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I. INTRODUCTION

The U.S. Department of Justice, Antitrust Division ("Division"), has filed a high profile case against Apple and several large book publishers ("Complaint"). The case alleges that the defendants agreed to change the way eBooks were sold. Traditionally, publishers followed the *wholesale model*, selling books outright—both "e" and traditional—to booksellers who then set retail prices. The challenged agreement allegedly required the publishers to switch to an *agency model* for eBooks. Pursuant to this model, each publisher would set the resale price and pay a 30 percent commission to the retailer.

Although the Division contends that the *per se* rule applies,[2] it hedges its bets. Much of the complaint reads as if the government were alleging a rule-of-reason case, articulating actual anticompetitive effects[3] in an eBook relevant product market of which the publisher defendants possess a large share.[4] Whether viewed as a *per se* or rule-of-reason case, the Complaint convincingly tells the story of traditional publishers' scheming to increase consumer prices and restrain competition from upstart eBook publishers. That three publisher defendants immediately entered consent decrees confirms the case's strength.

Yet, a sophisticated, doctrinally focused antitrust lawyer would have no trouble attacking (1) the applicability of the *per se* rule and (2) the eBook product market. The alleged agreement does not, on its face, appear to almost always harm consumer interests, as *per se* illegal agreements must. An agency distribution scheme could, for example, pro-competitively facilitate an industry introducing a new product into an established market. With respect to defining the market, many consumers readily substitute traditional books for eBooks, and the Division's anticompetitive story is motivated by eBooks' competitive impact on ordinary book sales. From a doctrinal perspective, the alleged eBook-only market thus seems too narrow.

That these points are debatable should not suggest that the government's case is weak. But the litigating defendants will spill plenty of ink nonetheless. Already, Apple's answer denies the existence of an eBook product market and attacks the complaint for ignoring that the agency model enabled robust competition by breaking up Amazon's dominant position.[5] Could skillful

[1] Professor of Law, Thomas Jefferson School of Law.
[2] *United States v. Apple et al.*, *Complaint* ¶ 97 (Apr. 11, 2012) ("Complaint").
[3] *Id.* at ¶ 98.
[4] *Id.* at ¶ 99.
[5] *United States v. Apple et al.*, *Answer of Defendant* Apple ¶ 99 (May 22, 2012) ("Answer").

lawyering bamboozle a judge with limited antitrust chops?[6] Perhaps the time has come to ask whether the *per se* rule and traditional market definition doctrine have become more trouble than they are worth.

Part I reviews the allegations in the complaint with respect to *per se* liability and market definition. Part II shows how a relentlessly doctrinal approach to criticizing the Division's *per se* and relevant market allegations could distort the antitrust analysis. Part III explains that these criticisms do not undermine the case in any meaningful sense—they simply create the opportunity for distracting doctrinal posturing. This Part then raises the question: If traditional doctrine has lost its ability to simplify antitrust cases, do these hoary tools serve any useful purpose?

II. A COMPLAINT OF TWO (MAYBE THREE?) MINDS

The Division's complaint alleges both (1) a *per se* case and (2) anticompetitive effects in an eBook product market, as a rule of reason case would require. This Part summarizes those allegations.

A. Per se v. Rule of Reason

The Division's Complaint alleges a *per se* illegal agreement among the publishers to impose the agency model on retailers.[7] It then articulates anticompetitive effects flowing from this agreement. But those allegations of competitive harm are precisely what a plaintiff would put forward when alleging a Rule-of-Reason case.

B. Trade eBooks Constitute a Relevant Product Market

In addition to the specific allegations of competitive harm, the Division casts doubt on its *per se* theory by defining the relevant product market impacted by the agreements as eBook versions of general interest fiction and non-fiction books.[8] While a traditional book might appear to be a good alternative to an eBook, the Division alleges that "no reasonable substitute exists . . ." because:

1. "thousands of [eBooks] can be stored [and read] on a single small device[,] . . . while print books cannot;"
2. consumers can locate, purchase, and download eBooks "anywhere a customer has an internet connection;" and
3. "[i]ndustry firms . . . view eBooks as a separate market segment from print books, and the Publisher Defendants were able to impose and sustain a significant retail price increase for their trade eBooks."[9]

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[6] It appears that Judge Denise presiding over related private litigation involving the alleged e-book agreement will not be distracted. *In re Electronic Books Antitrust Litigation,* --- F.Supp.2d ----, 2012 WL 1946759 (S.D.N.Y. 2012) (denying defendants' motion to dismiss).

