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Two Years Is Too Long: The Two-Year Ban on the Agency Model Can Save the E-Book Industry but Ruin Bookstores

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TWO YEARS IS TOO LONG: THE TWO-YEAR BAN ON THE AGENCY MODEL CAN SAVE THE E-BOOK INDUSTRY BUT RUIN BOOKSTORES

I. Introduction

On April 11, 2012, the United States Department of Justice (DOJ) filed suit against Apple and five of the major publishers in the publishing industry: Hachette, HarperCollins, Macmillan, Penguin, and Simon & Schuster.[1] The suit alleged that the companies colluded to fix the prices of e-books, giving Apple a Most Favored Nation Clause (MFN), in violation of the Sherman Antitrust Act, 15 U.S.C. § 1.[2] The DOJ filed suit against Apple and these publishers, because it believed that these steps were made to give Apple an advantage as it attempted to enter the e-book market after other companies had already established themselves and gained a following.[3] The DOJ and three of the publishers, Hachette, HarperCollins, and Simon & Schuster, also filed a proposed settlement agreement.[4] In the settlement, which was approved by the Southern District of New York on Sep-

1. United States v. Apple, Inc., 889 F. Supp. 2d 623, 626 (S.D.N.Y. 2012).
2. *Id.*
3. *Id.*
4. *See id.*

tember 6, 2012, the publishers agreed to terminate their current agreements with Apple and to renegotiate the contracts with other e-book retailers in order to allow the retailers to lower book prices without restraint.[5] Apple, Macmillan, and Penguin maintained that they would not settle and would like to go to trial.[6] While it took a short amount of time for the parties to bring a settlement to the court and for the court to approve it, there are several serious flaws in the settlement that could result in trouble in the future. The settlement leaves open an opportunity for future investigations into anticompetitive conduct in the e-book industry, and the settlement could have prevented this with further consideration.

This Comment will explain the details involved in the price-fixing investigation and how it pertains to the DOJ's suit against Apple and five major publishers; discuss why the settlement reached between the DOJ and three of the publishers could have been improved before it was approved by the court, particularly regarding the section in the settlement that bans the publishers from interfering with price discounts for the next two years; discuss the effects of the settlement on e-book sales for consumers and retailers; and discuss how the settlement will result in further investigations in the future.

II. BACKGROUND

In 2007, Amazon released the digital e-reader Kindle to the public.[7] Around this time, other e-reading devices were also released into the market, such as the Barnes and Noble Nook,[8] Sony eReader,[9] and Borders Kobo,[10] to compete with the Kindle.[11] The easy manner in which a consumer could buy a book using an e-reader device and the lower prices for books caused e-books and their devices to gain in popularity and in sales.[12] Alt-

5. *See id.*

6. *See* Answer of Apple Inc., United States v. Apple, Inc., 889 F. Supp. 2d 623 (S.D.N.Y. 2012) (No. 12 Civ. 2826).

7. *In re* Elec. Books Antitrust Litig., 859 F. Supp. 2d 671, 674 (S.D.N.Y. 2012).

8. *See* Michael Kozlowski, *The History of Barnes and Noble Nook and the eBook Ecosystem*, GOOD EREADER (Oct. 14, 2012), http://goodereader.com/blog/electronic-readers/the-history-of-the-barnes-and-noble-nook-and-ebook-ecosystem.

9. *See* Nicholas Kolawoski, *Sony E-Reader Line is Revamped, with a Higher Price*, EWEEK (Sept. 1, 2010), http://www.eweek.com/c/a/Desktops-and-Notebooks/Sony-EReader-Is-Revamped-With-a-Higher-Price-495180.

10. *See* Brennan Slattery, *Kobo E-Reader's Early Reviews: Can it Compete?*, PC WORLD (June 25, 2010, 9:03 AM), http://www.pcworld.com/article/199868/kobo_ereaders_early_reviews_can_it_ compete.html.

11. *Elec. Books Antitrust Litig.*, 859 F. Supp. 2d at 674.

12. *See* Bob Minzesheimer, *Adult E-Books Outsell Hardcover for the First Time,*

hough Amazon's Kindle was not the first e-reading device released for the general public, ninety percent of e-book sales resulted from Kindle purchases by 2010.[13] The popularity of e-books from the Kindle was partly attributed to Amazon's ability to sell its e-books at a price lower than a print book and e-books from other retailers.[14]

When Amazon and other e-book retailers negotiated with publishers for the rights to sell e-books, the publishers agreed to sell e-books using the wholesale model, which was the same method used to sell physical books.[15] Under the wholesale model, publishers sell the rights to books at a flat rate; the e-book seller is allowed to set whatever price it wishes to sell to the public, receiving whatever profit that comes as a result of those prices.[16] Using this model, most e-books sold to the public were priced around $9.99, which publishers were not pleased with, because the books were priced for more than that in print but less than the wholesale price that Amazon had originally paid to receive the rights to sell the book.[17] Publishers disliked the wholesale model because it allowed Amazon to lower prices to an amount much lower than the publishers wished, where other retailers could not reach, which threatened the publishing industry and its business model.[18]

In late 2009, Apple developed the iPad and created its own version of e-books to sell for its product, but did not want to compete with Amazon's low prices.[19] After contacting publishers about potentially creating a contract to sell iBooks, Apple's version of e-books, the publishers and Apple concluded that another mode of selling e-books would be more appropriate than the wholesale model.[20] Both Apple and the publishers would benefit from a new mode of selling, because the publishers were already displeased with the current system, and a new system would also give Apple an opportunity to gain an advantage in a market that already had established retailers and loyal consumers.[21] Further discussions between Apple and the publishers resulted in the publishers wishing to change their contracts with e-book retailers from the wholesale model to the agency model, believing that the new model would give the publishers more power in determining the prices

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USA TODAY (July 18, 2012, 11:11 AM), http://books.usatoday.com/bookbuzz/post/2012-07-18/e-books-outsell-hardcover-for-the-first-time/806063/1.

13. *Elec. Books Antitrust Litig.*, 859 F. Supp. 2d at 674.

14. William T. McGrath, *E-book Publishing Leads to Court Clash*, CHI. DAILY L. BULL., Aug. 24, 2012.

15. *Elec. Books Antitrust Litig.*, 859 F. Supp. 2d at 674.

16. McGrath, *supra* note 14.

17. *Elec. Books Antitrust Litig.*, 859 F. Supp. 2d at 674; McGrath, *supra* note 14.

18. *Elec. Books Antitrust Litig.*, 859 F. Supp. 2d at 675.

19. *Id.* at 674.

20 *Id.* at 675.

21. *Id.* at 674.

of the e-books being sold, which would prevent certain retailers, like Amazon, from selling their products below cost and gaining a monopoly over the other retailers.[22]

Under the agency model, publishers who wish to sell e-books receive the opportunity to set the prices themselves.[23] The publishers set up a range for which the e-book can be sold, factoring in the publishing date, popularity, and price of the book in print and use the retailers as an agent to sell the e-books to the public.[24] The retailers receive thirty percent of the sales, and the rest of the money goes to the publishers.[25] This model, used by the publishers, also gave Apple an MFN clause that allowed Apple to automatically lower its e-book prices if another retailer lowered its price to an amount lower than the price Apple had already set for its store.[26] While this mode of selling e-books is not as profitable for publishers, the publishing companies preferred this method, because it gave publishers much more power over the industry and took the power away from retailers like Amazon, eliminating the retailer's ability to cut the prices of the e-books.[27]

The new mode of selling also raised the prices almost forty percent for consumers buying e-books for any reading device.[28] Apple discussed this issue and acknowledged the price increase but stated that it was still the best solution for all involved in the e-book industry, and consumers paying more was not a large enough concern to prevent Apple and the publishers from altering their new agreements.[29]

After deciding on the agency model with Apple, the publishers approached the other e-book retailers and demanded they also switch their contracts to accommodate the agency model.[30] Retailers initially refused, but publishers threatened to remove their books entirely from the retailers' markets if they did not comply with the new agency agreement.[31] The publishers gave the retailers until April of 2010 to agree to change to the agency model before e-books would be taken away from retailers.[32] Macmillan even removed its books from Amazon's website when Amazon refused to conform to the agency model.[33] After Macmillan's e-books were removed

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22 McGrath, *supra* note 14.
23. *Elec. Books Antitrust Litig.*, 859 F. Supp. 2d at 676; McGrath, *supra* note 14.
24 *Elec. Books Antitrust Litig.*, 859 F. Supp. 2d at 676.
25 *Id.* at 677.
26. *See* United States v. Apple, Inc., 889 F. Supp. 2d 623, 628 (S.D.N.Y. 2012).
27. McGrath, *supra* note 14.
28. *Id.*
29. *Elec. Books Antitrust Litig.*, 859 F. Supp. 2d at 676.
30. *Id.* at 678.
31. *Id.*
32. *Id.*
33. *Id.*

from its website in April 2010, Amazon finally relented and agreed to sell its e-books using the agency model.[34]

Out of the six major publishers in the industry, Random House was the sole publishing company that was not listed in the suit.[35] Its absence is because Random House also did not approve of the agency model at first and was not involved in the communications with Apple regarding the uniform change in sales methods.[36] After the other publishing companies changed their selling modes, Random House was forced to change its methods in order to compete properly with the rest, because Apple refused to sell Random House books in its iBookstore.[37] Because the new model of selling e-books is not illegal, and the publishers colluding with Apple to change the sales model is the issue in this suit, Random House is not involved in any potentially illegal matters related to this suit.[38]

The DOJ announced its suspicion against the publishers in December of 2011, stating that the publishers and Apple were under investigation for conspiring to price-fix e-books to help Apple gain an advantage in the industry.[39] A few days before the DOJ's announcement of an investigation, the European Union (EU) also announced that it would start an investigation of its own in Europe.[40] On April 11, 2012, the DOJ brought a claim against the publishers.[41] The same day, three of the publishers, Hachette, HarperCollins, and Simon & Schuster, arranged to settle with the Department of Justice.[42] While these publishers were attempting to settle with the Department of Justice, the remaining publishers and Apple refused to admit any wrongdoing and elected to take the suit to trial.[43]

At the same time as this suit, a different suit was also brought to court. A class action suit involving forty-nine states and five U.S. territories was

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34. McGrath, *supra* note 14.

