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ANTITRUST ENFORCEMENT IN THE DEVELOPING E-BOOK MARKET: APPLE, AMAZON, AND THE FUTURE OF THE PUBLISHING INDUSTRY

Zachary C. Flood†

In *United States v. Apple, Inc.*, a panel of the United States Court of Appeals for the Second Circuit considered whether Apple orchestrated a conspiracy with major book publishing firms to raise the price of e-books in violation of Section One of the Sherman Act.[1] Apple negotiated with book publishers to secure content deals for its planned e-book application and platform in the lead up to its introduction of the iPad in 2010. The publishers, eager to break up Amazon's dominance over the e-book market and to raise retail e-book prices, welcomed the negotiations with Apple as a means to achieve both. Reviewing the collusive nature of the negotiations, the Second Circuit held that Apple violated the Sherman Act by using its talks and resulting contracts with each of the publishing firms to effectuate a horizontal price-fixing agreement.[2] Critically, the court also found that Apple's conduct was per se illegal under the Sherman Act, and thus did not require proof that the agreement actually harmed competition.[3]

The *Apple* decision is the latest chapter in an ongoing saga over the proper application of the per se rule in antitrust law. Over the past half-century—inspired by influential shifts in economic thinking—courts have reigned in their application of the per se rule to vertical restraints.[4] Courts increasingly review these restraints under what is known as the rule of reason, a probing analysis of a given agreement's procompetitive and

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1. United States v. Apple, Inc. (*Apple II*), 791 F.3d 290, 340 (2d Cir. 2015). Section One of the Sherman Act, 15 U.S.C. § 1, serves as one of the primary antitrust enforcement statutes.

2. *Id.* at 339.

3. *Id.* at 321.

4. *See* PHILLIP AREEDA, LOUIS KAPLOW & AARON S. EDLIN, ANTITRUST ANALYSIS ¶ 407 (7th ed. 2013). A vertical restraint is a limitation on competition between firms at different levels within a given market, such as a limit on maximum retail price imposed by a manufacturer on a local seller. By contrast, a horizontal restraint is a limitation on competition between firms at the same level within a given market—horizontal competitors—such as an agreement establishing a maximum retail price between two local sellers.

anticompetitive potential. At the heart of this shift in approach is the increasingly popular view that certain vertical agreements may lead to procompetitive effects, and thus should not be condemned without a more nuanced exploration of their effects on consumer welfare. The *Apple* court considered whether Apple's conduct qualified for this more lenient form of analysis, ultimately concluding that it did not.

The conduct at issue in *Apple* also represents a fascinating opportunity to explore the use of the per se rule in the context of a rapidly changing and ever-more important digital content market. The facts of this case illustrate the challenges that established firms—like the publishers here—can face during times of disruptive change. The court's decision makes clear that conduct in these changing markets is not exempt from the normal application of the antitrust laws.

This Note considers the Second Circuit's decision to apply the per se rule to Apple's conduct and explores how antitrust law has impacted the publishing industry. Part I explains the history of the per se rule and the reasons why courts have abandoned it for certain types of restraints. Part II provides background to the case, detailing the agreements between Apple and the publishers. Part III summarizes the Second Circuit's decision. In Part IV, the Note discusses three discrete ideas in separate Sections. The first Section discusses the Second Circuit's decision to apply the per se rule despite the presence of vertical restraints. This Section concludes that this was the proper decision given the nature of the agreement between Apple and the publishers, and the economic and administrative rationales associated with the per se rule. The next Section discusses—and rejects—Apple's proposed "Facilitating Market Entry" Exception to the per se rule. Finally, the last Section considers how antitrust law and the *Apple* decision could affect the future of the rapidly changing publishing industry.

I. THE HISTORY OF THE PER SE RULE AND THE RULE OF REASON

Section One of the Sherman Act ("the Act") bans every "contract, combination . . . or conspiracy, in restraint of trade or commerce."[5] Early on, the Supreme Court struggled with Section One's expansive language. The Court initially held that the Act banned literally *all* restraints on trade, rejecting a more limited reading that would condemn only unreasonable restraints because it believed that judges lacked the expertise and reliable

5. Sherman Act § 1, 15 U.S.C. § 1 (2004).

standards necessary for evaluating reasonableness.[6] Eventually, however, the Court adopted the view that the Act banned only unreasonable restraints, as measured under a rule of reason.[7] The Court later elaborated that the application of the rule of reason required a searching analysis of the given restraint and its context to determine whether, on balance, it "merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[8]

Despite the adoption of the rule of reason as the baseline mode of Section One analysis, courts began applying a rule of per se illegality to certain types of restraints with clear anticompetitive potential throughout the early part of the twentieth century.[9] Among the categories of restraints held to be illegal per se during this period were horizontal price-fixing;[10] vertical agreements to set minimum prices,[11] maximum prices,[12] and non-price restraints;[13] division of markets;[14] group boycotts;[15] and tying arrangements.[16] The underlying judicial perception was that, on balance, these types of restraints were so overwhelmingly likely to yield anticompetitive versus procompetitive results that individual cases did not merit an in-depth rule of reason analysis. Instead, courts deemed these restraints to be per se anticompetitive.

Beginning in the 1970s, however, the immensely influential brand of conservative economic theory known as the Chicago School called into question the widespread use of the per se rule.[17] This new economic

6. *See* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 331–32 (1897) ("[I]t is exceedingly difficult to formulate even the terms of the rule itself which should govern in the matter . . . .").

7. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 60 (1911).

8. Bd. of Trade of City of Chicago v. United States, 246 U.S. 231, 238 (1918) ("To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable.")

9. *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223–24 (1940) (establishing the per se illegality of price-fixing).

10. *Id*. at 210.

11. *See generally* Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911), *overruled by* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

12. Albrecht v. Herald Co., 390 U.S. 145 (1968), *overruled by* State Oil Co. v. Khan, 522 U.S. 3 (1997).

13. United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), *overruled by* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

14. United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899).

15. Fashion Originators' Guild of Am. v. Fed. Trade Comm'n, 312 U.S. 457, 688 (1941).

16. Int'l Salt Co. v. United States, 332 U.S. 392, 395 (1947).

17. *See* AREEDA & KAPLOW, *supra* note 4, at ¶ 400.

thinking challenged the assumptions about the economic effects of certain types of arrangements that courts had previously deemed per se illegal. These new economic perspectives had a profound impact on the way many courts and commentators viewed vertical restraints.[18]

During this period, Chicago School antitrust scholars began identifying a variety of situations in which they believed vertical restraints had the potential to benefit consumer welfare. Two observations in particular led to significant changes in the way courts approach vertical agreements. First, agreements between manufacturers and retailers that reduce price, territorial, or other forms of competition between retailers could increase overall output by allowing retailers to invest in promoting the manufacturer's product.[19] For example, a reduction in price competition between two local retailers as regards a given product might increase both of their overall sales by allowing each of them to focus on their marketing and salesmanship of that product, without fear that their competitor would charge lower prices and free-ride off their promotional investment. Second, a manufacturer's efforts to set maximum retail prices may increase sales and output by limiting dealer markups, constraining the dealer's ability to leverage its market power.[20]

