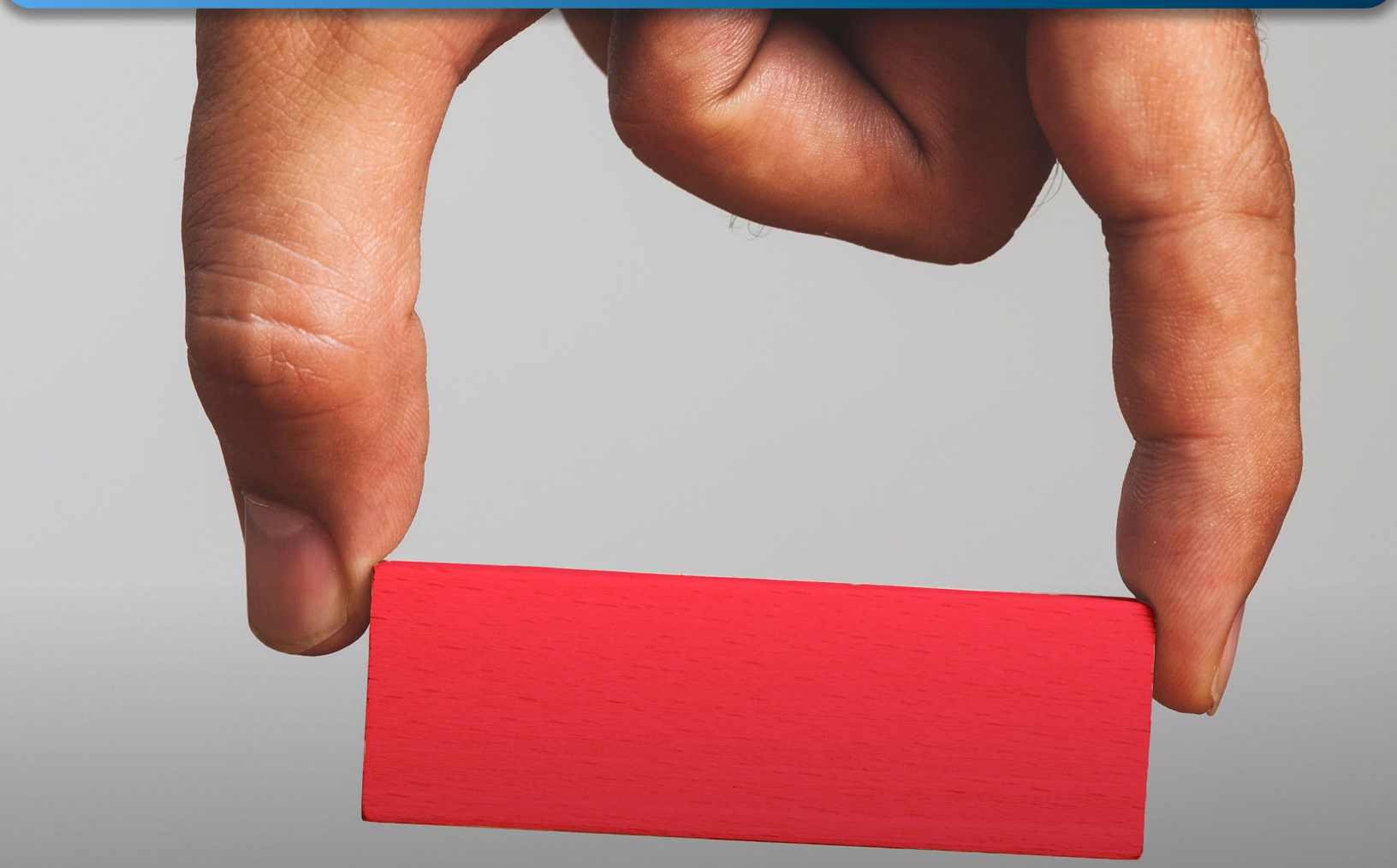
THE UNILATERAL CONDUCT GAP SACRIFICING INTEROPERABILITY AND INNOVATION



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The Unilateral Conduct Gap Sacrificing Interoperability and Innovation

By Susannah P. Torpey & Dillon Kellerman

The Sherman Act and related antitrust jurisprudence have proven flexible and capable of balancing competitive effects of virtually any kind of concerted conduct among two or more conspirators under the rule of reason. The same flexibility, however, is not available to plaintiffs seeking to remedy unilateral conduct — no matter how anticompetitive — except in very limited circumstances. The current U.S. antitrust framework overwhelmingly fails to reach anticompetitive, unilateral conduct by companies growing upwards of seventy percent in any well-defined product market. This unilateral conduct gap severely restricts the ability to protect interoperability and innovation, particularly with respect to complementary products that increase consumer welfare and choice. Congress should seize upon the rare cross-aisle support for modernizing antitrust legislation to create a new rule of reason cause of action to remedy anticompetitive unilateral conduct separate and apart from Section 2 of the Sherman Act.

