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# **E-Book Conspiracy: The Rule of Reason & Department of Justice v. Apple & Price-Fixing**

## **I. Introduction**

In 2010, Apple was anticipating the launch of its new “iBook” store. With that launch, Apple effectively entered into the e-book retail market.<sup>1</sup> However, Apple entered an e-book market dominated by its established competitors such as Barnes & Noble and Amazon. Apple saw little chance of successfully competing with the pricing schemes of these competitors while also generating a profit in the current e-book market.<sup>2</sup> As a result, “Apple demanded, as a precondition of its entry into the market, that it would not have to compete with Amazon on price.”<sup>3</sup>

Though Apple was not established in either the e-book publishing market or the e-reader manufacturing market, Apple was “one of America’s most admired, dynamic and successful technology companies.”<sup>4</sup> In order to convert its general technological market share advantage into an e-reader and e-book market share advantage, Apple contacted the “Big Six” publishers about setting up a pricing scheme for its e-book store that would allow it to evade the traditional competition in the e-book market.<sup>5</sup> The Big Six consisted of the six largest publishing firms in the world. It consisted of Hachette, Macmillan, Penguin, HarperCollins, Simon & Schuster, and Random House. Of those six publishing firms, only Random House refused to cooperate with Apple’s scheme to artificially inflate e-book prices.<sup>6</sup>

Apple and five of the Big Six publishers developed a pricing scheme called the “Agency Model.” Under this scheme, Apple became a nominal publishing agent. For every e-book that Apple sold, the publishers received 70% and Apple received 30%.<sup>7</sup> The five remaining publishers agreed to this minimum resale price fixing, because they were afraid of Amazon’s

burgeoning power within the e-book industry.<sup>8</sup> Amazon regularly took a loss on bestselling e-books by purchasing them from the publishers for \$11.99 and subsequently selling them for \$9.99. At first, publishing profits soared.<sup>9</sup> However, the major publishers began to resent Amazon when Amazon started offering an e-book publishing scheme to any and all prospective authors that was far more lucrative to those authors than a traditional print publishing contract.<sup>10</sup> In supporting Apple's Agency Model, the publishers hoped to diminish Amazon's market share in the e-book publishing and e-reader manufacturing market.<sup>11</sup>

Under the agreement between Apple and the major publishers, retail e-book prices were set between \$12.99 and \$15.99.<sup>12</sup> Apple also had a great deal of discretion in setting these prices despite the notion of the Agency Model. Apple demanded and received the ability to set prices for most of the e-book market; forbidding the publishers who contracted with Apple from allowing any other e-book retailer to sell below the prices that Apple set. "Apple demanded, as a precondition of its entry into the market, that it would not have to compete with Amazon on price."<sup>13</sup> The publishers then had the leverage to demand that the Agency Model apply to all other e-book retailers without the "Most Favored Nation" clause included in their contract with Apple.<sup>14</sup> Following the obvious and deliberate price-fixing agreement between Apple and the major publishers, the Department of Justice filed a lawsuit against Apple and the publishers.<sup>15</sup>

The Department of Justice "alleges that the defendants conspired to raise, fix, and stabilize the retail price for newly-released and bestselling trade e-books, to end retail price competition among trade e-books retailers, and to limit retail price competition among the Publisher Defendants in violation of Section 1 of the Sherman Antitrust Act."<sup>16</sup> The issue that arises in this case and the issue central to this paper is whether the price fixing employed by Apple and the major publishers to control the e-book market violated the Sherman Antitrust Act. As this paper

and all relevant case law shows, it does.<sup>17</sup> Apple and its co-defendants colluded to artificially inflate prices in the e-book market in an attempt to undermine and diminish Amazon's share of that market.<sup>18</sup> As a result, the cost to consumers purchasing e-books grew, publisher profits fell, author earnings plummeted, and the overall retail e-book market grew more inefficient. Apple was the only party who benefited.<sup>19</sup>

## II. History of the Supreme Court's Price Fixing Policy

### A. *The Sherman Antitrust Act and Per Se Illegality*

The Sherman Antitrust Act was one of the first attempts by the legislature of the United States to stop corporations and other such business ventures from engaging in anti-competitive practices that harmed both trade and the consumers. The relevant section of the act is section 1, and it states:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.<sup>20</sup>

As stated above, this act is generally considered to be overbroad. Over the next century, the Supreme Court narrowed the offending instances considerably. The first case relevant to the issue of minimum resale price fixing was Dr. Miles Medical Co. v. John D. Park & Sons Co. in 1911.<sup>21</sup>

The issue in Dr. Miles Medical Co. v. John D. Park & Sons Co. was whether the Dr. Miles Medical Company could force its retailers to sell its medical products at or above the prices it established.<sup>22</sup> Minimum retail price fixing was deemed per se illegal by the Supreme

Court in the *Dr. Miles* case. This type of price fixing harmed both the consumers and the retailers. Avoiding pricing schemes that harm the consumers was one of the main reasons the Sherman Antitrust Act was established.<sup>23</sup> The Court ruled, in essence, that minimum resale price fixing was per se illegal.<sup>24</sup> The Court's ruling was that minimum retail price fixing was a policy that only served to raise prices unnecessarily for consumers.<sup>25</sup> The Court decided that such a policy could not coexist with the Sherman Antitrust Act. The per se illegality of minimum retail price fixing established in *Dr. Miles* remained the law for almost a century.

*B. The Supreme Court Overrules Dr. Miles on Maximum Price Fixing in Khan.*

In 1997, the Supreme Court extended the Rule of Reason's power and applicability in its judgment of *State Oil Co. v. Khan*.<sup>26</sup> In *Khan*, the antitrust issue before the Court was whether maximum resale price fixing fit within the framework of the Sherman Antitrust Act or whether it was per se illegal.<sup>27</sup> For decades, the Court upheld its judgment in *Dr. Miles* that established a per se condemnation of price fixing.<sup>28</sup> The Court's decision received a great deal of criticism when it upheld the per se invalidation of all maximum price restraints in *Albrecht*.<sup>29</sup> The Court's decision in *Albrecht*, it was this reaction to its opinion in *Albrecht* that forced the Court to reassess the issue, because the Court acknowledged the "substantial criticism the decision...received," and in *Khan*, the Court finally decided that there was "insufficient economic justification for per se invalidation of vertical maximum price fixing."<sup>30</sup> As a result, the Court judged that "vertical maximum price fixing, like the majority of commercial arrangements subject to the antitrust laws, should be evaluated under the Rule of Reason."<sup>31</sup>

The Court's judgment in *Khan* was another step away from the Court's original and universal condemnation of all trade restraints established in *Dr. Miles*.<sup>32</sup> The Sherman Antitrust Act was established by Congress to protect America's citizens and markets from predatory

business practices.<sup>33</sup> Congress appointed the Court the sole party able to determine what business practices did or did not violate the Sherman Antitrust Act.

