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Commentary

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Publishers face antitrust lawsuit with potential implications for peer review, duplicate submission, and dissemination practices

Gregory Curfman*

JAMA Editorial Office, 330 N. Wabash Avenue, Chicago, IL 60611, United States

*Corresponding author: JAMA Editorial Office, 330 N. Wabash Avenue, Chicago, IL 60611, United States. Email: gregory.curfman@jamanetwork.org

Abstract

Scientific, technical, and medical (STM) publishers follow 3 basic tenets: (1) no compensation for peer reviewers; (2) manuscript submission only to one journal; and (3) no dissemination of manuscripts while under review. An antitrust lawsuit was filed in federal district court against STM publishers challenging these tenets. The lawsuit will have important implications for how STM research is published and will also affect authors and editors. Academic researchers (plaintiffs) who have served as authors and reviewers allege that the 6 largest STM publishers (defendants) have conspired to require authors to abide by the 3 basic tenets. The plaintiffs argue that the publishers have substantial market power, pursue anticompetitive policies, and violate Section 1 of the Sherman Antitrust Act. This article focuses principally on the second tenet, that research manuscripts may be submitted to only one journal. This requirement, which the plaintiffs believe is an antitrust violation, is not a feature of law journals, where multiple simultaneous submissions of manuscripts are a central part of the publishing process. This article will explain how the court may approach the legal analysis in this lawsuit and the important implications of the outcome of this litigation for the scholarly publishing ecosystem.

Key words: scientific; technical; and medical publishing; peer review; antitrust; sherman act; restraint of trade; rule of reason.

Publishers of scientific, technical, and medical (STM) research follow 3 fundamental tenets: (1) there must be no compensation for academic peer reviewers; (2) manuscripts may be submitted only to one journal at a time; and (3) there can be no dissemination of the information while the manuscript is under review. The second and third tenets are together sometimes referred to as the Ingelfinger Rule after the former editor of the *New England Journal of Medicine* who first established the tenets.[1] Authors must adhere to these requirements under threat of having their manuscripts rejected by the journals.

The prohibition against simultaneous submission of research manuscripts to more than 1 academic journal was incorporated into the Recommendations of the International Committee of Medical Journal Editors (ICMJE Recommendations, Section III. D. 1.).[2] The ICMJE's recommendations for medical research manuscripts are adhered to by most scholarly biomedical journals. The ICMJE's rationale for banning duplicate submissions is that there may be disagreement when 2 or more journals claim the right to publish a manuscript and that there may be unnecessary reviewer work when more than one journal undertakes the task of manuscript peer review.

The prohibition against duplicate submission is also the basis of the Integrity Hub of the International Association of STM Publishers,[3] which is the trade organization for STM member publishers. The Integrity Hub is a tool that allows collaboration among publishers to detect duplicate (or more) submission of manuscripts.

While multiple simultaneous submissions of manuscripts to STM journals are disallowed by the policies of the journals and their respective trade organizations, this is not the case for law journals (also called law reviews).[4] Submission of academic law manuscripts to 2 or often more law reviews is standard practice, and law reviews routinely compete with one another in offering acceptances to authors of academic legal manuscripts. After receiving a first acceptance of their manuscript from a law review, authors may contact the editors of other law reviews to which the manuscript was submitted to inquire whether they also want to offer an acceptance. A time limit is imposed for the editors to respond. This competitive process works to the benefit of the authors, giving them the opportunity to select among multiple possible acceptances and enabling earlier publication of their work. Although the editorial practice has been criticized,[4,5] it remains a fixture of law reviews' editorial policies.[6] By contrast, the single submission rule of STM journals gives a distinct advantage to journals with the highest impact factors. These journals are more likely to receive manuscript submissions first, placing journals with lower impact factors at a competitive disadvantage.

The Committee on Publishing Ethics, an organization that promotes ethical practices among scholarly publications, considers duplicate submission of academic manuscripts to be unethical,[7] a principle that conflicts with the standard practice of multiple submissions of manuscripts to law reviews. Given that law journals and biomedical journals have diametrically

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opposed editorial policies regarding multiple submissions, the contention that multiple simultaneous submissions are unethical—and a form of publishing misconduct—may be difficult to defend.

A previous article[6] admonished that the single submission rule of STM journals may be tantamount to a restraint of trade and therefore an antitrust violation based on Section 1 of the Sherman Act.[8] That concern has now materialized as a lawsuit filed in the U.S. District Court for the Eastern District of New York (*Uddin v. Elsevier*).[9] The suit was filed against the 6 largest STM publishers (Elsevier, Wolters Kluwer, John Wiley & Sons, Sage Publications, Taylor & Francis, Nature Springer) and their trade organization (STM). It is not the purpose of this article to take a position in this legal case, but instead to review the facts on both sides and the implications of this lawsuit for publishers, authors, and journal editors.

The plaintiffs are academic researchers who have submitted manuscripts to these journals and served as manuscript peer reviewers. Their complaint comprises 3 constituent claims. The first alleges that the publishers have conspired to set the level of remuneration for volunteer peer reviewers at zero dollars, which the plaintiffs believe is a form of anticompetitive price setting. The second alleges that the publishers have colluded to establish and enforce the single submission rule, which diminishes competition among the journals for the opportunity to publish individual manuscripts. Because each manuscript may be considered by only 1 journal at a time, the journal that receives the first submission of a manuscript is at a distinct advantage. Only if the first journal rejects the manuscript may other journals have the opportunity to consider it for publication. Third, the publishers agree as a matter of policy to proscribe dissemination of the research while the manuscript is under review by the editors of the journal. The plaintiffs allege that all 3 claims constitute restraints of trade. The principal focus of this article will be on the second constituent claim, which alleges that the single submission rule is a restraint of trade in violation of antitrust law. Overturning the single submission rule would have a substantial impact on the process for selecting manuscripts for publication. This article examines the single submission rule and provides an antitrust analysis of this rule, which will be conducted by the court when the case is considered on the merits.

