

THE APPLE E-BOOK AGREEMENT AND RUINOUS COMPETITION: ARE E-GOODS DIFFERENT FOR ANTITRUST PURPOSES?

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ABSTRACT

Publishers have spent the last decade and a half struggling against falling prices for digital goods. The recent antitrust case against Apple and the major publishers highlights collusive price fixing as a potential method for resisting depreciation.

This Article examines the myriad ways in which digital distribution puts downward pressure on prices, and seeks to determine whether or not collusive price fixing would serve as an appropriate response to such pressure given the goals of the copyright grant. Considering retailer bargaining power, increased access to substitutes, the loss of traditional price discrimination methods, the effects of vertical integration in digital publishing, and the increasing competitiveness of the public domain, I conclude that the resultant downward price pressure might in fact significantly hamper the commodity distribution of digital goods.

I remain unconvinced, however, that price fixing is an appropriate solution. The copyright grant affords rights holders commercial opportunities beyond simple commodity distribution. These other methods for commercializing e-goods suggest to me that current pricing trends are not indicative of market failure, but rather of a changing marketplace.

INTRODUCTION

The future of distribution in the entertainment industry is decidedly, if not *entirely*, digital. The MP3 has vanquished the CD;² Netflix has killed

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² See Sam Gustin, *Digital Music Sales Finally Surpassed Physical Sales in 2011*, TIME (Jan. 6, 2012), available at <http://business.time.com/2012/01/06/digital-music-sales-finally-surpassed-physical-sales-in-2011/>.

Blockbuster;³ nobody reads magazines in any form;⁴ and the e-book in all its myriad incarnations seems poised to displace increasingly large volumes of printed text.⁵ The significance of this shift for the content and entertainment industries is difficult to overstate. In the digital world, downward pressure on prices is everywhere. For producers of content, the reason is easily distilled: Digital availability has made “piracy”⁶ a household activity.⁷

The reality is unsurprisingly more complex, although “pirates” play a role. Let us assume, on grounds to be expounded later, that there is a source beyond piracy responsible for the downward price pressure threatening the digital content industry. Let us assume that this cause is simply the competitive economy for digital content, where producers are free from the shackles of marginal cost and where consumers can easily locate providers of substitute goods. That is, access to free or nearly free entertainment is not merely the result of free-culture activists and Cory Doctorow giving away valuable things without charge. In this view, rapid depreciation of cultural commodities is not simply a side effect of the activities of idealists and scofflaws, but rather a competitive reality.

If such depreciation is indeed reality, what can the content industry do to preserve itself? Answers to this question take many forms: new business models, new remedies for copyright infringement,⁸ and digital rights management are all common attempts at solutions. For publishers, the answer may have been to collude on prices, using Apple, Inc. as a facilitator

³ See Dawn McCarty, *Blockbuster Files for Bankruptcy After Online Rivals Gain*, BLOOMBERG (Sept. 23, 2010), <http://www.bloomberg.com/news/2010-09-23/blockbuster-video-rental-chain-files-for-bankruptcy-protection.html>.

⁴ Plainly an overstatement. Regardless, the future is not bright for magazines. See Katerina-Eva Matsa, *Magazines: By the Numbers*, STATE OF THE NEWS MEDIA 2012, <http://stateofthemedias.org/2012/magazines-are-hopes-for-tablets-overdone/magazines-by-the-numbers/> (last visited Mar. 2013).

⁵ See Dana Wollman, *E-book sales triple year-over-year, paper books decline in every category*, ENGADGET, (Apr. 15, 2011), <http://www.engadget.com/2011/04/15/e-book-sales-triple-year-over-year-paper-books-decline-in-every/>.

⁶ I use the word reluctantly, as it is emotionally charged, overwrought, and without legal significance. It does, however, capture the mood of industries that must deal with copyright infringement as a quotidian consumer activity rather than as a black-market business activity.

⁷ See Joe Karaganis, *Copyright Infringement and Enforcement in the U.S.*, THE AM. ASSEMBLY (Nov. 15, 2011), <http://piracy.ssrc.org/the-copy-culture-survey-infringement-and-enforcement-in-the-us/>.

⁸ In particular, graduated response (or “three strikes”) laws have been in vogue internationally, coming into effect most notably in France and New Zealand. The United States has a private-ordering equivalent in the “six strikes” program recently implemented by the country’s largest internet service providers.

for their decision to collectively and simultaneously switch pricing methods and tiers. Consolidation and collusive changes to pricing strategy would indeed be straightforward remedies for an industry in crisis, though these come at the risk of drawing antitrust scrutiny.

It is my intention to examine whether the cause of saving a languishing industry is dire enough to merit some loosening of our antitrust rules to permit these alternative, facially anticompetitive solutions to pricing trends for digital goods. The lens through which I address my inquiry is the case the Justice Department recently brought against Apple, Inc. and several global publishers, alleging horizontal price fixing in the e-book market. The Apple suit makes for an attractive target for such an examination because it has engendered significant and, in my view, somewhat unexpected popular pushback to the government's claims. As I detail more thoroughly below, Apple conspired to fix prices with what were then five of the six largest publishers in the world, successfully discontinuing Amazon.com, Inc.'s practice of selling bestsellers at \$9.99 and raising the effective price floor for such books to \$12.99. I find it odd that there appears to be little popular umbrage at a successful attempt to raise book prices, and wish to tease apart whether there is substance to this sentiment.

My exploration begins in Part I by relating the story of the lawsuit and the popular backlash it has engendered. In Part II, I outline the relevant laws, both in antitrust and in copyright. As antitrust jurisprudence leans heavily on economics, I take care to outline the pertinent economic attributes and goals of copyright law and how they might change in a digital environment. I apply these legal and economic principles to the current e-books market, examining whether the copyright grant is reasonably effectuated despite current downward price trends. Having examined the theoretical merits of the position that we should treat markets for digital goods differently, I ultimately conclude in Part III that, while competitive markets for digital goods may well be an existential threat to ailing incumbents in the content industry, any collusive remedy is even worse.

