Summary of Discussion Points

Presented by the Business and Industry Advisory Committee (BIAC) to the OECD
at the OECD Competition Committee
Roundtable on Barriers to Entry *

October 19, 2005

BIAC appreciates the opportunity to submit the perspective of the business community on the issue of barriers to entry. Given the nature of BIAC’s activities, we would like to focus our attention on practical aspects that bear a direct effect on the business community rather than on the more theoretical analysis of barriers-to-entry doctrine.1

I. INTRODUCTION

1. At the outset, BIAC would like to draw the pragmatic boundaries of the discussion in noting that barriers to entry, namely, legal or other obstacles that constrict the entry of a new firm into a market, do not necessarily raise antitrust concerns. BIAC commends the Secretariat in noting that the precise, technical definition of barriers to entry is less important than confirming that the practical question is whether, when and to what extent entry or expansion is likely to occur in the relevant market.2 BIAC also agrees that the term “barriers to entry” should not automatically carry a negative connotation.3

2. Similarly, BIAC agrees that just because some vertical arrangements, e.g. exclusive dealing contracts, may raise entry barriers, that does not necessarily mean that their net

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2 OECD, Roundtable on Barriers to Entry, Background Note by the Secretariat, DAF/COMP(2005)36, ¶ 2 and 7.

3 Id. footnote 6.
effects on consumer welfare are negative\textsuperscript{4} and would go further in observing that such vertical arrangements usually do not raise entry barriers to the point where they have a significant adverse effect on competition.\textsuperscript{5}

3. The most important observation of the Secretariat may well be that “Entry analysis . . . should not be conducted until after an assessment of the level of competition that would likely exist without entry.”\textsuperscript{6} Entry barriers are most often relevant to the competitive analysis in two specific antitrust contexts.\textsuperscript{7} The first of these contexts is merger review, where the evaluation of concentration issues, related to whether a proposed merger raises antitrust concern, takes barriers to entry into account as one of the relevant considerations.\textsuperscript{8} The second context is the evaluation of market power in non-merger cases, such as monopolization (or abuse of a dominant position) cases, where the ease and speed of entry by potential new market players may affect the assessment of an existing player’s market power and the effects of that player's entry or potential for entry on competition in a relevant market. In these cases too, ease-of-entry is only one of many considerations taken into account once a probability of competitive harm is established. Within these two specific contexts, barriers-to-entry are often specifically considered in defining the relevant geographical market in which proposed mergers or other challenged conduct take place.\textsuperscript{9}

II. GENERAL OBSERVATIONS ON BARRIERS TO ENTRY

4. The report of the Secretariat highlights the key considerations of analysing barriers to entry. Indeed, the report offers a great deal of substantive analysis with which BIAC agrees entirely. We would add, however, a few additional considerations.

5. First, the existing functioning of the market needs to be understood. There may be instances where even though there are a small number of competitors in the market; the market is functioning in an effectively competitive manner, and equally there may be instances where there are a large number of suppliers in a market and the market is not functioning effectively. The principal focus should be on the intensity of competition within a market.

6. Consideration of the likelihood of entry, which is the core of the entire barrier to entry equation, must be evaluated in view of the best information available. Although entry

\textsuperscript{4} Id. ¶ 30(7).
\textsuperscript{5} See, e.g., Canada v. Canada Pipe (2005), 40 C.P.R. (4\textsuperscript{th}) 453.
\textsuperscript{6} OECD, supra note 2, ¶7.
\textsuperscript{7} BIAC acknowledges that barriers to entry may also be relevant under the cartel laws of certain countries that impose a “rule of reason” analysis for these cases. For instance, the conspiracy provisions in section 45 of the \textit{Competition Act} (Canada) require an analysis of whether a conspiracy lessens or prevents competition "unduly", which in turn requires an assessment of market power and any barriers to entry in the market.
\textsuperscript{8} See, e.g., Council Regulation (EC) No. 139/2004 of 20 January 2004 on the Control of Concentrations Between Undertakings, 2004 O.J. (L 24) 1 (hereinafter The EC Merger Regulation) at Art. 2 § 1 (b).
\textsuperscript{9} See id. Art. 9 § 7.
should be considered in light of objective standards, this analysis should not occur in a vacuum. Best evidence would include the forward looking business plans of other actual or potential competitors in the market and their actual strategies. The absence of specific evidence regarding planned entry should not rule the analysis when economic conditions suggest that entry will be rational. However, specific plans by an entrant should be heeded, even if the agency deems such entry irrational. In other words, deference should be given to those entities preparing to put their money on the line. In this regard the authorities should adopt a proactive approach toward the understanding of the market and should organise their resources to monitor markets where competition problems are likely to occur. An ad hoc approach may be found to be both unduly resource intensive and unlikely to be able to deal with the complexity of issues that arise once a significant competitive harm has already occurred.

