

THE NEW BOOK PUBLISHING LANDSCAPE

MIKE FARRIS

Vincent Lopez Serafino Jenevein, P.C.
Thanksgiving Tower
1601 Elm Street, Suite 4100
Dallas, Texas 75201
mfarris@vilolaw.com

State Bar of Texas
24TH ANNUAL
ENTERTAINMENT LAW INSTITUTE
COURSE
November 6-7, 2014
Dallas

CHAPTER 1

TABLE OF CONTENTS

I.	THE TRADITIONAL PUBLISHING PROCESS AND PHYSICAL BOOKS	2
II.	E-BOOKS AND CHANGES IN THE TRADITIONAL WORLD	2
III.	THE WHOLESALE MODEL	2
IV.	THE FIRST EIGHT HUNDRED POUND GORILLA	3
V.	AMAZON: ANOTHER EIGHT HUNDRED POUND GORILLA	3
VI.	THE THREE MOST IMPORTANT THINGS IN E-BOOK SALES: PRICING, PRICING, PRICING.....	3
VII.	YET ANOTHER EIGHT HUNDRED POUND GORILLA ARRIVES ON THE SCENE.....	5
VIII.	AMAZON REACTS TO THE AGENCY MODEL.....	7
IX.	A FREE-FOR-ALL OF EIGHT HUNDRED POUND GORILLAS.....	8
X.	UP, UP, AND AWAY	10
XI.	MORE BIG GORILLAS	10
XII.	GORILLAS IN THE COURTROOM	12
XIII.	GORILLAS REACH A SETTLEMENT.....	13
XIV.	WHAT AUTHORS HAVE TO SAY	14
	APPENDIX.....	15

THE NEW BOOK PUBLISHING LANDSCAPE

I have been an avid reader since I was a kid and grew up reading *The Hardy Boys*. Each year on my birthday, my mother would take me to the store, and I could pick out any two Hardy Boys books I wanted. I also got them for Christmas and, if I had earned a little money, would buy them for myself throughout the year. I also had a library card and every two weeks, one of my parents would take me to the library. I would check out ten or more books at a time, which had to be returned in two weeks, so I was forced to read a lot just to finish them all.

I also read lots and lots of comic books. Most grown-ups back in those days frowned on reading comic books, but at least kids who read comic books were reading. Who knew, then, what an industry it would grow into today? What I wouldn't give to have back that huge box of comic books that I sold at a garage sale.

When I was in about the 6th or 7th grade, I discovered David Westheimer's *Von Ryan's Express*, which was later made into a movie starring Frank Sinatra. I really loved that book, and I probably read it three or four times over the course of that particular school year. Since then, I have seen the movie several times, but I still like the book better. There is just something about reading the words and forming my own pictures in my head about what's happening on the page. There's also something to be said for the time commitment you have to make to spend with characters in a book rather than simply an hour and forty-five minutes sitting in a darkened theater. The time spent with a book creates a bond with those characters that you can't form at the movies. Usually. Unless it's *Star Wars* and you're a character from *The Big Bang Theory*.

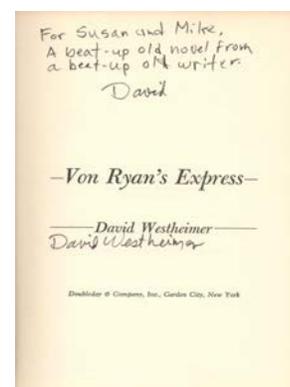
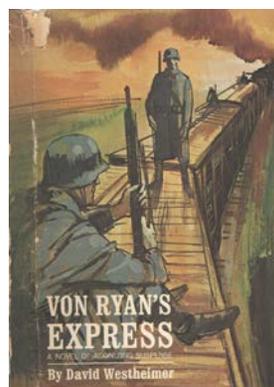
About 40 years after reading *Von Ryan's Express* for the first time, I had the privilege of being able to briefly represent David Westheimer, shortly before he passed away in 2005. In one of our conversations, I told him how much I had loved *Von Ryan's Express*, and its sequel, *Von Ryan's Return*, as a boy, and that I still had fond memories of reading and re-reading them, and discussing them with friends who were just as taken with them as I was. Not long after that, I got a great surprise in the mail: a battered first edition of *Von Ryan's Express*, signed by the author. It's one of my greatest treasures.

I used to be afraid that books were quickly heading the way of the dinosaurs. I'm not as worried about that as I used to be, although the world of books and publishing is certainly different than it was when I was reading *The Hardy Boys* and *Von Ryan*. I do know, though, that books generally don't have the same place

of importance in most lives that they once did. But time marches on, and with it come changes, for better or worse. The book publishing landscape of today is not the landscape of my youth, nor even of the youth of the late 1900s. Technology has brought changes across the board and perhaps has made as much impact on the world of publishing as anything since Gutenberg's printing press.

According to a report from the Association of American Publishers ("AAP") in June of 2014, the book publishing industry generated \$27.01 billion in net revenue for the year 2013, which translates to the sale of 2.59 billion units during that time. The "trade" sector, which is comprised of general consumer fiction and non-fiction, made up a majority of both revenue and volume.

E-book sales hit a record high during that same year, although the growth slowed somewhat over the prior year, accounting for 30% of unit sales for the first half of 2013, which represented 14% of consumer spending on books.¹ That number was essentially flat from the prior year, but it represented a 43% increase



over the year 2011. Just to give you an idea of how e-book sales have exploded, in 2008, when the AAP first started tracking e-book sales, roughly 10 million were sold. In 2012, that number shot up to 457 million.²

A Pew Research project from earlier this year revealed that the percentage of American adults who read an e-book in 2013 rose to 28% from 23% the prior year, while the percentage of American adults who read a physical book was roughly 70%, up four percentage points after a minor dip the year before. Additionally, 42% of American adults own some kind of e-book reader, be it a Nook, Kindle, or iPad, and

¹ <http://www.publishersweekly.com/pw/by-topic/digital/retailing/article/59194-signs-of-stability.html>; that apparent disparity is attributable to the fact that e-book prices are significantly lower than the prices of physical books.

² I'll leave it up to the math majors to figure out the percentage increase that represents; I was a political science major.

roughly 50% of Americans (of all ages) own such a device. In 2013, publishers' revenue from "Online Retail" (defined as either physical or digital products sold online) exceeded revenue from all brick-and-mortar sales outlets combined.

With those changes in the times and technology comes the inevitable in our modern society: litigation. And no litigation more significantly impacted the world of publishing and the distribution of books than the anti-trust lawsuit filed in 2012 by the Department of Justice against Apple, Inc. and five of the six largest publishers in the world. It is a cautionary tale of authors and agents and books and technology and publishers and retailers.

And consumers. Mustn't forget the consumers. Ultimately, it is a tale of power.

