

DEFINING THE GEOGRAPHIC MARKET IN MODERN  
COMMERCE: THE EFFECT OF GLOBALIZATION AND E-  
COMMERCE ON *TAMPA ELECTRIC* AND ITS PROGENY

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operate in the automotive, aerospace, defense, hotel supply, homebuilding, contact lens, wine and computer manufacturing industries, just to name a few.<sup>9</sup>

The estimated aggregate dollar sum of imports from Internet business in 2004 will range between four and eight trillion dollars.<sup>10</sup> The U.S. gross domestic product in 2001 was just over ten trillion dollars.<sup>11</sup> Comparing these figures shows the importance of these two growing areas in the global market. In 1960, just before the Court decided *Tampa Electric*, imports totaled twenty-two billion dollars and the Internet did not exist.<sup>12</sup> As a result of the sweeping changes that have revamped modern commerce, lawyers, judges and economists must explore whether the *Tampa Electric* standard provides sufficient guidance to manage present commercial realities.

This Article's purpose is to reinvigorate academic debate concerning geographic market definition. Global trade and e-commerce continue to play a larger role in commercial transactions. The *Tampa Electric* definition is too vague to aid courts with the dynamic changes this new economy has ushered in, and the definition must be reexamined. This Article addresses this issue in four parts. Part II demonstrates the importance of properly defining the geographic market in antitrust cases and provides a detailed analysis of the current test courts use to define the geographic market. Part III examines the various academic theories and their approach to delineate the relevant geographic market, particularly where international sellers compete. Part IV discusses *United States v. Eastman Kodak Co.*, a Second Circuit case addressing foreign competition in the geographic market.<sup>13</sup> Part IV uses *Kodak* to highlight the danger of allowing courts to supplement *Tampa Electric*'s vagaries with contradictory academic theories. Part V discusses the challenge that e-commerce and Internet sales pose to defining the relevant geographic market. Part V also proposes an alternative approach that courts should employ to define the geographic markets where e-commerce competes with traditional "brick and mortar" sellers. The proposed approach avoids overstating the

<sup>9</sup>*Id.*

<sup>10</sup>*Id.*

<sup>11</sup>Bureau of Econ. Analysis, U.S. Dep't of Commerce, *Business Situation: Advance Estimates for the Fourth Quarter of 2001*, SURV. CURRENT BUS., Feb. 2002 at 1.

<sup>12</sup>U.S. Census Bureau, *U.S. Trade in Goods and Services - Balance of Payments (BOP) basis* (June 13, 2003), available at <http://www.census.gov/foreign-trade/statistics/historical/gands.pdf>.

<sup>13</sup>63 F.3d 95 (2d Cir. 1995).

geographic market by expanding outward in concentric circle fashion to encompass Internet sellers.

## II. PART II

### A. *The Importance of Geographic Market Delineation in the Antitrust Context*

Delineating the relevant market is a prerequisite for antitrust claims under sections 3 and 7 of the Clayton Act,<sup>14</sup> Sections 1 and 2 of the Sherman Act,<sup>15</sup> and section 5 of the Federal Trade Commission Act.<sup>16</sup> To delineate the relevant market requires defining both the relevant geographic and product markets. The common law defines the geographic market as the area where sellers operate and where the buyer can practically turn for supplies.<sup>17</sup> The relevant product market refers to those products that compete with one another in a given industry.<sup>18</sup> Products that are good substitutes for one another fall within the same product market. The boundary for substitution is drawn based upon reasonable interchangeability of use as determined by cross-elasticity of demand.<sup>19</sup> Reasonability of use refers to the consumer's ability to switch from one product or service to another in response to price changes.<sup>20</sup> For the purpose of analysis hereafter, it is assumed that the product market is already established or that both parties have stipulated to the relevant product market.

<sup>14</sup>15 U.S.C. §§ 14, 18 (2000).

<sup>15</sup>*Id.* §§ 1, 2.

<sup>16</sup>*Id.* § 45.

<sup>17</sup>*Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961).

<sup>18</sup>*See generally Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 482 (1992).

<sup>19</sup>*See id.* While not of particular relevance to the discussion in this work, this inquiry also relies heavily on neoclassic economic theory. Courts often use cross-elasticity analysis in making this inquiry. Though the information for this analysis is not always available, it demonstrates the likelihood that a buyer may substitute product A for product B given price increase in product A.

<sup>20</sup>*See id.*

### 1. Inadequately Defining the Geographic Market Can Lead to Dismissal

It is paramount that an antitrust plaintiff does not overlook the importance of defining the relevant geographic market. The party seeking relief bears the burden of adequately defining the geographic market as a matter of law.<sup>21</sup> Both dismissal and summary judgment are proper when a plaintiff fails to define the relevant geographic market.<sup>22</sup> A plaintiff who alleges that the relevant geographic market is the area where the business tries to sell its goods, without accompanying economic data such as elasticity of demand and barriers to entry, fails to meet his burden.<sup>23</sup> Thus, even in a case in which defining the relevant geographic market is not an important strategic element of a plaintiff's antitrust claim, it cannot be overlooked.

### 2. Manipulating the Geographic Market Affects Antitrust Enforcement

A market actor's ability to affect competition cannot be measured without a relevant geographic market definition.<sup>24</sup> The importance of market definition within the framework of the antitrust statutes is most eloquently stated in Justice Fortas's dissent in the *United States v. Grinnell Corp.* case:

[T]he search for "the relevant market" must be undertaken and pursued with relentless clarity. It is, in essence, an economic task put to the uses of the law. Unless this task is well done, the results will be distorted in terms of the conclusion as to whether the law has been violated and what the decree should contain.<sup>25</sup>

Geographic market definition is tactically important to both parties in an antitrust case. Where a defendant can persuade the court that the defendant competes in a broader geographic market, there is a lower probability that

<sup>21</sup> See, e.g., *Apani S.W., Inc. v. Coca-Cola Enters., Inc.*, 128 F. Supp. 2d 988, 991 (N.D. Tex. 2001), *aff'd*, 300 F.3d 620 (5th Cir. 2002).

<sup>22</sup> *Home Health Specialists, Inc. v. Liberty Health Sys.*, No. CIV.A.92-3413, 1994 WL 463406, at \*2 (E.D. Pa. Aug. 24, 1994), *aff'd*, 65 F.3d 162 (3d Cir. 1995).

<sup>23</sup> *Id.*

<sup>24</sup> *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993).

<sup>25</sup> 384 U.S. 563, 587 (1966) (Fortas, J., dissenting).

the defendant's alleged anticompetitive conduct will result in a violation of the antitrust laws. Conversely, a narrow, localized geographic market increases the odds that a defendant's alleged conduct is anticompetitive. Case law illustrates that manipulating the geographic market can affect whether alleged anticompetitive behavior triggers antitrust enforcement.<sup>26</sup>

*Tampa Electric*, itself, illustrates the tactical importance of defining the geographic market. *Tampa Electric* involved a requirements contract in which petitioner agreed to buy a specified quantity of coal each year for a twenty-year period from an exclusive dealer.<sup>27</sup> Requirements contracts violate section 3 of the Clayton Act when their effect may be to substantially lessen competition or tend to create a monopoly in any line of commerce.<sup>28</sup> A contract substantially lessens competition when it forecloses a substantial share of commerce in the relevant market.<sup>29</sup> To determine whether a substantial share of commerce has been foreclosed, a court must first delineate the relevant geographic market. Both the district court and the United States Court of Appeals for the Sixth Circuit determined that the geographic market was peninsular Florida.<sup>30</sup> Limiting the market to peninsular Florida, the contract accounted for eighteen percent of the total coal tonnage in that geographic area, an amount significant enough to trigger antitrust enforcement.<sup>31</sup>

The United States Supreme Court disagreed, holding that the geographic market was not limited to peninsular Florida, rather, that the relevant geographic market was national.<sup>32</sup> Examined within this national market, the requirements contract represented only 0.77 % of all coal delivered in the nation.<sup>33</sup> This small restriction did not substantially lessen competition and the district court holding was reversed. Hence, manipulating the geographic market definition changed the outcome of the case.

<sup>26</sup> See, e.g., *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961); *United States v. Eastman Kodak Co.*, 63 F.3d 95 (2d Cir. 1995).

<sup>27</sup> 365 U.S. at 321.

<sup>28</sup> 15 U.S.C. § 14 (2000).

<sup>29</sup> *Tampa Elec.*, 365 U.S. at 328.

<sup>30</sup> See generally *Tampa Elec. Co. v. Nashville Coal Co.*, 168 F. Supp. 456 (M.D. Tenn. 1958), *aff'd*, 276 F.2d 766 (6th Cir. 1960), *rev'd*, 365 U.S. 320 (1961). Both courts accept with little discussion that the relevant market is limited to "peninsular Florida." There is little supporting economic data or statistics for this conclusion.

<sup>31</sup> *Tampa Elec.*, 365 U.S. at 331.

<sup>32</sup> *Id.* at 331-32.

<sup>33</sup> *Id.* at 333.

