How *Meyer v. Kalanick* Could Determine How Uber and the Sharing Economy Fit into Antitrust Doctrine

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ABSTRACT

Recently, Uber driver (and CEO) Travis Kalanick has been sued under antitrust laws with the plaintiffs arguing that he and the other drivers have engaged in a price-fixing arrangement that violates §1 of the Sherman Act. The case, *Meyer v. Kalanick*, has not yet been decided. This article will analyze the potential arguments from each side, and eventually make the case for the best reasoning the court should offer for not finding Uber drivers in violation of the Sherman Act. This determination will be based on the merits of the various arguments, how such a decision would fit within the history of antitrust law, and how it would be good precedent for the future. Additionally, there will be an analysis as to why Uber's place in the sharing economy distinguishes it from previous antitrust violators that the plaintiffs will likely try to analogize it to.

I. BACKGROUND

A. Introduction

Among the various other legal areas that have and will be struggling with the sharing economy, this paper will argue that the sharing economy ought to have an impact on how the parties make their arguments on market definition in antitrust cases as well. However, the paper will also argue that such an impact will not require a restructuring of market definition analysis within antitrust law, and that there is room within the hypothetical monopolist test and the existing antitrust law to accommodate the sharing economy.

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Specifically, Part I will provide an introduction to the sharing economy and the *Meyer v. Kalanick* litigation. Part II will analyze the merits of the potential antitrust legal arguments the parties will likely make. Part III will discuss what role, if any, the unique aspects of the sharing economy have in the antitrust principles governing market definition. Part IV will look to the future, and how the reasoning offered in the *Meyer v. Kalanick* decision could impact future sharing economy platforms in the realm of antitrust.

B. An Introduction To the Sharing Economy

Many antitrust decisions are based on how the relevant market is defined. As we will see, the parties in *Meyer v. Kalanick*[2] have been arguing the typical product and geographic market definition points in this case already: geographic limitations, suitable substitutes, elasticity of demand, and barriers to entry. However, the parties thus far have failed to acknowledge that Uber is part of the sharing economy, which is fundamentally different from traditional commerce.

The sharing economy refers to the emergence of peer-to-peer services that allow owners to give strangers access to their property during the time the owner does not wish to use it. Peer-to-peer markets allow small suppliers to compete with traditional providers of the same good or service, making it easy for buyers to engage in convenient, trustworthy transactions.[3] These services are typically in the form of apps and webpages, and have surged in their popularity. The result is that traditional businesses are losing consumers to these services, which often provide a

[2] *Meyer v. Kalanick*, No. 1:2015cv09796, Doc. 37, Opinion on Motion to Dismiss, (S.D.N.Y. 2016).

[3] Einav, L., Farronato, C., & Levin, J., National Bureau of Economic Research, NBER Working Paper No. 21496 (2015).

much more cost-effective substitute. These services include Uber (drivers), Airbnb (real estate), DogVacay (dogsitting), Turo (vehicle rentals), and many others. These services allow everyday people with full-time to careers to earn extra income by renting out the things they own (or their time), but happen not to be using at a specific time. For example, Airbnb allows owners to rent their homes to others when they may be away for a weekend, allowing the resource to be used and the owners to make money. In Uber's case, the owner of the vehicle is not only renting out the vehicle, but also providing the service of driving. Therefore an Uber driver is renting out his or her vehicle and time when both are being unused in order to earn extra income.

The people who operate on these platforms are blurring the line between private owner and business operator, which has caused a host of regulatory and tax issues in jurisdictions all over the world. For example, the average Airbnb host rents their room 58 nights each year,[4] making the owner difficult to treat the same as Best Western or a typical private homeowner. Additionally, New York City completed 828 inspections and issued 2,239 violations for short-term rentals in 2012 alone.[5] This demonstrates the blurring of the line as well because the city allows Airbnb to operate its service, yet inspects and issues violations for certain types of rentals.[6] Cities all over the world are struggling to fit the unique nature of sharing economy platforms into their existing legal framework, and it has been problematic. This struggle is epitomized by the case of EatWith, a website that connects diners with home chefs who want to

[4] The Economist, The Rise of the Sharing Economy, (Mar. 9, 2013).
[5] Geron, T., Forbes, Airbnb and the Unstoppable Rise of the Sharing Economy, (Feb. 11, 2013).
[6] *See* Benner, K., N.Y. TIMES, Airbnb Sues Over New Law Regulating New York Rentals, (Oct. 2016), <http://www.nytimes.com/2016/10/22/technology/new-york-passes-law-airbnb.html?_r=0>, (stating that New York State government has been fighting Airbnb by proposing large fines for hosts).

host a meal.[7] EatWith was founded in 2012 in Tel Aviv and landed in New York City in 2015.[8] The website allows budding chef's to build a reputation, test their menus, receive feedback from unbiased diners, earn some extra income, and has been the launching pad of many successful chefs who now own and operate their own restaurants.[9] However, New York City's current legal framework establishes that "…people who offer meals to the public for money are considered food service establishments and need permits," according to New York City Health Department Spokeswoman Veronica Lewin.[10] While health concerns are certainly a risk, people chip in for food and allow a host to cook all the time without permits, and the law seemingly allows this because friends and family differ from "the public". Yet, budding chefs are stonewalled from this wonderful resource because the law states that since it allows the public to chip in for food, rather than family, friends, or acquaintances, the chef's home is a food service establishment. It is the interaction with the public in ways that were traditionally intimate that makes the sharing economy so unique, and because that separation between public and intimate is so entangled with our laws, the sharing economy has caused much legal headache.