7. In considering the timeframe within which entry must occur, BIAC agrees that a two-year timeframe is a practical starting point as a general matter. In the context of a specific case, a more relevant approach may be to consider both the delay that may accompany entry within a particular market, as well as the likely durability of entry and overall impact on competition once it occurs. In some industries the timeframe should be shorter or longer and consideration should be given to the characteristics of the market. For instance, if entry entails a substantial sunk cost investment in a large increment of capacity, such entry is likely to have a profound and durable impact on competition with significant benefits to consumers. In such a case, an entry timeframe of more than two years, assuming such entry is likely, may be appropriate.

8. The strategic barriers to entry identified by the Secretariat raise some issues of concern. First, both impediments to entry and efficiencies may arise as a function of the relative efficiency of the market or the market participants that are already in the market. In principle, traditional anti-trust would often applaud efficient organisations that exploit economies of scale, scope or externalities despite the fact that these factors, if fully played-out, may lead to the evolution of barriers to entry and, conceivably, market dominance. The risks attendant to interfering with such factors through action by regulatory authorities is very much in question. Substantial economic study would be required to support regulatory action, particularly where productive efficiency and innovation remain in development. In these situations, agency action may lead to substantial impacts on short- and medium-term consumer welfare.

9. BIAC also notes that a barriers to entry analysis should address not only whether sufficient entry is likely to occur but should also inquire as to whether the threat of entry has kept or will keep prices at competitive levels. If barriers to entry are low, incumbents may price at competitive levels in order to deter entry, in which case the absence of entry (or limited entry) in the past is not necessarily indicative of any significant barriers to entry into the market.
II. BARRIERS TO ENTRY ARE NOT ABSOLUTE IN THEIR SUBSTANTIVE SCOPE OR IN DURATION

10. The long and still ongoing debate over the definition of barriers to entry is a useful reminder of the fact that the term “barrier to entry” is not an absolute term with unalterable meaning. In the U.S., for example, the U.S. Federal Trade Commission (FTC) acknowledged the existence of an impediment to entry. An impediment to entry has been defined as any condition that necessarily delays entry into a market for a significant period of time and, thus, allows market power to be exercised in the interim.

11. The definition of such an “impediment to entry” category reveals that a “barrier to entry” is not an absolute market condition that can be identified. Rather, a “barrier to entry” is a relative term whose competitive significance is very much dependent upon the surrounding circumstances. For example, this circumstance may arise in an industry characterized by rapid R&D progress, where entry barriers may not be as difficult to surpass as in a mature or declining industry that is not characterized by similar developments. Post-entry survival rate may also be telling as to the durability of barriers to entry. For example, if entry appears easy but a large number of companies that tried to enter the market in the past have exited the business soon thereafter, there may be an effective entry problem that is not being detected by the traditional theoretical tools. At the same time, it may also be a sign that the market already possesses sufficient capacity and cannot bear the cost of additional capital.

12. The absolute level of capital costs required to enter or expand in a market should not in itself be considered a significant barrier or impediment to entry. If it is difficult to raise capital to enter a business, that likely reflects lenders’ concerns about some other risk of entry. Otherwise, it is difficult to see why capital would not flow to profitable entry opportunities. Moreover, there are real difficulties in the assessment of sunk costs as well as examining the differences between sunk costs, as an economic concept, and fixed costs which may be both an accounting and an economic concept. Thus, an undue focus on total capital requirements or total sunk costs may not be warranted.


