

Antitrust: It's Back, It's Hot – Why You Should Care



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Antitrust Litigation

- Recent News
- Legal/Political Debate
- Hot Topics
 - Employment
 - No Poach
 - Labor/Wages
 - Pharma
 - Tech



Antitrust Transaction/Compliance

- M&A Transactions
 - Clayton Act
 - HSR
 - Beyond HSR
- Information Exchanges
- No Poach Agreements
- Antitrust Issues in Supply and Distribution Agreements
- Antitrust Policy and Compliance Programs

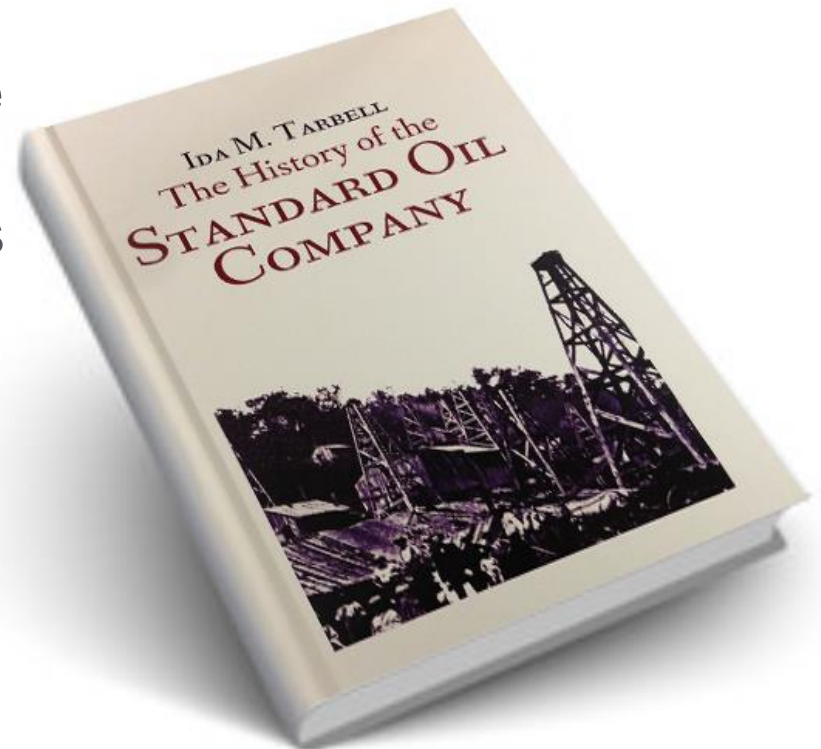
Recent News

- Congressional Investigation Into Tech
- European Union Counterpart
- What's the Focus and Why
 - Why Antitrust
 - State AG Lawsuits



Brief History of Antitrust

- Original Use of Sherman Act
- 1970s – Bork and Chicago Schools
- Consumer Welfare Test
- A market economy, free of private restraint and unnecessarily burdensome regulation, produces superior outcomes overtime



Sherman Act Section 1

- **Section 1** of the Sherman Antitrust Act prohibits agreements in restraint of trade--such as price-fixing, refusals to deal, bid-rigging, etc. The parties involved might be competitors, customers, or a combination of the two. Although the law states that "every contract, combination,... or conspiracy in restraint of trade... is declared to be illegal", it has been interpreted by the courts to mean every contract, combination, or conspiracy unreasonably in restraint of trade. The courts have come to judge violations of Section 1 of the Sherman Act by two approaches:
 1. The per se approach generally includes direct price-fixing and bid-rigging. Per se basically means that the courts have found a certain action to always be harmful and therefore it must only be proved that the defendant has committed the action to find him guilty.
 2. The rule of reason approach weighs the reasons a certain action was taken and the economic benefits and costs of that action before coming to a judgement on its legality.



Sherman Act Section 2

- **Section 2** of the Sherman Antitrust Act forbids monopolizing or attempting to monopolize. Basically it prohibits firms from using bad conduct or abusive behavior to become a monopolist or using such behavior if they're already a monopoly. Notice that it does not prohibit firms from being a monopoly. It only forbids the use of monopolistic power that was acquired or maintained unlawfully.



Section 1 case - Per Se Conspiracy – Direct Evidence

“Smoking Gun” – Rare
eyewitness account
employee admissions
conversations
conduct



Per Se - Circumstantial Evidence

- Parallel Conduct
- Plus Factors
- What is Parallel Conduct
 - Defendants acted similarly
- What are Plus Factors
 - Points toward meeting of the minds
 1. Acting against self interest
 2. Shared motive to conspire
 3. Market concentration
 4. Substantial amount of inter-Firm communication



Rule of Reason – not Per Se

- Conduct/Agreement
- Anticompetitive Effects on the Market

“Weighing all of the circumstances in deciding whether a restrictive practice should be prohibited for imposing an unreasonable restraint on competition.”