35. *Elec. Books Antitrust Litig.*, 859 F. Supp. 2d at 674 n.1.

36. *Id.* at 679.

37. *Id.*

38. *See id.*

39. Grant Gross, *DOJ Investigating E-book Pricing, Official Says,* PC WORLD (Dec. 7, 2011, 12:00 PM), http://www.pcworld.com/article/245648/doj_investigating_ebook_pricing_official_says.html.

40. Press Release, European Commission, Antitrust: Commission Opens Formal Proceedings to Investigate Sales of E-books, EUROPA.EU (Dec. 6, 2011), http://europa.eu/rapid/press-release_IP-11-1509_en.htm?locale=en.

41. *See* Complaint at 1, United States v. Apple, Inc., 889 F. Supp. 2d 623 (S.D.N.Y. 2012) (No. 12 Civ. 2826).

42. *See* [Proposed] Final Judgment as to Defendants Hachette, HarperCollins, and Simon & Schuster at 1, United States v. Apple, Inc., 889 F. Supp. 2d 623 (S.D.N.Y. 2012) (No. 12 Civ. 2826).

43. *See* Answer of Apple, Inc., United States v. Apple, Inc., 889 F. Supp. 2d 623 (S.D.N.Y. May 22, 2012) (No. 12 Civ. 2826).

brought to court to address the consumers' concerns regarding payment for e-books at a higher price than what they would have originally been sold for if the publishers had not forced retailers to change their method of selling e-books.[44] This case has also resulted in a settlement with Hachette, HarperCollins, and Simon & Schuster, which requires the publishers to reimburse the consumers who paid for overpriced books under the agency model.[45] This settlement was approved in the Southern District of New York in February of 2013.[46]

The settlement agreed upon in the DOJ's case requires the publishers to end their current contracts with e-book retailers and allow the retailer to renegotiate.[47] The retailers are to have the option of returning to the wholesale model, and the publishers are not to discourage the retailers from lowering prices to their choosing.[48] The settlement allows the retailers to go back to the price discounts that caused the collusion and bans the publishers from interfering with the price discounts for the next two years.[49] The reasoning is that the allowance for price discounts is to help the industry to naturally resume its previous competitive market.[50] As required by the Tunney Act,[51] the DOJ published its proposed settlement in the Federal Register and allowed comment on it.[52] Out of 868 comments, over 800 were opposed to the settlement.[53] The comments varied from consumers, to independent booksellers, to e-reader retailers, to members of the Authors Guild.[54] Many reasons were cited for why this settlement should not have been approved, with many comments reflecting the fear that, with this settlement agreement, Amazon would have an opportunity to gain the monopoly it once had over e-book sales because other retailers are not equipped to sell their books at such low prices.[55] The Authors Guild, in particular, ar-

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44. *See* Complaint, Texas v. Hachette, 12 Civ. 6625 (S.D.N.Y. Aug. 29, 2012).

45. Jeffrey A. Trachtenberg, *Amazon.com Says E-book Refunds May Be Coming*, WALL ST. J., Oct. 14, 2012, http://online.wsj.com/article/SB10000872396390443749204578055170207536696.html.

46. *Id.*

47. Final Judgment as to Defendants Hachette, Harper Collins, and Simon & Schuster at 8, United States v. Apple, Inc., 889 F. Supp. 2d 623 (S.D.N.Y. 2012) (No. 12 Civ. 2826).

48. *Id.*

49. *Id.* at 11.

50. *Id.*

51. 15 U.S.C. § 16(e)(1) (2006).

52. *See* United States v. Apple, Inc. Proposed Final Judgment and Competitive Impact Statement; 77 Fed. Reg. 24,518 (Dep't of Justice Apr. 24, 2012).

53. *See id.*

54. *See id.*

55. *See* Letter from Paul Aiken, Executive Director, Authors Guild, Inc., to John R. Read, Chief Litigation III, Antitrust Division, United States Department of Justice, Re: *United States v. Apple, Inc., et al.* (June 25, 2012).

gued that the settlement will harm the literary market in the long run, because Amazon's previous conduct of predatory pricing will likely resume with the acceptance of the proposal, and Amazon will once again gain a monopoly over the e-book industry, making it nearly impossible for other retailers to compete.[56]

On September 6, 2012, the Southern District of New York approved the proposed settlement between the DOJ and the publishers.[57] Under the Tunney Act, a court must consider the public interest when determining whether a proposed settlement should be approved.[58] The court must consider the competitive impact on both the relevant markets and the public in general and observe any benefits in relation to the injuries specified in the original complaint.[59] In order to determine all of this, the court may use testimony by the government, experts, outside consultants, comments made through the Federal Register, and anything else the court may deem appropriate to reach its decision.[60]

In this case, the court approved the settlement and explained its reasoning behind it, stating that it met all the requirements set out in the Tunney Act and would reach the adequate result required for cases such as these.[61] For a proposed judgment to be approved by the court, the government does not need to prove that the settlement is the best remedy. Rather, the government just needs to show that the settlement contains "reasonably adequate remedies" that will address the injuries created.[62] The court did not discuss whether the settlement was the best remedy for the case but held that, with this settlement, the government has been able to provide a remedy that will eliminate the collusion alleged by requiring the publishers to terminate its contract with Apple and renegotiate with all retailers.[63] All that the government needed to show was a "factual foundation for [its] decisions such that its conclusions regarding the proposed settlement are reasonable."[64] The court determined that the factual foundation which the government provided in this case, consisting of new contracts written by the major publishers implementing the same agency model at the same time Apple's iPad was released with its own iBook application, was reasonable enough to conclude that arriving at this settlement was a reasonable move by the gov-

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56. *Id.*
57. *See* United States v. Apple, Inc., 889 F. Supp. 2d 623, 632 (S.D.N.Y. 2012).
58. 15 U.S.C. § 16(e)(1) (2006).
59. *Id.*
60. 15 U.S.C. § 16(f) (2006).
61. *Apple, Inc.*, 889 F. Supp. 2d at 632.
62 United States v. SBC Commc'ns., Inc., 489 F. Supp. 2d 1, 17 (D.D.C. 2007).
63. *See Apple, Inc*., 889 F. Supp. 2d at 639-40.
64. *Id.* at 631 (quoting United States v. Keyspan Corp., 763 F. Supp. 2d 633, 637-38 (S.D.N.Y. 2011)).

ernment.[65] The court was also satisfied with the DOJ's basis that the settlement proposed would be successful in remedying the collusion.[66]

According to the requirements of the Tunney Act, a court may take into account the public comments made after the proposed settlement is released.[67] The court in this case addressed the public comments made through the Federal Register and discussed the main issues presented in the comments that the settlement would bring; however, the court failed to take into account the overwhelming amount of negative comments and the general displeasure the general public has at the prospect of the settlement.[68] While the court concluded that all the main issues the public had with the proposed settlement were insufficient to constitute a rejection of the proposed settlement,[69] the court stated the public did raise important matters in the comments that warrant further consideration.[70]

This settlement is inadequate and in need of revision. This settlement, while seemingly reasonable and an adequate solution to the DOJ lawsuit, fails to take into account the long-term effects that will come about because of the settlement agreement. When examining the long-term effects that this settlement could have on the e-book industry, it might not seem so fair and reasonable after all.

III. ARGUMENTS AGAINST THE APPROVAL OF THE SETTLEMENT

A. AMAZON'S MONOPOLY OVER THE E-BOOK INDUSTRY

One reason the settlement is faulty is because it fails to take into account the long-term effects of the renegotiated contracts with established e-book retailers. Particularly, the settlement does not consider the fact that it allows Amazon an opportunity to gain a monopoly over other e-book retailers, similar to the situation before the agency model was implemented.[71] Amazon could be successful in creating a new monopoly over the e-book market, because the two-year ban on publishers interfering with price discounts would allow Amazon to return to selling its books below cost.[72] In

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65. *Id.* at 633.
66. *Id.* at 632.
67. 15 U.S.C. § 16 (2006).
68. *See Apple, Inc*., 889 F. Supp. 2d at 634.
69. *Id.* at 641.
70. *Id.*
71. *See* Elec. Books Antitrust Litig., 859 F. Supp. 2d 671, 674 (S.D.N.Y. 2012).
72. *See* Letter from Paul Aiken, Executive Director, Authors Guild, Inc., to John R. Read, Chief Litigation III, Antitrust Division, United States Department of Justice, Re: *United States v. Apple, Inc., et al.* (June 25, 2012).

