

From: Joe Konrath [<mailto:joekonra>][REDACTED]

Sent: Monday, May 28, 2012 10:48 AM

To: Read, John [John.Read@ATR.USDOJ.gov]; Fairchild, Stephen [Stephen.Fairchild@ATR.USDOJ.gov]

Subject: 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

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

May 28, 2012

Dear Mr. Read,

I'm writing to you as the author of forty-six books--eight legacy published, two Amazon published (with three more on the way), and thirty-six self-published, all of which inform the views I express in this letter.

As you doubtless recognize from the mail you're receiving, there is currently underway a letter-writing campaign coordinated by the Association of Authors' Representatives, the Authors Guild, and other parts of the publishing establishment attempting to persuade you that the DOJ's suit against five of the Big Six and Apple is without merit, and that the Agency model is, at best, good for everyone, at worst, harmless.

I'm writing to tell you that these organizations did not solicit the views of their members, that they in no way speak on behalf of all or even most of their members, and that (as I imagine is obvious) they are motivated not by what's best for consumers, but by what they see as best for themselves.

I recognize that the heart of the DOJ's suit is collusion, not high prices. But it's clear that the legacy publishing industry's strategy is to keep the prices of ebooks high so as not to cannibalize high-margin hardback sales. If the prices of legacy published books are kept artificially high it could be argued that my lower-priced self-published books are made more attractive by comparison, but I believe that a regime of higher-priced books is bad for the industry overall because it slows the growth of the global book market, which indeed hurts all sales. I also believe it's obviously bad for consumers, especially lower-income consumers, who could buy more of the books they loved if those books weren't priced so high.

When prices of media are high, they're a barrier to entry. Many are avoiding buying an ereader because the ebooks they most want are \$9.99 - \$14.99. If prices came down, more Kindles (and Kobo readers and Nooks and Sony readers) would be sold. That widens the market, which leads to more ebook sales. This is good for authors, and for readers who can get more for their money.

I write a popular blog, notable in the industry for its contrary opinions, called A Newbie's Guide to Publishing <http://jakonrath.blogspot.com> and I'm including four recent blog posts to underscore some of the points I make above, and the structural problems in the publishing industry as they relate to the DOJ suit.

The first, written by Barry Eisler (a former attorney and author of eight legacy-published books, two with Amazon's Thomas & Mercer imprint, and four self-published titles), succinctly explains how big publishers function as a cartel (or, as it was recently revealed they refer to themselves, a "club").
<http://jakonrath.blogspot.com/2011/10/guest-post-by-barry-eisler.html>

The second explains how the legacy publishing model harms authors and consumers. <http://jakonrath.blogspot.com/2012/04/agency-model-sucks.html>

The third and fourth are direct refutations of two letters sent to you--one by the Association of Authors' Representatives <http://jakonrath.blogspot.com/2012/05/aar-fail.html>, and one by agent Simon Lipskar <http://jakonrath.blogspot.com/2012/05/simon-says.html>, president of a literary agency called Writers House. I have done my best to show how poorly thought-out, disingenuous, misleading, and sometimes outright deceitful these letters are.

The language I've used to rebuke these agents is the language I use on my blog, which is casual, coarse, and accusatory. I mention this just so you'll know that despite what I think is justifiable anger at the industry practices which I believe betray authors and harm readers, I recognize there's a difference in the kind of tone one can use in a blog and the kind one ought to use in a letter like this one.

Thank you in advance for taking the time to read these posts. Though it is my understanding that the goal of the DOJ's suit is to protect consumers, it is my belief that the group most harmed by the actions of the publishing cartel is writers, who have been forced to accept onerous, often unconscionable contract terms without recourse. The Association of Authors' Representatives, and the Authors Guild, which purportedly defend the rights of writers, in fact work for the publishers. For decades, thousands of writers have been exploited by a powerful industry that universally offers nonnegotiable, one-sided terms, which have gone unchallenged. To that end I offer three more links to posts I have written, <http://jakonrath.blogspot.com/2012/05/pricing-books-and->

[ebooks.html](#), <http://jakonrath.blogspot.com/2012/05/exploited-writers-in-unfair-industry.html>, and <http://jakonrath.blogspot.com/2012/05/unconscionability.html>.

Also, I should mention a point that was brought up in the comments to one of these posts (the comments are a great place to read what writers and readers really feel about this issue). I'll paraphrase: "Why is it the Big 6 had no problems with Amazon when they were drastically discounting hardcover book prices, but when Amazon does the same thing with ebooks it is suddenly the end of competition?"

These blog posts show that Amazon has not destroyed competition. In fact, it is the only company encouraging it.

Sincerely yours,

Joe Konrath

Guest Post by Barry Eisler
The Bogeyman and The Axe Murderer

A lot of conversation in and about the publishing world is fixated on fear of Amazon's purported potential monopoly power—on the possibility that Amazon will eventually enjoy such market dominance as a publisher that it will abuse its position and begin to punish authors, perhaps with extremely low royalties. Which leads to a question I'm not sure I can adequately answer, though I find it fascinating:

Why all the fear about what Amazon might do in the future, when legacy publishers are doing those fearful things right now?

Today, Amazon pays self-published authors 70% of the retail price of titles sold on the Kindle Store through Amazon's Kindle Direct Publishing. Legacy publishers, by contrast, pay their authors 17.5%. Now, certainly 17.5% is appallingly low. But if appallingly low royalties are your concern, why would you expend so much energy speculating about a lower royalty that might eventually come to pass, while caring so little about the extremely low royalties in effect today? It's like panicking about possibly getting sick in the future while failing to treat the pneumonia killing you right now.

I know from experience that some people will respond to the paragraph above by claiming New York publishers are not a monopoly. After all, don't the big houses fight with each other over new manuscripts? Aren't there sometimes bidding wars over a hot new property? And they even poach each other's employees and authors, too. So of course there's competition, right?

No. Everything I just described is, relatively speaking, a distraction—Kabuki competition, not the real thing. If the legacy houses actually competed with each other—if they actually strove to attract authors and serve readers and lower costs and improve performance—the publishing world would not be universally characterized by the following:

- An identical, lock-step, onerously low 17.5% digital royalty rate
- The practice of forcing readers who prefer digital to wait, sometimes for over a year, until a title is also ready to ship in paper
- Digital retail prices equivalent to paper ones despite the obvious lower costs of digital distribution
- Byzantine and opaque royalty statements, delivered twice-yearly as much as six months after the end of the applicable reporting period
- Non-compete clauses that attempt to preclude authors from meaningful control over their own professional and artistic destinies
- Morbidly obese contracts delivered months after agreement on high-level deal points, written in unendurable legalese and drawn up in nine-point font on 14-inch legal paper, the only purpose of which is to intimidate authors into not

reading the document, and to obscure the meaning of what's written just in case they do

- Payments tendered months after they've come due
- A refusal to share sales data with authors, even though authors have long clamored for such information and the web technology to provide such access was already old a decade ago.

