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B O O K S M E D I A D I G I T A L

June 7, 2012

John R. Read
Chief, Litigation III Section
United States Department of Justice
450 5th Street NW
Suite 4000
Washington, DC 20530

Dear Mr. Read,

As a book publishing professional for the last thirty years, who has worked both as a publisher (at divisions of Random House, HarperCollins, Disney Book Group, Macmillan and elsewhere) and currently as owner of a literary agency that represents the interests of authors in their dealings with publishers, I am writing to let you know my firm opinion that the proposed settlement between the United States and three publishers in the e-book collusion suit jeopardizes copyright and other intellectual property laws, is not in the best interest of the public, and should be abandoned. I am not a lawyer and will not attempt a legal argument; however I am versant in the publishing industry, particularly in issues concerning authors and the value of their copyrighted works, and the issue I want to call to your attention has serious moral, cultural as well as fair market repercussions.

The proposed settlement creates a situation that—in practice— makes collateral damage of the copyrighted works and careers of living active writers, who are also American entrepreneurs with legal protections. While it is clear that the government's intent in the lawsuit is to protect consumers, the government must not, in the course of negotiating a settlement, disregard the sui generis rights of intellectual property and copyright holders under the law.

Unlike many if not most businesses, in which the supplier is the sole owner of the merchandise they sell to retailers, the settling Publishers are licensors of authors' copyrighted intellectual property, and in most cases are granted a very specific and limited number of rights to the individual work. The author retains copyright in the work itself and full ability to exploit the other rights not granted to the publisher.

Each and every e-book title is a unique work of authorship protected by copyright, and each is a manifestation of an individual business venture, subject to contractual obligations between the author and the publisher. Every e-book published reflects a different unique creator, but those creators can be categorized into types: the author long

47 E. 19th Street, 3rd floor, New York, NY 10003
212-925-7744 voice 212 925-9803 fax info@defioreandco.com
www.defioreandco.com

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dead; the author who hasn't written a book in a decade; (in rare cases) no author at all but a work generated by the publisher itself; or most relevantly, the contemporary writer who has spent months or years in solitary entrepreneurial creative pursuit with an expectation that he will be able to sell his work for possible profit in a rational marketplace.

That last category of working writers—vital to a thriving and continuing American literary culture—are a quite small segment of any publisher's offerings and a tiny one of any major retailers' inventory. Yet it is only those writers (and only those who manage to write something of great value-- a book that becomes a hardcover bestseller) whose work is in question regarding the below-cost pricing referred to as "the \$9.99 problem" in the competitive impact statement. And it is only their work which will once again be sold to the public at 20-30% below cost should the settlement proceed. (It was never the case that all e-books were sold at below-cost discounts; that practice was only employed for a very small number of the most popular new books by contemporary authors.) This settlement wrestles with balancing the many market forces that gave rise to the adoption of 'agency pricing,' and does so by looking at a publisher's business in the macro, but that is a simplistic and erroneous way to see it. Any publisher's business is a conglomerate of small individual works of entrepreneurial intellectual property granted to them for limited exploitation by license from writers. When looked at that way, it is clear that one aspect of the settlement in particular is profoundly unfair to the owners of copyright and intellectual property:

The settlement acknowledges that below-cost pricing is an unfair practice by allowing the settling publishers to establish an annual cap on a retailer's ability to offer consumer discount equal to the amount of commission granted by aggregate sales from that publisher (ie, a retailer can't 'lose money' in aggregate over the course of a year from their sales from any one publisher). But given the fact that the only books being artificially priced in this manner are new hardcover-period 'bestsellers' (in virtually every case new books by living authors), and the discount limit will be offset by sales of ALL books by a publisher (including the thousands of 'non-bestsellers' by backlist and long dead authors, which typically sell at full price)—the artificially low pricing will continue to be unfairly imposed only on those authors who are actively creating new work. This settlement would allow, for example, a retailer to give a new work of authorship away for free, or at 90% discount, and credit the losses against the huge array of classics and backlist titles which they sell at full list price in order to stay within the cap. The government may see this as reasonable recompense to the publishers and an acknowledgement that retailers may not employ predatory extreme discounting—but it certainly isn't reasonable to the individual authors who are the creative entrepreneurs and the copyright owners of the thing of value.

