

# Interview with Dr. Alexander Italianer, Director General for Competition, European Commission

**Editor's Note:** Dr. Alexander Italianer was appointed by the European Commission to the post of Director General for Competition on February 18, 2010. In this interview, The Antitrust Source spoke with Dr. Italianer about the many competition law developments that have occurred at the Commission in the short time since he became Director General. These developments include cartel enforcement settlements, revisions to vertical and horizontal block exemption regulations, merger decisions, and public consultations.

Prior to his current appointment, Dr. Italianer served as Deputy Secretary General in charge of the Better Regulation Agenda and Chairman of the European Commission's Impact Assessment Board. He has worked for a number of years in the European Commission's Directorate-General for Economic and Financial Affairs, including from 2002 to 2004 as the Director for International Economic and Financial Affairs. Additionally, he has served in the Cabinets of European Commission President Jacques Santer, Commissioners Günter Verheugen and Pavel Telicka, and most recently, President José Manuel Barroso.

Dr. Italianer holds a graduate degree in econometrics and a Ph.D. in economics from the University of Groningen in the Netherlands. He was a research associate at the Catholic University of Leuven before he joined the Commission in 1985.

This interview was conducted on March 4, 2011, by Henry C. Su for The Antitrust Source. We would like to express our thanks not only to Dr. Italianer for his time and his informative remarks, but also to members of his staff, Ms. Alina Burea, Mr. Holger Dieckmann, and Ms. Chris Retore, for facilitating the interview.

For the convenience of our readers, we have footnoted this interview with references and links to various European Union and Commission documents that provide background and context to the questions that were asked.

**ANTITRUST SOURCE:** Thank you for agreeing to be interviewed today. You've been the Director General for Competition for a little over a year—since February of 2010, but obviously a lot has happened at the Commission in the last twelve months since you took office.

I'd like to begin with the subject of cartel enforcement. Last year the Commission settled the first few cases under the relatively new settlement procedure.<sup>1</sup> There was one involving producers of DRAM chips<sup>2</sup> and another involving producers of animal feed phosphates.<sup>3</sup>

And one of the things that comes out of the settlement procedure is this concept of a hybrid settlement where one or more firms decides not to settle under that procedure and avails itself of the ordinary procedure for resolving the matter. The question we have is does the Commission consider, before deciding to accept a hybrid settlement, whether and the extent to which it is still able to realize savings in its administrative resources devoted to cartel enforcement?

---

<sup>1</sup> Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, 2008 O.J. (C 167) 1, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:167:0001:0006:EN:PDF>; Commission Regulation (EC) No. 622/2008 of 30 June 2008 amending Regulation (EC) No. 773/2004, as regards the conduct of settlement procedures in cartel cases, 2008 O.J. (L 171) 3, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:171:0003:0005:EN:PDF>.

<sup>2</sup> See Press Release, European Comm'n, Dir. Gen. Competition, Antitrust: Commission Fines DRAM Producers € 331 Million for Price Cartel; Reaches First Settlement in a Cartel Case (May 19, 2010), <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/586&format=HTML&aged=0&language=EN&guiLanguage=en>.

<sup>3</sup> See Press Release, European Comm'n, Dir. Gen. Competition, Antitrust: European Commission Fines Animal Feed Phosphates Producers € 175 647 000 for Price-Fixing and Market-Sharing in First "Hybrid" Cartel Settlement Case (July 20, 2010), <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/985&format=HTML&aged=0&language=EN&guiLanguage=en>.



**Dr. Alexander Italianer**

*[W]e make a very clear distinction between the process of setting the fine and the financial capacity of the company to actually pay the fine.*

**DIRECTOR GENERAL ALEXANDER ITALIANER:** Let me say first of all that our experience with the settlement procedure is still relatively young. As you were stating, we have only had two such decisions to date. We are now involved in a couple of other cases as well and hope to further develop our experience.

It's undeniable that settlements will realize savings in administrative resources, not only during the process of getting into the settlement—notably because there will be a shorter and more streamlined statement of objections. But one may also hope and expect that once the settlement decision has been taken, there will be fewer appeals before the court and, of course, this also leads to administrative savings. The resources we save can thus be reallocated to other priority cases. Indeed we saw this in our first two cases, and particularly in the DRAM case. There was no appeal to the court so those savings were clearly realized.

As to your question on hybrid cases, I would like to make a distinction between settlement cases that start off as a full settlement and then develop into a hybrid, which was the case with the *Animal Feed Phosphates* case, and those cases where it is clear from the outset that one of the parties is not willing to settle. For the first type of case, as seen in the *Animal Feed Phosphates* case, we decided once it became clear that one of the parties was not willing to settle, to nevertheless continue because of the significant investment that had already been made in reaching a settlement and also because of the gains to be achieved in terms of the limited number of appeals envisaged. But it's clear that in such a hybrid case there is also a tradeoff because one has to go the ordinary route for the party that is not willing to settle, and that inevitably does not facilitate the process.

When it comes to hybrid cases where from the outset one of the parties is not willing to settle, I would say that normally we would not pursue a settlement route precisely because of the complications envisaged, unless there is a clear indication that overall the gains in terms of public and administrative resources would point to a benefit. But I would say that the starting point would be that normally we would not pursue the settlement route when one or more parties do not want to settle upfront.

**ANTITRUST SOURCE:** Another interesting aspect of the new cartel settlement procedure is how it works in tandem with the applications that financially troubled firms can make to the Commission seeking reductions in the fine amount under point 35 of the 2006 Guidelines on setting fines.<sup>4</sup> And in fact there was one such application granted in the *Animal Feed Phosphates* case.

The question here is does the Commission take into account that the firm has already received a 10 percent fine reduction under the settlement procedure when it's deciding whether to grant an inability to pay application and when arriving at an appropriate percentage reduction?

**DG ITALIANER:** The concrete answer is no because we make a very clear distinction between the process of setting the fine and the financial capacity of the company to actually pay the fine. This means that in the settlement process we apply the 10 percent reduction, and it's only at that point in time when we come near to the decision on the fine that we consider any claims for inability to pay. It's only at that point in time that we start looking at the financial situation of the firm, both today and in the future—in order to assess whether it's able to actually pay the fine. We look at a variety of indicators concerning the firm's financial strength, profitability, solvency, liquidity, and

<sup>4</sup> European Comm'n, Dir. Gen. Competition, Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(A) of Regulation No. 1/2003 ¶ 35, 2006 O.J. (C 210) 2, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:210:0002:0005:EN:PDF>.

also relations with a bank or partners and its shareholders because eventually they may need to step in as well. So these are really two separate processes; even though they may occur as part of the same decision, they are analytically distinct.

**ANTITRUST SOURCE:** You've talked about what factors the Commission does consider in the context of an inability to pay application, which leads me to my next question: does the Commission balance considerations regarding the economic viability of the firm under point 35 against perhaps the fact that the firm may have, as a result of its financial situation, chosen to participate in the cartel in the first place?

**DG ITALIANER:** No, we do not look at the reasons why a firm actually participates in a cartel. I know that there have been some discussions about crisis cartels and so on but when looking at a cartel we simply look at the facts of the case and not at the possible motivations of why a company decided to enter into a cartel.

Let me give you one example where such an approach would lead us into difficulties. There have been observers who have been saying that sometimes companies may use cartels for a strategic reason. Companies could set up a cartel for strategic reasons by trying to get potential competitors into that cartel. They could then claim immunity or leniency and thereby try to put pressure, financial pressure, on the other participants of the cartel—their competitors. Now if the Commission would have to step into this kind of situation and look at the reasons why companies participate in the cartel, I think we would go far beyond our objectives.

**ANTITRUST SOURCE:** Point 37 of the Guidelines seems to give the Commission some measure of discretion to depart from the stated fine setting methodology to take into account “the particularities of a given case.”<sup>5</sup> To what extent does the Commission take into account the overall fines and penalties that have been levied against cartel members by other enforcement authorities, including the United States, as well as damage recoveries that may have been awarded in private actions?

**DG ITALIANER:** Well, these are two different issues. So let me start with the first issue, which is the relationship with fines and penalties in other jurisdictions. Here the situation for me is very clear. We exclusively look at the infringement as it has occurred on the European market even if the infringement itself may be broader. The Commission does therefore not take into account fines imposed by other authorities. We impose fines exclusively in view of the European sales affected by an infringement, even if the infringement is worldwide. It regularly happens that firms are being fined both by the U.S. and also by the Commission for the part of their infringement on European territory.

There is no marital relationship between the two because the two aim at two different infringements. In fact we try to avoid double counting. Let me give you one example. In the recent *Air Cargo* case,<sup>6</sup> one may of course have wondered how to take into account relevant sales for an air cargo shipment between Europe and the United States. In order to avoid double counting, we

---

<sup>5</sup> *Id.* ¶ 37.

<sup>6</sup> See Press Release, European Comm'n, Dir. Gen. Competition, Antitrust: Commission Fines 11 Air Cargo Carriers €799 Million in Price Fixing Cartel (Nov. 9, 2010), <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1487&format=HTML&aged=0&language=EN&guiLanguage=en>.

have taken the inward and outward bound sales concerned and divided them by two to avoid overlaps between the two infringements. Moreover, I would add that from a legal perspective, the European courts would oblige us to only focus on the part of the infringement as it applies in the European economic area, which is the area of our jurisdiction.

As for your second point, the award of damages, there it must be recalled that damages and fines serve different purposes. The fines serve the purpose of deterrence, whereas potential damages awarded in private actions serve as compensation for the harm done. At least that is a clear distinction because in Europe we separate the two, and the proceedings concerning the two, whereas I understand that in the U.S. through the system of treble damages there is an interaction between the two.

Allow me to add that at the Commission we strongly support the pursuit of private damages. And I do not exclude that if and when there is a more harmonized system in Europe, there could be some form of interaction between the two. But for the time being these are entirely separate, in particular because the situation in the various Member States is very varied.

**ANTITRUST SOURCE:** I'd like to move on now to developments on the competition front. Let's start with the April 2010 adoption of the new Block Exemption Regulation (BER) and related Guidelines for vertical agreements.<sup>7</sup> One aspect of the new BER that's of interest to us in the United States, particularly as a result of the Supreme Court opinion in the *Leegin* case, is the fact that resale price maintenance or RPM remains a hardcore restriction under the BER,<sup>8</sup> even though the Economic Advisory Group on Competition Policy in the Office of the Chief Economist had proposed that there be a de minimis market share rule for RPM as well.<sup>9</sup> Can you give us a sense of the considerations that went into maintaining RPM as a hardcore restriction under the BER, although with the proviso that a firm could try to prove an efficiency defense under Article 101(3) in an individual case?<sup>10</sup>

**DG ITALIANER:** Let me start with the last point. Indeed we have defined RPM as a hardcore restriction, which is therefore not a per se restriction. So it is a rebuttable presumption, although it may be hard to rebut in practice—at least we have not seen many cases. Why did we arrive at this conclusion?

First of all, this decision is very much supported by case law and in a very consistent way. We based our decision on the case handling experience at the level of our Member States because many of these cases occur at the national level and of course on our own case practice. Since we have concurrent jurisdictions for antitrust in the EU system, what is happening at the level of the Member States is very important. We therefore took stock of enforcement as part of the review

---

<sup>7</sup> Press Release, European Comm'n, Dir. Gen. Competition, Antitrust: Commission Adopts Revised Competition Rules for Distribution of Goods and Services (Apr. 20, 2010), <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/445>.

<sup>8</sup> Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Categories of Vertical Agreements and Concerted Practices, art. 4(a), 2010 O.J. (L 102) 1, 5, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:102:0001:0007:EN:PDF>.

<sup>9</sup> European Comm'n, Dir. Gen. Competition, Econ. Advisory Grp. on Competition Pol'y, Vertical Restraints Subgrp., Hardcore Restrictions Under the Block Exemption Regulation on Vertical Agreements: An Economic View (Sept. 2009), available at [http://ec.europa.eu/dgs/competition/economist/hardcore\\_restrictions\\_under\\_BER.pdf](http://ec.europa.eu/dgs/competition/economist/hardcore_restrictions_under_BER.pdf).

<sup>10</sup> European Comm'n, Dir. Gen. Competition, Guidelines on Vertical Restraints ¶¶ 47, 223, 2010 O.J. (C 130) 1, 11–12, 45, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2010:0411:FIN:EN:PDF>.

process that led to the adoption of the Regulation and Guidelines. The discussion within the European Competition Network on the many RPM cases dealt with since 2000, mainly handled by the national competition authorities, pointed to the pertinence of a cautious approach towards RPM.

Our experience points out that companies have not been very successful in their attempts to show efficiencies and thereby to justify RPM. And therefore the overall conclusion is that the extensive recourse to RPM in our Member States, many of which have small and concentrated markets, would result in more harm than benefit for European consumers as a whole. And in fact there are some interesting examples that helped to confirm that statement—one of them with the ending of RPM for books in the UK in 1997. It actually turned out that the abolition of RPM led to an increasing number of titles rather than a reduction as was initially feared. Studies on the UK book sector show that the most significant development, after the sector specific laws allowing RPM for books were abolished, has been the accelerated entry and rapid growth of low price Internet sellers and one-stop grocery supermarket chains in the book retail market.

France has also had experience with RPM. The Galland Law, which tried to prevent large retailers from selling below cost, effectively allowed manufacturers and retailers to enforce RPM since 1997. Manufacturers charged a high invoice price to retailers and in return gave retailers an end-of-year discount which, according to the law, could not be used to lower the retail price. This led to an industry-wide use of RPM in the retailing sector in France. Empirical studies show that there is evidence that the RPM led to an important reduction in intrabrand competition and to a softening of interbrand competition. This can explain, at least partially, the sharp increase in prices of groceries that occurred in France after 1997. The negative effects spurred the French Competition Authority to take two prohibition decisions in RPM cases, and subsequently led to two amendments of the law, in 2005 and 2008, to end the unwanted experiment.

So these are two examples of national experiences that I think support our general line on RPM.

**ANTITRUST SOURCE:** Your reference to the experience of the Member States in the European Union seems to parallel the U.S. experience, where we have of course the federal government and specifically the Supreme Court taking one view about RPM but the individual states here have their own experiences and are continuing to legislate based on their experiences. And I also think your description of the way RPM is analyzed as a hardcore restriction is very similar to what we're calling the "inherently suspect" analysis or the truncated rule reason analysis in the U.S., under which a practice like RPM is subject to an adverse presumption and the parties must come forward with a procompetitive explanation for the practice.

Are there in fact analytical similarities between how RPM is analyzed by the Commission and in the U.S.?

**DG ITALIANER:** Of course in thinking about our own rules, we have mainly relied on our own experience and that of our Member States. But through the various international networks, like the OECD and the International Competition Network, academic literature, and so on, we have also been looking at the worldwide experience in this field. And there may indeed be more similarity between the situation in the U.S. and our situation than one could expect based only on the outcome in the *Leegin* case.

If I understand it correctly, first of all, the *Leegin* decision was itself a decision where the Supreme Court was not voting with unanimity. And secondly, it also remains to be seen how it will be implemented in practice. It is not yet clear what the new "post-*Leegin*" approach will be in the

U.S. The Supreme Court left it to the lower courts to decide whether a “pure” rule of reason analysis or an analysis circumscribed by presumptions should be applied. So I do not exclude that in practice the situation in the U.S. may not be dissimilar compared to the one in the EU. The EU hardcore approach remains an effects-based approach: companies may bring forward evidence that their agreement brings, or is likely to bring, efficiencies that outweigh the negative effects and therefore meets the conditions set out in Article 101(3). The ball is put first in the camp of the firms. Each agreement that fulfills the conditions of Article 101(3) is exempted from the prohibition laid down in Article 101(1).

**ANTITRUST SOURCE:** Another aspect of the vertical BER and the Guidelines that’s of interest is their treatment of Internet or online sales. They place important safeguards on the freedom of distributors to use the Internet to obtain what you’re calling “passive sales” from outside their exclusive territories or exclusive customer groups.<sup>11</sup> Clearly what we see is that the Commission views the Internet as playing a critical role to the development of the Single Market in Europe.<sup>12</sup>

And so in that vein, we’re curious as to why the Guidelines would allow a supplier under the block exemption to “require that distributors have one or more brick and mortar shops or showrooms as a condition for becoming a member of its distribution system.”<sup>13</sup> Doesn’t that approach seem to run counter to the notion that the Internet may be a more efficient and less costly means of distributing goods and services than a traditional brick and mortar shop? And so the requirement of actually requiring that distributors have a brick and mortar shop may actually retard competition rather than promote it?

**DG ITALIANER:** First of all, I should say that the promotion of online sales is extremely important for the internal market in Europe because it broadens the market, improves the choices for customers, and generally speaking, enhances competition. But that doesn’t mean that we should treat online sales differently from offline sales or ignore possible free-riding problems that may occur between offline and online sales. The hardcore resale restrictions relate to market partitioning by territory or by customer group. Since the Internet allows distributors to reach different customers and territories, restrictions of the distributors’ use of the Internet and sales over the Internet are generally considered to be hardcore resale restrictions. That is why both the previous and the new Guidelines state that, in principle, every distributor must be allowed to use the Internet to sell products. The new Guidelines only provide a more detailed description of the application of the policy towards online sales.

At the same time suppliers should in most cases, and certainly if below the market share cap of 30 percent, have the possibility to apply exclusive or selective distribution systems and thus appoint the exclusive or authorized distributors of their choice. The supplier may choose not to sell its product to Internet-only distributors for a number of positive reasons. If a supplier requires its distributor to have one or more brick and mortar shops where customers can see, touch, and experience the product, such a requirement is not dealt with as a hardcore restriction of on-line sales.

---

<sup>11</sup> Vertical Regulation, *supra* note 8, art. 4(b)(1), 2010 O.J. (L 102) at 5; Vertical Guidelines, *supra* note 10, ¶¶ 51–54, 2010 O.J. (C 130) at 13–14.

<sup>12</sup> See Mario Monti, *A New Strategy for the Single Market*, Report to the President of the European Commission (May 9, 2010), available at [http://ec.europa.eu/bepa/pdf/monti\\_report\\_final\\_10\\_05\\_2010\\_en.pdf](http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf).

<sup>13</sup> Vertical Guidelines, *supra* note 10, ¶ 54, 2010 O.J. (C 130) at 14.

You were mentioning the issue of passive sales outside exclusive territories or exclusive customer groups. There we have quite some experience in the field of offline sales, for instance with regard to car distribution. It's that experience that we have imported into the online world. So the issue here with the brick and mortar shop requirement is that for some products in terms of branding, customer relations, and so on, brick and mortar shops are a crucial feature.

Let me give a simple example: how would customers be able to experience perfumes if they were only on sale online and could not be tested in a brick and mortar shop? For some products the image that they have is based also on the brick and mortar shops. So there are efficiency arguments why certain products should not be sold exclusively online. We wanted to avoid with our rules the scenario whereby allowing some distributors to exclusively sell online, the fixed costs for these brick and mortar shops would only be imposed on the offline distributors.

That is why we have allowed for this possibility. However, once a distributor meets the conditions on the brick and mortar shop, then it generally cannot be prevented from also having a website and using that website for online sales. We have tried to find a balance between strongly promoting online sales on the one hand, and on the other hand, requirements that are indispensably linked to the branding and the sales of certain products.

**ANTITRUST SOURCE:** The BER and Guidelines talk about the need for suppliers and manufacturers to maintain quality control, and certainly there is a logical need to require a brick and mortar shop for products such as perfumes where it would be advantageous for consumers to visit and to try it.

**DG ITALIANER:** Yes, absolutely, and that's only one example. I think there can be objective and justified reasons for some of these restrictions. But the bottom line must be clear. What our Guidelines are doing is vastly promoting online sales.

**ANTITRUST SOURCE:** In December 2010, the Commission adopted revised competition rules for horizontal cooperation agreements.<sup>14</sup> There are two sets of BERs, one for research and development agreements<sup>15</sup> and another for specialization agreements relating to production.<sup>16</sup> And then there were also some revised horizontal Guidelines issued by the Commission.<sup>17</sup> One of the topics addressed at length in the revised Guidelines concerns the standardization agreements<sup>18</sup> or what we call standard setting in the United States. What has been the reaction from industry and from the public to these new Guidelines particularly as they relate to disclosure policies for intellectual property rights and the licensing of such rights under fair, reasonable and nondiscriminatory (FRAND) terms?

---

<sup>14</sup> Press Release, European Comm'n, Dir. Gen. Competition, Competition: Commission Adopts Revised Competition Rules on Horizontal Co-Operation Agreements (Dec. 14, 2010), <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1702>.

<sup>15</sup> Commission Regulation (EU) No. 1217/2010 of 14 December 2010 on the Application Of Article 101(3) of the Treaty on the Functioning of the European Union to Certain Categories of Research and Development Agreements, 2010 O.J. (L 335) 36, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:335:0036:0042:EN:PDF>.

<sup>16</sup> Commission Regulation (EU) No. 1218/2010 of 14 December 2010 on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Certain Categories of Specialization Agreements, 2010 O.J. (L 335) 43, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:335:0043:0047:EN:PDF>.

<sup>17</sup> European Comm'n, Dir. Gen. Competition, Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-Operation Agreements, 2011 O.J. (C 11) 1, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF>.

<sup>18</sup> *Id.*, ch. 7, 2011 O.J. (C 11) at 55–72.

**DG ITALIANER:** When we put these BERs and Guidelines up for consultation, the very large majority of the reactions were precisely on the rules concerning standardization agreements. So from that reaction I would say they attracted a huge interest, which is not surprising given the importance of standardization for the growing ICT (information, communications, and telecommunications) sector. I also think it's a good thing that we have updated our rules in this area to reflect market developments and stakeholder input.

Secondly, when preparing the rules we built on the experience that we have gained in certain cases, such as the *Rambus* case. What we tried to do here was not to prescribe any specific scheme of standardization but rather to promote a standard-setting system that is open and transparent. Promoting openness and transparency increases the visibility of licensing costs for intellectual property rights (IPRs) used in standards. This is an important element because licensing costs are ultimately passed on to consumers.

*What we tried to do*

*here was not to*

*prescribe any specific*

*scheme of standard-*

*ization but rather to*

*promote a standard-*

*setting system that is*

*open and transparent.*

We tried to find a balance between the various interests at stake, of companies with different business models. On the one hand, one has to maintain the incentives for innovation and therefore proper rewards for IPRs, and on the other hand, ensure that the benefits from the standardization are being passed on to consumers. It's a typical problem you find in general when talking about IPRs. When we put out our first draft, the stakeholders asked us to refine the safe harbor that we set out in the initial draft and also to provide more guidance on what would happen to standardization agreements falling outside of the safe harbor.

So that's what we did and in particular as regards the safe harbor, we clarified that the good faith disclosure of IPRs does not require the company concerned to embark on a patent search, which can be a very costly exercise. We wanted to maintain efficiency and not force the participants to go into costly patent searches. And we also stated that an IPR disclosure would not be required in the context of royalty-free settings, because in such cases the importance of the transparency on the IPRs is of course much less important because the standard is royalty free.

