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Bricks, Mortar, and Google: Defining the Relevant Antitrust Market for Internet-Based Companies

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I. INTRODUCTION

The Internet and the number of people who use it have grown tremendously over the years. From the use of instant messaging to the emergence of companies like Google, Inc., the Internet has changed the way that people communicate and conduct business. In the last decade alone, worldwide Internet use has grown from just over 360 million users in 2000 to over 1.9 billion users in 2010.[1] As technology continues to improve, the number of people who use the Internet, and consume products and services over the Internet, will likely increase exponentially if past trends are any indication.

As the Internet grows, "web-based businesses are increasingly [becoming] the subject of antitrust concerns"[2] given the emergence and growth of large Internet companies such as Google, Yahoo!, eBay, and MySpace, to name a few.[3] In his article *Antitrust Issues Raised by the Emerging Global Internet Economy*, David S. Evans[4] discusses the development of the web-based economy, and identifies several antitrust issues that are expected to arise.[5] Given that these issues are newly emerging in the

1. *Internet Usage Statistics*, InternetWorldStats, http://internetworldstats.com/stats.htm (last updated June 30, 2010).

2. David S. Evans, *Antitrust Issues Raised by the Emerging Global Internet Economy*, 102 Nw. U. L. Rev. Colloquy 285, 285 (2008); *see, e.g.*, LiveUniverse, Inc. v. MySpace, Inc., No. 06-6994, 2007 U.S. Dist. LEXIS 43739 (N.D. Cal. June 4, 2008) (alleging monopolization and attempted monopolization of Internet-based social networking sites, and advertising on Internet-based social networking sites); *In re* eBay Antitrust Litig., 545 F. Supp. 2d 1027 (N.D. Cal. 2008) (suit alleging tying of online payments service to transaction service); Person v. Google, Inc., No. 06-7297, 2007 U.S. Dist. LEXIS 47920 (N.D. Cal. June 25, 2007) (suit alleging monopolization and attempted monopolization of Internet advertising). In addition to a number of lawsuits filed, in 2007 the Federal Trade Commission investigated the acquisition of DoubleClick, Inc. by Google, and decided not to block it but expressed an intent to "closely watch" the markets involved in online advertising. *Fed. Trade Comm'n, Statement of FTC Concerning Google/DoubleClick*, Fed. Trade Comm'n (Dec. 20, 2007), *available at* http://www.ftc.gov/os/caselist/0710170/071220statement.pdf. Beyond the United States, there have been claims in the European Community that Apple, Inc. has violated competition law by limiting the compatibility between its music players and music purchased from its competitors. *See* Evans, *supra* note 2, at 285 n.2.

3. *See* Evans, *supra* note 2, at 286.

4. David S. Evans is the editor-in-chief of *Competition Policy International* and chairs the editorial board of the *CPI Antitrust Chronicle*. Competition Pol'y Intern'l, https://www.competitionpolicyinternational.com/profile/show/8433 (last visited Oct. 28, 2010). In addition, he is:

> A specialist on competition policy in the United States and European Union, a topic on which he has written and lectured extensively, David has served as an expert and testified before courts, arbitrators, regulatory authorities and legislatures in the United States and Europe. David is Lecturer, University of Chicago Law School and Visiting Professor, Faculty of Laws, University College London where he is one of the Executive Directors of Jevons Institute of Competition Law and Economics. From 1985 to 1995, he was an Adjunct Professor of Law at Fordham Law School . . . where he taught antitrust law and economics.

Id. He has also published seven books and seventy articles, many of which are on antitrust topics. *Id.*

5. *See generally* Evans, *supra* note 2. The issues Evans identifies are "the emergence of impregnable monopolies," "leveraging into adjacent markets," "access to facilities," "tying and bundling," and "envelopment and predation." *Id.* at 301–05. Evans describes "impregnable monopolies" as the

context of e-commerce, many of them have not yet found their way to the inside of a courtroom. Therefore, it is not entirely clear how courts will view and analyze the alleged anticompetitive behavior of these new and growing companies, nor is it entirely clear how courts will define the relevant markets in which these companies operate.

Defining the relevant market is a particularly important aspect of an antitrust case. The manner in which courts define the relevant market in cases involving emerging Internet companies will determine whether such companies ultimately face antitrust liability.[6] The definition of the relevant market enables agencies (specifically, the Federal Trade Commission and the Department of Justice) and ultimately the courts to "discern market power by examining concentration in a defined market."[7] "In defining the relevant . . . market, court[s] must determine which products compete with the defendant's product and thus limit or prevent the exercise of market power."[8] Therefore, the more broadly a court defines the relevant market, the less likely it is that the defendant will have the ability to exercise monopoly power in that market. As a corollary, if the court determines that the defendant does not have the ability to exercise monopoly power in the market, it is less likely that the defendant will ultimately face antitrust liability.

Given the importance of defining the relevant market in an antitrust case, this note attempts to predict how courts will define the relevant market for Internet companies facing antitrust liability. Part II of this note discusses the history of the Internet and its growth, and the resulting antitrust problems that are likely to arise. Part III is divided into two sections. The first section discusses the importance of defining a relevant market in an antitrust case, as well as the fact that it is not yet clear how courts will define the relevant antitrust market in cases involving Internet companies. The second section discusses the framework that courts use for defining the relevant antitrust market. Part IV predicts how courts will define the relevant antitrust market for Internet companies by analyzing three different types of Internet-based businesses: advertisers, retailers, and social networking Web sites. This analysis is based on how courts have begun to deal with defining the relevant market in the few cases involving businesses in these three categories, as well as how courts have defined the relevant market in cases involving more traditional brick-and-mortar businesses.

"monopolization of certain [market] segments." *Id.* at 302–03. "Leveraging into adjacent markets" refers to "dominant firms [seeking] to move into related markets for complementary products or services." *See id.* at 303. An example is Google's introduction of its Google Checkout payment system to compete with PayPal. *Id.* "Access to facilities" refers to issues that may arise from web platforms that close parts of themselves off. *Id.* at 303–04. For example, Facebook "does not allow search engines to crawl its web[ ]site" and search its content. *Id.* at 304. "Envelopment and predation" refers to a situation where an Internet company "crushes" other companies by giving away free features and services that the other company charges its users for. *Id.* at 305.

6. *See* Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001) ("Failure to identify a relevant market is a proper ground for dismissing a [monopolization] claim.").

7. Andrew C. Hruska, Note, *A Broad Market Approach to Antitrust Product Market Definition in Innovative Industries*, 102 Yale L.J. 305, 305 (1992).

8. 2–10 Earl W. Kintner et al., Federal Antitrust Law § 10.1 (Supp. 2010).

