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Re: United States v. Apple, Inc .et al (12 CV 2826)

Dear Mr. Read

I am writing you to urge you to rescind the actions taken by the Department of Justice in the cases of **United States v. Apple, Inc. et al.**

I have been the co-owner of an independent bookstore in Corte Madera, California, for over 35 years. During the entire time we've been in business, the publishing business has been rife with predatory, anti-competitive practices that have been extremely harmful to booksellers, small publishers, authors, and readers alike. Most of these unfair practices have been documented in independent studies, newspaper articles, private litigation, and even examinations by government investigators. All of this information has been made available to the DOJ and to its sister agency, the Federal Trade Commission, but no action has ever been taken by either agency to put a stop to such practices.

During these four decades my wife and I managed to keep our business alive, providing our community with the best possible books at the best price that we could afford. Like other independent booksellers, our profit margins have been very small. But we've kept moving forward – in spite of the deck being stacked against us – because we love books. We feel very deeply that that our stores are performing an important service for our community and for our nation.

During the entire time that we have been in business, we've clung to the hope that the Department of Justice would someday recognize the anti-competitive, unfair environment in which we have been operating. We've waited for the day the U.S. Attorney General would step in to remedy the situation.

Now the Department of Justice has finally taken action. But, shockingly, it has not acted to protect competition in the book business. Rather, it has stepped in to facilitate the aggressive tactics of the worst monopolist the book business has ever faced.

There is only one word to describe what independent booksellers and other book lovers feel about what the Department of Justice has done: that word is betrayal.

The Department of Justice Needs to Dismiss This Case and Send the Matter Back to its Staff for a More Thorough Investigation.

The action by the Department of Justice in this case is more than simply ill-advised or unwarranted. The implications of it go far beyond that. Sadly, the DOJ has displayed a shocking misunderstanding of the book business and of the long-term, anti-competitive effects of its own actions in this case. It has clearly not given the book industry the type of thorough analysis that is needed before a case of this magnitude should have been undertaken. The decision to pursue this case needs to be reversed and the matter sent back for an in-depth, further review of the book business and of the unintended consequences that are likely to flow from the course of action that the DOJ is pursuing.

And the Department of justice should go further than that. The DOJ attorneys need to take a complete look at the book business, study its workings and nuances, and consider carefully what is necessary to preserve vitality and competition over the long run. If the Department does this, I'm convinced it will conclude that it is currently moving in the exact opposite direction from where it should be headed. In short the Justice Department needs to reverse course and decide what steps it should take to stop Amazon.com from its imminent attempt to achieve monopolistic control of the book business.

By Failing to do a Thorough Study of the Book Business, the Department of Justice Has Made Several Critical and Fundamental Errors in its Analysis of the Case

The errors in this case have been noted by a great many commentators. Editorial reaction to this case has been very skeptical, and the DOJ's decision has drawn the wrath of such very different organizations as Barnes & Noble, The American Booksellers Association, and the Author's Guild. I won't try to recapitulate everything these groups have noted, but I want instead to focus on the errors that are apparent to me based on more than thirty five years of living and working in the book business.

1. The Evidence of a Conspiracy Directed Against Amazon.com is Scanty and Conjectural, and the DOJ has Overlooked the Long History of Predatory and Abusive Practices by Amazon.com that Preceded These Actions

I was present at a meeting of booksellers in 2010 when it was announced that MacMillan books was instituting a new agency plan for the sale of e-books. That company was alone in making such an announcement. MacMillan was the only publisher that had adopted such a plan at that point, and there was no indication that any other publisher would follow suit. Although several other publishers adopted similar plans later on, there is no real evidence that they did so according to some pre-arranged plan. Indeed, the largest publisher, Random House, adopted such a plan only many months later. John Sargent, president of MacMillan, remains adamant that he made the decision on his own:

It is also hard to settle a lawsuit when you know you have done no wrong. The government's charge is that Macmillan's CEO colluded with other CEO's in changing to the agency model. I am Macmillan's CEO and I made the decision to move Macmillan to the agency model. After days of thought and worry, I made the decision on January 22nd, 2010 a little after 4:00 AM, on an exercise bike in my basement. It remains the loneliest decision I have ever made, and I see no reason to go back on it now.