Section 2 Analysis

- Monopoly Power
 - Market Power
 - Product Market
 - Interchangeability of Products
 - Geographic Market



Section 2 – Anticompetitive Conduct

Lawful conduct – acquire monopoly by superior product, business acumen or historical accident.

Vs. Anticompetitive Conduct

Anticompetitive Effects

- Reduce Output
- Reduce Quality
- Increase Price



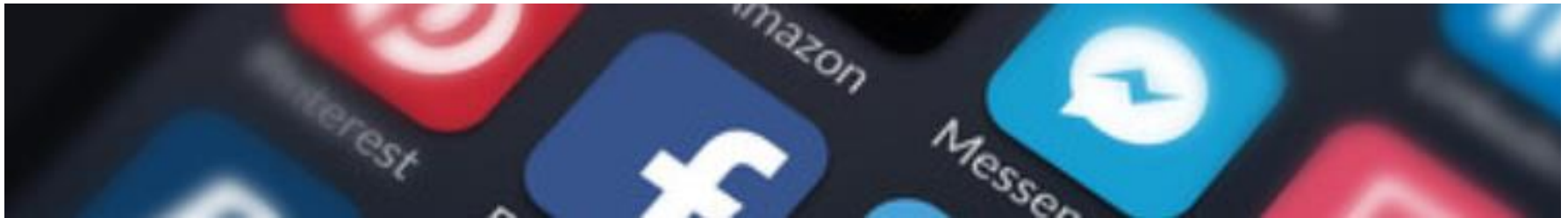
Antitrust Injury

- Harm to competition not harm to competitors



Current Debate about Tech

- Mostly focused on Section 2 – Monopolization Claims
- Big is Bad vs. Consumer Welfare
 - Tech
 - Google, Facebook, Microsoft, Amazon, Apple
 - Google
 - Digital Advertising
- Are These Really Privacy Issues – Antitrust as a proxy for privacy, labor/wages and other social concerns



Change the Statute? Pre Sherman Act

- Pig Iron Prices decreased 21%
- Sugar Prices decreased 22%
- Copper Prices decreased 10%



Post Sherman Act

- Pig Iron Price and Copper increased
- Sugar decreased at a slower rate



Consumer Welfare Test: Will a Change Increase Prices?

- Amazon – 1994 – books, movies, DVDs
- Apple – 2003 iTunes
- BLS – 1997-2019
 - Recreational books – price decreased by 4%
 - Movies – decreased by 19%
 - Recorded media – decreased by 64%
 - General prices – increased by 59%
- Competition – Who uses iTunes?
 - 2012 – 50% Market Share
 - 2017 – 20-35% Market Share
 - 2019 – 19% Market Share

Top 5 Companies, Ranked by US Net Digital Ad Revenue Share, 2018 & 2019

% of total digital ad spending

1. Google *



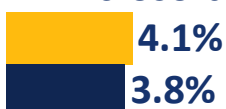
2. Facebook **



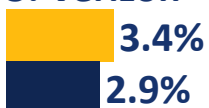
3. Amazon



4. Microsoft



5. Verizon



■ 2018 ■ 2019

Note: US total digital ad spending in 2019=\$129.34 billion; includes advertising that appears on desktop and laptop computers as well as mobile phones, tablets and other internet-connected devices, and includes all various formats of advertising on those platforms; net ad revenues after companies pay traffic acquisition costs (TAC) to partner sites; *includes YouTube advertising revenues; **includes Instagram advertising revenues

Source: eMarketer, Feb 2019



Consumer Welfare Test: Increase Prices?

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- Competition – Who uses iTunes?
 - 2012 – 50% Market Share
 - 2017 – 20-35% Market Share
 - 2019 – 19% Market Share
- Devices – Home, Echo, Pod, Portal
- Smart Phones – Android (Alphabet) v. IOS (Apple)

Is There Competition?

- Acquisition vs. Competition
 - United Health/Divvy Dose v. Amazon/Pill Pack v. Walmart/Care Zone – digital pharmacies
- Bundling Products
 - FB bundling WhatsApp, Messenger and Instagram
- Apple Store litigation – Epic/Spotify etc. v. Apple



Adequacy of Existing Law/DOJ

- To prohibit monopolization
- To prohibit anticompetitive transaction
- To support robust enforcement of antitrust laws