II. THE INTERNET

A. A Brief History

The Internet is a system of global "computer networks that are linked by both wired and wireless connections that interoperate through standard communication protocols."[9] "The Internet is at once a world wide broadcasting capability, a mechanism for information dissemination, and a medium for collaboration and interaction between individuals and their computers without regard for geographic location."[10] Indeed, the Internet has revolutionized the way that people do business and communicate with one another, from e-mail to online banking and from online shopping to even dating.[11]

The idea for the Internet originated in the early 1960s by MIT professor, J.C.R. Licklider.[12] Licklider referred to his vision as the "Galactic Network," and pictured a system of globally interconnected computers that would enable users to access data and programs at quick speeds from anywhere in the world.[13] Originally known as ARPANET, the Internet was first launched in 1969, and in its early stages was used by computer experts, engineers, scientists, and librarians.[14] At that point, personal computers did not exist, so those who used the Internet were required to learn an extremely complex system.[15] In fact, ARPANET was comprised of only four computers at its inception.[16]

The 1970s was a decade of progress for the Internet, and by 1972 nineteen additional computers were added to ARPANET, for a total of twenty-three host computers that formed the backbone of the network.[17] That same year, e-mail was adapted for ARPANET.[18] E-mail was regarded as the "killer app" that "changed the [I]nternet forever" by helping to spread ARPANET in its early days, as well as

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9. Evans, *supra* note 2, at 287. "A communication protocol is the set of standard rules for data representation, signaling, authentication and error detection required to send information over a communications channel." *Communications Protocol Definition*, Webster's Online Dictionary, http://www.websters-online-dictionary.org (last visited Oct. 27, 2010).

10. Barry M. Leiner et al., *A Brief History of the Internet*, Internet Society, http://www.isoc.org/internet/history/brief.shtml (last visited Oct. 27, 2010).

11. *See History of the Internet*, History of Things, http://www.historyofthings.com/history-of-the-internet (last visited Oct. 27, 2010).

12. *See* Leiner, *supra* note 10.

13. *See id.*

14. *See* Walt Howe, *A Brief History of the Internet: An Anecdotal History of the People and Communities that Brought About the Internet and the Web*, Walt Howe, http://www.walthowe.com/navnet/history.html (last updated March 24, 2010).

15. *See id.*

16. *See History of the Internet*, *supra* note 11.

17. *See id.*

18. Leiner, *supra* note 10.

fueling growth for the future.[19] ARPANET soon expanded to Europe and, by 1979, 111 computers were linked to the network.[20]

The 1980s marked a decade of tremendous growth as technical innovation helped to bring the Internet closer to what we know it to be today.[21] During this time, computers became more affordable and became commonplace within universities and businesses, and ultimately came within the budget of individuals.[22] This increase in computer access led to the development of "many new organizations . . . to help manage the . . . new users that were utilizing the Internet," and by the end of 1989 the number of computer hosts on the Internet reached 200,000 from 150 at the beginning of the decade.[23] By the early 1990s, the speed at which information could be transmitted had increased and the Internet had about 300,000 host computers; by the end of the decade, the number had reached the hundreds of millions.[24]

The commercial web,[25] as we know it today, appeared around "1995 with the introduction of browsers that made web navigation easier for regular computer users."[26] "Browsers are necessary to view text and media on the web,"[27] and their introduction encouraged the formation of businesses directed toward mass audiences.[28] As more businesses developed on the web, it became clear that many of their business models did not enable them to make money.[29] As a result, many of these businesses lost their market capitalization and disappeared during the bubble burst of 2001.[30] However, the bubble burst did not destroy the web-based economy, and the firms that emerged created new services and new ways of doing business.[31]

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19. *History of the Internet*, *supra* note 11. *See also* Terry W. Posey, Jr., *You've Got Service!*, 28 Dayton L. Rev. 403, 411 (2003) ("[T]he original 'killer app' for the Internet was email."). A "killer app" is "an application that becomes so indispensable to the way people work that it creates a larger market for the operating systems and platforms for which it is available." *Id.* at 411 n.46 (citation omitted).

20. *See History of the Internet*, *supra* note 11.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. The Web (short for the World Wide Web) refers to the products and services that rely on the Internet's physical communication system. Evans, *supra* note 2, at 288.

26. *Id.*

27. *See History of the Internet*, *supra* note 11. The dominant browser today used by Windows computers is Internet Explorer, although other browsers exist, such as Mozilla's Firefox, Google's Chrome, and Apple's Safari, to name a few. *Id.*

28. Evans, *supra* note 2, at 288.

29. *Id.*

30. *See id.*

31. *See id.*

B. The Internet Today and Antitrust

Indeed, the Internet has come a long way from its humble beginnings as an idea for the "Galactic Network." Today, in North America, over a quarter of a billion people, or 77.4% of the population, have access to the Internet.[32] As of December 2007, 78% of all Internet users in the United States used webmail, and 39% of United States users used instant messaging.[33] People can use the Internet to do their banking,[34] order groceries,[35] purchase books,[36] or even date.[37] And, as technology improves, the number of Internet users is likely to increase. For example, individuals currently consume Internet products and services mainly through personal computers; but as more mobile phones around the world become capable of connecting to the Internet, more people will likely connect more frequently and for longer periods of time.[38] Given that mobile phones are less expensive and more widely held than personal computers, this will likely increase not only the consumption of web-based products and services by current Internet users, but will likely increase consumption by new Internet users, especially in less-developed countries.[39]

The growth of the Internet and the number of people who use it has led to the emergence of "global gargantuan firms . . . which will likely attract scrutiny by competition authorities." [40] For example, in the United States, Google has approximately a 69% share of the online advertising market,[41] and eBay has close to a 100% share of auction page views.[42] In fact, some of these "gargantuan firms" have already come under antitrust scrutiny,[43] and further antitrust issues are likely to arise based upon the probable evolution of the Internet and web-based businesses.[44] These antitrust issues will likely be premised upon anticompetitive behavior stemming from the alleged monopoly power that these large firms wield in the relevant market.[45]

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32. *Internet Usage Statistics*, *supra* note 1.

33. Evans, *supra* note 2, at 289. Worldwide, 69% of Internet users used webmail and 47% used instant messenger. *Id.*

34. *E.g.*, Bank of Am., http://www.bankofamerica.com (last visited Sept. 21, 2010).

35. *E.g.*, NetGrocer, http://www.netgrocer.com (last visited Sept. 21, 2010).

36. *E.g.*, Amazon, http://www.amazon.com (last visited Sept. 21, 2010).

