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POTENTIAL PRODUCTION: A SUPPLY SIDE APPROACH FOR RELEVANT PRODUCT MARKET DEFINITIONS

INTRODUCTION

The scope of the relevant product market is often the crucial issue in


2. The vast majority of the cases cited in this Note turn on relevant market definition. Generally, courts have equated market power with the percentage of the relevant market. See, e.g., United States v. Grinnell Corp., 384 U.S. 563, 571 (1966); United States v. Grinnell Corp., 384 U.S. 270, 272-74 (1966); United States v. Aluminum Co. of America, 148 F.2d 416, 424 (2d Cir. 1945) (Alcoa). The relevant product market definition is important because the larger the percentage, the larger the likelihood of an antitrust violation. Defendants that allegedly have violated the antitrust laws, therefore, generally will prefer a broader market definition, while the plaintiff generally will prefer a narrower market definition. For example, defendant Du Pont had 75% of the cellophane market, but only 12.75% of the flexible wrapping materials market. See United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 383-84, 399 (1956) (Cellophane). The Grinnell Corporation had a small percentage of the business of providing some kind of property protective service from a central location, but had 87% of the accredited central service security systems market. See United States v. Grinnell Corp., 384 U.S. 563, 567, 572 n.6 (1966). In both cases only the larger percentage would have suggested monopoly power. 351 U.S. at 404, see 384 U.S. at 567, 572 n.6. A larger market share would also increase the likelihood of illegality of mergers. See, e.g., United States v. Aluminum Co. of America, 377 U.S. 271, 280 (1964) (Rome Cable); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 363 (1963); Brown Shoe Co. v. United States, 370 U.S. 294, 343 (1962). But see United States v. General Dynamics Corp., 415 U.S. 486, 511 (1974) (the majority upheld a merger "irrespective" of the market question); id. at 522 (Douglas, J., dissenting) (the dissent bemoaned the lack of market share analysis). See generally Comment, Antitrust Law—Market Share Analysis—Clayton Act, Section 7—United States v. General Dynamics Corp., 20 N.Y.L.F. 848 (1975). There are instances, however, when a defendant would prefer a narrow market definition. First, a narrow market definition would limit the breadth of the remedy available, thereby diminishing the effect of a loss on defendant's business. See, e.g., United States v. Grinnell Corp., 384 U.S. 563, 575-76 (1966), L.G. Balfour Co. v. FTC, 442 F.2d 1, 10-11 (7th Cir. 1971). Second, a defendant would prefer a narrow market so that the merging companies would be in two separate markets and not subject to antitrust scrutiny. See, e.g., United States v. Continental Can Co., 378 U.S. 441, 452-55 (1964), Brown Shoe Co. v. United States, 370 U.S. 294, 326 (1962), Beatrice Foods Co. v. FTC, 540 F.2d 303, 309 (7th Cir. 1976). Potential competition theory, however, can undercut this rationale because it asserts that an effect on competition can be exerted without actual presence in the relevant market and the elimination of this effect can be illegal. Markovits, Predicting the Competitive Impact of Horizontal Mergers in a Monopolistically Competitive World: A Non-Market-Oriented Proposal and Critique of the Market Definition—Market Share—Market Concentration Approach, 56 Tex. L. Rev. 587, 593 n.10 (1978); see Ford Motor Co. v. United States,
litigation involving section 7 of the Clayton Act, section 2 of the Sherman Act, and other antitrust statutes. To determine the relevant product market


3. Section 7 of the Clayton Act of 1914 provides: "No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition . . . may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18 (1976) (emphasis added).

4. Section 2 of the Sherman Act of 1890 provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ." 15 U.S.C. § 2 (1976) (emphasis added).

5. Section 3 of the Clayton Act provides: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale with the United States . . . where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." 15 U.S.C. § 14 (1976) (emphasis added).

6. In applying the statutory language that is the basis of relevant product market analysis, the Supreme Court has expressly stated that there is no distinction between "line of commerce" of § 7 of the Clayton Act, 15 U.S.C. § 18 (1976), and "part" of commerce of § 2 of the Sherman Act, 15 U.S.C. § 2 (1976). United States v. Grinnell Corp., 384 U.S. 563, 573 (1966); see International Boxing Club, Inc. v. United States, 358 U.S. 242, 252 n.8 (1959). But cf. United States v. American Bldg. Maintenance Indus., 422 U.S. 271, 276-79 (1975) (distinguishing the jurisdictional reach of the Sherman Act from that of the Clayton Act). Courts use relevant market standards derived from § 2 monopolization cases and § 7 merger cases interchangeably. Although Grinnell seems to leave open the possibility of a distinction, 384 U.S. at 573, certain commentators have urged a distinction, see 2 P. Areeda & D. Turner, supra note 1, ¶ 500; R. Posner, supra note 1, at 128-29, and one court seems willing to make the distinction if adequate policy reasons are demonstrated, L.G. Balfour Co. v. FTC, 442 F.2d 1, 11 (7th Cir. 1971), the precedent of non-distinction seems well settled. A distinction, however, may be merited solely on the basis of statutory language. Section 7 of the Clayton Act prohibits mergers that "may . . . substantially . . . lessen competition or . . . tend to create a monopoly." 15 U.S.C. § 18 (1976) (emphasis added). Section 2 of the Sherman Act subjects those who "shall monopolize . . . attempt to monopolize or combine or conspire . . . to monopolize," to civil and criminal penalties. 15 U.S.C. § 2 (1976) (emphasis added). Because the Sherman Act deals more with realities and the Clayton Act deals more with probabilities, the ambiguities of product market definitions might properly be resolved in favor of the government under § 7 and for the defendant under § 2. This Note focuses on §§ 2 and 7 and, as a matter of convenience, will make no distinction
under traditional demand side analysis, the factfinder\(^7\) inquires whether a buyer will substitute one product for another.\(^8\) A less traditional approach is potential production\(^9\) analysis, under which the factfinder ascertains whether a seller will substitute one manufacturing process for another.\(^10\) between them in defining the relevant product market.


8. See, e.g., United States v. Continental Can Co., 378 U.S. 441, 452-53 (1964); United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 400 (1956) (Cellophane); Beatrice Foods Co. v. FTC, 540 F.2d 303, 308-09 (7th Cir. 1976); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547, 552 (1st Cir. 1974), cert. denied, 421 U.S. 1004 (1975). For example, assume telephone companies purchase copper wire at 89\% per foot. If the price rises to 99\%, some firms would switch to glass cable, because both copper and glass are conductors capable of transmitting sound over distances. The existence of this demand substitute deters manufacturers of copper cable from raising their price. See generally 2 P. Areeda & D. Turner, supra note 1, \(\S\) 519a; R. Posner, supra note 1, at 125-34; F. Scherer, supra note 1, at 50-52; L. Sullivan, supra note 1, \(\S\)s 12-18. Thus, from the viewpoint of the buyer, glass and copper wire would be within the same product market.

9. This Note uses the phrase potential production to include many types of supply side analysis. Many other terms have been used, such as cross-elasticity of supply, production flexibility, and supply substitution, each subject to fine distinctions, different emphases, and overlap. See Rosenthal, Continental Can Revisited: Limits Upon the Breadth of a Line of Commerce in a Section 7 Case, 14 Hous. L. Rev. 973, 996-1002 (1977). This Note makes no such distinctions. Rather, "potential production" is used as a generic term to describe suppliers, arguably not in a market, with the potential to enter that market.

10. See, e.g., United States v. Columbia Steel Co., 334 U.S. 495, 510-11 (1948), Kaplan v. Burroughs Corp., 611 F.2d 286, 293-94 (9th Cir. 1979); Telex Corp. v. IBM
Potential production analysis is not focused, as it would first seem, on identifying the potential producers of the defendant's product. The focus is generally, courts reject using the defendant's product as the relevant product. See, e.g., United States v. Aluminum Co. of America, 377 U.S. 271, 284-85 (1964) (Rome Cable) (Stewart J., dissenting); Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962); Yoder Bros. v. California-Florida Plant Corp., 537 F.2d 1347, 1367-68 (5th Cir. 1976), cert. denied, 429 U.S. 1094 (1977). For example, copper and aluminum are metals that can be made into wire on the supply side, and used to conduct electricity on the demand side. Thus, under both supply and demand side analysis, copper and aluminum wire would be in the same relevant market. If manufacturing results in similar products, however, supply and demand side analysis can result in the same relevant product market. For this reason, the distinction between supply and demand substitutes is sometimes blurred. See, e.g., United States v. Aluminum Co. of America, 377 U.S. 271, 284-85 (1964) (Rome Cable) (Stewart J., dissenting); Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962); Yoder Bros. v. California-Florida Plant Corp., 537 F.2d 1347, 1367-68 (5th Cir. 1976), cert. denied, 429 U.S. 1094 (1977). For example, copper and aluminum are metals that can be made into wire on the supply side, and used to conduct electricity on the demand side. Thus, under both supply and demand side analysis, copper and aluminum wire would be in the same relevant product market.