11 See, Echlin Manufacturing Co. and Borg-Warner, Corp, No. 9157, 105 F.T.C. 410, 486 (June 28, 1985). This entry analysis was followed later by the Commission in B.F. Goodrich Co., Diamond Shamrock Chemicals Co. and Diamond Shamrock Plastics Corp., No. 9159, 110 F.T.C. 207, 297 (Mar. 15, 1988) ("Impediments to entry that do not rise to the level of absolute barriers to entry may nevertheless permit the exercise of market power for substantial periods of time."). In recent years, the Commission may have changed its entry analysis, but only very slightly; Coca Cola Bottling Co. of the Southwest, No. 9215, 118 F.T.C. 452, 617-18 (Aug. 31, 1994) ("Entry barriers include any condition that necessarily delays entry into a market for a significant period of time and thus allows market power to be exercised in the interim. We have pointed out that barriers or impediments need not be absolute; rather, they are assessed in terms of the amount of time required for a motivated outsider to effect entry.") (internal quotations and citations omitted).

12 BIAC notes, however, that Canada’s Merger Enforcement Guidelines (2004) list among the possible factors that can deter entry “high levels of investment in research and development.”
13. In sum, a “barrier to entry” should not be taken as a closed absolute definition but rather as a phenomenon that is affected by competitive circumstances over the course of time. Furthermore, the existence of a “barrier to entry” should not be an all-or-nothing finding but rather should be placed somewhere along the continuum between free-entry and impossible-entry. In the end, a flexible analysis will allow for better antitrust enforcement.

III. GOVERNMENT IMPOSED BARRIERS TO ENTRY

A. Trade regulatory barriers

14. The exponential growth of international trade, through which our world is slowly becoming one global trading community, may further eliminate traditional barriers to entry. Technological advancements, such as the Internet which is characterized by limited cost of entry, along with strong normative frameworks, like those of the World Trade Organization (WTO) and numerous bilateral treaties or multilateral free trade zones, make it much easier for market players to enter foreign markets than has been the case in previous decades. Businesses today are keenly aware that, in addition to their traditional domestic competitors, potential international entrants are also continuously watching the market, prepared to enter at any stage in which they deem such entry to be profitable.

15. Antitrust literature has developed these concepts before, recognizing that firms who are monitoring the profit potential of a market have either an ongoing or a prospective impact on the market, as such companies could one day enter the marketplace with more efficient or innovative products thus, consequently, enhancing competition. Today’s reality, in which entry into many foreign markets is becoming easier, dramatically increases the numbers of such potential entrants. This trend suggests that an entry analysis that has been conducted in a market even with the past few years should frequently be reconsidered, since the once well-defined borders of “relevant geographic markets” become blurred over time. Therefore, competition authorities should consider evolving evidence of declining barriers to international competition.

16. This requires consideration of the degree of freedom with which goods within a particular market may move through international trade. Inhibitions on the free flow of goods in international commerce are frequently the result of legislative or other governmentally-imposed restrictions to the free flow of trade. The classic means for such inhibitions are domestic import tariffs and quotas. There are, however, other examples of domestic legislation which may compromise free trade such as, for example, U.S. domestic legislation related to labeling requirements in the textile

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13 This does not mean that free trade and competition are necessarily identical, but there is a significant correlation and intersection between the two. For an analysis of this point, see, Final Report, International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust (2000), Chapter 5: Where Trade and Competition Intersect, available at http://www.usdoj.gov/atr/icpac/chapter5.htm.

14 See, Bush & Massa, supra note 1, and the literature by Bailey, Baumol, Panzar and Willig, infra note 17, for a review of the literature and legal background of the potential competition and the closely-related contestable markets doctrines.
industry, adopted in line with the North American Free Trade Agreement (NAFTA) which has been blamed as harmful to trade and, thus, to entry and free competition. To the extent possible, competition authorities should not only to remain aware of such inhibitions to trade, and take account of such inhibitions in weighing likely entry in a particular case, but should also seek to participate in the process through which a government evaluates the net benefits or detriment of restrictive trade policies.

B. Direct legislative and regulatory barriers

17. Entry to a market can be, and often is, impeded by various forms of government action. Courts have recognized that government-imposed entry restrictions can frequently form “barriers to entry.” Such regulatory barriers to entry may be problematic from two perspectives.

18. First, BIAC generally shares the views of the contestability theory, under which barriers to entry should be minimized since “[i]mpediments to entry and exit, not concentration…may be the primary source of interference with the workings of the invisible hand” of the market. It is, therefore, important that antitrust enforcement agencies acknowledge these potential anti-competitive effects and be alert to attempts by other regulatory agencies, either at a federal or local level, to erect regulatory entry barriers at the cost of competition.