37. *E.g.*, Match, http://www.match.com (last visited Sept. 21, 2010).

38. Evans, *supra* note 2, at 289.

39. *Id.*

40. *Id.* at 286.

41. *See DoubleClick Deal Means Google Controls 69% of the Online Ad Market*, Internet Marketing News (Apr. 1, 2008), http://www.browsermedia.co.uk/2008/04/01/doubleclick-deal-means-google-controls-69-of-the-online-ad-market/.

42. Evans, *supra* note 2, at 299–300.

43. *See supra* note 2 and accompanying text.

44. *See* Evans, *supra* note 2, at 302.

45. *See supra* note 2 and accompanying text.

III. DEFINING THE RELEVANT MARKET

A. The Importance of Defining the Relevant Market

In the United States, many of the predicted antitrust issues will likely arise under sections 3 and 7 of the Clayton Act and section 2 of the Sherman Act, as these statutes deal with unlawful monopolization.[46] Under these statutes, courts must define the relevant market that a firm is alleged to monopolize to determine whether the firm actually possesses monopoly power.[47] The relevant market definition is significant because if a firm does not possess monopoly power in the relevant market, it cannot violate the antitrust statutes that proscribe monopolization.

While newly emerging Internet companies may very well raise antitrust concerns, it is not certain how the relevant antitrust markets in which these companies operate will be defined. This is due to the fact that courts have not yet had much experience defining these markets. David S. Evans, the scholar who has predicted many of these antitrust issues,[48] even recognizes that defining the relevant market for these Internet firms involves some uncertainty. In discussing the large segment shares that some Internet companies possess, Evans acknowledged that "one can debate whether these segments correspond to well-defined antitrust markets."[49] Evans also conceded that the dominant shares held by companies like Google and eBay are only in "putative

46. Section 3 of the Clayton Act states in part that

> [i]t shall be unlawful for any person engaged in commerce . . . to lease or make a sale or contract for sale of goods . . . or other commodities . . . for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

15 U.S.C. § 14 (2006 & Supp. 2010). Section 7 of the Clayton Act states in part that "[n]o person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital . . . where . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18 (2006 & Supp. 2010). Section 2 of the Sherman Act states in part that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ." 15 U.S.C. § 2 (2006 & Supp. 2010).

47. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 324 (1962) ("[D]etermination of the relevant market is a necessary predicate to finding a violation of the Clayton Act, because the threatened monopoly must be one which will substantially lessen competition within the area of effective competition.") (quoting United States v. E.I. du Pont de Nemours & Co. 353 U.S. 586, 593 (1957)); United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 394–410 (1956) (discussing the need to define the relevant market in cases arising under § 2 of the Sherman Act).

48. *See supra* notes 4–5.

49. Evans, *supra* note 2, at 301.

antitrust markets"[50] and "are not necessarily relevant antitrust markets."[51] Given this uncertainty and the importance of defining the relevant market, this note attempts to predict how courts will define the relevant antitrust market for web-based businesses. First, however, it is necessary to discuss the framework courts use for defining the relevant market.

B. The Relevant Market Framework

The Supreme Court has defined a monopoly as "the power to control prices or exclude competition."[52] A patent is an example of a classic monopoly because the patent holder has sole control over the use of his patent, and can exclude others from using it.[53] Conversely, perfect competition[54] exists in a market where many buyers and sellers can freely exchange a standardized product, such as wheat or salt.[55]

As producers are able to differentiate standardized products in the way of quality, design, or use, competition diminishes as the producer's "power over price and competition of its product" increases.[56] Therefore, a seller may essentially have a "monopoly on [a] certain trade because of location, as an isolated country store or filling station, or because no one else makes a product of just the quality or attractiveness of his product."[57] In this sense, every seller of a non-standardized product may be considered a monopolist, since each seller has exclusive control over the production and price of its product.[58] However, this is not what creates an illegal monopoly under the antitrust statutes; "[i]llegal power must be appraised in terms of the *competitive market* for the product."[59] The overall competitive market for a given product depends on how similar products are to one another and how far buyers are willing to go to substitute one product for the other.[60] Therefore, to determine whether a firm maintains illegal monopoly power in a market, it is necessary to define the relevant market, which is

50. *Id.* at 286.

51. *Id.* at 286 n.6.

52. *E.I. du Pont*, 351 U.S. at 391.

53. *See id.* at 392.

54. Perfect competition is "[a] completely efficient market situation characterized by numerous buyers and sellers, a homogeneous product, perfect information for all parties, and complete freedom to move in and out of the market. Perfect competition rarely if ever exists, but antitrust scholars often use the theory as a standard for measuring market performance." Black's Law Dictionary 323 (9th ed. 2009).

55. *E.I. du Pont*, 351 U.S. at 392.

56. *See id.*

57. *Id.* at 392–93.

58. *Id.* at 393.

59. *Id.* (emphasis added).

60. *Id.* at 393.

comprised of the relevant geographic market (how far buyers will travel) and the relevant product market (how similar products are).[61]

1. Defining the Relevant Geographic Market

When examining a market in an antitrust case, courts must define the relevant geographic market. While the analyses of the geographic and product markets are distinct, "courts use the same principles in defining the geographic market as they do in defining the product market."[62] The definition of the relevant "geographic market encompasses the geographic area to which consumers can practically turn for alternative sources of the product" involved, as well as the geographic area where "the antitrust defendants face competition."[63] In determining where consumers can practically turn for alternatives, and where the defendant faces competition, courts will look at the "barriers to transactions between buyers and sellers of different locations," which include "transportation costs" and the "relative preferences of consumers with respect to travel and price."[64] Therefore, even if a product or service is available nationwide, the relevant "geographic market may be confined by the fact that it can be impractical for consumers to travel great distances to procure particular services,"[65] or by the fact that consumers may be unwilling to travel at all.[66]

2. Defining the Relevant Product Market

In addition to defining the geographic market in an antitrust case, it is necessary to define the relevant product market to determine "which products compete with the defendant's product and thus limit or prevent the exercise of market power."[67] A company does not maintain an illegal monopoly over a product simply because its product is different from other products.[68] If this were the case, then "only physically identical products would be part of the [relevant] market."[69] Therefore, in order to

61. *See* Charles Carson Eblen, *Defining the Geographic Market in Modern Commerce: The Effect of Globalization and E-Commerce on Tampa Electric and Its Progeny*, 56 Baylor L. Rev. 49, 53 (2004); Brown Shoe Co. v. United States, 370 U.S. 294, 324 (1962) ("The 'area of effective competition' must be determined by reference to a product market . . . and geographic market . . . .") (quoting United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 593 (1957)).

