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22 June 2012

John Read
Chief, Litigation III Section
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Re: Comments on Proposed Consent Decree in *United States v. Apple, inc. et al*, 77 Fed Reg/ 24518 (April 24, 2012)
Dear Mr. Read:

I am writing to you as someone who has spent his adult life working in the book business, as a bookseller in one store in one place for that whole period. During this time this industry—publishing and bookselling—has been undergoing tremendous change. I don't remember when it was not confronting some crisis or other. I write from the perspective of a local, independent bookseller, who has survived all those changes, but who is worried, for the first time in this lifetime of crisis, that the current changes are a very real threat to the survival of my store, and the hundreds of other independent bookstores across the country. That threat is embodied by what I perceive to be the predatory and monopolistic practices of Amazon.com. The proposed settlement between the three publishers and the Department of Justice is one manifestation of that threat, and is the reason I address these comments, in opposition to the settlement, to you. My comments are not brief, but I believe strongly that the background I provide is essential to understanding why I am convinced this lawsuit, and the settlement, is a grave mistake.

I started in the book business in 1975 as a member of a small group of avid readers and activists with no prior business or retail experience who purchased a small, independent store in Buffalo, New York, with the idea of turning it into a literary and cultural center specializing particularly in the kinds of books then not readily found on the shelves of the bookstores of that time—literary fiction, small press publications, writings from the political and cultural fringes, writings from the past and from other cultures not seen as relevant--books generally outside the mainstream. I've been working here ever since, learning the business, selling books to the citizens in my community, and observing and participating in the larger business of publishing. I speak impressionistically in these comments, but mine are the deep impressions of an active presence engaged over a long period of time.

At the time I began, there were between 40 and 50 large general trade publishers from whom we ordered books, along with a slew of smaller ones, and an even bigger slew of tiny ones (this was the era of the offset printing revolution, when it became possible for people to publish on a small scale without a huge capital investment). The era of consolidation in publishing had begun a decade earlier, but no one publisher of the large ones had gotten vastly larger than any of the others, and I doubt that as a group they controlled more than half of the trade book market. At this moment, there are six big publishers in the U.S. industry, and their books comprise about 80% of the trade retail market. [Competition among fifty has shrunk to competition among six, market share has nearly doubled, and no anti-trust actions have ever been taken against these companies. Now five of the six have been indicted for allegedly conspiring with a company that was about to enter a new part of the book business—e-books—to combat a retail entity which at the time of this supposed conspiratorial activity controlled 90% of the retail market for e-books. I'm just an ordinary citizen, and an interested observer, but something is wrong in this picture.]

Thankfully, real competition in the publishing world has continued, and grown, for the remaining 20% of the retail trade book business, and stores like mine have managed to survive, not without difficulty and considerable challenges, by focusing much of our energy and efforts on that section. We have survived because we have provided the reading and book-buying public, our customers, citizens who read and purchase books—unfortunately reduced over the past 40 years to the reductive moniker “consumer”—with a place to see, explore, talk about, and purchase the less dominant literature, and thought, of our time and culture, and of earlier ones. Interaction with customers is the mainstay of our business model—a relationship built on community, shared interests, immediate contact, as well as on the commercial transaction that authorizes our survival. In the parlance of the moment, we curated (and continue to curate) showrooms for the new, the old, the under-appreciated, the under- and un-represented, the different, the challenged and the challenging, the difficult, the exotic, the overlooked, the unorthodox, the diverse, along with whatever is the mainstream of the moment. We have helped to keep alive, in some cases to bring back to life, the tributaries that feed the mainstream, that refresh and restore it. [We're told this lawsuit and this settlement have to do with innovation. It is from the margins, from these edges, that innovation arises—without independent bookstores to nurture them, the innovative spirit and the waters from which it typically springs will shrink, if not dry up entirely.]

A good number of us have survived the challenge, over the past twenty years, of the rise (and apparent fall) of the corporate chain superstores, who modeled their efforts on what they perceived, during the 1980s, as our strength—the breadth and diversity of selection. They have failed where we succeeded because they mimicked the surface of what we do, but neglected to recognize the structure of committed, knowledgeable staff and customer service skills that held it up and made it work. At height of their success, the two dominant corporate chains ended up controlling about a third of the retail trade business between them—before their growth there had been no single dominant player in the bookselling eco-system. Rarely was there a peep during that time about monopoly or

anti-trust issues, despite the rapid decline in the independent share of the market during the 90's.

