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From Lightbulbs to #Sheinhauls: Considerations for Planned Obsolescence Regulation in the Modern Era

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FROM LIGHTBULBS TO #SHEINHAULS: CONSIDERATIONS FOR PLANNED OBSOLESCENCE REGULATION IN THE MODERN ERA

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Abstract: "Planned obsolescence," broadly defined as conduct by manufacturers to shorten product lifespans and spur consumption, is characteristic of the American economy. Such conduct largely manifests in widely accepted competitive strategies that require consumer participation: The periodic release of products or emergence of a trend, for example. In some instances, planned obsolescence conduct reaches beyond the accepted competitive practices, desired by consumers, to conduct that clearly harms consumers with no countervailing rationale. Such practices effectively cease product function prematurely, either through product failure or poor performance and inefficient repair costs. While this conduct largely evades legal capture, it intersects with many existing legal frameworks. Recognizing both the unlikeliness of a statutory proscription and the conduct's position in our market economy, this Comment explains how existing consumer law infrastructure could limit harmful planned obsolescence. Encompassing both antitrust and consumer protection, consumer law advances consumer welfare by promoting the competitive process and ameliorating consumer harm. The Federal Trade Commission, consumer law's dual enforcer, is uniquely situated to protect consumers from planned obsolescence that goes too far. However, greater research and careful application are necessary.

INTRODUCTION

Planned obsolescence is a manufacturing strategy that "produce[s] goods with a shorte[r] physical life than the industry is capable of producing under existing" market constraints, like technological capacity and cost.[1] In undermining product quality, manufacturers accelerate

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1. DANIEL R.A. SCHALLMO, LEO BRECHT, INES HEILIG, JULIAN V. KAUFFELDT & KIRILL WELZ, CLARIFYING OBSOLESCENCE: DEFINITION, TYPES, EXAMPLES AND DECISION TOOL 2 (2012) (emphasis omitted) (quoting Paul M. Gregory, *A Theory of Purposeful Obsolescence*, 14 S. ECON. J. 24, 24 (1947)); *see also* Jeremy Bulow, *An Economic Theory of Planned Obsolescence*, 101 Q.J. ECON. 729, 729 (1986) (defining planned obsolescence as "the production of goods with

product replacement, and in turn their business's economic growth.[2] The strategy was notably implemented in the late 1920s by the Phoebus Cartel, a cooperation of worldwide lightbulb producers.[3] Cartel members effectuated planned obsolescence by lowering the burning time of their lightbulbs, requiring consumers to buy more bulbs than they would have absent cartel interference.[4]

Standard setting is normal—at times even procompetitive—business conduct.[5] However, the Phoebus Cartel set a 1,000-burning-hour guarantee that was not so innocuous: It deliberately decreased the lifespan of its product, increasing demand by designing it to fail sooner.[6] When lightbulbs first entered the market, they had a burning time of 1,200 hours.[7] Like most products, the lightbulb's market entry prompted competition.[8] Competition between lightbulb manufacturers spurred innovation that increased standard lightbulb burning time to 2,000 hours.[9] This in turn caused the lightbulb market to consolidate among successful

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uneconomically short useful lives"); Stefan Wrbka & Larry A. DiMatteo, *Comparative Warranty Law: Case of Planned Obsolescence*, 21 U. PA. J. BUS. L. 907, 908–09 (2019) (characterizing planned obsolescence as "the phenomenon of deliberately shortening the durability of products").

2. SCHALLMO ET AL., *supra* note 1, at 2.

3. Throughline, *The Phoebus Cartel*, NPR (Mar. 28, 2019), https://www.npr.org/2019/03/27/707188193/the-phoebus-cartel (last visited Apr. 25, 2024). Members joined "for the purpose of a stronger cooperation, especially in order to avoid a conflict because of competition and in order to increase sales." *Id.* (translating German lightbulb producer OSRAM's archives in Berlin, Germany).

4. *Id.*

5. *See* Bd. of Trade of Chi. v. United States, 246 U.S. 231 (1918) (finding the restraint of trade caused by the Board's "call rule" outweighed by the effect of facilitating a new, competitive market). *But see* Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679 (1978) (finding the justification of improved public safety and professional ethics standards proffered by the professional society insufficient to overcome the restraint of trade caused by the ban on fee negotiation prior to selection of an engineer).

6. Throughline, *supra* note 3. Although evidence points to profit as the motivator for these changes, the Cartel rationalized its standard "as a trade-off: Their lightbulbs were of a higher quality, more efficient, and brighter burning than other bulbs." Markus Krajewski, *The Great Lightbulb Conspiracy*, IEEE SPECTRUM (Dec. 28, 2023), https://spectrum.ieee.org/the-great-lightbulb-conspiracy [https://perma.cc/8T28-9WPB].

7. Rebecca Matulka & Daniel Wood, *The History of the Light Bulb*, DEP'T OF ENERGY (Nov. 22, 2013), https://www.energy.gov/articles/history-light-bulb [https://perma.cc/54VM-QWU5].

8. Throughline, *supra* note 3.

9. *Id.* Some put the pre-Cartel burning standard as high as 2,500 hours. *See* Lieselot Bisschop, Yogi Hendlin & Jelle Jaspers, *Designed to Break: Planned Obsolescence as Corporate Environmental Crime*, 78 CRIME L. & SOC. CHANGE 271, 272 (2022). Irrespective of the precise standard increase, the longevity of lightbulbs was increasing pre-cartel formation. Throughline, *supra* note 3. Note too that this was the average lifespan increase; some inventors were achieving even greater burning hours. For example, French inventor Adolphe Chaillet used a hard carbon filament to create a bulb that has burned continuously since 1901. Throughline, *supra* note 3; THE LIGHT BULB CONSPIRACY (Media 3.14, Article Z, Arte France, Televisión Española & Televisió de Catalunya 2011).

manufacturers, a facilitating factor in cartel formation.[10] The Cartel's 1,000-hour guarantee therefore halved the average bulb's lifespan, bringing it 200 hours below its initial capacity at commercialization.[11] In other words, the Phoebus Cartel strategized to increase member profits through a significant backslide in lightbulb technology, a manifestation of planned obsolescence.

Cartel membership represented a substantial investment in member-firms' future profits.[12] However, these future profits were not solely a result of the planned obsolescence strategy.[13] Cartel formation minimizes conflict between would-be competitors and facilitates increased prices.[14] In addition to working cooperatively, Phoebus Cartel members minimized competition between themselves by divvying the developing world into nationwide territories for each member.[15]

When the Phoebus Cartel was uncovered, the U.S. Department of Justice brought suit against United States-member General Electric.[16] Ultimately, General Electric's conduct was found illegal not because it engineered its bulbs to fail, but because the company *agreed* with other lightbulb producers to do so.[17] The planned obsolescence was not itself problematic or illegal. To this day, planned obsolescence by individual

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10. E.A. Kandrashina, S.I. Ashmarina & D.V. Vukolov, *How to Identify Predisposition of Markets to Cartelization?*, *in* GLOBAL CHALLENGES AND PROSPECTS OF THE MODERN ECONOMIC DEVELOPMENT 1827, 1830 (Valentina Mantulenko ed., 2019).

11. Throughline, *supra* note 3; THE LIGHT BULB CONSPIRACY, *supra* note 9; Matulka & Wood, *supra* note 7.

12. For example, it was not until 1940 that the Cartel achieved its 1,000 burning hour guarantee first discussed at its 1924 founding. THE LIGHT BULB CONSPIRACY, *supra* note 9; *see* Throughline, *supra* note 3. The sixteen-year gap represents in part the investment in research and development needed to devalue their product, as well as the significant effort required to implement and manage a global cartel. The Phoebus Cartel enforced the 1,000-hour guarantee by testing bulbs and fining members whose bulbs outlived it. THE LIGHT BULB CONSPIRACY, *supra* note 9; *see* Throughline *supra* note 3.

13. Assuming a pre-Cartel burning average of 2,000 hours, a consumer in 1940 would have to make two purchases and (presumably) spend double to satisfy demand for what was previously one purchase. This ratio only expands if a 2,500 pre-Cartel burning average is assumed, as posited by some. *See* Bisschop et al., *supra* note 9, at 272; THE LIGHT BULB CONSPIRACY, *supra* note 9.

14. *See* Flavien Moreau & Ludovic Panon, *How Costly Are Cartels?* 5, 6 (Banca D'Italia Eurosistema, Working Paper No. 1413, 2023), https://www.bancaditalia.it/pubblicazioni/temi-discussione/2023/2023-1413/en_tema_1413.pdf [https://perma.cc/VV92-MZHL].

15. THE LIGHT BULB CONSPIRACY, *supra* note 9. Such market division is an automatic violation of the Sherman Act, which will be discussed in more detail below. *See* Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49–50 (1990) (holding agreements between competitors to allocate exclusive sales territories, and thus minimize competition and maximize profits, illegal).

16. United States v. Gen. Elec. Co., 82 F. Supp. 753 (D.N.J. 1949); *see also* VANCE PACKARD, THE WASTE MAKERS 59–60 (1960) (describing the United States' suit against General Electric involving its international agreements).

17. United States v. Gen. Elec. Co., 115 F. Supp. 835 (D.N.J. 1953).

firms remains uncaptured by existing law and unaddressed in a meaningful way.

Looking to the origins of planned obsolescence, this Comment explores the feasibility of using consumer law—embodied in existing antitrust and consumer protection laws—to tackle such conduct in its modern forms. Antecedent to this question, however, is whether such conduct can even form the basis for liability. To answer this underlying question, this Comment draws on the unique powers and mandate of the Federal Trade Commission (FTC or Commission). The Federal Trade Commission Act[18] empowers the FTC to conduct broad market research and enforce both antitrust and consumer protection violations based on this expertise, positioning it well to respond to planned obsolescence.[19]

The Comment proceeds as follows. Part I explores the concept of planned obsolescence, situating it in the current economic landscape and highlighting its complexity. Part II develops current understanding of antitrust and consumer protection enforcement, particularly by the FTC. Finally, Part III analyzes planned obsolescence through the consumer law frameworks. Providing any concrete solution is beyond the scope of this Comment. Rather, it fleshes out principles for consideration by the enforcement agency best positioned to do so.

I. UNDERSTANDING PLANNED OBSOLESCENCE

In order to formulate a response to planned obsolescence, it must first be understood. This Part explains planned obsolescence by tracing its history from inception in the "Throw-Away Society"[20] to modern expressions; defining its complex and interconnected manifestations; and discussing existing responses to it, both practical and academic.

A. The Rise of Planned Obsolescence

While Phoebus marks the first known implementation of planned obsolescence, the concept gained traction before the Cartel's conduct came to light. American real estate broker Bernard London proposed "a

18. 15 U.S.C. §§ 41–58.

19. *See, e.g.*, FTC Act, 15 U.S.C. § 45(a)(2) ("The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."); *id.* § 46(a) (providing the Commission with the power "[t]o gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce").

20. Jurgita Malinauskaite & Fatih Buğra Erdem, *Planned Obsolescence in the Context of a Holistic Legal Sphere and the Circular Economy*, 41 OXFORD J. LEGAL STUD. 719, 720 (2021).

national policy of planned obsolescence" to restore the U.S. economy following the 1929 Wall Street crash.[21] Like the Phoebus Cartel, London recognized that robust products were a liability to consumer spending and future profits.[22] In response, he proposed a policy whereby products had a set lifespan after which they were declared "legally dead."[23] Once "dead," the State would collect and destroy products before distributing vouchers worth the product's sales tax, thereby stimulating the next purchase.[24] London hypothesized that in the aggregate, consumption rates would increase and stabilize, and the manufacturing job market would thrive.[25] Although London's proposal never became mainstream, planned obsolescence became "normalized business behavior"[26] as manufacturing transitioned to mass production.[27]

Since the 1950s, obsolescence has dominated the consumer economy in a manner and extent that is implicitly accepted, if not celebrated. Implicitly accepted because planned obsolescence rarely manifests as a blatant assault on a product's longevity, but rather informs—or is inherent in—the modern manufacturing process; celebrated because it facilitates the modern consumer lifestyle.[28] American industrial designer Brooks Stevens[29] embodied the relationship between obsolescence and modern manufacturing by asserting that the purpose of industrial design is to "instill[] in the buyer the desire to own something a little newer, a little better, a little sooner than is necessary."[30] Indeed, many of the prominent

21. Bisschop et al., *supra* note 9, at 272.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 276.

27. THE LIGHT BULB CONSPIRACY, *supra* note 9.

28. *See* Bisschop et al., *supra* note 9, at 272 ("[P]lanned obsolescence was championed in the 'Throw-Away Society' campaign to counter the post-war economic crisis in the United States and Europe. Consumer products were designed and advertised to be 'a little newer, a little better, a little sooner than is necessary,' resulting in ever-shortening cycles of popular trends intended to decouple obsolescence from actual usefulness, yoking it to consumer perception." (citations omitted) (quoting GLENN ADAMSON, INDUSTRIAL STRENGTH DESIGN: HOW BROOKS STEVENS SHAPED YOUR WORLD 4 (2003))).

29. Stevens was a prolific American industrial engineer credited with coining the term "planned obsolescence" in 1954. *Stevens, Brooks, 1911–1995*, WIS. HIST. SOC'Y [hereinafter *Stevens, Brooks*], https://www.wisconsinhistory.org/Records/Article/CS553 [https://perma.cc/8XHK-N62S].

30. *Id.* (quoting Brooks Stevens); THE LIGHT BULB CONSPIRACY, *supra* note 9; *see also* PACKARD, *supra* note 16, at 54 ("We make good products, we induce people to buy them, and then next year we deliberately introduce something that will make those products old fashioned, out of date, obsolete. . . . It's a sound contribution to the American economy." (quoting Brooks Stevens)).

examples of planned obsolescence in existing scholarship originate from the "Throw-Away Society" of the 1950s and 60s.[31]

Planned obsolescence so informs the production of goods that consumers are often unaware of its role and effect. The impact of planned obsolescence becomes clearer when compared to products from communist economies where chronic shortages made planned obsolescence irrational.[32] In East Germany, for instance, consumer goods prioritized functionality and large appliances were designed to last for a minimum of twenty-five years.[33] In contrast, the United States saw the actual lifetime of energy-requiring consumer products like washing machines fall from ten years to seven or eight years from 2010 to 2018.[34] This is highlighted not to value one design method over another: East Germans themselves longed for western goods and sought them out following the fall of the Berlin Wall.[35] Rather, the comparison—imperfect in many ways, including the significant increase in functions and settings that modern consumer products provide—demonstrates the capacity for product longevity when this is the manufacturing intent. Additionally, it highlights a key complexity that underlies this Comment's inquiries: The difficulty involved in balancing planned obsolescence with innovation.