We can argue about whether the system I just described is properly known as a monopoly, or as a quasi-monopoly, or as a cartel. What can't be argued is that such a system is only possible—indeed, is only conceivable—in the absence of meaningful competition.

So don't go for the head-fake—the bidding wars, the poaching contests. These are as meaningful between publishing houses as are election contests between Democrats and Republicans; wars between Hapsburgs and Bourbons; arguments between [supposedly liberal and supposedly conservative media](http://baryeisler.blogspot.com/2010/07/ministry-of-truth.html) [http://baryeisler.blogspot.com/2010/07/ministry-of-truth.html]. The skirmishing on the surface is meaningless by comparison with the cooperation, collusion, and confluence of interests beneath.

Which brings us back to my original question: why are so many authors afraid of a possible monopoly while sanguine about a real one?

I can think of several possibilities.

First, fear is a powerful emotion, and, as Gavin de Becker [https://www.gavindebecker.com/] observes in his superb *The Gift of Fear* [http://www.amazon.com/The-Gift-of-Fear-ebook/dp/B0036Z9U2A/ref=tmm_kin_title_0?ie=UTF8&m=AG56TWVU5XWC2&qid=1319668546&sr=1-1], is by definition related to something that hasn't happened yet. Once the feared thing has happened, we're no longer afraid of it. New York's quasi-monopoly is a longstanding and accomplished fact; therefore, it can't be feared (though it can be loathed). By contrast, Amazon is relatively new in publishing. Whether it will attain and abuse monopoly power is currently unknown, and therefore is something people can fear. It may be that because of the nature and survival value of fear, the mind ascribes greater weight to potential threats than it does to actual problems, and this difference might explain the skew between fear toward Amazon and acquiescence to New York.

Second, and perhaps related, is the concept of the devil you know. Sure, New York functions as a cartel, but it always has, and people are accustomed to it. It seems normal. Amazon, by contrast, is unknown. So hey, your husband beats you, but it's been going on for a long time and you've survived. Do you really want to divorce and remarry? Maybe the new guy will beat you, too. Maybe the beatings will be even worse. Better to stick with what's familiar.

Third, and again perhaps related, is [Stockholm Syndrome](http://en.wikipedia.org/wiki/Stockholm_syndrome), [http://en.wikipedia.org/wiki/Stockholm_syndrome] or what might also be known as a serf's attitude toward his feudal lords (Mike Stackpole calls it a "[house slave](http://www.michaelstackpole.com/?p=2510)" [http://www.michaelstackpole.com/?p=2510] mentality). New York has been abusing authors for so long that a lot of them have come to identify with their oppressors—to think their oppression is desirable and even just. And rather than welcoming a powerful new player as a potential rescuer or reformer, these authors fear the new entrant and fling their bodies over their captors in an attempt to protect them from harm.

For me, that last metaphor really gets to the heart of the matter. Amazon is like an inkblot test of submissiveness to New York, with some authors welcoming a newcomer with the clout to crack the cartel wide open; and others fearing anything that might change their current circumstances.

Well, you know what the inkblot looks like to me. I think you'd have to be in profound denial to believe that Simon and Schuster's recently announced [Author Portal](http://www.nytimes.com/2011/10/20/business/media/authors-to-get-sales-data-from-three-big-publishers.html) [http://www.nytimes.com/2011/10/20/business/media/authors-to-get-sales-data-from-three-big-publishers.html], which will finally give authors the kind of access to sales data they've been pleading for, is the result of anything other than a belated attempt to counter Amazon, which provides authors such information as a matter of course. If legacy publishers next clean up their royalty statements, which are currently designed to be as transparent as the Dead Sea Scrolls, the timing and circumstances of that improvement will be no more coincidental than their sudden conversion to the benefits of sharing sales data. I just got my first royalty statement from Amazon, by the way, and it's the first royalty statement I've ever seen that I immediately and easily was able to understand. Amazon also provides its statements monthly, not twice-yearly, so expect legacy publishers to coincidentally change that practice in due course, too.

Will Amazon become functionally the same kind of publishing monopoly the New York houses currently comprise? I don't know. But it's silly to argue that you're afraid solely because you believe Amazon wants to be a monopoly, as though a monopoly motive is itself dispositive. All companies want to be monopolies—a company wants competitors like an army wants a fair fight, like a politician wants a serious opponent, like a lover wants rivals. Without means and opportunity, motive alone is meaningless, and I'm confident that with competitors like Apple, B&N, Google, Kobo, and Smashwords, Amazon will be driven to continue pursuing business practices based on enlightened self-interest. Another thing that will be useful in this regard is more and more authors creating their own [website stores](http://www.barryeisler.com/ebooks.php) [http://www.barryeisler.com/ebooks.php], and cross-selling each other's books on them. The more choices authors identify, create, and exploit, the more motivated Amazon and other publishers and distributors will be to continue to offer favorable royalty splits and to otherwise treat authors well.

Because, remember. If Amazon ever becomes a real monopoly, they could lower those 70% royalties a lot. After all, oppressively low royalties are simply what monopolies do, and Amazon could lower theirs all the way down to, I don't know, 17.5% or something. And a royalty rate that low would really suck. Damn, just imagining it scares the hell out of me.

Will the New York houses be able to shake off their torpor and rebuild their businesses based on more enlightened practices? It's hard to say. The same monopoly that protects a company's profits also withers its strength and adaptability. A company coddled by monopoly is like a fighter who never trains—who never even fights. Will a company like that be able to answer the bell when a real challenger enters the ring? I don't know.

What I do know is that a vigorous new player just kicked open the locked door of a dark and moribund fortress and is finally letting in some sunlight. If you see a better way than Amazon to reform New York's previously unassailable quasi-monopoly and all the suboptimal business practices that monopoly has enabled, I'd like to know what it is. In the meantime, I welcome Amazon and any other new entrant that can continue to loosen the legacy houses' monopolistic grip, and force them to rely on practices beneficial to authors and readers rather than on monopoly rents beneficial only to themselves.

Because, remember. A 17.5% digital split for authors would be a terrible thing. Little better than serfdom, really. We simply can't afford to let that happen.

The Agency Model Sucks

Joe Konrath

If you're a regular reader of my blog, no doubt you've heard about the Department of Justice filing suit against five of the Big 6 publishers for collusion. If you haven't read the complaint, [you should](http://newsandinsight.thomsonreuters.com/uploadedFiles/Reuters_Content/2012/04_-_April/e-books_complaint.pdf) [http://newsandinsight.thomsonreuters.com/uploadedFiles/Reuters_Content/2012/04_-_April/e-books_complaint.pdf].

Personally, I don't care if their alleged collusion was illegal or not. I've been known to break laws on occasion myself.

What I do care about is how authors are reacting to this news.

I won't point fingers, but a Google or Twitter search will show how many authors seem to think Amazon is bad, the agency model is good, and the poor Big 6 are getting the shaft.

Uh, no. That's just plain wrong.

