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LANDMARK CASES IN INTELLECTUAL PROPERTY LAW, edited by Jose Bellido. Hart Publishing, 2017. pp. xxv + 381, Hardcover, $108.

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Intellectual property is probably one of the most contentious fields of contemporary legal studies, but it is at the same time, to a large extent, a discipline still in search of identity. Not surprisingly, the historical and theoretical foundations of intellectual property have attracted increasing attention from researchers, within and beyond the boundaries of law. Not more than fifteen years ago, the essential bibliography on copyright history in English language could have been wrapped up in one single footnote, and a long footnote could have accommodated the main literature on the history of all intellectual property rights as such. This is certainly no longer the case today. Historical research on the legal, theoretical, and social foundations of intellectual property has proliferated in many directions. It has transformed from an ancillary subject at the periphery of the intellectual property debate into one that attracts the foremost scholars in the field.

The book LANDMARK CASES IN INTELLECTUAL PROPERTY LAW, edited by Jose Bellido, inscribes itself into this fertile ground of scholarship. It stands out, first of all, for the quality of the contributors, who are authors of some of the most authoritative and most-cited works on intellectual property history. Although first-hand research into litigation has been part and parcel of this field for a long time, not many works have systematically collected original contributions along the common thread of case law analysis. The most significant precedent in this genre is probably the remarkable collection of essays on leading US cases edited by Jane Ginsburg and Rochelle Cooper Dreyfuss over a decade ago.[1]

The interpretation of intellectual property history through the lenses of institutional and commercial practices, such as licensing and litigation strategies, is one of the distinctive features of Jose Bellido's scholarship.[2] The "case studies" methodology that defines this book shares the same rationale, namely – as Bellido puts it in his chapter – that "there is much to be gained in looking at the background of the dispute, its emergence, and how it is litigated by the protagonists." (p. 206).

The thirteen cases selected for this book are all by British courts, with one exception for a decision coming from the European Court of Justice. The time span starts in the 1600s, when patents were still called "monopolies" and

copyright was not yet even a word, and ends in the present days, under the growing influence of European Union law (still formally binding in the United Kingdom at the moment of writing this review). What makes the selected cases landmarks in intellectual property law?

As acknowledged by Jose Bellido in his preface, there are a number of reasons why a particular legal dispute marks an historical turning-point. In the most classical sense, it is so because of the disputes' enduring legacy as legal precedent, typically due to the way in which a particular legal principle has been established. Alternatively, the landmark quality may depend on the matter around which the controversy arose, for example when a new technology or business practice challenges established norms. In a more general sense, a case stands out if it has something crucial to say that goes beyond the facts of the litigation, and perhaps also beyond the boundaries of law.

A glance at the table of contents reveals that the choice of cases corresponds only partially to the typical reading list of IP courses. Evidently, the editor and the contributors were less preoccupied with ticking the boxes of an ideal list than to make an original and unique contribution to scholarship. There are typically two ways of advancing knowledge and understanding in a legal discipline through case studies: either you raise the attention to cases that have not yet received adequate consideration, or you tackle well-known cases from a fresh perspective. The book does both of these things. On the one side, it challenges the acquired assumptions on classical authorities and, on the other, it expands the notional catalogue of benchmark cases by pointing to "unorthodox" and less researched authorities.

Taken as a whole, these thirteen cases traversing five centuries of British history tell a story with many layers of meaning. First, and more obviously, there is a story of legal disputes and litigation, with their tangled backgrounds of business and personal micro-histories that frequently intertwine with the broader societal, cultural, and economic dimensions. This story entails also a narrative of legal strategies adopted by counsels, and how these strategies succeeded or failed, thereby influencing the development of the discipline. On another level, this same litigation describes a discipline in search of identity: different legal threads with diverse statutory or common law origins that only at a very late stage converge under the common umbrella construct of "intellectual property". This narrative seems to suggest that such convergence is not just the outcome of contingent factual circumstances, but unfolds a pattern that is deeply entrenched in the specific British legal tradition. Indeed, it is in this tradition that "property" emerged more prominently as the common thread that unites interests as diverse as those of authors, inventors, and trade mark owners. In this connection, there is at least another layer of meaning, which remains largely implicit in the book: it is the story of how different legal traditions, across the world, have shaped the fundamental principles of the discipline and how these traditions have influenced each other over the years.

The book is a treasure trove of insights into all of these layers. It begins by revisiting the impact of early statutory law on "monopolies", with Sean Bottomley's enlightening reading of *Mansell v Bunger* (1626), and then

embarks in a long epistemological journey with a number of direct and indirect cross-references.

In the course of this journey, the book is not afraid of reopening some of the most prominent "dossiers" of intellectual property history and theory. One of these is the 18th Century's "literary property debate", revolving around the question of whether there is an authors' property right protected at common law that precedes and exceeds the limited right created by the statute. Because of its vast implications on the origin, purpose, and limits of copyright, the question continues to attract attention from copyright historians and theorists alike.[3] The chapter by H. Tomás Gómez-Arostegui on *Stationers v Seymour* (1677) contributes to a better understanding of the debate. Based on the analysis of newly discovered manuscript reports and records, Gómez-Arostegui makes a convincing case that the reliance on this precedent by supporters of the subsistence of a common law intangible right vested in authors was by no means wrong. "In short," Gómez-Arostegui tells us, "a number of lawyers and judges in the late seventeenth century believed that an author's right in literary property was a plausible basis for argument, even though no statue expressly mentioned authors' rights before 1710." (p. 54). This means that "the notion of an antecedent [authors'] right at common law was not fanciful or novel." (p. 54).

