

Horizontal agreements under U.S. antitrust law

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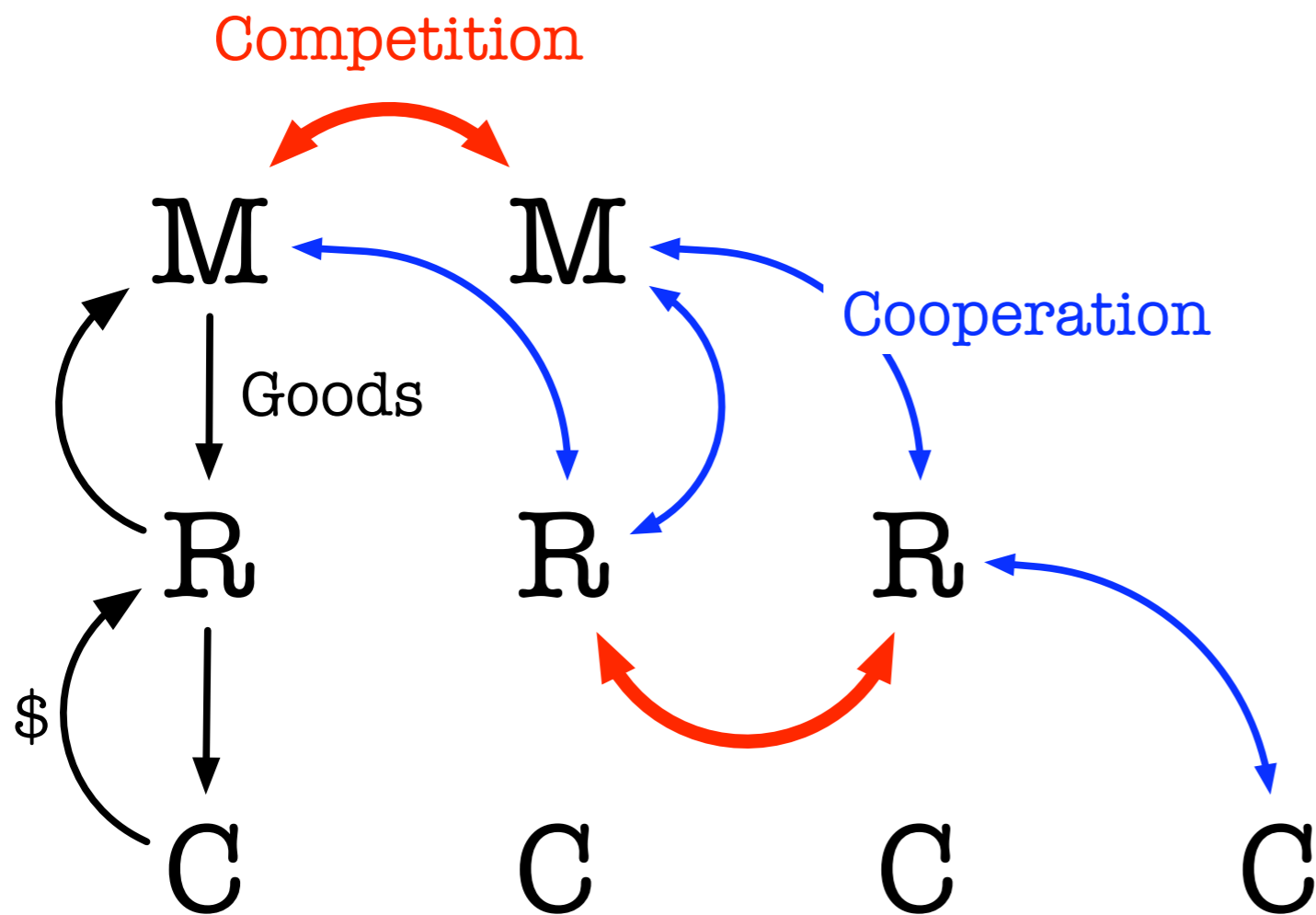
