U.S. v. Apple, Inc., 791 F. 3d 290 (2d. Cir. 2015)

Decided: June 30, 2015

OPINION

RAYMOND J. LOHIER (Circuit Judge) files a separate concurring opinion, joining in the judgment and in the majority opinion except for Part II.B.2.

DENNIS JACOBS (Circuit Judge) files a separate dissenting opinion.

DEBRA ANN LIVINGSTON, Circuit Judge:

[...]

BACKGROUND

I. FACTUAL BACKGROUND

We begin not with Kindles and iPads, but with printed “trade books,” which are “general interest fiction and non-fiction” books intended for a broad readership. Apple, 952 F.Supp.2d at 648 n. 4. In the United States, the six largest publishers of trade books, known in the publishing world as the “Big Six,” are Hachette, HarperCollins, Macmillan, Penguin, Random House, and Simon & Schuster. Together, the Big Six publish many of the biggest names in fiction and non-fiction; during 2010, their titles accounted for over 90% of the New York Times bestsellers in the United States. Id. at 648 n. 5.

For decades, trade book publishers operated under a fairly consistent business model. When a new book was ready for release to the public, the publisher would sell hardcover copies to retailers at a “wholesale” price and recommend resale to consumers at a markup, known as the “list” price. After the hardcover spent enough time on the shelves—often a year—publishers would release a paperback copy at lower “list” and “wholesale” prices. In theory, devoted readers would pay the higher hardcover price to read the book when it first came out, while more casual fans would wait for the paperback.

A. AMAZON'S KINDLE

On November 19, 2007, Amazon released the Kindle: a portable electronic device that allows consumers to purchase, download, and read ebooks. [...] In November 2009, Amazon was responsible for 90% of all ebook sales. Apple, 952 F.Supp.2d at 648–49.

Amazon followed a “wholesale” business model similar to the one used with print books: publishers recommended a digital list price and received a wholesale price for each ebook that Amazon sold. In exchange, Amazon could sell the publishers' ebooks on the Kindle and determine the retail price.

[...]

Where Amazon departed from the publishers' traditional business model was in the sale of new releases and New York Times bestsellers. Rather than selling more expensive versions of these books upon initial release (as publishers encouraged by producing hardcover books before paperback copies), Amazon set the Kindle price at one, stable figure —$9.99. At this price, Amazon was selling “certain” new releases and bestsellers at a price that “roughly matched,” or was slightly lower than, the wholesale price it paid to the publishers. Apple, 952 F.Supp.2d at 649. David Naggar, a Vice President in charge of Amazon's Kindle content, described this as a “classic loss-leading strategy” designed to encourage consumers to adopt the Kindle by discounting new releases and New York Times bestsellers and selling other ebooks without the discount. J.A. 1485.

[...]

B. THE PUBLISHERS' REACTIONS

Despite the small number of ebook sales compared to the overall market for trade books, top executives in the Big Six

saw Amazon's $9.99 pricing strategy as a threat to their established way of doing business. Those executives included: Hachette and Hachette Livre Chief Executive Officers ("CEOs") David Young and Arnaud Nourry; HarperCollins CEO Brian Murray; Macmillan CEO John Sargent; Penguin USA CEO David Shanks; Random House Chief Operating Officer Madeline McIntosh; and Simon & Schuster President and CEO Carolyn Reidy. In the short term, these members of the Big Six thought that Amazon's lower-priced ebooks would make it more difficult for them to sell hardcover copies of new releases, "which were often priced," as the district court noted, "at thirty dollars or more," Apple, 952 F.Supp.2d at 649, as well as New York Times bestsellers. Further down the road, the publishers feared that consumers would become accustomed to the uniform $9.99 price point for these ebooks, permanently driving down the price they could charge for print versions of the books. Moreover, if Amazon became powerful enough, it could demand lower wholesale prices from the Big Six or allow authors to publish directly with Amazon, cutting out the publishers entirely. As Hachette's Young put it, the idea of the "wretched $9 .99 price point becoming a de facto standard" for ebooks "sickened" him. J.A. 289.

The executives of the Big Six also recognized that their problem was a collective one. Thus, an August 2009 Penguin strategy report (concluded only a few months before Apple commenced its efforts to launch the iBookstore) noted that "[c]ompetition for the attention of readers will be most intense from digital companies whose objective may be to [cut out] traditional publishers altogether. ... It will not be possible for any individual publisher to mount an effective response, because of both the resources necessary and the risk of retribution, so the industry needs to develop a common strategy." J.A. 287. Similarly, Reidy from Simon & Schuster opined in September 2009 that the publishers had "no chance of success in getting Amazon to change its pricing practices" unless they acted with a "critical mass," and expressed the "need to gather more troops and ammunition" before implementing a move against Amazon. J.A. 290 (internal quotation marks omitted).

