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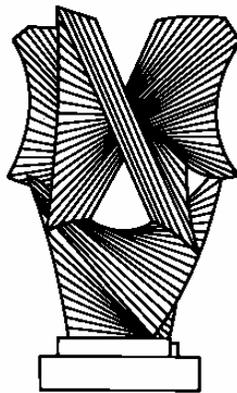
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Takes Two: Stare Decisis in Antitrust The Per Se Rule against Horizontal Price-Fixing

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**Take Two: Stare Decisis in Antitrust/The Per Se Rule
Against Horizontal Price-Fixing**

*Randal C. Picker**

Presented at the ABA Section of Antitrust Law Spring Meeting
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Take Two: Stare Decisis in Antitrust/The Per Se Rule Against Horizontal Price-Fixing

*Randal C. Picker**

In this essay, I want to consider two issues that pertain to the overall question of what antitrust doctrines are up for retirement. First, we can't consider that without understanding how the Supreme Court approaches stare decisis in antitrust. The Court's 5-4 decision in *Leegin*¹ identified some of the fault lines on this issue. The Court has suggested that it should approach stare decisis differently in statutory areas from the way it approaches it when it reconsiders constitutional decisions. I think that that is wrong and that the Court should apply its approach to stare decisis in constitutional cases to cases based on statutes, such as the Sherman Act. Second, I focus on the evil of evils: horizontal price-fixing. I don't think that the Court is likely to retire the per se rule against horizontal price-fixing, certainly not directly. We might only realize that it had been overturned after the fact, after the Court had so chipped away at the doctrine that nothing remained. That said, as again *Leegin* itself suggested, we can't be fully confident that horizontal price-fixing is always pernicious, especially when it might be implemented as part of a larger vertical arrangement.

I. Stare Decisis in Antitrust²

We start by mapping the lay of the land in antitrust. For doing that, almost any starting point would be arbitrary, but given that *Leegin*

* Copyright © 2008, Randal C. Picker. All Rights Reserved. Paul and Theo Leffmann Professor of Commercial Law, The University of Chicago Law School and Senior Fellow, The Computation Institute of the University of Chicago and Argonne National Laboratory. I thank the Paul H. Leffmann Fund and the Sarah Scaife Foundation for their generous research support.

¹ *Leegin Creative Leather Products, Inc v PSKS, Inc*, 127 S Ct 2705 (2007).

² This section is based on Section IV(D) of Randal C. Picker, Twombly, *Leegin and the Reshaping of Antitrust* (forthcoming, Sup Ct Rev, 2008).

overtured *Dr. Miles*³, we might start our analysis of stare decisis from a point where the Court *didn't* overturn *Dr. Miles*, its 1984 decision in *Monsanto*.⁴ *Monsanto* was the first of five antitrust cases decided during the Court's 1983 Term.⁵ The Solicitor General had asked the Court to reconsider *Dr. Miles* in *Monsanto*, but in a footnote, the Court declined to do so. Justice Brennan's brief concurring opinion focused exclusively on the status of *Dr. Miles*. He emphasized the opinion's longevity—73 years at that point—and the fact that Congress had never enacted legislation to overrule *Dr. Miles*.⁶

The 1983 Term is also interesting for the different ways that the cases approached stare decisis. In *Jefferson Parish*, the Court considered the law of tying, that is, the circumstances under which a seller forces a purchaser to take one product with a second product.⁷ The question of whether or not to abandon the Court's prior rule that tying cases should receive per se treatment divided the Court. The five-member majority believed that it was "far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable 'per se'."⁸ The Court saw a steady line of support for per se treatment going back to 1947 (*International Salt*) if not earlier.⁹ Justice Brennan, joined by Justice Marshall, concurred briefly pointing to his earlier concurring opinion in *Monsanto* and emphasizing that Congress had left alone the

³ *Dr. Miles Medical Co v John D. Park & Sons Co*, 220 US 373 (1911).

⁴ *Monsanto Co v Spray-Rite Service Corp*, 465 US 752, 761 (1984).

⁵ For discussion of those cases, see Diane Wood Hutchinson, *Antitrust 1984: Five Decisions in Search of a Theory*, 1984 Sup Ct Rev 69.

⁶ *Monsanto Co*, 465 US at 768.

⁷ *Jefferson Parish Hospital District No 2 v Hyde*, 466 US 2 (1984).