While planned obsolescence is largely outside the public consciousness, individual manufacturers who go too far can attract unwanted attention. Consumer electronics provide numerous examples.[36]

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31. Malinauskaite & Buğra Erdem, *supra* note 20, at 720.

32. Of course, it can be argued that designing goods to fail is in itself irrational. However, from an economic standpoint, firms may find planned obsolescence rational because long-lasting goods are a liability to future profits. For commentary on the economic incentives that make planned obsolescence attractive to manufacturers, see Bulow, *supra* note 1, at 734.

33. Bastien Poole, *How Consumerism Led to Nostalgia for Difficult Times in Post-Socialist East Germany*, ARCADIA (Sep. 27, 2022), https://www.byarcadia.org/post/how-consumerism-led-to-nostalgia-for-difficult-times-in-post-socialist-east-germany [https://perma.cc/62BY-XEHH]; THE LIGHT BULB CONSPIRACY, *supra* note 9. An East German fridge bought in 1985 ran with its original parts, including its lightbulb, for at least twenty-five years. *Id.*

34. *See* Bisschop et al., *supra* note 9, at 281.

35. Milena Veenis, *Consumption in East Germany: The Seduction and Betrayal of Things*, 4 J. MATERIAL CULTURE 79, 96 (1999). For discussion on the resurgence of East German goods following the initial demand for Western goods post-reunification, see Daphne Berdahl, *'(N)Ostalgie' for the Present: Memory, Longing, and East German Things*, 64 ETHNOS 192 (1999).

36. *See, e.g.*, AmandaM, *6 Times Printer Companies Tried to Screw People Over*, MEDIUM (Jan. 31, 2020), https://medium.com/compandsave/6-times-printer-companies-tried-to-screw-people-over-dbc0e1eb5149 [https://perma.cc/G6J9-5PQ5] (printers and ink cartridges); Christian Behler, *Planned Smartphone Obsolescence*, MEDIUM (July 2, 2021), https://medium.com/geekculture/planned-smartphone-obsolescence-a0786ee8b133 [https://perma.cc/2WE3-8EAY] (Android phones); Claire Turvill, *Is Planned Obsolescence a Concern for Electric Vehicles?*, EE POWER (Nov. 27, 2023), https://eepower.com/market-insights/is-planned-obsolescence-a-concern-for-electric-vehicles [perma.cc/NQ6A-RGX5] (Tesla electric cars).

Planned obsolescence has been a notable, reoccurring issue in printer and ink cartridge markets. Prominent printer manufacturers were implicated in planned obsolescence through a string of class actions alleging designs to falsely stimulate ink cartridge replacement or prematurely end the printer's useful life.[37] In 2006, Epson America, Inc. (Epson) settled *In re Epson Ink Cartridge Cases*,[38] a class action alleging its "inkjet printers and inkjet cartridges indicate that cartridges are 'empty' and suspend printer function, even though substantial ink remains."[39] Likewise, in 2010, Hewlett-Packard (HP) settled three class actions alleging that HP printers pushed out-of-ink notifications, leading consumers to believe ink cartridge replacement was necessary when they were not yet empty.[40] In 2015, Canon settled a consolidated class action alleging its Pixma printer had a uniform design defect that caused premature failure.[41] The consumers in that class received an error message that made their printers inoperable shortly after its one-year warranty passed.[42] The "printer planned obsolescence" cases settled before a court heard and weighed their merits.[43]

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37. *See, e.g.*, Exhibit 15: Order Granting Final Approval of Class Action Settlement and Application for Fees, Costs, Expenses and Incentive Award, O'Shea v. Epson Am., Inc., No. 2:09-cv-08063-PSG-CW (C.D. Cal. Dec. 21, 2009) (Epson); Order (1) Granting Renewed Motion for Final Approval of Class Action Settlement; (2) Granting in Part Renewed Motion for Attorneys' Fees and Costs; and (3) Denying Objectors' Motion to Decertify the Class or, in the Alternative, Disqualify the Class Counsel, *In re* HP Inkjet Printer Litig., No. 5:05-cv-03580, 2014 WL 4949584 (N.D. Cal. Sept. 30, 2014) (HP).

38. No. JCCP4347, BL-134 (Cal. Super. Ct. Oct. 23, 2006).

39. *2006 Epson Ink Cartridge Class Action Lawsuit Settlement*, EPSONSETTLEMENT.COM, https://www.epsonsettlement.com [https://perma.cc/ZC5R-2ZT5]. Plaintiff-consumers relied on the legal theories of "breach of contract, breach of implied warranties, unjust enrichment, fraudulent concealment," and violations of California consumer protection law. *Id.* However, these theories were never able to be "tested" before the court in application to Epson's planned obsolescence conduct. Claiming avoidance of further litigation, Epson agreed to pay forty-five dollar coupons to consumers who "bought leased or received" a qualifying inkjet printer model from April 1999 to May 2006. *Id.* One hundred sixteen Epson printer models qualified for the settlement. *Id.*

40. *In re HP Inkjet Printer Litig.*, No. 5:05-cv-03580, 2014 WL 4949584. Settlement here, valued at approximately five million dollars, included issuing two dollar, five dollar, or six dollar coupons to claimants and changing pop-up messages about cartridges. Bisschop et al., *supra* note 9, at 273.

41. Courtney Jorstad, *Canon Reaches Class Action Settlement over Printer Defect*, TOP CLASS ACTIONS (June 17, 2015), https://topclassactions.com/lawsuit-settlements/lawsuit-news/canon-reaches-class-action-settlement-over-printer-defect/ [https://perma.cc/GR7Z-5NF7].

42. *Id.*

43. *See In re HP Inkjet Printer Litig.*, No. 5:05-cv-03580, 2014 WL 4949584 (granting renewed motion for final approval of class action settlement); *2006 Epson Ink Cartridge Class Action Lawsuit Settlement*, *supra* note 39.

While settlement certainly has value,[44] this practice makes it hard for litigants to determine which legal theories best capture the printer manufacturers' conduct, the standard to apply, or how to measure harm. As this Comment will discuss, even limited successes leave many hurdles for litigants seeking to condemn planned obsolescence. The following section explores how to define planned obsolescence and how legal theory can thereby capture it.

B. Defining Planned Obsolescence

Must a manufacturer design its product to physically fail, or does planned obsolescence encompass design that simply motivates, rather than forces, consumers to purchase new products more frequently?[45] Defining planned obsolescence will help to better understand this nuanced category of conduct and ultimately reach legal solutions. Scholars, especially within the field of industrial organization, have spilled much ink defining planned obsolescence and categorizing its distinct forms.[46] These efforts have resulted in two overarching categories—relative and absolute planned obsolescence—that are supplemented by a range of subcategories.[47] This Comment uses Vance Packard's three "pillars of planned obsolescence"[48] as a conceptual tool to understand the nuance of planned obsolescence and evaluate what could be captured in a legal response. Two of the pillars—"obsolescence of desirability" and "obsolescence of function"—correspond with relative obsolescence, which embodies strategies that encourage product replacement even though the initial product retains functionality.[49] Packard's "obsolescence of quality" pillar corresponds with absolute obsolescence, wherein products actually "break[] down or wear[] out at a given time."[50] Absolute obsolescence is the ultimate focus of a legal response to planned

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44. *See, e.g.*, Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 NOTRE DAME L. REV. 221, 222 (1999) ("Litigants, both actual and prospective, have strong incentives to settle because the costs of litigation so outweigh the costs of settlement. . . . [F]avoritism of settlement is consistent with the view that litigation serves as a dispute resolution mechanism . . . [that] focuses on the private costs and benefits of litigation or settlement." (emphasis omitted)).

45. *See* MARK FENWICK & STEFAN WRBKA, INTERNATIONAL BUSINESS LAW: EMERGING FIELDS OF REGULATION 56 (2018).

46. *See, e.g.*, PACKARD, *supra* note 16, at 55 (defining planned obsolescence in three categories: obsolescence of quality, obsolescence of desirability, and obsolescence of function); SCHALLMO ET AL., *supra* note 1, at 4–5 (describing absolute, relative, and psychological obsolescence).

47. SCHALLMO ET AL., *supra* note 1, at 4–6.

48. Wrbka & DiMatteo, *supra* note 1, at 912; PACKARD, *supra* note 16, at 55.

49. PACKARD, *supra* note 16, at 55; SCHALLMO ET AL., *supra* note 1, at 4.

50. PACKARD, *supra* note 16, at 55.

obsolescence, but this Comment first establishes the context of such conduct by addressing all three pillars and their interconnectedness.

"Obsolescence of desirability" is a perceived obsolescence that is fostered by manufacturers but reinforced by consumers themselves.[51] It encompasses strategies whereby manufacturers seduce consumers into buying new products.[52] Consumers replace a product not because it failed but because they *desire* something "a little newer, a little better, a little sooner than is necessary."[53] General Motors (GM) was one of the first to use "obsolescence of desirability" when it began releasing "annual style changes"—reiterations of its models with cosmetic changes only—in 1923.[54] This was a successful competitive strategy, pushing GM's share of industry sales far beyond its close competitor Ford Motor Company.[55] The annual style change was effective because it was met by consumer demand.[56]

Fast fashion is a more modern, and especially destructive,[57] example of "obsolescence of desirability." In the 1970s, Zara's founder Amancio Ortega Gaona revolutionized the fashion industry by implementing a

51. *Id.* at 68–77.

52. *Id.*

53. *Stevens, Brooks*, *supra* note 29 (quoting Brooks Stevens).

54. Wrbka & DiMatteo, *supra* note 1, at 912; Note, *Annual Style Change in the Automobile Industry as an Unfair Method of Competition*, 80 YALE L.J. 567, 577–78 (1971) [hereinafter *Annual Style Change*]. Previously, new models were infrequent and came with significant performance enhancements. *Id.* at 576 ("[B]efore the 1920's, models were changed every few years to incorporate significant technological breakthroughs, but . . . since then the rate of technological progress has declined while model changes have become an annual phenomenon."); *id.* at 579.

55. *Annual Style Change*, *supra* note 54, at 579–80; PACKARD, *supra* note 16, at 79 ("General Motors took the automotive leadership from Henry Ford I by successfully insisting that competition be on the basis of styling rather than pricing."). GM's share of industry sales rose from thirteen to forty-three percent between 1922 and 1927. *Annual Style Change*, *supra* note 54, at 579. Ford, which did not begin cosmetic releases until 1928, experienced a decrease in market share from fifty-one to nine percent during the same period. *Id.* at 579–80.

56. In 1971, a law student argued that "annual style change[s]" constitute an "unfair method of competition" under Section 5 of the FTC Act because they result in anticompetitive entrenchment in the automobile industry. *Annual Style Change*, *supra* note 54, at 574; *id.* at 575. This was quickly rebutted by Stephen Selander, who claimed the student "fail[ed] to recognize that if style change is desired by consumers, this 'unfair method of competition' does nothing more than answer consumer demand—something which is not, and should not be, illegal under the antitrust laws absent an intent to monopolize." Stephen E. Selander, *Is Annual Style Change in the Automobile Industry an Unfair Method of Competition? A Rebuttal*, 82 YALE L.J. 691, 691 (1973).

57. The fashion industry accounts for ten percent of the world's carbon emissions, is the second largest consumer of water, and contributes thirty-two of all microplastics in the oceans; and eighty-five percent of textiles produced by the industry end up in landfills each year. Sharon Lewis, *Planned Obsolescence, and Other Open Secrets of the Fashion Industry*, JUMPSTART (June 24, 2020), https://www.jumpstartmag.com/planned-obsolescence-fast-fashion/ [https://perma.cc/P9P5-HEE7].

trend-responsive production model.[58] The model's success led to the rise of the "'fast fashion' retailer[],"[59] producers of affordable and trendy, yet low-quality clothing. Shein, an online retailer known for releasing approximately 6,000 new pieces of clothing daily, represents a maximization of the obsolescence strategy.[60] While these retailers undeniably rely on rapid trend cycles for continuous profits, perception is often not the only form of obsolescence at work in fast fashion. Shein products, for example, are notorious for rapid deterioration.[61] Additionally, "[w]ith perceived obsolescence, responsibility is shared between producers, marketers and consumers."[62] It is not just Ortega's business model that shifted the trend cycle from two collections per year to anywhere from twelve to twenty-four,[63] it is the consumers posting their #sheinhauls[64] on TikTok.

Packard's "obsolescence of function" is a nuanced, but generally net-positive, category of conduct. Functional obsolescence results from "the introduction of a new product that fulfils the function better than the existing product."[65] Consumption is spurred by the introduction of new features or capabilities to a product.[66] This conduct can be characterized

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58. Suzy Hansen, *How Zara Grew into the World's Largest Fashion Retailer*, N.Y. TIMES (Nov. 9, 2012), https://www.nytimes.com/2012/11/11/magazine/how-zara-grew-into-the-worlds-largest-fashion-retailer.html (last visited Mar. 12, 2024).

59. *See, e.g.*, *The Impact of Fast Fashion on the Retail Industry*, BUXTON, https://www.buxtonco.com/blog/the-impact-of-fast-fashion-on-the-retail-industry [https://perma.cc/5EWL-Z6EP] ("[R]etailers like Zara, Topshop, H&M and Forever 21 have found a way to capitalize on the consumer demands for instant gratification, at an affordable price. These brands, dubbed as 'fast fashion' retailers, leverage streamlined production cycles to release on-trend pieces in a matter of weeks. . . . The traditional model of four fashion seasons in a year is becoming obsolete.").