Uber is clearly part of the sharing economy, and it too is blurring lines. Are its drivers employees or independent contractors? Does it compete in the market of transportation services like taxis, subways, and buses, or only app-based ride-share services? Or both? There are many questions Uber elicits about the values and principles of property and ownership, but those are less relevant to the lawsuit in question. Uber fundamentally involves a transaction that is typically as intimate as food consumption. People normally would get rides from friends, family,

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[7] *See* Tozzi, J., Bloomberg, It Turns Homes Into Restaurants (and Tests Food Laws' Boundaries), (July 26, 2013), <http://www.bloomberg.com/news/articles/2013-07-26/it-turns-homes-into-restaurants-and-tests-food-laws-boundaries>.
[8] *Id.*
[9] *Id.*
[10] *Id.*

or well-established taxi or car services that were highly regulated and could be trusted. Uber allows people to get rides from complete strangers in their own vehicles with the touch of a smartphone. Uber's place in the sharing economy and the innovation of its service ought to play a role in how the courts handle the lawsuits against it. Defining the status of the drivers forces the courts to do so, but will an antitrust lawsuit force a court to acknowledge the sharing economy or will it be possible to avoid this challenge in a well written decision?

C. Uber's Business Model

Uber began in 2008 as an idea to create an app to get a ride when a person had trouble hailing a taxi.[11] Today, the transportation juggernaut allows people in thousands of cities get rides from opportunistic, everyday people looking to make some extra money on the side by giving rides in their personal vehicles. This model cements Uber's place in the sharing economy because it takes a privately owned resource – one's vehicle – and allows them to share it with strangers who need it when they do not.

From the consumer perspective, Uber is an app that connects them with available drivers in the area. The app allows the rider to view the estimated arrival time of their ride, car description, and the likely fare using the Uber Fare Estimator.[12] After the ride, the rider's card is charged (in some locations, cash payment is available).[13] From the driver perspective, things are not as simple as hitting download in the app store. Diver requirements include being 21 years old, having 3 years of driving experience, having in-state car insurance, having a license and

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[11] Uber, "Our Story," < https://www.uber.com/our-story/>.
[12] Uber, "How does Uber work?" < https://help.uber.com/h/738d1ff7-5fe0-4383-b34c-4a2480efd71e>.
[13] *Id.*

registration, having a Social Security Number, going through a background check, owning a vehicle with in-state plates that is less than 15 years old, and having that vehicle pass an Uber car inspection.[14] Additionally, drivers are subject to a background check, and can be deactivated if an investigation demonstrates that the driver has violated the deactivation policy.[15] Investigations are typically triggered through multiple customer reviews complaining of conduct that violates the deactivation policy.[16]

The key aspect of the service that led to the lawsuit in question is Uber's price algorithm. Uber drivers use the app's algorithm to calculate the fare.[17] By looking at how many consumers in a given geographic location are looking for a ride on the app at a given time, the price of a ride changes to increase along with the demand. Therefore, if for some reason a lot of consumers are requesting a ride in midtown Manhattan because there's a thunderstorm after a Knicks playoff game, there will be a significant increase in fares. The fact that all Uber drivers use the pricing algorithm is a necessary part of the allegation that the drivers are part of a price-fixing conspiracy that violates the Sherman Act. Uber has claimed that drivers have the freedom to depart from the algorithm so long as they depart downward.[18] However, it has been noted that there is no practical method that allows the drivers to do so.[19] Additionally, the complaint in *Meyer v. Kalanick* alleges that all drivers must use the algorithm.[20] In fact, the defendant's

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[14] Uber, "I Drive With Uber," < http://www.idrivewithuber.com/uber-driver-requirements/>.
[15] Uber, "Driver Deactivation Policy – US ONLY," < https://www.uber.com/legal/deactivation-policy/us-en/>.
[16] *Id.*
[17] This is also commonly referred to as "surge pricing" because fare rates fluctuate based on the algorithm's calculated demand, meaning that the fares tend to "surge" at times in an area when many people are likely to need a ride.
[18] Dickerson, T.A. & Hinds-Radix, S.O., N.Y. L. J., Airbnb and Uber in New York City: From Revolution to Institution, 4-8 (Apr. 22, 2016).
[19] *Id.* at 8.
[20] *Meyer v. Kalanick*, 1:15 Civ. 9796, Doc. 26: First Amended Complaint, (2016), ¶47-57.

motion to dismiss arguably admits this when it states, "[h]ere, that independent action is the individual decision of each driver-partner to sign up with Uber and accept the contractual terms offered, which include use of the pricing algorithm."[21] Therefore, while it is unclear whether the drivers *must* use the algorithm, it does not appear that the defense will be heavily contesting this portion of the allegations in the complaint.

D. Independent Actors

At first glance, one might ask, "how can there be a price-fixing conspiracy among Uber drivers if they all work for the same company?" Surely, individual Ford factory managers are not violating the Sherman Act by agreeing with corporate headquarters on the design of a Mustang. Rightfully so, a valid defense to an antitrust allegation is that the agreement in question is among parties of the same firm. Thus, it does not violate antitrust laws because cooperation is necessary among members of the same firm, and so the action is really unilateral.[22] Typically, this argument comes up in the context of members of a joint venture or a parent corporation and its wholly or partially owned subsidiary offering up this "single entity" defense amidst allegations of a conspiracy among them.[23]

That being said, such a defense would be futile in the Uber case because Uber has not only admitted, but also zealously argued that its drivers are *not* employees or part of the Uber

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[21] *Meyer v. Kalanick*, 1:15 Civ. 9796, Doc 28: Memorandum of Law in Support of Defendant Travis Kalanick's Motion to Dismiss, (2016), p.15.
[22] *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768-69 (1984) (holding that the Sherman Act "does not reach conduct that is 'wholly unilateral'" (quoting *Albrecht v. Herald Co.*, 390 U.S. 1459, 149 (1968))).
[23] *See id.*; *see also* Williamson, D.V., Dept. Justice Econ. Analysis Group Discussion Paper, "Organization, Control and the Single Entity Defense in Antitrust" (2006).

company.[24] Rather, Uber has claimed that its drivers are independent contractors.[25] The reason Uber has argued this point is the result of a host of lawsuits involving workers' rights.[26] When Uber drivers in the past have sued Uber to provide minimum wage, health benefits, mandatory overtime, and other rights that the government requires employers to provide to its workers, Uber has been able to successfully defend itself on the grounds that the drivers are not employees.[27] Insisting this point is what has opened the door this antitrust lawsuit because Uber has already relinquished a very potent defense.