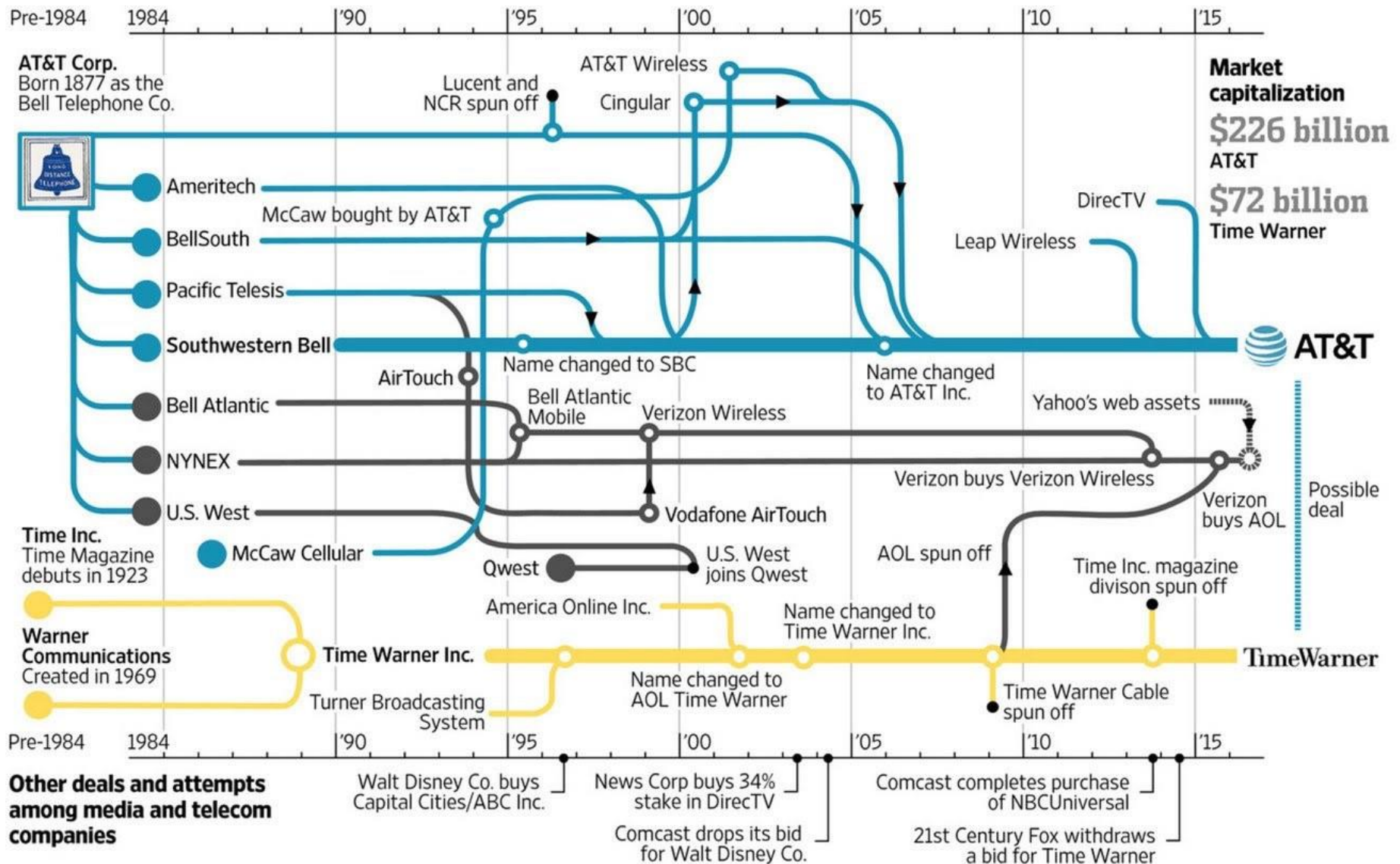
Solutions

- Divestiture?
 - Be careful what you ask for
- Reform Law
- New Agency



Converging Destinies

AT&T and Time Warner have reached an agreement to merge after decades of consolidation and deals in the telecommunication and media industries.



Source: staff and news reports

THE WALL STREET JOURNAL.

Why You Should Care

- Concerns for Large Businesses with market share
- Concerns for Small Businesses



M&A Transactions: Clayton Act

- Section 7 of Clayton Act prohibits transactions where
 - “in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be to **substantially lessen competition**, or tend to create a monopoly.”



M&A Transactions

- Fact intensive economic analysis:
 - Market definition
 - Horizontal merger of competitors or vertical merger?
 - Number of market participants
 - Barriers to entry
- Need economic analysis?



M&A Transactions: HSR

- Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR)
 - Requires premerger notification reports to FTC and DOJ
 - Allows agency opportunity to challenge transaction
 - Early termination... public disclosure.
 - “Second requests.” Similar to document subpoena.