I. THE APPLE SUIT

On January 27, 2010, Apple made a pair of groundbreaking announcements: First, they introduced their new tablet computer, the iPad. Second, they unveiled the newest component of their media sales empire, the iBookstore, a digital bookstore tailor-made to launch with the new device.⁹ Despite the hype, the iBookstore as a product was conspicuously unremarkable, promising digital downloads of e-books to Apple's newly

⁹ Steve Jobs, Apple iPad Launch Keynote (Jan. 27, 2010), *available at* http://www.youtube.com/watch?NR=1&v=ia42hMuFz_g at 03:00.

expanded iOS-based product line in much the same way that third-party software already allowed.¹⁰

However, before launching, Apple made arrangements with a number of publishers to provide content for the iBookstore. “We’ve got five of the largest publishers in the world that are supporting us in this and are going to have all their books on the store,” was the framing the late Steve Jobs announced at the unveiling. While Apple product launches tend toward hyperbolic language, this was no exaggeration. Apple’s launch partners were Penguin, Hachette, HarperCollins, Simon & Schuster, and Macmillan—that is, every major publisher except Random House.¹¹

The arrangement was startling not because Apple had agreed with publishers to sell their books—that much would be commonplace. Instead, the Apple deal changed the entire market for e-books in one fell swoop. Previously, e-book retailing functioned in much the same way as retailing of physical books, where publishers charged wholesale rates to retailers, who in turn were free to set retail prices as they saw fit.¹² Amazon, by far the country’s largest e-book retailer, had been using its freedom as a retailer to price books aggressively, usually at \$9.99—an amount that for some bestsellers was below cost.¹³

Apple’s store functioned very differently. Publishers sold books through Apple under an agency model,¹⁴ whereby Apple would sell e-books

¹⁰ Barnes and Noble’s “Nook,” Amazon’s “Kindle,” and a number of other lesser-known apps provided this functionality on Apple’s iPhone and continued to provide it on the iPad.

¹¹ It is worth noting that the publishing market is considerably more concentrated today than it was in 2010, with significant merger activity taking place between the above-listed firms. Bracket whether or not such mergers might be in pursuit of the same objective as the Apple agreement. Regardless, such merger activity is subject to DOJ scrutiny in a way that backroom agreements plainly are not.

¹² Complaint at 9, *United States v. Apple Inc.*, 889 F.Supp.2d 623 (S.D.N.Y. 2012) (No. 12 CV 2826).

¹³ *Id.*

¹⁴ Interestingly, the agency model itself has its roots in antitrust law. For a very long period of time, antitrust’s per se rule applied to the practice of resale price maintenance whereby a manufacturer would require a retailer not to sell their product below a certain price. *Compare* *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) (holding resale price maintenance per se illegal) *with* *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877 (2007) (overruling *Dr. Miles*). While vertical price restrictions remain subject to some antitrust scrutiny, agency relationships had been earlier proven as a workaround to the per se rule. *See* *United States v. General Elec. Co.*, 272 U.S. 476, 488 (1926) (“[T]here is nothing as a matter of principle, or in the authorities, which requires us to hold that genuine contracts of agency like those before us, however comprehensive as a mass or whole in their effect, are violations of the Anti-Trust Act.”).

on behalf of the publishers who were free to set their own prices subject to some constraints. Under Apple's plan, these prices hewed to certain tiers; for hardcover books, this would mean prices of \$12.99, \$14.99, or \$16.99, depending on the physical copy's cover price.¹⁵ At the hands-on event following the announcement, Walt Mossberg of the *Wall Street Journal* asked the question on everyone's mind: How would Apple compete? Why would consumers pay \$14.99 at the iBookstore for the same book that Amazon would sell for \$9.99? Jobs's confident reply: "That won't be the case. The price will be the same."¹⁶

Jobs was not wrong. Apple's contracts with the publishers included a most-favored-nation clause, requiring the publishers to allow Apple to provide the lowest price.¹⁷ In fact, Jobs framed these contractual arrangements as assisting the publishers in providing pushback against Amazon's aggressive e-book pricing. As he told his biographer the day after the announcement:

Amazon screwed it up. It paid the wholesale price for some books, but started selling them below cost at \$9.99. The publishers hated that — they thought it would trash their ability to sell hardcover books at \$28. So before Apple even got on the scene, some booksellers were starting to withhold books from Amazon. So we told the publishers, "We'll go to the agency model, where you set the price, and we get our 30%, and yes, the customer pays a little more, but that's what you want anyway." . . . So they went to Amazon and said, "You're going to sign an agency contract or we're not going to give you the books."¹⁸

Ultimately, Jobs' description mirrors almost exactly the actual course of events. The deal with Apple facilitated an industry-wide switch from the wholesale model to the agency model, and to a new effective price floor of \$12.99.

From the perspective of the publishers, the deal was an opportunity to strike back at the market dominance of the leading e-book retailer,

Note that resale price maintenance is likely to be at its most anticompetitive where it is done by colluding firms in a concentrated industry, effectively as a tool in a horizontal price fixing agreement, as is alleged in the Apple case. See Benjamin Klein, *Competitive Resale Price Maintenance in the Absence of Free Riding*, 76 ANTITRUST L. J. 431, 474 (2009).

¹⁵ Complaint at 4, *United States v. Apple Inc.*, 889 F.Supp.2d 623 (S.D.N.Y. 2012) (No. 12 CV 2826).

¹⁶ Ken Auletta, *Publish or Perish*, THE NEW YORKER (Apr. 26, 2010), http://www.newyorker.com/reporting/2010/04/26/100426fa_fact_auletta.

¹⁷ Complaint at 20–21, *United States v. Apple Inc.*, 889 F.Supp.2d 623 (S.D.N.Y. 2012) (No. 12 CV 2826).

¹⁸ WALTER ISAACSON, STEVE JOBS 503–504 (2011). The quote was given to Isaacson, Jobs' biographer, the day after the iPad launch. *Id.*

Amazon.¹⁹ The publishers were furious with its \$9.99 price point, and allegedly needed to act collectively to force the retailer into accepting a higher price.