60. Jonathan Eley & Eleanor Olcott, *Shein: The Chinese Company Storming the World of Fast Fashion*, FIN. TIMES (Dec. 8, 2021), https://www.ft.com/content/ed0c9a35-7616-4b02-ac59-aac0ac154324 (last visited Apr. 15, 2024).

61. *See* Chelsea Ritschel, *Woman Claims Shoes She Purchased from Shein 'Melted' While Attending Festival in Las Vegas*, INDEP. (May 17, 2022), https://www.independent.co.uk/life-style/fashion/shein-shoes-melted-festival-tiktok-b2081272.html [https://perma.cc/A9LQ-PMHE].

62. Bisschop et al., *supra* note 9, at 274.

63. Lewis, *supra* note 57.

64. A "haul" is the practice by influencers (and social media users generally) of recording and posting a video showing everything the recorder has purchased or received. *See* Tammy Gan, *Why Are Massive Shein Hauls So Popular on TikTok?*, GREEN IS THE NEW BLACK (June 24, 2021), https://greenisthenewblack.com/shein-ultra-fast-fashion-consumerism-tiktok-influencer/ [https://perma.cc/FQN2-PND5]. It is one way that influencers spread trends and recommend items for followers' purchase. *See id.* Because of its ultracheap products, "Shein hauls" often show a huge amount of clothing and accessories purchased at once, encouraging viewers to do the same. *Id.*

65. SCHALLMO ET AL., *supra* note 1, at 4.

66. *See, e.g.*, PACKARD, *supra* note 16, at 56 ("After the market for two-channel stereo is saturated, the producers can switch to three-channel stereo.").

as innovation, a competitively desirable outcome.[67] However, obsolescence of function rarely exists in a vacuum. An example of this is Apple's iPhone, which has had fourteen generations between 2007 and 2022.[68] While this evolution represents significant technological progress—increased data speed from 3G to 5G, touch and facial ID, and Siri, for example[69]—a new iPhone release also implicates obsolescence of desirability. As a product associated with wealth and status, the release of a new iPhone prompts consumers to replace the outdated model, regardless of whether its useful life has run.[70]

The release of a new iPhone has also engendered claims of "obsolescence of quality," Packard's third pillar of obsolescence wherein products break down or lose substantial functionality.[71] In 2020, Apple entered into two settlement agreements related to allegations that it intentionally slowed the performance of older phones[72] to induce owners to replace phones or batteries.[73] After initially denying the conduct, Apple admitted to "throttling" the older models—pushing software updates to slow phones—to preserve battery life in response to reports that iPhones were unexpectedly turning off.[74] The Apple example demonstrates the

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67. *See, e.g.*, Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) (explaining that "the opportunity to charge monopoly prices" following the introduction of a new product is precisely what "induces risk taking that produces innovation and economic growth").

68. Jamie Spencer, *Apple iPhone Timeline – from 2007 to 2023*, PRACTICALLY NETWORKED, https://www.practicallynetworked.com/apple-iphone-timeline/ [https://perma.cc/XR26-W8CF].

69. Britta O'Boyle, *Apple iPhone History: Look How Much the iPhone Has Changed*, POCKET-LINT (Sept. 14, 2022), https://www.pocket-lint.com/phones/news/apple/135231-the-apple-iphone-is-10-years-old-look-how-much-the-iphone-has-changed/ [https://perma.cc/N7PS-MXAE].

70. *See* Cory Stieg, *The Psychology Behind a New iPhone Release—and Why It's So Hard to Resist*, CNBC (Dec. 9, 2020, 10:51 AM EST), https://www.cnbc.com/2020/12/08/the-psychology-of-new-iphone-releases-apple-marketing.html [https://perma.cc/M5E8-EXUT].

71. Wrbka & DiMatteo, *supra* note 1, at 912–13.

72. Jonathan Stempel, *Apple to Pay Up to $500 Million to Settle U.S. Lawsuit over Slow iPhones*, REUTERS (Mar. 2, 2020), https://www.reuters.com/article/us-apple-iphones-settlement/apple-to-pay-up-to-500-million-to-settle-u-s-lawsuit-over-slow-iphones-idUSKBN20P2E7 [https://perma.cc/8MWH-EA2P]; Paresh Dave & Stephen Nellis, *Apple, U.S. States Reach $113 Million Settlement on iPhone Throttling*, REUTERS (Nov. 18, 2020), https://www.reuters.com/article/us-apple-iphones-settlement/apple-u-s-states-reach-113-million-settlement-on-iphone-throttling-idUSKBN27Y2ML [https://perma.cc/7K8U-5HKS].

73. Dave & Nellis, *supra* note 72. Apple faced and settled two lawsuits from this conduct. In March 2020, Apple settled a class action brought by affected iPhone owners for $500 million. *Id.* In November of the same year, Apple settled allegations from thirty-three states and the District of Columbia for $113 million and an agreement to provide information about iPhone power management, software updates, and settings on its website. *Id.* Apple settled "to avoid the burdens and costs of litigation." *Id.*

74. Stempel, *supra* note 72; *see* Sean Hollister, *Apple Will Pay $113 Million for Throttling Older iPhones in New 'Batterygate' Settlement*, VERGE (Nov. 18, 2020),

interconnectedness of obsolescence classifications: Increased innovation ("obsolescence of function") implicated the earlier product's functioning (absolute obsolescence or "obsolescence of quality").

Absolute obsolescence forces consumers to replace a product when it fully breaks or performs poorly and carries an inefficient cost of repair.[75] The burning hour guarantee set for Phoebus Cartel lightbulbs[76] is one example, but other historical examples are available. When DuPont began producing nylon stockings, they were "touted as having the strength of steel and the sheerness of cobwebs."[77] This changed in the 1950s when DuPont instructed its engineers to use weaker fibers, thus creating a fast-wearing nylon stocking that would tear or run within a handful of uses.[78] Tights and stockings remain a frequently replaced item; however, their fast-wearing nature must be evaluated in context. When diminished quality accompanies a price cut, it seems less like Phoebus' blatant scheme to increase sales. For example, rip-resistant tights like Sheertex[79] have entered the market. Sheertex claims its tights are ten times more durable than traditional tights and are listed for a base price of fifty-nine dollars,[80] providing an alternative to the five to ten dollar but prone-to-

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https://www.theverge.com/2020/11/18/21573710/apple-battery-gate-throttle-iphones-settlement-amount [https://perma.cc/F6AM-F7TT]. Apple's settled allegations involved harm from conduct that can be characterized as planned obsolescence, but this was not the focus of the lawsuits. Complaints filed in the United States targeted Apple's lack of communication about the nature of the product and its updates. *See, e.g.*, Complaint for Injunctive and Other Relief at 3, People v. Apple, Inc., No. RG20080113, 2020 WL 7671997 (Cal. Super. Ct. Nov. 18, 2020) ("Apple was not candid or forthright about throttling its iPhones, and chose instead to mislead consumers about the purpose and effect of its iOS updates."). Likewise, the Italian Competition Authority did not find the update itself problematic, but rather the persistent push notifications encouraging update without disclosure of its effect. Mariateresa Maggiolino, *Planned Obsolescence: A Strategy in Search of Legal Rules*, 50 INT'L REV. INTELL. PROP. & COMPETITION L. 405, 406 (2019). Thus, it was not the obsolescence (here, function) at issue, but the business practices employed to reinforce it.

75. Wrbka & DiMatteo, *supra* note 1, at 912–13.

76. *See* Throughline, *supra* note 3; THE LIGHT BULB CONSPIRACY, *supra* note 9.

77. Kimbra Cutlip, *How Nylon Stockings Changed the World*, SMITHSONIAN MAG. (May 11, 2015), https://www.smithsonianmag.com/smithsonian-institution/how-nylon-stockings-changed-world-180955219/ [https://perma.cc/A2K5-X6DD]. Note that DuPont was the first to engineer the synthetic fibers and thus had a monopoly on nylons. *Id.*

78. Malinauskaite & Buğra Erdem, *supra* note 20, at 722; THE LIGHT BULB CONSPIRACY, *supra* note 9 (interviewing woman whose father worked for DuPont's nylon division: "the problem was they worked too well, they lasted too long").

79. Katherine Homuth founded Sheertex in 2017 after getting "fed up with old-fashioned, disposable hosiery." SHEERTEX, https://sheertex.com/pages/about [https://perma.cc/3T4Y-6JDA].

80. *Classic Sheer Rip-Resist Tights*, SHEERTEX, https://sheertex.com/products/classic-sheer-tights [https://perma.cc/EQ33-AQFA].

runs tights one can find at the drugstore.[81] Thus, a range in quality facilitates a range of consumer preferences.

As compared to forms of relative obsolescence, the onus of absolute obsolescence is squarely on the manufacturer who designed the product to fail prematurely.[82] Consumers have no control in the product's failure and share no responsibility for resulting harm.[83] This is why absolute obsolescence is the likely starting point for any legal theory addressing planned obsolescence, as well as the primary meaning when the term "planned obsolescence" is subsequently used in this Comment. However, as the above examples demonstrate, the nuanced and interconnected nature of different modes of obsolescence, and the balancing of such conduct with any accompanying benefits, make the formation and application of a legal theory to specific conduct exceedingly difficult.

C. Attempts to Address Planned Obsolescence

Beyond its classification, regulation of planned obsolescence is complicated by the fact that it "treads close to legal boundaries in environmental, competition, tax, and consumer protection law."[84] This means planned obsolescence strategies are elusive to capture despite their similarity to existing legal frameworks. This section briefly looks to other relevant work—legislation and litigation in France, right to repair activism and legislation, and recent scholarship proposing a response utilizing existing legal frameworks—to contextualize and bolster a new proposal. As they stand, these pathways are insufficient in responding to planned obsolescence.

1. France and Planned Obsolescence

While the European Union (EU) drives environmental policy and legislation concerning sustainable production,[85] one member state

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81. *See, e.g.*, @justsamthings, *Panty Hose that Don't Rip So Easily?*, REDDIT, https://www.reddit.com/r/TheGirlSurvivalGuide/comments/181cp40/panty_hose_that_dont_rip_so_easily/?rdt=39543 (last visited May 17, 2024) ("I am so god damn sick of all my panty hose ripping!!! I bought 4 pairs last week and 3 of them are already ripped. Does anyone know a good brand that won't tear at the slightest touch? I'm willing to spend a bit more money if it means I don't have to buy new ones every other week.").

82. PACKARD, *supra* note 16, at 56–57.

83. *See id.*

84. Bisschop et al., *supra* note 9, at 280.

85. Wrbka & DiMatteo, *supra* note 1, at 914; *see, e.g.*, Council Directive 2009/125/EC, 2009 O.J. (L 285) 10 (establishing a framework to guide standard setting of ecodesign requirements for energy-related products); Energy Labelling Directive, Council Directive 2010/30/EU, 2010 O.J. (L 153) 1

attempted to directly regulate planned obsolescence.[86] France amended its Consumer Code (*Code de la Consommation*) to add a penal provision for planned obsolescence in 2015.[87] There, planned obsolescence was first defined as "any measure with the intent to conceptually reduce the operating life of a good for economic considerations"[88] and was punishable by two years in prison and a €300,000 fine.[89] In response to complaints of "vagueness,"[90] France amended the definition of planned obsolescence in 2016 to "the prohibited use of techniques by which the person who places a product on the market aims to deliberately reduce the lifespan of the product to increase its replacement rate."[91] Note that the initial definition attempted to capture obsolescence conduct beyond obsolescence of function with the language "conceptually reduce the operating life."[92] In contrast, the amended definition limited the offense to conduct that physically reduces product lifespan. While the amendment narrowed what is considered prohibited conduct under the law, sanctions increased to include a maximum fine of "5% of the average annual turnover, calculated based on the last three annual turnover numbers known at the time of the offence."[93] While investigations have been initiated under this article, no judgments have been rendered.[94] Thus, while a policy framework is more developed in France, its response to planned obsolescence remains largely theoretical.

(endorsing labelling and standard product information for resource consumption by energy-related products); Waste Electrical and Electronic Equipment, Council Directive 2002/96/EC, 2003 O.J. (L 37) 24 (creating measures to address electronic waste); Waste and Repealing Certain Directives, Council Directive 2008/98/EC, 2008 O.J. (L 312) 3 (providing measures for waste management).

86. Wrbka & DiMatteo, *supra* note 1, at 915.

87. CODE DE LA CONSOMMATION [CONSUMER CODE] art. L213-4-1 (2015) (Fr.) (amended 2016).

88. Wrbka & DiMatteo, *supra* note 1, at 916 (quoting CODE DE LA CONSOMMATION [CONSUMER CODE] art. L213-4-1(I), (II) (Fr.) (moved in 2016 to art. L441-2)).

89. *Id.* (quoting CODE DE LA CONSOMMATION [CONSUMER CODE] art. L213-4-1(I), (II) (2015) (Fr.) (moved in 2016 to art. L454-6)).

90. Paul Davies & Michael Green, *French HOP Complaint May Test Whether Planned Obsolescence Is a Misdemeanor*, LATHAM & WATKINS LLP: ENVIRONMENT, LAND & RESOURCES (Oct. 30, 2017), https://www.globalelr.com/2017/10/french-hop-complaint-may-test-whether-planned-obsolescence-is-a-misdemeanour/ [https://perma.cc/AVZ3-YCDP].

91. Wrbka & DiMatteo, *supra* note 1, at 916 (quoting CODE DE LA CONSOMMATION [CONSUMER CODE] art. L441-2 (Fr.)).

92. Wrbka & DiMatteo, *supra* note 1, at 916 (quoting CODE DE LA CONSOMMATION [CONSUMER CODE] art. L213-4-1(I), (II) (2015) (Fr.) (moved in 2016 to art. L441-2)).

93. Wrbka & DiMatteo, *supra* note 1, at 916 (quoting CODE DE LA CONSOMMATION [CONSUMER CODE] art. L454-6 (Fr.)). This provision connects penalties to the actual turnover rate of inventory relative to the cost of goods sold, making recovery proportionate to the gain from planned obsolescence. Davies & Green, *supra* note 90.

94. *See* Wrbka & DiMatteo, *supra* note 1, at 916 (noting investigations of Epson, Canon, Brother, and Hewlett Packard (printers) and Apple (iPhones)).