I. INTRODUCTION

The recent focus on anticompetitive conduct in digital markets has exposed a fundamental limitation of U.S. antitrust legislation and jurisprudence: How do we rein in anticompetitive, unilateral conduct in emerging and adjacent markets by entities that may be dominant players in related markets, but might not have a monopoly share in the complementary market restrained by the conduct? The Sherman Act and related antitrust jurisprudence have proven flexible and capable of balancing competitive effects of virtually any kind of concerted conduct among two or more conspirators under the rule of reason.[2] The same flexibility, however, is not available to plaintiffs seeking to remedy unilateral conduct — no matter how anticompetitive — except in very limited circumstances typically requiring proof of monopoly power to support a monopolization claim or the specific intent to monopolize and/or a dangerous probability of obtaining monopoly power.[3]

This is because Section 2 of the Sherman Act, which addresses unilateral conduct, is expressly limited to conduct related to monopolization.[4] The inability to reach anticompetitive unilateral conduct untethered to monopolization theories severely restricts the ability to protect innovation, particularly with respect to interoperable products that increase the value or functionality of complementary products. Congress should seize upon the rare cross-aisle support for modernizing antitrust legislation to create a new rule of reason cause of action to remedy anticompetitive unilateral conduct separate and apart from Section 2 of the Sherman Act.

II. THE CURRENT U.S. ANTITRUST FRAMEWORK RENDERS UNREACHABLE MOST UNILATERAL CONDUCT NO MATTER HOW ANTICOMPETITIVE

Because Section 2 of the Sherman Act is limited to claims relating to monopolization, our antitrust laws necessarily tolerate anticompetitive single-firm conduct perpetrated by companies with less than a monopoly share or counseled well enough to avoid making egregious statements supporting a specific intent to monopolize. If a dominant tech firm, for example, purposefully decides to degrade the interoperability of its products with a competitor's not for any efficiency-enhancing or procompetitive reason, but for the purpose of restraining competition, some cases suggest that, absent other conduct, there may be little that can be done if that company has less than a seventy percent share in that particular product market.[5] In contrast, in the area of concerted practices, antitrust jurisprudence recognizes that real, anticompetitive market effects may be achieved by a firm with market power, as opposed to monopoly power, with a market share hovering just around thirty percent.[6]

This is the unilateral conduct gap that has delivered the digital market dilemma we face today and looms in the background each time an elected official asks how the digital giants became what they are. The current antitrust framework overwhelmingly fails to reach anticompetitive, unilateral conduct by companies growing upwards of seventy percent in any well-defined product market. Even once such a share is reached, some courts faced with well-pled monopolization claims create carve-outs to the generally applicable standards for exclusionary conduct that further restrict antitrust scrutiny of unilateral conduct claims.[7]

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2 Under the rule of reason, the plaintiff bears the initial burden of proving that the defendant's conduct was anticompetitive, which shifts the burden to the defendant to prove it had a procompetitive justification. Unless the defendant could have achieved the asserted procompetitive benefit with a less restrictive alternative, the court will balance the anticompetitive and procompetitive effects to assess the overall competitive impact on the relevant market. See, e.g. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018); *Cap. Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 543 (2d Cir. 1993).

3 See, e.g. *Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004); *Spectrum Sports v. McQuillan*, 506 U.S. 447, 459 (1993) (unilateral conduct violates Section 2 "only when it actually monopolizes or dangerously threatens to do so"); *AIB Express, Inc. v. FedEx Corp.*, 358 F. Supp. 2d 239, 246-47 (S.D.N.Y. 2004) (monopoly leveraging requires monopoly power in one market and a dangerous probability of acquiring it in another).

4 15 U.S.C. § 2 (prohibiting conduct that "shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize").

5 See, e.g. *U.S. v. Aluminum Co. of America (Alcoa)*, 148 F.2d 416 (2d Cir. 1945) (J. Learned Hand) (ninety percent share "enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough"); see also *Exxon Corp. v. Berwick Bay Real Estate Partners*, 748 F.2d 937, 940 (5th Cir. 1984) ("monopolization is rarely found when the defendant's share of the relevant market is below 70%").

