Antitrust Blackletter Outline

I. Introduction

§1. Cartel Section.
§2. Monopoly Section.

II. § 2

A. Structural Consensus

To violate §2 of Sherman Act, need:
1. Market power AND
2. Exclusionary act / “anticompetitive conduct”
3. Dangerous probability of success

1. Must have market power and intent to perform act – not necessarily to monopolize. Alcoa.
2. Market power based on market share = power over price.
   To find out percentage of market share, must know what the market is
3. Defining market is key – may directly bear on liability. du Pont.
4. Anticompetitive conduct necessary to impute liability

B. Market Definition

1. Subjective – may be broadly or narrowly defined

C. Conduct Issues

Section 2 Conduct Test
Two parts:
1. Possession of monopoly power in the relevant market, and
2. The willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Violation is defined as use of offensive conduct to obtain, protect, expand or exploit the monopoly.

1. Leveraging – Using monopoly power in one market to attempt to disadvantage competitors in another market. Griffith.
2. Exclusionary conduct – Monopolist may not maintain monopoly power through conduct intended to exclude competitors. United Shoe. Without valid business justifications, following are illegal:
   ▪ Synthetic barrier to entry
   ▪ Bundling/tying products
   ▪ Subsidiary price discrimination

The key in avoiding violation of part two is that conduct needs to result in efficiencies that benefit consumers, although the test of efficiency sufficiency is not a specific standard – it is subjective.

D. Attempts and Conspiracies

1. Required elements:
   ▪ Predatory or anticompetitive conduct (“exclusionary act” or “anticompetitive conduct”),
   ▪ Specific intent to monopolize (cf. “general” intent), and
   ▪ “Dangerous probability” of success at monopolizing.
   \[\rightarrow\] Must have a defined market.
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Conspiracies to monopolize do not require the act or practice to have been carried out, but only require the agreement between competing firms to attempt to monopolize.

E. More Conduct Issues

1. Refusal to deal – a business with monopoly power may not refuse to deal with another business to disadvantage a competitor. Lorain Journal.

2. Essential facility – if a group of competitors or sole competitor create a facility that gives them a significant competitive advantage over excluded competition, in some situations, access must be afforded to the excluded parties on reasonable terms. Otter Tail. Limited doctrine requires:
   ▪ Monopoly control over essential facility
   ▪ Inability of competition to reasonably duplicate facility or operate without
   ▪ Monopoly denies use of facility
   ▪ No valid business reason for refusal
   Limits on essential facility. Where exclusionary action has no purpose to injure competition or expand monopoly power, there is no violation (missing “dangerous probability of success”). Airline Guides.

3. Duty to disclose – where defendant’s action is result of new technology or innovation, less chance of violation. Kodak.

4. Efficiencies and economies of scale – if a monopolist reasonably anticipates market growth, may expand to take advantage of market according to expectations. du Pont.

5. External v. internal duty to disclose – vertically integrated firms have no duty to disclose innovations to competitors, but non-integrated firms may not prevent buyers from sharing information to prevent competition. AT&T.

F. Predatory practices
Any act to drive out, punish, or disadvantage competitors that has no valid business reason but for the anticompetitive result.

Two almost impossible requirements to prove predation. Must prove pricing below:
   ▪ Some “measure of cost”, and
   ▪ Reasonable probability of recoupment.
   \( \rightarrow \) This case is an effectual endorsement of oligopoly maintenance.

1. Tests
   US test – Firms pricing below marginal cost to drive out competition, with dangerous probability of recouping later.

   Areeda-Turner test – Pricing below average variable costs is per se illegal.
   
   \[
   \text{Average Variable Cost:} \quad \text{Total variable costs divided by total units produced} \\
   \text{Average Total Cost:} \quad \text{Fixed costs} + \text{AVC}
   \]

   Exceptions:
   ▪ Loss leading (Wal-Mart)
   ▪ Product introduction
   ▪ Inventory liquidation

   The Clayton Act

   §2: Prohibits sellers from discriminating in price between different purchasers of goods of like grade and quantity where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce, unless the discrimination cost is justified.
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The Robinson-Patman Act

Amendment to Clayton Act, turning §2 into §2(a) and defining “primary line” discrimination – harm to competition at the seller’s level. Utah Pie – retail price discrimination eroding competition illegal.