However, as in the United States, significant instances of planned obsolescence have spurred legal action, both in France and other member states.[95] In 2017, French nonprofit *Halte à l'Obsolescence Programmée* (HOP) sued several printer manufacturers (including Epson, HP, and Canon) for business practices that forced consumers to spend more on repairs to the detriment of the environment.[96] The same year, HOP sued Apple for throttling old iPhone models.[97] Both of HOP's actions relied on the French crime of planned obsolescence; however, the effectiveness of the Article remains unknown.[98]

2. The Right to Repair

Right to repair advocacy and related legislation—which address and ameliorate harm from conduct that reinforces the primary planned obsolescence strategy—are gaining traction in the United States.[99]

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95. Apple's throttling conduct brought a number of lawsuits outside France, too. Beginning in 2020, a number of class actions were filed in Belgium, Italy, Spain, and Portugal. Bisschop et al., *supra* note 9, at 273–74. The Portuguese action was filed by the consumer organization *Deco Proteste* on behalf of 115,000 iPhone users. *Id.* The European class actions have focused on manipulation without informing users. *See id.* In addition to a class action there, Italy approached Apple's conduct through its Italian Competition Authority (*Autorità Garante della Concorrenza e del Mercato*), resulting in a five million euro fine for "unfair commercial practices" and an additional five million euros for "failing to properly inform consumer." *Id.* at 273.

96. *Les Fabricants d'Imprimantes Mis en Cause Par une Plainte [Printer Manufacturers Implicated by Complaint]*, HALTE À L'OBSOLESCENCE PROGRAMMÉE (Sept. 17, 2017), https://www.halteobsolescence.org/les-fabricants-dimprimantes-mis-en-cause-par-une-plainte/ [https://perma.cc/P4C3-HDPD] (noting a misdemeanor action brought against printer manufacturers including HP, Canon, Brother, and Epson under Article L441-2 of the Consumer Code); Bisschop et al., *supra* note 9, at 273. Each printer manufacturer to the suit was fined €15,000. *Id.*

97. *HOP Porte Plainte Contre Apple Pour Obsolescence Programmée [HOP Files Complaint Against Apple for Banned Obsolescence]*, HALTE À L'OBSOLESCENCE PROGRAMMÉE (Dec. 27, 2017), https://www.halteobsolescence.org/hop-porte-plainte-contre-apple-obsolescence-programmee/ [https://perma.cc/49Y9-ZUW7]; Bisschop et al., *supra* note 9, at 273. This action resulted in a twenty-five million euro fine to Apple. *Id.*

98. *See* Sonia Cissé, Rosie Nance, Caitlin Metcalf & Guillaume de Meersman, *In the Crosshairs: Planned Obsolescence*, LEXOLOGY (Mar. 31, 2020), https://www.lexology.com/library/detail.aspx?g=463c3580-1dfc-48b4-b57c-159b147b4708 [https://perma.cc/2UEP-9WE6] (explaining that France's competition and consumer rights authority determined Apple's conduct "did not constitute a planned obsolescence offence within the meaning of the French regulation," but was rather a "deceptive commercial practice by omission").

99. Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 14, 2021) (making promotion of independent and DIY repairs a priority for the administration). "[Twenty-seven] states have introduced or carried over Right to Repair legislation." Nathan Proctor, *Half of U.S. States Looking to Give Americans the Right to Repair*, PIRG (Apr. 22, 2022) [hereinafter Proctor, *Half*], https://pirg.org/articles/half-of-u-s-states-looking-to-give-americans-the-right-to-repair/ [https://perma.cc/4EN6-AM7F]. Right to Repair bills vary across states. *See, e.g.*, S.B. 5464, 68th Leg., Reg. Sess. (Wash. 2023) (digital electronic equipment); H.B. 23-1011, 74th Gen. Assemb., Reg. Sess. (Colo. 2023) (agricultural equipment); *see also* Nathan Proctor, *20 States File Right to Repair*

Although American consumers may have the legal right to repair their products, in practice this right is heavily restricted by the power manufacturers maintain over sold products.[100] Apple's practices are again illustrative, like the prohibitively difficult forty-four-step process to replace the iPhone 11's battery or the parts synchronized to the logic board.[101] The right to repair movement responds to such practical restrictions by advocating for increased mandatory information, from access to manuals and software updates to longevity labeling; availability of parts and tools, including diagnostic tools; and design with repair in mind.[102]

Increasing repair rights is a component to addressing planned obsolescence, but is an insufficient response alone. Right to repair largely addresses planned obsolescence when it is already inherent in a product's design, saying nothing about the manufacturer's product longevity going forward.[103] This makes it ill-suited to address planned obsolescence to scale. In addition, while legislation may improve information and access to repairs, this movement also requires a shift in consumer behavior and

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Bills as Momentum Grows, PIRG (Feb. 7, 2023) [hereinafter Proctor, *20*], https://pirg.org/articles/20-states-file-right-to-repair-bills-as-momentum-grows/ [https://perma.cc/4P3N-K85N] (detailing right to repair legislation proposed in 2023 thus far). Some cover all non-car consumer devices while others cover only agricultural equipment or other consumer appliances. Proctor, *Half*, *supra*; Proctor, *20*, *supra*.

100. FED. TRADE COMM'N, NIXING THE FIX: AN FTC REPORT TO CONGRESS ON REPAIR RESTRICTION 6 (2021) [hereinafter NIXING THE FIX]. Manufacturers have many tools to impede repair, including use of proprietary screws, gluing parts together, or prohibitively difficult repair. Thorin Klosowski, *What You Should Know About Right to Repair*, N.Y. TIMES: WIRECUTTER (July 15, 2021), https://www.nytimes.com/wirecutter/blog/what-is-right-to-repair/ (last visited Mar. 12, 2024). One way original manufacturers exert control is limiting the ways their goods can be repaired, either by restricting repair to themselves or to licensed repairers. *See* Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451 (1992). This cuts out independent service operators who provide repairs at more competitive rates. *Id.* The ability of a manufacturer to restrict repair markets was at issue in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), where Kodak's policy restricting repair of the parts it manufactured to its own repair services was challenged and the Court found Kodak's conduct could violate the Sherman Act. *Id.* Essentially, Kodak was using its monopoly power in camera parts production to capture the service market for cameras. *Id.* Although this conduct was held unlawful, it remains prevalent among manufacturers, which claim justifications like protection of intellectual property, safety, privacy, data security, and reputational harm, which are often viewed as procompetitive. NIXING THE FIX, *supra*, at 10.

101. Bisschop et al., *supra* note 9, at 278.

102. Klosowski, *supra* note 100.

103. *See*, *e.g.*, S.B. 5464, 68th Leg., Reg. Sess. (Wash. 2023) (requiring manufacturers of digital electronic equipment to make "parts, tools, and documentation required for the diagnosis, maintenance, or repair of such equipment" available to all owners and independent repair providers in Washington).

expectations,[104] which have focused on replacement in our "throw-away society."[105] Thus, repairability can respond to failures in current products and provide some standards to limit planned obsolescence design, but it does not necessarily respond to the root of the problem.

3. Warranty Law and Planned Obsolescence

Recent scholarship proposes warranty law—arguably a component of consumer protection law—to address planned obsolescence conduct.[106] Warranties are contracts that commit a manufacturer to "stand behind [their] product" based on representations made or statutory requirements.[107] Planned obsolescence intersects with warranty law because a product's early demise may constitute a defect if it occurs before the reasonably expected lifespan.[108] Shortened periods of usability constitute a relevant defect when the reasonably expected lifetime is longer than the product's true durability.[109] Central to a warranty regime is the principle that a product's quality should meet the reasonable expectations of consumers.[110] However, a key issue in the application of warranty law to planned obsolescence is the reality that many warranties are established by manufacturers.[111] A manufacturer implementing

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104. For one, repairs can be time-consuming and uncertain, often from the conduct of the manufacturer. Although prior to any right to repair legislation, when my Apple laptop stopped charging in June 2022, the Genius Bar technician encouraged me to purchase a new laptop as opposed to replacing the battery. This was in part because the cost of a new laptop (approximately $899) was just over the cost of battery replacement, but also because the technician was uncertain if the repair would be successful. These options, and the fact that access to a personal device was required for employment, led me to purchase a new laptop. Factors such as these increase the burden of repairs. *See also* Wrbka & DiMatteo, *supra* note 1, at 920 ("Apple, for example, engineers computers to make it almost impossible or cost-prohibitive to replace the battery. Planned obsolescence of the computer is engineered by tying the usefulness of the computer to the lifespan of the battery.").

105. Klosowski, *supra* note 100.

106. Wrbka & DiMatteo, *supra* note 1, at 918.

107. FED. TRADE COMM'N, BUSINESSPERSON'S GUIDE TO FEDERAL WARRANTY LAW [hereinafter BUSINESSPERSON'S GUIDE TO FED. WARRANTY L.], https://www.ftc.gov/business-guidance/resources/businesspersons-guide-federal-warranty-law [https://perma.cc/G28Z-3PK6].

108. Wrbka & DiMatteo, *supra* note 1, at 918.

109. *Id.*

110. *Id.* Reasonable expected lifespans for a given product are conceptualized with a two-prong analysis. First, a consumer can look to a group of reasonably comparable products to determine the "product-group benchmark of durability." *Id.* at 920. This establishes a measure for the acceptable durability deviations for the product. *Id.* The measure can be informed by the product's price, presentation, and design. *Id.* Second, those deviations that are outside "an acceptable range of tolerance" would point to planned obsolescence as a warranty violation. *Id.*

111. This does not include implied warranties of merchantability and fitness for a particular purpose. BUSINESSPERSON'S GUIDE TO FED. WARRANTY L., *supra* note 107. The implied warranty of

planned obsolescence and providing a warranty will likely account for the product failure as a component of the set warranty, and failure is unlikely to occur until after the warranty expires.[112] In response to warranty's timing component, scholars have considered tolling and laches or statutes of repose to help address this problem.[113] Besides the power dynamics at play in warranty setting, warranties may be ill-suited to respond to planned obsolescence because the law governing them is an amalgamation of federal and state laws, which leave gaps in coverage.[114]

While existing legal pathways can respond to and ameliorate the harms of planned obsolescence to a limited extent, they do not adequately tackle the issue at large. Rather, two legal frameworks—antitrust and consumer protection—touch on the issues presented by planned obsolescence,[115] but have received little consideration from existing scholarship. This Comment proceeds by laying out the development and understanding of antitrust and consumer protection law, paying particular attention to their common enforcer the FTC, before exploring application to the issue of planned obsolescence.

II. ANTITRUST, CONSUMER PROTECTION, AND THEIR COMMON FEDERAL ENFORCER

Antitrust and consumer protection laws operate to maximize consumer welfare[116]—a goal inconsistent with planned obsolescence.[117] Antitrust, the body of law that uncovered the conduct of Phoebus, promotes consumer welfare by maintaining competitive market conditions.[118] When competition constrains firms, consumers reap the benefits of lower prices,

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merchantability guarantees that the goods are fit for their use and the implied warranty of fitness for a particular purpose protects consumers who rely on manufacturers' assertions about their products. *Id.* While these implied warranties provide distinct security from manufacturers' express guarantees, applicability to planned obsolescence may still be limited based on consumers' product expectations and manufacturers' assertions. *See id.* Additionally, these warranties only speak to the condition of the product at the time sold, providing no specific guarantees about the product's longevity. *Id.*

112. *See id.*

113. Wrbka & DiMatteo, *supra* note 1, at 965.

114. *Id.* at 919. This Comment does not consider state warranty law, which is a more fertile ground for consumer protection in some states. *See, e.g.*, *Lemon Laws: 50-State Survey*, JUSTIA (Jan. 2024), https://www.justia.com/consumer/deceptive-practices-and-fraud/lemon-laws-50-state-survey/ [https://perma.cc/N2DU-YC6T] (documenting variation in covered consumers and products between states).

115. Bisschop et al., *supra* note 9, at 282 ("[C]ompetition and innovation can also function as a driving force behind planned obsolescence. Planned obsolescence is a competitive choice based on a corporate ecosystem requiring constant growth." (citation omitted)).

116. *See infra* sections II.A–II.B.

117. *See supra* note 15 and accompanying text.

118. *See infra* section II.A.

better quality, and increased innovation.[119] In contrast, consumer protection law takes a more direct approach. It prohibits practices that inhibit consumers' ability to make rational market decisions to maximize their wellbeing.[120] This section explains these consumer law frameworks before they are applied to planned obsolescence in the next.

A. Antitrust Law and Policy

As currently understood by the courts, antitrust law seeks to maximize consumer welfare via the competitive process.[121] Antitrust was first codified at the federal level in the Sherman Act,[122] which prohibits "every contract, combination . . . or conspiracy, in restraint of trade"[123] and improper acquisition or maintenance of a monopoly.[124] Through these two avenues, the Sherman Act seeks to promote competition. Whether competition successfully maximizes consumer welfare is assessed primarily by consumer price.[125] This view emerged and gained traction in the 1970s and 1980s via Chicago School economic thinking and the writing of Robert Bork.[126] However, price-based consumer welfare has not always been (and may not always be) the focus of antitrust policy.[127]

When courts first began interpreting the Sherman Act, their interpretations reflected the political climate of powerful industrial trusts the statute's drafters were concerned with.[128] Concentrated market structures and the abuses they engender were a key concern.[129] Recall the concentration of the lightbulb industry, the emergence of the Phoebus

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119. *See infra* section II.A.

120. *See infra* section II.B.

121. Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription.'" (quoting ROBERT H. BORK, THE ANTITRUST PARADOX 66 (1978))); ROBERT H. BORK, THE ANTITRUST PARADOX 7 (2021); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 932 (1979) ("[T]he proper lens for viewing antitrust problems is price theory.").

122. 15 U.S.C. §§ 1–7.

123. *Id.* § 1.

124. *Id.* § 2.

125. Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995); Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 716 (2017) ("[A]ntitrust doctrine views low consumer prices, alone, to be evidence of sound competition.").

126. *See, e.g.*, Khan, *supra* note 125, at 719–20 (describing the shift from structuralism to price theory). *But see* FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 463 (1986) (noting that along with price, quality and information access are relevant considerations in rule of reason analysis).

