



June 22, 2012

John Read
Chief Litigation III Section
Antitrust Division
U.S. Department of Justice
450 5th Street, NW, Suite 4000
Washington, DC 20530

Dear Mr. Read,

My name is Susan Novotny and I am an independent bookseller and the sole owner of Book House of Stuyvesant Plaza, Inc., in Albany, NY as well as The Little Book House, our children's bookshop and Market Block Books in Troy, NY. My "brick-and-mortar" bookstores have been selling print books for 37 years; since January 2011, we have been selling e-books through our website, www.bhny.com.

I firmly believe that the Department of Justice is making a grave error in (1) proceeding with its lawsuit against Macmillan, Penguin, Hachette, Simon & Schuster, HarperCollins and Apple Computer concerning the sale of e-books and (2) the specific terms of the *Settlement Agreement*, specifically that it allows retailers – notably Amazon.com – full control over the price of any individual e-book, including offering it for free. I believe that the Department of Justice has mistakenly brought a Section 1 Sherman Act violation (15 U.S.C. § 1), when it should have brought a Section 2 Sherman Act violation (15 U.S.C. § 2) against Amazon.com for *Attempt to Monopolize* both (a) the print book market and (b) the e-book market.

Book House provides numerous services beyond supplying books to the local community. These activities include our extensive involvement with charities, not-for-profits, churches and synagogues—both on premises and off; long-standing commitment to Literacy Volunteers and other reading readiness programs for at-risk children; programs that allow those with learning disabilities and mental illness issues the opportunity to gain work experience; discount programs for schools and libraries; and support of local authors. Book House covers 100% of our employees' healthcare costs; tax revenue to both the State of New York and the Federal Government; and provides a personal, warm, and friendly environment for the public that is conducive to the free exchange of ideas.

Some of the notable figures that have signed at the Book House include: Secretary of State Hillary Rodham Clinton; former Governor of the State of New York, Mario Cuomo; former Governor of the State of New York, George Pataki; U.S. Senator Charles Schumer; and Pulitzer Prize winning author William Kennedy to name a few. Book House has served and continues to serve, as a public arena for the dissemination of ideas that run the gamut from entertainment to historical to political – both on the right and the left.

Book House also is a shining example of entrepreneurial activity. The company took a substantial risk in 2004 and opened a new bookstore, Market Block Books, in downtown Troy, New York – an economically depressed urban center that has seen its manufacturing base virtually disappear because of international competition. When Market Block Books (“Market Block”) opened in 2004, the neighborhood was struggling, and there were few retail outlets. The Market Block building, where the bookstore is located, had been vacant for a number of years and was rapidly decaying.

Market Block Books provided the initial impetus for revitalizing the entire block. Since the bookstore’s opening, the entire building has been renovated. The ground floors are filled with shops of all kinds, and the renovated “Grand Ballroom” upstairs is home to a software company employing approximately 20 people with well-paying full-time jobs. More shops have opened on the block and the quality of life has greatly improved.

Currently the Department of Justice is serving as a proxy for Amazon.com to the detriment of smaller competitors and with negligible benefits to consumers. Those with the ability to enforce the Antitrust Laws are (1) the Department of Justice (2) the Federal Trade Commission; (3) State Attorneys General; and (4) private parties. I believe that taxpayer dollars would be better spent elsewhere. Instead of the Federal Government and the New York State Attorney General’s Office (among others) using taxpayer dollars – that were partially provided by Book House – to damage Book House, Amazon.com should pursue a private antitrust action. If Amazon.com has been substantially damaged in its business because of the allegations of price fixing, Amazon.com should bring a private Section 1 Sherman Act violation (15 U.S.C. § 1) for price fixing themselves. Amazon.com can easily afford the litigation. In the case of the New York State Attorney General’s Office, state tax dollars are being used to aid Amazon.com in its *Attempt to Monopolize*, although Amazon.com is a company that is notorious for not paying sales taxes and has already caused New York State and many others states to incur substantial legal fees in tax matters as well as unrealized tax revenues.

