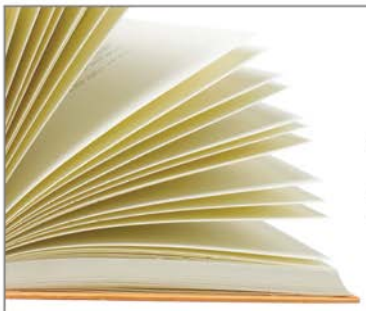

Antitrust Literature Watch

focusing on North American litigation

CRA Charles River Associates

Fall 2020

In this edition of the **Antitrust Literature Watch**, we feature recent papers by attorneys, economists, and academics that are focused on issues pertinent to North American antitrust litigation. The abstracts included below are as written by the author(s) and are unedited. Author affiliations and titles are reflected in the abstracts and papers. Included in this edition are:

- studies of **antitrust policy** debating the need for stronger antitrust enforcement, describing the evolving role of economic analysis in antitrust, assessing the impact of the 2010 Merger Guidelines on the role of market definition, providing a roadmap for regulatory reform in the context of regulations that may stifle innovation, and considering the connection between competition and corporate social responsibility.

- articles on **monopsony and buyer power** discussing the use of buyer power to address crises of demand and distribution in the current pandemic, analyzing the impact of no-poaching clauses in franchise agreements, and assessing the influence of employer concentration and outside employment options on wages.

- studies of **collusion** discussing competitor collaborations in the context of the current pandemic, analyzing the interplay of vertical restraints and horizontal collusion, and describing the potential for tacit collusion through algorithmic pricing.

- a **class certification** study quantifying use of petitions for immediate appellate review of class-certification decisions under Federal Rule of Civil Procedure 23(f).

- **tech: platforms and multi-sided markets** pieces considering whether large digital platforms are natural monopolies and potential remedies in the event of antitrust violations, and discussing the impact of intermediaries in decentralized markets on the welfare of all buyers (those who use brokers and those who do not).

To learn more about these topics and other recent antitrust publications, click below to download a copy of **Antitrust Literature Watch**.

Antitrust Policy

Joint Response to the House Judiciary Committee on the State of Antitrust Law and Implications for Protecting Competition in Digital Markets

Jonathan B. Baker (American University – Washington College of Law)
Joseph Farrell (University of California, Berkeley – Department of Economics)
Andrew I. Gavil (Howard University School of Law)
Martin Gaynor (Carnegie Mellon University; National Bureau of Economic Research (NBER); Leverhulme Centre for Market and Public Organisation)
Michael Kades (Washington Center for Equitable Growth)
Michael L. Katz (University of California, Berkeley – Department of Economics; Haas School of Business)
Gene Kimmelman (Public Knowledge)
A. Douglas Melamed (Stanford Law School)
Nancy L. Rose (Massachusetts Institute of Technology (MIT) – Department of Economics; National Bureau of Economic Research (NBER))
Steven C. Salop (Georgetown University Law Center; CRA)
Fiona M. Scott Morton (Yale School of Management; National Bureau of Economic Research (NBER); CRA)
Carl Shapiro (University of California, Berkeley – Haas School of Business; CRA)
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3632532

Economic research establishes that market power is now a serious problem. Growing market power harms consumers and workers, slows innovation, and limits productivity growth. Market power is on the rise in a number of major industries, including, for example, airlines, brewing, and hospitals, where multiple horizontal mergers that were allowed to proceed without antitrust challenge have markedly increased concentration in important markets and facilitated the exercise of market power. Exclusionary conduct by dominant companies that stifles competition from actual and potential rivals—including nascent rivals with capabilities for challenging a dominant firm's market power and firms with competing R&D efforts—impairs what is often the most important economic force creating competitive pressure for dominant firms. This concern exists in digital marketplaces. Platforms are often insulated from platform competition to a substantial extent by substantial scale economies in supply and demand (network effects) combined with customer switching costs.

