

**From:** [Howard Eisenberg](#) [areisenb[REDACTED]]  
**To:** [Read, John](#) [John.Read@ATR-USDOJ.gov]  
**Subject:** Fwd: United States v. Apple, Inc., et al., 12-cv-2826 (DLC) (SDNY). Comments on Proposed Final Judgment as to Defendants Hachette, HarperCollins and Simon & Schuster.  
**Date:** Monday, June 04, 2012 7:41:20 PM

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-----Original Message-----

From: Howard Eisenberg <areisenb[REDACTED]>  
To: john.read@usdoj.gov  
Sent: Mon, Jun 4, 2012 7:31 pm  
Subject: United States v. Apple, Inc., et al., 12-cv-2826 (DLC) (SDNY). Comments on Proposed Final Judgment as to Defendants Hachette, HarperCollins and Simon & Schuster.

Your Honor:

As an author of seven books and father of a best-selling author, I am deeply disturbed by the Justice Department's proposed settlement of its lawsuit alleging that Apple and a handful of large publisher colluded in introducing agency pricing for e-books.

This is a complete misreading by Justice Department lawyers of "the public interest." Indeed, it will allow mega-giant Amazon, which already almost totally monopolizes the on-line book market, to turn once flourishing book stores from the vibrant corpus of publishing distribution into a lifeless corpse.

That will leave Amazon striding alone on the battlefield and leave authors like myself at their competition-free mercy to cut royalties as they have cut out book sellers. Since they publish books as well, that will leave authors even further in their thrall, limiting public knowledge as well as public access.

Thank you for taking public comment.  
Sincerely (and somewhat fearfully),  
Howard Eisenberg  
144 W. 80th St.  
New York, NY 10024  
[areisenb](#)[REDACTED]

-----Original Message-----

From: The Authors Guild <[staf](#)[REDACTED]>  
To: areisenber <[areisenb](#)[REDACTED]>  
Sent: Mon, Jun 4, 2012 5:17 pm  
Subject: The Justice Department's E-Book Proposal Needlessly Imperils Bookstores; How to Weigh In

*Feel free to forward or comment. [Here it is at our blog.](#)*

This summer, U.S. District Judge Denise Cote will review the Justice Department's proposed settlement of its lawsuit alleging that five large publishers and Apple colluded in introducing agency pricing for e-books. Judge Cote's task is to determine whether the proposal is in the public interest. We encourage you to submit your own comments on the settlement, which the Tunney Act requires the Justice Department to read, consider, address, and deliver to the court. We'll get to the mechanics of submitting comments (it's quite simple) in a moment.

First, here's our view, in a nutshell: the proposed settlement is not in the public interest, because it needlessly imperils brick-and-mortar bookstores while it backs an online monopolist and discourages competition among e-book vendors and e-book device developers. The settlement needs to be rethought, and substantially modified.

Agency pricing, in which the e-book vendor acts as the publisher's "agent," with no authority to change

the retail price of the book, was a reaction to a specific anticompetitive provocation – Amazon had been routinely selling frontlist e-books at below cost. Amazon's predatory tactic wasn't scattershot; it was (and remains – Amazon continues to deploy this weapon with the titles of non-agency publishers) highly targeted. When not constrained by agency pricing, Amazon chooses to absorb substantial losses on e-book editions of a specific subset of new hardcover books: those that are most likely to be stocked by traditional bookstores.

The Justice Department's proposal, which would permit Amazon to resume using the frontlists of three major publishers for anticompetitive purposes, appears to be based on a fundamental misunderstanding of the market for trade books, particularly the interplay between the online market for print books and the e-book market. Amazon, which has long commanded 75% of the online market for print books, clearly understands that relationship well. The story of the introduction of the Kindle is largely a story of Amazon exploiting its dominance in the online market for print books to gain control of the e-book market.

### **Frontlist, Backlist, and the Rise of Online Bookselling**

To understand the U.S. market for trade books, one needs to understand how online retailing has radically altered the competitive landscape of bookselling.

