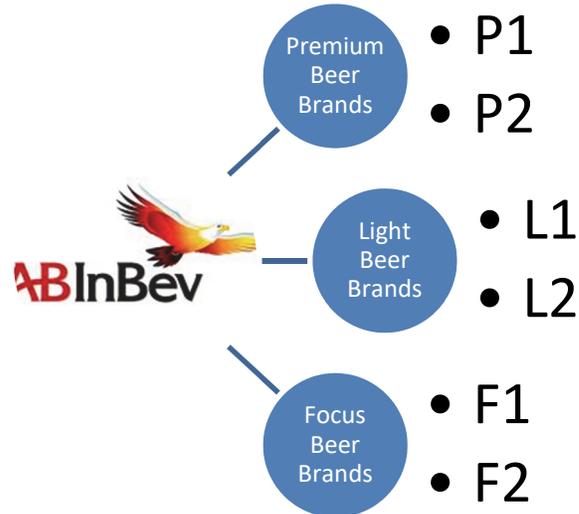
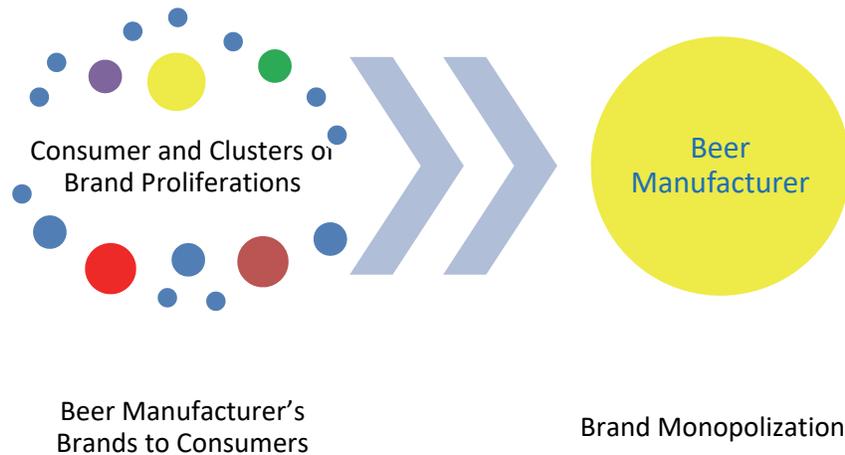
**Figure 8.**

Figure 9 illustrates how a monopolist beer producer uses differentiated beer brands, as indicated in bright colors, to target different consumer preferences (blue clusters).

**Figure 9.**

The branded monopoly theory is further buttressed by the *downstream monopolization* concept, in which there is an economic link between a third party and the proprietor of the trademark. In European Commission investigations of Google (*Ciao*, *Foundem* and *IplusV*),<sup>284</sup> for example, it was alleged that Google was distorting search results in order to benefit its own products and services.<sup>285</sup> However, one core concern about brand proliferations (or extensions) is that brand proliferation creates a double-pronged road, with trademarks on one side of the road and antitrust on the other side. From the perspective of trademarks, brand proliferations cause both the scope and strength of trademark rights to grow. This is due to the fact that the number of goods that are covered has proliferated, i.e., the number of goods covered by a trademark has expanded at the behest of the manufacturer. This proliferation creates tension and conflict.<sup>286</sup> This tension and conflict can arguably be attributed to antitrust or other areas; however, from an antitrust perspective, a rival firm can bring an antitrust claim that the expanded or proliferated brand has dominated the relevant product market. Figure 10 illustrates brand proliferation.

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<sup>284</sup> Cases COMP/C-3/39.740 (*Foundem v. Google*), COMP/C-3/39.775 (*IplusV v. Google*) & COMP/C-3/39.768 (*Ciao v. Google*) within the meaning of Article 11(6) of Regulation No. 1/2003 and Article 2(1) of Commission Regulation No. 773/2004. The *Ciao v. Google* announcement by the Commission states: “The proceedings were opened with a view to adopting in application of Chapter III of Council Regulation No. 1/2003 and concern the unfavorable treatment by Google Inc. (Google) of competing vertical search service providers in Google’s unpaid and sponsored search results coupled with an alleged preferential placement of Google’s own services. The Commission will also investigate the alleged imposition of exclusivity obligations by Google on its advertising and distribution partners and suspected restrictions on advertisers as to the portability of campaign data to competing online advertising platforms. These practices may constitute an infringement of Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement.” COMP/C-3/39.768.

