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Content rightsholders in the film and music industries previously spearheaded a legal campaign that, though highly successful in the courts, has resulted in significant normative backlash and overall has been counterproductive to their intended goal of increased copyright enforcement. In July 2011, when these rightsholders signed an agreement with five major national internet service providers to create the Copyright Alert System ("CAS"), a new and entirely private mechanism for copyright enforcement, they seemed poised to make that same mistake again. However, in a prime example of "normative avoision," content rightsholders have finally taken note of the normative consequences of their enforcement methods and, through subsequent changes to CAS, have deftly sidestepped the normative backlash dilemma.

EDITORIAL

In a field as slow to change as the law, it is often helpful to inject fresh perspectives from other disciplines. As different as legal analysis might be from that found in the medical and social sciences, they are all ultimately concerned with the pursuit of objectivity. Furthermore, in each of these fields, the pursuit of academic and practical goals are permeated and influenced by the values of those that seek to achieve them. Indeed, both the law and the social sciences in particular are fundamentally concerned with finding ways of distilling logic and order from the complexities of human behavior. Thus, there is much to be learned from how medicine and the social sciences reconcile these often competing goals, a comparison artfully explored by Lee McIntyre in this editorial.

NOTES

In 2012 the Department of Justice brought suit against Apple and five major US publishing houses for conspiring to fix the price of e-books. The complaint contained many detailed factual allegations, including the sort of high-level executive collusion commonly seen in criminal price fixing cases. The charged conduct, horizontal price fixing, is per se illegal under the Sherman Act and among the "hardcore" violations that under Antitrust Division policy merit criminal charges. Yet instead the government brought a civil case against Apple and the publishers. This note analyses the details of the Antitrust Division's case, viewed in light of current antitrust law, antitrust policy, and public perception of the players and the case, and suggests a number of possible explanations for the choice of a civil action.

Three-parent in vitro fertilization ("IVF") is a controversial procedure that offers the possibility of preventing the inheritance of genetically caused mitochondrial disease, sparing future generations from a range of incapacitating conditions. Due to the use of a controversial form of cloning technology, the procedure is currently banned in both the United Kingdom and the United States. If the procedure was to be made legal in the United States, it is unclear how the states would legally view the donor parent. This note argues that the rights that donor parents in three-parent IVF procedures receive will most likely parallel the rights afforded to surrogate parents. It then proposes ways to change existing law or incorporate three-parent IVF into the existing law using current surrogacy law as a model.

Normative Avoision: Revising the Copyright Alert System to Circumvent Normative Backlash

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I. Introduction

The Copyright Alert System represents the newest venture by the contemporary intermediary regime to intensify copyright enforcement. In July 2011, the Recording Industry Association of America ("RIAA") and the Motion Picture Association of America ("MPAA") signed an agreement with five major national internet service providers ("ISPs")—AT&T, Cablevision, Comcast, Time Warner Cable, and Verizon. This Memorandum of Understanding ("MOU") details the creation of a Copyright Alert System ("CAS"), a new and entirely private mechanism for copyright enforcement. Under CAS, content rightsholders—composed most prominently of the RIAA and MPAA—monitor and notify ISPs of any internet protocol addresses ("IP addresses") participating in peer-to-peer file sharing. The ISPs utilize this information, and by referencing the customer registered to that IP address at the alleged time, issue the customer a Copyright Alert. Alerts are graduated, with accompanying penalties that increase in severity.

Prior to CAS, content rightsholders embarked on legal and legislative campaigns that, although highly successful in the courts, resulted in significant normative backlash—producing counterproductive results of continued file sharing and infringement. With the signing of the Copyright Alert System's Memorandum of Understanding, content rightsholders seemed poised to make that same mistake again.

However, in a prime example of "normative avoision," content rightsholders have finally taken note of the normative consequences of their enforcement methods and, through subsequent changes to CAS, have deftly sidestepped the normative backlash dilemma. Content rightsholders have created a split enforcement regime that focuses litigation on frequent file sharers with deeply internalized pro-sharing norms, and pro-copyright education on nascent to moderate file sharers who have not yet deeply internalized pro-sharing norms. In light of content rightsholders recent litigation and legislative campaign debacles, the Copyright Alert System represents a new leaf for their pro-copyright efforts.

II. Background

A. Normative Backlash

In *Copyright Backlash*, Professor Ben Depoorter argues that punitive enforcement of copyright infringement statutes creates a normative backlash effect by strengthening anti-copyright positions:

> [C]opyright enforcement is a double-edged sword. While stringent sanctions have a modest deterrent effect on file-sharing behavior, they increase anti-copyright sentiments among frequent offenders. This raises a spectacular challenge for copyright enforcement: the more copyright owners push to step up sanctions for copyright infringements, the more the public resents the protected rights. Consequently, stepping up sanctions tends to increase—rather than decrease—the rate and frequency of infringing activities.[1]

Professor Depoorter likens the conditions that copyright law faces today to those encountered at times in the past, such as under Prohibition the early twentieth century.[2] The concept of a normative backlash can be summed up as follows: where noncompliance is widespread, effective deterrence can only be obtained by raising enforcement to levels that undermine the support for the underlying rules.[3] A slightly different formulation highlights the normative elements in a backlash scenario: "[w]hen behavior is driven by normative viewpoints, imposing laws that are perceived as 'unjust' or 'illegitimate' [may] reinforce and strengthen the underlying opposition against those laws."[4] The public may, for example, perceive laws as unjust if the associated sanctions seem excessive in relation to the punished behavior.[5] Under these conditions, enforcement has the unintended and counterproductive effect of moving behavior in the opposite direction from that intended by the law.[6]

Professor Depoorter applies the normative backlash structure to modern copyright enforcement and finds that content rightsholders' deterrence-based litigation approach will likely prove counterproductive to the goals of copyright holders.[7] Professor Depoorter finds the necessary elements for normative backlash present in the widespread noncompliance fueled by normative viewpoints, in the heightened legal campaign against noncommercial

1. Ben Depoorter et al., *Copyright Backlash*, 84 S. CALIF. L. REV. 1251, 1252 (2011).
2. *Id.* at 1269.
3. *Id.* at 1252.
4. *Id.* at 1269.
5. *Id.*
6. *Id.* at 1252.
7. *Id.* at 1256.

users, and in the public's "adverse reaction to the strict enforcement of copyright law."[8]

First, noncompliance is widespread in the online file sharing context. A 2003 Gallup Poll survey found that 83% of teenagers believed sharing digital music was morally acceptable.[9] At the same time, a substantial portion of the public views the current statutory damages framework as excessive, unjust, and punitive—far above and beyond actual compensatory damages.[10] For example, in *Sony BMG Music Entertainment v. Tenenbaum*, a graduate student was ordered to pay $675,000 for sharing 30 songs—$22,500 per song.[11] In *Capitol Records, Inc. v. Thomas-Rasset*, a single mother was ordered to pay $1.92 million for sharing 24 songs.[12] Yet despite these sky-high penalties, file sharing has continued, largely unabated.[13] A 2011 study by Sandvine reports that BitTorrent is still responsible for 21.6% of residential Internet traffic in North America.[14] Compare this to the top result for residential Internet traffic—Netflix at 22.2%,[15] and it becomes apparent that online infringement has not slowed.[16] Thus,

8. Depoorter, et al., *supra* note 1, at 1266

9. Steven Hanway & Linda Lyons, Teens OK With Letting Music Downloads Play, GALLUP POLL, Sept. 30, 2003, *available at* http:// www.gallup.com/poll/9373/teens-letting-music-downloads-play.aspx.

10. *See* Pamela Samuelson & Ben Sheffner, *Debate, Unconstitutionally Excessive Statutory Damage Awards in Copyright Cases*, 158 U. PA. L. REV. PENNUMBRA 53 (2009). But *see* Colin Morrissey, *Note, Behind the Music: Determining the Relevant Constitutional Standard for Statutory Damages in Copyright Infringement Lawsuits*, 78 FORDHAM L. REV. 3059 (2010) (arguing that the statutory damages framework was not intended to be punitive but remunerative of actual damages).

11. Sony BMG Music Entm't v. Tenenbaum, 660 F.3d 487, 489 (1st Cir. 2011).

12. Capitol Records Inc. v. Thomas-Rasset, 680 F. Supp. 2d 1045, 1050 (D. Minn. 2010).

13. *See* Simon Crerar, *Illegal File-Sharing As Popular As Ever*, TIMES (London), Jan. 19, 2006, *available at* http://www.thetimes.co.uk/tto/arts/music/article2418137.ece; Enigmax, File-Sharing Prospers Despite Tougher Laws, TORRENTFREAK.COM (May 22, 2012), http://torrentfreak.com/file-sharing-prospers-despite-tougher-laws-120522.

14. Janko Roettgers, *Sorry, Hollywood: Piracy may make a comeback*, GIGAOM.COM (Aug. 11, 2011, 2:02 PM), http://www.gigaom.com/2011/08/11/file-sharing-is-back ("[P]iracy never actually declined. It just didn't grow as fast as other types of media consumption."). Netflix is the single largest source of Internet traffic on North America's fixed access networks at 22.2%. *Id*; *see also* Sandvine, GLOBAL INTERNET PHENOMENA SPOTLIGHT NORTH AMERICA, FIXED ACCESS, SPRING 2011 at 2, *available at* http://www.wired.com/images_blogs/business/2011/05/SandvineGlobalInternetSpringReport2011.pdf [hereinafter "Sandvine Report"].

15. Sandvine Report at 2.

16. Mike Masnick, *File Sharing Continues To Grow, Not Shrink*, TECHDIRT.COM (Aug. 12, 2011, 11:45 AM), www.techdirt.com/articles/20110812/01061715485/file-sharing-

noncompliance has been, and continues to be, widespread in the online infringement context.

Second, over the past decade, content rightsholders, most notably the entertainment industry, have waged a largely successful legal campaign to heighten the enforcement and punishment for online copyright infringement. In a series of high-profile decisions, content rightsholders have persuaded courts "to accept expansive interpretations of contributory enforcement, to create novel doctrines of copyright infringement, and to apply broad interpretations of statutory damage provisions."[17] According to copyright backlash theory, it is the very success of this legal campaign, and the ever-higher sanctions it imposes on the public, that may fuel a counterproductive normative backlash.

In *Copyright Backlash*, Professor Depoorter conducted a number of experimental studies to explore the potential for counterproductive normative effect on various types of infringers.[18] By varying the probability and severity of monetary sanctions,[19] Professor Depoorter determined that a counterproductive effect on pro-copyright sentiments existed in relation to the probability and severity of sanctions.[20] Increasing either the probability or the severity of sanctions produced a counterproductive effect. Moreover, increasing both the probability and severity of sanctions produced a "powerful counterproductive effect, increasing anti-copyright norms."[21] Finally, Professor Depoorter found that elevated sanctions have a stronger effect on deterrence than increasing the probability of sanctions. Significantly, however, elevated sanctions also generated greater backlash effects.[22]

Because the marginal benefits of increasing the severity of punishment is greater than the equivalent increase in the probability of punishment, Professor Depoorter suggests that it will be more financially efficient for content rightsholders to increase the severity

continues-to-grow-not-shrink.shtml ("None of the actions taken by the industry appear to have slowed down infringement online. Instead, it appears that it just keeps growing.").

17. Depoorter, et al., *supra* note 1, at 1251. This article explores the successful litigation campaign and the concept of legal overdeterrence below in Part II.B.

18. *Id*. at 1279–80.

19. *Id.* at 1280.

20. *Id.*

21. *Id.*

22. *Id.* ("[H]igh-severity/low-probability enforcement conditions generate higher backlash effects as well as higher levels of deterrence than low-severity/high-probability enforcement—even though, interestingly, both enforcement regimes impose identical expected costs.").

of sanctions.[23] However, in what Professor Depoorter dubs "the irony of deterrence," increasing the severity of sanctions also strengthens anti-copyright norms in the public.[24]

Professor Depoorter's concluding remarks offer a potential solution to content rightsholders: "[E]nforcement efforts would likely be more effective if targeted specifically to different types of copyright offenders. . . . By focusing litigation on frequent offenders, copyright holders bolster anti-copyright norms among this group, while foregoing opportunities to promote pro-copyright norms among occasional infringers."[25] And indeed, content rightsholders have taken the concept of normative backlash to heart when developing and implementing the Copyright Alert System.[26]

B. The Litigation Campaign by Content Rightsholders

Content rightsholders have largely succeeded in ratcheting ever-higher copyright enforcement within the court system. First, content rightsholders have expanded the scope of copyright protection through intermediary liability. Second, content rightsholders, and in particular the RIAA and MPAA, have aggressively pursued individuals for what historically has been deemed noncommercial copying. Finally, content rightsholders have prevailed upon courts to apply expansive and severe statutory penalties against these private individuals for online copyright infringement.[27]

First, content rightsholders have greatly expanded the scope of copyright protection through intermediary liability. When online file sharing became prevalent in the late 1990s, the legality of online, noncommercial file sharing was still uncertain. In the pivotal case of *A&M Records, Inc. v. Napster, Inc.*, the Ninth Circuit departed from conventional noncommercial fair use theory to find Napster users directly infringed the plaintiffs' copyrights.[28] Once the court found that noncommercial file sharing by private users could qualify as direct infringement, the path was inevitably paved towards intermediary liability for the developers of file sharing platforms. The Ninth Circuit found the developers of the Napster software liable

23. Depoorter, et al., *supra* note 1, at 1286.
24. *Id*. at 1286.
25. *Id.* at 1289.
26. *See infra* Part V.
27. *See generally* Depoorter, et al., *supra* note 1.
28. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1014 (9th Cir. 2001).

under a theory of contributory liability.[29] By centrally hosting the database of shared files on its users' computers, Napster provided the "site and facilities" enabling the direct infringement, and therefore "materially contributed" to their users' copyright infringement.

The Supreme Court would expand the bounds of intermediary liability even further in *MGM Studios, Inc. v. Grokster, Ltd*.[30] In *Grokster*, the defendant did not centrally host files or databases that would qualify as the "site and facilities" necessary to meet the contributory liability test under *Napster*.[31] Nonetheless, the Court found the intermediary liable by creating a novel doctrine of inducement.[32] Under this new inducement theory, the Court held that mere distribution of software with the *intent to promote* copyright infringement creates secondary infringement liability.[33]

Second, content rightsholders have aggressively pursued individuals for what historically has been deemed noncommercial copying. As online file sharing continued to skyrocket in the early 2000s, the RIAA began targeting the individual users of file sharing technologies and doing so en masse. In September 2003, the RIAA began sending subpoenas to file sharers via their ISPs, eventually settling most cases via pre-litigation letters for approximately $3,000.[34] By 2008, the RIAA sued roughly 35,000 persons for online file sharing.[35] The MPAA entered the fray in 2004 when it launched its own lawsuits against individual sharers.[36] The litigation campaign against individuals thus seems to have grown exponentially. For example, in 2012, one movie studio sued almost 25,000 individual users in a single case.[37]

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29. *A&M Records*, 239 F.3d at 1020.

30. Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 936 (2005).

31. *Id.* at 919–20.

32. *Id.* at 936–37.

33. *Id.* ("[O]ne who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.").

34. Depoorter, et al., *supra* note 1, at 1260.

35. *See* Ethan Smith & Geoffrey A. Fowler, *Ganging Up on Internet Pirates Hollywood: Telecom Providers Unite to Target Those Who Share Copyrighted Films*, WSJ.COM (July 8 2011), http://online.wsj.com/news/articles/SB10001424052702303365804576432270822271148.

36. Fred Locklear, *MPAA lawsuits target BitTorrent, eDonkey and Direct Connect networks*, ARS TECHNICA (Dec. 14, 2004, 5:33 PM), http://arstechnica.com/uncategorized/2004/12/4467-2/.

37. Sarah Jacobsson Purewal, *'Hurt Locker' Studio Sues 2,514 Over Copyright Infringement*, PCWORLD.COM (Apr. 24, 2012, 7:41 AM), http://www.pcworld.com/article/254381/hurt_locker_sue_2_514_over_copyright_infringement.html ("Voltage

Contents rightsholders have also hurdled considerable obstacles in obtaining judgments against individuals. The evidentiary issue of proving that a file in a shared folder was actually downloaded from the alleged file sharer's computer is one such example. However, the courts haven given short shrift to the issue by ruling that dissemination could be presumed based on mere accessibility.[38] This evidentiary presumption enabled content rightsholders to pursue a number of questionable claims. For example, in 2005 the RIAA sued a deceased 83-year-old woman whose daughter alleged she "hated computers."[39] As a result of these and other actions, critics have characterized content rightsholders' litigation campaigns as akin to blackmail, extortion, and harassment.[40]

Finally, content rightsholders have prevailed upon courts to interpret statutory damage provisions exceedingly broadly against private individuals for online copyright infringement. The Copyright Act provides for copyright holders to elect for statutory damages at any time during litigation.[41] For "willful infringement" of registered works, a court may increase the award of damages to a sum of $150,000 per instance of infringement of a copyrighted work.[42] By convincing courts to interpret "willful infringement" broadly, content rightsholders have successful obtained astonishingly high damages against online file sharers.[43] For example, one individual was ordered to pay $1.92 million for sharing 24 songs and another $675,000 for 30 songs.[44]

Here too, content rightsholders have handily overcome evidentiary issues of damages through alternative statutory damages.

Pictures, the movie studio that gained its fame by producing the Academy Award-winning film "The Hurt Locker" and targeting 24,583 BitTorrent users in a piracy-related lawsuit last year, is on another copyright infringement crusade."); *see also* Voltage Pictures, LLC v. Vazquez, 277 F.R.D. 28, 31 (D.D.C. 2011) (action brought against named defendants and Does 1–24,583).

38. *Capitol Records*, 579 F. Supp. 2d at 1222.

39. Andrew Orlowski, *RIAA Sues the Dead*, REGISTER (U.K.) (Feb. 5, 2005, 2:30 AM), http://www.theregister.co.uk/2005/02/05/riaa_sues_the_dead/.

40. *See, e.g.*, Nate Anderson, *The "Legal Blackmail" Business: Inside a P2P-Settlement Factory*, WIRED (Oct. 3, 2010, 10:30 AM), http://www.wired.com/epicenter/2010/10/the-legal-blackmail-business.

41. 17 U.S.C. § 504(c) (2012).

42. *Id.*

43. *See generally* Kate Cross, *David v. Goliath: How the Record Industry Is Winning Substantial Judgments Against Individuals for Illegally Downloading Music*, 42 TEX. TECH L. REV. 1031, 1042 (2010).

44. *See Sony BMG Music Entm't*, 660 F.3d at 490; *Capitol Records*, 579 F. Supp. 2d at 1050.

For instance, a traditional damages analysis might be nuanced enough to inquire into how many times a file was downloaded and whether a download correlates to a lost sale for the rightsholder. Such an analysis, though complex because of the nature of online file sharing, would be strongly indicative of the actual harm to the copyright holder.[45]

III. The Copyright Alert System

A. Memorandum of Understanding

On July 6, 2011, a group of content rightsholders—the MPAA, the RIAA, an association of independent record labels,[46] and a number of film production companies[47]—met with five of the largest Internet Service Providers ("ISPs")—AT&T, Cablevision, Comcast, Time Warner Cable, and Verizon—and signed a Memorandum of Understanding ("MOU") that outlined a Copyright Alert System ("CAS") designed to combat online peer-to-peer file sharing ("P2P" file sharing).[48] Under the CAS MOU, content owners identify and notify ISPs of infringing Internet Protocol addresses ("IP" addresses) along with the time and date the alleged infringement took place.[49] ISPs then cross-reference that data with their own internal databases to determine which subscriber's account was assigned that IP address at the relevant time.[50] The ISP then sends an Alert to that subscriber.[51] These Alerts constitute a graduated response system that includes "temporary reductions of Internet speeds, redirection to a landing page until the subscriber contacts the ISP to discuss the matter or reviews and responds to some educational information about copyright, or other measures that the ISP may deem necessary to help resolve the matter."[52]

45. *See generally* Tim Wu, *When Code Isn't Law*, 89 VA. L. REV. 679, 746–49 (2003).

46. Represented by the American Association of Independent Music ("A2IM"). MEMORANDUM OF UNDERSTANDING, Center for Copyright Information 2 (July 6, 2011), http://www.copyrightinformation.org/wp-content/uploads/2013/02/Memorandum-of-Understanding.pdf [hereinafter MOU].

47. Represented by the Independent Film and Television Alliance ("IFTA"). *Id*. at 2.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. David Kravets, *Copyright Scofflaws Beware: ISPs to Begin Monitoring Illicit File Sharing,* WIRED (Oct. 8, 2012, 4:10 PM), http://www.wired.com/threatlevel/2012/10/isp-file-sharing-monitoring/.

Actual implementation of CAS began as of March 2013—almost two years since the MOU was signed by the parties and more than five years since initial dialogue and negotiations first began.[53] As a result, most of the scholarship heretofore in the area of CAS has been speculatively based on the guiding MOU.[54] Having laid the groundwork of how CAS came about in Part II, Part III will discuss the MOU as originally signed and highlight significant lines of criticism. Part III will discuss the recently publicized implementation methodology, as detailed by signatories of the MOU.

1. The Center for Copyright Information

Section Two of the Memorandum of Understanding delineates the creation of the Center for Copyright Information ("CCI"), which is the private entity charged with the design and management of a Copyright Alert System.[55] Additionally, CCI is tasked with educating the public about copyright law, online infringement, and the civil and criminal consequences of such infringement.[56]

CCI is governed by a six-person Executive Committee.[57] Three committee members are selected by content rightsholders, and three committee members are selected by the participating ISPs.[58] Initial funding for CCI is also split fifty-fifty between the two groups.[59] However, there is no public interest or copyright expert representative on the Executive Committee. Instead, the MOU creates a separate three-person Advisory Board "drawn from relevant subject matter experts and consumer interest communities."[60]

As with the Executive Committee, the Advisory Board is essentially co-governed. Content rightsholders and ISPs each select one Advisory Board member, and the two selected Advisory Board

53. Congressional Internet Caucus Advisory Committee, *Congressional Internet Caucus Meets on Copyright and Piracy,* C-SPAN.org (Mar. 8, 2013), http://www.c-span.org/Events/Congressional-Internet-Caucus-Meets-on-Copyright-and-Piracy/10737438657-1 (Jill Lesser presenting).

