

# IP, AT, AND AAAs: WHAT INTELLECTUAL PROPERTY CAN TEACH ANTITRUST ABOUT THE WAR ON AMAZON BASICS

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## INTRODUCTION

Amazon is magical. Search the online marketplace for pretty much anything you can imagine—not to mention all the things you never imagined;<sup>1</sup> you will likely find what you were searching for and be able to have it delivered in two days or less. The magic is not just in Amazon's vast array of innovative consumer products but also in its providing access to goods that are unavailable locally.<sup>2</sup> An extreme example of Amazon's ability to supply goods that were not locally available may be found in the pandemic lockdowns of 2020, when neighborhood stores were out of toilet paper and hand sanitizer, if the stores were even open.<sup>3</sup> These critical goods could often still be purchased from Amazon—although sometimes at pandemic pricing levels—and delivered to our doorsteps without any human contact required.<sup>4</sup>

Another source of Amazon's magic is its access to sellers that consumers may never otherwise know. Brick-and-mortar stores have limits on the number of goods they can warehouse and display, thus limiting the number of sellers they can support.<sup>5</sup> But Amazon's online storefront, and the fact that many products are not warehoused by Amazon but are instead shipped directly from a third-party seller,<sup>6</sup> means that Amazon does not face the same spatial limitations, opening up a vast universe of potential sellers to consumers. And on the flipside, Amazon's platform and reputation allow third-party sellers to reach a wide and diverse swath of new consumers.<sup>7</sup>

The last piece of Amazon's magic is affordability. In addition to offering products from third-party sellers on its platform at a variety of price points, Amazon offers an extensive line of private label goods at affordable prices.<sup>8</sup> Amazon Basics, the most popular and well-known of

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1. There are many blog posts, YouTube videos, and other resources if you are curious about what sorts of things Amazon carries that you never knew you needed. *See, e.g.,* Amanda Oliver, *36 Things You Didn't Know You Needed on Amazon*, REVIEWED: USA TODAY (Feb. 6, 2020), <https://reviewed.usatoday.com/home-outdoors/features/36-products-on-amazon-you-didnt-know-you-needed> [https://perma.cc/E5X7-ZLWG].

2. *See* Alison Kline, *How Amazon Managed the Coronavirus Crisis and Came Out Stronger*, CNBC (Sept. 29, 2020), <https://www.cnbc.com/2020/09/29/how-amazon-managed-the-coronavirus-crisis-and-came-out-stronger.html> [https://perma.cc/V2DF-QRVN].

3. *Id.*

4. *See* Richard D. Wang & Cameron D. Miller, *How Third-Party Sellers Can Make Amazon Work for Them*, HARV. BUS. REV. (July 15, 2020), <https://hbr.org/2020/07/how-third-party-sellers-can-make-amazon-work-for-them> [https://perma.cc/SUL5-9G79].

5. *Id.*

6. *See* Matt D'Angelo, *How to Start Selling on Amazon*, BUS. NEWS DAILY (Oct. 20, 2023) <https://www.businessnewsdaily.com/11208-sell-amazon-marketplace-guide.html> [https://perma.cc/DHJ3-VEJZ].

7. *Id.*

8. *See* Katie Tarasov, *How Amazon's Big Private-Label Business is Growing and Leaving Small Brands to Protect Against Knockoffs*, CNBC (Oct. 12, 2022), <https://www.cnbc.com/2022/10/12/amazon-private-label-business-growing.html>.

Amazon's private label goods, was created in 2009 to offer customers "a line of consumer electronics basics that combine quality and low prices for an overall focus on value."<sup>9</sup> Today, Amazon Basics extends well beyond electronics and offers household goods and furniture, office supplies, toys, and more.<sup>10</sup> Amazon Essentials provides a similar offering for clothing.<sup>11</sup>

Batteries are a popular Amazon Basics item and illustrate the premise and allure of Amazon Basics.<sup>12</sup> A recent search for AAA batteries on Amazon showed a thirty-six pack of Amazon Basics batteries costs about \$13, while Duracell and Energizer batteries come in twenty-four packs and cost around \$18.<sup>13</sup> Amazon Basics batteries are cheaper and, unlike other discount brands (of which there are many, based on this search),<sup>14</sup> Amazon has a known brand-name and reputation to stand behind the product.

Despite these three benefits—array and availability of products, access to new sellers and consumers, and affordability—Amazon has increasingly become a scapegoat for modern antitrust enforcement and policy.<sup>15</sup> According to regulators, politicians, and commentators, the online storefront has become too big, too successful, and too dangerous.<sup>16</sup> Some of the claims against Amazon are grounded in traditional antitrust doctrine. For example, the lawsuit filed in September 2023 by the FTC and seventeen

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[www.cnn.com/2022/10/12/amazons-growing-private-label-business-is-challenge-for-small-brands.html](https://www.cnn.com/2022/10/12/amazons-growing-private-label-business-is-challenge-for-small-brands.html) [https://perma.cc/4CTW-FWCP].

9. See *id.*; see also Press Release, *Amazon.com Introduces AmazonBasics*, AMAZON, (Sept. 19, 2009), <https://press.aboutamazon.com/2009/9/amazon-com-introduces-amazon-basics> [https://perma.cc/VGJ7-ZVT9].

10. See *Amazon Basics*, AMAZON, [https://www.amazon.com/stores/node/20648519011?channel=discoverbar?field-lbr\\_brands\\_browse-bin=AmazonBasics&ref\\_=nav\\_cs\\_amazon-basics](https://www.amazon.com/stores/node/20648519011?channel=discoverbar?field-lbr_brands_browse-bin=AmazonBasics&ref_=nav_cs_amazon-basics) [https://perma.cc/67VT-GQXX] (last visited Oct. 28, 2024).

11. See *Amazon Essentials*, AMAZON, <https://www.amazon.com/stores/AmazonEssentials/AmazonEssentials/page/F8FB6F3C-F896-455C-BC52-7879F4CEF0CF> [https://perma.cc/65WW-VHK7] (last visited Oct. 28, 2024).

12. See Sarah Emerson, *Unraveling the Secret Origins of an AmazonBasics Battery*, MEDIUM (Oct. 30, 2019), <https://onezero.medium.com/unraveling-the-secret-supply-chain-behind-an-amazonbasics-battery-e7b9ead4d72e> [https://perma.cc/59PE-GQWX].

13. Energizer and Duracell are the most popular and highly rated brands of batteries. See Daniel Walker, *Energizer v. Duracell: Which Brand Has the Better Batteries*, BATTERY SPECIALISTS (Jan. 13, 2022), [https://batteryspecialists.com.au/blogs/news/energizer-vs-duracell-which-brand-has-the-better-batteries?srltid=AfmBOorD\\_bqy4AvAFeyExOdZ3IvhfUH2M2w15grUAg\\_5qZcXXdqz7Tn-](https://batteryspecialists.com.au/blogs/news/energizer-vs-duracell-which-brand-has-the-better-batteries?srltid=AfmBOorD_bqy4AvAFeyExOdZ3IvhfUH2M2w15grUAg_5qZcXXdqz7Tn-) [https://perma.cc/AB8V-3BQF].

14. See *Amazon Basics*, *supra* note 10; Emerson, *supra* note 12.

15. See, e.g., Gerhard Maier, *Economics: How Did Amazon Become the Scapegoat?*, DRIVEBYCURIOSITY (Nov. 29, 2021), <https://drivebycuriosity.blogspot.com/2021/11/economics-how-did-amazon-become.html> [https://perma.cc/78C5-WXTX].

16. See, e.g., *id.*; Charles Duhigg, *Is Amazon Unstoppable?*, THE NEW YORKER (Oct. 10, 2019), <https://www.newyorker.com/magazine/2019/10/21/is-amazon-unstoppable> [https://perma.cc/9YW6-DT26]; Angel Gonzalez, *How Big Is Too Big? Amazon Sparks Antitrust Concerns*, THE SEATTLE TIMES (Aug. 6, 2017), <https://www.seattletimes.com/business/amazon/how-big-is-too-big-amazon-sparks-antitrust-concerns/> [https://perma.cc/7V9U-QHV8].

states alleges that Amazon is using exclusionary tactics to stifle competition on price, product selection, and quality, as well as to maintain its monopoly.<sup>17</sup> Other claims against Amazon have been raised but do not fall under the typical scope of antitrust; these include claims of unfair labor practices, environmentally damaging behavior, and social justice issues.<sup>18</sup>

Unfortunately, even if the focus is limited to claims that are properly based in antitrust, there are some concerns. Specifically, some of these antitrust allegations attack behavior that is, in reality, exactly what competition law and policy are meant to achieve. In general, antitrust is thought to be the legal regime that steps in when markets are failing or are in danger of failing.<sup>19</sup> Markets are considered failing, and antitrust law is invoked, when there is a lack of competition, either because a number of firms in the market are conspiring to affect competition or one firm in the market has the power to exclude others in a way that hinders competition.<sup>20</sup> From the perspective of the consumer, competition is often assessed by considering whether the price accurately reflects supply and demand versus whether the price is artificially elevated by the lack of competition.<sup>21</sup> Other axes of competition should be considered, including quality, service, and innovation.<sup>22</sup>

One of the most commonly raised claims against Amazon involves its offering of private label goods, such as Amazon Basics.<sup>23</sup> These private label goods provide affordability and access to consumers.<sup>24</sup> However, many lawmakers and antitrust enforcers claim that Amazon's behavior regarding its private label brands is anticompetitive and an antitrust

17. See, e.g., Press Release, *FTC Sues Amazon for Illegally Maintaining Monopoly Power*, FED. TRADE COMM'N (Sept. 26, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-sues-amazon-illegally-maintaining-monopoly-power> [<https://perma.cc/9D48-2J9R>].