The first insight eventually led the Supreme Court to its initial decision to backpedal on the application of the per se rule. In *Continental T.V., Inc. v. GTE Sylvania Inc.*, the Court held that the effects of vertical non-price restraints imposed by a manufacturer on a retail distributor were sufficiently ambiguous to warrant analysis under the rule of reason, overruling its prior decision in *United States v. Arnold Schwinn & Co.*[21] In an effort to revive its struggling television sales, Sylvania abandoned its wholesale distribution model and began selling directly to local retailers on a franchise model.[22] As part of the arrangement, Sylvania imposed geographic restraints on retailers, limiting where they could sell their products.[23] In holding that these restraints should be analyzed under the rule of reason, the Court focused on the complex potential for vertical restraints to boost interbrand competition (competition between manufacturers) at the relative expense of intrabrand

18. *Id.*
19. *Id.* at ¶ 409.
20. *Id.* at ¶ 408. Though this second insight is not discussed here, it eventually led the Supreme Court to reverse course on the application of the per se rule in cases of vertically imposed restrictions on maximum retail price. *See* State Oil Co. v. Khan, 522 U.S. 3 (1997).
21. Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 59 (1977).
22. *Id.* at 38.
23. *Id.*

competition (competition between retailers in the sale of a given product).[24] The Court determined the "redeeming virtues" of increased interbrand competition were enough to dispel the notion that such restraints lacked any redeeming value such that they should be proscribed per se.[25]

Twenty years later, the Supreme Court invoked similar reasoning to reverse course on the use of the per se rule in the context of vertical restraints on minimum retail price, or price floors. In *Leegin v. PSKS*, the Court held in a 5-4 decision that a manufacturer's use of retail price maintenance (RPM) to set minimum prices for its services held enough procompetitive potential to justify rule of reason, rather than per se, scrutiny.[26] Once again, the Court highlighted economic literature suggesting that, absent such price floors, "the retail services that enhance interbrand competition might be underprovided."[27] Justice Breyer dissented. Enumerating the arguments for and against the competitive impact of minimum RPM, Breyer sharpened his inquiry on the per se rule's costs and benefits—the tradeoff between foreclosing some potentially beneficial conduct on the one hand, and promoting efficient enforcement activity and smooth judicial administration on the other.[28] Breyer conceded that it was a difficult decision, but ultimately fell back on *stare decisis* and Congress's lack of intervention in the longstanding application of the per se rule, breaking from the majority's decision to apply the rule of reason to vertical restraints.[29]

While the Supreme Court has marched back the application of the per se rule in the context of vertical restraints, the rule continues to play an important role in other areas of antitrust law. Most prominently, the per se rule is thoroughly entrenched in the realm of horizontal agreements between competitors to fix prices or to divide markets.[30] Still, even among

24. *Id*. at 51–56.

25. *Id*. at 51–59. The Court further noted the view of some economic theorists, particularly Robert Bork, that manufacturers have a natural incentive to maintain as much intrabrand competition as is consistent with the efficient distribution of their product. However, the Court also highlighted the lack of consensus on this point. *Id*. at 56.

26. Leegin Creative Leather Prods., Inc. v. PSKS, 551 U.S. 877, 904 (2007).

27. *Id*. at 890.

28. *Id*. at 914–17 (Breyer, J., dissenting).

29. *Id*. at 919–20.

30. *See* Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647 (1980) (describing a horizontal agreement to fix prices as the "archetypal" per se violation); Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004) (referring to horizontal price-fixing as the "supreme evil" of antitrust law); Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49–50 (1990) (*per curium*) (finding scheme to divide national market for bar review materials per se illegal).

this category of restraints, the Court has made exceptions where it has found compelling reasons to presume a given horizontal restraint might yield procompetitive benefits.

For example, in the definitive case of *Broadcast Music Inc. v. Columbia Broadcast System, Inc.* ("*BMI*"), the Court held that BMI—one of the two main performing rights organizations in charge of licensing musical performance rights and collecting royalties under a blanket license fee—though a literal horizontal combination engaging in price-fixing, was entitled to escape per se condemnation under Section One.[31] The Court concluded that certain market failures within the music licensing market made BMI's creation of a blanket license with a set price an innovative and potentially efficient development.[32] The Court has characterized this and other analogous decisions as situations in which "restraints on competition are essential if the product is to be available at all."[33]

Notwithstanding these exceptions, the Court has generally drawn a dividing line between horizontal and vertical restraints, applying per se treatment to the former, and rule of reason treatment to the latter. But what if the conspiracy at issue involves agreements between both horizontally and vertically situated actors? This situation arises in so-called "hub-and-spoke" conspiracies in which many horizontal actors coordinate their activity through their interactions with a vertically situated actor.[34] For example, where a number of manufacturers decide to fix prices, they can then insist that a vertically situated retailer adopt a vertical restraint imposing a high price floor on each of them, thereby granting each manufacturer assurance that the others will be bound to that price floor. The *Apple* case grapples with what standard to apply where vertical restraints are used as part of horizontal conspiracies.

31. *BMI*, 441 U.S. 1, 21–24 (1979). For another landmark case in which the Court rejected application of the per se rule to horizontal price-fixing, see *National Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984).

32. Specifically, the Court focused on the transaction costs inherent in requiring consumers to negotiate individual licenses with each artist, and the difficulties artists in turn faced in policing unlicensed use of their works. *BMI*, 441 U.S. at 35 n.30.

33. Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 203 (2010).

34. *See, e.g.*, *In re* Musical Instruments & Equip. Antitrust Litig., 798 F.3d 1186, 1192 (9th Cir. 2015) ("[T]he line between horizontal and vertical restraints can blur. One conspiracy can involve both direct competitors and actors up and down the supply chain, and hence consist of both horizontal and vertical agreements.").

II. *U.S. V. APPLE*: FACTS AND PROCEDURAL HISTORY

On January 27, 2010, Apple, Inc. ("Apple") unveiled the iPad, a tablet device that marked a significant advance in consumer electronics. As part of the iPad's elaborate launch presentation, Apple showed off the iBookstore, its new online marketplace for e-books. During his presentation, Apple's CEO Steve Jobs used the iBookstore app to make a live purchase of the *New York Times* bestselling book *True Compass*. The list price for Jobs's purchase was $14.99, a price 50% greater than that charged by e-book pioneer and then-dominant retail player Amazon, Inc. Following the presentation, when a reporter asked Jobs how Apple would be able to compete with Amazon with prices 50 percent higher, Jobs confidently responded that they would not have to; that book publishers would force Amazon to raise its prices, and—infamously—that "the price will be the same."[35]

A. APPLE SEES AN OPPORTUNITY WHEN AMAZON AND PUBLISHERS FIGHT

Amazon, Inc. ("Amazon") established itself as the dominant force in the e-book market through the early introduction of its Kindle e-book reader in November 2007, and its associated online e-book marketplace. Though Amazon controlled an estimated ninety percent of the e-book market at the beginning of 2010,[36] it found itself in a contentious relationship with the book publishing industry; specifically, the "Big Six" publishing firms.[37] The publishers were against Amazon's practice of pricing its e-books—even new releases and bestsellers—at what the publishers saw as an unreasonably low $9.99. They feared that Amazon's pricing practices were eroding consumers' value perception of their offerings and undercutting demand for their more profitable new release, hardcover, print offerings.[38]

The publishers pursued a variety of strategies to get Amazon to increase its retail e-book prices. Prior to 2010, the publishers sold e-books to Amazon wholesale, charging Amazon a fixed fee for every e-book it sold.[39] When publishers raised the wholesale price they charged Amazon above $9.99, to nearly $13, Amazon reacted by maintaining its retail pricing and pursing a loss-leader strategy, incurring a loss on each e-book it sold in order

35. *Apple II*, 791 F.3d 290, 308 (2015).

