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CODING CONSENT: THE MERITS OF ANTITRUST CONSENT DECREES IN THE TECH INDUSTRY

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Coding Consent: The Merits of Antitrust Consent Decrees in the Tech Industry

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Introduction

Consent decrees are a power tool in the box of American antitrust regulators. The Department of Justice's Antitrust Division finalized its first consent decree in 1906, and from the 1950s until the present, between 87% and 97% of the Antitrust Division's cases have been resolved by consent decree.[1] As the economy has developed to incorporate more and more technological companies and products, consent decrees have naturally begun to affect some of the biggest players in the digital world. Those consent decrees have not necessarily provided the most appropriate fit to the needs and requirements of the digital world. It is the purpose of this paper to explore the intersection of consent decree and digital world, and perhaps suggest some changes to the consent decree.

Beginning at the beginning, this paper will first survey the goals of antitrust regulation. Second, the reasons for the high rate of settlements in the last half-century will be examined, together with certain pitfalls that may accompany such a rate. Third, the details of several consent decrees involving technological companies will be laid out and compared, to see whether and what pitfalls have actually materialized. Fourth, this paper will make some observations on the strengths and flaws of the consent decrees as they have appeared. It will conclude by

[1] Joshua D. Wright & Douglas H. Ginsburg, *Antitrust Settlements*, *The Culture of Consent*, *in* WILLIAM E. KOVACIC, AN ANTITRUST TRIBUTE - LIBER AMICORUM (Vol. 1) (2013), *available at* http://www.ftc.gov/public-statements/2013/02/antitrust-settlements-culture-consent. That first case in 1906 was *United States v. Otis Elevator Company*.

suggesting some specific considerations to be taken into account in future settlements with the digital world.

Part I: Why Bother?

Before a diagnosis can be ventured, the desired result must be known. Recent literature has displayed an uncertainty on that basic question regarding antitrust law. The current decisional law is almost exclusively concerned with "Consumer Welfare."[2] Some commentators, notably Judge Douglas Ginsburg of the D.C. Circuit and Commissioner Joshua D. Wright of the Federal Trade Commission ("FTC"), insist that it is the most economically sensible and legally clear goal for Antitrust law: "The promotion of economic welfare as the lodestar of antitrust laws—to the exclusion of social, political, and protectionist goals—transformed the state of the law and restored intellectual coherence to a body of law that Robert Bork had famously described as paradoxical."[3] Other commentators are less sure.

Neil W. Averitt and Robert H. Lande[4] have proposed a (slightly) different goal, which they call the "Consumer Choice Model."[5] The Consumer Choice Model is defined as follows: "An antitrust violation can, therefore, be understood as an activity that unreasonably restricts the totality of price and non-price choices that would otherwise have been available."[6] Averitt and Lande criticize Consumer Welfare for being too narrowly tied to price and efficiency determinations, and suggest that their model can accommodate those determinations as well as

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[2] *Id*.
[3] Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust; Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405, 2406 (2013).
[4] Averitt is an Attorney in the Office of Policy and Coordination, Bureau of Competition, Federal Trade Commission; Lande is the Venable Professor of Law at the University of Baltimore School of Law.
[5] Neil W. Averitt & Robert H. Lande, *Using the "Consumer Choice" Approach to Antitrust Law*, 74 ANTITRUST L. J.175, 175 (2007).
[6] *Id*. at 182.

other things that are "actually important to consumers—price, of course, but also variety, innovation, quality, and other forms of non-price competition."[7] Averitt and Lande claim that Consumer Welfare's fundamental flaw as a goal is that it does not account for this non-price competition. Consumer Welfare either creates an ambiguous "quality-adjusted price" or assumes that quality is folded into price competition.[8] They argue that this is particularly relevant in the high-tech market, because in that market creativity and innovation are more important tools of competition than price.[9] Therefore, Consumer Welfare is insufficient at least with regard to the technological industry, and must have the variables of variety and innovation added unto it, in order to comprise a proper goal for Antitrust.[10]

Judge Ginsburg and Commissioner Wright vehemently disagree. They argue that the Consumer Choice standard "rejects economic analysis," looking instead to the "misleading proxies" of the number of options in a market.[11] Ginsburg and Wright insist that there is nothing wrong with quality adjusted pricing, and counter that Averitt and Lande are diminishing the reality of the trade-offs consumers make when they choose to buy a product at one price and not another.[12] The sole concession made in what is otherwise a blunt contradiction comes in one sentence: "If the consumer choice standard were no more than an evidence-based approach to incorporating non-price competition into the traditional welfare standard, it would be

[7] *Id*. at 175.
[8] *Id*. at 176.
[9] *Id*. at 201-202. On the next page, Averitt and Lande utilize an analogy to the publishing market. They say that three book publishers may be sufficient to ensure price competition, but that even if they were competing "in perfect good faith" they might simply be unable to produce the variety of literature that perhaps could be produced if there were more of them. The loss of that literature, though it perhaps did not harm consumer's pocketbooks, might harm their quality of life.
[10] *Id*. at 238-239. Additionally, the Consumer Choice Standard is asserted to be more clearly and easily communicated to the layman. While this seems to be more important to Averitt and Lande than to anyone else in the conversation, it is certainly no vice.
[11] Wright & Ginsburg, *supra* note 3, at 2409, 2422.
[12] *Id*. at 2409-2411.

unobjectionable."[13] However, this seems like nothing more than what Averitt and Lande had wanted to do anyway: add variety and innovation to the Consumer Welfare Standard.

Maurice Stucke, a Senior Fellow at the American Antitrust Institute, provides a blunt counterpoint to Ginsburg and Wright. "The quest for a single economic goal [for antitrust]," he writes, "failed."[14] Stucke blandly points out that there is no generally agreed-upon definition for Consumer Welfare.[15] It is certainly not easily or clearly quantifiable, a fact that has been reflected in the consequent antitrust jurisprudence.[16] Instead of chasing the chimaera of a single economic standard, the purpose of antitrust should be to promote well-being generally. Stucke quotes Louis B. Schwartz, "The difficult question is not *whether* noneconomic considerations are a proper, indeed conventional, component of the antitrust calculus, but how to take them into account [emphasis in original]."[17] Stucke suggests that by taking in a blend of goals and going away from the single, fact-intensive, "rule of reason" standard in antitrust, the courts may achieve better clarity, and better economic results.[18]

Certain points emerge clearly from the crosstalk. First, Consumer Welfare is a malleable concept. Second, detailed economic analysis is a necessity for understanding this area of law, never mind generalist judges. Third, the addition of non-price competition into the Consumer Welfare concept is an attractive option, especially for the new digital economy.

Stucke's point that Consumer Welfare is not a rigidly defined concept, hits home. Ginsburg and Wright conceded as much when they suggested that Averitt and Lande's

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[13] *Id*. at 2411.
[14] Maurice E. Stucke, *Reconsidering Antitrust's Goals,* 53 B. C. L. REV. 551, 551 (2012).
[15] *Id*. at 571-573.
[16] *Id*. at 574-577.
[17] *Id*. at 618. *See also* Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, *in* 78 ANTITRUST L. J. 471 (2012). Blair and Sokol attempt to introduce yet another distinction, between "total welfare" and "consumer welfare," but never define either concept with particularity, and concede that either concept could fit the jurisprudence in this area
[18] Stucke, *supra* note 14, at 618-622.

