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The applicability of the per se rule[1] to horizontal price fixing practices[2] in antitrust litigation has been one of the staples of judicial interpretation of the Sherman Act[3] for over fifty years.[4] Although the United States Supreme Court has always posited the per se rule in a straightforward fashion, its application to alleged unlawful activity, and to price fixing conduct in particular, has at times been less than crystal clear.[5] Nevertheless, until the Court decided *Broadcast Mu-*

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1. The per se doctrine was fashioned by the United States Supreme Court in order to streamline judicial analysis of alleged anticompetitive market practices under the antitrust laws, and deems certain types of business arrangements inherently anticompetitive without any need to determine if the alleged restrictive practice has actually injured market competition. *See generally* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 67, at 182-86 (1977) [hereinafter cited as L. SULLIVAN]. BLACK'S LAW DICTIONARY 1028 (5th ed. 1979).

2. A horizontal price fixing practice generally involves an agreement among competitors at the same level of the market structure, such as producers, wholesalers, or retailers, to set, directly or indirectly, a price for a particular commodity.

3. 15 U.S.C. 1-2 (1976). Section 1 states in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." Section 2 states in relevant part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of trade or commerce among the several States . . . shall be deemed guilty of a felony misdemeanor."

4. *See infra* note 5.

5. *See generally* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978) (the Court used the rule of reason to determine whether section 1 of the

sic, Inc. v. Columbia Broadcasting System, Inc.,[6] horizontal price fixing situations to which the Court would apply the per se rule appeared fairly predictable.[7] With its decision in *Broadcast Music*, however, the Court appeared to take a different approach. The Court at least tacitly acknowledged a reasoning process it had at times employed in the past in order to determine whether to apply the per se rule to an alleged horizontal price fixing practice.

A study of subsequent Supreme Court cases reveals that the highest Court seems to be reshaping its approach to per se illegality in horizontal price fixing situations. The new approach focuses more particularly on the actual economic impact of alleged Sherman Act violations on competitive market conditions, and not merely on formalistic labels. These formalistic labels previously tended to characterize per se violations in order to distinguish those business practices to which the per se rule will in fact apply.[8] The Court's apparent departure from traditional per se analysis is still somewhat murky.

Sherman Act was violated); Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) (the Court overruled the per se rule, as stated in United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967)); White Motor Co. v. United States, 372 U.S. 253 (1963) (the Court held that the granting by the district court of summary judgment for the government was improper since the legality of the agreement should be determined by trial); Northern Pac. Ry. v. United States, 356 U.S. 1 (1958) (the practice of selling one product only on condition that the vendor will buy another product was found to be a per se violation where the seller has substantial economic power to restrain free trade); Kiejer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951) (an agreement to seal the maximum resale prices in an interstate trade found to be in violation of the Sherman Act); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (price-fixing agreements that fall short of exercising "dominion and control" over the market may, nonetheless, be a per se violation); Suger Inst. v. United States, 297 U.S. 553 (1936) (because of the particular character of the industry, the Court acknowledged the practice of announcing prices, but when the actions were taken to secure observance of the price, a violation of the Act occurred); Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933) (the standard of reasonableness was used to determine that formation of a corporation by competitors to act as their agents was not a violation of the Sherman Act); United States v. Trenton Potteries Co., 273 U.S. 392 (1927) (regardless of reasonableness of the price, an agreement to maintain a uniform price by competitors who held 80% of the market was in violation of the Sherman Act); Addyston Pipe & Steel Co. v. United States, 85 F. 271 (6th Cir. 1898) (competitors who agreed not to compete within the U.S. were perpetually enjoined by the court of appeals, but the Supreme Court held that such an injunction was too broad since the enforcement of the Sherman Act would be limited to interstate commerce); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897) (the Court held that the government could maintain the suit by simply showing that restraint in trade is a necessary effect without proving intent).

6. 441 U.S. 1 (1979).

7. There have been occasions, of course, when dissenting opinions have opposed characterization of an alleged price fixing restraint as per se unlawful. *See, e.g.*, United States v. Topco Assocs., 405 U.S. 596 (1972) (Burger, C.J., dissenting).

8. Although the trend, discussed *infra*, may well encompass the per se category of restraints in general, only horizontal price fixing practices will be brought to issue here. *See also* Brunet, *Streamlining Antitrust Litigation by "Facial Examination" of Restraints: The Burger Court and the Per Se-Rule of Reason Distinction*, 60 WASH. L. REV. 1 (1984-85).

Yet, some factors can be clarified and conclusions reached as to the Court process for determining the applicability of the per se rule to horizontal price fixing cases in antitrust litigation.[9]

In *Standard Oil Co. v. United States*,[10] the Supreme Court declared that, in general, the Sherman Act must be construed in the light of reason. In order to determine whether a restraint of trade is unlawful, the Court must ascertain the following: 1) the facts peculiar to the particular business involved; 2) the nature of the restraint and its practical effects on the market; and 3) the reasons for the Act's adoption.[11] The Court adopted this "rule of reason" analysis in part because of the possibility that a narrow reading of section 1 of the Sherman Act would make illegal all business agreements which might in some insignificant degree restrain trade or competition.[12] As Justice Brandeis pointed out almost sixty years earlier in *Board of Trade of City of Chicago v. United States*:

> Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition . . . . The history of the restraint, the evil believed to exist, the reason

9. The process has not necessarily been one of clarification. Rather, as subsequent lower court decisions indicate, the Court's recent approach has created considerable confusion as to how and when to apply the per se rule to alleged horizontal price fixing practices. *See, e.g.*, Northwest Publications, Inc. v. Crumb, 752 F.2d 473 (9th Cir. 1985) (although the price maintenance clause in a contract between the publisher and distributors was a per se violation of the Sherman Act, the latter's failure to establish causation barred recovery); Vogel v. American Soc'y of Appraisers, 744 F.2d 598 (7th Cir. 1984) (prohibition of fixed percentage appraiser fees by the association of appraisers did not constitute price-fixing); Compact v. Metropolitan Gov't of Nashville & Davidson County, Tenn., 594 F. Supp. 1567 (M.D. Tenn. 1984) (black architectural firms violated the Sherman Act by presenting common contractual terms to attract minority businesses); United States v. Stop & Shop Cos., No. B 84-51, slip op. (D. Conn. Nov. 8, 1984) (available in 1985-2 Trade Cas. (CCH) ¶ 66,689) (a conspiracy to end discounts on "loss leader" would be a per se violation of price fixing although it enhances competition in certain areas); Ratino v. Medical Serv. of the Dist. of Columbia (Blue Shield), 718 F.2d 1260 (4th Cir. 1983) (whether an insurance policy, which requires "peer review," violates the Sherman Act was a question of fact); Shafer v. Bulk Petroleum Corp., 569 F. Supp. 621 (1983) (the per se standard was applicable to claims against selling maximum resale price and tying prices of various items to a lease contract); Medical Arts Pharmacy of Stamford, Inc. v. Blue Cross & Blue Shield of Conn., Inc., 675 F.2d 502 (2d Cir. 1982) (the court employed the rule of reason to determine whether the particular agreements violated the Sherman Act since the agreements were novel restraints); National Elec. Contractors Ass'n, Inc. v. National Constructors Ass'n, 678 F.2d 492 (4th Cir. 1982) (the agreement between the incorporated trade association and the unincorporated labor association was a per se violation).

10. 221 U.S. 1 (1911).

11. *Id.* at 62-63.

12. *See Topco Assocs.*, 405 U.S. at 606.

> for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and predict consequences.[13]

By examining the characteristics of the alleged restraint, the Court is able to determine its reasonableness, and specifically whether it promotes or suppresses competition.[14] Thus, under the rule of reason, all the facts of a case are carefully weighed to determine whether the restrictive practice should be prohibited.[15]

Because this analytical process was often complicated and difficult to assess,[16] the Court later formulated an overall judicial doctrine of per se illegality. This doctrine held that certain business relationships were, in themselves, violations of the Act, without regard to a consideration of their reasonableness. As the Court noted in *Northern Pacific Ry. Co. v. United States*:

> [T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.[17]

These relationships or practices, of which horizontal price fixing was one,[18] were therefore manifestly anticompetitive and thus conclusively presumed illegal, regardless of the particular problems or characteristics of the industry in which they operated. Also, no showing of their purpose, aim, or effect on the market could be raised in their defense.[19] Thus, an agreement by members of a busi-

13. 246 U.S. 231, 238 (1913). Thus, read literally, the statute "would outlaw the entire body of private contract law. Yet, it is that body of law which establishes the enforceability of commercial agreements and enables competitive markets—indeed, a competitive economy—to function effectively." *National Soc'y of Professional Engineers*, 435 U.S. at 688.

14. Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

15. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977).

16. It is, for example, inordinately difficult to ascertain whether prices are reasonable or not. *See Socony-Vacuum Oil Co.*, 310 U.S. at 213-14. The Court, quoting from its opinion in United States v. Trenton Potteries Co., 273 U.S. 392, 397-98 (1927), pointed out the difficulty in determining reasonableness of prices by indicating that "a complete survey of our economic organization and choice between rival philosophies [must be examined]." *Socony-Vacuum Oil Co.*, 310 U.S. at 213-14.