We made clear there is no presumption that any agreement that falls outside the safe harbor is illegal but that it simply has to be assessed, and we gave a number of criteria under which such agreements would need to be assessed—such as whether the members remain free to develop alternative standards or products, how access is given to the standards, whether there are limitations on participation, and so on. I think this is a very good example of where interaction with the stakeholders in an extremely important area in the field of innovation allowed us to improve our Guidelines and bring them as close as possible to the market situation as we could.

**ANTITRUST SOURCE:** Particularly in the standardization area, where there are multiple stakeholders, you have to try to accommodate different interests—those of the consumers, the customers adopting and using the technology, the participants in the standard-setting process, as well as the organizations themselves.

**DG ITALIANER:** Yes, absolutely. You asked whether it is too early to tell whether this update has been successful. That is indeed the case. We will have to see how the situation develops in practice before we can reach any definitive conclusions.

However, I should point out that already now, the initial feedback we get from talking to different stakeholders is in general positive. They seem to recognize that we have taken a balanced approach in this review.

**ANTITRUST SOURCE:** The Commission does a lot of rulemaking, with public input. Good examples



are the Best Practices for antitrust proceedings<sup>19</sup> and the submission of economic evidence,<sup>20</sup> which were provisionally adopted by the Commission in January 2010 and for which public input has been solicited.<sup>21</sup> Does the Commission currently have a timetable for finalizing those Best Practices documents in view of the replies that have been submitted to the consultation?<sup>22</sup>

**DG ITALIANER:** The package that we put out in January last year of course has already been implemented provisionally. In addition to the public consultation that we have done, the provisional application is of course the best way of actually testing all the new elements that we included. And my impression is that the Best Practices are working very well, and that they are appreciated by the stakeholders. For instance stakeholders welcome that we now use more frequent “state of play” meetings, which is a practice that we have imported from the merger world.

The experience with the recommendations on the submission of economic evidence, economic data, and so on, is also quite positive. We are now digesting both that experience and the reactions from our stakeholder consultation. And I hope that in the course of this year we can put out a final and revised version of the Best Practices.

**ANTITRUST SOURCE:** Another form of feedback the Commission has received with respect to its Best Practices on the submission of economic evidence would be what the courts have done. And I think that you’ve expressed the view that the July 2010 judgment of the General Court in the *Ryanair* merger case<sup>23</sup> validates the process that the Commission has been following in terms of confronting and assessing the relevant econometric evidence.<sup>24</sup>

How and to what extent do the Best Practices being applied by the Commission help to ensure that its decision in an antitrust or merger case, particularly with respect to the analysis of the econometric evidence, is accorded the appropriate degree of deference by the courts of the European Union under the case law?<sup>25</sup>

**DG ITALIANER:** First of all, I should say that over the past years, the use of quantitative data and

<sup>19</sup> European Comm’n, Dir. Gen. Competition, Best Practices on the Conduct of Proceedings Concerning Articles 101 and 102 TFEU (2010) (provisionally applied), available at [http://ec.europa.eu/competition/consultations/2010\\_best\\_practices/best\\_practice\\_articles.pdf](http://ec.europa.eu/competition/consultations/2010_best_practices/best_practice_articles.pdf).

<sup>20</sup> European Comm’n, Dir. Gen. Competition, Best Practices for the Submission of Economic Evidence and Data Collection in Cases Concerning the Application of Articles 101 and 102 TFEU and in Merger Cases (2010) (provisionally applied), available at [http://ec.europa.eu/competition/consultations/2010\\_best\\_practices/best\\_practice\\_submissions.pdf](http://ec.europa.eu/competition/consultations/2010_best_practices/best_practice_submissions.pdf).

<sup>21</sup> See Press Release, European Comm’n, Dir. Gen. Competition, Antitrust: Improved Transparency and Predictability of Proceedings (Jan. 6, 2010), <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/2&format=HTML&aged=0&language=EN&guiLanguage=en>.

<sup>22</sup> See European Comm’n, Dir. Gen. Competition, Best Practices in Antitrust Proceedings and Submission of Economic Evidence; Hearing Officers’ Guidance Paper, PUBLIC CONSULTATIONS, [http://ec.europa.eu/competition/consultations/2010\\_best\\_practices/index.html](http://ec.europa.eu/competition/consultations/2010_best_practices/index.html). (The ABA Section of Antitrust Law, jointly with the ABA Section of International Law, were among the organizations that submitted comments. See ABA, Sections of Antitrust Law and International Law, Joint Comments to the European Comm’n Regarding Consultation Documents on Improved Transparency and Predictability in Competition Proceedings, [http://ec.europa.eu/competition/consultations/2010\\_best\\_practices/american\\_bar\\_association\\_en.pdf](http://ec.europa.eu/competition/consultations/2010_best_practices/american_bar_association_en.pdf).)

<sup>23</sup> Case T-342/07, *Ryanair Holdings plc v. Comm’n*, 2010 ECJ EUR-Lex LEXIS 397 (July 6, 2010), available at 2010 O.J. (C 221) 35, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:221:0035:0036:EN:PDF>, and at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007A0342:EN:HTML> (full version of the decision).

<sup>24</sup> See Alexander Italianer, Dir. Gen. for Competition, European Comm’n, The Interplay Between Law and Economics 5, Opening Address at the Charles River Associates Annual Conference (Dec. 8, 2010), [http://ec.europa.eu/competition/speeches/text/sp2010\\_09\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2010_09_en.pdf).

<sup>25</sup> See *Ryanair*, 2010 ECJ EUR-Lex LEXIS 397, at \*12–13, 2010 O.J. (C 221) 35, ¶¶ 29–30 (acknowledging the margin of discretion that the Commission has with respect to economic matters).

analysis has increasingly grown in our merger and antitrust investigations—whether it’s used to measure market growth, market share, capacity, bids, or price evolution. So the need for an economic assessment for us to scrutinize and assess the data is increasing. And like you said, it’s also playing an increasingly important role in the court proceedings.

What I notice here is that some of the submissions that we received from the parties have become increasingly technical and sophisticated. And that’s why we need to very carefully assess all the submissions and dismiss those submissions that do not follow proper methodology or are based on wrong assumptions, and so on. And on top of that we are of course doing our own analysis. We have a very highly qualified Chief Economist team.

In the *Ryanair* case that you mentioned, the General Court explicitly endorsed the transparent and balanced way in which we assessed the various economic submissions. And it also commended the Commission for deciding not to assign weight to part of its own economic analysis, which despite supporting the overall findings, the Commission considered had the same methodological flaws as that of the parties.

So the Best Practices come in here because this is sort of a logical step towards supporting a well-balanced competition enforcement system because they tell the parties what they should do in terms of presenting the content and the substance of their economic and the econometric analysis. In particular this allows us to replicate the empirical results. I can tell you that the mere possibility or impossibility to replicate submissions can be a very important factor in a case.

Secondly, we gave guidance on how to respond to our request for quantitative data in order to get timely and relevant input. So this is for me part of a broader picture. And I think it has been welcomed by all the parties. The Best Practices have already helped in a number of cases to gather quantitative data and to limit the scope of data requests. All this has led to better quality submissions in the context of both merger and antitrust cases, allowing the investigation to focus on the most important elements to determine the likely competitive effects of a merger, practice or agreement.

**ANTITRUST SOURCE:** Your Office of the Chief Economist has spoken publicly about the need for careful analysis of the economic evidence. Recently, your deputy chief economist Miguel de la Mano acknowledged that “the presentation of economic evidence has to be clear and transparent.” He also said “it can be difficult to know how much probative weight to give to something one does not fully understand, especially when the ‘experts’ on both sides reach completely divergent conclusions based on the same set of facts.”<sup>26</sup> And that echoed what your chief economist Damien Neven described, when he said that “apparently sound but contradictory analyses are sometimes generated and submitted by opposing parties.”<sup>27</sup> Given your professional education and training in economics and econometrics, do you have a particular perspective on what the Commission needs to do in such a situation where you’re trying to reconcile divergent conclusions or contradictory analysis based on the same set of facts or data?

**DG ITALIANER:** From my professional perspective and educational perspective, analyzing accurate

<sup>26</sup> See David Vascott, *DG Comp Reveals Measured Approach to Economic Analysis*, GLOBAL COMPETITION REV., Feb. 4, 2011, <http://www.globalcompetitionreview.com/news/article/29701/dg-comp-reveals-measured-approach-economic-analysis/>.

<sup>27</sup> Damien Neven & Raphael de Coninck, Best Practices on the Submission of Economic Evidence and Data Collection, European Comm’n, Dir. Gen. for Competition, Office of the Chief Economist Discussion Paper 2 (2010), available at [http://ec.europa.eu/dgs/competition/economist/neven\\_deconinck\\_best\\_practices.pdf](http://ec.europa.eu/dgs/competition/economist/neven_deconinck_best_practices.pdf).

*I can tell you that the mere possibility or impossibility to replicate submissions can be a very important factor in a case.*

and reliable data can be a very efficient and varied way to validate or refute contradictory claims and opinions that are put forth by parties with opposite interests, who may put forth data and analysis suited to their own needs. Having done a lot of econometrics myself, I'm the first one to recognize that there's no such thing as an ideal economic model or a perfect econometric model.

But I know two things. The first is that an econometric model or an economic model is simply a mathematical representation of a line of argumentation. And what that means is that whatever your argument is, it will be presented in a logical way and the outcome of such models will be consistent with the underlying logic of the assumption. So it's a very handy tool to structure your thoughts and your arguments. And that's why if your arguments are flawed and they are used as an input in a model, of course then the outcome of the model will also be flawed. And that's the kind of thing that we try to detect when we analyze the submissions of the parties.

And the second thing is that with econometric models, they are based on statistical techniques, and statistical techniques generally rely on the law of large numbers. And what happens with the law of large numbers is that imperfections usually disappear. So it's a useful way to get to the core of the issue while being able to disregard the noise. So I would say that the use of models and techniques on balance are useful provided that one knows what one can do and what one cannot do with these models. In particular, they are extremely useful to detect inconsistencies in the reasoning of various parties, so I'm not at all surprised that on the basis of exactly the same data, two parties may arrive at contradictory conclusions using different models because they probably put in assumptions that are to their benefit. And it's precisely by looking at these models and by replicating them that one can try to spot the flaws and the inconsistencies in the argument. Our Best Practices are indeed very helpful. They ensure that economic analysis meets certain minimum standards at the outset, they facilitate the efficient gathering and exchange of facts and evidence, in particular any underlying quantitative data, and they aim to use in an efficient way reliable and relevant evidence obtained during the administrative procedure, whether quantitative or qualitative.

**ANTITRUST SOURCE:** In addition to the need for transparency and clear analysis, you've also spoken publicly about the importance of due process in Commission proceedings relating to antitrust and merger cases,<sup>28</sup> which I think was echoed by the General Court in the *Ryanair* merger case.<sup>29</sup> Now, it's understood that the Best Practices documents put out by the Commission further this goal of due process. Another aspect of the due process safeguards seems to be the constitution and use of what you're calling "peer review" panels for complex cases. Can you tell us how this works?

**DG ITALIANER:** Yes, there is of course debate about due process, which is mainly about the interaction of the Commission with the parties. The extent to which a case is submitted to internal scrutiny before the Commission reaches a decision is sometimes underestimated. In fact, there are var-

---

<sup>28</sup> See, e.g., Alexander Italianer, Dir. Gen. for Competition, European Comm'n, Safeguarding Due Process in Antitrust Proceedings, Session on Enforcers' Perspectives in International Antitrust, Fordham Competition L. Inst. Annual Conf. on Int'l Antitrust L. & Pol'y (Sept. 23, 2010), [http://ec.europa.eu/competition/speeches/text/sp2010\\_06\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2010_06_en.pdf); Alexander Italianer, Dir. Gen. for Competition, European Comm'n, Priorities for Competition Policy, St. Gallen Int'l Competition L. Forum (May 20, 2010), [http://ec.europa.eu/competition/speeches/text/sp2010\\_04\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2010_04_en.pdf).

<sup>29</sup> See, e.g., *Ryanair*, 2010 ECJ EUR-Lex LEXIS 397, at \*13 & \*107-09, 2010 O.J. (C 221) 35, ¶¶ 31, 192, 194.

ious actors in that process and numerous checks and balances that I will not describe to you at length.

In any case, one of the elements in this internal process of scrutiny is the use of peer review panels. These panels are organized for major antitrust or merger cases, especially the complex ones, and where a statement of objections is either envisaged, or has already been adopted. The peer review panel may cover either all the aspects of the case, or a specific aspect, which is controversial or complex, where we want to have a fresh pair of eyes to look at all the relevant aspects. The practical objectives of this panel exercise are twofold: first, to provide assistance to the case team with a view to ensuring that the basic foundations of the case are strong, and second, to help all those involved in the decision making process with respect to the further orientation of the case. It's part of our internal scrutiny—like many other elements—before we take a position. The way this works is that these teams are set up by officials who are, of course, completely detached from the case at hand. We try to find a balanced composition in any peer review panel. We try to have at least an economist on the panel, a lawyer, and a Head of Unit. I appoint qualified officials based on a proposition made by the scrutiny officer who also chairs the peer review panel. It's a powerful instrument, and it's a purely internal tool, that plays an important role in our internal checks and balances.

**ANTITRUST SOURCE:** You gave a speech in December 2010 on the interplay between law and economics.<sup>30</sup> In that speech, I believe, you responded to an attempt by some members of the competition bar to distinguish the General Court's September 2010 decision in *Tomra Systems*<sup>31</sup> as a departure from the Commission's economic effects-based approach to abuse of dominance cases under Article 102, as reflected in its 2009 Guidance paper.<sup>32</sup>

When one reads the *Tomra* decision from the General Court, it's clear that the General Court acknowledged that the Commission, in fact, analyzed the actual effects of Tomra's practices.<sup>33</sup> But it also seemed to have gone out of its way to emphasize that the Commission isn't required to do so under the relevant Article 102 case law.<sup>34</sup> So my question is, does *Tomra* presage a relaxation at the Commission with respect to applying a rigorous effects-based approach to abusive dominance cases?

**DG ITALIANER:** I would say that effects-based analysis, including the one in our 2009 Guidance paper, does not always require proof of actual negative effect. For instance, it is often necessary to intervene before the conduct actually distorts competition, otherwise we would undermine the effectiveness of Article 102. That's one thing.

Secondly, actual effects may reinforce the conclusion that the conduct is anticompetitive. And in the *Tomra* ruling of the Court, I don't think that this is negated. In fact, what the Court said was

---

<sup>30</sup> Italianer, *supra* note 24, at 9–10.

<sup>31</sup> Case T-155/06, *Tomra Sys. ASA v. Comm'n*, 2010 ECJ EUR-Lex LEXIS 751 (Sept. 9, 2010), available at 2010 O.J. (C 288) 31, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:288:0030:0031:EN:PDF>, and at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006A0155:EN:HTML> (full version of the decision).

<sup>32</sup> European Comm'n, Dir. Gen. Competition, Communication from the Commission—Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, 2009 O.J. (C 45) 7, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:045:0007:0020:EN:PDF>.

<sup>33</sup> *Tomra*, 2010 ECJ EUR-Lex LEXIS 751, at \*82, 2010 O.J. (C 288) 31, ¶ 219.

<sup>34</sup> *Id.* at \*105–07, 2010 O.J. (C 288) 31, ¶¶ 287–290.

that although the Commission's analysis of the actual effects was not necessary, it has a complementary role.

Now, I should say that the *Tomra* case actually predates the Guidance paper,<sup>35</sup> so if my understanding of the court case is correct, what *Tomra* actually tried to do was to invoke the Guidance paper post hoc, after the case had actually been decided by the Commission. So that is also an important reason why I think that the ruling of the Court cannot be interpreted as a kind of definitive view on effects-based analysis. Actually, if you read the judgment of the Court, it focused quite a lot on the facts and the arguments that the Commission used to make its case.

So I think we have to wait a little bit. I would say the jury is still out. We have to see how the use of the analysis in the Guidance Paper in cases like Intel plays out before the Court. So we need to be patient.

*What is important for*

*us in general in the*

*near future is to*

*continue with our*

*vigorous enforcement*

*and to continue on the*

*fight against cartels,*

*which will remain a*

*priority . . .*

**ANTITRUST SOURCE:** We'd like to wrap up the interview by asking you to say a few words about the Commission's priorities for 2011. In particular, we note that there's another public consultation on a coherent European approach to collective redress for infringements of EU law.<sup>36</sup> Do you have any preliminary views on what can be accomplished through the consultation process?

**DG ITALIANER:** Yes. Before answering that particular question, let me say that collective redress is only one of our many activities. It's an important policy issue, of course. What is important for us in general in the near future is to continue with our vigorous enforcement and to continue on the fight against cartels, which will remain a priority and where we have been taking some extremely important decisions last year, including the settlement cases that we discussed.

And, also, for the benefit of economic growth and jobs in Europe, it's very important that we continue to focus on those sectors which are the most important for that growth potential—the network sectors, services, IT, and so on. So our enforcement practice remains, first and foremost, a priority.

Now, when it comes to collective redress, as I mentioned earlier, this is one of the two important legs, when it comes to antitrust enforcement. As the public authority, we work on the deterrence side of the case, but the other leg, which is the compensation for the harm done, is still missing. This is an issue that is particularly important in the field of antitrust, but it is also important in other areas of law, and where, in some of our Member States, it is possible to seek damages for either antitrust, or other types of infringement, but not in all of them. So it is very important that when we reflect on things like collective redress, we take a broader perspective on this, and that is precisely what we are doing by putting out a general consultation. I very much hope that this type of consultation will lead to an understanding of what the type of problem is, what the possible remedies are, and what we want and what we do not want in Europe. Once we have held the consultation, the Commission will hopefully take a general view on this, and this will then allow us to move forward with proposals in the specific area of damages in the antitrust area.

**ANTITRUST SOURCE:** Is it correct that the public consultation document indicates that the issue of

<sup>35</sup> The Commission's challenged decision in *Tomra* was adopted on March 29, 2006 (C 734) in Case COMP/E-1/38.113, *Prokent-Tomra*, 2008 O.J. (C 219) 11, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:219:0011:0015:EN:PDF> (summary decision) and at [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/38113/38113\\_250\\_8.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/38113/38113_250_8.pdf) (full decision).

<sup>36</sup> See Press Release, European Comm'n, Commission Seeks Opinions on the Future for Collective Actions in Europe (Feb. 4, 2011), <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/132&format=HTML&aged=0&language=EN&guiLanguage=en>.

collective redress is not limited simply to infringements of competition law?

**DG ITALIANER:** That's correct. It takes a broader scope. It could affect consumers through unfair commercial practices, for example. There are many areas where this may be a relevant issue. You see damage claims in the financial services field, environmental protection, and so on.

**ANTITRUST SOURCE:** You've been very generous with your time with us today, and we certainly thank you.

**DG ITALIANER:** It was a pleasure talking to you. ●

## District Court Rejects the Google Books Settlement: A Missed Opportunity?

**Gregory K. Leonard**

As part of its “Google Library Project” initiated in 2004, Google entered into partnerships with libraries with the goal of scanning the libraries’ books to create a searchable digital library.<sup>1</sup> A user could enter a search term and Google would display information about relevant books, including “snippets” of text that showed the context in which the search term was used.<sup>2</sup> In September 2005, several groups of copyright owners brought a class-action lawsuit against Google, alleging that the scanning of books under copyright, and the provision of snippets from those books, violated copyright law. Google responded that its actions constituted “fair use.”

Instead of litigating, the parties focused primarily on settling the case, and in October 2008, Google and the plaintiffs announced a proposed settlement agreement.<sup>3</sup> Instead of being limited to the issues raised in plaintiffs’ complaint (e.g., Google’s scanning of books and showing snippets), the proposed settlement created a business framework that would allow Google to sell access to entire copyrighted works. Objections to the proposed settlement arose from many quarters, including copyright owners, the U.S. Department of Justice, and Google’s competitors. In response to these objections, Google and the plaintiffs made certain revisions (but without changing the fundamental structure of the agreement) and produced the Amended Settlement Agreement (ASA).<sup>4</sup> The district court held a fairness hearing in February 2010. On March 22, 2011, the district court rejected the ASA.<sup>5</sup>

Antitrust practitioners—and especially economists—are trained to think about actions in terms of their effects on consumer welfare. From this perspective, it is hard to see how the court’s rejection of the ASA is a positive development. As the court noted, “The digitization of books and the creation of a universal digital library would benefit many.”<sup>6</sup> Principal among the many beneficiaries of the ASA would have been consumers who would have had access to works that will now not be available to them, at least for some significant period of time. There is no serious dispute that, without the ASA, neither Google nor any of its competitors will be able to offer a digital library service anytime soon.

---

<sup>1</sup> <http://books.google.com/googlebooks/library.html>.

<sup>2</sup> *Id.*

<sup>3</sup> The original proposed settlement is at [http://www.googlebooksettlement.com/r/view\\_settlement\\_agreement](http://www.googlebooksettlement.com/r/view_settlement_agreement).

<sup>4</sup> The ASA is available at [http://www.googlebooksettlement.com/r/view\\_settlement\\_agreement](http://www.googlebooksettlement.com/r/view_settlement_agreement).

<sup>5</sup> See *Authors Guild, Inc. v. Google, Inc.*, No. 05 CV 8136, 2011 WL 986049 (S.D.N.Y. Mar. 22, 2011), available at <http://www.nysd.uscourts.gov/cases/show.php?db=special&id=115>.

<sup>6</sup> *Id.* at 1; see also *id.* at 3 (“The benefits of Google’s book project are many.”).

■  
**Gregory K. Leonard** is  
senior vice president  
at NERA Economic  
Consulting.

*There is no serious dispute that, without the ASA, neither Google nor any of its competitors will be able to offer a digital library service anytime soon.*

There are two specific benefits that the ASA and the resulting Google digital library service would have provided to consumers.<sup>7</sup> First, consumers would have gained ready online access to in-copyright out-of-print works that are now difficult to locate. Second, the ASA would have solved the “problem” of “orphan” works, so-called because the copyright owner is unknown or cannot be located. Such works are caught in a no-man’s land. They cannot be reprinted or otherwise distributed because, by definition, the permission to do so cannot be obtained from the (absent) copyright owner. The ASA would have given Google permission to offer consumers digital access to such orphan works.<sup>8</sup>

### Copyright and Rule 23 Issues Prevail

Despite the court’s recognition of the benefits the ASA would have created, the court ultimately was swayed by the opponents of the ASA. The opponents’ arguments that seemed most central to the court’s decision involved copyright issues and the administration of class actions under Rule 23 of the Federal Rules of Civil Procedure. With regard to copyright, the court was troubled by the fact that the ASA would have given Google the ability to sell access to certain copyrighted works without explicitly obtaining the permission of the copyright owners.<sup>9</sup> Rule 23 sets forth the conditions under which a case can be litigated or settled as a class action, with an emphasis on whether the interests of the named plaintiffs coincide with those of absent class members. The court concluded that a settlement that involved the release of claims “well beyond those presented in the case” was not allowable under Rule 23.<sup>10</sup> Interestingly, the court largely adopted the positions of the DOJ on the Rule 23 issue.<sup>11</sup> The concern seemed to be that the wider the scope of the settlement, the less likely that the interests of the class would be cohesive.

