

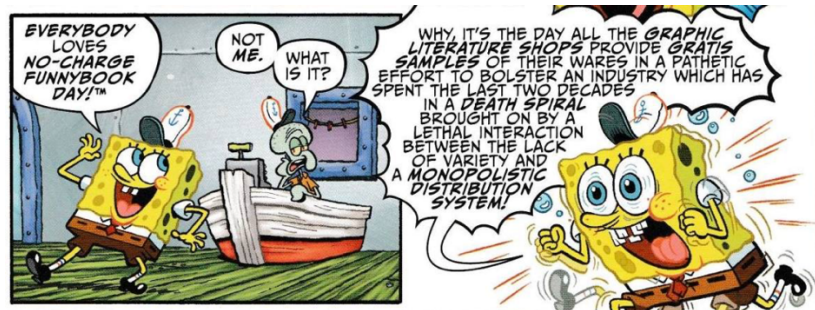
# Who Watches the Watchmen? Monopolization of Modern Comic Book Distribution

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“What’s happened to the American Dream?”  
 “It came true. You’re lookin’ at it.”

–*Watchmen*<sup>2</sup>

#### I. INTRODUCTION: DAYS OF FUTURE PAST

Walk into any comic book store on a Tuesday and you will probably find its owner sorting through that week’s new shipment of comic books. On the side of every box that has arrived, you will find a diamond logo accompanied by the name “Diamond Comic Distributors, Inc.” (“Diamond”). To most consumers, this name will mean almost nothing. After all, they have likely walked into this store merely to purchase a few comic books or perhaps a gift for a friend or relative. They could not care less about the name of some company on the side of a box. This name, however, should be spoken with more dread than the name of any villain found on the pages of any of the comic books within that shop. Diamond controls almost every aspect of the comic book industry and yet remains cloaked in relative anonymity from the general public.<sup>3</sup> Diamond came into power by capitalizing on the economic crisis that gripped the comic book industry during the late 1990s and exploiting the economic fragility of both its rivals and its suppliers to crown itself the king of comic book dis-

1. Jay Lender & Jacob Chabot, *The Great Funnybook Giveaway!*, SPONGEBOB FREESTYLE FUNNIES, May 6, 2017, at 1, 1.

2. Alan Moore & Dave Gibbons, *Absent Friends*, WATCHMEN, Oct. 1986, at 18.

3. See *infra* Part III.

tribution in the U.S.<sup>4</sup> The ripple effects from Diamond's past and present actions have inflicted a multitude of ills upon comic book retailers and consumers. Diamond's presence has left an indelible stain upon the comic book industry, and until this stain is removed, the industry will be cursed to perpetually endure the same problems it has had for almost twenty years.

This Note demonstrates how Diamond has potentially violated U.S. antitrust law, monopolized comic book distribution in the U.S., and significantly hindered economic growth and competition within the comic book industry. This Note's subdivisions track the traditional method that a court would employ in analyzing a market participant accused of antitrust violations,<sup>5</sup> including defining the relevant product and geographical market at issue,<sup>6</sup> determining the market share of the alleged monopolist in the defined market,<sup>7</sup> examining the conduct of the alleged monopolist within the defined market,<sup>8</sup> and weighing the pro-competitive justifications of the alleged monopolist's conduct against the possible anticompetitive effects on the overall market.<sup>9</sup> This Note serves as a guide to map out a viable antitrust suit against Diamond. Such a suit, brought by either a governmental administrative agency or private plaintiff, would allow a court the opportunity to properly resolve a problem that has plagued the comic book industry for over two decades.

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4. See *infra* Part II.

5. This Note follows the same analytical structure employed by Adam J. Levitin's *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. REV. 1321 (2008) and John M. Newman's *Complex Antitrust Harm in Platform Markets*, COMPETITION POL'Y INT'L, May 2017, at 1, 1–8, <https://www.competitionpolicyinternational.com/wp-content/uploads/2017/05/CPI-Newman.pdf>.

6. See, e.g., *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327–34 (1961).

7. See, e.g., *id.* at 328–34.

8. See, e.g., *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 789–96 (1984).

9. See, e.g., *United States v. Am. Tobacco Co.*, 221 U.S. 106, 179–84 (1911) (discussing the anticompetitive effects of American Tobacco Company's antitrust violations).

## II. PRESSURE AND TIME: DIAMOND'S ORIGIN STORY

Diamond's rise to its current position within the industry would not have been possible without several key events throughout the 1990s. First, the biggest boom in comic sales that the industry had ever seen, facilitated by publishers' greed and retailers' speculation, brought the industry itself to the brink of complete destruction. Publishers that once held immense economic power struggled to maintain even a semblance of steady revenue. This made them susceptible to Diamond's aggressive negotiating tactics and its ability to outbid most of its competition for distribution contracts. Second, despite Marvel Comic's ("Marvel") attempt to self-distribute its comics, Diamond's aggressive tactics ultimately prevailed allowing it to gain control of the vast majority of comic book distribution in the U.S. Other distributors panicked after being cut off from Marvel, one of the two largest comic book publishers, and scrambled to nail down DC Comics ("DC") to an exclusive distribution deal to stave off ruin. In doing so, Diamond outmaneuvered all of its rivals and left them to collapse due to a lack of access to popular comic books. Finally, the Department of Justice's decision not to charge Diamond with violating antitrust laws allowed the company to maintain, expand, and cement its hold on the comic book industry.

*A. Too Much of A Good Thing: Sales Boom to Speculation Bust*

In the early 1990s, the comic book industry was booming.<sup>10</sup> DC and Marvel, the two major comic publishing companies in the U.S., were selling comics at a volume that the industry had never seen before.<sup>11</sup> Each company relied on varying methods to achieve such massive sales revenue. Marvel and its new business-minded executives began maximizing profits by: (1) increasing the cover price of

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10. Tim Stroup & Mark Thompson, *Comic Distribution Headaches: How We Got into this Mess*, GAUNTLET, no. 19, 2000, at 19, 19–20 [hereinafter *How We Got into this Mess*].

11. REED TUCKER, SLUGFEST: INSIDE THE EPIC FIFTY-YEAR BATTLE BETWEEN MARVEL AND DC 166, 174 (2017).

its comics;<sup>12</sup> (2) expanding the number of titles produced every month;<sup>13</sup> and (3) publishing numerous variant covers<sup>14</sup> for each issue.<sup>15</sup> Not to be outdone, DC also began to produce variant covers for its own titles, but the sales boost it enjoyed did not come solely from gold foil covers. DC instead chose to focus on massive event storylines that would irrevocably impact its most popular characters.<sup>16</sup>

The first of these event storylines led to the death of DC's most recognizable character, Superman.<sup>17</sup> This was promptly followed by Batman's apprentice replacing him after a super villain broke Batman's back.<sup>18</sup> These event storylines, however, were not as irrevocable as the DC executives portrayed them. After several months, Superman would reappear alive and well,<sup>19</sup> meanwhile, though Batman's recovery spanned almost two years, he too regained his pre-

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12. SEAN HOWE, *MARVEL COMICS: THE UNTOLD STORY* 341 (2012); TUCKER, *supra* note 11, at 164.

13. HOWE, *supra* note 12, at 341; TUCKER, *supra* note 11, at 164.

14. *See* TUCKER, *supra* note 11, at 168–70. “Variant” is a fairly broad term used to describe varying versions of single issues of the same comic book that typically contain the same written and artistic internal material but with changes or alterations most often to the cover or a non-story related element of the internal content of the comic book itself. *Id.*

15. *See* HOWE, *supra* note 12, at 322–23; TUCKER, *supra* note 11, at 168–69; *How We Got into this Mess*, *supra* note 10, at 19; *see also* HOWE, *supra* note 12, at 333 (“Every week a different cover [of *X-Men* #1] was shipped to stores, building up to a fifth version . . . . When the smoke cleared, nearly 8 million copies had been sold . . .”).

16. TUCKER, *supra* note 11, at 174–75.

17. Dan Jurgens & Brett Breeding, *Doomsday!*, *SUPERMAN: THE DEATH OF SUPERMAN!*, Jan. 1993, at 1, 29–32, 34; *see* TUCKER, *supra* note 11, at 173–74.

18. Doug Moench & Jim Aparo, *The Broken Bat*, *BATMAN: THE BREAKING OF THE BATMAN*, July 1993, at 1, 21; *see* TUCKER, *supra* note 11, at 175.

