13-3741(L),

13-3748(CON), 13-3783(CON, 13-3857(CON), 13-3864(CON), 13-3867(CON)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, ET. AL.

Appellee

v.

APPLE, INC., ET. AL.

Appellant

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR *AMICUS CURIAE* BOB KOHN
IN SUPPORT OF DEFENDANTS-APPELLANTS
MACMILLAN AND SIMON & SCHUSTER
FOR REVERSAL OF IMPROPER MODIFICATION
OF TUNNEY ACT CONSENT DECREES

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INTRODUCTION

This *amicus curiae* brief is submitted in support of Defendants-Appellants Verlagsgruppe Georg Von Holtzbrink GMBH and Holtzbrink Publishers LLC, DBA Macmillan, (Macmillan Defendants) and Simon & Schuster, Inc. and Simon & Schuster Digital Sales, Inc (Simon & Schuster Defendants). The District Court's improper modification of the consent decrees between the United States and the Defendant Publishers, by virtue of the injunctive relief contained in the final judgment against Apple, should be reversed. This *amicus curiae* brief is submitted with the consent of all the parties. Fed. R. App. P. 29(a).[1] *Amicus curiae* requests permission to participate in oral argument with the Court's permission.

STATEMENT OF INTEREST

I am an attorney in good standing and am admitted to practice before this Circuit. Throughout my legal and business career, I have been deeply concerned about the intersection between copyright law and antitrust law as they relate to the public interest in promoting innovation and competition, particularly in the matter of digital goods. I submit this brief as one who believes the resolution of this appeal

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[1] In accordance with Local Rule 29.1, no party's counsel authored this brief in whole or in part, no party and no party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person other than amici curiae contributed money that was intended to fund preparing or submitting the brief.

has far-reaching implications for consumers of digital works of authorship (*e-books*, as well as *sound recordings* and *audiovisual works* delivered to consumers in digital form), the authors and publishers who create such works, and the public at large.

While working over the years for entertainment, computer software, and internet companies (including a music download service I founded in 1997, eMusic, formerly NASDAQ:EMUS), I have had responsibility and oversight for several high profile antitrust matters involving the adoption by consumers of technology products and copyrighted works, which operated in conjunction with each other, in a multi-sided market prone to attempted monopolization by dominant systems providers. I have testified on these subjects before both the FTC (1995) and joint hearings held by the DOJ and the FTC (2002). I am also the co-author of *Kohn On Music Licensing* (Wolters Kluwer, 4th Edition 2010), cited by the U.S. Supreme Court in *Eldred v. Ashcroft*, 57 U.S. 186 at fn 21 (2003), by this Circuit in *Woods v. Bourne*, 60 F.3d 978 (2d Cir. 1995) and *Boosey & Hawkes v. Buena Vista Home Video*, 145 F.3d 481 (2d Cir. 1988), and by other courts, including *Fred Ahlert Music Corp. v. Warner/Chappell Music*, 958 F.Supp. 170 (S.D.N.Y. 1997) and *Bridgeport Music v. Dimension Films*, 410 F.3d 792 at fn 18 (6th Cir. 2005). I have also testified before

the District Court in *United States v. ASCAP*, 559 F.Supp.2d 332 (S.D.N.Y. 2008) on the digital delivery of recorded music on the internet.[2]

Since August 28, 2012, I have served the District Court in the proceedings below (12-cv-2826, ECF#108 (8/28/12) as *amicus curiae*, filing, with the District Court's permission, briefs on three occasions, most notably perhaps: *Amicus Curiae* Brief of Bob Kohn, 12-cv-2826, ECF#110 (a five-page version, by Court order, replacing, *Amicus Curiae* Brief of Bob Kohn (Proposed), 12-cv-2826, ECF#97, 97-1).[3]

In August, 2013, I received a notice generated by plaintiff's counsel that I was a member of the class of consumers who the State and Class Action Plaintiffs have alleged to have been injured by the actions of the Defendants in this case. I subsequently filed an objection to one of the settlements in that case,[4] as well as a motion to intervene as a matter of right for the sole purpose of appeal,[5] which was

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[2] Further details are set forth in Memorandum of Law in Support of Motion to File Amicus Brief 8/13/12, 12-cv-2826, ECF#97-1.