54. *See, e.g.*, Annemarie Bridy, *Graduated Response American Style: "Six Strikes" Measured Against Five Norms,* 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 28 (2012); *generally* Mary LaFrance, *Graduated Response by Industry Compact: Piercing the Black Box,* 30 CARDOZO ARTS. & ENT. L.J. 165 (2012).

55. MOU, *supra* note 46, at 3.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 4, 14.

60. *Id.* at 3–4.

members select a mutually agreeable third member.[61] The Executive Committee is obliged to consult with the Advisory Board on any "significant issues" it is considering regarding the design and implementation of CAS.[62] Notably, the Advisory Board provides only nonbinding "recommendations" to the Executive Committee.[63]

The MOU envisions that CCI will also retain an Independent Expert—an "impartial technical expert" that would review on an ongoing basis the methodology of CAS and make recommendations "with the goal of ensuring and maintaining confidence on the part of the Content Owner Representatives, the Participating ISPs, and the public in the accuracy and security of the Methodologies."[64] Like the Advisory Board, the Independent Expert's recommendations are confidential and nonbinding on the Executive Committee.[65] "Failure to adopt a recommendation of the Independent Expert [does] not amount to a breach under [the MOU]."[66] This includes those instances where a particular Content Owner's methodology is found to be "fundamentally unreliable."[67]

If a Content Owner Representative Methodology is found by the Independent Expert to be fundamentally unreliable, the Independent Expert may issue a confidential finding of inadequacy only to that particular content owner.[68] Notification to participating ISPs,[69] wrongfully suspected subscribers, or other Content Owners using or contemplating similar methodologies is not required.[70]

2. The Six Strikes Structure

The escalating six-alert structure of CAS is modeled in theory after the French HADOPI[71] and Irish Eircom[72] graduated response

61. MOU, *supra* note 46, at 3.

62. *Id.* at 4.

63. *Id.*

64. *Id.* at 5.

65. *Id.*

66. *Id.*

67. *Id*.

68. *Id.* at 5.

69. It is uncertain based on the MOU whether the Independent Expert may disclose a finding of fundamental inadequacy to just the content rightsholder or also to affected ISPs. *See id.* However, participating ISPs other than those ISPs directly affected are expressly restricted from notice. *Id.*

70. *Id.*

71. *Lawmakers adopt Internet anti-piracy bill*, FRANCE24.COM (May 13, 2009), http://www.france24.com/en/20090512-lawmakers-adopt-internet-anti-piracy-bill-illegal-downloading-France.

systems. Under the MOU, content rightsholders send notices of infringement to a subscriber's ISP.[73] These notices assert ownership and infringement of a copyrighted work by a subscriber of the ISP and contain technical information necessary for the ISP to identify the subscriber (e.g., IP address, date, and time).[74] ISPs receive the notice, match the alleged infringing transaction to their subscriber using the IP address at the relevant time, and generate an alert.[75] Of note, ISPs are not required to generate alerts above a certain undisclosed notice volume.[76] Moreover, ISPs have discretion to temporarily stop processing or reduce the number of ISP Notices processed if in the sole discretion of the ISP, the resulting demand on their systems and resources becomes unreasonable.[77] Justifications for finding such an unreasonable demand are remarkably broad and include disproportionate impact on (1) business processes and systems, on (2) customer service departments arising from subscriber inquiries regarding CAS, and any (3) "other demands on the Participating ISP's businesses processes and systems" that "must be given precedence."[78] Thus, individual ISPs have incredible discretion in how many notices they choose to process and therefore how many alerts ultimately are sent to subscribers.

Upon processing a valid notice of infringement, ISPs generate and send one of six escalating copyright alerts to the subscriber. The six alerts can be divided into three categories: educational measures, acknowledgement measures, and mitigation measures.[79] The first two copyright alerts fall under the umbrella of educational measures.[80] These alerts are informative in nature and do not require a response or acknowledgement from the subscriber. They explain that copyright infringement is illegal, that there are lawful methods of obtaining copyrighted content, and that continued infringement will

72. Nate Anderson, *Irish ISP agrees to disconnect repeat P2P users*, ARS TECHNICA (Jan. 28, 2009, 11:10 PM), http://arstechnica.com/tech-policy/2009/01/irish-isp-agrees-to-disconnect-repeat-p2p-users/.

73. MOU, *supra* note 46, at 6.

74. *Id*.

75. *Id.* at 7.

76. *Id.* ("[E]ach Participating ISP shall not be required to exceed the notice volumes pertaining to its Copyright Alert Program as established in Section 5 of this Agreement.").

77. *Id.* at 16.

78. *Id.*

79. *Id*. at 8.

80. *Id.*

result in imposition of sanctions in the form of the mitigation measures.[81]

The third and fourth copyright alerts are best characterized as acknowledgement measures. These alerts require acknowledgement of receipt but do not require the user to "acknowledge participation in any allegedly infringing activity."[82] Acknowledgement does, however, require that the subscriber agree to immediately stop and/or instruct others using the subscriber's account to stop any infringing content.[83] The method of acknowledgement may be in the form of a temporary landing page requiring a click-through acknowledgement for subsequent online access; in a pop-up notice that persists concurrently with online access until a click-through acknowledgement; or in any other format deemed "reasonable" in the judgment of that ISP.[84]

The last class of copyright alerts, the mitigation measures, are triggered in the fifth and sixth alerts. As with the third and fourth copyright alerts, these alerts require acknowledgement of receipt and after a fourteen day notice period, apply one of several measures: a temporary reduction in bandwidth speed, a temporary step-down in service tier, a temporary redirection to a landing page until subscriber contacts an ISP customer service representative or completes "educational instruction on copyright," a temporary suspension of Internet access, or any other temporary mitigation measure designed by an ISP that is "designed to be comparable."[85] Note that after the sixth alert has been sent, the ISP is not obligated to send further alerts to the subscriber but must keep count of additional notices sent from content rightsholders.[86] Additionally, the alert system effectively resets once an ISP does not receive a notice relating to a subscriber's account within twelve months from the last notice.[87]

3. Appeal Process

Before any mitigation measure in the fifth and sixth copyright alerts is applied, the subscriber has fourteen days to appeal via a

81. MOU, *supra* note 46, at 8.

82. *Id.* at 10.

83. *Id.*

84. *Id.*

85. *Id*. at 11–12.

86. *Id.* at 13.

87. *Id*. ("The ISP must "expunge all prior ISP Notices and Copyright Alerts from the Subscriber's account.").

nonjudicial dispute resolution program.[88] The appeal process, known as the "Independent Review Program," is initiated by a subscriber upon receipt of a mitigation alert and payment of a $35 dollar filing fee.[89] Each appeal is decided by an individual "independent reviewer" selected by an Administrating Organization from a panel of neutral reviewers.[90] The legal principles applied in the independent review process is the "prevailing law as determined by United States federal courts," including such concepts as fair use.[91] These principles are determined for all independent reviewers by an "independent" copyright expert, who is suggested by the Administrating Organization and approved by the CCI Executive Committee.[92]

The MOU allows for just six limited grounds for review of a mitigation measure alert: (1) account misidentification; (2) unauthorized account use; (3) authorized content use; (4) fair use; (5) file misidentification; and (6) work published before 1923.[93] Under the appeal process, the subscriber carries the burden of proof to disprove a presumption of infringement.[94]

B. Critiques of the Original MOU

The original Memorandum of Understanding was undoubtedly written with the goal in mind of giving CCI substantial discretion in setting up the implementation of the Copyright Alert System. Despite this fact, numerous criticisms of the MOU and CAS in general have abounded. This Part will focus on five potential issues in the MOU: (1) education as a goal; (2) the power of the advisory board; (3) the neutrality of the Independent Expert and the Copyright Expert; (4) the severity of mitigation measures; and (5) the limited defenses in the Independent Review Process.[95]

First, one of the many goals of Copyright Alert System and CCI includes "educat[ing]" consumers.[96] The MOU requires that CCI

88. MOU, *supra* note 46, at 14, 30.

89. *Id.* at 30.

90. *Id.* at 31.

91. *Id*. at 35.

92. *Id*.

93. *Id.* at 26.

94. *Id.* at 27.

95. This review will be particularly succinct given the "updated" CAS implementation that deviates somewhat from the original MOU.

96. MOU, *supra* note 46, at 2 (The goals of the Copyright Alert System and CCI include "providing education, privacy protection, fair warning, and an opportunity for review that protects the lawful interests of consumers.").

develop and host online educational programs designed to "inform the public about laws prohibiting [o]nline [i]nfringement and lawful means available to obtain digital works online and through other legitimate means."[97] Because CAS has often been characterized as "private legislation," it is especially important that any "educational" materials be accurate and provide neutral information. Critics have expressed doubt about CCI's ability to educate the public in an unbiased fashion.

A review of CCI's website in late 2012 is telling and reinforces those doubts. If the official CAS website is an indication of the type of education materials to be bundled with alerts and mitigation measures, then CAS will be replete with big-media rhetoric. The educational resources available lack a balanced and objective viewpoint, and resemble indoctrination more than education.

At the time, the CAS website contained a "facts" section that listed a number of curious and outlandish dangers associated with peer-to-peer file sharing. For example, file sharing places "sensitive data" such as "personal health information," "financial records," and "classified documents" at risk.[98] File sharing "means viruses . . . spyware and malware."[99] CCI also appealed to the universal refrain to "save the children" when it alleged that CAS was a way for children to be protected because parents cannot "know everything that kids are viewing or downloading."[100] Such "education" could apply equally as well to the use of standard email and therefore should not be considered relevant within the goals and ambit of CAS, CCI, and the MOU.

CAS further utilizes the "copyright infringement as theft" rhetoric that the U.S. Supreme Court has repeatedly rejected. In its facts section, CCI states: "[O]nly 40 percent of Americans understood the serious legal consequences associated with the distribution of copyrighted content. That compares with the 78 percent who understood the serious legal consequences of *shoplifting* a DVD from the local video store."[101] In direct contrast, the Supreme Court has stated that "infringement plainly implicates a more complex set of property interests than does run-of-the-mill theft,

97. MOU, *supra* note 46, at 4.

98. *Facts*, COPYRIGHTINFORMATION.ORG, http://www.copyrightinformation.org/facts (last visited May 12, 2012) (Note that the page has since been taken down.).

99. *Id.*

100. *Id.*

101. *Id.* (emphasis added).

conversion, or fraud."[102] If CCI and its independent expert on copyright believe this is an accurate description of "prevailing legal principles," then "education" in the MOU truly means anything but.

Similarly, CCI declared that "copyright harms the economy," destroyed 373,000 American jobs, and deprived states of "badly needed . . . tax revenue."[103] Such language is reminiscent of big media rhetoric and shows considerable bias in ignoring the causative versus correlative issues inherent in such a statement. Obviously, a multitude of factors could have resulted or contributed to a loss of jobs in the entertainment industry, including the recent global recession of 2008.

Second, the Advisory Board wields very little substantive power by the terms of the MOU.[104] There is no guarantee of any role for the Advisory Board in decisions it may deem "significant" unless the Executive Committee also considers such an issue "significant."[105] The Executive Committee could therefore exclude the Advisory board simply by declining to find a particular decision "significant." The Advisory Board has no veto power, even if unanimous in its decisions. Furthermore, there is a lack of process information concerning how long Advisory Board members serve or if they could be replaced by the Executive Committee or parties to the MOU.[106] In short, under the terms of the MOU, the Advisory Board has the potential to act as nothing more than a public relations construct to which CCI can attribute efforts to "protect the lawful interest of consumers."[107]

Third, the MOU does not ensure the neutrality or the effectiveness of the Independent Expert and the independent copyright and privacy experts who are to review the CAS methodology and establish the legal principles under which the Independent Review Process will take place. Any recommendations these experts make are confidential and nonbinding.[108] The Executive Committee need not attempt to comply with these recommendations nor to document their reasoning behind such a decision, such as in a rudimentary cost-benefit analysis. Moreover, the Advisory Board has no material authority with regards to expert selection: CCI's

102. Dowling v. United States, 473 U.S. 207, 218 (1985).

103. *Facts, supra* note 98.

104. LaFrance, *supra* note 54, at 169–171; Bridy, *supra* note 54, at 28.

105. LaFrance, *supra* note 54, at 169–171.

106. *Id*. at 170.

107. *See* MOU, *supra* note 46, at 1–2.

108. *See id.* at 5.

Executive Board, i.e., the parties to the MOU, has the sole discretion to choose these experts.[109] Lastly, there is no provision that precludes CCI from replacing any experts with whom they disagree. Thus, as with the Advisory Board, the Executive Committee of CCI has arranged for expert resources to be at its disposal but has handicapped those very same experts from performing their duties.

Fourth, the severity and proportionality of the mitigation measures has been met with considerable and widespread disapproval in the public eye. Under the MOU, ISPs may suspend a subscriber's access during the fifth and sixth Mitigation Alerts.[110] An ISP may also terminate the access of a subscriber who receives a Mitigation Alert or further ISP Notices after a Mitigation Alert.[111] Civil liberties groups have expressed concern that CAS could result in the denial of basic rights to access. The importance of Internet access in today's world means "your access to the world's information and also your right to speak to the world." [112] Accordingly, "it would be wrong for any ISP to cut off subscribers' Internet access, even temporarily, based on allegations that have not been tested in court." [113] In short, denying access to what is already or is developing into a basic right should require proper due process and depend on assertions triable in a court or other governmental adjudication.[114]

Fifth, the Independent Review Process allows for just six limited grounds for review of a mitigation measure alert: (1) account misidentification; (2) unauthorized account use; (3) authorized content use; (4) fair use; (5) file misidentification; and (6) work published before 1923.[115] Generally, these limited defenses have been criticized as overly narrow and restrictive, especially in light of the presumption of infringement.[116] For example, Annemarie Bridy notes that in an account misidentification defense, "copyright owners under the MOU enjoy a rebuttable presumption of correctness as long as their method of capturing IP addresses was not found to be

109. MOU, *supra* note 46, at 5.

110. *Id.* at 12.

111. *Id.* at 7, 9, 13.

112. Smith & Fowler, *supra* note 35 (quoting Jay Stanley, a senior policy analyst with the ACLU in Washington).

113. David Sohn, *ISPs and Copyright Owners Strike a Deal*, CENTER FOR DEMOCRACY AND TECHNOLOGY (July 7, 2011), http://www.cdt.org/blogs/david-sohn/isps-and-copyright-owners-strike-deal.

114. *Id.*

115. MOU, *supra* note 46, at 26.

116. *See* Bridy, *supra* note 54, at 34–37; LaFrance, *supra* note 54, at 175–179.

'fundamentally unreliable' by CCI's independent technical expert."[117] Mary LaFrance finds significant omissions in that the listed grounds for review "do not even come close to encompassing the range of lawful uses for P2P file-sharing."[118] LaFrance has compiled a list of omitted legal grounds for noninfringement that should likewise apply to the CAS Independent Review Process, including fair use, works with copyrights forfeited due to publication without notice, and authorization by a licensee of the content in question.[119] For instance, under CAS, a work qualifying as fair use in an infringement suit, such as a parody, satire, mash-up or commentary, could trigger a Notice and Mitigation Alert, since a substantial portion of the work could consist of copyrighted content.[120] In such cases, the subscriber should be entitled to assert fair use, in any shape or form accepted by federal courts, as valid grounds for appeal.

The CAS MOU essentially set forth a broad set of guidelines that CCI would be held to operate within. Much ink was spilled considering the ramifications of the MOU as a guiding document, but until March 2013 when the Copyright Alert System entered active implementation,[121] little was known about how CAS would operate in practice.[122]

C. Above and Beyond the Original MOU

> The "[The Copyright Alert System] has the potential to be an important educational vehicle that will help reduce peer-to-peer online copyright infringement. Whether it will meet that promise or instead will undermine the rights of Internet users will depend on how it is implemented."[123]

Despite the MOU being signed by all parties in July 2011, details about the specific implementation of CAS, including its Notice discovery methodology as well as its Independent Review Process, were largely unavailable prior to when CAS was in fact rolled out by CCI in March 2013. This Part will summarize the new information on

117. Bridy, *supra* note 54, at 35.

118. LaFrance, *supra*, note 54, at 176.

119. *Id.* at 177.

120. *Id.* at 174.

121. *See* FIRST AMENDMENT TO MEMORANDUM OF UNDERSTANDING 1, COPYRIGHTINFORMATION.ORG, http://www.copyrightinformation.org/wp-content/uploads/2013/02/CCI-MOU-First-Amendment.pdf (last visited May 1, 2013).

122. Derek E. Bambauer, *Orwell's Armchair*, 79 U. CHI. L. REV. 863, 904–05 (2012).

123. Sohn, *supra* note, at 113.

CAS released primarily in a Congressional Internet Caucus Advisory Committee meeting and in a U.C. Hastings Conference on the Copyright Alert System.[124]Additionally, this Part will focus primarily on MPAA methodology, as provided by MPAA Senior Vice President Marianne Grant.[125]

The CAS methodology involves, sequentially: notice generation; notice validation; ISP alert discretion, generation, and conveyance; and the Independent Review Process. During the notice generation phase, content rightsholders will employ an independent contractor ("Scanning Vendor") to monitor peer-to-peer ("P2P") online file sharing. That Scanning Vendor, announced to be MarkMonitor Inc., will monitor and search for online file sharing via the BitTorrent protocol. [126]

Content rightsholders will provide a database of titles, focusing primarily on recent and popular works, to the Scanning Vendor. This database will contain titles, keywords, and unique digital IDs embedded in the content—allowing the Scanning Vendor to properly ascertain whether a file shared is in fact on the list of monitored titles. The Scanning Vendor operates simply as a peer node in the P2P network, although virtual servers will enable the Scanning Vendor to operate many peer nodes concurrently. While acting as a peer node, the Scanning Vendor will then record and connect to the list of peers sharing content.

Prior to packaging and submitted the Notice to an ISP, the Scanning Vendor must verify the content and the infringer. In order to verify the content, the Scanning Vendor uses a hashing algorithm[127] to create a 'digital fingerprint" of the shared file. If the hash is new to the database, the Scanning Vendor downloads the entire file for

124. Congressional Internet Caucus Advisory Committee, *supra* note 54 (MPAA Vice President Marianne Grant describing the Copyright Alert System as currently implemented); *UC Hastings Conference on Copyright Enforcement in the Digital Age: The Copyright Alert System*, UC Hastings College of the Law (Mar. 29, 2013) [hereinafter, *U.C. Hastings Conference*]; Sarah Laskow, *The new copyright alert system is running*, CJR.ORG (Feb. 28, 2013, 3:30 PM), http://www.cjr.org/cloud_control/cas_system_already_in_action.php?page=all&print=true.

125. *U.C. Hastings Conference, supra* note 125. Nevertheless, Grant has assured the public that the RIAA methodology is substantially similar. *Id.*

126. On behalf of the RIAA, MarkMonitor will also monitor Gnutella and other P2P platforms other than BitTorrent. *Id.*

127. "A hash function is any algorithm or subroutine that maps data sets of variable length to data sets of a fixed length." *Hash Function*, WIKIPEDIA.ORG, http://en.wikipedia.org/wiki/Hash_function (last visited Nov 17, 2013).

manual verification.[128] During manual verification, a person watches and reviews the file, comparing its content, size, etc. to a master file. If the hash is already in the database, the file is presumed verified.

In order to "verify" the infringer—i.e., confirm that the alleged infringer is actually uploading pieces of the content in question—the Scanning Vendor utilizes rudimentary network diagnostic tools such as ping and traceroute to ensure that the IP address is "live" at that time. Presumably, this step addresses the proven risk of innocent persons being framed as infringers.[129] For example, researchers were "able to generate hundreds of DMCA takedown notices for [computers at the University of Washington] that were not downloading or sharing any content."[130] Once the content and IP address are verified, the Scanning Vendor packages the evidence—including date, time, IP, ping and traceroute results, and shared content files or pieces—and delivers it to the ISP that controls that particular IP address.

The ISP uses the IP address and date and time records to match the Notice to one of their Subscribers. At this point, the ISP determines whether or not the seven-day grace period following a previous Alert is in effect. If a grace period is not in effect, the ISP generates and sends an Alert to the Subscriber.

In the case that the Alert is the fifth or sixth Mitigation Alert, the Subscriber has the option of pursuing an appeal via the Independent Review Process. The information available regarding the Independent Review Process remains largely the same as during the signing of the MOU, except for two items. First, the MOU was amended in October 2012 to include provisions that allowed the voiding of previous Copyright Alerts, if an appeal of the fifth Mitigation Alert is successful. Second, the Administrating Organization for the Independent Review Process has been selected. The American Arbitration Association ("AAA"), an established and respected dispute resolution organization, will be overseeing the Independent Review process. The choice of AAA will contribute to

128. The RIAA does not employ manual verification, relying instead on automated audio fingerprinting tools. *U.C. Hastings Conference, supra* note 125.

129. Michael Piatek, Tadayoshi Kohno, & Arvind Krishnamurthy, Challenges and Directions for Monitoring P2P File Sharing Networks –or– Why My Printer Received a DMCA Takedown Notice, 1-3, *available at* http://dmca.cs.washington.edu/dmca_hotsec08.pdf

130. *Id.* at 1.

the perception that CCI truly intends for the Independent Review Process to be fair and neutral.[131]

IV. The Proposal: Normative Avoision

Content rightsholders have spearheaded a legal campaign that, though highly successful in the courts, has resulted in significant normative backlash and overall has been counterproductive to their intended goal of increased copyright enforcement. With the signing of the Copyright Alert System's Memorandum of Understanding, content rightsholders seemed poised to make that same mistake again. Fortunately, it appears as though the content industry is coming to realize that normative overdeterrence is causing more harm to its business than good.[132] In its many significant changes to the Copyright Alert System since the signing of the Memorandum of Understanding, CCI and by extension content rightsholders, have deftly handled the very real threat of a normative backlash.