36. *Id.* at 299.

37. The "Big Six" firms at the time consisted of: Hachette, HarperCollins, Macmillan, Penguin, Random House, and Simon & Schuster. *Id.* at 298.

38. *Id.* at 299.

39. *Id.*

to incentivize consumers to invest in the Kindle platform.[40] Various publishers subsequently experimented with "windowing" their releases in order to move Amazon on its pricing, refusing to sell e-book versions of their new releases to Amazon for a set period following the release of initial hardcover editions.[41] As the publishers realized, however, windowing was a desperate and counter-productive strategy because it harmed customers, promoted piracy, and hurt long-term sales.[42]

Ultimately, while each of the Big Six hoped to move Amazon to increase the price of its e-books, they suffered from a collective action problem. Each of the Big Six was hesitant to challenge Amazon individually. As the dominant retailer of both e-books and—more importantly—physical books, Amazon possessed enormous power to retaliate against any individual publisher that took a hard line over e-book pricing by disrupting that publisher's physical book sales.[43]

In the lead up to the iPad's launch, Eddy Cue, Apple's Senior Vice President of Internet Software and Services and the director of Apple's digital content stores, saw an opportunity to develop a proprietary e-book marketplace for the iPad. He recognized the publishers' disdain for Amazon's pricing model and their unsuccessful attempts to change it, and anticipated that the Big Six would eagerly help facilitate Apple's entry into the e-book distribution market in order to gain negotiating leverage over Amazon. In Cue's own words to Jobs, "[t]he book publishers would do almost anything for [Apple] to get into the ebook business."[44]

B. THE AGREEMENT BETWEEN APPLE AND THE PUBLISHERS

Two months before the iPad's release, Apple reached out to the Big Six about providing content for its proposed iBookstore. Cue and the publishers negotiated at break-neck speed in order to come to an agreement in time to announce the iBookstore at the iPad launch event.[45] Ultimately, Apple agreed to a series of terms with five of the Big Six that all but guaranteed an increase in e-book prices.[46]

First, the parties agreed that Apple would distribute e-books under an "agency"—as opposed to a wholesale—model.[47] Under this agreement,

40. *Id*.
41. *Id*. at 300–01.
42. *Id*. at 301.
43. *Id*. at 300.
44. *Id*. at 301.
45. *Id*. at 301–03.
46. Random House was the lone holdout. *Id*. at 308.
47. *Id.* at 302–04.

publishers would set retail prices themselves and Apple would collect thirty percent of all e-book sales revenue. However, Apple feared that publishers would set prices too high, infuriating customers and embarrassing the iBookstore. Consequently, Apple included "price-ceilings" of $9.99, $12.99, and $14.99 for certain types of releases.[48] Second, each of the five publishers agreed to a Most Favored Nation (MFN) clause with Apple that required publishers to set iBookstore retail prices no higher than those charged by any other e-book retailer.[49]

C. THE EFFECT OF THE AGREEMENT

Combined, the agency pricing and MFN terms meant that publishers would be forced to sell e-books at $9.99 on the iBookstore in order to match Amazon's retail price, and would make less than $7 on each of those sales, significantly less than the $13 they earned from each of their wholesale e-book sales with Amazon. Thus, the only way the deal made economic sense for each publisher was if they demanded a shift toward higher retail pricing from Amazon, which they had previously been too afraid to do, for fear of retribution.

Critically, throughout the negotiations, Apple and the publishers freely shared information regarding their progress on these terms.[50] With each of the five publishers aware that the others were similarly entering into deals that would force them to confront Amazon, the final deal with Apple solved the publishers' collective action problem and forced them all to work together toward moving Amazon toward an agency model and raising retail prices for e-books.

In the months that followed, that is exactly what happened. The publishers, led by Macmillan, each began negotiations with Amazon designed to force it to switch to an agency model, sharing information with each other as they did so.[51] Unable to stand up to five of the Big Six, Amazon ultimately relented, switching to an agency model with all five by June 2010. In short time, retail prices of e-books rose to the cap levels provided for in each of the publishers' deals with Apple.[52] Notably, during the period following the price increase the five publishers saw an estimated 14.5% decline in their sales of e-books.[53]

48. *Id*. at 304–05.
49. *Id.*
50. *Id*. at 305–08.
51. *Id*. 309–10.
52. *Id*. at 310.
53. *Id*.

D. PROCEDURAL HISTORY

On April 11, 2012, the Department of Justice and various State Attorneys General filed two civil antitrust cases against Apple and the five Publisher Defendants.[54] By August 12, 2013, all of the Publisher Defendants had settled, entering into materially similar consent decrees with the Department of Justice curtailing their ability to set, alter, or reduce a retailer like Amazon's ability to set or reduce the price of any e-book.[55] Refusing to settle, Apple instead opted for a bench trial on the issues of liability and injunctive relief.[56] After a three week trial, on March 22, 2013 the District Court held that Apple had engaged in a per se violation of Section One of the Sherman Act and various congruent state laws by facilitating and engaging in a horizontal conspiracy to fix the retail price of e-books.[57] The court also expressed its view that Apple would still be liable were its behavior subject to a more economics-intensive rule of reason analysis.[58]

Following the ruling on Apple's liability, the District Court issued a final injunctive order forbidding the company from enforcing its MFN clauses with publishers or otherwise retaliating against them for agreeing to distribution agreements with other retailers, and modifying the terms of its agency agreements with the publishers.[59] Following the issuance of the order, Apple and two of the Publisher Defendants—Macmillan and Simon & Schuster—filed an appeal.[60]

III. THE SECOND CIRCUIT'S DECISION

In its appeal before the Second Circuit, Apple contended that its conduct should not be analyzed under the per se rule. First, Apple argued that its contracts with publishers were purely vertical and thus outside of the per se rule's reach.[61] Second, Apple argued that its conduct warranted analysis under the rule of reason because of the procompetitive effects on

54. United States v. Apple Inc. (*Apple I*), 952 F.Supp.2d 638, 645 (S.D.N.Y. 2013).
55. *Apple II*, 791 F.3d at 322.
56. *Id*.
57. *Id*. (citing *Apple I*, 952 F.Supp.2d at 694).
58. *Id.* at 312.
59. *Id*.
60. *Id*. at 297.
61. Appellant Apple Inc.'s Opening Brief, Apple v. United States, 731 F.3d 290 (2d Cir. 2015) (2014 WL 3556301), 48–49 (hereinafter Apple's Opening Brief).

