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QUALITY COLLUSION: NEWS, IF IT AIN'T BROKE, WHY FIX IT?

Mark McMillan[*]

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INTRODUCTION

It would be an Orwellian nightmare if one day we were to wake up and a single person decided which news stories were covered or how they were covered—in essence, if news stations colluded on their content. Every day in Honolulu, Hawaii, two stations simulcast their

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morning and evening news broadcasts.[1] In San Angelo, Texas;[2] Denver, Colorado; and Charleston, South Carolina, different on-air personalities read the same script across competing stations.[3] In Chicago, an editor coordinates the sharing of journalists, crews, and editorial staff of CBS, NBC, FOX, and CW to limit duplicative costs.[4] These are among the many examples of collusion in broadcast television news.[5] The nightmare is here.

Broadcast television firms have created various agreements of questionable antitrust legality to increase efficiency and profitability.[6] One example, known as a shared service agreement (SSA), coordinates the sharing of services and facilities between firms and inhibits quality-based competition between stations.[7]

Although antitrust laws cover almost all anticompetive activities, the agencies charged with enforcing the laws rarely pursue agreements on quality.[8] This lax enforcement probably stems from the difficulties of measuring quality and the procompetitive effects of standardization.[9] For some industries, such as local broadcast television news (LBTN), the justifications for ignoring quality collusion appear nonexistent.[10] Moreover, the quality reductions in broadcast television offend one of our society's cherished tenets: the

1. *See* Danilo Yanich, *Local TV News & Service Agreements: A Critical Look*, UNIV. DEL., 8 (Oct. 2011), http://www.udel.edu/ocm/pdf/DYanichSSAFINALReport-102411.pdf.

2. *See* Brian Stelter, *You Can Change the Channel, but Local News Is the Same*, N.Y. TIMES, May 28, 2012, at A1.

3. *Charleston, SC*, FREEPRESS, http://www.freepress.net/ changethechannels#!/ markets/97590/charleston-sc (last visited Nov. 12, 2012). Agreements between stations exist in at least eighty-three television markets, covering 55% of American television households. Yanich, *supra* note 1, at 7. The agreements can be very influential. For example, in Denver, 71% of the stories, broadcast by two stations, are the same, and of those, 67% use the same video, 62% use the same script, 39% have the same reporter, and 11% have the same on-air personality. *Id.* at 26-27.

4. *Chicago, IL*, FREEPRESS, http://www.freepress.net/ changethechannels#!/ markets/769/chicago-il (last visited Nov. 12, 2012).

5. *See generally* Yanich, *supra* note 1.

6. *See, e.g.*, *Honolulu Stations in Shared Services Deal*, TVNEWSCHECK (Aug. 18, 2009, 6:20 PM), http://www.tvnewscheck.com/article/2009/08/18/34810/honolulu-stations-in-shared-services-deal.

7. *See* Christopher S. Reed, *Regulating Relationships Between Competing Broadcasters*, 33 HASTINGS COMM. & ENT. L.J. 1, 5-7 (2010).

8. *See infra* Part II.B.

9. *See infra* Part II.A.

10. *See infra* Part II.B.

freedom of the press.[11] Accordingly, the collusive agreements are worthy of closer scrutiny.

This Note discusses quality-based collusion in three parts. Part I provides a background of the legal treatment and economic theory regarding quality collusion and how economic principles apply to broadcast television. Part II discusses the divergence between the antitrust laws as written and antitrust laws as enforced against quality collusion. Part III provides strategies the antitrust community (the Community)[12] could adopt to enforce the laws more effectively, with local broadcast television as a backdrop for applying the strategies.

I. BACKGROUND OF ANTITRUST LAW AND THE MEDIA

Antitrust law has a long history extending back to 50 B.C. when the *Lex Julia de Annona* prevented the people from rigging Rome's corn market.[13] In the United States, the statutory history began with the passage of the Sherman Antitrust Act of 1890 (Sherman Act).[14] While the debate over the purpose of antitrust law persists,[15] courts and enforcement agencies lean heavily on economic theory in interpreting the statutes.[16]

11. *See* U.S. CONST. amend. I, § 1; Curtis Publ'g. Co. v. Butts, 388 U.S. 130, 149 (1967) (noting that freedom of the press is a "social necessity" required to maintain our political system (quoting Time, Inc. v. Hill, 385 U.S. 374, 389 (1967))).

12. The antitrust community includes the state and federal legislatures that write the antitrust statutes; the federal and state judiciary that decide antitrust cases; the federal agencies charged with enforcing the federal antitrust statutes (namely the Federal Trade Commission (Commission) and the Department of Justice Antitrust Division (Division)); the state attorneys general that are charged with enforcing state antitrust statutes; the private legal professionals that bring and defend antitrust actions; and legal scholars of antitrust law.

13. *See* Michael Albery, *Restrictive Trade Practices and the Conflict of Law*, 44 PROBS. PUB. & PRIVATE INT'L L. 125, 130 (1958).

14. *See* Andrew C. Hruska, *A Broad Market Approach to Antitrust Product Market Definition in Innovative Industries*, 102 YALE L.J. 305, 306–07 (1992).

15. Legal commentators, such as Robert Bork (ROBERT BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 39–44 (1978)) and Richard Posner (RICHARD A. POSNER, ANTITRUST LAW 9–32 (2d ed. 2001)), have asserted that the purpose of antitrust law is economic, while others claim that it is to benefit consumers. *See* John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 196 (2008) (challenging such assertions).

16. For example, in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 233 (1993) and in *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 589–90 (1986), the Court accepted economic commentators' consensus that predatory pricing is rarely successful. In contrast with those cases, in *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001), the D.C. Circuit

A. Antitrust Law and the Legal Treatment of Collusion

While a complete discussion of U.S. antitrust law and policy exceeds the scope of this Note, this Section provides a general background on antitrust law, the parties involved, and how antitrust laws relate to quality collusion. The bulk of antitrust law flows from two broadly written statutes: the Sherman Act[17] and Section 5 of the Federal Trade Commission Act of 1914.[18] The laws are enforced by the Federal Trade Commission (Commission) and the Department of Justice Antitrust Division (Division) (collectively, the Agencies), although private parties can also bring antitrust claims.[19] The Agencies and courts will flesh out the statutes with economic frameworks, key definitions, and procedural rules,[20] though occasionally they make mistakes.[21]

The Sherman Act established the initial framework for antitrust regulation in the United States.[22] The key sections are: § 1 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal . . . .")[23]; and § 2 ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .").[24] The statute does not specify a particular type of

held that efficiencies would have to be "extraordinary" to defend an otherwise anticompetitive merger, and in that case the efficiencies were insufficient to counter the merger's anticompetitive effects. *See also* FTC v. Staples, Inc., 970 F. Supp. 1066, 1088–89 (D.D.C. 1997). Generally, the outcome of increasing economic efficiencies and protecting consumers are the same. *See* Kirkwood & Lande, *supra* note 15, at 240.

17. 15 U.S.C. §§ 1-7 (2006).

18. 15 U.S.C. §§ 41-58.

19. Robert P. Taylor & Roxane C. Busey, *Relationships Among Competitors*, *in* ANTITRUST INSTITUTE 2012: DEVELOPMENTS & HOT TOPICS, VOLUME ONE 131, 155, 162 (2012).

20. *See, e.g.*, Hopkins v. United States, 171 U.S. 578, 600 (1898).

21. *See, e.g.*, United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377 (1956).

22. *See* 15 U.S.C. § 1.

23. *Id.*

24. 15 U.S.C. § 2 (2006)

restraint.[25] The core restriction came shortly after the passage of the Sherman Act: the Supreme Court, in *Hopkins v. United States*, narrowed "[e]very restraint" to mean only unreasonable restraints.[26] To determine whether firms are unreasonably restricting trade, courts categorize the behavior.[27] Multi-firm behavior, which is the focus of this Note, has several categories, including horizontal agreements,[28] vertical agreements,[29] and mergers. Each of those categories has sub-categories. For example, horizontal agreements include group boycotts, price fixing, market allocations, information exchanges, and joint ventures.[30]

The cost of antitrust litigation[31] makes prosecutorial discretion an important consideration for firms. To help the Community understand, the Agencies jointly promulgate guidelines articulating the framework the Agencies use to determine whether to bring suit.[32]

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25. *See generally* 15 U.S.C. §§ 1, 2. Firms can theoretically restrict price, quality, or quantity in their dealings with other firms or customers. *See infra* Part I.B.

26. Hopkins v. United States, 171 U.S. 578, 600 (1898) ("The act of congress must have a reasonable construction, or else there would scarcely be an agreement or contract among businessmen that could not be said to have, indirectly or remotely, some bearing on interstate commerce . . . ."). Even the most basic service contract that sets out a future performance, such as painting a home, restrains trade by eliminating future competition for the job. A painter would be unwilling to take on the job without a contract to ensure payment. As a result, the contract is a reasonable restraint of trade. In comparison, an agreement between competitors that rigs an auction to obtain higher prices serves no legitimate purpose and is unreasonable. *See* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 87–88 (1911).

27. *See* Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 Iowa L. Rev. 1207, 1207 (2008).

28. A horizontal agreement is "[a]n agreement entered into between competing producers or dealers whereby they seek to control the market price of a commodity." Ballentine's Law Dictionary (3d ed. 2010).

29. A vertical agreement is an agreement entered into between non-competing producers or dealers. *See* Bus. Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717, 722 (1988).

30. *See* Taylor et al., *supra* note 19, at 11, 13.

31. *See, e.g.*, Iroquois Gas Transmission Sys., L.P. v. F.E.R.C., 145 F.3d 398, 399 (D.C. Cir. 1998) (charging the Iroquois more than $15,000,000 in legal fees); *In re* Visa Check/Mastermoney Antitrust Litig., 297 F. Supp. 2d 503, 522–25 (E.D.N.Y. 2003) (plaintiff's legal fees, based on lodestar, were more than $60,000,000 in addition to almost $19,000,000 in costs and fees); *In re* NASDAQ Mkt.-Makers Antitrust Litig., 187 F.R.D. 465, 488 (S.D.N.Y. 1998) (plaintiff's attorneys' fees totaled $143,780,000).

32. *See, e.g.*, Dep't of Justice & FTC, Antitrust Guidelines for Collaborations Among Competitors (2000); U.S. Dep't of Justice & FTC, Horizontal Merger Guidelines (Aug. 19, 2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf [hereinafter 2010 Horizontal Merger Guidelines].

Written by antitrust professionals, the guidelines take into account economic theory as it develops and data gleaned from the Agencies' experiences in enforcement.[33] The Agencies update the guidelines regularly to remain current with economic theory and antitrust practice.[34] Adding to the guidelines' weight, courts also rely on the publications to understand and apply economic principles.[35]

To limit the cost of antitrust litigation,[36] courts match the depth of their query, based on these categories and subcategories, to the likelihood that a particular restraint on trade is unreasonable.[37] The more likely it is that an activity is anticompetitive, the less time a court spends considering the reasonableness of the particular restraint.[38] The scheme uses a rough tripartite categorization: rule of reason (ROR),[39] *per se*,[40] and quick look.[41]

The "rule of reason" is the deepest, most common, and costly antitrust analysis.[42] Under the ROR, the court considers a variety of factors, including information about the business, the condition of the business before and after the restraint was imposed, the nature of the restraint, and the effect of the restraint on other businesses to determine whether the conduct in question is reasonable or not.[43] While the ROR allows defendants to use many different factors, they may not claim that competition itself is unreasonable,[44] although

33. Press Release, Federal Trade Commission and U.S. Department of Justice, Issue Revised Horizontal Merger Guidelines (Aug. 19, 2010) (on file with author).

34. The Merger Guidelines have undergone five major revisions since 1982, while the bulk of U.S. Supreme Court case law and statutes predate 1982. *See* Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 49, 92 (2010).

35. *See, e.g.*, DEP'T OF JUSTICE & FTC, HORIZONTAL MERGER GUIDELINES (1992, rev. 1997), *available at* http://www.justice.gov/atr/public/guidelines/hmg.pdf [hereinafter 1992 HORIZONTAL MERGER GUIDELINES] (S.S.N.I.P. test to define relevant market in a tying case); *see also* United States v. Visa U.S.A., Inc., 163 F. Supp. 2d 322, 335–36 (S.D.N.Y. 2001) (applying the 1992 HORIZONTAL MERGER GUIDELINES).

36. The oppressive costs of antitrust litigation were one of the driving forces behind the now seminal case of *Bell Atlantic Corp. v. Twombly*. *See* 550 U.S. 544, 558–59 (2007).

37. *See infra* notes 32–62 and accompanying text.

38. *Compare infra* notes 42–47 and accompanying text, *with infra* notes 48–51 and accompanying text.

39. *See* State Oil Co. v. Khan, 522 U.S. 3, 10 (1997).

40. *See* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

41. Taylor & Busey, *supra* note 19, at 205–11.

42. *See* Lemley & Leslie, *supra* note 27, at 1214–15.

43. *See, e.g.*, *Khan*, 522 U.S. at 10.

44. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 696 (1978).

restraints designed to enhance social welfare can be reasonable.[45] Given the complexity of the case theory, parties on both sides enlist economists and industry experts to develop models and claim that "reasonableness" weighs in their favor.[46] In the end, case ambiguities and complexities overwhelm the party with the burden of proof.[47]

"*Per se*" is an unforgiving antitrust analysis reserved for activities that, in the judiciary's experience, have lacked a legitimate business purpose.[48] As the Court explained in *Jefferson Parish Hospital District No. 2 v. Hyde*, the rationale for *per se* is to "avoid a burdensome inquiry into actual market conditions in situations where the likelihood of anticompetitive conduct . . . render[s] unjustifiable the costs of determining whether the particular case at bar involves anticompetitive conduct."[49] When an activity is *per se* illegal, the plaintiff need not prove an anticompetitive intent or effect.[50] The primary *per se* illegal activities are price fixing, division of markets, and group boycotts.[51]

To wade deeper into the murky waters of antitrust litigation than *per se* allows, without the full ROR analysis, the Court recently established a "quick look" analysis.[52] The quick look is an intermediate inquiry. It applies when someone with a "rudimentary understanding of economics" could determine that the alleged activity would have anticompetitive effects.[53] Under this type of analysis, defendants can demonstrate procompetitive economic justifications for their facially anticompetitive behavior to establish the restraint's reasonableness.[54] If the defendant fails, the conduct is

45. *See, e.g.*, FTC v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997) (using experts to break down cost differentials in submarkets with and without competition).

