

# AI and Antitrust – When Does an Algorithm Become an Agreement?

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This post is the first in a three-part series exploring the intersection between AI and antitrust.

The first blog post in this series discusses the U.S. Department of Justice, Antitrust Division's (Division) first criminal antitrust case involving the use of AI. The second part, which will be published next week, summarizes the FTC's and Division's positions on AI collusion and unlawful agreements among competitors, and offers proactive measures that companies can take to avoid government inquiries and/or liability.

## Part I: Antitrust and Algorithms

The Division, which is the agency with authority to prosecute antitrust misconduct, brought its first case involving AI in *United States v. Topkins*, Case 3:15-cr000201-WHO (N.D. Cal. 2015). In *Topkins*, defendant David Topkins sold posters through Amazon Marketplace, Amazon.com, Inc.'s Website for third-party sellers. Topkins conspired with competitors to fix and maintain the price of certain posters. Between September 2013 and January 2014, the companies not only engaged in direct discussions about the price of posters, they agreed to use an algorithm to coordinate their activity. The algorithm used by the defendants collected data to identify the lowest price in the market. The conspiring sellers set their selling price slightly below the market price, which inflated prices and impeded real competition in the market.

In economic terms, the *Topkins* case is relatively small. The affected volume of commerce was a mere \$175,000, and that limited the range penalties under the U.S. Sentencing Guidelines. In 2015, Topkins paid a fine of \$20,000 and received no jail time. In 2016, Trod Limited, one of the companies participating in the conspiracy, paid a \$50,000 fine and agreed to retain KPMG to serve as a compliance monitor. In 2019, defendant Daniel William Aston, part owner of Trod when it was doing business as "Buy For Less," was given a prison sentence of six months but received five months credit for time served in custody in Spain as he awaited extradition to the U.S.

Despite the relatively low penalties, *Topkins* case is considered a watershed case because it was the first time that the Division prosecuted defendants where AI was a tool to further antitrust misconduct. In the years that have passed since *Topkins*, the Division and the FTC have closely scrutinized the intersection between AI and Antitrust as we will see in next week's Part II.

[see AI and Antitrust: When Does an Algorithm Become an Agreement? Part II](#)

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