I'm going to explain why the agency model in this particular case is indeed bad for authors. But first go read April L. Hamilton's terrific breakdown of arguments and statements [erroneously defending the Big 6](#).

[<http://www.macstories.net/stories/understanding-the-agency-model-and-the-dojs-allegations-against-apple-and-those-publishers/>]

Before I begin, let's make sure we're all on the same page about what the agency model is. Here's a [detailed explanation](#) [<http://www.macstories.net/stories/understanding-the-agency-model-and-the-dojs-allegations-against-apple-and-those-publishers/>], but in a nutshell it is this: in a wholesale model, the one supplying the goods sells to a retailer at a predetermined price, then the retailer sells to consumers at whatever price they see fit.

In the agency model, the one supplying the goods gets to set the price for consumers, and then gives the retailer a set percentage (in this case 30%.)

It should be obvious that the one who sets the price has a great deal of power over the market.

The agency model by itself is not illegal. Retailers can choose to adopt any pricing structure with their suppliers as they see fit. And as I said before, I care less about the legality of this particular business relationship, and more about if it was good for authors.

And it wasn't, for this very big reason:

Under the Agency Model Authors Make Less Money

I've [gone into this in detail before](#)

[<http://jakonrath.blogspot.com/2012/03/presumed-inane.html>], but let me distill it.

Under the prior model, Amazon bought ebooks at a percentage of the recommended retail price. Then they priced them how they saw fit.

The recommended retail price for ebooks was often about half of the hardcover price. So a \$25 recommended retail price meant Amazon paid \$12.50 for the ebook.

According to most contracts, the author made 25% of the net price the publisher received. So at the above numbers, an author would make \$3.12 NO MATTER WHAT PRICE AMAZON SOLD THE EBOOK FOR.

In other words, if Amazon wanted to sell the ebook for \$9.99, the author still makes \$3.12.

Sell it for \$5.99? Author makes \$3.12.

Sell it for 99 cents? Author makes \$3.12.

So what happens when the agency model comes into play?

First of all, Amazon no longer controls the price. We all know that this is BAD, because Amazon became the giant billion dollar company it is today by ruthlessly gouging customers, forcing them to pay high mark-ups at unreasonable prices.

Oh, wait a sec... Amazon doesn't do that. In fact, Amazon works its butt off trying to keep prices low. That's why so many people shop there.

Now, I've got reams of data that show lower priced ebooks outsell higher priced ebooks. My higher-priced legacy novels are underselling my lower-priced self-pub novels by 1 to 5 or worse.

In other words:

With the wholesale model, authors made more money per unit and sold more units.

If you are an author defending the Big 6 and the agency model, repeat that in your head until it sinks in.

With the wholesale model, authors made more money per unit and sold more units.

Funny thing is, publishers also made more money under the wholesale model. But instead the Big 6 decided they wanted an agency model.

Authors still get 25% of net. But net has gotten lower in almost all cases.

With the wholesale model, net was \$12.50. With the agency model, net is 17.5% of the list price set by the publisher.

So the publisher sells it for \$12.99, the author makes \$2.27.

Sell it for \$9.99? Author makes \$1.74.

Sell it for \$5.99? Author makes \$1.04.

Sell it for 99 cents? Author makes 17 cents.

The Big 6 don't like low priced ebooks. It hurts their paper sales, and paper is the model they hold distribution power over. So once the agency model became adopted, the Big 6 kept ebook prices high.

In other words:

With the agency model, authors made less money per unit, and sold fewer units.

Is this sinking in yet? The wholesale model was better for authors. It was also better for customers, who benefited from lower prices.

So why are some authors defending the Big 6 for taking food directly out of their mouths?

Could be ignorance. Could be [Stockholm Syndrome](http://jakonrath.blogspot.com/2011/04/are-you-dense.html) [http://jakonrath.blogspot.com/2011/04/are-you-dense.html]. Could be they feel the need to defend the industry that made them rich or successful (though not all authors defending the agency model are rich or successful.)

The point is, no author should be on the Big 6's side here. Even those who fear that Amazon will someday become a huge monopoly that will destroy the world by offering low prices, excellent customer service, and a platform for authors to directly reach those customers.

Q: But Joe, aren't you benefiting from the agency model? After all, isn't that what KDP is?

Joe sez: Absolutely. When I self-publish, I can set my own prices. I'm able to find that sweet spot in pricing to maximize profits. I love the agency model. It's terrific if you are the content creator.

But I don't want an archaic, inefficient industry controlling the prices of the books I've written to further their own Machiavellian agenda. It's absurd that I'm the one who wrote the book, and I get 17.5% of list price, while the company setting my list price is getting 52.5%. Even worse, that company setting this list price is NOT PRICING TO MAXIMIZE REVENUE. They are PRICING TO PROTECT THEIR STRANGLEHOLD ON THE INDUSTRY which is HURTING MY INCOME.

Q: But Joe, if the Big 6 are no longer allowed to use the agency model, Amazon might also take the agency model away from self-pubbed authors.

Joe sez: I'd be happy to go into a wholesale arrangement with Amazon. As you can see by the numbers above, a wholesale arrangement can also be beneficial to authors.

Q: But Joe, what if Amazon cuts author royalties and raises ebook prices?

Joe sez: Amazon has a clear history of trying to lower prices, not raise them. Right now the Big 6 legacy publishers are the ones who want high prices.

As for Amazon lowering my royalties, as long as there is competition I doubt that will happen.

Q: But Joe, if all the Big 6 ebooks are priced low, no one will buy yours anymore.

Joe sez: I disagree. I believe I'll sell even more ebooks and make more money than I am now if all prices drop.

First of all, lower ebook prices encourage buying across the board. Low prices fuel impulse buys. People are looser with their wallets and buy more than they normally would when prices are low.

Second of all, lower ebook prices allow the entire market to grow, as higher prices are a barrier to entry for many. When we have \$49 ereaders and all NYT bestsellers are \$2.99, more people will adopt the technology and buy the media.

Third, we're entering a global marketplace that will have an infinite, inexhaustible customer base. We'll never run out of readers to sell to.

Fourth, at low prices, there is no competition between ebooks. Instead of spending [\\$19.99 on the new JK Rowling](http://www.amazon.com/The-Casual-Vacancy-ebook/dp/B007THA4FI/ref=sr_tr_sr_1?s=digital-text&ie=UTF8&qid=1334590518&sr=1-1) [http://www.amazon.com/The-Casual-Vacancy-ebook/dp/B007THA4FI/ref=sr_tr_sr_1?s=digital-text&ie=UTF8&qid=1334590518&sr=1-1], if her latest was \$3.99 a reader could buy that along with five of my titles.

In the comments, some keep insisting that once legacy ebook prices drop, indie sales will drop because of competition. Here's how I see it:

Ebooks aren't cars, where the buyer purchases one that will last for years. People who read books tend to read more than one.

If you read for pleasure, and ebooks become cheaper, I predict you'll buy more. This isn't about competing.

If a customer has a \$25 book budget for the month and the choice is between my new hardcover and Patterson's, that's competing for dollars.

