

**Antitrust: What is it Good For? The Story of a Failed
Merger Between Penguin Random House and Simon &
Schuster and its Implications for the Labor Market**

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For the last forty years, antitrust cases have largely been argued on the basis of consumer welfare. This basis has enabled firms to excuse practices—no matter how pernicious—if they can show that such practices reduce prices or increase the value of the goods and services they offer to consumers. In the fall of 2021, the Department of Justice filed a complaint which alleged that a proposed merger between Penguin Random House LLC and Simon & Schuster Inc. improperly stifled competition in the market for best-selling books and reduced author advancements within the same market. In December of 2022, the United States District Court for the District of Columbia enjoined the DOJ’s complaint. This article examines the threat that monopsonies present in labor markets; it argues that a shift in antitrust enforcers’ focus from the sell side of a market to its buy side can bolster economic output and empower the labor force.

I. The Details Behind the Proposed \$2.2 Billion Deal

In November of 2020, Penguin Random House (PRH), a wholly-owned subsidiary of the German media mogul Bertelsmann SE & Co., announced its bid to acquire Simon &

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Schuster Inc. (S&S) from its parent company ViacomCBS Inc.² PRH proposed to buy S&S for \$2.175 billion, a reported “premium” against other bidders looking to purchase the prestigious publishing house.³ At the time of the acquisition’s announcement, PRH—itsself a product of a 2013 merger between Penguin and Random House—was, and remains to be, the largest book publisher in the United States.⁴ In its complaint filed in the District of Columbia in November of 2021, the Antitrust Division of the Department of Justice recounted PRH’s staggering extent of market share in US markets for best-selling books. The complaint uncovered that in the fiscal year of 2020, PRH, through its ownership of 90 *imprints*,⁵ published over 2,000 new titles, amassing over \$2.4

² Viacom CBS has, as of February 2022, merged with Paramount Inc., creating Paramount Global which is a subsidiary of National Amusements Inc.; Benjamin Mullin & Jeffrey A. Trachtenberg, “Penguin Random House Parent to Buy Simon & Schuster from ViacomCBS,” *The Wall Street Journal*, November 25, 2020.

https://www.wsj.com/articles/penguin-random-house-parent-near-deal-to-buy-simon-schuster-from-viacomcbs-11606268232?mod=article_inline (accessed December 27, 2022).

³ Brent Kendall & Jeffrey A. Trachtenberg, “Justice Department Sues to Block Penguin Random House’s Acquisition of Simon & Schuster,” *The Wall Street Journal*, November 2, 2021.

https://www.wsj.com/articles/justice-department-sues-to-block-penguin-random-houses-acquisition-of-simon-schuster-11635866422?mod=article_inline (accessed December 28, 2022).

⁴ Julie Bosman, “Penguin and Random House Merge, Saying Change Will Come Slowly,” *The New York Times*, July 1, 2013.

<https://www.nytimes.com/2013/07/02/business/media/merger-of-penguin-and-random-house-is-completed.html> (accessed January 4, 2023).

⁵ In the publishing industry, an imprint is a trade name of a smaller press that is owned by a larger publisher. Imprints enable large publishers to create smaller “in-house” publishers that focus on specific genres or readership. For instance, Penguin Classics is an imprint of PRH that specializes in printing classic works of literature.



billion in total revenue in the US market.⁶ Consequently, as a report by *The Wall Street Journal* found,⁷ between January and October of the same year, PRH dominated sales in the market for printed books, accounting for 25 percent of all printed books sold in the US market.⁸

S&S, being the third-largest publisher in the United States,⁹ operates over 30 imprints in the US market. The company publishes over 1,000 new titles annually, leading it to amass over \$760 million in revenues in 2020.¹⁰ From January to October of the same year, S&S accounted for 9.1 percent of printed book sales in the US market, with its sellers including some of the best-selling books of the year, such as Mary L. Trump's memoir *Too Much and Never Enough* and John Bolton's *The Room Where it Happened: A Whitehouse Memoir*.¹¹ Although the publishing house has enjoyed industry prestige for decades, it has recently garnered particular praise for its publishing streak of critically acclaimed political

⁶ United States Department of Justice, United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., Case 1:21-cv-02886, United States District Court in for the District of Columbia: filed 11/02/2021, <https://s.wsj.net/public/resources/documents/dojlawsuit1102.pdf> (accessed December 27, 2022), 8.

⁷ *The Journal* is a wholly-owned subsidiary of News Corp.

⁸ In addition to its US presence, PRH also operates 325 imprints in 22 countries; Benjamin Mullin & Jeffrey A. Trachtenberg, "Penguin Random House Parent to Buy Simon & Schuster from ViacomCBS."

⁹ The second-largest publisher in the United States market is HarperCollins, a subsidiary of News Corp since 1987. HarperCollins accounted for 11 percent of printed books sold in the US market in the fiscal year of 2020; Benjamin Mullin & Jeffrey A. Trachtenberg, "Penguin Random House Parent to Buy Simon & Schuster from ViacomCBS."

¹⁰ United States Department of Justice, United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 8.