Expanding the geographic market from a national to a global level led to a similar result in *United States v. Eastman Kodak Co.*<sup>34</sup> *Kodak* involved a petition to terminate a consent decree. In the antitrust context, a consent decree should be terminated when the defendant shows that the purpose of the decree has been substantially effectuated or that the decree is not properly adapted to accomplishing its original purposes.<sup>35</sup> In *Kodak*, this required that Kodak prove it no longer possessed market power over film and photo-finishing, such that the purpose of the original decrees, the elimination of monopoly and unduly restrictive practices, had been achieved.<sup>36</sup> Whether Kodak possessed market power depended upon whether the relevant geographic market was global or national.<sup>37</sup> If the geographic market was national, Kodak possessed a sixty-seven percent national market share and accounted for seventy-five percent of all domestic sales.<sup>38</sup> Expanding the relevant market globally diminished Kodak's market share to a modest thirty-six percent in a highly competitive international market.<sup>39</sup> The Second Circuit chose the latter, holding that Kodak competes in a global market.<sup>40</sup> Faced with robust competition in the global photo-finishing market, the purpose for the consent decrees had been achieved. Again, as an academic exercise, *Kodak* reiterates the principle that size of the geographic market affects the outcome of the case.

### B. Geographic Market Definition at Common Law

*Tampa Electric* provides the relevant geographic market definition in most antitrust cases. *Tampa Electric* defines the relevant geographic market as "the market area in which the seller operates, and to which the purchaser can practicably turn for supplies."<sup>41</sup> *Tampa Electric* takes its

<sup>34</sup> 63 F.3d 95 (2d Cir. 1995).

<sup>35</sup> *Id.* at 101 (citing *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 248 (1968)). Note that the court sided with Kodak on the procedural question that a more flexible approach should be used to determine when the court will terminate a consent decree. The court held that a good starting place is to show that the original purpose for the decrees has been satisfied but that the court has the flexibility to decide whether the conditions have changed significantly such that the decree should be terminated. *Id.*

<sup>36</sup> *Id.* at 102.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 98-99.

<sup>39</sup> *Id.* at 100.

<sup>40</sup> *Id.* at 105.

<sup>41</sup> *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961).

theoretical underpinnings from the classic dicta in *Standard Oil v. United States*: "Since it is the preservation of competition which is at stake, the significant proportion of coverage is that within the area of effective competition."<sup>42</sup> This does not necessarily imply that a geographic market will be limited to a metes and bounds definition.<sup>43</sup> Rather, courts strive for a market definition that comports with commercial realities and is economically significant.<sup>44</sup>

Using its own definition, the Court in *Tampa Electric* examined market statistics to conclude that the market for coal was national.<sup>45</sup> The first part of the *Tampa Electric* definition charts the area sellers operate. The Court examined the behavior of these supply side actors, in this case coal manufacturers, by examining statistics and testimony showing the area in which the seller operates. Over seven hundred producers operated in more than seven states in the Appalachian region.<sup>46</sup> These seven hundred producers delivered a net quantity of 359 million tons of coal suitable for Tampa's requirements.<sup>47</sup> Of the tonnage produced, 290 million tons were sold on the open market, of which only 2.3 million tons reached Florida or Georgia.<sup>48</sup> This data led to the conclusion that the coal producers operated on a national level and that the buyer, to find adequate substitutes, must search within the seven-state Appalachian region, a market that reaches buyers nationally. The Court, however, brushed over the separate inquiry of where the buyers turn for supplies.

The statistics relied upon to find a national market are confusing. Statistics support the fact that sellers operate within a national market. But, the Court jumped to the conclusion that the buyers also may find substitutes in a national market, without offering evidence to support this assumption. The Court repeatedly emphasized that coal sellers reach buyers on a national level. *Tampa Electric* never analyzes the second part of the very test it creates: where buyers practically turn for substitutes. *Tampa Electric* states repeatedly that substitutes are available to buyers in the seven-state Appalachian region. The statement that substitutes are available in seven-state region belies the conclusion that buyers may practically turn to a

<sup>42</sup> *Id.* at 328 (citing *Standard Oil Co. v. United States*, 337 U.S. 293, 299 (1949)).

<sup>43</sup> *Id.* at 331.

<sup>44</sup> *Brown Shoe Co. v. United States*, 370 U.S. 294, 336-37 (1962).

<sup>45</sup> *Tampa Elec.*, 365 U.S. at 331.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 332.

<sup>48</sup> *Id.*

national market. By offering no evidence to support that buyers may turn to a national market for substitutes, which the court implies is its own distinct test, the Court is forced to bootstrap its conclusion with respect to the supply side test to support this finding. The conclusion under the latter half of *Tampa Electric's* geographic market definition, that buyers find substitutes nationally, really just incorporates the same conclusion from the supply side test. By so concluding, the Court ignores the separate demand side inquiry—an inquiry that the language of *Tampa Electric* implies is its own distinct test.

### 1. The Horizontal Merger Guidelines Approach and Its Influence

In 1997 the United States Department of Justice and the Federal Trade Commission revised the Horizontal “Merger Guidelines.”<sup>49</sup> The Merger Guidelines offer their own approach for delineating the relevant geographic market for mergers under section 7 of the Clayton Act.<sup>50</sup> The Merger Guidelines’ approach to market delineation is influential outside the merger context, as it is cited in other antitrust contexts where market definition is required. For example, a provisional market in the monopoly context is drawn similarly to the Merger Guidelines approach.<sup>51</sup>

The Merger Guidelines’ approach requires delineating both a product and geographic market.<sup>52</sup> Assuming the product market is correctly defined, the first step is to define a provisional geographic market.<sup>53</sup> The provisional market offers an initial determination of the competition of a product within a specified geographic area in which the alleged monopolist competes.<sup>54</sup> This market is tested with a hypothetical five percent price increase by the alleged monopolist, to gauge the effect on consumers and producers.<sup>55</sup> If producers outside the provisional market respond to the price increase by sending goods to the relevant market, the market is redrawn to include those new competitors.<sup>56</sup> The redrawn market then

<sup>49</sup>U.S. Dep’t of Justice & Fed. Trade Comm’n, *Horizontal Merger Guidelines* (rev. ed. April 8, 1997), available at [http://www.usdoj.gov/atr/public/guidelines/horiz\\_book/hmg1.html](http://www.usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html).

<sup>50</sup>*Id.*

<sup>51</sup>*Id.*

<sup>52</sup>*Id.* § 1.0.

<sup>53</sup>*Id.* § 1.2.1.

<sup>54</sup>*Id.* § 1.0.

<sup>55</sup>*Id.* §§ 1.2.1, 1.4.

<sup>56</sup>*Id.* § 1.2.1.

becomes the provisional market, and the process of adding a hypothetical five percent price increase is repeated *ad nauseum* until the price increase no longer attracts new producers to the provisional market.<sup>57</sup> When new entrants no longer respond to the five percent price increase, the relevant geographic market has been defined.

## III. ACADEMIC THEORY IN THE GEOGRAPHIC MARKET

### A. The Diversion Theory

Arguably, the most influential scholarly work on the geographic market is William Landes and Richard Posner’s law review article, *Market Power in Antitrust Cases*, which introduces the “diversion theory.”<sup>58</sup> The diversion theory proposes:

that if a distant seller has some sales in a local market, all its sales, wherever made, should be considered a part of that local market for purposes of computing the market share of a local seller. This is because the distant seller has proved its ability to sell in the market and could increase its sales there, should the local price rise, simply by diverting sales from other markets.<sup>59</sup>

This diversion theory is applicable to all distant sellers but is intended to address foreign competition.<sup>60</sup> The result is that when a distant seller has proven its ability to make some non-nominal amount of sales in the relevant market, that seller’s total output is factored into calculating market share.<sup>61</sup>

The theory that all of a distant seller’s output should be factored into the relevant market where that distant seller has proven its ability to sell in the market is not original.<sup>62</sup> According to the authors, the novel element is the theory that transportation costs or other distant related costs need not be factored into the seller’s ability to divert entire output.<sup>63</sup> They reason that

<sup>57</sup>*Id.*

<sup>58</sup>William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981).

<sup>59</sup>*Id.* at 963.

<sup>60</sup>*Id.* at 964.

<sup>61</sup>*Id.* at 963–64.

<sup>62</sup>*Id.* at 964.

<sup>63</sup>*Id.*

when firms have proven their capability of selling one unit of the product in the domestic market, "they ought to be able to sell many units there at no appreciably higher cost, since they have only to divert output from other markets."<sup>64</sup> Where foreign competition cannot be excluded, the conclusion is that a domestic producer cannot raise prices without foreign competition flooding the market.<sup>65</sup>

What is important is thus not any transportation cost or other barrier that foreign producers may face but (1) the fact that they sell some output in the local market and (2) the size of their total output, wherever sold, relative to the size of the local market in question.<sup>66</sup>

The diversion theory's complexity buries its caveats. The diversion theory applies only where the foreign and domestic products involved are identical.<sup>67</sup> "Even slight differences might induce the domestic monopolist to set a price at which some imports occurred."<sup>68</sup> The theory is less useful as a result of this stipulation. A correctly defined geographic market thus hinges upon a perfectly defined product market. Erroneously determining that two products are perfectly identical when in fact they are not, imputes the entire output of foreign sellers into the geographic market. Courts are left with zero margin for error when delineating the relevant markets under the diversion theory. Given the inherent difficulty that courts confront when attempting to delineate the relevant market based on conflicting economic theory, it may be imprudent not to allow room for error.