19. Louise Simonson, Jon Bogdanove & Dennis Janke, *The Return!*, *SUPERMAN: THE MAN OF STEEL*, Sept. 1993, at 1, 21–22; *see* TUCKER, *supra* note 11, at 177.

injury status.<sup>20</sup> These drastic events led to increased media coverage by major news and television outlets.<sup>21</sup>

This publicity spurred sales of these event storyline issues, and all their accompanying variants, to both retailers and individual consumers.<sup>22</sup> Comic books had always been collectible, but now they were portrayed as highly lucrative investments. These event storyline gimmicks were initially popular, but overreliance was eventually met with widespread disdain. Consumers regarded each gimmick as little more than a shallow publicity stunt intended to increase sales at the expense of creative attention to beloved characters and their stories.<sup>23</sup> In the short term, however, DC and Marvel profited substantially.<sup>24</sup> The implementation of major event storylines led to “a ridiculous amount of money being made, a ridiculous amount of product being sold,” but also “ridiculous expectations.”<sup>25</sup> These expectations of unrealistic profits became a key part of the problems that would soon plague the comic book industry but not the only part.

DC and Marvel did not rely solely on their self-produced gimmicks to sustain their high profit margins. They also sought to leverage a pre-existing distribution model, known as the “Direct Market” model, that had been steadily becoming more profitable for almost sixteen years.<sup>26</sup> By the early 1990s, the Direct Market model replaced

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20. Doug Moench, Kelley Jones & John Beatty, *Troika Part One: Dark Rider, Cold Warrior*, *BATMAN*, Feb. 1995, at 3; see TUCKER, *supra* note 11, at 175.

21. HOWE, *supra* note 12, at 350 (pointing out the fact that the media realized they had been “scammed” but no one covered the devastating effect on retailers); TUCKER, *supra* note 11, at 174.

22. See TUCKER, *supra* note 11, at 170–71.

23. See *How We Got into this Mess*, *supra* note 10, at 19.

24. See TUCKER, *supra* note 11, at 170–71, 176.

25. *Id.* at 176.

26. HOWE, *supra* note 12, at 168–69; see TUCKER, *supra* note 11, at 135; e.g., SHIRREL RHOADES, *COMIC BOOKS: HOW THE INDUSTRY WORKS* 152–53 (2008) (discussing the establishment of the Direct Market model and how retailers enjoyed a much better price “by buying the product outright (with no returns) and cutting out the wholesaler middleman”). Phil Seuling created the Direct Market distribution model in 1973. TUCKER, *supra* note 11, at 134–36. Initially, publishers viewed the Direct Market as merely an alternative revenue stream to their pre-existing distribution methods. HOWE, *supra* note 12, at 168–69. Over time, however, comic publishers’ positions shifted regarding their preferred distribution method. TUCKER, *su-*

the Newsstand model<sup>27</sup> as the main income stream for all comic publishing companies.<sup>28</sup> This shift in focus to the Direct Market allowed retailers to actually own the comics that were sold in their shops, as well as rake in far better profits. These retailers could now purchase new comic books at a 35%–57% discount off the cover price.<sup>29</sup> This newfound profit margin could either be pocketed as pure profit by the retailer or used to make even larger orders on desired titles. Both DC

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*pra* note 11, at 137. The Direct Market's profitability could no longer be ignored. It allowed for far greater profit margins for not only retailers but publishers as well. *Id.* at 219.

27. HOWE, *supra* note 12, at 168; RHOADES, *supra* note 26, at 153. The Newsstand Model placed comics in the spinner racks of newsstands and grocery stores all over the country for most of the 20th century. STEVE DUIN & MIKE RICHARDSON, *COMICS BETWEEN THE PANELS* 126 (Jackie Estrada ed., 1998). Retailers received bundles of random comics from newsstand wholesalers with both the number of comics and specific titles varying from shipment to shipment. *See* TUCKER, *supra* note 11, at 135. What comics were available to consumers at newsstands depended entirely on what had been thrown off the back of the delivery truck on a given day. *Id.* Comics that went unsold typically had their front covers ripped off with the covers sent back, first from retailers to wholesalers and then from wholesalers to publishers for a refund if desired. *Id.* This system allowed for widespread fraud with unscrupulous retailers selling coverless comics as wholesalers received reimbursements from publishers for those same issues based on the removed covers. *Id.* Additionally, rampant fraud and delays in receiving returned covers and calculating what issues sold well precluded publishers from having reliable sales data. *See* RHOADES, *supra* note 26, at 153; TUCKER, *supra* note 11, at 135.

28. The Direct Market model sought to address the problems found in the Newsstand Model and benefit all its participants. This model focused on distributing comics not to newsstands but to the rapidly growing number of specialty comic book stores. TUCKER, *supra* note 11, at 136. Critically, this model did not require distributors to return unsold comics to the publisher as newsstand wholesalers had in the past. *Id.* at 137. The distributor took on all the risk of their purchases by owning the comics outright after acquiring them from publishers. *Id.* at 135. The same was true when retailers ordered comics from the distributors, shifting the risk to comic book shops. Distributors benefitted from the 60% cover price markdown that previously had only been available to newsstand wholesalers, while retailers received precise comic shipments with the desired amount and variety as well as their own varying discounts. HOWE, *supra* note 12, at 169. Finally, the new model permitted publishers to track the sales of specific comics, even individual issues, in a far more accurate and expeditious manner through direct orders from distributors. *See* TUCKER, *supra* note 11, at 135.

29. RHOADES, *supra* note 26, at 153.

and Marvel came to see the Direct Market as the way of the future for the entire industry and the only way to guarantee their own continually expanding profits.<sup>30</sup> The major publishers' new emphasis on selling to specialty comic book stores caused the total number of stores in the U.S. to balloon to over twelve thousand.<sup>31</sup> Many of these new shop owners, however, were only looking to capitalize on the hype that publishers like DC and Marvel created.<sup>32</sup>

Such rapid growth within the industry and the added media attention on gimmick event issues quickly attracted the attention of speculators. Collectors suddenly began to buy boxes of the same comic book believing that the frenzied expansion of the industry would make the boxes grow exponentially in value over a short period of time. Retailers purchased more and more comics believing that even if the individual issues did not sell immediately they would still appreciate in value as they sat on the shelf.<sup>33</sup> Both retailers and consumers saw the back-issue market that had just come into existence as a further guarantee that their investments would pay off in a short period of time.<sup>34</sup>

Unfortunately, this massive amount of speculation proved unsustainable. In late 1993, the speculation bubble finally burst.<sup>35</sup> By 1995, thousands of comic book shops were out of business.<sup>36</sup> The ripple effect from this sudden market drop was not limited to retailers, however. Publishers suddenly found themselves with a retail market that shrunk tremendously in size, and their profits shrunk accordingly.<sup>37</sup> This turmoil even had Marvel teetering on the verge of bankruptcy by December 1996.<sup>38</sup> With their revenue quickly disappearing, many comic book publishers began to make reactionary business de-

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30. TUCKER, *supra* note 11, at 137.

31. RHOADES, *supra* note 26, at 153.

32. TUCKER, *supra* note 11, at 178.

33. *How We Got into this Mess*, *supra* note 10, at 19.

34. *Id.*

35. *Id.*; see HOWE, *supra* note 12, at 350. Today the number of comic book stores in the United States has stabilized at around 2,500. RHOADES, *supra* note 26, at 153.

36. See HOWE, *supra* note 12, at 350.

37. See *How We Got into this Mess*, *supra* note 10, at 19.

38. RHOADES, *supra* note 26, at 25; TUCKER, *supra* note 11, at 189.



cisions in order to stabilize their positions within the publishing market itself. One such decision by Marvel executives would not only lead to terrible consequences for the company itself but also change the comic book industry forever.

*B. Seizing the Mantle: Diamond Makes its Move*

The Direct Market model allowed for a small, diverse group of comic book distributors to coexist within the U.S. At the time the speculation bubble burst in 1993, more than ten different distributors were responsible for obtaining printed comic issues from publishers and then distributing them to comic shops all over the country.<sup>39</sup> Each distributor was free to purchase any new comic from any comic book publishing company in the country.<sup>40</sup> All a distributor had to do was open an account with the desired publishing company, and then it was able to cater its orders to its retail clientele as it saw fit. The two largest distributors, and direct rivals, in the market were Capital City Distribution (“Capital City”) and Diamond.<sup>41</sup> Combined they were responsible for distributing 80% of all comic books sold via the Direct Market.<sup>42</sup>

Distributors, however, were not immune to the bursting of the comic speculation bubble. Under severe economic strain, Marvel decided to vertically integrate in December 1994 by purchasing the third largest comics distributor, Heroes World Distribution Co. (“Heroes World”).<sup>43</sup> Despite its high position within the market, Heroes World was a small-scale regional distributor that only controlled 3.5% of the national Direct Market distribution.<sup>44</sup> Shortly after its purchase, Marvel made Heroes World the exclusive distributor for all Marvel comic

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39. Tim Stroup & Mark Thompson, *Comic Distribution Headaches: A View from Another Distributor*, GAUNTLET, no. 19, 2000, at 21, 21 [hereinafter *A View from Another Distributor*].

40. TUCKER, *supra* note 11, at 180.

41. *How We Got into this Mess*, *supra* note 10, at 19.

