The terms ‘group boycott’ and ‘refusal to deal’ do not have precise definitions. The meanings range from what is called a classic boycott – whereby competitors join to deny other actual or potential competitors access to upstream suppliers or downstream customers – to simple horizontal agreements pertaining to terms of an exchange. In between are arrangements among competitors to regulate some aspect of trade. For the most part, horizontal agreements about terms of exchange are economically indistinguishable from price fixing and are not considered here. For example, one of the classic refusal to deal cases involved a horizontal agreement to enter into contracts with arbitration clauses. In that type of case, the agreement on terms is a risk allocation device that could be substituted for by a price allowance.

For purposes of this chapter, whether labeled a group boycott or a refusal to deal, the focus is on concerted activity that targets specific firms, suppliers, or customers. ‘Concerted’ denotes an agreement between or among competitors and, thus, is reviewed under Section 1 of the Sherman Act. Much of the analysis of boycotts can be applied to single firm behavior as well and, consequently, is examined under Section 2 of the Sherman Act.

In general, the boycotts considered here have one of two relatively distinct goals. One is to regulate competition among participating firms. For example, the organizers of a golf tournament may disqualify a golfer who has been caught cheating. In these instances, from an economic standpoint, although not necessarily from the standpoint of antitrust law, the critical issue is not whether firms have formed an agreement to engage in a boycott but whether the purpose and effect of the boycott is likely to be anticompetitive. In this sense, a regulatory boycott can be distinguished from price fixing, horizontal divisions of territory, or even a ‘classic boycott’ as defined below. In the case of regulatory boycotts the agreement and the purpose are separate matters. In the case of a classic boycott the two issues merge.

The classic boycott is designed to damage a direct competitor by denying access to suppliers or customers. For example, a group of retailers may horizontally agree not to purchase from a wholesaler who is...
operating at retail or threatening to do so. Alternatively, a single powerful buyer (or seller) may pressure its suppliers (or customers) in order to deny a new entrant access to suppliers (or customers). As already indicated, like price fixing and horizontal territorial divisions, the agreement and the practice are inseparable. These two types of boycotts will be considered in turn. First, we turn to a brief examination of the relevant economic considerations when examining boycotts.

A. Economic perspectives on boycotts
Concerted action that may be regarded as a boycott can increase or decrease consumer welfare. Increases in consumer welfare from boycotts result from three possible effects: increases in efficiency, the introduction of new products, or a decrease in consumer transaction or search costs. Decreases in consumer welfare result from higher prices, lower output, or few choices. When a boycott decreases consumer welfare, the loss in welfare or most of it, will accrue as gain to the boycotters. Ideally, antitrust law distinguishes between consumer-welfare-increasing and consumer-welfare-decreasing boycotts. The costs of extended assessment of these practices by enforcement agencies should also be factored in and it makes sense to develop rules that minimize enforcement costs. In antitrust this means the application of a rule of per se illegality to actions that seem very unlikely to enhance consumer welfare and per se legality to those that rarely decrease consumer welfare.8

There are at least two approaches to the economic issues raised by boycotts. A boycott that decreases consumer welfare will rarely be one in which the boycotters gain as much as the consumers lose. Thus, a Coasian-like analysis can be applied.9 If the practice is seen as a ‘right’, which party would attribute the greater value to the right? Put differently, in a transaction-cost free environment, who would own the right to engage in a boycott or prevent others from engaging in one? Unless one of the three consumer benefits listed above occurs and outweighs anticompetitive effects, consumers would value the right to block the boycott more than boycotting firms value the right to engage in the boycott.10 When one of these three benefits do occur, consumers will lower their bids for the right to prohibit the boycotting accordingly. Thus, the question comes down not to whether boycotters are better off but whether they can make consumers better off as well.

For example, take the case of Neeld v. National Hockey League11 in which the National Hockey League (NHL) was sued by a potential player because the league enforced a rule barring one-eyed players. Now view that right to play or not to play as a right. The NHL will value the right to the extent it increases profits either by lowering costs or increasing the
Attractiveness of the product so that higher prices may be charged. On the other hand, one-eyed players would pay up to the difference between an expected salary and their opportunity costs. Their ‘demand’ for a no boycott rule would be strengthened by any consumer who would like to see them play or who places a value on their right to play. If these two interests face off in a Coasian-style auction, which would bid more for the right?

