

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



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.

Calendar

Day Week Month Year

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		

Calendar

Day Week Month Year

January 2010

					Fri 1	Sat 2
	3	 	4	 	5	6
	  	  				
	10	11	12	13	14	15
	17	18	19	20	21	22
	24	25	26		28	29
	31	1	2	3	4	5
						6

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" <k.moerer@apple.com>
Message-ID: <E4373EAD-7CSB-498E-91BF-A502890B3AD1@apple.com>

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

Eddy--

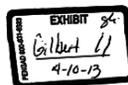
RH's #2, Madeline McIntosh, called me this afternoon to say RH is currently "stuck" in

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

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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.]

Calendar

Day Week Month Year

December 2009

Today

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		

Calendar

Day Week Month Year

January 2010

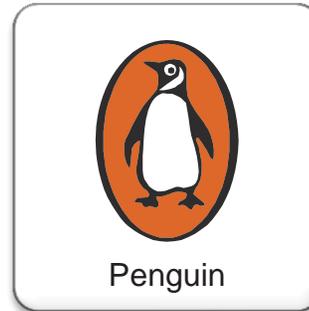
Today

					Fri 1	Sat 2
3	 	4	 	5	6	7
	     					
10	 	11	12	13	14	15
	  					
17	18	19	20	21	22	23
24	25	26	27	28	29	30
						
31	1	2	3	4	5	6

January 11, 2010



**Draft
Agreement**



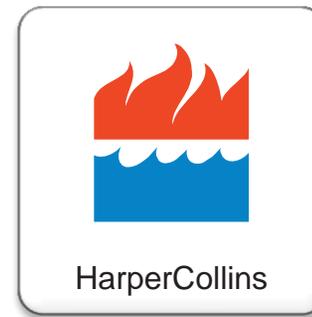
Penguin



Macmillan



Hachette



HarperCollins

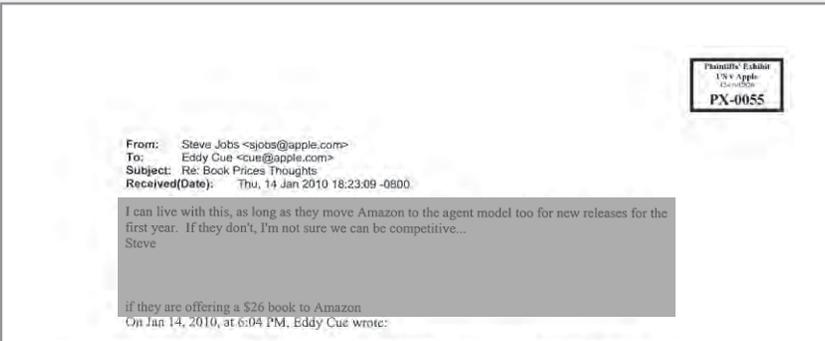


Random House



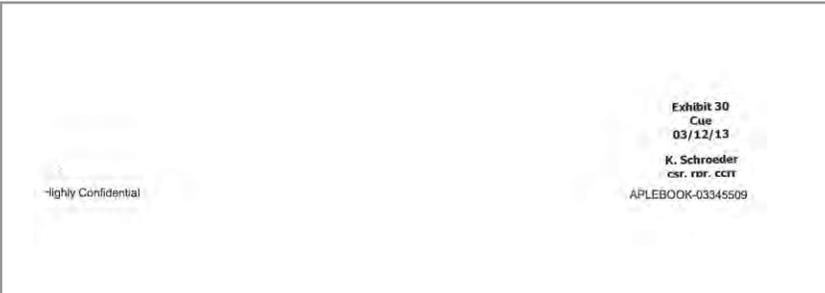
Simon & Schuster

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

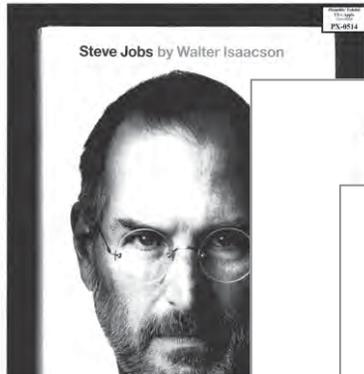


I can live with this, as long as they move Amazon to the agent model too for new releases for the first year. If they don't, I'm not sure we can be competitive...
Steve

if they are offering a \$26 book to Amazon



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 turning journalism into television and radio. Books were an obvious target, and there was an appetite for electronic books. The iTunes Store, which sold electronic books for \$9.99. There was, however, a slight difference. In the iTunes Store, Jobs had insisted that the price, initially 99 cents. Amazon's Jeppia approach with ebooks, insisting on the agency model, came in and offered publishers what other companies: They could set any price they wanted. In the iTunes Store, and Apple would take a 30% cut. In Amazon's model, the price would be higher than on Amazon. When Jobs asked him that question at the iPad launch event. "The same." He was right.

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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, but their current proposal will put B&N 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@newscorp.com]
Sent: Tuesday, January 05, 2010 12:58 PM
To: Murray, Brian (HarperCollins US)

USA v. Apple Inc., et al.
12-cv-02828-DLC
DX-175

HIGHLY CONFIDENTIAL

HC-DOJ-0089412

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

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

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

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.

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

APPLEBOOK-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