¹¹ Benjamin Mullin & Jeffrey A. Trachtenberg, "Penguin Random House Parent to Buy Simon & Schuster from ViacomCBS."



memoirs, award-winning biographies, and other best-selling works of non-fiction.¹²

Subsequently, when the deal between two of the industry's most influential publishing houses was announced, the Antitrust Division of the Justice Department (DOJ) quickly moved to block the merger. Although the government's swift action was not entirely surprising given the size of the proposed merger, the theories which the government deployed to block the deal did indeed come as a surprise to many.¹³

II. The Legal Theories Behind the Case

A. *The Consumer Welfare Standard*

The theories which the government deployed to argue against this merger notably depart from traditional antitrust arguments used before courts. For the last forty years, the use of the Consumer Welfare Standard (CWS) in the practices of law and economics has dominated, and therefore framed, debates over lawful mergers and acquisitions in courtrooms around the country. The CWS is a measurement derived from market analyses which assesses whether actions that a firm(s) is apt to take within a given market—such as merging with a competitor—will raise prices, decrease economic output, or

¹² United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 49.

¹³ In March of 2020, after ViacomCBS announced its wish to sell S&S to another media company, S&S CEO Jonathan Karp, wrote to one of the publishing house's best-selling authors, "I'm pretty sure that the Department of Justice wouldn't allow Penguin Random House to buy us, but that's assuming we still have a Department of Justice." Needless to say, as Karp very quickly found out, we definitely still do have a Department of Justice and it was not pleased about the proposed merger; United States Department of Justice, United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC. 6.



suppress innovation within that market. The standard was developed by a group of economists and law professors at the University of Chicago in the 1970s; it remains the dominant standard by which economists and antitrust lawyers assess whether the economic consequences incurred by consumers from a firm's practices warrant government action.¹⁴

The CWS is anchored by two premises: that buyers benefit from the lowering in cost of the goods or services they consume, and that buyers benefit from an increase in the value or quality of the products or services firms offer to them.¹⁵ The standard effectively illustrates where inefficiencies in a market may precipitate given a firm's actions, but as former Federal Trade Commissioner Christine S. Wilson wrote in a 2019 paper, "...if consumers are not harmed... antitrust agencies do not act."¹⁶ Under the CWS, so long as the difference between what each consumer actually pays and their willingness to pay for a product or service is maximized, any actions that a firm may take, regardless of if those actions amount to the hyper consolidation of an industry or the loss of political autonomy among the populace, are excusable in court.¹⁷

Under the CWS, a challenged practice can only be defeated before a court were it to either raise the price that

¹⁴ The group most prominently consists of Professors Robert Bork and Richard Posner from UChicago Law and Professor Milton Freedman of the Stigler Center at UChicago School of Economics.

¹⁵ Robert Bork. *The Antitrust Paradox: A Policy at War with Itself* (New York: Free Press, 1978).

¹⁶ Wilson, Christine S., "Welfare Standards Underlying Antitrust Enforcement: What You Measure is What You Get," *Luncheon Keynote Address at George Mason Law Review 22nd Annual Antitrust Symposium: Antitrust at the Crossroads?* (Arlington, VA: United States of America Federal Trade Commission, 2019), https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf, 2.

¹⁷ Wilson, "Welfare Standards Underlying Antitrust Enforcement: What You Measure is What You Get," 5.



consumers would ordinarily pay for a good or service, or depress market-wide outputs for the products or services a market would otherwise provide to its consumers. However, in this case, the government's theories to block PRH and S&S's merger did not rely on the CWS.

B. The Government's Theory

The DOJ argued that the proposed merger between PRH and S&S would, in the market for best-selling books,

- i) Disincentive publishers to offer superior editorial and marketing services to prospective best-selling authors whose publishing rights they hope to secure and,¹⁸
- ii) Depress the sum of advancements authors would receive for selling the rights to their books to a publisher¹⁹
 - a. Therefore, reducing the number (and variety) of books published.²⁰

Notice that the real crux behind these arguments *does not* lie in a concern for the *consumers* of best-selling books, rather, the concern is primarily for the *writers* of best-selling books. These arguments are concerned with the laborers (i.e., the authors) in the market for best-selling books, notably, not the buyers of best-sellers. The sub-argument for the second major argument does account for the lessened volume and variety of materials buyers (i.e., readers) will encounter, but the subargument exists only *in relation to* the broader argument regarding author advances. Advances are negotiated, up-front,

¹⁸ This is how publishers compete against each other.

¹⁹ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 2.

²⁰ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 1.



quarterly²¹ payments that authors receive from a publisher upon waiving the publishing rights to a work and are an author's primary source of revenue for a written work.²² Hence, the sub-argument concerning a lessened quantity and variety of published material exists only in relation to the lessened *wage* authors would earn were this merger granted by the court.

The arguments the DOJ made in its complaint were claims for the protection of a labor force, rather than a consumer block. In an ordinary antitrust case, the government is chiefly concerned with harms enacted upon a market when one firm gains substantial seller *market power*.²³ In analyzing seller market power, the government's chief suspicion lies with *monopolies*, and whether a merger of the proposed size of PRH and S&S would *monopolize an industry*.²⁴ However, in this case, the government was chiefly concerned with the status of a *monopsony* firm and its *labor market power*.²⁵ Arguments

²¹ Authors used to receive advancements in two payments. However, due to the consolidation of the publishing industry, publishers have been able to strike this schedule for payments because of increased leverage of authors' literary agents. Instead, because of their preference to pay less upfront, publishers prefer to spread the sum of an advancement over a series of quarterly payments made to authors for their work; United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 45.

