

JEANNE-MARIE HUDSON

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

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

April 23, 2012

Dear Mr. Read,

I am writing to express my outrage at the recent DOJ settlement with three publishers regarding e-book "price-fixing." I believe this settlement to be an utter travesty and miscarriage of justice. I cannot believe that the Obama administration has a full understanding of the true consequences that this settlement will have on the future of reading in this country, nor do I believe that they can possibly know the origins of this settlement; if they do, then they are corrupt. Either way, they will have lost a vote come November if some change is not made either in the Legislative Branch or in court.

In case you, sir, are actually as ignorant as this settlement makes you out to be, then perhaps some light reading might be of use in educating you about how Amazon is actually trying to systematically destroy the publishing industry by forming a complete monopoly and destroying both the suppliers of content and the sellers of content.

From The New York Times, 4/11/12

....Amazon, which already controls about 60 percent of the e-book market, can take a loss on every book it sells to gain market share for its Kindle devices. When it has enough competitive advantage, it can dictate its own terms, something publishers say is beginning to happen.

The online retailer declined to comment Wednesday beyond its statement about lowering prices. Asked last month if Amazon had been talking to the Justice Department about the investigation — a matter of intense speculation in the publishing industry — a spokesman, Craig Berman, said, "I can't comment."

Traditional bookstores, which have been under pressure from the Internet for years, fear that the price gap between the physical books they sell and e-books

from Amazon will now grow so wide they will lose what is left of their market. Barnes & Noble stores, whose Nook is one of the few popular e-readers that is not built by Amazon, could suffer the same fate, analysts say.

“To stay healthy, this industry needs a lot of retailers that have a stake in the future of the product,” Mr. Norris said. “The bookstore up the street from my office is not trying to gain market share. They’re trying to make money by selling one book at a time to one person at a time.”

Electronic books have been around for more than a decade, but took off only when Amazon introduced the first Kindle e-reader in 2007. It immediately built a commanding lead. The antitrust case had its origins in the leading publishers’ struggle to control the power of Amazon, **which had one point had 90 percent of the market.**

Apple’s introduction of the iPad in early 2010 seemed to offer a way to combat Amazon.

John Sargent, the chief executive of Macmillan, said he would not settle because he had done nothing wrong and colluded with no one. He wrote to his authors and employees that he made the decision to change pricing structure “on January 22nd, 2010, a little after 4 a.m., on an exercise bike in my basement. It remains the loneliest decision I have ever made, and I see no reason to go back on it now.”

The government suit, filed in United States District Court for the Southern District in New York, made clear that the publishers were resentful and angry about the way that their relationship with Amazon had evolved. The retailer started out a customer of the publishers, but became a competitor. Even as the publishers and Apple negotiated in early 2010, the suit said, Amazon announced its own publishing program.

This only fed publishers’ anxiety. “I am now more convinced that we need a viable alternative to Amazon or this nonsense will continue and get much worse,” the suit quoted David Shanks, the Penguin USA chief executive, as saying.

In the short term, readers will save money. When 16 states simultaneously sued Apple and three of the publishers Wednesday, they said consumers had lost \$100 million as a result of higher e-book prices.

“It will look like blue skies,” said Lorraine Shanley, a publishing consultant. **“But in the longer term, competition erodes as the spread between e-books and physical books grows greater. There will be fewer retail stores.”**

Booksellers reacted to the news with dismay. The American Booksellers Association said the Justice Department's decision "to challenge a business model that played an essential role in fostering a more competitive, diverse retail environment seems to turn logic on its head."

Individual stores struggled to absorb the news.

"If there's an upside, I don't see it yet," said J. B. Dickey, the owner of the Seattle Mystery Bookshop. "My fear is that the major publishers won't be able to stay in business just selling e-books. You can't bring in enough money to support the infrastructure. If that happens, there goes the marketing, the editorial, the author tours, the expertise of the book industry."

And his store, he added.

Celebrating on Wednesday was Steve Berman, a lawyer who last summer filed a class-action lawsuit against the five publishers and Apple for price-fixing. "The actions by the Justice Department substantiate our view of the case," Mr. Berman said.

