[Date tk]

The Hon. William J. Baer
Assistant Attorney General for the Antitrust Division
United States Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530

Dear Assistant Attorney General Baer:

We believe that Amazon has gathered unprecedented market power over the world of books, which many experts have asserted make it both a monopoly in its role as a seller of books[1] to the public and a monopsony in its role as a buyer of books[2] from publishers. We believe Amazon has been misusing that power in many ways, and we seek the benefit of your office to address this situation.

On its current course, Amazon threatens to derail the benefits of a revolution in the way books are created and sold in America. This shift was brought about by two broad innovations. The first is the e-book, the most dramatic new technology in publishing since the invention of the printing press. Because of the low cost of producing and distributing an e-book, many more authors now have the opportunity to self-publish, and millions of people can read books in formats that better fit their pocketbooks and preferences.

The second advance is the e-commerce technology that makes possible on-line bookstores. This techonology has connected readers with a vast selection of physical books, including rare, obscure, and out-of-print volumes. E-commerce has also made it far easier for small publishers to reach customers around the world.

Not only do these technological advances benefit our readers, they have revolutionized the way most of us research, write, edit, and publish our own books. Together, they provide the foundation for a renaissance in 21st century intellectual, political, and cultural life.

Yet, as with the coming of the railroad or the telegraph, disruptive new technologies can also become instruments of monopoly, reduced competition, and lost freedom if our laws and regulations fail to prevent the potential concentration of power they make possible. New technologies are neutral; they do not pre-determine any particular economic, social, or political outcome. One set of rules can ensure that a new technology promotes opportunity, competition and diversity in the marketplace. A different set of rules might allow a single firm to wield that same new technology in ways that amass profit, control and power in itself.

Initially, Amazon deployed these new technologies in ways that benefited both readers and authors. While Amazon did not invent the e-book or e-reader, it created a platform that made it easy for millions around the world to access e-books, including readers who live nowhere near a brick and mortar bookstore.

But as Amazon has become a global corporation of unprecedented size, scope, and power, it is increasingly engaging in practices that undermine the interests of readers, authors, publishers, and society as a whole. Amazon has used the digital revolution in book publishing to exercise control over the marketplace of ideas in ways that threaten not merely open markets but free speech.

While Amazon contends that its goal is to serve consumers by eliminating middlemen in publishing (which it calls the "gatekeepers"), Amazon's executives have also made clear they intend to make Amazon itself the sole gatekeeper in this industry. But what's at stake here is not merely monopoly control of a commodity; what is at stake is whether we allow one of the nation's most important marketplaces of information to be dominated and supervised by a single corporation.

Many people of goodwill have trouble seeing how threatening Amazon has become to the public interest. In part this is because, although Amazon's market share in books and e-books defines it as a monopoly by any historical standard, the corporation's business model does not fit the mold that people associate with classic monopolies. Amazon is barely profitable, for example. It excels in customer service and in providing low prices and wide selection. The face it presents to consumers is friendly and helpful.

But there is a reason why Wall Street has bid up Amazon to make it one of the most valued brands in the world, despite 20 years of low profits. Wall Street recognizes, and is willing to bet big money, on Amazon's ability to squeeze out much of its remaining competition – not only in book retailing but increasingly also in book publishing – even as it throws up barriers to entry. Already, Amazon has started to charge higher prices for many of the backlist, scholarly, and small-press books it sells, where its market share can reach upwards of 90 percent. As a *New York Times* article in 2013 noted, "with Borders dead, Barnes & Noble struggling and independent booksellers greatly diminished" there was growing evidence that Amazon is "beginning to raise prices." [3]

At the same time, Amazon's strategy from the beginning has been to use its book business as a "loss-leader" for other lines of commerce where it faces greater competition, but also often earns higher margins. Amazon sells books below cost in order to build its customer base and gather data on those customers to support its sales of non-book goods, such as televisions, shoes, and toys. The effects of this long term, loss-leader customer acquisition strategy have been harmful to the publishing industry. As Amazon extracts an ever larger share of revenue from booksales, the publishers' shrinking revenue base is already curtailing the diversity and quality of carefully written, well-edited books available to the public.

Many prominent voices share our concerns. Opinion writers and editorialists on both the right and left have sounded warnings about Amazon. The op-ed pages of the *New York Times* and the *Wall Street Journal* have editorialized against Amazon's abuses of power.[4] Paul Krugman, the

Nobel Prize winning economist, wrote that "Amazon.com, the giant online retailer, has too much power, and it uses that power in ways that hurt America."[5]

We are not experts in antitrust law, and this letter is not a legal brief. But we have a deep, collective experience in this field, and we believe Amazon poses an unnecessary and preventable danger to our industry and to our society. This is a serious charge. But we believe it is supported by fact. In this letter, we detail many of Amazon's practices that we consider monopolistic, predatory, intimidating, exclusionary, and threatening to the free flow of ideas. Never before in American history has one corporation achieved monopoly control of an informational marketplace—not in telegraph, newspapers, radio, television, or (most recently) broadband internet. We call on the Justice Department to take action against this unprecedented concentration of control in an area vital to democratic discourse and the free flow of ideas.