²² In the DOJ's complaint, advancements were described as how authors "fund their writing and pay their bills." United States Department of Justice, United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 2.

²³ *Market power* refers to the ability of a single firm to raise the prices of its goods or services without losing sizable sales to its competitors; Stevenson, Betsey & Wolfers, Justin, *Principles of Microeconomics* 1st ed., (New York: Worth Publishers, 2021), Chapter 14, Section 14.

²⁴ It should be noted here, that—in what is perhaps the most smirk-worthy distinction in law—it is *not* illegal for a firm *to be a monopoly* under the Sherman Act of 1890 (one of the two chief antitrust laws), but it *is* illegal for one firm to *monopolize* an industry.

²⁵ Benjamin Mullin & Jeffrey A. Trachtenberg, "Penguin Random House Parent to Buy Simon & Schuster from ViacomCBS."



against monopolies are concerned with markets that are dominated by a single seller of a good(s) or service(s), whereas arguments against monopsonies are concerned with markets dominated by a single buyer of a good(s) or service(s). Hence, the peculiarity of the government's argument in this case is that its theory is concerned with *a single buyer of labor* in a market, rather than *a single buyer of goods* within that market.²⁶

For the past half-century, the publishing industry has been subject to hyper-consolidation by five publishing houses (the Big Five): PRH, HarperCollins, S&S, Hachette Book Group, and Macmillan (named in descending order of market share).²⁷ According to Alexandra Alter, a reporter for *The New York Times*, such consolidation has “completely transformed the industry.”²⁸ If one accepts the government's argument, such consolidation enables the Big Five to adversely manipulate the conditions upon which they purchase their labor. This argument equates monopsonist harms to monopolist harms, looking to the labor rather than seller market to assess the damages of a merger. The argument advances that a firm the size of a consolidated PRH and S&S can purchase its labor at a reduced cost without facing the risk of losing that labor to its competitors. The government argued that a firm with this extent of buying power in a given market is too big.

This argument is only reached because of the argument that precedes it, one that is a more-traditional, pro-competition argument. The government's first major argument, that the proposed merger would stifle competition between publishers

²⁶ Rittenberg, Libby & Tregarthen, Timothy. *Principles of Microeconomics* 2nd ed., (New York: Flat World Knowledge, 2008), Ch. 14, Section 14.1.

²⁷ Lauren Hodges, Christopher Intagliata, & Mary Louise Kelly, “Federal Judge Blocks Penguin Random House from Buying Simon & Schuster,” *NPR*, November 1, 2022, <https://www.npr.org/2022/11/01/1133375227/federal-judge-blocks-penguin-random-house-from-buying-simon-schuster>, (accessed December 28, 2022).

²⁸ Lauren Hodges, Christopher Intagliata, & Mary Louise Kelly, “Federal Judge Blocks Penguin Random House from Buying Simon & Schuster.”



to secure rights to a prospective best-seller, is much more in-line with traditional anti-merger arguments.²⁹ This argument holds that a merger which would create a firm whose market share is nearly twice the size of its strongest competitor gives too much influence and control over the industry to one firm in a given market.³⁰ Such a firm, the government argues, could unfairly guide the trajectory of industry practices in their favor, reinforcing already high barriers of entry for new firms and choking existing competition among even the most prominent industry players.³¹

C. PRH and S&S's Theoretical Response

In response to the government's allegations, in their briefs to the Court, PRH and S&S reasoned that,

- i) a consolidated publishing house could have more leverage with associated retailers such as Amazon and other large book distributors,
- ii) which would enable both authors and publishing houses to write and publish riskier material, print a greater quantity of content, and enlarge the house's distributing capacity.³²

In a statement for *The Journal*, Lorraine Shanley, the president of Market Partners International, a consulting firm in the publishing industry, shared that the theory conveys that

²⁹ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 11-17.

³⁰ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 2.

³¹ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 22; United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 5-6.

³² Brent Kendall & Jeffrey A. Trachtenberg, "Justice Department Sues to Block Penguin Random House's Acquisition of Simon & Schuster."



through its acquisition of S&S, PRH could make S&S's existing catalog more widely accessible for domestic and international markets,³³ leading to higher sales for the “book behemoth.”³⁴

The defendants argued that leverage against “the behemoth that has actually dominated the publishing industry for the past three decades [is] (and that dwarfs Penguin Random House—or PRH/S&S, for that matter): Amazon,”³⁵ which enables publishers to take greater risks regarding what they publish. Securing rights to a book, especially a prospective best-seller, is a risky and expensive process involving two traditional avenues: auctions or private negotiations.³⁶ An author's literary agent will hold an auction for the rights to a work, where publishers gather and place their bets for a book, hoping to out-bet their competitors by offering

³³ Brent Kendall & Jeffrey A. Trachtenberg, “Justice Department Sues to Block Penguin Random House's Acquisition of Simon & Schuster.”

³⁴ Chief Executive of News Corp, Robert Thomson's words for the merger between PRH and S&S. As was aforementioned, News Corp owns HarperCollins, which has since shown reinterest in acquiring S&S from ViacomCBS following the failure of its merger with PRH. Such a merger would allot HarperCollins and S&S an estimated 20 percent of market share in the US market for best-selling books. So, no self-interested irony on Thompson's end here; Benjamin Mullin & Jeffrey A. Trachtenberg, “Penguin Random House Parent to Buy Simon & Schuster from ViacomCBS.”