[7] Complaint ¶ 97.

[8] *Id.* at ¶ 99 (Apr. 11, 2012). This market is said to exclude "electronic versions of children's picture books and academic textbooks, reference materials, and other specialized texts that typically are published by separate imprints from trade books, often are sold through separate channels, and are not reasonably substitutable for trade e-books." *Id.* at ¶ 27 & n.1 (Apr. 11, 2012).

[9] *Id.*

The Division then alleges that the publisher defendants have market power over eBook retailers because "they create and distribute a wide variety of popular eBooks, regularly comprising over half of the *New York Times* fiction and non-fiction bestseller lists." As a result, any retailer selling eBooks "would not be able to forgo profitably the sale of the Publisher Defendants' eBooks." That the publishers succeeded in increasing price is alleged to be evidence of this market power.[10]

III. DOCTRINAL CRITICISM OF THE eBOOK COMPLAINT

Putting aside the merits of the allegations, one focusing on the doctrine traditionally used to determine whether to (1) apply the *per se* rule and (2) define relevant product markets could find much to question in the Division's complaint.

A. The Per Se Allegation May Be Inappropriate Because a Universal Agency Model With Competitive Publisher Pricing Could Facilitate the Introduction of a New Product into a Well-Established Market.

The core purpose of treating a competitive restraint as *per se* illegal is to simplify the case.[11] As the Supreme Court has explained, the rule eliminates "the need to study an individual restraint's reasonableness . . ."[12] Since the rule cuts off all opportunities to defend a restraint, it only applies when the courts "can predict with confidence that the restraint would be invalidated in all or almost all instances under the rule of reason" because it "'would always or almost always tend to restrict competition and decrease output.'"[13] In short, "an observer with even a rudimentary understanding of economics [must be able to] conclude that the arrangements in question would have an anticompetitive effect on customers and markets."[14]

At one time, the Supreme Court appeared to hold that any agreement impacting price was *per se* illegal.[15] And in the eBooks case, the Division alleges an agreement among competing publishers that had the intent and effect of influencing price. But beginning in the 1980s, the Court clarified that price effects alone are not enough when a plausible pro-competitive

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[10] *Id.* at ¶ 101.

[11] *Northern Pacific R. Co. v. United States,* 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958) (explaining that the *per se* rule avoids "the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable"); *see F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 430 (1990) (describing the need for administrative efficiency in antitrust cases as "unusually compelling").

[12] *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 877 (2007).

[13] *Id.* at 877-78; *Jefferson Parish Hospital District No. 2 v. Hyde,* 466 U.S. 2, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984) (noting that "[t]he rationale for *per se* rules in part is to avoid a burdensome inquiry into actual market conditions in situations where the likelihood of anticompetitive conduct is so great as to render unjustified the costs of determining whether the particular case at bar involves anticompetitive conduct").

[14] *California Dental Association v. FTC,* 526 U.S. 756, 770 (1999).

[15] *U.S. v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 223 (1940) (holding that "[u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se"); see *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 48 (1990) (quoting *Socony-Vacuum*).

justification exists.[16] The limits on price and quality advertising in *California Dental* were one example. Although the impact on price from advertising restrictions was clear, the Supreme Court required the lower court to examine potential justifications. The restraint pro-competitively limited deceptive advertising and thus might not almost always harm consumers.[17]

Under modern *per se* doctrine, the publishers' agreement may similarly not fit within the *per se* rule. It does not restrain the publishers' individual freedom to price eBooks. The sense of anticompetitive inevitability conveyed by the Complaint flows not from the nature of the decision to follow the agency method but from the specific details about how (1) eBook sales impacted regular book sales and (2) the publisher defendants' desire to protect their sunk investments.[18]

And pro-competitive effects are at least plausible. Coordinating a distribution scheme may be pro-competitive when a new product is introduced to replace an established and effective one. For example, in the early 1980s Sony and Philips implemented a coordinated strategy to license compact disc and player technology in an effort to displace records and tapes. The Sony-Philips strategy effectively required mark-ups over what would have been the prevailing competitive price. In that case, the markup resulted from licensing fees paid to the technology providers without whom the competitive entrant would not have existed.

In the eBook case, the markup is effectively a payment to retailers for marketing services without which at least one significant retailer, Apple, would not have sold eBooks.[19] But the point is the same. Whether such a coordinated effort is pro- or anti-competitive turns on the economics of the particular product introduction rather than the decision to coordinate on a distribution-pricing scheme. And the restraint should—at least according to the doctrine—be assessed under the Rule of Reason.

