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### **Does Current Antitrust Regulation Provide Free Parking for eBay and PayPal in The Monopoly Game of Online Auction Sites and Person-To-Person Online Payment Systems?**

David S. Shevitz  
*Loyola Law School Los Angeles, dshevitz@lls.edu*

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# DOES CURRENT ANTITRUST REGULATION PROVIDE FREE PARKING FOR EBAY AND PAYPAL IN THE MONOPOLY GAME OF ONLINE AUCTION SITES AND PERSON-TO-PERSON ONLINE PAYMENT SYSTEMS?

## I. INTRODUCTION

Online shopping will never be the same again. “The economics and technology of web-based businesses has resulted in the emergence of companies that have substantial shares in their categories” in many countries globally.<sup>1</sup> With a market share of the online auction market exceeding ninety percent in several prominent European countries, eBay is a prime example of this global phenomenon.<sup>2</sup> Millions of individuals have turned to online auctions as a venue for buying and selling virtually all types of products including collectibles, electronics, and even automobiles.<sup>3</sup> Many of these people have turned to eBay to earn a living and support their households.<sup>4</sup>

eBay has dominated the online auction market since its initial public offering<sup>5</sup> in 1998.<sup>6</sup> Its growth rates have been staggering.<sup>7</sup> However,

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1. David S. Evans, *Antitrust Issues Raised by the Emerging Global Internet Economy*, 102 Nw. U. L. REV. 1987, 1999 (2008).

2. *See id.* at 1988, 2001 (“[E]Bay has more than a 90 percent share of auction site page views in France, Germany, Italy, Spain and the UK”).

3. Emily Maltby, *Has eBay Hit its Twilight?*, CNN MONEY, Oct. 17, 2008, [http://money.cnn.com/2008/10/17/smallbusiness/eBay\\_twilight.smb/index.htm](http://money.cnn.com/2008/10/17/smallbusiness/eBay_twilight.smb/index.htm).

4. Daniel Gross, *My eBay Job*, NEWSWEEK, May 22, 2008, <http://www.newsweek.com/id/138221>.

5. Dawn Kawamoto & Corey Grice, *eBay Roars into Public Trading*, CNET NEWS, Sept. 24, 1998, [http://news.cnet.com/8301-13578\\_3-10036948-38.html](http://news.cnet.com/8301-13578_3-10036948-38.html) (noting eBay’s share price tripled upon its first day of public trading).

6. Meet Meg Whitman - Meg Whitman for Governor of California, *MegWhitman.com*, [http://www.megwhitman.com/experience\\_detail.php?id=30](http://www.megwhitman.com/experience_detail.php?id=30) (noting that under her leadership as eBay’s Chief Financial Officer from 1998-2000, Meg Whitman “turned eBay into an unparalleled business success story”).

7. *See* Brad Stone, *eBay Profit Is Up 50%; Listings Off*, N.Y. TIMES, July 19, 2007 (noting a fifty percent increase in eBay’s net income between 2006 and 2007).

eBay's increase in profits was largely achieved through a combination of strategic purchases of direct competitors in the online auction<sup>8</sup> and payment systems markets,<sup>9</sup> as well as from steady annual increases in fees that it charges sellers.<sup>10</sup> eBay employs a variety of tactics to extract fees from online auction sellers.<sup>11</sup> Sellers are charged both insertion fees (fees for listing items) and final value fees (fees when the auction closes), both of which are drawn from a tier structure based on the price of the item.<sup>12</sup> Additionally, eBay charges online auction sellers fees for accepting credit card payments from buyers through its person-to-person (P2P) online payment system, PayPal, Inc. (PayPal).<sup>13</sup> For most sellers, accepting electronic payments, such as PayPal, is required.<sup>14</sup>

Until recently, eBay sellers were permitted to accept a wide array of payment options from buyers including wire transfers, money orders, and checks,<sup>15</sup> as well as credit card payments through PayPal and other merchant accounts.<sup>16</sup> However, pursuant to eBay's paperless payment policy enacted on November 11, 2008, sellers may no longer accept personal checks, cashier's checks, money orders, or wire transfers except in limited circumstances.<sup>17</sup> In April 2008, eBay attempted to take its

8. See generally, e.g., Press Release, eBay, eBay to Acquire Majority Stake in Korea's Internet Auction Co. (Jan. 8, 2001) <http://investor.ebay.com/releasedetail.cfm?releaseid=30278>.

9. See generally Chris Gaither, *eBay to Acquire PayPal for \$1.5B*, BOSTON GLOBE, July 9, 2002, at D1 (explaining eBay's deal to acquire PayPal, a profitable net payment company).

10. See Bob Sullivan, *eBay's Clever Fee Increase Plan*, MSNBC, Mar. 7, 2006, [http://redtape.msnbc.com/2006/03/ebays\\_clever\\_fe.html](http://redtape.msnbc.com/2006/03/ebays_clever_fe.html).

11. See generally eBay.com, Fees for selling on eBay, <http://pages.ebay.com/help/sell/fees.html> (last visited Oct. 14, 2009).

12. See *id.*

13. See eBay.com, About PayPal Fees, <http://pages.ebay.com/help/sell/paypalfees.html> (last visited Sep. 18, 2009).

14. eBay.com, Selecting Payment Methods You Will Accept, <http://pages.ebay.com/help/pay/accepted-payment-methods.html> ("For most listing categories, you need to offer at least one electronic payment or Internet merchant credit card option.") (last visited Nov. 17, 2008).

15. ADAM COHEN, THE PERFECT STORE 228–229 (2002).

16. Merchant accounts are provided by online banking services allowing individual sellers to accept various types of credit cards as payments. See eBay.com, Selecting Payment Methods You Will Accept, *supra* note 14.

17. Announcement, eBay, Safe Payment Requirements—Paperless Payments launch on eBay.com (Nov. 11, 2008) <http://www2.ebay.com/aw/my/20081111344042.html>. eBay does not allow sellers to offer to accept money order payments. However, eBay allows sellers to accept a limited number of money orders when specifically asked or demanded by a customer if they will accept them. See eBay.com, Discussion Boards, How are No Money Orders/Checks Going to Bring in More Buyers?, <http://workshops.ebay.com/thread.jspa?threadID=13000045&start=40> (last visited June 10, 2009) (highlighting an eBay representative's posting of an unwritten policy whereby eBay sellers can accept money orders on limited occasions).

paperless payment policy even further by imposing a PayPal exclusivity requirement on its Australia division.<sup>18</sup> This policy would have required all eBay sellers in Australia to accept PayPal as their exclusive means of accepting payments from customers.<sup>19</sup> After an unfavorable ruling by the Australian Competition and Consumer Commission (ACCC) and 700 seller complaints, eBay dropped its PayPal exclusivity requirement.<sup>20</sup>

Turbulent reactions to eBay's acceptable payment method restrictions and mandatory PayPal requirements are not confined to Australia. A class action consolidated lawsuit<sup>21</sup> was filed against eBay and is currently in the discovery stage.<sup>22</sup> The complaint alleges that "eBay is a monopolist in the online auction market and has abused, and continues to abuse, its market dominance to maintain and increase its monopolist profits."<sup>23</sup> Further, it alleges that eBay abused its market dominance by engaging in a series of anticompetitive acts including "forcing auction sellers to accept PayPal as a necessary means to successfully sell items on eBay, prohibiting sellers from using online payment systems that may pose a serious competitive threat to eBay," and "acquiring strategic competitors to protect against threats to eBay's monopoly of the online action market and person-to-person online payment systems."<sup>24</sup> eBay is a company that traditionally considered the buyer and seller community before pursuing corporate interests, and consistently made concessions to its needs when necessary.<sup>25</sup> However, the demands for increased shareholder profits and annual growth have encouraged eBay's executives to unfairly maintain the company's market power by engaging in anticompetitive business practices.<sup>26</sup> These practices have substantially damaged the sellers' ability to earn a living,

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18. See Fran Foo, *RBA to Review PayPal, eBay Link*, AUSTRALIAN IT, Sept. 9, 2008, <http://www.australianit.news.com.au/story/0,25197,24314829-15306,00.html>.

19. See *id.* ("Around five months ago, eBay submitted an 'exclusive dealing' notification to the ACCC so it could make PayPal mandatory on all sales listings from May 21, then bar all other payment methods from June 17.").

20. *Id.*

21. See Complaint, *In re eBay Seller Antitrust Litig.*, 2007 WL 1908730 (N.D. Cal. Apr. 4, 2007) (No. C-07-01882-JF (RS)) [hereinafter eBay Complaint].

22. See *id.*

23. See *id.* at 1.

24. See *id.* at 1-2.

25. See COHEN, *supra* note 15, at 205-06 (noting that when sellers were initially charged a fee of \$1.00 for listing a specific type of "reserve" auction, the community was outraged and eBay responded by dramatically lowering the fee to \$0.50). A reserve auction allows a seller to set a minimum price that the auction listing must meet in order for the seller to be obligated to sell the item for the final bidding price. See eBay.com, What's a reserve price?, <http://pages.ebay.com/help/buy/questions/reserve-price.html> (last visited Jan. 4, 2010).

26. eBay Complaint, *supra* note 21, at 1-2.

damaged the buyers' ability to shop at alternative online auction sites, and damaged competition as a whole in the online auction and P2P marketplace.

Part I of this comment introduces the main issues posed by eBay's position as a monopolist and its attempt to maintain monopoly power in the market of online auction sites and P2P payment systems. Part II will discuss a brief background and history leading to the development of current antitrust law and the relevant antitrust violations alleged against various monopolies similar to eBay. Part III will discuss online auction sites as identifiable and distinct marketplaces from other forms of online shopping. Part IV will argue that eBay possesses monopolistic power in the online auction marketplace due to both its control of a predominant market share and the existence of trade barriers. Part V will examine how eBay has attempted to willfully maintain its monopoly power by acquiring competitors and also by eliminating other competitors through exclusionary agreements. Part VI will discuss how those policies can potentially result in antitrust injuries to buyers and sellers of online auctions within eBay. Part VII will propose fair alternatives to eBay and PayPal's policies of trade restraint, emphasizing injunctive relief aimed at curbing eBay's anticompetitive business practices. Finally, Part VIII will conclude that even in an economic recession, eBay should not be given a free pass to engage in antitrust violations that harm competition.

## II. ORIGINS OF ANTITRUST LAW: THE SHERMAN AND CLAYTON ACTS

The purpose of antitrust law is to prevent "injury to the public by the prevention of an undue restraint on, or the monopolization of, trade or commerce."<sup>27</sup> Congress, under its constitutional power of the Commerce Clause to regulate interstate commerce, passed the Sherman Antitrust Act (Sherman Act) in 1890.<sup>28</sup> Section 1 of the Sherman Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."<sup>29</sup> Additionally, section 2 of the Sherman act (Section 2) declares that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a

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27. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 78 (1911).

28. 15 U.S.C. § 1 (2006).

29. *Id.*

felony.”<sup>30</sup> This legislation was passed because of opposition in the late nineteenth century to trusts,<sup>31</sup> which consolidated to form monopolies and charged excessive prices for financial gain to the detriment of consumers.<sup>32</sup> The Sherman Act reflected the belief that markets are not self-correcting and that the government can “intervene affirmatively in ways that would improve market outcomes.”<sup>33</sup> An early example of this philosophy is the Supreme Court’s decision in *Standard Oil Co. of New Jersey v. United States*.<sup>34</sup>

#### A. Antitrust Law Before Microsoft: Standard Oil and the Rule of Reason

In *Standard Oil*, the Supreme Court found Standard Oil guilty of monopolizing the petroleum industry through a series of abusive and anticompetitive actions.<sup>35</sup> Despite Standard Oil’s growth, which was originally driven by superior refining technology and consistency in its kerosene products, its tactics were ultimately deemed anticompetitive.<sup>36</sup> These tactics included underpricing its products and threatening suppliers and distributors who conducted business with Standard Oil’s competitors.<sup>37</sup> The Court’s remedy was to divide Standard Oil into several competing firms.<sup>38</sup> In reaching its decision, the Court adopted the “Rule of Reason” holding that only combinations and contracts unreasonably restraining trade are subject to actions under the antitrust laws and that size and

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30. *Id.*

31. USNews, *The Sherman Anti-Trust Act (1890)*, [http://www.usnews.com/usnews/documents/docpages/document\\_page51.htm](http://www.usnews.com/usnews/documents/docpages/document_page51.htm) (last visited Nov. 18, 2008) (“A trust was an arrangement by which stockholders in several companies transferred their shares to a single set of trustees.”); see also TheFreeDictionary, *Sherman Anti-Trust Act*, <http://legal-dictionary.thefreedictionary.com/Sherman+Anti-Trust+Act> (last visited Oct. 20, 2008) (noting that by 1888, the corporate holding companies “had consolidated a very large share of U.S. manufacturing and mining industries into nationwide monopolies”).