³⁵ Alex Shephard, “The Penguin Random House-Simon & Schuster Merger Has Been Blocked. What Now?” *The New Republic*, November 3, 2022, <https://newrepublic.com/article/168444/penguin-random-house-merger-blocked>, (accessed December 28, 2022).

³⁶ Initial bids at book-auctions among the Big Five can start from anywhere between \$150,000 to \$400,000, and catapult to well over \$700,000. As publishers experience what is coined as “auction fever,” when their peers essentially validate their own senses regarding how much a book is worth. Auction fever drives up the amount a book's publishing rights are sold for, benefiting the author and their agent; United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 11-14.



a higher bid backed by superior marketing services such as book tours, day-time talk show appearances by the author, and other editorial perks that build public anticipation. These auctions are scenes of intense competition between rival publishing houses, making them crucial to authors looking to make a living off of their writing. Because publishers know that it “[only] takes one passionate editor at another imprint to win that book away,”³⁷ they are driven to offer more in advancements and perks to the author for publishing rights of the auctioned work.

Stephen King, the beloved fiction writer who publishes through S&S, testified at trial that under his understanding of the publishing industry, “consolidation makes it tougher and tougher for writers to find enough money to live on.”³⁸ The average writer makes an estimated \$20,000 annually from publishing their work, which, as Mr. King rightly underscores, is “well below the poverty line.”³⁹ Literary agents also hold private, one-on-one negotiations with prospective publishers. Even in these private sessions, however, publishers are cognizant of the fact that “I am negotiating exclusively, but I always have my competition in my rearview mirror,”⁴⁰ as an agent’s foremost task is to secure the highest advancement with the best perks for their author. Although there are “no other

³⁷ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 11.

³⁸ Jan Wolfe and Jeffrey A. Trachtenberg, “Trial Ends in Government Challenge to Penguin Random House and Simon & Schuster Merger,” *The Wall Street Journal*, August 19, 2022. https://www.wsj.com/articles/trial-ends-in-government-challenge-to-penguin-random-house-and-simon-schuster-merger-11660932615?mod=article_inline (accessed December 27, 2022).

³⁹ Jan Wolfe and Jeffrey A. Trachtenberg, “Trial Ends in Government Challenge to Penguin Random House and Simon & Schuster Merger.”

⁴⁰ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 13.



market inputs,⁴¹ publishers will often preemptively offer agents a high advancement to entice them into doubting whether another publisher could match or exceed their offer.⁴²

PRH and S&S argued that the challenged merger would create a firm whose size can adequately ensure that authors are at liberty to write unconventional material which would otherwise not garner high advancements in an auction or private negotiation, thus increasing the quantity and variety of books which get published.⁴³ This argument rests on the premise that backlists, which are books formerly purchased by a publisher that still earn a profit for every print, are profitable enough to negate any losses a publisher assumes by overpaying for a book's publishing rights.⁴⁴ Although it should be noted here that a book "need not earn out its entire advance for a publisher to profit; publishers begin to profit at around 70 percent of earnout for most books."⁴⁵ PRH, for example, has the largest backlist in the publishing industry, which is the "most significant"⁴⁶ portion of its annual revenue.

⁴¹ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 13.

⁴² In these ways the market system, in publishing, is working exactly as it should. Every good capitalist dreams of a market whose conditions are such that firms (publishers) must compete (via advancements) and innovate (through fashioning new editorial systems or offering more effective marketing strategies) to offer the best goods and services to its consumers (literary agents and their clientele) to gain customer loyalty and market share. Perhaps there *is* hope for the market system, after all; United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 13-16.

⁴³ Jan Wolfe and Jeffrey A. Trachtenberg, "Trial Ends in Government Challenge to Penguin Random House and Simon & Schuster Merger."

⁴⁴ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 16.

⁴⁵ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 16 footnote 8.

⁴⁶ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 16.



Midsize competitors confirm that publishers of the Big Five's scale can take on riskier books or overpay for best-sellers because of this existing source of continual revenue.⁴⁷ Hence, the capital that the Big Five have enables them to entice authors to publish under their imprints, whilst covering any losses they may incur from a disappointing deal.⁴⁸ If one accepts the defendants arguments, a firm the size of the proposed merger could empower authors to write more avant-garde material without fear that a publisher would decline to bid for the work due to the publisher's doubts regarding whether the investment could be recouped. A consolidated firm has a larger distributive capacity which enables more books with unconventional themes or plots to circulate across markets.

III. The Opinion of the Court

The case, which was heard before circuit judge Florence Y. Pan in the United States District Court for the District of Columbia (D.C.),⁴⁹ ultimately sided with the government. In an economic Memorandum Opinion, Judge Pan deduced that the merger between the defendants under Section 7 of the Clayton Act, which in relevant part reads, “[that mergers and acquisitions whose effect] may be substantially to

⁴⁷ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 17-20.

⁴⁸ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, 16.

⁴⁹ Judge Pan assumed the former seat of now-Justice Ketanji Brown Jackson in the United States Court of Appeals for the District of Columbia Circuit on September 26, 2022; “Florence Y. Pan,” *District of Columbia Circuit*, United States Court of Appeals, accessed January 11, 2022.