§2(b), “secondary line” competitive injury – discrimination that disadvantages a disfavored buyer in its competition with a favored buyer.

2. Predatory design changes – Illegal to redesign products where the product change is not technically innovative, and the only effect is to harm competition. Transamerica v. IBM.

G. Duties to CONTINUE dealing

1. Refusal to deal by vertical integration – if vertical integration with valid business justification eliminates dealing with former retailers but creates a consumer benefit, refusal is OK. Paschall.

   → Drobak: This is a trick. Star’s claim that they wished to establish a uniform price of distribution got past the judges, but in actuality the cost of distribution in any market varies with population density. Therefore, a uniform price could possibly overcharge urban residents where distribution costs were lower, or subsidize higher costs for rural distribution.

2. Refusal to deal without valid business justification – when a firm excludes other market players on grounds other than efficiency, actions may be predatory. Aspen.

H. The Conduct Requirement: Differentiating Monopolization and Attempts to Monopolize

1. Attempt must have dangerous probability of success – no market power invalidates §2 violation. Empire Gas.

2. Solicitation of anticompetitive acts = attempt – the act of soliciting a monopolistic joint practice is illegal if there is a dangerous probability of success. American Airlines.

III. § 1 – Horizontal Agreements

Cartelization through price agreements

Horizontal agreements are between entities at the same level – producers, sellers, etc. A good cartel charges the exact same as monopoly prices. Therefore, constraints of cartels is also a necessity to promoting competitive pricing.

Two classifications of horizontal agreements:

- Per se
  - Price regulations
  - Horizontal market division
- Rule of Reason
  - All other restraints
  - “Quick Look” rule of reason
- Boycotts is transient – may be either category

A. Price Restraints

Any component of price is reachable as fixing. Price fixing agreement does NOT need specific numbers – just an agreement on structure whereby prices will be controlled.

<table>
<thead>
<tr>
<th>Per se</th>
<th>Rule of Reason</th>
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<tbody>
<tr>
<td>Trenton Potteries</td>
<td>Appalachian Coal</td>
</tr>
<tr>
<td>Socony Vacuum</td>
<td>Society of Engineers</td>
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<tr>
<td>Catalano</td>
<td>Broadcast Music</td>
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<tr>
<td>Maricopa County</td>
<td>Superior Trial Court Lawyers</td>
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</table>
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1. **Price restrictions** – per se violation. *Trenton Potteries.*
   - Price restrictions more lenient when competition is enhanced by the restraint. *Appalachian Coal.*

2. **Restrictions that intend to influence price** – doesn’t have to explicitly restrict price, as long as an agreement affects price. Does not require power of price, just the eventual influence on price. *Socony-Vacuum.*

Characterization step: “Quick Look” Rule of Reason – When per se rule is inappropriate, but no elaborate analysis is required to demonstrate the anticompetitive character of an inherently suspect restraint.

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Case is presented

Characterization

Per se                     Rule of Reason
Price fixing               All other restraints
Horizontal market division “Quick Look” RoR
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3. **Price fixing and professional organizations** – per se should apply, but court doesn’t want to slap a non-corporate entity with per se obligations. RoR will nail prof. society price fixing if it is aimed at affecting competition. *Society of Engineers.*

4. **Terms of payment constituting price fixing** – per se violation. *Catalano.*

5. **Price fixing without definite proof/joint ventures** – RoR will apply if agreement is result of increased efficiencies, or if agreement may be classified as a new product/joint venture. *Broadcast Music.*

6. **Maximum fixed prices** – just as illegal as any other fixed price. *Maricopa County.*

B. Market Division

1. **Horizontal market division** – any agreement, explicit or not, to divide markets between natural competitors is per se illegal. *Topco.*

