ANTI TRUST LAW: THE IMPACT OF THE CELLOPHANE CASE ON THE CONCEPT OF MARKET

Although the word "market" is not expressly stated in the Sherman Act, it plays a decisive role in the determination of the existence of monopoly power.[1] In general terms, monopoly power is the ability to control price or exclude competition in a certain area of business.[2] The determination of this area of business raises important questions of law and economics. Recently, the Supreme Court in the *Cellophane* case[3] affirmed a district court opinion vindicating DuPont of "monopolizing" cellophane in violation of Section 2 of the Sherman Act.[4] The decision, rendered over a strong dissent, dealt mainly with the determination of the relevant "market" in which cellophane was to be included. Prior to the Cellophane case the concept of "market" had witnessed a long and tedious development, because of the complex economic factors which market definition entails.[5] The issue in the *Cellophane* case dealt primarily with the determination of market in the product sense, in that it explored the effect of substitute wrapping materials on cellophane sales. The majority of the Court held that cellophane was not a market in itself but part of the greater "flexible wrapping paper" market, and since it comprised only twenty percent of this latter market it could not possibly "monopolize" it. The dissenting three judges, on the other hand, thought that cellophane was its own market and further urged that DuPont was guilty of monopolizing the "cellophane market." The difference of opinion of the divided Court and the effect of this decision on anti-trust

1. ATT. GEN. REPORT OF THE NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS at 44 (1955) (hereinafter cited as REPORT). "Monopoly power cannot exist in a vacuum, nor in theory alone. Testing for monopoly power requires first delineating that market within which power must be gauged." *Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary,* 84th Cong., 1st Sess., pt. 1, at 283 (1955).

2. REPORT at 43.

3. United States v. E.I. duPont de Nemours & Co., 251 U.S. 377 (1956), affirming 118 F.Supp. 41 (D. Del. 1953).

4. 26 STAT. 209 (1890), 15 U.S.C. § 2 (1952).

5. For a comprehensive discussion of the development of the theory of market in anti-trust cases see *Note,* 54 COLUM. *L.* REV. 580 (1954) and *Note,* 53 MICH. L. REV. 69 (1954). Also see Turner, *Anti-Trust Policy and the Cellophane Case* 70 HARV. L. REV. 281 (1956) for a lengthy discussion of this development in conjunction with an analysis of the Supreme Court decision in the *Cellophane* case.

For a further discussion on the field of economic data as used in judicial and administrative proceedings and the difficulties therein, see CURRENT BUSINESS STUDIES, March 1954 and October 1954.

law pose critical problems.[6]

An initial observation on the trial court litigation leads to the conclusion that the government attempted to base its arguments on theoretical assumptions concerning the competitiveness of the market.[7] Conversely, DuPont in its defense came forth with detailed evidence to develop a picture of intense competition in the flexible wrapping paper industry. DuPont presented testimony of competitors and consumers from both large and small industries. It supplemented its contentions by evidence from market surveys, reliable trade journals, authoritative texts, reports of DuPont's own officers and salesmen, and physical samples of the various materials.[8] The trial court judge even went to a packaging show in Atlantic City to view the relative competitiveness of the materials.[9] After the lengthy proceedings the trial court made specific findings and conclusions of facts very favorable to DuPont.[10] The trial court judge stated his belief in the great sensitivity among the customers of the flexible wrapping paper industry, both as to price and quality changes.[11] He further found that because of these price and quality changes the consumers of cellophane had shifted their habits of buying and that cellophane had experienced both substantial gains and losses in sales in relation to the other materials caused by these economic judgments.[12] These fluctuations of business the trial court characterized as frequent, continuing, and contested. So impressed was the trial judge with DuPont's elaborate evidence that its findings closely simulated DuPont's proposed findings.[13]

In an attack on the trial court decision which may have weakened its own case the government in its appeal to the Supreme Court accepted all the findings of fact but contended that from these facts the trial court should have concluded that cellophane was a distinct market.[14] The

6. Compare *Bus. Wk.,* Je' 16, 1956, p. 34, stating that the Supreme Court had written a new meaning for the concept of monopoly—a meaning that is likely to prevent the government from demonstrating the existence of monopoly in many markets that would otherwise be vulnerable to attack, as against the remark by Milton Handler in 11 *Record* at 368 stating his belief that the *Cellophane* case did not deal with questions of major substantive importance.