[3] *See also*, Amicus Curiae Brief of Bob Kohn Regarding Government's Proposed Schedule for Tunney Act Review, 12-cv-2826, ECF#167-2; Amicus Curiae Brief of Bob Kohn on Penguin Settlement 12-cv-2826, ECF#216-2.

[4] Objection to Settlement 10/18/13, 11-md-02293, ECF#426.

[5] Motion to Intervene for Sole Purpose of Appeal 11/27/13, 11-md-02293, ECF#459; Order 12/4/13 re: Plaintiff's Request for Appellate Bond, 11-md-02293, ECF#461; Response to Opposition Request for Requiring Objector to file Bond on Appeal 12/6/13, 11-md-02293, ECF#464.

denied by the District Court,[6] which suggested that I should instead avail myself of the opportunity to file an amicus brief in the present appeal.[7]

ARGUMENT

In the proceedings below, the District Court repeatedly ruled that this litigation was not "the occasion" to decide whether Amazon's below marginal cost pricing practices "may be a defense to the claims litigated." *See, e.g.,* Opinion & Order, 12-cv-2826, ECF#326 at 157 (7/10/13); *see also*, Opinion & Order 9/5/12, 12-cv-2826, ECF#113 at 40. By failing to take into account Amazon's below marginal cost pricing prior to April 1, 2010 (when the agency model took effect), the District Court's rulings below, I submit, were fundamentally at odds with basic tenets of *modern* antitrust law. Under rulings of the U.S. Supreme Court and this Circuit cited below, consideration of Amazon's below marginal cost pricing, and the economic consequences such conduct, is *pivotal* to the resolving the issues in this case.

In support of its view that Amazon's below marginal cost pricing was not relevant to considering alleged conduct aimed at stopping such pricing practices, the

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[6] Order 12/9/13, 11-md-02293, ECF#472; Notice of Appeal 12/20/13, 11-md-02293, ECF#498; 2d Cir., Case. No. 13-4828.

[7] Transcript of Fairness Hearing of 12/9/13 filed on 1/24/14 at this Court's docket number 13-4828, ECF#22 at 132-186.

District Court cited a 1940 decision for the proposition that "two wrongs" don't make a right: "even if Amazon was engaged in predatory pricing, this is no excuse for unlawful price fixing." Opinion & Order 9/5/12, 12-cv-2826, ECF#113 at 40 (citing, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940).

In doing so, the District Court swept away the past thirty-five years of Supreme Court evolution in the realm of antitrust law: *Socony-Vaccuum* became ancient history when in 1979 the fundamental underpinnings of the Sherman Act shifted from consideration of merely the *form* of the alleged conduct to the *consequences* of the conduct. In that year, the Supreme Court held for the first time that *not all* price fixing is unlawful, either *per se* or under the rule of reason. *Broadcast Music Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 8-10 (1979) ("*Broadcast Music*"); *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984) ("*NCAA*"). *See,* Richard S. Wirtz, *Rethinking Price-Fixing*, 20 Indiana L. Rev. 531 (1987); Christopher R. Leshe, *Achieving Efficiency Through Collusion: A Market Failure Defense to Horizontal Price Fixing*, 81 California Law Rev. 243 (1993).

Soon after that, the Supreme Court ruled that antitrust cases must be resolved with reference to the *economic consequences* of the alleged conduct, not by mere

evidence of collusive conduct or prices changes resulting from such conduct. *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S.717, 731 (1988).[8]

Consequently, the Supreme Court later recognized that the public has a vital interest, not in *low* prices, but rather *efficient* prices. *Brook Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993) (O'Conner, J); *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990) (Brennan, J.). Thus, for example, the pricing of goods below their marginal cost by a competitor with market power is unlawful. *Brook Group* at 225-226. (In the Second Circuit, selling below marginal cost is *presumed* predatory. *Northeastern Tel. Co. v. Am. Tel. &Tel., Inc,* 651 F.2d 76, 88 (1981) (2d. Cir. 1981), *cert. denied*, 455 U.S. 943 (1982) (Kaufman, J.). This is because selling below marginal cost leads to an "improper allocation of resources" and "greatly increases the probability that rivalry will be extinguished or prevented for reasons unrelated to the efficiency of the monopolist." *Northeastern*, 651 F.2d at 87-88; *see, Barry Wright Corp. v. ITT Grinnell Corp*., 724 F.2d 227, 230-34 (1st Cir. 1983) (Breyer, J.); Philip E. Areeda & Donald F. Turner,

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[8] Nothing in *Business Electronics* suggests that the principle of considering not just "a particular list of agreements, but to a particular economic consequence," is limited to vertical restraints. In discussing "the changing content of the term 'restraint of trade'" dating back to the enactment of the Sherman Act, the high court specifically cited *NCAA* and *Indiana Fed'n of Dentists*, *infra*, both regarding horizontal restraints. 485 U.S. at 717, 731-34.

Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, 88 Harv. L. Rev. 697, 712 (1975)).

As hundreds of public commentators attested in the Tunney Act proceedings, Amazon's below marginal cost pricing has caused a misallocation of resources on many levels. For example, it made it less financially practical for existing e-book retailers and new entrants to compete in the trade e-book market. This helped Amazon achieve an undisputed 90% monopoly of the trade e-book market. With a 90% monopoly in the sale of e-books, Amazon coincidently achieved a 90% *monopsony* in the acquisition of e-book distribution rights, artificially altering the bargaining position between Amazon and the sellers of such rights, namely: authors and book publishers. In addition, Amazon's below marginal cost pricing also increased the difference in the retail price between e-books and their hardcover counterparts. As a result, printed book retailers—destined for eventual digital disintermediation—suffered an artificially-induced *accelerated* disintermediation, the primary beneficiary of which was Amazon, whose share of the printed book market soared from 15% prior to the release of the Kindle to over 29% by the end of 2012.

The Supreme Court's shift to *efficiency*, and away from a particular form of conduct or the false objective of *low* prices, is what principally underlies the recognition that not all price fixing constitutes a restraint of trade under the Sherman

Act. That is to say: collusive conduct, even literal price fixing, will be sustained under the rule of reason where there is a "countervailing procompetitive virtue—such as for example, the creation of efficiencies in the operation of a market or the provision of goods and services." *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459 (1986) (citing *Broadcast Music* and *NCAA*).

Accordingly, if Defendants conduct in this case resulted in "pro-competitive virtues" or "efficiencies in the operation of a market," then Defendants conduct *could* be sustained under the rule of reason.

But my complaint here is not that the District Court considered the redeeming virtues of the alleged conduct and rejected them. On the contrary, the District Court plainly and explicitly *refused to even consider* the possibility that the alleged conduct had such redeeming virtues, ruling that neither the determination of liability nor the fashioning of a remedy was the "occasion" to consider them, blocking repeated requests by the parties, public commentators, *amicus curiae*, and class action objectors for discovery of the relevant facts pertaining to the economic consequences. Not only did the District Court find Amazon's below marginal cost pricing practices *not* relevant as a defense to the claims (Opinion & Order 7/10/13, 12-cv-2826, ECF#326 at 157), but it found they were *not* relevant in determining whether the Tunney Act settlements were "in the public interest," which necessarily entails, pursuant to the Act, that the Court consider the impact of the settlement on

the relevant market and the public generally. 15 U.S.C. §16(e)(1); Opinion & Order 9/5/12, 12-cv-2826, ECF#113 at 40. Nor did the court find relevant these effects when considering whether the injunctive relief set forth in the class action settlements was "fair, reasonable and adequate" under Fed. R. Civ. Proc. 23. Order Denying Objector's Request for Discovery 11/13/13, ECF#442; Letters re: Request for Discovery 11/13/13, 11-md-02293, ECF#438, 439, 440, 441; Final Judgment 12/9/13, 12-cv-2293, ECF#478.

Even if the District Court were correct and the Supreme Court were wrong—that procompetitive and efficiency-enhancing virtues could *never* justify collusive conduct and thereby never constitute a defense to Sherman Act claims—that would *still* not mean the District Court should ignore, in considering a settlement or final judgment, the *economic consequences* of the proposed injunctive relief upon consumers.

That the Court ignored such consequences is particularly jarring in light of several of the District Court's key *factual findings* during the course of these proceedings:

A. Prior to the shift to the agency model in April, 2010, Amazon had a "90 percent monopoly" in the e-book market. Opinion & Order 9/5/12, 12-cv-2826, ECF#113 at 34.