2007, Amazon received almost ninety percent of all e-book sales.[73] Since being forced to adhere to the agency model, this percentage drastically went down to only sixty percent, giving other e-book retailers an opportunity to also be competitive in the market.[74] With the agreement that the publishers came to with Apple, all the book retailers trying to compete in the industry would have a chance to gain in popularity and be evenly matched when it comes to sales and pricing. The idea behind antitrust laws is to keep competition in the consumer market and protect consumers from a dominant company that could provide unfair prices or services. Therefore, it would seem that preventing Amazon from practically eliminating the competition of e-book retailers is precisely the goal of antitrust laws.

The settlement now offers Amazon a chance to regain the monopoly it had previously because the settlement prohibits the settling publishers from interfering with price discounts for the next two years.[75] While the argument is that this two-year period is meant to allow the industry to naturally thrive before the publishers interfere again and change the normal method of pricing,[76] the period would instead give Amazon plenty of time to regain the dominance it once had in the field.[77] The sales show that, in nearly the same span of time, Amazon's sales fell from ninety percent to sixty percent when the agency model was implemented.[78] If the sales can fall in that same amount of time that the settlement prevents publishers from interfering in price discounts, it is likely that Amazon can also build its sales during the same time span. This would give Amazon the monopoly the publishers were trying to avoid. Without the price discount allowance, the publishers and retailers could immediately renegotiate to a new system of discounting prices that would prevent Amazon from gaining that monopoly while still allowing the industry and all retailers to competitively thrive.

Because Amazon had such a monopoly in the past,[79] it would be reasonable that an inquiry should be made into its methods of creating that monopoly to determine if unlawful practices were involved. Investigating Amazon's practices before reaching a settlement with the publishers would have been able to effectively come up with a settlement agreement that

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73. *See id.*

74. *See id.*

75. *See* Final Judgment as to Defendants Hachette, HarperCollins, and Simon & Schuster at 10, United States v. Apple, Inc., 889 F. Supp. 2d 623 (S.D.N.Y. 2012) (No. 12 Civ. 2826).

76. *See id.*

77. *See* Letter from Paul Aiken, Executive Director, Authors Guild, Inc., to John R. Read, Chief Litigation III, Antitrust Division, United States Department of Justice, Re: *United States v. Apple, Inc., et al.* (June 25, 2012).

78. *See In re* Elec. Books Antitrust Litig., 859 F. Supp. 2d 671, 674-75 (S.D.N.Y. 2012).

79. *See id.*

would prevent the potentially illegal practices from reoccurring under the new practices outlined in the settlement.[80] This should have been done before approving the settlement that allows Amazon to lower its prices once again in order to determine whether this allowance will provide Amazon another opportunity to create a monopoly that could potentially be unlawful.

B. THE NEGATIVE RESPONSE TO THE SETTLEMENT

Further, the responses to the settlement when it was initially proposed reflect the dangers that will come about later on after the settlement requirements have been fully implemented.[81] The comment left by Barnes and Noble opposing the approval of the settlement pointed out that while the settlement might benefit some people, particularly consumers who have purchased Kindles, it would have a severe impact on the businesses of other companies with their own e-reader devices and the consumers who have purchased those devices.[82] Barnes and Noble, it states, does not have the ability to lower prices as severely as Amazon can, because it has actual shops to maintain.[83] With a significant difference in prices between e-books from different companies, Barnes and Nobles stands to lose valued consumers who would rather purchase their reading materials from a cheaper source while ordering the product online in the comfort of their own home instead of going to a Barnes and Noble store to purchase the item.[84]

Also at a disadvantage are the brick-and-mortar bookstores that do not have an e-reader device being used to generate extra income in addition to the print books kept in the stores.[85] Many independent bookstores commented on the settlement agreement stating that bookstores were already in danger because of the popularity of e-books and the devices that can be used to read them and that a lower priced e-book would have a severe impact on their abilities to sell any print books in their stores.[86] Independent bookstores are unable to lower the prices of their books, like mainstream bookstores, such as Barnes and Noble and Amazon, and the evolution of e-

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80. *See* Comments of Barnes and Noble, Inc. on the Proposed Final Judgment, United States v. Apple, Inc., 889 F. Supp. 2d 623 (S.D.N.Y. 2012) (No. 12 Civ. 2826), *available at* http://www.justice.gov/atr/cases/apple/comments/atc-0097.pdf.

81. *Id.*

82. *Id.* at 18.

83. *Id.* at 19-20.

84. *Id.*

85. Comments of Barnes and Noble, Inc. on the Proposed Final Judgment at 19-20, United States v. Apple, Inc., 889 F. Supp. 2d 623 (S.D.N.Y. 2012) (No. 12 Civ. 2826), http://www.justice.gov/atr/cases/apple/comments/atc-0097.pdf.

86. *See id.* at 20.

books sold at a lower price also threatens their ability to keep in business.[87] With e-books already beginning to outsell physical books every year,[88] independent bookstores are in danger of losing their businesses and being forced to shut down if the e-book prices dip any lower.[89] These bookstores are not in any kind of position to help themselves in this settlement and rely on the courts and the DOJ to help ensure that the settlement does not destroy their businesses.[90]

The Authors Guild also brought up multiple legitimate arguments as to why the settlement would negatively affect the authors whose books are printed electronically.[91] The Guild's stance is that:

> The Justice Department has made clear that it intends to irreversibly reshape the literary market. Allowing Amazon to resume its predatory ways with e-books will likely accomplish that, but not in the way the Justice Department intends. The proposed settlement will almost certainly backfire and harm readers in the long run.[92]

A representative of the Guild wrote a letter outlining its objections to the settlement and how Amazon's actions should be considered more thoroughly before a settlement is approved.[93] The independently published authors, in particular, are opposed to this settlement, because it forces them to keep their prices low in order to meet the expectations of consumers, which makes it nearly impossible for the authors to make any profit.[94] The Authors Guild provided evidence that Amazon has practiced some suspicious behavior since releasing the Kindle in order to become dominant in the

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87. *Id.*

88. Claire Cain Miller & Julie Bosman, *E-Books Outsell Print Books at Amazon*, N.Y. TIMES, May 19, 2011, http://www.nytimes.com/2011/05/20/technology/20amazon.html.

89. *See*, *e.g.*, Letter from Calvin Crosby, Book Passage, to John R. Read, Chief Litigation III, Antitrust Division, United States Department of Justice (May 22, 2012).

90. *See*, *e.g.*, Letter from Calvin Crosby, Book Passage, to John R. Read, Chief Litigation III, Antitrust Division, United States Department of Justice (May 22, 2012). *See also* Comments of Barnes and Noble, Inc. on the Proposed Final Judgment, United States v. Apple, Inc., 889 F. Supp. 2d 623 (S.D.N.Y. 2012) (No. 12 Civ. 2826), *available at* http://www.justice.gov/atr/cases/apple/comments/atc-0097.pdf.

91. *See* Letter from Paul Aiken, Executive Director, Authors Guild, Inc., to John R. Read, Chief Litigation III, Antitrust Division, United States Department of Justice, Re: *United States v. Apple, Inc., et al.* (June 25, 2012).

92 *See id.*

93. *See id.*

94. *See id.*

field, and these practices should be properly investigated before a settlement such as the one that was approved goes into effect.[95]

Outlined in the letter, the Guild points out that Amazon priced its newest books at a loss in order to gain popularity for its device, and Amazon seems to make up some of that money by selling some of the lesser known or older books at higher prices in an attempt to gain from the backlist while taking a loss on the new releases.[96] The Guild argues that the settlement will allow Amazon to return to this practice "so long as the vendors don't lose money over the publisher's entire list of e-books over the course of a year."[97] As long as Amazon can prove a profit in its sale of e-books, it can continue selling the most popular books below cost and reach the monopoly it had before the agency model was implemented.[98] This appears to be a legitimate concern that Amazon participated in predatory pricing in order to maintain the monopoly that it created.[99] If Amazon is actively pursuing a method of selling that can be seen as predatory pricing, an investigation needs to be made into its sales in order to determine whether it has participated in illegal activities and whether the settlement would promote another illegal activity while trying to prevent another illegal move from continuing.

Another concern regarding Amazon's dominant position is its Lending Library.[100] When Amazon failed to release a tablet version of its reader before Barnes and Noble did, it was still able to keep its popularity by later offering a new opportunity to "check out" e-books exclusively on its device, similar to what one does when checking out books at the library.[101] Amazon provided these books to its Amazon Prime members and offered them the opportunity to "check out" one book a month for free on their Kindle devices.[102] Amazon chose to release books to this library from some of the major publishers, even though, after discussing the new arrangement

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95. *See id.*

96. *See* Letter from Paul Aiken, Executive Director, Authors Guild, Inc., to John R. Read, Chief Litigation III, Antitrust Division, United States Department of Justice, Re: *United States v. Apple, Inc., et al.* (June 25, 2012).