⁸ *Id* at 9.

⁹ *International Salt Co v United States*, 332 US 392 (1947).

Court's prior *per se* treatment of tying.¹⁰ But for Justice O'Connor and the other three justices joining her opinion concurring in the judgment, it was time "to abandon the 'per se' label and refocus the inquiry on the adverse economic effects, and the potential economic benefits, that the tie may have."¹¹

But less than three months later, the Court took a different approach to *stare decisis* in antitrust. In *Copperweld*,¹² the Court considered the question of whether a parent and its wholly-owned subsidiary were legally capable of conspiring under Section 1 of the Sherman Act. Yes, the two were distinct legal entities and hence could contract with each other, but was that what Section 1 was looking for in its focus on "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade?" In a 5-3 decision, the Court concluded that the parent and the sub lacked sufficient separateness for Section 1 purposes. In so doing, the Court "disapproved and overruled" its prior decisions that were inconsistent with the rule announced in *Copperweld*. Which ones exactly was a point of dispute between the majority and the dissenters. In dissent, Justice Stevens counted at least seven decisions of the Court that he believed to be inconsistent with *Copperweld*¹³ going as far back to 1947 (*Yellow Cab*).¹⁴ The majority attempted to recharacterize most of the cases to suggest that they could have been decided on an alternative basis and to suggest that the issue had never been

¹⁰ *Jefferson Parish*, 466 US at 32 ("Whatever merit the policy arguments against this longstanding construction of the Act might have, Congress, presumably aware of our decisions, has never changed the rule by amending the Act. In such circumstances, our practice usually has been to stand by a settled statutory interpretation and leave the task of modifying the statute's reach to Congress").

¹¹ *Jefferson Parish*, 466 US at 35.

¹² *Copperweld Corp v Independence Tube Corp*, 467 US 752 (1984).

¹³ *Copperweld*, 467 US at 779-782.

¹⁴ *United States v Yellow Cab Co*, 332 US 218 (1947).

considered in real depth by the Court.¹⁵ Justice Stevens noted that Congress could have revised the Court's prior rulings on capacity to contract for Section 1 purposes but had declined to do so over four decades.¹⁶

From the 1983 Term through the 2006 Term—24 terms—the Supreme Court decided 51 antitrust cases, or an average of more than two per term.¹⁷ We can try a mechanical approach to the role of stare decisis in antitrust. Of these 51 decisions, only five used the phrase “stare decisis”: *Leegin* (2007); *State Oil* (1997); *Eastman Kodak* (1992); *Square D* (1986); and *Copperweld* (1984)). That suggests immediately one of weaknesses of the “tag cloud” approach to matching text and ideas: both *Jefferson Parish* and *Monsanto* are missing from the list, even though it was precisely the question of stare decisis that separated the justices in *Jefferson Parish* and even though Justice Brennan's concurring opinion in *Monsanto* is almost exclusively about the importance of not overturning prior decisions of the Court.

We should start with a basic conception of stare decisis and then work up from there. A minimalist approach to stare decisis might focus on almost a physical notion of repeatability: if the same inputs go into the same production system, the same output should result. Treat the Court as a thing unto itself; not something made up of a changing slate of nine individuals but instead as a coherent, integral entity. In that formulation, mere changes in Court personnel shouldn't change case outcomes. If the Court reaches a conclusion, if the same arguments are subsequently presented to a different

¹⁵ *Copperweld*, 467 US at 760 (“Although the Court has expressed approval of the doctrine on a number of occasions, a finding of intra-enterprise conspiracy was in all but perhaps one instance unnecessary to the result”).

¹⁶ *Id.* at 784.

¹⁷ 51 is the number that emerges from the Westlaw search, run on Nov 21, 2007, on the Supreme Court database using the search request “to(29t) and date(after 1983) and sy(antitrust sherman clayton (federal +1 trade +1 commission)).”

instantiation of the Court, the same outcome should result. This isn't to say that the Court can't learn and therefore change results. Operating experience under one rule and new arguments should move the Court just as they do individuals, but it is precisely these input changes that should result in different outcomes, not change in the Court itself.

We might think that an odd, sterile and mechanical conception of what the Court is. Do we really think that a Court comprised of nine male justices would approach, say, the First Amendment status of pornography in the same fashion as an all-female Court? If you think not, then you probably believe that one of the inputs brought to Court decision-making are the individual experiences of the justices. We can submit the same briefs to one Court and then resubmit them to a new Court and see different results because the individual experiences of the justices shape outcomes.