I. THE TRADITIONAL PUBLISHING PROCESS AND PHYSICAL BOOKS

In the traditional world of publishing, the process starts with a writer – a solitary, anti-social person with little to no social skills³ – isolated in a lonely room, banging out words on a word processor and hopefully stringing those words together in such a way that, someday, somebody will ultimately pay good money just to read them. For the vast majority of writers, that's a pipe dream, but who knows? Lightning does actually strike every now and then.

Once the manuscript is completed, writers then engage in a form of torture known as the query process, in which they send out letters to literary agents, pleading with them to just read what they have written, sure that the brilliance of their written words, alone, will convince an agent to find a place to get those words published.

Query letters run the gamut from the professional ("I am seeking representation for my 90,000 word medical thriller") to the threatening ("If I ever suspect that you have stolen my work I will call my Harvard-trained lawyer to see what my next step should be"⁴) to the grandiose ("When you see how great it is, put it on your schedule to market it; I would like at least \$800,000"⁵) to the downright pitiful ("I'm 34, having trouble finding work and am living with my parents."⁶)

Most agents say "no," but a few lucky manuscripts get accepted for agency representation.

³ Q: How can you tell an extroverted writer?

A: He looks at *your* shoes when he talks to you.

⁴ These are excerpts from actual query letters that I have received. This one threatening to sic a Harvard-trained lawyer on me still brings me nearly to tears.

⁵ So would I.

⁶ I have often wondered if this one actually came from *Seinfeld* character George Costanza.

The agents then submit those manuscripts to acquisition editors at publishing houses, who also usually say no, but every now and then a second bolt of lightning strikes and a publishing contract is offered. A deal is struck whereby the publisher agrees to pay the author a royalty (usually somewhere between 7% and 15% of the list price, depending on whether it's softcover or hardcover), maybe even an advance, and the author agrees to pay the agent a commission, usually 15%. An editor is assigned to work with the author to get the manuscript in publishable form as a book and a release date is set, then the publisher prints, binds, and distributes the finished book. Publisher costs on print books include such things as author royalties, printing costs, distribution fees, and marketing costs. With a little luck, the publisher even commits to putting some marketing money and muscle behind the book, and it's off to the races.

II. E-BOOKS AND CHANGES IN THE TRADITIONAL WORLD

The process for e-books starts out pretty much the same way as the traditional world of physical books. However, e-books generally sell for much less than print books, and royalties are typically higher (generally 25% or more), because the associated costs are minimal – no printing and distribution or warehousing fees.

Publishers also usually have their own e-sales outlets for e-books in the form of their publisher websites, but they typically rely on outside retailers to take care of sales, just as they do with physical books. Another difference is that brick-and-mortar stores aren't needed to sell e-books, which are simply downloaded from various "e-retailers," such as Barnes & Noble and Amazon, that also sell physical books.

III. THE WHOLESALE MODEL

The way things traditionally worked for both physical books and e-books was that the publishers set a list price, then sold their books to retailers for a wholesale price that was typically a percentage of the list price. The retailers could then mark up the books as they chose, essentially determining their own profit margin.

The wholesale price was usually 50% off the list price for physical books, but then the publishers typically discounted that wholesale price by 20% for e-books because costs were less than for physical books and e-retailers couldn't justify higher retail prices. So, for example, a hardcover book that had a list price of \$26.95 would have a wholesale price of \$13.47 and an e-book wholesale price of \$10.78. The math was easy, and the e-retailers simply had to decide how much profit they wanted to make from each sale.

IV. THE FIRST EIGHT HUNDRED POUND GORILLA⁷

Since the early days of publishing, the industry in the United States has long been dominated by the major publishers located in New York City, much like the epicenter of the movie business is in Los Angeles. Although the number of publishers has varied over the years, shrinking with mergers, the godfathers of publishing in the relevant time frame were the heads of the Big Six (now Five)⁸ publishing conglomerates: Hachette Book Group, Inc. (formerly known as Warner Books, owned by Hachette Livre, the largest publishing company in France); HarperCollins Publishers, LLC (owned by News Corporation); Verlagsgruppe Georg von Holtzbrinck, d/b/a MacMillan (which includes St. Martin's Press and Henry Holt and Co.); Penguin Group (USA), Inc. (owned by Pearson, an international media company in the UK); Random House (owned by Bertelsman AG, a global media firm based in Germany); and Simon & Schuster, Inc. (owned by CBS Corporation).

In 2010, the Big Six garnered 60% of revenue from all print, or physical, books sold, and 85% from *The New York Times* bestsellers. They were also responsible for over 50% of all e-books sold in the United States. Collectively, they were the proverbial eight hundred pound gorilla in the world of book publishing.

For purposes of our cautionary tale, the key players for this particular eight hundred pound gorilla (represented by five of the Big Six) are:

- David Shanks – CEO of Penguin
- David Young – Chairman and CEO of Hachette
- Brian Murray – CEO of HarperCollins
- Carolyn Reidy – President and CEO of Simon & Schuster
- John Sargent – CEO of Macmillan

V. AMAZON: ANOTHER EIGHT HUNDRED POUND GORILLA⁹

First started in 1994 by Jeff Bezos in his garage in Bellevue, Washington, to sell and ship books, Amazon went public in 1997. In 2007, Amazon introduced the Kindle and opened up the world of e-books, which was the first step on the journey that led to 2012's anti-trust lawsuit. It has now grown into a behemoth that sells

and ships almost everything, and even employs its own drones to ensure deliveries within 30 minutes.¹⁰ In 2013, Amazon led the e-retailer market with 29% of market share, ahead of second place Barnes & Noble.¹¹

By 2009, Amazon controlled 90% of the e-book market and was responsible for 80% of the Big Six's e-book sales. With control of the e-book market pretty well locked up, Amazon did the unthinkable, as far as the Big Six was concerned: In late 2008, it put in place a discount pricing strategy, selling new releases and bestsellers for the low, low price of \$9.99.

As I noted above, the wholesale price at which publishers sold to e-retailers was typically 50% for physical books, with that price discounted another 20% for e-books. Doing the math,¹² a hardcover book that had a list price of \$26.95 would have a wholesale price of \$13.47 and an e-book wholesale price of \$10.78. On the whole, Amazon's \$9.99 price was quite often less than the wholesale price it paid for e-books. So why did Amazon price e-books so low? It was all about solidifying its hold on the market share. Other e-retailers had no choice but to follow suit or be totally locked out of the market.

VI. THE THREE MOST IMPORTANT THINGS IN E-BOOK SALES: PRICING, PRICING, PRICING

The Big Six were, to put it mildly, unhappy with Amazon's pricing. You might think that it was no skin off their noses because they still commanded the same wholesale price from Amazon and the other e-retailers, and even stood to increase sales if the buying public could pay less for their books. But the Big Six were more concerned about the Big Picture.