19. Second, incumbent market players may abuse such legislative and regulatory barriers to entry. One example of such abuse was presented with respect to “certificates of convenience and need” (CONs). CONs are generally required by public service commissions for potential market entrants who would like to construct facilities and/or begin offering public utility services (such as water, gas, telephone, etc.) to the public. The procedures associated with CON requirements may provide a variety of opportunities for incumbents to delay entry or raise entrants’ costs by tactics such as filing objections to applications, invoking rights to “public” hearings, challenging the sufficiency of information provided by applicants, forcing applicants to provide confidential business information that incumbents can then misuse, and similar techniques.


18 See, Susan A. Creighton, D. Bruce Hoffman, Thomas G. Krattenmaker & Ernest A. Nagata, Cheap Exclusion, 72 Antitrust L.J. 975, 990-992 (2005), which highlight the two examples that follow in the text.
C. Barriers imposed by professional regulatory boards

20. Another example of problematic regulatory barriers is presented by the abuse of industry-dominated regulatory boards for constricting competition. This, for example, was the case in the FTC Complaint in South Carolina Dentists\(^{19}\) where a legislative board established to supervise the practice of dentistry unlawfully restricted competition by adopting a regulation that restricted the ability of dental hygienists to deliver certain preventive care to children in South Carolina schools. The board regulation, whose cost was effectively zero to the dentists (because the State would have borne the costs of its enforcement), raised a significant barrier to entry to oral hygienists – complete exclusion – that would have been difficult and expensive to overturn by litigation.\(^{20}\)

21. The above considerations reveal two ways in which regulatory barriers may harm competition. First, by distorting the organic landscape upon which a healthy competitive process develops, and second, by serving as an instrument that market incumbents may use, often lawfully, for excluding or deterring competition. Antitrust enforcement agencies must remain vigilant for such regulatory barriers, take action to the extent possible to remove harmful barriers when they are identified, and seek to prevent the abuse of such barriers by incumbent market players. This can be achieved, for example, through the development of rules or doctrines designed to achieve an appropriate level of antitrust scrutiny in regulated industries and by offering submissions to legislators to identify the sometimes-hidden hazards of legislative initiatives.

IV. BARRIERS TO ENTRY IN DYNAMIC HIGH-TECH MARKETS

22. As high-tech markets continue to play an ever-growing role in today’s economy, we choose two issues for discussion in this context: 1) the questionable relevance of static market barrier analysis in dynamic markets; and 2) the fact that dynamic markets are often characterized by unique technological barriers to entry.

A. Static barriers to entry analysis in dynamic markets

23. The antitrust concept of a barrier to entry envelops certain assumptions, which includes an assumption that there is a well-defined relevant product market whose boundaries remain considerably static. However, antitrust literature in recent years has acknowledged that today’s markets frequently are characterized by rapid technological development. In such circumstances, an industry, its products and new technologies may evolve so fast that products are constantly reinvented, and, thus, the borders of the “relevant market” recognized by antitrust analysis keep shifting.\(^{21}\) This tendency of


\(^{20}\) Id. at 5.

One example of such a scenario may be observed in the U.S. FTC’s Dell case.\textsuperscript{22} While the FTC decision in Dell did not explicitly involve a challenge based on “barriers to entry,” the complaint was based on Dell’s alleged wrongful acquisition of market power through abuse of standard-setting processes, which led it to hold a patent covering a certain industry standard. The implicit underlying assumption of the decision is that holding a patent over an industry standard creates an entry barrier to which the patentee is the exclusive gatekeeper. However, historical perspective demonstrates that such barriers may not be sufficiently durable to create competitive harm as the advancement of technology may render them obsolete soon thereafter.

In the Dell case, the industry standard over which Dell came to hold exclusionary power was adopted in 1992 and was known as the VL (computer) Bus. A year later, in 1993, Intel invented an alternative Bus called the PCI bus (Peripheral Component Interconnect) which replaced Dell’s VL Bus as the common bus in the computer industry. In other words, in that case, the fast changing market reality caused what seemed to be an effective entry barrier, obtained thanks to abusive conduct, to become far less relevant soon thereafter as the technology in that industry moved on.

Another way to look at the same phenomenon is by recognizing, as noted earlier, that in many cases the intensity of R&D activity in high-tech markets facilitates entry.\textsuperscript{23} In other words, even to an extent that entry barriers are present in these industries, substantial R&D may allow potential entrants to overcome them. Moreover, it bears mention that the efforts by a company to reap monopoly profits in a market may in fact reduce barriers to entry by increasing the potential benefits available to an entrant.