Over the course of the century following its Dr. Miles opinion, the Court's opinions constantly altered which restraints on trade were truly injurious.<sup>34</sup> The Court's shifting interpretation of trade restraints was a result of constantly evolving economic theorems. As economists shifted the definition of practices that stimulated the economy and practices that harmed and depressed it, the Court altered its judgments to keep pace with the constantly shifting economic landscape. The Court asserted that "recognizing and adapting to changed circumstances and the lessons of accumulated experience," within the economic realm, was part of its duty.<sup>35</sup> The Court's opinion in Khan was partly a reaction to the evolving economic markets.

In its Khan opinion, the Court discussed the possible procompetitive effects of maximum price fixing.<sup>36</sup> The Court mostly referenced the economic criticisms of Albrecht.<sup>37</sup> In expanding its interpretation of the Rule of Reason, the Court managed to remove and convert a portion of the Rule of Reason's detractors. However, this expansion prompted the evolution of antitrust law that resulted in the Court's eventual Leegin opinion.

### *C. The Supreme Court Overrules Dr. Miles on Minimum Price Fixing in Leegin.*

In 2007, the United States Supreme Court overruled its Dr. Miles decision in Leegin Creative Leather Products, Inc. v. PSKS, Inc. (2007). After 96 years of applying per se illegality to minimum resale price fixing cases, the Supreme Court decided to overrule its Dr. Miles decision.<sup>38</sup> In its Leegin opinion, the Court established the Rule of Reason as the proper standard applicable to minimum resale price fixing, whether or not there was a violation of section 1 of

the Sherman Antitrust Act.<sup>39</sup> “Under this rule, the fact finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.”<sup>40</sup> The Supreme Court went on to enumerate many of the factors integral to the outcome of its Rule of Reason test.

The Court established many factors to consider within the umbrella of the Rule of Reason test, but it also implied that its enumerated factors were neither complete nor exhaustive. One of the factors it considered was “specific information about the relevant business and the restraint’s history, nature, and effect.”<sup>41</sup> The Court’s opinion involved examining the relative industry, how the restraint arose, why the restraint arose, what it was supposed to accomplish, and what it actually achieved. Another aspect of the Rule of Reason the Court enumerated was “whether the businesses involved have market power.”<sup>42</sup> Corporations, ventures, and trusts would be more likely to violate the Rule of Reason if those price fixing entities had the necessary power and influence to harm competing entities in the relevant market or to harm the customers of those other businesses and concerns while exerting a monopolistic-type power.

Further, the Rule of Reason analyzed the relationship between market power, market structure, and the free trade restraint’s actual effect on the market.<sup>43</sup> This is similar to the aspects of the Rule of Reason enumerated above, but it looked less at the initial motivation and more at the effects of the initiated restraint on free trade had on the overall market. An attempt to suborn a certain market, having a sinister motive that barely affected the market and free trade, was less damning under the Rule of Reason test than the effect an innocent motive that undermined and harmed consumers.<sup>44</sup>

With its implementation of the Rule of Reason, the Court essentially backed away from a *per se* condemnation of minimum resale price fixing. It argued that some of these price fixing restraints could have stimulating effects on a market and could serve to benefit consumers and therefore the general public.<sup>45</sup> The Court wanted to limit its condemnation to those restraints that had already negatively and actually affected a certain market; or at least those that were almost certainly going to produce a negative effect in the future. Further, the Court chose to proscribe anticompetitive practices that harmed the consuming public more harshly than it proscribed those that harmed business interests.<sup>46</sup> The Supreme Court focused on three main criteria in its application of the Rule of Reason.

In each of its analyses, the Court first focused on the intent of the trade-restraining party and whether a conspiracy of collusion existed. Next, the Court looked at the harm caused by the suspect to the relevant market or industry. Lastly, the Court determined whether or not the relevant and alleged restraint actually caused harm to the consumer. Of these three aspects, the Supreme Court found restraints that harmed the consuming public to be the most insidious. After all, the Sherman Antitrust Act's main goal was the "protection of competition, not competitors."<sup>47</sup>

### **III. Evolution of the Supreme Court's Application of the Sherman Antitrust Act to Trade Restraints.**

#### *A. Per Se Illegality Applied to All Restraints*

The Sherman Antitrust Act was enacted by Congress in 1890. The act banned "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce."<sup>48</sup> For the first few years of the act's existence, the Court interpreted the statute literally. The Court invalidated "every contract...in restraint of trade."<sup>49</sup> The Court did not care if

the restraint was harmful or even helpful to the market. Many legal scholars argued for a more discerning test to apply to market restraints.<sup>50</sup> From the Sherman Act's conception, dissenting justices of the Court wrote opinions arguing for a legal standard that only condemned a defendant if the "restraint which it produces be unreasonable."<sup>51</sup>

The Court first limited the overly broad scope of the Sherman Antitrust Act in Standard Oil Co. of N.J. v. United States.<sup>52</sup> The Court decided this case in 1911, and this was the first time the Court's application of the Sherman Antitrust Act went beyond the simple identification of any and all market restraints. Given that the Court limited its condemnation to only those market restraints that were unreasonable, the rule and method the Court used to analyze market restraints and apply the Sherman Antitrust Act became the Rule of Reason.<sup>53</sup> However, the Court did not utilize the Rule of Reason as the objective, analytical tool it is today until the Court's Chicago Board of Trade opinion in 1918.<sup>54</sup>

### *B. Development of the Rule of Reason as Alternative to Per Se Illegality*

The Supreme Court's opinion in Chicago Board of Trade marked the beginning of an important shift in how the Court applied the Sherman Antitrust Act. The Rule of Reason was formally adopted by the Court during its analysis of this case.<sup>55</sup> The Court's adoption of the Rule of Reason caused a divergence in its methods of analyses. While the Court continued to apply a standard of per se illegality to certain types of market restraints, such as maximum and minimum resale price fixing, it began to apply its newly developed Rule of Reason test to all market restraints not covered by specifically enumerated per se illegality rules.

Over the course of the 20<sup>th</sup> century, the Supreme Court applied its Rule of Reason test to an ever increasing number and variety of cases. As the Court's application of the Rule of Reason

to market restraints expanded, its application of per se illegality to market restraints contracted proportionally. Over the following years, the Court's application of the Sherman Antitrust Act inexorably moved towards a broader application of the Rule of Reason to a greater variety of market restraints.