E. *Meyer v. Kalanick*

The case in its pleadings appears to be one in which the plaintiffs allege only a horizontal price-fixing conspiracy among Uber drivers. The named defendant, Kalanick is the CEO of Uber, but the pleadings make clear he was being sued, at least in part, because he admitted in an interview that he was also an Uber driver. However, the Southern District of New York has found that the pleadings were sufficient to include an allegation of a hub-and-spoke arrangement involving vertical agreements between Kalanick and the drivers because Kalanick also designed the business model by which drivers must use the pricing algorithm that is central to the case.[28]

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[24] *See* Lien, T., LA TIMES, *Uber sued again over drivers' employment status*, (May 2, 2016), <http://www.latimes.com/business/technology/la-fi-tn-uber-nationwide-class-action-20160502-story.html>.
[25] *Id.*
[26] *Id.*
[27] However, there is pending litigation and the Ninth Circuit upheld Uber's arbitration provision in September 2016.
[28] Dickerson & Hinds-Radix, N.Y. L. J., *supra* n.7.

This finding was opined in denying an early motion to dismiss.[29] In response, the plaintiffs made a motion to join Uber Technologies, Inc. (Uber), which was granted.[30]

II. Merits of Potential Antitrust Arguments

A. Hub-And-Spoke Arrangement

A hub-and-spoke arrangement refers to a situation in which there is firm (the hub) that organizes collusion in the upstream or downstream market firms (the rim) by interacting with each rim firm individually (spokes) in order to preserve its market share from shrinking in some way or maintain high profits. This form of collusion involves not only the vertical agreements between the hub and the rim firms, but also the implied horizontal agreement among the rim firms. The examples below will illustrate how courts have been able to imply a horizontal agreement among rim firms without concrete evidence of communication.

The first discussion of a hub-and-spoke arrangement (although not using the term explicitly) occurred in the historic antitrust case, *Interstate Circuit, Inc. v. United States*.[31] In *Interstate Circuit*, the industry at issue was the movie industry. However, that industry looked far different in the 1930s than it does today. At the time of the case, there were eight main movie distributors and a series of first and second-run theaters nationwide.[32] A first-run theater refers to

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[29] *Meyer v. Kalanick*, No. 1:2015cv09796, Opinion on Motion to Dismiss, Doc. 37, (S.D.N.Y. 2016).
[30] *Meyer v. Kalanick*, No. 1:2015cv09796, Memorandum Order, Doc. 90, p.7 (S.D.N.Y. 2016).
[31] *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939).
[32] *Id.* at 213.

the major theater that existed in large cities that were typically higher-end and more expensive. Interstate Circuit had a complete monopoly of first-run theaters in five cities in Texas.[33] Movie distributors would send out their new movie to the first-run theaters gradually to build word-of-mouth popularity, and then some time later allow second-run theaters to show the movie for a lower cost of admittance. After a while, many people decided to simply wait for the movies to appear in their local second-run theater so they could see it at a lower cost. This lost the first-run theaters business, so Interstate Circuit decided to act. Interstate Circuit sent out letters to all eight major movie distributors that demanded each distributor to require second-run theaters to raise their prices if they wanted to show the distributors' films.[34] Each distributor agreed, but there was no direct evidence that any of the distributors colluded with each other or knew what the other distributors would do.[35]

The Supreme Court stated that it was permissible to draw the inference of an agreement from the nature of the proposals made and the unanimity among the distributors.[36] The Court added that each distributor knew the proposal was under consideration by the others and that without unanimous action there was a risk of substantial loss, but with unanimous action there was a prospect of increased profits.[37] This was the leading case in establishing that consciously parallel business conduct could be the basis for an antitrust violation.[38]

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[33] *Id.* at 215.
[34] *Id.* at 216-17.
[35] *Id.* at 221.
[36] *Id.* at 224-27.
[37] *Id.* at 222.
[38] Richard A. Givens, *Parallel Business Conduct under the Sherman Act*, 5 ANTITRUST BULL. 271, 277 (1960).

A modern example of a hub-and-spoke arrangement can be found in *Toys "R" Us, Inc. v. FTC*.[39] In the 1990s, Toys "R" Us was the largest chain of retail toy stores in the U.S., with approximately 20% of the market for all toys sold.[40] There were ten principal manufacturers of toys. In order of highest profit margin on toys, there were retail toy stores, such as Toys "R" Us, specialized discount stores, general discount stores, and warehouse clubs that sold toys among many other things, such as Costco.[41] When the toy manufacturers sold the exact same toys to both the retail stores and the warehouse clubs, consumers could easily compare price, which lost business for the more expensive retail stores. Evidence before the Seventh Circuit showed that Toys "R" Us went to each toy manufacturer with a new policy that would be required if the manufacturers wanted to do business with it.[42] The policy included demands that the warehouse clubs could not have a new product unless they carried the entire line, all new products would have to be shown to Toys "R" Us first to see if it wanted them, and clearance items were only permissible if Toys "R" Us had the first opportunity to buy the product.[43] Toys "R" Us also made clear that they would be going to all ten of the major toy manufacturers, and Mattel and Hasbro executives testified that they went along with "the special warehouse club policy" only because they believed their competitors had agreed to it.[44]