C. Data Dissemination

1. **Price sharing in an inelastic market** – per se illegal. *Container Corp.*

2. **When price sharing isn’t controlling circumstance** – data sharing is RoR. *U.S. Gypsum.*

3. **Inferring price fixing from information exchange** –
   - i. If evidence of an agreement exists – per se violation. *Goldfarb.*
   - ii. If exchange only informational (accompanied by warnings, etc.) – RoR. *C&S National.*

D. Product Standardization

Monopsonist – buyers band together to fix prices by regulating their own demand. Per se or RoR? The final effect of this scheme was to keep costs down for consumers, by decreasing product mix to decrease cost of sale. But this looks a lot like Socony Vacuum, and tends towards price fixing (although an argument can be made to call this a “joint venture”).

E. Boycotts

Agreement to only deal on certain terms becomes a boycott. Flips between both per se and rule of reason.
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1. **Blacklisting** - no need for agreement, actions of group alone can infer concerted boycott – per se illegal.  *Eastern States*.

2. **Undirected boycotts** – when sellers create rules of sale that may indiscriminately disfavor some businesses, RoR.  *Paramount Famous Lasky*.

3. **Self policing** - violates §1 because there is no guarantee of adherence to such policy by competitors.  *FOGA*.

4. **Vertical conspiracy with horizontal effects** – per se illegal when vertical deals are made by a competitor to exclude the vertical supplier from dealing with a horizontal competitor – even if the arrangement has causes harm to consumers.  *Klor’s*.

5. **Boycott classification** – boycotts with predominantly anticompetitive effects are per se illegal; boycotts justified by efficiencies are RoR.  *Northwest Stationers*.

6. **Boycott justifications without efficiencies** – per se illegal.  Even if the efficiency is meant for good (architects, doctors agreeing for safety or health reasons), invalid under RoR without economic benefit.  *Indiana Federation*.

**F. Political Action**

1. **Political lobbying with anticompetitive result** – OK to politicians with purely economic intent, even if bad.  *Noerr-Pennington Doctrine*.

2. **Sham litigation** – baseless abuse of Noerr-Pennington to harm competitors, where no reasonable litigant could expect success on the merits, violates §1.  *Pro Real Estate*.

3. **Private bodies** – doctrine only applies to politicians, not government agencies, regulatory bodies, or private regulatory bodies.  *Allied Tube*.

**MO v. NOW (8th Cir. 1980)**  *In Legal Briefs p. 49*

⇒ Should intent of a boycott be a consideration?
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G. Joint Ventures

   Judicial question: Is the joint venture actual significant entity integration (rule of reason), or merely cartel-like operation (per se or quick look)?

   1. **Joint venture with essential facility** – when a joint venture controls an essential facility that is essential for other competitors who require more than equal access, they must be able to join venture.  *Terminal Railroad.*

   2. **Restricted JVs with market power** – Restricted membership JVs with vast market power may have duty to allow competitor access.  *Associated Press.*

   3. **Exception to above** – when access to substitute product is ably obtained, then no JV duty to allow entry (promotes entrepreneurial spirit).  *Paddock Publications.*

H. Evidence of Agreement

   1) What does §1 mean by “contract, combination, or conspiracy”?  
      → Question of law.  An understanding between competitors is enough to implicate these words; which moves us to the next question:

   2) What constitutes sufficient evidence from which the fact-finder may find that defendants’ conduct occurred pursuant to contract, combination, or conspiracy?

   1. **Price leadership and parallel pricing** – when one’s act of raising prices is quickly matched by other retailers in the same field, court may infer parallel pricing (connecting the rimless wheel) as a conscious action by competitors as evidence of an agreement to set prices.  *Interstate Circuit.*

   2. **Conscious parallelism plus** – parallelism itself not illegal if justifiable business reasons exist, even is conscious parallelism is proved.  *Theater Enterprises.*

   3. **The law today** – must establish direct evidence of anticompetitive intent or lack of valid business reason for conscious parallel pricing.  *Matsushita.*  Evidence may be in form of boycott harm (i.e. limited access to raw materials, etc.).  *JTC Petroleum.*

I. Oligopoly

   Oligopolies need some kind of anticompetitive agreement to be in violation.  The natural activity of market firms seeming like a cartel is not enough to impute liability.