The more inherently harmful the Supreme Court found a certain kind of market restraint, the longer it took for the Court to acknowledge that said market restraint could possibly be reasonable and therefore eligible for analysis under the Rule of Reason. For example, the Court found price fixing of any type particularly harmful.<sup>56</sup> The Court continued to consider all types of vertical price fixing per se illegal for over 100 years after it first started applying the Sherman Antitrust Act to restraints on the market. The Court first changed its stance on vertical price fixing in 1997.<sup>57</sup>

### *C. Proliferation of the Rule of Reason in the Analysis of Market Restraints*

“Vertical maximum price fixing like the majority of commercial arrangements subject to the antitrust laws, should be evaluated under the Rule of Reason.”<sup>58</sup> State Oil v. Khan was the Supreme Court's first application of its Rule of Reason to any type of vertical price fixing. The type of price fixing in this case was maximum vertical price fixing. The Supreme Court's decades-long reluctance to apply the Rule of Reason to vertical price fixing was demonstration of the serious and anti-competitive nature of vertical price fixing. And even though the Court decided in 1997 that maximum vertical price fixing was not always inherently anticompetitive and unreasonable, the Court's view of minimum resale price fixing had not changed up to that point.

The Department of Justice accused Apple of instituting an unreasonable restraint on trade in violation of the Sherman Antitrust Act. One of the foremost issues in the case was minimum resale price fixing.<sup>59</sup> Throughout the history of the Sherman Antitrust Act, the Court treated few market restraints as harshly as it did minimum resale price fixing. For 117 years, the Court ruled that all types of minimum resale price fixing were per se illegal. This changed in 2007.<sup>60</sup> Leegin was a landmark case decided by the Court in 2007. Far from legalizing this particular type of vertical price fixing, the Supreme Court's ruling merely allowed for the possibility that this price fixing was not always, in every single instance, per se illegal.<sup>61</sup>

It was no coincidence that Apple enacted its price fixing scheme so soon after the Supreme Court's decision in Leegin. If it had launched its Agency Model just a few short years earlier, the Court would have found this Agency Model to be per se illegal. Apple saw a shift in the law, and it took advantage of this new ambiguity in antitrust law. Apple's plan worked economically, because at the very least, its new Agency Model had to be analyzed by the Rule of Reason in court.<sup>62</sup>

## **IV. The Sherman Antitrust Act & Apple's Agency Model.**

### *A. Overview of Apple's Agency Model.*

Apple and its publisher co-conspirators created the Agency Model to use as an economic and contractual tool. Apple and its publishing partners used the Agency Model to raise the retail price of e-books across the entire market.<sup>63</sup> Apple could not afford to match the e-book pricing of its competitors while maintaining a competitive profit margin.<sup>64</sup> Because of their established market share, Amazon's "Kindle" and Barnes & Noble's "Nook" were able to offer steadily diminishing e-book prices paralleling the increasing volume of their e-book sales. Instead of pricing competitively, Apple utilized the publishers' fear that lowering e-book prices would

cause the public to devalue physical, paper books. Apple also had a bargaining advantage, because they were such a large distributor of audiobooks. Further, Apple's contract with its publishing partners had a clause giving Apple unilateral control in pricing e-books for its competitors as well.<sup>65</sup>

One of the most pernicious aspects of Apple's Agency Model deal was the amount of collusion between the major publishers and Apple.<sup>66</sup> There were numerous secret meetings between the publishers and Apple, and there were a plethora of incriminating e-mails sent between the colluding parties. The publishers were already desperately searching for a way to stall the growth of the e-book, so they could prolong the life of the paper book. Further, the publishers were already looking for a way to injure Apple's largest competitor in the e-reader and e-book market.<sup>67</sup> The major publishers were frightened of Amazon's new efficient e-book publishing service for unsigned and independent writers. Given the low overhead on e-books, Amazon was able to offer relatively high royalty rates to a vast ocean of unknown writers. Some new writers were even able to utilize the e-book publishing on Amazon to make six figure royalties within the span of a few weeks.<sup>68</sup> The publishers were afraid their antiquated and inefficient publishing policies utilizing popular writers to subsidize unpopular and unknown writers would not be able to survive this new medium.

Apple also leveraged the addition of a clause in the agreement preventing contracted publishers from allowing other e-book retailers, with whom they were contracted, to sell the contracted publishers' e-books for a lesser resale price than Apple either could or would sell.<sup>69</sup> As a result, the five major publishers made this agency agreement a mandatory part of all contracts with other e-book retailers to whom they were contracted. With all of these new contracts, Apple became competitive in the e-book market by causing e-book resale prices

throughout the market to initially inflate and subsequently stagnate.<sup>70</sup> Further, and even more suspiciously, Apple's agency deal with the publishers contained a Most Favored Nation ("MFN") clause that essentially violated the entire idea of the agency deal.<sup>71</sup> It stopped the publishers from setting prices outside of a very small range of \$12.99 to \$14.99 and \$15.99. Even within these ranges, Apple was often able to set the prices.<sup>72</sup> And once Apple set the prices, the publishers could then no longer allow Apple's competitors to sell for less than Apple. "The MFN protected Apple from retail price competition as it punished a Publisher if it failed to impose agency terms on other e-tailers."<sup>73</sup> All of these different facets of the agency model agreement established between Apple and its e-book suppliers showed that the agreement existed more to hurt Amazon and other competitors than to help the publishers.

### *B. Vertical Price-Fixing Liability Applied to Apple's Agency Model.*

Firstly, the Supreme Court's Rule of Reason test analyzed "specific information about the relevant business" and the "restraint's history, nature, and effect."<sup>74</sup> The industry involved in this case was e-book wholesale (licensing) sales and retail (sublicensing) sales. Within this industry, e-book retailers licensed e-books from major publishers, often for around \$11.99 for new releases. After they licensed the e-books, the retailers were allowed to sell (sublicense) the e-books for whatever price they chose.<sup>75</sup>

Amazon often sold its new release e-books for \$9.99, which was a loss. It sold them at a loss, because it wished to build brand loyalty among the consumers of its e-books.<sup>76</sup> Until 2007 and Leegin, setting a minimum resale (sublicense) price as a wholesaler, was per se illegal.<sup>77</sup>

Next, the Court analyzed the "restraint's history, nature, and effect" within the e-book market.<sup>78</sup> Apple's iBook store was not launched until 2010, and this Agency Model restraint on

trade did not exist until those major publishers and Apple negotiated the contract relevant to the iBook store. This part of the analysis went poorly for Apple and the big five. The e-book market existed for nearly a decade before the agency model was first introduced, and the market was healthy and growing.<sup>79</sup> The e-book retailers were making a sizable and growing profit, and the publishers' profit margin on the e-books was equivalent to their corporeal book profit. The Agency Model's restrictive effect on resale pricing options caused a rise in the price of e-books and, it prohibited e-book retailers from being able to establish resale prices of their own. The effect was a quick and artificial inflation of e-book retail prices.<sup>80</sup> The publishers wished this inflation to boost their profit margin per unit.<sup>81</sup> However, the unforeseen effect was to lower the gross profits made by both themselves and their authors.<sup>82</sup> The consumers were unhappy with the raised prices, so they chose to buy fewer e-books.