97. *Id.*

98. *Id.*

99. *Id.*

100. Carolyn Kellogg, *Amazon's New Kindle Lending Program Causes Publishing Stir*, L.A. TIMES, Nov. 4, 2011, 11:46 AM, http://latimesblogs.latimes.com/jacketcopy/2011/11/amazons-new-kindle-lending-program-causes-publishing-stir.html.

101. Carolyn Kellogg, *Why Can't You Borrow that Penguin E-book from the Library?*, L.A. TIMES (Feb. 10, 2012, 1:10 PM), http://latimesblogs.latimes.com/jacketcopy/2012/02/why-cant-you-borrow-penguin-e-books-from-the-librariy.html.

102. *Id.*

with these publishers, the publishers stated that they did not wish for their books to be placed in the new library.[103] According to the Guild,[104] Amazon interpreted its contract with the publishers to mean it could do whatever it wanted with the books, including giving away access for free, as long as the publishers received their money. This greatly displeased the publishers, who had interpreted their contract to mean that Amazon could price the books in any way they chose but not freely give away access to the books.[105]

Amazon was also able to create an advantage over other booksellers by obtaining the exclusive digital rights to thousands of books, including all of Ian Fleming's James Bond books, comics, and children's books.[106] Amazon has even purchased the complete right to Avalon publishing company and has a large library of romance and western novels that no other seller can access and sell on e-book devices.[107] All of these practices that the Guild has described indicate that Amazon has attempted to take steps to create dominant power in the market and had mostly succeeded before the agency model limited the discounts and power Amazon had over pricing.[108] The Guild's main point in the letter was to point out that Amazon began to destroy the market for other retailers before the agency model was implemented, so its actions should be considered before accepting a settlement that could give Amazon an opportunity to go back to its old, questionable activities.[109]

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103. Carolyn Kellogg, *Amazon's New Kindle Lending Program Causes Publishing Stir*, L.A. TIMES (Nov. 11, 2011, 11:46 AM), http://latimesblogs.latimes.com/jacketcopy/2011/11/amazons-new-kindle-lending-program-causes-publishing-stir.html.

104. *See* Letter from Paul Aiken, Executive Director, Authors Guild, Inc. to John R. Read, Chief Litigation III, Antitrust Division, United States Department of Justice, Re: *United States v. Apple, Inc., et al.* (June 25, 2012).

105. *See id.*

106. *See* David Streitfield, *In a Battle of the E-Readers, Booksellers Spurn Superheroes*, N.Y. TIMES, Oct. 18, 2011, http://www.nytimes.com/2011/10/19/technology/bookstores-drop-comics-after-amazon-deal-with-dc.html?pagewanted=all; Julie Bosman, *Amazon Publishing Push Grows to Children's Books*, N.Y. TIMES, Dec. 6, 2011, http://www.nytimes.com/2011/12/07/business/amazon-publishing-push-grows-to-childrens-books.html; Jeffrey Trachtenberg, *Amazon Deal Nabs Bond Novels*, WALL ST. J., Apr. 17, 2012, 7:09 PM, http://online.wsj.com/article/SB10001424052702304299304577350170241190522.html.

107. Julianne Pepitone, *Amazon Buys 62-Year-Old Book Publisher Avalon Books*, CNN (June 4, 2012, 5:56 PM), http://money.cnn.com/2012/06/04/technology/amazon-avalon-books/index.htm.

108. Letter from Paul Aiken, Executive Director., Authors Guild, Inc. to John R. Read, Chief Litigation III, Antitrust Division, United States Department of Justice, Re: *United States v. Apple, Inc., et al.* (June 25, 2012).

109. *Id.*

The Authors Guild emphasizes the fact that the DOJ does not discuss the relationship between the two markets—print and e-book—and how Amazon's dominance has effected both markets.[110] This, the Guild states, is what creates the monopoly in the e-book market that is also ruining the brick-and-mortar stores that are not connected to an e-reader.[111] The Guild makes a valid point when discussing this because, according to the Tunney Act, any approval of a settlement must consider the effect of the settlement on the relevant markets.[112] The effect of the agreement on brick-and-mortar bookshops is definitely something that needs to be considered when making a decision about the e-book industry.

An important argument that the Guild refers to is that the Tunney Act requires that the court consider the effect of the agreement under all relevant markets, which this settlement does not appear to do.[113] There is no indication in the settlement or the court's decision that the effect on the print book market, an obviously relevant market, was taken into consideration.[114] Without considering the impact on the print book market, the settlement's flaws were not fully considered. There is obviously a relation between the print market and e-book market as evidenced by the fact that print book sales fell, while e-books sales have risen over the past few years.[115] Further, e-books outsell print books, showing that the lower prices and convenient readers are attracting more customers, while physical books are not making as much of a profit as they had in the past.[116] The argument has been made that, because e-books are selling better than print books, lowering the prices further, as Amazon has done, creates a situation where Amazon's e-books will cause brick-and-mortar bookstores to go out of business.[117] Because of the strong relationship between e-books and

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110. *Id.*

111. *Id.*

112. 15 U.S.C § 16(e)(1) (2006); Letter from Paul Aiken, Executive Director., Authors Guild, Inc. to John R. Read, Chief Litigation III, Antitrust Division, United States Department of Justice, Re: *United States v. Apple, Inc., et al.* (June 25, 2012).

113. *See* 15 U.S.C. § 16(e)(1); Letter from Paul Aiken, Executive Director, Authors Guild, Inc., to John R. Read, Chief Litigation III, Antitrust Division, United States Department of Justice, Re: *United States v. Apple, Inc., et al.* (June 25, 2012).

114. United States v. Apple, Inc., 889 F. Supp. 2d 623, 631 (S.D.N.Y. 2012).

115. Bob Minzesheimer, *Adult E-Books Outsell Hardcover for the First Time,* USA TODAY, July 18, 2012, http://books.usatoday.com/bookbuzz/post/2012-07-18/e-books-outsell-hardcover-for-the-first-time/806063/1.

116. *Id.*

117. *See*, *e.g.*, Letter from Calvin Crosby, Book Passage, to John R. Read, Chief Litigation III, Antitrust Division, United States Department of Justice (May 22, 2012); Letter from Oren J. Teicher, CEO, American Booksellers Association, to John R. Read, Chief Litigation III, Antitrust Division, United States Department of Justice, Re: Comments on the Proposed Consent Decree in *United States v. Apple, Inc., et al.*, 77 Fed. Reg. 24,518 (June 14, 2012); Letter from Paul Aiken, Executive Director, Authors Guild, Inc., to John R. Read,

bookstores, this problem should have been taken into account when the settlement was approved, but it does not seem to have been considered. The close relationship between e-books and print books requires at least a discussion by the DOJ and the presiding court as to why exactly the brick-and-mortar shops were not considered before the settlement was approved.[118]

The Guild points out that the DOJ also fails to discuss in its competitive impact statement how Amazon's methods result in Amazon taking a loss in profits in order to gain a competitive advantage over other retailers, a direct sign of predatory pricing.[119] The DOJ's competitive impact statement focuses mainly on the fact that the court cannot be sure that the negative comments made through the Federal Register, regarding the settlement, were made in the public interest, but, instead, were likely to be comments made by people who wish to continue to benefit from an illegal conspiracy.[120] While the DOJ is correct in stating that the public cannot benefit from the collusion, the Department should not assume that the majority of the negative comments were made with this motivation.[121] There have been many statements made that prove that there are members of the public that do have other interests besides benefiting from illegal activity.[122]

One letter, written by Calvin Crosby from Book Passage, outlines the dangers the settlement will cause, because it allows Amazon to have such a distorted control over the industry.[123] Crosby states that he believes the DOJ does not recognize the "extent, and intent, of Amazon to destroy an industry to increase its own power," which is the real problem in the e-book industry, not the agency model the publishers have tried to establish in the mar-

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Chief Litigation III, Antitrust Division, United States Department of Justice, Re: *United States v. Apple, Inc., et al.* (June 25, 2012).

118. *See* United States v. Apple, Inc., 889 F. Supp. 2d 623 (S.D.N.Y. 2012); Reply Memorandum in Support of the United States' Motion for Entry of Final Judgment, United States v. Apple, Inc., 889 F. Supp. 2d 623 (S.D.N.Y. 2012) (No. 12 Civ. 2826).

119. *See* Letter from Paul Aiken, Executive Director, Authors Guild, Inc., to John R. Read, Chief Litigation III, Antitrust Division, United States Department of Justice, Re: *United States v. Apple, Inc., et al.* (June 25, 2012).

120. *See* Competitive Impact Statement, United States v. Apple, Inc., 889 F. Supp. 2d 623 (S.D.N.Y. 2012) (No. 12 Civ. 2826).