The literary marketplace has traditionally been divided into two broad submarkets: frontlist (the season's new books) and backlist (everything else). Retailers faced the most competition in selling frontlist books – new hardcovers and new paperbacks were the most likely titles to appear on the shelves of stores (bookstores, airport newsstands, and big box retailers, among others) across the country. Backlist books were far less likely to be on store shelves, except for the relatively rare "core backlist" titles that had become steady sellers (*To Kill a Mockingbird*, *Green Eggs and Ham*, *What to Expect When You're Expecting*, for example). "Deep backlist" books, a subcategory of backlist books that were sold almost exclusively through special orders or at used bookstores, were the least commercially available books.

With the rise of online bookselling, these categories still largely existed, but online booksellers, with endlessly long bookshelves made possible by inexpensive warehouse space and on-demand printing technology, came to dominate the market for backlist and especially deep backlist titles. For nearly all backlist books, representing roughly 90% of all in-print titles, the online market had *become* the market, and Amazon owned the online market. The deeper one traveled down the backlist, the more complete Amazon's dominance. Amazon had even gained control of the furthest end of the long tail – out-of-print books – by buying up the major competing online used bookselling networks.

### **Online Print Book Dominance Dictates Amazon's E-Book Tactics**

From Amazon's perspective, as it prepared to launch the Kindle, the print book market had two components: the part in which it faced significant competition (the market for new books and core backlist titles) and the part in which it didn't (everything else). Amazon would leverage its online print book dominance to conquer the e-book market, protecting its profits on 90% of titles by focusing its predatory tactics on the other 10%, the books that were most likely to be on store shelves.

Brick-and-mortar bookstores were in the crosshairs, jeopardizing vital participants in the literary ecosystem. Bookstores remain critical showrooms for works by new or lesser-known authors and for entire categories of books, such as children's picture books. Marketing studies consistently show that readers are far more open to trying new genres and new authors when in a bookstore than when shopping online.

It seems to come down to browsing versus searching. Brick-and-mortar bookstores are optimized for browsing; the stores' "search engines" – their information desks – aren't what draw in customers. A reader browsing the shelves and tables of a bookstore is often hoping to discover something unexpected. Virtual bookstores, on the other hand, are optimized for search – browsing isn't the attraction. Readers behave accordingly, tending to use virtual bookstores as search engines to find books they've discovered elsewhere.

Publishers were aware of much of this and that the health of brick-and-mortar bookstores relied heavily on frontlist hardcover book sales, but Amazon persuaded them to break with established practice and release books in digital form at the same time they released them as hardcovers. The protection for the hardcover market (and brick-and-mortar bookstores) was implicit: Amazon agreed to pay the same wholesale price for e-books that it did for hardcovers.

Things didn't work out. As Amazon launched its Kindle in November 2007, publishers learned that it would be selling a long list of frontlist e-books at a loss. As Scott Turow said in his letter to members on March 9th:

It was as if Netflix announced that it would stream new movies the same weekend they opened in theaters. Publishers, though reportedly furious, largely acquiesced. Amazon, after all, already controlled some 75% of the online physical book market.

Amazon quickly captured the e-book market as well, bringing customers into its proprietary device-and-format walled garden (Sony, the prior e-book device leader, uses the open ePub format). Two years after it introduced the Kindle, Amazon continued to take losses on a deep list of e-book titles, undercutting hardcover sales of the most popular frontlist titles at its brick and mortar competitors. Those losses paid huge dividends. By the end of 2009, Amazon held an estimated 90% of the rapidly growing e-book market. Traditional bookstores were shutting down or scaling back. Borders was on its knees. Barnes & Noble had gamely just begun selling its Nook, but it lacked the capital to absorb e-book losses for long.

The publishers had made a huge mistake.

### **Taking Aim at One Percent**

Even as it targeted the 10% of titles sold in bookstores, Amazon would be selective. Amazon could get the most bang for its buck by taking aim at the narrow band of books on which its brick-and-mortar competitors were most dependent – those new titles from larger publishers that bring readers into bookstores. Once in the stores, a reader might choose to purchase other books within the list of 10% of titles in which Amazon faced competition: it was best, from Amazon's perspective, to keep readers out of bookstores and safely online, on Amazon's turf.