6 See, e.g. *BookLocker.com, Inc. v. Amazon.com*, Inc., 650 F. Supp. 2d 89, 103-04 (D. Me. 2009) ("consensus" among courts that "thirty percent is a threshold" for market power).

7 See *infra* Section III.

While the FTC theoretically could reach additional types of unilateral conduct that more broadly constitute unfair methods of competition under Section 5 of the FTC Act, the policy last stated by the FTC was to interpret Section 5 coextensively with Sections 1 and 2 of the Sherman Act.[8] Even if the FTC were to reverse this policy, however, the FTC's resources are limited. Further, the FTC's deterrent capabilities are now more constrained than ever following the Supreme Court's recent ruling that the FTC is not authorized to seek equitable monetary relief, such as restitution or disgorgement, directly from the courts.[9] And the DOJ, of course, does not itself pursue claims under Section 5 of the FTC Act.

III. OUR OUTDATED ANTITRUST FRAMEWORK CREATES STRUCTURAL BARRIERS TO ENFORCEMENT AND GROWTH ACROSS ALL SECTORS

The inability to address anticompetitive activities in the unilateral conduct gap has concrete consequences for innovation across all sectors of the economy in an increasingly high-tech world. Competitors cannot rely on a return on investment for interoperable products because one or more companies can simply render a start-up product incompatible without justification or raise insurmountable barriers to entry to wall off a targeted nascent product market. Without making changes to our antitrust laws, we may never know how many innovative products we miss out on or start-ups fold because nascent competitive products are at the mercy of the anticompetitive conduct of near monopolists.

Technological interconnectivity is driving growth across even the most traditional industrial sectors. One need only look to the myriad neologisms springing up to grasp the economic shift taking place as tech converges with other industries, from more familiar areas like biotech and fintech to emerging ones like agritech, foodtech, realtech/proptech, insurtech, wealthtech, regtech, legaltech, edtech, cleantech/greentech, medtech, healthtech, adtech/madtech, retailtech, and so on.[10] Companies that used to view themselves as consumer electronics or banking or medical companies or the like are increasingly viewing themselves as technology companies, and for good reason.

Our antitrust legislation, however, is not keeping up with the growing complexity of our modern economy. Waiting for anticompetitive conduct to mature into a monopoly, rather than responding at a point before the dominant tech has become so deeply entrenched and far-reaching, creates structural barriers to antitrust remedies and enforcement. By the time unilateral anticompetitive conduct supports a well-pled monopolization claim or the inevitable years of litigation come to a close, the conduct at issue may be so well entrenched and intertwined across markets that structural remediation is nearly impossible and the most promising challengers are long gone. Anticompetitive conduct and monopoly profits may be dispersed by this point across numerous interrelated products requiring the definition of multiple markets making complaints either unwieldy or incapable of depicting the full scope of anticompetitive effects. Monopoly profits may be nearly impossible to detect as they are arbitraged across markets or intermingled with products that companies pass off as "free" to consumers. Tracing the eventual harm to consumers across interlinked markets costs millions of dollars in legal and expert fees, making the cost of litigation prohibitive for most plaintiffs even where there is a significant likelihood of recovering attorneys' fees and automatically trebled damages years later. Even when litigation funding is available, the bar for succeeding in a unilateral conduct case is so high that would-be plaintiffs routinely choose to resign themselves to known anticompetitive conduct and effects, rather than risk being cut-off or further excluded by dominant companies that have powerful sway over necessary inputs and supply chains.

Monopolies, moreover, are not built overnight. It can take decades for a monopolist's anticompetitive conduct ultimately to exclude enough competition to support a claim, by which time memories have faded, witnesses have died or moved on, and evidence has long been wiped from hard drives. Plaintiffs may need to seek documents extending back more than a decade to obtain the foundational documents laying out an anticompetitive plan that has come to fruition years later. These challenges increase the costs of litigating unilateral conduct claims, decrease the odds of successful prosecution, and deter private litigation. With the rarity that the antitrust agencies have traditionally pursued unilateral conduct claims, these hurdles have meant that the majority of anticompetitive single-firm conduct has gone largely unchecked for decades.

8 See Donald S. Clark, *Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act*, F.T.C. (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

9 *AMG Cap. Mgmt., LLC v. Fed. Trade Comm'n*, 141 S. Ct. 1341, 1346-1348 (2021).