11. Generally, courts reject using the defendant's product as the relevant product. See, e.g., United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 393 (1956) (Cellophane); Kaplan v. Burroughs, Inc., 611 F.2d 286, 294-95 (9th Cir. 1979); Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d 256, 281-83 (5th Cir. 1978), cert. denied, 440 U.S. 939 (1979); Telex Corp. v. IBM Corp., 510 F.2d 894, 917-18 (10th Cir.), cert. dismissed, 423 U.S. 802 (1975); Nelligan v. Ford Motor Co., 262 F.2d 556, 557 (4th Cir. 1959); Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418, 420 (D.C. Cir.), cert. denied, 335 U.S. 822 (1957); ILC Peripherals Leasing Corp. v. IBM Corp., 458 F. Supp. 423, 428-30 (N.D. Cal. 1978), appeal docketed sub nom. Memorex Corp. v. IBM Corp., Nos. 78-3050, 78-3236 (9th Cir. Aug. 1, 1979); L. Sullivan, supra note 1, § 16. Use of potential production analysis instead of a highly specific market analysis recognizes that producing a different good is relatively unimportant to the manufacturer if a larger profit can be made. Cf. Crown Zellerbach, Corp. v. FTC, 296 F.2d 800, 812-13 (9th Cir. 1961) (a company presumably produced "what it knew it could sell"), cert. denied, 370 U.S. 937 (1962). But see, e.g., Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 375-76 (1927); Poster Exchange, Inc. v. National Screen Serv. Corp., 431 F.2d 334, 339 (5th Cir. 1970), cert. denied, 401 U.S. 912 (1971). In these cases the defendant's use of leverage led to the definition of its product as the relevant product. Cf. Heattransfer Corp. v. Volkswagenwerk, 553 F.2d 964, 980 (5th Cir. 1977) (relevant market of air-conditioners for Volkswagen, Porsche and Audi), cert. denied, 434 U.S. 1087 (1978); Crown Zellerbach Corp. v. FTC, 296 F.2d 800, 811 (9th Cir. 1961) (limiting the relevant product market inquiry to the products of the acquired company), cert. denied, 370 U.S. 937 (1962); L. Sullivan, supra note 1, § 15 & n.15 (unique product can be the relevant product). Furthermore, it would be disingenuous to imply that the market definition is not sometimes tailored to fit defendants. In some instances the market definition bears tenuous resemblance to economics and much resemblance to the defendant. See,
on whether sufficient competitive overlap is present to warrant a broad rather than a narrow market definition.\textsuperscript{12} For example, in \textit{Yoder Bros. v. California-Florida Plant Corp.},\textsuperscript{13} the plaintiff contended that the relevant product market should have been limited to suppliers of chrysanthemums, instead of the broader market of the suppliers of all ornamental plants.\textsuperscript{14} This argument was based on evidence that chrysanthemum prices are distinct from and not sensitive to the price of other ornamental plants, and that, once grown, a chrysanthemum is not interchangeable with other ornamental plants.\textsuperscript{15} The Fifth Circuit adopted potential production analysis, reasoning that minor adjustments made production shifts by suppliers “feasible and common,”\textsuperscript{16} and noting that suppliers frequently had made these adjustments in response to demand.\textsuperscript{17} This competitive overlap warranted a broad market definition including all producers of ornamental plants—the potential producers of chrysanthemums.\textsuperscript{18} The defendant’s market share, therefore, was lessened, and the monopolization claim was dismissed.\textsuperscript{19}

Consistent with trends to probe in more depth alleged anticompetitive effects,\textsuperscript{20} this Note advocates more systematic analysis of potential produc-

\textsuperscript{12} United States v. Continental Can Co., 378 U.S. 325 (1964); Beatrice Foods Co v FTC, 540 F.2d 303, 308-09 (7th Cir. 1976); General Foods Corp. v. FTC, 386 F 2d 936, 940-13d Cir. 1967), cert. denied, 391 U.S. 919 (1968) (defendant asserted that relevant product market definition was “untenable gerrymandering”). \textit{See also} R. Posner, supra note 1, at 125 (“a surprising number of innocuous mergers can be made to appear dangerously monopolistic”). The courts’ rationale for such gerrymandering in \textsection 7 cases is the statutory language prohibiting an anticompetitive effect in “any line of commerce.” \textit{Clayton Act} \textsection 7, 15 U.S.C \textsection 18 (1976) (emphasis added).


\textsuperscript{14} 537 F.2d 1347 (5th Cir 1976), \textit{cert. denied}, 429 U S 1094 (1977).

\textsuperscript{15} \textit{Id}. at 1367.

\textsuperscript{16} \textit{Id}. Sensitivity to price changes and lack of distinct prices would evidence a narrow market. \textit{Brown Shoe Co. v. United States}, 370 U.S. 294, 325 (1962) The plaintiff also alleged that production changes were very costly. 537 F.2d at 1367.

\textsuperscript{17} 537 F.2d at 1367.

\textsuperscript{18} \textit{Id}. at 1368.

\textsuperscript{19} \textit{Id}. at 1368. Yoder controlled approximately 20% of the ornamental flower market, \textit{id} , and approximately 55% of the chrysanthemum market. \textit{Id}. at 1367, \textit{see} note 2 supra.

\textsuperscript{20} In United States v. General Dynamics Corp., 415 U S. 486 (1974), the Court urged examination of the market’s “structure, history and probable future” after the presentation of the government’s statistics on anticompetitive effects. \textit{Id}. at 498 (quoting \textit{Brown Shoe Co v United States}, 370 U.S. 294, 322 n.38 (1962)). Previously, statistics were accepted with little
An examination of the case law suggests a two step approach that is reinforced by various analogous approaches. Finally, this Note explores the appropriateness of potential production analysis in certain instances.

21. Supreme Court standards for determining the relevant product market "were listed with the intention of furnishing practical aids in identifying zones of actual or potential competition rather than with the view that their presence or absence would dispose, in talismanic fashion, of the [market] issue." ITT Corp. v. GTE Corp., 518 F.2d 913, 932 (9th Cir. 1975). Furthermore, Justice Stewart, a frequent dissenter in the sixties in relevant market cases, see United States v. Grinnell Corp., 384 U.S. 563, 585 (1966); United States v. Von's Grocery Co., 384 U.S. 270, 281 (1966); United States v. Aluminum Co. of America, 377 U.S. 271, 281 (1964) (Rome Cable), is using the same analysis, but is now writing for the majority. See United States v. General Dynamics Corp., 415 U.S. 486, 488 (1974).

22. This Note focuses on case law analysis, because this is an area of law where case law analysis is frequently supplanted by economic analysis. Stein & Brett, supra note 5, at 640-41. ("All too often . . . practitioners and the courts have become distracted by the perceived need to address market definition and market power through the ill-suited concepts, impractical tools, and jargon of the economist. In so doing, they fail to address the definition, analysis and proof of such issues in the same empirical manner as is required when addressing other legal and factual questions."); see L. Sullivan, supra note 1, § 18. But cf. id. § 32 (discussing non-economic factors inferring a monopoly). This framework is chosen only hesitantly. Usually commentators do not think highly of the case analysis of relevant product markets. See 2 P. Areeda & D. Turner, supra note 1, ¶¶ 500-36f (after 67 pages setting forth what an economic analysis of antitrust fact patterns should be, with a mere four footnotes mentioning cases, the authors devote only 43 pages to evaluating how case law compares); R. Posner, supra note 1, at 130 ("I shall not burden the reader with a detailed examination of the many aberrant market-definition cases since Brown Shoe."); L. Sullivan, supra note 1, § 12 (the introduction to relevant market in monopolization cases contains references to 6 economic analyses and not a single case), § 203 (market definitions in merger cases have been "monstrosities"). See also Markovits, supra note 2, at 590-91 (wholly rejecting the concept of relevant market). The possibility that antitrust law is needlessly complicated by an ambiguous science only begins to justify dismissal of this analysis. Furthermore, opinions dealing with antitrust law are not easily reconcilable. United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 342 (D. Mass. 1953), aff'd per curiam, 347 U.S. 521 (1954). Still "the market's boundaries ultimately reflect a legal conclusion, not an economic fact." 2 P. Areeda & D. Turner, supra note 1, § 518 (footnote omitted). Judges, not economists, decide antitrust law. Case analysis, therefore, is the proper starting point.
I. POTENTIAL PRODUCTION IN THE COURTS

A. Supreme Court Precedent

In early cases, the Supreme Court included mere hypothetical potential production in the relevant market. Although the Court has never expressly rejected this approach, it has not expanded a market with potential producers in over thirty years. The only application of potential production analysis in that time was a rejection on the facts in a footnote. Although dissenting justices have favored this approach, majority opinions in cases where this analysis would have been appropriate have ignored it.

