Dear John Read,
As an owner of the 4th oldest bookstore in the country, I feel I must speak out about the DOJ lawsuit. The following letter presents the case most fully as coming from me. Please consider it as well.

Sincerely,
Betsy Rider,
Owner of
"Otto's a Booklover's Paradise"
107 W 4th St.
Williamsport PA 17701

BOOKS *of* WONDER®

18 West 18th Street, New York, NY 10011
Phone: (212) 989-3270 / Fax: (212) 989-1203

May 31, 2012

RECEIVED
JUN - 6 REC'D 2012
LITIGATION III, ANTITRUST DIV.
U.S. DEPT OF JUSTICE

John Read
Chief Litigation III Section
Antitrust Division
U.S. Department of Justice
450 5th Street, NW, Suite 4000
Washington, DC 20530

Dear John Read:

I firmly believe that the Department of Justice is making a grave error in proceeding with its lawsuit against Macmillan, Penguin, Hachette, Simon & Schuster, HarperCollins and Apple Computer concerning the sale of e-books. I believe this is true for three very different reasons.

First, as someone who has been in the industry for 37 years as a bookseller, editor, author, and publisher, I know quite well many of the companies and individuals the DOJ has accused of collusion and their ways of doing business. I regret to say that the DOJ has confused a sheep (or lemming) mentality with collusion. Publishers have always followed each other in setting terms and policy. Usually one of the major publishers will make a change while the others watch to see the reaction. If the new policy or terms seem to be accepted or workable, then the rest quickly follow. For example, prior to the 1980s, all publishers charged freight for shipping their books from their warehouse to retailers. One publisher introduced "free freight" on all orders over 25 books and quickly all the others matched them. In the 1990s, most publishers had wholesale terms of 40-44%, depending on how many books you were buying. Then independent booksellers got upset that the chains were getting better terms and sued some of the publishers for violation of the Robinson-Patman Act of 1936. To deal with this, one publisher came out with new terms at 46% regardless of quantity purchased (save for a small minimum quantity) and suddenly everyone else followed suit. Or you could look at co-op advertising funds. Prior to the 1990s, every publisher based the amount of money a bookseller could received for an author event in their store on the amount of the "supporting order" – i.e. the total amount of books the bookseller spent on books for the event. The more a bookseller ordered, the more funds they received. Then the chains started taking aggressive advantage of this policy to the point that the publishers could not afford it any longer. So one publisher introduced a cap of $250 per event and soon every publisher had a similar cap. And, through the 1990s, though publishers' official terms were almost universally 30 days EOM, they all allowed booksellers at least 90-120 days to pay their bills. Then, following one holiday season, Barnes & Noble, Borders, and Books-a-Million all returned millions upon millions of dollars of books, instead of making the hefty

payments the publishers had been expecting. Suddenly, all the publishers were in a very poor cash flow position – and within weeks, they were all trying to squeeze that money out of small, independent bookstores by insisting that all their bills past 30 days were now due. Again, one lead, the rest followed.

Were all these cases of collusion? Is there some secret cabal of publishers slyly meeting behind the scenes in some secret lair to coordinate their policies? Not at all. They were all watching what each other did and quickly following whoever seemed to be leading in the right direction (and they all followed each other off the cliff, as in the case when they all kept allowing the big chains to buy however much they wanted and got stuck with unmanageable returns that put them into a cash crisis, as highlighted above).

The same thing is what happened with e-books. John Sargent at Macmillan decided to adopt the agency model for Macmillan. No other publisher stepped forward to do the same. Amazon objected, refused to buy under the agency model, and in retaliation removed the buy button from every single Macmillan title on its site – both print and electronic versions – making it impossible to purchase thousands (probably tens of thousands) of Macmillan titles from Amazon. Did Macmillan browbeat Amazon into accepting the agency model? Not at all, Rather, it was the outcry from Amazon's unhappy and outraged consumers that led them to change their mind, re-establish the buy buttons, and agree to purchase under the agency model.

Then – and only then – did other publishers step up and transition to the agency model. Yes, it did happen over a period of 12 days. But the entire industry was waiting with its collective breath held while this battle between Amazon and Macmillan was played out – sometimes hourly – over the internet. I can assure you, had Amazon not acquiesced and agreed to purchase from Macmillan under the agency model, not one other publisher would have adopted it. And in today's digital speed world, taking 12 days to transition to a successful model adopted by a competitor is practically slow motion. It is certainly not evidence of collusion.

I can certainly see how in isolation this could look like a carefully crafted plan to test the waters with one publisher while the others held back to see what would happen It certainly would make for a compelling plot in a book or movie. But the reality is that publishers have never demonstrated such Machiavellian coordination. Rather, as outlined above, they have followed the leader like the good sheep and lemmings they are. Some are a bit slower, like Random House was in the case of the agency model (there's always a slow one in every herd), and some are bolder and more willing to take risks, like John Sargent did at Macmillan, but usually most simply follow in very short order what others have done successfully.A careful review of the history of publisher policies and terms will soon reveal this.

