

23 June 2012

John Read, Chief, Litigation III Section
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Dear Mr Read:

We are writing with regards to the Department of Justice (“DoJ”)’s findings and proposed settlement with Simon & Schuster, Hachette and HarperCollins on the DoJ’s civil suit regarding the “agency model” of electronic book (“e-book”) pricing and the charge of collusion, price-fixing, anti-competitiveness and harming the public interest and consumers.

We write as an independent bookseller, not associated with Apple or iTunes and associated with amazon.com and the publishers as a resale customer. We also write as representatives of the current and future reading public.

We do not know the intricacies of the applicable laws, but we do not doubt that the DoJ has seen some interpretation of the activities and facts to justify the complaint.

However, we take issue with two points that Attorney General Eric Holder had mentioned in the DoJ’s news release of 11 April 2012.

- a) That the DoJ’s efforts represent its “latest progress in protecting American consumers from anticompetitive harm, ensuring fairness in the marketplace, and making certain that cutting-edge technologies are available at the lowest possible price” and
- b) That the steps proposed in the settlement “are appropriate – and essential in ensuring a competitive marketplace.”

We respectfully submit the following suggestions to improve any settlement that might address the concerns of all parties – DoJ, publishers, readers who want to buy e-books, amazon.com and non-amazon.com retailers:

- a) Allow publishers to retain the right to set e-book release schedules and that e-books in all formats come out at the same time so that amazon.com and Kindle do not have an unfair advantage over non-Kindle resellers of e-books,
- b) Allow publishers to continue to set e-book list pricing on which amazon.com and everyone else can discount and the list price must be posted along with the discount or offered price, and ultimately,

c) Require that amazon.com provide access for owners of Kindle devices to be able to purchase non-Kindle formatted e-books, download and read them on their Kindle devices.

To elaborate on these recommendations:

Do you at DoJ really believe that it is for the consumers' interest – short-term or longer-term – that amazon.com wants to have the right to sell any if not all e-books on its Kindle platform at whatever pricing its marketing strategists have decided is the “right price,” usually lower than the publisher's list price? Would amazon.com be “competing” on the basis of price in order to ensure a competitive marketplace?

The answer is primarily no. Amazon.com undercuts its competition on price to gain a competitive advantage and ultimately, to become such a dominant force in the industry – publishing and bookselling – as to become a virtual (literally and figuratively) monopoly in that industry, driving out competition like independent booksellers, Barnes & Noble and other retailers, and enabling it to dictate terms (not just pricing but also selection and royalties) to its suppliers, to authors and to its customers.

Actually, amazon.com is well on its way to its anti-competitiveness, because most consumers do not understand the nature of a Kindle e-book. Many customers have come into the store bearing a Kindle e-book reading device which they have purchased or they had received as a gift, wanting to buy an e-book from us, just like they have purchased printed bound books. Prior to our explaining this, they or their generous giftgivers did not know that Kindle is not simply another way to hold a book, like hardcover binding versus trade paperbacks or even as audiobooks on compact disc versus MP3 media. To the dismay of many readers, Kindle is not yet a name for a product that can be used generically to represent all devices to read electronic books, like "Kleenex" for facial tissues or "Thermos" for vacuum storage containers or "PC" for desktop computers. And unlike any brand of compact disc player which plays any brand of compact disc, they cannot simply download any e-book from any bookseller on a Kindle and read it. Why? Kindle is PROPRIETARY software which creates a system for a user TO BUY quickly and easily ELECTRONIC BOOKS FROM AMAZON.COM AND ONLY FROM AMAZON.COM and then, reading them. Why? Amazon.com is a retail store. Its goal is to have a consumer exchange funds for products and services sold by amazon.com.

One Kindle-owner once told me that he reads lots of free Google e-books on his Kindle device. He believes that because amazon.com through Kindle's direct internet connection made it easy to buy from amazon.com, other Kindle users are either not tech savvy or eager enough to bypass that easy route. Maybe he is right about the majority of Kindle users being lazy or inept, but that is not technically why; it is because the operative word is "free." Barriers within the Kindle programming (DRM) code will allow a user to read free books, but none purchased from anywhere else but amazon.com.

Yes, "Kindle" is the name of an electronic reading device, but one can download “Kindle” onto an iPhone, an Android tablet and even a desktop computer. Amazon.com has had to create compatible software or bridges to allow buyers of amazon.com/Kindle e-books to read them on

something other than a Kindle device. Why? Amazon.com is a retail store. Its goal is attract and retain as many customers as possible and it would not be able to do so if its e-books can only be read by an exclusive (albeit huge) club of people who own Kindle devices. Thus, once the programming obstacle to buying and reading a Kindle e-book on a non-Kindle device is gone, as long as a consumer has a reason to come to amazon.com in the first place, amazon.com has a reason for him to buy all of his books, regardless of the price, in one place. Amazon.com does not need to undercut on the price of every e-book, just enough titles for the consumer to come look and then, shrug his shoulders and stay to buy the other e-books on his list at possibly the same price he could have bought it elsewhere. It is not “bait-n-switch.” The tactic is not illegal, but it is not competitive, because a consumer with a Kindle device cannot decide to go to a non-amazon.com website, like www.booksonfirst.com or www.bn.com or iTunes and buy e-books to load onto his Kindle, regardless of the price.