32. *The Sherman Anti-Trust Act (1890)*, *supra* note 31.

33. See William H. Page, *Ideological Conflict and the Origins of Antitrust Policy*, 66 TUL. L. REV. 1, 37 (1991).

34. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911).

35. See *id.* at 72 (“[D]efendants [Standard Oil] . . . have monopolized, and are continuing to monopolize, a substantial part of the commerce among the states, in the territories, and with foreign nations, in violation of section 2 of the anti-trust act.”).

36. Alex Epstein, *Vindicating Capitalism: The Real History of Standard Oil Company*, 3 THE OBJECTIVE STANDARD 2 (2008), available at <http://www.theobjectivestandard.com/issues/2008-summer/standard-oil-company.asp>.

37. See generally *Standard Oil*, 221 U.S. at 76 (noting Standard Oil’s “intent to drive others from the field and to exclude them from their right to trade”).

38. See *id.* at 78 (noting the Court’s resolution to dissolve Standard Oil into several competing firms).

possession of monopoly power are not illegal.<sup>39</sup> While certain arrangements such as price fixing and market division, as found in *Standard Oil*, are considered unreasonable per se, most other restraints are evaluated on a case-by-case basis.<sup>40</sup>

The dissent in *Standard Oil* argued that the majority's decision to adopt the "Rule of Reason" was a departure from the Court's initial application of the Sherman Act.<sup>41</sup> Justice Harlan believed the Court's earlier decisions seemed to embody the notion that all contracts restraining trade were prohibited, regardless of whether the restraint actually produced ill effects.<sup>42</sup> The Clayton Antitrust Act (Clayton Act),<sup>43</sup> passed by Congress in 1914, extended the right to sue under the antitrust laws to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws."<sup>44</sup> The Clayton and Sherman Acts are also enforceable by the Federal Trade Commission (FTC) and the Department of Justice (DOJ).<sup>45</sup>

The Sherman Act was "consciously designed to develop through judicial interpretation."<sup>46</sup> Consequently, the Justices' perceptions of monopolistic business practices, derived from the surrounding culture and changes in business and technology, have reflected their views.<sup>47</sup> More recently, with the dominance of large technology firms, the case of *United States v. Microsoft Corp.* has helped shape the modern manifestation of current antitrust law.

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39. See *id.* at 66 ("If the criterion by which it is to be determined in all cases whether every contract, combination, etc., is a restraint of trade within the intendment of the law, is the direct or indirect effect of the acts involved, then of course the rule of reason becomes the guide.")

40. *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 342-43 (1982).

41. *Standard Oil*, 221 U.S. at 100.

42. See *Standard Oil*, 221 U.S. at 83 (Harlan, J. concurring in part and dissenting in part) (stating the Court's decision "has not only upset the long-settled interpretation of the act, but has usurped the constitutional functions of the legislative branch of the Government"); see also *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 341-42 (1897) (noting that a mere restriction on the autonomy of traders would suffice to establish that an agreement restrained trade within the meaning of the Act).

43. 15 U.S.C. §§ 12-27 (2006). The Clayton Act increased the reach of antitrust law enforcement to include exclusive dealing, tying, and merger and acquisition agreements.

44. *Id.* § 15(a) (2006).

45. See U.S. Dep't of Justice Antitrust Div., Overview, <http://www.usdoj.gov/atr/overview.html> (last visited Jan. 4, 2010) (noting the division's joint enforcement and promulgation of antitrust laws and policies, respectively, with the FTC).

46. Page, *supra* note 33, at 39.

47. See, e.g., RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE*, 289 n.7 (1990) ("[A] pragmatist judge will feel free to adopt the socially preferable interpretation of a statute when the choice is open.")

*B. Using Market Power in One Market to Influence Competition in a Different Market*

1. *Microsoft Corp.*: The Development of Modern Antitrust Law in the Digital Age

In 1998, a coalition of nineteen states and the DOJ sued Microsoft over alleged abuses of monopoly power under Sections 1 and 2 of the Sherman Act in its handling of operating system and browser sales.<sup>48</sup> First, it was alleged that Microsoft had a monopoly in the market for personal computer (PC) operating systems and had used anticompetitive and predatory tactics to maintain its monopoly power.<sup>49</sup> Such anticompetitive conduct included Microsoft's alleged attempt to gain a monopoly in the Internet browser market by forcing computer companies using its Windows operating system to agree to leave Internet Explorer (IE) as the default browser and to not preinstall or promote the browser of any other company.<sup>50</sup> In addition, the complaint stated that Microsoft had forced computer companies that used Windows to sign agreements stating that they would not license, distribute, or promote software products that competed with Microsoft's own software products.<sup>51</sup> Finally, the DOJ accused Microsoft of "tying" its own browser to its own operating system so that customers who purchased Windows also had to purchase IE, even though the two were separate products.<sup>52</sup>

This product-tying violation was alleged to have been a prominent factor in Microsoft's conquests in the browser wars<sup>53</sup> because all Windows

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48. See *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 35 (D.D.C. 2000) (noting that the U.S., nineteen individual states, and the District of Columbia brought "these consolidated civil enforcement actions against defendant Microsoft Corporation . . . under the Sherman Antitrust Act, 15 U.S.C. §§ 1-2"); see also *Complaint, United States v. Microsoft Corp.*, No. 1:98CV01232 (D.D.C. filed May 18, 1998).

49. See *Complaint at 1, United States v. Microsoft Corp.*, No. 1:98CV01232 (D.D.C. filed May 18, 1998) (noting Microsoft's monopoly with a market share of 90%).

50. See *generally id.* at 5-6 (describing Microsoft's attempts to exclude competition).

51. See *id.* at 2 (describing Microsoft's attempts to exclude competitors by using "exclusionary agreements precluding companies from distributing, promoting, buying, or using products of Microsoft's software competitors or potential competitors").

52. *Id.* at 2 ("Microsoft's conduct included agreements tying other Microsoft software products to Microsoft's Windows operating system . . .").

53. The term "browser wars" refers to the competition for dominance in the web browser marketplace. It denotes two specific periods of time: the competition between market-dominating Netscape Navigator and its eventual defeat by Microsoft Internet Explorer during the late 1990s, and the competition between the dominating Internet Explorer and several emerging browsers that has gone on since 2003, most notably including Mozilla Firefox, Safari, Opera and, in late 2008, Google Chrome. See *generally* Brad Stone, *Open-Source Upstart Challenges the*



users thereby owned IE by default.<sup>54</sup> Consequently, Microsoft was accused of “substantially foreclos[ing] [the market for] competing Internet browsers” such as Netscape Navigator and Opera because this tying violation “reduced demand for other browsers” which had to be purchased separately in a store or downloaded over the Internet.<sup>55</sup> In response, Microsoft argued that the merging of Windows and IE was the result of innovation and competition and that the two had become one product.<sup>56</sup> Microsoft argued that the integrated product benefited consumers who would consequently receive IE free of charge.<sup>57</sup> However, in 2000, the District of Columbia District Court disagreed and found Microsoft guilty of the violations and ordered Microsoft to be split in two.<sup>58</sup> Nevertheless, on appeal, Microsoft successfully argued that splitting the company would diminish efficiency and slow the pace of software development.<sup>59</sup> Additionally, the trial court reversed Microsoft’s tying violation on remand.<sup>60</sup> Shortly after the *Microsoft* decision, a similar antitrust lawsuit was filed against credit card companies Visa U.S.A. (Visa) and MasterCard International, Inc. (MasterCard).<sup>61</sup> As in *Microsoft*, the case involved a

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*Big Web Browsers*, N.Y. TIMES, May 26, 2008, at C1.

54. *United States v. Microsoft*, [http://en.wikipedia.org/wiki/United\\_States\\_v.\\_Microsoft](http://en.wikipedia.org/wiki/United_States_v._Microsoft) (last visited Oct. 14, 2009) (describing the consolidated set of civil actions filed against Microsoft Corp).

55. *See generally* Complaint at 39–40, *Microsoft Corp.*, No. 1:98CV01232 (D.D.C. filed May 18, 1998) (“Tying Internet Explorer to Windows 95 also reduced demand for other browsers, even by users and OEMs that would otherwise have preferred another browser.”).

56. *See United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 48–49 (D.D.C. 2000) (“Microsoft contends that Windows and Internet Explorer represent a single ‘integrated product,’ that offers ‘some advantage’ to consumers.”).

57. *See Franklin M. Fisher, Antitrust and Innovative Industries*, 68 ANTITRUST L. J. 559, 561 (2000).

58. *See Microsoft Corp.*, 87 F. Supp. 2d at 50 (noting that since Microsoft “ostensibly priced Internet Explorer at zero does not detract from the conclusion that consumers were forced to pay, one way or another, for the browser along with Windows”); *see United States v. Microsoft Corp.*, 97 F. Supp. 2d 59, 59 (D.D.C. 2000) (“[C]onduct modification and structural reorganization including mandated divestiture was appropriate remedy.”).

59. *United States v. Microsoft Corp.*, 253 F.3d 34, 98–99 (D.C. Cir. 2001) (noting the courts divestiture must be vacated). The court also cited three additional reasons for vacating the order: “(1) the court failed to hold a remedies-specific evidentiary hearing when there were disputed facts; (2) the court failed to provide adequate reasons for its decreed remedies; and (3) this Court has revised the scope of Microsoft’s liability and it is impossible to determine to what extent that should affect the remedies provisions.” *Id.*

60. *Id.* at 84 (noting that an alleged tying violation must be remanded and decided under the rule of reason of § 1 of the Sherman Act). *See also Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 462 (1992) (a tying violation occurs if the “arrangement violates § 1 of the Sherman Act [because] the seller has ‘appreciable economic power’ in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market”).

61. *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003).

company's power in one market, namely general purpose card "network services," which influenced competition in the corollary market of general purpose cards.<sup>62</sup>

## 2. *UNITED STATES V. VISA U.S.A. INC.*: CREDIT CARD ANTITRUST LEGISLATION BEFORE THE RISE OF PAYPAL

In *Visa*, the Court of Appeals affirmed the District Court's holding that Visa and MasterCard violated Section 1 of the Sherman Act by enacting and enforcing exclusionary rules which prohibited their member banks from issuing competing American Express (Amex) or Discover cards.<sup>63</sup> It also upheld the order to revoke the exclusionary rules and permanently enjoined them "from [enacting] similar rules in the future."<sup>64</sup> Visa and MasterCard are two of the four major network systems in the payment card industry in the U.S.<sup>65</sup> "[They] are organized as open joint ventures, owned by the numerous banking institutions that are members of the networks."<sup>66</sup> Both Visa and MasterCard allowed their member banks to issue each other's credit cards but required that such member banks sign agreements precluding them from issuing Amex or Discover cards.<sup>67</sup> The rules mandated that any member bank that issued "Amex-branded cards would be forced to give up issuing both Visa and MasterCard cards—a move no U.S. bank ha[d] been willing to make."<sup>68</sup> Consequently, Amex and Discover were shut out of the business of bank-issued cards.<sup>69</sup>

The Court of Appeals found that there were two distinct markets.<sup>70</sup> First, the four credit card networks compete in a market for general purpose card "network services" whereby the "four [credit card] networks themselves are the sellers, and the issuers of cards [(banks)] and merchants are the buyers."<sup>71</sup> Second, there is a relevant market for general purpose cards whereby the "issu[ing banks] are the sellers, and the cardholders are the buyers."<sup>72</sup> The Court found Visa and MasterCard liable under the Sherman Act because their exclusionary rules adversely affected

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62. See generally *Microsoft Corp.*, 253 F.3d 34; *Visa*, 344 F.3d at 238–39.

63. *Visa*, 344 F.3d at 234.

64. *Id.*

65. *Id.* (noting that Amex and Discover comprise the remaining two credit card networks).

66. *Id.* at 235.

67. *Id.* at 235–36.

68. *Id.* at 236.

69. *Visa*, 344 F.3d at 237.

70. *Id.* at 238–39.

71. *Id.* at 239.