In United States v. Columbia Steel Co., an early case utilizing potential production analysis, the government challenged a merger under sections 1 and 2 of the Sherman Act. Defendant Consolidated Steel had purchased rolled steel plates and shapes on the open market before merging with defendant United States Steel, and from U.S. Steel after the merger. The government alleged that the foreclosure of Consolidated from purchasing steel plates and shapes on the open market was anticompetitive. Although the government

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23. United States v. Columbia Steel Co., 334 U.S. 495, 510-11 (1948); see United States v. Aluminum Co. of America, 148 F.2d 416, 438 (2d Cir. 1945). For other discussions of Supreme Court precedent in this context see P. Areeda & D. Turner, supra note 1, § 536; Supply Substitutability, supra note 10, at 137-38.


26. See United States v. Aluminum Co. of America, 377 U.S. 271 (1964) (Rome Cable); P. Areeda & D. Turner, supra note 1, ¶ 535 c, n.18; R. Posner, supra note 1, at 130.

27. 334 U.S. 495 (1948).

28. Id. at 498; 15 U.S.C. §§ 1, 2 (1976). For the text of these sections, see notes 3, 4 supra. It is important to note that the standards under §§ 1 and 2 of the Sherman Act are more tolerant with regard to mergers than those of § 7 of the Clayton Act, 15 U.S.C. § 18 (1976). For the text of § 7, see note 2 supra. This is evident in the legislative history of the 1950 amendment of § 7. Celler-Kefauver Antimerger Act of 1950, Pub. L. No. 899, § 7, 64 Stat. 1125 (1950) (codified at 15 U.S.C. § 18 (1976)). See generally Brown Shoe Co. v. United States, 370 U.S. 294, 314-23 (1962). This stricter standard is obvious because almost all mergers are challenged under § 7, not §§ 1 or 2. See, e.g., United States v. Von's Grocery Co., 384 U.S. 270, 271 (1966); United States v. Continental Can Co., 378 U.S. 441, 443 (1964); Brown Shoe Co. v. United States, 370 U.S. 294, 296 (1962); cf. United States v. American Bldg. Maintenance Indus., 422 U.S. 271, 275, 285-86 (1975) (no § 1 arguments were forwarded to invalidate a merger when § 7 was deemed inapplicable). See generally L. Sullivan, supra note 1, § 202b. The stricter standard of § 7 is largely irrelevant to product market questions raised here because this Note focuses on the standards for determining the relevant market under §§ 2 and 7, which are very similar. See Supply Substitutability, supra note 10, at 138-39; note 6 supra. To the extent that the Court's holding in Columbia Steel is based on § 1, however, relevant product market definitions dealt with in this Note—under §§ 2 and 7—and under § 1 may be distinguishable. See Columbia Metal Culvert Co. v. Kaiser Aluminum & Chem. Corp., 579 F.2d 20, 27 n.11 (3d Cir.), cert. denied, 439 U.S. 876 (1978).

29. 334 U.S. at 508.

30. Id. at 507.
contended that the relevant product market should include only rolled steel plates and shapes. The Court accepted defendants' argument that producers of plates and shapes could manufacture other items of rolled steel. If these rolled steel products could easily be made, all rolled steel producers would be within the relevant market. No evidence of actual production flexibility had been offered; mere potential was considered sufficient. Thus, the Columbia Steel Court held that even if the end products from rolled steel were used by buyers in different ways and were not interchangeable once produced, the relevant market should include all manufacturers of rolled steel with the potential to produce rolled steel plates and shapes. Similarly, in United States v. Aluminum Co. of America (Alcoa), the government alleged that Alcoa, as the sole manufacturer of aluminum cable, possessed monopoly power in that market. The court, however, reasoned that because of the ease of substituting copper for aluminum in production, the market could not be limited to the manufacturers of aluminum cable but must include the producers of copper cable.

The Supreme Court has not expanded a relevant market with potential producers since Alcoa and Columbia Steel. In Brown Shoe Co. v. United States, the Court set forth a two-part test in relevant market analysis: first, define the outer boundaries of a product market, and second, determine whether well-defined submarkets exist. Under this test evidence establishing

31. Id. at 510-11.
32. Id.
33. Production flexibility is the ability to respond to market forces by changing what is produced. See 2 P. Areeda & D. Turner, supra note 1, § 526a; note 9 supra.
34. 334 U.S. at 510-11.
35. See id. at 510. A broader market including all manufacturers of rolled steel products would have been appropriate if those in the broader market could have produced, as opposed to did produce, plates and shapes. Id.
36. Id. at 511.
37. 148 F.2d 416 (2d Cir. 1945) (Alcoa). Alcoa is not a Supreme Court case but is treated as such. Three judges from the Second Circuit made up the court of last resort because a quorum of the Supreme Court was lacking. Id. at 421. See generally American Tobacco Co. v. United States, 328 U.S. 781, 811-12 & n.10 (1946). The Supreme Court has expressly approved the legal doctrines set forth in Alcoa. Id. at 811-13. Although the statements in Alcoa concerning relevant market are not expressly endorsed, see id. at 813-14, approval can be inferred from the "unique circumstances which add to [Alcoa's] weight as a precedent." Id. at 811. For an economic analysis of Alcoa, see 2 P. Areeda & D. Turner, supra note 1, ¶ 530.
38. 148 F.2d at 438.
39. See id. Furthermore, Alcoa's market power was greater because buyer preference, perhaps unreasonably, mandated the use of virgin ingot in the production of wire. Id. at 423. Alcoa produced 90% of the virgin ingot and only 60% of all aluminum ingot. Id. at 424
40. See id. at 438.
42. Id. at 325.
43. "The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." Id. (footnote omitted). This Note does not distinguish market analysis from submarket analysis because the criteria used to
potential production would require that potential manufacturers be included in the broad market. In Brown Shoe, however, the Court found a narrow market appropriate because manufacturers "generally" did not change production capabilities to meet demand. Justice Harlan concurred on the

define markets and submarkets are much the same. R. Posner, supra note 1, at 129-30, Stein & Brett, supra note 6, at 642 n.10. Both measure the extent to which a group of products is effectively shielded from competition. See note 1 supra. The distinction seems to be that courts defining a narrow market use "submarket" analysis, see, e.g., Avnet, Inc v FTC, 511 F 2d 70, 77-78 (7th Cir.), cert. denied, 423 U.S. 833 (1975); Abex Corp. v FTC, 420 F 2d 928, 930-32 (6th Cir.), cert. denied, 400 U.S. 865 (1970); CBS, Inc v FTC, 414 F.2d 974, 978-79 (7th Cir 1969), cert. denied, 397 U.S. 907 (1970); General Foods Corp v FTC, 386 F 2d 936, 940-43 (3d Cir 1967), cert. denied, 391 U.S. 919 (1968), while courts defining a broad market use "market" analysis. See, e.g., Fount-Wip, Inc v Reddi-Wip, Inc., 568 F.2d 1296, 1301-02 (9th Cir 1978), Yoder Bros v California-Florida Plant Corp., 537 F 2d 1347, 1366-68 (5th Cir 1976), cert. denied, 429 U.S. 1094 (1977); Telex Corp. v IBM Corp., 510 F.2d 894, 914-19 (10th Cir.), cert. dismissed, 423 U.S. 802 (1975); Acme Precision Prods., Inc v American Alloys Corp., 484 F 2d 1237, 1240-44 (8th Cir 1972). See generally Supply Substitutability, supra note 1, § 16 (mostly focusing on demand substitutes as substitutability); L. Sullivan, supra note 1, § 1, (omission of potential production analysis in merger guidelines is "glaring"); F. Scherer, supra note 1, at 53-54 (giving supply substitutes the same weight as demand substitutes); L. Sullivan, supra note 1, § 16 (mostly focusing on demand substitutes as does the case law). But see Stein & Brett, supra note 6, at 665-66 & n 154 (confusing market with submarket analysis, and arguing that the commentators are divided and unclear).
merits, dissented on jurisdiction, and disagreed with the findings of fact. Specifically, he argued that because production could be shifted "without undue difficulty," potential producers should have expanded the relevant product market. He contended that potential production analysis would have been a more "realistic gauge of the possible anticompetitive effects."