121. *Id.*

122. *See, e.g.*, Letter from Calvin Crosby, Book Passage, to John R. Read, Chief Litigation III, Antitrust Division, United States Department of Justice (May 22, 2012); Letter from Oren J. Teicher, CEO, American Booksellers Association, to John R. Read, Chief Litigation III, Antitrust Division, United States Department of Justice, Re: Comments on the Proposed Consent Decree in *United States v. Apple, Inc., et al.*, 77 Fed. Reg. 24518 (June 14, 2012); Letter from Paul Aiken, Executive Director, Authors Guild, Inc., to John R. Read, Chief Litigation III, Antitrust Division, United States Department of Justice, Re: *United States v. Apple, Inc., et al.* (June 25, 2012).

123. *See* Letter from Calvin Crosby, Book Passage, to John R. Read, Chief Litigation III, Antitrust Division, United States Department of Justice (May 22, 2012).

ket.[124] The letter states that, because the DOJ has not investigated Amazon's actions, it cannot make an educated and informed decision about the publishers' settlement, because it cannot be properly informed of what the publishers' collusion was trying to prevent.[125] While this might be seen as an attempt to continue benefiting from the illegal activity, it is also a statement of the public interest indicating not that the collusion should be allowed to continue, but that the settlement is not the solution because it lets Amazon run independent bookstores out of business.

While some letters do discuss the agency model and state that the settlement should not be approved, because it works to keep the industry competitive, which the DOJ claims is an attempt to benefit from the conspiracy and therefore should be ignored, the point behind discussing the agency model is not an attempt to continue to benefit from illegal activity.[126] For the American Booksellers Association, the two-year ban on publishers interfering with price discounts, essentially banning the agency model is the problem, and not the fact that the DOJ is trying to remedy the illegal situation.[127] The Association's argument is that the renegotiations should start immediately, including the option for using the agency model, because of the fact that the two-year ban will create problems between Amazon and other retailers.[128] The Association states that new negotiations should allow the option to implement a new agency model, because the result of an agency model was to further competition among retailers more effectively than the wholesale model.[129] This argument should not be construed as an attempt to gain from the conspiracy but merely points out that, while the conspiracy was illegal, the conspirators should be punished and not the booksellers and consumers who will likely be harmed by the ban on the agency model and Amazon's ability to lower prices again.

Many other letters make similar statements that bookshop owners fear that the settlement will allow Amazon to thrive while their businesses collapse. None of them should be construed as trying to benefit from the collusion.[130] Instead, these statements should be considered to be made in the

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124. *Id.*

125. *See id.*

126. *See* Reply Memorandum in Support of the United States' Motion for Entry of Final Judgment, United States v. Apple, Inc., 889 F. Supp. 2d 623 (S.D.N.Y. 2012) (No. 12 Civ. 2826).

127. *See* Letter from Oren J. Teicher, CEO, American Booksellers Association, to John R. Read, Chief Litigation III, Antitrust Division, United States Department of Justice, Re: Comments on the Proposed Consent Decree in *United States v. Apple, Inc., et al.*, 77 Fed. Reg. 24518 (June 14, 2012).

128. *See id.*

129. *See id.*

130. *See, e.g.*, Letter from J.B. Dicker, Owner, Seattle Mystery Bookshop, to John Read, Re: DOJ vs Booksellers (June 22, 2012).

public interest showing that the settlement is not ideal for the situation or for the relevant markets, which the Tunney Act states the court has to consider before approving a settlement.[131] While some of the letters do address the fact that the agency model did allow them to compete with e-book retailers and that some sellers wish for the agency model to continue,[132] many other letters forego this argument in favor of arguing that the settlement should not give Amazon the opportunity to ruin them, which is obviously a statement made in the public interest and should not be construed as an attempt to continue to benefit from the collusion and the agency model the publishers previously created.[133]

The DOJ fails to discuss the problems with Amazon's pricing and tactics and how these practices will cause problems with the brick-and-mortar shops and other e-book retailers who have not been able to achieve the same advantages as Amazon has.[134] The Guild argues that the settlement does not take into account the effects of these methods Amazon uses, thus making a fair and competitive market out of the settlement nearly impossible.[135] This is a valid argument, because it is extremely difficult to make any kind of business deal that is in all parties' best interests if all aspects of the problem are not addressed. Without all problems addressed, there is a significant potential for these problems to cause harm in the future.

Also, the settlement does not take into account the third party interests, something else the Tunney Act states needs to be considered during a settlement agreement.[136] The Authors Guild makes it apparent that many authors are not in favor of the settlement, and all the negative comments left by consumers and bookstores in response to the settlement in the Federal Register.[137] This is briefly addressed in the final judgment, but there is no remedy to address the negative comments.[138]

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131. 15 U.S.C. § 16(e)(1) (2006).

132. *See, e.g.*, Letter from J.B. Dicker, Owner, Seattle Mystery Bookshop, to John Read, Re: DoJ vs Booksellers (June 22, 2012).

133. *See, e.g.*, Letter from Jeffrey Mayersohn, Owner, Harvard Bookstore, to Mr. John Read, Chief, Litigation III Section, Antitrust Division (June 19, 2012).

134. *See* Reply Memorandum in Support of the United States' Motion for Entry of Final Judgment at 9, United States v. Apple, Inc., 889 F. Supp. 2d 623 (S.D.N.Y. 2012) (No. 12 Civ. 2826).

135. *See* Letter from Paul Aiken, Executive Director, Authors Guild, Inc., to John R. Read, Chief Litigation III, Antitrust Division, United States Department of Justice, Re: *United States v. Apple, Inc., et al.* (June 25, 2012).

136. 15 U.S.C. § 16(e)(1) (2006).

137. *See* Letter from Paul Aiken, Executive Director, Authors Guild, Inc., to John R. Read, Chief Litigation III, Antitrust Division, United States Department of Justice, Re: *United States v. Apple, Inc., et al.* (June 25, 2012).

138. *See* United States v. Apple, Inc., 889 F. Supp. 2d 623, 633-34 (S.D.N.Y. 2012).

Because there was so much opposition to this settlement when it was first proposed,[139] it should have been an indication that there was something unsavory about the settlement that needed more consideration before the settlement was approved. While the DOJ's response to the comments and the order by the court address the negative reaction to the settlement, there is hardly any explanation as to why the negativity is not legitimate enough to deny the settlement.[140] Although the agency model began in an unlawful manner, the overall effect of it was to create a competitive market where all bookstores could still compete.[141] This new plan, set up in the settlement, ruins all of the balance that was created when the agency model was created. The model should not have been eliminated just because of the method in which it was created, but because the effect of it produced unfavorable results that created a market that provided one company with a monopoly over the others. This is not the case with this settlement, though, because the agency model actually created a more even market among retailers.[142] For this reason, the agency model should not have been abolished in favor of a plan that will allow the retailers complete power in the price discounts of e-books. While there should be some sort of punishment for the publishers that are settling because of the collusion involved in the agency model agreement, the negative response to the current punishment indicates that the publishers will not be the only people punished. Booksellers, e-book retailers, authors, and consumers have all expressed their concerns about the settlement and the harmful effects it will cause for them.[143] As antitrust laws are meant to protect consumers and create a competitive market, the responses to this settlement imply that this will not be the result.

C. THE SETTLEMENT WILL CREATE A FUTURE INVESTIGATION INTO E-BOOK PRICING

The biggest worry among independent bookstores and consumers with the settlement agreement is that it provides an opportunity to create another situation in which the DOJ will be forced to investigate the competitiveness of the e-book industry in the future. Amazon previously maintained ninety

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139. *See* United States v. Apple Inc., Proposed Final Judgment and Impact Statement, 77 Fed. Reg. 24,518 (Dep't of Justice Apr. 24, 2012).

140. *See Apple, Inc.*, 889 F. Supp. 2d at 633-34.

141. *See, e.g.*, Alexander Chernev, *Why Apple's E-Book Pricing Model Might Not Be Unfair*, BUSINESS WEEK (Apr. 16, 2012), http://www.businessweek.com/articles/2012-04-16/why-apple-s-e-book-pricing-model-might-not-be-unfair.

142. *See* Letter from Paul Aiken, Executive Director, Authors Guild, Inc. to John R. Read, Chief Litigation III, Antitrust Division, United States Department of Justice, Re: *United States v. Apple, Inc.* (June 25, 2012).