Related to the copyright issues, the court considered the “reaction of the class.”<sup>12</sup> The court cited the objections to the ASA, which were “great in number,” as well as “an extremely high number of class members—some 6800—[who] opted out.”<sup>13</sup> However, given that there are apparently 174 million unique books,<sup>14</sup> the class is likely much larger. In consideration of the size of the class, the fraction of class members who objected to or opted out of the ASA is actually relatively small.<sup>15</sup> Nor would the objectors likely provide a valid random sample of all class members from which inferences about the entire class could be drawn, since it is precisely those who have stronger than average negative views about the settlement who would choose to object.<sup>16</sup> Never-

<sup>7</sup> Consumers were not the only beneficiaries of the ASA. At least some copyright owners likely would have received more royalties (and perhaps recognition) than they would have otherwise. In addition, the digital preservation of books may be an “externality” that benefits society.

<sup>8</sup> Google would have paid royalties to a fund that, in turn, would have paid out the royalties to the copyright owners of orphaned works if those owners came forward or were otherwise identified.

<sup>9</sup> Opinion, *supra* note 5, at 31–35. This right only extended to out-of-print works; for an in-print work, Google would have needed to obtain permission before displaying the work. *Id.* at 10.

<sup>10</sup> *Id.* at 2.

<sup>11</sup> See *id.* at 21 (quoting Statement of Interest of the United States of America Regarding Proposed Amended Settlement Agreement, Author’s Guild v. Google, Inc. (Feb. 4, 2010), available at <http://www.justice.gov/atr/cases/authorsguild.htm>).

<sup>12</sup> Opinion, *supra* note 5, at 18.

<sup>13</sup> *Id.* at 19.

<sup>14</sup> *Id.* at 3 n.1.

<sup>15</sup> *Id.* at 10–11 n.6.

<sup>16</sup> For this reason, caution is warranted in reaching the conclusion that “many authors of unclaimed works undoubtedly share similar concerns [as the objectors].” *Id.* at 34.



theless, the court was clearly troubled by the prospect of a single court case resolving the rights of many absent copyright owners, and the volume and passionate nature of the objections undoubtedly left a strong impression on the court.

### Antitrust Issues

Antitrust issues seemed to play a lesser role in the court's decision than did the copyright and Rule 23 issues.<sup>17</sup> Nevertheless, the court did agree with ASA opponents that “the ASA would give Google a de facto monopoly over unclaimed works”<sup>18</sup> and “a significant advantage over competitors.”<sup>19</sup> It is notable that these are complaints that were raised by Google's competitors.<sup>20</sup> However, an important question that was not addressed by Google's competitors or the court is whether having a product available to consumers, even assuming it were “monopolized,” is better for consumers than having no product available at all.<sup>21</sup> The economics on this point is clear—in general, consumers are better off with a “monopolized” product than nothing.<sup>22</sup> Moreover, given that Google's competitors may well have proceeded with development of their own offerings by following the path that Google laid out, Google may not have been the only vendor of a digital library service for long in any event.<sup>23</sup>

*The economics on this point is clear—in general, consumers are better off with a “monopolized” product than nothing.*

The court also included a reference to an ASA opponent's claim that “[t]he ASA would arguably give Google control over the search market.”<sup>24</sup> However, since only a very small percentage of Internet searches likely pertain to unclaimed works now or in the future (such works are “unclaimed” for a reason), Google controlling the entire “search market” on the basis of a “de facto monopoly over [search related to] unclaimed works”<sup>25</sup> is an exceedingly unlikely outcome. It is even more so given the ease with which users can switch among search engines depending on their search target.

### The Missed Opportunity

In reaching its opinion, the court took a cautious approach to the copyright and Rule 23 issues, and perhaps understandably so. Had the court approved the ASA, it might have been accused of judicial “activism”—rendering an opinion not justified by the underlying law with the purpose of

<sup>17</sup> The court also cited issues related to privacy, foreign law, etc. *Id.* at 11–13.

<sup>18</sup> *Id.* at 36.

<sup>19</sup> *Id.* at 2.

<sup>20</sup> *Id.* at 36. The court notes that the DOJ and others also raised these complaints.

<sup>21</sup> One might reasonably have a concern about the welfare of any copyright owners that are involuntary participants because they did not know of the settlement. However, this concern is minimized because, under the ASA, a copyright owner could opt out at any time.

<sup>22</sup> See Jerry A. Hausman & J. Gregory Sidak, *Google and the Proper Antitrust Scrutiny of Orphan Books*, 5 J. COMP. L. & ECON. 411 (2009), available at <http://econ-www.mit.edu/files/4418>; Einer Elhauge, *Framing the Antitrust Issues in the Google Books Settlement*, ANTITRUST CHRON., Oct. 2009, available at <http://www.law.harvard.edu/faculty/elhauge/pdf/Elhauge%20Framing%20the%20Issues%20in%20the%20Google%20Books%20Settlement%20CPI%20article.pdf>; Einer Elhauge, *Why the Google Books Settlement Is Procompetitive* (Dec. 30, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1459028](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1459028); Mark A. Lemley, *An Antitrust Assessment of the Google Book Search Settlement* (Working Paper July 8, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1431555](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1431555); Gregory K. Leonard, *The Proposed Google Books Settlement: Copyright, Rule 23, and DOJ Section 2 Enforcement*, ANTITRUST, Summer 2010, at 26.

<sup>23</sup> See Leonard, *supra* note 22, at 29. Since Google's approach has not worked out, as mentioned above, no company is likely to offer a digital library service any time soon.

<sup>24</sup> Opinion, *supra* note 5, at 37.

<sup>25</sup> *Id.* at 36.

achieving a significant change in some aspect of society. But did the court miss an opportunity to provide the significant benefits to consumers that it recognized would have resulted from the ASA? Controversial “activist” legal rulings are hardly unknown, and some have led to societal changes that were later widely viewed as positive.<sup>26</sup> It is interesting to consider a more adventurous approach to the copyright and Rule 23 issues that the court could have taken.<sup>27</sup>

*It is interesting to consider a more adventurous approach to the copyright and Rule 23 issues that the court could have taken.*

For example, one of the primary copyright concerns was that the ASA would give Google the right to sell access to certain works without the explicit permission of the copyright owners, and that “[a] copyright owner’s right to exclude others from using his property is fundamental and beyond dispute.”<sup>28</sup> As I have previously written, it is not unheard of for the rights of intellectual property owners to be abridged “in the public interest.”<sup>29</sup> In patent cases, courts have declined to issue permanent injunctions against infringers after a finding of infringement, thereby denying the patent owner the “right to exclude.” For example, in the case of a medical product, an injunction might be denied because public health would be put at risk. With the ASA’s opt-out provision, which allowed any copyright owner to explicitly forbid Google from selling access to its copyrighted work at any time, the ASA seemingly imposes a substantially milder abridgment of rights than a patent owner’s loss of the right to exclude. The ASA would not have given Google the absolute right to sell access to copyrighted works. It was simply a question of where the burden for obtaining/denying permission would rest.<sup>30</sup> The “public interest” motivation for this mild abridgment of rights is quite strong given, again, that the ASA would “benefit many.”

As another example, one of the primary Rule 23 concerns was that the ASA released Google from claims beyond the scope of the plaintiffs’ complaint. However, the justification for the class action mechanism provided under Rule 23 is efficiency. The ASA provided an efficient means, and to date the only means, by which to clear the obstacles that stand in the way of a relatively complete digital library service being offered to consumers.<sup>31</sup> So, why wouldn’t the very efficiency logic that underlies Rule 23 also have supported approval of the ASA, particularly given the substantial benefits that the ASA would have conferred on consumers?

Another potential justification for the ASA under Rule 23 was that a settlement with scope greater than that of the plaintiffs’ complaint was necessary for the parties to reach agreement at all. The plaintiffs complained about Google’s scanning of books. There was no way for Google to compensate plaintiffs for such scanning as part of a settlement unless the settlement also provided Google a means by which to profit from the scanning (i.e., through the sale of access to the works). The courts’ strong interest in encouraging settlements would argue for allowing a wider ranging settlement in this case.<sup>32</sup>

<sup>26</sup> *Brown v. Board of Education* is a good example.

<sup>27</sup> Of course, such an approach may not have survived on appeal.

<sup>28</sup> Opinion, *supra* note 5, at 32.

<sup>29</sup> Leonard, *supra* note 22, at 27.

<sup>30</sup> Opinion, *supra* note 5, at 32–34. Moreover, it is important to keep in mind that the ASA called for all class members to be compensated by Google for the use of their copyrighted works. Thus, an author’s complaint referred to by the court that the copyrighted works would be “handed to Google free of charge” is not accurate. *Id.* at 34 (citing Letter from Margaret Jane Ross to Court 2 (Jan. 20, 2010)).

<sup>31</sup> Leonard, *supra* note 22, at 27–29.

<sup>32</sup> On the other hand, the court may have been troubled by Google appearing to have benefited from the complained of conduct. See Opinion, *supra* note 5, at 26–27 (“The ASA would grant Google control over the digital commercialization of millions of books . . . even though Google engaged in wholesale, blatant copying.”). Of course, whether the “wholesale, blatant copying” was in fact fair use had not yet been determined.

### What Now?

There would seem to be little reason for either side to move forward with the litigation. The issue to be litigated would be limited to the question of whether Google's copying of works and displaying of snippets was "fair use" under copyright law. From the plaintiffs' perspective, this would by no means be an easy case to win. The class had yet to be certified (other than for settlement purposes), Google had a strong fair use argument, and damages might be limited due to increased sales of copyrighted works resulting from the alleged infringement. From Google's perspective, there was substantial exposure given the number of works scanned and the prospect of at least statutory damages following a finding of copyright infringement.

Thus, a revised settlement seems likely. The question is how wide-ranging a revised settlement will be. An "opt-in" version of the existing ASA would appear to be potentially acceptable to the court.<sup>33</sup> However, Google may stand to gain little from an opt-in ASA as compared to simply making a unilateral offer to copyright owners. Therefore, the parties may negotiate a scaled-back revised settlement that addresses only the specific claims in the complaint, i.e., Google's scanning of works and provision of snippets. Under any imaginable revised settlement, Google's (or its competitors') ability to offer a digital library service will be forestalled for at least a significant period of time to the detriment of consumers.

With the court's rejection of the ASA, the rights of copyright owners have trumped the interests of consumers. While the court may have had a firm basis in copyright and class action law for its decision, consumers will be denied access to a digital library service. The issue will now probably head to Congress. Many ASA opponents had argued that Congress, rather than the court system, is the appropriate venue for deciding whether there should be any substantial change in copyright protection, e.g., for unclaimed works. However, if patent reform is any indication, this process could take a long time to reach a conclusion and the resolution may be less than satisfactory. While it would have required a somewhat bold approach, the court could have avoided these problems by approving the ASA. It was a missed opportunity from the point of view of consumers. ●

*With the court's  
rejection of the ASA,  
the rights of copyright  
owners have trumped  
the interests of  
consumers.*

---

<sup>33</sup> *Id.* at 46.

# Extradition: The New Sword or the Mouse that Roared?

## James A. Wilson

In March 2010, the U.S. Department of Justice Antitrust Division for the first time gained the extradition of a foreign national. Ian Norris, a retired English executive, was extradited to the United States from the United Kingdom on charges related to an antitrust investigation. Mr. Norris was subsequently convicted and sentenced to serve eighteen months in prison for conspiracy to obstruct justice.<sup>1</sup>

In the multi-year effort to extradite Mr. Norris preceding this conviction, the Antitrust Division made clear its view that these efforts were intended to overturn the perception that foreign nationals were safe from antitrust prosecution in the United States unless they voluntarily decided to face such charges, usually as part of a plea deal. Thus, the head of the Division's criminal enforcement section asserted that with the "increased willingness [of foreign governments] to assist the United States in tracking down and prosecuting cartel offenders, the safe harbors for offenders are rapidly shrinking."<sup>2</sup> Similarly, the Assistant Attorney General for Antitrust asserted: "The United States's efforts in the *Norris* case should send a powerful signal that cartelists will not be allowed to hide behind borders."<sup>3</sup>

Has the Norris extradition changed the landscape for foreign executives facing antitrust charges in the United States? This article asserts that it has not: extradition is likely still to be the exception to the rule, and in most jurisdictions, the executive who chooses not to come to the United States to face charges is not likely to be forced to do so.

## The *Norris* Case

In 2002, in connection with a U.S. antitrust investigation, the Morgan Crucible Company plc, based in Windsor, England, pleaded guilty to one count of tampering with witnesses and one count of document destruction. The company paid a \$1 million criminal fine.<sup>4</sup>

In 2004, a federal grand jury indicted Norris, a citizen of the United Kingdom, and former CEO of Morgan Crucible, on one count of fixing prices of carbon brushes and other carbon products, one count of conspiring to obstruct justice, and two counts of obstructing justice in connection with the Department of Justice's antitrust investigation of price fixing in the carbon products industry.<sup>5</sup> The Department alleged that Norris conspired with his subordinates to obstruct the

■  
**James A. Wilson** is a Partner at Vorys, Sater, Seymour and Pease LLP, and a former Chair of the ABA Section of Antitrust Law.

<sup>1</sup> United States v. Norris, No. 2:03-cr-00632 (E.D. Pa. Dec. 13, 2010) (judgment entering sentence).

<sup>2</sup> Scott D. Hammond, Deputy Ass't Att'y Gen., Address at the ABA Section of Antitrust Law Cartel Enforcement Roundtable: An Update of the Antitrust Division's Criminal Enforcement Program (Nov. 16, 2005), available at <http://www.justice.gov/atr/public/speeches/213247.htm>.

<sup>3</sup> Thomas O. Barnett, Assistant Att'y Gen., Presentation to the 11th Annual Competition Law & Policy Workshop at the European Union Institute: Seven Steps to Better Cartel Enforcement (June 2, 2006), available at <http://www.justice.gov/atr/public/speeches/216453.htm>.

<sup>4</sup> Press Release, U.S. Dept. of Justice Antitrust Div., U.S. Company and U.K. Parent to Plead Guilty to Charges Involving an International Electrical Carbon Products Cartel (Nov. 4, 2002), available at [http://www.justice.gov/atr/public/press\\_releases/2002/200423.htm](http://www.justice.gov/atr/public/press_releases/2002/200423.htm).

<sup>5</sup> United States v. Norris, No. 2:03-cr-00632 (E.D. Pa. Sept. 28, 2004) (second superseding indictment).

grand jury's investigation. Specifically, Morgan Crucible employees allegedly conspired with Norris to create a false script that employees of both Morgan Crucible and a competitor were to follow when questioned in the investigation. In addition, a document destruction task force was allegedly formed to collect and destroy or conceal documents from the grand jury.

The United States sought Norris's extradition from the United Kingdom on both price fixing and obstruction of justice charges. Initially, this attempt was successful, with both the trial court and the Supreme Court of the United Kingdom ordering Norris's extradition to the United States on the price-fixing charges.<sup>6</sup> However, in March 2008, Norris won a significant victory when the House of Lords ruled that he could not be extradited to the United States to stand trial on price-fixing charges because price fixing was not a criminal offense in the United Kingdom at the time he was alleged to have committed it.<sup>7</sup> The allegations related to the 1990s and price fixing did not become a criminal offense in the United Kingdom until 2003.

Nevertheless, the House of Lords left open the possibility that Norris could be extradited on obstruction of justice charges. In 2009, a UK judge ruled that the obstruction charge was of such gravity that Norris should be sent to the United States to face trial.<sup>8</sup> Norris appealed that decision in the UK Supreme Court, arguing that extradition would infringe his human right to a private and family life and could exacerbate his health problems. The appeal was unanimously rejected,<sup>9</sup> prompting Norris to seek relief from the European Court of Human Rights (ECHR) as a last-ditch appeal. The ECHR declined to hear the appeal.<sup>10</sup>

Norris was extradited to the United States in March 2010. On July 27, 2010, Norris was convicted by a federal jury of conspiring to obstruct justice. On December 10, 2010, Norris was sentenced to serve eighteen months in prison. His conviction was affirmed by the Court of Appeals for the Third Circuit on March 23, 2011.<sup>11</sup>

### Extradition and the Antitrust/Competition Laws: The Basic Framework

Prior to the successful extradition of Ian Norris, the Antitrust Division had not been successful in gaining the extradition of any foreign national on antitrust charges. Has the *Norris* case fundamentally changed the risk that foreign nationals will be extradited into the United States on such charges? While executives certainly cannot assume there is no risk of being prosecuted in the United States for antitrust violations, several of the most important hurdles to extraditing such individuals remain just as difficult as before the *Norris* case.<sup>12</sup>

The United States has extradition treaties with most countries.<sup>13</sup> While early extradition treaties listed the offenses that either nation agreed were a basis for extradition,<sup>14</sup> many more recent extra-

*While executives*

*certainly cannot*

*assume there is no risk*

*of being prosecuted in*

*the United States for*

*antitrust violations,*

*several of the most*

*important hurdles to*

*extraditing such*

*individuals remain just*

*as difficult as before*

*the Norris case.*

<sup>6</sup> *Norris v. Government of the United States of Am.*, [2007] EWHC (Admin) 71, [21], [180], [2007] 2 All E.R. 29 (Eng.).

<sup>7</sup> *Norris v. Government of the United States of Am.*, [2008] UKHL 16, [62], [2008] 2 All E.R. 1103 (Eng.).

<sup>8</sup> [2009] EWHC (Admin) 995, [2009] Lloyd's Rep FC 475 (Eng.).

<sup>9</sup> [2010] UKSC 9, [2010] All E.R. 256 (Eng.).

<sup>10</sup> See Helia Ebrahimi, *Norris Loses Fight Against Extradition*, DAILY TELEGRAPH, Mar. 17, 2010, available at 2010 WLNR 5514829.

<sup>11</sup> *United States v. Norris*, No. 10-4658, 2011 U.S. App. LEXIS 5946 (3d Cir. Mar. 23, 2011) (unpublished opinion).

<sup>12</sup> For a more comprehensive review of the process by which the United States can seek to extradite an individual accused of a criminal violation, see M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* (5th ed. 2007), and MICHAEL ABBELL, *EXTRADITION TO AND FROM THE UNITED STATES* (2010).

<sup>13</sup> The United States lacks extradition treaties with only a few nations, including Russia, the People's Republic of China, Namibia, the United Arab Emirates, and North Korea. BASSIOUNI, *supra* note 13, at 983–92.

<sup>14</sup> The author's research has not found any country with which the United States has a "list" extradition treaty (an older form of extradition treaty in which all extraditable offenses were listed) that includes cartel offenses in its list.

dition treaties rely on the principle of dual criminality.<sup>15</sup> Under this standard, an offense that is the basis for extradition must be a violation of the criminal laws of both the country requesting extradition and the country to which the request is made.<sup>16</sup>

Criminalization of the antitrust laws is a growing trend, but the number of jurisdictions that have adopted criminal sanctions for antitrust violations (e.g., hard core cartel conduct) remains relatively small. The United Kingdom,<sup>17</sup> Israel,<sup>18</sup> Ireland,<sup>19</sup> South Korea,<sup>20</sup> Australia,<sup>21</sup> Japan,<sup>22</sup> Canada,<sup>23</sup> Greece,<sup>24</sup> Brazil,<sup>25</sup> and Russia<sup>26</sup> have adopted criminal antitrust penalties for cartel offenses.

In light of the dual criminality requirement, extradition to the United States for an alleged violation of the Sherman Act is only possible if the country from which extradition is sought has criminalized cartel conduct or has listed antitrust offenses as a category of extraditable offense. This limits the number of jurisdictions from which extradition might be possible.

The requirement of dual criminality is not the only obstacle to extradition for antitrust offenses. Some countries forbid extradition of their own citizens by law.<sup>27</sup> For other countries, their treaty obligations with the United States do not require extradition of their own citizens.<sup>28</sup>

Accordingly, assessment of the likely impact of the Norris extradition requires a jurisdiction-by-jurisdiction analysis of whether those few jurisdictions criminalizing cartel offenses also (1) have dual criminality provision in its treaty with the United States or otherwise allow extradition for antitrust offenses; and (2) permit the extradition of their own citizens.<sup>29</sup>

<sup>15</sup> See William V. Dunlap, *Dual Criminality in Penal Transfer Treaties*, 29 VA. J. INT'L L. 813, 829 (1989) ("Dual criminality remains virtually universal in extradition, recognized by nearly every international extradition treaty, act of national implementing legislation, judicial opinion and scholarly commentary on the subject.") (footnotes omitted); John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1459 (1988) ("A maxim of international law, and a standard provision in nearly every United States extradition treaty, is that extradition will not take place unless the offense charged is a crime in both the demanding and the requested country."); see also Johanthan O. Hafen, *International Extradition: Problems Arising Under the Dual Criminality Requirement*, 1992 BYU L. REV. 191, 194 (2003).

<sup>16</sup> See, e.g., *Clarey v. Gregg*, 138 F.3d 764 (9th Cir. 1998).

<sup>17</sup> Section 188 of the Enterprise Act of 2002, available at <http://www.legislation.gov.uk/ukpga/2002/40/section/188>.

<sup>18</sup> Restrictive Trade Practices Law of 1988, available at <http://www.antitrust.gov.il/Files/HPLinks/RTP%20Law.pdf>.

<sup>19</sup> Section 6 of the Competition Act of 2002, available at <http://tca.ie/EN/Enforcing-Competition-Law/Competition-Law.aspx>.

<sup>20</sup> Article 66 of the Monopoly Regulation and Fair Trade Act, available at <http://eng.ftc.go.kr/legalauthority/recentlaw.jsp?pageId=0301>.

<sup>21</sup> Competition and Consumer Act of 2010, available at <http://www.comlaw.gov.au/Details/C2011C00003>.

<sup>22</sup> Japan Fair Trade Comm'n, Summary of the Amendment to the Antimonopoly Act (June 2009), available at <http://www.jftc.go.jp/e-page/pressreleases/2009/June/090603-2.pdf>.

<sup>23</sup> Canadian Competition Bureau, A Guide to Amendments to the Competition Act (Apr. 22, 2009), available at <http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03045.html>.

<sup>24</sup> Article 29 of Law 703/1977.

<sup>25</sup> Law No. 8,137 of December 27, 1990, as amended by Law No. 8884 of June 11, 1994, available at <http://www.oecd.org/dataoecd/14/41/1817679.pdf>.

<sup>26</sup> Federal LAW No. 216-FZ of 29th July, 2009, available at [http://en.fas.gov.ru/legislation/legislation\\_50483.html](http://en.fas.gov.ru/legislation/legislation_50483.html).

