Writers House LLC

A LITERARY AGENCY





DCF
9/5/12

August 10, 2012

Judge Denise Cote
United States District Court
Southern District of New York
500 Pearl Street, Room 1610
New York, NY 10007

12 civ. 2826

Dear Judge Cote,

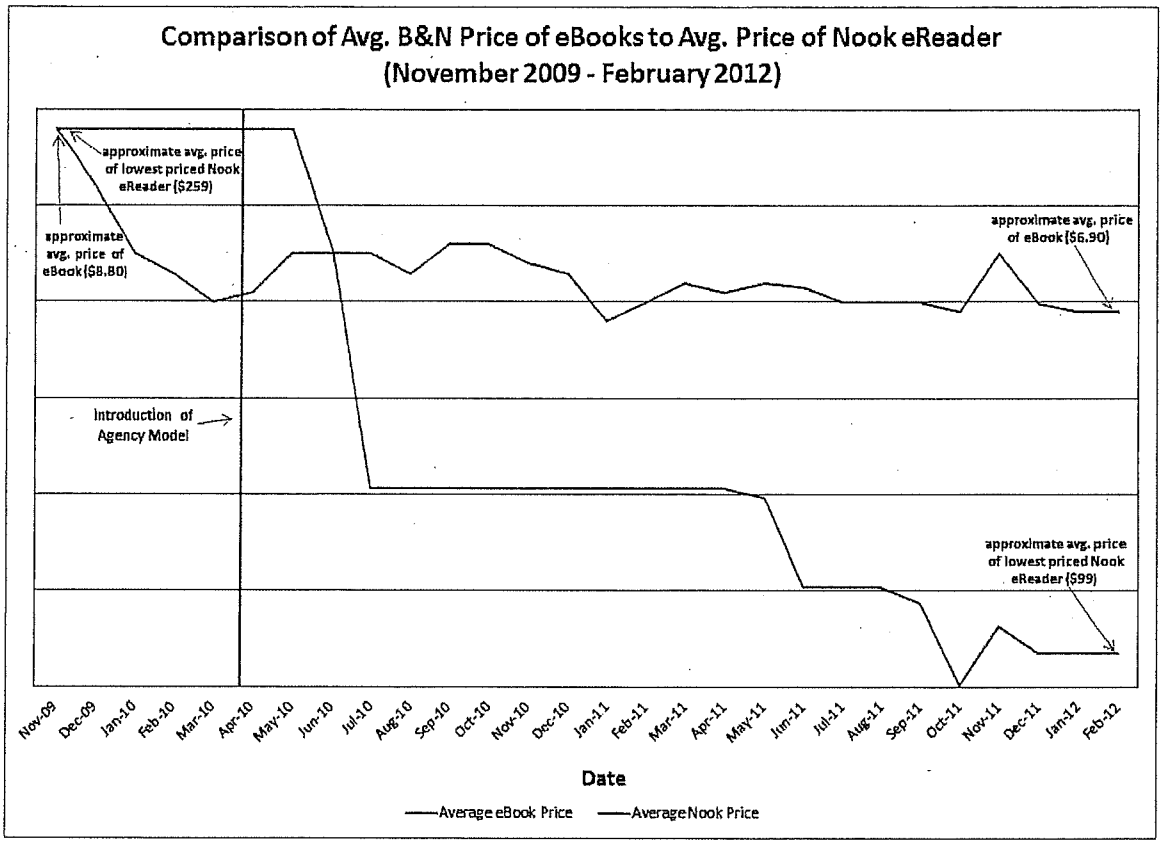
As you are likely aware, I sent a fairly extensive comment to the Department of Justice regarding the proposed settlement in the ebook pricing case. As the time draws near for you to render your judgment as to whether this settlement is in the public interest, I felt that it behooved me to write directly to you to express how profoundly the government had failed to address the objections raised to the settlement in its response to the Tunney Act comments. I apologize in advance for weighing down your desk with even more paper related to this highly contentious – but critically important – matter.

I will not waste your time by rehashing the point made in my original Tunney comment, beyond saying that I set out to demonstrate that the cost of ebooks had not increased as a result of agency pricing, which undermined the foundations of the DOJ's position that settling publishers must be prevented from using agency pricing rules to firmly set ebook prices for a period of two years. Subsequent to my letter, far better data and analysis was brought to light by B&N (among others) that depicted the pricing environment more comprehensively.

Indeed, the B&N data has itself become a point of conflict. The Consumer Federation of America, in fact, reprinted B&N's graph of the weighted average price of ebooks to demonstrate that, while the average price paid by a consumer for an ebook had not in fact gone up, it had been stable over a two year period (with some fluctuations); the DOJ leapt on this data in their response to make a new argument (one which did not appear in their own Competitive Impact Statement), that "a trend of falling e-book pricing was arrested" as a result of the agency agreements signed in 2010.

I'd like to present yet another version of this same graph, but this time include not only the weighted average ebook price but also the lowest price to acquire a Nook e-reading device, which of course is a necessity in order to read the ebooks bought from B&N. (I use only the price of the Nook in order to be consistent in comparing pricing on one platform; since we do not know weighted average ebook prices across all platforms, it seems consistent to focus on Nook pricing only.)

