OVERCHARGE BUT DON'T OVERESTIMATE:
CALCULATING DAMAGES FOR ANTITRUST
INJURIES IN TWO-SIDED MARKETS

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INTRODUCTION

Anyone who has ever looked for a job and was unable to locate employers, attempted to sell something and was unable to find buyers, or simply tried to find a date and was unable to meet suitable partners, intuitively understands the role played by firms that operate in two-sided markets. Two-sided markets are markets with two distinct sets of consumers, such as buyers and sellers, who wish to transact with one another but lack efficient means of organization. Firms operating in these markets provide forums in which these distinct sets of customers can meet and interact. The recent rise of the internet has greatly facilitated the emergence and visibility of such firms. At the same time, there has been a corresponding renewal of scholarly interest in these markets from both an economic and a legal standpoint, with a particular emphasis on the ramifications regarding the antitrust laws.

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1 See infra Part I.A.
2 See infra Part II.
3 The recent rise in interest and attention given by economists generally to two-sided markets has been credited to groundbreaking economic work on the topic in Jean-Charles Rochet & Jean Tirole, Platform Competition in Two-Sided Markets, 1 J. EUR. ECON. ASSOC. 990, 990 (2003) ("The recognition that many markets are multisided leads to new and interesting positive and normative questions."). The application of the antitrust laws to the field of two-sided markets has recently emerged in scholarly literature, including in articles by David S. Evans, see infra notes 17, 25, and, for example, in Mark Armstrong, Competition in Two-Sided Markets, 37 RAND J. ECON. 668 (2006). For further background and analysis in the emerging field of two-sided markets, see, for example, David S. Evans, Two-Sided Market Definition, in ABA SECTION OF ANTITRUST LAW, MARKET DEFINITION IN ANTITRUST: THEORY AND CASE STUDIES (forthcoming), available at http://ssrn.com/abstract=1396751 (last visited Oct. 25, 2011); Davis S. Evans & Richard Schmalensee, The Industrial Organization of Markets with Two-Sided Platforms, 3 COMPETITION POL'Y INT'L 150 (2007); David S. Evans & Richard Schmalensee, Markets with Two-Sided Platforms, in ABA SECTION OF ANTITRUST LAW, ISSUES IN COMPETITION LAW AND POLICY 667 (2008)ABA; Marc Rysman, The Economics of Two-Sided Markets, 23 J. ECON. PERSP. 125 (2009).
Like firms that provide their own internally generated products or services, firms that operate in two-sided markets are subject to the federal antitrust laws, and have, at times, been on the defending end of private lawsuits. Due to the central role that private enforcement plays in antitrust law in the United States and the potential for high damage awards, it is crucial that damage calculations in such cases be as accurate as possible. Accuracy in damages ensures that plaintiffs are justly compensated, while at the same time preventing plaintiffs from using the antitrust laws to derive improper gains at the expense of a defendant.

To ensure the fairness of monetary damages in private antitrust actions brought in two-sided markets, this Note will focus on modeling damages in a distinct subset of these cases—ones that allege the illegal use or acquisition of monopoly power, and that result in supracompetitive pricing. Claims involving supracompetitive pricing arise when a plaintiff argues that a defendant has engaged in anticompetitive behavior prohibited under section two of the Sherman Act, and, as a result, the plaintiff has been charged an unfairly high price in a transaction or series of transactions. This Note will analyze the approach of the federal courts to general claims of supracompetitive pricing as well as the unique economics applicable to two-sided markets, to arrive at the most fair and efficient form of damage computations in two-sided markets.

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5 See infra note 53.

6 See infra notes 54–60 and accompanying text.

7 See Edward D. Cavanagh, Detrebling Antitrust Damages: An Idea Whose Time Has Come? 61 Tul. L. Rev. 777, 791 (1987) (noting that the trebling of damages "has encouraged misuse of private actions for strategic purposes"). Another reason to be cautious of excessive damages assessed against antitrust defendants is the concern of overdeterrence. Id. at 801 ("Trebling discourages not only conduct which falls within the inner core of illegality under the antitrust laws, but also discourages conduct, which may be beneficial to competition, yet falls in the vast gray area between clearly legal and clearly illegal conduct. . . . The threat of treble damages, thus, deters good as well as bad conduct and may deny society the benefits of procompetitive business practices.").

8 Sherman Act § 2 (codified as amended at 15 U.S.C. § 2 (2006)). Violations of this section occur when the underlying conduct meets a two prong test. See United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966) ("The offense of monopoly under section 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."). There must also be causal antitrust injury created by the defendant’s actions. See Forsyth v. Humana, Inc., 114 F.3d 1467, 1475 (9th Cir. 1997). Supracompetitive pricing may be, but will not always be, a consequence of a section two violation.

9 See infra Part I.B.

10 See infra Part I.A.
This Note presents two arguments regarding damage awards in such cases. First, this Note argues that the proper measure of damages in such cases is the amount of the overcharge paid by the plaintiff to the defendant. This is consistent with the fact that overcharge is the generally accepted measure of damages in cases involving supracompetitive pricing by a monopolist operating in a more conventional single-sided market. Second, this Note argues that in cases of supracompetitive pricing in a two-sided market, certain adjustments to the amount of the overcharge are necessary in order to arrive at a fairer measure of damages. These include giving the defendant an opportunity to offset the alleged overcharge by the amount that the plaintiff benefited from defendant's monopolization due to efficiency gains; and proper balancing and pricing of the two sides of the market. In addition to the theoretical issues of computation, this Note also addresses the practical application of this approach by suggesting a two-step approach for district courts to use in assessing these damages. To help illuminate the discussion, this Note refers to a recent class action lawsuit brought in an online two-sided market alleging monopolization against the well-known online auction site eBay seeking damages based on alleged supracompetitive pricing. This case involved charges of illegal monopolization as well as requests for damages based on alleged supracompetitive pricing.

I. TWO-SIDED MARKETS AND SUPRACOMPETITIVE PRICING

This Note involves the application of section two of the Sherman Act, a statute that has spawned a well-established body of law, to two-sided markets—entities about which economic analysis has only recently matured. Before delving into this synthesis, this Note first presents the legal and economic background regarding each area individually.

A. The Economics of Two-Sided Markets

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11 See infra Part III.A.
12 See infra Part III.B.
13 See infra note 149 and accompanying text.
14 See In re Ebay Seller Antitrust Litig., No. 07 Civ. 01882-JF, 2010 WL 760433 (N.D. Cal. Mar. 4, 2010); infra Part II.
15 Sherman Act, ch. 647, § 2, 26 Stat. 209, 209 (1890), as amended by Pub. L. No. 93-528, 88 Stat. 1706 (1974) (codified as amended at 15 U.S.C. § 2 (2006)) ("Every person who shall monopolize ... any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony ... .").
16 See infra Part II.A.
The conceptual underpinnings of two-sided markets are fairly intuitive, and examples abound in the marketplace: dating clubs that serve male and female patrons by providing a common meeting ground; payment-card–system services that allow cardholders and merchants to transact through a common payment system; video game–console makers that allow gamers and designers to purchase and design games that will work on a common machine; real estate brokers that match up potential home buyers and sellers to allow for a sale; computer–operating-system developers who design systems by which software companies and software users benefit by programming and purchasing software that will function on a common operating system; and newspapers and television networks that allow advertisers to reach an audience of readers and viewers while providing the readers and viewers with a desired selection of goods and services providers.

Firms that conduct business in two-sided markets target two sets of customers that need each other in order to transact but lack efficient means of organization. These firms enter the market by providing a common forum through which the interested customer sets can interact. The characteristics of a two-sided market usually include: (1) two

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17 This catchy example is used by DAVID S. EVANS, AEI-BROOKINGS JOINT CTR. FOR REG. STUD., THE ANTITRUST ECONOMICS OF TWO-SIDED MARKETS (2002), available at http://www.lionel-lindemann.eu/blog/wp-content/evans.pdf, as an opening for his seminal and comprehensive work on the implications of two-sided markets in antitrust law. Apparently such dating bars exist in Japan and provide a valuable “speed dating” service for young men and women interested in finding a mate. Date seekers join a dating club through some form of membership structure and attend periodic matchmaking sessions. At the club, dating club members are given the opportunity to view one another through a transparent divider and communicate with prospective mates by sending love notes to members on the other side through the waiters. See Howard W. French, Osaka Journal; Japanese Date Clubs Take the Muss Out of Mating, N. Y. TIMES, Feb. 13, 2001, at A4.

18 See EVANS, supra note 17, at 7–9; see also infra note 52 regarding recent antitrust lawsuits in this area.

19 See EVANS, supra note 17, at 7–9.

20 See id.

21 See id.; see also infra note 51 regarding recent antitrust lawsuits in this area.


23 While this Note is limited in discussion to markets and industries that are commonly accepted as two-sided markets, it is not always clear whether a market is, in fact, two-sided and in many closer cases, this question will depend on detailed factual analysis as well as the definition one uses of two-sided markets. See Marc Rysman, The Empirics of Antitrust in Two-Sided Markets, 3 COMPETITION POL’Y INT’L 197, 206–08 (2007).

24 See EVANS, supra note 17, at 1–2 (“[I]n two-sided markets the product or service is consumed jointly by two customers and, in a sense, only exists at all if a ‘transaction’ takes place between them.”).
or more distinct groups of customers; (2) externalities or transaction costs associated with bringing the different groups together; and (3) the existence of an intermediary that brings the groups together by collecting payments from members of the groups. The term “two-sided market” refers to the two markets, or two sets of consumers, that the firm targets in marketing its product or service.

The firms that provide these services can be broken up into three categories, though these categories are not entirely mutually exclusive: (1) market-makers, who like dating clubs, seek to match a particular member of one market with a single member on the other side; (2) audience-makers, who like newspapers or television stations seek to provide each side of the market with broad access to the other side, but are not involved in reaching joint transactions; and (3) demand-coordinators, who like video game-console makers allow members of two sides of a market to transact using common intermediary structures or features, but expect the two sides to interact subsequently on their own.

Two of the most salient features of two-sided markets are indirect network effects and the chicken-egg problem. Indirect network effects refers to the phenomenon that the demand on one side of a two-sided market is positively correlated to demand on the other side. In other words, as there is greater use of the market-maker’s product or service on one side of the market, users on the other side derive greater utility from, and hence, have a greater demand to access the market. For example, the more women that choose to frequent a particular dating club, the more men will see that dating club’s services as valuable, and vice versa.

25 See David S. Evans, The Antitrust Economics of Multi-Sided Platform Markets, 20 YALE J. ON REG. 325, 331-33 (2003) (“A platform can increase social surplus when three necessary conditions are met: (1) There are two or more distinct groups of customers. . . . (2) There are externalities associated with customers A and B becoming connected or coordinated in some fashion. . . . (3) An intermediary is necessary to internalize the externalities created by one group for the other group.”).