Amazon.com has been guilty of *Predatory Pricing* in the market for print books for nine years, the length of time it took Amazon.com to become profitable. During that time, Amazon.com sold print books below their *average marginal cost*. By using this strategy it gained market share and market power in the print-book market. That market power was used against the major publishers to gain favorable terms in the market for e-books. Amazon.com used, and continues to use, its leverage in both markets to extract favorable terms from publishers that are not offered to competitors such as Book House and to exclude competitors from entering the e-book market through exclusionary tactics and high barriers to entry.

This nine-year loss contrasts sharply with the loss a smaller competitor, such as Book House, is able to bear when entering a new market. Additionally, from a policy perspective, it is of note that small businesses, such as independent bookstores, make up 99.7 percent of all employer firms and account for 65 percent of the 15 million net new jobs created between 1993 and 2009.

A major difference between a job created by Amazon.com and Book House is Amazon's practice of seasonal hiring. During the holiday season, when many retailers' balance sheets, including Book House, go from "red" to "black", Amazon hires temporary workers. After the holiday season ends, Amazon terminates their jobs, and these workers end up on unemployment. Thus, all businesses subsidize Amazon laying off their temporary employees. This allows Amazon to increase profits, but it does so on the backs of its competitors, such as Book House, because Book House pays its workers year-round, while still paying for unemployment insurance.

The Department of Justice is bringing the *In Re: Electronic Books Antitrust Litigation* on behalf of consumers, however, the DoJ seems to have failed to do any research whatsoever on the effect of the *Settlement Agreement/litigation* in general. Briefly:

There is strong empirical evidence from Germany, France, and many other countries that publisher-driven pricing will actually lead to lower book prices over the coming years. . . .

In March 2011, the Swiss parliament ended a failed four-year experiment when it reinstated a law that allows publishers to set the prices of both their printed and electronic books so that no matter where a book is sold — a bookstore, supermarket, or Amazon — the price is the same.

When the law was lifted in 2007, free-market theorists expected that giving retailers free rein to set prices would benefit book buyers. But *book prices actually rose over the next four years, while many bookstores closed and publishers increasingly struggled to invest in new authors.*

Switzerland is one of more than a dozen European countries, along with Japan, Mexico, and Argentina, which have laws mandating fixed book prices.

The thinking behind these laws is that a large number of well-stocked bookstores are necessary to support the publication of a wide variety of books, which in turn is essential to a country's cultural and civic life. Bookstores incur substantial costs by providing services that promote books and generate demand for them, such as hosting author readings, employing well-read staff, and maintaining an extensive inventory for browsing. Fixed prices allow bookstores to recoup these costs.

Consider the United Kingdom, which overturned its long-standing fixed-price book policy in 1995. *Since then book prices have soared. According to indices maintained by the Office for National Statistics, book prices rose 49.6 percent*

between 1995 and 2007, while all consumer prices increased 27.6 percent. Meanwhile, the share of a book's retail price flowing to publishers has dwindled, and large retailers, including Amazon's UK division, have claimed more of the revenue for themselves.

The UK book industry now resembles that of the United States. Independent bookstores now account for less than 10 percent of the market, as book sales are increasingly dominated by Amazon and superstores like Tesco and Wal-Mart-owned Asda. A 2008 analysis concluded, "The defense of the Net Book Agreement from the 1950s to its demise in 1995 was that without it there would be fewer stockholding bookshops, higher prices and fewer new titles. The evidence presented here tends to validate all three predictions."

Meanwhile, in Germany, which has had fixed prices since the 19th century, the cost of books has fallen steadily in comparison with other goods over the last decade. The country's network of publishers and bookstores remains robust. Germany is home to about 4,000 bookstores, more than exist in the United States, which has four times the population. German publishers also put out about twice as many titles, relative to population, as their U. S. counterparts.