The plaintiffs in the case are readers troubled by e-book prices. "One consumer came to us and said, 'How come I'm paying \$14.99 when I used to pay \$9.99?' " Mr. Berman recalled.

Mr. Berman's firm, Hagens Berman, is in a Seattle office building that also houses Amazon offices. That has set off some speculation among Amazon opponents. Mr. Berman said the proximity was simply a coincidence. "We have no relationship with Amazon," he said.

Amazon executives have said that the future is open to the bold, but that certain elements will be left behind. "Our mission is to reinvent reading," one executive, Russ Grandinetti, said in an interview. "I guess Kindle's not great for book binderies."

The retailer has been taking a more aggressive stance toward publishers in recent months. When it failed to get better terms from a large Chicago distributor, the Independent Publishers Group, it removed IPG's nearly 5,000 e-books from sale.

Curt Matthews, IPG's chief executive, said publishers who dealt with Amazon "will have to insist on keeping their fair share. It is obviously true that producing good content is the hard part of making a good book, no matter how that content is captured. Why should publishers cede all of their power to this new player in the book business?"

And I would also direct you to read this article: Slate 4/12/12

This week, the Obama administration's Justice Department struck a great legal blow against our open market for books, and indeed against open markets in America. Even though online retailer Amazon has captured more than 50 percent of many key book markets—like the one for e-books—antitrust enforcers brought suit not against this vast and swelling monopolist but against the publishers who are the victims of Amazon's power.

Their supposed crime? To do what is most normal in any real market: insist on the right to price your own product.

Now this vital marketplace is, for all intents, under the sway of a single boss. One that has a direct interest in stripping capital from publishers. One that has a direct interest in gouging all writers who must ride its rails. One that has a direct interest in suppressing any work of reporting that questions its power, or for that matter the political economic regime that enabled such concentration of power. One that is swiftly capturing direct control over much of the rest of the U.S. economy as well.

On the surface, the DoJ's action may seem perfectly reasonable. The antitrust enforcers charged that five big publishers conspired with Apple to raise the prices of e-books by creating a new regime in which the publishers, rather than the retailers, priced their books.

Absent any other consideration whatsoever, higher prices do indeed result in a bad outcome: namely, fewer books in the hands (or on the screens) of American citizens.

But while cheaper e-books might be a good short-term outcome for some readers, and for those companies pushing for wider adaption of e-readers, there are significant downsides on the horizon. The DoJ's action effectively robs publishers of the ability to price their own products and robs other retailers of any hope of competing effectively with Amazon. Hence the DoJ has all but guaranteed a future in which readers end up with fewer well-edited books—both physical and electronic—and in which writers feel less free to speak against concentrated power.

To understand how the DoJ got this issue so spectacularly wrong requires a look at how our anti-monopoly laws were watered down over the last generation.

For 200 years after the Boston Tea Party, anti-monopoly enforcement aimed mainly at distributing power and protecting the liberties of citizens. One of the hardest lessons we learned during those two centuries was to avoid the siren song of lower prices—precisely because they are so often used, consciously, to concentrate power.

Lower prices enable horizontal predation; when a fatly capitalized retailer (like Amazon) wants to bankrupt its less-wealthy direct competitors, it simply undersells them day after day after day. Furthermore, lower prices can be used in vertical predation, against producers; when a powerful retailer (like Amazon) wants to extract more wealth from its now-captive suppliers, it can set prices to promote those firms who accept its terms and to punish those who resist.

That's why Congress used the Interstate Commerce Act of 1887 to restrict the pricing power of railroads. That's why, in the 1930s, Congress used the Robinson-Patman and Miller-Tydings Acts to limit the ability of retailers and manufacturers to manipulate prices.

Over time, it became clear that the best way to lower prices over the long run was in fact to allow producers to set higher prices today. That's because doing so forces producers to compete with producers rather than retailers. And it forces retailers to compete with retailers rather than with producers. The result being that we end up with both producers and retailers doing a better job of serving the consumer.