26 See EVANS, supra note 17, at 1–2; Evans, supra note 25, at 337. Of note, while this Note focuses on two-sided markets, market-makers can also target more than two distinct sets of customers that seek to transact with one another, operating in so called “multi-sided markets.”

27 See Evans, supra note 25, at 334. (“There are three major kinds of multi-sided platforms: (1) Market-Makers enable members of distinct groups to transact with each other.”). This Note will, unless otherwise specified, use the term “market-maker” in a looser sense, referring to a firm that operates in any of the three types of two-sided markets.

28 See id. at 335 (“(2) Audience-Makers match advertisers to audiences.”).

29 See id. at 335–36 (“(3) Demand-Coordinators make goods and services that generate indirect network effects across two or more groups.”).

30 See id. at 349–51.

31 See EVANS, supra note 17, at 32 (“A market has network effects . . . when consumers value a product more the more other consumers use that product. . . . In the case of indirect network effects, I value . . . the product because your purchase means that the demand for complementary products is higher and the supply of those complementary products will benefit me.”).
The economic impact of indirect network effects on a firm is that the firm needs to set a pricing structure that will increase demand not just on one side of the market, but on both. A pricing structure, as opposed to a single price, refers to the set of prices that the market-maker charges its various customer groups. The goal of a pricing structure in a two-sided market with indirect network effects is to increase overall demand for the market-maker’s product or service, though the two sides may be priced differently. Thus, a firm needs to set its prices so that overall demand—taking both sides of the market into account—is maximized.

The second important feature of two-sided markets is the so-called chicken-egg problem. This refers to the fact that in two-sided markets, having users from one side is a prerequisite to attracting users from the other side. Market-makers must, therefore, find a way to make sure that they can make their products immediately attractive to both sides of the market; otherwise, the absence of one side will dissuade the other side from trying the market-maker’s services. For example, if a dating club owner cannot get any men to visit his or her dating club, women will find no utility in the services being offered, and vice versa. Getting both sides of a market on board is often accomplished by subsidizing one side of the market to attract one group of users who will be incentivized to use the market-maker because of the low cost, even if the market-maker may lose money on this half of the venture. The market-maker’s business plan is, then, that the other side will be drawn in after the subsidized side has already been attracted, and this newly drawn-in side will then be willing to pay for the privilege of access to the pre-assembled large audience.

32 See id. at 1.
33 See Evans, supra note 25, at 343–45; see also Rochet & Tirole, supra note 3, at 990 (“Under multi-sidedness, platforms must choose a price structure and not only a price level for their service.”).
34 See EVANS, supra note 17, at 40–42; Rochet & Tirole, supra note 3, at 990.
35 See Rochet & Tirole, supra note 3, at 991 (“[P]latforms often treat one side [of the two-sided market] as a profit center and the other as a loss leader, or, at best, as financially neutral.”).
36 See Evans, supra note 25, at 343–45.
37 See id. at 350 (“[C]oupled products cannot come into existence without a sufficient number of customers on both sides from the start.”); see also Roberto Roson, Two-Sided Markets: A Tentative Survey, 4 REV. NETWORK ECON. 142, 154 (2005).
38 See Evans, supra note 25, at 350 (“In some situations coupled products cannot come into existence without a sufficient number of customers on both sides from the start. Payment cards are the clearest example: The card is worthless to individuals if few merchants take it and is worthless to merchants if few individuals use it.”).
39 This is another justification for the “pricing structure,” as opposed to price, utilized by many market-makers and discussed in the previous paragraph.
40 See Evans, supra note 25, at 327–28 (describing the pricing model in Japanese dating clubs where one particular club charges men one hundred dollars for membership and twenty dollars per visit whereas female members are allowed in free of charge, and noting that such pricing
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The chicken-egg problem further suggests that market-makers turn to pricing structures in order to overcome this barrier. By adopting a pricing structure that is not evenly applied to both sides of the market, the market-maker can incentivize both sides to join its business and then maintain an optimal ratio of users. In fact, many firms in two-sided markets maintain such uneven pricing structures. In arriving at an optimal pricing structure, market-makers must make two decisions: determining a total price that is charged to their consumers that will cover the firm’s total operating expenses, and determining how that price is distributed between the two sides of the market.

In carrying out this balancing scheme, market-makers usually subsidize the side of the market that has, or that is likely to have, a higher degree of demand elasticity for the good or service being offered. For example, merchants almost always bear most of the costs of a payment-card system in which costs can be split between cardholders and merchants. This is because it is very easy for cardholders to switch cards when faced with higher fees whereas merchants are more likely to be reluctant to switch because rejecting even one card may result in substantially decreased sales. Moreover, as potential for profit rises on one side of the market, prices on the other side will tend to drop because

42 See Evans, supra note 25, at 338 tbl.1 (listing a group of two-sided platforms that operate in a variety of markets and noting in each instance which of the two markets served is subsidized at the expense of the other side of the market in order to encourage both sides’ participation and maximize indirect network effects).
43 See Benjamin Klein et al., Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees, 73 ANTITRUST L.J. 571, 598 (2006) (explaining that for a market-maker, “[w]hile total prices will be influenced by competition, relative prices are determined by optimal balancing of demand on the two sides of the market”).
44 Demand elasticity is defined as “how much the quantity demanded [by consumers] responds to a change in price,” or in other words, how sensitive a side is to higher costs. N. GREGORY MANKIW, PRINCIPLES OF MICROECONOMICS 90 (5th ed. 2008).
45 See Klein et al., supra note 43, at 596–97 (explaining that in payment card systems “the profit-maximizing relative prices charged to merchants and cardholders in all payment systems will depend on the relative demand elasticities of merchants and cardholders for a payment card system”).
46 See id. at 573–74 (“In the case of payment card systems, this economic balancing generally leads to merchant and cardholder prices that involve merchants bearing a larger fraction of total system costs than do cardholders. This is not due to payment card system market power over merchants, but because demand sensitivity generally is much greater on the cardholder side of the market than on the merchant side of the market. Cardholders deciding which payment card to carry and use can and do play off competing payment card systems; merchants, on the other hand, generally find it profitable to accept cards from all major payment card systems so as not to lose profitable incremental sales from consumers that use only one payment card.”). For a complete discussion, including empirical data, see id. at 585–88.
cause, through indirect network effects, demand will be further stimulated on the profitable side—the so-called “seesaw effect.”

In addition, pricing structures in two-sided markets will depend on the presence of viable competitors that a market-maker has in one or both sides of the market it services.

While antitrust cases that involve market-makers and two-sided firms are not a novel phenomenon, recently there has been a resurgence of legal-scholarly attention given to the unique economic nature of the topic, and particularly to the economic analysis that applies when adjudicating antitrust claims in these markets.

Two particular cases involving two-sided markets that have been the subject of lively scholarly debate in recent years are the Department of Justice’s colossal antitrust case against the computer-software giant Microsoft, and a large-scale

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49 The ability of users to select from competing market-makers is referred to as multihoming and, as one would expect, it puts downward pressure on prices where it exists. See Evans, supra note 25, at 346–48 (“Multihoming affects both the price level and the pricing structure. Not surprisingly, the price level tends to be lower with multihoming because the availability of substitutes tends to put pressure on the multi-sided firms to lower their prices.”); see also id. at 347 tbl.2 (listing the presence of one or two-sided multihoming in a variety of two-sided markets). For a consideration of multihoming by consumers in the payment market, see, for example, Rysman, supra note 23, at 207–08 (“I find that the question of whether consumers multi-home has a more complex answer than commonly envisioned. With regards to usage, few consumers regularly use multiple networks. Most consumers put a great majority of their payment card purchases on a single network. . . However, with regards to ownership, most consumers do maintain cards from different networks, which would allow them to take advantage of different networks quickly if they chose to do so.”).

50 See EVANS, supra note 17, at 6 (“Despite their economic importance, however, two-sided markets have only recently received attention from economists, and, with the exception of some recent work on payment cards, have received virtually no attention in the scholarly literature on antitrust.”); Evans, supra note 25, at 330–31. Additional attention was given to the topic by a 2005 issue of the Columbia Business Law Review devoted to the topic. See, e.g., Stephen V. Bomse & Scott A. Westrich, Both Sides Now: Buyer Damage Claims in Antitrust Actions Involving “Two-Sided” Markets, 2005 COLUM. BUS. L. REV. 643 (2005); Lloyd Constantine et al., In re Visa Check/Mastermoney Antitrust Litigation: A Study of Market Failure in a Two-Sided Market, 2005 COLUM. BUS. L. REV. 599 (2005); see also Daniel A. Crane, Optimizing Private Antitrust Enforcement, 63 VAND. L. REV. 675, 705–06 (2010). Furthermore, the Antitrust for Two-Sided Markets conference in Cambridge, Massachusetts in June of 2006 brought additional attention to the topic of two-sided markets and has generated additional valuable scholarly material on the subject. See Rysman, supra note 23. The FTC has also expressed interest in further research on this topic. See WILLIAM E. KOVACIC, THE FEDERAL TRADE COMMISSION AT 100: INTO OUR 2ND CENTURY 93 (2009), available at 2009 WL 1026874.


In these and related cases, spanning more than ten years, Microsoft was prosecuted by the
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set of price-fixing claims brought by private merchants against payment card–system giants Visa and MasterCard.52 These cases, and the subse-

Federal Government as well as by various state attorneys general for antitrust infringements including anticompetitive conduct, pricing, and tying. The prominent two-sided market feature of the litigation was what the court called Microsoft’s “applications barrier to entry.” United States v. Microsoft Corp., 84 F. Supp. 2d at 18. The Court of Appeals likewise recognized that Microsoft benefited from maintaining an “applications barrier to entry” which discouraged programmers to write for competing operating systems. United States v. Microsoft Corp., 253 F.3d at 55 (“Thus, despite the limited success of its rivals, Microsoft benefits from the applications barrier to entry.”). The antitrust allegation behind that phrase was that Microsoft’s operating system, Windows, enjoyed monopoly status because of the chicken-egg problem, discussed supra text accompanying notes 37–40, inherent in the market for operating systems. Specifically, operating systems are successful to the extent that software developers write programs that function on them, as well as to the extent that consumers choose to run a particular operating system on their computers. What allowed Windows to maintain its monopoly status was that developers are reluctant to write software for an operating system unless they believe many consumers would be interested in purchasing it, which they would only potentially do if they had the appropriate operating system. At the same time, consumers will greatly prefer an operating system that has a lot of software written for it. Thus the “applications barrier to entry” referred to the fact that the abundance of applications written and being written for Microsoft Windows prevented the rise and success of any subsequently developed operating system. It was alleged that Microsoft had violated antitrust law by actively discouraging the production of applications for competing operating systems. Microsoft, however, contended that the applications barrier to entry was naturally created and its continuance was a testament to Microsoft’s popularity. Of note, the Court of Appeals later observed that “the applications barrier to entry arose only in part because of Microsoft’s unlawful practices; it was also the product of ‘positive network effects.’” Massachusetts v. Microsoft Corp., 373 F.3d at 1226 (emphasis added).