To be sure, this finding does not change the fact that the notion of a perpetual authors' right at common-law, and the related narrative of the author as proprietor of a transferable object of property, was largely instrumental to the interests of publishers, to whom the alleged right could be transferred.[4] This story, which has been elsewhere described as the "*latent* story about commodification of knowledge",[5] seems to be confirmed by the other copyright cases discussed in the book. Indeed, perhaps not surprisingly, in none of these cases are the authors' personal interests the driving cause or the main issue at stake.

The argument developed in Gómez-Arostegui's chapter is echoed in Barbara Lauriat's discussion of a later case, widely acknowledged as seminal in Anglo-American copyright law, namely the House of Lords decision in *Walter v Lane* (1900). The case revolved around newspaper reports of oral speeches. Although the focus was on copyright subsistence in these reports, the question of whether oral speeches as such attract common law copyright was at the background of the litigation. Lauriat's thorough reconstruction of the facts seems to suggest that the litigation may not have happened, should the author of the speeches (the Earl of Rosebery) not have wrongly assumed that he did not own any copyright to assert against Lane to prevent the publication of his addresses. Yet the chapter makes an even more important point, which sheds new light into the persisting legacy of this case as an authority for the British concept of originality. This authority, argues Lauriat, is questionable, not because of its incompatibility with the modern, "higher" standard developed at the European level, but because it is not to be regarded as a case on originality in the first place. It is, rather, a case on *authorship*. The teaching of the case is *not* that reports qualify as "original" literary works, but that reports attract copyright *despite* not being original works of authorship – and this is because

"there was nothing in the statute that suggested only an 'original composition' would gain copyright protection." (p. 168).

The divorce between authors' interests and the actual operation of copyright law is perhaps another "latent history" that the book helps unveil. In fact, the dispute in *Walter v Lane* was carried out in complete disregard of the author's reluctance to be dragged into a lawsuit. In *Sayer v Moore* (1785), the first of a series of cases on alleged copyright infringement in maps and charts thoroughly discussed by Isabella Alexander (pp. 59-86), cartographers played a major role, but only as expert witnesses of the court. The representation of the author of the Popeye comic strip and his heir is a controversial aspect of *King Feature Syndicate* (1940), as presented by Jose Bellido. This case is best remembered for the emergence of copyright "as an economic and social platform for licensing and merchandising activities" where syndication, and not authorship, was "the basis of the intangible property rights."(p. 230).

There is another landmark element in the *King Feature* case, namely the role played by the counsel's strategy in pursuing a test case with very uncertain results. The choice of the court in which to bring proceedings is a distinctive point of interest in *Day v Day, Day and Martin* (1816), a litigation that "signalled a shift in trademark enforcement practice." (p. 87) and that forms the basis of Lionel Bently's insightful discussion of early trademark history. One century later, in *R v Johnstone* (2003), a case involving counterfeited CDs, the plaintiff's counsel sued on trade mark infringement grounds, instead on the more logical copyright infringement grounds, because of the stronger criminal sanctions then available under the Trade Marks Act of 1994. In this case, however, the strategy did not pay off, as the House of Lords famously concluded that the use of registered trademarks such as "Bon Jovi" in the front cover of bootlegged CDs was not a "use as a trade mark". In her analysis, Elena Cooper focuses on a further element of interest of this ruling, namely the relationship between civil and criminal law in intellectual property, and explains why the court rightly refrained from establishing "closer analogies between intellectual property crime and the law of theft." (p. 343).

The precedent set by *R v Johnston* as to the trade mark function had short life due to the subsequent jurisprudence of the European Court of Justice, whose landmark ruling on functionality in *Lego Juris v OHIM* (2010) is the focus of the last chapter of the book. Alain Pottage contextualizes the case on the background of the aggressive strategy pursued by the Danish company to extend its expired patent rights. "The [Lego] brick is so thoroughly implicated in the history of intellectual property law – Pottage tells us – that one could imagine taking it as the vehicle of an engaging and expansive course in intellectual property law" (p. 347). Pottage takes the brick as a vehicle for the understanding of how the nature and operation of trade mark law has evolved at the interface between EU and national jurisprudence.

However, the area of intellectual property where British jurisprudence has engaged more intensively with doctrines and principles from other European traditions is probably patent law. The three chapters on the modern patent system cover systematically the foundational elements of the law, namely subject matter qualification, obviousness, and construction of the scope of the claims. The latter is discussed extensively in Seymour Mauskopf's chapter on

Nobel Explosives Company v Anderson (1894), which digs critically into the origin of the British approach to claim interpretation. The contentious issue of subject matter eligibility is tackled by Brad Sherman with reference to *Slee & Harris's Application* (1966), one of the earliest decisions on computer programs. Another controversial subject matter, biotech inventions, is at the centre stage of *Biogen v Medeva* (1996). Luke McDonagh provides a critical re-reading Lord Hoffmann's judgment on obviousness and sufficiency in the context of the emergence of a disruptive technology.

The book pays the right tribute to common-law intellectual property in two of its chapters. Hazel Carty presents an elegant and articulated analysis of *Spalding v Gamage* (1915), the leading authority on the law of passing-off. The widespread legacy of *Coco v Clark* (1969) for the law of breach of confidence is discussed in Tanya Aplin's chapter. The surprising influence of this lower court decision across different jurisdictions is examined by a systematic quantitative and qualitative analysis of citations, which provides remarkable insights into the many trajectories followed by this legacy.

In its diversity of approaches, directions, and methodologies, the book offers a thoughtful opportunity to rethink the foundations of intellectual property, as well as its purpose and future. It will be an indispensable work of reference for research in the years to come.