Consumer Choice model could be incorporated as empirical factors into the Consumer Welfare calculus. The fact that the standard is both widely adopted and malleable militates in favor of its retention as the goal of antitrust. Epitomizing the spirit of common-law adjudication, a careful change or recalibration in the Consumer Welfare concept could work beneficial changes in the law, without upending the structure and subjecting business to grave uncertainty.

Detailed economic analysis is a necessity for understanding this area of law. Ginsburg and Wright relied on it heavily, and treated denying economic analysis as an insult equivalent to accusing someone of belonging to the Flat Earth Society. Contrary to Ginsburg and Wright, Averitt and Lande did not deny economic analysis. They framed their argument as an addition of dynamic variables to a calcifying and mechanical form of economic analysis. Even Stucke, while scoring points on the notorious ambiguity of economics and economists, made no move to eliminate detailed economic analysis. Like Averitt and Lande, Stucke seeks only to add factors to a unitary system gone awry.

With economic analysis entrenched, and the Consumer Welfare concept entrenched but malleable, it would be a good idea to make non-price competition a more robust part of the Consumer Welfare concept, so that analysts and judges can have more tools with which to work. While Stucke's generalized "well-being" may be a bridge too far for courts and the economists who study them, the addition of Averitt and Lande's non-price elements would be a welcome expansion of antitrust horizons. This is especially true in the technological market, in which "extras" such as applications and built-in programs play such a huge part. A buyer is often buying so many different functionalities, looks and feels, and potentialities, that price alone may not serve as an adequate evaluator of the trade-offs that a consumer is making. A computer, or even now a cellular phone, does far more than a typewriter ever could. The goal of Antitrust, then, should be a robust Consumer Welfare concept, including both price and non-price competition. Are consent decrees in the digital world aiming to meet this goal?

Part II: Why Consent?

The answer to the above question is unclear in large part due to the practical benefits that initially led to the consent decree's rise to prevalence. For litigators, the main practical consideration is simple: consent decrees are inexpensive. Similarly, because consent decrees consume less department resources than litigation, regulatory bodies including the Federal Trade Commission and the Department of Justice are motivated to choose consent decrees when possible.[19] Private companies also prefer consent decrees, and for the same reason; the relative expense of litigation is even more salient while trying to turn a profit.[20] Private companies have an additional incentive to avoid litigation: if a private company loses, its vulnerability to subsequent suits by private litigants substantially increases, whereas if a private company settles, it limits the availability of evidence to private litigants, thereby limiting the possibility of additional, future liability.[21] The cost of litigating and the risk of losing combine to make a consent decree a very attractive option.

While attractively inexpensive, the prevalence of consent decrees creates a systemic danger: with each consent decree, the common law on which the American legal system is built is deprived of its essential fuel.[22] The case that settles creates no precedent, and over 90% of cases routinely settle. The remaining 10% (or less) of cases in an area which reach adjudication

[19] Wright & Ginsburg, *supra* note 1, at 1; *see also* George Stephanov Georgiev, *Contagious Efficiency, The Growing Reliance on U.S.-Style Antitrust Settlements in EU Law*, 2007 UTAH L. REV. 971, 1012 (2007).
[20] *Id*. at 1012.
[21] *Id*. at 1006. Under the Clayton Antitrust Act, a consent decree cannot act as prima facie evidence of wrongdoing in later suits, whereas a final judgment on the merits can. Clayton Act, 15 U.S.C. § 16(a) (2012).
[22] Wright & Ginsburg, *supra* note 1, at 6.

may be thin gruel with which to feed the ever-developing organism which is the common law. This lack of adjudication has not gone unnoticed; discussion of the trade-off between efficiency and adjudication is a common feature in literature on the subject.[23]

Owen Fiss, a professor at Yale Law School and the preeminent critic of the rise of settlements, argues that settlements are an analog to plea bargains and are just as problematic: "settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised."[24] His argument hinges on four major points. First, the incentives to settle are asymmetrical; resources are always asymmetrical, as is time, and the consequences of loss are more severe on one party than another.[25] A court-ordered judgment prevents incentive asymmetries to color the terms of a consent decree to the disadvantage of one of the parties. Second, when a group (such as a corporation) is involved in an action which may end in settlement, it may be unclear who speaks for the entire organization; selection processes may be imperfect, and a company executive may want to settle for personal motives extraneous to the welfare of the company.[26] Going to judgment prevents those conflicts of interest and ensures that, at a minimum, the group will receive fair and impartial representation. Third, there is a dearth of safeguards on the process of entering a consent decree.[27] Fiss derides the Antitrust Act, which requires only that a judge find the proposed settlement to be 'in the public interest,' for using a completely subjective standard.[28] There is then no watcher to keep an eye out for abuses,

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[23] *Id.* at 1
[24] Owen Fiss, *Against Settlement*, 93 YALE L. J. 1073, 1075 (1984).
[25] *Id*. at 1076-1077.
[26] *Id*. at 1078-1079.
[27] *Id*. at 1081-1082. The lack of Congressional authorization or guidelines compounds the problem; the Sherman Act and other antitrust laws are notoriously minimal and vague, giving the agencies almost unfettered discretion and power. *See also* William E. Kovacic, *Lessons of Competition Policy Reform in Transition Economies for U.S. Antitrust Policy*, 74 ST. JOHN'S L. REV. 361, 387 (2000) (pointing out that in the case of Antitrust settlements, companies have no incentive to take action or publicize an unjust settlement because such action will only result in more unfavorable terms for them the next time they have to encounter that enforcement agency).
[28] Fiss, *supra* note 24, at 1081. This only applies to the Department of Justice. The FTC is not even required to submit its settlements to judicial review. Georgiev, *supra* note 19, at 1007.

and where there is no watcher, how are we to know that there are no abuses? Fourth and finally, Professor Fiss points out that in many cases the subject matter in controversy may go on for years; a judge may find himself tasked with restructuring an entire industry.[29] Without adjudication, the judge is bereft of a starting point with which to evaluate the requests that will be made of him. He is faced with a remedy for an unnamed offense and limited evidence, so he cannot but grant or deny based on superficial considerations.[30]

Others worry about the effect that consent decrees have on enforcement agencies. There is a laundry list of concerns falling into three rough categories: mission creep, over-powered remedies, and dangerous signaling. Concern regarding mission creep is based on the premise that agencies may seek payments or other concessions unrelated to those agencies' proper objective of providing compensation to victims of antitrust violations.[31] As one commentator wryly put it, "public officials rarely define their mission as consisting of the competent execution of programs begun by their predecessors, especially predecessors in a previous presidential administration."[32] The flexibility of a consent decree provides an occasion for officials to make a name for themselves, potentially by adding a condition that is newsworthy but not directly related to remedying the offense.