72. *Id.*

competition by “reducing overall card output and available card features as well as by decreasing network services output and stunting price competition.”<sup>73</sup> Changes in technology, the development of a web-based economy, as well as attitudes toward government intervention in business since *Visa* and *Microsoft* have continued to raise antitrust concerns.<sup>74</sup>

C. *Current Antitrust Law in the Wake of Online and Digital Platforms: Regulation of Market Power in Web-Based Powers Themselves.*

The Microsoft cases entailed the use of the company’s market power in operating systems and web browsers to manipulate competition in web-based markets; however, the Google and eBay situations involve “market power in web-based products and services.”<sup>75</sup>

1. Google: The Case of Double Click and Google Checkout

Like Microsoft, Google, a dominant firm, has come under constant antitrust scrutiny.<sup>76</sup> However, the differences between the companies’ antitrust issues are clear. The nature of the Web makes switching search engines or advertising platforms simple compared to eliminating Windows for a Macintosh or a Linux-based operating system.<sup>77</sup> Additionally, network effects resonate more strongly in the software world than in that of the Web.<sup>78</sup> Although the Federal Trade Commission (FTC) decided not to block Google’s acquisition of DoubleClick after a lengthy investigation in 2007, it expressed its intent to “closely watch these markets” involved in online advertising.<sup>79</sup>

The FTC based its decision upon finding that Google’s acquisition of DoubleClick did not threaten “to eliminate direct and substantial competition between the two companies.”<sup>80</sup> The FTC’s analysis of the evidence showed that “the companies are not direct competitors in any

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73. *Id.* at 240.

74. See generally Evans, *supra* note 1, at 1987.

75. See *id.* at 1988.

76. See generally Peter Whoriskey, *Google-Yahoo Deal Raises Antitrust Fears*, WASH. POST, June 14, 2008, at D1 (noting the Department of Justice’s investigation into the proposed merger between Yahoo and Google).

77. Declan McCullagh, *In D.C. Antitrust Circles, How Google Became the Hunted*, CNET NEWS, Sept. 9, 2008, [http://news.cnet.com/8301-13578\\_3-10036948-38.html](http://news.cnet.com/8301-13578_3-10036948-38.html).

78. See generally discussion *infra* Part IV.C (network effects).

79. Press Release, Federal Trade Commission, *Federal Trade Commission Closes Google / DoubleClick Investigation*, Dec. 20, 2007, <http://www.ftc.gov/opa/2007/12/googledc.shtm>.

80. *Id.*

relevant antitrust market.”<sup>81</sup> Furthermore, the FTC found that DoubleClick did not possess a significant market share of the third-party ad servicing market that could be exploited by Google to harm competition, thus benefiting Google’s ad intermediation product, AdSense.<sup>82</sup>

Despite potential threats of antitrust scrutiny, Google has continued expanding into markets that transcend mere web searching and ad revenue.<sup>83</sup> In 2006, “Google introduced its Google Checkout payment service in competition with PayPal by extending its software platform . . . and bundling Google Checkout for merchants into AdWords<sup>84</sup> for advertisers.”<sup>85</sup> “It is a well-established economics proposition that a monopoly [can] make greater profit if it also own[s] complementary monopolies or if it [can] replace these complementary monopolies with competitive markets.”<sup>86</sup> The latter can happen “through mergers or through one dominant firm challenging another, as Google is doing with eBay” and PayPal in online payment services.<sup>87</sup>

### III. ONLINE AUCTION SITES ARE A SEPARATE MARKET PLACE OVER WHICH EBAY HAS MONOPOLY POWER

The Federal Government has the power to regulate monopolies under Section 2 of the Sherman Act.<sup>88</sup> The threshold element of a Section 2 monopolization offense is “the possession of monopoly power in the relevant market.”<sup>89</sup> The Supreme Court has defined monopoly power as the “power to control prices or exclude competition.”<sup>90</sup> In assessing a monopolization claim under Section 2, the Court must first ascertain the boundaries of the commercial activity that can be termed the “relevant

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81. *Id.*

82. *Id.* (noting the FTC’s investigation of Doubleclick’s potential market share dominion and Google’s ability to use its dominance in the search engine market to influence the third party advertising market).

83. *See generally* Evans, *supra* note 1, at 1987.

84. “Adwords” is one of Google’s pay-per-click advertising services where users “create ads and choose keywords, which are words or phrases related to [their] business[es].” Google.com, Welcome to AdWords, <http://www.google.com/adwords> (last visited Nov. 8, 2009).

85. Evans, *supra* note 1, at 2004.

86. *Id.* (citing Michael A. Salinger, *Introduction to Chapters VII and IX of Augustin Cournot, Mathematical Principles of the Theory of Wealth*, 4 COMPETITION POL. INT’L 274, 280–82 (2008)).

87. *Id.*

88. 15 U.S.C. § 2 (2006).

89. *United States v. Grinnell Corp.*, 384 U.S. 563, 570 (1966).

90. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956).

market.”<sup>91</sup> Next, the Court must assess the defendant’s actual power to control prices in, or to exclude competition from, that market.<sup>92</sup> Under the Sherman Act, a “relevant market” is generally defined as a pool of services that are reasonably interchangeable and are therefore economic substitutes for one another.<sup>93</sup>

#### A. Online Auction Sites as a Separate “Relevant” Market Place

In *Microsoft*, the alleged relevant market was worldwide licensing of Intel-compatible personal computer (PC) operating systems.<sup>94</sup> There, the court concluded that the licensing of Intel-compatible PC operating systems was a relevant market because there were “no products—and . . . there [were] not likely to be any in the near future—that a significant percentage of computer users worldwide could substitute for [those] operating systems without incurring substantial costs.”<sup>95</sup>

Here, online auction sites can be defined as an independent relevant market because the ability of sellers to list items for sale, and for buyers to bid on particular items of interest is unique.<sup>96</sup> Indeed, eBay has acknowledged that there are virtually no substitutes for the online auction market structure of its website.<sup>97</sup> In its first Form 10-K, filed with the Securities and Exchange Commission (SEC) on February 28, 2007, eBay stated that “[a]t the core of [its] Marketplaces platform are [its] traditional auction format listings, in which a seller will select a minimum price for opening bids, with the option to set a reserve price for the item, which is the minimum price at which the seller is willing to sell the item.”<sup>98</sup> Additionally, eBay describes its auction services as a “distinctive forum” with an “auction format [that] creates a sense of urgency among buyers to

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91. See *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965) (“Without a definition of [the relevant] market there is no way to measure [defendant’s] ability to lessen or destroy competition.”).

92. *E.I. du Pont de Nemours*, 351 U.S. at 391 (“Monopoly power is the power to control prices or exclude competition.”).

93. See *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 (D.C. Cir. 1986) (“Because the ability of consumers to turn to other suppliers restrains a firm from raising prices above the competitive level, the definition of the ‘relevant market’ rests on a determination of available substitutes.”).

94. *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001).

95. *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 36 (D.D.C. 2000).

96. See generally *eBay Complaint*, *supra* note 21 (“eBay’s unique service ‘permits sellers to list items for sale, buyers to bid on items of interest and all eBay users to browse through listed items.’”).

97. See generally *id.*

98. See *id.*

bid for goods and creates an entertaining and compelling trading environment.”<sup>99</sup>

Compared to standard e-commerce websites and retail stores, online auctions seem to create a near *perfect* marketplace for which no comparable substitute exists.<sup>100</sup> While a traditional retail store model, e-commerce website, or classified ad allows sellers to list an item at a given price, an online auction allows a seller to set a minimum price and allows bidders to hammer out a final price, whatever that may be.<sup>101</sup> This creates various types of market efficiencies and advantages for sellers. First, it typically allows for sellers to receive a fair market price by enabling registered users from all over the world to bid on items.<sup>102</sup> Second, the online auction format enables sellers to obtain substantial product turnover without resorting to wholesale prices.<sup>103</sup> By listing identical items consecutively or simultaneously with minimum starting bids, sellers can ensure that they recuperate costs on each item while still turning a certain amount of profit for every item that sells. This is so even if there is some volatility among the final prices of those items.<sup>104</sup> Some advantages for buyers include setting their own prices and the ability to purchase virtually any type of product, such as rare and obscure collectibles, which may not be available elsewhere.<sup>105</sup>

#### IV. EBAY HAS MONOPOLY POWER IN THE ONLINE MARKET PLACE

##### *A. Market Share and Barriers to Entry*

Once a relevant market has been defined, monopoly power may be presumed if an entity owns a predominate share of that market.<sup>106</sup>

99. *See id.*

100. *See* COHEN, *supra* note 15, at 20–21 (describing the inspiration of eBay founder Pierre Omidyar to develop a “perfect marketplace” that more closely mirrored the free market than traditional methods of buying and selling goods online).

101. *See id.* at 20 (“Instead of posting a classified ad saying I have this object for sale, give me a hundred dollars, you post it and say here’s a minimum price.” (quoting eBay founder Pierre Omidyar)).

102. *See id.* at 169–170 (noting how an eBay seller sold a rare early Blown Glass Cathedral Pickle bottle he believed might be worth \$275.00 for a final auction price of \$44,100).

103. *See* JOSEPH T. SINCLAIR, EBAY BUSINESS THE SMART WAY 3–20 (3d ed. 2007).

104. *See id.*

105. *See* COHEN, *supra* note 15, at 23 (listing some of the auctions posted in the early days of eBay including an autographed pair of Marky Mark underwear, 1967 Superman metal lunch box, and Collectors Multicolor Reflection Hologram with current bids of \$400, \$22, and \$5,000 dollars, respectively).

106. *See* United States v. Grinnell Corp., 384 U.S. 563, 571 (1966) (stating that the

Additionally, such power may be proven through evidence of specific conduct undertaken by the defendant that indicates he has the power to affect price or exclude competition.<sup>107</sup> Predominate market share has been defined as low as seventy five percent.<sup>108</sup> However, past court decisions have shown that looking to current market share alone can be “misleading” because of the possibility of new entrants into the market that may obtain a percentage of a predominate firm’s market share.<sup>109</sup> Therefore, courts will often look beyond present market share and examine structural entry barriers<sup>110</sup> that may protect a company’s future position.<sup>111</sup>

In *Microsoft*, the court inferred that:

if a single firm or cartel controlled the licensing of all Intel-compatible PC operating systems worldwide, it could set the price of a license substantially above that which would be charged in a competitive market—and leave the price there for a significant period of time—without losing so many customers as to make the action unprofitable.<sup>112</sup>

Additionally, the government proved that Microsoft possessed a “dominant, persistent, and increasing”<sup>113</sup> share of the market that currently exceeded 95%.<sup>114</sup> Further, “[t]he plaintiffs also proved that the [Windows] applications barrier to entry protect[ed] Microsoft’s dominant market share.”<sup>115</sup> The court concluded that the combined “proof of dominant

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“existence of [monopoly] power ordinarily may be inferred from the predominant share of the market”).

107. *KMB Warehouse Distributions, Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 129 (2d Cir. 1995).

108. *See Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 481 (1992) (80% is predominant); *Grinnell*, 384 U.S. at 571 (87% is predominant); *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 379, 391 (1956) (75% is predominant).

109. *See Ball Mem’l Hosp., Inc. v. Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1336 (7th Cir. 1986) (“Market shares reflects current sales, but today’s sales do not always indicate power over sales and price tomorrow.”); *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 924 (9th Cir. 1980).

110. *See Rebel Oil Co., v. Atl. Richfield Co.*, 51 F.3d 1421, 1434, 1439 (9th Cir. 1995) (explaining that entry barriers such as certain regulatory requirements are factors that prevent new rivals from timely responding to an increase in price above the competitive level).

111. *See United States v. Microsoft Corp.*, 253 F.3d 34, 54–55 (D.C. Cir. 2001) (noting that the court focused its decision “not only on Microsoft’s present market share [95%], but also on the structural barriers that protect[ed] the company’s future position”).

112. *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 36 (D.D.C. 2000).

113. *Id.*

114. *See Microsoft Corp.*, 253 F.3d at 54. The court also found that even if the Mac Operating System were included, Microsoft’s market share would still exceed 80%. *Id.*

115. *Microsoft Corp.*, 87 F. Supp. 2d at 36 (“[T]his barrier ensures that no Intel-compatible PC operating system other than Windows can attract significant consumer demand, and the barrier would operate to the same effect even if Microsoft held its prices substantially above the competitive level for a protracted period of time.”).

market share and the existence of a substantial barrier to effective entry creat[ed] the presumption that Microsoft enjoy[ed] monopoly power.”<sup>116</sup>

*B. eBay Has a Predominate Market Share in Online Auction Sites*

As the world's largest online auction house, eBay controls approximately 96% of the market for online auction sites in the United States and 57% of the entire market share of online auctions worldwide.<sup>117</sup> eBay acknowledged this fact when it described itself in its first form 10-K filed with the Security and Exchange Commission (SEC) in 1999 as “the world's largest and most popular person-to-person trading community on the Internet, based on the number of items listed, number of users and minutes of usage per month.”<sup>118</sup> Like Microsoft, eBay's growth has been “dominant, persistent, and increasing” over the last decade; eBay's 2006 10-K<sup>119</sup> indicates that “in the last three years alone, eBay's active users (all those who bid on, bought, or listed an item) increased from 56.1 million in 2004 . . . [to] 81.8 million in 2006.”<sup>120</sup> Additionally, “[i]ts gross merchandise volume (the total value of all successfully closed items) increased from \$34.168 billion in 2004 . . . to \$52.474 billion in 2006.”<sup>121</sup> Nevertheless, eBay continues to face steady competition from new online auction site competitors, such as Swoopo, who attempt to break into the market.<sup>122</sup> Despite these new entrants, many of these rivals specialize in specific categories of wares such as electronics and therefore fail to garner any significant percentage of market share.<sup>123</sup> Additionally, some of these online auction sites sell only new products<sup>124</sup> or prohibit individual sellers

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116. *Id.*

117. See Evans, *supra* note 1, at 2000–01, (citing COMSCORE, MYMETRIX KEY MEASURES REPORT (Dec. 2007); COMSCORE, MY-METRIX QSEARCH 2.0 KEY MEASURES REPORT (Dec. 2007)).