<sup>27</sup> See, e.g., Basic Law for the Federal Republic of Germany, Article 16 (2), 29 July 2009, available at <http://www.iuscomp.org/gla/statutes/GG.htm#16>; Article 8 of the Extradition Law of the People's Republic of China, available at [http://www.gov.cn/english/laws/2005-09/22/content\\_68710.htm](http://www.gov.cn/english/laws/2005-09/22/content_68710.htm); Article 4 of the Law of Extradition of the Republic of China, available at [http://law.moj.gov.tw/Eng/news/news\\_detail.aspx?id=192](http://law.moj.gov.tw/Eng/news/news_detail.aspx?id=192); Article 2, Law of Extradition of Japan, available at <http://www.moj.go.jp/ENGLISH/information/loe-01.html>. See also Julian M. Joshua & Peter D. Camesasca, *An Antitrust NATO—the DOJ's "Foreign Policy" in the War Against International Cartels*, in EUROPEAN ANTITRUST REVIEW 2006, available at [http://www.howrey.com/docs/AnAntitrustNATO\\_GCR-EuropeanATReview.pdf](http://www.howrey.com/docs/AnAntitrustNATO_GCR-EuropeanATReview.pdf).

<sup>28</sup> See M. Plachta, *(Non) Extradition of Nationals: A Neverending Story*, 13 EMORY INT'L L. REV. 77, 82–84 (1999).

<sup>29</sup> Other obstacles to extradition may also exist, which would have to be addressed on a case-by-case basis. For example, some extradition treaties, particularly those of civil law countries, allow extradition only for offenses that occur within the territorial jurisdiction of the country seeking extradition. See ABBELL, *supra* note 12, at 74–77 & 325–26.

*[T]he hurdles to extradition in the vast majority of jurisdictions make it unlikely that Norris represents a turning point in the ability of the United States to routinely gain the extradition of foreign nationals for cartel offenses.*

Of the countries with criminal antitrust penalties: (1) Russia does not have an extradition treaty with the United States;<sup>30</sup> (2) three jurisdictions—Israel, Brazil, and Greece—do not contain dual criminality provisions but rather list the offenses for which extradition will be allowed<sup>31</sup> and none contains a provision for extradition of cartel offenders; and (3) four jurisdictions that have criminalized cartel offenses—South Korea,<sup>32</sup> Australia,<sup>33</sup> Japan,<sup>34</sup> and Brazil<sup>35</sup>—either by treaty or statute, limit the extradition of their own citizens.

Put differently, only the United Kingdom, Ireland and Canada (a) criminalize cartel conduct; (b) have extradition treaties with the United States that contain dual criminality provisions; and (c) do not have obstacles to the extradition of their own citizens in their extradition treaties or statutes.

Thus, only a few jurisdictions around the world appear candidates for a successful extradition of their own citizens.<sup>36</sup>

### Conclusion

The real lesson of *Norris* may be that foreign nationals face a greater risk of extradition for obstruction of justice than for committing a cartel offense. Given the typical requirements for extradition of a foreign national to the United States, only those countries that have criminalized cartel offenses are potential candidates for a successful extradition. Of those jurisdictions that have adopted such criminal sanctions—substantial hurdles, such as the lack of an extradition treaty, the absence of cartel conduct as an extraditable offense, or protection for citizens of those jurisdictions—remain to the successful extradition of foreign nationals for antitrust offenses. While residents of the United Kingdom, Ireland, and Canada face a clearer risk of extradition than before the *Norris* case, citizens of numerous other jurisdictions, even those which have criminalized antitrust offenses, remain unlikely to be extradited to the United States on antitrust charges.

The *Norris* case certainly demonstrates that the United States will be resolute in seeking extradition when it appears feasible. Nevertheless, the hurdles to extradition in the vast majority of jurisdictions make it unlikely that *Norris* represents a turning point in the ability of the United States to routinely gain the extradition of foreign nationals for cartel offenses. ●

<sup>30</sup> See 18 U.S.C. § 3181 (listing jurisdictions that currently have extradition treaties with the U.S.).

<sup>31</sup> 14 U.S.T. 1707, art. II (Israel); 15 U.S.T. 2093, art. II (Brazil); 47 Stat. 2185 art. II (Greece).

<sup>32</sup> 1998 U.S.T. LEXIS 248, art. 3 (“Neither Contracting State shall be bound to extradite its own nationals, but the Requested State shall have the power to extradite such person if, in its discretion, it be deemed proper to do so.”).

<sup>33</sup> 27 U.S.T. 957, art. V (“Neither of the Contracting Parties shall be bound to deliver up its own nationals under this Treaty but the executive authority of each Contracting Party shall have the power to deliver them up if, in its discretion, it considers that it is proper to do so.”).

<sup>34</sup> Article 2, Law of Extradition of Japan, available at <http://www.moj.go.jp/ENGLISH/information/loe-01.html>.

<sup>35</sup> 15 U.S.T. 2093, art. VII (“There is no obligation upon the requested State to grant the extradition of a person who is a national of the requested State, but the executive authority of the requested State shall, subject to the appropriate laws of that State, have the power to surrender a national of that State if, in its discretion, it be deemed proper to do so.”).

<sup>36</sup> *Id.* Obviously, the potential exists for a non-citizen of a dual criminality country to be apprehended in that country, in which case he or she would not have the protection of such restrictions on the extradition of a citizen. To date, however, no such extradition has occurred in an antitrust case.

## A Tale of Two Coasts: Recent RPM Enforcement in New York and California

**Michael A. Lindsay**

Two recent enforcement actions in California and New York illustrate the continuing uncertainty that businesses face in designing and implementing resale price maintenance (RPM) programs.<sup>1</sup> In *People v. Bioelements, Inc.*, the California Attorney General obtained a consent decree against a Colorado company that had RPM agreements with its independent resellers.<sup>2</sup> But in *People v. Tempur-Pedic, International Inc.*, the New York Attorney General sought to enjoin an RPM program—and lost a contested trial court proceeding. What can companies learn from these two enforcement actions?

### **Bioelements**

Bioelements sells skin-care products for various needs, such as cleansing, anti-aging, and hydration. Bioelements sells these products through two channels—salon spas and authorized Internet resellers—with written agreements for dealers in each channel. Before the December 2010 challenge 2010, salon spas signed Bioelements agreements with an explicit minimum RPM provision: “Accounts shall not charge less than the Manufacturer’s Suggested Retail Price (MSRP).”<sup>3</sup> The Internet-only dealers’ agreement had both a minimum and maximum RPM provision: “Accounts are prohibited from charging more or less than the Manufacturer’s Suggested Retail Price (MSRP).”<sup>4</sup> According to the California Attorney General’s press release about the case, however, the problematic provisions dealt only with online sales: the agreements required vendors “to sell Bioelements’ products *online* for at least as much as the retail prices prescribed by Bioelements. (There were no express pricing requirements for products sold in person or in shops.)”<sup>5</sup>

The California Attorney General alleged that the agreements constituted “vertical price-fixing in per se violation of the Cartwright Act.”<sup>6</sup> (There was no question that Bioelements had satisfied the “agreement” element of a Cartwright Act violation.<sup>7</sup>) In addition, the attorney general alleged

■ **Michael A. Lindsay** is a partner at Dorsey & Whitney LLP, where he chairs the firm’s Antitrust Practice Group. He serves as an associate editor of Antitrust magazine.

<sup>1</sup> See generally Joan Biskupic, *States Try to Counter Supreme Court’s Minimum-Price Ruling*, USA TODAY, Dec. 22, 2010, available at [http://www.usatoday.com/news/washington/judicial/2010-12-22-robertscourt22\\_CV\\_N.htm](http://www.usatoday.com/news/washington/judicial/2010-12-22-robertscourt22_CV_N.htm).

<sup>2</sup> *People v. Bioelements Inc.*, File No. 10011659 (Cal. Super. Ct. Riverside County, filed Dec. 30, 2010) (*Bioelements* Complaint). The consent decree was filed January 11, 2011 (*Bioelements* Consent Decree).

<sup>3</sup> *Bioelements* Complaint, *supra* note 2, ¶ 5.

<sup>4</sup> *Id.*

<sup>5</sup> Attorney General Halts Online Cosmetics Price-Fixing Scheme (Jan. 14, 2011) (emphasis added), available at [http://oag.ca.gov/news/press\\_release?id=2028&m=0](http://oag.ca.gov/news/press_release?id=2028&m=0).

<sup>6</sup> *Bioelements* Complaint, *supra* note 2, ¶ 15.

<sup>7</sup> CAL. BUS. & PROF. CODE § 16720 et seq.



that “vertical price-fixing” also constituted “unfair competition” in violation of California’s Unfair Competition Law.<sup>8</sup>

The case was resolved by consent decree. Bioelements was enjoined from making any agreements with a third party to “increase the price of merchandise or any commodity,” or “to fix at any standard or figure, whereby its price to the public or consumer shall, be in any manner controlled or established, any article or commodity of merchandise, produce, or commerce intended for sale, barter, use or consumption in this State.” In addition, Bioelements was enjoined from making agreements with third parties by which Bioelements and third parties bound themselves “not to sell . . . any commodity . . . below a common standard figure, or fixed value,” or “to keep the price of such . . . commodity . . . at a fixed or graduated figure,” or “establish or settle the price of any . . . commodity . . . between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such . . . commodity.” Bioelements also agreed to pay \$15,000 in civil penalties and \$36,000 for the state’s attorney’s fees.

**The California Attorney**

**General alleged that the**

**agreements constituted**

**“vertical price-fixing in**

**per se violation of the**

**Cartwright Act.”**

The consent decree also required Bioelements to send a letter “to each entity that, since January 1, 2005, made any agreement with Bioelements to maintain in any manner resale prices established or set by Bioelements for any Bioelements products.” The letter had to state that “Bioelements is immediately, unilaterally disavowing all parts of Bioelements’s distributor or resale agreement with you that purportedly obligated you to maintain certain resale prices for Bioelements products. As far as Bioelements is concerned, you do not have an agreement with Bioelements to maintain any resale prices for Bioelements products.”

Just how far do the consent decree’s injunctive provisions extend? More specifically, do the injunctive provisions apply to “interstate” sales?<sup>9</sup> The consent decree states that its injunctive provisions are issued “[u]nder [California] Business & Professions Code sections 16750, 16754.5 and 17203,” which presumably means that the injunction extends no further than the statute allows. Unless the California statute is preempted by federal law,<sup>10</sup> California clearly can prohibit a minimum RPM agreement that applies to sales by a California-based reseller to a California resident—whether or not the manufacturer is a California resident. Just as clearly, California has no power to enjoin minimum RPM agreements that apply to sales by a non-California reseller to a non-California resident (even if the manufacturer is subject to California’s jurisdiction).

In two intermediate cases, however, the result may not be as clear: (a) sales by a California reseller to a non-California resident, and (b) sales by a non-California reseller to a California resident. As a practical matter, these cases generally would arise in Internet sales, not bricks-and-mortar. The *Bioelements* consent decree does not distinguish between Internet resellers and brick-and-mortar resellers, although it plainly applies to both, and it does not distinguish between in-state and out-of-state resellers. Arguably the consent decree’s reference to the applicable state statute means that the injunction applies only to in-state resellers (and possibly only to in-

<sup>8</sup> *Id.* ¶ 12; CAL. BUS. & PROF. CODE §17200 et seq. Section 17200 defines “unfair competition” as “any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code [which deals with various kinds of advertising].”

<sup>9</sup> Bioelements itself is an Illinois corporation “physically headquartered” in Colorado, although its president (who founded the company) lives in California’s Riverside County. *Bioelements* Complaint, *supra* note 2, ¶ 5.

<sup>10</sup> I have discussed federal preemption of state prohibitions of minimum RPM agreements in *State Resale Price Maintenance Laws After Leegin*, ANTITRUST SOURCE, Oct. 2009, at 5–6, [http://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/Oct09\\_Lindsay10\\_23f.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Oct09_Lindsay10_23f.authcheckdam.pdf), and *Resale Price Maintenance and the World After Leegin*, ANTITRUST, Fall 2007, at 1, 33.

state sales by in-state resellers). But the consent decree also required Bioelements to notify all distributors and resellers with whom it had RPM agreements—seemingly without regard to whether the reseller or its customers were located in California.

### ***Tempur-Pedic***

Tempur-Pedic sells premium mattresses and related bedding products with visco-elastic memory foam. These products are sold primarily through specialty stores, furniture stores, and department stores,<sup>11</sup> although they can also be purchased directly from Tempur-Pedic for home delivery and from Internet resellers.<sup>12</sup> Unlike the Bioelements dealers' agreement, the Tempur-Pedic reseller agreement did not include any provision establishing a minimum resale price, although it did include provisions relating to *advertised* price (including, for example, prohibitions on advertising rebates, gift cards, free gifts, and store credits).<sup>13</sup> Tempur-Pedic also adopted a *Colgate*<sup>14</sup> policy: Tempur-Pedic had "announce[d] a policy to suspend doing business with any retailer who does not adhere substantially to [its] suggested retail price ranges."<sup>15</sup> The policy was enforced through shipment suspensions if a retailer was substantially deviating from Tempur-Pedic's suggested retail prices (other than an isolated incident or a liquidation sale of discontinued merchandise). The policy included the standard disclaimers—that the policy was Tempur-Pedic's "unilateral decision" and was "not negotiable," that Tempur-Pedic "neither seeks nor will . . . accept its retailers' agreement with the policy," and that retailers may set prices at whatever level they believe to be in their best interests.<sup>16</sup>

The New York Attorney General challenged Tempur-Pedic's practices under section 369-a of the Donnelly Act.<sup>17</sup> The Verified Petition alleged that Tempur-Pedic products were "sold at virtually uniform, high prices by all New York retailers of Tempur-Pedic products," and that this resulted from "contractual provisions that prohibit and restrain discounting contrary to New York law."<sup>18</sup> The Verified Petition alleged that Tempur-Pedic had sent letters to all of its accounts "explicitly stat[ing] that it will not do business with any retailer that charges retail prices that differ from the prices set by Tempur-Pedic," and that Tempur-Pedic retailers "have accepted the contractual requirement that discounting is not permitted by Tempur-Pedic, and comply with that requirement in violation of law."<sup>19</sup>

The trial court rejected the attorney general's challenge. First, the court found that section 369-a did not prohibit minimum RPM agreements. Although the caption for the statute reads "Price-fixing prohibited," the actual text of the statute does not say this. The statute says "Any contract provision that purports to restrain a vendee of a commodity from reselling such commodity

---

<sup>11</sup> Verified Petition, *People v. Tempur-Pedic International, Inc.*, 400837/10 (N.Y. Sup. Ct. N.Y. County filed Mar. 29, 2010) (*Tempur-Pedic Petition*). The Decision, Order, and Final Judgment (*Tempur-Pedic Order*) was filed on January 14, 2011.

<sup>12</sup> For purchases from Tempur-Pedic, see <http://www.tempurpedic.com/shopping-with-us/buy-from-us.asp>. For purchases from Internet resellers, see, e.g., <http://www.backtobed.com/mattresses/tempur-pedic/>.

<sup>13</sup> *Tempur-Pedic Order*, *supra* note 11, at 2–3.

<sup>14</sup> *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

<sup>15</sup> *Tempur-Pedic Order*, *supra* note 11, at 3.

<sup>16</sup> *Id.*

<sup>17</sup> N.Y. GEN. BUS. LAW § 369-a.

<sup>18</sup> *Tempur-Pedic Petition*, *supra* note 11, ¶¶ 9–10.

<sup>19</sup> *Tempur-Pedic Order*, *supra* note 11, at 6.

at less than the price stipulated by the vendor or producer shall not be enforceable or actionable at law.”<sup>20</sup> The court held that the meaning of the statutory language was plain: “Contracts for resale price restraints are unenforceable and not actionable, but not illegal.”

Second, citing *Monsanto*, the court found that there was no evidence of a minimum RPM agreement between Tempur-Pedic and its resellers—no “meeting of the minds.”<sup>21</sup> Even if an agreement could be formed when a reseller raised its price in response to threats or coercion (as Judge Posner had held in *Isaksen*<sup>22</sup>), the court found no evidence of such threats.<sup>23</sup>

### Some Lessons

The *Bioelements* consent decree and the *Tempur-Pedic* decision come from major markets, and so firms with resellers in those jurisdictions need to pay close attention. But the two decisions also offer several broader lessons as well.

[In New York],

[c]ontracts for resale

price restraints are

unenforceable and

not actionable,

but not illegal.

**State laws—or at least a state’s relative chances of success in challenging RPM agreements—vary significantly by state.** State laws are by no means uniform, as the *Antitrust Source*’s fifty-state survey illustrates.<sup>24</sup> Some state statutes will give the state a stronger argument that minimum RPM is illegal, and some state statutes will give the state a weaker argument. For example, the Maryland’s post-*Leegin* statute explicitly adopted, and specifically applies, the per se rule to minimum RPM agreements<sup>25</sup>—giving the Maryland Attorney General a strong position in challenging such agreements.

**Smaller companies may be more attractive targets in some states.** State attorneys general will not bring baseless actions, but resource limitations may influence decisions on which cases to bring. Given a choice between two potential defendants—only one of which has sufficient resources to mount a vigorous defense—there may be a temptation for a state attorney general to choose the less well-armed defendant. Other factors—the ease of proof and the clarity and magnitude of the violation, for example—will likely carry more weight in the decision-making.

Smaller companies should take particular care in program design and implementation. All companies should be cautious in adopting minimum advertised price (MAP) or RPM programs, but particularly companies doing business in California, Maryland, and other states with strong statutes. Moreover, companies that do not have the resources to defend a MAP or RPM program would be well advised to involve knowledgeable counsel in their program design and implementation.

**Maximum RPM challenges are still “mostly dead.”**<sup>26</sup> A jury is more likely to believe that competition is harmed by a minimum RPM agreement than by a maximum RPM agreement.<sup>27</sup> Indeed, the

<sup>20</sup> N.Y. GEN. BUS. LAW § 369-a.

<sup>21</sup> *Tempur-Pedic* Order, *supra* note 11, at 9–11 (citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U. S. 752 (1984)).

<sup>22</sup> *Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1158, 1162–63 (7th Cir. 1987).

<sup>23</sup> *Tempur-Pedic* Order, *supra* note 11, at 11–12.

<sup>24</sup> The fifty-state survey is available at ANTITRUST SOURCE, [http://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/Dec10\\_LindsayChart12\\_21f.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Dec10_LindsayChart12_21f.authcheckdam.pdf).

<sup>25</sup> MD. CODE ANN., COM. LAW. § 11-204(a)(1) (2009). This statute is discussed in *State Resale Price Maintenance Laws*, *supra* note 10, at 2.

<sup>26</sup> With apologies to fans of *The Princess Bride*.

<sup>27</sup> For a discussion of mock jury deliberations in a minimum RPM case, see Michael A. Lindsay, *Resale Price Maintenance: Real Life Lessons from a Mock Trial*, ANTITRUST SOURCE, June 2008, at 4–6, <http://www2.americanbar.org/antitrust/Searchable%20Antitrust%20Library/Jun08-Lindsay6=26f.pdf>.

post-*Leegin* Maryland statute applies the per se rule only to minimum price agreements. In a recent interview, California's Assistant Attorney General for Antitrust, Kathleen Foote, was not willing to say that the Cartwright Act applies only to minimum RPM agreements, but she did acknowledge that maximum RPM agreements are not an enforcement priority: "Given our limited resources, the cases that we are most likely to take on would be the minimum RPM ones first."<sup>28</sup> Still, although nothing in the *Bioelements* complaint, consent decree, or press release spoke of the specific evils of maximum RPM agreements, neither did they describe the case as only a minimum RPM case. A state challenge to a purely and truly maximum RPM agreement, though, still seems unlikely.

*Although some states may evaluate minimum RPM agreements under the rule of reason, other states will apply the per se rule.*

***But the Colgate doctrine is alive and well.*** Tempur-Pedic used a *Colgate* policy in combination with a MAP agreement to achieve its business objectives. Although the *Tempur-Pedic* court had held that section 369-a did not prohibit minimum RPM agreements, the court also found that this *Colgate*-MAP combination did not constitute an agreement on actual selling prices. This outcome is not terribly surprising, but it is a useful reminder that the best use of *Leegin* may be to contain the damages if a *Colgate* policy or MAP agreement drifts into an agreement on actual selling prices. As *Tempur-Pedic* noted, threats and coercion can result in a price agreement, and as *Bioelements* demonstrates, there remain some states where enforcement officials will view the resulting agreement as a per se violation of state antitrust law.

***Uniformity may be achievable only with the lowest common denominator.*** Although some states may evaluate minimum RPM agreements under the rule of reason, other states will apply the per se rule. Indeed, *Bioelements* was evidently required to disavow minimum RPM agreements with *all* resellers, regardless of customer or reseller location. In theory, a manufacturer could design RPM agreements that do not apply to sales made into zip codes in states that pose the greatest legal risk, but that approach may not be practical or may be too costly to implement. Thus, a manufacturer with a national distribution network may not be able to have a uniform policy for all resellers across the country—unless that policy complies with the strictest (or at least most strictly enforced) state laws, such as California's.

***Manufacturers should carefully consider their Internet sales and resale strategy.*** Internet sales and Internet advertising have national reach, and a discounting Internet reseller can have a disproportionate effect on a manufacturer's pricing. Given the differing state approaches (and for other commercial reasons as well), a manufacturer might choose to reserve the Internet sales channel to itself. Where that is not commercially feasible or desirable, then the manufacturer should consider other approaches, such as not dealing with Internet-only resellers, or adopting a *Colgate*-MAP strategy. *Tempur-Pedic* makes clear that a well-designed and well-implemented *Colgate*-MAP strategy can minimize market disruption while also controlling the manufacturer's legal risk. (*Tempur-Pedic* also took additional steps, such as requiring Internet sellers to have a bricks-and-mortar store.)

***Manufacturers should continue to weigh the incremental risks and benefits of RPM agreements.*** Using minimum RPM agreements obviously will entail legal risk in a number of states, including some substantial markets (again, California in particular). If that risk materializes in a state or private-plaintiff enforcement action, the manufacturer will incur defense and settlement costs, but what gain (relative to alternative strategies) did the manufacturer originally believe would offset the risk and potential cost? If a manufacturer consciously considered the issue at the outset, the man-

<sup>28</sup> Roundtable—Antitrust, CAL. LAW. May 2010, available at <http://www.callawyer.com/roundtable.cfm?eid=909465&evid=1>.

ufacturer might believe that a minimum RPM agreement provides better tools for enforcing compliance with the RPM policy. For example, unlike noncompliance with a *Colgate* policy, noncompliance with an RPM agreement might provide legal cause for termination of an otherwise nonterminable distribution agreement, and it might provide a damages remedy for breach—although asserting either of those positions would invite an antitrust defense or counterclaim, at least in states with strict statutes. When asked to draft a minimum RPM provision, an attorney should counsel his or her client to weigh the relative costs and benefits of this approach and to consider the alternatives.