We might think of stare decisis then as about the size of a required change necessary to reach a different result, where stare decisis might address either the non-court inputs to decisionmaking or the court process itself. The input version of stare decisis would focus on the required change in inputs that would permit the Court to change outcomes. A thin-version might mean that even small changes in inputs would cause the Court to change outcomes. So even weak new arguments or small changes in data would cause the Court to overrule a prior decision. A thick-input version of stare decisis would require much more substantial changes in circumstances before the Court would abandon prior positions.

A personnel-version of stare decisis might focus on voting rules for cases, which the Court might implement by adopting a super-majority decision rule for overruling prior cases. Don't overrule if the vote is only 5-4 in favor; instead, require greater unanimity than that.¹⁸ To be mechanical about this, a 6-3 or better rule would mean

¹⁸ Compare Jacob E. Gersen and Adrian Vermeule, *Chevron as a Voting Rule*, 116 Yale

that a one-member change on the Court wouldn't by itself change results. A 5-4 case in one term couldn't become a 5-4 decision the other way if one of the original five justices were replaced by a new justice who held the opposite view of the question.

The Court hasn't articulated *stare decisis* in this fashion. Instead, as Justice Breyer's dissent in *Leegin* emphasized, the Court has typically proceeded under a multi-factor approach. So the Court believes that *stare decisis* weighs more heavily when it construes statutes than when it reads the Constitution.¹⁹ This is based on the view that, save for rare amendments to the Constitution, only the Court can change how the Constitution is applied, but Congress can rewrite statutes if the Court has misunderstood statutory text. Congress's knowing inaction then amounts to a type of silent ratification of the Court's interpretation of a particular statute.

That analysis dramatically overstates the ease with which Congress can overturn the Court's statutory interpretations. This isn't about the normal difficulties of getting legislation enacted in the U.S.—though those hurdles are genuine—but much more about the Court's power to select positions strategically and know that they won't be overturned. Take a simple example. Assume the relevant statute bears two natural interpretations. If the Court chooses one and both the House and the Senate disagree with the Court's choice, we should expect Congress to rewrite the statute. In contrast, if the Court chooses the interpretation favored by both chambers, Congress leaves the statute alone. This seems to be the framework that animates the Court's views on the importance of *stare decisis* in cases dealing with statutes.

But consider two other possibilities. The Senate and the House have different preferences over the two natural readings of the statute.

L J 676 (2007).

¹⁹ In antitrust, see, eg, *Illinois Brick Co v Illinois*, 431 US 720, 736 (1977) (“[W]e must bear in mind that considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation”).

The Court will choose one or the other, and *whichever* one the Court chooses, we will not see legislation overturning that choice. If the Court chooses the interpretation favored by the Senate, the Senate will block legislation overturning that choice, and both the Senate and the House must approve new legislation for it go forward. Alternatively, if the Court chose the House's favored interpretation, the House will block new legislation.

In this simple situation—a statute with two natural readings—we have four possibilities. We will see responsive legislation in only one case—when the Court gets it “wrong” and the Senate and the House both disagree with that choice—but in the other three cases, we won't see new legislation. In only one of those situations should the Court infer acquiescence in the Court's read of the statute; in the other two cases, the two chambers don't agree and therefore can't agree to overturn the Court's interpretation. Note also that an especially strategic Congress wanting to send information to the Court might choose to pass confirmatory legislation in the case in which the Congress agrees with the Court's reading of the statute. Given the presumed agreement between the houses, it should be relatively costless to pass the confirming statute. The point of that legislation isn't to change the meaning of the text but to make clear that when the Court interprets statutory text and nothing issues from Congress, Congress disagrees internally over the meaning of the text. Guaranteed action in both cases in which Congress agrees internally would convey information to the Court about the existence of internal disagreement in Congress over the meaning of the relevant text in cases in which Congress *doesn't* act.