B. The Relevant Product Market May Include Regular Books Because eBooks Are a Reasonable Substitute and The Publishers Believe that the Price of eBooks Affects Regular Book Sales.

The Division's complaint defines the relevant market as trade eBooks, providing a set of allegations making that market entirely plausible—unless you have already read the preceding 98 paragraphs of the complaint. In describing what motivated the publishers to switch from the wholesale to the agency model, the Division alleged that the publishers feared lower prices for eBooks would "lower prices for print books."[20] More specifically, the Complaint alleges that "[t]he Amazon-led $9.99 retail price point for the most popular eBooks troubled the Publisher Defendants because, at $9.99, most of these eBook titles were priced *substantially lower than*

[16] *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1 (1979) (refusing to apply the *per se* rule to block copyright licensing that effectively set the price for all copyrights in the block, restraining competition among copyright owners).

[17] *California Dental Association*, 526 U.S. at 778.

[18] Even the most favored nation provision in the publishers' agreements with Apple would not be *per se* illegal because it is a vertical agreement. *Leegin Creative Leather Products*, 551 U.S. at 899 (holding that the Rule of Reason applies to all vertical price-fixing agreements).

[19] Answer ¶ 4 (May 22, 2012).

[20] Complaint ¶ 3.

hardcover versions of the same title. The Publisher Defendants were concerned these lower eBook prices would lead to *the 'deflation' of hardcover book prices . . .*"[21] And beyond price effects, the Complaint alleges that the publisher defendants worried that eBook-only publishers might become effective competitors of full service publishers, thereby eroding the "competitive advantages [the defendants] held as a result of years of investments in their print book business."[22]

No doubt Division lawyers felt that they were simply providing a belt and suspenders to bolster their case. But this reasonable litigation tactic nonetheless reveals the gap between the strength of the allegations of direct anticompetitive effects and the case's vulnerability when viewed through the prism of antitrust law's traditional framing doctrine.

Not surprisingly, Apple's answer denies that eBooks form a relevant market.[23] At first blush, Apple's denial might appear similar to *Microsoft*'s claim that middleware should have been included in the operating system market. In the *Microsoft* case, the Division proved that the nub of the anticompetitive effect was Microsoft's desire to prevent middleware (*e.g.,* web-browsers) from undermining the value of the assets that Microsoft had invested in its Window's operating system. Microsoft thus argued that if middleware's suppression created the competitive concern, then middleware must be included in the relevant market.[24]

The D.C. Circuit disagreed, finding an operating-system-only market. The threat from middleware, the court explained "is only nascent." A competitive alternative must be a current threat to be included in the relevant market.[25]

The *Microsoft* case differs from the eBooks case because in *Microsoft* no consumer (including application developers who used Window's APIs to simplify the application code) had yet substituted middleware APIs. "Whatever middleware's ultimate potential," the D.C. Circuit explained, "consumers could not [then] abandon their operating systems and switch to middleware in response to a sustained price for Windows above the competitive level."[26]

In the *Apple* case, by contrast, a large percentage of eBook purchasers are no doubt substituting eBooks for traditional books right now. And the alleged anticompetitive motive related directly to the spread between the current prices of eBooks and traditional books. The D.C. Circuit's holding that middleware was not in the operating system market because it was only a future threat that did not create existing reasonable substitutes thus provides no support for the Division's market allegations in the *Apple* case where both types of books are currently substitutes and the competitive threat is immediate.

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[21] *Id.* at ¶ 33 (emphasis added).

[22] Id. at ¶ 34.

[23] Answer ¶ 99 (May 22, 2012).

[24] *U.S. v. Microsoft Corp.,* 253 F.3d 34, 53-54 (D.C. Cir. 2001) (explaining that Microsoft argued that middleware should have been included in "the relevant market because the primary focus of the plaintiffs' §2 charge [wa]s on Microsoft's attempts to suppress middleware's threat to its operating system monopoly [and thus it would be] 'contradict[ory],' . . . to define the relevant market to exclude the 'very competitive threats that gave rise' to the action").

[25] *Id.*

[26] *Id.*

IV. IS THERE A CONTINUING ROLE FOR TRADITIONAL *PER SE* AND MARKET DEFINITION DOCTRINE?

The government's case alleges that book publishers conspired to raise the price of eBooks by several dollars to increase both their short-run profits and their longer-run market position by suppressing competitive entry. The anticompetitive effects are clear. The applicability of the *per se* rule or the publishers' share of any particular market seem entirely irrelevant. Were it not for their history, it is hard to imagine why the Division would have raised these issues.