### Conclusion

State minimum RPM law remains a minefield. Two of our largest states have demonstrated that they will pursue minimum RPM agreements aggressively—and, at least in California, successfully. In New York, the trial court's decision is not the final word; the attorney general has appealed, so we can expect further developments from that state. Moreover, the Kansas Supreme Court has had a *Leegin* case under advisement since September 2010.<sup>29</sup> Manufacturers continue to need caution and counsel when adopting and implementing RPM and MAP programs. ●

---

<sup>29</sup> O'Brien v. Leegin Creative Leather Prods. Inc., File No. 08-101000-S (Kan. filed Aug. 12, 2010). This case is discussed in Michael A. Lindsay, *An Update on State RPM Laws Since Leegin*, ANTITRUST SOURCE, Dec. 2010, at 4–6, [http://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/Dec10\\_Lindsay12\\_21f.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Dec10_Lindsay12_21f.authcheckdam.pdf).

# Overview of State RPM\*

Michael A. Lindsay

STATE	LEGISLATION	LITIGATION
AL	<p><b>AT: ALA. CODE § 8-10-1 (2009)</b> (providing civil penalty where a person or corporation “engages or agrees with other persons or corporations or enters, directly or indirectly, into any combination, pool, trust, or confederation to regulate or fix the price of any article or commodity”); <b>ALA. CODE § 8-10-3</b> (declaring it illegal for “any person or corporation . . . [to] restrain or attempt to restrain, the freedom of trade or production, or [to] monopolize, or attempt to monopolize”).</p> <p><b>IB: Ala. Code § 6-5-60(a) (2009)</b> (providing for the recovery of damages caused by “an unlawful trust, combine, or monopoly, or its effect, direct or indirect”).*</p> <p>* Note: <b>ALA. CODE § 6-5-60(a)</b> is not, strictly speaking, an <i>Illinois Brick</i> repealer statute because the statute was enacted in 1975, two years before the Supreme Court’s decision in <i>Illinois Brick</i>.</p>	<p><b>H: City of Tuscaloosa v. Harcros Chems., 158 F.3d 548, 555 n.8 (11th Cir. 1998)</b> (finding that federal antitrust law “prescribes the terms of unlawful monopolies and restraints of trade” under Alabama law (citing <i>Ex parte Rice</i>, 67 So. 2d 825, 829 (Ala. 1953))).</p>
AK	<p><b>AT: ALASKA STAT. § 45.50.562 (2009)</b> (declaring unlawful “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce”).</p> <p><b>IB: ALASKA STAT. § 45.50.577 (2009)</b> (authorizing attorney general, as <i>parens patriae</i>, to secure monetary relief “for injuries directly or indirectly sustained by persons by reason of any violation of” state antitrust laws).</p>	<p><b>H: Alakayak v. B.C. Packers, Ltd., 48 P.3d 432, 448 (Alaska 2002)</b> (holding that federal cases construing the Sherman Act § 1 “will be used as a guide” for Alaska antitrust claims); <i>see also West v. Whitney-Fidalgo Seafoods, Inc., 628 P.2d 10, 14 (Alaska 1981)</i> (finding that Alaska legislature intended Alaska courts to look to Sherman Act for guidance).</p>
AZ	<p><b>AT: ARIZ. REV. STAT. § 44-1402 (2009)</b> (declaring unlawful “[a] contract, combination or conspiracy between two or more persons in restraint of, or to monopolize, trade or commerce”).</p> <p><b>H: ARIZ. REV. STAT. § 44-1412 (2009)</b> (providing legislative intent that “courts may use as a guide interpretations given by the federal courts to comparable federal antitrust statutes” and that “[t]his article shall be applied and construed to effectuate its general purpose to make uniform the [antitrust] law” among the states).</p>	<p><b>H: Bunker’s Glass Co. v. Pilkington PLC, 47 P.3d 1119, 1126-27 (Ariz. Ct. App. 2002)</b> (noting that Arizona appellate courts “typically” follow federal antitrust case law and that 44-1412 permits, but does not require, courts to look to federal case law, rejecting <i>Illinois Brick</i>), <i>aff’d</i>, 75 P.3d 99 (Ariz. 2003).</p>
AR	<p><b>AT: ARK. CODE ANN. § 4-75-309 (2009)</b> (declaring it illegal “to regulate or fix, either in this state or elsewhere, the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever”).</p> <p><b>IB: ARK. CODE ANN. § 4-75-315(B) (2009)</b> (authorizing attorney general, as <i>parens patriae</i>, to secure monetary relief “for injury, directly or indirectly sustained” because of violations of state antitrust laws).</p>	<p><b>H: Ft. Smith Light &amp; Traction Co. v. Kelley, 127 S.W. 975, 982 (Ark. 1910)</b> (finding the state antitrust law did not apply to a contract with maximum resale restraint on natural gas because the law “was to prevent a combination among producing competitors to fix the prices to the detriment of consumers” and the contract would not be to the detriment of competitors).</p>

Michael Lindsay is a partner at Dorsey & Whitney LLP, where he chairs the firm’s Antitrust Practice Group.

**Abbreviation Key:** **AT** = Antitrust Provisions; **PF** = Price-Fixing Provisions/Cases; **H** = Federal Harmonization Clauses/Cases; **IB** = *Illinois Brick* Repealer Statute

\* This chart is an updated version of the one that accompanied the article by Michael A. Lindsay, *State Resale Price Maintenance Laws After Leegin*, ANTITRUST SOURCE, Oct. 2009, [http://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/Oct09-Lindsay10-23f.pdf](http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Oct09-Lindsay10-23f.pdf). *The Antitrust Source* would like to continue to publish timely updates to this chart. If you become aware of a case or statute that should be added, please contact *The Source* at [antitrust@att.net](mailto:antitrust@att.net).

## Overview of State RPM

STATE	LEGISLATION	LITIGATION
CA	<p><b>AT: CAL. BUS. &amp; PROF. CODE § 16726 (2009)</b> (providing that “every trust is unlawful, against public policy and void”); <b>CAL. BUS. &amp; PROF. CODE § 16720(A)</b> (defining a trust as a combination “[t]o create or carry out restrictions in trade or commerce”).</p> <p><b>PF: CAL. BUS. &amp; PROF. CODE § 16720(b) (2009)</b> (defining a trust as a combination “[t]o limit or reduce the production, or increase the price of merchandise or any commodity”); <b>CAL. BUS. &amp; PROF. CODE § 16720(d)</b> (defining a trust as a combination to “fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this State”); <b>CAL. BUS. &amp; PROF. CODE § 16720(e)</b> (defining a trust as a combination to “agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure” or “establish or settle the price of any article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity”).</p> <p><b>IB: CAL. BUS. &amp; PROF. CODE § 16750</b> (providing that a cause of action may be brought by any person injured by an antitrust violation, “regardless of whether such injured person dealt directly or indirectly with the defendant”).</p>	<p><b>H: <i>Clayworth v. Pfizer, Inc.</i>, 49 Cal. 4th 758, 233 P.3d 1066, 111 Cal. Rptr. 3d 666 (Cal. 2010)</b> (noting that in 1975, “federal antitrust cases were treated as ‘applicable’ and ‘authoritative’ on Cartwright Act questions”); <b><i>State of California ex rel. Van de Kamp v. Texaco, Inc.</i>, 46 Cal.3d 1147, 1164 (1988)</b>, <i>overruled in part on other grounds by statute</i> (“Our Supreme Court has noted that “judicial interpretation of the Sherman Act, while often helpful, is not directly probative of the Cartwright drafters’ intent”); <b><i>Marin County Bd. of Realtors, Inc. v. Palsson</i>, 549 P.2d 833, 835 (Cal. 1976)</b> (recognizing that a “long line of California cases” has recognized that federal cases interpreting the Sherman Act are applicable to state antitrust cases because “both statutes have their roots in the common law”); <b><i>Freeman v. San Diego Assn. of Realtors</i>, 77 Cal.App.4th 171, 183, fn. 9 (1999)</b> (federal precedent should be used “with caution”).</p> <p><b>PF: <i>Chavez v. Whirlpool Corp.</i>, 113 Cal. Rptr. 2d 175, 179-80 (Cal. Ct. App. 2001)</b> (applying <i>Colgate</i> doctrine to hold that supplier’s unilateral exclusion of distributor did not violate Cartwright Act); <i>see also</i> <b><i>Mailand v. Burckle</i>, 572 P.2d 1142, 1147-48 (Cal. 1978)</b> (finding resale price maintenance to be per se violation of state antitrust statute because it is a per se violation under the Sherman Act and “federal cases interpreting the Sherman Act are applicable in construing the Cartwright Act”); <b><i>Harris v. Capitol Records Distrib. Corp.</i>, 413 P.2d 139, 145 (Cal. 1966)</b> (finding that vendor’s resale price maintenance scheme violated the Cartwright Act and the Sherman Act); <b><i>People v. Dermaquest, Inc.</i></b>, Final Judgment Including Permanent Injunction (consent judgment), Case No. RG 10497526 (Cal. Super. Ct. Alameda County Feb. 23, 2010) (enjoining violations of <b>CAL. BUS. &amp; PROF. CODE §§ 16720(a), 16720(d), and 16720(e)</b>; requiring manufacturer-defendant to inform resellers that defendant disavows “all parts of . . . distributor or reseller agreement . . . that purportedly obligated you to maintain certain resale prices”); <b><i>People v. Bioelements Inc.</i></b>, Final Judgment Including Permanent Injunction (consent judgment), File No. 10011659 (Cal. Super. Ct., Riverside County, filed Jan. 11, 2011) (provisions substantially similar to <i>Dermaquest</i> injunction).</p>
CO	<p><b>AT: COLO. REV. STAT. § 6-4-104 (2002)</b> (declaring illegal “[e]very contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce”).</p> <p><b>PF: COLO. REV. STAT. § 6-4-119 (2002)</b> (instructing courts that they “shall” use “comparable” federal court decisions as guidance).</p> <p><b>IB: COLO. REV. STAT. § 6-4-111(2) (2002)</b> (authorizing attorney general to bring a civil action on behalf of any public entity “injured, either directly or indirectly, in its business or property by reason of” an antitrust violation).</p>	<p><b>H: <i>See Pomerantz v. Microsoft Corp.</i>, 50 P.3d 929, 933 (Colo. App. 2002)</b> (applying <i>Illinois Brick</i> indirect purchaser rule reasoning; recognizing legislative intent to use federal interpretations to construe state law); <i>see also</i> <b><i>Confre Cellars, Inc. v. Robinson</i>, No. 01 N 1060, 2002 U.S. Dist. LEXIS 26843, at *62 (D. Colo. Mar. 6, 2002)</b> (federal antitrust cases “provide substantial guidance” to courts interpreting the Colorado statute).</p>

## Overview of State RPM

STATE	LEGISLATION	LITIGATION
CT	<p><b>AT: CONN. GEN. STAT. § 35-26 (2005)</b> (declaring unlawful “[e]very contract, combination, or conspiracy in restraint of any part of trade or commerce”).</p> <p><b>PF: CONN. GEN. STAT. § 35-28(A) (2005)</b> (declaring unlawful contracts, combinations or conspiracies that “fix[], control[] or maintain prices, rates, quotations or fees in any part of trade or commerce”).</p> <p><b>H: CONN. GEN. STAT. § 35-44b (2005)</b> (courts “shall” be guided by federal interpretations).</p>	<p><b>H: <i>Miller’s Pond Co., LLC v. City of New London</i>, 873 A.2d 965, 978 (Conn. 2005)</b> (Connecticut courts follow federal precedent where the federal statute parallels the Connecticut statute but not where the text of Connecticut’s “antitrust statutes, or other pertinent state law, requires us to interpret it differently”); <i>see also</i> <b><i>Vacco v. Microsoft Corp.</i>, 793 A.2d 1048 (Conn. 2002)</b> (referring to <b>CONN. GEN. STAT. § 35-44b</b> and following <i>Illinois Brick</i> in finding that “the legislative history makes clear that the legislature intended to [give] Connecticut an [antitrust] [l]aw, similar to the existing [f]ederal [antitrust] law in every respect.”) (quoting <b>14 H.R. Proc., Pt. 9, 1971 Sess., p. 4182</b>) (<b>Statement of Rep. Neiditz</b>) (brackets in original); <b><i>Westport Taxi Serv., Inc. v. Westport Transit Dist.</i>, 664 A.2d 719, 728 (Conn. 1995)</b>.</p> <p><b>PF: <i>Elida, Inc. v. Harmor Realty Corp.</i>, 413 A.2d 1226, 1230 (Conn. 1979)</b> (finding purpose of <b>CONN. GEN. STAT. § 35-28 (d)</b> was to codify per se violations of the Sherman Act).</p>
DE	<p><b>AT: DEL. CODE ANN. TIT. 6, § 2103 (2009)</b> (declaring unlawful “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce”).</p> <p><b>H: DEL. CODE ANN. TIT. 6, § 2113 (2009)</b> (requiring that statute “shall be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes”).</p>	<p><b>H: <i>Hammermill Paper Co. v. Palese</i>, No. 7128, 1983 Del. Ch. LEXIS 400, at *12 (Del. Ch. June 14, 1983)</b> (declaring it “manifestly evident” that state antitrust laws should be construed in harmony with federal antitrust law).</p>
DC	<p><b>AT: D.C. CODE § 28-4502 (WEST 2009)</b> (“Every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce all or any part of which is within the District of Columbia is declared to be illegal.”).</p> <p><b>H: D.C. CODE § 28-4515 (WEST 2009)</b> (“In construing this chapter, a court of competent jurisdiction may use as a guide interpretations given by federal courts to comparable antitrust statutes.”).</p> <p><b>IB: D.C. CODE § 28-4509 (WEST 2009)</b> (“Any indirect purchaser in the chain of manufacture, production, or distribution of goods or services, upon proof of payment of all or any part of any overcharge for such goods or services, shall be deemed to be injured . . .”).</p>	<p><b>H: <i>Peterson v. Visa U.S.A., Inc.</i>, No. Civ. A. 03-8080, 2005 D.C. Super. LEXIS 17, *9 (D.C. Super. April 22, 2005)</b> (citing <b>D.C. CODE § 28-4515</b>) (“The [D.C. Antitrust Act] allows “a court of competent jurisdiction . . . [to] use as a guide interpretations given by federal courts to comparable antitrust statutes.”).</p>
FL	<p><b>AT: FLA. STAT. § 542.18 (2009)</b> (declaring unlawful “[e]very contract, combination, or conspiracy in restraint of trade or commerce”).</p> <p><b>H: FLA. STAT. § 542.32 (2009)</b> (describing legislative intent that “due consideration and great weight” be given to federal antitrust case law when interpreting state antitrust statute).</p>	<p><b>H: <i>Duck Tours Seafari, Inc. v. Key West</i>, 875 So. 2d 650, 653 (Fla. Dist. Ct. App. 2004)</b> (“Under Florida law, ‘Any activity or conduct . . . exempt from the provisions of the antitrust laws of the United States is exempt from the provisions of this chapter [542]’”); <i>see also</i> <b><i>Parts Depot Co., L.P. by &amp; Through Parts Depot Co. v. Fla. Auto Supply</i>, 669 So. 2d 321, 324 (Fla. Dist. Ct. App. 1996)</b> (recognizing that state courts “rely on comparable federal antitrust statutes” to construe state statute and recognizing Florida statute to cover horizontal and vertical restraints).</p>
GA	<p><b>AT: GA. CODE ANN. § 13-8-2(a)(2) (2009)</b> (declaring unenforceable “contracts in general restraint of trade”).</p>	<p><b>H: <i>Calhoun v. N. Ga. Elec. Membership Corp.</i>, 213 S.E.2d 596, 602-03 (Ga. 1975)</b> (the test for all restraints of trade is whether the restraint is “injurious to the public interest”).</p>



## Overview of State RPM

STATE	LEGISLATION	LITIGATION
HI	<p><b>AT: HAW. REV. STAT. § 480-4(a) (2009)</b> (declaring unlawful “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce”).</p> <p><b>PF: HAW. REV. STAT. § 480-4(b)(1) (2009)</b> (no person, partnership, trust or corporation shall “[f]ix, control, or maintain, the price of any commodity”; engage in activities “with the result of fixing, controlling or maintaining its price”; or “[f]ix, control, or maintain, any standard of quality of any commodity for the purpose or with the result of fixing, controlling, or maintaining its price”).</p> <p><b>H: HAW. REV. STAT. § 480-3 (2009)</b> (requiring Hawaii antitrust statute to be “construed in accordance with judicial interpretations of similar federal antitrust statutes”).</p> <p><b>IB: HAW. REV. STAT. § 480-13(a)(1) (2009)</b> (providing that “indirect purchasers injured by an illegal overcharge shall recover only compensatory damages, and reasonable attorney’s fees”).</p>	<p><b>H: Courbat v. Dahana Ranch, Inc.</b>, 141 P.3d 427, 435 n.6 (Haw. 2006) (recognizing that federal interpretations guide the construction of Hawaii statutes “in light of conditions in Hawaii.” (quoting <i>Ai v. Frank Huff Agency</i>, 607 P.2d 1304, 1309 n. 11 (Haw. 1980))); <i>see also Island Tobacco Co. v. R.J. Reynolds Tobacco Co.</i>, 627 P.2d 260, 262, 268 (Haw. 1981) (federal rulings will not be “blindly accepted;” rather they will “serve primarily as guides to the interpretation and application of state law in the light of the economic and business conditions of this State”), <i>rev’d on other grounds, Robert’s Haw. School Bus, Inc. v. Laupahoehoe Transp. Co., Inc.</i>, 982 P.2d 853 (Haw. 1999).</p>
ID	<p><b>AT: IDAHO CODE ANN. § 48-104 (2009)</b> (declaring unlawful “[a] contract, combination, or conspiracy between two (2) or more persons in unreasonable restraint of Idaho commerce”).</p> <p><b>H: IDAHO CODE ANN § 48-102(3) (2000)</b> (providing the statute “shall be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes”).</p> <p><b>IB: IDAHO CODE ANN. § 48-108(2) (2000)</b> (authorizing the attorney general, as <i>parens patriae</i>, to bring a cause of action “for injury directly or indirectly sustained” because of any violation of state antitrust laws).</p>	<p><b>H: Afton Energy v. Idaho Power Co.</b>, 834 P.2d 850, 857 (Idaho 1992) (recognizing that federal antitrust law is traditionally “persuasive” guidance, although not binding (quoting <i>Pope v. Intermountain Gas Co.</i>, 646 P.2d 988, 994 (Idaho 1982))).</p> <p><b>PF: K. Hefner v. Caremark, Inc.</b>, 918 P.2d 595, 599 (Idaho 1996) (requiring vertical price fixing restraint to fix prices for unrelated third parties in order for a per se rule to apply).</p>
IL	<p><b>AT: 740 ILL. COMP. STAT. 10/3(2) (2009)</b> (declaring unlawful any “contract, combination, or conspiracy with one or more other persons [to] unreasonably restrain trade or commerce”).</p> <p><b>PF: 740 ILL. COMP. STAT. 10/3(1)(A) (2009)</b> (declaring unlawful “any combination or conspiracy with . . . a competitor . . . for the purpose or with the effect of fixing, controlling, or maintaining the price or rate charged for any commodity sold or bought by the parties thereto, or the fee charged or paid for any service performed or received by the parties thereto”).</p> <p><b>IB: 740 ILL. COMP. STAT. 10/7 (2009)</b> (providing that “No provision of [the Illinois Antitrust] Act shall deny any person who is an indirect purchaser the right to sue for damages”).</p>	<p><b>H: People v. Crawford Distrib. Co.</b>, 291 N.E.2d 648, 652-53 (Ill. 1972) (declaring that federal antitrust precedent is a “useful guide to our court”).</p> <p><b>PF: People v. Keystone Auto. Plating Corp.</b>, 423 N.E.2d 1246, 1251-52 (Ill. App. Ct. 1981) (reciting legislative intent of 3(1)(a) to conclude that statute does not proscribe vertical price fixing agreements between buyers and sellers); <i>Gilbert’s Ethan Allen Gallery v. Ethan Allen, Inc.</i>, 620 N.E.2d 1349, 1350, 1354 (Ill. App. Ct. 1993) (ruling that vertical price-fixing agreements are to be tested under rule of reason because “per se” violations are normally agreements between competitors or agreements that would restrict competition and decrease output” and also recognizing that federal case law is instructive but not binding), <i>aff’d</i>, 642 N.E.2d 470 (Ill. 1994); <i>but see New York v. Herman Miller, Inc.</i>, No. 08-2977 (S.D.N.Y. filed Mar. 21, 2008) (Stipulated Final Judgment and Consent Decree) (post-<i>Leegin</i> challenge to minimum RPM agreement under federal, New York, Michigan, and Illinois law).</p>