B. The agency contracts (including their retail price restraints and most favored nations provisions) used by the book publishers were "not intrinsically unlawful." Opinion & Order 9/5/12, 12-cv-2826, ECF#113 at 17.[9]

C. After Amazon agreed to the agency contracts, it ceased selling e-books below marginal cost[10] and, as a result, e-book prices "shifted upward" (Opinion & Order 7/10/13, 12-cv-2826, ECF#326 at 12).

D. In the two years following the introduction of agency pricing, Amazon's market share "decreased from 90 to 60 percent." Opinion & Order 9/5/12, 12-cv-2826, ECF#113 at 35.

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[9] The effect of the agency contracts was to shift price e-book competition at the retail level back up to the book publisher level. The objective was to stop Amazon's selling of e-books below their marginal cost; as a result, e-book retailers—such as Amazon, its smaller rivals, and potential new entrants—would compete on service and technology, rather than price. Restricting price competition at the retail level for this purpose is not unlawful, as the District Court recognized when it ruled the Defendants' agency contracts (including their most favored nations' provisions) were not intrinsically unlawful.

[10] The Department of Justice affirmatively admitted what had throughout the proceedings remained undisputed: that prior to its adoption of the agency model, Amazon was selling e-books below marginal cost. *Government Response to Public Comments* 4/5/13, 12-cv-2826, ECF#201 at 12-13 (the settlement permitted Amazon to resume selling at below marginal cost, albeit "closer to their marginal cost" than before).

Yet, of those findings of fact, the only one that bore upon the District Court in rendering its decisions below is the fact that e-book prices "shifted upward" as a result of Defendants' conduct. Revealingly, the District Court's 160-page decision against Apple below opens with the following sentence: "This Opinion explains how and why the prices for many electronic books, or 'e-books,' rose significantly in the United States in April, 2010." The opinion might have gotten the *how* right, a factual matter, but it got the *why* wrong, a legal matter: it never explains why the rise in e-book prices were harmful to consumers or the public generally, because the Court *assumed* it was harmful, holding it was not the occasion to consider the economic consequences of the price adjustment resulting from the shift to the agency model. Opinion & Order 7/10/13, 12-cv-2826, ECF326.

According to the Supreme Court, however, the analysis does not end with a determination that prices rose (*Brooke Group* and *Atlantic Richfield*). Nor does it end with a determination of "literal" collusive conduct (*Broadcast Music*).

In *Brook Group*, Justice O'Conner quoted Justice Brennan for the proposition that "Low prices benefit consumers regardless of how those prices are set, and *so long as they are above predatory levels*, they do not threaten competition….We have adhered to this principle *regardless of the type of antitrust claim involved*." *Brook Group,* 509 U.S. 209, 223 [emphasis added]. In other words, low prices that are below marginal cost levels *harm* consumers; when those prices rise back up to

marginal cost, the economic consequence of the price increase is a *benefit* to consumers, *regardless,* as Justice Brennan suggested, *of whether the conduct alleged by the antitrust claim is price fixing, resale price maintenance, or any other kind of vertical or horizontal collusion*.

In *Broadcast Music*, the Supreme Court recognized that the court's consideration does not end upon a mere finding of a certain form of *conduct*—in that case, the music publishers and songwriters were spending tens of millions of dollars in administrative support for ASCAP and BMI, participating on their respective boards of directors and hiring full-time management, for the specific purpose of facilitating their collective "literal" price fixing of performance licenses.[11] Yet, the Supreme Court returned the case to the Second Circuit for a consideration of the potential *redeeming virtues* of the conduct under the rule of reason. Id. 441 U.S. 1, 9, 25. On remand, the Second Circuit considered the *economic consequences* of the music publisher's straightforward price fixing regime and came to this remarkable

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[11] Note, by contrast with the music publishers, the alleged conduct of the Defendant book publishers did not involve the collusive fixing of one single e-book price; all the Defendants were alleged to have done is collude to compel their e-book buyers—one of which wielded a 90% market monopsony—to change their business model for acquiring e-books from *retail* to *agency*. The Complaint even alleges that this could not have been accomplished without such collusion. Be that as it may, there was never an allegation of "literal" price fixing by Defendants and the District Court specifically held that there is nothing unlawful about Defendants' agency contracts.

conclusion: what the Supreme Court characterized as "literal" price fixing "had no anticompetitive effect at all." CBS v. ASCAP, 620 F. 2d 930, 934 (1980)).

