

Amazon and the New World of Publishing

Comments on CHRIS SAGERS, *APPLE, ANTITRUST, AND IRONY*
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INTRODUCTION

Chris Sagers’s new book, *Apple, Antitrust, and Irony*, focusing on the eBooks price-fixing conspiracy that led the Department of Justice (“DOJ”) to sue Apple in 2012, tackles an interesting conundrum. On one hand, the government’s case against Apple was strong and clear. Supported by undisputable written evidence, the government claimed and eventually proved that Apple initiated and coordinated a plan that required all major book publishers to license their eBooks to Amazon

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for a higher price. Price fixing among competitors, i.e., the publishers, is *per se* illegal.¹

On the other hand, many commentators, mostly non-lawyers, did not condemn Apple. On the contrary, many perceived Apple as a force for good, while Amazon, the main target of the conspiracy and the company that encouraged the Department of Justice to investigate and sue, was seen as the real source of danger. For these commentators, this is a story in which the villain—with the assistance of the federal government no less—beats the hero. It is a story of injustice with possibly dire consequences.

To explore this dichotomy, Sagers takes his readers on a fascinating journey through the history of the book industry; the emergence, expansion, and contraction of antitrust law and with it the public perception of the merits and perils of competition; the transformations in economic thinking about these issues; and the attempts to create an eBook market. Collectively, those often-parallel stories lead the readers to the Apple conspiracy. This essay cannot do justice to the in-depth, complex, and captivating narrative strands that Sagers weaves together to take us there. Indeed, by the time the readers get to the conspiracy itself, Sagers's rich analysis makes it look like an almost unavoidable result of the longstanding tensions in the relevant industries and in the law.

But Sagers's story is not only, or even mainly, just a story of the Apple conspiracy, the eBooks industry, or books in general. Sagers's main purpose is probably to examine antitrust law and competition policy and to use the Apple conspiracy case to make broader points. Indeed, Sagers's descriptions show that what we now perceive as antitrust violations, and what we do not, are rooted in choices the law made and preferences it respects. Indeed, the lines between what is permitted and what is not are the subject of political, economic, and legal fights that have been going on for decades. Sagers's analysis then goes a step further: It is not only antitrust law that we are fighting about, but the core values that the antitrust system tries to preserve—first and foremost competition—are not in themselves self-evident. The Apple conspiracy litigation and the discourse it entails, Sagers claims, were, in some sense, a trial on the value of competition.

I already conceded that I would not be able to fully address all the questions and nuances in Sagers's rich account. Instead, in this short essay, I want to make several comments about the Apple conspiracy

¹ *Texaco Inc. v. Dagher*, 547 U.S. 1, 2 (2006).

and especially about its aftermath. Focusing on the aftermath means focusing on the main player that was left on the field when the dust settled: Amazon.

Part I discusses Amazon's position in the market and how it affected the reaction to the Apple conspiracy. Amazon's dominance in the market not only motivated those who criticized the DOJ's case against Apple, but, I argue, should trouble everyone. Shielding Amazon's market dominance from legal scrutiny is problematic. Part II explains that as Amazon takes a more dominant role in this market it pushes the publishers out of it. The demise of the major publishers by itself is not necessarily bad. They might just provide a set of services that were much more valuable in the past than they are today. I place the conflict between Amazon and the major publishers in context, as one between vested short-term interests and socially desirable long-term reforms, and argue that public choice theory expects overreliance on short-term vested interests. In addition, Amazon's tech savviness plays into a common, related, and mostly misguided narrative, as to the risk that technology poses to Americans. That partly explains why the decision to sue Apple and the publishers was so controversial.² What might be unique in the Apple story is the defeat of the short-term interests. In other fields, this result, unfortunately, is much less attainable.

Finally, Part III focuses on the relationship between Amazon's market power and the authors of the books it is selling by making a rather radical claim: as Amazon gains more and more power in this market it does not just deflate the publishers' and the authors' compensation, but it also puts itself in a position of determining the overall reward for their creativity, while balancing various conflicting interests. As such, Amazon's policies are replacing much of copyright law itself as the source of creativity's incentives structure. This raises complex issues that this essay only briefly touches upon. For now, it is enough to say that while those changes might be desirable in the short run, their long term effects remain to be seen.

² In other words, in Part I, I will argue that the DOJ might be criticized because of the long-term dominance of Amazon. But, Part II shows that part of the motivation of those who criticized the DOJ had little to do with those legitimate long-term concerns.

PART I. AMAZON THE MONOPOLY: DOES AMAZON DEMOLISH EXISTING
MARKETS?

Apple, Antitrust, and Irony focuses on the book industry, the major book publishers, and, maybe to a lesser degree, Apple. However, the public reaction to the Apple conspiracy might have been primarily motivated by the identity of the victim of the Apple conspiracy: Amazon. Amazon was probably the main target and the driving force of those who criticized the DOJ for suing Apple and the major publishers.³ Amazon, both then and now, is perceived as a monopoly.⁴ For that reason, I believe that, to a large degree, the reaction to the Apple conspiracy was not an attack on competition itself (although in the next Part I will partly relax that statement), but an attack on monopolies and the risk they pose to competition.

Charles Schumer, the Senate minority leader, criticized the DOJ lawsuit by stressing Amazon's monopoly power: "The suit will restore Amazon to the dominant position atop the e-books market it occupied for years before competition arrived in the form of Apple. If that happens, consumers will be forced to accept whatever prices Amazon sets."⁵ Eleven months later, during the trial, L. Gordon Crovitz of the *Wall Street Journal* wrote: "This case against Apple has been a strange one from the start. Amazon had 90% of the e-book market until Apple launched the iPad. Amazon is now down to 60% market share. Isn't antitrust law supposed to encourage competition?"⁶ A month later,

³ When I refer to those DOJ critics I'm addressing a heterogeneous group of commentators. Most of those commentators perceived Amazon as the villain in the story and Apple and the publishers as the heroes. Many of those have criticized the Department of Justice for suing Apple and/or for not suing Amazon, although some of them might have expressed similar concerns about Amazon without directly criticizing the DOJ.

⁴ Antitrust law defines what companies enjoy monopoly power. U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT 20 (2008), <https://www.justice.gov/sites/default/files/atr/legacy/2009/05/11/236681.pdf> [<https://perma.cc/CRD5-KBZE>]. Most would agree that Amazon meets this definition in the eBooks market, as the parties in the Apple litigation did. *See United States v. Apple, Inc.*, 889 F. Supp. 2d 623, 639 (S.D.N.Y. 2012). For my purposes it is not crucial whether or not Amazon meets all those requirements, but it is significant that it has enough market power to set prices with relatively little market pressure.