Courts have contributed to increased monopoly power through decisions that have weakened the prohibitions against anticompetitive exclusionary conduct and anticompetitive mergers. The antitrust laws, as interpreted and enforced today, are inadequate to confront and deter growing market power in the U.S. economy and unnecessarily limit the ability of antitrust enforcers to address anticompetitive conduct. Many key antitrust precedents—particularly those precedents governing exclusionary conduct—rely on unsound economic theories or unsupported empirical claims about the competitive effects of certain practices. In part for this reason, the antitrust rules constructed by the courts reflect a systematically skewed error cost balance: they are too concerned to avoid both chilling procompetitive conduct and the high costs of litigation, and too dismissive of the costs of failing to deter harmful conduct. Excessively permissive precedents and unsound or unsupported economic claims have, in turn, encouraged overly cautious enforcement policies and overly demanding proof requirements and have discouraged government enforcers and private plaintiffs from bringing meritorious exclusionary conduct cases. The statement discusses a number of legal rules that are unsupported by or inconsistent with sound economic research that have contributed to overly permissive rules.

The signatories to this letter strongly believe that antitrust enforcement has become too lax, in large part because of the courts and that Congress must act to correct this problem. The statement suggests a number of reforms could be considered. We do not collectively or unanimously endorse any of these,

though some of us have done so in other contexts. We do believe that Congress has a historic opportunity to identify adverse trends in judicial interpretation of the antitrust and correct problems—not just by overriding damaging precedents, but also by reshaping the antitrust laws more broadly to enhance deterrence of anticompetitive conduct.

Letter by Maureen K. Ohlhausen to House Subcommittee on Antitrust

Maureen Ohlhausen (Baker Botts LLP)
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3607303

This letter analyzes the current state of antitrust law in the areas of mergers and conduct and the resources of the US antitrust agencies. It urges a continued focus on competition and consumer benefits, rather than the pursuit of other goals or prohibitions unrelated to competitive effects, and urges Congress to provide additional resources to the enforcement agencies.

Correcting Common Misperceptions About the State of Antitrust Law and Enforcement in Digital Markets

Geoffrey A. Manne (International Center for Law & Economics (ICLE))
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3623690

Allegations of the insufficiency of the modern antitrust regime regularly take as given that there is something wrong with antitrust doctrine or its enforcement, and cast about for policy "corrections." The common flaw with all of these arguments, however, is that they are not grounded in robust empirical or theoretical support. Rather, they are little more than hunches that something must be wrong, conscripted to serve a presumptively interventionist agenda. Because they are merely hypotheses about things that could go wrong, they do not determine—and rarely even ask—if heightened antitrust scrutiny and increased antitrust enforcement are actually called for in the first place.

Of course, it is possible that there are harms being missed and for which enforcers should be better equipped. Advocates of reform have yet to adequately explain much of what we need to know to make such a determination, however, and even more so to craft the right approach to it if we did. Laws should be formulated on more than an intuition that surely, somewhere, there must be anticompetitive conduct. Antitrust law should be refined on the basis of an empirical demonstration of harms, as well as a careful weighing of those harms against the losses to social welfare that would arise if procompetitive conduct were deterred alongside anticompetitive.

Contrary to the conventional wisdom, enforcers are hardly asleep at the switch and courts are hardly blindly deferential to conduct undertaken by large firms in the digital economy. It is impossible to infer from the general "state of the world," or from perceived "wrong" judicial decisions, that the current antitrust regime has failed.

In particular, several common misperceptions seem to be fueling the current drive for new and invigorated antitrust laws. These misperceptions are that:

We can infer that antitrust enforcement is lax by looking at the number of cases enforcers bring; Concentration is rising across the economy, and, as a result of this trend, competition is declining; Digital markets must be uncompetitive because of the size of many large digital platforms; Vertical integration by dominant digital platforms is presumptively harmful; Digital platforms anticompetitively self-preference to the detriment of competition and consumers; Dominant tech platforms engage in so-called "killer acquisitions" to stave off potential competitors before they grow too large; and Access to user data confers a competitive advantage on incumbents and creates an important barrier to entry.

I address these misconceptions in turn.

Energizing Antitrust; Submission to the Subcommittee on Antitrust, Commercial and Administrative Law, U.S. House of Representatives Committee on the Judiciary

Richard Steuer (Mayer Brown LLP)
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3623090

This submission was made in response to the invitation of the Subcommittee on Antitrust, Commercial and Administrative Law of the U.S. House of Representatives Committee on the Judiciary.