Professors Landes and Posner propose that this obstacle of perfectly identical products can be overcome under two circumstances. The first proposal is that "in the case of a differentiated product, that imports cross some percentage threshold of the domestic market before the entire output of importing foreign producers may be included in that market."<sup>69</sup> The second applies when a plaintiff proves that a foreign producer faces large transportation or tariff barriers that are not offset by lower production costs.<sup>70</sup> In these instances, the plaintiff may exclude the output of that

<sup>64</sup>*Id.*

<sup>65</sup>*Id.*

<sup>66</sup>*Id.*

<sup>67</sup>*Id.* at 965.

<sup>68</sup>*Id.*

<sup>69</sup>*Id.*

<sup>70</sup>*Id.*

importer on the theory that consumer preference demonstrates the existence of a differentiated product.<sup>71</sup>

Landes and Posner also discount the influence of tariffs and transportation costs as barriers to international producers.<sup>72</sup> While the authors concede that foreign competitors may be more affected by shortages in supply than domestic competitors, they believe that the qualifications contained in the diversion theory, requiring the seller to have achieved some non-nominal sales, account for the potential for higher transaction costs.<sup>73</sup> When a seller has achieved non-nominal sales, this seller has proven its ability to overcome any obstacles that would keep him from competing in the relevant market.<sup>74</sup> The authors add that, in addition to being non-nominal, the sales should be within the relevant market for a continuous period of several years.<sup>75</sup> Foreign sellers whose products only reach a isolated geographic area within the domestic market, should not be included as competitors in the entire market.<sup>76</sup> For example, a European seller whose product only reaches the East Coast should not be calculated as part of the entire U.S. market.<sup>77</sup>

The diversion theory is rooted in the belief that market share data alone inaccurately represents actual market power.<sup>78</sup> Because a market actor possesses significant market share does not *ipso facto* imply that said actor possesses market power.<sup>79</sup> Market share alone does not account for the output of fringe firms and other potential competitors that might enter the market in response to price change.<sup>80</sup> These types of potential competitors may exert a competitive pressure on an actor possessing a high market share, even though neither is actually included in market share computations.<sup>81</sup>

Even with the few stipulations that restrict application of the diversion theory, its result is to expand the relevant geographic market in most cases.

<sup>71</sup>*Id.*

<sup>72</sup>*Id.* at 966.

<sup>73</sup>*Id.* at 966-67.

<sup>74</sup>*Id.* at 967.

<sup>75</sup>*Id.*

<sup>76</sup>*Id.*

<sup>77</sup>*Id.*

<sup>78</sup>*Id.* at 947.

<sup>79</sup>*Id.*

<sup>80</sup>*Id.* at 947-48.

<sup>81</sup>*Id.*

Broader market definition leads to a lower probability of market power and hence a lower probability of finding an antitrust offense. Large market actors who face regular scrutiny under section 2 of the Sherman Act or section 7 of the Clayton Act stand to particularly benefit from a wholesale adoption of the diversion theory. The diversion theory's expanded geographic market would move most industries towards a global market definition. Fear of under-enforcement, and thus increased social costs, led to a predictable barrage of criticism directed at the diversion theory.

### B. Response to the Diversion Theory

The diversion theory became a catalyst for scholarly debate about the relevant geographic market.<sup>82</sup> In a responding article, Louis Kaplow argues that the diversion theory is illogical.<sup>83</sup> Kaplow agrees that market share alone does not determine market power.<sup>84</sup> Substitutes in consumption and production, the output of fringe firms, and potential competition all affect the degree of market power a market actor possesses.<sup>85</sup> Kaplow disagrees, however, that these factors are of such significance to require that the entire output of foreign competitors should be computed within relevant geographic markets.<sup>86</sup> These factors that potentially affect competition are implicitly built in to market share calculations. Kaplow writes: "Even for very high market shares, intuitive assessments of market power never approach infinity; therefore, some implicit discounting for the four factors is at work in all such judgments of market power."<sup>87</sup>

Kaplow highlights several major substantive flaws with the diversion theory. The diversion theory relies too heavily on factors that may influence future competition in the geographic market.<sup>88</sup> The intent of

<sup>82</sup> See generally Louis Kaplow, *The Accuracy of Traditional Market Power Analysis and a Direct Adjustment Alternative*, 95 HARV. L. REV. 1817 (1982); Richard Schmalensee, *Another Look at Market Power*, 95 HARV. L. REV. 1789 (1982). Though not particularly relevant to the discussion of the geographic market definition, Schmalensee disagrees with the economic analysis of Landes and Posner. Particularly, Schmalensee disputes the economic proof offered in support of the Appendix of Landes and Posner. The analysis is densely economic and is outside the scope of this Article.

<sup>83</sup> Kaplow, *supra* note 82, at 1817-18.

<sup>84</sup> *Id.*, at 1819.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 1820.

<sup>88</sup> *Id.*

antitrust law is to punish market actors whose anti-competitive acts exert a present harmful effect on the competitive market.<sup>89</sup> Accordingly, inquiries must focus upon the present market power and not rely heavily on the potential competition.<sup>90</sup> More emphasis on future competition,

would be appropriate only if the primary concern were the potential for *further* increases in prevailing prices. But the fundamental inquiry is whether prices are *already* sufficiently high to warrant an inference of significant market power; a firm with market power, no matter how great, already will have raised its price to the profit-maximizing level.<sup>91</sup>

Requiring that products be perfectly identical further complicates the application of the diversion theory.<sup>92</sup> The prerequisite that products be perfectly identical was intended to be read literally.<sup>93</sup> Even if a local firm has significant market power, there will often be imports, because, as Landes and Posner concede, their analysis is prescient only if the foreign and domestic products are identical.<sup>94</sup> Mandating that products be perfectly identical is dangerous since the common practice in antitrust analysis is to treat "substantially similar products as though they were identical, because any error thereby introduced is insignificant."<sup>95</sup> Reverse implication leads to the conclusion under Landes and Posner's analysis that any error, even if ostensibly insignificant, could have an outcome-altering-effect on an antitrust case. Though the diversion theory's qualifications help mitigate the harshness of incorrectly identifying the product market, the fact remains that the geographic market definition becomes inextricably dependant on correctly defining the product market.<sup>96</sup> A slight error in correctly identifying the relevant product market leads to massive overstatement of the geographic market, a prospect that troubles Kaplow.<sup>97</sup>

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 1833.

<sup>92</sup> *Id.* at 1836.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

Another point of disagreement is that tariffs and higher transportation costs do not significantly restrict imports. To this end, Kaplow would exclude imports in markets where high exclusionary barriers or transportation costs exist.<sup>98</sup> Kaplow concludes that when imports exist in industries where definable exclusionary barriers exist, the only reason sales of the import persist in the relevant geographic market is because it is a distinct product that should be presumptively excluded on the theory of product differentiation.<sup>99</sup>

Kaplow finds the diversion theory's syllogistic reasoning unrealistic. "Roughly speaking, Landes and Posner's logic is simply that, because significant market power implies that there would be no imports, the existence of imports implies that market power is not very substantial."<sup>100</sup> Kaplow's own socio-political viewpoints in this academic debate are illustrated in his fear that the diversion theory will lead to under-enforcement of antitrust laws. "Reflecting their fear of overstating market power, they typically favor a broad definition and ignore the risk that such broad market definitions may lead to understating market power."<sup>101</sup>

### C. Other Approaches to Geographic Market Definition

#### 1. The Areeda-Turner Approach

Professors Areeda and Turner propose a method for defining the geographic market that is strikingly similar to the diversion theory.<sup>102</sup> Their methodology, commonly known as the Areeda-Turner approach, proposes a different means for identifying and treating products that are not perfectly identical.<sup>103</sup> The Areeda-Turner approach includes the total output of a foreign seller with some sales in the domestic market when calculating market share.<sup>104</sup> The Areeda-Turner approach differs, however, by stipulating that certain requirements be met before the entire output may be added to the relevant market of a foreign seller.<sup>105</sup>

<sup>98</sup>*Id.* at 1840.

<sup>99</sup>*Id.*

<sup>100</sup>*Id.* at 1835.

<sup>101</sup>*Id.* at 1827.

<sup>102</sup>Landes & Posner, *supra* note 58, at 969-70.

<sup>103</sup>*Id.*

<sup>104</sup>*Id.*

<sup>105</sup>*Id.*

First, the output of a foreign producer should not be included in the relevant geographic market if the product is simultaneously imported and exported to and from the United States, and the sum of the foreign price, including transport and tariff costs of exporting it to the United States, exceeds the domestic price.<sup>106</sup> The rationale is that a perfectly identical product will not be concurrently imported and exported when the importer would be importing at a loss.<sup>107</sup> Where such a situation exists, transportation costs are minimized if the domestic producer simply meets demand.<sup>108</sup> A rational market actor will not import a product at a loss, and local producers would increase supply to meet the demand of local consumers.<sup>109</sup> Absent this finding, the Areeda-Turner approach favors an expansive geographic market.<sup>110</sup> Where foreign competitors have proven their ability to sell in the relevant product market, their entire output should be included within the relevant geographic market unless the above stipulation is met.<sup>111</sup>

#### 2. Criticizing Neoclassical Economics in Market Definition

In an article written in response to the Merger Guidelines, Professors Harris and Jorde suggest that courts employ a more practical approach to defining the relevant markets.<sup>112</sup> The authors rebuke the use of neoclassical economic theory and economic testimony to formulate market definition, noting that this leads to "an almost imp[r]udent exercise in economic gerrymandering."<sup>113</sup> They further criticize that the law defining relevant markets is relatively underdeveloped given its overall importance in the antitrust context.<sup>114</sup>

The authors believe that reliance upon neoclassical economic theory is dangerous.<sup>115</sup> Neoclassical economic theory simplifies the complexity of

<sup>106</sup>*Id.*

<sup>107</sup>*Id.*

<sup>108</sup>*Id.*

<sup>109</sup>*Id.*

<sup>110</sup>*Id.*

<sup>111</sup>*Id.*

<sup>112</sup>See generally Robert G. Harris & Thomas M. Jorde, *Market Definition in the Merger Guidelines: Implications for Antitrust Enforcement*, 71 CAL. L. REV. 464 (1983).