Hardcover books were by far their most profitable product, even over mass market and trade paperback, and the Big Six feared that rock bottom prices for e-books would cut into sales of physical books. Carolyn Reidy of Simon & Schuster would later explain the concern in prepared remarks she delivered to her board of directors in late January of 2010:

“You are probably asking why we have objected to the \$9.99 price if we are not losing any money on the sales, and that's because we feel it will ultimately be destructive to our industry. We believe it is destructive to retailers – both the retailer of our physical books, because it creates such a large disparity between the pricing of

⁷ Q: Where does an 800 pound gorilla sleep?

A: Anywhere it wants.

⁸ Random House and Penguin have now combined, reducing six to five.

⁹ Q: What do you call an 800 pound gorilla?

A: Anything he wants to be called.

¹⁰ <http://www.amazon.com/b?node=8037720011>

¹¹ <http://www.publishersweekly.com/pw/by-topic/digital/retailing/article/59194-signs-of-stability.html>

¹² Who knew there would be so much math?

physical and electronic books, and the eRetailer, because in order to compete any seller must also lose money on sales. We believe it is destructive to authors because it devalues intellectual property, assumes all books are ‘worth’ the same amount, and doesn’t differentiate between author, subject, content or timing. And we believe it is destructive to publishers because at the end of the day it takes control of our business away from us and creates the danger of disintermediation as authors, in order to preserve their income, decide they don’t need publishers.”

If the pricing domino fell, it could threaten the viability of brick-and-mortar stores, where their hardcover books were displayed and sold, and might even lower prices generally in the book business. In effect, they were worried that Amazon’s low pricing would erode the value, in the public’s collective mind, of books as a whole, on the theory that you get what you pay for.

Worse yet, the Big Six was already afraid of Amazon’s increasing dominance in the book distribution business. With an 800 pound gorilla rapidly eating its way up to being a 1,000 pound gorilla, they worried that Amazon might even begin to compete with them by going after authors directly for the rights to their books – an idea known as “disintermediation,” or, in layman’s terms, removing the middleman and allowing direct access.¹³

Carolyn Reidy expanded on disintermediation in her prepared remarks to her board:

“But for me the biggest danger from the digital world is the threat of disintermediation. When we published *Riding the Bullet*, Matt Lauer on the Today Show asked me – what does Stephen King need S&S for? Couldn’t he have published this electronically all by himself? Well, the answer back then was ‘yes, he could, if he wanted to bother.’ And that’s true today, too. So more than ever we need to prove our

value to our authors on a continual basis. And we need to be alert to retailers who try and get between us and our authors – as it sometimes seems they are trying to do.”

The Big Six knew that they had to do something about Amazon, and they had to do it fast. As David Young of Hachette would later say, the Big Six had to defeat Amazon’s pricing to prevent the “wretched \$9.99 price point becoming a *de facto* standard.”

The CEOs of the Big Six met on a fairly regular basis in 2009 to discuss various issues that faced them as publishers, but the discussions invariably rolled around to Amazon and its pricing. They considered various strategies to defang Amazon, including the elimination of the 20% discount on the wholesale price of e-books. That would mean Amazon would have to pay the same wholesale price for e-books that it did for physical books, often several dollars above the \$9.99 price. Remarkably, Amazon seemed content to take that hit and maintain its pricing.

Another option discussed was a process called “windowing” of new releases. Under that practice, the Big Six would release physical copies of books at one time, but withhold or delay the release of e-book versions rather than release them simultaneously. In other words, they would create different “windows” of time for release. The goal was to get buyers to splurge for hardcover books without having to wait months for the release of the e-books.

The Big Six’s CEOs were in communication with each other along the way about windowing. For example, Hachette’s Young emailed Arnaud Nourry, Chairman and CEO of Hachette’s French parent company, in the fall of 2009 that “confidentially, Carolyn [Reidy, of Simon & Schuster] has told me that they are delaying the new Stephen King, with his full support, but will not be announcing this until after Labor Day.” Aware that he was on shaky ethical ground, Young added that “it would be prudent for you to double delete this from your email files when you return to your office.”

On December 9, 2009, the *Wall Street Journal* reported:

“Simon & Schuster is delaying by four months the electronic-book editions of about 35 leading titles coming out early next year, taking a dramatic stand against the cut-rate \$9.99 pricing of e-book best sellers. A second publisher, Lagardere SCA’s Hachette Book Group, said it has similar plans in the works.”¹⁴

¹³ Who can forget “The Soldier in White” in Joseph Heller’s classic *Catch-22*. In the hospital, wrapped in bandages from head to foot, clear fluids from a jar dripped into him via a tube, while another tube drained clear fluids from him into another jar. Changing the jars was easy: When one was full and the other was empty, Nurse Cramer simply uncoupled the jars from their respective tubes and reconnected them to each other. As an artillery captain in the hospital, with whom the book’s hero, Yossarian, played chess, put it: “Why can’t they hook the two jars up to each other and eliminate the middleman? What the hell do they need him for?” *Catch-22* at Chapter 17.

¹⁴ “Two Major Publishers to Hold Back E-Books,” Jeffrey A. Trachtenberg, *Wall Street Journal*.

The article quoted David Young as saying, “We’re doing this to preserve our industry. I can’t sit back and watch years of building authors sold off at bargain-basement prices. It’s about the future of the business.”

The New York Times published its own story that suggested the windowing effort was broader than just Simon & Schuster and Hatchette, and named HarperCollins and Macmillan as also being involved to some degree. Macmillan was actually only windowing a few titles at the time, but announced in December that it would begin delaying all of its e-books for 90 days. Ironically, John Sargent, its CEO, didn’t like the practice, even though he had committed Macmillan to it – at least temporarily.

On December 14, 2009, *New York Times* bestselling novelist Lisa Scottoline emailed Sargent:

“. . . I understand the wish to delay the pub of an e-book to preserve hardcover sales, but if I ruled the publishing world, I’d flip the whole thing and embrace e-books. I’d pub the e-book at the same time as the hardcover and pray to God they both sell like crazy.”

Sargent replied:

“I couldn’t agree more. Windowing is entirely stupid. The only reason to do it is for the short term impact. Said another way, Amazon promised their Kindle buyers two things: \$9.99 and most of the books on the Times list. Well, looks like they will not be able to keep both promises.”

Amazon’s response was a pithy statement on its website that said:

“Authors get the most publicity at launch and need to strike while the iron is hot. If readers can’t get their preferred format at that moment, they may buy a different book or just not buy a book at all.”

By the end of the year, the only two of the Big Six that had not announced a windowing policy were Penguin and Random House. All of the Big Six, however, realized that windowing was not the real solution to their problem. Some of them even recognized that windowing was creating another problem: piracy. As Carolyn Reidy reported to her board:

“And of course there is the danger of electronic versions being copied and distributed across the internet – which is the

reason why all eBooks currently have DRM¹⁵ and are not lendable or shareable – which frustrates consumers, but until we can figure out the piracy question, will not change.”

The Big Six would also come to realize that the Amazon statement was, in fact, correct; a study by Penguin showed that customers simply didn’t buy those books that had been windowed. It was a case of cutting off their noses to spite their faces.