42. *Id.*

43. *Id.*

44. *Id.*

books and terminated all contracts with other distributors.<sup>45</sup> By distributing its own comics on its own terms, Marvel hoped to increase its faltering sales and stave off economic ruin.<sup>46</sup> Comic shops that wanted to have Marvel comics on their shelves would have to go through Heroes World to do so.

For the remaining comic book distributors, including Capital City and Diamond, losing the ability to distribute any Marvel products was a disaster. Marvel controlled 32% of the publishing market when Heroes World became its exclusive distributor.<sup>47</sup> Without the revenue from Marvel's popular titles, comic book distributors suddenly found themselves in an arms race to lock in guaranteed product pipelines through exclusive distribution contracts with the remaining comic book publishing companies. This rapid change in fortunes gave DC a powerful bargaining position. Desperate comic distributors swamped DC executives with offers to distribute DC's comics under any terms.<sup>48</sup> Locking in the last "big" publisher in the comic book industry would likely guarantee the survival of the prevailing distributor, so Steve Geppi the CEO of Diamond, sensing the gravity of the situation, moved decisively against all his competitors. Diamond's systematic campaign to aggressively outbid Capital City and any other challenger was ultimately successful, and in 1995, DC made Diamond the exclusive dealer for all its comics.<sup>49</sup> Any comic book shop that wanted access to Batman, Superman, or Wonder Woman comics had to go through Diamond.

Geppi, however, was not satisfied with this monumental victory but wanted the distribution rights from all comic book publishers.<sup>50</sup> Thus, at the 1995 San Diego Comic Con, he obtained exclusive distribution deals with several smaller, but popular, publishers including Dark Horse Comics, Valiant Comics, and the newly formed Image

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45. HOWE, *supra* note 12, at 368; *How We Got into this Mess*, *supra* note 10, at 19.

46. TUCKER, *supra* note 11, at 181.

47. *Id.* at 178.

48. *Id.* at 181.

49. HOWE, *supra* note 12, at 368; TUCKER, *supra* note 11, at 181–82; *How We Got into this Mess*, *supra* note 10, at 20.

50. DUIN & RICHARDSON, *supra* note 27, at 194; RHOADES, *supra* note 26, at 154, 156.

Comics.<sup>51</sup> Diamond's exclusive deals with these smaller distributors and DC, coupled with Marvel's self-distribution, crippled the diverse pool of distributors in the U.S.<sup>52</sup> Diamond locked out Capital City and the other remaining distributors by gaining exclusive distribution rights to 80%–90% of all published comics.<sup>53</sup> Within a year, all these distributors either went out of business, changed markets, or were acquired by Diamond, with Capital being the last to fall to Diamond in July 1996.<sup>54</sup>

The aforementioned "Distributor Wars" left only two distributors in its wake: Diamond, controlling the distribution rights to almost every comic book publishing company, and Marvel. Marvel's attempt at self-distribution through Heroes World, however, was quickly unraveling as Heroes World was simply incapable of making the jump from small-scale regional distribution to national distribution.<sup>55</sup> Marvel faced losses of more than \$400 million in the fourth quarter of 1996 alone.<sup>56</sup> Its executives knew that they had to make a decision. Heroes World was quickly shut down, and by February 1996, Diamond secured distribution rights to Marvel's published comics.<sup>57</sup> Diamond became the sole remaining distributor of comic books in the country. In just over two years, the "multiple year exclusive arrangements with the four largest publishers (Marvel, DC[,] Image[,] and Dark Horse) who publish[ed] almost 90% of the new comics sold every month" allowed Diamond to "control . . . 95-98% of the whole [distribution] market."<sup>58</sup> Diamond emerged the sole survivor of the Distributor Wars, yet it was not completely out of danger.

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51. *How We Got into this Mess*, *supra* note 10, at 20.

52. *Id.*; *A View from Another Distributor*, *supra* note 39.

53. *How We Got into this Mess*, *supra* note 10, at 20.

54. *Id.*

55. HOWE, *supra* note 12, at 181–82; *How We Got into this Mess*, *supra* note 10, at 20.

56. HOWE, *supra* note 12, at 387.

57. *Id.*; *How We Got into this Mess*, *supra* note 10, at 20.

58. *How We Got into this Mess*, *supra* note 10, at 20.

*C. Dodging a Bullet: The DOJ Investigation*

In the summer of 1997, shortly after Marvel entered into the final exclusive distribution contract with Diamond, the Department of Justice Antitrust Division (“DOJ”) set its sights on Diamond.<sup>59</sup> The DOJ was informed of Diamond’s alleged monopoly within the comic book Direct Market distribution and began an investigation.<sup>60</sup> The investigation itself lasted for three years and concluded in November 2000.<sup>61</sup> The DOJ chose to not bring charges against Diamond, as it concluded that Diamond had not violated any antitrust laws.<sup>62</sup> While the DOJ found Diamond “enjoyed a monopoly in North American comic book Direct Market distribution,” it concluded that the company had not created “a monopoly on book distribution (books including non-comic books)” within the U.S.<sup>63</sup> According to the DOJ, Diamond had not run afoul of any antitrust statutes because it still had competitors within the broader book distribution market, so “no [legal] action [was] deemed necessary.”<sup>64</sup> Diamond, against all odds, survived its standoff with an entity capable of destroying its powerful position. Nothing has since stood in its way.

Diamond continues to expand its facilities and today controls “three Distribution Centers, 13 drop-ship points (local pick up points for [Diamond’s] accounts) in North America, and a facility in the United Kingdom.”<sup>65</sup> The principal publishers with whom Diamond still maintains exclusive dealing contracts, Marvel and DC, publish

59. DUIN & RICHARDSON, *supra* note 27, at 130; RHOADES, *supra* note 26, at 154–55.

60. RHOADES, *supra* note 26, at 154.

61. Michael Dean, *Will DC Buy Diamond?*, COMICS J., Apr. 2002, at 16, 17.

62. Donna De Marco, *Feds Probe Comics King*, BALTIMORE BUS. J. (Dec. 15, 1997, 12:00 AM), <https://www.bizjournals.com/baltimore/stories/1997/12/15/story1.html>; Jonah Weiland, *DOJ Concludes Investigation of Diamond Comic Distributors*, COMIC BOOK RESOURCES (Nov. 8, 2000, 11:21 AM), <https://web.archive.org/web/20060322213439/http://www.comicbookresources.com/comicbrief/archives.cgi?category=1&view=11-00>.

63. RHOADES, *supra* note 26, at 154–55.

64. Dean, *supra* note 61, at 17.

65. *DCD Vendor Services*, DIAMOND COMICS DISTRIBUTORS, <https://vendor.diamondcomics.com/public/> (last visited Dec. 23, 2018).

around 80% of comic books in the current market.<sup>66</sup> Diamond's powerful position within the comic book industry is not inconspicuous among market participants, earning it the reputation, described by a small, independent distributor, as retaining a "dictatorial position over the entire [comic book] industry."<sup>67</sup> Diamond remains completely uncompromised because it either acquires any rival that becomes large enough to pose a potential threat to its business or waits for startup distributors to collapse due to the lack of access to Diamond's publishers.<sup>68</sup>

### III. GRADING A DIAMOND: THE COMPONENTS OF DIAMOND'S MONOPOLY

This section tracks the main steps that a plaintiff, either a public administrative agency or a private individual, should take to analyze any alleged antitrust violation by a single-firm monopolist. A court usually first defines the relevant market, in terms of both product and geographic area.<sup>69</sup> Next, a court determines the power that the alleged monopolist holds within that defined relevant market.<sup>70</sup> In doing so, a court uses either a direct approach, which examines direct evidence of a firm's power within the market to illustrate monopoly power, or an indirect approach, which demonstrates a firm's monopoly power through economic analysis.<sup>71</sup> Finally, a court examines specific instances of the alleged monopolist's conduct for any anticompetitive effects on the relevant marketplace.<sup>72</sup> The alleged monopolist is then permitted to explain its conduct by demonstrating procompetitive justifications that outweigh the potentially anticompetitive effects of its actions on the relevant marketplace.<sup>73</sup> A court will

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66. RHOADES, *supra* note 26, at 1.

67. *A View from Another Distributor*, *supra* note 39.

68. See Jacob Shelton, *The Dark Story of Diamond Distributors: The Company that Controls Your Comics*, TOTAL NERD, <https://www.ranker.com/list/dark-facts-about-diamond-distributors/jacob-shelton> (last visited Dec. 23, 2018).

69. See *infra* note 80.

70. See *infra* note 94.

71. See *infra* Sections III.B.1–2.

72. See *infra* Section III.C.

73. See *infra* Section III.C.3.

then balance these pro-competitive justifications against the anticompetitive effects to determine if the conduct at issue is monopolistic in nature or not.<sup>74</sup> If the court finds both that the defendant holds monopoly power within the relevant market and that its actions within the relevant market are anticompetitive, then the firm should be condemned as a monopoly.