Amazon's Unprecendented Market Power

In America, the importance of an open market for books was clear from the first. In January of 1776, when most printers feared to publish Thomas Paine's *Common Sense*, a Philadelphia bookseller named Robert Bell took a risk, paid Paine a small advance, and ran off an initial printing of 1,000 copies. Within three months *Common Sense* became the best-selling book in America up to that time and one of the most influential revolutionary treatises ever published. When Paine and Bell later quarreled over profits, Paine found another Philadelphia printer to bring out a longer version of his book, at half the price.

For two centuries, America's scrappy book business, comprising thousands of competing authors, publishers, and booksellers, was the freest, fairest, and most competitive in the world. More than a business, it was a marketplace of ideas, with publishers acting as venture capitalists, advancing funds to give authors the freedom to write their books, hoping to make a profit. All this was done without a penny in government subsidies.

In this way the profit motive was put in service of a personal right and a vital national interest. From the very beginning, Americans understood the central role that open and competitive markets play in promoting freedom of expression and protecting our democracy. “The best test of truth,” Oliver Wendell Holmes wrote in 1919, “is the power of the thought to get itself accepted in the competition of the market.” What Americans seek, he said, is “free trade in ideas.”[6]

As recently as a generation ago, fierce competition still existed at all levels in the book business in America. In the 1970s, no retailer could even imagine being powerful enough to control what books Americans would read, to influence what books would be published, or to intimidate authors and damage their careers. The four largest chains together accounted for less than 12 percent of trade book sales. Similarly, no publisher was powerful enough to dictate terms to retailers. In 1978, the five largest publishers accounted for less than one-third of all trade book sales. The top 75 percent of trade book sales were divided among 50 independent publishers.[7]

It is a different picture today. In 2015, by any reasonable standard, Amazon enjoys a near monopoly in the sale of both physical books and ebooks, while at the same time exercising what economists call “monopsony” power over its suppliers, which means it has the ability to dictate book prices to publishers, and by extension to authors. Amazon is both the largest retailer of books in the world, and (if self-published books are included), it is also the largest publisher of books in the world.[8] This gives Amazon vertical and horizontal control over the book industry as well as an interest in promoting its own books and services across every sector of the business. This one corporation controls the sale of:

- More than 75 percent of online sales of physical books.[9]
- More than 65 percent of e-book sales.[10]

- More than 40 percent of sales of new books.[11]
- Some 85 percent of ebook sales of self-published authors.[12]

As a recent *New York Times* article put it, "for many consumers there is simply no other way to get many books than through Amazon." Many cities and most suburbs and towns in America no longer have bookstores.[13]

In addition to the figures above, we also find direct evidence that Amazon enjoys sufficient market power to control prices and exclude competition. Amazon routinely exploits its position as a dominant seller of books and a dominant buyer of books to:

- Block or curtail the sale of certain authors' books, causing damage to those authors' careers. (As we discuss on pages 7 and 8.)
- Extract a greater share of the total price of a book from publishers, through the imposition of fees, under the threat of punishment. (As we detail on pages 14 and 15.)
- Charge readers higher prices for many scarce and obscure books than it could in a more open and competitive market. (As we mentioned on page 3.)
- Generate fear and stifle free expression in authors, agents, editors, publishers, and others who do not cooperate with the company. (As we detail on page 11.)
- Steer readers toward buying books published by Amazon and away from books published by other companies. (As we detail on pages 17 and 18.)

Amazon's share of the book market continues to grow. It is gaining e-book market share even in the face of competition from Google and Apple, as well as increasing its share in physical book sales. As its market share grows, so do its anti-competitive practices.

Beginning in March 2014, Amazon interfered with the sale of millions of books published by Hachette Book Group, one of the largest publishing houses in America. Amazon stopped taking preorders, delayed shipping, eliminated discounts, and used search engine modifications and pop-up windows to redirect readers to non-Hachette books.

Amazon targeted more than 8,000 titles by 3,000 authors. Because of Amazon's large market share and its proprietary e-book platform, other retailers were unable to make up the difference. In all, Amazon's sanctions drove down the sales of these books on Amazon.com by fifty to ninety percent in all formats, according to sales figures obtained by Authors United. By the time the Amazon and Hachette settled their dispute eight months later, tens of millions of books that would have otherwise been sold were not.[14]

The effect on the literary marketplace, and on readers, was profound. Millions of readers could not find the books they wanted at Amazon, or, having found them, were deterred from ordering them.[15] Authors watched their sales plummet and many – especially debut and midlist authors – saw their careers harmed. The free flow of ideas in our society was disrupted.

Amazon's power over book sales also has been a major factor in causing publishers to combine to increase their ability to resist Amazon's demands. The most extreme such merger took place in 2013, with the combination of the biggest two of the "Big Six" publishers, Random House and Penguin. Given that sales of Random House and Penguin equal those of the next four trade publishers together, many expect the remaining trade publishers will follow suit, until we see the ranks of top tier publishers trimmed to three or even two giant corporations. Such mergers further harm the interests of readers, authors, and the citizenry at large.