For critical perspectives on the cases with a focus on the issue of two-sided markets in the litigation, see, for example, David S. Evans et al., United States v. Microsoft: Did Consumers Win?, 1 J. COMPETITION L. & Econ. 497, 527–29 (2005) (“A second source of the commingling confusion . . . was the failure of any party to understand clearly the antitrust policy implications of the fact that Windows is a multi-sided market platform.”); and see also infra note 160.

52 Litigation regarding payment-card systems seems to have been the most active source of antitrust litigation in two-sided markets. See In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124 (2d Cir. 2001) (affirming the certification of the class of merchants against Visa and MasterCard), overruled on other grounds by In re Initial Pub. Offerings Sec. Litig., 471 F.3d 24 (2d Cir. 2006), and invalidated on other grounds by FED. R. CIV. P. 23(g); In re Visa Check/MasterMoney Antitrust Litig., 297 F. Supp. 2d 503 (E.D.N.Y. 2003) (approving of the settlement ultimately entered into by the parties, the largest in antitrust history, after the district court denied motions for summary judgment by the parties and a motion for severance by Defendant MasterCard), aff’d sub nom., Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96 (2d Cir. 2005).

In these and other unreported related decisions, spanning years, Visa and MasterCard were accused of tying and unfair monopolization by requiring merchants who accepted their credit cards to also accept their debit cards. In doing so, Visa and MasterCard were allegedly able to fix prices by conspiring to charge supracompetitive interchange fees. See In re Visa, 280 F.3d at 131. The problem that Visa and MasterCard faced in introducing their debit cards was the chicken-egg problem, discussed supra text accompanying notes 37–40. Retailers accept cards when customers use them and customers prefer to carry cards that are accepted by many merchants. Visa and MasterCard solved this problem with an “honor all cards” policy since their credits cards were already widely used. Merchants claimed that through Visa and MasterCard’s “honor all cards” policy, merchants were forced to accept the debit cards even though they were being charged unfairly high merchant discounts because of excessive interchange fees. Interchange fees are the fees paid by acquiring banks to issuing banks. Issuing banks are authorized by Visa or MasterCard to distribute cards to consumers and acquiring banks are authorized to enlist merchants to accept the card. The merchant is then reimbursed for a card-transaction from the acquiring bank minus a fee
quent scholarly literature, suggest that fairer results can be reached if the consequences of a two-sided market are more fully taken into consideration.53

B. Damages in Antitrust Cases Involving Supracompetitive Pricing

Damage calculations are a crucial part of antitrust cases in the United States because private enforcement of the antitrust laws is the primary vehicle relied upon to curb anticompetitive behavior in the marketplace.54 Through section four of the Clayton Act,55 private parties who have sustained injury by reason of proscribed anticompetitive behavior can recover for their loss threefold, plus reasonable attorney’s fees.56 As a result, plaintiffs are incentivized to sue for violations of the

known as the merchant discount. Issuing banks pay the acquiring banks the funds for the transaction minus a fee known as the interchange fee. Thus the interchange fee will have a great influence on the merchant discount. Interchange fees are set by Visa or MasterCard and banks are not free to negotiate them, thus indirectly setting merchant discounts.

This particular application of antitrust law in a two-sided market also seems to have received the most scholarly attention and critical perspectives. See Bomse & Westrich, supra note 50, at 655; Constantine et al., supra note 50; Crane, supra note 50, at 706; Klein et al., supra note 43; Sujit Chakravorti & Roberto Roson, Platform Competition in Two-Sided Markets: The Case of Payment Networks (Federal Reserve Bank of Chicago, Working Paper No. 2004-09, 2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=564564; see also infra note 160 (discussing the subsidizing feature of pricing in two-sided markets).


54 See Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979) (“Congress created the treble-damages remedy . . . precisely for the purpose of encouraging private challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations.”); Crane, supra note 50, at 675–76 (“The United States is unique in the world insofar as private enforcement of the antitrust laws vastly outstrips public enforcement. There are roughly ten private federal cases for every case brought by the Department of Justice or Federal Trade Commission.”); see also Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 262 (1972) (“In enacting these [antitrust] laws, Congress had many means at its disposal to penalize violators . . . Congress chose to permit all persons to sue to recover three times their actual damages every time they were injured in their business or property by an antitrust violation. By offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as ‘private attorneys general.’”); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130–31 (1969); Perma Life Mufflers, Inc. v. Int’l Parts Corp., 392 U.S. 134, 147 (1968) (Fortas, J., concurring).

55 Clayton Act, ch. 323, § 4, 38 Stat. 730, 731 (1914) (codified at 15 U.S.C. § 15(a) (2006)) (“[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.”).

56 The award of damages in private antitrust suits has been justified historically by courts and legal commentators on at least four grounds: (1) compensation for victims, (2) deterrence toward the violator, (3) forfeiture of the violator’s unjust enrichment, and (4) punitive damages against
antitrust laws by the promise of awards that may, after trebling, exceed their actual loss. They thereby vindicate their own loss as well as promote the positive externality of market efficiency by deterring anticompetitive behavior. It is particularly important that damages in such cases be given careful consideration because the trebling of antitrust damages means that an unfair verdict will result in a triply unfair result against an innocent defendant. While damage calculations raise issues in many types of antitrust claims that a plaintiff can make, the discussion in this Note will focus on claims that involve the use of illegally acquired or maintained monopoly power that enables a market-maker to charge supracompetitive prices, or above-competitive market prices, to at least one side of a two-sided market.

Supracompetitive pricing is a claim that often follows an allegation of monopolization because one of the key features of a monopoly is the monopolist's ability to hurt consumers by influencing the price of its output. A plaintiff will usually be able to show that it has suffered "in-the-violator. See Edward D. Cavanagh, The Private Antitrust Remedy: Lessons from the American Experience, 41 Loy. U. Chi. L.J. 629, 631–36 (2010). The statutory authorization of trebling these awards has been justified on the bases that antitrust violations are easy to conceal and hard to discover and that antitrust litigation tends to be prolonged and uncertain. Trebling thus serves as an incentive for a private suit as well as a fairer form of compensation. Id. at 631 ("Because of their typically covert nature, antitrust violations are frequently difficult to detect and very expensive to prosecute. Trebling creates strong incentives for private parties to investigate, detect, and prosecute antitrust violations.").

See id. at 642 ("Multiple damages provide an incentive to undertake the enhanced risk of litigating private antitrust suits.").

See III. Brick Co. v. Illinois, 431 U.S. 720, 746 (1977) (noting that the antitrust laws have the dual goals of compensation and deterrence); see also Phillip Areeda, Antitrust Violations Without Damage Recoveries, 89 Harv. L. Rev. 1127, 1127 (1976) ("Money awards under the antitrust laws do not serve only to compensate injured plaintiffs. Treble damages also punish wrongdoers and enlist private plaintiffs in the work of detecting, punishing, and thereby deterring wrongdoing."); Amanda Kay Esquibel, Note, Protecting Competition: The Role of Compensation and Deterrence for Improved Antitrust Enforcement, 41 Fla. L. Rev. 153, 153 (1989) ("The purpose of the antitrust laws is protecting competition and consumer welfare through compensation and deterrence.").

See 15 U.S.C. § 15 ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws ... shall recover threefold the damages by him sustained ... ").

Cavanagh, supra note 7, at 791 ("[T]rebling raises serious issues of fundamental fairness.").

Some examples of the wide variety of anticompetitive behavior that can lead to private damages awards under the Clayton Act include: vertical and horizontal price fixing, bid rigging, market and customer divisions, monopolization and monopsonization, attempts to monopolize, unlawful mergers, refusals to deal and resale price maintenance. For a discussion of the many benefits of enforcing these laws through private lawsuits and damage remedies as well as a discussion of some additional critiques, see Robert H. Lande & Joshua P. Davis, Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases, 42 U.S.F. L. Rev. 879 (2008).


See United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956) ("Monopoly power is the power to control prices or exclude competition."). For the economic definition of monopoly, see N. Gregory Mankiw, supra note 44, at 311–15 ("The key difference between a
jury of the type the antitrust laws were intended to prevent and that flows from that which makes [the] defendants' acts unlawful" by showing that it was forced to pay above-market prices due to a defendant's illegally acquired or maintained monopoly power. Thus, the plaintiff will be entitled to damages because the anticompetitive behavior resulted in his payment of supracompetitive prices.

Conceptually, there are at least two ways to quantify damages when supracompetitive pricing results from a monopolist's behavior: (1) profits that the plaintiff has been deprived of as a result of the defendant's illegal behavior; or (2) the amount of the overcharge paid to the defendant in excess of what the plaintiff would have paid in a competitive market. These measures of damages will not always be equivalent. For instance, lost profits may be less than overcharge when the plaintiff has taken advantage of the opportunity to pass along some of its overcharge costs to its own consumers. Conversely, lost profits may exceed the amount of overcharge when the monopolistic pricing causes long-term harm to the plaintiff's ability to do business and compete in the marketplace. In terms of calculations, measuring lost profits entails assessing how much potential business the plaintiff lost because of antitrust violations, whereas the general methodology for determining overcharge is to compare the actual price charged to the plaintiff with the price that would have prevailed in a world where, everything else being equal, the defendant lacked monopoly power or had

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64 Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977). Such a showing will fulfill the general requirement of injury causation as well as the special requirement in antitrust law that a plaintiff must not just be injured, but that he sustain the type of injury that is not consistent with competitive behavior, such as legitimate increases in competition. See id.

65 New York v. Hendrickson Bros., 840 F.2d 1065, 1079 (2d Cir. 1988) ("In general, the person who has purchased directly from those who have fixed prices at an artificially high level in violation of the antitrust laws is deemed to have suffered the antitrust injury within the meaning of § 4 of the Clayton Act, and hence may recover the entire amount of the illegal overcharge...."). See Phillip E. Areeda et al., Antitrust Law: An Analysis of Antitrust Principles and Their Application, ¶ 395, at 376 (3d ed. 2007); Richard A. Posner & Frank H. Easterbrook, Antitrust: Cases, Economic Notes, and Other Materials 549 (2d ed. 1981).

66 See Areeda et al., supra note 66, ¶ 395, at 378 ("[D]espite the prevalence of the overcharge as a measure of damages, it is a disconcerting fact of life that the overcharge is not precisely the same as the lost profit. The overcharge may be larger or smaller than the lost profit depending upon the economic circumstances.").