10 BBVA, *'Fintech', 'Proptech', 'Femtech', 'Edtech' and Other Related Neologisms* (July 12, 2018), https://www.bbva.com/en/fintech-proptech-femtech-edtech-and-other-related-neologisms/; see also Mukund Hari Nathany, *FinTech, MedTech, EdTech, RegTech and All the Other Terms Ending in 'Tech'*, UCL Finance and Technology Review, https://www.uclftr.com/post/fintech-medtech-edtech-regtech-and-all-the-other-terms-ending-in-tech (last visited May 11, 2021).

IV. CONGRESS NEEDS TO ADDRESS THE BROADER UNILATERAL CONDUCT GAP TO PROTECT INTEROPERABILITY, INNOVATION, AND ECONOMIC GROWTH

While federal and state authorities have recently focused unprecedented attention on a handful of dominant tech firms, even within the tech sector, the limited focus on digital markets and platforms risks implementing legal and regulatory changes that exclude protections for the interoperability of hardware and other physical products that traditionally have been the focus of unilateral efforts to degrade interoperability, such as chips,[11] medical devices,[12] and consumer electronics and appliances.[13] Particularly when our economy is standing on the precipice of another technological shift driven by the promise of 5G, it would be a regrettable oversight to introduce legislation or rules narrowly addressing digital markets without protecting interoperability more generally with and across physical products, such as the multitude of new IoT devices poised to spur innovation across numerous categories of connected devices.

Even within the context of digital markets, the House Majority Staff Report and Recommendations on the Investigation of Competition in Digital Markets characterized interoperability as "an important complement, not substitute, to vigorous antitrust enforcement," thereby missing an opportunity to recognize the applicability of antitrust jurisprudence to interoperability degradation more generally.[14] Beyond instituting rules that decrease switching costs, enabling portability of data across platforms, and encouraging interoperability by dominant digital platforms, Congress should consider reforms that more broadly deter unilateral conduct that degrades or eliminates interoperability across physical as well as digital products.

Interoperability is widely recognized as procompetitive, including by Democrats, Republicans, and the courts.[15] For example, in the standard-setting context, antitrust authorities and courts have long recognized that standard-setting can make products more valuable to consumers and can increase innovation, efficiency, and consumer choice "by allowing products to interoperate."[16] The Supreme Court has further held that "one of the evils proscribed by the antitrust laws is the creation of entry barriers to potential competitors by requiring them to enter two markets simultaneously," which a firm would need to do to compete in both a primary and interoperable secondary market.[17]

Despite the focus on the procompetitive virtues of interoperability and its ability to increase consumer welfare and innovation across complementary products in other contexts, some courts have hesitated to apply a traditional rule of reason analysis to interoperability degradation even by a monopolist, for example, in the context of product design.[18] Such refusals meaningfully to evaluate conduct that degrades or eliminates interoperability fail to assess the potential for an overall decrease in consumer welfare attributable to the sacrifice of real, innovative, and typi-

11 See, e.g. *In re Intel Corp.*, FTC File No. 061 0247, FTC Docket No. 9341 (last updated November 2, 2010), *available at* https://www.ftc.gov/enforcement/cases-proceedings/061-0247/intel-corporation-matter (degrading GPU interoperability with chipset interfaces).

12 See, e.g. *C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1367 (Fed. Cir. 1998) (redesigned biopsy gun to eliminate interoperability with competitors' non-infringing complementary needles).

13 See, e.g. *In re Keurig Green Mountain Single-Serve Coffee Antitrust Litig.*, 383 F. Supp. 3d 187, 213 (2019) (redesigned brewer to render inoperable competitors' hot beverage cartridges).

14 Jerrold Nadler and David N. Cicilline, *Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations*, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, at 386 (2020) (hereinafter "House Report"), *available at* https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519.

15 See, e.g. *id.* (Democratic report describing interoperability as procompetitive); see also Ken Buck, *The Third Way*, Subcommittee on Antitrust, Commercial, and Administrative Law of the Committee on the Judiciary, at 8-9 (Republican report agreeing that "interoperability policies will further facilitate competition in the marketplace"), available at https://buck.house.gov/sites/buck.house.gov/files/wysiwyg_uploaded/Buck%20Report.pdf.

16 U.S. Dep't of Justice and F.T.C, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* 33 (Apr. 2007), *available at* https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/222655.pdf; see also *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 435 (2015) (standard-setting can have "decidedly procompetitive effects by encouraging greater product interoperability, generating network effects, and building incentives to innovate"); *Princo Corp. v. Int'l Trade Comm'n*, 616 F.3d 1318, 1335 (4th Cir. 2015) (standard-setting is procompetitive in that it allows a number of different firms to produce competing, compatible products); *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 308 (3d Cir. 2007) ("standards that ensure the interoperability of products facilitate the sharing of information among purchasers of products from competing manufacturers, thereby enhancing the utility of all products and enlarging the overall consumer market").

