



June 14, 2012

Mr. John Read
Chief Litigation III Section
Antitrust Division
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:

The American Booksellers Association is a 112-year old organization that represents the nation's locally owned and operated independent booksellers. 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 that are currently selling e-books.

The ABA supports the Agency Model. We believe that the Agency Model corrects a distortion in the market fostered primarily by Amazon.com, which, if uncorrected, will reduce or eliminate competition both on the publishing level and at the distribution level. The Agency Model is pro-competitive and enhances consumer choice. It is a perfectly legitimate mode of business. Indeed, it is a completely appropriate response to aggressive pricing strategies that include the sales of e-books below the cost at which those books were acquired from publishers.

1. Following Adoption of Agency Model, Independent Bookstores Enter the E-Book Market

A central tenet of the ABA's mission is to ensure that a broad array of books is as widely available to American consumers as possible: the greater the number of books, the greater the number of voices and ideas; the greater the number of voices and ideas, the more rich the lives of our citizens and the better our society. In this way, independent bookstores are integrally important to the vitality of a democracy.

Although independent booksellers held their own in 2011, apparently benefiting from, among other factors, an improved economy and a growing Buy Local movement, they remain concerned

about ensuring they have a portion of the rapidly growing e-book market. ABA and its members firmly believe that bricks-and-mortar stores need an e-book strategy to continue to thrive given the considerable growth in the e-book market. Having identified that need, ABA's IndieCommerce subsidiary began a process of investigating and identifying an e-book supplier, ultimately choosing to launch in late 2010 with Google eBooks.¹

Before the adoption of the agency model for e-book sales, indie bookstores were concerned that Amazon had a 90 percent share of the growing e-book market, and that this one retailer was selling e-books at a price far lower than indie stores could even purchase these e-books for resale.

Indie bookstores' entrance into the e-book market in late 2010 occurred only because the market was commercially viable as a consequence of adoption by various publishers of the Agency Model in April 2010. Relying on the premise that the level playing field established by the Agency Model would result in some ability to make a return on their investment, there are now 380 independent stores selling e-books through ABA's IndieCommerce subsidiary. We believe there are scores of other indie bookstores, notably Powells.com and B&T RetailerPlace bookstores, selling on other ecommerce platforms, nearly all of which have entered the e-book market since the April 2010 introduction of the Agency Model. Under the Agency Model, these retailers sell titles from the five publishers at issue in the investigation, as well as from Random House and other e-book publishers not under investigation. Many other bookstores sit on the sidelines today, awaiting entry in the e-book market until this issue about Agency Model pricing is resolved, knowing that the investment cannot be recouped if publishers are left without the means to prevent below-cost pricing.

Since April 2010, as indie booksellers and hundreds of additional e-book retailers have appeared on the scene, Amazon's share of the market has fallen to approximately 60 percent. Diverse sellers now offer customers a rich array of e-book content from among the hundreds of thousands of titles now available in digital format through indie bookstores and others.

At the same time, the Agency Model has clearly lowered retail prices to indie bookstore customers. Since the introduction of the agency model, publishers have dropped their retail prices for e-books, and there has been far more significant e-book price competition among publishers, including significant promotions and discounts that indie bookstores can pass on to customers. Not only are indie bookstore customers paying lower prices, indie bookstores report that average prices to booksellers dropped \$2-\$5 per unit or more after Agency was introduced, while sales of e-books have significantly increased.

As importantly, the ability of indie bookstores to sell e-books has also led to overall increases in these bookstores' revenue from e-commerce activity. ABA member bookstores sell physical books, sidelines and other non-book items, tickets to bookselling events and other goods and services over their newly invigorated e-commerce sites, adding significantly to the bottom line of these small businesses.

The Google eBooks sold by indie bookstores are compatible with and can be read on a wide range of devices, including: Apple devices (iPhones, iPads, iPods); Android devices; Kobo

¹ Before January 2013, ABA's IndieCommerce subsidiary will fulfill e-book orders through a provider other than Google e-books since Google is discontinuing its business as a reseller of e-books.

devices; Sony e-readers; Aluratek e-readers, iRiver devices, and personal computers. Essentially, e-books sold by indie bookstores can be read on every device except the Amazon Kindle, which is a closed, proprietary system.

Indie bookstores have also invested tremendous effort and resources into selling e-books. These bricks-and-mortar stores provide training and concierge services to help customers purchase, download and read e-books. They use shelf-talkers with QR codes to help customers choose e-books as they walk around a physical bookstore. They promote Google and publisher specials on e-books. And they do all of this despite the fact that, even under the current Agency Model agreements, indie bookstores' profit margin on e-books is typically one-third less than their margin on physical books. If the agency model disappears such that that profit margin further decreases or disappears, indie booksellers are unlikely to continue to see e-books sales as a viable avenue for them.