Kindle is hardly the VHS technology in a world that Betamax opened up for the small screen recording world, in which VHS technology was made available to everyone and consumers (and ultimately filmmakers, television stations and all the actors, et al.) benefited. If we want to talk about a level playing field and a competitive market, we must also discuss how owners of Kindle devices can buy the same title in a non-Kindle e-book format at the same price (or lower) as sold on amazon.com and be able to read it on a Kindle device.

To return to more immediately available remedies for supposed price fixing, let us imagine what might have happened to lead to this situation. Like with most products, publishers set a list price on a printed bound book and then, sell it for some percentage of that list price to wholesale and retail booksellers. As with almost any vendor, there are quantity discounts. The more the customer buys, the bigger the discount. Also, if the vendor can be guaranteed that none of the product is coming back, so it will not have to return any money or find a way to deal with the returned product, it might give the customer a bigger discount. This is nothing new to anyone who has been in the business of making, buying and selling. The wrinkle comes in when a big resale customer says to the vendor/publisher, "I meet all those criteria -- I will buy lots and lots and I will not return them. I will even save you money, because I will do the 'printing' and the storage and the delivery." The publishers thought, this is great -- Deal! There was – and probably still is – a vast gulf of understanding about programming and sale of right of access versus sale of a hard good, but that was not amazon.com's problem. The publishers did not even make the mistake in perceiving that e-books were another format (which, remember, they are not), let alone a turning point in publishing. The publishers did not realize that if they wanted to retain control of their product – a published title, it had to retain the right to set the rollout schedule and list price.

With those controls relinquished by the publishers, amazon.com made available for retail sale a Kindle e-book title at the same time that the hardcover title was released at an offered price which was half of the price of the new hardcover. We use “offered price,” because no other list price was mentioned. We are not saying amazon.com did its usual discounting (e.g., on the new hardcover, it might say, list is \$25, but amazon.com price is 50% off at \$9.99); it simply advertised/posted the price of the new title’s Kindle format at a low price. Not only is this misleading and confusing the consumers to the actual value of the e-book, but would make another retailer look like it is price gouging if it offered the (non-Kindle) e-book at full list or

even less discounted price. This would seem to a consumer even more reason to buy the Kindle e-book at amazon.com, because another internet reseller could hardly say that the price of a non-Kindle e-book might be higher because the quality of the product is higher or the product is locally made or installation is included, like one can with melons or chainlink fences. What kind of competitive marketplace do we have in this situation?

One of the results of e-books coming out at the same time as a printed bound version is lower overall profits for everyone and thus, lower advances for less-than-big-name authors. Why should e-books come out at the same time as hardcovers? Do not say this is hurting the consumer. How often do you see a mass market ("pocket") paperback become available at booksellers for \$7.99 at the same time the hardcover copy of that same title comes out priced at \$25? Yes, that's right, hardly ever if never. Authors get advances based on how well their book is anticipated to sell: how many copies and at what margin, but that is not the only reason why roll-outs are staggered. Having one's book be printed in hardcopy is an honor for the published author. It is saying to the world: this work of art or immense culmination of diligent research has great keeping value. But many, many titles come out in hardcover, never to be seen again, except on dusty clearance bins during sidewalk sales. That's when possibly a mistake was made and possibly, a slightly later publication as an e-book would revive the title, versus dying two deaths at the same time. On the other hand, many, many titles live their entire lives as "pocket" paperbacks, until some seven or nine publications later, when the author hits it big and all these previous books either beloved to tatters or sitting neglected at someone's summer cabin rental get a new life breathed into it by being re-published as hardcovers. That could well be an argument (like a current runaway bestseller we could name) for a novel to be published as an e-book first and then, with the demand evident, have an extended life as a printed bound book.

If part of the agreement would include the publishers being able to negotiate the timing of when e-book formats of a brand new title becomes available (and that they become available in all e-book formats – or better yet, available in a universally accessible format – at the same time), this will go a long way in keeping the market competitive.

With a set e-book list price, amazon.com can continue to do its thing by heavily discounting the e-book just like it had been heavily discounting bestselling hardcovers, but it needs to say that the e-book is really a certain list price and that amazon.com is discounting it x% or y%. If there is a clause in the agreement which requires the publishers' list price to be posted along with discounts, then this would go a long way to providing consumers with a measurement or benchmark on what is the perceived value of any title.

In summary, we respectfully submit the above-elaborated recommendations to improve any settlement that might address the concerns of all parties – DoJ, publishers, readers who want to buy e-books, amazon.com and non-amazon.com retailers:

a) Allow publishers to set e-book release schedules which it would negotiate with writers or decide based on some arcane but hopefully sound marketing logic and that e-books in all formats come out at the same time so that amazon.com and Kindle do not have an unfair advantage over non-Kindle resellers of e-books,

b) Allow publishers to set e-book list pricing on which amazon.com and everyone else can discount and the list price must be posted along with the discount or offered price, and ultimately,

c) Require that amazon.com provide an opportunity for owners of Kindle devices to be able to purchase non-Kindle formatted e-books, download and read them on their Kindle devices.

I hope that all concerned will consider these recommendations which in reality would do much more to protect American consumers from anticompetitive harm, ensure fairness in the marketplace, and make certain that cutting-edge technologies are available at the lowest possible price: Let us not remedy one alleged trust-like situation with another.

Sincerely,

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cc: Dan Cullen, American Booksellers Association