

Alicia Wendt
249 Mission Road
Hackettstown, NJ 07840

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

UNITED STATES V. APPLE, INC., ET AL., NO. 12-CV-2826(DLC) (S.D.N.Y) – COMMENTS ON PROPOSED FINAL JUDGEMENT AS TO DEFENDANTS HACHETTE, HARPERCOLLINS, AND SIMON & SCHUSTER

Dear Mr. Read,

I am writing on behalf of Publisher Defendants Hachette Book Group, Inc., HarperCollins Publishers L.L.C, and Simon & Schuster, Inc., in the civil antitrust action filed against Apple, Inc., et al. (No. 12-CV-2826[DLC] [S.D.N.Y]) to urge the US Department of Justice to reconsider its complaint and drop the related charges.

In defense of the remaining Publisher Defendants, with the exception of Defendant Apple, I argue that the validity of this action, as well as the proposed settlement, is compromised by a number of flaws, the most important being the US Department of Justice's failure to acknowledge that neither Amazon nor Apple, Inc. actually *sells* e-books, thereby making it impossible for any publisher to violate antitrust laws in conspiracy either with or against them in a manner that would return even the slightest competitive benefit; no matter how many "secret meetings" their representatives may or may not attend, the Publisher Defendants are equally at the mercy of both Amazon and Apple, whose sole interests are not in selling e-books, but rather in selling electronic reading devices, using low e-book prices as a convenient marketing scheme to the severe disadvantage of traditional book publishers.

In the Terms of Service for its Kindle device, Amazon explicitly states that digital content is "**licensed, not sold, to [users] by the Content Provider.**" Likewise, the Terms and Conditions for Apple, Inc.'s iBookstore identify Apple as a provider of services that "**permit [users] to license software products and digital content.**" It is problematic, then, that the DOJ frequently refers to Amazon and Apple's "sale" of e-books to consumers when, in actuality, neither the sale of e-books nor the subsequent transfer of ownership that it would entail are part of either retailer's legal agreement with consumers.

According to the current business model(s) for the retail distribution of e-books, Amazon and Apple retain ownership of all digital content they purchase from publishers and sell licenses to consumers merely permitting them to view it. It follows that the retailer maintains the authority to revoke these licenses at its own discretion, without prior notification of the user. Unfortunately, this arrangement, which offers zero benefit to the publisher, is neither described nor acknowledged in the DOJ's complaint – an omission that raises three important concerns:

- (1) If the DOJ's understanding of how the e-book industry currently functions is inconsistent with the actual practices of the parties involved, how can any of the Defendants justifiably be accused of illegal activity, let alone be fairly reprimanded or settled with? Its frequent misuse of terminology in reference to the "sale" of e-books when they are actually "licensed" renders the claims against the Publisher Defendants inaccurate and ill-informed, thereby suggesting that the alleged antitrust violation is potentially unfounded. Until it can successfully present its case in the context of the actual conditions under which e-books are bought and sold, the DOJ should withdraw its complaint against the remaining Publisher Defendants.
- (2) There is the question of whether this practice of licensing digital content under the guise of "selling e-books" misleads consumers into thinking that the terms of sale for e-books are the same as those for print books. Historically, transactions conducted under the traditional model for the sale of print books resulted in a consumer's ownership of physical merchandise that he/she purchased from a retailer. It is entirely misleading to consumers to reference the traditional sales model when describing the current business model for the distribution of e-books, as it does not end in this same result. Discussion of the distribution of e-books using a frame of reference that has traditionally been used for print further reveals the lack of clarity, both in the DOJ's suit and among the industry as a whole, as to the conditions under which e-books are actually bought and sold. Until the confusion regarding the "sale" of e-books is universally clarified, the DOJ is not justified in accusing any party of wrongdoing in relation to the digital publishing industry.
- (3) According to the current e-book business model(s), the arrangement between retailers and consumers, in which retailers maintain ownership of and authority over the content they license to consumers, seems suspiciously convenient and potentially threatening to the concepts of free press and personal property, given that the success of Amazon and Apple's respective electronic reading devices depend on their continued, widespread, and competitive access to e-books. Having both ownership of a vast repertoire of digital content and authority over e-book pricing, while also being one the manufacturer of the only device on which the content can be viewed, all with little to no say from the publisher, would grant a retailer unprecedented control over the publishing industry and its profits. Given that, in order to view e-books distributed by Amazon and Apple, one must first invest in their respective electronic reading devices, it does not seem in the consumer's best interest to grant the manufacturers of these devices the power to own and distribute digital content without being held accountable by publishers and other e-book retailers. Before doling out punishments, the DOJ should consider the consequences of its proposed settlement on a larger scale.