Play this out briefly one more time. Imagine a text with three readings, where the House's preferences are $1 > 2 > 3$ and the Senate's are just the opposite, $3 > 2 > 1$. We shouldn't expect Congress to overturn *any* decision of the Court choosing *any* of the readings. If the Court chooses 1, the House is happy and will block new legislation. Ditto for the Senate if the Court chooses 3. And 2

probably represents the compromise position that would be reached by Congress were it required to act. A decision by the Court followed by congressional inaction would tell us nothing about congressional acquiescence in the Court's reading. The Court's approach to stare decisis for statutes and its power to draw inferences from congressional inaction and silence has ignored the way that the Court's prior interpretation of a statute determines the default position in the next round of legislative gamesmanship. As these examples suggest, the default position established by the Court matters enormously for the subsequent legislative path.

What does this mean for the Court's special rules of stare decisis for statutes, taking seriously, of course, that those rules actually exist meaningfully? The Court should kill them off. Return to the simple four-possibility situation. If the Court chooses the wrong interpretation and Congress overturns it, very little harm is done. If the Court reaches the result desired by both houses of Congress, we probably won't see legislation, absent the sort of exquisite legislative signaling that I describe above. But in that case, the Court has adopted the interpretation favored by the current Congress. And, to head towards stare decisis, if the Court flipped its position, in these cases, Congress would respond. The agreed Congress would overturn the contrary interpretation by the Court.

But if the Court chooses an interpretation and Congress is disabled from acting, what should the Court do in reconsidering the issue? For constitutional issues, Congress is disabled from acting by institutional design, as we have assigned the role of constitutional interpreter to the Court. In our two remaining cases, Congress is disabled from acting not by design but because of internal disagreement. By definition, that internal disagreement is just the opposite of acquiescence in the Court's view. One chamber favors one interpretation, the other the second, and that will be true regardless of which interpretation the Court chooses. Under those circumstances, the Court should give no special weight to that

disagreement in figuring out whether to reconsider its prior ruling but instead should rely on whatever general framework the Court brings to stare decisis.

What does that mean for *Leegin*? In my view, the Court majority appropriately gave very little weight to Congress's changes to Section 1. Recall that Section 1 expanded in 1937 with the Miller-Tydings fair trade delegation to the states and then contracted in 1975 when Congress reclaimed federal authority under Section 1. But the Court didn't take that to somehow limit its ability to continue to evolve Section 1 antitrust doctrine, and it understood itself to have full authority to overturn *Dr. Miles*. That isn't to say that the Court was right to overturn *Dr. Miles*, as all I have done above is to sketch some general ways to frame stare decisis and I haven't offered a full theory of it, but it is to say that the fact that *Dr. Miles* interprets a statute shouldn't be given real weight in the stare decisis analysis.

II. Rules for Horizontal Agreements Especially in a Vertical Context

We know that the set of activities that are treated as being per se illegal has shrunk over time. In some sense, antitrust doctrine has been riding a century-long roller coaster: we spent a great deal of time working our way up that large first hill and then we have rushed down from there. I am not sure where we would date the peak of the number of activities thought to be per se illegal, perhaps right before *Sylvania*.

I want to focus on horizontally-implemented vertical rules. That was a mouthful, so what do I mean by that? Take a series of questions posed by Justice Stevens during the *Leegin* oral argument. *Leegin* was represented by former Solicitor General Ted Olsen. Justice Stevens asked him: "Mr. Olson, suppose just the dealers in New York, the retail dealers agreed among themselves on the price. Would that be lawful?" Olsen demurred saying that as a horizontal agreement among retailers it would be per se unlawful. Justice Stevens persisted: "Why should that be any different from the arrangement where those

dealers all got together in the convention and recommended to the manufacturer that he impose a vertical restraint of precisely the same dimensions?”²⁰

I want to frame that question and to do so let me describe how I teach *Interstate Circuit*.²¹ That case, along with *Theatre Enterprises*²², is the last time that the Supreme Court seriously undertook the question of what was required to find a contract, combination or conspiracy in restraint of trade that violated Section 1 of the Sherman Act. But I start with the underlying activities and a start at a fairly abstract point. So consider Figure 1:



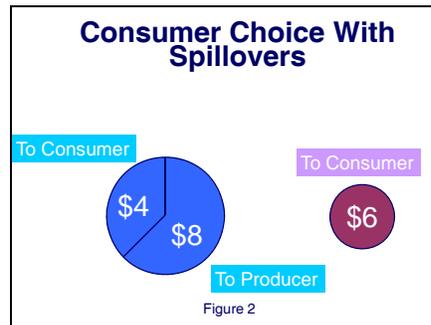
A consumer is presented with a choice. On the left, is an object or stack of dollar bills worth \$12; on the right is the same object, except the second object is worth only six dollars. The consumer is free to choose either object—either pie—and pays nothing. The consumer can have something either worth \$12 or \$6. This is supposed to be an easy choice. One of the first rules of economics is that more is better than less assuming we’re talking about something that is good. So the consumer should take the \$12 pie on the left.