The nadir of potential production analysis occurred in *United States v. Aluminum Co. of America* (*Rome Cable*). Although the facts of *Rome Cable* were similar to those in *Alcoa*, the Court found that the market of insulated aluminum cable was distinct from that of insulated copper cable. Potential production was never specifically mentioned in the majority opinion, but it was conceded that aluminum and copper cable were somewhat interchangeable. The Court, however, divided aluminum and copper cable into separate markets because of the difference in selling price and the distinct uses of the two types of cable. The finding of separate markets was not uncontested. Justice Stewart, writing for the dissent, would have included copper wire manufacturers in the relevant market. He noted that "[t]he federal trial courts were admonished to examine [the] 'practical indicia' [of *Brown Shoe* which] express in practical terms the basic economic concept that markets are to be defined in terms of close substitutability of either product (demand) or production facilities (supply), since it is ultimately the degree of substitutabil-

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46. *370 U.S. at 357* (Harlan, J., dissenting in part and concurring in part). Because the relevant product market is a question of fact, see note 7 supra, most disagreements on this issue do not center on law, but on fact. Thus, on this question, a dissenting opinion can be an accurate statement of the law. See, *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056, 1063 (3d Cir.), cert. denied, 439 U.S. 838 (1978).
48. *Id. at 367*.
51. *377 U.S. at 275-76*.
52. See *377 U.S. at 284-85* (Stewart, J., dissenting). This was despite the district court's finding of actual production flexibility and appellees' argument for it in their briefs. *Id. at 285*; Brief for Appellees at 34-38, *United States v. Aluminum Co. of America*, 377 U.S. 271 (1964) (*Rome Cable*), reprinted in 15 Major Briefs, supra note 45, at 189-93.
53. *377 U.S. at 275-77*. The Court based this finding on demand side analysis. *Id.*
54. *Id. at 276-77*. The stated rationale for finding that slight interchangeability was insufficient was submarket analysis. The market/submarket distinction confuses the analysis, however, and is avoided here. See note 43 supra.
55. *377 U.S. at 285* (Stewart, J., dissenting). The dissent disputed the finding that different prices and uses were significant enough to merit separate markets. *Id. at 284-86*. Interestingly enough, the government had conceded in the court below that insulated copper and aluminum wire were within the same market. *United States v. Aluminum Co. of America*, 214 F. Supp. 501, 509, 510 (N.D.N.Y. 1963) (item 7), rev'd, *377 U.S. 271* (1964) (*Rome Cable*).
ity that limits the exercise of market power.\textsuperscript{56} By applying this standard he concluded that "complete manufacturing interchangeability" existed in theory and practice.\textsuperscript{57} The Supreme Court's reluctance to analyze potential production, coupled with potential production's clear competitive effect,\textsuperscript{58} has left lower courts without guidelines on this issue.

B. Context and Approach for Potential Production Analysis

The scarcity of potential production analysis is part of a traditional judicial focus on demand factors when resolving relevant market questions. In that tradition, the Supreme Court has defined the relevant product as those "commodities reasonably interchangeable by consumers for the same purposes."\textsuperscript{59} Furthermore, \textit{Brown Shoe} indicia for defining product markets focus heavily on buyers' perceptions.\textsuperscript{60}

The lower federal courts have perpetuated and refined this demand side focus.\textsuperscript{61} In \textit{United States v. Bethlehem Steel Corp.},\textsuperscript{62} the district court observed that relevant market analysis "which ignores the buyers and focuses on what the sellers do, or theoretically can do, is not meaningful."\textsuperscript{63} \textit{Bethlehem Steel} was the first of many cases to hold that although perceptions of manufacturers may be important, the perceptions of consumers "are most salient in the determination of market boundaries."\textsuperscript{64} This approach has

\textsuperscript{56} 377 U.S. at 283 (Stewart, J., dissenting).
\textsuperscript{57} \textit{Id.} at 285 (Stewart, J., dissenting). This presumably met the "general" trend standard required in \textit{Brown Shoe}. See note 45 \textit{supra} and accompanying text.
\textsuperscript{58} See notes 10, 44 \textit{supra} and accompanying text.
\textsuperscript{60} 370 U.S. 294, 325 (1962); see note 43 \textit{supra} and accompanying text. Of the seven indicia, four are clearly focused on the demand side: distinct customers; sensitivity to price changes; distinct prices; and peculiar characteristics and uses. Two clearly focus on the supply side: unique production facilities; and specialized vendors. Recognition of the market is either industrial recognition (supply) or public recognition (demand). Thus four of the factors focus on demand, two focus on supply, and one recognizes both. \textit{Accord, Supply Substitutability, supra} note 10, at 141 n.70. \textit{But see Stein & Brett, supra} note 6, at 663-68 (dividing the \textit{Brown Shoe} factors into nine categories, with only five of nine focusing on demand side analysis).
\textsuperscript{63} \textit{Id.} at 592. In explaining why the peculiar uses and characteristics test of \textit{Cellophane} was to be preferred over the production flexibility test of \textit{Columbia Steel}, the court reasoned that the buyer's freedom of product choice is what § 7 was intended to protect. \textit{Id.} at 592 n.34. Rather than balancing these two factors, the court distinguished \textit{Columbia Steel} as a § 1 analysis of mergers, which is inappropriate in a § 7 case. \textit{Id.} The distinction between an analysis of a merger under § 1 of the Sherman Act and § 7 of the Clayton Act is probably still valid. \textit{See note 28 supra.} This distinction between § 1 and § 7 in the context of relevant market definitions may also still be valid. \textit{See note 28 supra.}
resulted in a general neglect of potential production analysis; even when courts explore supply side factors, it is almost as an afterthought of demand side analysis.

Overreliance on the perceptions of buyers, however, can distort the relevant product market definition. Two vastly different products in terms of manufacture, if perceived by consumers to have the same use, can be found to be within the same market. Furthermore, some courts focus solely on demand side analysis even when supply side analysis is patently more appropriate. For example, identical products have been found to be in separate markets when the perceptions and purchasing habits of buyers differed. Similarly, a price difference has supported an inference of different buyer perceptions, which, in turn, supported separate markets. Thus, even in the absence of evidence distinguishing two seemingly identical goods, courts have found separate markets. These anomalies will continue until potential production is analyzed more closely.

Despite the lack of guidance from the Supreme Court and the persistent focus on demand side factors, lower courts have expanded, with some reservations, relevant markets to include potential producers. Various cases suggest that the first step of potential production analysis is to explore the ability of producers to enter the relevant product market. In traditional antitrust terms, the courts explore the ability of the supplier to overcome

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66. See George F. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547, 551 (1st Cir. 1974), cert. denied, 421 U.S. 1004 (1975); L.G. Balfour Co. v. FTC, 442 F.2d 11 (7th Cir. 1971).

67. CBS, Inc. v. FTC, 414 F.2d 974, 979 (7th Cir. 1969), cert. denied, 397 U.S. 907 (1970). That the products were identical was unquestioned. The issue was whether the record market could be divided into the record club and retail distribution markets. Id. But see ITT Corp. v. GTE Corp., 518 F.2d 913, 933 (9th Cir. 1975) (a manufacturer is not concerned with the identity of the buyer).

68. CBS, Inc. v. FTC, 414 F.2d 974, 979 (7th Cir. 1969), cert. denied, 397 U.S. 907 (1970). In Reynolds Metals Co. v. FTC, 309 F.2d 223, 229 (D.C. Cir. 1962), the manufacture of florist foil was held to be the relevant product market even though florist foil did not differ from other decorative foils in terms of strength, gauge, or composition. The Reynolds court also used price differences to support its findings. Id.; cf. Avnet, Inc. v. FTC, 511 F.2d 70, 78 n.22 (7th Cir.), cert denied, 423 U.S. 833 (1975) (sales of rebuilt parts distinguished from sales of original equipment on the basis of substantial price differentials).

69. See notes 23-68 supra and accompanying text.
barriers to entry. These barriers, in effect, measure the potential of a firm to be a producer in the relevant market. Various barriers to entry are sufficient to warrant exclusion of potential producers from the relevant product market. The need for complementary products, increased transport costs,
excessive start-up costs,\textsuperscript{74} or even government tariffs\textsuperscript{75} can limit entry of a potential producer. Other barriers, such as a time lag in beginning production\textsuperscript{76} or lack of trained personnel,\textsuperscript{77} can also limit entry.