Concentrated Power Is a Threat to Free Speech

Since the founding of our nation, Americans have been concerned with the danger of public and private control over any marketplace of information. The framers wrote the First

Amendment in part to prevent the government from exercising monopoly control over information by restricting freedom of expression. But Americans long ago decided that private companies must also be prevented from capturing too large a share of an information medium. When telegraph lines were being strung across the continent, the Telegraph Act of 1866 blocked a single corporation, Western Union, from gaining monopoly control over this first electronic informational medium.[16]

In the 20th Century, U.S. courts repeatedly used antitrust law and other regulations to reduce concentration of control in the markets for information and ideas. Important cases include *Associated Press v. National Labor Relations Board* (1937), *Associated Press v. the United States* (1945), *FCC v. National Citizens Committee for Broadcasting* (1978), *United States v. AT&T* (1982), and *Turner Broadcasting System v. FCC* (1994).

Justice Hugo Black's statement in the 1945 Associated Press case is instructive. "The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[17]

The conviction that antitrust law plays a vital role in protecting freedom of expression continues to this day. Justice Anthony Kennedy, in the Turner Broadcasting case, wrote, "Assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment," and that, "[t]he First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas."

Antitrust law and common sense make it clear that these concerns apply not just to newspapers, radio stations, and television, but also to books. FTC Chairman Robert Pitofsky said in 2000, “if somebody monopolizes the cosmetics fields, they're going to take money out of consumers' pockets, but the implications for democratic values are zero. On the other hand, if they monopolize books, you're talking about implications that go way beyond what the wholesale price of the books might be.”[18]

Into the 1990s, regulators actively worked to keep the market for books open and competitive. After Barnes & Noble in November 1998 announced plans to buy Ingram Book Group, the largest wholesale book supplier in the United States, FTC staff recommended that the Commission sue to stop the deal. Barnes & Noble promptly shelved its plans.[19]

Amazon Interferes With the Flow of Ideas and Information.

Monopoly is not illegal in America. But Congress and the Supreme Court have repeatedly made clear that a company violates the Sherman Antitrust Act when it takes advantage of monopoly power to engage in anticompetitive exclusionary or predatory conduct to maintain its control. Further, as we have noted, the founders, Congress, and the Supreme Court have repeatedly made clear that a concentration of private power over any marketplace of ideas is not compatible with American ideals of liberty, competition, free speech, and the unfettered flow of ideas. We believe Amazon’s monopoly control over the retail book market, combined with its aggressive use of its monopsony power to punish publishers and sanction authors, violates the law and poses a danger to freedom of expression in the United States.

Consider what happened in August 2014 to Wisconsin Congressman Paul Ryan, the 2012 Republican Party candidate for vice president and who was at the time considered a possible candidate for president in 2016. Ryan’s new book, *The Way Forward*, was released August 19. Unfortunately for Ryan, his publisher was Hachette. In the days leading up to August 19, potential readers of *The Way Forward* were not allowed to preorder the book on Amazon in any format, e-book or hardcover, permanently damaging the prospects for a successful and bestselling launch of the book.

Congressman Ryan, speaking on CNBC's "Squawk Box" the morning of August 20, described his experience with Amazon as "a very frustrating thing… Clearly Amazon's making kind of a power play here." When asked whether he thought government law enforcers should address Amazon's actions Ryan hedged, but his words revealed his thinking. "If I were just a private citizen, I would voice one strong opinion. But since I'm a member of Congress and a policymaker, I'm gonna… withhold from making comments."

After Ryan complained, Amazon made *The Way Forward* fully available, offering discounts and providing immediate shipment. In lifting sanctions from Ryan's book, Amazon may have acted out of concern about offending a powerful politician. Or Amazon may have been seeking to show favor to Ryan's political point of view. Whatever Amazon's motive, the executives who run Amazon demonstrated that they had the power to pick and choose which books to advance or retard, even in subject areas that touch directly on vital political debate in America.

Amazon's aggressive and retaliatory behavior has engendered fear and stifled expression throughout the book industry. As we can attest from our own experience at Authors United, such fear runs deep among authors, editors, and literary agents. We saw this in August 2014, when we published an open letter in the *New York Times* condemning Amazon's suppression of books by Hachette authors.

Dozens of successful, bestselling authors declined to sign the letter, not because they disagreed with it, but because they said they were afraid of Amazon. The list of famous authors who expressed fear of retaliation by Amazon would surprise most Americans. Some literary agencies instructed their clients not to sign the letter for fear that Amazon would target the agency's business and their authors' careers. Most editors we contacted also expressed concern that Amazon might retaliate against them or their company if they spoke out.

Many of those who signed the letter were similarly apprehensive. Of the 17 authors who contributed between $1,000 and $20,000 each to pay for the *Times* advertisement, 10 did so on the condition that we keep their names confidential. Several prominent authors who helped draft the *Times* letter also asked Authors United to keep their names private, citing Amazon's history of retaliation. We received dozens of emails from authors expressing concern that their signature might make them subject to reprisals.