But, of course, there is a history. Alleging *per se* cases has been a core component of the antitrust lexicon for more than half a century, and the procedure for determining market power in a rule-of-reason case by drawing an inference from market share is no less well entrenched. Courts and commentators agree that whether the *per se* rule is applied and how the market is defined "generally determine[] the result of the case."[27] Even the classic antitrust polemicists—Robert Bork and Frank Easterbrook—reserved a place for these doctrines.[28] And no case or academic article seriously questions whether courts actually apply them.

Reading a complaint like the Division's in the eBook case, however, casts doubt on whether this is true. Does anyone seriously think that this case should be resolved based on whether the *per se* rule is applied or the eBook market is properly defined? These doctrines were developed to simplify cases so that courts could avoid the overwhelming task of assessing the complex economic effects of a particular restraint. By contrast, applying the *per se* rule or calculating market shares seems within the traditional expertise of the courts.

Over the past three decades, however, much has changed. Economic concepts have been incorporated effectively into antitrust analysis, particularly through the horizontal merger guidelines. Courts have demonstrated the ability to use the available tools to assess the likely impact of a merger or competitive restraint. During the same period, the legal tests governing the *per se* rule and market definition have grown more complex. The doctrines designed to simplify antitrust analysis now serve to complicate it.

Perhaps courts should require all plaintiffs to articulate plausible anticompetitive impacts flowing from the defendants' challenged actions. One could certainly find support for this

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[27] *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 469 n.15 (1992); *see, e.g.,* 1 ABA Section of Antitrust Law, ANTITRUST LAW DEVELOPMENTS 549 (Jonathan M. Jacobson et al. eds., 6th ed. 2007) ("Defining a relevant market is often a critical issue, and sometimes the critical issue, in an antitrust case."); Louis Kaplow, *Why (Ever) Define Markets?*, 124 HARV. L. REV. 437, 439 (2010) (describing market definition as "the most litigated issue in the field"); Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 ANTITRUST L.J. 129, 129 (2007) (asserting that "the outcome of more cases has surely turned on [it] than on any other substantive issue"); Thomas A. Piraino, Jr., *Reconciling the Harvard and Chicago School: A New Antitrust Approach For the 21st Century*, 82 IND. L.J. 345, 353 (2007) ("The per se and rule of reason approaches are so divergent that a court's choice of one analysis over anther has usually determined the outcome of an antitrust case.").

[28] *See, e.g.*, *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 229 (D.C. Cir. 1986) (per Bork, J.) (rejecting direct assessment of competitive effects and explaining that "[a]ntitrust adjudication has always proceeded through inferences about market power drawn from market shares"); Frank Easterbrooke, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 3, 18 (1984) (recognizing that "[e]nforcement of the rule against naked horizontal restraints appears to be beneficial"). Although Easterbrook had reservations about the value of market definition in close cases, his caution has had little impact.

approach in the Supreme Court's most recent forays into the *per*-se/rule-of-reason conundrum. Majorities have suggested that the old rubrics should be discarded in favor of an "enquiry meet for the case"[29] and expressed confidence that courts could "devise ... presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones."[30]

The most recent horizontal merger guidelines also downplay the significance of defining markets in merger cases,[31] and Harvard Law Professor Louis Kaplow recently suggested in his article *Why (Ever) Define Markets*? that "the market definition/market share paradigm [i]s not merely imperfect but fundamentally defective."[32] The potential for traditional doctrine to muck up a case as strong as the eBooks prosecution should cause the antitrust bar to consider rejecting traditional doctrine in favor of a mode of analysis that focuses on competitive effects and develops presumptions designed to limit undue complexity.

[29] *California Dental Association*, 526 U.S. at 779-81 (explaining that "[t]he truth is that our categories of analysis of anticompetitive effect are less fixed than terms like " *per se,*" "quick look," and "rule of reason" tend to make them appear. We have recognized, for example, that "there is often no bright line separating *per se* from Rule of Reason analysis," since "considerable inquiry into market conditions" may be required before the application of any so-called " *per se* " condemnation is justified. . . . there is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint. The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one.").

[30] *Leegin Creative Leather Products*, 551 U.S. at 898-99.

[31] *See* Horizontal Merger Guidelines, U.S. Dept. of Justice & Federal Trade Commission, *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.html (Aug. 19, 2010).

[32] Louis Kaplow, *Why (Ever) Define Markets?*, 124 HARV. L. REV. 437, 516 (2010).