Consumers would (unless they are receiving benefits that would decrease the maximum they would be willing to pay to buy the boycott right from potential boycotters under conditions of zero transaction cost). The most likely possibility is that the elimination of one-eyed hockey players increases safety and lowers liability costs for owners who, in turn, lower consumer prices. Given that the existence of one-eyed players means higher ticket prices, one would expect the willingness of one-eyed players to pay off consumers for the ‘no boycott’ rule would be less than their willingness to pay off owners for such a rule. This is not to say that the agreement by owners not to employ one-eyed hockey players is not technically anticompetitive. It does mean that if NHL owners value the right more than those who are ‘harmed’ in any way by the restriction, it makes little sense to view the boycott as ‘anticompetitive’.12 Put differently, from an economic perspective, the term ‘anticompetitive’ would be misused if applied to prevent wealth maximizing outcomes.

The ‘production’ of consumer benefits can be viewed as a form of intellectual property. Thus, the economics of intellectual property provides a useful analogy.13 In the context of intellectual property, exclusion is the price of encouraging consumer welfare-increasing creativity. The inventor or composer is permitted to internalize the gains from his or her works, but this is only a means to an end of promoting welfare more generally. In theory, if the value of a work is exceeded by the cost of exclusion, the work should not be protected.14 Moreover, any work should be produced at the lowest possible exclusion cost. For example, copyrighted work that would be produced if the copyright duration were only 20 years need not be protected beyond that period.15

In the case of the economies traced to boycott-type activities, the analogy is clear. There is no incentive to engage in activities that lead to productive or buying efficiencies if some portion of the gains cannot be internalized by members of the group. The same applies to the creation of a new product. For example, a group of physicians who join to offer an array of services to patients must be permitted to gain by virtue of the arrangement. The economics of information-related costs is even more on point. It is generally felt that information is produced and disseminated in suboptimal qualities. The principal reason is that information is very
susceptible to free riding. For example, suppose the manufacturer of housing insulation realizes that for buyers to understand the quality of the product there must be a rating system and instructions on what the ratings mean. Any individual manufacturer that provided that information could expect other manufacturers to free ride. Consequently, for the information to be produced and disseminated at all, it may be necessary to allow competitors to develop a rating system while excluding some other manufacturers.\(^{16}\)

In intellectual property law, protection from infringement is the means to an end of a generally beneficial activity. In antitrust the most similar concept is the ancillary restraints doctrine. The ancillary restraints doctrine was originated by the Supreme Court in *United States v. Adelyston Pipe*,\(^ {17}\) an 1898 case, as a way to reconcile business realities with the broad language of the relatively new Sherman Act prohibiting all restraints. The development of the rule of reason standard made the ancillary restraints doctrine less important but it underwent something of a rebirth with the Supreme Court’s decision in *Broadcast Music, Inc. v. Columbia Broadcast System*\(^ {18}\) which is viewed as applying a product necessity defense. Applied to boycotts, the ancillary restraints question is whether the restraint is necessary for a consumer-benefiting result and, ideally, whether the restraint is as narrow as possible and does not offset the procompetitive effects.\(^ {19}\)

Three points in particular should be noted. Part of the analysis is the question of whether the procompetitive effects necessitate collective action. The argument, sometimes made in the context of professionals, that a boycott is necessary to assure product quality, seems somewhat hollow.\(^ {20}\) First, individuals who provide high quality output will survive in the market without colluding. Second, although the economic ideal would be to examine each of these instances to determine that the restraint is no broader (anticompetitive) than necessary, that analysis in itself can be time consuming, expensive, and inexact. Finally, there is a fundamental paradox in the examination of boycotts. Given that participants are obviously self-interested, they are not likely to engage in a boycott that does not increase profit. Often the source of the profit is the exclusivity itself. Consequently, in most instances legality cannot hinge on exclusivity alone. Put differently, boycotts are by their nature anticompetitive. That anticompetitive effect and some level of internalization are necessary for increases in consumer welfare. In short, as in the intellectual property context, the boycotter must be permitted to retain some of the gain traceable to exclusivity.

**B. Regulatory boycotts**

As noted, some boycotts regulate competition among the participants. To the extent firms simply agree to adhere to the same contract term, the
analogy to price fixing is obvious and not considered here. This analysis examines boycotts that are devoted to regulating the relationship between the boycotting competitors and individuals, groups of suppliers, or groups of customers. The boycotts considered here are not, therefore, aimed at the exclusion of competitors by exerting leverage on suppliers or customers.