Conveniently, the Big Six operated in a close-knit industry and had no qualms communicating about the need to act together. As the district court found (based on the Publisher Defendants' own testimony), "[o]n a fairly regular basis, roughly once a quarter, the CEOs of the [Big Six] held dinners in the private dining rooms of New York restaurants, without counsel or assistants present, in order to discuss the common challenges they faced." Apple, 952 F.Supp.2d at 651. Because they "did not compete with each other on price," but over authors and agents, the publishers "felt no hesitation in freely discussing Amazon's prices with each other and their joint strategies for raising those prices." Id. Those strategies included eliminating the discounted wholesale price for ebooks and possibly creating an alternative ebook platform.

The most significant attack that the publishers considered and then undertook, however, was to withhold new and bestselling books from Amazon until the hardcover version had spent several months in stores, a practice known as "windowing." Members of the Big Six both kept one another abreast of their plans to window, and actively pushed others toward the strategy.

By December 2009, the Wall Street Journal and New York Times were reporting that four of the Big Six had announced plans to delay ebook releases until after the print release, and the two holdouts—Penguin and Random House—faced pressure from their peers.

Ultimately, however, the publishers viewed even this strategy to save their business model as self-destructive. Employees inside the publishing companies noted that windowing encouraged piracy, punished ebook consumers, and harmed long-term sales. One author wrote to Sargent in December 2009 that the "old model has to change" and that it would be better to "embrace e-books," publish them at the same time as the hardcovers, "and pray to God they both sell like crazy." J.A. 325. Sargent agreed, but expressed the hope that ebooks could eventually be sold for between $12.95 and $14 .95. "The question is," he mused, "how to get there?" J.A. 325.

C. APPLE'S ENTRY INTO THE EBOOK MARKET

Apple is one of the world's most innovative and successful technology companies. Its hardware sells worldwide and supports major software marketplaces like iTunes and the App Store. But in 2009, Apple lacked a dedicated marketplace for ebooks or a hardware device that could offer an outstanding reading experience. The pending release of the iPad, which Apple intended to announce on January 27, 2010, promised to solve that hardware deficiency.

Eddy Cue, Apple's Senior Vice President of Internet Software and Services and the director of Apple's digital content stores, saw the opportunity for an ebook marketplace on the iPad. By February 2009, Cue and two colleagues—Kevin Saul and Keith Moerer—had researched the ebook market and concluded that it was poised for rapid expansion in 2010 and beyond. While Amazon had an estimated 90% market share in trade ebooks, Cue believed that Apple could become a powerful player in the market in large part because consumers would be able to do many tasks on the iPad, and would not want to

carry a separate Kindle for reading alone. In an email to Apple's then-CEO, Steve Jobs, he discussed the possibility of Amazon selling ebooks through an application on the iPad, but felt that "it would be very easy for [Apple] to compete with and ... trounce Amazon by opening up our own ebook store" because "[t]he book publishers would do almost anything for [Apple] to get into the ebook business." J.A. 282. Jobs approved Cue's plan for an ebook marketplace—which came to be known as the iBookstore—in November 2009. Although the iPad would go to market with or without the iBookstore, Apple hoped to announce the ebook marketplace at the January 27, 2010 iPad launch to "ensure maximum consumer exposure" and add another "dramatic component" to the event. Apple, 952 F.Supp.2d at 655. This left Cue and his team only two months amidst the holiday season both to create a business model for the iBookstore and to assemble a group of publishers to participate. Cue also had personal reasons to work quickly. He knew that Jobs was seriously ill, and that, by making the iBookstore a success, he could help Jobs achieve a longstanding goal of creating a device that provides a superior reading experience.

Operating under a tight timeframe, Cue, Saul, and Moerer streamlined their efforts by focusing on the Big Six publishers. They began by arming themselves with some important information about the state of affairs within the publishing industry. In particular, they learned that the publishers feared that Amazon's pricing model could change their industry, that several publishers had engaged in simultaneous windowing efforts to thwart Amazon, and that the industry as a whole was in a state of turmoil. "Apple understood," as the district court put it, "that the Publishers wanted to pressure Amazon to raise the $9.99 price point for e-books, that the Publishers were searching for ways to do that, and that they were willing to coordinate their efforts to achieve that goal." Id. at 656. For its part, as the district court found, Apple was willing to sell ebooks at higher prices, but "had decided that it would not open the iBookstore if it could not make money on the store and compete effectively with Amazon." Id.