## Overview of State RPM

STATE	LEGISLATION	LITIGATION
IN	<p><b>AT: IND. CODE § 24-1-2-1 (2006)</b> (declaring illegal “[e]very scheme, contract, or combination in restraint of trade or commerce, or to create or carry out restrictions in trade or commerce”).</p> <p><b>PF: IND. CODE § 24-1-2-1 (2006)</b> (declaring illegal “[e]very scheme, contract, or combination . . . to deny or refuse to any person participation . . . or to limit or reduce the production, or increase or reduce the price of merchandise or any commodity”).</p>	<p><b>H: Deich-Keibler v. Bank One, No. 06-3802, 2007 U.S. App. LEXIS 15419, at *10 (7th Cir. 2007)</b> (noting practice of construing IND. CODE § 24-1-2-1 in light of federal antitrust case law); <b>Rumple v. Bloomington Hosp., 422 N.E.2d 1309, 1315 (Ind. Ct. App. 1981)</b> (recognizing that Indiana antitrust law is modeled after section 1 of the Sherman Antitrust Act and has been interpreted consistent with federal law interpreting it).</p> <p><b>PF: Ft. Wayne Cleaners &amp; Dyers Ass’n. v. Price, 137 N.E.2d 738 (Ind. Ct. App. 1956)</b> (affirming judgment against defendant dry cleaner association for vertical minimum price fixing).</p>
IA	<p><b>AT: IOWA CODE § 553.4 (1997)</b> (providing that “[a] contract, combination, or conspiracy between two or more persons shall not restrain or monopolize trade or commerce in a relevant market”).</p> <p><b>H: IOWA CODE § 553.2 (1997)</b> (requiring courts to construe Iowa statute “to complement and be harmonized with the applied laws of the United States which have the same or similar purpose as this chapter” but not “in such a way as to constitute a delegation of state authority” to the federal courts).</p>	<p><b>H: Max 100 L.C. v. Iowa Realty Co., 621 N.W.2d 178, 181–182 (Iowa 2001)</b> (recognizing that Iowa Competition law is “patterned” after federal Sherman Act and that IOWA CODE § 553.2 “explicitly requires” state courts to consider federal case law and construe state law “uniformly with the Sherman Act”). <i>But cf. Comes v. Microsoft Corp., 646 N.W.2d 440, 446 (Iowa 2002)</i> (finding that “Congress intended federal antitrust laws to supplement, not displace, state antitrust remedies” and that IOWA CODE § 553.2 does not require “Iowa courts to interpret the Iowa Competition Law the same way federal courts have interpreted federal law,” thus rejecting <i>Illinois Brick</i>).</p>
KS	<p><b>AT/PF: KAN. STAT. ANN. § 50-101 (2009)</b> (declaring unlawful and defining trusts as any “combination of capital, skill, or acts, by two or more persons” carried out for the purpose of, <i>inter alia</i>: restricting trade or commerce; increasing or reducing the price of goods; or preventing competition).</p> <p><b>PF: KAN. STAT. ANN. § 50-112 (2009)</b> (declaring unlawful “all arrangements, contracts, agreements, trusts or combinations between persons, designed or which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such products or articles”).</p> <p><b>IB: KAN. STAT. ANN. § 50-161(B) (2009)</b> (providing that a cause of action “may be brought by any person who is injured in such person’s business or property by reason of” an antitrust violation, “regardless of whether such injured person dealt directly or indirectly with the defendant”).</p>	<p><b>H: Bergstrom v. Noah, 974 P.2d 520, 531 (Kan. 1999)</b> (finding federal antitrust case law “persuasive” but “not binding” on the interpretation of the Kansas antitrust statute).</p> <p><b>PF: Joslin v. Steffen Ice &amp; Ice Cream Co., 54 P.2d 941, 943 (Kan. 1936)</b> (holding that resale price maintenance scheme by ice cream wholesaler violated KAN. STAT. ANN. § 50-112); <b>O’Brien v. Leegin Creative Leather Prods. Inc., No. 04 CV 1668, slip op. at 14 (8th Judicial Dist., Sedgwick County Kan. July 9, 2008), appeal pending</b> (applying rule of reason to vertical minimum RPM claim) (“Whether competition is regulated by a contract dictating who can provide a service in a given territory (as in <i>Okerberg v. Crable, 341 P.2d 966 (1959)</i>) or by all agreement to set retail prices for manufactured goods (as is claimed in this case), the impact to the consumer is not sufficiently dissimilar to justify differing legal analyses.”).</p> <p><small>* <i>O’Brien v. Leegin</i> was transferred from the Kansas Court of Appeals to the Kansas Supreme Court. The case was argued on September 17, 2010, but no decision has been issued. The Kansas Attorney General filed an amicus brief urging per se treatment for RPM agreements. See Brief for the State of Kansas as Amicus Curiae, <i>O’Brien v. Leegin Creative leather Products Inc.</i>, File No. 08-101000-S (Kan. filed Aug. 12, 2010).</small></p>
KY	<p><b>AT: KY. REV. STAT. ANN. § 367.175 (WEST 2009)</b> (declaring unlawful “[e]very contract, combination in the form of trust and otherwise, or conspiracy, in restraint of trade or commerce”).</p>	<p><b>H: Mendell v. Golden-Farley of Hopkinsville, Inc., 573 S.W.2d 346, 349 (Ky. Ct. App. 1978)</b> (applying federal antitrust case law to interpret Kentucky statute but noting that federal law is not binding).</p>

## Overview of State RPM

STATE	LEGISLATION	LITIGATION
LA	<p><b>AT:</b> LA. REV. STAT. ANN. § 51:122 (2009) (declaring illegal “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce”).</p>	<p><b>H:</b> <i>Free v. Abbott Lab.</i>, 982 F. Supp. 1211, 1214 (M.D. La. 1997) (recognizing that “Louisiana courts routinely look to federal anti-trust jurisprudence as ‘a persuasive influence on interpretation of our own state enactments’” (citing <i>La. Power &amp; Light v. United Gas Pipe Line</i>, 493 So. 2d 1149, 1158 (La. 1986))); <i>see also Red Diamond Supply, Inc. v. Liquid Carbonic Corp.</i>, 637 F.2d 1001, 1003, 1005 n.6 (5th Cir. 1981) (finding state antitrust statute was fashioned after federal statute and noting in dicta that vertical price restrictions are per se illegal, relying on federal law).</p>
ME	<p><b>AT:</b> ME. REV. STAT. ANN. TIT. 10, § 1101 (2009) (declaring illegal “[e]very contract, combination in the form of trusts or otherwise, or conspiracy, in restraint of trade or commerce”).</p> <p><b>IB:</b> ME. REV. STAT. ANN. TIT. 10, § 1104(1) (2009) (providing a right of action for any person “injured directly or indirectly in its business or property by any other person or corporation by reason of” an antitrust violation).</p>	<p><b>H:</b> <i>Davric Maine Corp. v. Rancourt</i>, 216 F.3d 143, 149 (1st Cir. 2000) (noting that the Maine antitrust statutes parallel the Sherman Act, “and analyzing state claims according to federal law” (quoting <i>Tri-State Rubbish, Inc. v. Waste Mgmt., Inc.</i>, 998 F.2d 1073, 1081 (1st Cir. 1993))).</p>
MD	<p><b>AT:</b> MD. CODE ANN., COM. LAW § 11-204(a)(1) (WEST 2009) (prohibiting any “contract, combination, or conspiracy” that unreasonably restrains trade).</p> <p><b>PF:</b> MD. CODE ANN., COM. LAW § 11-204(b) (WEST 2009) (defining any “contract, combination, or conspiracy that establishes a minimum price below which a retailer, wholesaler, or distributor may not sell a commodity or service” to be an unreasonable restraint of trade or commerce).</p> <p><b>H:</b> MD. CODE ANN., COM. LAW § 11-202(a)(2) (WEST 2009) (declaring legislative intent that courts “be guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters”).</p> <p><b>IB:</b> MD. CODE ANN., COM. LAW § 11-209(b)(ii) (WEST 2009) (providing that the State or any political subdivision thereof may maintain an action for damages stemming from an antitrust violation “regardless of whether it dealt directly or indirectly” with the defendant).</p>	<p><b>H:</b> <i>Davidson v. Microsoft Corp.</i>, 792 A.2d 336, 340–41 (Md. Ct. Spec. App. 2002) (citing MD. CODE ANN., COM. LAW § 11-202(A)(2) when applying <i>Illinois Brick</i> indirect purchaser rule to state statute); <i>see also Purity Prod., Inc. v. Tropicana Prod., Inc.</i>, 702 F. Supp. 564, 574 (D. Md. 1988) (finding that the Court’s application of the Maryland Antitrust Act “should be guided by the Court’s similar interpretation of the federal antitrust statutes).</p>
MA	<p><b>AT:</b> MASS. GEN. LAWS CH. 93, § 4 (2009) (declaring unlawful “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce”).</p> <p><b>H:</b> MASS. GEN. LAWS CH. 93, § 1 (2009) (requiring the Massachusetts antitrust laws to be “construed in harmony with judicial interpretations of comparable federal statutes insofar as practicable”).</p>	<p><b>H:</b> <i>Ciardi v. F. Hoffmann La Roche, Ltd.</i>, 762 N.E.2d 303, 307-08 (Mass. 2002) (reconciling state antitrust law with <i>Illinois Brick Co. v. Illinois</i>, 431 U.S. 720, 729–736 (1977) because MASS. GEN. LAWS CH. 93, § 1 requires state courts to harmonize state antitrust law with comparable federal law); <i>see also C. R. Bard, Inc. v. Med. Elec. Corp.</i>, 529 F. Supp. 1382, 1391 (D. Mass. 1982) (noting that sections 4 and 5 of the Massachusetts Antitrust Act are “directly comparable” to sections 1 and 2 of the Sherman Act).</p>

## Overview of State RPM

STATE	LEGISLATION	LITIGATION
MI	<p><b>AT: MICH. COMP. LAWS § 445.772 (2009)</b> (declaring unlawful any “contract, combination, or conspiracy” that is “in restraint of, or to monopolize, trade or commerce in a relevant market”).</p> <p><b>H: MICH. COMP. LAWS § 445.784(2) (2009)</b> (declaring intent of legislature that “in construing all sections of this act, the courts shall give due deference to interpretations given by the federal courts to comparable antitrust statutes, including, without limitation, the doctrine of per se violations and the rule of reason”).</p> <p><b>IB: MICH. COMP. LAWS § 445.778 (2009)</b> (providing that the state, any political subdivision, or any other person “threatened with injury or injured directly or indirectly” by an antitrust violation may bring an action for damages and injunctive relief).</p>	<p><b>H: Little Caesar Enters. v. Smith</b>, 895 F. Supp. 884, 898 (D. Mich. 1995) (finding no practical difference between federal and state vertical price fixing claims because “Michigan antitrust law is identical to federal law and follows the federal precedents”).</p> <p><b>PF: New York v. Herman Miller, Inc.</b>, No. 08-2977 (S.D.N.Y. filed Mar. 21, 2008) (Stipulated Final Judgment and Consent Decree) (post-<i>Leegin</i> challenge to minimum RPM agreement under federal, New York, Michigan, and Illinois law).</p>
MN	<p><b>AT: MINN. STAT. § 325D.51 (2009)</b> (declaring unlawful every “contract, combination, or conspiracy between two or more persons in unreasonable restraint of trade or commerce”).</p> <p><b>PF: MINN. STAT. § 325D.53, SUBDIV. 1(1)(a) (2009)</b> (declaring unlawful any “contract, combination, or conspiracy . . . for the purpose or with the effect of affecting, fixing, controlling or maintaining the market price, rate, or fee of any commodity or service”).</p> <p><b>IB: MINN. STAT. § 325D.57 (2009)</b> (providing a cause of action and treble damage remedy for any person or governmental body that is “injured directly or indirectly” by an antitrust violation).</p>	<p><b>H: Lorix v. Crompton Corp.</b>, 736 N.W.2d 619, 627–29 (Minn. 2007) (Minnesota generally follows federal law but rejects <i>Associated Gen. Contractors v. Cal. State Council of Carpenters</i>, 459 U.S. 519 (1983)); see also <i>State by Humphrey v. Road Constructors</i>, 1996 Minn. App. LEXIS 597 at *5 (Minn. Ct. App. 1996) (recognizing that “Minnesota antitrust law is to be interpreted consistently with the federal courts’ construction of federal antitrust law” (quoting <i>State v. Alpine Air Prods.</i>, 490 N.W.2d 888, 894 (Minn. Ct. App. 1992) <i>aff’d</i>, 500 N.W.2d 788 (Minn. 1993))</p> <p><b>PF: State v. Alpine Air Prod., Inc.</b>, 490 N.W.2d 888, 894 (Minn. Ct. App. 1992) (holding vertical minimum price fixing agreement a per se violation and recognizing that Minnesota courts consistently interpret state law in harmony with the federal courts’ construction of federal antitrust law) (citing <i>Keating v. Philip Morris, Inc.</i>, 417 N.W.2d 132, 136 (Minn. App. 1987) and <i>State v. Duluth Board of Trade</i>, 121 N.W. 395, 399 (Minn. 1909)), <i>aff’d</i>, 500 N.W.2d 788 (Minn. 1993).</p>
MS	<p><b>AT: MISS. CODE ANN. § 75-21-1(a) (2009)</b> (declaring unlawful any trust and defining trusts as a “combination, contract, understanding or agreement” that would be “inimical to public welfare and the effect of which would be . . . to restrain trade”).</p> <p><b>PF: MISS. CODE ANN. § 75-21-1(c) (2009)</b> (defining a trust as a combination, contract, understanding or agreement that would, among other things, “limit, increase or reduce the price of a commodity”).</p> <p><b>IB: MISS. CODE ANN. § 75-21-9 (2009)</b> (providing a right of action for any person injured by a trust or combine, “or by its effects direct or indirect”).</p>	<p><b>H: Futurevision Cable Sys., Inc. v. Multivision Cable TV Corp.</b>, 789 F. Supp. 760, 780 (D. Miss. 1992) (dismissing state law violations because the federal law violations failed) (citing <i>Walker v. U-Haul of Mississippi</i>, 734 F.2d 1068, 1070 n.5 (5th Cir. 1984) (treating Mississippi and federal antitrust claims as “analytically identical”)), <i>aff’d</i>, 986 F.2d 1418 (5th Cir. 1993).</p>

## Overview of State RPM

STATE	LEGISLATION	LITIGATION
MO	<p><b>AT: Mo. REV. STAT. § 416.031 (2009)</b> (declaring unlawful “[e]very contract, combination or conspiracy in restraint of trade or commerce” and defining a trust as lease or sale “of any commodity . . . for use, consumption, or resale within this state, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for such sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of trade or commerce in this state”).</p> <p><b>H: Mo. REV. STAT. § 416.141 (2009)</b> (requiring that state antitrust statute “shall be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes”).</p>	<p><b>H: <i>Hamilton v. Spencer</i>, 929 S.W.2d 762, 767 n.3 (Mo. Ct. App. 1996)</b> (recognizing that <b>Mo. REV. STAT. § 416.141</b> requires Missouri antitrust laws to be harmonized with federal law and therefore citing federal precedent to limit indirect purchasers’ standing to sue); <i>see also</i> <b><i>Stensto v. Sunset Memorial Park, Inc.</i>, 759 S.W.2d 261, 266 (Mo. App. 1988)</b> (state antitrust laws should be harmonized with federal antitrust laws).</p>
MT	<p><b>PF: MONT. CODE ANN. § 30-14-205 (2007)</b> (declaring it unlawful for a person or persons to enter into “an agreement for the purpose of fixing the price or regulating the production of an article of commerce” or to “fix a standard or figure whereby the price of an article of commerce intended for sale, use, or consumption will be in any way controlled”).</p>	<p><b>H: <i>Smith v. Video Lottery Consultants</i>, 858 P.2d 11, 12-13 (Mont. 1993)</b> (recognizing that <b>MONT. CODE ANN. § 30-14-205</b> is “modeled after § 1 of the Sherman Act,” but broader and therefore prohibits unilateral horizontal refusals to deal).</p>
NE	<p><b>AT: NEB. REV. STAT. § 59-801 (2009)</b> (declaring illegal “[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce”).</p> <p><b>H: NEB. REV. STAT. § 59-829 (2009)</b> (mandating that courts “shall follow the construction given to the federal law by the federal courts” when any provision is the same as or similar to the language of a federal antitrust law).</p> <p><b>IB: NEB. REV. STAT. § 59-821 (2009)</b> (providing a right of action for any person injured due to an antitrust violation, “whether such injured person dealt directly or indirectly with the defendant”).</p>	<p><b>H: <i>Heath Consultants, Inc. v. Precision Instruments, Inc.</i>, 527 N.W.2d 596, 601 (Neb. 1995)</b> (explaining that the “legal reality” is that “federal cases interpreting federal legislation which is nearly identical to the Nebraska act constitute persuasive authority”); <i>see also</i> <b><i>Arthur v. Microsoft Corp.</i>, 676 N.W.2d 29, 35 (Neb. 2004)</b> (interpreting <b>NEB. REV. STAT. § 59-829</b> to require courts to look to federal law unless federal interpretation would not support the state’s statutory purpose).</p> <p><b>PF: <i>State ex rel. Douglas v. Associated Grocers of Nebraska Coop., Inc.</i>, 332 N.W.2d 690, 693 (Neb. 1983)</b> (citing federal precedent as authority that “[b]oth horizontal price-fixing among wholesalers and vertical price-fixing between wholesalers and retailers are presumed to be in restraint of trade and are per se violations” of state antitrust laws).</p>
NV	<p><b>AT: NEV. REV. STAT. ANN. § 598A.060 (WEST 2009)</b> (declaring unlawful several categories of activities that constitute a “contract, combination or conspiracy in restraint of trade”).</p> <p><b>PF: NEV. REV. STAT. ANN. § 598A.060 (WEST 2009)</b> (enumerating unlawful activities including “price fixing, which consists of raising, depressing, fixing, pegging or stabilizing the price of any commodity or service”).</p> <p><b>H: NEV. REV. STAT. ANN. § 598A.050 (WEST 2009)</b> (declaring provisions “shall be construed in harmony with prevailing judicial interpretations of the federal antitrust statutes”).</p> <p><b>IB: NEV. REV. STAT. ANN. § 598A.210 (WEST 2009)</b> (providing a right of action and treble damage remedy for “any person injured or damaged directly or indirectly” by an antitrust violation).</p>	<p><b>H: <i>Boulware v. Nev. Dep’t of Human Res.</i>, 960 F.2d 793, 800–01 (9th Cir. 1992)</b> (finding Nevada statute adopts by reference applicable federal antitrust case law).</p>

## Overview of State RPM

STATE	LEGISLATION	LITIGATION
NH	<p><b>AT:</b> N.H. REV. STAT. ANN. § 356:2 (2009) (declaring unlawful “[e]very contract, combination, or conspiracy in restraint of trade” and expressly making unlawful “fixing, controlling or maintaining prices, rates, quotations or fees in any part of trade or commerce”).</p> <p><b>H:</b> N.H. REV. STAT. ANN. § 356:14 (2009) (permitting courts to be “guided by interpretations of the United States’ antitrust laws”).</p>	<p><b>H:</b> <i>Minuteman, LLC v. Microsoft Corp.</i>, 795 A.2d 833, 836 (N.H. 2002) (recognizing that it has “long been the practice” to rely on interpretation of federal antitrust legislation because the legislature “expressly encouraged a uniform construction with federal antitrust law”).</p> <p><b>PF:</b> <i>Wheeler v. Mobil Chem. Co.</i>, Civ. No. 94-228-B, 1994 U.S. Dist. LEXIS 16697, at *2-*3 (D. N.H. 1994) (relying on federal case law to apply rule of reason to nonprice vertical restraints under N.H. REV. STAT. ANN. § 356:14).</p>
NJ	<p><b>AT:</b> N.J. STAT. ANN. § 56:9-3 (WEST 2009) (declaring unlawful “[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce”).</p> <p><b>PF:</b> N.J. STAT. ANN. § 56:4-1.1 (WEST 2009) (“Any contract provision that purports to restrain a vendee of a commodity from reselling such commodity at less than the price stipulated by the vendor or producer shall not be enforceable or actionable at law”).</p> <p><b>H:</b> N.J. STAT. ANN. § 56:9-18 (WEST 2009) (requiring that act “shall be construed in harmony” with interpretations of comparable federal antitrust statutes to effectuate uniformity among the states “insofar as practicable”).</p>	<p><b>H:</b> <i>State v. Lawn King, Inc.</i>, 417 A.2d 1025, 1032-33 (N.J. 1980) (relying on “persuasive” interpretations of federal antitrust laws to hold that vertical price restraints are per se violations but that nonprice vertical restraints are subject to the rule of reason); <i>see also Glasofer Motors v. Osterlund, Inc.</i>, 433 A.2d 780, 787 (N.J. Super. Ct. App. Div. 1981) (New Jersey’s statute “to be construed in harmony with ruling judicial interpretations of federal antitrust statutes.”).</p> <p><b>PF:</b> <i>Exit A Plus Realty v. Zuniga</i>, 930 A.2d 491, 497 (N.J. Super. Ct. App. Div. 2007) (post-<i>Leegin</i> reference to N.J. STAT. ANN. § 56:4-1.1 (declaring vertical price fixing agreements per se unenforceable), but without any discussion of <i>Leegin</i>).</p>
NM	<p><b>AT:</b> N.M. STAT. ANN. § 57-1-1 (WEST 2009) (declaring unlawful “[e]very contract, agreement, combination or conspiracy in restraint of trade or commerce”).</p> <p><b>H:</b> N.M. STAT. ANN. § 57-1-15 (WEST 2009) (requiring that act “shall be construed in harmony with judicial interpretations of the federal antitrust laws” in order to achieve uniform application of the state and federal antitrust laws).</p> <p><b>IB:</b> N.M. STAT. ANN. § 57-1-3 (WEST 2009) (providing a right of action and treble damage remedy for “any person threatened with injury or injured in his business or property, directly or indirectly,” by an antitrust violation).</p>	<p><b>H:</b> <i>Smith Mach. Corp. v. Hesston, Inc.</i>, 694 P.2d 501, 505 (N.M. 1985) (recognizing that New Mexico courts look to federal antitrust cases “[i]n the absence of New Mexico decisions directly on point”); <i>see also Romero v. Philip Morris, Inc.</i>, 203 P.3d 873, 880 (N.M. Ct. App. 2008) (statute directs court to construe New Mexico statutes “in harmony with judicial interpretations of the federal antitrust laws”).</p>

## Overview of State RPM

STATE	LEGISLATION	LITIGATION
NY	<p><b>AT: N.Y. GEN. BUS. LAW § 340 (2009)</b> (declaring unlawful “[e]very contract, agreement, arrangement or combination . . . whereby [c]ompetition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained”).</p> <p><b>PF: N.Y. GEN. BUS. LAW § 369-a (2009)</b> (“Any contract provision that purports to restrain a vendee of a commodity from reselling such commodity at less than the price stipulated by the vendor or producer shall not be enforceable or actionable at law”).</p> <p><b>IB: N.Y. GEN. BUS. LAW § 340 (2009)</b> (providing that a person who sustains damages as a result of an antitrust violation shall not have their recovery limited due to the fact that that person “has not dealt directly with the defendant”).</p>	<p><b>H: <i>Sperry v. Crompton Corp.</i>, 863 N.E.2d 1012, 1018 (N.Y. 2007)</b> (noting that courts generally construe Donnelly Act in light of federal antitrust case law, but that it is “well settled” that New York courts will interpret Donnelly Act differently “where State policy, differences in the statutory language or the legislative history justify such a result.” (quoting <i>Anheuser-Busch, Inc. v. Abrams</i>, 520 N.E.2d 535, 539 (N.Y. 1988)); see also <i>Aimcee Wholesale Corp. v. Tomar Prod., Inc.</i>, 237 N.E.2d 223, 225 (N.Y. 1968) (recognizing that New York antitrust law was modeled on Sherman Act).</p> <p><b>PF: <i>Anheuser-Busch, Inc. v. Abrams</i>, 520 N.E.2d 535, 536–37 (N.Y. 1988)</b> (recognizing that vertical restraints are not per se illegal under New York law but may be illegal if they unreasonably restrain trade); <i>Dawn to Dusk, Ltd. v. Frank Brunckhorst Co.</i>, 23 A.D.2d 780, 781 (N.Y. App. Div. 1965) (applying rule of reason to vertical price restraints); <i>New York v. Herman Miller, Inc.</i>, No. 08-2977 (S.D.N.Y. filed Mar. 21, 2008) (Stipulated Final Judgment and Consent Decree) (post-<i>Leegin</i> challenge to minimum RPM agreement under federal, New York, Michigan, and Illinois law); <i>People v. Tempur-Pedic International, Inc.</i>, Decision, Order, and Final Judgment, Case No. 400837/10 (N.Y. Sup. Ct. N.Y. County filed Jan. 14, 2011) (under <b>N.Y. GEN. BUS. LAW § 369-a (2009)</b>, minimum RPM agreements unenforceable but not prohibited), <i>appeal filed</i> (N.Y. Sup. Ct. App. Div. N.Y. County Feb. 22, 2011).</p>
NC	<p><b>AT: N.C. GEN. STAT. § 75-1 (2009)</b> (declaring illegal “[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce”).</p>	<p><b>H: <i>Madison Cablevision, Inc. v. Morganton</i>, 386 S.E.2d 200, 213 (N.C. 1989)</b> (finding that the Sherman Act is instructive though not binding when interpreting state antitrust statute) (citing <i>Rose v. Vulcan Materials Co.</i>, 194 S.E.2d 521, 530 (N.C. 1973)); see also <i>North Carolina Steel, Inc. v. Nat’l Council on Comp. Ins.</i>, 472 S.E.2d 578, 582–83 (N.C. App. 1996) (noting extensive North Carolina history of reliance on interpretations of federal antitrust law), <i>aff’d in part and rev’d in part</i>, 496 S.E.2d 369 (N.C. 1998).</p> <p><b>PF: <i>North Carolina v. McLeod Oil Co.</i>, No 05 CVS 13975 (N.C. Super CL, Wake Co., July 30, 2007)</b> (consent decree in case where state challenged minimum resale price agreements between gasoline distributor and resellers).</p>
ND	<p><b>AT: N.D. CENT. CODE § 51-08.1-02 (2009)</b> (making unlawful a “contract, combination, or conspiracy between two or more persons in restraint of, or to monopolize, trade or commerce in a relevant market”).</p> <p><b>IB: N.D. CENT. CODE § 51-08.1-08 (2009)</b> (providing that recovery for damages caused by an antitrust violation shall not be barred because of the fact that the person threatened with injury or injured “has not dealt directly with the defendant”).</p>	<p>No cases on point—statute only.</p>