7. 118 F. Supp. 41, 196 n. 1714 (D. Del. 1953).

8. CURRENT BUSINESS STUDIES, March 1954 at 14.

9. *Ibid.*

10. Brief for Government, pp. 6-9, United States v. E.I. duPont de Nemours & Co., 351 U.S. 377 (1956), affirming 118 F. Supp. 41 (D. Del. 1953) (hereinafter cited as Brief for Government).

11. 118 F. Supp. 41, 197-198.

12. *Id.* at 200.

13. *Op. cit. supra* note 10.

14. See Dirlam & Stelzer, *The Cellophane Labyrinth,* 1 ANTITRUST BULL. 633 (1956) for a criticism of the government's attack in the trial court. They contend that the position of the government was one of extremes and was an overt attempt to extend

government urged that the lower court decision contained erroneous evaluations of the significant facts before it. It pointed out that even DuPont's own reports indicated a realization of the non-competitiveness of the other materials.[15] The government further emphasized that cellophane's comparative prices with the other materials combined with DuPont's high prices and great increase in business showed cellophane's non-competitiveness with other materials.[16] After pointing out these internal inconsistencies in the lower court decision, the government said that if the relevant facts were construed properly cellophane would be considered a separate market. DuPont, on the other hand, stated that although technically cellophane was a "part" of commerce, it did not have monopoly power because of the character of the market in which it sold its goods.[17] DuPont's argument relied heavily on the findings of the trial court, which they pointed out the government did not contest. DuPont further argued that the conclusions of the lower court were supported sufficiently by the evidence before it, and, therefore, they should not be subject to attack.[18]

Both the majority and dissenting opinions of the Supreme Court agreed that the determination of market was crucial, the majority conceding that if cellophane was the market then DuPont had a monopoly.[19] The majority, nevertheless, did not agree that DuPont would have been a monopolizer even if they had a monopoly.[20] The majority went on to find that although cellophane was somewhat unique in certain qualities and not similarly priced, the market in which cellophane competed was such that there was a great interchangeability with the other materials.[21] Also they felt that a showing of high profits on the part of DuPont was not conclusive without a showing of relative profits of other manufacturers.[22] The majority proceeded to affirm the trial court in substantially all of its conclusions on the facts presented. The minority, however, arrived at a different interpretation of the facts and chided the majority for rejecting the concept of inter-industry competition, such as between brick and other commodities like steel, wood, or stone, and then

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the issue of "bigness per se." For an excellent criticism attacking the trial court judgment in the *Cellophane* case see Stocking & Mueller, *The Cellophane Case and the New Competition*, 45 Am. Econ. Rev. 29 (1955).

15. Brief for Government at 76.
16. 24 U.S. L. Week 3101 (argument before the Supreme Court).
17. *Id.* at 3102-3103.
18. *Ibid.*
19. 351 U.S. 377, 391.
20. This provoked Justice Frankfurter to write a concurring opinion disassociating himself from this part of the majority opinion which he thought was surplusage. 351 U.S. 377, 413.
21. 351 U.S. 377, 398-399.
22. *Id.* at 404.

accepting the competition between cellophane and the other materials.[23] They based their conclusion that cellophane was its own market on the increased volume of business of cellophane and the comparative indifference of the price of the other materials to cellophane's price drops.[24] This combined with the price difference and evidence from DuPont's own reports influenced the dissenters to agree with the government that a different conclusion should be drawn from the trial court findings of fact.[25]

In comparing the majority and minority opinions it is difficult to determine on what point of market definition they disagreed. Both opinions agreed that interchangeability, physical characteristics, and relative prices of the goods were factors to be used in determining market.[26] Both also paid lip service to the technical term "cross-elasticity of demand" as a means of measuring the competitiveness of the materials.[27] About the only distinction that can be made is in terminology. The majority favored such phrases as "market alternatives that buyers may readily use"[28] and "functionally interchangeable"[29] while the minority preferred a "self same"[30] product test to typify what products they considered were in competition. This seems to be merely a quibbling over terms, while in reality the actual difference between the two opinions seems to be merely conflicting evaluation of the findings of fact made by the lower court.

