



# CPI Antitrust Chronicle

## June 2012 (1)

### *United States v. Apple and the Contemporary Legitimacy of Antitrust*

Chris Sagers  
Cleveland State University

## *United States v. Apple* and the Contemporary Legitimacy of Antitrust

Chris Sagers<sup>1</sup>

I think *United States v. Apple*, the so-called “e-Books case” pending in the Southern District of New York,<sup>2</sup> is an excellent case for the government (the Department of Justice’s Antitrust Division “DOJ”), put together by an exceptional team of government enforcers, and I think the defendants that remain in the case are likely to lose if they proceed to judgment. The complaint has been the talk of the blogosphere, surprising observers with the extent of its damning, meticulous factual detail and amazing them that defendants’ executives could have thought what they were doing was legal.

The hub-and-spoke conspiracy the case describes, if proven, is pretty obviously *per se* illegal under Supreme Court precedent<sup>3</sup> and a celebrated Seventh Circuit case.<sup>4</sup> And even if it weren’t, the underlying economic story has intuitive appeal: A major retailer entrant agrees with a manufacturing oligopoly, in exchange for a share of the spoils, to assist in coercion of the incumbent retailer, which got its dominant position through price-cutting. Motive, opportunity, plausibility. It was a conspiracy against the public, of a kind going to the core concerns of antitrust, and as a matter of legal doctrine it seems pretty simple.

So here’s my big question: Why does everybody seem to hate this case?

The punditry are bending over completely backwards to come up with whatever complex explanation they can that these companies were actually trying to help us average folks, through innovation, quality, and—this I just love—lower prices.<sup>5</sup> That may not be so surprising in this day and age. There is now some knee-jerking antagonism to any major government action, and much of it is predictably insipid.<sup>6</sup> But even an antitrust professor who purports to believe in some enforcement thinks that in approaching this overwhelming demonstration of naked price-fixing, brought by the federal government and not some conniving and avaricious private plaintiff

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<sup>1</sup> James A. Thomas Distinguished Professor of Law, Cleveland State University.

<sup>2</sup> *United States v. Apple, Inc.*, No. 1:12-CV-2826 (DLC) (S.D.N.Y. 2012).

<sup>3</sup> *Interstate Circuit v. United States*, 306 U.S. 208 (1939).

<sup>4</sup> *Toys R Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000).

<sup>5</sup> See, e.g., Richard Epstein, *Not Proven: The DOJ Suit Against Apple for eBook Pricing*, RICOCHET (Apr. 11, 2012), available at <http://ricochet.com/main-feed/Not-Proven-The-DOJ-suit-Against-Apple-for-eBook-Pricing>; Yaron Brooks & Don Watkins, *3 Things Everyone Needs to Know About the Apple Antitrust Case*, FORBES.COM (Apr. 10, 2012), available at <http://www.forbes.com/sites/objectivist/2012/04/10/3-things-everyone-needs-to-know-about-the-apple-antitrust-case/3/>; and Steven Shaw, *Antitrust Enforcement Gone Wild, eBook Edition*, ZDNET.COM (June 7, 2102), available at <http://www.zdnet.com/blog/law/antitrust-enforcement-gone-wild-ebook-edition/119>.

<sup>6</sup> See, e.g., Wendy Milling, *The DOJ’s Mugging of Apple Reminds Us That Antitrust Is Theft*, FORBES.COM (Apr. 19, 2012), available at <http://www.forbes.com/sites/realspin/2012/04/19/the-dojs-mugging-of-apple-reminds-us-that-antitrust-is-theft/> (arguing for antitrust repeal because, as the eBooks case shows, “antitrust is theft”).

(heaven forbid), we should still “err on the side of restraint.”<sup>7</sup> More mainstream media sources also seem to show Apple a fair bit of sympathy.<sup>8</sup> This concerns me.