The laws designed to restrict price predation also helped not merely to arrest the consolidation of power begun during the Plutocratic era, but to reverse the process. One result was that Americans enjoyed a truly open market for books well into the 1980s, one that delivered well-edited, provocative works priced to fit almost any budget.

So how do we restore our open market for books?

Unfortunately, the antitrust technocrats in our Justice Department are under the thrall of a dangerous ideology.

The intellectual and legal "regime" that guides enforcement of our anti-monopoly laws dates to 1981, when a strange coalition of consumer activists on the left and Chicago School "market fundamentalists" on the right joined to promote a new frame, designed in theory to promote the "welfare" of the "consumer" rather than the well-being of the citizen. The main goal was no longer competition but lower prices.

It's not that the 1981 changes were entirely wrong; at the time, the United States was suffering from double-digit inflation. But in the three decades since, the government never readjusted this frame, even though we licked inflation long ago, and even though it is now clear that the change helped to clear the way for the most wide-ranging concentration of economic power in our history.

We need to re-empower producers to set a minimum price for their goods, just as the book publishers attempted to do with their "Agency" model—the one the

DOJ found so objectionable. **Doing so would help to prevent Amazon (and other goliath trading companies) from continuing to use its immense and unfair pricing power to bankrupt other retailers, to loot the profits of and capture control over their suppliers, and to manipulate the content of the product itself.**

Some of the publishers quickly settled with the Justice Department. But at least one—Penguin—appears ready to continue this fight in court. Doing so will hopefully extend this debate long enough for the American people to relearn how to make a market in America that works for all books, physical and electronic. And indeed enables us to relearn how to remake our other markets as well.

And finally, again from the New York Times, SURPRISE, Amazon is now publishing James Bond novels:

When the Ian Fleming estate gave up the digital rights to the James Bond backlist last month, Random House UK's Vintage grabbed the English-language print and e-book rights everywhere outside the U.S. and Canada. Well, guess who's getting those North American digital rights? Amazon.

Amazon announced today that it's acquired a ten-year license for the North American rights to the print and digital James Bond backlist, as well as James Bond author Ian Fleming's two nonfiction titles. All of the books will be reissued by Amazon Publishing's mystery and thriller imprint, Thomas & Mercer, starting this summer.

"We believe that Amazon Publishing has the ability to place the books back at the heart of the Bond brand, balancing traditional publishing routes with new technologies and new ways of reaching our readers," Ian Fleming Publications managing director Corinne Turner said in the release.

The Wall Street Journal reports that the Bond e-books "will be initially available only via Amazon's Kindle e-book store." That means that Barnes & Noble will likely refuse to carry the print books.

Penguin had held world English print rights to the books, but suggested to The Bookseller that renewing those rights was not worth the high cost. Amazon has repeatedly demonstrated that it will spend large sums of money on acquiring titles, but publishers likely did not suspect that the company was in the running for the James Bond books.

How big a deal is this?

The James Bond books have sold 100 million copies worldwide. Of the 16 titles that Amazon is acquiring, the "newest," *Octopussy and the Living Daylights*, was

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published in 1966. Daniel Craig appears in a new Bond movie, "Skyfall," this autumn — it is the twenty-third Bond film and is not based on a Fleming title.

Back in the 1950s and 1960s when the books were released, they were only semi-hits in the U.S. The movies have been much more popular here; they've grossed a little over \$5 billion. This is to say that "James Bond" is a very recognizable brand — and a symbolic win for Amazon, at what was likely a very high price — but that does not necessarily translate into huge book sales in 2012.

Why is this important, you ask? Because again, you have HANDED Amazon a monopoly, sir. Note that iPads support ALL OTHER READER APPS. Kindles do not. Ereaders are worthless pieces of trash without content. How do you get people to buy the worthless pieces of trash? Give them cheap content that they want. If it's owned by someone else, buy it from them and sell it at a loss, which Amazon could afford. Now they want to not only bankrupt all other booksellers, they want to bankrupt publishers. And you are helping them. That is so astoundingly un-American, it's disgusting.

Sincerely,

A handwritten signature in cursive script that reads "Jeanne-Marie Hudson". The signature is written in black ink and includes a long horizontal flourish at the end.

Jeanne-Marie Hudson