62. *See* Kintner, *supra* note 8, § 10.15.

63. *See* Heerwagen v. Clear Channel Commc'ns, 435 F.3d 219, 227 (2d Cir. 2006) (quoting Morgenstern v. Wilson, 29 F.3d 1291, 1296 (8th Cir. 1994)).

64. *Id.* at 228.

65. *Id.*

66. *See id.* A confined geographic market definition may be found to exist in certain service industries where the service can only be offered from a particular location. Examples of such services include those provided by banks, hospitals, theaters, and ski resorts. 2–10 Kintner, *supra* note 8, § 10.15.

67. Kintner, *supra* note 8, § 10.1.

68. United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 394 (1956).

69. *Id.*

determine the products that comprise a relevant market, the Supreme Court has instructed courts to look at the products that are reasonably interchangeable with the product that is alleged to monopolize, as well the products that are viewed as actual substitutes by consumers.[70] In this vein, the Court has noted that the antitrust statutes do not require that "products be fungible to be considered [part of] the relevant market"; but at the same time, the definition of substitutes cannot be given an "infinite range."[71]

When determining whether products are reasonably interchangeable, courts will define the relevant market to include products that consumers actually view as substitutes for the defendant's products.[72] Accordingly, courts give weight to actual consumer purchasing patterns.[73] However, courts will also examine the functional interchangeability of products; that is, the court will look at whether products can perform the same function, regardless of whether consumers view the products as actual substitutes.[74] Additionally, consumers' failure to investigate all product sources does not mean that consumers' actual purchase patterns necessarily define the market.[75]

While it is difficult to provide concrete examples of relevant markets because "[t]he 'market' which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration,"[76] a look at *United States v. E.I. du Pont de Nemours & Co.*[77] may be useful to help contextualize the above discussion. In *E.I. du Pont*, the Supreme Court established the doctrinal framework for defining the relevant product market. The government alleged that E.I. du Pont had monopolized the market for cellophane.[78] The government argued that the product market was only cellophane, while E.I. du Pont argued that the relevant product market was all "flexible packaging materials," which included wax paper,

70. *See id.* at 394–95 ("What is called for is an appraisal of the 'cross-elasticity' of demand in the trade. . . . In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce,' monopolization of which may be illegal."); *see also* 2–10 Kintner, *supra* note 8, § 10.1 ("[T]he Court in du Pont looked to 1) 'functional interchangeability' and 2) actual substitution by consumers or 'cross-elasticity' of demand.").

71. *E.I. du Pont*, 351 U.S. at 394.

72. *See* Kintner, *supra* note 8, § 10.3.

73. *Id.*

74. *Id.* § 10.2.

75. *Id.* § 10.3 (citing Discon, Inc. v. NYNEX Corp., 86 F. Supp. 2d 154, 161 (W.D.N.Y. 2000)) ("All of [the] choices—whether a particular buyer decides to consider them, or instead ignore all options but one—must be included in the relevant market."); *Id.* (citing Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 140 F.3d 494, 514 (3d Cir. 1998)) ("Product market definition turns on the existence of close substitutes for a particular product, not on the ability of any particular consumer to switch effortlessly to such substitutes.").

76. *E.I. du Pont*, 351 U.S. at 404.

77. *Id.*

78. *Id.* at 378.

aluminum foil, and parchment paper, among other materials.[79] The government asserted that the markets for cellophane and the other packaging materials were distinct because cellophane and the other materials were neither "substantially fungible nor like priced."[80] The Court, in holding that the relevant market was all flexible packaging materials, examined the desirable characteristics of cellophane as compared to other packaging materials;[81] the "degree of functional interchangeability" of cellophane with the other materials;[82] and the "cross-elasticity of demand."[83] With respect to functional interchangeability, for example, the Court found that "cellophane had no qualities not possessed by many other materials," and that, for certain purposes, cellophane had actually lost a portion of its packaging business to the other materials.[84] In concluding that the relevant market was all flexible packaging materials that the Court cited the lower court's opinion:

> The record establishes plain cellophane and moistureproof cellophane are each flexible packaging materials which are functionally interchangeable with other flexible packaging materials and sold at same time to same customers for same purpose at competitive prices; there is no cellophane market distinct and separate from the market for flexible packaging materials; the market for flexible packaging materials is the relevant market for determining nature and extent of duPont's market control; and duPont has at all times competed with other cellophane producers and manufacturers of other flexible packaging materials in all aspects of its cellophane business.[85]

In addition to examining the availability of substitutes within the broad market, the Supreme Court, subsequent to the *E.I. du Pont* case, introduced the concept of submarkets. In *Brown Shoe Co. v. United States*, the Court stated that "within [the] broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes."[86] The Court went on to note that "[t]he boundaries of . . . a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors."[87] For example, in *Brown Shoe*, the Court recognized submarkets for men's, women's, and children's shoes within the broader market of shoes.[88] Although the Supreme

79. *Id.* at 393–94, 423.

80. *Id.* at 380.

81. *Id.* at 398.

82. *Id.* at 399.

83. *Id.* at 399–400.

84. *Id.*

85. *Id.* at 403.

86. 370 U.S. 294, 325 (1962).

87. *Id.*

88. *See id.* at 301.

Court has acknowledged that submarkets may exist, the Court itself has cautioned against disregarding the broader market in favor of a relevant submarket,[89] and both lower courts[90] and commentators have criticized the idea of submarkets generally.[91]

IV. THE INTERNET: HOW WILL COURTS DEFINE THE RELEVANT MARKET?

A. The Geographic Market

When antitrust cases involving Internet companies come before the courts, one issue that will arise is how the geographic market will be defined. As previously noted, "[t]he Internet is at once a world-wide broadcasting capability, a mechanism for information dissemination, and a medium for collaboration and interaction between individuals and their computers without regard for geographic location."[92] The Internet has no borders, and in a sense, it is everywhere, yet nowhere all at once. A person in New York and a person in Hawaii can both be on the same Web site, at the same time, without leaving the comfort of their living rooms. Yet the Internet is not a physical place where one can say, "I'll be back in five minutes, I'm going to pick something up on the Internet." This unique feature of the Internet presents an interesting question as to how courts will define the geographic market in which Internet companies operate for purposes of antitrust analyses.

One possible geographic-market definition for Internet companies is the Internet itself.[93] Such a definition may make sense if the defendant's product is only available on the Internet, and cannot be purchased from a brick-and-mortar business. In such an instance, there is no alternative geographic area in which consumers can practically acquire the product, nor is there another geographic area in which the antitrust

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89. *See* United States v. Greater Buffalo Press, 402 U.S. 549, 553 (1971) (quoting United States v. Phillipsburg Nat'l Bank & Trust Co., 399 U.S. 350, 360 (1970)) ("[S]ubmarkets are not a basis for the disregard of a broader line of commerce that has economic significance.").

