

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
 UNITED STATES OF AMERICA, :
 :
 Plaintiff, :
 :
 v. :
 :
 APPLE INC., *et al.*, :
 :
 Defendants. :
 ----- X

12 Civ. 2826 (DLC)

----- X
 THE STATE OF TEXAS, :
 THE STATE OF CONNECTICUT, *et al.*, :
 :
 Plaintiffs, :
 :
 v. :
 :
 PENGUIN GROUP (USA) INC., *et al.*, :
 :
 Defendants. :
 ----- X

12 Civ. 3394 (DLC)

APPLE INC.’S POST-TRIAL MEMORANDUM



Summation

2008 – 2009

2009 eBook Market Turmoil

Calendar

Day Week Month Year

2009

Today

January

Sun	Mon	Tue	Wed	Thu	Fri	Sat
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December

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2009 eBook Market Turmoil



Windowing



SEP 2009: Hachette announces plan to window Ted Kennedy's *True Compass* (Young Decl. ¶19); in December 2009 announces plan to window "vast majority of its titles." (DX-061)



SEP 2009: HarperCollins windows Sarah Palin's *Going Rogue* (PX-0416; PX-026); in December 2009 announces plan to window 5-10 titles per month. (DX-072)



NOV/DEC 2009: Simon & Schuster windows Stephen King's *Under the Dome* through the holidays and announces plan to window 35 new books from January to April 2010. (Reidy Decl. ¶¶14-15)



DEC 2009: Macmillan announces plan to window "most" of its eBooks beginning in January. (Sargent Decl. ¶19)



DEC 2009: Penguin CEO states that they "may undertake trial pricing and defer publication from time to time...." (DX-72)

Publishers Delay E-Book Releases

Publishers have been debating the timing of e-books in part as a way to protest the low prices - typically \$9.99 - that online retailers like Amazon and Sony are offering on e-book versions of new releases and best sellers.

DECEMBER 9, 2009 *New York Times*

HarperCollins Joins Ranks Of Those Delaying E-Books

The third major publishing house in two days has decided to delay the electronic-book publication of some titles next year, as the debate over the timing and pricing of e-books heats up.

...

Mr. Murray said that if new hardcover titles continue to be sold as \$9.99 e-books, the eventual outcome will be fewer literary choices for customers, because publishers won't be able to take as many chances on new writers.

December 10, 2009 *Wall Street Journal*

DX-23: April 2, 2009 Email From Bezos To Porco, et al.

From: Freed, Ian
Sent: Wednesday, June 03, 2009 7:23 PM
To: Naggar, David
Subject: FW: Kindle meeting with Markus Dohle, CEO Random House

FYI. Some old mail that is helpful for context.

From: Bezos, Jeff

On delaying the ebook -- that would be an absolute declaration of war

conversation early in the meeting by showing charts and graphs about how we need to get more of their books available

On delaying the ebook -- that would be an absolute declaration of war -- terrible customer experience -- very embarrassing to us in front of customers -- the simple fact is we couldn't tolerate it -- it would be better to just not carry their books. You have to nip that idea in the bud before he can even finish the sentence. I would pre-empt that conversation early in the meeting by showing charts and graphs about how we need to get more of their books available for kindle pre-order. Talk a lot about how that is our biggest most important initiative in the coming year.

- o January Kindle COGS: \$ [REDACTED]
- o Feb Kindle COGS: \$ [REDACTED]
- o March Kindle COGS through 3/30: \$ [REDACTED]
- o T90 Kindle Sales Units: [REDACTED]
- o T90 Physical Sales Units: [REDACTED]
- o Kindle units of total Physical Books at Amazon: [REDACTED]
- o Kindle sales ratio of Physical Books with a Kindle edition: [REDACTED]

We believe there are still significant areas of opportunity for Random House to increase sales and capture MSS for their authors.

- o [REDACTED] of their DWC is available on Kindle ([REDACTED] Kindle books)
- o Their biggest immediate opportunity is in [REDACTED] titles which account for [REDACTED] of their unapproved available DWC (if all of this was approved, it would [REDACTED]).

1

USA v. Apple Inc., et al.
12-CV-02826-DLC

DX-023

AMZN-MDL-0036927
HIGHLY CONFIDENTIAL

DX-28: June 29, 2009 Email From Naggar To Kessel, et al.

The nuclear nature of windowing, even on a single title
force us to a very negative response

content" mantra. Markus asked for the data (Laura sent to him today) to present at his US Board
Meeting this week. And you felt that looking at a book priced at \$9.99 for the DLP on the budget of

- I made it very clear to them the nuclear nature of windowing, even on a single title, and that such an action would scuttle this process and force us to a very negative response and that this was something we needed to stay away from.

- **Pool for advances:** least attractive option due to exclusivity despite the potentially significant dollars.
- **Incentive for pre-publication on Kindle:** they are very interested in doing books with enhanced features, and he considers early release titles to be in that category. He also said that they were looking at TTS enabling as an "enhanced feature that could justify a higher price. I disagreed, explaining that for the vast majority of titles and publishers, this was simply a feature on the device. We needed to talk about the dramatically recorded audiobook to make this interesting.
- **COGS guarantee:** Very intrigued (I put it on the table as our back of the envelope calc). Both seemed surprised that we weren't asking for more than lower DLP, release date parity, and raised DWC.

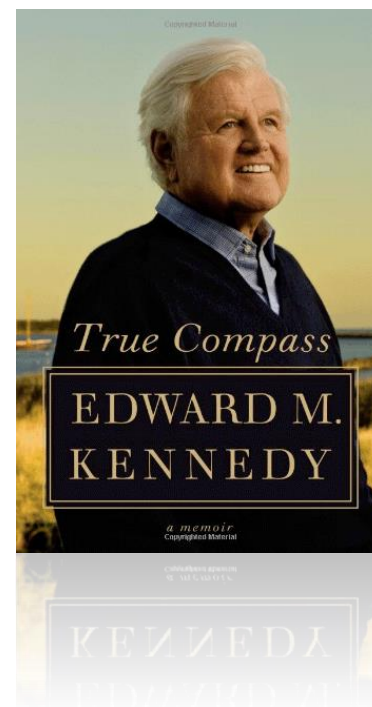
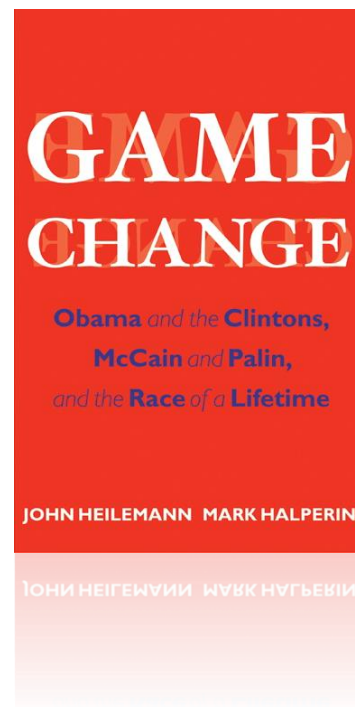
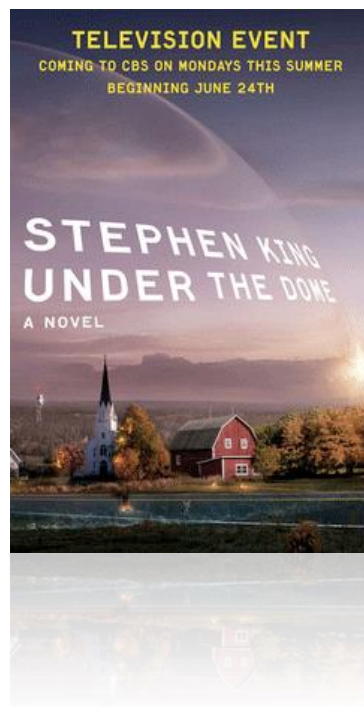
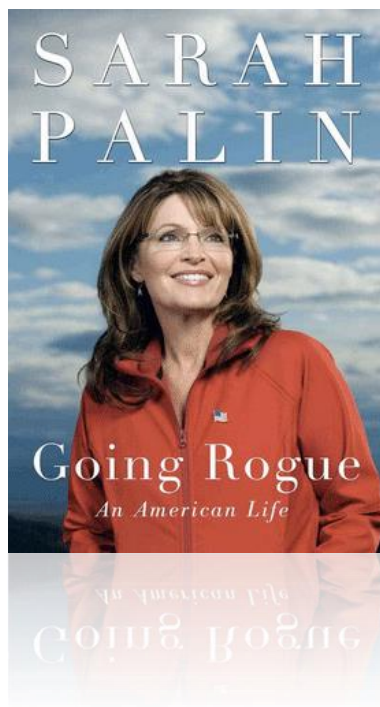
- I made it very clear to them the nuclear nature of windowing, even on a single title, and that such an action would scuttle this process and force us to a very negative response and that this was something we needed to stay away from.

- They are looking to experiment with pricing to understand elasticity and are wondering if we can help.

1

USA v. Apple Inc., et al.
12-CV-02828-DLC
DX-028

AMZN-MDL-0160724
HIGHLY CONFIDENTIAL





Testimony Of Eddy Cue

- Q. If windowing was such a big concern for Apple, when it was considering entering the eBook space, how come Apple never undertook to determine how many books were actually being windowed?
- A. Because the number doesn't matter. What matters is which books. So 37 could be a huge number if it's the right books.



Testimony Of Russell Grandinetti

Q. And that was because the industry, at the time, was debating a lot of issues and Amazon wanted agents and authors to have its perspective, correct?

A. Yes, sir.

Q. Now, would you agree with me, then, that throughout 2009, there was considerable unrest in the eBook industry?

A. Yes.

DX-55: On December 3, 2009 Barnes & Noble Made A Decision To Go To Agency

From: William J. Lynch
Sent: Thursday, December 03, 2009 3:11:07 PM
To: B&N.com Leadership; Theresa Homer; Victoria Repice; Douglas Gottlieb; Chris Peifer
Subject: Our Content Strategy

We discussed at length the importance of building one of the world's most formidable digital content catalogs...that is SALEABLE. Increasingly, publishers (large and small) are reticent to just post their wares on the web where the only entity making money monetizing that content in any real way is Google. So building a robust repository of digital content, where consumers can easily search and find books, magazines, newsletters, etc — and where a publisher can easily upload their content and establish a monetizable business relationship with B&N in a

We need to enable this agency model through our content store and [the publishers] will happily join.

store and they set the price. They don't want their books at 30% (monetizing their print-on-demand physical book business and quarterly restock) or lower margins for them as Amazon and us come banging on their door saying we no longer are willing to accept losses. We need to enable this agency model through our content store and they will happily join.

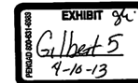
In summary, strategically it's important for us to build a robust click-and-go publishing platform that offers an 'agency' T&C agreement to publishers. The things we should solve for as we design the system include:

a platform that clearly outlines our requirements on supported formats (ePub, PDF, etc)
is administratively as turn-key as possible for the publishers to get their content loaded
contains a streamlined click-through agreement that encourages an agency relationship where the publisher sets the price
supports easy financial reconciliation as we scale the number of pubs we deal with

I'm sure there are other requirements I've missed.

Let's discuss at the next Exec Staff to capture thoughts and assess when we could launch something.

USA v. Apple Inc., et al.
12-CV-02326-DLC
DX-055




CONFIDENTIAL

BN00029474

PX-417: On Dec. 4, 2009 Hachette Board Votes To Window And Adopt "B&N Model"

Plaintiff Exhibit
US v Apple
Case No. 09-1703
PX-0417


hachette
BOOK GROUP

STRICTLY PRIVATE & CONFIDENTIAL

Date : December 4, 2009
To : David Young
Fr : Eve Rabinovits
Subject : MEETING OF THE BOARD - FR
Attending : C. Barba, S. Cottrell, T. Holl
M. Pietsch, J. Raab, C. Ross,
M. Thomas, A. Weinzimer,
Apologies :

DY distributed a list of 24 possible titles for windowing (January – June, 25k+ printorder, \$27.99+) and proposed a two-stage program: 1) make clear these titles will be windowed, and 2) if we move to the B&N model scenario windowing will be removed.

requested TM examine The News Group's sales were better than forecast.

Highlights of title news include Malcolm Gladwell's *Small Change* and Ted Kennedy's *True Compass* back on the shelves to see holiday sales soon.

Redacted

CONFIDENTIAL TREATMENT REQUESTED

win have to be made aware of the windowing policy, suggesting the approach of "We're concerned about the future of our business, and we're going to window your title." AN reminded that upon commencing windowing, HBG can rightfully say this policy has always been in place (e.g. hardcover edition preceding mass market edition). Announcement of the policy will be pending discussions with all major players, then possibly via conversations with BusinessWeek, the New York Times and/or the Wall Street Journal. Redacted

DY stated that this MT action is being taken to protect HBG's future, as key assets of the business are being given away at bargain basement prices. Redacted KM proposed referencing the B&N, Scribd and Apple Store link. Per AN, no decision yet as to how many days for windowing.

