Literary Agents

June 23, 2012

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

Dear Mr. Read,

Re: United States v. Apple Inc., et al., 12-cv-2826 (DLC) (SDNY). Comments on Proposed Final Settlement as to Defendants Hachette, HarperCollins and Simon & Schuster.

On behalf of my colleagues at Sanford J. Greenburger Associates, and as a passionate advocate for authors who has spent 20 years in the literary ecosystem *and* as a consumer, I am writing to bring your attention to the impact of the proposed settlement on a group that the Complaint has failed to acknowledge: the authors themselves and their unique, creative works.

Without the authors, this industry - and any industry that relies on the exploitation of an author's intellectual property including ourselves as literary agents, publishers, booksellers, e-reading device manufacturers, printers, broadcast networks, cable networks,

movie studios and on and on – would not have a basis for existence, yet the Complaint ignores them completely.

In isolating "e-books" as a "separate market segment from print books" as though they don't rely upon the same underlying creative work; in declaring that "e-books are considerably cheaper to produce and distribute" the Complaint fails to recognize that whether in electronic form or in print, neither would exist without an author's singular creative endeavor. An author mines his or her talent, perhaps spending years honing their craft, or years researching a subject, or coming up with a brilliant idea that will appeal to readers, to produce a book that they aspire to bring to market, with the same potential as any other entrepreneur launching a business that might become their brand.

There are then two main options for them at this point: self-publishing, or licensing certain rights to a publisher who essentially becomes a partner in trying to bring that creative work to the widest possible readership. Either way, the goal is the same: to reach as many readers as possible and build an audience for their creative work. This could potentially be the launch of a "brand". Therefore with each creative work published, whether through a self-publishing platform or through a license to a publisher, an entrepreneurial business – and a potential livelihood - is created.

For the author who chooses the self-publishing route – and that is their prerogative – they get to decide how to price their work in the marketplace, as only they should. Only they as the creators of the work know how much went into the creation of that work; only they can ascribe value. Yes, the market place can then respond – which is as it should be for all of us as consumers – but if we haven't been involved in the process of creation, we can't possibly

ascribe value. We can only decide whether we agree with the creator's assessment that the value they have ascribed is appropriate and make a purchase, or not. As consumers we make these choices every day.

For the author who chooses the second option, licensing certain rights to a publisher, the Complaint's "Authors submit books to publishers in manuscript form" is a gross oversimplification of what might be an extremely detailed negotiation to assess the publisher's vision as to whether they are the best partner to bring the creative work to market. Proposed format, price, timing and marketing support are important elements of any deal alongside the advance and the royalties. The author chooses whether or not to accept the Publisher's offer after consideration of all these elements – including proposed price. After all, the royalties are a percentage of the price, and an advance is only an advance against future royalties, so it is the only way an author can evaluate the Publisher's offer, alongside their own value assessment as the creator of the work. The Publisher - who the creator of the work then chooses to license rights to in order that they bring that work to market - also adds a value that can't be determined from the outside. It might be an editor who brings 30 years of editorial experience to bear, for example, at far greater cost to the Publisher than an editor who is editing his or her first book, or no editor at all. The author accepting the Publisher's offer in light of his or her own assessment of the value of the work, and the Publisher adding additional value, gives them the knowledge of the true "cost" of producing that work, above and beyond the more easily quantifiable physical elements of production and distribution that are more often discussed. Only they know what went into that creation and only they are able to place a value on it accordingly. As in the self-publishing option above, the market place can then respond, which is exactly as it should be.

Sanford J. Greenburger Associates, Inc.

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This position - where the creator should be the one to assign value - is already protected by law. The proposed settlement fails to recognize the special legislation that created copyrights and patents, granting a special status awarded to the creators of intellectual property: that they (and their licensees) for the length of the copyright or the patent shall have the exclusive right to control the distribution and pricing of the works that they create, and that they shall not be subject to the normal market competitive forces that apply to all other economic exchanges in our economy.

Copyright (and patent) laws in effect create legal monopolies that are recognized as necessary to reward the creators of intellectual property. In the proposed settlement with its regulatory provisions, an individual creator's work could be potentially be priced at nearly zero to promote something in which the creator has no financial stake: intellectual property as bait. The proposed settlement seeks to undo the right to control the pricing of one's own creative work – a right that our intellectual property laws have intentionally created - and the proposed settlement is therefore in effect, unconstitutional.

Furthermore, if one of the goals of anti-trust laws is to preserve innovation and competition, it is not in the public interest to prevent authors from making a living, potentially limiting the number of creative works they are able to produce and thus narrowing the range of consumer choices. It is in the public interest to encourage entrepreneurism and creation, so I would urge you to consider the authors on whose creativity and intellectual property so many industries rely, and allow them (and their licensees if applicable), to value their own creative output - as is already protected by law - and then allow market forces to prevail, so that ultimately the consumer gets to choose.

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I have neither the knowledge nor information to determine the truth or falsity of the allegations of collusion (though having read all the documents that are publicly available there seems to be a distinct lack of hard evidence in certain places), but I do know that the authors of these creative works would be damaged by government regulation of a fledgling e-book industry that prohibits the creator of a work of intellectual property assigning value to that creative work, and that is not in the public interest.

On behalf of our Chairman, Francis Greenburger and my colleagues, I urge you to reject the proposed settlement.

Yours sincerely,

Lisa Gallagher
Literary Agent

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