

**Question 1: Key Missing Issues**

Issues and Points: 27 point baseline (90% of 30 max)

27

<p>1. Failure to address (FTA) question of market definition (we have the ebook readers, the ebook content and then the broader content market (physical books and newspapers and magazines and then online newspapers and magazines); probably need much more detailed information about cross-elasticities of demand to have some sense of market boundaries): -2</p>	
<p>2. FTA whether Nile has market power in ebook market (without any info about offline markets, focus analysis on ebook market; in that market, the Zindle has a dominant position with 85% of the market; should meet the test for monopoly power in <i>Alcoa</i> and the weaker test for market power in SA 1): -2</p>	
<p>3. FTA <i>Kodak</i>-type issues about relationship between device market and aftermarket (we aren't told anything about pricing but <i>Kodak</i> rejects that notion that competition in device foremarket automatically protects against SA 2 monopolization charges in books aftermarket): -2</p>	
<p>4. FTA tying status of internet access for ebook device (a key design difference between Zindle and Ynos Reader is internet access; Zindle comes with bundled wireless, Reader none at all; no tying issue for Reader obviously; should we think of the wireless access ebook reader as a single integrated device (and therefore not subject to tying analysis) or as two separate products; <i>Jefferson Parish</i> suggests focus on question of separate consumer demand – which here would suggest separate products as some people might prefer the Ynos design choice – but <i>Microsoft</i> emphasizes that that test works poorly for evolving product, as is this case here (actual market seems to be moving strongly towards integrated wireless): -3</p>	
<p>5. FTA tying status of ebooks vis-à-vis ebook device (Ynos Reader supports a variety of formats, so weak tying claim; the Zindle will display content only in the NZW format, so consumers are locked into that content; this is very much like the tight machine-consumable ties that we have seen in the past (IBM tabulating machines and cards, for example); this is a variable proportions situation as different consumers will read different number of books, so a standard price-discrimination explanation might explain the tying, though we can't know without more whether that hurts or harms social welfare; unlike the internet access above, the ebooks themselves are easily separable from the device so we will have separate products; as to the basic tying test itself, the Zindle is probably impacting a substantial volume of commerce in a separate market, which triggers per se condemnation under current Sup Ct doctrine): -6</p>	
<p>6. FTA refusal to deal possibilities (the Zindle could support the open document format just as the Ynos Reader does; is Nile's refusal to support that format a unilateral refusal to deal actionable under SA 2?; Ynos clearly would like to support NZW, so no issues there): -2</p>	
<p>X1:</p>	
<p><b>Total Deductions</b></p>	

**Question 1: Additional Points**

1:	
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**Question 1: Final Score**

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**Question 2: Key Missing Issues**

Issues and Points: 27 point baseline (90% of 30 max)

27

<p>1. FTA CEO of WSJ email as an invitation to a group boycott of Nile in violation of SA 1 (this would limit competition among the national newspapers to print only and would ensure that they do not compete with the paper editions through the Zindle): -3</p>	
<p>2. FTA application of group boycott standard as set forth in <i>Northwest Wholesale Stationers</i> (three newspapers likely to hold substantial market power if the market is national, daily written news): -3</p>	
<p>3. FTA NewsNow as joint venture among WSJ, NYT and USA Today (joint ventures have a legitimate procompetitive constructive benefit and competitors need not enter any possible market separately; as <i>Dagher</i> suggests, competitors can legitimately structure competition between them through joint ventures): -4</p>	
<p>4. FTA whether NewsNow should be considered in the FTC/DOJ merger framework (odd, in many ways, to think that relatively permissive joint venture standard should apply to NewsNow rather than tougher merger standards; had the three newspapers entered separately on the Zindle through online subs and then subsequently proposed to merge the subs to create NewsNow would likely face much tougher merger standards): -2</p>	
<p>5. FTA how to assess whether NYT or USA Today accepted WSJ offer (all we have here is parallel action following a joint offer; joint offer tracks letter structure of <i>Interstate Circuit</i> and shouldn't expect to find actual acceptances in writing; that said, NYT and USA Today could have sufficient independent reasons for refusing the inquiry from Nile; without more evidence of actual agreement, hard to see how complaint could be written to survive motion to dismiss standard of <i>Twombly</i>): -4</p>	
<p>6. FTA significance of WSJ 90% counteroffer to Nile (did the WSJ reject its own offer of a group boycott or is this just standard cartel cheating?): -2</p>	
<p>X1:</p>	
<p><b>Total Deductions</b></p>	

**Question 2: Additional Points**

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**Question 2: Final Score**

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**Question 3: Key Missing Issues**

Issues and Points: 36 point baseline (90% of 40 max)

36

<p>1. FTA exclusivity issues in new 30/70 option from Nile (Nile leaves both options in place; Nile isn't insisting on exclusivity but instead is just offering a premium for it; exclusivity is one way that Nile can compete in the ereader/ebook space by having a better product offering; question of exclusivity is determined by the publisher and not Nile; even a firm with substantial market power is allowed to compete to attract contracting parties; key issue under <i>Microsoft</i> to avoid monopoly maintenance is to not leverage existing monopoly in a way that can't be replicated by competitors; query whether Nile is doing that given the size of its installed base of ebook devices): -6</p>	
<p>2. FTA Ynos initial hack of Nile proprietary format (should pose no antitrust issues; Ynos is looking to expand the number of books available on its platform; that is a good thing from an antitrust perspective; this does appear to be a move towards exiting the ebooks market by Ynos but we have no antitrust doctrine that forces them to compete in an adjacent market; problems, if any, would arise under other laws): -3</p>	
<p>3. FTA Nile revamping of proprietary format to block Ynos as an individual refusal to deal (<i>Trinko</i> suggests minimal obligations to deal with competitors; <i>Aspen</i> is based in part on history of prior consensual dealing; brief period of Ynos compatibility with Nile wasn't consensual so shouldn't suffice to trigger <i>Aspen</i>): -4</p>	
<p>4. FTA Nile revamping of proprietary format to block Ynos as attempted monopolization (this is tricky; knowing what happens next, Nile seems to be moving towards monopolizing the ebook market with ongoing competition with Ynos in the device market; but that would be the case anyhow even if Nile hadn't blocked Ynos, as the whole point of Ynos's hack was to have access to the Nile bookstore, suggesting Ynos was looking to compete less in the ebook market itself; that makes the causation issue particularly tricky, though <i>Microsoft</i> makes clear causation goes to remedy and not liability): -4</p>	
<p>5. FTA Nile offer and Ynos acceptance of ebook market exit in exchange for access to Nile ebook store (Nile looks like it is paying a firm not to compete with it in ebooks in possible violation of SA 1; this tracks the analysis in the branded drug/generic cases, except it isn't clear whether we have the patent overlay here as well (what is the exact status of the NZW format?); also might be characterized as monopolization of the ebooks market in violation of SA2): -6</p>	
<p>X1:</p>	
<p><b>Total Deductions</b></p>	

**Question 3: Additional Points**

<p>1:</p>	
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**Question 3: Final Score**

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