18. See, e.g., Todd Wasserman, *Amazon's Biggest, Hardest-to-Solve ESG Issue May Be Its Own Workers*, CNBC (Aug. 29, 2021), <https://www.cnbc.com/2021/08/29/amazons-biggest-hardest-to-solve-esg-issue-may-be-its-own-workers.html> [<https://perma.cc/L5YP-GZSA>]; Laura Weiss, *Amazon Faces Activism, Rising Tide of 'Environmental Justice'*, ROLL CALL (June 10, 2021), <https://rollcall.com/2021/06/10/amazon-faces-activism-rising-tide-of-environmental-justice/> [<https://perma.cc/3WJB-GNW2>].

19. See, e.g., *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, 4 F. Supp. 3d 1123, 1137 (D. Ariz. 2014) ("The purpose of antitrust is not to protect market participants from the market; it is to protect the public from market failure."), *aff'd*, 836 F.3d 1171 (9th Cir. 2016).

20. See *Monopolization Defined*, FED. TRADE COMM'N, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/single-firm-conduct/monopolization-defined> [<https://perma.cc/7N3G-ELEQ>] (last visited Oct. 28, 2024).

21. See Irena Asmundson, *Supply and Demand: Why Markets Tick*, INT'L MONETARY FUND, <https://www.imf.org/en/Publications/fandd/issues/Series/Back-to-Basics/Supply-and-Demand> [<https://perma.cc/W2YG-5477>] (last visited Oct. 28, 2024).

22. See *id.*

23. See, e.g., Lesley Hensell, *Proposed Antitrust Laws Could Hurt Amazon Sellers and Consumers*, FORBES (July 13, 2022), <https://www.forbes.com/sites/forbesbusinesscouncil/2022/07/13/proposed-antitrust-laws-could-hurt-amazon-sellers-and-consumers/> [<https://perma.cc/94LG-2WZX>].

24. See Tarasov, *supra* note 8; Press Release, *supra* note 9.

violation.<sup>25</sup> A different perspective is that Amazon, in part through its private label brands, has done precisely what antitrust laws are intended to foster: Amazon has adapted, innovated, and attracted customers through competition via lower prices, better service, and superior goods.<sup>26</sup>

The restrictions proposed by lawmakers and antitrust enforcers are likely to inhibit the current function of Amazon, in essence eviscerating some of what makes the company so beneficial to consumers.<sup>27</sup> Rather than assessing what the market will look like if Amazon continues to sell Amazon Basics, lawmakers and antitrust enforcers seem to be jumping straight to potential remedies. Opponents want Amazon to (a) stop using data about what is sold on the platform, (b) share this data with its competitors, (c) prioritize third-party competitors over Amazon's own products, or (d) stop selling its own products altogether on its platform.<sup>28</sup> There has been little to no assessment as to how these proposed remedies will change the market.

Worse still, some of the anticompetitive conduct that Amazon is being accused of is no different from conduct of brick-and-mortar stores,<sup>29</sup> and yet these marketplaces are not under fire.<sup>30</sup> In fact, some of the arguments being lodged today against Amazon have already been asked and answered in favor of the seller in the brick-and-mortar world,<sup>31</sup> raising questions about what exactly competition authorities are trying to do in this case.

This Article explores the war on Amazon Basics, and particularly the dichotomy in treatment of private label goods sold by Amazon versus those sold by brick-and-mortar stores. Using the lenses of antitrust law and intellectual property law to assess the anticompetitive claims being lodged against Amazon Basics, this Article argues that under either set of laws, Amazon Basics is beneficial to consumers and is promoting—not harming—competition. Moreover, this Article considers the guardrails

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25. See, e.g., Hensell, *supra* note 23 (noting that proposed legislation “started with the premise that Amazon should not be able to compete with other brands via its own private label products”).

26. See, e.g., Gregory Day, *Innovative Antitrust and the Patent System*, 96 NEB. L. REV. 829, 832–33 (2018) (explaining the role of innovation for competition); see also *id.* at 830 n.3 (describing competition as bringing lower prices, higher quality, and higher output).

27. 25See Hensell, *supra* note 23 (noting that the proposed legislation would likely eliminate Amazon as a marketplace, or at the very least, force the company to make significant changes in its offered services).

28. *Id.*; see generally Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L. J. 710 (2017).

29. See Hensell, *supra* note 23 (“Every major online retailer sells products sourced through wholesale relationships with vendors, as does every brick-and-mortar store.”).

30. See Khan, *supra* note 28, at 782 (“It is true that brick-and-mortar retailers sometimes also introduce private labels and may use other brands’ sales records to decide what to produce. The difference with Amazon is the scale and sophistication of the data it collects.”).

31. See *infra* Part II.

imposed by intellectual property law on private label and generic goods and illustrates that not only does intellectual property law provide sufficient protection for competitors of Amazon, but it also highlights the positive aspects of private label goods. This Article concludes that the war on Amazon Basics is the wrong approach, is unnecessary, and is likely to do more harm than good.

## I. THE WAR ON AMAZON BASICS

This Section will describe private label goods generally, as well as Amazon Basics and Amazon's other private label brands. Next, this Section will discuss the allegations of harm that are being raised against Amazon Basics by antitrust enforcement agencies, as well as explore whether similar issues are present with private label goods in a brick-and-mortar setting. Finally, this Section will describe the current state of enforcement actions and legislation against Amazon related to these issues.

### A. What are private label goods?

Private label, or store brand, goods are a common part of consumerism in the United States and have been for many decades.<sup>32</sup> When you go into any reasonably sized brick-and-mortar drugstore or grocery store—think CVS or Kroger—you are going to find private label goods. These goods span a wide range of product areas from hand lotion to aluminum foil to canned vegetables and more. Sometimes the private label references the store itself, such as CVS-branded lotion, while other private labels adopt a different brand. Kroger, for example, uses Simple Truth and Private Selection, as well as Kroger on various private label goods.<sup>33</sup>

Private label goods are viewed as positive for consumers and for competition generally.<sup>34</sup> The primary purpose of these goods is to provide consumers with a lower-priced alternative to a name brand good without requiring the consumer to expend significant search costs to identify that alternative.<sup>35</sup> Private label goods very often have incredibly similar trade dress, or packaging design, to the name brand products.<sup>36</sup> CVS's brand of hand lotion is packaged nearly identically to Vaseline Intensive Care hand

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32. See, e.g., Laura A. Heymann, *Trademark Law and Consumer Constraints*, 64 ARIZ. L. REV. 339, 372–73 (2022) (discussing private label goods and their prevalence, dating back to the 1800s).

33. See *id.* (“[P]rivate label goods are a mainstay for many large retailers, whether the product is sold under the trademark of the retailer or whether the retailer establishes its own mark for its private label goods.”).

34. *Id.* at 372–73.

35. See *id.* at 342, 372–73.

36. See *id.* at 373 (“[S]ome private label brands have adopted packaging trade dress that closely resembles that of the comparable national brand to easily indicate similarity to the consumer and ‘reassure the customer by a consistent look that the quality of the private label product is similar [to] or as good as the national brand[.]’”).

lotion, right down to the different colors of bottles to indicate different types of lotion.<sup>37</sup> The CVS brand sits on the shelf next to the Vaseline Intensive Care lotion and may even have a signal on its label to “compare to Vaseline Intensive Care.”<sup>38</sup> The CVS-brand lotion is generally available at a lower price point than the name brand product, which helps differentiate it from the name brand product that it mimics.<sup>39</sup>

Amazon controls about thirty-eight percent (38%) of the United States’ E-commerce market.<sup>40</sup> It provides cloud computing services and hosts an online marketplace, Amazon Marketplace, where it serves as a platform for third-party sellers.<sup>41</sup> Amazon is vertically integrated and owns its own shipping and fulfillment services that make “Amazon Prime” free, two-day shipping possible.<sup>42</sup> Because of Amazon’s large customer base and robust shipping network, Amazon is able to provide major benefits to third-party sellers as a platform.<sup>43</sup> About two-thirds of revenue on Amazon.com is attributable to third-party sales.<sup>44</sup>

Amazon also manufactures and sells its own private label goods, including under the name Amazon Basics.<sup>45</sup> Amazon claims its private label brands account for just a small percentage of overall product sales, although private label goods are a significant source of profits since Amazon need not spend a lot on advertising.<sup>46</sup> Of course, this is not unique to Amazon or

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37. See *Conopco, Inc. v. May Dep’t Stores Co.*, 46 F.3d 1556, 1567 (Fed. Cir. 1994); see, e.g., *CVS Health Hand and Nail Care Lotion*, CVS, [https://www.cvs.com/shop/cvs-health-hand-and-nail-care-lotion-3-25-oz-prodid-1015954?skuld=265245&cga=QWxsb3dHb29nbGVUb0FjY2Vzc0NWU1BhZ2Vz&cid=ps\\_bea\\_ski\\_pla&gclid=Cj0KCQjw7Py4BhCbARIsAMMx-LbUedOfrUANaBC52RYwRS9P5Wr\\_8PSwPBCfn6H7jhIHFjCgIx3FQaAmL2EALw\\_wcB&gclsrc=aw.ds](https://www.cvs.com/shop/cvs-health-hand-and-nail-care-lotion-3-25-oz-prodid-1015954?skuld=265245&cga=QWxsb3dHb29nbGVUb0FjY2Vzc0NWU1BhZ2Vz&cid=ps_bea_ski_pla&gclid=Cj0KCQjw7Py4BhCbARIsAMMx-LbUedOfrUANaBC52RYwRS9P5Wr_8PSwPBCfn6H7jhIHFjCgIx3FQaAmL2EALw_wcB&gclsrc=aw.ds) [https://perma.cc/XQ6L-VN85] (last visited Oct. 28, 2024); *Vaseline Intensive Care Healthy Hands Stronger Nails Lotion*, VASELINE, <https://www.vaseline.com/us/en/p/vaseline-intensive-care-healthy-hands-stronger-nails-lotion.html/00305210041837> [https://perma.cc/M7B4-4LAT] (last visited Oct. 28, 2024).

38. See, e.g., *supra* note 37.

39. See Heymann, *supra* note 32, at 372 (“Stores are able to sell private label goods at a cheaper price because they are both manufacturer and retailer, but because they don’t have the benefit of the national advertising conducted by the national brands, they need to compete at the point of sale.”).