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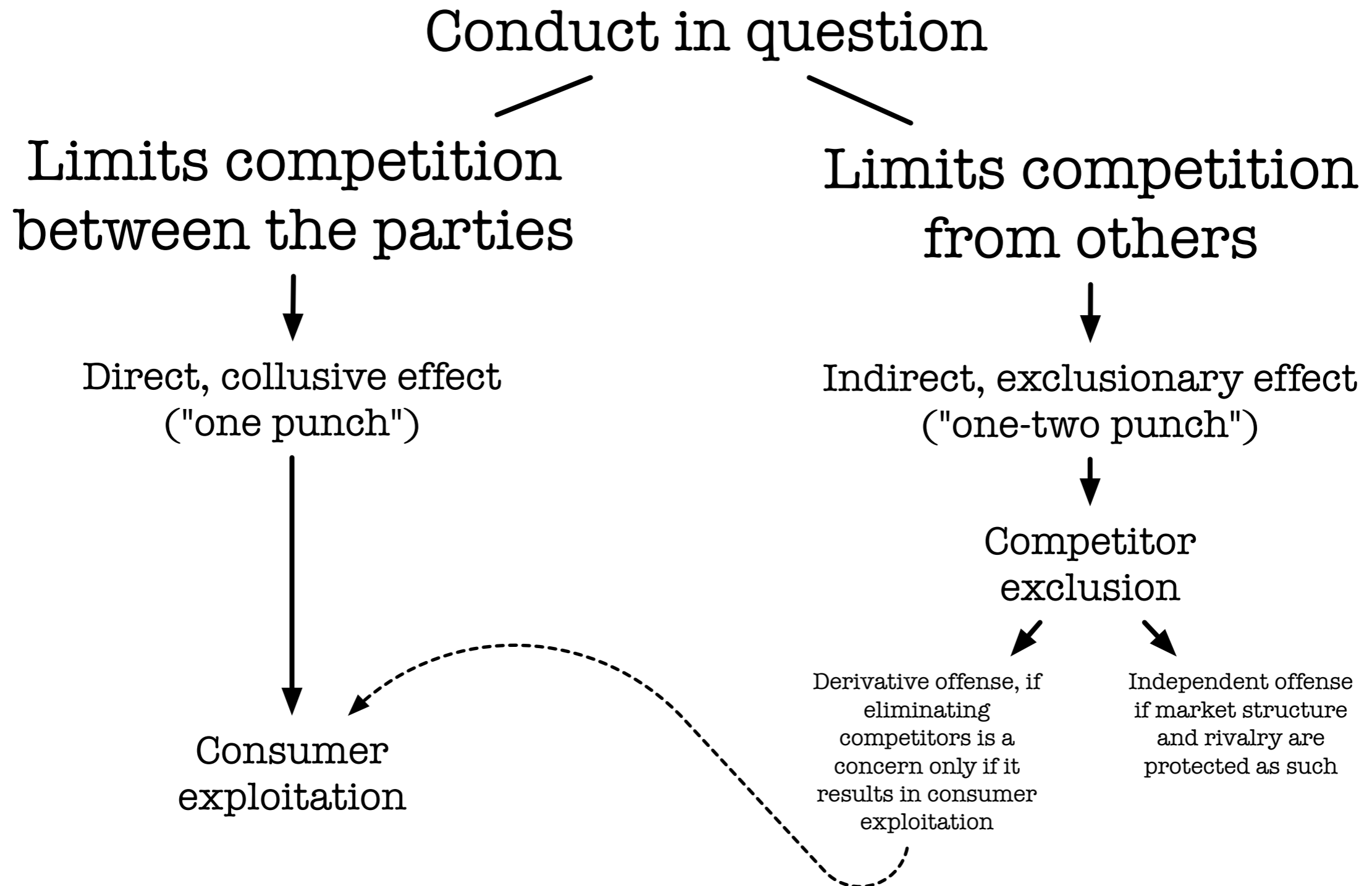
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There are horizontal and vertical agreements