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 unwilling to switch to another retailer even if the Agency Model is re-adopted by publishers when the two-year moratorium ends.² The situation is even less competitive for customers who read e-books on an Amazon Kindle device, as opposed to as an application for a multi-use mobile device, since the Kindle device is completely locked down and does not allow for the reading of e-books purchased from other vendors. (Virtually all other e-book reading devices allow the use of content purchased from other vendors.)

ABA believes that the introduction of the Agency Model was an entirely appropriate response by publishers to aggressive, below-cost pricing strategies that were devaluing the book and threatening the publishing ecosystem. Given that the Agency Model for e-book sales is itself a legal business model, no final consent decree should prevent publishers from independently choosing to adopt that business model for their own independent business reasons, which might include promoting a diverse distribution base.

2. The Agency Model is Necessary To Protect Bricks-and-Mortar Stores from Free-Riding

As a power buyer and power seller that regularly sells its books and e-books below cost, we believe that Amazon is a much more dangerous industry participant than the publishers or any other retailers. Until the introduction of the Agency Model, Amazon had been able to dictate terms of sale and eliminate or threaten elimination of publishers from their website if they

² ABA notes with particular concern that the proposed consent decree actually authorizes a retailer to reduce its commission to zero in the aggregate on e-books without fear of action by publishers, essentially permitting a retailer to sell some titles below acquisition cost, and to sell all e-books below the cost of acquisition combined with the fixed and variable costs a retailer incurs as a going business. ([Proposed] Final Judgment as to Defendants Hachette, HarperCollins, and Simon & Schuster (April 11, 2012) at 13-14.) DOJ should not authorize, let alone endorse, below-cost selling, especially when that was the key strategy the industry's major retailer used to gain its 90 percent share of the e-book market, which monopoly share was only eroded by the introduction of the Agency Model.

refused to comply. The DOJ Complaint recognizes this with respect to the Macmillan action, DOJ Complaint at ¶ 80, but there have been other examples as well in which Amazon has demonstrated a mercurial attitude toward its business partners with devastating results for those partners given Amazon's market share. *See, e.g.*, "Amazon.com trying to wring deep discounts from publishers," SEATTLE TIMES (April 1, 2012) (available at http://seattletimes.nwsourc.com/html/business/technology/2017889877_amazonpublisher02.html); "IPG Stands Firm on Terms with Amazon," PUBLISHERS WEEKLY (Feb 22, 2012) (available at <http://www.publishersweekly.com/pw/by-topic/industry-news/bookselling/article/50746-ipg-stands-firm-on-terms-with-amazon.html>); "Amazon, Publisher Settle Digital Books Dispute," WALL STREET JOURNAL (May 25, 2012) (available at <http://online.wsj.com/article/SB10001424052702304840904577426830792316616.html>); "Amazon drops California associates to avoid sales tax," CNN MONEY (June 29, 2011) (available at http://money.cnn.com/2011/06/29/technology/california_amazon_associates/index.htm); "Amazon says it will close Texas distribution center," THE AUSTIN AMERICAN-STATESMAN (Feb. 10, 2011) (available at http://www.statesman.com/blogs/content/shared-gen/blogs/austin/theticker/entries/2011/02/10/amazon_says_it_will_close_texa.html)

Not only is Amazon a power buyer and power seller, it is a classic free-rider that has long enjoyed at least two major advantages over its brick-and-mortar counterparts: (1) Amazon can and does free ride off the sales and promotional efforts of bricks-and-mortar stores; and (2) state governments have subsidized Amazon with sales taxes avoidance. (Unlike bricks-and-mortar book stores, Amazon does not collect sales taxes in many locales.)

The evidence of free-riding of online stores on the marketing and promotional activities conducted in bricks-and-mortar stores is widespread. As online purchasing of books has increased, locally owned bookstores have been widely viewed as showrooms for the discovery of books that are then purchased online. *See, e.g.*, "Book Shopping in Stores, Then Buying Online," The New York Times (12/4/2011) (available at <http://mediadecoder.blogs.nytimes.com/2011/12/04/book-shopping-in-stores-then-buying-online/> (reporting conclusion from Codex Group study that "Thirty-nine percent of people who bought books from Amazon in the same period said they had looked at the book in a bookstore before buying it from Amazon"); <http://bookmarketingbuzzblog.blogspot.com/2011/12/study-reveals-book-buyer-habits.html> (reporting conclusion from Codex Group study that 33 percent of Kindle owners surveyed a bricks and mortar bookstore and then purchased their e-book online from Amazon); 2011 Verso Study (presented on Jan. 19, 2012 at ABA Winter Institute) at slides 13, 14 (available at <http://www.versoadvertising.com/Wi7survey2012/> (concluding that a third of readers learn about new books from their bricks-and-mortar stores, 23 percent say they prefer shopping in indie bookstores, but 26 percent of those customers are buying the title recommended at their indie bookstore from an online source, resulting in lost revenue to indies of as much as \$260 million)).