127. *See, e.g.*, Khan, *supra* note 125, at 718 ("[A] market structure-based understanding of competition was a foundation of antitrust thought and policy through the 1960s.").

128. *Id.* at 739–40.

129. *Id.*; Eleanor M. Fox, *Against Goals*, 81 FORDHAM L. REV. 2157, 2158 (2013).

Cartel—a violation of Sherman Act Section 1—and its planned obsolescence strategy that preyed on modern lightbulb reliance.[130] However, focusing on market structure led to incoherent outcomes when viewed through short-term economic principles,[131] and created an opportunity for Bork to refocus antitrust's goal in his "consumer welfare" image.[132] While such consumer welfare may be "the only legitimate goal of antitrust" under economic principles,[133] it remains disputed whether consumers are "well" under this conception of antitrust.[134]

1. Antitrust Analysis 101

The Chicago School's pegging of antitrust to economic principles of price and efficiency facilitates courts' analysis of the antitrust laws for a couple of reasons. First, antitrust violations do not occur in the abstract, but rather are tied to the specific market in which a firm is competing.[135] Absent direct evidence of anticompetitive conduct,[136] the market in which the conduct occurs and the power of the firm implementing such conduct must both be defined to evaluate their effect.[137] A market, or the zone of

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130. *See* Throughline, *supra* note 3; THE LIGHT BULB CONSPIRACY, *supra* note 9; United States v. Gen. Elec. Co., 82 F. Supp. 753 (D.N.J. 1949); United States v. Gen. Elec. Co., 115 F. Supp. 835 (D.N.J. 1953).

131. *See, e.g.*, Utah Pie Co. v. Cont'l Baking Co., 386 U.S. 685, 703 (1967) ("We believe that the Act reaches price discrimination that erodes competition as much as it does price discrimination that is intended to have immediate destructive impact. In this case, the evidence shows a drastically declining price structure which the jury could rationally attribute to continued or sporadic price discrimination."); Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962) ("[W]e cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional *higher costs and prices* might result from the maintenance of fragmented industries and markets." (emphasis added)); *see also* Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405, 2405 (2013) ("The Court [initially] interpreted the Sherman and Clayton Acts to reflect a hodgepodge of social and political goals, many with an explicitly anticompetitive bent, such as protecting small traders with more efficient rivals." (citations omitted)).

132. *See generally* BORK, *supra* note 121 (reorienting antitrust to the consumer welfare standard).

133. *Id.* at 4; *see* Khan, *supra* note 125, at 742.

134. *See generally* Khan, *supra* note 125 (connecting the consumer welfare standard to an inability to capture meteoric firms in the modern economy).

135. *See, e.g.*, *Brown Shoe*, 370 U.S. at 297–98 (beginning antitrust analysis by defining the market).

136. *See id.* at 330.

137. *See, e.g.*, United States v. E.I. Du Pont De Nemours & Co., 353 U.S. 586, 593 (1957) ("Determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition 'within the area of effective competition.' Substantiality can be determined only in terms of the market affected." (footnote omitted) (quoting Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 300 n.5 (1949))); *Brown Shoe*, 370 U.S. at 325 ("The outer boundaries of a product market

competition, is where a firm sells it product or service.[138] Competitors are the firms providing the same or substantially similar goods or services.[139] A firm has power in the market when it can set prices higher than would be possible in a competitive environment.[140] Once a market is defined and the competitor's power in that market calculated, analysis of these factors can follow.

Second, antitrust analysis follows the rule of reason.[141] The rule of reason uses two primary categories to judge business conduct.[142] The first encompasses conduct that is so inherently anticompetitive that it is *per se illegal*, regardless of purpose, circumstances, or effects.[143] Agreements to divide the market, as in the case of the Phoebus Cartel,[144] are an example of a per se illegal antitrust agreement.[145] The second category captures all other business conduct based on its intent and effect.[146] As economic and judicial understanding of business conduct develops, the conduct that comprises a per se violation or will be analyzed under the rule of reason changes.[147] Thus, antitrust's framework has facilitated conflicting goals

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are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.").

138. *See Brown Shoe*, 370 U.S. at 325–28.

139. *See id.*

140. *See, e.g.*, Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995) ("Without market power to increase prices above the competitive levels, and sustain them for an extended period, a predator's actions do not threaten consumer welfare."). Market power can be shown through a firm's market share or other market factors, like barriers to entry, which insulate its market share. *See id.* at 1437.

141. *See* BORK, *supra* note 121, at 14–15.

142. *See id.* To simplify, this Comment does not include the "inherently suspect" standard that has been proffered by the Commission, which falls uncertainly between the two primary categories. *See, e.g.*, 1-800 Contacts, Inc. v. FTC, 1 F.4th 102, 109 (2d Cir. 2021) (per curium) (holding "analysis of the alleged restraints under the 'inherently suspect' framework . . . improper").

143. BORK, *supra* note 121, at 14–15. Price fixing, output fixing, market division, and bid rigging are a few examples of per se violations of the Sherman Act. *The Antitrust Laws*, FED. TRADE COMM'N [hereinafter *The Antitrust Laws*], https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/E3HJ-5TMP].

144. *See* Throughline, *supra* note 3 (detailing the Phoebus Cartel's market division by nation).

145. *See, e.g.*, Palmer v. BRG of Ga., Inc., 498 U.S. 46 (1990) (finding agreement between competitor bar prep sellers to allocate territories to minimize competition per se illegal under Section 1 of the Sherman Act).

146. BORK, *supra* note 121, at 14–15 ("Behavior not placed in the *per se* category is properly judged by the criteria of the intent which accompanies it and its probable effect upon competition."). Over time, a number of business practices have moved from per se treatment to be judged under the rule of reason as judicial and economic understanding of the practice grows. *See, e.g.*, Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 57–59 (1977) (holding vertical nonprice restrictions have the potential to promote interbrand competition and should thus be judged under the rule of reason).

147. BORK, *supra* note 121, at 17. Generally, conduct moves from per se to rule of reason analysis categorization, not vice versa.

and inconsistent policy, but also maintains the capacity to evolve with new economic understanding of competition and respond to new developments. This "dynamic principle" allows antitrust law to adjust in pursuit of its consumer welfare goal.[148]

While many see the rule of reason as a course-correcting tool in furtherance of consumer welfare,[149] others regard this application as a measure to take the proverbial wind out of antitrust's sails.[150] In 1914, Congress passed the FTC Act (and the Clayton Act[151]) to reinvigorate antitrust law in response to judicial adoption of the rule of reason.[152] Legislative history evidences concern that competition would be harmed by giving the courts a framework to utilize their economic theories of choice to find a just outcome.[153] The FTC Act authorized the "Commission to proceed against a broader range of anticompetitive conduct than can be reached under the Clayton and Sherman Acts," including emerging conduct.[154] The Commission derives much of its enforcement power through Section 5 of the Act, which prohibits "unfair methods of competition"—the competition provision—and "unfair or deceptive acts or practices"—the consumer protection provision.[155] Notably, Congress legislated a vague standard with undefined terms, granting the Commission leave to construct these boundaries.[156] The Commission developed the contours of the standards set by the antitrust and consumer protection provisions distinctly, implicating their responsiveness and practicality in responding to new conduct.

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148. *Id.* at 30.

149. *Id.*

150. *See* Khan, *supra* note 125, at 717–39.

151. 15 U.S.C. §§ 12–27.

152. FED. TRADE COMM'N, POLICY STATEMENT REGARDING THE SCOPE OF UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT, COMMISSION FILE NO P221202, 3 n.7 (2022) [hereinafter *Section 5 Policy Statement*] (finding the rule of reason "made it 'impossible to predict with any certainty' whether courts would condemn the many 'practices that seriously interfere with competition' and found it inconceivable that 'the courts . . . be permitted to test each restraint of trade by the economic standard which the individual members of the court may happen to approve'" (alteration in original) (quoting S. REP. NO. 62-1326, at 10, 12 (1913) ("Cummins Report")).

153. *See id.*

154. *Id.* at 5 n.21 ("[I]f the effect is to restrain trade or to create a monopoly[,] we have a complete and perfect prohibition in the antitrust law." (alteration in original) (quoting 51 CONG. REC. 13311 (1914) (statement of Sen. Cummins)).

155. 15 U.S.C. § 45; *see also The Antitrust Laws*, *supra* note 143 (describing the FTC Act's position in antitrust enforcement).

156. James Campbell Cooper, *The Perils of Excessive Discretion: The Elusive Meaning of Unfairness in Section 5 of the FTC Act* 3 (Mercatus Ctr. at George Mason Univ. Sch. of L., Working Paper No. 13-20, 2013).

2. *The FTC Act's Competition Provision Bans "Unfair Methods of Competition"*

While the FTC Act is generally understood as an expansion of existing antitrust policy, the scope of the expansion eludes both Commissioners enforcing the Act and those regulated by the "unfair methods of competition" standard.[157] In a 2022 policy statement,[158] a majority of Commissioners—relying on the text, structure, and legislative history of the FTC Act as well as Supreme Court precedent interpreting it[159]—sought to reestablish the broad scope of Section 5's competition provision.[160] Despite the existence of favorable precedent—the Commission's policy statement emphasizes twelve Supreme Court decisions[161] supporting its interpretation—such precedent does not represent recent interpretations of the Act's scope.[162] Although not binding on courts, the new policy statement providing general principles for whether conduct is an unfair method of competition within the meaning of the Act will guide the Commission's future actions.[163]

Two principles underly the statutory standard of "unfair methods of competition." First, conduct captured by the competition provision must be a "method of competition."[164] That is, it must be conduct of a market participant that implicates competition, even indirectly, rather than a

157. *See id.* at 4–6.

158. Policy statements are informal administrative law publications that manifest the agency's interpretation of the subject matter, thereby guiding but not binding the public. 5 U.S.C. § 553(b)(3)(A); *see* ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, ADMINISTRATIVE CONFERENCE RECOMMENDATION 2017-5: AGENCY GUIDANCE THROUGH POLICY STATEMENTS 1 (2017).

159. *See, e.g.*, FTC v. Cement Inst., 333 U.S. 683, 720 (1948) ("[T]here are many unfair methods of competition that do not assume the proportions of Sherman Act violations"); FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 242 (1972) ("[T]he Commission has broad powers to declare trade practices unfair" (quoting FTC v. Brown Shoe, 384 U.S. 316, 320–21 (1966)).

160. *Section 5 Policy Statement*, *supra* note 152, at 1. Looking to the text, the Commission argued that "Congress purposely introduced the phrase, 'unfair methods of competition,' . . . to distinguish the FTC's authority from the definition of 'unfair competition' at common law." *Id.* at 3.

161. *Id.* at 1–2 n.3 (citing FTC v. Ind. Fed'n of Dentists, 476 U.S. 447 (1986); *Sperry & Hutchinson Co.*, 405 U.S. 233; FTC v. Texaco, Inc., 393 U.S. 223 (1968); *Brown Shoe*, 384 U.S. 316; Atl. Refin. Co. v. FTC, 381 U.S. 357 (1965); FTC v. Colgate-Palmolive Co., 380 U.S. 374 (1965); Pan Am. World Airways, Inc. v. United States, 371 U.S. 296 (1963); FTC v. Nat'l Lead Co., 352 U.S. 419 (1957); Am. Airlines, Inc. v. N. Am. Airlines, Inc., 351 U.S. 79 (1956); FTC v. Motion Picture Advert. Serv. Co., 344 U.S. 392 (1953); *Cement Inst.*, 333 U.S. 683; FTC v. R.F. Keppel & Bro., Inc., 291 U.S. 304 (1934)).

162. *See* Boise Cascade Corp. v. FTC, 637 F.2d 573, 581 (9th Cir. 1980); Off. Airline Guides, Inc. v. FTC, 630 F.2d 920, 927 (2d Cir. 1980); E.I. Du Pont De Nemours & Co. v. FTC, 729 F.2d 128, 141–43 (2d Cir. 1984).

163. *Section 5 Policy Statement*, *supra* note 152, at 1–2.

164. *Id.* at 8.

market condition doing the same.[165] Second, the method of competition must be unfair, understood as competition not on the merits.[166] Conduct extends beyond competition on the merits when it is "coercive, exploitative, collusive, abusive, deceptive, predatory," etc., or when it negatively affects competitive conditions by foreclosing or impairing market participants, reducing competition between rivals, limiting choice, or otherwise harming consumers.[167] Once shown, these principles are balanced on a sliding scale.[168] Thus when "indicia of unfairness are clear," the burden required to demonstrate "a tendency to negatively affect competitive conditions" is lower.[169] Note that the Commission interprets the Act to require an enforcer to show only a "tendency" to impair competitive conditions.[170] This may look like "raising prices, reducing output, limiting choice, lowering quality, reducing innovation, impairing other market participants, or reducing the likelihood of potential or nascent competition."[171]

The policy statement rejects the Obama-era Commission statement for constraining the scope of Section 5's competition authority and previews the legal basis for the Commission's future action.[172] However, it continues to provide little clarity on what precisely constitutes an "unfair method of competition" within the meaning of the FTC Act.[173] It thus

165. *Id.*

166. *Id.*

167. *Id.* at 9.

168. *Id.*

169. *Id.*

170. *Id.* ("Because the Section 5 analysis is purposely focused on incipient threats to competitive conditions, this inquiry does not turn to whether the conduct directly caused *actual* harm in the specific instance at issue." (citations omitted)). Targeting antitrust incipiency is at least part of the FTC Act's widening in scope of the Sherman Act. *See id.*; *see also The Antitrust Laws*, *supra* note 143 ("The FTC Act also reaches other practices that harm competition, but that may not fit neatly into categories of conduct formally prohibited by the Sherman Act."). Even Bork's seminal work on antitrust principles recognizes this expansion in antitrust policy. BORK, *supra* note 121, at 60–61. Although he recognizes this statutory intent, he disavows it, believing that it does more harm than good to competition, and thereby consumers. *See id.* at 61.

171. *Section 5 Policy Statement*, *supra* note 152, at 10.