17 *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 485 (1992) (*citing Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 14 (1984) and *Fortner Enters., Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 509 (1969)).

18 See, e.g. *Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991, 1000 (9th Cir. 2010) ("There is no room in this analysis for balancing the benefits or worth of a product improvement against its anticompetitive effects.").

cally lower priced, complementary products in the ironic vein of seeking not to chill speculative, future innovation in the form of primary product redesigns.[19] Notably, this willingness by some courts to accept defendants' theoretical arguments about chilling potential innovation in the future stands in stark contrast to cases in which courts have declined to credit allegations that anticompetitive conduct has restrained a plaintiff's ability to innovate as a basis to support antitrust standing.[20] While the latter may reasonably be due in a number of cases to a failure to support allegations of lost innovation with non-conclusory, well-pled facts, the disparate willingness to credit speculative theories of future innovation when asserted by a defendant, in contrast to the high bar set for plaintiffs pursuing similar theories of harm, suggests that the pendulum has swung out of balance in favor of protecting a defendant's innovation over that of a plaintiff's. Decades of over-deterrence arguments thus have arguably tipped the balance in defendants' favor without fully considering chilling concerns on the other side.

Giving such overwhelming deference to innovation associated with a defendant's dominant, primary product alone, while ignoring the restraints and benefits associated with innovation generated by complementary, interoperable products in a related, secondary or otherwise adjacent market, is misguided for several reasons.[21] First, focusing solely on the primary product frequently conflates a putative benefit in a primary product market with that of a distinct and separate complementary product market in which the anticompetitive effects may overwhelmingly outweigh any putative benefit. Second, anticompetitive redesigns degrading interoperability with complementary products typically present at best a modest, incremental change to the primary product, which can then sacrifice the production and availability of numerous variations of more innovative complementary products that may have additional functionality or otherwise increase consumer choice and value beyond whatever previously existed. Third, presuming new or redesigned products are procompetitive without fully assessing potential anticompetitive effects is akin to carving out a judge-made exception to the generally applicable standard for exclusionary conduct and creating an implied exemption to the antitrust laws, which courts have long held are "strongly disfavored."[22]

Further, declining to apply a rule of reason analysis to conduct degrading or eliminating interoperability presumes a lack of institutional competence to do precisely what judges and juries do in other antitrust contexts by weighing procompetitive and anticompetitive effects of conduct that restrains competition.[23] Indeed, the Microsoft court was perfectly capable of distinguishing between the development of a new product (JVM) that legitimately improved the speed of applications running on Windows and did not have any anticompetitive effects versus product design conduct that the Court held did have unjustified anticompetitive effects.[24] Following the Microsoft case, two decades went by without significant oversight of unilateral conduct by other participants in that market. We should not be surprised to find ourselves here again.

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19 The FTC has similarly taken a deferential approach to product design, but query whether that approach will continue given the current focus on digital market dominance. *See Statement of the FTC regarding Google's Search Practices in re Google Inc.*, FTC File No. 111-0163 (Jan. 3, 2013) ("Product design is an important dimension of competition and condemning legitimate product improvements risks harming consumers . . . . Challenging Google's product design decisions in this case would require the Commission – or a court – to second-guess a firm's product design decisions where plausible procompetitive justifications have been offered . . . ."). Note, however, that the FTC did secure a commitment from Google in 2013 to remove certain restrictions governing the use of application programming interfaces or APIs that restricted interoperability with competitive software programs used to manage and optimize advertising campaigns. F.T.C., *Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns In the Markets for Devices Like Smart Phones, Games and Tables, and in Online Search* (January 3, 2013), https://www.ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc.

20 See *Feitelson v. Google Inc.*, 80 F. Supp. 3d 1019, 1029 (N.D. Cal. 2015) ("Plaintiffs' allegations of hypothetical loss of . . . innovation are entirely too conclusory and speculative [to constitute antitrust injury] . . . .").

21 A "primary" product market may refer to: a market in which there is a base product to which "secondary" components or other products may be added to enhance or extend value or functionality (like a chip and interoperable memory products); a product that works with complementary aftermarket products (like consumer electronics using interoperable cartridges, such as for printers or gaming) or consumables (like a biopsy gun and replaceable needles); or a market with one or more interrelated secondary markets (like internet search and comparison shopping services).