The prototypical case in which consumer welfare is enhanced is one in which the group boycott amounts to an ancillary restraint that is necessary to produce a new product or perhaps a new brand. Excellent examples come from sports leagues. For example, in *Deesen v. Professional Golfers’ Association* (PGA), a case decided during a period of little judicial tolerance for boycotts, the PGA’s eligibility requirements were challenged. In effect, golfers who had not been successful at shooting low scores were not permitted to compete in tournaments. The court applied a rule of reason analysis and approved the PGA’s practice, reasoning that the ‘purpose is to insure that professional golf tournaments are not bogged down with great numbers of players of inferior ability. The purpose is thus not to destroy competition but to foster it by maintaining a high quality of competition’. The court did not expressly invoke the ancillary restraints approach but applied it implicitly with the view that the restraint was a means of increasing competition.

*Deesen* was distinguished in *Blalock v. Ladies Professional Golf Association*. There Jane Blalock, a professional golfer, was suspended from a tournament, put on probation, and fined $500 by the executive board of the Ladies Professional Golf Association (LPGA) after she was observed moving her ball closer to the hole. After it announced her punishment, the LPGA held another meeting and invited Blalock’s competitors. After that meeting, Blalock’s punishment was extended to a one-year suspension. In her antitrust action Blalock claimed that the suspension was a violation of Section 1 of the Sherman Act. The court held that the one-year suspension was a per se unlawful boycott. *Deesen* was distinguished because Deesen could take steps that would enable him to play in tournaments. In addition, in *Deesen* player-competitors were less directly involved in the suspension decision. Although here again the court did not expressly apply the ancillary restraints doctrine, the theme was one of allowing a restraint in order to produce greater competition by virtue of the existence of a superior product. The ultimate result was that the PGA did what was necessary to preserve competition while the LPGA had gone too far.

The analysis of regulatory boycotts, thus, begins with the question of whether the choices available to consumers would diminish in the absence of the boycott. The same analysis has been applied to other professional sports leagues that limit the number of teams. The theory is that more
teams in a league would mean lower quality and a less attractive product when compared to substitute forms of entertainment. It has also been invoked in the context of the National Football League (NFL) draft. In *Smith v. Pro Football, Inc.*, the court examined the NFL draft from the perspective of whether it was a per se unlawful group boycott. In the NFL draft, if a player is drafted by a specific team, no other team will compete for the player’s services. The 1968 draft considered by the court had 16 rounds. The court first addressed whether the draft would be assessed under the per se standard or the rule of reason. It applied the rule of reason and distinguished per se boycotts from rule of reason boycotts. The distinction, described by the Supreme Court years later in *Northwest Wholesale Stationers v. Pacific Stationery and Printing Co.*, largely turned on whether the goal of the boycott was to deny competitors access to needed business relationships. Not only was this element missing, but the teams were not, according to the court, competitors in an economic sense. Additionally, they were not attempting to block access of another team. Most importantly, some restraint was necessary for the competitive balance required to make professional football an attractive product in the entertainment market. Having taken the draft out of the per se category, the court went on express doubts that the draft was essential for competitive balance. In effect, it required a showing of a connection between the procompetitive end and the restriction. It also noted the existence of less anticompetitive alternatives.

This is not to say that every joint venture/product necessity boycott should be regarded as legal or even subjected to the rule of reason. Again, the crucial consideration is not whether the boycott has some anticompetitive characteristics but whether those characteristics are necessary to produce offsetting procompetitive effects. There is no reason to regard as legal or even to examine very closely so-called product necessity boycotts that employ means that are not the least anticompetitive possible. For example, a decision by the sponsors of golf tournaments not to allow the use of golf balls produced by a specific supplier would not be necessary to hold a successful tournament. On the other hand, a decision to require all golfers to use balls, regardless of the manufacturer, that meet uniform specifications would be consistent with advancing a competitive product.

When there is no plausible procompetitive outcome that necessitates collective action, it is unnecessary to seriously consider the ancillary restraint. For example, in *Federal Trade Commission v. Indiana Federation of Dentists*, the Supreme Court rejected out of hand an agreement among dentists not to submit X-rays to insurance companies that would assess the necessity and, consequently, the coverage of treatment indicated by the X-rays. Dentists argued that not submitting X-rays would enhance
the quality of dental care. Precisely why each dentist would not offer the highest quality of care feasible in the absence of the joint effort was not clear.

The area of professional qualifications is one in which procompetitive, boycott-like actions are often found. For example, the Supreme Court has recognized that professional associations may enforce ethical requirements. These actions may lower information costs for consumers and allow the profession to compete more effectively with other suppliers. Similarly, physicians practicing as a group may offer a greater variety of services with easier referrals and coordination than they could individually. This increases competition in the market and lowers patient search costs. Similar justifications exist for exclusive panels of physicians on hospital staffs. Again, at least some of the benefits of the arrangements must be captured by the participants themselves and this would be unlikely or impossible without some level of exclusivity.