"Incipiency" describes the test under which mergers, acquisitions, and certain anticompetitive practices are prohibited by the Clayton Act when the effect may be substantially to lessen competition or tend to create a monopoly. Applied intelligently, the incipiency test can satisfy most of the calls that are coming from across the political spectrum to strengthen antitrust enforcement. As described in this submission, this can be accomplished without changing the statute. And if there is consensus that the Clayton Act needs to be sharpened, there are means to accomplish that too.

The Revolution in Antitrust: An Assessment

Dennis W. Carlton (Booth School of Business University of Chicago)
Ken Heyer (Retired from FTC and Department of Justice)
The Antitrust Bulletin
https://journals.sagepub.com/doi/full/10.1177/0003603X20950626

In this essay, we evaluate the impact of the revolution that has occurred in antitrust and in particular the growing role played by economic analysis. Section II describes exactly what we think that revolution was. There were actually two revolutions. The first was the use by economists and other academics of existing economic insights together with the development of new economic insights to improve the understanding of the consequences of certain forms of market structure and firm behaviors. It also included the application of advanced empirical techniques to large data sets. The second was a revolution in legal jurisprudence, as both the federal competition agencies and the courts increasingly accepted and relied on the insights and evidence emanating from this economic research. Section III explains the impact of the revolution on economists, consulting firms, and research in the field of industrial organization. One question it addresses is why, if economics is being so widely employed and is so useful, one finds skilled economists so often in disagreement. Section IV asks whether the revolution has been successful or whether, as some critics claim, it has gone too far. Our view is that it has generally been beneficial though, as with most any policy, it can be improved. Section V discusses some of the hot issues in antitrust today and, in particular, what some of its critics say about the state of the revolution. The final section concludes with the hope that those wishing to turn back the clock to the antitrust and regulatory policies of fifty years ago more closely study that experience, otherwise they risk having its demonstrated deficiencies be repeated by throwing out the revolution's baby with the bathwater.

The Antitrust Revolution: Charting the Course of Antitrust Enforcement

Richard J. Gilbert (Department of Economics, University of California Berkeley)
The Antitrust Bulletin
https://journals.sagepub.com/doi/full/10.1177/0003603X20950204

The seven volumes of The Antitrust Revolution published between 1989 and 2019 include dozens of excellent articles that describe topical antitrust cases and the circumstances that motivated them. Taken together, the volumes provide invaluable insights into the course of antitrust enforcement over more than three decades and the factors that influenced the direction of change. This essay follows the course described in the pages of The Antitrust Revolution for two major components of antitrust enforcement: mergers and vertical restraints. The cases demonstrate that economic analysis profoundly impacted merger decisions, although the trajectory has been anything but linear. The revolution was more dramatic for the treatment of vertical price and nonprice restraints of trade. Courts relied on economic principles to upset decades of legal precedent for these arrangements.

Refining, Not Redefining, Market Definition: A Decade Under the 2010 Horizontal Merger Guidelines

Adam Di Vincenzo (Gibson, Dunn & Crutcher LLP)
Brian Ryoo (Gibson, Dunn & Crutcher LLP)
Joshua Wade (Gibson, Dunn & Crutcher LLP)
The Antitrust Source
https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/2020/august-2020/aug20_divincenzo_8_18f.pdf
https://www.americanbar.org/groups/antitrust_law/publications/the_antitrust_source/2020/atsource-aug2020/

The issuance of new Horizontal Merger Guidelines in 2010 by the DOJ and FTC prompted much discussion over the role market definition would play in future merger reviews. A decade later, Adam Di Vicenzo, Brian Ryoo, and Joshua Wade explore how the antitrust agencies and courts have used the Guidelines to sharpen their analyses of the markets in which merging firms compete.

Ridesharing vs. Taxis: Rethinking Regulations to Allow for Innovation

Michael D. Farren (George Mason University – Mercatus Center)
Christopher Koopman (Utah State University – Center for Growth and Opportunity)
Matthew D. Mitchell (George Mason University – Mercatus Center)
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3613391

The advent of ridesharing platforms like Uber and Lyft has prompted regulators everywhere to rethink their approach to the vehicle-for-hire industry. Taxi companies and drivers have called for a level playing field where they can compete on equal footing with ridesharing drivers. The evidence suggests that the best means to provide parity lies in extensive taxi deregulation.

