While competition policy is not the kind of thing that most people (even lawyers) ponder in their free time, some who do have questioned the relevance of the antitrust laws, and whether a statute enacted 110 years ago—before the invention of the automobile—possibly could have any significance to the complicated, global markets of today’s New Economy. After all, Senator Sherman could not possibly have envisioned many of today’s markets and industries, including e-commerce, when he drafted his famous law to “bust the trusts” so prevalent in the 1800s. With the recent trial court decision in the Microsoft case, the debate has become more tangible and real. But although markets may change and become more complex, it is apparent that the Sherman Antitrust Act remains relevant today, which is testimony to its enduring underlying principle of free and unfettered competition and its evolution and flexible application over the years by the courts.

Sales over the Internet have exploded in recent years: the “Internet Economy” generated over one-half trillion dollars in revenue in 1999. That was an increase of 62% over 1998’s figure of $322.5 billion. These totals include every facet of the Internet economy, from the top layer of the Internet’s infrastructure to business-to-consumer commerce, or classic retail sales.

According to figures generated by the Census Bureau of the U.S. Department of Commerce, U.S. retail e-commerce sales alone for the first quarter 2000 were an estimated $5.3 billion. Common fungible products to high-tech goods and services are being hawked and sold on the Internet. Music, computer equipment, legal services, cars and even funeral services are being sold, and have put Web page designers in high demand. As a result, business is scrambling for a piece of the pie. This has challenged antitrust practitioners to predict how the courts might view certain business practices in this new medium. While the technology is outpacing the courts’ decisions, familiar antitrust principles will help inform the advice you give your clients.
An Antitrust Law Primer

The principal federal antitrust statutes are the Sherman Antitrust Act, the Clayton Act, the Robinson-Patman Act and the Federal Trade Commission Act. The Sherman Act, on which this article focuses, has particular widespread application. Sherman Act Section 1 condemns all contracts, combinations and conspiracies in restraint of trade. The conduct condemned by this provision typically is “horizontal” in nature, i.e., between competitors, and requires concerted activity between two or more actors. Certain horizontal arrangements have been deemed so devoid of competitive virtue that they are considered *per se* illegal. They include price fixing, horizontal group boycotts, market allocation and certain tying arrangements. It is this conduct, most typically price fixing, which gains the attention of criminal prosecutors under the antitrust laws.

Not every “restraint of trade” is illegal, however. The courts have read into the Sherman Act a reasonableness standard, and apply a “rule of reason” analysis to determine if a specific restraint is unreasonable. If it is, the restraint will be condemned as illegal. In making that determination, the courts typically go through a detailed analysis of the relevant market to determine whether the procompetitive justifications for the conduct outweigh its anti-competitive effects. This analysis is applied where the competitive impact of a practice is unclear, or where experience has indicated that it is not always anticompetitive.” “Vertical” non-price restraints, i.e., those imposed from a manufacturer down the chain of distribution, are typically subject to analysis under the rule of reason because they have been found to have “real potential to stimulate interbrand competition.” Such restraints include exclusive distributorships, territorial and customer restrictions, and profit pass-over arrangements, to name a few. While it remains illegal *per se* for a supplier to agree with its distributors/retailers on a minimum price to be charged for its products, maximum resale price maintenance (setting a ceiling on resale prices) is now subject to rule of reason analysis. Indeed, most agreements are reviewed under the rule of reason.

Sherman Act Section 2 prohibits monopolization, attempts to monopolize and conspiracies to monopolize. With the exception of conspiracies to monopolize, the focus here is unilateral conduct by a firm, not joint or concerted action. Monopolization arises when a firm willfully acquires or maintains monopoly power, typically through predatory conduct. Attempted monopolization arises when a firm engages in predatory or anticompetitive conduct with a specific intent to monopolize and there is a dangerous probability of that firm achieving monopoly power.

Defining a relevant product and geographic market is the first step in evaluating a Section 2 claim of monopolization or attempted monopolization; indeed, it is critical to any analysis under the rule of reason and failure to do so will be fatal to any claim. Relevant markets consist of both product and geographic markets, both of which must be described with reasonable specificity. The relevant product market generally is defined as the category of goods or services with which the product subject to the alleged restraint effectively competes, and with which it enjoys “reasonable interchangeability of use.” The relevant geographic market is the area in which buyers or sellers of the relevant products effectively compete. The area of effective competition is the market area in which the seller operates and to which the purchaser can practically turn for supplies.

The widely accepted general rule of thumb is that, while 90% market share is enough to support a claim for monopolization, “it is doubtful whether 60 or 64% would be enough; and certainly 33% is not.” Nevertheless, those who enjoy a market share of at least 60% can be guilty of monopolization. Attempted monopolization may be found where one’s market share is even lower.

In addition to adequately defining a relevant market, to prove an antitrust violation under the rule of reason one must also show that the challenged conduct produced an adverse effect on competition in the relevant market. That effect must be substantial, adverse, and not insignificant, de minimus, trivial or insubstantial. The antitrust laws exist to protect competition from practices which damage it; damage is measured by increased prices, reduced quality or increased market concentration, not by the removal of a single market participant. Antitrust practitioners are fond of the aphorism that the antitrust laws were enacted for the protection of competition, not competitors, to sum up this principle.

