

**From:** Courtney Milan [mailto:courtr[REDACTED] ]  
**Sent:** Friday, June 15, 2012 12:55 AM  
**To:** Read, John  
**Subject:** letter in support of the settlement

John R. Read  
Chief, Litigation III Section  
United States Department of Justice  
450 5th St NW  
Suite 4000  
Washington DC 20530

Dear John Read:

This letter is written in defense of the DOJ's proposed settlement with the so-called agency publishers, and also as a response to literary agent Simon Lipskar's defense of the agency-pricing scheme.

I'm aware that the Department of Justice's attorneys hardly need me to explain how deeply flawed Lipskar's understanding of antitrust law and competition really is. As the ongoing settlement is, however, a public process, I wanted to provide the DOJ with enough paper to demonstrate that not all members of the publishing community walk in lockstep with Simon Lipskar. I support the DOJ's settlement, and believe that agency pricing as implemented by the so-called Big 6 has been harmful to the book publishing community.

As to Lipskar's specific arguments, Lipskar cites Amazon sales ranks demonstrating that many titles in Amazon's top 100 are low-priced.

Of course, this doesn't demonstrate that consumers weren't harmed (even if such an inquiry were relevant; colluding to fix prices is a per se violation of Section One of the Sherman Act and so consumer harm is presumed). Instead, it demonstrates that because prices of New York Times bestsellers increased, consumers who would otherwise have preferred to purchase those books instead chose to purchase other books.

That agency pricing changed consumer buying habits is a demonstration of harm, rather than the reverse: Rather than buying the books they preferred at a reasonable price point, consumers instead bought books they might not otherwise have considered.

The second reason that Lipskar's data is unconvincing is that it demonstrates a deep-seated misunderstanding of how cartels work. Game theory tells us that cartels never last. New entrants come into the market and undercut the pricing schemes; plus, there's

always an incentive for cartel members to cheat and grab market share. That low-priced books from non-agency publishers have taken over the market proves only that the cartel here did what cartels are wont to do, given enough time: It failed.

As defenses go, “this cartel was so ineffective that it scarcely had any effect on competition” wins points for chutzpah.

But given the allegations in the multistate class action complaint—that David Shanks asked for assurance that he would not be the only publisher signing the agency agreement, that Carolyn Reidy wrote “3 agree = OK” on a print-out of an e-mail detailing the agreement, that the publishers who had entered the agreement collectively put pressure on Amazon when it refused to accept the retail price maintenance agreement from Macmillan and sent each other encouraging notes, and that those publishers then used their relationship with Barnes and Noble to force Random House to join their cartel—this cartel has already maxed out on chutzpah.

The only remedy for such blatant collusion is to wipe the slate clean—to undo agency pricing and to let the market sort out a more appropriate pricing scheme. While the collusion in this case has clearly benefited some third parties, I believe that the costs of the agency collusion scheme have been shouldered by consumers, who have been burdened with higher prices, and by authors who write for the agency publishers, who have been saddled with lower sales as consumers flock to books from lower-priced publishers.

For that reason, I support the proposed settlement.

Sincerely,

Courtney Milan

<http://www.courtneymilan.com>

Author