The FTC’s Unocal\textsuperscript{24} case provides another interesting example of a “barriers to entry” analysis in a standard-setting context. In this 2003 case, the Commission filed a complaint alleging that Unocal had illegally acquired monopoly power in the technology market for producing certain low-emission gasoline which the California Air Resources Board (CARB) mandated be sold and used in California for up to eight months of the year. The complaint alleged that Unocal misrepresented to CARB and other private industry groups that certain gasoline information was non-proprietary and in the public domain, while at the same time pursuing patents that would enable it to


charge substantial royalties if the information were used. Based upon these misrepresentations, CARB adopted reformulated gasoline standards which substantially overlapped with Unocal's patent rights. If Unocal were to enforce these patent rights, companies producing this particular low-emission gasoline would be required to pay over $500 million in royalties, a cost which ultimately would be passed along to the consumer. The Commission sought to have Unocal cease and desist from all efforts to assert these patents against those manufacturing, selling, distributing, or otherwise using motor gasoline to be sold in California. Unocal (and Chevron Corp. due to its proposed merger with Unocal) agreed to this relief on July 27, 2005.

28. Note however that the facts of the Unocal decision may be distinguished from those of the Dell decision. First, the circumstances suggest that Unocal's conduct may have been more overtly deceptive than that of Dell. Second, it may have been more difficult and time-consuming to change an industry standard or develop an alternative technology in the gasoline market that is not as fast-paced as the high-tech industry. Finally, in the Unocal case there was a regulatory requirement mandating the use of this standard, while the Dell case merely involved a voluntary industry standard. Indeed, the Unocal fact pattern may demonstrate how a regulatory-imposed barrier to entry can prove more pernicious than a commercially-imposed one.

29. The importance of accounting for technological change in competition analysis also is illustrated by the recent decision of the Canadian Competition Bureau not to challenge the acquisition by Rogers Wireless Communications Inc. of the mobile wireless telephone business of Microcell Telecommunications Inc. In its published remarks, the Competition Bureau noted that "change and innovation had an important impact on the Bureau's conclusions" and that technological dynamism in the wireless communications market would "continue to play an important, positive role in the future evolution of competition". In determining that the wireless market would continue to be competitive post-merger, the Bureau noted among other things that "advances in broadcast distribution and telecommunications are now providing new delivery mechanisms, allowing for greater convergence between these traditionally separate market segments". Thus, technological change in this industry reduced barriers to entry between different types of telecommunications suppliers. Recognition of industry change and innovation in competitive effects analysis is to be encouraged as part of a practical and fact-specific approach to assessing barriers to entry and market power.

B. Organic barriers to entry in Technology Markets

30. Despite their dynamic and fast changing nature which seems ideal for the development of a robust competition process, high-tech markets often suffer from organic technological barriers to entry, namely, barriers emanating from the nature of the products rather than from any specific conduct of market participants. A common

example for such barriers is known as network effects or network externalities, a term which refers to markets in which “the utility that a user derives from consumption of the good increases with the number of other agents consuming the [same] good”\(^{26}\).

31. These organic barriers such as network externalities are, of course, legitimate phenomena in themselves. Nonetheless, they may assist companies in carrying out abusive conduct which may raise antitrust concerns. Perhaps the most well-known example of such abusive conduct that took advantage of a technological barrier to entry was presented in the U.S. Microsoft antitrust case. The Microsoft case raised a problem of an “applications barrier to entry,” which stemmed from the fact that software applications written to Microsoft’s Windows platform could not run on other operating systems, and, thus, other operating systems could not effectively compete against Microsoft unless they could offer PC users a wide array of applications.\(^{27}\) In other words, the technological barrier to entry in Microsoft was a result of an interoperability problem, as the wide variety of existing software applications have been written exclusively to a Microsoft-Windows platform and, thus, could not work with competing platforms. Such interoperability barriers are not uncommon in the software industry in general.

32. In the European Commission Microsoft case, the EC acknowledged similar issues in finding that applications barriers to entry existed in both the client PC operating system and work group server operating system markets.\(^ {28}\) The allegedly abusive conduct targeted by the EC took advantage of these barriers to achieve claimed anticompetitive effects.