In the copyright litigation campaign, widespread noncompliance fueled by normative viewpoints and overdeterrent enforcement resulted in a "copyright backlash" that undermined support for content rightsholders' pro-copyright goals.[133] With the Copyright Alert System, that same widespread noncompliance remains present.[134] And initially, content rightsholders drafted CAS in a way reminiscent of their overdeterrent litigation campaign.[135] In doing so, rightsholders ran the very real risk of once again creating normative backlash effects that would frustrate their goal of reducing file sharing infringement. However, following hard on the heels of failed pro-copyright legislative endeavors, a popular shift in normative awareness and values has taken place.[136] In response, content rightsholders have finally taken note of the normative consequences

131. LaFrance, *supra* note 54, at 182.

132. *See* Peter S. Menell, *Infringement Conflation*, 64 STAN. L. REV. 1551, 1578 (2012) ("The recording industry has come to recognize that mass enforcement is causing more harm to its business than good under current circumstances."); Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J., Dec. 19, 2008, *available at* http://online.wsj.com/article/SB122966038836021137.html; *see also* Greg Sandoval, *Jammie Thomas Rejects RIAA's $25,000 Settlement Offer*, CNET NEWS (Jan. 27, 2010, 11:00 AM PST), http://news.cnet.com/8301-31001_3-10442482-261.html; *cf.* Depoorter, et al., *supra* note 1, at 1283–89 (arguing that enforcement-based strategies seeking disproportionate sanctions are counterproductive for deterring file sharing of copyrighted works).

133. *See supra* Part II.A.

134. *See supra* Part II.A

135. *See supra* Part III.B.

136. *See infra* Part IV.A.

of their enforcement methods and, through subsequent changes to CAS, have deftly sidestepped the normative backlash dilemma.

A. The Normative Shift

In the last three years, several unsuccessful legislative campaigns spearheaded by content rightsholders have brought to light for the general public the fact that copyright law is sometimes driven by the self-interested efforts of the content industry.[137] The seminal example occurred in late 2011, just after the parties to CAS signed the MOU. Content rightsholders introduced the Stop Online Piracy Act ("SOPA") in the Congressional House of Representatives. Opposition to the bill was powerful and occurred in speed and numbers never before seen.[138] Mark Lemley derided the bills as "pos[ing] grave constitutional problems and . . . potentially disastrous consequences for the stability and security of the Internet's addressing system, for the principle of interconnectivity that has helped drive the Internet's extraordinary growth, and for free expression."[139] Wikipedia, Google, Facebook, Twitter, and over 7,000 other websites protested by "blacking out" their services as a demonstration against the potential censorship embodied in SOPA.[140] Three million people emailed Congress to voice their opposition, and more than four million signed a petition opposing SOPA.[141] In the resulting groundswell, lawmaker after lawmaker renounced support for the legislation, and the bill was subsequently dropped from consideration.[142]

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137. Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 7 (2010).

138. Timothy B. Lee, *SOPA protest by the numbers: 162M pageviews, 7 million signatures*, ARS TECHNICA (Jan. 19, 2012, 10:45 AM), http://arstechnica.com/tech-policy/2012/01/sopa-protest-by-the-numbers-162m-pageviews-7-million-signatures/.

139. Mark Lemley, et al., *Don't Break the Internet*, 64 STAN. L. REV. ONLINE 34 (December 19, 2011), *available at* http://www.stanfordlawreview.org/online/dont-break-internet.

140. Rob Waugh, U.*S Senators withdraw support for anti-piracy bills as 4.5 million people sign Google's anti-censorship petition*, DAILYMAIL.CO.UK (Jan 22, 2011), www.dailymail.co.uk/sciencetech/article-2088860/SOPA-protest-4-5m-people-sign-Googles-anti-censorship-petition.html ("Wikipedia's 'blackout' protest against the U.S. anti-piracy bills SOPA and PIPA has ignited a wave of protest around the world – and up to 18 senators have publicly withdrawn support for the anti-piracy bills, after 7,000 sites 'blacked out', and protestors took to the streets in New York.").

141. *Id. See also* Jenna Wortham, *Public Outcry Over Antipiracy Bills Began as Grass-Roots Grumbling*, NYTIMES.ORG (Jan. 19, 2012), http://www.nytimes.com/2012/01/20/technology/public-outcry-over-antipiracy-bills-began-as-grass-roots-grumbling.html.

142. Wortham, *supra* note 141.

Post-SOPA, the public began to pay more attention to the legal and legislative campaigns of content rightsholders. A significant portion of the public began to believe that their social norms were not reflected in existing copyright law.[143] Critics assessed the copyright landscape and found that a handful of outsized content intermediaries lobbied fiercely "to arrive at copyright laws that enrich[] established copyright industries at the expense of both creators and the general public."[144] Jessica Litman observed that "[c]opyright lobbyists have not shown that recent enhancements to copyright have made it easier or more rewarding for readers, listeners, and viewers to enjoy copyrighted works."[145]

In the public debate that followed, a number of pro-copyright enforcement arguments were shown to be lacking. Content rightsholders' contention that the "sky is falling"—that new technologies were destroying established content industries and eliminating all incentives to create—is a prime example. Several studies came to light that questioned the data cited by content rightsholders to support their claims. In its April 2010 report on "Intellectual Property: Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods," the Government Accountability Office ("GAO") questioned the metrics and methodology used to support the existence of a growing file sharing problem.[146] The GAO investigation found that the reported damages to the American economy "[could not] be substantiated or traced back to an underlying data source or methodology."[147] A 2012 study showed that U.S. consumers spent more on entertainment today than they did 10 years prior.[148] Conflicting anecdotal evidence from some content rightsholders also painted the pro-copyright movement in a favorable light. Indeed, Jim Griffin, a former head of

143. *See, e.g.*, Peter Yu, *Digital Copyright and Confuzzling Rhetoric*, 13 VAND. J. ENT. & TECH. L. 881, 938 (2011) ("Many [digital natives] do not share the norms reflected in existing copyright law. Many of them also do not understand copyright law or see the benefits of complying with it.").

144. Litman, *supra* note 137, at 7.

145. *Id.* at 29.

146. U.S. Gov't Accountability Office, GAO-10-423, Intellectual Property: Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods 18 (2010); Casey Rae-Hunter, *Better Mousetraps: Licensing, Access, and Innovation in the New Music Marketplace*, 7 J. BUS. & TECH. L. 35, 67 (2012).

147. Rae-Hunter, *supra* note 146, at 43; *see generally* GAO-10-423, *supra* note 146.

148. Michael Masnick & Michael Ho, THE SKY IS RISING 3 (2012), http://gigaom2.files.wordpress.com/2012/01/theskyisrising.pdf ("By any measure, it appears that we are living in a true Renaissance era for content.").

technology at Geffen Records candidly noted that "[i]n the history of intellectual property, the things we thought would kill us are the things that fed us."[149] Peter Yu explains that these new technologies have generally "open[ed] up new markets for [the content rightsholders'] products and services."[150]

Additionally, the rise and prevalence of file sharing today has enabled an upsurge in the number of remix and mashup works, and consequently the popularity of such works.[151] Unsurprisingly, the public has, at least at the margin, internalized the pro file sharing norms enabling remixed works.

Furthermore, though content rightsholders' have long claimed that copyright infringement is tantamount to theft,[152] the Supreme Court has stated that copyright infringement is fundamentally different than theft because a copyright infringer neither "assumes physical control" nor "wholly deprive[s] its owner of use."[153] Some content rightsholders' have gone so far as to mischaracterize court decisions as "consistently rul[ing] personal file sharing is a copyright infringement and therefore . . . a crime."[154]

Instead of sympathizing with content rightsholders' file-sharing-as-theft rhetoric, the public has started to consider that "right holders should start by abandoning their old business models and adapting them to the new digital reality."[155] Increasingly, the public is displaying a willingness to adopt new and innovative legitimate services—combinations of "technical innovation, [convenient] access to the underlying delivery mechanisms, and reasonable licensing terms"—as solutions within their normative viewpoints and that therefore "serve musicians, rights-holders, and music fans."[156] Netflix and Spotify, buffet-structured online streaming platforms for video

149. J.D. Lasica, DARKNET: HOLLYWOOD'S WAR AGAINST THE DIGITAL GENERATION 109 (2005).

150. Yu, *supra* note 143, at 887.

151. *See generally* Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* 24–25 (2008).

152. *What is Online Piracy,* RIAA.com, http://www.riaa.com/physicalpiracy.php?content_selector=What-is-Online-Piracy, (last visited June 5, 2012) (characterizing file sharing as "music theft").

153. *Dowling*, 473 U.S. at 217–18.

154. The Law, RIAA.com, http://www.riaa.com/physicalpiracy.php?content_selector=piracy_online_the_law, (last visited June 5, 2012).

155. Eldar Haber, *Copyrights in the Stream: The Battle on Webcasting*, 28 SANTA CLARA COMPUTER & HIGH TECH. L.J. 769, 772 (2012).

156. Rae-Hunter, *supra* note 146, at 43–44.

and music respectively, are highly successful examples of the public adopting licensed content platforms, within this normative structure.

Thus, content rightsholders' face the difficult proposition of trying to increase effective copyright enforcement via the Copyright Alert System in an environment which has recently seen the tide flow in favor of pro file sharing social norms.

B. Avoiding a Normative Backlash

Between the time of the original parties signing the MOU and the implementation of CAS today, content rightsholders have changed much in the structure, methodology, and standards of the Copyright Alert System. To be sure, CCI has done much to dispel the many criticisms associated with the original MOU.[157] First, this Part will address the success with which CCI has addressed these critiques, many of which are deeply supported in the new normative framework. Second, this Part examines content rightsholders' split enforcement regime—separately targeting uninitiated versus frequent file sharers—and proposes that such a system abides well within the new normative shift. Accordingly, content rightsholders' new Copyright Alert System may very well prove successful, increasing enforcement in such a way as to minimize normative backlash amongst the majority of the general public.

In Part II.B. this article reviewed five potential issues in the original MOU: (1) education as a goal, (2) the power of the advisory board, (3) the neutrality of the Independent Expert and the Copyright Expert, (4) the severity of mitigation measures, and (5) the limited defenses in the Independent Review Process. As CAS goes into active implementation, CCI has arguably addressed three of these issues.

First, and perhaps most significant as it reflects on the integrity of CAS, the "education" rhetoric has been significantly amended. In a March 2013 panel for the Congressional Internet Caucus Committee, CCI Executive Director Jill Lesser emphasized CCI's focus not on enforcement and punishments but on neutral education and "chang[ing] attitudes."[158] Lesser noted that the CCI website, and especially the educational "fact" section, had been significantly improved.[159] Gone is the language characterizing file sharing as

157. *See supra* Part III.C.

158. Congressional Internet Caucus Advisory Committee, *supra* note 53.

159. *Id*.

outright criminal "theft."[160] Gone are the threats that file sharing "means" viruses, spyware, and malware.[161] Gone is the appeal to "save the children" through CAS.[162] Instead, the CCI site focuses primarily on what copyright is,[163] how CAS works,[164] and where to find convenient and legal access to content.[165]

Second, CCI is (slowly) moving to correct a blunder in which it hired arguably biased firm Stroz Friedberg as its "Independent" Technical Expert. On October 18, 2012, CCI announced that Stroz Friedberg would serve as the CAS Independent Technical Expert.[166] Days later, news outlets broke the story that the firm Stroz Friedberg had formerly been a lobbyist for the RIAA.[167] CCI "drew immediate fire from critics who rightfully questioned the firm's ability to be truly independent in light of its past paid advocacy for corporate rights owners."[168] CCI promptly responded by announcing that they would hire another expert to review Stroz Friedberg's initial evaluation of the CAS methodology.[169] Here, CCI's quick response does much to allay concerns about the legitimacy of CAS.[170]

Third, CCI has repeatedly declared that termination of a subscriber's service is not required and is not the ultimate goal of

160. *See Facts*, *supra* note 98.

161. *See Facts*, *supra* note 98.

162. *See id.*

163. *Resources & FAQ*, COPYRIGHTINFORMATION.ORG, http://www.copyrightinformation.org/resources-faq/what-is-copyright/ (last visited May 1, 2013).

164. The Copyright Alert System, COPYRIGHTINFORMATION.ORG, http://www.copyrightinformation.org/ the-copyright-alert-system (last visited May 1, 2013).

165. *A Better Way to Find Movies, TV & Music*, COPYRIGHTINFORMATION.ORG, http://www.copyrightinformation.org/a-better-way-to-find-movies-tv-music (last visited May 1, 2013).

166. *See* Ernesto, *Six-Strikes "Independent Expert" Is RIAA's Former Lobbying Firm*, TORRENTFREAK.COM (Oct. 22, 2012), https://torrentfreak.com/six-strikes-independent-expert-is-riaas-former-lobbying-firm-121022 (reporting on Stroz Friedberg's prior business relationship with the RIAA).

167. *Id.*

168. Bridy, *supra* note 55, at 30.

169. Ernesto, *Six Strikes" Evidence Re-reviewed to Fix RIAA Lobbying Controversy*, TORRENTFREAK.COM (Oct. 31, 2012), torrentfreak.com/six-strikes-evidence-re-reviewed-to-fix-riaa-lobbying-controversy-121031 ("We are sensitive to any appearance that Stroz lacks independence, and so CCI has decided to have another expert review Stroz's initial evaluation of the content community's processes. We will be selecting the additional expert promptly and will make that information available.").

170. However, as of March 8, 2013, the additional independent technical expert has not yet been named. Ernesto, "*Six Strikes" Evidence Still Waiting for Impartial Re-review*, TORRENTFREAK.COM (Mar. 8, 2013), torrentfreak.com/six-strikes-evidence-still-waiting-for-impartial-reexamination-130308.

CAS.[171] CCI leaves the specific choice and implementation of Mitigation Measure up to the ISP.[172] Cablevision is the only major ISP that will completely suspend (for 24 hours) customers' Internet service. Verizon is the only ISP that will cap customers' data speeds under CAS.[173] Thus, CCI has placated criticisms of normatively unfair and disproportionate sanctions, such as complete termination of basic rights of access to the Internet.

Admittedly, CCI has not addressed the power of the Advisory Board or the limited defenses available in the Independent Review Process. On the whole, however, CCI has made some effort to address and stay within the ambits of the new normative shift. Accordingly, at least for the majority of the public, the level of enforcement associated with the Copyright Alert System is likely not excessive enough to trigger a normative backlash.

However, content rightsholders recognize that this normatively compliant version of CAS will likely not "be able to deal with the hard-core infringers" and "is not likely to change that behavior."[174] Content rightsholders have reserved the possibility that [content rightsholders] would sue those it suspected of habitual piracy, as it did roughly 35,000 people between 2003 and 2008."[175] Content rightsholders have thus effectively adopted a split enforcement effort that focuses litigation on frequent file sharers with deeply internalized pro-sharing norms, and pro-copyright education on nascent to moderate file sharers who have not yet deeply internalized pro-sharing norms.

And so this article comes full circle to Professor Depoorter's suggestion to content rightsholders in *Copyright Backlash*: "[E]nforcement efforts would likely be more effective if targeted specifically to different types of copyright offenders." Content rightsholders have listened. This new split enforcement regime, consisting of the Copyright Alert System and reserved litigation, has the potential to not only avoid a normative backlash effect but to promote pro-copyright norms among occasional infringers. In light of content rightsholders recent litigation and legislative campaign debacles, the Copyright Alert System represents a new hope for their pro-copyright efforts.

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171. Congressional Internet Caucus Advisory Committee, *supra* note 53.

172. Alex Fitzpatrick, *ISPs Finally Explain How 'Six Strikes' Anti-Piracy Program Will Work*, MASHABLE.COM (Feb. 27, 2013), www.mashable.com/2013/02/27/isps-six-strikes.

173. *Id.*

174. Smith & Fowler, *supra* note 35; *U.C. Hastings Conference, supra* note 125.

175. Smith & Fowler, *supra* note 35.

C. Issues Beyond Backlash

Though this concludes the normative backlash and normative avoision analysis, this article does not suggest that all substantive issues with the Copyright Alert System have been resolved. For example, questions remain regarding the validity of CAS as "private legislation,"[176] whether ISPs are sufficiently adversarial to content rightsholders to ensure safeguards for the public,[177] the government's role in pushing ISPs towards a private solution for content rightsholders,[178] and whether the process from start to continued implementation is sufficiently transparent.[179] These questions persist but exist outside the scope of this article.

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176. "[S]tate-promoted private ordering represents a species of policymaking that is insulated from public scrutiny and that can be tailored, by virtue of that insulation, to serve corporate interests at the public's expense." Annemarie Bridy, *ACTA and the Specter of Graduated Response*, 26 AM. U. INT'L L. REV. 559, 578 (2011).

177. Many believe reducing online traffic in an effort to curb bandwidith infrastructure costs are the primary motivator behind ISPs backing CAS. Larry Dignan, *Why RIAA, ISP Cooperation May Deliver Returns for Both Sides*, ZDNET.COM (Jan. 29, 2009, 3:33 AM), http://www.zdnet.com/blog/btl/why-riaa-isp-cooperation-may-deliver-returns-for-both-sides/11893; Greg Sandoval, *Comcast, Cox Cooperating with RIAA in Antipiracy Campaign*, CNETNEWS.COM (Mar. 25, 2009, 9:49 AM), http://news.cnet.com/8301-1023_3-10204047-93.html; John M. Owen, *Graduated Response Systems and the Market for Copyrighted Works*, 27 BERKELEY TECH. L.J. 559, 583 (2012); *see* ENVISIONAL, TECHNICAL REPORT: AN ESTIMATE OF INFRINGING USE OF THE INTERNET (Jan. 2011), *available* at http:// documents.envisional.com/docs/Envisional-Internet_Usage-Jan2011.pdf (reporting that the transmission of infringing material accounts for about a quarter of all Internet traffic); *see also* Annemarie Bridy, *Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement,* 89 OR. L. REV. 81, 86 (2010) ("[T]he decision of broadband providers to implement intelligent network technology to gain greater control over the traffic that crosses their networks. Considering these consequences, it may be no more than prudent from a liability standpoint for broadband operators to engage with content owners in a renegotiation of the division of labor for online copyright enforcement."). Note that historically ISPs have not sided with content rightsholders. *See* Smith & Fowler, *supra* note 35 ("The cooperation between media and technology companies represents a shift in a relationship that had been a contentious one. . . . But as illegal movie downloaders started to strain their networks ISPs grew more willing to clamp down."); *see, e.g.*, MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR ORDER TO SHOW CAUSE at 2, AF Holdings, LLC v. Comcast Cable Communications, No. 12-C-3516 (N.D. Ill. June 1, 2012), ("[P]laintiffs should not be allowed to profit from unfair litigation tactics whereby they use the offices of the Court as an inexpensive means to gain Doe defendants' personal information and coerce 'settlements' from them.").

178. "President Barack Obama's administration reportedly threatened ISPs with legislation that would mandate termination of the accounts of users accused of intellectual property infringement and also blocking of infringing content itself, as a cudgel to press providers to agree to implement these measures voluntarily. The resulting agreement between ISPs and content providers was negotiated, if not in the shadow of the law, then in the threat of such shadow." Bambauer, *supra* note 123, at 896.

179. LaFrance, *supra* note 54, at 167 (focusing transparency and public participation as missing from the development of CAS).

V. Conclusion

Previously, content rightsholders spearheaded a legal campaign that, though highly successful in the courts, has resulted in significant normative backlash and overall has been counterproductive to their intended goal of increased copyright enforcement. With the signing of the Copyright Alert System's Memorandum of Understanding, content rightsholders seemed poised to make that same mistake again. In a prime example of what this article has termed "normative avoision," content rightsholders have finally taken note of the normative consequences of their enforcement methods and, through subsequent changes to CAS, have deftly sidestepped the normative backlash dilemma.

Content rightsholders' split enforcement regime—separately targeting uninitiated versus frequent file sharers—proposes a system that abides well within the new normative shift. Content rightsholders have thus effectively adopted a split enforcement effort that focuses litigation on frequent file sharers with deeply internalized pro-sharing norms, and pro-copyright education on nascent to moderate file sharers who have not yet deeply internalized pro-sharing norms. Accordingly, content rightsholders' new Copyright Alert System may very well prove successful, increasing enforcement in such a way as to minimize normative backlash amongst the majority of the general public. In light of content rightsholders recent litigation and legislative campaign debacles, the Copyright Alert System represents a new hope for their pro-copyright efforts.

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What Can Medicine Teach the Social Sciences?

by LEE MCINTYRE*

Editor's Note: In a field as slow to change as the law, it is often helpful to inject fresh perspectives from other disciplines. As different as legal analysis might be from that found in the medical and social sciences, they are all ultimately concerned with the pursuit of objectivity. Furthermore, in each of these fields, the pursuit of academic and practical goals are permeated and influenced by the values of those that seek to achieve them. Indeed, both the law and the social sciences in particular are fundamentally concerned with finding ways of distilling logic and order from the complexities of human behavior. Thus, there is much to be learned from how medicine and the social sciences reconcile these often competing goals, a comparison artfully explored by Lee McIntyre in the following editorial.

