

SCHULER BOOKS & MUSIC

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June 22, 2012

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

Re: Comments on the Proposed Consent Decree in *United States v. Apple, Inc., et al.*, 77 Fed. Reg. 24518 (April 24, 2012)

Dear Mr. Read,

Schuler Books & Music is a 30 year old independent bookselling company with five stores in Michigan. We write today to oppose the proposed consent decree with Hachette, HarperCollins and Simon & Schuster primarily because it requires that the Agency Model for the sale of e-books be eliminated by these three publishers for two years. We believe that elimination of the Agency Model will radically change the current e-book distribution system, will significantly discourage new entry, and will lead to the departure from the market of a sizeable number of the independent bookstores, such as ourselves, that are currently selling e-books - a result which would be damaging to the book industry and harmful to the public interest.

We believe the Agency Model corrects a serious distortion in the marketplace, which, if uncorrected, will reduce or eliminate competition both on the publishing level and at the distribution level. The fact of the matter is that before the implementation of the Agency Model, Amazon.com was selling most ebooks significantly below cost, a strategy which enabled them to keep competitors out of the ebook marketplace and establish a 90% share of the emerging ebook market.

Since the introduction of the Agency Model in 2010, many independent booksellers and other ebook retailers have been able to enter the marketplace, and established ebook retailers such as Barnes & Noble have been able to gain market share. Amazon's share of the market has fallen to 60%, meaning that competition within the ebook marketplace has actually *increased* rather than declined.

If the consent decree requirement banning Agency Model pricing for two years is finalized, there is a significant danger that Amazon will again regain a monopoly share in the sale of e-books and that the entire e-book distribution system constructed since the Agency Model went into effect will be dismantled. Using its completely proprietary

Kindle format, Amazon's below-cost e-book sales may well lock customers into their Kindle application e-book libraries over the next two years, rendering customers unable or unwilling to switch to another retailer even if the Agency Model is re-adopted by publishers when the two-year moratorium ends.

To think that banning use of the Agency Model will increase competition is simply wrong-headed. It would, in fact, have the opposite effect. And once Amazon has reestablished a monopoly position in the ebook market through predatory pricing practices, consumers would be the ultimate losers.

An irony of this proposed settlement is that the publishers have actually *lowered* the wholesale pricing of their ebooks under the Agency Model, as well as the publisher's retail price. In effect, the Complaint on which this proposed settlement is based alleges that the publishers have colluded to *lower* their income from the sale of ebooks.

In addition, there is ample evidence that the average prices *consumers* pay for both ebooks and hardcover books have actually decreased during the time in which the Agency Model has been in place. For a very clear presentation of the data on this point, please see the brief filed by Barnes & Noble on this proposed Consent Decree. By every measure, the Agency Model has increased competition, presented the consumer with more choices, and actually lowered prices overall to consumers.

The basis for this proposed settlement is a Complaint, alleging that certain publishers have colluded to lower their own profits and increase their payments to e-book distributors such as independent booksellers like ourselves. If that is a valid theory of collusion, and if the aim here is to end collusion, the proposed settlement should enjoin collusion and punish the purported colluders. Even in the most egregious cases of price fixing, the DOJ does not adopt price controls to remedy the effect on the market of agreed-to prices; it instead enjoins collusion and punishes the alleged collaborators. By contrast, the proposed settlement here imposes a regulatory regime that punishes only third parties and consumers. While the DOJ traditionally, and appropriately, seeks to prevent future violations and permit the market to determine prices, the proposed settlement seeks to substitute regulation for market forces.

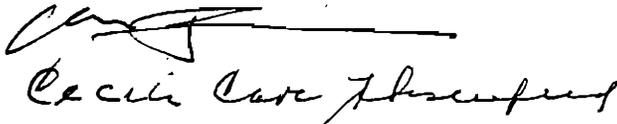
Moreover, the Complaint explains that, if collusion is ended, no regulation of agency contracts is needed. The Complaint expressly states that, without collusion, parties will only enter new agency contracts when those agreements are in their independent self-interests because there are costs to such contracts. The DOJ nonetheless would impose a specific business model on an industry—government action which is analogous to a cartel imposing a detailed business model on publishers. The end loser of this unnecessary and burdensome regulatory approach will be the American public, who will experience higher overall average e-book and hardback prices and less choice, both in how to obtain books and in what books are available. Agency contracts have created competition by making publishers—where there are many players and where competition is abundant—responsible for pricing and price competition. In just two years, the result of agency contracts has been significant; as competition at all levels of the e-book

distribution chain has increased. The fact is that the Agency Model has resulted in lower e-book prices, lower hardback prices, substantially lower wholesale e-book prices, and increased the quality and availability of ebooks.

The conclusion is obvious. If indeed there is collusion, the DOJ should punish collusion. They should not be engaged in forbidding publishers and their distributors from engaging in perfectly legal agency contracts. DOJ should not adopt a settlement that will be detrimental to publishers, booksellers, and the public as a whole by enabling predatory pricing practices that would ultimately lead toward monopoly.

This proposed settlement is of extraordinary importance, because it has the potential to have a devastating effect on the entire book industry over time, an industry that is central to the cultural life of the United States. Schuler Books & Music opposes the proposed settlement, and asks that DOJ not require publishers to drop the agency plan.

Respectfully,

A handwritten signature in black ink, appearing to read "William & Cecile Fehsenfeld". The signature is written in a cursive style with a long horizontal line extending from the end.

William & Cecile Fehsenfeld
Owners, Schuler Books & Music