- At the same level of production, the normative goal is **competition** (horizontal)
- In a supply relationship, the normative goal is **cooperation** (vertical)

Exploitation and exclusion both harm competition



How exploitation and exclusion work

- Effects from collusion are direct and immediate (“One punch”). A and B fix prices, competition ceases, and consumers are being exploited.
 - Collusive exploitation targets the customer directly.
- Effects from exclusion are indirect and delayed (“One-two punch”). Sawmill A locks up all lumber suppliers in the region, denying B access to inputs. B goes out of business. Once A is the only remaining seller, A charges monopoly prices.
 - Exclusion targets a rival directly and harms the consumer indirectly.

For details, see Fox, What is Harm to Competition, 70 Antitrust L.J. 371 (2002)

“Every contract ... in restraint of trade ... is ... illegal” (§ 1)

- Agreement (express or implied)
 - Conscious parallelism is not sufficient, e.g., two gas stations across from each other track each others' price movements and make their own judgments with the anticipated reaction of the other in mind. No “agreement.”
- In *unreasonable or net* restraint of trade
 - Compare anticompetitive effects (AE) with procompetitive effects (PE)
- Modern reading of § 1: “Every agreement for which $AE > PE$ is unlawful.”

Per se illegality

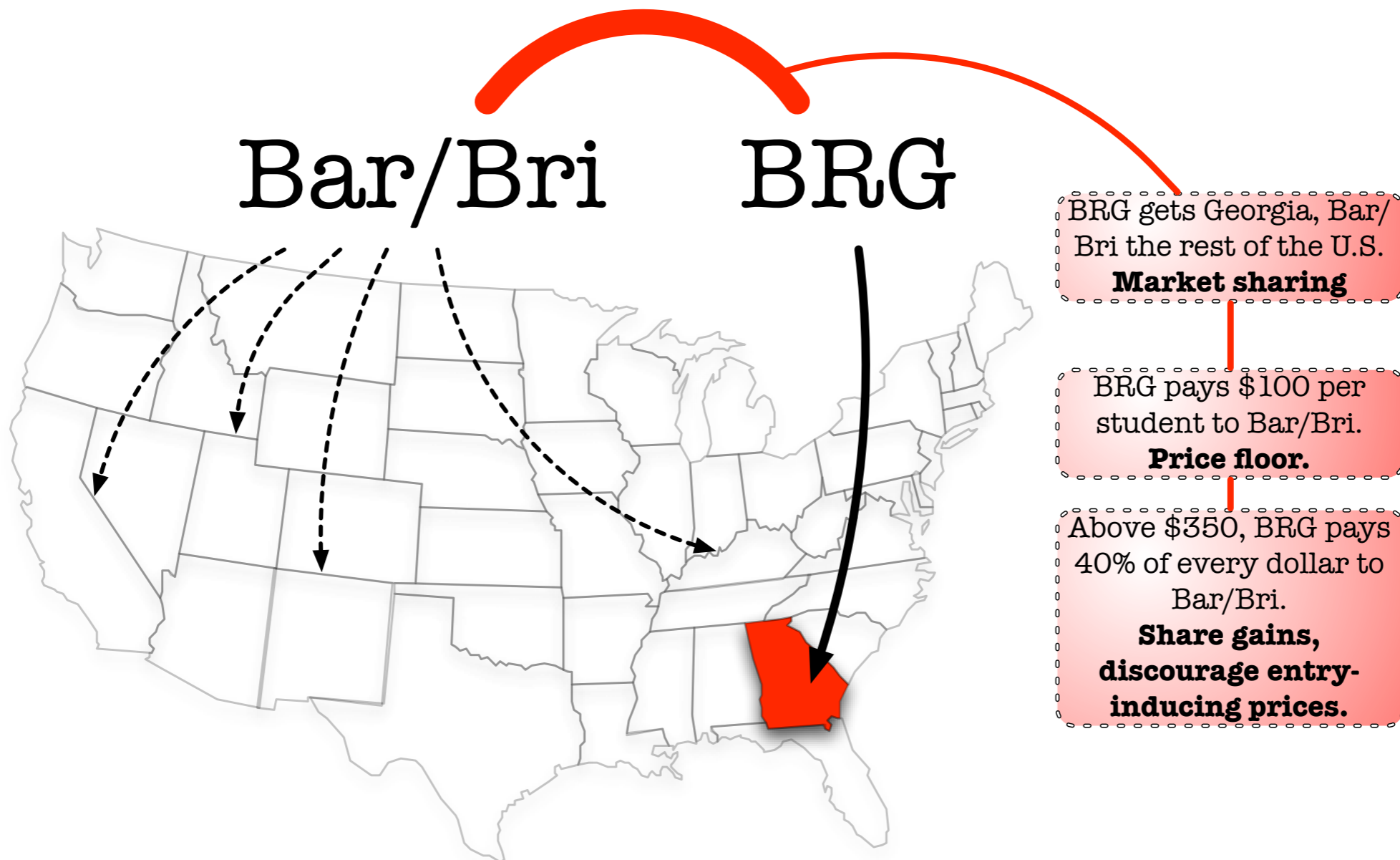
- For certain *categories* of hardcore restraints, the law conclusively presumes that $AE > PE$
 - Price fixing, market division (territory, customer, time), naked output restraint, group boycott to defend a cartel
- The courts will consider neither PE nor whether there are, in fact, any AE (*Northern Pacific Railway*)
- In other words: If two hot dog vendors in Central Park agree to charge \$4/dog, they engage in a *per se* illegal price fixing agreement, even though it has virtually no effect.