These cases, like their intellectual property counterparts, are characterized by the importance of curtailing free riding in order that something beneficial to the general public be created. Three Supreme Court cases, in particular, separated in time and by judicial philosophy, are indicative of this process. In *Silver v. New York Stock Exchange*, the plaintiff was an over the counter municipal bond brokerage firm with a private phone link to the Stock Exchange. This link was evidently essential for the continued operation of the firm, because the plaintiff went out of business when the link was discontinued. The Supreme Court, in 1963, noted that unless the Stock Exchange was viewed as enjoying some form of immunity, the exclusion would be per se unlawful. This automatically illegal approach left little or no room to assess the actual competitive impact of the exclusion or the set of rules that led to the exclusion.

When competition is eliminated as it was in *Silver*, an approach that allows a procompetitive justification is appropriate to remove the practice from the per se category to the rule of reason category. This requires a showing that the procompetitive purpose necessitates the anticompetitive action. Judge Bork has written about *Silver*, "The NYSE is a joint economic endeavor, and there must be some circumstance under which it can order its member not to refuse to deal . . ." While Bork is correct, permitting the possibility of some justification for refusing to deal to result in a rule of reason approach without first requiring the defendants to offer a plausible procompetitive justification makes little sense. More specifically, what benefits does the refusal to deal allow defendants to internalize and how are consumers, therefore, better off? If *Silver* were a free rider, the exclusion could be a net benefit to consumers. Instead *Silver*’s exclusion was the result of not reporting certain information in its application and engaging
in practices that were seen as ‘derogatory’ in nature. Similarly, there is little indication that Silver’s exclusion lowered costs – production or transaction. Unless the questions about Silver’s prior practices could have been translated into generalized harm to the operation of the Stock Exchange, the principal impact was to reduce output. In short, Silver represents a case in which no plausible procompetitive necessity was offered.

The second case is Associated Press v. United States. Here again the Court applied a per se standard to prohibit the news gathering coop from denying non-member newspapers access to the news items gathered by members of the coop. More specifically, members were not permitted to sell AP stories to other newspapers. According to the Court:

. . . the fact that an agreement to restrain trade does not inhibit competition in all of the objects of that trade cannot save it from the condemnation of the Sherman Act. It is apparent that the exclusive right to publish news in a given field, furnished by AP and all of its members, gives many newspapers a competitive advantage over their rivals.

In this case, almost certainly the Court could have refined its analysis in order to examine the possible impact. The Associated Press is, in effect, a joint venture among newspapers. Each took from and contributed to the whole. In effect, the cost of access to news of others is the contribution of news stories. The collected news had an intellectual property-like quality in that selling it to non members could undercut the incentive to share news with the rest of the coop. For example, newspaper A may be a member of Associated Press in competition with newspaper B, a non-member. What A is able to do is publish news about events in relatively remote locations without having a reporter present in those locations. If other members of the coop sell stories to newspaper B, the return on A’s investment (of making stories available to other members of the coop) diminishes. At least some degree of exclusivity was a necessary part of the coop. A more discerning analysis would have examined whether the restriction on selling stories was the least restrictive measure necessary to preserve the coop.

More troublesome in terms of determining the appropriate treatment is a more recent case, Northwest Wholesale Stationers v. Pacific Stationery and Printing Co. Northwest was a buying coop composed of retail sellers of office supplies. It also acted as a wholesaler. The coop members, but not other customers of the coop, received rebates at the end of the year. In effect, coop members acquired inventory at lower prices than non-members. Pacific, both a wholesaler and a retailer, was a member of the coop before its suspension for reasons allegedly connected to a failure to report an ownership change. For the most part it appears the Court used Northwest Wholesale Stationers as an opportunity to modernize its
position on boycotts. It held that the expulsion of a coop member was to be assessed under the rule of reason. In one of the more difficult passages in antitrust case law to interpret, the Court noted that it had ‘generally’ applied the per se standard in the case of classic boycotts (efforts to deny a competitor access to suppliers or customers). In addition, the firms involved ‘frequently’ possessed dominant market power and were unable to produce a convincing procompetitive justification. The Court then noted that not all of these conditions were necessary for an action to be labeled per se unlawful.