This fear of Amazon is well founded. Amazon has a decade-long history of retaliating against businesses and individuals who challenge the company. Amazon's suppression of Hachette books was only the latest of such actions. It appears that retaliation is a fundamental business practice at Amazon. As Brad Stone revealed in his book on Amazon, executives even coined a special name to describe a program in which the corporation demands higher fees from small and university presses, then employs a host of algorithmic tricks to make it harder to find or buy the books of the publishers who don't pay. They called it the "Gazelle Project" after Amazon CEO Jeff Bezos reportedly said in a meeting that "Amazon should approach these publishers the way a cheetah would pursue a sickly gazelle."[20]

Amazon has wielded this weapon against publishers at least since 2004, when it targeted the publisher Melville House. When that company's CEO, Dennis Johnson, publicly complained about Amazon's sudden demand for extra fees, Amazon immediately stopped selling all Melville House books. Johnson soon capitulated. "I paid that bribe," he told Brad Stone, "and the books reappeared." [21]

According James Marcus, one of Amazon's first employees, the company tracked the browsing habits of individual authors at Amazon.com to see how often they checked their own book pages. When Amazon had difficulty with a particular publisher, it would “mess with” the books of the publisher’s authors who most frequently checked their pages, in an effort to intimidate and distress them.[22]

As Amazon’s power over the book market has increased, so has its willingness to use such hardball tactics against larger publishers. Amazon’s first big target was Bloomsbury in 2008. In 2010 it removed the “buy buttons” from web pages offering books by Macmillan.

It is difficult to quantify how such an excercise of market power, and the fear it generates, might be affecting what books are published. Common sense, however, tells us that as Amazon decides to boost the sales of some books and authors and to choke off the sale of others, publishers may choose to publish more books that Amazon is likely to favor and fewer books that Amazon is likely to disfavor. This would clearly interfere with the free, vigorous, and competitive exchange of ideas in our society.

Amazon’s Practices Affect the Quality of Books

Amazon also uses its monopsony power in ways that weaken the economic system that has supported American writers and the publishing industry for more than two centuries, threatening the production of well-crafted, well-edited, accurate, and consequential books.

The idea that Amazon would intentionally use its power in a way that vitiates the book industry strikes many Americans as counterintuitive, much like choosing to kill the goose that lays the golden eggs. But Amazon’s goal has never been to sell only books. On the contrary, Amazon executives from the first spoke of their intent to build what they called “the everything store.” Amazon analyzed twenty product categories before choosing books as the company’s debut “commodity.” As George Packer explained in the *New Yorker*, as early as 1995 Amazon founder Jeff Bezos made it clear that he “intended to sell books as a way of gathering data on affluent, educated shoppers. The books would be priced close to cost, in order to increase sales volume. After collecting data on millions of customers, Amazon could figure out how to sell everything else dirt cheap on the Internet."[23]

As a result, Amazon has from the beginning employed practices that harm the book industry, in service of its long-term goal of dominating commerce on the Internet. Its intention was not to sell books *per se*, but to use book sales as a way to acquire customers and data to sell them non-book goods with higher margins.

Amazon often goes about acquiring those affluent customers by selling books for less than the price it pays the publisher. This practice is called "loss leading," and it has long been used by well-capitalized corporations to drive less rich competitors from the field. No one doubts that Amazon has used "loss leading" in a systematic way to capture market share from independent bookstores and big book chains. In the two decades since Mr. Bezos first explained his business plan, Amazon has sold tens or possibly hundreds of millions of physical books at or below cost. The practice became more extensive in 2007, when Amazon used its (then) 90 percent share of the e-book market to dictate to publishers when to release a particular book in electronic form (i.e. the day of publication),[24] and to impose a one-price-fits-all $9.99 sticker on all e-books, no matter how much authors and publishers had invested in those books. For years after the introduction of the Kindle, Amazon paid publishers $12 to $14 for many new e-books it sold at a loss for $9.99. This strategy worked very well for Amazon, which sold millions of Kindle devices and added many customers to its Amazon Prime program. And on the surface, it would seem to have worked well for "consumers" who paid less per book. But this strategy badly damaged the publishing industry by driving down the price customers were willing to pay for new books, hence reducing the amount of revenue available for publishers to invest in new books. This, over time, also harmed readers.