46. *See generally* United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377 (1956); *Staples, Inc.*, 970 F. Supp. at 1066.

47. Edward Brunet & David J. Sweeney, *Antitrust Procedure and Substance After* Northwest Wholesale Stationers*: Evolving Antitrust Approaches to Pleadings, Burden of Proof, and Boycotts*, 72 VA. L. REV. 1015, 1018 (1986).

48. *See* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

49. Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 15 n.25 (1984) (citing Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 350–51 (1982)).

50. *See id.* at 33 (O'Connor, J., concurring).

51. *See N. Pac. Ry. Co.*, 356 U.S. at 5 (internal citations omitted).

52. The Supreme Court alluded to the idea of a "quick look" analysis in *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 110 (1984), although it went unnamed until *California Dental Association v. FTC*, 526 U.S. 756, 769 (1999).

53. *Cal. Dental Ass'n*, 526 U.S. at 770.

54. *See generally id.*; *Bd. of Regents*, 468 U.S. at 110.

illegal.[55] Although it has yet to happen, if the defendant meets the burden, the court will probably adjudicate under the ROR.[56]

To tease apart "quick look" and *per se*, consider collegiate football[57]: a functioning football league requires participating colleges to agree on various aspects of game play, player recruitment, and player compensation to function as an amateur league. Each of these is a horizontal agreement, but they are also legal.[58] In the early 1980s, the NCAA fixed the price and quantity at which they sold television rights to stations among participating schools.[59] Because collegiate sports require certain agreements, the Court utilized the quick look standard, rather than a stricter *per se* analysis.[60] Because some agreement was necessary, the Court allowed the NCAA to rebut a presumption of illegality with evidence of the restraint's reasonableness.[61] Although the NCAA proposed various justifications for the restraint's reasonableness, such as ensuring stadium attendance by limiting the supply of televised football and the non-profit status of the NCAA, the Court determined that the NCAA's restraint was illegal.[62]

Antitrust violations have several affirmative defenses, two of which are especially relevant to multi-firm conduct: efficiency[63] and a failing company.[64] The efficiency defense asserts that the efficiencies that an otherwise illegal restraint creates are so great that the restraint is reasonable[65] while the failing company defense claims that the continued existence of one or both of the firms is economically

55. Lemley & Leslie, *supra* note 27, at 1215.

56. *See id.*

57. Lewis Cole, *The NCAA: Mass Culture as Big Business*, 8 CHANGE 8, 42 (1976).

58. *See Bd. of Regents*, 468 U.S. at 101.

59. *See id.* at 91-93.

60. *See id.* at 100-01.

61. *See id.* at 117.

62. *See id.* at 120.

63. *See generally* 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 32; Jamie Henikoff Moffitt, *Merging in the Shadow of the Law: The Case for Consistent Judicial Efficiency Analysis*, 63 VAND. L. REV. 1697, 1700 (2010). *Contra* Kirkwood & Lande, *supra* note 15, at 191 (arguing that the goal is to protect consumers).

64. *See* United States v. Gen. Dynamics Corp., 415 U.S. 486, 506–08 (1974); Citizen Publ'g Co. v. United States, 394 U.S. 131, 138 (1969); United States v. Third Nat'l Bank in Nashville, 390 U.S. 171, 182 (1968).

65. *See generally* FTC v. H.J. Heinz Co., 246 F.3d 708 (D.C. Cir. 2001); FTC v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997).

unfeasible without an otherwise illegal merger.[66] In asserting any defense, regardless of its grounds, firms cannot assert that the competition itself is unreasonable, thereby justifying the restraint.[67]

The Commission, Division, and district courts accept efficiency claims to justify otherwise anticompetitive behavior if the gains in efficiency outweigh the loss in competition.[68] Currently, the efficiency defense is in question, as higher courts have placed the bar so high that it is nearly impossible to overcome.[69] The Commission challenged Procter & Gamble's proposed acquisition of Clorox in 1967.[70] The United States Supreme Court discounted the possibility of an efficiency defense, stating in dicta, "Possible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition."[71] More than thirty years later, in 2001, the Commission challenged a merger between Heinz and Milnot Holding Corporation.[72] In that case, the D.C. Circuit acknowledged that lower courts had allowed efficiency defenses; however, the court went on to explain that the lower courts also usually found the efficiencies inadequate to overcome antitrust implications.[73] The court ultimately held that the efficiencies would have to be "extraordinary" in order to justify presumptively anticompetitive behavior.[74] Accordingly, the efficiencies in that case were insufficient.[75] Thus it is questionable whether efficiencies are a legitimate defense; the Supreme Court has not reconsidered its position since rejecting the defense in 1967.[76]

Cases involving the news have similar holdings.[77] In the 1960s, newspapers entered into joint operating agreements to increase efficiency by consolidating most newspaper operations—except for

66. *See, e.g.*, *Citizen Publ'g Co.*, 394 U.S. at 138.

67. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 696 (1978) (citing United States v. Addyston Pipe & Steel Co., 85 F. 271, 284 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899)).

68. *See, e.g.*, 2010 Horizontal Merger Guidelines, *supra* note 32.

69. *See infra* notes 70–76 and accompanying text.

70. FTC v. Procter & Gamble Co., 386 U.S. 568, 569-70 (1967).

71. *Id.* at 580.

72. FTC v. H.J. Heinz Co., 246 F.3d 708, 711–13 (D.C. Cir. 2001) (challenging a duopoly to monopoly merger between baby food manufacturers).

73. *Id.* at 720.

74. *Id.*

75. *Id.* at 721.

76. *See* FTC v. Procter & Gamble Co., 386 U.S. 568 (1967).

77. *See infra* notes 78–91 and accompanying text.

the editorial and news departments.[78] The Division brought suit against the publisher of Tucson's only evening newspaper and the publisher of the city's only morning and Sunday newspaper who formed an agreement that placed both papers under the control of a single entity.[79] The new firm, which the two original publishers controlled equally, managed all aspects of publishing, except for the editorial boards.[80] The Supreme Court deemed the joint operating agreement illegal under the Sherman Act.[81] Anxious over a declining newspaper industry with an eye towards preserving competing editorial voices, Congress passed the Newspaper Preservation Act of 1970, which effectively overturned *Citizen Publishing*.[82] The Act provides merging newspapers with limited antitrust immunity, subject to review by the Division—so long as the editorial boards remain independent.[83]

Another development from *Citizen Publishing* was the modernization of the failing company defense.[84] The Court rationalized that the inevitable loss to competition combined with other losses resulting from the failing firm's cessation could sometimes negate the immediate impact that the merger has on competition.[85] The defense allows firms to merge despite anticompetitive impacts, on the principle that it is the lesser of two evils.[86] To prevail on a failing company defense, the defendant must prove three points[87]: (1) that the company's "resources [are] so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure;"[88] (2) that the acquiring firm is the only available purchaser;[89] and (3) that a successful reorganization

78. *See, e.g.*, Citizen Publ'g Co. v. United States, 394 U.S. 131, 133 (1969).
79. *See id.* at 134.
80. *Id.* at 133.
81. *Id.* at 135-36.
82. 15 U.S.C. §§ 1801–04 (1970); *see* Mark Fink, Comment, *The Newspaper Preservation Act of 1970: Help for the Needy or the Greedy?*, 1990 DET. C.L. REV. 93, 105–06.
83. *See* 15 U.S.C. §§ 1801–04.
84. *See* 394 U.S. 131 (1969).
85. *Id.* at 136–37.
86. United States v. Gen. Dynamics Corp., 415 U.S. 486, 507–08 (1974).
87. *See Citizen Publ'g Co.*, 394 U.S. at 138–39.
88. *Gen. Dynamics Corp.*, 415 U.S. at 507 (citing Int'l Shoe Co. v. FTC, 280 U.S. 291 (1961)).
89. *Citizen Publ'g Co.*, 394 U.S. at 138–39.

through bankruptcy is unlikely.[90] Taken as a whole, the burden is difficult to overcome.[91]

Despite the judiciary's desire to achieve the proper outcome as indicated by the intricacies of the case law, the United States Supreme Court and lower courts have a difficult time adjudicating antitrust actions.[92] The combined complexities of the economic principles, the sophisticated evidence, and the breadth of the statutes all contribute to the courts' difficulties. For example, in *United States v. E. I. du Pont de Nemours & Co.*,[93] the United States Supreme Court found that du Pont de Nemours & Co. could not raise the price of cellophane without losing a substantial market share to alternative packaging materials.[94] Based on that factual finding, the Court decided that the firm did not have monopoly power, precluding it from monopolizing the market.[95] The Court erred, however, in assuming that because a firm cannot raise its price any more, the firm is not charging a monopoly price already. Even monopolies face reductions in demand when they increase prices.[96]

In antitrust cases, where the harm is purely economic, it is only logical that plaintiffs use economic theory in determining their litigation strategy, considering the probability and value of success against the costs of litigating.[97] For example, a *per se* illegal case of price fixing will need minimal expert testimony, while a challenge of

90. *Id.*

91. *See* Thomas D. Fina & Vishal Mehta, *The Failing Firm Defense: Alive and Well*, ANTITRUST SOURCE, Aug. 2011, *available at* http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug11_fina_7_26f.authcheckdam.pdf.

92. Thomas A. Lambert, *The Roberts Court and the Limits of Antitrust*, 52 B.C. L. REV. 871, 877 (2011).

93. 351 U.S. 377 (1956).

94. *Id.* at 400.

95. *Id.* at 404.

96. *See id.*

97. Generally the Agencies utilize their prosecutorial discretion to maximize economic efficiency based on economic principles. *See* Spencer Weber Waller, *Prosecution by Regulation: The Changing Nature of Antitrust Enforcement*, 77 OR. L. REV. 1383, 1401–05 (1998). Both the Commission and the Division have finite budgets. The Commission's Bureau of Competition 2011 budget was $125,260,000. *See* FTC, FEDERAL TRADE COMMISSION FISCAL YEAR 2012 CONGRESSIONAL BUDGET JUSTIFICATION SUMMARY (2012), *available at* http://www.ftc.gov/ftc/oed/fmo/budgetsummary12.pdf. The 2011 Division budget was $163,200,000. DEP'T OF JUSTICE, ANTITRUST DIVISION 2012 BUDGET SUMMARY (2012), *available at* http://www.justice.gov/jmd/2012summary/pdf/fy12-atr-bud-summary.pdf. Private parties also feel the sting of the cost of antitrust litigation. *See, e.g.*, Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 546 (2007).

quality fixing would require market analysis, research, and economic experts to testify regarding the reasonableness of the restraint.[98] As a result, the Commission and Division are justifiably hesitant to bring enforcement actions against quality collusion.[99]

Because this Note uses broadcast television as a lens, it is important to acknowledge that the Federal Communication Commission's (FCC's) enforcement authority runs tangentially to that of the Division and Commission.[100] The FCC's mandate is to ensure that television stations "serve the public interest, convenience, and necessity."[101] To that end, the FCC seeks to promote diversity, competition, and localism.[102] Recently the FCC relaxed local television market ownership rules, allowing a single entity to control two stations in a single market if there are eight independent stations in the market and at least one of the stations is not one of the top four in that market group.[103] These guidelines, however, are not binding on the Commission or the Division.[104]

B. The Economic Effects of Collusion

In response to the expansive statutory breadth, defendants turned to economic theory[105] to narrow the scope of the statutes.[106]

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98. Because there have been very few claims brought based on quality collusion in the past ten years and none have been successful, calculating the chance of success would be extremely speculative. *See infra* Part II.B.

99. *See, e.g.*, BUREAU OF COMPETITION, FTC, A STUDY OF THE COMMISSION'S DIVESTITURE PROCESS (1999), *available at* http://www.ftc.gov/os/1999/08/divestiture.pdf; Dr. Joseph Farrell, Remarks at the Antitrust Law Section Fall Forum 2011, Upward Price Pressure, Market Definition and Supply Mobility (Oct. 28, 2011) (on file with author).

100. *See generally* 47 U.S.C. §§ 151–62 (2006).

101. Wash. Utils. & Transp. Comm'n v. FCC, 513 F.2d 1142 (9th Cir. 1975); *see also* 47 U.S.C. § 151 (2006).

102. Additionally, the FCC promotes viewpoint, program, outlet, source, minority ownership, and gender ownership diversity. FCC, Notice of Proposed Rulemaking on Media Ownership Rules FCC 11-186, 10–12 (2011), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-186A1.pdf.

103. 47 C.F.R. § 73.3555(b)(1) (2010) (ranking based on Nielson).

104. *See* Prometheus Radio Project v. FCC, 373 F.3d 372, 414 (3d Cir. 2004).

105. Many of the economic theories and figures in this section are widely accepted and generally undisputed. They are discussed in a slew of books, including: ROBERT S. PINDYCK & DANIEL L. RUBINFELD, MICROECONOMICS (David Alexander et al. eds., 6th ed. 2005); ALBERT E. WAUGH, PRINCIPLES OF ECONOMICS (1947); LORIE TARSHIS, THE ELEMENTS OF ECONOMICS (Edgar S. Furniss ed., 1947); ROBERT B. PETTENGILL, PRICE ECONOMICS (1948); ARTHUR A. THOMPSON JR., ECONOMICS OF THE FIRM: THEORY AND PRACTICE (Alice Erdman ed., 3d ed. 1981).