67 See Areeda et al., supra note 66, ¶ 395a, at 382 (noting that in comparing the extreme cases of overcharge and lost profits "[i]f industry demand is perfectly elastic... the price does not rise, and lost profits clearly exceed the overcharge. If industry demand is perfectly inelastic... the price rises by the full amount of the overcharge, but profits are unaffected").
not colluded—the so-called "but-for" world.\textsuperscript{70}

In choosing between overcharge and lost profits as a measure for damages in cases of supracompetitive pricing, courts have set no bright-line rule.\textsuperscript{71} In one notable early case involving supracompetitive pricing brought under the federal statutory scheme, the Supreme Court embraced overcharge as a measure of damages where a municipality had been charged supracompetitive prices when it purchased water pipes for a waterworks system in Atlanta, Georgia.\textsuperscript{72} The Court explained that overcharge was the appropriate measure of damages since it was equal to the amount by which the city had actually been injured because of the illegal pricing.\textsuperscript{73} In other words, if not for the anticompetitive behavior, the city would have been able to purchase the piping material on the open market at a lower cost.

Notwithstanding the fact that the Supreme Court seemed to adopt overcharge as a measure of damages for supracompetitive pricing, it has been argued that this approach may only be appropriate where the plaintiff, like the city of Atlanta, is a municipality or other similarly situated not-for-profit organization.\textsuperscript{74} In such cases, only costs actually expended are lost and there is no loss of an anticipated profit. Where, however, the plaintiff is a for-profit entity, it is usually further damaged to the ex-

\textsuperscript{70} ABA SECTION OF ANTITRUST LAW, PROVING ANTITRUST DAMAGES: LEGAL AND ECONOMIC ISSUES 199 (2d ed. 2010) ("Most overcharge models are predicated on determining the prices and quantities of the relevant products that would have prevailed but for the alleged anticompetitive behavior, and comparing them to the actual prices and quantities purchased.").

\textsuperscript{71} See Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc. (\textit{Hess I}), 424 F.3d 363, 374 (3d Cir. 2005) ("A court might potentially use a lost profits measure of damages, as '[t]he Supreme Court has not explicitly held that any particular measure of damages is required or precluded." (alteration in original) (citations omitted) (quoting ABA SECTION OF ANTITRUST LAW, supra note 70, at 184)). On further appeal, the Third Circuit continued to stick with this rule. See Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc. (\textit{Hess II}), 602 F.3d 237 (3d Cir. 2010) (noting that although lost profits was not the preferred measure of damages, "\textit{Hess I} admittedly did not categorically bar lost profits damages in this circuit"). To see this in the case law, compare \textit{Chattanooga Foundry \\& Pipe Works v. Atlanta}, 203 U.S. 390 (1906) (allowing overcharge as a proper measure of damages for injury suffered as a consequence of supracompetitive pricing), with \textit{Eastman Kodak Co. of N.Y. v. S. Photo Materials Co.}, 273 U.S. 359, 376 (1927) ("The plaintiff's claim was that under these circumstances it was entitled to recover... the loss of profits which it would have realized had it been able to continue the purchase of defendant's goods [at a retailer's discount].").

\textsuperscript{72} See Chattanooga, 203 U.S. 390.

\textsuperscript{73} See id. at 396 (affirming damages based on "the difference between the price paid and the market or fair price that the city would have had to pay under natural conditions had the combination been out of the way, together with an attorney's fee"); see also Thomsen v. Casyer, 243 U.S. 66, 88 (1917) ("The plaintiffs alleged a charge over a reasonable rate and the amount of it. If the charge be true that more than a reasonable rate was secured by the combination, the excess over what was reasonable was an element of injury.").

\textsuperscript{74} See Jeffrey L. Harrison, The Lost Profits Measure of Damages in Price Enhancement Cases, 64 MINN. L. REV. 751, 760 (1980) ("Unlike Chattanooga Foundry, many price enhancement cases involve plaintiffs whose sole purpose in purchasing the illegally priced good is to process and resell it at a profit. In such cases, the theoretically correct measure of compensatory damages is lost profits since this measure is based on the actual injury sustained by the plaintiff.").
tent that it is deprived of its potential profit. Thus, the argument goes, damages ought to be construed accordingly.\textsuperscript{75}

The continued scholarly debate over the question of overcharge versus lost profits has highlighted additional advantages and disadvantages. On the one hand, it is often acknowledged that lost profits is a more accurate measure of the actual injury.\textsuperscript{76} Lost profits is thus more consistent with the damage award stated in section four of the Clayton Act, allowing a successful plaintiff to "recover threefold the damages by him sustained."\textsuperscript{77} However, the theoretical superiority of the lost profits method in claims based on supracompetitive prices has been generally overshadowed by other practical concerns. One is that calculating lost profits proves to be an incredibly complex calculation that requires many assumptions to be made about the plaintiff, the defendant, the markets in which they operate, and other related and uncertain future conditions.\textsuperscript{78} For that reason, damage claims raise the concern of being excessively speculative and lacking in proof.\textsuperscript{79}

A closely related concern is that of judicial efficiency: namely, that allowing proof of damages based on lost profits will create an excessively complex problem for a busy district court.\textsuperscript{80} In addition, Judge Easterbrook of the Seventh Circuit has pointed out that lost profits is a problematic measurement of damages since lost profits can also result from legitimate, and often desirable, increases in competition in a given market.\textsuperscript{81} Therefore, promising successful plaintiffs awards based on lost profits may encourage lawsuits against competitors who have actually made conditions better, rather than worse, for consumers.\textsuperscript{82}

\textsuperscript{75} See id. at 760–61.

\textsuperscript{76} See id. at 753; see also AREEDA ET AL., supra note 66, \$ 395b, at 383 ("In spite of the (arguably) theoretical superiority of lost profits as a measure of damages in a price enhancement case, nearly all plaintiffs claim damages on the basis of an overcharge calculation."). For further discussion, see Paul McDonald & Daniel J. Murphy, Recovery of Lost Profits Damages: All Is Not Lost, 24 Me. B.J. 152 (2009), regarding the uses of lost profits as a measure of damages and how to calculate them with a focus on local state law.


\textsuperscript{79} See id. ("Overcharge damages, for example, were recognized by the Supreme Court primarily because of the difficulty of proving lost profits in price-fixing cases. Rather than require the complex netting associated with lost profits, and thus practically deny recovery, the Court permitted plaintiffs to prove damages by showing a price enhancement.").

\textsuperscript{80} See Hess I, 424 F.3d 363, 374–75 (3d Cir. 2005) (noting the difficulty of calculating lost profits).

\textsuperscript{81} See Frank H. Easterbrook, Treble What?, 55 ANTITRUST L.J. 95, 100 (1986) ("The lure of damages for lost profits induces firms to make arguments that will injure rather than protect consumers. Profits get lost primarily from hard competition or from the elimination of monopoly... To allow suits for lost profits is largely to reward the victims of competition while ignoring the interests of the consumers the competition is supposed to protect.").

\textsuperscript{82} See id.
In weighing the merits of these approaches, courts have generally preferred to use overcharge as a measure of damages, even where the plaintiff was a for-profit enterprise, and even where it managed to pass on some of its costs to consumers. In addition to the practical benefits of the overcharge method described above, allowing plaintiffs to recover full overcharge is consistent with, and practically required by, the Supreme Court's continued adherence to the indirect purchaser rule in antitrust cases. Simply put, if only the direct purchaser has standing to sue the defendant, that lawsuit ought to provide a way to extract all the unjust enrichment that the defendant received from his illegal activity.

In terms of computation, the goal of overcharge is to compare the actual price to the price in a hypothetical but-for world where the defendant lacked monopoly power. The key is to determine, based on sound economic reasoning, what the price might look like in that but-for world. Four methods are commonly utilized by plaintiffs and have been accepted in federal courts to assess this hypothetical base price. These methods include: the yardstick method, the before-and-after method, the yardstick method, the before-and-after method, and the yardstick method.
the market-share method,90 and the going-concern method.91 All of these methods typically require the use of expert testimony by the plaintiff, and all tend to involve complex mathematical and economic models.92 It is the job of the trial court to ensure that all of this computation is based on legitimate and judicially acceptable scientific bases.93

II. SUPRACOMPETITIVE PRICING IN TWO-SIDED MARKETS: AN ILLUSTRATIVE EXAMPLE

To better illustrate the issue of damage calculations in two-sided markets, this Note will consider a recent antitrust case brought in the district court for the Northern District of California against eBay,94 an online market auction forum. Companies like eBay have become particularly common in the last decade, as online two-sided-market-makers have been able to utilize the growing home use of the internet to appeal to ever larger markets of consumers.95 Sites like eBay, Amazon, Craigslist and others have taken advantage of the large scale of indirect network effects created by the internet to enable two groups of users, usually buyers and sellers, to transact across a common platform and

estimates damages using its performance before or after the antitrust violation to infer how it would have performed during the damage period.

90 See id. at 95 (“Under this approach, plaintiff computes damages on the basis of lost market share resulting from defendant’s antitrust violation.”).

91 See id. at 98 (explaining that this measure is used when a plaintiff was totally driven out of business by defendant’s illegal behavior and it measures “what the injured business was worth to a reasonable buyer before sustaining injury from an antitrust violation”).

92 For a survey of some of the more common mathematical and economic models used to calculate prices in but-for situations, see ABA SECTION OF ANTITRUST LAW, supra note 70, at 89–115 (discussing economic and financial concepts). It has also been suggested that different models should be adopted on a case by case basis to arrive at the fairest damage calculation in a particular case. See Note, Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business, 80 HARV. L. REV. 1566, 1586 (1967) (“When the court can judge that a particular measure and specific means of computation would provide the most accurate result in a given case, the jury should be so instructed.”)

93 See Molyneaux, supra note 87, at 87 (“[T]he trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.” (quoting Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589 (1993))).


thereby access large markets on the other side.\textsuperscript{96}

The rise of these and other internet-based businesses has led to a variety of antitrust lawsuits against these sites alleging various forms of anticompetitive behaviors.\textsuperscript{97} With respect to these claims, consumers on one or both sides of a two-sided market may allege that they have been forced to incur higher expenses by a market-maker because it has enjoyed and abused monopoly power or has engaged in price fixing.\textsuperscript{98} This was, in fact, one of the allegations made in the eBay lawsuit by a group of sellers claiming to have been overcharged by eBay because the company enjoyed a monopoly in the online auction market.\textsuperscript{99} The plaintiffs alleged, among other things, that through a series of acquisitions and agreements, eBay was guilty, under section two of the Sherman Act, of abuse of monopoly power and monopoly maintenance in the online payment systems market, as well as in the online auction market.\textsuperscript{100}

eBay's business model is, in fact, fairly typical of an internet-based market-maker.\textsuperscript{101} It subsidizes buyers by allowing them to transact on its site for free, while generating revenue by charging sellers a "take rate."\textsuperscript{102} The take rate charged to a seller is calculated based on the features that sellers use in their presentations, the volume of goods posted, the volume of goods sold, and a rate schedule, which consists of a percent of sales revenue that sellers pay to eBay.\textsuperscript{103} The plaintiffs alleged that eBay used its monopoly power as an online auction market to

\textsuperscript{96} eBay, for example, has grown from a meeting place for people who wanted to buy and sell Pez dispensers to a massive meeting place for those looking to buy and sell a wide variety of goods. See Evans, supra note 25, at 334.