VII. YET ANOTHER EIGHT HUNDRED POUND GORILLA ARRIVES ON THE SCENE¹⁶

As of 2009, Apple, Inc. had devices available in the marketplace upon which customers could read e-books, but it didn’t have its own e-reading software, so owners of its devices had to get that software from third-parties. What it did have on the launching pad, though, was the iPad. Recognizing that the trade book market was a multi-billion dollar pond, and that Amazon was the biggest fish in that pond, but also clued in to the notion that content owners, such as the Big Six, did not have warm and fuzzy feelings toward Amazon, Apple found itself poised to dive in full force. Not only would the iPad provide e-reading software, it would also have the capability to display illustrations and photographs in color, as well as provide audio and video, and have a touchscreen. What more could a reader want?

Well, a reader would want access to all the current new releases from major publishers, such as the Big Six.

Under the leadership of Eddy Cue, Senior V.P. of Internet Software and Services, by November of 2009, Apple had compiled an internal outlook for audio and e-book opportunities, and it had also learned from analyst reports that \$12.99 was an almost ideal price point for e-books. That was certainly more profitable than Amazon’s \$9.99, but as long as the lower figure was out there in the marketplace, it would make it difficult to compete at the more “ideal” number.

But \$12.99 was just the kind of number to attract an alliance from the Big Six. The one thing that Apple lacked, but desperately wanted before launching the iPad, was an e-bookstore to go live along with the device. It planned to demonstrate the iPad in January of 2010 and to ship devices to stores in April of that

¹⁵ “DRM” refers to “Digital Rights Management,” which is a technology to prevent copying of digital content.

¹⁶ Q: If an 800 pound gorilla comes into a room, where does it sit?

A: Anywhere it likes.

year. That left it roughly two months to negotiate and execute agreements with the Big Six for content to sell through its e-bookstore.

In December, Cue's team from Apple contacted the CEOs of the Big Six to set up a series of meetings to discuss something "extremely confidential." That set off a flurry of phone calls between execs of the Big Six, who anticipated that the meetings would involve some exciting new device from Apple. Meeting with the Big Six one at a time, Cue was prepared to buy books on the wholesale model and sell them at prices up to \$14.99. The one caveat, though, was that Cue would not commit to launching Apple's e-bookstore unless all of the Big Six signed on.

The meetings turned out to be as educational for Cue as they were for the Big Six. For his part, Cue learned that the current wholesale prices for most e-books were in the \$13-15 dollar range. For Apple to make a go of it even at \$11.99 - 14.99, the publishers would have to lower their wholesale prices. Unlike Amazon, which already pretty much had the market locked up and could afford to take a loss, Apple was not prepared to follow suit. Apple also told the publishers that it was against windowing, because Apple believed the process alienated customers.

Against this backdrop, Hachette, and later HarperCollins, proposed an agency model to Apple, as opposed to a wholesale model, for distributing e-books. Cue rejected the notion initially, but changed his mind a few days later and developed his own proposal to make to the Big Six. Under Apple's proposed agency model, which was similar to the way Apple sold apps through its App Store, the publishers would set the e-book sales price, themselves, and then pay Apple, as the "agent," a 30% commission. It appeared to be a win-win proposition, because it would allow the publishers to control pricing, but it would also ensure that Apple would make a profit.

There were two possible hitches in the concept, both of which Apple addressed up front in an effort to head off problems later. The first was Apple's concern that the publishers would set the retail prices too high and alienate buyers. Its proposed solution was to suggest pricing tiers with caps.

The second hitch was that Amazon would still be selling e-books at \$9.99, which would put Apple at a competitive disadvantage. To deal with that, the other component of its proposal was a requirement that the Big Six move all of their e-retailers, including Amazon, to the same agency model. That would prevent Apple from being put at a disadvantage, but Cue felt that it would also appeal to the publishers because it would fix their problem with Amazon. If Amazon did not go along with it, the publishers could cut them off, and Apple would step into the void and pick up the sales slack.

Because Hachette and HarperCollins had

previously suggested an agency model, Cue figured that they would most likely agree to his proposal, or at least some form of it. He also believed that Penguin's CEO, David Shanks, would go along with the others, so he put those three on the back burner and focused his initial efforts on Simon & Schuster, Macmillan, and Random House. He particularly wanted Random House, the largest publisher, on board.

And so, after his meetings in December, Cue sent term sheets to all of the Big Six, with the same terms (see Appendix A):

- For hardcover books retailing for less than \$35, the publisher could set an e-price of its choice up to \$12.99.
- For any book with a retail price more than \$35, the price cap would be \$14.99.
- For mass-market or trade paperbacks, the price would be capped at \$9.99.
- A 30% commission for the e-retailer.
- All e-retailers would have to adopt this agency model.

On January 10, 2010, Apple added another wrinkle, in the form of a "most favored nations" ("MFN") requirement. This was its way of forcing the Big Six to adopt the agency model for all of its e-retailers without making that an explicit requirement. Under this MFN requirement, Apple essentially took away the publishers' discretion on pricing. Unless the Big Six converted all of their e-retailers to a similar agency model, Apple could still sell their e-books at the lowest prices offered by any of their competitors. Having added the MFN to its proposal, Apple then dropped the specific requirement that all e-retailers had to adopt the model because, as Cue was later reported to have said, "any decent MFN forces the [agency] model."¹⁷

On January 11, Apple sent a draft of its proposed distribution agreement to each of the Big Six, which included the MFN, price tiers, the 30% commission, and a commitment to prohibit windowing. Although some minor terms were changed during negotiations by the various publishers, the material terms were the same for all of them.

The main deal points were:

- **MFN:** The proposed MFN read:

"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

¹⁷ This language appeared in an email from Pete Alcom, one of Cue's colleagues at Apple, but at trial, Cue denied having said it. (Appendix B)

(‘Other Customer Price’), the Publisher shall designate a new, lower Customer Price to meet such Other Customer Price.”

Financially, the wholesale model was more profitable for publishers because the publisher typically received 50% of the *list* price, while under the agency model, it received 70% of the *retail* price. For example, if the hardcover list price was \$26, the wholesale price would be \$13 and the publisher’s take would also be \$13. However, if the e-book retail price was \$12.99, the publisher’s take would be \$9.10. Obviously, then, it didn’t make sense for any of the publishers to adopt Apple’s agency model unless there was some long term benefit. The goal, of course, was to act in concert to force Amazon to increase its e-book prices, which is what the MFN assured that they would have to do.

- **30% commission:**

There were some efforts among the publishers to get Apple to reduce its commission to 20%, but Apple hung tough at 30%.

- **Price tier:**

The draft agreement capped e-book prices at \$12.99 for New Release hardcovers priced retail at \$30 or under, and \$14.99 for those priced above \$30, with incremental increases allowable for each \$5 increase in the retail price. For non-New Releases, the price was capped at \$9.99. Through a series of negotiations, those caps were changed, albeit not significantly. The retail price triggers were slightly reduced for the \$12.99 (retail between \$25.01 and \$27.50) and \$14.99 tiers (retail between \$27.51 and \$30), but *New York Times* bestsellers were carved out for those tiers at the originally proposed list prices. Although there was still some push-back from the publishers, those tiers were ultimately adopted in the final agreements.

