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ICM® INTERNATIONAL CREATIVE MANAGEMENT

John R. Read, Chief

Litigation III Section

United States Department of Justice

450 5th Street N.W.

Suite 4000

Washington, D.C. 20530

Re: Department of Justice Digital Book Settlement

Dear Mr. Read,

I am a literary agent with ICM Partners in New York and am writing in response and opposition to the proposed settlement between the Department of Justice and certain publishers regarding the pricing of digital books. As a literary agent, I represent the sale of intellectual property, namely authors' rights in the books and articles they write, to publishers.

Since the settlement is designed to remediate a perceived injustice to consumers of that intellectual property, I am most eager to comment on the impact on the continued viability of the creation of that intellectual property for the reading public in the event the settlement is sustained.

While it is unfashionable to say so, the publishing business owes a debt of gratitude for Amazon's investment in the Kindle platform, its well-merchandised eBook store and seamless purchase to download environment that Amazon's customers enjoy. The publishing business was spared a host of growing pains in the infancy of ereaders, such as the piracy issues that plagued the music business during the Napster era, in no small measure thanks to Amazon and the tremendous investment it poured into ensuring the success of its e distribution business.

We all might have sailed off into the sunset, ecstatic about a robust new marketplace for a book industry struggling in an extremely troubled economy with an arguably antiquated business paradigm for printed works, if not for a particular front on which Amazon chose very strategically to press. Amazon pursued the discounting for its customers of a very, very narrow but to the public highly visible band of their Kindle books: those appearing on the New York Times Bestseller list. To say that this

selection of books is an exquisitely small and rarified portion of all titles published in a year would be a gross understatement, yet Amazon cleverly identified this class of book as the strongest fulcrum with which to raise their market share. The discounting of these bestselling titles was so extreme (in many cases actually costing Amazon dollars per title and creating so called "loss leaders") that this single bookselling account was able to influence not just the competitive retail landscape but, more critically, *the perceived value of intellectual property*. There's evidence of this everywhere, beginning with Amazon's own Customer Reviews, wherein Kindle buyers quickly began to use a forum intended for literary criticism and feedback to complain about the price of titles not included in Amazon's deep, deep discounts. Suddenly the value of the content for sale found itself sacrificed to a battle pitting the price of bytes against the price of pages. Many in the publishing industry watched in a sort of horror, believing that the public's perceived value of any intellectual property, be it an entertaining "summer read" or the most scholarly work of non-fiction, is the basis for its willingness to purchase the books by which authors and publishers disseminate the expression of ideas. Far from being a perspective limited to self-interest, this desire to protect the business of publishing is one very much in the public interest. Herman Hesse states in THE MAGIC OF BOOKS, "Without the writing of books, there is no history, there is no concept of humanity. And if anyone wants to try to enclose in a small space ... the history of the human spirit and make it his own, he can only do this from a collection of books." It is the value of content that counts and must be protected.

The actions of the defendant publishers speak volumes about this crisis. When Amazon showed no signs of abandoning these extraordinary discounts, publishers began to "window" the ebook format, delaying reader access to new titles in order to preserve the critical retail value for new publications (and in doing so, foregoing digital sales revenue). When news began to travel about the entry of a well-capitalized, highly-capable electronics and digital goods retailer, with an entirely new sales model ("Agency Pricing"), publishers were understandably relieved. Apple's Agency Pricing model offered published books a digital retail avenue that preserved the value of the commodity and offered a modicum of relief to publishers and authors from the plummeting public expectations for digital book prices precipitated by Amazon. In choosing the "Agency Model," publishers were not extracting an extra retail margin from digital retailers, but willingly surrendering a substantial portion of the unit sales margin in making the shift from the "wholesale" to "agency" model with the added effect of preserving the value of what was being sold to the customer.

I understand that a substantial body of legal precedent distinguishes between durable/consumable goods and intellectual property. Failure to recognize this distinction is to my way of thinking the key flaw in the settlement at hand, which is tragically off-target in conflating the pricing of durable goods with intellectual property. Unlike durable goods, which can be outsourced for manufacture in other countries with lower labor and resource costs, each and every book published in the digital marketplace

is unique, authored by an artist or a scientist who makes his or her living with his or her mind and who is then championed by a publisher who recognizes the merit of editing, marketing and distributing the expression of that author's thoughts. Such an undertaking cannot be reduced to the same form of efficiencies applied to durable goods. Publishers and authors are entirely justified in wanting to preserve the value of intellectual property – book by book. If my knowledge in antitrust law is admittedly limited, I have an abundance of experience in the tremendously challenging lives of authors. The financially precarious career of the author is the stuff of legend, and to say that the healthy, continued creation and distribution of books was endangered even before the advent of the digital marketplace would be an understatement. And yet it is a profession which has endured and indeed been protected by many societies for centuries. The D.O.J. settlement may remedy that sliver of the book marketplace embodied on the New York Times Bestseller List but it would be most certainly to the express detriment of authors' future ability to create new works, of the simultaneous availability to the public of books in multiple formats, of a healthy, competitive retail environment for publishing, and of the continued innovation in digital platforms, devices, and their prices. The settlement would have the effect of a sledgehammer where a scalpel is needed most, and I hope the Department of Justice will reconsider the settlement in light of the consequences its application is sure to have on the profession of the author.

Sincerely,

Sloan Harris