90. *See* Kintner, *supra* note 8, § 10.5 n.69 (citing Satellite Television & Associated Res., Inc. v. Cont'l Cablevision of Va., Inc., 714 F.2d 351, 355 n.5 (4th Cir. 1983)).

> The use of the term 'submarket' is to be avoided; it adds only confusion to an already imprecise and complex endeavor. For antitrust purposes a product group or geographic area either meets the listed criteria, in which case it is a relevant market; or it does not, in which case it is irrelevant for purposes of analysis. No fiddling with nomenclature will change the analysis or result.

Id.; Cmty. Publishers, Inc. v. Donrey Corp., 892 F. Supp. 1146, 1154 n.9 (W.D. Ark. 1995) ("'[T]he emerging consensus' of antitrust scholars and [the] case law seems to be that the term 'submarket' is unnecessary."); *In re* Air Passenger Computer Reservation Sys. Antitrust Litig., 694 F. Supp. 1443, 1458 n.9 (C.D. Cal. 1988) ("The term submarket will not be used in this memorandum because the prefix 'sub' merely creates confusion and is superfluous.").

91. *See* Kintner, *supra* note 8, § 10.5 n.70 (citing Lawrence C. Maisel, *Submarkets in Merger and Monopolization Cases*, 72 Geo. L.J. 39, 40 (1983)) (criticizing the submarket concept); *Id.* (citing Robert Pitofsky, *New Definitions of Relevant Market and the Assault on Antitrust*, 90 Colum. L. Rev. 1805, 1849 n.182 (1990)) (arguing that submarkets never had any theoretical justification and created confusion).

92. Leiner, *supra* note 10.

93. *See* Eblen, *supra* note 61, at 79.

defendant faces competition. In this respect, the Internet would seem to satisfy a geographic-market definition.

However, there are two problems with this approach. First, defining the geographic market as the Internet raises the glaring issue that the Internet is not a geographic location, and courts have always required that the *geographic* market be defined by geography in cases alleging an unlawful monopoly.[94] This is exactly the holding in one of the only cases to address this issue. In *America Online, Inc. v. GreatDeals.Net*, a case involving section 2 of the Sherman Act, the Eastern District of Virginia refused to define the relevant geographic market as the Internet, stating:

> With respect to the relevant geographic market in which 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. The Internet is a "giant network which interconnects innumerable smaller groups of linked computer networks." The network "allows any of literally tens of millions of people with access to the Internet to exchange information."[95]

The court in *America Online* seemed to suggest that the relevant geographic market *must* be a physical place; a place that can be "defined with outer boundaries."[96] The court also went on to intimate that although the Internet may be "infinite," the geographic locations of the individuals using the Internet should be considered in defining the geographic market.[97] Additionally, the court appeared to suggest that substitute products were available in physical geographic locations,[98] which leads to the second problem of defining the geographic market as the Internet.

The second problem is that brick-and-mortar substitutes for Internet products and services exist because there will often be businesses in physical, geographic locations that sell products or services that are possible substitutes for those sold by Internet companies.[99] For the purposes of defining the geographic market, however, it is sufficient to say that when brick-and-mortar substitutes exist, courts will undoubtedly need to define the relevant geographic market in a manner that accounts for the locations of all such substitutes.

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94. *See id.* at 56–59.

95. Am. Online, Inc. v. GreatDeals.Net, 49 F. Supp. 2d 851, 858 (E.D. Va. 1999) (quoting Cyber Promotions, Inc. v. Am. Online, Inc., 948 F. Supp. 456, 459 (E.D. Pa. 1996)).

96. *See id.*

97. *See Am. Online*, 49 F. Supp. 2d at 858 ("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."). Given the court's statement that the geographic market cannot be restricted to AOL subscribers, or even to people with Internet access, one may conclude that the geographic location of AOL subscribers *and* other individuals must be taken into account when defining the geographic market.

98. *See id.* at 858 ("There are numerous substitutes for e-mail advertising, some of which are less expensive, including use of the World Wide Web, direct mail, billboards, television, newspapers, radio, and leaflets, to name a few.").

99. These possible substitutes will be analyzed in the next section, which will discuss how courts will define the relevant product market. *See infra* Part IV.

Given that the geographic-market definition will depend on whether brick-and-mortar substitutes are available, the product-market definition will likely become increasingly significant, with the geographic-market definition becoming less important in the relevant market analysis where Internet companies are involved. Therefore, the first step in defining the relevant market in which Internet companies operate will be to define the product market.

When the product market consists of only products or services available on the Internet, the geographic market will still need to be "defined with outer boundaries" as a "place or location" in order to actually satisfy a *geographic* market definition. This point is illustrated in *LiveUniverse, Inc. v. MySpace, Inc.*,[100] where the plaintiff in a section 2 Sherman Act case alleged the relevant antitrust market to be "Internet-based social networking in the geographic region of the United States."[101] In discussing the relevant market, the Central District of California spent most of its time discussing the product market, and approved the plaintiff's geographic market definition as the United States, as opposed to the entire Internet, in just a few sentences.[102]

When the product market contains products available from brick-and-mortar businesses, however, the geographic market will need to be defined in a way that accounts for these businesses. Therefore, once the product market is defined to include brick-and-mortar businesses, the geographic market will logically follow and include the geographic locations of those brick-and-mortar businesses, as those are locations where consumers can practically turn to purchase substitutes to the products or services sold on the Internet.[103]

B. The Product Market

For the purposes of predicting how courts will define the relevant product market for Internet companies, this note will examine three categories of Internet businesses: advertisers (i.e., Google and Yahoo!); retailers or companies that sell tangible products (i.e., eBay and Amazon.com); and social networking Web sites (i.e., MySpace and Facebook).[104] This note predicts that when defining the relevant product market, courts will define the market broadly for Internet retailers and advertisers to include both traditional brick-and-mortar business and Internet businesses, but will define the market narrowly for social networking Web sites to include Internet businesses only.

100. No. CV 06-6994 AHM (RZx), 2007 U.S. Dist. LEXIS 43739 (C.D. Cal. June 4, 2007).

101. *Id.* at *10.

102. *See id.* at *16 (citing *Am. Online*, 49 F. Supp. 2d at 851). For a discussion of how the court defined the relevant product market, see *infra* text accompanying notes 137–42.