<sup>113</sup>*Id.* at 464 (citing Stigler, *The Economists and the Problem of Monopoly*, 72 AM. ECON. A. PROC., May 1982, at 8).

<sup>114</sup>See *id.*

<sup>115</sup>*Id.* at 464-65.

commerce through economic assumptions.<sup>116</sup> These assumptions may not accurately represent commercial reality. The theory employs hypothetical firms and managers, inaccurately simplifying commercial decision-making.<sup>117</sup> The authors believe the use of simplifying neoclassic data leads to an expansive definition of the relevant markets.<sup>118</sup>

Rejecting the use of neoclassical economics in market definition implicitly undermines Landes and Posner's diversion theory. The diversion theory relies on complex neoclassic economic models to prove broad theories, particularly price elasticities that are not easily obtained. The complexity of these models and the experts required to testify to them at trial, are not commensurate with commercial realities. While Harris and Jorde believe economic theory can be helpful, they believe it should not play a primary role at trial.<sup>119</sup>

Neoclassical price theory is a powerful theoretical construct because it simplifies reality. Assumptions such as perfect information, costless transactions, profit-maximizing firms, and utility-maximizing consumers can be entirely appropriate in some situations. Often, economic theory provides a useful starting point for analyzing economic problems by helping to formulate critical insights into complex matters. One should be wary, however, of drawing policy inferences from models founded on assumptions that are incongruent with reality.<sup>120</sup>

To add realism to the market definition, the authors propose that those who managers perceive as their own competitors should be taken into consideration.<sup>121</sup> The judicial system is better equipped to handle fact finding in that manner. It also provides, according to the authors, a more accurate definition of the relevant market.<sup>122</sup> Other tests, such as the diversion theory, give significant weight to the impact of potential entrants when computing market share. Harris and Jorde believe that if managers fail to factor these potential actors into pricing decisions, then the actors are

<sup>116</sup>*Id.*

<sup>117</sup>*Id.* at 465.

<sup>118</sup>*Id.*

<sup>119</sup>*See id.* at 468-69.

<sup>120</sup>*Id.* at 468.

<sup>121</sup>*Id.* at 493-94.

<sup>122</sup>*Id.* at 494.

not perceived competitors and exert no competitive effect on the market.<sup>123</sup> Actors not perceived as competitors should not be included in the geographic market. "Even if it can be assumed that potential entrants have perfect market information, these potential entrants should be defined within the market only if they might actually enter the market."<sup>124</sup>

The authors suggest their own approach to delineating the relevant market, which incorporates their belief that market definition should paint an accurate picture of what actually goes on with the industry in question.<sup>125</sup> The first step is identifying the class deserving protection.<sup>126</sup> This is based upon the belief that the market should be defined in relation to those whom the law was intended to protect. Second, and in contrast to the diversion theory or the Areeda-Turner approach, the geographic market should be drawn based on actual sales of the relevant product in the relevant geographic area.<sup>127</sup> For potential or future competition to qualify in the aggregate market power calculation, a party must offer "[h]ard evidence . . . based upon past market practices or upon testimony from experts intimately familiar with the history and practices of the industry."<sup>128</sup> Third, the court should specifically identify the factors that ought to be considered in the market definition process, how each of those factors can best be measured, and the effects of alternative measures on the market.<sup>129</sup> Finally, courts should rely only upon economic knowledge, not theory.<sup>130</sup> Ivory tower professional economists hinder the judicial process by offering haphazard theories, rather than a practical picture of the industry in question. Those intimately familiar with the industry are more useful witnesses. Their testimony is realistic, not theoretical, and can simplify an already complex inquiry.

The Harris-Jorde approach plays the same overt intellectual game as other geographic market scholarship, however at the opposing end of the enforcement spectrum. The result of applying their approach would limit the weight that foreign competition and prospective foreign competition will exert on the market definition. Logically, this narrows the geographic

<sup>123</sup>*See id.* at 493.

<sup>124</sup>*Id.* at 484.

<sup>125</sup>*See id.* at 493.

<sup>126</sup>*Id.*

<sup>127</sup>*Id.* at 494.

<sup>128</sup>*Id.*

<sup>129</sup>*Id.* at 494-95.

<sup>130</sup>*Id.* at 495.

market and increases the probability of antitrust enforcement. Implicit in the Harris-Jorde approach is the same socio-political argument that the guidelines will result in a significant understatement of the anti-competitive effects in mergers and other antitrust matters.

### 3. Elzinga and Hogarty: The Shipment Data Approach

The shipments approach is widely respected and cited in antitrust cases. The shipments approach defines the geographic market as the physical location to which and from which shipments are sent.<sup>131</sup> Both past and future shipment data serve as proof of the market definition.<sup>132</sup> The authors of the shipment approach use the generic economist's definition of a geographic market, that "[a] market encompasses the primary demand and supply forces that determine a product's price and the geographic market area is the area that encompasses these buyers and sellers."<sup>133</sup>

The shipment approach defines geographic market to the area in which ninety percent of the relevant product is shipped.<sup>134</sup> To prove that ninety percent of the alleged product reaches this internal area, courts should allow evidence of shipment numbers, both present and future, to make an accurate and reliable determination of the geographic market.<sup>135</sup> The proffered advantage is that the information relied upon at trial is more readily available than more abstract neoclassical economic data such as price data and elasticities.<sup>136</sup> Shipment information may be more intelligible in the trial context. Those lacking the economic training to make use of elasticity analysis will better understand shipment data. However, the shipment approach is not without notable flaws. This method does not account for potential competition as addressed in various approaches already discussed. Under or over-enforcement problems also lurk in employing arbitrary percentage cutoffs that may under or over-estimate the size of the geographic market.

<sup>131</sup> Kenneth G. Elzinga & Thomas F. Hogarty, *The Problem of Geographic Market Delineation in Antimerger Suits*, 18 ANTITRUST BULL. 45, 73-75 (1973).

<sup>132</sup> See *id.*

<sup>133</sup> *Id.* at 47.

<sup>134</sup> *Id.* at 73-75. The text defines it as seventy-five, not ninety percent, but allows objectors to substitute their own percentage. *Id.*

<sup>135</sup> *Id.* at 73.

<sup>136</sup> See *id.* at 75-76.

## IV. PART IV.

### A. Weighing Foreign Competition in the Geographic Market

The common law approach to geographic market definition provides little guidance as to how foreign competition, actual or potential, should be factored in the geographic market definition. *Tampa Electric* is vague, opening the door for unrestrained economic theorizing to compensate for uncertainty.<sup>137</sup> Without guideposts showing what expert testimony is helpful and when it should be considered, courts are left reaching for guidance from outside sources. Academic theories offer their own suggestions as to how courts should fill this vacuum, but are often polarized by political viewpoints, desiring more or less regulation. While these theories may provide a reference point, disagreement as to the proper approach fosters confusion. Using the academic theories to overcome ambiguity causes courts to misapply the various theories. *United States v. Eastman Kodak Co.*, the most recent federal case addressing international competition in the geographic market, illustrates how reliance on academic sources for guidance can cause misinterpretation.<sup>138</sup>

The Second Circuit in *Kodak* piecemealed together contradictory theories to reach a logical result.<sup>139</sup> For guidance in defining the geographic market, the district court cited both the diversion theory and the shipments approach as proof that Kodak competes in a global market.<sup>140</sup> The diversion theory and the shipments approach do not coalesce perfectly with one another. The diversion theory uses neoclassic economic theory as its foundation. It also relies heavily on potential competition as imputed through fringe competitors and potential market entrants. The political implication of the diversion theory favors an expansive geographic market resulting in less frequent enforcement of the antitrust statutes. In contrast, the shipments approach eschews neoclassical economics favoring more empirical evidence of a producer's data showing to which and from which the producer's products are sent. Potential competition, if it may be

<sup>137</sup> See *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 320 (1961).

<sup>138</sup> 63 F.3d 95, 95 (2d Cir. 1995).

<sup>139</sup> *Id.* at 95.

<sup>140</sup> *Id.* at 103. The district court weighed analysis from economic expert Professor Hausman, who testified that the facts in *Kodak* favored a global market applying the relevant standard of either the diversion theory or the shipments approach. See generally *United States v. Eastman Kodak Co.*, 853 F. Supp. 1454, 1468 (W.D.N.Y. 1994), *aff'd*, 63 F.3d 95 (2d Cir. 1995).

characterized as such, is only aggregated into the geographic market in the form of future shipments data that is readily available. The result of this approach is a more narrow market leading to more frequent antitrust enforcement. The court's attempt to patch ambiguity with disparate theories only succeeds because the facts of this case strongly support the conclusion that Kodak competes in a global market. This part argues that in a case with less conclusive facts, reliance on two diverging antitrust theories is not a reliable means for accurate market delineation.