17. *Northern Pac. Ry. Co.*, 356 U.S. at 5. *See also Continental T.V., Inc.*, 433 U.S. at 50 n.16. The Court enumerated certain advantages of the per se rule. However, it also noted that per se rules would introduce unintended and undesirable rigidity in the law. *Id.*

18. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

19. The per se category of antitrust violations also includes situations where the sale of one product is tied to the sale of a different one. *See, e.g.*, Mercoid Corp. v. Min-

ness combination (that substantially controlled a trade or business in interstate or foreign commerce) which concerned prices to be charged for their commodity was per se an undue and unreasonable restraint of trade and commerce.[20] As the Court pointed out in *United States v. Trenton Potteries Co.*:

> The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves the power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions.[21]

Until the Supreme Court decided the case of *Broadcast Music*,[22] horizontal price fixing practices were sentenced to per se condemnation in a fairly traditional and predictable manner, in accordance with the Court's earlier pronouncements about the purpose and use of per se rules.[23] But, in *Broadcast Music*, the Court ruled that the method of licensing, by which two New York licensing agencies authorized the use of copyrighted musical compositions for broadcast purposes in exchange for a fixed annual fee, a form of horizontal price fixing, was not illegal per se under the Sherman Act. Instead, such method of licensing must be proved unlawful under the rule of reason standard normally employed in antitrust cases.[24] In so holding, the Court reshaped its earlier and simpler approach to per se illegality under the antitrust laws in favor of a more deliberate and

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neapolis-Honeywell Regulator Co., 320 U.S. 680 (1944), (where competitors agree to divide markets horizontally); *see also* Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) (Klor's, a retail store owner, filed suit because a chain of department stores and national manufacturers boycotted the sale of goods. The Court found such an act to be in violation of the Sherman Act).

20. *Socony-Vacuum Oil Co.*, 310 U.S. at 218; United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927). Indeed, even if the combination was not in a position to control the market, to the extent that it fixed prices, it had the inherent power to interfere directly with the free play of the marketplace. *Socony-Vacuum Oil Co.*, 310 U.S. at 221.

21. *Trenton Potteries Co.*, 273 U.S. at 397-98.

22. 441 U.S. 1 (1979).

23. *See, e.g.*, United States v. Trenton Potteries Co., 273 U.S. 392 (1927); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

24. *Broadcast Music*, 441 U.S. at 24.

sensitive adjudicative process. This new process was specifically calculated to bring operation of the per se rule into line with the legislative purpose of the Sherman Act, which is to prohibit only those business combinations or relationships which have a significantly detrimental effect on competition or trade.[25]

In *Broadcast Music*, the Columbia Broadcasting System, Inc. (hereinafter CBS) brought an antitrust action in United States District Court for the Southern District of New York against the American Society of Composers, Authors, and Publishers (hereinafter ASCAP), Broadcast Music, Inc. (hereinafter BMI), and their members and affiliates.[26] The plaintiff alleged that the licensing system which ASCAP and BMI utilized to license the performance of copyrighted musical compositions in their repertories for broadcast purposes[27] violated sections 1 and 2 of the Sherman Act, and constituted copyright misuse. Members of ASCAP and BMI, a group of sellers or licensers, offered their products through a single agency at a single price, in the form of a blanket license. Thus, CBS contended that competition as to price among the individual copyright owners was restricted. Both agencies were therefore unlawful monopolies operating in restraint of trade, and the blanket license in particular amounted, *inter alia*, to illegal price fixing.[28] Since neither ASCAP nor BMI allowed the CBS network to pay only for those compositions which it actually used,[29] CBS sought injunctive relief under section 16 of the Clayton Act.[30]

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25. *Id.* at 7-16.

26. Both ASCAP and BMI are unincorporated membership associations comprised of authors, composers, and publishers who own copyrights on separate musical compositions, and function as "clearinghouse" agencies for the licensing of their members' copyrighted materials for nondramatic performance purposes. *Broadcast Music*, 441 U.S. at 5. Since most composers and publishers find it expedient to engage the services of ASCAP or BMI in order to negotiate with and license users, and to detect unauthorized uses of their works, the repertories (inventories) of both agencies are enormous. *Id.* at 5, 20-21.

27. Both agencies offered only two kinds of licenses to users. A "blanket" license permitted the use of any and all compositions in the particular agency's inventory "as often as the licensees desired for a stated term in exchange for a negotiated fixed annual fee, based on a percentage of the network's total advertising revenues." *Id.* at 5. A "per program" license also allowed unlimited usage, but its fee was determined by a percentage of the revenues from the number of network programs using the agency's composition. Thus, the fee for each type of license depended neither on the amount nor type of music actually used. *See, e.g.*, Columbia Broadcasting Sys. v. American Soc'y of Composers, Authors & Publishers, 562 F.2d 130, 133-34 (2d Cir. 1977), *cert. granted*, 439 U.S. 817 (1978) (the similarities and differences between "blanket" and "per program" licenses explained).

28. *Broadcast Music*, 494 U.S. at 6.

29. CBS held blanket licenses on an annual basis from both organizations. *Id.* at 5. *See Columbia Broadcasting Sys.*, 562 F.2d at 130. This was an antitrust action against licensing agencies for issuing blanket licenses. The Court held such a practice to violate the Sherman Act.

30. 15 U.S.C. 16 (1982).

Specifically, the requested injunction directed both agencies to offer CBS performing rights or terms which reflected the actual use of music by CBS. An alternative request was to enjoin ASCAP and BMI from offering blanket licenses to any television network.[31] Following a trial limited to the issue of liability, the district court denied relief and dismissed the complaint.[32] On appeal by CBS, the United States Court of Appeals for the Second Circuit reversed.[33] The Supreme Court subsequently granted *certiorari*[34] to consider two issues: first, whether the per se rule applied to the blanket license system, and second, whether this practice constituted copyright misuse.

In ruling against application of the per se rule to the blanket licensing practices of ASCAP and BMI, the Supreme Court noted that "[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations [of the Sherman Act]."[35] By contrast, the sui generis nature of the music industry and the practical complexities of licensing musical performance rights counseled against easy conclusions or glib generaliza-

31. CBS also sought a declaration of copyright misuse under the Declaratory Judgment Act, 28 U.S.C. 2201-02 (1982). *Columbia Broadcasting Sys.*, 562 F.2d at 132.

32. Columbia Broadcasting Sys. v. American Soc'y of Composers, Authors & Publishers, 400 F. Supp 737 (S.D.N.Y. 1975); *see also* Columbia Broadcasting Sys., Inc. v. American Soc'y of Composers, Authors & Publishers, 337 F. Supp. 394 (S.D.N.Y. 1972). The district court refused to declare the blanket license practice price fixing illegal per se, partly because the individual members of both ASCAP and BMI were able to bestow only *non*-exclusive licensing rights on the agencies. *Broadcast Music*, 441 U.S. at 5. See the consent decree in United States v. American Soc'y of Composers, Authors, & Publishers, 1950-51 Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. 1950) (amending United States v. American Soc'y of Composers, Authors & Publishers, 1940-43; Trade Cas. (CCH) ¶ 56,104 (S.D.N.Y. 1941)). See also the consent decree in United States v. Broadcast Music, Inc., 1966 Trade Cas. (CCH) ¶ 71,941 (1966)). Thus, the CBS network was always free to negotiate with the individual copyright owners for a better price.

33. *Columbia Broadcasting Sys.*, 562 F.2d at 130. In reversing the district court, the court of appeals reasoned that, even if the individual copyright owner members of ASCAP or BMI were willing to license the performing rights to their compositions separately, "the determination of how much each [member received from the agency's] common pot [was still] an artificial fixing of the price to that member of the combination for his composition," since ASCAP and BMI periodically distributed royalties to their copyright owner members with little regard to the blanket license fee. *Id.* at 136. (Both agencies distributed royalties to their members in direct proportion to the "nature and amount of use of their music." *Broadcast Music*, 441 U.S. at 5.) Furthermore, since the availability of the blanket license inevitably affected price negotiations for direct licensing with the individual copyright members, the system ultimately tampered with price structures, and was therefore illegal. *Columbia Broadcasting Sys.*, 562 F.2d at 136. Thus, the court of appeals remanded and directed that ASCAP issue a per use license. *Id.* at 140, *quoted in Broadcast Music*, 441 U.S. at 7 n.10.

34. 439 U.S. 817 (1978).

35. *Broadcast Music*, 441 U.S. at 9; (quoting *Topco Assocs.*, 405 U.S. at 607-08).

tions.[36] The cost of sales negotiations and policing copyright license violations would be prohibitive for most individual authors and composers. Thus, the blanket license appeared to be a market arrangement reasonably necessary to effectuate the legal and economic rights available to individual copyright owners.[37] The blanket license would also control the public performance of their musical compositions.[38] Viewed in this light, the blanket license was more than just a licensing vehicle for many separate musical compositions. Instead, it became a vital sales and enforcement mechanism, which most copyright owners found essential.[39] More important, the consequences of the blanket license itself had a synergistic effect on its component parts, which further distinguished it from the typical price fixing model.[40]

Notwithstanding their reasonableness, usefulness, or necessity, "agreements among competitors to fix prices on their individual goods . . . [were] among those concerted activities . . . the Court had held to be within the per se category."[41] But, in *Broadcast Music*, the Court had enough doubts "about the extent to which . . . [the blanket license] practice threatened 'the central nervous system of the economy' "[42] to reject application of the per se rule.[43] There was, for example, no agreement by individual composers and authors not to sell

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36. The court stated in part:

> The Sherman Act has always been discriminatingly applied in the light of economic realities. There are situations in which competitors have been permitted to form joint selling agencies or other pooled activities, subject to strict limitations under the antitrust laws to guarantee against abuse of the collective power thus created . . . . This case appears . . . to involve such a situation. The extraordinary number of users spread across the land, the ease with which a performance may be broadcast, the sheer volume of copyrighted compositions, the enormous quantity of separate performances each year, the impracticability of negotiating individual licenses for each composition, and the ephemeral nature of each performance all combine to create unique market conditions for performance rights to recorded music.