When substantial barriers to entry set off a group of manufacturers from alleged potential producers,\textsuperscript{78} a narrow market that excludes potential producers is appropriate.\textsuperscript{79} Absence of barriers to entry or increased potential of manufacturers to change production from one good to another should support a broad market.\textsuperscript{80} Courts, therefore, should inquire whether entry potential exists as a practical matter; if it does further analysis is appropriate.\textsuperscript{81}

The second step of potential production analysis should be to determine whether actual production, supporting the finding of potential to enter, is present. For example, in \textit{Reynolds Metals Co. v. FTC},\textsuperscript{82} the government conceded that others could easily manufacture the relevant product.\textsuperscript{83} Nevertheless, the District of Columbia Circuit excluded potential producers from the relevant market because this potential production did not occur.\textsuperscript{84} Mere hypothetical potential production is not sufficient.\textsuperscript{85}

\begin{itemize}
\item \textsuperscript{74} United States v. Empire Gas Corp., 537 F.2d 296, 303-04 (8th Cir. 1976), \textit{cert. denied}, 429 U.S. 1122 (1977) (potential use of natural gas or electricity to replace liquified petroleum was limited by the costs of constructing pipelines and converting equipment to fit the new source of energy). \textit{But see} Kaplan v. Burroughs Corp., 611 F.2d 286, 293-95 (9th Cir. 1979) (in a highly differentiated product market, the entry barrier is what it costs to produce one, not all, of the highly differentiated products). \textit{See generally} Telex Corp. v. IBM Corp., 510 F.2d 894, 915-17 (10th Cir.), \textit{cert. dismissed}, 423 U.S. 802 (1975).
\item \textsuperscript{75} ITT Corp. v. GTE Corp., 518 F.2d 913, 933-34 (9th Cir. 1975).
\item \textsuperscript{76} United States v. Aluminum Co. of America, 148 F.2d 416, 425 (2d Cir. 1945) (Alcoa); \textit{see supra} note 1, \textit{\textsuperscript{519b}}.
\item \textsuperscript{77} Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d 256, 284 (5th Cir. 1978), \textit{cert. denied}, 440 U.S. 939 (1979).
\item \textsuperscript{78} \textit{See note 1 supra}.
\item \textsuperscript{79} \textit{See, e.g.}, United States v. Empire Gas Corp., 537 F.2d 296, 303-04 (8th Cir. 1976), \textit{cert. denied}, 429 U.S. 1122 (1977); ITT Corp. v. GTE Corp., 518 F.2d 913, 933-34 (9th Cir. 1975); United States v. Aluminum Co. of America, 148 F.2d 416, 426 (2d Cir. 1945).
\item \textsuperscript{81} The standard "as a practical matter" would make barriers to entry a threshold inquiry.
\item \textsuperscript{82} 309 F.2d 223 (D.C. Cir. 1962).
\item \textsuperscript{83} \textit{Id.} at 225.
\item \textsuperscript{84} \textit{Id.} at 225, 228-29. The constancy of the specialized production in terms of number and identity of manufacturers involved, was one reason cited for giving potential production little weight. \textit{Id.} at 229. The hypothetical potential of the defendant to produce another variation of a product as the basis for expanding the relevant market has also been rejected. Crown Zellerbach Corp. v. FTC, 296 F.2d 800, 812-13 (9th Cir. 1961), \textit{cert. denied}, 370 U.S. 937 (1962).
\item \textsuperscript{85} \textit{See, e.g.}, Reynolds Metals Co. v. FTC, 309 F.2d 223, 225 (D.C. Cir. 1962) (florist foil
Requiring actuality of production results from the courts' emphasis on discovering "patterns of trade which are followed in practice." Pursuant to this reasoning, courts should "deal with the economic realities of competition as they exist and not on the speculative basis of what they could be. The fact is that [manufacturers] do not do whatever it is they can do." Thus, patterns and customs in the market should be of primary importance. For example, in *L.G. Balfour Co. v. FTC,* the Seventh Circuit expanded the market by including potential producers in one context but refused to do so in another, implicitly distinguishing the potential producers on the basis of actuality. In *Balfour,* the FTC had found a relevant market comprised of "national college fraternity jewelry" manufacturers. On appeal, the defendants first argued that each fraternity should be considered a separate market because once jewelry was produced, the manufacturer could only sell it to a member of the specific fraternity. The court acknowledged that rings could not be substituted for one another once produced, but suggested that focusing solely on demand side analysis was inappropriate. Implicitly applying potential producers were constant in identity and number over a period of years; United States v. Pennzoil Co., 252 F. Supp. 962, 975 (W.D. Pa. 1965) (although many others could refine Penn Grade crude, the actual refiners had remained the same for fifteen years); United States v. Bethlehem Steel Corp., 168 F. Supp. 576, 592-93 (S.D.N.Y. 1958) (steel producers focused on specific product lines). But see notes 33-35 supra and accompanying text (mere hypothetical potential seems to have been enough). Established patterns of trade may be accompanied by substantial barriers to entry. See notes 70-81 supra and accompanying text. Proof of these barriers, however, does not appear to be necessary to exclude mere hypothetical production from the relevant market. See 309 F.2d at 225; 252 F. Supp. at 975; 168 F. Supp. at 592.


88. 442 F.2d 1 (7th Cir. 1971).

89. For the sake of analysis, this Note ignores the possibility that the government's prima facie case to show lessened competition, *Horizontal Mergers After U.S. v. General Dynamics Corp.,* 92 Harv. L. Rev. 491, 495-99 (1978), was analogous to the government's burden of proof in market definition cases. See generally Rosenthal, supra note 9. The FTC's market definition may have constituted a prima facie market definition, and the defendant in *Balfour* may simply have failed in two separate instances to rebut the government's prima facie case. The deference afforded the government's case is obvious. In front of the Supreme Court the only even nominal government loss in substantive § 7 analysis until 1972 was United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964), where the government's case was not sustained factually on remand. United States v. Penn-Olin Chem. Co., 246 F. Supp. 917 (D. Del. 1965), *aff'd per curiam by an equally divided Court,* 389 U.S. 308 (1967); see United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966) (Stewart, J. dissenting) ("The sole consistency ... in litigation under § 7, [is that] the Government always wins."); F. Scherer, supra note 1, at 482-83; L. Sullivan, supra note 1, § 202 n.5.

90. L.G. Balfour Co. v. FTC, 442 F.2d 1, 9 (7th Cir. 1971).

91. Petitioners probably sought a narrow market definition here in an attempt to limit the scope of the remedy. See note 2 supra.

92. 442 F.2d at 10. A member of Sigma Alpha Mu will not buy a ring marked Pi Alpha Delta, no matter how low the price. See id.
duction analysis, the court reasoned that failure to include all fraternity emblematic rings in the same market "would deny the realities of the market situation." The defendants also contended that the market should include all manufacturers of emblematic jewelry—the potential producers of fraternity jewelry. The court summarily dismissed this argument, reasoning that Bethlehem Steel and its progeny dictated the application of demand side analysis alone. The court did not discuss the characteristics of the potential producers, except to suggest that the production involved was merely hypothetical. The implicit difference in rejecting markets of individual fraternities and of all emblematic jewelry manufacturers is that the defendant had the potential to and did change production procedures to sell to the various fraternities, whereas other manufacturers of emblematic jewelry did not in fact produce emblematic jewelry for fraternities.

The actuality requirement appears to be well established. The level of competitive overlap needed to include potential producers in the relevant product market, however, is unclear, although courts have suggested various standards. In Brown Shoe, for example, the Court found that potential producers would be included in the relevant market if there were a "general" trend in the industry of changing production capabilities to meet demand. In a more recent case, the Fifth Circuit queried whether production shifts were "common and feasible." Other courts have suggested that potential production must exist "as a practical matter." Applying this standard in Telex Corp. v. IBM Corp., the Tenth Circuit found that the plaintiff was

93. Presumably, production capabilities were changed to create the various rings, and thus the rings exemplified supply substitutes. See note 10 supra and accompanying text.
94. 442 F.2d at 11.
95. Id.
96. Id. Read narrowly, these cases reject only mere hypothetical potential production. Most of these cases explicitly analyze supply side factors. See notes 62-64 supra and accompanying text.
97. Petitioners argued that college fraternities "could, if necessary," turn to other manufacturers of emblematic jewelry. 442 F.2d at 11 (emphasis added). This implies that college fraternities did not, in fact, turn to these other suppliers.
98. This conclusion flows from the semantic distinction between "could, if necessary," see note 97 supra, and "market realities." See notes 93-94 supra and accompanying text. For an argument similar to that in Balfour, see United States v. Crowell, Collier & MacMillan, Inc., 361 F. Supp. 983, 990-91 (S.D.N.Y. 1973), where the court held that the most flashy band uniforms were viable alternatives for anyone seeking band uniforms. Manufacturers of other made-to-measure uniforms, for theater ushers, firefighters, or police, were excluded. The actual production flexibility distinction is at best an implicit one in that the court rejected defendant's argument by focusing on the distinctiveness of the buyers of band uniforms. Id. at 991.
99. See notes 82-85 supra and accompanying text.
100. 370 U.S. at 294 (1962).
101. Id. at 325 n.42; see notes 44-45 supra and accompanying text.
102. Yoder Bros. v. California-Florida Plant Corp., 537 F.2d 1347, 1367 (5th Cir. 1976), cert. denied, 429 U.S. 1094 (1977); see notes 16-18 supra and accompanying text.
103. Telex Corp. v. IBM Corp., 510 F.2d 894, 916 (10th Cir.), cert. dismissed, 423 U.S. 802 (1975); Abex Corp. v. FTC, 420 F.2d 928, 930 (6th Cir.), cert. denied, 400 U.S. 865 (1970). Because this is a question of fact, see note 7 supra, any of these standards is amenable to varying interpretations.
104. 510 F.2d 894 (10th Cir.), cert. dismissed, 423 U.S. 802 (1975).
an actual potential producer because it had advocated internal production changes, offered to shift manufacturing for its customers, and actually changed production to meet demand. The actuality requirement has also been restated as including only "serious" competition. In United States v. Empire Gas Corp.; the Eighth Circuit found various interchangeable products within the relevant market, but, because the suppliers were not yet "serious competitors," the court excluded them from the relevant market.