The issue before the court in *Kodak* was whether the district court correctly concluded that the geographic market for amateur color negative film was global.<sup>141</sup> The United States argued that the relevant geographic market was national.<sup>142</sup> The court ultimately rejected the government's contention and held that Kodak competes in a global market and that Kodak did not exert market power in that global market, possessing only a thirty-six percent market share.<sup>143</sup>

The court's analysis defining the geographic market is replete with contradictions. The most dangerous being that the court saw no error in the district court's analysis which applied both the diversion theory and the shipments approach to support the conclusion that the relevant geographic market is global.<sup>144</sup> The district court cited the diversion theory for the proposition that when a distant seller achieves a threshold level of sales in a local market, all of its sales, wherever made, should be considered a part of that market for purposes of computing the market share of a local seller.<sup>145</sup> In the same paragraph, the district court cites the shipments approach for the proposition that the geographic market is properly defined by determining the areas from which, and to which, a significant amount of relevant product is shipped.<sup>146</sup>

<sup>141</sup> *Kodak*, 63 F.3d at 102. This issue occurs in the context of whether the market for amateur negative film was sufficiently competitive such that the two restrictive covenants against Kodak could be terminated. For the purpose of this work we will ignore other issues before the court and focus on the geographic market question.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 109.

<sup>144</sup> *Id.* at 103.

<sup>145</sup> *Id.* (citing William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 963 (1981)).

<sup>146</sup> *Id.* (citing Kenneth G. Elzinga & Thomas F. Hogarty, *The Problem of Geographic Market Delineation in Antimerger Suits*, 18 ANTITRUST BULL. 45, 73-75 (1973)).

The district court heard testimony from a Kodak economic expert that both the diversion theory and the shipments approach support the finding that Kodak competes in a global market.<sup>147</sup> Applying the diversion theory, the district court held: (1) the foreign film manufacturers had proven their ability to sell their product in the United States; (2) these foreign film producers have some excess production capacity; and (3) the supply of film is elastic, meaning that foreign film manufactures could quickly increase supply of film for consumption in the United States if Kodak attempted to raise prices and restrict output.<sup>148</sup> Applying the shipments approach, the court concluded that the flow of imports and exports in the amateur color negative industry supports the finding that Kodak competes in a global market.<sup>149</sup>

The Second Circuit affirmed the district court's ruling, finding no error in the lower court's analysis and that elasticities of supply and demand supported the conclusion that Kodak competes in a global market.<sup>150</sup> The Second Circuit then performed its own delineation of the relevant geographic market which, in essence, incorporated the two academic theories cited in the district court analysis and applied them to the two part *Tampa Electric* inquiry—testing where sellers operate and where buyers may practically turn for supplies.<sup>151</sup> From the supply side, the court emphasized that Kodak is a worldwide seller.<sup>152</sup> Kodak is the only domestic manufacturer of amateur photo film.<sup>153</sup> Nearly one-third of the film sold in the United States comes from abroad.<sup>154</sup> Kodak competes within the U.S. market against four international amateur film manufacturers.<sup>155</sup> Additionally, if Kodak attempted to raise prices or reduce output, foreign producers could quickly increase supply to meet consumer demand.<sup>156</sup> Importers had proven their ability to sell in the domestic market for a significant and continuous period of time, and there was no showing

<sup>147</sup> *United States v. Eastman Kodak Co.*, 853 F. Supp. 1454, 1468 (W.D.N.Y. 1994).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Kodak*, 63 F.3d at 102 (citing *Kodak*, 853 F. Supp. at 1468).

<sup>151</sup> *Id.* at 104-05.

<sup>152</sup> *See id.*

<sup>153</sup> *Id.* at 104.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

that foreign producers faced burdensome tariffs or transportation costs.<sup>157</sup> The court concluded that those facts lead to the conclusion that there was "ample basis for the district court's finding that foreign film producers act as a check on Kodak's ability to raise domestic prices."<sup>158</sup>

The demand side inquiry, where buyers may practically turn for substitutes, also supported the finding that Kodak competes in a global market. The court found that film customers are generally price sensitive.<sup>159</sup> This means that they will react to any significant change in price of one brand of film by switching to an alternative.<sup>160</sup> Though the record showed that Kodak possessed high brand loyalty, its customers find other brands of film to be acceptable substitutes.<sup>161</sup> A 12.8 % growth in private label film is evidence of customer confidence in other brands as acceptable substitutes and that they are willing to switch when faced with price hikes.<sup>162</sup> Lastly, the court reiterated the fact that one-third of the film sold in the United States comes from abroad.<sup>163</sup> The foregoing findings, the court held, support the conclusion that Kodak competes in a global market.<sup>164</sup>

#### B. Kodak and the Danger of Ambiguous Market Definitions in Modern Commerce

Relying upon two potentially contradictory market theories in the same strand of analysis demonstrates the necessity for a new, comprehensible standard for defining the geographic market in antitrust cases. The Supreme Court must create a new adaptable standard—one that does not invite scholarly theory to add clarity to an ambiguous standard. The Second Circuit saw no error in the district court's analysis that applied both the diversion theory and the shipments approach to assist the market delineation process. As stated, these two tests are philosophically different, urge the use of vastly different types of evidence to prove the relevant geographic market, and are charged with latent political goals of enlarging

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *See id.* at 104–05.

<sup>160</sup> *Id.* at 104.

<sup>161</sup> *Id.* at 104–05.

<sup>162</sup> *Id.* at 105.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

or reducing the size of the geographic market. The only reason this erroneous analysis did not lead to a contradictory conclusion is that the facts in *Kodak* strongly supported a global market definition.<sup>165</sup>

Were *Kodak* not such an easy case, reliance upon the diversion theory and the shipments approach in the same breath could have led to a contradictory result. For simplicity's sake, assume the following facts. Kodak is the only domestic producer of film in the United States, possessing a ninety-five percent market share of the product in question. Two foreign sellers share equally the market share for all sales outside the United States. These two sellers each possess a token 2.5 % share of the U.S. market. Kodak does not export its film due to modest tariffs abroad and the lower cost of foreign film. Kodak film is sold for \$1 in the United States. Foreign manufactures are able to sell their film in non-U.S. markets for \$0.95. The foreign sellers face modest importation costs to ship their product into the United States. In attempt to introduce their product in the United States, they sell their film at a break-even point of \$1. While Kodak possesses a brand loyal customer base, customers view imported brands as "good substitutes." Foreign sellers have excess production capacity such that they could react and divert production in response to price changes. No transportation barriers will exist in the foreseeable future, to preclude foreign sellers from continuing to sell. The foreign sellers do not possess any contracts for future sales in the United States.

Applying the two theories that the court used to reach the same conclusion in the *Kodak* case to the above hypothetical leads to contradictory conclusions. The diversion theory would conclude that the relevant geographic market is *global* and that the entire capacity of the two foreign sellers should be computed in market share calculations. Under the diversion theory, though the foreign producers do not possess a significant market share, they exert competitive pressures on Kodak by preventing them from raising prices or restricting output. For the total capacity of a distant seller to be included in the relevant geographic market, the distant seller must have achieved some non-nominal sales in the relevant market for a significant period of time. Under the above facts, foreign sellers have maintained a five percent share of the U.S. market for a period of several years. Thus, they have proven their ability to compete despite the cost disadvantage of being a distant seller. If Kodak were to increase the price of its film, proven foreign producers could divert excess capacity into the

<sup>165</sup> *See id.* at 104–05.

U.S. market, grabbing market share. Though the distant producers possess little market power in terms of market share, under the diversion theory, their total capacity should be included in the relevant geographic market because foreign producers restrict Kodak from raising prices or restricting output.

Testing the hypothetical under the shipments approach leads to an entirely different geographic market definition. The shipments approach relies on present and future shipments data to determine to where and from where, the relevant product is shipped. The area in which ninety percent of the relevant product is shipped is determined to be the relevant geographic market. The only domestic seller, Kodak, sends its entire output solely to locations within the United States. Kodak accounts for ninety-five percent of total sales within this relevant geographic area. A modest five percent of market sales come from foreign sellers. Their shipments data show that this five percent share comes from foreign sellers. Applying the shipments approach to the hypothetical, a court would likely define the relevant geographic market as domestic. One seller provides ninety-five percent of the product within this relevant market. This seller's product is not exported from the domestic market. A meager five percent of the product comes from the international market. This means that the requisite ninety percent threshold for defining a relevant geographic market is satisfied by only including the domestically produced product. Under the shipments approach, the relevant geographic market is *national*.

The above hypothetical is simplistic. It illustrates, however, that the court in *Kodak* applied two different tests that could lead to opposite conclusions. The fact that, as applied to the case at bar, the court reached a logical conclusion supported by both tests was fortuitous. With a more difficult fact pattern the court could just have easily reached contradictory results, as the hypothetical illustrates. Because *Tampa Electric* is too vague to guide courts in delineating the geographic market, courts then turn to academic theory to supplement *Tampa Electric's* deficiencies.<sup>166</sup> Academic theory is misleading, as it is ideologically charged, and may be directed at conflicting enforcement goals. The geographic market can then be cut and pasted together, using selected data from different academic theories to define the market in a predetermined fashion.