21 W. 26 ST., NEW YORK, N.Y. 10010 • PHONE (212) 685-2400 • FAX (212) 685-1781




(N.B. The graph measures the price of ebooks and the price of the Nook proportionately in order to display the relative extent of price changes over time between ebooks and e-readers. So for the purposes of the graph, ebook prices range from approximately $8.80 to $6.90 and Nook prices range from $259 to $99.)

While it is impossible to assert true causality to any one phenomenon (though the DOJ in fact appears rather naively to believe that average ebook price was "stabilized" solely by illegal collusion and refuses to consider other, less insidious, reasons for this fact), the period beginning with the introduction of agency pricing evidences tremendous price competition in e-reading devices, with the overall effect that the average cost of reading ebooks was dramatically decreased.

As has been argued by Bob Kohn and others, since an ebook cannot be read without an e-reading device, one must look at the overall cost of the entire system rather than the cost of individual parts to assess whether a market has been proconsumer and procompetitive. This graph demonstrates inarguably that the period of agency pricing has indeed been remarkably proconsumer and procompetitive.

Simply put, a consumer buying an entry level e-reader from B&N today would need to buy more than 23 ebooks at today's average price before paying the amount that it would cost simply to have purchased the Nook alone two years earlier. According to Pew Research, the average ebook reader reads 24 books per year. So, in essence, overall competition in the market has delivered to today's consumers a year of reading along with a new Nook at the same price as the device alone originally cost.

To take this a step further, the total cost of acquisition of a year's reading by a consumer who acquired a Nook before June 2010 and purchased 24 titles in her first year of ownership would be approximately $439 ($259 for the Nook and $180 for the ebooks at the approximate average price of $7.50 at that time); the equivalent total cost in February 2012 would be $264.60 ($99 for the Nook and $165.60 for the books at the approximate average price of $6.90 this past February). In other words, in just two years aggressive competition has led to an overall 40% decrease in the cost for the average reader to buy a device and one year's reading material. This is the very definition of the word "proconsumer."

Even if one imagines that prices would be lower today without the effects of agency pricing (as the DOJ contends), it would take the purchase of many lower-priced books before the consumer benefit of the actual decreased e-reading device cost was matched by the hypothetical decreased ebook cost. For example, if ebook prices were $2 lower today on average than April 2010 (i.e. $5 instead of $7) but e-reading device prices had been stable during the past two years, a consumer would have to purchase 80 books (or more than three years of reading for the average ebook reader) at today's hypothetical average price to offset the actual decreased cost of the e-reader. And if the hypothetically lower price was only $6, it would take 160 book s (or almost seven years of reading) to offset the hypothetically higher cost of the Nook. (Of course, in fact, I think it's impossible to imagine that average ebook prices would be significantly lower given the explosion of low cost ebooks that occurred subsequent to agency pricing; while these books would unquestionably have existed even without agency, hypothetically lower prices of Big Six ebooks would likely have decreased the number of books sold at $.99-2.99. So this whole paragraph is a somewhat absurd exercise, but still, the point is that examining this highly unlikely hypothetical case demonstrates the irrefutably proconsumer nature of ebook and e-reader pricing in the real world.)

Ultimately, it comes down to this: we can't possibly know what would have happened had agency not been implemented. We can conjecture. We can even disagree. But it seems to me, and I admit I'm not a lawyer or an economist, that the DOJ is attempting to play god in this matter. And what a fickle god it is: one that refuses to acknowledge or investigate the truths of the marketplace, stonewalls all attempts at reason, and asserts its divine right to demand an arbitrary punishment that hurts everyone but the settling publishers themselves (since it is third parties like retailers, authors and consumers who will in fact be damaged by the proposed restriction on agency).

We know, without question or reservation, that consumers have received extraordinary benefits from competition during the two and a half years since the introduction of agency pricing. How can the DOJ be so certain that another hypothetical reality would be even better? And why, given that they simply cannot prove that the actual cost to consumers of digital reading has done anything but go dramatically down since the introduction of agency pricing, are they so insistent that the settlement terms must nonetheless restrict publishers from implementing pricing rules for ebooks that at least contributed and at best created this proconsumer environment?

None of this makes any sense at all.

The public interest, I think, is clear: the DOJ should be instructed to eliminate any terms that would restrict the use of agency pricing by the publishers. Any other outcome would fly in the face of all evidence, all fact, and all reason. Absent the discount restrictions, the settlement contains

substantive, expensive and punitive terms for the settling publishers, and the related settlements with the states extract significant monetary damages on behalf of consumers. These publishers are not getting off easily.

This letter is not a defense of their alleged collusion, nor is it a request to give them a slap on the wrist and a "get out of jail free" card. It is simply an argument that the basic facts of the DOJ's analysis of the ebook market are demonstrably wrong and, therefore, to permit the settlement to go through unaltered would be a rejection of both logic and evidence.

If I have argued this matter passionately, please forgive my heated tone. I believe wholeheartedly that the settlement terms are wrongheaded, dangerous and, most importantly, bad for readers. I fervently hope that you are persuaded by my and so many others arguments to reject the DOJ's profound misunderstanding of the digital reading market and its perverse insistence on a potentially toxic cure for a nonexistent harm.

Respectfully yours,

Simon Lipskar, President
Writers House

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