Whether the “businesses involved have market power is a further, significant consideration”<sup>83</sup> the Court considered in its analysis. The publishers involved in this case were five of the six largest book publishers in the world, and Apple was “one of America’s most admired, dynamic and successful technology companies.”<sup>84</sup> Further, while Apple did not have a very large market share in e-book sales at the time of the establishment of the Agency Model contract, Apple was technically a very large seller of e-book readers with its iPhone and iPod lines.<sup>85</sup> The fact that these major corporations colluded to inflate retail prices by forcing minimum resale prices on every other market participant was damning.<sup>86</sup> The sheer, economic power of the colluding parties in this case may even have been in violation of Section 2 of the Sherman Antitrust Act, which states:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several

States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.<sup>87</sup>

Also relevant to the Court's application of the Rule of Reason was "an inquiry into market power and market structure designed to assess [a restraint's] actual effect."<sup>88</sup> The Court analyzed the market structure prior to the restraint and Apple's entrance into the e-book market. From the introduction of the e-book until 2010, the market consisted of e-book licensors/wholesalers selling e-books to the sub-licensors/retailers for whatever price the market would bear. After that, the sub-licensors/retailers would sell the e-books to consumers for whatever price best fit their business strategies.<sup>89</sup> The retailers could raise the price, they could lower the price, and they had full control of the product's resale/sub-license price after they bought/licensed it. "This wholesale model was more profitable for a Publisher's e-book business than the agency model proposed by Apple."<sup>90</sup>

After Apple's Agency Model contract with the five major publishers in 2010, the whole structure of the e-book market changed. Six of the most powerful entities within the e-book market forced the Agency Model on all of the e-book sellers under threat of a complete cessation of business.<sup>91</sup> This forceful manipulation reeked of impropriety. Apple and its co-conspirators seemed to fail this aspect of the Rule of Reason test.

A last and overarching catchall within the Rule of Reason, as outlined in Leegin, was whether the effect of the restraint at issue was anticompetitive and harmful to the consumer, or whether the restraint stimulated competition and was beneficial to the consumer.<sup>92</sup> Did the restraint help or harm the average consumer? Before the Agency Model was implemented, many e-book companies such as Barnes and Noble sold e-books for the same price they paid for said e-

book. Amazon even sold most bestsellers for a loss. Amazon's aim was to lure consumers into buying other e-books while on its site. Basically, the overall effect of the Agency Model on the consumer was an increase in retail e-book prices across the board.<sup>93</sup> To protect Apple's profit margin, the contracting publishers forced all other e-book retailers to sell for up to 50% higher prices. This market restraint would definitely fail the Rule of Reason test. The consuming public lost in this scenario. The Sherman Antitrust Act was created to help the public and market competition. This restraint harmed them.

In summation, all of the factors the Supreme Court enumerated in its opinions when analyzing the Rule of Reason added up to whether or not the specific restraint violated three different aspects of the subject market and its participants.<sup>94</sup> The first was whether the parties colluded and intended to harm the market participants. Apple and the publishers colluded with the intent to harm Amazon in particular as well as other lesser participants in the market. The second is whether their restraint on free trade harmed the industry or market.<sup>95</sup> This restraint caused a diminution to all of the publishers' sales and profits.<sup>96</sup> And it also resulted in lowered sales and profits for the e-book retailers. Lastly, this Agency Model resulted in artificially inflated prices for the consumer.<sup>97</sup> The only participant in the market that was not harmed by this restraint was Apple. Despite minimum price fixing no longer being per se illegal, this Agency Model still failed the Rule of Reason test.

### *C. Horizontal Price-Fixing Liability Applied to Apple's Agency Model.*

The Supreme Court still applies the per se illegality standard to the horizontal price fixing restraint. Under the Sherman Antitrust Act, it was a more heinous offense, because it involved collusion between similarly situated parties that should have competed with one another within a certain market.<sup>98</sup> Horizontal price fixing involves an agreement between horizontally situated

parties, those who should be competitors, in an attempt to defraud the consuming public. The Court has continued to apply the per se illegality standard to horizontal price fixing, because horizontal price fixing is a market restraint that cannot possibly have procompetitive effects.<sup>99</sup> And even if Apple and its publishing partners did not violate the Rule of Reason with their vertical price fixing, they still colluded in an effort to establish a horizontal price fixing conspiracy between the contracting publishers and Apple.<sup>100</sup>

Apple's Agency Model, as described above, included more than just an agreement not to sell e-books under a certain price. Apple's Agency Model agreement with its publishing partners also included clauses that prohibited the publishers from allowing any of Apple's competitors to sell for a lower price than Apple.<sup>101</sup> This was the most basic definition of horizontal price fixing.<sup>102</sup> Apple conspired and colluded with the participating publishers to stop any e-book seller from pricing below a certain point. And even if Apple passed all of the Rule of Reason's requirements, as enumerated by the Court, they could not deny the horizontal price-fixing nature of Apple's conspiratorial plotting with the publishers that resulted in the Agency Model contracts. The success of the conspiracy depended on Apple's participation.<sup>103</sup>

Apple and its publishing partners admitted that there was no universal economic incentive to fix prices on e-books across all competitive e-book retailers. The publishers were chasing the unlikely goal of bolstering the abstract value of a corporeal book.<sup>104</sup> Apple manipulated the publishers' fears that print publishing would eventually evolve into an industry that primarily sold e-books. Apple utilized these fears to build an Agency Model contract with the publishers, with a necessary reciprocity that ultimately forced a unilateral and uniform pricing scheme across the entire e-book industry.<sup>105</sup>

Apple's Agency Model arrangement with its publishing partners started as mere vertical minimum resale price fixing, subject to the Rule of Reason. But Apple leveraged its market power and the publishers' fears of its competitors to create a horizontal price fixing stratagem that was per se illegal under the Sherman Antitrust Act.<sup>106</sup> Even if Apple managed to have its vertical market restraint proved reasonable, it would still fail. There has never been a legally reasonable horizontal price fixing restraint, as a result, Apple's horizontal conspiracy constituted "a per se violation of the Sherman Antitrust Act."<sup>107</sup> The Department of Justice would eventually find Apple in violation of multiple aspects of Sherman Antitrust Act.