<sup>166</sup>See *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 320 (1961).

## V. PART V

### A. *The Opening of the Internet Era*

The antiquated *Tampa Electric* geographic market definition could not have anticipated the Internet revolution that has ushered in what economists call the *New Economy*. Courts have yet to address the challenges the New Economy presents to geographic market delineation. Academic literature has noted several distinct spheres of market delineation in which the Internet presents new challenges. Some of these challenges are discussed in a recent Federal Trade Commission (FTC) study on anticompetitive barriers to online sales in the wine industry, the Wine Report.<sup>167</sup> The methodology and findings discussed in the Wine Report will be used to highlight the need for a new geographic market definition that factors Internet competition proportionally to its actual market influence.

Where the geographic market is the Internet, in other words products or services that only exist as part of the Internet itself—chat services, web advertisements, pop-up advertisements, SPAM, etc.—courts define the relevant geographic market as the Internet itself. As bizarre as it may sound, this definition is adequate because when products exist only within the Internet, the geographic market is isolated to this abstract world. In the more complex arena where Internet sellers compete with traditional “brick and mortar” sellers, however, defining the geographic market becomes exceedingly complex. The difficulties associated with geographic market delineation are compounded by adding in another, even more amorphous variable, into an already complicated inquiry. Where brick and mortar sellers compete head to head with Internet sellers, courts should calculate the relevant geographic market first by including only brick and mortar competitors. The court should then factor in Internet competition proportionately, rather than expanding outward in concentric circles—a process that captures brick and mortar sellers in the relevant geographic market that do not actually exert any competitive pressure.

### B. *E-Commerce's Impact on the Global Economy*

The Internet has added a new facet to the world economy. The Internet spawned e-commerce, or the buying and selling of goods over the Internet

<sup>167</sup>See generally FED. TRADE COMM'N, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE, <http://www.ftc.gov/os/2003/07/winereport2.pdf> (July 2003).

or other electronic servers.<sup>168</sup> This revolution is roughly six years old and experts believe it will become a multi-trillion dollar industry in 2004.<sup>169</sup> Within the ambit of e-commerce, experts identify two distinct markets, business-to-business (B2B) and business-to-consumer (B2C).<sup>170</sup> B2B markets are those in which an Internet seller offers products or services directly to other businesses via an on-line market.<sup>171</sup> This differs from the B2C sector in which an Internet seller markets and sells products or services directly to the individual consumer.<sup>172</sup> Both sectors are relevant in the antitrust context, with the B2C being the most complex of the two because demand side information is much more difficult to obtain with disaggregated market actors at play.<sup>173</sup>

The Internet creates competitive advantages that make it a strong competitor against traditional business. By allowing consumers and businesses to do business at all hours, from any location, and without leaving their homes, the Internet is convenient.<sup>174</sup> Ease of purchase, speedy comparison shopping, and home delivery are a few other notable advantages the Internet brings.<sup>175</sup> That consumers value this convenience is best illustrated during the holiday shopping season, where consumers avoiding crowded malls have boosted online shopping between two hundred and five hundred percent.<sup>176</sup> Internet sellers reap the benefits of

<sup>168</sup> See, e.g., WALID MOUGAYAR, *OPENING DIGITAL MARKETS: BATTLE PLANS AND BUSINESS STRATEGIES FOR INTERNET COMMERCE* (McGraw-Hill 1998).

<sup>169</sup> ZEINAB KARAKE-SHALHOUB, *TRUST AND LOYALTY IN ELECTRONIC COMMERCE: AN AGENCY THEORY PERSPECTIVE* 70 (Quorum Books 2002).

<sup>170</sup> *Id.* at 70-71. Note that some believe business-to-government sales and services (B2G) is also a distinct market. Karake-Shaloub believes, as rooted in expert opinion, that the B2B market is the biggest market and represents the largest growth opportunity.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> See generally John W. Daugherty, Jr., *Market Definition and International Trade*, 11-SUM CURRENTS: INT'L TRADE L.J. 10 (2002). One of the author's main contentions is that any geographic market delineation analysis that focuses on the behavior of demand side actors when these actors are the individual consumer and not a business is difficult and unreliable. Author advocates Elzinga and Hogarty's "shipments approach" based on the fact that relying on shipment data looks only to the more market savvy firms and their actions in the market. In the e-commerce context, as one could imagine, tracking disaggregated market information would only be more complex.

<sup>174</sup> See BERNADETTE TIERNAN, *E-TAILING*, 1-3 (Dearborn 2000).

<sup>175</sup> *Id.* at 1.

<sup>176</sup> *Id.*

cost efficiencies and thus the ability to offer lower prices due to lower paper, labor, and tax expenses.<sup>177</sup>

With clear market advantages, e-businesses have aggressively taken market share from brick and mortar sellers, particularly in certain industries.<sup>178</sup> Most notably in the travel industry, where Internet competitors accounted for nearly thirty percent market share as of 1997.<sup>179</sup> Financial services, personal computers, hardware and software, entertainment, books, music, contact lenses, wine, and apparel represent other industries in which Internet sellers are highly competitive.<sup>180</sup> Analysts expect these industries to become more competitive in the coming years. Furthermore, the Internet will continue reaching new industries as operating efficiencies increase and trust in the Internet is forged.

Experts believe that the Internet will never eliminate traditional business.<sup>181</sup> Due to the fact that economic and educational barriers inhibit some consumers from accessing Internet markets, it is unlikely that it will ever reach all people.<sup>182</sup> Furthermore, there are inherent risks of fraud and consumer loss associated with the Internet that do not exist in the brick and mortar context.<sup>183</sup> This dissuades the most skeptical consumers from doing business on the Internet. Also, some consumers and businesses prefer the old fashioned notion of doing business with a handshake.<sup>184</sup> For the market participant that places value upon the social elements of old fashioned business, the Internet is not a viable substitute. Long-term customer relationships may be so strong that the Internet's competitive advantages are not enough to invoke a paradigm shift for the traditionalists.<sup>185</sup>

With e-commerce accounting for a significant part of the U.S. economy, antitrust scholars must adjust dated legal and economic theories to accommodate for change. This is difficult, particularly in the geographic

<sup>177</sup> MOUGAYAR, *supra* note 168 at 32-33.

<sup>178</sup> TIERNAN, *supra* note 174 at 3-4.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 33. Tiernan cites a Morgan Stanley study aimed at businesses considering operation on the Internet. Among five key points this study notes that online shopping will not eliminate traditional shopping, but will provide opportunities to expand marketing opportunities for particular products. *Id.*

<sup>182</sup> See *id.* at 5-6.

<sup>183</sup> See generally KARAKE-SHALHOUB, *supra* note 169.

<sup>184</sup> See Tiernan, *supra* note 174 at 34.

<sup>185</sup> *Id.*

market context. Internet sellers can reach literally anyone in the world with just the click of a mouse. The difficulty in the geographic market context is accounting for e-commerce's competitive effect while acknowledging the above mentioned limitations. Experts agree that the Internet does not reach all market actors; therefore, the Internet should not be allotted more than its proportional competitive weight in market delineation analysis.<sup>186</sup> The first step in working towards this balance is to understand how the Internet changes traditional economic assumptions used in antitrust cases.

### 1. Neoclassic Economic Theory Incorrect in New Economy

Differences in economic underpinnings of the New Economy alter the policy rationale as to how and when antitrust enforcement is appropriate and what factors are important when defining the relevant market. Particularly in the monopoly context, fundamental differences in how competition takes place may change the desired goals for market regulation. Generally speaking, preventing monopolization seeks to preserve a competitive marketplace thereby protecting consumer welfare. Monopolization harms consumers through monopoly pricing, which is pricing above short-term marginal costs. This leads to monopoly profits for the monopolizing firm. Consumers bear social costs measured by the excess profit reaped above the marginal costs. The role of antitrust laws is to preserve the competitive marketplace such that producers are forced to sell where price is equal to marginal costs. In the New Economy, however, these long standing assumptions may be challenged. The long held neoclassic economic assumption presumes that competition takes place within the market. In the New Economy, the real competition is *for* the market, not *in* the market.

The New Economy is driven by a technological race to develop products to control the market at its inception. In this race for control, winners are rewarded with high profits to offset the losses incurred by the losers. Given the nature of this game, firm costs are different than in the traditional neoclassic setting. Initial investment, research, and labor costs are very high as innovation is the key to the battle for the market. Material and selling expenses represent less than twenty percent of revenues in software, for example. By contrast, outlays for material and selling expenses in manufacturing exceed sixty percent of revenues. The New Economy is also more labor intensive as opposed to capital intensive.

<sup>186</sup> See *id.* at 6.

Labor cost represents forty-six percent of costs as opposed to nine percent in manufacturing overall. This creates a market of "fragile monopolists," that is, monopolists that can retain market power only if they develop. To stay profitable in this market, even a monopolist *must* price over marginal costs to offset the large fixed costs invested in research, technology, and infrastructure and the risks of competing in a develop or drown market. Thus, the assumption that pricing above marginal cost is a sign of market power does not necessarily hold true in the New Economy. Competition becomes less about which producer can manufacture an existing product for the lowest price than which producer can create a new product so that consumers no longer want the existing product.