Two years later, on April 11, 2012, the Department of Justice filed a complaint charging the publishers and Apple with illegal price fixing under § 1 of the Sherman Act.²⁰ The Justice Department's allegations, if true, are damning: The complaint recounts stories of regular clandestine meetings between the publishing executives, without attorneys, to discuss their problems with Amazon's pricing. Furthermore, emails between members of the alleged cartel reveal attempts to remain surreptitious, with recipients instructed to "double delete" the messages.²¹

All of the publisher defendants have since settled with varying amounts of protestation.²² Apple, however, with its considerably deeper pockets, appears committed to seeing the case through to the end. But my project is concerned less with the outcome of the case than with the issue it frames.²³ The reaction amongst the commentariat has been overwhelmingly sympathetic to the publishers,²⁴ who were admittedly in a bind. Amazon was devaluing books by pricing them so aggressively and Amazon was keeping its competitors out of the market by pricing below cost. Amazon's pricing strategy was threatening American publishing as we know it.²⁵ According to this perspective, the existential threat posed by e-books is caused by anticompetitive action and solvable by anticompetitive action. I disagree.

¹⁹ See Ken Auletta, *Paper Trail*, THE NEW YORKER, Jun. 25, 2012, at 36, available at http://www.newyorker.com/reporting/2012/06/25/120625fa_fact_auletta.

²⁰ Complaint at 31, *United States v. Apple Inc.*, 889 F. Supp. 2d 623 (S.D.N.Y. 2012) (No. 12 CV 2826).

²¹ *Id.* at 12.

²² See *United States v. Apple Inc.*, 889 F. Supp. 2d 623 (S.D.N.Y. 2012). Macmillan was the last to settle, having held out until just four months before trial. See Justice Department Reaches Settlement with Macmillan in E-Books Case, Department of Justice Office of Public Affairs (Feb. 8, 2013), <http://www.justice.gov/opa/pr/2013/February/13-at-171.html>.

²³ Apple, Inc. as a defendant is particularly uninteresting with regard to my project. Apple has no direct stake in publishing and is motivated by entirely different considerations. It should be noted, however, that at the time of publication, Apple had actually lost its case in the Southern District of New York, where Judge Denise Cote found ample evidence of per se price fixing. Apple is appealing the decision. *United States v. Apple, Inc.*, 952 F. Supp. 2d 638 (S.D.N.Y. 2013).

²⁴ See, e.g., David Carr, *Book Publishing's Real Nemesis*, N.Y. TIMES, Apr. 16, 2012, at B1.

²⁵ See *id.*

II. THE LAW AND THE ECONOMICS OF ANTITRUST AND DIGITAL GOODS

No doubt, there is an existential threat to the American publishing industry. But it is caused by *competition*—and it is much more deeply rooted than Amazon’s market share. In this Part, I argue more precisely the nature of the threat, and examine whether collusion can or should be the remedy.

Section 1 of the Sherman Act very broadly prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce.”²⁶ While born of a general popular hostility to the monopolistic giants of the late nineteenth century, the Act also serves to promote certain economic ideals. Perspectives vary as to whether the ideal at issue is consumer welfare or economic efficiency more generally, but either way, the target is the deadweight loss associated with monopoly—the social loss that occurs when monopolists, and cartels maximize profits by underproducing and overpricing their goods. How precisely this deadweight loss is to be eliminated is not completely clear. The statute’s impossible breadth has left the courts to develop the contours of the regulation, more or less unimpeded, since the Act’s passage at the end of the nineteenth century. In that time, the Supreme Court has given us two primary tests with which to judge anticompetitive collusion: the *per se* rule and the rule of reason.

The *per se* rule usually operates as succinctly as its name implies—certain highly suspect behaviors are simply illegal *per se* under § 1 of the Sherman Act. These are behaviors that “because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry.”²⁷ While the contours of *per se* antitrust violations have ebbed and flowed, the persistent heart of the doctrine is the bar on agreements to fix prices. Under the *per se* rule, the plaintiff need only prove the existence of an agreement to fix prices and that prices were actually fixed.²⁸ As a result, the price-fixing inquiry is often largely a factual one into the behavior of the parties, eliding the complexities of the rule of reason. Accordingly, these cases often hinge on evidence of backroom meetings and discussions between competitors.²⁹

²⁶ 15 U.S.C. § 1 (2006).

²⁷ *N. Pac. Ry. Co. v. United States*, 356 U. S. 1, 5 (1958).

²⁸ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940).

²⁹ ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS ch. x.c. ¶ 27, at 98 (Arthur Hugh Jenkins ed., Kennikat Press, Inc. 1968) (1776).

Where the court does not see a sole-purpose restraint of trade like price fixing, it instead considers the case under the rule of reason, pursuant to which courts weigh anticompetitive effects against procompetitive benefits.³⁰ The rule of reason presents a much greater obstacle to would-be antitrust plaintiffs, as the “elaborate inquiry”³¹ it takes to prove a case can be quite elaborate indeed. Accordingly, much depends on whether a court applies the rule of reason or the per se rule.

One particular kind of procompetitive justification for treatment under the rule of reason has often been repeated and refuted throughout the history of antitrust: ruinous competition. These are situations where apparently colluding market participants claim that their restraint is necessary to prevent an industry from cannibalizing itself in a price war. In general, the law does not look kindly on ruinous competition arguments. In the leading antitrust case on the subject, *Socony-Vacuum Oil*, Justice Douglas provided U.S. courts’ typical response to such arguments:

But such defense is typical of the protestations usually made in price-fixing cases. Ruinous competition, financial disaster, evils of price cutting and the like appear throughout our history as ostensible justifications for price-fixing. If the so-called competitive abuses were to be appraised here, the reasonableness of prices would necessarily become an issue in every price-fixing case. In that event the Sherman Act would soon be emasculated; its philosophy would be supplanted by one which is wholly alien to a system of free competition; it would not be the charter of freedom which its framers intended.³²

But *Socony-Vacuum Oil* is an old case and, particularly in a post-Chicago-School world, it is clearly not a completely accurate reflection of current law.³³ There may be enough wiggle room in the law to allow a properly framed ruinous competition argument to persuade a court that perhaps the rule of reason is a better fit.

A. Intellectual Property and Ruinous Competition

While they are still disapproved generally, might ruinous competition arguments carry more weight in intellectual property disputes? That is, where there exist federally granted intellectual property rights, the

³⁰ *N. Pac. Ry. Co.*, 356 U.S. at 5.

³¹ *Id.* at 5.

³² *Socony-Vacuum Oil Co.*, 310 U.S. at 220–21.