In the debate over whether social science can someday hope to achieve the same degree of scientific rigor that has been met in natural science—usually taken to consist of physics, chemistry, and biology—it is often argued that there are insuperable limits to what can be attained in the study of human behavior.[1] In the natural sciences, many contend, we are dealing with a subject matter about which we can pursue inquiry dispassionately, with little concern for how the knowledge will be used once it is gathered and few worries that our objectivity may be clouded by the close relationship that we bear to the subject of inquiry. Not so, it is argued, in the study of human behavior. In social science we have a vested interest not only

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1. For a discussion of such alleged limits, see Lee McIntyre, *LAWS AND EXPLANATION IN THE SOCIAL SCIENCES: DEFENDING A SCIENCE OF HUMAN BEHAVIOR* (1996).

in the truth or falsity of competing theories about what causes behavior, but also in how these theories may be used to shape the social environment. Even if a science of human behavior were in principle possible, some hold, it could not be realized due to the inevitable biases that we bring to the study of a subject matter about which we care so deeply.

Of course, the last forty years of the philosophy of science has done much to disabuse us of the notion that objectivity is so easily purchased even in natural scientific inquiry; indeed, the history of some of the greatest scientific debates over the last 500 years—from Copernican astronomy to Darwinian evolution—has demonstrated just how closely the concerns of natural science may tread upon the egocentric assumptions that are inevitably present in any scientific endeavor. But, notwithstanding the question of whether objectivity in any science is perfectly achievable, can't the case be made that natural science has done pretty well for itself? Despite the challenges of normativity and subjectivity, natural science has thrived. Can one reasonably hope that in the fullness of time the same might be true of the social sciences?

In considering this question it is fruitful to remember not merely that physics, chemistry, and biology are not value free, but also that these three sciences do not exhaust the realm of successful scientific advancement over the last few centuries. Indeed, despite the fact that most philosophy of science focuses almost exclusively on a narrow set of issues that arise out of physics and biology, we see in *medicine* an example of a comparatively recent scientific revolution that occurred despite enormous closeness to the human issues at stake, and that bears a close resemblance to the current situation in the social sciences.

Medicine, like social science, doesn't fit well with the "dispassionate" ideal that is allegedly met by good scientific practice. Values permeate the science of medicine. A physician wants his or her patients to remain healthy. Disease and death are regarded as the enemy. Knowledge is gathered in the hope that it may be used to cure the sick and to prolong the life and well-being of all patients. Nonetheless, modern medicine is firmly based on a footing of science. Today's medical practices are founded on double-blind clinical trials and exacting statistical work done by medical researchers. Despite the over-arching desire to gather knowledge that may be used to cure disease and to alleviate suffering—which are normative values—medicine is well served by the conviction not to let its practical goals cloud the vision of what can actually be learned from experience.

Why? Because it is no benefit to the patient for a physician or researcher to pretend to see what is not really there.

In its mission to gather knowledge despite the entanglements of normativity and subjectivity, social science faces a challenge not unlike that of medicine. In macroeconomics, for instance, practitioners are concerned with the "health" of the economy and have a value-laden orientation toward the subject matter. Except in the most unusual circumstances, economists want unemployment to be low and productivity to be high. Inflation, in most cases, is bad. A growing stable economy is viewed as the goal of virtually all macroeconomic analysis. Values thus permeate inquiry in macroeconomics in that economists gather data and try to learn from it primarily in order to achieve a desired outcome.

But why, then, is the scientific status of medicine taken to be so different from that of social science? Why do so many people accept the idea that medicine is a science but that economics could not be? It couldn't be solely due to such problems as normativity and subjectivity, for surely these are challenges that are shared by both fields. Indeed, the very success of medicine *despite* the values that permeate it belies the argument that it is impossible to achieve scientific success in the face of a subject matter that is of direct human concern. Does this provide reason for thinking that—once it embraces the proper methodology—social science too may become more scientific?

The Youngest Science

Medicine was not always scientific. Although it is easy to forget in an age of routine inoculations and miraculous transplants, the successes of medicine were hard won against the ignorance of basic human pathogenesis that existed as recently as a century ago. During the Enlightenment, there was great hope that medicine would finally be able to lift itself out of the long dark period of superstition and ignorance that had characterized its early history. With the shining example of the Scientific Revolution in physics laid before it, efforts were made to throw off the Scholastic tradition of settling scientific matters by argument rather than by experiment, in the hope of basing medical knowledge on a firm foundation of science. These hopes were largely frustrated, however, until well into the 19th century, when the work of Pasteur and Koch led to the new field of bacteriology. With the gradual acceptance of the germ theory of disease and the rise of several public health measures based on

empirical methods, it was only after 1860 that medicine truly began to undergo its own scientific revolution.[2]

It is well to remember, however, that for all of the talk about the beginnings of a science of medicine in the mid-19th century, it was only in the mid-20th century that clinical practice was able to catch up and fulfill the therapeutic promise of this new science. Even in the early decades of the 20th century, a doctor's role was largely confined to explaining the course of a disease to the afflicted patient, not intervening in its path. Even basic physical examination was not universally practiced, as many physicians instead preferred to take lengthy histories and offer voluminous prescriptions that were little more than placebos. In the words of Lewis Thomas, in his memoir of medical practice in the 1930s,

> Explanation was the real business of medicine. What the ill patient and his family wanted most was to know the name of the illness, and then, if possible, what had caused it, and finally, most important of all, how it was likely to turn out. . . . For most of the infectious diseases on the wards of the Boston City Hospital in 1937, there was nothing to be done beyond bed rest and good nursing care.[3]

Another writer paints a similarly grim portrait of medical practice during this era:

> Twentieth-century medicine was struggling for the scientific footing that physics began to achieve in the seventeenth century. Its practitioners wielded the authority granted to healers throughout human history; they spoke a specialized language and wore the mantle of professional schools and societies; but their knowledge was a pastiche of folk wisdom and quasi-scientific fads. Few medical researchers understood the rudiments of controlled statistical experimentation. Authorities argued for or against particular therapies roughly

2. It is of course controversial to claim that a scientific revolution starts at any particular time, and in medicine it is no different. Some scholars would date the beginning of the scientific era in medicine as early as 1628, when William Harvey discovered the circulation of blood. Others would mark it at various advances that took place in the 18th century. But, as Roy Porter points out in his book *The Greatest Benefit to Mankind*, it was only after the founding of bacteriology in the mid-19th century that the clinical promise of medicine was based firmly on a foundation of experimental discovery and scientific rigor that "led directly and rapidly to genuinely effective preventive measures and remedies, savings lives on a dramatic scale." Roy Porter, *The Greatest Benefit to Mankind* 428 (1999). Surely this constitutes a revolution.

3. Lewis Thomas, THE YOUNGEST SCIENCE: NOTES OF A MEDICINE-WATCHER 28, 35 (1983).

> the way theologians argued for or against their theories, by employing a combination of personal experience, abstract reason, and aesthetic judgment.[4]

All of this changed with the discovery of penicillin in 1940. In the pharmacological revolution that followed—which brought sulfa drugs and antibiotics into routine use—medicine at last began to enjoy in clinical success the fruit of the scientific revolution that had started 80 years earlier. With the success of the new drugs, the old ways of practicing medicine began to wane, with the home remedies and palliatives of bedside consultation soon replaced by drugs that had resulted from laboratory research and large scale clinical trials. Medicine, at last, had become a science.

Prescription for the Social Sciences

To the student of history, what is most impressive about the story of medical science is not just its success but its *recency*. To the methodologist what also jumps out is the challenge, "if medicine can do it, why can't social science?" Indeed, note just how accurately the quoted descriptions of medicine in the 1930s might, with just a few changes in wording, be used to characterize the impoverished state of social scientific knowledge and its effect on public policy at the dawn of the 21st century.

Of course, some would argue that the comparison is false; that the problem of subjectivity is much worse in the social sciences than it is in any other field of inquiry in that we face a unique challenge by being both the investigator and the object of inquiry. Given this, some hold, we cannot help but to proceed in a way that is less than scientific.

The problem with this view is not that subjectivity is not a real problem in social science. The problem is that subjectivity is often used as an excuse for conducting bad social science. Yes, it is hard to be objective in the study of our own behavior. Yet, if the critics are right, and we cannot hope to achieve perfect objectivity in any scientific study, then one might rightfully ask why the social sciences cannot hope to do at least as well as the natural sciences in this regard? After all, it is these same flawed, self-interested human beings that conduct natural science who do social science as well. Success in contending with subjectivity could not in social science, any more so than in natural science, depend on *perfect individuals* who

4. James Gleick, *Genius:* THE LIFE AND SCIENCE OF RICHARD FEYNMAN 132 (1992).

are beyond the ken of subjectivity. As we see throughout the history of natural science, the investigation of nature too has individuals who prefer their own theories and are inclined to ignore evidence that does not fit them. But, when properly conducted, science as a whole is more objective than its practitioners, for science progresses by discovering the mistakes of others. Indeed, it is the appeal to evidential standards that keeps science as objective as it is. Thus, wishful thinking in science is rooted out not because of unique intellectual honesty amongst scientists, but because of the fear of public embarrassment against objective standards.

Yet here we face what may well be a real difference between the practice of natural and social science. For in natural science, even if one realizes that it cannot be achieved perfectly in practice, there is healthy respect for objectivity as an *ideal* and a conviction that the only means of resolving a scientific dispute is to appeal to the *evidence*. In natural science, the extent to which we bring ideological factors to bear on our inquiry is to be *repudiated*. Yet, in the social sciences, the importation of our political and social interests too often seems to be accepted as part and parcel of the way that research is conducted.

This is not to say that in social science the evidence is ignored completely, or that social scientific theories are made up out of whole cloth. It is rather to say that in much of social science, unlike natural science, the practitioners are not nearly so embarrassed about mixing up their ideological assumptions with positive inquiry. Much of what passes for social research these days consists of those who already know what policy they would like to support gathering evidence in its favor. Consequently, a good deal of social science is so ideological in its orientation that the very idea of fashioning social science as the empirical study of human behavior has, to many practitioners, become something of a disciplinary joke. As one social scientist has put it:

> [M]ost of the most influential work in the social sciences is ideological, and most of our criticisms of each other are ideologically grounded. Non social scientists generally recognize the fact that the social sciences are mostly ideological, and that they have produced in this century a very small amount of scientific knowledge compared to the great bulk of their publications. Our claim to being scientific is one of the

> main intellectual scandals of the academic world, though most of us live comfortably with our shame.[5]

Unfortunately, within such a politically charged research environment, even where careful empirical work *has* been done, it is almost routinely ignored or dismissed by policy makers.

A recent example, drawn from the field of criminal justice, will suffice to make the point. One of the most overlooked ills of the American judicial system is the problem of wrongful convictions. In light of the growth of mandatory sentencing guidelines and a diminishing national reluctance to employ capital punishment, however, the charge to be certain that those convicted are actually guilty of the crime is of paramount importance. As a recent survey of the problem has pointed out, "[e]ach year, in the United States, more than seventy-five thousand people become criminal suspects based on eyewitness identification, with lineups used as a standard control measure."[6] It has been well known for decades within the annals of social science research, however, that eyewitness reports are notoriously inaccurate. Nonetheless, the criminal justice system continues to put great weight on eyewitness testimony; in consequence, the most common cause of wrongful convictions is eyewitness error.[7]

Some may object that, flawed though it is, we have no choice but to consider the testimony of eyewitnesses, and should weigh it appropriately. The use of lineups as a means for assessing the accuracy of eyewitness recall, however, reveals at least one way in which the current methodology could be vastly improved.

The most common way of presenting a lineup is to show an eyewitness a group of several people all at once, including one or more actual suspects. This method of presentation, however, has been shown to introduce subtle pressure to choose one of the individuals presented, and consequently leads to a higher rate of false identification. As the research of Gary Wells and Rod Lindsay has shown, however, presenting culprits one at a time, and asking eyewitnesses to decide in each case whether this is or is not the perpetrator, leads to 50% fewer false identifications, while not

5. Charles Leslie, *Scientific Racism: Reflections on Peer Review, Science, and Ideology*, 31 SOC. SCI. & MED. 891, 896 (1990).

6. Atul Gawande, *Under Suspicion: The Fugitive Science of Criminal Justice*, NEW YORKER, Jan. 8, 2001, at 50.

7. *Id.*

effecting correct ones.[8] One might think, based on such dramatic results, that the use of sequential lineups would become widespread. Yet, despite a 1999 report by the Department of Justice that extolled the virtues of sequential lineups, only a handful of police departments—mostly outside the United States—have adopted them. In social science, subjective factors all too often trump empirical evidence.

Must it be like this? Does lack of perfect objectivity in practice necessitate the abandonment of the objective ideal and a corresponding neglect of the scientific attitude? Must the subjective nature of our interest in human behavior color the way that we conduct social inquiry? Of course, we cannot turn off our interests, hopes, and fears, when we are engaging in science. But what we *can* do is attempt to keep them from blinding us to what our inquiry is trying to tell us.

Here once again it is instructive to consider the example of medicine. In medicine we have an example of a science in which we have tremendous vested interests, yet where we realize that there is no purpose served in allowing wishful thinking or ideology to influence our analysis of how things are. Our overriding interests in medicine, like in social science, are *normative*. We have a practical goal in mind when conducting our inquiry; we know at the outset what it is that we value. Yet in medicine we do not use normativity as an excuse to abandon scientific standards: to cherry pick data to support a favored hypothesis or otherwise abuse statistics. Aiming at objectivity—*even where it is not completely reachable*—is an important aspect of any scientific inquiry. In social inquiry, subjectivity need not serve as a barrier to the scientific attitude any more than it does in natural science or medicine.

Prognosis

Given the potential for the social sciences to learn from and model their approach to inquiry on the methodological situation faced by medicine, may we expect the revolution anytime soon in the study of human behavior? No. For it is worth pointing out here that there *is* something missing in the social sciences—that was developed in the science of physics in the 17th century and the science of medicine during the 19th century—that has misfired in the social

8. R. C. L. Lindsay & Gary L. Wells, *Improving Eyewitness Identification From Lineups: Simultaneous Versus Sequential Lineup Presentations*, 70 J. APPLIED PSYCHOL. 556, 561 (1985).

scientific revolution that was hoped for after the Enlightenment. It is respect for the critical attitude that teaches us to acknowledge the vastness of our ignorance and the superiority of empirical methods when it comes to gathering knowledge about matters of fact. No matter the complexity of the subject matter, this is the first and most essential step toward scientific inquiry. To accept the *ideal* of the scientific attitude toward gathering knowledge—even when it cannot always be met in practice—is the mark of a field that is ready to move forward as a science.

Too often in social inquiry the practitioners think that they already know the answer to the question of why people go to war or commit crime, based on intuition or our allegedly special access to the subject matter of social science, so that we do not need to engage in any empirical investigation.[9] Unfortunately, many also eschew careful empirical inquiry in the social sciences because they fear the consequences that it may have for their most closely held political beliefs about human nature.

But this is to surrender to the worst side of subjectivity. And, it is worth remembering that the history of scientific progress has been one of relentless assault on such prejudices. The early practitioners of medicine were little assisted in their understanding of the human heart despite the fact that they each had one; their understanding of disease was scarcely advanced by the fact that they could also fall ill. Mocked by failure, medicine eventually turned to science as a model for gaining knowledge about a subject that quite simply could not be understood in any other way. The same is true in the study of human behavior. As in medicine, it is no favor to a sick society—one plagued by racism, war, crime, and child abuse—to pretend that we know what causes such problems when we do not. As in medicine, the social sciences will be doomed to play an ineffectual role in improving human life until they have gathered enough knowledge in a systematic way to be of more use in public affairs.

To some the prospects for such a revolution may appear dim. But, with the proper methodology, relatively rapid progress is possible. In the 17th century in physics and in the 19th century in medicine, who could have imagined the enormous success that would be enjoyed when empirical and experimental methods were finally employed? The case for a science of human behavior should be no less compelling. And, as in medicine, the world awaits the outcome.

9. It is interesting to note that this Aristotelian philosophy of relying on reason over empirical inquiry was once popular in gaining knowledge about nature, before the Galilean revolution in physics.

Just as numerous patients died of infectious diseases before there was a cure for them, today's society suffers from numerous plagues of our own making that we are powerless to stop until we understand their true causes.

In the study of human behavior, no less than in the study of health and disease, it is no favor to let our values interfere with gathering the empirical knowledge that is necessary to ameliorate our suffering and to cure our current ills.

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The E-Books Price Fixing Litigation: Curious Outlier or Harbinger of Change in Antitrust Enforcement Policy?

by EVAN D. BREWER*

Note: After this paper was written, the case against Apple was tried to bench in the United States District Court for the Southern District of New York. On July 10, 2013, Judge Denise Cote found Apple had committed a per se Sherman Act violation by conspiring with the publishers to eliminate retail price competition and to raise e-book prices.† The discussion here, based in part on the Government's allegations against Apple in the complaint, echoes much of Judge Cote's analysis. It remains unknown, however, why the government chose to pursue a civil action, and what its choice means for antitrust enforcement policy going forward.

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† Opinion & Order, United States v. Apple, et al., No. 12 CV 2826 DLC, 2013 WL 3454986 (S.D.N.Y. July 10, 2013). In September 2013, final judgment was entered against Apple, and part of the remedy included an injunction prohibiting Apple's use MFN clauses in conjunction with the agency model. Plaintiff United States' Final Judgment and Plaintiff States' Order Entering Permanent Injunction, United States v. Apple, Inc., No. 12 CV 2826, 2013 WL 4774755 (S.D.N.Y. Sept. 5, 2013). *See infra* Part II.

I. Introduction

In 2012 the Department of Justice ("DOJ") brought suit against Apple and five major US publishing houses for conspiring to fix the price of e-books.[1] The suit named five of the six largest publishers in the United States: HarperCollins, Hachette, Macmillan, Penguin, and Simon & Schuster.[2]

The complaint contained many detailed factual allegations, including the sort of high-level executive collusion commonly seen in criminal price fixing cases.[3] The charged conduct, horizontal price fixing, is per se illegal under the Sherman Act and among the "hardcore" violations that under Antitrust Division policy merit

1. Complaint, United States v. Apple, et al., No. 12 CV 2826, 2012 WL 1193205 (S.D.N.Y. Apr. 11, 2012) [hereinafter Complaint].

2. *In re* Elec. Books Antitrust Litig., 859 F. Supp. 2d 671, 674 (S.D.N.Y. 2012). Random House, also one of the six largest publishers, was not named. *Id.* at 1, n.1.

3. A recent example is the AU Optronics LCD price fixing litigation. *See* Superseding Indictment, United States v. AU Optronics Corp., No. CR-09-0110, 2010 WL 5641429 (N.D. Cal. June 10, 2010).

criminal charges.[4] Yet the government brought a civil case against Apple and the publishers. Exactly why the Division chose to pursue the matter as a civil rather than criminal case may never be totally clear: the decision was made at a high level and the specific details of such decision making are not made available to the public.[5] But analysis of the details of the Division's case, viewed in light of current antitrust law, antitrust policy, and public perception of the players and the case, suggests a number of possible explanations for the choice of a civil action.

The decision may reflect a shift in DOJ or Antitrust Division policy concerning the criminality of per se antitrust violations. Or it may augur a change in department policy regarding discretion to file civil versus criminal suits depending on the strength of the case. Another possibility is a change in the DOJ's opinion about the application of per se and rule of reason modes of analysis to horizontal price fixing. Finally, and most likely, I believe, the decision could have been motivated by the particular facts of the case. The government may have judged the departure from policy justified by prudential reasons, including public perception of antitrust enforcement, questions about the deterrence efficacy of criminal sanctions, and concerns about over enforcement in dynamic, high-tech sectors. If this is correct, it is possible the decision simply be an aberration, a one-time departure from enforcement policy, or a harbinger of a more flexible enforcement policy.

On the one hand, because there seem to have been no other indications of a broader shift, it seems likeliest this case is simply an outlier. On the other, the facts of this case illustrate many good reasons for such a shift in policy. Regardless, opacity in decision-making endangers both deterrence efforts and public confidence in antitrust enforcement agencies. Thus whether this is simply a one-off oddity or reflects a farther-reaching change, antitrust enforcement and those affected by it would all be well served by more transparency concerning antitrust prosecution decisions.

This paper begins with a discussion of the background of the case. Part I describes the rise of e-books over the past several years; Part II lays out the alleged conspiracy and the details behind the Agency Agreements signed between Apple and the defendant

4. *See* Donald I. Baker, *To Indict or Not to Indict: Prosecutorial Discretion in Sherman Act Enforcement,* 63 CORNELL L. REV. 405 (1977).

5. Final decisions are made by the Assistant Attorney General in consultation with senior officials in the Antitrust Division following an extensive analytical process. *Id.* at 408 n.21.

publishers; Part III the industry's rapid shift from wholesale to agency e-book distribution. In Part IV I discuss the deterrence rationale for criminal sanctions. Part V details application of and recent developments in the antitrust modes of analysis, the per se rule and the rule of reason, and how the alleged conspiracy fits in. It also discusses the government's proposed definition of the relevant market. Part VI examines strategic considerations that likely weighed on the Division's decision to bring a civil case. And Part VII puts it all together and reviews possible explanations. The final section concludes.

II. Background

A. The Rise of E-Books

E-books have proven a disruptive force in the publishing industry.[6] Production, distribution, and retailing costs are all lower for e-books than for their physical counterparts. So, too, are e-book prices. But how much lower? An entire industry rides on the answer to this question, and the machinations of major companies in tech, retail, and publishing to provide one are at the heart of the government's case.

Though not directly involved in the case, Amazon is central to the dispute. Through its online sales portal and Kindle e-reader, Amazon's aggressive marketing and sales popularized reading on tablets and devices and in large part birthed the e-book industry. Amazon's success hinged on its strategy of selling e-books for $9.99, particularly newly released and bestselling titles.[7] This price is well below the price of corresponding hardcover editions, and often below the wholesale prices paid to the publishers.[8] For Amazon, this sales model of razor-thin, or in some cases nonexistent, margins powered sales of Kindles and enabled them to capture the nascent e-book

6. *See* Complaint at ¶ 2; Letter from Scott Turow: *Grim News*, THE AUTHORS GUILD BLOG (Mar. 9, 2012) (Authors Guild President Scott Turow describing impacts of e-books on the publishing industry), *available at* http://www.authorsguild.org/advocacy/letter-from-scott-turow-grim-news/.