Later in the 90's came Amazon.com, billing itself as the store that had every book (despite the fact that it had almost no inventory at the start), at the best prices in the market, and available everywhere via this new way to shop, the internet. Invisible, opaque and very secretive, and yet the best of all possible worlds—a diversity of selection to outstrip the independent stores, prices to match and beat any competitor, and accessible to anyone, anywhere (excluding, of course, those without computers and/or access to this new thing the internet—at the moment of Amazon's founding, well over half the population; still a significant portion of the population). Any consumer (with the above exclusion) had access, and every one of them became nothing but a consumer, an economic cipher, a bit of data to be mined, with none of the shared human and community relationship that typified customers in the traditional retail marketplace.

Marketing itself as the new, the better, the best, with millions of dollars of investment capital behind it, Amazon, while losing billions of dollars, began to capture market share, most often through the ancient and elemental tools of the monopolist, not through innovation—particularly by selling books at near or below cost (such predatory practices were illegal in the past, but have yet to be challenged, in Amazon's case, by the Justice Department or other legal bodies), by failing to collect sales tax on most of their sales, claiming not to have nexus in most states while selling goods through affiliates in almost every state, and by subsidizing losses in its book business with other, unrelated parts of its business (another shady practice overlooked by those who should be paying attention). Its supposed innovation was not technological—it simply brought traditional, aggressive sales methods to a new venue. In the old world of monopoly building, companies typically tried to increase market share by such tactics only after their success and build up of capital made it possible—in this case, the capital flowed in from technologists eager to construct a competing ground for business, well before the company had made a dime. What was new was the channel, a totally manufactured, artificial “river,” built from scratch, sans tributaries, sans rivulets, without regard to landscape, to geography, to topography, to the nuances of the environment from which rivers typically spring. The tactics were, and remain, age-old.

By the time it introduced the Kindle, its e-reading device, in 2007, Amazon had already grabbed nearly 20% of the trade retail book business (five years later that has grown to nearly 25%). By selling the proprietary Kindle device at cost, or at a loss, and by selling best-selling books to its customers at a loss--generally at a price \$5-7 less than its cost)--Amazon in a very short period of time gained control of about 90% of the retail trade e-book business. It gained this share not by technological innovation (e-readers were not new, and the only revolutionary aspect of the Kindle was that Amazon made the device and format proprietary so anyone with its reader could purchase e-books from on one but it) but again by a timeworn tactic—discounting, again to a price well below its cost. In the case of selected e-books—typically bestsellers and books by well-known established authors (this is important as regards the DOJ lawsuit and settlement, which falsely claims, using only bestsellers as their evidence, that adoption of the Agency Plan by the

publishers and Apple led to a price increase for consumers)--Amazon put forth (while claiming that this was a consumer demand and decision), that e-books should sell for no more than \$9.99, less than the price of both hardcover and trade paperback books. Publishers, knowing that their cost of producing e-books, aside from the printing costs, is not significantly less, were pricing e-books using their traditional model, and selling them to Amazon at traditional terms of sale. From what I can tell, prior to the introduction of the Kindle, there was no public clamor for e-books, or a general perception that they should be cheaper than their printed counterparts. It was Amazon's marketing of the Kindle device, and claim that the prices for e-books should be less, that fueled the apparent consumer interest in lower priced e-books. It is way too early in this process, DOJ lawsuit or no, to determine if consumers are an ultimate beneficiary of this set of actions, as the lawsuit effectively claims, but to ignore that this was initiated by a commercial enterprise whose ultimate goal is company profit and the return on investment of its shareholders, rather than by some neutral innovations of technology, is absolute folly. (And I leave aside here any discussion of when the law decided that the determinant issue of benefit to consumers is the lowest price, and when the law decided that the consumer, rather than the citizen, was the dominant defining characteristic of the persons who make up this society—both issues that are in fact a fundamental part of this discussion. Despite a common belief to the contrary, laws are not static and unalterable—jurisprudence is an interpretive activity involving evaluation, argument, and judgment.)