With regard to the survival of the publishing industry in an increasingly electronic age, the implications of the terms and conditions set forth by Amazon and Apple in their sale of digital licenses require far greater consideration than the DOJ has yet granted them in its haste to settle with the remaining Publisher Defendants. Much to the publishers' disfavor, this case vastly misconstrues the true motives of both Amazon and Apple to sell electronic reading devices, not for the good of the publishing industry, but at its expense.

While it would significantly impact competition among the nation's publishers, a shift in the structure of the publishing industry, along with a significant decrease in the price of e-books, matters little to the long-term survival of Amazon and Apple, who are primarily interested in technology sales. At the expense of the publishing industry's traditional (and once structurally sound) business model, Amazon and Apple have made no efforts to cooperate with the Publisher Defendants to facilitate fair and competitive pricing across the digital publishing market, nor have they expressed intent to develop a lucrative model for the

distribution of e-books that would be to the ultimate benefit of American consumers; rather, both Amazon and Apple have acted only in their own self interest, ultimately imposing their power as corporate technology giants on the publishing industry for the sole purpose of crushing one another in a larger battle for global technology sales and brand influence in an increasingly digital world.

The high initial cost to consumers for devices like the Amazon Kindle (\$79-\$379) and the Apple iPad (\$499+) generates far greater revenue than the sale of e-books and also guarantees continued steady profits for the retailer, as the only content that is compatible with each device is distributed solely by that device's own manufacturer or its affiliates. In this sense, low e-book prices are merely manipulated as a form of advertising meant to entice consumers to purchase a particular device, securing extended profit for the retailer: this is the inherent difference between the motives of the Publisher Defendants and the motives of mega-retailers like Amazon and Apple.

Having authority over e-book pricing with no say from the publisher would only grant Amazon and Apple unbridled authority to continue using e-book pricing as a bargaining chip in the push to sell electronic reading devices. Amazon's current practice of selling e-books at a loss demonstrates where its true interests lie. A company that wants to turn a profit on a product does not sell its merchandise for less than it costs to produce it. If Amazon truly was invested in the e-book industry to the extent that other retailers and/or publishers might be successful in conspiring against it, the company would be selling Kindles at a loss hoping to make up the cost in fairly and competitively priced digital content, not the other way around. Ultimately, the Publisher Defendants are and always will be at the mercy of retailers, namely Apple and Amazon, because the digital content they distribute is worthless without the electronic reading devices used to view it.

To Amazon and Apple, the destruction of the publishing industry is merely collateral damage. In this case, siding with what is perceived to be, though perhaps wrongfully, the lesser of two evils is not an antitrust violation, but a basic survival instinct. This being so, the Publisher Defendants should not be condemned as conspirators, but rather appealed to as victims of a great technology race between two relentless forces that will consume everything in their path.

Instead of wasting its time and resources on prolonging its case against Apple, Inc., et al. – a venture that, if successful, would permanently cripple the US publishing industry in an already vulnerable economy – the USDOJ should dedicate its efforts to further scrutiny of Amazon and Apple's questionable involvement in e-book pricing and the digital publishing industry, as well as the equal role that both have played in forcing several of the nation's top publishers, who once engaged in decades of fair competition and long-standing success, into sudden survival mode for fear of being destroyed. If the US Government rules against the remaining Publisher Defendants, it will have been complicit in the destruction.

Sincerely,
Alicia Wendt