In determining whether Diamond holds a monopoly over U.S. comic book distribution, a court should rely on the language contained within § 2 of the Sherman Act. Section 2 of the Sherman Act governs the actions of individual firms within defined markets and condemns any action by a single firm to create a monopoly in the market in which it is a participant.<sup>75</sup> Case law has subsequently refined the elements of proving an illegal monopolization into: (1) possessing substantial power within a relevant market, and (2) exercising said power to maintain or protect the firm's monopoly status.<sup>76</sup> A court should determine, using the language of this statute, that Diamond's actions have created and maintained a monopoly within the U.S. comic book distribution market.

According to Robert Bork, the modern goal of antitrust law in the U.S. is the protection of consumer welfare.<sup>77</sup> Other antitrust scholars see this goal, espoused by the Supreme Court in *Reiter v. Sonotone Corp.*,<sup>78</sup> as striving to maximize all consumers' welfare within society.<sup>79</sup> This goal should drive every antitrust suit that

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74. See *infra* note 150 and accompanying text.

75. 15 U.S.C. § 2 (2012) (prohibiting the monopolization of "any part of the trade or commerce" by a single firm).

76. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004); *United States v. Griffith*, 334 U.S. 100, 107 (1948).

77. See ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 81–89 (1978). What Bork describes as "consumer-welfare" has been redefined by modern antitrust scholars to mean "total-welfare." Kenneth Heyer, *Consumer Welfare and the Legacy of Robert Bork*, 57 J.L. & ECON. S19, S20 (2014).

78. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) ("[Floor debates] suggest that Congress designed the Sherman Act as a 'consumer welfare prescription.'" (citation omitted)).

79. See BORK, *supra* note 77, at 66; Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1703–04 (1986) ("Goals based on something other than efficiency (or its close proxy consumers' welfare) really call on judges to redistribute income."). See generally *Consumer Welfare, Efficiencies, and Mergers*:

comes before any court, especially a suit against Diamond. The consumer welfare of comic book retailers—and everyday comic book consumers—should be the foremost concern of any private attorney or administrative agency seeking to bring an antitrust suit against Diamond. These parties have borne the brunt of the burden that Diamond’s overwhelming presence has imposed on the market. They should not have to bear it any longer.

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*Statement to Antitrust Modernization Commission* (2005) (statement of Charles F. Rule, Partner and Chair of the Antitrust Department at Fried, Frank, Harris, Shriver & Jacobson LLP; former Assistant Att’y Gen. in charge of the Antitrust Division, U.S. Department of Justice, 1986–89), [http://govinfo.library.unt.edu/amc/commission\\_hearings/pdf/Statement-Rule.pdf](http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Statement-Rule.pdf) (“[T]he Supreme Court’s declaration that antitrust is a ‘consumer welfare prescription’ [meant] that antitrust policy and rules should seek to support and facilitate (as opposed to replace) competitive-market capitalism’s tendency to maximize wealth without regard for its distribution.”); Ken Heyer, *Welfare Standards and Merger Analysis: Why Not the Best?*, 2 COMPETITION POL’Y INT’L 29 (2006) (advocating the use of a total welfare standard within merger analysis); Charles F. Rule & David L. Meyer, *An Antitrust Enforcement Policy to Maximize the Economic Wealth of All Consumers*, 33 ANTITRUST BULL. 677, 677–78 (1988).

There is not, however, complete academic consensus as to the meaning of “consumer welfare” in the context of antitrust law. See generally Jonathan M. Jacobson & Gary J. Dorman, *Joint Purchasing, Monopsony and Antitrust*, 36 ANTITRUST BULL. 1 (1991); Jonathan M. Jacobson & Gary J. Dorman, *Monopsony Revisited: A Comment on Blair & Harrison*, 37 ANTITRUST BULL. 151 (1992); Robert H. Lande, *Chicago’s False Foundation: Wealth Transfers (Not Just Efficiency) Should Guide Antitrust*, 58 ANTITRUST L.J. 631 (1989); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982); Steven C. Salop, *Question: What is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336 (2010).

Some practitioners see the academic schism regarding the defined meaning of “consumer welfare” as having no practical impact on the implementation of antitrust law. See Thomas O. Barnett, *Substantial Lessening of Competition—The Section 7 Standard*, 2005 COLUM. BUS. L. REV. 293, 297 (2005) (“[T]he consumer welfare and total welfare standards can diverge, although I think it is a rare case in practice.”). See J. Thomas Rosch, *Monopsony and the Meaning of “Consumer Welfare”: A Closer Look at Weyerhaeuser*, 2007 COLUM. BUS. L. REV. 353 (2007), for a more nuanced overview and analysis of the tension between these competing interpretations.

*A. Diamond's Market: Distributing from Smallville to Gotham*

The first step in building a case against Diamond is establishing the “relevant market” within which it has monopoly power.<sup>80</sup> In order to do this, a court must be able to determine: (1) a relevant product market and (2) a relevant geographic market.<sup>81</sup> A plaintiff must allege and properly support both of these markets in the initial complaint against Diamond for the suit to remain viable.<sup>82</sup> While courts should easily identify the relevant market in this instance, plaintiffs should leave no room for Diamond’s inevitable attempt to limit its market share by improperly drawing an alternative relevant market.

### 1. Relevant Product Market

A plaintiff must demonstrate to a court that Diamond’s relevant product market is the distribution of *comic books*. This product market definition is broad enough to include both the Direct Market model of comic book distribution<sup>83</sup> as well as alternative distribution methods, such as the Newsstand model.<sup>84</sup> It is also sufficiently narrow as to prevent inclusion of traditional book distributors, such as

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80. *See* United States v. Grinnell Corp., 384 U.S. 563, 570–76 (1966).

81. *See id.*

82. *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 564–70 (2007) (tightening the pleading requirements in antitrust actions); Simpson v. Sanderson Farms, Inc., 744 F.3d 702, 710–11 (11th Cir. 2014) (requiring plaintiffs to “present enough information in their complaint to plausibly suggest the contours of the relevant geographic . . . market[.]”) (alteration in original) (citation omitted); Agnew v. NCAA, 683 F.3d 328, 337–38 (7th Cir. 2012) (concluding that pleading a relevant market is necessary to sustain an antitrust action under the Sherman Act); Wampler v. Sw. Bell Tel. Co., 597 F.3d 741, 746 (5th Cir. 2010) (holding that a single apartment building was an improperly pled relevant geographic market); Mich. Div.-Monument Builders of N. Am. v. Mich. Cemetery Ass’n, 524 F.3d 726, 736–37 (6th Cir. 2008) (concluding that individual cemeteries are not proper relevant geographic markets in relation to lock-in claims).

83. *See supra* note 28 and accompanying text.

84. *See supra* note 27 and accompanying text.



Ingram Content Group, Inc.<sup>85</sup> Comic book distribution is a much smaller niche market than the traditional large-scale book distribution market, so conflation of these markets would improperly trivialize Diamond's position, skewing its actual power within the comic book distribution market. Diamond would be able to exploit its inclusion in a far larger market to appear far weaker.<sup>86</sup>

The DOJ improperly defined the relevant product market as *all book* distribution in its 2000 investigation of Diamond.<sup>87</sup> This overbroad definition allowed Diamond to argue that because it faced large-scale competitors within the book distribution market it could not have established a powerful monopoly position.<sup>88</sup> The insurmountable power that it held within the comic book distribution market appeared inconsequential compared to the traditional book distributors' market power at the time.<sup>89</sup> By defining the relevant product market so broadly, the DOJ directly perpetuated Diamond's

85. See *Book Distribution Worldwide*, INGRAM, <https://www.ingramcontent.com/publishers/distribution> (last visited Jan. 8, 2019) (claiming to be the largest wholesale book distributor in the world).

86. If placed in the traditional book distribution product market, Diamond would only control a market share of approximately 3.3% based on overall revenue from 2017. See DEVIN MCGINLEY, IBISWORLD INDUSTRY REPORT 42492: BOOK, MAGAZINE & NEWSPAPER WHOLESALING IN THE US 1, 27 (2018), <https://clients1.ibisworld.com/reports/us/industry/default.aspx?entid=995> (reporting an overall revenue within the traditional book market of \$17.2 billion); *2017 Comic Book Sales to Comics Shops*, COMICHRON, <http://www.comichron.com/monthlycomicssales/2017.html> (last visited Jan. 8, 2019) (reporting an overall revenue for Diamond of \$522.25 million in 2017 for comic book, graphic novel, and magazine sales).

87. See generally Dean, *supra* note 61, at 16–17 (outlining briefly the timeline and conclusion of the DOJ investigation).