40. Stephanie Chevalier, *Market Share of Leading Retail E-Commerce Companies in the United States in 2023*, STATISTA (May 22, 2024), <https://www.statista.com/statistics/274255/market-share-of-the-leading-retailers-in-us-e-commerce/> [https://perma.cc/HD72-8NNA].

41. *What We Do*, AMAZON, <https://www.aboutamazon.com/what-we-do> [https://perma.cc/5669-LUM5] (last visited Oct. 28, 2024).

42. *Amazon Prime*, AMAZON, <https://www.amazon.com/amazonprime> [https://perma.cc/5LVR-9SHB] (last visited Oct. 28, 2024). Prime members also gain access to other perks, such as online content.

43. See Wang & Miller, *supra* note 4.

44. See Hensell, *supra* note 23. Third-party sellers accounted for \$390 billion in annual sales in 2021, although individual sellers’ revenue varied. *Id.*

45. See *Amazon Basics*, *supra* note 10.

46. See, e.g., Jason Del Rey, *Amazon Executives Have Discussed Ditching Amazon Basics to Appease Regulators*, VOX (Jul. 15, 2022), <https://www.vox.com/recode/2022/7/15/23219277/amazon-basics-private-label-antitrust-concessions> [https://perma.cc/AM6A-BZEU].

even online retailers.<sup>47</sup> Many brick-and-mortar stores—including Walmart, Costco, and Target—sell private label brands, and in these situations, the private labels account for a larger percentage of the respective companies’ total sales for the same reason.<sup>48</sup>

## B. What is (allegedly) wrong with Amazon Basics?

Claims against Amazon, whether part of the current lawsuit or otherwise, span a wide variety of allegedly problematic behavior.<sup>49</sup> The focus of this Article is on two particular aspects of behavior related to Amazon Basics and other private label goods produced and sold by Amazon. First, Amazon is alleged to have used data gathered from sales made by third-party sellers on its platform to create private label goods that then compete with the parties behind the original sales (the “mountains of data” problem).<sup>50</sup> Second, Amazon has been chastised for self-preferencing, or putting its Amazon Basics goods at or near the top of search results, which supposedly disadvantages the third-party sellers of name brand goods (the “self-preferencing” problem).<sup>51</sup>

Compare the underlying behavior of these two problems with that of brick-and-mortar stores. In deciding what products get private label treatment, brick-and-mortar stores analyze their sales data.<sup>52</sup> Only name brand products that sell relatively well—and for which there is the ability to sell a profitable but less-expensive, private label product—will be compelling enough for a store to offer it under a private label.<sup>53</sup> One reason private label goods are able to be sold at a lower price point is because the brick-and-mortar store does not advertise this product.<sup>54</sup> Rather, it relies on the advertising or brand knowledge of name brand products and simply sets the private label good in close proximity to the name brand good, attracting customers during their search for that name brand good by offering a cheaper, comparable version.<sup>55</sup>

For example, CVS knows precisely how much of any given name brand product is sold by its stores and chooses to produce the same product and offer it for sale in competition with the name brand.<sup>56</sup> There are no requirements that the name brand good be given better shelf space than the

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47. *Id.*

48. *46Id.*

49. *See* Hensell, *supra* note 23.

50. *Id.*

51. *See* Press Release, *supra* note 17.

52. *See* Trelysa Long, *History Shows How Private Labels and Self-Preferencing Help Consumers*, ITIF (Nov. 30, 2022), <https://itif.org/publications/2022/11/30/history-shows-how-private-labels-and-self-preferencing-help-consumers/> [<https://perma.cc/XSQ4-BMVT>].

53. *Id.*

54. *Id.*

55. *Id.*

56. *See id.*



private label, unless there is a private contract between the name brand and the store to ensure certain product placement.<sup>57</sup> Even though name brand products may lose some sales to private label goods (which they inevitably must or there would not be private label goods),<sup>58</sup> and even though the private label goods benefit from the research, development, and marketing done by the name brand (which is clearly some level of free-riding),<sup>59</sup> the benefits to consumers in having more choices at differing price points is enough to protect private label goods from claims of intellectual property infringement or unfair competition.<sup>60</sup>

Not surprisingly, Amazon's private label goods are designed in a quite similar fashion. Amazon—like brick-and-mortar retailers—analyzes sales information about others' goods to determine which name brand products are apt for private label treatment. Like private label goods from brick-and-mortar stores, "Amazon Basics starts with the same premise . . . they can skip the expensive packaging and advertising and allow the house brand to speak for itself."<sup>61</sup> Unlike brick-and-mortar private label goods, where the companies use similar trade dress and adjacent placement to inform customers that the private label goods are comparable to the name brand ones, Amazon Basics goods show up in product search results, along with a variety of name brand (and lesser-known brand) products.<sup>62</sup> This is analogous to shelf placement and matching trade dress in many respects.

If consumers love private label goods and benefit from the lower price points, these offerings by Amazon are not increasing price or decreasing output, quality, or innovation,<sup>63</sup> and these same behaviors of using sales data to design private label goods and using placement to entice customers are similarly performed by brick-and-mortar stores<sup>64</sup> (and have been for years), then what precisely is the problem? Unfortunately, antitrust enforcers and legislators see things differently—specifically alleging that these activities allow the online marketplace to act anticompetitively.<sup>65</sup>

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57. See Benjamin Klein & Joshua D. Wright, *The Economics of Slotting Contracts*, 50 J.L. & ECON. 421, 427 (2007).

58. See *id.* at 427 n.13.

59. See *id.*

60. See *infra* Section III.A.

61. See Jennifer L. Henn, *Is Your AmazonBasics Surge Protector A Safety Hazard*, TOP CLASS ACTIONS (Sept. 25, 2020), <https://topclassactions.com/lawsuit-settlements/consumer-products/is-your-amazonbasics-surge-protector-a-safety-hazard/> [<https://perma.cc/7US6-M95U>].

62. See *Amazon Basics*, *supra* note 10.

63. See, e.g., Joshua D. Wright, Elyse Dorsey, Jonathan Klick, and Jan M. Rybnicek, *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L.J. 293, 305 (2019) ("Accordingly, antitrust law should endeavor to enhance consumer outcomes by permitting conduct that does not increase prices, or decrease output, quality, or innovation.").

64. See Long, *supra* note 52.

65. See Hensell, *supra* note 23.

Representative Pramila Jayapal of Washington state, a co-sponsor of an earlier-introduced reform bill targeting Amazon's activities, claimed that Amazon's private label goods harm competition.<sup>66</sup> Specifically, as she laid out in an interview with GeekWire:

Amazon is a marketplace, they control the marketplace, they set the rules of the game for the marketplace. If you want to sell on Amazon's marketplace, you have to follow the rules. They then collect all the data on every seller that sells on the marketplace. And then they produce their own private-label goods to compete with those that are on the marketplace. . . . Amazon knows exactly what's selling and to whom and how much it costs, and how much consumers are willing to pay. So they can undercut and push a seller out of business or they will acquire the company which you know, for some companies, that's great that you acquire it, but it takes away all of the competition.<sup>67</sup>

Of course, the same could be truthfully said about any number of brick-and-mortar stores.<sup>68</sup>

Despite the clear parallels between private label goods offered by brick-and-mortar retailers and Amazon Basics, the Big Tech marketplace has come under antitrust scrutiny due to the mounds of data and self-preferencing issues.

### C. How is the war on Amazon Basics playing out?

Over the last several years, Amazon has seen the war on its Amazon Basics line and other private label brands coming. An anonymous source told Vox that executives at Amazon had discussed for several years the possibility of abandoning the company's private label business arm altogether to avoid facing harsh penalties from antitrust regulators.<sup>69</sup> Although the company believes it has the right to sell private label products, the concession of shuttering that particular sector of Amazon's business was preferable to other remedies.<sup>70</sup> Last year, under the guise of cost-cutting (but in the shadow of a looming antitrust suit), Amazon announced it was closing several of its private label brands—the apparel

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66. See Mike Lewis, *Interview: Rep. Pramila Jayapal on Why Her New Legislation Might Make Amazon an Illegal Monopoly*, GEEKWIRE (Sept. 7, 2021), <https://geekwire.com/2021/interview-rep-pramila-jayapal-new-legislation-might-make-amazon-illegal-monopoly> [<https://perma.cc/K6NS-KMUT>].

67. *Id.*

68. See Long, *supra* note 52.

69. 46See Del Rey, *supra* note 46 (reporting that Betsy Harden, an Amazon spokesperson, stated that Amazon has not “seriously considered” this option).

70. See *id.*

and furniture spaces—because these brands “didn’t resonate with customers.”<sup>71</sup>

Amazon’s concerns that antitrust enforcers would come for its private label goods have come to fruition. In addition to the recently filed lawsuit by the FTC and seventeen states in the United States,<sup>72</sup> the European Commission has also taken on Amazon’s behavior with respect to private label goods.<sup>73</sup> Even before the lawsuits and enforcement actions were begun, there were efforts in both the United States and Europe to address these behaviors through new laws prohibiting Amazon’s behavior.<sup>74</sup> This Section covers these various attacks on Amazon’s private label goods.

### 1. 2023 Lawsuit Filed by FTC and 17 States

The FTC, along with attorneys general from seventeen states, filed a lawsuit against Amazon in September 2023.<sup>75</sup> The 172-page complaint alleges that Amazon has a monopoly in the “online superstore market” and that the company obtained and maintained that monopoly through unfair practices, such as punishing third-party sellers for selling elsewhere at lower prices.<sup>76</sup> Although the FTC’s complaint was originally available to the public in a largely redacted version, a less-redacted version was made available in November 2023. This version provided additional information about the claims against Amazon, including ones relevant to the private label goods issue.<sup>77</sup> One particular claim is that Amazon gathers extensive information from its own website and others, which it feeds into an algorithm to set prices.<sup>78</sup> In December 2023, Amazon filed a motion to

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71. See, e.g., Annie Palmer, *Amazon Axes Some Private Label Brands as Part of Wider Cost Cuts*, CNBC (Aug. 10, 2023), <https://www.cnbc.com/2023/08/10/amazon-axes-some-private-label-brands-as-part-of-wider-cost-cuts.html> [<https://perma.cc/F6F5-YU65>].