ENDNOTES

[1]INTELLECTUAL PROPERTY STORIES, Jane C. Ginsburg and Rochelle Cooper Dreyfuss, eds. (Foundation Press, 2006).
[2]See e.g. Jose Bellido and Fiona Macmillan, Music Copyright after Collectivisation, I.P.Q. 231-246 (2016); Jose Bellido and Kathy Bowrey, From the Author to the Proprietor: Newspaper Copyright and The Times (1842-1956), 6 J. of Media Law, 206-233 (2014); Jose Bellido, Codified Anxieties: Literary Copyright in Mid-Nineteenth Century Spain, in RESEARCH HANDBOOK ON THE HISTORY OF COPYRIGHT LAW, Isabella Alexander and H. Tomás Gómez-Arostegui, eds. (Edward Elgar, 2016), 423-443.
[3]See in particular Mark Rose, AUTHORS AND OWNERS. THE INVENTION OF COPYRIGHT (Harvard University Press, 1993), 92-101; Brad Sherman and Lionel Bently, THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW (Cambridge University Press, 1999), 9-19; Ronan Deazley, RETHINKING COPYRIGHT: HISTORY, THEORY, LANGUAGE (Edward Elgar, 2006), 16-25; Abraham Drassinower, WHAT'S WRONG WITH COPYING? (Harvard University Press, 2015), 152-155.
[4]See Mark Rose, AUTHORS AND OWNERS, 111-112.
[5]Abraham Drassinower, WHAT'S WRONG WITH COPYING?, 155.

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PATENT REMEDIES AND COMPLEX PRODUCTS: TOWARD A GLOBAL CONSENSUS, edited by C. Bradford Biddle, Jorge. L. Contreras, Brian J. Love, and Norman V. Siebrasse. Cambridge University Press, 2019. pp. xxxiii + 344, Hardcover, $125, and Open Access.

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Twenty leading scholars from around the world worked on the International Patent Remedies for Complex Products ("INPRECOMP") project. One of the fruits of this project is the book entitled PATENT REMEDIES AND COMPLEX PRODUCTS: TOWARD A GLOBAL CONSENSUS. The title reveals the book and indeed the project's aspirations: "to seek international consensus on issues affecting remedies in the context of complex products" (p.xxvii). The participants undoubtedly understood that this lofty goal was overly ambitious. In this complex global system, there are too many diverse viewpoints and agendas to achieve real consensus. Nonetheless, the authors have done an admirable job describing some of the most important issues in patent remedies law and setting forth different approaches countries have used to address these issues.

The book frames the problems that complex products pose by initially noting, "[w]e no longer live in a world of simple inventions where the patented technology provides most, if not all, of the value of an end product" (p.xxi). A single end product (e.g., smartphone) may contain thousands of technologies that are covered by "tens or even hundreds of thousands of individuals patents issued by patent offices across the globe" (p.1). These patent "thickets" make it immensely difficult to calibrate patent remedies in way that satisfies two competing interests: 1) incentivizing invention by adequately compensating patent holders, and 2) promoting follow-on innovation. If the law provides too weak a set of remedies, it will under incentivize invention.[1] On the other hand, making remedies too powerful can stifle follow on innovation. [2] The challenge for policymakers and judges is determining where to draw the different lines.

PATENT REMEDIES AND COMPLEX PRODUCTS divides the issues into seven chapters. The first four chapters discuss specific remedies, namely: "Reasonable Royalties", "Lost Profit and Disgorgement", "Enhanced Damages, Litigation Cost Recovery, and Interest", and "Injunctive Relief". The next three chapters then cover issues that makes this first set of topics even more complicated: "The Effect of FRAND Commitments on Patent

Remedies", "The Effect of Competition Law on Patent Remedies" and "Holdout, Holdup and Royalty Stacking: A Review of the Literature."

The book is well suited for readers of varying levels of expertise and patience. For those seeking bottom line answers, the book begins with a helpful "Executive Summary" that briefly summarizes the different chapter's principal recommendations. Each chapter starts by introducing fundamental concepts associated with the topic. The chapters then delve into many of the nuances associated with each topic. In many cases, the deeper dive describes issues that even some experts may not have considered. By discussing a sample of relevant examples, this review seeks to illustrate both the breadth and depth of the book's coverage. Indeed, PATENT REMEDIES AND COMPLEX PRODUCTS is currently the most comprehensive source of information about how patent remedies law is applied to modern complex products.

U.S stakeholders will want to pay special attention to the chapter on reasonable royalties. Since 2010, roughly 82% of patent cases that awarded damages included reasonable royalty awards.[3] Chapter 1 provides a wholistic treatment of the topic. It starts by providing a brief look at the numbers by highlighting studies that discuss how often reasonable royalty awards are awarded and what average awards are in the United States (different studies suggest that the range may be from $3.5 to $5.8 million) (pp.6-7). Although less data is available outside the United States, we still learn that awards are smaller in Japan (only 5 cases exceeded $1.7 million over a fourteen-year period) and rarer in China. The Chapter also briefly explores the theoretical justifications for awarding reasonable royalties and the principal approaches for calculating them. Of course, there is the discussion of the fifteen *Georgia Pacific* factors and its many failings.

But PATENT REMEDIES AND COMPLEX PRODUCTS is not merely a descriptive view of the law, the authors make recommendations. Like others have done before, Chapter 1 suggests narrowing the number of factors that juries consider.[4] In their variation of this reform, the focus is on: 1) determining incremental value, 2) assessing market evidence, and 3) then using the two prior steps as checks against each other. I am particularly heartened by two aspects of the discussion.