Another way Amazon routinely abuses its position as a monopsonist is to squeeze publishers with fees on top of the normal cut received from the sale of a book. Large book retailer chains like Barnes & Noble have long taken advantage of their power to charge publishers for favorable product placement, such as display in a storefront window or on a prominent table. But Amazon's greater dominance of the market means publishers and authors enjoy even less bargaining power than they did against the big box chains. This has allowed Amazon to take this practice of imposing fees to new levels. It has, for instance, added fees for "services" like warehousing and shipping. More problematic yet, these fees are often arbitrary and unexpected. For example, Amazon frequently surprises publishers at the end of the year with a sudden demand to pay a flat fee equal to a percentage of the previous year's sales (It was this issue of fees that lay at the heart of Amazon's dispute with Hachette). Amazon also charges different companies different size fees for the same services.[25]

Amazon backs its demands with punitive actions that reveal the extortionary nature of these schemes. If publishers don't pay Amazon's levies, Amazon slows or stops the sale of their books. One Amazon executive described the retaliation to author Brad Stone in blunt terms, "I did everything I could to screw with [the publisher's] performance." [26] Stone reported that the typical hit taken by a publisher that refused to pay these fees was a 40 percent decline in sales. Since almost no publisher can survive that steep a decline in sales, almost all choose to pay

A third way Amazon disrupts the traditional economic system of publishing is by using its monopoly to promote books that it publishes instead of books offered by other publishers. In other words, Amazon simultaneously provides essential access to the market and other essential services to authors and their publishing partners, and then exploits this control – and the information it has gleaned from their sales – to compete directly against these same authors and publishers.

Amazon launched its publishing business in 2009. The corporation publishes books, novellas, short stories, long-form nonfiction, and journalism through publishing imprints such as 47 North, Montlake, AmazonCrossing, AmazonEncore, Powered by Amazon, Amazon Children's Publishing, Little A, Grand Harbor Press, and Thomas & Mercer. And it does so through operations like Kindle Direct Publishing, Kindle Singles, CreateSpace and its other self-publishing platforms.

Amazon has enjoyed a rapid success in its publishing venture. Even though many authors and readers refuse to deal directly with Amazon's publishing arm, one reporter recently found that 25 of the top 100 books sold by Amazon on a particular day were published by Amazon.[27] Unlike traditional publishers, Amazon, for the vast majority of books it sells, invests little or nothing. It plays virtually no role in editing, designing, or vetting the books for accuracy and quality.[28] Amazon uses its dominance to promote books in which it has an ownership stake, and thereby to divert profits in the book business away from outside publishers and authors into its own vaults.

These three practices of loss-leading, fee collecting, and direct publishing form a unified business strategy. The quasi-permanent loss-leading of best sellers has weakened and bankrupted many rival book retailers, concentrating Amazon's control over the book industry. The levying of fees for marketing and other "services" allows Amazon to claw back from the publishers much of the cost of selling their books below invoice price. The direct publishing of books enables Amazon to advance its own product through preferential treatment and aggressive marketing.

The ultimate result is to extract vital resources from the industry in ways that lessen the diversity and quality of books. As George Packer explained, because of Amazon, "money for serious fiction and nonfiction has eroded dramatically in recent years; advances on mid-list titles—books that are expected to sell modestly but whose quality gives them a strong chance of enduring—have declined by a quarter."

In a well-documented trend, publishers have responded not just by cutting advances, but by publishing fewer titles and by focusing more on books by established bestselling authors and celebrities. Some authors who would otherwise be published can no longer attract the financial support they need to write their books. Readers are presented with fewer books that espouse unusual, quirky, offbeat, or politically risky ideas, as well as books from new and unproven authors. This impoverishes America's marketplace of ideas. One wonders if *Common Sense* would have found a publisher in the current environment.

John Rossman, a former Amazon executive, has said that Amazon executives understand full well that their position as a rich monopsonist affords them unparalleled leverage in the American book business. Amazon, he says, is "looking for every dollar they can to feed into their other businesses. To achieve that end, Rossman says, Amazon "is able to have a race to the bottom that most other companies don't want to have."[29]

Amazon's Manipulation and Deception of Readers.

Common sense tells us that Amazon's hinderance of books published by particular companies harms the interests of readers, as "consumers" of books. Common sense also tells us that readers are harmed when Amazon's actions cause a decline in the availability of well-crafted, carefully edited books. There is yet a third way in which Amazon's actions harm readers.

There is no reason why the traditional structure of publishing, in which publishing houses provide authors with capital and services, cannot co-exist with self publishing. On the contrary, an ideal situation would be one in which readers can decide for themselves how to find the books they like, without the interference of a data-rich, self-interested, all-controlling intermediary.

Yet in the real world, the exact opposite appears to be happening. Amazon's position as a monopolist seller of books and its access to enormous quantities of data enables the corporation to manipulate the choices readers make. Amazon actively steers readers towards some books – such as those from which it stands to earn more money – and away from others.

The most basic way Amazon manipulates a specific reader is to "price discriminate" by offering discounts and promotions that may lead a particular reader to buy one book and not another. Amazon also uses many other marketing mechanisms as well as its search engine to steer readers towards some books and away from others.[30] Amazon represents its rankings, recommendations, bestseller lists, and "Customers who bought this book also bought..." statements as objective and neutral. They are not; all these services, including Amazon's search engine, are for sale, and the corporation encourages publishers and authors to pay fees for higher rankings.[31] One of the prime negotiating points in the Hachette/Amazon dispute was how much more money Amazon could extract from Hachette to make sure its authors were being favored instead of disfavored.