Recently three French economists produced a study comparing 12 European countries, some with fixed-price laws and some without. It concluded: "Over the past decade, the growth rate of book prices is weaker in countries with fixed prices than in countries with free prices" and "the increase of new titles is stronger in the countries which have a fixed price." (*emphasis added*) (Stacy Mitchell, *Why Publishers, Not Amazon, Should Set Book Prices*, June 23, 2011, available at <http://www.ilsr.org/why-publishers-not-amazon-should-set-book-prices/>)

Freedom of expression and the free market are cornerstones of a democratic society. With the widespread introduction of the internet, society is changing and many industries and markets are in transition.

Digital products are raising substantial issues of privacy. Computers can track every website a person visits. Facebook compiles statistics on users of its social network and then uses that information to target advertising. Google is facing scrutiny from European antitrust regulators for its dominant position in search. Smart phones can track the location of the user in real time and have been raising substantial privacy concerns.

As more information is stored on computer servers, more information is vulnerable to theft by hackers (as most recently demonstrated by WikiLeaks.) The BlackBerry server crash showed society that a server going down could limit the availability of information. In 2009, with no measure of irony, Amazon remotely erased versions of George Orwell's novel, *1984*, from all Kindle e-readers. And every high school student in Zeeland, Michigan, has been given a free iPad to replace textbooks; Kindles have been given to the freshman class of Princeton University; and the State Department just announced that Kindles will be given away through a

global e-reader initiative. Finally, in 2008, the federal government bailed out American Insurance Group, Bank of America Corp., J.P. Morgan Chase & Co., Citigroup Inc., Morgan Stanley, Goldman Sachs Group Inc., and General Motors during the worst recession since the Great Depression, dubbing them “too big to fail.”

The legislative intent of the Sherman Act was to act as check on the power of the great industries of the late 19th and early 20th centuries: the oil trust, the coal trust, the railroad trust, the steel trust. As the Industrial Revolution moved full steam at the beginning of the 20th century so the digital revolution moves at lightning speed at the beginning of the 21st century. Google is market dominant in search; Facebook in social networking; Apple in music; Amazon in online commerce; Microsoft in operating systems. As Justice Douglas articulated in his dissenting opinion in *United States v. Columbia Steel Co* (334 U.S. 495 at 534-36):

We have here the problem of bigness. . . . The Curse of Bigness shows how size can become a menace---both industrial and social. . . . [It] is the measure of the power of a handful of men over our economy. That power can be utilized with lightning speed. It can be benign or it can be dangerous. The philosophy of the Sherman Act is that it should not exist. For all power tends to develop into a government in itself. Power that controls the economy should be in the hands of elected representatives of the people, not in the hands of an industrial oligarchy. Industrial power should be decentralized. It should be scattered into many hands so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men. The fact that they are not vicious men but respectable and social minded is irrelevant. That is the philosophy and the command of the Sherman Act. It is founded on a theory of hostility to the concentration in private hands of power so great that only a government of the people should have it.

Once again technological forces are busy consolidating power, only this time in a different age – the Information Age.

The vital issues at stake here not only affect the survival of independent bookstores but also the potential survival of the publishing industry, which is a major employer in the United States and employs more workers than Amazon.com. To protect the health of both small, community-oriented business and the pivotal publishing industry; and the ability to express and promote the free exchange of ideas, I respectfully urge the Department of Justice to abandon its suit against the publishers and Apple Computers and the *Settlement Agreement*.

Sincerely,

Susan Novotny
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518-489-4761

cc:

U.S. Senator Charles Schumer – NY

U.S. Senator Kirsten Gillibrand –NY

U.S. Congressman Paul Tonko – 21st Congressional District

U.S. Congressman Chris Gibson – 20th Congressional District

Secretary of State Hillary Rodham Clinton

U.S. Department of State

Eric T. Schneiderman

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