## **V. The Department of Justice v. Apple Judgment on the Agency Model & Conspiracy**

### *A. Overview of the Case*

On July 10, 2013 the court in Department of Justice v. Apple held that Apple's Agency Model agreement with the defendant publishers violated the Sherman Antitrust Act.<sup>108</sup> At the time of the court's decision, Apple was the only defendant that remained in the case. The publishers that contracted with Apple settled out of court.<sup>109</sup> The court held that Apple engaged in both horizontal and vertical price-fixing conspiracies.<sup>110</sup> In its opinion, the court first addressed the issue of whether Apple engaged in a horizontal price-fixing conspiracy.

Creating a restraint on trade by horizontal price-fixing was per se unlawful; therefore the court's analysis was not especially involved. However, the court used some creative logic to find Apple part of a horizontal conspiracy.<sup>111</sup> It was creative, because Apple was not horizontally aligned with the other conspirators. The Court ruled that Apple was the conspiratorial hub connecting the horizontally aligned publishers. After its first analysis, the court found that Apple engaged in vertical price fixing as well. Even under the application of this

more lenient Rule of Reason, the court found that Apple had engaged in a price-fixing conspiracy.<sup>112</sup>

### *B. Horizontal Price-Fixing*

The standard of liability for horizontal price-fixing is per se. As such, the court in U.S. v. Apple determined only whether Apple engaged in a conspiracy to restrain trade. However, the court also had to determine whether the conspiracy took place amongst interests situated horizontally similarly.<sup>113</sup> This was an odd course for the court to take, because Apple was a great deal more vertically related to the book publishers with which it conspired.

While the publishers could have been said to be in a horizontal conspiracy as horizontal competitors, it was not clear how the court could show that Apple had participated in such a conspiracy. However, the court judged that Apple was an integral and necessary part of the conspiracy to price fix amongst the publishers. Apple was the catalyst in this conspiracy, and the court decided the conspiracy would not have existed without Apple.<sup>114</sup> “Understanding that no one Publisher could risk acting alone in an attempt to take pricing power away from Amazon, Apple created a mechanism and environment that enabled them to act together in a matter of weeks to eliminate all retail price competition for their e-books.”<sup>115</sup> Apple organized, with the publishers, what the publishers had been unable to organize with one another.

“To establish a conspiracy...proof of joint or concerted action is required.”<sup>116</sup> To elaborate, “circumstances must reveal a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful agreement.”<sup>117</sup> Apple argued that there was no meeting of minds. It argued that all of the conspirators reached similar but independent conclusions. Apple’s defense was that there could be no “conspiracy by telepathy.”<sup>118</sup> The court did not accept or

validate Apple's claim of independent creation. The court already knew that "every Publisher with whom Apple met lamented Amazon's pricing New Releases and NYT Bestsellers at \$9.99. Several of them made clear that they were actively searching for a way to gain more control over pricing and were implementing tactics they did not enjoy."<sup>119</sup>

The evidence showed that there had been cooperation, unity of purpose, and correspondence in furtherance of Apple's conspiracy. Steve Jobs, Apple's CEO at the time, was the source of a great deal of this evidence. Jobs told James Murdoch that he understood the Publishers' concerns that "Amazon's \$9.99 price for new releases is eroding the value perception of their products . . . and they do not want this practice to continue."<sup>120</sup> He offered to help raise the prices, and he even told one reporter "that Amazon's \$9.99 price for the same book would be irrelevant because soon all prices will 'be the same.'"<sup>121</sup> The court found this last statement especially damning.

Further, "calls among the Publisher Defendants' CEOs would continue and intensify at critical moments during the course of the Publishers' ensuing negotiations with Apple."<sup>122</sup> Many times, Apple would reassure each publisher "that it was not interested in entering the e-book market by pursuing a low-price strategy. Apple opined that \$9.99 was not yet "engrained" in the consumer mind, and suggested in each meeting that e-books should be priced between \$11.99 and \$14.99."<sup>123</sup> Apple and the publishers conspired with one another to inflate the prices of e-books many times over the course of contract negotiations.

The court determined that there was a unity of purpose and a meeting of the minds. The months before the iPad launched, Apple and the publishers communicated constantly with one another.<sup>124</sup> The goal of the conspirators was to raise the retail prices of e-books. Further, every

party involved wanted Amazon to lose its e-book market share. The publishers and Apple all desired the same objective and the publishers were even willing to forego additional profits, at least in the short term, to obtain this objective.<sup>125</sup>

Though Apple was not horizontally positioned near the publishers, the court found it had committed horizontal price fixing.<sup>126</sup> Apple's position within the conspiracy was the most important aspect of this analysis. Apple negotiated, initiated, and united the conspiracy. It was the conspiracy's impetus, and the conspiracy could not have existed had Apple not actively sought and united the other conspiratorial parties for this purpose.<sup>127</sup> The publishers had been trying to accomplish something similar for years, and it never happened until Apple joined the conspiracy.<sup>128</sup>

### *C. Vertical Price-Fixing*

Next, the court looked at whether Apple had been engaged in a vertical minimum resale price-fixing conspiracy. This analysis was not necessary, but given vertical price-fixing's more lenient standard of analysis, the court wished to show that Apple would still be in violation of the Sherman Antitrust Act under the Rule of Reason.<sup>129</sup> Unlike horizontal price-fixing, vertical price-fixing is analyzed under the Rule of Reason.