143. *See* Proposed Final Judgment and Impact Statement, 77 Fed. Reg. 24,518.

percent of the sales in the e-book market,[144] and the settlement creates a situation that enables Amazon to once again reach a number of sales that is so much higher than any other e-book retailers have the ability to reach.[145] If Amazon once again achieves a monopoly in the e-book market, the DOJ will be forced to investigate to determine if the monopoly was created by using a method that is unlawful. Amazon previously selling e-books at below cost is a proper indication that Amazon could do the same thing again and needs to be disciplined for its actions.[146]

IV. COUNTERARGUMENTS FOR THE SUPPORT OF APPROVING THE SETTLEMENT

A. THE COURT'S RATIONALE

The court uses the reasoning in *United States v. Keyspan Corp.* to explain why it chose to ignore the negative comments and the protests in the public's interest when approving the settlement.[147] In *Keyspan*, the court determined that it could consider the public's interest in the settlement but "only to ensure that the resulting settlement is within the reaches of the public interest."[148] The court does not have to reject a settlement agreement just because there is a better agreement possible.[149] The court determined that the inquiry that should be made into a settlement agreement is whether the government has provided a "factual foundation for [its] decisions such that its conclusions regarding the proposed settlement are reasonable."[150]

The reasoning used regarding this settlement is flawed because it fails to address the reasonable conclusion that the two-year ban on preventing price discounts could ruin brick-and-mortar shops, which should be a consideration when reaching a settlement agreement, because it deals with the relevant market of book sales in general.[151] While *Keyspan* does state that the court should defer to the government to provide a basis that the settlement is reasonable,[152] there is some unreasonableness in this settlement that

144. *See In re* Elec. Book Antitrust Litig., 859 F. Supp. 2d 671, 674 (S.D.N.Y. 2012).
145. *See id.* at 675.
146. *See id.*
147. *See* United States v. Apple, Inc., 889 F. Supp. 2d 623, 631 (S.D.N.Y. 2012); United States v. Keyspan Corp., 763 F. Supp. 2d 633, 637 (S.D.N.Y. 2011).
148. *Keyspan*, 763 F. Supp. 2d at 637 (citing United States v. Alex Brown & Sons, Inc., 963 F. Supp. 235, 238 (S.D.N.Y. 1997)).
149. *Id.*
150. *Apple, Inc.*, 889 F. Supp. 2d at 631 (citing Keyspan Corp., 763 F. Supp. 2d at 637 (quoting United States v. Abitibi-Consolidated Inc., 584 F. Supp. 2d 162, 165 (D.D.C. 2008))).
151. *See Apple, Inc*., 889 F. Supp. 2d at 631.
152. *Keyspan Corp.*, 763 F. Supp. 2d at 637-38.

has been ignored. The price discount is largely ignored as being a problem in the settlement and is barely addressed in both the DOJ's competitive impact statement and the court's order.[153] The impact on brick-and-mortar shops is an important part of the settlement that was not addressed at all, indicating that there is a flaw in the settlement that could lead to problems in the market in the future.

The factors to consider when determining whether something is in the public's interest include the competitive impact statement and the impact of the settlement on the competition in the relevant markets, which in this case would include the retailers of both e-books and print books.[154] The court should also consider the public's benefit when approving a settlement.[155] The Tunney Act clearly states that the relevant markets should be considered when approving a settlement, but the court in this case does not appear to do this.[156] The obviously relevant market of print books was clearly suffering when Amazon had complete control to lower prices. The settlement is only going to continue to cause the suffering and possible demise of certain bookshops that are not able to compete with the drastically lowered prices that Amazon has the ability to provide for its Kindle customers. A rejection of at least the two-year ban in the settlement would ensure that the relevant market of brick-and-mortar bookshops would also continue to survive, therefore showing that the settlement was not evaluated to determine the effect on these independent bookstores and it should have been considered further before approval.

The court noticed that the volume of negative comments gave reason to consider the settlement further, but the court ultimately decided that the comments were not strong enough to prevent the settlement from being rejected.[157] The court acknowledged that because of the "sheer volume of comments opposing entry of the proposed Final Judgment and the significant harm that these comments fear may result, hesitation is clearly appropriate in this case."[158] The court examined four different categories that the comments addressed: harm to third parties, an unworkable decree, insufficient factual basis, and that the collusive impact actually had a procompetitive result.[159] The court explained in its opinion why none of these

153. *See Apple, Inc.*, 889 F. Supp. 2d at 639. *See also* Competitive Impact Statement at 12, United States v. Apple, Inc., 889 F. Supp. 2d 623 (S.D.N.Y. 2012) (No. 12 Civ. 2836).

154. 15 U.S.C. § 16(e)(1) (2006).

155. *Id.*

156. *Id.*

157. *Apple, Inc.*, 889 F. Supp. 2d at 639-40.

158. *Id.* at 633-34.

159. *Id.* at 634.

categories were enough for the court to reject the proposed judgment, but the rejection of the first category proved to be the most problematic.[160]

The court also stated that the effect of the settlement on booksellers was not to be considered in this instance, because the purpose of the Tunney Act is to protect the individuals who are harmed by the settlement, not the businesses.[161] While this is true, the booksellers are still making points that directly relate to the individual book buyers and how they are harmed by the settlement.[162] If a bookstore can no longer survive in an industry where Amazon has such power over the electronic market, the consumers who used to shop at the bookstore lose their options when it comes to book buying, some of them turning to Amazon. If a consumer loses its options, there is no competitive market, and that harms the consumer, who deserves to have choices instead of being forced to buy from only one company. Therefore, the bookstores' arguments should be considered for their merits in regards to their impact on individuals who shop at the store and not only on the impact of the bookstore. Also, because the Tunney Act recommends that the court consider "the impact of entry of such judgment upon competition in the relevant market or markets,"[163] which includes brick-and-mortar bookshops, the statements made by booksellers on the impact the settlement can have on the stores should have been considered before the settlement was approved.

The government describes the two-year ban as a necessary "cooling off" period in order to allow the e-book industry to thrive naturally before the publishers begin to alter prices again, which the court decided is solid reasoning for why the two-year ban should stand.[164] This poses a problem, though, for third parties who are trying to sell print books in independent bookstores.[165] The "cooling off" period impacts the brick-and-mortar shops that will inevitably lose profits when e-book retailers lower prices and gives consumers a reason to bypass the independent sellers in favor of the companies that have the ability to significantly lower prices and eliminate all

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160. *See id.* at 634-36.

161. *Id.* at 635.

162. *See*, *e.g.*, Letter from Oren J. Teicher, CEO, American Booksellers Association, to John R. Read, Chief Litigation III, Antitrust Division, United States Department of Justice, Re: Comments on the Proposed Consent Decree in *United States v. Apple, Inc., et al.*, 77 Fed. Reg. 24,518 (June 14, 2012).

163. 15 U.S.C. § 16(e)(1) (2006).

164. *See* Final Judgment as to Defendants Hachette, HarperCollins, and Simon & Schuster at 10-11, United States v. Apple, Inc., 889 F. Supp. 2d 623 (S.D.N.Y. 2012) (No. 12 Civ. 2826).

165. *See, e.g.*, Letter from Oren J. Teicher, American Booksellers Association, to John R. Read, Chief Litigation III, Antitrust Division, United States Department of Justice, Re: Comments on the Proposed Consent Decree in *United States v. Apple, Inc., et al.,* 77 Fed. Reg. 24,518 (June 14, 2012).

other competitive markets.[166] Though the court does not seem to believe it,[167] two years is a very long time in the business world, and businesses can both thrive and collapse in that period of time. The two-year ban could very well result in the dominance of Amazon sales and the ultimate collapse of independent bookstores that can no longer compete with such a powerhouse in the e-book world. It seems as if a shorter period of time to allow the e-book retailers to discount their prices would be more appropriate to allow the e-book industry to thrive naturally but still give independent sellers a chance to compete and survive.

While the court obviously has a point when stating that it must defer to the Government when it shows a factual finding that the settlement is reasonable,[168] this settlement's allowance of price discounts seems very unreasonable when looking at the interests of the brick-and-mortar shops and the independently published authors who suffer from this deal. While the court is, of course, acting reasonably to defer to the government in settlement agreements such as this, it is unreasonable for the court to look solely at the government's perspective; instead, it should also look to third party complaints when there is a glaring flaw in the settlement, such as the two-year allowance of price discounts.[169]

B. THERE HAS NOT BEEN AN INVESTIGATION AGAINST AMAZON FOR MONOPOLIZING THE MARKET

A counterargument that has been presented to help support the settlement agreement is that there has never been an investigation into Amazon regarding a monopolization effect.[170] The main point made is that, even though Amazon might have had a monopoly over the e-book industry, the monopoly was natural, and therefore, there was no illegal activity that warranted an investigation into Amazon's activities.[171] Because there has been no investigation into Amazon, the argument from supporters of the settlement is that there is no indication that there will be an investigation in the future, because Amazon has not done anything suspicious to warrant the DOJ's involvement.