A few years later, in *FTC v. Indiana Fed'n of Dentists*, the Supreme Court stated unequivocally that collusive conduct, even literal price fixing, will be sustained under the rule of reason where the conduct has a "counterveiling procompetitive virtue," citing as examples only, "the creation of efficiencies in the operation of a market or the provision of goods and services." 476 U.S. 447, 459.

Thus, as *Business Electronics* more broadly formulated this principle, the District Court was compelled consider the *economic consequences* of the conduct, not just its form or the direction of prices that resulted. Indeed, when e-book prices "shifted upward" following the adoption of the agency model, prices returned back to their economic equilibrium (i.e., marginal cost). As a result, the misallocation of resources caused by below marginal cost pricing *ceased*. Under such circumstances, e-book consumers could not have been harmed as prices returned to their equilibrium. On the contrary, the resulting upward shift in prices could only have promoted economic efficiencies in the operation of the market, thereby benefiting e-book consumers and the public at large.

The District Court's reliance on *Socony-Vacuum* is out-of-date. Modern antitrust doctrine compelled the District Court to consider the findings of facts it chose to ignore: that Defendants' conduct resulted in "pro-competitive virtues" (e.g.,

Amazon's drop in market share from 90% to 60%) or "efficiencies in the operation of a market" (e.g., the elimination of economically inefficient below marginal cost pricing by a competitor wielding 90% market power). If the District Court had done so, then it would not have applied the antitrust law in a way that harms consumers—which is precisely what it has done in the injunctive relief entered below in the Tunney Act proceedings.

Such relief enjoins the book publishers from fully exercising its rights under their *lawful* agency contracts, reversing, in part, their beneficial economic consequences. The injunctive relief specifically shifts significant pricing decisions back down to the e-retailers like Amazon, allowing them to resume their predatory pricing practices, though perhaps not to as great a degree.

Those restrictions were set to expire at the end of two years, which the District Court previously ruled was an adequate "cooling-off period." Since none of the parties appealed the Tunney Act settlements[12], the public has been forced to endure

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[12] I filed a motion to intervene for the sole purpose of appealing the first Tunney Act settlement, which the District Court denied. Opinion & Order 10/2/12, 12-cv-2826, ECF#136. I appealed. *Kohn v. United States* 10/4/12, 12-4017. Upon *motion* by the United States challenging my standing, this Court found that I clearly had standing to appeal the denial of my motion to intervene, but ruled summarily—without a hearing and before briefing of the appeal—that the District Court did not abuse its discretion. *Kohn v. United States* 3/26/13, 2d Cir. 12-4017 ECF#76. I drafted and filed a petition for rehearing/hearing en banc that was stricken because at the time the Court would not accept such a petition in response to an order disposing of my

them until they expire at the end of their respective two year terms. During this time, consumers, paying lower e-book prices than they should, have been suffering decreased competition in e-book retailing, resulting in stunted innovation,[13] accelerated bookstore closings,[14] and even the first inklings of the higher prices enabled by the predatory conduct.[15]

Yet, by the District Court's Judgment dated September 5, 2013 (Opinion & Order, 12-cv-2826, ECF#374), the Court has effectively extended the two-year

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appeal upon motion. Order 4/16/13, 2d Cir. 12-4017, ECF#87. With the wind blown out of my sails, and exhausted from the dark abyss of unfamiliar procedural hurdles—looking for sympathy here—I abandoned the appeal, the only possible appeal of the Tunney Act settlement. I was, however, consoled (at that time) by the fact that the injunctive relief I believed harmful to consumers would begin to expire less than one year later—on April 10, 2014 for three of the Defendant Publishers and on December 18, 2014 for the remaining two.

[13] On February 11, 2014, Barnes & Noble, Amazon's largest competitor in the sale of e-books, announced a lay-off affecting a large portion of the engineering staff of its *Nook* e-book reader device. http://finance.yahoo.com/news/layoff-news-drives-barnes-noble-182005055.html.