First, when Chapter 1 describes incremental value, it does not assume that the entire value of a product is made up by the various patents that cover the product. The Chapter acknowledges that taking a product to market requires "manufacturing, distribution, marketing, process refinement . . .." and concludes that a royalty should reflect "compensation to the party who made the investments and shouldered the risks related to these ancillary services" (p.24) [5] This is a nuance that courts can overlook, and it is important to remind everyone that it is not just about patents.

Second, I am delighted that there is also a discussion of cognitive bias in Chapter 1. When explaining the justifications for the entire market value rule and requiring royalties to be based on the smallest saleable unit, the authors discuss anchoring – the tendency to give undue weight to the first number they encounter (p.43). Law and psychology studies have repeatedly shown that

people are subject to a variety of such cognitive biases. These insights have important implications in many legal contexts, and patent law is no exception. Patent juries literally make billion-dollar decisions. Policymakers and practicing attorneys need to understand how juries think. For example, my own recent mock jury study with Roderick O'Dorisio revealed that juries often use damages to punish companies even when they are instructed to award compensatory damages.[6] Insights like these can help courts and policymakers calibrate new remedy policies that takes these heuristics into account.

Chapters 2-4 provide a similar treatment of lost profits, enhanced damages, and injunctions. For all three topics, the book provides a good baseline description of the doctrine, including some discussion of jurisdictions outside the United States. Then each chapter discusses some important nuances and provides a few recommendations. For the most part, these descriptions are extremely informative and provide a fair treatment of the law. And although I do not always agree with the recommendations, they are all certainly worthy of serious discussion.

My primary disagreement with the book concerns Chapter 3's recommendations on the treatment of unpatented goods and apportionment. The chapter advocates for legal rules that award lost profits associated with the sale of unpatented goods so long as the patentee can show causation. The chapter also endorses *Mentor Graphics* v. *Eve USA*, a Federal Circuit decision rejecting the idea of apportioning lost profits.[7] At its core, both of these recommendations reflect what Ted Sichleman has called "make-whole" remedies and they are controversial. Scholarship by Sichelman, Eric Bensen, Amy Landers, Mark Lemley and myself have all staked out positions that seem inconsistent with Chapter 3's view on lost profits.[8] In one form or another, we have all argued that rents should be split between initial innovators and later follow-on innovators. These views are fundamentally inconsistent with the idea of basing remedies purely on "but for" causation, the justification Chapter 3 relies on in making its recommendations. While this portion of Chapter 3 certainly has its own advocates (including ample precedent), I wish the book had at least acknowledged that the issue is more controversial than the authors seem to suggest.[9]

I found the other parts of PATENT REMEDIES AND COMPLEX PRODUCTS less objectionable and more helpful. Chapter 5 was particularly informative. It discusses the effect that FRAND (fair reasonable and non-discriminatory) commitments have on remedies for standards-essential patents ("SEPs"). Early on, Chapter 5 sketches out to how to determine royalty rates using a "top down" approach, an approach that is quite different than the "bottom up" reasonable royalty calculation that most U.S. patent experts are familiar with. The top down approach begins by determining the aggregate royalty burden that a standard should bear. It then seeks to find the particular portion of that royalty that individual SEPs should receive. Although the top down approach appears to have only been used in the SEP context, it seems that courts may want to consider borrowing aspects of this approach for any product covered by a large number of patents.

Perhaps because FRAND commitments have no borders, Chapter 5 explores international law in greater depth than some of the other chapters. There are discussions of several relevant international FRAND decisions including the Court of Justice of the European Union's landmark decision in *Huawei v. ZTE*.[10] *Huawei v. ZTE* describes the procedural steps that a SEP holder must follow if it wishes to seek an injunction against an unlicensed implementer without violating European Competition law. Chapter 5 also provides an appendix that summarizes how different the laws of different countries assess monetary FRAND damages. The appendix includes a discussion of the laws of Germany, Switzerland, Korea, Japan, and China. Importantly, the entire book (including the Appendix) provides citations to source material so that the reader can research specific topics in greater depth. Because the implications of a FRAND commitment is probably one of the least well-developed areas of patent remedies, Chapter 5 probably has the most potential to educate and influence policymakers and judges.

Of course, these are just a few of the many issues covered by PATENT REMEDIES AND COMPLEX PRODUCTS. In short, for both practicing attorneys and policymakers interested in how patent remedies should and do work for complex products, PATENT REMEDIES AND COMPLEX PRODUCTS is an excellent book with a wealth of helpful information.

ENDNOTES

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[1] See generally Adam B. Jaffe, et al, eds., , Navigating the Patent Thicket: Cross Licenses, Patent Pools, And Standard Setting, in Vol. 1 INNOVATION POLICY AND THE ECONOMY, VOL. 1, 119 (2001) (describing the patent thicket problem).

[2] See generally, Suzanne Scotchmer, , Standing on the Shoulders of Giants: Cumulative Research and the Patent Law, 5 J. ECON. PERSP. 29, 32 (1991)

[3] Unpublished results of review author's search on Lex Machina of all patent cases filed after January 1, 2010 that resulted in a monetary damages award as of February 20, 2020. 230 out of the 281 cases found resulted in an award of reasonable royalty damages.

[4] See, e.g., Hon. Arthur J. Gajarsa, William F. Lee, A. Douglas Melamed, Breaking the Georgia- Pacific Habit: A Practical Proposal to Bring Simplicity and Structure to Reasonable Royalty Damages Determinations, 26 Tex. Intell. Prop. L.J. 51, 52 (2018); Stuart Graham et. al., Final Report of the Berkeley Center for Law & Technology Patent Damages Workshop 15 August 2016, 25 Tex. Intell. Prop. L.J. 115,140 (2017)

[5] See also Mark A. Lemley, Distinguishing Lost Profits from Reasonable Royalties, 51 Wm. & Mary L. Rev. 655, 663–64 (2009)

[6] Bernard Chao & Roderick O'Dorisio, Saliency, Anchors & Frames, A Multicomponent Damages Experiment, 26 Mich. Tech. L. Rev. 1 (2019).

