



Future Competition and the Clayton Act at 100

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Some More History

- Penn-Olin (1964)
 - Double potential entrant theory; existing market.
- Falstaff (1973)
 - Perceived potential entrant theory; existing market.
- Salk Business Review letter (1975) (reiterated in 1980 DOJ research joint venture report)
 - Licensing somatostatin to fixed total of five pharmaceutical licensees initially denied; later approved after proof that simple non-exclusives would not induce necessary clinical trials.
 - No existing market, but market reasonably foreseeable.

SCM v. Xerox (1981)

- Xerox is licensed to Battelle's plain paper copying patents, but in 1956 acquires the patents outright.
- Jury finding, upheld by court of appeals, that the reasonably foreseeable effect at the time of the purchase was monopoly of a relevant market.
 - Plain paper copying market did not exist in 1956, but existence was reasonably foreseeable.

SCM v. Xerox (1981)



SCM v. Xerox (1981)

- Court of appeals
 - Because market did not exist in 1956, and because Xerox then lacked market power, “the policies of the patent laws” preclude antitrust liability.
- Solicitor General views (by Supreme Court request)
 - An “acquisition by a company having no power in the relevant market at the time of the acquisition does not violate” either the Sherman or Clayton Acts, *whether a patent is involved or not*.
 - First William F. Baxter brief in Supreme Court.
 - Certiorari denied.

But since SCM . . .

- Now standard to examine probable effects in future markets; no longer controversial.
 - Numerous pharmaceutical merger cases.
 - Some non-pharma too, such as Nielsen/Arbitron consent, with divestiture, to remedy future effects in a cross-platform audience measurement market that did not then (or now) exist.
 - Dissent by Commissioner Wright, not questioning the concept of harm in future markets, but finding the proof insufficient to show a probable adverse effect.

What standard?

- Acquisitions may be blocked or unwound when there is a reasonable probability that competition will be lessened substantially.
- Majority statement in Nielsen/Arbitron and Wright dissent frame the issues well

What standard?

1. Will the relevant market come into being and, if so, when?
2. What is the potential that the putative market will be supplanted or overtaken by some other technology or paradigm?
3. Who are likely to be the rivals in the future market?
4. Will the merging parties or assets have market power in the putative market?
5. If the acquisition is blocked, will that speed up or retard the relevant product's emergence?

What standard?

- Reasonable probability standard means the future market should be reasonably foreseeable.
- Projecting too far out reduces foreseeability.
- If the parties are at the research stage, almost certainly too early to find a reasonable probability that competition will be lessened.
- If the product is in development (e.g., FDA testing and review), antitrust intervention much more likely to be beneficial.