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Competition Law for a Post-Scarcity World

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Talk of a post-scarcity society can easily sound like the stuff of science fiction, or techno-utopianism, or worse, blithe ignorance of the billions of people on the planet for whom real scarcity of basic needs is very much an entrenched difficulty of the present. Nevertheless, the convergence of a series of technological developments has convinced observers both within law and without that, at least in some fields, we are approaching a world in which goods may be produced at or near a marginal cost of zero. Indeed, by some accounts, even the high initial fixed costs of many near-marginal cost goods traditionally protected by intellectual property law – such as software, recorded music, and video entertainment – may also be falling. According to this account, the combination of the rise of the Internet, the development of collaborative comments, and the advance of 3D printing are leading to a post-scarcity society. Knowledgeable economists and business writers take the possibility of an economy “beyond scarcity” seriously. Simply put, Star Trek’s replicator may be nearer to the horizon than previously thought.

Economists, most notably John Maynard Keynes, recognized this possibility decades ago. In 1930, Keynes observed that “the economic problem” – that is, material scarcity – “may be solved, or be at least within sight of solution, within a hundred years.” Keynes’ timing may be surprisingly accurate; legal scholars, particularly in the field of intellectual property, have of late recognized the implications of this possibility. Beyond intellectual property, rapid innovation in 3D printing and Internet-driven business models – especially “sharing economy” innovators such as Uber and Airbnb – are helping to rapidly drive down both fixed and marginal costs in a way that echoes Keynes’ predictions about the end of scarcity.



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Competition law scholarship has yet to engage with this potential development. Despite competition law’s deep ties to economic theory and analysis, the implications of a post-scarcity society have not yet been appreciated. In a new paper, I provide the first descriptive and normative study of this change’s critical implications for competition law. The article has two goals: First, it provides an account of the drivers of the trend towards a post-scarcity society and how they will challenge the heartland of competition law analysis. Second, with that snapshot as a springboard, the article identifies and analyzes the normative consequences for consumer welfare and competition law. To be sure, the interdependent technological and social changes that are working to drive costs down are still works-in-progress; an effort to describe and predict their future interrelationship with competition law must necessarily be partial, tentative and quickly outdated. Nevertheless, the transformation that they are effecting is too important to disregard.

One might ask: why would a world in which production costs approach zero need competition law – wouldn’t everything just be more or less free? This Article argues that, perhaps counter-intuitively, as we approach zero cost production, the need for competition law – and perhaps a *different* kind of competition law – may actually be greater. Simply put, we may need competition law to help us get from here to there; there are reasons to think that incumbent firms – and the policymakers who collect rents from them – may have strong incentives to prevent the transition to a post-scarcity society. First, competition law’s traditional balance of fears of increased market power versus hopes for increased efficiency of production tips towards more active competition law as production costs approach zero – essentially, there becomes less and less cost left to wring out through greater efficiency. Second, the desire for economic profits may drive firms towards expending more effort at rent-seeking by lobbying government for favorable action; competition law has struggled greatly with the question of how to deal with government action that hurts consumers. As a result, to the extent that firms currently face a choice between working on achieving greater efficiencies or trying to achieve market power through collusion, exclusion or rent-seeking, a post-scarcity world makes the latter choice more attractive.

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I argue for a new role for competition law in assisting the transition from the “legacy” economy of scarcity to the predicted post-scarcity world. Taking the potential of a post-scarcity world as a given, competition law should refocus itself on two targets that it has aimed at in the past: it should combat private exclusionary conduct that harms cost-reducing innovation, and it should fight government action that creates artificial scarcity. While competition law already has a history of taking these steps, the transition to a post-scarcity economy will require a rethink – and to some degree a rejection – of the Chicago-school dogma that forced a retrenchment in addressing private exclusionary conduct. It will also require a willingness to take a more aggressive tack against anticompetitive government action than federal courts traditionally have.

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