

May 29, 2012

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

RE: Proposed Final Judgment Civil Action No. 1:12-CV-2826

Dear Mr. Read:

I have been a bookseller since 1985. I have watched children buy books with their parents, and observed those children return, years later, to purchase books for their own children. Books are vitally important to our social welfare and are not a simple commodity. The value of books is inestimable and cannot be reduced to price.

The filing of the civil action against publishers taking rational independent action to maintain their ability to protect books and bookselling culture is surprising and difficult to fathom. It serves to benefit only Amazon, who, by its own admission, aspires to be Earth's company, the online retail source for everything – not just books. Amazon had a 90% share of the e-book market before agency pricing¹ and a new market entrant was introduced. The filing's narrow and misguided focus on price ignores both the below-cost pricing that resulted in the necessity for publishers to act and the subsequent procompetitive diversity that occurred in the e-book market. It has not been established that the agency model resulted in higher prices but there is convincing evidence that it has not and will not². It is certain that the possibility of distorting the market through the use of e-books as loss-leaders stops with agency pricing.

The e-book market became the fastest growing segment of the publishing industry largely due to the intense marketing of the Kindle. E-books had existed for a number of years, but the market became driven by the aggressive push to sell devices and acquire customers (for everything) by the Kindle manufacturer, Amazon. The future uncertainty in the publishing industry created by the Kindle's below-cost pricing of e-books required the publishers to protect their investment in authors and content and to develop appropriate adaptive responses.

The concern about using books as loss leaders and the machinations of price in the bookselling market is nothing new. In 1668, the booksellers of Saxony protested "against the evils of insufficient protection of their rights and the damaging of their interests through irregular bookselling."³ Adolph Growell, the

¹ In 2009, before the new pricing, Amazon was estimated to have around 90% of the e-book market. Its share has now slipped to around 60%, according to Mike Shatzkin, chief executive of the Idea Logical Co., a New York-based publishing consultancy. He estimated that Barnes & Noble has between 25% and 30%, and Apple has much of the remainder., <http://online.wsj.com/article/SB10001424052702304444604577337573054615152.html>

² Re: lower consumer prices - "there is no reason to think that this cannot occur under the agency pricing model as long as the distribution market for e-books remains competitive." - Alexander Chernev, Ph.D., marketing professor at the Kellogg School of Management, Northwestern University, <http://www.businessweek.com/articles/2012-04-16/why-apple-s-e-book-pricing-model-might-not-be-unfair>

³ Tebbel, John, "A History of Book Publishing in the United States Volume II" (New York: R.R. Bowker, 1975) p 113.

editor of Publishers Weekly (PW) in 1892, noted that “when the history of the book trade of the world is written, the historian will find himself obliged to devote the largest portion of his narrative of the first three centuries of its existence to a record of the struggle between the bookmaker and the bookseller to maintain their respective rights and to break up underselling.”⁴

In 1874, the primary objective of the newly formed American Book Trade Association was to “maintain and protect publishers’ retail prices.”⁵ A lively expression of this historical problem can be found in 1872 - reportedly a bad year in which many booksellers went out of business - and PW asked rhetorically whether the publishers were “satisfied with having their youngest offsprings slaughtered by the ‘book butcher’ and their carnage vulgarly heralded in the newspaper, and do they take no pride in their labors of many years, of which the bazaar-man is as ignorant as the ill paid slaves of his counter?”⁶

The fact is that, even in today’s consolidated, conglomerated publisher environment, the ability of publishers to be able to sustain and control their business utilizing pricing remains a necessity. That necessity has been apparent for centuries, and there is no need for publishers to collude to be able to perceive this imperative when the market is distorted by below-cost pricing. There was an obvious need for publishers to take action to protect their authors, their business, and “books” – and it is not difficult for people in the bookselling industry to independently conclude that agency pricing provided the best means to do that. The introduction of a new market entrant provided the opportunity to remodel and the publishers seized it. This was a case of parallel conduct that was simply a **“rational and competitive business strategy unilaterally prompted by common perceptions of the market.”**⁷