<sup>285</sup> *Antitrust: Commission probes allegations of antitrust violations by Google*, EU Commission (Nov. 30, 2010), [http://europa.eu/rapid/press-release\\_IP-10-1624\\_en.htm](http://europa.eu/rapid/press-release_IP-10-1624_en.htm) (stating that “[t]he opening of formal proceedings follows complaints by search service providers about unfavourable treatment of their services in Google’s unpaid and sponsored search results coupled with an alleged preferential of Google’s own services”); George N. Bauer, *eMonopoly: Why Internet-Based Monopolies Have an Internet “Get-out-of-Jail-Free Card,”* 76 BROOK. L. REV. 731, 762 (2010) (“[G]oogle, in returning results for its own services more favorably than those of competitors, is . . . promoting its own welfare anticompetitively.”).

<sup>286</sup> See Steve Baird, *Brand Extensions that Significantly Expand Trademark Strength, Scope, and Risk* (May 21, 2012), <http://www.jdsupra.com/legalnews/brand-extensions-that-significantly-expa-88705/> (“On the risk side of the trademark equation, the larger the gap between the core goods and the newly expanded goods, the greater the change for a serious conflict with intervening third party rights that must be taken into account when determining the availability of the brand-name and mark for use on the new goods.”).

**Figure 10.**<sup>287</sup>

### C. Trademark Market Power and Antitrust Foreclosure

Although trademarks are a source of market power, the acquisition of market power in itself is not a problem for antitrust. The problem arises, however, when that market power is used to foreclose the market. This Article focused on the beer industry in order to provoke a debate and finding evidence in how a market can be foreclosed if the market power acquired as a result of certain trademarks. Markets in and of themselves are very complex and the thought of trademarks as a source of market power is even more troublesome. However, this does not mean that trademarks are used in bad faith. While market power may have short-run consequences, as some have suggested,<sup>288</sup> market power is also the oxygen that ferments foreclosure.

<sup>287</sup> Harry Bradford, *These 10 Companies Control Enormous Number of Consumer Brands*, HUFFINGTON POST (Apr. 27, 2012), [http://www.huffingtonpost.com/2012/04/27/consumer-brands-owned-ten-companies-graphic\\_n\\_1458812.html](http://www.huffingtonpost.com/2012/04/27/consumer-brands-owned-ten-companies-graphic_n_1458812.html).

<sup>288</sup> Richard Schmalensee, *Another Look at Market Power*, 95 HARV. L. REV. 1789, 1793 (1982). See also Louis Kaplow, *The Accuracy of Traditional Market Power Analysis and a Direct Adjustment Alternative*, 95 HARV. L. REV. 1817 (1982); Landes & Posner, *supra* note 11 (developing a formal analysis of market power).

Even though the courts have recognized the nature of market power in a number of cases involving trademarks, those same courts were either indicating that a serious problem exists in the nature and use of trademarks or that with the existence of market power has not been sufficiently proven. This latter position is hard to reconcile with and the position of this Article is that it is the former the courts were alerting us to, in that, market power in trademarks is a serious issue. This is a sort of pink elephant that cannot be easily removed from the room and therefore, for the time being, it must be tolerated. In this Article, the pink elephant was not ignored, and with the evidence from the industries analyzed, market power should be interpreted as having a *foreclosure* effect.