As of January 16, 2010, no publisher had yet executed a distribution agreement, and Apple’s launch date was just eleven days away. It set a deadline for the publishers of January 21, but allowed them a little extra time. By January 26, all but Random House had executed an agreement.¹⁸

¹⁸ See Appendix C for an example of the Distribution Agreements; this one is with Penguin.

VIII. AMAZON REACTS TO THE AGENCY MODEL¹⁹

Most of what transpired between Apple and the publishers took place in secret, but word managed to leak out anyway. On January 18, 2010, the *Wall Street Journal* ran an article entitled “Publisher in Talks With Apple Over Tablet,”²⁰ which reported that HarperCollins was in negotiations with Apple and was “expected to set the prices of the e-books . . . with Apple taking a percentage of sales.” It also said:

“The HarperCollins negotiations with Apple represent a direct challenge to Amazon, which dominates the fast-growing e-book market but which could face significant competition from an Apple tablet.”

A day later, *Publishers Lunch* also reported on the negotiations between the Big Six and Apple. By the evening of January 19, Madeline McIntosh, Chief Operating Officer of Random House, told her former colleague Laura Porco, VP of Kindle Content at Amazon, that it looked like the other five publishers in the Big Six, except Random House, were negotiating agency agreements with Apple and that Random House was being pressured to do likewise.

In response, Amazon went on the offensive and did exactly what the publishers feared: they appealed directly to authors; i.e., disintermediation.²¹ On January 20, it announced to authors and other e-book publishers that, for e-books sold on Amazon at a list price between \$2.99 and \$9.99, they could receive a 70% royalty. At that point, typical royalties for e-books were 25% so, for instance, on an e-book selling through one of the Big Six at a price tier cap of \$12.99, an author would receive \$3.24 per book. However, at 70% of a book selling for \$9.99, the author would receive a royalty of \$6.99 – and would quite possibly sell more books.

The publishers responded by demanding that Amazon move to an agency model. As HarperCollins put it, in a less-than-veiled e-mail threat to Amazon:

“. . . If I could get your support to this kind of agency model in principle, I have less need to support other partners who wish to enter the ebook business. As I mentioned we haven’t made any decisions yet about how we will sell ebooks to

¹⁹ In summary: not well.

²⁰

<http://online.wsj.com/news/articles/SB10001424052748704541004575011092145509872>

²¹ See anecdote above about Heller’s “Soldier in White.”

consumers yet, but decision time is approaching.”

The communication ended with a more direct threat: If Amazon didn't move to an agency model, HarperCollins would delay all of its e-books for six months; i.e., windowing.

Perhaps HarperCollins can be forgiven for its ham-handed tactics, but it had been subjected to similar tactics, itself – from Apple. It was the last of the five publishers to sign an agency agreement, and Eddy Cue called on Apple founder and icon Steve Jobs to close the deal. On January 23, Jobs had emailed James Murdoch of News Corp, HarperCollins's parent, and said:

“Analysts estimate that Amazon has sold slightly more than one million Kindles in 18+ months (Amazon has never said). We will sell more of our new devices than all of the Kindles ever sold during the first few weeks they are on sale. If you stick with just Amazon, B&N, Sony, etc., you will likely be sitting on the sideline of the mainstream ebook revolution.”

In response to concerns from Murdoch, Jobs concluded on January 24 that HarperCollins had only these choices:

- “1) Throw in with Apple and see if we can make a go of this to create a real mainstream ebooks market at \$12.99 and \$14.99.
- 2) Keep going with Amazon at \$9.99. You will make a bit more money in the short term, but in the medium term Amazon will tell you they will be paying you 70% of \$9.99. They have shareholders too.
- 3) Hold back your books from Amazon. Without a way for customers to buy your ebooks, they will steal them. This will be the start of piracy and once started there will be no stopping it. Trust me, I've seen this happen with my own eyes.”

On January 26, HarperCollins became the fifth, and final, publisher to sign with Apple.

The next day, Apple launched its iPad and iBookstore. Following the launch, the *Wall Street Journal's* Walt Mossberg asked Jobs why people would pay \$14.99 to purchase an e-book that was selling at Amazon for \$9.99. Jobs responded “That won't be the case. . . . The prices will be the same,” and explained that “publishers will actually withhold

their [e]books from Amazon . . . because they are not happy with the price.”

Simon & Schuster General Counsel emailed company CEO Carolyn Reidy on January 29 about the Jobs quote and said:

“I cannot believe that Jobs made the statement below. Incredibly stupid.”

IX. A FREE-FOR-ALL OF EIGHT HUNDRED POUND GORILLAS²²

John Sargent, CEO of Macmillan, was the first publisher to meet with Amazon after the Apple launch and the execution of the distribution agreements. By all reports, he didn't expect things to go swimmingly with Amazon, but he at least had the decency to deliver the news in person that his company had, in fact, signed a deal with Apple. As he wrote in a January 28 email to a colleague who asked what he thought of the iPad:

“It made my life hell for the last three weeks. But it gave us the chance to change the entire business model for digital books. Am on my way to Seattle to get my ass kicked by Amazon. The device rocks.”

In Seattle, Sargent presented Amazon with an ultimatum: Switch to the agency model or Macmillan would withhold e-book versions of its New Releases from Amazon for seven months.²³ In response, Amazon removed the “buy” buttons on its site for both e-book and print versions of all Macmillan books. It seemed like a tantalizingly diabolical move: Customers could view the titles on Amazon's site but simply couldn't buy them.

Sargent responded on January 30 by posting an open letter to Macmillan's authors, illustrators, and literary agents in *Publishers Marketplace*.²⁴ His letter said:

“This past Thursday I met with Amazon in Seattle. I gave them our proposal for new terms of sale for e books under the agency model which will become effective in early March. In addition, I told them they could stay with their old terms of sale, but that this

²² Q: What do you do when an 800 pound gorilla asks you to dance?

A: Run.

²³ Seven months was the term in the Apple agreement for which titles were designated “new releases.”

²⁴

http://www.publishersmarketplace.com/lunch/macmillan_30_jan10.html

would involve extensive and deep windowing of titles. By the time I arrived back in New York late yesterday afternoon they informed me that they were taking all our books off the Kindle site, and off Amazon. The books will continue to be available on Amazon.com through third parties.

I regret that we have reached this impasse. Amazon has been a valuable customer for a long time, and it is my great hope that they will continue to be in the very near future. They have been a great innovator in our industry, and I suspect they will continue to be for decades to come.