The obvious message was that the per se standard would be applied sparingly and, probably only in the case of classic boycotts. In its haste to bring the notion of ‘boycotts’ in line with its post-Chicago approach to previously per se offenses, the Court may have missed an opportunity to announce a more economically-oriented approach. To understand why, it is important to note that there was no question that an agreement existed among competitors and that the outcome of the expulsion was to raise the costs of a party that threatened to compete both as a wholesaler and as a retailer. This would be enough to conclude that the agreement and the expulsion were more likely than not to make a relevant market less competitive. In short, a horizontal agreement that injures a competitor whose membership was once unobjectionable, is enough to require the defendants to explain why the action was ultimately beneficial to consumers. Instead, the Court’s approach seems to be the opposite – one that asks whether there is any possible procompetitive reason for the expulsion. Thus:

the act of expulsion from a wholesale cooperative does not necessarily imply anticompetitive animus and thereby raise a probability of anticompetitive effect. Wholesale purchasing cooperatives must establish and enforce reasonable rules in order to function effectively. Disclosure rules, such as the one on which Northwest relies, may well provide the cooperative with a needed means for monitoring the creditworthiness of its members.

The Court applies something that is close to the rational relationship test from constitutional law.

As already noted, this is not to say that the Court’s decision is economically incorrect. For example, using the approach suggested here, the questions would have been: (1) What does a buying coop deliver for consumers? and (2) Is a policy that requires expulsion of a member who does not report an ownership change necessary to protect those consumer benefits? In short, what is the connection between expulsion and possible free riding by a coop member?

Specifically, a broader examination of the facts of the case illustrates how the methodology suggested here would have likely led to the same
outcome while setting forth a more economically rational approach. Pacific Stationery, the plaintiff in the case, was operating at both the wholesale and retail level. In fact, the coop passed a rule, evidently after Pacific Stationery became a member, prohibiting wholesale operations by members. Pacific Stationery was grandfathered in and shortly thereafter was expelled for failing to report the change in membership. In fact, Pacific Stationery argued that the expulsion based on the reporting problem was a pretense and that the actual motivation for expulsion was the wholesale operation. The Court’s response was:

[s]uch a motive might be more troubling. If Northwest’s action were not substantially related to the efficiency-enhancing or procompetitive purposes that otherwise justify the cooperative’s practices, an inference of anticompetitive animus might be appropriate. But such an argument is appropriately evaluated under the rule-of-reason analysis.

Given these facts, a more promising analysis would have asked whether it was anticompetitive to suspend a coop member for operating at the wholesale level in competition with the coop. First, the Court could have recognized the procompetitive effects of the coop. Second, the Court could determine whether expulsion of wholesale competitors was necessary to achieve these gains. Almost certainly an expulsion would be necessary. In effect, whatever consumer-benefiting effects are generated will only exist if members of the coop are permitted to internalize some portion of the gain. A coop member who enters into competition with the coop at the wholesale level is likely to be a free rider with the capacity to undercut the necessary internalization.

C. Non-regulatory boycotts
When a group of competitors combines and communicates to suppliers or to customers that they will lose the business of the group if the suppliers or customers deal with a competitor or potential competitor, the term ‘classic boycott’ is applied. The law on these types of boycotts was both relatively clear and economically rational until the early 1980s. These types of boycotts were per se unlawful. Since that time, due to reinterpretation of the early cases and confusing language, the status of these types of boycotts is in doubt. The question here is whether movement of classic boycotts from a per se status to either a rule of reason or a ‘quick look’ approach is consistent with an economic approach to boycotts as set out at the beginning of this chapter.

Three cases are generally regarded as establishing the rule of per se illegality for group boycotts. In *Eastern States Retail Lumber Dealers’ Association v. United States*, retail sellers of lumber agreed to keep track
of wholesalers that were selling to retail customers. The defendants argued that the arrangement was ‘promotive of the public welfare in providing retail facilities’. In short, for the retail level to survive, wholesalers’ access to retail customers had to be inhibited. Obviously, this was a weak argument even in 1914. There was no connection between consumer welfare and an independent layer of ‘retailers’ in the chain of distribution. Although the case was decided in advance of the development of the per se rules, the Court dealt with the issue without any serious examination of the impact on the market. This treatment was obviously consistent with the approach suggested here – the exclusion of new competitors in sales to consumers was hardly a procompetitive end that justified the boycott.

In *Fashion Originators’ Guild v. Federal Trade Commission*, the designers and manufacturers of women’s clothing agreed not to sell to retailers who purchased clothing from so-called ‘style pirates’. Style pirates manufactured ‘knock-offs’ – clothing based on the original designs of defendants. The procompetitive justification was that the style pirates were free riders and the consequence of the free riding was that designers of originals were unable to internalize the benefits of their efforts and creativity. They were, in effect, attempting to create through a form of self-help an outcome comparable to that enjoyed by authors and inventors under federal copyright and patent law. Although not using the term ‘per se’, the Court’s analysis left no doubt that an inquiry into actual impact was not necessary. The ‘purpose and object’ of the defendants was enough to fall within the prohibitions of the antitrust laws.