If we're both \$3.99, the reader will get both. As a species we buy in bulk and hoard, even if we never use what we buy. That's how we're wired. And if prices came down unilaterally, I predict sales will go up unilaterally because the overall

pie will get bigger--because more readers will enter the market--and those readers in the market will be able to buy more with their money.

Think about your own buying habits. Or think about what stores do. When you need toothpaste, and a tube is \$4.99 or two for \$5.99, which do you buy? Think about the bargain DVD section at Best Buy, where every movie is \$2.99. If there is more than one you're interested in, do you get both? Contrast that to the new releases, which are \$19.99. If there is more than one you want you have to think about it before buying both. At the lower price, you don't think.

Now think about going to the store to buy a refrigerator and expecting to pay \$1000. You're thrilled to see a model you like for \$399. Do you leave the store with \$601 in your pocket, or do you keep shopping because you feel you saved money and can now spend some of it?

Lower prices will be better for everyone.

Q: But Joe, it isn't a question of money. It is a question of time. If people load up their Kindles on free or cheap ebooks, they'll never have time to read them all, which means they won't buy more.

Joe sez: People are already loading up their Kindles. That hasn't precluded buying more ebooks. Readers have always had To Be Read piles. But now they're cheaper to acquire, and portable.

It's the [buffet mentality I've written about before](http://jakonrath.blogspot.com/2011/02/end-of-bestseller.html) [http://jakonrath.blogspot.com/2011/02/end-of-bestseller.html].

Q: But Joe, Amazon is the devil and wants to eat my children.

Joe sez: I simply don't understand why authors are afraid of Amazon.

Amazon wants to lower ebook prices. The Big 6 want to raise them.

Amazon has [given authors more opportunity than ever](http://www.thepassivevoice.com/04/2012/kdp-was-my-one-shot-at-a-lifelong-dream/) [http://www.thepassivevoice.com/04/2012/kdp-was-my-one-shot-at-a-lifelong-dream/] before in history, allowing them to make money. The Big 6 has "nurtured" thousands of my peers into depression and poverty.

Those who fear what will happen when Amazon rules the publishing world should instead fear the cartel that currently controls the publishing world: the Big 6. Forcing the agency model has hurt authors and consumers, and that's a damn poor business model and not one I want to align myself with.

You shouldn't worry about being eaten by a lion tomorrow when there is currently a pit viper biting you in the ass. And if you're defending the pit viper, you're an idiot.

AAR Fail

Joe Konrath

I just read the letter the Association of Authors Representatives sent to the DOJ yesterday.

Then I threw up in my mouth. Ack.

Their letter in italics, my comments in bold.

My comments will not be kind.

May 8, 2012

John R. Read

Chief, Litigation III Section United States Department of Justice 450 5th St NW Suite 4000 Washington DC 20530

Dear Mr. Read,

I write to you as the President of the AAR, the largest organization of literary and dramatic agents in the United States, and on behalf of the unanimous AAR Board of Directors. Our more than four hundred seventy-five members represent writers who number in the tens of thousands. We want you to know in the strongest terms possible that we firmly oppose the proposed settlement between the Justice Department and three publishers with respect to e-book pricing.

Translation: We're about to put our collective foot in our mouth. Stay tuned!

Joe sez: I count thirteen names on this letter. I don't see the names of the other 462 AAR members, nor the names of the tens of thousands of authors they seem to be insinuating they speak for.

They DO NOT speak for me. And I hope the majority of the AAR who didn't sign their name to this nonsense show some guts and leave an organization that erroneously claims to speak for them. Or at least fire the board members that sent this without getting a majority vote.

Readers, writers and the general public benefit when there is a healthy competitive literary marketplace. Two and a half years ago Amazon, with its proprietary Kindle devices and its willingness to discount e-book "bestsellers" to a

level at which it sustained a significant loss on each copy sold, threatened the entire marketplace for books.

Translation: Amazon invented a device that consumers wanted. That's BAD. Readers were getting cheap ebooks. That's BAD. It may not seem bad on the surface, and we don't back-up our claim with any actual evidence, but boy oh boy trust us it really is because we say so.

Amazon's practice of targeting the very titles that drive profitability of our entire industry and pricing them several dollars below cost was clearly leading to the demise of the independent bookstore, hastened the loss of Borders, and threatened the existence of Barnes & Noble, the one remaining large chain store that sells books.

Translation: Customers were changing how and where they shopped because Amazon gave them a clearly better alternative; ebooks delivered instantly for less.

Joe sez: Apparently the AAR doesn't remember that under the previous model, their authors were [making more damn money](#) [http://jakonrath.blogspot.com/2012/04/agency-model-sucks.html].

Doesn't AAR stand for Association of AUTHORS Representatives? Why are they suddenly spokesmen for Barnes and Noble?

And Borders? Weren't they on the [verge of bankruptcy](#) [http://seekingalpha.com/article/174889-borders-on-the-verge-of-bankruptcy] (or at least in serious trouble) before Amazon even introduced the Kindle? Blaming Amazon for Borders' woes is bullshit correlation. Or as a friend of mine calls it: causality magical thinking.

This was not healthy for competition or for authors or indeed for consumers in the long-term.

Translation: Trying to outsell your competition, or attract customers with lower prices and better service, is bad.

And it's bad when authors get paid more for each copy sold and sell more copies because of lower prices.

And lower prices are bad for consumers, because maybe one day Amazon will again raise prices, possibly even up to the lofty heights publishers have them raised to now under the current Agency Model.

Retailers shouldn't be allowed to set their own prices. That's bad. It's much better for the wholesaler to set both the wholesale and the retail price,

because THAT and THAT ALONE encourages healthy competition. ESPECIALLY when there are several wholesalers in lockstep.

Nothing is better for consumers than a group of companies who set wholesale and retail. And even though they set the SAME prices, it really still is competition! Really!

The steep discounting from Amazon was a practice of selling our clients' work at a loss in order to make it impossible for other businesses to enter the e-book marketplace in a way that made financial sense for them.

Translation: This predatory pricing is driving competitors out of business, like it did with... um... what's that famous case where a company lowered prices, destroyed competition, and then became a monopoly and raised prices?

It must happen all the time, right?

Or if it doesn't, it's because the government steps in and stops it. Like in the case of... um...

Joe sez: Like in the case of the DOJ stepping in because 5 of the Big 6 were colluding to raise ebook prices?

This artificially low pricing unfairly threatened the world of publishing and bookselling and would ultimately have a devastating effect on the choices available to book consumers.

Translation: Apparently starting a company that allowed writers to self-publish their books, and that sold all the major publishers' books for less, is VERY BAD for authors and readers. Because more titles being sold at lower prices means less choice.

Joe sez: How could they write that with a straight face? What's worse, knowing you're spouting BS and doing it anyway to further your own self-interests, or actually believing the BS you're spouting?

What's a better quality to have for an agent? Someone more concerned with buddying up with Big Publishing at your expense, and making bullshit arguments to defend Big Publishing? Or being so stupid they actually believe they're correct?