It is possible that those outside of bookselling may imagine collusion or conspiracy and collect weak circumstantial evidence in attempts to support this, while those within the industry can clearly see the wisdom of taking such action. The suggestion that the power to set prices should be snatched from the publisher in an infant market that is dynamically transforming their industry is difficult to understand. The public interest and the exercise of free speech are served by a vibrant and dynamic bookselling market, and this action and settlement would only serve to enable a single market player - “Earth’s most customer-centric company”⁸ - the vendor of “virtually anything to buy online”⁹ - to use below-cost pricing to monopolize the fastest growing part of that market. The civil antitrust action and settlement contort the Sherman Act much like when it was deployed as an anti-labor weapon shortly after its passage in 1890. It is similarly ironic and perverse.

Notably, as mentioned previously, a more competitive and diverse marketplace has resulted from agency pricing. The statement in the complaint that the publisher’s actions were not “reasonably necessary to accomplish any procompetitive objective”¹⁰ is belied by the facts. Further, the claim that the “purpose of the lawsuit” is “to restore the competition that has been lost”¹¹ is ludicrous considering the

⁴ Ibid., p. 113.

⁵ Ibid., p. 107.

⁶ Ibid., p. 110.

⁷ Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)

⁸ <http://phx.corporate-ir.net/phoenix.zhtml?c=176060&p=irol-factSheet>

⁹ Ibid.

¹⁰ United States of America v. Apple Inc., et. al., 12 CV 2826, p. 34.

¹¹ Ibid., p. 5.

procompetitive changes that agency pricing has brought to the marketplace. The question that begs answering is how potentially reestablishing 90% market share to a single market player is restoring competition. Resale price maintenance facilitated market entry and has had demonstrable procompetitive effects by diversifying the marketplace.

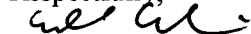
The infancy of the e-book explosion and the consequent uncertainty surrounding its adoption and growth created the common stimuli that resulted in the parallel conduct of the publishers. Resale price maintenance via agency pricing became the model that would help publishers regain control of a business that was being driven by a company whose primary interest was not bringing books to market, but acquiring customers and market share for “everything.” A single market player, by virtue of its size and power, should not be allowed to dictate the terms for the future of the book business that has served the culture for centuries. Books, in whatever format, should be considered a cultural resource that is not to be devalued and utilized as a means to acquire raw market power and dominance. The cost to the culture and society is too high.

The filing of this action, and the perceived need of some parties to settle to cut their losses despite their innocence, is not in the public interest. Slavish devotion to a consumer concept that is cynically manipulated by a company seeking to be Earth’s source for everything results in the Justice Department becoming a tool for Earth’s company. The people and their culture need to be respected and considered and Earth’s company should not be allowed to shield themselves behind the postulated “consumer” in its bid to gain dominance via below-cost pricing.

Harvard Law Professor Louis Kaplow points out that while strict rules on pricing can have a benefit of deterring supracompetitive pricing - which clearly we do not have in this case - **“the main cost is the chilling of desirable economic activity as a consequence of the prospect of mistaken condemnation of competitive behavior and of firms bearing high costs in demonstrating that their behavior is actually innocent.”**¹² The filing of this action transforms rationally independent business decisions with procompetitive effects into a nefarious conspiracy with high costs for those choosing to defend themselves and pay that price.

This is ultimately not about business models, conspiracies and collusion, illusory agreements, or any phantom desire to gouge consumers. This is about defending and protecting books and their critical role in the life and vibrancy of our culture. The filing of this legal action threatens the culture, would ultimately harm the consumer, and is not in the public interest. The settlement should not be approved and the civil action withdrawn.

Respectfully,



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Chaucer’s Books, Santa Barbara, CA 2008-present
Dutton’s Brentwood Books, Los Angeles, CA 1985-2008

¹² Louis Kaplow, “On the Meaning of Horizontal Agreements in Competition Law”, *California Law Review* 99, no.3, (2011): 816.