⁵ Charles E. Schumer, *Memo to DOJ: Drop the Apple E-Books Suit*, WALL ST. J., July 18, 2012, at A15.

⁶ L. Gordon Crovitz, *Information Age: Apple's 30% E-Book Commission Is 100% Legal*, WALL ST. J., June 10, 2013, at A11.

when the district court ruled for the government, a New York Times editorial also criticized the lawsuit: “The big picture is that while Apple's pact with the publishers raised prices in the short term, it also brought much-needed competition to the e-book marketplace ... That is healthier for the publishers and for consumers, too.”⁷

Sagers is, of course, aware of those claims. In fact, he cites those sources. Later, in chapter 13, he addresses the argument in depth by explaining that Amazon's actions probably did not violate antitrust law and therefore the government could not have successfully sued Amazon. From a narrow perspective, this analysis makes perfect sense. The toolbox that current antitrust plaintiffs have at their disposal to curtail existing monopoly power is quite limited. The law does not prohibit the creation of monopolies, their existence,⁸ or most of their pricing decisions. Illegal monopolization is limited to just certain actions,⁹ with the case law focusing on refusal to deal, which is irrelevant in Amazon's case.¹⁰ The only potentially illegal activity Amazon was engaged in was predatory pricing. However, Sagers explains, the case law sets a high threshold for proving this violation¹¹—and for good reasons.¹² That threshold could rarely be met nowadays, and it was unattainable in the eBooks case.

While this explanation properly addresses the current state of the law and clarifies why the DOJ did not sue Amazon, it likely does not fully tackle the concerns that the DOJ's critics raised. The implicit issues that many of them had were not limited just to the application of current law but to what the law should and should not do: should the law allow a giant such as Amazon to have such a dramatically significant market share? The answer is not obviously negative, not in general and not in the context of Amazon.

⁷ Editorial, *The E-Book Price-Fixing Conspiracy*, N.Y. TIMES, July 13, 2013, at A18.

⁸ See, e.g., *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

⁹ *Id.* (noting that the illegality is “the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”).

¹⁰ CHRIS SAGERS, *APPLE, ANTITRUST, AND IRONY* (forthcoming 2018).

¹¹ *Id.* See also *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-24 (1993) (setting forth the requirements for showing predatory pricing).

¹² SAGERS, *supra* note 10 (explaining the difficulty in identifying predatory pricing and the concern that it would chill socially desirable competitive pricing).

Our legal system chose to have limited restrictions on monopoly power. We could have had broader restrictions. For example, as Sagers mentioned, Congress considered but did not pass various legislative initiatives that tried to address market concentration concerns more aggressively, such as a “no-fault monopolization” statute.¹³ In some specific industries, public utilities and other natural monopolies being the most obvious examples, various laws regulate the activities of monopolists, including their pricing decisions.¹⁴ The fact that Amazon is not subject to such laws (as well as many other companies, such as Walmart or Google in their respective markets) is the result of collective decisions. This is not the place to argue whether this is the right choice, which is a complex question.¹⁵ But the sense that concentrated market power is a cause of concern that the law should deal with is a reasonable one.

Zooming in on Amazon: even if the DOJ were unlikely to prove a predatory pricing claim against Amazon under existing law, should Amazon and its pricing decisions be a cause for concern? Sagers provides some counter-arguments:¹⁶ Amazon’s prices for eBooks were not predatory, in the sense that they were roughly equal to its marginal costs and not below them. Moreover, Amazon did not raise prices even as its market share expanded and even when the conspiracy against it collapsed. Nor did Amazon try to use its market dominance to take other socially harmful actions, such as viewpoint censorship.

Those are all valid arguments, but I’m not convinced that they make Amazon’s market power untroubling. Amazon is playing a long-term game and therefore judging its actions in the short run might not tell the full story. Take, for example, Amazon’s retail pricing decision. It is unclear why they are so low. Unlike Schumer, the publishers, and many authors, my concern with those low prices has little to do with the harm they cause to the existing publishing industry, which is the

¹³ SAGERS, *supra* note 10; William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105, 1126-27 (1989). *But see* Barak Orbach & Grace Campbell Rebling, *The Antitrust Curse of Bigness*, 85 S. CAL. L. REV. 605, 632 (2012).

¹⁴ Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479, 484 (1998).

¹⁵ *Compare*, for example, Kovacic, *supra* note 13, *with* Orbach & Rebling, *supra* note 13.

¹⁶ SAGERS, *supra* note 10.

focus of the discussion in Part II below. Instead, the issue is that those low prices need to be explained. Amazon has enough market power to raise retail prices well beyond its marginal costs, but it refrains from doing so. As I, like most (including Sagers, if I had to guess), believe that benevolent monopolies are very rare, if they exist at all, I wonder what is Amazon's long-term plan. For example, do those low prices cross-subsidize other Amazon products?¹⁷ Or maybe a price increase is on the horizon once Amazon's market share increases even more?¹⁸ Without that information, it is hard to know how much of a threat Amazon might become.¹⁹

Moreover, in other contexts, Amazon might have engaged in a predatory pricing scheme—one that sets prices very low to drive competitors out of the market only to gain market power and raise prices. For example, it was reported that Amazon might have lost up to \$100 million in an aggressive predatory pricing scheme fight with a much smaller company, Quidsi, which then operated Diapers.com.²⁰

¹⁷ The various Kindle readers do not seem like reasonable candidates for cross-subsidy because Kindle eBooks can be viewed on practically all platforms.

¹⁸ *Cf.* United States v. Apple, Inc., 889 F. Supp. 2d 623, 641 (S.D.N.Y. 2012) (“DOJ describes as ‘speculative’ the fear that Amazon might use its monopoly power to raise prices in the future.”).