For Apple to have violated the Sherman Antitrust Act, the restraint of trade caused by its conspiracy had to have been unreasonable and not cancelled out by procompetitive effects. The restraint must be actual and adverse as well, because "the plaintiffs bear an initial burden to demonstrate the defendants' challenged behavior had an actual adverse effect on competition as a whole in the relevant market."<sup>130</sup>

Apple argued that its conspiracy with the publisher was procompetitive, because it lowered Amazon's market share in the e-book market.<sup>131</sup> But the court was not addressing such competitiveness. The court reminded Apple that the Sherman Antitrust Act is about "the protection of competition, not competitors."<sup>132</sup> The court ruled that Apple had one main goal in fixing the price. It opined that Apple simply "did not want to compete with Amazon (or any other e-book retailer) on price."<sup>133</sup>

The court went on to point out that there were few clauses more anticompetitive than the Most Favored Nation clause Apple inserted into its contract with each publisher. The primary effect of the MFN "protected Apple by guaranteeing it could match the lowest retail price listed on any competitor's e-bookstore."<sup>134</sup> However, the MFN clause went far beyond that. The court further condemned the MFN, because it "imposed a severe financial penalty upon the Publisher Defendants if they did not force Amazon and other retailers similarly to change their business models and cede control over e-book pricing to the Publishers."<sup>135</sup>

Apple tried to argue that a MFN clause was something common that it often included in contracts. The court pointed out that the MFN clause used here was unique. "Apple had used an MFN in one of its music agreements, but the music had been purchased under a wholesale model. Apple's use of an MFN for a retail price was a unique feature of its e-book agency agreements."<sup>136</sup> This MFN clause was simply too powerful and overreaching.

The Agency Model theoretically gave pricing discretion to the publishers; however, the MFN clause simply took this discretion for Apple. Publishers could set prices in Apple's e-book store. However, Apple could simply change the prices back "unless the Publishers moved all of their e-tailers to an agency model and raised e-book prices in all of those e-bookstores, Apple

would be selling its e-books at its competitors' lower prices."<sup>137</sup> The agency agreement was supposed to inflate the values of books, but it actually just "eliminated any risk that Apple would ever have to compete on price when selling e-books, while as a practical matter forcing the Publishers to adopt the Agency Model across the board."<sup>138</sup>

The court ruled that Apple failed even the much more lenient Rule of Reason analysis.<sup>139</sup> There was simply too much evidence of a conspiracy. There were e-mails, phone calls, and trips. Cue, an Apple executive, even testified that "his last trip was unprecedented in length -- it lasted nine days -- and as Cue described, for that entire period, if he was not eating or sleeping, he was negotiating."<sup>140</sup> There was much more than incidental contact between parties, and the court judged that the parties definitely did not independently arrive at the same prices.<sup>141</sup>

## **VI. The Effect of Leegin on Minimum Resale Price Fixing in Other Markets**

### *A. Overview*

Apple was not the first company to use the agency model in an attempt to get around the price fixing laws established by the Sherman Antitrust Act. With Leegin in 2007, the Supreme Court abolished the per se illegality of minimum retail price fixing established in Dr. Miles a century before.<sup>142</sup> It was no coincidence that the major issue in U.S. v. Apple first appeared in 2011, only a few years after the Supreme Court's decision in Leegin. With the establishment of the Rule of Reason as the new standard of analysis in minimum price fixing cases, many corporations tried to take advantage of price fixing. Wholesalers tried to unilaterally force their wills on retailers and on consumers.

Offending corporations were then able to spend years in court defending their business models while violating aspects of the Sherman Antitrust Act. There was no reason not to

implement minimum resale price fixing. Even markets such as big box retail and online music were incorporating minimum resale price fixing. Under this new, more lenient standard of analysis, wholesale corporations began to fix resale prices more often.

It became poor business not to push against this area of the law. The new, fashionable argument became that agency models made the market more “efficient.” The establishment of an efficient market was the main reason that the Court instituted the Rule of Reason and its vaguer standard to replace per se illegality.<sup>143</sup>

*B. Omega v. Costco: Big Box Price Fixing.*

In Omega S.A. v. Costco Wholesale Corp., Omega manufactured a copyrighted watch that it never marketed in America.<sup>144</sup> It had an agency agreement similar to Apple’s with certain retailers in Europe. Costco bought many of these watches from a third party for the purpose of resale.<sup>145</sup> Costco sold these watches in its store for \$1200, while Omega’s agency agreement with its contracted retailers in Europe required a \$2000 resale price.<sup>146</sup>

Costco entered into no such contractual agreement with Omega. Costco bought its Omega watches on the grey market and brought them to America.<sup>147</sup> This case started out as an issue of agency agreement versus the first sale doctrine in a way similar to the Apple case, but it morphed into something very different. Omega asserted copyright and trademark reasoning to get around the first sale doctrine.<sup>148</sup> Omega did not use an agency agreement. They utilized copyright and trademark reasoning to get around the Sherman Antitrust Act. Omega won<sup>149</sup> at the Appeals level. As a result, manufacturers and wholesalers acted more and more boldly in their attempts to evade certain aspects of the Sherman Antitrust Act. Costco applied to the Supreme Court for certiorari.

Corporations who wished to utilize maximum and minimum vertical price fixing saw a way to utilize intellectual property concepts to muddle and confuse the antitrust issues. In the Omega case, it was ultimately trademark law that benefited Omega.<sup>150</sup> In a Post-Leegin world, corporations became more and more creative in their attempts to skirt laws against market restraints such as the Sherman Antitrust Act. This was most apparent in the electronics market as corporations attempted to argue that software and electronic media were exempt from vertical restraint laws. This was a major issue in the cases involving online music.

### *C. Starr v. Sony: Price Fixing in Online Music*

Starr v. Sony BMG Music Entertainment is an ongoing case about alleged collusion amongst various music publishers to fix internet music prices.<sup>151</sup> The plaintiffs were consumers of online music, and they claimed that these publishers violated the Sherman Antitrust Act in conspiring to fix the prices of online music.<sup>152</sup> The plaintiffs cited how the price of online music had stayed the same throughout the history of the market's existence despite the fact that production costs had gone down.<sup>153</sup> The plaintiffs used ongoing investigations of the music companies for conspiracy and collusion by the New York Attorney General and the Department of Justice to show the presence of a conspiracy's symptoms and the need for discovery to find evidence of the conspiracy.<sup>154</sup>

The plaintiffs in this case utilized the uncanny lockstep pricing in the online music industry to show that there was evidence of anti-competitive practices occurring.<sup>155</sup> The appearance of a complete lack of competition in the online music industry, amongst all of the major publishers, showed at least one element of a violation of Section 1 of the Sherman Antitrust Act. The effects of a possible conspiracy were apparent but the origin was hidden. Apple would have argued that there can be no "conspiracy by telepathy."<sup>156</sup> The plaintiffs in this

case scored a big win for consumers against price fixing when they proved their right to enter discovery and continue the case.<sup>157</sup>

The Supreme Court has dealt with the issue of licensing and whether it fits within the umbrella of vertical price fixing before. The Court's opinion in United States v. Paramount held licensed films to the same Sherman Antitrust standards as more corporeal forms of property.<sup>158</sup> The issue of whether the First Sale Doctrine applied to online music and e-books was not as new an issue as it at first seemed. Online music price collusion was especially similar to the Paramount decision.<sup>159</sup> Both involved allegations of vertical and horizontal price fixing. Unlike with minimum resale price fixing, the Rule of Reason was never adopted by the Court for horizontal price fixing.

