

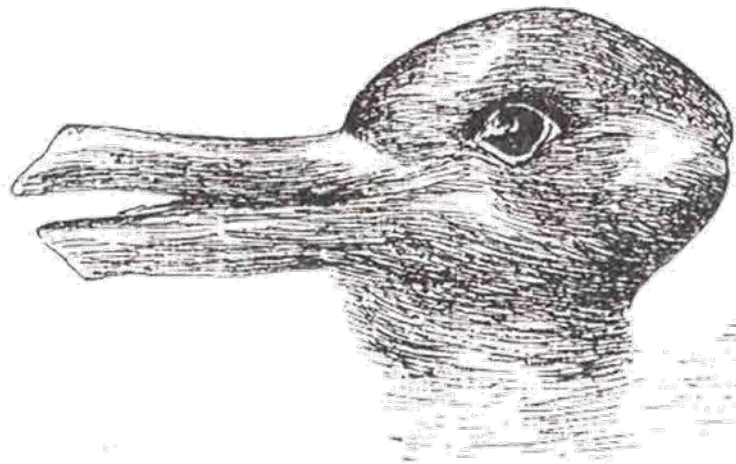
Conditional Pricing Practices: The Use and Misuse of Analogies

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Analogueical Reasoning

- Debate regarding the proper legal construct (predatory pricing, exclusive dealing, tying) is not about putting conditional pricing practices into a “box.”
- Analogueical reasoning is a powerful tool used in every intellectual endeavor. Scientists use it. Economists use it. Judges use it.
- *But how do we tell the good from the bad?*



Mapping

- **Analogical reasoning maps similarities in relational structures, allowing inferences based on relational pattern completion.**
 - Gaining consensus among antitrust lawyers is like herding cats.
 - An electrical circuit is like a plumbing system.
- **A good analogy maps the elements of the analog to the target such that relational structures are preserved.**

Conditional Pricing Analogies

- **Conditional pricing practice analogies focus on the conduct.**
 - Rebates are like price discounts. Predatory pricing involves price discounts.
 - Bundled rebates are conditioned on purchasing multiple products. Tying involves sales conditioned on purchasing multiple products.
 - We therefore infer the same economic effect.
 - We therefore apply the same legal rule.
- **But antitrust rules are a blend of economic, policy, and prudential concerns.**
 - Concerns must map to the target to justify analogous legal rule.
 - If concerns do not map, no inference that same legal rule should apply.

Predatory Pricing

- The economic, policy, and prudential concerns animating the predatory pricing price-cost test:
 - The price-cost test is *not driven by economics*. Above-cost pricing may reduce economic welfare.
 - The price-cost test is driven by *skepticism that predatory pricing is a viable strategy* – “rarely tried, and even more rarely successful” – because recoupment may be thwarted by competitive entry.
 - The price-cost test is driven by *prudential concerns* that the exclusionary effect of above-cost pricing may be “beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting.”

Mapping Predatory Pricing

- **Does the skepticism regarding predatory pricing map to conditional pricing?**
 - Conditional pricing faces no recoupment problem. “Recoupment” is simultaneous.
 - Based on the evidence, we cannot say that conditional pricing practices are “rarely tried, and even more rarely successful.”
- **Do the prudential concerns map to conditional pricing?**
 - Extreme caution is merited in the case of unconditioned price discounts.
 - Price cutting is at the heart of the competition – the “very conduct the antitrust laws were intended to protect.”
 - Difficult to characterize conditional pricing as an irreducible element of competition. Firms have procompetitive alternatives to conditional pricing.
 - Decision-theoretic arguments fail to account for alternatives.
 - Supposed “chilling effect” by other legal rules is not empirically supported.

Conclusions

*Though analogy is often misleading,
it is the least misleading thing we have.*

Samuel Butler



Antitrust by Analogy: Developing Rules for Loyalty Rebates and Bundled Discounts, 79 Antitrust L.J. 99 (2013)