Per se illegality

"[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore **illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.**" *Northern Pacific Railway Comp., v. U.S.*, 356 U.S. 1, 5 (1958).

Per se example: *Palmer v. BRG*

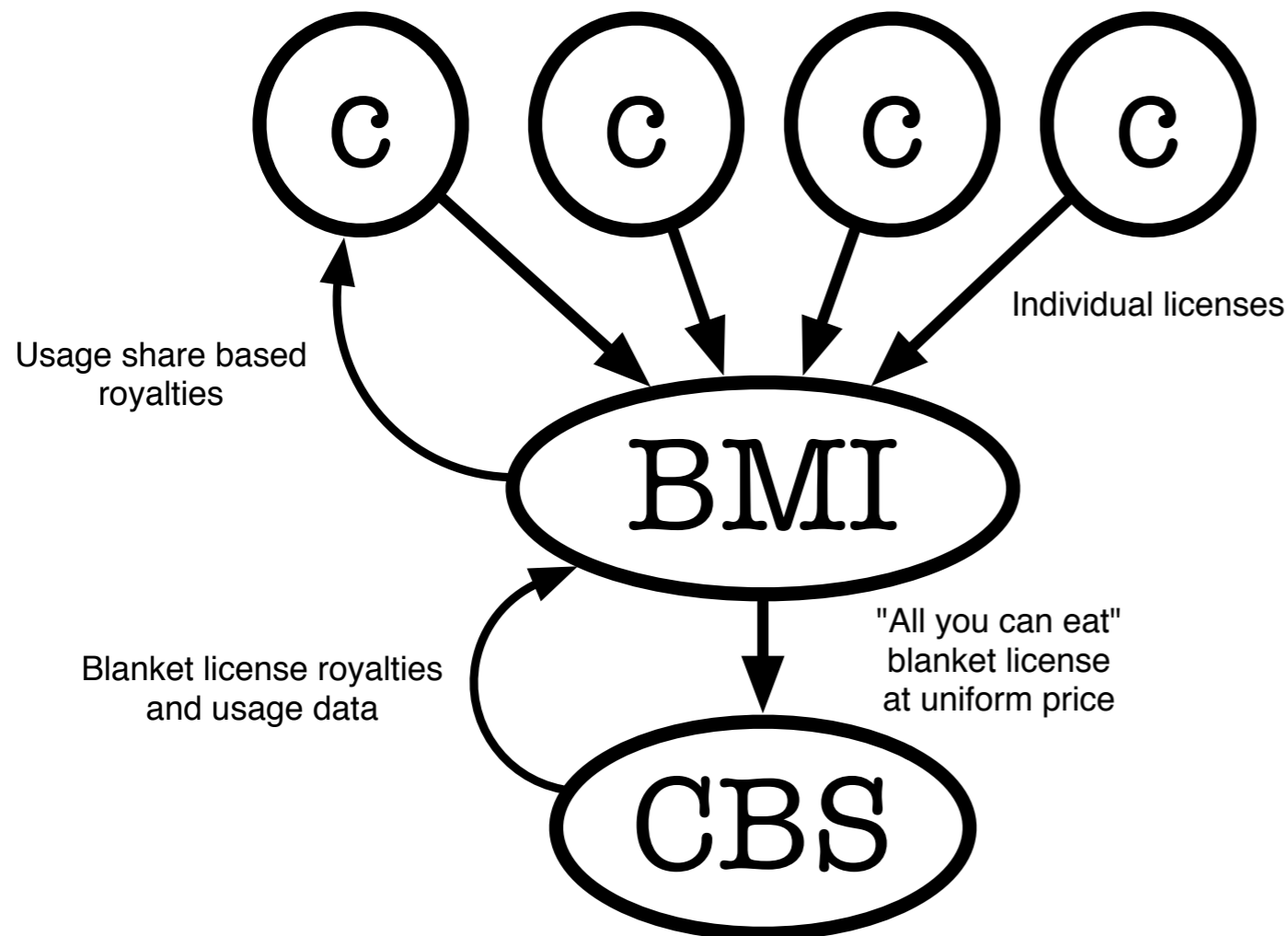
BRG and Bar/Bri competed in Georgia, when they entered into a market allocation (and price fixing) agreement. Within weeks, prices in Georgia went from \$150 to \$400. **Per se illegal.**