72. See Press Release, *supra* note 17.

73. See Press Release, *Antitrust: Commission Sends Statement of Objections to Amazon for the Use of Non-public Independent Seller Data and Opens Second Investigation into its e-Commerce Business Practices*, EUR. COMM’N (Nov. 10, 2020), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_2077](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077) [<https://perma.cc/Y4KF-YHTC>].

74. ASSOCIATED PRESS, *EU Probe Targets Amazon Over Concern that Retailer Data Gives It an Illegal Edge*, L.A. TIMES (July 17, 2019) <https://www.latimes.com/business/story/2019-07-17/assignment-eu-probes-amazon-over-use-of-retailer-info-to-gain-edge-new-story> [<https://perma.cc/7LYN-SJ8S>].

75. See Press Release, *supra* note 17.

76. See generally Complaint, FTC et al. v. Amazon.com, Inc., No. 2:23-cv-01495-JHC (W.D. Wash. Nov. 2, 2023), ECF Doc. 114.

77. See *id.*; see also, e.g., Diane Bartz, Arriana McLymore & David Shepardson, *Amazon Made \$1 Billion Through Secret Price Raising Algorithm—US FTC*, REUTERS (Nov. 2, 2023), <https://www.reuters.com/legal/new-details-ftc-antitrust-lawsuit-against-amazon-made-public-2023-11-02/> [<https://perma.cc/ECL4-9TGR>].

78. The primary allegation surrounding the algorithm is that Amazon would then raise its prices, determine for which products its competitors would match the price raise, and then would continue to sell the product at an artificially inflated price. See Bartz et al., *supra* note

dismiss, alleging that the anticompetitive behaviors at the core of the FTC's suit are simply "common retail practices that presumptively benefit consumers."<sup>79</sup>

The lawsuit is expected to take many years<sup>80</sup> and currently has a trial date set for October 2026,<sup>81</sup> but commentary critical of many aspects of the FTC's position has already begun to take hold. For example, some take issue with the FTC's definition of the "market" that Amazon allegedly monopolizes.<sup>82</sup> While, as part of this analysis, the point is made that the market definition is too narrowly tailored and excludes legitimate competitors of Amazon (including brick-and-mortar stores),<sup>83</sup> these criticisms are separate from the point made in this Article. Not only should brick-and-mortar stores be considered as part of the relevant market when assessing Amazon's antitrust liability, but also some of the behaviors that are at the core of the allegations against Amazon have long been allowed (and even blessed) in the brick-and-mortar world.<sup>84</sup>

## 2. 2019 European Commission Investigation

The United States competition authorities are not the first to take issue with Amazon's allegedly anticompetitive behavior. The European Commission's allegations are even more closely related to private label goods' "mounds of data" and "self-preferencing" problems.<sup>85</sup> The European Commission has long claimed Amazon distorts competition in the online retail market by gathering non-public data about independent sellers who

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77. However, the relevance of data gathering and price setting with respect to private label goods is clear.

79. See, e.g., Julia Shapero, *Amazon Files Motion to Dismiss FTC Antitrust Case*, THE HILL (Dec. 8, 2023), <https://thehill.com/policy/technology/4350622-amazon-files-motion-to-dismiss-ftc-antitrust-case/> [<https://perma.cc/J7KC-TBQV>].

80. See, e.g., Haleluya Hadero, *The Amazon Antitrust Lawsuit is Likely to Be a Long and Arduous Journey for the FTC*, ASSOC. PRESS (Oct. 10, 2023), <https://apnews.com/article/amazon-ftc-lina-khan-antitrust-lawsuit-da0b124e24183a3acd60367f05181f49> [<https://perma.cc/KT9R-5GVX>].

81. See, e.g., David Shepardson, *US Judge Sets October 2026 Trial for FTC Antitrust Suit Against Amazon*, US NEWS (Feb. 13, 2024), <https://www.usnews.com/news/technology/articles/2024-02-13/u-s-judge-sets-october-2026-trial-date-for-ftc-suit-against-amazon> [<https://perma.cc/4DH9-TT2R>].

82. See, e.g., Geoffrey A. Manne, *How the FTC's Amazon Case Gerrymanders Relevant Markets and Obscures Competitive Processes*, TRUTH ON THE MARKET (Jan. 26, 2024), <https://truthonthemarket.com/2024/01/26/how-the-ftcs-amazon-case-gerrymanders-relevant-markets-and-obscures-competitive-processes/> [<https://perma.cc/SUZ4-T6BD>]; Josh Withrow, *Breaking Down the FTC's Case Against Amazon*, R STREET (Oct. 4, 2023), <https://www.rstreet.org/commentary/breaking-down-the-ftcs-case-against-amazon/> [<https://perma.cc/8MHR-6VJA>].

83. See Withrow, *supra* note 82.

84. See *id.*

85. Press Release, *Antitrust: Commission Opens Investigation into Possible Anti-Competitive Conduct of Amazon*, EUR. COMM'N (July 16, 2019), [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_4291](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4291) [<https://perma.cc/2LJD-AW4L>].

sell on Amazon's market place and using that data to compete with the same independent sellers.<sup>86</sup> The non-public data that Amazon is accused of gathering includes: the number of products ordered, the number of products shipped, revenue, the number of visits to particular offers, shipping selections, past sales performances, and consumer claims against warranty or guarantee.<sup>87</sup> Using this data, according to European Commission competition authorities, Amazon is able to calibrate its own retail offers to focus on competing with best-selling products of third-party sellers.<sup>88</sup> Amazon is also accused of preferencing in search results its own retail products over products being sold by third-party sellers.<sup>89</sup> The European Commission has also expressed concern about Amazon's "fulfillment by Amazon" and "Buy Box" shopping options as being additional forms of self-preferencing.<sup>90</sup>

In July 2019, the European Commission opened a formal investigation based on Amazon's dual role as both a retailer and a platform.<sup>91</sup> Specifically, the European Commission believed that Amazon's use of data collected about third-party sellers on its site had a negative effect on competition.<sup>92</sup> In November 2020, the European Commission issued a preliminary set of findings, including the facts that Amazon had a dominant position for online marketplace services in France and Germany and that Amazon's use of non-public data about its third-party sellers allowed the company "to calibrate Amazon's retail offers and strategic business decisions to the detriment of the other marketplace sellers."<sup>93</sup>

In December 2022, Amazon agreed to settle two antitrust investigations in Europe by making significant changes to its business practices,<sup>94</sup> including some that affect Amazon Basics.<sup>95</sup> The investigations were centered on Article 102 of the Treaty on the Functioning of the European Union, which prohibits the abuse of a dominant position that affects trade within the European Union and prevents or restricts competition.<sup>96</sup> As part of the settlement, Amazon agreed to not use non-public data related to or deriving from third-party sellers on its marketplace in its own retail business, including the sale of both branded and private

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86. See Press Release, *supra* note 73.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. See Press Release, *supra* note 85.

92. See *id.*

93. See Press Release, *supra* note 73.

94. See, e.g., Adam Satariano & Karen Weise, *Amazon Agrees to Change Some Business Practices in E.U. Settlement*, NY TIMES (Dec. 15, 2022), <https://www.nytimes.com/2022/12/15/technology/amazon-europe-settlement.html> [<https://perma.cc/TPT5-YSCE>].

95. See *id.*

96. Treaty on the Functioning of the European Union, 2008 O.J. (L 115) § 102.

label goods.<sup>97</sup> The settlement lasts five years, and, while it only applies to Amazon's operations in the European Union, it could easily have effects outside of Europe—including encouraging other jurisdictions to look into Amazon's activities in this space.<sup>98</sup>

### 3. *Proposed Legislation in US*

While enforcement agencies around the world were considering bringing actions to stop Amazon's allegedly anticompetitive behavior under existing antitrust or competition law, politicians were proposing bills to target the behavior that they considered to be anticompetitive.<sup>99</sup> Following a sixteen-month investigation into Big Tech companies by the House Antitrust Subcommittee (resulting in a 450-page report), a series of bills were first introduced in June 2021.<sup>100</sup> These bills included: HR 3816, the American Innovation and Choice Online Act; HR 3825, the Ending Platform Monopolies Act; HR 3826, the Platform Competition and Opportunity Act; and HR 3849, the Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act.<sup>101</sup> A number of these bills, including the American Innovation and Choice Online Act and the Platform Competition and Opportunity Act of 2021, had complementary bills pending in the Senate as well.<sup>102</sup>

When none of these bills became enacted laws, a bipartisan group of senators reintroduced the American Innovation and Choice Online Act (the "AICOA") in June 2023.<sup>103</sup> Comments shared by the senators reflect

97. Press Release, *Antitrust: Commission Accepts Commitments by Amazon Barring it from Using Marketplace Seller Data, and Ensuring Equal Access to Buy Box and Prime*, EUR. COMM'N (Dec. 19, 2022), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_7777](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7777) [<https://perma.cc/Z5DA-T8AW>].

98. 94See Satariano & Weise, *supra* note 94.

99. See, e.g., Jay B. Sykes, *Summary: Antitrust Reform and Big Tech Firms*, CONG. RSCH. SERV. (Sept. 13, 2021), <https://sgp.fas.org/crs/misc/R46875.pdf> [<https://perma.cc/4J7L-J6MX>].

100. Press Release, *Judiciary Committee Publishes Final Report on Competition in the Digital Marketplace*, U.S. HOUSE COMM. ON THE JUDICIARY DEMOCRATS (July 19, 2022), <https://democrats-judiciary.house.gov/news/documentsingle.aspx?DocumentID=5025> [<https://perma.cc/2MCF-NCNH>].

101. *Id.*

102. S.2992—*American Innovation and Choice Online Act*, CONG., <https://www.congress.gov/bill/117th-congress/senate-bill/2992> [<https://perma.cc/2M9G-5QUD>] (last accessed Nov. 11, 2024); S. 3197—*Platform Competition and Opportunity Act of 2021*, CONG., <https://www.congress.gov/bill/117th-congress/senate-bill/3197> [<https://perma.cc/A5ZS-5JTM>] (last accessed Nov. 11, 2024).

