

RECEIVED *Kmw*

JAN 31 REC'D 2013

LITIGATION III, ANTITRUST DIV.
U.S. DEPT. OF JUSTICE

January 30, 2013

VIA FEDERAL EXPRESS

John R. Read
Chief, Litigation III Section
Antitrust Division, Department of Justice
Suite 4000, Liberty Square Building
450 Fifth Street, NW
Washington, DC 20530

Marc L. Fleischaker

Partner and Chair Emeritus
202.857.6053 DIRECT
202.857.6395 FAX
marc.fleischaker@arentfox.com

Brian D. Schneider

Associate
202.715.8590 DIRECT
202.857.6395 FAX
brian.schneider@arentfox.com

**Re: National Association of College Stores Comments on Penguin Proposed Judgment
(United States v. Apple, Inc., et al.)**

Dear Mr. Read:

We write on behalf of the National Association of College Stores (“NACS”) to convey its concerns regarding the proposed final judgment in *United States v. Apple, Inc., et al.* against defendant The Penguin Group (the “Proposed Judgment”). The language of the Proposed Judgment applies to all e-books, including non-trade e-books such as e-textbooks. This dramatically exceeds the scope of the Complaint, is beyond the bounds of the Tunney Act, and threatens harm to third-party publishers and retailers of non-trade e-books. There is no practical reason for the Department not to limit the judgment to the conduct at issue – the sale of trade e-books. Moreover, the Proposed Judgment threatens the sale of e-textbooks by NACS members and other retailers, including sales of e-textbooks published by Penguin’s sister companies, at least one of which is a key player in the e-textbook market.

NACS raised similar concerns with respect to the earlier, proposed final judgment in this matter, and the present proposal introduces increased risk of harm to third-parties. NACS therefore respectfully submits these comments urging the Department (or the Court) to clarify the scope of the Proposed Judgment.

A. The National Association of College Stores

NACS is a not-for-profit trade association headquartered in Oberlin, Ohio. NACS represents the \$10 billion campus retailing industry. More than 3,000 stores serving colleges, universities, and K-12 schools in the United States, Canada, and around the world are members of NACS, along with more than 1,000 companies supplying goods and services to campus stores.

NACS members also include higher education professionals, organizations, associations, and others interested in the industry's vitality. NACS members account for the majority of textbook sales in the United States, and more than half of NACS members' net sales are in the textbook market.

NACS members are at the cutting edge of the e-textbook market. The market for e-textbooks has developed much more slowly than the market for trade e-books, and e-textbooks currently account for less than 5% of textbook sales. New technological and consumer developments are expected, however, to propel this unique market in new directions during the next several years.

**B. The Complaint Focuses Entirely on the Trade e-Book Market,
Not the *e-Textbook* Market.**

The Complaint in this matter expressly excludes from its allegations the non-trade e-book market. The Complaint explains that “the relevant product market for purposes of this action is trade e-books,” defining “trade e-books” to mean “general interest fiction and non-fiction books.” Compl. ¶¶ 27, 99. The relevant market, according to the Complaint, does not include the “non-trade e-book market:”

Non-trade e-books include electronic versions of children's picture books and academic textbooks, reference materials, and other specialized texts that typically are published by separate imprints from trade books, often are sold through separate channels, and are not reasonably substitutable for trade e-books.

Compl. ¶ 27 n.1. The Complaint emphasizes that the two markets are distinct: Non-trade e-books are “not reasonably substitutable for trade e-books,” operate on an entirely different pricing model, are “sold through separate channels,” and have separate publisher-retailer agreements. *Id.*

The Complaint's allegations thus focus entirely on activities in the trade market. The Complaint alleges that “the anticompetitive acts at issue in this case directly affect the sale of trade e-books to consumers,” and that “the Publisher Defendants were able to impose and sustain a significant retail price increase for their trade e-books.” *Id.* ¶ 99 (emphasis added). *See also, id.* ¶ 101 (“The Publisher Defendants possess market power in the market for trade e-books [and] successfully imposed and sustained a significant retail price increase for their trade e-books.”); *id.* ¶ 101 (“Collectively, the [Publisher Defendants] provide a critical input to any firm selling trade e-books to consumers. Any retailer selling trade e-books to consumers would not be able to forgo profitably the sale of the Publisher Defendants' e-books.”); *id.* ¶ 102 (“Defendants' agreement and conspiracy has had and will continue to have anticompetitive effects, including:

Increasing the retail prices of trade e-books”) (emphasis added). The Complaint therefore alleges anticompetitive behavior only in the trade e-books market, not the non-trade market, which includes e-textbooks.