D. APPLE'S NEGOTIATIONS WITH THE PUBLISHERS

1. INITIAL MEETINGS

Apple held its first meetings with each of the Big Six between December 15 and 16. [...] Many publishers also emphasized that they were searching for a strategy to regain control over pricing. Apple informed each of the Big Six that it was negotiating with the other major publishers, that it hoped to begin selling ebooks within the next 90 days, and that it was seeking a critical mass of participants in the iBookstore and would launch only if successful in reaching this goal. Apple informed the publishers that it did not believe the iBookstore would succeed unless publishers agreed both not to window books and to sell ebooks at a discount relative to their physical counterparts. Apple noted that ebook prices in the iBookstore needed to be comparable to those on the Kindle, expressing the view, as Reidy recorded, that it could not "tolerate a market where the product is sold significantly more cheaply elsewhere." Apple, 952 F.Supp.2d at 657 (internal quotation marks omitted).

[...]

2. THE AGENCY MODEL

[Apple], recognizing its opportunity, abandoned the wholesale business model for a new, agency model. Unlike a wholesale model, in an agency relationship the publisher sets the price that consumers will pay for each ebook. Then, rather than the retailer paying the publisher for each ebook that it sells, the publisher pays the retailer a fixed percentage of each sale. In essence, the retailer receives a commission for distributing the publisher's ebooks. Under the system Apple devised, publishers would have the freedom to set ebook prices in the iBookstore, and would keep 70% of each sale. The remaining 30% would go to Apple as a commission.

This switch to an agency model obviated Apple's concerns about negotiating wholesale prices with the Big Six while ensuring that Apple profited on every sale. It did not, however, solve all of the company's problems. Because the agency model handed the publishers control over pricing, it created the risk that the Big Six would sell ebooks in the iBookstore at far higher prices than Kindle's $9.99 offering. If the prices were too high, Apple could be left with a brand new marketplace brimming with titles, but devoid of customers.

To solve this pricing problem, Cue's team initially devised two strategies. First, they realized that they could maintain "realistic prices" by establishing price caps for different types of books. J.A. 359. Of course, these caps would need to be higher than Amazon's $9.99 price point, or Apple would face the same difficult price negotiations that it sought to avoid by switching away from the wholesale model. But at this point Apple was not content to open its iBookstore offering prices higher than the competition.

[...]

Thus, rather than simply agreeing to price caps above Amazon's $9.99 price point, Apple created a second requirement: publishers must switch all of their other ebook retailers—including Amazon—to an agency pricing model. The result would be that Apple would not need to compete with Amazon on price, and publishers would be able to eliminate Amazon's $9.99 pricing.

[...]

3. THE "MOST-FAVORED-NATION" CLAUSE

[Apple subsequently] devised an alternative to explicitly requiring publishers to switch other retailers to agency. This alternative involved the use of a "most-favored nation" clause ("MFN Clause" or "MFN"). In general, an MFN Clause is a contractual provision that requires one party to give the other the best terms that it makes available to any competitor. In the context of Apple's negotiations, the MFN Clause mandated that, "[i]f, for any particular New Release in hardcover format, the ... Customer Price [in the iBookstore] at any time is or becomes higher than a customer price offered by any other reseller ..., then [the] Publisher shall designate a new, lower Customer Price [in the iBookstore] to meet such lower [customer price]." J.A. 559. Put differently, the MFN would require the publisher to offer any ebook in Apple's iBookstore for no more than what the same ebook was offered elsewhere, such as from Amazon.

On January 11, Apple sent each of the Big Six a proposed eBook Agency Distribution Agreement (the "Contracts"). As described in the January 4 and 5 emails, these Contracts would split the proceeds from each ebook sale between the publisher and Apple, with the publisher receiving 70%, and would set price caps on ebooks at $14.99, $12.99, and $9.99 depending on the book's hardcover price. But unlike the initial emails, the Contracts contained MFN Clauses in place of the requirement that publishers move all other retailers to an agency model. Apple then assured each member of the Big Six that it was being offered the same terms as the others.

[...]

The MFN Clause changed the situation by making it imperative, not merely desirable, that the publishers wrest control over pricing from ebook retailers generally. Under the MFN, if Amazon stayed at a wholesale model and continued to sell ebooks at $9.99, the publishers would be forced to sell in the iBookstore, too, at that same $9.99 price point. The result would be the worst of both worlds: lower short-term revenue and no control over pricing. The publishers recognized that, as a practical matter, this meant that the MFN Clause would force them to move Amazon to an agency relationship. As Reidy put it, her company would need to move all its other ebook retailers to agency "unless we wanted to make even less money" in this growing market. Apple, 952 F.Supp.2d at 666 (internal quotation marks omitted). This situation also gave each of the publishers a stake in Apple's quest to have a critical mass of publishers join the iBookstore because, "[w]hile no one Publisher could effect an industry- wide shift in prices or change the public's perception of a book's value, if they moved together they could." Id. at 665; see also J.A.1981.