118. See eBay Complaint, *supra* note 21, at 4 (quoting eBay's March 29, 1999 10-K45).

119. Federal Securities laws require publicly traded companies to disclose annual information on a 10K form. This form provides a comprehensive overview of the company's business and financial condition and includes audited financial statements. See U.S. Securities and Exchange Commission, Form 10K, <http://www.sec.gov/about/forms/form10-k.pdf> (last visited June 10, 2009).

120. See eBay Complaint, *supra* note 21, at 5.

121. See *id.*

122. Swoopo is a new online auction site that specializes in videogames, housewares, and other miscellaneous electronics. Buyers place bids on products in standard online auction format. With each bid placed, the price of the item increases by 12 cents. However, individuals cannot sell their products on Swoopo and only brand new merchandise is sold there. See What Is Swoopo?, [http://www.swoopo.com/what\\_is.html](http://www.swoopo.com/what_is.html) (last visited Oct. 18, 2009).

123. See, e.g., *id.*

124. See, e.g., *id.*



from participating.<sup>125</sup> Consequently, both buyers and sellers are drawn to eBay as a one-stop shop for virtually any type of product available for sale in online auction format.

### *C. High Barriers to Entry Persist in the Online Auction Sites Market*

#### 1. The Network Effect

One barrier to entry into the online auction market that has protected eBay's monopoly is the network effect.<sup>126</sup> In markets characterized by network effects, one product or standard tends towards dominance because "the utility that a user derives from consumption of the good increases with the number of other agents consuming the good."<sup>127</sup> Anyone who has ever used a cellular phone has experienced the network effect.<sup>128</sup> "An individual consumer's demand to use (and hence her benefit from) the [cellular] network, for example, increases with the number of other users in the network whom she can call or from whom she can receive calls."<sup>129</sup> However, as the benefits of one cell phone provider grow, such as AT&T's<sup>130</sup> mobile to mobile calling,<sup>131</sup> the "costs to consumers of choosing, or switching to, a rival offering" rise.<sup>132</sup> *Microsoft* provides a recent example of this phenomenon, as the court acknowledged that Windows was compatible with the widest range of hardware and software due in part to the network effect.<sup>133</sup>

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125. See, e.g., *id.*

126. A network effect causes the value of a good or service to a potential customer to directly depend in the number of customers who own the good or are users of the service. See, e.g., Evans, *supra* note 1, at 1995; Michael L. Katz & Carl Shapiro, *Systems Competition and Network Effects*, 8 J. ECO. PERSP. 93, 94 (1994).

127. Michael Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 AM. ECON. REV. 424, 424 (1985).

128. See, e.g., Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestiture in Network Industries*, 68 U. CHI. L. REV. 1, 5 (2001).

129. See, e.g., *id.* at 8.

130. AT&T is a cellular phone and telephone network that provides coverage to over 79 million AT&T customers. See *Mobile to Mobile Calling and Coverage, Wireless from AT&T*, <http://www.wireless.att.com/learn/why/mobile-to-mobile/> (last visited Oct. 16, 2009).

131. Mobile to mobile calling is a service offered to AT&T cellular customers that permits them to enjoy unlimited calling to other AT&T cellular customers without exhausting any daytime cell phone minutes. See *id.*

132. Shelanski & Sidak, *supra* note 128, at 5.

133. *United States v. Microsoft Corp.*, 253 F.3d 34, 55 (D.C. Cir. 2001) (finding that an applications barrier to entry "stems from two characteristics of the software market: (1) most consumers prefer operating systems for which a large number of applications have already been written; and (2) most developers prefer to write for operating systems that already have a

Hardware and software manufacturers ensure that their products are compatible with Windows in order to have access to the large market of Windows users.<sup>134</sup> Accordingly, “Windows is popular because it is well supported, but it is well supported because it is popular.”<sup>135</sup> Additionally, “[b]ecause the applications barrier to entry protects a dominant operating system irrespective of quality, Microsoft has the power to stave off even superior new rivals.”<sup>136</sup> Consequently, the court in *Microsoft* held that the barrier was a characteristic of the operating system market, not of Microsoft’s popularity or quality.<sup>137</sup>

This same network effect principle largely holds true for online networks, such as eBay, and other multi-sided platforms,<sup>138</sup> like Facebook.<sup>139</sup> Since “[a]n interactive technology has value only if many people use it,”<sup>140</sup> the network effect does not exist for many traditional e-commerce businesses where one commercial vendor sells to many others.<sup>141</sup> Conversely, eBay’s dominance as an online auctioneer puts it in what eBay’s founders called a “virtuous cycle.”<sup>142</sup> Buyers and sellers gravitate towards eBay to sell their products because they know of its popularity amongst other buyers and sellers, thus enabling eBay to quickly achieve critical mass.<sup>143</sup>

Once a network reaches “critical mass,”<sup>144</sup> this barrier to entry makes

substantial consumer base.” Therefore this “chicken-and-egg situation ensures that applications will continue to be written for the already dominant Windows, which in turn ensures that consumers will continue to prefer it over other operating systems.”)

134. See *Microsoft Corp.*, 253 F.3d at 55.

135. See eBay Complaint, *supra* note 21, at 5.

136. *Microsoft Corp.*, 253 F.3d at 56.

137. *Id.*

138. David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, 20 YALE J. ON REG. 325, 328 (2003); David S. Evans, *Some Empirical Aspects of Multi-sided Platform Industries*, 2 REV. NETWORK ECON. 191, 191 (2003) (explaining that multi-sided platforms provide goods or services to two or more “distinct groups of customers who need each other in some way” and who rely on the platform to intermediate transactions between them).

139. Facebook is an online interactive social networking site where users share biographical data, connect with friends, and engage in networking. See Facebook, <http://www.facebook.com> (last visited June 15, 2009).

140. COHEN, *supra* note 15, at 101.

141. See *id.* at 100–01 (noting that the products and prices offered by traditional e-commerce sites do not depend on who shops there).

142. *Id.* at 100.

143. *Id.*

144. “[C]ritical mass is the number of users [on a network] at which the quantity demanded becomes positive.” IVAN PNG & DALE LEHMAN, *MANAGERIAL ECONOMICS* 336 (3d ed. 2007) (explaining that on networks such as eBay, positive demand will only be achieved when the price or other factors are sufficient to attract a set number of users equivalent to the critical mass). This explains why other auction sites or internet startups often fail, because they never attract enough

it increasingly difficult to compete with a network like eBay.<sup>145</sup> Best stated by eBay's founder Pierre Omidyar: "We had a big magnet, which was eBay, and all these little magnets came along and tried to pull people away . . . [b]ut eBay's magnet was so powerful it was hard for them to get started."<sup>146</sup> Arguably, like the Windows platform, even if superior auction sites are created, they will be unable to attract significant buyers and sellers to their venue due to the established network effect in place.

## 2. eBay Users Exert Substantial Investments in Their Feedback Ratings

eBay's structure serves to further accelerate the network effect for its market of online auctions.<sup>147</sup> Since buyers and sellers typically remain anonymous to each other offline, both rely heavily on eBay feedback.<sup>148</sup> Buyers can leave positive, neutral, or negative feedback, while sellers can only leave positive feedback.<sup>149</sup> Each positive feedback rating for a successful sale or purchase has the same percentage effect on a user's total feedback rating.<sup>150</sup> These feedback ratings can reflect anywhere from weeks to years of online commerce.<sup>151</sup> Registered eBay users remain significantly invested in eBay because if they were to switch auction sites, this feedback—and subsequently buyer confidence—would vanish.<sup>152</sup> In fact, studies have shown that sellers' feedback ratings have a measurable effect on the price a buyer will pay for an item.<sup>153</sup> One study showed that

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users to reach a critical mass. *Id.*; see also Ina Steiner, *Yahoo! Europe to Close Auction Sites, Signs Major Ad Deal with eBay*, AUCTIONBYTES.COM, May 23, 2002, <http://www.auctionbytes.com/cab/abn/y02/m05/i23/s00> (noting Yahoo!'s closure of various auction sites in Europe because "Yahoo! could not attract enough users to these sites to allow it to charge auction listing fees").

145. See COHEN, *supra* note 15, at 100 (noting that when eBay achieved critical mass at an early stage in its formation, it "made no sense for users to go to any other site . . . [because] [b]uyers who did were less likely to find what they were looking for . . . [and] sellers were less likely to get a good price").

146. *Id.* at 101.

147. eBay Complaint, *supra* note 21, at 6.

148. See COHEN, *supra* note 15, at 100 (noting that eBay users were reluctant to leave eBay because they had significantly invested in their reputations based on such feedback ratings).

149. eBay.com, How Feedback Works, <http://pages.ebay.com/help/feedback/howitworks.html> (last visited Nov. 16, 2008).

150. See *id.* (noting that members receive one point for each positive rating whether they are a seller or a buyer).

151. COHEN, *supra* note 15, at 100.

152. See *id.* (noting that leaving eBay for a seller who had acquired significant feedback "would be like a businessman closing up shop in a town where he was well known and starting over somewhere new").

153. David Lucking-Reiley et al., *Pennies from eBay: The Determinants of Price in Online Auctions*, 55 J. INDUS. ECON. 223, 232 (2007).

an established seller with a strong<sup>154</sup> feedback rating earned an average eight and one tenth percent more in final auction prices than sellers with newly established feedback records.<sup>155</sup>

Consequently, eBay sellers are very reluctant to turn to rival auction sites because doing so would damage their reputation and trust, which in turn reduces their ability to charge equivalent prices for their items as an established seller.<sup>156</sup> Furthermore, they would have to compete with sellers on the new auction site or other consumer-to-consumer<sup>157</sup> e-commerce platforms such as Amazon.com's<sup>158</sup> fixed-price marketplace where other sellers may already have an established feedback reputation. Additionally, feedback on eBay encourages users to remain on its site because this feedback carries over to Half.com,<sup>159</sup> eBay's wholly-owned subsidiary P2P fixed-price website, a direct competitor to Amazon.com.<sup>160</sup> Moreover, feedback ratings encourage buyers to remain on eBay because positive feedback resulting from a successful purchase can ultimately strengthen an account benefiting that user if he or she ever decides to sell items.<sup>161</sup>

154. See Paul Resnick et al., *The Value of Reputation On eBay: A Controlled Experiment*, 9 EXPERIMENTAL ECON. 79, 87 (2006) (noting that a "strong" feedback rating for purposes of the study was a net score of over 2000, with only one negative).

155. *Id.* at 99.

156. See COHEN, *supra* note 15, at 100 (describing sellers' reluctance to turn to rival sites because doing so would damage their reputation and trust); Resnick et al., *supra* note 154, at 99 (concluding that established sellers with strong reputations receive price premiums and can therefore charge more for their goods than new sellers).

157. Consumer-to-consumer transactions are a type of e-commerce where individual third parties sell directly to one another. Therefore, the host website may simply act as a middleman or intermediary service to conduct the transaction such as eBay's auction forum or Amazon.com's marketplace. See STEFFANO KORPER & JAUNITA ELLIS, *THE E-COMMERCE BOOK: BUILDING THE E-EMPIRE* 11 (2d ed. 2001).

158. Amazon.com is an e-commerce website that sells a wide variety of goods directly to consumers. However, unlike traditional e-commerce websites, it also allows sellers to offer their goods at fixed prices alongside Amazon.com's offerings. Sellers and buyers can exchange feedback and Amazon.com charges sellers various fees including a percentage of the item price for all items that sell in the marketplace. See generally Amazon.com, *Selling at Amazon.com*, <http://www.amazon.com/gp/help/customer/display.html?ie=UTF8&nodeId=1161274> (last visited Nov. 27, 2008).

159. See Aron Hsiao, *Buying and Selling on Half.com*, ABOUT.COM, [http://ebay.about.com/od/websiteareas/a/ow\\_half.htm](http://ebay.about.com/od/websiteareas/a/ow_half.htm) (last visited Dec. 18, 2009) (noting that "Half.com transactions are also tracked in eBay feedback, so you gain feedback when you buy and sell on Half.com"); see also Half.com, <http://www.half.ebay.com> (last visited Dec. 18, 2009) (listing the exclusive categories as books, textbooks, music, movies, games, and game systems).