There is nothing inherently suspicious or illegal about such an Agency Plan. The DOJ admits as much in the Complaint. This is a type of plan that is often used in other businesses. In fact, Amazon.com itself

uses of a similar, affiliate program in conducting its own sales, and it has pioneered the use of such a selling method in on-line sales throughout the world. And there is nothing anti-competitive about such a plan. In this case it was just the opposite effect: the immediate impact of the Agency Plan was to reduced Amazon's share of the e-book business from 90% to under 70.

The DOJ makes the somewhat silly allegation in Para 74 of the complaint that in adopting the agency plan the publishers decided "to abandon the longstanding wholesale model for selling e-books." In Para 54 they turn up the rhetorical heat a little more by claiming that the sale of "e-books under an agency model" was a "dramatic departure from the way that books had been sold for over a century." To call anything "longstanding" or a "dramatic departure" in the context of a fast-moving technology like electronic books is stripping the language all meaning. In fact, there are good reasons for publishers to use an agency model or something like it with e-books. Unlike print books, e-books must be delivered to the reader in a precise, highly-technical manner over the internet, and this is probably best controlled by the company that is publishing the book.

Likewise, the DOJ tries to put a sinister face on the apparent conversations with Apple to insure that it would receive the lowest price offered to any retailer. There is nothing illegal about that, and in fact such action is required under the law. The Robinson-Patman Act makes it unlawful for a manufacturer "to discriminate in price between different purchasers of commodities of like grade and quality." The DOJ should probably be commending publishers for trying to treat all resellers fairly rather than using such conversations to shore up its shaky conspiracy theory.

But the biggest weakness of the DOJ's theory is that it totally ignores all of the anti-competitive practices by Amazon.com that lead up to the moment the Agency Plan was announced. In Para 80, the DOJ would have us believe that "Amazon effectively stopped selling MacMillan's print books and e-books" only in response to MacMillan's announcement of its agency plan. In fact, that was only the latest use of that tactic by Amazon.com. A sudden, unannounced de-listing of books is a tactic that Amazon frequently uses. Over the last decade Amazon has continually used that tactic to try and muscle special concessions, prices, and other terms from publishers that it knew would not be made available to other competing retailers. Throughout this period of time Amazon has had the economic clout to back up such demands. At the time the agency plan was announced, Amazon.com had close to 90% of the market in e-books and a very large share of print books. Its monopoly in e-books was solidified by restrictions that Amazon imposed on the use of its Kindle reading device, making it virtually impossible for other booksellers to sell e-books to readers who use that device.

In short, Amazon.com had monopoly power at the time this controversy began, and it didn't hesitate to use that power in the years leading up to this dispute. The evidence was there, and it was overwhelming. But the DOJ failed to investigate Amazon's misuse of that power. And it has never given any explanation as to why it failed to do so. This omission is reason enough why this complaint should be withdrawn and the matter sent back for further investigation.

2. The Evidence Shows that Amazon.com Had a Monopoly over E-books and that it Used its Monopoly Power Aggressively to Suppress Competition

In Para 99 of the Complaint the DOJ states that the "relevant product market for the purposes of this action is trade e-books." The DOJ goes on to bolster that assertion by alleging that "no reasonable substitute exists for e-books." This is an amazing admission. The Justice Department apparently did not think through what it is claiming, because this allegation undercuts the entire rationale of the DOJ

complaint. The complaint up to paragraph 99 portrays Amazon.com as an aggrieved party that had been injured by the price manipulation tactics of publishers. But by defining the market as “trade e-books,” the DOJ has conceded that Amazon.com is a monopolist. This shifts the argument dramatically and undercuts the DOJ’s position.

Amazon.com held a very strong monopoly of e-books at the time the Agency Plan was adopted. Evidence of this monopoly was readily available to the DOJ from a number of sources. Amazon’s market share of e-books was approximately 90%. Moreover, this was not a monopoly that Amazon had acquired by accident. There was plenty of evidence that showed Amazon’s aggressive efforts to gain and extend its monopoly power. Far from being the victim that the DOJ tries to portray, Amazon.com was clearly the bully whose tactics precipitated this whole problem.