4. FINAL NEGOTIATIONS

By the January 27 iPad launch, five of the Big Six —- Hachette, HarperCollins, Macmillan, Penguin, and Simon & Schuster —- had agreed to participate in the iBookstore. The lone holdout, Random House, did not join because its executives believed it would fare better under a wholesale pricing model and were unwilling to make a complete switch to agency pricing. Steve Jobs announced the iBookstore as part of his presentation introducing the iPad. When asked after the presentation why someone should purchase an ebook from Apple for $14.99 as opposed to $9.99 with Amazon or Barnes & Noble, Jobs confidently replied, "[t]hat won't be the case ... the price will be the same.... [P]ublishers will actually withhold their [e]books from Amazon ... because they are not happy with the price." the publishers' position with Amazon: "[y]ou're going to sign an agency contract or we're not going to give you the books." J.A. 891 (internal quotation marks omitted).

E. NEGOTIATIONS WITH AMAZON

Jobs's boast proved to be prophetic. While the Publisher Defendants were signing Apple's Contracts, they were also informing Amazon that they planned on changing the terms of their agreements with it to an agency model. However, their move against Amazon began in earnest on January 28, the day after the iPad launch. That afternoon, John Sargent flew to Seattle to deliver an ultimatum on behalf of Macmillan: that Amazon would switch its ebook sales agreement with Macmillan to an agency model or suffer a seven-month delay in its receipt of Macmillan's new releases. responded by

removing the option to purchase Macmillan's print and ebook titles from its website.

[...]

By February 5, Amazon had agreed to agency terms with Macmillan. The other publishers who had joined the iBookstore quickly followed Macmillan's lead. ... Each of the Publisher Defendants then informed Amazon that they were under tight deadlines to negotiate new agency agreements, and kept one another informed about the details of their negotiations. ... By March 2010, Macmillan, HarperCollins, Hachette, and Simon & Schuster had completed agency agreements with Amazon. When Penguin completed its deal in June, the company's executive proudly announced to Cue that "[t]he playing field is now level." Id. (internal quotation marks omitted).

F. EFFECT ON EBOOK PRICES

As Apple and the Publisher Defendants expected, the iBookstore price caps quickly became the benchmark for ebook versions of new releases and New York Times bestsellers. In the five months following the launch of the iBookstore, the publishers who joined the marketplace and switched Amazon to an agency model priced 85.7% of new releases on Kindle and 92.1% of new releases on the iBookstore at, or just below, the price caps. Apple, 952 F.Supp.2d at 682. Prices for New York Times bestsellers took a similar leap as publishers began to sell 96.8% of their bestsellers on Kindle and 99.4% of their bestsellers on the iBookstore at, or just below, the Apple price caps. Id. During that same time period, Random House, which had not switched to an agency model, saw virtually no change in the prices for its new releases or New York Times bestsellers.

[...]

[I]n response to the dissent's claim that Apple's conduct "deconcentrat[ed] ... the e-book retail market" and thus was "pro-competitive," Dissenting Op. at 31, it is worth noting that the district court's economic analysis and the parties' submissions at trial focused entirely on the price and sales figures for trade ebooks. This is because both parties agreed that the relevant market in this case is "the trade e- books market, not the e-reader market or the 'e-books system' market." United States v. Apple, Inc., 889 F.Supp.2d 623, 642 (S.D.N.Y.2012); Apple, 952 F.Supp.2d at 694 n. 60. The district court did not analyze the state of competition between ebook retailers or determine that Amazon's pricing policy acted, as the dissent accuses, as a "barrier[ ] to entry" for other potential retailers. Dissenting Op. at 24, 30.

II. PROCEDURAL HISTORY

[...]

DISCUSSION

[...]

I. STANDARD OF REVIEW

[...]

II. APPLE'S LIABILITY UNDER §1

This appeal requires us to address the important distinction between "horizontal" agreements to set prices, which involve coordination "between competitors at the same level of [a] market structure," and "vertical" agreements on pricing, which are created between parties "at different levels of [a] market structure." Anderson News, L.L.C. v. Am. Media, Inc., 680 F.3d 162, 182 (2d Cir. 2012) (internal quotation marks omitted). Under § 1 of the Sherman Act, the former are, with limited exceptions, per se unlawful, while the latter are unlawful only if an assessment of market effects, known as a rule-of-reason analysis, reveals that they unreasonably restrain trade. See Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 893 (2007). {17}

Apple characterizes its Contracts with the Publisher Defendants as a series of parallel but independent vertical agreements a characterization that forms the basis for its two primary arguments against the district court's decision. First, Apple argues that the district court impermissibly inferred its involvement in a horizontal price-fixing conspiracy from the Contracts themselves. Because (in Apple's view) the Contracts were vertical, lawful, and in Apple's

independent economic interest, the mere fact that Apple agreed to the same terms with multiple publishers cannot establish that Apple consciously organized a conspiracy among the Publisher Defendants to raise consumer-facing ebook prices—even if the effect of its Contracts was to raise those prices. Second, Apple argues that, even if it did orchestrate a horizontal price- fixing conspiracy, its conduct should not be subject to per se condemnation. According to Apple, proper application of the rule of reason reveals that its conduct was not unlawful. For the reasons set forth below, we reject these arguments. {18}