103. For a further discussion of defining the relevant geographic market, see Eblen, *supra* note 61, at 53. In contrast to this note, which discusses how courts should define the relevant antitrust market when Internet companies are the subject of antitrust scrutiny, Eblen discusses the extent to which Internet companies should be included in the relevant geographic market where they compete with brick-and-mortar sellers when the brick-and-mortar sellers are the subject of antitrust scrutiny. *Id.*

104. These categories are not intended to be exhaustive, and they are not an attempt to categorize every type of Internet business. The categories contain some of the largest Internet companies in existence, and will help to illustrate how courts may go about defining the relevant antitrust market.

1. Advertising

There are various ways to advertise on the Internet, ranging from search advertising to banner advertising to pop-up advertisements.[105] One possible way to define the relevant product market for Internet advertising is to divide the different forms of online advertising into submarkets. This is essentially the approach the Federal Trade Commission (FTC) took during a 2007 investigation of the proposed acquisition of DoubleClick, Inc. by Google.[106] While the FTC did not explicitly define the submarkets it believed to exist, its official statement from the investigation revealed that the FTC nevertheless contemplated several submarkets in its consideration of the relevant market based upon advertisers' willingness to substitute one form of online advertising for another.

First, the FTC's investigation found that advertisers purchase advertising space online in two ways: they purchase advertising space from search engine providers, such as Google, and from web content providers.[107] Within the category of purchases from web content providers,[108] the FTC discussed two channels through which content providers sell advertisements—direct and indirect sales.[109] With direct sales, content providers use their own sales force to sell advertisement space, and with indirect sales, content providers use advertisement intermediation firms to place advertisements on the content provider's Web site.[110] The FTC's investigation found that advertisers do not consider advertising intermediation to be a substitute for directly placed advertising.[111]

The FTC also discussed contextual advertising, which is an advertising channel used by certain advertisement intermediation firms.[112] The FTC found that advertisers do not consider contextual advertisements to be substitutes for directly purchased advertisements. At the same time, the FTC found that contextual advertisements do not constitute a separate market, but are part of a broad market comprised of all advertisements sold by intermediaries.[113]

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105. *See* Marshall Brain, *How Web Advertising Works*, How Stuff Works, http://www.howstuffworks.com/web-advertising.htm (last visited Oct. 27, 2010).

106. *See* Fed. Trade Comm'n, FTC File No. 071-0170, Statement of Federal Trade Commission Concerning Google/DoubleClick, 3 (2007) [hereinafter FTC Statement], *available at* http://www.ftc.gov/os/caselist/0710170/071220statement.pdf.

107. *Id.*

108. A content provider is "[a]n organization or individual that creates information, educational or entertainment content for the Internet . . . ." *Content Provider Definition*, PCMag, http://www.pcmag.com/encyclopedia_term/0,2542,t=content+provider&i=40275,00.asp (last visited Oct. 2, 2010).

109. FTC Statement, *supra* note 106, at 3–4.

110. *See id.*

111. *Id.* at 4.

112. *Id.* at 5. "Contextual ad[vertisement]s are predominantly text ad[vertisement]s that are delivered to a web page using technology that scans the text of a web page for key words and delivers ad[vertisement]s to the page based on what the user is viewing." *Id.*

113. *Id.* at 5–6.

While the FTC discussed different forms of online advertising and the purchasing behavior of advertisers, it did not explicitly state that certain forms of online advertising comprised distinct submarkets. The FTC, nevertheless, made it clear that it did not consider all forms of online advertising to be a part of the same relevant product market:

> It has been suggested that the [acquisition of DoubleClick by Google] . . . would eliminate competition . . . in an "all online advertising" market that would include search advertising, ads sold through intermediaries, and directly sold ad inventory. The evidence, however, indicates that all online advertising does not constitute a relevant antitrust market. Advertisers purchase different types of ad inventory for different purposes, and one type does not significantly constrain the pricing of another. For instance, advertisers primarily purchase search advertising space to implement direct response ad campaigns, while directly sold ad inventory is generally purchased for brand advertising campaigns.[114]

Although the FTC found that all online advertising does not constitute a relevant antitrust market and suggested that submarkets exist, it is unlikely that courts will adopt the FTC's approach when defining the relevant product market for online advertisers. First, as already discussed, the idea of submarkets has been rejected by many courts and commentators.[115] Additionally, at least one court has rejected the idea of submarkets in the context of online advertising. In *Person v. Google, Inc.*, the Northern District of California found that keyword-targeted Internet advertising (where advertisers pay to have their advertisements placed near the search results produced by a search engine) was not a relevant product market, and stated:

> The Court finds no basis for distinguishing the Search Ad Market from the larger market for Internet advertising. Search-based advertising is reasonably interchangeable with other forms of Internet advertising. A website may choose to advertise via search-based advertising or by posting advertisements independently of any search. The Search Ad Market thus is too narrow to form a relevant market for antitrust purposes.[116]

Furthermore, neither the FTC nor the court in *Person* considered that courts could possibly define the relevant market more broadly than just online advertising, and include traditional methods of advertising such as television, radio, and newspaper advertising in the relevant product market. Courts have found that different forms of advertising are substitutes for one another because "[a]ll advertising performs the same function of introducing and maintaining public awareness of the retailers'

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114. *Id.* at 7.

115. *See supra* notes 89–91 and accompanying text.

116. Person v. Google, Inc., No. C 06-07297 JF (RS), 2007 U.S. Dist. LEXIS 22499, at *12 (N.D. Cal. Mar. 16, 2007); *see also* KinderStart.com, LLC v. Google, Inc., No. C 06-2057 JF (RS), 2007 U.S. Dist. LEXIS 22637, at *15–16 (N.D. Cal. Mar. 16, 2007).

product."[117] In fact, the court in *America Online* held that various forms of advertising are substitutes for one form of online advertising—e-mailed advertisements—and stated that "[t]here are numerous substitutes for e-mail advertising, some of which are less expensive, including use of the World Wide Web, direct mail, billboards, television, newspapers, radio, and leaflets, to name a few."[118]

Internet advertising does, in fact, perform the same function as the other forms of more traditional advertising mentioned, and it accomplishes its function in a similar manner. Content placed on Web sites, such as non-interactive banner advertisements, is no different than advertisements placed on the page of a newspaper or magazine, and online video advertisements are no different than television commercials. Readers of Web sites and newspapers alike will both receive messages on a page they are viewing in exactly the same manner. For example, if Walt Disney Co. were to place an advertisement in a newspaper and then place the identical advertisement on a webpage, the viewer of that advertisement, in either medium, would receive exactly the same message. Additionally, both Internet and traditional advertisers use information regarding consumer interests to place their advertising.[119] "As they do in other media, [Internet] advertisers wishing to direct their advertising to customers based on their interests must decide where to place advertising after determining which websites are popular with the advertisers' target customers."[120] Indeed, Internet content advertising is functionally interchangeable with other forms of advertising, even if some "[a]dvertisers view online content providers differently."[121]