"enterprise and productivity" realized by its entry into the e-book retail market.[62]

A. WHETHER APPLE'S RELEVANT CONDUCT WAS HORIZONTAL OR VERTICAL

Apple's opening argument against the application of the per se rule was that its relations with the publishers consisted of "vertical agreements that in no way set prices or otherwise limited competition among the (horizontal) publishers."[63] Judge Jacobs, dissenting from the Second Circuit panel's decision, focused on this distinction and on specific language in *Leegin*[64] that he believed mandated rule of reason treatment for such vertical facilitation.[65] The majority, however, rejected this distinction in light of other Supreme Court precedent setting forth per se liability for vertically situated players who participate in and facilitate horizontal price-fixing conspiracies—so-called "hub-and-spoke" conspiracies.[66] In rejecting the dissent's focus on the isolated language in *Leegin*, the majority noted *Leegin*'s susceptibility to multiple interpretations and the general rule against reading decisions to overrule precedent *sub silentio*.[67] The majority concluded that the relevant agreement for the purposes of Section One was not the contract Apple signed with each publisher, but Apple's active agreement to further the horizontal price-fixing conspiracy.[68] It was Apple's willing participation in this horizontal scheme that mattered to the court, not its vertical market position.[69]

B. WHETHER APPLE'S ENTRY JUSTIFIED RULE OF REASON TREATMENT

Apple alternatively contended that its conduct deserved rule of reason treatment because it promoted "enterprise and productivity" by introducing competition into a monopolistic market and fostering technological

62. *Id.* at 50–52. Apple borrowed the language "enterprise and productivity" from Seventh Circuit cases built on the legacy of *BMI*. *See, e.g.*, *In re* Sulfuric Acid Antitrust Litig., 703 F.3d 1004, 1011 (7th Cir. 2012).

63. Apple's Opening Brief, *supra* note 61, at 49 (emphasis in original).

64. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 893 (2007) ("To the extent a vertical agreement setting minimum resale prices is entered upon to facilitate either type of cartel, it, too, would need to be held unlawful under the rule of reason.").

65. *Apple II*, 791 F.3d at 346.

66. *Id.* at 322–25.

67. *Id.* at 324.

68. *Id.* at 325.

69. *Id.* at 322.

innovation. It argued that the theoretical underpinnings of the per se rule made it appropriate only in cases where conduct "lacked *any* redeeming virtue."[70] Apple then highlighted how its entry had disrupted Amazon's total dominance in the e-book retail market, and how the market had since experienced robust growth.[71] Additionally, it touted the technological advances the iPad brought as an e-book device over Amazon's Kindle, including its ability to display color illustrations and photographs on a backlit screen.[72] According to Apple, these tangible benefits justified an exception to the application of the per se rule analogous to the one the Supreme Court applied in *BMI*.[73]

The Second Circuit majority thoroughly rejected this perspective. Quickly dismissing Apple's "technological innovation" argument, the court pointed out that the iPad's technological advances were wholly unrelated to Apple's agreements with the publishers and that the device was irreversibly destined for release regardless of whether Apple secured e-book content deals.[74]

The Second Circuit then directed its attention to Apple's novel "market entry" argument. It noted that this argument, at base, was "that higher prices enable more competitors to enter a market," a theory categorically inconsistent with antitrust precedent.[75] As regards Apple's disruption of Amazon's e-book monopoly, the court opined that "if Apple could not turn a profit by selling new releases and bestsellers at $9.99, or if it could not make the iBookstore and iPad so attractive that consumers would pay *more* than $9.99 to buy and read those ebooks on its platform, then there was no place for its platform in the ebook retail market."[76]

Furthermore, focusing on the district court record, the court found insufficient support for Apple's underlying premise that Amazon's low prices acted as a barrier to either its own entry or that of other e-book retailers.[77] Significantly, the majority and dissent sparred over the proper way to frame Amazon's role in the e-book market. The majority found that Amazon pursued a legitimate loss-leadership strategy in selling e-books below wholesale prices, but the dissent argued that characterization was

70. Apple's Opening Brief, *supra* note 61, at 51.
71. *Id.*
72. *Id.* at 52.
73. *Id.*
74. *Apple II*, 791 F.3d at 335.
75. *Id.* at 330.
76. *Id.* at 331.
77. *Id.* at 332–33.

unsupported by the facts or the record.[78] While the majority believed Amazon's conduct was permissible, they nevertheless concluded that—even if Amazon had abused its monopoly—"the Sherman Act does not authorize horizontal price conspiracies as a form of marketplace vigilantism to eliminate perceived ruinous competition or other competitive evils."[79]

IV. DISCUSSION

This Part will explore specific legal aspects of the *Apple* decision as well as its implications for the publishing industry. The first Section considers whether the Second Circuit correctly applied the per se rule to Apple's deals with the publishers. The second Section explores the merits of Apple's proposed "market entry" exception to the rule in this situation and in general. Finally, the third Section discusses the implications the ruling may have for the publishing industry, and how that industry may react in the face of ongoing disruption.

A. THE SECOND CIRCUIT CORRECTLY APPLIED EXISTING ANTITRUST LAW AND PRINCIPLES IN UPHOLDING APPLE'S PER SE LIABILITY

The Second Circuit properly interpreted antitrust case law in holding Apple per se liable for its anticompetitive conduct in the e-books market. The majority's decision to apply the per se rule ultimately turned on its view that Apple's conduct during its negotiations with the publishers made it a core participant in the publishers' horizontal conspiracy and not a complicit vertical bystander in a hub-and-spoke scheme. In reaching this result, the Second Circuit drew the critical, yet admittedly subtle, distinction between a vertically orientated actor's adoption of restraints to merely *facilitate* a horizontal price-fixing conspiracy, and that actor's direct *participation* in the horizontal price-fixing conspiracy.

In *Leegin*, the Supreme Court acknowledged the potential of vertical agreements to facilitate horizontal conspiracies among competitors while overturning the application of the per se rule to vertical minimum price restraints.[80] The Court specifically recognized that retailers might collude to decrease output or reduce competition and then "compel a manufacturer

78. *Id.* at 344. Properly characterizing Amazon's role in the contemporary e-book market is critical to understanding the potential long-term impact of Apple's entry. This issue will be discussed further, below.

79. *Id.* at 332 (internal quotation marks omitted).

80. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 893 (2007).

to aid the unlawful arrangement with resale price maintenance."[81] The *Leegin* Court then concluded that "[t]o the extent a vertical agreement setting minimum resale prices is entered upon to facilitate either type of cartel, it [] would need to be held unlawful under the rule of reason."[82] Judge Jacob's dissent in *Apple* seized upon this language as transparent guidance from the high court that Apple's conduct deserved rule of reason analysis.[83] In support of this position, he noted that the Third Circuit had also read *Leegin* to demand rule of reason treatment for vertical restraints alleged to have been adopted in order to facilitate a horizontal price-fixing agreement.[84]

The Second Circuit majority instead characterized this language in *Leegin* as isolated to situations in which horizontal conspirators impose vertical restraints on non-conspirators.[85] The critical factor, in the majority's view, was whether the vertically situated player was a knowing participant in the underlying horizontal conspiracy. If not, then a given vertical facilitating practice was entitled to the benefit of the doubt—in the form of rule of reason treatment—because "it may be difficult to distinguish such facilitating practices from procompetitive vertical retail price agreements."[86] In contrast, where a vertical player knowingly participates in and organizes a hub-and-spoke conspiracy, the majority concluded that the adopted restraint does not deserve the same benefit of the doubt.[87]

The majority's interpretation of *Leegin* makes intuitive sense given the assumptions underlying the differential treatment of horizontal and vertical restraints. One enduring justification for the per se treatment of horizontal restraints is that the parties to such agreements, as direct competitors, have an overwhelming incentive to engage in anticompetitive collusion. Vertical restraints instead entail agreements between upstream and downstream players in the same product market where incentives can align to promote interbrand competition. Had the publishers colluded solely among themselves, and then demanded the resulting agency agreement and MFN

81. *Id.*
82. *Id.*
83. *Apple II*, 791 F.3d at 346.
84. *Id.* In *Toledo Mack*, the Third Circuit read *Leegin* to mandate that, "rule of reason analysis applies even when, as in this case, the plaintiff alleges that the purpose of the vertical agreement between a manufacturer and its dealers is to support illegal horizontal agreements between multiple dealers." Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc., 530 F.3d 204, 225 (3d Cir. 2008).
85. *Apple II*, 791 F.3d at 324–25.
86. *Id.* at 325.
87. *Id.*

clause from Apple, the Second Circuit readily implied that the decision might have been different.[88] But the majority believed that Apple had agreed to participate in, and had in fact organized, the horizontal price-fixing agreement here in exchange for quick and favorable concessions from the publishers on other terms in their content deals.[89] Once the court concluded that Apple was actively involved in the horizontal conspiracy, itself subject to per se condemnation, it would make little sense to provide the company the benefit of the doubt simply because it helped effectuate its role through vertical contracts.

The Second Circuit's decision thus suggests that the critical inquiry in whether to assign per se liability to a vertically situated actor will be whether the evidence establishes that it played a culpable role in an underlying horizontal conspiracy by organizing it or knowingly agreeing to further its ends. Where a group of horizontal actors "compels" the vertical actor to facilitate its agreement, *Leegin* directs rule of reason treatment.[90] Where a vertical player instead knowingly participates in or organizes such a horizontal conspiracy, per se treatment attaches—not directly to its facilitating agreements, but to its underlying agreement to use them to further the conspiracy. Going forward, this distinction will turn on a necessarily uncertain line between identifying what facilitation by vertical actors is "compelled" and what stems from active participation in the underlying horizontal conspiracy. At base, however, this inquiry simply entails determining whether the vertical and horizontal actors *agreed* to effectuate horizontal price-fixing, which is both a core element in antitrust cases, and a standard that courts should find workable going forward.

B. ANTITRUST LAW SHOULD NOT RECOGNIZE A "FACILITATING MARKET ENTRY" EXCEPTION TO THE PER SE RULE AGAINST HORIZONTAL PRICE FIXING

Apple's additional argument for why it deserved rule of reason treatment invoked a well-known line of cases, exemplified by *BMI*, in which courts have held that otherwise illegal horizontal restraints possessed enough

88. *Id.* at 323 ("[T]he relevant 'agreement in restraint of trade' in this case is not Apple's vertical Contracts with the Publisher Defendants (which might well, if challenged, have to be evaluated under the rule of reason); it is the horizontal agreement that Apple organized among the Publisher Defendants to raise ebook prices.").

89. *Id.* at 334 ("[T]he district court's fact-finding illustrates that Apple organized the Publisher Defendants' price-fixing conspiracy . . . because it was a convenient bargaining chip.").

90. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 893 (2007).

procompetitive potential to justify application of the rule of reason.[91] Specifically, Apple argued that its agreements with the publishers should escape per se condemnation because its entry into the retail e-book business added serious competition to a market overwhelmingly dominated by Amazon. Given that the per se rule was designed to proscribe conduct that "lacked *any* redeeming virtue," Apple insisted its behavior could not be squared with the rule.[92]

However, Apple's argument does not fit into the archetype of cases like *BMI*, which the Second Circuit properly noted were marked by joint ventures that were necessary if a given market was to exist at all. After all, the e-book market existed before Apple's entry, even if in a concentrated form. Thus, in order to accept Apple's argument, a court would need to find a novel exception to the application of the per se rule: a tall order given the important judicial efficiency concerns justifying that rule.[93]

The implications of Apple's reasoning are breathtaking. The apparent result would be that the existence of a monopolist in a given market would suspend the normal application of the antitrust laws as regards potential entrants and their conduct in other markets. As a preliminary matter, this raises serious concerns relating to judicial administrability, as a move to the rule of reason in such situations would mandate that courts grapple with economic judgments about the relative merit of competition in one market versus another. It would also raise tensions with existing monopolization precedent under Sherman Act Section Two, which recognizes the legitimacy of certain monopolies and condemns only the inappropriate use of monopoly power.[94] Finally, even where market entry might counteract monopolistic abuses, Apple's argument would essentially require that courts endorse vigilantism.

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91. Apple's Opening Brief, *supra* note 61, at 50.

92. *Id.*

93. For a discussion of this justification, see *Leegin*, 551 U.S. at 914–17 (Breyer, J. dissenting).

94. *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 407 (2004). Writing for the majority in *Trinko*, Justice Scalia noted:

> The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.

Id.

A market entry exception makes little economic or administrative sense. Where courts have moved away from applying the per se rule to vertical restraints, they have generally done so in the belief that some ways of reducing intrabrand competition can have beneficial effects on interbrand competition.[95] By contrast, Apple's position would have the court sacrifice interbrand competition between the publishers for more interbrand competition between e-book retailers. This tradeoff between increasing interbrand competition in one market and reducing it in another would seem to apply in any situation in which Apple's proposed market-entry exception would apply. Wherever an entrant's antitrust violations would be warranted by the presence of a monopolist in a given market, those violations—in order to actually promote market entry—would occur in markets upstream or downstream to the monopolized one.

Further, if rule of reason analysis were to apply to these situations, how would a court evaluate whether a potential procompetitive effect on a downstream market outweighs the anticompetitive effect on an upstream one? The Supreme Court, recognizing the difficulty of such balancing and the important policy judgments it would entail, has previously characterized such an undertaking as outside the competency of the courts and more properly assigned to the legislature.[96] Thus, a divergence from per se treatment on account of market entry would force courts to engage in a balancing analysis the Supreme Court has determined courts are categorically unqualified to handle. This alone is a compelling justification for maintaining per se treatment in this context.