7. Complaint at ¶¶ 2–4.

8. Because it is easier, I refer to the transactions of e-books between the publishers, retailers and consumers as sales, though in reality, like many other electronic goods, e-books are distributed via licenses and sub-licenses. Amazon licenses an e-book from the publisher, and subsequently licenses it to the end user who reads it on their Kindle, or other device.

market. At the point Apple entered the market, nearly 90% of all e-books were sold through Amazon.[9]

Amazon's success, however, was seen by publishers as a major, possibly existential threat. Plummeting prices of e-books, they argued, would give rise to consumer expectations for similarly low prices of print books.[10] Receding margins in the market for print books, and small margins for e-books would combine to imperil the industry. If publishers were unable to recoup investments in book production, the industry would grind to a halt, output falling to a trickle of current day production.[11] This $9.99 problem—falling prices and consumer expectations of falling prices—lies at the heart of the alleged conspiracy.

Apple entered the scene in 2010 with its launch of the iPad and iBookstore. The publishers saw Apple, an influential and disruptive player in many markets, as a potential ally with whom they might challenge Amazon's influence over retail e-book prices. Their interests were closely aligned: Although Apple was not overly concerned with the publishers' $9.99 problem, it was uninterested in competing with Amazon on price. Apple did (and does) not need to sell e-books at a loss to generate sales of its iPad, which is more computer than e-reader. Apple makes money off its hardware,[12] whereas Amazon's motivations are more complex. Because it entered the e-book market in its infancy, Amazon was more interested in establishing the market for e-books than turning a profit. Even as the market has matured, Amazon continues to sell Kindles at a loss.[13] Amazon's real motivations lie in selling content, services, and

9. Turow, *supra* note 6.

10. Brad Stone & Motoko Rich, *With Rival E-Book Readers, It's Amazon v. Apple*, N.Y. TIMES, Jan. 21, 2010, at B1 (reporting that "publishers fear that Amazon has accustomed buyers to unreasonably low prices" and believe "if Kindle were to maintain its dominant position, it could force publishers to lower their wholesale prices.").

11. Publishers finance many if not most major titles in advance. Because author profits from books come after publication, advance payments provide the necessary income smoothing for authors to undertake long writing projects by essentially borrowing against future expected income from the book. *See* Jim Kukral, *The New Business Model of Book Publishing*, HUFFINGTON POST (Apr. 16, 2012), http://www.huffingtonpost.com/jim-kukral/ebook-publishing_b_1428197.html.

12. Apple's gross profit margin on iPhones is an astounding 60%, and the principal reason Apple is the most valuable company in the world. *See* Thomas J. Duesterberg, *The Apple Business Model Is Good for U.S. Manufacturing*, HUFFINGTON POST (Nov. 2, 2011), http://www.huffingtonpost.com/thomas-j-duesterberg/us-manufacturing-apple_b_1072089.html.

13. Hayley Tsukayama, *Amazon Loses $3 on Every Kindle Fire*, WASH. POST (Nov. 18, 2011), http://articles.washingtonpost.com/2011-11-18/business/35282380_1_kindle-fire-nook-tablet-e-reader.

goods across many categories, and many of its ventures are designed to bring more users to the Amazon brand.[14] Apple wanted to offer e-books, but doing so at prices significantly higher than Amazon would serve them little good, and in fact might turn people off if they saw higher prices as Apple taking advantage of their customers.

The agency model provided a solution to both Apple and the publishers' problems. Apple sought a way to avoid retail price competition with Amazon, and the publishers wanted to take away Amazon's pricing power. As it turned out, Apple proved a powerful ally, with whom the publishers collaborated to break Amazon's stranglehold on the retail e-book market, and introduce competition and a sustainable business model to the industry. Either that, or they illegally colluded to fix the price of, and restrain retail price competition in the market for, e-books.

B. The Alleged Conspiracy

The collusion alleged in the Complaint is a hub-and-spoke conspiracy hatched by Apple and the publishers to solve a collective action problem.[15] This collective action problem stemmed from the fact that the publishers faced monopsony, with Amazon as the only real buyer of e-books.[16] With nowhere else to sell e-books, the publishers sold to Amazon, on Amazon's terms. Although they all wanted to end Amazon's discounting, they could not do so without coordination. Apple's involvement proved instrumental in helping the publishers do just that.

1. Collective Action Problems

To solve the $9.99 problem, the publishers could have insisted on minimum retail price agreements with Amazon. Such arrangements would avoid antitrust issues because retail price maintenance scrutiny[17] is limited to the sales of goods and does not extend to

14. *See, e.g.,* Mark W. Johnson, *Amazon's Smart Innovation Strategy*, BUSINESSWEEK (Apr. 12, 2010), http://www.businessweek.com/innovate/content/apr2010/id20100412_520351.htm (describing Amazon's application of this business strategy across a number of markets).

15. Complaint at ¶¶ 46, 60–84.

16. Amazon's advantage as the popularizer of e-books should not be understated: it allowed them to capture nearly the entire market and made entry by others very difficult without competing on price, something few have been able to do in any market Amazon has entered.

17. Minimum and maximum retail price restrictions, as vertical price fixing agreements, were per se violations of the Sherman Act until 2007, when the Supreme

licensing rights to intellectual property.[18] However, the publishers faced a collective action problem that prevented this solution.

In such a situation, what is best for the group is not best for the individual acting alone, and the optimal group outcome requires cooperation.[19] While the publishers shared a desire for higher minimum prices, each individual publisher was deterred from acting unilaterally by the prospect that the others would not follow. If one publisher renegotiated its contract with Amazon to require higher minimum retail prices, the others would have an incentive to not follow suit—to defect from the optimal group behavior. By not following, publishers would see an increase in their respective shares of the market as consumers switched to their e-books on account of the price differential. Even if most publishers ignored the profit potential of defection and followed the first mover, the more publishers switched, the greater the incentive to defect would be for each remaining publisher.[20] As a result, the optimal outcome for the publishers, higher minimum retail prices, was unlikely to arise without coordination. Or, according to the DOJ, unlawful collusion.

2. Hub-and-Spoke Conspiracy

Coordinating through Apple to adopt agency distribution proved an effective way of solving the publishers' collective action problem. But because this shift required coordination and resulted in higher prices, the DOJ alleges it amounted to price fixing. According to the Complaint, the conspiracy to fix e-book prices grew out of private meetings among the publishers at various Manhattan restaurants,[21]

Court held they should instead be subjected to the rule of reason. Leegin Creative Leather Prods., Inc. v. PSKS Inc., 551 U.S. 877, 899 (2007).

18. United States v. Gen. Elec., 272 U.S. 476 (1926); LucasArts Entm't. Co. v. Humongous Entm't. Co., 870 F. Supp. 285, 289 (N.D. Cal. 1993) ("[T]he statutory right of intellectual property owners to forbid entirely sales by licensees necessarily includes the power to restrict the prices at which such licensees may sell licensed material."). *See also* Herbert Hovenkamp, Mark Janis & Mark Lemley, INTELLECTUAL PROPERTY AND ANTITRUST, §24.9 at 24-59 (explaining an implication of *General Electric* is that where "intellectual property owners license their rights by arrangements that contemplate sublicensing," so "long as no goods are attached to the primary license, the licensor's maintenance of the sublicense price is generally lawful").

19. *See* Russell Hardin, *Collective Action As an Agreeable n-Prisoner's Dilemma*, 16 BEHAVIORAL SCIENCE, 472–81 (1971).

20. Assuming the publishers are right that $9.99 improperly reflects the cost of an e-book, the market likely would have adjusted prices upward over time, as a result of small changes, as publishers slowly adjusted their pricing arrangements with Amazon, seeking to increase prices without losing market share. Or it would have resulted in exit from the market, as publishers could no longer profitably provide e-books at $9.99.

21. Complaint at ¶¶ 39–45.

continued under the guise of joint venture discussions,[22] and took final form with the help of Apple as go-between.[23] The end result was a concerted shift from wholesale to agency distribution of e-books. Under the wholesale model, suppliers (publishers) sell products to retailers (Amazon, Apple, etc.), who then set retail prices.[24] The agency model, by contrast, makes retailers agents of their suppliers. As agents they have no pricing power: they sell products at prices set by suppliers and keep a percentage of revenue as commission. Under the wholesale model, Apple would face two undesirable options: price books higher than Amazon or accept low margins.[25] Thus both the publishers and Apple stood to benefit from a move to agency distribution. Apple would get a 30% cut and, standing on equal footing with Amazon, could then bank on its better tablet to drive up its market share. And the publishers would solve their $9.99 problem by retaining sole pricing power, foreclosing Amazon's destructive discounting.

The collusion between the defendants took the form of a hub-and-spoke conspiracy. Coordination and agreement between publishers formed the rim, and the vertical Apple Agency Agreements they negotiated with Apple formed the spokes. Apple's involvement eliminated the collective action problem facing the competing publishers. With Apple at the center, the publishers could both signal which agency terms they would accept and lock each other into the model, eliminating the risk of defection.[26]

3. Agency Agreement Terms: MFNs and Pricing Tiers

Although the Agency Agreements signed between Apple and the publishers specifically governed only individual distribution relationships, they were designed to induce a shift to agency across the entire industry. Two key features accomplished this goal: most-favored-nation ("MFN") clauses and formulaic pricing tiers for newly released and bestselling titles. Together, these terms effectively

22. Complaint at ¶¶ 46–49.

23. *Id.* at ¶¶ 50–78.

24. Again, because e-books are licensed to retailers for subsequent sub-license, this is not strictly true, as the publishers hypothetically could have determined the retail price. But because of collective action difficulties discussed above, in reality they were unable to do so.

25. In other words, Apple faced retail price competition. Whether the margins would have been sufficiently small (or negative) so as to foreclose entry into the e-book market is a factual question, and one that would be relevant under rule of reason analysis.

26. Complaint at ¶ 61.

required the publishers to adopt agency distribution with not just Apple, but all their retailers, including Amazon.[27]

The Agency Agreements' MFN provisions prohibited publishers from pricing e-books at other retailers lower than at Apple's iBookstore, regardless of whether other retailers were an agent of the publisher or operated under the wholesale model. MFNs arguably restrict retail price competition, and may have the effect of causing price uniformity.[28] But MFN clauses are not per se illegal, and may be reasonable restraints if, for example, they are instituted to correct market failures.[29] MFNs can also help protect market entrants by shielding up-front investments from predatory pricing from competitors.[30]

Pricing tiers in the Agency Agreements linked prices of newly-released and best-selling e-books to their respective hardcover list prices, with ostensible maximum prices between $12.99 and $14.99.[31] In effect, however, these price points amounted to actual prices. Whereas before wholesale prices often exceeded Amazon's preferred retail price of $9.99 (with Amazon taking the loss),[32] now retailer-agents would take a 30% commission on sales, meaning that in order for publishers to maintain even current profit margins, retail prices would have to rise, likely to the maximum price tiers.[33]

C. Agreements in Action – The Shift From Wholesaling to Agency

In January, 2010, before the Agency Agreements came into effect, Apple launched the iPad and iBookstore.[34] Apple's announced e-book price points were well above Amazon's.[35] When asked why one would buy an e-book from the iBookstore for $14.99 when the

27. Complaint at ¶ 76.

28. *See, e.g.*, Letter from Richard Blumenthal, Attorney-General of Connectitcut, to Bruce Sewell, Apple's General Counsel (July 29, 2010), *available at* http://www.ct.gov/ag/lib/ag/consumers/appleltr080210.pdf.

29. *See Leegin Creative Leather Products*, 51 U.S. at 877, 879.

30. *Id*. at 913.

31. *Id*. at ¶ 75.

32. *Amazon Pulls Macmillan Titles in First E-book Skirmish*, LATIMES.COM (Jan. 30, 2010), http://latimesblogs.latimes.com/jacketcopy/2010/01/amazon-pulls-macmillan-titles-in-first-ebook-skirmish.html.

33. A book which previously carried a wholesale price of $12 under the agency model would need to retail for over $17.14 for publishers to receive the same revenue (70% * $17.14 = $12).

34. Brad Stone, *With Its Tablet, Apple Blurs Line Between Devices*, N.Y. TIMES, Jan. 28, 2010, at A1.

35. *Id*.

same title was sold for $9.99 on Amazon, Steve Jobs responded: "that won't be the case . . . the prices will be the same."[36] For Jobs to be right about uniform prices, either prices on the iBookstore would have to end up below what he announced, or prices across the market would have to rise. In either event, Apple would be insulated: nowhere would there be lower prices, and they would always receive a 30% cut. But the new Agency Agreements and Apple's place at the hub of the conspiracy ensured prices would go up, not down.

While the agreements insulated Apple from risk, they left publishers even more exposed. The Agency Agreements effectively raised the stakes of not acting in concert. If only some publishers signed Agency Agreements with Apple, not only would their $9.99 problem remain, but as Apple gained a larger share of the market, those who had signed up would see their margins decline even more dramatically. They would be obligated to price books on the iBookstore no higher than offered elsewhere, but would receive less per book: 70% of retail rather than wholesale prices. Before, Amazon took the discounting loss; now, on sales through the iBookstore, the publishers would take the hit, and the loss would be greater.

If all the publishers signed Agency Agreements with Apple, the MFN clauses would provide incentive to adopt the same agency model with Amazon and other retailers. If not, they would all face declining margin problems as Apple's market share increased. But the same collective action problem remained, as did the risk of defection. With these increased stakes, the publishers badly needed a way to coordinate and police defection. According to the DOJ, Apple proved an able constable, providing assurances the other parties would all sign the same Agency Agreements and thus all face the same risks.[37] Apparently high-level Apple executives passed information between publishers signaling commitment to the plan.[38] And it worked: The publishers signed Agency Agreements with Apple and all subsequently negotiated agency agreements with their other e-book retailers, including Amazon.[39] In the end it took only four months for most of the publishing industry to jettison the

36. Walt Mossberg, *All Things Digital,* WALL ST. J. (Jan. 28, 2010), http://m.wsj.net/video/20100128/012810atdmossy/012810atdmossy_320k.mp4. In the same clip Jobs can be overheard remarking that "Publishers are actually withholding their books from Amazon, because they're not happy with it."

37. Complaint at ¶ 69.

38. *Id.* at ¶¶ 70–74.

39. *Id.* at ¶¶ 74–75, 79.

wholesale model in use for over 100 years in favor of the agency model.[40]

III. Discussion

The Antitrust Division chooses to pursue criminal and civil enforcement by asking whether the investigated conduct constitutes a "hardcore" violation of antitrust laws. Such conduct, which includes price fixing, market division, and bid rigging, is typically illegal per se under the Sherman Act, and it alone merits criminal prosecution.[41] The strength of the government's evidence affects only whether a case is brought, not which type: if the conduct merits criminal prosecution, the government files a criminal case; otherwise, enforcement is civil.[42] The Division will not file a civil case against defendants engaged in "hardcore" conduct such as price fixing simply because it cannot meet the criminal burden of proof.[43] If the DOJ does not believe it can win a case, it does not bring it.[44]

Despite this, against Apple and the publishers the DOJ alleged a horizontal price fixing conspiracy—the paradigmatic criminal case—in a civil action. The decision to bring a civil case in these circumstances runs directly contrary to Division policy and practice.

Several key legal and strategic factors undoubtedly influenced DOJ decision-makers, and shed some light on how the Division may view the case and why it chose to bring a civil action. First, there are significant questions about the link between deterrence and criminal sanctions, and reason to believe that criminal penalties may not deter

40. Complaint at ¶ 79.

41. *See* Antitrust Division Manual, *Standards for Determining Whether to Proceed by Civil or Criminal Investigation* (Nov. 2012), at page III-12, *available at* http://www.justice.gov/atr/public/divisionmanual/chapter3.pdf; Thomas O. Barnett, Assistant Attorney General, Department of Justice Antitrust Division, *Criminal Enforcement of Antitrust Laws: The U.S. Model* (Sept. 14, 2006) (remarks before the Fordham Competition Law Institute's Annual Conference on International Antitrust Law and Policy, New York, NY), *available at* http://www.justice.gov/atr/public/speeches/218336.pdf; *and* Gary R. Spratling, Deputy Assistant Attorney General, Department of Justice Antitrust Division, *Transparency in Enforcement Maximizes Cooperation From Antitrust Offenders* (Oct. 15, 1999) (presented at Fordham University School of Law, New York, NY), *available at* http://www.justice.gov/atr/public/speeches/3952.pdf.

42. Baker, *supra* note 4, at 406 n.6.

43. *Id*.

44. This is the case for any federal prosecutor contemplating criminal prosecution. The DOJ's Principles of Federal Prosecution state the government should proceed with prosecution where "the admissible evidence will probably be sufficient to obtain and sustain a conviction." U.S. DEP'T OF JUSTICE, United States Attorneys' Manual, § 9-27.220.

as well in practice as in theory. Second, the facts of the case, in light of recent developments in the application of the per se rule to both horizontal and vertical price fixing arrangements, raise significant legal questions about whether the per se rule is appropriate for the alleged collusion and what the relevant market for assessing competitive effects should be.

Many strategic considerations likely influenced the decision as well, including the sufficiency of civil remedies, whether this case presents a truly novel question of fact or law, maintenance of public confidence in prosecutorial discretion, assessment of harm to consumers, Apple's central role in the case, Amazon's substantial market power in the market for e-books, and public perception of the defendants.

A. Criminal Antitrust Penalties and Deterrence

The argument for imposing criminal penalties on individuals involved in antitrust violations is based in large part on deterrence. Standard deterrence theory assumes actors have knowledge of the law and potential consequences of transgression, and make rational self-interested choices, weighing the benefits of breaking the law with the likelihood of detection and the severity of the penalties they would face.[45] To deter companies from engaging in cartel conduct like price fixing, then, an optimal fine should be greater than the gains of fixing prices, increased to compensate for imperfect enforcement.[46] Because detection of offenses like price fixing is difficult, and many transgressors will never be detected, optimal fines likely need to be increased to many times the amount of potential gain.[47] But given the large profit motives involved, the results of such large fines might well lead the offending companies into bankruptcy. Antitrust enforcers face what is known as the "deterrence trap": deterrence-optimal fines would bring hardship on innocent employees and investors.[48]

A solution to this problem is to penalize individual participation in cartels by imposing either civil or criminal sanctions, or both.

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45. More precisely, rational choice theories of deterrence. *See, e.g.,* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

46. Peter Whelan, *A Principled Argument for Personal Criminal Sanctions as Punishment under EC Cartel Law*, 4 COMP. L. REV. 7 (2007).

47. Wouter P.J. Wils, *Optimal Antitrust Fines: Theory and Practice,* 29 WORLD COMPETITION 183, 194–195 (2006).

48. *See* Christine Parker, *The "Compliance Trap": The Moral Message in Responsive Regulatory Enforcement,* 40 L. & SOC'Y REV. 591 (2006); John C Coffee Jr, "*No Soul to Damn: No Body to Kick:": An Unscandalized Inquiry into the Problem of Corporate Punishment,* 79 MICH. L. REV. 386 (1981).

Because companies can mitigate fines by compensating employees, fines alone are a weak individual deterrent.[49] Criminal penalties, especially incarceration, however, are less easily mitigated, and should provide stronger disincentive for individual participation in antitrust violations.[50] In addition to the increased severity of criminal sanctions, people may fear the increased investigatory powers that accompany criminal prosecution, and infer more generally a greater financial and time commitment to enforcement of criminal offenses.[51] In fact, enhanced investigatory powers may provide the most potent deterrent effect in light of research showing people are much more responsive to increased likelihood of detection and enforcement than increased severity of punishment.[52]

Over the past two decades, antitrust penalties have significantly strengthened. However, there is significant evidence that despite drastic increases in corporate fines, individual fines, and individual jail terms, more and bigger cartels are being detected.[53] Between the early 1990s and mid-2000s, average corporate fines have increased from $480,000 to $44,000,000 and €2,000,000 to €46,000,000, in the United States and European Union, respectively.[54] Similarly, the average jail sentence imposed for antitrust violations in the United States more than doubled from 274 days in the early 1990s to 717 days in 2005-09.[55] Also during this period, the United States and many other countries implemented corporate leniency programs, offering reduced penalties, and, for the first in the door, near immunity, in exchange for cooperation and whistle-blowing.[56] Leniency programs

49. Donald I. Baker, *The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging,* 69 GEO. WASH. L. REV. 693, 705 (2001).

50. Donald Baker, a former head of the Antitrust Division, reports a very senior corporate executive telling him: "as long as you are only talking about money, the company can at the end of the day take care of me . . . but once you begin talking about taking away my liberty, there is nothing that the company can do for me." *See id.*

51. Caron Beaton-Wells & Christine Parker, *Justifying Criminal Sanctions for Cartel Conduct: A Hard Case*, 1 J. ANTITRUST ENFORCEMENT 198, 207 (2013).

52. *See, e.g.*, John Braithwaite & Toni Makkai, *Testing an Expected Utility Model of Corporate Deterrence*, 25 L. & SOC'Y REV. 7, 8–9 (1991).

53. *See* John M. Connor & C. Gustav Helmers, *Statistics on Modern Private International Cartels, 1990-2005* (Am. Antitrust Inst., Working Paper No. 07-01, 2007), *available at* http://ssrn.com/abstract=944039; Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Sanctions*, 6 COMPETITION POL'Y INT'L 3, 14–15 (2010).

54. Ginsburg & Wright, *supra* note 53, at 4.

55. *Id.* at 12–13, fig.6.

