

HOPE R. DELLON
415 MAIN STREET, APT 15F
NEW YORK, NY 10044
HOPEDE[REDACTED]

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John R. Read
Chief, Litigation III Section
United States Department of Justice
450 5th St NW
Suite 4000
Washington, DC 20530

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LITIGATION III, ANTITRUST DIV.
U.S. DEPT OF JUSTICE

Dear Mr. Read,

I am deeply concerned about the Department of Justice lawsuit against Apple and five publishing companies (three of whom have now settled on terms that will likely be ruinous for them, as well as for the larger community of authors and readers). Although Eric Holder described the action as "essential in ensuring a competitive marketplace," I believe it will have the opposite effect--allowing Amazon to eliminate even more of the competition in the bookselling world than it already has.

Mr. Holder also announced that "the Department of Justice is committed to ensuring that e-books are as affordable as possible." The complaint alleges that the defendants conspired to raise e-book prices by shifting to the so-called agency model--but I believe there are several assumptions here that bear closer examination.

At the time of the alleged conspiracy, Amazon had a near monopoly on the sale of e-readers and e-books--at least 80--90% of the market. If their e-book prices on popular titles were cheap, they were classic loss-leaders--and were also subsidized by the price of the reading device itself, the Amazon Kindle.

Please consider the following: When the Kindle 2 was introduced in February 2009, it cost \$359, then was reduced to \$299 in July 2009. In October 2009 (possibly in anticipation of the much-rumored iPad?), the price was lowered still further, to \$259. In June 2010, a couple of months after the introduction of iPad, Amazon slashed the price of the Kindle 2 to \$189; then in July they announced the Kindle 3 at \$139 (WiFi) and \$189 (3G). The cheapest Kindle device is now selling for \$79.

This suggests to me that the very cheap e-books that were purportedly sacrificed to agency pricing weren't so cheap after all. Before agency pricing, the least expensive Kindle 2 cost \$259. If a consumer bought a Kindle 2 at \$259 and 20 e-books at \$9.99, he would spend a total of \$458.80--an average total cost per book of \$22.94. If, after agency pricing was instituted and Amazon--keeping competition alive and well--reduced the price of the Kindle to \$189, the device plus 20 e-books at \$12.99 would cost slightly less, or \$448.80 (\$22.44 per book). By August 2010, a \$139 Kindle plus 20 books priced at \$12.99 would cost the consumer \$398.80 (\$19.94 per book); and today a \$79 Kindle plus 20 e-books at \$12.99 would total \$338.80, or an average of \$16.94.

Obviously these figures would vary depending on how many e-books consumers actually bought and/or on variables in the agency pricing of some of those books. But it seems to me that before agency pricing, Amazon was subsidizing the apparently low cost of e-books by charging radically higher prices for the device upon which 90% of them were being read--at little or no genuine savings to the consumer.

In their dealings with print books, Amazon has been notorious for quashing competition with predatory pricing that has driven other booksellers--from the Borders chain to one independent bookstore after another--out of business. You can easily track the prices on Amazon.com: as soon as any other retailer lowers the price of a book, Amazon will lower theirs even more. Is this a good thing for the consumer? Possibly--as long as competitive booksellers remain in business. But if Amazon is the only bookseller left standing, what incentive would they have to keep lowering prices--as indeed they do not on less popular titles that are not offered at discounts elsewhere?

Two years ago, Amazon had nearly secured a monopoly on e-books--partly because the Kindle was the most appealing reading device on the market and partly because Amazon had convinced consumers--and apparently the DOJ--that e-books were more of a bargain than they really were. (Indeed, the terms "e-book" and "Kindle" were used interchangeably by most consumers at that time.) Since agency pricing came in, a more level playing field--which prevents Amazon from instantly underpricing all other booksellers--has dramatically increased competition in the e-book marketplace, and has fostered the proliferation of better and sometimes cheaper e-readers. All this seems to have provided clear benefits to the consumer that go far beyond a narrow fixation on heavy--and transitory--discounts on the bestselling e-book titles.

Still, even if the results turned out to be in the public interest, it is possible that the "Big Six" publishers behaved improperly. I was not privy to any of the conversations they may--or may not--have had about the future of the industry, yet there are two elements in the conspiracy theory that give me particular pause:

1. As I understand it, agency pricing dramatically reduced publishers' revenues on e-books. In their eagerness to establish dominance in the e-book marketplace, Amazon was subsidizing the lowered e-book prices themselves; they were sometimes paying the publisher more than the stated price of the e-book--again, a classic loss leader (except for the fact that the Kindles themselves cost 3 to 4 times as much as they do now). Since Amazon's terms were favorable to publishers during this period, the only way it would make sense for them to prefer agency pricing would be not to restrict but to broaden the competition that the DOJ seeks to preserve. Again, this is indeed what happened: a proliferation of devices and retailers that has greatly benefited the consumer, who has suffered only the loss of a few artificially lowered prices on a narrow range of titles (which was accompanied by much higher prices for the only device they could be read).
2. Nevertheless, did the publishers conspire with each other in those "private rooms in upscale Manhattan restaurants"? (Gracious! Would it have been better if they had met in cheap coffee shops or dark alleys?) Does anyone know precisely what they said at those dinners--or is it simply assumed that any conversations of peers and/or friends who are in the same industry must have nefarious purposes? And if the publishing heads all

agreed to adopt the agency model at the same time, why did only one of the companies do so--and have their "buy" buttons removed from Amazon--for about a week?

Moreover, it seems obvious beyond any need for collusion that there would be long-term benefits to supporting the development of a wider range of e-readers and e-book retailers. If there are dark storm clouds gathering and six people--who have met for dinner and/or spoken on the phone recently--all show up with umbrellas, did they need to "collude" to do so?

Meanwhile, I note that gas prices seem to rise in mysterious tandem at every pump, while the banking and investment industries continue to engage in dubious practices that threaten the larger economy. Is it really the best use of the DOJ's resources to throw the book, as it were, at the struggling publishing industry? As David Carr put it in the *New York Times* on April 15:

The Justice Department finally took aim at the monopolistic monolith that threatened to dominate the book industry. So imagine the shock when the bullet aimed at threats to competition went whizzing by Amazon — which not long ago had a 90 percent stranglehold on e-books — and instead, struck five of the six biggest publishers and Apple, a minor player in the realm of books.

That's the modern equivalent of taking on Standard Oil but breaking up Ed's Gas 'N' Groceries on Route 19 instead....

"If we are fixing prices for our benefit, we don't seem to be very good at it," said one publishing executive...

Carr also observes, "Now Amazon has the Justice Department as an ally to rebuild its monopoly and wipe out other players." As they say in the murder mysteries that I like to read but may ultimately be able to buy only from Amazon at whatever price they choose to demand: *Cui bono?*

Finally, I strongly endorse the words of the president of the Author's Guild, Scott Turow: "The irony bites hard: our government may be on the verge of killing real competition in order to save the appearance of competition." Like Mr. Turow, I beg you to reconsider this case, in order to preserve the increased competition that has entered the e-book marketplace in the past two years. Draconian penalties against publishers might benefit Amazon, but not authors and ultimately the American reading public.

Sincerely,



Hope Dellon

cc: President Barack Obama