Application to the Internet

In addition to traditional methods, the Internet has brought suppliers, distributors and retailers new ways to market, advertise, price and sell their products and services. Likewise, this presents suppliers and distributors who want to control the sale and distribution of their products with new antitrust challenges. While arising in a new medium, these problems will be addressed and resolved by the courts and practitioners alike under settled antitrust principles. Some of these potential problems are discussed on the following pages.

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Prohibiting Retailers From Selling On-Line

Some suppliers may wish to ban all sales by distributors/retailers over the Internet out of concern for maintaining the integrity of their distribution system. For example, a manufacturer may be concerned that sales over the Internet will infringe on its distributors’ exclusive territories or areas of primary responsibility, and will encourage discounters and “free riding,” all to the detriment of point-of-sale customer service, such as warranty repair.

Can a supplier prohibit all on-line sales of its products to prevent this “free rider” problem? A supplier may do so as long as it is careful that the restraint is lawful under the antitrust laws. Such a vertical, nonprice restraint would be analyzed under the rule of reason. The U.S. Supreme Court has even identified the eradication of the free rider problem as justification for vertical restraints such as the establishment of exclusive territories. The concern is the health of interbrand competition—not a problem if intrabrand competition suffers as long as the restraint promotes interbrand competition. Thus, since the courts have approved distributorship arrangements including exclusive territories, they likely would approve of exclusive territories being extended to cyberspace under the rule of reason.

Reserving Some or All Internet Sales to the Supplier

Some suppliers may wish to market and sell over the Internet directly to retailers and end users, in addition to maintaining their traditional sales channels through distributors. They might want to achieve this by reserving some or all Internet sales to themselves under their distributorship agreements. In such a case, the same considerations raised above with regard to a supplier’s ban on all Internet sales by its distributors would apply.

In addition, such a scheme would put the supplier in “dual distribution” with its distributors. The courts have found that although dual distribution has horizontal, as well as vertical, elements, it will be analyzed under the rule of reason if the restriction primarily benefits the supplier through increased interbrand competition. A supplier that adopts a dual distribution scheme, though, should be particularly vigilant that, outside the restrictions it adopts, it not engage in conduct with “competing” distributors that could be characterized as horizontal or per se illegal.

Favoring Certain Retailers Through Internet Policy

May a supplier favor certain retailers by providing them with hyperlinks from the supplier’s home page? The answer clearly is yes. A supplier may favor certain retailers as primary or favored dealers and grant them preferential treatment. For similar reasons, a supplier likely may allow only certain retailers to sell over the Internet, as long as it makes this decision unilaterally and can articulate compelling pro-competitive justifications for the policy.

Controlling Retailers’ Web Pages

Suppliers who are concerned about the content, design and appearance of the Web sites that their retailers are using to sell their products may want to exercise control over those aspects of distribution.

Is this legal?

. . . a supplier likely may allow only certain retailers to sell over the Internet, as long as it makes this decision unilaterally and can articulate compelling pro-competitive justifications for the policy.
long as they do so in an effort to make their brand more competitive in the interbrand market.

**Setting Minimum Resale Prices of Products Sold Over the Internet**

While a supplier may suggest a minimum price below which a retailer may not price and sell its products, and then unilaterally refuse to deal with a retailer who refuses to adhere to the policy, it may not secure a retailer’s adherence to this policy through agreement, pressure, coercion or threats. To do so would be resale price fixing, a *per se* violation of Sherman Act Section 1. Similarly, in the Internet context, a supplier may announce a minimum resale policy under which it will terminate any retailer who sells its products over the Internet or otherwise below a given price, but it may not take any other action to enforce the policy and may take no action to gain its retailer’s adherence to such policy through pressure, coercion or threats.

**Setting Maximum Resale Prices of Products Sold Over the Internet**

Unlike the setting of minimum prices, the U.S. Supreme Court has determined that under certain circumstances a supplier may have procompetitive justifications for setting a maximum price over which a retailer may not price its products. Therefore, a supplier’s maximum resale price maintenance policy will be subject to rule of reason analysis to determine its legality.

**Denying Cooperative Advertising Reimbursements to Noncompliant Dealers**

In an effort to promote the advertisement of their products locally, suppliers may establish a cooperative advertising program by which they reimburse their dealers some portion of their advertising expense. Suppliers may wish to use this program to enforce certain practices, such as denying reimbursement to those dealers whose Web sites do not meet standards established by the supplier, or who have failed to advertise the supplier’s products at the supplier’s suggested resale prices.

Can a supplier do so legally?

Suppliers should be careful in establishing such arrangements because they may be challenged as vertical price fixing. However, there is authority holding that such plans are lawful as long as the dealer remains free to sell the product at whatever price it chooses, and to advertise at whatever price it desires, so long as it is done at the dealer’s expense. Indeed, government regulators have stated that similar programs will be analyzed under the rule of reason.