Let's say for an extreme example that this practice is employed at publication of a new book by debut author John Doe. His book gets great reviews, starts to sell well thanks to consumer word-of-mouth, and hits the New York Times bestseller list. A retailer then

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chooses to discount the e-book edition of it to \$.05 a copy. Under the settlement negotiated by the government, this discounting would be allowable as long as the retailer stays within the annual 'discount cap.' (That would be easily achievable by the vast range of backlist titles published by a major publisher and sold at full price by the e-book retailer.) The discount cap insures that there is no negative marketplace value in the retailer's overall business with the publisher—but there is profound negative marketplace value in the work of Author Doe whose copyright in his work, and his future value in the marketplace, could be severely damaged. When extreme discounting is brought into the picture for a creative work it becomes impossible to determine the true value and popularity of the work to consumers, and therefore impossible for other potential licensors of the creative work to gauge its value in the marketplace. There is an enormous difference in market perception between a book that sells huge numbers at \$22.95 in hardcover and \$12.99 in e-book versus one that sells similar numbers at \$.05. In fact, Mr. Doe may well see the potential value to the foreign rights in his copyrighted material, as well as the film and television rights in his copyrighted material, profoundly diminished by the fact that the marketplace can no longer determine if the book's success is based on consumer appeal, or on an absurdly low price. Similarly, when Mr. Doe negotiates for publication of his next book, the value of his intellectual property is called into question, and his potential value as a writer in the marketplace is muddled.

When dealing with entrepreneurial works of intellectual property—and ones that, like the fictional Mr Doe's, have the inherent mass potential to generate millions of dollars of revenue for many businesses around the world from various forms of creative exploitation (foreign editions, feature film exploitation, television adaptations)—the government and the court need to recognize that an author's right to protect that value is critical; and determining that value is much more complex than it is in determining the value of a piece of manufactured merchandise. Giving away a work of authorship at artificially low prices obscures the value of all rights in that work and potentially harms the author as well as potential other licensees to the rights in that work. This settlement allows for selective devaluing of copyrighted material—damaging the value of rights not held by the publisher and not sold by the retailer. As I said, I am not a lawyer and cannot make that case that such a thing is illegal. But it should be. It is certainly immoral.

Contemporary authors have only one way to earn a living: on royalties earned or advanced to them for dollars actually generated (or anticipated) by their intellectual property. While the corporate publishers generate income from other sources as well (public domain books, backlist books, non-book or authorless titles) and large retailers generate income from the vast array of other merchandise that they may sell, as well as in ways that leverage authors' work but earn authors no income (electronic reader/device sales, advertising, membership programs, used books, and most importantly as one element of a 'locked-in' proprietary e-book reading system)—contemporary authors have no such ability. They rely solely on a profitable publication of their individual work of

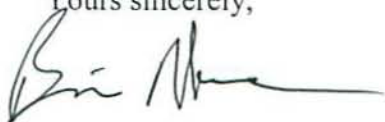
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authorship to establish their value in the marketplace. While to date authors may not have suffered financial damage by the practice of extreme discounting, thanks to historical terms of contractual agreements in place—it is naive to believe that authors will be able to continue to use the marketplace to establish value for their work at rational levels when the marketplace is itself being irrationally skewed by retailer pricing that is not based on profiting from that author's copyrighted work, but is instead based on leveraging that work in ways that have separate great value to the retailer and none to the copyright holder.

Should lowest prices to the consumer be the government's only consideration if those prices are being offered under a settlement that allows for the targeting of a specific class of entrepreneurs, and undermines the fair and open market value of their work? Should the government be party to a settlement that so clearly allows for the protection of the interests of the publishers in the macro while ignoring the interests of the individual copyrighted works of authorship? And ultimately, shouldn't the government take extreme caution before allowing this legal process to potentially harm a critical piece of American contemporary culture, with impact not only on the e-book publishing industry but on several related industries which rely on the same copyrighted material? How can authors continue to write books for fair market remuneration if, ultimately, the value of what they create has been made irrelevant and they can no longer establish or demand a fair price in the marketplace for what they do?

I appreciate that the Department of Justice needs to address issues of collusion and price fixing, and I of course have no idea if actual collusion took place as alleged (though given the caution I have seen from publishing executives in even agreeing to appear on panels together over the years due to this very concern—I doubt it.) But whether or not it did, the government and the courts must also protect intellectual property and authors' copyright under the law. Should this lawsuit be brought before a judge I would hope the impact of artificial prices on authors would be a critical part of any defense, and I would also hope that, regardless of how it was implemented, the publishers' attempt to protect the value of authors' creative work through agency pricing would be given serious and lenient consideration. But I understand that under the Tunney Act the only right the public has now is to comment on the settlement. As a representative of authors' rights I respectfully suggest that the government has not considered the potential devastating impact that this settlement could have on the value of authors' intellectual property, and that it needs to be thrown out.

Yours sincerely,



Brian DeFiore
President