Although Internet search advertising (as distinguished from the content advertising just discussed) differs from more traditional forms of advertising and may be considered "unique,"[122] the former still serves the same function as its more traditional counterpart. Search advertising provides advertisements to consumers based on terms they enter into a search engine.[123] Google's AdWords program, for example, allows advertisers to purchase keywords. When the purchased keyword is

117. Huron Valley Publ'g Co. v. Booth Newspapers, Inc., 336 F. Supp. 659, 662 (E.D. Mich. 1972) (holding newspaper advertising does not constitute relevant product market; all forms of advertising must be considered); *see also* Berlyn, Inc. v. Gazette Newspapers, Inc., 73 Fed. App'x 576, 583 (4th Cir. 2003) (holding television, radio, and print advertising to be part of the same relevant market as they "are competing for the same limited pool of advertisers' dollars").

118. Am. Online, Inc. v. GreatDeals.Net, 49 F. Supp. 2d 851, 858 (E.D. Va. 1999).

119. *See*, *e.g.*, *How does Google target ads to my website?,* Google AdSense, http://www.google.com/support/adsense/bin/answer.py?hl=en&answer=9713 (last visited Sept. 20, 2010); Ambarish Chandra & Ulrich Kaiser, *Targeted Advertising in Magazine Markets*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1653435 (Aug. 31, 2010); *Targeted Advertising*, Time Inc., http://www.timeinc.com/clients/advertising.php (last visited Sept. 20, 2010) (discussing Time Inc.'s targeted advertising divisions for both magazine and online advertising).

120. FTC Statement, *supra* note 106, at 3.

121. *Id.*

122. *Id.*

123. *See id.*

entered as a search term into Google's search engine by a user, the keyword triggers the advertiser's advertisement, and a link to the advertiser's Web site.[124] Based on the keywords that an advertiser purchases, a search for the term "football," for example, may trigger advertisements for replica jerseys or sporting goods stores.[125] This is not entirely different from more traditional forms of advertising. Just as an advertiser using Google's AdWords program can choose the keywords that trigger its advertisement, an advertiser using more traditional forms of advertising can choose the type of publication that "triggers" its advertisement. For example, a person who purchases a print copy of *TENNIS Magazine* will likely "trigger" advertisements for tennis rackets or tennis pro shops because those advertisers target readers of that magazine. While this analogy is admittedly an oversimplification of how search advertising works, it illustrates the point that search advertising serves the same function as more traditional advertising, and it raises some of the issues that courts may encounter when defining the relevant antitrust market. Accordingly, the relevant market definition for online advertising will need to take into account the non-Internet options that advertisers have available to them.

2. Retail

Online marketplaces and auction sites such as Amazon.com and eBay sell a variety of products, including books, electronics, and clothing, to name a few. One way of defining the relevant market might be the market for online book sales, or online electronics sales, etc. The problem with these possible definitions is the same problem associated with defining the advertising market as online advertising—they are too narrow because they fail to take into account substitutes that are available from brick-and-mortar sellers. This problem was evident in *Gerlinger v. Amazon.com, Inc.*, where the Northern District of California observed that the plaintiff was unable to offer anything but "unsupported allegations that there is a separate and distinct 'online market segment'" for books.[126]

Another possible definition is the market for online auctions, in the case of eBay, or the market for online marketplaces, in the case of Amazon.com. This was the approach taken by plaintiffs in *In re eBay Seller Antitrust Litigation*.[127] The plaintiffs in *eBay* alleged seven antitrust violations, including claims that eBay monopolized or attempted to monopolize the market for online auctions.[128] The plaintiffs, in their

124. *See* Rescuecom Corp. v. Google, Inc., 562 F.3d 123, 125 (2d Cir. 2009); *see also*, *Where will my ads appear?*, Google AdWords, https://adwords.google.com/support/aw/bin/answer.py?hl=en&answer=6119 (last visited Sept. 20, 2010).

125. FTC Statement, *supra* note 106, at 3.

126. Gerlinger v. Amazon.com Inc., 311 F.Supp. 2d 838, 851 (N.D. Cal. 2004). In this case the plaintiff challenged an agreement between Amazon.com, Inc., an online bookseller, and Borders Group, Inc., a retail bookseller, and alleged several antitrust violations including illegal price fixing and attempted monopolization. *See id.* at 840, 845, 851.

127. 545 F. Supp. 2d 1027 (N.D. Cal. 2008).

128. *Id.* at 1029.

complaint, described eBay as a place where "buyers can search for auction listings for specific items or search by category, key word, seller name, recently commenced auctions or auctions about to end," but did not go further in describing the online auction market.[129]

The problem with accepting the relevant product market as the online auction market is that such a definition fails to "acknowledge that alternatives to eBay . . . exist[,] let alone distinguish [it] from the pool of obvious substitutes."[130] As noted previously, a wide variety of items are available for sale on eBay, ranging from cars to electronics to musical instruments.[131] A market definition of online auctions fails to consider that online auctions are not the only place to purchase the items for sale in eBay's marketplace, and it also fails to consider that online auctions do not serve as the only means for buyers and sellers to transact such items.[132]

> After all, long before eBay [and other online marketplaces were] conceived, buyers and sellers of products ranging from cars to computer equipment to comic books found ways to complete sales. They gathered together and still meet through classified ads (both online and offline), car dealerships, department stores, comic book conventions and everywhere else that people buy and sell things.[133]

eBay further elaborated on the possible substitutes to online auctions:

> Someone looking, for example, to buy a pair of speakers for a home stereo has many options. That person might visit a shopping mall, Best Buy or a boutique home electronics store. A more adventurous (or more informed) buyer might thumb through classifieds, scan listings on Craigslist.com, type "speakers" into an Internet search engine, check Amazon.com or visit eBay.com. The same is true for someone looking to sell speakers. A would-be seller might post a note on a local bulletin board, host a garage sale, place an ad in a local newspaper, put a listing on Craigslist.com, list the item on eBay.com or put the item up for sale somewhere else on the Internet.[134]

Although the Northern District of California denied eBay's motion to dismiss, it did not accept the plaintiffs' market definition, and it did not define the market at such an early stage of the litigation. In fact, the court acknowledged that there may be problems with the plaintiffs' relevant market definition, stating that the "plaintiffs'

129. Consolidated Class Action Complaint at 9, *In re* eBay Seller Antitrust Litigation, 545 F. Supp. 2d 1027 (N.D. Cal. 2008) (No. C-07-01882-(JF)).