172. Press Release, Fed. Trade Comm'n, FTC Rescinds 2015 Policy that Limited Its Enforcement Ability under the FTC Act (July 1, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement-ability-under-ftc-act [https://perma.cc/9RQ8-7DHE].

173. *See* FED. TRADE COMM'N, DISSENTING STATEMENT OF COMMISSIONER CHRISTINE S. WILSON, REGARDING THE "POLICY STATEMENT REGARDING THE SCOPE OF UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT," COMMISSION FILE NO. P221202, at 2 (2022) ("Instead of [defining the conditions under which conduct would be unfair], the Policy Statement adopts an 'I know it when I see it" approach premised on a list of nefarious-sounding adjectives, many of which have no antitrust or economic meaning.").

remains unclear how planned obsolescence could be captured as an unfair method of competition within the Commission's new understanding of its antitrust enforcement authority. In contrast, the Commission's consumer protection authority has a much more developed understanding of its enforcement authority.

B. Consumer Protection Law

Whereas antitrust law operates as an "institutional framework" to promote competition and thereby maximize consumer welfare, consumer protection law acts directly in furtherance of the shared consumer welfare goal by focusing on "ameliorating" the harm that results from "consumers' imperfect or incomplete information."[174] Consumer protection law is an amalgamation of federal, state, and local law that developed from shortcomings in the common law (e.g., caveat emptor) that resulted in public outcry.[175] As a result, consumers in the United States are protected from a wide swath of consumer harm, including "unsafe products, fraud, deceptive advertising, and unfair business practices."[176] On the federal level, Congress has prevented harm by statutorily proscribing improper conduct.[177] Most notable for the purposes of this Comment is the FTC Act's prohibition on "unfair or deceptive acts or practices," the consumer protection provision of Section 5.[178]

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174. Joshua D. Wright, *The Antitrust/Consumer Protection Paradox: Two Policies at War with Each Other*, 121 YALE L.J. 2216, 2218 (2012).

175. Spencer Weber Waller, Jillian G. Brady, R.J. Acosta, Jennifer Fair, Jacob Morse & Emily Binger, *Consumer Protection in the United States: An Overview*, EUR. J. OF CONSUMER L. 1, 1 (2011). Caveat emptor is the buyer beware doctrine, which places the risk and burden of a bad transaction on the purchaser. *See id.* Instances where consumers have been harmed and left without remedy by the common law resulted in statutory intervention. *See id.* One example is the creation of the Food and Drug Administration following publication of *The Jungle*, Upton Sinclair's exposé of the meatpacking industry. *Id.*

176. *Id.* at 2.

177. *See* PRACTICAL LAW COMMERCIAL TRANSACTIONS, CONSUMER PROTECTION: OVERVIEW (2024), Westlaw 5-575-0814. The passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act and creation of the Consumer Financial Protection Bureau has been "heralded" as a "revolution in consumer protection law and enforcement." Wright, *supra* note 174, at 2219. One reason is because it centers "behaviorist" economics, which regulates with the mindset that consumers may not opt for their best interests, over traditional antitrust and consumer protection price-theory/consumer welfare standard economics. *See id.* at 2230–31. Because the Act and resulting agency focus on consumer protection for financial products, it and its behaviorist roots are not a focus of this Comment. *Id.* at 2219–20. However, behaviorist economic theory conceives of regulations that are contrary to consumers' desires but ultimately promote their welfare, and thus could be better suited to addressing wide swaths of planned obsolescence conduct. *Id.* at 2221. For a critique of behavioral consumer protection, contextualized with existing consumer laws following the consumer welfare model, see *id.*

178. 15 U.S.C. § 45.

1. *The FTC Act's Consumer Protection Provision Bans "Unfair or Deceptive Acts or Practices"*

In response to the Supreme Court's ruling in *Federal Trade Commission v. Raladan, Co.*[179] that the Commission lacked authority to directly regulate consumer harms,[180] Congress passed the Wheeler-Lea Act[181] in 1938, adding a prohibition on "unfair or deceptive acts or practices" to the Commission's mandate.[182] Despite coming later, Section 5's consumer protection provision is more developed than its competition provision. This is largely the result of the Commission's early policy statements, made in the wake of diminished public confidence in the agency, which were subsequently made law through judicial review.[183]

The FTC's unfairness authority stems from three factors implicitly approved by the Supreme Court in *Federal Trade Commission v. Sperry & Hutchinson*.[184] There, the Court asked whether the practice (1) "injures consumers," (2) "violates established public policy," and (3) "is unethical or unscrupulous."[185] The current understanding of unfairness has shifted slightly, as stated in *Federal Trade Commission v. Wyndham Worldwide Co.*[186] There, the Third Circuit laid out three tests based on the Commission's 1980 policy.[187] The tests ask whether the injury (1) is substantial, (2) is "outweighed by any countervailing benefits to consumers or competition," and (3) is one that consumers themselves could not have avoided.[188] While still relatively broad, this definition

179. 283 U.S. 643 (1931).

180. *Id.* at 654.

181. Pub. L. No. 75-447, 52 Stat. 111 (1938).

182. Wright, *supra* note 174, at 2263. This statutory language "remains the foundation of modern federal consumer protection law." *Id.* at 2227 ("Congress consciously left this proscription open-ended, delegating both definition and enforcement of these prohibitions to the FTC in the pursuit of maximizing consumer welfare.").

183. *See, e.g.*, Fed. Trade Comm'n, *FTC Policy Statement on Unfairness* (Dec. 17, 1980), https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness [https://perma.cc/43BW-RRN8] (explaining development of, and rationale for, the FTC's consumer unfairness jurisdiction); Fed. Trade Comm'n, Policy Statement Letter from James C. Miller III, Chairman, FTC, to Hon. John D. Dingell, Chairman, House Comm. on Energy & Com. (Oct. 14, 1983) [hereinafter 1983 Policy Statement on Deception] (explaining development of, and rationale for, the FTC's consumer deception jurisdiction); *see also* Cooper, *supra* note 156, at 6 ("As part of a program to inspire public—and more importantly, congressional—trust, the FTC adopted a series of binding policy statements that made consumer harm the touchstone of its authority to challenge 'unfair or deceptive acts or practices' (UDAP authority).").

184. 1980 Policy Statement on Unfairness, *supra* note 183.

185. *Id.*

186. 799 F.3d 236 (3d Cir. 2015).

187. *Id.* at 244.

188. *Id.*

narrowed the Commission's enforcement authority. By requiring harm to be "substantial" (and not "trivial or merely speculative"), the Commission relinquished incipiency authority[189] it may have been able to claim in the consumer protection sphere.[190] By requiring the harm to be unavoidable, the Commission promoted normal supply and demand market function[191] while recognizing that "certain . . . techniques may prevent consumers from effectively making their own decisions," and thus require agency intervention.[192] Agency unfairness enforcement is therefore focused on business practices that undermine consumers' ability to make free market decisions.

Factors once part of unfairness analysis—that the act is contrary to public policy and "unethical . . . or unscrupulous"[193]—are no longer requirements.[194] Today, public policy may be considered as evidence, but "may not serve as a primary basis" for a finding of unfairness.[195] This evolution reflects the fact that public policy was generally used to reinforce the primary inquiry into consumer harm.[196] The "unethical or unscrupulous" factor was likewise redundant: "Conduct that is truly unethical or unscrupulous will almost always injure consumers or violate public policy."[197]

While the Commission's unfairness authority has the potential to capture a wide array of conduct, its contours are less developed than the Commission's deception authority.[198] In 1983, the Commission issued a

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189. Incipiency authority refers to the Commission's ability to reach conduct that is not fully formed and may not have caused consumer harm yet. *See* Richard M. Steuer, *Incipiency*, 31 LOY. CONSUMER L. REV. 155, 156 (2019). It is conduct that "tend[s] to" be unfair. *See id.*

190. *See* 1980 Policy Statement on Unfairness, *supra* note 183 ("The Commission is not concerned with trivial or merely speculative harms.").

191. *Id.* That is, if consumers know of the product's unfairness but still choose it over other available options, the FTC will likely not be involved. *Id.* If consumers are unaware of the unfairness or have no other options, however, the FTC will investigate. *Id.*

192. *Id.*

193. FTC v. Sperry & Hutchinson Co., 405 U.S. 223, 244–45 n.5 (1972); 1980 Policy Statement on Unfairness, *supra* note 183.

194. 15 U.S.C. § 45(n) (codifying the Commission's 1980 Policy Statement on Unfairness).

195. *Id.* Established public policy may still guide agency evaluation of "whether a particular form of conduct does in fact tend to harm consumers." 1980 Policy Statement on Unfairness, *supra* note 183. Public policy articulated by courts and legislatures can confirm that conduct violates consumer rights, such as when the Commission looked to First Amendment jurisprudence to formulate advertising policy. *Id.* (citing Statement of Basis and Purpose, Advertising of Ophthalmic Goods and Services, 43 Fed. Reg. 23992, 24001 (1978)).

196. 1980 Policy Statement on Unfairness, *supra* note 183.

197. *Id.*

198. *See* G.S. Hans, *Privacy Policies, Terms of Service, and FTC Enforcement: Broadening Unfairness Regulation for a New Era*, 19 MICH. TELECOMM. & TECH. L. REV. 163, 173 (2012); Emma

Policy Statement on Deception.[199] The Statement clarified that the FTC's deception mandate is implicated when "there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment."[200] The Statement offered specific examples, such as "false oral or written representations" and "sales of hazardous or systematically defective products or services without adequate disclosures."[201] Additionally, the Statement provided that deception is established when three elements are shown: (1) the source of the deception, i.e., the representation, omission, or practice that is likely to mislead; (2) the reasonableness of the consumer; and (3) the materiality of the source.[202]

The source of deception can be "written or oral misrepresentations, or omissions of material information."[203] However, the mere act of selling a product implies it is "fit for the purposes for which it is sold."[204] Whatever the source of alleged deception, the Commission must establish it is "likely to mislead reasonable consumers under the circumstances."[205] Importantly, a deceptive act or practice requires no demonstration of intent, but rather looks to the reasonableness of consumer interpretation.[206] While this is a fact- and circumstance-specific inquiry, reasonableness is hard to establish "when consumers can easily evaluate the product or service, it is inexpensive, and it is frequently purchased."[207]

Elder, *Wrongful Improvers as a Guiding Principle for Application of the FTC's IP Deletion Requirement*, 97 WASH. L. REV. 1009, 1015–16 (2022).

199. 1983 Policy Statement on Deception, *supra* note 183.

200. *Id.*

201. *Id.*

202. *Id.*; *see also* FTC v. Cap. Choice Consumer Credit, Inc., No. 02-21050 CIV, 2004 WL 5149998, at *31–32 (S.D. Fla. Feb. 20, 2004) (applying the three elements to find defendant's Earn-a-Bankcard mailer deceptive); FTC v. Tashman, 318 F.3d 1273, 1277 (11th Cir. 2003) (relying on the three elements to remand for entry in favor of the FTC); FTC v. World Travel Vacation Brokers, Inc., 861 F.2d 1020, 1029 (7th Cir. 1988) (employing the three elements to affirm injunction of travel agency's deceptive advertising).

203. 1983 Policy Statement on Deception, *supra* note 183.

204. *Id.*; *see also* BUSINESSPERSON'S GUIDE TO FED. WARRANTY L., *supra* note 107 (implied warranty of merchantability).

205. 1983 Policy Statement on Deception, *supra* note 183; *World Travel Vacation Brokers, Inc.*, 861 F.2d at 1029 (rejecting Brokers' assertion that individuals relying on the World Travel advertisements were unreasonable in believing their airfare cost $29 in light of Brokers' steps to enhance credibility of the deal and its own witness's testimony that they believed they "had gotten airfare for $29").

206. *See* 1983 Policy Statement on Deception, *supra* note 183; *see, e.g.*, FTC v. Bay Area Bus. Council, Inc., 423 F.3d 627, 635 (7th Cir. 2005) ("The FTC is not, however, required to prove intent to deceive.").

207. 1983 Policy Statement on Deception, supra note 183; Simeon Mgmt. Corp. v. FTC, 579 F.2d 1137, 1146 (9th Cir. 1978) (reasoning that deception is dependent on contrary public perception).

Under these circumstances, an incentive to deceive is less apparent given manufacturers and sellers would generally "seek to encourage repeat purchases."[208] Lastly, the Commission must establish materiality.[209] A misrepresentation, omission, or practice is "material" when it is "likely to affect a consumer's choice of or conduct regarding a product."[210] Materiality is "an evidentiary proxy for consumer injury,"[211] meaning that a practice would not be found harmful unless consumers would change their behavior in response to it.[212] Courts have found materiality where a practice or statement "contains information that is important to a consumer's purchasing decision such as information relating to the economic viability of a transaction or the central character of the product or service."[213] Essentially, roadblocks to informed consumer decisionmaking are material in a deception analysis. Some representations—like express claims, intentional implied claims, or claims "significantly involv[ing] health [or] safety"[214]—carry a presumption of materiality.[215]

Under its consumer protection authority, the Commission has significant, but not unlimited, power to respond to unfair and deceptive practices in the marketplace.[216] The scope of this authority took shape from the Commission's self-imposed restraint, which limited enforcement to circumstances of unavoidable injury and material deception.[217] Whether the Commission's consumer protection authority can address

208. 1983 Policy Statement on Deception, *supra* note 183. *But see* FTC v. Nat'l Urological Grp., 645 F. Supp. 2d 1167, 1213 (N.D. Ga. 2008) (rejecting the notion that repeat customers should not be included in damages calculations for deceptive advertising of the product because they were influenced by their personal experience with the product, not the deception).

209. 1983 Policy Statement on Deception, *supra* note 183.

210. *Id.* ("Where the seller knew, or should have known, that an ordinary consumer would need omitted information to evaluate the product or service, or that the claim was false, materiality will be presumed because the manufacturer intended the information or omission to have an effect.").

211. *In re* Nomi Techs., Inc., 160 F.T.C. 437, 439 (2015) (dissenting statement of Comm'r Joshua D. Wright).