There is also concern that the remedies that are required by consent decrees may be over-powered. Consent decrees have included restrictions on firms' hiring decisions, and have even allowed an enforcing agency to monitor and obstruct a company and an entire industry for a period of several years; this is far more leverage than an enforcing agency would ever acquire

[29] Fiss, *supra* note 24, at 1085.
[30] *Id*.
[31] Wright & Ginsburg, *supra* note 1, at 2.
[32] Kovacic, *supra* note 27, at 385-386. Kovacic quotes another commentator who made the point thus: "No one likes to give speeches without having something to say, and a speech which simply says 'business as usual,' or even 'we are going to work hard and do an even better job on the usual matters,' is not likely to make the evening news, however reassuring such a pronouncement might be to the audience or the business community at large."

through adjudication.[33] Such consent decrees run the risk of damaging the efficiency and innovative capacity of a company, thereby harming consumer welfare.[34]

Finally, there is concern that the rising popularity of consent decrees may be chilling companies' interest in engaging in joint ventures with other organizations. Because of their prevalence in antitrust adjudication, consent decrees are often combed closely by attorneys for signals as to what may trigger an antitrust prosecution.[35] This guessing game, given the potential for over-powered settlements, often results in companies taking a conservative position in business dealings, sometimes leading to the loss of the added innovation and efficiency that joint ventures can bring.[36]

Keeping in mind that the goal of Antitrust is a multifaceted Consumer Welfare that includes price, efficiency, innovation, and other non-price factors, any detrimental effects caused by settlements have the potential to be serious. With settlement occurring in over 90% of cases, there is a real possibility that the common law system could be starved for precedent, and settlements themselves are already creating their own more opaque market signals. This lack of clear precedent harms the ability of companies to predict results and can result in business positions that are detrimental to innovation and efficiency. There are few safeguards to keep settlements from being unjust. On the contrary, the enforcement agencies have every incentive to impose irrelevant requirements on their defendants, in order to distinguish themselves in the bureaucratic hierarchy. This also harms efficiency, and will have a concomitant effect on price, at the least. The agencies have the ability and the inclination to make invasive settlements. Such settlements also harm efficiency, price, and potentially innovation (especially as a regulatory

[33] Wright & Ginsburg, *supra* note 1, at 2-3.
[34] *Id*.
[35] *Id*.
[36] *Id*.

agent has no real stake in the success of the company being watched). All of these are concerns to be considered carefully when examining recent antitrust settlements with tech companies.

Coda: The Eyes of the World

Another important consideration, though not a central one, is the global effect of American Antitrust procedures and settlements. Foreign enforcement agencies may take their cues from American procedures, to the concern of experts. Wright and Ginsburg worry that "to the extent those settlements depart from the objective of consumer welfare, they signal to other competition authorities that such considerations are appropriate."[37] There is some evidence that this is a valid concern; over the past 60 years, the number of countries with competition laws has ballooned from very few to nearly 100.[38] These laws have been crafted with the advice of Americans and some members of the EU, with one expert listing his involvement with countries on four continents.[39]

The phenomenon is not limited to developing countries, as the above statistics might imply. The EU itself has recently inserted a settlement provision into its own antitrust laws, modeled so closely on the American practice of settlement that it has been called a "legal transplant."[40] American Antitrust practices are highly influential around the world, and this influence is likely to increase in developing and fast-moving areas like the tech industry more so than others. This furnishes an added imperative to get our answers right in order to foster the guidance of antitrust practices throughout the world.

[37] Wright & Ginsburg, *supra* note 1, at 4.
[38] Kovacic, *supra* note 27, at 362.
[39] *Id*. at 363. The full list of countries he was involved with is as follows: Benin, Egypt, El Salvador, Georgia, Indonesia, Mongolia, Morocco, Nepal, Russia, Ukraine, Vietnam, Guyana, and Zimbabwe.
[40] Georgiev, *supra* note 19, 974.

Part III: Who Agreed to What?

The two antitrust enforcement agencies, the Department of Justice, Antitrust Division ("Justice Department") and the FTC, have settled with a number of companies on a number of claims. This is not a full-blown empirical study, but a "best of the best" examination of the higher profile settlements.[41] It could be argued that the higher-profile nature of the settlements may distort the results. However, this is unlikely. While the higher-profile nature of the settlements may theoretically subject them to a higher scrutiny and make the regulators more cautious, it is equally likely to lead to the grandstanding and over-powered remedies that worry commentators. The first major settlement that paved the way for subsequent antitrust decisions was brought by the Justice Department in a case concerning Ticketmaster's merger with its competitor, Live Nation.

A. *United States v. Ticketmaster Entertainment, Inc., et. al.*

In 2010, the Justice Department brought a suit against Ticketmaster, supported by 17 state Attorneys General, following a merger had been negotiated with Live Nation, one of its major competitors in the ticket-selling industry.[42] Ticketmaster was the world's largest ticketing company and Live Nation was the world's largest promoter of live concerts, owning over 75 concert venues in the United States, at the time the parties negotiated the merger.[43] The merger would have created the only vertically integrated firm capable of hosting, promoting, and ticketing concert events entirely in-house. The Justice Department's response, embodied in its

[41] Private actions do sometimes involve serious antitrust issues, but such actions do not form part of the analysis here. For an in-depth examination of a proposed settlement in a private suit, *see* Marina Lao, *The Perfect Is the Enemy of the Good: The Antitrust Objections to the Google Books Settlement*, 78 ANTITRUST L. J. 397 (2012).
[42] *Justice Department Requires Ticketmaster Entertainment Inc. to Make Significant Changes to Its Merger with Live Nation Inc*, JUSTICE.GOV, http://www.justice.gov/atr/public/press_releases/2010/254540.pdf (last visited December 18, 2014) [hereinafter *Ticketmaster Press Release*].
[43] *Id*.

suit and settlement, was to create two similarly-situated firms to compete with the new Ticketmaster.

In the settlement, Ticketmaster was first required to license the entirety of its ticketing platform to Anschutz Entertainment Group (AEG), for up to five years.[44] AEG owned or controlled venues such as Los Angeles' Staples Center and Kansas City's Sprint Center, and was "one of the world's leading concert promotion and touring companies."[45] Not only was Ticketmaster required to license their platform to AEG, but they also had to offer AEG an option to buy a perpetual license (paid in full) for that same platform, tailor the platform and accompanying website to AEG's specifications, and waive all non-compete agreements for employees who worked on the platform that AEG wished to hire.[46] This was designed to enable AEG to combine its own venue ownership and promotional ability with a newly acquired ticketing platform to directly compete with the behemoth created by the Ticketmaster-Live Nation merger.

The second stipulation imposed on Ticketmaster required a sale of its subsidiary company, Paciolan, to Comcast-Spectator or some alternative acquirer acceptable to the Justice Department .[47] Paciolan was a ticketing company already widely used by various venues, "including major concert venues around the country."[48] Comcast-Spectator was a joint venture between the cable company Comcast and a private investor that already owned a ticketing company and operated various venues in the United States.[49] Aside from the sale, Ticketmaster was also required to waive non-compete agreements for Paciolan employees wanting to work for

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[44] *United States v. Ticketmaster Entm't, Inc.*, No. 1:10-cv-00139, 2010 U.S. Dist. LEXIS 88626 at *12 (D.D.C. July 30, 2010) (final judgment).
[45] *Ticketmaster Press Release, supra* note 42.
[46] *United States v. Ticketmaster Entm't, Inc.*, 2010 U.S. Dist. LEXIS 88626 at *11-14.
[47] *Id*. at *14-15.
[48] *Ticketmaster Press Release, supra* note 42.
[49] *Id*.