³³ *See In re Sulfuric Acid Antitrust Litig.*, 703 F.3d 1004, 1012 (7th Cir. 2012) (“The plaintiffs retreat to the general language in the *Socony-Vacuum* opinion, an opinion 72 years old and showing its age.”) This opinion—plainly written by Judge Posner—points to various cases where the Supreme Court has tempered the per se rule as evidence for its assertion.

government has effectively given its imprimatur to a certain restraint of trade—the copyright monopoly—in furtherance of the goals of intellectual property. It seems plausible that the law might tolerate other kinds of facially anticompetitive behavior that serves to effectuate intellectual property rights. Below, I flesh out the argument for applying rule of reason analysis to market arrangements like that between Apple and the publishers.

Among the powers granted to Congress under the Constitution is the ability “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”³⁴ The Anglo-American copyright tradition that has evolved pursuant to this constitutional grant is one that is well recognized as being utilitarian in nature.³⁵ Our law operates under the belief that the incentives made possible by copyright are useful in persuading authors to create original works, thus advancing the “Progress of Science.”

This is to say that intellectual property as such exists in part because inventions and original works of authorship have the traits of public goods: They are non-rival and non-excludable and thus unlikely to be produced by a market economy—supposedly. As such, absent intellectual property protections, authors and inventors would find it difficult, if not impossible, to reap the financial and attributional rewards of their labor. In such a system, rational—that is, wealth-maximizing—creators might therefore abstain from producing works at all. Intellectual property is thought to incentivize creation by giving creators the legal hook necessary to cordon their work off from others.

The Supreme Court precedent on the interaction between intellectual property and antitrust suggests that Congress’s election to enact an intellectual property scheme receives some antitrust deference. In *BMI v. CBS*, a price-fixing case where the Court eschewed the per se rule in part because of its own unfamiliarity with applying antitrust law to the music industry,³⁶ Justice White left the door open to intellectual-property-based justifications for anticompetitive behavior, though just by a hair. He wrote:

Although the copyright laws confer no rights on copyright owners to fix prices among themselves or otherwise to violate the antitrust laws, we would not expect that any market arrangements reasonably necessary to effectuate the rights that are granted would be deemed a per se violation of the Sherman Act. Otherwise, the commerce anticipated by the Copyright Act and protected against restraint by

³⁴ U.S. CONST. art. I, § 8, cl. 8.

³⁵ See Lewis Hyde, *COMMON AS AIR* (2010) 51–54.

³⁶ See *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 9–10 (1979).

the Sherman Act would not exist at all or would exist only as a pale reminder of what Congress envisioned.³⁷

Digital publishing is at least as unfamiliar to the courts as were the blanket licenses at issue in *BMI*,³⁸ and the stakes are arguably at least as high for copyright holders, who—rightly or wrongly—fear that the copyright grant is losing its effectiveness. The question, then, is whether the status quo ante in digital publishing allows for a reasonably effectuated copyright grant. If it does not, and if the proposed restraint of trade might tend to effectuate the right, then there is an argument that rule of reason analysis might be appropriate.

It is easy to see some inherent tension between the Copyright Act and our antitrust laws, given the colloquialism “copyright monopoly”. The flip, pedantic rejoinder to the monopoly complaint is that the colloquial and technical definitions of “monopoly” diverge substantially. It is true that a copyright holder enjoys the “exclusive right[.]” to reproduce and sell their copyrighted works.³⁹ But a monopoly in a sense that is economically problematic requires more: Such a monopolist must possess sufficient market power to control prices.⁴⁰ In theory, even with a copyright grant, should suitable substitutes exist, the rights holder would hold little market power and must price its goods competitively.

Thus, we are told not to be concerned about the antitrust risks posed by intellectual property for two reasons. First, and most importantly, the intellectual property right is necessary to create markets in informational goods, even if it grants a monopoly. The reduction in competition is *necessary* for rights holders to recoup the substantial overhead incurred in creating an original work of authorship.

Second, we ought not be concerned because the rights granted tend not to be broad enough to give their owners the ability to unilaterally raise prices.⁴¹ The extent to which this is true, however, depends on the scope of the intellectual property grant—exactly how different must a substitute be in

³⁷ *Id.* at 19 (emphasis added).

³⁸ Most likely much more unfamiliar, given the music publishers’ perennial involvement with antitrust suits and continued operation under a consent decree. *See id.* at 10.

³⁹ 17 U.S.C. § 106 (2006).

⁴⁰ *See* James Boyle, *Cruel, Mean, or Lavish? Economic Analysis, Price Discrimination and Digital Intellectual Property*, 53 VAND. L. REV. 2007, 2013 (2000). It will likely come as no surprise to the reader that I am very sympathetic to the deconstruction of the use of “monopoly” in intellectual property contexts that Professor Boyle provides in this particular piece.

⁴¹ *See id.*; *see also* Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y.U. L. REV. 212, 219 (2004).

order to be allowed?⁴² The cross-elasticity of demand, however, is itself restricted by the operation of our copyright laws. That is, with each protected level of abstraction beyond literal similarity, the copyright monopoly becomes stronger and stronger. The malleability of copyright law⁴³ in this regard has come to provide an anticompetitive⁴⁴ buffer for firms operating in the content industry that, when combined with an expanding catalogue of rights and enforcement mechanisms, can make a copyright look more and more like a restraint of trade.

Nevertheless, even the most maximalist view of copyright leaves room for imperfect substitutes. Furthermore, copyrighted goods occupy a number of different markets in which consumers have different tendencies and habits. Consumers of software, of academic texts, of movies, of novels, and of television shows might demonstrate varied cross-elasticities of demand depending on the good being consumed. Copyrights for academic textbooks, for example, might well provide a much greater monopoly than do copyrights on paranormal romance novels.⁴⁵ For the purposes of keeping this analysis focused on the publishing industry writ large, let us assume that the average copyrighted book is somewhere between a textbook and a paranormal romance: Demand is relatively price elastic, but the imprecise boundaries of the copyright prevent many authors from producing substitute goods for any given title.

⁴² The answer is that no one can say for certain, *ex ante*. Judge Hand explains:

The test for infringement of a copyright is of necessity vague. In the case of verbal “works” it is well settled that although the “proprietor’s” monopoly extends beyond an exact reproduction of the words, there can be no copyright in the “ideas” disclosed but only in their “expression.” Obviously, no principle can be stated as to when an imitator has gone beyond copying the “idea,” and has borrowed its “expression.” Decisions must therefore inevitably be *ad hoc*.

Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960). See also DAVID NIMMER & MELVILLE B. NIMMER, *NIMMER ON COPYRIGHT* § 13.03 (explaining the substantial-similarity standard) (1963).

⁴³ See JAMES BOYLE, *SHAMANS, SOFTWARE, AND SPLEENS* 19–20 (1997).

⁴⁴ In that the chilling effects that exist in a given copyright’s shadow increase the monopoly value of the copyright.

⁴⁵ We can debate this, of course. A textbook, presumably a fact-based work, has thinner copyright protection than does a novel, enabling the production of very similar substitutes. However, demand for a given textbook will be much more inelastic than will demand for most novels: Students *must* buy the assigned book, regardless of the absurd price tag or inferior quality. Having compared the price points of textbooks with those of paranormal romances, I am inclined to think that inelastic textbook demand, coupled with a paucity of capable authors, creates more monopoly power than does a broad and fuzzy copyright grant to creative works.

We are comfortable with this limited monopoly—and frequently invoke the term monopoly to describe it—in part because we believe it to be necessary to create a market for creative works. This is plainly and tautologically true: Rights that do not exist cannot be traded, and the ability to fence off and trade copyrights seems likely to be a net producer of social benefit. Furthermore, even where the copyright monopoly produces supracompetitive benefit to the rights holder, in the manner of a true monopolist, we ought not be overly concerned, as the possibility of such rents is a necessary part of the incentive system we believe fuels our society's creative engine.⁴⁶

Whether and to what extent copyright provides a true monopoly is only half of the picture. That is, the above discussion of the copyright monopoly adequately describes the pre-digital operation of copyright, the ideal of how things are meant to function. This theory posits limited rights that allow for the recoupment of investment in certain creative goods, and it is not overly controversial. Digital economics, however, are quite different, and they alter—possibly fatally—the tenuous balance struck by the traditional copyright grant.

B. Is the Copyright Grant Effectuated in the E-books Market?

For any commodity, increased competition should, in theory, drive prices down. In perfect competition—admittedly a hypothetical ideal—price should settle at marginal cost, the cost a firm incurs in producing an additional unit of a good.⁴⁷ For most digital goods, however, marginal cost is so near zero as to effectively be zero.⁴⁸ From this simplified perspective, a digital book in a competitive market should be free or near free.⁴⁹ What is more, we have readily available empirical evidence of the veracity of this supposition: Online today, the going price for many public domain works is \$0.00.⁵⁰

⁴⁶ Indeed, supracompetitive profits should be necessary for copyright to function. For non-rivalrous goods, average cost and marginal cost are not expected to intersect at any quantity of production—average cost will always exceed marginal cost. If the competitive price is the intersection between marginal cost and demand, the only profitable configuration is definitionally supracompetitive. *See* Yoo, *supra* note 41, at 228.

⁴⁷ *See* EINER ELHAUGE & DAMIEN GERADIN, *GLOBAL ANTITRUST LAW AND ECONOMICS* 258–259 (2d ed. 2011).

⁴⁸ *See* Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. Chi. L. Rev. 263, 274 (2002).

⁴⁹ *See id.*

⁵⁰ *See, e.g.*, PROJECT GUTENBERG, (Jun. 3, 2013, 4:35 PM), <http://www.gutenberg.org/>.

This reality is arguably problematic for the traditional functioning of the copyright grant. As detailed above, the ability of a publisher to recoup upfront investment in the creation of a creative good is incumbent on the extraction of supracompetitive profits, even if for only a short time.⁵¹ Below, I outline a number of ways in which digital economics exerts downward pressure on the supracompetitive profits of digital goods notwithstanding the copyright grant.

1. Retailer Bargaining Power

While the marginal cost of a digital good is theoretically near-zero, as discussed above, the marginal cost a retailer faces for third-party titles is somewhat greater because retail buyers pay the publishers for each unit. In order to act profitably—and in order to avoid charges of predatory pricing—a retailer of digital goods will have to price at or above its wholesale cost, just like any other retailer.

However, both the retailer and the wholesaler know the marginal costs of the goods being traded are essentially zero. A large retailer, holding out for a better retail price, can expect the publishers to at least be willing to negotiate: The entire sale price of the good is above cost, so publishers will, when pressed, be likely to give somewhat.

This process plainly cannot continue forever. Eventually, publishers will reach the point where their wholesale cost is not enough to cover average cost—that is, their sunk costs will outweigh possible revenue. Since publishing practice has long been to take a loss on many titles,⁵² profits might dip below average cost across all titles relatively early. Nevertheless, the normal processes of competition between publishers and between retailers can be expected to drop the prices of the goods closer to cost, perhaps to a point where publishing ceases to be profitable.

2. Increased Information and Access to Substitutes

The greater the number of alternative texts that exist for any given copyrighted work, the more likely it is that one of them will prove to be an acceptable substitute for the good at issue. While there are less likely to be available substitutes for goods that are time sensitive,⁵³ books written to be

⁵¹ See Yoo, *supra* note 41, at 228.

⁵² See Arianne Cohen, *A Publishing Company*, NEW YORK MAGAZINE (June 3, 2007), <http://nymag.com/news/features/2007/profit/32906/> (“Many books are unprofitable,” says CEO Peter Olson. Fifteen to twenty best sellers at a time and a huge volume of steadily selling older titles support Random House Every week, the country’s biggest trade publisher releases 67 new books, but it’s the 33,000-book backlist (Ian McEwan’s *Atonement*, for example) that supplies 80 percent of its profit.”)

⁵³ *E.g.*, Political candidate biographies, current events, etc., etc.

entertainment goods are likely not to share this quality. Accordingly, aside from path-breakers into new genres,⁵⁴ few entertainment goods can be expected to enjoy relief from the heightened competitiveness of the digital marketplace.

And the digital marketplace is absolutely more competitive because there are simply more books to choose from. The physical distribution of a small press's wares is limited by the firm's size, while the physical distribution of a self-published author has traditionally been limited by his or her vanity.⁵⁵ Near-zero marginal cost changes this. Anybody who can write a book can effectively bring it to press for the whole world.