56. Nathan H. Miller, *Strategic Leniency and Cartel Enforcement*, 99 AM. ECON. REV. 750 (2009).

have likely increased cartel detection rates,[57] and combined with drastically increased penalties, should have had the effect of better deterring and reducing antitrust behavior. But the number of international cartels (typically the largest and most harmful to consumers) discovered per year increased from 4 to 6 per year in the early 1990s to 35 per year in the mid-2000s.[58] It is possible that enforcement agencies are simply doing a better job detecting and prosecuting cartels, but it could just as well be the case that cartels are fixing prices more frequently despite the increased penalties. Evidence on recidivism suggests the latter is more likely, and that cartels are currently being under-deterred: The top ten recidivists between 1990 and 2009 have had an average of over 15 judgments, with the worst, BASF, had 26 judgments against in in that period.[59] In the 15-year period 1990-2005, there were 86 companies with three or more judgments, and seven companies averaging one or more per year.[60]

It is possible that enforcement has been too focused on corporate fines, and larger increases in individual penalties would better deter antitrust violations.[61] And the fact that the majority of major cartels have been located outside the United States, where individual criminal penalties are strongest, suggests inconsistent criminal penalties worldwide may explain current cartel under deterrence. But several problems with criminal antitrust penalties have been identified, particularly behavioral biases that render such measures less effective than they appear in theory.

Deterrence theory assumes that businesspeople can identify antitrust behavior and recognize it is a criminal offense, and also assumes that they can accurately estimate the likelihood they will be detected and successfully prosecuted. It is not clear, however, that these are reasonable assumptions. Many cognitive biases have been shown to distort perceptions about the likelihood of detection and sanction, and these biases tend to be magnified when individuals attempt to estimate the risks they themselves face.[62] Empirical

57. Miller, *supra* note 56, at 760.

58. Connor & Helmers, *supra* note 53, at 37–38.

59. Ginsburg & Wright, *supra* note 53, at 15 fig.7.

60. Connor & Helmers, *supra* note 53, at 23 tbl.E.

61. *See generally* Ginsburg & Wright, *supra* note 53.

62. *See, e.g.,* Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioural Science Investigation,* 24 OXFORD J. LEGAL STUD. 173 (2004); John T. Scholz & Neil Pinney, *Duty, Fear, and Tax Compliance: The Heuristic Basis of Citizenship Behavior,* 39 AM. J. POL. SCI. 490 (1995).

evidence for the deterrence effect of criminal enforcement in the United States is limited.[63] And recent evidence from surveys conducted during the implementation of criminal antitrust laws in Australia calls into question several basic assumptions about deterrence.[64]

First, antitrust violations are complex, and businesspeople may not readily recognize behavior that amounts to criminal antitrust violations. Analysis of the Australian surveys revealed that a majority of those surveyed were unable to identify criminal price fixing, and even where they had accurate knowledge of the law and available penalties, one-third still judged it likely that businesspeople would engage in conduct meriting criminal penalties.[65] The United States has a long history of antitrust laws, and people may more readily recognize antitrust conduct than elsewhere. Still, recognizing behavior that violates antitrust laws is bound to be more difficult than, for example, recognizing theft or assault. This is likely to be even more so in cases involving complex arrangements like the e-books agreements, where there is arguably no literal price fixing.

Second, an individual's perception about societal support for laws tends to be strongly correlated with estimation of the chances of detection and punishment, and compliance.[66] That is, if a person thinks society condemns certain behavior and supports laws that punish such behavior, he is more likely to comply with the law, and consider the probability of detection and enforcement to be higher. Likewise if a person himself agrees with the law: in the Australian survey, this was the strongest predictor of perceived likelihood of detection and enforcement—more so than prior knowledge of cartel law and sanctions.[67]

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63. What empirical evidence there is, is weak. *See, e.g.,* Christine Parker, *Criminal Cartel Sanctions and Compliance: The Gap Between Rhetoric and Reality, in* CRIMINALISING CARTELS: CRITICAL STUDIES OF AN INTERNATIONAL REGULATORY MOVEMENT 239 (Caron Beaton-Wells & Ariel Ezrachi eds., Hart Publ'g 2011); Maurice E. Stucke, *Am I a Price Fixer? A Behavioural Economics Analysis of Cartels, in* CRIMINALISING CARTELS: CRITICAL STUDIES OF AN INTERNATIONAL REGULATORY MOVEMENT 263, 267–69 (Caron Beaton-Wells & Ariel Ezrachi eds., Hart Publ'g 2011); Jesse W. Markham Jr., *Does Criminalization of Cartels Work? A Few Lessons from the United States Experience*, 3 NEW J. EUR. CRIM. L. 115 (2012).

64. *See* Beaton-Wells & Parker, *supra* note 51.

65. *Id.* at 210.

66. *See* Harold G. Grasmick & Robert J. Bursik Jr., *Conscience, Significant Other, and Rational Choice: Extending the Deterrence Model,* 24 L. & SOC'Y REV. 837 (1990); Vibeke Lehmann Nielsen & Christine Parker, *To What Extent Do Third Parties Influence Business Compliance?,* 35 J. L. SOC'Y 309 (2008).

67. Beaton-Wells & Parker, *supra* note 50, at 209–210.

Beliefs about the inherent criminality of antitrust violations are also relevant. If "what distinguishes a criminal from a civil sanction . . . is the judgment of community condemnation which accompanies and justifies its imposition"[68] and if the public does not see certain antitrust violations as meriting criminal punishment, there will naturally be lower public support of and agreement with the law. To the extent that this is true, it will affect individual perception of the likelihood of detection and prosecution, and by extension the efficacy of criminal penalties in deterring antitrust violations.[69] In the Australian antitrust criminalization survey, the majority of respondents believed price fixing cartels should be illegal, but less than half believed they should be criminal, and less than 20% believed incarceration was appropriate punishment.[70] In the United States, the backlash to the e-books lawsuit has demonstrated there is little (or, at least, inconsistent) public support for some antitrust laws. In particular, although ruinous competition has long since been rejected as a defense to antitrust violations,[71] it seems the argument that collusion is necessary to combat monopoly is very appealing to the public.[72]

The Antitrust Division has long maintained that individual criminal penalties are more effective than corporate fines,[73] and this is among the principal reasons that the DOJ policy is to file criminal suits in cases of hardcore price fixing. While there is insufficient empirical evidence to conclude this is an effective deterrent, and there are reasons to question whether criminal penalties function as well in practice as they do in theory, it is unlikely that the choice of

68. Henry M. Hart Jr., *The Aims of the Criminal Law,* 23 LAW & CONTEMP. PROBS. 401, 404 (1958). *See also* Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 447 (1963).

69. Others have argued criminal law leads rather than follows, public opinion. *See, e.g.,* Harry V. Ball & Lawrence M. Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View,* 17 STAN. L. REV. 197, 217 (1964).

70. Beaton-Wells & Parker, *supra* note 50, at 212.

71. The Supreme Court first rejected this defense in United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897). The Court has consistently held that competition is presumptively beneficial, and that no defense may be raised on the "assumption that competition itself is unreasonable." Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 696 (1978).

72. *See, e.g.*, David Carr, *Book Publishing's Real Nemesis*, N.Y. TIMES, (Apr. 16, 2012), *available at* http://www.nytimes.com/2012/04/16/business/media/amazon-low-prices-disguise-a-high-cost.html?_r=0.

73. John M. Connor, *The United States Department of Justice Antitrust Division's Cartel Enforcement: Appraisal and Proposals*, 60, n.170 (Am. Antitrust Inst., Working Paper No. 08-02, 2008), *available at* http://ssrn.com/abstract=1130204.

civil enforcement in this case reflects a broad change in attitudes within the Antitrust Division regarding the efficacy of criminal enforcement. Longstanding policy and lack of clear indication otherwise also suggest there is no reason to think the DOJ is rethinking its general stance that criminal penalties are effective deterrents. But the various potential problems with criminal punishments, combined with the facts of this case suggest, at the very least, that a more nuanced policy regarding criminal enforcement may be preferable, and that the DOJ may adopt a less categorical approach in the future.

B. Price Fixing, Modes of Analysis, and the E-Book Conspiracy

1. The Per Se Rule and Rule of Reason Analysis

Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy in restraint of trade or commerce."[74] Despite this literal (and very broad) wording, the Supreme Court has long interpreted the provision to prohibit only unreasonable restraints.[75] The Act's purpose is to safeguard competition,[76] and in examining challenged actions, courts must "form a judgment about the competitive significance of the restraint."[77] Conduct that raises prices or reduces output restrains competition.[78] To determine whether competition is unreasonably restrained, courts apply the rule of reason and analyze the restraint's actual effects on competition in a relevant market.[79] Certain categories of restraint, however, are presumed to unreasonably restrain competition: conduct that "always or almost always tend[s] to restrict competition and decrease output" is condemned per se illegal without further analysis.[80] In such circumstances, therefore, a plaintiff need only prove that such an

74. 15 U.S.C. § 1 (2006).

75. Standard Oil Co. v. United States, 221 U.S. 1, 60–68 (1911); Northwest Wholesale Stationers v. Pacific Stationary & Printing Co., 472 U.S. 284, 289 (1985) ("[E]very commercial agreement restrains trade. Whether this action violates §1 of the Sherman Act depends on whether it is adjudged an unreasonable restraint.").

76. In the words of Justice White, the purpose of the Sherman Act is not to protect "against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself." Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993).

77. *Nat'l Soc'y of Prof'l Eng'rs,* 435 U.S. at 692.

78. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 113 (1984).

79. *Nat'l Soc'y of Prof'l Eng'rs,* 435 U.S. at 688.

80. *Leegin Creative Leather Products*, 551 U.S. at 886 (quoting Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 723 (1988)).

agreement exists. Only after extensive experience with certain business relationships will courts be satisfied this is the case and classify them as per se illegal,[81] and horizontal price fixing is among the few practices courts are comfortable condemning outright.[82]

Over time, however, the Supreme Court has taken an increasingly nuanced approach to horizontal price fixing. Because application of the per se rule is appropriate only where restraints undoubtedly will impede competition, cases in which there was not clear and unambiguous horizontal price fixing have prompted the Court to err on the side of caution and delve deeper before condemning the challenged arrangements.[83] Because in complex modern markets, arrangements that have the effect of fixing prices may not necessarily result in net anticompetitive effects, what was once a very robust rule has been pared back and now seems appropriate only where literal price fixing can be readily identified.[84] Otherwise, courts must first look at the effects and purpose behind a practice and determine whether it will "threaten the proper operation of a predominantly free-market economy."[85]

2. Recent Developments in Horizontal and Vertical Price Fixing

While the Complaint alleges per se violation, in reality the Division may question whether the sort of conduct at issue in the e-books case necessarily merits per se illegality. First, the Court's recent decision in *Leegin* removed vertical price fixing (in the form of minimum retail price maintenance) from the ambit of the per se rule. Because the challenged arrangement in this case is a series of similar vertical restraints, it too may be better suited to rule of reason analysis. The Supreme Court has also added significant wrinkles to its horizontal price fixing doctrine, and several parallels with two

81. United States v. Topco Assocs., 405 U.S. 596, 607–08 (1972).

82. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940). Per se illegality stems from the fundamental economic assumption that competitive markets will correctly price goods to achieve allocative efficiency and maximum social utility.

83. *See, e.g.*, *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. 679 (adopting rule of reason in assessing legality of horizontal restraint involving professional code of ethics); Broadcast Music, Inc. v. Columbia Broadcasting System, 441 U.S. 1 (1979) (holding rule of reason appropriate in examining commercial blanket licensing arrangement, even though a price fixing agreement was "literally" at issue); *Nat'l Collegiate Athletic Ass'n*, 468 U.S. 85 (rejecting per se analysis despite finding horizontal price and output restrictions).

84. Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 IOWA L. REV. 1207, 1226–28 (2008).

85. *Broadcast Music, Inc.,* 441 U.S. at 19.

recent cases suggest the per se rule may be inappropriate for the challenged conduct here.

Initially, the Court did not distinguish between vertical (supplier-retailer) and horizontal (supplier-supplier, retailer-retailer, etc.) price fixing arrangements: both were per se illegal.[86] A series of decisions,[87] culminating in *Leegin*, created a distinction between horizontal and vertical restraints: the former remaining subject to the per se rule, and the latter evaluated under the rule of reason.[88] Like other anticompetitive conduct evaluated under the rule of reason, vertical restraints may thus be justified by pro-competitive effects.[89]

Horizontal price fixing doctrine has likewise seen change in recent years. In the 1980s, Sony and Phillips coordinated to charge license fees for the use of the CD technology in an effort to introduce CDs as an alternative to tape media.[90] This coordinated imposition of license fees obviously resulted in a markup over competitive prices, but the Federal Circuit found it justified by the fact that the fees were necessary to recoup sunk investments in technology.[91] If such coordination was disallowed, the new technology would never have made it to market.[92]

The Supreme Court followed similar logic in *Broadcast Music, Inc. v. CBS* and declined to apply the per se rule to a system of blanket license fees negotiated by competitors, even though the coordination had the effect of fixing prices.[93] The motivation was to create a new product: a blanket license to TV stations for copyrighted musical works.[94] Because of the transaction costs involved in licensing

86. Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

87. Vertical non-price restraints were deemed subject to rule of reason analysis in Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) and State Oil Co. v. Khan, 522 U.S. 3 (1997) did the same for maximum retail price maintenance.

88. *Leegin Creative Leather Products*, 551 U.S. at 877.

89. *Id.*

90. Princo Corp. v. Int'l Trade Comm'n, 616 F.3d 1318, 1322 (Fed. Cir. 2010).

91. *Id.* at 1322–23.

92. Herbert Hovenkamp, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 251 (3d ed. 2005). *See generally* Robert S. Pindyck, *Sunk Costs and Real Options in Antitrust Analysis*, 1 ISSUES IN COMPETITION LAW AND POLICY 619 (ABA Section of Antitrust Law 2008) (concluding the danger of sinking capital into development of new technologies only to be preempted by a competitor's standard can induce firms to wait, which in the aggregate can result in market failure).

93. *Broadcast Music*, 441 U.S. at 23. The Court noted its doubt that the practice threatened the "central nervous system of the economy," and concluded the more discriminating examination of the rule of reason was appropriate. *Id.* at 24 (quoting *Socony-Vacuum*, 310 U.S. at 226 n.59).

94. *Id.* at 4.

copyrights from thousands of rights-holders, TV stations were unable to efficiently license music for broadcast. Coordination between the rights-holders in aggregating their copyrights and determining a fixed licensing fee was necessary to bring a new product to market.[95]

In *Texaco Inc. v. Dagher* the Court again narrowed the scope of the per se rule.[96] Texaco and Shell had formed a joint venture to jointly refine gasoline, and agreed upon a price at which to sell it under their respective brand names.[97] The Court, in declining to apply the per se rule, reasoned that joint ventures, which are legally single entities, must, "like any other firm, . . . have the discretion to determine the prices of the products that it sells, including the discretion to sell a product under two different brands at a single, unified price."[98] The Court quoted *Broadcast Music* for the proposition that "joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all."[99] Unlike in *Broadcast Music*, however, Texaco and Shell had not really introduced a new product. Rather, they jointly produced an existing product and sold it under their different brands.

3. The E-Books Agreement

The specifics of the e-books case, in conjunction with the Supreme Court's recent price fixing jurisprudence, provide Apple and the publishers with several strong arguments that their conduct should not be considered per se illegal.

First, the publishers may argue their conduct was necessary to prevent free riding and protect sunk investments, emphasizing the vertical restraints, not the horizontal collusion required to put them in place. Consumers can free ride by browsing Apple's bookstore (or physical bookstores, if the relevant market includes all books), which arguably provides a better experience, only to take advantage of Amazon's discounted prices. In *Leegin*, the Supreme Court held minimum retail price maintenance to be justified along these lines,[100] and there is considerable evidence that, in practice, such vertical price

95. *Broadcast Music,* 441 U.S. at 23.

96. Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006).

97. *Id.* at 3.

98. *Id.* at 7.

99. *Id.* at 8 (quoting *Broadcast Music, Inc.*, 441 U.S. at 23).

100. *Leegin Creative Leather Products*, 551 U.S. at 913–14.

fixing (and, for example, by MFN clauses) makes consumers better off.[101]

Second, the *Broadcast Music* and *Dagher* decisions strongly suggest that in cases where cooperation is either required to introduce a new product, or perhaps simply if conducted under the guise of a joint venture, resultant horizontal price fixing should be evaluated under the rule of reason. On the facts alleged in the Complaint, the case against the publishers appears strong, and the Division may have been able to bring and win a criminal per se case against them. Including Apple, however, changes the picture. Apple will certainly argue that absent insulation from price competition with Amazon, it would not have entered the market at all, and can very plausibly claim significant benefit to consumers by its entry, which resulted in greater diversity of offerings, and several beneficial innovations (color, pictures, video, etc.).[102] To a certain extent, the Apple marketplace for e-books amounts to a new product, and one which may have required coordination to bring to market. Moreover, market changes engineered by Apple and the publishers have undeniably coincided with increased, rather than depressed, output.[103] And the fact that prices and output have risen simultaneously also strengthens Apple's arguments about the pro-competitive effects of the agency model and its entrance into the e-book market. All these factors indicate a situation where, as in *Broadcast Music*, the pro-competitive benefits of some measure of collusion and horizontal restraint outweigh the anticompetitive effects.

Third, the Apple Agency Agreements may not literally restrain pricing of e-books. Because e-books are distributed by license, the publishers are free to set retail prices, regardless of which model is adopted.[104] Before Apple's entry into the market and the shift to agency distribution, the publishers had but one real option for selling e-books: Amazon. Because of this monopsony, no publisher could individually exercise its pricing power and impose minimum retail

101. Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, *in* HANDBOOK OF ANTITRUST ECONOMICS 391–414 (Paolo Buccirossi ed., MIT Press 2008) (reviewing empirical research on RPM and finding broad consensus that it most often results in consumer benefit, including higher quality products and better services.), *available at* http://www.economics.ubc. ca/files/2013/05/pdf_paper_margaret-slade-exclusivecontracts-verticalrestraints.pdf.

102. Answer, United States v. Apple, et al., 12-CV-2826, 2012 WL 1862008, at ¶ 1 (S.D.N.Y. May 22, 2012) [hereinafter Answer].

103. Answer at ¶ 93. This flies in the face of basic economic theory, which suggests a downward sloping demand curve, whereby higher prices correspond with less demand.

104. Hovenkamp, et al., *supra* note 18.

prices. Apple's entry provided the publishers' opportunity to adopt a distribution model Amazon otherwise would have blocked. They will argue that, in effect, their power to set prices is unchanged under the agency model. All that really changes is Amazon's veto on retail pricing, a power to which it is not legally entitled.

These arguments may have been sufficient to convince the DOJ that the agreements between the publishers and Apple do not quite reach the level of traditional, hardcore per se illegal horizontal price fixing. This may be why the Complaint appears to allege both per se and rule of reason cases. On the one hand, the Complaint alleges an "understanding and concert of action" among the publishers and Apple to "raise, fix, and stabilize retail e-book prices, end price competition among e-book retailers, and to limit retail price competition among" the publishers.[105] On the other, it contains lengthy exposition of anticompetitive effects—the sort of arguments necessary to bring a rule of reason case. Thus while the Complaint does allege a horizontal price fixing conspiracy, this may simply be posturing. Perhaps actions speak louder than words: after all, the DOJ filed a civil suit, not a criminal one.

4. Relevant Market

Also questionable is the proposed definition of the relevant market, which would be critical if the case were analyzed under the rule of reason. The relevant market is critical in rule of reason cases because it is key to determining defendant market power and potential anticompetitive effects of a restraint.[106] Although the Supreme Court's famous footnote 59 in *Socony-Vacuum* explained that market power is not a precondition to application of the per se rule,[107] subsequent decisions have demonstrated the Court is in fact willing to consider the participants' market positions in determining per se illegality.[108] If a court were to look at the relevant market in examining anticompetitive effects of the alleged conspiracy, the proposed definition might prove a weak point in the government's case.

The government proposes a narrow definition limited to trade e-books, excluding print.[109] It presents several strong arguments for this

105. Complaint at ¶ 95.

106. *See* United States v. E.I. Du Pont de Nemours & Co., 351 U.S. 377, 391–92 (1956).

107. *Socony-Vacuum,* 310 U.S. at 226 n.59.

108. *See* cases cited *supra* note 83.

109. Complaint at ¶ 99.

position, noting several advantages of e-books and differences between them. And it concludes e-books have no good substitutes.[110] Whether or not this is the case, elsewhere the Complaint convincingly tells the story of beleaguered publishers inspired to collusion by their concerns about the adverse impact of Amazon's e-book discounting on print books.[111] The complaint specifically alleges that the publishers were gravely concerned about the large price differential between print and electronic versions and that expectations of lower prices would spill over to print.[112] This would negate the "competitive advantages they held as a result of years of investments in their print book business."[113]

Thus despite the Division's arguments to the contrary, its own Complaint evidences the fact that many consumers do consider e-books substitutes for print books. After all, electronic and print books contain generally the same content, are written by the same authors, and are funded by the same investments of the publishers. If the competitive threat to print books was enough to motivate the publishers to engineer an elaborate scheme to change the industry distribution model, the converse is likely true as well: print books are a competitive threat to e-books. If this is so, then the relevant market may well include all books. In which case the government will face a tougher task should it be required to prove anticompetitive effects. If the government had brought a criminal case rather than civil, that task would have been tougher still.

C. Strategic Considerations

The Division is usually not fortunate enough to have a open-and-shut case, and price fixing cases are often brought based on circumstantial evidence. And there is always risk involved in bringing charges before a jury. Thus if the legal issues discussed above were insufficient on their own to have ruled out a criminal case, several strategic considerations weighing in favor of a civil action may have tipped the balance.

1. Civil Injunction

The availability of a civil injunction provides the government a powerful tool to restore the pre-Apple status quo. If the principal

110. Complaint at ¶ 99.

111. *Id.* at ¶¶ 3–4.