The Seventh Circuit agreed with the FTC's earlier decision that Toys "R" Us had violated the Sherman Act.[45] The court noted that similar to *Interstate Circuit*, each manufacturer's decision to agree to Toys "R" Us' demands represented an abrupt shift from previous business

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[39] *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000).
[40] *Toys "R" Us, Inc.*, 126 F.T.C. 415, 420 (1998).
[41] *Toys "R" Us,* 221 F.3d 928, 931 (7th Cir. 2000).
[42] *Id.* at 931-32.
[43] *Id.*
[44] *Id.* at 932-33.
[45] *Id.* at 940.

dealings.[46] However, here there was arguably a more compelling case than *Interstate Circuit* because of evidence regarding the communications.[47] The court specifically stated that if there were no evidence in the record tending to support concerted behavior, it would have ruled in Toys "R" Us' favor.[48]

One of the most recent examples of a hub-and-spoke arrangement was in *United States v. Apple, Inc*.[49] The case involved the eBook industry, which involved the six major publishers (Big Six), Apple, and its competitor, Amazon. Amazon was selling all eBooks for its Kindle at a very competitive $9.99.[50] Apple was about to enter the eBook market with the much-anticipated iPad.[51] Both Apple and the Big Six felt that Amazon's pricing was too low and destructive to the industry.[52] Apple devised a plan in which it would implement the agency model, which allowed the Big Six to set their own eBook prices under a certain ceiling, splitting the profits 70/30 in the publishers' favor.[53] However, as part of the plan, Apple would offer this agency model agreement to each of the Big Six with the condition that they force all of their distributers (Amazon) to also operate under the agency model.[54] Apple made it clear that unless a "sufficient number" of the Big Six agreed to the agency model, it would not bother building a bookstore for the iPad.[55] All six of the publishers agreed.

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[46] *Id.* at 935-36.
[47] *Id.* at 935.
[48] *Id.* at 938-39.
[49] *United States v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015).
[50] *Id.* at 296.
[51] *See id.* at 301.
[52] *See id.* at 301-02.
[53] *Id.* at 302-04.
[54] *Id.*
[55] *Id.* at 318.

The Second Circuit found that this agreement had the effect of raising eBook prices.[56] The court noted that parallel conduct with respect to Apple's agreement with each publisher was not enough to demonstrate that it had organized a conspiracy to raise prices, but that the presence of additional circumstantial evidence that tended to exclude to possibility that each of the Big Six were acting independently was sufficient to find a conspiracy.[57]

The plaintiffs in the Uber case will argue that Uber has engaged in the same conduct as the hubs in the previously discussed cases. They will argue that Uber is orchestrating price-fixing among the drivers by making use of its app contingent on agreeing to its pricing structure. The theory will try to analogize Uber's conduct to that of these previously discussed hubs by characterizing it as Uber reaching out to all of the potential drivers with this deal involving an anticompetitive price fix and those drivers accepting. The drivers would not have accepted independently if they did not know the other drivers were accepting as well. They could argue that drivers would only agree to be Uber drivers if there were many Uber drivers, which would indicate that Uber was successful and attracts many consumers. They could also note that like in *Apple*, Uber is trying to maintain high prices because if drivers competed on price, prices would likely decrease, and therefore Uber's profits would also shrink.

Uber will argue that unlike many of the previously discussed cases, the invitation that it is allegedly coercing the drivers to accept is actually part of its product. Part of the innovation Uber provides is a coherent pricing structure that changes as demand does. This is far different than the invention of specific demands sent out to the major players in the up or down stream markets. Additionally, Uber is different than the previously discussed defendants because of the sharing

[56] *See id.* at 310-11.
[57] *See id.* at 316; 339.

economy, the secondary nature of the fixed price, and the number of spokes. Uber will characterize its conduct as multiple, independent vertical agreements with each of its drivers. The reality is that many potential drivers do not accept Uber's terms and do not become Uber drivers. With so many people not accepting the invitation, Uber's conduct differs from that of the other hubs because when a potential Uber driver makes a decision as to Uber's terms, it has nothing to do with whether or not other potential drivers agreeing as well. Also, Uber could note that unlike in *Interstate Circuit*, *Toys "R" Us*, and *Apple*, Uber is not using its price algorithm to drive out competitors. In fact, the agreement between Uber and its drivers has nothing to do with any competing firm. Unlike in *Apple*, Uber is also not trying to maintain high prices in response to a competitor looking to lower them and nothing resembling the threat of Amazon in *Apple* exists here.

B. Ancillary Agreement

One defense to a price-fixing allegation is that the agreement in question that had the result of fixing prices was part of a broader agreement of which the main purpose was something other than fixing prices. This can be best seen in joint ventures. A joint venture involves multiple independent firms that agree to work together on something new and separate from either firm. This agreement involves sharing resources, profits, ideas, and in its nature requires the firms to agree on price if the venture is to sell a product. However, this does not violate the Sherman Act because the agreement to fix the price is ancillary to that of forming the joint venture.