DY acknowledged that some agents are not aligned on this issue. If an agency does not agree, concerns will be addressed on a case by case basis. MP confirmed James Patterson is on board. MT to see whether the policy works for Baker & Taylor re enabling independent bookstores to sell ebooks, with B&T acting as wholesaler. DY proposed establishing a set of terms that work for any vendor who gets involved. MST offered that availability of an ebook edition should be akin to waiting for the publication of a mass market edition, or a DVD only available months after a movie has run in theaters. AN maintained that with the introduction of B&N's Nook, and an Apple reader on the horizon, Amazon will not be willing to lose its supplier base

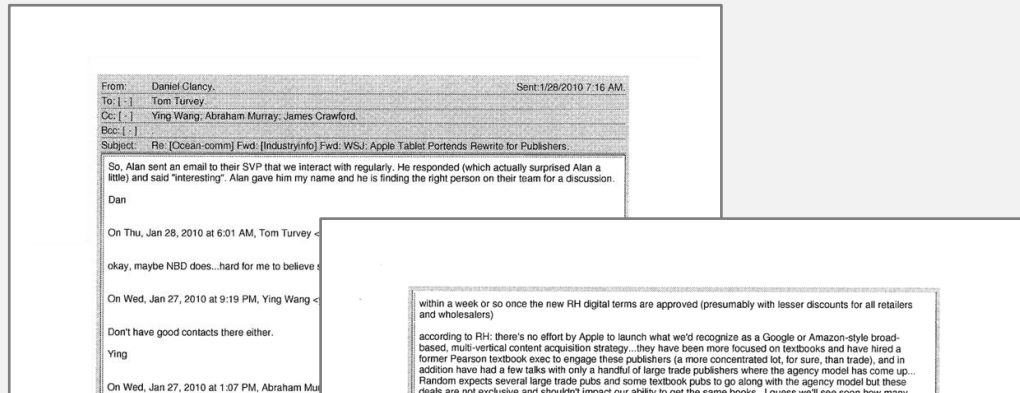
Redacted

4

CONFIDENTIAL TREATMENT REQUESTED

HBG00179253

DX-563: January 27, 2010 Email From Turvey To Murray



So this is all about pricing, and the closed (but growing) clouds that exist today for distribution. Some of you might remember we proposed such a model to publishers a couple of years ago when online access was around and it was them who shut this down then (this was pre "Kindle is ruining our business at \$9.99" hysteria). I don't think publishers fear authors going directly to a platform to be published (they can do that today cheaply and easily with the many author services companies that exist) so much as the loss leader strategy of Amazon that others would be free to follow in a list price minus discount world modeled on the print book business.

a little follow-up... apparently Random House won traditional terms of sale (list price minus discount) pricing (exactly my concern) and the reality that if terms of sale... Random House did say in their dis were about the potential for anti-trust issues to ar

Highly Confidential

USA v. Apple Inc.,
12-CV-02826-DL
DX-563

On Wed, Jan 27, 2010 at 8:28 AM, Tom Turvey <[redacted]> wrote:

So this is all about pricing, and the closed (but growing) clouds that exist today for distribution. Some of you might remember we proposed such a model to publishers a couple of years ago when online access was around and it was them who shut this down then (this was pre "Kindle is ruining our business at \$9.99" hysteria). I don't think publishers fear authors going directly to a platform to be published (they can do that today cheaply and easily with the many author services companies that exist) so much as the loss leader strategy of Amazon that others would be free to follow in a list price minus discount world modeled on the print book business.

Since we will accept a publisher's terms of sale today as a matter of policy, this is not a business discussion. It's really what impacts exist in the contract if they change their terms of sale and we accept them (i.e., no publisher believes the actual sales channel suddenly switches away from Amazon, Apple, Google, B&N, etc., to HoughtonMifflin.com). The industry hand-wringing over accepting Apple's model has delayed us getting a few tier 1s closed already despite very successful meetings (had another great meeting with Random House last week and their changing terms of sale was the only issue - they signaled they will likely change them to make them the VOR and us an agent, as did Hachette). Again, this is not a business issue for us.

The contractual implications and any other legal issues that arise b/c of such a change are really the issue. If the publisher is now the vendor of record, their obligations are now different w/r sales tax and other things, which might be good news for us. On the other hand, there are some potential anti-trust issues here with publishers setting the price to consumers that would be worth us scrutinizing, IIRC.

Highly Confidential

GOGEBKS-DC-0035170



Testimony Of David Naggar

Q. And you meant by that that the eBook industry was at a crossroad, correct?

A. Yes.

Q. And on the verge of substantial change, right?

A. In the middle of.

Q. In the middle of?

A. Yes.

Turmoil in eBook market over \$9.99 pricing

Windowed eBooks and threats to increase windowing

Publishers and retailers seek new business model

Agency model already being embraced

December 9 – 16, 2009

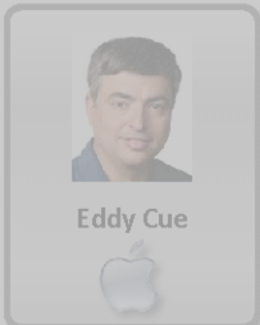


Apple Facilitates Publisher Communication

December 8, 2009



On December 8, Mr. Cue reaches out to Mr. Murray and Mr. Dohle to set up calls for the following day

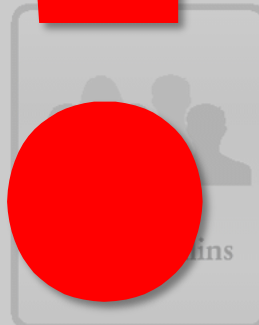


PX-0314

December 10, 2009

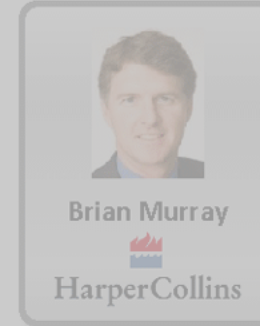


On December 10 at 9:47, Mr. Murray sends an internal e-mail concerning Mr. Cue

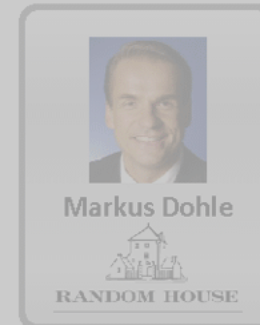


PX-304

December 10, 2009



On December 10 at 9:52, Mr. Murray e-mails Mr. Dohle



PX-0448



Government's Opening Statement




So on or about December 8th, Apple began reaching out to the CEOs of various publishers to discuss Apple's potential entry into the eBook market. And as the evidence will show, from the outset, Apple informed each publisher that it was speaking to its competitors, leading to a pattern of publisher communications between themselves.

Calendar

Day Week **Month** Year

December 2009

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Calendar

Day Week **Month** Year

January 2010

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December 9, 2009











Calendar

Day Week **Month** Year

December 2009

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Calendar

Day Week **Month** Year

January 2010

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December 15, 2009
















Calendar

Day Week **Month** Year

December 2009

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Calendar

Day Week **Month** Year

January 2010

◀ Today ▶

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December 16, 2009





December 2009

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January 2010

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Declaration Of Eddy Cue ¶38

To learn more about the business, I had my team schedule separate meetings for Keith Moerer, Kevin Saul, and me with each of the six largest trade publishers in the U.S.—Hachette, HarperCollins, Macmillan, Penguin, Random House, and Simon & Schuster—in New York from December 15-17, 2009. This was a little over a month before Steve would announce the iPad. Apple had not yet decided whether it would actually launch an e-bookstore, but I wanted to introduce myself and start conversations that could lead to Apple opening an ebookstore with these publishers as our content partners.



Testimony Of David Shanks

Q. So at that first meeting, had Apple even decided whether it was going to open a bookstore?

A. I thought it was a fact finding – he was on a fact-finding mission. They wanted to – they were exploring the idea of whether it was feasible for them to go into the book business, into the bookstore business inside – when we were talking, we were talking about iTunes at the time.



Testimony Of David Young

Q. You had an initial meeting with Mr. Cue and other Apple representatives on December 15, 2009, correct?
I believe that's stated in your declaration.

A. That is correct.

Q. And those – that began the series of negotiations that led to Hachette's signing the Apple agency agreement?

A. Mr. Cue, in that meeting, told us that they were investigating the possibility of establishing an iBookstore.

Government's Opening Statement

Now, as I mentioned a few moments ago, the first meetings with the publishers took place in New York, one after another, on December 15th and 16th, and as noted earlier, during the course of those meetings, Apple was informed by each publisher that it was unhappy with the 9.99 price point for New York Times best sellers and new releases *and was looking for Apple to solve the problem.*

DX-96: December 15, 2009 Reidy Notes

12/16

Eddie Que, Apple
Piers (Tunes + App St)
Kevin Small - Business O
Keith Moore - TV And

Pricing: has price flexibility
all items but single song
Not a million price points
Never sell at a loss
25% margin machines/single digits
12.99 + 14.99 OK w/ them
Digital should be less
Can't be less elsewhere
Need new releases - windowing
upsets customers
piracy

Want best bk reader there is
* Fairplay DRM (what have used)
* Not interested lending outside
Home - spouse and kids (small
DRM free in home
Rights only to Apple eco-system
No plans text to speech - won't launch
⊗ Launch in 90 days - US + Canada
10 products at once then Int'l
Austria, Japan,
Germany

Pricing: has price flexibility
all items but single song
Not a million price points
Never sell at a loss

25% margin machines/single digits store

12.99 & 14.99 OK w/ them

Digital should be less

Can't be less elsewhere

Need new releases - windowing
upsets customers

CONFIDENTIAL

SS00029306

Government's Opening Statement

So, your Honor, again, within a few days, Apple had adopted the exact rationale for the agency model and once again, as this document makes clear, Apple is aware that the publishers want higher prices and Apple is knowingly providing them with a means to accomplish that goal. In other words, knowledge and the conscious commitment to a common scheme to raise eBook prices.



Testimony Of Keith Moerer

- Q. And what was the impact, if any, in Apple's thinking in mid-December of the fact that the publishers were windowing books in connection with the wholesale model?
- A. We would not have done agreements with the publishers. We would not have launched the iBookstore if digital books – if new releases had been windowed.



Testimony Of Eddy Cue

A. Well, we're not willing to lose money under any model History, for me, as a person who's run a lot of businesses, shows me that people that do businesses that lose money quickly, give them up over time or change them to make money.



Testimony Of Eddy Cue

- Q. Why was it not true that you pitched the publishers that your agency deal was a way to change the entire industry?
- A. I was – my focus is thinking about this from an Apple point of view. I'm not interested in their business or how they do business with the – with anybody else.

December 2009

◀ Today ▶

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January 2010

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December 21, 2009





Apple & Publisher Conspiracy Commences



**December 21
10:33 a.m.**



Speak for
10 minutes and
45 seconds



 **SIMON &
SCHUSTER**

Carolyn Reidy



 **Apple®**

Eddy Cue

PX-0788



**December 21
12:17 p.m.**



Speak for
17 minutes and
37 seconds



 **RANDOM HOUSE**

Markus Dohle



 **Apple®**

Eddy Cue

PX-0788



**December 21
12:48 p.m.**



Speak for
11 minutes



 **MACMILLAN**

John Sargent



 **Apple®**

Eddy Cue

PX-0788







Declaration Of Eddy Cue ¶61

It was also important to us that the prices in our e-bookstore be competitive with other retailers' e-book prices. This is why Steve and I initially thought all publishers should move to agency with all e-book retailers selling their new releases. Our thinking at the time was that this would ensure that the publishers would treat Apple similarly to their other retailers at least with regard to pricing their most visible e-books.



December 2009












◀ Today ▶

Sun 29	Mon 30	Tue 1	Wed 2	Thu 3	Fri 4	Sat 5
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13	14  	15  	16  	17	18	19
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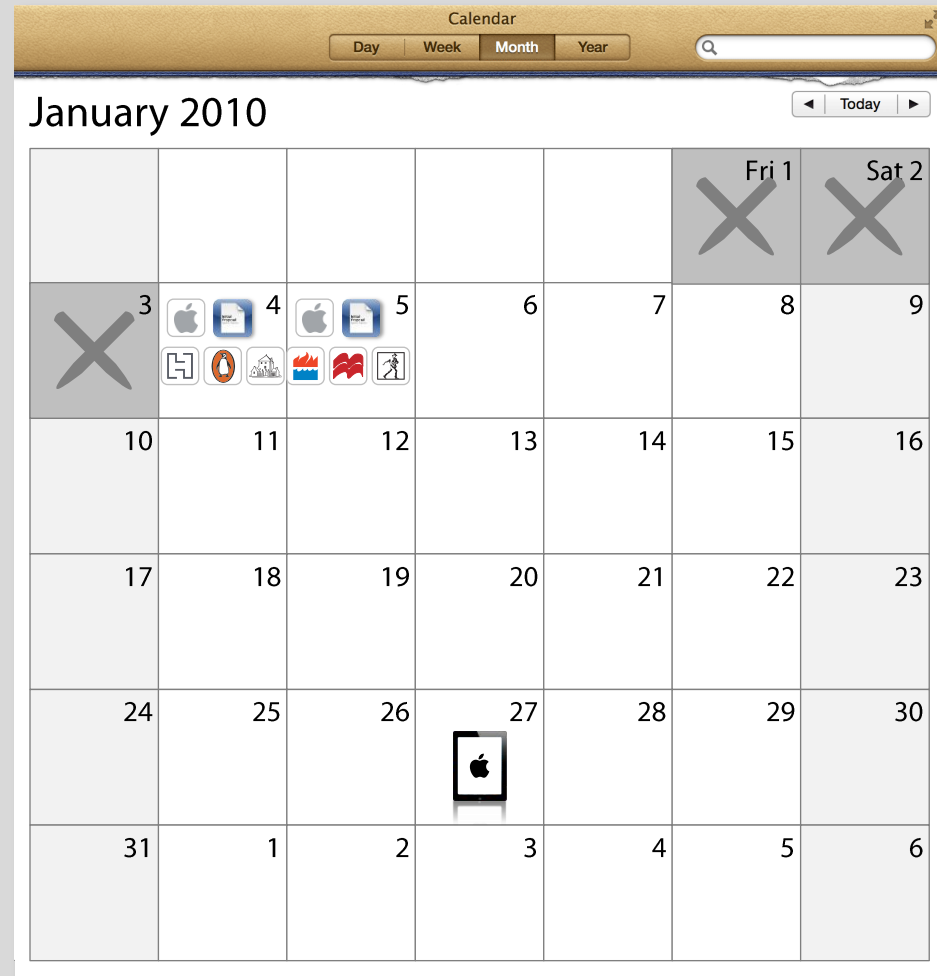
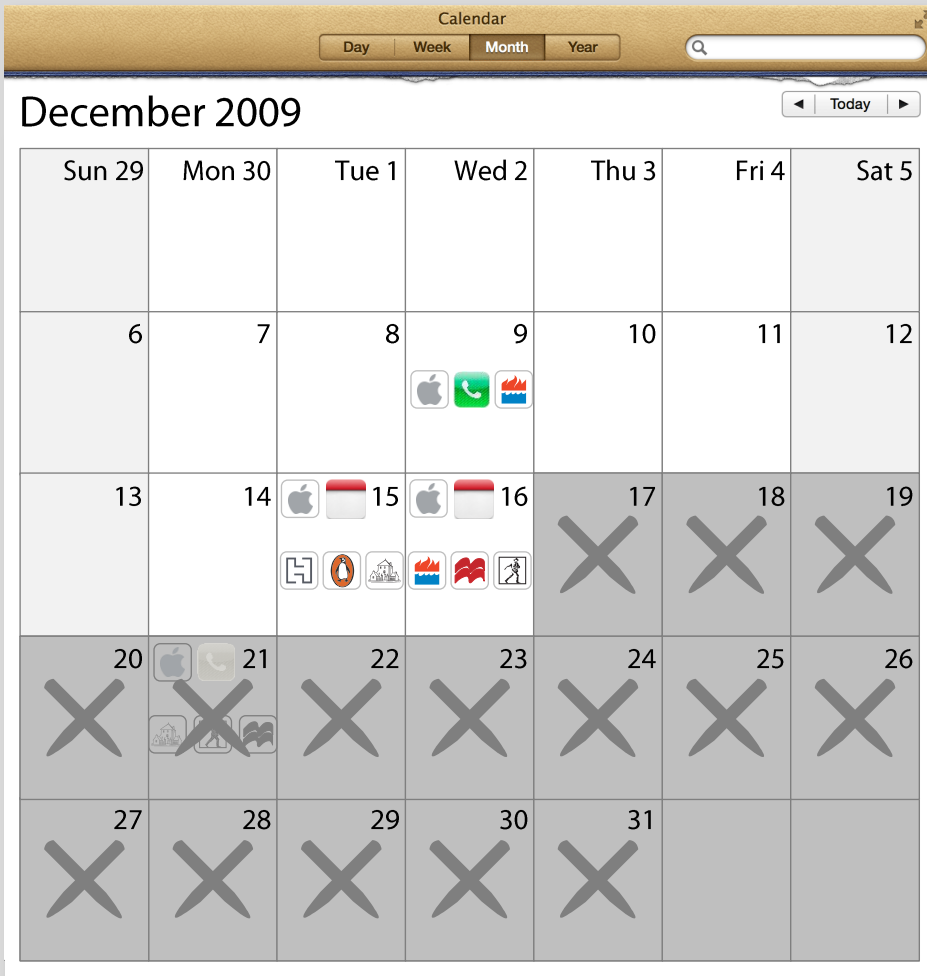
January 2010