Further, ABA understands that the book publishers recognize that author events, book groups and other indie bookstore marketing and promotion events lead to upticks in online sales for which indie bookstores receive no compensation.

Not only does Amazon understand the benefits it receives from free riding on bricks-and-mortar store promotional efforts and showrooming of products, Amazon has worked aggressively to

promote and expand its free riding advantages. Amazon encourages consumers to walk through bricks-and-mortar stores using its price check app for smartphones to purchase from Amazon while inspecting the physical product in the physical stores, even going so far as to pay consumers for checking prices in bricks-and-mortar stores. *See* http://www.amazon.com/gp/feature.html?ie=UTF8&docId=aw_ppricecheck_iphone_mobile; see also “Amazon Price-Check App Is Attack on Small Stores, Snowe Says,” Bloomberg Business Week, Dec. 13, 2011 (available at <http://www.businessweek.com/news/2011-12-13/amazon-price-check-app-is-attack-on-small-stores-snowe-says.html>); “With 5% Discount, Amazon Triples Use of Controversial App,” Mashable Business, Dec. 13, 2011 (available at <http://mashable.com/2011/12/13/amazon-price-check-app/>).

Given that free-riding appears to be a significant aspect of the Amazon business strategy, it would be entirely appropriate for publishers to individually decide to take control of their e-book pricing to ensure that, as the industry moves more toward the e-book world, the bricks-and-mortar showrooms of the publishers’ products continued to survive and thrive. In the final consent decree, publishers should not be barred from individually choosing to adopt this legal and prudent business strategy.

3. The Agency Model Ban Included in the Consent Decree Is Improper and Overly Broad Since it Seeks a Remedy Not Sought in the Complaint and Voids Agency Model Agreements Negotiated After April 2010 Which Are Not Alleged To Be Implicated

IndieCommerce negotiated with Google eBooks and with publishers from July through October 2010 to provide ABA members with an ability to sell e-books using the Agency Model. The IndieCommerce and Google negotiations with the publishers occurred long after the launch of the iPad and the dates at issue in the civil complaint. These negotiations were not the product of any sort of collusive activity, yet nonetheless, these agreements would all be voided by the proposed consent decree, despite the facts that DOJ’s complaint in this action does not seek such a remedy and that IndieCommerce is not a party to the action.

IndieCommerce and its ABA member stores should not be penalized by having their and the Google agency agreements set aside, when these were freely negotiated contracts that no one has alleged were the product of collusion. Further, DOJ should not be imposing in the consent decree a remedy that they do not seek in their complaint and that they could not obtain if they proved their allegation of collusion on the merits, especially given the far-reaching impacts of the proposed consent decree on the reasonable expectations of hundreds of small businesses.

If the publishers had together agreed that not one of them would offer an Agency Model to booksellers, that would clearly be illegal, and DOJ might today be pursuing them for so doing. But the proposed consent decree would have the same effect as to the three publishers that are required to sign it. They will together be jointly agreeing, with DOJ’s imprimatur, not to employ for two years a pricing strategy that would ensure broad distribution of e-books among diverse retailers, including indie bookstores. The consequences of this joint conduct with respect to key business terms are not lessened because DOJ is directing it. Indeed, the likely result is to drive the lion’s share of the e-book business back to a single online retailer. By dictating disadvantageous business terms, DOJ’s proposed consent decree will radically restructure the e-

book distribution system. That cannot be in the public interest, and should not be approved and finalized by the Court.

CONCLUSION

ABA asks that the final consent decree not require publishers to drop the agency plan as a condition of settlement. If there was collusion in the market, DOJ and the court should punish those colluders. A two-year hiatus from the agency plan will not punish any alleged colluders. It will only punish indie booksellers and other e-book distributors who entered the market after the Agency Model was adopted by changing the terms of their business arrangement in a way that facilitates below cost-pricing by power buyer, and likely leading to a monopoly for that buyer.

Sincerely,

A handwritten signature in black ink, appearing to read "Oren J. Teicher". The signature is fluid and cursive, with the first name "Oren" and last name "Teicher" clearly distinguishable.

Oren J. Teicher, CEO

American Booksellers Association