<https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Judges+-+FYP>.



lessen competition, or to tend to create a monopoly,”⁵⁰ would likely “substantially lessen competition in the market for the publishing rights to anticipated top-selling books.”⁵¹ The opinion deployed two primary modes of analysis to reach its final judgment: the *Baker Hughes Burden Test* (1990) and the Herfindahl-Hirschman Index (HHI).

A. *The Baker Hughes Burden Test*

The *Baker Hughes Burden Test* (or *Baker Hughes* as it will be referred to henceforth) is derived from the 1990 D.C. Circuit Court decision, *United States v. Baker Hughes Inc.*⁵² The test is used to analyze whether a merger or acquisition between defendants would, in all likelihood, raise prices or produce anticompetitive effects in an affected market.⁵³

Baker Hughes has a preliminary requirement that the government must fulfill as well as three subsequent steps:⁵⁴

⁵⁰ “The Antitrust Laws,” *Federal Trade Commission*, accessed January 11, 2022.

<https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws>.

⁵¹ *United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC.*, 80.

⁵² *United States v. Baker Hughes Inc.*, 908 F.2d 981, 982-83 (D.C. 1990).

⁵³ Ordinarily, *Baker Hughes* is deployed to stop mergers or acquisitions on the sell-side of a given market. Hence, its utility in mitigating the monopolization of industries. However, the government’s theory in this case is that “the combined defendants would exercise market power on the buy side of the publishing market, i.e., monopsony.... [but] the kinship between monopoly and monopsony suggest similar legal standards should apply to claims of monopolization and to claims of monopsonization”; *United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC.* 21 footnote 13.

⁵⁴ *United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC.*, 22.



- i) At the outset, the government must point to the existence of a relevant market—followed by the three accompanying steps:
 - a. By demonstrating excessive concentration within the relevant market, the test permits the government to “establish a *prima facie*⁵⁵ case and a presumption of anticompetitive effects.”⁵⁶
 - b. The burden then shifts to the defendants to show why non-ideal circumstances demonstrate that merely pointing to market concentration alone is not reliably indicative of the merger’s supposed anticompetitive effects.
 - c. Finally, if the defendants succeed in rebuttal, the burden shifts back to the government to ultimately persuade the Court of the merger’s undesirable effects.⁵⁷

The Court found the government’s identification of the market for anticipated best-selling books in the US satisfactory in fulfilling the preliminary requirement for the *Baker Hughes* test. Further, the Court affirmed the government’s reasoning that hyper-consolidation within this market would result in “lower advances for authors of such books and less favorable contract terms”⁵⁸ for the authors of best-sellers. At trial, the defendants confirmed the merger would result in “fewer books being published, less variety in the marketplace of ideas, and

⁵⁵ Meaning, on its face.

⁵⁶ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 22.

⁵⁷ This so-called *burden of persuasion* remains with the government throughout the duration of the case; United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 22.

⁵⁸ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 23.



an inevitable loss of intellectual and creative output.”⁵⁹ Yet, the defendants contest that advancement sums would decrease following the merger. They argue that competition among existing publishers would go unaffected and that eventually, author advancements would actually rise because of the merged house’s increased access to capital and continuous revenue.⁶⁰

Defining a relevant market has two components: the government must identify the geographic market and the product market. In this case, both parties agreed that the relevant geographic market is that of publishing rights in the United States. However, the parties contested the boundaries of the product market.⁶¹ The government argued that the relevant product market at stake was that of publishing rights to anticipated best-selling books, being those that are expected to generate high revenue and produce a higher advancement for authors. Following the government’s theory, the “targeted sellers against whom the merged defendants might lower the prices paid”⁶² are authors looking to sell rights to their works.⁶³

⁵⁹ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 23.

⁶⁰ Refer to sub-section C of the second section in this article, pp. 7-10, for a detailed analysis of this rebuttal.

⁶¹ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 24.

⁶² United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 25.

⁶³ It helps to understand that in the monopsony context, “[a] submarket exists when [buyers] can profitably [cut] prices to certain targeted [sellers] but not to others.” Applied in this case, the submarket for best-selling authors could reasonably exist as—if one buys the government’s position—the consolidated parties could profitably cut the wages (i.e., the amount paid to authors in advancements) they pay to best-selling authors, but refrain to cut the wages of non-best-selling authors. United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 25.



The Court primarily relied on qualitative *practical indicia*⁶⁴ to outline the relevant product market.⁶⁵

To draw the boundaries of the relevant product market, the Court utilized the government's threshold of a minimum of \$250,000 (being the sum publishers pay in advances to prospective best-selling authors).⁶⁶ The Court found that books which meet this threshold, though only making up two percent of all book acquisitions in the US, account for 70 percent of advance spending by publishers.⁶⁷ In the market for books which earn a minimum of \$250,000 in advancements, the Big Five comprise 91 percent of the market share, while mid-to-small publishing houses make up the remaining nine percent. Yet, in the market for books whose advancements are below the \$250,000 threshold, the Big Five only hold 45 percent of the market share.⁶⁸ Such a difference between market share among the Big Five and mid-to-small sized publishing houses, alongside the common practice among publishers, that books which do receive advances at or above the threshold require the approval from senior members of the house, signal the probable existence of a submarket.⁶⁹

In rebuttal, the defendants argued that defining a submarket by the price certain books garner for advances is

⁶⁴ A term derived from the Supreme Court's 1962 case, *Brown Shoe Co. v. United States*, 370 US 294, 325 (1962), used to describe signs or situations which render a hypothetical scenario likely.