◀ Today ▶

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31	1	2	3	4	5	6	

December 15, 2009 – January 4, 2010

No Communication Of Any Kind With Penguin, Hachette Or HarperCollins



PX-99: December 21, 2009 Email From Sargent To Cue

Plaintiff's Exhibit
US v Apple
Case#09
PX-0099

Subject: RE: iTunes
Date: Mon, 21 Dec 2009 15:50:23 -0800
From: "Sargent, John" <john.sargent@macmillan.com>
To: Eddy Cue <cue@apple.com>
Cc: "Napack, Brian" <brian.napack@macmillan.com>
Message-ID:
26128D8D89E8B41166D16A8D8A286C4E786

Hey Eddy. Have been thinking. Consider this completely blue sky, just a bit of brainstorming.

One of the problems we face is that most companies have contracts under the discount model. So what happens if we actually have two terms of sale. 1) 30% agency model with no windowing. 2) Discount model that includes windowing (essentially no change from the current terms we offer)? Everyone decides which model to buy under.

Price points: The concept would be that we would price books at around half of the price of the hardcover. That would put the majority of new releases at the 14.95 or 12.95 price points.

New release hardcover: 19.95, 16.95, 14.95, 12.95, (higher prices for very expensive books).

Post release, or original paperback: 9.95, 7.95, 4.95, 2.95

Want to reinforce these are just some thoughts to kick around.

Confidential

RECEIVED BY Sargent
1/27/13

APPLETX00018087



Testimony Of David Shanks

Q. And, in fact, when Mr. Cue sent you his initial proposal, you were angry, were you not?

A. I was.

DX-551: January 4, 2010 Email From McCall To Moerer

From: McCall, Tim
To: 'Keith Moerer'
Sent: 1/4/2010 11:02:01 PM
Subject: RE: follow up
Attachments: Apple Boilerplate Agreement.doc

Penguin's boilerplate

Hi Keith -- I understand you may not have Penguin's boilerplate, so I've attached it here.

Hi Keith -- I understand you may not have Penguin's boilerplate, so I've attached it here.
I'll speak with you soon,

DATED JAN

6.3 In the event that PGI approves in writing the release of a formal joint press release.

PGI will sell to APPLE the Ebooks for resale purposes.

7.1 PGI will sell to APPLE the Ebooks for resale purposes. APPLE shall be entitled to set the resale price of the Ebooks in its sole discretion having regard to the List Price.

7.1 PGI will sell to APPLE the Ebooks for resale purposes. APPLE shall be entitled to set the resale price of the Ebooks in its sole discretion having regard to the List Price. The List Price for each Ebook may be varied and updated by PGI in its sole discretion from time to time during the Term.

7.4.2 the total number of Ebooks sold per title for the Payment Period and for the life of the title to date, and the amount payable by APPLE for such sales, the PGI account number (as provided by PGI) and the relevant purchase order number;

(Sections 7.4.1 and 7.4.2 together being the "Sales Statement").

12

Confidential & Proprietary

Confidential & Proprietary

PEN675914



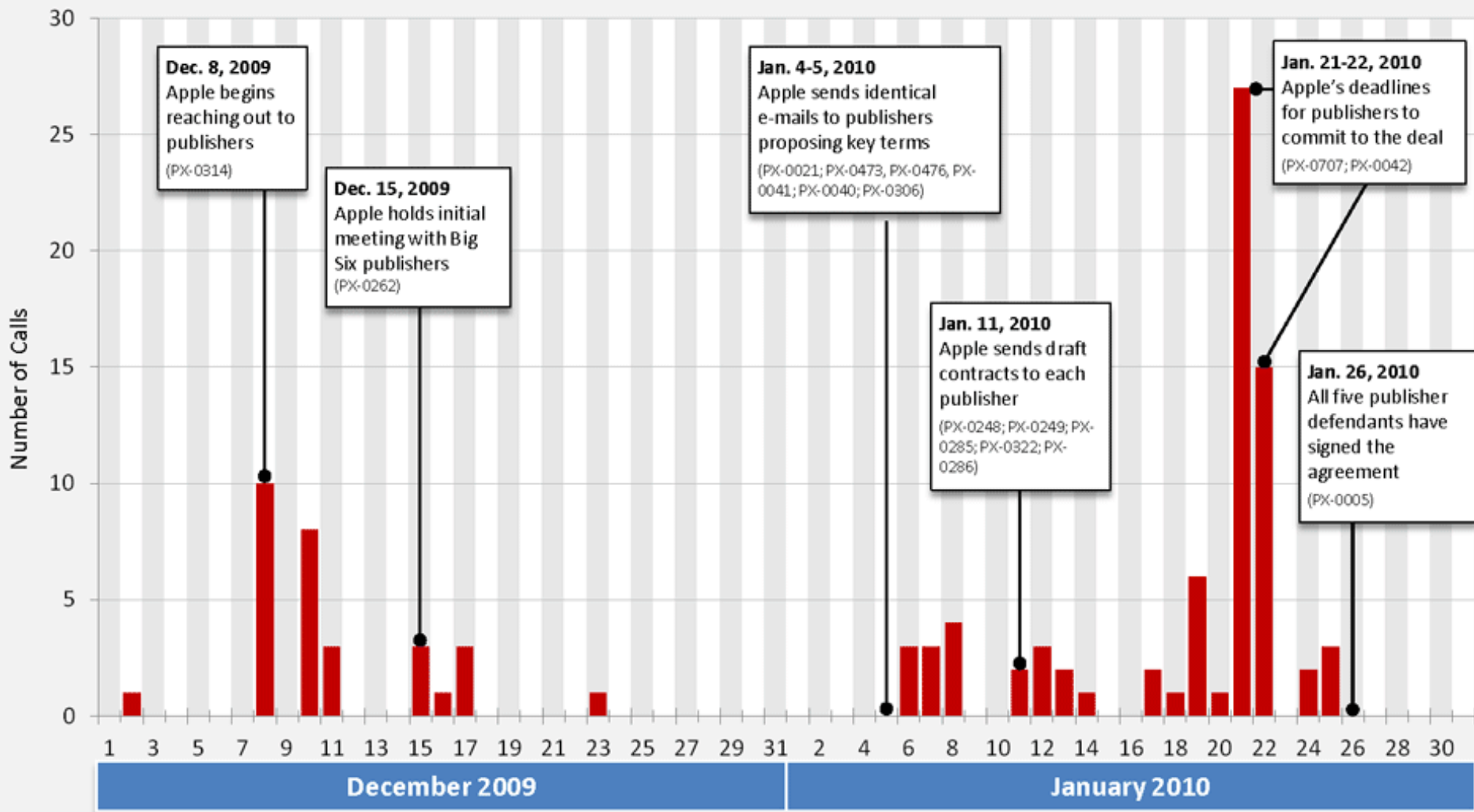
Testimony Of David Shanks

Q. So the time that Apple was proposing an agency model to Penguin, Penguin was proposing a wholesale model to Apple; is that correct?

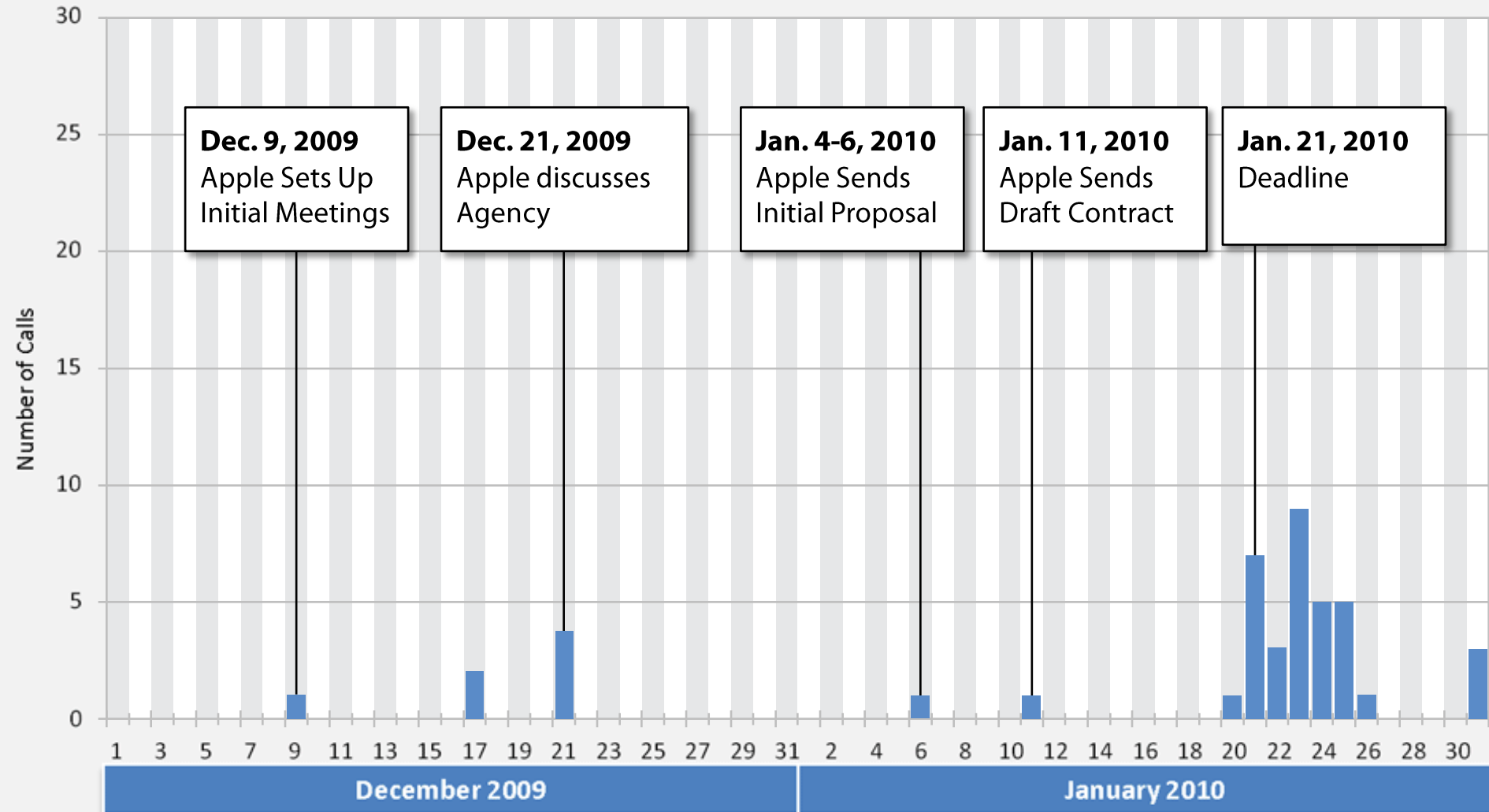
A. Yes.