For example, Equilon Enterprises was a joint venture between Texaco, Inc. and Shell Oil Co.[58] The venture was to refine and sell gasoline from both firms in the western part of the United States under both the Texaco and Shell Oil brand names.[59] Texaco and Shell Oil historically competed with each other in the sale of gasoline, but this ended in the western part of the United States when they decided to operate through Equilon.[60] The Court held that the joint venture was legitimate, and so the pricing decisions of that joint venture were not *per se* unlawful under §1 of the Sherman Act.[61] While the Court chose to use the "single entity" defense as the reasoning behind its decision, the Court clearly stated, "if we were to invoke the [ancillary restraints] doctrine in [this case], Equilon's pricing policy is clearly ancillary to the sale of its own products."[62]

Texaco and Shell Oil would have been allowed to agree on the price of Equilon because that agreement was ancillary to the broader agreement to work together in creating Equilon and enter the western U.S. market for the sale of gasoline. The agreement between Uber and its drivers to use Uber's pricing algorithm could similarly be viewed as ancillary to the broader agreement to work together to break into the transportation services market in each of the cities it operates in. Agreeing to become an Uber driver could be fueled by many forces, the most important of which (when compared to simply starting one's own driving service) is access to a tremendous number of consumers who are willing to pay you for driving them around. Without Uber, these drivers would likely never be able to earn income as an independent, part-time driver

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[58] *Texaco Inc. v. Dagher*, 547 U.S. 1, 3 (2006).
[59] *Id.*
[60] *Id.* at 3-5.
[61] *Id.* at 8.
[62] *Id.* at 7-8.

with no marketing budget or access to consumers. Without independently contracted drivers, Uber would have to hire people as employees, which would come with enormous overhead costs. This partnership between Uber and its drivers is primarily to allow both "firms" to enter the market of transportation services in select cities, and it could be argued that the fact that prices are set through an algorithm is merely ancillary.

C. Vertical Restraint

Vertical restraints are agreements between a firm and another firm in either the up or down stream markets. In other words, these are agreements that antitrust laws analyze even though they are *not* between competitors. It is far less likely that such agreements are anticompetitive because of this, and so after decades of decisions climbing to this result, all vertical restraints are now analyzed under the rule of reason, rather than *per se* analysis.[63] One main concern for subjecting these agreements to antitrust analysis at all is that it would infringe upon business' rights to make independent business decisions involving who they would deal with. This concern was addressed in *United States v. Colgate*, in which the Supreme Court noted that a business has the power to determine with whom to do business.[64] Specifically, the Court held,

> "the [Sherman] act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell."[65]

[63] *See Leegin Creative Prods. V. PSKS, Inc.*, 551 U.S. 877, 907 (2007).
[64] *See United States v. Colgate & Co.*, 250 U.S. 300 (1919).
[65] *Id.* at 307.

Colgate involved a company refusing to sell its product to businesses that would resell the product below a certain price.[66] The decision allows businesses to have a policy where they will not deal with resellers that charge less than a certain price.[67]

The Uber case involves the agreement between Uber and its drivers to use the pricing algorithm, which represents a vertical restraint on pricing. The plaintiffs could argue that under the rule of reason, the agreement between Uber and its drivers to use the pricing algorithm is anticompetitive. They would argue that unlike RPMs, the pricing algorithm does nothing to protect the integrity or reputation of the product. First, the pricing algorithm is a far more restrictive policy than a typical RPM in that it does not merely set the floor for pricing, but actually determines the exact price that the drivers' services must be sold. Next, the pricing algorithm is unnecessary for the success of the product and the business. If Uber allowed drivers to set their own price, they could open the app, see the prices of nearby drivers, and natural market forces would result in the proper price. Additionally, users could still open the app, see all the prices different drivers were offering, and choose accordingly. Therefore, forcing drivers to use the pricing algorithm is anticompetitive and there are no procompetitive justifications. Moreover, the vertical agreements violate the Sherman Act and Uber should be forced to stop making becoming an Uber driver contingent on use of the algorithm.

The defendant could argue that much like RPMs where companies have a policy to only deal with resellers who will sell above a certain price, Uber may choose to deal only with contractors who use its algorithm as a policy. The drivers acting under the Uber name are a reflection on the company, similarly to how a reseller selling a manufacturer's product is still a

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[66] *See id.* at 302-33.
[67] *See id.*

reflection on the manufacturer. Uber can decide it wants its fares at prices that properly reflect demand because prices too high or low would reflect poorly on their brand as a company and the best way to do this is to require use of the price algorithm. Additionally, the defendant could argue that Uber wants to maintain a sense of consistency in its users, which would explain why simply setting a price floor is insufficient. If all the drivers set different prices, Uber users may become dissatisfied and the business unsuccessful.

The plaintiffs could argue that this case is similar to *United States v. Topco Assocs.* in that Uber is placing a facially anticompetitive restriction on its drivers to compete in a larger market.[68] In *Topco*, Topco was a cooperative association of about 25 regional supermarkets that operated independently, but joined together for the purpose of creating a line of products that could compete more effectively with the large nation chains.[69] Topco restricted the sale of Topco-brand products into geographic territories to simulate the type exclusivity the nation chains had with their privately owned product lines.[70] The Court rejected Topco's justifications and found the conduct to be *per se* unlawful as a §1 horizontal territorial restraint.[71] The argument in the Uber case would be that Uber is outright price-fixing and the argument of increasing competition in the larger transportation industry does not justify restricting competition among the individual drivers. The defense would argue that *Topco* was analyzed as a horizontal agreement because the regional supermarkets *were* Topco and so Topco's restrictions were an agreement amongst competitors. Here, Uber is not an association of drivers, but a tech company setting the rules for its app, which males the restraint vertical. Additionally,

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[68] *See United States v. Topco Assocs.*, 405 U.S. 596, 604-05 (1972).
[69] *Id.* at 599-601.
[70] *Id.* at 605-06.
[71] *Id.* at 607-12.

Uber could argue that it is not justifying its conduct by saying it increases competition in a larger market because it will argue that the drivers are part of the same market as taxis and car services. In *Topco*, regional and national supermarket markets were clearly distinct from each other, but a ride in a city is a far more fungible product.