160. See Greg Sandoval, *eBay Makes Move for Fixed-Price Future*, CNET NEWS, Oct. 9, 2001, [http://news.cnet.com/eBay-makes-move-for-fixed-price-future/2100-1017\\_3-274155.html](http://news.cnet.com/eBay-makes-move-for-fixed-price-future/2100-1017_3-274155.html) (noting that eBay's expansion into fixed-priced goods by purchasing Half.com could challenge Internet retailers such as Amazon.com).

161. See How Feedback Works, *supra* note 149 (noting that both buyers and sellers can

Therefore, because eBay controls a dominant market share and substantial barriers to effective entry exist in online auctions, eBay enjoys monopoly power and can potentially exclude competitors from this market.<sup>162</sup> Further, eBay is free to set its auction fee prices at higher levels than would normally exist with normal market competition, without excluding enough customers to make the action unprofitable.

## V. EBAY ABUSES ITS MONOPOLY POSITION BY ENGAGING IN ANTICOMPETITIVE CONDUCT INSTEAD OF COMPETING ON THE MERITS

### A. Antitrust Law Establishing Anticompetitive Conduct of Monopoly Maintenance

“In a § 2 [antitrust] case, once it is proved that the defendant possesses monopoly power in a relevant market, liability for monopolization depends on a showing that the defendant used anticompetitive methods to achieve or maintain its position.”<sup>163</sup> The defendant’s “willful acquisition or maintenance of” power is to be “distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”<sup>164</sup> One example of an anticompetitive method is exclusionary conduct.<sup>165</sup> “Whether any particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition, can be difficult to discern . . . .”<sup>166</sup> Consequently, the appellate court in *Microsoft* outlined a four-part test that courts currently employ to determine “whether particular conduct can be said to violate” Section 2.<sup>167</sup>

“First . . . a monopolist’s act must have an ‘anticompetitive effect.’”<sup>168</sup> “That is, it must harm the competitive *process* and thereby harm consumers.”<sup>169</sup> Second, in a private action, “the plaintiff . . . must

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receive one point for each positive rating).

162. EBay Complaint, *supra* note 21, at 1.

163. *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 37 (D.D.C. 2000); *accord Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1353 (Fed. Cir. 1999).

164. *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

165. *See United States v. Microsoft Corp.*, 231 F. Supp. 2d 144, 156 (D.D.C. 2002) (quoting *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001)) (“[T]he appellate court set out to determine whether Microsoft ‘maintain[ed], or attempt[ed] to maintain, a monopoly by engaging in exclusionary conduct.’”).

166. *Microsoft Corp.*, 253 F.3d at 58.

167. *Microsoft Corp.*, 231 F. Supp. 2d at 157.

168. *Microsoft Corp.*, 253 F.3d at 58.

169. *Id.*; *see Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993).

demonstrate that the monopolist's conduct indeed has the requisite anticompetitive effect."<sup>170</sup> Furthermore, in an action brought by the government, the plaintiff must "demonstrate that the monopolist's conduct harmed competition, not just a competitor."<sup>171</sup> Third, "the monopolist may proffer a 'procompetitive justification' for its conduct."<sup>172</sup> If the plaintiff does not rebut the justification, the monopolist may escape liability.<sup>173</sup> Therefore, if applicable, the fourth prong of the inquiry requires that the plaintiff "demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit."<sup>174</sup>

### B. Monopoly Maintenance in the Case of Microsoft

"[T]he District Court held that Microsoft had violated § 2 by engaging in a variety of exclusionary acts . . . to maintain its monopoly by preventing the effective distribution and use of products that might threaten that monopoly."<sup>175</sup> The acts included:

(1) the way in which it integrated IE into Windows; (2) its various dealings with Original Equipment Manufacturers ("OEMs"), Internet Access Providers ("IAPs"), Internet Content Providers ("ICPs"), Independent Software Vendors ("ISVs"), and Apple Computer; (3) its efforts to contain and to subvert Java technologies; and (4) its course of conduct as a whole.<sup>176</sup>

Microsoft engaged in anticompetitive behavior in two ways: (1) it prohibited OEMs from promoting rival Internet browsers<sup>177</sup> and (2) it placed restrictions upon OEMs to pre-install the IE browser.<sup>178</sup> This was of particular importance in determining browser usage share because it is

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170. *Microsoft Corp.*, 253 F.3d at 58–59; see generally *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225–26 (1993). In a case brought by a private plaintiff, the plaintiff must show that its injury is "of 'the type that the statute was intended to forestall.'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487–88 (1977) (quoting *Wyandotte Co. v. United States*, 389 U.S. 191, 202 (1967)).

171. *Microsoft Corp.*, 253 F.3d at 59.

172. *Id.* (stating that procompetitive justification is a "nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal").

173. *Id.*; see also *Capital Imaging Assocs. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 543 (2d Cir. 1993).

174. *Microsoft Corp.*, 253 F.3d at 59.

175. *Id.* at 58.

176. *Id.*

177. *Id.* at 62.

178. *Id.* at 60.

one of the most cost-effective ways to distribute a browser.<sup>179</sup> The District Court found that by restricting OEMs from allowing the removal of IE desktop icons, they could not, practically speaking, install a second rival browser because it would lead to user confusion and increase an OEM's technical support costs.<sup>180</sup> "Microsoft's efforts to gain market share in one market (browsers) served to meet the threat to Microsoft's monopoly in another market (operating systems) by keeping rival browsers from gaining the critical mass of users necessary to attract developer attention away from Windows as the platform for software development."<sup>181</sup>

Additionally, the District Court found that Microsoft's integration of IE and Windows had an anticompetitive effect on the operating systems market.<sup>182</sup> Microsoft removed the Add/Remove Programs utility of IE in the Windows 98 version of Windows, which had the effect of "reduc[ing] the usage share of rival browsers not by making Microsoft's own browser more attractive to consumers but, rather, by discouraging OEMs from distributing rival products."<sup>183</sup>

*C. EBay Acquires Rivals Who Could Jeopardize EBay's Dominance of Online Auctions and as an Endeavor to Control the Market for P2P Online Payments*

In order for auctions to function, there needs to be a transfer of money from the buyer to the seller in exchange for the auctioned goods.<sup>184</sup> In the late 1990s, P2P payment systems developed and began "to fulfill this component of online auctions."<sup>185</sup> A significant amount of overlap continues to exist between the users on P2P online payment systems and

179. *Id.*

180. *Microsoft Corp.*, 253 F.3d at 61 (noting that "pre-installing more than one product in a given category . . . can significantly increase an OEM's support costs, for the redundancy can lead to confusion among novice users"). Novice users, confused upon seeing two browser icons, will call OEM support staff to ask which browser to use and when. *See id.*

181. *Id.* at 60.

182. *See id.* at 65 ("Because Microsoft's conduct, through something other than competition on the merits, has the effect of significantly reducing usage of rivals' products and hence protecting its own operating system monopoly, it is anticompetitive . . .").

183. *Id.*

184. *See* FEDERAL TRADE COMMISSION, INTERNET AUCTIONS: A GUIDE FOR BUYERS AND SELLERS 3, <http://www.ftc.gov/bcp/edu/pubs/consumer/tech/tec07.pdf> (last visited Nov. 22, 2008) (noting that "at the end of a successful auction, the buyer and seller communicate—usually by email—to arrange for payment and delivery").

185. EBay Complaint, *supra* note 21, at 7; *see* COHEN, *supra* note 15, at 228 (noting that PayPal was created in 1999 and allowed users to transfer money from computer to computer using e-mail).

online auctions.<sup>186</sup> Companies that provide a P2P payment system for a large percentage of users on an auction site could more easily overcome barriers to entry, such as network effects.<sup>187</sup> Therefore, “the growth of a preferred payment system network [such as PayPal] created an early threat to eBay’s monopoly over the online auction market.”<sup>188</sup> After acknowledging this threat to its online monopoly and “watching PayPal’s success with concern and frustration,” eBay sought to neutralize the threat through acquisition.<sup>189</sup>

### 1. eBay Acquires Billpoint to Compete With PayPal

In April 1999, eBay bought the credit card processing firm, Billpoint.<sup>190</sup> By mid-2001, PayPal had built a large user base in the P2P marketplace and Billpoint had failed to gain any significant market share.<sup>191</sup> Between 1999 and 2002, before “eBay acquired PayPal, eBay engaged in various anticompetitive” acts in order to eliminate PayPal as a threat to its online auction market.<sup>192</sup> These included: “funneling buyers (with ‘continue’ buttons and other prompts) to Billpoint, thereby giving buyers the impression that the eBay payment format, known as ‘buy it now’<sup>193</sup>, accepted only Billpoint payments; declaring that sellers were required either to have a credit card merchant account or to accept Billpoint to be included in eBay stores, de facto excluding PayPal as a payment option”; “banning PayPal from eBay’s community boards” and “mandating that buyers use a ‘checkout’ feature that presented marketing materials promoting Billpoint and even took the buyer to a Billpoint payment form.”<sup>194</sup>

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186. eBay Complaint, *supra* note 21, at 7.

187. See COHEN, *supra* note 15, at 231 (“PayPal had the advantage of a larger installed-user base, which made it the beneficiary of network effects.”).

188. eBay Complaint, *supra* note 21, at 7; see also COHEN, *supra* note 15, at 229 (noting that eBay tried “for over a year to develop its own online payment system”).

189. COHEN, *supra* note 15, at 229–30; see Tim Clark, *eBay Acquires Two Firms*, CNET NEWS, May 18, 1999, <http://news.cnet.com/2100-1017-226031.html> (noting eBay’s acquisition of Billpoint, a company which allows the transfer of person-to-person payments).

190. COHEN, *supra* note 15, at 230.

191. See *id.* at 231.

192. eBay Complaint, *supra* note 21, at 7–8.

193. Items listed with a “Buy It Now” feature allow bidders to purchase the item instantly for a listed price, without bidding or waiting for the auction to end. This feature disappears after a user has bid on the item that does not have a reserve, or after a reserve price has been met. See eBay.com, *Selling Using a Fixed Price*, <http://pages.ebay.com/help/sell/fixed-price.html> (last visited June 15, 2009).

194. eBay Complaint, *supra* note 21, at 8; see also COHEN, *supra* note 15, at 231 (“[Billpoint] was increasingly being integrated into the eBay site. When sellers listed an item on



## 2. eBay Acquires PayPal to Eliminate it as an Economic Rival

In 2002, after eBay lost the battle to entrench Billpoint as a significant contender to PayPal, eBay acquired its competitor, PayPal.<sup>195</sup> Due to the acquisition of PayPal, eBay decided to shut down Billpoint.<sup>196</sup> Hence, eBay's acquisition of PayPal eliminated a primary competitor for profits derived from payments of online auctions.<sup>197</sup>

Prior to the 2002 eBay acquisition, PayPal stated that "it handle[d] payment[s] for one in four winning auctions on eBay."<sup>198</sup> Further, Chief Executive Officer Meg Whitman, in justifying the PayPal acquisition, stated that "about 40 percent of eBay transactions are settled with electronic payments, a figure she hope[d] would 'increase dramatically.'"<sup>199</sup> When eBay acquired PayPal, analysts noted that this was the joining of two leading forces in the online auction market and online payment services.<sup>200</sup> As described by Merrill Lynch Analyst, Justin Baldauf, "PayPal is the 'gorilla' in the online payment market, as eBay is the 'gorilla' in the online auction market."<sup>201</sup> Hence, eBay employed its monopoly power to acquire PayPal due to its inability to establish a successful rival to PayPal through market incite, proficiency, or the creation of a better or preferred service, in order to willfully maintain power in the online auction and P2P online payment markets.<sup>202</sup>

## 3. eBay's Acquisition of Verisign

In February 2005, eBay implemented a policy change which required all sellers to accept payment cards<sup>203</sup> whenever using the PayPal system.<sup>204</sup> Shortly after announcing this change in policy, on or around November 21,

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eBay, they were offered a one-click option to use Billpoint, but not PayPal to close the sale.").

195. Troy Wolverton, *It's Official: eBay Weds PayPal*, CNET NEWS, Oct. 3, 2002, [http://news.cnet.com/Its-official-eBay-weds-PayPal/2100-1017\\_3-960658.html](http://news.cnet.com/Its-official-eBay-weds-PayPal/2100-1017_3-960658.html); see Gaither, *supra* note 9 (announcing eBay's acquisition of PayPal for \$1.5 billion in eBay stock).

196. *Id.*

197. eBay Complaint, *supra* note 21, at 8.

198. Margaret Kane, *eBay Picks Up PayPal for \$1.5 Billion*, CNET NEWS, July 8, 2002, <http://news.cnet.com/2100-1017-941964.html>.