It is those decades that concern me now, as I am sure they concern you. In the ink-on-paper world we sell books to retailers far and wide on a business model that provides a level playing field, and allows all retailers the possibility of selling books profitably. Looking to the future and to a growing digital business, we need to establish the same sort of business model, one that encourages new devices and new stores. One that encourages healthy competition. One that is stable and rational. It also needs to insure that intellectual property can be widely available digitally at a price that is both fair to the consumer and allows those who create it and publish it to be fairly compensated.

Under the agency model, we will sell the digital editions of our books to consumers through our retailers. Our retailers will act as our agents and will take a 30% commission (the standard split today for many digital media businesses). The price will be set for each book individually. Our plan is to price the digital edition of most adult trade books in a price range from \$14.99 to \$5.99. At first release, concurrent with a hardcover, most titles will be priced between \$14.99 and \$12.99. E books will almost always appear day on date with the physical edition. Pricing will be dynamic over time.

The agency model would allow Amazon to make more money selling our books, not less. We would make less money in our dealings with Amazon under the new model. Our disagreement is not about short-term profitability but rather about the long-term viability and stability of the digital book market.

Amazon and Macmillan both want a healthy and vibrant future for books. We clearly do not agree on how to get there. Meanwhile, the action they chose to take last

night clearly defines the importance they attribute to their view. We hold our view equally strongly. I hope you agree with us.

You are a vast and wonderful crew. It is impossible to reach you all in the very limited timeframe we are working under, so I have sent this message in unorthodox form. I hope it reaches you all, and quickly. Monday morning I will fully brief all of our editors, and they will be able to answer your questions. I hope to speak to many of you over the coming days.”

Sargent realized he had helped create a controversy, emailing Penguin’s John Makinson: “I have stepped into a shitstorm.” Steve Jobs, on the other hand, seemed to relish his role, emailing Eddy Cue that “We have definitely helped stir things up in the publishing world.”

In this battle of the 800 pound gorillas, Amazon blinked first. Recognizing that it wasn’t contending just with Macmillan, but with five of the Big Six, and under intense criticism from customers and publishers, compounded by a dip in its stock price, Amazon buckled. On January 31, it issued a public statement to customers on its website that said:

“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 versions of bestsellers and most hardcover releases.

We have expressed our strong disagreement and the seriousness of our disagreement by temporarily ceasing the sale of all Macmillan titles. We want you to know that ultimately, however, we will have to capitulate and accept Macmillan’s terms because Macmillan has a monopoly over their own titles, and we will want to offer them to you even at prices we believe are needlessly high for e-books. Amazon customers will at that point decide for themselves whether they believe it’s reasonable to pay \$14.99 for a bestselling e-book. We don’t believe that all of the major publishers will take the same route as Macmillan. And we know for sure that many independent presses and self-published authors will see this as an opportunity to provide attractively priced e-books as an alternative.

Kindle is a business for Amazon, and it is also a mission. We never expected it to be easy.

Thank you for being a customer.”²⁵

Notwithstanding Amazon’s backdown from Macmillan, the other publishers worried how Amazon might react to them. On February 11, Carolyn Reidy wrote to Les Moonves, President and CEO of CBS Corporation, Simon & Schuster’s parent company, and told him that “I believe within a few weeks Amazon will try and punish us in some way.” She added:

“Amazon did come to terms with Macmillan on an agency approach, it appears, and in fact stated publicly that it would have to give in to Macmillan’s demands for higher prices because of Macmillan’s monopoly on its titles (of course we call it copyright). Their settlement with Macmillan was very quick and we believe it was because of the backlash on their actions was so strong and negative.”

While Amazon did send a complaint letter to the Federal Trade Commission²⁶ about the conduct of Apple and the publishers, it nevertheless negotiated an agency agreement with Macmillan. One by one, Amazon then executed agency agreements with the other of the publishers, with Penguin being the last to sign, on June 2. All of the agreements had similar terms, but different termination dates, ranging from eighteen months to three years. The idea on termination dates was to ease the potential of future collective action by the publishers by having each agreement reach its expiration date at different times. The agreements also contained a “model parity” clause that permitted Amazon to return to the wholesale model if any of the publishers agreed to such an arrangement with any other e-retailer.

X. UP, UP, AND AWAY

As expected, after signing agency agreements with Apple, the publishers almost immediately raised their e-book prices to at or near the tier caps. Within two weeks, the average price increase for e-books from the five publishers was 14.2% for New Releases, 42.7% for *New York Times* bestsellers, and 18.6% across the board. Interestingly, some hardcover prices were also raised, a move that bumped those books into the next higher price tier for e-books. Professor Richard Gilbert²⁷ prepared the following chart for the

Department of Justice to show increases just on Amazon, alone.²⁸

Amazon Weighted Average Price Increases

Publisher	All eBooks	New Releases	NYT Bestsellers	Backlist
Hachette	33.0%	14.1%	37.9%	37.5%
HarperCollins	13.6%	12.5%	44.0%	15.2%
Macmillan	11.6%	14.0%	-	11.2%
Penguin	18.3%	19.5%	43.6%	17.6%
Simon & Schuster	18.0%	15.1%	28.7%	19.8%
Defendant Publishers	18.6%	14.2%	42.7%	19.6%
Random House	0.01%	1.9%	0.2%	0.3%
Non-Majors	-0.2%	-0.9%	1.1%	0.1%

It’s probably not surprising that sales took a dip after the prices were raised. According to Judge Cote’s Opinion and Order signed on July 10, 2013, in the anti-trust litigation, the publishers who went to the agency model in April of 2010 suffered a 12.9% decrease in number of units sold in a two-week period after entering into the agreements, and another report showed a 14.5% decrease relative to Random House, which had not yet shifted to the agency model.

Ah, yes, Random House. In early 2011, it finally converted to an agency model, raised its prices, and then saw an almost immediate drop in e-book sales. Interestingly, prior to joining the party, Amazon continued to sell Random House’s New Releases and *New York Times* bestsellers at \$9.99 and, during that period, Random House’s sales increased, as did its market share.

XI. MORE BIG GORILLAS

On April 11, 2012, the biggest gorilla of all, the United States of America, filed suit in the United States District Court for the Southern District of New York against Apple, Hachette, HarperCollins, Macmillan, Penguin, and Simon & Schuster, alleging that Apple had conspired with the publisher defendants to limit e-book price competition, in violation of the Sherman Act, and it sought equitable relief under 15 U.S.C. §4 and injunctive relief under 15 U.S.C. §1.

A group of smaller gorillas²⁹ filed a similar suit in the Western District of Texas, Austin Division, against Apple, Penguin, Macmillan, and Simon & Schuster. That action, filed “as *Parens Patriae*”³⁰ on Behalf of

²⁵

http://www.amazon.com/forum/kindle/Tx2MEGQWTNGIMHV?_encoding=UTF8&cdForum=Fx1D7SY3BVSESG&displayType=tagsDetail&ref_=cm_cd_tfp_ef_tft_tp

²⁶ Cue ominous music here.

²⁷ Professor Emeritus of Economics at Berkeley University.