Not only has Amazon enjoyed monopoly power in e-books, it has exploited that power relentlessly and attempted to expand its control over the entire book market. There are many examples of Amazon’s misuse of its monopoly power. Four of them, however, bear special scrutiny:

a. Amazon.com has abused the power of its monopoly position by tying its e-book Sales to the Sale of its Kindle Reading Device

Amazon.com has attempted to expand its monopoly power by tying its products together, thus precluding other booksellers from competing for its customers’ business. The most blatant example of this is the fact that Amazon designed its Kindle Book Reader to read only e-books sold by the Amazon.com and to make it extraordinarily difficult, if not impossible, for customers to use the reader to read e-books purchased from other sources. Likewise, it designed its e-books so that they could only be read on a Kindle reader.

Tying arrangements violate the policy of the Clayton Act. They are a particularly egregious violation in situations – like this one – where the perpetrator has monopoly power in one or both products.

b. Amazon.com has used its political power and economic threats to undermine the efforts of states to force it to collect sales tax

The massive, well-funded effort by Amazon.com to undermine the sales tax-collection policy of the states is unprecedented in U.S. history. This campaign by Amazon has been well-reported in many news articles and legislative hearings throughout the country. Amazon’s efforts included, among other things, threats to state governments to remove Amazon operations from the state or to terminate all of its affiliates in such state. All of this information was readily available to the DOJ, but the Department apparently chose to ignore it.

Whether Amazon’s tactics in this campaign were illegal is a matter for another investigation, but there is no question about Amazon’s reasons for embarking on such a campaign. By refusing to collect sales tax, it was able to expand unjustifiably whatever price advantage it had over its competitors. When viewed through the lens of anti-trust enforcement, Amazon’s actions can be seen for what they are: i.e. the efforts of a monopolist extend its power and customer base.

c. Amazon.com has abused the power of its monopoly position by attempting vertical integration of the book business

In Para 34 of the Complaint the DOJ makes this allegation:

The Publisher Defendants were especially concerned that Amazon was well positioned to enter the digital publishing business and thereby supplant publishers as intermediaries between authors and consumers. Amazon had, in fact, taken steps to do so, contracting directly with authors to publish their works as e-books.”

If there ever was a red flag, this was it. According to the DOJ’s own complaint, Amazon.com has been trying to use its monopoly power in the e-book business to force publishers out of business and achieve vertical integration of publishing. This is a textbook case of monopolistic abuse. It is astonishing that the DOJ could admit that this was happening and yet still pursue a case that would aid Amazon.com in solidifying its monopolistic control.

d. Amazon.com has abused the power of its monopoly position by selling e-books and the Kindle reading device below cost

In Para 30 of the Complaint there is another, even brighter red flag that the Justice Department appears to have missed:

When Amazon launched its Kindle device, it offered newly released and bestselling e-books to consumers for \$9.99. At that time, Publisher Defendants routinely wholesaled those e-books for about that same price ...

In other words, Amazon was selling these e-books below cost. The DOJ’s own complaint admits that Amazon.com was selling e-books at the same price for which it was buying them, and evidence will show that Amazon’s selling price was even further below cost than the DOJ has admitted. This type of selling below cost – a form of predatory pricing – is a clear indication of an attempt to abuse and extend monopoly power. Given Amazon’s 90% market share at the time, it’s an action that is obviously illegal.

The evidence is likewise strong that Amazon has been selling its Kindle Reader below cost. There have been numerous articles in the trade press analyzing Amazon’s sale practices for the Kindle, and they’ve all suggested that the Kindle was being sold below cost. This has been exacerbated by widespread give-away programs of the Kindle

The combination of selling both e-books and the Kindle e-book reader below cost is a potent anti-competitive tactic. In light of Amazon’s e-book monopoly, it is astounding that the DOJ would be aware of this abuse and nevertheless pursue a case that can only aid Amazon’s efforts to extend its monopoly.