Subsequent to both the district court and the Supreme Court decisions there has been some controversy as to their validity.[31] The arguments both pro and con base themselves on either past cases or independent economic judgments as to DuPont's actual power. Unfortunately, there seems to be no clear precedent for the *Cellophane* case, for although there had been many cases dealing with market determination, only one, the *Alcoa* case,[32] presented a similar fact situation and the same type of Sherman Act violation.

In the *Alcoa* case the government appealed adverse findings by the district court on the issue of whether Alcoa had "monopolized" virgin

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23. *Id.* at 423.
24. *Id.* at 417.
25. *Id.* at 418.
26. Compare *Id.* at 394-398 with *Id.* at 414-418.
27. *Id.* at 417. But cf. MACHLUP, THE POLITICAL ECONOMY OF MONOPOLY, 522-523 (1852).
28. *Id.* at 394
29. *Id.* at 399.
30. *Id.* at 414.
31. See note 5 and 14 *supra.* See also 11 RECORD 367 (1956).
32. United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) reversing, 44 F. Supp. 97 (S.D. N.Y.) (1941).

aluminum. Alcoa, in its defense, claimed that competition of imported virgin aluminum and secondary native aluminum so limited its power to control the price of virgin aluminum that it did not have monopoly power.[33] Judge Hand, in his opinion, conceded that imported and secondary aluminum actually did compete in the virgin aluminum market but eliminated secondary aluminum in his computation of the market percentage.[34] This, however, was not because he thought that secondary aluminum was outside the relevant market but because he thought that Alcoa's control over the source of all aluminum would give it control of scrap or secondary aluminum if Alcoa ever decided to limit its production.[35] Thus, this delimitation of market was not a narrow definition, but is rather a refinement in computing market percentage control peculiar to a relationship involving a raw material and its scrap. Later, on remand to the district court for a remedy, Judge Knox deduced that conditions had so changed that no longer could Alcoa control the scrap, and he therefore included secondary aluminum in the computation of market control.[36] Another facet of the *Alcoa* case which might be cited as precedent for narrowly defining a market in monopolization cases is the manner in which Judge Hand summarily dismissed the competition of the other light metals, such as copper, from his market definition.[37] This market definition is *necessarily* narrow, however, because the sales outlets of virgin aluminum were the aluminum fabricators, who could not change readily to other metals because of insurmountable metallergical difficulties. From a practical sales standpoint, moreover, it would be quite awkward for a consumer of virgin aluminum, such as Reynolds aluminum, to change over to copper ware.[38] Judge Hand did consider the effect of these other metals in the aluminum end product market. He specifically rejected an alleged monopoly in aluminum cable because of the direct competition of copper cable.[39] Similarly, he included substitute metal products in the same market as aluminum utensils.[40] Under close analysis of the *Alcoa* and *Cellophane* cases, the contention by the

33. *Id.* at 423.

34. *Id.* at 424-425.

35. *Ibid.*

36. United States v. Aluminum Co. of America, 81 F. Supp. 333, 357-358 (S.D. N.Y.) (1950).

37. 148 F.2d 416, 426 (2d Cir. 1945) stating that Alcoa was free from domestic competition, "save as it drew other metals into the market as substitutes."

38. Attacks on the *Alcoa* case such as that put forward in 1950, U. ILL. L. FORUM 515, 525-528 and that stated by R. S. Meriam in Anti-Trust Law Symposium, N.Y. Bar Ass. C.C.H. (1950 ed.) seem to lose sight of this point. It seems useless to talk of competition by other materials in end products when the market dealt with was the aluminum fabricators who were the consumers of virgin aluminum.

39. 148 F.2d 416, 438 (2d Cir. 1945).

40. *Id.* at 436.

majority in the Cellophane case that the two cases presented different problems seems to be substantiated.[41] Where the cases are similar, as in respect to the end products of aluminum cable and utensils, the Alcoa case seems to compliment the contention by the majority in the *Cellophane* case that substitute products may be considered in a market although of a different substance and not priced the same. Therefore, viewed in light of Judge Hand's reasoning in the Alcoa case the decision in the Cellophane case is not a departure from prior law.[42]