Palmer v. BRG of Georgia, 498 U.S. 46 (1990)

Sometimes it's hard to tell whether the *per se* rule applies

BMI v. CBS, 441 U.S. 1 (1979)



- Literally “price fixing” by a composer cartel, but:
 1. The restraint is *absolutely necessary* for the venture to work
 - w/o the blanket license, costs for composers to monitor outlets and cost for outlets of finding composers would be excessive
 - The flat rate ensures that stations report usage truthfully
 2. The venture also involves the *creation of a new product*, with which the composers don't compete
- New market option added, output increased: ROR

The ancillary restraints doctrine is a good criterion

- “To be ancillary ... an agreement eliminating competition must be subordinate and collateral to a separate, legitimate transaction. The ancillary restraint is subordinate and collateral in the sense that it serves to make the main transaction more effective in accomplishing its purpose.”
- *If the restraint is ancillary, then ROR applies*
- *If the restraint is not ancillary (or “naked”), then the per se rule applies.*

Rothery Storage & Van Co. v. Atlas Van Lines, 792 F.2d 210, 224 (D.C.Cir. 1986)

Ancillarity can be strong or weak

Assuming that the rivals are engaged in a *bona fide* productive venture or sale (the “primary transaction”), and:

1. The restraint is a *conditio sine qua non* for the primary transaction (e.g., *CBS v. BMI*), then ROR applies.
2. The restraint *promotes* the primary transaction (e.g., partnerships; seller non-compete clause in the sale of a business), then ROR applies.
3. The restraint is *basically unconnected* to the primary transaction (*Palmer v. BRG*) – then we’re dealing with a “naked restraint” and the *per se* rule applies
 - Exception: Self-regulation of professionals comes under the ROR (*Professional Engineers; Indiana Fed. of Dentists*); but not boycotts/price fixing (*Trial Lawyer’s Ass’n*)

ROR is the default standard

- Actually balancing AE and PE is extremely difficult and time consuming
- The original ROR was an unweighted, multi-factor test (*Chicago Board of Trade*)
- The modern ROR employs a structured, burden shifting approach (*Calif. Dental*)

The structured ROR

1. Plausible theory of harm (*motion to dismiss*)

a. π : Plausible AE

- AE without market power (< 30% share) are not plausible

b. Δ : Plausible PE for which the restraint is reasonably necessary

2. Proof of harm (*summary judgment*)

a. π : Proof of AE (direct or circumstantial, i.e., market power)

b. Δ : Proof of PE and that the restraint is reasonably necessary to achieve them

3. Balancing (*trial*)

a. Court: AE > PE?

See Elhauge & Geradin, *Global Antitrust*, p.190-91 (2007)

Do social welfare justifications have a place in the ROR?

- “Contrary to its name, the [ROR] does not open the field ... to any argument in favor of a challenged restraint that may fall within the realm of reason.” (*Professional Engineers*)
- The *legislative policy decision for competition* cannot be questioned in a ROR inquiry. (*Id.*)
 - In other words, basic marketplace design rules (e.g., competition) are reserved for public not private promulgation (vividly illustrated in *Socony Vacuum*)
- No “first amendment immunity” for expressive price fixing/boycott (*Trial Lawyer’s Ass’n*)