²⁸ http://www.mediabistro.com/galleycat/doj-charts-agency-model-price-increases_b70460

²⁹ The states of Texas, Connecticut, Alaska, Arizona, Colorado, Illinois, Iowa, Maryland, Missouri, Ohio, South Dakota, Tennessee, Vermont, and West Virginia, and the Commonwealths of Pennsylvania and Puerto Rico.

³⁰ Defined by *Nolo’s Plain-English Law Dictionary* as: “Latin for ‘parent of his or her country.’ The power of the state to act as guardian for those who are unable to care for themselves, such as children or disabled individuals.”

Consumers,” was later consolidated with the action in New York, to be presided over by U.S. District Judge Denise Cote.

In the action filed in New York, the government also named as co-conspirators “[v]arious persons, who are known and unknown to Plaintiff, and not named as defendants in this action, including senior executives of the Publisher Defendants and Apple”³¹ John Sargent of Macmillan apparently took offense because, that same day, he sent another letter to “authors, illustrators and agents” protesting his innocence. He noted that Macmillan had been in settlement discussions with the government for months, but had decided not to settle because the “terms the DOJ demanded were too onerous.”

He also stated:

“When Macmillan changed to the agency model we did so knowing we would make less money on our e book business. We made the change to support an open and competitive market for the future, and it worked. We still believe in that future and we still believe the agency model is the only way to get there.

It is also hard to settle a lawsuit when you know you have done no wrong. The government’s charge is that Macmillan’s CEO colluded with others in changing to the agency model. I am Macmillan’s CEO and I made the decision to move Macmillan to the agency model. After days of thought and worry, I made the decision on January 22nd, 2010 a little after 4:00 AM, on an exercise bike in my basement. It remains the loneliest decision I have ever made, and I see no reason to go back on it now.”³²

John Makinson, Penguin’s chairman, also issued a statement, which said, in part:

“A responsible company does not choose a path of litigation with US Government agencies without carefully weighing the implications of that course of action. Nonetheless, countless hours discussing this issue with colleagues here at Penguin, as well as with our parent company, Pearson plc, have not led any of us to the view that we

should settle this matter. Indeed, alone among the publishers party to the investigations that resulted in today’s announcements, we have held no settlement discussions with the DOJ or the states.

We have held strongly to this view for two, and only two, reasons. The first is that we have done nothing wrong. The decisions that we took, many them of them costly and difficult, were taken by Penguin alone.

The second, and equally powerful, reason for our decision to place this matter in the hands of a court is that we believed then, as we do now, that the agency model is the one that offers consumers the prospect of an open and competitive market for e-books. We understood that the shift to agency would be very costly to Penguin and its shareholders in the short-term, but we reasoned that the prevention of a monopoly in the supply of e-books had to be in the best interests, not just of Penguin, but of consumers, authors and booksellers as well.

We are of course in the business of making money for our shareholders, but our purpose as a company is to make entertaining and intelligent books for readers of all ages and tastes. We shall not achieve either of those objectives in the absence of competition or choice. The decision we took in January 2010 to move Penguin’s e-book business to agency pricing has been vindicated by the very rapid subsequent growth in the volume of e-books sold by agency publishers, and by the benefit to consumers of the steep decline in the price of e-book readers that has resulted from this open competition.

Any other decision would have been a disservice in the long term to our staff and our shareholders, but also to the writers, booklovers, retailers and agents whom we serve.”

Notwithstanding such bold words from Penguin’s and Macmillan’s CEOs, over the course of the next several months, the government settled with the various publisher defendants. Hachette, HarperCollins, and Simon & Schuster went first, consenting to the entry of a final judgment against them on September 16, 2012. Under the terms of the judgment, the publishers were required to terminate their pre-lawsuit agreements with Apple and to notify any other e-retailer with whom they had contracts that restricted the e-retailer’s ability

³¹ See ¶22 if the Complaint.

³² The facts established, however, a multitude of communication between Sargent and the other publisher defendants during the relevant time period. I’m not sure how many of those phone calls, if any, took place while Sargent was on his exercise bike.

to set their own prices or contained a “Price MFN”³³ that those contracts could be terminated on 30 days’ notice. The settling publishers were also required to notify the Justice Department, on at least 60 days’ notice, of any new joint venture or business arrangement involving the sale, development, or promotion of e-books in the United States.

Additionally, the publishers were prohibited, for a period of two years, from restricting, or entering into any agreement that restricts, any e-retailer from setting its own prices for e-books, or “to offer price discounts or any other form of promotions to encourage customers to Purchase one or more E-books” They were also prohibited from entering into any agreement with any e-retailer that contained a Price MFN; from retaliating against any other e-retailer or e-publisher for engaging in the conduct that the judgment defendants were prohibited from engaging in; or from entering into any agreement or arrangement to fix or set retail or wholesale prices of e-books or any terms of their sale.

Lastly, the publishers were prohibited from communicating, directly or indirectly, with any other e-book publisher about business plans or strategies, including wholesale or retail pricing strategies, or terms of any of their agreements with book retailers (regardless of format) or their authors. They were also required to designate an “Antitrust Compliance Officer” responsible for ensuring compliance with the judgment and reporting to the Department of Justice, and to permit compliance inspections by the DOJ upon reasonable notice.

Penguin fell next, with the entry of a similar final judgment against it on May 17, 2013. Macmillan held out the longest but, on August 12, 2013, it consented to a final judgment on essentially the same terms as those entered against the other publisher defendants.

That left only Apple to go to trial.

XII. GORILLAS IN THE COURTROOM

A bench trial on liability was held before Judge Denise Cote from June 3 to June 20, 2013. Judge Cote delivered her 160-page Opinion and Order on July 10, 2013, stating right off the bat that “[t]his Opinion explains how and why the prices for many electronic books, or ‘e-books,’ rose significantly in the United States in April 2010.”

She also noted in her Summary of Findings:

³³ “Price MFN” is defined as a term in an agreement with an e-retailer under which the retail or wholesale price, or any discounts, or the revenue share or commission that the publisher receives, depends on the price or discounts on the prices, or the revenue share or commission received, of any other e-retailer.

“The Plaintiffs³⁴ have shown that the Publisher Defendants conspired with each other to eliminate retail price competition in order to raise e-book prices, and that Apple played a central role in facilitating and executing that conspiracy. Without Apple’s orchestration of this conspiracy, it would not have succeeded as it did in the Spring of 2010.”

Applying the law to the facts, Judge Cote found:

“The Plaintiffs have shown through compelling evidence that Apple violated Section 1 of the Sherman Act by conspiring with the Publisher Defendants to eliminate retail price competition and to raise e-book prices. There is overwhelming evidence that the Publisher Defendants joined with each other in a horizontal price-fixing conspiracy.”³⁵

Judge Cote based her ruling of a conspiracy on, among other facts, Steve Jobs’s admissions³⁶ and the “web of telephone calls among the Publisher Defendants’ CEOs surrounding each turning point in the presentation and execution of the Agreements.” A particularly striking illustration of this “web” can be seen on a demonstrative exhibit introduced by the government and that is attached as Appendix D; see also Appendix E. Compare this to Macmillan CEO Sargent’s protestations that he made this decision all by himself, alone on an exercise bike, in the wee hours of the morning.