Plaintiffs could also argue that Uber's conduct does not really resemble a RPM at all. Uber is not like a manufacturer concerned about the resale of its product because if the drivers are independent contractors, then Uber's product is not the ride itself, but merely the app that connects drivers to riders. Riders ought to know that these independent contractors are not Uber employees and do not represent Uber in any way other than they have signed up to have the app connect them with drivers. Therefore, Uber should not be concerned with the price because it has nothing to do with them. The defendant would likely argue that following this logic, Uber should not have a say in the quality of the rides, safety of the riders, and other things it clearly works towards now. The argument would be that whatever the deal is between Uber and its drivers, consumers will undoubtedly associate the service they receive with the Uber app, and so it is imperative that Uber maintain the integrity of the ride itself because it directly reflects its business.

The defense's arguments outlined above probably also serve as their best theory of the case, assuming narratives that characterize Uber's conduct as *per se* unlawful are to no avail. Describing the facts in this way offers a clear way to avoid antitrust liability; as well a precedential benefits to be discussed later. The crux of how a judge or jury will come down on the case if these two narratives come forward will be whether or not the conduct is anticompetitive. Uber's potential argument about preserving its business by setting a reasonable price standard for the goal of uniformity is persuasive. As is the plaintiffs potential argument that Uber would lose no consumers to allowing driver to set different prices. This would come down to the evidence presented, specifically the expert testimony regarding how consumers might respond if drivers set their own prices. The court would have to decide whether any harm would come from removing the restriction to use the algorithm because without some showing that Uber needs the algorithm to operate, there is no reason it should escape antitrust liability. However, if the court remains unsure if the algorithm is essential to Uber's business model, it may decide to err on the side of caution before potentially destroying a truly innovative company if that is a potential effect of preventing Uber from forcing drivers to use the algorithm.

D. *BMI*

Lastly, one would be remiss to not at least mention the "BMI Defense." In *Broadcast Music, Inc. v. CBS*, CBS alleged that the blanket licenses for copyrighted music Broadcast Music, Inc. (BMI) was selling violated the Sherman Act as illegal price-fixing.[72] CBS argued that BMI was fixing the prices of individual performers' copyrighted music instead of allowing bidding on each song as needed.[73] The Court went on to explain all of the procompetitive justifications for blanket licensing agreements such as owners of copyrighted material to have a reliable method of collecting earnings, avoiding expensive and complicated individual transactions, and allowed users to get the "unplanned, rapid, and indemnified access" that they wanted.[74] More importantly, the Court holds that blanket licenses are unique, and that they are

[72] *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 6 (1979).
[73] *See id.* at 8-9.
[74] *See id.* at 20-21.

truly a different product than the individual licenses they are made up of.[75] Specifically, the Court states, "here, the whole is truly greater than the sum of its parts; it is, to some extent, a different product… in short, [BMI] made a market in which individual composers are inherently unable to compete."[76] While succeeding cases that involve this argument have failed as the Supreme Court relegated *BMI* to a one-hit wonder so to speak, the case is still good law.[77]

If there were ever a defendant that could feasibly convince the high court to reiterate the language from BMI in a favorable opinion, Uber might just be it. Uber allows a level of convenience for getting a ride that has been unprecedented. Uber is arguably a cheaper mode of transportation than seeking out individual drivers and is certainly more convenient for the Uber drivers to have a reliable method of earning income. Additionally, the plaintiffs in the Uber case have characterized the app as facilitating price-fixing among its drivers, but *BMI* offers a new characterization that seems truly appropriate: Uber has created an entirely new market in which individual drivers could never compete. That being said, the lid is likely sealed on successful BMI defenses, and it would be a shock if the Court used such reasoning here.

III. Defining A Market In The Sharing Economy

A. Hypothetical Monopolist Test

Now that the relevant antitrust arguments have been discussed, it is important to look at how some of the most critical evidence in any antitrust case – market definition - will be

75 *See id.* at 21-22.
76 *See id.*
77 *See, e.g.*, *Ariz. v. Maricopa County Medical Soc.*, 457 U.S. 332 (1982); *NCAA v. Bard of Regents*, 468 U.S. 85 (1984).

analyzed. The hypothetical monopolist test (also referred to as the SSNIP test)[78] is the standard method for defining markets in antitrust cases. The test looks to determine if the defendant were a monopoly that raised prices a non-insignificant amount, which substitutes would consumers switch to in order to avoid the price increase and within what geographic area would they be willing to find such substitutes? If consumers would switch to a given product or go to a competitor in a given location to avoid the price increase, than that product or geographic area is a satisfactory substitute, and can be considered part of the product or geographic market in which the defendant competes when determining the defendant's market share and ultimately, market power.

B. Product Market

Using the hypothetical monopolist test, each party will make arguments and offer expert opinions to defend their definition of the relevant market. This will be a vital determination for the fact finder because it could determine whether the defendant has market power, which plays a large role in a rule of reason analysis. So far, both parties have made arguments relating to the relevant product market. The defense would like to include taxis, driving services, and even public transportation in the list of sufficient substitutes that would prevent Uber from successfully raising prices in the hypothetical monopolist test. The Complaint alleges that Uber's experts have suggested that in some cities, Uber has 50-70% of a market that includes taxis, cars for hire, and mobile-app generated ride-share services.[79] The plaintiffs would like to limit the list

[78] SSNIP is a commonly used acronym for the phrase "Small Significant Non-transitory Increase in Price."

[79] *Meyer v. Kalanick*, First Amended Complaint, ¶ 107, *supra*, n.19.

of sufficient substitutes only to other "mobile app-generated ride-share services" such as Lyft.[80] The plaintiffs have alleged that in this more limited market, Uber has an 80% market share, which would indicate market power and tend to make Uber's procompetitive justifications less likely to prevail in a rule of reason analysis.[81] In making these arguments, the parties have not yet addressed how the Uber's existence in the sharing economy makes this analysis different, which may simply indicate that neither party believes it does.