22 *United States v. Phil. Nat'l Bank*, 374 U.S. 321, 348, 350-51 (1963) ("It is settled law that immunity from the antitrust laws is not lightly implied.").

23 But see *U.S. v. Microsoft*, 253 F.3d 34, 75 (D.C. Cir. 2001) ("In order to violate the antitrust laws, the incompatible product must have an anticompetitive effect that outweighs any procompetitive justification for the design.").

24 See *id.* (programming instructions rendered Java applications incompatible with competing platforms in a manner that did not contribute to or result from superiority of operating system).

V. CONGRESS COULD RECONCILE THE ENFORCEMENT IMBALANCE ACROSS CONCERTED AND UNILATERAL PRACTICES BY ENACTING A RULE OF REASON CLAIM FOR SINGLE-FIRM CONDUCT

While critics of monopolization claims argue that the risk of false positives can deter innovation,[25] more consideration should be given to protecting innovation driven by interoperable products of nascent competitors that could spur even greater economic expansion. Big in and of itself is not bad, and nothing needs to change the jurisprudence that protects success driven by superior acumen and skill. Caution must also be taken to ensure incentives to innovate across all sizes are fostered, particularly in connection with protections afforded by intellectual property rights, which include the right to exclude competitors from practicing inventions legitimately covered by patent claims.[26] The focus, however, should be on the conduct and effects, not the mere size of the actor.

Just as the rule of reason is capable of distinguishing between anticompetitive and procompetitive conduct in the concerted conduct context, it could do so in the context of unilateral conduct as well if Congress (and/or state legislatures) were to create a rule of reason claim to address anticompetitive, unilateral conduct by entities with less than a monopoly share of a well-defined market that is untethered from the monopolization constraints of Section 2 of the Sherman Act. A rule of reason claim applicable to unilateral conduct could more predictably place the focus on the anticompetitive nature and effects of single-firm conduct, rather than on market share numbers that can differ dramatically based on conflicting market definition theories or on the specific know-it-when-you-see-it nature of a defendant's business under judge-made doctrines, as in essential facilities or duty to deal cases. A unilateral rule of reason claim could also import the reasoning and guidance from Section 1 concerted conduct jurisprudence to borrow appropriate thresholds for market effects, while providing flexibility to address the new and complex ways single-firm conduct restrains competition that Senator John Sherman never could have anticipated in the 1800s. For those concerned that the availability of such a claim would open the floodgates of antitrust litigation, one need only consult the numerous observations that rule of reason litigation under Section 1 itself is typically prohibitively expensive.[27] And of course, Rule 11, Article III standing, antitrust standing, and the technical and costly nature of antitrust litigation all would still remain to temper the impetuous filer.

As the Supreme Court recognized in *Trinko*, our antitrust laws should be interpreted to "safeguard the incentive to innovate."[28] Those safeguards should likewise protect incentives to innovate in markets not yet dominated by a monopolist, including in connection with interoperable products in adjacent and complementary product markets. Failing to do so risks sacrificing consumer welfare overall and irrationally preferencing already entrenched dominant market players over the innovations offered by nascent competitors that hold the key to pushing competition forward, keeping markets dynamic over time, and stimulating economic growth. Congress should seize on this unique moment in history to make a meaningful change to our antitrust laws that will help fuel the growth of our economy through the next technological transformation.

25 See, e.g. *Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) ("The cost of false positives counsels against an undue expansion of § 2 liability . . . . Judicial oversight under the Sherman Act would seem destined to distort investment").

26 35 U.S.C. § 101.

27 See Herbert Hovenkamp, *The Rule of Reason*, Research Paper No. 17-28, University of Pennsylvania Law School (July 2017) ("[A] full blown rule of reason inquiry is significantly more costly than analysis under the per se rule. Applying the rule of reason typically requires expert testimony identifying a relevant market or alternative mechanisms for estimating market power, as well as some evidence that purports to measure actual anticompetitive effects."), *available at* http://awa2018.concurrences.com/IMG/pdf/ssrn-id2885916.pdf; see also Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, UC Davis L. Rev. Vo. 42 No. 5 (June, 2009) ("Because a rule-of-reason case is so costly to try, it is likely that fewer antitrust violations will be challenged."), *available at* https://lawreview.law.ucdavis.edu/issues/42/5/articles/42-5_Stucke.pdf.

28 *Trinko*, 540 U.S. at 407.

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