\textsuperscript{97} For example, suits have been brought against eBay alleging tying, against Apple alleging that its music player did not support competing formats, and against Google alleging various illegal acquisitions. For these and other examples as well as information on the particularly large market shares held by small numbers of online firms, see Evans, supra note 95, at 285–87; and Evans & Schmalensee, supra note 3, at 681–87. For a recent antitrust inquiry focused on Google, see James Kanter & Eric Pfanner, Google Faces Antitrust Inquiry in Europe, N.Y. TIMES, Dec. 1, 2010, at B1.

\textsuperscript{98} See Evans, supra note 25, at 355 ("[F]irms in concentrated multi-sided markets have the same opportunities as firms in concentrated single-sided markets to establish price levels that permit them to earn supra-competitive profits—i.e., profits that exceed those necessary to attract capital to the industry after accounting for risk.").

\textsuperscript{99} See In re Ebay Seller Antitrust Litig., 2010 WL 760433, at *1.

\textsuperscript{100} See id.; see also Sherman Act, ch. 647, § 2, 26 Stat. 209, 209 (1890) (codified as amended at 15 U.S.C. § 2 (2006)) (making it illegal to "monopolize, or attempt to monopolize... any part of the trade or commerce among the several States").

\textsuperscript{101} See Evans, supra note 25, at 360 ("eBay has made significant investments in developing buyer communities even though it realizes most of its revenues from sellers. It likely charges sellers more than the marginal cost of serving them.").

\textsuperscript{102} In re Ebay Seller Antitrust Litig., 2010 WL 760433, at *13. This is presumably because buyers have a higher degree of demand elasticity inasmuch as it is particularly easy for them to shop around online and it makes little difference to them what website they ultimately purchase through. See supra note 44.

\textsuperscript{103} See In re Ebay Seller Antitrust Litig., 2010 WL 760433, at *13.
charge sellers higher take rates than it would have been able to charge had it not monopolized the market. 104 eBay countered, in part, that its operation as a firm in a two-sided market justified the manner in which it set its fees. 105

Ultimately, the court granted defendant eBay’s motion for summary judgment based on a deficiency in the plaintiff’s model of damages. 106 However, the court did not reach the question of whether overcharge or lost profits was the appropriate measure of damages in an antitrust case that involved a two-sided market. 107 This was an issue that was addressed in the parties’ briefs, 108 and the court acknowledged that no case was brought to its attention that directly addressed the question. 109 Nonetheless, because of the ultimate disposition of the case, this issue remained unresolved. The eBay decision thus presents a helpful and concrete model to utilize in assessing what the proper measure of damages should be in an antitrust suit based on supracompetitive pricing in a two-sided market.

104 See Reply in Support of Plaintiffs’ Motion for Class Certification, In re Ebay Seller Antitrust Litig., 2010 WL 760433 (N.D. Cal. Mar. 4, 2010) (No. 07-CV-01882-JF), 2009 WL 5001626 [hereinafter Seller’s Reply] (including Plaintiffs’ claim that their models will “demonstrate the [lower] rate card eBay likely would have been able to charge online auction sellers absent employing conduct the jury determines to be anticompetitive”).

105 See Reply in Support of Defendant Ebay Inc.’s Motion for Summary Judgment, In re Ebay Seller Antitrust Litig., 2010 WL 760433 (N.D. Cal. Mar. 4, 2010) (07-CV-101882-JF), 2009 WL 5001625 [hereinafter eBay’s Reply] (explaining that rates were justified because “in a two-sided market such as eBay’s seller platform, changes to eBay’s fee structure affect more than just the charge imposed on its customers; there is no dispute that the level of eBay’s fees determines what goods are listed, how quickly they sell and at what price they sell”).


107 See id. at *10–11 (“As a preliminary matter, the parties disagree over the appropriate measure of injury in a two-sided market such as eBay’s. Consistent with their theory of recovery, Plaintiffs contend that the appropriate measure of damage is the alleged overcharge itself . . . . eBay maintains that overcharge is not the appropriate measure of injury and that the Court should look instead to seller profit . . . . Ultimately, however, this Court need not decide which measure of damages is appropriate here . . . .”).

108 See Seller’s Reply, supra note 104 (“Of these two theories of damages, courts and economic theory recognize that the standard method of measuring antitrust damages is overcharges and not lost profits.”); eBay’s Reply, supra note 105 (“[The plaintiffs] point out that overcharges have long been used to assess impact in antitrust cases, citing among other cases Howard Hess Dental Laboratories Inc. v. Dentsply International . . . and Chattanooga Foundry & Pipe Works v. Atlanta . . . . But Dentsply and Chattanooga Foundry differ in a fundamental way from this case, and are therefore inapposite. Those cases did not arise in the context of a two-sided platform, which, as both sides to this case agree, complicates a straight overcharge analysis. This is so because in a two-sided market such as eBay’s seller platform, changes to eBay’s fee structure affect more than just the charge imposed on its customers.”).

109 See In re Ebay Seller Antitrust Litig., 2010 WL 760433, at *11 (“[T]here is no case law that addresses directly the issue presented here.”).
III. ANALYSIS OF ANTITRUST DAMAGE CALCULATION IN TWO-SIDED MARKETS

Despite the fact that the economics of two-sided markets differ somewhat from those of one-sided markets, a plaintiff who can successfully prove antitrust injury through the payment of an overcharge should be compensated based on the amount of that overcharge. This is consistent with the general tendency of the law to award the victim of an antitrust overcharge damages in the amount of the overcharge with respect to one-sided markets. Furthermore, many of the same rationales used to support overcharge damages in one-sided markets apply equally to two-sided ones. This is true even where a plaintiff has not suffered damages in the full amount of the overcharge—for example, by passing along some of the overcharge to customers, thereby diminishing lost profits.

However, in calculating the amount of the overcharge due to victims of supracompetitive pricing in two-sided markets, the unique economics applicable to two-sided markets must be taken into account in order to avoid a windfall to the plaintiff. Straightforward applications of the overcharge methods commonly used to compute damages can lead to unfairness if they fail to take into account what the market would realistically look like without the monopoly size and unique business capabilities of the market-maker. This problem can be corrected, though, by allowing a defendant to present evidence to offset the damages. Specifically, the defendant ought to be able to ensure that such overcharge models applied in two-sided markets account for the two-sided nature of pricing structures, as well as the loss of network effects and market efficiencies that would not exist if the defendant did not conduct business as a monopoly. Such an adjustment takes the realities of two-sided markets into account without transforming the overcharge remedy into lost profits. The remaining overcharge paid by the plaintiff is the proper antitrust injury that should be assessed, trebled, and awarded.

A. Overcharge is the Proper Measure of Damages in a Two-Sided Market

110 See infra Part III.A.
111 See supra Part I.B.
112 See infra Part III.A.
113 See infra Part III.B.
114 See infra Part III.B.
The use of overcharge as the appropriate measure of damages in antitrust cases in which the plaintiff alleges supra-competitive pricing brought in a two-sided market, while not confirmed by the federal courts, nevertheless finds support in the case law. Price overcharge would also be a familiar methodology to compute damages in two-sided markets because it would be similar to the calculation already in use in one-sided markets before allowing the defendant's offset opportunities. Also, most of the justifications for using overcharge put forth in one-sided markets apply in two-sided markets as well.

One of the central justifications for using overcharge as a measure of damages in cases of monopolistic pricing is that a measure based on lost profits leads to excessively speculative results. This uncertainty is explained in one-sided markets by the fact that any method of calculation used to ascertain lost profits makes assumptions about the future of the plaintiff, its suppliers, and its customers, that cannot be tested. A concern for speculative damages would thus apply with even more force in the case of two-sided markets. Although, in a one-sided market, assumptions must be made about the plaintiff and the parties with whom it interacts in order to arrive at a lost profits calculation, these assumptions are mostly limited to the manner in which each party will interact with the plaintiff, and the assumptions often track a single line of production or distribution. By contrast, in a two-sided market, assessing lost profits involves assumptions not only about how third parties would have interacted with the plaintiff in the future, but also how the parties on the other side of the two-sided market would have interacted with the plaintiff in light of the way changes made by the defendant market-maker also affected both parties. This adds an additional layer of as-

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115 In In re Visa Check/MasterMoney Antitrust Litigation, while not deciding the issue of damage calculations, the court noted that plaintiff's expert witness' opinion on the proper method of damage calculation in a tying case that involved supra-competitive interchange fees in the two-sided market of payment card systems was a sufficient model for damages at the class certification stage. 280 F.3d 124, 133–34 (2d Cir. 2001) ("[Plaintiff's expert] ... proffered the following formula for calculating each class member's damages: In the absence of the tying arrangement, the interchange rates for Visa Check and MasterMoney would have been comparable to that of on-line debit cards, and therefore, an individual class member's damages could be calculated by measuring the overcharge it had paid on all of the Visa Check and MasterMoney transactions it accepted." (emphasis added)).

116 See supra notes 87–90 and accompanying text.

117 See Blair & Page, supra note 78 (expressing concern that damages based on lost profit involve too many unpredictable variables and, hence, lead to claims for spurious damages).

118 See id. at 435. ("Because of the multitude of potential influences on business conditions, a plaintiff cannot prove what would have happened with the same degree of certainty that it can prove what did occur.").

119 For example, in Chattanooga Foundry & Pipe Works v. Atlanta, damages arose after the City of Atlanta had been overcharged by a piping supplier for the city's water delivery system. 203 U.S. 390, 395–96 (1906).

120 This is because pricing in two-sided markets depends not only on the relationship between the one buyer and seller, but also on "the responsiveness of demand to changes in price on side A,
sumptions to a lost profits calculation and thus adds to the speculative nature of any measure of lost profits damages.

Furthermore, because of the complications involved in calculating lost profits, allowing lost profits to serve as a proxy for damages in two-sided markets would create excessive complications for district courts in the form of more detailed multivariate economic models and an additional need for experts.\textsuperscript{121} Lost profits would, therefore, be a less efficient method of damage calculation compared to the relatively simple overcharge calculation. Moreover, considering the immense amount of time and resources that are already spent in the earlier stages of antitrust litigation,\textsuperscript{122} judicial economy would be greatly increased by this simplification.

In the eBay case, for example, ascertaining lost profits based on the sellers’ allegations would involve attempting to figure out multiple variables. These include how sellers would react to eBay if faced with a decreased rate schedule; how buyers would then respond to eBay and to sellers after the decreased rate schedule; and, lastly, the effect that these two responses would have on the total price and quantity of transactions conducted between buyers and sellers on eBay.\textsuperscript{123} At least some of this guesswork can be avoided by calculating damages based on the amount of overcharge since the behavior of the buyers will not have to be factored into the equation and the analysis can focus on the transaction between eBay and its sellers.