The Fifth Circuit recently analyzed actuality in an interesting way. In Heattransfer Corp. v. Volkswagenwerk, the court probed whether manufacturers focused "[w]ith few exceptions," on a particular product. The court suggested that actual overlap could be proven by the behavior of either those within the alleged narrow market, or those outside the narrow market but within the alleged broad market. Applying this standard the court found that no "outside" manufacturers produced the relevant product—no potential producers had actually entered the market—and that the producers in the market did not manufacture products in the alleged broader market, although they had the potential to do so. Because the products of "outside" and "inside" manufacturers did not overlap, the court upheld the narrow market definition. The approach taken by the Fifth Circuit is laudable because it scrutinizes competitive effects that originate both in the narrow and broad market.

The actuality requirement measures the production history of the potential producers. To reflect trade realities adequately, more than mere hypothetical potential production should be required. Although the standards to determine the requisite level of production overlap are similar, "as a practical matter" is the preferable standard because, through its application, an acknowledged competitive effect is included in the relevant market.

105. Id. at 917.
107. Id. at 303.
108. Id. at 304. Another interpretation of this holding is that a substantial time lag before entry by potential producers is possible excludes them from the relevant market. See note 76 supra and accompanying text.
110. Id. at 980.
111. See id.
112. Id. This was based on the finding that of the four major competitors in the market, two never sold outside the proposed market, one had other sales that were insignificant, and one, after having outside sales of 10%, focused at the time of the lawsuit almost exclusively on the proposed market. Id.
113. Id.; see note 85 supra and accompanying text.
114. 553 F.2d at 980.
115. See notes 86-87 supra and accompanying text.
116. A competitive effect from an actual potential producer might exist, however, without that potential producer being in the market. Cf. United States v. El Paso Natural Gas Co., 376 U.S. 651, 658-59 (1964) (a company can be a substantial factor in a market without technically being in the market).
117. See notes 100-14 supra and accompanying text.
118. See notes 103-05 supra and accompanying text. Furthermore, to the extent that inclusion
Furthermore, because potential production questions usually scrutinize the overlap of production capabilities, actuality analysis should explore the production of all manufacturers within the alleged broad market. This includes the acts of those within the alleged narrow market, and those only within the alleged broad market. Within this framework, supply side factors would be explored because of the recognized competitive effect, and would be limited to reflect trade realities.

II. ANALOGOUS CONCEPTS

Although the Supreme Court has neglected potential production analysis, lower federal courts have accepted it with appropriate limitations. Furthermore, other legal analyses presently used by courts explore the effects that suppliers have on a market. These analyses and their various limitations further reinforce a qualified acceptance of potential production analysis.

A. Capacity

Some courts use capacity rather than sales/production figures to determine a firm's market share. Sales/production figures take into account only actual transactions. When capacity is used, however, a court measures the extent of potential producers in the relevant market evidences a willingness to analyze the concept in depth. "as a practical matter" is preferable. See notes 104-05 supra and accompanying text. "Common and feasible." a "general" trend, "with few exceptions," and "serious competitors" seem to allow a competitive effect to be present without including that effect in the market. See notes 100-02, 106-14 supra and accompanying text.

119. See note 12 supra and accompanying text.
120. See notes 109-14 supra and accompanying text.
121. See notes 9-10 supra and accompanying text.
122. See notes 86-87 supra and accompanying text.
123. For a similar discussion advocating total acceptance of the doctrine, see Supply Substitutability, supra note 10, at 134-36.
124. See, e.g., United States v. Aluminum Co. of America, 377 U.S. 271, 278 (1964) (Rome Cable); United States v. Columbia Steel Co., 334 U.S. 495, 503, 505 (1948); Reynolds Metals Co. v FTC, 309 F.2d 223, 225 (D.C. Cir. 1962). One court discussed sales versus capacity as a measure and concluded that "[u]sing capacity as the measure of market position enables one to obtain a picture of the structure of the industry, unclouded by current manipulations which may be practiced by those who operate within the market." United States v. Amax, Inc., 402 F.Supp. 956, 962 (D. Conn. 1975). Production or sales, however, is the most frequent measure. See, e.g., United States v. Von's Grocery Co., 384 U.S. 270, 272 (1966); Brown Shoe Co. v. United States, 370 U.S. 294, 297 (1962); United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 379 (1956) (Cellophane). See generally 2 P. Areeda & D. Turner, supra note 1, ¶ 520. In some Supreme Court cases, capacity and production figures are used interchangeably without express distinction. See United States v. Aluminum Co. of America, 377 U.S. 271, 278 (1964) (Rome Cable); United States v. Columbia Steel Co., 334 U.S. 495, 505, 509 (1948). Capacity, as a measure of market power, can work for or against the defendant, depending on whether the percentage of the defendant's market share of capacity exceeds that of actual production. If a defendant's capacity is proportionately greater than that of its competitors, a capacity measure will work to the defendant's detriment; if it is proportionately less, a capacity measure will work to the defendant's benefit. Cf. note 2 supra and accompanying text (including potential production in the relevant product market can work for or against the defendant).
to which companies in the market could produce. Capacity essentially measures the potential of a firm to produce a certain good. Potential production essentially measures the potential of all companies to produce a certain good. The potential of a firm already in the market to increase production (capacity), and the potential of other firms to begin or resume production (potential production), are similar and are similarly limited. Because of the business inefficiencies usually associated with the maintenance of excess capacity, capacity does not always reflect market power. Similarly, mere hypothetical potential production is rejected as a distortion of trade realities.

B. Captive Sales

The second analogous situation is that courts include captive sales, those sales made within the company itself, in the relevant product market. Because captive sales are not directly subject to the forces of the competitive market, they constitute potential production. Hypothetically, if there are changes in demand, a company will divert captive sales to the competitive market. Courts have implicitly recognized this potential diversion as a competitive effect when they have included captive sales in the relevant market. A market including captive sales, those product transactions

127. This potential is the amount the firm is capable of producing (capacity) less that which is actually produced (sales/production). See notes 125-26 supra and accompanying text.
128. See notes 9-10 supra and accompanying text.
129. See 2 P. Areeda & D. Turner, supra note 1, § 520.
130. For a discussion of the actuality requirement as it relates to potential production, see notes 82-122 supra and accompanying text.
131. The difficulty of accurately measuring capacity is another reason for its limited use. See 2 P. Areeda & D. Turner, supra note 1, § 520. Similarly, mere hypothetical potential production may be rejected because of uncertainty of measure. See notes 86-87 supra and accompanying text.
132. See notes 86-87 supra and accompanying text.
133. See, e.g., Ford Motor Co. v. United States, 405 U.S. 562, 566 (1972); Sulmeyer v. Coca Cola Co., 515 F.2d 835, 850 (5th Cir. 1975), cert. denied, 424 U.S. 934 (1976); United States v. Aluminum Co. of America, 148 F.2d 416, 424 (2d Cir. 1945) (Alcoa). See generally 2 P. Areeda & D. Turner, supra note 1, §§ 527e, 527f; see also R. Posner, supra note 1, at 196. Inclusion of captive sales in the relevant market can work for or against the defendant. Cf. note 2 supra (including potential producers in the relevant market can work for or against the defendant). Exclusion of captive sales is a relevant consideration in determining whether the defendant's captive sales increased its market share. See Ford Motor, the inclusion of the captive sales of another manufacturer, General Motors, decreased Ford's market share. 405 U.S. at 566. In Sulmeyer, manufacturers other than the defendant had franchises—captive suppliers—that decreased the defendant's market share. 515 F.2d at 850. In Alcoa, however, the inclusion of the defendant's captive sales increased Alcoa's share of the market. 148 F.2d at 424.
134. 2 P. Areeda & D. Turner, supra note 1, §§ 527f & n.13. These authorities list other competitive effects that captive sales have on the competitive market. The major factor is that control over captive sales represents control over supply. In this sense, captive sales are related to capacity. See notes 124-32 supra and accompanying text.
135. See, e.g., ITT Corp. v. GTE Corp., 518 F.2d 913, 931 (9th Cir. 1975); Sulmeyer v.
between a parent and a subsidiary, is well accepted. In *Alcoa*, for example, the court included captive sales in the market because the defendant's internal sales "necessarily had a direct effect upon the . . . market" even without being a part of the competitive market. Thus, including captive sales in the relevant product market is directly analogous to potential production because both analyses recognize the competitive effect of goods not presently sold in the competitive market, and include that effect in the relevant product market. Furthermore, as with potential production, inclusion of captive sales in the relevant market is limited. Captive sales analysis requires actuality; thus, excluding mere potential sales to affiliates has been held appropriate.