So Amazon's predation focused on a slice within a slice of the literary market. Amazon would sell at a substantial loss the electronic versions of select new hardcovers: the new bestsellers, near bestsellers, and might-become bestsellers from commercial publishers. Our best estimate was that Amazon's predatory tactics focus on less than one percent of in-print titles.

Amazon's highly selective predation not only conquered the e-book market, it paid immediate dividends in the print book market. Marketing studies confirm what Amazon no doubt guessed: readers who buy Kindles tend to dramatically shift their print book purchases to Amazon.

The strategy was brilliant, a predatory feedback loop in which online print book dominance allowed Amazon to absorb selective losses to gain control of the e-book market, which in turn gave Amazon an ever-larger share of the print book market. It was a tactic Amazon could continue indefinitely, as it offset its losses on the most recognizable new e-books by taking profits on e-books by lesser-known authors, on backlist e-books, and on its growing share of print book sales.

### **After Two Years of Predation, Agency Pricing Opens the E-Book Market**

For more than two years Amazon's predatory pricing went unchecked. Then, in January 2010, one month after B&N shipped its first Nook, Steve Jobs introduced Apple's iPad, with its iBookstore and its proven iTunes-and-apps "agency model" for selling digital content. Five of the largest publishers jumped on with Apple's agency pricing, even though it meant those publishers would make less money on each e-book they sold. Again, from Scott Turow's March 9th letter:

Publishers had no real choice (except the largest, Random House, which could bide its time – it took the leap with the launch of the iPad 2): it was seize the agency model or watch Amazon's discounting destroy their physical distribution chain. Bookstores were well along the path to

becoming as rare as record stores. That's why we publicly backed Macmillan when Amazon tried to use its online print book dominance to enforce its preferred e-book sales terms, even though Apple's agency model also meant lower royalties for authors. Agency pricing brought real competition, steadily loosening Amazon's chokehold on the e-book market: its share fell from 90% to roughly 60% in two years.

Agency pricing allowed cash-strapped B&N to make substantial investments in e-readers with the reasonable hope of earning a return on those investments. Customers are benefiting from the surprisingly innovative e-readers those investments have delivered, including a tablet device that beat Amazon to the market by a full twelve months.

Authors in Amazon's Kindle Direct Publishing program benefited as much as anyone, as Amazon more than doubled its royalty rates to match Apple's agency model royalties.

Most importantly, agency pricing has prohibited Amazon from using the most popular new books from six large publishers to undermine the economics of bookselling. Agency pricing has given bookstores a fighting chance.

### **The Proposed Settlement Allows Amazon to Resume Its Predatory Practices**

The Justice Department's proposal undoes all of this. Its settlement with three large publishers would require the publishers to allow Amazon (and other e-book vendors) to sell e-books at below cost, so long as the vendors don't lose money on the publisher's entire list of e-books over a 12-month period. Amazon, a far richer and more powerful corporation than it was even two years ago, has every motivation to revert to its prior ways – it will take losses on the books that bring customers into bookstores, and make it back on less popular and backlist books. It will lose money on the one percent, and make it back on the rest.

The Justice Department is sanctioning the destructive, anticompetitive campaign of a corporate giant with billions in cash and boundless ambitions. The situation is bizarre, and without precedent, to our knowledge: the Justice Department is intervening to help entrench a monopolist.

We encourage all authors to speak up, and let the Justice Department know that bookstores play a vital role in our literary ecosystem, and the public has a strong interest in protecting them from predation.

Comments must be submitted in writing by June 25, 2012.

You may send comments by regular mail or e-mail to:

John R. Read, Esq.  
Chief, Litigation III  
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[john.n.read@usdoj.gov](mailto:john.n.read@usdoj.gov)

Please include a reference to the litigation:

United States v. Apple, Inc., et al., 12-cv-2826 (DLC) (SDNY). Comments on Proposed Final Judgment as to Defendants Hachette, HarperCollins and Simon & Schuster.

All comments received will be considered by the Justice Department, published in the Federal Register, and filed with Judge Cote.

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