[7] Mentor Graphics Corp. v. EVE-USA, Inc., 851 F.3d 1275 (Fed. Cir. 2017).

[8] Ted Sichelman, Purging Patent Law of "Private Law" Remedies, 92 Tex. L.Rev.517 (2014) (arguing that "make- whole" remedies are ill suited for patent law); Eric E. Bensen, Apportionment of Lost Profits in Contemporary Damages Cases, 10 Va. J.L. & Tech. 1 (2005) (making the historical case for

apportioning lost profits), Amy L. Landers, Patent Claim Apportionment, Patentee Injury, and Sequential Invention, 19 Geo. Mason L. Rev. 471, 504-509 (2012) (arguing that dividing rents among different innovators optimizes innovation); Mark A. Lemley, Property, Intellectual Property, and Free Riding, 83 Tex. L. Rev. 1031, 1046 (2005) ("The assumption that intellectual property owners should be entitled to capture the full social surplus of their invention runs counter to our economic intuitions in every other segment of the economy."); Bernard Chao, Lost Profits in a Multicomponent World, 59 B.C. L. Rev. 1321 (2018) (arguing that lost profits should be apportioned); *see also* Brian J. Love, The Misuse of Reasonable Royalty Damages as a Patent Infringement Deterrent, 74 Mo. L Rev. 909, 931 (2009) ("[T]he 'convoyed sales' doctrine . . . overcompensate[s] patent owners by allowing them to earn a royalty on value they did not create.").

[9] Rite-Hite Corp. v. Kelley Co., 56 F.3d 1538 (Fed. Cir. 1995) (en banc) (allowing for the recovery of lost profits of complementary goods that do not practice the patent); Roger D. Blair and Thomas F. Cotter, Rethinking Patent Damages, 10 Tex. Intell. Prop. L.J. 1, 2 (2001) (defending remedies based on "but for" causation).

[10] Huawei Technologies Co. Ltd. v. ZTE Corp., C-170/13 ECJ (2015).

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UNITED STATES V. APPLE: COMPETITION IN AMERICA, by Chris Sagers. Harvard University Press, 2019. pp. 336, Hardcover, $29.95.

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That Professor Sagers has written an ambitious book is demonstrated in its subtitle. "Competition in America" covers a lot of ground, from the stock market to the football field. Competition fuels America, moving it forward. But competition also can slam on the brakes suddenly and frighteningly, as with deep economic downturns or failures to respond to crises, like a pandemic. These tensions are at the heart of this engaging and important book.

Professor Sagers uses the 2012 antitrust prosecution against Apple and the major book publishers as the catalyst for his exegesis on competition. The United States Department of Justice (along with the attorneys-general of several states) alleged that Apple and the book publishers had conspired to raise the price of e-Books, violating the Sherman Act's prohibition against restraints of trade. While the publishers settled, Apple proceeded to trial where the district court ruled in favor of the government.[1] According to Judge Denise Cole, Apple had orchestrated a conspiracy among publishers to implement a set of contractual terms in its agreements with authors that would raise the price of e-Books. These terms were a per se violation of the Sherman Act.

The Second Circuit affirmed in a 2-1 decision whose rationale was divided.[2] Judge Debra Ann Livingston, writing for the majority, found Apple liable under a rule of reason analysis, which entails a balancing of anticompetitive and procompetitive effects. Judge Raymond Lohier concurred with the result and the factual findings but would have affirmed on the district court's per se ruling. Finally, Judge Dennis Jacobs dissented, reasoning that Apple had acted pro-competitively and therefore did not violate the Sherman Act.

Professor Sagers provides context for these various judicial decisions for those not fully familiar with antitrust doctrines. Standards for liability, whether rule of reason or per se, reflect compromises over interpretations of the phrase "restraint of trade," starting with Judge Taft's famous decision in *Addyston Pipe & Steel* on illegal and ancillary restraints.[3] Economic justification for these standards developed through economic thinking in the nineteenth and twentieth centuries. Professor Sagers presents these economic developments in great and, for some, familiar detail. His presentation is relatively clear and

accurate while being critical of some of the underlying assumptions. There is a lot to be said about how economics translates into law and policy, and the book suggests some of the problems. Professor Sagers alludes to the limitations in a brief discussion of the German Historical School in the late nineteenth century. Some readers may be disappointed by this attention, short relative to the pages devoted to the more well-known marginalist analysis. But, as I suggest below, what the book may lack in theoretical discussion is compensated for in some very engaging institutional and historical discussion of the publishing industry.

In focusing on marginalist economic theory, with its emphasis on the centrality of price as determined by free markets, Professor Sagers highlights limitations in our understanding of competition. Antitrust economics relies on the mantra of voluntary transactions negotiated through price among many actors on the seller and buyer sides of the market. These transactions translate into marginalist terms of utility, revenue, and cost, which in turn imply the benefits of competition, quality products provided at affordable prices. These idealized transactions are abstracted from real world business decisions and market dynamics. Competition's virtues are gauged by results; if prices are low, competition is functioning.

The Apple litigation shows why this abstracted view of competition is limiting and misleading. Apple and the publishers sought to counter the perceived threat from Amazon, a company that was selling inexpensive e-books while limiting compensation for authors. By agreeing not to sell e-books below a set price, the practice termed "minimum resale price maintenance", the publishers and Apple were seeking to promote competition in publishing by supporting authors and bringing quality new books to readers. Contrary to these competitive goals, the Second Circuit, applying antitrust law, focused on the increased prices by Apple and competitive virtues of Amazon, namely lower prices for consumers. Consequently, Apple's agreement with the publishers must violate the Sherman Act, the Court reasoned.