Additionally, applying a market entry exception to the situation here would be difficult to reconcile with existing monopolization precedent. Illegal monopolization under Sherman Act Section Two requires more than the mere possession of market power; it requires exclusionary acts used to

95. *See, e.g.*, Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

96. *See* United States v. Topco Assocs., Inc., 405 U.S. 596, 611–12 (1972). The Court in *Topco* noted:

> If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion this [] is a decision that must be made by Congress and not by private forces or by the courts. Private forces are too keenly aware of their own interests in making such decisions and courts are ill-equipped and ill-situated for such decisionmaking. To analyze, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to bear on such decisions, and to make the delicate judgment on the relative values to society of competitive areas of the economy, the judgment of the elected representatives of the people is required.

Id.

achieve or maintain that market power.[97] Absent conduct that qualifies as exclusionary, the Supreme Court has repeatedly emphasized that the Sherman Act, and the competitive principles it was designed to reinforce, should not condemn monopoly status alone.[98] Specifically, the Court has noted that the acquisition of a monopoly through legitimate competition serves as a valuable reward to those competitors who achieve market dominance through "growth or development as a consequence of a superior product, business acumen, or historic accident."[99] Allowing an entrant to avoid the full force of the antitrust laws simply based on the existence of a monopoly in a given market would seem to undercut the view that obtaining a monopoly can serve as a due reward for successful competitors. Accordingly, excluding conduct from per se condemnation based on market entry seems rational only to the extent that entry targets those illicit monopolies that run afoul of the Sherman Act.

Even where market entry might disrupt an illicit monopoly, creating an exception to per se treatment on this basis would essentially endorse competitive vigilantism. Such an exception is contrary to applicable precedent. The Supreme Court has rejected arguments that the illegal conduct of others ever justifies antitrust violations.[100]

C. *APPLE*'S IMPLICATIONS FOR ANTITRUST LAW AS APPLIED TO THE PUBLISHING INDUSTRY

The Second Circuit's decision no doubt came as a great disappointment to many in the publishing world who view Amazon as a destructive force. Some commentators were also stunned by the Department of Justice's initial decision to pursue charges against Apple and the struggling publishers on behalf of Amazon.[101] To many, Amazon represents an existential threat to not just established publishers, but also the very foundations of literary creativity. They see the major publishing houses as integral to supporting a vibrant creative infrastructure, and worry that Amazon's power over the publishers will erode that infrastructure. This Section examines how the

97. *Trinko*, 540 U.S. 398 at 407.

98. *Id.*

99. *Id.*

100. *See, e.g.*, Fashion Originators' Guild of Am. v. Fed. Trade Comm'n, 312 U.S. 457, 458 (1941) (noting that illegal conduct by others "would not justify petitioners in combining together to regulate and restrain interstate commerce in violation of federal law").

101. *See* Keith Gessen, *The War of the Words,* VANITY FAIR (Nov. 30, 2014), http://www.vanityfair.com/news/business/2014/12/amazon-hachette-ebook-publishing [https://perma.cc/WED9-SDSG]; *see also* Charles Schumer, *Memo to DOJ: Drop the Apple E-Books Suit*, WALL ST. J. (July 17, 2012), http://www.wsj.com/articles/SB10001424052702303740704577527211023581798 [https://perma.cc/7FY7-3XHB].

antitrust laws have influenced the current state of the publishing industry, limiting the ways in which publishers interact with each other and Amazon, as well as how antitrust laws might shape the publishing industry's future.

1. The Publishers' Lack of Bargaining Power or Legal Remedies

Ultimately, the publishers colluded because they individually lacked the bargaining power necessary to compel Amazon to raise e-book prices. But the publishers could have legally achieved the same result, by either adopting agency pricing deals with Amazon so that they could set retail prices themselves, or simply raising the wholesale price they charged Amazon such that Amazon had no choice but to increase its retail prices. If Amazon had simply been an e-book retailer, individual publishers may have risked its wrath and held firm on their pricing demands. But Amazon held tremendous leverage over the publishers because it also served as the dominant physical bookseller.

The publishers also lacked a clear legal recourse. Amazon's aggressive leveraging of its market power in its dealings with the publishers was not a violation of the antitrust laws. The offense of monopolization under Sherman Act Section Two, as discussed above, requires that a monopolist engage in exclusionary acts to obtain, protect, or expand its market power. For the purposes of this analysis, the focus is generally on the monopolist's market power in the relevant horizontal market. This means that Amazon's exclusionary acts would have to have been targeted toward existing or potential horizontal competitors in the retail e-book market, rather than upstream suppliers like the publishers.[102] Thus, under current law, only Amazon's exclusion of a potential entrant, like Apple here, could form the basis for a Section Two claim.

But a Section Two claim is highly unlikely to succeed. The strongest grounds for a claim that Amazon violated Section Two would have been that the company engaged in "predatory pricing," artificially deflating the sales price of its e-books in order to squeeze its current competitors and dissuade new ones from entering the retail e-book business. A firm engages in predatory pricing when it (1) sets its prices below an appropriate measure

102. Amazon was technically a monopsony—a buyer with market power. Notably, the Supreme Court has never found an illegal monopsony under Sherman Act Section Two. The closest any company has come to being labeled an illegal monopsony was in *Weyerhaeuser*, where the relevant inquiry was whether defendant had engaged in "predatory bidding" by artificially driving up the cost of upstream inputs in order to deny them to its competitors. Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 318–319 (2007). The publishers would have little grounds to make such a claim here, as e-books are nonrivalrous goods and Amazon was actually driving prices down, not up.

of its costs, and (2) possesses a dangerous probability of recouping its short-term losses by eventually leveraging its resulting market power.[103] In this case, any claim that Amazon was engaging in predatory pricing to exclude entrants into the e-book market would run into significant obstacles in the form of alternative explanations for Amazon's behavior, and the difficulty of showing that such a scheme could have ever succeeded.

First, Amazon could argue that its pricing strategy represented a legitimate investment in its e-book sales platform and the Kindle. This complicates the determination of what the appropriate measure of cost is, as Amazon could frame the approximately three dollar per unit loss it took on sales of bestselling e-books as a way to incentivize consumers to purchase the Kindle and try out the e-book experience. Amazon had a strong incentive to price e-books below cost in order to drive sales of the Kindle and to draw new users to its platform.

More definitively, it would be difficult to demonstrate that Amazon ever had a reasonable chance of recouping its losses because of e-books' status as digital goods. In evaluating whether a company has a dangerous probability of recoupment for the purposes of Section Two, one important variable is the ease with which a new competitor could subsequently enter the market.[104] Courts require a dangerous probability of recoupment so as not to condemn legitimate competitive discounting or unsuccessful attempts at predation, which simply benefit consumers who enjoy lower prices.[105] Where entry barriers are insignificant, new competitors will enter the market and punish the predator's subsequent monopoly pricing. Here, the ease with which Apple launched the iBookstore illustrates the relatively insignificant barriers to entry in the retail e-book market. If Amazon "succeeded" in establishing a complete monopoly in retail e-book sales and then raised its prices to recoup its losses, little would stop companies with existing mobile software platforms from entering the market and undercutting Amazon's profits with lower priced e-books. Indeed, the greatest obstacle to entering the retail e-book market would likely be negotiating content deals with publishers; a group that one would expect to

103. For the purposes of the Sherman Act Section Two, predatory pricing requires a "dangerous probability" of recoupment. *See* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224 (1993). Under the Robinson-Patman Act, by contrast, only a "reasonable prospect" of recoupment need be shown. *Id.*

104. *See id.* at 226.