## **VII. Conclusion**

In conclusion, Apple and its five major publishing cohorts violated Section 1 of the Sherman Antitrust Act with their Agency Model method of restricting free trade for e-book retailers. Apple tried to disguise the agreement's nature by alleging that it was the "agent" for the publishing companies. This relationship did not truly exist. The contract existed solely to raise e-book prices throughout the market to allow Apple to compete in a new market while establishing the prices and the profit margins it desired.<sup>160</sup> Further, Apple conspired with the publishers to harm Amazon's e-book sales with this agency method. However, the parties most harmed by Apple's conspiracy were the authors whose profits saw a large decline and the consumers who were forced to pay vastly inflated prices.<sup>161</sup>

Apple's Agency Model scheme was definitely in violation of section 1 of the Sherman Antitrust Provision, and it may have been in violation of section 2, covering monopolies as well.

Lastly, while Apple and five of the Big Six book publishers failed in their attempt to establish minimum resale price restraints, more and more companies are succeeding in varied and diverse markets where their predecessors failed.

If the Department of Justice convicted Apple of nothing else, it could still convict Apple of horizontal price fixing. It is still per se illegal, and Apple was an integral component in the collusion to horizontally fix all e-book prices in the market.<sup>162</sup> Apple tried to force a new industry standard into its publishing contract that ultimately required its competitors to utilize this same standard. If the Department of Justice had allowed Apple's agreement with the publishers to stand, there would no longer have been any competition within the e-book retail market, because all of the major publishers would be forced to sell or license their products for the same price to retailers or risk taking huge losses. The retailers would then be forced to sell or sub-license their products for fixed prices. The consumers would be left with no options within the market. Apple's conspiracy had to be struck down, or there would be no competition between any e-book retailers, and the consumers would suffer the most.<sup>163</sup>

For all of the conclusions stated above, the court invalidated Apple's Agency Model agreement.<sup>164</sup> The price-fixing was too obvious, and it was beneficial only to Apple. In some cases, the publishers' profits dropped 50% or more on a given e-book. Further, sales volumes also dropped under this new system. The publishers were so obsessed with getting rid of the threat they knew, they could not see the larger threat of Apple. As a result, Apple was able to extract some extreme concessions that resulted in both vertical and horizontal price-fixing.<sup>165</sup> The conspiracy hurt the consumer, promised short term losses for the publishers, and only had an ephemeral chance of being beneficial for the publishers in the long term.<sup>166</sup>

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<sup>1</sup> United States of America v. Apple, No. 12 Civ. 2826, 10-11 (S.D.N.Y. Jul. 10, 2013).

<sup>2</sup> Id. at 27-28.

<sup>3</sup> Id. at 156.

<sup>4</sup> Id. at 26.

<sup>5</sup> Id. at 32-33.

<sup>6</sup> Id. at 32.

<sup>7</sup> Id. at 53-54.

<sup>8</sup> Id. at 34-35.

<sup>9</sup> Id. at 53-55.

<sup>10</sup> Amazon, Kindle Direct Publishing Terms and Conditions, (Sep. 03, 2013), <https://kdp.amazon.com/self-publishing/help?topicId=APILE934L348N#Select>.

<sup>11</sup> Apple, No. 12 Civ. 2826 at 40.

<sup>12</sup> Id. at 46.

<sup>13</sup> Id. at 156.

<sup>14</sup> Id. at 47-49.

<sup>15</sup> Id. at 4-5.

<sup>16</sup> Id. at 4.

<sup>17</sup> Id. at 158-159.

<sup>18</sup> Id. at 30-32.

<sup>19</sup> Id. at 155-159.

<sup>20</sup> The Sherman Antitrust Act, 15 U.S.C.A. § 1 (2004).

<sup>21</sup> Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 407-409 (1911).

<sup>22</sup> Id. at 376.

<sup>23</sup> Apple, No. 12 Civ. 2826 at 156.

<sup>24</sup> Dr. Miles, 220 U.S. at 384-385.

<sup>25</sup> Id. at 408-409.

<sup>26</sup> State Oil Co. v. Khan, 522 U.S. 3, 15 (1997).

<sup>27</sup> Id. at 15.

<sup>28</sup> Dr. Miles, 220 U.S. at 408-409.

<sup>29</sup> Albrecht v. Herald Co., 390 U.S. 145, 167-168 (1968).

<sup>30</sup> Khan, 522 U.S. at 18.

<sup>31</sup> Id. at 22.

<sup>32</sup> Id. at 15-16.

<sup>33</sup> Apple, No. 12 Civ. 2826 at 156.

<sup>34</sup> Khan, 522 U.S. at 15-16.

<sup>35</sup> Id. at 20.

<sup>36</sup> Id. at 12-15.

<sup>37</sup> Id. at 15-20.

<sup>38</sup> Leegin Creative Leather Products, Inc. v. PSKS, Inc. 551 U.S. 877, 905-907 (2007).

<sup>39</sup> Id. at 897-900.

<sup>40</sup> Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 48-50 (1977).

<sup>41</sup> Khan, 522 U.S. at 10.

<sup>42</sup> Leegin, 551 U.S. at 885-886.

<sup>43</sup> Id. at 885-886.

<sup>44</sup> Apple, No. 12 Civ. 2826 at 106-108.

<sup>45</sup> Leegin, 551 U.S. at 886.

<sup>46</sup> Id. at 906.

<sup>47</sup> Id. at 906.

<sup>48</sup> 15 U.S.C.A. § 1 (2004).

<sup>49</sup> 15 U.S.C.A. § 1 (2004).