3. Amazon.com is Using its Monopoly Power in the e-book Business to Achieve Monopoly Control in the Wider, General Book Business

There is an even wider issue in this case that the Department of Justice has missed entirely. Amazon.com has been strenuously using its monopoly power in the e-book business to exert control over the general book business. Amazon has been one of the largest print book sellers for several years, and its share of the market has been expanding. Moreover, during this the same period Amazon’s market share of sales in non-book items has been growing rapidly as well. At the moment Amazon is

well poised to exert monopoly power in several lines of commerce in addition of the monopoly power it already has in e-books

It seems clear that the DOJ did not do any kind of in-depth study of the book business. If it had done so, it might have realized that this case will have a far-reaching impact on the *entire* book business – affecting print books, as well as e-books. The DOJ alludes at several points in the complaint to Amazon’s attempts to use its monopolistic power to control the overall book business, but it seems to have missed the point of what it was alleging. The DOJ dismisses the concerns of the publishers as unimportant. In Para 34 of the Complaint the DOJ says that the publishers feared that Amazon’s pricing “would make e-books so popular that digital publishers could achieve sufficient scale to challenge the incumbent publishers’ basic business model.” In Para 3 the DOJ alleges that the “publishers saw the rise in e-books, and particularly Amazon’s price discounting, as a substantial challenge to their traditional business model.” They were worried, the DOJ alleges, about prices “and other consequences the publishers hoped to avoid.” At no point does the DOJ describe what those “other consequences” were that the publishers found so fearful. The overall tenor of the DOJ’s position seems to be stated in Para 34, where it says that the publishers fear was that Amazon would “supplant publishers as intermediaries between authors and consumers.”

As explained in more detail below, Amazon’s actions raise a serious threat of monopolization of the entire book business – for both print books and e-books. This is an extremely serious question that should have been investigated by the DOJ. There are two basic lines of inquiry that the Justice Department should have made:

1. What are the anti-competitive effects of any business exercising the type of economic power that Amazon has accumulated?
2. What are the anti-competitive effects of Amazon’s actions under the particular circumstances of the book business?

Both of these questions should have been addressed. But it is clear that the DOJ did not seriously pursue either one.

a. Amazon.com’s potential monopoly power over the entire book business would have a devastating effect on both authors and readers

If Amazon were to get monopoly power over the entire the book business, what would this mean under conventional economic analysis? As is true of any monopolist, Amazon would have the power to eliminate suppliers, constrict its product offerings, and raise prices. In this context, the DOJ’s supposed desire to protect the \$9.99 e-book price to readers would be completely ephemeral. If Amazon gets monopoly power over both the print book and e-book businesses, it would have the power to set any prices it wanted for both print books and e-books. The history of monopolies shows that they inevitably lead to high prices to consumers. The DOJ’s efforts in this case to protect a lower price to consumers would prove to be totally illusory.

What is potentially even more destructive, however, is the power that Amazon.com would have over the supply to books. A monopolist will typically restrict the goods that it sells and focus only on the ones that bring the highest immediate return and predictable sales patterns. Thus, one immediate effect is to stifle innovation and new product development, thus reducing customer choice. A \$9.99 cover price or any other arbitrary price point will not benefit a customer, if that customer faces a restricted number of products from which to choose.

In this connection, the DOJ should have investigated the numerous instances in which Amazon.com has already cut off sales of books in many instances. Sometimes, Amazon has de-listed books from its website without warning or explanation. In other cases, it has done so apparently to pressure publishers for more favorable terms that are not available to other retailers. Given Amazon's monopolistic power, this is a practice that the DOJ should have looked at. Clearly, this type of arbitrary de-listing of books is a foretaste of how an Amazon.com monopoly would operate if it gained further power over both the print book and e-book business.