A. THE CONSPIRACY WITH THE PUBLISHER DEFENDANTS

Apple portrays its Contracts with the Publisher Defendants as, at worst, "unwittingly facilitat[ing]" their joint conduct. Apple Br. at 23. All Apple did, it claims, was attempt to enter the market on profitable terms by offering contractual provisions—an agency model, the MFN Clause, and tiered price caps—which ensured the company a small profit on each ebook sale and insulated it from retail price competition. {19}

We disagree. [...] [T]he Publisher Defendants' shifting to an agency model with Amazon was the result of express collusion among them and ... Apple consciously played a key role in organizing that collusion. {20}

Apple offered each Big Six publisher a proposed Contract that would be attractive only if the publishers acted collectively. Under Apple's proposed agency model, the publishers stood to make less money per sale than under their wholesale agreements with Amazon, but the Publisher Defendants were willing to stomach this loss because the model allowed them to sell new releases and bestsellers for more than $9.99. Because of the MFN Clause, however, each new release and bestseller sold in the iBookstore would cost only $9.99 as long as Amazon continued to sell ebooks at that price. So in order to receive the perceived benefit of Apple's proposed Contracts, the Publisher Defendants had to switch Amazon to an agency model as well—something no individual publisher had sufficient leverage to do on its own. Thus, each Publisher Defendant would be able to accomplish the shift to agency —and therefore have an incentive to sign Apple's proposed Contracts—only if it acted in tandem with its competitors. See Starr, 592 F.3d at 324; Flat Glass, 385 F.3d at 360–61; see also J.A.1974 (noting that the agreements would "not fix the publishers' problems" if they could not move Amazon to an agency model). By the very act of signing a Contract with Apple containing an MFN Clause, then, each of the Publisher Defendants signaled a clear commitment to move against Amazon, thereby facilitating their collective action. As the district court explained, the MFNs "stiffened the spines" of the Publisher Defendants. Apple, 952 F.Supp.2d at 665. {20}

Even if Apple was unaware of the extent of the Publisher Defendants' coordination when it first approached them, its subsequent communications with them as negotiations progressed show that Apple consciously played a key role in organizing their express collusion. {22}

Apple's involvement in the conspiracy continued even past the signing of its agency agreements. {22}

Combined with the unmistakable purpose of the Contracts that Apple proposed to the publishers, and with the collective move against Amazon that inevitably followed the signing of those Contracts, the emails and phone records demonstrate that Apple agreed with the Publisher Defendants, within the meaning of the Sherman Act, to raise consumer-facing ebook prices by eliminating retail price competition. {22}

B. UNREASONABLE RESTRAINT OF TRADE

In antitrust cases, "[p]er se and rule-of-reason analysis are ... two methods of determining whether a restraint is 'unreasonable,' i.e., whether its anticompetitive effects outweigh its procompetitive effects." Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 342, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990). {24}

1. WHETHER THE PER SE RULE APPLIES

A. HORIZONTAL AGREEMENT

"The true test of legality" under § 1 of the Sherman Act "is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." Bd. of Trade of City of Chi. v. United States, 246 U.S. 231, 238, 38 S.Ct. 242, 62 L.Ed. 683 (1918) (emphasis added). By agreeing to orchestrate a horizontal price-fixing conspiracy, Apple committed itself to "achiev[ing] [that] unlawful objective," Monsanto, 465 U.S. at 764 (internal quotation marks omitted): namely, collusion with and among the Publisher Defendants to set ebook prices. This type of agreement, moreover, is a restraint "that would always or almost

always tend to restrict competition and decrease output." Leegin, 551 U.S. at 886 (internal quotation marks omitted). {25}

The response, raised by Apple and our dissenting colleague, that Apple engaged in "vertical conduct" that is unfit for per se condemnation therefore misconstrues the Sherman Act analysis. It is the type of restraint Apple agreed to impose that determines whether the per se rule or the rule of reason is appropriate. These rules are means of evaluating "whether [a] restraint is unreasonable," not the reasonableness of a particular defendant's role in the scheme. {25}

Consistent with this principle, the Supreme Court and our Sister Circuits have held all participants in "hub-and-spoke" conspiracies liable when the objective of the conspiracy was a per se unreasonable restraint of trade. {25}

Because the reasonableness of a restraint turns on its anticompetitive effects, and not the identity of each actor who participates in imposing it, Apple and the dissent's observation that the Supreme Court has refused to apply the per se rule to certain vertical agreements is inapposite. {26}

[T]he relevant "agreement in restraint of trade" in this case is not Apple's vertical Contracts with the Publisher Defendants (which might well, if challenged, have to be evaluated under the rule of reason); it is the horizontal agreement that Apple organized among the Publisher Defendants to raise ebook prices. {26}