#### VI. MARKET POWER, TRADEMARKS AND PRESCRIPTION DRUGS

To put the same question in a different industry raises the same intricate set of problems which are similar to the beer industry—the branding of prescription drugs exacerbate the problem of trademarks and antitrust. For example, prescription drugs can present complicated challenges for antitrust and intellectual property rights. These challenges are a result of the innovation market of the prescription drug, the brand (trademark) of the prescription drug, and the prices at which that those drugs will be sold. The issue is whether the brands of prescription drugs are a tool for market power,<sup>289</sup> and conversely, whether the prices for prescription drugs are evidence of market power. If there is evidence of price discrimination for prescription drugs, then the concern of market power is settled.<sup>290</sup> It is only settled once the relevant market has been defined and the plaintiff establishes the market share of the defendant and the likely barriers to entry.<sup>291</sup> In *Brand Name Prescription Drugs Antitrust Litigation*<sup>292</sup> it was claimed that brand name prescription manufacturers tried to fix the prices for such drugs through

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<sup>289</sup> *E.g.*, *Walgreen Co. v. AstraZeneca Pharm. L.P.*, 534 F. Supp. 2d 146 (D.D.C. 2008).

<sup>290</sup> *See Ill. Tool Works*, 547 U.S. at 45–46 (“[W]hile price discrimination may provide evidence of market power . . . it also occurs in fully competitive markets . . .”).

<sup>291</sup> HOVENKAMP ET AL., *supra* note 9, at 4–91 (“[E]vidence of persistent price discrimination can be persuasive as part of the plaintiff’s larger argument that the defendant possesses market power.”). *See generally* David Balto, *Pharmaceutical Patent Settlements: The Antitrust Risks*, 55 FOOD DRUG L.J. (2000).

<sup>292</sup> *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599 (7th Cir. 1997).

the use of a “two-tiered” pricing system. Even outside of lawsuits, it has been observed in some circles that “the manufacturers of well-known prescription drugs have . . . prerequisites for price discrimination [since] they possess market power either upon protection or on their trademarks.”<sup>293</sup> For a clearer picture to emerge on the relationship between prescription drugs, trademarks and any form of anticompetitive activities, this Part examines three areas of concern product hopping, redesigns and price discrimination.

*A. Pharmaceutical Product Redesigns Can Constitute Exclusionary Conduct*<sup>294</sup>

In *Mylan Pharmaceuticals v. Warner Chilcott*, the FTC argued in an amicus brief that “a monopolist’s product change can violate antitrust laws”<sup>295</sup> and that in the pharmaceutical industry, “prior to facing generic competition, a brand company can introduce a reformulated product.”<sup>296</sup> As such, it argued that “product reformulations constitute an unlawful means of preserving monopoly power in violation of Section 2 of the Sherman Act.”<sup>297</sup> This claim illustrates that differentiated pharmaceutical products, in particular, reformulated brands, have effects on market power, in that a relevant market is gained from reformulated pharmaceutical products, constitutes evidence of market power and fulfills the test for a monopolization claim. The premise of the FTC claim is that pharmaceutical companies have been built up on reputable brand names over time, and those pharmaceutical companies may use their recognized brands to block generic competition. According to the FTC, when brand name pharmaceutical companies endeavor to protect their revenue streams, they may engage in anticompetitive actions such as driving pharmaceutical “brand companies to seek to obstruct generic drug competition by making modest product

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<sup>293</sup> Robert H. Lande & Howard P. Marvel, *The Three Types of Collusion: Fixing Prices, Rivals, and Rules*, 2000 WIS. L. REV. 941, 978.

<sup>294</sup> Brief for Fed. Trade Comm’n as Amicus Curiae, *Mylan Pharm. v. Warner Chilcott Pub. Ltd. Co.*, 2:12-cv-03824-PD (No. 12-3824) (E.D. Pa., Nov. 21, 2012).

<sup>295</sup> *Id.* at 12.

<sup>296</sup> *Id.* at 13.

<sup>297</sup> *Id.* at 14.

reformulations that offer patients little or no therapeutic advantages.”<sup>298</sup> The FTC arguments were raised in an amicus brief, in the *Mylan Pharmaceutical* complaint, where the plaintiff alleged that Warner Chilcott engaged in a “pattern of product switching” by product reformulations. The defendant moved to dismiss the case, arguing that plaintiff does not have sufficient evidence to state “exclusionary conduct.”