Calls Between Publisher Defendant CEOs from December 1, 2009 to January 31, 2010



Calls 1 Minute Or Longer Between Publisher Defendant CEOs And Apple From December 1, 2009 to January 31, 2010






Phone Calls Between Eddy Cue and Publisher Defendant CEOs in December and January



HarperCollins
Brian Murray



SIMON &
SCHUSTER
Carolyn Reidy





Apple®
Eddy Cue



MACMILLAN
John Sargent



Penguin
David Shanks



hachette
BOOK GROUP
David Young



Phone Calls Between Eddy Cue and Publisher Defendant CEOs in December and January

Calls of ≤ 1 Minute Removed



HarperCollins

Brian Murray



SIMON &
SCHUSTER

Carolyn Reidy



Apple®

Eddy Cue



MACMILLAN

John Sargent



Penguin

David Shanks



hachette
BOOK GROUP

David Young



Phone Calls Between Eddy Cue and Publisher Defendant CEOs in December and January

Calls of ≤ 1 Minute Removed
Calls After Jan. 20 Removed




HarperCollins

Brian Murray



 SIMON &
SCHUSTER

Carolyn Reidy



 Apple®

Eddy Cue



MACMILLAN

John Sargent



Penguin

David Shanks



hachette
BOOK GROUP



David Young



Phone Calls Between Eddy Cue and Publisher Defendant CEOs in December and January



HarperCollins
Brian Murray



SIMON &
SCHUSTER
Carolyn Reidy



Apple®
Eddy Cue



MACMILLAN
John Sargent

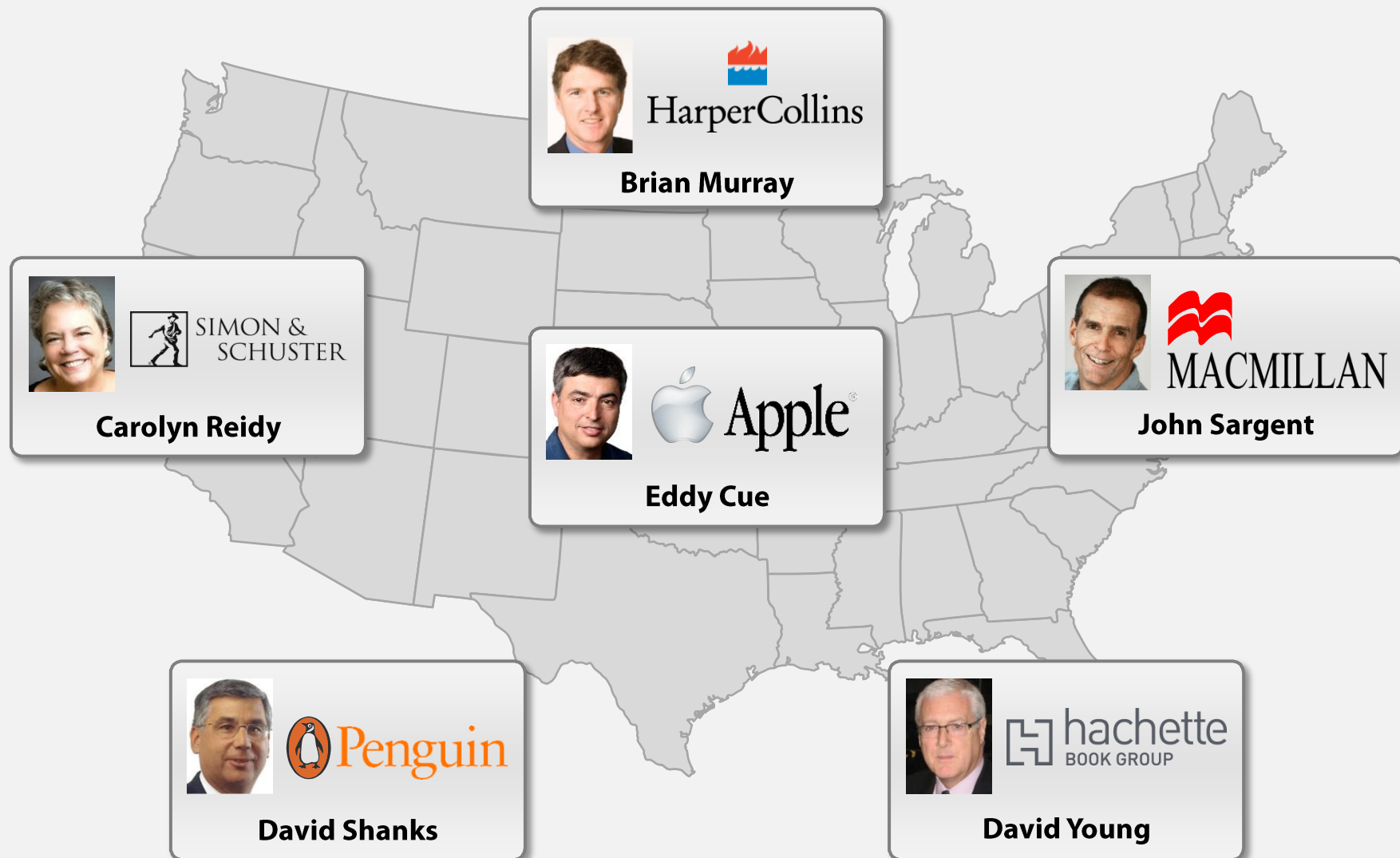


Penguin
David Shanks



hachette
BOOK GROUP
David Young

More Reasonable Inference: Cue Is Not “Chief Ringleader”

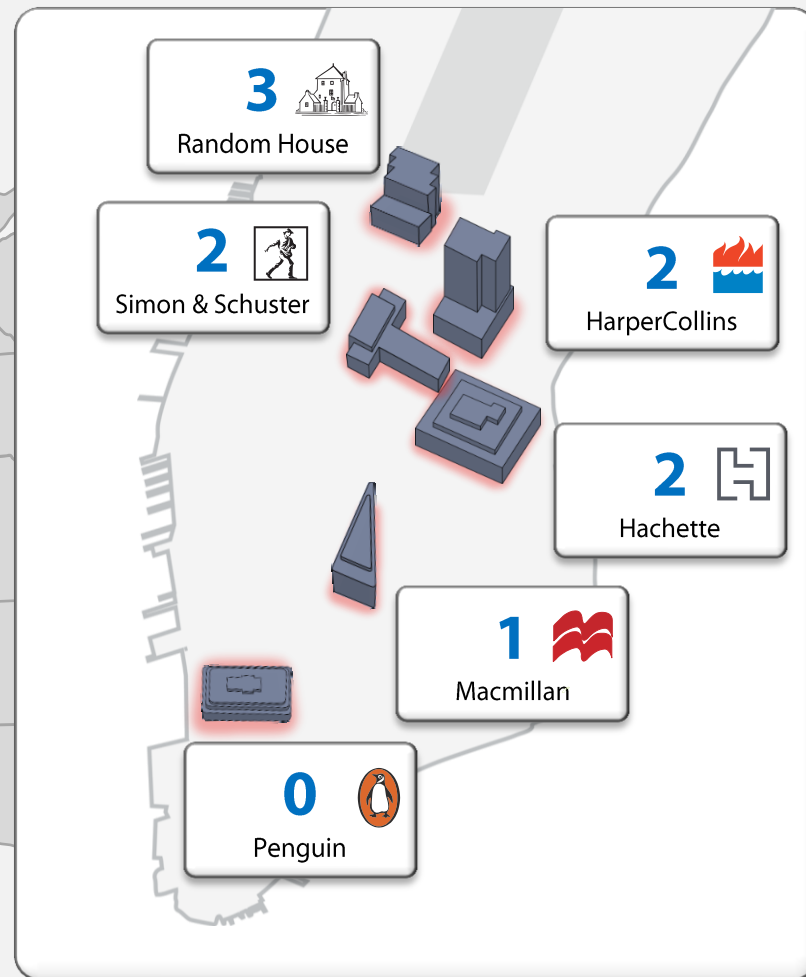
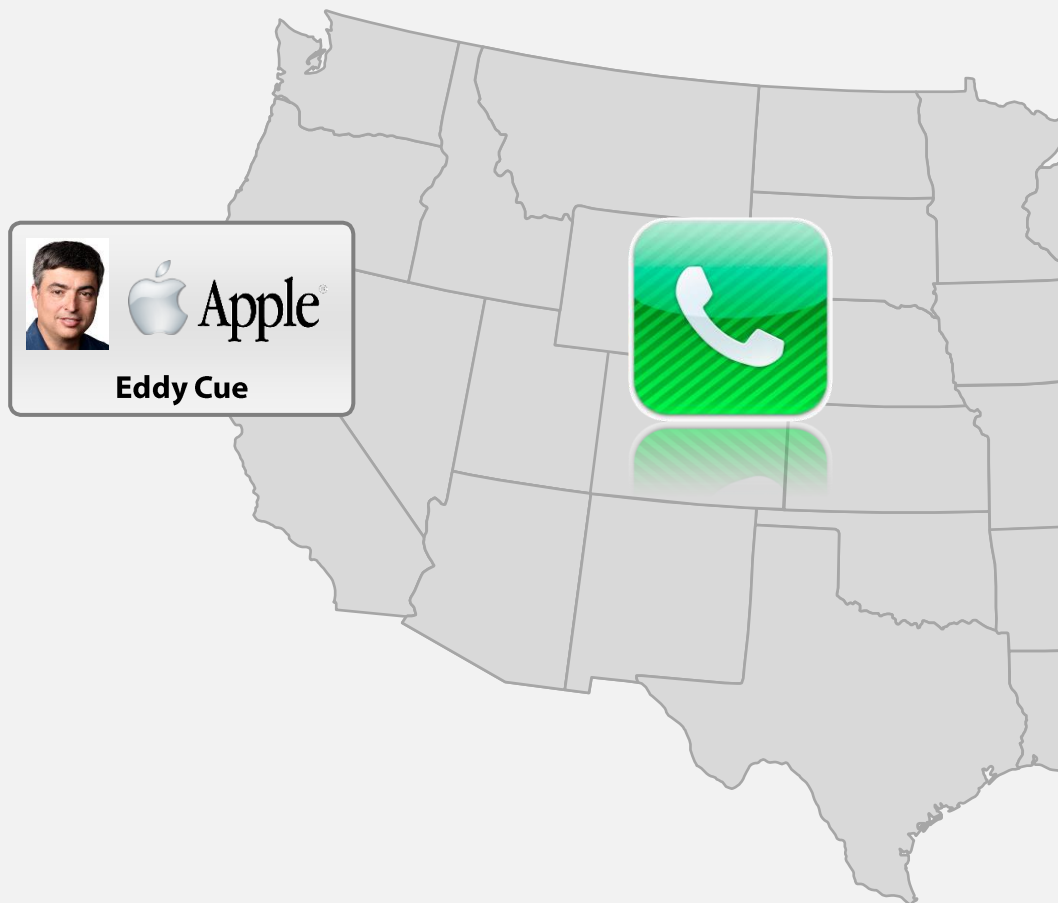


More Reasonable Inference: Cue Is Not “Chief Ringleader”

The image features a light gray map of the United States with several callout boxes. A large green WhatsApp icon is centered over the map. The callout boxes contain the following information:

- Eddy Cue**: Apple logo and portrait of Eddy Cue.
- Markus Dohle**: Random House logo and portrait of Markus Dohle.
- Brian Murray**: HarperCollins logo and portrait of Brian Murray.
- Carolyn Reidy**: Simon & Schuster logo and portrait of Carolyn Reidy.
- John Sargent**: Macmillan logo and portrait of John Sargent.
- David Shanks**: Penguin logo and portrait of David Shanks.
- David Young**: Hachette Book Group logo and portrait of David Young.

More Reasonable Inference: Cue Is Not “Chief Ringleader”



Apple exploring the possibility of opening eBookstore

No agreements reached with publishers

Apple chose agency model based on its
core business principles









Apple's actual communications – and lack of
communications – with publishers show no conspiracy

January 4 – 10, 2010



December 2009











◀ Today ▶

Sun 29	Mon 30	Tue 1	Wed 2	Thu 3	Fri 4	Sat 5
6	7	8	9   	10	11	12
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January 2010

◀ Today ▶

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17	18	19		21	22	23
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January 4 & 5, 2010



**Initial
Proposal**



Penguin



Macmillan



Hachette



HarperCollins



Random House



Simon & Schuster

January 4 & 5, 2010

Plaintiff's Exhibit
US v Apple
Case No. 10-17078
PX-0041

Subject: iTunes
Date: Mon, 04 Jan 2010 09:21:47 -0800
From: Eddy Cue <cue@apple.com>
To: David Young <david.young@hbgusa.com>
Message-ID: <953BE52E-855D-45E0-83E5-A40C6E07A6DE@apple.com>

Hi David,

I hope you had a great holiday!

After talking to all the other publishers and seeing the overall book environment, here is what I think is the best approach for ebooks.

Just like the App Store, we are proposing a principal-agency model with you, where you would be the principal and iTunes would sell your product as your agent for your account. In exchange for acting as

There are several things we have to accomplish in order to sell ebooks at realistic prices -

- books need to be cheaper to buy than physical
- you should make less per book since significant costs have been eliminated but still have a healthy, profitable sale
- all resellers of new titles need to be in agency model

- you should make less per book since significant costs have been eliminated but still have a healthy, profitable sale
- all resellers of new titles need to be in agency model

We think these agency terms accomplishes all the goals we both have. I will try to schedule a call for us for tomorrow to catch up and determine the next steps.

--- Eddy

----- end message -----

Exhibit 20
Cue
03/12/13

K. Schroeder
csr, rpr, ccr

Confidential

APPLEBOOK-00012465

PX-0041 / 1

PX-0041



erCollins



& Schuster

Government's Opening Statement

But as Mr. Cue will admit, Apple never had any further communications with the publisher defendants rescinding that demand.



Testimony Of Eddy Cue

Q. And I think you testified that there came a time when you realized that that idea didn't work?

A. ...But as we started thinking about this, I started thinking of several issues that were very concerning to me. Number one, how was I to be assured that the agency deal that I got was the same agency deal that they were going to give somebody else? In other words, there was nothing in my agency deal that said all the terms had to be the same and so it had to be exactly the same as ours.

CONTINUED



Testimony Of Eddy Cue

Secondly, I was concerned that even if they gave us the same terms in the agreement, Amazon and Barnes & Noble were extremely powerful, huge resellers of books, because they were in the physical business along with digital. And so my concern was what power did they have over the publishers to negotiate deals that were combined between physical books and digital books.

CONTINUED



Testimony Of Eddy Cue

Thirdly, I'm concerned that I realize that even if I put in this requirement that says all the resellers need to go to an agency model, how can I enforce it? And so I look at Amazon, Barnes & Noble, they are the largest providers of money to these six major publishers. And I'm thinking, okay, let's say they're even willing to agree to this. Let's say I'm willing to ignore the first two issues that I just described. If at the end of the day they don't sign the deal, what's my – what do I do?