Broadcast Music, 441 U.S. at 14-15 (quoting Memorandum for United States as *Amicus Curiae* at 10-11, K-91, Inc. v. Gershwin Publishing Corp., 372 F.2d 1 (Cir. 1967), *petition for cert. filed*, 389 U.S. 1045 (1968) (No. 147).

37. *See* the Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. 111, 506 (1976)).

38. *Broadcast Music*, 441 U.S. at 19 n.32.

39. The blanket license thus served an eminently practical use—"unplanned, rapid, indemnified access to . . . a repertory of compositions", as well as a reliable method for owners to collect fees for the use of their copyrighted material. *Id.* at 20.

40. *Id.* at 22-23.

41. *Id.* at 8.

42. *Id.* at 23 (quoting United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 226 n. 59 (1940)).

43. One of the inevitable consequences of an aggregate license was that its price had to be established. *Broadcast Music*, 441 U.S. at 21. It was not the individual members of ASCAP or BMI who set the blanket license fee, but the agency itself. *Id.* at 23. Even the particular agency, however, was not the ultimate price setting authority, for if a prospective licensee and the agency were unable to agree on a price, the District Court for the Southern District of New York would set a reasonable one. *Id.* at 11.

individually in any other market.[44]

The Court also found two particularly persuasive facts. First, there had been intense scrutiny of the licensing practices of ASCAP and BMI in the past.[45] Second, Congress itself had specifically provided for blanket licensing and similar practices in the Copyright Act of 1976.[46]

In light of these factors, the Supreme Court reversed the court of appeals.[47] The case was then remanded to the court of appeals for a determination of the legality of the blanket licensing system under the rule of reason, if the issue had been preserved by CBS in that court.[48]

The significance of the *Broadcast Music* decision was the Court's departure from its traditional approach towards application of the per se rule to alleged horizontal price fixing practices in antitrust litigation. In previous decisions, the Court focused on the fact that the justification or reasonableness of a price set by agreement by a business combination was irrelevant to a determination of its lawfulness under the Sherman Act. The Court had also previously noted that a price had been fixed by agreement, rather than on the *effect* which the agreement may have had on the market.[49] Although such attention was perhaps natural enough in "price fixing" cases, it neverthe-

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See also the amended consent decree in United States v. American Soc'y of Composers, Authors & Publishers, 1950-1 Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. 1950).

44. *Broadcast Music*, 441 U.S. at 24 n.42. Under the amended consent decree, individual members retained the right to license individually the public performance of their works. Thus, there were no "real impediments preventing direct dealing by the television network with individual composers if it so chose." *Id.* at 12.

45. "Courts have twice construed the [ASCAP consent decrees] not to require ASCAP to issue ["per use"] licenses for selected portions of its repertory." *Broadcast Music*, 441 U.S. at 12. Of course, the consent decrees did not immunize ASCAP from liability as to the rights of nonparties. *Id.* at 13.

46. *Broadcast Music*, 441 U.S. at 15-16; see the provisions of 17 U.S.C. 111(d)(5)(A), 111(c)(4) (1976) relating to secondary transmissions by cable television systems and to the use of copyrighted compositions in jukeboxes.

47. The court of appeals found price fixing illegal per se under the Sherman Act.

48. *Broadcast Music*, 441 U.S. at 25 n.44. On remand, the court of appeals held the blanket license lawful under the rule of reason. *See* Columbia Broadcasting Sys. v. American Soc'y of Composers, Authors, & Publishers, 620 F.2d 930 (2d Cir. 1980).

49. *See generally* Northern Pac. Ry. v. United States, 346 U.S. 1 (1958); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933); United States v. Trenton Potteries Co., 273 U.S. 291 (1927); Board of Trade of City of Chicago v. United States, 246 U.S. 231 (1918) (the Court held that the test of legality depends upon whether the agreement promotes or destroys competition); United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd and modified*, 175 U.S. 211 (1898); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).

less tended to obscure the ultimate rationale behind the per se rule, which was to facilitate application of the Sherman Act to particular sets of facts.[50]

In *Standard Oil*[51] and *American Tobacco Co. v. United States*,[52] the Court construed the Sherman Act to prohibit only those restraints upon interstate or foreign commerce which were unreasonable.[53] Whether the type of restraint was reasonable must, in turn, be decided by its effect on competition.[54] In order to expedite the determination of the reasonableness of certain business practices, the Court later developed per se categories. These categories were applicable to specific types of practices which had already been adjudged inherently anticompetitive. Thus, the need for elaborate and time-consuming analysis was eliminated.[55] Originally, then, it was the detrimental effect which these restraints had on market competition which was controlling, and not simply the labels which many of these practices had acquired.[56]

In *Broadcast Music*, in order to ascertain whether a per se application was appropriate, the Court concentrated on the effect of the blanket license on the operation of the music industry. In other words, the applicability of per se illegality did not turn solely on whether a price had been fixed. Rather, the issue was "whether the practice [also] facially appear[ed] to be one that would always or almost always tend to restrict competition and decrease output . . . or instead one designed to 'increase economic efficiency and render markets more, rather than less competitive.' "[57] Thus, the court of appeals' conclusion that an organization of composers, authors, and publishers which set its price for the blanket license it sold did not alone establish that the particular practice was so "plainly anticompetitive"[58] as to fall within the per se category. It was not simply a question of whether two or more potential competitors literally "fixed" a price.[59] The blanket license seemed to serve a vital need in

50. Perhaps, too, "it [was] necesary to characterize the challenged conduct as falling within or without that category of behavior to which . . . the label '*per se* price fixing' [had been applied]." *Broadcast Music*, 441 U.S. at 9.

51. 221 U.S. 1 (1911).

52. 221 U.S. 106 (1911).

53. *See also Trenton Potteries*, 273 U.S. at 396.

54. *Id.* at 397.

55. *See Topco Assocs.*, 405 U.S. at 607.

56. *See Socony-Vacuum Oil Co.*, 310 U.S. at 215-16; *see also Appalachian Coals, Inc.*, 288 U.S. at 375.

57. *Broadcast Music*, 441 U.S. at 19-20; *see also Continental T.V., Inc.*, 433 U.S. at 49-50.

58. *Broadcast Music*, 441 U.S. at 9.

59. "Literalness is overly simplistic and often overbroad." *Id.* Moreover, 'price fixing' is a shorthand way of describing certain categories of business behavior to which the per se rule has been held applicable. The Court of Appeals' literal approach

the music business. It did not "always or almost always tend to restrict competition."[60] Thus, the Court held the licensing practices of ASCAP and BMI distinguishable from other practices to which the per se rule was found clearly appropriate.

Unfortunately, the Supreme Court's consideration of factors for applying the per se rule to an alleged horizontal price fixing practice in *Broadcast Music* contradicted earlier Court pronouncements regarding the general application of the per se rule to price fixing cases. For example, in *United States v. Socony-Vacuum Oil Co.*,[61] the Court stated:

> Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive .... Whatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike.[62]

Still later, in *National Society of Professional Engineers v. United States*,[63] the Court reasoned:

> There are, thus, two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are 'illegal *per se*.' In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. *In either event, the purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry.*[64]

Thus, per se rules were designed to promote efficient characterizations of economic practices.

But, in *Broadcast Music*, the Court engaged in an extensive analysis of the music industry in order to reject application of the rule. For instance, the Court concentrated on the economic effect of the blanket license (the alleged price fixing mechanism) upon both the individual copyright owners and the music industry. Such an inquiry would normally be reserved for a rule of reason analysis. The Court's approach, employed to decide whether to apply the per se rule, appears to be one of the central characteristics of the *Broadcast*

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does not alone establish that [the] particular practice is one of those types or that it is 'plainly anticompetitive' . . . ." *Id.*

60. *Id.* at 19-20.

61. 310 U.S. 150 (1940).

62. *Id.* at 221-22.

63. 435 U.S. 679 (1978).

64. *Id.* at 692 (emphasis added).

Music decision.[65]

This newly articulated approach to per se illegality in a horizontal price fixing case was the logical, if unanticipated, outcome of at least two of the Court's previous rulings.[66] The prior rulings restricted the simplistic application of per se rules in antitrust litigation. For instance, in *White Motor Co. v. United States*,[67] the United States brought suit against a manufacturer of trucks. The government contended that the manufacturer's franchise contracts which restricted, in part, the geographic areas within which distributors and dealers were permitted to sell trucks and parts, constituted per se violations of sections 1 and 3 of the Sherman Act. The Court refused to bring this vertical arrangement[68] within the per se rationale. Instead, the Court declared that it "[knew] too little of the actual impact of [this] restriction on competitive market conditions to render conclusive judgment on the bare facts."[69] Later, in *Continental T.V., Inc. v. GTE Sylvania, Inc.*,[70] a case involving yet another vertical territorial restriction, the Court again denied per se relief. It noted that, although "particular applications of vertical restrictions might justify per se prohibition,[71] [a] departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing."[72] Thus, any business practice which

65. The Court itself hinted at its approach inadvertently in its reference to the "bobtailed" application of the rule of reason which the court of appeals had used with respect to the blanket license. *See Columbia Broadcasting Sys.*, 562 F.2d at 140; *see also Broadcast Music*, 441 U.S. at 17 n.27.