The FTC stated how a company may use its recognized brands in the pharmaceutical industry to affect competition and consumers:

[P]rior to facing generic competition, a brand company can introduce a reformulated product, and simply withdraw the original product . . . . In such a situation, consumers do not choose the reformulated product based on its merits; instead, *the brand forces the switch by removing the product from the market and preventing consumers from weighing the relative merits of competing products*. A brand company can achieve the same result through indirect means (such as by raising the price of the original product by a meaningful amount or by creating supply shortages of the original product prior to facing generic competition) so that there is effectively no longer a market for the original product when a generic would be ready to enter.<sup>299</sup>

Another matter that should be taken into consideration where the issue of product redesign is concerned in prescription drugs is the labeling that is attached to the “new and improved” drug. The new label can be a combination of the trademark of the original drug manufacturer along with a new name. In the situation where multiple marks exist for the same product, consumers may be easily misled regarding the new and improved drug. However, a more fundamental question is whether manufacturers see using their trademarks for prescription drugs as a way to product hop, that is, the process of “evergreening” or “line extensions.”

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<sup>298</sup> *Id.* at 1 (emphases added) (adding also that “a brand company can interfere with the mechanism by which generic drugs compete by making modest-therapeutic changes to its product, and effectively prevent generic competition, not because the reformulated product is preferred by consumers, but simply because it is different”).

<sup>299</sup> *Id.* at 13 (citing *Abbott Labs v. Teva Pharms. USA, Inc.*, 432 F. Supp. 2d 408 (D. Del. 2006)).

B. “Product Hopping”<sup>300</sup>—Brands in Pharmaceuticals

The expiration of patents in pharmaceuticals has created a boom industry for generic drugs, where cheaper copies of the more expensive patented drugs are sold. However, the large pharmaceutical companies are fighting back with what scholars referred to as “product hopping.”<sup>301</sup> In doing this, does it mean that the large pharmaceutical companies are monopolizing the market for prescription drugs or they are only competing for more market share? A related question is whether they are fighting to retain their market share with product hopping? A final question is whether such practices are lawful under antitrust law. *United States v. Microsoft Corp.* answers this question in the negative, as the court found that product designs were unlawful.<sup>302</sup>

One implication of product-hopping in prescription drugs is that a consumer who might have been unhappy with a manufacturer’s drug could possibly end up buying the same drug under a different brand. A second implication for consumers is that product-hopping in pharmaceutical creates a continuous market for (a) drugs manufacturers and (b) consumers’ drug appetite, and hence, in the latter, those consumers, paying little or no attention to a re-invented drug, become locked-in in a relationship with the manufacturer. The “locked-in” effect is created by a previous purchasing relationship that a customer has with the drug manufacturer.<sup>303</sup> The product-hopping brand of prescription drugs thus creates a market dependency for the uninformed consumer. Product-hopping has been under antitrust investigations, and in *FTC v. Barr Pharmaceuticals*,<sup>304</sup> it was recognized that

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<sup>300</sup> HOVENKAMP ET AL., *supra* note 9, at 15–76 (discussing the phenomenon of “product hopping”).

<sup>301</sup> *Id.* (“Pharmaceutical patent owners have engaged in a second form of evergreening, one that might be described as ‘product-hopping.’ Product-hopping pharmaceutical companies faced the possibility of generic competition once a patent expires or is held invalid sometimes make trivial alterations to their approved drugs, get . . . approval for those trivial alterations, and then replace the old product with the new product.”); *see also* Fed. Trade Comm’n v. Warner Chilcott Holdings Co. III, Ltd. et al., 2007 U.S. Dist. LEXIS 4240 (D.D.C. Jan. 22, 2007); *see, e.g.*, Michael Carrier, *A Real-World Analysis of Pharmaceutical Settlements: The Missing Dimension of Product-Hopping*, 62 FLA. L. REV. 1009 (2010); Guy V. Amoresano, *Branded Drug Reformulation: The Next Brand vs. Generic Antitrust Battleground*, 62 FOOD & DRUG L.J. 249 (2007).

<sup>302</sup> *United States v. Microsoft Corp.*, 253 F.3d 34, 65 (D.D.C. 2001) (“[P]roduct innovation . . . does not mean that a monopolist’s product design decisions are per se lawful.”).

<sup>303</sup> *See, e.g.*, HOVENKAMP ET AL., *supra* note 9, at 21–64.