In this policy brief, we provide a framework to help policymakers understand the harms of anticompetitive taxi regulations. We organize the discussion around regulations that act as barriers to entry, control prices, and mandate certain business practices. We briefly address the original rationale for taxi regulation—the belief that it was necessary to correct for ruinous competition or for market failures such as asymmetric information—and explain why this rationale is obsolete. We then discuss the unintended consequences of regulation, focusing on the tendency for regulations to benefit incumbent firms at the expense of consumers and would-be competitors. We conclude with a roadmap for regulatory reform that includes specific steps for reform as well as guiding principles for sound regulation.

Competition Laws, Norms and Corporate Social Responsibility

Wenzhi Ding (University of Hong Kong)
Ross Levine (University of California at Berkeley, Haas School of Business)
Chen Lin (University of Hong Kong)
Wensi Xie (Chinese University of Hong Kong)
NBER Working Paper No. 27493
https://www.nber.org/papers/w27493

Theory offers differing perspectives and predictions about the impact of product market competition on corporate social responsibility (CSR). Using firm-level data on CSR from 2002 through 2015 and panel data on competition laws in 48 countries, we discover that intensifying competition induces firms to increase CSR activities. Analyses indicate that (a) intensifying competition spurs firms to invest more in CSR as a strategy for strengthening relationships with workers, suppliers, and customers and (b) the competition-CSR effect is stronger in economies where social norms prioritize CSR-type activities, e.g., treating others fairly, satisfying implicit agreements, protecting the environment, etc.

Monopsony and Buyer Power

Monopsony Power and COVID-19: Should We Appoint Exempt Monopsonists to Deal With the Crisis?

John Roberti (Allen & Overy)
Kelse Moen (Allen & Overy)
Competition Policy International
https://www.competitionpolicyinternational.com/monopsony-power-and-covid-19-should-we-appoint-exempt-monopsonists-to-deal-with-the-crisis/

The novel strain of coronavirus COVID-19 has upended countless areas of life, from home economics to the structure of global supply chains. Key supplies have been immediately and unexpectedly in high demand worldwide. As many supplies were bid away from hard-hit areas, some U.S. officials and policymakers began calling for a consolidated buyer to countervail the power of overseas manufacturers and direct supplies to the areas within the U.S. that needed them most. This article questions whether such a consolidated buyer—in competition terms, a "monopsonist"—could adequately address the crises of demand and distribution presented by COVID-19 in a manner consistent with the U.S. antitrust laws. We consider whether an exemption from the antitrust laws to allow for buyer coordination in the context of the COVID-19 crisis is necessary.

Measurement of Market Concentration Faced by Labor Pools: Theory and Evidence from Fast Food Chains in Rhode Island with No-Poaching Clauses

Daniel Levy (Advanced Analytical Consulting Group)
Tim Tardiff (Advanced Analytical Consulting Group)
Competition Policy International
https://www.competitionpolicyinternational.com/measurement-of-market-concentration-faced-by-labor-pools-theory-and-evidence-from-fast-food-chains-in-rhode-island-with-no-poaching-clauses/

No-poaching clauses in franchise agreements recently have attracted widespread attention from the press, state Attorneys General, private litigations, and Congress. The concern is that franchise no-poaching clauses may increase monopsony power by increasing the share of jobs that individual employers control. Fundamental empirical support for these investigations and legal claims is based on important assumptions and limited empirical research. This paper challenges fundamental assumptions in previous research, demonstrating that those claims of the highly concentrating effects of franchise no-poaching clauses are invalid. This paper also demonstrates the need for a new type of concentration measure for market arrangements and contractual terms like franchise no-poaching clauses that produce differences in effective concentration across suppliers within the same geographic and product market.