The public benefit justification of the defendants fell on deaf ears as it probably should have. First, the Constitutional provisions allowing Congress to pass laws to protect intellectual property are broad enough to authorize the protection of clothing design, but Congress has not so acted. In effect, the defendants attempted to create and protect a property right that Congress seems to have specifically declined to create. Second, as the Court noted, the means by which the defendant manufacturers sought to survive was the elimination of competing manufacturers. Just as the retailers in *Eastern States* attempted to survive by eliminating potential retailers, the defendants here attempted to eliminate their most powerful competitors. The argument of a competitor that it could survive if simply permitted to eliminate another competitor is not likely to be one the antitrust laws endorse.

Judge Bork offers another possible procompetitive justification. Suppose a manufacturer of originals attempted to compete through advertising and other means. That advertising might result in visits to the store but if competing, less expensive knock-offs are available, consumers would choose them and, perhaps, even be steered to them. The manufacturer
could avoid these problems if it became the exclusive supplier to the retailer. The manufacturer could threaten to pull his products without a promise of exclusivity. According to Judge Bork, the promise of exclusivity is unlikely to be made if the manufacturer demanding it could not offer a complete product line. An agreement among several manufacturers may be a means of offering a complete product line. Thus, the combination ‘may be nothing more than an attempt to gain efficiencies of advertising and promotion that lead to exclusive dealing in many industries’. This would permit the manufacturers of original fashions to compete with other manufacturers free of the free riding problem. Judge Bork’s analysis has the flavor of a product necessity defense. It is similar to the theory that it may make sense to limit intrabrand competition as a means of increasing interbrand competition.

In effect, Judge Bork offers this as a possible procompetitive rationale for what amounts to a demand by one set of competitors that they be dealt with exclusively at the expense of other competitors who have not similarly combined. This was essentially what the Fashion Originators did. His point seems to be that a per se rule eliminates an exploration of this possibility. It is important to note that Judge Bork is not proposing limiting intrabrand competition in order to increase interbrand competition. Instead it is the more difficult case of weighing restrictions on interbrand competition as a means to increase competition among a different set of interbrand competitors. Moreover, it is not clear that the procompetitive end will be produced at all; in terms of free riding, it has little impact. If a buyer can visit one store to examine designer clothing and buy a substitute at a store three doors down, the anticompetitive act does not achieve what Judge Bork is looking for. In fact, what may be more likely to achieve Bork’s desired end are designer-only stores that demand a cover charge. Prohibiting photography within those stores would also raise the cost of producing knock-offs.

The third key classic boycott case is (or for reasons explained below, was) Klor’s Inc. v. Broadway-Hale Stores, Inc. There, Broadway Hale, a retailer, pressured its suppliers not to sell to Klor’s, a retail level competitor. The defendant offered to demonstrate that there was no actual anticompetitive effects since both Klor’s and Broadway-Hale had many nearby competitors. The Court clearly applied the per se standard by indicating the boycott fell into the ‘forbidden category’ of cases that could not be saved by arguments that they are reasonable.

The application of Klor’s to classic boycott cases was undermined in Business Electronics Corporations v. Sharp Electronics Corporation, a resale price maintenance case. There the Court suggested that a critical element in Klor’s was the existence of horizontal agreements among
manufacturers and distributors. In effect, Broadway-Hale acted alone in facilitating an agreement, but there was no agreement among firms at the level at which the boycotted firm operated.

The legal position of classic boycotts was, as described earlier, further scrambled by the Court in *Northwest Wholesale Stationers*. There, in a non-classic boycott case, the Court described its prior use of the per se standard as involving boycotts in which some combination of three factors were involved: an agreement to deny access to suppliers or customers; a dominant market share; and the absence of a procompetitive justification. No further clarification has been offered. Still, to some extent, *Northwest Wholesale Stationers* could have revitalized at least one element of the rule applied in *Klor’s*. Specifically, in describing past boycotts that were deemed to be per se unlawful, the Court refers to ‘joint efforts by a firm or firms to disadvantage competitors’. The term ‘joint efforts’ suggests an agreement is necessary at the level where competition is decreased. On the other hand, the word ‘firm’ suggests that a *Klor’s*-like arrangement would also qualify for the per se rule. In other words, a single firm could orchestrate a boycott if it had enough power to coerce suppliers or customers. In addition, after *Northwest Wholesale Stationers*, it seems clear the Court has indicated its receptiveness to an ancillary restraints analysis of boycotts in the same manner that it has indicated that willingness in the context of other cases involving horizontal restraints.