The innovation of businesses operating in the sharing economy is not a new device you can buy at the store and take home. It usually is a simple, user-friendly platform that allows people to cheaply replace things they would normal solicit from traditional businesses (rides from a taxi service, rooms from a hotel, etc.) with things already privately owned by individuals who do not need to use it at the time the consumer wants to. This allows users incredibly cheap access to goods and services that could traditionally be quite expensive. The savings come from the fact that the people operating on these platforms own the good and do not need it. There is essentially no overhead cost and there would be no profit without the platform anyway, so these operators can afford to price fairly low while remaining "profitable." The defendant in this case have argued in their motion to dismiss that only mobile app-based ride-share services should be considered part of the relevant market, excluding traditional taxi services and public transportation.[82] This ignores the reality of the sharing economy, which is that it exists to replace the traditional, more costly way the services were previously consumed. This is not only intuitive; it is supported by significant data. For example, medallion prices for cabs in New York

[80] *Id.* at ¶ 94-97.
[81] *See id.*
[82] *Id.* at ¶ 94-97.

City went down 40% in 2015, a drastic change after increasing 50% over the 5 prior years.[83] Also, in 2015 the New York City Taxis created the Arro app where people could hail taxis similarly to how they would get a ride from Uber.[84] The direct effect Uber's presence and popularity has on the value and progression of the taxi service as a product clearly demonstrates that the two compete against each other for the same consumers.

Similar to Airbnb and the traditional hotel industry, Uber exists as an innovative alternative to traditional transportation services. Both are able to compete at such a high level in an industry traditionally difficult to break into because of the necessary scale because they rely on individuals and their privately owned property, rather than trying to acquire that property and provide those services on their own. While the method of attracting consumers and providing the service may different than taxis and car services, the consumer is buying a ride, which all three compete amongst each other to provide.

C. Geographic Market

The geographic market will likely be less disputed in this case. Uber operates in select major cities, and often the less populated regions just outside of those major cities. The geographic location may revert back to the product market dispute if either side decides to argue that substitutes are different in different cities. For example, New York City has an intricate subway system, whereas many other cities have a much less diverse option of subway lines. One could argue that the subway is a viable substitute in New York City, but not in the other cities

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83 Isidore, C., *CNN Money*, New York City's Yellow Cab Crisis, (July 22, 2015), accessed at <http://money.cnn.com/2015/07/21/news/companies/nyc-yellow-taxi-uber/>.

84 Alba, D., *Wired*, "NYC's Taxis Finally Launch An App To Compete With Uber" (Aug. 2015), < https://www.wired.com/2015/08/arrow-ny-taxis-app/>.

where Uber operates. For a company that provides transportation, Uber's product is not one that a consumer could travel elsewhere to get. A person who needs a ride in San Francisco would not be willing to go to a different city to get a ride from a competing service in the way they might be willing to do so for a more tangible product like a car. The nature of Uber's product and the clearly defined cities in which they operate will likely leave the geographic market largely undisputed.

IV. Precedent For The Sharing Economy

The fate of the Uber case my not be determinative for all future antitrust cases involving companies who operate in the sharing economy. In fact, there may not be any more antitrust cases involving such companies. However, many of these sharing economy platforms involve everyday people becoming quasi-businesses, and it is not too farfetched to imagine how the agreements necessary to operate on these platforms could be subject to antitrust laws in the future (especially if the plaintiffs in the Uber case win).

A. Hub-and-Spoke Reasoning

If the court decides to subscribe to the plaintiff's allegation of an implied horizontal price-fixing agreement, it would likely have to do so by characterizing the case as a hub-and-spoke arrangement. So far this article has mainly distinguished Uber from other hub-and-spoke arrangements and antitrust violators by describing differences in the market as a result of the sharing economy, rather than differences in the conduct. While distinctions surely exist between

Uber's conduct and that of other hub-and-spoke arrangement "hubs," basing a decision off of the market itself would send a different message to the major firms in other sharing economy platforms. The legal precedent does have room to allow Uber to exist without overturning the previously discussed hub-and-spoke arrangement cases, and can likely be done using a number of rationales. However, to do so in the best way, the opinion must be written very carefully as to not describe such a small window that Uber fits through, but that other sharing economy platform firms may not.

For example, if a decision in Uber's favor is based on Uber divers' lack of knowledge that the other drivers would agree to Uber's "invitation," it could pose difficulties for future cases. One could easily imagine a procompetitive service that antitrust laws ought to want to protect that fails this reasoning. For example, imagine a bike-share app with a price algorithm that shows users the other users in the area that have also agreed to the app's terms. This might be helpful because it would encourage potential new users to join since the service would only be beneficial if there were other nearby users. If the court allows Uber to exist based on the reasoning that they could not infer an agreement because the drivers did not know about each other, such a service would not find a valid defense from the precedent set by the Uber case.

The better analysis lies in the central question of antitrust law, namely, is the conduct anticompetitive? Characterizing the case as a hub-and-spoke arrangement would leave the court in a difficult situation because if they find an implied agreement among the drivers, the agreement would be *per se* unlawful, and no further analysis would be warranted. However, in deciding to not find an implied agreement, the court could still find that the drivers knew about each other, but still did not agree. The Uber arrangement could feasibly look like any of the other hub-and-spoke arrangements previously discussed. Uber could reach out to every potential driver through advertising and they could all agree with the knowledge that anyone who signs up to be an Uber driver will also be agreeing on prices. However, that is not *why* an Uber driver elects to become an Uber driver. The other hub-and-spoke arrangements are unlawful because those business decisions make no economic sense without implicit collusion. Assuming Uber does not allow drivers to deviate from the algorithm, it would still make sense for an individual driver to agree to the terms because it grants them access to thousands of consumers he or she would otherwise have no way of reaching. The risk of other drivers forgoing Uber to charge lower prices on their own is unrealistic because each of those drivers lacks the network of consumers to adequately compete with an Uber driver. Therefore, it makes economic sense for drivers to independently agree to use Uber's price algorithm regardless of what the other drivers do.