Professor Sagers dissects the Second Circuit's logic by pointing to contemporary public attitudes about Amazon, markets, and competition. Consumer purchases attest to Amazon's popularity. At the same time, there is a wariness, perhaps more among some antitrust theorists than among consumers, about Amazon's ubiquity in the marketplace. The company's size raises concerns about its dominance and its possible anticompetitive practices. These concerns in turn reflect doubts over markets and economic theories of competition as benefitting consumers. Instead, public perception is that markets lead to scaling up and size to the detriment of consumers despite the dubious predictions of marginalist economics. Apple's agreement with publishers is a competitive response to the anticompetitive conduct of Amazon. Its low prices do not result from Amazon's competitive superiority but from predatory conduct, a rapacious form of competition.

Conflicting public attitudes towards competition belie assessments of *United States v. Apple*. Society appreciates competition but deplores competitiveness. There is the Greek ideal of *agon*, which is the competition of the sports field and of battle that stems from an internal conflict among ambition, aspiration,

and discontent. But there is the reality of greed, selfishness, and rivalry. What Professor Sagers reveals, at least to me, is how the ambiguous appeal of competition leads to confusion within antitrust law as to means and ends. Antitrust law may not know its goals or how to reach them.

But from this disconcerting message, to be fair perhaps only Professor Sagers' subtext, grows some constructive messages. The best part of this book is the detailed history of the publishing industry in the United States. Some of the details are familiar, but most demonstrate a valuable integration of institutional and economic analysis. Professor Sagers teaches us about actual business practices but provides an effective theoretical explanation for why these practices were adopted and their implications for publishers, authors, and readers. This portion of the book makes up for the scant attention to the German Historical approach to economics, mentioned too briefly. The slight is made up for by illustration. Professor Sagers' discussion of book publishing shows the German Historical School in action, and the illustration brings to life the competition in the book market with its dysfunctions. I was reminded of a forthcoming book chapter by Professor Robert Spoo on the tacit agreement regarding the publication of James Joyce's poems among US book publishers in the early Twentieth Century.[4] Both Professors Sagers and Spoo are exemplars of how to communicate about specific markets and business practices in nuanced and insightful ways.

Within antitrust law, all competitive markets are the same while anticompetitive markets are different in their own ways. It is the differences that are hard to respond to. The appeal of marginalist economic analysis in antitrust law is how amenable it is to rule-like application. A per se rule against price fixing follows from the theoretical benefits of price competition. Rule of reason rests on careful analyses of pricing, marginal costs, and deadweight loss, each of which can be diagrammed and statistically discerned.

By contrast, an historical analysis is open ended without a clear "ought" to guide legal decision making. I finished Professor Sagers book with a mixed feeling of enjoyment and doubt. The Apple litigation reflects some deep confusions within antitrust law. But what, short of a wholesale rewrite of history, including doctrines, statutes, and treatises, can provide a cure? Professor Sagers wants to expand the normative criteria that currently inform antitrust analysis. For example, he discusses how the Second Circuit should have considered benefits to authors from the Apple agreements. Such benefits would be excluded from current antitrust analysis which focuses exclusively on benefits to consumers from reduced prices. In addition, Professor Sagers argues that the court failed to consider the importance of book publishing to developing a literary culture, an ambition not countenanced within marginalist economic analysis. These broader normative concerns with non-consumer interests and cultural values are arguably more consistent with historical and institutional analyses of markets. Although Professor Sagers touches upon these points, further elaboration, perhaps in subsequent scholarship, would be welcome.

But there is a certain degree of ad hocness to normative considerations. The alignment between current antitrust law and marginalist economic analysis

may be resistant to change. There is an iron logic to the connection, made stronger by strains of conservative and liberal politics in the United States. This rigidity goes beyond the *Apple* case, surfacing in labels of hipster antitrust, merger decisions that increase market concentration, and debates over how antitrust authorities should deal with the tech sector. Professor Sagers ignores the politics splitting antitrust law, preferring the abstraction of "popular attitudes." Avoiding an analysis of politics is understandable given the illusion of neutrality within legal methodology. Professor Jonathan Baker's recent book on antitrust attempts to engage with the perilous political issues while extolling the traditional emphasis on economic efficiency.[5] Antitrust politics summon the ghost of Thurman Arnold, a prominent antitrust enforcer and scholar whom Professor Sagers does cite, as does Professor Baker. But neither embraces Arnold's whole-hearted commitment to the practical realities of antitrust enforcement, perhaps because Arnold seems to have ended his career disillusioned.[6]

Professor Sagers has written an ambitious book. Do not be fooled by his emphasis on a single case. His sights are much broader, as his scholarship engages in healthy competition with many academics and practitioners struggling over antitrust's present and future by grappling with its past. Active thinkers in antitrust, intellectual property, business law, and innovation policy will finish reading this book enriched. Professor Sagers' own agonistic interaction with the law teaches us about competition, its ambiguities, and its elusiveness for antitrust law.

ENDNOTES

[1] United States v. Apple Inc., 952 F. Supp. 2d 638 (SDNY 2012).
[2] United States v. Apple Inc., 791 F.3d 290 (2d Cir 2015).
[3] United States v. Addyston Pipe & Steel Co., 85 F. 271 (6ht Cir 1898), affirmed 175 U.S. 211 (1899).
[4] Robert Spoo, The Lawful Piracy of James Joyce's Poems in Shubha Ghosh, ed., Forgotten Comparative Intellectual Property Lore (forthcoming 2020).
[5] Jonathan Baker, The Antitrust Paradigm: Restoring a Competitive Economy (2019). See my review at https://lawprofessors.typepad.com/antitrustprof_blog/2019/05/shubha-ghosh-on-the-antitrust-paradigm-restoring-a-competitive-economy.html
[6] See Spencer Weber Waller, Thurman Arnold: A Biography (2005).