Comcast-Spectator, on the condition that all Paciolan assets would be operational upon the date of sale, and all the permits needed by the company ready and would not be later challenged by Ticketmaster.[50] This would provide Comcast-Spectator with the necessary clout to compete on a larger scale than previously. Finally, the merged Ticketmaster was barred from reacquiring any Paciolan assets, or providing ticket services at any AEG-owned venue.[51]

Aside from those two major concessions required by the settlement, the newly merged Ticketmaster would also be required to refrain from retaliating against any venue owner for contracting with another company, or conditioning their provision of ticketing services upon an exclusive contract for promotional services, or vice versa.[52] The merged Ticketmaster was also ordered not to disclose client data to its employees unless necessary to run a specific event, or required by law. Ticketmaster was also required to return all client data and routine data kept on ticket buyers, to any client that decided not to renew a contract.[53] The Justice Department also reserved for itself unfettered access to Ticketmaster and Live Nation's books and personnel, the right to answers for written interrogatories, and a requirement that Ticketmaster and Live Nation pay for an independent audit of their practices if requested by the Justice Department.[54] Finally, the Justice Department granted certain non-disclosure requests to Ticketmaster, especially with regard to trade secrets.[55] The judgment itself was to last for ten years, or until mid-2020.[56]

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[50] *United States v. Ticketmaster Entm't, Inc.*, 2010 U.S. Dist. LEXIS 88626 at *11-13.
[51] *Id.* at *35-36.
[52] *Id*. at 19. Although the settlement purported not to prevent the merged Ticketmaster from bundling services, but it is hard to see how the provision at issue would not do just that.
[53] *Id.* at 20-21.
[54] *Id*. at 23-24. The access was limited to matters "relating to" issues concerned in the final judgment, but given the depth of the corporate restructuring, that limitation seems more fantastic than real.
[55] *Id.* at 24. The Department of Justice was only to disclose information or documents obtained via their inspections in the course of legal proceedings to which the United States was a party, as a means of securing compliance, or as "otherwise required by law." They were further required to give 10 days' notice before disclosing trade secret material covered under Federal Rule of Civil Procedure 26(c)(1)(G).
[56] *Id.* at 26.

The Justice Department showed it was primarily concerned with ensuring the existence of multiple head-to-head competitors in the industry. Rather than prevent the formation of a vertically integrated venue-managing company, the Justice Department reduplicated elements of Ticketmaster and handed them to other companies in order to create viable competition. The Justice Department then separated those competitors from Ticketmaster's influence, rendering the merged company unable to contract with AEG, make exclusive contracts with venues, buy certain assets for 10 years (several lifetimes in the tech world), or retain information from its clients. Although the Justice Department retained an all-access pass for itself into the workings of the defendant companies to ensure compliance, it did allow for some protection against disclosure of trade secrets, an important concession.

B. *United States v. Google Inc. and ITA Software, Inc.*

The Justice Department also brought suit against Google consequent to a merger it had negotiated with ITA Software. ITA was the developer and proprietor of "QPX," a software product that provides the ability to instantaneously produce customized flight fare information to online travel agents, search sites, and airlines.[57] As the Justice Department wrote in its filing, "When a customer wants to know the availability and cost of flights from Boston to San Francisco, for example, QPX is the tool that provides the answer."[58] Google planned, post-merger, to use QPX to offer an online travel service that would compete with existing travel sites, many of which also used QPX, and had been ITA's customers.[59] The Justice Department felt that allowing the new owner of QPX to compete with its own customers would place those

[57]*United States v. Google Inc.* No. 1:11-cv-00688 at *1 (D.D.C. Apr. 8, 2011) (competitive impact statement) [hereinafter *Google & ITA Competitive Impact Statement*].
[58] *Id*. at *1-2.
[59] *Id*. at *2.

other customers in a position of extreme competitive weakness: Google could use its rights to QPX to "foreclose rivals or unfairly raise their costs."[60] Though initially filing to enjoin the merger, the Justice Department instead settled with Google, imposing significant limitations on Google's future use of QPX.

The first provision of the settlement required that Google and ITA honor all then-existing agreements regarding QPX, except insofar as the other terms of the settlement might free the hands of the other airline search entities.[61] Google and ITA were also required to negotiate an extension of any then-existing QPX licensing agreements with other airline search providers, at terms similar to the then-existing terms. The extensions were to last for at least one year but no more than five.[62] Furthermore, any airline search provider that did not have a then-existing license for QPX could obtain one for a term length of their choosing that was not less than one year or more than five.[63] Google and ITA could not require that any of the aforementioned QPX agreements require a search provider to use only QPX, but they might sign such exclusive contracts if they first offered the provider a non-exclusive contract "on fair, reasonable, and non-discriminatory terms."[64]

Google and ITA were also required to grant other airline search providers access to all "ordinary course upgrades" to QPX at no additional charge.[65] They were also required to provide the same version of QPX to other airline search providers as that used by their own search service.[66] They were further required to devote at least the same amount of resources to

[60] *Id*.
[61] *United States v. Google Inc.*, No. 11-cv-00688, 2011 LEXIS 124151, at *16-17 (D.D.C. Oct. 5, 2011) (final judgment) [hereinafter *Google & ITA Final Judgment*].
[62] *Id*. at *17-18.
[63] *Id.* at § 18-19.
[64] *Id*. at 19.
[65] *Id*. at 20. Other customers might be charged a "fair, reasonable, and non-discriminatory fee" to use ordinary course upgrades.
[66] *Id*.

developing and maintaining QPX for customers that ITA had expended over the previous two years. This allocation could only be reduced if there was a material decrease in licensing revenue of QPX, and the Justice Department gave its approval.[67] Additionally, they were required to license the next generation of QPX, InstaSearch,[68] to any airline search provider, and make "commercially reasonable efforts" to make any improved version available to that provider, if it was used by their own search service.[69]

If Google and ITA were unable to reach a good faith agreement with an airline search provider seeking a QPX license under the consent decree, the matter was to be submitted to binding arbitration.[70] This arbitration could only go forward if 1) both parties authorized a contact to resolve the dispute entirely and those contacts met without result, 2) the airline search provider certified to the Justice Department that it negotiated in good faith and 3) the provider received the consent of the Justice Department to initiate arbitration.[71]

Additionally, various other miscellaneous provisions were present in the decree. These included a requirement that Google maintain a website disclosing the settlement in its entirety, that Google and ITA not enter into exclusive agreements with any airline for information unless a competitor entered such an agreement, and that Google and ITA not condition the provision of QPX or InstaSearch on the purchase of other Google products and services.[72]

Finally, in addition to the usual enforcement provisions, the settlement included a special "Firewall" provision. This provision stated that no employee that developed or made strategic decisions with regard to Google's new QPX-based service could access another airline search