²⁰ Oral Argument Transcript, *Leegin Creative Leather Products, Inc v PSKS, Inc*, No 06-480, *4-5 (Mar 26, 2007).

²¹ *Interstate Circuit, Inc v United States*, 306 US 208 (1939).

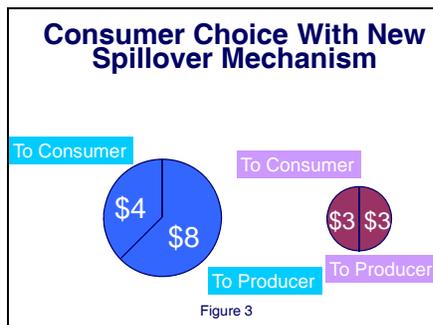
²² *Theatre Enterprises, Inc v Paramount Film Distributing Corp*, 346 US 537 (1954).

Then I switch the example to the situation in Figure 2:



The pies are as before but the division associated with the first pie has changed. If the consumer chooses pie two, again paying nothing, the consumer receives an object were \$6 as before. The first pie continues to be worth \$12, but now when that pie is chosen, the consumer receives \$4 and \$8 goes to the producer. We again ask the consumer to choose between pie 1 and pie 2 and presumably our consumer chooses pie 2, again on the theory that more is better than less and that all are consumer cares about is her pocketbook. But this choice is socially inefficient meaning that society would be better off if the consumer chose the first pie. Economists typically start with the proposition that they are neutral about how pies are split; economists want more pie and leave to others the question of how to divide the pie. The first pie was bigger in Figure 1 and is also bigger in Figure 2, but the division of value has changed, and now the private choice made by the consumer no longer maximizes social welfare.

I then consider the situation set forth in Figure 3:



The change from Figure 2 to Figure 3 is that now the \$6 pie when chosen channels \$3 to the consumer and \$3 to the producer. Which pie will our consumer choose and how do we evaluate that socially? In Figure 3, if the consumer chooses pie 1, she receives \$4, while if she chooses pie 2, she gets \$3. Again on the principle that more beats less, we should expect the consumer to choose pie 1. As was the case in Figure 2, we want the consumer to choose pie 1. Now the consumer does so and does so because more value is being channeled to the producer from pie 2 in Figure 3—\$3—than was the case for that pie in Figure 2, where the producer received nothing.

This must seem like a long distance from the facts of *Interstate Circuit*, so let us see if we can head there. Consider a hypothetical involving a consumer who is choosing whether to see a movie today or six months from now. Recall that the agreement in *Interstate Circuit* was over the prices that would be charged at second-run movie theaters in Texas. Those were movie theaters that would receive a movie after had it already played in a first-run theater. First-run theaters understandably were concerned about the competition that second-run theaters posed. Competitors rarely want more competition, so the unhappiness of the first-run theaters shouldn't matter, unless something more interesting is going on.

Back to our hypothetical consumer. She values seeing the movie today at \$12 and six months from now at \$6. That difference in value reflects the waiting costs of delay. That may be a standard preference for consumption today over tomorrow but also reflects in the case of things like movies and other culture objects that part of the consumption is a private consumption—me sitting at home watching the DVD on my television—and a second part is social consumption—me talking about the movie at work with colleagues. Movie watching in theaters is more naturally synchronized, DVD watching less so. Watching a movie six months later on DVD sacrifices much of the social consumption value.

The consumer movie values match the size of the pies we started with in Figures 1 through 3. If the consumer could watch the movie for free, we would be back to Figure 1 and presumably the consumer would simply watch the movie today. But producers of movies typically charge for viewing them, so the consumer is actually facing a choice of $12 - p_1$ —that being today's price for the movie—versus $6 - p_2$ —the price of the movie six months from now. If we charge \$8 for a movie today and nothing to see it tomorrow, then we now match Figure 2. To get to Figure 3, we need to live in a world in which the price of the movie today is \$8 and the price six months from now is \$3.