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UNITED STATES V. APPLE: COMPETITION IN AMERICA, by Chris Sagers. Harvard University Press, 2019. Pp. 336, Hardcover, $29.95.

A Reply to Shubha Ghosh

By Chris Sagers[1]

I was glad to read Shubha Ghosh's generous review of my book on the *Apple* eBooks litigation, and happy to write this response, which I hope will clarify a few things. I was pleased by his characterization of the book's breadth, as its philosophical aims go pretty far beyond the one lawsuit it uses as a case study. I was also glad for the book to be reviewed for IP readers, because innovation always seemed like such an important part of the story, and I was glad that he liked my history of American publishing. I very much appreciate his recommendation of the book to other readers.

My need is much less to dispute his views or rebut criticisms, than just to clarify some ways that I think he mistook me. He seems to have misunderstood my point of view in a fundamental way. The fault is probably mine for not explaining myself better, but without understanding these issues, assessments of the book will be pretty misleading or inapt.

Professor Ghosh states what I take to be his own view that antitrust should not focus single-mindedly on prices. "The Apple litigation," he says, "shows why [an] abstracted view of competition" preoccupied with prices "is limiting and misleading." That sort of thing is now a standard criticism of antitrust and the conservative ideology that has made it what it's come to be. Other social values are at stake, the argument goes. In a case like *Apple*, they include the interests of authors, independent booksellers, literary culture, and more, all of which could be imperiled by a preoccupation with price competition alone.

He's entitled to his own opinion, but the problem is that he seems to think I share it. I was troubled enough by that that I re-read the entire book to see how fairly I could be taken that way. I'll take the blame, I suppose, and I chalk it up to the effort I made to be fair to conflicting views in the fraught, complex, long-fought struggle over issues of competition and social values. If you spend too much time trying to give each argument its due, you risk your own view getting lost in the mix. In any case, I cannot stress enough how much Professor Ghosh has mistaken me, and a lesson for this author in future will be to cut to the chase a little more quickly and with less caution.

Professor Ghosh apparently took the book to argue that *Apple* was wrongly decided, or at least poorly reasoned, for not considering values other than low retail prices. He thinks I "want[] to expand the normative criteria that currently inform antitrust analysis," and to "dissect[] the Second Circuit's logic," because the court "should have considered benefits to authors from the Apple agreements" or "the importance of book publishing to developing a literary culture." I guess he thought I included brief digressions on German historicism and the early American Institutionalists to demonstrate how I think antitrust should be done: that in individual cases, we may need to conduct in-depth, particularized histories of the markets in question, to see if anything about them requires special legal treatment. We can't just ask whether given conduct caused prices to go up or down and decide on that basis whether it was desirable or not. He does not really say this explicitly, but as a practical matter, if we take that approach we imply that some markets are not suited to vigorous price competition, and as far as antitrust policy goes, the only reason to imply it is one specific policy prescription. If there really are markets like that, then maybe firms within them should be allowed to engage in things that antitrust would otherwise make illegal. If price competition itself can sometimes imperil important social values, then firms should be permitted to dampen that competition with trade-restraining contracts, exclusion of competitors, or market-concentrating mergers. So far as I can tell, Professor Ghosh took me to argue that this is how we should do antitrust.

My point is diametrically, emphatically, overwhelmingly the opposite. The whole reason for writing the book was to argue the opposite. Its driving force is that we *should* generalize, with simplified legal rules, and we should not try to make allowances for idiosyncrasies that might suit particular markets poorly to price competition. The book argues that, despite how things may superficially seem, idiosyncrasies *don't* create special cases, hardly ever. Notwithstanding the lamentations of every defendant who ever set foot in court, few markets are actually special in antitrust-relevant respects. The problem is not that some markets are special, but that all competition is painful when it works as it's supposed to, but it's still the system we've got and we don't get better results by restraining it. I've studied such things a lot in prior work, including in a few whole books and several articles asking whether the dozens of exemptions we've had over the life of antitrust, designed to address purportedly special market circumstances, were really justified. The overwhelming evidence is that they were not.[2] So not only do I not think the *Apple* opinion was wrong or poorly reasoned. I think the prevailing caselaw identifies its normative criteria in a way that is pretty okay, so long as "price" competition is understood the way I think it should be. A preoccupation with prices seems bad only if "price competition" is understood according to the caricature favored by some conservatives and by their left-leaning critics. Professor Ghosh repeats that caricature here in his own criticism of mainstream antitrust.[3] Instead, price competition means comparatively numerous, autonomous units vying non-cooperatively for the same customers, on the basis of quality-adjusted price. Accordingly, I think that simple, pro-enforcement antitrust rules, applied pretty generally and across the board, are the way to go.

In other words, the problem in antitrust is not that the law fails to account for non-price values, as was alleged by the many critics of the *Apple* eBooks litigation. It is that the broader public fails to appreciate why and how thoroughly the law doesn't have to.