C. Potential Competition

There is also a striking similarity between potential production and potential competition, a section 7 theory used to invalidate mergers. The potential competition theory asserts that a firm technically outside a market may have a competitive effect in that market. When this firm merges with a company in the market the elimination of that competitive effect may be deemed illegal. Both potential production and potential competition attempt to measure Coca Cola Co., 515 F.2d 835, 850 (5th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); United States v. Aluminum Co. of America, 148 F.2d 416, 424 (2d Cir. 1945) (*Alcoa*). This is appropriate because the captive buyer will almost always sell the end product to the consumer. See 148 F.2d at 424; F. Scherer, *supra* note 1, at 239.

136. In *Ford Motor Co. v. United States*, 405 U.S. 562, 566 (1972), the Court found that Ford had foreclosed 15% of the sparkplug market by purchasing a sparkplug manufacturer. General Motors already owned and purchased sparkplugs from AC, and AC's production, although captive, was included in the relevant market. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 301 (1962) (inclusion of sales to wholly-owned subsidiaries in the relevant product market); *ITT Corp. v. GTE Corp.*, 518 F.2d 913, 931 (9th Cir. 1975) (not even a consent decree shielding the anticompetitive effects of vertical integration from governmental attack merits the exclusion of captive sales from the relevant market in a private antitrust action). In strict competitive terms, however, non-integrated corporations making independent sales are preferable to vertically integrated firms making captive sales. See *Ford Motor Co. v. United States*, 405 U.S. at 570. Non-integrated companies are independent companies that do not sell to a parent or subsidiary. Between independents and captive sales are long-standing contractual relationships, which are usually considered "captive sales." See Sulmeyer v. Coca Cola Co. 515 F.2d 835, 850 (5th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

137. 148 F.2d 416 (2d Cir. 1945).

138. *Id.* at 424.

139. See notes 9-10, 134-35, *supra* and accompanying text.

140. For a discussion of actuality in potential production cases, see notes 82-122 *supra* and accompanying text.

141. *ITT Corp. v. GTE Corp.* 518 F.2d 913, 933 (9th Cir 1975). This is directly analogous to the exclusion of mere hypothetical potential production from the relevant market. See note 85 *supra* and accompanying text.

142. Companies in the market will hold down prices to preclude entry by these potential competitors. See generally R. Posner, *supra* note 1, at 113-25 (advocating the elimination of the doctrine); F. Scherer, *supra* note 1, at 482-83, 486; L. Sullivan, *supra* note 1, at 633-42.

143. In *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967), a product market extension case, the court found that a manufacturer of similar products had a procompetitive effect on the market. *Id.* at 579. Because the acquisition eliminated this effect, the merger was invalidated. *Id.*
the competitive effect of those not presently in the market and thus expand the relevant market by considering this "outside the market" effect. Furthermore, the distinction between actual and merely hypothetical potential production is analogous to the distinction between the perceived potential entrant and actual future entrant in potential competition. Potential production analysis rejects the mere hypothetical; potential competition accepts both variants, although actual future entrants should be given more weight.

Moreover, the concepts cannot be distinguished on the basis of the contexts in which they arise. Section 7 is meant to deal with probabilities and incipience. Relevant product market definitions should deal with realities. Thus, ambiguity arguably could be resolved in favor of invalidating mergers under potential competition theory and excluding potential producers from the relevant product market. If there is to be consistency and fairness in analyzing the sphere in which competition exists, however, potential competition and potential production should be both accepted and applied. Potential production analysis can prevent the potential competition theory from making relevant market definitions inapplicable.

144. See notes 9-10, 142-43 supra and accompanying text.
145. See notes 88-98 supra and accompanying text.
147. See note 85 supra and accompanying text.
149. See Supply Substitutability, supra note 10, at 135 n.28
151. See notes 86-87 supra and accompanying text
153. Accord, Supply Substitutability, supra note 10, at 134-35
154. Relevant market questions may be rendered inapplicable when a competitive effect from outside the market invalidates an act within the market. See Markovits, supra note 2, at 593 n.10.
potential competitive effect has been eliminated, potential production analysis would measure the importance of that effect. When potential producers expand the relevant market, potential competition standards would measure the competitive effect within the expanded sphere.

D. Practicable Turn

Finally, the alternate way of viewing the relevant geographic market set out in *Tampa Electric Coal Co. v. Nashville Coal Co.* supports the acceptance of potential production analysis. In *Tampa Electric*, the Court held that the relevant geographic market included those areas “to which the purchaser can *practically turn* for supplies.” Applying this standard, the Court concluded that the geographic market included areas that suppliers could have, but had not, entered. This broad geographic market definition differs from traditional relevant product market analysis. Under product analysis, the trier of fact examines the product and includes in the market only those goods that can presently be substituted for the relevant product—the actual product substitutes. Under *Tampa Electric*, however, the trier of fact includes in the geographical market all suppliers that could sell in the area by overcoming slight geographic barriers to entry—the potential producers. Thus, the production of these nearby suppliers is included in the relevant product market when determining market share. Similarly, potential producers capable of overcoming slight non-geographic barriers to entry should be included in the relevant product market because geographic barriers are similar to other entry barriers.

156. *Id.* at 327 (emphasis added). This idea previously had only been stated in the negative. If “purchasers cannot, as a practical matter, turn to suppliers outside their own area,” the geographic market can be restricted. Standard Oil Co. v. United States, 337 U.S. 293, 299 n.5 (1949). The positive statement in *Tampa Electric* reinforces the expansive definition of the relevant market.
157. 365 U.S. at 331-32. The expansive geographic market definition might also have resulted from a reversal of the usual position of the parties. Usually, an antitrust plaintiff asserts that the defendant has violated antitrust law. In *Tampa Electric*, however, a seller sought to repudiate a contract that the purchaser wanted to enforce. The seller alleged that it had violated § 3 of the Clayton Act, 15 U.S.C. § 14 (1976), by entering into the contract. See Brief for Petitioner at 52-58, *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961), reprinted in 7 Major Briefs, *supra* note 45, at 339-44.
159. See note 8 *supra* and accompanying text.
160. All relevant production within the relevant geographic market is included in determining the market share. See note 2 *supra* and accompanying text.
161. “The criteria to be used in determining the appropriate geographic market are essentially similar to those used to determine the relevant product market.” *Brown Shoe Co. v. United*
Admittedly, different considerations may be involved in different analyses. Nevertheless, these analogous situations demonstrate courts' recognition of the competitive effect that can be exerted from the supply side, and support the acceptance, with limitations, of potential production analysis.

III. APPROPRIATE MARKETS FOR POTENTIAL PRODUCTION ANALYSIS

Potential production analysis may not be warranted in all cases. There are, however, at least three markets in which potential production analysis is appropriate: markets of intermediaries; markets defined by a strong buyer; and markets composed of highly differentiated goods.

A. Intermediaries

Potential production analysis should be used when the identity of the buyer is not clear or when the market is one that connects one group with another. Such markets are dominated by brokers, franchisees, and other intermediaries. For example, in Cass Student Advertising, Inc. v. National Educational Advertising Services, Inc., the defendant allegedly monopolized the service market connecting national advertisers with student newspapers. The district court found that the buyers were the national advertisers and that they had reasonable alternative means of reaching students. Accordingly, it found a relevant market comprised of all companies that could connect advertisers with students. The Seventh Circuit, however, reasoned that both the advertisers and the college newspapers could be considered buyers. Because it was "possible for [the defendant] to lack the requisite market power in one direction while achieving a complete stranglehold in the other," the court asserted that "two relevant market determinations might be necessary." Although both supply and demand factors can affect a market, the relevant product market is the sphere of effective competition, and that sphere should not change depending on the viewpoint of analysis. Thus, it is difficult to understand how two market

States, 370 U.S. 294, 336 (1962); see United States v. Grinnell Corp., 384 U.S. 563, 593 (1966) (Fortas, J., dissenting); Mississippi River Corp. v. FTC, 454 F.2d 1093, 1090 (8th Cir. 1972); Mytinger & Casselberry, Inc. v. FTC, 301 F.2d 534, 542 (D.C. Cir. 1962) (Burger, J., dissenting). See also R. Posner, supra note 1, at 42.


163. 516 F.2d 1092 (7th Cir.), cert. denied, 423 U.S. 986 (1975).

164. Id. at 1093.

165. The advertisers could have reached the student market through television, radio, direct mail, and magazines. Id. at 1097.