IV. Section 1, Vertical Agreements

A. Resale Price Maintenance

   RPM is vertical price fixing.  When a manufacturer dictates fixed retail prices to retailers, it is considered resale price fixing.

   → Per se if price is a floor, RoR if price is a maximum cap.

   1. **Contractual agreements to fix prices** – per se illegal for manufacturers to force price maximum or minimum by contract.  *Dr. Miles.*

      → See *Colgate*, infra.  Does it escape the Dr. Miles ruling because Dr. Miles’ product was unique and in fact a monopoly, but if Dr. Miles had had substitutable competitors, he would have been able to set prices?

      ▪ The more INTERBRAND competition there is, the less RPM matters.  People will shift to less expensive products, and the firm ceases to be a price maker.

      ▪ INTRABRAND (competition between a single firm’s resellers) competition is stifled by RPM, and that is where a violation occurs.  This is the harm in *Dr. Miles.*
2. *Using consignment to avoid Dr. Miles* – producers cannot use sham consignment to coerce price maintenance. *Simpson.*

3. *RPM without market power* – if a producer using RPM makes an easily substitutable product, not illegal as long as the RPM is a unilateral requirement for all retailers. *Colgate.*

4. *The law today* – manufacturer can say what a price is if they avoid the agreement step. Basically needs to state price and walk away. *Russell Stover* Cannot use coercion to force RPM. *Parke Davis.* Shouldn’t use discounts, warnings, permanent terminations, etc. Gray area. *Drobak.*

5. *Complaints plus doctrine* – vertical agreement to exclude a reseller at behest of a competitor requires proof both of complaints and corresponding supplier action, differentiating treatment, etc. *Monsanto.*

6. *Refusals to deal to discounters* – unilateral refusals to deal to discounters usually upheld under RoR, as long as no RPM agreement between full price retailers exists, company makes efforts to avoid inference of agreement, and awareness of discounter activity not brought to supplier's attention by tons of competitors. *Business Electronics.*

Remember: Interbrand restrictions bad – intrabrand regulation negligible!

**B. Maximum Resale Prices**


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<tr>
<td>Per se</td>
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<tr>
<td>Horizontal price fixing</td>
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<tr>
<td>- Max and min</td>
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<tr>
<td>Vertical price fixing (RPM)</td>
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<tr>
<td>- Min (no interbrand competition)</td>
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<tr>
<td>Horizontal market division</td>
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**C. Vertical Nonprice Restraints**

1. *Vertical nonprice restraints* – subject to RoR. Where a firm has large market power and few substitutes, lies more closely with unreasonable. *Continental TV.*

   → Drobak’s Key: Interbrand competition! Harm to consumers will never happen in blatant nonprice restraints where there is VIGOROUS interbrand competition. Competition severely counterbalances intrabrand manipulation, so look for market size and share in RoR analysis.

   → On exam – show specifically what the non-price restraint is and the harm it causes!

**D. Exclusive Dealing**

When supplier is able to establish exclusive agreements with resellers in certain areas – contracts that impose limits on buyers, like satisfying all need from one seller, etc. Violates §3 of Clayton Act – only applies to goods, not services.

1. *Agreements that have likelihood of lessening competition* – invalid under §3. Only need possibility, doesn’t have to taken effect. *Standard Fashion.*

2. *Foreclosure of substantial market share* – violates §3 where size of the market share foreclosed by contract is substantial (percentage, not money). *Standard Oil.*
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3. **De Facto exclusive dealing** – where terms of contract are not exclusive, but have practical effect. Microsoft (royalty fee for computers shipped w/o Windows).

4. **Market foreclosure key** – market definition. Even if deal is exclusive, if it only effects nominal market share, no violation. Tampa Electric (20 year contracts only foreclosed 1% market share).