Popular wisdom teaches us, paradoxically, both to disregard and to fear this development. To disregard it, because publishers are a *sine qua non* for quality; anything made without their oversight will necessarily be plagued by errors, mistakes, and poor writing. To fear, it because self-publishing increases search costs for readers—the narcissism of web authors creates an impenetrable morass of junk.⁵⁶ Part of this cynical perspective may well have some merit. After all, I do not pretend to be able to offer any special insight into what distinguishes quality writing or how important a world-class publisher is to achieving it.

But search costs are most definitely diminishing, no matter the increase in total volume of available writing. What this means is that the practical substitutability of books in the digital world should, *ceteris paribus*, be greater than what we have seen in earlier markets. A reader with knowledge of his or her preferences⁵⁷ can take advantage of publicly accessible search utilities⁵⁸ to identify works that best satisfy those preferences. While works that have the benefit of some marketing might suggest themselves more readily, the universe of satisfactory titles is greatly expanded simply by virtue of a greater number of accessible works.

What is more, this process is aided by the sort of algorithmic preference matching aggressively employed by digital retailers.⁵⁹ Setting

⁵⁴ Paranormal romance gets the spotlight again!

⁵⁵ However, this has also changed with technology. Print-on-demand books do now exist.

⁵⁶ See Steven Rosenbaum, *Filter or Be Flooded: Publisher as Curator*, PUBLISHER'S WEEKLY (Mar. 7, 2011), <http://www.publishersweekly.com/pw/by-topic/columns-and-blogs/soapbox/article/46359-filter-or-be-flooded-publisher-as-curator.html>.

⁵⁷ I recognize this might be a substantial assumption. The argument I find most compelling for saving local booksellers, record stores, etc. is that sometimes a consumer needs help identifying the right book.

⁵⁸ Themselves a product of the low costs of digital information.

⁵⁹ See, e.g., *Improve Your Recommendations*, AMAZON.COM, <http://www.amazon.com/gp/help/customer/display.html/?nodeId=13316081> (last visited Mar. 2013);

aside for now the privacy issues inherent in close digital monitoring of consumer behavior, there is good reason to believe in the efficacy of such systems. The point is not that these systems make consumers aware of new goods, it is that they also make consumers aware of *competing* goods and their relative prices. Where demand is elastic, it stands to reason that consumers faced with two very different prices for two very similar goods would switch to the low-cost version, regardless of its possibly humble provenance.

3. Vertical Integration

The biggest threat that e-book retailers pose—the biggest threat that digital goods pose—to traditional publishing is that of a vertically integrated firm that is not a part of the cartel. Although it was not happy with the prices Amazon charged for its books, the industry was able to set some sort of a floor: Amazon was limited by the wholesale price it was made to pay to the publishers, which, in the absence of other costs, would act as Amazon's marginal cost.

A vertically integrated firm would be able to sell closer to the true marginal cost of digital goods, provided that it has not promised its competitors to keep prices high. The wholesaler/retailer relationship has acted as a buffer, however temporary, to the realities of decreasing costs. A vertically integrated firm dealing in enough volume, committed to competing on price, would effectively remove that buffer. Theoretically, competing on price would be business suicide: The new entrant would be unable to cover its average cost if it maintains the same cost structure adopted by incumbents. A leaner publisher, however, or a facilitator of self-publishing, could do a great deal to undermine the competitiveness of industry incumbents without itself collapsing.

4. Loss of Price Discrimination Methods

The stakes are raised for the publishers because physical books and e-books are relatively good substitutes⁶⁰ with drastically different economics of production. Indeed, there is ample evidence that the alleged cartel in the Apple case was particularly afraid of low-priced e-books cannibalizing sales of hardcover editions.⁶¹

see also Matt Marshall, *Aggregate Knowledge raises \$5M from Kleiner, on a roll*, VENTURE BEAT (Dec. 10, 2006), <http://venturebeat.com/2006/12/10/aggregate-knowledge-raises-5m-from-kleiner-on-a-roll/> (describing new entrant in recommendation field).

⁶⁰ Indeed, for some consumers they may be perfect substitutes. For others, the lower-priced e-book might even be more desirable than a physical book.

⁶¹ Complaint at 14, *United States v. Apple Inc.*, 889 F.Supp.2d 623 (S.D.N.Y. 2012) (No. 12 CV 2826).

This fear is not unfounded. The greater the difference between the price of the e-book and the hardcover, the more theoretically likely it is that a potential buyer will opt for the electronic version. This matters to publishers because it partially disables one of the more effective means of garnering supracompetitive profits: price discrimination.

Price discrimination is the practice of pricing along the demand curve, charging each customer the maximum that he or she would be willing to pay. Perfect price discrimination is an efficient economic situation: There is no deadweight loss because all possible surplus goes to the producer. Perfect price discrimination is not attainable, but price discrimination nonetheless tends to be effective in garnering the supracompetitive profits necessary to stay afloat in intellectual property-based industries. For books, the traditional mechanism has been windowed release, where books first come out as hardcovers with large cover prices meant to target the least price-sensitive buyers and lower-cost paperbacks follow.⁶²

Digital availability has been merciless to such methods of price discrimination. While e-book prices still trend somewhat higher for new releases, the difference is not terribly significant. And, what is more, many of those consumers who would have paid \$30 for a hardcover are now paying \$10 for an e-book. A substantial portion of the lost \$20 comes out of the producer's surplus—a boon for the readers, but a huge problem for the bottom line of an industry that depends on supracompetitive profit. Why not simply delay the release of the digital version? Of course, some publishers have done exactly that.⁶³ But this solution is at best a stopgap and comes with a great deal of danger—on the internet, release delays fuel piracy, at least anecdotally, and piracy is plainly a worse result than taking a cut in profit margins.⁶⁴

5. *The Public Domain*

⁶² See Cory Doctorow, *With a Little Help: The Price is Right*, PUBLISHER'S WEEKLY (Feb. 15, 2010), <http://www.publishersweekly.com/pw/by-topic/columns-and-blogs/cory-doctorow/article/42071-with-a-little-help-the-price-is-right.html>.

⁶³ See Motoko Rich, *Publishers Delay E-Book Releases*, N.Y. TIMES ARTS BEAT (Dec. 9, 2009, 4:12 PM), <http://artsbeat.blogs.nytimes.com/2009/12/09/publishers-delay-e-book-releases/>.