33. Examples of abusive conduct which takes advantage of technological barriers to entry\(^ {29}\) demonstrate how antitrust agencies on both sides of the Atlantic are realizing that, despite their dynamic nature, high-tech markets may at times be highly susceptible to entry barriers that assist market players in constricting competition. In some cases rapid or unforeseen technological advancements may still overcome such problems.


\(^{29}\) We intentionally refer to the term “barriers to entry” here rather than “network effects” since the two terms are not identical. In markets characterized by network effects, “the utility that a user derives from consumption of a good increases with the number of other agents consuming the [same] good.” Michael L. Katz & Carl Shapiro, *Network Externalities, Competition and Compatibility*, 75 AM. ECON. REV. 424, 424 (1985). Thus, even though markets with network effects may display barriers to entry, the substantive definition of these two market phenomena is different.
V. INTELLECTUAL PROPERTY RIGHTS AND ENTRY BARRIERS

34. Intellectual property rights (IPRs) may, in certain cases, give rise to structural entry barriers. These barriers, however, are sometimes overestimated or misconstrued and frequently become the target of undeserved enforcement action. IPR-created barriers are merely statutorily granted rights to exclude others from certain property, similar to any property right. A decision to refuse to allow another entity to access a legitimate IPR, therefore, should not be seen either as an abuse of dominance or the unreasonable erection of an entry barrier. IPRs, even those that create barriers to entry, should be accepted as legitimate rights, in line with the recognition afforded under the binding principles of the WTO TRIPS agreement. While the breadth of the IPR protection may well determine the ease or difficulty of entry into a market, the exercise of a valid IPR to exclude entry should not give rise to concern by antitrust enforcement agencies. At the same time, striking the proper balance in maximizing consumer welfare requires the proper exercise of discretion in granting such rights by the specialized patent and trademark offices and intellectual property courts. Indeed, using the competition laws to remedy imprudently granted IPRs will necessarily result in perverse results and will threaten the integrity of both the competition authorities and the relevant IPR authorities. Competition authorities, therefore, should exercise their advocacy powers to ensure that IPR authorities use proper discretion in determining when to grant IPRs.

35. A distinction should be drawn between legitimate IPRs that create structural barriers to entry and the abuse of IPRs for the creation of a strategic exclusionary barriers to entry. In the latter case, antitrust policy may have some leeway to evaluate and intervene in order to stop such abusive scenarios, as intellectual property laws may not extend antitrust immunity beyond the legitimate exercise of an IPR. However, in evaluating such cases, antitrust analysis must be applied cautiously so as not to effectively undermine the validity of the IPR itself or the protections guaranteed by the WTO’s TRIPS standards.

VI. SUMMARY

36. The BIAC applauds the OECD’s focus on the analysis of barriers to entry and suggests that:

a. Competition agencies should consider the substantial harm that can be created by direct and indirect government regulation which creates the opportunity for structural or strategic barriers to entry.


b. Barriers to entry should not be viewed as absolute or fixed and, therefore, should always be considered in light of the specific, evolving market circumstances.\(^{32}\)

c. The application of a barrier-to-entry analysis in dynamic high-tech markets must be recognized as complex and, in evaluating the optimal outcome on consumer welfare, may require that a balance to be struck between considerations of short-term competitive harm and long-term market development in a dynamic industry.

d. Globalization, which eases entry into foreign markets, should be promoted to reduce barriers to entry and enhance consumer welfare. Domestic legislative barriers may inhibit such a desirable effect.

e. IPRs may erect legitimate structural entry barriers and should not be presumptively suspect. Analysis of the abuse of IPRs for the strategic creation of barriers to entry should be undertaken, while giving deference to the legitimate proprietary nature of IPRs and their assurance of international protection.

\(^{32}\) In the words of Robert Pitofsky, former Chairman of the FTC, “In the end, the question of whether market power is durable or ephemeral is fact specific and needs to be addressed on a market by market and product by product basis.” Robert Pitofsky, Chairman, U.S. Federal Trade Commission, “Antitrust and Intellectual Property: Unresolved Issues at the Heart of the New Economy,” Prepared Remarks Before the Antitrust, Technology and Intellectual Property Conference, Berkeley, California, (Mar. 2, 2001), available at http://www.ftc.gov/speeches/pitofsky/jpf301.htm.