## Overview of State RPM

STATE	LEGISLATION	LITIGATION
OH	<p><b>AT: OHIO REV. CODE ANN. § 1331.01(B)(1) (WEST 2009)</b> (declaring unlawful any trust that is “[t]o create or carry out restrictions in trade or commerce”).</p> <p><b>PF: OHIO REV. CODE ANN. § 1331.01(B)(4) (WEST 2009)</b> (declaring unlawful any trust that is “[t]o fix at a standard or figure, whereby its price to the public or consumer is in any manner controlled or established, an article or commodity of merchandise, produce, or commerce intended for sale, barter, use or consumption”); <b>OHIO REV. CODE ANN. § 1331.02.</b></p> <p><b>(WEST 2009)</b> (prohibiting any person from entering into a combination, contract or agreement “with the intent to limit or fix the price or lessen the production or sale of an article or service of commerce, use, or consumption, to prevent, restrict, or diminish the manufacture or output of such article or service”).</p>	<p><b>H: <i>Johnson v. Microsoft Corp.</i>, 834 N.E.2d 791, 794–795 (Ohio 2005)</b> (recognizing that “Ohio has long followed federal law in interpreting the Valentine Act” because the state statute is patterned after the Sherman Act).</p> <p><b>PF: <i>McCall Co. v. O’Neil</i>, 1914 WL 1669, *4 (Ohio Com. Pl. Nov. 12, 1914)</b> (interpreting statute to prohibit scheme to fix prices at which goods may be resold by the reseller); <i>see also</i> <b><i>Ohio ex. rel. Brown v. Andrew Palzes, Inc.</i>, 317 N.E.2d 262, 266 (Ohio Com. Pl. 1973)</b> (interprets <b>OHIO REV. CODE ANN. § 1331.01(B)</b> as a per se bar to maximum resale price agreements).</p>
OK	<p><b>AT: OKLA. STAT. TIT. 79 § 203 (2002)</b> (declaring unlawful “[e]very act, agreement, contract, or combination in the form of a trust, or otherwise, or conspiracy in restraint of trade or commerce”).</p> <p><b>H: OKLA. STAT. TIT. 79 § 212 (2002)</b> (requiring that act “shall be interpreted in a manner consistent with Federal Antitrust Law” and applicable case law).</p>	<p><b>H: <i>Star Fuel Marts, LLC v. Sam’s E., Inc.</i>, 362 F.3d 639, 648 n.3 (10th Cir. 2004)</b> (Oklahoma’s antitrust act is required by statute to be interpreted in accordance with federal antitrust case law).</p>
OR	<p><b>AT: OR. REV. STAT. § 646.725 (2009)</b> (declaring illegal “[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce”).</p> <p><b>H: OR. REV. STAT. § 646.715(2) (2009)</b> (declaring legislative intent that federal court decisions interpreting federal antitrust law “shall be persuasive authority”).</p> <p><b>IB: OR. REV. STAT. § 646.780(1)(a) (2009 Update)</b> (providing a right of action and treble damage remedy for antitrust violations, “regardless of whether the plaintiff dealt directly or indirectly with the adverse party”).</p>	<p><b>H: <i>Jones v. City of McMinnville</i>, No. 05-35523, 2007 U.S. App. LEXIS 11235 at *8 (9th Cir. 2007)</b> (finding that Oregon and federal antitrust statutes are “almost identical” and that Oregon courts look to federal decisions as “persuasive”) (quoting <b>OR. REV. STAT. § 646.715; <i>Or. Laborers-Employers Health &amp; Welfare Trust Fund v. Philip Morris, Inc.</i>, 185 F.3d 957, 963 n.4 (9th Cir. 1999)</b>), <i>cert. denied</i> <b>528 U.S. 1075 (2000)</b>; <i>see also</i> <b><i>Willamette Dental Group, P.C. v. Oregon Dental Serv. Corp.</i>, 882 P.2d 637, 640 (Or. Ct. App. 1994)</b> (with no reported Oregon decisions on point, “we look to federal decisions interpreting Section 2 of the Sherman Act for persuasive, albeit not binding, guidance”).</p>
PA	<p>No statute—common law remedies only.</p>	<p><b>PF: <i>Shuman v. Bernie’s Drug Concessions, Inc.</i>, 187 A.2d 660, 662 (Pa. 1963)</b> (finding horizontal price-fixing agreements to be unlawful at common law and holding that vertical restraints that are the “incidents or fruits of an unlawful [horizontal] conspiracy . . . are infected with the illegality of the horizontal conspiracy and are hence unenforceable”).</p> <p><b>H: <i>Collins v. Main Lind Bd. of Realtors</i>, 304 A.2d 493, 496 (Pa. 1973)</b> (court looks to United States Supreme Court case for guidance in determining whether an agreement unreasonably restrains trade).</p>



## Overview of State RPM

STATE	LEGISLATION	LITIGATION
RI	<p><b>AT: R.I. GEN. LAWS § 6-36-4 (2009)</b> (declaring unlawful “[e]very contract, combination, or conspiracy in restraint of, or to monopolize, trade or commerce”).</p> <p><b>H: R.I. GEN. LAWS § 6-36-2(b) (2009)</b> (requiring that act “shall be construed in harmony with judicial interpretations of comparable federal antitrust statutes insofar as practicable, except where provisions of this chapter are expressly contrary to applicable federal provisions as construed”).</p> <p><b>IB: R.I. GEN. LAWS § 6-36-12(g) (2009)</b> (providing that, in an antitrust action, the fact that a person “has not dealt directly with the defendant shall not bar or otherwise limit recovery”).</p>	<p><b>H: UXB Sand &amp; Gravel, Inc. v. Rosenfeld Concrete Corp., 599 A.2d 1033, 1035 (R.I. 1991)</b> (statute requires court to interpret state antitrust statute in harmony with federal antitrust statutes).</p> <p><b>PF: Auburn News Co. v. Providence Journal Co., 504 F. Supp. 292, 300 (D.R.I. 1980)</b> (reasoning that “vertical arrangements in general, often are competitive in effect” and therefore subject to the rule of reason), <i>rev’d on other grounds</i>, 659 F.2d 273 (1st Cir. 1981), <i>cert. denied</i>, 455 U.S. 921 (1982).</p>
SC	<p><b>AT: S.C. CODE ANN. § 39-3-10 (2008)</b> (declaring unlawful arrangements, contracts, agreements, trusts or combinations which “lessen, or which tend to lessen, full and free competition in the importation or sale of articles imported into this State or in the manufacture or sale of articles of domestic growth or of domestic raw material”).</p> <p><b>PF: S.C. CODE ANN. § 39-3-10 (2008)</b> (declaring unlawful “arrangements, contracts, agreements, trusts or combinations . . . which tend to advance, reduce or control the price or the cost to the producer or consumer of any such product or article”).</p>	<p><b>H: Drs. Steuer &amp; Latham, P.A. v. Nat’l Med. Enters., 672 F. Supp. 1489, 1521 (D.S.C. 1987)</b> (recognizing that South Carolina has “long adhered to a policy of following federal precedents” in antitrust cases), <i>aff’d</i>, 846 F.2d 70 (4th Cir. 1988) (quoting <i>In re Wiring Device Antitrust Litig.</i>, 498 F.Supp. 79, 87 (E.D.N.Y. 1980)).</p> <p><b>PF: Walter Wood Mowing &amp; Reaping Co. v. Greenwood Hardware Co., 55 S.E. 973, 975–76 (1906)</b> (analyzing vertical restraint under rule of reason analysis).</p>
SD	<p><b>AT: S.D. CODIFIED LAWS § 37-1-3.1 (2009)</b> (making unlawful any “contract, combination, or conspiracy between two or more persons in restraint of trade or commerce”).</p> <p><b>H: S.D. CODIFIED LAWS § 37-1-22 (2009)</b> (allowing courts to “use as a guide interpretations given by the federal or state courts to comparable antitrust statutes”).</p> <p><b>IB: S.D. CODIFIED LAWS § 37-1-33 (2009)</b> (providing that “[n]o provision of this chapter may deny any person who is injured directly or indirectly in his business or property” by an antitrust violation).</p>	<p><b>H: Byre v. City of Chamberlain, 362 N.W.2d 69, 74 (S.D. 1985)</b> (because of the similarity of language between federal and state antitrust statutes and because of the legislative suggestion for interpretation found in <b>S.D. CODIFIED LAWS § 37-1-22</b>, “great weight should be given to the federal cases interpreting the federal statute”); <i>see also In re S.D. Microsoft Antitrust Litig.</i>, 707 N.W.2d 85, 99 (S.D. 2005) (reaffirming that “great weight should be given to the federal cases interpreting the federal statute” and citing <i>Byre</i> for the proposition that, when state courts lack precedent on an issue, they look to federal case law for guidance).</p> <p><b>PF: Assam Drug Co. v. Miller Brewing Co., 624 F. Supp. 411, 412–13 (D.S.D. 1985)</b> (applying rule of reason to vertical territorial restraint and suggesting rule of reason is appropriate for all vertical restraints), <i>aff’d</i>, 798 F.2d 311 (8th Cir. 1986).</p>

## Overview of State RPM

STATE	LEGISLATION	LITIGATION
TN	<p><b>AT: TENN. CODE ANN. § 47-25-101 (2009)</b> (declaring unlawful “[a]ll arrangements, contracts, agreements, trusts, or combinations . . . to lessen, or which tend to lessen, full and free competition in the importation or sale of articles imported into this state, or in the manufacture or sale of articles of domestic growth or of domestic raw material”).</p> <p><b>PF: TENN. CODE ANN. § 47-25-101 (2009)</b> (declaring unlawful “all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed, or which tend, to advance, reduce, or control the price or the cost to the producer or the consumer of any such product or article”).</p>	<p><b>H: Spahr v. Leegin Creative Leather Products, 2008 WL 3914461 (E.D. Tenn. Aug. 20, 2008), appeal dismissed, File No. No. 08-6165 (6th Cir. Nov. 20, 2008)</b> (recognizing argument that every Tennessee case decided under the Tennessee Trade Practice Act has relied heavily on federal precedent, but noting at least one circumstance where Tennessee Supreme Court has extended the reach of the TTPA beyond that permitted by the Supreme Court’s interpretation of the Sherman Act); <b>Freeman Indus. LLC v. Eastman Chem. Co., 172 S.W.3d 512, 519 (Tenn. 2005)</b> (declining to follow <i>Illinois Brick</i> when interpreting state statute and noting that Tennessee does not have a statutory “harmony clause” requiring courts to interpret the state antitrust laws consistently with federal law).</p> <p><b>PF: Spahr v. Leegin Creative Leather Products, 2008 WL 3914461 (E.D. Tenn. Aug. 20, 2008), appeal dismissed, File No. No. 08-6165 (6th Cir. Nov. 20, 2008)</b> (applying rule of reason to antitrust challenge of minimum RPM agreement under Tennessee state law).</p>
TX	<p><b>AT: TEX. BUS. &amp; COM. CODE ANN. § 15.05(A) (2002)</b> (making unlawful “[e]very contract, combination, or conspiracy in restraint of trade or commerce”).</p> <p><b>H: TEX. BUS. &amp; COM. CODE ANN. § 15.04 (2002)</b> (declaring that the statute “shall be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes to the extent consistent with this purpose”).</p>	<p><b>H: Star Tobacco, Inc. v. Darilek, 298 F. Supp. 2d 436, 440 (E.D. Tex. 2003)</b> (finding that the Texas antitrust statute is intended to be construed in accordance with federal antitrust statutes (citing <b>Abbot Labs, Inc. v. Segura, 907 S.W.2d 503, 511 (Tex. 1995)</b> (Gonzalez, J., concurring)); see also <b>Gonzalez v. San Jacinto Methodist Hosp., 880 S.W.2d 436, 441 (Tex. App. 1994)</b> (Texas Antitrust Act “should be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes”); <b>Puentes v. Spohn Health Network, No. 13 08 00100, 2009 Tex. App. LEXIS 4131, at *15 (Tex. App. June 11, 2009)</b> (cites <i>Leegin</i> for principle that a per se rule is appropriate only after courts have had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason).</p>
UT	<p><b>AT: UTAH CODE ANN. § 76-10-914(1) (2009)</b> (declaring illegal “[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce”).</p> <p><b>H: UTAH CODE ANN. § 76-10-926 (2009)</b> (declaring legislative intent that “the courts, in construing this act, will be guided by interpretations given by the federal courts to comparable federal antitrust statutes and by other state courts to comparable state antitrust statutes”).</p>	<p><b>H: Evans v. State, 963 P.2d 177, 181 (Utah 1998)</b> (citing and following statutory mandate to look to federal and state courts for guidance when construing Utah statute).</p>
VT	<p><b>AT: VT. STAT. ANN. TIT. 9, § 2453(a) (2009)</b> (declaring unlawful “[u]nfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce”).</p> <p><b>H: VT. STAT. ANN. TIT. 9, § 453(b) (2009)</b> (declaring that in construing the statute, “the courts of this state will be guided by the construction of similar terms contained in Section 5(a)(1) of the Federal Trade Commission Act”).</p> <p><b>IB: VT. STAT. ANN. TIT. 9, § 2465(b) (2009)</b> (providing that the fact that a person “has not dealt directly with a defendant shall not bar or otherwise limit recovery” for an antitrust action).</p>	<p><b>H: Elkins v. Microsoft Corp., 817 A.2d 9, 15–17 (Vt. 2002)</b> (holding that “harmonization provision” requiring courts to look to regulations and decisions of the Federal Trade Commission and federal court decisions of the FTC Act does not require courts to look to other federal antitrust statutes or corresponding decisions, thus rejecting <i>Illinois Brick</i>); see also <b>State v. Heritage Realty, 407 A.2d 509, 511 (Vt. 1979)</b> (interpreting VT. STAT. ANN. TIT. 9, § 2453(a) in light of federal case law to find that horizontal price fixing is per se unlawful).</p>

## Overview of State RPM

STATE	LEGISLATION	LITIGATION
VA	<p><b>AT: VA. CODE ANN. § 59.1-9.5 (2009)</b> (declaring unlawful “[e]very contract, combination or conspiracy in restraint of trade or commerce”).</p> <p><b>H: VA. CODE ANN. § 59.1-9.17 (2009)</b> (declaring legislative intent that act “shall be applied and construed to effectuate its general purposes in harmony with judicial interpretation of comparable federal statutory provisions”).</p>	<p><b>H: Williams v. First Fed. Sav. &amp; Loan Ass’n, 651 F.2d 910, 930 (4th Cir. 1981)</b> (recognizing statutory mandate to harmonize state law with federal interpretations of comparable federal antitrust statutes).</p>
WA	<p><b>AT: WASH. REV. CODE § 19.86.030 (2009)</b> (declaring unlawful “[e]very contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce”).</p> <p><b>H: WASH. REV. CODE § 19.86.920 (2009)</b> (declaring legislative intent that construction of act “be guided by final decisions of the federal courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters” but that the act “shall not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business or which are not injurious to the public interest, nor be construed to authorize those acts or practices which unreasonably restrain trade or are unreasonable per se”).</p>	<p><b>H: Blewett v. Abbott Labs., 938 P.2d 842, 846 (Wash. Ct. App. 1997)</b> (recognizing that although federal antitrust precedent is only a “guide,” in practice Washington courts have uniformly followed federal precedent in matters described under the Washington antitrust laws and any departure from federal law “must be for a reason rooted in our own statutes or case law and not in the general policy arguments that this court would weigh if the issue came before us as a matter of first impression”).</p>
WV	<p><b>AT: W. VA. CODE § 47-18-3(a) (2009)</b> (declaring unlawful “[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce”).</p> <p><b>PF: W. VA. CODE § 47-18-3(b)(1) (2009)</b> (deeming unlawful certain contracts, combinations or conspiracies including those with “the purpose or with the effect of fixing, controlling, or maintaining the market price, rate or fee of any commodity or service” or “[f]ixing, controlling, maintaining, limiting or discontinuing the production, manufacture, mining, sale or supply of any commodity, or the sale or supply of any service, for the purpose or with the effect of fixing, controlling or maintaining the market price, rate or fee of the commodity or service”).</p> <p><b>H: W. VA. CODE § 47-18-16 (2009)</b> (declaring legislative intent that statute “shall be construed liberally and in harmony with ruling judicial interpretations of comparable federal antitrust statutes”).</p>	<p><b>PF: Kessel v. Monongalia County Gen. Hosp. Co., No. 33096, 2007 W. Va. LEXIS 52, at *27–*44 (W. Va. 2007)</b> (holding West Virginia intended to codify existing federal per se violations when it enacted <b>W. VA. CODE § 47-18-3</b> and setting forth factors for deciding whether to follow modern federal precedent when construing per se categories).</p>
WI	<p><b>AT: WIS. STAT. § 133.03 (2009)</b> (declaring illegal “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce”).</p> <p><b>IB: WIS. STAT. § 133.18(1)(a) (2009)</b> (providing a right of action and treble damage remedy for “any person injured, directly or indirectly, by reason of” an antitrust violation).</p>	<p><b>H: Emergency One v. Waterous Co., 23 F. Supp. 2d 959, 962, 970 (D. Wis. 1998)</b> (noting that Wisconsin courts have “repeatedly” stated that federal antitrust law guides the interpretation of <b>WIS. STAT. § 133.03</b> (citing <b>Grams v. Boss, 294 N.W.2d 473, 480 (Wis. 1980)</b>); <i>but cf. Olistad v. Microsoft Corp., 700 N.W.2d 139, 144, 154–55 (Wis. 2005)</i> (finding that one of the major objectives of revisions made to the state’s antitrust law in 1980 was to reverse the holding in <i>Illinois Brick</i>, and that Wisconsin’s antitrust laws are to be interpreted “in a manner which gives the most liberal construction to achieve the aim of competition”).</p> <p><b>PF: Słowiak v. Hudson Foods, Inc., No. 91-C-737-2, 1992 U.S. Dist. LEXIS 9387, at *25–*30 (D. Wis. 1992)</b> (holding vertical maximum price restraint lawful because there was no antitrust injury).</p>

## Overview of State RPM

STATE	LEGISLATION	LITIGATION
WY	<b>AT: WYO. STAT. ANN. § 40-4-101(a)(i) (2009)</b> (prohibiting “any plan, agreement, consolidation or combination of any kind whatsoever to prevent competition or to control or influence production or prices thereof”).	<b>PF: <i>Bulova Watch Co. v. Zale Jewelry Co.</i>, 371 P.2d 409, 420 (Wyo. 1962)</b> (declining to hold that Fair Trade Law’s authorization for resale price maintenance violates the state constitution but noting that it is “certainly out of harmony with its spirit”).

## Book Review

# The Net Neutrality Guy

Tim Wu

**The Master Switch: The Rise and Fall of Information Empires**

Alfred A. Knopf • 2010

### Reviewed by Abigail Slater

Antitrust practitioners may know Tim Wu best as the senior advisor to the Federal Trade Commission's Office of Policy Planning for consumer protection and competition issues that affect the Internet and mobile markets. But he is also the possessor of an impressive resume: Tim Wu is an author and professor of law at Columbia University and was recognized as one of fifty leaders in science and technology by *Scientific American* in 2006. His previous publications include a co-authored book, *Who Controls the Internet?* as well as various articles in *Slate*, the *New Yorker*, and other magazines and newspapers. Wu has indicated that his current research interests include the advertising industry and the role played by surplus in American society.

*The Master Switch* traces the history of five information industries: telephony, radio, film, television, and the Internet. The book is organized chronologically, and begins in the 1870s with the story of the early Bell system, the mother of all information industries, or as the author puts it: "the Ur-information network, the one whose working assumptions and ideology have influenced every information industry to follow." (p. 7) Wu follows the Bell story with an account of the early days of radio, and so on with film and television, to the present day and the Internet.

The future of the Internet is the target of *The Master Switch*. Wu argues that, as with information industries before it, the Internet may be shifting from an open to closed structure. With this in mind, he makes the case for net neutrality—indeed a complete ban on any significant degree of vertical integration between or among information industries—in the book's final chapter. Wu supports his argument with his historic research. According to the author: "Illuminating the past to anticipate the future is the *raison d'être* of this book." (p. 7)

While Wu clearly sides with those who would tackle net neutrality today through legislation prohibiting vertical integration leading to large monopolies in information industries, his book is fairly open-minded and even soft on benevolent monopolists. Take, for example, his treatment of Bell Labs. Founded in 1925 for the purpose of improving telephony, Bell labs gave birth to magnetic storage, from which technology grew audiocassettes, videotapes, and the computer hard drive. (p. 104) The innovation that flowed from Bell Labs in the post-war era may not have happened had the Bell system faced fiercer competition and thus not enjoyed the excess profits it used to invest in a fleet of research scientists. (p. 105)

At over 300 pages, the book is a big read. The story of each information industry is replete with interesting anecdotes, colorful personalities, and original research. What makes the book most relevant to antitrust practitioners are some of the concepts underpinning Wu's historical narratives—The Cycle, Creative Destruction, the Kronos Effect, and the roles played by the legal system and

■  
*Abigail Slater is an attorney with the Federal Trade Commission. The views expressed in this article are those of the author and do not necessarily represent the views of the Commission or any individual Commissioner.*

corporate DNA. The book's final chapter—The Separations Principle—ties together many of the concepts developed earlier in the book and establishes Wu's framework for net neutrality.