⁶⁴ See Ryan Lawler, *How Hollywood Drives People to Piracy*, GIGAOM (Jan. 19, 2012, 1:27 PM), <http://gigaom.com/2012/01/19/hollywood-windows-piracy/>. There is a clear trend, at least in the film industry, to reduce windowing delays somewhat in an effort to stave off such piracy. See Lauren A.E. Schuker & Ethan Smith, *Hollywood Eyes Shortcut to TV*, WALL ST. J. (May 22, 2010), <http://online.wsj.com/article/SB10001424052748704167704575258761968531140.html>.

As demonstrated above, near-zero marginal cost is enough on its own to undermine the copyright monopoly. But, with the passage of enough time, the damage is made even worse. As goods age and fall out of copyright,⁶⁵ they become zero-cost competition to copyrighted works. This is as it should be, and it has a nice symmetry as well—the public domain is the creative wellspring for all creative works, but works within the public domain are also independent competitors for consumption.

It is hard to gauge how much the wide availability of public domain works affects prices. Intuitively, it does not seem to have that great of an effect. That the public domain does not exert more price pressure on copyrighted works can mean either or both of two things: First, popular taste does not much demand older works,⁶⁶ or second, the volume of works safely⁶⁷ ensconced in the public domain might be too meager to satisfy demand. I think the latter more likely—many works that are more than 95 years old still compete admirably. It is the paucity of available works that restricts their market effects, not the appeal of said works.

The future of the public domain is blindingly bright compared to its present, assuming, as always, that works will ever again fall into the public domain.⁶⁸ Many of the cultural goods we produce today are simply too new to be found in the public domain. Recorded sound is a nineteenth century invention, and recording quality pre-microphone is so atrocious—and degradation of the recordings so bad—that most consumers would not listen to many public domain recordings for pleasure. Much the same can be said about early moving pictures.⁶⁹ Novels are not so technologically limited, but they are also not so terribly old in their modern form. Besides, in times before ubiquitous literacy and availability of writing materials, fewer novels were produced. But our digital goods do not degrade, and we are producing more creative goods than ever before. Moreover, I am inclined to believe that the quality—as in, fidelity—of our digital media is high enough to render them accessible to future generations. All this to say that though the

⁶⁵ If they ever do. *See generally* *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

⁶⁶ And indeed, most works that enter the public domain “naturally” have to be quite old—only works published before 1923 are sure to qualify. *See* 17 U.S.C. § 302 (2006); *see also* Peter B. Hirtle, *Copyright Term and the Public Domain in the United States*, CORNELL UNIVERSITY COPYRIGHT INFORMATION CENTER (Jan. 3, 2013), <http://copyright.cornell.edu/resources/publicdomain.cfm>.

⁶⁷ Or perhaps not so safely. *See* *Golan v. Holder*, 132 S. Ct. 873 (2012).

⁶⁸ *See generally* Jennifer Jenkins, *In Ambiguous Battle: The Promise (And Pathos) of Public Domain Day, 2014*, 12 DUKE L. & TECH. REV. 1 (2013) (lamenting the impoverishment of the public domain and charting alternative zones of legal freedom).

⁶⁹ *But see* THE CABINET OF DR. CALIGARI (Goldwyn Distrib. Co. 1920) *available at* <http://www.youtube.com/watch?v=xrg73BUxJLI>.

public domain is not necessarily a competitive threat to the content industry today, it may well be in time.

C. The Amazon Monopsony: Unimportant to Price Trends

As has been shown above, there is no doubt that there is significant price pressure on the publishing industry. The refrain from the press and from the publishers has been that this pressure is the result of Amazon's monopsony: Amazon has long been the only major player in the American e-book business, and its status as the largest buyer gives it the bargaining power to extract deals capable of wringing the publishers dry. It is easy enough to be sympathetic to this position: For each of the possible threats I have enumerated above, all except for piracy can be attributed to Amazon. Amazon prices aggressively, helps consumers identify substitute goods, is vertically integrating as a publisher, and is facilitating self-publishing. Amazon also distributes many public domain works free of charge. But these are all qualities of a highly competitive business, not an anticompetitive one.

The allegations of anticompetitiveness on Amazon's part are—at least as far as the public is in a position to know⁷⁰—misplaced. Unfortunately, teasing apart these allegations completely requires dealing with another section of the Sherman Act and is outside the scope of this Essay. Suffice to say that § 2 of the Sherman Act prohibits unilaterally anticompetitive behavior, that is, monopolization.⁷¹ A requirement for a violation of § 2 is market power, the power to increase prices. Market power correlates poorly with market share when considering digital goods. Monopolists extract their rents by reducing output and increasing prices. The producer of a digital good, however, will struggle to reduce output even with a very dominant position: Relying on the absence of marginal cost, competing firms can increase production of substitute goods to compensate for the would-be monopolistic strategy.⁷² The publishers do have a price problem, and Amazon is contributing to that problem, but Amazon's contributions are not sanctionable. They are merely what digital competition looks like.

D. Would a Restraint of Trade Countermand the Perceived Failings in Copyright for E-books?

⁷⁰ Amazon, like many businesses, keeps many important details out of their publicly released reports. In order to know with any certainty whether or not Amazon's e-books operations have done anything suspect, one would need access to some of the more closely held records.

⁷¹ See 15 U.S.C. § 2 (2006).

⁷² See McKenzie & Lee, *supra* note 64, at 261.

In formulating his brief thoughts on the merits of the Justice Department's case against Apple,⁷³ Richard Epstein spells out the basic form of the intellectual property justification for the alleged collusion, writing:

[I]t is not clear that lower prices are necessarily in the long term interests of the public at large. As with all complex transactions, lower prices spell both low costs to consumers and low royalties to authors. The lower royalties translate into lower level of production of new books, so that we do not have here the usual cartel situation where higher prices reduce output. It is plausible that the higher royalties increase the number of titles available, and by increasing competition in the new book market, prices are lowered in the long run.⁷⁴

At its core, this plays to the classic utilitarian argument for intellectual property, that is, that the creative impulses of authors and inventors are sensitive to incentives, and maintaining those incentives is a social good.