Furthermore, as Judge Easterbrook points out, awarding lost profits to plaintiffs in one-sided markets will sometimes lead plaintiffs to make claims that are at odds with the interests of consumers—the primary intended beneficiaries of the antitrust laws in the first place.\textsuperscript{124} Although the analysis is not precisely the same, Judge Easterbrook’s concerns apply in two-sided markets as well. Applying this to the eBay example, lost profits by sellers are consistent with a variety of events. Sellers may experience lost profits because buyers’ behaviors have resulted in lower consumption; because higher costs imposed by elevated fees from eBay the responsiveness of demand on side B to changes in quality-adjusted sales on side A, and changes in variable costs to both sides."\textsuperscript{125} Evans, \textit{supra} note 25, at 339–40.

\textsuperscript{121} It is well known that increased complexity in cases has led to district courts’ greater dependence on expert testimony. See John E. Lopatka & William H. Page, \textit{Economic Authority and the Limits of Expertise in Antitrust Cases}, 90 \textit{CORNELL L. REV.} 617, 617 (2005) ("In antitrust litigation, the factual complexity and economic nature of the issues involved require the presentation of economic expert testimony in all but a few cases.").

\textsuperscript{122} See \textit{MANUAL FOR COMPLEX LITIGATION} § 30 (Fed. Judicial Ctr. eds., 4th ed. 2004) ("Antitrust litigation can . . . involve voluminous documentary and testimonial evidence, extensive discovery, complicated legal, factual, and technical (particularly economic) questions, numerous parties and attorneys, and substantial sums of money . . . . Antitrust trials usually are long, and there often are controversies over settlements and attorney fees.").

\textsuperscript{123} See eBay’s Reply, \textit{supra} note 105.

\textsuperscript{124} See Easterbrook, \textit{supra} note 81 (arguing against the use of lost profits as a measure of damages because of its tendency to lead to antitrust claims that are themselves anticompetitive).
have led to restricted supply; because lower rates by eBay have attracted more sellers; or because competitors to eBay have entered the market and allowed for generally increased seller and buyer activity in online auction market platforms. In either of the latter two scenarios, sellers will face decreased profits even though the overall market has generally been made more competitive, not less, from the perspective of the consumer. Allowing awards for lost profits may, in the case of market-makers, allow plaintiffs suing on one side of the market to show damages in the form of decreased profits even where those damages result, in fact, from increased competition. Thus damage calculations based on lost profits are not always consistent with consumer protection. 125

Moreover, while one purpose of antitrust damages is to compensate the plaintiff, a substantial and parallel theme in antitrust damages is to deter anticompetitive behavior by the monopolist. 126 This is evidenced by the trebling of damages in antitrust cases 127 and the somewhat relaxed standards of proof necessary to show damages. 128 In addition, because anticompetitive behavior is often easy to hide and hard to catch, the deterrence element of an antitrust award is particularly important. 129 The deterrence component further supports the argument for overcharge damages since it allows the successful plaintiff to recover all potential damages, without making the plaintiff account for exact-

125 While there is a general debate about whether the federal antitrust laws are primarily about protecting consumers or promoting efficiency, see, e.g., John B. Kirkwood & Robert H. Lande, The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency, 84 NOTRE DAME L. REV. 191 (2008), this approach makes consumer welfare a top priority while also maximizing market efficiencies.

126 See supra note 58 and accompanying text; see also Blue Shield of Va. v. McCready, 457 U.S. 465, 472 (1982) (“[I]n enacting § 4 [of the Clayton Act] Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations.”).

127 See Cavanagh, supra note 56, at 633 (“[M]andatory trebling serves to deter antitrust violations.”).

128 Relaxation of standards for damages is a well established principle in antitrust cases. See Locklin v. Day-Glo Color Corp., 429 F.2d 873, 879–80 (7th Cir. 1970) (“It must nevertheless be kept in mind that a treble damage plaintiff seeking recovery for market exclusion cannot provide detailed, concrete, and precise proof. . . . The fact finder may act on probability and inference. Any other rule would only induce the wrongdoer to inflict more grievous injury, thus immunizing himself from liability by causing the amount of damages to be uncertain . . . .” (citations omitted) (citing Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969); and Bigelow v. R.K.O. Radio Pictures, Inc., 327 U.S. 251, 264 (1946)); see also 54 AM. JUR. 2D Monopolies and Restraints of Trade § 586 (2011) (“The proof of damages which is required in antitrust suits is less than that required in other civil actions. Moreover, an antitrust plaintiff’s burden of establishing the amount of damage is less severe than its burden of proving the fact of the damage, and may consist of indirect proof, including estimates based on assumptions.”). AR EEDA ET AL., supra note 66, ¶ 392, at 332 (“When it comes to the amount of the damage, however, the burden of proof is somewhat relaxed.”).

129 See Cavanagh, supra note 56, at 633 (“Because many antitrust violations are concealable and hence difficult to detect, the benefits from engaging in illegal conduct are potentially enormous.”).
ly which portion of the damages resulted in lost profit. Moreover, allowing overcharge damages against a market-maker, just as against a supplier, ensures that a successful plaintiff will recover the full amount of harm that the defendant inflicted, thus giving the plaintiff full incentive to act as the "mini-attorney general" and prosecute antitrust violations. This is particularly true in a system of private enforcement, where plaintiffs are in the best position to know whether and by how much they were overcharged in the first place.

Similarly, awarding overcharge damages encourages would-be plaintiffs to sue, whereas lost profits damages might have to be split up among a number of plaintiffs so large that it would not be worth their costs and efforts to bring suit. This is especially relevant in the course of complex business litigation. Instead, antitrust law looks to the direct damage caused by the defendant—the overcharge—rather than to the diluted downstream effects, to best incentivize private enforcement of the antitrust laws.

In addition, computation of overcharge damages can be accomplished by straightforwardly importing some of the methodologies that courts already use in one-sided markets. For instance, the yardstick method of proving damages may be available if a similar firm can be identified that also operates in a two-sided market. If no suitable yardstick can be found, the before-and-after-approach will also provide a way to determine the amount of the overcharge by comparing the pricing structure before and after any alleged anticompetitive behavior took place.

130 See POSNER & EASTERBROOK, supra note 66, at 549-50 (suggesting that, in a hypothetical world where monopolists are always apprehended and where the legal process is costless, damages based on overcharge would accurately capture the monopolist's profit, and hence be a suitable damage principle under the "deterrence model").

131 See Cavanagh, supra note 57; supra text accompanying note 57 (discussing the incentives of private parties to enforce the antitrust laws).

132 See Clare Deffense, Comment, A Farewell to Arms: The Implementation of a Policy-Based Standing Analysis in Antitrust Treble Damages Actions, 72 CAL. L. REV. 437, 470 (1984) ("This plaintiff plays an especially important role in promoting compliance with the antitrust laws because it is often in an excellent position to observe illegal conduct in progress.").

133 This concern can be compared to that voiced by the Supreme Court in rejecting the pass-on defense to antitrust claims of monopolistic pricing in Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 494 (1968) ("In addition, if buyers are subjected to the passing-on defense, those who buy from them would also have to meet the challenge that they passed on the higher price to their customers. These ultimate consumers, in today's case the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them.").

134 See supra note 122.

135 Despite the fact that "a yardstick firm may be especially hard to find" in the context of a single firm monopoly with a large scope, ABA SECTION OF ANTITRUST LAW, supra note 70, at 240, with the rise of the internet this problem may be slightly alleviated as online market-makers enter more comparable two-sided markets.

136 See supra notes 87-89 and accompanying text.
Since many two-sided markets are particularly conducive to a small number of large firms, the before-and-after approach may be the most useful methodology due to a lack of comparable yardsticks.

B. Permissible Offsets to Overcharge Damages in Two-Sided Markets

Using economic analysis to fine-tune the application of the antitrust laws is nothing new. In the realm of two-sided markets, such economic analysis has helped scholars to refine the antitrust concepts of market definition, market power, predatory pricing, efficiencies, price fixing, tying, mergers, and antitrust injury. The remainder of this Note will focus on how economic analysis can be used to fine-tune damage calculations in cases in two-sided markets that in-

137 See Evans, supra note 25, at 354 (“In practice, a relatively small number of firms tend to compete in multi-sided platform markets because of indirect network effects on the demand side and fixed costs of establishing platforms.”).
138 This was, basically, the methodology used in the eBay case by the sellers in order to demonstrate, through regression models, how eBay’s “take rate” changed in relation to “the occurrence of each alleged anti-competitive act.” Seller’s Reply, supra note 104.
139 It is generally accepted in the realm of antitrust law that the field of economics can, and should, be used to develop and shape the law. For a discussion of the role that economic studies play in shaping antitrust law, see John E. Loptka & William H. Page, Economic Authority and the Limits of Expertise in Antitrust Cases, in THE ECONOMICS OF ANTITRUST INJURY AND FIRM-SPECIFIC DAMAGES 195, 195 (Kevin S. Marshall ed., 2007) (“Although some have suggested that interdisciplinary approaches have made legal scholarship generally less useful to courts, the use of economics in modern antitrust scholarship has had the opposite effect. Economic authority largely drawn from that scholarship not provides the conceptual basis for many judicial decisions in antitrust cases . . . . Judge Richard Posner has gone so far as to suggest that ‘antitrust law has become a branch of applies economics.’”).
140 See William H. Rooney & David K. Park, The Two-Sided Market Literature Enriches Traditional Antitrust Analysis, 3 COMPETITION POL’Y INT’L 211, 213 (2007) (“Capturing competitive effects in a dynamic analytical paradigm also has important implications for market definition.”); see also Evans, supra note 3, at 10–18.
141 See Evans, supra note 25, at 356–62; see also Evans & Noel, supra note 53.
142 See Evans, supra note 25, at 366–70.
143 See id. at 373–74.
144 See Klein et al., supra note 43, at 591–92.
145 See Bomse & Westrich, supra note 50, at 661–62 (“Does all of this mean that there can never be a damage claim in a two-sided market tying case? Not necessarily. The key is to focus on the actual source of antitrust concern. In tying cases, that ‘vice’ typically is leverage, i.e., using power in one market to gain market power elsewhere by foreclosing competition.”).
147 See Bomse & Westrich, supra note 50, at 647–53 (“Antitrust injury is not ordinarily a significant issue in buyer, as opposed to competitor, cases because increased prices or restricted output are generally the essence of the buyer-plaintiff’s damage claim, and they are the very injuries with which antitrust law is most directly concerned. However, in cases involving two-sided markets, which have two or more distinct groups of customers, the antitrust injury principle may play a more important role.”).
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volve supracompetitive pricing.
While this Note argues that overcharge is the correct measure of damages for supracompetitive pricing in two-sided markets, the final calculation must allow for certain offsets based on the unique economics of two-sided markets. At trial, once a plaintiff has fully satisfied its burden of showing overcharge under section two of the Sherman Act, the defendant should be allowed to show that, because of the nature of the two-sided market, some portion of that overcharge cannot be attributed to anticompetitive conduct. The burden is squarely on the defendant at this second stage to justify an offset of the damages by raising the issue of an applicable offset, and persuading the trier of fact of its legitimacy. The defendant can point to two elements, efficiencies and pricing structures, that can justify partial offsets of damages in antitrust suits in two-sided markets.