I should clarify one point of technical antitrust doctrine. While I believe in price competition, and, like Hovenkamp, take it that in antitrust we are mostly marginalists now,[4] none of this means that courts should actually *measure* prices. This actually reflects a point of common confusion. Antitrust courts in fact almost never do that. Except in certain narrow circumstances, antitrust is a tort-style law enforcement regime that measures conduct and not prices, and that's how I want it.[5] It's just that I think that those conduct rules must be designed to encourage vigorous competition on the basis of quality-adjusted price, meaning that it should bar trade-restraining conspiracy, unilateral exclusion, and merger that generates concentration or strategic advantage. Defendants don't then need the opportunity to turn cases into graduate social-science seminars, à la institutionalism or historicism, because what we find on extended consideration is that their markets never really need the special clemency they think they've got coming. Publishing is just another in a centuries long series of examples proving it.

And so, ironically enough, the reason I included the part of the book that Professor Ghosh liked best—several chapters on the history of American publishing—was the opposite of defending case-specific institutionalism. I should probably have been much more clear about that too. My point was to show that if we just go ahead and do what institutionalist critics want, and look at particular cases with in-depth care, we won't actually get different results than theoretical abstraction would lead you to expect. I said, in effect, "fine, let's have a look. As I predicted before we even started arguing, we will find that the behavior, motivations, and outcomes are pretty much what price theory would have predicted." For as long as there has been publishing, publishers have argued that they cannot cope with price competition, and as long as there has been an independent bookselling sector, both publishers and booksellers have argued that maverick retailers must be constrained, or else the sky will fall. Since at least the early 19th century, they've been organizing price cartels with both horizontal and vertical components, largely indistinguishable from the eBooks conspiracy of 2010-2012. Those conspiracies have usually been initiated and coordinated from downstream, as one expects in RPM arrangements meant to enforce retail collusion. And in that history, the publishers and booksellers have provided a nice little natural experiment. British bookselling was governed by a legalized, industry-wide RPM consortium for nearly the entire twentieth century, but American bookselling never was, and both had comparable experiences.

So when Amazon introduced a radically price-cutting innovation in bookselling in 2007—almost single-handedly creating the new eBooks sector and selling new-releases for a third of their hard-cover price—the industry complained that they needed collusion to constrain very novel, technologically unprecedented circumstances. But they were lying. They dealt with an old problem in the same way they'd done for 200 years.

Anyway, I then did what I would think any good institutionalist would demand, and attempted to generalize this observation with case-specific comparisons to other industries. And it turns out that cartels with vertical components were not unique to publishing and bookselling. They followed essentially the same pattern throughout mass retail, all throughout the 19th and early 20th centuries. *That* was the point. It was not that publishing must be understood only according to its own idiosyncrasies, or that we actually need in-depth historical studies in order to apply the law. It was to prove that we don't need to keep doing them, routinely, every time some defendant says their market is special. There has *never* been a defendant in antitrust that didn't think its market was special, but we just really haven't found, in the hundreds or thousands of times that we've given them the benefit of the doubt, that they were right.

Finally, the book clarifies at some length that I don't think these things because markets are magic or because they were sent here for our benefit by God. I point out specific ways in which markets do in fact seem problematic, and the particular macro and dynamic respects in which they fail us severely. But the argument that follows is just a simple point of policy. Those ways in which markets fail would *not* be well addressed by the one policy correction that could possibly be relevant to antitrust law: allowing private firms to solve them through arrangements that reduce price competition. It hasn't worked when it's been tried, and it won't work going forward. Instead, as I say several times in the book, we should let competition do what it does well, and solve other problems with solutions that could actually address them. Trying to address them by restraining market-by-market price competition is treating real sickness with the wrong medicine.

ENDNOTES

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[2] Am. Bar Ass'n, Section of Antitrust Law, HANDBOOK ON THE SCOPE OF ANTITRUST (ABA Pub'g 2015) (Chris Sagers, editorial chair); Am. Bar Ass'n, FEDERAL STATUTORY EXEMPTIONS FROM ANTITRUST LAW (ABA Pub'g 2007) (Chris Sagers, editorial co-chair); Chris Sagers, Much Ado about Possibly Pretty Little: McCarran-Ferguson Repeal in the Health Care Reform Effort, 28 Yale L. & Pol'y R. 325 (2010) (health insurance); Chris Sagers, The Demise of Regulation in Ocean Shipping: A Study in the Evolution of Competition Policy and the Predictive Power of Microeconomics, 39 Vand. J. Transnat'l L. 779 (2006) (ocean shipping); *see also* Chris Sagers, Platforms, American Express, and the Problem of Complexity in Antitrust, 98 Neb. L. Rev. 389 (2019) ("platform" markets); Chris Sagers, "Rarely Tried, and . . . Rarely Successful": Theoretically Impossible Price Predation among the Airlines, 74 J. Air L. & Comm. 919 (2009) (passenger air carriage).

[3] Professor Ghosh's description of the price-preoccupation that he criticizes, and that he thinks I criticize too, feels like one such caricature. I do not believe and I don't think it is widely accepted that "if prices are *low*" (emphasis mine),

then "competition is functioning." That is, low prices are not their own goal, unless one understands "price" to mean quality-adjusted price, defines "low" to mean "least margin above cost," and requires that the "prices" that are supposed to be "low" in this sense are *all* prices, and not just end-use retail price. Even then, price is only instrumental. The goal of encouraging low quality-adjusted price is not to have low prices or to favor retail end-users. It is to secure a range of social benefits, which only begin with static allocational efficiency. The benefits might also include dynamic innovation, better distributional equity, reduction of concentrations of undue political power, and so on.

[4] *See* Herbert Hovenkamp, *Progressive Antitrust*, 2018 U. Ill. L. Rev. 71, 75.

[5] Antitrust courts directly consider prices actually charged only in challenges to price predation under §2, price discrimination under the Robinson-Patman Act, or in which the plaintiff attempts to prove market power through direct evidence of effects on price or output. Each of those cases is unusual and not that often litigated.

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