If this is the case, an argument like that put forth by Justice Bork in the context of *Fashion Originators* would likely be the type of restraint that a court might be expected to consider. Unfortunately, in *Northwest Wholesale Stationers* the Court does not offer examples of the possible procompetitive effects of classic boycotts. It is doubtful that many such procompetitive justifications exist in part because they ultimately are based on the premise that the market will be more competitive if one interbrand competitor is, or a group of interbrand competitors are replaced by another group of interbrand competitors.

One useful exploration of the status of group boycotts in the post *Northwest Wholesale Stationers* era is *Toys ‘R’ Us v. Federal Trade Commission*. The case takes the form of *Klor’s*. Toys ‘R’ Us, a retailer of toys, formed vertical agreements with manufacturers and helped facilitate agreements among manufacturers designed to prevent the sale of toys to large discount clubs or warehouse stores. Evidently, the vertical agreements alone were not sufficient to achieve Toys ‘R’ Us’s ends because manufacturers were concerned that other manufacturers would ‘cheat’ and continue making the sales to the warehouse stores. Notably, there was no agreement at one distribution to eliminate competition at that level.

The Federal Trade Commission regarded the network of agreements as
per se unlawful and was affirmed by the Seventh Circuit Court of Appeals. The court followed the *Northwest Wholesale Stationers* roadmap. Toys ‘R’ Us had acted to eliminate competition at its level by coercing its suppliers not to sell to Toys ‘R’ Us’s competitors. Toys ‘R’ Us possessed dominant power as a buyer of toys and, although it offered an ‘avoidance of free riding defense’, the court properly rejected it. The court stressed the importance of the horizontal agreement among manufacturers. The implication is if Toys ‘R’ Us, as a powerful buyer, had simply entered into a series of vertical agreements with each manufacturer then a per se analysis would not have been appropriate. Then the question would have been whether a series of exclusive dealing arrangements would violate the Act. This would involve applying a rule of reason analysis.

The position of classic boycotts, like other violations that were once per se unlawful, is less predictable than it once was. The term ‘per se’ may still be used but the language in *Northwest Wholesale Stationers* seems to require a horizontal agreement at either the pressuring level or the pressured level. In addition, the firm or firms at the level benefitting from the boycott may need to possess market power. Finally, the Court will consider procompetitive justifications. This modern rule sacrifices the economies inherent in the per se rule. It is not clear that it makes a great deal of sense from an economic point of view. The consistent procompetitive argument in a classic boycott is that one competitor or a group of cooperating competitors is somehow superior to another competitor or group of competitors and that the superiority cannot be established through market forces alone. If one returns to the intellectual property analogy, the argument should be pressed at least to the point of asking what anticompetitive free riding would take place in the absence of the boycott. A plausible argument to this effect seems unlikely. In fact, in the context of the classic boycott, it does not appear that the Supreme Court has yet found such a case.

D. Conclusion
Although all boycotts do not fall neatly into one category or the other, for the most part they are designed either to regulate competition among a group of competitors or to eliminate actual or potential competitors. In both cases, as in every other antitrust question, the ideal distinction is between those agreements that leave consumers better off and those that leave them worse off. Complexity arises because in order for even procompetitive boycotts to exist, there must be some gain to those engaged in the boycott. In short, there must be some internalized benefit.

This chapter proposes the use of an intellectual property analogy. The question is whether the costs of exclusion and internalization by the
boycotters is offset by the gain to others. It also suggests that regulatory and classic boycotts be treated slightly differently and finds that, with some exceptions, judicial treatment of boycotts has evolved to the point of recognizing this difference. In the case of regulatory boycotts, the goal is not to eliminate competitors. Consumer choices still determine the end result. In this context, defendants should be able fairly easily to escape per se condemnation by indicating: (1) A plausible procompetitive end and (2) That the horizontal agreement represents the least restrictive means of achieving that end.

Classic boycotts are different. Here the goal is to eliminate actual competitors. In effect, the agreeing firms want to bypass the market and consumer choice. A court’s approval of these agreements represents a decision that one group of competitors is competent to determine that another group of competitors is to be eliminated and that this is in the interest of consumer welfare. This type of economic paternalism is worrisome and there appear to be few cases in which such authority should be vested with competitors. A per se rule is probably still warranted in these cases. If not, it should be avoided only by a clear showing of a not merely plausible, but likely, procompetitive justification.