It's important to remember that this is a case about books. A monopoly in any business is a bad situation, but a monopoly in books is simply unthinkable. The effect of monopolistic control over what Americans read has implications far beyond the immediate economic concerns. Because of the importance of books, the Justice Department owes the public a more thorough investigation of any potential abuse of monopoly power. There is nothing in the DOJ analysis of this case to show that they gave this case the kind of heightened scrutiny that it deserves. Books might as well have been widgets under the mechanistic reasoning of this complaint.

b. Amazon's actions could have a destructive impact on the book business and harm readers even if its actions fall short of achieving a monopoly

The book business is an intricate, economic mechanism that differs substantially from most other segments of the economy. A wrong-headed legal action can alter the balance within the book business in unintended ways and cause injury to all segments of that business. Authors depend on certain functions being performed within the book business if they are going to reach their potential readers. And readers – whether they read print books or e-books – depend on the book business working smoothly if they are going to find the quality books they have a right to expect. The print book market affects the e-book market, and the e-book market affects the print book market in ways that may not be obvious to the casual observer. The DOJ lawyers apparently made no effort to understand the actual operation of the book business.

By referring to the publishers as mere “intermediaries” between authors and readers (as the complaint does in Para 34), the DOJ has overlooked a crucial element of the book business: i.e. publishers and bookstores perform essential services without which the current book business cannot function. These services are crucial to authors. Moreover, these services are crucial to book buyers – *all* book buyers – whether they buy print books or they buy e-books. From the language of the DOJ complaint, it would appear that the Justice Department lawyers are unconcerned about this. The tone throughout the complaint is that the book business can survive just fine without publishers and bookstores, if it ever comes to that. As long as consumers can get books at low prices, the DOJ lawyers seem to be saying, the Justice Department doesn't care whether publishers and booksellers continue to exist at all.

This attitude of the DOJ is wrong-headed to the point of being tragic.

While it may be theoretically possible to construct a model of the book business that does not include publishers and brick-and-mortar bookstores, that is only a theory without any basis in the present reality of the business. The fact is that without the services of publishers and bookstores, the books that readers want to read are not likely to be available in any reasonable fashion and, in many cases, are not likely to be written at all.

To understand this, you have to start with the author. Most authors work in isolation. Unless they are famous, there is ordinarily no ready market for the books they write. There may be a large potential readership for the book, but the great majority of authors have no practical way to reach that audience. For the vast majority of authors, the cost of doing this on their own would be prohibitive. This is where publishers and brick-and-mortar bookstores step in. Their principal role is to help authors reach readers that they might otherwise not be able to find.

Publishers are the key to this process, because they make it financially worthwhile for authors to spend their time and energy writing books. Not only do publishers typically pay authors an advance against royalties, but they also spend considerable sums of money editing the text, designing the book, promoting the book to reviewers and others, distributing the book to bookstores, and – in some cases – paying for the author to go on tour to promote the book. Booksellers play a role that is almost as important. They buy the book, display it, and promote it within their communities by a variety of means. Both publishers and book stores use their own money to promote and distribute books to potential readers that authors can't reach on their own. This process is by no means perfect, but it is the only proven way by which potential book buyers can become aware of books that they might want to read.

The point to be emphasized is that this process of promoting books and distributing books to stores is crucial to purchasers of both print books *and* e-books. E-book purchasers frequently use bookstores to find out what they want to buy on-line. The process is called “showcasing.” A recent survey conducted by the Codex Group, a book market research and consulting company, showed that 24% of the people who bought books from an online retailer said they had looked at the same book in a brick and mortar bookstore before making that purchase. In the case of customers purchasing from Amazon.com, that number jumped to 39%. Amazon apparently found this “showcasing” process so important to its business that last December it encourage its customers to walk into stores, find the merchandise they wanted, and then send an order for that item to Amazon for a reward.

It's little wonder that purchasers who use Amazon.com and other on-line sellers rely on publisher promotions and bookstore displays to find what they want. There is almost no comparable way to do that on-line. Books on Amazon.com and other on-line sellers are typically listed in an undifferentiated format. There is no promotional effort on such websites that is at all comparable to what publishers and bookstores do. Statistics from those who have only self-published on-line typically show sales of less than a hundred copies. The mere fact that Amazon says it is selling e-book “best-sellers” for \$9.99 implies that the book must have been selling well in some other venue beforehand.

It's important to step back from this process and view it with a certain amount of perspective. Publishers have been publishing, promoting, and distributing books in the United States for well over a hundred years. Booksellers have been promoting and selling books for just as long. Virtually every major writer in the U.S. over the last century owes his or her success to this system. Although the system has its flaws, it has proven to be an extremely successful way for allowing authors to find the audience for their books and allowing readers to have a large selection of quality books from which to choose.