Personally, I want my agents to be smart and to look out for my best interests. I want them to recognize they work for me, not the Big 6 or bookstores. And if I were repped by one of the 13 agents who signed their name to this, I'd be a lot angrier than I am right now.

When Apple launched the iPad and offered to sell books at the “agency model” terms it was already using for other media sales, our members breathed a sigh of relief. This would create a fair playing field for Barnes & Noble, Apple and others to develop devices and join the e-book marketplace.

Translation: For healthy competition to exist we need to disregard consumer preference and put floundering competitors on life support. Because no one can ever start a company to compete with Amazon.

Which is odd, because Amazon started a company to compete with bookstores and did just fine.

And soon Amazon will compete with publishers as its imprints begin to outsell theirs.

Which is what we're REALLY afraid of, because Amazon doesn't return our calls. Or take us out to lunch all the time at posh Manhattan restaurants.

Consumers would be able to buy their books at various retailers or e-booksellers; the threat of a monopoly was diminished.

Translation: Consumers couldn't buy ebooks from other retailers prior to the agency model. After all, there was only Kindle.

And the Nook.

And the Kobo.

And the Sony Reader.

And even though publishers band together to control price, making it impossible for these different companies to ACTUALLY compete on price, it really really still is competition.

We cheered this development despite the fact that, as you no doubt know, under the agency model publishers were taking in less money per copy sold and therefore we and our clients were getting less in royalties and commissions. But we believe this sacrifice was in the best interests of the book landscape and therefore our clients long-term.

Translation: We're in bed with Big Publishing, even though we allegedly work for authors.

Joe sez: How noble of you guys to sacrifice your authors' incomes by taking up this worthy cause, without consulting us.

How about changing your name to the Association of Book Landscape Protectors? Or the Champions of What We Call Healthy Competition Even if Authors Get Screwed?

The proposed settlement would allow for a resumption of predatory discounting of our clients' most important and profitable new 'frontlist' and bestselling titles and undermines the growth of a competitive marketplace for books.

Translation: Discounting is predatory, even if it benefits our authors and consumers in general. But higher ebook prices via collusion and lower royalties isn't predatory, it encourages a competitive marketplace.

Also, the Big 6 in no way ever undermined the growth of a competitive marketplace for books.

Sure, the Big 6 never created an ereader or an ebook store. And never innovated anything.

Sure, the Big 6 all price their books comparably.

Sure, the Big 6 offer authors shockingly similar contract terms and royalty rates.

Sure, the Big 6 fit the [definition of a cartel](#)

[<http://jakonrath.blogspot.com/2011/10/guest-post-by-barry-eisler.html>].

But Amazon is the real enemy here! Can't you see?

Joe sez: This is the part in the letter where Mr. Reid is laughing so hard he falls off his chair.

It seems to us outrageous that the Department of Justice would choose to interfere in a functioning marketplace where consumers can choose from a broad array of titles with huge differential in prices and formats with a very unclear picture of whether or not 'agency pricing' did indeed raise e-book prices on anything but a select number of titles that had been targeted for underselling by Amazon.

Translation: The marketplace can only function to our satisfaction with collusion and price-fixing, even though we admit it is harmful to our clients' wallets. You DOJ folks should just mind your own business. Stop picking on our crooked industry!

We do not want to return to an environment in which our clients' intellectual property is irrationally priced in order to stifle innovation and harm consumer choice.

Translation: Because the only choice consumers should be allowed is paying more money for ebooks, which is what Big Publishing wants.

Joe sez: Where is there more choice—the legacy way? Or via the kind of self-publishing Amazon has enabled? Which system produces more titles and more variety? Which bestseller list has more variety—the NYT? Or the Kindle Store? Which bookstore has more variety, a brick and mortar shop stocking 200 copies of Patterson's latest near the front door, or an online bookstore where EVERY title ever in print is available and given equal virtual shelf space?

Of course we have no way of knowing if there was collusion among the publishers and Apple.

Translation: We didn't do nothing! We swear!

We can't look to the lockstep royalties, the draconian rights lockups, and the absolute absence of innovation from legacy publishing, to see if maybe there's been some collusion. We can't even read the allegations in the DOJ's own complaint or in the complaint brought by sixteen states! There's just no way to know! What are we, psychic or something?

But this proposed settlement damages our clients and the industry in a way that goes beyond any appropriate remedy for any possible misconduct.

Translation: Any possible misconduct?!

Look, I know we did a crappy job of presenting our terrible argument, but it should be okay for the Big 6 to break the law. So can you allow it? Just this once?

We urge you to reject the proposed settlement and allow the market to return to one that protects the value of our clients' intellectual property from unfair and predatory discounting. This will protect and encourage broader competition among all booksellers, will allow the consumer the protection of a range of choices in format, price, and retailer, and will encourage digital innovation in the burgeoning field of e-book publishing and retailing.

Translation: If we keep repeating the same bullshit over and over, maybe someone will believe it.

Respectfully,

*Gail Hochman,
President, AAR
The AAR Board of Directors:
Brian Defiore
Mitchell S. Waters
Anne Edelstein
Beth Bickers
Sarah Lazin
Jim Rutman
Jodi Reamer
Liza Dawson
Ellen Geiger
Dorian Karchmar
Barbara Hogenson
Anne Reingold*

Here is my response, which they won't reply to but will be seen by over a hundred thousand people this week thanks to blog readers like you.

Dear AAR-

I understand these are uncertain, even scary times. But methinks you're forgetting who you work for.

Your clients are writers, not publishers. Your job is to make them more money, not support a program (the Agency Model) that makes them less money.

Your job isn't to defend publishers—that would be the job of the Association of Publisher Representatives.

Your job isn't to make sure Pop's Books on 3rd Street doesn't go out of business—that would be the job of the Association of Brick-and-Mortar Representatives.

Again, last I checked, you were calling yourselves the Association of Author Representatives. If the name you've bestowed on yourselves means anything, you should be representing authors. By costing us money without even consulting us, you're not representing us. You're screwing us.

I know you're worried that without the Big 6, more and more authors will self-publish, and won't require your services to the extent they do now. But the disservice you're doing your authors with this letter is damn near unforgivable.

You are taking the side of the companies you're hired to negotiate with. You really don't see a problem with that? Even worse, the side you're taking is one that continues to screw authors--*your clients*--in many, many ways.

Am I the only one who sees ethical problems with this stance? First the Writers Guild, now the AAR. Those who are supposed to protect authors, are betraying authors.

It's appeasement, caused by fear.

Winston Churchill said it best. "An appeaser is one who feeds a crocodile—hoping it will eat him last."

I've accused authors of having Stockholm Syndrome. Apparently it is alive and well in the agent biz as well.

I know you feel threatened by Amazon just like publishers do. But your letter is bullshit. To imply that the tens of thousands of writers you represent agree with your bullshit is even more bullshit.

I assume John R. Read will be able to detect bullshit when he hears it, but I'm going to send him a copy of this blog post just the same.