Economists cannot measure competition directly; they target proxies of competition, such as quantity, price, and cost.[107] This Section explains the relevant, and widely accepted, economic assumptions and theories before delving into the negative impact quality collusion has on social welfare.[108]

Model competitive markets, as represented in Figure 1,[109] rely on several assumptions: homogenous products; rational participants;[110] perfect information;[111] lack of participant market power;[112] negligible barriers to entry;[113] demand decreasing as price increases; and supply increasing as price increases.[114] The supply curve, also known as the

106. Although initially unsuccessful, as early as *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899), defendants raised the reasonableness of restraints, and as early as *United States v. American Tobacco Co.*, 164 F. 700, 711-712 (C.C.S.D.N.Y. 1908), defendants based a defense on economic theory to support the reasonableness of an alleged restraint.

107. *See* Jan Boone, *A New Way to Measure Competition*, 118 ECON. J., 1245, 1245 (2008) (discussing various means of measuring competition, all of which derive from price, quantity, and cost).

108. "Social welfare" is an economic term of art representing the aggregate wellbeing of individuals within society. JEAN-JACQUES LAFFONT & JEAN TIROLE, COMPETITION IN TELECOMMUNICATIONS (2001). In Figure 1 below, societal welfare is the total area encompassed by the consumer and supplier surplus. *See generally id.*

109. *See infra* Figure 1 and note 118.

110. Rational market participants maximize profits. *See* PETTENGILL, *supra* note 105, at 149; PINDYCK & RUBINFELD, *supra* note 105, at 264–65; TARSHIS, *supra* note 105, at 62; THOMPSON, *supra* note 105, at 294–96; WAUGH, *supra* note 105, at 248.

111. "Perfect information" means that all market participants know all of the relevant, available, market information. *See* MIA DE KUIJPER, PROFIT POWER ECONOMICS: A NEW COMPETITIVE STRATEGY FOR CREATING SUSTAINABLE WEALTH 45 (2009); TARSHIS, *supra* note 105, at 134–36; THOMPSON, *supra* note 105, at 320–47; WAUGH, *supra* note 105, at 282.

112. In perfect competition, each participant's contribution to the market is too small to influence the market as a whole. *See* PETTENGILL, *supra* note 105, at 109–11; PINDYCK & RUBINFELD, *supra* note 105, at 8; TARSHIS, *supra* note 105, at 134–36; THOMPSON, *supra* note 105, at 130–47, 471–72; WAUGH, *supra* note 105, at 282–83. Think of each market participant as a grain of sand on a beach—no single grain of sand affects the beach as a whole.

113. "Strictly speaking, a barrier to entry is a condition that makes the long-run costs of a new entrant into a market higher than the long-run costs of the existing firms in the market." RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 227 (2d ed. 1977). Examples of entry barriers include, but are not limited to, regulatory restrictions, *id.*, and hefty sunk costs. Elizabeth E. Bailey, *Papers and Proceedings of the Ninety-Third Annual Meeting of the American Economic Association*, 71 AM. ECON. REV. 178, 178 (1981).

114. *See* PINDYCK & RUBINFELD, *supra* note 105, at 358; TARSHIS, *supra* note 105, at 156–59; THOMPSON, *supra* note 105, at 322–45; WAUGH, *supra* note 105, at 324–51.

marginal cost curve, represents the cost of production.[115] Supply and demand intersect at a market clearing price and quantity, known as the equilibrium.[116] Buyers in a market may value a product more than the market price, and sellers in the market may value the product less than the market price; the difference between a party's internal valuation and the market price is the party's surplus indicated by the shaded areas.[117]

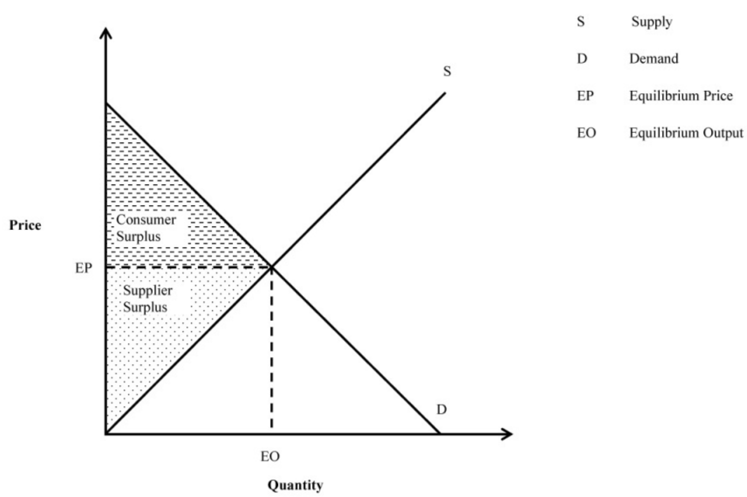

Figure 1. Basic supply and demand for a product market.[118]

In a competitive market, individual suppliers lack market power;[119] as illustrated in Figure 2, they face a flat demand curve.[120] With consumers only willing to buy at or below the market price, firms with excess capacity have an incentive to undercut their competitors'

115. The marginal cost curve is the collection of points at which suppliers can produce. Each point is a particular quantity that corresponds to a particular price. *See* PETTENGILL, *supra* note 105, at 99–102, PINDYCK & RUBINFELD, *supra* note 105, at 85; TARSHIS, *supra* note 105, at 89–103; THOMPSON, *supra* note 105, at 241–42; WAUGH, *supra* note 105, at 264–68.

116. *See* PETTENGILL, *supra* note 105, at 108; PINDYCK & RUBINFELD, *supra* note 105, at 24; TARSHIS, *supra* note 105, at 214; THOMPSON, *supra* note 105, at 602–20.

117. *See* PETTENGILL, *supra* note 105, at 184–85; PINDYCK & RUBINFELD, *supra* note 105, at 128, 300–01; WAUGH, *supra* note 105, at 75.

118. *See* PINDYCK & RUBINFELD, *supra* note 105, at 23; TARSHIS, *supra* note 105, at 212; THOMPSON, *supra* note 105, at 29.

119. *See supra* note 112.

120. *See* PINDYCK & RUBINFELD, *supra* note 105, at 273–74; THOMPSON, *supra* note 105, at 331–34.

prices, thereby temporarily gaining 100% market share, to the point that the market price is equal to their marginal cost, where further undercutting would only lead to losses.[121] Consequently, firms with excess supply have an incentive to undercut the other in price—thereby temporarily gaining 100% market share—up to the point that the market price equals the firm's marginal cost; below that, the firm loses money on each sale.[122]

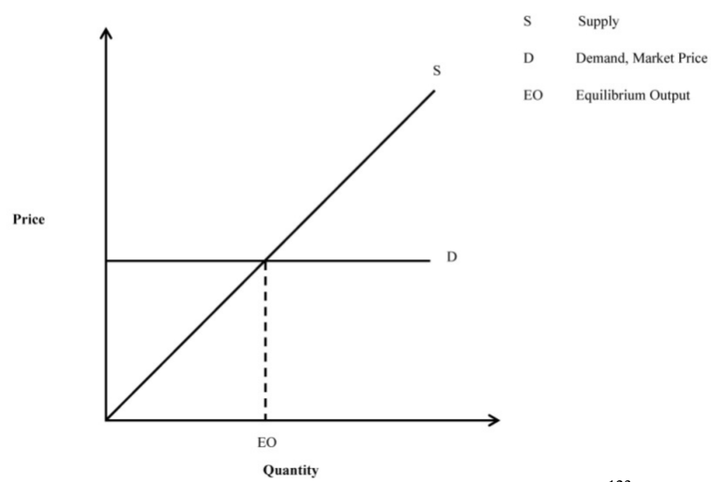

Figure 2. Basic supply and demand faced by an individual supplier.[123]

In competitive markets, firms compete on price and quality, eventually reaching an efficient equilibrium.[124] When one of those factors is fixed, they reach the equilibrium by adjusting the remaining variable factor—either quality or price.[125] For example, firms compete on price to clear their production in commodities markets like hard red spring wheat on the Minneapolis Grain Exchange,

121. *See supra* note 115.

122. *See id.*

123. *See* Pettengill, *supra* note 105, at 109–11; Pindyck & Rubinfeld, *supra* note 105, at 23 fig.2.3; Tarshis, *supra* note 105, at 134–36; Thompson, *supra* note 105, at 130–37, 471–72; Waugh, *supra* note 105, at 282–83.

124. *See* David Besanko et al., Economics of Strategy 290–95 (2009); Tarshis, *supra* note 105, at 212; Thompson, *supra* note 105, at 29.

125. *See* Besanko et al., *supra* note 124, at 290–95; Pettengill, *supra* note 105, at 123; Thompson, *supra* note 105, at 511–22.

where quality is fixed.[126] Because firms only sell at or above their marginal cost, they can only reduce their price if their marginal cost decreases.[127] Figure 3 illustrates a decrease in suppliers' marginal cost.[128] With lower production costs, manufacturers increase production, lowering the market price along the existing demand curve.[129]

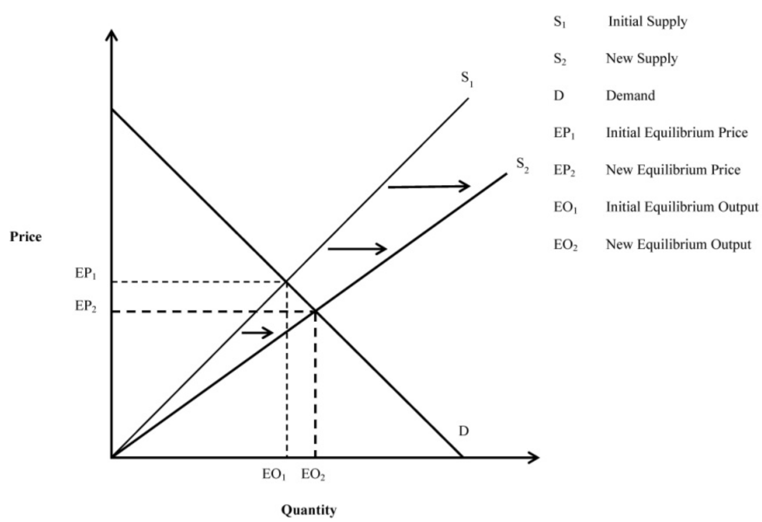

Figure 3. Changes in supply (marginal cost).[130]

126. Flour is graded by its protein content—generally the higher the protein content, the better for baking. *MGEX Spring Wheat 2010*, MGEX, http://www.mgex.com/documents/MGEX_HRS_Wheat_2010_v1a_001.pdf (last visited Nov. 13, 2012). The protein content for hard red spring wheat must be between 13–14% as set by commercial standards. *Id.* As a result, buyers of hard red spring wheat know what they will receive and can purchase the lowest priced wheat on the Minneapolis Grain Exchange rather than comparing protein content relative to their prices. *Id.*

127. *See supra* note 115.

128. *See* PETTENGILL, *supra* note 105, at 200–09; PINDYCK & RUBINFELD, *supra* note 105, at 25; TARSHIS, *supra* note 105, at 210.

129. *See* PETTENGILL, *supra* note 105, at 200–09; PINDYCK & RUBINFELD, *supra* note 105, at 25 figs.2.4 & 2.5; TARSHIS, *supra* note 105, at 210; WAUGH, *supra* note 105, at 259–65.

130. *See* PETTENGILL, *supra* note 105, at 200–09; PINDYCK & RUBINFELD, *supra* note 105, at 25; TARSHIS, *supra* note 105, at 210; WILLIAM M. WADMAN, VARIABLE QUALITY IN CONSUMER THEORY: TOWARD A DYNAMIC MICROECONOMIC THEORY OF THE CONSUMER 229–31 (2000); WAUGH, *supra* note 105, at 259–65.

In contrast, when prices are restricted, firms compete on quality.[131] The airline industry's prices were restricted prior to deregulation in the 1970s, so the airlines competed on quality.[132] Firms increased quality of service by offering better food and other niceties to increase the individual demand.[133] A change in quality creates a new and distinct product offering, with new supply and demand curves.[134] As represented in Figure 4, these corresponding shifts (the supply and the demand changes) create the new equilibrium.[135]

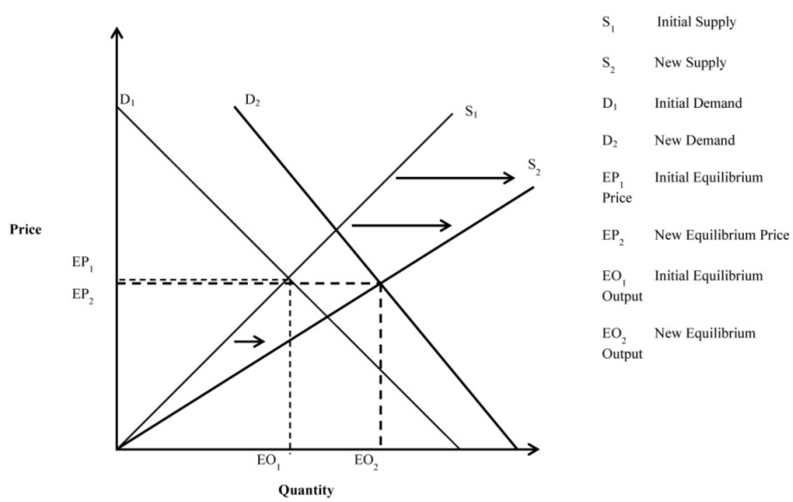

Figure 4. Changes in quality.[136]

If profits rise above the equilibrium, suppliers increase their production capacity or new firms enter the market, supply increases,

131. George W. Douglas & James C. Miller III, *Quality Competition, Industry Equilibrium, and Efficiency in the Price-Constrained Airline Market*, 64 AM. ECON. REV., 657, 657–69 (1974).

132. *Id.*

133. *Id.*

134. *See* PETTENGILL, *supra* note 105, at 200–09; PINDYCK & RUBINFELD, *supra* note 105, at 25; TARSHIS, *supra* note 105, at 210; WADMAN *supra* note 130, at 229–31; WAUGH, *supra* note 105, at 259–65.

135. *See* PETTENGILL, *supra* note 105, at 108, 200–09; PINDYCK & RUBINFELD, *supra* note 105, at 24–25; TARSHIS, *supra* note 105, at 210, 214; THOMPSON, *supra* note 105, at 602–20; WADMAN *supra* note 130 at 229–31; WAUGH, *supra* note 105, at 259–65.