### C. Defining the Geographic Market Where the Internet is the Geographic Market

Where all competition takes place within the Internet, the courts have defined the geographic market as the Internet itself. Examples of these products are: chat services, web advertisements, pop-up advertisements, SPAM, etc. Though defining the Internet itself as a geographic market sounds illogical, it is a simple inquiry. Where the product is only available on the Internet, the geographic market is the Internet. The only judicial attempt at defining a geographic market in any context involving Internet competition was in *America Online, Inc. v. Greatdeals.net*.<sup>187</sup> In evaluating a counterclaim for monopolization and attempted monopolization of e-mail advertising to America Online (AOL) subscribers, the court was required to define the relevant geographic market.<sup>188</sup> The court stated, "[w]ith respect to the relevant geographic market in which the competition takes place, the Court finds that the Internet cannot be defined with outer boundaries. It is not a place or location; it is infinite."<sup>189</sup> The Internet is a "giant network which interconnects innumerable smaller groups of linked computer networks."<sup>190</sup> The network "allows any of literally tens of millions of people with access to the Internet to exchange information."<sup>191</sup> The court stated:

<sup>187</sup> 49 F. Supp. 2d 851, 857-58 (E.D. Va. 1999).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 858.

<sup>190</sup> *Id.* (citing *Cyber Promotions, Inc. v. Am. Online, Inc.*, 948 F. Supp. 456, 459 (E.D. Pa. 1996)).

<sup>191</sup> *Id.*

Defendants ignore the fact that they have multiple means of advertising their computer equipment to the Internet-accessing public. The geographic market may not be restricted to AOL subscribers not only because there are other persons with access to the Internet, but also because there are other means of advertising to those persons and to AOL subscribers.<sup>192</sup>

Though the analysis is conclusory, it is logical. Where the product market is such that the product is isolated to the Internet, defining the geographic market becomes a default conclusion. It could be argued that there really is no geographic market. Instead, the product is itself so distinct that the product market really occupies both product and geographic markets. Perhaps rather than going through the motions, the court should state that there is no relevant geographic market in cases where the product market is so distinct that it is only on the Internet. Though it is difficult to find any substantive flaws with the *America Online* geographic market definition, it is not helpful in a larger sense.

#### *D. Defining Geographic Markets Where the Internet Competes with Traditional Sellers*

There are no geographic boundaries for an Internet seller in the sense that the seller instantaneously connects with buyers throughout the world. Presumably then, when an Internet seller reaches buyers in a geographic area, brick and mortar sellers in that area must treat Internet sellers as competitors. The real difficulty becomes deciding when an Internet seller in a specific industry competes in a geographic area and to what extent they compete there. One could argue that because of the Internet's global reach, an Internet seller shares the same geographic market as all brick and mortar retailers so long as the Internet seller can and will ship to that geographic area at a competitive price. A price change by any Internet seller is therefore likely to impact consumer behavior in many local markets simultaneously, since in a sense, Internet sellers are omnipresent. Similarly, a price change by an Internet seller will affect the sales of brick and mortar retailers in local geographic markets.

The potential to overstate the geographic market exists if antitrust scholars do not approach Internet competition with caution. Where brick

<sup>192</sup> *Id.*

and mortar sellers compete with Internet sellers, moving to a *de facto* national or global market relieves the court of a difficult inquiry because it is sure to capture all Internet sellers. The principal fallacy in this corner-cutting is that it ignores the importance of demand side actors to geographic market definition. Because Internet technology is not available to all consumers and some consumers prefer brick and mortar sellers, Internet competitors do not exert equal competitive pressure across all geographic and demographic areas.<sup>193</sup> This is best illustrated by demographic data measuring Internet usage and consumer preference. Consider that, as of 1998, over fifty percent of all U.S. households shopped on the Internet to some degree.<sup>194</sup> This percentage is projected to rise two hundred percent annually over the next few years.<sup>195</sup> However, a consumer living in an urban setting with an average household income over seventy-five thousand dollars is over five times more likely to use the Internet than someone who is underprivileged and living in a rural setting.<sup>196</sup> The median income of an Internet user is over sixty thousand dollars per year, and nearly half of those who use the Internet are college educated.<sup>197</sup> Only forty percent of the U.S. population has access to the Internet at work or at home.<sup>198</sup> Given this usage divide, blanket assumptions are risky, as they may over or under assume the relevance of the Internet in certain geographic and product markets.

Trust and fraud issues also affect Internet usage. According to agency theory principles, human beings are rational, risk-averse and motivated by self-interest.<sup>199</sup> Buying and selling goods on the Internet, particularly as it is still developing, presses psychological assumptions. The buyer cannot see the good being purchased and is asked to give credit card information with the good faith assumption that they will receive their product. This mode of business is too adventuresome for some consumers. The cost savings offered by Internet sellers may not be outweighed by the risks involved. Therefore for some, the Internet may not be a viable alternative to brick and mortar retailers until technology makes business more secure

<sup>193</sup> See, e.g., TIERNAN, *supra* note 174, at 3-6.

<sup>194</sup> *Id.* at 2.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 6.

<sup>197</sup> *Id.* at 5.

<sup>198</sup> *Id.*

<sup>199</sup> KARAKE-SHALHOUB, *supra* note 169 at 100.

or until price differences are so substantial to the market actor that the risk becomes justifiable.

### 1. Internet Competition Should Be Factored Proportionally

The most sophisticated challenge to defining the geographic market is how to handle the case where Internet sellers compete with traditional brick and mortar sellers. The courts have yet to address this problem. The *Tampa Electric* test, particularly the demand side inquiry, which queries where buyers turn for substitutes, lacks the sophistication to accurately delineate the geographic market in this complex setting.<sup>200</sup> This part proposes that courts should not simply expand the geographic market where Internet competition is present, but rather they should calculate a brick and mortar geographic market first, and then add the effect of Internet competition proportionally.

It is unfair to assume, even in relevant markets where Internet transactions are quite common, that all consumers are able and willing to switch to Internet sellers in response to price changes. The better approach isolates the actual competitive effects Internet sellers exert in a given area. Internet use and access does not reach all market actors. Many consumers distrust buying and selling over the Internet. Doing business over the Internet carries the risk of fraud, lacks face-to-face service, does not allow a buyer to physically see or touch the product, and does not allow immediate possession of the good. These factors dissuade some Internet users from conducting business over the Internet. Economic and educational limitations also prevent some from using the Internet. The conclusion is that even in markets where the Internet sellers compete, they only reach a certain percentage of buyers.

When performing geographic market analyses in markets where Internet sellers compete, courts must account for two potential dangers: (1) expanding the geographic market definition in order to encompass Internet sellers, thereby capturing distant brick and mortar sellers that exert no competitive pressure in the relevant market; and (2) assuming Internet sellers exert equal competitive pressure in all geographic markets in which they compete. The first fallacy occurs where there is a local market for a given product, plus a handful of Internet sellers that compete with the local brick and mortar sellers. If the Internet sellers are not physically located within the local market and sell their product throughout the nation, the

<sup>200</sup>See *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 320 (1961).

court may well conclude that the geographic market is national in order to capture these sellers. Once the geographic market bears that generic *national* label, a court can easily include distant brick and mortar sellers in market share computations since they too fall under this same heading. The second fallacy occurs when a court uses broad Internet market share data under the assumption that Internet sellers compete on an equal basis in all geographic areas of the country. If Internet sales account for X percentage of market share in a given industry, it should not be assumed that this percentage is the same no matter where geographic market lines are drawn. As stated, differences in Internet access and usage patterns across various geographic and demographic areas make blanket assumptions inaccurate.

Courts can avoid these problems by defining the brick and mortar geographic market *first* and then adding in the effects that Internet competition exerts proportionally according to use and data. First, the court should delineate the relevant geographic market as if the Internet did not exist. Initial geographic market delineation should proceed as if Internet sellers exert no actual or potential competitive influence within the relevant market. Once this market is defined, it will be labeled a brick and mortar market. The court must then make a separate inquiry to determine the dollar amount of Internet sales of the relevant product within the brick and mortar market. To do so, the court should obtain sales data from Internet sellers in the brick and mortar market. The sales of those Internet sellers whose products reach the brick and mortar market can then be added to brick and mortar data for the purpose of calculating market share. Thus, when market shares are then used as a proxy to determine if an antitrust violation has occurred, they provide the most accurate estimate of market power.

### 2. Policy Basis

The policy basis behind calculating Internet sales proportionally is to accurately compute the competitive effect that Internet sellers exert in the geographic market. *Tampa Electric* and most academic theories risk defining the geographic market too broadly where Internet and brick and mortar sellers compete.<sup>201</sup> Calculating the brick and mortar and Internet markets separately provides a more accurate estimation of the competitive effect Internet sellers exert on the market. Since Internet sellers have virtually infinite reach, the all too easy conclusion is that where Internet

<sup>201</sup>*Id.*

sellers compete, the geographic market is either national or international. This is a dangerous assumption. Due to the fact that approximately fifty percent of all Americans have Internet access, and in various geographic and demographic pockets this number is far lower, it is incorrect to draw the relevant geographic market too large when so doing does not comport with consumer realities. The following section applies the facts, findings, and methodology of the Wine Report to test this theory with existing geographic market definitions.