Judge Cote also cited very strong circumstantial evidence, including:

³⁴ Remember that the Texas action, brought by various states (and later joined by even more), was consolidated with the New York action; hence the plural reference to Plaintiffs.

³⁵ Judge Cote, at page 107 of her Opinion and Order, wrote: “Generally speaking, price-fixing agreements or agreements to divide markets that are horizontal in nature – meaning that the parties to the agreement are ‘competitors at the same level of market structure,’ *Anderson News, L.L.C. v. American Media, Inc.*, 680 F.3d 162, 182 (2d Cir. 2012) (citation omitted) – are *per se* unlawful.”

³⁶ Those admissions included his answer to the *Wall Street Journal*’s Walt Mossberg, as well as statements included in his biography *Steve Jobs*, by Walter Isaacson. On page 503-504, Isaacson quotes Jobs as saying: “Amazon screwed it up. It paid the wholesale price for some books, but started selling them below cost at \$9.99 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.’”

- Each of the publishers shared the identical goal to raise e-book prices from \$9.99 to protect their print books.
- Within days of each other, the publishers demanded that Amazon adopt the agency model.
- The agency model protected Apple from price competition.
- Each agreement precipitated the rise in prices to the price caps almost simultaneously.
- The move to the agency model was against all of the publishers' "near-term financial interests," yet they all did it anyway.
- All of the publishers "acted in identical ways even though each was also afraid of retaliation by Amazon."

Apple argued that its conduct involved its own independent business interests and could legitimately be interpreted as having been "consistent with independent, unilateral action." Judge Cote disagreed, noting that the evidence established that Apple "made a conscious commitment to join a scheme with the Publisher Defendants to raise the price of e-books. . . Apple did not and could not have acted independently to achieve the results it achieved here."³⁷ Judge Cote noted that even though all of the individual terms or clauses were inherently legal, "that does not make it lawful for a company to use those business practices to effect an unreasonable restraint of trade."³⁸

Apple next contended that it didn't have any evil intent – that it never intended to conspire to raise prices of e-books. In fact, Apple pointed out, it was the publishers that actually raised those prices, and not Apple, and that all Apple did was to introduce a new device with innovative software. However, Judge Cote noted that from the start, Apple appealed to the publishers' desire to raise prices and to "create a mechanism and environment that enabled them to act together in a matter of weeks to eliminate all retail price competition for their e-books."³⁹

Apple then asserted that, but for its actions, the publishers would have "windowed," or delayed, their e-books. Judge Cote shot down that argument, as well, noting that there was no evidence that "windowing would have become widespread, long-lasting, or effective," and that "there was never any threat (before Apple encouraged one) to withhold all e-books." Judge Cote concluded that "it is ironic for Apple to claim credit for the end to windowing when it was Apple that encouraged the Publisher Defendants to present Amazon with a blanket threat of windowing for a

seven month period."⁴⁰

On September 5, 2013, Judge Cote entered "Plaintiff United States' Final Judgment and Plaintiff States' Order Entering Permanent Injunction," which contained similar terms to the prior judgments with the publisher defendants, and prohibited Apple from discriminating against ebook applications and from entering contracts with publishers that prevent e-retailers from discounting. She also appointed an external compliance monitor to review and evaluate Apple's compliance with the judgment.

XIII. GORILLAS REACH A SETTLEMENT

After entry of the final judgment on liability and remedy, the issue of damages against Apple remained to be tried. In the interim, Apple appealed both the finding of liability and the appointment of a compliance monitor. Macmillan and Simon & Schuster also appealed, contending that the provisions of the judgment that restricted Apple from entering into contracts that restrict discounting, but which would expire at six-month intervals for each of the publisher defendants, beginning two years after the entry of judgment, effectively amended their consent judgments, which imposed earlier termination dates.

A settlement was recently announced that is contingent upon the outcome of Apple's appeal from Judge Cote's ruling on liability. According to media reports, under the settlement, Apple could pay as much as \$450 million, but that amount could be reduced, or eliminated, depending upon what happens with Apple's appeal.

Apple issued this statement on July 16, 2014, to announce the settlement:

"Apple did not conspire to fix ebook pricing, and we will continue to fight those allegations on appeal. We did nothing wrong and we believe a fair assessment of the facts will show it. The iBooks Store has been good for consumers and the publishing industry as a whole, from well-known authors to first-time novelists. As we wait for the court to hear our appeal, we have agreed to a settlement which is contingent upon the outcome of the appeal. If we are vindicated by the appeals court, no settlement will be paid."

Now all we have to do is wait.

³⁷ Pages 129-130 of Opinion and Order.

³⁸ Page 132 of Opinion and Order.

³⁹ Page 135-136 of Opinion and Order.

⁴⁰ Page 141-142 of Opinion and Order.

XIV. WHAT AUTHORS HAVE TO SAY

Here's what some prominent authors have had to say about the fight between the gorillas:

- **Michael Connelly**, *New York Times* bestselling author of *The Lincoln Lawyer*:

"I'm in a bit of an awkward position because this has pitted my publisher against the retailer that far and away sells more of my books than any other. I don't want to bite the hand that feeds me, and both of these hands feed me. . . . I hope the government will be just as vigilant in guarding this amazing, creative and important industry from being monopolized by one entity. Amazon spreads my work far and wide. You can't beat that. I'm very grateful. But I don't want a world where there are no bookstores or other venues for discovering my work or the work of any other writers."

- **Scott Turow**, *New York Times* bestselling author of *Presumed Innocent* and president of the Authors Guild:

"Today's low Kindle book prices will last only as long as it takes Amazon to re-establish its monopoly. It is hard to believe that the Justice Department has somehow persuaded itself that this solution fosters competition or is good for readers in the long run."

- **Barry Eisler**, *New York Times* bestselling author of the John Rain series:

"Look, you can build a business by forcing your choices on consumers (commonly known as monopoly rents), or you can build one by figuring out what consumers would prefer — and giving it to them. Consumers like buying books online and they like digital books. You can argue that all such consumers are evil or that they're morons, but they like what they like, and innovative companies will try to serve them. That's what's going on here, and legacy players would do better to compete than to complain. They might still lose, but competing would at least be more dignified."

- **Joe Konrath**, self-published author of the Jack Daniels mystery series, who was named in 2011 as one of "5 eBook Authors to Watch" by *mediabistro.com*:

"If someone is going to dominate me, I'd prefer the dominator who can make me more

cash. That said, the whole 'What will happen when Amazon controls the world and creates robots that suck human blood' argument is silly. The Big 6 have been sucking my blood for a decade. We're supposed to fear what Amazon might do, while ignoring the teeth in our necks right now?"