M&A Transactions: HSR Thresholds

- Size of Persons Test
 - One party has \$151.7 in annual sales or total assets; and
 - The other party has \$15.2 million; and
- Size of Transaction Test
 - Value of securities or assets exceeds \$75.9 million

OR

- Size of Transaction Test Alone
 - Buyer acquires securities or assets of \$303.4 million

M&A Transactions: Failure to Report

- Failure to report, even when there are not any antitrust issues, is a violation.
- Example:
 - Berkshire Hathaway required to pay \$896,000 civil penalty for failure to report an acquisition of shares of USG Corporation, even though FTC had no issue or complaint with the transaction itself.



M&A Transactions: Beyond HSR

- Transactions can be challenged under Clayton Act for lessening competition even if HSR threshold not met.
- Example:
 - \$3 million transaction between Tyson Foods and George's Foods involving acquisition of chicken processing plant.
 - Not reportable under HSR.
 - Government challenged claiming that the transaction would reduce prices paid to chicken farmers in the area surrounding the plants.
 - Resolved in a consent decree requiring increased production at facility.

M&A Transactions: Beyond HSR

- Government approval is not a safe-harbor
- Even if the DOJ and FTC allow transaction, private parties may still challenge the transaction under Clayton Act.
- Example:
 - Steves and Sons, Inc. v. JELD-WEN
 - DOJ reviewed without challenge JELD-WEN's acquisition of a competitor's factory.
 - Years later, customer/competitor challenged transaction.
 - Court ordered divestiture of manufacturing assets.
 - In addition to monetary damages.

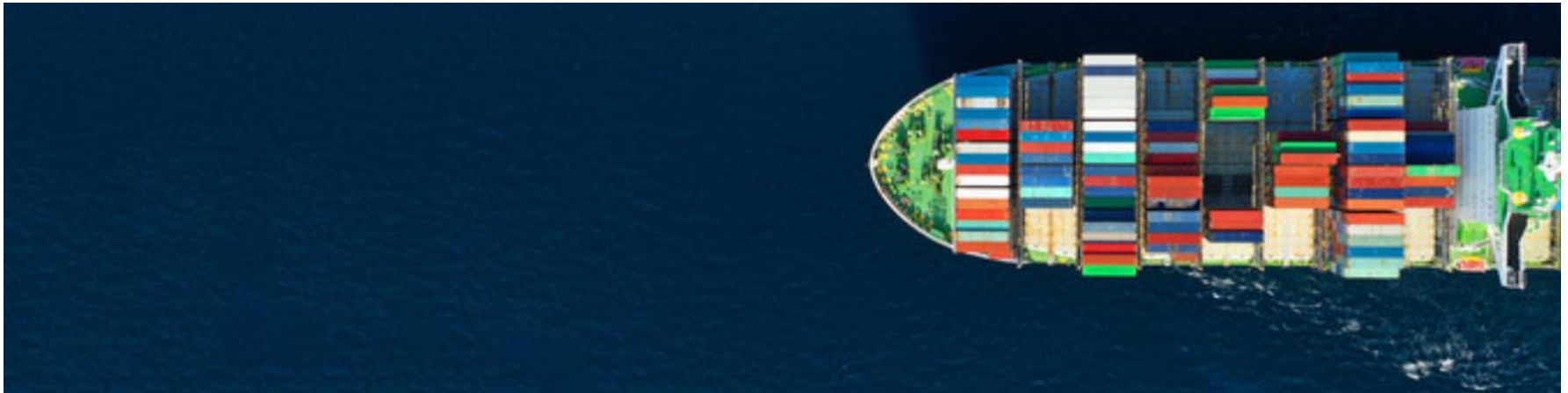
M&A Transactions: Information Exchanges

- Due diligence information exchanges.
- What happens if transaction does not go through?
- Identify sensitive information.
- Set up procedures and access to data room.
- Work through attorneys on sensitive issues.
- No gun jumping.



Information Exchanges outside of M&A

- Agreements in restraint of trade.
- Information exchanges as evidence of agreement.
- Information exchanges facilitate agreement/conspiracy.
- Increasing focus on information exchanges by DOJ/FTC as well as private plaintiffs.



No-Poach Agreements

- Increasing focus on no-poach agreements.
- Examples:
 - High tech employees in Silicon Valley.
 - Medical school faculty members.
 - Fast Food employees.



Antitrust Issues in Supply and Distribution

- Suggested resale price.
- Minimum advertised price.
- Exclusive distribution.
- Dual distribution.



What to do? Antitrust Policy and Training

- Antitrust Policy and Antitrust Compliance Program
 - Written and updated antitrust policy.
 - Meaningful antitrust compliance and training program.
- Allows businesspeople to identify issues before they become a problem.
- Leniency.
- Confidence to aggressively compete without running afoul of antitrust law.

Antitrust Training and Compliance

- Who needs antitrust training?
 - Who goes to trade associations?
 - Who interacts with competitors.
 - Who negotiates supply/distribution agreements.
 - Who sets prices?
 - Sales people.
 - C-Suite.



Questions?



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