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[67] *Id*. at *21.
[68] *Google & ITA Competitive Impact Statement*, supra note 56, at *11.
[69] *Google & ITA Final Judgment*, supra note 60, at *22-27.
[70] *Id.* at *28.
[71] *Id*.
[72] *Id*. at *34-36.

provider's information without written consent from that provider.[73] The Firewall also required Google and ITA to get written consent before using an airline search provider's information in any way except to tailor and market products to that provider.[74]

Enforcement measures identical to the measures in *Ticketmaster* were then put in place: unfettered access by the Justice Department to the books and personnel of the companies, the right to answers of written interrogatories, and a requirement that Google and ITA pay for an independent audit of their practices if the Justice Department requests it. Non-disclosure requirements on the part of the Justice Department were put in place with regards to these provisions, focusing on the protection of trade secrets.[75] The judgment itself has a five-year lifespan dating from October of 2011.[76]

In the merger settlement with Google and ITA, the Justice Department again showed an inclination to freeze the defendants in place. For five years, until the fall of 2016, Google and ITA are locked in to re-licensing their products to their competitors at substantially the same terms as existed in 2011. The Justice Department also showed its preference for limiting the information to which the defendants had access. Here, they did this by creating a "Firewall" around key employees at Google and ITA to keep them from gaining or using customer and competitor information, or using it once gained. Finally, the Justice Department once again displayed its insistence on total access to the defendant company in order to enforce compliance, though with the valuable concession of tying its own hands with regard to trade secrets.

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[73] *Id*. at *36-37.
[74] *Id*. at *36-39. Google and ITA were to submit a compliance plan to the DOJ, which the DOJ would have sole discretion to approve. The provisions of the firewall may be modified upon application of Google and ITA and with the consent of the DOJ.
[75] *Id.* at *40-43
[76] *Id*. at *43.

C. *United States v. Apple Inc., et.al*

In 2012, the Justice Department charged Apple and five publishers with colluding to raise retail prices of eBooks.[77] The Justice Department then extracted a laundry list of concessions that fall into three categories: immediate action, future prohibitions, and notice requirements.

The first, immediate actions required were obvious, and sensible—the publishers were required to terminate any agreement with Apple concerning eBook sales, disbanding the cartel that drew the Department's antitrust charge.[78] Subsequently, all agreements the publishers made with other retailers that contained any sort of price restriction on the retailer were to be terminated as soon as possible.[79] This set the publishers back to square one in regards to eBooks as it eliminated most of their related contracts.

The future prohibitions cut deeper. For two years, the publishers were barred from taking any action or entering into any contract that would affect a retailer's ability to set prices or offer discounts on eBooks.[80] In an almost humorously duplicative section, the publishers agreed not to repeat their offenses by creating any future cartel with the purpose of coordinating pricing other conditions on the sale of eBooks.[81] In other words, they promised not to break the law ever again. The settlement also provides that no employee of any of the publishers "who exercises direct control over…business decisions or strategies" may communicate any "competitively sensitive information" to any such employee of another eBook publisher.[82] The publishers had a

[77] *United States v. Apple, Inc.,* No.12-CV-2826, 2012 U.S. Dist. LEXIS 139445, at *9 (S.D.N.Y. Sept. 6, 2012) (final judgment). The five publishers were Hachette, HarperCollins, Macmillan, Penguin, and Simon & Schuster.
[78] *Id*. at *11.
[79] *Id.* at *12
[80] *Id*. at *15-17.
[81] *Id*. at *17-18.
[82] *Id*. at *18-19. This requirement included the exceptions listed in note 82, below, and allowed for conveying information to enforce intellectual property and contract rights, or for a contemplated "merger, acquisition, or purchase or sale of assets."

wall erected around them; they could not affect the prices set by retailers whatsoever, and they could not even communicate with each other, much less collude.

In a final set of concessions, the publishers were required then to notify the Justice Department sixty days before undertaking any joint venture or "other business arrangement" relating to eBooks with another publisher as a party, and to inform the Justice Department scrupulously of the details.[83] The publishers were also required to give the Justice Department a copy of every agreement with any eBook retailer concerning eBooks, on a quarterly basis.[84] The publishers were also required to appoint a compliance officer who would watch for all manner of violations of the agreement, and train employees who had control over the business in what those employees could and could not do under the settlement.[85]

Finally, compliance enforcement measures identical to the measures in the *Ticketmaster* and *ITA* cases were then put in place. Unfettered access to the books and personnel of the companies was given to the Justice Department, along with the right to have written interrogatories answered, and a the addition of the requirement that Google and ITA pay for an independent audit of their practices if the Justice Department requested one. Again, the Justice Department signed non-disclosure requirements, especially with regard to trade secrets.[86] The Justice Department created for themselves an all-access pass to the publishers' records and required the publishers to pay for their own policing.

[83] *Id*. at *12-15. The company was required to describe the venture in detail. Then the DOJ had 30 days to request information. If the DOJ did so, then the company was debarred from proceeding until 30 days after they had complied. The settlement did carve certain exceptions to the notice requirement, including "ordinary course business arrangements" that did not involve eBooks, or that involved co-publishing works, providing technology services, or distributing eBooks published by another, non-defendant publisher.
[84] *Id.* at *15.
[85] *Id*. at *21-24. Essentially, the Justice Department required each company to create an ombudsman for the Justice Department.
[86] *Id*. at *26-27. This measure also would expire when the settlement itself expires five years from September 2012, unless the Court grants an extension.

In summary, the Justice Department showed their inclination to do three things in the Apple Settlement. First, they were willing to wipe the slate entirely clean, as all agreements relating to eBooks in which the defendants were parties, were terminated as soon as possible. Second, the Justice Department held the publishers in place; for two years the publishers were forbidden not only to affect the prices charged by retailers, but even to discuss anything that had to do with competition among themselves. Third, the Justice Department left themselves complete freedom and access to the publishers' information. The publishers were not allowed to make a move without satisfying the Justice Department, nor could they resist any review of their books. This settlement left the publishers with their hands tied and the Justice Department with extra leverage.

D. Intel and the FTC (Round 1)

The FTC was the agency responsible for bringing suit against Intel on two separate occasions. The first instance was in 1998, when Intel had 80% of the world market share for general-purpose computer processors.[87] Even though their competition was seemingly negligible, the FTC charged that Intel was moving to weaken that competition through coercive business practices. Intel typically dispensed proprietary information on upcoming processors to customers and manufacturers of compatible products under tight non-disclosure agreements. This allowed customers and manufacturers to ascertain the functionality of the processors, and to develop and design products to be compatible with Intel's market-dominant wares.[88] However, with respect to three companies, Digital, Intergraph, and Compaq, Intel threatened to withhold such information, unless the targeted companies would provide Intel with licenses to their patents on

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[87] Intel Corp., 128 F.T.C. 213, 214 (1999). The Complaint in the case tersely states in a single line item: "The relevant geographic market is the world."
[88] *Id*. at 216.

microprocessor-related technologies.[89] The FTC argued that Intel's behavior limited the incentives of other companies to innovate and provide competition; there was little point in spending resources to obtain patents for new technologies when those patents would eventually be strong-armed away by the dominant force in the marketplace.[90]