136. *See* PETTENGILL, *supra* note 105, at 200–09; PINDYCK & RUBINFELD, *supra* note 105, at 25; TARSHIS, *supra* note 105, at 210; WADMAN, *supra* note 130, at 229–31; WAUGH, *supra* note 105, at 259–65.

and prices return to equilibrium.[137] If market characteristics prevent self-correction (such as elasticity of supply,[138] elasticity of demand,[139] and entry barriers), a monopolist or cartel[140] can exercise market power by manipulating price, quality, or both to increase profit.[141] Once in place, monopoly pricing decreases consumer welfare: a portion transfers to suppliers, and another portion, known as the deadweight loss, is lost altogether.[142] Because marginal revenue[143] decreases with each unit sold, monopolists maximize profit by producing the quantity at which marginal revenue equals marginal cost, as illustrated in Figure 5 *infra*.[144] Because monopolizing is illegal

137. *See* PETTENGILL, *supra* note 105, at 200–09; PINDYCK & RUBINFELD, *supra* note 105, at 25; TARSHIS, *supra* note 105, at 210; WADMAN *supra* note 130, at 229–31; WAUGH, *supra* note 105, at 259–65.

138. Elasticity of supply is the measurement of how supply, for a particular product, responds to changes in price. PINDYCK & RUBINFELD, *supra* note 105, at 32–33. Quantity in a market with an elastic supply is more responsive to changes in price than a market with an inelastic supply. *Id.* For example, in a market where a 1% price increase results in a 10% change in quantity, the supply would be more elastic than a market where a 1% price increase results in a 2% change in quantity.

139. Elasticity of demand is the ratio between a change in price and the corresponding change in the quantity demanded. *See* PETTENGILL, *supra* note 105, at 39; PINDYCK & RUBINFELD, *supra* note 105, at 32; TARSHIS, *supra* note 105, at 116–21; THOMPSON, *supra* note 105, at 121–48; WAUGH, *supra* note 105, at 90.

140. A monopolist or cartel can be defined as "an association of firms with common interests, seeking to prevent extreme or unfair competition, allocate markets, or share knowledge." BLACK'S LAW DICTIONARY (9th ed. 2009).

141. "Market power" is the ability of a firm or cartel to increase profit by charging supracompetitive price; also barriers to entry enhance market power. *See* PETTENGILL, *supra* note 105 at 173–75; PINDYCK & RUBINFELD, *supra* note 105, at 351–54, 359; TARSHIS, *supra* note 105, at 674–76; THOMPSON, *supra* note 105, at 290, 445–47; WAUGH, *supra* note 105, at 244–97. Barriers to entry are factors that dissuade prospective market entrants from entering the market. These might include intellectual property, government regulation, and sunk costs. *See* PINDYCK & RUBINFELD, *supra* note 105, at 340. The greater the barriers, the greater the cartel's market power. *Id.*

142. The restricted output eliminates the products from the market, thus no one obtains the surplus associated with their production. *See* PINDYCK & RUBINFELD, *supra* note 105, at 304; Joseph G. Sidak, *Rethinking Antitrust Damages*, 33 STAN. L. REV. 329, 333-34 (1981).

143. Marginal revenue is the revenue generated by selling an additional unit. As production increases, the marginal cost increases because the scarcity of inputs increases. For a more complete discussion of marginal revenue, see PETTENGILL, *supra* note 105 at 42–47; PINDYCK & RUBINFELD, *supra* note 105, at 218–21; TARSHIS, *supra* note 105, at 121218–2122; THOMPSON, *supra* note 105, at 594; WAUGH, *supra* note 105, at 309.

144. *See* PINDYCK & RUBINFELD, *supra* note 105, at 342–44; TARSHIS, *supra* note 105, at 676; THOMPSON, *supra* note 105, at 439–46; WAUGH, *supra* note 105, at 316, 318.

under the Sherman Act,[145] the antitrust community must hypothesize what effect a proposed merger will have.[146] The Agencies determine whether the hypothetical post-merger firm could increase profits with a small but substantial, non-transitory, increase in price—if so, the merger is generally illegal.[147]

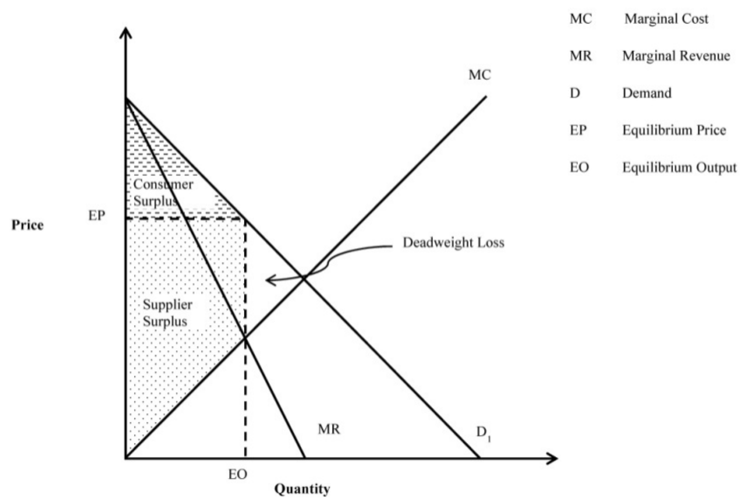

Figure 5. Monopoly supply and resulting deadweight loss.[148]

Firms in otherwise competitive markets can form a cartel to synthesize a monopoly, by coordinating production and market participation to escape the flat demand curve shown in Figure 2, allowing the cartel to achieve monopoly-like profits.[149] Several factors limit cartelization.[150] Because a cartel forms a virtual monopoly, the

145. 15 U.S.C. § 1 (2006).

146. 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 32.

147. The 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 32, do not cite a percentage increase; however, a 5–10% threshold is generally accepted. FTC v. CCC Holdings Inc., 605 F. Supp. 2d 26, 38 n.12 (D.D.C. 2009) ("In most contexts, the Merger Guidelines consider a price increase of 5% to constitute a SSNIP"); *see also* FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1044 (D.C. Cir. 2008); California v. Sutter Health Sys., 130 F. Supp. 2d 1109, 1129 (N.D. Cal. 2001).

148. *See* PINDYCK & RUBINFELD, *supra* note 105, at 304; Sidak, *supra* note 142, at 333-34.

149. *See* PINDYCK & RUBINFELD, *supra* note 105, at 436, 462–67; JOSHUA GANS, STEPHEN KING & GREGORY MANKIW, PRINCIPLES OF MICROECONOMICS 380 (2011).

150. *See* Jonathan T. Schmidt, *Keeping U.S. Courts Open to Foreign Antitrust Plaintiffs: A Hybrid Approach to the Effective Deterrence of International Cartels*, 31 YALE J. INT'L L. 211, 217-18 (2006).

market structure must allow monopolization.[151] If the market allows the cartel, it has several additional hurdles.[152] The cartel must be able to: agree on the output;[153] detect cheating;[154] punish cheating;[155] and if illegal, go undetected.[156] If the cartel overcomes these difficulties, they reduce social welfare by inflicting deadweight losses, harm firms outside of the cartel, and waste resources maintaining the cartel.[157] Although practically impossible to measure accurately, the collective social harm caused by cartelization can be significant.[158]

151. *See* Schmidt, *supra* note 150; PINDYCK & RUBINFELD, *supra* note 105, at 436, 462–67; GANS, *supra* note 149, at 380. Just like a monopolist, a cartel needs to be able to influence the market to be effective. *See* Schmidt, *supra* note 150. The less competition from current market participants and potential entrants, the more market power a cartel can exert. *Id.*

152. *See* Schmidt, *supra* note 150, at 218.

153. Agreements between competitors can be difficult to negotiate. For example, firms with different production methods maximize profits with differing outputs, often forcing firms to compromise before reaching an agreement. Additionally, the more firms involved, the greater the number of competing interests that need placation and policing. *See* GANS, *supra* note 149, at 380; PINDYCK & RUBINFELD, *supra* note 105, at 462–66; Schmidt, *supra* note 150.

154. Cheating occurs when a firm's supply exceeds the agreed upon allotment. Firms cheat because the individual firm's profits increase as they sell units beyond the agreed allotment, erasing the benefits of the cartel. In a quality context, firms have to be able to accurately and consistently measure the product quality of their competitors. *See* GANS, *supra* note 149, at 380; PINDYCK & RUBINFELD, *supra* note 105, at 462–66; Schmidt, *supra* note 150.

155. Once cheating is detected, the cartel must be able to respond by punishing the deviant firm by returning to competitive production levels. *See generally* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

156. *Cf., e.g.*, Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899).

157. To form and enforce agreements, cartels expend resources that could be spent increasing productivity rather than restricting it. Additionally, potential competitors may be unable to compete as a result of enlarged barriers to entry. Thus, any social gain their competition would have created by reducing the deadweight loss is either lost or the entrant must incur additional costs to overcome the barrier. *See* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY 382–87 (Jesse H. Chopper et al. eds., 2d ed. 1999). While not technically a social harm, cartels also result in a reduction of consumer welfare, because consumers are forced to pay more for the product, transferring wealth to the suppliers. *Id.*

158. For a more complete discussion with estimates of the social cost of monopoly, see Richard A. Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807 (1975).

C. Quality and the Local Television Broadcast Stations

Local broadcast television news (LBTN) is a two-sided market[159] with viewers who consume content on one side, local television broadcast stations in the middle, and advertisers that pay for content on the other side.[160] Although both sides of the market face similar structural limitations, the transactions are very different. The transaction between advertisers and stations is simple—advertisers pay stations for access to the television stations' viewers; the more viewers, the more the revenue advertising generates per minute for the station.[161] This section explains this more complex transaction between viewers and television stations and how cartels operate in the market.

The competition between television stations for viewers is brutal.[162] Firms pay billions of dollars for content to increase viewership, because having more viewers means more advertising revenue.[163] For example, exclusive rights to broadcast the 2011 Super Bowl, which captured the attention of 111,000,000 viewers, netted Fox over $3 million per commercial spot.[164] Advertisers would have been unwilling to pay Fox the same amount if Fox and NBC simulcast the event and shared the viewers; exclusivity made the advertisements more expensive. As a result, the Super Bowl and other NFL content cost CBS, NBC, and Fox $3.1 billion per year.[165]

159. A two-sided market is a platform where one firm must interact with two networks to generate demand from either of them. *See* David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, 20 YALE J. ON REG. 325, 336 (2003). For example, HMOs are in a two-sided market where the insurance company acts as a platform, bringing together a network of patients with a network of health care professionals.

160. *See* Reed, *supra* note 7, at 28.

161. The elasticity between the number of views and the advertising rates charged is 0.83. *See* Kenneth C. Wilber, *A Two-Sided, Empirical Model of Television Advertising and Viewing Markets*, 27 MARKETING SCI., 356, 372 (2008). In other words, if the number of viewers for a particular show increases by 100%, the rate for advertising on the show would increase by 83%. *See generally id.*

162. *See infra* notes 164–65 and accompanying text.

163. *See id.*

164. Ben Klaymen, *Super Bowl Packs in Record U.S. TV Viewer Total*, REUTERS, Feb. 7, 2011, *available at* http://www.reuters.com/article/2011/02/07/us-superbowl-ratings-idUSTRE7163GS20110207.

165. Joe Flint, *NFL Signs TV Rights Deals with Fox, NBC and CBS*, L.A. TIMES, Dec. 15, 2011, http://articles.latimes.com/2011/dec/15/business/la-fi-ct-nfl-deals-20111215. The deal, which covers nine years and includes rights to the Super Bowl, splits evenly among the three networks.

When analyzing the LBTN, it is important to recognize that supply and demand are constrained.[166] On the supply side, significant entry barriers, such as the market structure and legal restrictions, restrict supply.[167] Statutory restrictions also prevent or restrict entry by new stations.[168] In combination, firms are unlikely to enter the market in response to a small but significant increase in price, making it more likely that such a change would be profitable.

The demand for broadcast television is inelastic.[169] Alternate media sources such as cable television, print, radio, and the Internet exist but they lack sufficient interchangeability with broadcast television to curtail anticompetitive behavior in the market.[170] Internet access, newspapers, and cable television are more expensive than broadcast television. They deliver different content. Newspapers and radio lack video. Internet video quality lags behind television.[171] The broadcast industry, among others, might argue that more people are turning to the Internet for news content; however, broadband Internet access currently lacks ease of use, market penetration,[172] and content breadth to counter a cartel's power.[173] In

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166. *See infra* notes 167–79 and accompanying text.

167. The vertically integrated market forces firms to enter two markets simultaneously—content production and content distribution—and pay the sunk costs for both. Television broadcast stations' allotments are divided up and limited by geographic areas. 47 C.F.R. § 73.622 (2011). *See generally Ownership Chart: The Big Six*, FREEPRESS, http://www.freepress.net/ownership/chart/main (last visited Nov. 13, 2012) (General Electric owns NBC and Universal Studios; Walt Disney owns ABC Television Network, Touchstone, Miramax Walt Disney Pictures, and Pixar Animation Studios; News Corp. owns Fox Broadcasting Company, 20th Century Fox, Fox Searchlight Pictures, and Blue Sky Studios; CBS Corporation has major holdings in the CW network with Time Warner). The current cost of content could bankrupt a small nation, let alone prohibit all but the wealthiest potential firms from entering the market. Compare, for example, the nearly $3.1 billion that CBS, NBC, and Fox pay annually to provide NFL game coverage, Flint, *supra* note 165, with Greenland's gross domestic product of $2.1 billion. CIA, THE WORLD FACTBOOK (2011), *available at* https://www.cia.gov/library/publications/download/index.html.

168. *See*, *e.g.*, 47 C.F.R. § 73.622 (2012).

169. *See infra* text accompanying notes 170–73.

170. *See generally* Prometheus Radio Project v. F.C.C., 373 F.3d 372 (3d Cir. 2004).

171. If Internet video does not lack quality in transmission, then it does in experience, as computer screens tend to be smaller than television screens.