88. At the time the DOJ concluded its investigation in 2000, Diamond controlled only 1.4% of the traditional book distribution market. See *2000 Comic Book Sales to Comics Shops*, COMICHRON, <http://www.comichron.com/monthlycomicssales/2000.html> (last visited Jan. 8, 2019) (calculating \$209.95 million in sales for Diamond in 2000); *Book Store Sales in the United States from 1992 to 2017*, STATISTA, <https://www.statista.com/statistics/197710/annual-book-store-sales-in-the-us-since-1992/> (last visited Jan. 8, 2019) (indicating \$14.88 billion in traditional book sales in 2000).

89. See RHOADES, *supra* note 26, at 154–55.

extensive power within the *comic book* distribution market. Thus, to avoid this same mistake, a plaintiff should demonstrate to the court that the proper relevant product market at issue is not traditional book distribution but *comic book* distribution.

## 2. Relevant Geographic Market

Diamond's relevant geographic market should be within the continental U.S. This should be a relatively simple point for a plaintiff to argue, because the majority of English-written comic publishing companies are located within the continental U.S.<sup>90</sup> Diamond holds exclusive dealing contracts with each of these distributors and distributes all their comics to every comic book shop in the nation through its extensive network of warehouses and drop-off points.<sup>91</sup> Diamond may attempt to argue that the geographic market should be expanded to include the United Kingdom because it controls a distribution facility there. This would be a tenuous contention, however,

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90. *Cf.* *United States v. Grinnell Corp.*, 384 U.S. 563, 575 (1966) (finding a national geographic market because accredited providers of alarm services operated on a national level); *United States v. E.I. Du Pont de Nemours & Co.*, 353 U.S. 586, 595 (1957) (concluding that the geographic market for automotive finishes and fabrics was consistent with the national automotive market). The five largest comic book publishers all have headquarters in the U.S. Marvel Comics has its headquarters in New York, New York. *See Marvel Corporate Information*, MARVEL ENT., <https://marvel.com/corporate/contact> (last visited Jan. 8, 2019). DC Comics recently moved its headquarters from New York City to Burbank, California. *See Associated Press, Warner's DC Comic-Book Unit Leaving Gotham*, SAN DIEGO UNION-TRIB. (Oct. 29, 2013, 5:38 PM), <http://www.sandiegouniontribune.com/sdut-warners-dc-comic-book-unit-leaving-gotham-2013oct29-story.html>. Image Comics is headquartered in Portland, Oregon. *See Contact*, IMAGE COMICS, <https://imagecomics.com/contact> (last visited Jan. 8, 2019). Dark Horse Comics was founded in Milwaukie, Oregon, and is still headquartered there. *See Contact Us*, DARK HORSE COMICS, <https://www.darkhorse.com/Help/Contact/> (last visited Jan. 8, 2019). IDW still maintains its publishing headquarters in San Diego, California. *See IDW*, IDW ENT., <https://www.idwpublishing.com/about/> (last visited Jan. 8, 2019).

91. *See DCD Vendor Services*, *supra* note 65.

because Diamond does not report its distribution numbers for comic books sold in the United Kingdom.<sup>92</sup>

A court could additionally inquire into whether U.S. buyers would travel to the United Kingdom for the sole purpose of buying comic books. Given that the average price of a comic book is \$3.91 and round-trip airfare to the United Kingdom is at least \$788, this scenario is unlikely.<sup>93</sup> Add in the fact that a customer would have to repeat this round trip on a weekly basis to receive the new issues that come out consistently every Wednesday and the likelihood drops even lower. Therefore, a court should find that the relevant geographic market that Diamond operates within is the continental U.S. alone and the relevant product market in which it participates is the narrow market of comic book distribution.

#### B. *Diamond's Power: Demonstrating the Indestructible*

A plaintiff must then show that Diamond has established market or monopoly power within the continental U.S. comic book distribution market, which is more complex than the aforementioned issues.<sup>94</sup> Monopoly power, as defined by the Supreme Court, is the power to exclude competition from the marketplace.<sup>95</sup> In economic terms, monopoly power is the “measure of a firm’s ability to raise prices above competitive levels without incurring a loss in sales that

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92. Rich Johnston, *Why Don't the Diamond Comics Monthly Stats Include the UK Numbers?*, BLEEDING COOL (NOV. 16, 2016), <https://www.bleedingcool.com/2016/11/14/dont-diamond-comics-monthly-stats-include-uk-numbers/>.

93. *Comic Book Sales by Year*, COMICHRON, <http://www.comichron.com/yearlycomicsales.html> (last visited Jan. 8, 2019) (finding that the average price of comic books in Diamond’s top 300 each month averaged \$3.91 in 2017, the highest monthly average in at least twenty years); see Dara Continenza, *How Much Does a Flight to Europe Cost from My State?*, HOPPER (May 1, 2015), <http://www.hopper.com/articles/2394/how-much-does-a-flight-to-europe-cost-from-my-state> (stating that the average cost to fly from the U.S. to Europe can range from \$788 to \$1,435).

94. See *Grinnell Corp.*, 384 U.S. at 570–71.

95. *Du Pont*, 353 U.S. at 592–93 (quoting *Transamerica Corp. v. Bd. of Governors of Fed. Reserve Sys.*, 206 F.2d 163, 169 (3d Cir. 1953)).

more than outweighs the benefits of the higher price.”<sup>96</sup> Determining monopoly power in the relevant market, therefore, typically requires an estimation of the potential monopolist firm’s overall market share of the relevant market. The amount of market share that a court will require to determine monopoly power will likely depend on the accuracy with which a plaintiff defines the relevant market. Judges will likely require less and less proof of the defendant’s market share as the accuracy of the relevant market definition increases.<sup>97</sup>

A plaintiff can demonstrate Diamond’s supposed market share and alleged monopoly power to a court in two ways: (1) the direct method, which uses direct evidence to demonstrate Diamond’s alleged monopoly power; or (2) the indirect method, which demonstrates Diamond’s alleged monopoly power through the presentation of structural economic evidence.<sup>98</sup> Plaintiffs should attempt to utilize both methods; however, plaintiffs will not likely have access to any direct evidence and thus should rely heavily on the indirect method.<sup>99</sup> As with market definition,<sup>100</sup> plaintiffs must sufficiently plead and reasonably support the claim that Diamond possesses monopoly power in the initial complaint, regardless of the method relied upon to prove it, or risk dismissal of the suit altogether.<sup>101</sup>

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96. E. THOMAS SULLIVAN & JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS 27 (6th ed. 2014).

97. HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 358 (5th ed. 2015).

98. *See* Fed. Trade Comm’n v. Ind. Fed’n of Dentists, 476 U.S. 447, 456–57 (1986) (utilizing direct evidence to find that defendants conduct hampered competition amongst dentists); *Re/Max Int’l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1016 (6th Cir. 1999) (“There are two ways to establish . . . that the defendant holds monopoly power. The first is by presenting direct evidence ‘showing the . . . exclusion of competitors.’ The second is by presenting circumstantial evidence of monopoly power by showing a high market share within a defined market.”) (internal citations omitted).

99. *See* *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001) (“direct proof [of monopoly power] is only rarely available”).

100. *See supra* Section III.A.

101. *See* *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 564–70 (2007) (tightening the pleading requirements in antitrust actions); *TKO Energy Servs., LLC v. M-I LLC*, No. 12-CV-108-GKF-PJC, 2013 U.S. Dist. LEXIS 29750, at \*10–12 (N.D. Okla. Mar. 1, 2013), *aff’d*, 539 Fed. App’x 866, 867 (10th Cir. 2013) (dismiss-

### 1. Direct Method

In theory, a plaintiff would prefer using direct evidence, as opposed to the inference-heavy indirect method, to demonstrate a defendant's monopoly power to a court. Convincing a court of a firm's monopoly power within a market would be far easier with direct proof of the effects that the monopoly has had on the marketplace. In reality, such incriminating evidence—if it did at one time exist—will likely never see the light of day, and any evidence found would likely be ambiguous and of little probative value. Although the likelihood that such evidence exists is low, a plaintiff exercising subpoena power or searching public records might uncover Diamond's secrets.<sup>102</sup> With the existence of such evidence being questionable at best, a plaintiff should be prepared to utilize the indirect method to demonstrate Diamond's alleged monopoly power.

### 2. Indirect Method

A plaintiff will likely demonstrate Diamond's alleged monopoly power within the market using economic data and circumstantial evidence. While not as immediately conclusive as the direct method, the indirect method allows for inferences to be drawn from a variety of different types of evidence. This method requires a court to: (1) define a market;<sup>103</sup> (2) calculate the defendant's share of said market; and (3) assess any entry barriers to the market.<sup>104</sup> Using this method, a plaintiff can demonstrate market share to a court by calculating either: (1) the potential monopolist's output of a particular product or

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ing a complaint due to inadequate support of defendant's possession of monopoly power).