103. See, e.g., Press Release, *Klobuchar, Grassley, Colleagues Introduce Bipartisan Legislation to Boost Competition and Rein in Big Tech*, U.S. SENATOR AMY KLOBUCHAR (June 15, 2023), <https://www.klobuchar.senate.gov/public/index.cfm/2023/6/klobuchar-grassley-colleagues-introduce-bipartisan-legislation-to-boost-competition-and-rein-in-big-tech> [<https://perma.cc/R7LY-72QZ>]. Senators Amy Klobuchar (D-MN) and Chuck Grassley (R-IA) are joined by fellow co-sponsors Senators Dick Durbin (D-IL), Lindsey Graham (R-SC), Richard Blumenthal (D-CT), Josh Hawley (R-MO), Mazie Hirono (D-

concerns that Big Tech is hurting consumers and that lax antitrust enforcers are ignoring the issue.<sup>104</sup> The key features of the bill are provisions prohibiting “dominant platforms from . . . favoring their own products or services[;]” “prohibit[ing] specific forms of conduct that are harmful to small businesses, entrepreneurs, and consumers[,] . . . including . . . misusing a business’s data to compete against them; and biasing search results in favor of the dominant firm.”<sup>105</sup>

a. American Innovation and Choice Online Act (S.2033 – 2023)

The American Innovation and Choice Online Act (the “AICOA”), as it did in its previous iteration, provides a list of prohibited behaviors relevant to private label goods.<sup>106</sup> For example, the bill makes it unlawful for a covered platform to:

- preference the products of the covered platform over those of a third-party seller on the covered platform “in a manner that would materially harm competition[;]”
- use nonpublic data obtained from or generated on the covered platform by the activities of a third-party seller to offer products of the covered platform that compete with products offered by third-party sellers; and
- in connection with search or ranking functionality, treat the products offered by the covered platform more favorably relative to those of a third-party seller.<sup>107</sup>

Each of these prohibitions, while addressing the “mounds of data” and “self-preferencing” issues identified as anticompetitive, would drastically impact Amazon’s ability to offer private label goods. Moreover, each of these activities is not terribly dissimilar to behavior of brick-and-mortar stores, and yet the bill only extends to covered online platforms.<sup>108</sup>

Specifically, the “covered platforms” to which the bill applies are very narrowly defined to include only the Big Tech companies that have been at the center of Congress’s investigations. “Covered platforms” include only “online platforms” that have been designated by the Federal Trade Commission and Department of Justice as being covered by the bill.<sup>109</sup> Alternatively, a “covered platform” is an “online platform,” defined as “a website, online or mobile application, operating system, digital assistant, or online service” that either enables a user to generate and share

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HI), Mark Warner (D–VA) and Cory Booker (D–NJ) in reintroducing the American Innovation and Choice Online Act.

104. *See id.*

105. *See id.*

106. *See id.*

107. American Innovation & Choice Online Act, S. 2033, 118th Cong. §§ 3(a)(1), (a)(6), (a)(9) (1st Sess. 2023) [hereinafter AICOA].

108. *See id.*

109. *Id.* § 2(a)(5)(A) (citing § 3(d)(1)).

content, facilitates a user offering, advertising, selling, or shipping products or services, or enables user searches or queries.<sup>110</sup> Of potential online platforms, “covered platforms” are those that have fifty million monthly active U.S. users, one hundred thousand U.S. business users, or one billion worldwide users that have annual market cap or U.S. net sales exceeding \$550 billion and that serve as “critical trading partners” for business users.<sup>111</sup> Commentators note that only Amazon, Apple, Alphabet (Google), Meta (Facebook), and maybe Microsoft fall within these designated criteria.<sup>112</sup>

The scope of companies that fall under the bill’s definition of “online platforms” is quite wide, both with respect to type of service (website, app, operating system, etc.) and activity (content generation/sharing, e-commerce, and search engines).<sup>113</sup> If the bill prohibited allegedly anticompetitive behavior from the companies that fit within its definition of “online platforms,” the Internet would fall apart in an instant.<sup>114</sup> Instead, Congress chose to limit applicability to only those online platforms it finds most offensive—Big Tech.<sup>115</sup> The monetary and user criteria limits the regulations to only the upper echelon of online platforms,<sup>116</sup> but it fails to recognize a few simple truths. Smaller firms that do not meet the criteria of “covered platforms” could easily engage in the same anticompetitive behavior to the detriment of consumers.<sup>117</sup> Firms that have hybrid sales operations—brick-and-mortar stores that also have successful online shopping platforms—could engage in the same anticompetitive behavior to the detriment of consumers and may have the market power to have significant impact.<sup>118</sup> And—perhaps the most troubling—nothing about the criteria guarantees that the regulations are being imposed on companies that are actually violating the spirit of the law.<sup>119</sup> Essentially, if you are a very successful website or app owner, you may face regulatory limits on your actions, even if you have never done anything anticompetitive just based on what and who you are.

Rather than needing to show that the allegedly bad actor has monopoly power and used it to engage in exclusionary conduct,<sup>120</sup> there would only need to be a showing (1) that the bad actor meets the requirements of a “covered platform,”<sup>121</sup> which—of course—were

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110. *Id.* §§ 2(a)(5)(A), (a)(9).

111. *Id.* § 2(a)(5).

112. Sykes, *supra* note 99, at 52–55.

113. *See* AICOA § 2(a)(9).

114. *See id.*

115. *See id.* § 2(a)(5) (using the definition of “covered platform” as a narrowing construction).

116. *See id.*

117. *See* Sykes, *supra* note 99, at 2–6.

118. *See id.*

119. *See* AICOA §§ 2(a)(5), (a)(9).

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

121. 100*See* Sykes, *supra* note 99, at 4–5.



specifically written to cover the Big Tech targets and (2) that they engaged in one or more of the listed activities.<sup>122</sup> Critics of the bill have argued that the conduct prohibited by the bill is not necessarily anticompetitive and may actually increase output and/or lower prices.<sup>123</sup> Others have argued that the bill is vague and overbroad and will inevitably harm not just the targeted companies but also the consumers.<sup>124</sup> For this reason, the bill looks less like a true effort at antitrust law and policy and more like a hit on a few Big Tech giants. While such a hit alone would render the proposed legislation suspect, the behaviors that allegedly underlie the need for the bill are also not nearly so anticompetitive as they may first seem. This is particularly true with respect to private label goods.<sup>125</sup>

b. Ending Platform Monopolies Act (H.R. 3825 – 2021)

Unlike the AICOA, the Ending Platform Monopolies Act has not yet been reintroduced in the current Congress.<sup>126</sup> However, it is interesting to consider in relation to the problems associated with private label goods. Specifically, the gist of this bill would prohibit operators of covered platforms (defined in a similar way as for AICOA) from using their own platforms to sell or to provide goods, as well as to prohibit operators of covered platforms to require third-party sellers to use a product or service as a condition of receiving access to that platform.<sup>127</sup> This bill would require structural separation between being an online platform and providing any goods or services of one's own.<sup>128</sup> This level of interference in the operation of a business, under the guise of antitrust, is extraordinary.<sup>129</sup>

Not surprisingly, Amazon has expressed concern about all the reform bills and has told third-party sellers that these bills (and the others) if passed could negatively affect third-party sellers, many of whom are small and medium-sized companies.<sup>130</sup> Amazon also stated that Congress's

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122. *See id.*

123. *Id.* at 7.

124. *See id.*

125. *See id.*

126. *All Information (Except Text) for H.R. 3825 – Ending Platform Monopolies Act*, CONG., <https://www.congress.gov/bills/117/congress/house-bill/3825/all-info>. [https://perma.cc/L2J2-4MQD].

127. *See Sykes, supra* note 99, at 9.

128. 100*See id.*

129. *See id.* (“The bill is . . . a form of sector-specific competition regulation, similar to the regimes governing banking and (historically) railroads—two other industries in which entry into adjacent markets has been viewed as creating irremediable conflicts of interest.”).

130. *See* Brian Huseman, *Antitrust Legislation and the Unintended Negative Consequences for American Consumers and Small Businesses*, AMAZON NEWS (June 1, 2022), <https://www.aboutamazon.com/news/policy-news-views/antitrust-legislation-and-the-unintended-negative-consequences-for-american-consumers-and-small-businesses> [https://perma.cc/TDL8-4GX5].

bills would hurt customers by creating less price competition for products and increasing prices for consumers.<sup>131</sup> Given the ongoing enforcement action filed by the FTC, which has also targeted other Big Tech companies, it is likely that the current AICOA bill and any potential other efforts to legislatively rein in Big Tech will remain in limbo for a while.

#### 4. *Legislation in Europe*

In 2020, the European Council proposed the Digital Markets Act (the “DMA”) that was adopted in July 2022.<sup>132</sup> Similar to the notion in the United States that existing antitrust law is not sufficient to capture the concerning behavior of Big Tech, the DMA is also based on an assumption that existing European Union competition law is inadequate.<sup>133</sup> However, unlike the proposed United States legislation, the DMA is specifically not a competition bill but is based on Article 114 of the Treaty of the Functioning of the European Union.<sup>134</sup> Although it is not based on competition law, it protects fairness and contestability, covering competition at least in substance, if not in name.<sup>135</sup> By removing the basis for the DMA from competition law, however, the DMA allows enforcers to bypass difficult traditional antitrust questions, such as market definition and dominance—not unlike the AICOA.<sup>136</sup>

Also, similar to the AICOA, the DMA creates an obligation for companies that meet certain criteria (deemed “gatekeepers”). Gatekeepers are firms that include a platform, either a network or an app, that have a specified market capitalization level of monthly users.<sup>137</sup> While the criteria include the typical Big Tech companies, they are broader than the “covered platforms” in the United States and would capture other popular websites, such as Booking.com.<sup>138</sup> Companies that fall within this “gatekeeper” designation must comply with a number of requirements—the most relevant to this discussion include data access and an end to self-preferencing.<sup>139</sup> Data access would require gatekeepers to provide access to third-party sellers of the data that a gatekeeper generates based on that

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131. *See id.*

132. Commission Regulation 2022/1925 of the European Parliament and of the Council of 14 September 2022 on Contestable and Fair Markets in the Digital Sector (Digital Markets Act), 2022 O.J. (L 265), 1 [hereinafter DMA].