172. Only 17% of people obtain their local news from the internet, compared to 61% for local broadcast television. Yanich, *supra* note 1, at 8. Moreover, the fact that a broadcast television cartel lacks market power with one market segment does not preclude profitable market power on the whole. *See generally* Press Release, FTC, FTC Consent Order Settles Charges that Whole Foods' Acquisition of Rival Wild

sum, a broadcast television cartel could probably increase its profit by charging supracompetitive prices.

Although quantity and price are the standard units of measurement in economics,[174] the traditional notions of quantity and price fail in the market between viewers and broadcast stations.[175] Price fails because no money changes hands between viewers and stations; viewers pay by watching commercials. Quantity fails because supply is effectively binary; firms do or do not broadcast. Unique minutes of quality-adjusted programming and the level of advertising synthesize the traditional concepts of quantity and price, respectively.

A unique minute of quality-adjusted programming has three parts: a minute of programming; a level of uniqueness; and a level of quality. Programming is only unique to the extent that it increases the supply of content. If firms share aspects of content, such as scripts, video feeds, and on-air personalities, or rebroadcast content at a different time, their content is no longer unique, and the minutes of unique programming are reduced proportionally to the redundancy. Separate from the quantity of unique programming is quality. Broadcast television's primary role is to entertain and inform viewers; the better it accomplishes these goals, the higher its quality.[176] Differences in programming, such as the video feed quality and the talent of the news anchors, influence the ability of the program to entertain and inform. As a result, minutes of unique programming are unequal—they need adjustment to account for differences in quality.

Oats Was Anticompetitive (Mar. 6, 2009), *available at* http://www.ftc.gov/opa/2009/03/wholefoods.shtm.

173. The antitrust enforcement agencies typically only project two years out when forecasting the reasonableness of a restraint. 1992 HORIZONTAL MERGER GUIDELINES, *supra* note 35, at 27. The timeline for the Internet to be a strong enough force in the broadcast television market to eliminate a cartel's power is probably more than two years.

174. *See supra* Part I.B.

175. *See infra* notes 176–78 and accompanying text.

176. As prescribed by regulation, the purpose of broadcast television is "to offer services of any nature, consistent with the public interest, convenience, and necessity." 47 C.F.R. § 73.624 (2012). Although in reference to radio stations, the FCC required the station to dedicate a nominal amount of time to non-entertainment content, the requirement was eliminated in 1981. *In re* Deregulation of Radio, 84 F.C.C.2d 968, 975, 983 (1981); Glenn P. Harris, *Federal Communications Commission: Deregulation of Radio Revisited*, 55 GEO. WASH. L. REV. 882, 887–88 (1987).

Without money changing hands, the level of advertising functions as price's proxy.[177] Audiences tolerate the intrusion of advertising in exchange for content, and broadcasters tolerate providing content in exchange for the viewers' willingness to watch advertisements.[178] Even though the viewers' preference to avoid advertising is neither absolute nor static (for example, some viewers watch the Super Bowl expressly for the advertisements,[179] which inverts the typical demand structure), firms do have to pay attention to the quantity of advertisements.[180] Just as farmers have to set the "right price" for hard red spring wheat, broadcast stations have to set the right level of advertising. Based on the same economic models, if there are too many advertisements, fewer people will watch them, driving the per-advertisement price to a point where the station will no longer be profitable. On the other hand, if there is too little advertising, the per-advertisement price required to maintain the station's profitability would be too high for advertisers to afford.[181] The level of advertising, as discussed in this Note, accounts for the minutes and intrusiveness of advertising.[182]

Using the price (advertising level) and quantity (minutes of unique, quality adjusted programming) proxies, demand is measured by the minutes of unique quality-adjusted programming viewers consume at a given level of advertising.[183] The price that viewers pay (the level of advertising) is relatively constant.[184] Thus, with the cost of content relatively even across stations, consumers maximize their surplus by

177. GENEVA OVERHOLSER & KATHLEEN HALL JAMIESON, THE PRESS 417 (2005).

178. *See* Wilber, *supra* note 161, at 376.

179. Chad Brooks, *Employers Beware: Fans Wiling to Miss Work, Weddings and More for Super Bowl*, FOX BUSINESS (Jan. 27, 2012), http://smallbusiness.foxbusiness.com/legal-hr/2012/01/27/employers-beware-fans-willing-to-miss-work-weddings-and-more-for-super-bowl/ ("Nearly 40 percent of those surveyed tune in primarily for the commercials . . . .").

180. *See Super Bowl Ads Rival Game Again in 2012, According to Hanon McKendry Poll Conducted by Harris Interactive*, PR NEWSWIRE (Feb. 3, 2012), http://www.prnewswire.com/news-releases/super-bowl-ads-rival-game-again-in-2012-according-to-hanon-mckendry-poll-conducted-by-harris-interactive-138660569.html.

181. *See supra* notes 109–29 and accompanying text.

182. It is interesting to note that a broadcast station's marginal revenue curve, as it relates to advertisers, is particularly steep. The curve is so steep because, in addition to the standard price reduction accompanying any increase in supply, the additional minutes of advertising degrades the quality of the programming, reducing the number of viewers, and making the advertising time inherently less valuable. In other words, having more commercials makes most TV programming less enjoyable.

183. *See generally supra* notes 109–29 and accompanying text.

184. *See* Wilber, *supra* note 161, at 376.

choosing the highest quality programming. In the aggregate, with consumers individually maximizing their surplus, content with the highest viewership is the "highest quality."[185] Therefore, Nielsen ratings, as a measure of viewership, are possibly the best available proxy for quality.[186]

As represented by the marginal revenue curve in Figure 6, supply is the willingness of firms to produce unique minutes of quality adjusted programming at a given level of advertising.[187] A strong positive correlation exists between minutes of unique quality-adjusted programming and production costs.[188] The correlation is the product of the cost of producing unique programming, as opposed to rebroadcasting the same content, and the cost of producing high quality programming.[189] As a result, in the LBTN market, based on the model in Figure 5, to achieve monopoly like profits, cartels have to coordinate their efforts to reduce the minutes of unique, quality-adjusted programming to the point where it intersects with the level of advertising, as illustrated in Figure 6.

Firms have instituted SSAs, which coordinate the sharing of services between broadcast stations to increase efficiency.[190] To take full advantage of SSAs, broadcast stations eliminate as many redundancies as possible, including news crews, scriptwriters, reporters, video technicians, news anchors, and studio space.[191] The result is a reduction in the uniqueness of their broadcasts for each of those factors.

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185. *Comment: Reality Television*, WALL ST. J., Feb. 24, 2000, at A16. On some level it pains the author to categorize certain shows as high quality television, yet the purpose of television is largely its entertainment value, and as the adage goes, "there's no accounting for taste." *See, e.g.*, *Who Wants to Marry a Multi-Millionaire* (FOX television broadcast Feb. 15, 2000).

186. *See* Nielsen Holdings N.V., Annual Report (Form 10-K), at 3 (Feb. 22, 2012), *available at* http://www.nielsen.com/sitelets/yir/pdfs/2011_nielsen_10k.pdf.

187. *See generally supra* notes 109–29 and accompanying text.

188. For an extreme example of the effect that price has on quality, compare Flint, *supra* note 165 (noting the combined $3.1 billion per year that CBS, NBC, and Fox pay for NFL coverage), with Darren Rovell, *First Interview with Vince from ShamWow!*, CNBC, (Jan. 27, 2009), http://www.cnbc.com/id/28880253/First_Interview_with_Vince_from_ShamWow (highlighting that the original ShamWow commercial cost $20,000 to produce).

189. *See supra* note 188.

190. *See* Reed, *supra* note 7, at 3.

191. *See* Yanich, *supra* note 1, at 22, 33-34, 63, 73.

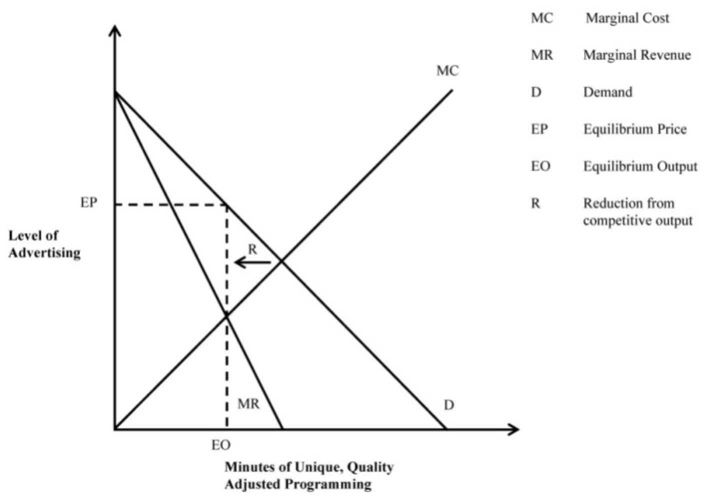

Figure 6. A LBTN cartel's output restriction.

One type of SSA, known as a local news sharing agreement (LNSA), coordinates the sharing of news coverage between competing stations.[192] Even in smaller markets, the cost of producing a news program approaches a million dollars a year. Stations assert that the money LNSAs save benefits the public by allowing more coverage of a wider variety of topics. Some stations, appearing to assert the failing firm defense, claim that the agreements allow their continuing operation.[193] The actual cost savings are undisclosed and difficult to estimate; however, various firms have asserted that they allow operations that would otherwise be financially unfeasible.[194] Although formed in the name of efficiency, LNSAs can have a significant anticompetitive impact. LNSAs coordinate participating firms' output and allow the participants to reduce or eliminate competition for exclusive content.[195] Once an agreement is in place,

192. *See* Yanich, *supra* note 1, at 6.

193. *See* Stelter, *supra* note 2; Hillary Atkin, *As Local Sharing Progresses, New Concerns Emerge*, TVWEEK (Aug. 3, 2009), http://www.tvweek.com/news/2009/08/as_local_sharing_progresses_ne.php (last visited Nov. 7, 2011); *Honolulu Stations in Shared Services Deal*, TVNEWSCHECK (Aug. 18, 2009), http://www.tvnewscheck.com/article/2009/08/18/34810/honolulu-stations-in-shared-services-deal.

194. *See* Atkin, *supra* note 193.

195. Yanich, *supra* note 1, at 24, 35.

the number of unique and local stories declines although the length of news programming increases.[196]

Independent stations have the same effect on a cartel as a cheater.[197] The cartel restricts supply of content driving up the per unit price. In response, independent firms will increase supply until their marginal cost equals their marginal revenue, increasing their profit at the cartel's expense.[198] For example, a hypothetical market has three firms, two of which are in a cartel. The firms in the cartel have a composite 60% share of the market by producing better quality content at a lower cost than the independent station. The cartel, simulcasting identical content, evenly divides the 60%—thus each firm receives 30% of the market. The non-participating firm supplies the remaining 40% of the market. This does not mean that member firms' profits are lower than they would be without the cartel—so long as the savings on production are substantial enough, net profits can still increase. According to Nielsen ratings, in markets with SSAs, independent stations outperform the SSA.[199]

II. The Divergence Between Antitrust Law and Practice

The statutes prohibit all unreasonable restraints on trade, regardless of whether they are based on price, quantity, or quality.[200] To determine the veracity that quality collusion is pursued, the author, on September 1, 2012, conducted a search of all U.S. District, Circuit, and Supreme Court cases within the LexisNexis Trade Cases database that included the term "antitrust" and "collusion" extending back to September 1, 2002.[201] The search returned 806 results.[202] The author then reviewed the cases for instances which raised quality

196. *See id.* at 24.

197. *See generally supra* Part I.B.

198. *See generally* Gans, *supra* note 149, at 380; Pindyck & Rubinfeld, *supra* note 105, at 462–66; Schmidt, *supra* note 150.

199. Yanich, *supra* note 1, at 24, 35, 45. The fact that stations accept lower ratings in exchange for market share indicates that the cost savings created by the SSAs are substantial.

200. *See supra* Part I.A.

201. Lexis Nexis, http://www.lexisnexis.com (follow Area of Law—By Topic" hyperlink; then follow "Antitrust & Trade" hyperlink; then follow "US Supreme, Appellate, District and Claims Court Trade Cases" hyperlink; then search "antitrust and collusion" from "09/01/2002" to "09/01/2012") (last visited Oct. 31, 2012).

202. *Id.*

collusion as an issue.[203] One percent of cases focused on quality collusion as a primary issue and less than three percent of the cases reviewed mentioned quality as a secondary issue. Part A of this section discusses the probable justifications for this non-enforcement. Part B then discusses how the probable justifications for non-enforcement are inapplicable in certain markets.

A. Why the Antitrust Community Should Ignore Quality Collusion

Probable justifications for non-enforcement of quality collusion stem from the fact that quantifying quality is difficult, making cases involving quality expensive and difficult to win. In addition, quality adjustments change the demand curve, possibly negating any societal harm. Finally, in many cases, standardization enhances competition.

Many products lend themselves to quality quantification. For example, a sheet of standard copy paper is eight-and-a-half by eleven inches—deviant paper is easy to detect. Many products however, are not easily compared. Product quality can be difficult to measure because of the product's abstract nature, complexity, or its consumers' idiosyncratic preferences. Clearly, the more abstract a product is, the more difficult it is to determine its quality.[204] Product complexity also makes quantification difficult as different factors bear different weights on the product's overall quality. Moreover, certain factors are synergistic, while others are antagonistic.[205] Subjectivity imposes an enormous burden on quantifying quality, potentially bringing even a simple product's quality into dispute. What some people consider excellent, others consider unacceptable, and because

203. The review was limited to reading one hundred words on each side of the word "quality" to determine whether quality could be at issue. If it was likely raised as an issue, the author read the entire opinion to determine whether a party raised a restraint on quality as an issue.

204. Consider the quality of abstract products, such as education. U.S. NEWS bases 40% of their law school rankings on peer and legal professionals' reputational assessments of the schools.