In this example, the movie version of Figure 2 might correspond to a world in which illegal downloading and copying of movies was easy; in that world, a consumer could count on being able to get the movie for free six months from now. In that case, the consumer would clearly wait to watch the movie, creating a social pie of \$6 rather than paying to watch the movie today, which would create the social pie of \$12. And note that assumes that the movie would be created; in a real example we would need to be concerned with ensuring that movie producers receive sufficient payment to create the movie in the first place. There is no movie to freely download illegally at date two if a movie is never created at date one.

Suppose we were in the world movie version of Figure 2. How should we feel about a mechanism which appeared which transformed Figure 2 into Figure 3? To be clear, this is a mechanism which somehow makes it possible for producers to gain a larger share of the pie in movie sales six months out. On the hypo, that might happen if we improved the enforcement of property rights in movies. But there are other alternatives, including the possibility of reducing competition between producers at stage two. In this example, doing so would be welfare enhancing.

Note that the hypothetical embraces an overall-welfare standard and not a narrow version of a consumer-welfare standard. If we just focused on consumer welfare, we would want to prevent the emergence of the stage two mechanism. Consumer welfare drops as we move from Figure 2—where consumer welfare is \$6 when the second pie is chosen—to Figure 3, where it is \$4 with the first pie is chosen in Figure 3. The proper welfare measure is a controversial issue in antitrust, and I do not mean to address it here in detail. I find it hard not to think in overall welfare terms. Ultimately, individuals own corporate producers and we should attribute corporate profits to those individuals. Individuals should count, and not somehow just individuals as consumers. In any event, my focus here is on total welfare and, in this example, the new mechanism that splits the second pie in Figure 3 increases overall welfare.

We might frame the question then as whether antitrust should care about the source of that mechanism if we can with confidence evaluate it directly. I understand this to be Justice Stevens's question at the *Leegin* oral argument. Minimum RPM is minimum RPM regardless of whether it is implemented horizontally by a group of local New York dealers or whether it is imposed one step up the vertical food chain by a manufacturer.

Take another step closer to the facts of *Interstate Circuit*. There is clearly a relationship between first-run and second-run movie markets. Sure there is a basic price competition between those

markets but there are other spillovers that take place. If a first-run theater advertises the new blockbuster, that create creates demand for the second-run theater. That is easy to see if the theater markets are separated mainly by the income of the consumers. High-income consumers see movies today, while lower-income consumers wait to see them tomorrow. An ad when the movie comes attracts high-income consumers today to the first-run theater, but low-income consumers aren't going to see the movie today. But the initial ads create built-in demand six months down the road. Advertising might influence the willingness of those consumers see the movie at all, and if so, advertising by a first-run theater would create benefits for the second run theater.

This is a standard free-riding issue and we might be that concerned that the spillover would lead to the underproduction of advertising, absent some sort of assurance for the first-run theater that they would recover sufficient fraction of the benefits of advertising. Now we might think in that situation that the movie studios would understand this and would have the incentive to internalize advertising across markets. They of course might do that by integrating vertically in the movie business, as indeed they once did prior to the antitrust decree in *Paramount*. But if we block vertical integration, then we might need some other mechanism to address competition between first- and second-run movie theaters. I don't see a reason to assume why the movie studios will necessarily have a better sense of what those mechanisms might look like than the theaters themselves.

We might be able to identify one or more classes of horizontal agreements fixing prices that we might think should be outside the per se rule of illegality. Justice Stevens hints that he might think that horizontally-implemented vertical rules might fall into that category. Obviously, merely suggesting that some horizontal price-fixing agreements might be useful isn't enough. The per se rule is a rule about *most* cases and a single example or a handful of examples may

still be insufficient. I don't know how many horizontal cases might be thought to fall within the class of horizontal agreements that should be evaluated under the rule of reason. I have never been quite sure what to make of *Broadcast Music*.²³ On one version of the case, it looks like broad horizontal activity. On another characterization, we emphasize that the blanket license is a new product and given that the access to the underlying compositions isn't exclusive, we might go beyond the rule of reason to regard the creation of the new product as wholly outside of Section 1. A raw focus on output might drive this: the new blanket license expands the opportunities available to consumers of performances—restaurants, radio stations and the like—and thus shouldn't be understood as a *restraint* on trade at all (again, conditioned on the nonexclusivity provisions of the license).

²³ *Broadcast Music, Inc v Columbia Broadcasting System, Inc*, 441 US 1 (1979).

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