Testimony Of Eddy Cue

Q. And how if at all, sir – if you were to say it simply, what was your thinking behind the MFN? What was your overall thinking behind proposing an MFN?

A. It lets me compete on price so that I can set the best price for the consumer.



Testimony Of Brian Murray

- Q. And how, if at all, did Apple explain to you its thinking behind [the] MFN, why it wanted it in its agency agreements?
- A. They wanted the consumer offer in their bookstore to be competitive with the Kindle bookstore; so it was important to them to have a consumer offer that was competitive on price.



Testimony Of Russell Grandinetti

- Q. What purpose, if any, is served by having both a price parity provision and a business model parity provision in Amazon's agency contracts?
- A. The price parity provision allowed us, under an agency model, to know with comfort that our agency price would be no higher than the lowest price of another agent for that publisher, to the extent the publishers, at some future point, additionally change their terms or offered a new set of terms.



Testimony Of Theresa Horner

Q. How important, if at all, were those MFNs to Barnes & Noble?

A. The pricing MFN?

Q. Yes.

A. Extremely important.

Q. Why?

A. As previously stated, if we didn't have a representation from the publisher that the price that we were getting from the publisher was the lowest available in the marketplace, we didn't have assurances that -- we didn't have an understanding without the ability to discount that we could compete unless we understood that we had the lowest price available.



Testimony Of Thomas Turvey

Q. And Google determined that it needed [a price parity] provision because it was concerned about pricing discrepancies once you gave the principal pricing authority between the eBooks on Google's bookstore with those sold by Apple and Amazon under agency agreements on its bookstore, correct?

A. Yes. We wanted to make sure that we were not being discriminated against, yes.

Q. On price, correct?

A. Correct.



Testimony Of Keith Moerer

Q. To your knowledge, sir, did Apple ever negotiate with any publisher the all-resellers-to-agency idea contained in Mr. Cue's initial e-mail proposal?

A. No, I did not.



Testimony Of Carolyn Reidy

Q. What did that mean in terms of negotiating forward?
Did you have to negotiate that issue then?

A. No. We did not have to negotiate it. In other words, it never appeared in it so we didn't have to object to it.

Because as I said, we wouldn't sign an agreement that demanded that we treat other retailers in some way.



Testimony Of Brian Murray

Q. Now, if you believed, sir, that moving all retailers to agency was a condition of your agreement with my client, Apple, would you have negotiated for these exceptions to the MFN?

A. No.

Q. Why not?

A. I didn't think it was a condition, and I thought it was certainly pressure they were putting on us to make the change. But we were preparing to operate on what we called a hybrid model, where Apple would be in the business on the agency model and where we would then have negotiations with Amazon and Barnes and Noble. And it was possible that we would stay on the wholesale model with either one of them.



Testimony Of John Sargent

Q. Did anyone at Apple ever tell you that Macmillan was required to be on agency with Amazon?

A. No.



December 2009












Today

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January 2010

Today

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	31	1	2	3	4	5

DX-140: January 10, 2010 Email From Cue To Moerer

Subject: Re: Random House update
Date: Sun, 10 Jan 2010 11:24:21 -0800
From: "Eddy Cue" <cue@apple.com>
To: "Keith Moerer" <kmoerer@apple.com>
Message-ID: <E4373EAD-7CSB-498E-91BF-A502890B3AD1@apple.com>

On Jan 9, 2010, at 7:37 PM, Keith Moerer wrote:

Eddy--

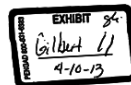
RH's #2, Madeline McIntosh, called me this afternoon to say RH is currently "stuck" in

2) Are we willing to accept an agency model if other retailers continue a standard wholesale model for new releases without holdbacks? (No.)

We are (I don't think we can legally force this). What we care about is price so the contract will say we get it at 30% less whatever the lowest retail price out in the market is (whether agency or wholesale).

4) Are we willing to consider an agency model with more tiers or different tiers than currently proposed? (I told her we're willing to listen to and consider a counter-proposal. I also told her that I would send our analysis of NYT bestsellers comparing physical prices and current ebook prices, which helped us arrive at a \$12.99 price point for most new-release titles, once I got your OK.)

No, I don't want a proposal. This is our offer. I am willing to add \$14.99 for above \$30. We need to start being very firm on price.



APLEBOOK00434623

Confidential






















Declaration of Madeline McIntosh ¶13

We addressed the issue of the proposed MFN directly with Apple to ensure that there was no confusion over the terms. Specifically, I asked Mr. Moerer whether Random House could sign an agency deal with Apple and continue doing business on a wholesale model with Amazon. Keith responded on January 14 that it was entirely up to Random House how it dealt with Amazon or any other retailer. [DX-169.]

December 2009

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January 2010

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January 11, 2010



**Draft
Agreement**



Penguin



Macmillan



Hachette



HarperCollins



Random House



Simon & Schuster

PX-55: January 14, 2010 Auto-Saved Draft Jobs Email (18:23:09)

Plaintiff Exhibit
US v Apple
13-00000
PX-0055

From: Steve Jobs <sjobs@apple.com>
To: Eddy Cue <cue@apple.com>
Subject: Re: Book Prices Thoughts
Received(Date): Thu, 14 Jan 2010 18:23:09 -0800

I can live with this, as long as they move Amazon to the agent model too for new releases for the first year. If they don't, I'm not sure we can be competitive...
Steve

if they are offering a \$26 book to Amazon
On Jan 14, 2010, at 6:04 PM, Eddy Cue wrote:

I can live with this, as long as they move Amazon to the agent model too for new releases for the first year. If they don't, I'm not sure we can be competitive...
Steve

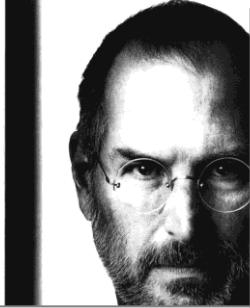
if they are offering a \$26 book to Amazon

Highly Confidential

Exhibit 30
Cue
03/12/13
K. Schroeder
csr. rtr. ccr
APLEBOOK-03345509

Steve Jobs by Walter Isaacson

Steve Jobs by Walter Isaacson



504

WALTER ISAACSON

cheaper than we are, then we can sell them at the lower price too. So they went to Amazon and said "You're going to sign an agency contract

The day after the iPad launch, Jobs described to me his thinking on books:

Amazon screwed it up. It paid the wholesale price for some books, but started selling them below cost at \$9.99. The publishers hated that—they thought it would trash their ability to sell hardcover books at \$28. So before Apple even got on the scene, some booksellers were starting to withhold books from Amazon. So we told the publishers, "We'll go to the agency model, where you set the price, and we get our 30%, and yes, the customer pays a little more, but that's what you want anyway." But we also asked for a guarantee that if anybody else is selling the books cheaper than we are, then we can sell them at the lower price too. So they went to Amazon and said, "You're going to sign an agency contract or we're not going to give you the books."

The

linked nature of the web were sacrificed or searchable. Because the iPad allowed browsing, it was not at war with the alternative, for both the consumers

Publishing and Journalism

With the iPod, Jobs had transformed the iPad and its App Store, he began to bring journalism to television and

Books were an obvious target, so there was an appetite for electronic books. There was, however, a slight difference. In the iTunes Store, Jobs had insisted that price, initially 99 cents. Amazon's approach with ebooks, insisting on the same in and offered publishers who came in and offered publishers who companies: They could set any price. The eBooks Store, and Apple would take a higher price than on Amazon. When "That won't be the case," Jobs answered him that question at the iPad launch event. "The same." He was right.

The day after the iPad launch, Jobs described to me his thinking on books:

Amazon screwed it up. It paid the wholesale price for some books, but started selling them below cost at \$9.99. The publishers hated that—they thought it would trash their ability to sell hardcover books at \$28. So before Apple even got on the scene, some booksellers were starting to withhold books from Amazon. So we told the publishers, "We'll go to the agency model, where you set the price, and we get our 30%, and yes, the customer pays a little more, but that's what you want anyway." But we also asked for a guarantee that if anybody else is selling the books

DX-175: January 17, 2010 Email From Miller To Murray

“All Resellers To Agency” Not Mentioned

30% commission on new releases. I think we will come to terms at some point. Our their current proposal will put barn and Borders out of business very quickly. We don't want to accelerate this faster than it is already happening. This is no different from Fox managing Walmart and Apple's wholesale terms in the DVD business.

We talked about books but not specific terms. Here are jobs points that he volunteered:

1. They're committed to the agency model
2. They like their standard 30% commission
3. They want pricing in line w amazon's to the consumer; making the assumption that (a) profit margin wouldn't be hurt due to lower costs on pub side and (b) they don't want to be disadvantaged vs amazon on consumer prize
4. They were having trouble getting terms w pubs and maybe would just drop it all

I assume the last is positioning for effect

Is the above what they're saying to you ?

help and will result in continued windowing of ebooks.

Brian

From: Miller, Jonathan [mailto:jon.miller@newsinc.com]
Sent: Tuesday, January 05, 2010 12:58 PM
To: Murray, Brian (HarperCollins US)

USA v. Apple Inc., et al.
12-CV-02826-DLC
DX-175

HIGHLY CONFIDENTIAL

HC-DOJ-0089412

PX-195: January 14, 2010 Auto-Saved Draft Jobs Email (18:21:39)

Plaintiff Exhibit
US v Apple
12/20/09
PX-0195

From: Steve Jobs <sjobs@apple.com>
To: Eddy Cue <cue@apple.com>
Subject: Re: Book Prices Thoughts
Received(Date): Thu, 14 Jan 2010 18:21:39 -0800

I can live with this, as long as they also agree to the other thing you told me you can get:
The retail price they will set for any book will be the LOWER of the applicable "iTunes" price

I can live with this, as long as they also agree to the other thing you told me you can get:
The retail price they will set for any book will be the LOWER of the applicable "iTunes" price below OR the lowest wholesale price they offer the book at to anyone else, with our wholesale price being 70% of such price. For example, normally our retail price for a \$26 book will be \$12.99 and we will pay 70% of that, or \$9.10. However, if they offer the same book to Amazon for a wholesale price of, say, \$12.50, then our retail price for the same book shall be set at \$12.50 and we will pay 70% of that price for the book.

if they are offering a \$26 book to Amazon

Highly Confidential

APLEBOOK-03345511



Testimony Of Eddy Cue

THE COURT: There's another way to read this, which is that there was some concern at Apple about profitability at a 9.99 price point.

THE WITNESS: By us?

THE COURT: Yes. Even with the 30 percent commission, that you were concerned if prices were low, at 9.99, let us say, where the volume of the eBook business might be expected because those might be the most popular titles, that that might not generate enough money for Apple. Any way to read that?

THE WITNESS: Your Honor, there's absolutely zero chance of that. We were selling music at 9.99. We sold apps at \$9. The business of running the bookstore is not significantly different than running a music store or running a video store, and so there's you zero chance of that. We know that we can run a profitable business running it at 70 percent at whatever price points they're with.



Testimony Of Kevin Murphy

- Q. Did you evaluate whether it would have been in Apple's independent business interest to sell eBooks on the iBookstore at a price point of 9.99?
- A. My assessment would be, yes, it would. They would still be able to earn a 30 percent margin. They would capture the additional sales provided by the reduction in price while only bearing 30 percent of that price reduction. That would be very attractive from their point of view. So you can't make a presumption that they would like higher prices.

DX-187: January 19, 2010 Email From Napack To Cue

Subject: Fwd: New Draft Response
Date: Tue, 19 Jan 2010 15:03:54 -0800
From: Keith Moerer <kmoerer@apple.com>
To: Kevin Saul <ksaul@apple.com>
Message-ID: <F1B1FFDB-C514-484A-A760-236440

Sent from my iPhone

Begin forwarded message:

From: "Napack, Brian" <Brian.Napack@macmillan.com>
Date: January 19, 2010 3:34:26 PM EST

referenced above

Availability: Majority of titles where we control rights would be made available, and the majority of those would be made available day and date with the physical release.

Financial terms:

- Net 30 days after end of month

Other terms:

- Agent would agree to give us access to identity and transaction info of purchasers of our titles
- We cannot agree to match other resellers prices
- We cannot agree that we will force other resellers of our e-books into the agency model

- All price caps are removed for titles after the initial
- Annual review of pricing rules for adjustment based

Commission: 70/30; 85/15 on NY Times bestsellers t

Confidential

Brian

Brian Napack
Macmillan
41 Madison Avenue, 38th Floor

Confidential

APLEBOOK-00007545



Testimony Of John Sargent

Q. So why don't you give me your explanation of why he writes this?

...

A. I believe this is in response to the first thing that was sent over, which we saw. There was a statement at the bottom saying that how we would put all resellers on it. Now, we cannot agree that we will force, is nothing to do with Apple's suggestion that we would force it. It's to suggest that we would not be – we did not want to force... They said all resellers on agency, we said no.

“All resellers to agency” idea abandoned and never negotiated

Apple sought MFN for same reason other retailers did:
To lower prices on its eBookstore
























Publishers knew they could sign with Apple and remain on
wholesale terms with Amazon

JANUARY 18 – 26, 2010

December 2009

Sun 29	Mon 30	Tue 1	Wed 2	Thu 3	Fri 4	Sat 5
6	7	8	9	10	11	12
			  			
13	14	 	 	17	18	19
		     				
20	 	21	22	23	24	25
	  					
27	28	29	30	31		

January 2010

					Fri 1	Sat 2
3	 	4	 	5	6	7
	     					
10	 	11		12	13	14
	   					
17		18	19	20	21	22
				  		
				  		
24	25	26	27	28	29	30
						
31	1	2	3	4	5	6

Government's Opening Statement

The reality here, and it's important to understand, these negotiations were simply not taking place unilaterally, but, in essence, were collective.



Testimony Of Kevin Saul

- Q. Can you describe how much time was spent during these weeks negotiating these agreements in hours, approximately? Were you negotiating a couple hours a day? Give the Court a sense, please, of what the pace and structure of the negotiations was.
- A. Twelve hours a day negotiations, e-mails, exchanging drafts. It was a challenging, tiring, and difficult couple of weeks.