1. Offsets Based on Efficiency

First, there is, to some degree, a fundamental tension between network effects as an inherent quality of two-sided markets and the antitrust laws in general. Simply put, while antitrust law cautions against allowing business entities to grow too large through the use of unfair methods of competition, in two-sided markets, the large size of a mar-

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148 The argument presented in this subpart is essentially a specific application of the general concept of disaggregation. Under disaggregation principles, an antitrust plaintiff may only recover damages for portions of harm caused by antitrust violation and not for any suffering that can be attributed to other, legal factors. See City of Vernon v. S. Cal. Edison Co., 955 F.2d 1361, 1373 (9th Cir. 1992) (affirming an award of summary judgment because "[the] plaintiff insists that all of [the defendant's] acts contributed to the damage figure, but the district court and we have already found that many of those acts were proper"). Isaksen v. Vt. Castings, Inc., 825 F.2d 1158, 1165 (7th Cir. 1987) ("We do not allow antitrust plaintiffs or any other plaintiffs to obtain damage awards without proving what compensable damages were actually suffered as a result of the defendant's unlawful conduct."); Litton Sys., Inc. v. Am. Tel. & Tel. Co., 700 F.2d 785, 825 (2d Cir. 1983) ("The argument, stated more simply, is that Hexter could not separate the lost profits related to lawful activity from the lost profits related to the unlawful interface and practices associated therewith. AT&T correctly points out that courts have held that damage studies are inadequate when only some of the conduct complained of is found to be wrongful and the damage study cannot be disaggregated.").

149 Procedurally, it makes the most sense to put the burden of proving any permissible offsets on the defendant because the defendant is the one who has committed the wrong and because the defendant will almost always be in a better position to show what portion of the damages resulted from legitimate business activity. Putting the burden of production and persuasion on the defendant in these cases is also consistent with the practice of courts to not require the plaintiff to be the one to prove disaggregation of damages. See MCI Commc'ns Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081, 1163 (7th Cir. 1983) (quoting the "rule that a plaintiff need not disaggregate damages among those acts found to be unlawful").

150 See Rysman, supra note 3, at 137 ("Two-sided markets typically have network effects and as such are likely to tip toward a single dominant platform. As a result, it is not surprising that these markets are of interest to antitrust authorities.")
ket-maker may provide for efficiencies and cost savings. In fact, because the large size of a successful market-maker allows users on either side of the market to access a broader network on the other side, one would expect a rational consumer to be willing to pay more for that opportunity in the form of an increased fee. The consumer is merely paying for the right to access a system with greater indirect network effects and, hence, efficiencies. For example, men at the Japanese dating bar would be acting rationally in agreeing to pay a somewhat higher

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151 See Evans & Noel, supra note 53, at 686 ("[Two-sided] platforms with more customers in each group are more valuable to the other group."). The idea that efficiencies can and should be used to offset the normal antitrust consequence of increased market power is an argument that has been raised for awhile regarding other antitrust claims, and many of the arguments made in those contexts can carry over to claims involving supra-competitive pricing in two-sided markets. For a discussion of the efficiency defense in the context of horizontal mergers, see, for example, Paul Rogers, The Limited Case for an Efficiency Defense in Horizontal Mergers, 58 TUL. L. REV. 503 (1983). For a classic argument for allowing defenses based on efficiencies in almost all antitrust contexts, see Robert B. Bork, The Antitrust Paradox: A Policy at War with Itself (1978).

152 See Evans, supra note 25, at 376-78 (making the observation that, based upon this reasoning, regulators should focus on both "the efficiencies from the merger as well as its prospect for increasing prices" in considering, for example, a merger in a two-sided market). This balancing test is a natural outgrowth of the realization that such a merger simultaneously can create convenience for consumers while increasing market power. One particular study referred to by Evans regarding mergers affecting the yellow pages (a two-sided market featuring advertisers and phone call makers) and attempting to balance efficiencies to consumers with higher costs, see Marc Rysman, Competition Between Networks: A Study of the Market for Yellow Pages, 71 REV. ECON. STUD. 483 (2004), concluded that "welfare losses from price increases swamp the welfare gains from the additional indirect network effects on both market sides." Evans, supra note 25, at 376-78.

153 This damage offset is particularly reasonable to the extent that a court would analyze a claim of enhanced pricing in a two-sided market under a rule of reason approach rather than a per se rule of illegality concerning supra-competitive pricing. Certain antitrust behavior is considered per se illegal when it is "manifestly anticompetitive" or "would always or almost always tend to restrict competition." Rossi v. Standard Roofing, Inc., 156 F.3d 452, 461 (3d Cir. 1998) (quoting Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988)). Horizontal price fixing, for example, has generally been considered per se illegal. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 (1940). Nonetheless one exception seems to have been interchange fees set by Visa and MasterCard. See Klein et al., supra note 43, at 593 n.40 ("[C]ourts have looked at this question have concluded that interchange fees should not be considered per se illegal."). A rule of reason standard, by contrast, is employed when conduct is not clearly detrimental and while it can be anticompetitive in some instances, in others it can actually be pro-competitive. See Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886 (2007) ("In its design and function the rule distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest."). Since per se rules are disfavored, unless a court has substantial experience to know that a given practice is always harmful, see id. at 886-87, the rule of reason is the appropriate standard under which to judge general cases involving pricing issues—either supra-competitive pricing or predatory pricing, see Evans, supra note 25, at 366-67 ("Businesses engage in various price and non-price strategies to increase their sales and to decrease their competitors' sales. Courts evaluate these strategies under the rule of reason to determine whether, on balance, they harm consumers and competition."). Thus, just as the nature of the harm needs to be evaluated on a case-by-case basis, the extent of damages should likewise be considered on a case-by-case basis, taking note of the relevant factual circumstances.
entrance fee for bars that attracted many women.154

Furthermore, there is a related efficiency advantage to a large-sized market-maker in that a consumer only needs to expend resources on that particular market-maker, rather than having to spread resources across multiple market-maker platforms.155 For example, with eBay, a seller can post items and maintain an account on a single website, secure in the knowledge that most of the buyers he or she targets will be accessible at that single venue. However, in a but-for scenario where multiple competing internet-auction sites comprise the relevant market, sellers might have to simultaneously maintain multiple accounts to get exposure to the same volume of buyers. In doing so, they would incur additional time and monetary expenditures. Thus, the defendant can rebut full overcharge damages alleged by a plaintiff by showing efficiency gains.

In allowing the defendant to argue for damage offsets based on efficiencies, however, a court must limit the defendant to assumptions about the market consistent with the but-for world advanced by the plaintiff in its overcharge allegations. Otherwise, the defendant might argue that if a proper but-for world can be constructed, it should include even more competitors than plaintiff’s model suggests, thereby permitting the defendant to claim that its monopolistic size created even more efficiency-based savings. Allowing a defendant to argue this would be unreasonable for at least two reasons. First, it would be fundamentally unfair to the plaintiff inasmuch as the entire lawsuit arises out of a claim by the plaintiff that the defendant acted unfairly as compared to a hypothetical world. It would be strange to allow the defendant to then, at this second stage, acknowledge his wrongdoing and contend that the plaintiff did not go far enough in stating the wrongdoing. Second, it would introduce complications and uncertainty into the trial that would further take up the time and resources of the district court to understand a second complicated but-for world analysis.156

2. Offsets Based on Pricing Structure

The second complication of straightforward overcharge analysis arises from the fact that, as previously discussed, market-makers set

154 See supra note 17.
155 General offsets to awards for anticompetitive behavior for efficiency gains have also been positively considered from an economic perspective. See POSNER & Easterbrook, supra note 66, at 550 (“Suppose the monopolist is also more efficient than a competitive firm. . . . We want to deter the monopoly only if the welfare loss is larger than the saving.”).
156 See supra note 92 regarding the complicated mathematical models used to compute antitrust damages.
prices within price structures, rather than classical prices.157 These price structures are usually skewed toward one side of the market, with that side paying more than the other.158 Courts have, at times, ignored the fact that each side’s pricing cannot be examined on its own in light of this subsidizing feature of pricing structures in two-sided markets.159 However, one would nonetheless expect a print advertiser to freely agree to pay a higher fee for advertising if he or she knows that the medium in question is circulated among a larger audience of readers, and that this large circulation is due to the fact that those readers pay much lower fees to access the newspaper’s content.160

157 See supra notes 33–36 and accompanying text.
158 See Bomse & Westrich, supra note 50, at 652–53 (“[I]t is impossible to assess the competitive effects of conduct within a multi-sided market without considering all sides of the market.”); see also id. at 659–60 (noting that in two-sided markets “a buyer on one side may appear to pay an excessive amount when viewed in isolation” but the antitrust inquiry must find that there was an “increase in prices overall” to show damages based on anticompetitive behavior); id. at 645–46 (“However, in cases involving two-sided markets, the analysis is more complicated because courts must consider a second group of customers whose participation was necessary for the transaction to occur. These buyers are not only absent from the suit, but they may have economic interests that are in direct conflict with those of the plaintiff. . . . [T]he differences in pricing strategies between two-sided markets and standard markets affect both liability and damage issues.”).
159 Some commentators have expressly disagreed with this rationale and have contended that courts do and should, in fact, only look at one side of the market in determining antitrust injury. See Constantine et al., supra note 50, at 615 (“Visa’s and MasterCard’s ‘two-sided market’ argument was nothing more than an attempt to distract the court from the powerful antitrust injury narrative in In re Visa Check. This case demonstrates how the elimination of competition on one side of a market can cartelize and subvert competition on the other.”). The authors claim that not only is an offset based on the two-sided nature of the market inappropriate, it has been expressly rejected by the Supreme Court. Id. at 615 & nn.68–69 (“[T]he argument advanced by Visa and MasterCard—that one cannot show antitrust injury by reference to only one side of a two-sided market—has been squarely rejected by the Supreme Court.”); see also Times-Picayune Publ’g Co. v. United States, 345 U.S. 594, 610 (1953) (“Every newspaper is a dual trader in separate though interdependent markets; it sells the paper’s news and advertising content to its readers. . . . This case concerns solely one of these markets. . . . For this reason, dominance in the advertising market, not in readership, must be decisive in gauging the legality of the Company’s unit plan.”). This Note, however, does not posit that antitrust injury never exists on one side of a two-sided market; rather, it asserts that a defendant must at least have the opportunity to show a pricing structure that is built on balancing demand on the two sides based on sound economic reasoning. Moreover, Constantine et al. cite primarily newspaper and cable television cases in support of the argument that courts should stick to a one-side-of-the-market analysis. However, while beyond the scope of this Note, one might argue that courts should be more receptive to the two-sided argument where (1) one side of the market is completely subsidized or (2) the firm in question is a market-maker rather than an audience maker (both of which conditions, for example, existed in the eBay case but not in the Times-Picayune case). See supra notes 27–29 and accompanying text.
160 Attention was focused on this point in Evans et al., supra note 51, at 528. There, the authors note with regard to the Microsoft cases that: In the case of computer operating systems, for instance, no vendor charges applications developers for the right to use the system’s APIs, even though Microsoft, Apple, and other firms devote substantial resources to wooing and informing ISVs [independent software vendors]. Operating system vendors receive almost all their income from end-users, in Microsoft’s case through OEMs [original equipment manufacturers]. . . . The economic literature on two-sided markets makes it clear that there is nothing inherently
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In considering such an offset based on pricing structure, a court must be mindful that it will be difficult, if not impossible, to show that any one pricing structure is perfect. Instead, empirical evidence suggests that in many industries there is a range of reasonable pricing structures. In determining whether a particular defendant’s proposed offset based on pricing structure is legitimate, a court needs to balance the need to allow companies to experiment and innovate with pricing, while at the same time requiring a defendant to show that a pricing structure would be reasonable in light of generally accepted industry-wide practice. Ultimately, a fair test would involve assessing whether such a pricing structure could survive in a fairly competitive market.