102. A pending Freedom of Information request for the documents from the DOJ's three-year investigation into Diamond during the late 1990s could also possibly shed some light on Diamond's inner workings. See Letter from Sue Ann Slates, Chief of Freedom of Info. Act / Privacy Act Unit, Antitrust Div., U.S. Dep't of Justice, to Michael Manahan (Jan. 30, 2017), <https://www.muckrock.com/foi/united-states-of-america-10/why-isnt-diamond-comic-distributors-32510/#file-122109>.

103. See *supra* Section III.A.

104. See *United States v. Grinnell Corp.*, 384 U.S. 563, 577–79 (1966).

(2) the potential monopolist's capacity to produce a given product.<sup>105</sup> Diamond's capacity, while potentially relevant, remains unclear due to the lack of readily available information regarding the overall capacity of its warehouses and shipping capabilities. Thus, the best way to demonstrate Diamond's alleged monopoly power within the comic book distribution market is by demonstrating Diamond's output.

A plaintiff should use established precedent in order to demonstrate that Diamond's output constitutes a monopoly power within the U.S. comic book distribution market. *United States v. Aluminum Co. of America* ("Alcoa") outlines how to demonstrate an estimation of a potential monopolist firm's output.<sup>106</sup> The Second Circuit found that the defendant company, Alcoa, held an illegal monopoly on aluminum production by holding various patents on the production of virgin aluminum ingot.<sup>107</sup> The Court's calculation of Alcoa's market share revealed that Alcoa controlled an average of 90% of virgin aluminum ingot produced within the defined market in the U.S.<sup>108</sup> The court provided a scale to measure a firm's market power based on the percentage of the market controlled; under the scale, control of 90% of the market share of a relevant market, according to Judge Learned Hand, constituted monopoly power.<sup>109</sup> Over time, however, this bar has been lowered. Courts have held that an inference of monopoly power is proper where a defendant's market share falls between 70%–75% of the relevant market.<sup>110</sup> If this market share falls below 70%, however, courts are less likely to find that the defendant possesses

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105. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 1.4 (1997), <https://www.justice.gov/sites/default/files/atr/legacy/2007/08/14/hmg.pdf>.

106. *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

107. *Id.* at 422.

108. *Id.* at 423.

109. *Id.* at 424 ("[Ninety percent] is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not.").

110. See *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) (holding 87% market share sufficient to show monopoly power); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 167–72 (1948) (suggesting that 70% market share is possibly sufficient to find monopoly power); *United States v. Dentsply Intl., Inc.*, 399 F.3d 181, 187–89 (3d Cir. 2005), *cert. denied*, 546 U.S. 1089 (2006) (finding that 75%–80% market share was sufficient to show monopoly power).

monopoly power in the relevant market.<sup>111</sup> Thus, a plaintiff need only show that Diamond controls above 75% of the comic book distribution market in the U.S. to establish monopoly power.

A plaintiff should be able to show that Diamond controls well above the required market share within the comic book distribution market, warranting a determination that Diamond retains monopoly power within that market. Diamond's exclusive dealing contracts with the top five U.S. comic book publishers alone give it control over roughly 84%–88% of the U.S. comic book distribution market.<sup>112</sup> This range, though just short of Judge Hand's 90% benchmark, falls well within the modern courts' range for finding that a defendant holds monopoly power.<sup>113</sup>

The nature of Diamond's *exclusive* dealing contracts<sup>114</sup> with all major comic book publishers allows Diamond, and a plaintiff, to calculate each publisher's total market share.<sup>115</sup> In fact, these publishing companies use the statistics generated by Diamond to gauge their own growth over time, as Diamond is the only company that is able to track the publishers' comics sales.<sup>116</sup> Remarkably, Diamond publish-

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111. See *Moore v. Jas. H. Matthews & Co.*, 473 F.2d 328, 332 (9th Cir. 1972) (finding that defendant's market share of 65%–70% only raised a question of fact and not an inference of monopoly power).

112. This range can be determined by adding the publisher market shares that Diamond publishes on its own website. See *Publisher Market Shares: Year-End 2017*, DIAMOND COMICS DISTRIBUTORS, INC., <https://www.diamondcomics.com/Home/1/1/3/237?articleID=205749> (last visited Jan. 8, 2019). The variance is due to the two methods used by Diamond to determine publisher market share: retail market share and unit market share. See *id.* While these combined percentages would seem to only portray the portion of the market that the top five comic book distributors possess, the calculation also describes the percentage of the comic book distribution market that those five companies make up. See *id.* Since Diamond holds exclusive dealing contracts with each of them, and possibly more of the smaller distributors, this initial estimation is potentially only the lower end of the range of the U.S. comic distribution market that Diamond controls.

113. See *supra* notes 109–10.

114. See *infra* Section III.C.1.

115. See *Publisher Market Shares: Year-End 2017*, *supra* note 112.

116. Indeed, Diamond's statistics are the sole way that anyone can attempt to calculate anything related to the comic industry, be it monthly or yearly sales of a specific comic book issue or the overall market share of a publisher like Image or

es this evidence of its monopoly power on its website.<sup>117</sup> Diamond distributes these publishing companies' entire lineups of comics to retailers, so it effectively controls *the entire* distribution market for comic books within the U.S.<sup>118</sup> In effect, a court should find that Diamond has monopoly power over the comic book distribution market if only because it has the exclusive ability to accurately compute the market shares of the market's participants. A court should examine Diamond's output to find that Diamond has monopoly power over the comic book distribution market if only because it has the exclusive ability to accurately compute the market shares of the market's participants.

A plaintiff could also use Diamond's quantifiable capacity to distribute comics to demonstrate Diamond's monopoly power in a more straightforward manner. This second approach to the indirect method, however, is far more susceptible to being misconstrued by either a court or Diamond itself. To calculate Diamond's capacity to distribute comic books, a plaintiff would require records that only Diamond would have access to. Outside evidence, however, leads to the inference that Diamond's capacity is quite expansive. Diamond's warehouse in Olive Branch, Mississippi, recently underwent an expansion that included the addition of "an additional mile of conveyor belt and a second floor" to the existing structure, which allows for "21,000 more storage bins for [comic shipments]."<sup>119</sup> Steve Geppi, Diamond's CEO, also announced that Diamond would lease two entirely new warehouses, adding 175,000 square feet of storage space to the Olive Branch distribution center.<sup>120</sup> This data, however, does not

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DC. See generally COMICHRON, <http://www.comichron.com/index.php> (last visited Jan. 8, 2019) (using Diamond's data to estimate yearly comic book sales).

117. *Industry Statistics*, DIAMOND COMICS DISTRIBUTORS, INC., <https://www.diamondcomics.com/Home/1/1/3/237> (last visited Jan. 8, 2019).

118. In calculating the retail market shares of each publishing company, according to their figures, the final total share of the publishing market that Diamond distributes is 100.01%. See *Publisher Market Shares: Year-End 2017*, *supra* note 112.

119. Jonathan Munshaw, *Diamond Comic Expands, Upgrades Distribution Hub*, *BALT. BUS. J.* (Sept. 22, 2016, 11:18 PM), <https://www.bizjournals.com/baltimore/blog/real-estate/2016/09/diamond-comic-expands-upgrades-distribution-hub.html>.

120. *Id.*



include the capacity of Diamond's remaining two distribution centers in the U.S.<sup>121</sup> To properly examine Diamond's capacity, either Diamond would need to make far more data available or a plaintiff would need to obtain it by subpoena. Plaintiffs should not entirely neglect this method, however, because it could lead to either direct evidence of monopoly power<sup>122</sup> or other relevant evidence that could be used to prove Diamond's monopoly power.

Courts, however, have consistently held that the finding of monopoly power alone is not enough to condemn a defendant for violating antitrust laws. Judge Hand carefully noted in *Alcoa* that "size does not determine guilt" in deciding whether a defendant has committed an antitrust violation.<sup>123</sup> For a firm to have violated the antitrust laws, this "size" must be accompanied by: (1) outward actions that lead to the exclusion of competitors; (2) actions that allowed the firm to illegally obtain and maintain its monopoly; or (3) evidence that the firm's actions were "unduly coercive."<sup>124</sup> A plaintiff, therefore, must show that Diamond acted in a manner that was either unlawful or outright exclusionary for the suit to proceed.

### C. *Diamond's Conduct: The Devourer of Competition*

A plaintiff should emphasize Diamond's long-term exclusive dealing agreements and continued serial acquisitions of its competitors as the centerpiece of any antitrust suit against Diamond. For years, Diamond has used its leverage to stamp out its competition and deprive potential competitors of access to a multitude of popular, established comic book characters, such as Batman or Iron Man. Startups have also been at considerable risk of being acquired by Diamond, despite efforts to find a profitable way to compete. Using its old tactics—due to their efficacy in the Distributor Wars of the 1990s—Diamond simply buys out the competition or waits long

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121. *DCD Vendor Services*, *supra* note 65.

122. Such direct evidence could be used to demonstrate Diamond's monopoly power without the need to speculate regarding the amount of the market controlled by Diamond. *See supra* Section III.B.1.

123. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 429 (2d Cir. 1945).

124. *Id.*

enough for competitors to fail and then purchases the scraps.<sup>125</sup> Fortunately, Diamond's longevity has produced ample evidence of anti-competitive behavior to bolster a plaintiff's antitrust case against Diamond. A plaintiff should highlight Diamond's anticompetitive behavior to a court by emphasizing: (1) Diamond's exclusive dealing contracts with all major comic book publishers and (2) Diamond's serial acquisitions of its competitors during the Distributor Wars. Courts should then balance these potentially anticompetitive behaviors with any pro-competitive justifications that Diamond could present to justify the continuation of these actions.

### 1. Exclusive Dealing

Diamond's exclusive deals with all major comic book publishers render Diamond's "dictatorial" position within comic book distribution nearly unchallengeable. These deals contractually bind all major comic book publishers to sell their comic books exclusively to Diamond from distribution to retailers. A court's analysis of whether Diamond's exclusive deals with the major publishers should be condemned must examine whether Diamond's actions have unreasonably impaired its competitors' ability to enter the comic book distribution market, in addition to creating dominant market power.<sup>126</sup> A plaintiff seeking to demonstrate Diamond's conduct to a court should utilize the widespread effects that Diamond's exclusive deals have had on the comic book industry and particularly its everyday consumers.

Courts are reluctant to immediately condemn the use of exclusive dealing contracts unless the effects of such contracts have an anticompetitive effect on the market in question.<sup>127</sup> *United States v. Dentsply International, Inc.* sets out the modern standard by which exclusive dealing contracts are analyzed under antitrust provisions.<sup>128</sup> In *Dentsply*, the court condemned the exclusive dealing agreement

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125. See *supra* notes 49–54 and accompanying text.

126. See HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 198 (2005).

127. See *Standard Oil Co. v. United States*, 337 U.S. 293, 299 n.5, 311–15 (1949); *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 333–35 (1961).

128. *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 191–96 (3d Cir. 2005), *cert. denied*, 546 U.S. 1089 (2006).

made between Dentsply and the network of retailers it controlled.<sup>129</sup> Dentsply's product output within the defined market constituted 67%–80% of materials used to fill teeth and manufacture artificial teeth, and Dentsply required its retailers to exclusively sell Dentsply's materials.<sup>130</sup> Dentsply's exclusive deals made it incredibly difficult—nearly impossible—for dentist-consumers to find retailers who would fill orders with non-Dentsply materials.<sup>131</sup> The court held that Dentsply's exclusionary conduct “effectively choked off the market,”<sup>132</sup> and though it “won its preeminent position by fair competition, that fact does not permit *maintenance* of its monopoly by unfair practices.”<sup>133</sup> Dentsply's condemned conduct parallels Diamond's exclusive dealing within the comic book industry and could be used to persuade a court that Diamond maintains a monopoly.

Diamond's dominant position within the comic book distribution market coupled with its exclusive dealing contracts with all the major comic book publishers precludes the market from self-correcting and limiting Diamond's monopoly power. The exclusive dealing contracts maintain Diamond's steady stream of income but also prevent potential competitors from gaining a foothold in the concentrated comic book distribution market.<sup>134</sup> Startup distributors seeking to enter the market do not have access to any of the large, established comic book publishers from the beginning and are tasked with finding a publisher that does not already have an exclusive deal with Diamond—which is almost impossible because publishers want Diamond's unequalled access to retailers. Alternatively, a startup could attempt survival without any access to nearly all new comic books, sustaining itself on specialty or back-issue sales, which is a

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129. *Id.* at 196.

130. *Id.* at 184, 196.

131. *Id.* at 191 (“By ensuring that the key dealers offer Dentsply [materials] either as the only or dominant choice, [this exclusive dealing] has a significant effect in preserving Dentsply's monopoly. It helps keep sales of competing [materials] below the critical level necessary for any rival to pose a real threat to Dentsply's market share.”).

132. *Id.* at 196. See *supra* Part II for a description of Diamond's exclusionary conduct.

133. *Dentsply*, 399 F.3d at 196 (emphasis added).

134. See RHOADES, *supra* note 26, at 1. (“Together, [Marvel and DC] account[] for better than three quarters of the U.S. [comic book publishing] market.”).

completely unprofitable business model. As a result, no competitors are entering the comic book distribution market because Diamond preemptively cuts them off from most, if not all, profitable revenue streams.

Under *Dentsply*, Diamond's exclusive dealing with all major comic book publishers maintains a monopoly. As noted above, any new participant in the comic book distribution market immediately finds its available revenue streams severely reduced. These exclusionary contracts prevent any distributor from providing Superman, Spider-Man, or The Walking Dead comics to its clients—and, in turn, that client's customers.<sup>135</sup> With no access to popular comics, a startup distributor has to rely on luck to find a popular original character with artists and writers willing to leave the resources of a traditional comic book publishing company.<sup>136</sup> The likelihood of finding such a goldmine of unclaimed talent within the comic book industry is exceedingly rare, if not entirely non-existent. The last group to attempt such a breakaway from the major publishers was Image Comics in 1992 formed by Todd McFarlane,<sup>137</sup> Jim Lee, Whilce Portacio, Marc Silvestri, Erik Larsen, Jim Valentino, and Rob Liefeld.<sup>138</sup> Each made his name working for Marvel and already had widespread success and followers as a result.<sup>139</sup> When they broke away, however, they were

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135. *Superman, Amazing Spider-Man, and The Walking Dead* are published by DC, Marvel, and Image respectively.

136. See Rich Johnston, *Haven Distributors Closes Its Doors*, BLEEDING COOL (Oct. 5, 2011), <https://www.bleedingcool.com/2011/10/05/haven-distributors-closes-its-doors/>. However, this has not completely stopped intrepid startups from trying to compete in a market so thoroughly dominated by one participant. See Chris Arrant, *A New Comic Book Distributor with Big Ambitions Launches*, NEWSARAMA (Mar. 14, 2017, 6:13 AM), <https://www.newsarama.com/33568-a-new-distributor-comes-to-challenge-diamond.html>.

137. McFarlane is the co-creator of Venom in the Spider-Man franchise for Marvel. Later at Image, he created the popular anti-hero Spawn. See Todd McFarlane, *Questions, Part One*, SPAWN, May 1, 1992, at 1; David Michelinie & Todd McFarlane, *Venom*, AMAZING SPIDER-MAN, May 1988, at 1.

138. See SYFY WIRE, *The History of Image Comics (So Much Damage) | Part 1: The Founding* | SYFY WIRE, YOUTUBE (Nov. 20, 2017), <https://www.youtube.com/watch?v=c9a1XSyjjNg>.

139. See SYFY WIRE, *The History of Image Comics (So Much Damage) | Part 2: The Beginning* | SYFY WIRE, YOUTUBE (Nov. 20, 2017), <https://www.youtube.com/watch?v=70dsjiLERfs>.

immediately pursued by Diamond and signed the same type of exclusive dealing contract that Marvel would sign just four years later.<sup>140</sup>

The other main issue regarding Diamond's exclusive dealing contracts is their indeterminate length. Their length is not public knowledge, and Diamond has likely worked quite hard to make sure that information remains confidential. Yet this does not change the fact that these contracts are a valid and potent tool to maintain its monopoly power within the comic book distribution market. These contracts are now beginning to hamper publishers that were in a vulnerable state at the time the contracts were signed due to the rapid market fluctuations of the 1990s but have since developed into powerhouse companies.<sup>141</sup> Marvel, now owned by the Walt Disney Corporation,<sup>142</sup> has access to a powerful and far reaching self-distribution mechanism through its parent company yet is still bound to use Diamond to distribute all its comics, due to the longevity of its exclusivity deal.<sup>143</sup> This conveniently allows Diamond to maintain its important position within the industry by blocking any now-established publisher's hopes to vertically integrate and attempt self-distribution.

## 2. Serial Acquisitions

Diamond utilized its profits to quickly and efficiently prevent any viable competitor from threatening its position within the comic book industry by serially acquiring all its major competitors early on in the Distributor Wars. During the mid to late 1990s, Diamond was in the process of consolidating its market power via securing publish-

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140. *How We Got into this Mess*, *supra* note 10, at 20.

141. Marvel was worth an estimated \$4 billion when it was finally acquired by Walt Disney Co. See Ben Fritz, *Disney Tells Details of Marvel Entertainment Acquisition in a Regulatory Filing*, L.A. TIMES (Sept. 23, 2009), <http://articles.latimes.com/2009/sep/23/business/fi-ct-marvel23>.

142. Brooks Barnes & Michael Cieply, *Disney Swoops into Action, Buying Marvel for \$4 Billion*, N.Y. TIMES (Aug. 31, 2009), <https://www.nytimes.com/2009/09/01/business/media/01disney.html>.