66. White Motor Co. v. United States, 372 U.S. 253 (1963); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

67. 372 U.S. at 253.

68. A "vertical" restraint generally entails an agreement among competitors at different levels of the market structure (for example, "to allocate territories in order to minimize competition"), while a "horizontal" restraint involves combinations of competitors at the same level of the market structure. *See Topco Assocs.*, 405 U.S. at 608.

69. *White Motor Co.*, 372 U.S. at 261. "We do not know enough of the economic and business stuff out of which these arrangements emerge to be certain [of anticompetitive restraint]." *Id.* at 263.

70. 433 U.S. at 36.

71. *Id.* at 58.

72. *Id.* at 58-59. The Court stated:

> *Per se* rules thus require the Court to make broad generalizations about the social utility of particular commercial practices. The probability that anticompetitive consequences will result from a practice and the severity of those consequences must be balanced against its procompetitive consequences. Cases that do not fit the generalization may arise, but a *per se* rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them. Once established, *per se* rules tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system of the more complex rule-of-reason trials, but those advantages are not sufficient in themselves to justify the creation of *per se* rules. If it were otherwise, all of antitrust law would be reduced to *per se* rules, thus introducing an unintended and undesirable rigidity in the law.

did not patently restrain competition had to be examined under the more benevolent rule of reason standard.[73]

In *Broadcast Music*, the Court went a step further and declined to characterize the horizontal price restriction, a type of business restraint generally categorized as manifestly anticompetitive, as per se unlawful. Instead, by redirecting its attention to the legislative purpose of the Sherman Act,[74] the Court seemed to return to Justice Brandeis' reasoning in *Board of Trade of City of Chicago*:

> Not all arrangements among actual or potential competitors that have an impact on price are *per se* violations of the Sherman Act or even unreasonable restraints. Mergers among competitors eliminate competition, including price competition, but they are not *per se* illegal, and many of them withstand attack under any existing antitrust standard. 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.[75]

Since the Court had never previously examined the licensing methods of ASCAP or BMI and their effect on competition, the Court was necessarily hesitant to declare these price arrangements illegal per se.

Many lower courts interpreted the *Broadcast Music* case as a basic, fundamental shift in the highest Court's approach to per se illegality in general.[76] These courts believed that they should no longer employ the per se rationale when faced with new or untested business practices. Business ingenuity would be encouraged, as long as it did not ostensibly stifle competition, and even though it involved price fixing.[77] A classic example of this type of reasoning, at least on the

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Id. at 50 n.16 (footnote omitted). *See* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978), where the Court held per se unlawful an engineering association's canon of ethics that prohibited competitive bidding by its members only after carefully considering a great deal of evidence, which ultimately indicated no substantial procompetitive efficiencies. *Id.* at 692-93.

73. *See also* United States v. Schwinn, Arnold, & Co., 388 U.S. 365 (1967) (overruled in *Continental T.V., Inc.*, 433 U.S. at 58) (territorial limitation); Evans v. S.S. Kresge Co., 544 F.2d 1184 (3d Cir. 1976) (joint merchandising venture), *cert. denied*, 438 U.S. 908 (1977).

74. The legislative purpose was to prohibit only those business combinations or relationships which have a significantly detrimental effect on competition or trade.

75. *Broadcast Music*, 441 U.S. at 23. *Compare Board of Trade of City of Chicago*, 246 U.S. at 238, *supra* note 13.

76. *See, e.g.*, Byars v. Bluff City News Co., 609 F.2d 843 (6th Cir. 1979) (joint refusal to deal); Mardirosian v. American Inst. of Architects, 474 F. Supp. 628 (D.D.C. 1979) (group boycott).

77. *See* Optivision, Inc. v. Syracuse Shopping Center Assocs., 472 F. Supp. 665 (N.D.N.Y. 1979), where an optical wholesale-retailer lessee of the Syracuse Shopping Center Associates sued the Association and a competitor. The plaintiff charged that an exclusivity clause, which appeared in a lease between the Association and the competi-

lower court level, was utilized in *Catalano, Inc. v. Target Sales, Inc.*[78] In *Catalano*, a group of beer retailers brought an action wherein they alleged that various beer wholesalers had engaged in a conspiracy to restrain trade (in violation of section 1 of the Sherman Act) by agreeing to eliminate deferred, interest-free payment terms for their retailers.[79] In affirming the district court's ruling that the wholesalers' credit-fixing agreement was not per se unlawful, the Ninth Circuit Court of Appeals reasoned that the fixing of credit terms was not manifestly anticompetitive, since the credit-fixing arrangement, a "nonprice" condition of sale, might actually enhance competition.[80] As the appellate court stated:

> [A]n agreement to eliminate credit could sharpen competition with respect to price by removing a barrier perceived by some sellers to market entry. Moreover, competition could be fostered by the increased visibility of price made possible by the agreement to eliminate credit. For example, an agreement to eliminate credit might foster competition by increasing the visibility of the price term, and hence, promote open price competition in an industry in which imperfect information shielded various sellers from vigorous competition.[81]

In addition, "[s]imply labeling concerted conduct as price-fixing without proof of purpose to affect price will not justify application of a *per se* rule. The antitrust laws concern substance, not form, in the preservation of competition."[82] Thus, the court believed a more complete examination of the impact of credit-fixing on competitive market conditions in the beer industry was required to determine the lawfulness of the arrangement.

On appeal, however, the Supreme Court, in a *per curiam* opinion, reversed.[83] Noting that "[a] horizontal agreement to fix prices was the archetypal example of [a plainly anticompetitive practice,]"[84] the Court observed that the wholesalers' agreement to eliminate credit

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tor, offended sections 1 and 2 of the Sherman Act, *inter alia*, as veiled attempts at price fixing. *Id.* at 676. The United States District Court for the Northern District of New York refrained from applying the per se rule. The court found no indication that the purpose of the arrangement was to fix prices or that its effect upon prices was anything more than incidental. *Id.* at 675. The court also believed it inappropriate to treat the exclusivity clause as conduct unreasonable per se without further judicial analysis of its economic impact on competition under the rule of reason. *Id.* at 676.

78. 605 F.2d 1097 (9th Cir. 1979), *rev'd*, 446 U.S. 643 (1980), *reh'g denied*, 448 U.S. 911 (1980).

79. Because competing wholesalers refused to sell to retailers unless they made payment in cash either in advance or upon delivery, the retailers sought to establish that the wholesalers had specifically conspired to eliminate short term trade credit formerly granted to them on beer purchases, and therefore asked the district court to declare the credit-fixing agreement illegal per se. *Catalano, Inc.*, 605 F.2d at 1097, 1098.

80. *Id.* at 1099.

81. *Id.*

82. *Id.* at 1100 (quoting L. SULLIVAN, *supra* note 1, § 74, at 198 (1977)). It had not been established that the wholesalers' agreement had been entered into with the purpose of restraining price competition in the industry. *Id.*

83. Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980).

84. *Id.* at 647.

was "tantamount to an agreement to eliminate discounts . . . ."[85] The Court reasoned that extending interest-free credit for a period of time was equivalent to giving a discount equal to the value of the use of the purchase price for that period of time. Thus, the credit terms had to be characterized as an inseparable part of the price.[86] An agreement to terminate this practice was, in essence, price fixing,[87] and thus fell within the traditional per se category.[88] Moreover, "the fact that a practice may turn out not to be harmless in a particular set of circumstances will not prevent its being declared unlawful *per se* . . .", especially "when a particular concerted activity entails an obvious risk of anticompetitive impact with no apparent potentially redeeming value."[89] The Court concluded that, although "a horizontal agreement to eliminate credit sales may remove a barrier to other sellers who may wish to enter the market," the end result of the arrangement, an agreement to eliminate credit sales, would be likely to extinguish one form of competition among sellers.[90]

Catalano, if read alone, indicated that the Court was returning to "business as usual." In other words, absent compelling circumstances, the Court would continue to use a per se rule only where appropriate. To summarize, plainly anticompetitive agreements (i.e., where no elaborate study of surrounding market conditions was needed to establish their illegality) would continue to fall within the per se category. However, agreements where the "competitive effect can be evaluated only by analyzing the facts peculiar to the business, the history of the restraint, and the reasons [for its adoption would be examined under the rule of reason]."[91]

But read together, *Broadcast Music* and *Catalano* make an intriguing break with past decisions. *Broadcast Music*, in particular, now sets the stage for a bifurcated approach to per se horizontal price fixing analysis. First, the decision suggested that, if the alleged practice is a "naked restraint of trade,"[92] which a cartel might impose, it would clearly be per se unlawful.[93] But, if the troublesome practice,

85. *Id.* at 648.

86. Price fixing, of course, encompasses more than the mere establishment of uniform prices. *See Socony-Vacuum Oil Co.*, 310 U.S. at 222.

87. *Catalano, Inc.*, 605 F.2d at 648.

88. *Id.* at 649.

89. *Id.*

90. *Id.*

91. *See National Soc'y of Professional Eng'rs*, 435 U.S. at 692.

92. *Broadcast Music*, 441 U.S. at 20.

93. *See id.* at 19-20; *see also Trenton Potteries*, 273 U.S. at 392.

which included an ancillary price fixing component, enhanced or produced inherently procompetitive characteristics of or justifications for the arrangement,[94] then a "truncated" or "mini" rule of reason analysis would be used to determine whether to apply the per se rule.[95] The abbreviated analysis might well indicate that the practice was manifestly anticompetitive, and thus per se illegal. If not, then a full-blown rule of reason inquiry would be employed to determine whether or not the conduct was reasonable.[96] Although the Court never directly acknowledged this approach,[97] it had been tacitly used in the past, and is one way to rationalize the *Broadcast Music* decision.