A natural monopoly is not illegal, because legal methods of gaining an advantage over competitors are encouraged to keep the market competi-

166. *See, e.g.*, *id.*
167. United States v. Apple, Inc., 889 F. Supp. 2d 623, 632 (S.D.N.Y. 2012).
168. *Id.* at 14.
169. *Id.* at 632.
170. *See* Alison Frankel, *DOJ E-Books Filing: Amazon Probed, Cleared for Predatory Pricing*, THOMAS REUTERS NEWS & INSIGHT (July 23, 2012), http://newsandinsight.thomsonreuters.com/New_York/News/2012/07_-_July/DOJ_e-books_filing__Amazon_probed,_cleared_for_predatory_pricing.
171. *See id.*

tive.[172] In order for a monopoly to be regarded as illegal and in need of an investigation, some kind of suspicious activity that distinguishes itself from normal growth must result from a superior product or mere accident.[173] So, even though Amazon might have previously monopolized the e-book market, this does not mean it was practicing illegal methods in order to gain that monopoly.[174] It could mean a superior product, or even an accident created, an advantage for Amazon that other retailers have not yet been able to reach. Before an investigation can be brought against the company, it must be shown that Amazon was participating in predatory pricing in order to gain the monopoly.[175] After predatory pricing is established, an investigation by the DOJ could then be successful.[176]

There is currently very little indication that Amazon was practicing illegal methods to create its monopoly during the time that it possessed such a large portion of sales in the e-book market.[177] There is evidence, though, that Amazon had been participating in below cost pricing,[178] which is a suspicious activity that makes a monopoly illegal, but this has never been investigated by the proper authorities. While there is currently no investigation into Amazon's pricing before the collusion between Apple and the publishers occurred, there are indications that the company was selling its e-books below cost, which can be a sign that a company is participating in predatory pricing to gain a monopoly that is worth investigation.[179]

C. ANTITRUST LOOKS AT THE SHORT TERM RESULTS, NOT THE LONG TERM

Another argument for the settlement is that, when looking at antitrust law, the short-term effects on consumers are most often the best. Usually it has been determined that the lower the prices the better, as long as there is still a competitive market. Because Amazon has not done anything suspicious and is providing low prices to its customers, supporters reason that there is no harm in the method in which Amazon prices its e-books, and there is no violation of antitrust laws.

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172. United States v. Grinnell, Corp., 384 U.S. 563, 570-71 (1966).

173. *Id.*

174. *See* Alison Frankel, *DOJ E-Books Filing: Amazon Probed, Cleared for Predatory Pricing*, THOMAS REUTERS NEWS & INSIGHT (July 23, 2012), http://newsandinsight.thomsonreuters.com/New_York/News/2012/07_-_July/DOJ_e-books_filing__Amazon_probed,_cleared_for_predatory_pricing.

175. *Id.*

176. *Id.*

177. *See* United States v. Apple, Inc., 889 F. Supp. 2d 623, 641 (S.D.N.Y. 2012).

178. *See In re* Elec. Book Antitrust Litig., 859 F. Supp. 2d 671, 671 (S.D.N.Y. 2012).

179. *See* Brooke Group Ltd. v. Brown and Williamson Tobacco Corp., 509 U.S. 209 (2003).

There is a point, though, when low prices are no longer beneficial to customers, and other factors need to be taken into consideration. Such considerations should include whether one retailer could create a monopoly, the potential profits, and the sales numbers when the book prices are raised. While these considerations are not required to comply with current law or the Tunney Act,[180] they should still be taken into account because these considerations are factors any business would take into consideration when making a new business deal, and that is basically what the settlement is doing: creating a new business deal. Because a new deal is being negotiated, it would be more logical to require the publishers and retailers to apply the same factors into the settlement that they would when they renegotiate or start a new deal with a new publisher or retailer. If these factors are not considered, the settlement the publishers and retailers have come up with is not going to be as effective as it could be if the settlement only required a renegotiation process between the parties.

D. THE TWO-YEAR LIMITATION ON THE AGREEMENT WILL PREVENT A MONOPOLY FROM OCCURRING

Supporters also argue that, while the settlement might help Amazon create another opportunity to lower its prices severely, the settlement also contains a provision that the publishers are only prevented from interfering with the retailers' abilities to lower prices for the next two years.[181] The idea behind this is that the business will naturally realign to the nature that it is supposed to be, and the publishers can then renegotiate when both the retailers and publishers have equal bargaining powers.[182]

While the fact that, in two years, the publishers will be able to strike a new deal seems reasonable and a way to prevent the monopoly from reemerging, the two years allows for an opportunity for Amazon to gain more power over the industry and give it more bargaining power.

The idea behind the two-year limit in the settlement is that the e-book retailers and the publishers will regain their previous positions before the unlawful acts took place.[183] During this time, the business is expected to naturally thrive in the way it would have had the previous deal not occurred between Apple and the publishers.[184]

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180. 15 U.S.C. § 16(e)(1) (2006).

181. *See* Final Judgment as to Defendants, Hachette, HarperCollins, and Simon & Schuster at 10, United States v. Apple, Inc., 889 F. Supp. 2d 623 (S.D.N.Y. 2012) (No.12 Civ. 2826).

182. *Id.*

183. *Id.*

184. *Id.*

Previously, Amazon was resistant to a change in its contract and has refused to renegotiate from its original contract.[185] Amazon did not agree to renegotiations when changing to the agency model until after the publishers removed their products from Amazon's e-book library.[186] When negotiating contracts with publishers, Amazon has even resorted to removing the publisher's entire library of titles from both the Kindle market and print books Amazon sold online, in order to gain an advantage in the negotiations.[187] It is likely that because Amazon did not want to originally agree to an agency model way of sales, it will go back to the wholesale model and regain the power it previously had in the market. With Amazon regaining its power in the e-book industry, there is a possibility that it will gain so much power that it will refuse to renegotiate again, even when the publishers are not colluding together to raise prices. After the two years that the publishers are not allowed to interfere with price discounts, the publishers are likely to lose the power they previously had to convince the e-book retailers to raise their prices again.

E. THE DEPARTMENT OF JUSTICE'S ARGUMENT

In its reply motion in support of the settlement, the DOJ refers to the fact that many of the comments made against the settlement come from people and are made in the interests of people who are not to be considered when approving the settlement to make the argument that the settlement does take third party opinions into account in its response to the comments made through the Federal Register.[188] The DOJ states that, while the opinions and concerns of the third parties are important, they cannot be the deciding factor when approving the settlement, because the comments do not reflect the majority or the correct public interests the Tunney Act wishes to address.[189] The DOJ uses *United States v. International Business Machines Corp.* to show that the court can disregard the massive amount of negative comments due to the fact that it cannot be considered to be the majority, or because "[t]he purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of

185. *See* Letter from Paul Aiken, Executive Director, Authors Guild, Inc., to John R. Read, Chief Litigation III, Antitrust Division United States Department of Justice, Re: *United States, v. Apple, Inc., et al.* (June 25, 2012).

186. *See id.*

187. *See id.*

188. *See* Reply Memorandum in Support of the United States' Motion for Entry of Final Judgment at 9-10, United States v. Apple, Inc., 889 F. Supp. 2d 623 (S.D.N.Y. 2012) (No 12 Civ. 2826).

189. *See id.*

the market."[190] Therefore, the DOJ argues that the bookstores sending in complaints about the settlement should not be taken into consideration.[191] The DOJ also argues that because not everyone who approves of the settlement has commented, and the negative comments can largely be considered as people trying to benefit on the conspiracy, who do not wish for the effects of the conspiracy to disappear, the massive amounts of negative comments are not a clear indication as to what the public really thinks about the settlement.[192]

In its reply to the negative comments filed through the Federal Register, the DOJ relied on *United States v. Airline Tariff Publishing Co.*,[193] which also received an overwhelming amount of negative comments regarding the decree.[194] The court in that case determined that the balance struck up with the government and that some airlines were already complying with the decree was enough to outweigh the opposition by the public.[195] The DOJ also pointed out that the comments should not be considered to be made in the public interest but rather the court should consider whether the comments were made from people who had benefited from the conspiracy and were interested in continuing to benefit.[196] Because the negative comments reflected a desire to continue using the methods of sale that the conspiracy created, the DOJ argued that the comments were not made with the correct interests in mind and should be largely ignored in favor of the comments that reflect the interests of those wishing to create a mode of sale using a legal method.[197]

The DOJ makes a valid point about how a court cannot just assume that all the negative comments are made in the public interest and could instead be made by people seeking to continue to benefit from illegal activity. However, the DOJ does not address the fact that many of the negative comments raise serious doubts that come with the settlement that should be

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190. Reply Memorandum in Support of the United States' Motion for Entry of Final Judgment at 9, United States v. Apple, Inc., 889 F. Supp. 2d 623 (S.D.N.Y. 2012) (No. 12 Civ. 2826) (citing United States v. Int'l Bus. Machs. Corp., 163 F.3d 737, 741-42 (2d Cir. 1998) (quoting Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993))).

191. *Id.*

192. *See id.*

193. United States v. Airline Tariff Pub'g Co., 836 F. Supp. 9, 11 (D.D.C. 1993).

194. *See Id.*; Reply Memorandum in Support of the United States' Motion for Entry of Final Judgment at 9, United States v. Apple, Inc., 889 F. Supp. 2d 623 (S.D.N.Y. 2012) (No. 12 Civ. 2826).

195. *See Airline Tariff Pub'g Co*., 836 F. Supp. at 11; Reply Memorandum in Support of the United States' Motion for Entry of Final Judgment at 9, United States v. Apple, Inc., 889 F. Supp. 2d 623 (S.D.N.Y. 2012) (No. 12 Civ. 2826).

196. *See* Reply Memorandum in Support of the United States' Motion for Entry of Final Judgment at 9-10, United States v. Apple, Inc., 889 F. Supp. 2d 623 (S.D.N.Y. 2012) (No. 12 Civ. 2826).