105. *See, e.g., Brooke Grp.*, 509 U.S. at 224 (noting that "unsuccessful predation is in general a boon to consumers"); *see also* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986) ("[C]utting prices in order to increase business often is the very essence of competition.").

be ever more willing to ease Apple or another competitor's entry in order to thwart Amazon.[106]

2. *The Effect on Consumers*

In the end, the Second Circuit's *Apple* decision benefitted a company with tremendous power—Amazon—and harmed smaller players in a struggling industry. *Apple* therefore begs the question of whether the antitrust laws fostered the right result from a consumer welfare perspective. In order to properly assess the result the court reached in *Apple*, it is important to take into account: the state of the publishing industry prior to Apple's entry; the publishers' underlying motivations in raising e-book prices; whether those motivations align with consumer interests; and whether Amazon's conduct actually represents a threat to consumers.

Any potential alignment between the publishers' and consumers' interests is merely speculative. As discussed above, Amazon's pricing behavior cannot be condemned as a traditional "predatory pricing" scheme, and thus could not be pigeonholed into existing monopolization precedent. This reflects the reality that Amazon's aggressively low priced e-books were almost surely a boon to consumers, at least in the short-term. The underlying concern of many in the publishing industry, however, centers on how Amazon's pricing might change the literary landscape in the long-term.[107] The thrust of this concern is that Amazon's disruption of the publishing industry could hurt a precariously balanced creative ecosystem.

The theory here is that what could be labeled "inefficiencies" in the publishing industry actually support a wide creative class of authors, which yield long term benefits to readers and to society as a whole.[108] The traditional publisher model involves providing authors advances against

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106. Significantly, here the publishers' apparent concern was not that Amazon would eventually raise prices above competitive levels, but that it would keep prices low indefinitely, forever devaluing the book in the consumer's mind.

107. In the words of Hachette CEO David Young: "The big concern—and it's a massive concern—is the $9.99 pricing point. If it's allowed to take hold in the consumer's mind that a book is worth ten bucks, to my mind it's game over for this business." Ken Auletta, *Publish or Perish*, NEW YORKER (Apr. 26, 2010), http://www.newyorker.com/magazine/2010/04/26/publish-or-perish [https://perma.cc/AP7T-H6HD]. The co-owner of the small publisher Melville House, Dennis Johnson, likewise expressed his fear that Amazon's low prices had "successfully fostered the idea that a book is a thing of minimal value" in consumers' minds—"It's a widget." George Packer, *Cheap Words*, NEW YORKER (Feb 17, 2015), http://www.newyorker.com/magazine/2014/02/17/cheap-words [https://perma.cc/TQ59-VUDM].

108. *See* Auletta, *Publish or Perish*, *supra* note 107 ("Good publishers find and cultivate writers, some of whom do not initially have much commercial promise. . . . The system is inefficient, but it supports a class of professional writers, which might not otherwise exist.").

future royalties to underwrite their research and writing.[109] Seventy percent of these advances will never be earned back in full through royalties.[110] A small number of books will end up selling well, subsidizing the initial investment in advances to a variety of authors, and insulating those authors from the vagaries of the market. The worry is that Amazon's pricing pressure threatens to disrupt this equilibrium by squeezing margins to the point where advances are assigned to only those works most likely to earn them back through robust sales, such as those by already-prominent authors.

Even assuming that the traditional publishing model provides these structural creative benefits, it is hard to see how they would fit within the normal scope of antitrust analysis. Consider the analogous situation of a horizontal price-fixing conspiracy among manufacturers that increase profit margins to the point where they are able to provide more jobs, at higher wages, than they otherwise would be able to.[111] While courts weigh the procompetitive and anticompetitive effects of a restraint whenever they engage in rule of reason analysis, at some point the likely effects must become too speculative to merit consideration. Courts cannot parse every possible attenuated effect of a restraint. The antitrust laws themselves promote a particular vision of free-market competition that is itself assumed to order markets in a desirable manner.

That antitrust law vindicated Amazon's interests here may also reflect Amazon's unique characteristics. Amazon wields its market power in surprising ways—making it an interesting case study. The company now controls a sprawling universe of online retail, cloud services, streaming video, music, and, of course, physical and electronic books. Its success is due in no small part to its relentless discounting.[112] Despite its apparent power to raise prices in many goods, it seems not to. As a result, even as it has grown into a powerful force in the American economy, Amazon has generally earned relatively paltry overall profits.[113] Furthermore, within the

109. *See* Ken Auletta, *Paper Trail*, NEW YORKER (Jun. 25, 2012), http://www.newyorker.com/magazine/2012/06/25/paper-trail-2 [https://perma.cc/82TR-FBL4].

110. *See* Auletta, *Publish or Perish*, *supra* note 107.

111. This example assumes increased margins find their way to workers and not investors. In the publishing industry, commentators have widely differing views on whether profits have ever been sufficiently channeled toward authors.

112. Amazon even markets itself as "Earth's most consumer-centric company." *See* Packer, *supra* note 107.

113. *See* Farhad Manjoo, *How Amazon's Long Game Yielded a Retail Juggernaut*, N.Y. TIMES (Nov. 18, 2015), http://www.nytimes.com/2015/11/19/technology/how-amazons-long-game-yielded-a-retail-juggernaut.html [https://perma.cc/6P78-NKKC].

company, more profitable divisions such as its cloud storage business actually subsidize investment in other, less profitable ones.[114]

If the goal of antitrust law was merely to promote competition between firms in a given market, it may actually be preferable for a monopolist like Amazon to charge a price higher than the market would normally support. Such a "supracompetitive" price is the carrot that incentivizes other firms to enter, eventually hastening the monopolist's downfall. What is to be done with a company that continuously accumulates market power but refuses to leverage it against consumers? Does this even pose a problem? A cynical long-view perspective is that such a company will continue to make investments that allow it to operate so efficiently, or take advantage of platform effects so successfully, that no entrant would ever be able to undercut its prices. Once a company has achieved that level of dominance, the company may then raise prices without fear that new firms would attempt to enter the market.

3. *Implications for the Publishing Industry*

The conflict between Amazon and the publishers reflects a familiar trend. As digital technologies stir an established content market—like music and television before e-books—conflict between newly ascendant digital players like Amazon and traditional gatekeepers is almost inevitable. And Amazon's preexisting market power in physical books only exacerbated the tension between Amazon and publishers. The publishing industry is likely to face ongoing changes as it acclimates to both the new normal of Amazon's physical dominance, and the rise of the e-book.