Toys ‘R’ Us HO (7th Cir. 2000)  
*Like Klor’s.*

Hasbro ➔ FP ➔ Mattel ➔ Etc.

Dep’t. stores  Toys R Us  Wal Mart  Clubs

Held a horizontal conspiracy because of the “I’ll do it if they do it” provision of the exclusive distribution agreement, even though the ringleader is a vertical relative to the industry (*Interstate Circuit’s rimless wheel* provision). CA held that there was market power not by TRU’s percentage of the toy retailer market, but provable by anticompetitive effects alone. In actuality, TRU controlled no more than 20% of the retailer market nationally, and no more than 49% of any single market nationwide. The manufacturers participating in the alleged boycott represented 40% of the toy market.

→ Also a boycott *per se* case if analyzed under Northwest.

E. **Tying**

A tying agreement is when a manufacturer ties a second, undesired product as a condition to the sale of a primary, desired product (the tying product) to retailers.

Blackletter law: §1 Sherman Act, §3 Clayton Act has a modified rule against *per se* tie ins.

→ Requires:

1. Sufficient economic power with respect to the tying product to force people to buy the tied product,
2. Conditioned on a factual showing that a substantial dollar amount of trade in the tied product is affected.

Loosely read, illegal tying must show 1) two or more products, the tying and the tied, and 2) sufficient market power over tying product to force purchase of the tied product.

§ I

### Per se

- Horizontal price fixing
  - Max and min
- Vertical price fixing (RPM)
  - Min (no interbrand competition)
- Horizontal market division

### RoR

- Vertical price fixing (RPM)
  - Max
- Vertical mkt div (*Sylvania*)

A manufacturer may sell a monopolist item for a monopolist price. A pair of shoes may be sold for $100 total, but with a cost appropriation of 20 for one shoe and 80 for the other. Allocation usually does not matter to a consumer: they want the full utility of the combined product.

*Bolt-nut hypo:* Assume that every bolt must be used with a nut, but that there are alternate uses of nuts that do not require bolts. The manufacturer uses this alternate application as a reason to segue into the nut-only market as a monopolist.

*IBM illustration:* Tying punch card costs to mainframes. Monopoly profit on the machines themselves were distributed into the IBM manufactured punch cards. This lowered the cost of computers and increased their demand, while charging heavy users with the balance of the monopolist profit (and in some cases, the excess).
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Newspaper Hypo: Morning Lever and Evening Tide owned by same company. Evening Time independent. Morning Lever sells ads at one price that must run in both papers. Time sues as tying. Who wins?

➔ US said that the advertisement is one product: newspaper advertising. As such, the claim fails on the first test of multiple product.

➔ Once two products are established, then MARKET POWER is the next big test

1. Tying as a forced choice – modified per se illegal if buyer doesn’t want product or would rather purchase elsewhere under different terms – only illegal if market power is established and that power carries to coercion. Jefferson Parish Hospital.

2. Franchise agreements – where tied products are not necessary to conduct the business of the franchise, or to the goodwill attached to end items, tying is illegal. Chicken Delight.

3. Franchise agreements where business is integrated product – not illegal. McDonald’s.

4. Secondary service markets – parts and services may be considered secondary market where consumer demand would make the secondary market efficient. Kodak.

➔ Note the bass-ackwards system that this prevents. US held that high investment costs in the initial market may force the consumer to remain in a non-competitive derivative market.

5. Modern test – four parts:
   i. One or two products? No issue if integrated product reasonably classified as one.
   ii. Seller have market power in tying product?
   iii. Is there “not insubstantial” affectation of commerce in the tied product’s market?
   iv. Is power in the tying market used to prevent competition on the merits in the tied market?

6. Defenses:
   i. New industry
   ii. Quality control
   iii. Integrated product

V. Mergers
Why are they occasionally bad? Because they promote oligopolies, and because the bigger you are, the better chance you have at controlling price.