If this blog post made you mad, your anger is misplaced. You shouldn't be pissed at me, or the DOJ. You should be mad at Big Publishing, which has screwed you guys the same way it has screwed your clients for decades. Think about all the books they abandoned or orphaned or tanked or passed up on, all the hoops you had to jump through to get your clients slightly better terms, all the onerous, unfair clauses in those archaic, one-sided contracts that they en masse refuse to consider changing, all the accounting errors and questionable royalty statements, all the shitty covers and poor editing jobs, all the late checks and late contracts, all the pain and depression your writers have had to deal with because they had no power and no other choice. Now publishers have forced Amazon--a company that benefits authors and readers--to accept the Agency Model, which [I've clearly explained sucks](http://jakonrath.blogspot.com/2012/04/agency-model-sucks.html) [http://jakonrath.blogspot.com/2012/04/agency-model-sucks.html].

And how do you react? You defend them.

Your clients trusted you. You were supposed to be advocates for authors. Champions for authors.

Instead, you've shown yourself to be self-interested cowards.

You've sold out. *Shame on you.*

Once upon a time I praised the AAR for its ethics and standards.

I won't be doing that in the future. Your behavior has made it impossible.

Simon Says

Joe Konrath

Joe sez: This is a letter I received from a mid-level legacy publishing insider who wishes to remain anonymous. I have his or her permission to post the letter here, and will add some thoughts of my own afterward. Let's call her Guy Fawkes. So here's Guy...

Guy sez: Writers House president Simon Lipskar has posted [an open letter](http://www.digitalbookworld.com/2012/response-to-doj-bizarre-misunderstanding-of-e-book-business-from-aar/) [http://www.digitalbookworld.com/2012/response-to-doj-bizarre-misunderstanding-of-e-book-business-from-aar/] in response to the [Justice Department's suit](http://newsandinsight.thomsonreuters.com/uploadedFiles/Reuters_Content/2012/04_-_April/e-books_complaint.pdf) [http://newsandinsight.thomsonreuters.com/uploadedFiles/Reuters_Content/2012/04_-_April/e-books_complaint.pdf] alleging price-fixing among five of the Big Six publishers and Apple (there is also a similar suit brought by the Attorneys General of [sixteen states](http://www.ct.gov/ag/lib/ag/press_releases/2012/20120411_ebookscomplaint%28public_version%29.pdf) [http://www.ct.gov/ag/lib/ag/press_releases/2012/20120411_ebookscomplaint%28public_version%29.pdf]). In the letter, Lipskar argues that the DOJ is mistaken, and calls for “every one of us — publishers, agents, authors, retailers, wholesalers and device makers — impacted by the DoJ’s quite literally bizarre misunderstanding of the ebook, publishing and bookselling businesses... to stand up and make their voices heard.”

I hear you, Simon. And here I am. I hope other publishing insiders will follow suit, and particularly hope we’ll also hear from readers -- the group we serve; the group most affected by the DOJ’s suit and the publishing practices at the heart of it; and the one group you neglect to mention in your call for greater public involvement.

Lipskar’s argument has two main premises. First, that whatever publisher collusion might have been behind the simultaneous industry-wide imposition of the [agency model](http://www.macstories.net/stories/understanding-the-agency-model-and-the-dojs-allegations-against-apple-and-those-publishers/) [http://www.macstories.net/stories/understanding-the-agency-model-and-the-dojs-allegations-against-apple-and-those-publishers/] on retailers, the collusion caused no harm to consumers because the collusion made only some books more expensive. Second, and related to the first, consumers can’t be harmed by some books being priced higher because books are essentially fungible. I’m not an antitrust lawyer, but I think I’m qualified by my position to examine these premises in turn.

1. Publishing Collusion Caused No Harm. This line of argument -- that “there has been no discernable [sic] consumer harm from the advent of agency pricing” -- is interesting because it functions as an implicit acknowledgement that collusion did indeed occur. And unless the DOJ and sixteen states’ Attorneys General are fabricating the extensive allegations of collusion (including admonitions to “[double delete](http://newsandinsight.thomsonreuters.com/uploadedFiles/Reuters_Content/2012/04_-_April/e-books_complaint.pdf)” [http://newsandinsight.thomsonreuters.com/uploadedFiles/Reuters_Content/2012/04_-_April/e-books_complaint.pdf]) in their complaints, it seems

Lipskar's lawyers are being tactically astute in steering clear of what would pretty clearly be a losing fight over collusion itself. Their better bet is to essentially acknowledge collusion, instead arguing, "All right, fine, but nobody got hurt -- so no harm, no foul."

And how do they argue that nobody got hurt? Well, because:

2. One Book Is Pretty Much The Same As Any Other. Lipskar acknowledges, as he must, that the prices of New York Times bestselling books went up following the simultaneous industry-wide imposition of agency pricing ("prices for a limited number of titles published by these publishers increased, i.e. those ebooks that were digital editions of newly released bestselling hardcover titles. Amazon had quite explicitly promised its consumers that these titles would be available at \$9.99, and with the switch to agency pricing, these titles did indeed increase in price, mostly to \$12.99"). But, he claims, these higher prices couldn't hurt anyone because the prices of other books decreased ("No Price Increase for Non-Bestselling Titles").

Now, I want to say that I think Lipskar's numbers are cherry-picked, and that using only 80 out of 100 titles from a single hour of a single day, with traditionally published titles and self-published titles mixed together, is for many reasons an inappropriate data set. But for now I'll accept for the sake of argument that Lipskar's numbers are accurate -- because I think his argument would still be terribly problematic even if his numbers were right.

So let's just assume Lipskar's broad argument is correct ("Even if an individual consumer was unhappy with the agency pricing of bestsellers, the existence of other options, including new competitive ones that have thrived since agency, means that harm cannot be ascribed to the decision to buy a \$12.99 ebook"). Let's accept that alleged publisher collusion on agency pricing made bestsellers more expensive but didn't affect the prices of non-bestsellers, and examine the premise that therefore readers couldn't have gotten hurt because *they could still find other books cheaper than the newly expensive bestsellers*.

Implicit in Lipskar's argument is the notion that a reader will be as happy with one book as she would be with another. Because if the notion is untrue -- if, in fact, readers are drawn to certain titles more than they are to others, and if readers find some books are more attractive, more enriching, more life-changing than others -- then it's impossible to argue a reader would be unharmed if the books she found most worthwhile were made more expensive.

Now, I can't really prove readers don't find all books to be of equal attractiveness, equal importance, and equal worth. It's possible, as Lipskar suggests, that books are pretty much as fungible a commodity as a bunch of M&M's in a glass bowl, none of which has any special merit a consumer might weigh in making a

selection. Can't easily reach that one you want at the bottom? No problem, there are a bunch of others just like it right at the top.