205. For example, imagine Dean Munching is considering whether to order a pizza from Anthony's or Bobby's. Anthony's uses premium ingredients for the pizza crust and a homemade sauce, but they use canned toppings. Bobby's uses premium ingredients for the crust and fresh toppings, but the sauce is from a can. To determine pizza quality, Dean Munching considers each of the inputs that make up the pizza, weighs them according to their importance to her, and then aggregates them to determine each pizza's total quality.

subjectivity is infinitely variable, ultimately even price is subjective.[206] Consumers' conflicting opinions on quality extend from airplanes to cars, computers, and pizza. Thus, quantifying quality can be difficult.[207]

Although quality collusion claims are essentially non-existent, quality has been at issue in antitrust disputes.[208] For example, to define the relevant market,[209] in *Federal Trade Commission v. Whole Foods Market, Inc.*, the Commission attempted to block a merger between Whole Foods Market, Inc. (Whole Foods) and Wild Oats Markets, Inc. (Wild Oats) with a temporary restraining order.[210] Part of the Commission's argument required the court to differentiate between premium grocery stores[211] and standard grocery stores.[212] The Commission argued, based on Whole Foods's internal documents, that the merger would provide Whole Foods, as a premium grocery store, with monopoly power in several geographic areas.[213] The Commission failed to persuade the trial court that Safeway and Whole Foods operated in different markets and service different customers.[214] Because of the Commission's difficulty, the

206. To a person living below the poverty line, ten dollars could represent three or four meals, while a person with income four times the level of poverty might spend that much on a can of soda at a baseball game. Clearly, a can of soda is not as valuable to the person at the baseball game as four meals are to the person living below the poverty line.

207. Continuing with Dean Munching, *see supra* note 205, she is still contemplating where to order her pizza. She is planning a luncheon with a colleague—Professor Picky—who happens to be a pizza connoisseur that she would like to impress. Dean Munching and Professor Picky both weigh the crust as the most important aspect of a pizza. Because both Bobby's and Anthony's use premium ingredients in their crusts, Dean Munching must continue her examination further. Professor Picky loves fresh tomato and basil toppings while Dean Munching prefers a hearty, flavored sauce. In this instance, Dean Munching, in an effort to impress, defers to Professor Picky's pizza preference and orders from Bobby's. Clearly, no matter how you slice it, people have different perceptions of what constitutes better pizza.

208. *See supra* notes 201–03 and accompanying text.

209. *See supra* notes 201–03 and accompanying text.

210. *See* FTC v. Whole Foods Mkt., Inc., 502 F. Supp. 2d 1 (D.D.C. 2007).

211. Examples of such grocery stores include Whole Foods and Wild Oats. *Id.* at 4–5.

212. Examples cited by the court include: Safeway, Giant Eagle, Giant Food, Stop & Shop, Harris Teeter, Food Lion, and Publix. *Id.* at 12.

213. *See id.* at 19.

214. *See id.* at 49. After the Commission lost at trial, the merger was consummated. The Commission continued litigating the case. *Id.* More than two years after the merger plans were announced, the Commission and Whole Foods Market, Inc. entered into a consent decree which required the divesture of several stores as well as intellectual property. *See* Press Release, FTC, FTC Consent Order

Community likely has legitimate concerns over its ability to define quality sufficiently before a court.[215]

The benefit of certain horizontal quality agreements outweighs the harm.[216] If challenged, courts would likely treat beneficial restraints as reasonable.[217] Weighing in favor of horizontal agreements on quality are factors such as: (1) reducing information and transactional costs;[218] (2) enhancing network effects;[219] (3) eliminating free riders;[220] and (4) leveraging resources.[221]

Product standardization can reduce information and transaction costs.[222] In markets with product differentiation, consumers research and compare various products, calculate the various options' worth, and negotiate transactions separately to account for these variables before making an informed buying decision.[223] In markets with standardization, consumers can understand and compare price differential more easily.[224] The clearest example of this is in commodities markets such as hard red spring wheat, where buyers compare a standardized product and make purchasing decisions based solely on price.[225] In this and other similar markets, firms must match or beat competitors' prices to clear their production.

Standardization can help consumers with enhanced network effects and eliminate lock-in costs.[226] Consider telephones—a standard telephone exchange extends the market to include everyone with a

Settles Charges that Whole Foods' Acquisition of Rival Wild Oats Was Anticompetitive (Mar. 6, 2009), *available at* http://www.ftc.gov/opa/2009/03/wholefoods.shtm.

215. *See, e.g.*, FTC v. Freeman Hosp., 69 F.3d 260, 270 (8th Cir. 1995)

216. *See* Posner, *supra* note 158 and accompanying text.

217. One example of a potentially beneficial restraint was seen in a recent case, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007). In *Leegin*, the Court ruled that vertical price restraints were no longer *per se* illegal because sufficient inter-brand price competition could prevent monopolistic prices, and the restraints could reduce free-riding, enhancing non-price competition. *Id.* at 895–900.

218. *See supra* text accompanying notes 124-29; *infra* note 227 and accompanying text.

219. *See infra* notes 228–29 and accompanying text.

220. *See infra* notes 229–35 and accompanying text.

221. *See infra* notes 229–35 and accompanying text.

222. *See infra* notes 224–26 and accompanying text.

223. *See* PINDYCK & RUBINFELD, *supra* note 105, at 168–70, 618.

224. *See supra* note 126 and accompanying text; *infra* note 226 and accompanying text.

225. *See supra* note 126.

226. This is especially true for consumable products related to capital expenditures—for example, razor blades, printer cartridges, bolts, car parts, etc.

telephone—regardless of a consumer's individual service provider. The larger network enhances consumer utility, increasing overall demand. Likewise, standardization reduces consumers' lock-in costs by allowing consumers to make subsequent purchases from any participating firm, making the aftermarket competitive.[227]

Standardization can also eliminate or reduce free-riding.[228] Firms are reticent to invest when a free-rider problem exists.[229] They either fear that their competition will benefit without incurring the costs, or they believe they can free ride and derive the benefit without the associated costs.[230] Horizontal agreements can limit free riders and their negative impact, by sharing the expenses amongst the firms certain to benefit. Examples of legitimate agreements that limit free riders include research and development for Blu-Ray Discs,[231] and advertising campaigns for pork[232] and milk.[233] Thus, by limiting free riders, firms are willing to undertake programs that would not make sense for a firm acting alone.[234]

227. *See* Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 465–70 (1992) (explaining that even if a firm lacks market power in the primary market, it may be able to exert market power in a secondary market). Bolts are another example where standardization increased consumer utility. *See generally* William Sellers, *The United States Standard Screw Threads (1864)*, ASME, http://anniversary.asme.org/
2005landmarks3.shtml (last visited Nov. 13, 2012). Initially, independent manufacturers made bolts with unique threading until the Franklin Institute pushed for standardization. *Id.* The standardization eliminated supplier lock–in, allowing companies to repair machines without having to use custom bolts or order specific bolts from the original manufacturer. *Id.*

228. Free-riding is when market participants receive economic benefits without incurring the related cost. BLACK'S LAW DICTIONARY (9th ed. 2009).

229. *See* PINDYCK & RUBINFELD, *supra* note 105 at 668.

230. *See id.*

231. Blu-Ray was developed with support from more than 180 companies including LG Electronics Inc., Samsung Electronics Co., Ltd., Sony Corporation, Twentieth Century Fox, Walt Disney Pictures, and Warner Bros. Entertainment. *See Blu-ray FAQ*, BLU-RAY.COM, http://www.blu-ray.com/faq/ (last visited Nov. 13, 2012).

232. Although created through an act of Congress eliminating questions of antitrust legality, this horizontal agreement of the National Pork Board, which charges pork producers a 0.4% surcharge on every pound of pork sold, gave us the wonderful tag line: "Pork: The Other White Meat." *See About the National Pork Board*, NAT'L PORK BOARD, http://www.porkbeinspired.com/AboutTheNational PorkBoard.aspx (last visited Nov. 13, 2012).

233. The expression "Got Milk?" was a creation of the California Milk Processor Board, which charges milk processors in California a $.03 surcharge on each gallon sold to fund the advertising campaign. *See* CALIFORNIA MILK PROCESSOR BOARD, http://www.gotmilk.com/ (follow "About" hyperlink) (last visited Nov. 13, 2012).

234. *See, e.g.*, *supra* notes 232–34 and accompanying text.

Horizontal agreements can also allow firms to pool resources and leverage various individual firms' strengths to accomplish projects beyond the reach of an individual firm.[235] For example, contractual agreements between pharmaceutical companies, hospitals, and universities form the basis for research alliances and joint research projects that develop new drugs.[236] By integrating their efforts, firms can leverage their expertise, access to capital markets, and intellectual property,[237] while limiting their exposure to the cost of a failed drug, which can reach almost a billion dollars.[238] It also gives companies access to scarce resources.[239]

Between the potential costs and the potential benefits of horizontal non-price agreements, net economic effect can be difficult to ascertain.[240] When confronted with antitrust cases that are difficult to decide, courts have a tendency to utilize the ROR.[241] Accordingly, courts would probably utilize the ROR to determine the legality of a quality-based agreement. With the burden of proof in their favor, defendants will likely prevail.[242]

B. Why the Antitrust Community Should Not Ignore Quality Collusion

Cartels can inflict a severe deadweight loss on society.[243] The antitrust statutes are broad enough to encompass and prohibit quality collusion in addition to the traditional price and quantity restrictions.[244] Guidance provided by the Commission and the

235. *See infra* notes 237–40 and accompanying text.

236. *See infra* notes 238–40.

237. For example, the differences in firm expertise could involve leveraging a university's clinical research facility with financial assistance from a pharmaceutical company that has greater access to financial markets.

238. By allowing firms to diversify their research, they are able to limit downside risk while maintaining a similar long-term upside potential. The adage, "Don't put all your eggs in one basket," promotes diversification. For example, Pfizer put a lot of eggs in one basket when it invested almost $1 billion on Torcetrapib before deciding the drug was a failure. *See* Alex Berenson & Andrew Pollack, *Pfizer Shares Plummet on Loss of a Promising Heart Drug*, N.Y. TIMES, Dec. 5, 2006, http://www.nytimes.com/2006/12/05/health/05pfizer.html.

239. By working with hospitals, drug companies have greater access to patients for their clinical trials, as well as doctors to run the trials.

240. *See supra* notes 227–40 and accompanying text.

241. *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

242. *See supra* note 47 and accompanying text.

243. *See supra* note 158.

244. *See supra* Part I.A.

Division reinforces this assertion—it even indicates that quality has moved from a trivial factor to an important consideration of the Agencies.[245] In certain markets, the interactions between price, quantity, and quality allow firms to extract monopoly profits by manipulating quality instead of quantity or price.[246] Therefore, a gap exists between what enforcement agencies should pursue and what they do pursue.[247]

The anticompetitive impact of LNSAs on viewers has gone unchallenged by the Commission and the Division for at least ten years.[248] The FCC has stated that it is investigating the matter.[249] However, this is not to say that the industry has escaped all enforcement. On the contrary, there have been numerous antitrust actions filed—the actions simply ignore the antitrust violations' impact on viewers.[250]

In 2011 the Division filed a civil complaint to enjoin the merger between Cumulus Media, Inc. and Citadel Broadcasting Corporation, two radio broadcast companies.[251] The Division's complaint,[252] competitive impact statement,[253] and consent decree[254] focused on the

245. *Compare* 1992 HORIZONTAL MERGER GUIDELINES, *supra* note 35 (using the word "quality" five times, but only in one instance—a footnote, expressing concern over a potential negative impact on quality), *with* 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 32 (using the word "quality" six times in all, but one instance expressing concern over the negative impact of a merger on quality). The increased prominence of quality and the negative effects that mergers can have on it suggests that the Commission and the Division agree that quality manipulation is or can be illegal.

246. *See supra* Part II.B.

247. In addition to the research described in Part II.B., *infra*, the author conducted a search of the Commission and the Division's enforcement activity on their respective websites. The Commission's website allows searches of documents extending back through 1996. Since 1996, the only document to contain the term "broadcast television" concerned cable television companies. *FTC Competition Enforcement Database*, FTC, http://www.ftc.gov/bc/caselist/index.shtml (last updated Oct. 19, 2011). This is not to say that the media has been free of antitrust enforcement.

248. *See supra* notes 201–03 and accompanying text.

249. *See* Stetler, *supra* note 2.

250. *Id.*

251. Complaint, United States v. Cumulus Media Inc., No. 1:11-cv-01619 (D.D.C. Sept. 8, 2011), *available at* http://www.justice.gov/atr/cases/f274800/274819.pdf.

252. *Id.*

253. Competitive Impact Statement, United States v. Cumulus Media Inc., No. 1:11-cv-01619 (D.D.C. Sept. 8, 2011), *available at* http://www.justice.gov/atr/cases/f274800/274828.pdf. "Competitive impact statements" are summaries of the Division's economic findings regarding a particular case. *See, e.g.*, *id.*

sale of radio advertising, while remaining silent on the effect that the merger would have had on listeners. There was no discussion in any of the documents as to whether the merger would adversely affect the quality of programming on the stations.[255]

Three years earlier, in 2008, Raycom acquired three television broadcast stations from Lincoln Financial Media Company.[256] One of the stations was in a market where Raycom was already present, giving Raycom ownership of two of the four broadcast stations in that market.[257] In response to the consolidation, the Division filed for an injunction.[258] While remaining silent on the impact the merger would have on programming, the competitive impact statement stated that continued ownership by Raycom of one of the acquired stations "would substantially lessen competition in the sale of broadcast television spot advertising"[259] in that market. The final judgment required divestiture[260] of the station and prevented local marketing or joint sales agreements between Raycom and the divested station—the stations appear to be free to engage in LNSAs.[261]

Prior to those cases, the Division filed to block a media consolidation in the Salt Lake City broadcast television market.[262]

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254. United States v. Cumulus Media Inc., No. 1:11-cv-01619 (D.D.C. Nov. 29, 2011), *available at* http://www.justice.gov/atr/cases/f279100/279195.pdf. In an antitrust setting, "consent decrees" are agreements whereby a firm consents to act in accordance with the demands of the Commission. *See, e.g.*, *In re* Whole Foods Mkt., Inc., No. 9324, 2009 WL 1557334 (F.T.C. May 29, 2009), *available at* http://www.ftc.gov/os/adjpro/d9324/090529wfdo.pdf.