C. The Proposed Remedies Require Clarification.

Unlike the Complaint, the Proposed Judgment impermissibly extends to the non-trade market, including e-textbooks.¹ This is the result of the Proposed Judgment’s definition of “E-books,” which includes all e-books, not just those in the Complaint’s narrower relevant-market. Proposed Judgment § II.D (defining “E-books” to mean “an electronically formatted book designed to be read on a computer, a handheld device, or other electronic devices capable of visually displaying E-books.”). The Proposed Judgment excludes from “E-books” (1) audio books; (2) standalone specialized software applications (“apps”); or (3) media files containing an electronically formatted book, *id.*, but this would not operate to exclude non-trade e-books such as e-textbooks.

When NACS raised this contradiction in its comments on the earlier settlement decree in this matter, the Department responded that “it was not necessary to expressly exclude e-textbooks from the proposed Final Judgment because none of the Settling Defendants sell e-textbooks, and the Complaint already makes it clear that ‘e-books’ in the context of this case does not encompass ‘[n]on-trade e-books includ[ing] . . . academic textbooks’ [Docket No. 81.] The Department’s response thus avoided directly addressing NACS’s concern by asserting that the text of the then-proposed judgment did not mean what it said.

The Department should not take the same approach here. Penguin’s family of companies (including Pearson Education and possibly other parent and sister companies) are major players

¹ The Court may not “enjoin all future illegal conduct of the defendant, or even all future violations of the antitrust laws,” regardless of the allegations in the complaint. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 133 (1969). Rather, the Court must ensure that the remedy is “tailored to fit the wrong creating the occasion for the remedy.” *New York v. Microsoft Corp.*, 224 F. Supp. 2d 76, 100 (D.D.C. 2002) *aff’d*, 373 F.3d 1199 (D.C. Cir. 2004) (quoting *U.S. v. Microsoft Corp.*, 253 F.3d 34, 107 (D.C. Cir. 2001)). The decree is therefore bound by the four corners of the complaint. See 15 U.S.C.A. § 16(e)(1)(B); *United States v. Microsoft Corp.*, 56 F.3d 1448, 1458 (D.C. Cir. 1995); *United States v. Keyspan Corp.*, 763 F. Supp. 2d 633, 637-38 (S.D.N.Y. 2011) (“the relevant inquiry is whether there is a factual foundation for the government’s decisions such that its conclusions regarding the proposed settlement are reasonable”).

in the e-textbook market,² and the Proposed Judgment threatens to constrain those companies' ability to sell e-textbooks. *See* Section II.K (defining "Penguin" to include Penguin's "divisions, groups, partnerships; and each of their respective directors, officers, managers, agents, and employees," which may include entities related to Pearson's e-textbook educational offerings); Section III (applying the judgment to all entities "in active concert or participation with Penguin," which arguably includes any company related to Penguin). Similarly, the agreement hamper's any other publisher or retailer (including NACS members) from exploring with Penguin and its related entities emerging opportunities in the nascent e-textbook market. For example, the Proposed Judgment would bar NACS members for at least the next two years from selling Penguin's or its affiliates' e-textbooks using otherwise legal arrangements, such as a fixed-price, agency model, or a most-favored nation provision. *See* Section V.B, V.C.

The Proposed Judgment thus may impact a non-targeted market in an impermissible manner. *See Keyspan Corp.*, 763 F. Supp. 2d at 637-38. This is unnecessary given the ease with which the Proposed Judgment could be more narrowly tailored. Accordingly, the broadly worded Proposed Judgment must be clarified to exclude e-textbooks and other products in the non-trade e-book market.

Thank you for your consideration.

Sincerely,



Marc L. Fleischaker



Brian D. Schneider

² *See, e.g., Pearson Releases new Wave of Interactive Textbooks for Apple's iPad.*
<http://www.pearsoned.com/pearson-releases-new-wave-of-interactive-textbooks-for-apples-ipad/>