112. *Id.*

113. *Id.* at ¶ 34.

goal of the Division in bringing the case was to return prices to previous levels rather than punish the defendants or provide an example for deterrence purposes, then the Division may have weighed the risks of bringing the case against the sufficiency of a civil remedy and found a criminal case unattractive. Also, the DOJ's Principles of Federal Prosecution state that where a criminal prosecution would otherwise be called for, it may be unnecessary if "there exists an adequate non-criminal alternative to prosecution."[114] As of early 2013, Apple is the only remaining defendant, with the publishers all having settled with the DOJ.[115] The settlements entered between the United States and publishers mandate termination of the Agency Agreements, a return to the wholesale model, and restitution to purchasers of e-books.[116] That all the settlements contain this restitutionary remedy lends support to the view that the DOJ's overriding concern was a return to the status quo.

2. Novel Issues of Fact or Law

Antitrust Division standards for determining whether to bring criminal charges contain a discretionary exception for "truly novel issues of fact or law."[117] It is possible the Division found the particular arrangement between Apple and the publishers falls into this exception. The government has criminally prosecuted arrangements involving series of vertical restraints before, and the courts has found them per se illegal.[118] But these both involved a group of competitors at the supplier level colluding with a retailer possessing substantial market power. The publishers, by contrast, colluded with Apple, who, although a powerful company with significant power in other markets, had yet to enter the market for e-books. With that said, the Division is generally not shy about bringing criminal charges where

114. U.S. DEP'T OF JUSTICE, United States Attorneys' Manual, § 9-27.220.

115. Cyrus Farivar, *Macmillan, sole e-book publishing holdout, settles with Justice*, ARS TECHNICA (Feb. 8, 2013), http://arstechnica.com/tech-policy/2013/02/macmillan-sole-e-book-publishing-holdout-settles-with-justice/.

116. *See, e.g.,* United States v. Apple, Inc., 12 CIV. 2826 DLC, 2012 WL 3865135 (S.D.N.Y. Sept. 5, 2012) (order granting motion for entry of final judgment against three of the five publishers).

117. Antitrust Division Manual, *supra* note 39, at page III-12.

118. *See, e.g.*, Interstate Circuit v. United States, 306 U.S. 208 (1939) (finding conscious parallelism combined with several "plus factors" sufficient to infer an illegal horizontal agreement from a series of vertical distribution agreements); Toys "R" Us v. FTC, 221 F.3d 298 (7th Cir. 2000) (inferring a horizontal agreement from a series of vertical agreements).

the collusion does not correspond perfectly with previous examples.[119] In light of this, it appears unlikely this particular arrangement presents a sufficiently novel issue of law that would foreclose criminal prosecution.

Perhaps more importantly, cases for which the application of the per se rule is not entirely clear tend to be brought anyway because they involve blatant anticompetitive conduct and effects.[120] Two factors may distinguish the e-books case: the anticompetitive effects here are not entirely self-evident, and the defendants have several potential pro-competitive arguments to offer in defense of the new model. Regardless, if this was a principal reason for bringing a civil rather than criminal case, the Division would likely have made that clear. Doing so would prevent uncertainty about whether policies are in flux. In light of its silence, it is hard to imagine this exception was a key factor in deciding to forego criminal prosecution, though in conjunction with other considerations, the relative novelty of the facts may have played a part.

3. Prosecutorial Discretion

Concern about public perception of antitrust enforcement, and federal prosecution in general, may also have weighed against a criminal case. The Sherman Act's bipolarity—both criminal and civil penalties flow from the same words—vests a great deal of prosecutorial discretion with the DOJ. The choice between seeking civil or criminal redress on behalf of the public for antitrust violations is a serious responsibility and getting it wrong will have serious consequences. Inappropriately bringing criminal cases carries the risk of appearing to the public an erratic or arbitrary enforcer, perhaps motivated more by political factors, back-room dealing, or favoritism than strict adherence to application of the antitrust laws.

And yet a steady hand is needed on the wheel of antitrust, and the Division, like any other public prosecutor, should seek to apply laws consistently. Clear enforcement policies establish predictable boundaries between civil and criminal conduct. To this end the government regularly prosecutes specific categories of anticompetitive conduct criminally, and others civilly. Horizontal price fixing and market allocation nearly always give rise to criminal

119. *See, e.g.*, United States v. Brown, 925 F.2d 1182 (9th Cir. 1991) (holding intent requirement introduced in *Gypsum* typically does not extend to per se violations).

120. *See, e.g.*, *Nat'l Collegiate Athletic Ass'n,*, 468 U.S. 85 (rejecting per se analysis despite clear horizontal price and output restrictions).

charges, and others, including tie-ins, merger cases, and restrictive membership rules, result in civil cases.[121]

So there may be tension between, on the one hand, consistency in prosecuting cases, and on the other, public perception of impartial and even-handed enforcement. In this case, the Division may have concluded bringing a criminal case against defendants for violations widely perceived to be worthy of civil penalties would expose the government to criticism of abuse of its prosecutorial discretion. The attendant impact on public confidence in the government's antitrust enforcement might well defeat whatever positive impact (deterrence, retribution, or public confidence) stemmed from the criminal case.

4. Sympathetic Narratives and The Case Against Apple

Whether criminal or civil, Amazon would inevitably loom over the case. Backlash against the case indicates the public views Amazon as a monopolist, and there appears to be genuine appreciation for increased diversity of e-book offerings.[122] Regardless of their merits, the Division is undoubtedly aware of these feelings. And the government is equally aware that at trial the defendants would paint themselves as struggling to cast off the traditions of print, the dominant paradigm for centuries and embrace the nascent world of e-books, a transition made all the more difficult by Amazon's machinations.

A criminal case against Apple would also be more difficult to win.[123] Not only is the legal case against Apple weaker, Apple would have a compelling narrative to tell a jury. The government would have to overcome a perception of an Amazon-monopolized industry to which Apple, a hugely popular company, widely esteemed for its innovation and forward-looking nature, attempted to introduce a bit of its magic. And despite the added difficulty of doing so, the government was probably unwilling to bring the case without naming Apple, the hub of the conspiracy.

D. Putting It All Together: An Explanation for an Odd Lawsuit

1. Some Horizontal Price Fixing is Not Per Se Illegal

It is possible the Division believes the sort of conduct engaged in by the defendants should not be considered illegal per se. They may

121. Barnett, *supra* note 41.

122. *See* Carr, *supra* note 72.

123. For several reasons discussed herein, including Apple's history using the agency model and its position at the retail rather than supplier level, and general Apple-philia.

have read the tea leaves in Broadcast Music and Dagher, which suggested evolving attitudes toward horizontal restraints. The nature of competition in high-tech industries may also demand a more nuanced view of collusion. If so, the DOJ may treat differently collusive conduct that falls short of naked horizontal price fixing motivated solely by a desire to extract consumer surplus. The DOJ may be headed toward a policy where some horizontal price fixing is not illegal per se, and does not call for criminal prosecution. The allegation of a per se violation in the Complaint contradicts this view, but the Division may simply be hedging its bets, or this may reflect an unwillingness to surrender that bargaining chip so early in the game. It does seem unlikely, however, that the DOJ would unilaterally determine certain conduct should no longer be considered per se illegal, and unlikelier still that they would make prosecution decisions on the basis of such a determination. Antitrust laws may well end up with a more nuanced approach to horizontal restraints, much like vertical restraints, but the DOJ will probably wait for the Supreme Court to make that decision first.

2. Not All Horizontal Price Fixing is Equal (or Treated Equally)

On the other hand, if we take the complaint at its word, that the DOJ considers the collusion between Apple and the publishers illegal per se, it is possible the DOJ is in the midst of a major change in policy.

One possibility is that the DOJ may be changing its policy about criminal prosecution of horizontal price fixing cases. It may believe certain per se price fixing violations do not merit criminal consequences—a "softcore" category of per se illegal price fixing. Another is that the e-books case may be an example of an intermediate category of cases the Division believes are provable by a preponderance of the evidence but not beyond a reasonable doubt. It is possible the government is simply not willing to give up so easily in cases where they encounter burden of proof problems. Both of these possibilities, however, amount to sweeping policy changes. Either changing the scope of criminal conduct under the Act, or adopting Division prosecution policy that is inconsistent with general DOJ policy, especially without formal notice, seems shortsighted. Transparency in enforcement is one of the Division's top priorities,

and this sort of shift would very likely merit announcement to the public.[124]

3. Simply an Outlier?

Finally, the decision could simply be an outlier. It is conceivable that the decision was made based on political, rather than doctrinal, reasons. Because this would seemingly be a major violation of the government's prosecutorial discretion, this seems exceedingly unlikely. It is more probable the DOJ judged the benefits of a nonadherence in this case to outweigh the costs of departing from strict adherence. If this is so, there are several prudential reasons that likely would have weighed in favor of a one-time exception.

First, the DOJ has an interest in maintaining public confidence in antitrust enforcement. On the one hand, possible adverse consequences might include weaker antitrust deterrence (or not, depending on the deterrence efficacy of criminal sanctions) and increased uncertainty about the scope of criminal conduct under the Sherman Act. Such uncertainty can result in deadweight losses as companies make decisions based on incomplete information about the legality of their actions. And such costs are likely to be exaggerated in fast moving, high-tech sectors like e-books. On the other, given public perception of Apple and the publishers as battling the monopolistic Amazon, a departure from form might be the better choice—especially so if sufficient civil remedies were available, as seems to be the case.

Second, the decision may reflect prudential considerations about the dangers of over enforcement and over deterrence in high-tech industries. These risks are greatest in high tech sectors, like e-books, where market forces are least predictable to enforcement agencies, and high rates of innovation lead to rapid changes in market structure. The costs of misidentifying anticompetitive conduct are potentially very great: many high-tech innovators face multidimensional competition, and high-tech markets are more likely winner-take-all. Thus there is good reason to proceed cautiously in the area, and combined with the various strategic and legal considerations that weighed against criminal enforcement, it seems most likely the DOJ made an individualized decision to bring a unique enforcement action.[125]

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124. *See, e.g.*, J. Gregory Sidak & David J. Teece, *Dynamic Competition in Antitrust Law,* 5 J. COMPETITION L. & ECON. 581 (2009); Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust,* 6 J. COMPETITION L. & ECON. 153 (2010).

125. Spratling, *supra* note 41.

IV. Conclusion

Unless the DOJ decides to publicly reveal the details of its decision making process, it will never be completely clear what exactly motivated the DOJ to bring a civil case against Apple and the publishers. Concerns about public perception of antitrust enforcement, concerns about over deterrence and chilling effects in high-tech industries, the deterrence efficacy of criminal sanctions, and the availability of civil injunctions seem the likeliest explanations. But it remains to be seen whether the decision will prove a one-time exception (and possibly go unexplained), or a harbinger of long-term changes in antitrust policy.

Regardless of whether the case proves to be an outlier and what the specific reasons were for choosing to bring a civil case, the Division needs to maintain transparency about its antitrust enforcement policies—especially those concerning the choice of whether to pursue civil or criminal sanctions. Not only is transparency in decision-making key to maintaining public trust in law enforcement, it is also central to antitrust deterrence: generally, in providing clear guidelines about what conduct is legal and what is proscribed; and more specifically in encouraging cooperation from antitrust offenders. Transparency leads to predictability, and the Division's leniency program depends on transparency in prosecution standards. If prospective cooperating parties cannot predict the likelihood of prosecution, or cannot be certain of their treatment following cooperation, they will not come forward.

Finally, there are good reasons to speculate the decision to bring a civil case against Apple and the publishers was motivated by positive changes in how the DOJ views the high-tech industry, as well as the need for a more flexible approach toward complicated arrangements in emerging markets. It would be a good thing if this case reflected a general shift in that direction. And simply explaining why exactly it was that no criminal case was brought against Apple and the publishers would be a step in that direction.

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Three-Parent IVF and Its Effect on Parental Rights

by PADMINI CHERUVU*

I. Introduction

Three-parent in vitro fertilization ("IVF") is a controversial procedure that offers the possibility of preventing the inheritance of genetically caused mitochondrial disease, sparing future generations from a range of incapacitating conditions.[1] Due to the use of a controversial form of cloning technology, the procedure is currently

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1. Nick Collins, '*Three-parent Baby' Fertility Technique Could be Made Legal,* THE TELEGRAPH (Sep. 17, 2012), http://www.telegraph.co.uk/science/science-news/9546214/Three-parent-baby-fertility-technique-be-made-legal.html.

banned in both the United Kingdom and the United States.[2] British law bans the use of manipulated embryos for reproductive purposes, while United States law has banned gene transfer procedures since 2001 and will continue to ban them until they are proven safe.[3] However, due to the many benefits[4] of the procedure, which could potentially outweigh any ethical concerns,[5] three-parent IVF may become legal in the United Kingdom as early as this year.[6] If the procedure is legalized in the United Kingdom, it might launch a public debate about whether it should be legalized in the United States.

If the procedure was to be made legal in the United States, it is unclear how the states would legally view the donor parent.[7] Part I of this note will review the general history of IVF, and its evolution into an accepted practice. It will specifically focus on the history of surrogacy and state laws regarding the rights afforded to surrogate parents. The rights that donor parents in three-parent IVF procedures receive will most likely parallel the rights afforded to surrogate parents. Part II of this note will explain mitochondrial disease, IVF and three-parent IVF in more detail. Part III will delve into the legal treatment of surrogates by analyzing three cases illustrating the types of surrogates and their treatment under the law. Part IV will look at how states differ in their legal treatment of surrogacy, and the impact three-parent IVF may have on state and federal law, especially in regard to lesbian co-parents and United States citizenship. Part V will propose ways to change existing law or incorporate three-parent IVF into the existing law using current surrogacy law as a model.

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2. Jody Lyneé Madeira, *Conceivable Changes: Effectuating Infertile Couples' Emotional Ties to Frozen Embryos Through New Disposition Options*, 79 UMKC L. Rev. 315, 316–317 (2010).

3. *Id.* at 315.

4. "[T]he obvious good is in permanently removing a genetic mutation that will alleviate the suffering of future generations." Stephanie Pederson, *The Cost-Benefit Equation of Three-Parent IVF,* THE INTERNATIONAL (Sept. 23, 2012), http://www.theinternational.org/articles/253-the-cost-benefit-equation-of-three-parent.

5. There are also unknown risks regarding how this will affect future generations. The ethical concern is the slippery slope argument: "[t]here are concerns that if three-parent IVF treatment is legalized, it will pave the way for other more extreme germline therapies and manipulations, namely the creation [of] designer babies." *Id.*

6. Collins, *supra* note 1.

7. State laws regarding surrogacy differ and what courts may choose to do or should do will be a complicated issue to address. *See infra* Part III.

II. Background

The human body contains tissues and organs, all of which are composed of many cells. Each cell, with the exception of red blood cells, contains a cell nucleus, which in turn contains one full copy of a person's nuclear DNA.[8] The nuclear DNA from both parents is genetically inherited by that couple's children.[9] Nuclear DNA is also the type of DNA most people think of when they hear the term "DNA." Each cell also contains many mitochondria, which are inherited solely from the mother and contain their own DNA—mitochondrial DNA.[10] Mitochondria have many functions, but are primarily known for generating our cells' chemical energy, which is required to keep human bodies functioning properly.[11]

Malfunctioning mitochondrial DNA results approximately one in 6,500 children being born with serious diseases, including "fatal heart problems, liver failure, brain disorders, blindness and muscular weakness."[12] Mitochondrial diseases result in these physical deficiencies because mitochondria are involved in many of the important internal functions of the body, such as generating most of our cells' chemical energy, signaling between cells leading to cellular differentiation or cell death, and controlling the cell cycle and cell growth.[13] Without sufficient chemical energy and proper signaling, a human body is not able to function properly, leading to debilitating conditions.[14]

A. Three-Parent IVF

In order to combat mitochondrial diseases, British scientists have mastered a controversial technique. Using cloning technology the researchers have discovered a way to prevent the inheritability of

8. *See* Wikipedia, *Nuclear DNA*, http://en.wikipedia.org/wiki/Nuclear_DNA (describing nuclear deoxyribonucleic acid (DNA) inherited from two parents, rather than matrilineally as with mitochondrial DNA) (last visited Oct. 30, 2013).

9. *Id.*

10. *See* Wikipedia, *Mitochondrion*, http://en.wikipedia.org/wiki/Mitochondrion (defining mitochondrial DNA) (last visited Oct. 30, 2013).

11. *Id.*

12. Ben Hirschler, *DNA Egg Swap Prevents Rare Diseases in Babies*, Reuters (Apr. 14, 2010), http://www.reuters.com/article/2010/04/14/us-dna-disease-idUSTRE63 D3O B20100414.

13. *See* Wikipedia, *supra* note 10.

14. For a list of conditions *see Possible Symptoms*, UNITED MITOCHONDRIAL DISEASE FOUNDATION, http://www.umdf.org/site/pp.aspx?c=8qKOJ0MvF7LUG&b= 7934631 (last visited Mar. 13, 2013).

these diseases.[15] Since mitochondria, and its individual mitochondrial DNA, follow a pattern of maternal inheritance, they are inherited only from mothers.[16] Scientists utilized this pattern of inheritance when developing the technique to prevent mitochondrial diseases.[17] By swapping DNA between two fertilized eggs, the researchers created a new embryo containing the core nuclear DNA from the mother and father and the healthy mitochondrial DNA from a female egg donor.[18] The implication of this procedure, once it is in effect, is that mitochondrial disease could be completely eradicated for future generations.[19] The controversy that arises out of this procedure is that thirty-seven genes, out of more than twenty thousand genes, are found in the mitochondria.[20] Therefore, the baby inherits about 0.2% of its genetic information from the donor parent, resulting in the baby having three genetic parents.[21]

There are currently two variations of the technique being debated: the spindle transfer method and the pronuclear transfer method.[22] The spindle transfer method involves placing nuclear material from the mother's egg into a donor egg "shell," which contains healthy mitochondria but no nuclear DNA.[23] In this method the egg is fertilized with the father's sperm in vitro, but not until after the transfer occurs.[24] Since an unfertilized egg is more susceptible to damage, researchers believe that the more complex pronuclear transfer method, which involves two in vitro fertilizations, will be the preferred, future technique.[25] The alternative to spindle transfer is pronuclear transfer. Under this method, genetic material in an embryo created from donor sperm and egg is removed and replaced with the genetic material from a second egg created with the parental sperm and egg, a process called enucleation.[26]

15. Hirschler, *supra* note 12.

16. *Id.*

17. *Id.*

18. *Id.*

19. Pederson, *supra* note 4.

20. Hirchler, *supra* note 12.

21. *Id.*

22. Michael Hanlon, *Three-parent IVF is a chance to create a generation free from mitochondrial diseases*, THE TELEGRAPH (Sept. 17, 2012),http://www.telegraph.co.uk/science/9548387/Three-parent-IVF-is-a-chance-to-create-a-generation-free-from-mitochondrial-diseases.html.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

B. IVF

To understand the current turmoil caused by three-parent IVF procedures, a look back at the history of IVF procedures is necessary. In vitro fertilization, a currently well-accepted and commonly used medical technique, was created in order to treat infertility issues.[27] The procedure involves transferring a fertilized egg, cultured in a laboratory dish, into a woman's uterus.[28]

Since the purpose of IVF procedures is to treat infertility, there are many forms of IVF.[29] The most traditional infertility case is when something is preventing the sperm and the egg from fusing, so the IVF procedure is used to overcome that hurdle by uniting the father's sperm and the mother's egg outside the body.[30] A more controversial form of IVF involves the use of a donor egg, donor sperm, or both, to produce an embryo, which is then transferred into the infertile woman's uterus.[31]

This note will focus on the most controversial form of IVF, involving a third party such as a surrogate who is either implanted with an embryo created from the infertile couple's egg and sperm, or who is also the egg donor in addition to the surrogate.[32] Because IVF participants may combine genetic material in nontraditional ways to produce a baby, an IVF-produced child could potentially have up to five parents: the intended mother and father, the biological mother and father, and the gestational mother or surrogate.[33] Since the first successful use of IVF leading to a live birth in 1978, the traditional IVF procedure has evolved from being controversial to generally undisputed.[34]

III. Surrogacy

The emergence of IVF resulted in increased demand for surrogates. There are two types of surrogates: the more common

27. Keith Alan Byers, J.D., LL.M., *Infertility and in Vitro Fertilization A Growing Need for Consumer-Oriented regulation of the in Vitro Fertilization Industry*, 18 J. LEGAL MED. 265, 265 (1997).

28. *Id.* at 274.

29. *Id.* at 274–75.

30. *Id.* at 274.

31. *Id.* at 275.

32. *Id.*

33. *Id.* at 276.

34. *Id.* at 276, 285.

gestational surrogate and a traditional surrogate.[35] A gestational surrogate is a woman who carries a child that is not genetically related to her in any way, while a traditional surrogate acts as both the surrogate and the egg donor.[36] A small number of states have begun regulating gestational surrogacy, which makes up ninety-five percent of surrogate cases.[37] A major topic of regulation is how the parenthood for the resulting child should be determined.

Due to differing state laws, regulation becomes a complex issue. Should the gestational mother, the intended parents, or the genetic parents be the legal parents of the child? Some states have recognized the intended parents, the parents who intended to create the child, as the legal parents, but have limited that recognition to situations where the intended parents are also the genetic parents. Some have gone even further, and limited that recognition to situations where the intended parents are married or are a man and woman, however regulation is still complex.[38]

A. Traditional Surrogacy

Matter of Baby M was the first traditional surrogacy case to capture the public's attention.[39] Mary Beth Whitehead had agreed to carry a child for William Stern, whose wife was infertile.[40] As the only child of Holocaust survivors, Stern wanted genetic offspring.[41] The two entered into a contract with the terms that Whitehead would bear the child and relinquish all her rights, and Stern would pay her $10,000 upon delivery of the child to him after its birth.[42] After giving birth, Whitehead realized she could not give up her baby and eventually asked to keep her for a week.[43] She failed to return the baby back to the Sterns until the baby was forcibly removed from her care.[44]

35. *Types of Surrogacy*, SURROGATE 411, http://www.surrogate411.com/id1.html (last visited Feb. 7, 2013).