Testimony Of David Young

Q. And at this point in time, on **January 19**, had Hachette made a decision yet to enter into an agreement with Apple?

A. I don't recall. It was – It was a very busy time. I don't know whether we had actually decided on January 19 that we were going to do it, do so because there were **still issues in contention.**

Q. So when you say issues in contention, what do you mean?

A. Well, we weren't happy with prices. **We weren't happy with the MFN and so forth, and I think they were still being wrangled.**



Testimony Of Keith Moerer

Q. On January 21, did you and your colleagues have a belief as to whether or not Apple was going to be able to announce a bookstore on the 27th?

A. I was not at all sure we would launch a bookstore. We had no agreements signed at that point.

Q. And how, if at all, did that impact your state of mind as an executive and negotiator of this deal?

A. It made me very, very anxious, very concerned that we – we would not be able to do what we had been sent out to New York to do which is sign deals with publishers and enough publishers so that we could make that announcement.



Testimony Of Eddy Cue

Q. Why did you send Mr. Jobs a summary of the status of negotiations with each publisher on January 21st?

A. Well, I was supposed to be done and Steve was reminding me, as we were up – as I was updating him, and he had given me a drop-dead date of the 21st to complete the deals or he would not announce it the following week.



Testimony Of John Sargent

- Q. And we've heard some about the difficult negotiations that took place between Apple and the publishers. Did you have – were the negotiations difficult for Macmillan?
- A. Yeah, I would say the negotiations were quite intense, a lot of back and forth. They were never – As it says here, “they were never unreasonable or overly aggressive or anything like that, but they were serious, hard, contract negotiations.”



Declaration Of Brian Murray ¶24

In the meantime, Apple showed no signs of moving on any of the core terms of their agency proposal that concerned me. I kept trying to get a better deal for HarperCollins, but my negotiations with Apple just went in circles. By January 23 or 24, negotiations had essentially broken down.

DX-234: January 24, 2010 Email from Jobs to Murdoch

Subject: Fwd: HarperCollins
Date: Sun, 24 Jan 2010 22:31:31 -0800
From: "Steve Jobs" <sjobs@apple.com>
To: "Eddy Cue" <cue@apple.com>
Message-ID: <20AD9C93-7B76-4DA1-A6FA-FBD6F79D3F0D@apple.com>

Our proposal does set the upper limit for ebook retail pricing based on the hardcover price of each book. The reason we are doing this is that, with our experience selling a lot of content online, we simply don't think the ebook market can be successful with pricing higher than \$12.99 or \$14.99. Heck, Amazon is selling these books at \$9.99, and who knows, maybe they are right and we will fail even at \$12.99. But we're willing to try at the prices we've proposed. We are not willing to try at higher prices because we are pretty sure we'll all fail.

As I see it, HC has the following choices:

1. Throw in with Apple and see if we can all make a go of this to create a real mainstream ebooks market at \$12.99 and \$14.99.

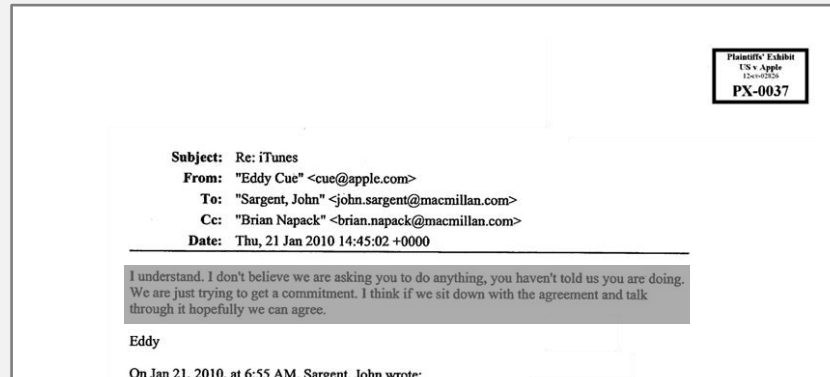
Regards,
Steve

Confidential

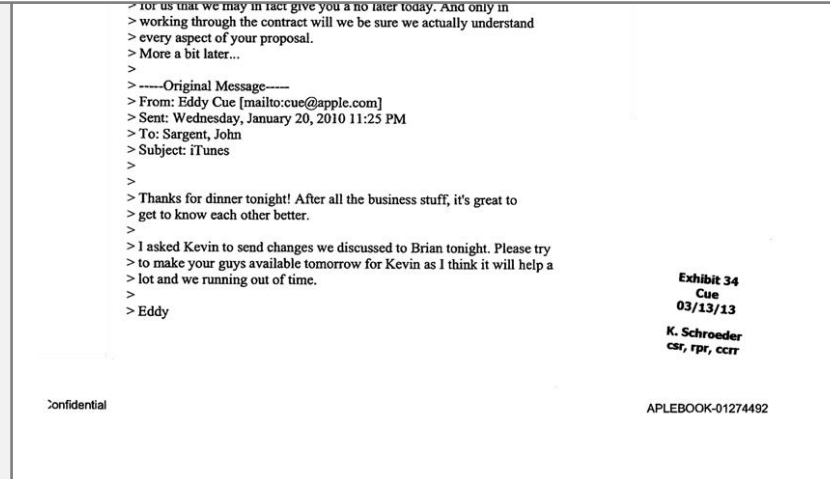


APPLEBOOK-00013995








PX-37: January 21, 2010 Email From Cue To Sargent



I understand. I don't believe we are asking you to do anything, you haven't told us you are doing. We are just trying to get a commitment. I think if we sit down with the agreement and talk through it hopefully we can agree.



Points Of Contention

	No Windowing	Price Tiers/Caps	MFN	"New Release" Definition	Apple's 30% Commission
 RANDOM HOUSE	 Did Not Reach Agreement				
 hachette <small>BOOK GROUP</small>	✓	✓	✓	✓	
 HarperCollins		✓	✓	✓	✓
 MACMILLAN		✓	✓	✓	✓
 penguin		✓			✓
 SIMON & SCHUSTER		✓	✓		✓

DX-213: January 21, 2010 Email From Saul To Solomon

Subject: Re: Apple Draft Agreement - Hachette Comments
Date: Thu, 21 Jan 2010 18:44:50 +0000
From: "Kevin Saul" <ksaul@apple.com>
To: "Ross, Carol" <carol.ross@hbgusa.com>
CC: "Elise Solomon" <elise.solomon@hb
<maja.thomas@hbgusa.com>, "Neil DeY
<kmoerer@apple.com>
Message-ID: <AEE33F14-67D0-40D4-B

Elise, I think this reflects most of what we
wrt Orbit as a place holder. I need to get
will give you time to get me something ba

Hachette comments 1.20.10 - Without Prejudice

furtherance of Apple's appointment, including any payments required under
collective bargaining agreements.

4. Agency Commission; Tax and Reporting

(a) For Sales of eBooks, Apple shall be entitled to a commission of thirty
percent (30%) of the Customer Price payable by eBook purchasers net of

Author

Comment: We are not sure why Apple included a
reference to the Content Usage Rules here.

Author

Deleted: and the Content Usage Rules, consistent
with this Agreement.

Author

Deleted: s. "...), even if Apple is unable to collect
from the purchaser. The "rate" of an eBook shall

[[APPLE: THIS IS A MUST]]

Author

Deleted: If, for any particular New Release in
hardcover format, the then-current Customer Price at
any time is or becomes higher than a customer price
offered by any other reseller ("Other Customer
Price"), then Publisher shall designate a new, lower
Customer Price to meet such lower Other Customer
Price.

Author

Deleted: TAKING THIS OUT GUTS OUR
ABILITY TO COMPETE. WE WILL DISC (... [3]

Confidential

APLEBOOK00430005

Government's Opening Statement

The evidence that we will present here, your Honor, will establish that through identical communications and identical term sheets and identical contracts and through constant reassurances that the publishers would all be moving together with identical terms such as price tiers and most favored nation clauses, Apple facilitated the publishers' collective abandoning of their existing wholesale model of sale in favor of a new agency method that would generate higher prices.



Testimony Of Kevin Saul

Q. Can you please tell the Court, sir, why Apple made the decision on or around January 11 to send materially similar agency agreements to the major publishers at the same time?

A. We wanted to treat everybody on a level playing field such that big publishers and eventually small publishers would be treated the same, so-called democratic way of doing things.

Q. During your 17 years at Apple working with its various content stores, the iTunes store, the app store, is that level playing field democratic approach to content providers consistent across Apple's various content stores?

A. Absolutely.



Testimony Of Russell Grandinetti

Q. At the bottom of the first page you say – this is an e-mail from you to David Young, right? “Hi, David.” And you say, “We are making good progress with everyone else, and we’d love to do the same with Hachette.”

And what you were referring to by “good progress with everyone else” was the progress, the positive progress that Amazon was making in its negotiation with the other publishers with which you were negotiating at the same time, right, Mr. Grandinetti?

A. Yes.



Testimony Of Thomas Turvey

Q. And there's nothing wrong with Google approaching the six largest U.S. trade publishers at or around the same time in 2010 as Google was contemplating opening up a bookstore, correct?

A. **Nothing wrong with that.**

Negotiations were contentious, challenging, and serious

Publishers opposed the very deal terms claimed to facilitate the alleged conspiracy

Apple's negotiation conduct was perfectly legitimate, independent, and corroborated by other retailers

Amazon's Decision To Move To Agency

DX-170: January 15, 2010 Email From Lynch To Horner

From: Steve Riggio
Sent: Friday, January 15, 2010 3:46:14 PM
To: William Lynch
Subject: RE: The next big thing

Great news. This business could get very interesting at 25%-30% GM.

I don't think Amazon will concede price leadership. Their move might be to institute some type of rebate - the more eBooks you buy, the more cash back you get.

This is great progress!

From: William J. Lynch
Sent: Friday, January 15, 2010 2:11 PM

I just came from lunch with Brian Napack, President [of] Macmillan. After we exchanged pleasantries the first thing out of his mouth was, "John (CEO) and I are interested in hearing your position on considering an agency model. I told him his timing was good and that we'd have a revised agreement outlining an agency-like relationship for him to consider in 2 weeks. They are VERY excited.

Please read below. Cader is asking me about publishers asking to us about an agency model. I have NO OBJECT with some publisher told Cader about our interest in this model.

T.

From: Joseph Gonnella
Sent: Friday, January 15, 2010 10:26 AM
To: Theresa Homer
Cc: Jaime Carey; Mary Ellen Keating
Subject: FW: The next big thing

I have not answered this e-mail.

Do you know what he is referring to, Theresa?

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USA v. Apple Inc., et al.
12-cv-02826-DLC
DX-170

BN00783125

DX-243: January 24, 2010 Email From Lynch To Sargent

From: William J. Lynch
Sent: Sunday, January 24, 2010 6:31 PM
To: John Sargent (john.sargent@macmillan.com); brian.napakomacmillan.com
Cc: Theresa Horner
Subject: Our Meeting

In advance of our meeting tomorrow, and as a follow-up to my lunch with Brian, I've attached an executive summary of agency relationship terms B&N would support. This document represents B&N's current thinking about how we might structure an agency partnership and is meant to stimulate discussion.

Publisher Option to Provide Content on Agency or Resale Basis

Agency or Resale Model. For each item of eContent provided, Publisher shall have the option to provide content to Barnes & Noble on an agency or a resale basis.

-
-

Termination of Agency or Resale Model. The agency relationship shall terminate if Publisher provides eContent to any other party, or if Publisher provides such eContent to Barnes & Noble on a resale basis.

Comment. This will be an agency basis to resale.

Agency Commission. Commission") for each item of eContent provided by Barnes & Noble (

- ___% of the retail price through any conversion services;
- ___% of the retail price through an eContent conversion service;
- ___% of the retail price through an eContent conversion service; and
- ___% of the retail price through an eContent conversion service.

Executive Summary

Publisher Option to Provide Content on Agency or Resale Basis

Agency or Resale Model. For each item of eContent provided, Publisher shall have the option to provide content to Barnes & Noble on an agency or a resale basis.

- Retail prices for each item of eContent provided by Publisher to Barnes & Noble as its sales agent shall be set by Publisher.
- With respect to any item of eContent provided to Barnes & Noble for resale, Barnes & Noble shall have the sole and complete discretion to set the retail price.

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Testimony Of Theresa Horner

Q. Now, to the best of your knowledge during your negotiations with the publishers, did any publisher ever tell Barnes & Noble in words or substance that it needed to move to an agency agreement with Barnes & Noble because of its agency agreement with Apple?

A. No.

DX-184: January 18, 2010 Email From Naggar To Porco And Grandinetti

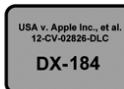
—
From: Porco, Laura
Sent: Monday, January 18, 2010 8:05 PM
To: Naggar, David
Cc: Grandinetti, Russell
Subject: RE: Publisher in Talks With Apple Over Tablet - WSJ.com
Sure.

According to Madeline tonight. She is concerned that Harper, Simon and Hachette are going to do a deal with Apple that allows the pubs to control price and that the pubs will release titles on Apple only

Subject: Publisher in Talks With Apple Over Tablet - WSJ.com

<http://online.wsj.com/article/SB10001424052748704541004575011092145509872.html?mod=djemalertNEWS>

7/17/2010



AMZN-TXCID-0008923

DX-217: January 20, 2010 Email From Porco To Leslie, et al.