199. *Id.*

200. Gaither, *supra* note 9 (stating that the deal brings together the world's largest Internet auction house with the leading provider of online payments).

201. Kane, *supra* note 198.

202. eBay Complaint, *supra* note 21, at 8.

203. Payment card refers to transactions with credit, debit, or charge accounts, such as Visa or MasterCard.

204. See eBay Complaint, *supra* note 21, at 10.

2005, eBay acquired Verisign's payment gateway business "to combine with its PayPal [P2P] online payment system."<sup>205</sup> "The acquisition of this business segment of Verisign allowed eBay and PayPal the ability to process credit card payments internally without relying on a bank or other intermediary, while at the same time eliminating Verisign as a rival online payment method for eBay sellers."<sup>206</sup> Like Microsoft's efforts to gain market share in the browser market to protect its operating system, eBay's efforts to gain market share in the P2P services market similarly preserves eBay's monopoly power in the online auction market.<sup>207</sup> By keeping rival P2P services from gaining the critical mass necessary to attract the attention of consumers, eBay thereby reduced the available alternative accepted payment methods for developers of other online auction sites.<sup>208</sup> Consequently, this has allowed eBay to "charge supra-competitive fees to auction sellers enabled by anticompetitive activities."<sup>209</sup>

*D. eBay Implemented Anticompetitive Policies Through PayPal to Maintain Its Monopoly of the Online Auction Market and the P2P Online Payment Systems Market*

After removing PayPal as a strategic threat, eBay succeeded in making PayPal an absolute necessity for sellers in the online auction market.<sup>210</sup> As touted by eBay, the vast majority of auctions are paid with PayPal and 90% of eBay users have PayPal accounts.<sup>211</sup> eBay's anticompetitive policies with respect to PayPal include: (1) "requiring sellers to accept PayPal or have a separate merchant account for Payment Cards"; (2) prohibiting sellers from accepting checks, money orders, and other previously accepted payment methods; (3) "discontinuing insurance protection for non-PayPal transactions on eBay"; (4) "excluding competitor [P2P] online payment systems from eBay's network"; and (5)

205. eBay Complaint, *supra* note 21, at 9; see also Greg Sandoval, *eBay Buys Payment Service from Verisign for \$370 Million*, USATODAY.COM, Nov. 10, 2005, [http://www.usatoday.com/money/industries/technology/2005-10-10-ebay-verisign\\_x.htm](http://www.usatoday.com/money/industries/technology/2005-10-10-ebay-verisign_x.htm) (announcing eBay's decision to purchase Verisign).

206. eBay Complaint, *supra* note 21, at 9.

207. *See id.* at 5.

208. *Id.* at 6.

209. *Id.* at 9 (noting that supra-competitive pricing is pricing above what can be sustained in a competitive market).

210. *Id.* at 10.

211. Keith Regan, *eBay Puffs Up PayPal With Fraud Protection Upgrade*, E-COMMERCETIMES, June 20, 2008, <http://www.ecommercetimes.com/story/63507.html> (noting that eBay stated 97 percent of eBay.com listings offer PayPal as a payment option and more than 90 percent of active eBay users have PayPal accounts).

implementing PayPal exclusivity arrangements worldwide.<sup>212</sup>

### 1. EBay's Current Rules Mandate That Sellers Either Take PayPal or Maintain a Merchant Account

Pursuant to an eBay policy, all sellers who register after January 17, 2007 must agree to offer payment cards as a payment option.<sup>213</sup> They do so either by using eBay's PayPal service or an alternative credit card merchant account.<sup>214</sup> To use PayPal, customers set up an account with their credit card or bank account details, fill out a payment amount with the e-mail address of the recipient, and send the payment via the Internet to PayPal.<sup>215</sup> PayPal allows users to engage in two types of payment methods: (1) a stored-value payment where buyers make payments from direct transfer through a connected bank account or via money already existing in their PayPal account; or (2) payments via credit cards such as Visa, MasterCard, Discover, or American Express.<sup>216</sup> eBay's policies limit online payment services to those that are expressly permitted to be used by auction buyers and sellers.<sup>217</sup> This effectively limits sellers who do not have their own merchant account, enabling them to accept payment cards using either PayPal, ProPay, or hyperWALLET.<sup>218</sup>

However, ProPay does not allow for stored-value payments; instead, it only allows for payments via payment cards.<sup>219</sup> Consequently, PayPal currently only provides one realistic alternative for most individual

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212. EBay Complaint, *supra* note 21, at 10; see eBay.com, Safe Payment Requirements - Paperless Payments Launch on eBay.com, <http://www2.ebay.com/aw/my/20081111344042.html> (last visited June. 10, 2009).

213. See eBay.com, Frequently Asked Questions: Rewards & Standards, <http://pages.ebay.com/sell/update08/rewardsfaq/> (last visited Oct. 9, 2009).

214. Selecting Payment Methods You Will Accept, *supra* note 14.

215. See generally PayPal.com, How PayPal Works, <https://www.paypal.com/us/cgi-bin/webscr?cmd=xpt/Marketing/general/NewConsumerWorks-outside> (last visited June 10, 2009).

216. See *id.*

217. See eBay.com, Accepted Payments Policy, <http://pages.ebay.com/help/policies/accepted-payments-policy.html> (last visited June 10, 2009).

218. The majority of the other acceptable payment options, including cash2India.com, are for international users or are not acceptable for individual use. Additionally, hyperWALLET.com appears to be designed for organizations or groups so that they can issue their members individualized spending accounts, rather than for individualized subscriptions and memberships for use by sellers. See hyperWALLET.com, Login, <https://www.hyperwallet.com/login.jsp> (last visited June. 10, 2009) (noting that members cannot transfer funds from an American financial institution to hyperWALLET.com).

219. See generally ProPay.com, ProPay: Accept Credit Cards—Simple, Safe & Affordable, <https://epay.propay.com> (last visited Aug. 26, 2009).

sellers—Propay.com—to accept online payments.<sup>220</sup> In order to satisfy eBay's condition that "all sellers must accept Payment Cards as a payment option, sellers who also want to accept stored-value payments must either use two or more non-PayPal payment services (incurring increased costs) or be forced to use PayPal."<sup>221</sup> Further, requiring sellers to accept PayPal as a payment method, and similarly not allowing for the removal of the PayPal logo in eBay's online auctions, limits the ability of sellers to accept alternative payment methods because offering multiple P2P payment services can confuse novice buyers.

## 2. eBay Prohibits Sellers from Accepting Checks, Money Orders, and Other Previously Accepted Payment Methods

Since October 22, 2008,<sup>222</sup> eBay, with a few exceptions, no longer allows sellers to solicit money orders, checks, cash, and payments through bank-to-bank transfers from buyers.<sup>223</sup> eBay attempted to justify these restrictions by noting that "over 90% of transactions are paid with online payment methods and [paper payments] have declined by 40% over the last 3 years."<sup>224</sup> Despite these alleged statistics, there are still a significant number of eBay sellers who wish to accept—and buyers who wish to make—payments by cash, checks, and money transfers; for them, credit card payments are not adequate substitutes.<sup>225</sup> This policy injures both buyers and sellers because certain sellers receive a much larger portion of their payments in the form of money orders and certain buyers continue to pay for auctions exclusively with money order payments because they do not trust inputting their credit card information online or providing other personal information to PayPal.<sup>226</sup>

In addition to forcing buyers and sellers to use PayPal to pay for

220. See Accepted Payments Policy, *supra* note 217.

221. See eBay Complaint, *supra* note 21, at 11.

222. See eBay.com, August 2008 Update, <http://pages.ebay.com/sell/august2008update/otherfaq/> (last visited Sept. 18, 2009).

223. See Accepted Payments Policy, *supra* note 217 (noting that sellers may offer bank-to-bank or wire transfers, checks, or money orders for larger items such as boats, motor cycles and real estate, as well as items listed in the adult category).

224. eBay.com, Accepted Payments Policy Changes, <http://pages.ebay.com/sell/August2008Update/Payments> (last visited Nov. 8, 2009).

225. See generally Ina Steiner, *eBay to Tell Shoppers, No Checks or Money Orders*, AUCTIONBYTES.COM, Aug. 28, 2008, <http://www.auctionbytes.com/cab/abn/y08/m08/i28/s01> (noting "Sellers are saying eBay's ban on checks and money orders is, in effect, a move to a PayPal-only policy—at least for the many sellers who don't have their own credit card merchant account").

226. See August 2008 Update, *supra* note 222.

online auctions, restricting these formerly acceptable payment methods hinders consumer privacy by creating a permanent online trail of all their purchased items.<sup>227</sup> eBay argues that these policy changes are intended to prevent fraud and increase both seller and buyer security online.<sup>228</sup> However, despite recent policy changes to increase buyer protection,<sup>229</sup> potential fraudulent chargebacks from credit cards are plentiful on eBay.<sup>230</sup> An alternative reason for these policies could be to increase corporate profits that would not be captured if sellers were to accept alternative methods of payment to eBay auctions outside of PayPal.

### 3. eBay's Buyer Protection Program is Limited to Buyers Using PayPal

Although historically offering protection for all buyers who purchased items on eBay, eBay has acted to eliminate protections to non-PayPal buyers.<sup>231</sup> From 1999 until 2007, eBay offered a buyer protection program that provided buyers with “coverage of up to \$200, less \$25 to cover processing costs, [for] cases of non-shipment or significant misrepresentation of goods.”<sup>232</sup> On January 17, 2007, eBay doubled the PayPal buyer protection, offering \$2000—up from \$1,000—for transactions with qualified sellers as long as the buyer paid with PayPal.<sup>233</sup> eBay simultaneously eliminated buyer protection for all non-PayPal transactions.<sup>234</sup> This policy was instituted as eBay began to face increasing

227. See Batya Friedman, Peter H. Kahn Jr. & Daniel C. Howe, *Trust Online*, COMM’NS. OF THE ACM, Dec. 2000, at 34, 38, available at [http://faculty.washington.edu/pkahn/articles/Trust\\_Online.pdf](http://faculty.washington.edu/pkahn/articles/Trust_Online.pdf).

228. See Accepted Payment Policy Changes, *supra* note 224 (noting that eBay wants to help ensure that the marketplace offers buyers safer online payment choices).

229. See *Ebay Strengthens PayPal's Anti-Fraud Provisions*, USATODAY.COM, June 19, 2008, [http://www.usatoday.com/tech/news/computersecurity/2008-06-19-ebay-paypal\\_N.htm](http://www.usatoday.com/tech/news/computersecurity/2008-06-19-ebay-paypal_N.htm) (noting that eBay buyers may be eligible for a full refund if a seller fails to deliver a product and sellers may be eligible for unlimited protection against a payment card charge being reversed—these limits on claims were \$2000 and \$5000 respectively and applied exclusively to buyers in the United States, Canada, and the United Kingdom).

230. See Mary M. Calkins, Alexei Nikitkov & Vernon Richardson, *Mineshafts on Treasure Island: A Relief Map of the eBay Fraud Landscape*, 8 PGH J. TECH. L. & POL’Y 1, 14–15 (2007) (noting the popularity and efficiency of credit cards contribute to their wide use and potential for fraud).

231. See eBay Complaint, *supra* note 21, at 12.

232. See *id.*

233. See Ina Steiner, *eBay Limits Buyer Protection to PayPal-Funded Transactions*, AUCTIONBYTES.COM, Jan. 10, 2007, <http://www.auctionbytes.com/cab/abn/y07/m01/i10/s01> (noting that eBay will double PayPal Buyer Protection on its site, but is eliminating buyer protection for non-PayPal transactions).

234. See *id.*

competition from Google Checkout.<sup>235</sup>

#### 4. eBay Independently Bans Rivals from the Online Auction Payments Market

##### a. eBay Bans Google Checkout

On June 29, 2006, Google launched its online payment system, Google Checkout.<sup>236</sup> Although Google Checkout does not allow for stored-value payments, it enables purchases using credit cards and allows merchants to use the checkout system on their websites.<sup>237</sup> Google charges a 2% and \$0.20 processing fee per transaction; “PayPal charges a standard rate of 2.9% plus \$0.30 per transaction, or merchant rates ranging from 1.9%–2.5% plus \$0.30 per transaction.”<sup>238</sup> Acknowledging this competitive threat to eBay’s online auction revenue, Jeff Jordan, president of eBay’s PayPal unit, immediately asked employees to research Google Checkout.<sup>239</sup> Further, Jordan noted that Google is “a very legitimate competitive threat” and “it’s hard not to pay attention to what Google is doing.”<sup>240</sup> In early July 2006, eBay announced it was “banning sellers from requesting payment from Google Checkout.”<sup>241</sup> Furthermore, eBay updated its “Safe Payments Policy”—now titled Accepted Payment Policies—to reflect this change by adding Google Checkout to its list of prohibited online payment services.<sup>242</sup>

##### b. eBay Bans Other Competitors

In addition to banning Google Checkout, eBay has banned sellers from using a host of other competitors.<sup>243</sup> eBay has acknowledged that it limits the type of online payment services buyers can use for online auction

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235. See *id.* (noting that PayPal’s buyer protection increase is a dramatic effort by eBay to push buyers to use its PayPal payment service at a time when it faces increasing competition from Google Checkout).