In the past, Amazon has admitted to charging different customers different prices for the same books based on what it knows about their demographics and on-line habits.[32] More recently, one price tracking firm estimated that Amazon changes the prices of all of its goods, including books, some 2.5 million times per day.[33] Whether the company still engages in such "first-degree" price discrimination among its customers is hard to determine without better access to internal records. What we do know is the corporation's detailed knowledge of the buying habits of millions of readers – which it amasses through a minute-by-minute tracking of their actions online – puts it in a powerful position to use such "personalized" pricing and marketing to influence the decisions of readers and thereby extract the most amount of cash possible from each individual.[34]

We believe this combination of vast market power, access to vast amounts of data about its customers' personal preferences, and a direct financial interest in steering readers to certain books and away from others, calls for regulatory scrutiny.

When a monopolist promotes different books to different readers, and uses invisible algorithms to steer readers away from certain authors and toward others, it means many customers simply never see books that might interest them. This violates their right to sift freely among a full spectrum of ideas and information.[35] This is true whether the discrimination is managed by a human censor, a human merchandiser, or a human-engineered algorithm.[36]

Amazon sees more of the commercial information that flows through our book market, and knows more about the whims, habits, political, religious and cultural beliefs of individual readers and authors, than any other company. The corporation has the ability to make use of that information to promote its own interests in ways that are opaque and unaccountable. Amazon has the ability to promote or destroy a book in the national marketplace for any reason it chooses, and nobody outside the company can know why or how—or even that it was done. Thanks to the corporation's prowess in acquiring and managing "big data," Amazon's ability to supervise and manage the actions of authors, publishers, and readers is growing at a rapid pace.

Our concerns about Amazon's manipulation of book sales mirror the U.S. government's concerns about the ability of internet service providers to control the flow of information across the internet. These were made clear in the Federal Communication Commission's recent decision to guarantee "net neutrality" and in the Justice Department's concerns that if Comcast were allowed to acquire Time Warner Cable it would become an "unavoidable gatekeeper for internet-based services."[37] Similarly, our concerns about Amazon mirror the European Commission's fear that Google is abusing its position as the dominant search-engine to direct people away from the products of competitors towards products it directly owns.[38]

Other Possible Antitrust Violations by Amazon

Amazon routinely engages in other actions that may violate antitrust law. These include:

Buying out competitors. Amazon has acquired many of the largest companies that once competed with it in the sale of physical books and e-books, the printing of books, the resale of used books, and the gathering and curating of reader reviews.[39] The list includes Goodreads, AbeBooks, BookSurge, LibraryThing, Bookfinder.com, and The Book Depository.[40] Amazon also relied on an aggressive acquisition strategy to capture and consolidate control over the e-book market by buying two of the most developed and user-friendly formats, Mobi and Stanza.

Exclusion of Competitors. Amazon has used its control of the book market to force book publishers to publish their e-books on a format owned by Amazon, rather than on one of the many competing, open-source e-book formats. This despite the fact that many of these formats predated Amazon's "Kindle" format and, arguably, are superior in quality. Such leveraging of control over the e-book format seems to have been specifically designed to hinder competition in the e-book market by other companies, including Barnes & Noble, Microsoft, Google, Apple, and Sony. The fact that these large companies are failing to compete with Amazon is a comment on Amazon's concentration of power in the market.

Free Riding on Competitors. Amazon designed its "Price Check" app to encourage readers shopping at a physical retailer to scan the books they want and send that information to Amazon, and to instantly purchase that book from Amazon's store.[41]

Doing so helps Amazon spy on the prices charged by independent bookstores. It also enables Amazon to "free ride" off the value-added services provided by those book retailers. Amazon benefits when book stores suggest what books to read, host authors and spotlight their works, or simply allow shoppers to browse through many books, then uses special offers to lure readers to its website. Many bookstore owners have told us that customers will come in, get staff help to recommend or find a book, scan it, and then order it from Amazon—right in the store itself.[42]

Misrepresentation. During the eight-month showdown with Hachette**,** Amazon claimed the delays in shipping the books of Hachette authors were caused by Hachette's failure to ship the books to Amazon. As far as we understand the situation, it was in fact Amazon that allowed its stock to run out and refused to accept timely shipments from Hachette. It also seems that even when Amazon had books on hand, it continued to warn its customers of one to four-week shipping delays. Amazon's statements therefore appear to be clearly deceptive, hence in violation of the law.

Remedies

Amazon has sought to depict its monopoly over the American market for books as a simple, natural, and inevitable consequence of new technologies. As Jeff Bezos put it in 2011, "Amazonians are leaning into the future, with radical and transformational innovations."[43] Amazon executives depict publishers and traditional authors, by contrast, as relics of the 19th Century, ignorant Luddites, or as former Amazon employee James Marcus put it, "antediluvian losers."

Amazon executives say they are using these new technologies to level publishing's "hierarchy" and to bulldoze away "gatekeepers" and other "middlemen" who, in their view, seek to retard progress.[44]

But as we've seen, Amazon's market share isn't a predestined outcome of the digital revolution in book retailing and publishing. It is the result of specific, illegal, anti-competitive behaviors by Amazon, which has taken advantage of these new technologies to concentrate economic power and gain monopoly control of a vitally important, nationwide media market.