133. *See id.* at 1–2.

134. *Id.* at 1.

135. *See id.* at 2–3.

136. *See id.*

137. Dominik Arnken et al., *The EU Digital Markets Act – The Holy Grail of Big Tech Regulation?*, JD SUPRA (July 19, 2022), <https://www.jdsupra.com/legalnews/the-eu-digital-markets-act-the-holy-5056954/> [https://perma.cc/94KU-GPJ4].

138. *See* Press Release, *Commission Designates Booking as a Gatekeeper*, EUR. COMM’N (May 12, 2024), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_24\\_2561](https://ec.europa.eu/commission/presscorner/detail/en/ip_24_2561) [https://perma.cc/6QAE-ZYAZ].

139. DMA, *supra* note 132, at 1.

third-party seller's activity on the platform.<sup>140</sup> Gatekeepers would also not be able to prefer their own products and services over those offered by third-party sellers unless there were fair competition.<sup>141</sup> Failure to comply may result in steep financial penalties.<sup>142</sup>

While European competition law is quite different from that of the United States, it is clear that the war on Amazon Basics (and Big Tech more generally) is a global endeavor. Margrethe Vestager, European Commission Executive Vice-President for A Europe Fit for the Digital Age and Competition, has described the DMA as a “global movement” and notes her desire that the European Union’s “take on [digital markets] will inspire all over the planet.”<sup>143</sup>

## II. INTELLECTUAL PROPERTY & PRIVATE LABEL GOODS— AND WHY ANTITRUST SHOULD STOP FIGHTING AMAZON BASICS

Despite the inclination of legislators and enforcement agencies to go full speed ahead in hindering the operations of Big Tech marketplaces, these efforts are plainly misguided. Existing antitrust and intellectual property laws are sufficient to provide guardrails against the allegedly anticompetitive behavior and, in fact, reveal that private label goods are actually pro-competitive indicia of a thriving market. Moreover, when compared to similar conduct by extant brick-and-mortar stores, it would seem that Amazon, through its private label goods, is doing exactly what the market hopes for and thus should not be thwarted at all. This Section will dig deeper into the allegations of private label brands as being anticompetitive, using both antitrust and intellectual property lenses, as well as compare Amazon to brick-and-mortar stores. This Section concludes that there is no reason to shut down Amazon Basics.

### A. Private Label Goods Are IP-Positive and Procompetitive

Private label goods have been regularly considered under both intellectual property and competition law. It is natural to turn to intellectual property when examining private label goods: the product itself may be covered by patent,<sup>144</sup> its design covered by patent or copyright,<sup>145</sup> and its

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140. *Id.* at 1–3.

141. *Id.* at 14.

142. *Id.*

143. *See, e.g.,* Arncken et al., *supra* note 137.

144. *See* 35 U.S.C. § 101. *See generally* *Private Label Without Brand Registry: Is It Possible? A Comprehensive Guide*, THE SOURCING GUY, <https://www.thesourcingguy.com/blog-post/private-label-without-brand-registry> [<https://perma.cc/RB94-PLS3>] (last visited Oct. 29, 2024).

145. *See* 35 U.S.C. § 171 (“Patents for Designs”); 17 U.S.C. § 102 (“Subject Matter of Copyright”); *Private Label Without Brand Registry*, *supra* note 144.

packaging and labelling covered by trademark/trade dress or copyright.<sup>146</sup> Despite the interplay of these various intellectual property regimes, private label goods are generally approved under intellectual property scrutiny and found to be beneficial to consumers.<sup>147</sup> In a similar way, under competition law, private label goods have been found to enhance, not thwart, competition.<sup>148</sup>

Private label brands are beneficial to consumers because they provide desired products at (generally) lower price points.<sup>149</sup> The private label good can be produced at lower cost than the name brand.<sup>150</sup> The store does not need to do research and development on the product formula or configuration because it can lawfully copy any product that is not covered by patent.<sup>151</sup> The store does not need to spend as much advertising the private label good because it can rely on the name brand advertisement and can even mimic the trade dress of the name brand good to inform the consumer that the product is a copy.<sup>152</sup> The store need not risk the uncertainty of introducing a product that may not be desired by consumers. After all, stores opt to create store brands of products that they already know will be bought by consumers.<sup>153</sup> For these reasons, private label goods provide a lower-cost alternative for consumers—a benefit— and have been blessed by intellectual property law.

Intellectual property law starts from the premise that if something is not protected, whether it be by patent, copyright, or trademark, it is free for the copying.<sup>154</sup> In part, intellectual property rights are granted for limited times to allow for copying of the materials after they enter the public domain.<sup>155</sup> If a good is no longer covered by patent or copyright protection, not only is copying lawful, but also it is even encouraged.<sup>156</sup> Because trademark law is not so time-limited as patents and copyrights, copying of

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146. See 15 U.S.C. § 1127 (“[Trademark] Constructions and Definitions”); 17 U.S.C. § 102 (“Subject Matter of Copyright”); *Private Label Without Brand Registry*, *supra* note 144.

147. See Andrew W. Coleman, *National Brands, Private Labels and Unfair Competition – When Imitation Goes Beyond the Sincerest Form of Flattery*, 87 TRADEMARK REP. 79, 82–83 (1997).

148. See *id.* at 80–81.

149. See *id.* at 81.

150. See *id.* at 82.

151. See *id.*; see also *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 238 (1964)) (“[A] defendant can copy at will if the design is ‘not entitled to a design patent or other federal statutory protection.’”).

152. See Heymann, *supra* note 32, at 373 (explaining the informational value of trade dress, particularly for private label goods).

153. See *id.*

154. See, e.g., *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146–52 (1989); *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 365 U.S. 336, 358 (1961); see also Todd R. Geremia, Comment, *Protecting the Right to Copy: Trade Dress Claims for Configurations in Expired Utility Patents*, 92 NW. U. L. REV. 779, 792–99 (1998) (describing the development of the right to copy in intellectual property cases).

155. 154 See Geremia, *supra* note 154, at 798.

156. See *id.*

trademark, or at least trade dress, is permissible so long as consumers know the source of the product they are getting and that the product is not the name brand and consumers are not misled.<sup>157</sup>

Multiple cases over the last decades support the understanding that private label goods are good and not problematic as a concept. In *Conopco, Inc. v. May Department Stores Co.*, in 1994, the Court of Appeals for the Federal Circuit held that the phenomenon of retailers marketing both national brands and private labels had “become commonplace and well-known in the marketplace” such that it is presumptively lawful so long as the “packaging is clearly labeled and differentiated.”<sup>158</sup> In 2007, the Court of Appeals for the Third Circuit observed in *McNeil Nutritionals, LLC v. Heartland Sweeteners, LLC* that, because consumers are so familiar with private label brands at this point, there is no confusion by consumers with respect to source of goods.<sup>159</sup> Because of the different price points, the fact that the private label goods are placed on a shelf near the brand name product and often explicit labeling invites comparison to the brand name product, consumers are rarely—if ever—confused into purchasing a private label good.<sup>160</sup> They are acutely aware they are paying less for a comparable product.<sup>161</sup>

This ability to sell a product mimicking a brand name good is not without limits. If the underlying good is protected by patent or copyright or if the private label good created a likelihood of trademark confusion based on its packaging or labeling, then the supplier of the name brand good would have a cause of action under the relevant intellectual property regime.<sup>162</sup> These guardrails ensure that consumers are protected from confusion and that brand name companies can enforce their intellectual property rights.

Competition law also generally supports the existence of private label goods. After all, private label entry is essentially the addition of another competitor into a field and often at a price point that benefits consumers.<sup>163</sup> “More competitors, lower prices” seems like an antitrust win. Of course, if the entry of private label goods is coupled with exclusionary

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157. 32See Heymann, *supra* note 32, at 374–75.

158. *Conopco Inc. v. May Dep’t Stores Co.*, 46 F.3d 1556, 1565 (Fed. Cir. 1994); *see also* *Warner Lambert Co. v. McCrory’s Corp.*, 718 F. Supp. 389, 398–99 (D.N.J. 1989) (“[T]he price difference between the two products is not only a product difference in itself, but also prompts [the store brand] to bring this price difference to the [consumer’s] attention through the prominent use of ‘compare and save’ signs on shelves in which the products appear, further distinguishing the two products from each other in the minds of prospective consumers.”).

159. *McNeil Nutritionals, LLC v. Heartland Sweeteners, LLC*, 511 F.3d 350, 361 (3d Cir. 2007).

160. *See id.* at 361–62.

161. *See id.*

162. *See id.* at 360–61.

163. *See, e.g.,* John M. Yun, *Does Antitrust Have Digital Blind Spots?*, 72 S.C. L. REV. 305, 341 (2020).

conduct or if the purpose of entry is merely to drive out competitors to later drive up prices, then there may be anticompetitive effects.<sup>164</sup> But the entry of a private label good does not necessarily drive out competitors.<sup>165</sup> Over time, private label goods have improved in quality; given this, it would be expected that the name brand good would suffer and perhaps even exit the market.<sup>166</sup> However, strong brand awareness based on the head start that a name brand product has is often sufficient to maintain the name brand's market position.<sup>167</sup> Consumer loyalty also impacts a consumer's willingness to purchase a name brand over a private label good.<sup>168</sup>

### **B. Amazon Basics goods are similar to brick-and-mortar private label goods**

Private label goods factor extensively into brick-and-mortar store operations. For example, in 2005, 30% of Walmart's sales were private label goods.<sup>169</sup> Intellectual property laws support private label goods.<sup>170</sup> Antitrust supports private label goods and, if anything, some query whether an old case that did not recognize the value of private label goods was decided incorrectly.<sup>171</sup> This Section tackles the two issues raised with respect to Amazon's private label goods—the “mounds of data” and “self-preferencing” complaints. For both of these issues, the same type of activity is done by brick-and-mortar stores, and yet no one is trying to shut down CVS or Kroger.<sup>172</sup> And at least with respect to search results, there's an analog in the brick-and-mortar world that may make it important for the private-label goods of Amazon to be located near the top of its search results.<sup>173</sup> This Section thus explains why these two issues should not really be concerns after all.