Approximately two years after the decision in *Broadcast Music*, the Court, perhaps mirroring the different possibilities of *Catalano* and *Broadcast Music*, handed down a closely split decision in *Arizona v. Maricopa County Medical Society*.[98] In *Maricopa*, the State of Arizona brought suit against the Maricopa Foundation for Medical Care.[99] The defendant was a nonprofit corporation composed of li-

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94. *See also* R. BORK, THE ANTITRUST PARADOX (1978), where Judge Bork reasoned, with regard to horizontal price fixing practices (one year before *Broadcast Music* was decided):

> The upshot is that when the integration is essential if the activity is to be carried on at all, the integration and restraints that make it efficient should be completely lawful. But when the integration may be useful but is not essential (in the sense that cooperation is not the essence of the activity), then the joint venture and its ancillary restraints (including price fixing and market division) should be lawful when three conditions are met:
>
> (1) The agreement fixing prices . . . is ancillary to a contract integration; that is, the parties must be cooperating in an economic activity other than the elimination of rivalry, and the agreement must be capable of increasing the effectiveness of that cooperation and no broader than necessary for that purpose.
>
> (2) The collective market share of the parties does not make the restriction of output a realistic danger . . . .
>
> (3) The parties must not have demonstrated a primary purpose or intent to restrict output.

Id. at 279. *See also* L. SULLIVAN, *supra* note 1, § 74, at 200 (1976).

95. *But see* Arizona v. Maricopa County Medical Soc'y, 643 F.2d 553, 563 (9th Cir. 1980) (Larson, J., dissenting), where the dissenting judge used the phrase "truncated rule of reason analysis" in a different sense; specifically, to indicate his perception of the Supreme Court's approach to its rule of reason analysis in National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978).

96. On remand, the Second Circuit held that CBS had failed to prove, under the rule of reason, that the blanket license had restrained competition. *See, e.g., Columbia Broadcasting Sys.*, 620 F.2d at 930.

97. The Court inherently admitted the problem which its per se analysis raised when it stated: "The scrutiny occasionally required [under the per se rule] must not merely subsume the burdensome analysis required under the rule of reason . . . or else we should apply the rule of reason from the start." *See Broadcast Music*, 441 U.S. at 19 n.33.

98. 457 U.S. 332 (1982).

99. The state initially sought injunctive relief to halt alleged price fixing conspiracies among two county medical societies and two "foundations for medical care" which the medical societies had organized. *Id.* at 336.

censed doctors engaged in the private practice of medicine. The state alleged that the membership agreements between the doctors and the foundation, which contained a promise to abide by maximum fee schedules,[100] violated section 1 of the Sherman Act.[101] The district court denied the state's motion for partial summary judgment on the issue of liability.[102] Yet, the court certified for interlocutory appeal the question whether the membership agreements were unlawful per se.[103] The Ninth Circuit Court of Appeals affirmed the lower court's refusal to enter partial summary judgment.[104] The Supreme Court subsequently granted *certiorari*[105] to consider the question of whether the undisputed facts disclosed a per se violation of section 1 of the Sherman Act.

In a 4-3 decision, the Supreme Court reversed the lower courts' determinations.[106] The majority opinion, penned by Justice Stevens, seemed to adopt a very traditional, hard-line stance toward per se illegality.[107] First, the arrangement between the foundation and the physicians was a form of price fixing. The arrangement involved a price restraint which "tended to provide the same economic rewards to all practitioners, regardless of [individual skill, experience, or training]."[108] Second, the fact that the Court had little experience with the health care industry did not counsel against application of a

100. More specifically, the physicians set, by majority vote, the maximum fees that members could claim in full payment for treatment which they provided to policy holders under insurance plans approved by the foundation. *Maricopa*, 643 F.2d at 554.

101. *Id.* "To obtain . . . [foundation approval for insurance plans], the insurers . . . agree to pay the doctors' charges up to the scheduled amounts, and in exchange the doctors agree to accept those amounts as payment in full for their services." *Maricopa*, 457 U.S. at 341. Arizona therefore charged that the foundation membership agreements were basically contracts to fix prices. *Maricopa*, 643 F.2d at 555.

102. Interestingly enough, the court noted that "a recent antitrust trend appears to be emerging where the rule of reason is the preferred method of determining whether a particular practice is in violation of the antitrust law." App. to Pet. for Cert. 43.

103. *Maricopa*, 457 U.S. at 336-37.

104. 643 F.2d 553 (9th Cir. 1980). Since the Supreme Court had not yet handed down its decision in *Catalano* at the time, the court of appeals believed that, because it knew very little about the actual competitive effects of the challenged arrangement within the health care industry, the actual purpose and effect of the agreements should be evaluated at trial. Moreover, the arrangement had considerable procompetitive justifications. *Id.* at 556-57. After all, *Broadcast Music* had taught that, whether to classify an arrangement as " '*per se* price fixing' [would] often, but not *always*, be a simple matter." *Id.* at 558 (quoting *Broadcast Music*, 441 U.S. at 9 n.14 (emphasis added by court)).

105. Arizona v. Maricopa County Medical Society, 450 U.S. 979 (1981).

106. *Maricopa*, 457 U.S. at 332.

107. *Id.* at 342-55.

108. *Id.* at 348.

per se rule, for per se rules were designed to avoid complicated economic analyses.[109] The Court found that an extensive inquiry into the health care industry would be inconsistent with *Socony-Vacuum*. Justice Stevens observed:

> [T]he argument that the *per se* rule must be rejustified for every industry that has not been subject to significant antitrust litigation ignores the rationale for *per se* rules, which in part is to avoid 'the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.'[110]

Third, to argue that the fee arrangement had procompetitive justifications, and therefore should escape per se condemnation, indicated a complete misunderstanding of the per se concept.[111] Finally, to contend that the fee schedules involved price fixing only in a literal sense, and therefore should not be condemned outright, would be to incorrectly interpret the *Broadcast Music* decision.[112] As the majority pointed out, the " 'blanket license' was entirely different from the product that any one composer was able to sell by himself."[113] For example, "the blanket license arrangement did not place any restraint on the right of an individual copyright owner to sell his own compositions separately to any buyer at any price."[114] Here, "each of the foundations [was] composed of individual practitioners who competed with one another for patients . . . [and sold medical services]. Their combination in the form of the foundation [did] not permit them to sell any different product."[115] Perhaps more importantly, the members of ASCAP and BMI delegated the power to fix the price for the blanket license to the clearinghouse agencies. In *Maricopa*, on the other hand, the doctors themselves essentially fixed the prices used in the fee schedules.[116] Since the *Maricopa* fee agreements were among independent, competing entrepreneurs (i.e., doctors), and set the price at which each physician-foundation member offered his own services, they fell "squarely within the horizontal

109. *Id.* at 349-51.

110. *Id.* at 351 (quoting in part *Northern Pac. Ry.*, 356 U.S. at 5).

111. The Court rejected the foundations' contentions "that [the] fee schedules [were] procompetitive because they make it possible to provide consumers . . . with a uniquely desirable form of health insurance coverage that could not otherwise exist." *Maricopa*, 457 U.S. at 351. The majority referred to some of the Court's earlier decisions which held that anticompetitive potential inherent in all price fixing agreements justified their facial invalidation despite potentially redeeming features. *Id.* at 350 n.22.

112. *Id.* at 355-57.

113. *Id.*

114. *Id.*

115. *Id.* at 356.

116. *Id.* at 356 n.33. It was not necessary for the physicians themselves to set the prices. For instance, a similar maximum fee schedule sponsored by the foundation for another health program employed a state agency, rather than the physicians involved, to prescribe the prices for services. *Id.* at 353.

price fixing mold."[117]

The dissenting opinion, spearheaded by Justice Powell,[118] was equally blunt in arguing for the softer, more sensitive approach to per se illegality.[119] Although the price fixing aspect of the arrangement between the foundation and the physicians was an integral part of their association, the primary purpose of the association was to offer an alternative to existing health insurance plans at procompetitive prices.[120] Moreover, the foundation arrangement did not foreclose any competition, either among physicians or insurers.[121] For example, doctors "who participate[d] in the [Maricopa] plan [were] free . . . to associate with other medical insurance plans, . . . and to serve directly uninsured patients—at any fee level." In like manner, insurers who participated in the foundation plan could also do business outside the plan with any physician at any fee level.[122]

As to labeling the arrangement per se unlawful on its face, the dissent reminded the majority that the per se label was not to be applied to every arrangement that literally fixed prices.[123] *Broadcast Music* had made plain that a more discriminating approach was necessary when the Court was faced with an untested business practice which achieved procompetitive goals.[124] After all, the cooperative agreement in *Maricopa*, much like the blanket license in *Broadcast Music*, did indeed result in a different product in that it permitted the more economical delivery of the basic insurance service. In fact,

> [t]he foundations provide a 'different product' to precisely the same extent as did *Broadcast Music*'s clearinghouses. The clearinghouses provided only what copyright holders offered as individual sellers—the rights to use individual