In November 2013, U.S. District Judge Denise Cote, in finding that Apple and the publishers had colluded to raise the price of e-books, also issued a warning to Amazon. "This trial has not," she wrote, "been the occasion to decide whether Amazon's choice to sell NYT Bestsellers or other New Releases as loss leaders was an unfair trade practice or in any other way a violation of law."

We believe the time has come for the Department of Justice to follow through on that warning. Amazon has captured more control over a vital medium of information in the United States than any company in history. It uses its technologically supercharged monopoly powers to manipulate and supervise the sale of books and therefore affect the exchange of ideas in America.

The government has the responsibility to maintain an open, competitive, free, unsupervised, and undistorted market for books. We know that among the traditional remedies to limit monopolies has been separation of business components. Whether that, or some less drastic remedy, is called for here is obviously a matter that we entrust to your judgment. Our larger point is that we believe the Antitrust Division needs to reassess Amazon's overwhelming market power, bearing in mind the very special constitutional sensitivities that have historically been applied to any business that has established effective control of a medium of communication.

We believe the remedy should aim to accomplish several goals: to eliminate Amazon's power to discriminate among authors and readers, whether through pricing, marketing, or the fees it charges for its service; to prevent Amazon from selling books below cost to acquire customers for unrelated lines of business; and to restore competition in self-publishing, by requiring the book-retailing arm of Amazon to compete with other retailers on a level playing field.[45]

We believe these steps would restore freedom of choice, competition, vitality, diversity, and free expression in the American book market, while ensuring that the American people – as individual free citizens and as a democratic community – determine for themselves how to take advantage of the new technologies of the 21st Century.

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1 Judges Raymond Lohier and Dennis Jacobs of the U.S. Court of Appeals Second Circuit, who heard Apple's appeal regarding price fixing of books, during arguments both called Amazon a "monopolist.". http://thinkprogress.org/economy/2014/12/16/3604049/amazon-monopoly-e-books%20-apple-case/

2 Economist Paul Krugman wrote in the *New York Times* described Amazon as a monopsonist. http://www.nytimes.com/2014/10/20/opinion/paul-krugman-amazons-monopsony-is-not-ok.html?_r=0

3 David Streitfeld, "As Competition Wanes, Amazon Cuts Back Discounts," *New York Times* July 4 2013.

4 "Amazon Loves Government: How the online retailer leveraged federal power to crush the publishers," *Wall Street Journal*, September 11, 2014; The Editorial Board, "Amazon's Power Play," *New York Times*, June 3, 2014.

5 Paul Krugman, "Amazon's Monopsony is Not OK," *New York Times*, Oct. 19, 2014.

6 Abrams v. United States, 250 U.S. 616 (1919)

7 U.S. Congress, Senate, Committee on the Judiciary, Subcommittee on Antitrust, Monopoly and Business Rights, *Concentration in the Book-Publishing and Bookselling Industry: Hearings on Monopolization of the Publishing Industry*, 96th Cong., March 13, 1980 (Serial No. 95-56), Washington: Government Printing Office, 1980.

8 To date, Amazon has published three million unique titles—about as many as there are books in Harvard's Widener Library. Amazon now uploads about 500,000 new titles every year to its website through its imprints, Kindle Direct, and its self-publishing platforms. By contrast, the largest traditional publisher in the world, Penguin Random House, publishes 15,000 titles a year.

9 Authors Guild Tunney Act Filing to the DOJ, June 25, 2012, p. 2.

10 Jeff Bercovici, "Amazon Vs. Book Publishers, By the Numbers," *Forbes*, February 10, 2014.

11 June 2014 survey by researcher Codex-Group LLC, based on a survey of 3,672 adults who purchased books in the prior month, in Jeffrey Tractenberg, "Authors Guild Met with DoJ to Seek Investigation into Amazon's Practices," *Wall Street Journal*, October 1, 2014.

[12] David Woghan, “Self-Publishers Claim Amazon Represents 85% of their eBook Sales,” *SellBox*, October 8, 2013.

[13] The American Booksellers Association (ABA) estimates that the number of bookstore outlets owned by independent proprietors and large chains has fallen by more than 2,000 over the last 15 years.

[14] Amazon’s suppression of Hachette titles affected about seven percent of all books sold in the United States, by sales volume. Nielsen BookScan Marketingt Report, Market Share By Subject Group Summary, Week Ending 12/28/2014.

[15] Even when the books were available, Amazon denied these readers ordinary discounts and delayed filling their orders by up to four weeks.

[16] http://www.thebhc.org/node/1240

[17] Associated Press v. U.S., 326 U.S. 1 (1945).

[18] Alec Klein, “A Hard Look at Media Mergers,” *Washington Post*, November 29, 2000.

[19] Barbara Quint, Barnes & Noble Abandons Attempt to Buy Ingram, *Information Today*, June 28 1999. Amazon was one of the strongest supporters of FTC action against Barnes & Noble. At the time, Ingram fulfilled some 58 percent of Amazon orders. Jeff Bezos led the call for enforcement of antitrust laws. “Goliath,” he said, “is always within range of a good slingshot.” Doreen Carvajal, “Barnes & Noble Rattles Industry by Buying Top Book Wholesaler,” *New York Times*, November 7, 1998.