¹⁹ Monopoly power is of course much less troubling without barriers to entry. *See, e.g.*, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 591 n.15 (1986) (“[W]ithout barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time.”). However, it seems that some barriers exist in this market, which would allow Amazon to maintain its market position in the long run and raise prices. Those barriers include the licensing schemes that Amazon set up with so many publishers, the technology that goes into the creation and distribution of books and eBooks, Amazon's brand name, Amazon's economy of scale, especially when it comes to physical products (i.e., books), Amazon's rating system, and more. Granted, none of those factors, individually, seems to pose a truly significant barrier to entry, but together they probably do. This partly explains why, despite the publishers' efforts to introduce another eBook distributor, which included creating their own eBook store, *see SAGERS, supra* note 10, Amazon controls more than 80% of the eBook market. *See Big, Bad, Wide & International Report*, AUTHOR EARNINGS (Feb. 2017), <http://authorearnings.com/report/february-2017> [<https://perma.cc/7L7B-H9G6>].

²⁰ Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 768-70 (2017); Will Oremus, *The Time Jeff Bezos Went Thermonuclear on Diapers.com*, SLATE (Oct. 10, 2013), http://www.slate.com/blogs/future_tense/2013/10/10/amazon_book_how_jeff_bezos_went_thermonuclear_on_diapers_com.html [<https://perma.cc/DN4A-E852>]; Nick Saint, *Amazon Nukes Diapers.com In Price War*, BUSINESS INSIDER (Nov. 5, 2010, 9:31AM), <http://www.businessinsider.com/amazon-diapers-price-war-2010-11> [<http://perma.cc/4CED-RVPK>].

The pricing scheme and the threat to lower prices even further eventually forced Quidsi's executives to agree to sell their company to Amazon. Amazon then raised prices.²¹ Amazon used a similar strategy to purchase other small companies.²² The major publishers are probably stronger than Quidsi and the other victims of this strategy—the 2014 dispute between Amazon and Hachette, which ended in a compromise that allowed Hachette to set its own prices seems to show it²³—but, especially in the long-run, they are not immune from it.

The argument is rather intuitive: market concentration is worrisome in itself, and in the era of mass concentration in so many markets, typically (unlike the Amazon case) driven by large-scale mergers, the public pays attention to them.²⁴ Most of those concerns are in the long-term.²⁵ In the short run, Amazon seems like a wonderful company that gained most of its reputation by being innovative, sophisticated, and responsive to market demand. Its market power is an award for its brilliance. But in the long-run, it can be dangerous.

²¹ Khan, *supra* note 20, at 770.

²² Carl T. Bogus, *The New Road to Serfdom: The Curse of Bigness and the Failure of Antitrust*, 49 U. MICH. J.L. REFORM 1, 25 (2015).

²³ During 2014, Amazon and Hachette, one of the six major publishers at the time, were engaged in a public dispute, focusing on the same issue that the Apple conspiracy revolved around: who gets to set the retail prices of eBooks. During that dispute, Amazon used various tactics to discourage sales of Hachette books, which shows how powerful the company is. On the other hand, when the dispute settled, in November 2014, Hachette won, at least in the short-run, as Amazon allowed it to set the retail prices of its eBooks. Many commentators, however, believe that this settlement will not prevent future disputes and that Amazon will likely be even more powerful when they arise. David Streitfeld, *Amazon and Hachette Resolve Dispute*, N.Y. TIMES (Nov. 13, 2014), <https://www.nytimes.com/2014/11/14/technology/amazon-hachette-ebook-dispute.html>.

²⁴ See, e.g., John Oliver, *Corporate Consolidation: Last Week Tonight with John Oliver*, YOUTUBE (Sep. 24, 2017), <https://www.youtube.com/watch?v=oowQYmfvhn4> [<http://perma.cc/2R6M-M3PC>].

²⁵ It is hard to rule out that there is a short-term harm as well. Some of the harm that monopolies inflict is not easily known or noticeable in real time. For example, monopolies might suppress innovations, as AT&T Bell Laboratories did, in a way that was difficult to observe. Bill Frezza, *Ma Bell Suppressed Innovation for Thirty Grueling Years*, FOUND. ECON. EDUC. (July 21, 2016), <https://fee.org/articles/ma-bell-suppressed-innovation-for-thirty-grueling-years> [<https://perma.cc/6JR4-Q2TQ>]. Intuitively, I doubt that Amazon is already engaged in such a scheme although one must admit that it probably can easily do it without the public's knowledge.

This probably explains why Amazon is both popular among consumers²⁶ but at the same time feared and vilified.²⁷

Sagers raised another important point: even if Amazon's market power is concerning, should that allow the publishers to engage in horizontal price fixing? Cartels of that kind are illegal and they inflict harm on consumers, and so why shouldn't the DOJ sue them? That is a valid and difficult question.

There is, however, a counter-argument: Even if we take the current state of antitrust law as a given, the DOJ can still exercise prosecutorial discretion and avoid suing Apple and the publishers. The DOJ, one can argue, must consider the decrease in Amazon's market power that the cartel caused²⁸ and compare that problematic situation to the one in which Amazon controls the market. It's a choice between two bad options: a long-term oligopoly held together by a horizontal price fixing cartel or a monopoly. In making that choice, the DOJ should probably place relatively little weight on the current pricing decisions of Amazon, because, once the benevolent monopolist hypothesis is rejected, it should consider the possibility of different prices in the future.

This counter-argument has its weaknesses and I'm not sure I'm convinced by it. Indeed, it is hard to allow the real immediate harm to consumers to continue uninterrupted just to preserve speculative long-term benefits. In addition, it is unclear that the DOJ should even use prosecutorial discretion—a controversial topic in other contexts that is well beyond the scope of this essay²⁹—so broadly to allow a

²⁶ See, e.g., Nick Statt, *Amazon Is the Ruthless Corporate Juggernaut People Love*, THE VERGE (Oct. 27, 2017, 8:47AM), <https://www.theverge.com/2017/10/27/16552614/amazon-popularity-user-survey-prime-echo-trust> [<https://perma.cc/T39V-RM5J>].

²⁷ See, e.g., Matt Weinberger, *Amazon keeps reminding us that it's the most dangerous company in tech*, BUSINESS INSIDER (Feb. 25, 2017, 8:30AM), <http://www.businessinsider.com/amazon-versus-everybody-2017-2> [<http://perma.cc/76ZH-D63W>]; Matt Stoller, *America's Amazon Problem*, HUFFINGTON POST (June 16, 2017, 6:19PM), https://www.huffingtonpost.com/entry/americas-amazon-problem_us_59443b5be4b06bb7d2731cba [<https://perma.cc/P4BU-TU4H>].

²⁸ *United States v. Apple, Inc.*, 889 F. Supp. 2d 623, 640 (S.D.N.Y. 2012) (“[I]t is undisputed that Amazon's market share in e-books decreased from 90 to 60 percent in the two years following the introduction of agency pricing.”).