117. *Id.* at 357.
118. *Id.* (Powell, J., dissenting).
119. *Id.*
120. "[T]he foundation arrangement . . . 'impose[s] a meaningful limit on physicians' charges,' . . . 'enables the insurance carriers to limit and to calculate more efficiently the risks they underwrite,' and . . . 'serves as an effective cost containment mechanism that has saved patients and insurers millions of dollars.' " *Id.* at 360.
121. *Id.*
122. *Id.* at 360.
123. *Id.* at 361-62.
124. *Id.* at 362-64. The insurance plan "in fact benefited consumers by '[allowing insurers] to limit and to calculate more efficiently the risks they underwrite' ". *Id.* at 361. In addition, the dissent pointedly referred to prior statements made by the Court in earlier decisions which indicated a more analytical approach. For instance, *Sylvania* had specified that "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than upon formalistic line drawing." *Id.* at 362 (quoting *Sylvania*, 433 U.S. at 58-59). The dissent also cited *National Soc'y of Professional Eng'rs*, 435 U.S. at 679, where the Court carefully scrutinized the arrangement under attack there before ruling it per se illegal. *Maricopa*, 457 U.S. at 362.

compositions. The clearinghouses were able to obtain these same rights more efficiently, however, because they eliminated the need to engage in individual bargaining with each individual copyright owner. In the same manner, the foundations set up an innovative means to deliver a basic service—insured medical care from a wide range of physicians of one's choice—in a more economical manner. The foundations' incentives in typical 'usual, customary, and reasonable' insurance agreements with a stronger cost control mechanism: an absolute ceiling on maximum fees that can be charged.[125]

To condemn the plan as per se illegal without a broader consideration of the evidence was unwise and shortsighted.[126]

Although *Maricopa* had little precedential value in a substantive sense, it is significant as to the Court's overall attitude toward per se illegality in horizontal price fixing cases. While the majority retreated from its unanimous[127] stance in *Broadcast Music*, the dissent continued to opt for the more sensitive adjudicative approach. The majority insisted that the arrangement between the foundation and physicians, which involved a uniform price restraint, invoked the per se rule in a traditional manner.[128] It made little difference that the fee arrangement occurred in an industry with which the Court had little experience or that the arrangement had beneficial, procompetitive aspects.[129] Such considerations ignored the rationale for per se rules.[130] The dissent, on the other hand, believed that the *Broadcast Music* approach should control. Of particular importance was the fact that the association between the doctors and the foundation, even though it involved a price fixing component, was not a naked restraint of trade. Moreover, it was a novel arrangement with which the Court was unfamiliar.[131] It also had extenuating, procompetitive justifications.[132]

Perhaps one reason why the *Maricopa* decision was so close is because the truncated rule of reason approach to per se illegality tends to blur the distinction in general between per se and rule of reason analyses.[133] With this in mind, the majority may have wanted to return the Court to more familiar terrain. The majority's prudential approach may also serve as a signal to lower courts to exercise caution when tempted to use a truncated rule of reason analysis.[134]

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125. *Id.* at 365-66 n.12 (citation omitted).

126. *Id.* at 367.

127. Justice Stevens, who dissented in part in *Broadcast Music*, nevertheless agreed that the blanket license was not per se unlawful. *See Broadcast Music*, 441 U.S. at 25.

128. *See supra* note 109.

129. *See supra* note 111.

130. *Id.*

131. *See supra* note 124.

132. *Maricopa*, 457 U.S. at 367.

133. It is interesting to note, in this regard, that Justice Stevens, who dissented in part in *Broadcast Music* because he believed that the blanket license should have been declared unlawful under the rule of reason then and there, authored the majority opinion in *Maricopa*.

134. At the time, lower court decisions subsequent to *Broadcast Music* seemed to

Then, too, the majority may have believed the Maricopa arrangement warranted per se condemnation, in light of the relative ease with which the troublesome practice could have been corrected.

The Court's balance was maintained two years later in *Jefferson Parish Hospital District No. 2 v. Hyde.*[135] Although the opinion, again written by Justice Stevens, concerned the legality of an alleged tying arrangement, the decision, along with the concurring opinions of Justices Brennan and O'Connor, appears to have significant implications regarding the Court's overall stance toward per se illegality in horizontal price fixing situations.

In *Jefferson Parish*, an anesthesiologist sought, *inter alia*, a declaratory judgment that an exclusive contract between a hospital and a firm of anesthesiologists was an unlawful tying arrangement under section 1 of the Sherman Act.[136] The contract stipulated that every patient undergoing surgery at the hospital had to use the services of that particular group of anesthetists. The United States District Court for the Eastern District of Louisiana denied relief.[137] The Fifth Circuit Court of Appeals reversed. It held the agreement was illegal per se.[138] The Supreme Court granted *certiorari*,[139] and sub-

indicate a certain amount of confusion as to how to approach per se illegality in price fixing cases. *See, e.g.*, National Elec. Contractors Ass'n v. National Constructors Ass'n, 678 F.2d 492 (4th Cir. 1982); Medical Arts Pharmacy of Stamford, Inc. v. Blue Cross & Blue Shield of Conn., Inc., 675 F.2d 502 (2d Cir. 1982); United States v. National Ass'n of Broadcasters, 536 F. Supp. 149 (D.D.C. 1982); United States v. Columbia Pictures Indus., 507 F. Supp. 412 (S.D.N.Y. 1980). In spite of, or perhaps because of, *Maricopa*, lower courts continued to use both the traditional approach as well as the truncated rule of reason approach to per se analysis. *See, e.g.*, Ratino v. Medical Serv. of the Dist. of Columbia (Blue Shield), 718 F.2d 1260 (4th Cir. 1983), and Shafer v. Bulk Petroleum Corp., 569 F. Supp. 621 (E.D. Wis. 1983).

135. 466 U.S. 2 (1984).

136. *Id.* at 5.

137. The district court found that, since the relevant geographic market was an entire metropolitan area in which 20 different hospitals competed, the anticompetitive consequences of the contract were minimal and outweighed by benefits in the form of improved patient care. Hyde v. Jefferson Parish Hosp., 513 F. Supp. 532, 544 (E.D. La. 1981).

138. The court of appeals believed that the contract between the hospital and the firm constituted a tying arrangement, because the "users of the hospital's operating rooms (the tying product) [were] also compelled to purchase the hospital's chosen anesthesia service (the tied product)." Hyde v. Jefferson Parish Hosp. Dist. No. 2, 686 F.2d 286, 289 (5th Cir. 1982). In addition, the appellate court, unlike the district court, determined that the relevant geographic market for the tying product was sufficiently small so that the hospital possessed "sufficient market power in the tying market to coerce purchase of the tied product." *Id.* at 291.

139. Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 460 U.S. 1021 (1983).

sequently reversed.[140]

In ruling against application of the per se rule to the arrangement, the Court[141] pointed out that not every refusal to sell two products separately restrained competition.[142] The seller, through "market power,"[143] must exploit "its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want . . . or might have preferred to purchase elsewhere on different terms."[144] Per se condemnation, according to the Court, would have been appropriate only if the existence of "forcing" was probable, since application of the per se rule focused on the probability of anticompetitive consequences.[145] The hospital had neither the degree nor the kind of market power[146] to force patients, about to undergo surgery, to purchase the services of a particular anesthesiological group. And, since there was no real demand for the purchase of anesthesiological services apart from hospital services,[147] further inquiry into actual competitive conditions was required under the rule of reason.[148]

Several aspects of the *Jefferson Parish* opinion are noteworthy. First, Justice Stevens again authored the Court's opinion. Yet, it was a bare plurality.[149] Next, Justice Stevens' per se analysis was at least three times longer than his rule of reason determination.[150] He explained at length as to why the alleged tying arrangement was not per se unlawful. Since per se rules were designed to save judicial

140. The Court also held the agreement lawful under the rule of reason. *See Jefferson Parish*, 466 U.S. at 29-32.

141. As noted, Justice Stevens delivered the opinion of the Court, albeit a plurality comprising one Justice, since Justice Marshall joined in Justice Brennan's concurrence, and Chief Justice Burger, Justice Powell, and Justice Rehnquist joined in Justice O'Connor's concurring opinion.

142. *Jefferson Parish*, 466 U.S. at 11.

143. "Market power" may be defined crudely as the ability of a seller to force a purchaser to buy something that he would not otherwise buy in a competitive market. *See* United States Steel Corp. v. Fortner Enter., 429 U.S. 610, 620 (1977); *Northern Pac. Ry.*, 356 U.S. at 6-7.

144. *Jefferson Parish*, 466 U.S. at 12.

145. "[A]s a threshold matter there must be a substantial potential for impact on competition in order to justify per se condemnation." *Id.* at 16.

146. "The fact that a substantial majority of the parish's residents elect not to enter East Jefferson [Hospital] means that the geographic data do not establish the kind of dominant market position that obviates the need for further inquiry into actual competitive conditions." *Id.* at 26-27.

147. "It is safe to assume that every patient undergoing a surgical operation needs the services of an anesthesiologist; at least this record contains no evidence that the hospital 'forced' any such services on unwilling patients." *Id.* at 28.

148. *Id.* at 17-18.

149. *See supra* note 141.