Still, you'd think that if readers were as indifferent about picking books as they are about picking M&M's, different books wouldn't have different titles. Or different covers. Or different *prices*. You'd think publishers wouldn't be so fixated on increasing the prices of certain titles -- certain *bestselling* titles, as Lipskar himself is forced to acknowledge -- that they would allegedly collude, and then allegedly "[double delete](#)

[http://newsandinsight.thomsonreuters.com/uploadedFiles/Reuters_Content/2012/04_-_April/e-books_complaint.pdf] the evidence of their collusion, to do it. You'd think, in fact, that there was barely a reason for publishers to exist at all. What are we nurturing, and curating, and passionately presenting to the public, if in the end it's all just a bunch of fungible widgets?

But again, I can't really prove books aren't like M&M's. I can only say that as a lifelong reader and lover of books, I know there are certain titles that I want more than others, that have added more meaning to and had a more profound impact on my life than others, and that *cannot be replaced by others*, even if those presumptive others might carry a lower price point. And I can only solicit readers who share my passion for books to chime in with your own thoughts about Lipskar's "all books are fungible" theory, and to share your thoughts with the DOJ directly at the address below (even though -- no, make that *because* -- Lipskar forgot to mention you when he was encouraging all those other people to act).

I have to add, on a personal note, that Lipskar's argument makes me sad. Not just because, in suggesting that books are fungible, Lipskar implicitly devalues them. But also because Lipskar has made me aware of how hollow it is when the leading lights of my industry claim to value rich literary culture, and the special author-editor relationship, and the high-value, carefully vetted, professionally prepared books we curate and produce. I believe all that -- believe the *raison d'etre* of publishing is to select, nurture, and collaborate with authors to produce books of lasting value and substantial impact. And yet here is a top literary agent arguing that one book is pretty much the same as another -- traditionally published, self-published, genre, literary, whatever. Obviously both these things cannot be true. And yet publishing's luminaries claim both, depending on which position suits them at any given moment. Doing so isn't just devaluing. It's dishonest.

So if you're a reader, and you feel you're being harmed when my industry increases the prices of the books you care most about, do something about it. Post on your blog. Share a tweet. Most of all, send your thoughts to John Read at the Justice Department at the address below to let him know that although Simon Lipskar thinks that books are just another fungible commodity and that you don't count, you beg to differ and you demand to be heard.

Yours sincerely,
Guy Fawkes

Joe sez:

First off, I thank Guy Fawkes for her insights, and for contacting me. I did some checking via Google and she indeed appears to work within the publishing industry. But that's not the point. She could be a hobo who emailed me while squatting in her own filth, and she still makes a solid argument. No offense, Guy.

I agree with 100% of what Fawkes said, though she was a lot kinder than I'm gonna be.

I haven't examined the data Simon claims to have because he didn't provide titles and prices. Maybe it's correct. Maybe it's cherry-picked, as Fawkes mentioned. Maybe it's flat-out wrong. I'd guess the DOJ has ample evidence that prices went up, or they wouldn't have brought the suit. The one who has ALL the numbers, both sales and prices, is Amazon, and if needed they can be subpoenaed, which would be a lot more informative than the tiny sample Lipskar has presented.

But is Simon wrong only because he apparently thinks books are all fungible? Or is he wrong in other ways, too?

Here's what Simon says:

In fact, prior to the change to agency pricing, many ebooks were sold by Amazon for significantly more than \$9.99 (the price that is widely and incorrectly perceived by the government and the public to be the highest price for an ebook before agency). As reported by Publishers Lunch, an industry newsletter, on February 24, 2009, "Using two different methods for checking Kindle price data in Amazon's system, we find that roughly 30 percent of the 240,000 or so Kindle titles sell for more than \$9.99 (and well over 20 percent sell for more than \$20)."

Joe sez: Amazon priced ebooks for more than \$9.99 because at \$9.99 they were losing money. As I have shown in my blog post, [The Agency Model Sucks](http://jakonrath.blogspot.com/2012/04/agency-model-sucks.html) [http://jakonrath.blogspot.com/2012/04/agency-model-sucks.html], under the wholesale model publishers were selling ebooks to Amazon for around \$12.50. Is it a surprise Amazon sold at least some of them for more than that?

What drove publishers to collude was the fact that Amazon sold many of these titles for less than wholesale. Which, if memory serves, was what their customers wanted, and continue to plead for in the form of [negative reviews](http://www.guardian.co.uk/books/2010/nov/03/ebook-prices-kindle-amazon-protests) [http://www.guardian.co.uk/books/2010/nov/03/ebook-prices-kindle-amazon-protests] and [boycotts of ebooks priced above \\$9.99](#)

[http://www.mediabistro.com/galleycat/amazon-customers-continue-to-boycott-kindle-books-priced-higher-than-9-99_b11002].

But publishers didn't care about readers, or their opinions. Publishers wanted to control price, and they didn't like Amazon discounting below wholesale cost. Hence the collusion, and the Agency model.

So let's be perfectly clear. The reason ebook prices were high under the wholesale model, and are still high under the Agency model, is because **that's how publishers want it**. But at least under the wholesale model, Amazon could discount some ebooks as they saw fit, even at a loss. And publishers and authors made more money per ebook sold.

With the Agency model, publishers exchanged a larger percentage of the sale for control over pricing.

So how'd that pricing control work out?

Here's what Simon says:

What this means is that, counter to the endless claims made by the government that agency prices for ebooks raised the consumer price of all ebooks, in fact, by setting most hardcover-period ebooks to \$12.99, agency publishers were raising the consumer price of a small set of bestselling titles but simultaneously decreasing the price paid by the consumer on many other hardcover period ebooks.

Joe sez: I'd love to know what the ratio of bestseller sales to midlist sales were.

I could raise the price of a product that sells a million units by 30%, and drop the price of a product that sells ten thousand units by 30%, and that doesn't mean prices overall stayed the same.

Bestsellers are so-called because they (say it with me) **sell the best**. So if the agency model decreased the price on some titles that weren't popular, while increasing the price on those that were popular, then the AVERAGE price of ebooks would have gone up, based not on titles, but on the number of units sold overall.

But then Simon says something that sounds like it could be persuasive:

the price of the average bestselling ebook has decreased significantly, from approximately \$10.20 in Q3 2010 to \$8.29 on April 27 – a decrease of 19% in the two years since the introduction of agency pricing – and that, furthermore, the average price today is in fact lower than it was before the introduction of agency pricing.

Joe sez: Wow. That's pretty damning.

But is it correct?

In the graph Simon refers to, included in the DOJ papers, the average ebook bestseller was \$8.91 in the first quarter of 2010 under the wholesale model. It then rose to \$12.11 by third quarter, 2012, under the Agency model.

According to Simon's info, on April 27th of this year the average price of a Kindle bestseller is \$8.29.

Is that right? I decided to check for myself. At 5pm on May 10, 2012, I cataloged every Top 100 Kindle Bestseller. (I managed to do it all in under an hour, so I didn't limit it to 80 like Simon did.)

Here's a [link to the spreadsheet](http://www.jakonrath.com/spreadsheet.xls) [http://www.jakonrath.com/spreadsheet.xls].