²⁹ Prosecutorial discretion is a hotly debated topic in areas such as criminal procedures and immigration. See, e.g., *Texas v. United States*, 809 F.3d 134, 167 (5th Cir. 2015); *The Dep't of Homeland Sec.'s Auth. to Prioritize Removal of Certain Aliens Unlawfully Present in the U.S. and to Defer Removal of Others*, 38 Op. O.L.C. 1 (2014),

clear violation of federal law to proceed.³⁰ Nevertheless, the intuition of the DOJ critics is clear. Indeed, there is some irony and unease when an antitrust case cements a company's extreme monopoly power.

PART II. AMAZON THE PUBLISHER: DOES AMAZON DEMOLISH THE PUBLISHING BUSINESS?

Sagers suggests that the debate about the Apple conspiracy is, at least to a degree, a debate about the value of competition. I mostly agree. I think it is, to a degree, a debate about the *dynamic value* of competition, and as such, it is a well-known phenomenon that I would like to place in context.

Standard economic theory explains that competition has both static and dynamic benefits. From a static perspective, the competitive pressure reduces prices and thus increases quantities, and with it the total social surplus. I think it is more difficult to convince large segments of the public that this effect of competition is undesirable, although, as we shall see in Part III below, some authors have made that claim.

The dynamic effects of competition are both distinguishable and more controversial. In the long run, by driving prices close to their marginal costs competition causes inefficient businesses to lose money and to eventually disappear. Economists consider this change efficient as it allows cheaper production and distribution, encourages creativity, and increases overall total surplus in the long run.

But for many, the long-run is heavily discounted. As John Keynes famously said (in a different context): "In the long run, we are all dead."³¹ In the short run, this switch from an existing market structure to a new one is not instantaneous and it causes tremendous agony

<https://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> [<https://perma.cc/NVJ3-V5SL>]; Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1754 (1992).

³⁰ It is also unclear that the DOJ even had the power to let Apple and the publishers get away with their conspiracy. States were also suing Apple and the publishers and private entities, including Amazon, could also step in if the DOJ refused to act.

³¹ Simon Taylor, *The True Meaning of "In the long run we are all dead"*, SIMON TAYLOR'S BLOG (May 5, 2013) <https://www.simontaylorblog.com/2013/05/05/the-true-meaning-of-in-the-long-run-we-are-all-dead> [<https://perma.cc/4Q5H-XG5C>].

during the transition. This pain is typically concentrated in a small and identified group, while the benefits are typically diffused over a larger group that, in many cases, includes unidentified and even unknown individuals. Standard public choice theory suggests that a small, wealthy, homogenous, and well-identified group will typically be able to exercise more political pressure than a group, even larger, that is more heterogenic and not well defined.³² Thus, the long-term changes that competition brings can often produce significant political pushback from entrenched interest groups.

The book industry nicely demonstrates this broader point.³³ In the last decades, the land is shaking under the book publishers' feet, a phenomenon that Sagers explores throughout his book. I believe that at its core the publisher problem is existential: many of the services they provide are becoming less and less valuable in the 21st century. In the past, the publishers served as important gatekeepers, especially with respect to bottlenecks in the distribution chains.³⁴ When books

³² See, e.g., William N. Eskridge, Jr., & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 738–39 (1991) (“interest groups are much more likely to organize and be politically salient if they are small, wealthy, and homogeneous”), and the reference there.

³³ In fact, even when it comes to the book industry, these arguments are not new. Jewish law, for example, has been struggling with similar questions for about 500 years. For example, in 1550, Rabbi Moses Isserles addressed a dispute between two Italian publishers: The first, Giustiniani, was the leading publisher of Jewish books at the time with significant market power. The second, Bragadini, wanted to enter the market by republishing a classic Jewish book, *Mishneh Torah*, with modern editing and commentary. Giustiniani threatened to undercut whatever price Bragadini set and thus deny it entry into the market. Bragadini's Jewish editor, Meir Katzenellenbogen, then approached Isserles and asked him to grant Bragadini ten-year exclusivity over the publishing of *Mishneh Torah*, which would mean boycotting Giustiniani's version. In a decision that became one of the cornerstones of Jewish copyright law, Isserles granted this request. His detailed reasoning surprisingly tracked many arguments that are relevant nowadays to Amazon and its dispute with the major publishers, including the need to allow entry to a concentrated market, even if that entry is fostered by short-term price increase, the best way to incentivize publication, the need to limit predatory pricing, and a concern over censorship. See NEIL NETANEL, *FROM MAIMONIDES TO MICROSOFT: THE JEWISH LAW OF COPYRIGHT SINCE THE BIRTH OF PRINT* 71-114 (2016).

³⁴ See RICHARD E. CAVES, *CREATIVE INDUSTRIES: CONTRACTS BETWEEN ART AND COMMERCE* (2000); Joel Waldfoegel & Imke Reimers, *Storming the Gatekeepers: Digital Disintermediation in the Market for Books*, 31 INFO. ECON. & POL'Y 47, 48-49 (2015); Sam Henrie, *A New Era in Book Publishing*, WHEATMARK (Feb. 14, 2008), <https://www.wheatmark.com/a-new-era-in-book-publishing/> [<https://perma.cc/FM8R-8B4S>]; Alex Pham, *Book publishers see their role as gatekeepers shrink*, BALT. SUN (Dec. 26, 2010), <http://www.baltimoresun.com/la-fi-gatekeepers-20101226-story.html> [<http://perma.cc/MKS7-R8TE>].

were primarily sold in stores, where space was limited both in the front (i.e., display area) and in the back (i.e., storage), ex-ante identification of worthy titles was crucial, and the publishers provided such filtering services. They initially did it in their own stores³⁵ but, later, they did it for and together with stores owned by others.³⁶ The process did not just require the publishers to identify the worthy titles but also to establish and manage the relationship with those companies that controlled the distribution channels.

As the value of the display space diminished the value of the publishers as gatekeepers diminished as well. In an era of large online stores, the amount of space is exploding, which makes the value of that space smaller. In its prime, a large Borders store could have stored up to 140,000 different book titles, which is a small fraction of the number of books available.³⁷ Amazon, for comparison, has over 3.7 million available eBooks on sale at any given time.³⁸ Print on demand, an idea that Amazon has been toying with for a few years, might eliminate any remaining value of storage space. eBooks similarly eliminate the value of physical storage space altogether.