The next problem, that of determining the amount of actual competition given cellophane by the other materials, is much more difficult. On this point, as previously stated, the majority was content to rely on the trial court's conclusions concerning the supposed buying habits of the purchasers of flexible wrapping papers, while the minority preferred to base its decision on the difference in physical characteristics, which, combined with the difference in price of the materials, was enough to indicate to their minds a monopoly. Although there are conflicting opinions concerning the validity of both the Supreme Court and district court opinions it seems that from the facts disclosed in the proceedings there was actual competition between cellophane and the other materials.[43] Cellophane sales had been directly affected by changes in price and improvements in quality of the other materials. Indeed, the trial court foresaw that the film, pliofilm, although not competitive in a real sense at the time of adjudication, was destined to enter the competition in a real sense in the near future.[44]

Another crucial question, however, of whether this competition was artificial or real was never properly before the Court, although it was latent in the government argument and reflected in the dissenting opinion.[45] Stated in hypothetical form, this problem is whether a producer of a somewhat unique article is a monopolist if he has the choice of pricing his goods so high that other goods will compete, while at normal levels of profits and prices the other goods would not compete.[46] The answer, of course, is that such a producer does have monopoly power, for the assumption that the producer may allow other goods to compete

41. 351 U.S. 377, n. 23 at 396 (1956).
42. But see Turner, *Anti Trust Policy, op. cit. supra* note 5, at 281, 292, 308.
43. See notes 5 and 14 *supra*.
44. 351 U.S. 377, 399-400.
45. In all fairness to the government's attack it should be noted that the proper presentation of this type of issue would have increased the government's already burdensome task in the *Cellophane* case. The only feasible way to include this attack would have been to attack DuPont first on the theory that cellophane had its own distinct market and did not compete and then in the alternative prove that even if cellophane did compete it had such a cost advantage as to give it monopoly power.
46. CURRENT BUS. STUDIES, March 1954 p. 18.

or not also assumes monopoly power. Even the majority opinion makes reference to the possibility of this situation by refuting the government's argument concerning DuPont's profits, stating that such evidence without comparable data of the other wrapping paper producers' profits would be inadequate to show monopoly power.[47] What the majority would have done if shown that the other manufacturers' profits were conspicuously lower than DuPont's raises a relevant question concerning these profits. Without proof, however, the majority concluded that this great profit was either due to the increase in commodity packaging in recent years or to DuPont's efficiency.[48] The minority, however, were not content with this explanation and seemed to be conscious of a price-cost advantage in favor of DuPont when they emphasized the lack of sensitivity of the other materials' prices to cellophane's price changes.[49] This economic non-competitiveness was again pointed out by the minority by showing that in 1948 although cellophane increased its prices seven percent, still its earnings were increased.[50] This, the minority pointed out, invalidates the contention of the lower court that if DuPont were to increase its prices in monopolistic fashion the self-adjusting market would punish DuPont by decreasing its sales to the extent that its profits would dwindle.[51] In this manner, the minority stressed the economic fact that it is possible for a producer of goods subject to competition from substitutes to have high prices relative to costs and a smaller share of the market or low prices relative to costs and a larger share of the market, and in both cases to have high profits.[52] Unfortunately, this argument, without a showing of the market conditions at the time and the economic condition of the competitors, is similar to questioning how high is high.[53] Due to the fact that the government's argument was addressed to proving that cellophane had its own distinct market rather than proving that although cellophane competed with the other materials it had such a cost-price advantage as to give it monopoly power, the data of the other producers were not put in evidence.

An excellent exposition of the cost-price problem has been stated in the hearings before the Senate Judiciary Committee by Carl Kaysen when he said, "[w]here we look at competition among substitutes, we

47. 351 U.S. 377, 404.
48. *Ibid.*
49. *Id.* at 417-418.
50. *Id.* at 422-423.
51. *Ibid.*
52. See note 46 *supra.*
53. Comparable data of the profits of the producers of the other materials would be pertinent but due to the many factors to be dealt with in ascertaining the general efficiency of the other producers as compared with DuPont, not conclusive.

cannot define the market intelligently without looking at price-cost margins, and the costs of the various substitute products as well as their prices. Only where two products are close substitutes at prices in the close neighborhood of their respective cost, can we include them in the same market."[54] This idea is not without case precedent for it was espoused as early as the *Corn Products* case in 1916.[55] In this case Judge Hand decided that as long as the cost of production per unit of a desired quantity favored one producer of goods over another, although the favored producer had a limited monopoly within these limits he had a true monopoly.[56] This theory was later reiterated by Judge Hand in the *Alcoa* case, when he stated that although the influence of potential imported virgin aluminum was a limit on the price Alcoa could put on virgin aluminum, this ceiling on price policy did not nullify Alcoa's monopoly power.[57] The underlying rationale of the cost-price relationship also seems to permeate the cases delimiting the market into areas, because of shipping costs which would have to be assumed by the producer and would add to the cost of placing a product in competition.[58]