197. *See id.*

addressed.[198] For instance, the American Booksellers Association and the Authors Guild address the issue of brick-and-mortar shops being pushed out of business by the two-year ban on publishers' abilities to prevent price discounts by the retailers.[199] This is a legitimate problem, made in the public's interest that was not addressed by the DOJ or the court in great detail.[200]

This should not be seen as an attempt by the commenters to benefit from the conspiracy but an attempt by independent shops to prevent the DOJ from reaching an agreement with publishers that would ultimately impact their livelihoods and possibly ruin their businesses. These are obviously comments made in the public interest. The shops take issue with the settlement due to the part that allows the retailers of e-books to lower their prices, and not because they just wanted to continue to benefit from the possible business that the conspiracy may have brought them in the past. It was just the commenters' attempt to show that there were flaws in the settlement that should be addressed. These flaws were not addressed properly, showing that the public's interests were not fully considered, and the settlement is flawed the way it currently stands.[201]

V. POLICY ARGUMENTS

The settlement is, for the most part, a very fair and balanced agreement that remedies the illegal collusion and attempts to put the industry in a position that it would have been had Apple and the publishers not interfered and created a conspiracy to raise prices.[202] Where the settlement does not provide a fair solution, it creates a situation where Amazon or another powerful company could gain control over the industry when the publishers are banned from interfering with the retailers' price discounts.[203] The settlement should have instead been structured to prevent retailers from having

198. *See id.*

199. *See* Letter from Oren J. Teicher, CEO, American Booksellers Association, to John R. Read, Chief Litigation III, Antitrust Division, United States Department of Justice, Re: Comments on the Proposed Consent Decree in *United States v. Apple, Inc., et al.*, (June 14, 2012). *See also* Letter from Paul Aiken, Executive Director, Authors Guild, Inc., to John R. Read, Chief Litigation III, Antitrust Division, United States Department of Justice, Re: *United States v. Apple, Inc., et al.* (June 25, 2012).

200. *See* Reply Memorandum in Support of the United States' Motion for Entry of Final Judgment at 9-10, United States v. Apple, Inc., 889 F. Supp. 2d 623 (S.D.N.Y. 2012) (No. 12 Civ. 2826).

201. *Id.*

202. *See generally* Final Judgment as to Defendants Hachette, HarperCollins, and Simon & Schuster, United States v. Apple, Inc., 889 F. Supp. 2d 623 (S.D.N.Y. 2012) (No. 12 Civ. 2826).

203. *See id.*

complete control over the prices, and thereby control the amount of money from sales. In order for the industry to function without antitrust violations, both the publishers and retailers should have input in setting the prices. The publishers have the interest of making a profit and keeping the prices at an acceptable level, while the retailers would continue to serve the interests of the consumers by keeping the prices low, but not low enough that one retailer, such as Amazon, would have an opportunity to overpower the entire industry. The best way to solve this problem would be to allow the publishers and the retailers to renegotiate immediately and set a limit on the price discounts in order to prevent one party from gaining an unbalanced amount of power in e-book sales.

While antitrust laws look more to the short-term and low prices, the settlement should consider the long-term complications that come with long-term contracts that affect large numbers of retailers. The long-term impact as a result of this settlement can possibly result in the lowering of prices on Amazon's site that other retailers cannot reach. A more detailed examination of the comments made by independent bookstores would outline the long-term problems of the settlement, mainly that the steep price discounts that Amazon previously practiced can ultimately ruin an independent seller, and the DOJ should take care to make a settlement that will not destroy that market. The two years that the settlement allows retailers to lower prices gives Amazon an enormous period of time to lower prices and gain the ninety percent dominance it previously had, possibly ruining brick-and-mortar shops and other e-book retailers. This is the very problem with predatory pricing, because then Amazon could raise prices. With other retailers' businesses ruined, Amazon would be the only retailer to turn to for books, giving Amazon the perfect opportunity to raise its prices.[204]

A settlement that could work well and would still allow the retailers to terminate the current contract, instead of allowing the retailers to sell the way they deem fit, would require the renegotiations to start immediately, rather than two years after the wholesale model has been used and damaged the market. Allowing the retailers to return to the wholesale model, even for a brief period, could allow Amazon to create a monopoly like it had before.[205] With the publishers settling, the retailers now have more bargaining power than they did when the agency model was implemented. Therefore, it is likely that the mode of selling will be more favorable for everyone involved. Instead of allowing the retailers to lower prices in the settlement, it should have just terminated the current agency model agreement and re-

204. *See* Comments of Barnes and Noble, Inc. of the Proposed Final Judgment, United States v. Apple, Inc., 889 F. Supp. 2d 623 (S.D.N.Y. 2012) (No. 12 Civ. 2826).

205. *See id.*

quired the publishers to renegotiate new business agreements without placing a ban on the publisher's ability to prevent price discounts on its e-books.

This problem and the settlement impact most consumers purchasing books, because the e-book industry has slowly begun to take over the literary world.[206] E-books now outsell print books; many customers must pay these prices and would benefit from a better settlement.[207] The imbalance in prices between the lowered e-book prices on Amazon and the regularly priced print books almost forces consumers to go to Amazon if they wish to purchase e-books, while there are many other devices and retailers available. With this shift to Amazon e-books, both print book and e-book sales are affected, causing problems for all consumers of books.

Evidence of the price fixing scheme became apparent when all five publishers signed deals with Apple to sell e-books within a three-day span, and Apple held a press conference announcing the iPad the very next day.[208] The day after the iPad launch, the publishers contacted other retailers to begin renegotiations with them to start using the agency model.[209] This activity, conducted so close in time and with all five publishers, carried enough suspicion for the DOJ to assume that the publishers and Apple had been colluding together, and an investigation needed to begin soon.[210] This obvious sign of collusion shows that the DOJ needed to take action and change the method the publishers were using. However, this does not mean that the remedy needs to negatively impact independent bookstores, e-book retailers that cannot afford the steep price discounts, and, most importantly, the readers that should have a choice over where to buy their books. Because there are so many people affected by this settlement, the settlement needed to be inspected carefully, and all problems should have been carefully considered before reaching a settlement that was somewhat agreeable to everyone affected by the e-book industry.

VI. CONCLUSION

The book publishers and Apple colluded to change the sale of e-books from a wholesale model, where retailers set the price, to an agency model in order to give Apple an advantage over other e-book retailers and have a

206. *See* Bob Minzesheimer, *Adult E-Books Outsell Hardcover for the First Time,* USA TODAY, July 18, 2012, http://books.usatoday.com/bookbuzz/post/2012-07-18/e-books-outsell-hardcover-for-the-first-time/806063/1.

207. *See id.*

208. *See* Complaint at 24-25, United States v. Apple, Inc., 889 F. Supp. 2d 623 (S.D.N.Y. 2012) (No. 12 Civ. 2826).

209. *Id.*

210. *Id.*

chance at succeeding in the business.[211] Collusion in the industry is illegal and must be dealt with by the DOJ.[212] The deal Apple agreed to with the publishers was to come up with pricing tiers to determine what price should be given for certain books.[213] By creating pricing tiers, the publishers and Apple essentially fixed the prices of all books for all retailers, forcing the other retailers away from the wholesale model they had already agreed to through previous agreements with the publishers.[214]

The MFN Clause the publishers gave Apple also caused problems with the industry.[215] This clause required the publishers to guarantee that no other retailers would sell e-books for a lower price than Apple, even if the publishers did not have control over the other retailer's pricing.[216] The MFN agreement eliminated pricing competition for all retailers selling these books; even if the retailers had the ability to reduce their prices, they could not because Apple's prices were set and other retailers could not sell at lower prices.[217] While the settlement the DOJ reached with a few of the publishers has been approved by the court, there are still flaws in the plan, namely the two year ban on publisher's ability to interfere with a retailer's price discounts.

The final judgment of an antitrust settlement must be reviewed to determine if it was made in the interest of the public and the impact on the relevant markets.[218] This case did not fully consider either of these interests, which is evidenced by the fact that valid points were stated in the Authors Guild's responses, the amount of negative comments regarding the settlement, and the danger the settlement places on brick-and-mortar shops.[219] Because this settlement does not properly serve the public interest in the way it should, further considerations should have been investigated in the court's decision to approve the settlement. A more appropriate settlement would have still required the publishers to terminate their current agreements with the retailers and come to new agreements, but it would have required the renegotiations to begin right away. Instead, Amazon has two years without a ban on price discounts to regain its dominance in the mar-

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211. *Id.*

212. *Id.*

213. *See* Complaint at 3-4, United States v. Apple, Inc., 889 F. Supp. 2d 623 (S.D.N.Y. 2012) (No. 12 Civ. 2826).

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. Final Judgment as to Defendants Hachette, HarperCollins, and Simon & Schuster at 10, United States v. Apple, Inc., 889 F. Supp. 2d 623 (S.D.N.Y. 2012) (No. 12 Civ. 2826).

219. *Id.*

ket.[220] In today's world of technology, two years is an extremely long stretch of time, and a lot can happen in the business world during that time. In two years, it will be very easy for a company like Amazon to reach the dominance it had in prior years; similar pricing, which could be seen as predatory if it continues, will lead to further investigations in the future.

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220. *Id.*

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