As Sagers explains, the value of the publishers as gatekeepers is further diminished as online platforms develop their own systems of ratings, which seem to match the consumer preferences at least as well as the publishers do.³⁹ Publishers also serve important financial needs of the author by paying them advances, which both reduce their risk and provide them with quicker compensation. The value of those services, while still valid, is also reduced with the significant reduction in the fixed costs of producing a digital book.⁴⁰ The value of the

³⁵ SAGERS, *supra* note 10.

³⁶ More specifically, publishers typically paid bookstores for the right to prominently display their titles in the limited display space. Randy Kennedy, *Cash Up Front*, N.Y. TIMES (June 5, 2005) <http://www.nytimes.com/2005/06/05/books/review/cash-up-front.html>. This practice still exists in the digital age as Amazon also charges publishers for promoting their books.

³⁷ Waldfoegel & Reimers, *supra* note 34, at 49.

³⁸ Piotr Kowalczyk, *Kindle Unlimited ebook subscription – 12 things to know*, EBOOK FRIENDLY (Dec. 18, 2017), <https://ebookfriendly.com/kindle-unlimited-ebook-subscription/> [<https://perma.cc/HJ6V-DHR7>].

³⁹ SAGERS, *supra* note 10; Waldfoegel & Reimers, *supra* note 34, at 49-50.

⁴⁰ Waldfoegel & Reimers, *supra* note 34, at 49.

remaining services that the publishers provide, such as editing or paging, is probably smaller. And modern technology is expected to diminish the value of those remaining services as well.⁴¹ It is therefore not surprising that a self-publishing model, which bypasses the publishers altogether, has been developed and has become more and more popular in the last few years.⁴²

From this perspective, the tension between the publishers and Amazon is almost unavoidable and it does not necessarily depend on Amazon's market power. Even if instead of one gigantic Amazon the market had several smaller technologically-sophisticated companies, the publishers would disapprove of the changes that those companies would have brought with them. In many respects, a publisher and an Amazon-like distributor are two types of intermediaries in a market that might need only one.⁴³

When presented in this way, the publishers' position is all too familiar. It is not that different from that of lamplighters, taxicab drivers, telephone operators, and in the creative industries, photographers, newspaper distributors, or video rental store owners. It is understandable why the public is conflicted about those changes. The harm to those losing their jobs—from gas station attendants, to travel agents, to coal miners—is very real and very salient. The

⁴¹ See, e.g., Darren Allan, *IBM's Watson tries its hand at editing a magazine*, TECHRADAR (June 21, 2016), <http://www.techradar.com/news/world-of-tech/ibm-s-watson-tries-its-hand-at-editing-a-magazine-1323716> [<http://perma.cc/HJ9E-G7B3>] (discussing a magazine that was edited by IBM's Watson); *Is The Period Dead? One BuzzFeed Editor On How The Internet Has Changed Language*, WBUR (Nov. 29, 2017, 2:22PM), <http://www.wbur.org/hereandnow/2017/11/29/emmy-favilla-world-without-whom> [<https://perma.cc/ZQ7H-LTU2>] (suggesting that the value of grammar rules is diminishing nowadays); Adrian Shaughnessy, *Will designers be replaced by robots?*, CREATIVEBLOQ (Mar. 23, 2017), <http://www.creativebloq.com/features/will-designers-be-replaced-by-robots> [<http://perma.cc/A59Y-M8AU>] (discussing whether technology might replace graphic designers). A full analysis of the possibilities and limitations of technology in performing those tasks is well beyond the scope of this essay.

⁴² Waldfoegel & Reimers, *supra* note 34, at 55.

⁴³ The process in which a new model replaces an old established one typically takes time and copyright law allows the publishers to slow it down even further. Publishers can rely both on their older copyrighted works and on authors they built relationships with in the old world to keep a dominant position even if a newer model is superior. For several reasons the publishers' ability to slow down this trend is probably more limited with respect to eBooks: The publishers bring limited experience to this market and even more limited technology; it's a market that requires less gatekeeping; and, last but not least, many publishers did not secure their rights to the eBook format of older works. See *Random House, Inc. v. Rosetta Books, LLC*, 283 F.3d 490, 491-92 (2d Cir. 2002).

benefits from these processes, while real, are not as observable. When it comes to the publishing industry, the harm is especially salient because some of the beneficiaries of the current order are well-known. Indeed, as will further be explored below, many famous authors participated in this public discourse and commented on the harm that the new order is causing them.⁴⁴ When it comes to the book industry, the beneficiaries of this process include many less successful authors, who are now allowed access to a broader market that the digital revolution opens up as well as consumers who are charged lower prices.⁴⁵

This tension between short-term identified harm and long-term and possibly diffused benefits is not limited to competition policy. It is not unusual for the public to give too little weight to long-term considerations and to intuitively oppose changes that would yield results mainly down the line.⁴⁶ Examples abound: one of the main tensions within copyright policy is between current and future authors. Expanding copyright protection serves the interest of current authors, as it provides them with more control and higher revenues from their works. Limiting copyright, on the other hand, serves the interests of future creators as it bolsters the public domain and provides the authors of tomorrow with a more robust library of old works to rely upon.

Historically, the story of copyright law is one of expanding rights, from 14-28 years during the 18th century to about 100 years today. From a right that was limited to books, charts, and maps then, to close to any fixed creative work now. From a right that was focused on restrictions on reproduction and distribution, to one that now encompasses public performance and adaptation rights. Most of these expansions were the result of legislative amendments to the Copyright Act, for which vested stakeholders—authors guilds, publishers, libraries, and production companies, to name just a few—heavily

⁴⁴ David Streitfeld, *Plot Thickens as 900 Writers Battle Amazon*, N.Y. TIMES (Aug. 7, 2014), <https://www.nytimes.com/2014/08/08/business/media/plot-thickens-as-900-writers-battle-amazon.html> [http://perma.cc/3KJ-8CA5].

⁴⁵ Waldfoegel & Reimers documented a significant reduction in sales concentration in the book industry since 2010, as well as significant increase in the popularity of eBooks and a decrease in their prices. Waldfoegel & Reimers, *supra* note 34, at 52-55.