Unfortunately, the elimination of substitute products by the cost-price relationship raises many problems. Determining a cost-price index of either the commodity alleged to be monopolized or its substitute would entail a weighing of the efficiency and possible hidden advantages of each of the producers. This added burden of determining the validity of complicated economic evidence would possibly cloud the courts' vision instead of clearing it.[59] Proof of consistently high profits could present a prima facie case of monopoly power, but this could show merely ef-

54. *Hearings, op. cit. supra* note 1, at 196.
55. United States v. Corn Products Refining Co. 234 Fed. 964 (S.D. N.Y.) (1916).
56. *Id.* at 975, 976.
57. 148 F.2d 416, 426.
58. In United States v. Addyston Pipe & Steel Co., 85 Fed. 271 (6th Cir. 1898) at 291-292 the court in defining the market stated that although the defendants were limited by the price of cast iron plus the additional freight charges from outside the area, that within these bounds they held monopoly power. Considering the freight charge as a cost of distribution the court could have just as easily had said that the defendant had such a cost-price advantage over those outside the area as to give him monopoly power. The case was similar in United States v. Columbia Steel Co., 334 U.S. 495, 519 (1948) where the Court limited its discussion of rolled and fabricated steel to a seven state area rather than the whole United States. What else would preclude the other producers from other states from competing in this market except for the freight costs which would put them at a compettiive disadvantage? Like considerations were relevant in Standard Oil Co. of California v. United States, 337 U.S. 293 n. 5, at 299 (1949) where the Court stated that the area to be judged is that which is in effective competition.
59. As to the difficulties of the present procedure on market analysis and similar problems see Justice Jackson's statement in Standard Oil Co. of California v. United States, 337 U.S. 293, 372 (1949) where he considers the judicial process inadequate for such economic issues.

ficient business tactics.[60] These problems, although theoretically difficult to solve, are not insurmountable in the practical cases which would involve this refinement of the market definition test. Mitigating factors would almost always arise to ease the difficulty of the test. Such factors as a captive buyer, for example the cigarette industry in the *Cellophane* case, would tend to stabilize profits of the defendant producer at higher levels than its competitors and increase the probability that the producer held monopoly power.[61] This type of attack, as has been noted, may find the trial courts ill equipped to pass accurately on such evidence, but this type of evidence does not seem to be more difficult than that already before the courts on market definition.[62] This cost-price method of delimiting the market, although not squarely adopted by the Supreme Court, would probably have been accepted by the Court in the *Cellophane* case if it had been presented in suitable fashion.

The method used by the majority in distinguishing a number of cases presented by the government to support their contention that market definition in past cases had limited markets to narrow field presents another problem. The Court distinguished such cases as the *Indiana Farmers Guide Publishing case,*[63] the *Columbia Steel case,*[64] and the *Para-*

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60. CURRENT BUSINESS STUDIES, March 1954 at 22.

61. 351 U.S. 377, 399, 406. In this field Cellophane controlled some 75% to 80%, and therefore the cigarette industry could be considered virtually a captive buyer. The reason why this alone was not enough to give DuPont power to control its price was because this part of production consisted of but 11.6% of its total production, and thus DuPont would be forced to price competively with the other materials.

62. There seems to be a great deal of consternation about the ill informed manner in which economic evidence has been handled before the courts. This may be caused either by lack of acceptable proof in the ordinary role of evidence or by the general incompetence of the trial court judges. One trial court judge has summarized the problem by stating that Congress, through the anti-trust laws, had placed upon the courts complex economic controversies such as "market" which have no easy definition and have left the courts without acceptable procedures or standards to point up the issues, thus leading to tedious and often confused trials. CURRENT BUSINESS STUDIES, March 1954 at 16. A glaring example of this ineptitude of the courts was experienced in the *Alcoa* trial court. The government attempted to submit statistics comprising two pages of data on imported aluminum but the trial court judge required first that the government submit evidence of every statute under which the government compiled these statistics since 1890. It also required the original books year by year which contained the relevant figures. These proceedings took approximately one week to verify the two page report. 30 AM. ECON. REV. 164, 173 (1940 Supplement). These reasons combined with the fact that trial court judges do not have qualified advisers have brought to mind the suggestion that these cases be judged on an administrative board level. CURRENT BUSINESS STUDIES, Oct. 1954 at 71; 1 ANTI-TRUST BULL. (May-July 1956). A suggested general solution would be to urge the law schools to train the future judges to deal with these problems. Another present remedy would be to make available qualified advisers as exemplified by the use of Carl Kaysen, an economist, as a law clerk in the Shoe Machinery Case. 110 F. Supp. 295 (D.C. Mass. 1953); 60 YALE L. J. 1076, 1082 (1951).