Moreover, it has proven to be a very democratic and egalitarian system. Many authors have started out with little money, but nevertheless they have been able to reach a wide audience because publishers and booksellers have invested their own funds to bring those books to the attention of the reading public. Without such a system, only the very famous or the very wealthy would be able to write books and reach a wide enough audience to sell those books and make a living. And without such a system

many, many writers would be discouraged from spending the time to write books that they knew they would have no reasonable prospect of selling.

And this is the system that the DOJ complaint treats with such disdain. It's time for the Department of Justice to step back and take stock of what it is doing. If it is going to be a party to dismantling the current system of book distribution – as it appears willing to do in this case – it better be certain that it has something workable with which to replace it.

c. The threat to the book business that the publishers were trying to avert at the time of the Agency Plan was both immediate and dire

Everything leads back to the threat that the publishers were facing at the time they adopted the Agency Plan. That threat was a real one. And the response of the publishers to that threat was reasonable in every sense.

The publishers' perception of that threat probably began with the arbitrary price of \$9.99 that Amazon.com set for its e-books. It's important to look at that price for a moment. It was not a price generated by the law of supply and demand, nor was it a price that arose out of some efficiency in the way that Amazon.com was operating its business. Neither was it a price that Amazon was forced to adopt to meet the price of a competitor. It was simply an arbitrary price. The evidence will show that it was a price point selected by Amazon in order to sell e-books below what it perceived as the psychological barrier of ten dollars. Moreover, it was a price that was set below the cost of the book, as the DOJ seems to admit, and the extent of that differential between cost and price was probably a good deal greater than the DOJ has acknowledged. In short, Amazon set a price for its e-books in a way that only a monopolist that is intent on extending its monopoly could afford to do.

The evidence is also clear as to why Amazon set the price at that level. According to many industry sources, Amazon wanted to wean the maximum number of customers away from print books and into its e-books. Its apparent goal was to create the greatest possible price disparity in order to induce the maximum number of book buyers from print books to e-books, where it held a monopoly.

In this situation, a publisher would have every right to be alarmed and to take counter measures. Amazon's attempts to expand its e-book market through predatory pricing and other tactics directly threatened any publisher with which it did business. Amazon already held 90% of the e-book market, and it was using anti-competitive tactics to expand that control by trying to convert print book customers to e-book customers. From the publisher's perspective this would increase Amazon's already formidable buying power and increase the likelihood that it would make further economic demands that the publisher might not be able to meet. Moreover, the tactics posed a severe threat to the publisher's other customers, raising the real prospect that they would not be able to meet Amazon's predatory prices and would be forced out of business. This would further weaken the publisher in its effort to protect itself from unreasonable demands by Amazon. Finally, the publisher would be faced with the problem that any precipitate loss of print-book customers would weaken its ability to distribute and promote books in the print market and, thus, reduce its ability to properly promote the sale of such books in the overall market.

The publishers in this situation faced an even greater threat. They had every reason to fear that the next step by Amazon would be to put severe pressure on them to reduce the wholesale price substantially below the retail price of \$9.99 that Amazon had artificially set. Amazon wasn't going to be content

selling e-books below cost forever, and the publishers had every reason to fear that it would use its monopoly power to force the publishers' prices down to that level. This presented a severe problem for publishers. If they reduced their prices low enough to meet Amazon's demands, they would not have sufficient revenue from the sale of such books to cover the necessary promotional and other expenses for the book. They would be faced with two unpalatable choices. One choice would be to cut their overall budget for promotion, marketing, and distribution of their books. This would substantially reduce the visibility of their books in the market place and probably reduce their overall sales. Their other choice would be shift more of their promotion and marketing costs to their print books, thus forcing them to raise the price of such books and feed into Amazon's plan of inducing customers away from print books and into its own e-books. This is the type of situation that no publisher should be forced to endure, and it is unconscionable that the DOJ would try to interfere with these types of crucial business decisions that the publishers faced.