**The Cycle.** Wu's core thesis is that the history of each information industry shows a "typical progression . . . from somebody's hobby to somebody's industry; from jury-rigged contraption to slick production marvel; from a freely accessible channel to one strictly controlled by a single corporation or cartel—from open to closed system." (p. 6) Wu calls this progression "the Cycle." (p. 6) His book traces the history of the Cycle in each of the five information industries. The Cycle's progression has meant that "[c]ommunications by wire became the sole domain of the Bell system. The great networks, NBC and CBS, ruled radio broadcasting, as they prepared, with the help of the Federal Communications Commission, to launch in their own image a new medium called television. The Hollywood studios, meanwhile, closed a vise grip on every part of the film business, from talent to exhibition." (p. 11) And so it goes. That is, until the information industry becomes a target for assault and the Cycle is arrested.

*Wu argues that FCC*

*regulations have in*

*several instances*

*served to suppress*

*innovation, often at the*

*behest of an incumbent*

*technology.*

**Creative Destruction.** Assault of the kind that arrests the Cycle comes in one of two flavors: technological innovation or the legal system.

Antitrust practitioners will be familiar with Wu's innovation concept: It is Schumpeterian creative destruction with a few wrinkles. According to Schumpeter, as quoted by Wu, innovation in information industries as elsewhere is a "process of industrial mutation . . . that incessantly revolutionizes the economic structure from within, incessantly destroying the old one, incessantly creating a new one." (p. 27) Creative destruction in information industries is not hard to find. Telephony was the original disruptive technology. In 1876 the Western Union telegraph service was one of the most powerful corporations in the world. No one saw the telephone coming. As Wu explains: "At the very beginning . . . the Bell Company probably seemed more a source of comic relief than a threat to Western Union." (p. 25) Western Union could have purchased all of Bell's patents for \$100,000, but it passed on them, and the rest is history. Bell subsequently acquired Western Union and, in 1913, agreed to sell the company—which "was fast becoming a dinosaur anyway"—in order to settle a DOJ antitrust suit. (p. 56)

The story of the early Bell system is Schumpeter's theory at its purest. What may be more challenging to antitrust practitioners is how often the Cycle in information industries has disproven Schumpeter's creative destruction theory—hence the wrinkles.

**The Kronos Effect.** Wu's research suggests that the demise of an information industry when faced with a disruptive technology is not a foregone conclusion. In the real world, Schumpeter does not always have his way. The Cycle can be arrested. In several instances, old technology has co-opted its usurper through a merger or other form of cooperation. In other instances, old technology killed its disruptive rival in its infancy, a phenomenon Wu dubs the Kronos Effect.<sup>1</sup> (p. 25) Once again, the Bell system story illustrates the point well. According to Wu's account, Bell Labs suppressed or failed to market several of its own technologies in their infancy for fear that they would disrupt its telephony franchise. These technologies included fiber optics, mobile phones, and DSL. (p. 107)

The visible hand of Government has also played a role in the Kronos Effect. Wu argues that FCC regulations have in several instances served to suppress innovation, often at the behest of an incumbent technology. The story of FM radio is illuminating here. According to Wu, from the 1920s

<sup>1</sup> Kronos was the Greek ruler of the Universe who was moved to eat his infants after having been told by the Oracle at Delphi that one of his children would dethrone him.

until the mid-1940s the AM radio industry, with the help of the FCC, managed to suppress the technologically superior FM radio. (p. 132) In fact, for six years after FM's invention, the FCC, without a coherent explanation, completely banned commercial FM broadcasting. (p. 130) Similarly, in the 1960s the FCC, deciding that cable television "posed a threat to the common good . . . issued an order barring it from America's hundred largest cities or towns by population." (p. 181) These operational constraints meant that funding for cable expansion dried up until a friendlier regulatory environment emerged during the Nixon administration, followed by the emergence of such cable mavericks as Ted Turner (who was by all accounts Schumpeter's poster child). (pp. 207–12)

***The Law as Sword and Shield.*** Throughout the book Wu explores the role of the legal system, principally the FCC, antitrust, and patents, in the Cycle's progress. These forces have acted both as sword and shield.

According to Wu, the legal system has both prevented information industry Cycles from closing and re-opened those that would otherwise have remained closed. In this context, the bluntest instrument has been federal antitrust enforcement. The best known examples here are the breakups of the Bell system and the Hollywood film studios. The film breakup took ten years and a Supreme Court challenge, with the Court finally agreeing in 1948 with the DOJ that Hollywood was an illegal conspiracy in restraint of trade (p. 164) The Bell breakup was similarly protracted. It began with Nixon's communications advisor, Clay Whitehead, in 1974 and ended with the breakup of the Bell system into eight pieces in 1984. FCC regulation played a role here too. It is interesting to note that perhaps the most significant event in the Bell breakup was not the final breakup itself but rather an FCC rulemaking. In 1971, the Nixon FCC "issued a rule banning AT&T from directly entering the market for 'data processing' or 'online services.'" (p. 190) Absent this rulemaking, the infant industry created by America Online and CompuServe that came to be known as online services might never have emerged. (p. 191)

Antitrust enforcement in information industries has not always been as forceful as that deployed against the Bell system and the film studios. In fact, several investigations of information industries through the years petered out. Unsurprisingly, these investigations are less well reported than their more high profile counterparts. Even at the FTC it is not well known that from 1921 until 1927 the agency conducted an antitrust investigation into the film industry's block booking practices. The investigation ended when Chairman Myers, a Coolidge appointee, issued a weak reprimand to the industry. The consent was promptly and publicly ignored by the film industry. (p. 98)

The patent system has served both as a sword and a shield in information industry Cycles. Here again the Bell story is instructive. The early Bell system survived in part because of patents. According to Wu's account, the Bell patent was the original strong patent, and Bell survived competition from Western Union due to a patent lawsuit filed in 1878, despite being dwarfed by Western Union in all other respects. (p. 30)

Patents have also been used effectively to curb competition and to keep the Cycle closed. In Wu's telling, the Film Trust, the original patent pool, effectively kept the film industry closed to competition throughout the 1920s until the rise of the Hollywood studio system. The Film Trust, established in New York "pooled sixteen key film patents, blocked most film imports, and fixed prices at every step of filmmaking and exhibition" for the purpose of avoiding "ruinous" competition. (p. 64) As a consequence, "merely to operate a camera without a license was to violate patents owned by the Trust." (p. 68) The Film Trust enforced these patents vigilantly. Beginning in 1910, it commenced a scorched earth enforcement campaign. (p. 68) According to Wu, the Hollywood studios were born "not out of choice, let alone glamour, but of brutal necessity." (p. 67) This is because independent film producers who violated the east coast Film Trust became industrial out-

laws in Hollywood. (p. 68) The use of patents against competitors eventually drew the attention of the Taft administration, which began its own investigation into the Film Trust, resulting in a 1915 federal district court order dissolving it. (p. 72)

**Non-Market Values.** Wu's book is informative reading for antitrust practitioners not only because it challenges some antitrust assumptions with real world evidence, but also because it challenges the antitrust reader to think more broadly about industrial organization in information industries. In other words, Wu challenges the antitrust reader to think about issues outside the antitrust box. These issues can be loosely categorized as non-market values and include the importance of free speech and the role of "corporate DNA" or attitude in decision making, including decisions that might fall within the scope of Sherman Act Sections 1 or 2.

*Wu's research shows that the attitude of information industry monopolists certainly has made a difference to the level of antitrust scrutiny they attract.*

**Corporate DNA.** There is a long running debate in the field of antitrust theory as to what should matter when judging anticompetitive conduct. Robert Bork's *Antitrust Paradox* argues that a corporation's intent should be irrelevant. Yet as Bork knew, and Wu demonstrates in his book, for much of the history of antitrust in information industries, attitude mattered. (p. 57) Wu's research shows that the attitude of information industry monopolists certainly has made a difference to the level of antitrust scrutiny they attract. The Bell system survived antitrust attack for the best part of the 20th century because it was viewed as a benign monopolist. Bell's early mission statement "One System, One Policy, Universal Service" said it all. (p. 51) When Congress passed the Mann Elkins Act of 1910 designating Bell a common carrier, the company embraced this role. Common carriage "was a promise to serve any customer willing to pay, charge fixed rates, and carry his or her traffic without discrimination," (p. 57), in effect the early inspiration for net neutrality. (p. 311)

Moving forward to the Internet era, it would appear that attitude still matters. Although attitude may not be quite everything to today's antitrust practitioners, most would agree that it is at least relevant when weighing credibility, be that by a judge or an antitrust agency. Take, for example, the Microsoft monopolization case before the EC Commission. Having exhausted all appeals against the Commission's 2004 decision finding that Microsoft had abused its dominant position in operating systems, the company appeared to ignore the Commission altogether. That is until 2008 when then Commissioner Neelie Kroes imposed an unprecedented €899 million fine against Microsoft for its inaction. Commissioner Kroes's statement at the time illustrates Wu's point about antitrust and attitude nicely. As Commissioner Kroes said: "Talk is cheap; flouting the rules is expensive. We don't want talk and promises—we want compliance. If you flout the rules you will be caught, and it will cost you dear."<sup>2</sup>

The post-Microsoft era may mark an inflection point in corporate DNA in that industry. The social idealism of the World Wide Web founder Tim Berners-Lee, who believed that the Web should be open and would not patent it or enrich himself from his invention, inspired the Google "Don't be evil" mantra. In its 2004 IPO prospectus, Google's founders explained to future shareholders that the company's aim was "greater than simply growing itself as large as it can be" and that it had an obligation to apply its resources "ultimately to make the world a better place."<sup>3</sup> Of course, Google's corporate DNA has yet to be seriously tested in an antitrust arena, although the ongoing book settlement saga may shed some light on the issue. According to filings in that case, the

<sup>2</sup> Press Conference, Neelie Kroes, European Commissioner for Competition Policy, Introductory Remarks, Decision to Impose €899 Million Penalty on Microsoft for Non-compliance (Feb. 27, 2008), <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/105&format=HTML&aged=1&language=EN&guiLanguage=en>.

<sup>3</sup> KEN AULETTA, GOOGLED 289 (2010).



Google book settlement was either “a proposal to construct a repository of scholarly works that will be used to benefit the public” or “a sordid financial scheme to restructure the publishing industry and to control web commerce.”<sup>4</sup> Judge Denny Chin in the Southern District of New York has rejected the current settlement and invited the parties to go back to the drawing board, where they will no doubt grapple with the dichotomy between Google’s “Don’t be evil” self image, and its opponents’ less flattering image of the company.

**Free Speech and Market Structure.** As with corporate DNA, the effect of consolidation in information industries on free speech and media plurality is not an issue given much thought in the antitrust world. Vertical mergers between content providers and information platforms, such as those between AOL/Time Warner and Comcast/NBC, did not raise significant eyebrows under traditional merger analysis. The chapter in Wu’s book devoted to the AOL/Time Warner merger—“A Surprising Wreck”—seems to suggest that this lack of concern was well placed. As explained by Wu, the merger was stillborn because the structure of the Internet was such that the merged company had no means of holding onto AOL’s already declining customer base. (p. 260) Yet vertical integration of the kind seen in AOL/Time Warner or Comcast/NBC is more worrisome to Wu than most horizontal consolidation. This is because protecting free speech and media plurality, and not antitrust, are his principal concerns. In fact, the book’s title is borrowed from a former CBS News President’s comment that issues of free speech necessarily follow the question of “who controls the master switch.” (p. 13)

Here as elsewhere Wu makes his point through example, in this case, the film industry. As Wu argues about the vertical integration of the film industry in the 1920s and 1930s:

[W]e must confront the reality that cultural and information industries pose special problems for standard industrial analysis, complicating the rules of supply and demand by virtue of the product’s less tangible forms of value. We might understand perfectly well how block booking and vertical integration reduced the costs of industrial production [in the film industry], while understanding nothing of what these innovations meant for film as a form of expression. (p. 97)

In fact, Wu argues that it was consolidation in the film industry that made early film censorship in the form of a voluntary “Production Code” possible. (p. 119) Had the film industry not been consolidated around the major Hollywood studios, the industry might not have been as able to acquiesce to the Catholic activists behind the Code, given the risk to profits. There simply would have been too many studios involved, leading Wu to conclude that: “in the United States, it is industrial structure that determines the limits of free speech.” (p. 121)

**The Separations Principle.** In the final chapter of his book Wu pulls together the lessons from previous information industries and applies them to the Internet. As explained in his introduction:

To understand the forces threatening the Internet as we know it, we must understand how information technologies give rise to industries, and industries to empires. In other words, we must understand the nature of the Cycle, its dynamics, what makes it go, and what can arrest it. As with any economic theory, there are no laboratories but past experience. (p. 7)

Wu’s Separations Principle is his suggested framework for Internet governance today that would allay the risk of Internet Cycle closure tomorrow. In a nutshell:

A Separations Principle would mean the creation of a salutary distance between each of the major

---

<sup>4</sup> Supplemental Memorandum of Amicus Curiae Open Book Alliance in Opposition to the Proposed Settlement Between the Authors Guild, Inc., Association of American Publishers, Inc. et al., and Google Inc. at 1, Case No. 05 CV 8136-DC (S.D.N.Y. Jan. 28, 2010).

functions or layers in the information economy. It would mean that those who develop information, those who own the network infrastructure on which it travels, and those who control the tools or venues of access must be kept apart from one another. At the same time, the Separations Principle stipulates one other necessity: that the government also keep its distance and not intervene in the market to favor any technology, network monopoly, or integration of the major functions of an information industry. (p. 304)

Wu does not dismiss the role of antitrust and FCC regulation in this process, but neither does he see them as entirely up to the job. As he explains with respect to antitrust:

To leave the economy of information, and power over this commodity, subject solely to the traditional ad hoc ways of dealing with concentrations of industrial power—in other words, to antitrust law—is dangerous. Without venturing into the long, rancorous debate over what, if any, kind of antitrust policy is proper in our system, I would argue that by their nature, those particular laws alone are inadequate for the regulation of information industries . . . [A] framework that has worked well enough for oil and aluminum is ultimately unsuited to an industry whose substrate is speech. (p. 303–04)

He concludes his book with the suggestion that the most effective Internet governance may well be industry self-regulation. The concept of corporate DNA comes into play here. He encourages reliance on “corporate norms” which “have in many ways proved to be a far more powerful deterrent to misconduct than regulations, which in corporate psychology exists only to be circumvented, preferably though not necessarily by legal means.” (p. 314) This final point will no doubt resonate with the antitrust reader. ●

# Paper Trail: Working Papers and Recent Scholarship

**Editor's Note:** Editor Bill Page comments on two papers that consider the relationship between intellectual property and antitrust as policies to promote innovation. Send suggestions for papers to review to: [page@law.ufl.edu](mailto:page@law.ufl.edu) or [jwoodbury@crai.com](mailto:jwoodbury@crai.com).

—WILLIAM H. PAGE AND JOHN R. WOODBURY

## Recent Papers

---

**Mark A. Lemley, Industry-Specific Antitrust Policy for Innovation**

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1670197](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1670197)

**C. Scott Hemphill & Mark A. Lemley, Earning Exclusivity: Generic Drug Incentives and the Hatch-Waxman Act, forthcoming ANTITRUST L.J. (2011)**

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1736822](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1736822)

The first of these papers considers the general relationship between intellectual property and antitrust as policies to promote innovation; the second considers a specific instance of that relationship. In the first paper, Mark Lemley argues that the roles of competition and monopoly in the process of innovation differ across industries and that antitrust and intellectual property should take account of the differences to foster innovation more effectively. The paper is a useful introduction to Lemley's extensive scholarship on the intersections between antitrust and IP.

Lemley notes that innovation is far more important than static competition in promoting consumer welfare—few, he observes tellingly, would trade a middle-class life today to be the richest person in the world in 1700. The more difficult question is how best to promote innovation. The old oversimplification that antitrust promotes competition and patent law promotes monopoly, Lemley argues, has been displaced by a new oversimplification that antitrust promotes static efficiency while patent law promotes Schumpeterian or dynamic efficiency.<sup>1</sup> In reality, competition may promote innovation, and monopoly (and the practices of monopolists) may impede it.<sup>2</sup> More generally, monopoly and competition spur innovation to varying degrees depending upon the nature of the industry. Both antitrust and IP recognize these differences within their domains, but antitrust ignores them in defining its relationship to IP. Antitrust, Lemley argues, defers excessively to IP rights in contexts in which competition would enhance innovation.<sup>3</sup>

In the pharmaceutical industry, patent monopolies are appropriate because of the enormous costs of research, development, and regulatory approval. According to Lemley, pharmaceutical

---

<sup>1</sup> See WARD S. BOWMAN, JR., *PATENT AND ANTITRUST LAW: A LEGAL AND ECONOMIC APPRAISAL* (1973).

<sup>2</sup> See Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in NATIONAL BUREAU OF ECONOMIC RESEARCH, *THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS* 609 (1962).

<sup>3</sup> Lemley has argued for this position for years. See Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031 (2005).

production exemplifies Schumpeterian prospect theory,<sup>4</sup> which emphasizes the importance not only of invention but also development and commercialization in the process of innovation. Patents provide necessary incentives for the development of new drugs and tend to cover a complete product without the necessity of ancillary licenses. Moreover, they do not generally block the development of chemically analogous and therapeutically similar drugs. Thus, Lemley suggests, “[p]rospect theory works in the pharmaceutical industry.”<sup>5</sup>

It does not work, however, for other industries or products where “R&D cost is small, where the ratio of innovator cost to imitator costs is small, or where first-mover advantages or network effects can provide the needed incentives.” Business methods, for example, require little R&D support and provide ample rewards without patent protection. Consequently, Lemley notes, routine patenting of new business methods reduces welfare. Patent protection is also less obviously necessary in software markets. Lemley compares the explosive development of the Internet, which is built on nonproprietary protocols, with the relatively lackluster pace of innovation in communications when AT&T controlled U.S. telephony.

These differences among markets call for different legal policies toward innovation. In a recent book,<sup>6</sup> Lemley and Dan L. Burk have argued that courts should adapt patent law’s protections based on the characteristics of the industry. Lemley likewise suggests that antitrust has made some appropriate adaptations. Antitrust enforcement agencies, for example, recognize the importance of detailed understanding of industries by organizing themselves along industry lines. Courts recognize differences among industries both by formulating industry-specific rules, like the platform-software tying standard announced in *Microsoft*, and by adapting general rules, like market definition, to industry characteristics.

Where antitrust fails, Lemley argues, is in deferring to patents regardless of their competitive effects. (*Walker Process* and sham litigation claims, he suggests, are rarely effective.) Antitrust, for example, defers entirely to conditions that a patentee imposes on its licensees. Lemley argues that antitrust should take the lead in industries and circumstances in which competition is necessary for innovation, while deferring when the prospect of monopoly is necessary to induce investment. Most provocatively, Lemley suggests that antitrust should be willing to regulate conduct protected by patents if doing so would better advance innovation:

Antitrust might, for instance, impose restrictions on patent pools in industries in which we think competition is important, driving competitors to litigate the validity and infringement of patents that would otherwise have been included in the pool. Or it might limit the acquisition of an array of patents that fence off a particular field such as a new business model. It might constrain the ability of patent owners to condition the license of their IP rights on a restriction in other forms of competition. Most radically, it might restrain the enforcement of patent rights themselves where that enforcement will prevent competition.

Interestingly, one of the examples Lemley offers of antitrust’s failure to take a leading role in promoting innovation is its deference “to settlements of even ‘fatally weak’ patent claims” in the pharmaceutical industry. Thus, Lemley argues that antitrust should not necessarily defer to patent rights in industries in which patent protection is necessary. Even in industries like pharmaceuticals, exclusive rights can be excessive and actually impede innovation.

---

<sup>4</sup> See Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 J.L. & Econ. 265, 266 (1977).

<sup>5</sup> See also Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 Va. L. Rev. 1575, 1615–30 (2003).

<sup>6</sup> DAN L. BURK & MARK LEMLEY, *THE PATENT CRISIS AND HOW THE COURTS CAN SOLVE IT* (2009).

Lemley and Scott Hemphill of Columbia Law School make this point in more detail in the second paper, which proposes an amendment to the Hatch-Waxman Act in order to correct what Lemley views as the failure of antitrust to set appropriate limits on the settlement of patent disputes. The Hatch-Waxman Act confers 180 days of market exclusivity to the first manufacturer to file an “Abbreviated New Drug Application” (ANDA) for FDA approval of a “bioequivalent” generic drug in the market for a patented drug. The idea behind this feature of the law is to encourage generic entry and consequent challenges to weak pharmaceutical patents. If the courts decide that the patent is valid and infringed, the generic entrant loses its exclusivity. Lemley and Hemphill argue that this mechanism “isn’t working” because the patent holders regularly pay the first entrants to drop their challenges. After a settlement, the potentially invalid or weak patent remains. As the courts have interpreted the law,<sup>7</sup> however, the entrant keeps its 180-day exclusivity, which may account for upwards of half of the entrant’s profit on the drug, because the entrants charge consumers only slightly less than the branded drug’s monopoly price during this period. The settlement may also include a provision paying the challenger to delay entry. The framework of incentives, as Lemley and Hemphill show, strongly encourages settlements that harm consumers.

The settlements that keep out generic entrants, particularly those that involve payments to delay entry, have spawned numerous antitrust challenges. An enormous scholarly literature considers how antitrust law should treat these arrangements. According to Lemley and Hemphill, however, the antitrust approach has failed to reduce the frequency of anticompetitive deals. The authors support their argument by presenting the results of a study of all 49 drugs that received exclusivity awards during 2005-2009. Almost half of the entrants faced no suit at all; 10 were sued and settled, but without opening markets to competition. Only 9 entrants actually won a patent infringement suit. The authors also check the timing of entry after the exclusivity period ended and conclude that exclusivity does indeed delay subsequent generic entry.

Consequently, Lemley and Hemphill propose that Congress amend Hatch-Waxman to confer the “mini-patent” of exclusivity only if the generic entrant “earns it” by proving either that an incumbent patent is invalid or that the generic entrant’s drug does not infringe the patent. The generic entrant would forfeit exclusivity by settling an infringement case in a way that does not permit immediate generic entry. Somewhat reluctantly, the authors would permit the entrant to retain exclusivity if the branded drug manufacturer never sues for infringement. The authors recognize that an “earned exclusivity” rule will deter some generic challenges that would otherwise be brought. But it would do so mainly by removing the perverse incentive the present regime creates to file challenges automatically in hopes of being bought off. ●

—WHP

---

<sup>7</sup> See, e.g., *Mova Pharm. Corp. v. Shalala*, 955 F. Supp. 128, 130 (D.D.C. 1997), *aff’d*, 140 F.3d 1060 (D.C. Cir. 1998).