From: Grandinetti, Russell
Sent: Thursday, January 21, 2010 6:28 AM
To: Naggar, David; Porco, Laura; Leslie, Tim; Zapolsky, David; Kessel, Steven
Subject: RE: privileged: mtg with Hachette Maja Thomas 1/20/2009

From: Naggar, David
Sent: Wednesday, January 20, 2010 8:53 PM
To: Porco, Laura; Leslie, Tim; Zapolsky, David; Kessel, Steven; Grandinetti, Russell
Subject: RE: privileged: mtg with Hachette Maja Thomas 1/20/2009

Breakfast with Maja. Gave her the new dtp terms. Said I had read about the speculation about publishers moving to “agency” terms in the trade press. Asked her if they were considering and what the details were - at no time did I say anything for or against agency terms or intimate Amazon’s point of view on them. Below are notes from the conversation:

Breakfast with Maja. Gave her the new dtp terms. Said I had read about the speculation about publishers moving to “agency” terms in the trade press. Asked her if they were considering and what the details were - at no time did I say anything for or against agency terms or intimate Amazon’s point of view on them. Below are notes from the conversation:

- Approached by partners to establish agency terms which would give consumer pricing control to the publisher
- Partners don’t like current TOS economics so they asked them to establish agency terms promising publishers control of pricing.
- They are considering whether they build them or not
- Partners aren’t interested in competing with Amazon on consumer price and current economics
- Their counsel has told them that they can’t offer books under two different sets of terms – TOS & Agency
- They haven’t discussed with us because they believe they understand what we would say – no
- They would keep all current titles at current terms and they would sell new books under agency terms which they believe means amzn wouldn’t carry them.
- Maja thinks not selling through amzn (because they assume we wouldn’t accept agency terms) is a mistake for Hachette but she isn’t the one in the end making the decision
- Because some at Hachette are looking for a white knight to save the publishers from a world of devalued content, they are considering risks they wouldn’t normally. Some at Hachette think Apple and Google are “whit knights.”
- She asked me if our \$9.99 pricing would ever change because that would change the discussion internally.
- I told her I couldn’t discuss consumer pricing with her.

1

USA v. Apple Inc., et al.
12-cv-02826-DLC
DX-217

AMZN-MDL-0160741
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Apple

Agency

Color iPad

All the books

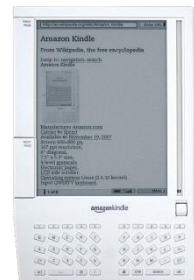


Amazon

Wholesale with
windowing

OR

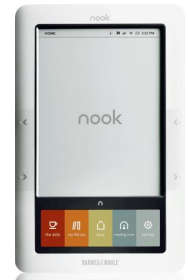
Agency with
all the books



Barnes & Noble

Agency

All the books



DX-281: January 31, 2010 Email From McIntosh To Dohle, et al.

From: Weber, Andrew
To: McIntosh, Madeline; Dohle, Markus; Sarnoff, Richard; Von Moltke, Nina; Close, Amanda; Updike, Jaci; Martin, Matthew; Shatz, Matt; Malaviya, Nihar; Demayo, Joan
Sent: 2/1/2010 2:22:07 AM
Subject: RE: privileged & confidential: spoke to David

Quite a surprising outcome.

We still need to be mindful of a potentially bad outcome: we move to agency, get lower wholesale prices while consumer prices move up from where they are today, and demand falls as

Sent: Sunday, January 31, 2010 5:58 PM

3. They want to sit down with us (starting tomorrow) to figure out how best to work out the agency model between us. We clearly are in a good position to negotiate this while also retaining leverage in our physical terms. We can end up getting agency without having to give anything up.

4. DN pointed out we should then be in a great position to require the same set of agency terms of Apple. (Translation: get the commission rate we want, not the one offered.) Apple will need us. Otherwise Amazon will have a great marketing ploy available to them (envision full page NYT ads pointing out the books on Kindle that aren't on Apple.)

To: Dohle, Markus; Sarnoff, Richard; Weber, Andrew; Von Moltke, Nina; Close, Amanda; Updike, Jaci; Martin, Matthew
Subject: FW: [read20-1] amzn folds

Certainly a lively weekend.

-----Original Message-----

From: read20-l@lists.panix.com [mailto:read20-l@lists.panix.com] On Behalf Of Peter Brantley
Sent: Sunday, January 31, 2010 5:35 PM
To: Read20 List
Subject: [read20-1] amzn folds

Amazon apparently is capitulating to Macmillan - no confirmation yet from other channels.

http://www.amazon.com/tag/kindle/forum/ref=cm_cd_tfp_ef_tft_tp?encoding=UTF8&cdForum=Fx1D7SY3BVSESG&cdThread=Tx2MEGQWNGIMHV&displayType=tagsDetail

Dear Customers:

Macmillan, one of the "big six" publishers, has clearly communicated to us that, regardless of our viewpoint, they are committed to switching to an agency model and charging \$12.99 to \$14.99 for e-book

USA v. Apple Inc., et al.
12-CV-02828-DLC

DX-281

Random House Confidential Business Information

RH-USDOJ-00003100



Testimony Of Keith Moerer

Q. And how did you find out, for example, that Amazon moved to agency?

A. The morning of April 3, which was the launch of the iBookstore, I went to Amazon's website and I looked at New York Times bestsellers and new releases and I noticed that for some of the publishers, the first five publishers we signed, that there was a line on the product detail page that said "this price set by publisher." And my assumption was that those publishers had signed agency deals.

Amazon's decision to move to an agency model was a result of the same market forces facing Apple and Barnes & Noble

Apple had virtually no contact with the publishers after the Apple agency agreements were signed

The Law Limits Inferences

The *Monsanto* Standard

“There must be evidence that *tends to exclude the possibility* that [the defendants] were acting independently.”

Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984) (emphasis added).

475 U.S. 89 (1986)

Matsushita

But antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. Thus, in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984), we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.

1348 104 SUPREME COURT REPORTS 475 U.S. 89

In three actual precedents, the inquiry is whether the defendant's failure to carry his burden here. The judgment of the Court of Appeals is

1356 104 SUPREME COURT REPORTS 475 U.S. 89

Shawmut Corp. v. Pacific West O. Nat. Ins. Co., 429 U.S. at 495, 97 S.Ct. at 870, because they actually tended to identify respondents. *Supra*, at 1354. Therefore, when, in context, evidence of these "acts of conspiracy raises a genuine issue concerning the existence of a predatory pricing conspiracy, that evidence cannot defeat petitioner's summary judgment motion. Second, the issue of fact must be "genuine." Fed. Rule Civ. Proc. 56(c)(2). When the moving party has carried its burden under Rule 56(c)(2) the opponent must do more than simply show that there is some metaphysical doubt as to the material facts. See *Celotex v. Altek*, 497 U.S. 317, 110 S.Ct. 1078, 110 L.Ed.2d 1078 (1990); *Wright v. Miller & W. Kane, Federal Practice and Procedure* § 3722 (1983); *Chalk, Special Proceedings in Drafting and Interpreting Proceedings Rules and Rules of Fed. R. Civ. P.* 484-486 (1990). Cf. *Sherwin v. Arkansas Natural Gas Corp.*, 321 U.S. 408, 412, 64 S.Ct. 774, 779, 88 L.Ed. 967 (1944). In the language of the Rule, the opposing party must come forward with "specific facts showing that there is a genuine issue for trial." Fed. Rule Civ. Proc. 56(c)(2) (emphasis added). See also Advisory Committee Note to 1963 Amendment of Fed. Rule Civ. Proc. 56(c), 28 U.S.C. App. 2 (1963) (purpose of summary judgment is to "prove the plaintiff and to assess the proof in order to see whether there is a genuine issue for trial"). Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial." *Chloroform*, *supra*, 391 U.S. at 290, 88 S.Ct. at 1392.

It follows from these settled principles that if the factual context renders respondents' claim implausible-of the claim is one that simply makes no economic sense-respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary. *Chalk*

13. See n. 10 *supra*.

facturers alleging that the Japanese manufacturer had illegally conspired to drive the American manufacturer from the American market by engaging in a scheme

to injure the American market. The issue in that case was whether proof of the defendant's refusal to deal with the plaintiff supported an inference that the defendant willingly had joined an illegal boycott. Economic factors strongly suggested that the defendant had no motive to join the alleged conspiracy. 395 U.S. at 278-279, 88 S.Ct. at 1387. The Court acknowledged that, in addition, the defendant's refusal to deal might well have sufficed to create a triable issue. *Id.* at 277, 88 S.Ct. at 1386. But the refusal to deal had to be evaluated in the factual context. Since the defendant lacked any rational motive to join the alleged boycott, and since its refusal to deal was consistent with the defendant's independent interest, the refusal to deal could not by itself support a finding of antitrust liability. *Id.* at 280, 88 S.Ct. at 1388. [4] Respondents correctly note that "[a] summary judgment of the inference to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion." *Chalk*, *supra* v. *Shawmut*, *supra*, 395 U.S. at 274, 88 S.Ct. 774, 88 L.Ed.2d 775 (1969). But antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. Thus, in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984), we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. 465 U.S. at 764, 104 S.Ct. at 1470. See also *Chalk*, *supra*, 391 U.S. at 290, 88 S.Ct. at 1392. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a § 1 violation must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. 465 U.S. at 764, 104 S.Ct. at 1471. Respondents in this case, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or reflexive action that

Apple's Independent Business Interest

The Train Is Leaving The Station = Apple's Independent Business Interest



Kevin Saul: Was a “[v]ery effective negotiating strategy” that let publishers know “the train is leaving the station” and a tactic Saul has “often” used before. Tr. 292:7-25.



David Shanks: Sought info re status of other publishers to ensure enough selection in Apple's bookstore. Tr. 435:4-22.



Russell Grandinetti: Amazon referred to status of other publishers during negotiations. Tr. 691:4-692:14 (citing DX-312).



David Naggari: Amazon has shared information with one publisher about negotiations with other publishers and regarded it as a proper negotiating device. Tr. 802:24-803:18.



Eddy Cue: Used same negotiation tactic with iTunes Radio. Tr. 1777:2-8.

Similar Contract Terms = Apple's Independent Business Interest



Russell Grandinetti: Amazon sought certain core terms with all five defendant publishers. Tr. 640:2-14 (citing DX-274).



Thomas Turvey: Was in Google's independent business interests to insist on core terms with all six publishers. Tr. 871:6-11; Google's intent in offering same terms to all major publishers was not to help them organize as a group. Tr. 873:17-22.



Eddy Cue: Sought to treat everyone "roughly the same" and gave everyone similar terms; confirmed Apple has done so for its other content businesses. Tr. 1775:23-1776:14.



Richard Gilbert: Does not dispute that Apple had a business justification for imposing similar contractual terms on all five publishers. Tr. 1549:15-19.

Agency Model = Apple's Independent Business Interest



Russell Grandinetti: Amazon uses the agency model for other parts of its business, including periodicals and music. Tr. 728:11-18.



Eddy Cue: Agency model worked effectively because content owners must compete with each other; and keeps pricing aggressive. Tr. 1791:24-1792:14.

MFN = Apple's Independent Business Interest



Brian Murray: Amazon's reasons for wanting a retail-price MFN were the same as Apple's reasons. Tr. 1061:14-1062:22



David Young: Testified to his understanding that Apple insisted on the MFN because "they didn't want to be undersold." Tr. 1458:13-15



Eddy Cue: Testified that the purpose and intent of the MFN was to ensure that Apple could be competitive on price. Tr. 1836:19-23.

30% Is A Standard And Reasonable Commission



Russell Grandinetti: 30% commission gave “certain degree of comfort” of being no worse off. Tr. 669:22-670:1.



John Sargent: Macmillan had 70/30 agency model split discussions ongoing before meeting with Cue. Tr. 1189:18-1190:5.



Eddy Cue: 30% commission used in App Store and permitted low, single-digit profit margin. Cue Decl. ¶54.



DX-278: Jan. 31 2010 email chain between Porco and McIntosh regarding Amazon’s seeking 70/30 split.



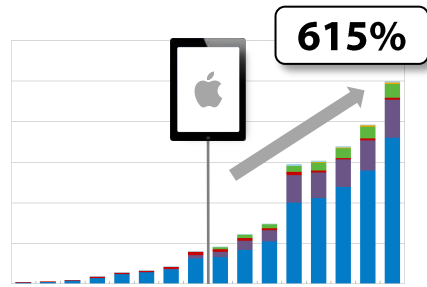
Declaration Of Kevin Murphy ¶18

“[A]s a matter of economics, all the actions taken by Apple in connection with its entry into e-book retailing are consistent with it acting independently of any conspiracy with publishers.”

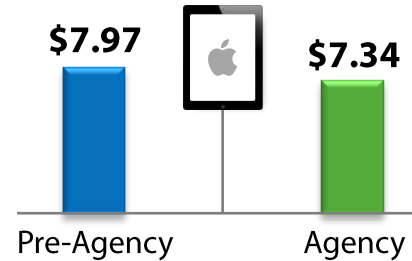
Price, Output, Competition

Pro-Competitive Benefits Of Apple's Entry In eBook Market

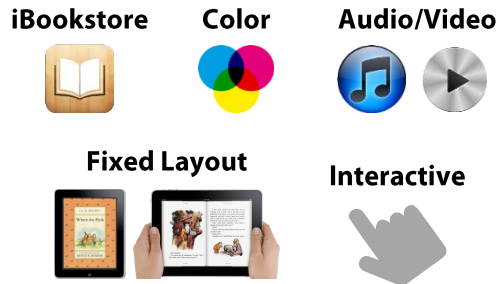
Output Increase



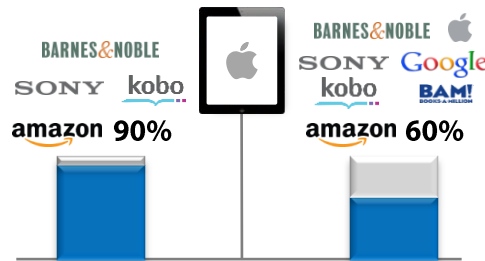
Price Decrease



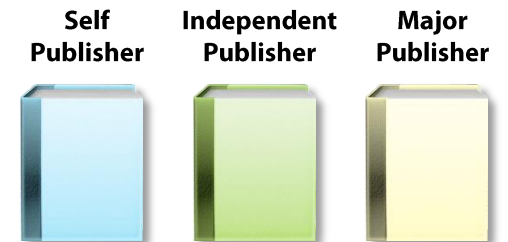
Product Innovation



Market Competition



Consumer Choice





Testimony Of Richard Gilbert

THE COURT: Is another way of thinking about it that if there hasn't been any control or analysis presented by Dr. Burtis, of whether the average price would have fallen even more without the alleged conspiratorial activity?

THE WITNESS: Yes, your Honor, that's another way of looking at it. If all those other factors were controlled for, and it's my understanding that that's what Professor Ashenfelter was trying to do, then, yes, that the prices would have fallen even more than they did.