[14] The *Huffington Post* has dedicated a news-blog to cover the subject: www.huffingtonpost.com/news/bookstore-closings/

[15] On January 30, 2014, Amazon announced that it was planning to raise the price of its *Amazon Prime* subscription service—through which Amazon "lends" e-books, among other benefits—by $40 per year, a roughly 50% increase. http://www.usatoday.com/story/tech/2014/01/30/amazon-raise-prime-price/5063693/

restrictions to five years. (The District Court's use of its judgment against Apple to modify the terms of a previously settled, publicly-conducted Tunney Act proceeding creates a significant *due process* concern that towers over the mere violations of civil procedure, undermining of public policy, and disregard of judicial fairness discussed by Defendant-Appellants in their respective briefs. To put it bluntly, hundreds of members of the public who were lead to believe by their Congress that the Tunney Act was intended to welcome their participation in these settlements have been hoodwinked.[16] Next time, why bother?)

If such extension is allowed to stand, the market inefficiencies and misallocation of resources caused by the restrictions will be prolonged for an additional three years. No amount of zeal to punish defendants for conduct (or "lack of remorse" for such conduct) that may be superficially suspect—yet arguably sustainable under the rule of reason—should be allowed to exacerbate the collateral damage already suffered by consumers and the public at large.

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[16] In my case, had I known that the District Court could use the Tunney Act proceedings to ratchet-in a minimum duration of injunctive relief, only to later (after the judgments are no longer appealable and without any showing of changed circumstances required by Fed. R. Civ. Proc. 60) use the Apple judgment to increase the duration of such relief, there would have been a greater incentive (a) to prosecute the appeal I chose to abandon (*see*, note 12 above) and (b) to file similar appeals to the Macmillan and Penguin Tunney Act settlements, to reverse the consumer harm resulting from such judgments.

THE BIG PICTURE

As noted, the District Court below found as an undisputed fact that Amazon had a "90 percent monopoly" in the trade e-book market at the time Defendants' alleged conduct took place. Opinion & Order 9/5/12, 12-cv-2826, ECF#113 at 34-35.[17] Paragraph 80 of the Government's own Complaint (Id. ECF#1) dramatically illustrates what can happen in a market beset with the presence of 90% monopoly power (particularly when that monopoly is wielded by a large systems provider attempting to use network effects to dominate and maintain a relevant market). When defendant Macmillan presented Amazon with its proposal for an agency contract to replace its existing retail contract, Amazon exercised what has been described as its "nuclear option": the online retail giant promptly deleted the "buy" buttons in the Amazon online store for all of Macmillan's books (e-books, as well as printed books). As a result, 90% of Macmillan's e-book revenues and 25% of its printed book revenues vanished in an instant. The sixth largest book publisher in the United States was brought to its knees.

This kind of conduct affects everyone in the e-book supply chain. For example, had Amazon continued its single-handed boycott of Macmillan's books a

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[17] At the time, Amazon also reportedly sold 25% of all printed trade books in the United States.

while longer, the competitively-handicapped Macmillan would have been unable to solicit new manuscripts from authors and would have ceased publishing new books, effectively putting it out of business. Driving Macmillan out of business would have meant one less publisher to bid on the acquisition of authors' manuscripts. Over time, authors would receive less money for the licensing of their copyrighted works—the recognition of which involves one of the Constitutionally-enumerated powers of Congress calculated to promote the Writings of authors for the purpose of enhancing the *public interest*. U.S. Const. art. I, sec. 8.

Fear of retaliation by large system providers with 90 percent market power is not new. See, *United States v. Microsoft*, 56 F.3d 1448, 1463-64 (D.C. Cir.1995) (criticizing a district court's decision to grant competitors, fearing retaliation from Microsoft, leave to participate as *amicus curiae* on an anonymous basis).[18] More than twenty-five years later, with Amazon dominating the market for e-books (e.g., *Kindle*), Apple the market for music (e.g. *iTunes*), and Google the market for audiovisual works (e.g., *YouTube*), the Courts must now grapple with how authors of these Writings and their representatives will be able to navigate the dissemination

[18] In 1995, I was the in-house General Counsel of Borland International, Inc. (makers of *Sidekick, Paradox, dBase II, Quattro Pro, Turbo Pascal, Borland C++*, etc.), one of Microsoft's anonymous competitors on behalf of whom the *amicus curiae* brief was filed.

of their works to consumers through a technological and economic environment comprised of a few dominant system providers with substantial *monopsony* power.