Monopsony and Outside Options

Gregor Schubert (Harvard University, Department of Economics)
Anna Stansbury (Harvard University, Department of Economics)
Bledi Taska (Burning Glass Technologies)
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3599454

In imperfectly competitive labor markets, the value of workers' outside option matters for their wage. But which jobs comprise workers' outside option, and to what extent do they matter? We measure the effect of workers' outside options on wages in the U.S, splitting outside options into two components: within-occupation options, proxied by employer concentration, and outside-occupation options, identified using new occupational mobility data. Using a new instrument for employer concentration, based on differential local exposure to national firm-level trends, we find that moving from the 75th to the 95th percentile of employer concentration (across workers) reduces wages by 5%. Differential employer

concentration can explain 21% of the interquartile wage variation within a given occupation across cities. In addition, we use a shift-share instrument to identify the wage effect of local outside-occupation options: differential availability of outside-occupation options can explain a further 13% of within-occupation wage variation across cities. Moreover, the two interact: the effect of concentration on wages is three times as high for occupations with the lowest outward mobility as for those with the highest. Our results imply that (1) employer concentration matters for wages for a large minority of workers, (2) wages are relatively sensitive to the outside option value of moving to other local jobs, and (3) failure to consider the role of outside-occupation options in the concentration-wage relationship leads to bias and obscures important heterogeneity. Interpreted through the lens of a Nash bargaining model, our results imply that a $1 increase in the value of outside options leads to $0.24-$0.37 higher wages.

Collusion

COVID-19 in Canada: Competitor Collaborations, Pricing, Mergers, and Foreign Investment During (and After) the Pandemic

Anita Banicevic (Davies Ward Phillips & Vineberg LLP)
John Bodrug (Davies Ward Phillips & Vineberg LLP, Co-Chair of Editorial Board of *The Antitrust Source*)
The Antitrust Source
https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/2020/august-2020/aug20_banicevic_8_18f.pdf

As the COVID-19 public health crisis continues to unfold around the globe, antitrust considerations remain important for businesses evaluating strategic options and reacting to the pandemic's disruptive impact on business operations. The legality of competitor collaborations, the applicable rules concerning "price gouging" during the pandemic, and whether strategic mergers will attract more (or less) scrutiny under antitrust or foreign investment legislation are but a few of the issues that have arisen and remain relevant. We discuss the Canadian antitrust perspective on each of these issues as well as the latest guidance provided by the Competition Bureau and various branches of the federal and provincial governments in Canada.

Vertical Restraints and Collusion: Issues and Challenges

Patrick Rey (Toulouse School of Economics, University Toulouse Capitole, France)
The Antitrust Law Journal
https://www.americanbar.org/digital-asset-abstract.html/content/dam/aba/publishing/antitrust_law_journal/alj-83-1/rey-alj-83-1-final.pdf

This short introduction to the symposium first briefly reviews the main lessons from the economics literature on the role of vertical restraints as "facilitating practices" for the monitoring or enforcement of upstream or downstream cartels. It then discusses the insights of recent research, including the following articles, that shed new light on the interplay between vertical restraints and horizontal collusion.

The Strengthening of the Oligopoly Problem by Algorithmic Pricing

Amalie Toft Bentsen (Copenhagen Business School – CBS Law)
Copenhagen Business School, CBS LAW Research Paper No. 20-10
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3630578

The purpose of the paper is to establish if algorithms have an anticompetitive impact on firms' pricing behavior that may not be detected by competition law. Specifically, it examines how pricing algorithms change the structure on the market and how this strengthens the oligopoly problem.

Class Certification

An Empirical Study of Class-Action Appeals

Bryan Lammon (University of Toledo – College of Law)
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3589733

Federal Rule of Civil Procedure 23(f) allows parties in a class action to petition the court of appeals for immediate review of class-certification decisions. Criticisms of the rule are common. Some see Rule 23(f) as a defendant-favoring tool for dragging out litigation and ensuring that no class is certified. Others contend that the rule is inconsistently applied among the circuits and should be replaced with a right to appeal. Yet there is little reliable data on how the courts have applied Rule 23(f).

To bring some hard data to this discussion, I collected all petitions to appeal from class-certification decisions under Federal Rule of Civil Procedure 23(f) that parties filed from 2013 through 2017. The data revealed three insights on Rule 23(f) and class actions generally. First are the basic findings—the number of petitions the rate at which different courts grant them, and what those courts do (affirm or reverse) after granting a petition. Second, empirical testing found little support for either of the above-mentioned criticisms. And third, the data shows one corner of the class-action universe in which plaintiffs are not predominantly losing: in the Rule 23(f) context, the courts of appeals reached a plaintiff-favorable outcome over 50% of the time.