166. Id. In defining the market as those connecting national advertisers with students, the court ignored the role of college newspapers in defining the market. Id. The defendant provided a service that was impractical otherwise. Id. at 1098.

167. Id. at 1099. The circuit court believed that the district court had erred on this point. Id.

168. Id.

169. Id. at 1098.

170. See notes 6-10 supra and accompanying text.

171. See note 1 supra and accompanying text.
definitions flow from one service. Nevertheless, the court found that the student newspapers, not the national advertisers, were the buyers. 172 Accordingly, it remanded with instructions to analyze the relevant market from the viewpoint of the newspapers. 173 This search for a buyer was both unnecessary and inappropriate. Recognizing the singular market power of intermediaries over the groups serviced, the court should have defined the market as those companies capable of connecting the two groups. This requires both supply and demand side analysis.

In Twin City SportService, Inc. v. Charles O. Finley & Co., 174 the recognition of the singular position of an intermediary led to a straightforward application of potential production analysis. In its counterclaim, the defendant had alleged that Twin City had monopolized the market of concession services at major league baseball games. 175 The district court had accepted defendant's argument and found the relevant product market to be provision of concession services to major league baseball. 176 The Ninth Circuit, however, described the service in issue as the sale of food to the public and the purchase of franchises from baseball teams. 177 Thus, the court recognized that the concessionaires were intermediaries between baseball club owners and food-consuming fans. Because major league baseball (supply) could turn to various organizations to make food available to fans (demand), the court held that the relevant product market included those companies that sold food at leisure time activities—those capable of connecting the supply with the demand—not only those selling to major league baseball fans. 178 Accordingly, the case was remanded to determine the scope of this connecting market. 179 Unlike the Seventh Circuit in Cass, the Ninth Circuit in Twin City recognized the competitive sphere in which an intermediary operated, and pursued the proper approach by explicitly recognizing and analyzing the supply side effect in a market of intermediaries.

B. Powerful Buyers

The presence of a powerful buyer 180 also merits potential production analysis. When the buyer possesses market power vastly superior to that of

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172. 516 F.2d at 1099. This finding was based on the fact that the defendant required contractual relations and commissions only of the college newspapers. Id.
173. Id. at 1099-1100. This misperception as to the nature of the market is not innocuous. From the viewpoint of the newspapers, the defendant provided willing advertisement purchasers. Other means of obtaining this income might include, for example, local businesses. To overlook the role played by national advertisers would be to misunderstand the nature of the defendant's service.
174. 512 F.2d 1264 (9th Cir. 1975).
175. Id. at 1269. The other issue in the litigation was the validity of the concessionaire contract between the parties. This issue previously had been resolved in favor of the plaintiff. Id.
176. Id. at 1272.
177. Id.
178. Id. at 1272-73.
179. Id. at 1273.
180. A market where many sellers serve one buyer is a monopsony; one with few buyers is an oligopsony. See F. Scherer, supra note 11, at 239. The unfamiliarity of these terms, as compared to the more common terms describing powerful sellers, like monopoly and oligopoly, corresponds to a general lack of analysis. See id. at 239-52.
the seller, that power can define the market. Usually, the buyer has comparatively little market power and the relevant product is defined as that which is actually available.182 A seller with comparatively little market power, forced to tailor its business to the desires of the powerful buyer, should also be in a market defined in terms of what is realistically available.183 A small individual buyer has practicable access only to what the powerful seller offers. A powerful buyer, on the other hand, has practicable access to what the small individual seller has the potential to offer. Thus, a market with a powerful buyer should be defined as where that buyer can “practically turn for supplies.”184

The effect that buyer characteristics have on the relevant product market is already recognized. Evidence of different buyers can lead to a narrow market based on that difference.185 Furthermore, evidence of buyers exerting pressure to receive discounts has supported a relevant product market including only sales to those powerful buyers.186 Courts have even defined the relevant product market in terms of those manufacturers supplying a powerful buyer.187 In Ovitron Corp. v. General Motors Corp.,188 for example, the district court defined the market as those companies that provided the government with a particular squad radio. The court found that the defendant had monopoly power because it supplied the majority of the government's needs for that product.189 In effect, a single buyer defined the market. Ignoring a powerful buyer, one which is able to "play one seller off against the

181. See Ovitron Corp. v. General Motors Corp., 364 F. Supp. 944, 947 (S.D.N.Y. 1973), aff'd per curiam on other grounds, 512 F.2d 442 (2d Cir. 1975). Even though most goods ultimately go to consumers, there are many “intermediate transactions” where a powerful buyer might intrude. F. Scherer, supra note 1, at 239.
182. See notes 59-64 supra and accompanying text.
183. See F. Scherer, supra note 1, at 249-50.
184. Tampa Elec. Coal Co. v Nashville Coal Co. 365 U.S. 320, 327 (1961). This analogizes the relevant geographic market definition of Tampa Electric to a relevant product definition. See notes 155-61 supra and accompanying text.
187. See Ovitron Corp. v. General Motors Corp., 364 F. Supp. 944, 947 (S.D.N.Y. 1973), aff'd per curiam on other grounds, 512 F.2d 442 (2d Cir. 1975); cf. Ford Motor Co. v United States, 405 U.S. 562, 565 (1972) (Ford's market position permitted it to buy sparkplugs at below production costs); United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 593-95 (1957) (GM) (the market power of the automotive industry is arguably the rationale for finding a market of automotive finishes, although the stated reason is that the product is peculiarly appropriate for that market).

188. 364 F. Supp. 944 (S.D.N.Y. 1973), aff'd per curiam on other grounds, 512 F.2d 442 (2d Cir. 1975).
189. Id. at 947.
others," however, leads to a market definition that ignores the practical effect of market power on the supply side. Thus, the Ovitron court should have determined with whom the government could have signed a contract for squad radios, rather than with whom the government had signed a contract. Only this type of analysis will recognize all the competitive effects in a market which includes a powerful buyer.

C. Highly Differentiated Products

Potential production analysis is also appropriate in markets of highly differentiated products in which goods are not interchangeable once produced. In this situation, demand side analysis does not adequately explore the scope of the market. Highly differentiated product markets are more appropriately defined as the buyers that the seller can service. For example, newspapers are highly differentiated products because old papers are not reasonably interchangeable by readers for current ones. A newsstand selling outdated papers could not compete with newsstands selling current papers. Nevertheless, each day's paper is not in a separate market, despite this lack of demand substitutability. Rather, a relevant market of newspapers includes the products of the businesses able to gather, print, and sell news.

Occasionally only a limited part of a highly differentiated product market will meet the needs of particular buyers. Once a Ford is purchased, for example, only a Ford piston can be used when repairs are needed. Courts generally have been reluctant, however, to define the relevant market as the defendant's product, preferring to focus on functional interchangeability. This reluctance has often properly been coupled with potential production analysis, most notably in markets of computer peripherals. In ILC Periph-

190. F. Scherer, supra note 1, at 250; see id. at 249-50.
194. An implicit actuality requirement is included. Mere potential to produce newspapers is not enough; some actual production must have been shown. A similar analysis is present in a market of emblematic jewelry. See L.G. Balfour Co. v. United States, 442 F.2d 1 (7th Cir. 1971). In Balfour, the court held that to have separate markets for each fraternity "would deny the realities of the market situation." Id. at 11.
196. See note 11 supra and accompanying text.
197. E.g., Kaplan v. Burroughs Corp., 611 F.2d 286, 293-95 (9th Cir. 1979); Telex Corp. v. IBM Corp., 510 F.2d 894, 899 (10th Cir.), cert. dismissed, 423 U.S. 802 (1975); ILC Peripherals v. IBM Corp., 458 F. Supp. 423, 428-29 (N.D. Cal. 1978), appeal docketed sub nom. Memorex Corp. v. IBM Corp., Nos. 78-3050, 78-3236 (9th Cir. Aug. 1, 1979).
eral Leasing Corp. v. IBM Corp., the potential producers of IBM plug-compatible peripherals—the manufacturers of non-IBM plug-compatible peripherals—were included in the relevant market. Thus, the court explored the production potential of the manufacturers of products which were functionally equivalent but not demand substitutes. Potential production analysis, therefore, prevents an unfairly narrow market definition in a market of high product differentiation which could result from a mechanical application of demand side analysis.

CONCLUSION

In the field of antitrust law, it may be “delusive to treat opinions written by different judges at different times as pieces of a jig-saw puzzle which can be, by effort, fitted correctly into a single pattern.” Nevertheless, the effort is worthwhile. In defining the relevant product market, potential production has long been a misplaced piece. Rather than setting this piece aside because it is not amenable to the traditional approach, courts should strive systematically and consistently to find where it fits in the overall puzzle. Only then will the goal of a consistent and adequate framework that accounts for all competitive effects be attained.

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199. Id. at 429.