⁴⁶ This phenomenon is well documented in various areas of social science, including, for example, the calculation of present value of future income in economics and the status quo bias in psychology.

lobbied.⁴⁷ Here too, as was the case during the disputes between Amazon and the major publishers, famous, popular, and well-established authors—such as Mark Twain, Sonny Bono, and Bob Dylan⁴⁸—actively participated in and lobbied for copyright expansion. Future creators, and especially future industries, were, for the most part, not represented in those discussions.⁴⁹

This public choice problem can lead to much worse results: Consider, for example, global warming. From an abstract perspective, the debate about global warming follows the same pattern. In the long run, it is clear to most that humanity is likely heading to an unprecedented catastrophe. But addressing it will be agonizing and costly in the short run. Moreover, many of the measurements designed to combat climate change and reduce CO₂ emission target specific identified industries, such as those that rely on coal and other dirty energy (from coal miners to utility companies). Those industries, and the people whose livelihood depends on them, are naturally fighting back.⁵⁰ And so far, for the most part, they are winning and humanity does not seem to be willing to bear the short-term costs of addressing the forthcoming long-term calamity.

⁴⁷ Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 862 (1987) (defining the process leading to the enactment of the Copyright Act of 1976 as an “anomalous legislative process designed to force special interest groups to negotiate with one another.”).

⁴⁸ Mark Twain testified before Congress, asking to extend the term of copyright, possibly in perpetuity, as well as to grant additional set of rights. See Samuel L. Clemens, *Copyright in Perpetuity*, 6 GREEN BAG 2D 109, 110 (2002); see also Guy A. Rub, *Stronger Than Kryptonite? Inalienable Profit-Sharing Schemes in Copyright Law*, 27 HARV. J.L. & TECH. 49, 80 (2013). Many famous artists were involved in convincing Congress to extend the term of copyright in the 1990s. See *Eldred v. Ashcroft*, 537 U.S. 186, 207 n.15, 223 (2003) (referring to the statement of Bob Dylan, as well as Quincy Jones, Don Henley, and Carlos Santana urging Congress to pass the Copyright Term Extension Act. The Act was named after Sonny Bono, who was one of its main co-sponsors).

⁴⁹ See JESSICA D. LITMAN, DIGITAL COPYRIGHT 47 (2001) (“[T]he interests that had not yet come into being when the negotiations took place were the quintessential excluded parties. They posed a potential competitive threat to all current stakeholders yet they couldn’t lobby against legislation ... they were the parties most likely to find that the negotiated compromises operated to their disadvantage.”). Another group that was, at least until recently, not properly represented in copyright revision discussions included users and consumers of creative work. *Id.* at 51-52. A full analysis of users’ rights and their involvement in the legislative process is beyond the scope of this essay.

⁵⁰ See Uma Outka, *Environmental Law and Fossil Fuels: Barriers to Renewable Energy*, 65 VAND. L. REV. 1679, 1684-85 (2012), and the references there.

Zooming out even further, this issue is only one aspect of the gap between the way experts, and in particular economists, and laypeople perceive policy questions. As part of that gap, laypersons are much more pessimistic about the future and are significantly more concerned about the effect of technology. One comprehensive 1996 survey found that 46% of laymen but only 2% of economists believe that one of the major reasons that the economy was not doing better was that “technology is displacing workers.” 74% of economists, but only 15% of the general public, saw it as a non-issue.⁵¹ The economist Bryan Caplan analyzed the survey by pointing to the “sense [among economists] that the popularity of mistaken economic beliefs leads democracies to adopt foolish economic policies” and that “there is a long tradition in economics of (a) recognizing systematic belief differences between economists and the public, and (b) blaming policy failures on these belief differences.”⁵²

Framing the dispute between the publishers and Amazon as an example of a broader tension between new and old industries shows that the difficulties that Sagers identifies and thoroughly analyzes might not be solvable. The issues are real. In the dispute between the publishers and Amazon, the economic view might have won, but, as we saw, in other contexts public misconception can lead to undesirable public policies. Sagers’s book does not offer real solutions to this issue and it is quite likely that there are no easy fixes.⁵³ But the first stage in addressing the issue is identifying and analyzing it and

⁵¹ *Survey of Americans and Economists on the Economy*, KAISER FAMILY FOUND. 12 (1996), <https://kaiserfamilyfoundation.files.wordpress.com/1996/09/survey-of-americans-and-economists-on-the-economy-toptlines-survey.pdf> [<https://perma.cc/93XY-DGTU>].

⁵² BRYAN CAPLAN, *THE ENCYCLOPEDIA OF PUBLIC CHOICE* 180-81 (Charles Rowley & Friedrich Schneider eds., 2004).

⁵³ Solutions, mostly partial, to the issue are beyond the scope of this essay. In some cases, public education might mitigate the issue. In some countries the legislators addressed this short-sight bias by creating special commissions or committees that are designed to put a thumb on the scale in public discussions in favor of future interests of unidentified stakeholders. See Tomilola Akanle, *Proposal for Ombudsperson for Future Generations Published*, SDG KNOWLEDGE HUB (Feb. 23, 2012), <http://sdg.iisd.org/news/proposal-for-ombudsperson-for-future-generations-published/> [<https://perma.cc/K7HS-ND59>]; Sci. & Envtl. Health Network & The Int’l Human Rights Clinic at Harvard Law Sch. *Models for Protecting the Environment for Future Generations* (2008), http://hrp.law.harvard.edu/wp-content/uploads/2013/02/Models_Future_Generations.pdf [<https://perma.cc/T93T-GAWV>].

Sagers provides an excellent account and a case study of this tension in the eBooks publishing industry.

PART III. AMAZON AND AUTHORS: DOES AMAZON DEMOLISH COPYRIGHT LAW?

One narrative that runs through the discussion regarding the conflict between Amazon and the major publishers is that books are special and that they should not be analyzed with the same tools that are typically used to analyze market behavior. Sagers, for the most part, rejects that argument. Books might have cultural value, but that value is an externality and economists can typically consider externalities in their analysis. I don't dispute that argument although I will note that analyzing literature's contribution to humanity in terms of externalities entails a possibly normative choice in itself.⁵⁴

But books are somewhat unique even if one uses market rhetoric. As Sagers recognizes, the initial fixed costs of creating books, especially the author's alternative costs, are typically significant, while marginal costs are low, especially for eBooks. Consequently, the average costs of books typically exceed their marginal costs and therefore, unlike many other goods, competition can be destructive for them.⁵⁵ The standard response, which Sagers also provides, is copyright law. It is true that copyright law is designed and justified by the need to solve this market failure. But in at least some respects that answer kicks the can down the road. The effectiveness of many

⁵⁴ One may argue that the question is not whether economists have a way to model cultural contribution and personal expression but should they. In applying market rhetoric to those values, the argument goes, we change and diminish the value itself. Indeed, it is quite possible that some of the "books are unique" claimants perceive them as an extension of their personhood and are thus channeling arguments that are part of the non-commodification rhetoric. See generally Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1850 (1987). Sagers does not address such an argument in his book and I also am going to leave it beyond the scope of this essay.