The concern can be presented in several different ways. We might be concerned merely about participation in the market. A priori, we have economic reason to believe that there will be little to no market for copyrighted goods without a reasonable possibility of supracompetitive profit, ergo collusive steps to retain monopoly-like rents are necessary to effectuate the copyright grant.

It can also be argued that any diminution of publishers' supracompetitive profits comes with a great social cost that copyright was meant to foreclose, whether or not wide participation in creative enterprise is empirically affected. Publishers, in the attempt to compete in the cutthroat e-book market, will eventually have to cut into their fixed costs (after all, there are no marginal costs to cut!) And those fixed costs (the argument goes) are what, historically, have provided quality in publishing and success for authors: screening, editing, marketing, etc.

I am skeptical of these arguments. Content as a profitable enterprise served us well—well enough that the concept of the copyright grant seems sound in principle. But, the publishers seek to ensure that their copyrights guarantee a commodity market in their wares. I do not mean commodity in the sense of an undifferentiated good—much of this paper has been dedicated to how copyrighted works can be differentiated—but rather in the sense of a good exchanged on the market. Above I demonstrate how falling prices suggest that commodity distribution might very well cease to be an

⁷³ Hint: Professor Epstein does not think the case has merit.

⁷⁴ Richard Epstein, *Not Proven: The DOJ Suit against Apple for eBook Pricing*, RICOCHET (Apr. 11, 2012, 9:33 PM), <http://ricochet.com/main-feed/Not-Proven-The-DOJ-suit-Against-Apple-for-eBook-Pricing>.

effective means of producing and selling copyrighted works. But this does not mean that the copyright grant is necessarily ineffective—there are other methods of distribution for which copyright remains an important, if not necessary, tool.

Furthermore, even accepting the argument that some fix to pricing is necessary, horizontal agreement as a solution poses its own problems. First and foremost, price fixing exacerbates the piracy problem, rather than solving it. By underproducing and overcharging, the cartel only makes infringing uses more attractive. A broad enough cartel—ASCAP or BMI, for instance—might have enough market power to survive competition from close substitutes, but it would do nothing about piracy. In this way, piracy provides one of the best reasons to distrust justifications of would-be cartels. In order for the cartel to form and operate effectively, we would need to strengthen our copyright enforcement mechanisms to ensure that the monopoly rents are actually achieved. There is already a great deal of literature on why ever-increasing rights holder control is undesirable,⁷⁵ so I do not believe it is necessary to elaborate overmuch on why this is problematic. Suffice to say that once our collective freedoms become implicated in the enforcement of a government granted property right, we ought to think twice about the necessity or scope of the right.

CONCLUSION

Antitrust law and policy can, as I have shown, be critical in the shaping of the information economy. This should be nothing new—we are used to the content industry pleading for effective monopolies. James Boyle has elsewhere shown how the content-industry lobby has, while disclaiming the “monopoly” characterization of intellectual property, subtly adopted monopolistic trappings in seeking greater enforcement powers.⁷⁶ I have

⁷⁵ See, e.g., JAMES BOYLE, *THE PUBLIC DOMAIN* 82 (2008).

⁷⁶ For instance, the refrain among today’s copyright maximalists is that, substantially for the reasons stated above, “cost-based” pricing is no longer feasible for digital goods; we should turn to “value-based” pricing instead. See, e.g., Kent Anderson, *Not Free, Not Easy, Not Trivial—The Warehousing and Delivery of Digital Goods*, *THE SCHOLARLY KITCHEN* (Jun. 13, 2012), <http://scholarlykitchen.sspnet.org/2012/06/13/not-free-not-easy-not-trivial-the-warehousing-and-delivery-of-digital-goods/> (“[T]he information economy works more rationally if it’s value-based.”).

Value-based pricing refers to the value to the consumer—that is, pricing pegged as closely to possible to a good’s demand curve. In other words, price discrimination. In *Cruel, Mean, or Lavish?*, James Boyle laid bare this particular duplicative use of “monopoly” by the content industry lobby. First, intellectual property apologists would disavow the existence of the kind of monopoly that is meant to invite antitrust scrutiny. Then they would adopt the language of

shown here another, more brazen iteration of a similar sleight of hand: one in which copyright holders, disavowing as ever any monopoly, seek to price like monopolists by way of antitrust's cardinal sin, a horizontal agreement to fix prices.

In a world where economic efficiency is paramount,⁷⁷ we might be tempted by these rationales even if their result is behavior we are normally inclined to disdain. In response, I would point to the dissent in *Leegin*, which cautions against over-reliance on economics scholarship in the production of antitrust law, pointing out that per se rules have administrative certainty and clarity.⁷⁸ We do know that prices for books are under pressure and are falling. We can reasonably suspect that the future will hold more of the same, and this might persuade us to abandon our hard and fast rules. But it is what we do not know—how *other* means of monetization might successfully flourish in the absence of commodity pricing—that should give us pause.

None of this means that copyright as it has existed—without brazenly anticompetitive assistance—has no value in the digital age. Intellectual property can still be a valuable incentive for creation even if it does not precisely guarantee the ability to commodify one's work. No doubt there will be some people so distressed by the idea that they might choose not to publish at all, but we must assume that these will be a minority, driven as much by a generational fissure in social practice as by the intrinsic morality of copyright.

A decommodified cultural economy should be as exciting as it is, rightly, terrifying. But we are testing the waters now through offerings like Netflix, the Kindle owner's lending library, and Spotify. These are all for-profit, *service*-based providers of content, increasingly central to cultural consumption and yet it does not appear that the sky is falling. Anticompetitive collusion, which basic antitrust principles teach us as being

monopolistic price discrimination in seeking greater enforcement powers. Boyle, *supra* note 40, at 2028.

⁷⁷ For example, James Boyle's "Econo-World." See Boyle, *supra* note 40, at 2011.

⁷⁸ "Economic discussion, such as the studies the Court relies upon, can help provide answers to these questions, and in doing so, economics can, and should, inform antitrust law. But antitrust law cannot, and should not, precisely replicate economists' (sometimes conflicting) views. That is because law, unlike economics, is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients. And that fact means that courts will often bring their own administrative judgment to bear, sometimes applying rules of per se unlawfulness to business practices even when those practices sometimes produce benefits." *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 914 (2007) (Breyer, J. dissenting).

harmful to insofar as it seeks to preserve a business model that we are not certain we need to effectuate copyright, is not merited.