143. See generally Chris Sutcliffe, *Diamond Distributors: What it Means for Publishers to Have Lost Control of Distribution*, MEDIA BRIEFING (Jan. 27, 2016), <https://www.themediabriefing.com/analysis/diamond-distributors-what-it-means-for-publishers-to-have-lost-control-of-distribution/> (illustrating publishers' dependence on Diamond).

ers through exclusive dealing contracts.<sup>144</sup> Diamond then further profited by acquiring all its rivals, including Capital City, whose income streams had begun to fail due to the existence of those same exclusive dealing contracts.<sup>145</sup>

This serial acquisition activity is what initially attracted the attention of the DOJ in 1997 and led to its three-year long investigation of Diamond.<sup>146</sup> At the end of this investigation, however, the DOJ concluded that because Diamond lacked a monopoly over *book* distribution—and had competitors within that market—it was not capable of maintaining a monopoly in the *comic book* distribution market.<sup>147</sup> Given the definition of monopolistic activity and conduct given in the preceding sections of this Note, the DOJ's decision is questionable.<sup>148</sup> At the time, Diamond appeared to control the requisite market power and exhibit the requisite monopolistic conduct to have incurred the wrath of the DOJ, but Diamond was allowed to continue its practices, uninhibited by the government. Why? A logical conclusion is that the DOJ likely realized after three years of investigating and monitoring the comics industry that Diamond had deeply entrenched itself in the whole of the comic book market, and its removal or break-up could prove fatal to the entire market itself. The DOJ could have recognized this “failing firm defense” to monopolistic activity to ensure the survival of the entire comic book industry instead of targeting one market participant that potentially violated antitrust laws.<sup>149</sup> The DOJ likely chose what it perceived as the lesser of two evils and allowed arguably monopolistic activity to persist so that an entire market would not be completely destroyed.

### 3. Competitive Justifications

Despite the condemnable appearance of Diamond's conduct in maintaining exclusive dealing contracts with publishers and its blan-

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144. See *supra* Sections II.A–B.

145. *How We Got into this Mess*, *supra* note 10, at 20.

146. See *supra* Section II.C.

147. RHOADES, *supra* note 26, at 154–55.

148. See *supra* Section II.C.

149. See *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 376–77 (1933); U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 105, at 5.1.

ket acquisition of its competitors during the 1990s, it may still argue the pro-competitive justifications of its supposed anticompetitive conduct. Courts will balance valid pro-competitive justifications provided by the accused monopolist against their anticompetitive effects within the market to determine whether its position in the market is legitimate or illegitimate under antitrust statutes.<sup>150</sup> Diamond would likely proffer justifications that highlight its role as a stabilizing force in the turbulence of the market during the 1990s as well as its efforts to standardize the quality and dependability within the distribution component of the comics industry. These justifications, while perhaps tenuously appropriate twenty years ago, are no longer valid justifications for the actions that Diamond has consistently taken to maintain its position as the sole viable comic book distributor in the U.S.

Diamond may argue that its position within the comics industry has allowed it to make strides to standardize the quality and dependability of its client's products' distribution. The defendant in *United States v. American Can Co.* made a similar argument that the development of better industry standards and the creation of better business performance were valid pro-competitive justifications that sufficiently offset the anticompetitive practices of maintaining the defendant's monopoly in the metal can production industry.<sup>151</sup> Here, Diamond may have had a proper argument in the 1990s, but it has not survived into the new century. When there were multiple distributors controlling various publishers' comic lines, comic store managers were required to maintain separate accounts with different sets of rules and discount levels.<sup>152</sup> This system made it incredibly difficult for retailers to consistently receive discounts on the purchased products that often made up a significant portion of their profit margin; it also led to confusion regarding how to maintain accurate selling records of the weekly invoices from multiple distributors.<sup>153</sup> Diamond's presence, therefore, solved several problems by standardizing and simplifying comic book distribution. This simplification, however,

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150. See *United States v. Am. Tobacco Co.*, 221 U.S. 106, 175–84 (1911).

151. *United States v. Am. Can Co.*, 230 F. 859, 895 (D. Md. 1916) (“[Defendant’s] influence has been an important factor in bettering [overall metal can quality].”).

152. See RHOADES, *supra* note 26, at 154.

153. *Id.*

was only favored by inexperienced businessmen who tended to favor less complex ways of running their retail comic businesses, such as using one distributor for their entire business. The experience and savvy of retail comic managers today is unclear, and thus, this justification has lost its persuasive tone with the passage of time.

The fragility of the comics market that existed in the 1990s is a relic of that time, and today the comics industry has diversified into a multi-million dollar a year industry encompassing television, movies, and other forms of mass media.<sup>154</sup> DC and Marvel have become entertainment giants that compete over a variety of platforms and are no longer the emaciated, desperate companies that they were in the 1990s.<sup>155</sup> Even smaller publishers, such as Image, have become formidable members of the industry due to the success of niche series, such as *The Walking Dead*.<sup>156</sup> The comics industry no longer requires a stabilizing force to secure the viability of the market as a whole. The comics industry, therefore, should also leave Diamond's ability to control the distribution of all major comic book publishers in the past.

#### IV. CONCLUSION: IS THE END NIGH?

If the comics industry is to achieve its full potential, both economically and artistically, then legal action is required to defeat Diamond's powerful position. Either an administrative agency or an enterprising plaintiff's attorney must reexamine this market as a whole and file suit against Diamond. This Note serves as a starting point for the filing of such a suit. This matter deserves to be properly argued in

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154. See Travis M. Andrews, *The Resurgence of Comic Books: The Industry Has Its Best-Selling Month in Nearly Two Decades*, WASH. POST (July 12, 2016), [https://www.washingtonpost.com/news/morning-mix/wp/2016/07/12/the-resurgence-of-comic-books-the-industry-has-its-best-selling-month-in-nearly-two-decades/?utm\\_term=.1fdc4c2dda43](https://www.washingtonpost.com/news/morning-mix/wp/2016/07/12/the-resurgence-of-comic-books-the-industry-has-its-best-selling-month-in-nearly-two-decades/?utm_term=.1fdc4c2dda43).

155. See *Marvel VS DC—Which is More Successful? Comic Company Comparison*, INFOGRAPHICS SHOW (July 26, 2017), <https://www.theinfographicsshow.com/home-1/marvel-vs-dc-successful-comic-company-comparison>.

156. Aaron Scott, *Image Comics to Move to Portland*, OR. PUB. BROADCASTING, <https://www.opb.org/radio/article/image-comics-to-move-to-portland/> (last updated Sept. 3, 2016, 10:38 AM).



a courtroom and decided by a judge. The foregoing analysis should not be confused with an outright, overall condemnation of Diamond, as it employs innovative and competitive practices.<sup>157</sup> Thus, Diamond should be allowed the opportunity to justify its practices, but this opportunity must take place in a courtroom.

The proper potential remedies for such an antitrust action have shifted over time, with courts becoming more and more averse to breaking up single-firm monopolies into smaller satellite firms or companies.<sup>158</sup> Despite this reluctance, a court could still enjoin the exclusive deals that Diamond has maintained with the major publishing companies in the comic industry.<sup>159</sup> The issue of a remedy for Diamond's alleged monopolistic behavior is best left to the determination of a court, though several are suggested here, as only a judge will be able to properly remedy the problems that plague the comic book distribution market. If a court takes away Diamond's position within the comic book distribution market, it could open the door for an influx of new entrants. Allowing this would permit investment and growth in a market that has not seen much of either since Diamond won the Distributor Wars in 1996. It would also inject a much-

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157. See Susana Polo, *Major Change for Comics Shops Could Mean Major Change for the Industry*, POLYGON (Feb. 23, 2018, 12:51 PM), <https://www.polygon.com/comics/2018/2/23/17044752/buying-comics-diamond-distributors-pullbox> (introducing a new online pre-ordering system for print comics through Diamond's pre-existing relationships with retailers).

158. Compare *United States v. Am. Can Co.*, 230 F. 859 (D. Md. 1916) (ruling that dissolving companies that had grown too large was proper only in certain extreme circumstances), with *Standard Oil Co. v. United States*, 221 U.S. 1 (1911) (ordering the breakup of the defendant company due to its expansive power within the oil industry), and *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131 (D. D.C. 1982) (preceding an out of court resolution that required the dissolution of AT&T into several geographically situated "Baby Bells").

159. This would not be the first time that legal action has broken a monopoly's hold on a comic book distribution market. See DUIN & RICHARDSON, *supra* note 27, at 127. Phil Seuling, the creator of the Direct Market method, held a monopoly over comic book distribution with his company Seagate for almost seven years using many of the same exclusive dealing tactics utilized by Diamond. *Id.* at 126–27. New Media/Irjax, a paper distribution company, sued and forced a settlement, allowing other distributors access to major comic book publishers and their comics. *Id.* at 127; HOWE, *supra* note 12, at 216.

needed dose of hope into an industry that has been deprived of it for far too long.