[T]he Publisher Defendants' coordination to fix prices is uncontested on appeal. ... The competitive effects of that same restraint are no different merely because a different conspirator is the defendant. {26}

Accordingly, when the Supreme Court has applied the rule of reason to vertical agreements, it has explicitly distinguished situations in which a vertical player organizes a horizontal cartel. {27}

Our dissenting colleague suggests that Leegin also "rejected per se liability for hub-and-spokes agreements." {28}

We need not worry about the possibility that Leegin covertly changed the law governing hub-and-spoke conspiracies, however, because the passage relied upon by the dissent is entirely consistent with holding the "hub" in such a conspiracy liable for the horizontal agreement that it joins. A horizontal conspiracy can use vertical agreements to facilitate coordination without the other parties to those agreements knowing about, or agreeing to, the horizontal conspiracy's goals. For example, a cartel of manufacturers could ensure compliance with a scheme to fix prices by having every member "require its dealers to adhere to specified resale prices." VIII Areeda & Hovenkamp, supra, ¶ 1606b. Because it may be difficult to distinguish such facilitating practices from procompetitive vertical resale price agreements, the quoted passage from Leegin notes that those "vertical agreement[s] ... would need to be held unlawful under the rule of reason." 551 U.S. at 893. But there is no such possibility for confusion in the hub-and-spoke context, where the vertical organizer has not only committed to vertical agreements, but has also agreed to participate in the horizontal conspiracy. In that situation, the court need not consider whether the vertical agreements restrained trade because all participants agreed to the horizontal restraint, which is "and ought to be, per se unlawful." Id. 20 {28}

In short, the relevant "agreement in restraint of trade" in this case is the price-fixing conspiracy identified by the district court, not Apple's vertical contracts with the Publisher Defendants. How the law might treat Apple's vertical agreements in the absence of a finding that Apple agreed to create the horizontal restraint is irrelevant. Instead, the question is whether the vertical organizer of a horizontal conspiracy designed to raise prices has agreed to a restraint that is any less anticompetitive than its co-conspirators, and can therefore escape per se liability. We think not. {28}

B. "ENTERPRISE AND PRODUCTIVITY"

Apple seeks refuge from the per se rule by invoking a line of cases in which courts have permitted defendants to introduce procompetitive justifications for horizontal price- fixing arrangements that would ordinarily be condemned per se if those agreements "when adopted could reasonably have been believed to promote 'enterprise and productivity.' " Apple Br. at 50 (quoting In re Sulfuric Acid Antitrust Litig., 703 F.3d 1004, 1011 (7th Cir.2012)) (internal quotation mark omitted). The decisions falling in this line are narrow, and they do not support Apple's position. {29}

C. PRICE–FIXING CONSPIRACY

Apple and its amici argue that the horizontal agreement among the publishers was not actually a "price-fixing"

conspiracy that deserves per se treatment in the first place. {30}

The conspiracy among Apple and the Publisher Defendants comfortably qualifies as a horizontal price-fixing conspiracy. {30}

[T]he Publisher Defendants' primary objective in expressly colluding to shift the entire ebook industry to an agency model (with Apple's help) was to eliminate Amazon's $9.99 pricing for new releases and bestsellers, which the publishers believed threatened their short-term ability to sell hardcovers at higher prices and the long-term consumer perception of the price of a new book. {30}

Faced with downward pressure on prices but unconvinced that withholding books from Amazon was a viable strategy, the Publisher Defendants—their coordination orchestrated by Apple—combined forces to grab control over price. {31}

This conspiracy to raise prices also had its intended effect. Immediately after the Publisher Defendants switched Amazon to an agency model, they increased the Kindle prices of 85.7% of their new releases and 96.8% of their New York Times bestsellers to within 1% of the Apple price caps. They also increased the prices of their other ebook offerings. {31}

2. RULE OF REASON

My concurring colleague would [...] affirm the district court's decision on [a per se] basis alone. {32}

[T]he Supreme Court has applied an abbreviated version of the rule of reason—otherwise known as “quick look” review—to agreements whose anticompetitive effects are easily ascertained. See id. at 779. This “quick look” effectively relieves the plaintiff of its burden of providing a robust market analysis, see id., by shifting the inquiry directly to a consideration of the defendant's procompetitive justifications. {33}

A. MARKET ENTRY

Apple's initial argument that its agreement with the Publisher Defendants was procompetitive (an argument presented principally in an amicus brief adopted wholeheartedly by the dissent) is that by eliminating Amazon's $9.99 price point, the agreement enabled Apple and other ebook retailers to enter the market and challenge Amazon's dominance. But this defense—that higher prices enable more competitors to enter a market—is no justification for a horizontal price-fixing conspiracy. {34}