The justifications for these offsets manifest themselves most clearly when the attempt is made to uncover monopolistic pricing using a but-for model, where everything is held constant except a firm’s monopolistic power and abuse in price-setting. In the but-for world that would exist in a one-sided market where a defendant lacked monopoly power to set supracompetitive prices, that firm would then be one of many similar firms selling or supplying a common good or service alongside a full market of firms engaging in comparable activity. This inefficient or anticompetitive in this sort of pricing, even if pricing on one side of the market is below the marginal cost incurred there.

Id. Thus, the argument goes, Microsoft’s interactions with programmers need to be considered in light of how Microsoft structures its total pricing to yield maximum demand on both sides of the market. This point was also addressed regarding the antitrust cases brought in the context of payment-card systems. See Klein et al., supra note 43, at 575. There, the authors note regarding the interchange fees set by Visa and MasterCard that:

[Interchange fees are not a measure of payment card system market power. Interchange fees influence relative prices paid by cardholders and merchants, not the total price of a payment card system, that is, the sum of the prices paid by cardholders and merchants. The market power of a payment system determines the ability of the payment system to charge a total price above costs, but has no predictable effect on relative prices. The relative prices paid by cardholders and merchants are determined by two-sided market balancing considerations. Accordingly, the level of interchange fees has no particular relationship to the presence or absence of market power.

Id. Thus, it emerges that by looking at only one side of the market, one misses the total pricing structure being utilized by the market-maker. See Bomse & Westrich, supra note 50, at 653 (“One cannot determine whether a defendant’s prices are predatory by comparing the defendant’s prices on one side of the market to the costs associated with that side of the market. Rather, the relevant question is whether the defendant’s total prices are below the appropriate measure of its costs on both sides of the market.”); Evans, supra note 25, at 367 (“The analyst can mistake competitive for predatory prices when looking at only one side of a multi-sided market.”).

161 See, e.g., Evans, supra note 25, at 327 n.5 (providing evidence that suggests that in Japanese dating bars as well as other bars and dance clubs around the United States, there is a range of reasonable pricing structures charged to male and female patrons to arrive at a desired balance); see also Klein et al., supra note 43, at 600–01 (showing how Visa and MasterCard adopted different viable pricing strategies than American Express even though both operated within a similar two-sided market); id. at 600 n.52 (indicating that even Visa and MasterCard adopted different pricing strategies over time to try and maximize overall demand).

162 Usually, a but-for world aims to make a “comparison of profits, prices and values as affected by the conspiracy, with what they would have been in its absence under freely competitive
multitude of market activity would benefit the consumer because competing firms would have a strong incentive to offer the best possible deals to attract the consumer's business.

In the but-for world of the two-sided market, however, consumers might suffer a degree of economic harm—even if it were offset by economic benefits of competition—if the defendant were forced to compete in a saturated market with similar firms engaging in similar economic activity.\textsuperscript{163} If so, then by awarding the plaintiff overcharge damages derived from the difference between the market-maker's rate and the theoretical rate that would be charged by the market-maker in a but-for world, the plaintiff is receiving a windfall by not having to pay for the benefits and efficiencies of the network effects. Also, the plaintiff would avoid paying for the pricing-structure-subsidization effects from which it may have gained by using the large market-maker. This windfall would then be magnified threefold under the recovery scheme of section four of the Clayton Act.\textsuperscript{164} It is these justifications that warrant using the two step approach of allowing the plaintiff to present a prima facie case of overcharge followed by the defendant's rebuttal based on permissible offsets.

C. \textit{Comparison with Alternative Damage Remedies}

The use of overcharge as a proxy for damages with allowances for offsets is not a mere reversion to lost profits and it is fairer than a solely overcharge-based remedy. The allowance of offsets to an overcharge remedy does not turn overcharge damages back into lost profits because the efficiency and pricing structure considerations outlined above do not involve inquiry into the potential losses that might befall the plaintiff. Thus, they do not implicate the major concerns associated with the lost profits remedy, such as the excessive speculation involved in calculation and the assumptions that need to be made about future conditions.\textsuperscript{165} Instead, the offsets restrict evidence that can be offered by the defendant to the ways in which its pricing has been fair in light of past market considerations. Moreover, the concerns voiced by Judge Easterbrook about the potential of antitrust suits to be antithetical to the concerns of consumers\textsuperscript{166} are not raised by these adjustments, as they are only raised by the defendant after a showing of overcharge and they

\textsuperscript{163} In such a scenario, market-makers would be unable to realize maximal indirect network effects through a pricing structure. \textit{See supra} Part I.A.


\textsuperscript{165} \textit{See} Blair & Page, \textit{supra} note 78.

\textsuperscript{166} \textit{See} \textit{supra} note 81.
would tend to lower rather than raise antitrust verdict amounts.

Furthermore, the approach advocated in this Note is preferable to a straight overcharge assessment, without offset allowances, in the case of two-sided markets. While a straight overcharge might be simpler and more time efficient in a particular case, it is both less efficient from the perspective of the market as a whole, as well as unfair as between the litigating parties. It is less efficient when considered in light of the outcome on the market as a whole because it prevents a market-maker from experimenting with pricing structures that might benefit the consumer base as a whole.\footnote{167} For example, having a pricing structure based on the parties' relative demand elasticity causes each consumer group to pay what the service is actually worth to it, thus maximizing consumer surplus. Moreover, to the extent that plaintiffs actually derive benefit from the efficiencies created by large market-makers, they would be unjustly enriched at the market-maker's expense if allowed to keep the full amount of the overcharge, including the portion arising from legitimate competitive conduct.\footnote{168}

D. Hypothetical Application to the eBay Case

The potential for the application of the two-step approach to damage calculation can be demonstrated with the eBay case. Had the case gone to trial and the question of damages arisen, the fact that eBay operated in a two-sided market could have been more thoroughly explored in the briefs and by the court.\footnote{169} In response to the sellers' demand for overcharge damages, eBay, first, may have been able to argue that the efficiencies created by its size provided the sellers with economic benefit in the form of substantial indirect network effects.\footnote{170} Taking that factor into account would limit damages to increases in seller fees enabled by monopolistic power that exceeded consumer benefit arising from...
access to larger networks.\footnote{171}

Second, eBay employs a classic pricing structure that allows buyers to use its site for free while generating all of its income from sellers.\footnote{172} Given the fact that what eBay truly sells is access to a transaction, having two parties on board is necessary to reach that result. Thus eBay would also be justified in coming forth with economic data that explained its cost and revenue per transaction and justified why a portion of the alleged seller overcharge is in fact subsidization for the buyers.\footnote{173} The remaining overcharge that the sellers could show as attributable to monopolistic pricing would then represent the fair damages for overcharge under the antitrust laws.

CONCLUSION

As applied in two-sided markets, the antitrust laws need to strike a balance. On the one hand, courts must be mindful of the legitimate commercial interest in creating large market forums that generate efficiencies in the form of substantial indirect network effects. Simultaneously, courts cannot lose sight of their role in curbing and controlling the unlawful exercise of disproportionate market power that can be used to harm consumers. To achieve this balance, it is imperative that consumers who have been harmed by a market-maker be given the opportunity to sue and recover the amount of the overcharge that was

\footnote{171} The only related argument that actually appears in the eBay decision and briefs is the one made by eBay that because their charge to sellers, the “take rate,” was based on a variety of factors, and some of them lead to adjustment based on the seller’s independent decisions, plaintiffs could not show what portion of the take rate actually constituted overcharge. \textit{See In re Ebay Seller Antitrust Litig.}, 2010 WL 760433, at *11 (“eBay contends . . . that ‘when an antitrust plaintiff complains about the effects that flow from an allegedly anticompetitive act, injury is determined by the net effect of the act.’”). While this argument was persuasive to the court in determining whether eBay’s take rate could be used to show overcharge, the same general argument supports the notion that if some portion of the high pricing is based on legitimate efficiencies, then that portion should not be included as part of antitrust damages.

\footnote{172} eBay makes all its revenue on the seller side: “The fees eBay charges for all of its services, including the auction format, are listed and published in its ‘rate cards.’ For the online auction format, sellers’ fees depend on the initial listing price for a product (‘insertion fee’) and final value of the item sold (‘final value fee’). Ranges for insertion fees and final value fees are listed on the rate card.” \textit{Id.} at *1. eBay may even lose revenue on buyers in the form of advertising and site maintenance, both of which are intended to attract and retain both buyers and sellers.

\footnote{173} For a similar argument made in the context of antitrust issues surrounding the internet giant Google, see Yuan Ji, \textit{Why the Google Book Search Settlement Should Be Approved: A Response to Antitrust Concerns and Suggestions for Regulation}, 21 ALB. L.J. SCI. & TECH. 231, 249–50 (2011) (“The proper antitrust analysis of a two-sided platform should not focus solely on a single side because the pricing decisions on side A will affect those on side B, which will in turn affect side A again. Because a two-sided platform such as Google needs to bring a critical mass on board from each set of customers, it may undertake pricing strategies that would look odd in a one-sided business with no such interdependent sets of customers.”).
collected from them. By doing this, they vindicate their own rights and promote general efficiency in the market. However, in order to ensure that damage awards are fair, and to deter spurious lawsuits, defendants to such suits ought to be able to show that some portion of an alleged overcharge may actually be the result of a legitimate pricing strategy or even the result of greater overall efficiency in the relevant market. Administered with the careful supervision of district courts, this will ensure that showings of overcharge allow a plaintiff to collect at trial and afford a defendant the opportunity to utilize reliable economic measures to justify that a particular organization and pricing structure was not entirely anticompetitive.

174 See supra Part III.A.
175 See supra Part III.B.