255. *See generally* United States v. Cumulus Media Inc., No. 1:11-cv-01619 (D.D.C. Nov. 29, 2011); Complaint, United States v. Cumulus Media Inc., No. 1:11-cv-01619 (D.D.C. Sept. 8, 2011); Competitive Impact Statement, United States v. Cumulus Media Inc., No. 1:11-cv-01619 (D.D.C. Sept. 8, 2011).

256. Complaint, United States v. Raycom Media Inc., No. 1:08-cv-01510 (D.D.C. Aug. 28, 2008), *available at* http://www.justice.gov/atr/cases/f236600/236613.pdf.

257. *See generally id.*

258. *Id.* at 1.

259. Competitive Impact Statement at 2, United States v. Raycom Media Inc., No. 1:08-cv-01510 (D.D.C. Aug. 28, 2008), *available at* http://www.justice.gov/atr/cases/f236600/236618.pdf.

260. Specific performance in antitrust, has included—as it did in this case—mandatory divestment, as well as requiring the operations to continue as long as they remain fiscally possible. United States v. Raycom Media Inc., No. 1:08-cv-01510 (D.D.C. Dec. 4, 2008), *available at* http://www.justice.gov/atr/cases/f240100/240199.pdf.

261. *See generally id.*

262. *See generally* Complaint for Injunctive Relief at 1, United States v. News Corporation Ltd., No. 1:01CV0077 (D.D.C. Apr. 11, 2001), *available at* http://www.justice.gov/atr/cases/f8000/8039.pdf.

The News Corporation (owner of KTVX-TV, a Fox Television affiliate station) proposed an acquisition of Chris Craft (owner of KSTU-TV, an ABC affiliate station), which would have placed 40% of the Salt Lake City broadcast television spot advertising market under common ownership.[263] Again the Division challenged the merger because the merger would substantially lessen competition in the broadcast television advertising market.[264] The complaint and the competitive impact statement were silent on the merger's potential impact on quality.[265] The final judgment required divestiture of the station and prevented local marketing or joint sales agreements between Raycom and the divested station—again, the stations appear to be free to engage in LNSAs.[266]

The lack of concern exists in non-broadcast media as well. In 2004, the Daily Gazette Company and MediaNews Group, Inc. consummated a merger.[267] In 2007, the Division filed an action to unwind the transaction, alleging that the merger eliminated price and non-price competition.[268] The reduction in non-price competition was manifested in the termination of a Saturday publication, the reduction of local news stories, and the elimination of several sections from the newspapers.[269] In 2010, the companies agreed to a consent decree that unwound the merger.[270] The consent decree included specific performance on price requirements to rebuild the diminished subscriber base; however, the eliminated Saturday publication, the reduction of local news stories, and the elimination of several sections from the newspapers were untouched.[271] Again, price concerns

263. *Id.* at 2.

264. *Id.* at 8.

265. *Id.* at 1; Competitive Impact Statement, United States v. News Corp. Ltd., No. 1:01CV00771 (D.D.C. May 14, 2001), *available at* http://www.justice.gov/atr/cases/f8300/8374.pdf.

266. *See generally* United States v. News Corp. Ltd., No. 1:01CV0077, 2001 WL 34038534 (D.D.C. Aug. 20, 2001).

267. Complaint at 1, United States v. Daily Gazette Co., No. 2:07-0329 (S.D. W. Va. May 22, 2007), 2007 WL 1571956.

268. *Id.* at 2.

269. *Id.* at 3.

270. United States v. Daily Gazette Co., No. 2:07-0329, 2007 WL 7575700 (S.D. W. Va. Oct. 18, 2007).

271. *Id.*

trumped quality. The newspapers currently co-publish a single weekend edition.[272]

Clearly, under the right circumstances, firms are able to form cartels and charge supracompetitive prices.[273] Participating firms find ways to increase their profit, with little concern regarding the effect on the consumer (listener, viewer, reader, etc.).[274] The statutes, however, also cover agreements on quality just as much as those on price.[275] Although the Agencies' guidance and case law indicate that quality agreements are illegal,[276] there appears to be little in the way of enforcement action by the Community.[277]

III. SUGGESTIONS FOR CLOSING THE GAP BETWEEN THE LAW AND THE PRACTICE OF ANTITRUST ENFORCEMENT

Quality collusion is a highway with vague and infrequent signs and no police. Firms have no idea how fast they can drive or how expensive tickets are. In fact, they probably dismiss the possibility of a citation altogether. As a result, they freely collude on quality in violation of the antitrust laws with a resulting increase in social harm. While a multitude of solutions exists, this Note discusses four of them: (A) increase quality collusion enforcement; (B) develop strategies to quantify quality; (C) adopt a framework to adjudicate quality collusion claims; and (D) conduct retrospective analyses of the aforementioned strategies.

A. Increase Enforcement Actions Against Quality Collusion

To reduce quality collusion, the Commission and Division should increase enforcement against quality collusion by (1) increasing the prominence and depth of quality analyses in actions brought primarily on price; and (2) by bringing actions based entirely on quality collusion.[278] The increase in enforcement would reduce quality collusion through direct intervention against firms involved with quality collusion. An increase in enforcement will also act as a

272. As of the writing of this Note, there is a joint weekend publication between the two companies. *See* CHARLESTON NEWSPAPERS, https://iservices.cnpapers.com (last visited July 5, 2012).

273. *See supra* Part I.B.

274. *See supra* Part I.B.

275. *See supra* Part I.A.

276. *See supra* Part I.A.

277. *See supra* notes 201–03 and accompanying text.

278. *See supra* Part II.B.

deterrent, signaling that the enforcement agencies will not tolerate anticompetitive quality collusion. Concerns over increased enforcement such as its cost and overly constrictive self-regulation are reasonable, yet improbable.

By pursuing quality collusion within claims that would have previously been brought exclusively on charges of price or output collusion, enforcement agencies can maximize the deterrent effect of their actions. For example, the *Raycom* complaint[279] only cited the effect the merger would have on the advertising market. The Commission could have discussed the importance of the merger's impact on the programming quality as well, to signal its broader focus. Because enforcement action was already underway, the additional enforcement cost of pursuing the quality issue would be minimal. An increase in enforcement will bolster the current anemic case law, thus providing firms with a clearer delineation between pro- and anticompetive horizontal agreements. This move would enhance self-regulation as well.

Increasing enforcement prevents firms from continuing anticompetitive behavior. Being the subject of an antitrust enforcement action costs time, money,[280] and public relations.[281] Rational firms will reduce their exposure to antitrust actions. Although firms will still assume some risk of defending antitrust actions based on their cost-benefit analyses, additional enforcement will shift the equation and increase self-regulation that in turn will reduce the future burden on the Agencies, enhance competition, and increase social welfare.

It is true that increasing enforcement increases litigation costs. A single antitrust case is extremely expensive,[282] and it is unlikely that the Commission and the Division's current budgets could support a

279. *See* Complaint, United States v. Raycom Media, Inc., No. 1:08-cv-01510 (D.D.C. Aug. 28, 2008).

280. *See supra* Part I.A.

281. Antitrust complaints connote the idea that the company is taking advantage of its customers, which causes public relations issues. For example, Microsoft experienced major public relations setbacks as a result of their antitrust woes. *See* Elizabeth Corcoran, *For Gates, Fight May Prove Costly*, WASH. POST, May 19, 1998, http://www.washingtonpost.com/wp-srv/business/longterm/microsoft/stories/microtale19.htm.

282. The Division spent more than $50,000,000 related to the Microsoft antitrust litigation. *See* United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001); Declan McCullagh, *DOJ Pushes Case Against MS*, WIRED (Jan. 12, 2001), http://www.wired.com/news/antitrust/0,1551,41163,00.html.

significant increase in antitrust litigation.[283] A modest increase in funding, however, could justify itself by enhancing self-regulation, clarifying case law, and encouraging firms to self-regulate out of fear of an enforcement action.

Concern about overzealous self-regulation is rarely a worthwhile consideration.[284] If enforcement went too far, firms might shy away from aggressive procompetitive strategies fearing costly litigation. The counterargument is that increased enforcement will clarify case law, helping firms conform to the proper standards—reducing antitrust litigation spending through compliance rather than laxity. Additionally, the judiciary's increased experience could decrease the per-case cost of litigation.[285] The news companies could revert to their pre-LNSA methods of acquiring original content.

Although the cost concerns are rational, weighing the positives against the negatives shows that the balance favors quality-based enforcement. Consider an increase of quality-based antitrust enforcement in the broadcast television market. Currently, this enforcement is negligible, making any spending on enforcement a cost attributable to the new strategy.[286] Any change in the market would also be a result of the increased enforcement. To begin, the Commission or the Division would choose a market with LNSAs, in which they would likely prevail. Because the sharing is facially so extreme in Honolulu, the city would be an ideal starting point.[287] If the agency prevailed, the next case brought would have the Honolulu case law to support it.[288] As the enforcement progressed to different market groups, firms would dissolve LNSAs rather than face the certain litigation expenses. Eventually, firms beyond the television broadcast industry would take note and adjust their course. In the end, the Agencies would litigate relatively few cases compared to the number of horizontal agreements that would break up.

283. *See supra* Part I.A.

284. Additionally, courts have dealt with overzealous attempts at enforcing antitrust laws in the past, indicating the system is already prepared. *In re* Indus. Gas Antitrust Litig., 681 F.2d 514, 520 (7th Cir. 1982).

285. It was experience that allowed the judiciary to qualify certain activities as *per se* illegal, conserving judicial resources in the process. *See supra* notes 48–51 and accompanying text.

286. *See supra* notes 201–03.

287. *See supra* note 6 and accompanying text.

288. On the other hand, if the agencies increase enforcement and lose at trial, their additional litigation expenditures might be counterproductive, encouraging firms to push the boundaries of antitrust law even further.

B. Develop Strategies for Quantifying Quality

The Community attempts to define quality in enforcement actions by requiring parties to define the relevant market.[289] The Commission's initial failure in *FTC v. Whole Foods Market, Inc.* demonstrates how difficult quantifying quality can be.[290] Two factors favor the Community's quantification of quality: (1) successful quality collusion will only occur in industries where it is practical to fix quality, and (2) in certain cases, enforcement will only require determining the direction and not the magnitude of a quality manipulation. Thus, when implemented in conjunction with retrospective studies, to enhance the enforcement actions' effectiveness, there are no compelling reasons to ignore quality collusion.

Although the qualities of simple products, like bolts or hard red spring wheat, are easily quantifiable, most products are more complex. Even so, industries develop and implement means of quantifying difficult-to-measure qualities. For example, pasta companies measure the amount of semolina and durum wheat[291] and cell phone companies count dropped calls.[292] Even a complex service, like hospital care, is quantifiable, based on patient mortality and the number of foreign objects retained after surgery.[293] In rooting out quality collusion, plaintiffs can use the industries' experts and metrics to prove their case.

Quality collusion is likely to occur in industries where quality is easily manipulated or quantified.[294] Successful cartels need to be able to agree on output, detect and punish cheating, and, if illegal, remain undetected. The difficulties the Agencies will have in quantifying quality are the same difficulties that the firms face in forming

289. *See supra* Part II.A.

290. 592 F. Supp. 2d 107 (D.D.C. 2009); *see supra* Part II.A.

291. Nat'l Macaroni Mfrs. Ass'n v. FTC, 345 F.2d 421, 424 (7th Cir. 1965).

292. Will Park, *AT&T Customers Log the Most Dropped Call Complaints, Verizon Claims Fewest*, INTOMOBILE (May 5, 2010, 4:35 PM), http://www.intomobile.com/2010/05/05/att-customers-log-the-most-dropped-call-complaints-verizon-claims-least/ (citing ChangeWave Research).

293. *Special Open Door Forum: Hospital Value Based Purchasing Proposed Rule Overview for Facilities Providers and Suppliers*, U.S. DEP'T HEALTH & HUM. SERVICES (Feb. 10, 2011), https://www.cms.gov/HospitalQualityInits/downloads/0210_Slides.pdf; *see also* Ann L. T. Powell et al., *Uniform Ripening Encodes a Golden 2-like Transcription Factor Regulating Tomato Fruit Chloroplast Development*, 336 SCIENCE 1711 (2012), *available at* http://www.sciencemag.org/content/336/6089/1711.full.pdf.

294. *See supra* Part I.B.

cartels.[295] If firms cannot measure or manipulate product quality, then they will either be unable to agree, destroying the cartel before inception, or they will cheat and sap the supracompetitive profit from the cartel.[296] As a result, in these industries, cartels are unworthy of antitrust scrutiny. However, in industries where a cartel succeeds, the Agencies can use the same tools the cartel uses to operate and maintain compliance to condemn the cartel.

To remedy antitrust violations in quality collusion, the Agencies only need to seek injunctive relief for a disparity in performance.[297] Cases where an agreement increases product quality are likely reasonable and therefore legal. Accordingly, in the absence of monetary damages, courts can limit their query to the direction of a quality change without bogging themselves down with the details of the magnitude of the quality change. Determining a directional change is generally easier than determining the magnitude of a change. For example, consider two tomatoes: an heirloom tomato, bred for taste, grown locally on a farm, ripened on the vine, and picked at the peak of ripeness; the other bred for uniformity of color, grown in a greenhouse halfway around the globe, picked when green, and ripened with ethylene.[298] By sampling the tomatoes, a person could determine which one tastes better—but objectively quantifying that difference would be much more difficult. If tomato growers did not have antitrust immunity, then the Agencies could order the tomato growers' organization disbanded—without quantifying the differences between the tomatoes.[299]

Courts have had difficulty understanding and applying complex economic theory derived from industry metrics.[300] The two possible erroneous outcomes in antitrust enforcement litigation are false positives and false negatives. When faced with borderline cases,

295. *See generally* notes 149–58 and accompanying text.

296. *See generally* notes 149–58 and accompanying text.

297. *See, e.g.*, FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028 (D.C. Cir. 2008).

