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

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

Re: United States v. Apple, Inc. et al., No. 12-CV-2826(DLC) (S.D.N.Y.) – Comments on Proposed Final Judgment as to Defendants Hachette, HarperCollins, and Simon & Schuster

Dear Mr. Read,

I'm a literary agent at The Gernert Company in New York, as well as a lover of books and of our literary culture, like most people in the publishing business. I am writing to express an opinion on the Department of Justice's lawsuit against Apple, Hachette, HarperCollins and Simon & Schuster.

I should say first that I have no knowledge regarding, or opinion on, the United States' allegations of collusion between Apple and the five original agency publishers named in the DOJ's suit. I do, however, feel strongly that in bringing this suit the DOJ is seeking to fix a system that isn't broken, and that it has failed to understand that in the long-term, the true beneficiary of the proposed settlement is not the American public, but rather an entity much more deserving of the Antitrust Division's scrutiny than publishers: Amazon.

In his letter to you of May 9, 2012, Simon Lipskar of Writer's House makes the if-it-ain't-broke-don't-fix-it argument—and several others—better than I ever could hope, with detailed data to support it. He not only demolishes the notion that agency pricing has caused consumer harm; he makes a compelling case that it has in fact been pro-competitive and, in a remarkably brief period of time, led to increased competition and innovation in the area of e-reading devices. As he has made his letter public, I will link to it here and let it speak for itself:

<http://www.digitalbookworld.com/2012/response-to-doj-bizarre-misunderstanding-of-e-book-business-from-aar/>

To Simon's argument I would add that I think it's helpful to look at the fundamental difference between printed books and ebooks. A printed book is, in essence, a bundle: content created by an author, and the technology with which to access that content, sold for a single price. (Bound paper printed with movable type may not seem like technology to us, in the 21st century, but it certainly was to Gutenberg). Neither part of the bundle has economic value without the other; publishers' business model was built for centuries upon the value derived from bundling content and technology, even if they wouldn't have described it that way.

It's worth pointing out that, without exception, there is no other sector of the culture or entertainment industry for which this has ever been true: to listen to a CD you had to

have a CD player, for instance, and for all the disruption in the music industry as it struggled to adapt to a digital world over the past decade or so, the fact remains that record companies were never in the business, as publishers were, of providing the device with which to consume the content they had acquired, produced, marketed, and distributed. There was a separate market for those devices, a market so lucrative and competitive that the innovation that resulted took us from the phonograph to the iPod in a little over a century.

Now, suddenly, for the first time in the history of the publishing business, there is a lucrative and competitive—as well as innovative; see the leaps forward made with each successive generation of the Kindle or Nook—market for technology with which to access ebooks, technology that is in fact worthless without the content that ebooks represent. The only other person I've seen make this argument is Bob Kohn, whose 55 page letter is, in my view, a bravura performance, and to which I will direct your attention again:

<http://lunch.publishersmarketplace.com/wp-content/uploads/2012/05/BobKohnComments.pdf>

To Mr. Kohn's points I'll add that the DOJ is not the only one who hasn't paid sufficient attention to the "upstream" market for devices created by ebooks. I think publishers failed to prepare for it themselves, and I personally feel that, before the Kindle arrived, individual publishers should have demanded—on business grounds, not legal ones—a small royalty, to be shared with authors, on the sale of each Kindle, since Amazon's device would have otherwise been worthless. (Recording company executives made that same argument to Apple, albeit unsuccessfully, when it was seeking to license music for the iPod, as anyone who's read the Steve Jobs biography will know. That publishers never had the leverage to actually achieve such a concession from Amazon, which was already too powerful a player in the industry, doesn't mean they shouldn't have fought for it, on principle.) That train has already left the station, of course. I only make the point to highlight how unreasonable it is to penalize publishers for seeking to retain control over the pricing of ebooks in the environment that resulted, one in which a) there emerged an entirely new market for devices to access those ebooks, a market in which publishers had no participation whatsoever and b) profits from this entirely new market enabled the largest vendor of both the devices and the ebooks themselves to artificially drive down ebook prices, thereby incentivizing more consumers to buy more devices, thereby increasing the vendors market share of ebooks and e-readers to the level of 90%, an effective monopoly. And all that was happening, I hasten to note, around Amazon's closed Kindle platform, which prevented its customers from reading content acquired from other vendors on their Kindles, or from reading Kindle content on other platforms—hardly a pro-competitive business practice.

By seizing control of the pricing of their products, publishers opened the door for the likes of Apple, Barnes & Noble, Kobo and others to make significant inroads into the e-reader market, such that today it is robust, competitive, innovative and, one imagines, very profitable. One might even say that in taking steps that led to increased competition,

publishers saved DOJ from having to pursue an entirely different antitrust suit against Amazon itself. But there's a chance of that yet. Because if Amazon is allowed to return to discounting ebooks to drive sales of its devices, and Barnes & Noble is unable to compete and goes under, it is just a matter of time before Amazon has an effective monopoly over the sale of both print and digital books, leaving us with a literary culture that is not just monopolistic, but irrevocably impoverished.

Sincerely,

A handwritten signature in black ink, appearing to read 'Chris Parris-Lamb', with a stylized, cursive script.

Chris Parris-Lamb