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*Awards of Merit and Local Bar Leader of the Year*

Deadline for submissions: May 7, 2001

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Conclusion

The Internet is a new, explosive medium that has and will continue to raise new challenges in many fields of law, including antitrust. The starting point for meeting the challenges in the antitrust field, however, will remain traditional, well-worn principles familiar to all antitrust practitioners. If you stick with those principles, even though the case law discussing Internet issues is not yet developed, you will serve your clients well.

Francis Casola is a principal of the Roanoke firm of Woods, Rogers & Hazelgrove, PLC, and is the immediate past chair of the Virginia State Bar’s Antitrust, Franchise and Trade Regulation Section. This article borrows from an outline and presentation made by Howard Feller entitled, “Sales Practices on the Internet: Antitrust and Trade Regulation Issues,” presented on June 18, 1999 in Virginia Beach. The author thanks Mr. Feller for his kind permission to use this outline, and he also gratefully acknowledges the research assistance provided by Richard D. Scott, an associate with Woods, Rogers & Hazelgrove.

ENDNOTES
2 See Executive Summary, The Internet Economy Indicators (visited August 13, 2000) http://www.internetindicators.com/executive_summary_june_00.html The report cites a study by the University of Texas at Austin’s Center for Research in Electronic Commerce, an excellent source of information and statistics regarding the explosion of Internet-based commerce. The Center for Research in Electronic Commerce’s Web site can be found at http://cism.bus.utexas.edu/
3 See id.
4 See Retail E-Commerce Sales are $5.3 Billion in First Quarter 2000, Census Bureau Reports, United States Department of Commerce News (visited August 13, 2000) http://www.census.gov/mrts/www/current.html
5 15 U.S.C. § 1 et seq.
12 Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1979). Tying occurs where a firm with market power in one product coerces or ties the sale of that product to the sale of another separate and distinct product. Id.
13 Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918).
14 Id. Some courts, including the Fourth Circuit Court of Appeals, shortcut the analysis by employing a market screen. That is, “a finding of no market power precludes any need to further balance competitive effects of a challenged restraint.” Marrow Furn. Galleries, Inc. v. Thomasville Furniture Indus., Inc., 889 F.2d 524, 529 (4th Cir. 1989). If an entity does not enjoy market power in the relevant market (geographic and product), then there is no “need to further balance the competitive effects of a challenged restraint.” Id. (commenting on what has come to be known as the ‘market screen’).
17 Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911) (holding it is per se illegal for a manufacturer to agree with distributors of its products to fix and maintain resale prices for those products). United States v. Goodyear Tire & Rubber Co., 250 U.S. 300 (1919) (holding that manufacturers may unilaterally state in advance the prices at which its goods may be resold and refuse to deal with wholesalers and retailers who do not conform to such prices, but may not coercer their compliance). State Oil Co. v. Khan, 522 U.S. 3 (1997) (maximum resale prices and not illegal per se; and shall be subject to the rule of reason).
19 United States v. Grinnell Corp., 384 U.S. 563 (1966). By contrast, monopolization does not involve the possession of monopoly power through growth or development as a consequence of a superior product, business acumen or historic accident. Id. at 570- 71.
20 Examples of predatory acts include predatory pricing, unlawful refusals to deal, price fixing, tying arrangements and monopoly leveraging.
30 United States v. Aluminum Co. of America, 148 F.2d 416, 424 (2nd Cir.1945).
31 Rezzin v. Blue Cross and Blue Shield of Kansas, Inc., 663 F. Supp. 1360 (D. Kan. 1987), aff’d and remanded, 899 F.2d 951 (10th Cir.), cert. denied, 947 U.S. 1005 (1990) (60% sufficient where defendant’s share was 15 times larger than next largest competitor and there were significant barriers to entry).
32 M & M Medical Supplies and Servs., Inc. v. Pleasant Valley Hospital, Inc., 981 F.2d 160 (4th Cir. 1992) (rehearing en banc) holding that claims involving greater than 50% market share should be treated as attempts to monopolize when other elements of offense are satisfied), cert. denied, 508 U.S. 972 (1993).
33 Great Escape, Inc. v. Union City Body Co., 791 F.2d 532, 539 (7th Cir. 1986).
40 Sewell Fashions, Inc. v. Barrington Indus., Inc., 763 F.2d 604 (4th Cir. 1985) (allowing manufacturer to give lower prices to certain very effec-
tive carpet dealers in order to encourage those dealers to bid and otherwise promote the manufacturer’s carpets rather than the carpets of competitors).

43 Garment Dist., Inc. v. Belk Stores Servs., 799 F.2d 905, 910-11 (4th Cir. 1986) (discounters terminated because of poor image), cert. denied, 496 U.S. 1005 (1988), Winn v. Edna Hibel Corp., 858 F.2d 1517, 1520 (11th Cir. 1988) (reason for terminating dealer was to maintain image and integrity of products), and Wilson v. I.B.E. Industries, Inc., 510 F.2d 986 (5th Cir. 1975) (upholding requirement that service stations not be “cluttered”). For the implications wielding such control may have in the franchise context, see R. Scott Caulkins’ article in this issue of the Virginia Lawyer.