⁶⁵ The Court also engages with the "hypothetical monopsonist test" on pp. 40-43 of the Memorandum Opinion. Although this discussion is worthy of further mention, it is beyond the reach of this article's scope and page count.

⁶⁶ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 26-33.

⁶⁷ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 26.

⁶⁸ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 27.

⁶⁹ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 28.



insufficient to firmly establish the existence of a submarket of best-selling books. The defendants argued that “any correlation between advance level and expected sales shows only that books are ‘valued along a *continuum*.’”⁷⁰ The Court was unpersuaded by the rebuttal, underscoring that the \$250,000 threshold serves as a necessary starting benchmark, which “‘support[s] the appropriateness of regarding’ anticipated top-selling authors as a ‘distinct [seller] group’ that buyers can target.”⁷¹ The Court added that, in addition to the \$250,000 threshold top-sellers typically meet, authors within this submarket have unique demands regarding the reputation of the publishers who distribute their books, the contract terms authors receive for working with particular houses, and the different competitive conditions these authors face due to the substantial share the Big Five control in the market for best-sellers.⁷²

B. Market Concentration and HHI

Courts turn to analyses of market concentration to determine whether the effects of a merger or acquisition would substantially increase concentration within a given market. Typically, markets comprised of many buyers and sellers—all

⁷⁰ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 32.

⁷¹ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 32.

⁷² “It is precisely those specialized needs that make the authors of anticipated best-selling books vulnerable to targeting for price reductions. Publishers of anticipated top-selling books know that such authors are not able to find adequate substitutes for publishing their books because of their unique needs and preferences. Those publishers therefore can target authors of anticipated top-selling books for a decrease in advances (prices) because it is not as likely that such a price decrease will cause the publishers to lose a book”; United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 36 and 33-34.



of which hold little to no market share or power—enjoy the greatest degree of competition. When there are relatively few firms competing amongst each other in a given market, coordinated behavior aimed at reducing output and raising profits above those of competitive thresholds is more common.⁷³ In the 1963 decision *United States v. Philadelphia Nat'l Bank*, the Supreme Court ruled that any merger or acquisition which results in a combined market share of at least 30 percent establishes a legal presumption that the merger likely violates Section 7 of the Clayton Act.⁷⁴

The Court found that in the market for books at or exceeding the \$250,000 threshold, PRH holds 37 percent of the market share and S&S maintains 12 percent. Conversely, in the market for books below the \$250,000 threshold, that of non-best sellers, PRH holds 16 percent, while S&S only hold 9 percent. Consolidated, the two houses would hold a staggering 49 percent of the market for best-selling books, which is just over double the 24 percent market share that HarperCollins, their direct competitor, would control.⁷⁵ Considering these statistics, it is important to note that rights to a book are sold to the highest bidder 93 percent of the time, while 60 percent of anticipated best-sellers (books that meet or exceed the \$250,000 threshold) include a negotiated advancement sum.⁷⁶ This means that not only do the rights to a best-seller often hinge on how much a publisher is willing to pay for them, but also that authors use this opportunity to amass the highest possible wage for their work. Hence, the remaining

⁷³ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 43.

⁷⁴ *United States v. Philadelphia Nat'l Bank*, 374 US 321 (1963).

⁷⁵ Hachette would own 10 percent, while Macmillan would hold nine percent; United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 44.

⁷⁶ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 9.



small-to-medium independent publishers would only hold a 9 percent share of the submarket following such a merger. The Court referred to the already “undeniable trend in consolidation”⁷⁷ within the publishing industry, along with the substantial raise in market share the combined defendants would hold, to justify its presumption that anticompetitive effects would follow from a merger.

To ground its final judgment on the post-merger effects of the market’s concentration, the Court used the Herfindahl-Hirschman Index (HHI), a measuring tool used by economists to evaluate the competitiveness of a market based on the number of firms and their size in a market. By summing the squared share of the market every firm holds within the market, the index provides an insightful analysis regarding the conditions of the market post-merger.⁷⁸ In an HHI analysis, the figures of the post-merger HHI and the increase in the HHI from pre-and-post-merger indicate whether a merge or acquisition is detrimental to competition in a given market.

Any merger that increases the HHI of a given market by more than 200 points, with a post-merger HHI of over 2,500 is “presumptively anticompetitive.”⁷⁹ In this case, the post-merger HHI would amount to 3,111 with an increase of 891 points.⁸⁰ As the Court noted, this is “well above the threshold required to trigger the [anticompetitive] presumption.”⁸¹ The Court added that in addition to this high market concentration, the merger would also likely harm authors by eliminating the

⁷⁷ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 45.

⁷⁸ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 45.

⁷⁹ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 46.

⁸⁰ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 46.

⁸¹ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 46.



yields⁸² of the direct competition between two of the most powerful publishers⁸³ and increase the risk of coordinated anticompetitive conduct between the post-merger Big Four publishing houses.⁸⁴ In settling its determinations regarding the detrimental effects to the best-seller submarket, the Court concluded that a merger between PRH and S&S would “distill the Big Five to a Big Four, with an overwhelmingly dominant top firm ... controlling 49 percent of the market and dwarfing its nearest competitor. In the newly configured market, the top two firms ... would have 74 percent market share,”⁸⁵ making price leadership and coordination between firms a serious threat in an already highly consolidated market.