In 1979, the Supreme Court considered the controversy between one of the three national television networks and over 25,000 music publishers and the hundreds of thousands of songwriters they represent.[19] The high court agreed with the Second Circuit's assessment of the matter: "In dealing with performing rights in the music industry we confront conditions both in copyright and in antitrust law which are *sui generis*." *Broadcast Music* at 10 (quoting *CBS v. ASCAP*, 562 F.2d 130, 132 (2d Cir. 1977). Hence, this Court understood at the time: this was not *your father's price fixing case*.[20]

Thirty-five years later, this Court finds itself facing similar conditions: thousands of book publishers and authors facing a few buyers of e-books with

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[19] It is no coincidence that a leading commentator on *Broadcast Music* concluded that the music publishers' conduct could be justified as a lawful response to the *monopsony* power wielded by the three major networks at that time. John Cirace, *CBS v. ASCAP: An Economic Analysis of a Political Problem*, 47 Fordham L. Rev. 277, 293-94 (1978-79). The monopsony at issue in the present action is far stronger that that confronted by the music publishers, given the undisputed fact that Amazon was the buyer of 90% of all e-books at the time of the alleged wrongful conduct.

[20] Ironically, not a single e-book price was alleged to have been collusively fixed by Defendants' in their effort to move to agency model, yet the District Court (more than a year before the trial) characterized this action as a "straightforward price-fixing case." Opinion & Order 9/6/12, 12-cv-02826, ECF#113 at 18).

networked access to consumers—one of whom wielded 90% market power. The goods involved are not licenses to perform music over television, but something as equally intangible: licenses to transmit e-books over the internet. Both are what economists call "public goods," and, as discussed elsewhere at length,[21] the courts have recognized that "the natural market forces of supply and demand do not operate normally on pricing in this market." See, *Broadcast Music, Inc. v. Moor-Law, Inc.*, 527 F.Supp. 758, 763 (D. Del. 1981), aff'd without published opinion, 691 F.2d 490 (3d Cir. 1982).

Fortunately, back in 1979 (about the time of the invention of the first personal computers), the courts got ahead of the curve in developing the law of antitrust in anticipation of the digital era, refining more carefully the kinds of activities that constitute an *unlawful* "restraint of trade." Antitrust doctrine quickly evolved with the recognition that (a) the *efficiency* of a market is the objective and (b) the paramount consideration in determining the whether a particular restraint, set of agreements, or form of conduct is unlawful depends upon its *economic consequence*. At the same time, the courts began to recognize that something different is going on where antitrust intersects with copyright. (The Department of Justice and the Federal

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[21] *See, e.g.,* Comments of Bob Kohn to Macmillan Settlement at http://www.justice.gov/atr/cases/apple/comments2/atc-2000.pdf

Trade Commission followed suit by jointly adopting on April 6, 1995, their *Antitrust Licensing Guidelines for the Licensing of Intellectual Property,* which the DOJ has conveniently ignored throughout the prosecution of the present action).[22]

In cases like this one, where the courts are confronted with such conditions in copyright and antitrust law, it serves no one—especially consumers and the public generally—for a District Court to disregard the economic consequences of the alleged conduct and, instead, regress to pre-war oil industry antitrust dogma and familiar mantras such as the one regarding "two wrongs." Opinion & Order 9/6/12, 12-cv-02826, ECF#113 at 40.

Indeed, one can only deeply admire a district court's seasoned ability to reason to a conclusion from a set of premises. But when one of those premises is wrong, the conclusion must collapse.

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[22] Available at http://www.justice.gov/atr/public/guidelines/0558.pdf.

CONCLUSION

It may be too late to reverse the harmful economic effects of the Tunney Act judgments or the class action settlements approved by the District Court that are now impervious to the crucible of appellate review, but millions of consumers today have a vital interest in a prompt return to a competitive market for e-books. The quickest path to that, it would seem, would be the expiration of the detrimental injunctive relief at the end of their original two-year terms.

DATED: February 14, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULES 32(a) & 29(d)

1. This brief complies with the type-volume requirements of Fed. R. App P. 32(a)(7)(B). It contains 5,056 words, excluding parts of the brief exempted by Fed. R. App P. 32(a)(7)(B)(iii).
2. This brief complies with Fed R. App. P. Rule 29(d) in that it is no more than one-half the maximum length authorized by the rules for the appellants' principal brief.
3. This brief complies with the typeface requirements of Fed. R. App P. 32(a)(5). It has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

DATED: February 14, 2014 Respectfully submitted,

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