Publishers, particularly the so-called big six, who up until the time of the introduction of the Kindle, had tolerated and, from my perspective, enabled some of Amazon's predatory pricing practices and demands for special treatment, clearly began to get worried that they were enabling a monopoly, and that that monopoly was no longer a customer, but a competitor. They realized that something had to change. I have no idea of whether these publishers "colluded" or not, in the manner alleged in the DOJ lawsuit (and from what I have observed over my career of the behavior of the big Six publishers, I seriously doubt it—they tend to copy each other, not work hand in hand). But I do know that if it was as clear to them as it was to me, from a vantage far more privileged than my tiny corner of the book eco-system, that Amazon was no longer a collaborative retail business partner but a serious competitor threatening their profitability and their existence, they were also going to see the same potential solutions—they had to reclaim the ability to control the pricing of e-books, particularly the best-selling ones which have traditionally driven profitability and allowed them to publish a broader range of material.

Generally, producers (manufacturers, publishers) set the prices of their products based on their costs, desired profit margins, etc. and retailers purchase items at a discount from the suggested retail price, or at a net price set by the publishers from which they would set a retail price that allowed them a margin sufficient for survival and profitability. Amazon, taking its cue from other mega-retailers like Wal-Mart, is, it seems to me, looking to upset that model by setting prices itself and forcing suppliers to meet its pricing demands, generally on an exclusive basis. Once the largest retailers begin to set prices, smaller ones, without the economic clout and wherewithal, have a much harder time competing--

another monopolistic practice conveniently ignored by those who are supposed to monitor such issues.

Publishers, I think, had two choices—no longer supply their books to Amazon at all (a difficult decision given Amazon’s growing share of the print book market, though it would have been my choice), or adopt a model that gave them greater control over the pricing (and its relation to their costs) of their e-books. The agency model, an accepted legal business model, was an obvious answer, again even to people like me far from the corridors of power. Executives of the big six publishing houses were familiar with it and thought about it long before rumors of Apple’s I-pad tablet started to circulate. They would also have known that Apple operated under agency terms in most of its dealings with its customers, and that Apple would have no reason to alter its operational method for them. The notion that somehow the five men in charge of the publishing houses and Apple representatives cooked up this agency plan in secret, in order to “fix” the prices of e-books, and set it in motion in collusion is a hollow fantasy, seen only by investigators looking through a keyhole into a room lit by a small flickering candle, reading shadows. Collusion or no, this decision to adopt the agency plan with Apple and present the same terms to Amazon was inevitable, it was appropriate, and it was the right decision, for both the book industry and the consumer. Even, ironically, for Amazon, since under agency terms it actually made money selling e-books. Publishers, as the owners/creators/facilitators of the books, were simply re-asserting their right to set and control the price, a traditional, time honored right.

If the thinking is that the publishers acted this way in order to raise prices (false on its face, by the way, since they had always been pricing their e-books higher than Amazon was charging for them—the fact is Amazon was lowering prices to below cost; publishers never actually “raised” them), the reality of what has happened since the adoption of agency pricing disproves the notion. The big six publishers have lowered prices on most of their e-books, not just the best-sellers Amazon had been discounting, so that prices overall for e-books have in fact declined, more dramatically than prices have gone up on the best-selling books which did see an increase. Further, publishers actually make less money selling lower priced e-books under the agency plan than they did selling the higher priced e-books under the traditional model, since Amazon was paying them under the wholesale model for the books it chose to discount so dramatically to make its point. Choosing the agency model clearly was not an attempt to raise prices or increase profits—it was an attempt to curb the increasing monopoly power of Amazon in the e-book market, which threatens all of us—publishers, booksellers, and readers, and, yes, consumers, too. What was “fixed”—i.e. repaired—was a rupture created by Amazon’s underhanded, morally and, I believe, legally suspect tactics; what was not “fixed”—i.e. arranged in some dishonest and underhanded way—was the price of e-books.

And the repair was successful. As many have noted in their public statements issued since the DOJ lawsuit was announced, and as the comments on the Consent Decree submitted to you by the American Booksellers Association and others make very clear, in the past two years the market for e-books has changed dramatically. Amazon still controls, to my mind, a much larger share of that market than any one entity should, but it

is now closer to 60% than 90%. Independent bookstores like my own can now compete on a reasonably level playing field with Amazon and anyone else who sells e-books. There has been a significant increase in the number and quality of e-reading devices, and both Barnes & Noble and independent booksellers have been able to sell e-books and participate in that sector of the book business in a way impossible before the adoption of the agency model. Any decision that threatens the agency model, as this settlement clearly does, will lead not to increased competition and lower prices, but will have precisely the opposite effect, allowing the one real, obvious threat to competition, Amazon, to continue its monopolistic and predatory practices, effectively unimpeded.