IV. Case Conclusions & the Decision’s Implications

A. *The Labor Market*

The government’s victory in this case is not merely a win for the authors of best-selling books or small-to-medium sized publishing houses who compete with the Big Five. This victory could represent a pathway to strengthening labor protections through existing antitrust law. While the general public may not think of authors as traditional laborers for a slate of sociocultural reasons, writers are ultimately laborers.

⁸² Editorial offerings and marketing techniques.

⁸³ The government’s expert found that “PRH is S&S’s closest competitor, and that S&S is a significant competitor to PRH... if PRH lowered advances, between 19 and 27 percent of its authors would divert to S&S; and that if S&S lowered advances, between 45 and 59 percent of its authors would divert to PRH”; United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 50.

⁸⁴ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 48.

⁸⁵ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 61.



They participate in the labor market in the same capacity as every other worker in the greater labor force, and this case came down in their as well as the greater labor force's favor. As former DOJ antitrust lawyer Taylor Owings told *The Journal*, the case “demonstrates that the DOJ is going to test new theories in cases that focus on older industries ... [this case is] an important one for setting an agenda in the labor space.”⁸⁶

Cases which advance enforcement actions against agreements between firms that restrain competition in labor markets is a significant drift away from the traditional consumer welfare notions of how antitrust law ought to be applied.⁸⁷ The high-risk strategy is emerging as influential enforcers and scholars across the country are increasingly concluding that practices by firms which encroach upon workers' ability to secure higher pay and better working conditions are, in fact, enforceable antitrust issues.⁸⁸ A panel, hosted by New York University's (NYU) School of Law in May of 2022, saw scholars and enforcers discuss the challenges and prospects of bringing these kinds of cases before courts. Professor Steven C. Salop of Georgetown University Law argued that the *Philadelphia National Bank* approach to labor

⁸⁶ Brent Kendall & Jeffrey A. Trachtenberg, “Justice Department Sues to Block Penguin Random House's Acquisition of Simon & Schuster.”

⁸⁷ Geoffrey A. Manne, the president of the Center for Law and Economics, told *The Journal* in the response to the peculiar nature of the PRH and S&S merger that, “labor markets just have not been the subject of much [antitrust] litigation”; Jan Wolfe, “Key Tests Loom in 2023 for US Antitrust Enforcers,” *The Wall Street Journal*, December 28, 2022.

https://www.wsj.com/articles/key-tests-loom-in-2023-for-u-s-antitrust-enforcers-11672234668?cx_testId=3&cx_testVariant=cx_168&cx_artPos=1&mod=WTRN#cxrecs_s (accessed December 28, 2022).

⁸⁸ Karen Hoffman Lent & Kenneth Schwartz, “Expect Aggressive Antitrust Enforcement and Novel Theories,” *New York Law Journal*, Vol. 267, No. 89 (2022).

https://www.skadden.com/-/media/files/publications/2022/05/expect_aggressive_antitrust_enforcement_and_novel_theories.pdf. 1.



restraints, which regards laborers as consumer-equivalences, blocks courts from balancing consumer benefits, such as lower prices, against labor harms, such as decreases in wages.⁸⁹

Such tactics appear viable even in the Supreme Court. In Justice Brett Kavanaugh's concurrence in *NCAA v. Alston* (2021), he argued that defendants in antitrust suits ought not to be able to balance anticompetitive harms in one relevant market against the benefits deductible from another relevant market.⁹⁰ Kavanaugh wrote that "price-fixing labor is price-fixing labor. And price-fixing labor is ordinarily a textbook antitrust problem because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work."⁹¹ Evidently, there are Justices, even in the highest Court, that may be receptive to these arguments. Diana Moss, president of the American Antitrust Institute, underscored at the NYU's Spring panel, that regulators' "historic neglect"⁹² of the effect of firms' anticompetitive practices in the labor market is a serious issue which requires immediate attention. Moss advanced that this neglect has had depressive implications on the quantity of economic output and the liberty of workers within the labor force.⁹³

In his most-recent book, *How Antitrust Failed Workers*, Professor Eric Posner⁹⁴ of the University of Chicago School of

⁸⁹ Professor Salop's areas of expertise include trade and regulation in the antitrust realm as well as law and economics, more broadly; Karen Hoffman Lent & Kenneth Schwartz, "Expect Aggressive Antitrust Enforcement and Novel Theories," 3.

⁹⁰ *National Collegiate Athletic Association v. Alston et al.*, 594 US (2021).

⁹¹ *National Collegiate Athletic Association v. Alston et al.*, (2021), 43.

⁹² Karen Hoffman Lent & Kenneth Schwartz, "Expect Aggressive Antitrust Enforcement and Novel Theories," 3.

⁹³ Karen Hoffman Lent & Kenneth Schwartz, "Expect Aggressive Antitrust Enforcement and Novel Theories," 3.