63. Indiana Farmer's Guide Co. v. Prairie Farmer Publishing Co., 293 U.S. 268 (1934).

64. United States v. Columbia Steel Co., 334 U.S. 495 (1948).

mount case,[65] among others, by blandly stating that these cases were decided on the issue of attempted monopoly or an unreasonable restraint of trade and thus went on to dismiss these cases as authority.[66] From this part of the opinion an inference may be drawn that the Court recognizes two or more definitions of market corresponding to the different violations of the Sherman Act. This interpretation of the court's decision can be justified on the basis of the difference of conduct inherent in the various offenses. Thus such activities as that of a local newspaper refusing to advertise for merchants who advertised on a local radio station are much more obvious than the conduct in the Alcoa case—the outward extent of which was the buying up of possible water power sites.[67] This dichotomy would lead logically to a broad definition of market for actions brought under monopolization offenses under the Sherman Act where overt conduct is sparse, as against a narrow definition for conspiracy or attempt to create a monopoly, where the conduct and design of the defendant leave him no room to complain of the stringent definition. Since this interpretation of market definition depends on the difference in degree of the conduct involved, it would seem to be much more logical to have a uniform market definition and a different market percentage test for the various offenses, which in fact seems to be the tenor of the decisions prior to the *Cellophane* case.[68]

Assuming arguendo that there are different definitions for the various offenses, there seems to be nothing in the *Cellophane* case which either expands or contracts the market definition of the *Alcoa* case. Indeed, if there is a distinction between the market definitions of the vari-

65. United States v. Paramount Pictures, 334 U.S. 131 (1948).

66. 351 U.S. 377, n. 23 at 395, 396.

67. Times-Picayune Pub. Co. v. United States, 345 U.S. 594 (1953); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

68. For example it is hard to determine the difference in criteria used in differentiating between automatic and manual concrete block making machines, United States v. Beaser Mfg. Co., 96 F. Supp. 304 (E.D. Mich. 1951); farm newspapers and regular newspapers, Indiana Farmers Guide Pub. Co. v. Prairie Farmer Pub. Co., 293 U.S. 268 (1934); various submarkets in shoe machinery, United States v. U.S. Shoe Machinery Corp. 110 F. Supp. 295 (D.C. Mass. 1953) (dictum); refined "grits" and brewer's "grits," United States v. Corn Products Refining Co., 234 Fed. 964 (S.D. N.Y. 1916); regular priced and ten cent cigarettes, American Tobacco Co. v. United States, 328 U.S. 781 (1946); "first run" and "second run" movies, United States v. Paramount Pictures, 334 U.S. 131 (1948); an established wholesale house and a potential new one, Gamco Inc. v. Providence Fruit and Produce Bldg., 194 F.2d 484 (1st Cir. 1952); newspapers and other mass dissemination of news, Times-Picayune Pub. Co. v. United States, 345 U.S. 594 (1953); But see Lorain Journal v. United States, 342 U.S. 143 (1951); linen rungs, and other rugs, United States v. Klearflax Linen Looms Inc., 63 F. Supp. 32 (D.C. Minn. 1945); color film and black and white film, Eastman Kodak Co. v. FTC, 158 F.2d 592 (2nd Cir. 1946); green slate and black slate, O'Halloran v. American Sea Gıeen Slate Co., 207 Fed. 187 (N.D. N.Y. 1913); hydraulic and other pumps, Kobe Inc. v. Dempsey Pump Co., 198 F.2d 416 (10th Cir. 1952).