150. *Compare Jefferson Parish*, 466 U.S. at 9-29, *with Jefferson Parish*, 466 U.S. at 29-32.

time and energy,[151] the extent of the per se discussion is interesting. Stevens' per se analysis was almost too constrained to fit into a truncated rule of reason mold. But, he did focus on what made tying arrangements inherently anticompetitive, by noting the legislative purpose of the Sherman Act. In so doing, Stevens' opinion mirrored what the Court had done in horizontal price fixing cases up to that time.[152] Perhaps Stevens ultimately was attempting to make strict application of the per se rule in tying situations more palatable to those members of the Court who joined in Justice O'Connor's concurrence.[153] After all, use of the per se rule would not be pernicious, in theory at least, if the per se analysis were performed correctly, since the proper conclusion would, or should, be reached through its use in any case. In this regard, it is significant that Justice Brennan, with whom Justice Marshall joined, felt compelled to reaffirm his adherence to the per se rule in his brief concurring opinion.[154]

Justice O'Connor's concurrence in *Jefferson Parish* was even more intriguing. O'Connor, along with Chief Justice Burger, and Justices Powell and Rehnquist (the same three justices who had dissented in *Maricopa*), believed that since correct application of the per se rule in tying cases had always involved a truncated rule of reason analysis, it made little sense to retain the per se rule in tying cases at all. Justice O'Connor reasoned:

> The *'per se'* doctrine in tying cases has thus always required an elaborate inquiry into the economic effects of the tying arrangement. As a result, tying doctrine incurs the costs of a rule-of-reason approach without achieving its benefits: the doctrine calls for extensive and time-consuming economic analysis characteristic of the rule of reason, but then may be interpreted to prohibit arrangements that economic analysis would show to be beneficial. Moreover, the *per se* label in the tying context has generated more confusion than coherent law because it appears to invite lower courts to omit the analysis of economic circumstances of the tie that has always been a necessary element of tying analysis. The time has therefore come to abandon the *'per se'* label and

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151. *Per se* rules always contain a degree of arbitrariness. They are justified on the assumption that the gains from imposition of the rule will far outweigh the losses and that significant administrative advantages will result. In other words, the potential competitive harm plus the administrative costs of determining in what particular situations the practice may be harmful must far outweigh the benefits that may result. If the potential benefits in the aggregate are outweighed to this degree, then they are simply not worth identifying in individual cases.

United States v. Container Corp. of Am., 393 U.S. 333, 341 (1969) (Marshall, J., dissenting).

152. *See also* National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla., 468 U.S. 85 (1984), discussed *infra* text accompanying notes 183-87.

153. *See infra* text accompanying note 155.

154. *See Jefferson Parish*, 466 U.S. at 32.

refocus the inquiry on the adverse economic effects, and the potential economic benefits, that the tie may have.[155]

Thus, *Jefferson Parish*, when viewed as a whole, continued to show virtually the same split in the Court, this time with respect to tying arrangements, regarding strict application of the per se rule. Indeed, *Jefferson Parish* may well go further, and have more significance for alleged tying practices than *Broadcast Music* had for horizontal price fixing arrangements, for *Jefferson Parish* now appears to make it far easier for defendants to prevail against per se allegations in future tying cases, much as *Monsanto Co. v. Spray-Rite Service Corp.*[156] does in vertical price fixing cases.

In *Monsanto*, Spray-Rite, a wholesale distributor of agricultural chemicals, brought suit under section 1 of the Sherman Act against manufacturer Monsanto. Spray-Rite alleged that Monsanto had conspired with certain other distributors to fix the resale prices which Monsanto set for its products sold to Spray-Rite. Plaintiff also claimed Monsanto had terminated Spray-Rite's authorized distributorship, in furtherance of the conspiracy.[157] Both the district court and the court of appeals found Monsanto's conduct per se unlawful.[158] On appeal, the Supreme Court affirmed the judgment, but held that the court of appeals applied the wrong standard of proof.[159]

The *Monsanto* decision primarily concerned the correct standard of proof in a vertical price fixing case. But, certain statements made by the Court are significant with respect to the truncated rule of reason approach in horizontal price fixing situations. While distinguishing concerted action to set prices from concerted action on nonprice restrictions in distributor-termination cases, the Court noted that the legality of alleged anticompetitive conduct should be judged primarily by its "market impact."[160] The economic effect of legal and illegal behavior, however, is often indistinguishable, as is lawful and unlawful conduct by the parties.[161] It was, therefore, crucial that the kernel of the alleged unlawful practice be pinpointed and then carefully analyzed in order to determine accurately whether the practice was in fact per se unlawful.[162] By virtually setting forth the evidentiary criteria which one can now use to escape per se condemnation of vertical price fixing, *Monsanto* appears to weaken significantly the probability that the per se rule will operate in subsequent vertical

155. *Id.* at 34-35 (footnote omitted).
156. 465 U.S. 752 (1984).
157. *Id.* at 757.
158. *See* Spray-Rite Service Corp. v. Monsanto Co., 684 F.2d 1226 (7th Cir. 1982).
159. Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984).
160. *Id.* at 762.
161. *Id.*
162. *Id.* at 763.

price fixing cases. Thus, the virtually unanimous decision[163] further erodes, to some degree, the possibility of strict application of the per se rule, at least in vertical price fixing cases.

During the same term in which it decided *Jefferson Parish* and *Monsanto*, the Supreme Court also handed down *National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Oklahoma*.[164] In *NCAA*, two universities in the College Football Association (CFA)[165] brought suit against the National Collegiate Athletic Association (NCAA).[166] The plaintiffs alleged that the television plan, which the NCAA had adopted for the 1982-1985 football seasons,[167] violated the Sherman Act.[168] Under the NCAA plan, the American Broadcasting Company (ABC) and the Columbia Broadcasting System, Inc. (CBS) "shared exclusive first rights to negotiate with NCAA member[s] [as to] the live broadcast of football games."[169] ABC and CBS then guaranteed to pay a "minimum aggregate compensation" to the participating NCAA member institutions over the contract period.[170] The master agreement itself did not define "the method of computing the compensation for each game."[171] Instead, an NCAA representative

163. Justice Brennan concurred in the judgment.

164. 468 U.S. 85 (1984).

165. The CFA was an organization of major football-playing colleges within the National Collegiate Athletic Association. It attempted to achieve "a greater voice in the formulation of football television policy than [the group had] in the NCAA" by developing its own television plan. *Id.* It also obtained a separate contract offer from the National Broadcasting Company (NBC). This contract provided for a greater number of television appearances for each institution and for increased overall revenues collected by CFA members. Board of Regents of the Univ. of Okla. v. NCAA, 546 F. Supp. 1276, 1285 (W.D. Okla. 1982). *See infra* note 159.

166. The NCAA plays a vital role in the regulation of amateur collegiate sports by "integrat[ing] the rulemaking and rule-enforcing activities of its member institutions." Among other things, it determines standards of amateurism, such as playing rules, eligibility requirements, recruiting standards, and game schedulings. It also formulates a television plan which regulates the televised appearances of its member institutions' football games by national television networks. Board of Regents of the Univ. of Okla. v. NCAA, 707 F.2d 1147, 1153 (10th Cir. 1983).

167. The major purpose of the NCAA's football television plan was "to reduce the adverse effect of live television upon football game attendance [by] limit[ing] the total amount of televised intercollegiate football and the number of games that any one [team could] televise." *NCAA*, 468 U.S. at 85.

168. Specifically, the CFA universities brought suit because "the NCAA [threatened] disciplinary action against any CFA member that complied with the CFA-NBC contract." *Id.* at 85. This was a serious deterrent, since "[o]ne sanction often levied [by the NCAA] for violation of [its] rules [was] the restriction of television appearances." *NCAA*, 707 F.2d at 1153.

169. *NCAA*, 707 F.2d at 1150.

170. *Id.*

171. *NCAA*, 468 U.S. at 93.

would compute the costs "for different types of telecasts . . . . [T]he aggregate of all the payments would presumably total the minimum aggregate compensation set forth in the basic agreement."[172]

However, there were some problems with this arrangement: "the amount that any team receive[d] [changed neither] with the size of the viewing audience, the number of markets in which the game [was] telecast, [n]or [with] the particular characteristics of the game or the participating teams."[173] Rather, the NCAA plan provided "that the carrying networks make alternate selections of those games they wished to televise . . . thereby obtain[ing] exclusive right[s] to submit a bid at an essentially fixed price to the institutions involved."[174] The United States District Court for the Western District of Oklahoma initially granted injunctive relief.[175] After a full trial, the district court found that the controls exercised by the NCAA over the televising of college football games violated the antitrust laws.[176] The Tenth Circuit Court of Appeals affirmed and held the NCAA television plan constituted per se illegal price fixing.[177]

The appellate court decided "the restraints contained in the television plan [did] not increase the efficiency of the NCAA's rulemaking integration and [were] broader than necessary to achieve its asserted procompetitive goals."[178] Moreover,

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172. *Id.*

173. *Id.*

174. *Id.* Thus, much like a cartel, the NCAA in effect "established a uniform price for the products of each of [its] member producers, with no regard for the differing quality of the products or the consumer demand for [them]." *NCAA*, 546 F. Supp. at 1300-01. In other words, "the price . . . paid for the right to televise any particular game [was] responsive neither to the relative quality of the teams playing the game nor to viewer preference." *NCAA*, 468 U.S. at 106 n.30 (quoting *NCAA*, 546 F. Supp. at 1318).

175. Board of Regents of the Univ. of Okla. v. NCAA, 546 F. Supp. 1276 (W.D. Okla. 1982). Although a preliminary injunction prevented the NCAA from initiating disciplinary proceedings against any CFA member, most CFA participants were no longer willing to commit themselves to the NBC contract, and therefore the agreement was never consummated. *Id.* at 1286.