<sup>304</sup> Fed. Trade Comm’n v. Barr Pharm., 2007 U.S. Dist. LEXIS 98351.

“branded/generic agreement unreasonably restrains competition.”<sup>305</sup> In this case, it was alleged that Barr Pharmaceuticals entered into anticompetitive agreements with Warner Chilcott, which “unlawfully delayed entry of Barr’s generic version of Warner Chilcott’s Ovcon birth control pill into the market.”<sup>306</sup> The FTC alleged that Barr Pharmaceuticals conspired with Warner Chilcott “to keep a generic version of Ovcon off the market.”<sup>307</sup> Although the issues raised in both the *FTC v. Barr Pharmaceuticals* and *FTC v. Warner Chilcott* cases involved anticompetitive agreements for Section 1 of the Sherman Act, rather than Section 2, the broader effect on consumers lies where the patented drugs are used for brand proliferation in anticompetitive agreements. The brands of those drugs used in the product-hopping allegations amounts to “predatory brand proliferation.”<sup>308</sup> As a form of predatory brand proliferation, product-hopping brands are subject to investigations under antitrust law,<sup>309</sup> because they are used to suppress competition.<sup>310</sup>

From an antitrust perspective, product hopping to ward off generic competition is precisely the sort of behavior the Sherman Act condemns. While monopolists have no general duty to help their competitors, they do have an obligation to refrain from acts that have no purpose or effect to exclude competition.<sup>311</sup>

Where the object of product hopping is frequent and is for the purpose of driving consumers to said manufacturer’s brand, it is a technique that runs counter to the aims of antitrust.<sup>312</sup> Because of the use of trademarks in product hopping, the ability of antitrust laws to deal with product hopping is also limited. However, where there is direct evidence that the new and improved product (line extensions) generate significant market power, and that the

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<sup>305</sup> *Id.*

<sup>306</sup> See Press Release, Fed. Trade Comm’n, FTC Settles Charges Against Barr Laboratories, Protects Consumers from Anticompetitive Agreements in Prescription Drug Market (Nov. 29, 2007).

<sup>307</sup> *Id.*

<sup>308</sup> HOVENKAMP ET AL., *supra* note 9, at 15–78 (similarly refers to this as “predatory product change”).

<sup>309</sup> *Id.* (“[P]roduct changes by pharmaceutical patent owners represent unilateral conduct . . . [A] pharmaceutical patent owner has no legal duty either to help its generic competitors or to continue selling a particular product.”). See also *Abbot Labs*, 432 F. Supp. 2d 408.

<sup>310</sup> HOVENKAMP ET AL., *supra* note 9.

<sup>311</sup> *Id.* (citation omitted).

<sup>312</sup> See also BORK, *supra* note 23, at 159 (discussing similar techniques).

rivals are forced out of the market, the ability of antitrust laws is not so limited.

### *C. Price Discrimination and Pharmaceutical Brands*

Courts have suggested that trademarks can be used as an instrument of price discrimination.<sup>313</sup> In *Stiftung v. Zeiss*, the court observed that there was no “attempt to show that the trademarks were used as an instrument of unlawful price discrimination.”<sup>314</sup> It is such a suggestion, that is posited, confronts prescription pharmaceutical drugs. While the process for obtaining a trademark and branding for pharmaceutical drugs is different in nature,<sup>315</sup> once the drug comes on the market, then the trademark/brand for the drug creates a similar effect to that of the bud-effect as shown in the beer industry. Can, as the *Zeiss* court suggested, there be attempts to use trademarks as unlawful instruments of price discrimination in the pharmaceutical sector? Price discrimination acts as a deterrent to lessen competition or to create market power<sup>316</sup> and it has long been an instrument in the arsenal of firms that compete for customers.<sup>317</sup>

Over the years, a number of class action lawsuits involving drug companies have been litigated,<sup>318</sup> and the courts have all but confirmed that “the manufacturers of brand name prescription drugs engage in price discrimination” and have “market power.”<sup>319</sup> Another critical element is the determination of “brand name drugs” and how it is linked to trademarks. By

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<sup>313</sup> *Stiftung v. Zeiss*, 298 F. Supp. 1309 (S.D.N.Y. 1969).