Stores like mine, independent stores with a strong presence in their communities, and with inventories and visions substantially different from each other and from their corporate and internet competitors, in particular will be forced to drop out, without the substantial economic ballast to compete. And if, as projected, the e-book market is going to continue to grow and become a larger, perhaps dominant part of the book industry, and stores like mine are shut out of it, our odds for survival as print book retailers also diminish. Consumers will flock to the cheapest sources for books, and customers, who would prefer that we survive, will have a hard time supporting and sustaining us if we can't provide them access to a significant portion of the books available to them. And, to bring this back to where it started, our culture will lose a valuable source of both the nutrients for innovative thinking and innovation itself, since independent bookstores as curators have been essential to that process. Amazon, and any competitors it has left, will not be tremendously interested in the rivulets and small streams and tributaries that feed the big river it named itself after—its profits will come from the traffic on the artificial river itself, the settlements it will encourage, and all the ways it can come up with to lure consumers to fill its coffers. The innovation it is interested in is solely financial, and its loyalty is not to the consumer except as a contributor to the company bottom line, as a spender or as a piece of data to be strip-mined. In the long run, even the “consumer” will not benefit from this state of affairs—“its” choices and options will have narrowed to the shallow confines of the artificial river to which it will have become tethered.

My major concern, I hope I've made clear, is that this lawsuit itself, and the terms of settlement imposed on the three publishers, will do irreparable damage to the eco-system of the publishing and bookselling world, while not particularly providing any tangible long term benefit to consumers, other than perhaps those who choose to purchase best-selling books from Amazon. The increased competition in the e-book business enabled by the adoption of the agency model by the five publishers and Apple will be severely curtailed, likely sending consumers who were happy to have more choices for purchasing e-books back to Amazon, strengthening its market dominance. I ask again why it is that the consumers supposedly harmed by this alleged collusion, who constitute a miniscule number of the actual consumers of books in this country, and whose harm is that they may have had to pay slightly more for *some* of their purchases than they did before agency, apparently matter more to the Department of Justice than the rest of the country's consumers, who may never buy an e-book, who may never shop on-line from Amazon or any national retailer, and whose choices for purchasing any type of book may be severely harmed in the wake of this lawsuit and settlement. When did things like choice,

community, cost, quality, and substance, get written out of the definition of “consumer,” leaving only price? When did “consumer” take over from citizen as the definition of one’s primary function in our democracy?

If you determine that the publishers and Apple colluded to set up agency terms in the e-book business, I encourage you at least to void the terms of settlement placing restrictions on the settling publishers. Punishment for the collusion should not include restrictions to the agency model—the major victims of that punishment will not be the alleged colluders, but the bookstores who have successfully competed with Amazon under the agency model, and all current and future purchasers of e-books and e-book reading devices, who will all be forced to swim and fish and boat in the same shallow river.

I have focused my remarks on my concerns on the short- and long-term effects this lawsuit and settlement will have on the book eco-system at the retail end, my observation and engagement point for the past three-plus decades. I must add, before concluding, that the rise of the digital book and digital reading devices has raised legal issues far more complex and wide-ranging than those at this end—issues relating to intellectual property, control of content, ownership, among others. The lawsuit by the Justice Department is wrong—wrong on the concept, wrong in the details, wrong in the punishment, wrong in the consequences, and wrong in the timing. There is so much more the law needs to come to terms with before deciding that some consumers may have been harmed by paying too much for something they may not even “own”, or that the seller may not really have the rights to “sell.”

The Department of Justice has attempted to find and solve a crime and obtain justice for the victims with no real evidence that a crime was committed or that there are victims. Its actions, however, will have consequences that do grievous and lasting harm to the eco-system that includes authors, publishers, booksellers and readers—all citizens, customers, and consumers. Their action, if upheld, has many victims--I, and the customers I have developed a strong relationship with over the years, will likely be among them.

I thank you for taking the time to read and consider the issues I raise my letter.

Sincerely,

Jonathon Welch
Co-founder, President
Talking Leaves...Books