36. *Id.*

37. June Carbone, *Negating the Genetic Tie: Does the Law Encourage Unnecessary Risks?,* 79 UMKC L. REV. 333, 355 (2010).

38. *Id.*

39. Matter of Baby M, 109 N.J. 396, 417 (1988); Carbone, *supra* note 37, at 335.

40. Matter of Baby M, *supra* note 39, at 412–13.

41. *Id.*

42. *Id.* at 412.

43. *Id.* at 414–15.

44. *Id.*

The New Jersey Supreme Court ruled that the surrogacy contract was void due to conflict with public policy and state adoption laws.[45] Under New Jersey law, Whitehead was the genetic and biological mother, therefore she was the legal parent of the child.[46] According to the court, "[o]nly adoption, not contract, could sever the parental tie."[47] Therefore, any surrogacy contract agreement that included Whitehead's termination of parental rights was void under New Jersey law.[48] Whitehead remained the legal parent of the child unless she wished to relinquish her rights to the father, via adoption.[49] The court issued its ruling in order to discourage further surrogacy agreements at a time when surrogacy was thought of as "the creation of a child for sale."[50] Most states have also addressed this issue, but *Matter of Baby M* remains good law in New Jersey.[51]

B. Gestational Surrogacy

Surrogacy became more accepted once science allowed for the separation of genetics and gestation through gestational surrogacy; however, the issue of who constitutes the legal parents became more complicated.[52] The case of *Johnson v. Calvert* involved a surrogacy contract between Mark and Crispina Calvert, and Anna Johnson.[53] The terms of the contract were similar to the terms of the contract in *Matter of Baby M*, except Calvert, not Johnson, would be providing the egg, so therefore Calvert, the intended mother, was the genetic mother of the baby.[54] During the pregnancy, the relationship between the parties soured and Johnson asserted that she was the child's mother.[55]

To make its ruling, the California Supreme Court looked towards the Uniform Parentage Act, under which maternity can be determined in multiple ways.[56] The court held that like proof of having given birth, presentation of blood test evidence sufficed to

45. Matter of Baby M, *supra* note 39, at 421–22.
46. Carbone, *supra* note 37, at 335–36.
47. *Id.* at 335.
48. *Id.* at 336.
49. *Id.*
50. *Id.* at 335–36.
51. *Id.* at 336.
52. *Id.*
53. Johnson v. Calvert, 5 Cal. 4th 84, 87 (1993).
54. *Id.*
55. *Id.* at 87–88.
56. *Id.* at 90; CAL. FAM. CODE § 7610 (West 1994).

establish maternity.[57] Under the Act, both women had proof of maternity: Calvert through genetics, and Johnson through pregnancy and birth.[58] Since both women constituted the legal mother under the Act, the court looked at the parties' intent as a tiebreaker to determine maternity.[59] The intent behind the surrogacy agreement was for Johnson to help the Calverts have a child, not for the Calverts to donate a zygote to Johnson:

> [A]lthough the Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship . . . she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law.[60]

Therefore, under California law, Calvert was the natural mother, not Johnson.[61] At a time when gestational surrogacy was quickly replacing traditional surrogacy, *Johnson* had a deep impact on surrogacy as a practice.[62]

C. Complicated Forms of Surrogacy

Further complicating the legal parentage issue in surrogacy cases were instances where neither of the intended parents nor the gestational surrogate was a genetic parent of the child, such as *In re Marriage of Buzzanca*.[63] The case involved a couple, Luanne and John Buzzanca, who procured both a sperm and egg donor, in order to create an embryo to implant in a gestational surrogate.[64] After implantation, but prior to the child's birth, the Buzzancas separated and John disclaimed any responsibility of the child.[65] The issue before the trial court was who had legal parentage of the child.[66] The court allowed a stipulation stating that the gestational surrogate was not the

57. *Johnson*, 5 Cal. 4th at 90.
58. *Id.* at 92.
59. *Id.* at 92–93.
60. *Id.* at 93.
61. *Id.*
62. Carbone, *supra* note 37 at 337.
63. In re Marriage of Buzzanca, 61 Cal. App. 4th 1410 (1998).
64. *Id.* at 1412.
65. *Id.*
66. *Id.*

mother.[67] They then ruled that Luanne was not the mother because she had neither contributed genetically by providing the egg nor given birth.[68] John was not the father because he had not contributed the sperm, and therefore had no genetic ties to the child.[69] The court also noted that neither the egg nor the sperm donors were legal parents under the law because they consented to procreate a child for someone else who intended to raise the child.[70] By the trial court's ruling, it looked as if the child had no legal parents.[71]

The California Court of Appeal disagreed with the trial court's view that Uniform Parentage Act sets out only three ways in which a woman can establish legal maternity—giving birth, contributing genetically through her egg, or legally adopting.[72] The appellate court pointed to the statute, which states that "[t]he parent and child relationship *may* be established as follows: (a) [b]etween a child and the natural mother, it may be established by proof of her having given birth to the child, or under this part."[73] The statute does not say "shall" be established, showing that there may be other, unlisted methods of establishing parentage. Also, the statute does not directly refer to genetics as being one of the factors for establishing maternity, but rather the court in *Johnson* construed it to include genetic testing.[74]

The trial court failed to look at how paternity can be determined by multiple non-biological ties.[75] Under the Act, paternity can be determined if a man and "the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated . . . ."[76] Paternity can also be determined in many other ways, including if a man consents to being named the father on the birth certificate or he willingly opens his home to the child and proceeds as if the child is naturally his.[77] When a woman conceives a child through artificial insemination with semen donated by a man other than her husband, the husband is

67. *Buzzanca*, 61 Cal. App. 4th at 1412.
68. *Id.*
69. *Id.*
70. *Id.* at 1418.
71. *Id.* at 1412.
72. *Id.* at 1412, 1415.
73. FAM. § 7610 (emphasis added).
74. *Buzzanca,* 61 Cal. App. 4th at 1415.
75. *Id.* 1416–17.
76. CAL. FAM. CODE § 7611 (West 2005).
77. *Id.*

treated as the child's natural father so long as he consented to the conception.[78] The Court of Appeal ruled that this law was also applicable to IVF using a donor egg and sperm; therefore, John Buzzanca was determined by the court to be the legal father of the child.[79]

Turning to determination of legal maternity, the court noted that this can be determined in multiple ways.[80] First, under the facts in *Buzzanca*, Luanne can be viewed as similar to a husband in an artificial insemination case, and therefore permitted to voluntarily consent to being the mother of a child not biologically related to her.[81] Luanne consented to being the mother of the child, but even if she had not, the court found that maternity can be determined by intent according to *Johnson*.[82] In *Buzzanca*, the child would never have been born if the Buzzancas had not initiated and agreed to the procedure.[83] Luanne intended to be the mother of the child, and John intended to be the father of the child.[84] Therefore, the court ruled that the Buzzancas were the legal parents of the child.[85]

Viewing the case's history, there are multiple ways for a court to determine legal parentage. First, legal parentage can be determined by genetics or pregnancy and birth. Second, if the two parties are at odds, intent can be determinative of legal parentage. Third, in cases where multiple parties are involved due to IVF and donors, consent and intent seem to be the determinative factors.

IV. Current Law

A. State Regulation of Surrogacy

The United States differs from the United Kingdom in the legal rights afforded to surrogate mothers.[86] While the U.K. has a uniform national position that recognizes the surrogate mother as the legal

78. CAL. FAM. CODE § 7613 (West 2012).

79. *Buzzanca*, 61 Cal. App. 4th at 1421.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 1412.

85. *Id.* at 1428.

86. *See* Radhika Rao*, Surrogacy Law in the United States: The Outcome of Ambivalence,* in SURROGATE MOTHERHOOD: INTERNATIONAL PERSPECTIVES 23, 23 (Rachel Cook & Shelley Day Sclater eds., Hart Publ'g 2003).

mother of the child, the U.S. has no uniform policy and the law varies from state to state:[87]

> [T]he law of surrogate motherhood in the United States is in a state of flux and confusion. States have widely differing laws, some enforcing surrogacy contracts, some banning them entirely, and some allowing them under certain circumstances. Many states have no laws regarding surrogacy contracts at all. No single statutory regime has won widespread acceptance. As a result, courts are often left to decide parenthood disputes arising from these contracts, and have a range of theories by which to do so.[88]

State laws fall into four general categories: (1) prohibition; (2) inaction; (3) status regulation; and (4) contractual ordering.[89] States seeking to prohibit surrogacy do so either by banning it or imposing civil or criminal penalties on those who create or help create surrogacy contracts.[90] Examples of states that prohibit surrogacy are Michigan[91] and Arizona.[92] States that would be included under the inaction category seek to maintain the status quo by refusing to enforce surrogacy contracts and refusing to specify rules governing surrogacy.[93] States that follow this approach do not ban surrogacy contracts but allow courts to nullify them as against public policy.[94] States that follow status regulation allow citizens to enter into surrogacy contracts, but include certain mandatory terms and specific status relationships in those contracts.[95] An example might be

87. *See* Rao, *supra* note 86.

88. Carla Spivack, *The Law of Surrogate Motherhood in the United States*, 58 AM. J. COMP. L. 97, 114 (2010).

89. Rao, *supra* note 86.

90. *Id.*

91. *See* MICH. COMP. LAWS ANN. § 722.855 (West 2012) ("A surrogate parentage contract is void and unenforceable as contrary to public policy."); *see also* MICH. COMP. LAWS ANN. § 722.859(1) (West 2012) ("A person shall not enter into, induce, arrange, procure, or otherwise assist in the formation of a surrogate parentage contract for compensation."). Michigan also makes it a felony to enter into such an agreement and a violator can be punished by a fine of up to $50,000 and up to five years in prison. MICH. COMP. LAWS ANN. § 722.859(2)-(3) (West 2012).

92. *See* ARIZ. REV. STAT. ANN. § 25-218 (1989) ("A surrogate is the legal mother of a child born as the result of a surrogate parental contract and is entitled to the custody of that child.") Although this statute has been ruled unconstitutional, it has never been repealed. Spivack, *supra* note 88, at 101.

93. Rao, *supra* note 86.

94. Spivack, *supra* note 88, at 101.

95. *Id.*

mandatory terms allowing for compensation of legal and medical fees but not service fees.[96] States that enforce whatever agreement the parties negotiate fall under the contractual ordering category.[97]

With differing state laws it is often unclear whether a surrogacy contract will be enforced. Courts have followed several different theories in determining whether to enforce a surrogacy contract.[98] The three-parent IVF procedure creates three genetic parents, further complicating the issue of genetic parentage and the state laws that purport to define it.

B. Impact of the Three-Parent IVF on State Law

1. Lesbian Co-Parents

Three-parent IVF creates the novel concept of two genetic mothers, requiring the courts to determine which mother has legal rights to the child. The procedure raises a lot of questions such as, what if both genetic mothers want to be considered as the legal mother under the law? If the two women agree upon that, will the state comply with their wishes?

Lesbian co-parents who participate in the "planned conception, birth, and/or rearing of [their] partner's biological child" would like to be recognized as the legal mother alongside their partner's biological or adopted child.[99] Due to differing state law regarding both surrogacy and the parental rights of lesbian co-parents, these women will be highly affected by the possible legalization of three-parent IVF in the United States.

Some states, such as California, Illinois and Maryland, among others, are thought to be surrogacy friendly states.[100] California, in particular, has no statute addressing the issue but would likely uphold

96. Spivack, *supra* note 88, at 101. ("Six states refuse to enforce surrogacy contracts when the surrogate is compensated for her services. Five states have explicitly made only uncompensated surrogacy contracts legal.").

97. *Id.*

98. *Id. See also supra* Part III.

99. Joanna L. Grossman, *Do Lesbian Co-Parents Have Rights?,* VERDICT (Aug. 23, 2011), http://verdict.justia.com/2011/08/23/do-lesbian-co-parents-have-rights.

100. *See California Surrogacy Law,* HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/laws-and-legislation/entry/california-surrogacy-law (last updated Sept. 19, 2009); *see also* H. Joseph Gitlin, *Illinois Becomes Surrogacy Friendly,* AMERICAN ACADEMY OF MATRIMONIAL LAWYERS, http://www.aaml.org/sites/default/files/Illinois%20Becomes%20Surrogacy%20Friendly.pdf (last visited Mar. 13, 2013); *see also* Hilary Neiman, *Maryland: A Friendly State for Surrogacy,* INTERNATIONAL COUNCIL ON INFERTILITY INFORMATION DISSEMINATION, http://www.inciid.org/printpage.php?cat=thirdparty&id=782 (last visited Mar. 13, 2013).

agreements that include lesbian, gay, bisexual and transgender ("LGBT") individuals.[101]

In 2005, the California Supreme Court decided cases regarding lesbian couples who had reproduced via surrogacy.[102] The court, interpreting the Uniform Parentage Act, ruled that two women can be the legal parents of a child produced via surrogacy.[103] The court's reasoning recalls the reasoning used to determine paternity in *Buzzanca*.[104] The Uniform Parentage Act provides for determination of paternity in several ways, including genetic testing, consent by being named on the birth certificate, and treatment of the child as one's own.[105] The court again pointed to the Act's recognition of paternity in cases of artificial insemination with prior consent.[106] According to the court, this same reasoning should apply to all who intend to create a child and act in as a family, and that "a person who uses reproductive technology is accountable as a de facto legal parent for the support of that child" because "[l]egal parentage is not determined exclusively by biology."[107] The holding in these cases most likely applies to all members of the LGBT community.[108]

Currently, some states refuse to recognize that a lesbian co-parent has parental rights.[109] Under Ohio law, for example, a nonparent, same-sex partner does not qualify as a "parent" under state statute, and as a result the state does not recognize statutory shared parenting arrangements between a parent and his or her nonparent, same-sex partner.[110] However, a parent can voluntary

101. *California Surrogacy Law, supra* note 100.

102. *Id. See also* Eliza B. v. Superior Court, 37 Cal. 4th 108 (2005); K.M. v. E.G., 37 Cal. 4th 130 (2005).

103. *California Surrogacy Law, supra* note 100; *see also* Eliza B., 37 Cal. 4th at 113; K.M., 37 Cal. 4th at 134.

104. *Buzzanca*, 61 Cal. App. 4th at 1420–21.

105. FAM. § 7611.

106. FAM. § 7613 ("[W]ith the consent of her husband, [if] a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived.")

107. *Eliza B.,* 37 Cal. 4th at 115.

108. *California Surrogacy Law, supra* note 100.

109. Ohio is one example. *In re Mullen,* 129 Ohio St. 3d 417, 420 (2011) ("Ohio does not recognize a parent's attempt to enter into a statutory 'shared parenting' arrangement with a non-parent, same-sex partner"). *See generally Same Sex Adoption Laws by State: Welcome to the Jungle,* IT'S CONCEIVABLE (Aug. 17, 2011), http://itsconceivablenow.com/2011/08/17/sex-adoption-laws-state-jungle-it's-fun-games/.

110. *Mullen*, 129 Ohio St. 3d at 420.

share the care, custody and control of his or her child with a non-parent through a shared-custody agreement.[111]

In the case of *In re Mullen* (*Mullen*), the two women in a couple never expressly created a formal shared custody agreement, so when parentage was disputed the court looked at whether their actions implied that formal agreement was created.[112] Even though the co-parent, Hobbs, planned for the pregnancy with the birth mother, Mullen, was present at the child's birth, appeared on the birth certificate, cared for the child jointly with Mullen, acted like a family, was named as the child's guardian, and was given power of attorney to make decisions for the child, the court ruled that Mullen's conduct did not create an implied shared-custody agreement.[113] Mullen had never agreed to permanently give over partial legal custody of the child and therefore, all of the custodial responsibilities that Mullen gave to Hobbs were revocable.[114] The ruling by the court has the long term effect of leaving many parent-child relationships in doubt and potentially unprotected.

If three-parent IVF became legal in the United States, cases such as *Mullen* could be decided very differently. This is due to the fact that some of the states that do not recognize the rights of lesbian co-parents determine parentage by genetics.[115] Under three-parent IVF, both women in the lesbian couple could have genetic ties to the child, giving them legal rights to the child under the theory of parentage by genetics.[116] Three-parent IVF would make it difficult for such states to deny two women legal parentage of a child to whom they both have genetic connections.[117]

Custody and parentage determinations are not the only complicated legal areas impacted by IVF techniques. Due to the genetic tie that children will have to the donor parent, three-parent IVF could have an impact on how United States citizenship is determined and who constitutes a citizen.

2. United States Citizenship

The Fourteenth Amendment to the Constitution provides that "[a]ll persons born or naturalized in the United States . . . are citizens

111. *Mullen*, 129 Ohio St. 3d at 420.
112. *Id.* at 422.
113. *Id.*
114. *Id.*
115. *See supra* Part III.
116. *Id.*
117. Carbone, *supra* note 37, at 342.

of the United States and the State wherein they reside."[118] A child born in the U.S. or ones of its territories acquires birthright citizenship. Children born abroad to a U.S. citizen can also be deemed a citizen of the U.S. if the following conditions are met: the child's parents were married at the time of the birth, one of the parents was a U.S. citizen when the child was born, the citizen parent lived in the U.S. for at least five years before the child's birth, and at least two of those five years were after the citizen parent's fourteenth birthday.[119]

The rules differ for babies born through IVF. Even if the mother, father or both are United States citizens, but both the egg and sperm donors are not, then the child is not considered a United States citizen—what matters is "the biological material, not the actual parent."[120] As a result, if it can be proven that the donor egg or sperm used by non-American citizens to conceive a child came from an American citizen, the resulting child would presumably be eligible for American citizenship.[121]

Three-parent IVF could have an impact on the regulation of United States citizenship. Although mitochondrial DNA accounts for only a fraction of our total DNA, it still creates a genetic tie to the woman who passes along those genes. If a woman with U.S. citizenship donates her mitochondrial DNA to a couple from a different country, the child has a genetic tie to a U.S. citizen. The law does not specify the amount of shared genes the child needs to have in order to be deemed genetically related to a U.S. citizen; therefore three-parent IVF has the potential of creating children who would otherwise not have U.S. citizenship.

V. Proposals for Incorporating Three-Parent IVF into Law

If three-parent IVF becomes legal in the United States, it is unclear what parental rights would be afforded to the donor parent.[122] Due to differing state laws, there seems to be only two options on how to deal with this issue—create a uniform national policy or

118. U.S. CONST. amend. XIV.

119. Immigration and Nationality Act § 301(g), 8 U.S.C.A. § 1401 (West 2012).

120. *See* Allison Kaplan Sommer, *IVF Babies Denied U.S. Citizenship,* THE JEWISH DAILY FORWARD (Mar. 21, 2012, 4:30 PM), http://blogs.forward.com/sisterhood-blog/153409/ivf-babies-denied-us-citizenship/.

121. *Id.*

122. *See supra* Part IV.

continue to allow states to create their own individual laws, whether it is by keeping their current law or updating it based on advances in medical technology.

Other countries, such as the United Kingdom[123] and France,[124] have a uniform national policy regarding surrogates and their parental rights.[125] In the U.K. the surrogate mother retains all the legal rights to the child, even if she is not genetically related to it, unless there is a parental or adoption order.[126] France, on the other hand, makes all surrogacy agreements illegal.[127] Although the U.S. could create a national uniform policy regarding surrogacy agreements, it would be hard to do so. Unlike the U.K. and France, the U.S. is composed of many states, all of which have certain rights under the United States Constitution to govern activities within the state.[128] Creating a uniform policy throughout the U.S. would be the equivalent of creating a uniform policy throughout the European Union, which currently is not the case.[129]

The alternative method would be to avoid infringing on states' rights by allowing each state to incorporate three-parent IVF into their existing law. Depending on how states deal with parental rights of surrogates, either by establishing parentage through genetics, birth or consent, the same method can be followed for three-parent IVF. In the case of lesbian co-parents, this would mean that if the co-parent is genetically related to the child, then she also has parental rights. Therefore, states that refuse to recognize the rights of lesbian co-parents would either be forced to allow them parental rights, or change their state law to ban such agreements.

In regard to United States citizenship, Congress has the power to establish a uniform rule of naturalization, which it has through the

123. The Human Fertilisation and Embryology Act, 1990, c. 37, § 27 (Eng.).

124. *See* CODE CIVIL [C. CIV.] art. 16-7 (Fr.).

125. *See* Rao, *supra* note 86.

126. *Id. See also* The Human Fertilisation and Embryology Act, 1990, c. 37, § 27 (Eng.) ("(1) The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child. (2) Subsection (1) above does not apply to any child to the extent that the child is treated by virtue of adoption as not being the [woman's] child . . . .").

127. C. CIV. art. 16-7 (Fr.) ("All agreements relating to procreation or gestation on account of a third party are void.").

128. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

129. *See* C. CIV. art. 16-7 (Fr.); *see also* The Human Fertilisation and Embryology Act, 1990, c. 37, § 27 (Eng.).

Immigration and Nationality Act.[130] The way the law stands right now, any child born outside the U.S. to a U.S. citizen donor parent is a U.S. citizen, regardless of the fact that the child will only receive less than one percent of his or her DNA from the citizen donor parent. Since the Constitution reserves the right to establish a uniform rule of naturalization to Congress, an act of Congress through an amendment to the current law is the only way to change the current law to reflect the medical advancement of three-parent IVF in regard to citizenship determination.

In sum, the potential chaos that the legalization of three-parent IVF could cause can be alleviated by the creation of a uniform national policy on parental rights, or by federal and state governments incorporating the medical advance in their existing law.

130. U.S. CONST. art. I, § 8, cl. 4.