Tech: Platforms and Multi-sided Markets

Antitrust and Platform Monopoly

Herbert Hovenkamp (University of Pennsylvania Law School; University of Pennsylvania – The Wharton School; University College London)
Yale Law Journal, Vol. 130, 2021
U of Penn, Inst for Law & Econ Research Paper No. 20-43
https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=3639142

Are large digital platforms that deal directly with consumers “winner take all,” or natural monopoly, firms? That question is surprisingly complex and does not produce the same answer for every platform. The closer one looks at digital platforms the less they seem to be winner-take-all. As a result, we can assume that competition can be made to work in most of them.

Second, assuming that an antitrust violation is found, what should be the appropriate remedy? Breaking up large firms subject to extensive scale economies or positive network effects is generally unwise. The resulting entities will be unable to behave competitively. Inevitably, they will either merge or collude, or else one will drive the others out of business. Even if a platform is not a natural monopoly but does experience significant economies of scale in production or consumption, a breakup will be socially costly. In the past, structural relief of this type has led to lower output and higher prices or business firm failure. If breakup is not the answer, then what are the best antitrust remedies?

After examining some alternatives, this paper argues that the best way to deal with platform monopoly is to break up ownership and management rather than assets. Leaving the platforms intact as production entities but making ownership more competitive could actually increase output, benefitting consumers, labor, and suppliers. The history of antitrust law is replete with firms, including the Chicago Board of Trade, the NCAA, the NFL, and numerous real estate boards that are organized as single entities for many legal purposes but that also function as combinations and can be treated that way by antitrust law.

Finally, this paper examines the problem of platform acquisition of nascent firms, where the biggest threat is not from horizontal mergers but rather from acquisitions of complements or differentiated technologies. For these, the tools we currently use in merger law are poorly suited. Here I offer some suggestions.

Intermediation and Competition in Search Markets: An Empirical Case Study

Tobias Salz
NBER Working Paper No. 27700
https://www.nber.org/papers/w27700

Intermediaries in decentralized markets can affect buyer welfare both directly, by reducing expenses for buyers with high search cost and indirectly, through a search-externality that affects the prices paid by buyers that do not use intermediaries. I investigate the magnitude of these effects in New York City's trade-waste market, where buyers can either search by themselves or through a waste broker. Combining elements from the empirical search and procurement-auction literatures, I construct and estimate a model for a decentralized market. Results from the model show that intermediaries improve welfare and benefit buyers in both the broker and the search markets.

Contact

For more information about this issue of the Antitrust Literature Watch, please contact the editors:

Mary Beth Savio
Vice President
Boston
+1-617-425-3329
msavio@crai.com

Timothy S. Snail
Vice President
Boston
+1-617-425-3173
tsnail@crai.com

Jarrod R. Welch
Principal
Chicago
+1-312-619-3397
jwelch@crai.com

Evolution in thinking about competition is stimulated by developments in antitrust law and economics. Understanding the current scholarship in antitrust will significantly impact your merits, market definition, class certification and damages arguments. This literature watch covers antitrust economics, litigation and policy, with a focus on North America. Our consultants regularly offer consulting on a broad range of **competition** issues around the world. For more information, visit **crai.com**.

CRA Charles River Associates

The publications included in this issue of *Antitrust Literature Watch* were identified based upon a search of publicly available material related to antitrust economics, litigation and policy. Inclusion or exclusion of any publication should not be viewed as an endorsement or rejection of its content, authors, or affiliated institutions. Any views expressed in this issue are the views and opinions of the authors and do not reflect or represent the views of Charles River Associates or any other organizations with which the authors are affiliated. If you have questions or require further information regarding this issue of *Antitrust Literature Watch*, please contact the editor(s) at Charles River Associates. This material may be considered advertising. Detailed information about Charles River Associates, a trademark of CRA International, Inc., is available at **www.crai.com**.

Copyright 2020 Charles River Associates