176. The district court believed that the television plan virtually eliminated competition for broadcasting rights:

> First, the networks have no intention to engage in bidding. Second, once the network holding first choice for any given date has made its choice and agreed to a rights fee for that game with the two teams involved, the other network is in a monopsony position. The schools cannot threaten to sell the broadcast rights to any other network. They cannot sell to NBC without committing a violation of NCAA rules. They cannot sell to the network which had first choice over that particular date because, again, they would be in violation of NCAA rules, and the network would be in violation of its agreement with NCAA. Thus, NCAA creates a single eligible buyer for the product of all but the two schools selected by the network having first choice. Free market competition is thus destroyed under the . . . plan.

Id. at 1292-93.

177. *NCAA*, 707 F.2d at 1152, 1156.

178. *Id.* at 1154.

> [a]s did the performing rights societies in *Broadcast Music*, the NCAA offers a product—exclusive broadcast rights to all NCAA games—that is different from that which the individual schools could offer. However, unlike the blanket license at issue in *Broadcast Music*, the new and different product in this case comes at the expense of the product that would otherwise be offered by the schools. In *Broadcast Music*, the copyright holders retained the right to negotiate individual contracts: they could sell outside the blanket licensing arrangement. Under the television plan at issue here schools are not permitted to sell outside the network contracts. Not only does this restraint inhibit the freedom of the individual schools, it also poses a greater risk of cartelization than was present in *Broadcast Music*. There, the right of the copyright holders to sell outside the blanket licensing arrangement ensured the presence of potential competition to inhibit the exercise of market power by the performing rights societies. Here, every producer of commercially salable intercollegiate football is bound to sell through the television plan only. There is no potential competition from producers of intercollegiate football.[179]

The Supreme Court later affirmed the judgment,[180] but not upon the rationale of the court of appeals.[181] The NCAA's plan prevented member institutions from competing against one another. There was no contest over price or television rights. Thus, any "real price negotiation between broadcasters and institutions . . . constitut[ed] a horizontal [restraint of trade and] price fixing."[182] Despite these facts, the Supreme Court decided against application of the per se rule to the arrangement. The Court explained that its decision to withhold application of the rule was not based upon

> a lack of judicial experience with this type of arrangement, on the fact that the NCAA was organized as a nonprofit entity, or on any respect for the NCAA's historic role in preservation and encouragment of intercollegiate amateur athletics. Rather . . . [the] critical [point was] that, [due to the inherent nature of this particular industry] horizontal restraints on competition [were] essential if the product [was] to be available at all.[183]

After all, the NCAA played an important role in allowing college football to preserve its character, and as a result, enabled a product to be marketed which might otherwise have been unavailable.[184] In

179. *Id.* at 1156.

180. Board of Regents of the Univ. of Okla. v. NCAA, 468 U.S. 85 (1984).

181. The appellate court found that the plan was unlawful not only per se but also under the rule of reason, in that "its anticompetitive limitation on price and output was not offset by any procompetitive justification sufficient to save the plan even when the totality of the circumstances was examined." *NCAA*, 707 F.2d at 1157-60. Yet, the Supreme Court held the plan illegal under the rule of reason only. *See infra* text accompanying notes 187-89.

182. *NCAA*, 468 U.S. at 99-100.

183. *Id.* at 100-01. *See also supra* note 94.

184. Specifically, the NCAA marketed "contests between competing institutions. [The competitions would have been totally] ineffective if there were no rules on which the competitors agreed . . . ." Thus, in order to preserve the character and quality of the product, many rules and restrictions had to be mutually agreed upon by the member institutions, such as the size of the field, the number of players on a team, class

fact, in performing the function of regulating and defining competition, the NCAA actually widened consumer choices, and thus produced procompetitive results. Thus, despite the fact that the television plan involved horizontal restraints on the ability of member institutions to compete in terms of price and output, *Broadcast Music* counseled that a fair evaluation of the competitive character of and the justifications for the restraints was required under the rule of reason.[185]

As in *Broadcast Music*, a unanimous Court[186] once again agreed that an alleged anticompetitive practice, which unquestionably involved the fixing of prices among competitors, was not per se invalid. The NCAA marketed a television plan which, much like the blanket license arrangement in *Broadcast Music*, had an essentially ancillary price fixing component. It achieved procompetitive efficiencies. The practice did not "facially appear to be one that would always or almost always tend to restrict competition and decrease output."[187]

By deciding not to apply the per se rule, the Court engaged in fairly extensive analysis of the alleged restraint and its effect on competition. The Court used, as in *Broadcast Music*, a truncated rule of reason approach to determine the applicability of the per se rule. The Court tacitly acknowledged its approach when it stated:

> Indeed, there is often no bright line separating *per se* from Rule of Reason analysis. *Per se* rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct. For example, while the Court has spoken of a '*per se*' rule against tying arrangements, it has also recognized that tying may have procompetitive justifications that make it inappropriate to condemn without considerable market analysis.[188]

NCAA is the most recent Supreme Court horizontal price fixing case to use the truncated rule of reason approach to determine per se illegality. In a sense, the *NCAA* opinion balances out *Broadcast Music*. After all, both cases held the per se rule inapplicable to alleged horizontal restraints. Yet, the blanket license in *Broadcast Music* was

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attendance requirements, and the like. If an institution were to have adopted such restrictions unilaterally, its effectiveness as a competitor might easily have been compromised. *NCAA*, 468 U.S. at 101.

185. *Id.* at 103.

186. Although Justice White, with whom Justice Rehnquist joined, dissented in *NCAA* on the ground that the television arrangement should have passed muster under the rule of reason, both dissenting Justices appeared to agree that the NCAA's television plan was not per se unlawful. *See NCAA*, 468 U.S. at 120-36.

187. *Broadcast Music*, 441 U.S. at 19-20.

188. *NCAA*, 468 U.S. at 104 n.26 (citation omitted). Even the court of appeals admitted that "it is difficult to assess the validity of the NCAA's argument without getting into the enormous complexities of market definition that the per se rule seeks to avoid." *NCAA*, 707 F.2d at 1155 (quoting R. BORK, THE ANTITRUST PARADOX at 269). In this regard, it is interesting to note that the Supreme Court placed much of the appellate court's per se reasoning in its rule of reason analysis instead. *See NCAA*, 468 U.S. at 103-20.

subsequently held lawful on remand under the rule of reason, while the television plan in *NCAA* was found unlawful by the Court itself under the rule of reason. From the standpoint of procompetitive justification, the controlling factor as to whether the Court will use the truncated rule of reason approach, the split ruling in *NCAA* is troublesome. Although the Court, in effect, ruled the television plan per se lawful, the plan nowhere appeared to lower prices or increase output in the football "industry." In other words, the *NCAA* arrangement was unlike the *Broadcast Music* licensing practice in that the *NCAA* plan did not appear to create procompetitive market efficiencies, as did the blanket license practice in *Broadcast Music*. The upshot is that perhaps the television plan in *NCAA* should not have escaped per se condemnation under the truncated rule of reason approach. Even the Court itself may have recognized this inadvertently by holding the television plan unlawful under a full-blown rule of reason determination.

As to the question of why the balance of the Court shifted so dramatically in *NCAA* from that in *Maricopa*, perhaps the Court believed that *NCAA* presented a clearer case in which to apply safely a truncated rule of reason approach without giving lower courts too much leeway in using it as well. Perhaps, too, more members of the Court were willing to adopt the truncated approach in light of the fact that *NCAA* was decided during the same term as *Monsanto* and *Jefferson Parish*.

Thus, for over half a century, the Supreme Court has used the per se rule in antitrust litigation in order to avoid prolonged and tedious investigations into market practices which, based on the Court's past experience, would virtually always be determined unlawful. In this way, horizontal price fixing has traditionally been subject to the per se rule, and therefore conclusively presumed illegal under the Sherman Act without regard to the particular problems or characteristics of the industry in which it existed, and no showing of its purpose, aim, or effect on the market could be raised in its defense.

With its decision in *Broadcast Music*, however, the Court seemed to soften its per se approach. It focused more particularly on the true effect which the alleged restraint had on the operation of the industry in question, something to which the Court previously had generally paid mere lip service when applying the per se rule. Hence, *Broadcast Music* established that when an alleged restraint, which included horizontal price fixing as only one of its many components, actually enhanced inherently procompetitive characteristics of and justifications for its use, then the troublesome practice would survive a per se inquiry.

The opinions in subsequent cases, such as *Catalano, Maricopa,* and *NCAA*, along with *Jefferson Parish* and *Monsanto*, all tend to support this view. Indeed, the Court seems to be correcting its course a few degrees when applying the per se rule in order to bring operation of the rule back into line with the original legislative purpose of the Sherman Act, which is to prohibit only those business restraints which are in fact unreasonable. In a sense, the Court is examining market practices as it always has under the per se rule, but is doing so in a manner which is perhaps more transparent than it once was. Whether this trend will continue, and perhaps solidify, depends on future decisions by the Court regarding untested business arrangements which will push the law to its limits.[189]

189. Subsequent to the *NCAA* decision, lower courts have continued to apply, somewhat haphazardly, both the traditional and *Broadcast Music* per se approaches to horizontal price fixing practices. *See, e.g.,* Northwest Publications, Inc. v. Crumb, 752 F.2d 473 (9th Cir. 1984); Vogel v. American Soc'y of Appraisers, 744 F.2d 598 (7th Cir. 1984); Franson D.K.S. Tom v. Hawaii Dental Serv., 606 F. Supp. 584 (D. Hawaii 1985); United States v. Stop & Shop Cos., No. B 84-51 (D. Conn. Nov. 8, 1984).