A dominant firm charging low prices may have proven itself more efficient than its competitors, such that a potential new entrant's inability to earn a profit would result not from any artificial “barriers to entry,” but rather from the fact that, in light of the value proposition offered by the dominant firm, consumers would not choose to buy the new entrant's products at the price it is willing and able to offer. {34}

[I]f Apple could not turn a profit by selling new releases and bestsellers at $9.99, or if it could not make the iBookstore and iPad so attractive that consumers would pay more than $9.99 to buy and read those ebooks on its platform, then there was no place for its platform in the ebook retail market. {35}

[T]he dissent invites conduct that is strictly prohibited by the Sherman Act—horizontal collusion to fix prices—to cure a perceived abuse of market power. Whatever its merit in the abstract, that preference for collusion over dominance is wholly foreign to antitrust law. See Trinko, 540 U.S. at 408 (referring to collusion as the “supreme evil of antitrust”). Because of the long-term threat to competition, the Sherman Act does not authorize horizontal price conspiracies as a form of marketplace vigilantism to eliminate perceived “ruinous competition” or other “competitive evils.” {35}

[T]he district court's fact-finding illustrates that Apple organized the Publisher Defendants' price-fixing conspiracy not because it was a necessary precondition to market entry, but because it was a convenient bargaining chip. {37}

To summarize, the district court made no finding that a horizontal conspiracy to eliminate price competition in the ebook retail market was necessary to bring more retailers into the market to challenge Amazon, nor does the record evidence support this conclusion. More importantly, even if there were such evidence, the fact that a competitor's entry into the market is contingent on a horizontal conspiracy to raise prices only means (absent monopolistic conduct by the market's dominant firm, which cannot lawfully be challenged by collusion) that the competitor is inefficient,

i.e., that its entry will not enhance consumer welfare. For these reasons, I would reject the argument that Apple's entry into the market represented an important procompetitive benefit of the horizontal price-fixing conspiracy it orchestrated. {37}

B. OTHER JUSTIFICATIONS

The technological innovations embedded in the iPad are similarly unrelated to Apple's agreement with the Publisher Defendants. {38}

III. THE INJUNCTIVE ORDER

[...]

CONCLUSION

We have considered the appellants' remaining arguments and find them to be without merit. Because we conclude that Apple violated § 1 of the Sherman Act by orchestrating a horizontal conspiracy among the Publisher Defendants to raise ebook prices, and that the injunctive relief ordered by the district court is appropriately designed to guard against future anticompetitive conduct, the judgment of the district court is AFFIRMED. {42}

***

LOHIER, Circuit Judge, concurring in part and concurring in the judgment:

I join in the majority opinion except for part II.B.2 relating to the application of the rule of reason. {42}

I recognize that the publisher defendants, who used Apple both as powerful leverage against Amazon and to keep each other in collusive check, may appear to be more culpable than Apple. And there is also some surface appeal to Apple's argument that the ebook market, in light of Amazon's virtually uncontested dominance, needed more competition. But more corporate bullying is not an appropriate antidote to corporate bullying. It cannot have been lawful for Apple to respond to a competitor's dominant market power by helping rival corporations (the publishers) fix prices, as the District Court found happened here. However sympathetic Apple's plight and the publishers' predicament may have been, I am persuaded that permitting “marketplace vigilantism,” Majority Op. at 9, would do far more harm to competition than good, would be disastrous as a policy matter, and is in any event not sanctioned by the Sherman Act. {42}

***

DENNIS JACOBS, Circuit Judge, dissenting:

The district court committed three decisive errors:

• The district court ruled (and the majority affirms) that a vertical enabler of a horizontal price-fixing conspiracy is in per se violation of the antitrust laws. However, the Supreme Court teaches that a vertical agreement designed to facilitate a horizontal cartel “would need to be held unlawful under the rule of reason.” Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 893, 127 S.Ct. 2705, 168 L.Ed.2d 623 (2007) (emphasis added). (POINT I)

• The district court's alternative ruling under the rule of reason was predetermined by its (erroneous) per se ruling. Thus the district court assessed impacts on competition without recognizing that Apple's role as a vertical player differentiated it from the publishers. The court should instead have considered Apple as a competitor on the distinct horizontal plane of retailers, where Apple competed with Amazon (and smaller players such as Barnes & Noble). (POINT II)

• Apple's conduct, assessed under the rule of reason on the horizontal plane of retail competition, was unambiguously and overwhelmingly pro-competitive. Apple was a major potential competitor in a market dominated by a 90 percent monopoly, and was justifiably unwilling to enter a market on terms that would assure a loss on sales or exact a toll on its reputation. In that connection, the district court erroneously deemed the monopolist's $9.99 price as categorically good for competition because it was lower than cost, and because e-book prices rose after the monopoly was broken. (POINT III) {44}

BACKGROUND

[...]

DISCUSSION

I.