298. *Pocket K No. 12: Delayed Ripening Technology*, INT'L SERVICE FOR ACQUISITION AGRI-BIOTECH APPLICATIONS (Apr. 2004), http://www.isaaa.org/resources/publications/pocketk/12/default.asp.

299. The tomato-growing example is for illustration purposes only. Farmers have a specific antitrust exemption that allows the exact agreement detailed. *See* 7 U.S.C. §§ 291–92 (2006); *see also* FLORIDA TOMATO COMMITTEE, http://www.floridatomatoes.org/ (last visited Nov. 10, 2012).

300. *See, e.g.*, Cellophane Fallacy, *supra* Part I.A.

lower courts have erred on the side of lax enforcement[301]—minimizing the risk of false positives. On the other side, the quality collusion enforcement vacuum limits the cost of false negatives to the cost of litigation. However, because cartels can exact such a high price on society,[302] the Community should seriously consider increasing its quality collusion enforcement efforts.

There are few industries where quality is as subjective as it is in LBTN, yet it is at times necessary to quantify quality. In addition, the Agency will have to prove the existence of a restraint and prove that the restraint is unreasonable. To examine quality, plaintiffs or the Agency could measure the broadcast content as other have done, or develop new metrics. Based on these metrics, the Agency would have to show an injury to establish that the restraint is unreasonable.

Studies by Danilo Yanich and Gregory S. Crawford[303] have quantified numerous quality indicators. Going beyond these studies, the Community could quantify the number of unique news stories in a market, the number of minutes dedicated to unique news stories, the number of viewpoints on a given topic, as well as turning to the industry's existing market data. Alternatively, the Agencies could simply rely on the absence of differentiation—for example, the fact that multiple stations use the same camera, the same studio, the same on-air personality, the same script, or even identical programming—to show that quality was fixed. The directional shift in quality could then be determined by comparing the quality of the broadcast in that market with the quality of the broadcast in other equivalent markets. Whether a study could be extensive or reliable enough to convince a court remains untested; however the possibility exists. If a college professor with a team of research assistants quantified certain aspects of LBTN,[304] the news and its quality is clearly quantifiable.

Based on these studies, the Agencies still would have to prove that the restraints are unreasonable. The opinions of Judge Learned Hand,[305] congressional action relating to other news media,[306] and statutory and regulatory language[307] make it clear that the LNSA's

301. *Compare* FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1032–33 (D.C. Cir. 2008), *with* Eastman Kodak Co. v. Image Technical Servss, 504 U.S. 451 (1992).

302. *See supra* note 47 and accompanying text.

303. *See supra* Part I.C.

304. *See supra* Part I.C.

305. *See infra* note 321 and accompanying text.

306. *See supra* note 82 and accompanying text.

307. *See supra* Part I.A.

duplicative and constrictive news coverage harms society. It is equally clear that the Commission or the Division should pursue LNSAs in accordance with the existing antitrust laws.

C. Utilize a Three-Factor Framework

Because horizontal agreements on quality can have a legitimate business purpose,[308] and the *per se* rule is reserved for activities that lack a legitimate business purpose, quality collusion would probably be judged under either a ROR, which can be expensive, or a quick look analysis, which only handles cases that are easier to determine. This Note advances a three-factor framework that could simplify the initial sorting when determining whether an agreement is reasonable. By providing the courts with this framework, market participants can make better strategic decisions, Agencies can decide when to bring cases more accurately, and courts can execute more consistent and accurate rulings in less time with less cost.

Clarifying the boundary between legal and illegal conduct could increase compliance. When deciding whether to pursue an antitrust claim, the Agencies face many of the same questions a cartel faces during its formation: What will the litigation cost? What is the likely profitability of the cartel? What is an enforcement action's probable outcome? Moreover, there are other legitimate concerns. The three-factor framework will help both sides by demarcating the boundary between legitimate and illegitimate actions. Answering in the affirmative for any of the three factors would demand a deeper probe.

1. The Three Factors, Generally

Standardization can enhance competition. Question one determines the first factor: "Does the industry typically compete on the facet of quality that is allegedly manipulated?" This inquiry carves out an exception for industries enhanced by standardization. Product standardizations, such as the protein content of hard red spring wheat traded on the Minneapolis Grain Exchange, allow manufacturers that use the wheat to buy from whoever is able to supply it.[309] The demand of a large manufacturer may exceed a farmer's supply. In that case, standardization allows smaller farmers to provide the market with wheat, even if they cannot meet the needs of the larger buyer alone. The Minneapolis Grain Exchange has

308. *See* supra Part I.B.
309. *See supra* note 126.

existed since 1881 due to the mutually beneficial agreement.[310] The exchange's long history would provide it with security from enforcement.

Many markets self-correct without involving the legal system. Question two determines the second factor: "Is the market susceptible to small yet substantial changes in quality without a reflexive demand change?" In this case, markets reach a competitive equilibrium naturally.[311] In markets with quality inelastic demand, self-correction may be limited.[312] If this occurs, a cartel can reduce quality without a demand shift returning the market to a competitive level, allowing the cartel to earn supracompetitive profits.

The second question can be critical in two-sided markets, where one side of the market subsidizes the other. The disconnect between consumption and compensation facilitates a profitable reduction in quality by acting as a barrier between the suppliers and the consumers. For example, in the oral hygiene market, dentists exist in a two-sided market. Consumption and compensation are severed: employers select and pay insurance companies; insurance companies pay dentists based on patients' consumption. Worsening matters, patients have a difficult time ascertaining quality of care. As a result, a dental cartel could agree to restrict the quality of filling materials. The market structure limits the patients' recourse to extremes: change their employers, purchase different yet duplicative insurance, or try to pressure their employers into pressuring the insurance company into pressuring the dentists into providing high-quality fillings. All of the solutions are far removed from the dental chair. Consequently, the theoretical dentist cartel could maintain supracompetitive profits.

Because procompetitive restraints are reasonable and reasonable restraints are legal, determining the likelihood of quality collusion requires answering a third question: "Does the alleged collusion cause a cognizable net social harm?" If answered in the negative, it releases from review those fledgling industries with a short track record that might otherwise require scrutiny under the first factor. The question is a threshold—if the harm is substantial enough to be reasonably

310. *See* MGEX, *supra* note 126.

311. Because the transaction does not involve price, changes in consumer utility serve as a proxy to measure the change in value. In line with how the 1992 HORIZONTAL MERGER GUIDELINES were applied, *supra* note 35, a theoretical 5% change in consumer utility, without a corresponding change in output, would indicate the potential for monopoly power. *See supra* note 147.

312. Courts must be careful not to commit the Cellophane Fallacy in answering this question. *See supra* Part I.A.

cognizable, then this factor is satisfied. Aside from the suggestions in Part III.B, to answer this question courts can and should consider whether the consumers or the firms are pressing for standardization. If consumers are pressing for a standardized product, a socially cognizable harm is less likely.[313] Returning to the oral hygiene market, if the lower quality filling material caused excess tooth decay, there is obviously social cognizable harm. In comparison, if the dentists pressed manufacturers to standardize the shape of the clips used to fasten a patient's bib to increase the dental hygienists' efficiency, it would benefit consumers and therefore be unlikely to cause a socially cognizable harm.

Members of the Community or society may fear the three-factor test or framework is either over- or under-inclusive. Consumers want an inclusive framework to avoid monopoly prices. Suppliers want to avoid over-inclusion to have more flexibility to compete. The first two questions ensure that the net is fine enough to catch anticompetitive horizontal agreements on quality and protect consumers. The final question protects firms from overzealous enforcement. Although walking a fine line, retrospective studies, discussed below, will enhance the accuracy of the framework over time, and ensure it works in practice.

2. *The Three-Factor Test as Applied to the LBTN Market*

Local Broadcast Television News stations entered into horizontal agreements that coordinated their activities.[314] This section applies the three-factor test to the agreements' information that is available publicly. Obviously, a more precise application could be accomplished with more information.

The first factor is whether firms in the industry typically compete on quality. Operating in a two-sided market, LBTN stations compete for advertisers, necessitating a competition for viewers. The clearest examples of inter-station competition are the prices stations pay for exclusive content, such as the Super Bowl. The advertising rates broadcasters can charge for spots during exclusive events makes the station's cost of the event worthwhile. If it were less clear, a court

313. When the Industrial Revolution was in its infancy, toolmakers, the bolt consumers, pressed for standardization, and the result was an increase in competition. William Sellers, *The United States Standard Screw Threads (1864)*, ASME, http://anniversary.asme.org/2005landmarks3.shtml (last visited Nov. 13, 2012).

314. *See supra* Part I.C.

could look to whether the firms or the consumers were pressing for standardization. The covert nature of many of the agreements makes it clear that the agreements are for the stations' benefit; were they for the benefit of the public, the participants would tout them as examples of customer appreciation.

The second factor is whether the market is susceptible to a substantial change in quality without a reflexive change in demand. The LNSA market is conducive to cartelization because supply and demand are inelastic,[315] allowing price increases to be profitable. The market is concentrated, making agreements easier to reach.[316] Lastly, significant barriers to entry in the form of regulations[317] and market structure prevent new entrants from increasing competition.[318] As a result, demand cannot correct anticompetitive quality restrictions. LNSAs naturally overcome the remaining hurdles cartels face. Once LBTN stations come to an agreement and form a cartel, the rest falls into place. LNSAs effectively force the identical output across several firms,[319] making cheating impossible and unnecessary. For example, for a cartel member in Charleston, South Carolina, to "cheat" it would both subsidize its competition and bear the full cost of its unique content—making it financially unfeasible. The closest that firms can get to cheating are marginal improvements in quality such as anchor or set quality. Furthermore, even if cheating were possible, the public nature of broadcast television allows instant detection and nearly instant punishment by the cartel.

The final question is whether the collusion results in a socially cognizable harm. LNSAs cause several. Judge Learned Hand articulated the clearest harm in the context of news, when he explained that "one of the most vital of all general interests [is] the dissemination of news from as many different sources, and with as many different facets and colors as is possible."[320] Because LNSAs share scripts and restrict the number of unique stories, they inherently have significantly fewer facets and colors.[321] In keeping with Judge Learned Hand's statement, society is harmed. Reinforcing the judge, the rationale for the Newspaper Preservation

315. *See supra* Part I.C.
316. *See supra* Part I.C.
317. *See supra* Part I.A.
318. *See supra* Part I.C.
319. *See supra* Part I.C.
320. Associated Press v. United States, 326 U.S. 1, 28 (1945).
321. *See* Yanich, *supra* note 1, at 25–27.

Act of 1977[322] acknowledges the importance of editorial diversity, placing it above other antitrust concerns: newspapers received antitrust immunity conditioned on maintaining editorial independence. To ignore quality collusion in television broadcasting while disallowing the same behavior in other media is hypocritical. There is certainly enough evidence to support an investigation into the negative impact SSAs have on quality in the market.

In sum, the LNSAs satisfy the three factors: the market typically competes on the quality of programming; it is susceptible to substantial changes in quality without reflexive changes in demand; and the reduction in the news output is a cognizable social harm. Accordingly, if LNSAs as they stand today were prosecuted, they would be found illegal, barring other justifications or defenses. Although these justifications are allowed, they are rarely successful. To ensure the effectiveness of the factors it is important that the Agencies study the results.

D. Conduct Retrospective Analyses of the Aforementioned Strategies

Retrospective studies are possibly the most important and smallest addition to federal antitrust policy of the proposed suggestions. Economic theory, modeling, and analyses, which drive antitrust law, are evolving and growing in sophistication and accuracy.[323] Past actions provide the best data available to determine the appropriateness of future actions and retrospective studies will make future economic models more accurate.[324] Additional retrospective studies could provide insight into cases brought by the Commission and Division. While retrospective studies are completed on a limited basis, additional analyses could enable the agencies to utilize their resources more efficiently, curtail anticompetitive activity more effectively, adjust their publications and guidelines, and promote competitive behavior that the Agencies initially considered anticompetitive.

322. 15 U.S.C. § 1801 (2006).

323. *Compare* United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956), *with* FTC v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997). Unfortunately, it may be impossible to perform thorough analysis in cases where the enforcement action failed because much of the data will remain private.

324. Unfortunately, cases are decided without hindsight.

Retrospective studies are not more prevalent, because they are expensive and drain the Agencies' resources[325] in the short term, even if they may produce long-term cost savings. Unfortunately, given that the Agencies' budgets are limited, they may need to shift resources from current enforcement actions to retrospective studies that will enhance future enforcement. It is unclear which path is more efficient in the end.

Regarding the LBTN industry, the Agencies should look at former media enforcement actions, litigated or not, such as *Raycom* and *News Corporation Limited* with an eye on quality collusion. Additionally, as the Agencies move forward, they should continue to conduct retrospective studies to determine whether the original remedies were effective or needed. To make the studies more effective, the consent decrees may call for specific language that requires the firms to provide the Agencies with certain information. These studies could prove invaluable to determining the best course of action going forward, increasing the efficiency and effectiveness of federal antitrust laws, and thereby improving the quality of the news.

CONCLUSION

The status quo leaves the door wide open. Firms openly collude on quality without fear, and broadcast stations collude, causing significant social harm. The neglect likely stems from the difficulty in measuring and the complex nature of quality restraints. These justifications can only bend antitrust laws so far and in certain markets. The justifications appear non-existent, while the social costs remain high. In these markets, quality collusion requires closer scrutiny. Unfortunately, the problems with quality collusion extend beyond television, and the potential consequences can be more severe. What if pharmaceutical companies decided that the drugs they have developed to cure cancer were sufficient? What if they agreed to fix quality at the current level? Quality collusion should be pursued as vigorously as price collusion.

To enforce antitrust laws in accordance with their statutory language, the Community needs to shift its stance. It must increase enforcement to reduce quality collusion as it occurs and deter quality collusion in the first place. The Community can develop strategies to quantify quality, or use an industry's metrics to prove the existence of cognizable social harms in court. It can also institute a framework for

325. *See supra* notes 283–84 and accompanying text.

courts to follow, such as the three-factor test advanced by this Note, to streamline litigation and work towards eliminating quality collusion. These changes will allow courts to provide relief from the cost our society pays for collusion.