In part I think this skepticism reflects the somewhat troubling, persistent suggestion that the government investigation was begun at the behest of Amazon. Prior to the conspiracy Amazon held a massive share in e-book sales. Amazon has been accused by some of price predation, and those critics argue that if the Apple e-books model is broken up by DOJ, Amazon will return to its predatory ways. More troubling yet are the thoughtful arguments of authors, publishers, and competing booksellers, who fear the only beneficiary will be Amazon and the real victim will be written literature itself.<sup>9</sup>

I think these fears are somewhat misplaced. As for Amazon, that it had a large market share does not show that it is or could be a monopolist (how many antitrust plaintiffs attorneys wish that that were the law!). When a firm gains market share by charging low prices, we typically do not presume as our first instinct that it is a monopolist,<sup>10</sup> and the law makes it very hard to prove such a theory. That Amazon acquired a large share through price-cutting suggests that it likely could not price monopolistically once its competitors were gone. No one seems to suggest that Amazon did anything except sell products cheaply. When that is the case there is no reason to doubt that when it raises prices it will face competitors who can sell eBooks cheaply too. And in any event, if the problem is that Amazon is a monopolist, the solution is not to let competitors form price-fixing cartels. If there is one regulator that does not share the public interest, it is a conspiracy of competitors.

The harm to authors and the printed book is a bigger concern, to me at least. But consider this: The ocean-sailing ship industry during the mid 19th century suffered a long period of devastating price wars with the new steam-ship industry, and was ultimately sunk by it (sorry). Boats that have to wait for favorable winds can't really compete with boats that can provide the regular, reliable departure schedules that shippers desire.<sup>11</sup> And yet the tall-masted, swashbuckling ships of yore were very romantic and fun. Should the law have allowed the sailing

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<sup>7</sup> Geoffrey Manne, *How Apple Can Defeat the DOJ's E-Book Antitrust Suit*, FORBES.COM (Apr. 12, 2012), available at <http://www.forbes.com/sites/beltway/2012/04/12/how-apple-can-defeat-the-doj-s-e-book-antitrust-suit/>.

<sup>8</sup> See, e.g., Tim Carmody, *Report: Justice Dept. Threatens Apple, Publishers with Price-Fixing Lawsuits*, WIRED.COM (March 8, 2012), available at <http://www.wired.com/business/2012/03/justice-dept-threatens-apple-publishers-with-price-fixing-lawsuits-report>.

<sup>9</sup> I think the best of these is the thorough, elaborate economic analysis contained in a formal statement prepared by the Authors Guild: *Justice Department's E-Book Proposal Needlessly Imperils Bookstores; How to Weigh In* (June 4, 2012), available at <http://blog.authorsguild.org/2012/06/04/the-justice-departments-e-book-proposal-needlessly-imperils-bookstores-how-to-weigh-in/>. See also Comments of Barnes & Noble, Inc., on the Proposed Final Judgment, *United States v. Apple, Inc.*, No. 1:12-CV-2826 (DLC) (S.D.N.Y. 2012); Scott Turow, *Apple Antitrust Suit Would Aid Amazon*, BLOOMBERG (Mar. 21, 2012), available at <http://www.bloomberg.com/news/2012-03-21/apple-antitrust-suit-would-aid-amazon-book-monopoly.html>.

<sup>10</sup> Even a firm like Walmart. Walmart has gotten market share through sometimes disagreeable means, and the consequences for small-town downtowns have been ugly. But no one seriously believes that Walmart's model is to price predatorily so as eventually to have profitable monopoly pricing power.

<sup>11</sup> See generally Chris Sagers, *The Demise of Regulation in Ocean Shipping: A Study in the Evolution of Competition Policy and the Predictive Power of Microeconomics*, 39 VAND. J. TRANSNAT'L L. 779 (2006).

industry to conspire with the steam industry to ensure prices that would preserve sailing ships as a living technology?

I like paper books too, because I am old, and I write them. They have a romantic value to me. Sadly, that is irrelevant to the law and it should be, at least when the social policy favoring their preservation is sought to be effected by private conspiracy. Preserving paper books is at best a government job, not a job for horizontal competitors who respond with a multilateral agreement not to compete.<sup>12</sup>

Ultimately, I think the deeper problem, driving the skepticism that seems now to surround major government antitrust actions, is just that antitrust has lost the support of the public. The public does not understand antitrust and is easily swayed by the narrative of businesspeople attacked for no more than their success. If antitrust has current legitimacy, a case like *United States v. Apple* should seem simple.

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<sup>12</sup> See John Wiley, *Antitrust and Core Theory*, 54 U. CHI. L. REV. 556 (1986) (destroying the argument that alleged competitive dysfunctions in ocean shipping should justify private cartels).