<sup>314</sup> *Id.* at 1316.

<sup>315</sup> For example, under United States federal law, the introduction of a new pharmaceutical products to the marketplace is governed by the Food, Drug & Cosmetic Act (USC) Title 21; *see* U.S. Food & Drug Admin., Guidance for Industry: Best Practices in Developing Proprietary Names for Drugs (Draft 2014).

<sup>316</sup> *See, e.g., In re Brand Name Prescription Drugs Antitrust Litig.*, 186 F.3d 781, 783 (7th Cir. 1999) (“Price discrimination implies market power . . . the power to charge a price above cost . . . without losing so much business so fast to competitors that the price is unsustainable. The reason price discrimination implies market power is that assuming the lower of the discriminatory prices covers cost, the higher must exceed cost.”).

<sup>317</sup> *In re Brand Name Prescription Drugs Antitrust Litig.*, 288 F.3d. 1028, 1030 (7th Cir. 2002) (“[M]anufacturers of brand-name prescription drugs engaged in price discrimination. That is, a manufacturer would sell the same product, costing the same to make and sell, at different prices to different customers.”).

<sup>318</sup> *E.g., Drug Mart Pharmacy Corp. v. Am. Home Prods. Corp.*, 378 F. Supp. 2d 134 (E.D.N.Y. 2005); *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599 (7th Cir. 1997).

<sup>319</sup> 186 F.3d. at 786.

“brand name drugs,” this Article is referring to situations where a drug or drugs is marketed and coexists with the relevant trademark that is well-known. A similar definition was applied by the Second Circuit Court of Appeals in *In re Brand Name Antitrust Litigation*.<sup>320</sup> The effect of brand name drugs is that they strengthen their market power and allows new entry brands (generics) to enter the market,<sup>321</sup> thus further strengthening the market position of the trademark owner. A further effect is that customers who are loyal to the initial brand name drug based on its trademark brand will be drawn to generic.<sup>322</sup>

As discussed above, these practices—in particular product hopping and product switching—may be used to exclude generic competition from the pharmaceutical market and allow an established pharmaceutical company to maintain a monopoly position in the pharmaceutical market.

## VII. CONCLUSION

The arguments in this Article concerned market power and how trademarks serve as a source of market power. The Article demonstrates how trademarks are concentrated in single source and ownership, and as such proliferated via various brands, signal market power. Furthermore, the Article demonstrates how trademarks can be used as an anticompetitive tool in a number of situations, such as brand promotions/acquisitions,<sup>323</sup> entry barriers, product differentiation and the presumption of market power due to predatory pricing. The danger with brand proliferation is that producers want to protect their own slice of the market for the relevant product, however, in doing so; they also create tension with antitrust law. One of the main conclusions from this Article is that the data and other evidence suggest that factors such as pricing promote product differentiation and allow firms to maintain market power. In this regard, there are two principal effects of harm

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<sup>320</sup> *In re Brand Name Prescription Drugs Antitrust Litig.*, 1999 WL 33889 (N.D. Ill. Jan. 19, 1999) (“The brand name [is the] sole-source brand name . . .”).

<sup>321</sup> *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 326, 341 (E.D. Mich. 2001) (“[T]he bigger the brand name drug, the faster generics penetrate the market . . .”).

<sup>322</sup> See Mark A. Hurwitz & Richard E. Caves, *Persuasion or Information? Promotion and the Shares of Brand Name and Generic Pharmaceuticals*, 31 J.L. & ECON. 299 (1988); Eric L. Cramer & Daniel Berger, *The Superiority of Direct Proof of Monopoly Power and Anticompetitive Effects in Antitrust Cases Involving Delayed Entry of Generic Drugs*, 39 USF L. REV. 81 (2004).

<sup>323</sup> See HOVENKAMP ET AL., *supra* note 9, § 14.02 (“[T]he acquisition of a trademark can have an anticompetitive effect at least as large as that of the acquisition of a patent.”).

to competition that the evidence from the beer industry and the proliferation of brands reveal: (1) trademarks are used to create sub-markets and maintain further dominance in the market for beers from single source and (2) trademarks are instruments of predatory pricing on the market for beer.