Testimony Of Orley Ashenfelter

Q. ...My question was intended to go to, as you pointed out how I wasn't precise enough, average price at the market level. You haven't done that the correct way, as you term it in paragraph 61 of your declaration, have you?

A. ...I have not done an analysis of Dr. Burtis' all data attempting to establish for what a but-for world -- how to model a but-for world.

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- On July 6, MacHette announced that James Patterson had sold 1.4 million e-books to date. Of those, 607,661 were Kindle books.
- Five authors—Charlaine Harris, Stieg Larsson, Stephenie Meyer, James Patterson, and Nora Roberts—have each sold more than 500,000 Kindle books.

Readers are responding to Kindle's uncompromising approach to the reading experience. Weighing 10.2 ounces, Kindle can be held comfortably in one hand for hours, has an e-ink display that is easy on the eyes even in bright daylight, has two weeks of battery life, lets you buy your books once and read them everywhere—on your Kindle, Kindle DX, iPad, iPod touch, iPhone, Mac, PC, BlackBerry, and Android-based devices—and has free 3G wireless with no monthly fees or annual contracts—all at a \$189 price.

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4/18/2013

Conclusion

Apple's eBook Market Choices According To The Government

Amazon Terms:
Lose Money &
Get Windowed



or

**Agency Agreement
= Antitrust Liability**

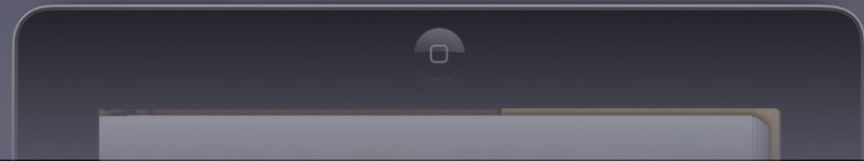
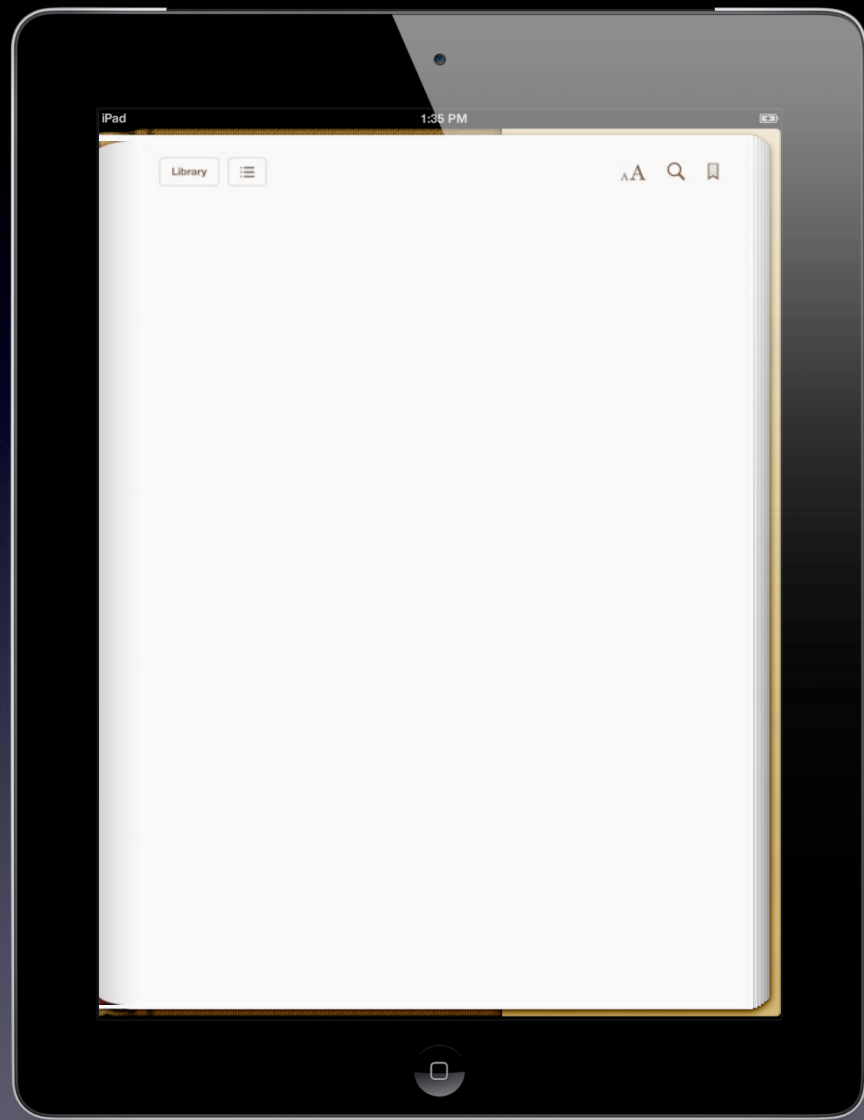


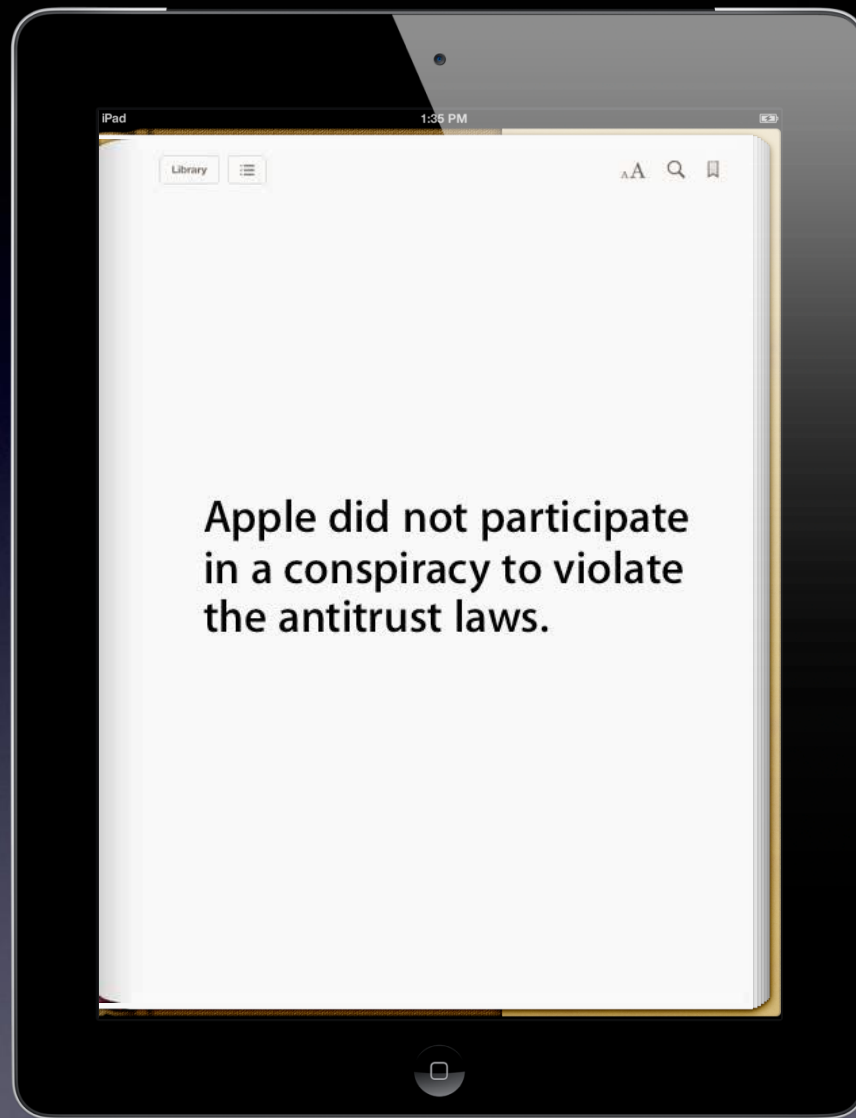
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eBook Market**

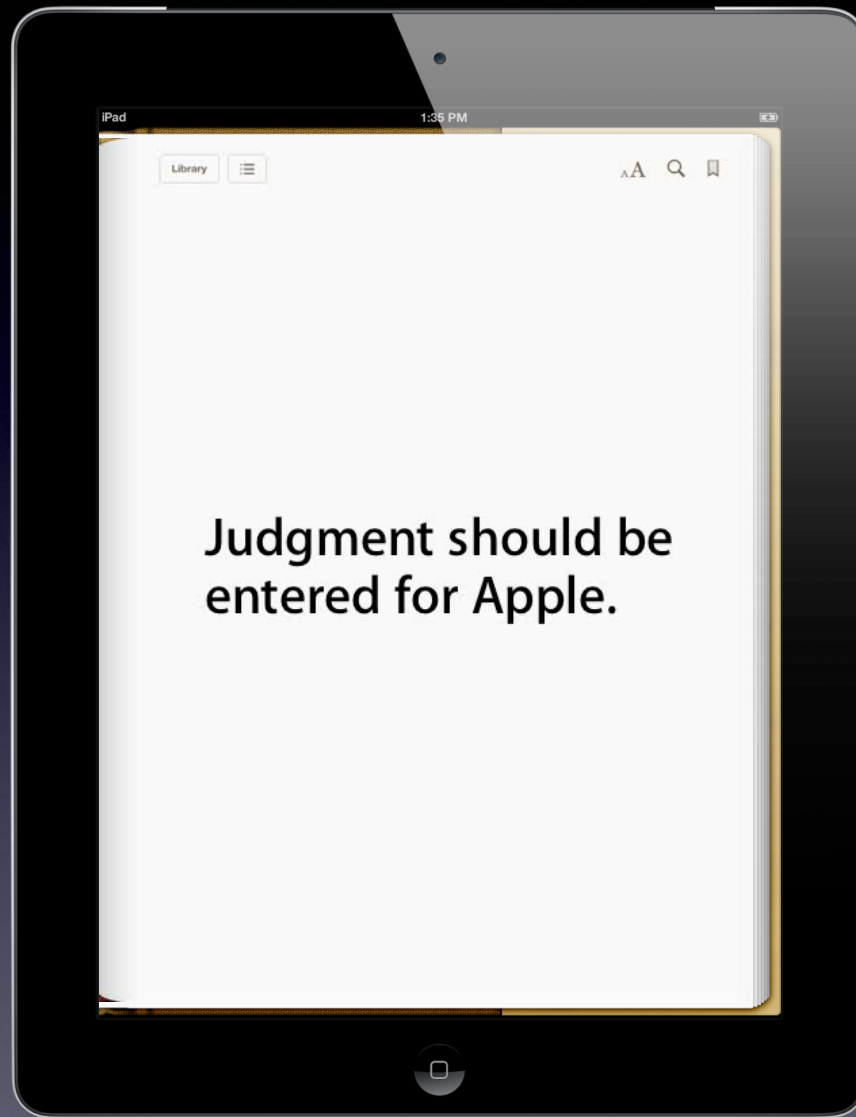




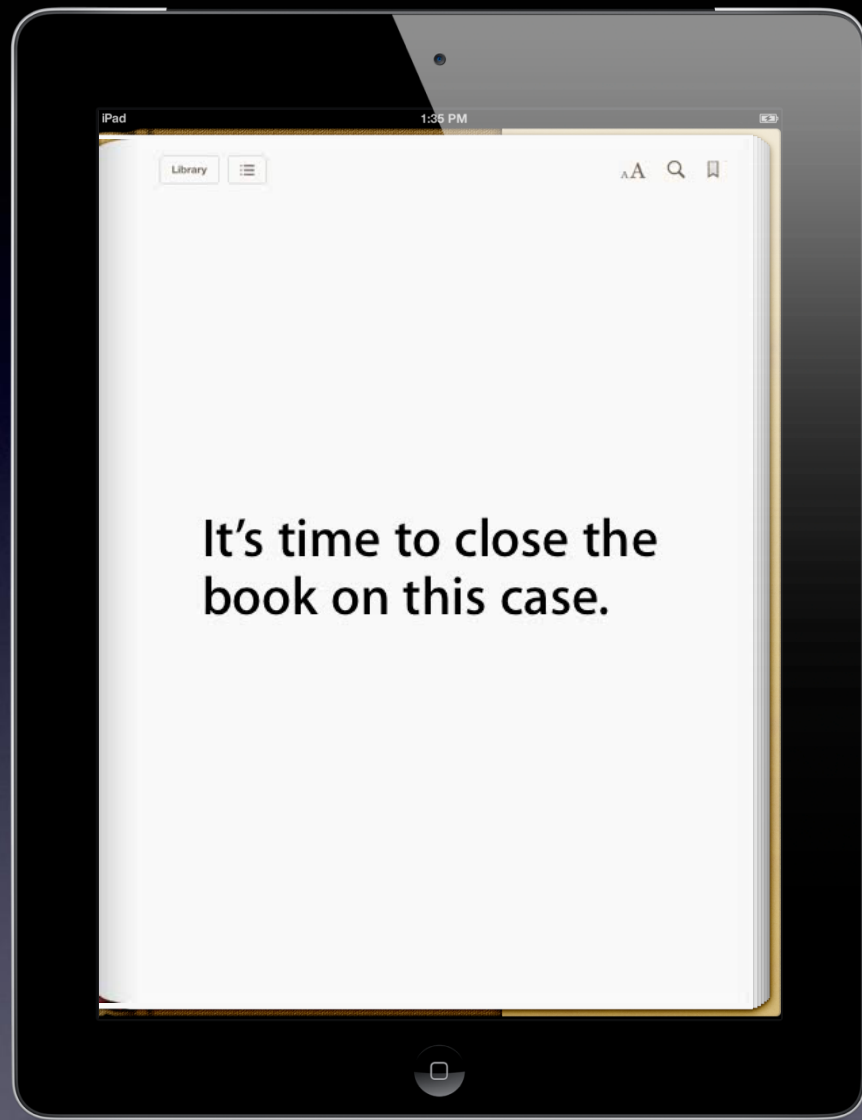




**Apple did not participate
in a conspiracy to violate
the antitrust laws.**



**Judgment should be
entered for Apple.**



**It's time to close the
book on this case.**