The case is still in its early stages, but if the plaintiffs ultimately prevail in the lawsuit, there will be significant implications for STM publishing. The single-submission rules of the ICMJE and STM would no longer be enforceable. The Ingelfinger Rule, a longstanding fixture of medical publishing, would be countermanded. Authors of scholarly manuscripts would be able to submit their work to multiple journals simultaneously, and STM journals, like law journals,[6] would compete for the opportunity to publish new research. The plaintiffs in the current lawsuit believe that authors would gain more authority in the publishing process, and their research in many cases would be published more quickly. This, plaintiffs believe, would benefit not only the authors, but also the wider academic community, which would gain access to the new research sooner. In the case of medical research, patients could benefit by being able to receive new therapies more rapidly. The STM publishing community might object that the multiple submission scheme would overload the peer review system and make it less efficient, but this objection could be addressed by limiting the number of simultaneous submissions (to 2 or 3, for example) while still preserving competition among journals.

For those readers who want to understand how the case will be decided, the antitrust analysis, which typically proceeds along 3 possible tracks,[10] will be discussed briefly. The first track, designated the per se rule, may be used by the court to conclude that a restraint of trade is such a clear violation that further evaluation is unnecessary, and the case is promptly resolved in the plaintiff's favor. The complaint in the current case (*Uddin v. Elsevier*) does claim a per se violation,[9] but antitrust arguments based on the per se rule are not often successful.[11]

If the case is not resolved by the per se rule, the analysis moves to a second track, referred to as the rule of reason.[10,11] The rule of reason addresses the question: If it is determined by the court that there is an anticompetitive restraint, is it a reasonable or unreasonable restraint? A rule of reason analysis proceeds in several steps that involve burden shifting.[10,11] First, it is the plaintiffs' burden to show evidence that there is an anticompetitive restraint. The plaintiffs in this case believe they have established that the publishers have unlawfully restrained trade according to the 3 claims in their complaint. If the court agrees, then the burden shifts to the defendants (publishers), who must show that there are procompetitive attributes that offset the anticompetitive aspects of the restraint. Finally, the court may have to conduct a balancing test to determine whether the plaintiffs' or defendants' arguments prevail.

A third possible track in the antitrust analysis involves the court taking a quick look at the facts of the case and making a judgment without undertaking a complete rule of reason assessment. This form of analysis is intermediate in complexity between the per se rule and the rule of reason.

It is likely that the court in this case will apply the rule of reason, but whichever approach the court follows in reaching a decision, the court's ruling will have a potentially major impact on the STM publishing ecosystem. Now that the door has been opened for lawsuits to be filed against STM publishers, even if the plaintiffs in the current case do not prevail in the lawsuit, other similar legal actions may follow. Members of the STM publishing community, including authors, journal editors, and publishers, are advised to follow this case, be alert, and be prepared to act on its outcome. STM publishing is now under legal scrutiny—as it has never been before.

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Authorship

The author takes full responsibility for the content of the article.

Notes

1. Definition of "sole contribution". *N Engl J Med*. 1969;281(12):676-677. https://doi.org/10.1056/NEJM196909182811208
2. International Committee of Medical Journal Editors. Recommendations. (2024). https://www.icmje.org/news-and-editorials/icmje-recommendations_annotated_jan24.pdf
3. STM Integrity Hub. A Unified Approach to Safeguard Research Integrity. 2022. https://stm-assoc.org/stm-integrity-hub-launches-new-research-integrity-tool/
4. Friedman B. Fixing law reviews. *Duke Law J*. 2018;67(7):1297-1380. https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3936&context=dlj
5. Boston AJ. The Bizarro World of Law Reviews. 2024. https://ajboston.pubpub.org/pub/k8hjcnac/release/5#nviscr8sgwj
6. Curfman G. Law journals, biomedical journals, and restraint of trade. *J Law Med Ethics*. 2022;50(1):195-199. https://doi.org/10.1017/jme.2022.25
7. COPE. Handling Concurrent and Duplicate Submissions. 2021. https://publicationethics.org/guidance/cope-position/handling-concurrent-and-duplicate-submissions
8. National Archives. Milestone Documents. Sherman Anti-Trust Act (1890). https://www.archives.gov/milestone-documents/sherman-anti-trust-act
9. US District Court for the Eastern District of New York. Case No. 1:24-cv-06409-HG. 2024. https://storage.courtlistener.com/recap/gov.uscourts.nyed.520652/gov.uscourts.nyed.520652.63.0.pdf
10. Lemley MA, Carrier MA. Rule or reason? The role of balancing in Antitrust Law (July 15, 2024). Rutgers Law School Research Paper Forthcoming. https://ssrn.com/abstract=4896529 or https://doi.org/10.2139/ssrn.4896529
11. Hovenkamp HJ. The rule of reason. *All Faculty Scholarship*. 2018:1778. https://scholarship.law.upenn.edu/faculty_scholarship/1778