236. See Ina Steiner, *eBay’s Fears Confirmed: Google Launches Checkout Service*, AUCTIONBYTES.COM, June 29, 2006, <http://auctionbytes.com/cab/abn/y06/m06/i29/s00>.

237. *Id.*

238. *Id.*

239. Mylene Mangalindan, *PayPal Prepares for a Challenge From Google*, WALL ST. J., Feb. 6, 2006, at B1.

240. *Id.* (internal citations omitted).

241. Ina Steiner, *eBay Bans Sellers From Using Google Checkout*, AUCTIONBYTES.COM, July 6, 2006, <http://auctionbytes.com/cab/abn/y06/m07/i06/s02>.

242. *Id.*

243. See Accepted Payments Policy, *supra* note 217 (listing prohibited payment methods).

payments.<sup>244</sup> Over thirty competitors worldwide are excluded, including ePassporte.com (ePassporte), Goldmoney.com, Netpay.com, PayPay.com, and Sendmoneyorder.com.<sup>245</sup> Without eBay's restriction, these competitors could challenge PayPal for a margin of the profits obtained from online auction payments.<sup>246</sup> eBay's ban on the ePassporte electronic payment service is noteworthy since ePassporte allows its customers to fund their accounts using credit cards, debit cards, or a bank checking account.<sup>247</sup> Therefore, ePassporte would directly compete with PayPal were it not excluded by eBay.<sup>248</sup> According to eBay's website, these online payment sites are excluded due to safety concerns.<sup>249</sup> However, eBay's prior conduct in Australia revealed its true intent to exclude competition from the online market for P2P systems.<sup>250</sup>

### 5. eBay Has Attempted to Impose PayPal Exclusivity Arrangements Abroad

eBay's attempt to implement an exclusive PayPal payment policy in Australia further exemplifies eBay's intent to increase revenue rather than exclude certain competitors because of any legitimate safety concerns those competitors might create.<sup>251</sup>

#### *E. eBay Thwarts Market Competition by Engaging in Exclusionary Arrangements with Competitors and Potential Rivals*

"Exclusive contracts are commonplace . . . in our competitive, market economy."<sup>252</sup> Therefore, courts are reluctant to find an antitrust violation when firms with market power engage in these types of contracts.<sup>253</sup> However, "a monopolist's use of exclusive contracts . . . may give rise to a § 2 violation even though the contracts foreclose less than the roughly 40%

244. *See id.*

245. *See id.* (noting payment can only be made through eBay-accepted online payment services, such as Allpay.net).

246. eBay Complaint, *supra* note 21, at 14.

247. *Id.* at 15. *See* ePassporte.com, Personal Accounts, <https://www.epassporte.com/secure/jsp/PersonalAccounts.jsp>.

248. eBay Complaint, *supra* note 21, at 15.

249. *See generally* Accepted Payments Policy, *supra* note 217.

250. *See generally* Foo, *supra* note 18.

251. *See generally id.*

252. *United States v. Microsoft Corp.*, 253 F.3d 34, 70 (D.C. Cir. 2001).

253. *Id.* ("[I]mposing upon a firm with market power the risk of an antitrust suit every time it enters into such a contract, no matter how small the effect, would create an unacceptable and unjustified burden upon any such firm.").

or 50% share usually required in order to establish a § 1 violation.”<sup>254</sup> An exclusive contract or arrangement may have an anticompetitive effect if it has a substantial effect on preventing competition from entering the relevant market.<sup>255</sup>

For example, Microsoft had exclusive arrangements with IAPs whereby subscribers of those IAPs were offered IE either as the default browser or as the only browser.<sup>256</sup> Additionally, the court found Microsoft had entered into exclusive arrangements with important ISVs that agreed to certain conditions in exchange for preferential support in Windows and the “right to use certain Microsoft seals of approval.”<sup>257</sup> “One of these conditions [was] that the ISVs use Internet Explorer as the default browsing software for any software they develop with a hypertext-based user interface.”<sup>258</sup> The District Court found that “Microsoft’s deals with the IAPs [and ISVs] clearly ha[d] a significant effect in preserving its monopoly; they help[ed] keep usage of Navigator below the critical level necessary for Navigator or any other rival to pose a real threat to Microsoft’s monopoly.”<sup>259</sup> Like Microsoft’s exclusivity agreement with IAPs and ISVs, eBay has entered into various exclusivity arrangements with competitors which were intended to have, and have resulted in, a substantial effect on restraining competition in the online auction market.<sup>260</sup> These agreements include marketing and advertising with America Online, Inc. (AOL) and Yahoo! Inc. (Yahoo).<sup>261</sup>

## 1. eBay Enters into Advertising Arrangement with America Online to

254. *Id.*

255. *Id.* (noting that certain circumstances may give rise to a violation of 15 U.S.C. § 2).

256. *Id.* at 71–72 (D.C. Cir. 2001).

257. *Id.* at 71.

258. *Microsoft Corp.*, 253 F.3d at 71–72.

259. *Id.* at 71.

260. See COHEN, *supra* note 15, at 103–05; see also Stephen Foley, *Yahoo! and ebay Join Forces to Fight Google*, INDEPENDENT, May 26, 2006, <http://www.independent.co.uk/news/business/news/yahoo-and-ebay-join-forces-to-fight-google-479806.html>; Marshall Kirkpatrick, *Google Scores eBay International Advertising Deal*, TECHCRUNCH.COM, Aug. 28, 2006, <http://www.techcrunch.com/2006/08/28/google-scores-ebay-international-advertising-deal/>; *Yahoo to Close North American Auction Site*, May 9, 2007, <http://www.msnbc.msn.com/id/18578841/>; Ina Steiner, *eBay’s PayPal Battles Google Checkout with Help of Yahoo*, AUCTIONBYTES.COM, Apr. 18, 2007, <http://www.auctionbytes.com/cab/abn/y07/m04/i18/s01>; Troy Wolverton, *Yahoo Shuttters European Auction Sites*, CNET NEWS, June 28, 2002, [http://news.cnet.com/Yahoo-shuttters-European-auction-sites/2100-1017\\_3-940580.html](http://news.cnet.com/Yahoo-shuttters-European-auction-sites/2100-1017_3-940580.html).

261. See COHEN, *supra* note 15, at 103–05; see also Foley, *supra* note 260; Kirkpatrick, *supra* note 260; *Yahoo to Close North American Auction Site*, *supra* note 260; Steiner, *supra* note 260; Wolverton, *supra* note 260.



## Prevent AOL from Creating a Rival Online Auction Site

In December 1997, eBay finalized negotiations with AOL wherein eBay paid AOL \$750,000 in exchange for AOL's agreement to promote eBay's user base for six months.<sup>262</sup> eBay mainly entered into the deal because it believed AOL might enter the online auction business.<sup>263</sup> Senior Director Robert C. Kagle stated that he "thought in some ways [they] were paying that amount of money to keep AOL from entering the business."<sup>264</sup> eBay believed AOL was a threat because of "AOL's skill at e-commerce, and because of the large overlap between the two companies' registered users."<sup>265</sup> Further, over the next four years, eBay paid AOL \$12 million for prominent ad placements on the AOL site.<sup>266</sup> This may have resulted in permanently removing AOL as a potential competitor since it never entered the online auction market despite having a user base in 1999 of 16 million members, trumping eBay's 2.1 million users at that time.<sup>267</sup>

### 2. eBay Engages in Territorial Division Agreements with Rival Yahoo!

eBay has also commenced upon various territorial division agreements with Yahoo.<sup>268</sup> On May 22, 2002, eBay and auction rival Yahoo announced a multiyear arrangement, whereby Yahoo agreed to "stop accepting new listings for its auction sites that serve France, Germany, Italy, and Spain" and to "close its auction site that serves the United Kingdom and Ireland."<sup>269</sup> As part of the deal, Yahoo agreed to promote eBay's rival sites for those European countries via banner

262. COHEN, *supra* note 15, at 103.

263. *See id.* at 105 (noting that eBay favored an AOL marketing agreement because it would likely prevent AOL from getting into online auctions itself).

264. *Id.* (quoting Senior Director Robert C. Kagle).

265. *Id.*

266. *Id.* at 142.

267. *See id.* (noting that eBay paid AOL \$12 million dollars over four years for prominent placement on the AOL site); Press Release, TimeWarner, America Online and eBay Announce Strategic Marketing Alliance (Mar. 25, 1999) <http://www.timewarner.com/corp/newsroom/pr/0,20812,666500,00.html> (explaining that through the agreement "AOL will promote eBay to its member community of over 16 million members" and also "make[] AOL's many brands even more accessible to eBay's more than 2.1 million registered users").

268. eBay Complaint, *supra* note 21, at 20. *See also* Wolverton, *supra* note 260 (noting eBay's agreement with Yahoo).

269. Troy Wolverton, *Yahoo Concedes Europe Auctions to eBay*, CNET NEWS, May 22, 2002, [http://news.cnet.com/Yahoo-concedes-Europe-auctions-to-eBay/2100-1017\\_3-921043.html](http://news.cnet.com/Yahoo-concedes-Europe-auctions-to-eBay/2100-1017_3-921043.html).

advertisements and text links.<sup>270</sup> In turn, eBay agreed to advertise on Yahoo's sites in each of those countries.<sup>271</sup> Further, in May 2006, eBay and Yahoo announced another arrangement whereby Yahoo would be "the exclusive provider of advertising on eBay's auction site," while eBay's PayPal service would become the exclusive third-party Yahoo! Wallet payment method.<sup>272</sup> In April 2007, eBay and Yahoo launched Yahoo! PayPal Checkout.<sup>273</sup> Shortly thereafter, between June 16 and October 29, 2007, Yahoo closed its U.S. and Canadian auction sites.<sup>274</sup> Ultimately, these agreements enabled eBay to eliminate Yahoo from competing in the online auction market.<sup>275</sup>

## VI. EBAY'S ANTICOMPETITIVE CONDUCT CAUSED ANTITRUST INJURY TO BUYERS AND SELLERS

eBay's practices as outlined above have the potential to injure both consumers and sellers. To sustain an antitrust injury under the Sherman Act, the plaintiff must show unlawful conduct, causing an injury to the plaintiff that flows from that which makes the conduct unlawful and that is of the type the antitrust laws were intended to prevent.<sup>276</sup> Causation may be inferred "when exclusionary conduct is aimed at producers of nascent competitive technologies as well as when it is aimed at producers of established substitutes."<sup>277</sup> By enabling eBay to extract supra-competitive fees from sellers via its control of PayPal, eBay's anticompetitive conduct in excluding competitors in the online P2P systems market has resulted in antitrust injury to consumers.<sup>278</sup> These fees are ultimately borne by consumers because sellers often indirectly pass such costs on to their customers to remain in business. Furthermore, eBay's paperless payment policy, which forces users to use online payments and input their personal information, has injured consumers by reducing their level of privacy

270. Wolverton, *supra* note 260.

271. eBay Complaint, *supra* note 21, at 21. See Wolverton, *supra* note 260 ("[C]ustomers who click on 'auctions' on Yahoo's U.K. site come to a page with an eBay logo and a note describing eBay as Yahoo's 'preferred online auction service.'").

272. Foley, *supra* note 260.

273. Steiner, *supra* note 260 (noting that PayPal Checkout is a service similar to Google Checkout, on Yahoo).

274. *Yahoo to Close North American Auction Site*, *supra* note 260 (noting Yahoo's closure of its North American and Canadian sites).

275. eBay Complaint, *supra* note 21, at 21.

276. *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1477 (9th Cir. 1997).

277. *United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001).

278. See eBay Complaint, *supra* note 21, at 10.

online.<sup>279</sup> Finally, eBay's restraint on competition in the online auction and P2P payment systems market caused the same types of injuries that the Sherman Act was designed to prevent in a modern context.<sup>280</sup>

## VII. FAIR ALTERNATIVES OR REMEDIES TO EBAY AND PAYPAL'S TRADE RESTRAINING POLICIES

While there is convincing evidence that proves eBay's monopoly power restrained competition, there has been conflicting authority on how to remedy such trade restraint and whether the government should intervene.<sup>281</sup> Modern American antitrust policy generally recognizes that monopolies are the reward for successful investment and innovation.<sup>282</sup> In fact, the Supreme Court has stated that "[t]he mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system."<sup>283</sup> Alternatively, "European Community (EC)-based competition policy views competition as the more desirable outcome, and when that is not possible, it imposes significant obligations on the dominant firm."<sup>284</sup> Although the regulation of antitrust law of web-based powers (i.e., Google or eBay) remains fairly new, European approaches to antitrust law may provide some informative insight for a successful domestic remedy in the case of eBay. In light of the alternative approaches and possibilities to remedy eBay's unlawful conduct in trade restraint, two complementary remedies are recommended: (1) injunctive relief requiring eBay to allow sellers to solicit money orders, checks, and wire transfers; and (2) injunctive relief requiring eBay to allow sellers to accept other methods of P2P online payment systems that are currently prohibited.<sup>285</sup>

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279. See generally How PayPal Works, *supra* note 215 (noting that buyers must provide their bank account or credit card information to make payments unless they have existing funds in their PayPal account).