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164. *See id.* at 340–41.

165. *See id.*

166. Deven R. Desai & Spencer Waller, *Brands, Competition, and the Law*, 2010 BYU L. REV. 1425, 1440 (2010).

167. *Id.*

168. *See id.* at 1441.

169. *See* Albert A. Foer, *Breaking Up the Big Box: Trade Regulation & Wal-Mart: Mr. Magoo Visits Wal-mart: Finding the Right Lens for Antitrust*, 39 CONN. L. REV. 1307, 1312 n.11 (2007).

170. *Conopco Inc. v. May Dep't Stores Co.*, 46 F.3d 1556, 1565 (Fed. Cir. 1994).

171. *See* Elyse Dorsey, *Anything You Can Do, I Can Do Better – Except in Big Tech?: Antitrust's New Inhospitability Tradition*, 68 U. KAN. L. REV. 975, 982–87 (2020) (discussing the Supreme Court's analysis in *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), and the Court's failure to recognize the benefits of the private label goods that were created and supported by an agreement between a number of small-to-medium grocery stores).

172. In fact, as described in the previous section, private label goods have long been blessed in the brick-and-mortar setting. *See supra* Part I.

173. Khan, *supra* note 28, at 782.

*1. Mounds of Information*

A common complaint lodged against Amazon with respect to its private label goods is that Amazon has access to a significant amount of non-public data that it can analyze when determining what products to manufacture and sell as a private label good.<sup>174</sup> In thinking about Amazon's private label goods in the same way as brick-and-mortar store brands, it must be recognized that, for example, CVS also has mounds of data on how much Vaseline Intensive Care is sold at any one of its locations, when Vaseline is running deals or has coupons, when Vaseline is introducing new products, and more.<sup>175</sup> CVS is not going to offer private label products for goods that are not popular.<sup>176</sup> They are going to be certain to underprice, or at least competitively price, their private label goods vis-a-vis the name brand product with which it competes.<sup>177</sup> It makes perfect sense for any retailer offering a store brand to use data about what products are popular on their platform and also to underprice or otherwise strive to compete with the name brand.<sup>178</sup> Every brick and mortar store does it; why can't Amazon?

In her article *Amazon's Information Paradox*, Lina Khan acknowledges that brick-and-mortar stores use data about third-party sales to determine what to produce, but she distinguishes Amazon because of the scale and type of the information it can capture, such as how long a consumer spends on a site, what is put into carts but not purchased, and more.<sup>179</sup> In doing so, she argues that Amazon can increase sales while shedding risks and that Amazon is "exploiting the fact that some of its customers are also its rivals."<sup>180</sup> Yet both of these facts are true for brick-and-mortar stores as well.<sup>181</sup> And more and more, the types and amount of data available to Amazon are becoming available to brick-and-mortar establishments.<sup>182</sup> Stores have always been able to track which products sell and which do not.<sup>183</sup> Thanks to loyalty programs, stores can even track the

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174. *See id.*

175. *See* Jean-Pierre H. Dubé, *Amazon Private Brands: Self-Preferencing vs Traditional Retailing*, SSRN (Sept. 11, 2022), <https://dx.doi.org/10.2139/ssrn.4205988> [<https://perma.cc/YN2B-WKR9>].

176. *See id.*

177. *See id.*

178. *See id.*

179. Khan, *supra* note 28, at 782.

180. *Id.* at 783.

181. *See* Heymann, *supra* note 32, at 372–74.

182. *See id.*

183. *See* Ian Bogost, *You Should Worry About the Data Retailers Collect About You*, THE ATLANTIC (Sept. 13, 2023), <https://www.theatlantic.com/technology/archive/2023/09/retailers-consumer-tracking-data-personalized-ads-influence/675181/#> [<https://perma.cc/35ZD-RANS>].

demographics of consumers and what products consumers prefer.<sup>184</sup> Given that many, if not most, brick-and-mortar marketplaces also have online presences, it is now possible for CVS to also gauge how long a consumer spends on its site, what items the consumer looks at but does not put in the cart, and even what items get put in and taken out of a cart in exchange for others.<sup>185</sup> Even putting aside websites of brick-and-mortar stores, technology is available to allow much of this data to be gathered in real life.<sup>186</sup> Stores, such as Target, have invested in Bluetooth beacon technology to affix to shopping carts, ostensibly to help the consumer navigate around the store.<sup>187</sup> But if the technology can be used for that purpose, it will also know how long a consumer stood in a particular section of the hairbrush aisle before moving on.<sup>188</sup> There is also technology available that senses and identifies objects in your physical shopping cart.<sup>189</sup>

Even putting aside the technology that exists for brick-and-mortar stores to gather nearly the same types of information as Big Tech marketplaces, it is important to recognize that even without these futuristic smart cart technologies, other online marketplaces that are not the subject of the proposed legislation or lawsuits already have precisely the same data gathering capabilities as Amazon.<sup>190</sup> This being the case, and in line with the offending Big Tech companies being designated based on their size, it seems that Amazon's real problem is just being too big. Being big without a showing of anticompetitive behavior and effects should not be an antitrust violation.

As noted above, with respect to Amazon's gathered data on third-party sales, some suggest that Amazon should stop using this data, while others suggest that Amazon should be required to share this data with its competitors to even the playing field, just as the DMA requires.<sup>191</sup> For Amazon to not use this data would force Amazon out of the private label

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184. See Kathy Kelley, *Using Loyalty Programs to Attract Consumers to Value-Added Businesses*, PENN STATE EXCHANGE (Mar. 14, 2023), <https://extension.psu.edu/using-loyalty-programs-to-attract-consumers-to-value-added-businesses> [<https://perma.cc/K7WD-JJGK>].

185. See *How Websites and Apps Collect and Use Your Information*, FED. TRADE COMM'N, <https://consumer.ftc.gov/articles/how-websites-and-apps-collect-and-use-your-information> [<https://perma.cc/833W-K4XH>] (last accessed Nov. 11, 2024).

186. See, e.g., Sarah Perez, *Target Rolls Out Bluetooth Beacon Technology in Stores to Power New Indoor Maps in its App*, TECHCRUNCH (Sept. 20, 2017), <https://techcrunch.com/2017/09/20/target-rolls-out-bluetooth-beacon-technology-in-stores-to-power-new-indoor-maps-in-its-app/> [<https://perma.cc/SK6M-6A7U>].

187. See *id.*

188. See *id.*

189. See, e.g., Sarah Perez, *Amazon to Test Dash Cart, A Smart Grocery Cart that Sees What You Buy*, TECHCRUNCH (July 14, 2020), <https://techcrunch.com/2020/07/14/amazon-to-test-dash-cart-a-smart-grocery-shopping-cart-that-sees-what-you-buy/> [<https://perma.cc/D33B-2J8R>].

190. See Foer, *supra* note 169, at 1310 n.4.

191. See DMA, *supra* note 132, at 11–15 (outlining roles and responsibilities of gatekeepers).



game.<sup>192</sup> After all, if a company is not certain what might sell and at what prices, it is unlikely to produce it, especially if it does not have the name brand recognition and nationwide advertising channels in place to promote the unknown good.<sup>193</sup> This would decrease competition because it would effectively shut down Amazon as a competitor. Forcing Amazon to share this data would be akin to asking Target to share its sales data with Walmart or CVS to hand over their sales information to Walgreens. This solution also would decrease competition, because it would disincentivize the stores forced to hand over data from competing if, after all, they have to give all their information to their competitors.<sup>194</sup>

## 2. *Self-Preferencing: Search Results vs. Store Shelves*

The other complaint about Amazon and its private label goods is the assertion that Amazon engages in self-preferencing with respect to its search results and private label goods.<sup>195</sup> Again, in thinking about this with respect to brick-and-mortar stores, CVS also places its private label goods with particular motives.<sup>196</sup> Not only is CVS going to use its non-public data to decide whether and how to compete with Vaseline Intensive Care, but also CVS is going to put its store-brand product right next to Vaseline Intensive Care on the shelves.<sup>197</sup> This is very similar to search results, and the collocation of the name brand and the store brand is actually a very good thing.

In fact, case law in the trademark space suggests that private label brands must be located next to the name brand products so that customers can make a fair comparison.<sup>198</sup> When the brand name and the store-brand products are right next to each other, the fact that they share a similar trade dress means the consumer does not have to think too hard about whether the products might be substitutes for each other and the price point differential. Putting the products next to each other on the shelf easily alerts customers to the fact that the products are not exactly the same.<sup>199</sup> When Amazon places its private label good in the search results such that it appears close in line with the third-party seller's good of the same ilk, it is performing the same basic function as collocating the store brand and name brand products—allowing for fair comparison by the customer of two substitutable goods. Confusion is actually more likely if the potential options that appear in front of the consumer are separated.<sup>200</sup>

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192. See Dubé, *supra* note 175, at 1–2.

193. See Coleman, *supra* note 147, at 81–83.

194. Or, alternatively, could lead to collusive pricing behavior.

195. See Dubé, *supra* note 175, at 1.

196. See *id.*

197. See *id.* at 2, 8–9.

198. 32See Heymann, *supra* note 32, at 372–75.

199. See *id.* at 373–75.

200. See *id.* at 373–76.

Looking at the literature, there is an argument that Amazon is somehow different from a drugstore shelf.<sup>201</sup> Specifically, there is data about how customers often purchase the top-listed result at a disproportionate rate and that they rarely click through to the second or later pages of search results.<sup>202</sup> Seventy percent of Amazon shoppers do not click past the first page of search results; thirty-five percent click on the first product featured on the search page; the first three products listed account for sixty-four percent of the clicks; and eighty-five percent of the clicks are on brands from the first page of the search results.<sup>203</sup> Because Amazon populates its search results using a closely guarded algorithm (as do most Big Tech companies that provide search functionality)<sup>204</sup> and because Amazon shoppers do not scan past the first page, apparently Amazon's self-preferencing is anticompetitive. However, there are at least two arguments why this is not the problem it is made out to be.