And let's not forget the impact on the authors. The whole point of the book business is to create a means by which authors can find an audience and get paid a reasonable amount for their creative efforts. However, Amazon's artificially created price-point of \$9.99 poses a severe threat to the income of authors. An author will typically receive anywhere from \$3.00 to \$4.00 on the sale of a hard cover book and somewhat less on the sale of books in other forms. The overall royalty structure is designed to give authors a reasonable income for their work. But if Amazon is allowed to artificially drop the price of e-books to \$9.99 and force most sales into that medium, the income of authors would drop drastically. By the time the publisher was paid and Amazon took its mark-up, there would likely be only pennies left for the author. This would be disastrous both for authors and for the entire reading public. If payments to authors ever drop to the point that authors are discouraged from writing books, the entire country would be impoverished in a way that is hard to calculate.

4. This is Not a Proper Case for the Department of Justice

All the evidence in this case points to one thing: Amazon.com had a monopoly in the e-book market and was moving aggressively to extend that monopoly to the overall book market. The evidence of this is quite overwhelming. Nevertheless, the Department of Justice has intervened in this dispute on the side of Amazon.com, pursuing a matter that is at best peripheral to the very real monopolistic threats to the book business.

The question then is why – why this case and why now? The DOJ has not provided an answer.

The prohibition of monopolies is at the heart of the anti-trust laws. Section 2 of the Sherman Act makes this clear in no uncertain terms:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony."

Amazon.com had 90% of the e-book market at the time the Agency Plan was adopted. The Justice Department admits that Amazon was using tie-in sales, vertical integration, sales below cost, and other aggressive tactics to maintain and expand that monopoly. The evidence is clear that Amazon was trying to extend its monopoly to the larger, overall book market. What clearer example of a violation of Section 2 of the Sherman Act could there be?

In this context, the actions of the defendants take on a whole different light: arguably, they were fighting to preserve their business against the unfair tactics of a monopolist. Every fact the DOJ alleges to show anti-competitive conduct by the publishers can just as easily be explained as the efforts of responsible business organizations to protect their businesses from the abuses of a monopolist. If there is any case that the DOJ should be pursuing, it should be a case to break up Amazon's monopoly. But for some reason the DOJ chose to do exactly the opposite.

To put the issue in its starkest form, does a shaky claim of collusion under Section One of the Sherman Act take precedence over a clear violation of Section Two of that same act? I am aware that the DOJ has characterized the actions of the publishers as a *per se* violation, but the invocation of that label should not be a substitute for clear thinking. The creation of a monopoly in the book business is a far more serious offense than the claim of collusion alleged in this case, because it creates a permanent, anti-competitive situation that is extremely difficult to dislodge.

And this leads to the question of the role of the DOJ. What is the Justice Department doing in this case? Why – of all the potential cases it could be pursuing – did it decide to take this one? Amazon.com – the supposed aggrieved party in this case – is one of the largest, richest companies in America. It is perfectly capable of protecting its own interests and asserting any claims it might have in the courts. So why, then, has the Justice Department decided to align itself with this monopolist?

The actions of the DOJ are especially galling in light of the fact the Justice Department and its sister agency, The Federal Trade Commission, have turned a blind eye to anti-competitive activities in the book business over the last forty years. There has been substantial evidence of anti-competitive uncovered practices uncovered by lawsuits initiated by Northern California Booksellers Association and by the American Booksellers Association. There were two investigations conducted by the staff of the FTC, but in both cases the recommendations of the staff were turned down by the Commission itself. The Justice Department is certainly aware of these investigations, because Christine Varney, the immediate past head of the Anti-Trust division, was a Commissioner on the FTC at the time its investigation was curtailed.

So once again, why now? Why has the Department of Justice decided to ally itself with the interests of a monopolist? By placing the power and majesty of its office on the side of Amazon.com, the Justice Department is undermining that fabric of the book business and signaling to all future monopolists that concentrated, anticompetitive behavior will get a free pass from the government.

I urge you to withdraw this complaint and conduct the type of thorough, unbiased investigation that this matter deserves.

Sincerely yours

William Petrocelli
Co-owner
Book Passage, Inc.