My second reason for objecting to the DOJ's lawsuit and settlement offers has to do with the very nature of how e-books have been sold. As I understand it, in the DOJ's lawsuit the DOJ objects to publishers colluding to switch from the wholesale model where the retailer purchases and take ownership of the property created by the manufacturer (or publisher), and agrees to pay for it in a specified period of time at a specified price or discount off the recommended price. In this model, since the retailer is purchasing and owns the merchandise, it is generally considered their right to set whatever price they wish. Unfortunately, publishers have never sold e-books under the wholesale model. Rather, they have sold them under the consignment model. Amazon and other e-book sellers never purchased or took ownership of the e-books they resold. Rather, they advertised the product, handled the transaction, and only after they had received payment and concluded the transaction did they pay the publisher for the e-book. That is consignment, not wholesale. Amazon never placed any buy orders or made any commitments to purchase specific quantities of any e-books. Unless the DOJ is seeking to change the very nature of property ownership in the United Sates and allow vendors to set prices on property they do not own nor have any commitment to purchasing, the precedent the DOJ would be setting should the DOJ win this lawsuit and go forward with its settlements could have grievous unintended consequences. I'm sure there are lawyers out there already looking forward to how they will be able to twist this to the advantage of themselves and their clients.

My third reason for objecting to the DOJ's lawsuit and settlement offers has to do with the very nature of what an e-book is and is not. What it definitely is not, is physical property. When a consumer buys a book, they are buying what you might call a hybrid product. They are purchasing the paper, binding, and printing – which they then own. They are also purchasing a license to view and read the intellectual property of the author who has licensed that intellectual property to the publisher. This the consumer cannot buy. It remains the property of the author (or, when done as a "work for hire," the publisher).

With an e-book, there is no actual property for a consumer to buy. What they are purchasing is a license to view the intellectual property belonging to someone else via a specific software or platform. They certainly don't own the data file, as was made abundantly clear by Amazon.com itself in July of 2009 when they removed every copy of George Orwell's *1984* and *Animal Farm* from every Kindle in the world, without the consent or prior knowledge of the owners of those Kindles. It seems that Amazon had been selling e-books of these titles provided by a company that did not have the right to produce or sell them. When the rights holder informed Amazon of this, they removed every copy they had sold from their customers' Kindles. This would have been neither possible nor legal if they had been selling a printed copy of the book that had been manufactured without the rights holder's consent. Instead, Amazon would have had to cease selling the book, return or dispose of its remaining inventory of the books, pay the rights holder for any damages incurred because of Amazon (as would the offending publisher), and *offer* a refund to its customers who wished to return the book. Amazon could no force them to return it

– the book would be the consumer's property and been bought in good faith. Yes, the intellectual property the book contained would not have been lawfully sold, but the physical object – the paper, binding, and print – would have been and so would be the legal property of the consumer. Obviously, Amazon has established that no such legal ownership of an e-book data file is conveyed to those purchasing e-books on its site.

So if the purchase of an e-books is not the purchase of property, but rather the purchase of a license to view the intellectual property of another, then Amazon is not retailing e-books, but rather acting as an agent and sub-licensee. So, if that is the case, then the "sale" of e-books are not subject to the physical property and retail laws of our nation, but rather to the intellectual property and licensing laws and regulations. And as any film, book, or licensing agent can tell you, when they license intellectual property they frequently set pricing as part of the licensing deal. Therefore, publishers have always had the right to set the price that Amazon can offer their e-books at but had simply not enforced it till introducing the agency model.

It seems to me that the DOJ in its desire to protect consumers has blindly stumbled into a legal quagmire. If the DOJ goes forward with this ill-conceived lawsuit and settlements the only people who will benefit are Amazon and the lawyers who will be tying up the courts arguing the ramifications of this ruling on property rights and intellectual property rights for years. Clearly, the authors and artists who create and own the intellectual property at stake will not win, for their rights and the rights of their duly appointed representatives (agents and publishers) to set prices on their property will be reduced if not revoked.

Although it is my fervent hope that the DOJ will drop this lawsuit and settlements, at the very least it is essential that the DOJ establishes in their actions that Amazon has no right to set prices on e-books – that that right is reserved to the owner of the intellectual property and their duly appointed representatives. And towards that end, I would hope the DOJ would drop the provision in its settlements with Hachette, HarperCollins, and Simon & Schuster that requires them to allow Amazon to set whatever price it wants on e-books.

One additional point concerning Amazon setting prices on e-books. Prior to the publishers adopting the agency model, Amazon frequently priced e-books on its site for less than they were paying the publishers on each e-book they sold – essentially losing money on each sale to gain and secure market share. This was a very successful strategy that allowed Amazon to gain a 90% market share prior to the introduction of the agency model. If a foreign owned company were to do this in the US, they would be forced to stop what would be deemed "predatory pricing" – notwithstanding its positive benefits for consumers. I am at a loss to understand why it is okay for Amazon – a US company – to do this and damage other US companies, when we would never allow it from a foreign company. Is justice for US companies competing with foreign companies different from justice for those competing with domestic ones?

Thank you for taking the time to read my letter. I apologize for its length, but I wished to make clear my points which do not seem to have been discussed in the press or any of the letters to the DOJ that I have seen published.

Respectfully yours,

Peter Glassman
President
Books of Wonder