130. Motion to Dismiss Plaintiffs' Consolidated Class Action Complaint at 9, *In re* eBay Antitrust Litigation, 545 F.Supp.2d 1027 (N.D. Cal. 2008) (No. C-07-01882-(JF)). This problem is similar to the problem that results when the product market for online advertising is defined as the online advertising market. Such a definition fails to consider the brick-and-mortar-substitutes that are available.

131. *See* eBay, http://www.ebay.com (last visited Oct. 28, 2010).

132. *See* Motion to Dismiss Plaintiffs' Consolidated Class Action Complaint, *supra* note 130, at 9.

133. *See id.*

134. Reply in Support of Motion to Dismiss the Consolidated Complaint at 3, *In re* eBay Antitrust Litigation, 545 F.Supp.2d 1027 (N.D. Cal. 2008) (No. C-07-01882-JF).

market is narrowly defined and may be implausible as a theoretical matter." [135] However, the court held that at that stage of the litigation the plaintiffs' allegations were sufficient to allow the plaintiffs to move forward to prove the relevant market that they had alleged. [136]

Though the court did not dismiss the complaint outright, it seems clear that there are a variety of functional substitutes to an online auction market that exist both in brick-and-mortar businesses as well as on the Internet. The narrow market definition of online auctions does not encompass all of these substitutes, and in analyzing antitrust claims that arise, courts will need to consider these substitutes when determining what the relevant market is.

3. Social Networking

"Social networking websites allow visitors to create personal profiles containing text, graphics, and videos, as well as to view profiles of their friends and other users with similar interests."[137] Unlike online advertising and online marketplaces, social networking sites do not have readily identifiable substitutes that exist in brick-and-mortar businesses. In fact, social networking Web sites are a relatively new concept and represent a new product that does not exist in brick-and-mortar form. This is in contrast to online advertising and marketplaces, which are simply new ways of providing existing products or services. Therefore, when examining the relevant market for social networking sites (as well as other products or services unique to the Internet which may already exist, or have yet to be invented) the market definition will be narrow enough to capture only web-based companies.

This idea of a narrow market definition is illustrated in *LiveUniverse, Inc. v. MySpace, Inc.*[138] In that case, the plaintiff alleged the relevant product market in which MySpace operates to be Internet-based social networking.[139] On a motion to dismiss, the Central District of California discussed whether this market definition was sufficiently alleged and held that it was.[140] Although the defendant claimed that businesses other than social networking Web sites competed in the relevant market,

135. *In re* eBay Antitrust Litig., 545 F.Supp. 2d 1027, 1032 (N.D. Cal. 2008) (quoting Brownlee v. Applied Biosystems, Inc., No. 88 20672, 1989 WL 53864, at *3 (N.D. Cal. Jan. 9, 1989)).

136. *Id.* at 1032–33. On a subsequent motion for summary judgment brought by eBay, the court maintained that the plaintiffs had raised a triable issue of fact as to whether the online auction market is a viable relevant market definition. *In re eBay,* 2010 WL 760433, at *9 (N.D. Cal. Mar. 4, 2010). The court nevertheless granted summary judgment in favor of eBay because the plaintiffs failed to proffer any evidence that eBay's alleged anticompetitive acts actually caused the plaintiffs' injuries. *Id.* at *14. This case, therefore, leaves open the question as to whether the online auction market is a viable relevant market definition for antitrust purposes.

137. LiveUniverse, Inc. v. MySpace, Inc., 2007 U.S. Dist. LEXIS 43739, at *1 (C.D. Cal. June 4, 2007).

138. *Id.*

139. *Id.* at *10.

140. *Id.* at *19.

there was no argument that brick-and-mortar businesses competed in the relevant market.[141]

Indeed, it is difficult to imagine the types of brick-and-mortar businesses that would compete with social networking Web sites. It is even difficult to imagine the types of Internet businesses that would compete with social networking Web sites. For example, in response to the defendant's argument that online dating sites should be included in the relevant market with social networking sites, the court in *LiveUniverse* stated that "[a]lthough social networking web sites may also be used for dating, if MySpace suddenly were to shut down, its members would not fill the social void by turning to online dating sites. Instead, they would likely set up profiles on a different social networking website."[142]

Given that there are no readily identifiable functional substitutes for social networking Web sites, courts will likely continue to define the relevant product market for these sites in a manner that only includes web-based businesses. Even if courts conclude that there are substitutes for social networking Web sites, these substitutes will be unlikely to exist in brick-and-mortar businesses. Therefore, the relevant market definition for social networking Web sites will still be narrow enough to include only web-based businesses.

B. Implications

Although companies have emerged that seemingly dominate the Internet and appear to exercise market power, courts will often define the relevant antitrust market broadly to include brick-and-mortar competitors that operate and conduct business beyond the Internet. In a case where the market is defined broadly, a company that appears to dominate the Internet will not face antitrust liability for alleged anticompetitive behavior because it does not exercise power in the broader relevant market.

This is not to suggest that courts will define the relevant market broadly in all cases involving Internet giants suspected of behaving in an anticompetitive manner. Only Internet companies that have developed a new product which is exclusive to the Internet (e.g., social networking sites) will fall into a narrowly defined relevant market, while companies that have simply developed a new method for delivering existing products or services (e.g., advertising and retailing companies) will be part of a broader relevant market. Therefore, companies in the former category will be more vulnerable to antitrust liability, while the converse will be true for those companies in the latter category.

V. CONCLUSION

The Internet has grown immensely from its primitive days as the idea for a "Galactic Network" and a handful of computers. Its growth and development, especially over

141. *Id.* at *17–19.

142. *Id.* at *19.

the last decade, have led to the emergence of "global gargantuan" firms, the likes of which were probably unimaginable in the early days of the Internet. These firms, due to their size, are likely to be at the center of antitrust scrutiny in the future, though it is not currently clear how courts will define the relevant antitrust market when cases involving these giants present themselves.

If and when these predicted antitrust cases come before the courts, the relevant market definition will likely depend upon whether brick-and-mortar substitutes are available for a given product or service, or whether that product or service is available from an Internet-based business only. Internet businesses such as advertisers and retailers will likely fall into the former category and comprise a broadly defined market, while businesses such as social networking Web sites will likely fall into the latter category and comprise a narrowly defined market. The implication of these definitions is two-fold: First, when Internet firms come under antitrust scrutiny, only firms that fall into the latter category will face antitrust liability. Second, simply because a firm dominates the Internet does not mean that it dominates the market for the product that it sells.