The resulting settlement between the FTC and Intel was directly aimed at that specific form of coercion. The first requirement imposed on Intel prevented the interruption of any currently-existing stream of information to another company for "reasons related to an Intellectual Property Dispute."[91] However, Intel would be allowed to make any decision it wished with regard to processors that were the subject of a dispute, unless the other company agreed not to seek injunctive relief.[92] Various other exceptions were carved into that requirement, including two provisos allowing Intel to interrupt the flow of information or the supply chain of processors for "business considerations unrelated to the existence of the IP dispute," and another proviso that permitted Intel to restrict the use of proprietary information to systems that incorporate the processor to which the information pertains.[93]

Intel was additionally required to post the settlement on its website, and notify its customers and competitors of the contents.[94] Intel was to provide a written report with the FTC

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[89] *Id*. at 216-22.
[90] *Id*. at 217. Intel's interaction with Digital is representative of its treatment of all three competitors. Digital produced a line of processors known as 'Alpha' that was regarded within the industry as the highest-performing line of general-purpose processors, though their market share was low. Intel officials declared an "emergency" when the performance of Alpha was verified, and they soon offered the Pentium Pro processor to close the gap in performance. Digital, upon examining the product, found that it infringed on several of their patents and filed suit. Intel responded by recalling all information about their products from Digital and refusing to supply any further information, questioning whether they would supply Digital with the processors needed for Digital's other products, and generally calling into public question Digital's ability to produce processors in a timely manner. *Id*. at 218-19.
[91] *Id.* at 226.
[92] *Id*. The company had to agree, in writing, not to seek injunction against "all Intel microprocessors that are based upon the same core microarchitecture as the Intel microprocessor that is the subject of the assertion of infringement."
[93] *Id*. at 227.
[94] *Id*. at 227-28.

on its compliance once every year for five years, and "at such other times as the Commission may require."[95] For five years, Intel was also required to maintain "records to describe in detail any action taken" with regard to the interruption of information to any customer or competitor with whom Intel had an intellectual property dispute, as well as confer right of inspection on any FTC representative for any records pertaining to the matters covered in the settlement.[96] The settlement would terminate at the end of ten years, in August 2009.[97]

In this particular instance, the FTC showed -more than anything else- solicitude for the flexibility of the company being regulated. The remedy was focused specifically and solely on preventing Intel from using its market share to blackmail companies with which it might have IP disputes. It provided Intel with exceptions to allow it to cut off information for any other reason, and also allowed Intel to retaliate if the opposing company sought an injunction.[98] The design of the settlement was strictly limited to providing companies the information they needed to take a product to market. Furthermore, the companies who were supposedly protected from Intel by this order were not afforded protection unless they refrained from use of a completely legal process to keep Intel's products off the shelves. The companies could seek any damages they pleased, but could not interfere with the contents of the market.[99]

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[95] *Id*. at 228.
[96] *Id.* at 228-29. The FTC representative was also to have the opportunity to interview any officer, director, or employee of Intel (with counsel present if they chose) upon five days notice. *Id.* at 229.
[97] *Id*. at 229.
[98] The exceptions were the subject of some dispute with regard to their clarity, as they required regulators to assess the mind of the institution. However, even the lone dissenting Commissioner conceded that he was not particularly worried about that issue. *See id*. at 231.
[99] This concern is compatible with an extensive discussion in the Complaint of barriers to entry in the processor market. The FTC was concerned that access to, and options in, a market with such high barriers be preserved. *See id*. at 214-216.

E. Intel and the FTC (Round 2)

The previous settlement had only just expired when the FTC brought new charges against Intel. The FTC charged that Intel had engaged in three reprehensible practices to maintain its monopoly in computer processors and gain a monopoly in graphics processors. First, Intel had offered rebates and guaranteed supply of processors to those computer manufacturers who agreed to use and advertise only Intel products.[100] Intel threatened price increases and lack of support to those manufacturers who refused.[101] Second, Intel changed its compiler (which translates source code into binary) such that any source code written on an Intel compiler would slow the performance of a computer with a non-Intel processor.[102] Third, Intel gave competitors false product plans under the pretense of allowing them to make their products interoperable with Intel products; when Intel made its products non-interoperable, the time and resources already expended by the competitors simply went to waste.[103] Intel was playing corporate hardball, and was able to maintain market shares greater than 65% in any computer processor market.[104]

As with the DOJ settlement in the Apple case, after predictably and sensibly beginning with the requirement that Intel desist from the practices charged, the FTC's settlement propounded provisions falling generally under three categories: good-faith business practices, licensing and interoperability requirements, and enforcement.[105] The settlement first required Intel to allow manufacturers to know what licenses for Intel products its competitors did and did not have in order to foster improved business practices.[106] The settlement additionally required

[100] Intel Corp., 75 Fed. Reg. 48338, 48340-41 (Fed. Trade Comm'n Aug. 10, 2010) (analysis of proposed consent order).
[101] *Id.* at 48341.
[102] *Id*.
[103] *Id*. at 48341-42.
[104] *Id*. at 48340.
[105] Intel Corp., No. 9341, 2010 WL 4542454, at *5 (Fed. Trade Comm'n Nov. 2, 2010).
[106] *Id*. at *5-6. The requirement was subject to an agreement of confidentiality from the manufacturer. *Id.* at *5.

Intel, in the event a competitor underwent a change of control, to offer the new owner an agreement for a one-year hiatus from initiating patent litigation between the two companies.[107] Intel was also required to disclose to its customers the extent of the change in performance caused by its compilers when interacting with a non-Intel processor.[108] Finally, Intel was required to reimburse any customer who detrimentally relied on Intel's compiler and subsequently had to use another compiler.[109] Intel was required by all these provisions to let consumers, competitors, and the public know what had transpired, and to show an effort to remedy the situation.

More substantively, Intel was required to extend its then-existing patent licenses with competitors for an extended term of 15 years.[110] This provision expressly allowed the competitor to make its processors compatible with other Intel products.[111] The settlement permitted Intel to make exclusive contracts with a customer, provided that the exclusivity refer only to a new "segment or channel or product."[112] Intel was also required to respond truthfully to any inquiries about a product roadmap to any party Intel had disclosed the roadmap to, for up to one year after the disclosure.[113] This provision was made more easily enforceable by the next clause, which required Intel to disclose its product roadmap to competitors for its future processors, revealing the interface that could be used to make it compatible with competitor products.[114] All of these requirements were designed to force Intel to be more open with licensing its patents, and to allow competitors the freedom to design products that are interoperable.

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[107] *Id*. at *6. The offer had to stay open for 10 days. *Id.*
[108] *Id.* at *12. Intel was also required to post on its website that any test for processor speed may have been affected by Intel's lack of interoperability. *Id*. at 13-14.
[109] *Id*. at *12-13. This reimbursement requirement was capped at a total of ten million dollars.
[110] *Id*. at *6-7.
[111] *Id*.
[112] *Id*. at *9-10.
[113] *Id*. at *11.
[114] *Id*.