280. See *supra* text accompanying notes 27–34.

281. See, e.g., *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 407 (2004); Evans, *supra* note 1, at 2003.

282. See, e.g., *Verizon Commc'ns Inc.*, 540 U.S. at 407 (noting that the induction of risk taking that produces innovation and economic growth is what attracts "business acumen" to the opportunity to charge monopoly prices in the first place).

283. *Id.*

284. Evans, *supra* note 1, at 2003.

285. See discussion *supra* Part V.D.

*A. Taking Their Case Abroad: Foreign Regulators and the Case of  
A.M.D. v. Intel*

Antitrust challenges are especially likely under EC law and other foreign countries where decisional practice imposes “special obligations and significant scrutiny on firms that have market shares as low as [forty] percent.”<sup>286</sup> It should come as no surprise that Intel—a company whose “pricing is intended to maintain near monopoly on the microprocessor market”—faced heightened scrutiny abroad.<sup>287</sup> Advanced Micro Devices (AMD), a smaller rival of Intel, has accused Intel of engaging in anticompetitive practices to preserve its near monopoly.<sup>288</sup> Specifically, “AMD has accused Intel of systematically giving its customers—the world’s leading personal computer makers—large discounts, at times below Intel’s own manufacturing costs, in exchange for commitments not to do business with competitors.”<sup>289</sup> Intel “responded that its discounts were legitimate incentives, not offered below cost, and benefit[ted] customers who c[ould] [then] buy computers at lower prices.”<sup>290</sup> Despite years of lackluster success in proposing a viable antitrust suit<sup>291</sup> against Intel in the U.S., AMD initially made far greater strides with European and Asian regulators.<sup>292</sup>

In the U.S., state and federal officials have been less vigorous toward investigating and prosecuting potential antitrust violations than regulators in foreign countries.<sup>293</sup> However, due to AMD’s success overseas, the FTC opened a formal investigation of Intel for antitrust violations, and AMD consequently sued Intel in Federal District Court in Delaware.<sup>294</sup>

286. See Evans, *supra* note 1, at 1988.

287. Stephen Labaton, *In Turnabout, Antitrust Unit Looks at Intel*, N.Y. TIMES, June 7, 2008, at A1.

288. See *id.*

289. *Id.*

290. *Id.*

291. AMD has engaged in two decades of antitrust battles with Intel over chips that power PCs, but filed its most recent antitrust lawsuit against AMD in the U.S. in Delaware in 2005 which was scheduled for trial in March 2010. Don Clark & Jerry A. Dicalo, *Intel to Pay AMD \$1.25 Billion in Settlement*, WALL ST. J., Nov. 13, 2009, at A1.

292. See Labaton, *supra* note 287 (noting that the Korean Fair Trade Commission ordered Intel to pay \$25 million for violating its fair trade laws). However, “[i]n the United States . . . the quest [to prosecute Intel for maintaining anticompetitive pricing practices] ha[s] not gained much ground among state authorities or federal regulators.” *Id.* See James Kanter, *Europe Fines Intel \$1.45 Billion in Antitrust Case*, N.Y. TIMES, May 13, 2009, at B8 (noting that the European Union, fined Intel a record \$1.45 Billion dollars for “abusing its dominance in the computer chip market”).

293. Labaton, *supra* note 287.

294. *Id.*

Additionally, on November 4, 2009, New York's attorney general Andrew M. Cuomo filed an antitrust suit against Intel in Delaware that follows the lead of similar actions against Intel by European and Asian regulators.<sup>295</sup> On November 12, 2009, Intel announced that it would pay \$1.25 billion to settle its disputes with AMD in exchange for AMD's agreement to drop its pending lawsuit in Delaware, among other provisions.<sup>296</sup>

Following its year-long investigation, on December 16, 2009, the FTC filed an antitrust lawsuit against Intel "seeking an order that would prevent Intel from engaging in a variety of actions the FTC believes are anticompetitive," rather than seeking any monetary sanctions.<sup>297</sup> In a case that has been hailed by commentators as "among the most important since the antitrust cases brought against Microsoft in the 1990s," the FTC's decision to sue Intel will certainly have a significant impact on the way foreign antitrust law influences regulation domestically.<sup>298</sup> As a result, eBay users' current case against eBay would be subject to heightened scrutiny abroad.<sup>299</sup> Nevertheless, given AMD's success against Intel overseas, which arguably was the catalyst for a multi-faceted litigation campaign by the FTC and attorney general Cuomo, a foreign judgment against the online auction and P2P system giants may pave the way for more immediate intervention by U.S. regulators.

### *B. Finding a Middle Ground: The Case for Injunctive Relief*

Under 15 U.S.C. § 26, "[a]ny person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws."<sup>300</sup> eBay's unlawful conduct in violation of section 2 of the Sherman Act damaged and continues to

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295. Ashlee Vance, *State Accuses Intel in an Antitrust Suit*, N.Y. TIMES, Nov. 5, 2009, at B1.

296. See James Kanter, *A.M.D.-Intel Settlement Won't End Their Woes*, N.Y. TIMES, Nov. 13, 2009, at B1 ("The jury trial in A.M.D.'s antitrust case against Intel was scheduled to begin in Delaware next spring. If things had gone against Intel, the chip maker could have been hit with triple damages.").

297. Brent Kendall & Jerry A. DiCola, *4th UPDATE: US FTC Sues Intel Alleging Anticompetitive Conduct*, WALL ST. J., Dec. 16th, 2009, <http://online.wsj.com/article/BT-CO-20091216-710620.html>. See Eliot Van Buskir, *FTC Sues Intel for Anti-Competitive Practices*, WIRED, <http://www.wired.com/epicenter/2009/12/ftc-sues-intel-for-anti-competitive-practices> ("Intel has engaged in a deliberate campaign to hamstring competitive threats to its monopoly" (quoting FTC Bureau of Competition director Richard A. Feinstein)).

298. Labaton, *supra* note 287.

299. See generally eBay Complaint, *supra* note 21.

300. 15 U.S.C. § 26 (2006).

threaten damage to both consumers and sellers in the online auction and P2P system markets.<sup>301</sup> Consequently, injunctive relief imposed by the District Court in the pending eBay antitrust case or via the FTC is recommended to curb eBay's antitrust violations and increase competition. This relief should require eBay to allow sellers to (1) solicit money orders, checks, and wire transfers; and (2) accept other methods of P2P payment systems. However, the assessment of its costs must be weighed against the direct benefits of antitrust intervention. Under the best circumstances, applying the requirements of section 2 of the Sherman Act "can be difficult . . . [because] the means of illicit exclusion, like the means of legitimate competition, are myriad."<sup>302</sup> Further, mistaken inferences and the resulting false condemnations "are especially costly, because they chill the very conduct [such as risk and innovation that] the antitrust laws are designed to protect."<sup>303</sup>

In light of these considerations, injunctive relief marks the most fair and efficient adjudication of this legal dispute. Although compliance on its face would simply result in a policy change in eBay's "Acceptable Payment Methods," such compliance would in fact be significant because it would put eBay on notice that further abuse of its monopoly power may result in heightened government scrutiny and intervention. Compliance would also result in a smaller percentage of fee extractions from sellers through PayPal who would have the freedom to use other P2P services or accept other forms of payment. A more invasive approach such as a corporate split of eBay into two smaller entities is not only impractical, but unwarranted.<sup>304</sup> Therefore, the costs of imposing these restrictions are modest reductions to eBay's corporate infrastructure.

The magnitude of evidence establishing eBay's abuse of its monopoly power raises the question of why eBay and PayPal have not been legally challenged more recently for violating antitrust laws. "[B]ecause there are many markets in which eBay competes, determining which one eBay allegedly attempted to monopolize would be difficult at best."<sup>305</sup> In 2001,

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301. See discussion *supra* Part VI.

302. *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001).

303. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1985).

304. See Peter Dizikes, *Justice Dept. Drops Microsoft Breakup Request*, ABCNEWS, Sept. 6, 2001, <http://abcnews.go.com/Business/story?id=87749&page=1> ("Rather than break up the company into separate operating systems and applications businesses, the Justice Department said the government will pursue restrictions on Microsoft's business practices to 'obtain prompt, effective and certain relief' for consumers.").

305. See Oscar S. Cisneros, *eBay Accused of Monopolization*, WIRED, July 7, 2000, <http://www.wired.com/print/techbiz/media/news/2000/07/37871> ("Proving monopolization is a pretty steep hill to climb in a market that's changing on a daily basis." (quoting a prior FTC

auction listing re-aggregator Bidder's Edge dropped their countersuit against eBay alleging monopolistic practices.<sup>306</sup> In that case, Bidder's Edge lacked the financial wherewithal to continue litigation; moreover, the myriad of exclusionary agreements conducted by eBay, including its acquisition of PayPal, ceased to exist.<sup>307</sup> Additionally, litigation against a powerful company like eBay can cost millions.<sup>308</sup> Because such class action lawsuits require a large investment, law firms working on a contingency fee basis are not likely to make such an investment unless they believe they have a clear-cut case that is highly lucrative. Finally, as discussed above, current antitrust regulators such as the DOJ have been hesitant to prosecute or interfere with large corporations possessing monopoly power, leaving the colossal task up to private litigants.<sup>309</sup>

## VIII. CONCLUSION

Web-based businesses that have substantial shares in their relevant markets, such as eBay and Google, will continue to emerge in our global economy.<sup>310</sup> Although the incentives to monopolize spur significant innovation and growth, regulators cannot remain dormant if companies use their monopolistic advantage to engage in anticompetitive conduct. eBay, as well as many other technology firms, have recently felt the economic impact from a global recession.<sup>311</sup> Nevertheless, such global economic

attorney Peter Ward).

306. See Troy Wolverton, *eBay, Bidder's Edge End Legal Dispute*, CNET NEWS, Mar. 1, 2001, <http://news.cnet.com/2100-1017-253443.html> (noting that eBay and Bidder's Edge signed an agreement whereby Bidder's Edge agreed to "drop its appeal of an injunction that barred it from using an automated search [system] to comb eBay's listings").

307. See *id.* ("The settlement comes a week after Bidder's Edge shut down its Web site [sic], citing market conditions.").

308. See generally *id.*

309. See generally Ina Steiner, *Justice Dept. Closes Antitrust Investigation Against eBay, Company Reports*, AUCTIONBYTES.COM, Mar. 26, 2002, <http://www.auctionbytes.com/cab/abn/y02/m03/i26/s02> ("[T]he Antitrust Division of the Department of Justice ha[d] closed its investigation against [eBay] without taking action."); see also Press Release, Dep't of Justice, *Statement of the Department of Justice Antitrust Div. On Its Decision to Close Its Investigation of XM Satellite Radio Holdings Inc.'s Merger With Sirius Satellite Radio Inc.*, Mar. 24, 2008, [http://www.usdoj.gov/opa/pr/2008/March/08\\_at\\_226.html](http://www.usdoj.gov/opa/pr/2008/March/08_at_226.html) (noting that the Division decided to close its investigation of the merger between XM Satellite Radio and Sirius Satellite Radio despite the existence of a market where only two major satellite radio firms existed).

310. See Evans, *supra* note 1, at 1999.

311. See Jessica Guynn, *eBay Swings to Profit But Cuts Forecast*, L.A. TIMES, Oct. 16, 2008, at C3 (noting a 13.6% drop in eBay stocks).

downturn should not provide a free pass for powerful companies to violate antitrust laws.

*David S. Shevitz* \*

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\* J.D. Candidate, Loyola Law School, Los Angeles, 2010; B.A., University of California, Los Angeles, 2006. Thank you to Professor Daniel E. Lazaroff for his comments and revisions and Professor Georgene M. Vairo for her inspiration and support. Additionally I would like to thank the members of the Loyola of Los Angeles Entertainment Law Review, especially Ali Matin, Sharoni S. Finkelstein, and Ryan Patrick Murray. Special thanks to my grandparents for being my heroes and consistent source of inspiration throughout my life. I give never-ending gratitude to my parents and sisters for always believing in me.