The principle object of merger analysis is to determine the probable competitive impact of the merger. Brown Shoe. This is traditionally accomplished by:

   1. Defining the market,
   2. Measuring the shares of the merging companies before and after the merger,
   3. Measuring market concentration before and after the merger,
   4. Draw inferences from the results, as well as a survey of competitive dynamics and barriers to entry, and
   5. Analyze competitive style of the merging companies.

To analyze these indicia, the merging companies must be divided up into three different forms:

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<thead>
<tr>
<th>Horizontal</th>
<th>Vertical</th>
<th>Conglomerate</th>
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<tbody>
<tr>
<td>Worst kind</td>
<td>Less suspect, but</td>
<td>Mergers with companies</td>
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<tr>
<td></td>
<td>occasionally smacked</td>
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A. Horizontal Mergers

1. Presumptively illegal test – when merging firms create an undue controlling percentage of market AND produce significant increase in market concentration, rebuttable presumption of illegality. Philly Nat'l Bank.

2. Merging of major competitors – where merging companies represent the major competitive factors in a market, the elimination of significant competition is between them constitutes a violation of §1. FNB of Lexington.

3. Aggressive innovators – court may invalidate a merger because of its impact on removing an aggressive competitor from the market. Alcoa v. Rome.

4. Line of commerce – even if merging companies aren’t in identical business, if there is reasonable relation to the two across industry lines, negation of potential competition may invalidate merger. Continental Can (acquiring a glass jar maker).
   → Drobak says that this has no cross-elasticity of supply problems.

5. Vons – bad law. Can’t stop change, even if it does concentrate an industry.

6. Lack of competitive harm – prima facie case of illegal merger may be overcome if the lessened competition is attributable to other factors than the merger, such as ineffective competition, diminishing market capacity in general, etc. General Dynamics.

7. Failing firm defense – mergers producing disconcerting market share may be approved if the acquired firm is operating at a loss and so close to insolvency that a bailout is its only option; only then the burden must show that the acquiring company was the only suitor available and capable of a buyout of its competitor. Citizen Publishing.

HHI
Sum the squares of market share. If under 1000, the market is unconcentrated. Anything above 1800 is highly concentrated. And change in the HHI +100 between those two levels post merger indicates a significant chance of anticompetitive effect.

Change in HHI by specific merging firms is calculated by: %MKT(1) * %MKT(2) * 2 = %CHG(HHI)
CHG < 50 in any market not likely to have bad effect
CHG > 100 is presumably illegal in 1800 range, moderately probable bad effects in 1000-1800 area.

Hospital Corp. of America 789 ()
Prior to merger, CR-4 = 79%. After merger, CR-4 = 90%. Fits under PNB methodology because the acquired hospitals were progressively larger in the local market. The management contract was an effectual merger because the management agreement leads to control.

Merger guidelines
FTC will only consider efficiencies proposed as a result of merger that are likely to be accomplished with the merger and cannot be accomplished without the merger. Called merger-specific efficiencies.

Guideline themes
- Designed to articulate the analytical framework the Agency applies to proposed mergers. DO NOT indicate lawsuit tactics.

AOL/Time Warner merger
Fear of market foreclosure.

<table>
<thead>
<tr>
<th>AOL</th>
<th>Time Warner</th>
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<tr>
<td>ISP</td>
<td>Magazines</td>
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<td></td>
<td>Largest cable system</td>
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<td>Music</td>
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<td>- Cable broadband</td>
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- Interactive TV
- Movies
- Roadrunner
- Network TV
- Broadband ISP

Would allow AOL to move into broadband ISP through Roadrunner. Fear that AOL would put so much money into cable access that they would let DSL suffer from neglect. FTC handled vertical concern by obligating the merged company to make cable broadband access to Earthlink, basically opening up distribution to independent providers and disallowing refusal based on competitive reasons – only technological limitations.

It looks as if AOL would eventually become a horizontal merger because of the emerging broadband technology. Should technological inevitabilities foreclose these types of mergers that are facially conglomerate in nature?

B. Vertical Mergers

du Pont III

Brown Shoe

Consolidated Foods