[20] Brad Stone, The Everything Store: Jeff Bezos and the Age of Amazon, New York, Little, Brown and Company, 2013, p. 243.

[21] George Packer, “Cheap Words: Amazon is good for customers. But is it good for books?” *The New Yorker*, February 17, 2014.

[22] James Marcus, former Amazon employee, currently Executive Editor of *Harper’s Magazine*, personal communication.

[23] Packer, “Cheap Words.”

[24] Traditionally, it was the publisher that decided whether and when to release a paperback version of a hardcover book.

[25] The company-specific nature of Amazon’s fees explains why publishers like Hachette must engage in such extensive negotiations with the giant retailer.

[26] Stone, Everything Store, p. 245.

[27] Jane Litte, “Has everyone conceded the US ebook market to Amazon?” *Dear Author*, March 9, 2014.

[28] David Streitfeld, “Amazon Offers All-You-Can-Eat Books,” *New York Times*, December 27, 2014, “CEO Marcus Dohle Announces Penguin Random House Global Leadership Tea,” Penguin Random House, July 1, 2013.

[29] David Streitfeld, “Examining the Amazon Way,” *New York Times*, September 26, 2014.

[30] Amazon also enjoys the power to police the review process in ways that can alter how a specific reader will react to a specific book. The corporation, which long controlled the main online site for book reviews by readers, in March 2013 bought out Goodreads, its main competitor in this space.

[31] Packer, *New Yorker.*

[32] Anita Ramasastry FindLaw columnist Special to *CNN.com* (June 24, 2005). “CNN: Web sites change prices based on customers’ habits.” *Edition.cnn.com*. Archived from the original on August 19, 2010. Retrieved January 23, 2015.

[33] Roberto Ferdman, “Amazon changes its prices more than 2.5 million times a day,” *Quartz*, December 14, 2013.

[34] Personalized price discrimination allows Amazon to charge some consumers (such as those who spend less time shopping around, or who have fewer outside options) more for the same product. A good explanation of how this works

can be found in the article "Websites Vary Prices, Deals Based on Users' Information," by Jennifer Valention-DeVries, Jeremy Singer-Vine, and Ashkan Soltani, in the *Wall Street Journal*, December 24, 2012.

[35] In a traditional competitive book market in which no retailer controls a large share of the total market, a decision to promote one book over another will not have any systemic effect; other retailers after all are equally free to promote the book. By contrast, when a monopolist opts not to carry a book or to steer readers away from a book, the decision can have an enormous effect on sales.

[36] In a marketplace of ideas, such discrimination by a monopoly retailer can also harm the citizenry in other important ways. When a monopoly retailer arbitrarily directs readers with certain reading histories towards certain books and away from others, the overarching result can be to shunt large groups of citizens into intellectual and political ghettos. Such discrimination by a monopoly retailer may reduce the ability of individual citizens to engage in constructive political discourse with one another, thereby contributing to greater political polarization. Such discrimination by a monopoly retailer may also prevent the public, as a whole, from fully analyzing common problems or fully considering potentially important ideas.

[37] "Comcast Corporation Abandons Proposed Acquisition of Time Warner Cable After Justice Department and the Federal Communications Commission Informed Parties of Concerns," Department of Justice press release, April 24, 2015.

[38] James Kanter and Mark Scott, "Europe Challenges Google, Seeing Violations of Its Antitrust Law," *New York Times*, April 15, 2015.

[39] Mergers and acquisitions are a normal and necessary part of business. But acquisitions are illegal if they are pursued only to attain monopoly and are devoid of any significant productive efficiency. *See, e.g*. United States v. Grinnell Corp., 384 U.S. 563, 576 (1966) (defendant's monopoly perfected through its acquisition of controlling interests of its significant competitors); Lorain Journal Co. v. United States, 342 U.S. 143, 146 (1951) (same); United States v. Terminal R.R. Ass'n of St. Louis, 224 U.S. 383, 391-94 (1912).

[40] In addition to greatly reducing competitive pressure on Amazon, these acquisitions increased Amazon's already one-sided domination of the flow of commercial information through the book market, which in turn increased Amazon's ability to manipulate the actions of readers, authors, and publishers.

[41] http://www.amazon.com/gp/help/customer/display.html?nodeId=200777320

[42] Amazon even free rides off public libraries, thanks to a 2011 deal with OverDrive, the biggest e-lending service provider. The deal requires OverDrive to redirect book borrowers from the websites of local libraries to Amazon's website.

[43] Jeff Bezos, 2011 Letter to Shareholders, on Amazon.com, Annual Reports and Proxies, April 13, 2012.

[44] Bezos, 2011 letter.

[45] There is strong evidence that when publishers are left free to price their own e-books they often set lower prices than Amazon (Mark Coker, Does Agency Pricing Lead to Higher E-book Prices? *Huffington Post*, March 29, 2012).