Finally, the FTC included provisions on enforcement. First, it allowed for the selection of a "Technical Consultant," chosen with the consent of Intel and paid by Intel, to monitor compliance.[115] The Technical Consultant and any FTC staff would have full access to Intel's books upon request.[116] Intel was also required to submit a written report to the FTC that detailed its compliance each year, for six years, and to give the FTC 30 days notice prior to its own dissolution, merger, acquisition, or "any other change in Respondent…if such change might affect compliance obligations arising out of the Order."[117] Intel, like Apple, was required to pay for its own policing, though in a more moderated manner. The FTC has made sure that there will be no legal barriers to any future investigation it wishes to conduct into Intel.

In this settlement, the FTC showed a concern for three central values. First, they valued public disclosure and good-faith practices. Intel was required to put its cards on the table and specify the level of interoperability its products had with competitors' products, as well as offer new company management a grace period of one year from any patent litigation. Second, and unlike the DOJ, the FTC valued communication and the ability for products to integrate. Rather than isolate the competitors and prevent them from interacting with one another, the FTC forced Intel to show its competitors the goods, so that competitors could work on creating compatible and perhaps complementary products.[118] Finally, the FTC left the door open for its own return to investigate, as they had in the previous Intel settlement, and as their counterparts at the Department of Justice do regularly.

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[115] *Id.* at *14-15.
[116] *Id*. at *15.
[117] *Id*. at 16. The settlement is to terminate in 2020, giving it a length of 10 years.
[118] In fairness to the DOJ, a case of collusion and cartelization such as the case between Apple and the publishers seems to require an opposite response to exclusionary practices. However, the FTC could have frozen Intel as the DOJ froze the publishers, requiring notice before all deals and joint ventures, and debarring Intel from interfering with customer pricing. Instead, they left Intel's deals with customers relatively intact, and tried to force more product integration.

F. In the Matter of Motorola Mobility LLC, and Google Inc.

The FTC also involved itself in the policing of mergers when it negotiated the terms of a settlement with Google shortly after that company's acquisition of Motorola. The Antitrust Division of the Department of Justice had previously passed on filing a complaint regarding the acquisition itself.[119] The FTC alleged that Google had used Standard Essential Patents (SEPs), which are integral to mobile phone devices and are licensed to every member of the Standard Setting Organization (SSO), and which Google had acquired the rights to by buying Motorola, to exclude competitors from certain markets.[120] By bringing infringement lawsuits on the patents and seeking injunctive relief, Google was violating its obligations as a member of the SSO, and "holding up" the other members for more fees for the necessary components to standard-compliant products.[121]

The settlement negotiated by the FTC barred Google from rescinding any commitment to license SEPs to the other members of the SSO and from seeking injunctive relief on any SEP.[122] Google was further required to submit potential licensing agreements to binding arbitration (subject to certain notice conditions and in the event good-faith negotiations failed) and was barred from selling its SEPs unless the buyer agreed to adhere to the conditions of the settlement.[123] The FTC also required Google to submit a compliance report within 30 days of the judgment entry and every year for the next nine years (until the settlement expires in 2023).[124]

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[119] *Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigations of Google Inc.'s Acquisition of Motorola Mobility Holdings Inc. and the Acquisitions of Certain Patents by Apple Inc., Microsoft Corp., a...*, U.S. DEP'T. OF JUST. (Feb. 13, 2012), http://www.justice.gov/opa/pr/statement-department-justice-s-antitrust-division-its-decision-close-its-investigations.html. The DOJ concluded that the main issue in the acquisition, hundreds of patents owned by Motorola, would not transform the market by being transferred to Google.
[120] Motorola Mobility LLC, No. 121-0120, 2013 WL 124100, at *4 (Fed. Trade Comm'n Jan. 3, 2013).
[121] *Id*.
[122] *Id*. at *10-11.
[123] *Id.* at *12-13.
[124] *Id*. at *15-16.

This included an additional guarantee of FTC access to Google's books and personnel to allow the FTC to confirm Google's compliance with the settlement.[125]

The FTC aimed carefully and clearly at patent use in this settlement. The Justice Department's determination that the transfer of patents from Motorola to Google would not be significantly anticompetitive was not sufficient to pass the FTC's tests. The FTC tailored its measures to ensure that Motorola's, now Google's, SEPs would be available to the other participants in the SSO and to other potential licensees for period essentially equivalent to the life of the patents. Finally, the FTC left the door open for its own future return for information.

Part IV: Must We Remedy Our Remedy?

The next major question is whether the settlements examined lend weight to the concerns expressed in Part II? Are the settlements over-powered? Do they contain provisions irrelevant to the antitrust matters at hand, indicative of grandstanding? Are they failing to establish a clear standard and instead sending mixed signals? The answer to those questions seems like a qualified "yes."

The settlements examined showed definite signs of being over-powered. The requirement that the eBook publishers provide the Justice Department notice before making a range of business moves is certainly beyond what the Justice Department could have managed in court. Similar decisions could very easily result in a chilling, or at least an unnecessary slowing, of the conduct of business. Likewise, the provision prohibiting officials of the publishers from speaking to other publisher officials about "competitively sensitive information" was a clear extension of the Justice Department's power. A barrier of that magnitude is highly invasive and difficult to

[125] *Id*. at *16.

administer fairly and efficiently. It would certainly create an uncertainty that could chill the conduct of business. Similar considerations attach to the “Firewall” provisions in the ITA settlement. However, the Ticketmaster settlement was easily the most notable example of overreach: the Justice Department restructured the entire subject market ad hoc. Instead of simply acting to prevent the merger, they turned one integrated company into three, and walled them off from each other so that they would have to compete for at least the 10-year life of the settlement.

The FTC’s settlements were more closely tailored, but they too showed signs of overreach, especially in the second iteration of the Intel contest. Requiring Intel to offer its competitors’ new management a one-year moratorium on patent litigation would never have appeared out of a trial order. It appears to be more of an order to be nice than a remedy for an infraction. However, the requirement could be interpreted as a punitive measure resulting from Intel’s repeated poor behavior.

While the remedies appeared to be over-powered, they did not appear to contain provisions which were wholly irrelevant to the antitrust matters at hand. The Justice Department settlement with Apple and the publishers was cabined to eBooks and transactions involving eBooks, and their “Firewall” provisions with ITA were likewise directed at the software centrally at issue. Furthermore, while their settlement with Ticketmaster was wildly beyond the usual scope of the Justice Department’s power, the provisions were directed to address concerns over competition created by the merger. The FTC’s various requirements of Intel were all related to the flow of information and the patent licenses that Intel had been manipulating, with one provision to cure damage already done. In sum, each settlement did appear to address the subject matter to which it was directed, even if the subject matter was addressed with a heavy hand.

The settlements described above were also likely to have sent mixed signals regarding the remedies that are likely to be imposed, though the settlements were clear on the enforcement provisions a company will have to accept. In some cases, the Justice Department appeared ready to wipe the contractual slate clean (as with Apple and the publishers, where all existing contracts were voided). In others, it was inclined to hold licensing contracts steady and insist on their maintenance (as in the ITA settlement) or to create new contracts and business enterprises out of the blue (as with Ticketmaster and Live Nation). However, the Justice Department appears to have consistently attempted to wall companies off from each other to make sure they are in competition and cannot benefit from mutual information gathering and sharing; the Justice Department created the limits on the publishers in the Apple settlement, the "Firewall" in the ITA settlement, and locked client data away from Ticketmaster.