212. Joshua D. Wright & Alexander Krzepicki, *What Is an Independent Agency to Do? The Trump Administration's Executive Order on* Preventing Online Censorship *and the Federal Trade Commission*, 6 ADMIN. L. REV. ACCORD 29, 37 (2020) ("A materially false statement results in injury when, in the absence of a deception, the consumer would have chosen a more preferred option.") (citing *In re* Nomi Techs., Inc., 160 F.T.C. 437, 439 (2015) (dissenting statement of Comm'r Joshua D. Wright)).

213. FTC v. Davison Assocs., Inc., 431 F. Supp. 2d 548, 559 (W.D. Pa. 2006) (citing FTC v. Five-Star Auto Club, Inc., 97 F. Supp. 2d 502, 529 (S.D.N.Y. 2000)).

214. 1983 Policy Statement on Deception, *supra* note 183.

215. *Id.*

216. 15 U.S.C. § 45; Wright, *supra* note 174, at 2227.

217. *See supra* note 183 and accompanying text.

planned obsolescence will turn on whether such circumstances are present.

III. APPLICATION TO PLANNED OBSOLESCENCE

With the basic contours of consumer law—specifically, the Commission's enforcement of its competition, unfairness, and deception authorities—laid out, this Comment proceeds by exploring the application of antitrust and consumer protection to planned obsolescence. Although necessarily simplistic, this analysis will clarify the viability of using consumer law to respond to planned obsolescence and elucidate key considerations for any future action.

A. Antitrust and Planned Obsolescence: A Conceptual Fit Only?

Can planned obsolescence—which harms consumers by diminishing the quality of their products and undermining their spending power—be captured by the antitrust laws? As a strategy through which a firm increases consumption of its good(s) and thereby bolsters its bottom line, planned obsolescence can be conceptualized as a method of competition.[218] In a "corporate ecosystem requiring constant growth," planned obsolescence is a "competitive choice" for manufacturers to meet shareholder demands.[219] As it stands, however, antitrust law is agnostic to social values beyond the consumer welfare goal.[220] This means planned obsolescence must result in harm within a narrow meaning and under specific circumstances to constitute an antitrust violation.[221] While there are some circumstances under which planned obsolescence could be captured by antitrust law, this section shows that current antitrust theory is largely ill-suited to responding to planned obsolescence.

The Phoebus Cartel example illustrates antitrust law's capacity to respond to planned obsolescence. There, the dynamic between planned obsolescence and a firm's market position is evident: Phoebus decreased the longevity of lightbulbs and cartel members' sales surged.[222] However,

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218. *See* Bisschop, et al., *supra* note 9, at 282.

219. *Id.*

220. *See* Thomas J. Horton, *Rediscovering Antitrust's Lost Values*, 16 U. N.H. L. REV. 179, 239 (2018) ("Conservative antitrust commentators rejoice today in claiming that 'the powerful impact of economic analysis' has led to an American antitrust system that 'has become relatively politics-agnostic.'" (quoting Theodore Voorhees, Jr., *The Political Hand in American Antitrust—Invisible, Inspirational, or Imaginary?*, 79 ANTITRUST L.J. 557, 558, 576 (2014))).

221. *See, e.g.*, Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995) ("Without market power to increase prices above competitive levels, and sustain them for an extended period, a predator's actions do not threaten consumer welfare.").

222. *See supra* section I.A.

the competitive harm was the agreement between cartel members, a straightforward Sherman Act Section 1 violation.[223] In fact, it is unclear whether planned obsolescence could be a viable strategy in a competitive environment. In such a setting, implementing planned obsolescence would not allow a firm to outcompete rivals, but would rather benefit competitors to the implementor's detriment.[224] For instance, if Nike manufactured a shoe with a quick-deteriorating sole, hoping to force consumers to purchase more sneakers, most consumers would simply switch to Adidas (or Reebok, New Balance, Asics, etc.).[225] As consumers made this switch to more durable products, plummeting sales and diminished market position would force Nike to renege on its planned obsolescence strategy.[226] Thus, in a competitive marketplace, planned obsolescence is irrational and, while individual consumers might experience harm (like early purchasers of the Nike shoes above), it is not of the kind antitrust addresses: The market should correct itself.[227]

When a market is not competitive, however, economists have noted rational incentives for why "a firm might opt to give its products a shorter than economically desirable useful life."[228] For a monopolist, durable products are a liability to future profits.[229] And, because a monopolist enjoys relative isolation from competition, undermining product durability would not result in immediate consumer flight to alternative products.[230] Planned obsolescence may even be economically rational for

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223. 15 U.S.C. § 1; United States v. Gen. Elec. Co., 82 F. Supp. 753, 847–48 (D.N.J. 1949).

224. *See* Bulow, *supra* note 1, at 737 (modeling the way added competition undermines the advantages of planned obsolescence for monopolists).

225. *See* Scott Germaise, *Why Do Customers Switch? How to Keep from Being Just a Satisficer?*, LINKEDIN (Feb. 14, 2022), https://www.linkedin.com/pulse/why-do-customers-switch-how-keep-from-being-just-scott-germaise/ [https://perma.cc/D55T-33MT] (listing better products and higher value as reasons why customers change their purchasing practices).

226. *See* Bulow, *supra* note 1, at 737 (showing how a manufacturer choosing planned obsolescence in the first quarter will increase their durability in response to competition in the second).

227. *See id.*; Horton, *supra* note 220.

228. Bulow, *supra* note 1, at 730.

229. Barak Y. Orbach, *The Durapolist Puzzle: Monopoly Power in Durable Goods Market*, 21 YALE J. REG. 67, 69 (2004) ("The demand for perishables is more or less stable over time, since the consumer returns to the market to buy a replacement for the perishable after consumer it. In contrast, the demand for durables shrinks over time because the consumer can reuse the good and has little, if any, need to return to the market."). While Bulow's model demonstrates that a "monopolist will generally choose a durability below efficient levels . . . planned obsolescence is just one of several ways in which a monopolist might mitigate the commitment problem," *i.e.*, "[t]he perfectness constraint . . . reduces the monopolist's profits." Bulow, *supra* note 1, at 735–36.

230. Tejvan Pettinger, *Advantages and Disadvantages of Monopolies*, ECON. HELP (Oct. 4, 2020), https://www.economicshelp.org/blog/265/economics/are-monopolies-always-bad [https://perma.cc/F7Q6-Y9LL]. Although a monopolist, by definition, is an economic actor without

oligopolists as well; however, such incentive is further constrained by "the effect of one's durability on competitors' . . . output."[231]

Thus, economic understanding—from which antitrust policy should not be divorced[232]—reveals that planned obsolescence could be the product of anticompetitive conduct under certain conditions. For monopolists, and to an extent oligopolists, planned obsolescence can act as a tool to maintain or create monopoly power in violation of the antitrust laws.[233] However, under existing case law, a manufacturer's decision to raise price or lower quality alone is not by itself an antitrust violation.[234] While antitrust may conceptually capture some planned obsolescence conduct, it remains unclear whether it could be an effective legal framework in practice. It becomes difficult to see a case being brought when the unique difficulties of planned obsolescence are added to the generally onerous burden of antitrust litigation.

B. Planned Obsolescence as an "Unfair Method of Competition"

Although traditional antitrust law is likely unresponsive to the harms of modern planned obsolescence, it could fall within the Commission's competition authority. The Commission's November 2022 Policy Statement provides general guidelines to evaluate whether conduct like planned obsolescence could constitute an unfair method of competition.[235] Although amorphous, the Statement reorients FTC competition enforcement beyond the Sherman Act, expanding what may be considered anticompetitive and harmful.[236] With this logic, a complaint alleging planned obsolescence as a stand-alone violation under this provision becomes conceivable.

To constitute an "unfair method of competition," the conduct must be a "method of competition."[237] Unlike under the Sherman and

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competition, Adam Hayes, *What Is a Monopoly? Types, Regulations, and Impact on Markets*, INVESTOPEDIA (May 3, 2024), https://www.investopedia.com/terms/m/monopoly.asp# (last visited May 15, 2024), I use "relative isolation" to denote the possibility of market entry. Were a manufacturer to implement planned obsolescence in an extreme and obvious fashion, incentives for market entry would only increase as actors recognize demand for a "good" product.

231. Bulow, *supra* note 1, at 737.

232. *See generally* BORK, *supra* note 121.

233. *See* Bulow, *supra* note 1, at 735, 737. Oligopolists, by nature of their increased competition, must balance the advantages that high durability and faster obsolescence can have on their profitability. *Id.* at 737.

234. *See* Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 407–08 (2004).

235. *Section 5 Policy Statement*, *supra* note 152.

236. *See id.* at 8–10.

237. *Id.* at 8.

Clayton Acts, which would likely consider planned obsolescence to be a method of competition only when implemented by an oligopoly or monopoly, a majority of FTC Commissioners interpret the term more broadly.[238] Under the FTC Act, a method of competition is simply "conduct undertaken by an actor in the marketplace," which only need "implicate competition" indirectly.[239] Absolute obsolescence readily fits within this definition: As a manufacturing strategy, planned obsolescence is elected conduct that increases consumer spending.[240]

Once shown to be a method of competition, the conduct must also go beyond competition on the merits to constitute an "unfair method of competition."[241] Competition on the merits is evident from "superior products and services" or "investment in research and development that leads to innovative outputs."[242] Unfair competition, in contrast, "tend[s] to negatively affect competitive conditions" through coercion, exploitation, collusion, abuse, deception, or predation.[243] While greater understanding of planned obsolescence's impact on competition is required, there are clear overlaps between the Statement's "beyond competition on the merits" descriptors[244] and the nature of absolute planned obsolescence. Most obviously, the Phoebus Cartel's collusion resulted in an inferior lightbulb, although this did require investment and research.[245] A counterargument follows that the strategy is competition on the merits. That is, consumers have shown a preference for cheaper, disposable goods which the strategy facilitates.[246] Thus, it remains important to delineate obsolescence of function from other like conduct.

Of course, the Phoebus Cartel involved a clear agreement in restraint of trade, placing it within the Sherman Act's bounds.[247] Imagine, however, that the Cartel never formed and instead General Electric unilaterally began to shorten the life of their bulbs to see whether the other major lightbulb producers would follow suit. If none adopted its action, General Electric would likely need to abandon the obsolescence strategy

238. *See supra* section III.A; *see also Section 5 Policy Statement*, *supra* note 152, at 8 (presenting a broadened scope of FTC enforcement as an unfair method of competition); *The Antitrust Laws*, *supra* note 143 (describing the FTC Act's reach beyond the Sherman Act's formal categories of conduct).

239. *Section 5 Policy Statement*, *supra* note 152, at 8.

240. *See id.*

241. *Id.*

242. *Id.* at 8–9.

243. *Id.* at 9.

244. *Id.* at 8–9.

245. *See supra* note 12 and accompanying text.

246. *See* PACKARD, *supra* note 16, at 68–77.

247. United States v. Gen. Elec. Co., 82 F. Supp. 753, 847–48 (D.N.J. 1949).

or risk losing customers; but if others began to implement their own obsolescence strategy, the result is an incipient threat to competition.[248] This tacit collusion scenario does not implicate the Sherman and Clayton Acts because there is no formal agreement to restrain trade, despite restraint of trade being the practical effect. This is one example of where the current Commission seeks to establish the scope of their Section 5 powers beyond other antitrust laws, and thus reach "[c]onduct that violates the spirit of the antitrust laws."[249] Likewise, this is a situation in which absolute obsolescence could operate rationally in the modern era. If market research suggests manufacturers are currently using planned obsolescence in this way, it is likely a claim could be brought consistent with the 2022 Policy Statement.

While the recent Policy Statement makes a complaint alleging planned obsolescence as an unfair method of competition plausible, such a complaint would face a significant uphill battle. For one, judges are largely unresponsive to new antitrust theories, lest they depart from its (currently) recognized consumer welfare goal.[250] This aversion is in part due to antitrust's conflicted development.[251] Additionally, much of the case law cited in support of an expanded reading of Section 5 was decided before antitrust refocused on consumer welfare alone.[252] While still "good law," it is not the current judicial understanding.[253] With this base of skepticism, initial adjudication of planned obsolescence practices would need to advance clear instances of absolute obsolescence—i.e., obsolescence without procompetitive benefit. This is in part because the Commission advances new theories of Section 5 harm primarily through

248. *Section 5 Policy Statement*, *supra* note 152, at 13.

249. *Id.* ("Conduct that violates the spirit of the antitrust laws . . . includes conduct that tends to cause potential harm similar to an antitrust violation, but that may or may not be covered by the literal language of the antitrust laws or that may or may not fall into a "gap" in those laws . . . . [An example is] practices that facilitate tacit coordination . . . .").

250. Wright & Ginsburg, *supra* note 131, at 2405. At the same time, however, Congress specifically wrote the relevant standard vaguely, knowing that precision would limit the scope of enforcement and quickly become outdated. *See Section 5 Policy Statement*, *supra* note 152, at 2–3.

251. *See, e.g.*, TED BOLEMA, WHAT DOES THE NEW FEDERAL TRADE COMMISSION POLICY STATEMENT MEAN FOR ANTITRUST?, CTR. FOR GROWTH & OPP. AT UTAH STATE UNIV. 8–10 (2023) (mapping the shift toward giving the Commission little deference under Section 5 since the Supreme Court adopted the consumer welfare standard); *see also* BORK, *supra* note 121, at 13 (discussing the conflicting goals of consumer welfare and small-business welfare in the early period of antitrust law).

252. *See supra* section II.A.1.

253. *Id.*

adjudicative precedent, meaning groundwork must be laid before greater conduct of this nature could be captured.[254]

Most importantly, it remains unclear whether such pure obsolescence of function even exists as a modern practice. If it does, how could this be discerned and proved in an adjudicatory forum, along with the other burdens of defining the market and crossing the requisite market power threshold? The novelty and nuance of planned obsolescence make adjudication a hard starting point for efforts to curb this conduct.[255]

C. Consumer Protection and Planned Obsolescence: An Easier Fit?

Planned obsolescence appeals to general public conceptions of unfairness and deception: Intentionally sabotaging the lifespan of a product, without purchaser knowledge, does not square with the plain meaning of these terms. Although planned obsolescence offends popular notions of fairness, it is a separate question whether it falls within the meaning of "unfair or deceptive acts or practices" under the FTC Act.