This reasoning demonstrates that the conduct does not tend to prove an implicit agreement, and defending such a decision in this way would allow Uber to exist without pigeon-holding future sharing economy platform firms to prevent its participants from learning that the others have accepted the firm's pricing structure. Because agreeing to use the Uber app can be distinguished from outright price-fixing, and logically allows the explanation to come from a *per se* analysis, the above reasoning could properly result in a dismissal under the rule of reason without changing existing law.

B. Vertical Restraints Reasoning

If the court opts to ignore the hub-and-spoke theory altogether because the thought of thousands of drivers globally engaging in an implicit agreement to fix prices is so implausible, than it will likely turn to the vertical restraints characterization of the case. This could easily happen because, as mentioned earlier, other notable hub-and-spoke arrangements involve a very small number of spokes, making implicit collusion realistic. This situation is such a deviation from those cases that a court may reject the comparison outright. By treating the case as a challenge of thousands of vertical agreements between Uber and each individual driver, the court would allow a more in-depth analysis because it would be operating under the rule of reason.

The court could truly dive into why Uber is procompetitive for the transportation industry, and this would start by agreeing with the defendant's market definition. By including taxis and other driving services in the market that Uber competes in, the court can better demonstrate the procompetitive value Uber offers. Namely, these other transportation options are not only substitutes for Uber in the hypothetical monopolist test, but they are exactly who Uber was designed to compete with. Uber offers a great new product that is forcing traditional transportation services to become more readily available to consumers. For example, in 2015 the New York City Taxis created the Arro app where people could hail taxis similarly to how they would get a ride from Uber.[85] This was in direct response to Uber's popularity and resulted in a better product from a competitor, a true sign of healthy competition in a common market. The court could identify Uber as a sharing economy platform and demonstrate that these platforms are procompetitive in how they challenge the existing traditional services to improve and adapt to consumers' craving for convenience.

The above procompetitive justifications are to Uber's existence, but the pricing algorithm is what really needs to be justified because that is the vertical restraint at issue. The court should accept Uber's potential argument that the pricing algorithm is procompetitive because it maintains uniformity within its service and confidence among its users that they will see

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[85] *Id.*

reasonable prices when they open the app. Forcing drivers to constantly be updating their pricing to compete with the other drivers is extremely dangerous. These price changes are instantaneous, and a ruling that the pricing algorithm is anticompetitive would force individual drivers who do this work part-time to somehow calculate the appropriate fare for each ride they provide. With such a difficult task forced upon the drivers, and what would likely result in widely varying fares for consumers, Uber's entire business model could be upended and all of the above procompetitive justifications for its existence would disappear along with the business. Competing on price is a fundamental principle of antitrust law, but Uber's business model is successful, at least in part, because it provides a pricing algorithm along with connecting drivers and riders. Therefore, the pricing algorithm is procompetitive in that it is a fundamental part of Uber. Of course, if the court finds through expert testimony that no harm would come by having drivers set their own prices and that natural market forces would guide the price of rides to a reasonable fare, the court would have to rule in the plaintiffs' favor because forcing use of the algorithm is clearly a pricing restraint.

By holding that the agreements between sharing economy platforms and the independent contractors who operate on them are procompetitive if they are necessary for or enhance the success of the platform itself, the Uber case could pave the way for more confidence in investment and research in new platforms to transform other industries into more convenient ones for the future.

V. Conclusion

With regards to the merits of this case, it is unlikely that the plaintiffs will succeed. The most convincing narratives that could be offered will be a hub-and-spoke arrangement in which an agreement between the drivers is implied and numerous vertical restraints between Uber and each driver that are anticompetitive under the rule of reason. As previously discussed, both of these narratives ought to fail because the defense can demonstrate the key factual differences between Uber's conduct and that of traditional "hubs" in historical hub-and-spoke arrangement cases. Also, there are several procompetitive justifications for the pricing algorithm that should serve as successful defenses against the claim that the agreement is anticompetitive under the rule of reason. Additionally, any ruling in the plaintiff's favor would result in harsh criticism and backlash from the business community (not that this ought to be a dispositive consideration for the judiciary). Such a decision could result in completely disbanding Uber, forcing them to hire drivers as part-time employees, or forcing them to allow drivers to set their own price. Any of these measures, combined with the enormous treble damages payouts of antitrust cases, could be catastrophic to the business. The meddling itself could also be seen as the court preventing a tech company's innovation from offering a great new form of transportation beloved in cities worldwide, thus discouraging new innovation, growth, and investment from existing and developing sharing economy platforms.

The sharing economy has been met with much criticism and concern. Governments often fight the firms operating on these platforms for fear of safety issues, workers' rights, tax avoidance, discrimination, and lost revenue. While each of these issues has been fiercely debated and widely discussed, they play no role in an antitrust analysis. Social welfare is not a valid defense against allegations of antitrust violations, so nor should it be a consideration in favor of finding an antitrust violation (outside of the social welfare associated with consumer protection and the goals of antitrust law). The sharing economy has proved to offer innovative platforms that are procompetitive. When looking at Uber empirically, it is clear that the service increases competition in the broad market of transportation. Since enhancing or diminishing competition is the ultimate issue antitrust laws look to analyze, the lawsuit against Uber ought to be dismissed under the rule of reason. However, in doing so, the court must explain *why* Uber and its conduct are procompetitive. Doing so need not include an attempt to thread the needle of Uber's conduct through decades of precedent. However, it must include facing the reality of how the development of the sharing economy makes Uber, its market, and its conduct fundamentally different from other hub-and-spoke arrangements. It is these differences that will allow other innovative platforms to be developed and invested in without fear of harsh antitrust ramifications.