In contrast, while the Justice Department may be insistent on provisions limiting the mutual gathering and sharing of information, the FTC is anything but; the FTC's provisions in the Intel settlements were designed to force Intel to communicate information with other competitors and manufacturers. The only point on which the regulators are in clear agreement is enforcement: they both insist on complete access to company books and personnel and reports on compliance (or independent audits) for which the company will pay.

While the terms of the settlements do show an inclination to be over-powered, they do not show signs of major grandstanding. The settlements are, however, also inconsistent in their terms, both within the Justice Department and between the Justice Department and the FTC. What then would lead to better remedies? What are the issues that should be taken into consideration when crafting settlements for the tech industry? The fifth and final section of this paper attempts a brief answer to these questions.

Part V: What Now, What Next?

A cursory examination of the settlements discussed above reveals one salient fact: they all involve some form of intellectual property. Only the charges brought against Apple and the publishers alleged simple price-fixing, but that price-fixing involved the sale of a paradigmatic form of intellectual property: books. The Ticketmaster settlement relied on licensing of intellectual property to perform its function. The ITA settlement, both rounds of the Intel fight, and the Google/Motorola settlement directly hinged on the use of licenses and patents. No solution to the settlement problem in the tech world can come without an appreciation of the direct relationship of antitrust to intellectual property rights.[126]

The FTC appears to have honed their understanding of the importance of intellectual property within the world of tech antitrust. In the FTC's settlements, the FTC has not only required ongoing licenses of intellectual property, but they have also required further sharing of information regarding other products being offered by the defendant companies. The requirement of ongoing (and paid) licenses strikes a measured balance between the purpose of patent law (granting a monopoly to reward innovation) and the purpose of antitrust (preventing monopolies that harm consumers). The property holders gain the revenue of the license, so their innovation is rewarded, while competitors and customers gain access to the technology to improve their products and lives. Furthermore, the dispensation of information does not directly harm the property holder, since the right to its use does not transfer, but the free flow of information

[126] For a fuller discussion of this relationship, and further readings on the subject, see Tim Wu, *Taking Innovation Seriously, Antitrust Enforcement if Innovation Mattered Most*, 78 ANTITRUST L.J. 313 (2012); William H. Page & Seldon J. Childers, *Antitrust, Innovation, and Product Design in Platform Markets, Microsoft and Intel*, 78 ANTITRUST L.J. 363 (2012).

allows other parties the opportunity to develop other ideas which may benefit both the property holder and consumers.

Also, as mentioned in note 97, above, barriers to entry into a market were a concern to the FTC in the Intel negotiations; they were evidently a concern for the Justice Department in the Ticketmaster case as well, given that Department would not otherwise have required Ticketmaster to duplicate its platform for its prospective competitors. As with patents and patent hold-up, barriers to entry do have the effect, of chilling innovation by preventing people and companies other than the monopolist from considering ways to make products better and consequently placing competitive pressure on the monopolist to make its own products better.[127] Therefore, the removal of barriers to entry to a market should be an important concern for regulators to take into account when bringing charges and crafting settlements.

The FTC approach to this – using requirements to license technology on fair terms – appears more likely to be successful than the Justice Department's experiment in market design. Redesigning a market in the way that the Department did is likely to have untold unforeseen consequences. Instead a better response may have been to require Ticketmaster to license its platforms on fair terms to any business involved in promotion, venue management, or with a viable plan to enter promotion or venue management. This would make the barrier to entry to the market much lower as any entrant would no longer have to design a platform from scratch, but obviate the risks of creating three new entities, entities which might in turn decide to lock out future entrants or competitors. Requirements to license essential patents, or (as the Justice Department required with Paciolan) to sell surplus key assets at reasonable may be the most direct way of opening the door to a market without pushing people or companies through it.

[127] Wu, *supra* note 124, at 316-320.

Another issue present in these settlements is the time element. Of the six settlements discussed above, four had life spans of 10 years, one had a duration of five years with a provision allowing the court to grant an extension, and the last had a duration of five years. A period of five or ten years is a lifetime in the fast-paced world of technological innovation; noted author Thomas Friedman commented in 2011 on the changes that had occurred in just the previous six years: “Facebook didn't exist; Twitter was a sound; the cloud was in the sky; 4G was a parking place; LinkedIn was a prison; applications were what you sent to college; and Skype for most people was typo.”[128] Locking tech companies into settlements for a decade makes little sense: well before the end of the settlement, the scene will have shifted dramatically and the old settlement will either be irrelevant or will emerge as a stumbling block at a critical point.

In this regard, the Justice Department seems to have developed a better understanding than the FTC of the importance of time in the tech world. Both of the five-year settlements were negotiated by the Department, while the FTC’s settlements all ran for ten years. This may have been a function of the FTC targeting patent issues directly – those patents having a shelf-life of well over a decade. However, given the immense churn in the tech market over a short period of time, flexibility is vital. Having a settlement span less than five years may seem to turn regulation into a game of whack-a-mole; especially given that Intel had to be prosecuted again for the same infractions a whole decade after its first settlement with the FTC. However, the provision in the Apple settlement that the five years could be extended by act of the court may provide an avenue for added regulatory flexibility; if the five years are up and the danger still exists, the regulatory agency and the company may be able to reach an agreement to continue with the status quo or to make necessary modifications from a ready-made baseline.

[128] Thomas Friedman, *Thomas Friedman On “How America Fell Behind”* NPR (Sept. 6, 2011) http://www.npr.org/2011/09/06/140214150/thomas-friedman-on-how-america-fell-behind.html

Four basic suggestions for regulators moving forward have emerged from this discussion. First, focus on intellectual property rights; in this area since the agencies are already on the right track with licensing requirements and loosening patent enforcement. Second, open the channels of information as wide as the patent system will allow; here the FTC is on the right track, but the Justice Department seems to be pulling in the opposite direction. Third, lower barriers to entry wherever possible; here again both agencies are leaning in the right direction, but the Justice Department is going too far, pushing companies into markets instead of merely opening doors. Fourth, adjust the time horizons of the settlements; in this area the Justice Department's model of a five-year settlement with possibility of extension seems to be the most flexible and sensible approach. These four suggestions will increase consumer welfare by encouraging innovation and ensuring that more products can be tested by public approval without unduly penalizing a monopolist who may have simply found the most efficient way of operating.

Conclusion

The goal of antitrust enforcement is consumer welfare, a measure defined to include both price and non-price components. The substance of antitrust enforcement, for better or worse, has been settlements embodied in consent decrees. Those settlements have certain pitfalls, including the tendency to overpowering remedies, and the danger of inconsistency in terms of different settlements sending mixed signals to the regulated individuals. This paper examined the manifestation of those pitfalls in tech-related settlements, going through the terms of six major settlements negotiated by the Justice Department and the FTC and gave rise to four considerations for promoting consumer welfare in future tech settlements: 1) required licensing of patents, particularly SEPs and other basic design patents, 2) free flow of information between competitors, 3) lowered barriers to entry into a market, especially a platform market and 4) short but flexible settlement durations.