1. Planned Obsolescence as an Unfair Act

If a clear instance of planned obsolescence conduct can be identified, it will likely fall within the Commission's understanding of an "unfair" act. Looking to Phoebus as one such "clear" example, it becomes obvious that consumers can be harmed when manufacturers implement planned obsolescence strategies. After 1940, lightbulb purchasers had to spend approximately twice as much on bulbs to enjoy equivalent, pre-Phoebus function.[256] The resulting harm from this conduct is clear from the monetary injury inflicted: The difference between consumer spending on bulbs pre- and post-Phoebus Cartel.[257] This injury was especially clear

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254. *See* Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583 (2014) (describing the trajectory of FTC privacy policy and enforcement under the consumer protection provision of Section 5).

255. While the FTC's antitrust authority has developed by adjudication, two FTC Commissioners—former Commissioner Rohit Chopra and current Chair Lina Khan—have expressed interest in using rulemaking, pursuant to the Administrative Procedure Act, to develop Section 5 and supplement antitrust adjudication. Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357 (2020). Analysis of "unfair method of competition rulemaking" is outside the scope of this Comment, and a highly contested subject, *see, e.g.*, JAY B. SYKES, CONG. RSCH. SERV., LSB 11159, THE FEDERAL TRADE COMMISSION'S NON-COMPETE RULE 6 (2024) (noting three lawsuits contending, in part, that the FTC lacks substantive competition rulemaking authority), however it may represent a more viable course of action with respect to planned obsolescence conduct under the competition provision.

256. *See* Throughline, *supra* note 3; THE LIGHT BULB CONSPIRACY, *supra* note 9.

257. 1980 Policy Statement on Unfairness, *supra* note 183 (recognizing substantial injury will generally involve monetary harm).

given the diminished lifespan provided no "countervailing benefits to consumers or competition" like facilitating a brighter lightbulb.[258] Rather, the practice simply increased producers' profits. Additionally, the harm was not reasonably avoidable by consumers because it was adopted by all major lightbulb producers and implemented behind the scenes.[259]

The Commission's requirement that harm be unavoidable focuses its enforcement on business practices that undermine consumers' ability to make free market decisions.[260] Unavoidability is especially relevant to planned obsolescence because of the many ways that planned obsolescence manifests. At times, consumers have no choice but to use a product undermined by planned obsolescence, as with lightbulbs during Phoebus' global reach, making the injury unavoidable.[261] In other instances, planned obsolescence can be better understood as producing a range of products available to consumers, thereby giving consumers choices across different price and quality points, and facilitating free market decision.[262] If consumers have "a free and informed choice" about using products impacted by planned obsolescence, "an injury is reasonably avoidable."[263] Thus, application of the unfairness standard to planned obsolescence will necessarily be a very context-specific inquiry. Additionally, whether planned obsolescence is avoidable will depend on the context and the expectations of consumers. For example, consumers purchasing Sheertex hosiery can hold expectations of the product's longevity that would be unreasonable for consumers purchasing drugstore hosiery.[264]

Because of the variability of planned obsolescence, any unfairness actions should be prefaced on showing a "clear instance" of planned obsolescence, which can be thought of as obsolescence of function conduct.[265] This is because consumers are necessary participants in

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258. *Id.*

259. *See* Throughline, *supra* note 3; THE LIGHT BULB CONSPIRACY, *supra* note 9; United States v. Gen. Elec. Co., 82 F. Supp. 753, 828 (D.N.J. 1949). Public policy could bolster the Commission's conclusion that such planned obsolescence conduct is "unfair" within the meaning of the consumer protection provision. *See, e.g.*, section I.C.2 (Right to Repair). To Bernard London's chagrin, incentivizing planned obsolescence has never been a public policy goal, see *supra* notes 20–24 and accompanying text, even if it is widely accepted in certain contexts.

260. 1980 Policy Statement on Unfairness, *supra* note 183.

261. *See, e.g.*, FTC v. Wyndham Worldwide Corp., 799 F.3d 236, 246 (3rd Cir. 2015) (finding it plausible that Wyndham's privacy conduct "satisfies the reasonably unavoidable requirement at least partially *because* of its privacy policy" (emphasis added)).

262. For a discussion on hosiery, see *supra* section I.B.

263. FTC v. Walmart Inc., 664 F. Supp. 3d 808, 835 (N.D. Ill. 2023).

264. *See supra* section I.B.

265. This tracks with the concept that a good must be fit for its intended purpose. BUSINESSPERSON'S GUIDE TO FED. WARRANTY L., *supra* note 107.

broader conceptions of planned obsolescence conduct, making such conduct harder to establish as "not reasonably avoidable by consumers."[266] Thus, while the above analysis shows promise for the ability of consumer protection law to respond to planned obsolescence conduct, what is really needed is more market research on whether such obsolescence is in modern practice. Section 13(a) of the FTC Act empowers the Commission, with some exceptions, "[t]o gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership or corporation engaging in or whose business affects commerce."[267] This authority enables the FTC to conduct the needed market research and, upon a "clear instance" of planned obsolescence, to conduct further investigation[268] and pursue enforcement.[269]

2. Planned Obsolescence as a Deceptive Act

Planned obsolescence may fall within the FTC's deception authority as well. Most obviously, the FTC's Policy Statement on Deception expressly characterizes "sales of . . . systematically defective products . . . without adequate disclosures" as deceptive.[270] Planned obsolescence seems to logically implicate this example.

Deception analysis looks to (1) the source of the deception—the representation, omission, or practice that is likely to mislead; (2) the reasonableness of the consumer; and (3) the materiality of the source.[271] Because a manufacturer implies that a product is fit for intended use when placed on the market, the act of placing a product designed to fail prematurely into commerce is itself misleading.[272] Because of the product's implied warranty, it is also possible that consumers' purchase of the product is reasonable, satisfying the second element. Of course, whether the purchase is reasonable will be dependent on the specific

266. 15 U.S.C. § 45(n); 1980 Policy Statement on Unfairness, *supra* note 183.

267. *Id.* § 46(a).

268. *Id.* §§ 46, 49, 57b-1 (authorizing investigations and compulsory processes).

269. *Id.* § 45 (authorizing enforcement under competition and consumer protection authorities).

270. 1983 Policy Statement on Deception, *supra* note 183; *see also* FTC v. IFC Credit Corp., 543 F. Supp. 2d 925, 941 (N.D. Ill. 2008) (using the Policy Statement's examples of deceptive conduct to illustrate deception in rental leasing practices); Simeon Mgmt. Corp. v. FTC, 579 F.2d 1137, 1146 (9th Cir. 1978) ("[T]here c[an] be no deception unless the public holds a belief contrary to material fact not disclosed by the advertisement.").

271. 1983 Policy Statement on Deception, *supra* note 183.

272. *Id.*

context.[273] For instance, a laptop with an undisclosed shelf-life of six months could be deceptive given consumer expectations about the product's longevity; but it would be harder to establish a consumer had been deceived when a cheap sweater bought from Zara began to run after a few wears.

The need for context specificity also extends to the third element of deception, materiality. Deceptive acts are material when they influence information relevant to consumer decisionmaking.[274] Because a majority of planned obsolescence conduct is accepted, if not desired, by consumers,[275] information about productive longevity may not universally impact consumer purchases. In these instances, planned obsolescence could be found immaterial. However, case law on deception and materiality may still be capable of establishing materiality because planned obsolescence and manufacturer statements regarding product longevity are relevant purchasing considerations, even if consumers ultimately make the purchase.

While it is possible that planned obsolescence conduct could be found material—through a broad conception of materiality or as presumptively material because it undermines the "durability, performance, . . . or quality" of a product[276]—two potential obstacles should be noted. First, the current understanding of planned obsolescence in the modern economy makes arguing materiality tricky. As discussed prior, planned obsolescence is a highly nuanced and interconnected category of conduct.[277] The fact that there can be countervailing benefits to undermined durability, performance, or quality counters against a presumptive materiality label. Second, the fact that planned obsolescence is an irrational market decision in a competitive market could temper application of the deception standard.[278] It is generally presumed that a

273. *See Simeon Mgmt. Corp.*, 579 F.2d at 1146 ("[T]here c[an] be no deception unless the public holds a belief contrary to material fact not disclosed by the advertisement.").

274. *See, e.g.*, *In re* Cliffdale Assocs., Inc., 103 F.T.C. 110, 165 (1984) ("[A] material representation, omission, act or practice involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product."); FTC v. Davison Assocs., Inc., 431 F. Supp. 2d 548, 559 (W.D. Pa. 2006) ("A practice or statement is material if it contains information that is important to a consumer's purchasing decision such as economic viability of a transaction or the central character of a product or service." (citing FTC v. Five-Star Auto Club, Inc., 97 F. Supp. 2d 502, 529 (S.D.N.Y. 2000))); *In re* Nat'l Credit Mgmt. Grp., 21 F. Supp. 2d 424, 441 (D.N.J. 1998) ("Explicit claims or deliberately-made implicit claims utilized to induce the purchase of a service or product are presumed to be material.").

275. *See supra* Part I.

276. 1983 Policy Statement on Deception, *supra* note 183.

277. *See supra* section I.B.

278. This is, however, a very context dependent analysis. For example, whereas obsolescence is largely accepted in the fashion industry, other industries may foster different expectations.

manufacturer values an ongoing relationship with its customers, lest consumers take their business elsewhere. Thus, a manufacturer would likely seek to facilitate repeat purchases and brand loyalty rather than undermine consumer trust with planned obsolescence in most competitive circumstances.[279]

Even if the Commission shows planned obsolescence and a court determines it constitutes a deceptive act, such a finding could likely be remedied by lifespan labeling, as opposed to any condemnation of the underlying planned obsolescence conduct. Labeling—assuming it is structured to account for planned obsolescence design and does so accurately, thus avoiding replication of the problems raised by the use of warranty law to address planned obsolescence[280]—provides consumers with the information needed to make informed, welfare-maximizing market decisions. With proper labeling on longevity, a consumer would not be deceived by a product's failure because these facts would be known. While behavioral remedies like labeling are imperfect,[281] labeling has the capacity to cure all three elements of a deceptive act or practice. First, by expressly providing the product's lifespan, labeling can cure the source of deception, the implied warranty created by placing a product designed to fail on the market. Second, labeling removes any need for consumer assumption, reasonable or not, about the product's lifespan. Finally, labeling makes materiality less relevant because all information is provided.

Of course, the assumption that labeling could be done to effectively remedy deception is perhaps impractical.[282] Labels must clearly and prominently provide truthful information to cure deception.[283] Frequently, labels themselves are the source of deception.[284] Thus, a comprehensive lifetime labeling regime could remedy deception, but creating and implementing one that could do so may be unrealistic. It might be more

279. 1980 Policy Statement on Unfairness, *supra* note 183. *But see* FTC v. Nat'l Urological Grp., 645 F. Supp. 2d 1167, 1213 (N.D. Ga. 2008) (rejecting the notion that repeat customers should not be included in damages calculations for deceptive advertising of the product because they were influenced by their personal experience with the product, not the deception).

280. *See supra* section I.C.3.

281. *See, e.g.*, U.S. DEP'T OF JUST., ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 7–8 (2004) ("Structural remedies are preferred to conduct remedies in merger cases because they are relatively clean and certain, and generally avoid costly government entanglement in the market. . . . A conduct remedy, on the other hand, typically is more difficult to craft, more cumbersome and costly to administer, and easier than a structural remedy to circumvent.").

282. *See, e.g.*, FTC v. FleetCor Techs., Inc., 620 F. Supp. 3d 1268 (N.D. Ga. 2022) (collecting cases where disclaimer could not cure the net impression about a product's characteristics).

283. Removatron Int'l Corp. v. FTC, 884 F.2d 1489, 1497 (1st Cir. 1989).

284. *See, e.g.*, Belfiore v. Proctor & Gamble Co., 311 F.R.D. 29 (E.D.N.Y. 2015) ("flushable" wipes).

realistic to address deception from planned obsolescence on a case-by-case basis, as was done for inkjet printer and iPhone battery claims.[285]

Enforcement of planned obsolescence as a deceptive act could improve consumer welfare by curing specific instances where planned obsolescence harmed consumers. Consumer welfare could be further improved by giving consumers the information needed to make informed market decisions. Assuming they could be properly fashioned and enforced, labeling could keep consumers from being misled by planned obsolescence by providing the full context of product longevity and price to their choices. Through enforcement actions, ongoing harm from planned obsolescence could be mitigated; through a labeling regime, consumer harm from individual purchases could be mitigated. However, broader conceptions of harm that stem from planned obsolescence may remain unaddressed with these options. If the deception is cured by providing more information to consumers, the harm that results from planned obsolescence itself would not be a consumer harm under the Commission's deception standard.[286] While the Commission's consumer protection authority—and perhaps consumer protection more broadly—can be responsive to planned obsolescence, it may be incapable of condemning the conduct itself in all contexts.

CONCLUSION

Planned obsolescence is a manufacturing strategy developed during the rise of mass production whereby manufacturers shorten product lifespans to spur consumption.[287] Historic occurrences like the Phoebus Cartel present fantastic examples of the strategy in action; however, planned obsolescence has become a normalized baseline for disposable consumer goods in the modern era. Looking to the practice's roots and its conceptual overlap with consumer law, the Comment presents a proof of their application. The above analysis suggests that consumer law could be responsive to planned obsolescence in terms of the harm it does to consumers, but not the practice itself. Ultimately, market research is needed to determine how planned obsolescence is currently used and whether it implicates the harms that consumer law can address. Such research, as well as any relevant enforcement action, can be jointly

285. *See supra* sections I.A–I.B.

286. *See supra* section I.B.1.

287. SCHALLMO ET AL., *supra* note 1, at 2 (referencing Gregory, *supra* note 1, at 24–43); *see also* Bulow, *supra* note 1, at 729 (producing goods with "uneconomically short useful lives"); Wrbka & DiMatteo, *supra* note 1, at 911–12 (characterizing planned obsolescence as "the phenomenon of deliberately shortening the durability of products").

conducted by the Federal Trade Commission, an agency with mandates for both.