The sheet shows there were 48 ebooks priced under the Agency model at that specific time on that list. Two of them were short stories priced at 2.99 and .99 cents. Whether or not we average those in with the full length ebooks is a judgment call. I would say it depends on if shorts were included in the DOJ's or Simon's counts, but neither listed titles so it is impossible for me to know. If we do exclude them, what is the average price of an Agency full-length bestseller?

\$11.81 per title.

Hmm. That seems to be **higher than the \$8.91** from first quarter 2010, which was under the wholesale model. It also seems **higher than the \$8.29** Simon reported. Feel free to check my math. Unlike Simon, I'm posting a spreadsheet with titles, publishers, and prices, rather than just expecting you to take my word for it.

But numbers and facts can be manipulated to prove different points. Of the 48 Agency model bestsellers I listed, two were short stories, two were compilations, and two were obviously sale prices--in other words, the Big 6 publishers behind them had temporarily lowered the price for a small period of time. Hmmm, who was it that predicted that would happen? Hint: [me, back in 2010](http://www.jakonrath.com/spreadsheet.xls) [http://jakonrath.blogspot.com/2009/12/ja-konraths-2010-ebook-predictions.html].

So we can easily crunch the data other ways. We can remove the two sale-priced titles and we get **\$12.21 per Agency bestseller title**. Or we can break up the bundled ebooks and average out their sale prices (A Game of Thrones set would be \$7.50 each, and the Shades Of set is \$9.99 each) and put in the sale priced ebooks and the short stories, giving those Agency model ebooks every possible shot at looking cheaper. What's the average then?

\$10.33 per title. Still markedly higher than Simon's total. Still two bucks more than the pre-Agency Model total.

So what have we learned?

Depending on how we do the counting, and on what day we count, numbers can fluctuate considerably. Now, I believe I've made a better case that average prices under agency went up than Simon made that average prices under agency went down, but the only one who can accurately gauge the veracity of this is Amazon, who has **all** the numbers.

And you can bet the DOJ will get those numbers if they need them. And they'll be more accurate than the attempts by Simon and me to figure it out using limited data. What we both did is called [cherry picking](http://en.wikipedia.org/wiki/Cherry_picking_(fallacy)) [http://en.wikipedia.org/wiki/Cherry_picking_(fallacy)], and it is a logical fallacy. A fallacy, of course, is "[an error in reasoning that renders an argument logically invalid](http://en.wikipedia.org/wiki/Fallacy)" [http://en.wikipedia.org/wiki/Fallacy]". The Top 100 changes every hour. **Simon's data, cherry-picked two years after the Agency model started, was 1 data point out of 17,520.** (Two years is 730 days times 24 hours in a day, each hour a different data point.)

In other words, I believe it is entirely reasonable to throw out all of Simon's questionable data, and the conclusions he based on it.

What else can we pick on Simon for?

Plenty.

Simon says:

agency has fostered more competition at every level. It has increased competition between retailers (the market is no longer dominated by a single retailer with 90% market share, but is now a competitive field with multiple retailers with significant share, and there is reasonable likelihood that we will see more competitors enter the market).

Joe sez: Can someone explain how ebooks being equally priced in every market increases competition? Because under Agency terms, THE PUBLISHER CONTROLS PRICES. This isn't a case of Wal-Mart undercutting Barnes & Noble on the cost of a hardcover, which is indeed competition. If publishers set retail, retailers CANNOT COMPETE on price. That's one of the big reasons price-fixing and collusion and cartels are bad. They inhibit competition, not foster it.

Simon says:

One specific area of competition that benefits from further illustration is the way that agency pricing has fostered aggressive competition in the area of the e-reading devices, leading to extraordinary consumer benefit in the form of fast-paced innovation and dramatically lowered prices for the devices themselves.

Joe sez: Ack. The Sony, Nook, and Kobo ALL EXISTED PRIOR TO THE AGENCY MODEL!

As for innovation and lower prices, there's that magic causality again. Can you say [pirates and global warming](http://en.wikipedia.org/wiki/Pirates_and_global_warming) [http://en.wikipedia.org/wiki/Pirates_and_global_warming#Pirates_and_global_warming]?

Guess what, Simon? Technology keeps improving, and prices drop, ON EVERYTHING! THAT'S HOW TECHNOLOGY WORKS!

Did the Agency model make 32" LED TVs drop from \$1199 a few years ago to \$399 today? Did it make DVD players drop from \$400 to \$29 too? Can the Agency model also help me lower my mortgage payments, and improve my eyesight? Damn, it's like the Superman of pricing structures! Let's collude and force it on everybody!

Again, as I said yesterday, I wonder which is preferable in an agent; a smart man trying to use bullshit to fool people, or a moron who believes the bullshit?

Let's continue, shall we?

Simon says:

Absent demonstrable consumer harm, there is no competitive reason for the United States to punish the alleged collusion in the manner suggested by the settlement; rather, the terms mandated by the settlement should have focused on the collusion itself, not the damages from it, since there are none.

Joe sez: I agree. No damages, except for those readers forced to pay more for ebooks, and your clients, who got paid less. Other than that, a victimless crime.

Speaking of authors, in the post I mentioned earlier I break down, step by step, how authors were [financially damaged by the Agency model](http://jakonrath.blogspot.com/2012/04/agency-model-sucks.html) [<http://jakonrath.blogspot.com/2012/04/agency-model-sucks.html>]. In short, under the Agency model, writers sold fewer ebooks, while making less money on each ebook sold. I know they sold fewer because cheaper sells more copies. I've [done the math](http://jakonrath.blogspot.com/2010/03/value-of-ebooks.html) [<http://jakonrath.blogspot.com/2010/03/value-of-ebooks.html>], many times.

Now, it's natural that publishers didn't consult with their authors before thrusting the Agency model upon retailers--after all, authors typically have no say regarding where or how publishers exploit the rights they've secured.

But if you're an agent, tell me: have you ever had an honest discussion with your clients before publicly supporting a pricing system that is costing your clients money? And don't tell me you honestly believe that yes, although Agency pricing costs authors money today, it'll make authors more money tomorrow by fostering healthy competition and greater choice and blah blah blah. You can't ethically make a decision to cost your clients money today because you speculate doing so might make them more tomorrow without even having a conversation about that decision beforehand.

So now we have agents publicly supporting Big Publishing at the expense of their own clients' finances--without even consulting those clients. Think about how insane that is. How widely unquestioned. Whose interests do these agents represent? Those of their authors? Or those of Big Publishing?

Shame on you, Simon. Not only for touting this bullshit, but for forgetting who you really represent. I'm thrilled you're not my agent. And I feel bad for those stuck with you.

Now, please, PLEASE can a few agents stand up and show they have the stones to disagree with Simon and all [the AAR garbage](http://jakonrath.blogspot.com/2012/05/aar-fail.html) [http://jakonrath.blogspot.com/2012/05/aar-fail.html]? You can't all buy into this. Someone's got to have some integrity.

Anyone?