First, Amazon's algorithm increases competition instead of hindering it. If Amazon did not have an algorithm that displayed alternatives to your searched item, how would you even know there were substitutes available? Unlike a store shelf that displays the various offerings of a particular good for your perusal, if you simply typed "Duracell batteries" into a dumb search engine, you would never be made aware of the existence of Amazon Basics batteries or any other non-Duracell-branded battery option. That Amazon puts its batteries front and center in a search for batteries does not seem terribly different from CVS putting its store brand batteries right next to the Duracell batteries on its store wall. In some respects, Amazon's search engine is even better for competition because, unlike CVS, the search results will display a variety of sellers of Duracell batteries at a variety of price points, as well as a variety of other battery brands, including Amazon Basics, at a variety of price points—some with free shipping, some with next day delivery, and more. More choices, lower prices, enhanced service and quality—these are all accomplish antitrust goals.

Second, there is another lesson that can be drawn from intellectual property law: the Internet is not new, and everyone cannot be protected from one's self. In early cases involving trademark law on the Internet, there was a concern that people were inept or unsophisticated in navigating

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201. See Khan, *supra* note 28, at 710.

202. Loren Baker, *Amazon's Search Engine Ranking Algorithm: What Marketers Need to Know*, SEARCH ENGINE J. (Aug. 14, 2018), <https://www.searchenginejournal.com/amazon-search-engine-ranking-algorithm-explained/265173/> [<https://perma.cc/2WUH-MKBD>].

203. *Id.*

204. Dana Mattioli, *Amazon Changed Search Algorithm in Ways That Boost Its Own Products*, WALL ST. J. (Sept. 16, 2019), <https://www.wsj.com/articles/amazon-changed-search-algorithm-in-ways-that-boost-its-own-products-11568645345> [<https://perma.cc/HE38-Z2SE>].

this new world, and so guardrails were set up to protect users.<sup>205</sup> One of these guardrails is the doctrine of initial interest confusion.<sup>206</sup> Initial interest confusion is essentially the trademark term for bait-and-switch; you lure a consumer into your store promising a particular brand of good, but once they make a purchase, they know they are getting something else.<sup>207</sup> The deception is made solely to get them through the door; this is different from regular trademark infringement, where the consumer is misled as to the source of the good.<sup>208</sup> The theory is that there is a price paid when one trademark is dangled in front of you to make you change your course of action, even if you do not end up making a purchase based on that trademark.<sup>209</sup> While initial interest confusion has been recognized since at least the 1970s,<sup>210</sup> it took on a new life in the Internet age.<sup>211</sup>

In *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*,<sup>212</sup> Brookfield created software featuring a searchable database containing entertainment-industry information, marketed under the mark “MovieBuff” in 1993.<sup>213</sup> In 1996, Brookfield attempted to register the domain name moviebuff.com but was denied because the domain name had already been registered to West Coast Entertainment.<sup>214</sup> Brookfield then registered moviebuffonline.com.<sup>215</sup> In 1997, Brookfield filed for federal registration of the trademark “Moviebuff,” and the trademark registrations issued in 1998.<sup>216</sup> Shortly thereafter, Brookfield learned that West Coast was planning to launch a website at moviebuff.com which would contain, among other things, a searchable entertainment database.<sup>217</sup> The important thing about this case is how the court justified its finding of initial interest confusion—and how it almost ruined the Internet.<sup>218</sup>

The court recognized that if a user types “moviebuff” into a search engine, the results will likely include both Brookfield’s website and West

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205. See Jennifer E. Rothman, *Initial Interest Confusion: Standing at the Crossroads of Trademark Law*, 27 CARDOZO L. REV. 105, 107 (2005).

206. See *id.* at 108.

207. See *id.*

208. See *id.*

209. See *id.*

210. See *id.* at 114 (crediting the Court of Appeals for the Second Circuit for coining the term in *Grottrian, Helfferich, Schulz, Th. Steinweg Nachf. v. Steinway & Sons*, 523 F.2d 1331 (2d Cir. 1975)).

211. See *id.* at 117–18.

212. *Brookfield Commc’ns, Inc. v. W. Coast Ent. Corp.*, 174 F.3d 1036 (9th Cir. 1999).

213. *Id.* at 1041.

214. *Id.* at 1042.

215. *Id.*

216. *Id.*

217. *Id.*

218. Putting aside the nitty gritty assessment of the trademark ownership, priority, and tacking, as well as a lengthy discussion of metatags (which were cool in 1999, neither of which is super relevant here, also funny is (retroactively) reading the judge’s explanation of how the Internet works—which may have been necessary in 1999, but just feels quaint now. See *id.* at 1044–45.

Coast Entertainment's website.<sup>219</sup> Once a user arrives at West Coast's website, it will not be confused into thinking it is on Brookfield's site, but the user may also decide just to go ahead and use West Coast's site since he is already there.<sup>220</sup> Thus, West Coast is unfairly benefiting from Brookfield's goodwill and name recognition.<sup>221</sup>

The most important takeaway is how the court, in 1999, described making choices on the Internet:

Using another's trademark in one's metatags is much like posting a sign with another's trademark in front of one's store. Suppose West Coast's competitor (let's call it "Blockbuster") puts up a billboard on a highway reading - "West Coast Video: 2 miles ahead at Exit 7" - where West Coast is really located at Exit 8 but Blockbuster is located at Exit 7. Customers looking for West Coast's store will pull off at Exit 7 and drive around looking for it. Unable to locate West Coast, but seeing the Blockbuster store right by the highway entrance, they may simply rent there. Even consumers who prefer West Coast may find it not worth the trouble to continue searching for West Coast since there is a Blockbuster right there. Customers are not confused in the narrow sense: they are fully aware that they are purchasing from Blockbuster and they have no reason to believe that Blockbuster is related to, or in any way sponsored by, West Coast. Nevertheless, the fact that there is only initial consumer confusion does not alter the fact that Blockbuster would be misappropriating West Coast's acquired goodwill.<sup>222</sup>

According to the court, navigating the Internet is like driving on a highway: if you see a misleading sign and exit, you may decide just to avail yourself of whatever is at that exit, rather than wasting time and gas to find what you are really looking for. But the Internet is not like a highway—not even in 1999. If you take a wrong turn, you hit the back arrow. No harm, no foul, no wasted gas, and very little wasted time.

While intellectual property law in the early days of the internet may have been concerned with folks getting off at the wrong exit of the world-wide super-highway, modern views understand that consumers today know how to use the internet (and the back button). Thus, expanding trademark law beyond its reasonable limits is no longer necessary. In fact, even a few short years after the *Brookfield* opinion, commentators were questioning

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219. *Id.* at 1062.

220. *Id.*

221. *Id.*

222. *Id.* at 1064 (internal citations omitted).

why the judge had such a low opinion of consumers and their capabilities.<sup>223</sup>

As of 2021, when the United States bills were introduced, people had been shopping on the Internet for a very long time.<sup>224</sup> People who shop on Amazon, Google, or anywhere for that matter know that the results are going to appear in a way that preferences the provider of the search tool. That folks do not click further than the first page of Amazon search results or often buy one of the top three items displayed does not mean that consumers need to be protected from Amazon. Instead, it may be that Amazon has displayed items that suit the customers' needs and tolerances. And if the results do not suit, the customer only has to click the back button or scroll down to the next item or next page—no harm, no foul, no waste of gas or time. The Internet is not a highway; consumers are not idiots.

### CONCLUSION

Not only does Amazon Basics and Amazon more generally provide AAA batteries, but they also provide AAA benefits to consumers: array and availability of products, access to new sellers and consumers, and affordability. Amazon and other Big Tech marketplaces are providing platforms for third-party sellers, including small businesses that may otherwise be unable to thrive. Amazon also provides convenient shopping experiences for consumers, with access to goods that may not be locally available and a wide variety of vendors offering a wide swath of goods and services across a range of price points. Amazon is constantly evolving, adapting, innovating, and providing desired services. In different circumstances, if Amazon were a brick-and-mortar store and not part of Big Tech or if it was just not so big in general, chances are that society would be applauding it, rather than trying to shut it down.

Even putting aside the visible indicia of positive competition (e.g., lower prices, more competitors, increased supply, innovative offerings), Amazon is also—at least with respect to private label goods—not doing anything unlawful. It is using lawfully obtained data to make decisions about what goods to produce, and it is presenting its private label products collocated with name brand products that match the consumer's search terms. These are things that happen every day in brick-and-mortar stores, as well as other, smaller online storefronts, yet neither of these groups has found itself in Congress's or the FTC's crosshairs.

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223. See, e.g., Ann Bartow, *Likelihood of Confusion*, 41 SAN DIEGO L. REV. 721, 723 (2004) ("Why, in trademark litigation decisions, do judges so often write about representative members of the public as if we are astoundingly naive, stunningly gullible, and frankly stupid? Do jurists truly believe that consumers are complete idiots? What is it about trademark law that seems to elicit from courts such offensive and humiliating views of the citizenry?").

224. Cf. EBAY, *Our History* (last visited Dec. 11, 2024) [<https://perma.cc/YKP9-V3TL>].

Moreover, there are extant laws that prevent Amazon from going beyond what it is already doing. If it copies a product that is covered by intellectual property rights of patent, trademark, copyright, there are infringement laws that can be used to enjoin this behavior. If Amazon is using unlawfully acquired data, there are other laws that can be used to stop this. If Amazon's behaviors are resulting in anticompetitive effects, then the Sherman Antitrust Act stands at the ready. But to bring suit at this point, the FTC has had to strain the very edges of market definition to find that Amazon has broken the antitrust laws. With multiple layers of legal doctrine available to use and little evidence of actual harm under any of these doctrines, it seems that the proposed bills are really a response to a growing moral panic about big tech and a rather dim view of consumers.