One seemingly inevitable result of Amazon's dominance and the disruptive emergence of the e-book market is greater consolidation in the publishing industry. Since the initial district court decision in *United States v. Apple*, the trend toward consolidation in the publishing world has only accelerated. In 2013, Penguin and Random House—two of the former "Big Six" publishers—merged to form Penguin Random House, creating by far

114. Deutsche Bank estimates that Amazon's cloud service could soon be worth $160 billion as a stand-alone company. *Id.* That division maintains a net operating margin of 25 percent, compared to 3.5 percent for Amazon's North American retail business. *Id.* For more details on Amazon's business model, see Andrea M. Hall, *Standing the Test of Time: Likelihood of Confusion in* Multi Time Machine v. Amazon, 31 BERKELEY TECH. L.J. 815, 826–29 (2016).

the largest publishing house in the world.[115] The merger was widely seen as a bid to increase bargaining power with Amazon.[116]

This sort of consolidation poses its own threats to competition and creative output at the publisher level. Large publishing houses generally maintain many "imprint" subsidiary publishing brands united under the larger corporate umbrella. Predictably, the large firms restrict their imprints from bidding against each other for manuscripts, which means that mergers effectively reduce the relative bargaining power of authors by winnowing competition for manuscripts.[117] In this way consolidation can pass along the pressure publishers feel from Amazon to authors, with the potential to disrupt the creative ecosystem.

While the publishers consolidate and authors are left with ever fewer traditional suitors, Amazon itself has pursued a strategy that represents an existential threat to the publishers: disintermediation.[118] Amazon Publishing, created after the Kindle's release, offers an increasingly popular self-publishing tool for those who either fail to secure deals with publishers or who covet the opportunity to earn up to seventy percent of their work's royalties.[119] But Amazon has experienced a rocky start in promoting the self-publishing model thus far. Established authors have proven surprisingly loyal to their publishers and new authors may be drawn towards the aura of prestige surrounding certain traditional publishing house brands.[120] Amazon's early failures with this model have been attributed both to tension between Amazon and other physical retailers, as well as a lack of institutional knowledge on Amazon's part—the industry frequently casts Amazon as a data-driven company out of its element in a business built on relationships.[121] Nevertheless, Amazon's efforts in this area continue.

115. *See* Jeremy Greenfield, *Penguin Random House Merger Deal Closed, New Publishing Giant Emerges*, DIGITAL BOOK WORLD (July 1, 2013), http://www.digitalbookworld.com/2013/penguin-random-house-merger-deal-closed-new-publishing-giant-emerges [https://perma.cc/6C8K-T3AF].

116. *See* Packer, *supra* note 107.

117. *See* Boris Kachka, *Book Publisher's Big Gamble*, N.Y. TIMES (July 9, 2013), http://www.nytimes.com/2013/07/10/opinion/book-publishings-big-gamble.html [https://perma.cc/H9KT-CDK5].

118. Disintermediation refers to any process by which a firm bypasses an intermediary between itself and end consumers. Amazon has taken steps toward working directly with authors, cutting the traditional publishers out of the process. *See* Packer, *supra* note 107.

119. *See* Packer, *supra* note 107.

120. *See id.* Notably, MacKenzie Bezos, the wife of Amazon CEO Jeff Bezos, published her 2014 novel *Traps* with Knopf, a respected imprint that is now a subsidiary of Penguin Random House. *Id.*

121. *Id.*

The Second Circuit's decision represents a win for Amazon's—and consumers'—interests. However, focusing solely on the legal result obscures how Apple and the publishers ultimately achieved their objectives of raising prices and breaking Amazon's hold on the e-book retail market. After the expiration of the waiting period imposed as part of their settlement with the Justice Department, the five publishing houses that had reached deals with Apple eventually had to negotiate new deals with Amazon. This led to a highly publicized standoff during the negotiations between Amazon and Hachette—the first of the publishers to renegotiate.[122] In the deals that followed, every publisher insisted upon and received the power to set prices under the agency model.[123] Since those deals were negotiated, e-book prices have risen, and—perhaps not coincidently—growth in e-book sales has begun to level off.[124] Furthermore, Amazon now faces considerable competition in the retail e-book market from both Apple and Google.

On March 7, 2016 the Supreme Court denied Apple's cert petition.[125] Notably, the $450 million the company has agreed to pay out as a result of the case represents a small sum compared to its latest quarterly profits of almost $11.1 billion.[126]

V. CONCLUSION

The Second Circuit's decision in *Apple* is a well-reasoned application of existing antitrust precedent and principles. Apple's justifications for why its conduct deserved rule of reason, as opposed to per se analysis, do not make sense given either the facts of the case or established antitrust approaches. Once the court determined that Apple had knowingly participated in the publishers' horizontal pricing fixing conspiracy, the fact that Apple used vertical contracts in order to effectuate that conspiracy should not save it

122. *See* Davey Alba, *Amazon Resolves Dispute With Top-Five Publisher Hachette Over Book Sales*, WIRED (Nov. 13, 2014), http://www.wsj.com/articles/amazon-hachette-end-publishing-dispute-1415898013 [https://perma.cc/VN8E-N7UC].

123. *See* Alison Griswold, *Amazon to Publishers: Set Your Own E-Book Prices! Amazon to Customers: Not Our Fault!*, SLATE (Apr. 14, 2015), http://www.slate.com/blogs/moneybox/2015/04/14/what_the_amazon_harpercollins_deal_means_for_e_book_pricing_and_publishing.html [https://perma.cc/F5V2-MNVW].

124. *See* Jeffrey A. Trachtenberg, *E-Book Sales Fall After New Amazon Contracts*, WALL ST. J. (Sept. 3, 2015), http://www.wsj.com/articles/e-book-sales-weaken-amid-higher-prices-1441307826 [https://perma.cc/95HX-CW2R].

125. *See* Adam Liptak & Vindu Goel, *Supreme Court Declines to Hear Apple's Appeal in E-Book Pricing Case*, N.Y. TIMES (Mar. 7, 2016), http://www.nytimes.com/2016/03/08/technology/apple-supreme-court-ebook-prices.html [https://perma.cc/3FNW-Y22W].

126. *See* Colin Lecher, *Apple Will Pay $450 Million After Losing Ebooks Price-fixing Appeal*, THE VERGE (June 30, 2015), http://www.theverge.com/2015/6/30/8870061/apple-450-million-ebooks-price-fixing-appeal [https://perma.cc/HNP7-792S].

from the application of the per se rule. Rule of reason treatment represents an unnecessary benefit of the doubt in such situations.

The court likewise properly rejected the invitation to recognize a market entry exception to the per se rule. Such a rule would require courts to make sweeping decisions about the relative value of competition in different markets, would fly in the face of monopolization precedent, and essentially endorse antitrust vigilantism.

In the end, the circumstances surrounding the *Apple* decision also provide an insight into the current state of the publishing industry and how antitrust law might affect its future. The industry is currently in the midst of an ongoing transformation driven by technology and embodied by Amazon—a highly disruptive force. Antitrust law will not insulate the publishers from this change, nor will it ignore their collusion. While publishers ultimately succeeded in raising e-book prices and slowing the pace of change, the future of the publishing business is far from clear. In the words of Jeff Bezos, Amazon's CEO: "Amazon is not happening to bookselling. The *future* is happening to bookselling."[127]

127. *See* Packer, *supra* note 107.