Notes
1. Stephen C. O’Connell Chair and Professor of Law, University of Florida College of Law.
2. See e.g., Eastern States Retail Lumber Dealers’ Ass’n v. United States, 234 U.S. 600 (1914).
4. Id.
8. In practice, if a practice is not per se unlawful it will be assessed under the rule of reason. This typically means the defendant prevails.
9. For an application of the same analysis to market power questions see Coase, supra note 7.
10. This is because consumers will lose not simple consumer surplus that is captured by the boycotters but the deadweight loss associated with all deviation from conditions of perfect competition. The question for a court becomes how to allocate the right in a manner that is consistent with wealth maximizing principles.
12. The idea of viewing the issue in the context of a market emphasizes the wealth maximizing or Kaldor-Hicks approach to the issue. The Kaldor-Hicks or wealth maximizing concept to efficiency requires that resources be allocated to those who value them the most. The outcome is sometimes called potential Pareto Superior because in a transaction cost free context the parties would have voluntarily bargained for the exchange.

14. The narrow case-by-case cost benefit analysis is hardly reflected in statutory patent law or copyright law although certain elements of both these areas of law can be squared with an economic approach.


19. The connection to the treatment of covenants not to compete under the common law is obvious. In that context, the covenant must be appropriate with respect to the activity, the time period and the geographic area affected.

20. This justification was offered in FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986).


22. Id. at 170.


24. Id. at 1266.


28. 593 F.2d at 1178.

29. The court did not address the economic competition on the buying side of the market and the monopsony power of the League.

30. Id. at 1187. Subsequently, in Powell v. National Football League, 711 F. Supp. 959 (D. Minn. 1989) the draft was held to fall within the nonstatutory labor exemption for collective bargaining agreements.


34. See generally, Robert Heidt, ‘Industry Self-Regulation and the Useless Concept of “Group Boycott”’, 39 Vand. L. Rev. 1507 (1986). For some period of time between Silver v. New York Stock Exchange, 373 U.S. 341 (1963) and Northwest Wholesale Stationers v. Pacific Stationery and Printing Co., 472 U.S. 284 (1985) the analysis of these agreements often concerned the issue of whether the excluded competitor had been afforded due process. In Northwest Wholesale Stationers, however the Supreme Court announced:

   In any event, the absence of procedural safeguards can in no sense determine the antitrust analysis. If the challenged concerted activity of Northwest’s members would amount to a per se violation of § 1 of the Sherman Act, no amount of procedural protection would save it. If the challenged action would not amount to a violation of § 1, no lack of procedural protections would convert it into a per se violation because the antitrust laws do not themselves impose on joint ventures a requirement of process. (Id. at 293.)


36. Robert H. Bork, The Antitrust Paradox, 343 (1978) (emphasis in original). Interestingly, in his 1978 book Judge Bork identifies a number instances in which the per se rule against boycotts was applied. In addition to Silver, the list includes Fashion Originators’ Guild of America v. Federal Trade Commission, 312 U. S. 457 (1941) and Associated
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Press v. United States, 326 U.S. 1 (1945). He writes that it is impossible to know whether application of the per se rule did more harm than good. R. Bork at 338. This is an odd question given that we would not know whether any course of action would have done more harm than good. What we do know is that whatever impact those decisions had, the New York Stock Exchange and the Associated Press remain robust enterprises. Although the Fashion Originators’ Guild of America did cease operation, one would be hard pressed to show that the development of fashion has been slowed.

38. 326 U.S. 1 (1945).
39. Id. at 17 (notes deleted).
40. In theory, if the impact of exclusivity is extreme, access could be regarded as an essential facility. This is not to suggest that the essential facilities doctrine is a promising one for plaintiffs.
42. Id. at 287.
43. Id. at 294.
44. Id. at 296.
45. Id. at 287 n.7.
46. 472 U.S. 296 n.7.
47. This would be aside from agreeing in order to exert monopsony power. This is a distinction the Court seems to make. Id. at 295.
48. See discussion at text to notes 61–3, supra.
49. See the crucial language of Northwest Wholesale Stationers discussed at text to notes 42–5, supra.
50. 234 U.S. 600 (1914).
51. Id. at 613.
52. 312 U.S. 457 (1941).
53. Id. at 468.
54. Id. at 467–8.
56. Id.
58. This is the standard issue in any exclusive dealing arrangements.
60. Id. at 212.
62. Id. at 1525.
63. Id. at 294.
64. 221 F.3d 928 (7th Cir. 2000).
65. Id. at 932.

References

Cases and statutes

Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899).
E. States Retail Lumber Dealers’ Ass’n v. United States, 234 U.S. 600 (1914).
Fashion Originators’ Guild of America v. FTC, 312 U.S. 457 (1941).
Silver v. New York Stock Exchange, 302 F.2d 714 (2d Cir. 1963).
Toys ‘R’ Us, Inc. v. F.T.C., 221 F.3d 928 (7th Cir. 2000).