ous offenses, it must be a fine line, for the factors which were used in determining that "rolled" steel and fabricated steel were in the same market in the *Columbia Steel* case[69] and similar considerations which placed a morning newspaper in the same market with an evening newspaper in the *Times-Picayune*[70] case look distractingly similar to the factors used by the Court in the *Cellophane* case. In the former case the Court refused to consider fabricated (plate and shape) steel on a market distinct from the rolled steel market, due to the fact that a producer of rolled steel could easily produce other steel products and were "interchangeable" with these other products.[71] In the latter case the Court refused to delimit "morning" from "evening" newspapers because the market was the advertising readership and this included both morning and evening newspapers.[72] Furthermore, there seems to be no valid reason why a cost-price analysis should be excluded from the broadest definition of market, since the idea is reflected in both the *Cellophane* and *Alcoa* cases.[73] Thus, since the broadest explanation of this supposed dichotomy of market definitions includes all the pertinent economic factors for accurately determining monopoly power, the proposed different definitions of market seem to vanish.

We are therefore left with a definition of market which is necessarily broad and which encompasses a refinement of cost-price relationship in applicable situations which defy standardization. The crucial question in seeking a market definition reverts to determining the sphere of rivalry in which a buyer may transfer readily from one supplier of a product to another, assuming of course a true competition.[74] The application of this test by the trial courts may sometimes lead to doubtful economic judgments, because of either the trial judge's personal inadequacies to rule on such complicated and usually elaborate evidence or possibly to the strictness of judicial rules of evidence.[75] Thus, the *Cellophane* case may support any of three possible conclusions. It might possibly be considered as showing how certain inadequacies of trial courts in construing complicated economic evidence may even get past the Supreme Court; but, yet, it might just point out that the government was not diligent in presenting their whole case so that the Supreme Court could adjudicate on all the issues. Finally, the decision may be completely supportable if a really competitive market without a cost-price

69. United States v. Columbia Steel Co., 334 U.S. 495 (1948).
70. Times-Picayune v. United States, 345 U.S. 594 (1953).
71. 334 U.S. 495.
72. 345 U.S. 594.
73. See notes 47-51 and note 57 *supra.*
74. REPORT at 322.
75. See note 62 *supra.*

advantage existed at the time of adjudication, although it was not shown. What may be said with certainty about the *Cellophane* case, however, is that there was no diversion from the *Alcoa* case, and if there were any changes from other prior cases on the question of market definition it was in form and not in substance.

REGULATORY "EXECUTIVE PRIVILEGE" TO WITHHOLD INFORMATION

That the maintenance of secrecy in regard to certain types of information in the possession of the federal government is desirable needs no explanation. The executive branch having been entrusted with the responsibility of carrying on the affairs of the nation, it is natural that the appropriate departments, in their discretion, classify information collected by them in the exercise of these functions. On the other hand, it is a fundamental requirement in the Anglo-American system of administration of justice that any evidence which may aid in the assessment of the rights of the parties to a law suit be made available,[1] if need be under judicial compulsion. Obviously, where the two requirements conflict, i.e. when data possessed by the executive branch and considered by it not susceptible of disclosure becomes needed as evidence in court proceedings, a decision must be reached which subordinates one of the two requirements to the other. This adjustment is made within the framework of the law of evidentiary privileges from disclosure. When the need for secrecy is determined to be paramount, the court will accord immunity from disclosure to the information in the form of a "governmental privilege."[2]

1. *Ex parte* Uppercu, 239 U.S. 435 (1915).

2. The two common law governmental privileges universally recognized are the state secrets privilege and the informer privilege. The former is said to apply where it is attempted to obtain production of information the disclosure of which would tend to injure the national security or cause diplomatic embarrassment. The latter is applicable to prevent disclosure of the identity of informers who are the government's sources of information concerning illegal acts committed. The policy behind this privilege is founded on a fear that communications of this type will in the future be made less freely, or not at all, if the precedent of disclosing the communicant's identity in court proceedings were to be established, such communications being essential to the efficient administration of government.

One distinction, besides that inherent in the policy reasons, between the two privileges is found in the fact that in the case of the informer privilege the privilege is one which attaches to a *type* of information, the privilege being granted (unless special reasons exist for not granting it) as soon as it is established that the information sought to be produced is of that type, i.e. is the identity of an informer, whereas a state secrets privilege is founded on characteristics inherent in the *particular data* sought to be pro-