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- <sup>50</sup> United States v. Trans-Missouri Freight Asso., 166 U.S. 290, 343-344 (1897).  
<sup>51</sup> Id. at 343.  
<sup>52</sup> Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 1 (1911).  
<sup>53</sup> Id. at 76-78.  
<sup>54</sup> Chicago Board of Trade v. United States, 246 U.S. 231, 231 (1918).  
<sup>55</sup> Id. at 238-241.  
<sup>56</sup> Dr. Miles, 220 U.S. at 406-408.  
<sup>57</sup> Khan, 522 U.S. at 3.  
<sup>58</sup> Id. at 15-16.  
<sup>59</sup> Apple, No. 12 Civ. 2826 at 120-122.  
<sup>60</sup> Leegin, 551 U.S. at 877.  
<sup>61</sup> Id. at 901-906.  
<sup>62</sup> Apple, No. 12 Civ. 2826 at 120-122.  
<sup>63</sup> Id. at 94-96.  
<sup>64</sup> Id. at 156.  
<sup>65</sup> Id. at 52-55.  
<sup>66</sup> Id. at 147-148.  
<sup>67</sup> Id. at 114.  
<sup>68</sup> Joe Konrath, \$100,000, A Newbie's Guide to Publishing (Jan. 11, 2012), <http://jakonrath.blogspot.com/2012/01/100000.html>.  
<sup>69</sup> Apple, No. 12 Civ. 2826 at 53-57.  
<sup>70</sup> Id. at 94-96.  
<sup>71</sup> Id. at 55.  
<sup>72</sup> Id. at 54-56.  
<sup>73</sup> Id. at 55.  
<sup>74</sup> Khan, 522 U.S. at 10.  
<sup>75</sup> Apple, No. 12 Civ. 2826 at 53-55.  
<sup>76</sup> Id. at 15-18.  
<sup>77</sup> Leegin, 551 U.S. at 885-889.  
<sup>78</sup> Khan, 522 U.S. at 10.  
<sup>79</sup> Apple, No. 12 Civ. 2826 at 27.  
<sup>80</sup> Id. at 94-98.  
<sup>81</sup> Id. at 53.  
<sup>82</sup> Id. at 53-55.  
<sup>83</sup> Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768 (1984).  
<sup>84</sup> Apple, No. 12 Civ. 2826 at 26.  
<sup>85</sup> Id. at 26-27.  
<sup>86</sup> Id. at 118-124.  
<sup>87</sup> 15 U.S.C.A. § 2 (2004).  
<sup>88</sup> Illinois Tool Works Inc. v. Independent Ink, Inc., 547 U.S. 28, 45-46 (2006).  
<sup>89</sup> Apple, No. 12 Civ. 2826 at 52-54.  
<sup>90</sup> Id. at 53.  
<sup>91</sup> Id. at 89-91.  
<sup>92</sup> Leegin, 551 U.S. at 885-887.  
<sup>93</sup> Apple, No. 12 Civ. 2826 at 95.  
<sup>94</sup> Id. at 120-123.  
<sup>95</sup> Id. at 121-122.  
<sup>96</sup> Id. at 54-55.  
<sup>97</sup> Id. at 121-122.  
<sup>98</sup> Continental, 433 U.S. at 36.

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- <sup>99</sup> Ariz. v. Maricopa County Medical Soc., 102 S.Ct. 2466, 2475 (1982).
- <sup>100</sup> Apple, No. 12 Civ. 2826 at 113-115.
- <sup>101</sup> Id. at 55.
- <sup>102</sup> Maricopa, 102 S.Ct. at 2475.
- <sup>103</sup> Apple, No. 12 Civ. 2826 at 118.
- <sup>104</sup> Id. at 54-55.
- <sup>105</sup> Id. at 55.
- <sup>106</sup> Id. at 117-120.
- <sup>107</sup> Id. at 120.
- <sup>108</sup> Id. at 159.
- <sup>109</sup> Id. at 5.
- <sup>110</sup> Id. at 113-122.
- <sup>111</sup> Id. at 114-118.
- <sup>112</sup> Id. at 122.
- <sup>113</sup> Id. at 113-118.
- <sup>114</sup> Id. at 118.
- <sup>115</sup> Id. at 136-138.
- <sup>116</sup> Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761 (1984).
- <sup>117</sup> Id. at 764.
- <sup>118</sup> Apple, No. 12 Civ. 2826 at 146.
- <sup>119</sup> Id. at 34.
- <sup>120</sup> Id. at 149.
- <sup>121</sup> Id. at 149.
- <sup>122</sup> Id. at 30-31.
- <sup>123</sup> Id. at 35.
- <sup>124</sup> Id. at 29-37.
- <sup>125</sup> Id. at 54-55.
- <sup>126</sup> Id. at 118.
- <sup>127</sup> Id. at 114-118.
- <sup>128</sup> Id. at 114.
- <sup>129</sup> Id. at 118.
- <sup>130</sup> Geneva Pharms Tech Corp. v. Barr Labs Inc., 386 F.3d 485, 506-07 (2d Cir. 2004).
- <sup>131</sup> Apple, No. 12 Civ. 2826 at 155-158.
- <sup>132</sup> Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).
- <sup>133</sup> Apple, No. 12 Civ. 2826 at 11.
- <sup>134</sup> Id. at 12.
- <sup>135</sup> Id. at 12.
- <sup>136</sup> Id. at 48.
- <sup>137</sup> Id. at 48.
- <sup>138</sup> Id. at 48.
- <sup>139</sup> Id. at 118-122.
- <sup>140</sup> Id. at 147.
- <sup>141</sup> Id. at 146-149.
- <sup>142</sup> Leegin, 551 U.S. at 901-906.
- <sup>143</sup> Id. at 895-906.
- <sup>144</sup> Omega S.A. v. Costco Wholesale Corp., 541 F.3d 982, 983 (9<sup>th</sup> Cir. 2008).
- <sup>145</sup> Id. at 983-987.
- <sup>146</sup> Id. at 983-987.
- <sup>147</sup> Id. at 983-987.
- <sup>148</sup> Id. at 988-991.

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<sup>149</sup> Id. at 989-990.

<sup>150</sup> Id. at 989-990

<sup>151</sup> Starr v. Sony BMG Music Ent., 592 F.3d 314, 314 (2<sup>nd</sup> Cir. 2010).

<sup>152</sup> Id. at 316-322.

<sup>153</sup> Id. at 316-322.

<sup>154</sup> Id. at 318-320.

<sup>155</sup> Id. at 316-323.

<sup>156</sup> Apple, No. 12 Civ. 2826 at 146-147.

<sup>157</sup> Starr, 592 F.3d at 326-327.

<sup>158</sup> United States v. Paramount Pictures, Inc., 334 U.S. 131, 177-178 (1948).

<sup>159</sup> Id. at 171-178.

<sup>160</sup> Apple, No. 12 Civ. 2826 at 52-55.

<sup>161</sup> Id. at 156.

<sup>162</sup> Id. at 52-56.

<sup>163</sup> Id. at 156-158.

<sup>164</sup> Id. at 159.

<sup>165</sup> Id. at 113-119.

<sup>166</sup> Id. at 54-55.