⁵⁵ Cf., Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 282-83 (1970) (suggesting that many authors can recoup their fixed costs even in a competitive market). Notwithstanding the validity of Breyer's arguments when his work was authored, with copying costs being close to zero nowadays it is hard to imagine the book industry surviving without some legal protection from free copying. A full analysis of the role that copyright law plays and does not play in encouraging creativity is of course well beyond the scope of this essay.

copyright law doctrines partly depends on the structure of the market for copyrighted goods.⁵⁶

Copyright provides incentives to authors by partly shielding their works from competitive pressure. But, as the conflict between the major publishers and Amazon nicely demonstrates, the size of the incentives package that authors receive fundamentally depends on the market in which they operate. Amazon, quite consistently, both before and after the Apple conspiracy, pressured publishers to reduce prices.⁵⁷ Amazon's dominant position in the market, discussed above, allows it to effectively exercise that pressure notwithstanding the market power that copyright law attempts to give to authors and their assignees and licensees—the publishers.

In the post-Apple-conspiracy world, with Amazon's market share growing even more, Amazon can continue to push book prices toward their marginal costs, or, at least if Amazon cares about the long-term stability of the market (more on that below), toward their average costs. That pressure will not stop at the publishers. It is unavoidable that the authors will feel it as well. Lowering the wholesale prices that Amazon pays (whether or not Amazon keeps retail prices low), means that the publishers will pay authors less. If Amazon gets a close to absolute power to set prices, and with it indirectly the authors' compensation, then copyright law becomes partly irrelevant.

This last point might need further clarification: copyright law assumes that authors will trade in their copyright-law-created market power. The broader that market power is, the more authors will be able to get in the marketplace for it and the larger their incentives will be.⁵⁸ This simple description suggests that the market in which authors operate is crucial for copyright policy. Indeed, copyright law assumes that authors will trade in their rights, which means that they will have a market in which to do so. When one company controls a

⁵⁶ In this essay I focus on the overall incentives to create. But even specific copyright law doctrines might implicitly assume a certain market structure. *See, e.g.*, Rub, *supra* note 48, at 86-87 (explaining how copyright's termination of transfer mechanism makes sense in certain market structures but not in others).

⁵⁷ Sagers explores in depth Amazon's pricing strategies leading to the Apple conspiracy and shortly thereafter. This constant pricing pressure on the publishers did not stop and it led, two years later, to the public dispute between Amazon and Hachette. *See supra* note 23.

⁵⁸ Those incentives are the main social benefits of copyright law. Copyright law also entails social costs, such as limiting access. *See* Guy A. Rub, *Rebalancing Copyright Exhaustion*, 64 EMORY L.J. 741, 763-65 (2015). A full analysis of those costs and the balance between them and the benefits is beyond the scope of this essay.

vital point in the distribution chain then that market does not really exist. The prices in that market are primarily determined by that monopolist. At least in the short run, there is no reason for the monopolist to refrain from pushing the prices it pays down toward their marginal costs. If prices are determined by those costs, then copyright is mostly irrelevant. It no longer plays a vital role in determining the authors' compensation.⁵⁹

Is this change socially desirable? A full analysis is quite complex and beyond the scope of this essay, but in the next few paragraphs I will provide a few initial thoughts.

This situation is obviously undesirable to most commercial authors⁶⁰ and it is therefore not surprising that in recent years many prominent authors attacked Amazon's market power and policies.⁶¹ Some of those authors were not shy in claiming that they deserve higher compensation for their books and that Amazon sells them too

⁵⁹ If a company is truly a monopolist in a truly permanent vital step in the distribution chain, copyright law might be completely irrelevant. But this situation is exceptionally unrealistic, and Amazon is nowhere close to that status and will likely never be. Amazon might eventually control practically all the market for the sale of eBooks and maybe even for the sale of books. But it will still face indirect competitive pressure through related markets, such as from public domain works, a market in which Google plays a vital role, as it distributes those works for free as part of its Google Books project. Copyright law is of course relevant in determining what works are in the public domain and what are not. Piracy provides yet another competitive pressure to Amazon. Finally, and importantly, book authors do not generate all their income from selling books and eBooks. They also earn an income from selling related rights, such as rights to adapt their work in other forms, such as movies, and from public speaking engagements. Copyright law plays an important role in those endeavors, and as long as the monopolist does not control those markets as well, copyright will continue to play a role in incentivizing authors.

⁶⁰ Amazon's market position, and the digital revolution in general, also helps some authors. First, as already explored, the sale of books nowadays is less concentrated, which allows more authors to be best-selling ones. See Waldfogel & Reimers, *supra* note 34, at 55. Moreover, keeping retail prices low increases the quantities sold, which is especially valuable to certain types of authors, such as those who write for non-commercial purposes (sometimes called "authors who write to be read") such as those in academia and some starting authors. See Mission Statement, AUTHOR'S ALLIANCE, <https://www.authorsalliance.org/about/#mission> [<https://perma.cc/87EH-QLKH>]. Some authors therefore supported Amazon in its dispute with Hachette. Alan Yuhas, *Amazon vs Hachette: readers and authors take sides in publishing dispute*, THE GUARDIAN (Aug. 12, 2014, 1:10PM), <https://www.theguardian.com/books/2014/aug/12/amazon-hachette-readers-authors-publishing-dispute> [<https://perma.cc/HV4P-WFEW>]. Things might be different if Amazon decides to raise its retail prices while keeping wholesale prices low.

⁶¹ Streitfeld, *supra* note 44; Stephen Colbert, *Amazon v. Hachette*, COMEDY CENTRAL (June 4, 2014), <http://www.cc.com/video-clips/ukf9gv/the-colbert-report-amazon-vs-hachette> [<http://perma.cc/Y2HA-67A3>].

cheaply. But U.S. copyright policy is not designed for the benefit of authors, but for that of society.⁶² Therefore, reducing the authors' compensation, by itself, does not make this situation undesirable.