⁹⁴ In a simple twist of scholastic-fate, Professor Posner is the son of former-professor and judge of the Ninth Circuit, Richard Posner, who was



Law, argues that firms who are permitted to engage in monopsony behavior on the buy-side of markets, leading to an excessive increase in market concentration, create a loss in output and equity among workers within a given market.⁹⁵ Posner concludes that, contrary to the CWS model, the savings in labor costs does not translate to lower prices for consumers. Instead, these savings enrich employers and shareholders because the prices consumers pay are determined by frameworks of the product market, not the labor market.⁹⁶ By exercising market power on the buy-side through purchasing inputs, such as goods & services and labor, at a reduced cost, employers are able to concentrate a market to maximize profits and cut wages without suffering losses. Posner explains that market concentration enables a monopsony firm to pay workers wages between competitive and monopsony wages without losing this labor to other competitors because of its large holdings in the market. Hence, workers must either accept the lessened wage, undergo expensive retraining, or retire.⁹⁷

The options (or lack thereof) that workers in monopsony markets face ultimately hurt consumers and the economy as a whole because monopsony power enables firms to raise the prices of goods or services by reducing output or wages, just as in product markets. Moreover, employers within a monopsonied market can more easily engage in explicit or implicit collusion to decrease output by further suppressing wages.⁹⁸ By reducing labor costs through hiring fewer workers, and paying them less-than-competitive wages, consumers end up paying higher prices because of a decline in the production

among the leading figures in the Chicago School, and a voiceful advocate of the Consumer Welfare Standard.

⁹⁵ Eric Posner, *How Antitrust Failed Workers* (Oxford University Press: Cambridge, UK, 2021). 23

⁹⁶ Posner, *How Antitrust Failed Workers*, 23.

⁹⁷ Posner, *How Antitrust Failed Workers*, 16-18.

⁹⁸ Posner, *How Antitrust Failed Workers*, p. 77.



of goods and services labor monopsonists output. Such actions not only reduce the number of workers willing and able to work for firms, but also reduce the quantity of economic output firms annually contribute to the American economy.⁹⁹

*B. Antitrust as More than Competition and Lower Prices
for Consumers*

On their podcast, *Capitalism 't*, from UChicago's Stigler Center & Booth School of Business, economist Luigi Zingales and journalist Bethany McLean discussed why we, as consumers, laborers, and citizens, should support robust antitrust enforcement. In an episode discussing the case, *United States v. Microsoft Corp.*,¹⁰⁰ Zingales and McLean advanced the following thesis: we should support antitrust regulation not necessarily because it benefits us economically. As in many cases, especially in the age of the Information Economy, antitrust regulations will not economically benefit citizens; but we should want these regulations because they are fundamental to securing our ideals of self-determination.¹⁰¹ Cases such as the failed merger between PRH and S&S show us that corporations which are permitted to grow, and then capture such an enormous share of a given market, pose a threat to the welfare of workers, the health of an economy, and, especially in this case, the liberty of citizens to think for themselves.

⁹⁹ Eric Posner, "The Rise of the Labor-Antitrust Movement," *Competition Policy International*, November 29, 2021. <https://www.competitionpolicyinternational.com/the-rise-of-the-labor-antitrust-movement/> (accessed December 29, 2022).

¹⁰⁰ *US v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

¹⁰¹ Luigi Zingales and Bethany McLean, *Capitalism 't*, podcast audio January 14, 2021, <https://www.capitalisnt.com/episodes/microsoft-1998-vs-google-2020-antitrust-and-big-tech>.



The defendants in this case are two publishing houses who publish some of the most widely read and influential authors in the industry. PRH publishes the Obamas, John Brown, and Danielle Steel, while S&S has published F. Scott Fitzgerald, Bob Woodward, and Ernest Hemingway. These are among the most influential writers and thinkers of modern thought. Had publishers not provided the “venture capital”¹⁰² for these authors to write their ideas and circulate them through the public sphere, the country may have never been exposed to such critical material.¹⁰³ To consumers, who are ultimately citizens, such a threat should not be dismissed.

The power monopolists wield in labor markets have real consequences for the economic and intellectual autonomy of workers and ordinary citizens alike. The threat of a select few persons in private board rooms deciding who gets to circulate their ideas in the public sphere and under what conditions they may do so is not to be dismissed frivolously. Who controls the basis upon which political, economic, and cultural issues are debated determines the trajectory of how those issues are settled in the public arena.¹⁰⁴ If we claim to have deliberative, democratic ideals, then every citizen should have the opportunity to influence how these issues are presented and ultimately settled in the public sphere.

The case between the government and PRH and S&S demonstrates that we, as both consumers and citizens, must

¹⁰² Alex Shephard, “The Penguin Random House-Simon & Schuster Merger Has Been Blocked. What Now?”

¹⁰³ Hence, diminishing the “breadth, depth, and diversity of our stories and ideas,” the remarks of Assistant Attorney General of the DOJ, Jonathan Kanter regarding the block of the merger between PRH and S&S; Brent Kendall & Jeffrey A. Trachtenberg, “Justice Department Sues to Block Penguin Random House’s Acquisition of Simon & Schuster.”

¹⁰⁴ À la Foucault’s concept that it is not knowledge that is power, but rather, that power is knowledge; Michel Foucault, *Power/ Knowledge: Selected Interviews & Other Writings, 1972-1977*, ed. by Colin Gordon (New York: Pantheon, Books, 1980).



come to think of antitrust as more than some brainy-economic area of law which only focuses on advancing consumer welfare. Rather, we must come to conceive of it as a critical tool to bolster the strength of the broader economy and the health of our civic society. Subsequently, antitrust enforcers must continue to ground their arguments in equating monopsony harms to monopoly harms to ensure that labor markets are competitive, productive, and ethical.



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