The district court's principal legal error, from which other errors flow, is its conclusion that Apple violated § 1 under the per se rule. {47}

This appeal turns on whether purely vertical participation in and facilitation of a horizontal price-fixing conspiracy gives rise to per se liability. {47}

A vertical relationship that facilitates a horizontal price conspiracy does not amount to a per se violation. In another age, the Supreme Court treated such a hub-and-spokes conspiracy as a per se violation. See Interstate Circuit, Inc. v. Paramount Pictures Distrib. Co., 306 U.S. 208, 226–27, 59 S.Ct. 467, 83 L.Ed. 610 (1939). But the per se rule has been in steady retreat. {48}

The most recent and explicit signal is given in Leegin, which explains that "the Sherman Act's prohibition on 'restraints of trade' evolves to meet the dynamics of present economic conditions," such that "the boundaries of the doctrine of per se illegality should not be immovable." 551 U.S. at 899– 900 (alterations omitted). {48}

The [Supreme] Court ... rejected per se liability for hub-and-spokes agreements, in wording that prescribes rule-of-reason review of vertical dealings that facilitate per se unlawful horizontal agreements (the type of agreement that the district court found Apple had undertaken):

"To the extent a vertical agreement setting minimum resale prices is entered upon to facilitate either type of cartel [among manufacturers or among retailers], it, too, would need to be held unlawful under the rule of reason. "Id. (emphasis added).

After Leegin, we cannot apply the per se rule to a vertical facilitator of a horizontal price-fixing conspiracy; such an actor must be held liable, if at all, "under the rule of reason." Id. {49}

The majority's holding in this case therefore creates a circuit split, and puts us on the wrong side of it. {49}

Collusion among competitors does not describe Apple's conduct or account for its motive. Apple's conduct had no element of collusion with a horizontal rival. Its own rival in competition was (and presumably is) Amazon; and that competition takes place on a horizontal plane distinct from the plane of the horizontal conspiracy among the publishers. All Apple's energy—all it did that has been condemned in this case—was directed to weakening its competitive rival, and pushing it aside to make room for Apple's entry. On the only horizontal plane that matters to Apple's e-book business, Apple was in competition and never in collusion. So it does not do to deem Apple's conduct anti-competitive just because the publishers' horizontal conspiracy was found to be illegal per se. {50}

Apple's promotion of that horizontal conspiracy was limited to vertical dealings. {50}

The per se rule is inapplicable here for another independent reason: The per se rule does not apply to arrangements with which the courts are not already well-experienced. Leegin, 551 U.S. at 887. As the government conceded at oral argument, no court has previously considered a restraint of this kind. Several features make it sui generis: (a) a vertical relationship (b) facilitating a horizontal conspiracy (c) to overcome barriers to entry in a market dominated by a single firm (d) in an industry created by an emergent technology. {50}

II.

Having confirmed Apple's per se liability by conflating the horizontal plane of competition among publishers with the horizontal plane of competition among retailers, the district court committed the same error in its rule of reason analysis. Thus the district court (as explained below) overstated the anti-competitive nature of Apple's vertical dealings and overlooked the pro-competitive effects on retail competition –the horizontal plane on which Apple does e-book business. "The district court did not analyze the state of competition between ebook retailers," as the majority

concedes. Op. of Judge Livingston, ante, at 44 (for the Court) (emphasis omitted). Exactly. {51}

III.

On this appeal, we have reached no majority as to the rule of reason. Judge Livingston writes for herself alone that, as an alternative to the per se rule, she would also affirm under the rule of reason; without a second judge supporting this conclusion, it is dicta, because our affirmance is based on the per se theory adopted by two judges. {52}

Analysis under the rule of reason—whether conducted in full or by an untainted quick look—compels the conclusion that Apple did not violate § 1 of the Sherman Act. The issue is decided by comparing (a) the restrictive effect of Apple's dealings with (b) the pro-competitive result of deconcentrating a market that had been dominated by a monopolist and insulated from competition through below- cost pricing. {52}

The agency agreement that Apple signed with each publisher was innocuous: as the parties agree, each term—including the agency structure, MFN clause, and price caps—is absolutely legal. The district court so found expressly {52}

As to the pro-competitive effects, the rule of reason must take account primarily of the deconcentrating of the e-book retail market. {53}

Another pro-competitive effect is the encouragement of innovation, a hallmark and benefit of competition. {53}

The restraint of Apple's vertical conduct was no more than a slight offset to the competitive benefits that now pervade the relevant market. {54}

Apple took steps to compete with a monopolist and open the market to more entrants, generating only minor competitive restraints in the process. Its conduct was eminently reasonable; no one has suggested a viable alternative. “What could be more perverse than an antitrust doctrine that discouraged new entry into highly concentrated markets?” In re Text Messaging Antitrust Litig., 782 F.3d 867, 874 (7th Cir.2015). {55}

IV.

[...]

...