The real question, which was already mentioned above, is how the monopolist uses its market power. It might be quite socially harmful if, for example, it drives wholesale prices to marginal costs and below average costs. At that price, many authors⁶³ will be unable to cover their fixed costs of writing and will therefore leave the market or refuse to enter it. However, the monopolist is likely aware of this dynamic impact of its pricing scheme, and therefore, assuming it plans to stay in the market for the long run, it will be in the monopolist's best interest to keep wholesale prices at least at average costs.⁶⁴ Authors will then stay in the market. In fact, assuming, again, that the monopolist is in it for the long run, it is likely to make pricing decisions that balance the interests of current authors with those of future authors—a function that copyright law itself is aimed to serve.

The overall desirability of this scheme will likely depend on the retail pricing decision of the monopolist. It is hard to argue that Amazon's current scheme, where it sells eBooks at minimal profits (if at all), is socially undesirable, at least in the short run. Authors might be paid less, and are being denied some of the benefits copyright law tries to give them, but most will agree that those benefits are inflated anyway. Copyright is too broad, both in scope and in duration, which probably creates over-incentives to create as well as other significant social harms. Therefore, reducing the overall compensation to authors might not be bad in itself.

But what makes the current Amazon scheme exceptionally socially desirable in the short run is that it transfers much of the fruits of its

⁶² The Constitution authorizes Congress to enact the Copyright Act “to promote the progress of science . . .” U.S. CONST. art. I, § 8, cl. 8. *See also* Harper & Row Publishers, Inc. v. Nation Enter., 471 U.S. 539, 546 (1985) (“The monopoly created by copyright thus rewards the individual author in order to benefit the public.”); TCA Television Corp. v. McCollum, 839 F.3d 168, 177 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 2175 (2017).

⁶³ Some authors are naturally less sensitive to changes in the prices of books. Authors whose main source of income does not depend on sales, from university professors to Hollywood script writers to independently wealthy individuals who write as a hobby, are likely to produce books regardless of their royalties. In other words, royalty reduction will disproportionately affect certain types of authors and not others.

⁶⁴ Average costs will need to take into account all forms of income, including possible income from markets that the monopolist does not control, such as the market for movie rights. *Cf.*, Breyer, *supra* note 55, at 310-11; *supra* note 59.

market power to its consumers. Amazon acts like it is a benevolent ruler (or maybe a benevolent bully?) who uses its power to extract excessive surplus from the publishers and authors and transfer it to consumers. This process entails more than just a transfer of surplus because, as prices decrease, the deadweight loss in the market for copyrighted goods decreases as well and social surplus increases.

As long as it lasts. If and when Amazon decides to use its market power in other ways, and in particular to increase its retail prices, those benefits will be eliminated. Amazon's market power would then just be used to transfer surplus from authors to itself, which does not seem to generate any real social benefits even in the short run, and will likely be harmful in the long run.

Amazon's dominance is problematic from a copyright law perspective for other reasons, and in particular its effect on free speech. One of the advantages of copyright law, and in fact one of the reasons for its creation,⁶⁵ is that it rewards creativity in a non-centralized way. Before the passage of the Statute of Anne in 1710, which is perceived by many as the birth of modern copyright law, the law in Great Britain⁶⁶ required book printers to be licensed by the Stationers' Company. That company was a guild of printers that was responsible for censoring literary works. Patronage by royalty was also a major source of creativity at the time. The public outcry against censorship was one of the main causes for the collapse of this system and its replacement by modern copyright law.⁶⁷ The Statute of Anne replaced the old system by granting rights to authors who met simple statutory requirements without considering the content of their work. Modern copyright law cannot fully be understood without appreciating its function in promoting free speech.

When one company controls the book market completely, as Amazon might be able to do in the future, the decentralized nature of creation that copyright law is trying to foster might be, at least partly, lost. If creation is not free, then the advantages of copyright law's

⁶⁵ Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 *YALE L.J.* 283, 354-55 (1996).

⁶⁶ The focus here is on the legal development in Britain, as this is the main source of American law. While the Statute of Anne was the first modern copyright act in the western world, similar statutes were passed in other European countries during the 18th and 19th centuries.

⁶⁷ LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* 179 (1968).

clumsy post-factum reward mechanism over a system that is based on governmental grants and awards becomes questionable.

Amazon is currently using its censorship power in limited ways. For example, it actively removes self-published works that depict incest, rape, and child pornography.⁶⁸ On the other hand, it currently does not seem to remove books that criticize Amazon itself.⁶⁹ But its market dominance, especially if it expands further, might allow Amazon to do so. Indeed, awarding such a power to one company might not be as troubling as awarding it to the government, but it should still be quite concerning, as it gives that company significant power over public discourse and over the marketplace of ideas.

CONCLUSIONS

Chris Sagers's *Apple, Antitrust, and Irony* is a wonderful work that takes one dispute and through it explores our views of the book industry, antitrust policy, competition, technology, and more. The book correctly points out and analyzes the dichotomy between the way that antitrust law viewed the Apple conspirators' behavior, as clearly illegal, and the public reaction, which, in many cases, perceived them more positively.

In this essay, I address just a few aspects of this complex issue. I suggest that the dichotomy is indeed partly driven by suspicion of competition as causing a short-term disruption to vested interests—a view that is both prevalent and myopic. At the same time, the eBooks case is somewhat different, because the collapse of the Apple conspiracy left Amazon with tremendous market power. While currently Amazon, as far as we know, does not seem to abuse that power over the eBooks industry, the concerns about the long-term danger of such a market structure are understandable. In the long term, that dominance may prompt serious reconsiderations of various

⁶⁸ Hector Tobar, *Self-published Erotica Writers Strike Back*, L.A. TIMES (Oct. 17, 2013), <http://articles.latimes.com/2013/oct/17/entertainment/la-et-jc-self-published-erotica-writers-strike-back-20131017> [<https://perma.cc/R7B7-T35R>]. As a private company, Amazon is of course allowed to choose which books to offer in its stores. To the best of my knowledge, most of the titles that Amazon removes do not violate the law and therefore, under the First Amendment, the censorship function that Amazon provides could not have been performed by a governmental entity.

⁶⁹ For example, Amazon currently sells a book entitled MINDLESS: WHY SMARTER MACHINES ARE MAKING DUMBER HUMANS, which claims that together with Walmart, Amazon might be “the most egregiously ruthless corporation in America.”

legal doctrines related to copyright, free speech, and competition policy and antitrust law.