### 3. The Wine Report

In July 2003, the FTC published a study of on wine sales conducted over the Internet, the Wine Report.<sup>202</sup> The purpose of the Wine Report was to test whether state bans on direct delivery of wine from out of state wine sellers affects the price and variety available to consumers in that state.<sup>203</sup> The study chose as its test market McClean, Virginia, a relatively sophisticated wine consuming suburb of the District of Columbia.<sup>204</sup> Virginia is one of nearly twenty-five states that ban direct delivery to consumers from out-of-state sellers.<sup>205</sup> To compare price and selection variances of brick and mortar sellers within a ten mile radius of McClean and Internet sellers, the FTC compared the prices of the fifty most popular wines, as identified in the *Wine and Spirits*' restaurant poll.<sup>206</sup> The FTC found that if McClean wine consumers were able to purchase wine over the Internet, depending on the shipping method chosen, they could save between 8-13% percent per bottle on wines priced over twenty dollars and between 20-21% per bottle on wines priced over forty dollars.<sup>207</sup> Additionally, fifteen percent of the bottles available on the Internet were not available at any brick and mortar seller within a ten mile radius of McClean,

<sup>202</sup> FED. TRADE COMM'N, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE, <http://www.ftc.gov/os/2003/07/winereport2.pdf> (July 2003).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at app. A.

<sup>205</sup> *Id.* at 3; See generally U.S. CONST. amend XXI (giving the states wide latitude to regulate the sale of alcoholic beverages); See FED. TRADE COMM'N, *supra* note 202, at 5-7 (explaining that most states use a three-tiered distribution system that requires alcoholic beverages be sold from producer to distributor prior to sale to retail outlets and that this system helps the state collect taxes and prevents minors from obtaining alcohol.)

<sup>206</sup> FED. TRADE COMM'N, *supra* note 202, at 18.

<sup>207</sup> *Id.* at 19.

Virginia.<sup>208</sup> The FTC's conclusion is that bans on interstate wine diminishes consumer welfare by increasing prices, decreasing selection, and for those consumers who value time, removing the time efficiencies the Internet creates.<sup>209</sup>

While the Wine Report does not extensively discuss the Internet's effects on geographic market definition, its facts and methodology provide an analytical framework to test existing geographic market theory. Economic assumptions in the Wine Report are also useful for geographic market analysis. While there are differences in opinion, most scholars conclude that Internet sellers generally create lower prices and greater product variety.<sup>210</sup> Added variety and lower prices effectively expand the geographic market by enticing customers to reach geographic markets which they would not otherwise have accessed.<sup>211</sup>

#### a. Applying the Wine Report to Geographic Market Definition

##### 1. A Proportioned Approach

The findings Wine Report's findings help advance geographic market scholarship by showing the practical and economic benefits Internet competition adds to the marketplace. However, while Internet sellers add competition to existing geographic markets, courts must resist the temptation to automatically expand geographic markets where Internet sellers operate. Using the Wine Report as an analytical framework, this section demonstrates how applying Internet competition proportionally avoids the two pitfalls discussed earlier. This section also illustrates how the facts in the McClean study lead to an overly broad geographic market definition under *Tampa Electric* or existing academic theory.

Calculating the brick and mortar and Internet geographic markets separately apports the competitive effect of the Internet without improperly expanding the market. Employing this approach, the brick and mortar geographic market is defined under the fictitious assumption that the

<sup>208</sup> *Id.* at 18.

<sup>209</sup> See *id.* at 3-4.

<sup>210</sup> See, e.g., *id.* at app. A 7-15. While most studies now conclude that Internet sellers are able to offer cost savings and greater variety to consumers, some dispute this assumption. Prior studies had suggested that greater product differentiation and convenience allow Internet sellers to price above many brick and mortar sellers.

<sup>211</sup> *Id.* at 18-19.

Internet exerts no competitive pressure in that market. In the McClean study, this includes all wine sellers within a ten mile radius of McClean, Virginia. For hypothetical purposes, it must be assumed that the state ban on direct delivery did not exist. Rather than expanding the geographic market definition until all Internet wine sellers are captured, the court should determine the proportional competitive weight Internet sellers exert in the McClean market. The best means for doing this is to first gather shipment and sales data from sellers that deliver to that market. The total dollar figure of these sales is then calculated and added to the total sales figure for brick and mortar sellers in that geographic market. This aggregated sales figure will serve as the denominator for market share calculations. The market share figures can accurately assist courts to determine if antitrust enforcement is proper. Arriving at these figures without expanding the geographic market by titles (local, region, national, and global), prevents courts from reaching an overbroad market calculation. This approach prevents courts from arriving at the default conclusion that, since the Internet defies a true physical geographic definition, the geographic market should always be national so that Internet sellers are necessarily encompassed.

## 2. *Tampa Electric*

Applying *Tampa Electric's* geographic market definition to the market conditions in the Wine Report leads to an inaccurate geographic market definition.<sup>212</sup> *Tampa Electric* charts where sellers operate and where buyers may practically turn for supplies.<sup>213</sup> Again, if it is assumed that no shipping ban exists, some Internet sellers will capture some market share in McClean. These Internet wine merchants operate nationally, selling from coast to coast and even beyond. An easy conclusion is that wine sellers operate on a national level. The court must then determine where buyers may practically turn for supplies. Consumers have two options: brick and mortar sellers in the McClean area and Internet sellers. Since Internet sellers physically operate outside the McClean area, the simple conclusion under *Tampa Electric* is that the market must be broader than McClean in order to encompass Internet sellers in the market definition. This inevitably captures distant brick and mortar sellers in geographic market calculations that exert no competitive pressure within the McClean area.

<sup>212</sup>*Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327-29 (1961).

<sup>213</sup>*Id.*

## 3. The Merger Guidelines

The Merger Guidelines lead to the same *de facto* market expansion. Recall that the Merger Guidelines delineate a provisional market, then test five percent hypothetical price increases to see if they attract new competitors. If new competitors enter, the market is redrawn to include them. Hypothetical price increases are repeated until no new competitors enter the market. It is probable that with no direct delivery ban on wine, more consumers would switch to Internet wine sellers in response to a five percent price increase by McClean brick and mortar sellers. When new Internet sellers enter, the geographic market is redrawn to include these sellers. However, these sellers are online and do not correspond to a physical geographic area. It is convenient for courts to make the logical jump that since these Internet sellers operate nationally, the geographic market is national. Again, by moving outward to a national market, distant brick and mortar sellers are included in the geographic market when they exert no competitive pressure in the area in question.

## 4. The Diversion Theory

The diversion theory will lead to the same overly broad market when applied to the McClean study. Internet sellers shipping to McClean are distant sellers that have proven their ability to achieve non-nominal sales in the market for a significant period of time. Under the diversion theory, the entire output of all Internet wine sellers meeting this threshold is computed into the market share calculations. This creates a situation where, no matter how powerful any single brick and mortar seller in McClean might become, that market power will be trivialized when examined in a national market. Anticompetitive behavior by powerful local actors could go unnoticed if the Internet competition pushes courts towards *de facto* national market definitions.

## 5. The Shipments Approach

The shipments approach comes closest to best approximating the true competitive effect of Internet sellers in the geographic market, but succumbs to the same caveats. The shipments approach defines the relevant geographic market as the area to which and from which ninety percent of the relevant product is shipped. It is the *from which* portion of this inquiry which distorts the geographic market. The product is actually purchased through this abstract online marketplace, which does not correspond to a

physical geographic location. The product, however, must be shipped *from* somewhere. It is probable that the shipping locations will come from a variety of geographic locations across the United States. A court can simplify the market definition process by hastily concluding that since Internet competitors ship nationally, the geographic market is national. Risking redundancy, this approach leads to the blanket conclusion that an inherently *local* market is *national*—instead of computing Internet competition for its proportional competitive weight.

#### VI. CONCLUSION: ADAPTING MARKET DELINEATION TO COMPLEX MARKETS

Complex markets require changing the traditional geographic market definition. As globalization and e-commerce make modern commerce more seamless, defining the boundaries of a geographic market becomes increasingly difficult. Further, dialectic scholarship is needed to craft a geographic market definition sophisticated enough to deal with the complex nature of modern commerce, yet simple enough to function within a court of law. This is a daunting task to which this Article does not have the credulity to propose a solution. Influential case law and academic theories have shaped how courts approach geographic market delineation where international competition is present. *Kodak* illustrates that despite their significant contribution, academic theories can be piecemealed together to reach contradictory results.<sup>214</sup> Furthermore, courts have yet to address how Internet competition should factor into the geographic market definition where Internet sellers compete with traditional brick and mortar sellers. Using the Wine Report as a theoretical construct, this Article argues that proportionally weighing the competitive effects of Internet competition provides a more accurate geographic market definition than current formulations. However, as Internet and globalization overlap more and more, old methodologies may need to be abandoned. The cautious solution is to factor Internet competition proportionally in the interim, and as Internet commerce and globalization increase, re-evaluate the geographic market definition altogether.

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<sup>214</sup>See *United States v. Eastman Kodak Co.*, 853 F. Supp. 1454, 1454 (W.D.N.Y. 1994).